

# Self-Pay Challenges to Providers in the Post-Pandemic World

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# Part 1: TCPA Review and the impact of the Facebook decision.

# What is the TCPA?

- Federal statute: 47 U.S.C. § 227, 47 C.F.R. § 64.1200
- An Act of Congress, passed in 1991 to implement “restrictions on use of telephone equipment”, specifically, “automatic telephone dialing system” (ATDS).
- Regulates phone calls, faxes, and text messages
- Initially, the ATDS restriction was not a concern for most companies. Virtually no one viewed the Act as targeting calls in the ordinary course of business rather than banning telemarketing.

*Wait-what about Facebook, Inc. v. Duguid case issued April 1, 2021?*



# What is the TCPA?

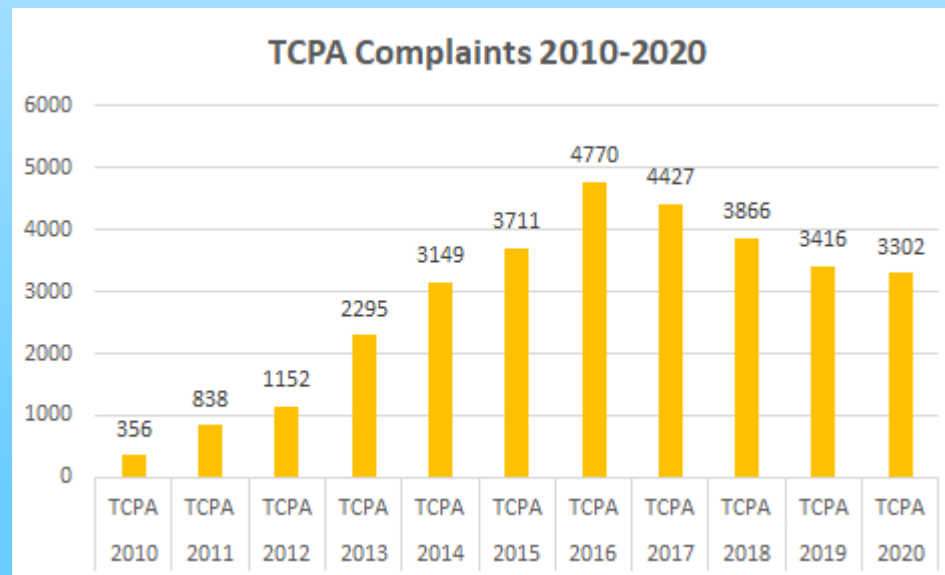
- As dialing technology advanced, however, some believed the ATDS restriction should advance with it.
- Beginning with Obama-era rulemakings, the Federal Communications Commission (FCC) seized upon a perceived ambiguity in the ATDS definition to advance a decidedly different, more muscular regime. Trial courts had to defer to the FCC, so the once-limited reach of the TCPA (and its crippling statutory damages) grew rapidly.

*In essence, a law to protect consumers from annoying telemarketing calls in 1991 became a weapon of mass destruction by 2010.*



# What is the TCPA?

- The number of filed TCPA claims jumped from:
  - 356 in 2010
  - 1,152 in 2012
  - 3,149 in 2014
  - 4,770 in 2016



# Why should I care about the TCPA?

- ❑ Private cause of action
- ❑ Broad application and strict liability
- ❑ Potential for individual liability
- ❑ Class Action
- ❑ Statutory (and unlimited) damages =

*Strict liability exists when a defendant is liable for committing an action, regardless of what his/her intent or mental state was when committing the action. Basically, there are no defenses.*



# Why should I care about the TCPA?

## Huge settlements

- ❑ Caribbean Cruise Line: up to \$76 million (Sep. 2016)
- ❑ Capital One: \$75.5 million (Aug. 2014)
- ❑ Dish Network: \$61 million (Oct. 2017)
- ❑ US Coachways: \$49.9 million (Nov. 2016)
- ❑ AT&T Mobility: \$45 million (Oct. 2014) HSBC: \$40 million (Sep. 2014)
- ❑ Bank of America: \$32 million (Sep. 2014)
- ❑ Midland Credit: \$20.5 million (July 2016)
- ❑ Uber: \$20 million (Sep. 2017)
- ❑ Wells Fargo: \$16.3 million (July 2016)
- ❑ Wells Fargo: \$15.7 million (Feb. 2017)
- ❑ Life Time Fitness: \$15 million (Feb. 2015)
- ❑ Wells Fargo: \$14.5 million (Dec. 2014)
- ❑ American Eagle: \$14.5 million (Dec. 2016)



