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Construction Collection Actions & The "New" Fair Debt Collection Practices Act

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Most of you know the Fair Debt Collection Practices Act (FDCPA) exists and applies to the collection of consumer debts. 15 USC §1692 et. seq. Most of you also likely know that Oregon has a sister statute, the Oregon Unlawful Debt Collection Practices Act (OUDCPA), ORS 646.639–646.656 (collectively "the Acts"). What many of us tend to forget is that the Acts are not limited to a collection agency attempting to collect credit card debt. Indeed, the Acts apply to a much broader swath of collection activity, including collection of amounts owed by a homeowner to a construction contractor or supplier! This includes counsel asserting lien rights against a homeowner on a contractor client's behalf.

Generally speaking, the FDCPA applies to communications by a third-party collecting a consumer debt. The Oregon act is broader in scope because it applies to a commercial creditor attempting to collect its own debt. A "commercial creditor" is "a person who in the ordinary course of business engages in consumer transactions." ORS 646.636(1)(c). Debt is broadly defined as, "any obligation or alleged obligation of a consumer to

pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 USC §1692a(5). The intended use of the proceeds of the transaction determines whether a transaction is primarily for personal, family, or household purposes. See Bloom v. I.C. Sys., Inc., 972 F2d 1067, 1068–1069 (9th Cir 1992). "Communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 USC §1692a(2). A lawyer can be a debt collector. See Garrett v. Derbes, 110 F3d 317, 318 (5th Cir 1997). Whether conduct violates the Acts is based on a "least sophisticated" consumer standard.

An attorney representing a contractor or supplier attempting to collect amounts owed by a homeowner most likely falls under the Acts. A contractor or supplier who regularly "engages in consumer transactions" likely falls under the OUDCPA. The FDCPA, §§1692c, d & e, and the OUDCPA, ORS 646.636(2)-(3), set forth a laundry list of acts that are prohibited under each act. Among other things, the Acts define how and when the debt collector may communicate with the debtor and what can and cannot be said to the debtor (and third parties). Thus, a residential contractor/supplier and their counsel would be well served by carefully reviewing these statutes to ensure they are following their requirements. Counsel should also make sure to advise the client that the client can be liable for violating the OUDCPA!

The FDCPA requires the debt collector to make certain mandatory disclosures to the consumer debtor. The FDCPA requires two types of disclosures: the debt validation notice under §1692g and the "mini Miranda" notice under §1692e. Historically (and generally speaking), the debt validation notice had to be made once, in the first written communication with the debtor. The "mini Miranda" notice had to be made in every communication with the debtor. These requirements certainly apply to demand letters
sent by an attorney to a homeowner and most likely apply to lien notices as well. Giving the FDCPA notice cannot "boot strap" you into the FDCPA; however, the failure to give the required notice is a violation of the FDCPA, which allows for up to $1,000 statutory damages (or actual damages) and attorney fees.

Effective November 30, 2021, the FDCPA was amended to address more current forms of communications (e.g. texts and social media; 12 CFR §§1006.18 & .22), to set call frequency requirements (12 CFR §1006.14(b)), explicitly bar the collection of time-barred debts (12 CFR §1006.26(b)), and expand the information required in the §1692g debt validation notice (12 CFR §1006.34). The "standard" §1692g language was expanded to include, among other things, the contact information of the debt collector and an itemization of the debt. A creditor may now also

give the new debt validation notice orally, if the oral communication is the creditor's first communication with the debtor (not recommended). Fortunately, the CFPB has provided a "safe harbor" form of written notice that complies with the amended debt validation notice requirements. The safe harbor notice maybe found **here.**

If you collect consumer debts on behalf of your clients, a thorough review of 12 CFR §1006.34 is a must. Indeed, a review of all the "recent" amendments to the FDCPA is advisable. It is also a good time to refresh yourself (and your client) on the requirements under the OUDCPA.

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