



UNFAIR COLLECTION ON CREDIT CARD DEBT

BY
MS. PIMCHANOK TANWISUT

AN INDEPENDENT STUDY PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENT
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

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Author : Ms. Pimchanok Tanwisut
Major : Master of Laws (Business Law)
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Faculty of Law, Assumption University approves this Independent Study Paper as the partial fulfillment of the requirement for the Degree of Master of Laws.

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ABSTRACT

The objective of this study is to address prominent unfair activities of credit card debt collection in Thailand and how Thai regulatory shortcomings – especially when compared to those of the United States – contribute to such practices. Though credit card creditors can exercise their right to collect overdue payments themselves, they commonly avoid this complex process and instead choose to pursue payment of debt, either by themselves, through an affiliated company or by engaging the services of a third party collector – which is becoming increasingly popular. In pursuit of maximizing their economic interests, debt collectors have pushed ethical boundaries with abusive techniques to pressure debtor payment, ranging from undue harassment to even the threatening of a debtor's life. The Foundation for Consumers estimates more than 2,000 debt collection cases in violation consumer rights. Should this invasion of personal privacy continue, the victimized Thai family will be increasingly exposed to the loss of jobs, personal bankruptcies, and marital instability – ultimately contributing to social instability.

It is found that at present, Thailand does not have specific law regulating the collection of credit card debt. The Civil and Commercial Code, Penal Code and Consumer Protection laws all have their inadequacies in addressing the aforementioned debt collection problem. Moreover, two effective notifications issued by the Bank of Thailand regarding the undertakings of credit card businesses enact merely one part regarding demand for debt repayment and the process of debt collection. Such rules provided therein are general, with mention only of select written aspects of debt collection and not of other activities – such as verbal communication, unreasonable conduct along privacy boundaries and prohibited practices. Moreover, both notifications are applicable only to banks and non-banks,

therefore excluding outsourced debt collectors. In light of this, The Bank of Thailand issued a Guideline for the Collection of Debt. However, this guideline is ineffective and inadequate as it has no legal sanction and still does not apply to third party debt collectors. Moreover, it still fails to address many key issues consumers face with abusive practices. In contrast, the United States enacted the Fair Debt Collection Practices Act in 1977 providing a comprehensive delineation of rules, regulations and procedures to ensure the protection of debtors from abusive, deceptive and unfair debt collection practices.

With the advantages of such regulations surmounting, it is recommended that Thailand first enact specific law – in the form of a Parliamentary Act – specifically regarding the rules, procedures and conditions of credit card collection. This Act should be applicable to bank and non-bank creditors and outsource debt collectors. Detailed explanations of measures and acceptable practices have been proposed including:

- 1) The written and verbal communication limitations.
- 2) The rights of debtors to be upheld
- 3) The unfair and prohibited collection activities
- 4) The punishment of fines and imprisonment terms.

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Chapter 1

Introduction

1.1 Background and General Statement of the Problems

Credit cards are cards issued by financial institutions or credit card companies and allows the holder to purchase goods or services on credit, i.e., without cash. It is generally known that credit cards are playing an ever important role in our modern life, allowing for convenient access to goods and services.

For consumers, becoming a credit cardholder is as easy as ever. Numerous banking and non-banking institutions – both local and foreign – now aggressively market their credit cards, competing for their share in a large and profitable pool of Thai consumers. As such, credit cards are becoming increasingly prevalent as the Thai economy continues to grow and along with it, the amount of outstanding debt.

Though credit cards are a key enabler to modern economic growth, it has not emerged in Thai society trouble free. Even though most credit cardholders acquire credit cards with the sincere intent of repaying their debts, defaults – where debtors are unable to meet their debt obligations – do occur, nearly always due to unforeseen events such as unemployment, overextension, serious health matters or marital difficulties. Unfortunately, defaults are also increasing in rate.

Once a debtor is in default, a creditor has one of two options. The creditor can either choose to pursue the payment of debt from the debtor or file a lawsuit against the debtor. As filing lawsuits remains a relatively costly and time consuming process, creditors are progressively opting to pursue overdue payments through a credit card debt collection process. This process may be conducted within the creditors operations or through an affiliated company. However, outsourcing credit card debt collection to more effective and efficient third-party collection agencies is becoming increasingly popular. In either case, the ultimate objective of the creditor is to recover as much of the payments as possible – if not all – using the least costly and quickest means available. Such means often resolve to methods that are unjust and unethical.

Many debt collectors – creditors and third-party collectors alike – realize that the most profitable debt collection operations are those that are able to collect the most monies in the shortest amount of time. Unfortunately, this results in an increasingly widespread virus of debt collectors who violate debtors' civil rights by adopting unfair debt collection practices. Some of the most common methods involve:

1. Debt collectors causing substantial inconvenience to debtors without reasonable ground and with the intent to annoy debtors into payment.
2. Debt collectors threatening the physical safety of debtors or the damage of debtors' reputation and/or property.
3. Debt collectors engaging in illegal methods in obtaining personal information of debtors.
4. Debt collectors violating debtors' right to privacy by disclosing sensitive debtor information to debtors' colleagues, employers and/or family.
5. Fraudulent debt collectors using misleading representations to persuade unknowing debtors into payment.
6. Debt collectors wrongfully seizing the property of debtors to force performance of debtors' obligations.

These methods clearly infringe upon the individual rights of the consumer debtor, are in violation of Section 35 of Thai Constitution B.E.2550 and should be prevented. Alas, Thailand has many laws that protect the rights of individual consumers, but none specifically against the malicious practices of the aforementioned debt collectors.

By virtue of an obligation the creditor is entitled to claim performance from the debtor.¹ Therefore, the right to claim for payment of a debt by a creditor is recognized. However, as this independent research paper will clearly delineate, current Thai law is inadequate and ineffective against the growing undue methods of debt collectors – whether it be Thailand's Civil and Commercial Code, Penal Code, Consumer Protection Acts or BOT notifications and debt collection guidelines. This is in stark contrast to the Fair Debt Collection Practices Act 1977 of the United

¹ Section 194 Thai Civil and Commercial Code.

States of America. Such inadequacies have allowed for this problem not only to exist, but also to become increasingly prevalent. This prevalence will continue to contribute to the escalation of personal bankruptcies, marital instability, loss of jobs and invasion of individual privacy – all contributing factors to an instable society.

1.2 Hypothesis of the Study

Today, our society continues to face the growing problem on unfair credit card debt collection methods which has allowed creditors profitable means of resolving default accounts other than filing lawsuits. This clearly violates the individual rights of the debtor and is in direct result of the deficiencies of – or lack thereof- of current Thai law governing such practices. Despite efforts of the Bank of Thailand to mitigate this issue with the issuance of two notifications and debt collection guidelines, the lack of legal sanction has refrained the intended purpose from realizing an acceptable level of success. Specific law regulating credit card debt collection is required as a solution, adopting learnings from what laws are in place today and what the United States has enacted via the FDCPA. This law should include the appropriate scope of application, regulatory contents, acceptable and prohibited practices and penalties in circumstances of violation.

1.3 Objectives of the Study

1. To study characteristics of credit card debt.
2. To study the problems of credit card debt collection.
3. To illustrate the problems of unfair credit card debt collection in Thailand.
4. To study the principles of the debt collection and its legal implications resulting from the application of current Thai laws.
5. To study the rationale and principles of the debt collection under Fair Debt Collection Practices Act 1977 of The United States of America.
6. To determine legal measures regarding debt collection to resolve the unfair credit card debt collection problem.

1.4 Study Methodology

The methodology of this independent research is a documentary research. It includes the extensive study of credit card service contracts, Fair Debt Collection Practices Act 1977 of the United States of America, Thai laws related to debt collection, Guidelines of The Bank of Thailand concerning to collection of debt, and textbooks, articles, theses and court's decisions directly related to the above documents.

1.5 Scope of the Study

The scope of this independent Study is limited to study of the problems associated with debt collection practices of the collectors that arising out of or in connection with credit card services. This independent research studies the principles of debt collection under the related Thai laws, aspects of the debt collection methods used by collectors, and the principles of debt collection under American law through the Fair Debt Collection Practices Act 1977.

1.6 Expectations of the Study

1. To understand the characteristics of credit card debt..
2. To arrive at a fair analysis of the problems of unfair collection of debt.
3. To understand the principles of the debt collection under Thai laws.
4. To understand the rationale and principles of debt collection under Fair Debt Collection Practices Act 1977 of the United States of America.
5. To identify the legal solution in order to resolve the problem of unfair collection of debt.
6. To ultimately protect the privacy rights of the debtor.

Chapter 2

Principles of debt collection under Thai laws

After an overview the credit card industry, this chapter examines the debt obligations of the debtor and, when in default, the rights of the creditor. Then both lawful and unfair methods of credit card debt collection are illustrated, with explicit examples of the latter. Finally, the role of the Bank of Thailand is reviewed, along with regulations, notifications and guidelines it has passed regarding the industry.

2.1 Credit Cards

2.1.1 History of credit cards

Credit cards were discovered in the United States. In 1914, the General Petroleum Corporation of California, now known as Mobil Oil Corporation, issued credit cards to its selected customers for fuel payment. At the time, a credit card was simply a piece of rectangular sheet metal or a metal coin² that was embossed with the customer's name, city and state (no address). However, its use was limited to the business of the credit card issuer.

The concept of customers paying different merchants using a single card was invented in 1950 by Frank McNamara, who was having dinner at a restaurant when he realized he had forgotten his wallet. Needless to say, he did not have money to pay for his dinner bill, so he had to wait for his wife to bring him money. For such a situation, Frank thought there should be a special card that could be used instead of cash. After consultations between Frank McNamara and Ralph Schneider, "The Diners Club" was established. The Diners Club produced the first charge card³, entitling the cardholder to buy goods or services without cash payment.

In 1958, American Express Company, which created a worldwide credit card network, offered credit cards with the initial purpose of creating convenient

² Anan Jantaraaupakorn, "Legal Problem on Using Credit Cards in the United States of America," Thammasat Law Journal (986): 2-4.

³ Charge Card required the entire bill to be paid with each statement.

traveling for travelers. Travelers did not carry much money in cash. Credit cards could generate cash through banks. However, no one had been able to create a functioning, revolving credit financial instrument issued by a third-party bank that was generally accepted by a large number of merchants until Bank of America launched the BankAmericard. BankAmericard (now known as Visa Card) became the first successful and recognizable modern credit card.

In 1969, Master Charge (now known as Master Card) was initiated when Master Charge, issued by a group of Californian banks, and Everything Card, issued by Citibank, had merged into Master Charge.

2.1.2 Definition of credit card

Credit cards are cards issued by financial institutions to cardholders or consumers for the payment of goods, services, or any other fees, as an alternative to cash payment or cash withdrawal. Payment of goods with a credit card does not include payment for goods, services or any other fees that have been made in advance.⁴

There are several types of cards such as credit cards, charge cards, and debit cards, all of which are used instead of cash but employ different mechanics to the method of payment.

There are many differences between a debit card and a credit card. Firstly, when a cardholder pays with a debit card, the money is directly deducted from the cardholder's deposit account, whereas a credit card allows the cardholder to spend money on credit to the issuing bank. In other words, a debit card uses money the cardholder has readily available, but a credit card uses money the cardholder does not have immediately on hand. Secondly, there is no line of credit on a debit card, whereas a credit card poses limits of a pre-defined amount for items and services. This is called a credit limit. The credit limit is determined by the cardholder's credit history, income, debts, and ability to pay. Thirdly, payment for a debit card does not include interest, although there may be transaction fees for using debit cards. On the other hand, credit card users need to repay the charged amount, plus interest if

⁴ Bank of Thailand Notification no. 16/2552.

payment is not made in the full amount each month and within the given grace period.

A charge card is called a travel and entertainment card, such as American Express and Diners Club. A charge card is similar to a credit card transaction, yet not all the same. A charge card has no credit limit. Therefore, the cardholder can use as much as he/she wants, but is required to pay off the entire balance on the card when due each month. Whereas, a credit card permits the cardholder to pay off a portion of the balance provided the minimum amount is paid each time.

2.1.3 Characteristics of credit card debt

A credit card agreement is one type of contract made between two parties. One party is the credit card service provider (must be a juristic person) and other party is the service receiver (must be a natural person). The purpose of the credit card service provider is to grant credit by issuing credit cards to consumers, who then become cardholders.⁵ Cardholders are entitled to use their credit card to make purchases of goods and services wherever they see their card logo instead of making cash payments. Furthermore, credit cards can also be used for cash withdrawals at automated teller machines (ATMs) and financial institutions displaying the appropriate logo. For such services, service fees, interest, annual fees, penalties shall be paid to the service provider in reciprocation.

Credit cards offer revolving credit. The consumers can repay outstanding balances and incur new borrowings every month without the need to arrange a fresh agreement with the issuer, provided they stay within the specified credit limit and meet regular monthly payments.

A provider will issue a card only to its members. Therefore, the consumer must apply to be a member by submitting an application form and required documents to the provider. To become a member, the consumer must meet the issuer's qualifying criteria such as age and average monthly income.

⁵ Pasakorn Yansutree, Credit Card Clinic and Acknowledgement of credit card debt (Bangkok: Inter Book Publishing Co., 2008), p. 7.

The applicant is issued a card after receiving approval from the provider. The card is then sent to the cardholder by mail. Each card has a credit limit. A credit limit (sometimes called a credit line) is the maximum amount of credit that a provider will allow a cardholder to borrow on a single card. A credit limit is influenced by several factors, such as the individual's ability to make repayment, payment record, employment, credit history and credit rating. It is designed to help consumers meet likely needs without borrowing more than they can afford. Limits can be increased or decreased based on changes of the cardholder's financial circumstance, or by automatic amendment applied by the issuer. If consumers spend over the given limit, they would be charged with an over-limit fee.

2.1.4 Transaction

1. Making purchases of goods and services. There are three parties involved in a credit card transaction, consisting of the issuer, the cardholder and the merchant, who agrees to accept the card and is not the issuer. The cardholder is entitled to purchase goods and services from a merchant. When the purchase is made, the cardholder pays by using a credit card. The card is swiped through an electronic terminal or an embossing machine which produces a sales draft specifying transaction details including the purchased amount. The card is immediately verified through electronic verification systems for validity and sufficient credit to cover the purchase. The cardholder indicates his/her consent to make the purchase by signing his/her signature on the sales draft. The merchant is guaranteed to receive payment within a few days by the credit card issuer. After purchase, the merchant submits the sales draft to the acquiring bank for deposit. The acquiring bank performs an interchange⁶ for each sales draft with the appropriate issuing bank. At this stage, the acquiring bank must also pay an interchange fee if the card uses card networks such as Visa and MasterCard. Thus, the issuing bank transfers money in the amount of the

⁶ Interchange is transaction that takes place between the acquiring bank and the credit card issuing bank and for this transaction the acquiring bank pays a fee to the issuing bank in order to process a credit card transaction involving a cardholder's account. This fee averages approximately 2% of transaction value.

sales draft minus an interchange fee to the acquiring bank. The acquiring bank then deposits the amount of all sales drafts submitted by the merchant, less a discount fee, into the merchant's bank account. Typically, a discount fee is higher than an interchange fee.

2. Making cash withdrawals. This transaction involves two parties, the issuer and the cardholder. Every card issuer allows a cash withdrawal facility on its credit cards. Cardholders can use their credit cards to obtain cash advances from the card issuer's bank account. This is generally a fixed percentage of the total credit limit. A cardholder can withdraw no more than the fixed amount. Cash advances are more expensive than standard credit card charges and offer more onerous terms for consumers including;

1) Transaction fee. The cardholder must pay a handling fee for each cash advance transaction. In Thailand, a handling fee is limited by the Bank of Thailand. The maximum rate allowed for a handling fee is 3 percent of the cash withdrawal amount.⁷ Moreover, the issuers always determine the minimum and maximum amount that the cardholder can withdraw for each cash withdrawal.

2) No grace period. Grace period is an extended time period during which the cardholder can pay his/her credit card bill without paying a finance charge. Most service providers charge interest from the day the cash advance is made, even if cardholder pays it back in full as soon as the bill is received.

