SiroteCFPB
COMPLIANCE SERIES

Debt Collection Under the CFPB's UDAAP Principles and the Fair Debt Collection Practices Act

2017 Kentucky/Tennessee Consumer Finance Convention

October 12, 2017

Hilton Sandestin Beach Golf Resort & Spa

Destin, FL 32550

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Sirote

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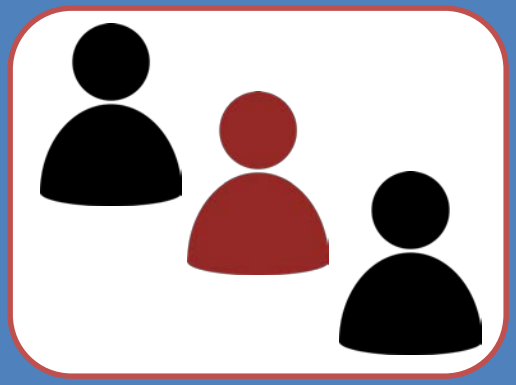
If you have any questions, please contact Sirote & Permutt, P.C. at 205-930-5100.

Thank you, and enjoy.

Sirote

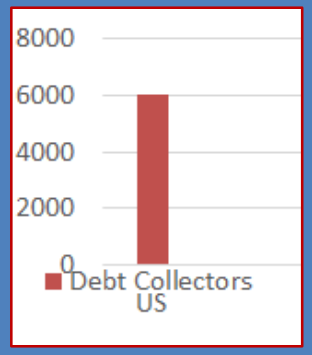


According to a recent CFPB study, about 1 out of 3 consumers had been contacted by a creditor or collector trying to collect a debt within the past year.

Most consumers contacted reported attempts to collect between 2 and 4 debts.[1]

Over 40% of consumers who said they were approached about a debt in collection asked the creditor or collector to stop calling, and 3 out of 4 of these consumers reported the creditor or collector did not honor that request. [3]

The CFPB found that over 27% of consumers contacted by debt collectors felt threatened.[3]



More than **6,000** debt collection firms operate in the U.S.[3]

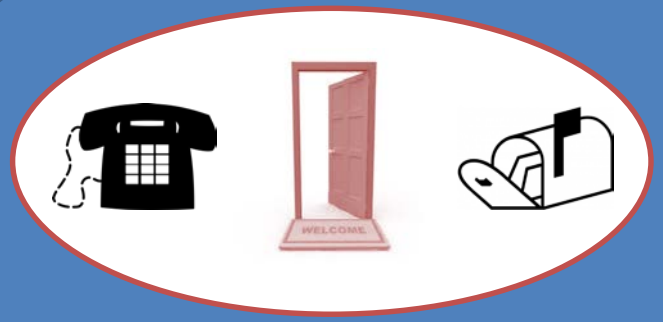
In a recent study, **53%** of consumers who were contacted about a debt in the prior year said at least one collection effort was erroneous .[3]

37% of consumers contacted about a debt stated the most recent creditor/collector contacted **4** or more times a week. **20%** said **4** to **7** times a week. **17%** said **8** or more times per week.[3]

36% of consumers who were contacted about a debt in collection said the credit or collector called between **9pm** and **8am**.[3]

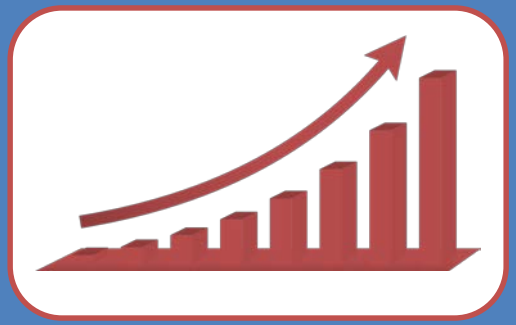
Lawsuits are reportedly filed against **15%** of consumers contacted about a debt in collection. About **75%** of those sued do not go to the court hearing.[3]

According to the CFPB study, medical bills, credit cards and student loans are the most common debts for consumers to be contacted about. [4]

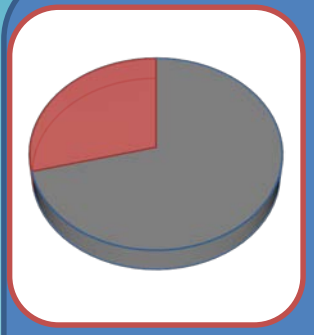


The CFPB study indicates that consumers would rather be contacted by telephone or mail. In-person collections is the least desirable method for consumers. [4]

Based on CFPB data, debt collection is consistently the most-complained-about industry– and it has been for over **3** years. [2]



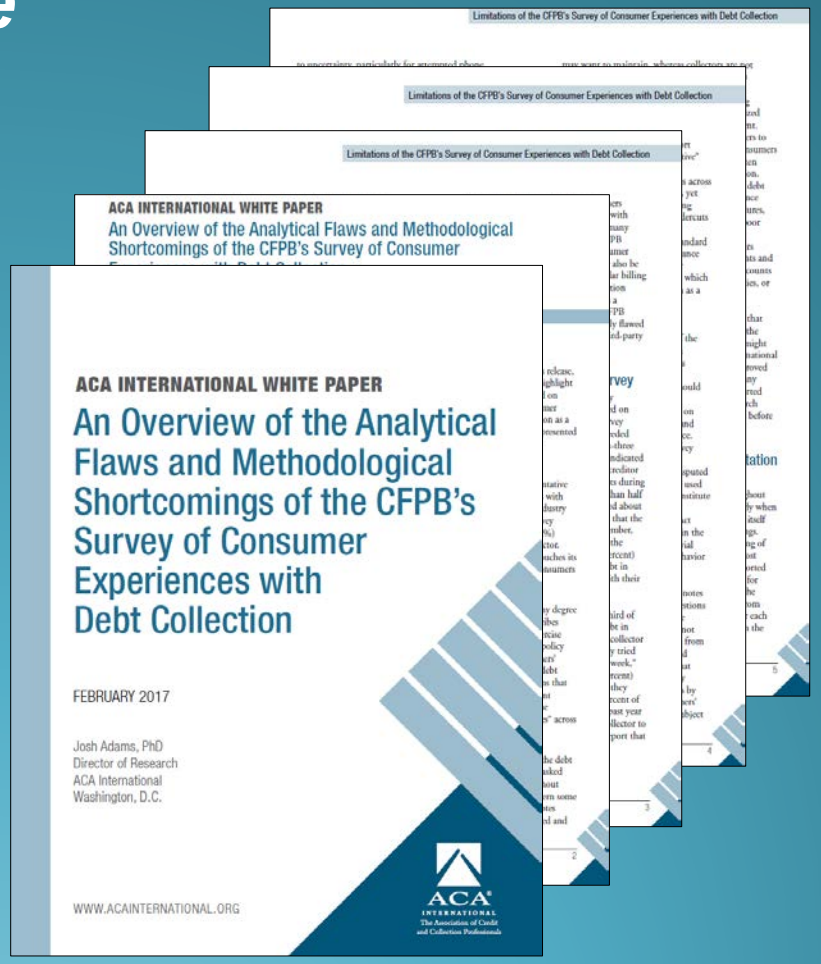
The most common complaints are collecting from the wrong consumer, collecting the wrong amount and that the debt cannot be legally enforced.[1]



