

**DEBT COLLECTION LAWS  
AFFECTING TEXAS COLLECTIONS**

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## I. THE FAIR DEBT COLLECTIONS PRACTICES ACT (“FDCPA”)

### A. History & Overview

- Congress found that abusive debt collection activities contributed in large part to unnecessary bankruptcy filings, loss of jobs, marriage difficulties and invasions of individual privacy

### B. Does the FDCPA Apply?

- It only covers “consumers,” which are defined as “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a(3). The FDCPA has no application to commercial accounts.
- Under the FDCPA, “debt” is defined as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5).

### C. Who is not a “Debt Collector” under the FDCPA?

- Employees of the United States or individual states.
- Creditors, lenders and mortgage servicing companies, collecting their own debts are generally excluded from FDCPA coverage. Also, employees of creditors who collect the creditor’s debts in the creditor’s name are not debt collectors. 15 U.S.C. § 1692a(6).
- Assignees of a debt, or lenders that purchased a debt, as long as the debt was not already in default at the time the debt was assigned. 15 U.S.C. § 1692a(4); *Perry v. Stewart Title Company*, 756 F.2d 1197 (5<sup>th</sup> Cir. 1985).

### D. Who is a “Debt Collector” under the FDCPA?

- Generally, a debt collector under the FDCPA is any person or organization that: (a) uses any instrumentality of interstate commerce or the mails in any business whose principal purpose is the collection of any debts; or (b) regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another.
- Each employee of a debt collector can be a debt collector individually, if the employee is collecting a debt in their own name, rather than the creditor’s name. Joint and several liability can be asserted against such employees.

- Most courts examining the issue have found that lenders that purchase loans or are assigned loans after they in default are debt collectors under the FDCPA. See, e.g., *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987); *Holmes v. Telecredit Service Corp.*, 736 F.Supp. 1289 (D.Del. 1990).
- Independent collectors of past due accounts originated by a third party and assigned to the collectors are debt collectors under the FDCPA. See *Kimber*, 668 F.Supp. 1480.

**E. Many Attorneys are “Debt Collectors” Under the FDCPA**

- Attorneys who routinely assist in the collection of debts are considered debt collectors under the FDCPA. In general terms, the FDCPA applies to attorneys who regularly engage in consumer debt collection activity, including litigation, on behalf of a creditor client. *Heintz v. Jenkins*, 514 U.S. 291, 299, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995); *Garrett v. Derbes*, 110 F.3d 317, 318 (5th Cir.1997).
- The legislative history of 15 U.S.C. § 1692a(6) indicates that “[t]he requirement that debt collection be done ‘regularly’ would exclude a person who collects a debt for another in an isolated instance, but would include those who collect for others in the regular course of business.” S.Rep. No. 95-382, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1977.
- Courts have held that an attorney who engaged in collections “more than handful of times per year” is a debt collector under the FDCPA. *Crossley v. Lieberman*, 868 F.2d 566, 569 (3<sup>rd</sup> Cir. 1989). Other opinions have been wide-ranging:
  - One court held that an attorney is a debt collector when debt collection represented one third of the firm’s activities, *Ditty v. CheckRite, Ltd., Inc.*, 973 F.Supp. 1320, 1336 (D.Utah 1997).
  - Another held that an attorney who collected debt for a large corporate client was a debt collector even though debt collection made up only 4% of the firm’s practice. *Stojanovski v. Strobl & Manoogian, PC*, 783 F.Supp. 319, 322 (E.D.Mich. 1992).
  - In comparison, one court found an attorney was not a debt collector where he averaged only 2 debt collection matters per year, and debt collection comprised less than 1% of his practice. *Mertes v. Devitt*, 734 F.Supp. 872, 873-74 (W.D.Wis. 1990).
  - The Fifth Circuit has suggested that the critical inquiry involves the attorney’s volume of collection cases, not what percentage of

those cases makes up his/her practice. *Garrett*, 110 F.3d at 318 (5th Cir.1997).

