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pulse

The Difference a Year Makes

The CFPB issues an update on what constitutes "abusive acts or practices."

By Angela Czerlanis

This year marks a decade since the inception of the Consumer Financial Protection Bureau's authority over Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

What is UDAAP? In short, it aims to curtail bad behavior in consumer financial services for covered entities, which include collectors and service providers working with third-party collectors. Examples of this behavior:

- Acts that cause or are likely to cause substantial injury to consumers;
- Practices that interfere with consumers' ability to understand the terms of a financial product or service; or
- Practices that take unreasonable advantage of the consumer's ability to protect themselves against risks or costs of a financial product or service.

The broad umbrella of UDAAP has been subjective—"You just know it when you hear or see it." The statute doesn't list specific actions to avoid, only some conditions of behavior.

How can you make sure you're not running afoul of UDAAP? The Fair Debt Collection Practices Act has three sections that list harassing and abusive, false or misleading, and unfair practices. This is a good place to start when thinking about UDAAP because specific actions are listed. For example:

- Making an excessive number of phone calls to a consumer is harassing.
- Disclosing personal information about the debt to third parties is unfair.
- Lying about the collector's identity or threatening legal action that cannot or will not be taken is deceptive.

As you can see by comparing the FDCPA's list to the UDAAP conditions, it's possible to violate the FDCPA and UDAAP at the same time. This is especially challenging when trying to separate what is "abusive" from what is "unfair" and/or "deceptive."

That's where a new policy statement from the CFPB issued Jan. 24, 2020, hopes to clarify things. Now, when the CFPB looks at potential violations of UDAAP during supervisory examinations or investigations of alleged violations, it will:

1. Focus on citing or challenging conduct as "abusive" only when the harm to consumers outweighs the benefit.
2. Avoid classifying abusive behavior as also unfair or deceptive, meaning that the facts of the abuse violation must "stand alone" from claims of unfairness or deception.
3. Apply a "good faith" standard when seeking monetary relief for abusiveness.

This means that although the CFPB will continue to seek restitution for injured consumers, if the company acted in good faith, that effort will be considered despite the UDAAP error.

For a closer look into the interpretation of UDAAP and how the policy statement was developed, check out an archived video of the CFPB's symposium panel discussion on abusive acts or practices held June 25, 2019: http://bit.ly/37YnNs2. Then take a deeper dive into UDAAP with ACA International's Core course, Keep Calm and Avoid UDAAP, available at www.acainternational.org.

Angela Czerlanis is ACA International's compliance education specialist.

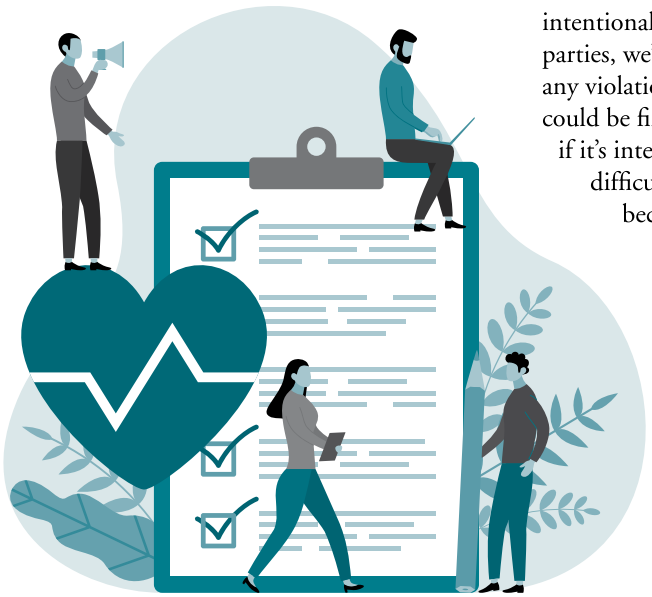
ACA CAST

Health Care Billing Practices—What's New and What You Need to Know

The CFPB's proposed debt collection rule could dramatically impact professionals who deal with medical debt. Make sure you are ready for potential changes.