2.1.5 Types of credit cards

Typically, a card issuer can be either a commercial bank or a non-bank. Non-bank credit card companies are not commercial banks but are regarded as undertaking a business similar to commercial banking business.⁸

1. Commercial banks

The following commercial banks are operating credit card businesses.⁹

⁷ Bank of Thailand Notification no.184/2549.

⁸ The decision of Supreme Court no. 5566/2540.

- 1) Bangkok Bank Public Company Limited
- 2) Kasikorn Bank Public Company Limited
- 3) TMB Bank Public Company Limited
- 4) Siam Commercial Bank Public Company Limited
- 5) Thanachart Bank Public Company Limited
- 6) Siam City Bank Public Company Limited
- 7) United Overseas Bank (Thai) Public Company Limited
- 8) Standard Chartered Bank (Thai) Public Company Limited
- 9) Citibank, N.A
- 10) Hong Kong and Shanghai Banking Corporation Limited

2. Non-bank credit card companies

In order to operate a credit card business, the business operator must be a juristic person, if not a bank. It can be a company limited or a public company limited. Moreover, such companies are required to request for permission from the Ministry of Finance by submitting a request through The Bank of Thailand. A written approval from the Ministry of Finance is required.¹⁰ Currently, there are twelve non-bank credit card companies in Thailand as follows;¹¹

- 1) Capital OK Company Limited
- 2) GE Capital (Thailand) Company Limited
- 3) General Card Services Company Limited
- 4) Cetelem (Thailand) Company Limited
- 5) City Consumer Products (Thailand) Company Limited
- 6) Tesco Card Services Company Limited
- 7) Krungthai Card Public Company Limited

⁹ Bank of Thailand, The name of Credit Card Companies in Thailand, At <http://www2.bot.or.th/feerate/Result.aspx?no=530>. (last visited 29 July 2009).

¹⁰ Ministry of Finance Notification, "Businesses Requiring Operating Permits according to Executive National Announcement no. 58."

¹¹ Bank of Thailand, The name of Financial Institutions in Thailand, At http://www.bot.or.th/Thai/FinancialInstitutions/WebsiteFI/_layouts/application/bot%20financial%20institutions/financialinstitutions.aspx. (last visited 29 July 2009).

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- 8) Krungsriyudhya Card Company Limited
- 9) American Express (Thai) Company Limited
- 10) Aeon Thana Sinsap (Thailand) Public Company Limited
- 11) Easy Buy Public Company Limited
- 12) Ayudhya Card Services Company Limited

2.2 Default of Debtor

It is essential to understand the maturity of an obligation as well as the default of debtor.

2.2.1 The maturity of an obligation

An obligation can be categorized into two categories. The first is an obligation without a specified time for performance, and the second is an obligation with a specified time for performance. The maturity of an obligation is the due date for the debtor to perform the obligation. It depends on several circumstances as follows:

1. An obligation without specified time for performance

When an obligation is established without a fixed, specified time or cannot be inferred from the circumstances for a time of performance, the creditor may demand for performance forthwith, and the debtor may perform his obligation forthwith also.¹² Therefore, an obligation without a specified time for performance is mature at the time the contract is concluded.

2. An obligation with specified time for performance as per calendar

An obligation with a specified time for performance as per calendar is not only an obligation that has been specified for the performance per the calendar but also an obligation that requires a notice and the notice period may be calculated with certainty by the calendar¹³ such as an obligation with a specified a

¹² Section 203 Thai Civil and Commercial Code.

¹³ Section 204 Thai Civil and Commercial Code.

time for performance as per month or per year. An obligation with a specified time for performance as per calendar is mature at a certain time that is fixed or calculated as per calendar. There are three categories of the specified maturity date as per calendar as follows;

1) An obligation with specified maturity date as a specific date per the calendar, such as the maturity date has been fixed on May 1, 2009 by the calendar.

2) An obligation with required noticed and a notice period that may be calculated by the calendar, such as a loan agreement that has not included the maturity date and at a later time the creditor gives a notice that a loan must be repaid within 7 days. The maturity date is after the 7 days of the notice.

3) An obligation with specified period assumed by the calendar such as a loan agreement that is concluded on May 1, 2009 and the agreement stipulates that the loan period is one year. The maturity date is on May 1, 2010.

2.2.2 Default

Default is when a debtor performs his/her obligation later than the maturity date, or fails to perform his/her obligation within the maturity date.

Default takes place within two cases as follows;

1. An obligation without the specified time for performance

When this obligation is already mature, the creditor is entitled to demand the debtor for performance. Even though the debtor has not yet performed his/her obligation, the debtor is not yet regarded as in default. The debtor is in default if the debtor does not perform his obligation after the creditor notifies a warning.¹⁴

Notification of a warning shall be done only when the obligation has matured. There is a possibility that at the time the warning is sent, the obligation, has yet to mature, but when the warning reaches the debtor, the obligation has matured. In this case, such warning is regarded as a declaration of intention. It takes into effect once it reaches the receiver of intention.¹⁵ Therefore, such warning is lawful.

¹⁴ Section 204 Thai Civil and Commercial Code.

¹⁵ Section 169 Thai Civil and Commercial Code.

Section 204 does not provide a form for notifying the warning by the creditor. Thus, the creditor may give a warning verbally, through a written notice or through any method indicating the creditor's intention. In addition, there is a court's decision holding that filing a lawsuit is regarded as a warning given by the creditor.¹⁶

2. An obligation with the specified maturity date as per calendar

An obligation with the specified maturity date as per calendar is due on the date and fixed period. If the debtor does not perform his/her obligation on that date or fixed period, he/she is automatically in default. A warning given by the creditor is not required as the debtor knows the exact time for performance.

2.2.3 Default in credit card debt

A normal credit card billing cycle has 30 days. The issuer will collect all transactions that have been made via credit card by the cardholder. On the statement date, often called the closing date, all transactions made within the billing period are closed. The total amount owed by the cardholder is shown in the billing statement. The statement is created and mailed to the cardholder within the same day. The statement usually shows several elements such as a snapshot of the credit card number, the statement date, the date in which payment is due, the total amount due, the minimum amount due, and detailed information about the purchases made. The statement also contains interest and other fees (if any). The statement date and the payment due date are specified dates per calendar depending on agreement between the issuer and cardholder. For instance, assume that the closing date is on the 5th of each month and payment due date is on the 20th of that particular month.

There are two methods for repayment of credit card debt. First, full payment could be made within the due date. There is no interest charge. Some companies offer a maximum period of repayment without interest charge of up to 55 days¹⁷ from the closing date. Second, a minimum payment could be made within the due date. The minimum amount is usually ten percent of the total amount due.

¹⁶ The decision of Supreme Court no. 2687-2688/2532.

¹⁷ Credit Card Application Form of the Standard Chartered Bank and the United Overseas Bank.

Paying the minimum amount is usually reflective of a small portion of the balance. For many consumers, it is simply too convenient or appealing to simply pay the minimum amount each month. Most credit card accounts have interest charged on balances that are not paid in full before the due date. Interest is charged from the posting date (the date that the issuers pay for cardholder's purchases to the merchants). When interest is charged, it becomes part of the balance due. This means that in the next billing cycle, interest from the previous cycle becomes a portion of the total balance incurred. Compound interest makes the balance on a credit card grow rapidly. Today, the interest rate charged cannot exceed 20 percent per year.

A default on a credit card debt occurs when cardholder fails to make a payment on his credit card account. This occurs whenever a debtor refuses to pay or cannot pay according to the terms and agreements of the contract or the cardholder makes the payment after the due date of the statement. When payment is not received within the due date, the account is considered late and eventually goes into default.

Once, the cardholder does not pay the outstanding balance or the minimum amount due within the due date. The cardholder has defaulted. The unpaid balance will be treated as a delinquent amount. The consequences of defaulting on the cardholder's credit cards will be stated in the terms and agreements. The issuer (creditor) can increase the amount for payment in finance charges such as late fees and collection fees. Late fees may be charged even if the cardholders are in default by one day. The amount of late fees vary by issuers. Moreover, a collection fee may be also charged at a high amount. Today, the minimum rate of a collection fee is 250 Baht and there is no limitation of maximum rate of collection fee. If the cardholder has defaulted for a time length more than 2 times the billing period, the amount of the collection fee will increase. The collection fee will be charged per every billing period. In some credit card companies, they will charge a collection fee every time they call for the debt. This means that the cardholders may realize the collection fees of more than one amount per each billing period. Generally, late fees and collection fees are charged automatically without collector's warning.

There are different levels of delinquency. An account can be 30, 60, 90 or even 120 days past due. Once, the cardholder's account is in serious default (90

days late or more), banks and credit card companies can send the cardholder's account to a collection agency (outsource) and report the account to the credit bureau.

2.3 Rights of Creditor

According to the Civil and Commercial Code, the rights of the creditor can be divided into two types as follows;

2.3.1 Right to Claim

Section 194 of the Civil and Commercial Code provides that "By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist of a forbearance".¹⁸ The debt collection right is recognized by the Civil and Commercial Code, but there is no legal definition of the debt collection right in the Civil and Commercial Code and other laws. However, some lawyers define debt collection as "the activity of pursuing overdue payments on outstanding loans from individual or business debtors which includes collection calls and notices to inform debtors of their obligations and motivate repayment, and the facilitation of the receipt of such payments, starting from the overdue date and lasting throughout litigation and ultimately until legal verdict enforcement or an agreed-upon settlement".¹⁹

In the researcher's opinion, even though the debt collection right does not have an explicit definition, it can be inferred that the debt collection right is one type of claim by the creditor to use any measure in order to receive performance from his debtor. Section 194 is provided in line with the general principle of law that when there is an obligation there must be a performance. An obligation creates the right and the duty between parties. Once an obligation is mature whether it is mature by a specified time or a creditor's warning, a creditor is entitled to receive a

¹⁸ Kamol Sandhikshetrin, The Civil and Commercial Code And Glossary, 7th ed. (Bangkok: Nitibannagarn Publishing Co., 2000), p. 54.

¹⁹ Praphan Supsang, Art for debt Collection (Bangkok: Nititham Publishing Co., 1993), p. 65.

performance. A debtor has a duty to perform his obligation in accordance with the true intent and purpose of the same. Therefore, the performance of credit card debt is a delivery the money owed back to a creditor.

Generally, before litigation, the creditor may exercise his claims through several procedures such as the collection of debt, negotiation, rescission of contract, receiving performance or sell-off. There is a significant consideration that such procedures are also governed by the rules, conditions and procedures in accordance with the written law, but there is no law governing rules, conditions, and procedures related to the collection of debt. On other words, the law only entitles debt collection right to the creditor but does not provide methods related to how to exercise this right to collect debt.

In practice, if the debt is a money debt arising from a transactional contract, most creditors prefer exercising this right through debt collection more than filing a law suit. There are several factors that make debt collection popular among most creditors. Firstly, the law does not provide legal procedures for debt collection; therefore, there are no complicated procedures. Secondly, there is no specific law providing the rules and the practices concerning debt collection. Thirdly, normally, consumer debts are non-collateral debt. Fourthly, most creditors know that filing a case to the court against the debtor may give rise to an argument related to calculating interest rates or penalty rates or other fees. If such charged amount is disproportionately high it may be reduced to a reasonable amount by the court. Fifthly, filing a case to the court will take a long time until all proceedings are complete. Therefore, deceptive or unfair practices for collection of debt are used against the debtors as long as there chance the debtor can pay the debt. Using debt collection, the creditor has a higher chance of receiving most of the owed money, if not the full amount.

If a creditor is concerned that it will not obtain the debt, the creditor can file a case to the court for performance enforcement by the debtor. Although the creditor's claim leads to the enforcement for performance, this creditor's claim is a personal right, not a real right. Therefore, the law does not give the authority to creditors to freely enforce performance by themselves. The creditors must claim performances through the court's proceedings.

Even if judgment has been decided, the right to collect the debt of the judgment creditor remains. From then on if the debtor still ignores payment following the decree of enforcement, the judgment creditor is entitled to request from the court the right of execution.²⁰

2.3.2 Right to Sue

Where there is an obligation, the creditor may demand performance from his debtor; and in case the debtor ignores his duty, the creditor is entitled to enforce the performance by filing a case through the court. This right is called right to sue. To exercise this right, however, it must be in accordance with legal provisions and legal procedures. It also will be enforced upon the court's decision.

In order to file a lawsuit, the obligation must be mature and the debtor must be in default. Therefore, to understand the maturity of an obligation as well as the default is essential.

The following is an overview on the proceedings concerning litigation. Litigation begins when the plaintiff (creditor or his attorney) files a complaint in writing with the court and sends a copy of the plaint to the defendant (debtor) by service of a summons. The complaint shall set forth clearly the nature of the plaintiff's claims and of the relief applied for as well as the allegations on which such claims are based.²¹

Afterwards, that the defendant is given a specific amount of time, generally 15 days from the date of the service of the summons and complaint, to file with the court an answer in writing.²² If the defendant does not file his answer he shall be deemed to be in default of answer.²³ Whereas the defendant is in default of answer, the plaintiff shall apply to the court within 15 days from the expiration of time for the defendant to file an answer for judgment or order disposing the case in his favor given by default.²⁴ Then the court may take evidence in connection with the

²⁰ Section 271 Thai Civil Procedure Code.

²¹ Section 172 Thai Civil Procedure Code.

²² Section 177 Thai Civil Procedure Code.

²³ Section 197 Thai Civil Procedure Code.

²⁴ Section 198 paragraph 1 Thai Civil Procedure Code.

plaintiff's evidence *ex parte*. The defendant is not entitled to raise any contention against the plaintiff. Because of being a civil case, the defendant's contention is not necessary. Even if the defendant fails to file his answer, the court's proceedings can be carried on. On the other hand, if the plaintiff fails to apply to the court for judgment or order disposing the case in his favor within the prescribed period of time, the court shall issue an order striking the case out of the case list.²⁵

On the day of settlement of the issues, the court shall settle each point in issue and also decide burden of proof and order of proof on each point in issue.

On the day of taking evidence, if one of the parties does not appear, it is not permitted by the court to adjourn the case such party shall be deemed to be in default of appearance.²⁶ There are three consequences of default of appearance upon any party being in default. If both parties are in default of appearance, the court shall issue an order striking the case out of the case list.²⁷ If the plaintiff is in default of appearance, the court shall issue an order striking the case out of the case list unless the defendant informs the court that he desires that the case proceed then the court shall proceed and adjudicate the case *ex parte*.²⁸ If the defendant is in default of appearance, the court shall proceed and adjudicate the case *ex parte*.²⁹

Where a judgment or order has been pronounced and the decree of execution has been served on the judgment debtor but the judgment debtor does not comply with a judgment in whole or part, the judgment creditor can apply for execution by filing with the court an *ex parte* application for a writ of execution (the same meaning of establishing an executing officer) in order to seize or attach property belonging to the judgment debtor and sell it by auction within ten years³⁰ from the date of pronouncement of the judgment.

²⁵ Section 198 paragraph 2 Thai Civil Procedure Code.

²⁶ Section 200 paragraph 1 Thai Civil Procedure Code.

²⁷ Section 201 Thai Civil Procedure Code.

²⁸ Section 202 Thai Civil Procedure Code.

²⁹ Section 204 Thai Civil Procedure Code.

³⁰ Section 271 Thai Civil Procedure Code.

2.4 The lawful methods for collection of debt

2.4.1 Introduction

In some cases, a notice by the creditor is applied as a condition before a creditor will exercise his right through the court, such as an enforcement of mortgage. But in general circumstances, the law does not provide a notice as a condition before exercising the right to sue. Therefore when a debtor is in default, a creditor has the authority to sue such debtor through the court, even though the creditor did not extend a notice beforehand. In practice, the creditor should notify the debtor to collect his debt before litigation because it will save time, court fees and other expenses.

For debt collection methods, there are many that a creditor can use. A creditor may notify the debtor by word when the debtor comes into presence or communicate via telephone. The best method that a creditor should use is to notify via notice in writing to debtor's domicile or debtor's office because it can be used as future evidence.

