

**ENFORCEMENT OF THE FEDERAL FAIR DEBT  
COLLECTION PRACTICES ACT**

**I. PRIMARY SOURCES OF THE LAW**

- A. Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. (FDCPA)
- B. Federal Trade Commission Staff Commentary to the FDCPA, 53. Fed. Reg. 50097-50110 (December 13, 1988)
  - 1. FTC is statutorily limited from promulgating regulations under the FDCPA - 15 U.S.C. 1692l (d)
  - 2. FTC Commentary and staff opinions therefore have limited precedential value - Jordan v. Kent Recovery Services, Inc., 731 F. Supp. 652 (D. Del 1990)
- C. FDCPA is remedial statute to be liberally construed- Cirkot v. Diversified Financial Systems, Inc., 839 F. Supp. 941 (D.Conn. 1993)

**II. FDCPA COVERAGE**

- A. **Must arise from a "consumer" "debt" "transaction"**- 15 U.S.C. §§ 1692a(3) and (5). Term 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. Id.
  - 1. Commercial and agricultural debts are excluded - Munk v. Federal Land Bank, 791 F. 2d 130 (10th Circuit 1986) (Per Curiam), and National Union Fire Insurance Company V. Hartel, 741

F. Supp. 1139 (S.D. NY.1990)

2. Underlying debt must arise from a "**transaction**," thus excluding tort claims - Zimmerman v. HBO Affiliate Group, 834 F. 2d 1163 (3rd Cir. 1987); Bounced check is debt covered by FDCPA - Snow v. Riddle, \_\_\_ F3d \_\_\_, 1998 WL 233383 (10th Cir. May 11, 1998); Condominium fee is debt covered by FDCPA - Ladick v. Van Gemert \_\_\_ F.3d \_\_\_, 1998 WL 300056 (10th Cir. June 9, 1998)

3. Where debt arises from mixture of consumer and commercial purposes, question is factual issue whether "primarily" [15 U.S.C. 1692a (5)] a consumer purpose - Gallegos V. Stokes, 593 F. 2d 372 (10th Cir. 1979) (TILA)

**B. Extends only to a "debt collector" as defined - 15 U.S.C. ¶1692a (6)**

1. Any person collecting debts on behalf of another  
2. Original creditors excluded  
3. Assignee of debt excluded, but only where the assignment occurs prior to default - Kimber v. Federal Financial Corp., 668 F. Supp. 1480 (D. Ala. 1987); Cirkot v. Diversified Financial Services, Inc., 839 F. Supp. 941 (D. Conn. 1993)

4. Check guarantee companies are debt collectors - Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990)

5. Statutory exclusions for creditor employees, government employees, process servers, "bona fide" consumer

credit counselors, and certain escrow companies

6. A creditor who "uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debt" is subject to coverage

**C. Attorney debt collectors are subject to coverage**

1. 1986 amendment deleted explicit statutory exclusion for attorneys, who are now subject to coverage as any other debt collector - Crossley v. Lieberman, 868 F 2d 566 (3rd Cir. 1989).

2. FDCPA applies to attorneys engaged in litigation. An attorney who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly attempts to collect those consumer debts - Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L.Ed. 2d 395 (1995)

**D. Collector must "regularly" attempt to collect debts - 15 U.S.C. ¶1692a(6)**

1. Does not require that collections be the primary part of the collector's business

2. Truly sporadic collection activity is not regular - Mertis v. Devitt, 734 F. Supp. 872 (W.D. Wis. 1990) (engaging in debt collection activity 1 1/2 times per year is not "regularly" collecting debts); compare James v. Ragin, 432 F. Supp. 887 (W.D. N.C. 1977) (Lender who extended mortgage credit

on ten occasions in five years "regularly" extended credit under identical standard in TILA)

3. Undertaking collection activity "more than a handful of times per year" constitutes regular activity - Crossley v. Lieberman, 868 F. 2d 566 (3rd Cir. 1989). A law firm was found not to be a debt collector because less than 1% of the firm's business involved debt collection - Hartl v. Presbrey & Associates, 1996 WL 529339 (N.D. Ill. 1996). But see Garret v. Derbes, 110 F. 3d 317 (5th Cir. 1997) where an attorney who collected against 639 different individuals in a nine month period satisfied the requirement that he "regularly" collected debts for another although those 639 cases only represented .05% of his practice. The Court found that he was regularly collecting consumer debts because that volume was great enough to meet the threshold.

