



# NEW TECHNOLOGY AND THE FAIR DEBT COLLECTION PRACTICES ACT

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Fair  
Debt  
Collection  
Practices  
Act  
(FDCPA)

# FDCPA

## FAIR DEBT COLLECTION PRACTICES ACT

- Passed in 1978 and amended in 1986 to include attorneys as debt collectors
- Defines “debt collector” 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 debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”
  - PA state law has its own version of the FDCPA known as the Fair Credit Extension Uniformity Act (FCEUA)

# FDCPA

## FAIR DEBT COLLECTION PRACTICES ACT

- **15 USCS § 1692a (3)** – Consumer: any natural person obligated or allegedly obligated to pay any debt.
- **15 USCS § 1692a(5)** – Debt: 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.

# FDCPA

## FAIR DEBT COLLECTION PRACTICES ACT

- **15 USCS § 1692a(6)** – Debt collector: 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.

# FDCPA

## FAIR DEBT COLLECTION PRACTICES ACT

- See **15 USCS § 1692c**: (d) “Consumer” defined. For the purpose of this section, the term “consumer” includes the consumer’s spouse, parent (if the consumer is a minor), guardian, executor or administrator.

# IMPORTANT ELEMENTS OF FDCPA

Validation Notice	Mini Miranda	Jurisdictional Considerations	Ceasing Communications
<p>Requires that a letter be sent to the debtor within five days of the initial communication with the debtor stating that the debtor has the ability to request verification of the debt, if disputed, upon written request within thirty (30) days of receipt of the letter.</p> <p>If the debtor responds to the letter and requests information or disputes the debt, then the debt collector may not have further contact with the debtor until such information is provided.</p>	<p>The FDCPA requires that the debt collectors identify themselves as such and the nature of the communication. This means that specific language be inserted in the initial communication with the consumer debtor. Debt collectors must inform the debtor in specific terms that "This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose." In an effort to ensure compliance, it is recommended that the language be placed in any and all written communications with the debtor as well as expressed verbally at the beginning of the first telephone conversation with the debtor. Written correspondence should have the "warning" in regular size print so as to not hide the language.</p>	<p>In the case of any action to enforce an interest in real property securing the consumer's obligation, such action should be brought in a judicial district in which such real property is located.</p> <p>-in the case of an action not described above, the action should be brought where the debtor resides or in the jurisdiction where the consumer signed the contract that is sued upon.</p>	<p>If the debtor notifies the debt collector that he refuses to pay the debt or requests that communications cease, then the debt collector must cease communication with the debtor.</p> <p>*Exceptions:</p> <ul style="list-style-type: none"> <li>-debt collector may advise the consumer that further collection efforts are being terminated.</li> <li>-debt collector may inform the consumer that the debt collector is invoking a specified remedy.</li> </ul>

Mr. Joe Debtor  
123 Main Street  
Pittsburgh, PA 15200

January 17, 2014

CREDITOR: Bank Associates, Inc.  
AMOUNT: \$6,174.95

Dear Mr. Debtor:

We have been retained to represent Bank Associates, Inc. in a claim against you. Your immediate remittance of \$6,174.95 should be made payable to BERNSTEIN-BURKLEY, P.C., Attorneys at Law, and mailed to this office by February 17, 2014. If we do not receive payment we will recommend that our client take appropriate action. Should you have any question, please feel free to communicate with me at (412) 456-8100.

#### NOTICE

THIS IS A COMMUNICATION FROM A DEBT COLLECTOR AND IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. THIS LAW FIRM WILL PRESUME THIS DEBT TO BE VALID UNLESS YOU DISPUTE THE VALIDITY OF ALL OR ANY PART OF IT WITHIN 30 DAYS OF RECEIPT OF THIS LETTER. IF YOU NOTIFY US IN WRITING THAT YOU DISPUTE ALL OR A PORTION OF THIS DEBT, WE WILL OBTAIN AND SEND TO YOU VERIFICATION OF THE DEBT OR A COPY OF ANY JUDGMENT AGAINST YOU ARISING OUT OF THIS DEBT. ALSO, UPON WRITTEN REQUEST WITHIN 30 DAYS AFTER RECEIPT OF THIS NOTICE, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CREDITOR NAMED ABOVE. WE RESERVE THE RIGHT TO TAKE LEGAL ACTION WITHIN THE 30 DAY VALIDATION PERIOD IF OUR CLIENT INSTRUCTS US TO DO SO.

