

# Debt Collection

## Serving and Supporting the U.S. Economy

by David B. Ashe

Our have-now society does not exist in a pay-now economy. As a result, debt collection is not only essential to the U.S. economy, it is understandable. The fundamentals of the U.S. market are easy: services are provided, goods are delivered, and then payments are owed. However, things happen that disrupt the market. Bad timing, bad luck, and hard luck lead to debt. The debt collectors engage.

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John Smith obtained a credit card. He asked for it, he needed it, and he used it. But life got in the way and the card was closed for nonpayment with an unpaid balance. His credit score is now blemished, default penalties are likely, and so is the embarrassment of being behind on bills. Does the arrival of the debt collector portend additional pain or needed relief for the debtor? The collector will likely settle for a reduced amount, so Mr. Smith will obtain a discount he never expected. Plus, considering the time between default and collection activity, Mr. Smith obtained an unexpected extension on his payment schedule. With additional time to pay on a now reduced total, Mr. Smith has his best chance ever to clear this blemish from his credit history. Lastly, the bank that once faced a total loss for this account now has obtained a partial recovery.

The key element in the above scenario was communication. Unfortunately, pitfalls prevent something as simple as a phone call or a letter from a debt collector. Creditor clients are incredulous when collection attorneys explain that there is nothing simple or casual about a communication to collect a debt. A New Jersey case has attempted to discourage any collector from even leaving a voice mail message. What about written communications? The Fair Debt Collection Practices Act (FDCPA) requires that

if a debtor asks for verification of the debt, the collector must provide it in writing. What if the debtor uses one of the many downloadable collection response forms on the Internet to request no further contact, but still requests verification? This, too, has been the source of litigation against the collector.

From the perspective of collectors, the FDCPA is a good law. As written and intended, it's easy to navigate. When Congressman Frank Annunzio of Illinois championed this legislation in 1977, he sought to end the midnight phone calls, the false threats that debts have criminal liability, the attempts to reveal a consumer's debt to third parties. Even if the FDCPA did not exist, most people in this country would not use such dishonorable tactics. Fortunately, Congressman Annunzio's goals were achieved. Unfortunately, there was just enough space in the mortar of this law to stick a crowbar in there and wiggle out a few bricks.

The Federal Trade Commission and vigilant consumer attorneys have stopped many violations of the FDCPA. However, creatively construed claims can still allege an FDCPA violation. As an example, a federal case in Alabama has attempted to convert a statute of limitations in that court from an affirmative defense to a provision of the FDCPA. By statute in Virginia, as in most states, a statute of limitations is affirmative and must be raised by the defendant. In collection cases only, that Alabama case attempts to replace legislative

statute and require a collector to assess whether a debtor could possibly raise this defense in a collection suit. Nowhere else in civil litigation must a plaintiff abandon his claim due to the possible existence of a defense the defendant might raise and upon which the defendant might prevail.

Despite any disagreements about the FDCPA, no business can ignore outstanding accounts receivable or the critical need for available credit. In its 2009 *Roundtable Report*, the FTC stated:

Consumer credit is a critical component of today's economy. Credit allows consumers to purchase goods and services for which they are unable or unwilling to pay the entire cost at the time of purchase. By extending credit, however, creditors take the risk that consumers will not repay all or part of the amount they owe. If consumers do not pay their debts, creditors may become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.

Regarding purchased debt, most Virginia judges have avoided a temptation to address purchased debt action different from a third-party contingency collection effort. As the FTC statement above suggests, there is no difference. Needed service in the form of a credit card was extended and a balance is owed. To suggest that a simple assignment of a debt dilutes the substance of the debt questions the solid case law in Virginia regarding assignments and the fact that the assignee “stands

federal laws and regulations are based on the information contained in the final or “charge off” statement of a credit card account. While the final balance reflected on the defaulted account will undoubtedly contain late fees and interest, these are service charges accepted by the cardholder and a fee for the credit service provided. As is noted in numerous cases across the country, credit card statements were not produced in preparation for litigation, they were generated in the normal course of business to reflect the routine transactions required to operate a business and as such, have an inherent trustworthiness.

In a previous scenario, it was easy to determine that with good communication enabled, the arrival of a debt collector brings relief to the debtor. Has the arrival of these interpretations of the FDCPA brought added relief to the debtor? There are not very many moving parts to the job of a debt collector: Make contact with the debtor and discuss payment arrangements. FDCPA litigation has narrowed or eliminated safe harbor conduct for many commonsense routes of communication with the debtor. Cautious collectors are being forced to avoid attempts to simply discuss the debt with the consumer. What is left for the collector except a lawsuit? And the collector had best not wait too long for that, either. ☹

*Author's note: A tip of the hat to a debt collection company operating in Virginia, Asset Acceptance LLC. Its mission statement is strong endorsement of any action taken on an account receivable: Returning value to our credit driven economy.®*

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in the shoes” of the assignor. *Nat. Bank & Trust Co. v. Castle*, 196 Va. 686, 85 S.E.2d 228 (1955)

There is also no dilution of the reliability of documentation that an assignee might produce from the assignor. A dozen federal agencies and