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Analysis of New York City Debt Collection Regulation: Part 2 (Challenges for Third Party Collectors)

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As mentioned in Part 1 of our article series, the revised New York City debt collection regulation will become effective on the first of September - so operationalizing compliance with the new rules should be well underway. In this issue, we will focus on contact requirements that will present some challenging nuances for third-party debt collectors trying to comply with both federal Reg F and the revised New York City rule.

Like most rules governing debt collection, the revised New York City rule regulates how "debt collectors" (defined broadly in the rule to include creditors collecting their own debts) must interact with consumers during the collection process. The public policy aim is to ensure these communications are fair, truthful and not abusive.

Perhaps the most axiomatic principle in any debt collection regime is ensuring that a debt collector is seeking repayment from the correct consumer, which is done via the debt validation process. Debt validation is common among third-party debt collection regulatory schemes (less so in rules that govern first party collectors, but still there), and its rationale is understandable. Because third-party collectors service accounts on behalf of multiple creditors, it is incumbent on those collectors to pursue repayment from the right consumers. And as the CFPB made clear in its Reg. F rulemaking, the debt validation notice and procedure are supposed to give consumers enough information about the debt a debt collector is servicing to help those consumers to recognize the debt that a new company is trying to collect, and to afford them an opportunity to dispute the debt or request more information if they do not recognize the debt.

However, under the New York City rules there is a nuance. Like all other conduct-regulating requirements in the revised rule, the rules governing the debt validation process apply only once the debt collector engages in "debt collection procedures." The definition of "debt collection procedures" is such that it is triggered ***after*** the occurrence of one of several events:

- For accounts where the creditor is $required$ to send periodic statements, debt collection procedures do not commence until the creditor has ceased sending such statements or has threatened to take legal action against the creditor;
- For "30-day accounts" (like a charge card, which require repayment in full within a stated period to avoid imposition of a finance charge), debt collection procedures do not commence until the creditor has ceased sending bills or has threatened to take legal action against the creditor; or

- For all other types of credit, "debt collection procedures" do not commence until the creditor has accelerated the unpaid balance or demanded repayment in full.

All of these events occur relatively late in the credit servicing life cycle. Perhaps later than you think for certain types of credit.

Let's focus on the final trigger (acceleration of the obligation). In the context of vehicle finance, where periodic statements are not traditionally *required*, when acceleration may occur is further modified by New York state law. Specifically, under the state's credit sale, retail leasing and direct lending statutes consumers are provided with reinstatement in the event of payment default. In such cases, consumers can get their vehicles back and resume payments after repossession if they can pay the past due payments on their account, plus expenses. And New York state law does not compel a vehicle finance creditor to accelerate balances at any specified time in the credit life cycle. As a result, some vehicle finance creditors do not accelerate the maturity of a credit sale or loan until after the reinstatement window has closed - often after sale, when they have identified the deficiency balance. In those cases, under the revised debt collection rule, the debt validation rules are not triggered until the end of the credit life cycle. That may or may not be what the NYC Department of Consumer and Worker Protection ("DCWP") intended, given the increased pace of communication contact attempts creditors and servicers usually reserve for those pre-repossession periods when they try to caution consumers that their payment delinquencies are about to trigger serious (but avoidable) consequences.

Even if the timing of the notice seems odd, a vehicle finance creditor engaging in debt collection procedures as contemplated by the rule may operationalize the debt validation notice requirements in a relatively straight-forward fashion based on whether they hold off on acceleration until after the post-repossession sale of the vehicle, or they accelerate before repossession and then unwind the impact of acceleration when a consumer reinstates. But what of third-party debt collectors (including parties licensed as "debt collection agencies" in New York City) who may engage in default servicing before the sale of the vehicle? Such parties are "debt collectors" FDCPA and Reg F purposes and under the New York City rules. However, the starting line for when "debt collection procedures" commences establishes a compliance trigger for the debt validation notice under the New York City rules that is absent from its federal FDCPA / Reg F counterpart. What do we mean?

Under the New York City rules the debt validation notice must be sent within 5 days after the initial communication in collection with the collection of a debt *after the initiation of debt collection procedures*. Reg F establishes the same standard - within 5 days of the initial communication in connection with the collection of a debt - but without the "debt collection procedures" starting line. How a third-party debt collector may harmonize what are fundamentally similar requirements, but which operate on different timelines, is unclear. Maybe (hopefully?) The DCWP will issue a FAQ on this.

There is also a difference between the New York City rule and Reg F when it comes to contact frequency. Most (if not all) debt collection conduct-regulating regimes limit the number of times a debt collector may contact or attempt to contact a debtor. While the DCWP highlights the fact that the applicable limit actually *increased* in the final rule from 2 communications or attempted communications in 7 days to 3, this limit applies without regard to the method of contact. And like the validation requirements, the contact frequency limit only applies once the debt collector is engaging in "debt collection procedures."

This is not the rule under Reg F. Third-party collectors subject to Reg F must adhere to a "7 in 7" limit for

contact attempts (1 in 7 when there is an actual conversation), but only telephone communications count toward the Reg F limit. And unlike the New York City rule, the Reg F limitation applies from the inception of a "debt collector's" servicing relationship with a consumer - there is not another uniformly measurable fixed point in time in servicing when that rule adheres. As a practical matter, this means that a third-party debt collector operating in New York City and servicing delinquent accounts that the creditor has not yet accelerated would be governed by the "7 in 7" limit until "debt collection procedures" as that term is defined under the New York City rule commence, at which point that collector sees a drastic reduction in its contact frequency limit.

Certainly a third-party debt collector could adhere to the stricter New York City standard prior to the time when it engages in "debt collection procedures." And that may be the easiest path to operationalize, and is certainly the most risk-averse. But to stay with our vehicle finance example in the debt validation notice discussion above, that means self-imposing contact limits on the third-party debt collector that could disadvantage the consumer in a pre-repossession status when a successful contact could help avoid the repossession. As above, the difference between the federal and New York City rules present business and operational challenges that third party collectors must be mindful of when planning their compliance strategies.

We will wrap up this three-part article series with some additional thoughts on the compliance requirements of the new rule, as the September 1 st effective date will be here before you know it.

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