

## Fair Debt Collection: What Every Bankruptcy Attorney Should Know

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## Scope

This outline provides the elements of an FDCPA claim, an overview of common violations, related statutes, and ends with a set of frequently asked questions. It is not an in-depth study of the FDCPA, but a basic treatment of the issues that consumers experience from the perspective of a law who has dedicated his practice to helping consumers.

## Elements of an FDCPA Claim

### A. Persons

- a. Consumers – people who owe the alleged debt being collected.
- b. Persons means anyone who is contacted by a debt collector that is not the consumer. Persons other than the consumer may have claims for violations of the FDCPA.

### B. Consumer Debt

- a. 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 a judgment.
- b. Transaction
  - i. The debt must be the result of a transaction.
  - ii. Fees, fines, and taxes are not consumer debts.
- c. Common Consumer Debts:
  - i. Defaulted credit card debt
  - ii. Medical bills
  - iii. Student loans
  - iv. Mortgages
  - v. HOA fees
  - vi. Rent
  - vii. Bail bonds

### C. Debt Collector

- a. 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 to another.

- i. Original creditors are excluded, unless they are collecting the debt in a name other than their own.
- ii. Also includes those who use instrumentalities of interstate commerce to “enforce security interests” when:
  1. There is no present right to possession of the property claimed as collateral
  2. There is no present intention to take possession of the property; or
  3. The property is exempt from such dispossession or disablement.

b. Attorneys

- i. The first FDCPA case to reach the Supreme Court decided that attorneys engaged in the collection of consumer debts via litigation are debt collectors under the FDCPA.
- ii. Attorneys who “regularly engage” in debt collection are debt collectors. This means that attorneys who engage in debt collection in more than isolated instances, even if it is a minor but regular part of the attorney’s practice, or if the attorney collects consumer debts more than a few times a year.
- iii. In *Garret v. Derbes* 110 F.3d 317 (5th Cir. 1997) the Court found that an attorney who filed 639 cases, representing just .5% of his practice, satisfied the requirement of “regular” debt collection.

D. Communication - conveying of information regarding a debt directly or indirectly to any person through any medium.

E. Violation of FDCPA

- a. The FDCPA can be violated in any number of ways. Typically, the communications that violate that violate the FDCPA are telephone calls, letters, and credit reports.
- b. Common violations:
  - i. Misstating the amount of the debt. 15 U.S.C. § 1692e(2)(A).

1. Direct violations - It seems surprising that a debt collector would not be able to keep the amount consistent but I've seen it change from letter to letter, and between pleadings and letters.
  2. Indirect violations - can happen when a letter threatens that the amount will change due to interest, charges, or other fees, when in fact it will not change.
- ii. False representation that a communication is from an attorney. 15 U.S.C. § 1692e(3)
1. Obviously, when a caller says they are an attorney and they are not.
  2. But also when a letter appears to be from a lawyer or law office then the implication is that an attorney has reviewed the letter. If an attorney has not reviewed it, or there are glaring errors that suggest a lack of meaningful attorney review there may be a claim that the letter falsely appears to be from an attorney.
- iii. The threat to take any action that cannot legally be taken or is not intended to be taken. 15 U.S.C. § 1692e(5).
1. Letters stating that the debt collector will be filing suit when they do not have a history of litigation.
  2. Threats of wage garnishment.
  3. Attempting to collect a discharged debt.
- iv. 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. 15 U.S.C. § 1692e(8).
1. False credit reporting usually involves the amount of the debt. Consumer will have a final statement showing one amount owed, a letter from a debt collector showing another, and a lawsuit showing a third.
  2. Misreporting a debt that has been discharged in bankruptcy.

3. Reporting that a debt is owed by someone other than stated in a collection letter.
- v. The use of any false representation or deceptive means to collect or attempt to collect a debt or obtain information concerning a consumer. 15 U.S.C. § 1692e(10).
  1. While 1692e generally prohibits the use of any false, deceptive, or misleading representation or means in connection with the collection of a debt, e(10) specifically prohibits false representations or deceptive means.
  2. This a catch-all and is often brought in combination with other subchapter e violations.
- vi. Other subchapter e violations that are less common are:
  1. The false representation that document are legal process. 15 U.S.C. § 1692e(13).
  2. The false representation that documents are not legal process. 15 U.S.C. § 1692e(15).
- vii. Venue Violations 15 U.S.C. § 1692i
  1. Suing in the wrong venue is a violation of the FDCPA.
  2. Proper venue
    - a. Where the debt was established; or
    - b. Where the consumer resides.
  3. “The smallest geographical area relevant to venue in the court system in which the case is filed.” This is the standard, so the wrong Precinct in JP cases is a violation.
- c. Letter violations
  - i. While the above violations can be in any form, there are some that are exclusive to letters. The initial letter is the most important letter for a consumer to hold on to.
  - ii. Validation notice errors.
    1. The validation notice in 15 U.S.C. § 1692g must be given as part of or within 5 days of the initial

communication. It is usually in the first letter a consumer receives. It must state:

