

**Fair Debt Collection Practices Act,  
15 USC 1692 et. seq.**

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**Elements of a FDCPA Claim**

- (1) Plaintiff is a consumer under 15 U.S.C. § 1692a(3) or §1692c(d).
  - (2) The debt at issue is a consumer debt under 15 U.S.C. §1692a(5).
  - (3) Defendant is a debt collector under 15 U.S.C. § 1692a(6).
  - (4) Defendant has violated, through act or omission, some part of the FDCPA.
- 29 Causes of Action 49 §(2005).



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**(1) Plaintiff is a consumer under  
§1692a(3) or §1692c(d)**

- The term “consumer” means “any natural person obligated or allegedly obligated to pay any debt.”
- For purposes of § 1692c (communication in connection with a debt), the term “consumer” includes the “consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator.”



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**(2) The debt at issue is a consumer debt under 15 U.S.C. §1692a(5)**

- The 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.”
- Summary Judgment is possible if there is no evidence it is a consumer (rather than a business) debt. *Garcia v. LVNV Funding*, 2009 U.S. Dist. LEXIS 85967 (TX 2009).



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**(3) Defendant is a debt collector under 15 U.S.C. § 1692a(6)**

- A “debt collector” is “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...” [exceptions].
- Purchaser of a defaulted debt is a debt collector. *Ruth v. Triumph Partnerships*, 577 F.3d 790 (7<sup>th</sup> Cir. 2009).
- May be a debt collector if debt collection is only a small amount of practice but it is done regularly. *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D.Mich. 1992).



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**(4) Defendant has violated, through act or omission, the FDCPA**

- **15 USC 1692c- Communication in Connection with a debt**
  - Phone calls must be between 8am & 9pm.
  - Must contact attorney if debtor is represented.
  - Must not call debtor’s work if prohibited by employer.
  - No communication with 3<sup>rd</sup> parties [exceptions].
  - Must cease communication if notified in writing [exceptions].
  - Cease communication not required if orally requested. *Sembler v. Attention Funding Trust*, 2009 U.S. Dist. LEXIS 79323 (E.D.N.Y. 2009).



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**(4) Defendant has violated, through act or omission, the FDCPA (cont.)**

- **15 USC 1692d- Harassment or Abuse**-A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse. Examples:
  - Use/threat of violence.
  - Obscene or profane language/abusive language.
  - Phone continuously ringing with intent to harass.
  - Calling without disclosure of identity.
  - Issues with voicemail- meaningful disclosure of identity versus third party disclosure.



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**(4) Defendant has violated, through act or omission, the FDCPA (cont.)**

- **15 USC 1692e- False or misleading representations** - A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.



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**15 USC 1692e- False or misleading representations - Examples**

- False representation of character/amount/status of debt.
- Threat to take any action that cannot legally be taken.
- Communicating/threatening to communicate false credit info.
- Failure to state that Defendant is a debt collector.
- Not a false representation to refer to placement amount as principal even though it includes interest. *Wahl v. Midland Credit Mgmt*, 556 F.3d 643 (7<sup>th</sup> Cir. 2009).
- Not a violation to rely on business records (rather than personal knowledge) when signing off on an affidavit, as long as it doesn't state it is based on personal knowledge. *Myers v. Asset Acceptance, LLC*, 750 F. Supp. 2d 864 (S.D. Ohio 2010).



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**(4) Defendant has violated, through act or omission, the FDCPA (cont.)**

- **15 USC 1692f- Unfair Practices-** may not use unfair/unconscionable means to collect/attempt to collect any debt.



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**15 USC 1692f- Unfair Practices- Examples**

- Collection of any amount not expressly authorized by agreement or permitted by law.
  - R.S.Mo. §408.020 and § 408.080; National Bank Act, §25, 12 U.S.C.A. §85.
  - Filing lawsuit based on time-barred debt violates FDCPA. *Herkert v. MRC Receivables Corp.*, 254 F.R.D. 344 (N.D. Ill. 2008).
  - Incorrect card agreement may be violation if amount sought is incorrect. *Avery v. Gordon*, 2008 U.S. Dist. LEXIS 86811 (D.Or. 2008), *Valdez v. Capital Management Services*, 2010 U.S. Dist. Lexis 121483 (S.D. TX 2010).



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**(4) Defendant has violated, through act or omission, the FDCPA (cont.)**

- **15 USC 1692g- Validation of debt-** Within five days after initial communication (unless provided initially), must give written notice of:
  - (1) amount of the debt;
  - (2) name of the creditor to whom the debt is owed;
  - (3) statement that debt presumed valid unless debtor disputes in 30 days;
  - (4) a statement that if debtor disputes the debt in writing in 30 days, collector will obtain verification of the debt and mail it to consumer;
  - (5) a statement that, upon written request in 30 days, collector will provide name and address of the original creditor.
- If written dispute in 30 days, must cease collection until debt verified.
- Failure to dispute is not an admission of liability.
- Formal pleading is not an initial communication.



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## Bona Fide Error Defense

- **15 USC 1692k(c)**- debt collector not liable if it shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
- Must be pled as affirmative defense, even in 517 cases. *Jerman v. Carlisle, McNellie, Rini, Ulrich LPA*, 559 U.S. 573 (2010); *KMS, Inc. v. Wilson* 857 S.W.2d 525(Mo.App. W.D., 1993).



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## Issues with Bona Fide Error Defense

- Discovery of company policies and procedures
  - Written policies and procedures
  - Written examinations
  - Training seminars
- Usually reserved for clerical errors
- Requiring client verification of amounts
- Repeated violations eliminate the defense
- Does not apply to mistakes of law re: interpretation of FDCPA



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## Damages under the FDCPA

- **15 USC 1692k(a)- Civil Liability**
  - actual damages.
  - statutory damage up to \$1,000.
  - costs and reasonable attorney's fees as determined by the court.
- Lodestar Method used for Attorney Fees.



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## Relief for Debt Collector

- **15 USC 1692k(a)(3)**
  - If suit brought in bad faith and for the purpose of harassment, the court may award attorney’s fees and costs to debt collector.
  - Costs recoverable even absent bad faith. *Marx vs. General Revenue Corporation*, 2013 U.S. LEXIS 1859 (2013).



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## Interpreting the FDCPA

- Just because a collection action is ultimately unsuccessful does not mean that a FDCPA violation was committed. *Heintz v. Jenkins*, 514 U.S. 291 (1995).
- One year statute of limitation to bring a FDCPA action. 15 USC §1692k(d).
- Least sophisticated consumer standard- Claims viewed from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression or abuse. *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 237 (2nd Cir. 1998).



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## Interpreting the FDCPA

- One action can violate multiple sections of the FDCPA. *Clark v. Capital Credit & Collection Serv.*, 460 F.3d 1162, 1177 (9th Cir. 2006), but only \$1,000 total statutory damages are allowed.
- Strict liability – no need to show intent. *Pollock v. Bay Area Credit Serv., LLC*, 2009 WL 2475167 (S.D. Fla. 2009).



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