Fair Debt Collection Practices Act A Law Needing Updating?

By Rex C. Anderson

It has been more than 33 years since the original enactment of the Fair Debt Collection Practices Act (FDCPA)[1] in 1977 and, arguably, it's still one of the best consumer protection laws ever conceived. The FDCPA protects you, me, or anyone else who owes a consumer debt from harmful, abusive, and deceptive treatment by debt collectors. Before the enactment of the law, Congress found that consumer collection harassment and abuses were "abundant."[2] In response, the federal consumer law was fashioned by consumer advocates who worked diligently to maintain its integrity—despite voracious national opposition by the collection and banking industry. President Jimmy Carter signed the law, which went into effect March 20, 1978. The act was subsequently amended in 1986, 1996, and 2006.

Unlike most federal statutes, the FDCPA has a congressional preamble or mandate that describes the reasons for the law's creation and its purpose—namely, to "eliminate abusive debt collection practices" and to protect those debt collectors refraining from abusive practices from being competitively disadvantaged.[3]

The insightful historical explanation in the preamble is the best evidence of how lawmakers believed it was necessary to rein in the abuses of a previously unregulated collection industry. Congress concluded that the collection industry needed regulation and oversight, so they federalized the public's response to consumer collection harassment.

Private Cause of Action

Because the federal government did not have the resources to monitor and regulate the debt collection sector, it created a private right of action to be enforced by consumer lawyers. The act provided for the payment of attorney fees to compensate lawyers who stepped in to make sure that debt collectors complied with federal law.[4] In *Jerman v Carlisle,* the second United States Supreme Court decision concerning the FDCPA, the American Collectors Association (ACA) unsuccessfully tried to argue that Congress had spawned a "cottage industry" for the plaintiffs' bar to seek attorney fees for so-called "technical" violations of the FDCPA.[5] The *Jerman* majority rejected this notion out of hand.[6]

Despite the public relations spin, what the ACA pejoratively calls a cottage industry disregards the statutory protections intended to protect consumers from overreaching debt collectors. It also neglects to mention the act's intended effect of protecting law-abiding debt collectors from being competitively disadvantaged. To combat a well-informed, well-represented, well-financed, and highly profitable collection industry, it's necessary to develop the expertise to enforce this important federal consumer protection law just the way Congress intended.

Elements of an FDCPA Violation

A lawsuit under the FDCPA requires four essential elements:

(1) A consumer—"any natural person obligated or allegedly obligated to pay any debt";[7]

(2) A consumer debt—"any obligation…[incurred] primarily for personal, family or household purposes";[8]

(3) A debt collector—any person using interstate commerce who regularly collects debts;[9] and

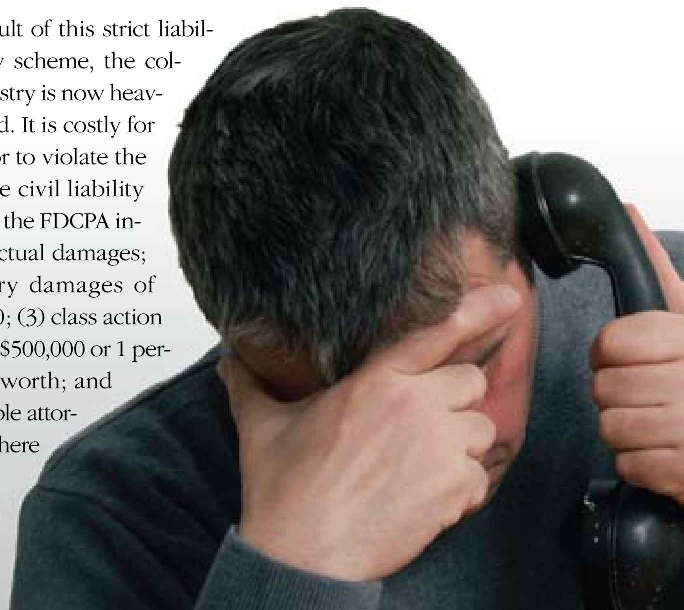
(4) A violation of the FDCPA.

The FDCPA Protects and Regulates

Simply put, the FDCPA protects consumers. A business entity or an individual cannot sue for a violation of the act if the debt was primarily business related. The FDCPA also protects those persons caught in the crossfire of the collection process who do not owe the debt but are getting harassed anyway, such as family, friends, and neighbors.[10] The FDCPA applies only to third-party debt collectors who regularly collect debts owed to another. The FDCPA does not apply to creditors collecting their own debts unless they hold themselves out to be debt collectors.[11] Lawyers and law firms handling consumer collections are regulated by the act.[12]

Strict Liability

As a result of this strict liability statutory scheme, the collection industry is now heavily regulated. It is costly for the collector to violate the FDCPA. The civil liability for violating the FDCPA includes (1) actual damages; (2) statutory damages of up to $1,000; (3) class action damages of $500,000 or 1 percent of net worth; and (4) reasonable attorney fees.[13] There



Fast Facts

The collection industry generates more consumer complaints than any other business.

