

Bad Check Diversion Program Collection Letters May Violate Federal Consumer Protection Laws



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LOCAL AND STATE PROSECUTORS' OFFICES often offer bad check diversion programs to people accused of writing bad checks as a way for the individual to avoid criminal prosecution. These programs typically require alleged bad check offenders to complete a financial accountability class and pay full restitution to the victim merchant as well as an administrative and program fee. Debt collectors running these programs at the direction, supervision, and control of the district attorney have recently come under closer scrutiny by the federal Consumer Financial Protection Bureau (CFPB). Prosecutors using these programs need to be cognizant of the law to ensure compliance with federal legal requirements.

The Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in unfair, deceptive, abusive, and other unlawful conduct in collecting consumer debts. In 2006, Congress amended the FDCPA to exempt debt collectors that operate bad check diversion programs from certain FDCPA requirements under certain conditions.¹ According to the law, to enjoy the exception from the FDCPA's general requirements, the private entity must operate the program "under the direction, supervision, and control" of the district attorney and is not permitted to exercise independent prosecutorial discretion or contact consumers until a district attorney has determined that they are appropriate for the diversion program. The private entity must also comply with state penal laws and include cer-

tain clear and conspicuous statements in its initial written communication with consumers. Because debt collectors that operate these programs do not always operate within these parameters and do not always conduct themselves in accordance with the FDCPA, these programs have recently come under scrutiny by the American Bar Association (ABA) and the CFPB.

The ABA Standing Committee on Ethics and Professional Responsibility recently issued a formal ethics opinion on the subject, stating that "[t]ypically, no lawyer in the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct prior to the mailing."² The ABA found that such collection letters "misuse the criminal justice system by deploying the apparent authority of a prosecutor" and "carry with them the implication that the prosecutor or associates in the prosecutor's office have reviewed the facts and found that a crime has been committed and criminal prosecution is warranted," creating a false impression in violation of ABA Model Rule 8.4(c). Supplying district attorney letterhead to debt collectors and allowing them to "send threatening letters to alleged debtors without any review by the prosecutor or staff lawyers to determine whether a crime was committed and prosecution is warranted" also violates Model Rule 5.5(a) "by aiding and abetting the unauthorized practice of law,"

¹ 15 U.S.C. § 1692p

² See ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 469 (2014)

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according to the ABA ethics opinion.

The CFPB recently sued debt collector National Corrective Group (NCG), and related entities, for making deceptive threats of criminal prosecution and jail time in order to intimidate consumers into believing that they must enroll in a “costly financial education program” to avoid criminal charges.³

According to the lawsuit, NCG entered into arrangements with prosecutors and merchants to administer a bad check diversion program whereby merchants would send bounced check allegations directly to NCG. NCG would then independently determine whether consumers were eligible to participate in the diversion program. In making that determination, NCG typically would not consult the district attorney or the district attorney’s office.

NCG would then send bad check diversion/debt collection letters on district attorney letterhead, often bearing facsimiles of the district attorney’s signature, accusing con-

and completed a financial accountability class. The fee for the class, which ranged from \$130 to \$190, went to NCG.

Aside from a brief reference to “a third-party administrator,” the letters did not disclose that they were being sent by a debt collector and had not been reviewed by the district attorney’s office. The letters also did not disclose that the possibility of prosecution was — according to the CFPB — extremely remote. According to the lawsuit, less than 1 percent of consumers who received the collection letters, including those who received letters stating “CASE FORWARDED FOR POTENTIAL CRIMINAL PROSECUTION” met the district attorney office’s criteria for criminal prosecution or were referred to the district attorney’s office for possible criminal prosecution.

The CFPB alleged that NCG violated the FDCPA and the Dodd-Frank Wall Street Reform and Consumer Protection Act by masquerading as state or district attorneys, intimidating consumers with false threats of criminal charges, and deceiving consumers into paying extra fees for costly financial education classes.

On March 31, 2015, a federal court entered a consent order against NCG and its related entities, which requires them to pay a \$50,000 civil money penalty and prohibits them from operating a bad check diversion program unless under the supervision of a state or district attorney’s office, and prohibits them from sending any letters to individuals about entering such a program unless the office has reviewed and provided written confirmation to the company that there is reason to believe the individuals being contacted violated the law. The order also prohibits the collectors from using district attorney letterhead or facsimile signatures or otherwise stating or implying that they are a state or district attorney, and prohibits the debt collectors from falsely representing that the failure to pay a debt or enter the bad check diversion program will result in imprisonment. The debt collectors must also disclose to consumers that participation in the program is voluntary, that the prosecutor’s office has not made a decision about whether to charge them with a crime, and that many consumers accused of writing bad checks are never prosecuted.

If you have any questions about bad check diversion programs or federal consumer financial protection laws, you can contact the CFPB directly at (855) 695-7974 or whistleblower@consumerfinance.gov.

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sumers of violating specific state statutes and informing them that a “conviction under this statute is punishable by... imprisonment and/or a fine.” In order to “avoid the possibility of further action against the accused by the District Attorney’s office” the letters told consumers that the district attorney’s office would “consider this matter resolved” if the consumer paid restitution to the merchant

³“CFPB Takes Action Against ‘Bad Check’ Debt Collector,” March 30, 2015, <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-bad-check-debt-collector/>