2.4.2 Procedures for collection of debt

There are general procedures that a collector, both creditor and collection agency, should apply for the collection of debt as follows;

1. A creditor should check the information of all details of debtor within utmost accuracy before the collection of debt in order to avoid a mistake.
2. If the debtor's information is not based on current information because the debtor has moved his domicile or office, a creditor can try to find out the most recent debtor's information; however, this should be done with reasonable care in order to avoid injuring a debtor's reputation.
3. A creditor should send a notice for collection of debt or assign this to a lawyer acting on its behalf.
4. In issuing a notice, a creditor should indicate summaries of only important information, such as the source of debt, reason for issuing, the amount of debt including interests and fees. If given too much detail, the debtor may take benefit in a court's hearing.
5. If there is no contact from the debtor, a creditor may go see the debtor at debtor's place in order to collect or negotiate with the debtor. Such an act should be done with utmost politeness.

6. If there is no compromise, a creditor must sue the debtor to the court only in order to enforce the debtor for payment of debt. A creditor has no authority to enforce payment by the debtor by itself.

2.5 The unfair methods for collection of debt

In practice, most credit card creditors avoid filing against the debtors to the court and opt to pursue the collection of debt instead. In the process of collection of debt, the creditor may hire a debt collecting service provider who is a third party to collect the debts for it. In sight of the highest returns possible, these collectors have resolved to many debt collection methods that cause damage to debtors. This independent research gathers many complaints of debtors being treated unfairly by debt collection methods from complaints of the debt club³¹ that is governed by the Foundation for Consumers. Unfair methods can be organized into groups as follows;

2.5.1 Undue harassment of the private rights of a debtor

When a collector is assigned a debtor, the first thing a collector will do is attempt to contact the debtor by calling to the debtor or personally seeing the debtor. A collector will search the current information of the debtor, such as domicile, phone number, and office of the debtor. Sometimes such information may be obtained through unlawful methods, such as the underground sale of this information by an official of the Social Security Office or Credit Bureau. After a collector has obtained the debtor information, he starts to contact the debtor without respect of the debtor's private rights. The methods for collection of debt are applied with intent to disturb the normal life of the debtor are

1. Calling the debtor in excess of necessity.
2. Calling the debtor during improper periods of time.
3. Using offensive language or profanity with the debtor.
4. Seeing the debtor at the debtor's office without permission.
5. Collecting debt during the working hours of the debtor.
6. Collecting debt without collector's identification.

³¹ Consumer Debt Club, Complain webboard for unfair collection of credit card debt, At <http://www.debtclub.consumerthai.org/>. (last visited 30 August 2009).

2.5.2 Injuring a debtor's reputation

Being in debt is increasingly accepted in our society. However, many people still think that being in debt is grounds for being ashamed. No one wants someone else to know he/she is in debt. Therefore, being in debt is regarded as private information. Injury of debtor's reputation can occur when a collector spreads to a third person that the debtor is in debt in order to coerce the debtor for payment of debt. This can include:

1. Sending a postcard to the debtor.
2. Sending a letter to the debtor's neighbor.
3. Sending a fax to the debtor's office.

2.5.3 Threatening life, body, liberty or property of the debtor

This includes:

1. Threatening assault on the body or the life of the debtor.
2. Threatening debtor's arrest by police.
3. Destroying the property of the debtor.

2.5.4 Fraud and fraudulent threats

This includes:

1. Threatening that the debtor would be charged by the court.
2. Threatening that the debtor's salary would be withheld.
3. Threatening that the debtor's property would be seized.
4. Posing by a collector as a government official such as court's official, police.
5. Threatening that a lawyer would make the debtor lose his job.
6. Threatening that the debtor would be charged with a criminal case.

2.5.5 Debt collection and pursuing payment from a person who is not a debtor

This includes:

1. Collecting payment from a person who is not the debtor and not related to the debtor.

2. Collecting payment from a person who is not the debtor but related to the debtor such as family, friends or his/her employer.
3. Collecting payment from a person who is cited as a contract of the debtor.

2.6 The Control of Credit Card Business

2.6.1 Bank of Thailand

The Bank of Thailand (“BOT”) is the central bank of Thailand. BOT is a juristic person which is under control of the Ministry of Finance. As the central bank, the Bank of Thailand is the most important financial institution because it plays important roles to keep financial stability and promote monetary stability³², such as printing banknotes, providing banking facilities to the government, providing banking facilities to the financial institutions, examining the financial status of the financial institutions, managing the country’s foreign exchange rate and controlling the foreign exchange.

For the undertaking of the credit card business, there are two laws empowering BOT to act as controller in the credit card industry. The first one is Financial Institutions Businesses Act B.E. 2551 to control the undertaking credit card business of commercial banks. The second one is Ministry of Finance Notification to control undertaking credit card business of non-banks. Therefore, BOT has the power to issue its own notifications in order to control the credit card business whether such business is undertaken by commercial banks or non-banks.

2.6.2 Regulations for Control Credit Card business

At present, there are two effective notifications issued by BOT regarding Prescription of Rules, Procedures and Conditions for Undertaking Credit

³² Bank of Thailand, Roles and responsibilities of Bank of Thailand, At <http://www.bot.or.th/Thai/AboutBOT/index/Pages/RolesAndResponsibilities.aspx>. (last visited 29 November 2009).

Card Business of Commercial Banks and Non-Banks. Both notifications provide the same content of regulations for the control of credit card business as follows;

1. Controlling the approval of credit cards

Credit card business operators are not permitted to pre-approve any credit cards to customers without request. For approval, credit card business operators shall consider qualifications of credit cardholders according to documents supporting the application for credit cards of a customer.

2. Controlling the qualification of the credit cardholders

Credit card business operators, banks and non-banks, shall issue basic cards to cardholders or consumers only when the cardholders or consumers meet one of the following criteria:

- 1) Earning total incomes at an amount no less than 15,000 Baht per month or no less than 180,000 Baht per year.
- 2) Having the average income or used to earn the average income of 15,000 Baht per month from working in deposit accounts at a financial institution within the past six months.
- 3) Pledging deposits at commercial banks, or investing in debt instruments issued by commercial banks, government agencies, or state enterprises established by specific laws, as collateral for full amount of the approved credit line.
- 4) Possessing fixed deposits at financial institutions at the amount no less than 500,000 baht for the period of at least 6 months.
- 5) Possessing either fixed deposits or savings deposits at financial institutions or investing in debt instruments at an amount no less than 1,000,000 baht for the period of at least 6 months.

3. Controlling the approval of credit line

Credit line shall be approved to each cardholder not exceeding 5 times of the average income per month and not exceeding 10 percent of the amount of fixed deposits.

4. Controlling interests, penalties, service charges and other fees arising from using credit card

1) Credit card business operators may charge interests on unpaid or overdue debts or interests accrued during the default period, penalties on unpaid or overdue debts, and other service charges or fees at in aggregate amount does not exceed 20 percent per year.

2) Credit card business operators may charge any service charges related to credit card debts in case of debt collection of the actual payment amount as appropriate.

In addition, there are other regulations to control credit card businesses which are stipulated in both BOT notifications, such as regulations on change of debt category, regulations on practice and management of information of cardholders or consumers, regulations on risk management of the credit card business, regulations on practices regarding complaints and regulations on the demand for debt repayment and the process of debt collection.

2.7 Notifications of the Bank of Thailand

As mentioned, there are two effective notifications of the Bank of Thailand regarding the Undertaking of Credit Card Business. These notifications provide prescription of rules, procedures, and conditions for credit card business operation by separating business operator categories as follows:

1. The Notification of the Bank of Thailand Re: Prescription of Rules, Procedures, and Conditions for Undertaking Credit Card Business of Commercial Banks dated 9 July 2009. (By virtue of the provisions of Section 39, 41 and 71 of the Financial Institutions Businesses Act B.E. 2551)

2. The Notification of the Bank of Thailand Re: Prescription of Rules, Procedures, and Conditions for Undertaking Credit Card Business of Non-Banks dated 9 July 2009. (By virtue of the provisions of Section 6(1) and 8 of Ministry of Finance Notification Re: Businesses Requiring Operating Permits dated 11 November 2002)

Both of notifications stipulate rules regarding “Demand for debt repayment and the process of debt collection” as follows:

2.7.1 Regulations regarding debt collection

Although each notification has a different scope of application depending on the business operator category– commercial banks or non-banks – the contents specifically regarding debt collection in each notification are similar. Therefore, this independent research presents the significant contents of both notifications together.

All commercial banks and non-banks shall proceed as follows:

1. In case where credit card business operators, commercial banks and non-banks, would like the cardholders or consumers to make debt repayment in an installment, the credit card business operators shall set up rules on debt installment payment under which the cardholder or consumer shall repay the debts for each installment period at a minimum amount. The minimum debt repayment shall not be less than 10 percent of the total outstanding balance for each installment period. Unless debts arise from temporary credit lines in cases of emergency, cardholders shall fully repay the total outstanding balance.
2. Notifying the cardholders or consumers in the form of a warning letter no less than 20 days in advance prior to pursuing legal execution of debt repayment.
3. Sending a statement to notify the cardholders or consumers no less than 10 days in advance prior to the due date or debit date, and demonstrating the details of interests and expenses calculations in such statement in case where there are any interests or expenses charged on the overdue or unpaid debts.
4. Canceling the credit cards immediately if the cardholders do not repay the debts for more than 3 months from the due date.

2.7.2 Regulations on practice regarding complaints

Credit card business operators whether commercial banks or non-banks shall conduct thorough examinations when the cardholders or consumers make complaints regarding the use of credit cards and advise the progress thereof as well as subsequent processes to the cardholders or consumers within 7 days from the date of receipt of such complaint. In this case, such credit card business operators shall rectify the complaint and inform the cardholders or consumers promptly.

2.7.3 Penalties

Penalties can be considered depending on business operator category as follows;

1. Commercial Banks

If any commercial bank violates or fails to comply with the notification issued by BOT regarding Prescription of Rules, Procedures, and Conditions for Credit Card Business Operation of Commercial Banks which is empowered by section 39 and 41, it shall be liable to a fine not exceeding 500,000 Baht and a further fine of not exceeding 5,000 Baht per day for everyday during which such violation continues or until the time the correction has been made.³³

2. Non-Banks

If any non-bank violates or fails to comply with the notification issued by the BOT regarding Prescription of Rules, Procedures, and Conditions for Credit Card Business Operation of Non-Banks which was empowered by Ministry of Finance Notification dated 11 November 2002, it shall be liable under section 10 of such Ministry of Finance Notification. According to section 10, the BOT shall be empowered to order non-bank to rectify the violation within the time specified by BOT. The Minister of Finance, with recommendation of BOT, has the power to order such non-bank to temporarily suspend its business operation entirely or partially for a period prescribed if such non-bank still violates or ignores the rectification order. Finally, the Minister of Finance has the power to revoke the license of such non-bank if it still violates or ignores the temporarily suspension order.³⁴

In addition, the notification of Ministry of Finance dated 11 November 2002, was empowered by section 5, 7, 8 and 14 of Executive National Announcement no.58 dated 26 January 1972. Thus, any person who violates the notification of BOT is also regarded as being a violation of such Announcement. According to section 17 of Executive National Announcement no.58, any person who fails to comply with the conditions shall be liable to imprisonment for a term

³³ Section 125 Financial Institutions Businesses Act B.E. 2551.

³⁴ Section 10 Ministry of Finance Notification, "Requiring Operating Permits according to Executive National Announcement no. 58."

not exceeding one year or a fine not exceeding 20,000 Baht and a further fine of not exceeding 1,000 Baht per day for everyday during which such violation continues.

2.8 Guideline of the Bank of Thailand for Collection of debt

At present, The Bank of Thailand has issued “A guideline for collection of debt” with the intention to resolve the prevalent problem of improper debt collection methods in the undertaking of credit card business. Due to the many complaints that consumer debtors had sent to the Bank of Thailand for damages they experienced from unfair debt collection practices, BOT issued a guideline for collection of debt to serve as recommendations of the proper practices for credit card business operators to use in the collection of debt.

These guidelines of the Bank of Thailand are to be used as short-term measures. Moreover, there is no legal sanction with such guidelines. The followings are important issues contained within the guideline:

2.8.1 Scope of application

There are three aspects of the scope of application. The guideline determines the category of person, the category of debt and the form of debt collection that shall be governed by this guideline as follows;

1. Business operators

The following business operators shall be governed by the guideline for collection of debt.

- 1) Commercial Banks
- 2) Finance Companies
- 3) Credit Foncier Companies
- 4) Credit Card Companies (Non-Bank)
- 5) Personal Loan Companies (Non-Bank)

2. Debts

In considering the rationale of this guideline, the BOT purposes to control all kind of debts. Therefore, any kind of debt, not only credit card debt and personal loan debt, shall be governed by this guideline in order to set a standard of debt collection in all kind of debts.

3. Forms of collection of debt

This guideline shall be applied for business operators who collect the debt by themselves

2.8.2 Prescription of rules and procedures

There are three aspects contained in the prescription of rules and procedures concerning general practices, rules of hiring other service providers for debt collection and rules of setting up complaint systems.

1. General practices

1) Period of time and frequency for collection of debt

Business operators shall contact the debtor in accordance with proper frequency and time window.

(1) Monday – Friday between 08:00 AM and 08:00 PM

(2) Official holidays between 08:00 AM and 06:00 PM

2) Personal identification of collector

Both a business operator and an outsourced service provider shall (1) identity his/her name and indicated the objective of communication in accordance with the truth and (2) show a permission document granted by the business operator – the real and original creditor – to directly contact the debtor.

3) Methods for collection of debt

The following practices are prohibited;

(1) Communication with a third person who is related to the debtor unless there is consent from the debtor or the otherwise permitted by law.

(2) The use of violence, injuring of the body, reputation or property of the debtor.

(3) The use of false or misleading representations

- (4) The use of unlawful harassment
- (5) The use of undue harassment without a reasonable ground
- (6) The use of offensive language or insults
- 4) Security of debtor's privacy

A business operator, including a collector, shall not disclose the debtor's information during contact with a third person unless there is consent from the debtor.

- 5) Debt collecting systems

A business operator and a debt collector shall have an effective debt collecting system and shall have an effective receipt system.

2. Debt collecting service provider

- 1) Employment

If a business operator who is the creditor employs a debt collector to collect the debt instead a him/herself, the business operator shall be liable to the debtor and the third person for any damages arising out of debt collection as if he/she had committed it by him/herself. In addition, a business operator is bound to control the debt collection activities performed by the debt collecting service provider with as much care as it would take of his/herself own business.

- 2) Selection of debt collecting service provider

A business operator shall consider the form of the organization and the history of the organization in the selection of a debt collecting service provider. Moreover, a business operator shall evaluate the operating results in the collection of debt. The evaluation outcome would be use as an important factor in the renewal of the debt collecting service contract.

- 3) Giving information to the debtor

A business operator shall serve the debtor a bill of statement which contains a list of at least the following particulars;

- (1) A number in money and a period of arrears.
- (2) A contact number for debt payment.
- (3) A collection fee (if any).
- (4) The right, the procedure and the place for complaints.
- (5) The right of the debtor to select a payment method to his creditor

3. Setting up a complaint system

1) A business operator must have in place the appropriate policy, process, and management for any complaints arising from its debtors regarding the collection of debt. A complaint must always be reported to an Executive in an acceptable proper period of time.

2) The complaint system must be systematic and effective.



Chapter 3

Principles of debt collection under American law

This chapter presents an in-depth study of effective law governing debt collection practices in the United States of America, particularly the Fair Debt Collection Practices Act. Within this Act, the scope of application, required debt collection practices, prohibited debt collection practices, liability and supervision are thoroughly examined.

3.1 Historical Background

The Fair Debt Collection Practices Act (“FDCPA”) was enacted on September 20, 1978 by passing of the United States Congress. The FDCPA³⁵ effective date followed six months after the enactment² on March 20, 1978. The FDCPA is a federal statute applicable in every state of The United State of America.

