The Fair Debt Collection Practices Act
("FDCPA") – 15 U.S.C. § 1692 et seq.

2021 SWILL Presentation

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I. Purpose

a. "[T]o eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."
   i. This act was enacted because there was an "abundant" amount of evidence of unfair and deceptive debt collection practices by debt collectors.
   ii. These abusive practices were a contributing factor to many bankruptcies, loss of jobs, and marital problems.
b. Federal law because debt collection is carried on in interstate commerce and through means and instrumentalities of such commerce. Even when strictly intrastate in nature, the acts effect interstate commerce.
c. The FDCPA was enacted in 1977. It only applies to "consumer" debts, not "commercial". Consumer debts include: personal, family or household transactions.

II. Prohibited Conduct

a. Acquisition of location information [15 USC 1692b]
   i. It is lawful to communicate with third-parties in order to attempt to locate information about the debtor.
   ii. However, you cannot mention that the debtor owes a debt or anything about the debt.
   iii. As a general rule, you cannot communicate with a non-debtor more than once.
   iv. You cannot communicate via post card or have any indication on an envelope that the letter is in regards to the collection of a debt.
      1. Douglass v. Convergent Outsourcing 3d 299, (3rd Cir. 2014): Recent 3rd Circuit case found that account number visible through plastic part of envelope to be a violation of this section.
      2. Compare Strand v. Diversified Collection Service, Inc., (8th cir. 2004): Eighth Circuit found benign language and symbols on an envelope was not a violation of this section. Words included: "personal and confidential".

b. Communication in connection with debt collection [15 USC 1692c]
   i. Unless consumer gives consent, a debt collector cannot communicate with a debtor:
      1. Times known to be inconvenient. General rule: between 8:00 a.m. and 9:00 p.m. is acceptable.
      2. If know that the Debtor is represented by an attorney.
      3. At place of employment, if know that debtor cannot take calls at work
   ii. Cannot communicate with third parties, except as previously mentioned to obtain location information, or an attorney, or a credit reporting agency.
   iii. If debtor request in writing that debt collector cease communication with debtor, the debt collector must not communicate with the debtor.
      1. See e.g., Erickson v. Messerli & Kramer P.A. 2011 WL 1869044 (D.Minn. 2011) (stating verbal request to cease communicating insufficient for a FDCPA violation).

c. Harassment or abuse [15 USC 1692c]
   i. The use of threat;
   ii. The use of obscene or profane language;
   iii. Publishing a list of delinquent debtors;
   iv. Advertisement for sale of any debt to coerce payment;
   v. Causing a telephone to ring or engaging a person in conversation with the intent to annoy, abuse, or harass;
      1. Unanswered calls made to a consumer may be considered communications. See *Cerrato v. Solomon & Solomon*, 909 F.Supp.2d 139 (2012). In *Cerrato*, Defendants found liable for

eight unanswered calls after a cease and desist. Key factor was the telephone number appeared on the screen. The same telephone number used on previous collection calls.

vi. Calling a person without meaningful disclosure of the caller's identity;
    1. The number of calls made to a debtor found to be in violation of the FDCPA vary widely.
        a. Tucker v. CBE Grp., Inc., 710 F.Supp.2d 1301, (M.D.Fla.2010) (finding defendant's conduct of calling plaintiff fifty-seven (57) times over a 20–day period was not a violation of § 1692d(5)).
        b. Compare United States v. Central Adjustment Bureau, Inc., 667 F.Supp. 370, 376 (N.D.Tex.1986), aff'd, 823 F.2d 880 (5th Cir.1987) (finding harassment where debt collector made as many as four or five telephone calls to the same debtor in one day).

d. False or misleading representations [15 USC 1692e]
    i. The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
    ii. The false representation of
        1. The character, amount, or legal status of any debt; or
        2. Any services rendered or compensation which may be lawfully received by any debt collector for the collection of debt.
    iii. The false representation or implication that any individual is an attorney or that any communication is from an attorney.
    iv. The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
    v. The threat to take any action that cannot legally be taken or that is not intended to be taken.
    vi. The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause a consumer to
        1. Lose any claim or defense to payment of the debt; or
        2. Become subject to any practice prohibited by this title.
    vii. The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
    viii. Communicating or threating to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
    ix. The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or

which creates a false impression as to its source, authorization, or approval.

x. The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
    1. Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2000) (holding that letter was false and misleading where letter demanded full amount of possible statutory penalty, i.e., up to $100.00, in order to satisfy the debt).
    2. Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th 2011) (holding that letter was false and misleading when letter implied that debt collector could report to credit bureaus the account when debt collector did not in fact report to bureaus.