- In-house counsel for a creditor generally enjoys an exemption from coverage as an employee of the creditor. However, if in-house counsel sends correspondence that could leave the impression that the attorney is acting as independent counsel, the exemption can be lost. *See Dorsey v. Morgan*, 760 F.Supp. 509 (D. Md. 1991).

#### F. What is Required by the FDCPA?

- **The “Mini-Miranda” Warning:** The FDCPA requires that a debt collector, in its initial communication (oral and written) with a consumer, state that the “debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.” 15 U.S.C. § 1692e(11). Every communication that follows must state that the communication is from a debt collector.
  - Must be done in first communication regardless of whether oral or written. *Id.* FDCPA exempts “formal pleadings” from the requirement, but does not define “formal pleading.” *Id.*
- **Validation Notice:** Section 1692g of the FDCPA requires that within five days of initial communication with the consumer concerning the collection of a debt, the debt collector must send a written notice containing the following:
  - (a) the amount of the debt;
  - (b) the name of the creditor to whom the debt is owed;
  - (c) a statement that unless the consumer, within 30 days of the receipt of notice, disputes the validity of the debt, or any portion of it, the debt will be assumed to be valid by the debt collector;
  - (d) a statement that if the consumer notifies the debt collector in writing within the 30 day period that the debt or any portion of it is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer, and a copy of the verification or judgment will be mailed to the consumer; and
  - (e) a statement that, on the consumer’s written request within the 30 day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
  - If the consumer disputes the debt, or requests the name and address of the original creditor, the debt collect shall cease

collection of the debt until it receives verification of the debt and such verification is mailed to the consumer. 15 U.S.C. § 1692g(b).

- The notice must be conspicuous, and printing it on the back of a letter is not sufficient. *Riveria v. MAB Collections, Inc.*, 682 F.Supp. 174, 177 (W.D.N.Y. 1988).
  - A payoff amount should also mention whether it is subject to change, or if it is of limited duration, explaining the expiration of the payoff amount. *See Waterfield Mortgage Co., Inc. v. Rodriguez*, 929 S.W.2d 641 (Tex.App.—San Antonio 1996, no writ).
  - Note: the Validation Notice should include the “Mini-Miranda” warning.
- **“Least Sophisticated” Consumer:** Debt collectors must assume that they are communicating with the least sophisticated consumer when collecting debts. All determinations as to whether conduct violates the FDCPA are made from the perspective of whether the “least sophisticated consumer” would have been deceived, misled or harassed by the conduct. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-75 (11<sup>th</sup> Cir. 1985); *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir. 2006).
  - **Filing Suit in The Correct Forum:** Debt collectors must bring suit for collection of a consumer debt in the in the judicial district in which” (a) the consumer signed the contract sued on, or (b) in which the consumer resides at the commencement of the action. 15 U.S.C. § 1692i(a). Debt collectors cannot bring suit in distant forums, and this requirement trumps any contrary state law. *See Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9<sup>th</sup> Cir. 1994).
    - The District of Massachusetts recently found that a debt collector and the law firm hired by the debt collector could be held liable for filing in a remote forum. *Harrington v. CACV of Colo., LLC*, 508 F.Supp.2d 128 (D.Mass. 2007). In *Harrington*, the debt collector filed suit in Massachusetts against a Colorado resident, with whom it had previously communicated at her home address.

#### G. What is Prohibited by the FDCPA?

- **Contact with Consumer**
  - Cannot communicate by postcard, or send envelopes that suggest debt collection.

- Cannot contact directly if known to be represented by counsel. 15 U.S.C. § 1692c(a)(2); *see also* Tex. Disciplinary R. Prof'l Conduct 4.02. This includes the consumer's spouse, guardian, executor, administrator or parent (in the case of a minor). 15 U.S.C. § 1692c(d).
- Cannot repeatedly call or engage in conversation with intent to annoy or harass.
- Cannot place calls without giving disclosure of caller's identity.
- Cannot continue to contact consumer after consumer has notified the debt collector in writing that the consumer refuses to pay the debt. 15 U.S.C. § 1692c(c).
- Cannot use obscene or profane language. 15 U.S.C. § 1692d(2).
- Contact hours between 8:00 a.m. and 9:00 p.m., unless other consent is achieved.
- While a debt collector can contact a consumer at work, if the debt collector has reason to know that the employer prohibits the consumer from receiving communications at work about the debt, the communication is prohibited. 15 U.S.C. § 1692c(a)(3).

