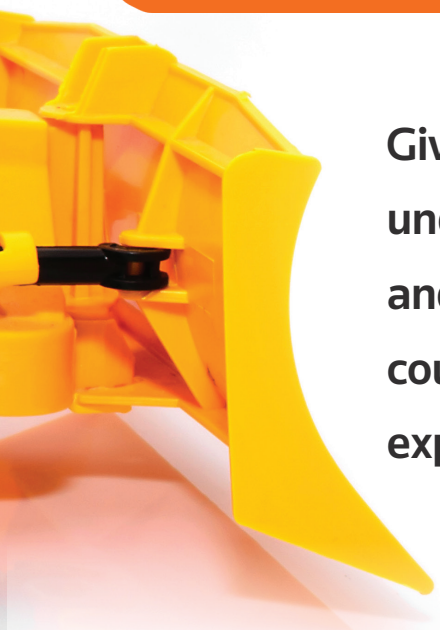
Aedka Studio/Shutterstock.com

FDCPA Litigation

KEY ISSUES AND CONSIDERATIONS



Given the dramatic rise in private consumer litigation under the Fair Debt Collection Practices Act (FDCPA) and the uncertainty of future regulatory enforcement, counsel must consider how best to limit their clients' exposure to liability under the statute.

COURTNEY H. GILMER
SHAREHOLDER
BAKER DONELSON

Courtney represents lenders, businesses, secured creditors, and creditor committees in bankruptcy proceedings, financial transactions, corporate reorganizations, and litigation. She has extensive experience counseling clients on corporate restructurings and workouts, bankruptcy, and commercial transactions, and guiding clients through complex commercial litigation. Courtney is the co-chair of the firm's Consumer Compliance Team.

JONATHAN E. GREEN
SHAREHOLDER
BAKER DONELSON

Jonathan focuses his practice on defending financial institutions and litigating real estate matters. He has substantial experience with complex litigation involving mortgage lending and servicing, real estate title issues, real property taxation, lender liability defense, and mortgage fraud. Jonathan is the co-chair of the firm's Consumer Compliance Team.

CRAIG NAZZARO
OF COUNSEL
BAKER DONELSON

Craig advises depository institutions, bankers, non-bank servicers, investors, and third-party service providers on issues of compliance, data privacy, and regulatory violations and investigations arising out of state and federal law. Before joining the firm, he was a vice president and assistant general counsel at J.P. Morgan Chase, where he managed a team of senior legal officers and attorneys in responding to government and regulatory inquiries.

Congress enacted the FDCPA in 1977 to eliminate abusive debt collection practices, ensure that debt collectors who refrain from abusive practices are not competitively disadvantaged, and promote consistent state action to protect consumers (15 U.S.C. § 1692(e); see *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010)).

The FDCPA generally prohibits debt collectors from making false or misleading representations, or engaging in abusive or unfair debt collection practices. It also imposes civil liability on debt collectors for certain prohibited practices. (*Heintz v. Jenkins*, 514 U.S. 291, 292-94 (1995); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 947-48 (9th Cir. 2011).)

Although the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB) share enforcement authority under the FDCPA and both have issued related regulations and informal guidance, private consumer lawsuits seeking to recover actual or statutory damages for FDCPA violations far outnumber agency enforcement actions. The volume of consumer litigation brought against debt collectors has dramatically increased over the last decade. According to the CFPB, private litigation under the FDCPA increased from 4,316 cases in 2007 to 11,697 cases in 2015 (see CFPB, Fair Debt Collection Practices Act Annual Report 2016, at 15 (Mar. 2016)).

This litigation trend likely will continue, given that the collection industry forecasts growth over the next five years due to a continuing rise in consumer debt levels (see Edward Rivera, IBIS World, *Debt Collection Agencies in the US: Market Research Report* (Dec. 2016), available at *ibisworld.com*). Moreover, plaintiffs' counsel are increasingly aggregating consumer claims for class action litigation.

This article examines the key issues that counsel should consider when litigating private consumer lawsuits under the FDCPA, including:

- The scope of the FDCPA.
- The entities and individuals covered by the FDCPA.
- The FDCPA's preemption of state law claims.
- The available damages and remedies under the FDCPA.
- The FDCPA provisions that most often form the basis for consumer claims.
- Common defenses to FDCPA claims.
- Special issues in FDCPA class actions.
- Best practices for minimizing FDCPA liability.