It is a violation of the Fair Debt Collection Practices Act for a collector to fail to notify the credit reporting agencies that a debt is disputed by the consumer.

Collectors often engage in the abusive tactic of "re-aging" a debt by failing to report the initial date of delinquency or charge-off of the debt, resulting in the debt being included in credit reports long after it has become legally obsolete and therefore no longer reportable.

is no such thing as a "technical" violation under the FDCPA. The standard is whether the collector is compliant with the FDCPA. If the collector is found to be noncompliant, the judge or jury may award actual damages flowing from the collector's conduct, including emotional distress damages. If the consumer is unable to prove actual damages, he or she may still be awarded statutory damages and attorney fees under the lode star method.[14] As with other consumer laws, the attorney fees are often the real hammer that deters collectors from violating the FDCPA.

The FDCPA is the debt collector's rulebook on how it should conduct itself. It applies to all types of communications with debtors, including written and verbal and whether in person, by telephone, or any other medium.

Harassment or Abuse

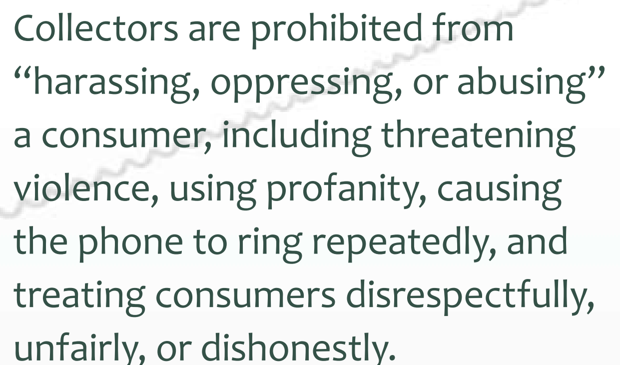
Debt collectors are prohibited from "harassing, oppressing, or abusing" a consumer while attempting to collect a debt. This includes threatening violence, using profanity, causing the phone to ring repeatedly, failing to disclose the collector's identity, and treating consumers disrespectfully, unfairly, or dishonestly.[15]

False and Misleading Practices

Debt collectors may not use any "false, deceptive, or misleading representation or means" in the collection of a debt.[16] The courts apply the "least sophisticated consumer" standard, which focuses on whether the debt collector's actions would mislead an unsophisticated consumer.[17] This ensures that the "FDCPA protects all consumers, the gullible as well as the shrewd."[18] For instance, the FDCPA prohibits debt collectors from threatening legal action that the debt collector or attorney does not intend to take.[19] Most collectors and creditors are unwilling to sue on debts under $300. A collector's threat to sue on a time-barred debt is also a violation.[20] The collector may not misrepresent that he or she is an attorney, a government official, or a credit bureau agency or that the consumer is guilty of a crime for owing the debt.[21] Failing to tell the credit-reporting agencies that a debt is disputed also violates the FDCPA.[22]

Prohibited Communication Practices

Collectors are prohibited from calling consumers (1) at unusual or inconvenient times and places, (2) when it is known that the consumer has legal



representation, (3) at the consumer's place of employment if it is known that the employer prohibits it, or (4) after written notification that the consumer refuses to pay the debt or the consumer wants the collector to cease communication.[23]

Contacting Third Parties

Collectors are prohibited from calling third parties and disclosing the consumer's debt. A collector may speak with a third party only to confirm the consumer's *location information*. Location information means confirming *home address, home telephone, and place of employment*.[24] Even such seemingly innocuous questions as "When will she be home?" or "Where is he?" are illegal.

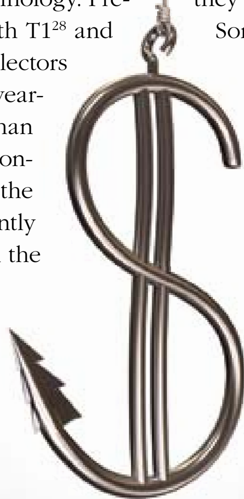
Deadbeats?

