

FDCPA Enforcement Policy Statement
Matter No. P104806

Concurrence of Commissioner Julie Brill
July 20, 2011

The Fair Debt Collection Practices Act (“FDCPA”) describes, in no uncertain terms, the individuals with whom a debt collector may communicate regarding a consumer’s debts: the consumer, her attorney, her spouse, her parent (if the consumer is a minor), her guardian, and a small group of other individuals.¹ If the consumer is deceased, the FDCPA expands this group to allow a debt collector to contact the executor or administrator of the consumer’s estate.² As the FDCPA Enforcement Policy Statement (“Policy Statement”) issued by the Commission today points out, state probate laws have changed significantly since the passage of the FDCPA over three decades ago. As a result of these changes, when a consumer dies, her estate will not necessarily have an “executor” or an “administrator” with whom a debt collector can communicate regarding the decedent’s debt.

The Policy Statement expands the communications in which debt collectors may engage with a decedent’s friends and family members, so that debt collectors may identify the person who has “the authority to pay the decedent’s outstanding bills from the decedent’s estate.” The Policy Statement also permits debt collectors to follow up with “clarifying questions” until the person with whom the debt collector is speaking has, to the collector’s satisfaction, identified the executor, administrator, or individual with authority to pay the decedent’s outstanding bills from the decedent’s estate. The rationale for the Commission’s action today is that Congress intended to give creditors a right to engage in limited communications in order to collect the legitimate debts of a deceased debtor through the estate. Through its action, the Commission wishes to avoid a hyper-technical reading of the statute that allows contact only with statutorily required, but in reality likely non-existent, administrators or executors. The Commission’s action is thus designed to prevent us from elevating form over substance in a manner that defeats the intent of the statute. Without a reasonable and narrowly defined safe harbor, a debt collector’s alternative may be to force the appointment of an executor or administrator, which could be costly and time consuming for decedent’s relatives and the estate.

Balanced against these concerns for rational administration of estates are equally legitimate concerns that the Policy Statement will operate as a license for some debt collectors to take unfair advantage of the survivors and loved ones of recently deceased debtors. Most consumers, even in the best of times, will likely be unable to understand and respond accurately to arcane questions of law regarding the identity of “the person

¹ Fair Debt Collection Practices Act, 15 U.S.C. §1692c (b) and (d). Subsection (b) provides that a debt collector may also communicate with “a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.”

² FDCPA 15 U.S.C. §1692c (d).

who has legal authority to pay outstanding bills from a decedent's estate.” Allowing debt collectors to contact the survivors and loved ones of recently deceased consumers will require them to respond to these arcane questions of law at a time when they find themselves in unfamiliar and unsettling territory, trying to sort through the finances and personal affairs of the deceased, while simultaneously trying to cope with their loss. A consumer in this vulnerable condition may mistakenly identify himself as the person with whom the debt collector should be speaking. Worse still, he may end up feeling as if he has an obligation — legal, moral, or otherwise — to pay the debt from personal funds, even though debt collectors cannot legally ask him to do so.

In view of the pitfalls of allowing debt collectors to contact family members to identify the person who has authority to pay outstanding bills from for the decedent's estate, the Policy Statement is crafted to limit potential abuses. First, when contacting the family members, the debt collector must include in the statement that he is looking for the person who is responsible for paying the outstanding bills of the decedent “from the decedent's estate.” Second, until such time as it is established that the debt collector is talking to the person with such authority, the collector cannot reveal that the decedent owes a debt. This should eliminate any opportunity by debt collectors to make appeals to those without authority to pay bills from the estate's assets to pay a debt out of a sense of moral obligation. Third, the Policy Statement makes clear the debt collector's general responsibility to disclose that the person with authority to pay the debts from the estate is not required to use his individual assets to pay the decedent's debt.³ Finally, if the debt collector does reach the person with authority to pay the bills from the estate of the decedent, that person stands in the shoes of the “consumer” and must be given notice that he is entitled to proof of the decedent's debt and has the right to contest it.

On balance, I concur in the issuance of the Policy Statement at this time, despite concerns that the Policy Statement may operate as a license for some debt collectors to take unfair advantage. I take this view, in large part, because staff's review of thousands of interactions between debt collectors and the family members and survivors of decedents indicates that, while some collectors were engaged in egregious conduct, the vast majority were trying to comply with a reasonable, although at times incorrect, interpretation of the requirements of the FDCPA.

Yet, in light of these strong policy reasons for protecting the survivors and loved ones of recently deceased debtors, the Commission should ensure that any forbearance of enforcement will occur only when debt collectors strictly comply with the criteria set forth in the Policy Statement, especially the four safeguards listed above. The debt collection industry should know that we will not refrain from aggressive enforcement when debt collectors go beyond the very limited inquiries allowed by today's action. I urge my fellow Commissioners and staff to couple today's action with strict monitoring of the industry going forward, to ensure its close adherence to the criteria set forth in the Policy Statement. If abuse becomes widespread, I would recommend withdrawal of the Policy Statement by the Commission.

³ There may be circumstances where the individual, in fact, *is* legally obligated to pay the debt himself. In those cases, the disclosure requirement would not apply.

The new Bureau of Consumer Financial Protection, created under the Dodd-Frank Wall Street Reform and Consumer Protection Act, will have an important role in this area as well. Dodd-Frank grants the new Bureau of Consumer Financial Protection the authority to promulgate regulations under the FDCPA, an authority that the Federal Trade Commission has not possessed. In the event that the Commission finds that the debt collection industry is not adequately adhering to the limited inquiries allowed under this Policy Statement, I hope my fellow Commissioners and staff will work closely with the new Bureau to further develop appropriate rules to be applied to the collection of the debts of decedents.