



Best Practices for Consumer Financial Services Clients in the COVID-19 Era

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Introduction

The COVID-19 pandemic presents unique challenges for creditors, banks, and collection agencies as they navigate state and federal consumer protection laws during a period of unprecedented economic disruption. Some areas of concern include, but are not limited to, compliance with the Fair Debt Collection Practice Act, 15 U.S.C. § 1692 et seq. ("FDCPA"), the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. ("FCRA"), and the Telephone Consumer Protection Act, 42 U.S.C. § 227 ("TCPA"). Additionally, a novel patchwork of state and local executive orders and other directives presents compliance challenges in different states and regions of the country. KDV's Consumer Financial Services practice group stands readily available to offer nationwide compliance guidance and litigation strategy.

Effect on Collection Practices and the FDCPA Generally; State & Local Regulations; Garnishments

In the wake of the COVID-19 pandemic, many states have placed greater restrictions on the method and mode of collection practices. For example, Massachusetts enacted an outright ban on all collection calls for the duration of the state-of-emergency (this ban became the subject of a temporary restraining order issued by the United States District Court for the District of Massachusetts). A violation of any particular state or local directive curbing collection activity could likely form the basis of a viable FDCPA claim as a deceptive, harassing, unfair, or unconscionable collection activity. See 15 U.S.C. §§ 1692d, 1692e, 1692f.

Collection agencies and creditors must be mindful that the same activity taken pre-pandemic will likely be under further scrutiny if taken post-pandemic. For example, the State of Wisconsin issued guidance on debt collection procedures that suggested actions taken in normal times may be considered to be problematic during the pandemic and subsequent economic crisis. Collection agencies, banks, and other creditors should be mindful that consumers who previously bought items on credit did not expect to be out of work this spring and, therefore, payments may be missed. Agencies and creditors are reminded that consumers who find themselves out of work need to prioritize food, shelter, medicine, and other essentials over debt payments.

The legal question, asked through the lens of the FDCPA, will be whether conduct can *reasonably* be expected to threaten or harass a consumer. This question must be answered within the nationwide context of the pandemic and ensuing economic devastation. The regulations issued by the State of Wisconsin indicate that the context "shifted dramatically" with COVID-19. Juries will be the ultimate deciders on these contextual and legal questions over threatening, harassing, deceptive, or unfair conduct,

who are themselves experiencing the unfolding economic uncertainty. The practice of repeated calls and unsolicited threats to initiate legal proceedings is discouraged at this time.

Additionally, consumers challenging wage garnishment orders entered before the pandemic will likely increase. Consumers may file legal action to stop a garnishment to obtain a CARES Act stimulus payment from the government. This environment could lead to subsequent FDCPA claims alleging that debt collectors interfered with stimulus payments. Further, many states have temporarily ceased evictions and foreclosures for a period of time. Any violation of these temporary restrictions could form the basis of a cognizable FDCPA claim.

Effect on Credit Reporting and the FCRA Generally; Forbearance Agreements; Congressional Action; CFPB Action

The pandemic and attendant economic hardship has resulted in a multitude of forbearance agreements offered to impacted borrowers. The variety of these proposed agreements, given that some are mandated by law (e.g. federal student loan payments), and others merely offered by private agreement (e.g. residential mortgage economic hardship forbearance), results in no small amount of uncertainty regarding creditors' and lenders' obligations in terms of credit reporting and other areas of compliance with the FCRA. Unanswered questions remain about how deferred payments should be treated; when should delinquent accounts be reported once the deferral expires; and whether a deferral or forbearance will result in an accelerated "balloon" payment.

The U.S. House of Representatives has attempted to resolve some of this uncertainty with the passage of the Health and Economic Recovery Omnibus Emergency Solutions ("HEROS") Act, which aims to place a temporary moratorium on all negative credit reporting activity and bolster existing consumer protections. Specifically, the text of the HEROS Act states, "No person may furnish any adverse item of information (except information related to a felony criminal conviction) relating to a consumer that was the result of any action or inaction that occurred during a [major disaster]." H.R. 6800, Division K, Title IV(b).

