

Key Concept: Consumer Protectionism

The FDPCA didn't come out of nowhere. There had been egregious abuses of debtors by collection industry professionals for many years. When a new spirit of consumer protectionism was born during the Carter years, the industry became a tempting target for legislators looking to shore up support among their constituencies.

It's a trend that has continued and grown through the present day. Remember that consumer protectionism is the dominant paradigm as you assess your own commitment to compliance. "Living by the sword" may have worked for you in the past, but in fact, it's only a matter of time before you wind up on the wrong end of that peacemaker.

§ 803: Who's Who and What's What in the FDPCA

Any law begins with specific definitions of the terms employed in the law, to keep confusion (and loopholes) to a minimum. It's important to be well-acquainted with these definitions, which are often complex and even counterintuitive, before going wading through the code. §803, "Definitions", gives you a handle on who's who and what's what in the FDPCA.

The Federal Trade Commission. The federal regulatory body tasked with enforcement of the FDPCA is the *Federal Trade Commission* (FTC), referred to in the Act as "The Commission". Established in 1914 by the Federal Trade Commission Act, its primary purpose was to aid in President Woodrow Wilson's campaign against trusts. These days, its main focus is consumer protection. The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate. The Commissioners serve staggered seven-year terms and are nominated from both political parties.

The Commission collects, analyzes, and investigates consumer complaints against all kinds of businesses. A consumer may lodge a complaint in writing, over the telephone, or via the internet. If the Commission believes that a business has been operating illegally, it's empowered to offer a "consent order", a compromise between the offender and the Commission to end the illegal practices without further litigation. It may also file an administrative complaint or even initiate litigation in federal courts.

In combination with the courts, the power of the FTC is formidable. In certain circumstances it may freeze assets or enter business premises to collect and preserve evidence. It also has the authority to issue "Trade Regulation Rules", governing the actions of entire industries, though under the FDPCA, the Commission does not issue such rules for the collection industry. However, the Commission does generate reports to government and offers formal guidelines and informal opinions on laws and regulations. The Commission has published many such "staff opinion letters", "staff commentaries", "advisory opinions", and annual reports to Congress on the FDPCA.

Communication. A *communication* under the FDPCA is "the conveying of information regarding a debt directly or indirectly to any person through any

medium.” Until recently, it was thought that only letters to and actual contacts with debtors could be regarded as “communications.” However, recent court decisions have allowed a broader interpretation. In *Foti v. NCO* (March 2006), a pre-recorded message requesting a call back was held to be a communication. Since the recording obviously didn’t include a mini-Miranda statement for fear of a third-party disclosure claim (you’ll read more about the mini-Miranda later in this chapter), it was determined that NCO had violated the FDCPA. The judge rejected NCO’s argument that to require the mini-Miranda on a pre-recorded message would create a “Catch-22” for the collection agency, which would then be violating the law by making an unauthorized third-party disclosure. He pointed out that it was NCO’s decision to leave the pre-recorded message, and so the “Catch-22” was self-imposed. In the judge’s words, “...it does not seem unfair to require that one who goes deliberately close to an area of proscribed conduct shall take the risk that he may cross the line.”

In *Stinson v. Asset Acceptance* (June 2006) and *Hosseinzadeh v. M.R.S. Associates Inc.* (March 2005) judges ruled that *live* messages without a mini-Miranda disclosure constitute a violation. The decision has far-reaching ramifications for collection agencies and departments, which rely on their ability to leave messages for debtors in order to establish contact with them. It may be that in the future, collection agencies won’t be leaving messages on voicemails or with third parties.

To collection professionals, it may seem that this is contrary to the spirit of the FDCPA. It doesn’t seem likely that the legislators deemed leaving a message for a debtor requesting contact an “abusive practice.” If they’d thought so, they probably would have said so specifically in the law. But the language the legislators chose to define communication created a dispute, and so it was left to the judges to decide. It’s difficult to see how collection agencies can defend against such lawsuits in the future unless there’s an amendment to the law.

Debtor. A *debtor* is defined by the FDCPA as a “consumer”. That’s “a natural person obligated or allegedly obligated to pay any debt.” A “natural person” is an individual consumer, distinct from an organization such as a business. In addition, when a debt collector duns a wrong party, that party has been “alleged” to owe a debt, and therefore is protected under the FDCPA, just as the right party is.

Many states regard a spouse as coequally liable for household debts incurred by the other spouse under the “doctrine of necessities”. This is a common-law doctrine that guarantees the right of a spouse to use the credit of his or her wife or husband to purchase the “necessaries of life” for herself or her children. In addition, nine “community property states” recognize debts created during marriage to be the responsibility of both spouses. Therefore, a spouse may sometimes be held to be “jointly and severally liable” for a debt, even if he or she didn’t sign an agreement. Since in both of these cases, the spouse would be obligated to pay the debt, she’d be considered a “consumer” under the Act.

Hot Topic: Spousal Liability

In “doctrine-of-necessaries” states as well as in “community property” states, one spouse may be held liable for the household debts of the other spouse. The Doctrine of Necessaries allows a husband or wife to use each others’ credit for obtaining the necessities of life for themselves or their families; attendant to that right is the coequal responsibility of repayment. Community Property states hold that both partners in a marriage are jointly and severally liable for any debts either incurred during marriage.

Creditor. The definition of *creditor* makes a distinction between the credit grantor and the person or agency assigned to collect the debt. According to the FDCPA, a creditor is “any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.” The language “transfer of a debt in default” differentiates between overdue debt assigned to a collector and current debt that may be transferred to another lender, such as mortgage debt (which is routinely bought and sold) or other kinds of debt serviced by billing companies or other third parties.

Debt. According to the FDCPA, a *debt* is “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.” Therefore, commercial debts—those arising from a transaction that is commercial in nature, and not for personal, family, or household purposes—aren’t covered under the Act. Also the debt need not be alleged on the basis of a judgment by a judge in a court, but based merely on the assertion of the creditor.

Definition: Joint and Several Liability

When a debt is owed by more than one person, and when each person is fully responsible for repaying the entire debt, liability for the debt is said to be “joint and several.” This means that both parties will continue to be held responsible for the debt, regardless of what amount either pays, until the debt is paid in full. Most debts held by more than one debtor—such as rent debts, credit card debts, and even cosignorships—are joint and several liabilities.

Debt Collector. The term *debt collector* is also very specifically defined in the FDCPA. Under the Act, 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.” The definition goes on to include creditors who keep the debt in-house but collect it under another name: “... the