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Advancing Fairness
in the Marketplace for All

Nov. 17, 2010



Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW.,
Washington, DC 20580

Re: Deceased Debt Collection Policy Statement

Dear Madam or Sir:

Please find enclosed the Comment of the National Consumer Law Center, Inc. and the National Association of Consumer Advocates regarding the 'Deceased Debt Collection Policy Statement. We had filed the comment previously online on Nov. 4 but it does not appear in the online comments at this time. Please add this to the public comments.

Sincerely,

Robert J. Hobbs
Deputy Director

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ORIGINAL



COMMENTS
of the
NATIONAL CONSUMER LAW CENTER (on behalf of its low-income clients)
and of the
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
on the
FEDERAL TRADE COMMISSION's

Statement of Policy Regarding Communications in Connection with Collection of a
Decedent's Debt
or
Deceased Debt Collection Policy Statement

November 4, 2010

Via Electronic Submission:

Re: FTC's Deceased Debt Collection Policy Statement

The FTC recently proposed its first debt collection "enforcement policy," addressing the collection of decedent's debts under the Fair Debt Collection Practices Act (FDCPA).¹ No mention in that policy is made of the tidal wave of complaints that the FTC receives about the debt collection industry each year-- more than any other industry. The proposal makes no mention of the particular sensitivity and vulnerability of bereaved relatives and friends. Unfortunately, what is proposed will facilitate debt collectors contacting unobligated relatives and friends of decedents -- in direct violation of the FDCPA's explicit restrictions on such contacts -- and using that contact to persuade the relatives to pay the decedent's debts out of their own funds to honor the memory of their loved one.

The FDCPA Strictly Prohibits Contacts with Unobligated Relatives, Friends, and Neighbors

The FDCPA in 15 U.S.C. §§ 1692b and 1692c(b) and (d) strictly limits debt collectors' contacts to "consumers" (persons allegedly obligated to pay the debt) and a short list of unobligated third parties. The "surviving spouse" is not such a party. Thus, contrary to the proposed policy, the clear language of the FDCPA forbids debt collectors from contacting unobligated survivors except to locate the representative of the decedent's estate.

The FDCPA clearly states: "... a debt collector may not communicate, in connection with the collection of any debt, with *any person* other than the consumer..."² The unobligated spouse of a living debtor is an exception to this rule by virtue of § 1692c(d) ("For the purpose of this section, the term 'consumer' includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.") However, the FTC proposal assumes, without examination, that the bereaved, unobligated, widow or widower may be contacted as a "spouse," even though a widow or widower is no longer a "spouse" at that point. However, the marriage

¹ 75 Fed. Reg. 62389 (Oct. 8, 2010), also available at www.FTC.gov.

² 15 U.S.C. § 1692c(b) (emphasis added).

terminates at the death of a spouse. See e.g. 52 Am. Jur. 2d Marriage § 8 (“Thus, under American law all valid marriages continue in force during the joint lives of the parties or until divorce or annulment; marriage cannot be revoked at the will of the parties, and is terminable only by death or presumption of death, or by a judicial decree of divorce, dissolution, or annulment.”) (Footnotes omitted).

Congress’ choice not to employ the term “surviving spouse” or similar language is telling. Throughout the U.S. Code are hundreds of examples where Congress included the term “surviving spouse” or the like when, unlike here, it intended to identify the widows and widowers whom this proposed policy would now place in jeopardy.³ Its failure to do so here only confirms the plain meaning of the actual language used.

The FDCPA was written to strongly protect unobligated friends, neighbors, and relatives of consumers as well as the people obligated on the debt.⁴ Congress specifically addressed collections against decedent estates by explicitly authorizing debt collectors to contact the “administrator” or “executor” of the deceased’s estate.⁵ To imply that a debt collector may approach unobligated survivors of the deceased and be permitted to persuade them to assume the deceased’s debt defies the plain language and structure of the FDCPA. A survivor who was a cosigner or account holder⁶ of a credit card, on the other hand, would be obligated and could be contacted by the debt collector directly and asked for payment.

As the executor or administrator of the estate is defined to be a consumer by § 1692c(d), the debt collector should only communicate with the attorney of the executor or administrator once the debt collector is informed of legal representation.⁷ Presumably this protection should be extended to other representatives of the estate recognized by state law. The FTC proposal does not address this point, which should be added to the policy.