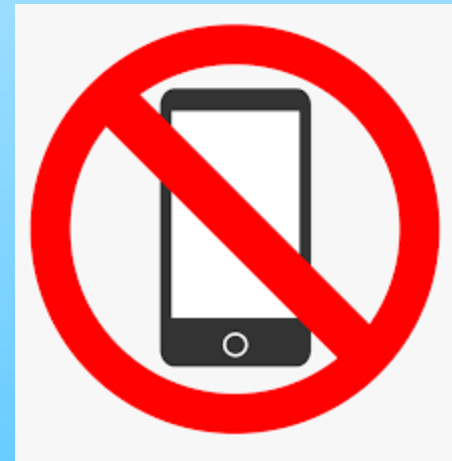


# What communications should I worry about?

1. Calls made to consumers using **ATDS** or prerecorded messages without requisite consent *what's this?*
2. Text messages
3. Faxes
4. Do not call lists

# What is an ATDS? *Statute*

- The term “automatic telephone dialing system” means equipment which has the capacity—
  - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
  - (B) to dial such numbers.
- Unlawful to use ATDS to call *cell phones*



# What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

*what's this?*

# Consent a maze of regulations

	Residential Landline		Cell Phones	
	Marketing	Non-Marketing	Marketing	Non-Marketing
ATDS Calls or Texts	Check Do Not Call lists	✓	Prior express written consent	Prior express consent
Non-ATDS Calls or Texts	Check Do Not Call lists	✓	Check Do Not Call lists	✓
Prerecorded Voice	Prior express written consent	✓	Prior express written consent	Prior express consent

# Consent

What is the purpose of the contact?

# Consent a maze of regulations

	Residential Landline		Cell Phones	
	Marketing	Non-Marketing	Marketing	Non-Marketing
ATDS Calls or Texts	Check Do Not Call lists	✓	Prior express written consent	Prior express consent
Non-ATDS Calls or Texts	Check Do Not Call lists	✓	Check Do Not Call lists	✓
Prerecorded Voice	Prior express written consent	✓	Prior express written consent	Prior express consent

# Consent telemarketing or advertisement?

- Telemarketing or Advertisement
  - Sale need not occur during the call for the call to qualify
  - Dual-purpose calls (both a solicitation and non-solicitation purpose)
  - Motivated by desire to achieve future sale
- A lot of gray area and litigation here
  - *Smith v. Blue Shield of California Life & Health Ins. Co.*, 228 F. Supp. 3d 1056 (C.D. Cal. Jan. 13, 2017)
  - *Flores v. Access Ins. Co.*, No. 215CV02883CASAGR, 2017 WL 986516 (C.D. Cal. Mar. 13, 2017)

# Consent

What level of consent is needed?



# Consent a maze of regulations

	Residential Landline		Cell Phones	
	Marketing	Non-Marketing	Marketing	Non-Marketing
ATDS Calls or Texts	Check Do Not Call lists	✓	Prior express written consent	Prior express consent
Non-ATDS Calls or Texts	Check Do Not Call lists	✓	Check Do Not Call lists	✓
Prerecorded Voice	Prior express written consent	✓	Prior express written consent	Prior express consent

# Consent prior express consent

- Providing cell phone number = consent to receive calls and texts for purposes related to the underlying transaction

# Consent a maze of regulations

	Residential Landline		Cell Phones	
	Marketing	Non-Marketing	Marketing	Non-Marketing
ATDS Calls or Texts	Check Do Not Call lists	✓	Prior express written consent	Prior express consent
Non-ATDS Calls or Texts	Check Do Not Call lists	✓	Check Do Not Call lists	✓
Prerecorded Voice	Prior express written consent	✓	Prior express written consent	Prior express consent

# Consent prior express written consent

- ❑ Written agreement
- ❑ Contains a signature (can be electronic)
- ❑ Clear authorization for use of an ATDS or artificial or prerecorded voice to deliver ads or telemarketing information
- ❑ Identifies telephone number
- ❑ Clear and conspicuous disclosures:
  - ❑ Agreeing to autodialed telemarketing calls
  - ❑ Consent is not required and isn't a condition of purchase



# Consent can be revoked

- ❑ FCC in 2015: Consent can be revoked through “any reasonable method” that, based on the “totality of the facts and circumstances expresses a desire not to receive further messages”
  - ❑ Appeal pending - *ACA Int’l v. FCC*
- ❑ Lots of litigation and case law regarding what revocation must look like
- ❑ Can be *partially revoked*



# Consent reassigned numbers

- FCC: Liability for calls to reassigned numbers even if the sender did not know that a service provider reassigned the intended recipient's phone number
  - Appeal pending - who is the "called party"?
    - *ACA Int'l v. FCC*
- More than 37 million numbers are reassigned every year
- 1 call "safe harbor"

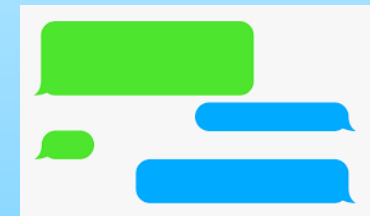
# What communications should I worry about?