STATUTORY SCOPE

The FDCPA generally regulates the collection of consumer debt, which the statute defines as any obligation or alleged obligation of a consumer to pay debts for personal, family, or household purposes (15 U.S.C. § 1692a(5)). Examples include:

- Mortgages.
- Credit card debt.
- Medical debt.
- Student loan debt.

Contrary to popular belief, an offer or extension of credit is not required for a payment obligation to constitute a "debt" under the FDCPA. So long as the transaction creates an obligation to pay, debt is created. (*Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922, 924-25 (11th Cir. 1997); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1325 (7th Cir. 1997).)

Debt under the FDCPA therefore includes obligations relating to, for example:

- Homeowners' or condominium association dues (*Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477, 481-82 (7th Cir. 1997)).
- Dishonored checks (*Duffy v. Landberg*, 133 F.3d 1120, 1123-24 (8th Cir. 1998)).
- Residential rent (*Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998)).
- Water and sewer bills (*Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 687 (E.D. Pa. 2003)).

Courts also have held that the FDCPA governs collection efforts relating to debts owed by limited liability companies (see, for example, *Anarion Invs. LLC v. Carrington Mortg. Servs., LLC*, 794 F.3d 568, 570 (6th Cir. 2015)).

However, the FDCPA does not govern collection efforts relating to:

- Child support obligations (*Mabe v. G.C. Servs. Ltd. P'ship*, 32 F.3d 86, 88 (4th Cir. 1994)).
- Taxes (*Staub v. Harris*, 626 F.2d 275, 278-79 (3d Cir. 1980)).
- Debts owed for business or commercial purposes (15 U.S.C. § 1692a(5)).

REGULATED ENTITIES

The FDCPA defines debt collectors as "any person" who:

- Uses US mail or any instrumentality of interstate commerce in any business that has the principal purpose of either:
  - collecting debts; or
  - enforcing security interests.
- Regularly collects or attempts to collect consumer debts on behalf of another person or institution.
- Uses any name other than his own when collecting his own consumer debts, therefore indicating that a third party is attempting to collect the debts.

(15 U.S.C. § 1692a(6); see *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1313 (11th Cir. 2015).)

In addition to encompassing traditional third-party collection agencies, this statutory definition includes:

- Creditors collecting their own debt using an assumed name (15 U.S.C. § 1692a(6); see below *Creditors Versus Debt Collectors*).
- Attorneys who regularly collect debts through litigation (see below *Attorneys and Law Firms as Debt Collectors*).

The statute identifies several exceptions to the debt collector definition, including:

- Officers or employees of a creditor who collect debt in the creditor's name.
- Persons collecting debt for an affiliated corporation or another person related by common ownership, if debt collection is not

the person's principal business. This "common ownership" exception applies, for example, to a division of a corporation that collects only that corporation's debt.

- Government officers or employees collecting debt in their official capacity.
- Persons serving or attempting to serve legal process in connection with the judicial enforcement of any debt.
- Nonprofit organizations performing consumer credit counseling.
- Any person collecting debt that:
  - is incidental to a fiduciary obligation or an escrow arrangement;
  - was originated by that person;
  - was assigned to that person when the debt was not in default; or
  - was obtained by that person as a secured party in a commercial credit transaction involving the creditor.

(15 U.S.C. § 1692a(6)(A)-(F).)

CREDITORS VERSUS DEBT COLLECTORS

The FDCPA defines a creditor as any person:

- Who offers or extends credit, creating a debt.
- To whom a debt is owed.

(15 U.S.C. § 1692a(4).)

Although a creditor can be a debt collector under the FDCPA, not all creditors are debt collectors (see, for example, *Davidson*, 797 F.3d at 1313). Generally, the FDCPA applies to creditors who collect their own debt using an assumed name (15 U.S.C. § 1692a(6)). However, the FDCPA does not apply to so-called "first-party" debt collectors, defined as any person collecting debt:

- Originated by that person.
- Obtained by that person when the debt was not in default.

(15 U.S.C. § 1692a(6)(F)(ii), (iii).)

The federal circuit courts are split on whether the FDCPA applies to persons who purchase defaulted debt and attempt to collect on that debt. Some courts have held that collectors of purchased defaulted debt are debt collectors within the meaning of the FDCPA because they were assigned the debt "solely for the purpose of facilitating collection" for another entity (*Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 362-63 (6th Cir. 2012); *Ruth v. Triumph P'ships*, 577 F.3d 790, 796-97 (7th Cir. 2009); *FTC v. Check Inv'rs, Inc.*, 502 F.3d 159, 172-74 (3d Cir. 2007)).