The purpose of FDCPA is to protect consumers from debt collector abuse. It has been stated that there is, “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors, contributing to a number of personal bankruptcies, marital instability, the loss of jobs, and invasion of individual privacy.” The US Congress also stated that in addition to elimination of these practices, another key purpose of the Act is “to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged”.³⁶

The FDCPA is based on the premise “that every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner.”³⁷ Therefore, Congress viewed that an individual debtor should be protected and treated accordingly. There were arguments that a person entering such a transaction with the deliberate intention to default would benefit from this law. However, Congress

³⁵ Fair Debt Collection Practices Act of 1977.

³⁶ Section 802 Fair Debt Collection Practices Act of 1977.

³⁷ Baker v. G. C. Services Corp., 677 F.2d 775, 777 (9th Cir.1982).

ultimately recognized the “universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule” and that “the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.”³⁸ Most debtors act in good faith but unforeseen circumstances are main reasons for default.

The fostering of fair trade competition was another reason the FDCPA was pushed forward. Debt collection agencies, playing an ever important role in place of the actual creditors, became increasingly prominent as more and more debt contracts were engaged. Most creditors, like today, favored outsourcing debt collection to third-party debt collection agencies as outsourcing provided many advantages and thus became increasingly popular. Debt collection agencies have more experience, along with better human and technological capabilities. Outsourcing debt collection operations to a more-efficient, third party released creditors from the responsibility of this burden, saved creditors time for other aspects of their businesses, and reduced administrative costs associated with debt collection. Debt collection agencies using abusive, unfair methods were usually able to successfully recover overdue payments from debtors at higher rates than those that exercised fair methods. Therefore, if there was no regulation to control debt collection, unethical debt collection agencies would continue to realize an unfair advantage in the marketplace, further encouraging such unjust practices. Congress viewed that specific law should be in place to govern and regulate to prevent inequitable competition.

3.2 Scope of FDCPA Application

It is import to first understand the application scope of the FDCPA. This Act does not apply to all cases of debt collection. To fall under the protection of this Act, a debtor must fall within the defined characteristics and meet all the stated requirements.

³⁸ S. Rep. No. 382, 95th Cong., 1st Sess., p. 3 (1977), reprinted in 1977 U.S.C.C.A.N.1695, 1697, At www.edcombs.com/cm/7ant%20new.pdf. (last visited 30 September 2009).

The scope of application is defined across all key stakeholders:

- 1) Debtor and his/her debt
- 2) Creditor
- 3) Debt collector

3.2.1 Debtor and his/her debt

FDCPA mainly aims to protect individual debtors who are consumers. Therefore, it protects only consumer debts which arise out of transactions for personal, family, or household purposes.³⁹

According to section 803 (5) of the FDCPA, debt that qualifies for protection under the FDCPA must have the three following characteristics:

1. The debt must be consumer debt of a natural person

As defined in section 803 (5) of the FDCPA, the term “consumer” is any natural person obligated or allegedly obligated to pay any debt⁴⁰, not including artificial persons such as a corporations or other entities created by statute.⁴¹

The FDCPA also gives an explicit definition of the term “debt” as any obligation or alleged obligation of only a consumer to pay money arising out of a transaction and does not include commercial debts.⁴² Business loans⁴³ and agricultural loans⁴⁴ are “debts” not covered by the FDCPA. Moreover, the FDCPA limits the types of transactions to ones primarily for personal, family or household purposes.

³⁹ Section 803 (5) Fair Debt Collection Practices Act of 1997.

⁴⁰ Section 803 (3) Fair Debt Collection Practices Act of 1997.

⁴¹ FTC Official Staff Commentary on the Fair Debt Collection Practices Act, Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, At <http://www.ftc.gov/os/statutes/fdcpa/commentary.html>. (last visited 3 October 2009).

⁴² S. Rep. No.382 at 3.

⁴³ Bloom v. I.C. System, Inc., 972 F.2d 1067 (9th Cir. 1992).

⁴⁴ Munk v. Federal Land Bank, 791 F.2d 130 (10th Cir. 1986).

2. It can be an obligation or alleged obligation arising out of a transaction but the performance of such an obligation must be done by paying money.

There are two key elements of this condition as follows:

1) It can be both of an obligation and an alleged obligation.

Debt has been defined to mean not only owed obligation but also allegedly owed obligation arising out of a transaction involving money, property, insurance or services. FDCPA defines the term “debt” broadly because a type of debt flows from the type of consumer transaction.⁴⁵

An “allegedly owed obligation” of a consumer includes a consumer who is victim of mistaken identity and a legally non-obligated spouse. In addition, there are several courts’ decisions holding that “alleged obligation of a consumer” could be an invalid obligation, a void obligation, or nonexistent obligation.⁴⁶

2) It must be money debt.

In considering whether a debt will be covered by the FDCPA, the court will also consider the duty of performance of the debtor. If the debtor has a duty to pay money for performance, such debt will be regarded as debt that is covered by FDCPA. There is a court’s decision holding that the FDCPA does not cover only debt arising in connection with a money transaction but also covers any debt where the debtor has any obligation to pay for the purchasing of goods or services.⁴⁷

3. Such debt must be obligated with the purpose of personal or family or household usage.

FDCPA limits debtor’s purpose for debt obligation into three conditions as follows;

1. For personal purpose
2. For family purpose

⁴⁵ Daniel A. Edelman, Fair Debt Collection Practices Act Update, At http://www.edcombs.com/cm/Action/Fair_Debt_Collection.asp. (last visited 3 October 2009).

⁴⁶ Robert J. Hobbs, National Consumer Law Center, Fair Debt Collection 5th ed. (United States: Oceana Publications, 2006), p. 106.

⁴⁷ *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997).

3. For household purpose

If a debtor obligates debt within purpose of at least one of the aforementioned purposes, such debt will be covered by the FDCPA. Debt arising out of a lending transaction to purchase goods for neither of these purposes would not be covered by the FDCPA.⁴⁸

Consumer debt may also arise from consumer installment credit transactions, such as retail installment sales, installment credit or small loans.⁴⁹ However, classification as consumer debt has no relationship with the amount of debt – the debt could be either a small or relatively large amount. In an actual case, a debtor owed credit card debt in the amount of three hundred thousand Dollars, rising out of more than 40 credit cards. The court maintained a ruling that the debt was consumer debt despite such a large amount of money owed.⁵⁰

3.2.2 Definition of Creditor

“Creditor” is defined as any person who offers or extends credit creating a debt or to whom a debt is owed. However, such a term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.⁵¹ The term “any person” includes an artificial person such as a corporation or partnership.

Per the FDCPA definition, the following persons are regarded as a “creditor”;

1. Any person who actually extended credit creating a debt.
2. Any person who became the obligee on an account in the normal course of business.
3. An assignee of the debt subject to the FDCPA when the assignment is made before default.⁵²

⁴⁸ Garza v. Bancorp Group, Inc., 955 F. Supp. 68 (S.D. Tex. 1996).

⁴⁹ Robert J. Hobbs, National Consumer Law Center, Fair Debt Collection, p.102.

⁵⁰ Ballard v. Equifax Check Services., 158 F. Supp. 2d 1163 (E.D. Cal. 2001).

⁵¹ Section 803 (4) Fair Debt Collection Practices Act of 1997.

⁵² Wadington v. Credit Acceptance Corporation, 76 F.3d 103 (6th Cir.1996).

4. A receiver of the debt subject to the FDCPA when the transfer is made before default. A receiver is a creditor, not a “debt collector”, because he stands in the shoes of the creditor.⁵³

Generally, these creditors are excluded from the definition of “debt collector” and do not fall in the coverage of this Act if such creditors collect their own debts in their own name.

However, there are several exceptions where the creditor qualifies as a debt collector and falls within the coverage of this Act as follows⁵⁴;

1. A person who accepts assignment of a debt, which is then in default, for the purpose of collecting the debt.

2. A creditor who uses a name other than his own including a fictitious name to collect his own debt which would indicate that a third person is collecting or attempting to collect such debt.

3. The creditor’s salaried attorney employees who collect debts use stationery that indicates that attorneys are employed by someone other than the creditor or are independent or separate from the creditor.

4. A creditor who regularly collects debts for another creditor. However, he is a debt collector only for purposes of collecting these debts, not when he collects his own debt in his own name.

5. The creditor's collection division or related corporate collector is not clearly designated as being affiliated with the creditor; however, the creditor is not a debt collector if the creditor's correspondence is clearly labeled as being from the “collection unit of the (creditor's name)”.

⁵³ Weiss v. Weinberger, 2005 WL 1432190, 2005 U.S. Dist. LEXIS 11876.

⁵⁴ Federal Trade Commission, Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, At http://www.ftc.gov/os/statutes/fdcpa/commentary.htm#N_10, (last visited 3 July 2009).

3.2.3 Definition of Debt Collector

The FDCPA affects activities of a debt collector. A debt collector, who falls under the enforcement of this Act, must be a “debt collector” in accordance with its legal definition.

The following persons are classified as debt collectors:

1. Any person who uses any instrumentality of interstate commerce or the mails in any business with the principal purpose of which is the collection of any debts. For this, the principle purpose of business should be considered, i.e., whether main purpose of doing business is for the collection of debt. If collection of debt is the main business, it is regarded as a debt collector, such as debt collection agencies, employees of debt collection agencies, collection lawyers or credit counselors. On the other hand, if collection of debt is only a supporting part of the business, it may not be regarded as debt a collector such as bank’s collection division.⁵⁵ This includes the following cases:

1) Employees of a debt collection business, including a corporation, partnership, or other entity whose business is the collection of debts owned by another.

2) A firm that collects debts in its own name for a creditor solely by mechanical techniques, such as making phone calls with pre-recorded messages and recording consumer responses, or making computer generated mailings.

3) A party based in the United States who collects debts owned by consumers residing outside the United States, because he uses the mails in the collection business. The residence of the debtor is irrelevant.

2. Any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. This includes a firm that regularly collects overdue rent on behalf of real estate owners, or periodic assessments on behalf of condominium associations, because it regularly collects debts owned another.

3. Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of

⁵⁵ Robert J. Hobbs, National Consumer Law Center, Fair Debt Collection, p.72.

security interests such as a repossession company. In general, there are many types of businesses with the main purpose of the enforcement of security interests, such as repossession businesses, or foreclosure businesses. But there are many court decisions defining that the interpretation of “enforcement of security interest business” refers only to repossession businesses and not foreclosure businesses because the enforcement of mortgage is not money debt collection.⁵⁶ However, not every repossession company falls within the FDCPA. A repossession company may be subject to the Act only if it collects debt by taking or threatening to take any non-judicial action to effect dispossession or disablement of property.⁵⁷

4. A creditor who uses a name other than his own name, including using a false name, which suggests that there is a third-party debt collector involving in the collection process.

5. A creditor, in case of his salaried attorney employees who collect debts using stationery that indicates that attorneys are employed by someone other than the creditor or are independent or separate from the creditor, are regarded as debt collectors. For instance, ABC Company sends collection letters on stationery of “John Jones, Attorney-at-Law”).

6. A creditor, in case of his collection division or related corporate collector is not clearly designated as being affiliated with the creditor.

7. A creditor who collects debts for another creditor.

8. Any person who obtains the debt after default solely for the purpose of collection such as a bad debt buyer, or an assignee of a debt. It has become increasingly common for banks, credit card companies and other creditors to sell their delinquent debts to companies which specialize in the purchase and liquidation of bad debts. For a bad debt buyer, there are many court’s decisions holding that a financial institution which purchases delinquent debts, debts in default, and its business purpose is to collect such debts, is a “debt collector” within the meaning of the FDCPA with respect to the delinquent debts.⁵⁸ This rule is also applied to an assignee of debt. The assignee of a debt which is in default at the time of the

⁵⁶ *Hulse v. Ocwen Fed. Bank*, F.S.B., 195 F. Supp.2d 1188 (D.Or. 2002).

⁵⁷ Section 808 (6) Fair Debt collection Practices Act of 1997.

⁵⁸ *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003).

assignment is a “debt collector”, if the assignee's principal purpose is the collection of debts, or the assignee regularly engages in the collection of debts.⁵⁹ Among the court’s decision, a key point to consider whether bad debt buyers and assignees are “debt collectors” is that the debts are the result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer.

9. Attorney who regularly practices the collection of debt. In the past, attorneys were originally excluded from the definition of debt collector. In 1986, Congress removed the attorney exception because congress needed to stop the abusive and harassing tactics of attorney debt collectors. Today, the FDCPA does apply to an attorney with a general practice including a minor but regular practice in debt collection.⁶⁰ In considering the criteria for determining when a lawyer or law firm regularly engages in debt collection, it must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity.

The followings factors are important factors to make an attorney become a debt collector;

- 1) The amount of collection activity.
- 2) The absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period.
- 3) The frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernible.
- 4) Whether the entity has personnel specifically assigned to work on debt collection activity.
- 5) Whether the entity has systems or contractors in place to facilitate such activity. And;
- 6) Whether the activity is undertaken in connection with ongoing client relationships with entities that have retained in the lawyer or firm to assist in the collection of outstanding consumer debt obligations.⁶¹

⁵⁹ *Games v. Cavazos*, 737 F.Supp. 1368, 1384 (D.Del. 1990).

⁶⁰ *Piper v. Portnoff Law Assocs.*, 396 F.3d 227 (3d Cir. 2005).

⁶¹ *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bartolotti*, 374 F.3d 56, 62-63 (2d Cir. 2004).

The following persons are excluded from the definition of debt collector;

(1) Any person who collects debts only in isolated instances because the definition includes only those who “regularly” collect debts.

(2) A credit card issuer that collects its cardholder's account, even when the account is based upon purchases from participating merchants, because the issuer is collecting its own debts, not those “owed or due to another”.

(3) An attorney whose practice is limited to legal activities such as the filing and prosecution of lawsuits to reduce debts to judgment.

(4) Officers and employees of the creditor while collecting the debt in the creditor's name.

This exception includes firstly, a collection agency employee, who works for a creditor to collect in the creditor's name at the creditor's office under the creditor's supervision, because he has become the de facto employee of the creditor. Secondly, a creditor's salaried attorney or other employee who collects debts on behalf of, and in the name of, that creditor.

(5) Affiliated companies of the creditor.

(6) Officials or employees of the United States or any state.

(7) Process servers

(8) Non-profit debt counselors.

(9) Fiduciaries such as a receiver or trustee of a corporate creditor, or the personal representative of an individual creditor.

(10) Any person who collects debt in which a debt was not default at the time it was obtained.

3.3 Required practices in collection of debt under the FDCPA.

The FDCPA stipulates required practices for debt collectors to follow when collecting debt. The required practices cover the acquisition of debtor's location information and communication with the debtor or third party in connection with debt collection. This research paper separates the required practices into two key areas.

3.3.1 Required practices in dealing with the debtors.

1. Communication with the debtors in debt collection.

In communication with the debtor, if a debt collector does not have the prior consent of the debtor or permission of a court, a debt collector shall communicate to the debtor in time and at place with regarding to the requirement of the Act as follows;

1) Time for communication.

A debt collector shall not communicate to the debtor for debt collection at an unusual time, including a time known or should be known to be an inconvenient time. If a debt collector does not know when a convenient time is, the law assumes such time is the time between 8:00 AM and 9:00 PM local time of the debtor's location.⁶²

2) Place for communication.

The law does not strictly prohibit a debt collector to pursue communication at a debtor's place of employment. The law only prohibits a debt collector from communicating at debtor's place of employment if the debt collector knows or should know that the debtor's employer prohibits such communication.⁶³

3) Communication with the debtor through the debtor's attorney.

If a debt collector has already known that the debtor appointed an attorney with regard to the debt and he knows such attorney's name and address, the debtor collector shall communicate with the debtor's attorney, not the debtor, unless there is no response from the attorney within reasonable time or there is the attorney's consent to communicate with the debtor directly.⁶⁴

2. Notification requirements to the debtor in the initial communication.

FDCPA stipulates procedures in the initial communication between a debt collector and a debtor. A debt collector has to follow these procedures requiring the debt collector to disclose himself and to notify the debtor of some information on the debt.

⁶² Section 805(a)(1) Fair Debt Collection Practices Act of 1997.

⁶³ Section 805(a)(3) Fair Debt Collection Practices Act of 1997.