The Consumer Financial Protection Bureau's proposed debt collection rule has been a constant topic of concern among ACA members as they continue to work while awaiting the final rule. All the while, everyone is wondering how the final rule will impact their ability to communicate and collect rightfully owed debt.

With that in mind, last fall a few seasoned professionals helped others navigate certain aspects of the proposed rule in relation to health care billing during ACA's 2019 Fall Forum & Expo in Chicago. Because the information was so well-received, ACA staff invited two panelists from the "Health Care Billing Practices" session to participate in a follow-up podcast on the topic. The excerpt below features Irene Hoheusle, vice president of collections and education with Account Recovery Specialists in Wichita, Kansas, and Tim Haag, president of State Collection Service in Madison, Wisconsin, as they engage in a lively conversation about their experiences and thoughts related to the CFPB, rulemaking and other information.



In this section, Hoheusle and Haag are responding to the question, "Is there anything about the proposed rule you believe is problematic for our industry?"

Irene Hoheusle:

The NPRM (notice of proposed rulemaking) wants us to put more itemization on the validation notice now. In their own words, "somewhere else" ... If you look at the rules on page 397 on the NPRM, they mention that about 16% of all validation notices in our industry reach family members—they're not even talking about strangers. So, we know about 16% on average are going to the wrong parties.

If we have to include more validation language in those letters, then we know we're intentionally disclosing protected health information to at least 16% of the population, which is bad because we have to follow the Health Insurance Portability and Accountability Act, HIPAA. According to HIPAA, we have to secure protected health information, which would be everything in a patient's health care file. If we use means to intentionally send information to third parties, we're going to violate the act, and any violations impact our clients. So, they could be fined for that too, especially if it's intentional. It becomes really difficult within the medical industry because oftentimes we collect bills that are from multiple dates of service that have multiple things that have happened to it, with multiple insurances—itemizing that could be extremely lengthy, especially if you have a doctor's office.

And I'm not even going to mention the burden on our medical provider clients because, to be honest with you, and I'm sure Tim could even share his view on this, most of our consumers don't ask for validation of debt. It's really a very small percentage on medical debt that actually ask. There needs to be some consideration of the HIPAA rule, the minimum necessary rule, in the model notice of these medical bills.

Now I can go on and on about other things that need to be tweaked, but I'm going to suggest something. If you really want to know what needs to be tweaked, go and pull out the ACA 154-page comment letter. Tim, what do you think?

Tim Haag:

I agree. Obviously, we don't have to put a box at the bottom of the validation notice giving the consumer or the patient the ability to dispute. So, I agree. We do see people who do dispute, but when you put it right in front of their face and, as you said, you know that you went to the doctor, you know you have this bill. Now, if I could check a box and send it back in saying, "First off let's just delay the process," because it's going to come back to us, we're going to have to go back to the client, get that information, send it back to the consumer, and then that process starts over. So really it's going to delay it, money's going to come in at a later time because obviously we will be able to prove that it isn't a dispute, but having that box, the ability to check that box, just delete it for that patient. So really, that will be very problematic in my opinion.

The 28-minute podcast titled "Figuring it Out: Health Care Billing Practices," is packed with interesting tidbits on policy and tips for succeeding in this space. If you would prefer to read the transcript, it can accessed along with the podcast on ACA's website at https://www.acainternational.org/acacast.

LEGAL CORNER

Court Sides with Industry

A validation notice indicating that "future interest of 5% per year may be added" did not violate the FDCPA's requirement to provide the amount of the debt.

By Andrew Pavlik

In *Salvatore v. Americollect, Inc., No. 19-cv-447 (W.D. Wisc. Feb. 5, 2020)*, the consumer received a collection notice regarding a medical debt which provided the amount of the debt owed as of the date of the letter, but also included language indicating that future interest might accrue. The consumer claimed the letter violated §1692g(a)(1) of the FDCPA because it did not state the amount of her debt clearly enough to allow an unsophisticated consumer to understand it. The letter in question stated, in part:

"The amount due stated below, is the amount due as of the date of this letter. Future interest of 5% per year may be added to the account if the amount due is not paid."