xi. The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

xii. The false representation or implication that accounts have been turned over to innocent purchasers for value.

xiii. The false representation or implication that documents are legal process.

xiv. The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

xv. The false representation or implication that documents are not legal process forms or do not require action by the consumer.

xvi. false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

e. Unfair practices [15 USC 1692f]
    i. Attempting to collect an amount not authorized by the agreement;
    ii. Accepting post-dated checks of more than 5 days, unless the debt collector notifies the debtor within 3-10 days of depositing the check;
    iii. Soliciting post-dated checks in order to threaten or institute criminal prosecution;
    iv. Depositing or threatening to deposit post-dated checks prior to the date on the check;
    v. Causing charges to be made for the communications by concealing the true purpose of the communication (e.g. collect calls or telegram fees)
    vi. Taking or threatening to take non-judicial action when there is no right or intention to take such action;
    vii. Communicating by post card;

viii. Using symbols or language indicating debt collection besides the name of the debt collector on envelopes.
    1. Benign language not actionable. Strand v. Diversified Collection Service, Inc., 380 F.3d 316 (8th Cir. 2004).
    2. "Judgment Enforcement Law Firm" on the envelope was a violation. Keasey v. Judgment Enforcement Law Firm, PLLC 2014 WL 1744268 (W.D.Mich. 2014).

f. Validation of debts [15 USC 1692g]
In the initial communication or within 5 days of the communication, the debt collector must send the debtor certain disclosures in writing, which include:
    i. The amount of the debt;
    ii. Who the current creditor is;
    iii. Informing the debtor if they don't dispute the debt within 30 days of the letter, the debt collector will assume its valid;
    iv. If the debtor notifies the debt collector in writing within the 30 day period that the debt is disputed, the debt collector will obtain verification of the debt and mail it to the debtor;
    v. If the debtor requests name of original creditor, if different from current creditor, within the 30 days, the debt collector will provide that information;
    vi. Statement that if the debtor requests verification of the debt, the debt collector will cease collecting until the verification is provided to the debtor.
        1. Subject of a lot of litigation has been what can debt collectors do, if anything, during the 30 day validation period or after a verification request
            a. Ellis v. Solomon and Solomon P.C., 591 F.3d 130 (2d Cir. 2010), the 2nd Circuit held that serving a Complaint during the 30 day period "overshadowed" the validation notice and was therefore a violation of the FDCPA.
            b. Several courts have found that filing a lawsuit prior to verifying the debt is a "collection activity" and a violation of this section. See e.g.'s, Garcia–Contreras v. Brock & Scott, PLLC, 775 F.Supp.2d 808 (M.D.N.C. 2011); Anderson v. Frederick J. Hanna & Associates, 361 F.Supp.2d 1379, 1383 (N.D.Ga.2005).
            c. Accepting payment during the dispute period is valid, but the consumer must be told that all disputes rights are in effect.

III. Civil Liability

a. Any actual damages suffered (emotional distress damages allowed). Punitive damages not allowed under the FDCPA, but they are recoverable under the FRCA;

b. Statutory damages
   i. Up to $1,000.00 for an individual action; or
   ii. The lesser of $500,000 or 1% of the debt collector's net worth in a class action.

c. Attorneys fees
   i. Most courts follow the "lodestar" method in awarding attorney fees. Here are some recent examples as to how these fees can add up and the risks involved in defending these claims.
      1. Douyon v. NY Medical Health Care, P.C.,2014 WL 4948121(E.D.N.Y. 2014) (awarded attorney fees in the amount of $113,597.75 after a 10% reduction in the requested fees).
      2. Erickson v. Credit Bureau Services, Inc., 2013 WL 672281 (D.Neb. 2013) (awarded attorney fees in the amount of $88,121.75).

d. Class actions
   i. The new trend by consumer attorneys is to file punitive class actions.
   ii. FRCP Rule 23 - Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
      1. The class is so numerous that joinder of all members is impracticable;
      2. There are questions of law of fact common to the class;
      3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
      4. The representative parties will fairly and adequately protect the interests of the class.
         A. Numerosity – A Plaintiff cannot establish numerosity by simply referencing the amount of lawsuits a law firm files each year. *Washington v. Brumbaugh & Quandahl*, 2017 WL4174754 (2017).
         B. Commonality – Commonality requires a Plaintiff to show that class members have suffered the same injury. *Powers v. Credit Management Servs., Inc.*, 776 F.3d 567, 510 (8 Cir. 2015).