E. Repossessors are subject only to 15 U.S.C. ¶1692f (6) - 15 U.S.C. ¶1692a (6)

1. Limitation bars only certain unlawful conversions occurring in the course of repossessions - Larranaga v. Mile High Collection and Recovery Bureau, Inc., 807 F. Supp. 111 (D.N.M. 1992)

2. A reposessor who also regularly collects debts on behalf of third parties in addition to performing repossessions is subject to the entirety of the FDCPA - Jordan v. Kent Recovery Services, Inc., 731 F. Supp. 652 (D. Del. 1990); Shapiro and Meinhold v. Zartman, 23 P.2d 120 (Colo. 1992)

F. Validity of the underlying debt is immaterial - Baker v. G.C. Services Corp., 677 F 2d 775 (9th Cir. 1982); Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990); Cirkot v. Diversified Financial Systems, Inc., 839 F. Supp. 941 (D. Conn. 1993)

### III. LIMITATIONS ON COLLECTION COMMUNICATIONS GENERALLY

A. Whenever "the debt collector knows the consumer is **represented by an attorney**" with respect to the debt - 15 U.S.C. ¶1692c (a) (2)

1. Attorney's representation with regard to one debt does not automatically extend to another debt - Graziano v. Harrison, 950 F. 2d 107 (3rd Cir. 1991)

2. Knowledge of attorney representation need not be formally conveyed - Commentary Section 805 (a)-3

3. Creditor's knowledge of attorney representation is not imputed to collector-Id.

B. **At any "unusual" or "inconvenient" time or place** - 15 U.S.C. ¶1692(a) (1)

1. Never before 8:00 a.m. or after 9:00 p.m. - Id.

2. When or where the consumer informs the collector communications are inconvenient - Austin v. Great Lakes Collection Bureau, Inc., 834 F. Supp. 557 (D. Conn. 1993); accord, Commentary Section 805 (a)-2

C. At consumer's place of employment if debt

collector knows or has reason to know that employer prohibits -  
15 U.S.C. ¶1692c (a) (3)

**D. Upon written notice from the consumer stating either to cease communication or that consumer refuses to pay -**  
15 U.S.C. ¶1692c (c)

**E. Generally no third party contacts whatsoever -** 15  
U.S.C. ¶1692c (b); West v. Costen, 558 F. Supp. 564 (W.D. Va.  
1983)

1. Third party contact permitted to locate the  
consumer - 15 U.S.C. ¶1692a (7)

2. Strict limitations on content of communication to  
locate the consumer - 15 U.S.C. ¶1692b.

3. FDCPA's limitations on communications with third  
parties raise special issues in the context of discovery and post  
judgment proceedings. However FDCPA contemplates need do deal  
with third parties during litigation. 15 U.S.C. ¶1693c (b)  
permits such contacts with express permission of a court of  
competent jurisdiction. Also third party communications without  
judicial authorization allowed "as reasonably necessary to  
effectuate a post-judgment judicial remedy." Id.