As of December 2016, debt collection complaints accounted for over **29%** of all complaints. [2]

ACA International White Paper Response [5]

- **Study unfairly characterizes debt collection as a predatory industry**
- **Overall sample size is “remarkably small.”**
- **Lack of legal context and definition to questions.**
- **Using percentages rather than raw numbers is unclear and leads to overestimation of findings.**
- **Fuzzy distinctions between original creditors and third-party collectors.**



Overview of Presentation

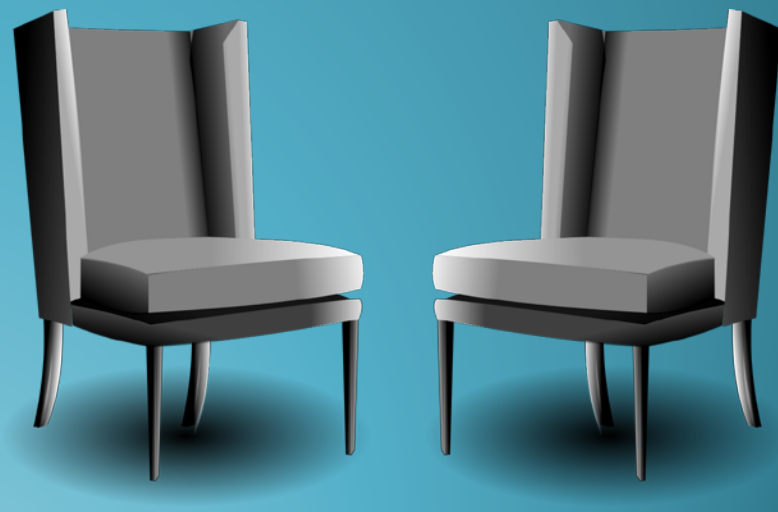
Consumer Financial Protection Bureau

- Categories of Debt Collectors: Original Creditors, Third-Party Debt Collectors, Debt Buyers

- Overview of Applicable Laws: FDCPA, UDAAP and other CFPB Initiatives, State Laws

- Best Practices for Debt Collection in the
- 21st Century

- Discussion Format; Questions and Answers throughout the Presentation



Categories of Companies Collecting Debt

Original Creditors

A company that offers or extends credit creating a debt or to whom the debt is owed. In other words, the originating creditor.

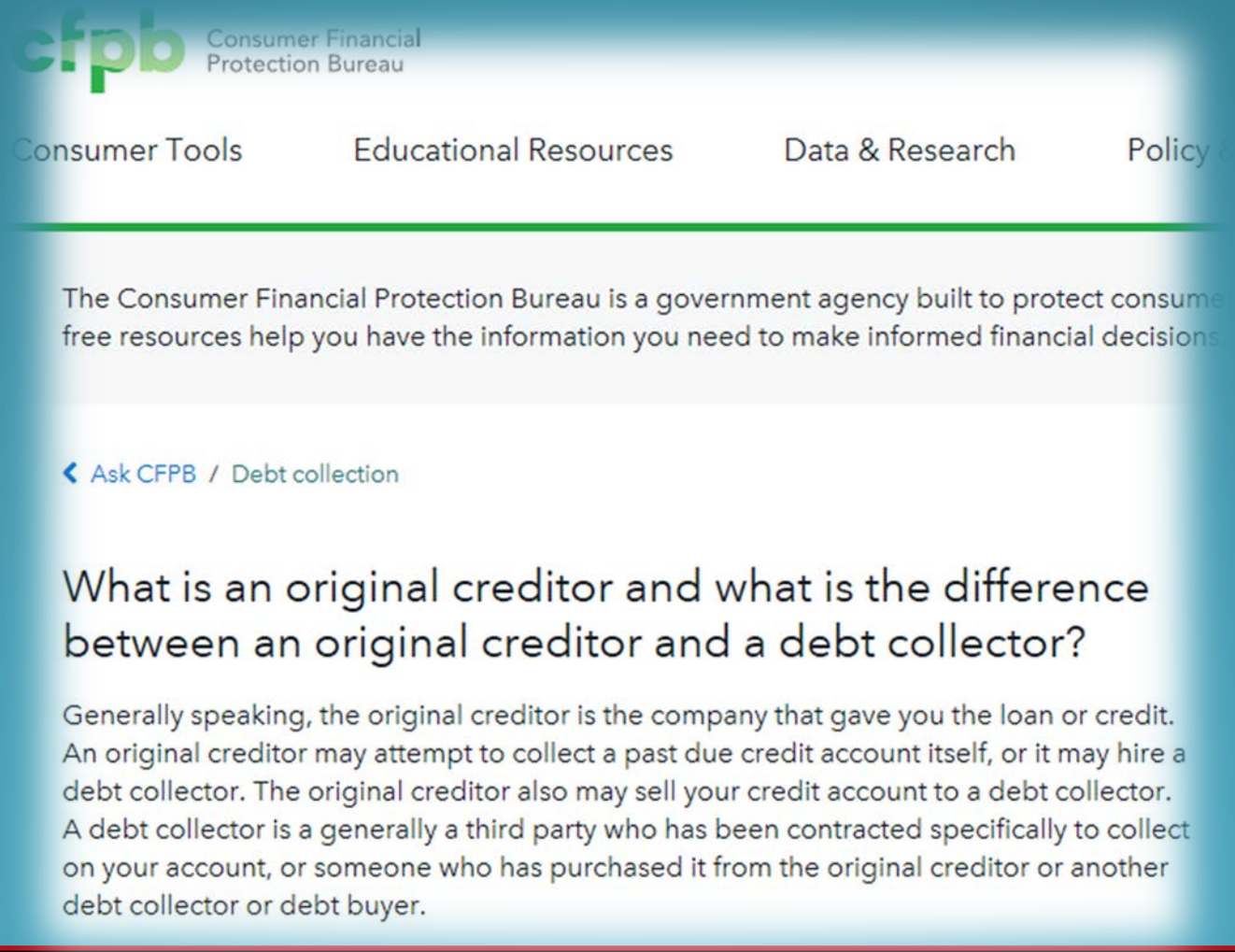
Third-Party Collectors

A third-party company that collects debts owed to another company.

Debt Buyers

A company that purchases debts from the original creditor or another debt buyer. The debt buyer owns the account, and the consumer is liable to the debt buyer, not the originating creditor.