By contrast, other courts have held that the statute does not apply to collectors of purchased defaulted debt because these purchasers have stepped into the creditor's shoes and become the owner of the debt (*Henson v. Santander Consumer USA, Inc.*, 817 F.3d 131, 135-36 (4th Cir. 2016); *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1209-10 (9th Cir. 2013); *Davidson*, 797 F.3d at 1313-16).

The US Supreme Court recently granted *certiorari* to resolve this issue (see *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 810 (2017)).

ATTORNEYS AND LAW FIRMS AS DEBT COLLECTORS

Attorneys and law firms are subject to regulation as debt collectors under the FDCPA if they regularly engage in consumer debt collection activity (*Heintz*, 514 U.S. at 292-95). This is true even where the attorney's or law firm's activity:

- Included litigation.
- Was directed at someone other than a consumer, such as a consumer's attorney.

(See, for example, *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1297 (11th Cir. 2015) (holding that court documents filed by an attorney in judicial proceedings are subject to the FDCPA if they are used to collect on a debt).)

Although law firms can be subject to the CFPB's supervision, the CFPB's supervisory efforts are limited by its larger participants rule for debt collection (*Defining Larger Participants of the Consumer Debt Collection Market*, 77 Fed. Reg. 65,775 (Oct. 31, 2012)). Under that rule, before supervising certain non-banking entities (including law firms), the CFPB generally must define the "larger participants" of the consumer debt collection market. A non-bank covered person (such as a law firm), is a larger participant of the consumer debt collection market if their annual receipts resulting from consumer debt collection are more than $10 million (12 C.F.R. § 1090.105(b)). However, all debt collection law firms remain subject to the CFPB's authority to bring an enforcement action under the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. § 5481(5), (6)).

Search CFPB Supervision and Enforcement Procedures and CFPB Issues Final Procedural Rule on Non-bank Supervision for more on the procedures the CFPB follows when examining supervised institutions.

PREEMPTION OF STATE LAW CLAIMS

When alleging FDCPA violations, consumers often bring claims under various state laws in the same action. Although most state debt collection laws and regulations are similar to the FDCPA, some are not. For example, some of these state regulations cover the original creditor, while others do not.

The FDCPA preempts state statutes, regulations, and common law governing debt collection practices to the extent the state law is inconsistent with the FDCPA. A state law that is more protective of the consumer is not considered inconsistent with the FDCPA. (15 U.S.C. § 1692n.)

The FTC may exempt certain debt collection activities from the FDCPA's requirements if the FTC determines that state laws both:

- Impose substantially similar requirements to those set by the FDCPA.
- Provide adequate enforcement mechanisms.

(15 U.S.C. § 1692o.)

DAMAGES AND REMEDIES

Consumers alleging an FDCPA violation may seek:

- **Actual damages.** A consumer can recover any out-of-pocket losses or other actual damages incurred as a result of the FDCPA violation (15 U.S.C. § 1692k(a)(1)). This can include

damages for emotional distress, even if the plaintiff suffered no economic damages. Different jurisdictions impose different thresholds to recovering damages for emotional distress. (See, for example, *Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1077-78 (E.D. Cal. 2007).)

- **Statutory damages.** Statutory damages are available without proof of actual damages under the FDCPA (see, for example, *Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 780-81 (9th Cir. 1982)). A plaintiff can recover up to:
  - $1,000 per proceeding (not per violation), in an individual action; or
  - $1,000 for each named plaintiff in a class action, and an award of the lesser of up to $500,000 or 1% of the debt collector's net worth, to be divided among all class members.

  (15 U.S.C. § 1692k(a)(2).)
- **Costs and reasonable attorneys' fees.** Although plaintiffs typically seek costs and attorneys' fees, a court may award a defendant reasonable attorneys' fees if it concludes that a consumer brought the action in bad faith and for the purpose of harassment (15 U.S.C. § 1692k(a)(3)).

When calculating damages in an individual action, courts must consider:

- The frequency and persistence of the debt collector's noncompliance.
- The nature of the noncompliance.
- Whether the noncompliance was intentional.

(15 U.S.C. § 1692k(b)(1).) In class actions, courts also must consider the debt collector's resources and the number of persons adversely affected (15 U.S.C. § 1692k(b)(2)).

