

Does California's Rosenthal FDCPA protect nondebtors from abusive debt collection practices?

By Scott J. Hyman*

Creditors and debt collectors sometimes (unfortunately) engage in tactics that involve nondebtors, such as repeatedly contacting third parties to obtain location information, or being rude or abusive in such dealings. California's Rosenthal Fair Debt Collection Practices Act is often used by third parties as a remedy against the creditor or debt collector. So long as the creditor or debt collector is not attempting to actually collect the obligation from the third party, the RFDCPA should provide no relief.

The RFDCPA is not a panacea for collection-related torts. In order to trigger the RFDCPA, the creditor or debt collector must be allegedly collecting a "consumer debt," the definition of which also requires a "consumer credit transaction." This analysis depends upon the interplay of several definitions found in Cal. Civ. Code § 1788.2:

■ **Debt collector:** Any person who, in the ordinary course of business, regularly on behalf of himself or herself or others, engages in debt collection." (Section 1788.2(c))

■ **Debt collection:** Any act or practice in connection with the collection of consumer debts. (Section 1788.2(b))

■ **Consumer debt/consumer credit:** money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction. (Section 1788.2(f)).

■ **Consumer credit transaction:** a transaction between a natural person and another person in which property, services or money is acquired on credit *by that natural person* from such other person primarily for personal, family, or household purposes." (Section 1788.2(e)), *emphasis added*; see *Gouskos v. Aptos Village Garage, Inc.*, 94 Cal. App.4th 754 (Cal. Ct. App. 2001.)

■ **Consumer debt:** money, property or their equivalent, due or owing or alleged to be due or owing *from a natural person by reason of a consumer credit transaction*. (Section 1788.2(f) (*emphasis added*)).

'Consumer credit transaction' is key

The absence of a consumer credit transaction is fatal to an RFDCPA claim. (See *Abels v. JBC Legal Group, PC*, 428 F.Supp.2d 1023 (N.D. Cal 2005) (dishonored checks did not arise "by reason of a consumer credit transaction"; no RFDCPA claim); *Gouskos* (automobile repair expenses not subject to RFDCPA because it requires "a transaction where a person acquires property or services on credit").

Remedies available under the Rosenthal Act confirm this point. Section 1788.30(a) imposes liability on the debt collector "to that debtor." It also provides a \$1,000 penalty for willful violations "with respect to any debtor," and allows attorneys' fees and costs to "a prevailing debtor."

The RFDCPA defines "debtor" as "a natural person from whom a debt collector seeks to collect a consumer debt which is due and owing or alleged to be due and owing from such person". (Section 1788.2(h)). So long as the

third party is not someone from whom the debt collector is attempting to recover the consumer debt, the RFDCPA should offer no protection.

Federal definitions inapplicable

Section 1788.17, which incorporates portions of federal law, does not change the inquiry. It does not incorporate the federal FDCPA's definitions (*see* 15 USC § 1692a), but retains all of the RFDCPA's definitions. Section 1788.17 merely incorporates Sections 1692b through 1692j, and "subjects" a "debt collector collecting or attempting to collect a consumer debt" to the remedies in Section 1692k. As stated above, without a "consumer debt" or "consumer credit transaction," the RFDCPA is not triggered.

Federal law is different because of the definitions it uses. Whether the FDCPA, for example, protects third parties and gives them standing turns on whether the specific provision protects either "persons" or "consumers." (See, *e.g.*, *Bank v. Pentagroup Financial, LLC*, 2009 WL 1606420 (E.D.N.Y. 2009).

For example, Section 1692e(1) requires a debt collector to include the 'mini-Miranda' in the initial communication with "consumers," who are persons "obligated or allegedly obligated to pay the debt." (See Section 1692a(3).) Third parties are not "consumers" (if they are not dunned), but may be worthy of protection under some provisions of the FDCPA that protect "persons" rather than "consumers."

Section 1692d(1) prohibits "[a] debt collector [from] not engaging] in any conduct the natural consequence of which is to harass, oppress, or abuse *any person* in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person."

However, the RFDCPA, even with its incorporation of federal law, would not draw in similar protections for third parties because the RFDCPA retains its own definitions and does not incorporate the federal definitions. For example, the RFDCPA would interpret "debt collector" under 15 USC § 1692d(1) using its own definition of "debt collector" found in Civil Code § 1788.2(c), which refers to the definition of "debt collection" in Section 1788.2(a), which then refers to the definition of "consumer debt" in Section 1788.2(f).

Creditors and debt collectors who are accused by third-party nondebtors of abusive debt collection tactics that do not involve dunning the third party have an argument against liability under the RFDCPA. □

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