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West Virginia Consumer Protection Changes Don't Necessarily Track Federal Law

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Governor Tomblin recently signed into law ***S.B. 542*** that amends several debt servicing and collection provisions of the ***West Virginia Consumer Credit and Protection Act (the "WVCCPA")***. The amendments, which variously take effect in June (unless otherwise specified) and September (when specified, such as for the revised limitations periods), significantly affect how consumer claims against creditors and debt collectors will be litigated in West Virginia.

The initial proposed legislation amending West Virginia's debt collection laws attempted to mirror significant portions of the Fair Debt Collection Practices Act, 16 U.S.C. § 1692 (the "FDCPA"). Typically, most creditors rely on the restrictions found in the FDCPA to develop their applicable policies and procedures as well as training programs to ensure compliance with debt collection laws. Those FDCPA-based policies normally would be sufficient for a creditor to collect debts lawfully in most states. Policies geared toward complying with the FDCPA, however, are not sufficient to ensure compliance with the WVCCPA, even with recent amendments.

In most respects, the FDCPA and the WVCCPA are remarkably similar. Both statutes contain prohibitions on harassment and abuse, prohibitions on deceptive or misleading representations, and prohibitions on certain unfair practices. Most notably, the WVCCPA and the FDCPA both contain prohibitions on contacting consumers represented by attorneys and contain similar remedy provisions.

Despite their similarities, there are unique differences which create substantial challenges for creditors attempting to collect a debt in West Virginia. For example, a creditor collecting its own debt is not deemed a debt collector under the FDCPA. Language was proposed that would have included the same exception under the WVCCPA, but that language did not survive. Due to that language not surviving, the WVCCPA still defines a creditor collecting its own debt, including a bank, as a debt collector. W. Va. Code § 46A-1-101.

Another significant difference is the definition and interpretation of the word "communication" as used in the two statutory schemes. West Virginia Code § 46A-2-128 provides that a debt collector is not permitted to communicate with a consumer who is represented by counsel. Specifically, that section states that "[n]o debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim . . . the following conduct is deemed to violate this section: . . . (e) Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained." The FDCPA similarly prohibits communication with an attorney-represented debtor. *See* 15 U.S.C. § 1692c(a)(2).

The WVCCPA does not define "communication," while the FDCPA defines "communication" as "the *conveying of information* regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2) (emphasis added). Relying on the FDCPA's definition, courts ruling on claims under that act consistently have concluded that leaving a message or merely attempting to call an attorney-represented debtor (as shown by the creditor's call log) do not violate the FDCPA.

Unlike courts construing the FDCPA, state and federal courts in West Virginia construing the WVCCPA have rejected arguments that a "communication" has to be the actual conveyance of information in an effort to collect a debt. These courts have focused on the WVCCPA's phrase "any communication" to find that causing an attorney-represented debtor's phone to ring violates the WVCCPA.

The recent WVCCPA amendments provide additional guidance on the use of the word "communication" in that act. Now, "regular account statements" are excluded as a debt collection communication that could be deemed a violation. W. Va. Code § 46A-5-128(e) (2015). Similarly, required notices, such as foreclosure notices, no longer are prohibited communications. W. Va. Code § 46A-5-128(e) (2015). The West Virginia Legislature, however, did not address whether unanswered calls and certain loss mitigation communications could be deemed WVCCPA violations. To date, West Virginia courts typically have concluded those types of communications would violate W.Va. Code § 46A-2-128(e).

Another significant difference between the two acts is the potential exposure between the FDCPA and WVCCPA. Under the FDCPA, courts have universally held that the FDCPA remedies provision unambiguously limits damages to $1,000 ***per action***. A similar provision limiting a debt collector's exposure to $1,000 per action was introduced as an amendment to the WVCCPA, but the amendment did not survive to the enacted version of the bill. Instead, the Legislature amended the WVCCPA's debt collection penalty to a flat $1,000 per violation. Previously, the per-violation penalty ranged from $100 to approximately $4,800. Now, causing a debtor's phone to ring on ten separate occasions after notification of attorney representation exposes the creditor to $10,000 in penalties. Previously, the exposure would have ranged from $1,000 to $48,000.

In summary, while West Virginia's debt collection laws moved closer to similar federal laws, distinct differences remain that create traps for unwary creditors and other debt collectors.

This is the second in a series of reports on recent changes to the West Virginia Consumer Credit and Protection Act. Click here for the first report, Damages for WVCCPA Violations Have Changed Significantly.

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