#### **IV. PROHIBITIONS AGAINST ALL ABUSIVE, FALSE AND UNFAIR COLLECTION PRACTICES**

A. Three core substantive provisions prohibit all

abusive, false and unfair practices without limitation - 15

U.S.C. ¶¶1692d, 1692e, and 1692f

1. Each section contains in identical format general prohibitions and, "[w]ithout limiting the general application of the foregoing...", a list of per se violations

2. FTC Commentary confirms with regard to each section that the listed illustrations are indeed only "examples" of prohibited activity which in no manner limit the general proscriptions against abusive, false, and unfair means - Commentary, Sections 806-1, 807-1 and 808-1; accord, Clomon v. Jackson, 988 F.2d 1314 (2nd Cir. 1993)

3. Congress explicitly stated that this format is designed to be open-ended in order to "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed" - Senate Report No. 95-382, 95th Cong. 2d Sess., at 4, reprinted in 1977 U.S.C. Cong. & Admin. News, page 1695, 1698 (August 2, 1977)

4. United States Supreme Court has directed that statutory prohibitions employing general terms such as unfairness and the like are to be given effect by "consider[ing] public values beyond simply those enshrined in the letter or encompassed in the spirit of" the statute - Federal Trade Commission v. Sperry & Hutchinson Co., 405 U.S. 233, 244 and n.5 (1972):

a. "Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -

whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness"

b. "whether it is immoral, unethical, or oppressive, or unscrupulous"

c. "Whether it causes substantial injury to consumers..."

5. Violations of either federal or state law standards of conduct are generally transferrable to establish violations of the other - Fox v. Citicorp Credit Services, Inc., 15 F. 3d 1507, (9th Cir. 1994)

#### **B. Common violations**

1. Threatening to take or taking any action that cannot legally be taken or which is not intended to be taken - 15 U.S.C. §1692e(5)

a. Threatening to contact third parties - Commentary Section 807(5)-6; Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (D. Ill. 1979)

b. Action constituting the unauthorized practice of law in accordance with applicable state law - Kolker v. Duke City Collection Agency, 750 F. Supp. 468 (D.N.M. 1990)

c. Collecting debts without license required by forum state - Gaetano v. Payco of Wisconsin, Inc., 774 F. Supp. 1404, 1414-1415 (D. Conn. 1990)

d. Filing time-barred collection litigation - Kimber

v. Federal Financial Corp., 668 F. Supp. 1480 (D. Ala. 1987)

e. Threatening collection litigation which is in fact not intended Pipiles v. Credit Bureau of Lockport, Inc., 886 F. 2d 22 (2nd Cir. 1989); Bentley v. Great Lakes Collection Bureau, 6 F. 3d 60 (2nd Cir. 1993)

2. Attempting to collect any amount not "expressly authorized by the agreement creating the debt or permitted by law" 15 U.S.C. ¶1692f (1)

a. Interest - Venes v. Professional Service Bureau, Inc., 353 N.W. 2d 671 (Minn. App. 1984)

b. Dishonored check charges - West v. Costen, 558 F. Supp. 564 (W.D. Va 1983)

c. Attorney's fees - Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992)

3. False sense of urgency - Commentary, Section 807(10)-2

4. False representation of the imminence of any action - Commentary. Section 807(5)-6; Rosa v. Gaynor, 784 F. Supp. 1 (D.Conn. 1989); Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2nd Cir. 1993)

5. Immediately re-calling the consumer who has hung up the telephone on the collector - Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D. N.D. 1981)

6. Telephonic inquiry into personal assets - Id.

**C. False representations**

1. Any representation which is objectively false constitutes a per se violation of Section 1692e Jeter v. Credit Bureau, Inc., 760 F. 2d 1168, 1175-1176 (11th Cir. 1985)

2. Even if not objectively false, any statement which is capable of deceiving or misleading violates Section 1692e - Id.

a. Deception is tested under the standard of the "least sophisticated consumer" - Swanson v. Southern Oregon Credit Service, Inc., 869 F. 2d 1222 (9th Cir. 1988); Graziano v. Harrison, 950 F. 2d 107 (3rd Cir. 1991); Jeter v. Credit Bureau, Inc., 760 F. 2d 1168 (11th Cir. 1985); Clomon v. Jackson, 988 F. 2d 1314 (2nd Cir. 1993)

b. Standard measures tendency to deceive "consumers of below-average sophistication or intelligence" - Id., 988 F.2d at 1318

c. Any "plausible" interpretation of a representation which is deceptive or false to the "least sophisticated consumer" is a violation of law - Dutton v. Wohlar, 809 F. Supp. 1130 (D. Del. 1992)