1. Calls made to consumers using ATDS or prerecorded messages without requisite consent
2. Text messages
3. Faxes
4. Do not call lists

*these too??*

# Texts

- ❑ TCPA originally meant for calls and faxes (passed in 1991)
- ❑ But now, also applies to text messages: A text message is a “call” subject to the provisions of the Telephone Consumer Protection Act (TCPA). *Campbell-Ewald Co. v. Gomez*, (U.S. 2016).
- ❑ Same consent requirements as a call
- ❑ Beware of computer or cloud-based programs that automatically send text messages following a transaction or other event. *Wick v. Twilio Inc.*, (W.D. Wash. July 12, 2017).





# TCPA Exceptions

When can I use an ATDS or prerecorded voice?

# TCPA Exceptions

- ❑ Requisite consent (cell + residential)
- ❑ Emergency purposes (cell + residential)
- ❑ Non-telemarketing (residential)
- ❑ Commercial purpose but not telemarketing or advertisement (residential)
- ❑ Made by or on behalf of a tax-exempt entity (residential)
- ❑ Delivers a healthcare message, by or on behalf of a “covered entity” or its “business associate,” as defined by HIPAA (cell + residential)

# Prevention Steps

How do I avoid TCPA liability?



# Prevention Steps

- Get the requisite consent
- Monitor your third-party vendors
- Insurance

# Prevention Steps: Consent

- ❑ Comply with federal regulations
- ❑ Maintain, enforce, and monitor clear procedures and policies regarding consent
  - ❑ How to get consent
  - ❑ What to do when a customer might be intending to revoke consent
  - ❑ Keep customer information up-to-date
- ❑ Provide easy automated opt-out mechanisms
- ❑ Maintain and enforce internal “do not call” list

# Prevention Steps: Monitor your third-party vendors

- ❑ When using third-party vendors, address TCPA concerns up-front
- ❑ Relevant vendors to consider are customer-facing vendors as well as “lead-generating” vendors
  - ❑ Mixed authority on the extent of vicarious liability - the key question is whether there is an agency relationship
- ❑ Require TCPA compliance from vendors
- ❑ Include indemnity for TCPA violations
- ❑ Require vendors to carry liability insurance covering TCPA violations

# Prevention Steps: Insure Yourself

- In addition to requiring vendors to carry TCPA insurance, make sure you do too!
- Insurance companies are often inserting a standard exclusion for TCPA violations, make sure to check for this

# Bonus Prevention Step: Keep in Mind Other Laws

- Don't forget about other federal and state laws
  - Fair Debt Collection Practices Act
  - Consumer Protection Acts (MCPA)
  - Fair Credit Reporting Act
  - Truth in Lending Act
  - Other state laws



# Facebook Decision

- Curtailing the reach of an antiquated robocall law, the U.S. Supreme Court has sharply limited what constitutes an “autodialer” under the Telephone Consumer Protection Act of 1991.
- The unanimous decision in Facebook, Inc. v. Duguid issued on April 1, 2021, restores order to a law that had been weaponized against business interests for more than a decade.

# Facebook Decision

- The Court's framing of the facts reflects that the district court dismissed Mr. Duguid's claims because Facebook delivered "targeted, individualized texts to numbers linked to specific accounts." The Court did not question the procedural correctness of this dismissal. Instead, the Court readily concluded that login notification systems like Facebook's do not meet the ATDS definition. This suggests that a plaintiff's allegations of targeted, repeated calls or texts to a specific cell number alone are adequate to show that the calls or text were not made using an ATDS. It would be statistically improbable, if not impossible, for a defendant dialer to randomly or sequentially produce a customer's same 10-digits for dialing several times in succession.

# Facebook Decision

- ❑ The Duguid decision is helpful for its limitation on liability in the near-term and the certainty it offers moving forward. But its beneficiaries should not lower their guard. As the Court noted, its ruling does not impair the sister provision regulating calls made to cell phones using artificial voices or prerecorded messages.
- ❑ What's more, the next iteration of the ATDS restriction could be worse. As expected, the Court left the job of updating the TCPA to Congress. There is little reason to expect it will decline the invitation.
- ❑ Now is the time to prepare. Refine your procedures. Contact your legislators and lobbyists. Stay vigilant.