The FDCPA does not expressly provide for injunctive relief in private consumer actions brought under the statute, and courts generally have found this relief to be unavailable (15 U.S.C. § 1692k; see, for example, *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 223-24 & n.1 (2d Cir. 2012) (collecting cases); but see *Schwarm v. Craighead*, 233 F.R.D. 655, 663 (E.D. Cal. 2006) (certifying injunctive class action in FDCPA lawsuit)).

Similarly, the statute does not explicitly authorize punitive damages, and a majority of courts considering the issue have determined that punitive damages are unavailable under the FDCPA (*Varnado v. Midland Funding LLC*, 43 F. Supp. 3d 985, 993 (N.D. Cal. 2014); *Gervais v. O'Connell, Harris & Assocs., Inc.*, 297 F. Supp. 2d 435, 440 (D. Conn. 2003)).

COMMON FDCPA CLAIMS

The FDCPA imposes liability on any debt collector who violates the statute "with respect to any person" (15 U.S.C. § 1692k(a)). Courts broadly interpret this language, holding that in addition to consumer debtors, other plaintiffs also have standing if they:

- Do not owe money but are subject to improper practices by debt collectors.
- "Stand in the shoes" of debtors (such as estate administrators).

(*Wright v. Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 650 (6th Cir. 1994) (*en banc*); *Kerwin v. Remittance Assistance Corp.*, 559 F. Supp. 2d 1117, 1123 (D. Nev. 2008).)

When evaluating potential FDCPA violations, courts use an objective standard based on whether the "least sophisticated consumer" would be deceived by the collection practice (see, for example, *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)).

Although the FDCPA imposes a variety of requirements, plaintiffs most frequently raise claims alleging that a debt collector violated the FDCPA by:

- Improperly communicating with consumers.
- Engaging in harassing or abusive conduct to collect a debt.
- Making false or misleading representations when collecting a debt.
- Employing unfair practices to collect a debt.
- Providing improper or incomplete consumer disclosures.
- Using improper payment processing methods.

IMPROPER COMMUNICATIONS

The FDCPA imposes certain procedural requirements on how, when, and where debt collectors may communicate with consumers when collecting a debt. These requirements apply to communications with consumers, as well as those with their spouses, parents (if the consumer is a minor), guardians, executors, or administrators (15 U.S.C. § 1692c(d)).

A consumer can recover any out-of-pocket losses or other actual damages incurred as a result of the FDCPA violation. This can include damages for emotional distress, even if the plaintiff suffered no economic damages.

Absent consumer consent or a court's express permission, these requirements include:

- **Time and place restrictions.** A debt collector may not contact consumers at an unusual time or place (15 U.S.C. § 1692c(a)(1)). Specifically, a debt collector:
  - typically may contact consumers only between the hours of 8:00 a.m. and 9:00 p.m. (15 U.S.C. § 1692c(a)(1)); and
  - may not contact a consumer at work if the debt collector knows or has reason to know that the consumer may not receive calls at work (15 U.S.C. § 1692c(a)(3)).
- **Contacting a consumer's attorney.** If a debt collector knows that a consumer is represented by an attorney with respect to a debt, then it must contact the attorney instead of the consumer. However, a debt collector may contact a consumer represented by counsel if the attorney:
  - fails to respond within a reasonable time period to a communication from the debt collector; or
  - consents to direct communication with the consumer.

  (15 U.S.C. § 1692c(a)(2).)
- **Honoring a consumer's written request to stop contact.** If a consumer sends either a written notice that he does not intend to pay the debt or a written request that a debt collector stop contacting the consumer, then the debt collector must not contact the consumer except to:
  - inform the consumer that there will be no further contact;
  - notify the consumer of impending legal action; or
  - notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

  (15 U.S.C. § 1692c(c).)
- **Not communicating with third parties associated with the consumer.** A debt collector may not communicate with any person other than:
  - the consumer;
  - the consumer's attorney;
  - a consumer reporting agency (if otherwise permitted by law);
  - the creditor or creditor's attorney; and
  - the debt collector's attorney.

  (15 U.S.C. § 1692c(b).)

HARASSMENT OR ABUSE

A debt collector may not harass, oppress, or abuse any person in connection with collecting a debt (15 U.S.C. § 1692d). Examples of harassment or abuse include:

- Using, or threatening to use, violence or other criminal means to harm the consumer's physical person, reputation, or property (15 U.S.C. § 1692d(1)).
- Using obscene or profane language (15 U.S.C. § 1692d(2)).
- Publishing the names of consumers who allegedly refuse to pay their debts, except to a consumer reporting agency (15 U.S.C. § 1692d(3)).
- Advertising a debt for sale to coerce payment of that debt (15 U.S.C. § 1692d(4)).
- Repeatedly or continuously calling a person with the intent to annoy, abuse, or harass any person (15 U.S.C. § 1692d(5)).

