

Consumer Practice

a primer on fdcpa, fcra, tcpa, and related consumer claims for bankruptcy practitioners

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Overview

- ▶ Debtors consulting with a BK attorney have high likelihood of having or developing valuable consumer claims before, during, or after BK filing
- ▶ Fair Debt Collection Practices Act - 15 U.S.C. § 1692 *et seq.*
 - ▶ Curtails abusive debt collection practices
 - ▶ Older debts frequently lead to violations by collectors
- ▶ Fair Credit Reporting Act - 15 U.S.C. § 1681 *et seq.*
 - ▶ Specific requirements for credit reporting accuracy, disputes, and use
 - ▶ A natural fit where BK counsel is reviewing debt/credit information
- ▶ Telephone Consumer Protection Act - 47 U.S.C. § 227
 - ▶ Restricts collection & marketing calls, texts, and faxes
- ▶ Identifying and pursuing these claims can diversify a BK practice and provide relief to debtors

Fair Debt Collection Practices Act

15 U.S.C. § 1692 *et seq.*

- ▶ Makes many debt collection abuses unlawful
 - ▶ Harassment, threats, misrepresentation of character or amount of debts
 - ▶ Failure to make required disclosures
 - ▶ Misrepresentation of legal rights
 - ▶ Contacting debtors at inconvenient times or after being told to stop
 - ▶ Communicating, threatening to communicate with third parties
 - ▶ Collection suits filed in wrong venue
- ▶ Powerful consumer remedies and incentives
 - ▶ Up to \$1,000 statutory damages per plaintiff per case or actual damages
 - ▶ Mandatory cost- and fee-shifting

The perfect position to spot potential FDCPA issues

- ▶ Prospective bankruptcy filers may have many delinquent debts
- ▶ Creditor and collector harassment may in fact be the reason they are seeking your advice
- ▶ Rule of thumb: the older the debt, the more likely that the collector will run afoul of the law trying to collect it
- ▶ Remember: pre-petition claims must be disclosed in bankruptcy

Threshold Inquiry 1: Am I Dealing with a “Debt Collector”?

- ▶ FDCPA only regulates the conduct of “debt collectors.” 15 U.S.C. § 1692a(6)
 - ▶ “Creditors” are not debt collectors.
 - ▶ Bank, credit card issuer, finance company to which money is owed - not a DC (few exceptions)
 - ▶ Usually mortgage servicers are not DCs (some exceptions)
 - ▶ BUT debt buyers - those who purchase assignments of debts - are DCs
 - ▶ Persons who regularly collect or attempt to collect debts owed to others are debt collectors
 - ▶ Repo companies can be DCs if they “breach the peace”
 - ▶ Collection law firms are DCs
 - ▶ A creditor using a false name to collect debts - i.e., acts like a DC - IS a DC
 - ▶ “Payment processors” who collect for creditors are not DCs unless debts were assigned to them after default

Threshold Inquiry 1: Am I Dealing with a “Debt Collector”? Part 2

▶ Mortgage Servicers

- ▶ Considered “creditors,” not debt collectors, under case law
- ▶ EXCEPT when they obtain servicing rights after default
- ▶ Foreclosure-related collection misconduct by default servicers can give rise to FDCPA liability - *Glazer v. Chase Home Finance LLC*, 704 F.3d 453 (2013)
- ▶ Look to notice of assignment to determine if a servicer is a DC

▶ Other Creditors

- ▶ Are DCs if they use a false name to collect a debt
- ▶ Can sometimes be pulled in under state law even if not DCs under FDCPA

Threshold Inquiry 2: Is this conduct regulated by FDCPA?