# Part 2: What's the CFPB's New Debt Collection Rules Mean for Agencies and their Provider partners.

# Agenda

- 01** Overview of the FDCPA and Rulemaking that led to the Fall 2020 new regulations
- 02** Highlight of changes and key provisions in the new FDCPA regulations
- 03** Recent CFPB actions to delay and supplement the new FDCPA regulations
- 04** The 11<sup>th</sup> Circuit's *Hunstein* Decision and its impacts

# Overview of the FDCPA and Rulemaking that led to the promulgation of Regulation F in Fall 2020

# Fair Debt Collection Practices Act

- Enacted in 1977 and codified at 15 U.S.C. § 1692, *et seq.*
- Passed in response to “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.”
- Statute is intended to:
  - curb abuses
  - promote consistent State action to protect consumer
  - ensure that debt collectors who do not engage in abusive debt collection practices are not put at a competitive disadvantage

# What does the FDCPA do?

- Establishes broad consumer protections:
  - requires debt collectors to provide certain disclosures (“Mini-Miranda”);
  - puts privacy protections in place;
  - enables consumers some control over when and how debt collectors contact them;
  - prohibits harassment or abuse, and false or misleading representations by debt collectors.
- Private cause of action provided for violations.
  - Remedy is actual damages, statutory damages (\$1000 per violation) and attorneys’ fee.
  - Class action can substantially multiply damages.



# Implementation and Enforcement of the FDCPA

- Currently enforced by the Consumer Financial Protection Bureau (“CFPB”) per authority granted by the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010.
- Previously administered by FTC.
- Federal courts have interpreted FDCPA and added judicial gloss since FDCPA enacted in 1977.
- FDCPA leaves room for State regulations that are not inconsistent with the FDCPA.
- In May 2019, CFPB published proposed debt collection rules under the FDCPA; final rule (Regulation F) published December 2020 and to be effective in November 2021.

# Who does the FDPCA apply to?

- Statute is targeted towards “debt collectors” , as defined in 15 USC 1692a(6).
- “[A]ny person who uses any instrumentality of the 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.”
  - Generally does not apply to creditors seeking to collect debts owed to them.
  - But it **may include** creditor collecting its own debts using a name other than its own.

# Key Requirements

- Mini-Miranda disclosure required in initial communication with the consumer.
- Debt collector must attempt to contact consumer prior to furnishing information to a consumer reporting agency (CRA).
- Restrictions on time, place, and manner of communications.
  - - May not use false, deceptive, or misleading representations or means.
- Consumer has right to dispute the debt.
- Restrictions on credit reporting with respect to disputed debts.
- Rules regarding filing of court actions.

# CFPB-Reg F-Final Rule (2020)

- Regulation F - Final Rule Published November 30, 2020.
- Final Rule scheduled to be effective on November 30, 2021 and will be found at 12 CFR Part 1006.
- Final rule covers “debt collectors”, as defined in the FDCPA.
- [Text available at: 12 CFR Part 1006 - Fair Debt Collection Practices Act \(Regulation F\) | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)



# “Consumer” Standard and Definition

- New regulations adopt an objective, “unsophisticated” or “least sophisticated” consumer standard.
- Statutory definition of “consumer” interpreted to include deceased individuals
  - person who is authorized to act on behalf of estate (executor, administrative, personal representative) is considered to be the “consumer”;
  - debt collectors must provide representative of deceased consumer with validation information and opportunity to dispute the debt;
  - “know or should know” that the consumer is deceased standard.

# Initial Disclosures & Subsequent Communications

- Debt collector must **disclose** in initial communication it is attempting to collect a debt and that any information obtained will be used for that purpose. § 1006.18(e)(1).
  - social media “friend” or “follow” request qualifies.
- Must disclose in subsequent communications that they are from a debt collector. § 1006.18(e)(2).
- If communicating in language other than English, disclosure must be in same language as the rest of the communication, and the translation must be complete and accurate. § 1006.18(e)(4).
- Communications may not be false, deceptive, or misleading. § 1006.18(b).
- Per CFPB interpretation: May not communicate or attempt to communicate with consumer through **social media** if the communication is viewable by the general public **or** by the consumer’s social media contacts.

# Additional Requirements for Communications

- Communications must not be made at a time or place that the debt collector knows or should know is inconvenient to the consumer. **§ 1006.6(b)**.
  - – *How does social media and email play into this?*
- Debt collector must cease communication attempts upon written notice **§ 1006.6 (c)**.
  - - Email, text, or social media message likely sufficient.
- Generally may not communicate with third party about the debt (inc. social media) **§ 1006.6(d)**.
- As before, debt collectors may not “engage in any conduct the natural consequence of which is to harass, oppress, or abuse.” **§ 1006.14**.

