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ARTICLES & INSIGHTS

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Finding Shelter in the Storm: Using the Bona Fide Error Defense with the Final Debt Collection Rule

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The FDCPA provides a bona fide error defense for debt collectors who can show by a preponderance of the evidence that their violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. §1692k(c). Historically, debt collectors have been judicious in its use. While it is a powerful tool, it shines a bright light on a debt collector's policies and procedures, and therefore, the stakes are high. If a debt collector's policies are adjudicated to be lacking, it can expose the debt collector to liability not only in the present action but potentially to a swarm of further litigation. On the other hand, if the debt collector can safely navigate the defense with robust policies and procedures, it may fend off the present action, as well as future litigation.

With the enactment of the Debt Collection Rule, debt collectors now have a map of certain best practices that can help them better inform their policies and procedures. Assuming they mold their actions to comply with the same, the Rule may now provide a more effective shield in actions under the FDCPA. Scattered throughout the Rule like little nuggets of gold, the CFPB has provided safe harbors which, when coupled with the bona fide error defense, should allow savvy debt collectors to better take advantage of the bona fide error defense. This article examines these nuggets, which, if incorporated into a debt collector's policies and procedures, may provide an effective bona fide error defense.

LIMITED CONTENT MESSAGES

"Limited Content Messages" are a new concept introduced by the Rule in its definitional section (1006.1) and are intended to provide a safe way for debt collectors to leave non-substantive messages for a consumer requesting a return call while not inadvertently disclosing the debt to third parties. The Rule and its Comments make clear that Limited Content Messages are not communications regarding a debt. To qualify as a Limited Content Message, the message must be left by voice mail and only contain the specified limited content set forth explicitly in Section 1006.1(j). A Limited Content Message can only include: (a) a business name for the debt collector that does not indicate that the

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debt collector is in the debt collection business; (b) a request that the consumer reply to the message; (c) the name or names of one or more natural persons whom the consumer can contact; (d) a telephone number or numbers the consumer can use to reply to the debt collector; and (e) certain very limited and specified optional content. Communications are distinguished as they convey information regarding a debt.

While not a *per se* safe harbor, the Rule's Official Comments contain sample scripts which, if used, would comply with the Rule. Using those scripts, therefore, may provide an implied safe harbor. Debt collectors should consider incorporating these scripts into their best practices to help mitigate risk with respect to 15 U.S.C. §§1692c and 1692e(11). *See, e.g.,* Comment 2(j)(1)-1; Comment 2(j)(2)-2.

ELECTRONIC COMMUNICATIONS

As a general notion, the Rule provides a general road map for compliance with the FDCPA with respect to electronic communications in Section 1006.6. Specifically, the Rule sets forth specific procedures which, if followed (including provisions for consumer opt-outs), provide the debt collector with a safe harbor with respect to electronic communications and unintentional third party electronic communications.

The Rule allows for the use of email and text message communications and sets forth procedures that provide the debt collector with a safe harbor if followed. Specifically, Section 1006(d)(4) allows for email communications to the consumer: first, by allowing the use of an email address the consumer has either used to communicate with the debt collector (and has not subsequently opted out) or the consumer has provided prior express consent to use and second, by allowing an email address used previously by the creditor or a prior debt collector subject to certain limitations and conditions. Section 1006(d)(5) allows for text messaging subject to similar conditions. Additionally, the Official Comments contain sample language for opt-out notices where, if used, are likely to provide an implied safe harbor. *See, e.g.,* Comment 6(d)(4)(ii)(C)-2)(i) – (ii); Comment 6(e)-1(i)-(ii). Debt collectors contemplating the use of electronic communications should incorporate these into their policies and procedures to mitigate risk.

