

Atty. Alexander Ullenberg's

GETTING PAID BULLETIN

Your source for information on collecting the money you're owed, promptly and legally.†

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IS YOUR COLLECTION AGENCY EXPOSING YOU TO THOUSANDS OF DOLLARS OF FDCPA LIABILITY?

What is the Fair Debt Collection Practices Act of 1978 ("FDCPA").

In 1978, Congress enacted the FDCPA (15 U.S.C. s.1692a) to correct the apparent abusive conduct of some collection agencies operating through the United States. The FDCPA regulates the collection of consumer debts by requiring certain warnings on all collection communications and restricting certain collection practices including contacting third parties (like employers, parents, and even spouses) while collecting consumer debts.

Penalties for violating the Act (even for technical violations) start around \$1,000 plus payment of the debtor's attorneys' fees (which are usually the largest part of the "penalty"). [15 U.S.C. s.1692k.]

While the FDCPA generally applies only to collection agencies and collection attorneys, it can also apply to creditors directly if they are using names other than their

own when collecting their debts or using a collection agency which is engaging in questionable collection tactics. Are you one of the creditors it applies to?

Applies to Creditors Who Use Another Name When Collecting Their Debts.

Normally the FDCPA does not apply to creditors who are collecting their own debts. However, a creditor becomes subject to the FDCPA if the creditor "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". [15 U.S.C. §1692a (6).] This can occur merely when a different corporate name implies that a third party is involved in collecting its debts or the creditor "pretends to be someone else" or "uses a pseudonym or alias." Villarreal v. Snow, 1996 WL 473386 at *3 (N.D. Ill. Aug. 19, 1996).

For example, in MacGuire v. Citicorp Retail Services, Inc., the U.S. Second Circuit Court of Appeals held that Citicorp violated this provision by communicating with debtors using the legal name of one of its divisions called "Debtor Assistance". Even though this was a legal name of its division, the Court concluded the name could give the false im-

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pression to the least sophisticated consumer that a third party was collecting the debt.

Similarly then, a landlord who is renting his personal properties could be in violation of the FDCPA by sending out an overdue rent notice on his company letterhead. Likewise, a medical practitioner working in a group practice who separately bills his patients, could be in violation of the FDCPA by using the collection forms of a practice-wide billing department.

However, if a creditor has a wholly-owned affiliated company which handles only its collections, and that company adequately discloses the relationship, it is not considered a “debt collector” under the FDCPA.

Problems with Using Collection Agencies Who Commence Legal Proceedings On Your Behalf! In Wisconsin, many creditors are unknowingly exposing themselves to FDCPA liability by sending accounts to outside collection agencies who improperly commence legal proceedings on their accounts. In Wisconsin, your collection agency cannot commence a lawsuit on your behalf — even if you give them permission. See State ex. rel. State Bar v. Bonded Collections, 36 Wis.2d 643, 164 N.W.2d 250 (1967); Wis. Stats. §§799.06 (2) and 803.01.

In Bonded Collections, the collection agency accepted assignment of the creditors’ account for collection, advised

the creditor when a lawsuit should be filed, hired the attorney to commence the suit, and managed the legal proceedings in exchange for a fixed percentage of the recovery and recoupment of the court costs. (Sound familiar?) In finding such behavior constituted the “unauthorized practice of law”, the Wisconsin Supreme Court noted that the collection agency was effectively usurping the position of the lawyer in advising the client when suit was appropriate and the client’s natural right to control and direct the lawyer’s actions. In effect the collection agency was selling the services of a lawyer to the creditor.

Likewise, the similar practice whereby the collection agency acted as the creditor’s agent in selecting the attorney, was equally egregious according to the Court unless (1) it was clear the attorney was representing the creditor-client and was to take direction and guidance from the creditor, (2) the collection agency did not interfere, manage or direct the details of the litigation, and (3) the attorney was paid by the creditor-client not the collection agency. (Does your collection agency operate this way?)

The Wisconsin Rules of Professional Conduct which regulate Wisconsin attorneys also indicate “an attorney is to ‘have appropriate relations with [the] client and avoid interference by the collection agency. The attorney must look to the creditor-client for payment of legal fees. An attorney must be compensated on the basis of work per-

formed or responsibility assumed on the client’s behalf and may not share fees with a non-lawyer [such as a collection agency.]” Wis. Ethics Op. 6/75(D).

However, some collection agencies still tell their clients that they can commence legal proceedings for their creditor-customers if necessary. You should be very leery of these claims.

