

UNDERSTANDING THE FAIR DEBT COLLECTION PRACTICES ACT

Request for Validation

This statute is federal and many states have codified versions of it that are substantially the same. You cannot expect to defeat a collection process with this statute alone, not even if you rely on your state's statute while you are defending against a lawsuit in your state. This statute was probably written to quell consumer outrage at abusive collection practices undertaken during the 1970s. It has very little penalty provision or authority. Most creditors will ignore it and most debt collectors have never heard of it, even though it applies to them. Your best defense against a third party debt collector is the chance that they did not include any assignment agreement from the creditor, did not include evidence of consideration for that agreement, or for your consent to enter into any so-called obligations with the collector (unless you made payment), and many times, the fact that they are not registered with your state's Secretary of State to do business in your state. It is always good practice to obtain a certificate of non-existence from your Secretary of State for any third party debt collector so that it can be used in court. Failure to register means that the collector is not authorized to file any lawsuits in that state. None the less, I have included the following analysis.

The Fair Debt Collection Practices Act (FDCPA) provides some type of defense against nearly every unsecured collection instituted by a third party (assignee) debt collector. The important sections of the Act are discussed below and you might want to search for a complete copy of the text on the Internet.

Analyzing Section 804, any collection notice or other form of communication such as a telephone call must comply with each of these requirements.

When a debt collector calls you, his only objective is to get you to commit to make payments or to pay the entire debt as quickly as possible. The collector may ask for your social security number and bank account or even credit card information to secure payment. Sometimes they will ask you to fax or mail them post dated checks. Some debt collectors will even go as far as to tell you that if you don't pay by a certain date, they will come out and tow away your car or take your house. This is patently false, only in cases where the property in question is secured as collateral by an actual written agreement (usually a promissory note), can the collector take the property, and only after they have followed the lengthy and expensive process of a lawsuit and obtaining an actual judgment. Based on what I have noticed from conversations conveyed to me by subscribers, it appears that debt collectors and their agents are trained to actually lie and tell you whatever they think will induce a payment.

A judgment would only be obtained in about a year if they are diligent about it. In nearly every debt collection case, the collector is not prepared to sue you, that's the purpose of calling you, to try and harass and intimidate you with verbal statements and scare you into paying to make them stop calling. Sometimes the collector will tell you that adverse and negative claims will be made on your credit history, but even this doesn't happen many times and if it does, the items can be removed simply because the information published in the debt collector's claim does not represent your account. One or two letters will cure this problem, if it ever is a problem.

Without making any such commitment or disclosing any more information than the collector already has about you (do not engage in argument with the caller), it is recommended that you obtain the following information before disconnecting: the caller's identity, such as his full name, and 2. The name of the caller's employer (name of debt collector). Keep a written record of this information close to the phone (a phone log) and write down the time and date of each call. Try and obtain the caller's phone number, fax number and mailing address as well. This information can be used at a later time if it becomes necessary to file a complaint with the Federal Trade Commission or even a lawsuit for damages (so far, I have never seen a need for this).

Let's discuss Sections 805 and 806 in detail and see how they apply to our strategy. Unless you give them permission, a collector cannot call you at work or after normal "convenient" hours at home, that is not before 8:00 AM or after 9:00 PM local time. If after being notified that you are represented by an attorney, the debt collector cannot contact you directly. Our program is not designed for use with attorneys who represent you, but in case you already have one, this is the rule. In some cases, collectors know that they cannot intimidate your attorney, so they will try and go around your attorney to try and get a commitment to pay from you over the phone, as discussed earlier.

Instead of requesting that the collector cease further communication, we notify the collector that no further telephone contact will be permitted and that the only line of communication available will be via fax or mail. This helps you avoid unnecessary argument with the caller or disclosing information or making commitments over the phone. Believe it or not, many people are intimidated by what a collector will say over the phone, the requirement to correspond in writing usually eliminates this potential problem.

If any of these prohibitions apply to your particular situation, one or more of the templates published in this series can be modified to address and solve the problem.

Let's examine Sections 807 & 808 as well and see how they apply to what we want to accomplish. As you can see, there is a great deal of potential liability for the collector. I really cannot imagine how this type of business can even come close to being profitable, especially with other publications such as Winning The Collection Game® and educated consumers.