Only Strictly Regulated Contacts with Unobligated Relatives Allowed in Locating the Estate Representative

The FDCPA permits debt collectors to contact unobligated survivors to obtain the contact information of the representative of the decedent’s estate in § 1692b but strictly regulates what may be said in that context. If the debt collector has the contact information for the estate’s representative, the debt collector may not contact unobligated survivors at all. The FTC proposal contemplates allowing the debt collector calling for contact information for the estate to reveal to unobligated survivors that the debt collector is calling about the decedent’s debt, despite the clear prohibition in § 1692b(2) of mentioning the debt in the pursuit of contact information. This disregard of the clear prohibition of the FDCPA is unjustified. Debt collectors can simply state that they are calling or writing to obtain the contact information of the person representing the estate of the deceased. The FTC should not ignore the clear language and approach of the FDCPA in this regard.

The FTC proposal asks for comment on allowing debt collector to mention the debt in this context, apparently on the theory that the deceased’s privacy interests have diminished by death. However, the FDCPA explicitly protects not just consumers but unobligated friends and relatives from unjustified debt collection, and the FDCPA approach limiting these contacts should be maintained.

³ See e.g. 10 U.S.C. § 1447(q) (military pensions); 26 U.S.C. § 2(a)(1) (Internal Revenue Code); 38 U.S.C. § 101(3) (veterans’ benefits); 42 U.S.C. § 402(g)(1) (Social Security benefits). Hundreds of sections of the U.S. Code use the term “surviving spouse.”

⁴ See National Consumer Law Center, Inc., Fair Debt Collection § 4.5 (6th Ed. 2008).

⁵ 15 U.S.C. § 1692c(d).

⁶ “Authorized users” of credit card accounts are generally not contractually responsible for the account and in some state responsible at most for their own charges.

⁷ 15 U.S.C. § 1692c(a)(2).

The FTC proposal should also make it clear that the debt collector may not imply an unobligated survivor may or should assume the decedent's debts under any circumstances. To do so violates § 1692c(b)'s clear prohibition against collecting debts from unobligated parties.

Impact of FTC Enforcement Policy

It is difficult to predict the effect of this proposed FTC enforcement policy if it is adopted. As originally contemplated by the FDCPA, debt collection abuses are addressed primarily by consumers suing debt collectors and by state attorneys general. The FTC only brings a small number of FDCPA enforcement actions, so the effect on FTC initiated cases would be minimal. However, if the courts defer to the new FTC's policy in private and state actions as a persuasive interpretation of the FDCPA's requirements, the impact on targeted bereaved friends, neighbors, and relatives would be far greater. Moreover, in the next year, the Consumer Financial Protection Bureau (CFPB) will have authority to write FDCPA regulations, a power denied to the FTC, and the CFPB could eventually address this issue with more sensitivity to Congressional intent. But, the CFPB will probably act only after dealing with the more pressing issues involving the reform of the mortgage market.

Debt Collectors and Decedents' Estates

The FTC proposal describes how the debts of wealthy and many middle class decedents are addressed by more than 3,000 county probate courts. State law governs the procedure and the obligations of decedent estates. The law in community property states may make widows and widowers liable for many of the debts of their deceased spouse. Outside of community property states, only the estate of the deceased is usually responsible for debts of the decedent's estate. Moreover, much of the property of the decedent may flow directly to heirs avoiding probate through life insurance proceeds, property held jointly or with a right of survivorship, many types of retirement funds, and trusts. Such property is generally not available to the decedent's creditors through probate. Recognizing this, the FTC's proposal would require debt collectors to affirmatively disclose to any representative of the estate who is contacted by the collector that they have no legal obligation to pay the decedent's debts out of their own funds, including their funds received from the decedent outside of probate, such as jointly owned property.⁸ The FTC proposal states that appealing to the "purported moral obligation to pay the debt" would be considered a violation of 15 U.S.C. § 1692d prohibiting abuse and the FTC Act.⁹ The FTC should go further and state that debt collectors may not imply that the representative should personally assume the decedent's debt or accept payment from the representative's funds.

A new breed of specialized debt collection agencies has sprung up in the last decade or two with a focus on the collection of decedents' debts.¹⁰ Their websites often stress their gentle handling of bereaved relatives in order develop a new customer for their creditor client as well as to enhance recovery on the decedent's debt: "When finalizing financial obligations during a period of grief, it's critical that collectors employ techniques that are sensitive and respectful of survivors' circumstances."¹¹ However, their collection employee's actual practices may not always be in tune with that approach.¹²

⁸ *Id.* at 62394.

⁹ *Id.*

¹⁰ See Phillips and Cohen at www.phillips-cohen.com/ ; Probate Finder OnDemand at www.probatefinder.com; Forte, LLC at www.fortedatasolutions.com ; DCM Services at www.dcmservices.com.

