

Eye on the Horizon -2012: Emerging Legal, Legislative and Regulatory Trends in the Accounts Receivable Industry

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2012 ushers in many changes for the accounts receivable industry on every front, but legal, legislative and regulatory trends may be the most impactful. For every company involved in collections, new laws and regulations—even *proposed* versions—will involve significant changes to workflow, technology and day-to-day operational policy. As I take stock of thousands of regulations, case law decisions and recent legislation, here are some of the trends I view as most critical for our industry.

Case law

Lawsuits mushrooming—In 2011, lawsuits against collection industry companies reached an all-time high. According to WebRecon LLC., one of the leading providers of litigation data for the collection and asset purchasing industry, Fair Debt Collection Practices Act lawsuits leveled off at just fewer than 12,000 in calendar year 2011, representing more than 11,000 plaintiffs nationwide. Based on year-to-date totals, claims under the Telephone Consumer Protection Act (TCPA) approached 500 in 2011. This increase in claims under the TCPA, coupled with the removal of coverage for this exposure from errors-and-omissions policies by most insurance carriers, arguably presents the leading business risk for third-party debt collectors and debt purchasers. WebRecon, LLC reports the following year to date totals as of December 1, 2011:

WebRecon, LLC. Statistics Year to Date:

11597 total lawsuits for 2011, including:

- 10788 FDCPA
- 1714 FCRA
- 432 TCPA
- 1382 TILA

Number of Unique Plaintiffs: 11610 (including multiple plaintiffs in one suit)

The most active consumer attorneys of the year:

- Representing 314 Consumers: David Michael Larson
- Representing 299 Consumers: Feng Li
- Representing 239 Consumers: Craig T Kimmel
- Representing 227 Consumers: Sergei Lemberg
- Representing 179 Consumers: Michael S Agruss”

State attorneys general file lawsuits and take action—The most notable litigation trend to threaten the industry surfaced in 2011 from the offices of states’ attorneys general. In 2011, more than 38 attorneys general filed lawsuits against individual agencies, initiated administrative actions or filed letters of opposition to class action settlements involving members of the industry. The concerns of the attorneys general centered on two issues:

- 1) *Affidavits as proof of indebtedness*— The attorneys general proffered that affidavits stating the consumer has failed to pay a debt are insufficient proof of indebtedness. The industry argued that such affidavits provide sufficient evidence to file suit under the business records rule of civil procedure. Many of the attorneys general also believed some debt collectors file false and deceptive affidavits to collect consumer debt; some allege the affidavits are improperly prepared.
- 2) *Time-barred debts*—Many of the attorneys general alleged that the collection of time-barred debts is an inherently deceptive practice. They want state legislatures to resolve this issue in favor of consumers, making clear that when the statute of limitations expires, the underlying debt is extinguished.

Perhaps the most alarming news in 2011 was the organizational savvy displayed by a group of 54 U.S. state and territorial attorneys general who signed and delivered a letter to Congress expressing strong opposition to H.R. 3035, also called the Mobile Informational Call Act of 2011. As reported by Patrick Lunsford of insideARM.com on December 8, 2011, “the bill was intended to modernize the TCPA by exempting informational calls to wireless phones from auto-dialer restrictions; clarify the “prior express consent” requirement; and continue the prohibition against the use of assistive technologies to call wireless numbers for telemarketing purposes.

The letter of opposition, which was signed by the attorney general of every state except Nebraska and Virginia, claims that calls to mobile phones placed by auto-dialers would increase charges for most users.” The attorneys’ general noted in their letter that not all cell phone plans include unlimited minutes. And in the case of prepaid plans, users actively pay for minutes. The letter states that 25 percent of Americans will be on prepaid plans by the end of 2011.

From my vantage point it is time for the marketplace to solve this problem. Congress is loath to address the TCPA at all; much less in favor of our industry. Consumer groups bird dog any attempt on the part of industry groups to relax the auto-dialer and prerecorded message restrictions and rally the troops accordingly. The attorneys general obviously have no appetite for relaxing the TCPA’s restrictions and

the industry groups have failed to give Congress any new solutions to help either the Republicans or the Democrats reach a meaningful compromise in the interest of TCPA reform.

The marketplace solution is actually embedded in an often overlooked provision of the TCPA. Congress made clear in Section 47 U.S.C. § 227 (b) (2) (c) that the Federal Communication Commission (FCC) “**shall prescribe** regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—(c) may, by rule or order, **exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party**, subject to such conditions as the Commission.” Emphasis added.