First, in many cases, the collection agency is using the agency-practice highlighted in Bonded Collections. But in many cases, the attorney retained to assist you never communicates directly with you, is retained and paid directly by the collection agency, and takes direction solely from the agency. Such behavior is not in compliance



with Wisconsin law.

Second, if you allow a collection agency to recommend an attorney, often times the level of services you receive is significantly diminished because the collection agency tries to reduce legal expenses by minimizing the services provided by the attorney. And when those services are so severely minimized that the collection attorney is realistically

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Protect Yourself from FDCPA Liability!

1. Don't try to make it seem like you're operating a collection division from within your organization. Be careful sending out collection letters to consumers on special letterhead or signed by the "Collection Officer" or "Collection Manager". Even if you have such positions, the least sophisticated consumer could become confused as to whether a third-party is now involved in the collection process. Likewise, even if you have a large collection staff, separating them from your main organization makes them seem more like a third-party collection agency trying to collect your debts. Avoid this misapprehensions.

2. When collecting debts remain professional, but don't become a push over. Like you, your debtors are people with feelings and emotions. Keep your cool and professionalism even in the face of a debtor's ranting. Listen to their complaints. Look for solutions. Often times, a little consideration goes a long way in resolving a problem account and obtaining payment. Likewise, an aggressive and rude response can provoke a debtor to "get even". But do not coward away from or lose sight of reaching a resolution or determining that legal proceedings are necessary.

3. Consider out-sourcing the collection of all amounts

owed you by consumers or agricultural consumers. The FDCPA and most state consumer laws (like the Wisconsin Consumer Act) apply only to the collection of debts from consumers (including some agricultural consumers) – not businesses. While the collection of business debts can be somewhat regulated, most of the technical laws regulating debt collection do not apply to business debts.

4. Understand the limitations of collection agencies. In Wisconsin, collection agencies cannot commence legal proceedings on your behalf. Their primary collection weapon is repeated personal contact with your debtor by mail or telephone. When that is unsuccessful you often must consider legal proceedings.

5. Don't delegate your authority to select, retain, and work with your own collections attorney. Select your own attorney, discuss the decision to file a lawsuit directly with your attorney, approve all settlements with your attorney, and pay your attorney directly. Besides minimizing FDCPA liability exposure, such practices make good business sense. Your collections attorney represents your interests exclusively and is not torn between their responsibility to you and their paycheck from a collection agency (that is collecting other accounts besides yours.)

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seen as doing nothing more than lending the use of their name or letterhead to the collection effort, a separate violation of the FDCPA ensues. If your collection attorney does not review the file, consult with you directly if necessary, and personally sign the collection letters sent out on their letterhead, there is a FDCPA violation. Veillard v. Mednick and Doctors Service Bureau, 24 F.Supp.2d 863 (N.D. Ill. 1998).

Third, if you, as the creditor, know or have reason to know that the collection agency and attorney collecting your accounts is engaging in such improper behavior, you too may be in violation of the FDCPA since you are effectively authorizing the use of a form which deceptively implies a third party (i.e. an attorney) is actually involved in the collection of your debt.

(I personally have been contacted by a collection agency here in Wisconsin that asked me to engage in just this same behavior, and after I explained the law to them I have never heard from them again. However, I know they are still operating in the State of Wisconsin. Be careful.)

Lastly, "if a creditor knowingly approves of representations made by its debt collector which violate the Act [FDCPA], or acts in concert with or knowingly assists its debt collector in making these representations, the creditor may have engaged in unfair or deceptive acts or practices in violation of Section 5 [of the

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Federal Trade Commission Act "FTC Act")." [Federal Trade Commission Letter to Douglass dated Nov. 26, 1993. See [http://www.ftc.gov/os/statutes/fdcpa/letters/](http://www.ftc.gov/os/statutes/fdcpa/letters/douglass.htm)

[douglass.htm](http://www.ftc.gov/os/statutes/fdcpa/letters/douglass.htm)]

See the related sections in this bulletin for some helpful tips in avoiding these problems and potential liability.

Excuse of the Month: "I spoke with someone at that company and they told me if I sent them a piece of paper saying I did not owe the money, they wouldn't bother me anymore."

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He is a guest lecturer at the University of Wisconsin Law School and a former business law instructor for Marian College of Fond du Lac.

Alex lives in Fond du Lac, Wisconsin, where he is an active member of the State Bar of Wisconsin, Fond du Lac County Bar Association, and the Noon Rotary Club.

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Questions? Comments? Ideas? Opinions? I'm always happy to hear from you. *Alex*

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