



The New York City Department of Consumer Affairs'
Comments to
Statement of Policy Regarding Communications in Connection with
Collection of a Decedent's Debt

Submitted to
Federal Trade Commission

November 8, 2010

Introduction

To curb deception and abuse by debt collectors seeking to recover alleged debts from decedents' family members, the New York City Department of Consumer Affairs (DCA) supports and strongly encourages the adoption of the Federal Trade Commission's (FTC) proposed policy statement pursuant to the Fair Debt Collection Practices Act (FDCPA).¹ We also offer the following additional recommendations to further strengthen the policy, more fully described below:

1. Require collectors to make specific disclosures in all communications with an individual authorized to pay outstanding debts from an estate to ensure that that individual understands fully that he or she is not personally liable for the debt.
2. Limit the "clarifying questions" collectors may ask when making location communications with an individual who expresses any uncertainty with regard to his or her authority to pay outstanding debts out of the decedent's estate.
3. Require collectors to make documented good faith efforts to obtain additional information before making a second or subsequent contact with an individual, for the purpose of collecting a debt, when the individual stated he or she lacks, or is uncertain about, this authority.

To be most effective, the FTC's policy must ensure that debt collectors give consumers clear, accurate information regarding liability and must be strongly enforced to protect consumers from predatory practices. The FTC's recognition of the need for this policy statement also underscores the importance of continued and coordinated vigorous oversight and enforcement. Finally, to empower consumers to protect themselves from pernicious debt collection practices, DCA urges the FTC to post on its website information concerning financial counseling and financial literacy programs available to consumers around the country.

Background on DCA and its Office of Financial Empowerment (OFE)

DCA is the largest municipal consumer protection agency in the country. To ensure a fair and vibrant marketplace for consumers and businesses, DCA licenses over 71,000 businesses in 55 different industries, including debt collection agencies; mediates thousands of individual consumer complaints annually; educates consumers and businesses through press releases, press conferences, educational materials, community outreach and public hearings; and works with other city, state and federal law enforcement agencies to protect consumers from deceptive

¹ 15 U.S.C.A. § 1692 et seq.

practices. DCA enforces the City's consumer protection and licensing laws and other laws that regulate the marketplace and prohibit deceptive acts and misleading marketing practices.

Debt collection regulation and enforcement. DCA licenses approximately 2,000 debt collection agencies, including debt buyers.² DCA received nearly 3,000 complaints against debt collectors in the past three years, making it our number one complaint category in 2008 and 2009. To combat this widespread problem, DCA is actively engaged in curbing debt collection abuses in New York City. For example, as a result of DCA's mediation over the past three years, debt collectors ceased collection of debts totaling more than \$4 million from New Yorkers who filed complaints.

Further, DCA was instrumental in the passage of legislation last year to strengthen protections for consumers from improper debt collection, and last May, DCA issued revised debt collection regulations implementing the new law.³ In addition to requiring licensing for debt buyers, the amendments to the law and the implementing regulations strive to ensure that debt collection agencies collect only on debts that are actually due and owing by New Yorkers. Under the new law, any debt collection agency attempting to collect a debt from a New Yorker must provide substantial proof the debt is owed at the consumer's request. Specifically, the collector must provide a copy of the original debt document or original written confirmation of the transaction resulting in the debt, a copy of the final account statement of the debt, and a document itemizing the remaining amount due, including any additional fees or charges claimed to be due and the bases of the consumer's obligation to pay them. In addition, the new law and regulations require a collector to disclose the consumer's rights regarding the statute of limitations when attempting to collect on an expired debt, send written confirmation of any debt payment schedule or settlement within five business days of the agreement, and provide a telephone number which is answered quickly by a live person.⁴

DCA is also working to ensure that consumers sued by debt collection agencies are properly served with notice of suits filed against them. The FTC recently concluded that the high rate of defaults in consumer debt litigation and the deficiencies in the service of process documented in various jurisdictions establish a need to improve process service in debt collection cases.⁵ These findings are consistent with studies showing that a high percentage of consumer debt cases in New York City result in default.⁶ DCA licenses nearly 2,000 individual process servers

² N.Y. City Admin. Code § 20-489(a).