Very truly yours,

BERNSTEIN LAW FIRM, P.C.

Nicholas D. Krawec, Esquire

# “MINI-MIRANDA WARNING”

THIS DEBT COLLECTOR IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Required warning per 15 U.S.C. Section 1692e (11) which provides in pertinent part:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

# DEBTOR CONTACT

## TELEPHONE CONTACT AND WRITTEN CONTACT WITH DEBTOR

- **The Fair Debt Collection Practices Act**
- **(FDCPA- 15 USC §1692)**
- **15 USC 1692b** – Acquisition of Location Information-The FDCPA restricts methods by which debt collectors may acquire information (skip tracing) regarding a debtor.
- **15 USC 1692c** – Communication in Connection with Debt Collection-The FDCPA limits contact with the debtor in certain circumstances, times and places as well as limiting debt collector communications with third parties.
- **15 USC 1692d** – Harassment or Abuse – The FDCPA defines six specific acts that would be deemed harassment or abuse by any debt collector attempting to collect a debt. Collectors must be mindful that the FDCPA does not limit harassment to the six acts. Debt collectors must not take any action that could reasonably be interpreted by the debtor as harassment or abuse.

## DEBTOR CONTACT

### TELEPHONE CONTACT AND WRITTEN CONTACT WITH DEBTOR

- **15 USC 1692e** – False or Misleading Representations – The FDCPA lists sixteen collection practices that are deemed to be deceptive or false representations. Such actions by a debt collector are prohibited collection practices.
- **15 USC 1692f** – Unfair Practices – The FDCPA lists eight collection practices that are deemed to be unfair (unconscionable) collection practices.
- **15 USC 1692g** – Validation of Debts – A technical section under the FDCPA requires that the collector respond within five days of the initial communication with the debtor by letter informing the debtor of the amount owed, the name of the creditor and a statement notifying the debtor of his/her right to request validation documents of the debt. See the demand letter attached as Appendix A.

## THERE'S A STATE VERSION OF THE FDCPA

- It's the FCEUA
  - (Fair Credit Extension Uniformity Act)



# TELEPHONIC COMMUNICATION

# TELEPHONIC COMMUNICATION

- ***Telephone Consumer Protection Act (“TCPA”), 47 U.S.C.A. § 227***
  - What is restricted?
  - What constitutes a call?
    - Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, (9th Cir. 2009)
    - Section 227(b)(A)(iii) – “Catch all” Prohibition

## TCPA-APPLICATION TO DEBT COLLECTION

- While certain provisions of the TCPA apply only to telephone solicitations and not debt collection calls, the prohibited use of auto-dialers has been found to apply to debt collection calls.
- Griffith v. Consumer Portfolio Services, Inc., 838 F. Supp. 2d 723 (2011).

## EXPRESS CONSENT

- Prior Express Consent – This is an affirmative defense to a TCPA claim.
  - Consent must be given at the time of the transaction that gave rise to the debt owed.

## REVOCACTION OF EXPRESS CONSENT

- Express Consent can be revoked.
  - "[T]he weight of authority suggests that consent may be revoked under the TCPA and that if messages continue after consent is revoked, those messages violate the TCPA." *Munro v. King Broadcasting Co.*, 2013 WL 6185233 (W.D.Wash. 2013).

## TCPA-DAMAGES AND STATUTE OF LIMITATIONS

- The TCPA provides individuals with a private right of action and the ability to seek \$500 in damages for each violation or treble damages (\$1,500) where the unsolicited communication was sent willfully or knowingly.
- Two year statute of limitations relating to violations of the TCPA.

## WILLFULLY OR KNOWINGLY

- Willfully – means that the actor was acting under his own free will and voluntarily, regardless of whether he knew the actions were in violation of the statute or not.

## COMMUNICATING VIA CELL PHONE

- Generally, technology has advanced to the point where cell phones are as common place as land lines.
  - In 2012 the number of households with a mobile number only rose to 34%. Ages 25-29, this increased to 60%. Study by National Health Interview Study

# UNIQUE ISSUES FOR CELL PHONES

- Fees
- Tracking
- Listings
- Turnover

## AUTO-DIALERS

- Predictive Dialers – In the early days of the TCPA, there was an attempt by telemarketers to distinguish between predictive dialers (rely on telephone numbers from lists provided by equipment operators) and other auto dialers (those that generate random or simply sequential numbers). This distinction has been rejected by the FCC. “A predictive dialer falls within the meaning and statutory definition of ‘automatic telephone dialing equipment’ and the intent of Congress” In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014, 14093 (July 3, 2003).