- a. The amount of the debt;
  - b. The name of the current creditor;
  - c. Give the dispute, validation, and original creditor notices. 15 U.S.C. §§ 1692g(3), (4), and (5);
  - d. If a consumer responds to g(4) or (5) it must be in writing to have any effect.
2. Debt collectors misstate the amount of the debt, both directly and indirectly.
  3. It is not always clear who the debt is owed to.
  4. The 3rd Circuit, last year, found that leaving out the “in writing” requirement in reciting the 1692g(4) and (5) language was a violation of the FDCPA. Without the “in writing” language it gives a consumer the impression that an oral dispute will be honored, when it will not be.
  5. Overshadowing – if the collection letter gives the impression that the “30 days from receipt of the letter” time period will be shortened or not honored then there may be an overshadowing claim.
    - a. Sometimes this can be apparent from one letter;
    - b. A second letters sent within the 30 days saying “times up” is a clear violation.

iii. Time barred debt collection

1. Collectors can attempt to collect time barred debts in Texas.
2. However, letters attempting to collect a time barred that offer to “settle” the debt without disclosing the unenforceability of the debt violate the FDCPA.

*Daugherty v. Convergent Outsourcing, Inc.*, 836 F.3d 507 (5th Cir. 2016)

d. Phone call violations

- i. Debt collectors still make offensive phone calls, but not with the frequency or severity they used to. The FDPCA and telephone technology have been effective in limiting the occurrence of offensive phone calling.
- ii. In addition to making the false representations described in this paper, debt collectors are prohibited from:
  - 1. Calling before 9am;
  - 2. Calling after 8pm;
  - 3. Calling someone they know is represented by counsel;
  - 4. Calling at work if they know its not allowed;
  - 5. Revealing the debt to a third party (they can ask for location information);
  - 6. Calling repeatedly or continuously; or
  - 7. Failing to disclose their identity when calling.

#### F. Damages

- a. The FDPCA is a strict liability statute and a debt collector is liable for just one violation. If a violation of the FDCPA is proven then a debt collector is liable for actual damages, statutory damages, attorney's fees, and litigation costs.
- b. Actual damages. If a consumer has paid a fee that can not be charged or made a payment that remains uncredited, then there are actual damages. Actual damages also recoverable for personal humiliation, embarrassment, mental anguish, and emotional distress.
- c. Statutory damages, up to \$1,000 per case, not per violation.
- d. Attorneys fees and costs.
- e. Class Actions
  - i. The FDCPA provides for class action damages at the lesser of 1% of the debt collectors net worth or \$500,000.
  - ii. Most debt collectors do not have a great net worth. Some do. Only the biggest will have a net worth sufficient to be capped at \$500,000. But the big debt collectors still make mistakes. Midland case.

## Texas Debt Collection Act

### A. Applies to First- and Third-Party Collectors

- a. Texas Finance Code Chapter 392.
- b. Requires third party debt collectors to have a bond on file with the Secretary of State.
- c. <https://direct.sos.state.tx.us/debtcollectors/dcsearch.asp>
- d. Similar to the FDCPA in the acts and practices prohibited:
  - i. Threats and coercion, Tex. Fin. Code § 393.301;
  - ii. Harassment and abuse, Tex. Fin. Code § 393.302;
  - iii. Unfair and unconscionable means, Tex. Fin. Code § 392.303;
  - iv. Fraudulent, deceptive, and misleading representations, Tex. Fin. Code § 392.304.
- e. Differences:
  - i. No required disclosures except “mini-Miranda”;
  - ii. No tools to stop communications from debt collectors, no way to stop a first party creditor from contacting you;
  - iii. Relief:
    1. Injunctive;
    2. Damages:
      - a. Actual damages;
      - b. Attorney’s fees and costs;
      - c. Statutory damages of not less than \$100 per violation for:
        - i. Collecting without a bond;
        - ii. Failing to honor a dispute; and
        - iii. Representing to a third party that a consumer is willfully refusing to pay a nondisputed debt when the debt is in dispute and the collector has been notified.
    - d. No general statutory damages;
    - e. Ties into DTPA
      - i. DTPA damages available,
      - ii. Most cases do not have mental anguish.