# Validation Notice

- Requirements set forth in § 1006.34; similar to current practice, with some additions:
- If debt is related to a “consumer financial product or service,” must direct consumer to CFPB’s website for additional information about consumer debt protections.
- “Safe harbor” form is provided (“Model Form B-1”).
- Consumer-response information required at the bottom of any validation notice;
  - *“How do you want to respond? Check all that apply.”*
    - *“I want to dispute the debt because I think: ...”*
    - *“This is not my debt.”*
    - *“The amount is wrong”; and*
    - *“Other (please describe on reverse or attach additional information.)”*
  - Must also include checkbox for consumer to indicate that, *“I want you to send me the name and address of the original creditor.”*
  - “Safe harbor” form is provided (“Model Form B-1”).



# Email Communications

- Lays out **Reasonable Procedures** for email and text communications. § 1006.6(d)(4).
  - Compliance permits debt collector to establish either a lack of a violation or the bona fide error defense.
- **Email:**
  - Consumer use or prior consent to use email; OR
  - **Creditor** obtained email and, **before** debt collector used it to communicate, provided written notice (can be electronic) to the consumer that
    - the debt is being transferred to a debt collector,
    - the debt collector might communicate by email,
    - other individuals with access to the email account may see them, and
    - provide opt-out procedure.

# Example Creditor Disclosure for Email

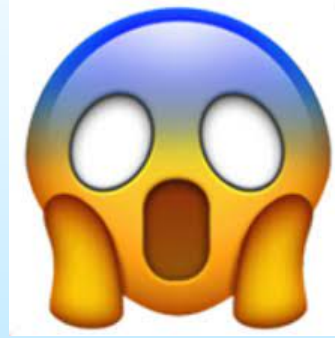
- Official interpretation provides model language that a
  - **creditor** may, but is not required, to use:

*“We are transferring your account to ABC debt collector, and we are providing ABC debt collector with the following email address for you: [email address]. ABC debt collector may use this email address to communicate with you about the debt. If others have access to this email address, then it is possible they may see the emails. If you would like to opt out of communications by ABC debt collector to [email address], please click here by [date].”*

# Text Messaging

- Texting requirements in § 1006.6(d)(5).
- A debt collector may text, if:
  - Consumer used number to communicate about debt by text and has not since opted out, and within the past 60 days either:
    - consumer texted debt collector from that number; OR
    - debt collector confirmed, using complete and accurate database, that the number has not been reassigned.
  - **Alternatively**, may text where, debt collector received **prior consent** to text at that number, and with the past 60 days, the debt collector either:
    - had obtained that initial consent or **renewed consent** (i.e., it goes stale after 60 days); or
    - confirmed, using complete and accurate database, that the phone number has not been reassigned.

# Credit Reporting



- ❑ Must not furnish information to a consumer reporting agency (“CRA”) before:
  - ❑ The debt collector “speaks to the consumer about the debt in person or by telephone” **or**
  - ❑ The debt collector provides written notice (mail or electronic) about the debt and **waits** a reasonable period of time to receive a notice of undeliverability.
  - ❑ If notice of undeliverability received, debt collector “must not furnish information about the debt to a [CRA] until the debt collector” either speaks with the consumer or provides written notice that is **not undeliverable**. § 1006.30(a).
  
- ❑ Potentially onerous requirement if consumer is actively seeking to evade debt collectors.

# Disputes

- Dispute procedures governed by [§ 1006.38](#).
  - During validation period, must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of consumer's right to dispute the debt and request name of original creditor;
    - Safe Harbor: that use of the Model Form B-1 as a validation letter (discussed previously) is not a violation of this requirement.
- Original-creditor information may be sent electronically in certain circumstances.

# Time-Barred Debts and Litigation

- New rules on attempts to collect “time-barred debt,” interpreted as debt on which the state statute of limitations has run.
- Debt collector violates FDPCA if it sues or threatens to sue to collect a time-barred debt.
  - no “knew or should have known” standard from the debt collector’s perspective; “strict liability standard”;
    - bona fide error defense is available.
  - Debt collector may still use non-litigation tactics (phone calls, letter, etc.) to attempt to collect time-barred debt, as long as those methods do not violate the FDCPA themselves (First Amendment; commercial speech).
  - CFPB declined to adopt a requirement that debt collector disclose that a statute of limitations has expired.