⁶⁴ Section 805(a)(2) Fair Debt Collection Practices Act of 1997.

The required information that a debt collector has to notify shall consist of the following information:⁶⁵

- 1) A statement showing that he is a debt collector and attempting to collect a debt.
- 2) A statement confirming that the obtained information will be used only the purpose of debt collection.
- 3) A statement showing the details of the next communication

A debt collector is entitled to select the method of initial communication to the debtor. The initial communication can be written or oral communication. The method for the notification of information depends on the method of initial communication selected by the debt collector:

- (1) Written communication.

If the initial communication for debt collection is made in writing, the debt collector must notify the required information in such notification of information is called “Mini-Miranda Notice”.

- (2) Oral communication.

If the initial communication for debt collection is made orally, the debt collector must also notify the required information orally. Such notification of information is called “Mini-Miranda Warning”⁶⁶

However, there is an exception. The aforementioned requirements of notification are not required if the documents sent by the debt collector are legal documents, for example a formal pleading.

3. Validation notice.

A validation notice is delineated in section 809. A debt collector has the duty to send a notice indicating the details of the debt, including the debtor’s rights as a debtor.

⁶⁵ Section 807(11) Fair Debt Collection Practices Act of 1997.

⁶⁶ Windy A. Hillman, Overview of The Fair Debt Collection Practices Act, At http://www.birminghambar.org/data/_/HillmanArticle/fdcpagseminar.pdf. (last visited 9 October 2009).

A validation notice can be communicated to the debtor in two ways. The first way is enclosing the information together with the initial communication. The second way is notifying the debtor in writing within five days after the initial communication.

The validation notice shall contain the following;⁶⁷

- 1) The amount of the debt.
- 2) The name of current creditor or the name of original creditor.

When the creditor has been changed and there are differences in name and address between current creditor and original creditor, a debtor has the right to demand a debt collector to disclose the name and address of the original creditor by a written request within thirty days.

3) The statement notifying the debtor's right to dispute the validity of debt or a portion of debt. The statement shall contain the following details;

(1) "If the debtor does not dispute the validity of debt within thirty days after receipt of a notice, the debt will be assumed to be valid."

(2) "If the debtor disputes the validity of debt in writing within thirty days, the debt collector will obtain verification of debt or a copy of a judgment and a copy of such documents will be mailed to the debtor."

(3) Although the debtor fails to dispute the validity of debt it will affect that such debt is assumed to be valid but it is not an admission of liability of the debtor.⁶⁸

Once the debt collector has received a written notice of the debtor states that such debt is disputed or a written request of the debtor states that the name and address of original creditor are required, the debt collector shall cease debt collection activities temporally until the debt collector has obtained verification of debt or a copy of a judgment and such document, or the original creditor's name and address has been mailed to the debtor.⁶⁹

⁶⁷ Section 809(a) Fair Debt Collection Practices Act of 1997.

⁶⁸ Section 809(c) Fair Debt Collection Practices Act of 1997.

⁶⁹ Section 809(b) Fair Debt Collection Practices Act of 1997.

4. Ceasing the collection of debt.

According to section 805(c), a debtor is strictly entitled to demand the debt collector to cease the collection of debt. To exercise this right, the debtor shall notify to the debt collector in writing showing the debtor's refusal to pay the debt or wishing the debt collector to cease future communication. The debtor's notice will take effect when it reaches the debt collector. The debt collector shall not further communicate with the debtor with respect to the debt.

However, there are exceptions. The debt collector can communicate with the debtor regarding the following cases;

- 1) To notify that the debt collector will cease debt collection as the debtor demands.
- 2) To notify that the debt collector or the creditor may invoke ordinarily specified remedies.
- 3) To notify that the debt collector or the creditor intends to invoke a specified remedy.

3.3.2 Required practices in dealing with third parties.

1. Acquisition of debtor's location information.

In the process of acquiring a debtor's location information, a debt collector shall identify himself to a third party but shall not discuss the owed debt. A debt collector can communicate to any person other than debtor only one time unless there is reason to believe that such person now has the correct location information of the debtor. If the debt collector knows that the debtor has appointed an attorney with regard to the debt and knows the attorney's name and address, the debt collector shall not communicate with other persons except the debtor's attorney unless there is failure in communication with the attorney or there is consent from the debtor consent or to there is permission from the court.⁷⁰

⁷⁰ Section 804 Fair Debt Collection Practices Act of 1997.

2. Communication with third parties.

The FDCPA prohibits a debt collector to communicate with any person other than a debtor, a debtor's attorney, or a consumer reporting agency with the following exceptions:⁷¹

- 1) To communicate with purpose of obtaining debtor's location information as the provision of section 804.
- 2) There is the prior consent of the debtor. It is not necessary to make such consent in writing.
- 3) There is the court's permission.
- 4) There is reasonable necessity to effectuate a post judgment judicial remedy.

3.4 Prohibited practices in collection of debt under the FDCPA.

3.4.1 Harassment or abuse

Before the enactment of the FDCPA, a debt collector could collect debt using several methods which include harassment, oppression or abuse of another person. Therefore, the FDCPA prohibits any conduct with the natural consequence to harass, oppress, or abuse any person in connection with the collection of a debt.⁷² There are six subsections as examples of harassment or abusive conduct as follows:

1. The use of violence or threat to harm any person or his reputation or property. Implied threats are included, such as if a debt collector sends a statement to a debtor as "we're not playing around here but we can play tough".
2. The use of obscene or profane or abusive language. Abusive language includes religious slurs, profanity, calling the consumer a liar or a deadbeat, and the use of racial or sexual epithets.
3. The publication of a list of debtors who allegedly refuse to pay debts unless to report the items to a consumer reporting agency.
4. The advertisement of a debt in order to coerce payment.

⁷¹ Section 805(b) Fair Debt Collection Practices Act of 1997.

⁷² Section 806 Fair Debt Collection Practices Act of 1997.

5. Repeated telephone calls with excessive frequency or making a series of telephone calls with intent to annoy, abusive, harass any person.

6. The telephone calls without disclosure of the caller's identity.

However, the list of examples is not exhaustive, and a debt collector's conduct can be considered harassment, oppressive or abusive conduct in violation of section 806 even if it does not fall within any of the subsections. For instance, unnecessary calls to third parties, neighbors – when the debt collector knows the consumer's name and telephone number and could have reached him/her directly – would classify as a prohibited practice. Other examples include multiple personal contacts to the consumer with intent to harass him, posing a lengthy series of questions or comments to the consumer without giving the consumer a chance to reply, and contacting the consumer at his/her place of employment in a manner that jeopardizes his/her job.

3.4.2 False or misleading representations

The FDCPA prohibits the use of any false, deceptive, or misleading representations in connection with the collection of debt.⁷³ There are sixteen subsections as examples of false or misleading representations as follows;

1. The false representation of the appearance that he is vouched, bonded by, affiliated with the United States or any State including using the government symbol on a collection notice such as a police badge, a judge, or the scales of justice.

2. The false representation of the character, the amount, legal status of the debt. For instance, claiming an amount more than the actual debt or assertion that the debt is mature when it is not true. There is court's decision holding that a debt collector shall be liable for false representation even if he asserted such falseness without false intention, unless such false assertion was a bona fide error.⁷⁴

3. The false representation or implication that any individual is an attorney or that any communication is from an attorney.

⁷³ Section 807 Fair Debt Collection Practices Act of 1997.

⁷⁴ *Duffy v. Landberg*, 215 F.3d 871 (8th Cir. 2000).

4. The representation or implication that nonpayment will result in arrest, imprisonment, seizure, garnishment, attachment, or sale of the consumer's property even if such action is lawful but the debt collector or creditor does not intend to take such action.

5. The use of threats of illegal or unintended action such as threatening to file a suit or take other collection actions when the creditor has not authorized or the debt collector does not intend to take such action.

6. The false representation that a transfer of the debt will cause the consumer to lose the rights under the FDCPA.

7. The false representation that the consumer has committed a crime, such as fraud.

8. The communication using false credit information.

9. The use of any document which creates false understanding as official government documents.

10. The use of false representations or deceptive methods in collection of debt or in obtaining consumer's location information.

11. The failure of a debt collection warning. This subsection requires a debt collector to clearly disclose information in communication connection with debt collector or obtaining debtor's information that the debt collector is attempting to collect a debt and that any information obtained will be used only for that purpose.

12. The false statement that a transfer to other parties has occurred.

13. The simulation of legal process.

14. The use of any name other than the true name of the debt collector.

15. The false representation that documents are not legal process forms such as to conceal the importance of the papers to make a consumer fail to respond in legal process.

16. The false representation that the debt collector is part of a credit reporting agency when it is not.

However, the prohibited practices are not limited to the aforementioned sixteen subsections. Any conduct arising with the use of false, deceptive, or misleading representations or methods shall be prohibited under this section.

3.4.2 Unfair Practices

The FDCPA prohibits unfair or unconscionable methods in the collection of debt by a debt collector. There are eight examples of unfair methods as follows:⁷⁵

1. Collecting any amount in excess of principal of debt such as interest, service charges, late fees, collection charges, and bad check handling charges without the expressly agreement creating the debt or permission by law.
2. Accepting a postdated check by more than five days unless timely written notice is given to the consumer prior to deposit.
3. Soliciting the post-dated checks for purpose with threatening of criminal prosecution.
4. Depositing a postdated check before its maturity date.
5. Collecting charges for communication made by concealing the true purpose of such communication such as telephone calls, telegram fees.
6. Taking or threatening to take non-judicial action to enforce a security interest on property.
7. Using postcards or envelopes that reveal the collection purpose
8. Using anything other than the debt collector's address on any envelope. If the debt collector's business name does not indicate his/her business is the collection of debt, the debt collector can show his/her business name.

However, the prohibited conducts are again not limited into the eight subsections. Any conduct that is of the nature of unfair or unconscionable methods shall be prohibited by this section. A debt collector's conduct in collecting a debt may be "unfair" if it causes injury to the consumer that is (1) substantial, (2) not outweighed by countervailing benefits to consumers or competition, and (3) not reasonably avoidable by the consumer.⁷⁶

⁷⁵ Section 808 Fair Debt Collection Practices Act of 1997.

⁷⁶ Federal Trade Commission, Official Staff Commentary on the Fair Debt Collection Practices Act, Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, At <http://www.gov/os/statutes/fdcpa/commentary.htm>. (last visited 3 October 2009).

3.5 Liabilities

3.5.1 Liability of a debt collector

A debt collector's liability under the FDCPA is a strict liability. In a suing consumer, the consumer is required to only prove that the debt collector has violated any provision of this Act. The consumer is not required to prove that a violation was intentional or negligent. If a consumer fulfills such requirement, the debt collector shall be liable directly to the consumer, unless the debt collector can prove that such violation was from a bona fide error.

Any debt collector who does not comply with the provisions of the Act shall be liable to pay a compensation for such person.⁷⁷ The term "any debt collector" includes employees of a debt collection agency because the employees are "debt collectors" and shall be liable to the same extent as their agency. Moreover, a debt collection agency shall be liable for the FDCPA violations of their attorneys.

3.5.2 Damages

The amount of compensation shall be determined by discretion of the court. The damage can be divided into two parts as the actual damage and the additional damage. Therefore, the amount of damage is equal to the sum of the following;

1. Actual damages

It is of court's decision that actual damages are not only out-of-pocket expenses but also damages for personal humiliation, embarrassment, mental anguish, or emotional distress.⁷⁸ But the amount of a valid debt does not constitute actual damages.⁷⁹

⁷⁷ Section 813 Fair Debt Collection Practices Act of 1997.

⁷⁸ Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182, 185 (D.Del.1991).

⁷⁹ Wiginton v. Pacific Credit Corp., 2 Haw. App. 435, 634 P.2d 111, 118 (1981).

2. Additional damages

For individual action lawsuits, the court may determine the amount of additional damages not more than one thousand dollars. For class action lawsuits, the court may determine the amount of additional damages for each of the named plaintiffs no more than one thousand dollars and for other class members no more than five hundred thousands dollars or one percentage of the debt collector's net worth.⁸⁰

In determining additional damages, the court may determine the amount of both damages by considering in the frequency and persistence of non-compliance by the debt collector, the nature of such non-compliance, and the extent to which the non-compliance was intentional. Moreover, in class action lawsuits, additional factors are the resources of the debt collector and the number of persons adversely affected.

3.5.3 Attorney's fee

The court shall determine the attorney's fee and also the costs of action to the successful consumer. On the other hand, if the court finds that the plaintiff brought a case to the court in bad faith and for purpose of harassment, the court shall determine such expenses to the defendant.

3.5.4 Exception

A debt collector may not be liable for the FDCA violation if he can preponderantly prove the evidence that such violation was unintentional and resulted from a bona fide error and he has maintained the proper procedures to avoid such error. The failure to prove each condition makes a bona fide error is unavailable.

3.5.5 Limitation

A consumer shall exercise his/her rights according to the FDCA against violations through any proper United States District Court or other competent court. A consumer has to bring the case to the appropriate court within one year from the violation. However, such limitation period shall apply only to private lawsuits, not to actions brought by a government agency.

⁸⁰ Net worth is equal to asset deduct with liability.

3.6 Supervision

According to the FDCPA, the government agency which supervises the enforcement of the FDCPA is called Federal Trade Commission (“FTC”).⁸¹ There are two widely-used measures of the FTC’s enforcement.

The first measure is the establishment a formal advisory concerning the FDCPA by the commission. A debt collector who complies with any formal advisory opinions from the FTC, or omits compliance in good faith, shall not be liable under the FDCPA even after such opinion has been amended or rescinded.⁸² In practice, the Federal Trade Commission assigns their staffs to recommend its policies, including the interpretation of FDCPA among debt collectors, attorneys, and consumers through FTC informal staff letters. Although an informal staff letter is credible, it is not binding in the court⁸³ as the letter is not approved by FTC commissioners. However, it is typically taken into serious account by the court. Since an informal staff letter is not commissioner-approved, any person who complies with it shall not be protected from FDCPA liability.

In 1988, the FTC issued a “FTC staff commentary on FDCPA” in replacement of prior informal staff letters. Still, this aggregated version of the staff commentaries remains non-binding to the FTC, the public and the court because it is not law in itself and it has not been developed through case laws.⁸⁴ Therefore, the staff commentary remains unrecognized when in conflict with a court’s decision or a specific term in the Act itself.

⁸¹ The Federal Trade Commission (FTC) is an independent agency of the United States government, established in 1914 by the Federal Trade Commission Act. Its principal missions are to protect the consumer from unfair or deceptive practices in commerce and to promote fair competition by elimination and prevention of “anti-competitive” business practices, such as coercive monopoly.

⁸² Section 813(e) Fair Debt Collection Practices Act of 1997.

⁸³ *Moore v. Ingram & Associates, Inc.*, 805 F. Supp. 7 (D.S.C. 1992)

⁸⁴ Robert J. Hobbs, National Consumer Law Center, Fair Debt Collection, p.67.

The second measure is the enforcement of FDCPA violations. When the FTC obtains complaints from consumers or the report from its State or local's representative that a violation has occurred, the FTC will supervise such violation as a concealed and informal investigation. If FTC finds that there was a violation, the FTC will offer the debt collector to voluntarily enter into a consent order confirming that he agrees to stop such disputed conduct. This is not binding as confession. If the debt collector does not enter into a consent order, the FTC will bring a case to the court for further enforcement.

In addition, the FTC is required to submit an annual report to Congress.⁸⁵ An annual report should contain its enforcement and other activities in administering the FDCPA, the number of complaints, assessment of the degree of compliance, and recommendations.



⁸⁵ Section 815 Fair Debt Collection Practices Act of 1997.

Chapter 4

Analysis of the Research Problems

This chapter serves to evaluate the applicability, effectiveness and limitations of current Thai laws in regards to credit card debt collection. Then, the advantages and disadvantages of enacting specific law governing these practices are weighed. Findings from both current Thai laws and the US FDCPA are finally fused into regulatory contents to be incorporated a new Parliamentary Act.

