The Business of Debt Collection

THE FAIR DEBT COLLECTION PRACTICES ACT

By J. Dennis Mock and Robert B. Burleigh, CHBME

The Fair Debt Collection Practice Act (FDCPA) was enacted in 1978 in response to a variety of abusive collection practices employed by collection agencies, lenders, and a host of other creditors. Prior to FDCPA, only a few states had enacted laws governing debt collection. As a result, there was a "wild west" attitude among some debt collectors. Pre-FDCPA, some debt collectors would send mail designed to resemble court documents, summonses, subpoenas, warrants, etc.; send mail designed to embarrass the debtor by putting collection messages on the exterior of the envelope; make telephone calls 24/7 or repeatedly call the debtor's place of employment; make calls to neighbors or relatives, and a host of other abusive practices.

The Fair Debt Collection Practices Act (or FDCPA), 15 U.S.C. §1692 et seq., is a United States statute added as Title VIII of the Consumer Credit Protection Act. Its purposes are to:

- Eliminate abusive practices in the collection of consumer debts
- Promote fair debt collection
- Provide consumers with an avenue for disputing and obtaining validation of debt information in order to ensure the information's accuracy

The act creates federal guidelines under which debt collectors may conduct business, defines rights of consumers involved with debt collectors, and establishes penalties and remedies for violations of the Act. In addition, it is sometimes used in conjunction with the Fair Credit Reporting Act.

WHO IS COVERED?

FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce (the telephone, for example) 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." That might seem to apply exclusively to traditional collection agencies, but so-called "original creditors" may also be subject to the law. For practical purposes, conforming to the FDCPA rules does not impair an original creditor's ability to communicate with a debtor and is therefore a very good idea, regardless of whether the law strictly applies, or not.

Some states, such as California, Maryland, New York, Arizona, Rhode Island, and others have established state laws that augment or supersede federal law, to the extent that they are more restrictive than the federal laws. Even some cities, notably New York City and Buffalo, NY, have enacted collection laws that further supersede federal and state laws. Furthermore, within the collection industry, there are so-called "license states" and "non-license states"—states that require collection agencies to be licensed to conduct business. In addition to paying license fees, many "license" states require that companies be insured (bonded) and comply with other requirements. Maryland and Arizona—and possibly others—construe their laws to apply to medical billing companies and require billing companies to be licensed if they are located in, or do business with state providers.

FDCPA applies exclusively to consumer debts; commercial debts are not covered by FDCPA. Court decisions in many states have found billing companies to be subject to the federal law, although some have not.

WHAT IS COVERED?

Prohibited Conduct

The Act prohibits "abusive and deceptive" conduct that might be used in an attempt to collect debts, including:

1. Contacting consumers by telephone outside of the hours of 8:00 a.m. to 9:00 p.m. local time
2. Contacting consumers in any way (other than litigation) after receiving written notice that said consumer wishes no further contact or refuses to pay the alleged debt (unless it is to say that collection efforts are being terminated or that the collector intends to file a lawsuit)
3. Contacting consumers at their place of employment (after having been told verbally or in writing that this is not acceptable)
4. Continuation of collection efforts after receiving written request from consumer for validation of debt, unless/until validation is provided
5. Misrepresenting the debt or using deception to collect the debt
6. Publishing the consumers name or address on a "bad debt" list
7. Adding extraneous "fees" or "charges" to the original balance (unless allowed by law)
8. Threatening consumers with arrest or legal action that is not actually contemplated or even possible
9. Using abusive or profane language in the course of communication related to the debt

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10. Revealing or discussing the nature of debts with third parties (other than the consumer's spouse or attorney)
11. Reporting false information on a consumer's credit report or threatening to do so in the process of collection.
12. Filing lawsuits in places other than where the consumer lives or signed the contract

Consumers may file a private lawsuit in a State or Federal court to collect damages (actual, statutory, attorney's fee and court-costs) from third-party debt collectors. The FDCPA is a strict liability law, which means that a consumer need not prove actual damages in order to claim statutory damages of up to $1,000 if a debt collector is proven to have violated the FDCPA. The collector may, however, escape penalty if it shows that the violation (or violations) was the result of a "bona fide error." As with many legal specialties, there are consumer law attorneys specializing in FDCPA litigation. Over the past few years, there have been an increasing number of lawsuits filed against medical billing companies; defeating the suit can often cost as much—or more—than settling or losing.

Alternately, if the consumer loses the lawsuit and the court determines that the consumer filed the case in bad faith and for the purposes of harassment, the court may then award attorney's fees to the debt collector. Historically, courts have only very rarely ordered consumers to pay debt collectors' attorney fees in an FDCPA case.

