Caveat Creditor: Why Creditors Must Be Wary Of California's Rosenthal Act And The FDCPA

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Should creditors care about the FDCPA? For the most part, original creditors – including banks, credit card issuers, finance companies, telecommunications companies, payday lenders, and other entities that extend credit directly to consumers – do not operate as "debt collectors" as defined by the FDCPA. For this reason, when creditors are trying to collect money from their own customers, they may not pay much attention to the requirements of the FDCPA, or the myriad of cases that have interpreted the statute. But ignoring the FDCPA is not a good idea for creditors who want to collect money from customers located in California.

Any creditor who attempts to collect a consumer debt from a California consumer likely qualifies as a "debt collector" under California's debt collection statute – the Rosenthal Act. *See* Cal. Civ. Code § 1788.2(c) ("debt collector" includes anyone "who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection."). The Rosenthal Act not only includes its own set of requirements regulating debt collection, but also incorporates by reference most of the requirements of the FDCPA. *See* Cal. Civ. Code §1788.17. Thus, a creditor who fails to comply with the FDCPA while collecting from a California resident may be violating California law.

There are two significant exceptions to section 1788.17 of the Rosenthal Act: creditors do not need to provide consumers with the "mini-Miranda" notice required by section 1692e(11) of the FDCPA, nor must creditors send consumers the validation notice mandated by section 1692g of the FDCPA. *See* Cal. Civ. Code § 1788.17. But the remaining substantive provisions of the FDCPA, as well as the remedies provided by section 1692k(a)(3) of the Act, apply to creditors who collect in California. *Id.*

The FDCPA can be an awkward fit when it is applied to creditors collecting from their own customers. Despite this, courts will often rely on the reasoning employed by FDCPA decisions when evaluating Rosenthal Act claims filed against creditors. *See, e.g., Reyes v. Wells Fargo Bank, N.A.*, 2011 WL 30759

(N.D. Cal. Jan. 3, 2011) (using "least sophisticated debtor" standard to evaluate Rosenthal Act claims against creditor); *Thompson v. Chase Bank, N.A.*, 2010 WL 1329061, at *3 (S.D. Cal. March 30, 2010) (refusing to dismiss Rosenthal Act claims alleging that collection calls made on Easter Sunday, Memorial Day and Mothers' Day were at "inconvenient" or "unusual" times).

Creditors, like traditional debt collectors, must be aware of the volume and pattern of their collection phone calls. Creditors obviously have a legitimate need to contact their delinquent customers by phone to make payment arrangements. But the Rosenthal Act, like the FDCPA, prohibits creditors from placing telephone calls repeatedly or continuously with the intent to annoy the person called. *See* Cal. Civ. Code §§ 1788.11(d), 1788.11(e). Is there a limit on how many call attempts a creditor can make?

To date, there are no clear answers, because the reported decisions have involved calls placed by traditional debt collectors, not by creditors. But we can expect that the courts will be guided by the reasoning used in FDCPA cases, considering not only the volume of the calls, but also the calling pattern and the individual facts of the case. *See e.g., Arteaga v. Asset Acceptance*, 733 F. Supp. 2d 1218, 1229 (E.D. Cal. 2010) (summary judgment for debt collector; evidence of "daily" calls not sufficient to support claim for intent to harass under FDCPA or section 1788.11 of the Rosenthal Act); *Rucker v. Nationwide Credit, Inc.*, 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (refusing to dismiss claims under FDCPA or sections 1788.11(d), (e) of Rosenthal Act where collector allegedly placed 80 calls to consumer in one year).

Will courts utilize the *Foti* line of cases when evaluating the content of voice mail messages left by creditors? The reasoning of the *Foti* decisions likely will not make sense when applied to a creditor's voice mails messages, and to date, there are no published decisions on the issue. But creditors should consider that California courts have held that a debt collector's failure to properly identify itself in a voice mail message can violate both the FDCPA and the Rosenthal Act. *See, e.g., Hosseinzadeh v. M.R.S. Associates, Inc.*, 387 F. Supp. 2d 1104,1117-18 (N.D. Cal. 2005) (collector's failure to properly identify itself in voice mail messages violated FDCPA and Rosenthal Act); *Joseph v. J.J. Mac Intyre, L.L.C.*, 238 F. Supp. 2d. 1158, 1168 (N.D. Cal. 2002) (same, denying motion to dismiss).

