How to Comply with the FDCPA, CFPB, and State Law: Selected Topics

and

How to Avoid (and Handle) FDCPA Claims

By:

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Introduction

Let's talk first about what this section *is*. This is a "Basic" level program sponsored by National Business Institute ("NBI"). This section is therefore written to help legal practitioners, legal staff, in-house counsel, debt collectors, and other creditors' representatives to understand entry-level concepts under the Fair Debt Collection Practices Act ("FDCPA" or "the Act") and its synthesis with Nebraska law. Though there are many complex areas and topics this section could discuss in relation to the FDCPA, they are beyond the scope of what is written here.

Now let's talk about what this section *is not*. This is not a complete or definitive guide to the current state of the law under the FDCPA. Instead, this section will focus on common FDCPA issues, claims, and problems with an emphasis on how they have arisen over time in state and federal courts. For more comprehensive resources and research, readers should consult one or more of the available book-length treatises on the FDCPA. For example, at least one consumer advocate group publishes and regularly updates a 2-volume treatise extensively dealing with FDCPA claims, FDCPA litigation, and the impacts of such cases on consumers.[1] This treatise is available in paperback and online at minimal cost to practitioners interested in this area of the law.

1. FDCPA Basics – Defining and Understanding the Terms that Make the FDCPA Function

a. Entities, Transactions, and Communications Covered by the FDCPA

i. What is a "Debt"

This four-letter word is the first key term in determining whether the FDCPA applies to any transaction. Under the Act "debt" means:

> 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.[2]

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[1] *See* National Consumer Law Center, *Fair Debt Collection* vols. 1-2 (9th ed. 2018), https://library.nclc.org/fdc (last visited June 11, 2019).

[2] 15 U.S.C. § 1692a(5) (emphasis added).

The definition of debt involves two key components. First, the obligation in question must be owed by a "consumer." "Consumer" means "any *natural person* obligated or allegedly obligated to pay any debt."[3] Thus, other types of entities such as corporations, LLCs, or other creatures of statute are excluded from the definition of "consumer" and are outside the scope of the FDCPA. And although partnerships may be formed by groups of natural persons, they are do not meet the definition of "consumer" because debt arising out of commercial or business transactions is excluded from coverage under the Act.[4]

Second, the debt owed by a natural person must have arisen from a transaction that was "primarily for personal, family, or household purposes."[5] In other words, debts owed by individuals for commercial or business purposes are not covered by the FDCPA.[6] If a debt arises from a commercial transaction, the FDCPA is inapplicable.[7] Further examples of transactions covered or not covered by the FDCPA are discussed at greater length below.

ii. Who is a "Creditor?"

"Creditor" means "any person who offers or extends credit creating a debt or to whom a debt is owed,[8] but such term does not include any person to the extent that he

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[3] 15 U.S.C. § 1692a(3) (emphasis added).
[4] 15 U.S.C. § 1692a(5); see, e.g., *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990) (promissory note for the purchase price of a limited partnership investment not a consumer debt under § 1692a(5)).
[5] *Id*.
[6] See, e.g., *Bloom v. I. C. System, Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992) (FDCPA not applicable where loan proceeds were applied for a business purpose even though it was a loan among friends and it was informally documented); *Mabe v. G.C. Services Limited Partnership*, 32 F.3d 86 (4th Cir. 1994) (child support obligations are not "debt" under the FDCPA because they are not incurred to receive consumer goods or services); *Bank of Boston International of Miami v. Tefel*, 644 F. Supp. 1423, 1430 (E.D.N.Y. 1986) (bank loan used to purchase corporate controlling interest is not a "debt" because it is not for a personal, family, or household purposes).
[7] *Clark v. Brumbaugh and Quandahl, P.C., LLO*, 731 F. Supp. 2d 915, 921 (D. Neb. 2010).
[8] See *Henson v. Santander Consumer USA, Inc*., ___ U.S. ___, 137 S. Ct. 1718, 198 L.Ed.2d 177 (2017) (unanimously holding a company may collect debts that it purchased for its own account without triggering the statutory definition of a "debt collector" under the FDCPA. By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the statute's plain language seems to focus on third party collection agents regularly collecting for a debt owner - not on a debt owner seeking to collect debts for itself.).

receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another."[9] It does not matter whether the party who originally extended the credit has sold or assigned its rights in the document evidencing the debt; assignees or purchasers of debt that is *not in default* are considered creditors.[10] But where a party takes an assignment or purchases debt that is *in default for purposes of collection on behalf of another,* that party is no longer considered a creditor under the Act.[11]

Practical Pointer: it is *extremely important* to determine which entity or entities are "creditors" and which are "debt collectors" for a disputed transaction at the outset of any FDCPA litigation. "The distinction between creditors and debt collectors is fundamental to the FDCPA, because the Act does not regulate creditors' activities at all."[12] Some FDCPA claims can be defeated early by a motion to dismiss[13] where a debtor's counsel has failed to properly sue a "debt collector" under any applicable provision of the Act. For example, consider a hypothetical where Big Bank is Debtor's secured mortgage lender under an ordinary deed of trust. Debtor misses a few mortgage payments, Big Bank allows Debtor to cure his default, and then Debtor misses a few more payments. Big Bank then initiates non-judicial foreclosure proceedings as allowed under Big Bank's deed of trust. Debtor eventually sues Big Bank for FDCPA violations, claiming that at some point Big Bank orally modified the payment structure of its loan agreement with Debtor and has now misrepresented the status of the mortgage debt and security interest.[14] Debtor should lose this argument because Big Bank is a creditor of

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[9] 15 U.S.C. § 1692a(4).
[10] *C.f.* 15 U.S.C. § 1692a(6)(E)(iii) (this section confirms that no action can be taken under the FDCPA against a person who purchases a debt that is not in default because such person *is excluded from being a debt collector*).
[11] See, e.g., *Kimber v. Federal Financial Corp*., 668 F. Supp. 1480 (M.D. Ala. 1987) (court found that defendant was a "debt collector" and subject to requirements of the FDCPA because it regularly collected debts, its principal purpose was debt collection, and the debts collected were in default when assigned to defendant for collection).
[12] *Donnelly-Tovar v. Select Portfolio Servicing, Inc*., 945 F. Supp. 2d 1037, 1043 (D. Neb. 2013) (citing *Schmitt v. FMA Alliance*, 398 F.3d 995, 998 (8th Cir. 2005)).
[13] *See, e.g.*, Neb. Ct. R. Pldg. § 6-1112(b)(6) and (b)(7).
[14] *See* 15 U.S.C. §§ 1692e(2)(A) and 1692f(6)(A).

Debtor with respect to the mortgage, therefore Debtor has no claim against Big Bank under the FDCPA.

iii. Who is a "Debt Collector?"

The term debt collector means:

> 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*. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes *any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts*. *For the purpose of section 1692f(6)* of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in *any business the principal purpose of which is the enforcement of security interests*.[15]

Though somewhat bulky, this definition conveys a gist to practitioners that there are three kinds of debt collectors to consider under the Act: (1) persons whose "principal" or "regular" practice is to collect debts owed to other entities; (2) creditors who use alternate or disguised names when collecting debts; and (3) for limited purposes, persons whose "principal" purpose is to enforce security interests.[16] Categories one and three further require the use of interstate commerce, an almost trivial requirement in an age when debt collection occurs by mail, phone, auto-dialing, e-mail, text messaging, and other ubiquitous forms of communication. Category three, by referencing enforcement of security interests as discussed in 15 U.S.C. § 1692f(6), also specifically involves collection of security interests in "property claimed as collateral through an enforceable security interest" that can possessed, dispossessed, or disabled.[17]

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[15] 15 U.S.C. § 1692a(6) (emphasis added).
[16] *Id*.
[17] 15 U.S.C. § 1692f(6)(A)-(C); see also *Obduskey v. McCarthy & Holthus LLP*, ___ U.S. ___, 139 S. Ct. 1029 (2019) (unanimously holding a business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of § 1692f(6)).

Given the definition of "debt collector" used in the FDCPA, the following persons or entities fall within the scope of the Act:

- Employees of a debt collection business.[18] This could include everyone from the assistants answering phone calls to a debt collection company's president;
- Rent collectors.[19] For example, a management company that regularly collects past due rent for real estate owners, assessments for condo associations, or unpaid fees associated with rental agreements;[20]
- Attorneys acting as debt collectors and those attorneys or law firms that perform traditional debt collection activities.[21] For example, collection activities may include sending demand or "dunning" letters for client debts or making collection calls directly to consumers. In fact, attorneys are generally held to a higher standard under the Act when it applies.[22] However, simply responding to a consumer's inquiry about a lawsuit filed for collection of a debt, without more, arguably does not bring the lawyer within the purview of the Act. Attorneys with an insignificant number of collection cases are also not considered debt collectors;[23] and
- Creditors whose collection divisions or departments have different names which are not clearly disclosed as being affiliated with the creditors (this can be avoided by indicating the correspondence is "From the Collection Department of Creditor's Name, Inc.).

