Federal Fair Debt Collection Practices Act ("FDCPA")

Federal law governing the conduct of third party debt collectors (collection agencies and lawyers) who collect "consumer" debts for creditors

Presented By:

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The Federal Fair Debt Collection Practices Act (FDCPA) is found at 15 US Code §1692 et. seq.

1. **Applies to third party "debt collectors"** -- *excludes* creditors collecting their *own* debts.

2. **Applies to "consumer debts" -- debts incurred primarily for *personal, family or household use*.** Business and agricultural debts are excluded.

    - Consumer debts include credit card collections, the foreclosure of a home mortgage, past due utility bills, condominium fees and time share debts, telephone and cell phone bills, etc.
    - Foreclosure of a farm mortgage, even if it includes the farm homestead, is **not** a consumer debt.
    - Courts have held that collection of alimony and child support is **not** a consumer debt
    - Collection on a retail installment contract sold by a car dealer to a bank, even though it may be a consumer debt originating at a car dealer, has been held by the courts not to come under FDCPA, because the bank that bought the retail installment contract is legally deemed considered to be collecting its own debts – remember FDCPA applies only to third party debt collectors.

3. **Limits contact with debtor**, and severely limits contacts with the debtor's employer, neighbors, and others.

    - If the debtor demands in writing that you no longer call him, write to him, or contact him, you must cease immediately. Your only alternative is to sue at this point.
    - You can contact the debtor's employer, neighbors and others only for the purpose of locating the debtor, and you cannot volunteer that you are a debtor collector.

4. **Must treat debtor as "least sophisticated consumer."** Any communication with the debtor must be clear and simple enough so as not to confuse a "least sophisticated consumer."

5. **Affords debtor opportunity for "debt verification"** -- not defined by the Act, but presumes to require some proof of the debt beyond a mere assertion of the amount owed. A debt collector must provide notice in writing to the debtor of the consumer's right to request verification within 5 days after first communicating with the debtor. We recommend you do it in the first communication. See the invitation to the debtor to ask for debt verification in the bold print on the ***Consumer Debt Dunning Letter at the end of this presentation.***

6. **Requires debt collectors to give civil "Miranda Warnings" -- *maxi and mini.*** The

"Maxi Miranda" warning is a statement that *"This communication is from a debt collector and any information obtained will be used for that purpose,"* which is required in the *initial* communication with the consumer debtor. The "Mini" warning is a statement that *"This communication is from a debt collector"* which must be used in all subsequent communications with the consumer debtor. See the Maxi Miranda in bold print on the ***Consumer Debt Dunning Letter at the end of this presentation.***

7. **FDCPA has laundry lists of specific prohibited underhanded and unethical collection activities** under categorical headings including "Harassment or Abuse," "False or Misleading Representations" and "Unfair Practices." (Feds' philosophy: "Even if it's effective, it should be illegal.")

   a. **Harassment or Abuse**

      - Use or threat of violence to harm person or property.
      - Obscene or profane language.
      - Posting or publication of a list of consumers who refuse to pay their debts (unless it is to a consumer reporting agency or internally for employees only in a financial institution or collection agency).
      - Causing telephone to ring repeatedly or repeated telephone calls intended to annoy, abuse or harass.

   b. **False or Misleading Representations**

      - Representing that a debt collector is somehow affiliated with the federal or state government, or the use of any badge or uniform implying that.
      - False representation that a debt collector is an attorney, when he or she is not.
      - Representation or implication that failure to pay a debt will result in arrest or imprisonment (no debtor's prison in the United States).
      - Representation that failure to pay a debt will result in seizure, garnishment, attachment or sale of property or wages unless the action is lawful and the debt collector intends to take such action.
      - Threat to take action that cannot legally be taken (e.g., beyond statute of limitations, or collecting the creditor's attorney fees from the debtor – illegal in North Dakota).
      - Representation that failure to pay a debt is a crime (failure to pay a debt is a breach of civil contract, not a criminal offense).
      - Sending written communication which falsely represents or simulates that it is an official document issued or approved by a court, official or agency of the government.
      - False representation that documents are legal process (e.g., a "fake" Complaint).
      - False representation that legal documents are not legal documents (e.g., Summons and Complaint served in a pink envelope with a picture of Sponge Bob Square Pants on it).

- Failure to disclose in the initial written communication with the consumer and in the initial oral communication, that **"this communication is from a debt collector attempting to collect a debt and any information obtained will be used for that purpose" (Miranda warning)**, and for all subsequent communications, failure to disclose that the communication is from a **"debt collector" (Mini-Miranda warning)**.

c. Unfair Practices

- Collection of any amount including interest, a fee, a charge, or an incidental expense unless that amount is expressly authorized by the agreement creating the debt or permitted by law (e.g., collection of attorney fees prohibited by North Dakota law).
- Accepting a post-dated check more than 5 days in advance of the post date.
- Depositing or threatening to deposit any post-dated check early.
- Collect phone calls or collect telegram fees charged to the debtor by the debt collector.
- Threatening to self-help repossess collateral without judicial action unless the law allows it and the debt collector intends to do it.
- Placing intimidating symbols, words or pictures on envelopes containing debt collection letters (e.g., pictures of lightening about to strike).

8. **Penalties: $1,000 per violation plus actual damages plus attorney fees**, plus possible Federal Trade Commission fines and penalties. Note that the debtor's attorney can collect at an hourly rate against the debt collector, even though the attorney may have been on a contingent fee arrangement with the debtor. This results in the real life ironic situation where the debtor is awarded a couple thousand dollars but his lawyer gets tens of thousands of dollars in fees.

