THE COMMERICAL LAW LEAGUE OF AMERICA
FAIR DEBT COLLECTION PRACTICES ACT
WHITE PAPER ISSUES

Debt Collection Workshop, P074805

Submitted to
The Federal Trade Commission
Bureau of Consumer Protection

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INTRODUCTION

The Commercial Law League of America ("CLLA" or "League") is a 112-year-old national organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. The CLLA is the publisher of the award-winning Commercial Law Journal, and a leading provider of legal education to collection attorneys and agencies throughout the country. It has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable, and efficient administration of commercial and bankruptcy cases for all parties-in-interest. The League has been firmly committed to policing its own industry and has regularly provided articles and presentations to its members on consumer and commercial law issues.

Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. The League has appeared as an amicus curiae before the United States Supreme Court and multiple federal appeals courts on issues ranging from FDCPA to TILA to bankruptcy. The vast majority of the League's membership represent credit grantors in collection disputes.

The following represents the CLLA's initial submission in response to the Federal Trade Commission's (FTC) request for comments, published on the FTC website April 23, 2007. The CLLA shall supplement these comments with additional, more comprehensive academic paper(s) regarding consumer debt collection issues in the future, prior to September 7th.

ISSUES

1. Voice Mail

When the FDCPA was enacted in 1977, few debtors had answering machines, and none had voice mail as we now know it. As answering machines and then voice mail came into widespread use the collection industry developed standards that were geared to protect consumer privacy rights. Three cases, *Joseph v. J.J. Mac Intyre Cos., LLC*, 281

F. Supp. 2d 1156 (N.D. Cal. 2003), *Hosseinzadeh v. M.R.S. Assocs., Inc.*, 387 F. Supp. 2d 1104 (C.D. Cal. 2005), and *Foti v. NCO Financial Systems*, 2006 U.S. Dist. LEXIS 13857 (SDNY 2006), have rejected the industry standards, thereby impairing consumer privacy rights by:

a. mandating disclosure of the name of a collector's employer (and not just the collector's identity); and
b. requiring the Section 807(11) ("mini-Miranda") disclosures when a collector leaves an answering machine or voice mail message.

2. Cell Phones

When the FDCPA was enacted in 1977, modern cell phone technology did not exist. Car phones were a luxury item, and Congress could not have contemplated the current cell phone culture. Approximately 20% of the country has abandoned land lines to use their cell phones as both home and mobile numbers. Industry experience suggests that in the consumer debtor population it may be closer to one out of three who has only a cell phone.

Cell phones present some challenges to the collection industry for which there are no perfect solutions under the Act. Because consumers both travel with their cell phones and keep the same numbers when moving across the country there is a very real danger that collectors will call at what they believe to be a permissible time of day (based upon the area code dialed) only to discover that the consumer is in a time zone in which the call is received before 8:00 a.m. or after 9:00 p.m.

3. Caller ID

The League agrees that it is not permissible for a collector to use a false Caller ID, as such conduct would run afoul of Section 807(10). However, two issues that are of concern to the League are:

a. can Caller ID be blocked; and
b. must the Caller ID disclose that the call is from a debt collector?

These may seem to be silly questions, but at least one court has suggested that the Caller ID message must comply with Section 807(11), and that Section 806(6) applies to Caller ID. *See Knoll v. IntelliRisk Management Corporation*, 2006 U.S. Dist. LEXIS 77467 (D. Minn. October 16, 2006). Given the 15-character limit on Caller ID, this is simply unrealistic.

4. Pagers

Pagers provide a mechanism for consumers to be contacted and to leave a digital call-back request. However, the League is concerned about whether Sections 806(6) and 807(11) apply to pager calls.

5. Email

Realistically, many consumers would prefer to communicate by email, rather than have to talk to collectors. What are the limits under the FDCPA for the use of email? What consent, if any, is required to send an email to a consumer? Given the fact that many consumers use workplace email addresses (for which they have no privacy rights), is email to be treated as the same as "snail mail" or more akin to the forbidden post card? Is email adequate for the sending of required notices (e.g., post-dated checks, verification of debt, validation notice)? What if the consumer expressly consents to receiving all notices required by state or federal law by email?

6. Skip-tracing ("Location Information")

Most calls to verify employment result in a transfer to the Human Resources Department. May a collector send a fax to an HR dept? If so, under what conditions?