3. Falsely simulating judicial or official documents - 15 U.S.C. ¶1692e (9); Tolentino v. Friedman, 833 F. Supp. 697 (N.D. Ill. 1993)

#### **D. Attorney/Debt Collector Violations**

1. "A debt collection letter on an attorney's

letterhead conveys authority and credibility" - Crossley v. Lieberman, 868 F. 2d 566, 570 (3rd Cir. 1989)

2. A communication generated on attorney letterhead where the attorney does not personally "review the debtor's file and have some knowledge about the alleged debt" violates multiple provisions of the FDCPA - Masuda v. Thomas Richards & Co., 759 F. Supp. 1456, 1461 (C.D. Ca 1991)

3. A communication purportedly signed by an attorney violates Section 1692e when the attorney does not review the debtor's file, does not determine when particular letters should be sent, does not approve the sending of particular letters based upon the recommendations of others, and does not see particular letters before they were sent - Clomon v. Jackson, 988 F.2d 1314 (2nd Cir. 1993); accord, United States v. Central Adjustment Bureau, Inc., 667 F. Supp. 370 (N.D. Tex 1986), aff'd 823 F.2d 880 (5th Cir. 1987)

4. "Attorney" letters typically imply false threat of litigation - Rosa v. Gaynor, 784 F. Supp. 1 (D. Conn 1989); United States v. National Financial Services, Inc., 820 F. Supp 228 (D. Md 1993)

5. No debt collector, including attorneys, may file a collection action, including post-judgment execution proceedings, in any venue other than where the consumer resides or signed the contract being sued upon (or where real property is located when enforcing an interest in that property) - 15 U.S.C. ¶1692i; Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo 1992) (Attorney

collector who brought foreclosure action in a county other than that where real estate was located violated ¶1692i (a)(1) even though Colorado Statute allowed such venue). See also Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994); Scott v. Jones, 964 F. 2d 314 (4th Cir. 1992)

**E. Affirmative disclosure requirements**

1. Collector must "disclose clearly in initial communications other than a formal pleading in a lawsuit made to collect a debt that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose" - 15 U.S.C. 1692e(11) ("Miranda warning"). Subsequent communications must disclose that communication is from a debt collector. Id.

2. 15 U.S.C. 1692g validation notice

a. In the initial communication or within five days, debt collector must disclose in writing the following:

i. The amount of the debt

ii. The name of the creditor to whom the debt is owed

iii. A statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid

iv. A statement that if the consumer notifies the debt collector in writing within the thirty day period to dispute

the debt, or any portion thereof, the debt collector will obtain verification thereof

v. A statement that, upon the consumer's written request within the thirty day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

b. "A debt collector may condense and combine the required disclosures, as long as he provides all required information": - Commentary, Section 809(a)-4

c. The validation notice "must be large enough to be easily read and sufficiently prominent to be noticed"- Swanson v. Southern Oregon Credit Service, 869 F.2d 1222 (9th Cir. 1988)

i. The notice placed on the reverse side of a communication must have sufficiently conspicuous reference to it on the front - Gaetano v. Payco of Wisconsin, Inc., 774 F. Supp. 1404 (D. Conn. 1990); Rabideau v. Management Adjustment Bureau, 805 F. Supp. 1086 (W.D.N.Y. 1992)

ii. Format overshadowing results from smaller print or size or contrasting color - Miller v. Payco General American Credit, Inc., 943 F. 2d 482 (4th Cir. 1991); compare, Latimer v. Transworld Systems, Inc., 842 F. Supp. 274 (E.D. Mich 1993)

d. Contradictory messages violate validation disclosure requirements

i. Demand for payment or action within a time

less than thirty days contradicts thirty-day validation period - Swanson v. Southern Oregon Credit Service, 869 F.2d 1222 (9th Cir. 1988); Graziano v. Harrison, 950 F. 2d 107 (3rd Cir. 1991)

ii. Otherwise proper notice with emphasis in body of the letter to telephone the collector obscures required disclosure that an effective dispute must be in writing - Miller v. Payco General American Credit, Inc., 943 F.2d 482 (4th Cir. 1991); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724 (D. Conn. 1990)