Required Conduct

Further, the FDCPA requires debt collectors to:

1. Identify themselves and notify the consumer *in every communication* that the communication is from a debt collector
2. Give the name and address of the original creditor (company to which the debt was originally payable) upon the consumer's written request
3. Provide verification of the debt to the consumer upon written request (but, what constitutes verification is not spelled out by the act)
4. Notify the consumer of their right to dispute the debt, in part or in full, with the debt collector. Such a dispute must also be reported by the creditor to any credit bureau that reports it.

If a written dispute or request for verification is sent within 30 days after receiving the first written notice concerning the consumer's rights, then the debt collector must either provide the requested validation information or cease its collection efforts altogether. The so called 30-day "g" validation notice is required to be sent by debt collectors within five days of the initial communication. The consumer's receipt of this notice starts the clock running on the 30-day right to demand validation of the debt from the debt collector. Consumers may still dispute a debt later, but they lose the right to compel the debt collector to produce verification of the debt if they dispute it after the 30-day period has elapsed. A consumer may also verbally dispute a debt, but the consumer does not preserve all of his/her rights by doing so.

The collector may, however, escape penalty if it shows that the violation (or violations) was the result of a "bona fide error."

HOW DOES FDCPA AFFECT THIRD PARTY MEDICAL BILLING COMPANIES?

1. Communicating in a name other than the creditor (client)

a. Written communications that are, or appear to be from a third party, or contains statement(s) associated with third party debt collections can expose a billing company to FDCPA liability. For example: large block print in red, on yellow paper, saying "PAST DUE." This could allow the courts to agree with plaintiffs belief that the notice was from a collection agency, whether it actually was, or not.
b. Verbal communications that suggest the call being received by the patient is from the physician's CPA, rather than the practice's office is an open invitation to a possible problem.

2. Communicating actions you don't or can't do.

a. *Credit bureau involvement.* It is permissible to report bad debts and delinquent accounts to a credit bureau, HOWEVER, the reporter (practice) is liable for maintenance of the reported debts, so that later payments—partial or in full—must be reported to the credit bureau. Failure to report subsequent payments, settlement or forgiveness of the debt is a violation of the Fair Credit Reporting Act (FCRA).

   Stating or implying that a past due or delinquent balance might be or will be reported to a credit bureau is an FDCPA violation if the account is never reported to a credit bureau.
b. *Inferring no further treatment.* All states have laws governing medical practices. One of those laws, often described (continued on page 25)

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as "abandonment," addressees how a patient can be terminated ("fired") from a practice. There is typically a written notice required along with notification of alternative providers. Inferring that a patient is, or might be, "fired" from the practice not only can violate FDCPA, it may also violate your state's abandonment laws.

c. *Demanding payment be made by a specific time and date*. Unless a practice has published policies or patient-signed agreements about payment terms and due dates, demands for specific payment amounts and/or specific dates by which payment must be made will be construed by the courts as activities consistent with those of a commercial debt collector, rather than a primary creditor.

d. *Threatening (unplanned or untrue) consequences.* Section 807 – False Representation of FDCPA has 16 subsections, most of the activities mentioned would never be engaged in by a billing company. But it is not uncommon for a patient to perceive that the unpaid bill will affect their credit, particularly when it is inferred or even suggested that the bill has to be brought current before any additional appointments are made.

3. Portraying something you aren't

a. Collection agencies, as mentioned earlier, require licensing in some states. Yet some software firms sell a module that allows the practice or billing company to "create" an agency simply by opening a post office box.

b. Saying or inferring the caller is a lawyer, government official, or using other false titles that patients claim they hear when they have an unpaid medical bill and receive a call, an email or letter in the mail is also problematic conduct.

c. If a company employs collectors, customer service personnel or, by any other title, employees who have routine contact with patients are permitted to allow their staff to use a pseudonym in place of their real name, *provided*: the name is on file with the employer, it is not used by more than one employee, and there is a cross-walk document that allows identification of the actual employee associated with the pseudonym.

4. Calling at times inconvenient to the patient

Part of this problem is many billing companies have clients with patients in several, or even all, U.S. time zones. FDCPA states 8 AM – 9 PM, local time (the patient's local time, not the caller's local time).

ADDITIONAL RISK AREAS

State and local collection laws. First understand this is an overview of a law that was not intended for the medical billing industry. Using common sense should avoid most exposure risks, but there are patients and lawyers who may use this for economic enrichment. Therefore, you need to have a general understanding to insure you and your clients are compliant.

Courts use of "unsophisticated". The court standard of "unsophisticated consumer" is only used within FDCPA. This helps explain how billers have lost cases, as it mandates that courts accept that whatever the consumer says [no matter how illogical] is the truth. Even if the plaintiff says something which logically can't be correct the court must accept it.