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[18] Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50102 (Dec. 13, 1988).
[19] *Id*.
[20] See, e.g., *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992) (broker's fee for finding a replacement tenant for debtor's unexpired apartment lease is for a "household purpose" and, therefore, covered under the FDCPA).
[21] See 53 Fed. Reg. 50097, 50102; see also *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L.Ed.2d 395, 63 U.S.L.W. 4266 (1995); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (finding that a law firm regularly conducting trust deed foreclosure sales was a debt collector under the Act); but see *Obduskey v. McCarthy & Holthus LLP*, ___ U.S. ___, 139 S. Ct. 1029 (2019) (discussed below).
[22] See *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 106-07 (1st Cir. 2014); see also *Campuzano-Burgos v. Midland Credit Mgmt., Inc*., 550 F.3d 294, 301 (3d Cir. 2008).
[23] See, e.g., *Mertes v. Devitt*, 734 F. Supp. 872, 874-75 (W.D. Wis. 1990).

After listing the persons and entities that will be considered "debt collectors," the FDCPA carefully lists several categories of people who do not fit within that term:

- Any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.[24] This exclusion, one of the most important to regular practitioners, allows creditors with in-house collection departments to collect in-house debts under their own names without complying with the Act;[25]
- Any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts.[26] This exclusion synthesizes with the first exclusion above to extend coverage for in-house collection by related-entity creditors. Typical examples include credit card issuers who use related entities to collect accounts receivable;[27]
- Any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties. This exclusion may cover agents for state or federal revenue, healthcare recovery, or housing agencies.[28] However, government officers or employees are *only* exempted from FDCPA coverage when performing their official duties and not when moonlighting in the private collection business.[29]

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[24] 15 U.S.C. § 1692a(6)(A).
[25] See, e.g., *Sterling Mirror of Maryland. Inc. v. Gordon*, 619 A.2d 64, 66-67 (D.C. App. 1993) (FDCPA covers the activities of collection agents working on behalf of third parties; it is not applicable to a creditor's employee collecting a creditor's account receivable).
[26] See, e.g., *Meads v. Citicorp Credit Servs., Inc.*, 686 F. Supp. 330, 333-34 (S.D. Ga. 1988) (further stating that the Act is directed at *independent* debt collectors, not to in-house collection divisions).
[27] 15 U.S.C. § 1692a(6)(B).
[28] 15 U.S.C. § 1692a(6)(C); *but see* 26 U.S.C. § 6304, which establishes "Fair Tax Collection Practices" against tax collectors that are analogous to the consumer communication and harassment restrictions implemented under the FDCPA.
[29] 53 Fed. Reg. 50097, 50102.

- Any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt.[30] This exclusion may cover people like civil process servers, constables, sheriffs, and private investigators hired to perform skip tracing services;
- Any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors.[31] This exclusion is more relevant to practitioners frequently handling bankruptcy matters, as non-profit consumer credit counseling services are sometimes involved in pre-bankruptcy administration of a debtor's estate. However, for-profit consumer counseling services are not exempted from FDCPA coverage;[32] and
- Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity:
    - is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement.[33] This exclusion may cover people like trustees involved in trust administration that requires debt collection, bank trust departments, or financial institutions collecting delinquent payments due on escrow accounts;[34]
    - concerns a debt which was originated by such person.[35] This exclusion may cover lenders who make loans or extend credit that creates a debt and who later assign that debt to other entities;
    - concerns a debt which was not in default at the time it was obtained by such person;[36] or

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[30] 15 U.S.C. § 1692a(6)(D).
[31] 15 U.S.C. § 1692a(6)(E).
[32] 53 Fed. Reg. 50097, 50103.
[33] 15 U.S.C. § 1692a(6)(E)(i).
[34] 53 Fed. Reg. 50097, 50103.
[35] 15 U.S.C. § 1692a(6)(E)(ii).
[36] *Id*. at (iii).

- concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.[37] This exclusion may cover lenders who acquire consumer debts, likely in the form of accounts receivable or debt instruments, as collateral for a commercial loan.[38]

2. Transactions and Communications Covered by the FDCPA

Two basic kinds of transactions are covered by the Act: (1) oral communications with a debtor about a debt; and (2) written communications with a debtor about a debt.[39] Because these categories are intentionally broad, debt collectors and their counsel must be intimately familiar with the FDCPA's applicable definitions and enumerated examples of prohibited conduct.

a. Understanding "Communication" and "Location Information"

To understand some of the narrower collection practices controlled by the FDCPA, practitioners need to understand two other defined terms under the Act. "Communication" means "the conveying of information regarding a debt directly or indirectly to any person through any medium."[40] "Location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.[41] These two definitions come up and interact frequently under 15 U.S.C. §§ 1692b and 1692c, the Act's provisions related to acquisition of location information from third parties and direct communications with consumers.

"A communication to collect a debt is one that either demands a payment or implies that something is owed."[42] "There is no categorical rule that only an explicit demand for payment will qualify as a communication made in connection with the collection of a debt."[43] A communication made specifically to induce the debtor to settle

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[37] *Id*. at (iv); *see also* 15 U.S.C. § 1692a(6)(F) regarding repossession of physical collateral.
[38] 53 Fed. Reg. 50097, 50103.
[39] Broadly construed in favor of consumers, written communications may encompass both traditional paper media and electronic media of all kinds.
[40] 15 U.S.C. § 1692a(2).
[41] 15 U.S.C. § 1692a(7).
[42] *Donnelly-Tovar v. Select Portfolio Servicing, Inc.*, 945 F. Supp. 2d 1037, 1044 (D. Neb. 2013) (citing *Bailey v. Security Nat. Servicing Corp.*, 154 F.3d 384, 389 (7th Cir. 1998)).
[43] *Id*. at 1044.

her debt will be sufficient to trigger the protections of the FDCPA.[44] But notices required by law as a prerequisite to enforcing contractual, judicial, or non-judicial remedies are not considered covered communications.[45] Similarly, generic requests for a return phone call or information on a consumer's assets are not covered communications if a debt collector does not reveal the existence of a debt.[46]

b. Acquisition of Location Information from Third Parties - Be Honest, Be Brief, and Be Careful Not to Disclose Too Much

Section 1692b broadly prohibits debt collectors from communicating "with any person other than the consumer for the purpose of acquiring location information about the consumer . . ." unless the debt collector meets six criteria:

- The debt collector must identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;[47]
- not state that such consumer owes any debt;[48]
- not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;[49]
- not communicate by post card;[50]
- not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt;[51] and

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[44] *Id*. at 1045.
[45] 53 Fed. Reg. 50097, 50101.
[46] *Id*.
[47] 15 U.S.C. § 1692b(1).
[48] 15 U.S.C. § 1692b(2).
[49] 15 U.S.C. § 1692b(3).
[50] 15 U.S.C. § 1692b(4).
[51] 15 U.S.C. § 1692b(5).

- after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.[52]

These protections generally require debt collectors be truthful in communicating with third parties when acquiring location information while avoiding disclosure of any information that the debtor owes a debt in collection. Here, the Act also gives represented debtors the power to stop collection communications to third parties by demanding that all collection correspondence be directed to debtor's counsel instead of third parties.[53] Except as provided in section 1692b, and absent a debtor's prior consent or court order, debt collectors may not communicate with any person other than a debtor, a debtor's spouse or legal representative,[54] his attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's attorney.[55]

c. Communications Directly with "Consumers"

"Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction,"[56] debt collector communications with "consumers"[57] are limited by the Act in three ways:

- Debt collectors may not communicate with consumers "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer."[58] The Act sets a default "convenient" time for communicating

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[52] 15 U.S.C. § 1692b(6).
[53] 15 U.S.C. § 1692b(6); *see also* 15 U.S.C. § 1692c(a)(2).
[54] *See* 15 U.S.C. § 1692c(d) (applying a special definition of the word "consumer" to section 1692c; this special definition expands the scope of people with whom a debtor collector may or may not communicate about a debt in certain categories of cases, e.g. collecting from minors, disabled debtors, or estates).
[55] 15 U.S.C. § 1692c(b).
[56] 15 U.S.C. § 1692c(a)-(b)
[57] Defined broadly to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." 15 U.S.C. § 1692c(d). But remember that this definition of "consumer" applies *only to section 1692c*.
[58] 15 U.S.C. § 1692c(a)(1).

with consumers between 8:00 a.m. and 9:00 p.m. "local time at the consumer's location."[59] This default time can change if the debt collector has knowledge of circumstances that would make the default period inconvenient to the consumer.[60] For example, if a debt collector knows that the consumer is a night-shift nurse who works overnights and sleeps during the day, the "convenient" time should be adjusted;

- Like the limits on third-party communication noted above, debt collectors who know a consumer is represented must communicate only with the consumer's counsel, unless the attorney consents to direct communication with a consumer or entirely fails to respond within a reasonable time.[61] But a creditor's knowledge that a consumer had or has an attorney is not automatically imputed to a debt collector;[62] and
- Debt collectors may not communicate with consumers at the consumers' place of employment if the debt collector knows such contact is prohibited by the employer.[63] But until a debt collector knows or has reason to know that contact at a consumer's place of employment is prohibited, the debt collector may communicate with a consumer at that location.