Section 807 describes what would constitute a false or misleading representation of the disputed account or collection attempt. It's not such a problem anymore, but in a few collection cases, we will see a collector who uses a letterhead to appear as if it were an attorney or law firm, or even a government agency. Sometimes a debt collector will use a "dba" (doing business as) or an actual corporate name, that sounds like a government agency with words such as "United" or "American" or "Department." Some of the examples include language such as "...from the offices of Peterson and Peterson" yet this name may be the debt collector's dba and not an actual law firm. Some debt collectors will obtain the consent of a local law firm to use their letterhead in written correspondence or to simply be able to mention that they are calling from an actual lawyer's office if they contact you by telephone, when in fact, the lawyer may be in another state or city and have no intention of representing the collector in an actual lawsuit against you. This does not happen very much, but it is good to be able to recognize these attempts to mislead you into thinking that the debt collector is something other than what it is legally. Obviously, the reason why a collector would take such measures would be to try and intimidate the consumer. Many consumers greatly fear being contacted by a debt collector and especially fear a debt collector's attorney or government agency.

Some debt collectors will misrepresent the status of the collection account by claiming (by phone or letter) that if you do not pay, they will take your car or garnish your paycheck, when in fact, they have not obtained any judgment. All debt collectors (except the government) must obtain a judgment by suing you and giving you the opportunity to answer and defend yourself. If you lose, the collector would obtain the judgment from the court, then file it on the public record in your county and begin "executing" its right to enforce the collection under the authority of the court and local sheriff's office. In order to take your property when no property is secured by the agreement creating the debt, the collector would need to post a bond with either the clerk of court or the sheriff's office and then apply to the court for a writ of execution and have it served by the sheriff before any property could be taken. The typical collection is a paycheck and not cars or even real estate. It can happen, but I cannot remember any single case in the thousands I have assisted with in the last eight years where this has happened.

In order for a collector to take your house, it would have to overcome any homestead exemptions and the amount of the collection would have to be high enough to justify the foreclosure. Again, I have never seen this happen, but I could imagine a time when it might be possible. Remember that the most valuable tool a debt collector has is using the fear of the consumer (fear of the unknown) to coerce a payment. One of the purposes of this course is to dispel that fear in your mind so that you can deal with any collection situation in a rational manner. Once you know what they can and cannot do, a debt collector will not be able to intimidate you. Once a debt collector cannot intimidate you, its collection efforts will be costly and worthless. The more money a debt collector spends to try and collect from anyone, the greater the likelihood that, not only will the collection not take place, but the debt collection industry will calculate

that this particular business enterprise is not very profitable. In fact, in the relatively short period of time that we have been publishing this information and educating consumers, I have seen various trends in the debt collection industry that would indicate this type of awareness is spreading throughout the debt collection industry. There are higher number of “contingency” collections, where the collector is simply hired to make one or two attempts to get a payment and must return the account to the creditor when it is not successful.

I think once you understand this course, you will realize that we would prefer to face the debt collector rather than the creditor, but we can surmise that if the creditor uses a debt collector at all, it probably does not have a budget to sue or to defend itself against a counter suit. This is the reason why we can be so successful at stopping debt collections.

While the debt collector may be able to use a dba, it cannot use a fictitious name unless it is registered with the state in which it is doing business and attempting a collection. In other words, the debt collector must be available to be sued or investigated and this cannot happen if collectors were permitted to make up business names with regulation.

In some cases, a debt collector may correspond using a form or other document that appears to be an official or legal document issued by a court. This is one of the recognized and illegal collection practices described under the last part of this section.

Section 808 of the statute describes what would be considered unfair practices employed in the course of attempting to collect a purported debt. It begins by saying that the limitations described in the following section do not limit the object of the statute, that means that even though the debt collector might not have violated the literal language of a particular provision, if it can be shown that the particular collection practice was unfair or unconscionable, then it will be considered a violation of the Act.

It further states that the debt collector cannot collect any amount of money that is not permitted by law or by the agreement. Because there is no agreement between the collector and the alleged debtor, no collection can be sustained. Paragraph 2 states that they cannot keep any post dated check longer than two weeks (approximately). We do not recommend paying the debt collector so this is not an issue. If the collector solicits you for a post dated check, he cannot do so while indicating that if you don't provide it, you may be indicted for a crime. You should not be having this type of conversation with a debt collector if you are following the program. They cannot charge you fees for communicating in any way, and they cannot threaten to take your property as if they had a right to repossess personal property without a court order. Obviously, post card communication would violate the privacy restrictions in the Act as well simply because anyone can read the contents of their correspondence which would probably include your personal information. And the return address or envelope cannot display information indicating in any way that the correspondence is from a debt collector.

