

Understanding State and Federal Law/Regulations Associated with Skip Tracing and Asset Searches

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Understanding State and Federal Law/Regulations Associated with Skip Tracing and Asset Searches

Written by Melissa A. Jones, Esq.

Be mindful of privacy issues by obtaining information from public records or via subpoenas whenever possible. Certain information is regulated. Make sure you meet usage requirements when searching for and requesting information:

A. Permissible Uses Under the Gramm-Leach-Bliley Act of 1999 (GLBA)

Among other things, the GLBA, codified at 15 U.S.C. §§ 6801-6809, regulates the collection and disclosure of customers' personal financial information by financial institutions. It also applies to companies, regardless of whether they are financial institutions, who receive such information.

► **Practice Tip:** Financial institutions are defined as “companies that offer financial products or services to individuals, like loans, financial or investment advice, or insurance,” including non-bank mortgage lenders, real estate appraisers, loan brokers, some financial or investment advisers, debt collectors, tax return preparers, banks, and real estate settlement service providers, who are considered significantly engaged in the financial service or production that defines them as a “financial institution.”

Searching financial information is permissible under the GLBA for:

Fraud Prevention or Detection: for use to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability.

Legal Compliance: for use to comply with federal, state, or local laws, rules, and other applicable legal requirements.

Required Institutional Risk Control: for required institutional risk control, or for resolving customer disputes or inquiries.

Transactions Authorized by Consumer: as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer.

Persons Acting in a Fiduciary Capacity for Consumer: for use by persons acting in a fiduciary or representative capacity on behalf of the consumer.

Persons with a Legal or Beneficial Interest re Consumer: for use by persons holding a legal or beneficial interest relating to the consumer.

If you do not have a permissible use, you can search unregulated data only.

B. Permissible Uses Under the Drivers Privacy Protection Act of 1994 (DPPA)

When searching state drivers' licenses records, motor vehicle registrations and boat registrations, each state has certain requirements for permissible uses. The DPPA, codified at 18 U.S.C. §§ 2721-2725, permits searches for:

Litigation: Use in connection with any proceeding (including arbitration) in any court or government agency, or before any self-regulatory body, including investigation in anticipation of litigation

Debt Recovery / Fraud: Use to verify the accuracy of information about a person who provided the information to you (or to your client) but only if used to recover on a debt against the person or to pursue legal remedies against the person for fraud.

Insured: Use by an insurer (or its agent) in connection with claims investigation activities, antifraud activities, rating or underwriting.

Government Agency: Use by a government agency but only in carrying out its functions.

On Government Behalf: Use by any person acting on behalf of a government agency but only in carrying out the agency's functions.

Motor Vehicle: Use (except by or for a motor vehicle manufacturer) in connection with motor vehicle safety or theft, or driver safety.

If you do not have a permissible use, you cannot search drivers' licenses, motor vehicle registrations and boat registrations. Damages for violations of this act include actual damages, liquidated damages in the amount of \$2,500, punitive damages and attorneys' fees.

C. The Fair Debt Collection Practices Act: A General Overview

A complete copy of the Fair Debt Collection Practices Act (FDCPA), 15 USC §1692 *et seq.*, is attached to these materials.

1. What Sort of Debt is Covered

Consumer debt is covered by the FDCPA. A consumer is "any natural person obligated or allegedly obligated to pay any debt." Consumer debt is debt incurred for personal, family or household use. Commercial debt is not covered by the FDCPA. A personal guaranty of commercial debt is also not covered by the FDCPA. Some states hold that collection of child support,

tort claims, and personal income taxes are excluded from the FDCPA. However, err on the side of caution and abide by the FDCPA when in doubt.

2. Who is a Collector Under the Act

Under the Act, 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.”

The intent is to cover all third persons who are collecting or attempting to collect a debt. This also 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 a debt. Attorneys who regularly collect consumer debts are also included.

This does not include:

- The original creditor;
- any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
- 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;
- 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;
- any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
- 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
- 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.
 - For attorneys: "Genuinely sporadic collection activity" is not regular activity. *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223 (W.D.Va. 1994). However, "regularly collecting occurs when undertaking collection activity more than a handful of times per year" - *Crossley v. Lieberman*, 868 F. 2d 566 (3rd Cir. 1989).