9. ***Important:*** **Beginning in 1986, attorneys were made subject to FDCPA**, and are now considered "debt collectors" under the Act, whereas before attorneys were exempt. *(Caution: An attorney's malpractice carrier may not cover the attorney because it is the adversary, not the client, who is suing the attorney.)*

10. **Note that Section 1692(e)(11) of FDCPA does not require the Miranda Warnings in formal lawsuit "pleadings" served on a consumer debtor – *BUT CAUTION!*** Although a Complaint is defined as a "pleading" under the Rules of Civil Procedure, a Summons, on the other hand, is not characterized or defined as a pleading, so to be safe the debt collector attorney may want to include the Miranda Warning on the Summons, but there is a risk of confusing the "least sophisticated debtor" with the 30 days allowed to the consumer to dispute the debt required under Federal Law by FDCPA, and the 21 days required to be stated in the Summons by the State Law North Dakota Rules of Civil procedure to Answer the formal lawsuit Complaint. ***FURTHER CAUTION!*** Correspondence related to litigation is **not** exempt from FDCPA's Miranda warning, and arguably any document *other than* a Complaint,

Answer or Counterclaim is not a pleading, and therefore **not** exempt from FDCPA's Miranda warning.

11. **Lawsuit venues for debt collection are restricted** to the court district and state where the debtor lives or the court distict and state where the debtor signed the contract (if a signed contract is involved). Your state's broader reach long-arm statute will not help you, because FDCPA overrides state law.

CASENOTE: FDCPA violation costs attorney $250,000 for lending a collection agency his letterhead. In Neilson v. Dickerson, 7th Circ Nos. 00-2780 & 2781 (October 2002), a lawyer who lent his letterhead and his signature on form collection letters to a collection agency, Household Credit Services, to collect balances owed by consumers on General Motors Credit Cards, was hit with a $250,000 class action damage award for violating FDCPA's prohibition on misrepresentation that the collector is an attorney. The attorney was not familiar with the debtor files for which he was signing the letters. The collection agency was also hit with a similar damage award, since it was using the lawyer's letters to give the impression to debtors that an attorney was handling the creditor claims. The lawyer was getting paid $1.50 per letter from Household. OUCH!!!!

CASENOTE: Grand Forks ND FDCPA Case: Debtor awarded $7,000 plus his attorney fees of $35,000 against a collection agency (he asked for $80,000) when a collection agency was found by the jury to have contacted the debtor twice at his place of employment after the debtor asked them not to do that.

CASENOTE: Fargo ND FDCPA Case – Montana Debtor awarded $311,000 when a North Dakota-based law firm attempted to collect a $3,800 credit card debt after the statute of limitations on the debt had expired. The federal court jury's award in favor of the disabled consumer debtor contained the $1,000 statutory FDCPA damages plus $250,000 emotional distress damages and $60,000 punitive damages.

State law debt collection acts either mirror the Feds' FDCPA at the state level or set licensing standards. North Dakota Collection Agency Regulation, Ch. 13-05, NDCC, adopts the licensing approach for debt collectors. Note that attorneys are exempt under Section 13-05-02, NDCC from having to obtain a debt collector license, because the law license theoretically keeps lawyers at least as ethical as a debt collector license.

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[Date]

[Name and Address of Consumer Debtor]

- **This Letter Concerns Your Past Due Account With Our Client**
- **Our Creditor Client:** *[identify our client]*
- **Total Amount Of Consumer Debt As Of Date Of This Letter: $** *[total amount due with interest and late charges]*

Dear *[salutation for debtor]:*

This law firm has been retained by the creditor named above to take whatever legal action may be required to collect the amount you owe on your account. Before we initiate a formal lawsuit against you to collect the amount you owe plus court costs, we want to give you an opportunity to settle this matter without the necessity of formal legal action. To avoid formal legal action, you must pay the total amount of the debt shown above **within 30 days** after you receive this letter. Only a certified check, a cashier's check, or a money order will be accepted. Please make the check or money order payable to the creditor named above, but send the check or money order to this office. If you do not pay this debt within 30 days of the date of this letter, we are instructed by our client to initiate formal legal action against you to collect it, plus interest, late charges (if applicable) and court costs allowed by law and the judge.

Under the Fair Debt Collection Practices Act, which is federal law, we are required to notify you of the following information and rights you have:

1. **You have thirty (30) days from the day you receive this letter to dispute all or part of the debt. If you notify us in writing that all or part of the debt is disputed, we will provide you with a verification of the debt by mail. Unless you dispute all or part of the debt in writing within this period of time, we will assume the debt is valid.**

2. **If the creditor named above is different from the original creditor on this debt, we will provide you with the name and address of the original creditor by mail if you request this in writing within thirty (30) days from the date you receive this letter.**
3. **This is an attempt to collect a debt by a debt collector and any information we obtain will be used for that purpose.**

If you have any questions please call the undersigned attorney for the creditor, or if you hire an attorney of your own, please have your attorney contact the undersigned. We sincerely hope that formal legal action will not be necessary and that you will make arrangements to settle the debt within the next thirty (30) days.

Yours very truly,

Tracy A. Kennedy
TAK:brdp

cc: *[Name of client]* **CONSUMER DEBT - FAIR DEBT COLLECTION PRACTICES ACT**