IV. Defenses to 1982(e) and 1692(f) – Letter Allegations

a. Materiality
   i. A statement cannot mislead unless it is material, so a false but non-material statement is not actionable. *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir.2009).
   ii. The Fair Debt Collection Practices Act (FDCPA) is designed to provide information that helps consumers to choose intelligently; the statute addresses only misstatements that are in the sense that they could objectively affect the least sophisticated consumer's decisionmaking. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692(e), (f).
   iii. A representation is material, within the meaning of the Fair Debt Collection Practices Act (FDCPA), if it frustrates a consumer's ability to intelligently choose his or her response. Consumer Credit Protection Act § 802, 13 U.S.C.A. § 1692 et seq.; *Grunwald v. Midland Funding, LLC*, 172 F.Supp. 3d, 1050 (8th Cir.2016).
   iv. Grunwald v. Midland Funding
      1. In In *Grunwald* a consumer received the following language in a letter sent by the firm representing Midland: "At this time we can settle this matter for $8,964.00. If you want to take advantage of this settlement offer, please send a check or money order made out to Midland Funding, LLC to the address listed above within the next ten days. The account balance of $9,960.61 consists of the principle balance of $9,930.61, plus incurred costs of $30.00
      2. *Grundwald* alleged Midland violated the FDCPA by adding $30.00 to her account balance before it prevailed at the state court level.
      3. The Court found *Grunwald's* allegations failed as a matter of law.
         a. The Court found a $30.00 misrepresentation in connection with a debt exceeding $9,000.00 cannot be material as a matter of law.
         b. The Court rejected the argument that any misstatement of a debt no matter how minor would constitute a violation of the statute.
         c. The Court found the text of the letter read in full did not create any misrepresentation. Nowhere in the letter is the word "demand" used. The only demand, if any, is the opportunity to settle the case for less than the full amount.
         d. The Court failed to perceive how even an unsophisticated consumer's response would have been altered by the addition of the $30.00 fee.

b. Relatively innocuous
   i. Court's examining 1692(e) and (f) have also found that "relatively innocuous" communications do not violate the FDCPA. *Wade v. Regional Credit Associations*, 87 F.3d 1098 (9th Cir.1996).

1. See *Sutton v. Financial Recovery Services, Inc.*, 121 F.Supp. 3rd 309 (2015). Consumer filed FDCPA claim alleging misleading representation and unconscionable means 1692(f) in the collection of a debt. The basis of the suit was a settlement letter permitting 3 months of $25.00 payments and at the end of the 3 months "hopefully" you will be able to pay the balance. Sutton argued the letter was inappropriately worded and confusing including questioning how it could benefit the consumer. The Court found all of *Sutton's* arguments non persuasive and not in violation of 1692(f) and 1692(e). The Court stated "even from the standpoint of a least sophisticated consumer, this is nothing more than a **relatively innocuous** consumer attempting to settle a debt. While Financial Recovery Services, Inc. might have drafted the letter in a more precise fashion and better explained its offer, nothing about the letter is unfair and unconscionable. Accordingly, this claim is dismissed."

ii. Unsophisticated consumer

1. In evaluating whether a debt collection letter is false, misleading or deceptive in violation of § 1692(e), the letter must be viewed through the eyes of an unsophisticated consumer. *Duffy*, 215 F.3d at 873. The "unsophisticated consumer" test was adopted by the Seventh Circuit in *Gammon v. G.C. Services Ltd. Partnership*, 27 F.3d 1254, 1257 (7th Cir.1994), which preferred it to the "least sophisticated consumer" standard used by a number of other circuits. See *Wilson v. Quadramed Corp.*, 225 F.3d 350, 254-55 (3rd Cir.2000); *Smith v. Computer Credit, Inc.*, 167 F.3d 1052, 1054 (6th Cir.1999); *Terran v. Kaplan*, 109 F.3d 1428, 1431-32 (9th Cir.1997); *United States v. Nat'l Fin. Serv., Inc.*, 98 F.3d 131, 136-39 (4th Cir.1996); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir.1993); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir.1985). These tests are designed to protect consumers of below average sophistication or intelligence, but they also contain an "objective element of reasonable," *Gammon*, 27 F.3d at 1257, that **prevents liability for bizarre or idiosyncratic interpretations of collection notices**," *Wilson*, 225 F.3d at 354, quoting *Nat'l Fin. Serv., Inc.*, 98 F.3d at 136. See also *Duffy*, 215 F.3d at 874-75 *Peters v. General Service Bureau, Inc.*, 277 F.3d 1051, (C.A.8 (Neb.), 2002).