After listing prohibited forms of communication, the FDCPA gives consumers[64] the ability to cease direct communication with debt collectors by written notice.[65] Specifically, the consumer must give written notice that he or she "refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer."[66] Upon receiving this written notice, the debt collector may not communicate with the consumer except: (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor

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[59] *Id*.
[60] *Id*.
[61] 15 U.S.C. § 1692c(a)(2).
[62] 53 Fed. Reg. 50097, 50104.
[63] 15 U.S.C. § 1692c(a)(3).
[64] *See* 15 U.S.C. § 1692c(d).
[65] 15 U.S.C. § 1692c(c).
[66] *Id*.

may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[67] For samples of a typical consumer's cease and desist letter in response to contact by a debt collector, see the forms at the end of these materials.

Practical Pointer: Given the strict limitations on "communicating" with a debtor and third parties listed above, what kinds of communications should practitioners avoid altogether? One problematic area is communication that is primarily accessible to the debtor but easily accessible to a third party.[68] For example, consider a Debt Collector who leaves a voicemail for a Debtor. The Debt Collector communicating with the Debtor is required as a matter of law to identify itself and state that any information will be used for debt collection.[69] For initial communications, the requirements are even greater.[70] But the Debt Collector is also prohibited as a matter of law from disclosing this kind of information to third parties.[71] The wise move under these circumstances is for the Debt Collector not to leave a voicemail unless Debt Collector is certain that no one else has access to the device on which it leaves the message.[72] The same problem may arise for *any kind of communication on any medium* that may be available to someone other than Debtor. This is a problem that will likely require a future legislative fix as more communication technology, like smart phones, becomes ubiquitous.

d. Don't Be a Jerk – What Constitutes Harassment and Abuse?

The FDCPA's operative section on harassment and abuse is surprisingly short: "a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[73] The Act goes on to provide a non-exclusive list of things it deems to be harassment:

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[67] 15 U.S.C. § 1692c(1)-(3).
[68] *See* 53 Fed. Reg. 50097, 50104 (a debt collector may not send a written message to a debtor that is easily accessible to third parties).
[69] *See* 15 U.S.C. § 1692e(11).
[70] *See* 15 U.S.C. § 1692g(a).
[71] *See* 15 U.S.C. § 1692(1)-(2).
[72] See *Berg v. Merchants Ass's Collection Div., Inc.*, 586 F. Supp. 2d 1336 (S.D. Fla. 2008).
[73] 15 U.S.C. § 1692d.

- The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.[74] Implied threats of harm are also prohibited by this section;[75]
- The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader;[76]
- The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons who are relying on consumer reports for business, commercial, or employment purposes;[77]
- The advertisement for sale of any debt to coerce payment of the debt;[78]
- Causing 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;[79] and
- Except as provided in section 1692b of the Act, the placement of telephone calls without meaningful disclosure of the caller's identity.[80] For example, this may include the modern practice of masking or "spoofing" caller identification information when placing phone calls or text messages for debt collection purposes.

It is worth repeating that the list above is *non-exclusive*. In other words, *any behavior* that a court may find to be abusive, harassing, or oppressive can be an FDCPA violation regardless of whether it is enumerated above. The best rule of thumb for practitioners who wish to avoid claims of harassment is simple: don't be a jerk. There is no reason to sacrifice your professional integrity or reputation to collect a debt. It is not worth it, so do not do it. Legions of other practitioners and debt collection professionals will thank you for behaving yourself, this author included.

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[74] 15 U.S.C. § 1692d(1).
[75] 53 Fed. Reg. 50097, 50105.
[76] 15 U.S.C. § 1692d(2).
[77] 15 U.S.C. § 1692d(3); *see also* 15 U.S.C. §§ 1681a(f) and 1681b(a)(3) for details on people to whom publication of a consumer's credit information are permitted or not permitted.
[78] 15 U.S.C. § 1692d(4).
[79] 15 U.S.C. § 1692d(5).
[80] 15 U.S.C. § 1692d(6).

e. False, Deceptive, and Misleading Practices

In line with the Act's cryptic definition of "harassment" its prohibition against deception is also obscure: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[81] The Act then provides a non-exclusive list of more than a dozen behaviors considered false or misleading:

- The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.[82] A debt collector may violate this section by using collection letters depicting a police badge, a judge, or a judicial symbol;[83]
- The false representation of: (1) the character, amount, or legal status of any debt; or (2) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.[84] This set of false or misleading practices is one of the most common FDCPA violations. Practitioners must carefully assess the attributes of the debt they are collecting before attempting any communication with a debtor and before filing suit against any debtor;
- The false representation or implication that any individual is an attorney or that any communication is from an attorney;[85]
- The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action;[86]

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[81] 15 U.S.C. § 1692e.
[82] 15 U.S.C. § 1692e(1).
[83] 53 Fed. Reg. 50097, 50105.
[84] 15 U.S.C. § 1692e(2)(A)-(B).
[85] 15 U.S.C. § 1692e(3).
[86] 15 U.S.C. § 1692e(4).

- The threat to take any action that cannot legally be taken or that is not intended to be taken.[87] This prohibition extends to actions which are technically legally possible, but which are unlikely in a particular collection action.[88] To avoid this problem, many practitioners are vague in any communication with a debtor about the actions their creditor-client intends to take in the future;
- The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to: (1) lose any claim or defense to payment of the debt; or (2) become subject to any practice prohibited by the FDCPA;[89]
- The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer;[90]
- 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;[91]
- The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval;[92]
- The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;[93]
- 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

[87] 15 U.S.C. § 1692e(5).
[88] 53 Fed. Reg. 50097, 50106.
[89] 15 U.S.C. § 1692e(6)(A)-(B).
[90] 15 U.S.C. § 1692e(7).
[91] 15 U.S.C. § 1692e(8).
[92] 15 U.S.C. § 1692e(9).
[93] 15 U.S.C. § 1692e(10).

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;[94]

- The false representation or implication that accounts have been turned over to innocent purchasers for value;[95]
- The false representation or implication that documents are legal process;[96]
- The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization;[97]
- The false representation or implication that documents are not legal process forms or do not require action by the consumer; and[98]
- The false representation or implication that a debt collector operates or is employed by a consumer reporting agency.[99]

As with the FDCPA's examples of abusive behavior, the list above is *non-exclusive*. In other words, *any behavior* that a court may find to be false, deceptive, or misleading can be an FDCPA violation regardless of whether it is enumerated above. The best rule of thumb for practitioners who wish to avoid claims of deceit is simple: be honest about the facts of your case and the procedures you intend to use in litigation. Not only will this kind of transparency reduce your potential exposure under the Act, but it will garner better relations with debtors and their counsel that are more likely to get your clients paid.

f. Unfair Debt Collection Practices

In line with the FDCPA's other broad definitions, the act proscribes "unfair or unconscionable means to collect or attempt to collect any debt."[100] The Act then provides a non-exclusive list of unfair acts:

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[94] 15 U.S.C. § 1692e(11).
[95] 15 U.S.C. § 1692e(12).
[96] 15 U.S.C. § 1692e(13).
[97] 15 U.S.C. § 1692e(14).
[98] 15 U.S.C. § 1692e(15).
[99] 15 U.S.C. § 1692e(16).; *see also* 15 U.S.C. § 1681a(f).
[100] 15 U.S.C. § 1692f.