- ▶ FDCPA applies only to consumer debt
 - ▶ Debt must be primarily for “personal, family, or household purposes”
 - ▶ Cannot be commercial/business debt
 - ▶ Alleged debts not actually owed, or owed by another, are debts under the Act
- ▶ Threatened or actual foreclosure/repossession can sometimes constitute debt collection under the Act
 - ▶ If purpose is to collect a consumer debt, and
 - ▶ If there is no right and/or intent to foreclose/reposse ss or other misconduct
 - ▶ Note that not every failure to follow state law (e.g., foreclosure by advertisement statutes) will constitute an FDCPA violation

Common Fact Patterns Part 1

review collection letters

- ▶ Collection letters *without required disclosures*
 - ▶ 15 U.S.C. § 1692g - in the initial communication from debt collector to debtor, or within 5 days after, the collector *must* send the debtor a written communication which
 - ▶ States the amount of the debt
 - ▶ Names the creditor to which the debt is owed
 - ▶ Provides correct information on debt dispute/validation
 - ▶ 15 U.S.C. § 1692e(11)
 - ▶ Every written communication must state that it comes from a DC
 - ▶ The initial written communication must: state that it comes from a DC, that its purpose is to collect a debt, and that any information obtained will be used for that purpose
 - ▶ Class actions on the basis of faulty dunning letters are frequently certified by courts - *ClearSpring*

Common Fact Patterns Part 2

ask your clients

- ▶ Abusive telephone calls
 - ▶ Common in situations of:
 - ▶ Time-barred debt (4 years for auto debt; 6 years for most others)
 - ▶ Old debt purchased multiple times, *especially* payday loans
 - ▶ Illegitimate or fraudulent debt; stolen account information
 - ▶ Typical methods:
 - ▶ Threats of criminal prosecution, jail, warrants
 - ▶ Use of nonsensical legal jargon to confuse (alleged) debtor
 - ▶ Insults, threats, other high-pressure tactics
 - ▶ Threats to take any action that would be unlawful; e.g., ruin credit forever, tell third parties (esp. employers) about debt, etc.
- ▶ **HAVE THE CLIENT RECORD PHONE CALLS, SAVE VOICEMAILS**

Common Fact Patterns Part 3

collection lawsuits

- ▶ Allegations in consumer collection suits are regulated communications under FDCPA
- ▶ False representation of character or amount of debt in complaint
- ▶ False representation of interest or fees owed
- ▶ Suing, threatening suit on time-barred debt
 - ▶ 6+ years since last payment = barred
 - ▶ 4+ years on auto loan = barred
- ▶ Attempts to collect attorney fees where not allowed
- ▶ False affidavits - see CFPB Consent Order against PRA:
http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf

Evaluating FDCPA Claims

pitfalls and defenses

- ▶ *Spokeo v. Robins*, 136 S.Ct. 1540 (2016) - KNOW IT WELL
 - ▶ TCPA case, but frequently cited by defense counsel in all statutory damages cases
 - ▶ No Article III standing unless a “concrete injury” is demonstrated
 - ▶ Purely technical deficiencies that do no actual harm and present no serious risk of actual harm should never be the sole basis for a case
- ▶ Bona Fide Error (“BFE”) defense - 15 U.S.C. § 1692k(c)
 - ▶ Clerical and similar mistakes give rise to the defense *if* DC can show that it maintains procedures reasonably adapted to avoid such errors
 - ▶ Reliance on an FTC advisory opinion gives rise to BFE defense
 - ▶ Mistakes of law do not count - *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010)

Evaluating FDCPA Claims

pitfalls and defenses part 2

- ▶ “Materiality”
 - ▶ Misrepresentations must be “material” to be actionable
 - ▶ “Material” means that the misrepresentation must be such that could affect decision making - *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961 (2009)
 - ▶ Be careful when relying on hyper-technical violations to establish claims
- ▶ One-year statute of limitations - 15 U.S.C. § 1692k(d)
- ▶ Michigan licensure laws for debt collectors have recently changed!
 - ▶ M.C.L 339.901(b) changed effective 9/7/2016
 - ▶ Formerly required “forwarding companies” to be licensed; not anymore