Most creditors have procedures in place for dealing with consumers who are represented by attorneys. When a consumer notifies the creditor in writing that she has retained an attorney, the Rosenthal Act prohibits the creditor from initiating communications directly with the consumer – "other than statements of account" – in an attempt to collect the debt. *See* Cal. Civ. Code § 1788.14(c). But what if the creditor mails a monthly statement directly to a represented consumer, and the statement includes language noting that the account is delinquent? Unfortunately, the Rosenthal Act does not define the term "statements of account" and the courts in California are split on this issue. *See, e.g., Marcotte v. GE Capital Services*, 709 F. Supp. 2d 994 (S.D. Cal. 2010) (granting judgment on the pleadings; monthly billing statements sent directly to represented consumer did not violate section 1788.17 of Rosenthal Act); *Moya v. Chase Cardmember Service*, 661 F. Supp. 2d 1129 (N.D. Cal. 2009) (denying motion to dismiss claim that monthly statements sent to represented consumer violated section 1788.14 of Rosenthal Act).

Should creditors be concerned about facing Rosenthal Act class actions? Section 1788.30 of the Rosenthal Act does not allow for class actions, and in fact, it specifically limits consumers to pursuing claims "only in an individual action." *See* Cal. Civ. Code §§ 1788.30(a), 1788.30(b). Under section 1788.17 of the Rosenthal Act, however, creditors are "subject to the remedies" of section 1692k of the FDCPA. A number of courts have held that consumers may pursue class actions under the Rosenthal Act. *See, e.g. Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541 (N.D. Cal. 2005) (granting motion to certify Rosenthal Act class action); *Gonzalez v. Arrow Financial Services LLC*, 489 F. Supp. 2d 1140 (S.D. Cal. 2007) (denying motion to decertify Rosenthal Act class action).

The Rosenthal Act allows consumers to recover any actual damages they sustain by reason of the violation. *See* Cal. Civ. Code § 1788.30(a). Unlike the FDCPA, however, the Rosenthal Act is not a strict liability statute. Statutory penalties ranging from $100 to $1000 may be recovered, but only if the consumer demonstrates the defendant "willfully and knowingly" violated the Rosenthal Act. *See* Cal. Civ Code § 1788.30(b).

If a willful and knowing violation is shown, are the statutory damages limited to $1000 per action, as in FDCPA cases, or may the consumer recover $1000 per violation? The better-reasoned decisions hold that the consumer is limited to $1000 per action. *See, e.g.*, *Scott v. Federal Bond and Collection Service, Inc.,* 2011 WL 176846, at *3 (N.D. Cal. Jan 19, 2011) (Rosenthal Act

statutory damages limited to $1000 per action); *Marseglia v. JP Morgan Chase Bank*, 2010 WL 4595549 (S.D. Cal. Nov. 12, 2010) (same). One California court, however, refused to grant a creditor's motion to strike portions of a Rosenthal Act complaint that sought $1000 per violation. *See Hamberg v. JP Morgan Chase Bank,* 2010 WL 2523947 (S.D. Cal. June 22, 2010).

What about defenses? Like the FDCPA, the Rosenthal Act includes a "bona fide error" defense, which allows a creditor to prove that any violation was not intentional, and occurred notwithstanding maintenance of procedures reasonably adapted to avoid the violation. *See* Cal. Civ. Code § 1788.30(e). The Rosenthal Act also has a "right to cure" defense, which permits a creditor, within 15 days of discovering any violation which is "able to be cured" or after written notice of any such violation, to notify the debtor of the violation and to make any adjustments or corrections necessary to cure the violation. *See* Cal. Civil Code § 1788.30(d).

The Rosenthal Act has been around for decades, and the statute has always applied to creditors. During the past few years, however, the Rosenthal Act has become a favorite of consumer attorneys, and the trend appears likely to continue. Creditors with customers in California must be aware that, in light of section 1788.17 of the Rosenthal Act, any attempts to collect in California must comply with the Rosenthal Act and the FDCPA.