³ 6 RCNY § 2-190 *et seq.*

⁴ Recognizing that predatory debt collection practices continue even after collection agencies obtain judgments, DCA was active in New York State's passage of the Exempt Income Protection Act (EIPA) which went into effect in January 2009. N.Y. C.P.L.R. § 5205. The EIPA protects bank accounts that contain subsistence funds such as government benefits, pensions, and some earned income and prevents creditors and debt collectors from freezing these accounts to pay private debts, like credit card debts. *See* DCA's consumer fact sheet, "Debt Collection: Money Judgments and Frozen Bank Accounts," available at http://www.nyc.gov/html/dca/downloads/pdf/web_debt_collection_fact_sheet.pdf.

⁵ FTC, "Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration" (July 2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

⁶ *See, e.g.*, New York Appleseed, "Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Debt Cases," at 3 (2010) (noting that, in 2008, 41 percent of cases filed in New York City civil courts resulted in default judgments, and in the first half of 2009, 35 percent of such cases resulted in default judgments); The Legal Aid Society, MFY Legal Services, Inc., Neighborhood Economic Development Advocacy Project, and Urban Justice Center, "Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers," at 6 (May 2010); MFY Legal Services, Inc., "Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York" at 2 (June 2008) (finding that in 2007, out of 180,177 debt collection lawsuits filed in the Bronx, Staten Island, Brooklyn and Queens by seven law firms, only 8.57 percent of defendants appeared in court).

and almost 150 process serving agencies and vigorously prosecutes process servers who do not comply with the law. Recent amendments to the New York City laws governing process servers strengthen protections for consumers sued by debt collection agencies and increase DCA's ability to prosecute wrongdoers. Under the new law, process servers must provide an electronic record of their work by using an electronic device, such as a global positioning system (GPS), to automatically and independently verify the service of process at the location where such service was made or is claimed to have been made.⁷ DCA anticipates that this innovative requirement will help put an end to "sewer service" and significantly reduce the number of defaults.

Financial counseling and other empowerment work. DCA's OFE is the first local government initiative in the nation aimed expressly at educating, empowering, and protecting those with low incomes, so they can build assets and make the most of their financial resources. Launched in December 2006, OFE was the first initiative implemented under Mayor Michael R. Bloomberg's Center for Economic Opportunity, a comprehensive, research-driven effort to design and implement innovative poverty-reduction strategies. OFE spearheads an array of initiatives designed with potential for scale: protecting New Yorkers with low incomes from unfair and predatory practices, conducting large-scale public education campaigns, implementing innovative asset-building and safe banking programs, and coordinating a dynamic citywide network of quality financial education providers. OFE's Financial Empowerment Centers provide the "gold standard" of financial education: one-on-one financial counseling and coaching, at no cost and available at more than 20 locations Citywide. Over 80 percent of clients seeking financial counseling identify debt as their primary reason for doing so. OFE also connects New Yorkers with safe, affordable financial products and services offered by mainstream financial institutions. To share lessons learned and advocate jointly for national policy reforms, New York City founded and co-chairs the Cities for Financial Empowerment (CFE) Coalition, a group of ten city governments working to improve financial services for households with low incomes.

Based upon this broad and varied experience, DCA fully appreciates the importance of setting strong rules regulating collection of debts owed by decedents. Our efforts to ensure that debt collection agencies use only legal tactics in seeking to collect debts from New Yorkers – from service of process to collection – are undermined when collection agencies employ deceptive and illegal methods to collect debts from decedents' relatives. We respectfully submit the following recommendations.

Recommendations

DCA supports the FTC's proposed policy to clarify its interpretation of the FDCPA with regard to attempts to collect debts from family members of deceased consumers. DCA commends and supports the FTC's effort to curb abuses by collection agencies in seeking to collect debts from decedents' relatives.

