

FAIR DEBT COLLECTIONS PRACTICES ACT IN THE FORECLOSURE PROCESS

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The Fair Debt Collections Practices Act, 15 U.S.C.A. 1692A-1692O (“FDCPA”) was enacted in 1977. Congress felt that there was abundant evidence of the use of abusive deceptive and unfair debt collection practices by many third party consumer debt collectors which contributed to a number of personal bankruptcies, marital instability, the loss of jobs and invasions of individual privacy, to such an extent that required regulation. The aforesaid statute is the codification by Congress that applies throughout the United States with regard to these debt collection practices.

A debt collector is any third party who uses any interstate commerce or mails, the business purpose of which is collection of any consumer debts and who regularly attempts to collect those debts (Section 1692(A)(6)). It is clear that to the extent that debt has been purchased or assigned from one creditor to another, that the end creditor is a debt collector under the FDCPA and subject to the restraints imposed thereon. The FDCPA sets forth who third party debt collectors, such as attorneys, may deal with and under what circumstances. The case of Heintz v. Jenkins 514 U.S. 291 (1995) made a definitive statement that the Act applies to law firms and attorneys. The Act prescribes what is necessary in all communications with debtors, and provides statutory damages for violations. The Act has been very fertile ground for consumer law attorneys. One of the largest filers of these types of cases is located in Chicago, Illinois and as a result, the District Court in Chicago as well as the 7th Circuit Court of Appeals has been very active in issuing opinions on this topic. An individual or firm who “regularly” collects debts, must become familiar with the FDCPA. Clients who originate their own loans are not subject to the FDCPA. Therefore, clients may not be familiar with the workings and requirements that attorneys face on a daily basis.

The FDCPA prescribes what is necessary in all communications with debtors and provides statutory damages for violations of the act. This Act, although short, has led to a great amount of litigation. The damages prescribed by the Act, although seemingly small (\$1,000.00 per violation plus reasonable attorney fees), are magnified by class action capability and attorney fee awards to successful parties. Punitive damages could also be awarded, up to one percent of the net value of the defendant, not to exceed the lesser of \$500,000.00 or 1% of the net worth of the debt collected. In the situations where there is significant net worth, this could pose a significant problem for the debt collectors.

The FDCPA first comes to light during the “first communication” with the debtor. Section 1692(G) states that, within five days after the initial communication with consumer in connection with the collection of any debt, the collector shall send the consumer a written notice containing validation options and other consumer notes. What is the initial communication? The initial communication can be via a fax, letter, telephone call, or telegram. Section 1692(G) is the “mini miranda” validation section of the FDCPA. It sets forth the requisites for validating the debt and providing the debtor with notice of his or her rights to have the debtor verify the amount of the debt, the name of the creditor or to cease all further communications with the debtor.

The effect of 1692(G) is far reaching. Take, for example, a situation where the debtor has not been given its “mini miranda” warnings, and a phone call was made to inquire the debtor as to his or her intentions on the debt. Within five days after that phone call, the validation notice letter must be sent to the debtor or a violation of the FDCPA exists. Think of the consequences this might have on “dialer units” or even loss mitigation units who have not searched the file to ascertain whether or not the validation notice has been given. Therefore, it is important to have procedures in place to provide debtors with these FDCPA warnings.

Many third party mortgage forms follow the standard FNMA language which require a lender to give notice to the borrower of the events of default and the amounts necessary to cure. That letter is required to be sent out either certified mail or first class mail and to give the borrowers a time period to cure the defaults that are existing under the terms of the note. Some clients generate their own demand letters pursuant to the mortgage documents while others require their foreclosure counsel do so. If the letter was not generated, and an action to foreclose was brought, that case would be subject to a motion to dismiss for failure to comply with the condition precedent in the mortgage contract, i.e., notice given to the borrower and a time period to cure the default.

The demand letter may very well be the first opportunity to communicate with the debtor. To the extent that the debt collector is sending out that demand letter, it needs to comply with Section 1692(G) dealing with the validation of debts. The additional “mini miranda” language needs to be inserted in that correspondence to provide the debtor with the admonitions required of the act.

If it is necessary to generate the demand letter, additional care should be exercised in ascertaining the type of notice to be given, the language of the notice and the time period to cure. Clients must be cognizant of the fact that the FDCPA requirements impact on the additional language that is necessary in the right to cure letter. In the 7th Circuit we have seen the court describe “safe

harbor” language. Judge Posner in Bartlett v. Heibl 128 F.3d. 497 tried to give practitioners guidance by giving us a form to use. The case also stands for the proposition that a debt collector is perfectly free to sue within the 30 day validation period.

The Bartlett case was taken a step further in Miller v. McCalla 214 F.3d 872 (2nd Circuit 2000). That case attempted to assist practitioners in advising mortgage debtors of the amount due and owing on the account since during each billing period, additional amounts would be due. Once again, Judge Posner gave us safe harbor language to use in the demand letter. These two cases are a must reading for any practitioner in the 7th Circuit. The demand letters that are sent out should be in strict compliance with the language set forth in these two cases. These letters should be copied and used without any type of embellishment. Clients need to understand that if a debtor requests verification during a 30 day period, all actions must cease and the verification should be made and then the action can recommence.