4.1 Limitations on current laws

Thailand currently has no specific law regulating credit card debt collection. Therefore, debtors can only be protected from unfair collection practices with laws currently in place, namely through civil law and wrongful acts, through criminal law with offences of liberty, defamation and extortion, or through consumer protection law. In this section the researcher analyzes the limitations of current law and regulations regarding credit card debt collection. It has been found that current Thai law is ineffective and inadequate in protecting the individual debtor from unfair debt collection practices that violate their civil rights. Thailand should have specific law governing credit card debt collection.

4.1.1 Limitations on Civil law: Wrongful Acts

The purpose of wrongful acts law is to establish resolution to the person violated through compensation after the damage has occurred. Therefore, it is a legal protection measure, not a legal prevention measure. Wrongful act law has been enacted for long time. At the time of its conception, there was no concept of consumer protection. Therefore, at present, the application of wrongful act law would not be sufficient to protect consumer debtors. Most consumer debtors, as plaintiffs, are at a disadvantage, especially with the burden of proof. The debtor must factually prove the collector had really committed a wrongful act causing damage to the debtor. This is very difficult. For instance, a debtor being verbally harassed with multiple telephone calls – which are automatically relayed through an autodial

system - at the utmost inconvenient times will find it near impossible to prove the situation without being able to record all activities and conversations through hard means. Even if the debtor could capture this electronically, admissibility and credibility of electronic data in court is always in question as it can be easily modified.

In Thailand, the court applies conditional theory in tort cases for the analysis of causation between a deed of conduct and its result. The defendant shall compensate the plaintiff when the conduct of the defendant is the direct cause of the result, i.e., without the defendant's actions, the damage to the plaintiff would not have occurred. There are shortcomings with this, especially if the damage to the debtor arises from several causes. For instance, if a debtor becomes seriously ill because he/she had faced the pressures in connection with being short of money and being seriously harassed by a debt collector, it would be very difficult to prove whichever act caused the debtor's illness. If fact shows that the collector did not know of the debtor's illness, the collector will not be regarded as a tortfeasor and will not be liable.

The reasons mentioned above show that current wrongful act law is not sufficient to protect debtors who have been injured by unfair debt collection methods.

4.1.2 Limitations on Criminal law

The purpose of criminal law is to punish offenders who commit crime with criminal punishment and to keep criminals harbored away from society. This differs from the purpose of civil law which aims to protect the individual and compensate him/her for any damages resultant from a wrongful act. Therefore, criminal law protects debtor consumers with regards to personal safety, not restitution. Although criminal law may prohibit collectors from using unlawful methods, criminal law does not resolve the damage in which debtors suffer. Therefore, the consumer debtors still suffer damages that arise from unlawful debt collection methods.

Moreover, in criminal proceedings, the burden of proof is an important point because every crime is composed of criminal elements. Criminal cases usually

place the burden of proof of each element on the prosecutor or the asserting plaintiff. The accused will not be found guilty if this burden of proof is not sufficiently shown by the prosecution. The court requires enough evidence to find the defendant guilty beyond a reasonable doubt. If there remains reasonable doubt, the accused will be found not guilty. This poses complications to the plaintiff similar to that of previously-analyzed wrongful act law.

There are other significant shortcomings. Criminal law can not refrain collectors from motivation to commit crime as penalty fines are not high-enough incentives to stop unfair collection practices. Most collection agencies are given remuneration from the real creditors as a proportion – a flat rate or a percentage – of the amount of debt that has been collected. The rate of remuneration is usually based on the period length of delinquency of owed debt. Typical remuneration of a collection agency for collecting consumer debt owed less than a year is 15 percent of the debtor's payment. If the debt owed is between two to five years, remuneration rates fall between 30 and 50 percent.⁸⁶ It is not uncommon for a collection agency to pursue 3 to 5 hundred thousand accounts per year. The average value of each account is about 50 thousand Baht, placing the total value of all debts at around 50 billion Baht. This means that a collection agency could be paid no less than 5 billion Baht in remuneration⁸⁷. This amounts to orders of magnitudes more than penalty fines in a criminal case. Therefore, most collectors are not entirely concerned with fines and continue to use unlawful methods for collecting debt. In conclusion, the application of criminal law does not have much bearing in solving unfair methods for collection of debt.

4.1.3 Limitations on Consumer Protection Law

Thailand currently has in effect law protecting the consumer which offers several advantages to consumers. Consumers can file lawsuits verbally through Thailand's legal system and are exempted from any court fees, however, under the Consumer Protection Act B.E. 2522 only four general areas of protection are covered: 1) Protection from false advertising.

⁸⁶ Thansettakij, (2-5 September 2007): 12.

⁸⁷ Thansettakij, (13-15 September 2007): 15.

- 2) Protection from false, unclear and inaccurate labeling.
- 3) Protection from unfair contracts taking advantage of consumers.
- 4) Protection from dangerous and harmful products and services.⁸⁸

However, the act does not protect consumers from unfair debt collection practices.

Moreover, section 3 of the Consumer Protection Case Procedures B.E. 2551 defines a “consumer case” as a civil case between a consumer or person entitled to file a law suit on behalf of the consumer and a business operator concerning rights and duties under law due to consumption of goods or services.⁸⁹ This means that when a credit card creditor sues a debtor for delinquent payments, interest and operational costs, it is considered a consumer case.⁹⁰ But by definition, a consumer case does not include unfair debt collection practices because they are not the disputes arising from consumption of goods or services. Therefore, Thai consumer protection act cannot be applied to protect the consumer debtor from abusive debt collectors.

4.1.4 Limitations on BOT notifications regarding the pursuit of debt repayment and the process of debt collection

As mentioned in Chapter 2, BOT has issued two notifications prescribing requirements, rules, procedures and conditions for the establishment of a credit card business – one for commercial banks and the other for non-banks. However, both notifications have the same regulations regarding the pursuit of debt repayment and the process of debt collection. Although these regulations take effect as law, limitations to these notifications remain. This affects the application of such rules and has direct influence in the conduct of credit card debt collection practices. Limitations exist in both the scope of application and within the actual contents of the regulations.

⁸⁸ Prateep Alwijitkun, Consumer Protection Law: Consumer Protection Act B.E. 2551 (Bangkok:Asiakit Packprint Publishing Co., 2008), p.36-37.

⁸⁹ Section 3 Consumer Case Procedure Act B.E.2551.

⁹⁰ The decision of President of Appeal Court no. 3/2551.

1. Limitations in the scope of application

At present, collection of debt can be widely divided into two categories, depending on the type of person exercising the right to collect the debt.

The first category is when creditors exercise their own right to collect the debt from their debtors by themselves. This includes exercising such right through their internal employees. Some credit card business operators collect their debt through a separate collection division or through an affiliated company.

The second form is the collection of debt via a third-party, outsourced service provider. Although the third-party is not the contractual party, the right to collect the debt of the creditor is not a personal right in which the creditor must only exercise this right by itself. The right to collect debt is in fact a relative right, in which the creditor can assign or contract a third party to exercise its right instead. This assignment is not the assignment of claims by the creditor, in which the debtor's consent is required.

Credit card business operators are increasingly hiring third-party collection agencies to collect their debt payments on their behalf. There are several reasons for this trend to continue in the foreseeable future. Firstly, as creditors acquire more credit card debtors, they do not have the skills necessary to collect overdue payments. Third-party collection agencies have access of modern technology allowing them to record, track and maintain relationships with debtors. Moreover, credit card debt is unsecured debt. If the creditor cannot collect the debt within specified period, it will affect the whole business as the debt will have to be written off as a company expense. Therefore, it is crucial that a creditor pursue the most effective and efficient means in collecting overdue payments. Third-party collection agencies are able to achieve more effective collections at a lower cost. Hence, outsourcing has become increasingly popular among credit card creditors. Third-party collection agencies can assume one of several legal classifications. They can be a natural person, a collection agency or a law office. The researcher has found that all of these parties are becoming increasingly interested in collecting consumer debts, especially unsecured debts.

Both BOT notifications are only applicable to credit card business operators, commercial banks⁹¹ and non-banks.⁹² This means that these notifications apply only to creditors and not third-party debt collectors and lawyers to which debt collection has been outsourced. It is immediately clear that current Thai law governing and regulating the collection of credit card debt is inadequate in its coverage.

2. Limitations in the regulatory contents

Regulatory contents of both notifications, like the scope of application, are the same. The rules and regulations on the pursuit of debt repayment and the processes of debt collection are provided in four sections. However, the contents stipulated within these four broad sections and are expressed in very general terms. Moreover, most regulations are focused on activities dealing with paper documents. For example, it is specified that a creditor has to send customer statements and other documents relevant to the owed debt to each consumer no later than 10 days before the due date⁹³ and that a creditor has to notify delinquent consumers by issuing a warning letter no later than 20 days before filing a law suit.⁹⁴ There are no specified rules that regulate other important activities in the collection of debt, such as verbal communication processes. For example, it is not specified during what times of day is it appropriate for creditors or debt collectors to make a personal phone call to the debtor. There are also no specifications of prohibited practices and unreasonable, unethical debt collection conduct. Therefore, this inadequacy easily permits debt collectors to violate debtor basic rights.

The researcher is of opinion that the rules and regulations on the pursuit of debt repayment and the processes and activities of debt collection should apply to third-party debt collectors as well and not only creditors. Moreover, the regulatory content needs to be revised to include regulations regarding all other

⁹¹ Section 3 Bank of Thailand Notification no. 16/2552.

⁹² Section 3 Bank of Thailand Notification no. 18/2552.

⁹³ Section 5.2.4 (3) Bank of Thailand Notification no. 16/2552.

⁹⁴ Section 5.2.4 (2) Bank of Thailand Notification no. 16/2552.

important aspects of debt collection in which contact with the debtor could lead to serious infringement of debtors' personal privacy and other civil rights.

4.1.5 Limitations on BOT guidelines concerning the collection of debt

In realization of the shortfalls of the two aforementioned BOT notifications, BOT has issued guidelines concerning the collection of debt with the intention to resolve the problem of unfair debt collection methods. Yet there still remains persistent resolve in such methods. A report from the Foundation for Consumers has stated that there are more than 2,000 cases of complaints claiming collection of debt practices in the violation consumer rights⁹⁵. It is clear that the guidelines issued by BOT are insufficient and ineffective against the prevalence of unwarranted debt collection practices. The following addresses four key limitations of the BOT guidelines in detail.

1. Lack of regulatory 'clout'

BOT issued this guideline in the form of a circular letter merely requesting cooperation from banks and non-banks to follow the guidelines regarding debt collection processes. In essence, the issued guideline was rightfully understood as not enforceable by law in any manner and under any circumstances.

The researcher is of opinion that this guideline will never be able to realize its intended purpose in full. It has no legal sanction as it is not a law. Therefore, most third-party debt collection agencies would not take and follow this guideline seriously, let alone creditors.

2. Limitations of application scope

As with the BOT notifications, this guideline is only intended for credit card business operators, commercial banks and non-banks. This again means that it is not intended to be guidelines for third-party debt collectors and lawyers to which debt collection has been outsourced. It is once again clear that current

⁹⁵ Mr. Eitiboon Ounwongsa, The head officer of consumer protection center, Trong Pao khao Praden TV Program, Channel NBT, 30 October 2009.

intentions in governing and regulating the collection of credit card debt are inadequate in its coverage.

3. Regulatory content

There are some unresolved conflicts within this BOT guideline. Each provision defines that both credit card business operators and debt collection service providers have to follow the rules and procedures stipulated in this guideline, while the scope of application clearly defines that this guideline only applies to credit card business operators. This may lead to the argument that this guideline is not applicable to debt collection service providers.

In addition to the conflicts above, the content indicating the appropriate times and frequency for a collector to contact a debtor is determined as a fixed provision. According to the provision, the collector can only contact the debtor between 8:00 AM and 8:00 PM on working days and between 8:00 AM and 6:00 PM on holidays. The provision has not incorporated any flexibility. Strictly applied, this provision could lead to complications with the collection of debt from some debtors. For example, a particular debtor may work during night hours and this leads him/her to rest during the day. Under such circumstances, if a collector were to call him/her during the stipulated hours, it would be of much inconvenience to the debtor.

4. Lack of sanction

The BOT guideline indicates that should a creditor decide to outsource debt collection to a third-party debt collection agency, the creditor – as though it was performing debt collection itself – shall be liable for any damage arising from unacceptable debt collection activities performed by the collection agency on a debtor. However, the BOT guideline does not provide any further level of detail on the range or the depth of creditor responsibility in such arrangements. There is no definition of what a creditor's responsibility actually is. And even if the aforementioned points were incorporated, the guideline has no sanction to punish the creditor in the case of violation of the BOT guideline.

Furthermore, the BOT guideline also stipulates that the creditor shall evaluate the operating performance of the third-party debt collection agency

and whether the agency complies with the guideline. The evaluation is to be considered by the creditor as a key criterion when contract renewal is under consideration. In the opinion of the researcher, this stipulation is by no means binding. If the third-party agency engages in unfair debt collection practices, the creditor cannot be enforced to terminate the contract even if the creditor has evaluated the agency as such. The creditor can freely choose whether of not to continue or renew a contract independent of a performance evaluation. This point within the guideline is extremely weak in being able to accomplish what it was intended to. A third-party agency engaging in unfair debt collection practices is more likely to collect and recover larger sums of over due payments from debtors. This is an attractive situation for any creditor, giving substantial incentive to continue doing business with these types of agencies. If a creditor actually does abide with the guideline and terminates its contract with a debt collection agency using unfair practices, the agency can easily find work elsewhere with another creditor. It is common for a creditor to engage multiple third-party debt collection agencies at a time, and as mentioned previously outsourcing debt collections is an increasingly popular option for creditors.

4.2 Advantages and disadvantages of having law specifically regulating credit card debt collection

As previously mentioned in this research paper, Thailand does not have specific law regulating the collection of credit card debt. The protection of debtors' rights is covered generally in other laws currently in effect. However, such laws do not adequately protect individual debtors from unfair debt collection practices as such laws are applied for very different purposes. It is in the researcher's opinion that having a specific law regulating the collection of credit card debt will provide the necessary protection that individual debtors need from abusive and deceptive modes of conduct of debt collectors. In arriving to such an opinion the researcher has considered both the advantages and disadvantages of having law specifically regulating credit card debt collection.

Section 35 of Thai Constitution B.E.2550 clearly states that “a person’s family rights, dignity, reputation and the right of privacy shall be protected.” This is one of the basic rights and liberties of the Thai citizen. This is an element at the core of democracy and citizens should be protected from such depravities. Common methods of unfair debt collection – such as undue harassment, injury of a debtor’s reputation, deception, threatening of a debtor’s safety and many others – are methods of abuse in which large companies and organizations have taken advantage of the unknowing consumer. These methods are clearly in violation of Section 35 and should be prevented. Thailand has many other laws that protect the rights of individual consumers, but not against debt collectors. It has been shown in the previous section that what Thailand has in place today is nowhere near adequate.

Most debtors enter into a consumer loan contract with the sincere intention to repay the creditor. Often times consumers get behind on their payments due to lack of proper financial planning and to circumstances that are often beyond their control, such as loss of a job, the sudden sickness of a family member, a personal accident or other unforeseeable emergencies that require the debtor to allocate a considerable portion of his/her wealth first for survival and self-preservation purposes. Under such common circumstances and with such initial intentions, it is by no means acceptable for a business or corporation to further complicate a debtor’s life with derogatory practices causing the loss of reputation and/or safety. Such practices most often have longer term consequences such as marital breakups, reactionary crime leading to imprisonment or self-inflicted mental or physical harm.

Having law regulating credit card debt collection will mitigate consumer exposure to unfair practices and also offer means for the individual debtor to respond and refute undue claims against him/her. Debtors will be given adequate and clear notifications of intent of creditors to pursue overdue payments, giving debtors enough time to consider options of repayment. All documentation will be comprehensive and accurate. If not, debtors will be given the right to refute, ensuring debtors will not be exposed to false and inaccurate obligations and accusations. Collectors will communicate with debtors in a professional and considerate manner to avoid debtors from being harassed. And finally, debtors right to privacy will be

upheld at all times, protecting him/her and those close to him/her from loss of reputation.