#### **V. STATUTORY REMEDIES**

A. Any single violation triggers statutory liability and remedies - Clomon v. Jackson, 988 F.2d 1314 (2nd Cir. 1993)

B. Up to \$1,000 in statutory damages available - 15 U.S.C. 1692k (a) (2) (A)

1. Statutory damages available without regard to presence of actual damages - Baker v. G.C. Services Corp., 677 F. 2d 775 (9th Cir. 1982)

2. Amount to be determined by the trier of fact on the basis of the frequency, persistence, and nature of the violation and whether the violation was unintentional - 15 U.S.C. 1692k (b) (1)

3. Limited to \$1000 per case Wright v. Finance Services of Norwalk, Inc., 22 F.3d 647 (6th Cir 1994)

4. Strict liability statute, where degree of the defendant's culpability is relevant only in computing damages,

not in determining liability - O'Conner v. Checkrite, 973 F. Supp. 1010 (D.Colo 1997); Bently v. Great Lakes Collection Bureau, 6 F.3d 60 (2nd Cir. 1993); Cacace v. Lucas, 775 F. Supp. 502 (D. Conn 1990)

C. Award of reasonable attorney's fees to prevailing plaintiff - 15 U.S.C. ¶1692k (a) (3)

1. Award is mandatory once liability is established - Emanuel v. American Credit Exchange, 870 F.2d 805 (2nd Cir. 1989)

2. Award of attorney's fees is required even if no damages are awarded - Pipiles v. Credit Bureau of Lockport, Inc., 886 F. 2d 22 (2nd Cir. 1989)

3. Award proper in post-judgment enforcement action - Nunez v. Interstate Corporate Systems, Inc., 799 P. 2d 30 (Ariz. App. 1990)

**D. Unlimited actual damages:** "The courts have awarded "actual damages" for FDCPA violations that were not just out-of-pocket expenses, but included damages for personal humiliation, embarrassment, mental anguish, or emotional distress" - Commentary, Section 813-2; 15 U.S.C. ¶1692k (a) (1)

**E. Private remedy available to any aggrieved person,** not just the consumer - 1692k (a)

1. Any person harmed by proscribed activity, e.g. relative of consumer or third party who is the object of harassment - Whatley v. Universal Collection Bureau, Inc., 525 F.

Supp. 1204 (N.D. Ga. 1981)

2. Personal representative or other person who "stands in the shoes" of the consumer - Wright v. Finance Service of Norwalk, Inc., 996 F.2d 820 (6th Cir. 1993)

F. Right to jury trial - Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982)

G. One year statute of limitations - 15 U.S.C. ¶1692k (d)

**H. Collector's bona fide error defense - 15 U.S.C. ¶1692k (c)**

1. Limited defense available only where violation results from an unintentional error notwithstanding maintenance of reasonable procedures adopted to avoid the error - Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994); Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824 (N.D. Ga. 1980)

2. Mere fact that error was unintentional is insufficient - Bingham v. collection Bureau, Inc., 505 F. Supp. 864 (D.N.D. 1981)

3. Mistaken view of the law is insufficient - Pipiles v. Credit Bureau of Lockport, Inc., 886 F. 2d 22 (2nd Cir. 1989); Hulshizer v. Global Credit Services, Inc., 728 F. 2d 1037 (8th Cir. 1984)

I. No liability for any act done or omitted in good faith in conformity with any advisory opinion of the FTC - 15 U.S.C. ¶1692k (e).

