Twenty More Ways to Avoid Liability Under the Federal Fair Debt Collection Practices Act

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By Alvin C. Harrell

With that in mind, here are twenty more ways to help avoid liability under the FDCPA:

1. Don't advise the consumer to seek legal advice or to consult an attorney. There is no obligation to do so, and a surprising number of cases arise because a debt collector makes this suggestion and the consumer accepts the advice.

2. If a debt collection practice is questioned, never respond (especially in writing, or in a conversation over the telephone—which may be recorded) that "we do this all the time," or "we do this all over the state/country," or in a similar manner. This is an invitation to a class action lawsuit.

3. Never use profanity. It is a violation of the FDCPA for the debt collector to use any "obscene or profane language." Any such violation, no matter how minor, harmless or technical, may trigger a claim for statutory damages and the plaintiff's attorney fees.

Note that use of profanity by the consumer is not prohibited. If the consumer initiates an exchange of profane language in an effort to antagonize the debt collector, and the debt collector responds in kind, the debt collector will be in violation of the Act and can be held liable but the consumer will not have violated any law or duty.

4. Do not impose a charge for services rendered in validating the debt in response to a consumer request or notice disputing the debt. In requiring validation upon written dispute of the debt by the consumer, the Act neither authorizes nor prohibits such charges, but until the issue is clarified the safest practice is to avoid the possibility of an expensive lawsuit to resolve the issue. Do not proceed with any collection ac-

2. For a summary of the Act, see Alvin C. Harrell, Overview of the Fair Debt Collection Practices Act after 1996 Revisions—Time For Another Change?, in this issue.
3. Many of these suggestions were discussed at a seminar on debt collection issues, presented by the Conference on Consumer Finance Law in Dallas, Texas on October 10, 1997. Separate presentations at this program are the source for much of the material in this article, and your author would like to thank program speakers George W. Heimer, Randy Miller, and (Continued in next column)
tivities after receiving notice the debtor is disputing the debt.\(^{11}\)

5. Be aware of the relationship between the FDCPA and state ethics rules and deceptive trade practices laws. FDCPA viola-
tions may also be deemed a violation of these state laws, and vice versa, and the state laws typically have no credit-
tor exemption.\(^{12}\)

6. The debt collector should not rely blindly on the accuracy of the financial data (e.g., the amounts due) received from the creditor. Different audits of the same financial records may yield slightly different results, resulting in a claim that the debt collector is seeking to collect an improper amount.\(^{14}\)

The type of claim resultant from George H. W. Heintz in the transaction that gave rise to the debt Heintz litigation,\(^{15}\) which was essential to his successful assertion of the bona fide defense,\(^{6}\) seems to be the only practical means of preventing the creditor from becoming the guar-
antor of the accuracy of the creditor's financial records. In the Heintz the credit-
tor specifically warranted the accuracy of the information it provided, thereby allowing Mr. Heintz to demonstrate “the maintenance of procedures reasonably adopted to avoid [the] error.”\(^{16}\)

However, such a contract may not be enough to protect the debt collector from liability for errors on the part of the documentation provided by the creditor. In Patzka v. Verber College,\(^{17}\) for example, the creditor added an imper-
mise “collection fee” of $1,410.47 to the loan principal, and the change was clearly re-
flected in the documentation provided to the debt collector. The court concluded that the debt collector knew or should have known the debt included an unauthorized amount, in violation of the FDCPA.\(^{18}\)

7. Probably it is best not to rely on the exclusion from the Act of commercial debt collection and creditors collecting their own debts.\(^{19}\) A statement signed by the debtor certifying that the loan is for consumer purposes may help, but otherwise it is not practical to trace all of the loan proceeds to be sure there was no consumer purpose.

As suggested supra,\(^{20}\) the ex-
clusion for creditors collecting their own debts\(^{21}\) has been di-
misinterpreted.\(^{22}\) The creditor and debt collector must also be concerned with secondary market loan discounts or “ac-
quision losses” and potentially less li-
ability under the so-called “close connection” doctrine.\(^{23}\)

UCC section 9-318 also pro-
vides for enforcement of an agreement not to assert against an assignee defenses or claims arising out of a sale, “as pro-
vided in [section] 9-206,” but recognizes the right of the ac-

count debtor\(^{24}\) to pay the as-

signor upon proper notice of the assignment is given.\(^{25}\)