CFPB CALL FREQUENCY PROPOSAL

Collector Activity	No Confirmed Consumer Contact	Confirmed Consumer Contact
Attempts per unique address or phone number (per week)	3	2
Total contact attempts (per week)	6	3
Live communications (per week)	N/A	1

(CFPB, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*, at 26 (July 28, 2016).)

Courts have applied different standards to determine whether a debt collector has called repeatedly with the intent to annoy (see, for example, *Fausto v. Credigy Servs. Corp.*, 598 F. Supp. 2d 1049, 1056 (N.D. Cal. 2009) (finding that 200 repeated calls over a 19-month period could be viewed as actionably offensive)). The CFPB recently proposed the weekly limits on contact frequency (see *Box, CFPB Call Frequency Proposal*). Although not yet official guidance, plaintiffs might cite these proposed limits when pressing their claims.

- Calling without meaningful disclosure of the caller's identity (15 U.S.C. § 1692d(6)). However, a debt collector may use a desk name or an alias when contacting a debtor, so long as the debt collector accurately discloses his employer's name (see, for example, *Wright v. Credit Bureau of Ga., Inc.*, 548 F. Supp. 591, 597-98 (N.D. Ga. 1982)).

FALSE OR MISLEADING REPRESENTATIONS

Debt collectors may not use any false, deceptive, or misleading representations in connection with collecting a debt (15 U.S.C. § 1692e). Representations that violate the statute might include:

- **Statements that misrepresent the identity or authority of the caller.** This might include statements that:
  - falsely state or imply that the debt collector is affiliated with the US or any state government;
  - falsely state or imply that the debt collector is an attorney;
  - lie about the services rendered by the debt collector or the compensation it may receive;
  - in written communications, purport to be a document issued or approved by the US or any state government;
  - fail to disclose the caller's identity as a debt collector;
  - use a business name other than the true name of the debt collector's business; or
  - falsely state or imply that the debt collector is employed by a consumer reporting agency.
- **Statements that misrepresent details about the debt or the consumer.** This might include statements that:

- lie about the amount or status of the debt;
- falsely state or imply that nonpayment of the debt may result in imprisonment of the consumer and seizure of its property (unless the debt collector lawfully intends to take this action);
- threaten to take any unlawful action;
- falsely state or imply that selling or transferring the debt may cause the consumer to lose any claim or defense to the debt;
- falsely state or imply that the consumer has committed a crime;
- falsely state or imply that accounts have been turned over to innocent purchasers for value; or
- lie about the nature of documents or communications as legal process requiring action by the consumer.

- **Other deceptive conduct.** This catch-all category includes conduct that:
  - communicates information that the debt collector knows or should know is false; or
  - uses deception to collect or attempt to collect a debt or to obtain information concerning a consumer.

(15 U.S.C. § 1692e(1)-(16).)

UNFAIR PRACTICES

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. The statute specifies several unfair methods, including:

- Collecting interest, fees, charges, or other money from the consumer unless authorized by the agreement creating the debt or by law.
- Accepting a check or other payment postdated by more than five days, unless the debt collector informs the consumer in writing at least three business days, but not more than ten business days, before depositing the check.
- Soliciting a post-dated check or other payment instrument to threaten criminal prosecution for bouncing the check.
- Depositing or threatening to deposit a post-dated check before the date on the check.
- Charging the consumer for communications (for example, using collect telephone calls), by concealing the true purpose of the communication.
- Taking or threatening to take unlawful non-judicial action to repossess property.
- Communicating with a consumer using a post card.
- Using language or symbols, other than the debt collector's address, on any envelope when communicating with a consumer. A debt collector may use its business name, however, if the name does not indicate that it is in the debt collection business.

(15 U.S.C. § 1692f(1)-(8).)