In sharp contrast to the very limited rulemaking power Congress granted the FCC with regard to the requirements of 47 U.S.C. § 227 (b) (1)(A)(iii) [the provision which prohibits one from placing a call to a wireless number for which the called party is charged for the call using an auto-dialer or a prerecorded messages] - Congress granted the FCC the unfettered right to exempt [from the TCPA] calls made to a telephone number assigned to a cellular telephone service **that are not charged to the called party** and to promulgate rules [of which there are none at this time] regarding such calls. The industry needs to rally around this opportunity, identify a fair, reasonable solution and formally present a proposal to the FCC for its consideration. Oddly enough, it is commonplace in non-U.S. countries, for the calling party to pay for the cost of a call placed to a telephone number assigned to a cellular telephone service. It is only within the United States that the called party must incur the cost of a call to their cellular phone.

* For your reference Section 47 U.S.C. § 227 (b) (1) (A) (iii) provides,

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice-- ...

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

Legislative

Relative quiet at the federal level—FDCPA reform is likely to again dodge review by the House Financial Services Committee and the Senate Banking Committee during the second session of the 112th Congress; neither committee shows signs of having FDCPA reform on its agenda this year. Although many consumer advocates and third-party collection agencies claim reform is overdue, many knowledgeable observers realize no action is a win. Often the collection industry fails to appreciate that the price for legislative reform will be high. Consumer advocates want the statutory penalty to increase to \$5,000 per violation, and the industry generally considers that a non-starter. Some observers speculate that House Financial Services Chair Spencer Backas (R-AL) will try to address FOTI by attaching a reform provision to another vehicle, such as a regulatory reform bill, but this probably reflects a desire for the politicians to placate their supporters rather than a chance such legislation will pass.

Generally, legislative activity affecting the credit and collection industry at the federal level is scant. However, two bills we have paid a close watch because they may gain traction in the next few months include:

- 1) The Medical Debt Responsibility Act of 2011, which proposes removing paid or settled medical debt from credit reports; and
- 2) The Secure and Fortify Data Act (SAFE Data Act), which proposes requiring greater protection for sensitive consumer data and timely notification within 48 hours in case of a data security breach.

The most hopeful legislation introduced this past year was H.R. 3035, also called the Mobile Informational Call Act of 2011. However, as explained above, the author of this bill pulled the legislation in response to the incredible political pressured placed on him and its eight co-sponsors by the attorneys general and consumer groups.

But regardless of one's political bias, the retirement of Senator Ben Nelson, (D-NE) announced on December 28, 2011, creates a very real opportunity for the Republicans to take control of the Senate in the 2012 November election. If the Republicans gain control of the Senate and hold the majority in the House, industry reforms may be possible once again in 2013.

Collection-practices bills abound at state level—State legislatures bustled with activity in 2011. Hundreds of bills were introduced and considered to varying degrees, all presented as solutions to allegedly onerous, abusive collection activity. Of these, the bill most indicative of a trend toward legislation affecting the duties and obligations of debt purchasers and those who collect purchased debt surfaced in California. This legislation—the Fair Debt Buyers Practices Act—would have required 1) certain documentation to be provided to the consumer when suit is filed to collect a debt, 2) a debt buyer to respond to a consumer request for verification within five business days, and 3) a disclosure be provided to a consumer if the debt extended beyond the applicable statute of limitations. It also would have imposed penalties higher than currently provided under the California Rosenthal Act. Though

ultimately defeated, the bill's name and the attention it drew indicate it may well be the leading edge of a trend toward legislation directed at debt purchasers and debt purchaser collection activities.

In light of the resounding opposition to H.R. 3035 by the state attorneys general, I also expect to see many states introduce legislation in 2012 designed to control the frequency with which debt collectors call consumers, limit debt collectors' ability to contact consumers on their wireless phones using an auto-dialer or prerecorded message, require express written consent before a debt collector may communicate with a consumer by any means other than in a writing sent via U.S. mail.

Regulatory

New CFPB likely to take cues from FTC—The most remarkable regulatory change for the industry is the creation of the new Consumer Financial Protection Bureau (CFPB), which opened its doors on July 21, 2011. This past summer, President Obama announced his nomination of Richard Cordray, a former Ohio Attorney General, to head the Bureau, but as of this writing, it remains to be seen whether the Senate will confirm Cordray or if the White House will follow through on its warning to appoint Cordray to this post during the 2011 holiday recess. The President has the power to make this appointment when Congress is in recess.

