THE BASICS OF DEFENDING DEBT COLLECTION

An Overview of the Florida Consumer Collection Practices Act (FCCPA) and the Federal Fair Debt Collection Practices Act (FDCPA)

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FCCPA

- A consumer collection agency (i.e., debt collector) must register with the Office of Financial Regulation 559.553
  - https://real.flfr.com/ConsumerServices/SearchLicense
  - No private right of action for failure to register; can only be an affirmative defense (i.e., no standing to sue because condition precedent not satisfied)
  - Best raised at SF or at trial because it is outside the 4 corners of the pleading
ASSIGNMENT OF CONSUMER DEBTS

- 559.715
- “the assignee must give the debtor written notice of such assignment within 30 prior to an attempt to collect a debt”
- Notice of the assignment of the debt is typically construed to be a letter to the consumer letting her know that someone new now owns the debt
- Designed to enable the consumer to know who to pay and who owns the debt
- Failure to provide the notice of assignment is failure to satisfy a condition precedent
- No private right of action – only a defense

PROHIBITED PRACTICES UNDER 559.72

- All of these provisions have a private right of action
- Applies to any “person” 559.72
  - Original creditors and debt collectors
- (5) report to a person other than the debtor (i.e. a credit reporting agency) if the information is false
- (9) attempt to collect a debt when the person knows that the debt is not legitimate
- There are 17 other articulated violations of the statute that may fit your particular circumstances as well

FCCPA DAMAGES

- $1,000 statutory damages
- Actual damages
- Attorney Fees
- Costs
LITIGATION PRIVILEGE

- Echevarria v. Cole, 950 So. 2d 380 (Fla. 2007)
- No FCCPA cause of action for violations during litigation
- i.e. if amount sued on is inflated, no FCCPA violation
- Must have a violation outside of the litigation
  - Present letter or call
  - Reporting incorrect debt to credit reporting agency
  - Or some other act that is not part of the litigation

FDCPA

- 1692a
- The FDCPA only applies to third parties (i.e. debt collectors) not original creditors
- Only applies to consumer debts (i.e. not torts or business debts)
- Cannot record phone calls in Florida without both parties' consent

CONTACTING THIRD PARTIES

- 1692b
- Debt collector must identify himself when he calls
- Can only contact third parties for location information
- Cannot disclose that he is seeking to collect a debt
- Only gets to call a third party once and only for contact information
- Cannot use postcards or symbols on envelopes
- Cannot contact third parties if consumer is represented by an attorney
PROHIBITED COMMUNICATIONS PRACTICES

- 1692c
- Cannot contact the consumer at unusual time or place
- Can only call between 8 AM and 9 PM
- Cannot contact a consumer once it is known that consumer is represented by an attorney
- Cannot contact place of employment once consumer says that he is not allowed to receive calls at work
- No contact after consumer says that he does not wish to communicate with debt collector about the debt

HARASSMENT OR ABUSE

- 1692d
- "Any conduct the natural consequence of which is to harass, oppress, or abuse any person"
- Cannot threaten violence or other criminal means
- Cannot use profane language or other abusive language
- Cannot cause the phone to ring or engage in conversations repeatedly
- Cannot call without disclosing identity

FALSE OR MISLEADING REPRESENTATIONS IN COMMUNICATIONS

- 1692e
- Character, amount, or legal status of a debt
- That the communication is from an attorney
- Fails to include "This is an attempt to collect a debt"
- Any false representation or deceptive means to collect a debt
- That documents are legal process when they are not
- Threaten to take legal action that cannot be taken
UNFAIR PRACTICES

- 1692f
  Any unfair or unconscionable means to collect a debt.
- 1692g
  Attempt to collect fees or interest not allowed by the underlying agreement.
- Soliciting post dated checks for the purpose of prosecution.
- Cause charges to be made to the consumer (i.e. collect calls, cell phone charges).

30 DAY VALIDATION NOTICE

- 1692h
  Must send 30 day validation notice within 5 days of the initial communication.
- This letter must state:
  - Amount of the debt
  - Name of creditor to whom it is owed
  - Right to dispute debt within 30 days
  - Right to have judgment/verification sent to consumer
  - Will provide name and address of original creditor
- Collector must cease collection efforts until debt is validated.

FDCPA DAMAGES

- $1,000 statutory
- Actual damages
- Attorney fees
- Costs
COMMON ISSUES IN DEBT COLLECTION CASES

- **Causes of Action**
  - Breach of Contract
    - Look at what is attached to the complaint
    - "contract" should be the terms and conditions along with whatever the consumer signed showing she agreed to those terms and conditions
    - Make sure the date of the terms and conditions does not predate the opening of the account
    - Are the terms and conditions for the same company as the original creditor?
    - Are the terms and conditions legible? If not, Motion for More Definite Statement
    - Look at what state law controls

CAUSES OF ACTION CONT.

- **Open Account and Account Stated**
  - Florida Rule of Civil Procedure Form 1.933 and 1.934
  - Both require an accounting of every item, time of accrual of each, and amount of each be attached to the complaint
  - A final statement showing the total is not enough for open account and account stated
  - Attaching all of the monthly statements which itemize all of the charges is sufficient
  - Cannot collect fees and interest — those are only pursuant to contract and if no contract, then back out all the fees and costs

CAUSES OF ACTION CONT.

- **Unjust Enrichment**
- **Money Lent**
  - These have a much lower pleading threshold
  - But if the debt arose pursuant to a contract, then the only remedy is a remedy at law pursuant to the contract
  - Cannot seek equitable or quasi-equitable remedies when a contract at law exists under the contract
DEFENSES

- Look for statute of limitations issues – the law that governs the contract controls the SOL
- Laches
- Unclean hands
- Unearned fees and interest added
- Usury
  - If no contract that provides for high interest rate, then usury limits may apply
- Failure to satisfy condition precedent
  - Failure to provide notice of assignment
  - Failure to register as a consumer collection agency

DEFENSES CONT.

- Failure to file Cost Non-Resident Cost Bond
  - All non-residents of Florida must pay a bond of $100
  - Florida Statute section 57.011
  - Look on the secretary of state website (www.sosfla.org) to see if the plaintiff is a resident of Florida
  - Send a letter giving the plaintiff 20 days to file the bond
  - If no bond after 20 days, then you can file a motion to dismiss for failure to post the bond

ATTORNEYS FEES

- Can arguably get attorney’s fees pursuant to the contract and Florida Statute section 57.105(7)
  - But contract not usually attached
  - Many judges do not like you arguing that the “contract” does not apply, but then try to get fees under the same contract
- Or file a 57.105(1) for filing a lawsuit with no basis
  - No proof of the debt
  - Not registered as a consumer collection agency
  - No ability to prove the debt at trial
  - No ownership of the debt
DISCOVERY
- Be sure to ask for the chain of assignments showing the plaintiff owns the debt
- Usually you get a bill of sale that references an exhibit (which lists all the debts being sold) and the exhibit is not attached
- Sometimes the bill of sale predates the existence of the debt
- Make sure the names in the chain of title match up (i.e. Cavalry IV is different than Cavalry III)

TRIAL
- Brush up on your business records exceptions
- To get documents into evidence through the business records exception, need to have a records custodian who maintained those records
  - A debt collector cannot testify to the business records of the original creditor
- Come prepared with the evidence statute and cases