It is also important to read the statute and not to clutter the letter so as to overshadow the admonitions given under the FDCPA. As stated above, these letters should be used without embellishment. However, we as attorneys, do not always like to copy another person’s work and try to add our own little handiwork to these matters and we have several cases where attorneys have done so. A large volume foreclosure firm has allegedly violated the FDCPA. See Greer v. Shapiro & Kreisman, 2001 WL 389343 (E.D. Pa. 2001). Another example of the failure to heed the 7th Circuit language is found in Pierson v. Stupar, 136 F.Supp.2d 957, (Eastern Dist. WI, 2001).

To the extent that you communicate with the debtor over the telephone, please be cognizant of Section 1692(C) which gives the specific time periods for the collection of the debt via the phone under subsection (a), as well as admonitions of dealing with attorneys and third parties and ceasing said communications. It is important to note subparagraph (b) that unless the consumer gives consent to the debt collector, the debt collector may not communicate with any person other than the consumer or his or her attorney. The issue then becomes what if there is a payoff statement request being made by a mortgage lender or a title company? What if a third party is calling you with regard to information as to the property to the extent that you are involved in a foreclosure action? What information do you give to another third party credit grantor when they call to ask information on the debt?

It would clearly appear that Section 1692(C) prohibits this type of communication with third parties. If the debtor wishes to fax a communication to you authorizing you to deal with the specific

title company, lender or attorney, then it would be appropriate to have such a communication with those parties. In the absence of same, it would be inappropriate to have any such a discussion and would be a violation of the FDCPA.

A corollary to this deals with information that you would want to send to the debtor pursuant to the debtor's request. Please keep in mind that communication with the debtor involves not only telephone calls, but also mail, faxes, telegrams, etc. The scenario that we see most often in our office deals with the situation where the debtor wishes us to fax certain data to them. We refuse to do so and err on the side of caution. The reason for that is that a third party could be standing at the fax machine receiving a fax when our fax comes over the machine and the debtor is not present. We then have communicated with that third party regarding a debtor's debt and it was not authorized.

The same would be true with regard to mailed communications. We have removed our firm name and law offices from the top left hand corner of our return address. Now all that shows is the post office box and street address rather than from where it came from. The reason being is that a third party may be looking through the mail of a debtor at home and ascertain that there was a law firm and then realize that we were attempting to collect a debt and the communication would be with the third party which would then subject us to the violation of the FDCPA. By removing the name, we have eliminated any type of imprints that the envelope contains information collecting a debt.

There are some states that do not allow creditors to communicate with consumers in that state unless they are licensed, as debt collectors in that State. As a result, we have ceased having the mail forwarded to that debtor, so that if the debtor has moved to that state, the mail will not go to them and we will not be crossing into "closed borders". Rather, the mail is returned to us with a new address and then we can ascertain whether or not the mail can be sent out to that new address or whether we need to retain a local debt collector in that state to prosecute the claim. We must assume that most states have consumer protection laws stronger than the FDCPA.

Voice mail and telephone answering machines pose the same problem as the mail. There is no way for the debt collector to know if anyone has access to a voice mailbox or who might be listening as the message is left on the answering machine. The collector has to be careful to only identify himself/herself and leave a number, but not refer to a debt that is due and owing.

The client should be aware of when and how to deal with debtors and third parties to the transaction. Each time a debtor makes contact, it is imperative that the debt collector advise them

that they are a debt collector for _____. Our office voice mail system has this incorporated so that it is routinely given. In addition, I have added this to my personal greeting to make sure that this admonition is heard by the debtors. In addition, each staff member should be trained to advise the debtors about being a debt collector as well as to make a notation of the call and the fact that the notice was given.

Debt collectors can only contact third parties about a debtor's account if the debtor consents to the contact. Mortgage brokers might contact law firms for payoff letters for a potential refinance. If this happens, then you will need to obtain a written authorization signed by the debtors allowing you to speak and communicate with the mortgage brokers. What about an interested party who wishes to bid at a sale? Our office refers these parties to the court file or to the sale officer. In as much as we would want to be helpful, we do not want to be placed in a compromising position and potentially to stall the client's case. We have felt that the best practice is not to divulge any information. It is for this reason that attorneys generally are unable to obtain payoff letters or bid amounts from senior lien holders. Such information would be shared with third parties without the consent of the debtor. In these instances the client would be better able to obtain this information by sending to the third party a copy of their loan application which authorized the receipt of the information.

The above is meant to be just a primer with regard to the FDCPA. This is not meant to be an exhaustive discussion of all particular issues that may arise in the context of your collection of debts. You would be well advised to take time to read the statute and the cases that have emanated from the FDCPA prior to engaging in any type of collection activity.