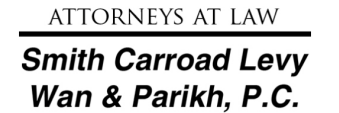




CLLA FALL VIRTUAL EDUCATION BONANZA SEPTEMBER 9 - 11

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TRAPS FOR THE UNWARY:

WHAT COMMERCIAL COLLECTORS NEED TO
KNOW ABOUT THE FDCPA, TCPA, FCRA AND
OTHER CONSUME-RELATED COLLECTION LAWS

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- Nothing in this presentation should be interpreted as legal advice. This presentation is intended to help a person to understand the area of law to help ask the right questions with the attorney of their choice. Your time to act may be very limited and this could substantially reduce your rights and options. **YOU CANNOT** rely on anything contained here in. These information are not intended to substitute for professional legal advice and does not create an attorney-client relationship. You should accept legal advice only from a licensed legal professional with whom you have an attorney-client relationship. You should contact a lawyer in your area immediately, to assist you in any of these matters.

ROADMAP

- Consumer collections are regulated extensively on both state and federal level
 - Federal laws include:
 - Fair Debt Collection Practices Act; 15 U.S.C. sec 1692
 - Telephone Consumer Protection Act; 47 U.S.C. sec. 227
 - Fair Credit Reporting Act 16 U.S.C. sec 1681
 - State laws include:
 - State “FDCPA’s”
 - UDAAP
 - Privacy Laws (Think California!)


FDCPA

- The Fair Debt Collection Practices Act
 - Enacted in 1977
 - Abusive debt collection
 - Personal bankruptcies, marital instability, and invasions of individual privacy
 - Competing Interests
 - Eliminate “abusive” debt collection practices
 - Ensure that the debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged
 - Promote consistent state action to protect consumers against debt collection abuses.

FDCPA

- Prohibited Acts & Practices:
 - Call at unreasonable hours
 - Add additional fees or interest that weren't part of the original agreement
 - Purposely delay posting the payment to the customer's account for the sake of adding more fees and interest
 - Tell the debtor's employer or co-workers about the debt (if it's a person and not a company)
 - Lie about how much the debtor owes
 - Pretend to be a lawyer to intimidate the debtor
 - Pretend you represent the government
 - Lie about whether or not you'll report the debt to the credit bureaus
 - Make false threats about suing the debtor, having them arrested or sending them to prison for non-payment

FDCPA

- (1) Actual Damages
 - (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.
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FDCPA

- Applicability- see generally, sec. 1692(a).
 - “Debt Collectors” -----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.
 - “Debts” --- “Personal, family, or household purposes”
 - “Consumers”-----any natural person obligated or allegedly obligated to pay any debt.

BUT WAIT! Don't Celebrate Yet!



THE “CONSUMER” DEBT


- Common Scenarios
 - The failing small business and the credit card
 - The failing small business and the loan with personal guarantee.
 - The business that isn't really a business at all.
- What do the courts say?


THE “CONSUMER DEBT”





THE “CONSUMER DEBT”

- Vick v. NCO Fin. Sys., Inc., No. 2:09-CV-114-TJW-CE, 2011 U.S. Dist. LEXIS 33348, 2011 WL 1195941, at *5 (E.D.Tex. Mar. 7, 2011), rec. adopted, 2011 U.S. Dist. LEXIS 32906, 2011 WL 1157692 (E.D.Tex. Mar. 28, 2011) (collecting cases) (focus is not the purpose for which the account was opened).
 - Garcia v. LVNV Funding, No. A-08-CA-514-LY, 2009 U.S. Dist. LEXIS 85967, 2009 WL 3079962, at *3 (W.D.Tex. Sept. 18, 2009) (citing Bloom v. IC Sys., Inc., 753 F. Supp. 314, 317 (D. Or. 1990)). (examining use of the loaned funds).
 - Perk v. Worden, 475 F. Supp. 2d 565, 569 (E.D.Va. 2007) (personal use of company credit card can be a “debt” under the FDCPA”).
 - Bloom v. I.C. Sys., Inc., 972 F.2d 1067, 1068 (9th Cir. 1992) (ultimate “use” of the funds is the real question”)
- 

An illustration of four people celebrating. On the left, a man with a beard and a purple party hat jumps with his arms raised. Next to him, a woman in a purple dress jumps with her arms raised. In the center, a man in a grey shirt and black pants jumps with his arms raised. On the right, a man with glasses in a grey shirt and black pants jumps with his arms raised. The background is light blue with falling confetti in red, white, and blue. A dark grey semi-transparent box is overlaid on the right side of the image, containing text.

WHAT CAN THE COMMERCIAL COLLECTOR DO?