# Part 3: Comprehensive Debt Collection Improvement Act (CDCIA)

# Comprehensive Debt Collection Improvement Act (CDCIA)

- On May 13, 2021, the U.S. House of Representatives passed H.R. 2547, also known as the Comprehensive Debt Collection Improvement Act (CDCIA). If passed by the Senate, the CDCIA would amend several existing consumer finance statutes and impose new requirements and limitations on debt collectors.
- Sponsors (8)
  - Maxine Waters (D)\*
  - Jacob Auchincloss (D)
  - Emanuel Cleaver (D)
  - Madeleine Dean Cunnane (D)
  - Gregory Meeks (D)
  - Ayanna Pressley (D)
  - Rashida Tlaib (D)
  - Nydia Velazquez (D)



# Comprehensive Debt Collection Improvement Act (CDCIA)

The bill, the Comprehensive Debt Collection Improvement Act (CDCIA), is actually 8 separate bills, each with a Congressional sponsor.

Generally, these are the 8 bills:

- Amends Truth in Lending Act (TILA) to restrict the use of confessions of judgment for small business owners.
- Amends the FDCPA to prohibit debt collectors from threatening an Armed Services Member.
- Amends TILA to require the discharge of private student loans in the case of permanent disability of the borrower.
- Bars entities from collecting medical debt or reporting it to a consumer reporting agency without giving a consumer notice about their rights under the FDCPA and the FCRA.
- Amends the FDCPA to prohibit a debt collector from contacting a consumer by email or text message without a consumer's consent to be contacted electronically.
- Expands the definition of debt covered under the FDCPA to include money owed to a state or local government; municipal utility bills, tolls, traffic tickets, and court debts are subject to the FDCPA. It would also extend FDCPA protections related to a debt owed to a federal agency and limit the fees debt collectors can charge.
- Updates monetary penalties for inflation, including class action limits, and clarifies that courts can award injunctive relief, as well as add protections for consumers affected by national disasters.
- Amends the FDCPA to clarify that the statute covers non-judicial foreclosure proceedings.



# Comprehensive Debt Collection Improvement Act (CDCIA)

Specific to medical collections, HR 2537, the “Consumer Protection for Medical Debt Collections Act”, introduced by Representative Rashida Tlaib (D-MI).

At a high level, it bars entities from collecting medical debt or reporting it to a consumer reporting agency without giving a consumer notice about their rights under the FDCPA and the FCRA. BUT, that’s not all. If you look at the actual language, here’s where it is really bad for all of us are underlined.

## SEC. 402. AMENDMENTS TO THE FAIR DEBT COLLECTION PRACTICES ACT.

(a) Definition.—Section 803 of the Fair Debt Collection Practices Act (15 U.S.C. 1692a) is amended by adding at the end the following:

“(9) The term ‘medical debt’ means a debt arising from the receipt of medical services, products, or devices.”.

(b) Unfair Practices.—Section 808 of the Fair Debt Collection Practices Act (15 U.S.C. 1692f), as amended by section 202(b), is amended by adding at the end the following:

“(10) Engaging in activities to collect or attempting to collect a medical debt before the end of the 2-year period beginning on the date that the first payment with respect to such medical debt is due.” (emphasis added).



# Comprehensive Debt Collection Improvement Act (CDCIA)

## SEC. 404. REQUIREMENTS FOR FURNISHERS OF MEDICAL DEBT INFORMATION.

(a) Additional Notice Requirements For Medical Debt.—Section 623 of the Fair Credit Reporting Act (15 U.S.C. 1681s–2) is amended by adding at the end the following:

“(f) Additional Notice Requirements For Medical Debt.—Before furnishing information regarding a medical debt of a consumer to a consumer reporting agency, the person furnishing the information shall send a statement to the consumer that includes the following:

“(1) A notification that the medical debt—

“(A) may not be included on a consumer report made by a consumer reporting agency until the later of the date that is 365 days after—

“(i) the date on which the person sends the statement;

“(ii) with respect to the medical debt of a borrower demonstrating hardship, a date determined by the Director of the Bureau; or

“(iii) the date described under section 605(a)(10); and

“(B) may not ever be included on a consumer report made by a consumer reporting agency, if the medical debt arises from a medically necessary procedure.

“(2) A notification that, if the debt is settled or paid by the consumer or an insurance company before the end of the period described under paragraph (1)(A), the debt may not be reported to a consumer reporting agency.

“(3) A notification that the consumer may—

“(A) communicate with an insurance company to determine coverage for the debt; or

“(B) apply for financial assistance.”.

(b) Furnishing Of Medical Debt Information.—Section 623 of the Fair Credit Reporting Act (15 U.S.C. 1681s–2), as amended by subsection (a), is further amended by adding at the end the following:

“(g) Furnishing Of Medical Debt Information.—

“(1) PROHIBITION ON REPORTING DEBT RELATED TO MEDICALLY NECESSARY PROCEDURES.—No person shall furnish any information to a consumer reporting agency regarding a debt arising from a medically necessary procedure.

