

Presented:

2012 Collecting Debts and Judgments

October 11-12, 2012

Austin, Texas

Trends, Traps and Best Practices Involving Consumer Collections

**(Ten Things You must Know
To Survive and Prosper
In Today's Consumer Collection Arena)**

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Introduction

This presentation is oriented toward practical issues associated with consumer collections in today's reality. The world of consumer collections is rapidly changing and is expected to continue to do so over the next few years. Title X of Dodd-Frank Wall Street Reform and Consumer Protection Act which was passed on July 21, 2010 (P.L. 111-203) (Dodd-Frank) created the Consumer Financial Protection Bureau (CFPB), a governmental oversight body which is still in the process of organizing and staffing up. The CFPB is only now beginning to focus on the consumer collection industry. It, combined with the Fair Debt Collection Practices Act, 15 USC 1692, *et seq.*, ("FDCPA") and its Texas counterpart, the Texas Debt Collection Act, Tex. Fin. Code § 360, *et seq.*, ("TDCA"). Form the fundamental framework regulating the consumer collection industry, including legal collections. It is expected that over the next three years, the CFPB will effectively redefine who is engaged in consumer collections and how the industry, as a whole, goes about conducting its business. The CFPB is expected to advocate substantial reforms to the FDCPA; some of which are certainly needed, while others may result in substantial harm to both creditors and vendors.

This presentation is largely intended to look at consumer collection issues which exist today, but with an eye towards how these issues may be evolving going forward.

Back Ground

What is the FDCPA? (the short version)

The purpose of the FDCPA is "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." ¹ Section 806 of the FDCPA bars "[e]ngaging in any conduct the natural consequences of which is to harass any person in connection with the collection of a debt."

Surveying the Landscape

To understand FDCPA/TDCA compliance, you must understand the world in which a debt collection attorney operates. While the statutes may contain various definitions which are "open to interpretation," the reality is that the language of the statute is routinely stretched to its breaking point for one purpose, and one purpose only: Attorney's Fees. Specifically, the FDCPA provides

¹ S. Rep. No. 382, 95th Cong. 1st Sess. 1, 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

for an award of attorney's fees in "any successful action" to recover damages.² Combine this fact with a strict liability statute and you have a legal industry.

So, what makes the FDCPA so problematic for collection attorneys? The answer can be found in the application of the statute which, at every turn, is interpreted expansively.

a. Are You a Collection Attorney?

Put simply, if you ever stop to ask yourself that question – you are. While the legal standard is that a third-party debt collector is a person who "regularly engages in consumer debt collection activity," courts have held that dedicating as little as 4% of one's legal practice to collections may satisfy this requirement.³ An original creditor is not a third-party debt collector,⁴ however, the person who acquires a debt once it is in default, is considered a third-party debt collector.⁵

b. Are You Attempting to Collect a Consumer Debt?

The FDCPA defines the term "debt" to mean

"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."⁶

The practical application of the provision is this: If there is any way to characterize a debt as a "consumer debt," then treat it like a consumer debt. Courts look to not only the form of the transaction (i.e., personal credit card, personal bank account)⁷ but the substance of the transaction as well.⁸ For example, the debt associated with the purchase of a backhoe by a construction

² 15 U.S.C. §1692k(a)(3).

³ See *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F.Supp. 319 (E.D.Mi. 1992).

⁴ 15 U.S.C. §1692a(6)(A).

⁵ See *McCartney v. First City Bank*, 970 F.2d. 45 (5th Cir. 1992) (A bank that attempts to collect a judgment in connection with the liquidation of another bank is a debt collector, not a creditor, and must follow the requirements of the FDCPA); see also *Ruth v. Triumph P'ship*, 577 F.3d 790 (7th Cir. 2009) (A debt collection company that purchases debts already in default at the time of purchase is considered a debt collector); *Pollice v. Nat'l Tax Funding LP*, 225 F3d 379, 403-404 (3rd Cir. 2000); *Whitaker v. Ameritech Corp.*, 129 F3d 952, 958-959 (7th Cir. 1997).

⁶ 15 U.S.C. §1692a(5).

⁷ See *Hetherington v. Allied Intern. Credit Corp.*, Civ. No. H-07-2104, 2008 WL 2838264 (S.D. Tex. July 21, 2008) (In determining whether a transaction was for consumer or commercial purposes, the court must examine the whole account from which payment for the specific transaction was made, rather than the specific transaction).

⁸ *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072 (9th Cir. 2001).

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First appeared as part of the conference materials for the
2012 Collecting Debts and Judgments session

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