CATEGORIES OF COMPANIES COLLECTING DEBT



Categories of Companies Collecting Debt

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Original creditors using a different name when collecting its own debts

Original creditors collecting debts through affiliated companies

Categories of Companies Collecting Debt

Third-Party Collectors

A third-party company that collects debts owed to another company.

Categories of Companies Collecting Debt

Acquisition of accounts in good standing

Acquisition of accounts in default

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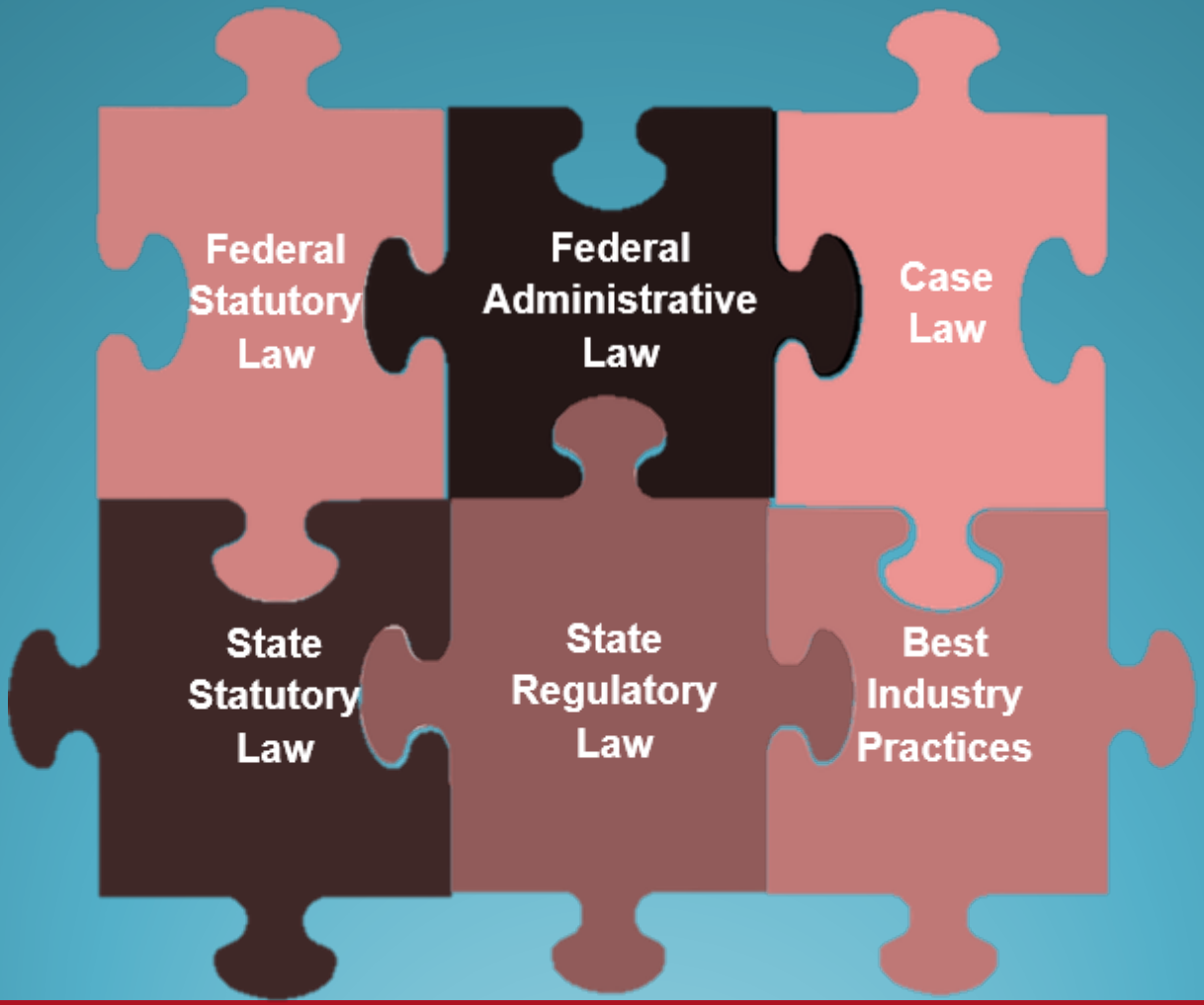
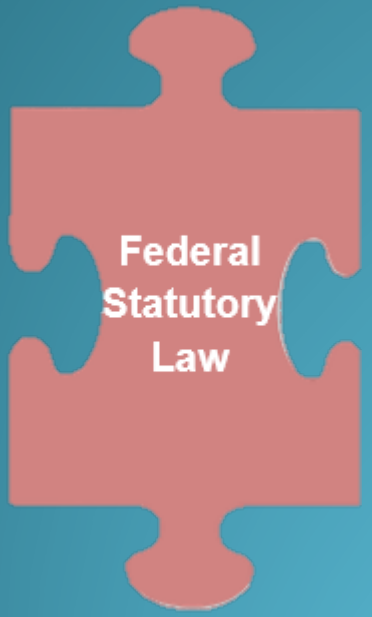
Debt Collection Laws

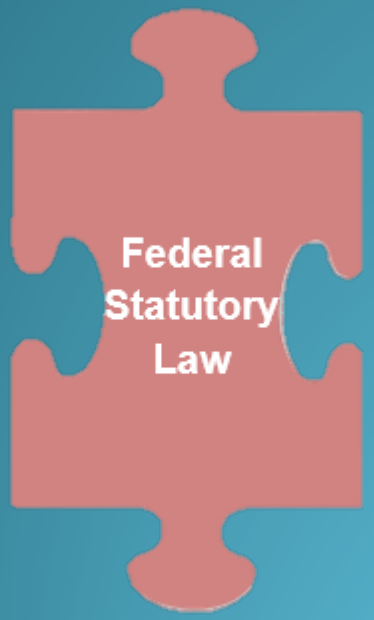


Debt Collection Laws



Debt Collection Laws

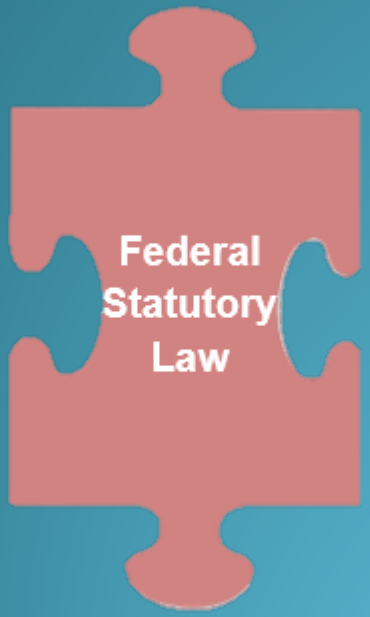
Fair Debt Collection Practices Act (FDCPA)