J. Jurisdiction and venue are proper in forum of consumer's residence, even where debt collector's contacts with jurisdiction are limited to a single letter or telephone call - Russey v. Rankin, 37 F. Supp. 1103 (D.N.M. 1993); Bates v. C&S Adjusters, Inc., 980 F.2d 865 (2nd Cir. 1992)

## COLORADO COLLECTION STATUTES

### I. UNCONSCIONABLE DEBT COLLECTION

A. C.R.S. ¶5-5-108 Prohibits the use of unconscionable means in the collection of consumer credit debts. **Applies to any person collecting debts.** C.R.S. ¶5-5-108 (4) lists factors to consider in determining unconscionability. Remedies include grant of an injunction, an award of actual damages and attorney fees. Unconscionability limitations period is three years under C.R.S. ¶13-80-101 (1)(g)

### II. COGNOVIT CLAUSES

A. In Colorado, a collection agency or its attorney may not invoke a cognovit clause (written authority of debtor for entry of judgment against him in event debtor defaults in payment) so as to confess judgment - C.R.S. ¶12-14-128 (2) Additionally, cognovit clauses are void with regard to consumer debts - ¶¶ C.R.S. 5-2-415, 5-1-107.

### III. NOTICE OF RIGHT TO CURE

A. If a debtor has been in default for ten days on a consumer credit transaction, the creditor must give notice of the debtor's right to cure the default - C.R.S. ¶5-5-111. The creditor may not accelerate unpaid balance nor enforce a security interest until twenty days after a proper notice to cure has been given to the debtor, assuming that there has been no cure by the debtor up to that point - C.R.S. 5-5-112 (1)

B. When enforcing security interest in goods, Notice of Right to Cure not required where debtor has voluntarily surrendered the collateral - C.R.S. ¶5-5-112 (3)

C. If cash price of a consumer credit sale is \$2,100.00 or less, a creditor who repossesses, or voluntarily accepts surrender of the collateral on default, is barred from pursuing a deficiency judgment against the debtor - C.R.S. ¶5-5-103 (3).

#### **IV. COLORADO FAIR DEBT COLLECTION PRACTICES ACT**

A. Colorado Fair Debt Collection Practices Act (CFDCPA) largely parallels Federal FDCPA with analogous prohibitions, affirmative disclosure requirements and defenses - C.R.S. ¶12-14-101 et seq.

1. Accompanying Colorado Collection Agency Board Regulations can be found at 4 C.C.R. 903-1

B. CFDCPA provides for a two year statute of limitation period, as opposed to the one year statute applicable to Federal FDCPA - C.R.S. ¶12-14-113 (4).

C. Debtor cannot be awarded double damages under

CFDCPA and Federal FDCPA - C.R.S. ¶12-14-114 (6)

D. If debtor loses a CFDCPA action, the debtor is liable to the defendant in an amount equal to defendant's costs including attorney fees, unlike the Federal FDCPA - C.R.S. 12-14-113 (1.5) (However, note that under both Federal FDCPA and CFDCPA the debtor may be liable for the defendant's reasonable attorney's fees if the Court finds that an action was brought in bad faith and for the purpose of harassment - 15 U.S.C. ¶1692k (a) (3) and C.R.S. ¶12-14-113 (1) (c)).

E. CFDCPA has licensure requirements for those meeting definition of "collection agency" - C.R.S. ¶12-14-115 and 12-14-118. Additionally, "debt collectors" (collection agency employees) must register and meet other requirements with Colorado Collection Agency Board C.R.S. ¶12-14-115.

F. CFDCPA requires the additional affirmative disclosure set forth in C.R.S. ¶12-14-105 (3) (c).

G. FDCPA does not preempt CFDCPA except where CFDCPA is "inconsistent." State law which provides the same or greater protection to the debtor is not inconsistent - 15 U.S.C. ¶1692n.