SIGNIFICANT CASE LAW

HUNSTIEN V. PERFERRED COLLECTION AND MANAGEMENT CASENO. 19-14434 (11TH CIRCUIT 4/21/21)

A debt collector electronically transmitted data concerning a consumer's debt- including outstanding balance, the fact that the debt is the result from medical services to consumer's son and the son's name to a third-party vendor. The third-party then used the data to create, print, and mail a "dunning" letter to the consumer. The consumer filed a lawsuit alleging that, in sending his personal information to the vendor, the debt collector had violated 15 U.S.C. 1692c(b), which prohibits debt collectors, with certain exceptions, from communicating consumers' personal information to third parties "in connection with the collection of a debt." 1692c(b)of the FDCPA, titled "Communication with third parties, provides:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

The Eleventh circuit first held plaintiff had Article III standing. In finding standing the court found the consumer did not allege any tangible (actual) harm, failed to allege a risk of real harm but did allege a valid intangible harm. Specifically, that the statutory violation at issue led to the type of harm which has been recognized as actionable under common law. In this instance the court found 1692c(b) equates to invasion of privacy torts.

Second, the court found the debt collector transmittal of the consumer's personal information to its dunning vendor 1. Constituted a communication and 2. Was in connection with the collection of any debt within the meeting of 1692c(b). The debt collector argued the communication did not make a demand for payment and therefore was not a communication. The Court rejected this argument stating any such argument is limited to 1692e and not 1692c(b) which is communications to third parties which typically do not have a demand for payment.

The Eleventh Circuit in their decision did recognize the difficulties for debt collectors in attempting to navigate the FDCPA:

> One final (and related) point: It's not lost on us that our interpretation of § 1692c(b) runs the risk of upsetting the status quo in the debt-collection industry. We presume that, in the ordinary course of business, debt collectors share information about consumers not only with dunning vendors like Compumail, but also with other third-party entities. Our reading

of § 1692c(b) may well require debt collectors (at least in the short term) to in-source many of the services that they had previously outsourced, potentially at great cost. We recognize, as well, that those costs may not purchase much in the way of "real" consumer privacy, as we doubt that the Compumails of the world routinely read, care about, or abuse the information that debt collectors transmit to them. Even so, our obligation is to interpret the law as written, whether or not we think the resulting consequences are particularly sensible or desirable. Needless to say, if Congress thinks that we've misread § 1692c(b)—or even that we've properly read it but that it should be amended—it can say so.

REGULATION F – Attachment 1

The long-awaited Final Rule (Regulation F) for the Fair Debt Collection Practices Act (FDCPA) was issued Friday afternoon, concluding a seven-year rulemaking process. In its official press release, the Consumer Financial Protection Bureau's (CFPB or Bureau) Director, Kathleen Kraninger, stated that "Our debt collection rulemaking provides limits on debt collectors and provides clear rights for consumers. With this modernized debt collection rule, consumers will have greater control when communicating with debt collectors."

The Final Rule will be effective within a year from its publication in the Federal Register, which is expected to be December 2021. In its currently form, the Final Rule is not perfect and certainly presents challenges for the industry. The Rule, as it stands, presents challenges to small participates who will need a more robust infrastructure to ensure compliance. The Final Rule is certainly the first step in bringing some much-needed consistency to a statute that lacked a primary regulator until the CFPB was granted authority over the statute under Dodd-Frank. Whether Regulation F achieves the goal of clear rules of the road for industry while at the same time providing consumers with a clear understanding of what constituted appropriate debt collection activity remains to be seen.

Ultimately, the Final Rule did not add substantive changes from last year's proposed rule. A summary of the most significant regulations that were finalized are as follows:

- Limited content voicemail Messages will be exempt from the FDCPA
  Debt collectors will now be allowed to leave a specific voicemail message for consumers to get a call back or response without running afoul of the FDCPA. This specific message cannot be used in a text.
- Opportunities to communicate with consumers by email and/or text
  Debt collectors will no be able to communicate with consumers by email and text provided that the debt collector has reasonable procedures in place to ensure that emails and texts are sent to the proper consumer, that the consumer can establish a preference regarding how he or she wants to communicate and that consumer has not otherwise opted-out of receiving the electronic communication or withdrawn that consent. Confirmation of a consumer's telephone number or email address can come directly from the consumer, the creditor or a prior debt collection.
- Debt collectors are provided with a rebuttable presumption of non-compliance if they exceed frequency limits on telephone calls.
  If a debt collector places more than seven calls within seven consecutive days or calls a consumer more than once within a seven day period after communicating with a consumer, a debt collector is presumed to have violated the FDCPA. The burden would then be on the debt collector to rebut that presumption.