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The Fair Debt Collection Practices Act: Legal Framework

Overview

Congress enacted the Fair Debt Collection Practices Act (FDCPA) in 1977 to "eliminate abusive debt collection practices by debt collectors" by rendering particular types of collection activities unlawful. This In Focus provides an overview of some of the FDCPA's most salient provisions and identifies pertinent legal considerations for Congress.

To Whom—and to Which Debts—Does the FDCPA Apply?

With limited exceptions, the FDCPA applies only to entities that qualify as "debt collectors." The statute's definition of "debt collector" is intricate and excludes various entities from its scope. For example, a creditor seeking to collect debts on its own behalf and under its own name ordinarily does not qualify as a "debt collector." Federal employees who collect debts pursuant to their official governmental duties seldom qualify as "debt collectors" either. Additionally, Congress amended the FDCPA's definition of "debt collector" in 2006 to exclude certain private entities that operate bad check enforcement programs on behalf of a state or district attorney.

Along with only covering certain *entities*, the FDCPA also applies only to certain *debts*. The FDCPA defines "debt" to include only obligations incurred "primarily for personal, family, or household purposes" such as credit card debt and medical bills. As a result, business debts ordinarily fall outside the FDCPA's scope.

What Does the FDCPA Prohibit?

The FDCPA bars debt collectors from taking various actions when seeking to collect debts from consumers. Among other things, the FDCPA:

- **Forbids debt collectors from using any "false, deceptive, or misleading representation or means in connection with the collection of any debt."** For example, a debt collector may not misrepresent "the character, amount, or legal status of any debt."
- **Prohibits debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt."** For instance, a debt collector may not attempt to collect any money—such as a fee or expense—not "expressly authorized by the agreement creating the debt" or otherwise permitted by applicable law.
- **Bars debt collectors from engaging in harassment or abuse.** To illustrate, a debt collector may not use profane language or threaten to use violence when attempting to collect a debt.
- **Regulates when, where, how, and under what circumstances debt collectors may communicate with consumers and third parties**. For example, a debt collector generally may not contact a consumer at an "unusual time or place" that would be "inconvenient to the consumer."
- **Requires debt collectors to provide consumers with a written notice that discloses certain information and allows the consumer to dispute the debt's validity.** Among other things, this notice includes the amount of the debt and the creditor's identity.
- **Restricts the forums in which a debt collector may pursue legal actions against a debtor.** A debt collector may not, for instance, force a consumer to defend himself against a lawsuit in an inconvenient or geographically distant court.

Who Enforces the FDCPA, and How?

The FDCPA authorizes several federal agencies—including the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB)—to pursue enforcement actions against debt collectors in particular contexts. Congress has also authorized the CFPB to promulgate rules and regulations to implement the FDCPA. For instance, the CFPB recently invited public comment on a proposed regulation that would aim to, among other things, "clarify how debt collectors may employ . . . newer communication technologies in compliance with the FDCPA" and provide interpretive guidance regarding the FDCPA's consumer disclosure requirements.

Besides authorizing these agencies to initiate administrative enforcement actions, the FDCPA also empowers consumers to enforce the statute by bringing private lawsuits. Subject to certain conditions and limitations, if a debt collector violates the FDCPA, the person subjected to those violations may obtain an award of monetary damages and attorney's fees from that debt collector. Many courts have concluded, however, that the FDCPA does not authorize awards of punitive damages.

A court may not hold a debt collector liable under the FDCPA if it can prove that (1) the violation resulted from an unintentional good-faith error, and (2) the collector maintained "procedures reasonably adapted to avoid any such error." Nor will a debt collector be liable for "any act

done or omitted in good faith in conformity with any advisory opinion" issued by the CFPB.

How Does the FDCPA Interact With State Law?

The FDCPA does not foreclose states from enacting and enforcing their own debt collection laws. The FDCPA expressly does not preempt state laws regulating debt collection practices "except to the extent that those laws are inconsistent with" the FDCPA, "and then only to the extent of the inconsistency." As a result, the FDCPA expressly does not displace any state law that affords consumers greater protections than those guaranteed by the FDCPA.

Legal Considerations for Congress

The U.S. Supreme Court has decided several cases interpreting the FDCPA within the past few years. In many of these cases, the Court has interpreted the statute narrowly to limit defendants' potential exposure. For instance, in *Henson v. Santander Consumer USA Inc.* and *Obduskey v. McCarthy & Holthus LLP*, the Court interpreted the term "debt collector" to exclude particular types of entities such as debt buyers and businesses engaged in nonjudicial foreclosure proceedings. Additionally, in *Midland Funding, LLC v. Johnson*, the Court ruled that filing a claim in a debtor's bankruptcy case that the applicable statute of limitations bars does not qualify as "false, deceptive, or misleading" behavior or as "unfair" or "unconscionable" under the FDCPA. The Justices have explicitly emphasized that Congress, if it believes the Court has interpreted the FDCPA incorrectly, is free to override the Court's interpretations by amending the statute. To that end, several Members of the 115th and 116th Congresses have introduced legislation proposing to amend the FDCPA in various respects. These legislative proposals implicate several legal considerations.

For example, several of these bills propose to redefine key legal terms in the FDCPA in a way that could either enlarge or contract the FDCPA's scope. The Stop Debt Collection Abuse Act of 2017 (H.R. 864 and S. 575, 115th Cong.) (SDCAA), for instance, would have broadened the FDCPA's scope by expanding the term "debt collector" to include, among other things, certain entities that purchase debts and then attempt to collect them. By contrast, the Practice of Law Technical Clarification Act of 2018 (H.R. 5082, 115th Cong.) would have narrowed the FDCPA's applicability by exempting attorneys from the FDCPA's definition of "debt collector" under specified circumstances.

Bills proposing to modify the FDCPA's definition of "debt" would similarly alter the statute's coverage by broadening or narrowing the universe of obligations to which the FDCPA applies. For example, the SDCAA would have enlarged the FDCPA's coverage by extending the statutory definition of "debt" to include specified types of obligations owed to a federal agency. The Debt Collection Practices Harmonization Act (H.R. 1521, 115th Cong.) (DCPHA) would have similarly expanded the FDCPA's definition of "debt" to include debts "owed to a State."

Other recent bills have likewise proposed to modify the FDCPA's protections and remedies. The Military Lending Improvement Act of 2018 (S. 3334, 115th Cong.), for instance, proposed to expand the list of actions that qualify as unlawful communications or misleading representations under the FDCPA, which, in turn, could have exposed debt collectors to increased liability. Taking a different route, the DCPHA would have expanded the remedies available to FDCPA plaintiffs by (1) adjusting the monetary damages available under the FDCPA to account for inflation, and (2) authorizing courts to issue injunctive relief against entities that violate the statute.

As an alternative to amending the FDCPA's substantive requirements, some recent legislative proposals would modify the statute's procedural provisions. For example, the Medical Debt Relief Act of 2019 (S. 1581, 116th Cong.) would, among other things, amend the FDCPA's disclosure requirements to bar entities from reporting medical debt to a consumer reporting agency without first giving the consumer one year's notice.

Separate from the question of how broadly the FDCPA should apply is which entity (or entities) should be authorized to enforce it. The Repeal CFPB Act (S. 1335, 116th Cong.), for instance, would eliminate the CFPB's current authority to pursue administrative enforcement actions under the FDCPA by abolishing the CFPB entirely.

Relevant Statutes

15 U.S.C. §§ 1692-1692p—the Fair Debt Collection Practices Act.

Proposed Regulations

Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274 (proposed May 21, 2019).

Other Resources

Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029 (2019).

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017).

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010).

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