



Using Technology to Collect Debt: Navigating the Regulatory Landmines

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Overview

- ◆ Reg F and creditor considerations
 - When a creditor's debt collector adopts Reg F's safe harbors
 - Compliance with Reg F's provisions relating to emails and text messages
- ◆ Implications of the Facebook case on account-related text messages
- ◆ Implications of the Hunstein decision on the use of email, text message, and other technology vendors

Reg F is Here

Creditor Considerations: What are a creditor's obligations when its debt collector chooses to follow the safe harbors?

◆ Emails

- Procedures based on communication by the creditor

(A) A creditor obtained the email address from the consumer;

(B) The creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it;

(C) Before the debt collector used the email address to communicate with the consumer about the debt, ***the creditor sent the consumer a written or electronic notice***, to an address the creditor obtained from the consumer and used to communicate with the consumer about the account, that clearly and conspicuously disclosed: (1) That the debt has been or will be transferred to the debt collector; (2) The email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt; (3) That, if others have access to the email address, then it is possible they may see the emails; (4) Instructions for a reasonable and simple method by which the consumer could opt out of such communications; and (5) The date by which the debt collector or the creditor must receive the consumer's request to opt out, which must be at least 35 days after the date the notice is sent;

(D) The opt-out period provided for above has expired and the consumer has not opted out; and

(E) The email address has a domain name that is available for use by the general public, unless the debt collector knows the address is provided by the consumer's employer.

Reg F is Here

Creditor Considerations: What are a creditor's obligations when its debt collector chooses to follow the safe harbors?

◆ Text messages

- Reg F does not provide safe harbor procedures based on communication by the creditor

Reg F is Here

Creditor Considerations: Should Creditors Comply with Reg F?

- ◆ Reg F applies to persons who are “debt collectors” under the federal FDCPA
 - A person with a principal business purpose of debt collection
 - A person collecting debts owed or due another, if the person began collecting after the debt went into default
 - Reg F does not, on its face, apply to creditors
- ◆ The CFPB has used its UDAAP authority to enforce many (but not all) provisions of the FDCPA against creditors
- ◆ Distinction between safe harbor procedures and affirmative requirements or outright prohibitions
- ◆ Many states have laws or regulations that govern creditor collection practices (“mini-FDCPAs”)

Facebook v. Duguid

Sending Account-Related Text Messages

- ◆ Holding: Sending text messages to telephone numbers without the use of a random or sequential number generator does not trigger liability under the TCPA, regardless of whether the device has the capacity to generate random or sequential phone numbers
- ◆ Court rejected consumer-friendly definition (equipment that was capable of automatically dialing numbers from a stored list, even if that feature was not used to send the message in question)
- ◆ Potential risks
 - Court emphasized that prerecorded messages delivered to cell phones and residential lines are still subject to TCPA consent requirements, whether or not an autodialer is used
 - ◆ Plaintiffs' attorneys have started bringing claims that text messages are prerecorded messages and are therefore subject to the TCPA regardless of whether sent via an auto-dialer
 - As to debt collectors, FDCPA requires some method of consent to send text messages and an opt-out notice
 - As to creditors, there are UDAAP risks for sending text messages without a customer's consent
- ◆ Bottom line: Consent is a best practice for communicating via text message

Hunstein v. Preferred Credit

Email, Text Message, and Other Technology Vendors

- ◆ Status of the case:
 - Prior decisions are vacated, and the 11th Circuit reheard oral argument in February
 - Continue to see copycat lawsuits in other jurisdictions
 - Decision by the 11th Circuit could ultimately end up being the same as the prior two decisions (which found that the consumer stated a claim for a violation of the FDCPA)
- ◆ If the court gets to the merits of the case, it will largely hinge on the FDCPA's definition of "communication" and whether a debt collector's agent is a third party for purposes of the FDCPA's prohibition on third-party disclosure
 - "[T]he conveying of information regarding a debt directly or indirectly to any person through any medium."
- ◆ Considerations
 - How would an adverse holding impact creditors?
 - ◆ UDAAP
 - ◆ State mini-FDCPAs
 - Are your vendors "mediums"?
 - Is the information you transmit "regarding a debt"?

Questions?

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