



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 25, 1989

Kathy Eaton Cranmer, Esq.
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Englewood, Colorado 80155

Dear Ms. Cranmer:

I am responding to your letter of March 9, 1989, to Mr. Jerison of this office. Your letter asks for an advisory opinion (sic) on behalf of clients who service mortgage loans. You ask for our determination of whether the loan servicing companies would meet the definition of a "debt collector" within the meaning of the Fair Debt Collection Practices Act (FDCPA or Act) in a series of circumstances encountered by your clients, and our opinion whether, if the companies are found to meet the definition of a debt collector, certain affirmative requirements of the FDCPA must be complied with under specified circumstances.

I will attempt to answer your inquiries, but I must preface my remarks with a few observations. First, your letter notes that your firm represents "a variety of companies that service residential mortgage loans for others." Your letter goes on to state that "these companies" include "state and national banks ... [and] savings and loan associations." I will assume that the referent for "these companies" is "others" -- that is, the originators of the loans -- and not the "companies" that are your clients.⁽¹⁾

Your inquiry begins by posing three examples of the ways in which the companies that you represent acquire loan servicing, namely:

Example A

The client closes a loan, sells the loan to a third party, and retains the contractual obligation to service the loan.

Example B

The client buys a loan or a package of loans, resells the loan or package of loans to a third party, and retains the contractual servicing obligations with respect to the loan or loans.

Example C

The client acquires a loan servicing package from a third party. This entails the assignment to and assumption by the client of the obligations to service a group or pool of mortgage loans.

Your letter then summarizes the activities that comprise the business of mortgage loan servicing and notes that these activities include "the collection of monthly payments as they become due." You note that, for reasons specified in your letter, your clients occasionally obtain a "group or pool" of mortgages that contain within the group individual loans that "are delinquent" at the time they are acquired by the servicing companies.⁽²⁾

You ask whether, under the circumstances, mortgage servicing companies would be deemed "debt collectors" within the meaning of the FDCPA. As your letter notes, Section 803(6) defines a debt collector to mean "any person 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 to another." Sub-section (F) of the statute excludes from the definition of debt collector "any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation, or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving a creditor."

Example A. Section 803 (6) (F) (ii) of the Act exempts a servicing company collecting a debt under the circumstances outlined in your first example because, as related in your letter, the debt was originated by the servicing company but is, in fact, "owed... [to] another."⁽³⁾ The Commission staff's recently-published Commentary on the FDCPA⁽⁴⁾ notes that "the exemption applies to a creditor who makes a mortgage... loan and continues to handle the account after assigning it to another."⁽⁵⁾

Example B. Section 803 (6) (F) (iii) of the Act exempts a company that acquires loan servicing under the circumstances summarized in Example B, but only, as your letter recognizes, to the extent that the loans were not actually in default at the time they were obtained. The Staff Commentary notes that "[t]he exception (iii) for debts not in default when obtained applies to parties such as mortgage service companies whose business is servicing current accounts."⁽⁶⁾

Example C. You suggest that a servicing company may not be deemed to be a "debt collector" with respect even to those loans that are delinquent (i.e., in default) when acquired because the servicing company "does not acquire the 'debt.'" We cannot agree with this assertion. Section 803 (6) defines a "debt collector" as one who "collects or attempts to collect, directly or indirectly, debts owed ... another." I believe you have confused the notion of acquiring the debt and acquiring the right to collect. Your clients have, apparently, acquired the right to collect and they obtain (I assume) a fee or commission for doing so; in this respect they are indistinguishable from any other third-party debt collector. If the servicing company did, in fact, acquire the debt (that is, the credit obligation), it would be the creditor and exempt from the FDCPA as a creditor collecting its own debt.

A mortgage servicing company that collects on a debt that was in default at the time the account was obtained is thus a "debt collector" with respect to that account, and must comply with the FDCPA -- including its affirmative requirements such as notification required by Section 809 of the Act -- with respect to that account. In connection with your penultimate inquiry, therefore, it is my opinion that a servicing company, when it is required to comply with the FDCPA with respect to those accounts that were in default when acquired, is not thereby rendered a "debt collector" for all accounts that it services. Indeed, if a mortgage servicing company were to "over comply" and adhere to e.g., the affirmative notification requirements of the FDCPA with respect to current accounts, it could be misleading and otherwise counterproductive for the consumer/debtors obligated on those accounts. In short, a mortgage servicing company is not required to comply with the Act with respect to loans that were not in default when acquired for servicing.

Your final inquiry asks what constitutes the "initial communication with a consumer" under various circumstances for purposes of complying with the validation requirements of Section 809 of the Act (15 U.S.C. 1692g). A large portion of this inquiry is answered by the material above; Section 809 will not apply to accounts that become delinquent after they are obtained by the servicing company. With respect to those accounts that are in default when obtained, Section 809 (a) requires that the company, within five days of the initial communication, provide the consumer a written notice containing specified material, if not provided in the initial communication.

"Communication" is defined by Section 803 (2) of the Act to mean "the conveying of information regarding a debt...to any person through any medium." 15 U.S.C. 1692a (2). Thus, any first contact -- oral or written -- that mentions the debt must either contain disclosure of the required material or be followed within five days by written notification. Because the requirement applies only to those accounts that are in default when obtained, and because your letter suggests that the first contact with a consumer on any account consists of written notice that the company has obtained the loan servicing, it would appear that the Section 809 notice should be included in that communication or should be sent in a separate notification within five days of the initial message.⁽⁷⁾

I hope that the above discussion will prove helpful. Please understand that it represents the current enforcement views of the staff, but is not binding upon the Commission.

Very truly yours,

Christopher W. Keller
Attorney
Division of Credit Practices

1. The Federal Trade Commission does not have jurisdiction over banks and savings and loan associations. 15 U.S.C. 45 (a) (2). See also Section 814 of the FDCPA , 15 U.S.C. 1692f.

2. A threshold questions, therefore, is whether such debts are "in default" within the meaning of Section 803 (6) (F) (iii). Whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state law. For purpose of this letter, I will assume that the debts you characterize as "delinquent" are, in fact, in default within the meaning of Section 803 (6) (F) (iii).

3. Your letter raises no inference that the practice described in Example A is anything other than a routine business procedure. I believe I would be remiss in failing to note, however, that if there were evidence that such transfers of obligations were entered into with the intent of providing FDCPA insulation for the collecting entity, the practice-might raise serious questions under Section 5 of the Federal Trade Commission Act.

4. 53 Federal Register 50097 (December 13, 1988).

5. *Id.* at 50103.

6. *Ibid* (emphasis added).

7. As noted in the Staff Commentary, if the "...first communication with the consumer is oral, [the collector] may make the [required Section 809] disclosures orally at that time[,] in which case he need not send a written notice." 53 F.R. at 50108. As I understand your letter, however, the first communication with a consumer would be by telephone only in those accounts that became delinquent after acquisition by the servicing company. As noted above, the FDCPA does not apply to those accounts.

*De Dios v. International Realty & Investments,
No. 08-56288 archived on July 19, 2011*