Other state laws may impose additional requirements or restric-
tions. For example, the 1968 Uniform Consumer Credit Code (UCC) limits the ability of an assignee in a consumer credit sale to “enforce an agreement by the consumer not to assert claims and defenses; but certain claims and defenses are barred as against the assignee if notice is given to the consumer and no written notice of the claim or defense is served within 30 days.”\(^{26}\) The 1968 UCC also prohibits the use of a negotiable instrument (except a check) in a consumer credit sale or consumer lease,\(^{27}\) reinforcing the FTC’s effort to eliminate the holder in due course doctrine in consumer credit sales.\(^{28}\)

The 1974 Uniform Code of the UCC goes even further, for ex-

ample additionally prohibiting the use of a check post-dated by more than 10 years in a consumer credit sale or lease.\(^{29}\) Section 3-404 of the 1974 Uni-

form Code broadly preserves the right of the assignee to assert-

claim and defenses arising from a consumer credit sale against a holder in due course, but only to the extent of the amount owing to the assignee at the time the assignee re-

duces notice of the claim or defense.\(^{30}\) Overall it seems effi-
cient unless the assignee promptly requests written con-

firmation. These provisions fail to respond within an agreed time limit (which can-

not be less than 14 days).\(^{31}\) These rights of the consumer cannot be limited or waived by agreement.\(^{32}\)

9. Debt collection attorneys should not sign verified com-

plaints in cases subject to the FDCPA, unless the attorney is prepared to guarantee the pre-


cise accuracy of all information provided by the creditor.\(^{33}\)

10. Remember that the 1996 amendments to 15 U.S.C. sec-
tion 1692e[11], including for formal pleadings from the "Mini-
Miranda" notice requirement in that section, have only a nar-

row scope and impact. The amendments protect only "for-

mal pleadings," and do not exclu-

de any other communications from the FDCPA require-
mence. They do make the communi-

lations other than "formal pleadings" re-

main covered.\(^{34}\) "Form-

nal pleadings" are excluded only for purposes of section 1692e[11]; for example, for

theft pleading would still be subject to the requirement for a valida-

tion of debts notice if that requirement is otherwise applicable (i.e., where the plea-

ding is the initial communica-
tion).\(^{35}\)

11. Debt collection attorneys should exercise caution when com-

municating with the con-

sumer, in order to avoid any thing that could be construed as giving legal advice to the consumer. This could occur, for example, where commu-

nications with the debtor the debt collection attorney describes the legal and factual implications of non-pay-

ment. Among other things this may also implicate state ethics rules.\(^{36}\)

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\(^{11}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{12}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{13}\) 15 U.S.C. § 1692m (2006).\(^{14}\)

\(^{14}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{15}\) 15 U.S.C. § 1692e(4)(B).\(^{16}\)

\(^{16}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{17}\) 15 U.S.C. § 1692e(4)(B).\(^{18}\)

\(^{18}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{19}\) 15 U.S.C. § 1692e(4)(B).\(^{20}\)

\(^{20}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{21}\) 15 U.S.C. § 1692e(4)(B).\(^{22}\)

\(^{22}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{23}\) 15 U.S.C. § 1692e(4)(B).\(^{24}\)

\(^{24}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{25}\) 15 U.S.C. § 1692e(4)(B).\(^{26}\)

\(^{26}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{27}\) 15 U.S.C. § 1692e(4)(B).\(^{28}\)

\(^{28}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{29}\) 15 U.S.C. § 1692e(4)(B).\(^{30}\)

\(^{30}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{31}\) 15 U.S.C. § 1692e(4)(B).\(^{32}\)

\(^{32}\) See supra section on rights of debtors in bankruptcy, supra note 2.

\(^{33}\) 15 U.S.C. § 1692e(4)(B).\(^{34}\)

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\(^{35}\) 15 U.S.C. § 1692e(4)(B).\(^{36}\)

\(^{36}\) See supra section on rights of debtors in bankruptcy, supra note 2.
Specially trained clerks in Data Operations review the consumer debt accounts and input the information into Bowman's computer system.

c. The file is then transferred to the Paralegal Department for initial review of the account information on the Bowman computer. The paralegal reading the file is trained by the law firm to ensure the accuracy of Bowman computer printouts. Any files that contain errors are sent back to Data Operations for correction. Where no mistake is found, the paralegal dictates a complaint, summons, verification and "Bowman Firm Form" that allows the plaintiff to reconstruct how the deficiency balance was established.

d. The file is then placed in a room reserved for attorney review. The attorneys have the complete loan file and the documents prepared by the paralegal. The attorney reviews the loan account file and the Bowman-generated documents to insure accuracy. If they are accurate, the attorney approves the complaint and summons.

e. The complaint is then forwarded with a cover letter to the client, along with a blank "Bowman Firm Form" that will allow the client to reconstruct how the deficiency balance was established. The client is also sent a verification form which requires the client to swear under oath that the balances sought are accurate.

f. Once the completed verification and "Bowman Firm Form" are returned, a paralegal reviews them to insure accuracy.

g. The account is again submitted to the attorney review room where the collection attorneys again review the complete file, including all original transmittal letters and information from the client, the computer information, and copies of the proposed pleadings. The attorney also reviews the client verification and the client completed "Bowman Firm Form." If after this final review the attorney signs the proposed complaint and attaches the file to the Paralegal Department for processing and filing.

h. The file is finally transferred to the court typing department. The court typist reviews the file and prepares and processes the new suit and submits it to the appropriate court for filing.