IMPROPER OR INCOMPLETE DISCLOSURES

Within five days of a debt collector's initial communication with a consumer in connection with the collection of any debt, the debt collector must provide written notice that includes the following information:

- The amount owed.
- The creditor's name.
- A statement that:
  - the debt will be assumed to be valid, unless the consumer disputes the validity of the debt within 30 days after receiving the notice;
  - if the consumer disputes the debt within 30 days, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer, and mail copies to the consumer; and
  - if requested within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(15 U.S.C. § 1692g(a).) A debt collector may include these five pieces of information in its initial communication with the consumer if it chooses to, which would satisfy the requirement as well. Notably, a communication in the form of a formal pleading in a civil action is not treated as an initial communication (15 U.S.C. § 1692g(d)).

If the consumer disputes the debt or requests the name and address of the original creditor within the 30-day period, the debt collector must stop collection efforts until it obtains and mails to the consumer either:

- Verification of the debt or a copy of the judgment against the consumer.
- The name and address of the original creditor.

(15 U.S.C. § 1692g(b).)

IMPROPER PAYMENT PROCESSING

The FDCPA requires debt collectors to apply all payments received as instructed and only to undisputed debts (15 U.S.C. § 1692h). A debt collector's failure to do so gives rise to a claim under the statute.

COMMON DEFENSES TO FDCPA CLAIMS

Defendants in FDCPA actions typically argue that a plaintiff failed to satisfy specific statutory requirements needed to establish liability. For example, a defendant can point to a failure of proof relating to the alleged FDCPA violation. This type of challenge also can serve as grounds for dismissal under Federal Rule of Civil Procedure (FRCP) 12(b)(6) or a motion for summary judgment under FRCP 56.

Search Responding to a Complaint Toolkit for a collection of resources to help counsel file and respond to motions to dismiss in federal court.

Search Summary Judgment: Overview and Summary Judgment: Drafting and Filing a Summary Judgment Motion, Opposition, and Reply for more on moving for and opposing summary judgment in federal court.

In addition to challenging the plaintiff's proof, common defenses to FDCPA claims include:

- The expiration of the statute of limitations.
- The absence of an actual injury and constitutional standing.
- Bona fide errors.

STATUTE OF LIMITATIONS

A plaintiff must bring an FDCPA claim within one year from the date of the alleged violation (15 U.S.C. § 1692k(d)).

If a plaintiff's claims arise from multiple communications, some of which occurred inside the one-year period and others outside the period, the plaintiff may pursue FDCPA claims based on only the communications that occurred within the statutory period (*Pittman v. J.J. Mac Intyre Co. of Nev., Inc.*, 969 F. Supp. 609, 611 (D. Nev. 1997)).

ACTUAL INJURY AND CONSTITUTIONAL STANDING

Plaintiffs in FDCPA actions often seek statutory damages without regard to any actual injury, giving rise to questions of whether they suffered an injury-in-fact for Article III standing purposes.

The Supreme Court addressed these questions in *Spokeo, Inc. v. Robins*, where it held that Article III requires a plaintiff to demonstrate that he suffered an injury that is both concrete and particularized (136 S. Ct. 1540, 1544-45 (2016)).

At issue in *Spokeo* was whether a plaintiff has Article III standing where he has not suffered a concrete injury but can demonstrate the defendant's willful statutory violation. The Supreme Court clarified that Article III standing requires a concrete injury even in the context of a statutory violation, and that a bare procedural violation absent any concrete harm is insufficient. The Supreme Court further clarified that where a plaintiff alleges a procedural violation of a statutory right without any tangible harm, Article III's concreteness requirement might still be satisfied if the plaintiff suffered an "intangible" injury, which could be simply a "risk of real harm."

The Supreme Court said little in *Spokeo* about which intangible injuries would qualify, but noted that historical practice and Congressional judgment are relevant considerations. It also left much unanswered about when the mere risk of real harm would suffice, but notably cited *Clapper v. Amnesty International USA*, in which the Supreme Court stated that a "threatened injury must be certainly impending to constitute injury in fact" (133 S. Ct. 1138, 1147 (2013)). (*Spokeo*, 136 S. Ct. at 1547-50.)