Class action law suits. A common approach to FDCPA litigation is the filing of a Class Action lawsuit. Therefore, a complaint or claim by one patient can quickly become a claim of 10,000. If the allegation by the patient is over a letter, one of the first questions that will be asked is, "how many letters like this did you send out in the past two years?" A common approach to obtaining this information is to subpoena the records of the company's software and/or statement vendor(s), avoiding the need to wrestle the information from the billing company. In one recent FDCPA Class Action case, an HBMA member company settled for $40,000, plus their own legal expenses, on a case arising from one statement but settled for hundreds of statements. Over 2/3 of the "settlement" went to the plaintiff's lawyer.

Your Errors & Omissions (E & O) Insurance policy. If you have an E & O policy, make sure that FDCPA risks are covered. If they are not mentioned, they are probably not covered.

WHAT SHOULD I DO TO PROTECT MY COMPANY AND MY CLIENTS?

Here's a checklist of To Do's to reduce your FDCPA risks:

1. Read and understand the FDCPA Regulations.
2. Determine whether your state(s) [*where you have clients and where they have patients*] have local-level collection laws. Read and understand them, too.
3. If you must have a collection agency license in your state, get one.
4. Have a qualified collections attorney review your statements and statement messages, patient call scripts (your calls should be scripted for common topics), form letters, etc. Have a *(continued on page 27)*

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relationship with the attorney that allows for help with new questions, employee training needs, etc. The national and/or state chapter of the American Collectors Association (www.acainternational.org) can provide attorney referrals.

5. TRAIN your staff. Make sure they know about FDCPA, their responsibilities for compliance and the common traps.
6. TRAIN your managers and supervisors so they can step in if a patient call may be getting out of hand. Make sure they know how to escalate further up.
7. Use—or add and use—"call monitoring" feature on your phone system. If you can record ALL calls (a common feature), do so. Use good and bad ones as training examples. Be sure to comply with your state's laws regarding beep tones or other notice requirements if a call is being recorded.
8. Consider sending your key staff to ACA-sponsored FDCPA seminars. They are held often, around the US.
9. Add FDCPA and FCRA to your Compliance Program. Make sure your Compliance Officer is able to support these responsibilities within 18 months.
10. Communicate with the collection agencies to which you refer your clients' accounts. Ask them to provide training and feedback to your staff. Many agencies employ certified collectors, some of whom are excellent trainers. Pay something for it, if you must.

THE FTC REPORT

The Federal Trade Commission (FTC) produces an annual report to Congress of its findings with respect to its FDCPA enforcement activities. This report details consumer complaints to the FTC about alleged debt collector violations of the FDCPA. There were more than 66,000 consumer complaints made to the FTC about unlawful collection activities in 2005. This was an overall increase of more than 14% over 2004.

SUMMARY

Call it what you want—extortion, blackmail or coercion—FDCPA is often used as an income generator for lawyers instead of a law to protect consumers. Understand that it is a high stakes game being played in the US Courts every day of the week. Avoiding liability is straightforward if common sense and a little thought are applied to these risk areas.

"Their" game plan is rather simple:

- You do something that will allow me, as an "unsophisticated consumer," to say that I thought you were a collection agency. If you do it in a state that has collection regulation, I will also sue you in a state court for violation of that regulation, too.
- Step two is to go to the Federal Courts [with proof that you acted as a collection agency] and proceed to allege all kinds of FDCPA violations. Make sure the target(s) incur maximum legal costs to motivate a settlement.
- Collect tens of thousands of dollars in settlements for a few hours of work. Pay pennies to the "injured" patients.

Bottom line, if you're not sure, ask for help from someone who knows the arena. If you are not a collections expert, find and work with one. ▲

J. Dennis Mock is currently with his three-generation-owned family business called Medical Business Bureau, LLC in Park Ridge, IL. He can be reached at jdm@mbb.net. Robert B. Burleigh is president of Brandywine Healthcare Services. He can be reached at brandywinebob@aol.com.

USEFUL LINKS

Note: *Check to be sure you are looking at the current version of the Act. It was most recently amended in 2006.*

- **Fair Debt Collection Practices Act - United States Federal Trade Commission**
  www.ftc.gov/os/statutes/fdcpa/fdcpact.htm
- **ACA International's web page**
  www.acainternational.org
- **ACA International's FDCPA web page**
  www.acainternational.org/?cid=494
- **FTC's FDCPA web page**
  www.ftc.gov/os/statutes/fdcpajump.shtm
- **FDCPA Expert**
  www.fdcpaexpert.com
- **Public Citizen**
  http://pubcit.typepad.com/clpblog/2006/10/fdcpa_amendment.html
- **National Association of Consumer Advocates: Find a Lawyer**
  www.naca.net