

How Collecting Consumer Debts Can Cost Your Business Big Money

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An increase in delinquent debts is one factor that defines a difficult economy. Creditors must make special efforts to keep their customers paying in a timely manner. When customers fail to meet their obligations, creditors often designate the accounts for Collections in the hope that the business will be able to recover the debts owed. However, these special efforts could result in a costly lawsuit against your business if your collectors are not aware of a Florida law placing firm limits on the collection of consumer debts.

The Florida Consumer Collection Practices Act (“FCCPA”), Fla. Stat. §§559.55-559.77, applies to any “person,” which includes corporations or other legal entities, who collects consumer debts. Section 559.72 contains a list of nineteen subsections, describing prohibited actions. Every person who attempts to collect a consumer debt should learn what specific acts are prohibited. Every business in Florida that collects consumer debts should implement a training program on this law, as well as the corresponding federal law,¹ or it may cost thousands to the business. Once source shows a 29% increase in cases filed under the federal act alone by consumer debtors against creditors in 2008 over 2007.²

Both the Florida and Federal consumer collection laws are intentionally unfair to creditors. The statutes are intended to allow a consumer, who usually owes a debt to the creditor, to sue the creditor over the smallest, most technical violation of these laws. If

¹ The Federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §1692, only applies to third party collectors who do not collect their own debt, such as collection agencies or attorneys who collect debts for their clients. However, §559.77(5) requires that interpretations of the FCCPA must give “due consideration and great weight” to interpretations of the FDCPA, so both statutes should be learned. Both of these statutes only apply to “consumer” debts, defined as debts incurred for “personal, family or household use.”

² FDCPA Case Listing Service LLC at www.fdcpacases.org

the creditor loses, it will likely cost the creditor thousands of dollars even if the consumer has not suffered any damages. A creditor who loses must pay the consumer his or her actual damages, additional statutory damages of up to \$1,000.00 even if the consumer has no actual damages, plus attorneys' fees and court costs.³ The attorneys' fees alone for the debtor's attorneys can be \$15,000 to \$50,000 or more if the case goes to trial. In addition, the creditor will have the privilege of paying its own attorneys to defend the action, which could double that cost. If the debtor is able to turn the case into a class action, it could cost the creditor far more.

If the creditor wins? Except in rare circumstances, the creditor will **not** be awarded the attorneys' fees it has spent on its own attorneys – so even if the creditor did nothing wrong, a claim could cost the creditor \$15,000 to \$50,000 or more.⁴ Even in those rare situations where the court awards attorneys' fees to the creditor, it is likely that the consumer will not have the funds to pay the creditor's judgment. He or she was a debtor, after all. So, the net result is that even if the creditor wins the case, the creditor will have lost a lot of time and money defending the claim. *It is almost always less expensive to settle the claim early, even if the claim has no merit.*

An innocent error can result in a violation unless the business takes reasonable safeguards, such as a training program and policies established to comply with the FCCPA. Some of the provisions appear to be easy to follow, such as the prohibition against simulating legal or judicial process,⁶ or not threatening force or violence.⁷ Other

³ §559.77(2)

⁴ §559.77(2) allows a creditor to be awarded its attorneys' fees only "if the court finds that the suit fails to raise a justiciable issue of law or fact."

⁶ §559.72(10)

⁷ §559.72(2)

provisions can be subject to differing interpretations, such as the prohibition against calling “with such frequency as can reasonably be expected to harass the debtor or her or his family.”⁸ How often is too often? Does a busy or an unanswered phone call count? If the debtor refuses to pay the debt, is a second phone call, no matter how soon after, “reasonably” considered to be abuse or harassment?

Violations can occur due to simple mistakes or a failure to establish adequate safeguards against easy-to-make mistakes. The FCCPA prohibits a creditor from contacting a debtor if the creditor “knows that the debtor is represented by an attorney with respect to such debt.”⁹ If the business does not have a strong policy of prominently noting that an attorney has become involved in the case, a collector could easily miss that an attorney has become involved and contact the debtor directly. This is a common violation.