When Lenders are Also Collectors

The Sixth Circuit Court confirmed in January 2013 that the FDCPA applies to mortgage foreclosures. *Glazer v. Chase Home Fin., et al.*, 704 F.3d 452 (6th Cir. 2013). However, if a mortgage servicer starts servicing the mortgage *before* it goes into default, the FDCPA does not apply, because the term "debt collector," per the FDCPA, does not apply to "any person attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." *Id.* at 457; 15 U.S.C. 1692a(6)(F)(iii). The Eighth Appellate District followed this rationale in the related case of *Glazer v. Chase Home Fin., et al*, 2013-Ohio-5584 (8th Dist.) ¶28.

3. Prohibited Communications and Practices

The Federal Trade Commission (FTC) has published their interpretation of the law which says debt collectors may not call repeatedly or continuously.

See 12 C.F.R. Pt. 226, Supp. I, § 226.1 *et seq.* See also <https://www.fdic.gov/regulations/laws/rules/6500-1325.html>

The FTC also states that collection calls must be meaningful and for a legitimate purpose. In other words, the calls must be for a productive purpose such as verifying information, following up on a previous conversation, arriving at an agreement and so forth. A debt collector cannot keep calling you repeatedly or continuously for the sole purpose of demanding payment; doing so is harassment. Although creditors are exempt from this federal requirement, state laws may prohibit this activity.

Bill collectors and debt collection agencies must follow the FDCPA rules when contacting consumer debtors. Debtor collectors can contact debtors via, mail, phone, or email. However, unless the debtor gives permission to do otherwise, debt collectors can only contact debtors under these specific conditions:

- Contact the debtor at his place of residence by phone, mail, in person, by fax or email during reasonable hours (8 a.m. – 9 p.m.)
- Do not contact the debtor at any unusual time or place or a time or place known or which should be known to be inconvenient to the debtor.
- Do not contact the debtor at work if the employer disapproves and the employer is not informed of this fact by the debtor or his employer.
- Collectors cannot disclose any information about the debtor or his debt to third parties (relatives, friends, neighbors, fellow workers and employers). Collectors can call these people to verify location information and only, if asked, reveal who the collector is employed by. Revealing who the collector works for does not mean that, once asked, the collector can discuss the debtor's case. Also, collectors clearly violate the FDCPA when they call these people more than

once or call them after they already have the debtor's location information.

Other techniques of harassment include:

- use of obscene or profane language, shouting
- constant unrelenting telephone calls
- repeatedly calling back immediately after the debtor hangs up
- failure to respond to written disputes
- continuing to communicate with the debtor after receiving written notice by the consumer that consumer refuses to pay or that the consumer wishes the debt collector to cease communication
- publication of debtor information
- threatening legal action that cannot be taken, including jail or civil actions on time-barred claims

Other examples of what not to do:

- If a debtor is represented by legal counsel, do not contact the debtor directly.
- If the debtor is a non-consumer debtor, do not contact the debtor at the debtor's place of business (unless the debtor is the owner of, or employed by, the commercial debtor).
- If the debtor is in bankruptcy, do not contact the debtor.
- Do not threaten criminal action for failure to pay a debt.
- Do not threaten litigation on time-barred claims or when the creditor has not authorized the lawsuit.
- Do not file suit on time-barred claims.

- Do not demand payment of amounts not legally due. Make sure your amount due is the most current and accurate amount legally due.
- Do not demand attorneys' fees without any legal basis for recovery.
- Do not represent yourself as an attorney if you are not one, or otherwise commit the unauthorized practice of law.
- False reporting to credit bureaus (no such debt, reporting the debt as undisputed when it is disputed)
- BE PROFESSIONAL! Avoid abusive language, tones, or volumes of your voice and don't contact the debtor at a time known to be inconvenient.
- For attorneys: do not send letters under your signature when you have not personally reviewed the file or are not personally familiar with the claim.
- Filing in a jurisdiction outside where the consumer resides or signed the contract being sued upon.

A debtor who believes his rights have been violated can file a formal complaint with the appropriate state attorney general or the FTC. He can also file a lawsuit, and obtain a recovery of fines.

See: <https://www.ftc.gov/search/site/FDCPA>

4. Validating the Debt

A specific written FDCPA Validation Notice must be sent to the consumer within five days of the collector's first communication or attempted communications (written or verbal) with the debtor. This Notice is attached to these materials. The Validation Notice must include the written notice containing:

- (1) the amount of the debt;

- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 USC 1692g (§809).