## Telephone Consumer Protection Act

- A. The TCPA regulates the use of automatic telephone dialing systems (ATDS) and artificial or prerecorded messages in telephone communications.
- B. Generally prohibits the use of these technologies in placing calls to cell phones.
- C. 26.3 billion robocalls placed in 2018. 91% of Americans have cell phones and 90% of frequently carry their phone with them.
- D. The TCPA was enacted in 1991, when all cell phone service plans were by the minute.
- E. Now the cost in dollars of unwanted calls is less of a concern, the cost in attention is significant.
- F. A research study shows that when interrupted, it takes a person between 22 and 25 minutes to resume the task they were working on before the interruption.
- G. What is an ATDS
  - a. Equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.
  - b. While no defendant will admit it, all computers are capable of generating and storing numbers sequentially or randomly.
- H. Consent
  - a. Consent is a hot issue in the courts.
  - b. The TCPA requires “prior express written consent” to receive autodialed calls. And a company is required to accept revocation in any reasonable manner.
  - c. The 2nd Circuit held that a consumer who consents to ATDS calls can not be later unilaterally alter the contract by revoking consent.
  - d. However, the TCPA at 47 C.F.R. § 64.1200(f)(8)(i) prohibits consent to receive such calls be condition of the purchase.
- I. Damages
  - a. Damages are on a per call basis
  - b. \$500 per call
  - c. If it can be shown that the caller placed the calls knowingly or intentionally then the damages can be trebled.

## FAQ

- A. How do I get a debt collector to stop calling?
  - a. Send a letter stating:
    - i. you want the debt collector to cease communications; or
    - ii. that you refuse to pay the debt. 15 U.S.C. § 1692c(c).
  - b. Oral revocation does not work under the FDCPA, it has to be in writing.
- B. What should I tell a debt collector when I talk to them?
  - a. Find out who they are;
  - b. Find out what the debt is from;
  - c. Find out how much they say you owe;
  - d. If you have a lawyer, give them your lawyer's information; then
  - e. Hang up.
- C. What is a debt collector required to tell me?
  - a. Within 5 days, or as part of it, they have to tell you in writing:
    - i. The amount of the debt;
    - ii. The name of the current creditor;
    - iii. 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;
    - iv. 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
    - v. 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.
  - b. All communications must include the "mini-Miranda" statement:
    - i. The initial communication must state:
      - 1. The debt collector is attempting to collect a debt; and

2. Any information obtained will be used for that purpose.

ii. Subsequent communications must state that the communication is from a debt collector.

D. Can a debt collector add on fees?

- a. Only if permitted by law or the agreement creating the debt;
- b. 15 U.S.C. § 1692f(1) prohibits any other fees, interest, charge, or incidental expense from being added to the debt, unless part of the agreement or otherwise allowed by law.

E. Should I dispute a debt?

- a. Yes, within 30 days of receiving the initial communication from the debt collector, dispute the debt in writing.
- b. Disputing the debt requires the debt collector to report the debt as disputed to the CRAs.
- c. If they do not correctly report the debt as disputed it is a violation 15 U.S.C. § 1692e(8).

F. Should I request verification?

- a. Yes, requesting verification stops all collection activity on the account until verification is complete. This will stop collection calls and letters for a bit.
- b. This will get you some proof of the debt. Debt collectors are not required to produce a lot, but its better than nothing.

G. Can I record phone calls?

- a. Maybe.
- b. If the debt collector says they are recording it, then you can record the phone calls.
- c. If the phone call originates in Texas and you are in Texas, then you can record it. Texas is a one-party state.
- d. Not every state is a one-party state, some require the consent of both parties.
- e. <https://www.rcfp.org/wp-content/uploads/imported/RECORDING.pdf>

H. How long do I have to bring a lawsuit under the FDCPA?

- a. One year from the violation.
- b. Or one year from service if it's a venue violation.

- I. Who is a debt collector under the FDCPA?
  - a. Third parties who;
  - b. Take the debt after default; and
    - i. Whose principal purpose is the collection of defaulted debts or
    - ii. Who regularly engages in the collection of debts owed to another.