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Litigation and Enforcement of the FDCPA How To Comply and Still Collect

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Fair Debt Collection Practices Act

- CFPB Focal Point
- Enforcement actions and civil liability have become an invitation to litigators everywhere
- This will be a rapidly changing area for future regulations and litigation



The Basics

- The law limits what debt collectors can do or say
- What is a “debt collector”
 - Traditionally, “a person or entity trying to collect a debt owed to others”
 - CFPB is looking to expand this definition to any entity, subject to its jurisdiction, even if one is collecting its own debts



CFPB's reach...

- In *Hernandez v. Williams, Zinman & Parham*, the CFPB and FTC filed an amicus brief with the 9th Circuit. (August 2014)
- The argument: each debt collector must send a proper validation notice under Sec. 1692(a) – to eliminate erroneous collections
- Government's position is that for 1692(a) to serve its purpose, this section must apply to both initial and subsequent debt collectors.
- No decision YET



CFPB puts the world on notice...

- July 2013 – Bureau highlights the national numbers involved in debt collection.
- Finding that 63% of collection receipts stem from firms under CFPB supervision
- ***Invited*** collection-related complaints to its website
- Clear direction that this is a priority



Mortgage Servicers

- General Rule has been that FDCPA does not apply to creditors/servicers collecting their own debt
- Long line of cases holds that a mortgage servicing company is exempt - and not a “debt collector” -when the loan was not in default at the time it was assigned.
- Proposed CFPB guidance would potentially overturn this authority.



CFPB...Final Word Coming Soon?

- There has been much discussion about this question, and speculation that 2015 will bring about new rulemaking – making mortgage servicers liable for full compliance with FDCPA
- The CFPB will likely issue guidance that any mortgage servicer is a “debt collector” under the law
- Who is next – any creditor trying to collect any federally regulated debt? (Medical, education, credit cards, etc...)



Who to believe? CFPB or Courts

- Balancing test exists – Mortgage Servicing Rules and FDCPA (timely communication and action versus waiting and verification.)
 - Periodic statements and other communications required
 - Versus – is this continued debt collection activity?
- In 2013, the CFPB issued an advisory opinion declaring that a mortgage servicer is not liable under the FDCPA for providing periodic statements even after a “cease communication” letter. CFPB Bulletin 2013-12.
- Which branch of government interprets the laws?



What are the Current Claims?

- Plain failure of debt collectors to follow the basic mandates of the FDCPA (§1692e)
- Deception – UDAAP (§1692e)
- Initiating Foreclosure
- Collections involving Service members (SCRA)*
- Communicating with Borrowers Post-Discharge
- Filing a Proof of Claim
- Harassment and abusive actions (§1692d)
- Communications after notice of attorney representation.
- Communications with 3rd parties (§1692b)



2014 – FDCPA’s Interesting Year

- In *Tourgeman v. Collins Financial* the ninth circuit held that a person has a right to sue for debt collection letters he did even not receive. 755 F.3d 1109 (9th Cir. 2014).
- In *McLaughlin v. Phelan Hallinan & Schmieg* a court held a consumer does not even have to dispute a claim prior to suit to bring a claim under the FDCPA. 756 F.3d 240 (3d Cir. 2014).
- “Requiring debtors to dispute their debts as a condition to filing suit would produce consequences squarely at odds with the FDCPA’s essential purpose of preventing abusive, deceptive, and unfair debt collection practices.” *Russell v. Absolute Collection Services, Inc.* 2014 WL 3973792 (4th Cir. 2014).



Initiating Foreclosure?

- Not a debt collection under the FDCPA.

Brown v. Morris, 243 Fed.3d 31 (5th Cir. 2007); *Reese v. Ellis, Painter, LLP.*, 678 F.3d 1211 (11th Cir. 2012).

- This is a collection activity under the FDCPA.

Glazer v. Chase 704 F.3d 453 (6th Cir. 2013). *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006).



Bankruptcy

- The filing of a proof of claim cannot form the basis of an FDCPA claim.

Walls v. Wells Fargo 276 F.3d 502 (9th Cir. 2002).

- The filing of a proof of claim for a time-barred debt may violate the FDCPA.

Crawford v. LVNV Funding LLC 2014 WL 3361226 (11th Cir. 2014).



UDAAP – The Great “Catch All”

UDAAP -- Unfair Deceptive Abusive Acts and Practices

- Has there been any action that could cause a reasonable consumer to be deceived?
- Is there anything misleading in the collection practices?
- Has debt been properly validated?
- Is debt beyond statute of limitations – but still in collection?
- More to come...



Deception

- Dunning letters to collect time barred debts
- Proof of claims to collect time barred debt.
- Theme? Making consumer think that a debt is still valid



Deception II

- Post bankruptcy discharge communications or “statements.”
- Post discharge “informational letters.”
- Post discharge negative credit reporting.



Bona Fide Errors

- Bona Fide Error Defense codified in FDCPA. Sec. 1692k(c)
 - Must establish violation not intentional and resulted notwithstanding the maintenance of procedures designed to prevent such errors.
- Must be clerical or simple factual error.
 - This defense does not apply to violations resulting from a debt collector's mistaken interpretation of the FDCPA. *Jerman v. Carlisle*, 559 U.S. 573 (2010).



Best Practices in 2015

- Key 1 = Vigilance
 - Policies
 - Procedures
 - Training
 - Retraining
- Key 2 = 3rd Party Oversight
 - Debt collector + poor oversight = liability



3rd Party Oversight

- Vetting

- Policies
- Procedures
- Training protocol

- Oversight

- Testing
- Record Keeping
- Monitoring



Importance of Good Procedures

- Creates a Bona Fide error defense
- Types of Preventative Procedures:
 - Publication of training material on lawful collection practices
 - Compliance Training
 - Detailed pre-litigation process
 - Creditor/Note holder's certification regarding the accuracy of each charge

See *Jenkins v. Heintz*, 124 F.3rd 824 (7th Cir. 1997) and *Johnson v. Riddle*, 443 F.3rd 723 (10th Cir. 2006).



Big Issue

- Must have system to separate service members from non-service members
- Significant litigation involving SCRA
- Must be part of collection “quality control”



Bottom Line

- You CAN Collect
- The Process must be defined
- The Procedures must be very clear as to proper and improper conduct
- The Training must be a priority



THANK YOU.

Questions?

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