

2015 Annual Convention

Best Practices for Busy Attorneys: Collection Law

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Speaker Biographies

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Attorneys who file suits to collect debts owed to creditors should consider the applicability of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692 et seq., and the Ohio Consumer Sales Practices Act ("OCSPA").

I. What Is the Fair Debt Collection Practices Act (FDCPA)?

The FDCPA was enacted by Congress "to 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. . . ."

II. What Is the Ohio Consumer Sales Practices Act (OCSPA)?

The CSPA is remedial in nature, having been designed to compensate for incomplete consumer remedies available at common law. *Anderson v. Barclay's Capital Real Estate, Inc.* (2013), 136 Ohio St.3d 31, 989 N.E.2d 997. (Internal citation omitted).

Specifically, the CSPA "was to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement of proof of an intent to deceive in order to establish fraud." *Eisert v. Kantner* (3rd Dist. 2010), Case No. 2-10-13, 2010-Ohio-4815. (Internal citation omitted).

III. Who Is a "Debt Collector" Regulated by the FDCPA?

15 U.S.C. § 1692a.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

Amendment

SUBSECTION (6), defining "debt collector," was amended to repeal the attorney at law exemption at former Section (6)(F) (1986)

The FDCPA applies to attorneys. *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489 (1995)

Case Alert: Gillie, et al. v. Law Office of Eric A. Jones, LLC, et al., OHSD Case No. 2:13-cv-00212-JLG-EPD (on appeal).

IV. Who Is Not Regulated by the FDCPA?

"Debt collector" does not include (15 USC 1692a(3))--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; . . .

V. Best Practice #1

Develop a checklist to identify if the obligation is a "debt" under the FDCPA or arose from a "consumer transaction" under the OCSPA.

A. What transactions are covered by the OCSPA?

"Consumer Transaction" is a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household ***. (Emphasis added). A consumer transaction *does not include* transactions between person, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers. (1345.01(A) lists several exceptions to the exception).

Chapter 5725 of the Ohio Revised Code contains certain regulations of financial institutions. *See Ohio Revised Code § 5725.01 et seq.* Revised Code section 5725.01(A) defines "financial institution," as, *inter alia*, "[a] national bank organized and existing as a national bank association pursuant to the 'National Bank Act,' 12 U.S.C. 21."

CSPA does not apply to sale between individual and supplier if the transaction was primarily for business purposes; falls outside plain language of the act. *Lecso v. Toyota of Bedford, Inc.* (8th Dist. 2005), No. 86144, 2005-Ohio-6724.

B. What transactions are covered by the FDCPA?

15 U.S.C. § 1692a(5).

(5) The term "debt" means 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.

VI. Best Practice #2.

Develop a compliance checklist to locate the debtor and the debtor's assets.

A. The FDCPA regulates acquisition of location information.

The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

§ 804. Acquisition of location information [15 USC 1692b]

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall --

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

VII. Best Practice #3

Develop a compliance checklist for communications with the consumer/debtor.

§ 805. Communication in connection with debt collection [15 USC 1692c]

(a) COMMUNICATION WITH THE CONSUMER GENERALLY. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt --

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

THE FIRST LETTER TO THE DEBTOR.

15 U.S.C. § 1692g(a).

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

CEASE COMMUNICATION REQUESTS

*(c) CEASING COMMUNICATION. If a consumer notifies a debt collector **in writing** that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—*

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

VIII. Best Practice #4

Develop a compliance checklist for communicating with third parties.

(b) COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, 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 a 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.

IX. Best Practice #5

Develop a compliance checklist for responding to disputes and requests for validation of a debt.

Validation of debts 15 U.S.C. 1692g(b)

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

Case Alert: *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777 (6th Cir. 2014).

X. Best Practice #6

Develop a written training program for professional and para-professional staff to understand and avoid harassment or abuse..

Harassment or abuse [15 USC 1692d]

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)1 of this Act.

- (4) The advertisement for sale of any debt to coerce payment of the debt.*
- (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.*
- (6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.*

XI. Best Practice #7

Develop a compliance checklist to determine statute of limitations and remedies available under applicable law.

[15 USC 1692e]

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(2) The false representation of --

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening 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.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) 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.

(13) The false representation or implication that documents are legal process.

Case Alert:

McMahon v. LVNV Funding, LLC, 744 F.3d 1010, (7th Cir. 2014)

Stratton v. Portfolio Recovery Associates, LLC, 770 F.3d 443, (6th Cir., 2014)

Slorp v. Lerner, Sampson & Rothfuss, 2014 WL 4800100 (6th Cir.) (continuing violations from earlier court filings not permitted)

Clark v. Lender Processing Services, 562 Fed.Appx. 460 (6th Cir. 2014)

Jarvis v. First Resolution Inv. Corp., 983 N.E.2d 380, 2012-Ohio-5653, Ohio App. 9th Dist., Dec. 05, 2012.

XII. Best Practice #8

Develop a compliance checklist to avoid claims of unfair practices.

Unfair practices [15 USC 1692f]

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if --

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

Case Alert:

Clark v. Main Street Acquisition Corp., 553 Fed. App'x 510 (6th Cir. 2014).

Currier v. First Resolution Inv. Corp., 762 F.3d 529 (6th Cir. 2014).

XIII. Best Practice #9

Develop a compliance checklist for choice-of-venue.

Legal actions by debt collectors [15 USC 1692i]

(a) Any debt collector who brings any legal action on a debt against any consumer shall --

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity --

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

XIV. Best Practice #10

Turn the checklists into procedures to support a bona fide error defense.

Civil liability [15 USC 1692k]

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of --

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors --

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Case Alert:

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010).

Currier v. First Resolution Inv. Corp., 762 F.3d 529 (6th Cir. 2014).

The error at issue could have been avoided if First Resolution had established a practice of waiting to file a judgment lien until 10 days after obtaining a judgment or of checking the docket before filing a lien. It could also have maintained a procedure for immediate correction of error. But First Resolution admits that it had implemented none of these procedures. First Resolution is not entitled to the bona fide error defense.