FDCPA Class Actions

- ▶ Technical FDCPA violations are often systematic & lend themselves to class treatment
- ▶ Fed. R. Civ. P. 23 applies
 - ▶ Beyond our scope today
 - ▶ IMPORTANT: when in doubt, co-counsel with experienced class counsel
- ▶ Special characteristics of FDCPA class actions, 15 U.S.C. § 1692k:
 - ▶ Statutory damages are capped at the lower of
 - ▶ 1% of defendant's net worth, or
 - ▶ \$500,000
 - ▶ Often better to avoid class action if defendant is impecunious
 - ▶ No cap on actual damages or attorney fees
 - ▶ Smaller classes lead to larger recoveries per class member - define accordingly

FDCPA Individual Actions

- ▶ Actual damages + statutory damages up to \$1,000 + costs + reasonable attorney fees - 15 U.S.C. § 1692k
- ▶ Many clear violations can be settled for \$1,000 + costs + fees
- ▶ Be clear in fee agreements that fee recovery will almost certainly exceed client's recovery
- ▶ Bring claims in federal district court when possible
- ▶ Many suits can be settled pre-filing
 - ▶ Do your homework on defendant, players, practice at issue
 - ▶ Draft a detailed complaint
- ▶ Rule of thumb: file if you think you can win on MSJ

Michigan Counterparts to FDCPA: *MOC and MRCPA*

- ▶ Michigan Occupational Code, M.C.L 339.901 *et seq.*
 - ▶ Requires “debt collectors” (different definition than FDCPA!) to be licensed
 - ▶ Restricts collection activity of licensees, similar to 15 U.S.C. § 1692e
 - ▶ Provides for actual damages, treble damages for willful violations
 - ▶ \$50/\$150 statutory damages, costs, attorney fees
- ▶ Michigan Regulation of Collection Practices Act, M.C.L 445.251 *et seq.*
 - ▶ Applies to many creditors and collection law firms
 - ▶ Restricts collection activity of “regulated persons,” similar to 15 U.S.C. § 1692e
 - ▶ Same relief as MOC

MOC and MRCPA

when and where to use

- ▶ When FDCPA claims are time-barred. MOC & MCPA have six-year statutes of limitations compared to FDCPA one-year statute
- ▶ When substantial actual damages make MOC/MCPA treble damages attractive
- ▶ *Rarely* under any other circumstances
 - ▶ Don't try a state class action under MOC or MRCPA if seeking statutory damages - MCR 3.501 disallows class actions for statutory damages unless class/statutory damages are explicitly allowed by underlying statute
 - ▶ Federal district courts routinely decline to exercise supplemental jurisdiction over MOC & MCPA claims brought alongside FDCPA actions

Fair Credit Reporting Act

15 U.S.C. §1681 *et seq.*

- ▶ Enacted in 1970 to promote fairness and accuracy in consumer credit reports
- ▶ Imposes civil liability for actual, statutory, and punitive damages for failure to comply; mandatory fee shifting
- ▶ Applies to:
 - ▶ Consumer Reporting Agencies (“CRAs”)
 - ▶ Equifax, Experian, Trans Union
 - ▶ Many other companies that perform background checks/screening (see CFPB list)
 - ▶ Furnishers of data to CRAs (“furnishers”)
 - ▶ Banks, creditors
 - ▶ Users of consumer reports
 - ▶ Banks, creditors, insurers, employers

Check and Monitor Credit Reports

- ▶ Credit reports frequently contain inaccurate information about consumers
 - ▶ Wrong names, addresses, employers, personal information
 - ▶ Accounts/debts not belonging to consumer
 - ▶ Delinquency, default, foreclosure, public record/judgment, bankruptcy information
- ▶ Credit reports disclose entities requesting reports on the consumer
 - ▶ “Hard pulls” affect credit ratings and usually cannot be performed without the consumer’s consent
 - ▶ “Soft pulls” do not affect credit ratings and can be performed without the consumer’s consent

