



Beer and Basics: Overview of the FDCPA and Updates in FDCPA Litigation

Consumer Financial Services Committee
ABA Business Law Section
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Roadmap:

- What is the FDCPA?
- What is a debt collector?
- Obligations
- Selected FDCPA Litigation Updates

Let's Get Started

Disclaimer

The views and opinions expressed today do not constitute legal advice nor do they necessary represent those of the firm with which the speaker is associated or the clients that it represents.



What is the FDCPA?

The 500,000 Foot Overview

- 15 U.S.C. § 1692, et seq.
- Congress found abundant evidence of abusive and deceptive practices in debt collection, and that the existing laws were inadequate to protect consumers. 15 U.S.C. § 1692 (a) and (b).
- “It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e).

Why do we care?

- \$\$\$\$\$\$ - A debt collector who fails to comply with the FDCPA is liable for:
 - ▣ Actual damages
 - ▣ Up to \$1,000 in statutory damages for individual claims
 - ▣ Class Actions: Up to \$1,000 for the named plaintiff(s) and statutory damages not to exceed the lesser of \$500,000 or 1% of the net worth of the debt collector
 - ▣ Costs of the action and reasonable attorney fees
- Attorneys can also be debt collectors

Who is a debt collector?

■ 15 U.S.C. § 1692a(6)

- Any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due another.
 - Includes any person who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third-party is attempting to collect the debt.
- Excludes creditor – person to whom the debt is owed – unless received the debt solely for the purposes of collecting the debt for another.
- Does not include, among other things, debt collector related to creditor by common ownership or affiliated corporate control, or person collecting a debt that he originated or which was not in default when the debt was obtained by the debt collector.

Provisions to Consider:

- Acquisition of Location information – 15 U.S.C. § 1692b
- Communication in connection with debt collection – 15 U.S.C. § 1692c
- Relation to State Laws – 15 U.S.C. § 1692n
- Exemption for State regulation – 15 U.S.C. § 1692o

What is prohibited?

- Harassment or abuse – 15 U.S.C. § 1692d
- False or misleading representations – 15 U.S.C. § 1692e
- Unfair practices – 15 U.S.C. § 1692f

Interesting Cases

- *In re: Pressler & Pressler, LLP*, CFPB Consent Order, 2016-CFPB-0009
 - ▣ CFPB found that by relying on summaries received from clients instead of on actual account information or documentation and failing to verify facts resulted in harassment of the consumers and improper court actions in violation of the FDCPA.
 - ▣ Law firm agreed to pay a fine of \$1 million and is required to have certain documentation and take certain steps prior to filing debt collection lawsuits.

Interesting Cases

- *Nelson v. Midland Credit Management, Inc.*, 8th Cir. No. 15-2984 (July 2016)
 - ▣ Rejected 11th Circuit's precedent in *Johnson and Crawford*, and held that “[a]n accurate and complete proof of claim on a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA.”

Interesting Cases

- *Hernandez v. Williams, Zinman & Parham PC*, No. 14-15672, — F.3d —, 2016 WL 3913445 (9th Cir. July 20, 2016)
 - ▣ Subsequent debt collectors are required to send a § 1692g(a) validation notice within 5 days of its initial communication, even if the validation notice was provided to the debtor by another debt collector for the same debt.
 - ▣ Compare *Lee v. Cohen, McNeile & Pappas, P.C.*, 520 F. App'x 649 (10th Cir. 2013); *Oppong v. First Union Mortg. Corp.*, 326 F. App'x 663 (3d Cir. 2009) (per curiam).

Questions?