- 15 USC § 1692
- Adopted in 1977 and amended
- Key Federal law governing debt collectors
- Purpose: "[T]o eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

DEBT COLLECTION LAWS

FDCPA – *Who's Covered?*



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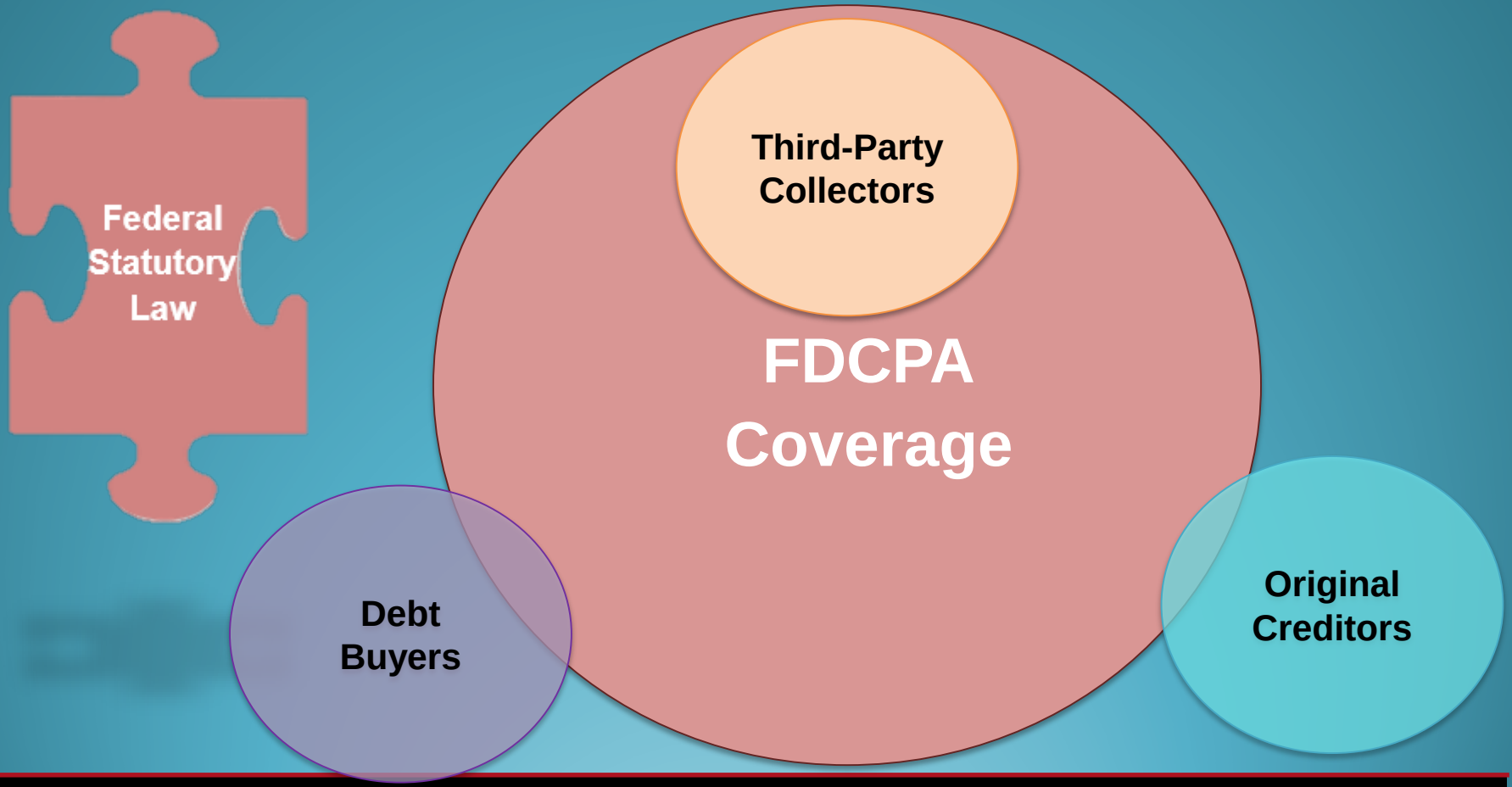

DEBT COLLECTION LAWS

FDCPA – *Who's Covered?*

(6) The term "debt collector" means 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. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include --

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment

DEBT COLLECTION LAWS

(4) The term "creditor" means 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.

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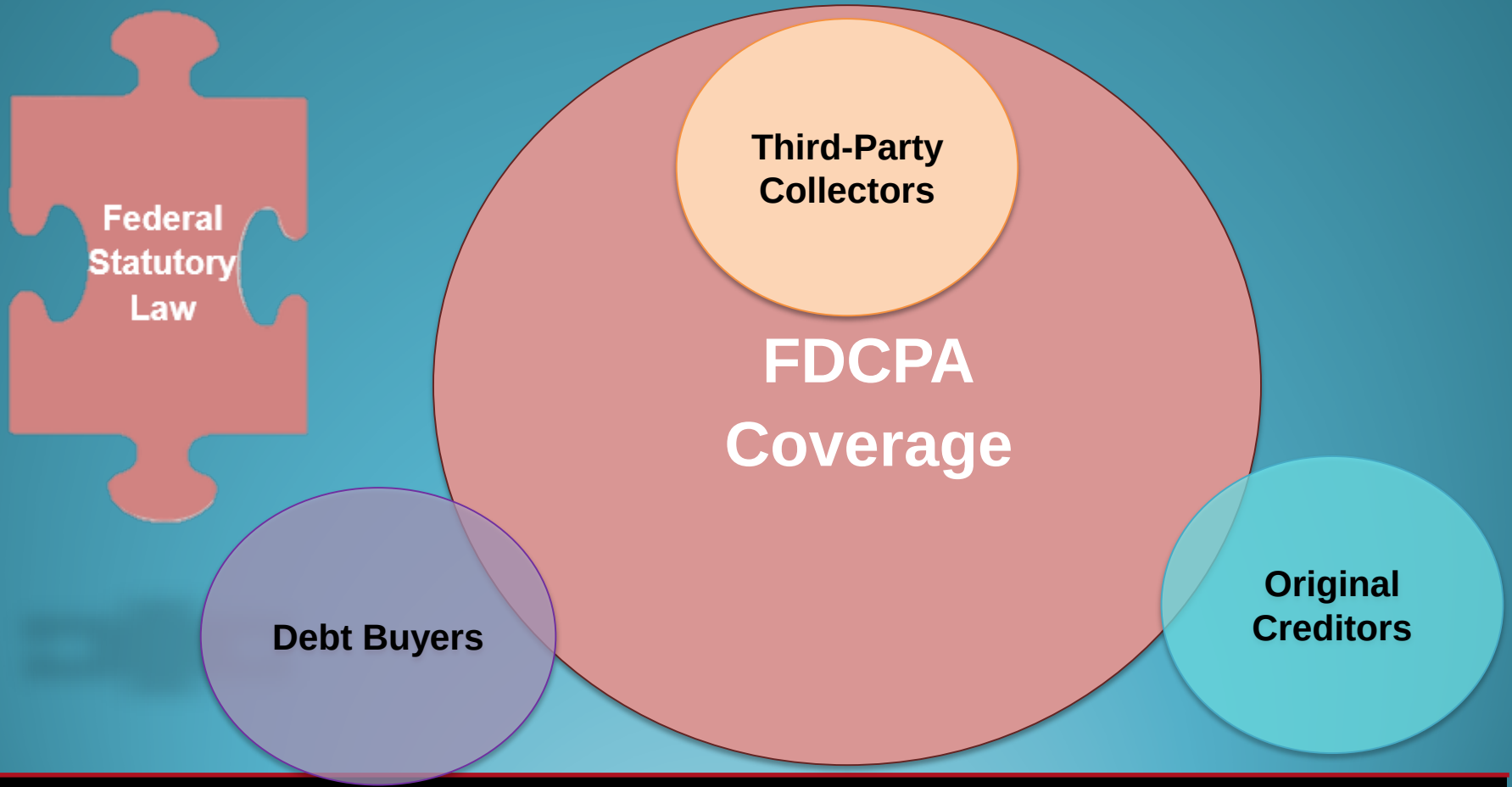
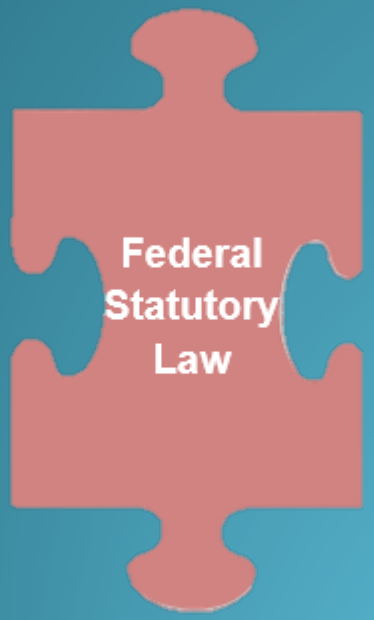
DEBT COLLECTION LAWS