- The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.[101] This unfair practice is one of the most common FDCPA violations. Practitioners must carefully assess the principal, interest, fees, and charges permitted by any agreement underlying the debt and by law before attempting collection action against a debtor. The reasonableness of collectible fees is typically a matter of state law.[102] This problem will be discussed under Nebraska law in greater detail below;
- The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit;[103]
- The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution;[104]
- Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument;[105]
- Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees;[106]
- Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if: (1) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (2) there is no present intention to take possession of the property; or (3) the property is

[101] 15 U.S.C. § 1692f(1).
[102] 53 Fed. Reg. 50097, 50108.
[103] 15 U.S.C. § 1692f(2).
[104] 15 U.S.C. § 1692f(3).
[105] 15 U.S.C. § 1692f(4).
[106] 15 U.S.C. § 1692f(5).

exempt by law from such dispossession or disablement.[107] This section is of particular importance to practitioners representing clients who regularly perform secured transactions, like lenders, vendors, repossession agents, or service-providers who have lien rights in improved property;

- Communicating with a consumer regarding a debt by post card;[108]
- Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business;[109]
- Applying a debtor's payment to a disputed debt or not in accordance with a debtor's directions;[110] and
- Using any forms that mislead a debtor about the parties participating in collection of his or her debt.[111]

Use of unfair or unconscionable means under the FDCPA "can be established with a showing that a debt collector's act in collecting a debt causes injury to the consumer that is (1) substantial, (2) not outweighed by countervailing benefits to consumers or competition, and (3) not reasonably avoidable by the consumer."[112] Under section 1692f(1), "an additional amount may be collected if state law expressly permits it, even if the contract is silent on the matter; but, if state law neither affirmatively permits nor expressly prohibits collection of an additional amount, the amount can be collected only if the customer expressly agrees to it in the contract."[113] Because the FDCPA permits debt collectors only to collect amounts that are permitted by agreement or by law, practitioners must continually research state law and meticulously review the agreements that originate the debt they are collecting. A debt collector's mistake in any

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[107] 15 U.S.C. § 1692f(6)(A)-(C).
[108] 15 U.S.C. § 1692f(7).
[109] 15 U.S.C. § 1692f(8).
[110] 15 U.S.C. § 1692h.
[111] 15 U.S.C. § 1692j(a).
[112] *Hage v. General Service Bureau*, 306 F. Supp. 2d 883, 887 (2003) (citations and quotations omitted).
[113] *Id*.

communication to a debtor about the amounts that can be legally collected is one of the fastest and easiest ways to create a claim for violating the Act.[114]

Where a debt collector performs his or her due diligence and decides to file suit, the FDCPA mandates specific filing venues based on the kind of collection action the debt collector takes. Where the collection action involves enforcing a security interest in real property, the action must be filed in a judicial district or similar legal entity in which the real property is located.[115] Where the collection action does not involve real estate, the action must be filed in a judicial district or similar legal entity in which the debtor signed the contract sued upon or in which the consumer resides at the commencement of the case.[116] Failing to comply with these venue requirements may, in itself, be a violation of the Act that subjects a debt collector to further litigation.

g. The FDCPA's "Miranda" and "Mini-Miranda" Warnings

The FDCPA's "Miranda" disclosure comes from 15 U.S.C. §§ 1692g(a). This long-form FDCPA notice is required "within five days after the initial communication" between a consumer and a debt collector. In practice, many debt collectors submit this long-form notice simultaneously with the debt collector's first communication to the debtor. This simultaneous submission abates the risk that a debt collector or his or her staff will forget to send the required information within 5 days of an initial communication with a debtor. That said, a debt collector that files a debt collection lawsuit without the immediate means of proving the existence, amount, or true owner of the debt does not violate the FDCPA.[117]

The FDCPA's "mini-Miranda" comes from 15 U.S.C. § 1692e(11). This short-form FDCPA notice is required in *every* communication the debt collector has with a debtor. In practice, many debt collectors implement office phone services that automatically deliver this message to every incoming phone call to avoid potential

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[114] See, e.g., *Dunham v. Portfolio Recovery Associates, LLC*, 663 F.3d 997, 1002 (8th Cir. 2011).
[115] 15 U.S.C. § 1692i(a)(1).
[116] 15 U.S.C. § 1692i(a)(2).
[117] *Carlson v. Credit Management Services, Inc*., 4:11CV3173 (D. Neb. Mar. 14, 2012) (citing *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 333 (6th Cir. 2006)).

FDCPA violations. Many practitioners have also adopted mandatory e-mail signatures and template collection letters that automatically insert the required language into any piece of correspondence that leaves the collector's office. For sample long-form and short-form FDCPA notices that readers can add to their own form libraries, please see the information at the end of these materials.

Regardless of whether a creditor or prior debt collector has provided a debtor with the FDCPA long-form or short-form notices, a current debt collector must still provide the notices required by law under the circumstances.[118] Moreover, a debt collector must still verify a disputed debt even if he or she has included proof of the debt with the initial communication to a debtor.[119] If the debtor disputes the validity of the debt, the debt collector may still commence legal action against the debtor regardless of the dispute but must cease all other "collection activity" until the debt is verified.[120]

h. Analyzing FDCPA Violations under the "Least Sophisticated Consumer" Legal Standard

"FDCPA violations are analyzed objectively."[121] "A plaintiff may pursue a claim for an FDCPA violation even if she was not actually confused by a debt collector, but the converse is also true: a plaintiff who was actually confused does not automatically have a claim. What matters is whether the debt collector's conduct, when viewed objectively, violated the statute."[122] "FDCPA coverage is not defeated by clever arguments for technical loopholes that seek to devour the protections Congress intended."[123] Because the FDCPA is a remedial statute, it is construed liberally in favor of the consumer.[124]

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[118] 53 Fed. Reg. 50097, 50108.
[119] *Id*.
[120] 53 Fed. Reg. 50097, 50108-09.
[121] *Cribbs v. Accredited Collection Service, Inc*., 8:15CV313 (D. Neb. March 27, 2017) (citing *Adams v. J.C. Christensen & Assocs., Inc*., 777 F. Supp. 2d 1193, 1197 (D. Minn. 2011)).
[122] *Id*.
[123] *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355, 361 (6th Cir. 2012).
[124] *Hage v. General Service Bureau*, 306 F. Supp. 2d 883, 887 (8th Cir. 2003).

To determine whether a statement is misleading normally requires consideration of the legal sophistication of its audience.[125] When evaluating whether a communication is false, deceptive, or misleading, courts consider the perspective of an unsophisticated consumer.[126] This standard is designed to protect consumers of below average sophistication or intelligence without having the standard tied to "the very last rung on the sophistication ladder."[127] The standard protects the uninformed or naive consumer, yet also contains an objective element of reasonableness to protect debt collectors from liability for peculiar interpretations of collection letters.[128] "The unsophisticated consumer test is a practical one, and statements that are merely susceptible of an ingenious misreading do not violate the FDCPA."[129]

"A court evaluating debt collection letters must view them 'through the eyes of the unsophisticated consumer.'"[130] "The case law on this issue focuses on the debt collector's actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them."[131] The "unsophisticated consumer" standard is not applied to communications sent to a consumer's attorney.[132]

3. Dealing with the Bureau of Consumer Financial Protection – Rules, Regulations, Trends and Enforcement under the FDCPA

a. Current Trends, Reform Efforts, and FDCPA Enforcement Actions

The Federal Trade Commission ("FTC") and the Bureau of Consumer Financial Protection ("BCFP") share regulatory and enforcement responsibilities for the FDCPA.[133]

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[125] *Bates v. State Bar of Ariz.*, 433 U. S. 350, 383, n. 37 (1977), overruled on other grounds by *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).
[126] *Janson v. Katharyn B. Davis, LLC*, 806 F.3d 435, 437 (8th Cir. 2015).
[127] *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 317 (8th Cir. 2004) (quoting *Duffy v. Landberg*, 215 F.3d 871, 874 (8th Cir. 2000)).
[128] *Id*. at 317-18; *Peters v. Gen. Serv. Bureau, Inc*., 277 F.3d 1051, 1055 (8th Cir. 2002).
[129] *Peters v. General Serv. Bureau, Inc*., 277 F.3d 1051, 1056 (8th Cir. 2002).
[130] *Freyermuth v. Credit Bureau Services*, 248 F.3d 767, 771 (8th Cir. 2001) (citing *Duffy v. Landberg*, 215 F.3d 871, 873 (8th Cir. 2000)).
[131] *Id*.
[132] *Powers v. Credit Management Services, Inc*., 775 F.3d 567, 573-74 (8th Cir. 2015).
[133] *Bureau of Consumer Financial Protection*, Fair Debt Collection Practices Act BCFP Annual Report 2019 at 7 (Mar. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf

The FTC and the BCFP coordinate their efforts and discuss them in an annual report to Congress summarizing consumer complaints, supervisory activities, enforcement actions, education and outreach initiatives, and rulemaking efforts.[134] The annual reporting provides key statistical data showing the volume and frequency of debt collectors' attempts to recover different kinds of debts. For example, the 2019 annual report demonstrates that most consumers actively involved in collection activity had medical, telecommunications, or banking and financial services debt, and that debt in other categories is generally rising.[135] The report also shows about 85% of debt collectors are operating on either contingency fee or debt buying models as compared to other collection models.[136]

The FDCPA grants the FTC and the BCFP the authority to administratively enforce the Act through civil financial penalties and injunctive relief.[137] In response, the Act gives debt collectors two potential affirmative defenses to enforcement. First, a debt collector will not be liable if they show by a preponderance of the evidence that an FDCPA violation was not intentional and resulted from a "bona fide error" despite maintaining regular compliance protocols.[138] Second, a debt collector will not be liable if they show that they performed an act done in good faith and in conformity with any advisory opinion of the BCFP.[139] Learning to use these two affirmative defenses will be a practitioner's first step to handling FDCPA claims if they arise against clients, law firms, and debt collecting entities.

In 2018, the BCFP engaged in six public enforcement actions arising from alleged FDCPA violations.[140] Two of these actions resulted in judgments against debt collector defendants, while the remaining four actions remained pending as of March 2019.[141] The FTC and BCFP's recent actions are briefly summarized below.

