CFPB Takes First Steps to Extend Fair Debt Collection Practices Act to Debt Owners

November 6, 2013 - When the Fair Debt Collection Practices Act (FDCPA) was passed in 1977, the specifically prevented federal agencies from adopting and enforcing rules that impacted third party debt collectors. The rules that debt collectors were to follow were specifically laid out in the law, along with the penalties for breaking them. And the FDCPA didn't cover owners of debt who were attempting to collect unpaid bills themselves. But Dodd-Frank financial reform changed that and yesterday, the CFPB made the first move to change the way debts are collected in the United States.

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The Consumer Financial Protection Bureau (CFPB) has issued an Advanced Notice of Proposed Rulemaking (ANPR). The notice doesn't contain any proposed rules. Instead, it attempts to explain the FDCPA, the purpose for which congress enacted it, and some of the current issues associated with debt collection. The ANPR also solicits input from consumers and businesses on the process and asks commenters to suggest rules.

Perhaps the largest anticipated change associated any new rules for debt collection is that the CFPB is making it very clear that it intends to enforce any new rules against businesses attempting to collect on bad debt that they own. Prior to Dodd Frank, the law didn't permit this. But the ANPR says very specifically that â€œCovered personsâ€• for purposes of the Dodd-Frank Act includes first-party collectors [emphasis added] and third-party collectors who are collecting or attempting to collect on debts that arise out of consumer credit transactions. It then goes on in the footnotes to describe the agencies authority to take this action. Footnote 47 reads in part:

"Consumer financial product or serviceâ€• under the Dodd-Frank Act means any â€œfinancial product or service," either offered or provided for use by consumers primarily for personal, family, or household purposes, or, as applicable, delivered,

offered, or provided in connection with a consumer financial product or service. Section 1002(5) of the Dodd-Frank Act, 12 U.S.C. 5481(5). "Financial product or service" includes "extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extension of credit (other than solely extending commercial credit to a person who originates consumer credit transactions)."

In other words, any business that issues any form of credit is subject to CFPB regulation.

There is no doubt that there are a wide variety of shady practices used by some debt collectors. This includes debt collection practices by businesses who engage in their own collections on debts which they own. But as they say, the road to perdition is paved with good intentions. In this case, if the CFPB doesn't proceed with extreme caution, their actions could have an effect that is completely opposite of that which is intended.

If new rules create an undue regulatory burden on businesses, there are two immediate results that can be expected. First, prices charged by those businesses will increase for everyone. Second, access to credit is likely to be reduced significantly. Some businesses may simply decide to stop issuing new credit of their own. Others may decide to significantly tighten their lending standards. Either way, the people that will be most impacted are those who already have limited access to credit.

One of the topics mentioned in the ANPR is that of Debt Buyers. These are companies that purchase debts from the original creditor for pennies on the dollar and then attempt to collect on them. Again, there are some significant industry issues associated with the purchase of bad debt, but too much regulation could make it difficult or impossible for businesses to sell bad debts. This would increase business costs which will in turn be passed on to all consumers in the form of higher prices.

Throughout this process, the CFPB should seek a middle ground.

Certain practices are likely to put in place for first and third party collections alike. These may include some of the current rules restricting the time of day that people can be contacted and prohibitions on legal threats unless the collector intends to follow through.

Other restrictions may require more study however. For instance, third party debt collectors have a legal obligation not to contact people when they are at work if they are told such contact could jeopardize the debtor's job. But placing the same restriction on the owner of a debt may actually threaten the livelihood of the business owner, especially if the business owner was responsible for originating credit to the debtor.

The ANPR also mentions new technologies and discusses potential restrictions on their use for debt collection. In one specific example, it asks whether time of day restrictions for contacting debtors should be extended to email messages because many consumers receive notifications on their smart phones with every mail message they receive? This would likely place an undue burden on all debt collectors. There is no way to tell from an email address what time zone that a person actually resides in. And smart phones can easily be configured to turn off email notifications at night. That isn't the collectors' responsibility.

Two items that would provide consumer benefit involve the accuracy of debts subject to collection activities. While it may be unreasonable to expect any large business to be 100% accurate in its collections - many credit card companies have millions of customers - the agency could adopt a threshold number for accuracy. This could be applied to information supplied to credit bureaus as well as debts that are sold or sent out for collection. Any business exceeding the threshold could be made subject to additional scrutiny and enforcement action. But businesses that meet the threshold should also receive the benefit of being left alone. And any threshold number should be reasonable.

Secondly, the current system for disputing inaccurate data on credit reports is simply ineffective for consumers. The credit bureaus and businesses extending credit need to have meaningful dispute policies in place and they need to review documents provided by consumers in disputes. This is not happening right now. In fact, many consumers who dispute items will find that even if they get specific line items removed from their credit reports, those items may reappear in a month or two.

The credit bureaus could easily prevent this but they don't; largely because it is more profitable for them to sell useless credit monitoring services than to provide accurate credit reports. They should face significant fines and criminal penalties for failing to correct data that has already been reported as accurate. These fines should be in addition to civil liability associated with inaccurate credit reports. And these same penalties should apply to businesses that continue to report old or erroneous items to the credit bureaus when they have been removed, proof has been provided by the consumer that they are not responsible for the debt or that it was actually paid, or when the business should reasonably have known that their reporting was inaccurate but had no systems in place to prevent their reporting.

Last month, the CFPB issued a warning to both the credit bureaus and to businesses on these issues. They have already made it clear that businesses that regularly report inaccurate information or which don't have effective procedures in place to review documents provided by consumers when they dispute charges are subject to agency regulatory action. Likewise, they have notified the credit bureaus that using ineffective electronic dispute resolution procedures will lead to agency enforcement actions. The ANPR is apparently the next step in formalizing those warnings.

We'll continue to watch this issue and let you know how it is progressing. We urge both consumers and businesses to provide comments on this topic to the CFPB. Comments can be made at www.regulations.gov by searching for Docket No. CFPB-2013-0033 or for Regulatory Identification Number (RIN) 3170-AA41.
byJim Malmberg
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