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Has the Debt Collection Industry Captured the CFPB?

The CFPB's proposed new rule implementing the Fair Debt Collection Practices Act indicates that the CFPB has been captured by the debt collection industry it regulates.

By Michael D. Donovan

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In 2010, as part of the Dodd-Frank Act, Congress created the Consumer Financial Protection Bureau (CFPB), which has the stated purpose of "protect[ing] consumers from unfair, deceptive, or abusive practices and tak[ing] action against companies that break the law." *See* About the Bureau (a section of the CFBP's website). Around the time the CFPB was created, thoughtful commentators wondered whether its unique institutional design would be sufficient to insulate it from industry capture, which is when an agency acts to further the interests of the industry it regulates instead of the public interest. *See, e.g.*, Rachel E. Barkow, "Insulating Agencies: Avoiding Capture Through Institutional Design," 89 *Tex. L. Rev.* 15 (2010). Professor Barkow, among others, expressed hope that a single director insulated from at-will firing who was independent of the annual appropriations process would be able to marshal regulatory expertise while avoiding subservience to the industry or groups being regulated. The CFPB's structure, she and others noted, took lessons from at least two sources: multi-member commissions (like the Consumer Product Safety Commission) that had been captured and bank supervisory offices that had self-contradictory missions to promote the "safety and soundness" of financial institutions even at the expense of consumer protection. "To achieve either expert or nonpartisan decision making, one must avoid undue industry influence, or 'capture,'" Barkow observed. *See id.* at 21.

Departing from the diffuse and contradictory agency designs of the past—which many believed were contributors to the Great Recession—the CFPB was designed for one mission, and one mission only: consumer financial protection. It is against this single-minded mission statement that we can measure whether the CFPB has been captured by one or more participants in the consumer finance industry.

The CFPB Proposes a Rule That Reduces Consumer Protection

Prior to the Dodd-Frank Act, Congress had not expressly delegated any rulemaking authority for the Fair Debt Collection Practices Act (FDCPA) to a specific agency, though the Federal Trade Commission had enforcement authority through which it had implemented some industry standards with consent decrees and informal safe harbors. In May 2019, under the authority granted to it, the CFPB announced a proposed rule to implement the FDCPA. The CFPB said that its proposed rule is an effort "to modernize the legal regime for debt collection." *Id.* Under the proposal, debt collectors would be allowed, among other things, to text and email consumers about missed payments. They would also be allowed to call an alleged debtor up to seven times per week, per debt. And, for mandatory notices such as so-called "validation notices," debt collectors could include them in hyperlinks in electronic communications. *See id.*

More than 20 U.S. senators have called on the CFPB to reconsider and rewrite this proposed rule, stating that it puts industry ahead of consumers. Scores of consumer advocates and hundreds of individuals have submitted comments decrying the proposal and highlighting the manifest flaws and significant backtracking on actual consumer protection reflected in the proposed rule.

While many parts of the purposed rule are troubling, one portion stands out from the rest because it directly conflicts with the actual language of, and established judicial precedent applying, the FDCPA. With respect to the collection of time-barred, stale, or so-called "zombie debts," the CFPB's proposed rule flips the express statutory burdens of proof by contradicting the precise language and specific elements of the FDCPA. Worse yet, it does so in artfully crafted language that is, at best, misleading: "The proposed rule would prohibit a debt collector from suing or threatening to sue a consumer to collect a debt if the debt collector knows or should know that the statute of limitations has expired."

The proposed rule is problematic because, contrary to the FDCPA itself, it unambiguously removes the element of intent or knowledge from any affirmative claim by a consumer (or the CFPB) for a violation by a debt collector. The FDCPA specifically addresses the issue of debt collector intent and knowledge, stating that it is an element of a debt collector's affirmative defense to liability: "A debt collector may not be held liable in any action brought under this subchapter *if the debt collector shows by a preponderance of evidence* that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c) (emphasis added). In fact, countless courts have held that the FDCPA "is a strict liability statute that 'makes debt collectors liable for violations that are not knowing or intentional.'" *Donohue v. QuickCollect, Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010) (quoting *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008)). And even unintentional mistakes of law—in contrast with clerical errors or factual mistakes—are insufficient to support a bona fide error defense. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010). The proposed rule directly conflicts with both the language of the FDCPA and the way that language has been interpreted in these consumer-friendly cases.

The Proposed Rule May Exceed the CFPB's Rulemaking Authority

The CFPB likely lacks authority to adopt a rule at odds with the FDCPA's intent requirement. It is a well-settled principle of administrative law that where a statute is unambiguous, there is no room for agency discretion or interpretation. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). More concretely, where a court—as in legions of FDCPA precedents—has held that the statute unambiguously forecloses any intent or knowledge element to establish liability, there is "no gap for the agency to fill, [thereby] displac[ing] a conflicting agency construction." *Id.* at 983. This is true whether or not the agency has been delegated rulemaking authority by Congress. *See id.* Only "ambiguities in statutes within an agency's jurisdiction to administer are delegations to the agency to fill in the statutory gap in reasonable fashion." *Id.* at 980.