CRA Duties & Liability

- ▶ CRAs must
 - ▶ Maintain reasonable procedures to ensure maximum accuracy of their consumer reports
 - ▶ Conduct a reasonable investigation of a consumer's dispute of reported information

“Reasonable Procedures”

CRA Liability

- ▶ 15 U.S.C. § 1681e(b) - CRAs “shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”
- ▶ Information reported about the plaintiff must be inaccurate (otherwise no Art. III standing) to be actionable
- ▶ Inaccuracy must result from failure to follow reasonable procedures
- ▶ Violations may be negligent or willful

“Reasonable Procedures”

negligent violations - elements

- ▶ Consumer report contained inaccurate information
- ▶ CRA provided the report to at least one third party
- ▶ Inaccuracy was due to failure to implement or follow reasonable procedures
- ▶ Plaintiff was injured
 - ▶ *Always* plead actual harm even if it is only “reputational” - your case is bound for *Spokeo* dismissal otherwise
 - ▶ Plead denials of credit and economic harm whenever possible
- ▶ Injury was caused by inaccuracy
- ▶ Split of authority in circuit courts on burden of proof re: reasonableness
- ▶ “Reasonable procedures” violations lend themselves to class treatment, but can be very technical and may require expert testimony

“Reinvestigation”

CRA Liability - 15 U.S.C. §1681i

- ▶ Consumer’s dispute regarding inaccuracy triggers CRA duty to “reinvestigate”
 - ▶ Dispute letter should be mailed to CRA at address provided in report - this usually triggers investigation duties for both CRA and furnisher
 - ▶ A dispute sent only to the furnisher only triggers furnisher duties
 - ▶ Dispute must provide identifying information of the consumer
- ▶ Within 30 days after receiving notice of the dispute, the CRA must complete a “reasonable reinvestigation” to determine whether the disputed information is inaccurate

What is a “reasonable reinvestigation?” - 15 U.S.C. § 1681i

- ▶ Requires the CRA to request verification from the furnisher - commonly done through electronic system “Metro 2”
 - ▶ Ordinarily it is considered “reasonable” for CRA to rely on the furnisher’s validation
 - ▶ If CRA knows or should know the furnisher is unreliable, “reasonableness” may require it to verify the accuracy of the furnisher’s information
 - ▶ Typically “reasonableness” does not require the CRA to weigh in on a legal dispute regarding, e.g., whether the consumer’s or the furnisher’s interpretation of a contract is the correct one
- ▶ CRA need not complete a reinvestigation if dispute is frivolous or irrelevant

CRA Duties after dispute/reinvestigation

- ▶ CRA must notify the furnisher of the dispute and provide all relevant information within five (5) days
- ▶ After information is received from the furnisher, CRA must promptly modify or delete the disputed information if it:
 - ▶ Determines the disputed information is inaccurate or incomplete
 - ▶ Cannot verify the information within the timeframe for completing the reinvestigation
 - ▶ Deleted information cannot be reinserted unless the furnisher certifies its accuracy
- ▶ After completing or terminating a reinvestigation, CRA must notify the consumer of the results within five (5) business days and provide an updated disclosure

Furnisher Liability

15 U.S.C. § 1681s

- ▶ Furnisher must conduct and complete an investigation within 30 days of receipt of a dispute (directly or through CRA)
 - ▶ If furnisher determines there is an inaccuracy, it must correct the information with all CRAs to which it furnished the information
 - ▶ Investigation must be reasonable
- ▶ FCRA only provides recourse against furnishers if information is disputed by consumer
 - ▶ FCRA preempts most state-law claims, e.g. defamation, unless it is willful/malicious on the part of the furnisher
 - ▶ Furnisher claims under FCRA are poor candidates for class treatment