A Roundup of Recent Enforcement Activity of the Consumer Financial Protection Bureau (“CFPB”)

Mia Whang Spiker Johnson

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- Over the last year, the CFPB has been actively engaged in keeping with its mission to protect consumers in the financial marketplace
 - 65 public enforcement actions from April 2015 through March 2016
 - Continued interest in mortgages, credit cards, student loan spaces
 - Approximately [[\$]]million paid to consumers
 - Overview of some of the CFPB's activity

Debt Collection

- Security National Automotive Acceptance Company
- EZCORP
- Frederick J. Hanna & Associates
- Citibank
- Westlake Services
- Fifth Third Bank

Mortgage and Predatory Lending

- Corinthian Colleges
- Hudson City Bank
- Gordon
- Provident

Auto Loans

- Car Hop
 - “buy-here, pay-here”
- Herbies Auto
- Settlement, along with DOJ, with Toyota Motor Credit Corporation
 - \$21.9 trillion in restitution to minority borrowers

Student Loan

- Student Aid Institute
- Student Financial Resource Center

Credit Reporting and Consumer Reports

- Clarity Services
- General Information Services

Payday and Short Term Lending

- Integrity Advance

UDAAP

- PayPal

Where is the Bureau Headed?

- What can we anticipate?
- Recent change in Debt Collection Law
- Dwolla
 - First action ever taken by CFPB in area of data security practices



Dodd-Frank - Section 342 & CFPB Proposed Arbitration Rule

The materials contained herein are presented for informational purposes only and are not intended to constitute legal advice.

Keesha Warmsby, Associate

Dodd-Frank Section 342 Overview

342 Overview

- Background
- Enforcement
- Requirements and Implications
- Joint Standards

Background

- Section 342 of Dodd-Frank directed six federal agencies to establish an Office of Minority and Women Inclusion (OMWI) at each agency to oversee all diversity-related matters concerning management, employment, and business activities.
- OMI also directed to establish Joint Standards for assessing the diversity policies and practices of the agencies' regulated entities.
- Federal Agencies:
 - Federal Reserve Board
 - Consumer Financial Protection Bureau
 - Federal Deposit Insurance Corporation
 - National Credit Union Administration
 - Office of the Comptroller of the Currency
 - Securities and Exchange Commission

Framework

- Goal:
 - Provide a framework for regulated entities and promote transparency and awareness of diversity policies and practices within the entities regulated by the Agencies.
- Purpose:
 - Provide guidance for assessing the diversity policies and practices of regulated entities.
 - Facilitate transparency and awareness of the regulated entities' diversity policies and procedures for the public.
 - Promote stronger, more effective, and more innovative businesses so that the company can serve a wider range of customers.

Enforcement

- The Joint Standards rely on:
 - Voluntary self-assessment by regulated entities;
 - Voluntary disclosure of these self-assessments to the Agencies;
and
 - Voluntary display of diversity information on public websites.
- BUT, Section 342 does not prohibit the OMWIs from creating stronger assessment standards than currently presented.
- The Joint Standards emphasize public accountability.
 - Institutions that fail to incorporate diversity and inclusion policies and procedures may be held accountable by the public which could result in individual consumers electing to take their business elsewhere.

Joint Standards

- 1. Organizational Commitment to Diversity and Inclusion**
- 2. Workforce Profile and Employment Practices**
- 3. Procurement and Business Practices – Supplier Diversity**
- 4. Practices to Promote Transparency of Organizational Diversity and Inclusion**
- 5. Entities' Self-Assessment**

Organizational Commitment to Diversity and Inclusion

- Implement a top down approach
 - Accountability begins at the top and permeates throughout
 - Section 342 expects leaders (board of directors, senior officials, managers) to demonstrate a commitment to diversity
- Leadership depends on size
 - Large entities may use boards
 - Small entities may use presidents or CEOs

Workforce Profile and Employment Practices

- Hiring
 - Create relationships with minority and women professional organizations
 - Create relationships with educational institutions
- Retention
 - Create a culture that values employee contributions
 - Evaluate manager performance
 - Evaluate the programs
 - Track and report data accordingly

Procurement and Business Practices

– Supplier Diversity

- Entities are encouraged to identify the spending and growth in minority-owned and women-owned businesses.
- Broaden their pipeline:
 - Use outreach methods to inform entities about opportunities and the mechanism used by the entity for procurement.
- Subcontractors
 - Using minority and women owned businesses provides valuable opportunities for all parties.