Although the Dodd-Frank Act gave the CFPB formal rulemaking authority under the FDCPA, 15 U.S.C. § 1692*l*(d), it did not delegate any authority to disregard or rewrite the statute. As a result, there are strong arguments that there is no delegated authority for the CFPB to change the statutory burden under the FDCPA. Perhaps recognizing the absence of delegated authority, the CFPB's notice of rulemaking expressly requests comment on an "alternative strict-liability standard pursuant to which a debt collector would be liable for suing or threatening to sue on a time-barred debt even if the debt collector neither knew nor should have known that the debt was time-barred." 84 Fed. Reg. 23,274, 23,329 (May 21, 2019). But requesting comment on that "alternative" standard is puzzling because that is the standard Congress already set forth in the FDCPA. That the CFPB elected to create a proposed rule contradicting the already established standard regarding debt collectors' knowledge and intent under the FDCPA is particularly concerning because this issue can be easily addressed—debt collectors unsure about the applicable statute of limitations could include general language that the debt may not be legally enforceable, which would correct any possible misimpression by unsophisticated consumers. *See Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 400 (6th Cir. 2015).

A Better Approach: Clarifying the "Unfair and Unconscionable" Standard

As the CFPB undoubtedly knows, the debt-buying industry acquires a stale, time-barred, or zombie debt "at a heavily discounted price that account[s] for the fact that its legal enforcement is barred by the statute of limitations." *See Holtzman v. Malcolm S. Gerald & Assocs., Inc.*, 920 F.3d 1264, 1272–73 (11th Cir. 2019). To the extent there is any ambiguity in the FDCPA for the CFPB to address with a proposed rule, it is whether it is "unfair or unconscionable" for a debt collector to attempt to collect a debt that is legally unenforceable, particularly where that debt has been purchased at pennies on the dollar. While courts have recognized that debt collectors may still appeal to a "debtor to honor the debt out of a sense of moral obligation," they have also noted that "the opportunities for mischief and deception, particularly when sophisticated parties aim carefully crafted messages at unsophisticated consumers, may well be so great that the better approach is to simply find that any such efforts violate the FDCPA's prohibitions on deceptive or misleading means to collect debts, § 1692e, and on 'unfair or unconscionable means' to attempt to collect debts, § 1692f." *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 684 (7th Cir. 2017). Indeed, for time-barred debts collected by debt buyers, a plausible argument could be made that it is unfair and unconscionable, or at least deceptive and misleading, to dun a consumer for the face value of the debt without also disclosing that the debt was purchased for a small fraction of that face value. The CFPB's proposed rule could have provided consumers with additional protection if it clarified whether attempting to collect a legally unenforceable debt is "unfair or unconscionable."

The CFPB's Proposed Rule Suggests It Has Been Captured by the Debt Collection Industry

A combination of factors reflected in the CFPB's proposed FDCPA rule strongly suggest that the CFPB, despite its unique structural design, has been captured by the debt collection industry and perhaps even other financial industry participants. For time-barred debts, the CFPB has proposed an interpretation and rule that are directly contrary to the specific design and language of the statute. By proposing a "know or should know" standard, the CFPB has disregarded the precise language of the FDCPA's "intent" provision as well as controlling precedent that has established the statute as a "strict liability" law.

Moreover, the CFPB had and has authority to interpret the FDCPA to prohibit the collection of all time-barred debts because such activities are inherently deceptive and, at a minimum, unfair and unconscionable, particularly where a debt buyer fails to disclose that it paid a mere fraction of the face value to purchase the time-barred debt. That the CFPB failed to propose or even ask for comment on such a rule strongly suggests it is being more responsive to the industry it is responsible for regulating, which is the definition of agency capture.

It is also notable that since the departure of Director Richard Cordray, the CFPB has been absent from any significant enforcement efforts to protect consumers and has even failed to seek significant penalties, disgorgement, or compensation from well-known consumer predators. While this alone may not establish agency capture, it does suggest that institutional design alone may not be sufficient to ensure that a regulatory agency fulfills its mission in a good-faith manner.

At bottom, while institutional design may be important to accomplishing the public interest and protecting consumers, the most important characteristic may still be, as with all government entities, the appointment of competent, informed, and committed professionals interested, first and foremost, in accomplishing the goals assigned to the agency. Unfortunately, the proposed rule from the CFPB demonstrates the opposite.

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