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[134] *Id*. at 8-42.
[135] *Id*. at 9, 12-13.
[136] *Id*. at 11.
[137] 15 U.S.C. § 1692l(a).
[138] 15 U.S.C. § 1692k(c) (commonly called the "bona fide error" defense).
[139] 15 U.S.C. § 1692(e).
[140] *Id*. at 23.
[141] *Id*.

i. *CFPB v. Navient Corporation, Navient Solutions, Inc. and Pioneer Credit Recovery, Inc*.[142]

The BCFP filed a lawsuit in federal district court against Navient Corporation and its subsidiaries, Navient Solutions, Inc. and Pioneer Credit Recovery, Inc. The complaint alleged that Pioneer and Navient Corporation misled consumers about the effect of rehabilitation on their credit reports and overpromised the amount of collection fees that would be forgiven in the federal loan rehabilitation program. The BCFP made allegations relating to Navient's servicing practices as well. Through its action, the BCFP seeks relief for consumers harmed by these practices and seeks to keep Navient Corporation, Navient Solutions, and Pioneer from committing such practices in the future.

ii. *CFPB v. Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC*[143]

The BCFP filed a lawsuit in federal district court against one of the country's largest non-bank mortgage loan servicers, Ocwen Financial Corporation, and its subsidiaries alleging that Ocwen violated the law by mishandling basic functions, such as sending accurate monthly statements, properly crediting payments, and properly handling insurance. The BCFP also alleged that Ocwen illegally foreclosed on struggling borrowers, failed to adequately correct errors raised by customer complaints, and sold off the servicing rights to loans without fully disclosing the mistakes it made in borrowers' records. The Florida Attorney General and Massachusetts Attorney General took similar actions against Ocwen in separate lawsuits.

iii. *CFPB v. Universal Debt & Payment Solutions, LLC, et al*.[144]

The BCFP filed a lawsuit in federal district court against a group of seven debt collection agencies, six individual debt collectors, four payment processors, and a telephone marketing service provider alleging unlawful conduct related to a phantom debt collection operation. Phantom debt is debt consumers do not actually owe or debt that is not payable to those attempting to collect it. The BCFP alleges that the individuals,

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[142] *Id*. at 25; *see* (M.D. PA 3:17-cv-00101) (complaint filed January 18, 2017).
[143] *Id*. at 26; *see* (S.D. Fla. 17-cv-90495) (complaint filed April 20, 2017).
[144] *Id*. at 26-27; *see* (N.D. GA No. 1:15-CV-0859) (complaint filed March 26, 2015).

acting through a network of corporate entities, used threats and harassment to collect phantom debt from consumers. The BCFP alleges the defendants violated the FDCPA and the Dodd-Frank Act's prohibition on unfair and deceptive acts and practices and provided substantial assistance to unfair or deceptive conduct. The BCFP is seeking permanent injunctive relief, restitution, and the imposition of a civil money penalty. On April 7, 2015, the BCFP obtained a preliminary injunction against the debt collectors, which froze their assets and enjoined their unlawful conduct. On September 1, 2015, the court denied the defendants' motion to dismiss. On November 15, 2017, the BCFP and two defendants moved for summary judgment. The case remains pending.

iv. *CFPB, et al. v. MacKinnon, et al.*[145]

In partnership with the New York Attorney General, the BCFP filed a lawsuit in federal district court alleging that Douglas MacKinnon and Mark Gray operate a network of companies – Northern Resolution Group LLC, Enhanced Acquisitions LLC, and Delray Capital LLC – that harass, threaten, and deceive millions of consumers across the nation into paying inflated debts or amounts they may not owe. The BCFP is seeking to shut down this operation and to obtain compensation for victims and a civil penalty against the companies and partners. The case remains pending.

b. FDCPA Regulations and Interpretive Staff Commentary

Though the FDCPA gives the BCFP the power to prescribe rules "with respect to the collection of debts by debt collectors" under the Act, there are few to be found in the Code of Federal Regulations.[146] Those regulations that do exist relate primarily to allowing states to apply to the BCFP for certain exemptions from federal enforcement of the Act. Specifically, any state:

> may apply to the Bureau pursuant to the terms of [12 C.F.R. § 1006] for a determination that, under the laws of that state, any class of debt collection practices within that state is subject to requirements that are substantially similar to, or provide greater protection for consumers than, those imposed under sections 803 through 812

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[145] *Id*. at 27; (W.D.N.Y. Case 1:16-cv-00880) (complaint filed November 2, 2016).
[146] *See* 12 C.F.R. §§ 1006.1-1006.8.

of the Act, and that there is adequate provision for state enforcement of such requirements.[147]

If the BCFP determines a state's application meets the applicable regulatory requirements, the BCFP will exempt the state from federal enforcement of the FDCPA.[148]

Because of the dearth of regulations to support or fill in the gaps of the FDCPA's text, practitioners may instead turn to the FTC's Staff Commentary on the Fair Debt Collection Practices Act ("Staff Commentary").[149] The Staff Commentary initially states that it is intended as a set of guidelines for practitioners but is not an advisory opinion that is binding on enforcement agencies that may provide a legal defense to FDCPA claims.[150] That said, the Staff Commentary is extremely helpful and addresses many frequently asked practitioner questions; a copy of the Staff Commentary is included at the end of these materials. Nebraska courts have previously relied on the Staff Commentary as persuasive authority when deciding FDCPA litigation.[151] If practitioners have specific questions related to compliance with the FDCPA, the BCFP will provide advisory opinions on such issues by request.

4. Learning from Other People's Mistakes - Notable and Recent Case Law under the FDCPA

a. *Midland Funding v. Johnson*[152]

This U.S. Supreme Court decision held the filing of a proof of claim in a bankruptcy case that is obviously time-barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act.[153] This decision provides limited FDCPA protection to debt collectors who regularly file claims in bankruptcy courts in Nebraska.[154]

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[147] 12 C.F.R. § 1006.2.
[148] 12 C.F.R. § 1006.6.
[149] 53 Fed. Reg. 50097-50110.
[150] *Id*. at 50101, 50109.
[151] *Hage v. General Service Bureau*, 306 F. Supp. 2d 883 (2003).
[152] *Midland Funding, LLC v. Johnson*, 581 U.S. ___, 137 S. Ct. 1407, 197 L.Ed.2d 790 (2017).
[153] *Id.*
[154] See also *In re Gatewood*, 533 B.R. 905 (8th Cir. B.A.P. 2015).

i. Facts of the Case[155]

In 2014, Aleida Johnson filed for bankruptcy in Alabama bankruptcy court under Chapter 13 of the Bankruptcy Code. In 2003 and years prior, Midland Funding had purchased a bundle of debt worth almost $2,000 from Johnson, so after she filed for bankruptcy, Midland Funding filed a proof of claim in the same court. Because the date of the last transaction in the account in question occurred in 2003 and the statute of limitations for collecting unpaid debt in Alabama is six years, Johnson sued Midland Funding in federal district court argued that the FDCPA prevented bankruptcy actions that had passed their statutes of limitations.

Midland Funding moved to dismiss, and the district court granted the motion. The district court determined that, while the FDCPA prohibited the filing of a proof of claim known to be barred by the statute of limitations, the U.S. Bankruptcy Code allowed a creditor to file a proof of claim even after the statute of limitations has run. The district court resolved that conflict by holding that the creditors' right to file a claim precluded debtors from challenging that practice under the FDCPA. Johnson appealed, and the U.S. Court of Appeals for the Eleventh Circuit reversed and remanded the case. The appellate court found that, although the Bankruptcy Code allowed creditors to file claims barred by the statute of limitations, that did not preclude them from liability under the FDCPA for filing the claim.

ii. The U.S. Supreme Court's Decision[156]

The FDCPA does not prevent a creditor from filing a proof of claim on an unpaid debt in a Chapter 13 bankruptcy proceeding even after the statute of limitations on that debt has run. Specifically, the Court held that filing a proof of claim for a time-barred debt is not a "false, deceptive, or misleading representation" or using an "unfair or unconscionable means" to collect the debt. Although a claim is defined as a "right of payment" in the Bankruptcy Code, there is no requirement that the claim be enforceable. The Bankruptcy Code treats the unenforceability of a claim as an affirmative defense, but

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[155] See *Midland Funding v. Johnson*, Oyez, https://www.oyez.org/cases/2016/16-348 (last visited June 14, 2019).
[156] *Id*.

the claim may still be filed and does not give rise to the type of practices the FDCPA was enacted to prevent. The court also held that, while there is precedent showing that the filing of a claim that is known to be time barred was unfair *in a civil suit*, that precedent does not extend to Chapter 13 proceedings. The Bankruptcy Code and the FDCPA have different purposes, and to allow an FDCPA suit to proceed in this case would upset the balance between the two pieces of legislation. Justice Sonia Sotomayor wrote a dissent, joined by Justices Ginsburg and Kagan, in which she argued that a creditor who knowingly tries to collect a time-barred debt in bankruptcy proceedings has violated the FDCPA because this is precisely the kind of predatory behavior Congress enacted the FDCPA to prevent.