Below this text, the letter stated that the amount due was $98.52.

The consumer contended the statement of the amount due was unclear because the letter didn't say how the debt collector would assess interest or tell her what the collector would do if she paid the stated amount after additional interest had accrued. The debt collector moved to dismiss for failure to state a claim, arguing the notice was not misleading.

Siding with the debt collector, the court cited appellate court decisions such as *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.*, 214 F.3d 875 (7th Cir. 2000), and *Taylor v. Financial Recovery Services*, 365 F.3d 572, 574 (7th Cir. 2004), which examined similar issues. The instant court observed that while the Seventh Circuit in *Miller* had provided safe harbor language for debts that may increase due to interest, the court had not required that specific language. Likewise, the court in *Taylor* had examined a similar statement and found that the letter merely provided "'the clear statement of a truism'" that further charges might accrue if the debt was not paid.

Granting the consumer's motion to dismiss, the court stated:

"The debt-collection letter that [the debt collector] sent to [the consumer] told her the precise amount that she owed as of the date of the letter and said that future interest might accrue if she did not pay her debt. This is all that § 1692g(a)(1) requires. Even if the information that [the consumer] contends that the letter lacked would have been helpful, its absence does not give rise to a cause of action under the FDCPA."

This article originally appeared in ACA's Daily Decision, which is powered by ACA's Litigation Advocacy and Compliance Teams. Previously published Daily Decision articles may be viewed on the ACA's Industry Advancement Program webpage located at www.acainternational.org//industry-advancement-program

Salvatore v. Americollect, Inc., No. 19-cv-447 (W.D. Wisc. Feb. 5, 2020) may be accessed here: https://tinyurl.com/r9x8drq

Andrew Pavlik is ACA International's compliance analyst.

NEWS & NOTES

Fly-In to DC

Registration is open for the ACA International Washington Insights Fly-In May 19-21, 2020 at the Phoenix Park Hotel in Washington, D.C. It's never too late to become part the solution by educating policymakers about the impact their decisions have on your ability to effectively recover rightfully owed debt. Join us this year! For additional information, visit our website at www.acainternational.org and click "events".

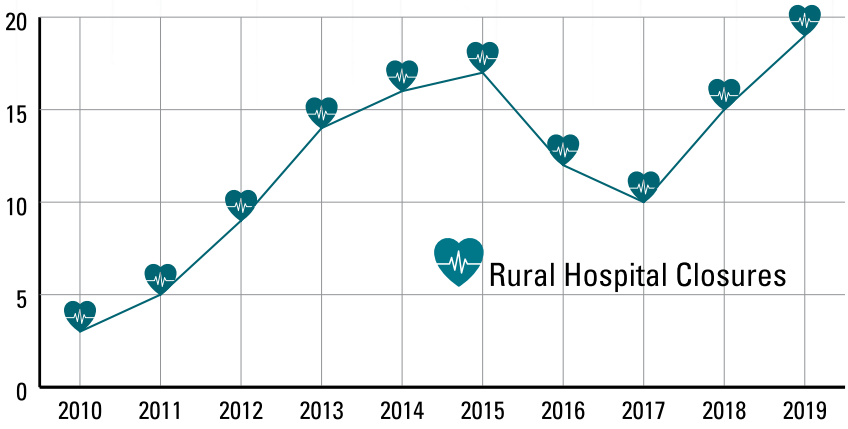
Scholarships Available

It's not too late to apply for the Loomer-Mortenson Scholarship program for the 2020/2021 school year. The deadline to submit applications is May 15, 2020 – so if you know someone who may need financial assistance, encourage them to apply. Read more here: https://www.acainternational.org/about/ief

For more health care collections news, visit ACA's Health Care Collections page at www.acainternational.org/pulse.

datawatch

19 Rural Hospitals Shut Down in 2019 Marking Worst Year of Closures



Source: The Rural Health Safety Net Under Pressure: Rural Hospital Vulnerability, The Chartis Center for Rural Health, Feb. 2020 https://tinyurl.com/rya8kln

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