There are many other defenses to collection instituted by a third party. The debt collector cannot provide the same services as the creditor did, so the contractual arrangement changes. It would be analogous to assigning a credit card debt to a loan shark and instead of getting sued, the loan shark hunts you down and shoots off your kneecaps. It's not an equitable agreement and there was no "meeting of the minds," a necessary element of any valid contract. This is known as "breach of contract" or the affirmative defense of "statute of frauds" (no contract in writing).

The "statute of frauds" has its origin from the English common law as early as 1677. It required certain classes of contracts to be in writing so as to avoid perjuries or false testimony when maintaining an action to enforce the terms of an agreement. Generally, the statute of frauds is concerned with agreements exceeding five hundred dollars in value, contracts which guaranty the debt of another, the sale of land, or those agreements that cannot, by their terms, be performed within a year. It has been adopted by many state legislatures in America and has nothing to do with "fraud" per se. It was formerly known as the statute of frauds and perjuries because, by securing an agreement in writing, the courts can better decide on the facts of the dispute and avoids perjured testimony by the parties.

Suppose you made an agreement with another person to purchase his property for a value of one thousand dollars. If you both agreed that a down payment of one-fourth of that was acceptable, then you might also agree to pay the balance over the next several months. That's a fair deal, but if you decided not to fulfill your end of the bargain by making those payments, and the seller never entered into a written agreement with you defining those particular terms, it would be very difficult to enforce through our court system.

You might argue that the seller agreed to accept payment on the balance over the next eighteen months, while the seller would argue that you agreed to pay him the balance within a week. An agreement in writing should prevent this type of dispute. The statute of frauds prevents costly disputes, as in this example. The parties would have simply referred to the written agreement, each knowing completely what the obligations were.

The statute of frauds can be used very effectively as an affirmative defense if a debt collector sues you. Here is an example of the language you could use in an affirmative defense.

"The purported contract or agreement falls within a class of contracts or agreements required to be in writing. The purported contract or agreement alleged in the complaint was not in writing and signed by defendant or by some other person authorized by defendant and who was to answer for the debt, default, or miscarriage of another person." In order to make this argument effectively, "statute of frauds" must be properly plead as an affirmative defense in your answer. You must review your state jurisprudence (case law) about this to determine the elements of facts which are required to be plead.

Another reason is that the debtor of a creditor cannot be responsible to third party collectors because our legal system does not provide a remedy for a individual (e.g. collector) who knowingly and voluntarily incurs a liability (takes the assignment of a debt) and then seeks to recover the purported balance from the debtor (former debtor). It would be analogous to arriving on the scene of a house fire, buying the house from the owner and then suing him for damages resulting from the fire.

There are certain principles of law that protect debtors from the collection efforts of third party debt collectors. One of those involves the concept that one cannot put oneself in harm's way and maintain a suit for damages resulting therefrom. It's such an old principle of law that it's found in Latin as "Scienti et volenti non fit injuria" in which the literal translation is "An injury is not done to one who knows and wills it."

This is what debt collectors must do when they assume the liability for collecting a debt from you on behalf of an assignor.

Furthermore, because there was no exchange of any benefit or detriment between the collector and former debtor, there is no enforceable agreement. A benefit or detriment would include a payment history to the collector, receiving products or services from the collector or some reliance by either party on the other to perform. Because these elements are not present, there is a "failure of consideration" and no valid contract or agreement.

In some cases, the creditor (assignor) makes an insurance claim for an assignment or claims it as a tax deduction. This is known as "accord and satisfaction" because the creditor accepted payment from a third party for the purported debt, or a portion of the purported debt. This renders the debt satisfied and legally uncollectible by the creditor or any subsequent assignees.

If the collector waits too long to file the suit or fails to serve it within the time limits, then the "doctrine of laches" or "statute of limitations" precludes any claims.

"Each cause of action, claim, and item of damages did not accrue within the time prescribed by law for them before this action was brought."

This is another example of an affirmative defense. Better known as the doctrine of laches or the statute of limitations for civil actions, it's a defense to bar claims in which the claimant waits too long to assert his rights. Today, it's governed by statute and imposes a time limit on most civil actions. It could be anywhere from two years to seven years in duration depending upon the subject matter of the dispute.

The legal affirmative defense of "failure of consideration" is another way of saying that there has never been any exchange of any money or item of value between plaintiff and defendant. Defendant has never entered into any contractual or debtor/creditor arrangements with plaintiff.

"Consideration" is a necessary element to prove the existence of a valid, binding and enforceable agreement (or contract). Consideration may be shown

in any form, and it must be valuable. It must give rise to a benefit and/or a detriment between two or more individual people or companies. In other words, if it can be shown that either party had even the option to benefit from the other, it might be enough to argue that there was valuable consideration for an alleged agreement. The terms of the agreement would need to be disclosed, and that is another defense to the claim that there was valuable consideration.