Debtors are not the only stakeholders to benefit from such law. Creditor and credit collection agencies who practice fair collection methods serve to gain from fair competition. Allowing some creditors and collection agencies an unfair advantage in debt collection will render fairer companies less profitable and less competitive. This imbalance in competitive advantage leads the industry of debt collection into a vicious cycle where only those creditors and credit agencies who engage in unfair collections are profitable and survive. Those who are fair are unprofitable and exit. This encourages the further prevalence of unfair debt collection practices. We see this today as debtor harassment continues to grow.

Those opposing the enactment of specific law regulating credit card debt collection have made strong arguments against it. Many in the credit industry have taken the stance that if such a law is in place, individual debtors will increasingly file frivolous lawsuits against creditors and collection agencies and seek damages for minor technical violations. They argue that this could seriously impede their ability to collect valid debts, especially if regulating law and its provisions are developed in a strict liability nature. Moreover, opponents of such litigation argue that strict laws regarding debt collection will lead to increases in non-performing loans, leading to an increased rate of write-offs for creditors. This of course affects the bottom line of businesses.

The above effects will lead to less credit card loan balances being issued in two regards as creditors argue that strict regulations will increase the exposure to risk for creditors. First, to compensate for this risk creditors will be forced to increase interest rates. Secondly, the rate of credit card loan approval will also fall as creditors would be less willing to lend money. This would mean that consumers will be granted stunted access to goods by virtue of higher effective prices and leading to diminished consumption with fewer purchases. Opponents of such legislation ultimately argue that laws regulating debt collection will limit its role in keeping prices low and ensuring that consumer credit remains widely available and affordable.

In summary, for debtors, passage of debt collection regulating law is a consumer rights issue. Without such law being passed, debtors will continue to be

the subject of poor treatment from collectors who would use any means necessary to force payment. Consumers need to be protected against this and also be offered the legal means to fight back and sue collectors for damages resulting from violation. However, the credit industry has argued that if such law is passed, consumers are the ones who would ultimately have to pay with higher prices – to cover increased risk and operating costs – and decreased access to affordable debt.

After considering both arguments, it is still in the researcher's opinion that specific law regulating the collection of credit card debt be enacted. Protection of individual rights is the pillar of democracy and should be upheld at any cost. Such a law will also further promote fair competition within the credit industry. With the sincere intention of most debtors to repay their debts, if delinquent debtors are treated in a professional, considerate manner and given alternative options to repay, most will be willing to cooperate. Moreover, the increased costs argued by the credit industry will balance itself through the economic mechanics of the competitive market. In conclusion, the social and competitive benefits of specific law far outweigh the potential increases in economic costs to individual creditors.

4.3 Significant contents of law regulating credit card debt collection

This section of the research paper delineates the contents that should be enacted within the law specific to regulating credit card debt collection.

4.3.1 Scope of application

In the United States, the FDCPA is applicable only to third-party debt collectors to which collection is outsourced. It is not applicable to creditors, which has been defined as any person who offers or extends credit creating a debt or to whom a debt is owed, but not any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

A “debt collector” – which is governed by FDCPA – must meet at least one of the following criteria:

- 1) Any person who undertakes a business in which the principal purpose of the business is the pursuit and collection of any type of debt.
- 2) Any person who regularly collects or attempts to collect the debts of another.
- 3) Repossession companies who seize any collateral belonging to debtors without legal ground.
- 4) A creditor who uses a name other than his own in the collection of debt, including a creditor who collects debts for another creditor.
- 5) An attorney who regularly practices the collection of debt.
- 6) A person who furnishes certain deceptive forms or documents used in fraudulent collection methods

But a “debt collector” does not include the following persons:

- 1) Officers and employees of the creditor engaging in the collection of debt in the name of the creditor.
- 2) Affiliated companies of the creditor.
- 3) Officials or employees of the United States or any state.
- 4) Operational processing service personnel.
- 5) Non-profit debt counselors.
- 6) Any person collecting any debt owed to another to the extent such activity is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; concerns a debt which was originated by such person; concerns a debt which was not in default at the time it was obtained by such person; or concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

In Thailand, there is no specific law concerning the collection of debt. The BOT guideline is currently the only form of debt collection regulation. Whereas the application scope of the FDCPA of the United States applies only to third-party debt collectors, the BOT guideline applies only to commercial banks and non-banks.

The researcher is of the opinion that the application scope of the new Thai law should cover both credit card creditors and third-party debt collection agencies. This application scope will help protect debtors from unfair debt collection practices as both creditors and third-party debt collectors engage in debt collection.

Although creditors are governed by the BOT guideline, it is not effective as law. Therefore, most creditors do not comply with the guideline. Even if debt collectors are a party in the credit card contract, the law allows them to exercise the right to collect the debt of the creditor through a hire of work contract or an agent contract. There is no measure to restrict unfair debt collection stemming from outsourced debt collectors. Therefore, it is necessary to seriously govern debt collection, whether it performed by creditors or debt collectors. To enact a law applying to both types of persons will set an equivalent standard in the collection of credit card debt.

It is of most importance to clearly define the term “creditor” and “debt collector” that will be governed by the new law.

The following persons should be classified as a “creditor” in accordance with the new law:

- 1) Commercial banks operating in the credit card business.
- 2) Non-banks operating in the credit card business.
- 3) Any person who receives an assignment or transfer of credit card debt. Today, businesses that purchase delinquent or “bad” debt at a discount from original creditors are growing. Then, these businesses pursue the collection of the debt payments which are typically accounts that are harder to collect. With substantial initial discounts, the purchaser can turn a healthy profit if it is successful in its debt collection activities. This leads to these businesses often resolve to unfair methods in debt collection. Therefore, these persons should also be governed by a notification.

A “debt collector” should include any person engaged in debt collection for another person or entity. This applies to any natural person and any business entity, such as a debt collection agency or a law office.

However, since under certain circumstances, some people who conduct debt collection should not be liable under the new law. Using the FDCPA as a guideline, the term “debt collector” should not include the following persons

- 1) Any officer or employee of the government to the extent that collecting or attempting to collect any debt is in the performance of his official duties such as a comptroller in bankruptcy.

2) Any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt.

Other exceptions stipulated in FDCPA are not applicable to the situation and problem in Thailand and are therefore not necessary.

4.3.2 Scope of protection

In the United States, the FDCPA aims to protect consumers. Although the FDCPA protects debtors from abusive, deceptive and unfair debt collection practices by many debt collectors, it does not protect all related stakeholders. The FDCPA protects only consumer debtors because the definition clearly provides the term “consumer” to be used instead of the term “debtor”. A “consumer” refers to any natural person, and not a juristic person, who is obligated or allegedly obligated to pay any debt. The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of transactions which the subject of the transaction are primarily for personal, family, or household purposes.

However, unfair debt collection not only directly affects the consumer debtor, but could also affect a third person – whether that person is related to the consumer debtor or a person who is unrelated but allegedly obligated to pay a debt. The words “any person” are used to define the term “consumer” which allows the application to extend the protection also cover third persons whose privacy rights are invaded. As the FDCPA aims to restore all damages arising from debt collection, these third-person consumers can also demand compensation from debt collectors regarding damages to them.

In Thailand, there is only one law regarding credit card debt collection where the term “consumer” appears: the Ministry of Finance Notification Re: Businesses Requiring Operating Permits. Such law empowered the Bank of Thailand to issue the Notification on Prescription of Rules, Procedures, and Conditions for Credit Card Business Operation of Non-Banks, which is currently in effect. Within the Ministry of Finance Notification the definition of the term “consumer” is referred to that which is defined within the Consumer Protection Act B.E. 2522. Therefore, it is necessary to consider this definition therein.

According to the Consumer Protection Act, “consumer” means a person who buys or obtains services from a business operator or a person who has been offered or invited by a business operator to purchase goods or obtain services and includes a person who duly uses goods or obtains services from a business operator even though he or she is not a person who pays the remuneration. Under this definition a consumer is offered broader protection than Thai contractual law as it also protects a person who is not the contractual party to a business operator. However, there is a problem with this legal interpretation. It is unclear whether a juristic person should be protected under the Consumer Protection Act since the strict definition does not stipulate that only a natural person and not a juristic person can buy or obtain services from a business operator. Therefore, a juristic person should also be protected in the likes of a natural person.

The researcher is of the opinion that although the definition of consumer under the Consumer Protection Act has its advantages, its strict definition may not be suitable for the new credit card debt collection law. A “consumer” under the Consumer Protection Act refers to a person who buys or obtains services from a business which does not translate to a person obligated or allegedly obligated to pay debt. Moreover, using such a definition may lead to a problematic interpretation of a juristic person as aforementioned. On the other hand, the FDCPA definition of a consumer is most suitable as it protects not only a natural person, but also a natural person allegedly obligated to pay any debt. Therefore, Thailand should adopt the FDCPA’s definition of consumer into the new law. However, the term “consumer” under the new law should also include a juristic person in addition to FDCPA’s definition of only a natural person. There are reasons that a juristic person should also be protected. Today, in addition to consumers, business entities can also be cardholders; for example, business credit cards or corporate credit cards. Business credit cards are issued to civil servants or the staff of government agencies, state enterprises, or enterprises whereby the said institutions will be responsible for all debt payments arising from such credit cards. Whereas an enterprise means private companies, public companies, limited partnerships, registered ordinary partnerships, other juristic persons, or non-registered partnerships. Therefore, a juristic person can also be a credit card debtor. To protect both a natural person and a juristic person

from exposure to unfair practices similarly should be most effective and comprehensive.

Under the new law regarding a credit card debt collection, a protected “consumer” means any person – natural or juristic – obligated or allegedly obligated to pay credit card debt.

4.3.3 Required debt collection practices

The following are the generally accepted practices regarding credit card debt collection that should be included in the new credit card debt collection law.

1. Communication with the Consumer

Thailand has no provision of law concerning the period of time and place for communication with the consumer in during debt collection. There is only the BOT guideline where it is recommended that a debt collector can communicate with the debtor between 8:00 AM and 8:00 PM from Monday to Friday and between 8:00 AM and 6:00 PM on weekends and official holidays. However, such strict prescriptions may lead to inflexibility resulting in inconvenience to the debtor. For instance, many debtors have to work during nights, requiring them to rest during the daytime. Such individuals will be inconvenienced by recommended practices of the BOT guideline.

In contrast, the FDCPA does not stipulate a specific time to communicate with the debtor. It allows the debt collector flexibility in determining when a convenient time and place for the debtor should be. If this information is not known to the debt collector, the FDCPA assumes the most convenient time for communication is between 8:00 AM and 9:00 PM.

The researcher is of the opinion that the new law would be more effective if it could allow flexibility for the debt collector to use his/her knowledge of the debtor to determine the most convenient time and place of communication with the debtor. However, a specific time as prescribed by the BOT guideline should also be provided as the default assumption in cases where the debt collector has no knowledge of the most convenient time or place for the debtor. In addition, the debt

collector shall identify him/herself and state the purpose of communication in every verbal contact with the debtor.

The new law should contain provisions stipulating that “a creditor or debt collector shall communicate with a consumer in connection with the collection of any credit card debt at a time and place known or which should be known to be convenient to the debtor. In the absence of knowledge of such circumstances, the convenient time for communication with a debtor shall be assumed to be between 08:00 AM and 08:00 PM. In communicating with a debtor, a creditor or debt collector shall clearly identify him/herself and state the purpose for such communication.”

2. Communication with third parties

At present, many third parties – despite not being the actual debtor – rights have also been violated by the use of unfair debt collection practices. Examples of third parties are consumers’ employers or consumers’ relatives and family members. Therefore, third parties should also be protected as with consumers. In general, a creditor and a debt collector should not communicate with any person other than the debtor. However, there should be some exceptions permitting communication with a third party, such as communication with the purpose of acquiring information of the consumer debtor’s location including his/her place of abode, place of employment. Another exception is when there is the consent of consumer or the right permitted by law.

This provision should be provided as the following clause: “A creditor or debt collector shall not communicate with any person other than a consumer in connection with the collection of any debt unless communicating for purpose of acquisition of consumer’s location information or there is the consent of consumer or the right permitted by law. In communicating a creditor or a debt collector shall:

(1) identify himself

(2) not state that such consumer owed any debt

(3) not communicate with any such person more than once unless there is a reasonable belief that such person now has correct or complete location information

(4) not communicate by post card

(5) not use any language or symbol in any communication that indicates that the communication relates to the collection of a debt”.

3. Notifying the right to dispute the validity of debt

In the United States, the debt collector must notify the consumer of all relevant information to the debt and of the right to dispute the validity of debt in conjunction with initial communication or within five days from the initial communication. The notice contains the amount of the debt, the name of creditor, the right to dispute the validity of debt or any portion of debt in writing within thirty days and statement notifies that if the consumer fails to dispute the validity the debt, such debt will be assumed to be valid.

In Thailand, both BOT notifications governing banks and non-banks have content similar to that of the FDCPA regarding the requirements in notifying the consumer debtor. If the demand for debt repayment is a warning to a debtor before debt maturity, BOT stipulates that the notification requires only the minimum amount due and the minimum number of days before the due date in which a statement must be sent to the debtor. The debt collection process requires that the debt collector send a warning letter before pursuing legal action and canceling the credit card if the cardholder has not made payments of the debts for over 3 months.

The researcher is of the opinion that rules for demand for payment through the issuance of a notification are for performing debt and include general information on this debt. They are not used for debts in default. Even though sending a warning letter mentions the outstanding amount, the purpose of the warning letter is to enforce payment within 20 days after sending such warning letter. After these 20 days the creditor has the right to pursue legal action. Despite the BOT guideline recommending the amount of debt, period of arrears and the expense of collection be included in the warning letter, a warning letter does not give a consumer the power to dispute the validity of the debt. Therefore, Thailand does not have law allowing the debtor to dispute the validity of the debt. Thus, rules for disputing the validity of debt should be applied in the new law because there are multiple cases where the

collectors pursue payments from a person who is of no relation to the debt or the amount of debt in pursuit is inaccurate.

4. Ceasing communications in the collection of debt

In the United States, ceasing communication for the collection of debt under the FDCPA can be divided into two scenarios as follows;

1) Temporarily ceasing communication will occur when the debt collector has received a written notice disputing the validity of debt from the consumer. The debt collector shall cease any communication in connection with debt collection until the debt collector has obtained verification of debt and such verification has been mailed to the consumer.

2) Strictly ceasing communication will occur when the debt collector has received a written notice stating that the consumer refuses to pay a debt or the consumer wishes the debt collector to cease further communication. The debt collector shall cease to communicate further with the consumer unless (1) to advise the consumer that further debt collections are being terminated or (2) to notify the consumer that the debt collector or creditor may invoke specified remedies (3) to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

In Thailand, there is no law allowing the consumer to cease communication with debt collectors. There is only a rule of practice regarding complaints prescribed by the BOT notification which provides that credit card business operators should conduct investigations when consumers make complaints regarding the use of credit cards. However, it is not regarding the dispute of validity of credit card debt. In part of guideline, there is a rule of setting up a complaint system which provides that the business operator must have a policy, process, and management in place for any complaint from the debtor regarding to the collection of debt. It is again not, however, regarding the dispute of validity of credit card debt.

The researcher is of the opinion that temporarily ceasing communication should be applied in the new law because it is an appropriate mechanism in connection with the right to dispute the validity of debt of the consumer as mentioned. The consumer should be entitled to dispute the validity of

his/her debt and after he/she has exercised this right, the debt collector should cease all debt collection activities until the examination is complete and the verification document is mailed to the consumer. On the other hand, a strict ceasing of communication should not be applied in the new law because it is accepted that most Thai consumers do not have a good understanding of exercising their rights. If a large number of consumers exercise the right to cease all debt collection activities in bad faith at the same time, creditors and the debt collectors will be substantially impacted. Since creditors will not receive the payments from these debtors and cannot pursue debt collection, the last resolve for the creditors is to bring the cases to court for enforcement. This will lead to caseloads. However, if the new law takes effect for a certain time and it has been understood to not be able to solve the use of abusive, deceptive, and unfair debt collection practices, the law may be amended to incorporate a strict ceasing of communication right later. This should encourage more business operators to adopt the new law.