UNINTENTIONAL THIRD PARTY COMMUNICATIONS

On a related note, what happens when an impermissible third party receives the communication? Section 1006.6(d)(3) provides a bona fide error defense in those instances where the debt collector can satisfy two conditions. First, there must be procedures in place to reasonably confirm and document that the communications complied with 1006.6(d)(4) or (5) (see above discussion). Secondly, the debt collector's procedures must include steps to reasonably confirm and document that the debt collector did not communicate with the consumer at an email address or telephone number that the debt collector knows has led to an impermissible third party communication. Moreover, Section 1006.22(g) provides a safe harbor under 15 U.S.C. §1692f for emails and text messages which are sent in accordance with 1006.6(d)(3) that reveal the debt collector's name or other information indicating the communication relates to the collection of a debt.

TIME AND PLACE

With the advent of new technologies, preventing communications at a time and place known or should be known to be inconvenient has become challenging for debt collectors. The Rule attempts to address these challenges in Section 1006.6 and its Official Comments. Section 1006.6 provides that an inconvenient time for communication with the consumer is before 8:00 AM and 9:00 PM local time at the consumer's location. The Official Comments then provide a safe harbor and guidance on handling conflicting or ambiguous information regarding a consumer's location. In those instances and the absence of knowledge to the contrary, Comment 6(b)(1)-2 provides that the debtor collector complies with the Rule (specifically, 1006.6(b)(1)(i)) if the debt collector communicates or attempts to communicate with the consumer *at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located.*

CALL FREQUENCY

Section 1692d(5) of the FDCPA prohibits a debt collector from causing a telephone to ring and from engaging a person in telephone conversations repeatedly or continuously with the intent to annoy, abuse, or harass. Section 1006.14 establishes a bright line by placing numeric limitations on the placing of telephone calls. In doing so, the Rule creates presumptions of compliance and violation. While not a safe harbor *per se*, Section 1006.14 creates a presumption of compliance with 15 U.S.C. §1692d(5), where the debt collector complies with the call limitations set forth in §1006.14(b)(2). Of course, this will require documentation of policies and procedures which set forth frequencies consistent with the Rule's requirements.

DEBT VALIDATION NOTICE

Section 1692g of the FDCPA requires debt collectors provide consumers with a validation notice which includes the name of the creditor, the amount of the debt, and the disclosure of certain statutorily prescribed consumer protection rights. Section 1006.34 of the Rule reinvents the Debt Validation Notice by requiring significantly more robust disclosures. These disclosures fall roughly into three categories: (a) information to help consumers identify the debt; (b) information about consumer protections; and (c) information to help consumers exercise their rights, including a tear-off dispute form with prescribed prompts.

The Rule provides safe harbors for compliance with the information and form requirements set forth in Section 1006.34(c) and (d)(1) for debt collectors who use the model validation notice, specified variations of the same, or a substantially similar notice. Additionally, debt collectors using the model validation notice are provided with a safe harbor as to 15 USC §1692g(b)'s overshadowing prohibition. *See* 1006.38(b). Further, assuming the debt collector does not receive a notice of undeliverability, Comment 42(a)(1)-3 makes clear that a debt collector has sent the required disclosures for purposes of the Rule if the debt collector mails a printed copy of any required disclosures to a consumer's last known address unless the debt collector, at the time of mailing, knows or should know that the consumer does not currently reside at, or

receive mail at, that location.

CREDIT REPORTING

While Section 1692d(3) of the FDCPA allows for credit reporting, the Rule now limits the circumstances and timing for credit reporting and prohibits the practice of passive debt collection through credit reporting. Section 1006.30(a) prohibits debt collectors from furnishing information to a consumer reporting agency about a debt before the debt collector either speaks to the consumer about the debt in person or by telephone or sends its validation notice and then waits for a reasonable period of time to receive notice of undeliverability. Comment 30(a)(1)-2 provides a safe harbor for debt collectors as to what constitutes a "reasonable period of time." Specifically, Comment 30(a)(1)-2 provides a safe harbor by construing a "reasonable period of time" to mean a period of 14 consecutive days after the date that the debt collector places a letter in the mail or sends an electronic message.

While the CFPB intends to push back the effective date of the Rule sixty (60) days, compliance teams should be reviewing the Rule and Comments to assess what changes will need to be made to the agency's practice and procedures. As part of this process, debt collectors should be considering incorporating the safe harbors, implied and express, set forth within the Rule to allow for future mitigation of risk.

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