“(2) TREATMENT OF OTHER MEDICAL DEBT INFORMATION.—With respect to a medical debt not described under paragraph (1), no person shall furnish any information to a consumer reporting agency regarding such debt before the end of the 365-day period beginning on the later of—

“(A) the date on which the person sends the statement described under subsection (f) to the consumer;

“(B) with respect to the medical debt of a borrower demonstrating hardship, a date determined by the Director of the Bureau; or

“(C) the date described in section 605(a)(10).

“(3) TREATMENT OF SETTLED OR PAID MEDICAL DEBT.—With respect to a medical debt not described under paragraph (1), no person shall furnish any information to a consumer reporting agency regarding such debt if the debt is settled or paid by the consumer or an insurance company before the end of the 365-day period described under paragraph (2).

“(4) BORROWER DEMONSTRATING HARDSHIP DEFINED.—In this subsection, and with respect to a medical debt, the term ‘borrower demonstrating hardship’ means a borrower or a class of borrowers who, as determined by the Director of the Bureau, is facing or has experienced extenuating life circumstances or events that result in severe financial or personal barriers such that the borrower or class of borrowers does not have the capacity to repay the medical debt.”



# Comprehensive Debt Collection Improvement Act (CDCIA)

The CDCIA is now in the hands of the Senate. The House passed the act by a narrow margin, mostly along party lines. The Senate is evenly divided, which leaves the ultimate fate of the Act unpredictable.

On May 17, 2021, the Act was referred to the Committee on Banking, Housing, and Urban Affairs and may undergo further revisions before final submission. The next steps would be:

- In the Senate, the bill is discussed, debated, and possibly amended, and finally voted on. Again, it only needs a simple majority: 51 out of 100.
- If it passes the Senate, it's referred back to a committee of House and Senate members to iron out the wrinkles.
- It's then returns to the House and Senate for one final approval.
- Finally, if it passed the House and the Senate a second time, the President has 10 days to sign or veto the proposed bill.



# Part 4: The 11<sup>th</sup> Circuit's Hunstein Decision and its impacts

# Hunstein v. Preferred Collection & Management Services, Inc.

- Debt Collector transmitted to its mailing vendor the debtor's status as a debtor, debt balance, entity to which the debt was owed, that the debt concerned his son's medical treatment, and the debtor's name
- Liability for violating Section 1692c(b) required a finding that the disclosure was made "in connection with the collection of any debt"
- The 11<sup>th</sup> Circuit described the case as one of first impression - no prior court in 40+ years of the FDCPA had issued a decision on this issue



# Hunstein v. Preferred Collection & Management Services, Inc.

- Eleventh Circuit Decision issued April 21, 2021
- FDCPA case asserting claim for a violation of Section 1692c(b)
- Claim was that the Debt Collector violated the Privacy Provisions by disclosing the Debtor's private information to its mailing vendor
- Common industry practice: use of outside vendors to send so-called "dunning" letters
- A novel claim - no prior court had found liability
- District Court dismissed the case

# Hunstein v. Preferred Collection & Management Services, Inc.

- ❑ Court rejected Debt Collector's argument that the key language required the disclosure to "necessarily entail a demand for payment"
- ❑ Court found prior decisions interpreting the same language as used in FDCPA Section 1692e inapplicable
  - because it would violate canons of statutory construction to render exception language as surplusage
- ❑ Court also rejected Debt Collector's argument that this would upset a common industry practice without any evidence of actual harm
- ❑ Court left it to Congress to amend statute



# Hunstein v. Preferred Collection & Management Services, Inc.

- What's next following *Hunstein*?
- Possible further judicial review: petition for en banc review to the full 11<sup>th</sup> Circuit or possible petition for certiorari to the U.S. Supreme Court
- Possible disruption of credit industry - new considerations/alignments
- Debt collection industry participants likely to work together to challenge *Hunstein* and/or develop other solutions
- Industry organizations and associations lobbying and legal advocacy efforts
- Expect the unexpected: not the last novel interpretation of the FDCPA

## Part 5:

# Engagement, Consumerism and the Future of Self-Pay Collections



# New Era = Patient Expectations

- Patients are customers and consumers
- Simple, Accessible, Affordable
- Innovation - People, Process and Technology
- Engagement and Satisfaction
- Transformation of experience