Procurement and Business Practices

– Supplier Diversity

- Supplier diversity can increase a company's competitive advantage by creating a broader choice of:
 - Available business
 - Price
 - Quality
 - Attention to detail
 - Future relationship building

Practices to Promote Transparency of Organizational Diversity and Inclusion

- To be transparent, that information must be on the entity's:
 - Website;
 - Annual report; and/or
 - Promotional materials.
- Information includes:
 - Diversity and Inclusion Strategy
 - Diversity and Inclusion Policy
 - Procurement and workforce activities

Self-Assessment Standards

- Standards for self-assessment should be used in a manner that reflects the regulated entity's size and characteristics.
- Standards such as:
 - Entity uses standards to annually conduct self-assessments of its diversity policies and practices
 - Entity monitors and evaluates its performance on diversity policies and practices on an ongoing basis
 - Information from the self-assessment is provided to the OMWI director of its primary federal financial regulator
- Entities may use qualitative and quantitative measures to evaluate each joint standard.

Use of Information by Agencies

- Information submitted to the Agencies will be used to identify trends within the industry.
- Agencies will monitor employment and contracting progress to identify successful policies.
- Regulated entities that decide to share need to only share with a primary federal financial regulator.
 - The financial regulator will share information with other agencies where applicable.
- Regulated entity's diversity policies and practices will not be examined, but OMWI directors will continue to try and find the best methods across the industry.
- Best practices may be published without disclosure of confidential information or identification.

CFPB Arbitration Rule Overview

CFPB Proposed Arbitration Rule

- Prohibits covered institutions from including “pre-dispute arbitration agreements” that contain class action waivers in most core consumer contracts. Covered institutions would also be required to submit arbitration information to the CFPB.
- Consumers will have the ability to file or join a class action lawsuit.

CFPB Proposed Arbitration Rule - Provision

- “We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.” CFPB, Notice of Proposed Rulemaking, Arbitration Agreements, Docket No. CFPB-2016-0020, (proposed May 5, 2016), (to be codified at 12 C.F.R. pt. 1040), p. 219 (2015).

CFPB Arbitration Rule

- Comment period ends, August 22, 2016 - 90 days after May 24, 2016
- Effective date - 211 days after *Federal Register* publication, no retroactive application
- Rule will apply to any contract with a covered institution entered into 180 days *after* rule's effective date

Application

The rule applies to most core banking depository and credit products, including:

- Banks
- Certain auto lenders
- Private student lenders
- Loan originators,
- Loan servicers,
- Certain payment processors
- Debt buyers
- Credit Unions
- Auto title lenders
- Debt collectors
- Entities that arrange for consumer loans
- Debt settlement firms
- Credit monitoring service providers
- Check cashing providers
- Credit card issuers
- Payday lenders
- Other installment lenders
- Providers of certain automobile leases
- Certain credit repair organizations
- Payment advance companies
- Remittance transfer providers

CFPB Study

Industry Breakdown

- Payday loan contracts – 99%
- Prepaid card agreements – 92%
- Largest private student loan lenders – 86%
- Credit card issues – 53%
- Banks taking insured deposits – 44%

CFPB Study

- CFPB March 2015 Study found that few consumers bring actions against financial services companies and claimed that few understood how arbitration works.
- Between 2010 – 2012 consumers filed approximately roughly 400 arbitration cases and 1,200 individual federal lawsuits on average each year in the six markets studied: credit cards, checking accounts, prepaid cards, payday loans, private student loans and mobile wireless contracts.
- Approximately 34 million consumers were eligible for relief through class action settlements in federal court each year.