It is hard to see how any law firm could do more. These procedures should be compared to those involved in the Pachte case. To author the Heintz procedures seem a model of propriety, in contrast to the near-abandonment of the diligence responsibilities in Purkis.

13. Attorney debt collectors seeking to comply with the Avila mandate to review every file should not only conduct such a review, but document that review in a permanent record as part of the file. Otherwise, the reviewing attorney may not remember or be able to establish the extent of that review when the issue arises in a lawsuit years later. Perhaps a compliance checklist in each file, documenting the review of that file, and signed by the reviewer, is in order.

14. Some collection attorneys believe it is important to provide written validation of debt, "Mini-Miranda" and collector identification in an initial written communication without stating a demand for payment or suggesting any threat of legal remedy. The theory is that the debtor already knows the debt is past due, so nothing is to be gained by saying it again; a bare-bones written disclosure should satisfy the FDCPA requirements without any risk of those disclosees being "overshadowed" by other language.

15. Remember that each debt collector must satisfy all FDCPA requirements applicable to him or her, regardless of how many times the requirements have been met by other debt collectors previously seeking to recover the same debt.

16. Note that the 30-day validation of debt period provided at section 1692g runs for 30 days "after receipt of the notice" by the consumer; and permits the consumer to trigger certain additional debt collector obligations (including an obligation to "cease collection of the debt") by notifying the debt collector within that 30-day period.

A validation of debt notice mailed by the debt collector may not be "received" by the consumer (so as to begin the 30 day response period) until several days after the notice is sent, and the consumer could "notify" the debt collector that the debt is disputed by mailing a notice within that 30 day period that would be received by the debt collector after the 30 day period. The potential for cumulative delays in the receipt of mailed notice and the consumer's response means that a debt collector could receive timely notice that a debt is being disputed up to 35 or even 40 days after the validation of debt notice was sent.

For this reason some debt collectors consider it prudent to wait 35 or even 40 days (after sending the validation of debt notice) before taking further action to collect the debt, rather than starting the action on the 31st day after mailing the notice.

17. Among other things, the Heintz case serves to emphasize the importance of well documented internal procedures as a prerequisite to claiming the bona fide error defense.

Again, it is important not only to have such procedures, but to have a permanent record documenting this fact, for evidentiary purposes if the issue arises in a lawsuit years later. This suggests a possible need for a law firm to have an internal audit and compliance program, with regular compliance audits performed and documented by a designated "compliance officer."

18. Collection lawyers (and other FDCPA debt collectors) should be very cautious about threatening legal action or describing the likely consequences of legal action. For one thing, there is the risk of giving an unauthorized legal advice to the consumer. There is also the risk of such threats being viewed as harassment or abuse. And of course it is a violation to threaten action which the debt collector does not intend to take.
not intend to take (a lack of such intent may be inferred on the basis of the debt collector’s past practices). And if such threats are included with the required FDCPA disclosures, the threats may be deemed to “overshadow” and therefore negate the required disclosures.68

Aside from these risks, in your author’s view there is little to be gained from a lengthy exposition on the likely consequences of a creditor’s legal exercise of its remedies. While a brief explanation of the possibility of a deficiency judgment and/or creditor remedies may be permissible (if the creditor intends to pursue such), idle threats or detailed “glory and doom” scenarios seem inappropriate and possibly dangerous. 69

19. Chief Judge Richard Posner performed a much needed service in his opinion in Bartlett v. Heibl,70 by including a form letter designed to satisfy the initial communication requirements of the FDCPA without confusing the least sophisticated consumer or overshadowing the required validation of debt notice. While Judge Posner’s entire opinion in Bartlett deserves a careful reading, his suggested form for an initial collection letter (and his comments on that form) are as follows:

We here set forth a redaction of Heibl’s letter that comports with the statute without forcing the debt collector to conceal his intention of exploiting his right in resort to legal action before the thirty days are up. We are not rewriting the statute; that is not our busi-
ness. Jang v. V. A. M. Miller & Associates, No. 963,173, 1997 WL 526,001, at *4 (7th Cir. Aug. 37, 1997). We are simply trying to provide some guidance to those who are in the position to comply with it. We commend this redaction as a safe harbor for debt collectors who want to avoid liability for the kind of suit that Bartlett has brought and now won. The qualification “for the kind of suit that Bartlett has brought and now won” is important. We are not certifying our letter as proof against challenges based on other provisions of the statute; those provisions are not before us. With that caveat, here is our letter:

Dear Mr. Bartlett:

I have been retained by Mircard Services to collect from you the entire balance which, as of September 25, 1995, was $1,656.90, that you owe Mircard Services on your MasterCard Account No. 5417016170876749.