Some violations of the statute can occur due to ignorance of Florida law. The FCCPA prohibits creditors from asserting “the existence of some other legal right when such person knows that the right does not exist.”¹⁰ A collector may not know about Florida’s unique homestead protection, and threaten that a lawsuit could result in a debtor losing his or her home. While the individual collector may be ignorant of this law, the collector company probably is not, so failing to instruct a company’s collectors not to make such threats might be considered a violation of the FCCPA.

The FCCPA also includes a prohibition against the creditor disclosing information affecting the debtor’s reputation to anyone other than a family member or a person who

⁸ §559.72(7)

⁹ §559.72(18)

¹⁰ §559.72(9)

has a legitimate business need for the information.¹¹ This would include roommates or even houseguests. Leaving a message on an answering machine with any information that the person owes a debt could be a violation in the event that some person other than the debtor hears the message. Even if there is a legitimate business need for the information, the creditor is required to disclose that the debt is disputed by the debtor if the dispute is reasonable.¹² If the creditor refers a debt to a collection agency or reports it to a credit bureau, but fails to report that the debt is disputed, then the creditor has committed a violation.

The FCCPA contains a “bona fide error” provision, that allows a creditor to avoid liability if it can prove by a “preponderance of the evidence” that the creditor’s “violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.”¹³ Therefore, it is important for any business to implement a training program for all employees who perform consumer collections, and establish policies and procedures to prevent violations of the FCCPA.

Training is critical to avoid situations that might possibly result in a claim. Once a claim is made, the creditor is automatically in a difficult situation even if the creditor did nothing wrong or even if the creditor made a “bona fide error.” Law firms knowledgeable about claims under the FCCPA know that the cost to defend a claim will far exceed the cost to settle the claim early, and the creditor rarely has a chance of successfully recovering its attorneys’ fees from the debtor. Taking a case to trial, even if the creditor wins or is able to prove a “bone fide error” at trial becomes very expensive

¹¹ §559.72(5)

¹² §559.72(6)

¹³ §559.77(3)

for a risky situation. These law firms also know that the FCCPA specifically states that the law is interpreted broadly in favor of the debtor/consumer, under a “least sophisticated consumer” standard, meaning that if some type of communication to a debtor might be a violation to a “least sophisticated consumer,” then the court will deem the action to be a violation of the FCCPA.¹⁴ With vague terms in the statute like “abuse or harass,” a jury will be instructed to give a lot of latitude to the claims of the debtor. The attorneys who handle these claims will often assert lengthy discovery demands right at the beginning of the case, knowing that it increases the amount of attorneys’ fees early in the case, justifying a higher settlement demand from the beginning.

If a creditor has, in fact, committed a violation of the FCCPA, the creditor should make its best efforts to settle the case early, even if the debtor’s attorney seems to be making unreasonable demands. If the violation was the result of a faulty procedure followed for many debtors, then the creditor could be subjected to a class action, with potential damages of \$1,000 per member of the class up to but not exceeding \$500,000 or 1% of the creditor’s net worth, whichever is less – in addition to attorneys’ fees and costs, of course. An example might be where a creditor regularly reports its delinquent debtors to a credit bureau, but fails to designate when a debtor has disputed the debt. All debtors who disputed their debts before the debts were reported to the credit bureau could become members of a class in a class action.

Due to the nature of the FCCPA and its “unfairness” to creditors, any business that frequently collects from consumers should avoid “pushing the envelope” or “stepping into the grey area” when communicating with consumers. Debtors’ attorneys

¹⁴ Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir.1985) and §559.77(5).

know that it is cheaper for creditors to settle than to fight, even if the creditor wins, so they are willing to file a risky case with the expectation that a settlement will be paid.

The debt collection laws were intended to curtail abuses by unscrupulous collectors, and legislatures created a structure for the affected consumer debtors to enforce the rules. To some degree, the laws have been successful, even though there are still plenty of improper collectors. Unfortunately, these laws were designed to place the creditors at a disadvantage by placing the costs of enforcement on business, sometimes causing substantial harm to an innocent or well-meaning creditor. These laws are a trap for the unwary, and have created an opportunity for some debtors and attorneys to find windfalls. Businesses which must collect debts from consumers should become aware of these laws in order to avoid violating the statutes and to avoid costly claims.