What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer

FTC Sends Warning to Creditors Collecting Their Own Debts: Winter is Coming

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Creditors collecting their own debts have often sought solace in the fact that they were not covered by the FDCPA; however, over the past few years, that solace has been called into question by the CFPB and now the FTC. In a blog post entitled "Think Your Company's Not Covered by the FDCPA? You May Want to Think Again", the FTC yesterday warned creditors to carefully consider whether they are covered by the FDCPA and, more importantly, warned that whether or not they are covered by the FDCPA, they are not immune from debt collection violations. The warning was timely as I spent most of yesterday morning with a bank client discussing the same issue. So why should banks and other first party creditors be concerned?

The FTC Act and Dodd-Frank generally prohibit deceptive and unfair practices, and both the FTC and CFPB have used this umbrella to punish creditors for unfair and deceptive debt collection issues even where they were not covered by the FDCPA. For instance, the draconian CFPB Consent Order with JP Morgan Chase, which was entered in July, was premised in part on Dodd-Frank's general prohibition on unfair, deceptive or abusive acts because the bank did not fall under the FDCPA. The FTC's blog post makes no bones about the Commission's intent to continue using the FTC Act's general prohibition in absence of FDCPA coverage stating that "even if the FDCPA doesn't apply, your collection activities are still covered by Section 5 of the FTC Act's general prohibition against deceptive or unfair practices....[T]he FTC has taken action under Section 5 when first-party creditors engage in other practices expressly prohibited by the FDCPA – for example, revealing the existence of a debt to anyone other than the debtor."

The CFPB Has Left Little Doubt that Impending Regulation F Will Encompass Creditors Collecting on Their Own Behalf. To borrow a phrase from Jon Snow on *Game of Thrones*, "winter is coming" for the debt collection world even for those of us to consider it already here. The CFPB will likely issue proposed regulations concerning debt collection in the first half of 2016, and those regulations are anticipated to address first party collections, as well as third party collections. The Bureau's recent enforcement actions, as well as other publications, make clear their position that anyone collecting consumer debt, whether first or third party, cannot do so in an unfair

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

or deceptive manner and all debt collectors will likely be encompassed in Regulation F.

In 2013, the Bureau issued Compliance Bulletin 2013-07, which clearly laid out its position: "[a]lthough the FDCPA definition of "debt collector" does not include some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act." Specifically, the CFPB identified several practices that they are particularly concerned with, including:

- 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.
- 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.
- Falsely representing the character, amount, or legal status of the debt.
- Misrepresenting that a debt collection communication is from an attorney or a government source.
- Misrepresenting whether information about a payment or nonpayment would be furnished to a credit reporting agency.
- 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.
- Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue
- False threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.

The CFPB concluded by stating that "[o]riginal creditors and other covered persons and service providers involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act. The CFPB will continue to review the practices of those engaged in the collection of consumer debts for potential UDAAPs, including the practices described above."

The FDCPA does not provide a blanket exception for creditors collecting on their own behalf. As the FTC blog aptly notes, the definition of debt collector under the FDCPA may include creditors collecting on their own behalf under several limited scenarios. First, the FTC points out that "if a creditor collects its own debt but uses a different name that suggests that it's a third party debt collector…then the company is now a debt collector subject to the FDCPA". The FTC also points to a second scenario – when a creditor is collecting a debt on its own behalf that was in default at the time it was obtained by such person. What is troubling, however, is that the FTC, misses the second crucial element of the definition of a debt collector – specifically, that the creditor's principal business purpose must be debt collection. The FTC blog suggests by implication that banks who acquire loans may be subject to the FDCPA; however, the majority of courts who have examined that issue have ruled to the contrary.

The Bottom Line? Creditors who collect debt on their own behalf need to examine their policies, procedures and compliance management systems to insure their

collection efforts are consistent with the FDCPA whether or not they are “debt collectors” under the Act. Both the FTC and CFPB have made clear their intention to enforce unfair and deceptive debt collection practices under the FTC Act and Dodd Frank when the FDCPA is unavailable. Additionally, it is likely that any debt collection regulation proposed by the CFPB will include creditors collecting on their own behalf. Winter is coming – creditors should be prepared.

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