The validation provision of the Notice "must be large enough to be easily read and sufficiently prominent to be noticed." *Swanson v. Southern Oregon Credit Service*, 869 F.2d 1222 (9th Cir. 1988).

The debt collector cannot send any messages or communications directly contradictory to the thirty-day validation period. Thus, it is universally held that a demand for payment within a time less than thirty days contradicts thirty-day validation period.

If the consumer requests a validation of the debt, mail it to him or her as promptly as possible. No timeframe required by law, but be prompt. This validation should include a verification of the debt, such as the underlying contract and account statement or a copy of the judgment, and

the name and address of the original creditor if different from the current creditor.

5. Other Notables:

- The words “[insert name of debt collector] is a debt collector is attempting to collect a debt and any information obtained will be used for that purpose” must be included in the first written communication to the debtor. The words “this communication is from a debt collector” must be included in all subsequent communications after the first written communication. This includes phone messages and voicemail messages (incoming and outgoing).
- The consumer must be able to contact the debt collector at a toll-free number.

6. Defenses Under the Act

1. Understanding Strict Liability – the FDCPA is a strict liability statute. This means that even if a person or entity unknowingly violates the FDCPA, he, she or they are liable. In other words, intent is generally not an element. One single violation triggers liability. Statutory damages are up to \$1,000 per violation, and the damages are mandatory once liability is determined. Statutory damages are available even in the absence of actual damages; however, the debt collector can be liable for both statutory and actual damages. Attorneys’ fees can be recoverable to the plaintiff. FDCPA violations have a one-year statute of limitations.
2. Defenses to FDCPA claims include:
 - Statute of limitations
 - The “bona fide error” defense: this is a limited defense created to protect against essentially clerical errors. It is designed to defend against “violations resulting from unintentional error notwithstanding maintenance of reasonable procedures adopted to avoid the error.” *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994). However, the “mere fact the error was

unintentional is insufficient.” *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996).

3. Building a Good Compliance System is therefore essential! See FDCPA checklist attached.

7. Common Abuses

The common abuses arise from a failure to abide by itemizations in “prohibited communications / practices” section above. The common factors which are analyzed for abuse include:

- Calling back immediately after the debtor hangs up
- Calling / communicating when the debtor requests that the calls stop
- High call volume
- Calling the debtor’s place of employment
- Daily phone calls
- Leaving messages
- The content of the calls and messages

See <http://www.ellislawgrp.com/article12harassment.html>, which elaborates on caselaw on these factors

Another good cite from the American Bar Association:

http://www.americanbar.org/content/dam/aba/events/legal_assistance_military_personnel/ls_lamp_cle_mar12_fair_debt_collection_outline.authcheckdam.pdf

SAMPLE FAIR DEBT COLLECTION PRACTICES ACT CHECKLIST

1. First written or oral communication with debtor (demand letter, telephone call):

- Must include written FDCPA Notice, or send Notice within five days of first written or verbal communication (actual or attempted) (sample attached)
 - If first communication with debtor is from debtor, either by phone or mail, send Notice within 5 days
 - If first communication is the lawsuit, Notice not required, but include it when possible

2. Debtor has 30 days to dispute debt or request validation:

- No deadline for creditor to respond or send validation
- But, wait 30 days from date of demand, then proceed with next step (second demand, follow-up phone call, lawsuit, etc.)
- If debtor requests validation during 30 days, cease all action directly against debtor until validation sent. (Attach a sample validation letter for internal use).
 - Best practice tip: the law permits creditor to file a lawsuit during the 30 days, even if debtor disputes the debt. However, as a best practice, wait the 30 days.
 - Best practice tip: referring case to local counsel, or drafting letters or complaints, during the 30 days OK, just no action directly with or against the debtor

3. General Notes:

- The phrase "*This law firm is a debt collector attempting to collect this debt for our client and any information obtained will be used for that purpose*" must be included in all communications with debtor, written and oral (i.e., telephone calls or messages)

- exception: this language not required in the complaint, or in any other legal pleadings; however, best practice is to include it
- When providing a telephone number to debtor, always provide the toll free number.
- Envelopes to debtor must not include anything that indicates communication relates to a debt collection, or that the sender of the communication is a debt collector
- FDCPA applies only to consumer (personal, family or household use) debt. It does not apply to personal guarantees of commercial debt.

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