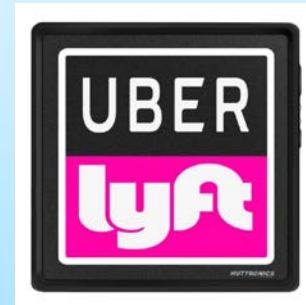


# Thinking Different

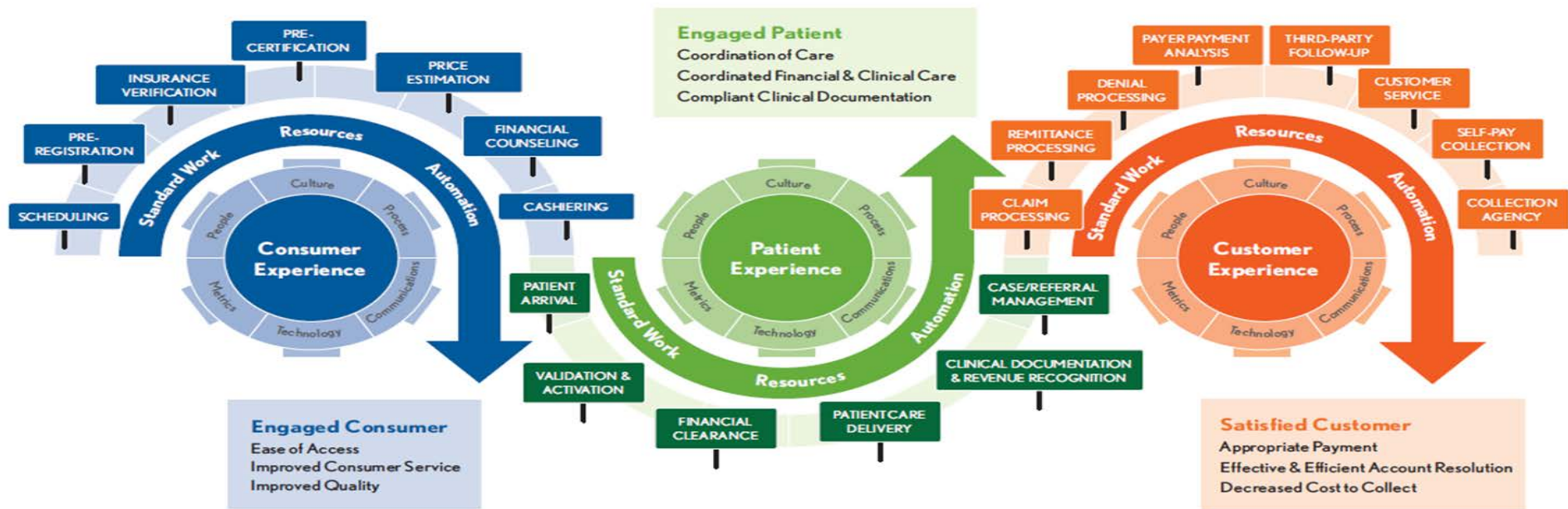
- To meet the consumers needs we must change how we think
  - [The Backwards Brain Bicycle](#)



# Thinking Different



# The Patient-Centric Revenue Cycle Roadmap



# Self-Pay Collections - The Essentials!

## (Remember - EXPECTED)

- Omnichannel Solutions w/ Patient Communication Delivery Preferences
- Online financial assistance & bill payment options (including mobile device/text)
- Patient Portal with quick pay functionality
- Credit card storage/tokenization
- Request for information/status updates
- Standardization across all facilities/practices/urgent care
- Single guarantor statement
- Patient friendly statements
- eStatements (via email, text, print)
- Interactive Voice Response (IVR)
- Web chat
- Two-way text
- Artificial intelligence
- Flexible payment options
- Satisfaction surveys
- Propensity to pay
- Analytical tools



# Transformation - Take the Leap

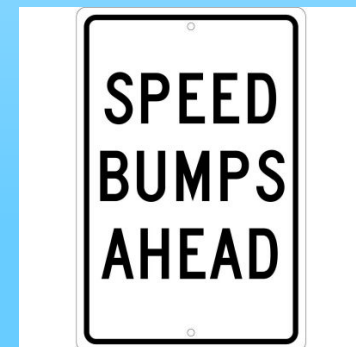
- Develop a Patient Engagement Strategy
  - Research/Actionable Data
    - Ask your customers for feedback
    - Create a focus group, send out surveys, etc.
    - Know your target audience and demographic
  - Establish goals
    - Stronger patient engagement
    - Improve patient satisfaction
    - Increase patient cash
    - Create self-service options
    - Digitize functionality
    - Reduce expense
    - Change patient behavior





# Transformation - Take the Leap

- Identify ALL patient touch points and apply individual goals to each
  - Include patient facing, print and digital touch points
- Identify technology and/or partner solutions that meet your needs
- Set realistic timelines for completion
  - Create phases & segmentations for implementation to avoid drastic changes in patient behavior
- Test, Test, Test
- Measure to gauge effectiveness / Make Adjustments
- Adapt & Evolve



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# Thank You