The bill also directs the director of the Consumer Financial Protection Bureau to inform consumers of their rights to request the deletion of any adverse credit reporting item and to request a subsequent consumer credit report or score. Further, the HEROS Act would require the CFPB to create a website for consumers to report, under penalty of perjury, economic hardship as a result of the pandemic for the purpose of providing the credit report protections offered under the bill. While the future of the bill remains uncertain in the Senate, it does provide some clues on what a future

congressional response could look like. Furnishers of credit reporting information are advised to lean on the side of caution and refrain from furnishing adverse information, at least during these immediate uncertain times.

On April 1, 2020, the CFPB issued a statement regarding credit reporting on loans affected by the pandemic. The statement encourages a flexible supervisory and enforcement approach. While the CFPB has also announced that they are relaxing enforcement standards for companies struggling to respond to consumer disputes, the plaintiff's bar is not bound by these guidelines. An agency's failure to comply with all statutory requirements will likely invite liability under the FCRA and FDCPA.

Anticipated Issues with Work from Home; the TCPA

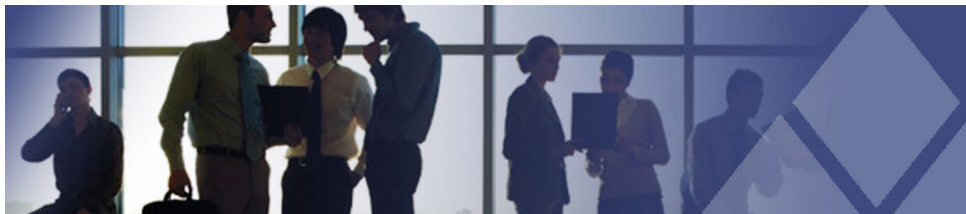
The collective pandemic response has rapidly ushered in a new era of working from home ("WFH") for large swaths of American industries. WFH presents unique challenges to many in the credit and collections industry. For example, many states and even some localities require debt collectors to be licensed with a physical commercial address. Agencies implementing WFH procedures may be required to register each individual employees' home address to adequately comply with the law. WFH may bring increased litigation exposure as a result of less oversight of employees that could lead to critical mistakes. Examples include possible failures to give the required FDCPA "mini-Miranda"; failure to properly account for any debt dispute or verification requests; and failures to heed cease and desist requests with respect to phone calls or other collection activity.

Additionally, with collection calls being made remotely and out of individual's own homes, concerns arise as to whether agency call recording systems will be fully operational to capture these communications should litigation arise. Further concerns include the viability and practicality of agency mailing procedures during WFH. Agency reliance on WFH may also lead to riskier practices with respect to the use of automated call recordings, which could invite liability under the TCPA. Agencies could leave more pre-recorded messages in an attempt to reach more consumers with less physical staff, without first confirming that sufficient documentation is on file demonstrating consumer consent. These practices could lead to increased TCPA claims.

Conclusion

While the COVID-19 pandemic and attendant economic crisis presents challenges to the entire consumer financial services industry, agencies and their carriers can benefit from reliable and experienced counsel in this arena. KDV's Consumer Financial Services practice group is available to answer your questions and assuage your concerns.

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About Kaufman Dolowich & Voluck LLP

KDV is a nationally recognized, AV-rated® law firm serving the business community in a number of practice areas. Originally founded over 33 years ago as a boutique labor and employment law firm, KDV has established a strong reputation in areas of commercial litigation, directors and officers liability (D&O), all matters involving financial institutions, professional liability coverage and defense, and insurance coverage and litigation. The firm's attorneys are seasoned legal practitioners and litigators who place clients first, think like business people, and provide viable, innovative solutions.



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