b. *Henson v. Santander*[157]

This U.S. Supreme Court decision held a debt buyer who purchases a debt portfolio and collects those debts for profit and for its own account is not subject to the FDCPA. This case provides an important FDCPA coverage exclusion for *debt buyers* who are not collecting debts *on behalf of others* within the more traditional collection industry model. The case specifically narrows the definition of a "debt collector"[158] in a way that is favorable to practitioners.

i. Facts of the Case[159]

The petitioners were a group of individuals who all obtained car loans from CitiFinancial Auto. When they were unable to make payments on the vehicles, CitiFinancial repossessed them, sold them, and then informed the petitioners they owed a deficiency balance to cover the difference between the agreed purchase price and the amount of money for which CitiFinancial sold the debt. It later sold the defaulted loans to Santander Consumer, USA ("Santander"), which attempted to collect these alleged debts. In November 2012, the petitioners filed a putative class action lawsuit that alleged that

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[157] *Henson v. Santander Consumer USA, Inc.*, ___ U.S. ___, 137 S. Ct. 1718, 198 L.Ed.2d 177 (2017).
[158] 15 U.S.C. § 1692a(6).
[159] *Henson v. Santander Consumer USA, Inc.*, Oyez, https://www.oyez.org/cases/2016/16-349 (last visited Jun 14, 2019).

Santander violated the FDCPA in its communications with them. Santander moved to dismiss the action and claimed that it was not a "debt collector" under the FDCPA because Santander merely bought the debt from another institution and did not originate it. The district court agreed with Santander and dismissed the case. The U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's decision and declined to rehear the case *en banc*.

ii. The U.S. Supreme Court's Decision[160]

The Supreme Court unanimously held a party that purchases a debt and attempts to collect the debt for its own account is not a "debt collector" subject to the FDCPA. The court explained the plain text of the FDCPA defines debt collectors as those who collect debts owed to another and therefore focused on debt collection agents collecting on behalf of a debt owner. A debt owner who collects debts for his own profit, on the other hand, is not subject to the FDCPA. Although the petitioners tried to argue that the statute's use of the past tense "owed" covered those who were collecting debts that had been previously owned by someone else, that reading does not comport with the text of the statute. The Court held that it was clear Congress intended to use "owed" in the present tense in the relevant part of the statute, because elsewhere Congress clearly distinguished between original and current creditors. Because the meaning of the text was plain and there was no evidence that Congress intended an alternate, broader reading, purchasers of debt who collect for their own accounts are not subject to the FDCPA.

c. *Obduskey v. McCarthy & Holthus LLP*[161]

This U.S. Supreme Court decision held that business or collection entities operating with a principal purpose of enforcing security interests are subject only to limited FDCPA coverage under the Act's special provisions related to security interests.[162] This case provides another important FDCPA coverage exclusion for security interest enforcers who frequently repossess personal property or foreclose real property without simultaneously attempting to collect money judgments for others. The decision

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[160] *Id.*
[161] *Obduskey v. McCarthy & Holthus LLP*, ___ U.S. ___, 139 S. Ct. 1029 (2019).
[162] *See* 15 U.S.C. § 1692f(6)(A)-(C).

once again narrows the definition of a "debt collector"[163] in a way that is favorable to practitioners, especially law firms conducting non-judicial foreclosure sales.

i. Facts of the Case[164]

Dennis Obduskey obtained a mortgage loan for $329,940 in 2007 serviced by Wells Fargo. Obduskey defaulted on the loan in 2009. Over the next six years the bank initiated foreclosure proceedings several times but never completed them. Obduskey's loan remained in default, and in 2014 the bank hired the law firm of McCarthy & Holthus LLP to pursue non-judicial foreclosure proceedings against him. The firm sent Obduskey a letter informing him that it had been instructed to begin foreclosure proceedings, and Obduskey responded to the letter by disputing the debt. The firm initiated a foreclosure action in May 2015. Obduskey later sued McCarthy and the bank, alleging, among other things, a violation of the FDCPA. The district court granted the defendants' motions to dismiss on all claims but noted disagreement among several courts as to whether the FDCPA applied to non-judicial foreclosure proceedings.

Upon Obduskey's appeal to the U.S. Court of Appeals for the Tenth Circuit, the appellate court held that based on the FDCPA's plain language and policy considerations, the Act did not apply to non-judicial foreclosure proceedings in Colorado. It agreed with the district court's finding that Wells Fargo was not a debt collector because Obduskey was not in default when it began servicing the loan. It also held that McCarthy was not a debt collector under the FDCPA because attempting to enforce a security interest was not the same as attempting to collect a money debt. In reaching this conclusion, the Tenth Circuit joined the Ninth Circuit, and ruled in conflict with the outcomes reached on this topic in the Fourth, Fifth, and Sixth Circuits.

ii. The U.S. Supreme Court's Decision[165]

The court unanimously held a business engaged in no more than non-judicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited

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[163] 15 U.S.C. § 1692a(6).
[164] *Obduskey v. McCarthy & Holthus LLP*, Oyez, https://www.oyez.org/cases/2018/17-1307 (last visited Jun 14, 2019).
[165] *Id*.

purpose of 15 U.S.C. § 1692f(6). The Court first looked to the primary definition of a "debt collector" under the FDCPA, which is "any person . . . in any business the principal purpose of which is to collect, directly or indirectly, debts."[166] The Act then provides a limited-purpose definition that a debt collector "also includes any person . . . in any business the principal purpose of which is the enforcement of security interests."[167] The Court found the language "also includes" strongly suggests that limited-purpose security interest enforcers do not fall within the scope of the primary definition. This reading is favored as a matter of statutory interpretation because it gives effect to every word of the definition. The Court then found that the purpose and legislative history of the FDCPA support this interpretation because the Act was a compromise intended to treat security-interest enforcement differently from ordinary debt collectors.

5. Common FDCPA Claims and Violations

Many practitioners wonder how to avoid the most common FDCPA violations and potential claims by consumers they collect from. Two rules of thumb go very far in reducing potential exposure: (1) do not claim your client is entitled to collect money that it cannot or will not collect; and (2) do not try to collect debt that is legally uncollectible for whatever reason.

a. Attempting to Collect Time-Barred Debt

Several federal district and circuit courts have found or indicated that, in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be time barred is "unfair."[168] "The U.S. Court of Appeals for the Eighth Circuit has cited with approval the decision in *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987), holding that a 'debt collector's filing of a lawsuit on an apparently time-barred debt, without having first determined after a reasonable inquiry that the

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[166] 15 U.S.C. § 1692a(6).
[167] *Id.*
[168] *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013) (holding as much); *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (same); *Huertas v. Galaxy Asset Management*, 641 F.3d 28, 32–33 (3rd Cir. 2011) (indicating as much); *Castro v. Collecto, Inc*., 634 F.3d 779, 783 (5th Cir. 2011) (same); *Freyermuth v. Credit Bureau Servs., Inc*., 248 F.3d 767, 771 (8th Cir. 2001) (same); *Beattie v. D.M. Collections, Inc*., 754 F. Supp. 383, 393 (D. Del. 1991) (same).

limitations period had been tolled, was a violation of the FDCPA.'"[169] The Third Circuit has determined "the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action in connection with its debt collection efforts."[170] And the Seventh Circuit has reasoned that the FDCPA outlaws stale suits to collect consumer debts as unfair because:

> (1) few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts and would therefore unwittingly acquiesce to such lawsuits; (2) the passage of time . . . dulls the consumer's memory of the circumstances and validity of the debt; and (3) the delay in suing after the limitations period heightens the probability that [the debtor] will no longer have personal records about the debt.[171]

Because of the collection industry's practice of bulk transfer and assignment of accounts in default with minimal information about the underlying debt,[172] practitioners should carefully determine whether any debt they collect might be time-barred. In Nebraska, the threat or actual commencement of litigation on time-barred debt may be considered an FDCPA violation.[173]

b. Attempting to Collect Amounts Not Allowed by Law or Agreement – Working with Nebraska's Small Debt Statute

Nebraska's federal district court has previously held that Nebraska debt collectors act unfairly by attempting to collect or actually collecting amounts they may not collect under Nebraska law.[174] This holding is problematic because Nebraska collection lawyers typically rely on Neb. Rev. Stat. § 25-1801 ("the Small Debt statute") to recover in

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[169] *Jenkins v. General Collection Co*., 538 F. Supp. 2d 1165, 1172 (D. Neb. 2008) (citing *Freyermuth v. Credit Bureau Servs., Inc*., 248 F.3d 767, 771 (8th Cir. 2001)).
[170] *Huertas v. Galaxy Asset Management*, 641 F.3d 28, 32-3 (3rd Cir. 2011) (citing *Freyermuth v. Credit Bureau Servs., Inc*., 248 F.3d 767, 771 (8th Cir. 2001)).
[171] *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1260 (11th Cir. 2014) (citing *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013)).
[172] C.f. *Debt Buyers' Ass'n v. Snow*, 481 F. Supp. 2d 1, 4 (D.D.C. 2006).
[173] See, e.g., *Freyermuth v. Credit Bureau Servs., Inc*., 248 F.3d 767 (8th Cir. 2001).
[174] *See* Neb. Rev. Stat. § 25-1801 (Cum. Supp. 2018); *Hage v. General Service Bureau*, 306 F. Supp. 2d 883 (2003).

collection cases involving $4,000 or less for unpaid labor, material, goods, services, and "necessaries of life."[175] Though the Legislature recently amended this statute to make it much more favorable to creditors and debt collectors,[176] it still creates potential pitfalls for debt collectors under the FDCPA.

