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TEXAS REQUIRES RESIDENTIAL MORTGAGE LOAN SERVICER REGISTRATION

The Texas legislature has enacted the Residential Mortgage Loan Servicer Registration Act. A person may not act as a residential mortgage loan servicer, directly or indirectly, for a residential mortgage loan secured by a lien on residential real estate in Texas unless the person is registered through the Nationwide Mortgage Licensing System or exempt. A "residential mortgage loan servicer" receives scheduled payments from a borrower, including amounts for escrow accounts and makes payments as required under the terms of a servicing loan document or servicing contract.

Registration is not required of, among others, (i) federal or state depository institutions or their affiliates or subsidiaries, (ii) persons registered under the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act, or (iii) certain persons licensed under the Consumer Loans statute or regulated under the Home Loans statute.

Registrants must pay a registration fee and be bonded. The fee and bond requirements are waived for persons that (i) collect delinquent consumer debts owed on residential mortgage loans, (ii) do not own the residential mortgage loans for which the applicant acts as a residential mortgage loan servicer and (iii) have filed a bond in compliance with the Texas Debt Collection statute. The Act requires registrants to provide a disclosure statement to borrowers.



✧ *Mike Tomkies and Margaret Stolar*

COURTS CONSIDER CALL FREQUENCY COLLECTION HARASSMENT CLAIMS

Two United States District Courts recently rejected claims of harassment under the federal Fair Debt Collection Practices Act based on the number of calls made to plaintiffs. Section 1692d of the FDCPA prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Specifically, Section 1692d(5) prohibits causing a telephone to ring or engaging

any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

In *Coleman v. Credit Management, LP*, 2011 WL 5248219 (N.D. Tex., Nov. 2, 2011), the debt collector made 14 calls, three of which were received after 9 p.m. in the plaintiff's time zone, over a roughly two-month period. The plaintiff in that case was not the debtor but an unrelated person living in Texas who was mistaken by the debt collector for the actual debtor who lived in California. The plaintiff never answered any of the debt collector's calls and the debt collector stopped calling once notified by the plaintiff that she was not the debtor. The plaintiff brought claims under both Sections 1692c and 1692d of the FDCPA.

In considering the plaintiff's claims on a Motion for Summary Judgment, the court first rejected the claim under Section 1692c(a), which prohibits a debt collector from contacting a "consumer" (*i.e.*, any natural person obligated or allegedly obligated to pay any debt) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer (with a convenient time assumed to be between 8 a.m. and 9 p.m. local time). The court found that the plaintiff had not alleged that the debt collector had ever asserted that she was liable for the debt and, in fact, the debt collector had stopped calling the plaintiff when it realized that she was the wrong person. The plaintiff, the court concluded, was not a "consumer" as defined in the FDCPA and thus could not recover under Section 1692c.

With respect to Section 1692d, the court found that a claim could be made by the plaintiff even though she was not a "consumer" because Section 1692d applies to "any person." The court noted that the plaintiff did not have an issue with the content of the phone calls from the debt collector, basing her claim instead on the number of calls and the time they were made. The court held as a matter of law that the debt collector could not be found to have intended to annoy, abuse, or harass the plaintiff because (i) the frequency of calls (approximately one every five days) did not rise to the level of abuse and (ii) the mistake with respect to the time zone of the phone number, along with the fact that the debt collector stopped calling after discovery of the error, negated any intent to harass. Finally, the court also noted that even if a violation of either Section 1692c or 1692d had occurred, the debt collector would have prevailed based

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upon a bona fide error defense as the debt collector had met its burden of showing reasonable procedures to avoid mistakes.

In *Daniel v. West Asset Management, Inc.*, 2011 WL 5142980 (E.D. Mich., Oct. 28, 2011), the debt collector had made 64 calls, none of which were made before 8 a.m. or after 8 p.m., over approximately 133 days. The plaintiff never answered any of the debt collector's calls or returned the collector's voice messages.

In considering the plaintiff's Section 1692d claim on a Motion for Summary Judgment, the court found that case law precedent placed the burden of proof on the plaintiff and required consideration of the volume of calls, along with the pattern in which they were made and whether or not there was any oppressive conduct. The only evidence supporting the plaintiff's claim was an admission by the debt collector that it called 64 times over approximately a six-month period. The volume of calls alone, however the court found, does not support a violation of Section 1692d. The plaintiff must provide evidence beyond the mere number of calls, the court said, to support her claim of harassment. Given the lack of evidence beyond the debt collector's admission as to the number of calls made and the fact that it never called outside the 8 a.m. to 8 p.m. time period and never immediately called back after ending a prior call, the court ruled in favor of the debt collector.

While the number of calls alone may not directly result in liability under the federal FDCPA, the number of calls is often a factor in complaints about telephone calls. Some state laws place specific limits on the number, timing and circumstances under which calls may be made. Collectors should monitor the number of calls and the circumstances under which such calls are allowed to be made. □

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