User Liability

hard pulls vs. soft pulls

- ▶ Users of full consumer disclosures (i.e., “hard pulls”) must either:
 - ▶ Have a permissible purpose for obtaining the report as outlined in the FCRA, 15 U.S.C. § 1681b; or
 - ▶ Get the consumer’s consent to obtain the report
- ▶ Permissible purposes include:
 - ▶ Extension of credit to the consumer
 - ▶ Employment purposes (written authorization required!)
 - ▶ Insurance underwriting
 - ▶ Licensure eligibility
 - ▶ Assessment of credit risks for an existing credit obligation

User Liability

hard pulls vs. soft pulls part 2

- ▶ Impermissible purposes include anything not itemized as permissible in 15 U.S.C. § 1681b, e.g.:
 - ▶ Divorce, child support, or paternity proceedings
 - ▶ Tax collection proceedings
 - ▶ Civil or criminal litigation
 - ▶ By investigators
 - ▶ In connection with making a determination about another individual
 - ▶ Insurance claims
 - ▶ Marketing (“soft pulls” in connection with “firm offers” ok - these do not affect credit scoring)
 - ▶ Social network use (e.g. dating sites)
- ▶ Users are liable for impermissible pulls under 15 U.S.C. § 1681b(f)
- ▶ CRAs are liable if they
 - ▶ Negligently or willfully release consumer reports for impermissible purposes
 - ▶ Fail to maintain reasonable procedures to limit the furnishing of consumer reports only for permissible purposes

Recourse Under FCRA

15 U.S.C. §§ 1681n, 1681o

- ▶ Statute of limitations: 2 years from discovery, or 5 years from violation
- ▶ Recourse for negligent violations:
 - ▶ Actual damages
 - ▶ Attorney fees & costs
- ▶ Recourse for willful violations:
 - ▶ Actual damages, OR statutory damages from \$100 to \$1,000
 - ▶ Punitive damages as the court may allow
 - ▶ Attorney fees & costs

FCRA Claims & Bankruptcy Practice

- ▶ FCRA claims can be identified at both ends of a client relationship
 - ▶ You are already reviewing the client's debts
 - ▶ Many inaccuracies can be spotted upon the first review of a client's credit reports
 - ▶ Bankruptcy code does not displace FCRA
 - ▶ Pre-petition FCRA claims should be disclosed in bankruptcy
- ▶ After discharge, review reports again
 - ▶ Discharged debts should be reflected with zero balances - see *White v. Experian Info. Solutions, Inc.*
 - ▶ Bankruptcy event itself should be reported accurately
 - ▶ Both of these items can lead to CRA and/or furnisher liability

Telephone Consumer Protection Act, 47 U.S.C. § 227

- ▶ Enacted in 1991 to curtail unwanted telephone solicitations
- ▶ TCPA prohibits many robocalls, robo-texts, and junk faxes, and restricts other types of marketing calls and texts
- ▶ Potential for significant recoveries:
 - ▶ \$500/\$1,500 statutory damages per violation (negligent/willful respectively) - far exceeding actual damages in virtually every case
 - ▶ Good class action potential due to repetitive/bulk nature of violations

TCPA and Debtors

autodialers & prerecorded calls

- ▶ Automatic telephone dialing systems and artificial prerecorded voice messages violate the TCPA when made to:
 - ▶ Any cellular telephone, or
 - ▶ Any service for which the called party is charged for the call
 - ▶ Unless the called party has given consent
- ▶ Telemarketing, information, and debt collection calls are covered
- ▶ Collection robocalls after caller/collector has been informed to cease communications, or repeated/harassing robocalls, may also violate FDCPA

TCPA and robocalls

what is an autodialer?