¹¹ www.dcmservices.com/solutions_empathetic_active.php

¹² See e.g. *Sparks v. Phillips & Cohen Associates, Ltd.*, 641 F. Supp. 2d 1234 (S.D. Ala. 2008) ("... if plaintiffs' version of the facts is accepted as true, a reasonable jury could find that [defendant's employee] must have subjectively known that her acts of calling [plaintiffs'] home despite knowledge that [plaintiff] was not involved with the Glover [decedent's] matter, refusing to identify herself when calling [plaintiffs'] home telephone number, berating [plaintiff's daughter] even after [she] told her to call her mother, casting aspersions on [plaintiff's daughters] in her communications with [plaintiff], browbeating [plaintiff] with a statement that defendant had already investigated her,

About 2.4 million Americans die each year,¹³ and, unlike prior generations which were often excluded from borrowing, many of today's elderly have large amounts of mortgage, credit card, and medical debt. Most elderly households leave few financial assets for their heirs and creditors. Survivors often feel the costs of probate are prohibitive where there are not enough decedent's assets to pay the decedent's creditors, and they do not pursue probate or any of the informal substitutes for probate. For example, thirty percent of elders 70 to 74 years old have an average of only \$2,885 of net worth (excluding home equity, which usually passes to the widow or widower or requires probate).¹⁴ Probably the majority of estates are not probated. Decedent's creditors are permitted by state law to initiate administration of the estate if they believe it will be worthwhile and the survivors do not. That is the procedure for debt collectors to follow when there is no legal representative of the estate.

New Debt Collectors Focus on the Bereaved

For filing creditor claims against wealthier decedents' estates, one debt collector, Probate Finder OnDemand,¹⁵ has established a database of probate cases for creditors and other debt collectors and provides a creditor claim form filing and tracking system. An affiliated debt collector, DCM Services,¹⁶ markets a system to encourage decedent's creditors to use the time of grieving to establish a customer relationship with the decedent's survivors while DCM Services recovers on the debt from the estate.

A paper by DCM Services mentions several times some creditors' goal of having the *survivors* assume the decedent's debts.¹⁷ The funds and income streams of survivors, combined with their vulnerability, may create strong incentives for creditors and debt collectors to approach unobligated survivors about "honoring the memory of the deceased" by assuming the deceased's debt or by implying that it is the survivor's obligation to pay the decedent's debt. The FTC proposal should make clear that unobligated survivors should not be approached at all by debt collectors in connection with paying the debts of the decedent's estate, except the formal representative of the estate through the informal or formal probate process. If there is no probate process, the debt collector can initiate one or abandon the claim. Debt collectors should not use the absence of a probate to seek payment from survivor's funds.

DCM Services and its affiliated decedent debt collection firms also maintain a separate website for the bereaved that provides useful information in their time of grief. Noticeably absent from that website is any statement that the bereaved are generally not legally responsible for the debts of the decedent unless they had cosigned for the debt.¹⁸

Conclusion

The Federal Trade Commission should revise its proposed enforcement policy to make clear that the only contact a debt collector may have with an unobligated friend, neighbor, relative, employer, widow, widower, or other unobligated person is the very limited contact as permitted by § 1692b to obtain necessary contact information of the representative of the estate. Under no circumstances may a debt collector demand payment from such a third party or even disclose the debt, as stated in the FDCPA. In addition, the FTC should use its authority under the FTC Act to extend this rule to creditors within its jurisdiction. .

and going out of her way to denigrate and calumniate [plaintiff's daughter] to her boss were all outside the scope of permissible activity under the FDCPA."').

¹³ U.S. Dept. of Commerce, Statistical Abstract of the U.S. Table 78.

¹⁴ See He Wan, "65+ in the United States: 2005" p. 108 (U.S. Census Bur. 2005) (sixty percent have less than \$31,513).

¹⁵ See Probate Finder OnDemand at www.probatefinder.com.

¹⁶ See DCM Services at www.dcmservices.com

¹⁷ See Forte, "From CRM to DCRM: A Multi-Generational Approach to Customer Relationships" pp. 3,5,6 (2009) available at www.fortedatasolutions.com/whitepaper.php.

¹⁸ www.mywayforward.com.

The FTC policy should state that the grieving and vulnerability of the bereaved require special attention by debt collectors to the requirement of § 1692c(a)(1) that the consumer not be contacted at any "inconvenient" time or place. Initially in any telephone call to a representative of the estate who is a grieving relative of the deceased, the debt collector should inquire if this is a convenient time to talk and terminate the call until it is. This policy too should be enforced regarding creditors subject to the FTC Act.

Finally, the FTC policy should make clear that debt collectors and creditors may not violate state unauthorized practice of law rules by providing information about the law of estates and probate to surviving relatives of the decedent and that such actions may be unfair and prohibited under the FDCPA and the FTC Act.