▪ **Misrepresentations**

- Generally, a debt collector cannot use a false representation or deceptive means to collect a debt or to obtain information concerning a consumer. 15 U.S.C. § 1692e(10); *Tsenes v. Trans-Continental Credit & Collection Corp.*, 892 F. Supp. 461 (E.D.N.Y. 1995).
- Cannot misrepresent the amount, character or legal status of the debt. 15 U.S.C. § 1692e(2)(A).
- Cannot represent or threaten legal action unless they are certain to be pursued. The debt collector or creditor must intend to actually take the threatened action. 15 U.S.C. § 1692e(5).
- Cannot represent that they are attorneys if they are not, or imply that communications are from an attorney. 15 U.S.C. 1692e(3).

- Cannot represent that debt collector is working with an attorney if it is not. *See Russey v. Rankin*, 911 F.Supp. 1449 (D.N.M. 1995).
  - Cannot represent or imply that the debt collector is affiliated with the United States or any state. 15 U.S.C. § 1692e(1).
  - Cannot misrepresent or imply that a consumer has committed a crime. 15 U.S.C. § 1692e(7).
- **Collection of Improper Amounts:** Debt collector cannot collect any amounts, including interest, fees, charges or expenses, that are not expressly authorized in the agreement underlying the debt or permitted by law. 15 U.S.C. § 1692f(1).
  - **Time-Barred Debts:** Debt collector cannot collect a time-barred debt, and attempts to do so have been specifically held to be violations of the FDCPA. *See Kimber*, 668 F.Supp. at 1488.
  - **Postdated Checks:** A debt collector violates the FDCPA by accepting a check postdated by more than five days, unless the person giving the check is notified in writing of the debt collector's intent to deposit the check within ten days, but not less than three business days before the deposit. It is also a violation to solicit a postdated check. Furthermore, it is a violation to deposit or threaten to deposit a postdated check prior to the date on the check.

#### H. The Bona Fide Error Defense

- A debt collector can avoid liability when it shows that the violation was unintentional and resulted from a bona fide error despite the maintenance of procedures reasonable adapted to avoid such an error. 15 U.S.C. § 1692k(c).
- For example, a notice sent after a payment was received was found to be a bona fide error. *See Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6<sup>th</sup> Cir. 1992). Likewise, the defense excused an unintended failure to issue the "Mini-Miranda" warning when the employer had policies in place to ensure that the warning was regularly given. *Beattie v. D.M. Collections, Inc.*, 754 F.Supp. 383 (D.Del. 1991).

#### I. Liability of Debt Collectors & Lawsuits.

- FDCPA provides for civil liability for violations. It also provides a tie-in to the Federal Trade Commission Act.
- **Damages:** Damages recoverable include actual damages, additional statutory damages and attorneys' fees. 15 U.S.C. § 1692k. Some courts

have included mental anguish and emotional distress in “actual damages.” *See, e.g. Carrigan v. Central Adjustment Bureau*, 502 F.Supp. 1218 (E.D.Ga. 1980); *see also Smith v. Law Offices of Mitchell N. Kay*, 124 B.R. 182 (D.Del. 1991).