The *Spokeo* decision might have opened the door for those defending themselves from FDCPA claims to use standing as a defense. For example, many claims brought under the FDCPA assert purely procedural statutory violations, without any other alleged harm. These are the types of violations that *Spokeo* suggested would be insufficient to confer Article III standing (see, for example, *Perry v. Columbia Recovery Grp., LLC*, 2016 WL 6094821, at *5-9 (W.D. Wash. Oct. 19, 2016) (holding that an alleged violation of FDCPA disclosure requirements does not confer Article III standing where the plaintiff does not allege that the debt was incorrect); but see *Church v. Accretive Health, Inc.*, 654 F. App'x 990, 994-95 (11th Cir. 2016) (*per curiam*) (finding that a bare violation of FDCPA disclosure requirements can create a concrete injury for Article III purposes); *Linehan v. Allianceone Receivables Mgmt., Inc.*, 2016 WL 4765839, at *7 (W.D. Wash. Sept. 13, 2016) ("Since *Spokeo*, the Eleventh Circuit and multiple district courts have considered whether a violation of the FDCPA itself confers standing on a plaintiff, and they have answered that question in the affirmative.") (collecting cases)).

BONA FIDE ERRORS

The FDCPA is a strict liability statute, and consumers are not required to prove an intentional FDCPA violation to recover under the statute (see, for example, *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996)). However, the bona fide error defense affords defendants a narrow carve-out to this general rule (15 U.S.C. § 1692k(c)). Specifically, a debt collector may avoid liability if the debt collector shows by a preponderance of evidence that:

- **The violation was unintentional.** However, the debt collector does not need to show that the communication or underlying act was unintentional (see, for example, *Johnson v. Riddle*, 443 F.3d 723, 728-29 (10th Cir. 2006); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 401-02 (6th Cir. 1998)).
- **The violation resulted from a bona fide error.** Although a bona fide error may be based on a clerical or factual mistake, the defense does not apply where the alleged violation was based on the advice of counsel or a debt collector's mistaken interpretation of the FDCPA's legal requirements (*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581-82 (2010); *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1273 (11th Cir. 2011)).

carolgaranda/Shutterstock.com

Because debt collection is routinely volume based, and relies on standardized forms and practices that are held to a strict liability standard under the FDCPA, consumers often bring FDCPA claims as class actions under FRCP 23.

- **The debt collector maintained and employed procedures "reasonably adapted to avoid" the error.** Examples of these procedures may include:
  - compliance training and audits;
  - document disposal procedures; or
  - regular updates to software and employee trainings and procedures.

  (See, for example, *Danielson v. Hicks*, 1995 WL 767290, at *3 (D. Minn. Oct. 26, 1995); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 389 (D. Del. 1991).)

SPECIAL CONSIDERATIONS FOR FDCPA CLASS ACTIONS

Because debt collection is routinely volume based, and relies on standardized forms and practices that are held to a strict liability standard under the FDCPA, consumers often bring FDCPA claims as class actions under FRCP 23. Defendants can sometimes defeat these class actions by:

- Challenging class certification.
- Making the lead plaintiff an offer of judgment under FRCP 68.

CLASS CERTIFICATION

As in any other class action, to obtain class certification in an FDCPA action, the class representative and named plaintiff must establish:

- **Numerosity.** The plaintiff must show that the class is so numerous that joining each individual plaintiff to the lawsuit is not practical. With the volume typical of most debt collectors, plaintiffs usually try to satisfy this requirement by showing how many accounts were subject to the debt collector's actions.
- **Commonality.** The plaintiff must demonstrate that the class action presents common questions of law or fact. Plaintiffs often try to satisfy this requirement by demonstrating that the alleged prohibited actions were the result of a form letter or an instituted practice.
- **Typicality.** The plaintiff must show that his claims are typical of those of the class. This requirement may be satisfied in an FDCPA class action where, for example:
  - the lawsuit alleges a pattern of wrongdoing;
  - the claims are based on the same form;
  - each of the class members was sent the same collection letter; and
  - each class member was allegedly subjected to the same violations of the FDCPA.
- **Adequacy of representation.** The named plaintiff must show that his interests are aligned with those of the class. In an FDCPA class action, this might also involve retaining class counsel who have litigated similar cases.

(FRCP 23(a); see, for example, *Abels v. JBC Legal Grp., P.C.*, 227 F.R.D. 541, 545-46 (N.D. Cal. 2005).)

Putative class representatives may pursue only statutory damages under the FDCPA (see above *Damages and Remedies*). This tactic avoids the need for individualized assessments of damages, which often prompt commonality and typicality challenges to class certification.

By seeking only statutory damages, class representatives might face an argument that they lack an actual, concrete injury, and therefore lack Article III standing (see above *Actual Injury and Constitutional Standing*). Additionally, proving a concrete injury could require a consumer-by-consumer inquiry that might be inconsistent with class certification.