FDCPA – *Who's Covered?*



DEBT COLLECTION LAWS

FDCPA – *What does it require?*



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Debt Collection Laws

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

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Debt Collection Laws

CFPB Efforts - *UDAAP*

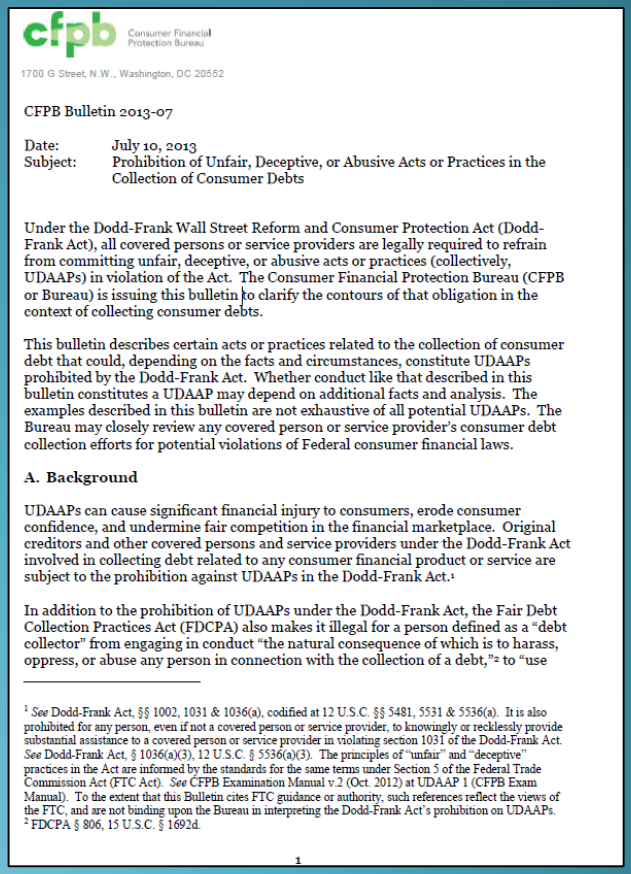
Unfair, **D**eceptive, or **A**busive **A**cts or **P**ractices (UDAAP) - Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act make it unlawful for a finance company to engage in UDAAP. The CFPB is charged with detecting and assessing risks to consumers from UDAAP.

DEBT COLLECTION LAWS

CFPB Efforts - *UDAAP*

CFPB Bulletin 2013-07: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

July 10, 2013



cfpb Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-07

Date: July 10, 2013
Subject: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) in violation of the Act. The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this bulletin to clarify the contours of that obligation in the context of collecting consumer debts.

This bulletin describes certain acts or practices related to the collection of consumer debt that could, depending on the facts and circumstances, constitute UDAAPs prohibited by the Dodd-Frank Act. Whether conduct like that described in this bulletin constitutes a UDAAP may depend on additional facts and analysis. The examples described in this bulletin are not exhaustive of all potential UDAAPs. The Bureau may closely review any covered person or service provider's consumer debt collection efforts for potential violations of Federal consumer financial laws.

A. Background

UDAAPs can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace. Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act.[1]

In addition to the prohibition of UDAAPs under the Dodd-Frank Act, the Fair Debt Collection Practices Act (FDCPA) also makes it illegal for a person defined as a "debt collector" from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt,"[2] to "use

[1] *See* Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a). It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. *See* Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3). The principles of "unfair" and "deceptive" practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act). *See* CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1 (CFPB Exam Manual). To the extent that this Bulletin cites FTC guidance or authority, such references reflect the views of the FTC, and are not binding upon the Bureau in interpreting the Dodd-Frank Act's prohibition on UDAAPs.
[2] FDCPA § 806, 15 U.S.C. § 1692d.

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DEBT COL

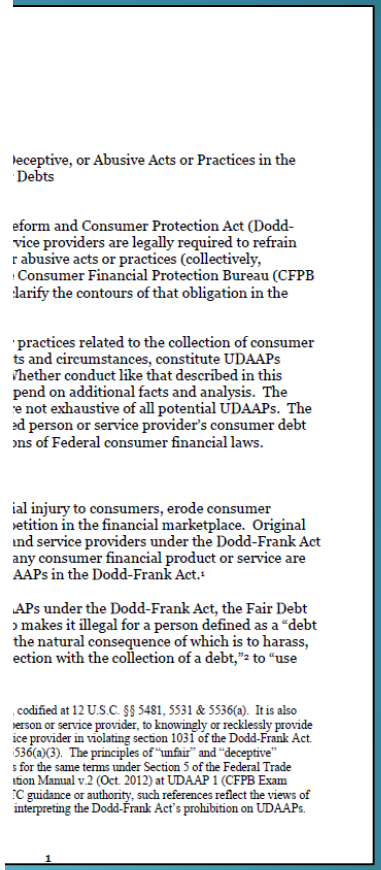
C

Federal Administrative Law

C. Examples of Unfair, Deceptive and/or Abusive Acts or Practices

Depending on the facts and circumstances, the following non-exhaustive list of examples of conduct related to the collection of consumer debt could constitute UDAAPs. Accordingly, the Bureau will be watching these practices closely.

- Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.[26]
- Failing to post payments timely or properly or to credit a consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.[27]
- Taking possession of property without the legal right to do so.
- Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers.[28]
- Falsely representing the character, amount, or legal status of the debt.
- Misrepresenting that a debt collection communication is from an attorney.
- Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.
- Misrepresenting whether information about a payment or non-payment would be furnished to a credit reporting agency.[29]
- Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.[30]
- Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.



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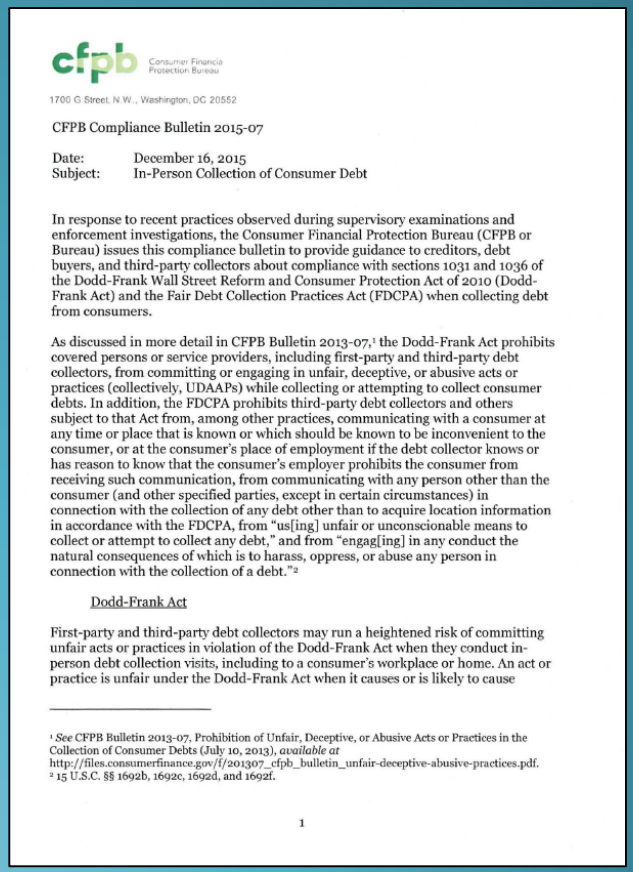
DEBT COLLECTION LAWS

CFPB Efforts - *UDAAP*

CFPB Bulletin 2015-07: In-Person Collection of Consumer Debt

December 16, 2015



cfpb Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Compliance Bulletin 2015-07

Date: December 16, 2015
Subject: In-Person Collection of Consumer Debt

In response to recent practices observed during supervisory examinations and enforcement investigations, the Consumer Financial Protection Bureau (CFPB or Bureau) issues this compliance bulletin to provide guidance to creditors, debt buyers, and third-party collectors about compliance with sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) and the Fair Debt Collection Practices Act (FDCPA) when collecting debt from consumers.

As discussed in more detail in CFPB Bulletin 2013-07,[1] the Dodd-Frank Act prohibits covered persons or service providers, including first-party and third-party debt collectors, from committing or engaging in unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) while collecting or attempting to collect consumer debts. In addition, the FDCPA prohibits third-party debt collectors and others subject to that Act from, among other practices, communicating with a consumer at any time or place that is known or which should be known to be inconvenient to the consumer, or at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication, from communicating with any person other than the consumer (and other specified parties, except in certain circumstances) in connection with the collection of any debt other than to acquire location information in accordance with the FDCPA, from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," and from "engag[ing] in any conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[2]

Dodd-Frank Act

First-party and third-party debt collectors may run a heightened risk of committing unfair acts or practices in violation of the Dodd-Frank Act when they conduct in-person debt collection visits, including to a consumer's workplace or home. An act or practice is unfair under the Dodd-Frank Act when it causes or is likely to cause

[1] *See* CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), *available at* http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.
[2] 15 U.S.C. §§ 1692b, 1692c, 1692d, and 1692f.

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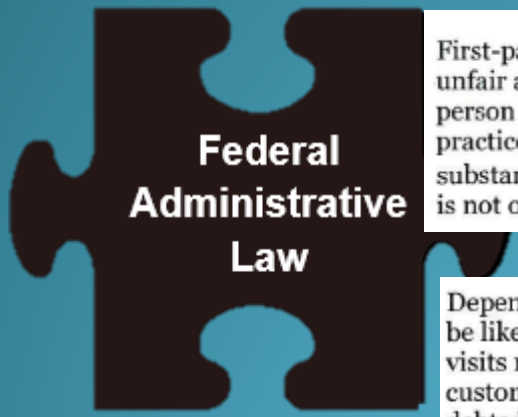
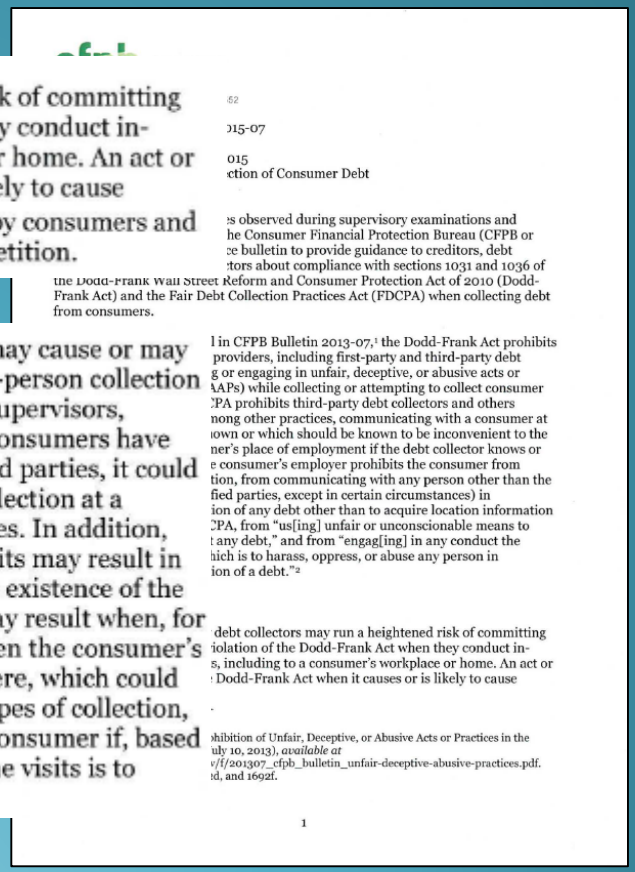
DEBT COLLECTION LAWS

CFPB Efforts - *UDAAP*



First-party and third-party debt collectors may run a heightened risk of committing unfair acts or practices in violation of the Dodd-Frank Act when they conduct in-person debt collection visits, including to a consumer's workplace or home. An act or practice is unfair under the Dodd-Frank Act when it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition.

