The Fair Debt Collection Practices Act (FDCPA) extensively regulates the collection of debts and provides private remedies for Act violations. As described in the next two subsections, application of the FDCPA to criminal justice debt must contend with whether the Act applies to parties involved in the collection of government debt and whether criminal justice debt falls within the scope of “debt” covered by the Act.

When the FDCPA does apply to collection of criminal justice debt, debtors are protected against a range of deceptive, misleading, abusive, or unfair practices. For example, a debt collector may not represent or imply that nonpayment of any debt will result in arrest or imprisonment or the seizure, garnishment, attachment, or sale of any property or wages unless such action is lawful and the debt collector or creditor intends to take such action.

A debt collector also violates the FDCPA by making a false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the government. Some courts have found this provision to apply to businesses that perform “check diversion” programs for state or local prosecutors and send debt collection notices on district attorney letterhead or to private collection firms collecting criminal justice debt that otherwise suggest they themselves represent the government or that the government has sanctioned their specific debt collection practices.

The validity of these decisions is now muddied by the U.S. Supreme Court’s decision in Sheriff v. Gillie, rejecting a claim that the use of attorney general letterhead by statutorily appointed private collection contractors was misleading. The Court reasoned that the letters did not imply a false association with a governmental entity, as the collectors had in fact contracted with the State to carry out debt collection and were authorized to collect on behalf of the government. The Court also was reluctant to intervene in a state’s collection of debt out of federalism concerns.

Nevertheless in Gillie the collection letter did not threaten prosecution, incarceration, or other criminal action. A communication falsely asserting that a private entity will invoke remedies reserved only to governmental actors could still violate the FDCPA—either because it suggests a false association with governmental actors or because it falsely suggests actions will be taken that the collector is not authorized to take.

Footnotes


A debt collector violates the prohibition on deceptive practices even when the debtor is not actually deceived. Instead, courts apply an “objective” test based on the “least sophisticated” or “unsophisticated” debtor standard. This standard serves the dual purpose of protecting all consumers, including the inexperienced, the untrained and the credulous, from deceptive debt collection practices, and protecting debt collectors against liability for bizarre or idiosyncratic consumer interpretations of collection materials.” Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997).

However, advocates should be aware that, even though the FDCPA does not require actual deception as an element of a claim, the Supreme Court’s 2016 decision in Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), makes it clear that the debtor must be prepared to show that the matter presents a case or controversy as defined by Article III of the Constitution. See National Consumer Law Center, Fair Debt Collection §§ 7.2.3 [3], 11.10 [4] (9th ed. 2018), updated at www.nclc.org/library.

11.7.4.1 Application of FDCPA Substantive Requirements to Criminal Justice Debt

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For a general overview of the issue, and a discussion of why “check diversion” companies are “debt collectors” within the meaning of the FDCPA, see generally Del Campo v. Mealing, 2013 WL 4764975, at *10 (N.D. Cal. Sept. 5, 2013) and National Consumer Law Center, Fair Debt Collection §§ 1.3.5.2.5 [7], 4.3.12 [8], 7.3 [6] (9th ed. 2018), updated at www.nclc.org/library.


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