CFPB Study

- CFPB concluded that “pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.” CFPB, Notice of Proposed Rulemaking, Arbitration Agreements, Docket No. CFPB-2016-0020, (proposed May 5, 2016), (to be codified at 12 C.F.R. pt. 1040), p. 219 (2015).[9] NPRM at p. 4.
- CFPB’s position: class actions provided an effective means for consumers to challenge problematic practices and to bring monetary relief to consumers. (Day In Court)

Proposed Benefits According to CFPB

- A Day in Court for Consumers
 - Only 2% of consumers with credit cards consulted with attorneys
- Deterrent Effect
 - Incentivize companies to comply with the law to avoid group lawsuits
 - Company accountability
- Increased Transparency
 - Required submission of arbitration claims filed and awards issued to CFPB for monitoring

Industry Comments to NPRM

- No clearly defined rational connection between public interest and proposed rule
- Arbitration is more efficient and effective
- Plaintiff class-action lawyers benefit, not consumers
- Increased costs for financial products passed along to consumers

Issues Going Forward

- Commend Period ended on August 22
- Increased compliance and litigation costs
- Questions remain as to how courts will treat the enforceability of mandatory arbitration clauses (including class action waivers) included in contracts executed before the effective date.

QUESTIONS?

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A Roundup of Recent Enforcement Activity of the Consumer Financial Protection Bureau (“CFPB”)

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Overview

- Over the last year, the CFPB has been actively engaged in enforcement actions
 - Over 70 public enforcement actions from April 2015 through July 2016
- Continued interest in debt collection practices, mortgages, credit cards, student loan, payday loan spaces
 - Proposed rules significantly altering debt collection
- Approximately \$50 million paid to consumers
- High Level overview of activity in each of the following areas: Debt Collection; Mortgage and Predatory Lending; Auto Loans; Student Loans; Credit Reporting; Payday Loans; and UDAAP

Debt Collection

- Security National Automotive Acceptance Company
- EZCORP
- Frederick J. Hanna & Associates
- Citibank
- Westlake Services
- Universal Debt & Payment Solutions

Mortgage and Predatory Lending

- Hudson City Bank
 - Alleged redlining activity
- Gordon
- Provident
- Bancorp South

Auto Loans

- “Buy-here, Pay-here”
 - Car Hop
 - Herbies Auto
- Settlement, along with DOJ, with American Honda Finance
 - \$24 million in restitution to minority borrowers
- Fifth Third Bank
 - Joint investigation with DOJ
 - \$18 million settlement
 - Alleged higher charges to African-Americans and Hispanics

Student Loan

■ Corinthian Colleges

- Allegations of misrepresentation and illegal debt collection: lured students into taking on loans by inflating job prospects and placement
- Default judgment: \$530 million to consumers
- CFPB and DOE: \$480 million in loan forgiveness

■ Student Aid Institute

- Consent Order
 - Orders Student Aid and its CEO to shut down all debt-relief operations; cancellation of all contracts; cease charging students
 - Barred from participating in debt relief industry and must help borrowers so that they are made aware of repayment benefits
 - \$50,000 penalty

Student Loan (cont'd)

- Student Financial Resource Center
 - Allegations of misrepresentation: Students pay fee to have company match them to financial aid opportunities; company falsely represented their affiliation with government

Credit Reporting and Consumer Reports

- Clarity Services
 - Nationwide CRA and owner
 - Alleged illegal acquisition of credit reports; failure to properly investigate consumer disputes
 - \$8 million penalty
- General Information Services and e-Background-checks.com
 - One of the largest employment background screeners
 - \$10.5 million to consumers plus \$2.5 million penalty

Payday and Short Term Lending

- Integrity Advance
 - Administrative lawsuit filed against online lender and CEO
 - Allegations: Contracts failed to disclose payments under default provisions; debiting consumer accounts using remotely created checks even after authorization to withdraw revoked
- All American Check Cashing
 - Alleged tricking and trapping of consumers

UDAAP

- PayPal
 - “Bill Me Later”
 - \$15 million to consumers plus \$10 million penalty
- Affinion
 - Credit monitoring and add-on products
 - Stipulated judgment and consent order
 - \$6.8 million restitution plus \$1.9 million penalty; cease unfair billing; bar from engaging in certain aspects of phone-based retention
- Chase Bank
 - Alleged sale of inaccurate and unenforceable accounts to debt buyers
 - \$50 million to consumers plus \$30 million penalty