For example, the *Spokeo* dissent argued that the plaintiff had adequately alleged injury because the nature of the alleged violation could affect the plaintiff's fortune in the job market (*Spokeo*, 136 S. Ct. at 1555-56 (Ginsburg, J. dissenting)). It is unlikely that the courts will deem this sort of individualized inquiry suitable for class action treatment in the future.

Search Class Action Toolkit: Certification for a collection of resources to help counsel with class action certification in federal court.

OFFERS OF JUDGMENT UNDER FRCP 68

Under FRCP 68, a defendant may make an offer to a plaintiff allowing for judgment on specified terms. In the context of class actions, defendants often invoke this rule to make pre-certification offers of judgment to representative plaintiffs in an effort to end the litigation before a class is certified. In the

context of FDCPA litigation, defendants regularly use FRCP 68 because the statutory damage provisions permit a defendant to offer complete monetary relief to the plaintiff and thereby terminate the potential exposure resulting from a class action.

The Supreme Court recently held that an unaccepted offer of judgment under FRCP 68 that fully satisfies the representative plaintiff's claim does not also moot the class claims (see *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670-72 (2016)). As a result, a defendant can no longer moot a putative class action simply by offering complete relief to the named plaintiff (see, for example, *Conway v. Portfolio Recovery Assocs., LLC*, 840 F.3d 333, 335 (6th Cir. 2016)).

Notably, the Supreme Court left open the issue of "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount" (*Campbell-Ewald Co.*, 136 S. Ct. at 672). In his dissent, Justice Alito built on this potential exception, noting that the decision "does not prevent a defendant who actually pays complete relief – either directly to the plaintiff or to a trusted intermediary – from seeking dismissal on mootness grounds" (*Campbell-Ewald Co.*, 136 S. Ct. at 685 & n.3 (Alito, J., dissenting)).

District courts are likely to see an increase in FRCP 68 offers with corresponding efforts at payment and entry of judgment from defendants who want to establish the boundaries of the potential exception. However, neither the majority nor Justice Alito determined the method of payment and the identity of the persons or entities that would qualify as a "trusted intermediary." If a defendant is unwilling to tender the funds directly to the plaintiff (using cash, check, MoneyGram, PayPal, or a similar method) or to the plaintiff's counsel (or plaintiff's counsel refuses attempts at payment), then, conceivably, the defendant could deposit the funds with the court, or create a bank or trust account for the sole benefit of the plaintiff.

Of course, the *Campbell-Ewald* decision does not affect FRCP 68 offers of judgment that a plaintiff accepted. These offers remain an effective strategy to eliminate a representative plaintiff before class certification, particularly if the plaintiff's underlying claims are weak.

Search FRCP 68 Offers of Judgment for more on the procedural framework and key considerations for offers of judgment under FRCP 68.

BEST PRACTICES TO MINIMIZE FDCPA EXPOSURE

Debt collection is a highly regulated business. To protect against litigation and regulatory exposure, debt collectors should:

- Implement and maintain a robust compliance management system around debt collection practices, including:
  - adopting detailed policies, procedures, control functions, audit, and quality assurance processes covering every aspect of FDCPA regulation; and
  - maintaining detailed records of how debt is serviced, and when and how collection attempts are made.
- Maintain a high standard for preserving and maintaining the records and documentation of purchased debt.
- Closely monitor the CFPB customer complaint database, which:
  - plaintiffs might use in current cases against specific collectors or for possible class actions; and
  - the CFPB uses to drive its supervisory and enforcement efforts.

The best defense against future litigation and regulatory liability is a strong offense, so counsel always should stay in front of regulatory developments. The CFPB currently is in the process of promulgating new rules to govern debt collection. Counsel should follow and understand this process and begin to prepare for these changes as soon as possible. It is currently expected that these rules will govern the activity of both first-party and third-party debt collectors, including information integrity, debt sales, expanded disclosures, and a prohibition on time-barred debt. (See CFPB, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*, at 5-22.)

The CFPB publishes its various activities, including any new guidance, filed *amicus* briefs, rule promulgation efforts, and its annual reports to Congress concerning the administration of its functions under the FDCPA. Counsel also should follow and review relevant enforcement actions and *amicus* briefs in the FDCPA space, to further minimize exposure under the statute.

Search Consumer Regulations Governing Debt Collection for more on the CFPB regulations governing debt collection.

Search CFPB Examinations and Investigations: Defense Strategies and Best Practices for information on the CFPB's examination and investigation processes, including its scope of authority, enforcement methods, and recent enforcement activity across different industries.