

FAIR DEBT COLLECTION PRACTICE ACTS CONSUMER RIGHTS LAWS EXTENDED EFFECTIVE NOVEMBER 30, 2021

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As a preface, this article addresses the federal Fair Debt Collection Practice Act (FDCPA) and not the North Carolina Fair Debt Collection Practices Act (NCFDPCA). There are both significant similarities and differences between the two consumer protection laws. Discussing these similarities and differences is beyond the scope of this article.

On November 30, 2021, two final Rules (combined totaling more than 600 pages) that were previously issued by the Consumer Financial Protection Bureau (CFPB) under the Fair Debt Collection Practices Act (FDCPA) took effect. Following is a summary of the pertinent parts of each Rule:

The first rule, issued in October 2020, focuses on debt collection communications and clarifies the FDCPA's prohibitions on harassment and abuse, false or misleading representations, and unfair practices by debt collectors when collecting consumer debt. This Rule requires debt collectors who communicate electronically to offer the consumer a reasonable and simple method to opt out of such communications at a specific email address or telephone number. The rule also provides that consumers may, if the debt collector communicates through a medium of electronic communications, use that medium of electronic communications to place a cease communication request or to notify the debt collector that they refuse to pay the debt.

The second rule, issued in December 2020, clarifies what disclosures a debt collector must provide to consumers at the beginning of collection communications. The Rule also provides a model form that debt collectors may use to comply with the Rule's requirements. This second Rule also prohibits debt collectors from suing or threatening to sue consumers on debt that is so old as to fall outside the applicable statute of limitations. Additionally, this second Rule requires debt collectors to take specific steps to disclose the existence of a debt to consumers before reporting information about the debt to any consumer reporting agency.

The Final Rules apply to all "debt collectors" as they are defined by the FDCPA, but they generally do not extend to apply to "first party" creditors who are merely collecting their own debts. The FDCPA defines a debt collector as **any person who regularly collects, or attempts to collect, consumer debts for another person or institution or uses some name other than its own when collecting its own consumer debts**. However, the FDCPA provides certain exemptions to who is or is not a debt collector. In a case involving the interpretation of the FDCPA, the Fourth Circuit Court of Appeals (in an unpublished decision) stated:

Critically, the FDCPA excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person." The Court went on to find that to the extent residential property managers begin attempting to collect the debts from their residents before those debts are in default, they may be excepted from the general "debt collector requirements".

Based on this case, it is currently a generally accepted theory that the FDCPA should not apply to most (if not all) residential property management firms in North Carolina. However, as an unpublished decision, it is not binding precedent, AND courts in other jurisdictions have reached the opposite interpretation of this FDCPA language, finding that managers of residential rental properties are debt collectors within the FDCPA. So, there is reason for caution around what policies and practices you may want to employ in your operations. Until the Supreme Court has determined whether a residential property manager is (or may) meet the definition of “debt collector”, our understanding of who is and is not a debt collector must remain open to change in the future. We will keep you apprised of any new developments as these new Rules take effect across the Country, as well.

All that being said, there is one provision that allows a property manager to assist any future collectors of the resident’s debt. A property manager’s email communications can affect protections provided to a debt collector who the account may be referred to later on. The following steps are required of the property manager to trigger protection of the debt collector under this provision: 1) creditor obtained the email address from the consumer; 2) 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; 3) 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:

- that the debt has been or will be transferred to the debt collector;
- the email address and the fact that the debt collector might use the email address to communicate with the consumer about the debt;
- that, if others have access to the email address, then it is possible they may see the emails;
- instructions for a reasonable and simple method by which the consumer could opt out of such communications; and
- 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.

4) The opt-out period provided has expired and the consumer has not opted out; and 5) 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.

As a final reminder, the discussions in this article are limited to the federal Fair Debt Collections Practices Act and do not include the North Carolina Fair Debt Collection Practices Act.

If you're interested in reading the full text of either of these Rules for yourself, the links to each are here.

- The [first rule, issued in October 2020](#) (focused on debt collection communications)
- The [second rule, issued in December 2020](#) (disclosures debt collectors must provide to consumers)