- 15 U.S.C. sec 1692k
 - “Policies and Procedures”
 - “Reasonably Adapted”
 - “Not intentional”

A FEW PRACTICAL TIPS

- Include language communications expressing that the debt is believed to be commercial.
- Written policies about the different treatment of consumer and commercial debt.
- Include representations by creditor about nature of debt in your retainer or servicing agreement.
- Create a plan for employees to follow if they learn the debt is consumer.

COMMON PITFALL #2: SOME STATES HAVE ABOLISHED THE COMMERCIAL/CONSUMER DISTINCTION

- State laws matter too.
- For example, in California, the Rosenthal California Fair Debt Collection Practices Act extends the protections of the FDCPA to ANY type of debt collection
 - In addition, California has expanded the definition to “debt collector” to INCLUDE the original creditor, and most recently attorneys.
 - Private right of action, statutory damages, strict liability. . .


STATE LAWS

- Apply Collection Laws to Commercial Collectors Arizona, Arkansas, Buffalo (NY), Delaware, Florida, Idaho, Illinois, Indiana, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Pennsylvania, Puerto Rico, Tennessee, Utah, Virgin Islands, Washington, West Virginia, and Wisconsin.
- Apply Collection Laws to Creditors (the FDCPA does....sometimes...) and a myriad of other states...Florida, California, Wisconsin, Michigan.....

UDAAP

CFPB has the ability to identify and prohibit “unfair, deceptive or abusive acts and practices (UDAAPs).

In 2013, the CFPB issued Bulletin 2013- 07, wherein the CFPB addressed UDAAPs in the context of debt collection.

- Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.
 - Failing to post payments timely or properly or to credit a consumer’s account with payments that the consumer submitted on time and then charging late fees to that consumer.
 - Taking possession of property without the legal right to do so. • Revealing the consumer’s debt, without the consumer’s consent, to the consumer’s employer and/or co-workers.
 - Falsely representing the character, amount, or legal status of the debt. • Misrepresenting that a debt collection communication is from an attorney.
 - Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.
 - Misrepresenting whether information about a payment or nonpayment would be furnished to a credit reporting agency.
 - Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.
 - Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.
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TCPA

- The Telephone Consumer Protection Act; 47 U.S.C. sec 227
 - Using an “automatic telephone dialing system” or recorded voice to place any “call” to a cellular telephone.
 - \$500 or \$1,500 PER CALL
 - Strict Liability
 - Class Action

AUTOMATIC TELEPHONE DIALING SYSTEM

- Random or sequential number generator?
- Lists of numbers?
- Click to dial?
- Preview?
- Rotary Phone?
- My iphone?
- And, wait! What about texts?

A FEW PRACTICAL TIPS

- Vet your system in advance!
- Have an opt-out system.
- Require documented consent.
- Policies and procedures!

WHAT ABOUT EMAILS?!?!


- Not covered by the TCPA!
- No consent needed (CANSPAM)
 - New York
- Third-party disclosure

FAIR CREDIT REPORTING ACT

- The FCRA regulates the furnishing and collection of consumer credit information and access to credit reports and imposes certain disclosure requirements. Although the FCRA is generally limited to consumer credit transactions, it also applies in some instances to commercial credit transactions involving a consumer.
- Provides private right of action
 - Willful (and gross negligent)- actual damages, statutory damages, punitive damages, fees and costs
 - Negligent- Actual damages, fees and costs



FCRA

- Creditors must have a permissible purpose to obtain a consumer's credit report, regardless of the purpose of the transaction. FCRA Section 604(a), 15 U.S.C. §1681b(a).
 - (2) In accordance with the written instructions of the consumer to whom it relates.
 - (3) To a person which it has reason to believe—
 - (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
 - (B) intends to use the information for employment purposes. . . .
 - (F) otherwise has a legitimate business need for the information—
 - (i) in connection with a business transaction that is initiated by the consumer; or
 - (ii) to review an account to determine whether the consumer continues to meet the terms of the account. . . .
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FCRA

- Can you report a personal guarantor on his/her personal credit report?
 - YES!
- BUT WAIT!!! don't celebrate yet!



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- The federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681-1681y, imposes responsibilities on all persons who furnish information to consumer reporting agencies (CRAs).
 - Reasonable procedures, updating, handling disputes, following CRA guidelines!
 - See more <https://www.consumer.ftc.gov/articles/pdf-0092-notice-to-furnishers.pdf>

PRACTICAL TIPS

- Policies and Procedures
 - Disputes
 - Reasonable Procedures
 - Accuracy
 - Investigations
- Audit and Revise
- Get help!

COMMENTS AND QUESTIONS?



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