DCA has received complaints from consumers who express frustration at attempts by collection agencies to collect debts owed by deceased relatives. In addition to their grief at losing a loved one, such consumers must contend with deceptive and aggressive tactics by collectors to induce consumers to pay debts consumers may very well not be obligated to pay. Our complaints come not only from spouses, but also parents, siblings and adult children – who, as

⁷ N.Y. City Admin. Code § 20-410.

the FDCPA contemplates, are less likely to be liable for the debts of deceased family members.⁸ Many consumers report receiving collection telephone calls and letters addressed to the deceased relatives; some of these consumers report collection agency contacts continue unchanged even after consumers send the collection agency a copy of the decedent's death certificate.⁹ The FTC's proposed policy will help ensure that consumers are protected from such crude and unscrupulous methods.

While the proposed policy is an important step in setting federal standards for protections against such tactics, we offer the following additional recommendations to increase its impact. Our experience regulating and addressing consumer complaints about debt collection agencies demonstrates that debt collectors engage in deception with great frequency – making strong protections with regard to vulnerable, bereaved and often older consumers all the more vital.¹⁰ DCA and the FTC have recognized in other contexts that transactions involving such consumers require heightened regulation and robust enforcement. For example, the perils of debt collection are similar to those prevalent in the funeral industry and are addressed in DCA and FTC regulation of funeral service providers.¹¹

1. Require collectors to make specific disclosures in all communications with an individual authorized to pay outstanding debts from a decedent's estate to ensure that that individual understands fully that he or she is not personally liable for the debt.

The proposed policy appropriately prohibits collectors from misleading individuals who are authorized to pay debts out of a decedent's estate to believing themselves personally liable for the decedent's debts. This policy is warranted given collectors' well-documented propensity to bend the truth in order to collect debts.¹² The policy, however, states only that it "may be necessary" for collectors to make these disclosures "[t]o avoid creating . . . a misimpression." To minimize abuse and confusion, the FTC should require collectors to affirmatively disclose, in all communications with an individual authorized to pay outstanding debts from the estate of a decedent, that the collector is seeking to collect payment from the decedent's estate, and not from the individual contacted, and that the individual has no obligation to pay the debt with the individual's own assets or assets owned jointly with the decedent.

⁸ 15 U.S.C.A. § 1692c(d).

⁹ The complaints DCA has received very likely represent the tip of the iceberg with regard to this issue, as many consumers do not file complaints regarding debt collection agencies. *See, e.g.*, FTC, "Federal Trade Commission Annual Report 2010: Fair Debt Collection Practices Act" (hereinafter "FTC Annual Report 2010") at 2 (2010). It seems particularly likely that consumers would dispense with filing complaints when dealing with emotional and practical concerns after losing a loved one.

¹⁰ *See, e.g.*, FTC Annual Report 2010, *supra* note 9; FTC, "Prepared Statement of the Federal Trade Commission on 'Consumer Protection and the Credit Crisis' Before the Senate Committee on Commerce, Science, and Transportation" at 2, 10 (Feb. 26, 2009).

¹¹ *See* N.Y. City Admin. Code § 20-730 *et seq.*; 6 RCNY § 5-161 *et seq.*; "Department of Consumer Affairs Funeral Home Sweep Uncovers Many Funeral Homes Denying Consumers Legally Mandated Pricing Information" (Mar. 16, 2010), available at http://www.nyc.gov/html/dca/html/pr2010/pr_031610.shtml (noting that, over a two-month period, DCA conducted 579 inspections of funeral homes, finding violations at 87 businesses). *See also* 16 C.F.R. § 453.3; 47 Fed. Reg. 42260 (Sept. 24, 1982) ("While the arrangement of a funeral is clearly an important financial transaction for consumers, it is a unique transaction, one whose characteristics reduce the ability of consumers to make careful, informed purchase decisions. Decisions must often be made while under the emotional strain of bereavement . . .").