To recover attorney's fees, interest, and costs under the Small Debt Statute, collection lawyers must file suit "at the expiration of ninety days after each claim [has] accrued" and obtain a judgment.[177] If a collection lawyer obtains payment before obtaining a judgment, the plaintiff will generally only recover costs of the lawsuit.[178] The statute then clarifies the date that each claim accrued means "the date the services, goods, materials, labor, or money were provided, or the date the charges were incurred by the debtor, unless some different time period is expressly set forth in a written agreement between the parties."[179] Attorney's fees under the Small Debt statute are limited by both "reasonableness" and the amount of the judgment obtained before the trial court. If the lawyer recovers $50 or less, the court granting the judgment must award at least ten dollars or a reasonable amount.[180] If the lawyer recovers more than $50, up to $4,000, the court granting the judgment must award "ten dollars plus ten percent of the judgment in excess of fifty dollars."[181] This formulaic approach, though antiquated, allows a collection lawyer to recover up to $405 in attorney's fees on claims of $4,000 or less.[182] Note, however, that if any Small Debt case is appealed, the Small Debt Statute allows recovery of additional attorney's fees for a successful plaintiff.[183]

When requesting attorney's fees under the Small Debt statute, debt collectors must be careful to collect the applicable attorney's fees at the right time. Nebraska's

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[175] See Neb. Rev. Stat. § 25-1801 (Cum. Supp. 2018).
[176] *See* Neb. Laws L.B. 710, § 1 (2018), available at https://nebraskalegislature.gov/FloorDocs/105/PDF/Slip/LB710.pdf).
[177] Neb. Rev. Stat. § 25-1801(1) (Cum. Supp. 2018).
[178] *Id*.
[179] Neb. Rev. Stat. § 25-1801(4) (Cum. Supp. 2018).
[180] Neb. Rev. Stat. § 25-1801(3) (Cum. Supp. 2018).
[181] *Id*.
[182] *E.g.:* [$10 + ($3,950 x 10%)] = $10 + $395 = $405.00
[183] Neb. Rev. Stat. § 25-1801(2); *Thomas Grady Photography v. Amazing Vapor*, 301 Neb. 401, 406 (2018).

federal district court has specifically held: "Nebraska law does not authorize collection of interest or attorney fees absent a judgment."[184] If debt collectors claim or recover interest or attorney's fees under the Small Debt statute before obtaining a judgment, they may violate the Fair Debt Collection Practices Act.[185] That said, collection practitioners should be aware of two things. First, there are no current, authoritative rulings interpreting the current version Small Debt Statute in the context of the FDCPA. Second, other Nebraska case law has held that attorney's fees *must* be requested before a trial court enters a judgment because attorney's fees are an element of court costs.[186] Thus, there is some room for argument under the Small Debt Statute about *when* a debt collector may seek to collect attorney's fees given the apparent conflicts in Nebraska's existing jurisprudence.

Practical Pointer: If you use the Small Debt statute to collect attorney's fees, make sure you have the facts necessary to plead and prove each element required by the statute stated in your pleadings. When obtaining your judgment, make your attorney's fee request to the court using the formula provided in the statute. If it has not been more than 90 days since the claim "accrued," you should not be using the Small Debt Statute in the first place, and alleging the elements needed to invoke the Small Debt Statute in your pleadings *may be considered misleading* and expose your client to FDCPA liability.

6. Interplay Between the FDCPA and State Law - the FDCPA and Its Impact on Collecting Attorney's Fees under Nebraska Law

a. Nebraska's General "American Rule" on Attorney's Fees

The general rule under Nebraska law is that attorney's fees and costs may be recovered in litigation only where provided for by statute or when a recognized and

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[184] *Hage v. General Service Bureau*, 306 F.Supp.2d. 883, 888 (2003) (citing *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585, 588 (1954); (note: curiously, *Ehlers v. Campbell* does not contain any such language).

[185] *Id.*

[186] See *Salkin v. Jacobsen*, 263 Neb. 521, 527, 641 N.W.2d 356, 361 (2002) (a motion for costs or attorney's fees must be filed before the judgment is entered because attorney fees are an element of court costs); *Webb v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 810, 820 (2018) (same).

accepted uniform course of procedure has been to allow recovery of attorney's fees.[187] "[Nebraska's] practice is in keeping with the so-called American rule that a prevailing party may not also recover an attorney fee from his opponent. The generally accepted justification of this rule is that a defendant should not be unduly influenced from vigorously contesting claims made against him."[188] The American rule focuses on provisions allowing attorney fees in *judicial proceedings* rather than non-judicial proceedings.[189]

"Although [the Nebraska Supreme Court has] applied the American rule to invalidate contracts providing for fees to prevailing parties in judicial proceedings, [it has] never applied the rule to nonjudicial proceedings."[190] "In determining whether to apply the American rule to nonjudicial proceedings, [the Nebraska Supreme Court recognizes] a strong policy favoring the parties' freedom to contract."[191] Thus, the Nebraska Supreme Court has declined to extend the American rule to non-judicial proceedings; by implication, Nebraska lawyers may recover attorney's fees for their clients in non-judicial proceedings like foreclosures.[192]

"A reasonable hourly rate is usually the ordinary rate for similar work in the community where the case has been litigated."[193] The factors Nebraska courts will consider in determining and awarding a reasonable attorney's fee are long-established:

> The factors relevant to determining a reasonable attorney fee include (1) the services actually performed, (2) the amount in controversy, (3) the nature of the case, (4) the results obtained, (5) the extent of preparation of the case, (6) the difficulty of the questions involved, (7) the skill required, (8) the customary charges of the bar for similar work, and (9) the character and standing of the attorney.[194]

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[187] *Parkert v. Lindquist*, 269 Neb. 394 (2005).
[188] *Holt County Co-op. Ass'n v. Corkle's, Inc*., 214 Neb. 762, 767, 336 N.W.2d 312, 315 (1983).
[189] *Id*.
[190] *Parkert*, 269 Neb. at 397, 693 N.W.2d at 532.
[191] *Id*.
[192] *Id*. at 397-98, 693 N.W.2d at 531-32.
[193] *Emery v. Hunt*, 272 F.3d 1042, 1048 (8th Cir. 2001).
[194] *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001).

These factors, though not identical, largely mirror the factors for determining the reasonableness of a fee set forth in Nebraska's Court Rules of Professional Conduct.[195]

b. Recovering Attorney's Fees for Frivolous Pleading

While it is sound legal policy to give litigants a chance to present their arguments and recognize substance over form, Nebraska courts have a duty to prevent abuse of process, unnecessary delay, and frivolous proceedings.[196] Lawyers may recover attorney's fees where an opposing party asserts a harassing, dilatory, or frivolous legal position, whether the position is taken in pleadings, during discovery, or at trial.[197]

"A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence."[198] The Nebraska Supreme Court has explained that the term "frivolous" implies an improper motive or legal position so wholly without merit as to be ridiculous.[199] Any doubt whether a legal position is frivolous or taken in bad faith is resolved in favor of the one whose legal position is in question.[200] Sanctions for filing a frivolous action should not be imposed except in the clearest cases.[201] A litigant's previous, unsuccessful attempt to rely on or use an argument may render later use of the same argument "frivolous" under Nebraska law.[202]

Practical Pointers: Given the authority above, best practices for Nebraska lawyers claiming and recovering attorney's fees should include the following:

i. Where possible, cite directly to the statute or uniform course of procedure you rely on to claim recovery of attorney's fees in judicial proceedings. Consider the significant risks under the FDCPA and its state analogs of claiming attorney's fees can be recovered in any case where you cannot identify a specific statute or custom that applies to your case from the outset.

