

# Regulations Regarding Skip Tracing

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## **Regulations Regarding Skip Tracking**

### **FDCPA, FCRA, and CFPB**

Every attorney needs to comply with the laws. Certain Acts regulate this area such as the Fair Debt Collections Practices Act, Fair Credit Reporting Act, and the Consumer Financial Protection Bureau. To prevent violations, training is required. I suggest some practice pointers to help comply. Our office records each phone call in order to train new employees and to ensure compliance. Listening and grading calls help both ensure compliance and also help make certain our staff is getting the most out of calls. One of the common errors that a skip tracer will make is the failure to identify oneself which is required under the Fair Debt Collection Practices Act "FDCPA".

Skip tracing starts at placement. Our office performs an initial scrub of accounts to ensure that we are not contacting parties that are deceased, in the military, or bankrupt individuals. If we find a person is deceased, we check for a probate estate and file a claim in the probate. If no estate is filed, we monitor it for 6 months. In our jurisdiction, a creditor could file an estate if known assets make the probate worthwhile.

We also search to see if the person is not in the military as those active service people receive special protections. The Servicemembers Civil Relief Act (SCRA) reduces interest rates to 6 percent if the person is on active duty. This Act also stays evictions up to 3 months

for nonpayment of rent. An attorney must notify the court if a defendant is on active duty. The Court cannot enter a judgment against a service person unless the Court appoints a person to represent the defendant.

If a person has filed a bankruptcy, an automatic stay arises. No collection activity including letters can be sent if the person has filed bankruptcy. You can either use products like accurint to scrub the account. If any bankruptcy is located, we search pacer to see the status and if our debt is included in the bankruptcy. Pacer will tell you the type of bankruptcy that has been filed. A Chapter 7 filing is usually without a requirement for claim filing. A creditor should file a claim with the Court if required by the Court. Chapter 13 bankruptcies usually require a claim to be filed in order to be paid. As a practice note, if you or your client discover that assets are missing from the petition, you may want to attend the creditor's meeting to ask questions.

Our offices uses a service at the beginning of the placement such as Accurint to verify that the address is correct. We use social security death records database or accurint to determine if the person is deceased. See <http://searchancestry.com/search/db.aspx?dbid=3693> for a link.

Debt Collection including skip tracing is regulated by the FDCPA. One important section prevents the use of any false, deceptive or misleading statement. A debt collector may not use any false, deceptive, or misleading representations or means in

collecting a debt. 15 U.S.C.A. Section 1692e. This broad language of the Act includes, but does not limit the following as false representations.

1. The false representation of the character, amount, or legal status of any debt;

2. The false representation of any service(s) rendered for collection of a debt;

3. The false representation that any individual is an attorney from an attorney's office;

4. The representation that nonpayment of any debt will result in arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages unless such action is lawful and the collector intends to take such action. 15 U.S.C.A. Section 1692e(1-16).

5. Communicating or threatening to communicate to any person credit information which is known or should be known to be false, including the failure to communicate that a debt is disputed.

6. False representation or implication that a debt collector operates or is employed by a consumer reporting agency.

Therefore, a skip tracer cannot trick the consumer into thinking they won a prize and only need to send a check to collect the prize in order for the skip tracer to obtain checking account information. A skip tracer cannot claim to be a governmental agency and is taking a survey to gain employment information.

However, a skip tracer can use a tool found in the FDCPA which allows under limited circumstances a collector to acquire what is called "location information" from third parties. 15 U.S.C.A. Section 1692b. "Location information" means the collector can call the consumer's place of abode and his place of employment. 15 U.S.C.A. Section 1692a(7). To acquire location information, the collector must identify herself. The collector must state she is confirming employment or the debtor's home address and telephone number. A collector cannot state that the debtor owes money. Furthermore, a collector can call only once for this information unless she reasonably believes that the earlier response was erroneous or incomplete.

Using an investigator is a risky area and you should ensure that the agency you use complies with the Graham Leach Bliley Act. This act was passed to prevent misuse of personal information and ensure elimination of any possibility of identity theft. An investigator is useful to locate assets when the debtor has absconded with them. However, this investigator cannot make a false, fictitious, or fraudulent statement or representation to the customer. For example, you cannot bribe a bank employee for account information. Under the Act, it is a crime and can be punishable by up to ten years imprisonment. Pretexting is also a violation under the GLB. Do not impersonate an attorney, if you are not.

Sometimes a violation under the Fair Credit Reporting Act can trigger a violation of the Fair Debt Collection Practices Act. Therefore, a brief review of the FCRA is also needed. FCRA

regulates three types of activity; credit reporting, furnishing credit information, and use of credit information.

