CFPB Proposed Debt Collection Rules: Calling Practices and Limited-Content Messages

June 25, 2019

Presented by: Lee Gilley and Jared Searls

Agenda

1. FDCPA and Proposed Rule Overview
2. Calling Practices
3. Limited-Content Messages

FDCPA and Proposed Rule Overview

Bradley

FDCPA Overview

- **Passage and purpose –** Passed in 1978 because of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors"
- **Key Features –**
  - Broadly prohibits debt collectors from engaging in harassing, abusive, deceptive, and unfair practices
  - Also contains more specific prohibitions and requirements (*e.g.* may not contact a debtor before 8:00 am or 9:00 pm)
- **Enforcement –** FDCPA provides for private right of action that allows for damages, statutory penalties, and attorney's fees

Bradley

FDCPA Overview

- **Rulemaking –**
  - Prior to the passage of Dodd-Frank in 2010, no one had the authority to issue rules under the FDCPA
  - Dodd Frank gave the CFPB rulemaking authority under the FDCPA, and the proposed rules are one of the last steps to exercising that authority
  - CFPB relied on its authority under the FDCPA and its UDAAP authority in issuing the rules

- **Courts as rule makers –**
  - Without a rulemaking authority, the United States court system became the de facto authority for determining how the 40 year old statute applied in today's world
  - This resulted in a patchwork of case specific rules that varied from jurisdiction to jurisdiction

Bradley

FDCPA

1. Lack of clarity regarding how the FDCPA applied to new technology

2. Lack of clarity regarding what constituted an oppressive, harassing, deceptive, unfair or abusive practice

3. Lack of clarity regarding who is a debt collector under the rule

4. Outright contradiction (*i.e.* one court requiring an activity that another court explicitly barred)

Bradley

CFPB Rulemaking Timeline

- The proposed rule is the CFPB's final step before issuing a final rule
- The CFPB will accept comments from consumer advocacy and industry groups until August 19, 2019
- The CFPB, based on prior timelines, will likely issue a final rule in early to mid 2020, and the rule will likely take effect in late 2020 or early 2021

Bradley

CFPB Proposed Rule - Overview

1. Communications
   - **Create the limited-content message**
   - **Establish bright line call limitations**
   - Clarify when and where a debt collector may contact the consumer
   - Allow debtors to restrict the media through which they are contacted
   - Clarify how debt collectors may use newer communication technologies
2. Disclosures
   - Specify that debt collectors must provide certain information regarding the debt
   - Establish a model validation notice
   - Clarify processes for providing disclosures electronically
3. Other Categories
   - Clarify how debt collectors deal with a successor to a deceased consumer
   - Prohibiting credit reporting prior to communicating with the borrower
   - Limiting transfer of certain debts (*e.g.* settled debts, discharged debts)

Bradley

Call Limitations

Bradley

	Current Law	Proposed Rule
Statute	15 U.S.C. 1692d(5) - Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.	15 U.S.C. 1692d(5) - Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
Authority	FDCPA	FDCPA UDAAP (Dodd-Frank)
Regulation	None	12 C.F.R. 1006.14(b)
Number of Calls Allowed – No Live Contact	Case-by-case analysis that can range from a handful of calls to hundreds of calls	Seven calls in a rolling seven day period, unless additional calls fall into a specified exception
Number of Calls Allowed – Live Contact	Case-by-case analysis that can range greatly	One live contact in a rolling seven day period unless additional calls fall into a specified exception

Call Limitations – Telephone Call

"A debt collector violates [the rule]…by placing a **telephone call** to a particular person in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days; or (ii) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

- Telephone Call – Any time the debt collector dials the consumer unless one of the following applies
  - Misdirected call – Applies when the debt collector learns that a telephone number does not belong to the particular person who it believed it was calling
  - Responsive calls – Calls made to respond to a person's request for information
  - Consent calls – Calls made with the person's prior consent given directly to the debt collector
  - Unconnected calls – Calls with indication that the number is disconnected (*i.e.* a busy signal or error message)
  - Calls made to specified parties – Calls made to (1) the consumer's attorney; (2) a consumer reporting agency; (3) the creditor; (4) the creditor's attorney or (5) the debt collector's attorney

Bradley

Call Limitations – Particular Person

"A debt collector violates [the rule]…by placing a telephone call to a **particular person** in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days; or (ii) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

- Particular Person – Any person other than the specified parties described in the preceding slide (*e.g.* the creditor, consumer reporting agency, etc.)
  - The rule protects individuals other than the consumer
    - For example, the debt collector can only make seven calls in a seven day period in an effort to obtain location information from a third-party
  - Debt collectors should not forget the limitations on communicating with third-parties regarding the debt

Bradley

Call Limitations – Particular Debt

"A debt collector violates [the rule]…by placing a telephone call to a particular person in connection with the collection of a **particular debt** either: (i) More than seven times within seven consecutive days; or (ii) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt.

- Particular Debt – Each of the consumer's debts in collection
  - A debt collector who has multiple consumer debts may make seven contact attempts in a rolling seven day period for each debt (*i.e.* a debt collector who services two debts may place up to 14 phone calls)
  - For student loans debts, the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector

Bradley

Call Limitations – Counting Calls

"A debt collector violates [the rule]…by placing a telephone call to a particular person in connection with the collection of a particular debt either: (i) More than seven times within **seven consecutive days**; or (ii) Within a period of **seven consecutive days** after having **had a telephone conversation** with the person in connection with the collection of such debt.