## ACTUAL KNOWLEDGE

- A consumer need not have actual knowledge that an automatic telephone dialing system was used to place any call. Brown v. Collections Bureau of Am., LTD, 2016 U.S. Dist. Lexis 58816 (Dist. Ct. N.D. Ca. 2016).

## FREQUENCY OF TELEPHONE CALLS

- Fact sensitive as to each case. The key is not only the volume of calls made, but also the pattern of the calls.
- Shand-Pistilli v. Professional Account Services, Inc., 2010 WL 2978029, at 4, 2010 U.S. Dist. LEXIS 75056, at 11 (E.D. Pa. July 26, 2010).

## POTENTIAL VIOLATION ASSOCIATED WITH FREQUENCY OF TELEPHONE CALLS

- Section 1692d(5) of the FDCPA prevents, “[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” 15 U.S.C. § 1692d(5).

## FREQUENCY OF CALLS – CASELAW EXAMPLES

- VanHorn v. Genpact Servs., LLC., No. 09-1047-CV-S-GAF, 2011 WL 4565477, at 1 (W.D. Mo. Feb. 14, 2011)
  - (Finding 114 calls in a four-month period did not violate the FDCPA).
- Carman v. CBE Grp., Inc., 782 F. Supp. 2d 1223, 1232 (D. Kan. 2011)
  - (Summary judgment in favor of defendant who placed 149 telephone calls to plaintiff during two month period).

## FREQUENCY OF CALLS – CASELAW EXAMPLES

- Clingaman v. Certegy Payment Recovery Servs., No. H-10-2483, 2011 WL 2078629, at 5 (S.D. Tex. May 26, 2011)
  - (Granted summary judgment for a defendant who placed 55 calls over three and one-half months).
- Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443, 1452-53 (D. Nev. 1994)
  - (Violation of Section 1692d(5) for six telephone calls in 24 minutes where numerous phone calls “significantly disrupted plaintiff’s place of work).

## FREQUENCY OF CALLS – CASELAW EXAMPLES

- **United States v. Central Adjustment Bureau, Inc.**, 667 F. Supp. 370, 376 (N.D. Tex. 1986), aff'd as modified on other grounds, 823 F.2d 880 (5th Cir. 1987)
  - (Finding a violation of Section 1692d(5) where debt collectors placed up to seven calls a day or 15 calls a week to debtors or their family members, at both home and work, including instances in which debt collectors called back immediately after a debtor abruptly hung up, and even after debt collectors were told to stop either orally or in writing).

## VOICEMAIL

- The FDCPA is silent with respect to the availability of voicemails as a means for collecting debt. Obviously, technology has changed considerably since the initial passage of the Act in 1978. In fact, voicemail was not widely available at that time.

## VOICEMAIL

- Inherent Tension – There is an inherent tension between the FDCPA's requirement that debt collectors identify themselves and the FDCPA's bar against communicating with third parties when it comes to voicemails

## CONFLICTING SECTIONS OF FDCPA ON VOICEMAILS??

- Section 1692d(6) – Requires meaningful disclosure of caller’s identity
- Section 1692e(11) – “A debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt,” including a “failure to disclose in subsequent communications with a consumer that the communication is from a debt collector.”

## CONFLICTING SECTIONS OF FD CPA ON VOICEMAILS??

- Section 1692c(b) – Debt collector may not communicate in connection with the collection of a debt to anyone other than the consumer and certain parties identified in the statute.
- How do you control who listens to voicemails?

## VOICEMAIL

- Past Practice – Debt collectors have traditionally refrained from identifying themselves or leaving information regarding debts on voicemail messages. This has been out of concern for violating Section 1692c(b) that prohibits a debt collector from “communicat[ing], in connection with the collection of any debt, with any person other than the consumer.” 15 U.S.C. § 1692c(b). This makes sense because once a message is left. The debt collector leaving the message has no control over who hears that message.

# VOICEMAIL

- Changing Practice – The practice of debt collectors started to change when courts started to impose liability for violations of Sections 1692d(6) and 1692e(11) of the Fair Debt Collection Practices Act.
  - Bar against, “the placement of telephone calls without meaningful disclosure of the caller’s identify.” 15 U.S.C. § 1692d(6).
  - “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt,” including a “failure to disclose in subsequent communications [with a consumer] that the communication is from a debt collector.” 15 U.S.C. § 1692e(11).