On December 8, 2011, Kent Hoover reported in the Capital, that “a motion to move forward with a vote on Richard Cordray’s confirmation got only 53 votes, short of the 60 votes needed under Senate rules. Republicans didn’t have a problem with Cordray, former attorney general for Ohio. Instead, they and many of their allies in the business community think the Dodd-Frank Act gave the CFPB director too much power. Republicans say they won’t confirm a CFPB director until Congress changes the financial reform law to create a bipartisan board to run the agency, instead of it being run by a single person. They also want the agency’s budget to be subject to congressional approval, and they want to give other banking regulators more power to stop CFPB rules that could jeopardize banks’ financial soundness. However, without a director, the CFPB can’t exercise all of the powers it was granted by Congress, such as regulating nonbank lenders. “

[Author’s Post Script: On January 6, 2012, President Obama took matters into his own hands and appointed the first director to the Consumer Financial Protection Bureau (CFPB). This decision is in defiance of Senate Republicans who have been blocking the confirmation of former Ohio Attorney General Richard Cordray. Litigation over the question as to whether Congress was in fact in recess on January 6, 2012 is under consideration. For the full story visit:
<http://www.creditinfocenter.com/wordpress/2012/01/06/in-defiance-of-senate-republicans-obama-appoints-cfpb-director/>]

With leadership in question, funding in peril and more than 1,000 positions yet to fill, the CFPB is likely to pluck “low-hanging fruit”—regulations that impact payday lenders, credit repair organizations and mortgage servicers and regulations that address prepaid credit card and mortgage foreclosure practices—before it tackles any sweeping reform measures. If and when the CFPB takes any action with respect to the collection industry, it will be led by Peggy Twohig, former Assistant Director of the Federal

Trade Commission's Bureau of Consumer Financial Protection. Reporting directly to acting CFPB Director, Mr. Raj Date, Special Advisor to the Secretary of the Treasury, Twohig is responsible for all CFPB activity regarding the collection industry. Financial services lobbyists believe the Federal Trade Commission (FTC) will continue to take the lead on enforcement actions and for at least the next few years, the CFPB will consult with the FTC on policy and regulatory issues affecting the industry. Industry members and their trade groups should be mindful of the FTC's power and influence on the CFPB, and the considerable time and effort the FTC is spending on relationship-building with state attorneys general.

In terms of specific next steps for the CFPB regarding the collection and asset purchasing industries, the CFPB needs to define the term "larger participant in the market." This is because its direct, supervisory authority in nonbank markets, which includes the collection and asset purchasing industries, is strictly limited to the larger players. For purposes of the debt collection and asset purchasing industries, the CFPB's definition of larger market participants may turn on the participant's annual number of transactions in the market; annual value of transactions, annual receipts or revenue; geographic coverage (e.g., number of states where engaged in business); or asset size.

The scope of the CFPB's supervision of larger participants in other non-bank markets has not yet been determined but we do know that with respect to the collection and asset purchasing industries, the CFPB will require the larger participants in the collection and asset purchasing industries to comply with Federal law and adhere to audit requirements. It may also establish a consumer complaint resolution program and impose registration requirements, including the registration of debt collectors.

[Note: According to the CFPB, debt collection market affects a large number of consumers. About 30 million individuals, or 14% of consumers, now have debt that is subject to the collections process, and the average debt those consumers have under collection is approximately \$1,400. The debt collection market includes those market participants that collect on behalf of another entity that owns the debt, or collect on their own behalf after purchasing the debt from a creditor or other holder of the debt.]

A word to the wise: mind your complaints—As a preventive measure, all agencies and debt purchasers should proactively consider their complaint resolution processes. Complaints against the industry remain at an all-time high, and the new CFPB website places heavy emphasis on consumer education, consumer complaints and complaint resolution. The CFPB is sending a strong message to the industries it regulates and those it intends to regulate—that it takes consumer complaints very seriously and that industry players should do likewise. Collection agencies, debt buyers and even first-party creditors are well-advised to establish internal complaint resolution programs that seek to resolve consumers' concerns at all stages of the billing and collection process. For your reference, the FTC's 2011 Report to Congress indicated the following complaint categories and volumes for calendar year 2010.

Consumer complaint tally:

Complaint	2010	2009
Collector harassed debtor*	54, 147	41, 063
Collector demanded more than is permitted by law	33, 122	27, 483
Collector did not send required consumer notice	32, 447	27, 712
Collector threatened dire consequences	27, 554	20, 256
Collector revealed debt to 3rd party	23, 758	16, 961
Collector made impermissible calls to consumer's work	17, 008	11, 991
Collector failed to verify disputed debt	11, 492	10, 164
Collector failed to cease communications	7, 343	7, 426

*17K regarding the collector's use of profanity or abusive language.

Outlook – It is unlikely lawsuits against collection agencies and asset purchasers will abate in 2012. The once cottage industry of consumer attorneys has grown to a mansion industry and has a hungry appetite to file lawsuits under state and federal consumer protection statutes that include an attorney's fees provision. This machine must be fed and the collection and asset purchasing industry is an easy target. Negative press, high levels of consumer complaint filings, ambiguous laws and regulations and the resolve state and federal regulators have to fill the coffers with money extracted from the industry in the form of fines and penalties does not bode well for the industry. Establishing reasonable compliance programs, increasing the time and resources spent on collector training and using technology that is designed to prevent law violations is critical to any agency or asset buyer's successful navigation of the legal, legislative and regulatory environment we predict for 2012.