Depending on the facts and circumstances, in-person collections may cause or may be likely to cause substantial injury to consumers. For example, in-person collection visits may result in third parties, such as consumers' co-workers, supervisors, customers, roommates, landlords, or neighbors learning that the consumers have debts in collection. When such information is revealed to such third parties, it could harm the consumer's reputation and, with respect to in-person collection at a consumer's workplace, result in negative employment consequences. In addition, depending on the facts and circumstances, in-person collection visits may result in substantial injury to consumers even when there is no risk that the existence of the debt in collections will be disclosed to third parties. Such injury may result when, for example, a collector goes to a consumer's place of employment when the consumer's employer prohibits the consumer from having personal visitors there, which could also result in negative employment consequences. As with other types of collection, in-person visits may also be likely to cause substantial injury to a consumer if, based on the facts and circumstances, a likely or actual consequence of the visits is to harass the consumer.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the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) and the Fair Debt Collection Practices Act (FDCPA) when collecting debt from consumers.

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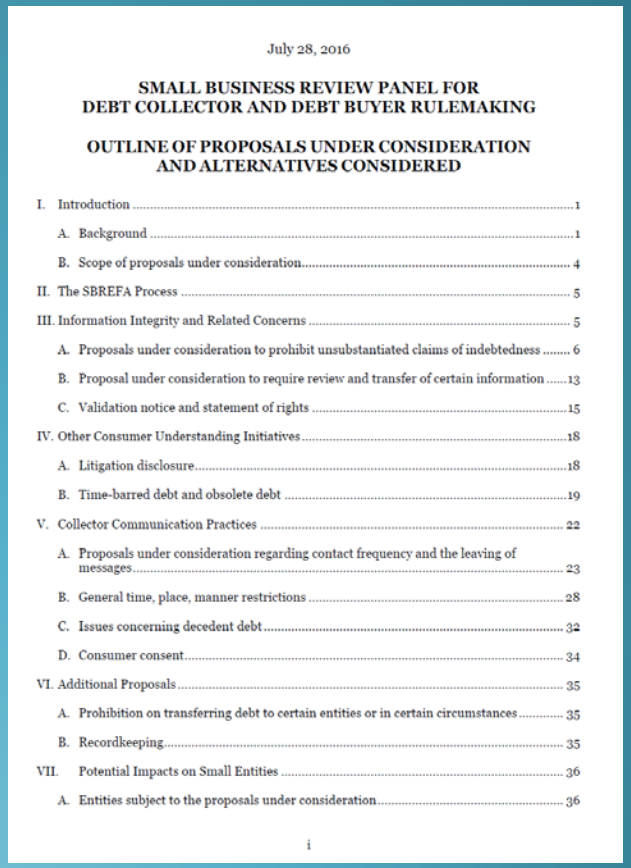
Debt Collection Laws

CFPB Efforts - *FDCPA*

Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking

Outline of Proposals under Consideration and Alternatives Considered

July 28, 2016



July 28, 2016

SMALL BUSINESS REVIEW PANEL FOR
DEBT COLLECTOR AND DEBT BUYER RULEMAKING

OUTLINE OF PROPOSALS UNDER CONSIDERATION
AND ALTERNATIVES CONSIDERED

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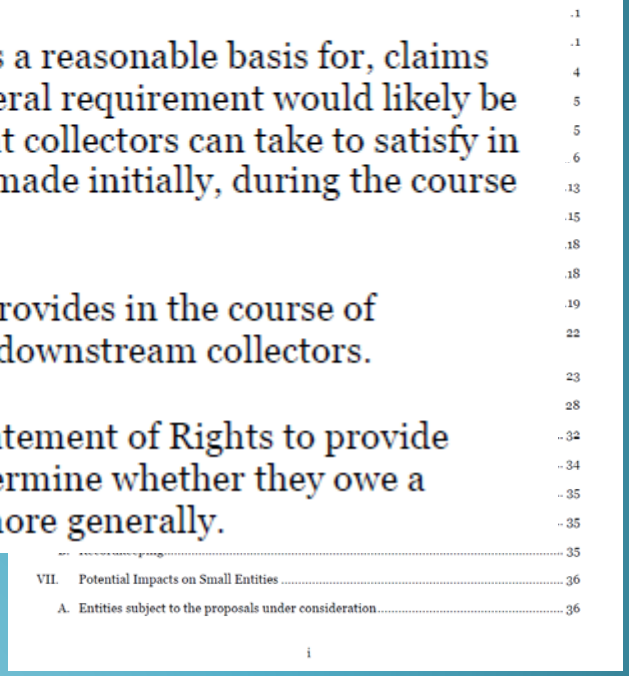
DEBT COLLECTION LAWS

The Bureau believes that these two problems combine to substantially harm consumers and to increase downstream costs to debt collectors, frequently rendering the debt collection process inefficient and frustrating for all participants. As discussed below, the Bureau believes poor information transfer may also contribute to other debt collection problems addressed in other parts of this Outline. Accordingly, the Bureau is considering three major interventions to address these two sets of problems:

- A requirement that debt collectors "substantiate," or possess a reasonable basis for, claims that a particular consumer owes a particular debt. This general requirement would likely be combined with provisions describing more specific steps that collectors can take to satisfy in part their obligation to substantiate claims of indebtedness made initially, during the course of collections, and before filing litigation.
- A requirement that certain information that the consumer provides in the course of collections with one collector be passed on and reviewed by downstream collectors.
- Provision of an improved FDCPA validation notice and a Statement of Rights to provide consumers with the most critical information needed to determine whether they owe a particular debt and to navigate the debt collection process more generally.



VII. Potential Impacts on Small Entities 36
A. Entities subject to the proposals under consideration 36

DEBT COLLECTION LAWS

FDCPA Case Law

According to the CFPB, over the last five years, consumers have brought over 50,000 FDCPA cases. In 2015 alone, over 12,000 FDCPA lawsuits were filed. [6]

collectors have violated the FDCPA, with nearly 12,000 such lawsuits being filed in 2015.[8] While these cases may bring redress for those involved, differing court decisions or decisions in different jurisdictions have created some splits in the FDCPA's interpretation. These decisions can create uncertainty for consumers and industry alike.