Although consumers are often touted by the collection industry as irresponsible deadbeats who refuse to pay their bills, some of the blame lies with banks that irresponsibly extend credit without pre-screening borrowers on their monthly financial obligations. Throw in high school and college student borrowers (to whom credit card companies frequently loan), an economy in recession, job layoffs, and medical catastrophes and you have a recipe for financial disaster. The situation is worsened when banks add phantom fees and usurious interest charges.[25] Banks know they can get collection agencies to collect this money—that is in part why they lend it. Studies show that interest and fees often amount to well over 50 percent of credit card balances.[26]

Technology in Collections

In the current recession, it is tough to collect. Collectors are turning up the volume to keep the "Benjamins" rolling in. And despite the recession, buying and selling debt is still a billion-dollar industry.[27]

Collectors are now employing state-of-the-art technology. Predictive auto-dialers, also known as robo-dialers, with T1[28] and PRI lines[29] are used by call centers nationwide. Collectors work in cubicles inside massive collection centers, wearing audio headsets with more calls fed to them than they can answer. Auto-dialer computer systems call consumers in the background, and when they connect, the call is routed to an inbound pool. The collector instantly sees the monitor screen automatically populate with the consumer's background information and answers the call. The background information includes a history of any prior contacts made by the collection team.



The predictive dialer's algorithm attempts to correlate its dialing to match available collectors. The system remembers and calls at the time of day when the consumer has answered in the past. Even when there are no collectors available to speak, the robo-dialer system may still ring the consumer's phone. When the consumer picks up, he or she may hear only dead air for about 30 seconds before the dialer hangs up;[30] this is referred to as a withdraw rate. It is a violation of California state law for the withdraw rate to exceed 3 percent of the total calls made.[31] The FDCPA and Michigan state law unfortunately have no counterpart for such restrictions on withdrawal rates.

Some collection agencies hire third-party robo-vendors in addition to their own internal auto-dialers to keep their collectors busier. When these robo-dialers are not properly synchronized and tracking each other, the result can be hundreds, sometimes thousands, of repeated calls to a single consumer over a short period of time. The consumer's home telephone and cell phone can both be ringing at the same time or in alternating, repeating sequences. This is referred to as blistering the consumer. When the evidence, including third-party phone records, prove that this repeated ringing has occurred, the collector typically defends itself by claiming that it did not intend to annoy or harass and that the consumer should have answered the phone.

Once finally connected, the collector goes into a "talk-off" script, a discussion of which is beyond the scope of this article. Suffice it to say, every collection agency prides itself on its talk-off scripts and fights to keep them confidential. Collectors claim they don't want their competition knowing their secret psychological formula for getting consumers to pay. There are even specialized talk-off scripts for collecting from recipients of public benefits.

All collectors use skip tracing to investigate consumers. Skip tracing is the practice of finding consumers who have skipped on their obligations. Collectors use Internet background checks, Google searches, credit checks, and more. Even though they want to find consumers, some collectors themselves don't want to be found so they employ the use of technology to spoof their telephone numbers. Spoofing is the practice of sending false caller ID information over phone lines. This technology has been around for a while and just about anyone can use it.[32] It's illegal for collectors to spoof their telephone numbers because it's false and deceptive. The practice also keeps collectors in the shadows where they are safe from lawsuits and attorneys general.[33]

Some collectors use spoofing to get consumers to answer the phone by making them think it's a local call. With the use of technologically sophisticated PRI lines, a collector can easily send out false caller ID information. Collectors use these same PRI lines to capture caller ID information on in-bound consumer calls to their agency, and they can easily obtain cellular phone numbers in this way.

Not all of the technology deployed by collectors is legal. In fact, it is a violation of the Telephone Consumer Protection Act (TCPA) to use automated robo-dialers to call consumers or leave pre-recorded messages on a consumer's cell phone without prior express consent.[34] These federal claims are supplemental to a consumer's FDCPA claims. The statutory damages for each such call made in violation of the TCPA is $500. The civil penalty can increase to $1,500 a call if the court finds that the calls were made intentionally.[35]

Some collection agencies own multiple call centers scattered throughout various states and countries. These call centers can

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house upwards of 600 collectors in a single location. The collectors work in two to three shifts a day. Some collectors are also outsourcing their call centers to other countries like India, Israel, and Canada. Another trend is outsourcing collections to telecommuters who work from home where there is no supervision or control on FDCPA compliance. Collectors also use untraceable cell phones in an effort to trick consumers into thinking they are not being contacted by a collector. The trend is clear: the more technology that exists, the more the collection industry leverages that technology for illicit collection purposes.

Without a doubt, consumers should pay their just and owing debts, and the collection industry has its place within the financial services industry. The collection industry employs many individuals who love their work and are good at it. Many are compliant with the FDCPA. Unfortunately, some collectors operate in the murky waters of illegal collection activities. Many cannot resist crossing over into the easy money afforded by such tactics.