If there was consideration for an agreement, then there must also be terms that can be scrutinized in writing or by an analysis of an accounting ledger. For example, a ledger showing regular payments could be interpreted as the payee's right to receive those regular payments now and in the future.

The assignment may also not be valid. Although the assignment is permitted by normal business practices, the assignee (debt collector) is not named in the agreement so the debt is not owed to the collector. Because the creditor assigns the account to a third party, he waives his rights to collect, afterwards. There was no "meeting of the minds," a necessary element of a valid contract. This is known as "repudiation."

If there were terms of an assignment from the creditor to the collector, the customer was not a party to those terms, nor was he ever notified of the terms (if any), and most importantly, the customer of the original creditor had already calculated and assumed a certain number of risks (just like in any contract or agreement). When the assignment took place, that number and those types of risks changed and the customer was never given a fair opportunity to agree to the new risks. It was prejudicial to say the least. I have never seen an assignment agreement with any terms and it follows that I have never seen any customer included as a party to any assignment agreement. The assignment clause in the credit agreement is not sufficient to establish a new obligation with a un-named third party. The assignment clause is merely enough to allow the assignment, and thereby eliminate or abrogate any rights the creditor may have had before the purported assignment. While the assignment may be valid, because there are no terms and because there was no disclosure to the customer and because the customer never consented knowingly, and voluntarily to unknown or undisclosed terms, the collection of the debt cannot be enforced or maintained. The simple explanation, the assignment clause is enough to defeat the collection possibilities for both the creditor and debt collector.

The argument may look like this in court:

"The plaintiff is not an assignee for the purported agreement and no evidence appears on the record to support any related assumptions.

Plaintiff's complaint fails to allege a valid assignment and there are no averments as to the nature of the purported assignment or evidence of valuable consideration. Plaintiff's complaint fails to allege whether or not the purported assignment was partial or complete and there is no evidence that the purported assignment was bona fide. Plaintiff's complaint fails to allege that the assignor even has knowledge of this action or that the assignor has conveyed all rights

and control to the plaintiff. The record does not disclose this information and it cannot be assumed without creating an unfair prejudice against the defendant.”

We say that the “complaint fails to state a cause of action or a claim upon which relief can be granted” for several reasons. 1. The complaint fails to allege or prove that plaintiff is licensed and has procured a bond as required by law. 2. The complaint is not supported by any certified facsimile of a collection agency license. 3. The plaintiff is not a collection agency licensed or authorized to conduct a collection agency business in this state. 4. The plaintiff is not authorized or licensed to collect claims for others in this state, solicit the right to collect or receive payment of a claim of another. 5. Plaintiff is not authorized or licensed to advertise or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment of a claim for another, nor to seek to make collection or obtain payment of a claim on behalf of another. The complaint fails to allege any exception or exemption to these requirements. The plaintiff is not any of the following: an attorney at law; a person regularly employed on a regular wage or salary in the capacity of credit men or a similar capacity, except as an independent contractor; a bank, including a trust department of a bank, a fiduciary or a financing and lending institution; a common carrier; a title insurer or abstract company while doing an escrow business; a licensed real estate broker; an employee of a licensee; nor a substation payment office employed by or serving as an independent contractor for public utilities. 6. The complaint fails to allege necessary facts such as the terms of the purported agreement, the date that purported account was opened, the form of consideration given and the complaint is unsupported by any evidence, details or other information. Believe it or not, these conditions are usually always true.

The Fair Debt Collection Practices Act requires all debt collectors to validate the collection upon request of the purported debtor. Debt collectors cannot possibly validate the claim unless payment to the debt collector has been made by the customer of the assignor (original creditor). Although the legal requirements of validating a collection account can be met by producing the name and account information upon request, as in the Chaudhry v. Gallerizzo case, but the collector will have a very difficult time meeting the burden of proof and obtaining a judgment against you.

If you have not yet mailed your request for validation, you can send it in the mail, in a separate envelope, at the same time you file your answer to their complaint (for those that end up in court). Attach a copy of the request (or requests) with a copy of their collection notice or notices to your answer. In any case, a request for validation, or several of them, should be sent by first class mail to the debt collector and a copy of each request should be maintained for your records. Be sure to include a copy of the collection notice with your request for validation.

We collect and sometimes purchase transcripts from subscribers and attorneys using these strategies so that we can show how they work in practice for real collection lawsuits. The effectiveness of these strategies is continually

confirmed by these transcripts and we also use them as tutorials for those using them for the first time or without an attorney.