- ▶ “Automatic dialing system” (“ADS”) is equipment that has the capacity to:
 - ▶ Store or produce telephone numbers to be called, using a random or sequential number generator, and
 - ▶ Dial such numbers
- ▶ FCC interpretation: ADS includes predictive dialers that operate from a list; many courts have followed this interpretation
- ▶ Manually dialed calls to cell phones are not prohibited - but be skeptical of defendants’ claims that calls are manually dialed - it’s very uncommon

TCPA and prerecorded messages

cellular phones

- ▶ Without consent, any call to a cell phone, using a recorded or artificial voice in any part of the call, is prohibited
 - ▶ Collection calls that use a prerecorded disclosure message
 - ▶ Telemarketing and other calls that begin with a prerecorded option menu
 - ▶ Defendants often claim they had explicit consent or consent through established business relationship (“EBR”)
- ▶ With consent, specific disclosures must be provided. 47 C.F.R. § 64.1200(b)
 - ▶ Identifying the caller by registered name
 - ▶ Providing the telephone number of the business
 - ▶ If a marketing call, caller must provide a touchtone or voice-operated opt-out mechanism

TCPA cell phone robocalls

practical tips

- ▶ Have client keep voicemails and call logs, and call recordings
- ▶ Obtain carrier records
- ▶ Consent can be slippery
 - ▶ Defendant may point to contract or provision of phone number the client doesn't remember
 - ▶ If client is receiving autodialed or prerecorded phone calls, *immediately* have them revoke consent & document it. Future calls will be clear violations
- ▶ Finding the defendant can be tricky
 - ▶ Callers are cagey - many know they are violating TCPA
 - ▶ Have client request mailing address for sending paper check payment
 - ▶ Follow the trail of phone numbers, any addresses, and names

Unlawful Text Messages

TCPA Remedies

- ▶ Prohibits autodialed calls to cell phones including spam text messages sent using an automatic telephone dialing system
 - ▶ *Campbell-Ewald Co. v. Gomez*, 577 U.S. ____ (2016)
- ▶ Virtually every bulk text message sent without prior express consent is a TCPA violation
- ▶ Same \$500/\$1,500 statutory damages
- ▶ Provisions have survived constitutional challenges

Junk Faxes

broad TCPA coverage

- ▶ Unsolicited advertising faxes are prohibited. 47 U.S.C. § 227(b)(C)
 - ▶ Includes faxes sent by computer or by fax machine
 - ▶ Includes faxes sent to a fax server (i.e., fax-to-email) or to a traditional print-on-receipt fax machine
 - ▶ Exception: where there is consent or an existing business relationship (“EBR”)
- ▶ Liability for:
 - ▶ The entity on whose behalf the advertisement is sent; and
 - ▶ The entity whose goods or services are advertised or promoted
 - ▶ Different from telephone calls and texts, where “caller” is liable under TCPA. *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.2d 886 (6th Cir. 2016)
- ▶ Statutory damages of \$500/\$1,500 per fax

Junk Faxes *continued*

- ▶ Even where there is an EBR:
 - ▶ Fax solicitations must include an unsubscribe notice and number
 - ▶ Fax solicitations must stop if consent is revoked
- ▶ Injunctive relief may be available
- ▶ Example of a recent TCPA junk fax victory: *Bridging Communities, Inc. v. Top Flite Financial Inc.*, ___ F.3d ___ (6th Cir. 2016)
 - ▶ Reversing denial of class certification by district court
 - ▶ Provides a window into symbiotic fax-blasting and lead-generation business models

Practical points in fee-shifting situations

FDCPA-MOC-MRCPA-FCRA

- ▶ Keep detailed, contemporaneous, defensible records of your time and costs
 - ▶ Assume your fees will be paid only upon a successful fee petition to the court
 - ▶ You will likely need time records even if you are being paid as a percentage of a class action common fund, as a check on the reasonableness of the fees sought
- ▶ Set a reasonable hourly rate and be able to demonstrate its reasonableness

Supplemental materials

- ▶ www.westbrook-law.net/dbwm
 - ▶ These slides
 - ▶ Links to key cases & statutes
- ▶ www.nclc.org
 - ▶ National Consumer Law Center website
 - ▶ Excellent treatises for consumer practitioners
- ▶ www.consumeradvocates.org
 - ▶ National Association of Consumer Advocates website
 - ▶ Community discussion forums, email listservs
 - ▶ Consider joining if you plan on doing substantial consumer litigation

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