Does leaving a message with a neighbor/secretary, etc. fall under Section 804? Arguably, leaving a message is not a location call, and if the message does not convey information regarding the debt it should not be treated as a third-party communication. Therefore, where do such messages fall under the statutory scheme?

7. Litigation

Recently, multiple courts have applied the common law litigation privilege to claims based upon pleadings. Although attorneys who litigate are certainly "debt collectors," given the well-established body of law on litigation privilege should that privilege apply in FDCPA cases? To the extent not limited by *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006), should the common law privilege of witness immunity apply in FDCPA cases?

8. Account Documentation

Does the FDCPA require a debt buyer or its collection agency or attorney to have account documents in-hand before making demand on a consumer? In *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006), the plaintiff alleged that the defendant violated the FDCPA by filing a lawsuit to collect a purported debt "without the means of proving the existence of the debt, the amount of the debt, or that Defendant Great Seneca . . . owned the debt." The District Court dismissed Harvey's claims under Sections 806 and 807(10), and the Court of Appeals affirmed, finding that: "[e]ven when viewed from the perspective of an unsophisticated consumer, the filing of a debt-collection lawsuit without the immediate means of proving the debt does not have the natural consequence of harassing, abusing, or oppressing a debtor." Similarly, in *Deere v. Javitch, Block and Rathbone LLP*, 413 F.Supp.2d 886 (S.D. Ohio 2006), the Court stated:

> However, filing a lawsuit supported by the client's affidavit attesting to the existence and amount of a debt, is not a false representation about the character or legal status of a debt, nor is it unfair or unconscionable. A defendant in any lawsuit is entitled to request more information or details about a plaintiff's claim, either through formal pleadings challenging a complaint, or through discovery. [Plaintiff] does not allege that anything in the state court complaint was false, or that the complaint was baseless. She essentially alleges that more of a paper trail should have been in the lawyers' hands or attached to the complaint. The FDCPA imposes no such obligation.

It is illogical (and inconsistent with the validation scheme set forth in Section 809 to require a debt collector to possess more documentation to make demand on a consumer than would be needed in order to file suit. Moreover, it is reasonable for debt collectors and debt buyers to rely on the information provided by the banks that issue credit card accounts. The card-issuing banks are usually national banks, regulated and audited by the United States Government and charged with keeping and maintaining accurate records. It is therefore perfectly reasonable for the debt buyers and their attorneys to rely on the information provided by the banks.

9. Debtor Contacts

Can a debtor block calls to work if the employer does not prohibit such calls? The Act states two circumstances under which a consumer can stop contacts from a debt collector at the consumers place of employment: (a) a written demand to cease communications under Section 805(c) (which applies to all communications in general); or (b) an oral or written notice as per Section 805(a)(3) that the consumer's employer prohibits such communications. Although Section 805(a) forbids communications at times or places which are known or which should be known to be inconvenient to the consumer, the League asserts that the mere fact that the consumer states "I don't want to be called at work" cannot trigger that prohibition. If it did, consumers could similarly say "it is inconvenient for you to call me at home after a hard day at work or when I'm trying to spend quality time with my family," and that would be sufficient to prohibit calls. The statutory scheme did not provide for such an additional method to compel collectors to cease their communications.

10. Bogus Complaints

The collection industry has been plagued for several years by a variety of debtor scams and debt elimination schemes. The League will furnish samples of some of the documents used to perpetrate these scams. The problem is serious enough that the Federal Reserve Board has issued directives to banks regarding what action should be taken in response to some of these scams.

Additionally, many of the complaints filed with the FTC and various state attorneys general essentially boil down to a complaint that the debt collector is refusing to take a payment plan. Such a refusal is not a violation of the FDCPA, but the FTC does not weed such complaints out of its complaint statistics; furthermore, some states' attorneys general will require responses to such complaints.

Attorneys have an ethical duty to carry out the assignments given to them by their clients. Subsequent to charge-off a creditor is not obligated to accept a payment plan, and neither is the creditor's assignee. It is not an FDCPA violation for the attorney's client to refuse a payment plan; therefore, it is not a violation for the attorney to refuse (in accordance with client instructions) to accept such a plan. Acceptance of a payment plan in contravention of client instructions would be an ethics violation for an attorney and a breach of fiduciary duty for a collection agency.