

FAIR DEBT COLLECTIONS PRACTICES ACT



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•The Fair Debt Collection Practices Act, often referred to as the "FDCPA", was passed by Congress in response to abusive conduct by collection agencies. The purpose of the FDCPA is to provide guidelines for collection agencies seeking to collect debts, while providing protections and remedies for debtors.

•THREE AREAS OF DEBT COLLECTOR COMPLIANCE

- 1. Identifying oneself as a debt collector.
- 2. Advising the debtor of the right to verify and dispute the debt.
- 3. Refraining from harassment, false representations and third party communications.

•PRIMARY SOURCES OF THE LAW

•Fair Debt Collection Practices Act. 15 U.S.C. § 1692 et seq. and Federal Trade Commission Staff Commentary to the FDCPA. 12 C.F.R.Pt. 226, Supp. I, § 226.1 *et seq.*

•The FDCPA Applies To:

- 1. Natural person obligated to pay any obligation or alleged obligation arising from a transaction the subject of which is primarily for personal, family, or household purposes.
- 2. Underlying debt must arise from a "transaction," thus child support, tort claims, and personal taxes are excluded.
- 3. When debt incurred for combined consumer and nonconsumer purposes, it becomes a fact question as to which purpose was primary reason debt was incurred - 15 U.S.C. Section 1692a(5).
- 4. FDCPA also applies to bad check debts, condominium assessment fees, residential rental payments, and other non-credit consumer obligations.

**Please note that many states have similar laws, which typically proscribe the same types of misconduct by debt collectors and which may cover a broader range of debts than the federal law. See list in materials.*

•Covered Debt Collectors:

•Any person who regularly collects debts owed to others. This definition includes lawyers who perform debt collection services on a regular basis. Even where money is legitimately owed, a debt collector's conduct is restricted by this law.

•Not Covered Debt Collectors:

•In-house collection departments are not ordinarily covered by the Act. For example, if you are collecting a mortgage debt owed to your company, the FDCPA does not apply. However if you use an outside collection agency to contact the borrower in relation to that same debt, the outside agency's conduct is restricted by the FDCPA. Similarly, if you use your in-house collection department, but suggest to the borrower that the collection is being performed by a third party, the FDCPA may apply as a result of that representation.

•Assignees of debt are not covered, provided that the assignment occurs prior to default.

•Government employees, process servers, "bona fide" consumer credit counselors, and certain fiduciaries and escrow companies are not covered.

**Please note that there may be other laws in your state which restrict the conduct of in-house collection departments.*

•The FDCPA Restricts Debt Collectors From Engaging in Certain Conduct Including the Following:

- Contacting a third party who does not owe the debt, such as a relative, neighbor, or a borrower's employer. Co-signers to the debt, however, may be contacted;
- Threatening to refer the borrower's account to an attorney; to harm the borrower's credit rating; to repossess or garnish, without actual intention of action on the threat.

**Please note that a debt collector may warn the borrower of an actual impending intention to refer a case to an attorney or to report a debt to a credit agency. What you cannot do is use a false threat to try to intimidate the borrower into paying.*

- Making repeated telephone calls or telephone calls at unreasonable times. The Act defines unreasonable times as contact before 8:00 AM or after 9:00 PM, unless the borrower has given you permission to contact him/her during those hours;
- Placing telephone calls to an inconvenient place. For example, contacting a borrower at work in violation of a policy by the borrower's employer that you know about or following a request by the borrower that you not contact the borrower at work;

WHAT RESTRICTIONS ARE IMPOSED ON DEBT COLLECTORS BY THE FDCPA?

Restrictions Continued:

- When placing a telephone call to a borrower at work, informing the borrower's employer of the purpose of the call, unless first asked by the employer;
- Using obscenity, racial slurs or insults;
- Sending letters which appear to have come from a court;
- Seeking collection fees or interest charges not permitted by the mortgage or by state law;
- Requesting post-dated checks with the intention to prosecute if they bounce;
- Suing in courts far removed from the borrower's place of residence;
- Making false representations in association with efforts to collect the debt, including false claim that you are an attorney, falsely claiming to have started a lawsuit, using a false name, or using stationery designed to look like an official court or government communication;
- Using false claims to collect information about the borrower, such as pretending to be conducting a survey; and
- Threatening the borrower with arrest if the borrower does not pay the debt.

WHO MAY YOU CONTACT ABOUT THE BORROWER'S DEBT?



- **Attorney:** If a borrower has an attorney, the borrower can instruct the debt collector to make all inquiries about the debt through his/her attorney. Once you have been instructed to make inquiries through the borrower's attorney, you should no longer make any direct contact with the borrower.

- **Third Parties:** If the borrower does not have an attorney, you may make only those inquiries necessary to determine where the borrower lives, what the borrower's phone number is, and where the borrower works. If the borrower's current address is not known, you are permitted to send a single letter to the borrower's last known employer inquiring about the borrower's present address. Ordinarily, other than the borrower's attorney, you may make only one inquiry about the borrower with any given third party.

WHAT MUST YOU TELL THE BORROWER?

- **"Mini-Miranda Warning:"** Written communications must include a warning known as the "Mini-Miranda Warning" stating that the communication is from a debt collector and that any information obtained may be used to collect the debt. Except for pleadings associated with a legal action, all subsequent communication from you must also include the warning that "the communication is from a debt collector." (1996 amendment.)
- **Validation Notice:** Within 5-days of your first contact with the borrower, you must send a written notice telling the borrower:
 - How much money the borrower owes;
 - The name of the creditor to whom the debt is owed;
 - That unless the borrower, within 30-days after receipt of the notice, disputes the validity of the debt or any portion of the debt, you will assume the debt valid;

•Continued:

- That if the borrower disputes the debt in full or in part within that 30-day period, you will obtain verification of the debt and mail it to the borrower; and
- That upon the borrower's written request within the 30-day period, you will provide the borrower with the name and address of the original creditor, if different from the current creditor.

**Please note that the thirty day notice requirement does not limit you from taking other measures to collect the debt during that initial 30-day period, as long as the action is not inconsistent with the borrower's right to contest the debt under the FDCPA.*

• **WHAT IF THE BORROWER TELLS YOU TO STOP CONTACTING HIM/HER?**

- If the borrower wants you to stop contacting him/her, the borrower must send you a written notice instructing you to stop. Once you receive that letter, you may contact the borrower only one additional time to notify the borrower that you intend to take a specific action in relation to the debt.
- Sending this type of notice does not resolve the debt. You may still, for example, file a lawsuit against the borrower in order to collect the debt, even if the borrower prohibits further contact by you.

• **WHAT IF THE BORROWER DISPUTES THE DEBT?**

- If, within 30-days after receiving written notice of the debt, the borrower sends you a letter stating that he/she does not owe the money, you must stop contacting the borrower. The notice from the borrower must be in writing, and must be hand delivered or postmarked within 30-days of the first written notice from you.
- You may renew collection activities if you send the borrower proof of the debt, such as a copy of a bill for the amount owed.

WHAT REMEDIES ARE AVAILABLE IF A DEBT COLLECTOR VIOLATES THE LAW?



- **Private Cause of Action:** Under the Fair Debt Collection Practices Act, the borrower has the right to sue you in state or federal court within 1-year from the date of the violation. If the borrower wins, the borrower may recover damages in the amount of any losses the borrower suffered as a result of the violation, plus an additional amount of up to \$1,000.00. The borrower may also be able to recover court costs and attorney fees.
- **Class Action:** If you engage in unlawful conduct with a number of borrowers, it may be possible to find a lawyer who will file a class action lawsuit.