- The additional statutory damages are to be determined by the court, but capped at \$1,000.00 per individual per suit. *Wright v. Finance Service of Norwalk*, 22 F.3d 647 (6<sup>th</sup> Cir. 1994).
- In class actions, the additional statutory damages include up to \$1,000.00 for each named class member, plus the lesser of \$500,000 or 1% of the debt collector’s net worth for the other class members. 15 U.S.C. § 1692k(a)(2)(B)(ii).
- Obviously, the attorneys’ fees awards will eclipse the damages in many of these cases.
- **Jurisdiction & Venue:** Federal courts have original, but not exclusive, jurisdiction over FDCPA claims. So, claims for FDCPA violations can be filed in state or federal courts. 15 U.S.C. § 1692k(d). Venue lies in the county in which the consumer received the debt collector’s notice letter. Because “receipt of a collection notice is a substantial part of the events giving rise to a claim under the Fair Debt Collection Practices Act,” *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2d Cir.1992), the district where a communication is received is a proper venue under subdivision (2) of section 1391(b). *Id.* at 866-867.
- **Limitations:** The statute of limitations on a FDCPA claim is one year from the date of the FDCPA violation. 15 U.S.C. § 1692k(d).
- **Bad Faith Protection:** FDCPA provides a remedy for creditor or debt collector when consumer’s action is brought in bad faith or for purposes of harassment. 15 U.S.C. § 1692k(a)(3). Court can award the defendant reasonable attorneys’ fees.

## II. TEXAS DEBT COLLECTION PRACTICES ACT (“DCPA”)

- A. **Location:** The separate Texas version of the FDCPA is found at Chapter 392 of the Texas Finance Code.
- B. **Similarities:** The DCPA expressly defines many of the same terms, including “consumer” and “consumer debt.” The DCPA applies to any obligation primarily for personal, family or household purposes, arising from a transaction or alleged transaction. TEX. FIN. CODE §392.001(2). As with the FDCPA, There is no application of the DCPA to commercial transactions. *Ford v. City State Bank of Palacios*, 44 S.W.3d 121, 135-36 (Tex.App.—Corpus Christi 2001).

### C. Differences

- The DCPA applies to anyone who attempts to collect consumer debts, including attorneys and collection agencies. It also includes creditors that are collecting their own debts from consumers. TEX. FIN. CODE § 392.001(3), (5) and (6).
- The DCPA covers anyone that attempts to collect consumer debt, but also places more requirements on third-party debt collectors. Third-party debt collectors are required to obtain a surety bond in the amount of \$10,000.00 in order to collect debts. TEX. FIN. CODE § 392.101. This does not include an attorney who is collecting a debt on behalf of – and in the name of – his/her client unless the attorney has non-attorney employees who either are regularly engaged to solicit debts for collection or regularly make contact with debtors to adjust or collect debts.
- Causes of action are available to any person against whom a prohibited act is committed. *Campbell v. Beneficial Finance Co.*, 616 S.W.2d 373, 374-75 (Tex.App.—Texarkana 1981, no writ).

### D. Prohibited Conduct

- Generally, the DCPA prohibits debt collectors from harassing or coercing consumers, and also prohibits misrepresentations.
- Eight coercive practices that are prohibited by the DCPA are found at TEX. FIN. CODE § 392.301.
- The unfair and unconscionable practices prohibited by the DCPA are found at TEX. FIN. CODE § 392.303
- The nineteen fraudulent, deceptive and misleading representations that are prohibited by the DCPA are found at TEX. FIN. CODE § 392.304.
- Conduct prohibited concerning contact with debtors is found at TEX. FIN. CODE § 392.302.

### E. DCPA Liability

- Like the FDCPA, the DCPA provides for civil liability for violations. An aggrieved party can seek injunctive relief and recover actual damages, statutory damages and attorneys' fees.
- The DCPA also makes a violation of the DCPA a misdemeanor crime. It is punishable by a fine between \$100 and \$500 per violation.

- The DCPA also provides a tie-in to the Texas Deceptive Trade Practices Act. TEX. FIN. CODE § 392.404(a).
- **Bona Fide Error Defense:** The DCPA has a nearly identical bona fide error defense. TEX. FIN. CODE § 392.401.
- **Bad Faith Protection:** The DCPA provides a remedy for creditor or debt collector when consumer's action is brought in bad faith or for purposes of harassment. Tex. Fin. Code § 392.403(c). The statute provides that the court must award the defendant reasonable attorneys' fees, along with costs, upon such a finding.