¹² *See, e.g.*, FTC Annual Report 2010, *supra* note 9 at 7 (noting that in 2009, the FTC received 18,438 complaints alleging that collectors falsely threatened lawsuits or other actions collectors did not intend to take, and 11,505 complaints alleging that collectors falsely threatened arrest or seizure of property); 15 U.S.C.A. § 1692 ("There is abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors . . ."); FTC, "Nationwide Debt Collector Will Pay \$2.25 Million to Settle FTC Charges" (Nov. 21, 2008) (stating that collector had "allegedly engaged in false or deceptive threats of garnishment, arrest, and legal action . . .").

The FTC should further require collectors to explain that such individuals will not be sued to recover the debt and that the debt will not harm the individual's credit. Given the likely emotional state of many of the individuals contacted, as well as general consumer confusion about liability for debts and the complexities of the legal and credit reporting systems, it will help consumers to have their lack of responsibility for decedents' debts put in clear terms. Collectors should be required to make these disclosures clearly, prominently and in plain language at the beginning of any communication with such individuals – whether or not collectors believe such disclosures are necessary.¹³ The only exception to this requirement should be when an individual is personally liable for a decedent's debt under a state statute or for another valid, documented reason.

Similarly, collectors should be required to make the above disclosures during “location communications” when collectors contact an individual to determine who has the authority to pay outstanding debts from a decedent's estate, and such individual states that he or she has such authority. Provided that such statement is consistent with information available from another source, and collectors intend to attempt to collect the debt through such individual, collectors should be required to make the above disclosures before proceeding with any collection attempts.

2. Provide examples of appropriate “clarifying questions” collectors may ask when making location communications with an individual who expresses any uncertainty with regard to his or her authority to pay outstanding debts out of the decedent's estate.

The proposed policy would permit collectors to ask “clarifying questions” of individuals who express uncertainty as to their authority to pay debts from the assets of a decedent's estate. As the policy statement notes, there are many questions a collector could ask that could easily mislead such individuals into erroneously believing that they have such authority or, worse, that they are actually legally liable.¹⁴ Although the policy statement provides examples of misleading questions, more guidance is warranted to prevent agencies from asking roaming questions, leading consumers to believe they should pay decedents' debts – particularly given the sophisticated psychological techniques collectors are known to employ to induce people to pay debts incurred by deceased loved ones.¹⁵ Thus, in addition to providing examples of problematic questions, the FTC should circumscribe the nature and scope of the questions by giving examples of questions that may be appropriate. For example, the debt collection agency may properly ask the individual whether the decedent's estate is the subject of probate proceedings and questions related to such proceedings that may establish the identity of individuals liable for the decedent's debts or with authority to resolve those debts.

3. Require collectors to make and document good faith efforts to obtain additional information before making a second or subsequent contact with an individual for the purpose of collecting a debt, when the individual has stated he or she lacks or is uncertain about this authority.

¹³ See, e.g., N.Y. City Admin. Code § 20-493.1(a) and § 20-493.2(b), requiring debt collectors to provide certain information in all permitted communications with consumers.

¹⁴ Statement of Policy Regarding Communications in Connection With Collection of a Decedent's Debt, 75 Fed. Reg. 62389, 62394 (proposed Oct. 7, 2010).

¹⁵ David Streitfeld, *You're Dead? That Won't Stop the Debt Collector*, N.Y. TIMES, Mar. 4, 2009, at A1.