## VOICEMAIL – CASE LAW

- Fonti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 669 (S.D.N.Y. 2006).
  - Debt collectors began to defend against these cases by asserting that compliance would cause them to violate the non-disclosure to third party requirements set forth in Section 1692c(b) of the FDCPA.

## VOICEMAIL – CASELAW EXAMPLES

- Hicks v. America’s Recovery Solutions, LLC., 816 F. Supp.2d 509, 514 (N.D. Ohio 2011)
  - (“the small risk of exposure cannot relieve the debt collector of its obligation to identify itself”).
  - Courts would also comment, in dictum, that Section 1692c(b) would only apply to purposeful third-party communications.

## A POSSIBLE SOLUTION TO THE VOICEMAIL PROBLEM?

- Zortman v. J.C. Christensen, 870 F. Supp. 2d 694, (D Minn. 2012)
  - A recent case in Minnesota holding that a voicemail on a consumer's cellular telephone was not a third party communication that would violate the FDCPA may offer some guidance for debt collectors when faced with an answering machine or voicemail.

ZORTMAN V. J.C. CHRISTENSEN, 870 F. SUPP. 2D 694,  
(D MINN. 2012).

- “We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866-319-8619.”
  - JCC’s messages not directed to Zortman by name.
  - JCC’s message does not mean the call was regarding a debt.

ZORTMAN V. J.C. CHRISTENSEN, 870 F. SUPP. 2D 694,  
(D MINN. 2012).

- Here, no more information was conveyed with the message than that which would have been conveyed by a hang up or missed call.
- Finding this as a violation of the FDCPA would have effectively removed the telephone as a collection tool.

ZORTMAN V. J.C. CHRISTENSEN, 870 F. SUPP. 2D 694,  
(D MINN. 2012).

- Ex) This does not work – “This is a message for Jane Doe. If this is not you, please hang up or disconnect. By continuing to listen to this message, you acknowledge that you are Jane Doe...”

## CALLER-IDENTIFICATION

- Glover v. Client Servs., Inc., No. 07-cv-81, 2007 WL 2902209, at 3-4 (W.D. Mich. 2007)
  - Holding that it is not a deceptive practice under the FDCPA for a debt collector to have “unavailable” appear in a caller ID window instead of its telephone number.



# ELECTRONIC COMMUNICATION

## ELECTRONIC MAIL

- Email communication is permitted.
- FDCPA rules must be followed:
  - Email during 8am to 9pm
  - Emails to place of employment if known or have reason to know that employer prohibits such communication
  - Watch for work email not being confidential

## TEXT MESSAGES

- Text communication is permitted.
- FDCPA rules apply and must be followed.
- Violation for each text can lead to increased damages.
- Additional damages if consumer is charged per texts. Class action could lead to big money.



# SOCIAL MEDIA

## SOCIAL MEDIA

- As more and more people become Internet savvy and the world trends toward online communication, debt collectors will have to evolve. While these technological advances provide great tools to assist with the collection of debts, they also present a number of pitfalls that must be avoided.

## ISSUES AND CASE LAW

- “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. This is by far the greatest opportunity for a violation of the FDCPA by a debt collector.
- Case law on the issue of social media is sparse, but a number of the actions involved can be evaluated using existing case law.

# FACEBOOK

- Skip Tracing – Facebook can be an effective tool to locate debtors and obtain information.
  - Cannot mislead or threaten
  - Public Information – If your debtor has a public profile and allows all Facebook users to view, then you are probably okay to search their page.
  - Private Information – Fake profiles are not advised.

## FACEBOOK – FAULTY FRIEND REQUESTS

- This involves using an alias in an attempt to “friend” a debtor on Facebook. This shouldn’t be a surprise, but courts are going to universally find that this is a violation of the FDCPA. The act itself is misleading.

## FACEBOOK – FAULTY FRIEND REQUESTS

- **Beachham v. Mark One Financial, LLC.** – This is an unreported opinion, but it involved the creditor’s use of Facebook to contact the debtor regarding collection of a \$362.00 car loan. The creditor used a fake profile to “friend” the debtor. See, USA Today, March 9, 2011, Mark Winters, ABA Journal, July 2011, Brian Sullivan.

# LINKEDIN AND TWITTER

## LINKEDIN

- Public vs. Private Profiles
- The same concerns as Facebook

## TWITTER

- “Follow” a debtor to find out more about them
- Thirty party disclosures



# Q&A

THANK YOU

**BERNSTEIN ■ BURKLEY**

ATTORNEYS AT LAW

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