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[195] *See* Neb. Ct. R. Prof. Cond. § 3-501.5.
[196] *Steinberg v. Stahlnecker*, 200 Neb. 466, 263 N.W.2d 861 (1978).
[197] *See generally* Neb. Rev. Stat. §§ 25-824 et seq.; Neb. Ct. R. Disc. §§ 6-326 and 6-337
[198] *State v. Carter*, 292 Neb. 16, 21 (2015).
[199] *Cisneros v. Graham*, 294 Neb. 83, 104 (2016).
[200] *Sports Courts of Omaha, Ltd. v. Meginnis*, 242 Neb. 768, 777, 497 N.W.2d 38, 44 (1993).
[201] *Randolph Oldsmobile Co. v. Nichols*, 11 Neb. App. 158, 645 N.W.2d 566 (2002).
[202] *State v. Carter*, 292 Neb. 16, 22 (2015).

ii. Be cautious in relying on contract provisions that allow you to recover attorney's fees. These contract provisions are likely not enforceable in Nebraska judicial proceedings. Representing to debtors that contract provisions allow you to recover attorney's fees in Nebraska judicial proceedings could arguably be an FDCPA violation. But you may rely on contract provisions allowing recovery of attorney's fees if you are resolving your case non-judicially.

iii. Do not assert any legal position that could appear to be in bad faith by your trial court or any appellate court. Harassing, delaying, or burdening the court with an absurd argument wastes everyone's time and could create large sanctions liability for both lawyers and their clients.[203] A frivolous pleading or argument also creates independent liability for accused practitioners under the FDCPA.

iv. Consider the factors for determining the reasonableness of your attorney's fees *before* making any claim to those fees to opposing parties or a court. The court will be considering each of those factors before it awards you any fees. If you can justify the requested fees under the relevant factors, the court will be more likely to find your fee request credible and give you the requested fees. On the other hand, if practitioners make blatantly unreasonable fee requests, those requests may create exposure under the FDCPA.

7. Interplay Between the FDCPA and State Law - the FDCPA and Its Impact on Collecting Pre-Judgment Interest under Nebraska Law

Practitioners should be aware that the Nebraska Supreme Court recently clarified decades of law on the issue of recovering prejudgment interest under a series of Nebraska's interest statutes.[204] Nebraska jurisprudence had previously struggled to determine whether pre-judgment interest was available exclusively through the means

[203] See, e.g., *State of Florida v. Countrywide Truck Ins. Agency*, 294 Neb. 400 (2016); Neb. Ct. R. App. P. § 2-109(F).
[204] *Weyh v. Gottsch,* 303 Neb. 280 (2019); Neb. Rev. Stat. §§ 45-103.02 and 45-104 (2010).

identified in Neb. Rev. Stat. § 45-103.02 or also independently available under the categories of claims listed in Neb. Rev. Stat. § 45-104.[205]

On June 7, 2019, the Nebraska Supreme Court finally reviewed the tension identified in its prior decisions by discussing the legislative history of the pre-judgment interest statutes from early cases through the present.[206] The court specifically disapproved of prior jurisprudence stating the Neb. Rev. Stat. § 45-103.02 is the exclusive statutory means to collect pre-judgment interest and held that prejudgment interest can also be claimed independently under § 45-104.[207] Three avenues now exist for collection of pre-judgment interest under Nebraska law:

> Section 45-103.02(1) authorizes the recovery of prejudgment interest on unliquidated claims[208] when the statutory preconditions are met, § 45-103.02(2) authorizes the recovery of prejudgment interest on liquidated claims, and § 45-104 authorizes the recovery of prejudgment interest on four categories of contract-based claims without regard to whether the claim is liquidated or unliquidated. All three of these statutory provisions establish different criteria for the recovery of prejudgment interest, and none makes the recovery of prejudgment interest contingent on proof of another.[209]

Thus, practitioners now have much more clarity on the circumstances under which they can recover pre-judgment interest for clients.

Practical Pointer: Now that Nebraska's Supreme Court has clarified when debt collectors can recover prejudgment interest, there is little excuse for seeking pre-judgment interest when it is not allowed by law. Practitioners should carefully consider

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[205] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013); *Fitzgerald v. Community Redevelopment Corp*., 283 Neb. 428, 811 N.W.2d 178 (2012); *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009); *Sayer v. Bowley*, 243 Neb. 801, 810, 503 N.W.2d 166, 172 (1993) (collecting cases); *Records v. Christensen*, 246 Neb. 912, 918, 524 N.W.2d 757, 762 (1994).

[206] *Weyh v. Gottsch*, 303 Neb. 280, 304-12 (2019).

[207] *Id*. at 313-14.

[208] See *Jacob v. Schlictman*, 16 Neb. App. 783, 792-93, 753 N.W.2d 361, 370 (2008) (holding where "reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is considered to be unliquidated").

[209] *Id*. at 314.

whether the claims they are collecting are liquidated, unliquidated, or covered by Neb. Rev. Stat. § 45-104 and comply with each section accordingly. Failure to do so creates greater exposure for potential FDCPA liability.[210]

[210] *See* 15 U.S.C. §§ 1692e(2)(A) and 1692f(1).

FDCPA "Miranda" and "Mini-Miranda" Notice Samples

For specific statutory requirements see: 15 U.S.C. §§ 1692e(11) and 1692g(a)

Fair Debt Collection Practices Act Mini Miranda

This is an attempt to collect a debt and any information obtained will be used for that purpose. This firm and the lawyer signing this document may be considered debt collectors under the Fair Debt Collection Practices Act.

Fair Debt Collection Practices Act – Long Form Notice

For use in correspondence:

This is an attempt to collect a debt and any information obtained will be used for that purpose. This firm and the person signing this document may be considered debt collectors under the Fair Debt Collection Practices Act. The amount of the debt is stated above. The name of the creditor is stated above. Unless the debtor disputes the validity of the debt within thirty (30) days after receipt of the notice, it will be assumed that the debt is valid. If the debtor notifies the lawyer in writing within thirty (30) days that the debt is disputed, the lawyer will obtain verification of the debt or a copy of a judgment and mail it to the debtor. The lawyer will provide the debtor with the name and address of the original creditor, if different from the current creditor, if the debtor requests this information in writing within thirty (30) days.

For use in e-mail signatures*:*

This is an attempt to collect a debt and any information obtained will be used for that purpose. This firm and the lawyer sending this e-mail may be considered debt collectors under the Fair Debt Collection Practices Act.

Fair Debt Collection Practices Act – Alternate Long Form Notice

1. The amount of the debt owed by you to [Creditor] is $_____, plus interest at the rate of _____% per annum.

2. The Plaintiff as named in the attached document is the creditor to whom the debt is owed.
3. The debt described in the attached document will be assumed to be valid by the creditor's law firm, unless the debtor, within 30 days after receipt of this Notice, disputes the validity of the debt or some portion thereof.
4. If written notice is received within 30 days of the receipt of this notice that you dispute the debt, or any portion thereof, the creditor's law firm will obtain a verification of the debt or a copy of the judgment against you and a copy of the verification will be mailed to you.
5. If [Creditor] is not the original creditor, and if you make a written request to the creditor's law firm within 30 days from the receipt of this notice, the name and address of the original creditor will be mailed to you by the creditor's law firm.
6. This is an attempt to collect a debt and any information obtained will be used for that purpose. [Lawyer] and the law firm of [Law Firm] may be considered debt collectors and any information obtained from you will be used for the purpose of collecting the above-referenced debt.

FDCPA Debt Verification and Cease and Desist Letter Samples

For more information, see Legal Aid of Nebraska's Collections Handbook[211] and the BCFP's Sample Collection Letter Response Templates[212]

Sample Letter A – Debt Verification

_____ [Date]

_____ [Name of Debt Collector]

_____ [Address of Debt Collector]

_____ [City, State, Zip Code of Debt Collector]

Dear Sir or Madam:

I am writing you pursuant to the Fair Debt Collection Practices Act ("FDCPA") regarding the debt to _____, Account Number _____. I do not think I owe this debt. I dispute the validity of the debt you are attempting to collect. The FDCPA gives me the right to obtain verification of a disputed debt from a debt collector. I demand verification of the debt you are attempting to collect from me by sending to me the following information: 1. an explanation of the nature of the debt-who I owe and for what; 2. a copy of any contracts or documents that are the basis for the debt you are attempting to collect; 3. the outstanding balance allegedly due on the disputed debt; and 4. an accounting of how the outstanding balance was computed. You are required by law to cease any further collection of the disputed debt until you provide verification of the disputed in accordance with the FDCPA.

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[211] Legal Aid of Nebraska, *Collections Handbook* (rev. Jan. 2017), *available at* https://www.legalaidofnebraska.org/wp-content/uploads/2017/01/Collections-Handbook-2017.pdf

[212] Bureau of Consumer Financial Protection, *What should I do when a debt collector contacts me?, available at* https://www.consumerfinance.gov/ask-cfpb/what-should-i-do-when-a-debt-collector-contacts-me-en-1695/

Sincerely,

_____ [Debtor's Name]

Sample Letter B – Cease and Desist

_____ [Date]

_____ [Name of Debt Collector]

_____ [Address of Debt Collector]

_____ [City, State, Zip Code of Debt Collector]

Dear Sir or Madam:

I am writing you pursuant to the Fair Debt Collection Practices Act ("FDCPA") regarding the debt to _____, Account Number _____. I am writing to ask that you stop contacting me. This letter is not meant in any way to be an acknowledgement that I owe this money.

Sincerely,

_____ [Debtor's Name]