- Seven Consecutive Days –
  - If a debt collector wants to place a call on Tuesday June 25, 2019, it should (1) count the number of **calls it placed** from Tuesday June 18, 2019 through Monday June 24, 2019 and (2) determine if it **had a telephone conversation** with the person after Tuesday June 18, 2019
  - The standard for 10016.14(b)(2)(i) and (ii) is different
    - For 1006.14(b)(2)(i), the debt collector counts the number of calls it placed
    - For 1006.14(b)(2)(ii), the debt collector counts the number of conversations regardless of who initiated the call

Bradley

Call Limitations – Safe Harbor

"Effect of complying with frequency limits. A debt collector who does not exceed the frequency limits in paragraph (b)(2) of this section complies with paragraph (b)(1) of this section and section 806(5) of the FDCPA (15 U.S.C. 1692d(5)), and does not, based on the frequency of its telephone calls, violate paragraph (a) of this section, section 806 of the FDCPA (15 U.S.C. 1692d), or sections 1031 or 1036(a)(1)(B) of the Dodd-Frank Act (12 U.S.C. 5531 or 5536(a)(1)(B))."

- Safe Harbor –
  - 1006.14(b)(4) establishes a safe harbor for debt collectors who comply with the call frequency limitations
  - This safe harbor applies to alleged violations of the FDCPA and or Dodd-Frank's UDAAP standard
  - The safe harbor should effectively limit nuisance FDCPA lawsuits in circumstances where the debt collector did not call in excess of seven times

Bradley

Compliance Tips

1. Your organization must be able to systemically track calls and contact on a rolling basis
   - If you operate in MA, NYC, WA, you likely already have a process for tracking calls on a rolling basis in those jurisdictions
2. Your organization must be able to systemically document exceptions that you intend to rely on
   - For example, if you intend to rely on the misdirected call exception, you must be able to identify misdirected calls
3. Your organization should not forget its obligations to comply with other calling requirements
   - State laws
   - Other FDCPA requirements (*e.g.* call timing restrictions)
   - Other federal laws (*e.g.* TCPA)

Bradley

Limited-Content Messages

Bradley

Limited-Content Messages

Why are limited-content messages important to understand?

- A limited-content message is not a communication. Instead, a limited-content message is considered an "attempt to communicate."
- As such, a debt collector who leaves a limited-content message for a consumer need not make the disclosures required for "communications."
- Reasoning: a limited-content message does not convey information about a debt directly or indirectly to any person, and as a result, a debt collector could provide such a message for a consumer without communicating with any person for the purposes of the FDCPA or Regulation F.

Bradley

Limited-Content Messages - Definition

Under the Proposed Rule, a limited-content message "means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content."

- Paragraph (j)(1) – *Required content.*
  - The consumer's name;
  - A request that the consumer reply to the message;
  - The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector;
  - A telephone number that the consumer can use to reply to the debt collector; and
  - If applicable, the disclosure required by § 1006.6(e).
- Paragraph (j)(2) – *Optional content*.
  - A salutation;
  - The date and time of the message;
  - A generic statement that the message relates to an account; and
  - Suggested dates and times for the consumer to reply to the message.

Bradley

Breaking Down the Definition – Important Points to Emphasize

- A message "for the consumer"
  - A communication directed to anyone that is not your consumer will automatically fall outside of the protection of a limited-content message
- Provide the name of a "natural person"
  - When providing the message, the message must include the name of a natural person (as opposed to an entity name) that the consumer can contact in return
- A generic statement that the message "relates to an account"
  - It is clear from the examples provided that this does not mean that an account number or any details regarding the account can be given. Instead, the message must simply state that the message is related to "an account."
- Potentially applicable disclosure under 1006.6(e)
  - If the communication is electronic (i.e., a text message) the debt collector must include a statement describing one or more ways to opt out of further communication

Bradley

Limited-Content Messages - Examples

The Official Interpretations of the Proposed Rule provide examples of limited-content messages that demonstrate a proper message using both 1) only the required information as well as 2) the optional information

- Using only required content described in § 1006.6(j)(1):
  - "This is Robin Smith calling for Sam Jones. Sam, please contact me at 1-800-555-1212."
- Using content described in both § 1006.6(j)(1) and (2):
  - "Hi, this message is for Sam Jones. Sam, this is Robin Smith. I'm calling to discuss an account. It is 4:15 p.m. on Wednesday, September 1. You can reach me or, Jordan Johnson, at 1-800-555-1212 today until 6:00 p.m. eastern, or weekdays from 8:00 a.m. to 6:00 p.m. eastern."

Bradley

Limited-Content Messages – Methods

- The proposed rule would enable a debt collector to transmit a limited-content message by voicemail, by text message, or orally.
- Importantly, the proposal does not enable a debt collector to transmit a limited-content message by email.
- Simply put, an email message typically requires additional information – e.g., a sender's email address – that may convey information about a debt that falls outside of a limited-content message. Moreover, a consumer is not likely to read or respond to an email containing solely the information that may be included in a limited-content message.

Bradley

Compliance Tips

1. Your organization needs to be aware of the elements that constitute a limited-content message and understand how to use them
2. Your organization needs to understand the implications of limited-content messages
   – The fact that a limited-content message is not considered a “communication” may avoid certain requirements under the FDCPA, but not all
3. Your organization needs to understand how to integrate limited-content messages into your debt collection strategy

Bradley

Questions?

Bradley