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# Fair Debt Collection Practices Act

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# Agenda

- FDCPA Overview
  - Who qualifies as a “debt collector”?
- Debt collection law update
  - California Debt Collection Licensing Act
  - *Hunstein v. Preferred Collection and Management Services, Inc.*
  - *Alexander v. Carrington Mortgage Services, LLC*

# Fair Debt Collection Practices Act (“FDCPA”) Overview

- The FDCPA is designed to eliminate abusive, deceptive, and unfair debt collection practices by debt collectors. It also protects reputable debt collectors from unfair competition and encourages consistent state action to protect consumers from abuses in debt collection.
- “Debt collectors,” as defined at 15 U.S.C. § 1692a(6) are subject to the provisions of the FDCPA.

# FDCPA Overview

- A “debt collector,” for the purposes of the FDCPA, is any person who uses any instrumentality of interstate commerce in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect debts owed or due to another.
- Businesses that collect their own debts are generally exempted from the FDCPA.
- However, a creditor that collects its own debts under another name is a “debt collector.”

# FDCPA Overview

- Other exceptions to definition of “debt collector”:
  - Any person acting as a debt collector for another, 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 related entities that are not in the primary business of collecting debts;
  - Any person attempting to serve legal process on a person in connection with judicial enforcement of a debt;

# FDCPA Overview

- Other exceptions to definition of “debt collector”:
  - Any person collecting debt owed or due to the extent such activity is (i) incidental to a bona fide fiduciary obligation or escrow arrangement; (ii) concerns debt originated by such person; (iii) concerns debt not in default at the time it was obtained; and (iv) concerns a debt obtained by such person as a secured party in a commercial transaction involving the creditor.

# FDCPA Overview

- Some state debt collection laws may apply broader definitions of “debt collector.”
- For example, the Maryland Consumer Debt Collection Act defines “collector” as “a person collecting or attempting to collect an alleged debt arising out of a consumer transaction.”
- The California Debt Collection Licensing Act defines “debt collector” to include any person who engages in debt collection “on the person’s own behalf or on behalf of others.”

# FDCPA Overview

- “Debt collectors” are subject to certain notice requirements and restrictions on communications with debtors, which can be enforced by the Consumer Financial Protection Bureau and by private cause of action.



# California Debt Collection Licensing Act ("CDCLA")

- Took effect on January 1, 2022
- Applies to businesses that collect their own debts as well as those that collect consumer debts for others.
- Consumer debt is debt resulting from a transaction in which property, services, or money are acquired primarily for personal, family, or household purposes.

# CDCLA (continued)

- All persons engaged in the business of debt collection in the state of California must obtain a license from the Department of Financial Protection & Innovation (“DFPI”).
- Affiliated companies may be licensed under a single license.
- A management company collecting timeshare association maintenance fees is not subject to the CDCLA, but a developer or lender collecting purchase money loan payments, including for loans it originated, is.

# ***Hunstein v. Preferred Collection and Management Services, Inc.***

- 17 F.4th 2016 (11th Cir. 2021) (hearing *en banc* granted)
- Plaintiff alleged that debt collector violated the FDCPA by communicating with a third-party printing vendor regarding the plaintiff's debt.
- 15 U.S.C. § 1692c(b) prohibits debt collectors from communicating debtor's personal information to third parties "in connection with the collection of any debt."

## ***Hunstein* (continued)**

- 11th Circuit held, in part, that the debt collector's transmittal of the consumer's personal information (name, outstanding balance, that debt resulted from minor son's medical treatment, son's name) to third party printing vendor constituted a communication "in connection with the collection of any debt."
- Court recognized that this holding may force debt collectors to bring services like printing and mailing in house.

## ***Hunstein* (continued)**

- This holding is significant, but subject to change. The Court granted rehearing *en banc* in November 2021, which is still pending.
- Note procedural posture – *Hunstein* came to the 11th Circuit on appeal from a grant of the debt collector’s motion to dismiss. The Court acknowledged that full factual development could show that vendors’ employees do not actually view personal information transmitted to them.

# ***Alexander v. Carrington Mortgage Services, LLC***

- 23 F.4th 370 (4th Cir. 2022)
- Suit under Maryland Consumer Debt Collection Act (“MCDCA”), which incorporates FDCPA. Court interpreted MCDCA in light of FDCPA precedent.
- Consumer sued mortgage service company alleging that servicer violated MCDCA by charging \$5 convenience fee for monthly mortgage payments made online or by phone.

## ***Alexander (continued)***

- MCDCA/FDCPA prohibit “the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law”
- “Permitted by law” requires affirmative sanction. Not enough that charge is not prohibited by law.
- Key takeaway – make sure that convenience fees are provided for in loan agreements.