

# PUBLICATION

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## Recent Case Law Hints at Possible Additional Defenses for Auto Finance Companies Hit With Debt Collection Lawsuits

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According to the Consumer Financial Protection Bureau (CFPB), debt collection is the leading source of consumer complaints. Many debt collection statutes, including the Fair Debt Collection Practices Act (FDCPA), provide for a private right of action and damages against companies that violate their provisions. Some recent case law under the FDCPA could provide important defenses for auto financing companies opposing such lawsuits.

### ***Who is a Debt Collector?***

As a preliminary matter, one must be a "debt collector" in order to fall under the purview of the FDCPA.<sup>1</sup> The statute defines "debt collector" as one who "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The statute contains two notable exceptions applicable to auto finance companies. First, most provisions apply only to a debt collector, but not to a *creditor* which is separately defined under the statute. A creditor is defined as "any person who offers or extends credit creating a debt or to whom a debt is owed ..." In *Blanc v. Capital One Bank*, the court addressed this distinction. In *Blanc*, the consumers alleged that Capital One Auto was their "finance company" – it issued an auto loan to the consumers in the amount of \$14,000 to finance the purchase of a car. The court found that these and other facts in the complaint alleged that Capital One was a *creditor* and not a debt collector. Significantly, the court also found that the FDCPA does not impose vicarious liability on creditors solely based on the acts of third party debt collectors. As a result, the court dismissed the consumer's claims under the FDCPA on this basis. Under this authority, an auto finance company would not have liability under the FDCPA where the company is collecting a debt it originated, or if it is sued as a result of something done by a third party debt collector.

Courts have also recently addressed the definition of "debt collector" under the statute. As a preliminary matter, the statute specifically excludes from the definition one who obtains a debt which was not in default at the time the debt was acquired. In other words, if the debt was acquired or the account service transferred at a time when it was a fully performing loan, any later default does not matter and the consumer simply cannot sue the acquiring company under the FDCPA. Although this is generally a straightforward analysis, complications arise when the debt collector or servicer's records indicate a default, but the consumer is not really in default because of some restructuring of the loan, often through bankruptcy. In such cases, the courts may look at a variety of factors to determine whether the debt was in default. Some courts look at this from the creditor's perspective; e.g., whether the creditor treated the debt as being in default. Other courts view this analysis from the perspective of the consumer; e.g., whether a reasonable person in the consumer's position would believe the creditor viewed the loan as in default based upon the communications received by the consumer.

### ***What is Debt Collection Anyway?***

A "debt" is defined in the statute 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 ..." Notably, the debt must result from a

transaction for personal use. Generally, courts "examine the transaction as a whole, paying particular attention to the purpose for which the credit was extended in order to determine whether [the] transaction was primarily consumer or commercial in nature." More recently, however, courts have indicated that it may be appropriate to determine whether a reasonable person in the consumer's position believed that the creditor viewed the debt as being for personal or business use. Stated another way, did the debtor do things that would reasonably cause the creditor to view the loan as being for business use? If so, the debt may be viewed as a business obligation and excluded from the reach of the FDCPA.

Often, the courts look at the communication itself to see whether it evidences debt collection. Several circuits have found that a communication need only be loosely "connected to" debt collection. Nevertheless, courts have looked to the substance of the communication to determine whether it constitutes debt collection and they have identified particular language as evidencing that a communication is *not* debt collection. In *Thompson*, the court found that where the document at issue was six pages long, contained extensive disclosures required by law and stated that the document was "for informational purposes only," the document at issue did not constitute an attempt to collect a debt although it did include a courtesy payment coupon. Notably, although a notice may state that it "is an attempt to collect a debt," this fact alone is not dispositive.

Lien enforcement or collateral recovery alone does not constitute debt collection under the FDCPA. However, a communication can constitute lien enforcement and debt collection at the same time. In that case, the overall communication would likely constitute debt collection. In determining whether a communication contains debt collection language, the courts look at things such as whether the communication "demands full and immediate payment." On the other hand, where the communication at issue amounts only to lien enforcement, the communication is not actionable under the FDCPA. In *Dunavant*, the court found that published notices of foreclosure sale did not constitute debt collection under the FDCPA because the notices did not demand payment.

Developing a defense with your attorney for your debt collection suit is crucial. You must help your attorney understand your lien enforcement practices generally, as well as your efforts specific to the instant lawsuit. Moreover, it is crucial that you help your attorney understand how the account at issue was acquired and its status at acquisition, since these facts may provide important defenses.

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<sup>1</sup> Contrast the Telephone Consumer Protections Act, which contains no such requirement.