4.3.4 Prohibited debt collection practices

In the United States, the FDCPA prohibits the debt collector from conducting collection practices with any of the following natures:

1. False or misleading representations, such as the false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State or an attorney or that any communication is from an attorney such as sending a debt collection letter by using attorney's symbol. This also includes the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

2. Unfair practices, such as the collection of any amount that is not expressly authorized by the agreement creating the debt or permitted by law or communicating with a consumer by post card.

3. Harassment or abuse, such as the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person, the use of obscene or profane language, causing a telephone call to ring repeatedly or continuously with intent to annoy, abuse, or harass any person.

Even though Thailand does not have a specific law governing debt

collection, it has a criminal law which is a general law to govern the unlawful conduct used by many debt collectors. There are several offenses that can be applied to protect consumers, such as Offences against Life and Body as provided in Sections 288-308, Offences against Liberty and Reputation as provided in Sections 309-333, Offences against Property as provided in Sections 334-336, Petty Offences as provided in Section 367-398.

Also, as part of the BOT guideline, there are several categories on prohibited debt collection practices. The guideline prohibits the following conduct of debt collection: (1) The collection of debt from any person who is not the debtor.

(2) The use of violence to harm the physical body, reputation or property of the debtor.

(3) The use of false or misleading representations.

(4) Threatening the debtor.

(5) Harassing the debtor without reasonable ground.

(6) The use of obscene or profane language.

The researcher is of the opinion that the application of criminal law is too broad. To apply criminal offenses with debt collection conduct, it is necessary to consider whether such conduct meets all the external elements of any offense. As previously mentioned, the FDCPA divides many of the prohibited practices into specific categories, depending on its nature. Within in each category, there are many examples of specific actions that qualify as prohibited practices. This makes it easy to interpret if the practice in question is in violation of the law and less time is wasted on interpretation, as is not the case for Thai criminal law today. In addition, the FDCPA defines the term “any” and the term “without limiting” as any practice that, by nature, that may be classified into any of the three categories. Therefore, the FDCPA can be easily expanded to prohibit other unforeseeable practices that could occur in the future. This definition has many advantages. Despite some of the FDCPA concepts being incorporated into the BOT guideline, it is not considered law and has no legal sanction.

In issuing a new law, the rules of the prohibited practices in connection with a debt collection should also be divided into categories depending on the nature of the debt collection methods as with the FDCPA and the BOT guideline. There are

at least three categories of the prohibited practices which should be applied as follows:

- (1) Harassment or abuse.
- (2) False or misleading representations and
- (3) Unfair practices.

Each category should contain two main. The first part should provide the general concept emphasizing on the nature of a debt collection method whether it is harassment, abusive, unfair, false or misleading practice. The second part should provide the examples of prohibited practice. Since there are several methods or forms that expose a consumer to harm, pressure or abuse, to list all debt collection methods is impossible and may lead to the inflexibility of application. However, to list some examples of the prohibited practice should be taken into account because it is easy to understand what methods are prohibited and no time is wasted to interpret whether the debt collection method in question has violated the prohibited practices. The examples listed should represent most common methods of unfair collection as complained by the consumers.

The following categories should be stipulated as prohibited practices regarding collection of debt in this new law:

1. Harassment or abuse. Some debt collection methods do not meet the requirements under criminal or civil law, such as communicating with the consumer at a time or place which known to be of inconvenience to the consumer or communicating with consumer with the intent to annoy or disgrace the consumer, both methods of undue harassment of common use by debt collectors. Most creditors and debt collectors always use those conducts to coerce for payment.

2. False or misleading representations. Many consumers are not fully educated in the legal process. Some creditors or debt collectors always take advantage from such disparity. For instance, the debt collector may claim that if the debtor does not pay the debt, he will be arrested or faced imprisonment, implying the non-payment represents a crime. To prohibit such practices will be useful for consumers. However, there should be some exceptions on the normal exercise of a

creditor's right⁹⁶, such as should the creditor or debt collector notify that if the debtor does not to pay the debt, the creditor will take a further legally action, even it is not intended to be taken. Therefore, to notify the normal exercise of a right should not be considered as violation of this provision.

3. Unfair practices. This provision is enacted as a sweeping clause in order to apply with other practices which are not mentioned in two previous provisions. Moreover, it can apply with new methods which could occur in the future.

4.3.5 Penalties

In the United States, the FDCPA punishes a debt collector who fails to comply with its provisions by imposing civil liability. Such debt collector shall be liable to pay a consumer in an amount equal to sum of the actual damages and additional damages. Actual damages are real damages to compensate for consumer's injuries that have actually occurred. Additional damages are the additional amounts of money that the court orders the debt collector to pay a consumer as punitive damages. However, additional damages will be limited as not exceeding 1,000 Dollars in case of action by an individual or not exceeding 500,000 Dollars in case of class action.

In Thailand, since there is no a specific law regarding the collection of debt, once unfair methods have been used by the creditor or debt collector in collection of debt, the general laws such as criminal law, tort law will be applied case by case. For civil liability, the debt collector shall be liable to pay compensation if his debt collection practice meets the all requirements under tort law. For criminal liability, the debt collector shall be punished with imprisonment or fined or both depending on each offence if his debt collection practice meets all elements of offence. However, there are many debt collection methods that do not meet the requirements in accordance with tort law and criminal law. Therefore there should have some penalties to punish the debt collector when using unfair methods for collection of debt.

⁹⁶ Section 165 Thai Civil and Commercial Code.

The researcher is of the opinion that to best motivate the application of rules and procedures for collection of credit card debt, including the prohibited practices, provided by the new law, penalties should be stipulated to punish anyone who violates or fails to comply with such rules and procedures. The penalty should include not only a fine, but also imprisonment or both. Having the appropriate level of fines and imprisonment potential will help to ensure proper engagement and exercise of the law, ultimately serving to protect the consumer from unfair collection practices.



Chapter 5

Conclusion and Recommendation

To conclude this research paper, this chapter summarizes the findings and analyses of all previous chapters. To ultimately resolve unfair credit card debt collection practices, specific recommendations for a new Parliamentary Act governing such practices are made along the scope of its application, definitions, accepted and prohibited practices, and penalties.

5.1 Conclusion

According to the Civil and Commercial Code, Section 194 provides that by virtue of an obligation, a creditor is entitled to claim performance from a debtor. A debtor in turn has the duty to fulfill his/her debt obligation. In the case of debtor default, the creditor is entitled to file a lawsuit against and sue the debtor. However, it has been shown to be increasingly popular for creditors to pursue the payment of debt from the debtor – either through its own operations or by outsourcing the debt collection activities to a third-party debt collection agency. Nevertheless, there is still no Thai law specifically regulating credit card debt collection, let alone debt collection in general.

Without law regulating such activities and ever increasing economic motivators, creditors and third-party debt collectors resolve to unfair methods for credit card debt collection to expose extreme pressure to a debtor in a short amount of time to coerce payment. Undue harassment of a debtor, invasion of a debtor's privacy rights, injuring a debtor's reputation, threatening life, body, liberty or property of a debtor, fraudulent or misleading representations or collecting from a third person who is not the actual debtor are some common malicious practices exercised by debt collectors today. These methods violate the individual rights of the consumer debtor and ultimately have negative consequences to the economic and social stability of the Thai society as a whole.

The Bank of Thailand has been empowered by the Ministry of Finance to oversee the credit card industry. Despite having industry regulations in place, there

currently exists no law that specifically pertains to the processes of credit card debt collection. BOT has issued to notifications that are somewhat related to debt collection, but it has been shown by the researcher that both notifications are very general in nature and do not tackle the issues of unfair debt collection practices. In realization of the shortcomings of the notifications, BOT further issued a debt collection guideline. But as there is no legal sanction associated with this guideline, debt collectors are able to take it merely at face value. Moreover, neither the notifications nor the guidelines are intended for third-party debt collection agencies – they are applicable to banks and non-banks only. Therefore, these attempts by BOT have been anything but sufficiently adequate and effective in solving the problems of unfair credit card debt collection practices.

In stark contrast, the United States of America enacted its Fair Debt Collection Practices Act in 1977 with the explicit purpose of protecting US consumer debtors from the use of abusive, deceptive and unfair debt collection practices by debt collectors. This Act stipulates comprehensive rules and procedures for proper debt collection practices, including accepted and prohibited practices and fines and penalties for violations.

In addition to the aforementioned BOT notifications and guidelines, the researcher has studied in great depth the current limitations of current Thai laws in place, ranging from the Civil and Commercial Code, to the Penal Code, to Consumer Protection Law. Within laws regarding wrongful acts, application of conditional theory in tort cases leads to complications as it is extremely difficult to establish direct causal relationship among the actions of the debt collector and the damages incurred by the debtor. Under penal law, the burden of proof is bestowed upon the plaintiff, who is more than often incapable of capturing admissible evidence against a debt collector. Moreover, the penalty fines under the penal code are not substantive enough to offset the potential gains in collecting payments and are therefore unable to deter unfair collection practices. And finally, under consumer protection law, consumers are protected only from unfair engagement in transactions related to purchase of a good or service from a business entity and does not apply to the practices of collection of overdue payments for such services. It is clear that current

law is unable to fully protect and compensate victimized debtors from unfair credit card debt collection methods.

Acknowledging the shortcomings of the aforementioned laws, along with the advantages and disadvantages of the US FDCPA, alternatives to the resolutions of unfair credit card debt collection practices have been weighed and assessed.

5.2 Recommendation

The researcher strongly proposes that Thailand develop and enact specific law governing and regulating the procedures and conditions for credit card debt collection in the form of a Parliamentary Act. Contents stipulated in the act are recommended with the intention of addressing inadequacies of the current Thai laws and applying appropriate concepts from the FDCPA.

The following contents are those that should be enacted in conjunction with the new act – at a minimum:

1. **This Act should be applicable to both creditors and debt collectors.**

1) The term “creditor” shall be clearly defined such that it encompasses any person or entity who undertakes credit offering operations in the credit card industry, including any person or entity to which debt is transferred via an assignment or transfer at any time.

2) The term “debt collector” shall be clearly defined such that it encompasses any person or entity conducting the debt collection activities, whether it be for itself or for another person/entity in which it was assigned at any time.

However, the term shall not include any officer of the government nor any person while serving in a legal process in connection with the judicial enforcement of any debt.

1) Debt to be covered by this act should be of any debt arising from, or in connection with, the use of a credit card to complete the transactional purchase of a product or service

2) A consumer who is protected by this act can be either a natural person or a juristic person; but such person shall be obligated or allegedly obligated to pay credit card debt.

2. This Act should stipulate the required practices for credit card debt collection as follows:

1) Communication with a consumer debtor shall be conducted at any time and any place known or which should be known as convenient for the debtor. In the absence of knowledge of the circumstances, the convenient time for communication shall be assumed to be between 8:00 AM and 8:00 PM. In communicating, the debt collector shall identify his/herself and indicate the purpose for such communication.

2) Communication with any person other than the consumer debtor shall be prohibited unless the purpose of communication is to acquire the debtors location information, the debt collector has the consent of the debtor, or it is permitted by law. In communicating, the debt collector shall identify him/herself, refrain from stating that the debtor owes such debt and not use any language of verbal hint that indicates such communication relates to the collection of owed debt.

3) The consumer debtor shall receive a written notice delineating details of the amount of debt owed and the right of the debtor to dispute the validity of debt along with the appropriate procedures of doing so. If the debtor or alleged debtor disputes the validity of the debt in writing within 30 days of receipt of the notice, communication with the debtor shall be ceased temporarily until the creditor or debt collectors obtains verification of the debt and a copy of such verification is mailed to the consumer.

3. This Act should prohibit the following practices, along with examples of such practices that are in violation of the Act:

1) Any practices with the intent to harass, oppress or abuse any person into payment of debt

2) The use of false, deceptive or misleading representation or means in connection with the collection of debt

3) The use of any unfair or unreasonable practices in connection with the collection of debt

4. This Act should stipulate the punishment as follow:

A person or entity that violates or fails to comply with the Act shall be liable to a fine not exceeding 500,000 Baht or imprisonment not exceeding 1 year or both. The violator shall be further fined in the amount not exceeding 10,000 Baht per day for every consecutive day during which such violation continues or until rectification has been made or both.





THE UNITED STATES OF AMERICA

THE FAIR DEBT COLLECTION PRACTICES ACT

As amended by Pub. L. 109-351, §§ 801-02, 120 Stat. 1966 (2006)

As a public service, the staff of the Federal Trade Commission (FTC) has prepared the following complete text of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p.

Please note that the format of the text differs in minor ways from the U.S. Code and West's U.S. Code Annotated. For example, this version uses FDCPA section numbers in the headings. In addition, the relevant U.S. Code citation is included with each section heading. Although the staff has made every effort to transcribe the statutory material accurately, this compendium is intended as a convenience for the public and not a substitute for the text in the U.S. Code.

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§ 801. Short Title

This title may be cited as the “Fair Debt Collection Practices Act.”

§ 802. Congressional findings and declaration of purpose

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 803. Definitions

As used in this title—

- (1) The term “Commission” means the Federal Trade Commission.
- (2) The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- (3) The term “consumer” means any natural person obligated or allegedly obligated to pay any debt.
- (4) The term “creditor” means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent

that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term “debt collector” means 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 another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) 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 the creditor.

(7) The term “location information” means a consumer’s place of abode and his telephone number at such place, or his place of employment.

(8) The term “State” means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 804. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney’s name and address, not communicate with any person other than that

attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

§ 805. Communication in connection with debt collection

(a) **COMMUNICATION WITH THE CONSUMER GENERALLY.** Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) **COMMUNICATION WITH THIRD PARTIES.** Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) **CEASING COMMUNICATION.** If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 806. Harassment or abuse

A debt collector may not engage 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.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) of this Act.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 807. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial

oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

§ 808. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 809. Validation of debts

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector

shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

§ 810. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 811. Legal actions by debt collectors

(a) Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

§ 812. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

§ 813. Civil liability

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or

(B) in the case of a class action,

(i) such amount for each named plaintiff as could be recovered under subparagraph (A), and

(ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad

faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) A debt collector may not be held liable in any action brought under this title 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.

(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 814. Administrative enforcement

(a) Compliance with this title shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this title is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any

person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Compliance with any requirements imposed under this title shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act, in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act, by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) the Acts to regulate commerce, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the

meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law, except as provided in subsection (d).

(d) Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title.

§ 815. Reports to Congress by the Commission

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title.

(b) In the exercise of its functions under this title, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

§ 816. Relation to State laws

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

§ 817. Exemption for State regulation

The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

§ 818. Exception for certain bad check enforcement programs operated by private entities

(a) In General.—

(1) TREATMENT OF CERTAIN PRIVATE ENTITIES.—Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 803(6), with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) CONDITIONS OF APPLICABILITY.—Paragraph (1) shall apply if—

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—

- (i) complies with the penal laws of the State;
- (ii) conforms with the terms of the contract and directives of the State or district attorney;
- (iii) does not exercise independent prosecutorial discretion;
- (iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain Checks Excluded.—A check is described in this subsection if the check involves, or is subsequently found to involve—

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions.—For purposes of this section, the following definitions shall apply:

(1) STATE OR DISTRICT ATTORNEY.—The term “State or district attorney” means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1, United States Code), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) CHECK.—The term “check” has the same meaning as in section 3(6) of the Check Clearing for the 21st Century Act.

(3) BAD CHECK VIOLATION.—The term “bad check violation” means a violation of the applicable State criminal law relating to the writing of dishonored checks.

§ 819. Effective date

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

Legislative History

House Report: No. 95-131 (Comm. on Banking, Finance, and Urban Affairs)

Senate Report: No. 95-382 (Comm. on Banking, Housing and Urban Affairs)

Congressional Record, Vol. 123 (1977)

April 4, House considered and passed H.R. 5294.

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99-361 (July 9, 1986)

101-73 (Aug. 9, 1989)

102-242 (Dec. 19, 1991)

102-550 (Oct. 28, 1992)

104-88 (Dec. 29, 1995)

104-208 (Sept. 30, 1996)

109-351 (Oct. 13, 2006)



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