DEBT COLLECTION LAWS

FDCPA Case Law

Henson v. Santander Consumer USA, Inc., 817 F.3d 131 (4th Cir. 2016)

- Consumers claimed that Santander violated FDCPA in collecting auto-loan deficiencies. The loans were originally made by CitiFinancial Auto. CitiFinancial foreclosed and then sold the defaulted loans to Santander as part of a portfolio of receivables.

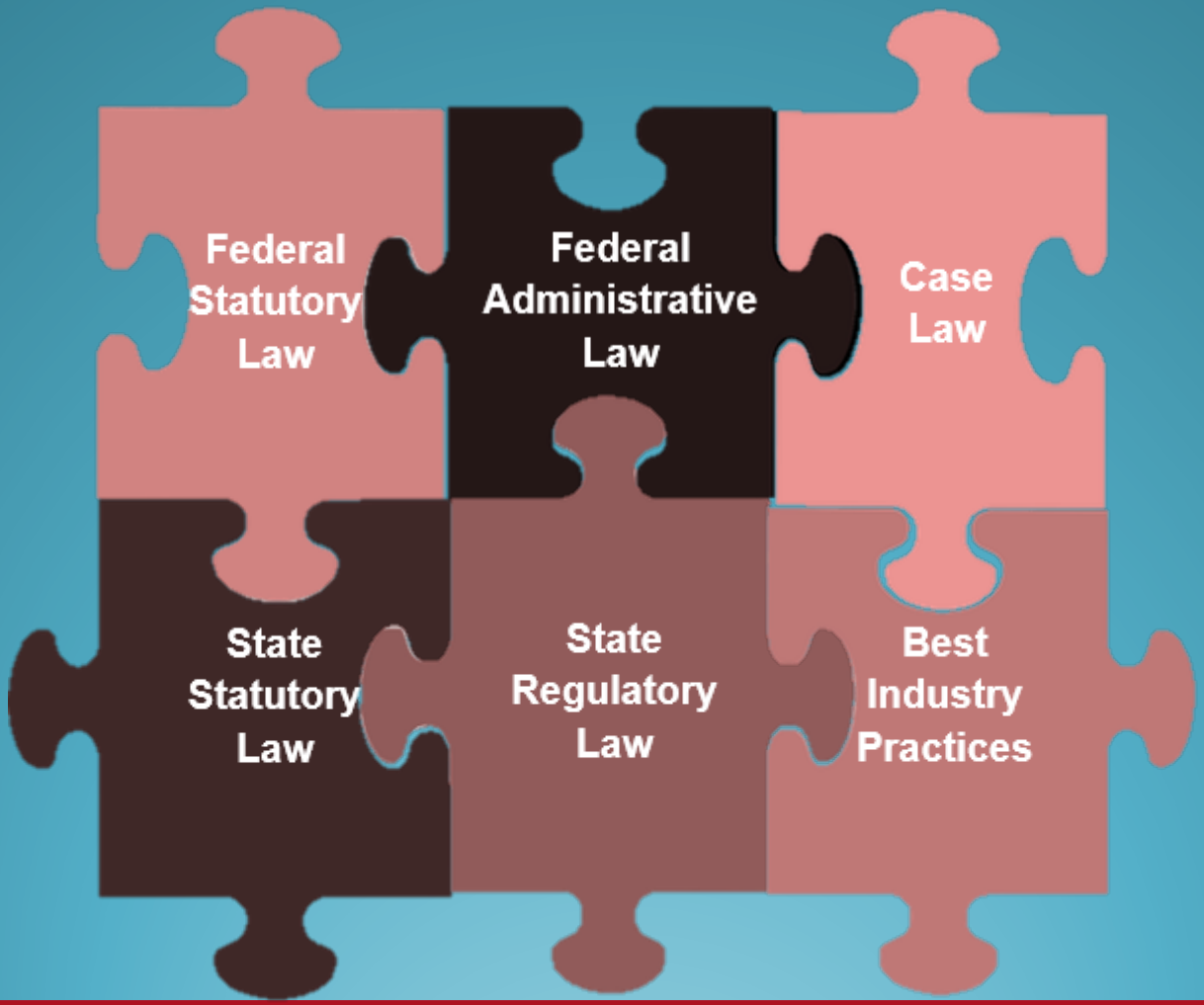
- Santander argued the FDCPA did not apply because it was not a "debt collector" since it was collecting its own debt, not a debt owed to another. The federal district court agreed and dismissed the case.

- The Fourth Circuit Court of Appeals affirmed and held "Santander became a creditor when it purchased the loans before engaging in the challenged practices."

- A debt collector is "(1) a person whose *principal purpose* is to collect debts; (2) a person who *regularly* collects debts *owed to another*; or (3) a person who collects *its own debts*, using *a name other than its own* as if it were a debt collector."

- US Supreme Court has affirmed and agreed! June, 2017.

Debt Collection Laws



Key FDCPA Sections

To avoid committing UDAAP, original creditors should consider voluntarily implementing certain FDCPA Sections: § 807, § 808, and § 812

DEBT COLLECTION LAWS

Key FDCPA Sections - § 807

§ 807. 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. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

Debt Collection Laws

Key FDCPA Sections - § 808

§ 808. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(7) Communicating with a consumer regarding a debt by post card.

Debt Collection Laws

Key FDCPA Sections - § 812

§ 812. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

Debt Collection Laws

Key FDCPA Sections

Additionally, as a matter of best practices, consider implementing certain additional FDCPA provisions: § 804, §805, and § 806

§ 804. Acquisition of location information
Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall --

§ 805. Communication in connection with debt collection
(a) Communication with the consumer generally (b) Communication with third parties (c) Ceasing communication (d) "Consumer" defined

§ 806. Harassment or abuse
A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

1. “Consumer Financial Protection Bureau Considers Proposal to Overhaul Debt Collection Market,” July 28, 2016, available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market/
2. “Monthly Complaint Report,” January 2017, available at http://files.consumerfinance.gov/f/documents/201701_cfpb_Monthly-Complaint-Report.pdf
3. “CFPB Survey Finds Over One-In-Four Consumers Contacted By Debt Collectors Feel Threatened,” January 12, 2017, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/
4. “Consumer Experiences with Debt Collection,” January 2017, available at http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf
5. “ACA International White Paper: An Overview of the Analytical Flaws and Methodological Shortcomings of the CFPB’s Survey of Consumer Experiences with Debt Collection,” ACA International, available at http://www.acainternational.org/assets/research-statistics/wp-cfpbsurvey.pdf
6. “Small Business Review Panel for debt Collector and Debt Buyer Rulemaking,” available at http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf
7. “Debt Collectors: You may ‘like’ social media and texts, but are you complying with the law?,” Colin Hector, Federal Trade Commission available at https://www.ftc.gov/news-events/blogs/business-blog/2016/03/debt-collectors-you-may-social-media-texts-are-you-complying

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