

When is a Mortgage Servicer considered a Debt-collector under the FDCPA?

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What is a debt-collector under the FDCPA?

15 USC 1692(a)(6)

- A *debt collector* is defined as “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 [1692f \(6\)](#) of this title, 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.”

What is a debt-collector under the FDCPA? (cont.)

Exclusions:

- (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;
- (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
- (E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
- (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity
 - (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
 - (ii) concerns a debt which was originated by such person;
 - (iii) concerns a debt which was not in default at the time it was obtained by such person; or
 - (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

Is a mortgage servicer a debt collector under the FDCPA?

- Servicer is not a debt collector if:
 - Servicer is collecting its own loans under its own name
 - Servicer is collecting debts it originated and then sold but servicer retains servicing
 - Servicer is collecting debts that were not in default when they were obtained
- General Rule: If a servicer receives a loan that it did not originate and the loan is in default at the time servicing is received, the servicer is a debt collector.

If a servicer is subject to the FDCPA, what requirements must the servicer follow?

- Communication restrictions:
 - May not communicate with a consumer at any unusual time (generally before 8:00 AM or after 9:00 PM) or at any place that is inconvenient to the consumer.
 - May not communicate with consumers about the debt if the servicer knows the consumer has retained an attorney to handle the debt and can easily ascertain the attorney's name and address, unless the attorney is unresponsive or agrees to allow direct communication with the consumer.
 - May not have further communication with a consumer if the consumer requests that the collector cease further communication.
- Restrictions on communication with Third Parties
 - Only communicate with third parties that are: the consumer, the consumer's attorney, a consumer reporting agency, the creditor, the creditor's attorney, the debt collector's attorney.
 - Skip-tracing – consumer's home address, telephone number, and place of employment (location information).
- Validation period (30 days from first communication) – If a consumer disputes in writing any portion of the debt or requests the name and address of the original creditor, the collector must stop all collections collection efforts until they mail verification of the debt. Debt collector must provide consumer certain basic information about the debt in the initial communication or subsequent written communication.

If a servicer is subject to the FDCPA, what requirements must the servicer follow? (cont.)

Prohibited practices:

- May not harass, oppress, or abuse any person
 - Includes making telephone calls without properly identifying himself or herself, except for skip-tracing.
- May not use any False, Deceptive or Misleading Representations
 - Falsely represent the character, amount, or legal status of the debt, or of any services rendered
 - Falsely imply that he or she is an attorney or that communications are from an attorney
 - Threaten to take any action that is not legal or intended
 - Mini-Miranda – Fail to disclose in the initial written communication with the consumer, and the initial oral communication if it precedes the initial written communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. In addition, the debt collector must disclose in subsequent communication that the communications is from a debt collector.
- May not use unfair or unconscionable means to collect or attempt to collect a debt.
 - Collect any interest, fee, charge, or expense incidental to the principal obligation unless authorized by the original debt agreement or is otherwise permitted by law.
- Relation to state law – Preempts state law only to the extent that a state law is inconsistent with the FDCPA (less protective to consumer than FDCPA).

Problems with the FDCPA for Mortgage Servicers

Industry groups, such as the MBA, have identified many issues in applying the FDCPA to servicers. The industry position has generally been that Mortgage Servicers should not be considered debt collectors under the FDCPA, even if a loan transferred is contractually in default. The loan servicer is an ongoing relationship with the customer, not an attempt simply to get payment on a delinquent account.

- Miranda Warning
 - Mini-Miranda is detrimental to relationship with consumers and unnecessary. Consumer protection statutes targeting mortgage servicers require ongoing, additional outreach to and discuss workout options to bring the loan current and performing. The single most frequent issue in reaching a resolution with borrowers is communication. Mini-Miranda makes a borrower feel as though the servicer is nothing more than another debt collector.
 - Hurts customer relationship at the initiation of servicing (Hello or welcome letter) and for remaining term of mortgage (all subsequent communications).

1. Issues are identified by the Mortgage Banker's Association "Issues and Recommendations Concerning Servicing of Mortgage Debt and the FDCPA", June 2007.

Problems with the FDCPA for Mortgage Servicers (cont.)

- Attorney Represented Borrowers
 - Servicers are required to only communicate with an attorney once the servicer knows or should know that a borrower is represented by counsel in connection with the loan. Issues arise when attorney is representing the borrower for a specific scope and is unwilling to discuss matters with the servicer outside the scope of representation. (For example, divorce actions and property division, or foreclosure but not loss mitigation)
- FDCPA has not kept pace with Technology
 - Voicemails - Conflicting case law in jurisdictions regarding leaving messages on answering machines without disclosing that it is a debt collector. FOTI message has conflicting interpretations.
 - Cell Phones and Emails – New technology has arisen since FDCPA was enacted and are not currently addressed by the statute and regulations.

CFPB Guidance to Date

- October 15, 2013 – CFPB issued an Interpretative Interim Rule to Clarify issues relating to relationship between Mortgage Servicing Rules under Reg. X and Reg. Z and FDCPA and US Bankruptcy Code.
 - Clarifies that even when delinquent borrowers have invoked the FDCPA cease communications, certain communications mandated by the CFPB and Dodd-Frank are still required.
 1. Requests for loss mitigation
 2. Information Requests and Error Resolution
 3. Force-/Lender-Placed Insurance Notices
 4. Initial interest rate adjustment notice for ARMs
 5. Periodic Statements
 - Servicers are not required to provide certain early intervention contacts or ongoing notices of interest rate adjustments to delinquent borrowers who have instructed the servicer to stop communicating with them.

What's next?