The collection industry generates more consumer complaints than any other business in the United States.[36] Many agencies, if not outright encouraging collectors to operate illegally, simply turn a blind eye to it. Generally, collectors are paid commissions on top of a base salary. Top collectors can even earn six-figure incomes. Without a doubt, there are strong incentives for collectors to break the law to get consumers to pay. The only rational response is an even stronger incentive to enforce private rights of action under state and federal consumer protection statutes. ■

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FOOTNOTES

1. 15 USC 1692 *et seq.*
2. IHateDebt.com, *The History of Debt in America—Colonial Times to 1799* <http://www.ihatedebt.com/ALookatDebt/TheHistoryofDebtinAmerica/index.php>. All websites cited in this article were accessed August 5, 2010.
3. 15 USC 1692(e).
4. 15 USC 1692k(3).
5. Brief of ACA International as Amicus Curiae Supporting Respondents at 8–9, *Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* ___ US ___; 130 S Ct 1605; 176 L Ed 2d 519 (2010). See also Brief for the Respondents at 19–21, *Jerman, supra.*
6. *Jerman,* 130 S Ct at 1623.
7. 15 USC 1692a(3).
8. 15 USC 1692a(5).
9. 15 USC 1692a(6).
10. 15 USC 1692d ("any person").
11. *McGuire v Citicorp Retail Services, Inc,* 147 F3d 232 (CA 2, 1998).
12. *Heintz v Jenkins,* 514 US 291; 115 S Ct 1489; 131 L Ed 2d 395 (1995).
13. 15 USC 1692k.
14. See *Zagorski v Midwest Billing Services, Inc,* 128 F3d 1164, 1167 (CA 7, 1997) (The purpose of this fee-shifting provision is to attract competent counsel.); *Graziano v Harrison,* 950 F2d 107, 113 (CA 3, 1991) (In litigation under the FDCPA, an award of attorney fees is mandatory, not discretionary.); see also *In Re Boddy,* 950 F2d 334 (CA 6, 1991).
15. 15 USC 1692d.
16. 15 USC 1692e.
17. *Gradisher v Check Enforcement Unit, Inc,* 210 F Supp 2d 907 (WD Mich, 2002).
18. *Kistner v Law Offices of Michael P. Margelefsky, LLC,* 518 F3d 433 (CA 6, 2008).
19. See *Jeter v Credit Bureau, Inc,* 760 F2d 1168 (CA 11, 1985).
20. *Kimber v Federal Financial Corporation,* 668 F Supp 1480 (MD Ala, 1987).
21. 15 USC 1692e.
22. 15 USC 1692e(8).
23. 15 USC 1692c.
24. 15 USC 1692b.
25. See McGeehan, *Soaring Interest Compounds Credit Card Pain for Millions,* New York Times (November 21, 2004) ("Last year they collected $11.7 billion in penalty fees, more than half of the total $21.5 billion in fees they collected from cardholders . . . .").
26. See Frontline/New York Times Report, *Secret History of the Credit Card: Interviews* <http://www.pbs.org/wgbh/pages/frontline/shows/credit/interviews/>.
27. Weston, *"Zombie" Debt is Hard to Kill* <http://articles.moneycentral.msn.com/SavingandDebt/ManageDebt/ZombieDebtCollectorsDigUpYourOldMistakes.aspx>.
28. Wikipedia, *T-carrier* <http://en.wikipedia.org/wiki/T-carrier> (T1 means any telephone data circuit that runs at a 1.544 Mbit/s line rate. Originally, the T1 format carried 24 pulse-code modulated, time-division multiplexed speech signals, each encoded in 64 kbit/s streams, leaving 8 kbit/s of framing information to facilitate call handling.).
29. Wikipedia, *Primary Rate Interface* <http://en.wikipedia.org/wiki/Primary_rate_interface> (Primary Rate Interface is a digital telephone service that provides 23 channels for live phone calls and one channel for data handling and caller ID processing. It is equivalent to the 24 channels of a T1 line. The advantage of the 24th channel is that it sends control signals that can dynamically allocate any number of the other 23 channels for different applications. For example, one channel can be used for voice and another for data, while six more can be used for a videoconferencing channel and so on. PRI lines are essentially the same as a T1 line except the 24th line is digital, with the capability to push out and capture caller ID information.).
30. This is the same story testified to by many Michigan consumers.
31. California Public Utilities Commission, *When are Robocalls Illegal?* <http://tinyurl.com/y69ok5e>.
32. Appsafari, *iSpoofCard* <http://www.appsafari.com/phone/1232/spoofcard/>.
33. Wikipedia, *Spoofing Attack* <http://en.wikipedia.org/wiki/Spoofing_attack>.
34. 47 USC 227 *et seq.*
35. *Id.*
36. See Federal Trade Commission, *Annual Report 2010: Fair Debt Collection Practices Act* <http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf> ("[T]he FTC receives more complaints about the debt collection industry than any other specific industry.").