As an attorney or a creditor, you can only pull a credit report for permissible purposes. Under 15 U.S.C. §16816, a permissible use is defined if pulling the report was related to the “collection of the account”. FCRA 15 U.S.C. §16816(a)(3)(A). See, Edge v. Professional Claims Bureau Inc., 64 F.Supp 2d 115 (E.D.N.Y. 1999) The showing of a permissible purpose acts as a complete defense to any claim asserted against a party. Washington v. CSC Credit Services, 199 F.3d 263 (5<sup>th</sup> Cir. 2000).

Permissible purposes are:

- A. Employment-related. 15 U.S.C. §16816(a)(3)(B);
- B. For insurance underwriting. 15 U.S.C. §16816(a)(3)(D);
- C. For licensing underwriting. 15 U.S.C. §16816(a) (3) (D);
- D. In order to evaluate credit risk in certain financial transactions. 15 U.S.C. §16816(a)(3)€;
- E. When there is a legitimate business need arising from certain transactions with the consumer. 15 U.S.C. §16816(a)(3)(F);
- F. Express written consent of the consumer. 15 U.S.C. §16816(a)(2).

The burden to prove no permissible purpose is on the plaintiff.



In Pintos v. Pacific Creditors Assoc., 504 F.3d 792 (9<sup>th</sup> Cir. 2007), the court held that a creditor can only pull credit reports if the debt involved a credit transaction in which the consumer directly participated and voluntarily sought. The consumer in Pintos incurred towing and impound fees when her car was towed. The bank repossessed the car and paid these charges. The amount of the vehicle sold for at auction did not cover the fees paid. The bank's attorney pulled a credit report to determine if the consumer had sufficient assets to proceed. The court found a violation under FCRA because Pintos did not incur the debt voluntarily.

The Ninth Circuit in another opinion issued 4-30-99 confirmed the debt must involve the consumer, and the transaction must involve the extension or review of credit or the collection of an account. A debt that has been reduced to judgment would be a permissible use per the Ninth Circuit. These violations could become a violation under the FDCPA

The CFPB issued new final collection rules on October 30, 2020, which regulate debt collection. The Final Rules go into effect one year from its date of publication in the Federal Register which is November 30, 2021. Under Reg F, the Code creates a rebuttable presumption that seven or fewer debt collection calls limited to seven attempts in a week does not create harassment. This limit is account specific.

The Reg F allows attorneys to also contact consumers by text and email. Emails are restricted to nonwork addresses. This may be difficult to recognize as many g-mail accounts can



be both personal and work emails. No social media messaging is allowed. Both email and text messages require an opt-out instruction. The opt-out is a clear and conspicuous statement that describes the method by which a consumer can opt-out of future electronic communication attempts. For example, a link that allows the consumer to click on a "stop" link would be such a method. The Final Rule does allow the collector to respond once after receiving an opt-out request. The collector can respond to the consumer that they are confirming the request to stop. Also, if the consumer communicates by an electronic method after requesting an opt-out, the debt collector, can respond once to that request without a violation.

All communications are still regulated by the FDCPA's prohibition on communicating at any unusual and inconvenient times and places. Reg F does not change the requirement that communication must be between 8 am and 9 pm in the consumer's time zone or any other time that the consumer has stated is inconvenient.

Reg F allows a collector to leave messages called a Limited Content Message. This message is left on a voicemail, and it does not constitute a communication as defined under Section 805. In that message, the firm must state that is a business name, a request for the consumer to reply to the message and the names of the person that the consumer can contact, and a telephone number to reply to the debt collector. The message can also include a salutation, the date and time of the message, suggested date and times for the consumer to respond to the

message, and a statement that if the consumer replies, the consumer can speak to any of the firm's representatives or associates. If the message exceeds the content allowed, the communication is no longer protected.

Reg F also gives firms a safe harbor if a message is unintentionally disclosed to a third party. The debt collector must have a policy and procedure in place to reasonably prevent such disclosures. If the firm can show that the third-party disclosure occurred despite these policies, the Reg F gives the firm a bona error defense.

If a law firm decides to outsource skip tracing, it will require those vendors to have service provider contracts. In those contracts, the skip tracer will need to comply with the Acts earlier described. Service agreements will vary but generally, they will include confidentiality provisions. Some ideas about becoming compliant might be to have a code of conduct that each employee must sign. Required educational programs to teach staff about the FDCPA, UDAAP, and FCRA with testing should be considered. It is important to document all training. Call recording helps with the monitoring and training. If you give your employees written scripts to use, it will help you protect your company by having policies and procedures in place. Certainly, care must be taken to protect any personal information such as social security numbers given to a third party.



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