If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Mircard $316 against the balance that you owe (unless you’ve paid it since your last statement) or call Mircard at 1-800-221-5230 and work out arrangements for payment with it. If you do neither of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over.

Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you do not dispute it within that period, I’ll assume that it’s valid. If you do dispute it—by notifying me in writing to that effect—I will, as required by the law, obtain and mail to you proof of the debt. If, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor (Mircard Services), I will furnish you with that information too.

The law does not require me to wait until the end of the thirty day period before you can collect this debt. If, however, you request proof of the debt, the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through liaison with Mircard, or otherwise) to collect the debt until I mail the redaction information to you.

Sincerely,

John A. Heibl

We cannot require debt collectors to use “our” form. But of course they depart from it, they do so at their own risk. Debt collectors who want to avoid suits by disgruntled debtors standing on their statutory rights would be well advised to stick close to the form that we have drafted. It will be a safe haven for them, at least in the Seventh Circuit.71

Note that Judge Posner’s letter recognizes that the FDCPA does not prohibit further collection efforts to maximize the day validation of debt period at section 1692z, in contrast to some courts which read into the statute such a prohibition.72

20. Creditors should carefully audit their files and accounting records before referring a matter to a debt collector, and should immediately notify the debt collector of any change in the status of the debt (such as any payment received). The debt collector should regularly remind him or her creditor clients (in writing) of these matters. As noted supra, it is a violation of the Act for a debt collector to seek collection of an improper amount,73 and misakes can be easily made in the course of servicing an installment loan.74 It is only prudent for a debt collector and his or her creditor clients to recognize and seek to minimize these risks. Again, these efforts should be documented.

As noted supra, debt collector procedures and a good client retention contract can help to mitigate these risks.75 But these precautions can only do so much, and they are not substitutive for accurate information. So the creditor client should be utilized in this effort.

There is a perception among some consumers attorneys that some creditors regularly “pad” their amounts due by adding unauthorized and improper charges, in an effort to maximize the subsequent recovery (perhaps contemplating that the consumer may file bankruptcy, and that a percentage of the claim may be paid), partly on the expectation that a default judgment will be rendered and the consumer will thus not re-

view the amount due. Debt collectors should avoid this kind of client like the plague, no procedures or retention contract will protect a debt collector (or creditor) who is perceived as engaging in or tolerating this kind of intentional abuse and illegality.76

A number of cases involve debt collectors who are seek-

21. (Bonus) Raise your fees. The increased procedural requirements and risks of liability for debt collectors (and creditors) under the FDCPA warrant higher fees for lending and debt collection activities. Ultimately these increased costs will be borne by consumers who pay, effectively redistributing wealth from paying consumers to those who do not.77

While some may question whether this is appropriate public policy, it is an approach increasingly being embraced by some in a variety of contexts (ranging from the UCC Article 9 revisions to bankruptcy reform proposals). Both creditors and debt collectors may choose to recognize that the public policy environment has changed, and adjust their fees and charges accordingly. Those who object to the high fees and charges imposed in consumer credit transactions should also keep this in mind. Consumer credit costs have increased over the past 30 years in conjunction with increases in consumer remedies and creditor liabilities, proving again that there is no such thing as a free public policy lunch.

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68. See supra note 40.
69. See supra note 40.
70. 129 S. Ct. 1284 (2009).
71. 5417016170876749.
72. Note that the latter does not apply to the “Mike Heibl” case, from an important case of the 12th Cir. 1024 (1995). However, these disclosures can still apply.
73. See supra note 39 and supra note 40.
74. A landlord-tenant dispute over interest is an example of a reason for the “payment dormancy” that may enable a debt collector to keep the account open, even if the account has been paid, and even if the FDCPA has been violated. (See, for example, the Federal Reserve Bulletin, January 1994, page 37, for a discussion of the FDCPA and its impact on consumer credit).
75. See supra notes 14 and 15.
76. Regardless of the latter, it will still matter to one’s reputation to have higher credit and reduced collection costs.
77. See supra note 40 and supra note 45.