The FTC's policy statement allows for a repeat location communication with an individual who initially states that he or she lacks authority to pay debts from the decedent's estate or who expresses uncertainty as to this authority if the collector later believes such statement was incorrect. To limit harassment of decedents' loved ones during a difficult time with groundless collection attempts that may lead to consumers paying debts for which they are not liable, the FTC should prohibit a collector from engaging in subsequent contacts with an individual who expressed uncertainty about authority or liability for a debt unless the collector's second or subsequent contact with the individual is preceded by documented good faith efforts to obtain additional information to identify individuals liable for the debt or with authority to resolve debts.¹⁶ Such efforts could include searching the probate court filings in the decedent's jurisdiction to identify individuals liable for the debt or with authority to resolve debts or locating bank information. The FTC could consider documentation of these efforts if investigating a collector for harassment.

Conclusion

DCA supports the FTC's proposed policy guidance subject to our recommendations. We nonetheless note that the practices prompting the FTC to issue the instant policy can neither be viewed nor solved in isolation. Collection agencies all too frequently employ coercive telephone tactics, pursue debts that are beyond statutes of limitations or that are not owed by the alleged debtors, and fail to provide consumers with documentation of debts' resolutions. Collection efforts aimed at a decedent's loved ones are simply an extension of these routine insidious practices.¹⁷ To help arm consumers against these tactics, we suggest the FTC include on its website jurisdiction-specific information on financial literacy and counseling – such as that provided by OFE.¹⁸ We also recommend that all FTC agreements with debt collection agencies require collectors to include with all dunning letters to consumers notification that this information is available on the FTC's website.

As discussed earlier, in New York City we have taken steps to curtail such practices through strong regulations.¹⁹ We urge the FTC to continue to address these broader challenges.²⁰ Further, the abuse that this policy seeks to address confirms the need for vigilant oversight and

¹⁶ Should these remedies prove insufficient, we recommend that the FTC use its obligation to report annually to Congress, 15 U.S.C.A. §1692m, to suggest an amendment to the FDCPA requiring collectors to send written confirmation of receipt of a death certificate within five business days to any individual who provides such death certificate and to disclose receipt of the death certificate to any person called with regard to collection of the debt. Collectors would then be unable to plead ignorance that the debtor or alleged debtor was deceased in order to explain continued attempts to contact the decedent's residence.

¹⁷ For example, many debts owed by decedents are likely to be beyond the relevant statutes of limitations and collectors nonetheless pursue such debts, including through initiating lawsuits. *See, e.g.*, FTC, "Collecting Consumer Debts: The Challenges of Change" (hereinafter "Challenges of Change") at 64 (Feb. 2009); Andrew Martin, *Old Debts That Won't Die*, N.Y. TIMES, July 30, 2010, at B1.

¹⁸ *See* <http://www.nyc.gov/html/ofe/html/home/home.shtml>. The United States Department of Housing and Urban Development website may serve as a model. It links to state and local resources that assist consumers in foreclosure prevention. *See* http://portal.hud.gov/portal/page/portal/HUD/topics/avoiding_foreclosure/local.

¹⁹ 6 RCNY § 2-190 *et seq.* In addition, our Licensing Law provides us with the authority to suspend and revoke licenses of agencies that collect or attempt to collect debts from New York City residents.

²⁰ For example, the FTC may reiterate its recommendation to amend 15 U.S.C.A. § 1692g(a) to heighten requirements for validation notices and communication to consumers of consumers' rights. "Challenges of Change," *supra* note 17, at 26. The annual report may similarly provide data supporting the need for debt collection agencies to provide more comprehensive substantiation of debts to disputing consumers as well as the need for collectors contacting consumers about debts that are beyond the relevant statutes of limitations to disclose that such debts are expired. *See* N.Y. City Admin. Code § 20-493.2; 6 RCNY § 2-191, § 2-190.

coordinated enforcement among government agencies. We stand ready to work with federal enforcement agencies to protect consumers from collection abuses.²¹

Respectfully submitted,

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Jonathan Mintz
Commissioner
New York City Department of Consumer Affairs

²¹ DCA participated in the 2007 FTC workshop “Collecting Consumer Debts: The Challenges of Change” and the 2009 FTC workshop “Protecting Consumers in Debt Collection Litigation: A Roundtable Discussion.”