

Recovering Costs and Attorney's Fees Defending Debt Collection Cases

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Complete materials available at: www.llckc.com/forlawyers

Defending Debt Collection Cases

In 2010-2013, 90 million consumer debt buyer accounts.....face value of \$143 BILLION.

Thousands of cases in Missouri every year.

The main challenge of debt defense is getting paid....



Two Paths to Getting Paid

Defense: Use of Procedural Rules and Statutes to Obtain Costs and Fees



Offense: Use of Counterclaims, Affirmative claims in other courts, Third party claims

Basic rule: No fees, no costs

“American Rule”

-Pay your own way

-Exceptions: statute or contract



Award of Costs

-In most debt defense cases, costs are very small or nonexistent



-Probably won't have:
-Filing fees
-Depositions
-Mediation

Statutory Authority for Cost Awards

RSMo. § 514.060

Prevailing party gets costs (“shall”)

RSMo. § 514.170

Costs if Plaintiff dismisses case

RSMo. § 514.180; Rule 67.02(d)

Costs if Plaintiff brings case again



Fees For Enforcing Credit Agreements

§ 408.092 allows attorney's fee awards

- “to enforce a credit agreement”
- must be in agreement or limited to 15%
- Court can award more to prevailing party

Credit Agreement is an “agreement to lend or forbear repayment of money, to otherwise extend credit, or to make any other financial accommodation.” RSMo. § 432.045.1.

Sounds easy, right?

Right?

Fees For Enforcing Credit Agreements



§ 408.092 is not a magic bullet:

- Judges used to seeing Plaintiff's use this statute
- Suing for (or defending) breach of contract may not be “enforcing a credit agreement” *Bailey v. Hawthorn Bank*, 382 S.W.3d 84, 108 (Mo. App. W.D. 2012)
- Very little case law to argue either way

Defensive Use of § 408.092

How to do this in practice?

Motion at end of case?

Prayer for relief?

Affirmative defense?

Bring as a counterclaim?



http://www.colortears.com/wiki/index.php?title=File:Who_is_Who.png

Sanctions for discovery abuses

Rule 61.01(a): Evasive or incomplete answers

-no fees from Rule

Rule 61.01(b): Failure to answer Interrogatories

-no fees from Rule

Rule 61.01(c): Failure to answer RFAs

-can get fees from Rule*

Rule 61.01(d): Failure to Produce

-can get fees from Rule

Sanctions for discovery abuses

NEVER FORGET!

The Court has inherent power to sanction bad faith conduct.

See Mitalovich v. Toomey, 217 S.W.3d 338, 340 (Mo. Ct. App. 2007)

See McLean v. First Horizon Home Loan, Corp., 369 S.W.3d 794, 801 (Mo. Ct. App. 2012)

Sanctions for discovery abuses

Local Rules to the rescue!

Jackson L.R. 32.2.4.2

Platte L.R. 32.2.4

Clay L.R. 32.2.6.1



Sanctions cont.

What constitutes an abuse of discovery?

- Vague, boilerplate objections
- Evasive answers
- Improper claim of confidentiality, etc.
- Failure to produce

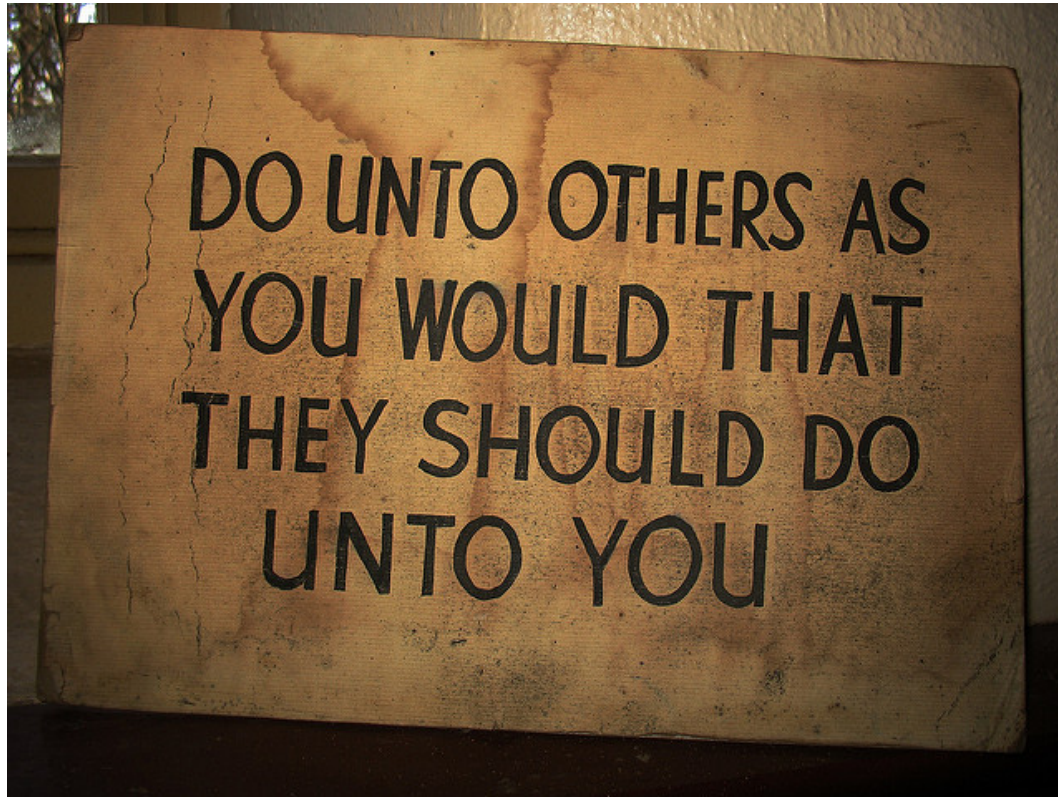
Practice Pointers on Sanctions

- Judicial resistance requires proof of repugnant behavior
- Don't whine! Show you are the grown-up
- Being reasonable wins, being unreasonable loses

Practice Pointers on Sanctions

- Make sure your fee agreement addresses fee awards
- Your client may get “picked off” by settlement offer

Remember the “Golden Rule”



“Defense” Takeaways / summary

- Several paths to costs
- Fees are tougher to get
- Don't let discovery abuses slide

None of that worked. Now what?

Time to play some offense.



Most Likely to Succeed:

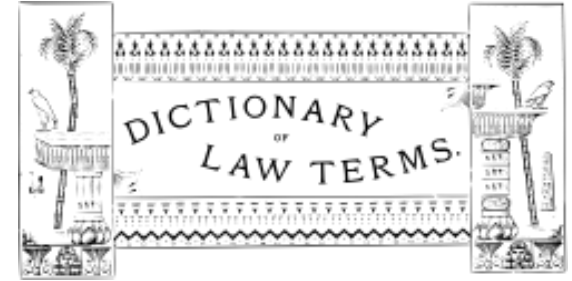
The two consumer claims associated with debt defense cases:

1. **FDCPA** - Fair Debt Collection Practices Act
2. **MMPA** - Missouri Merchandising Practices Act



Consumer Counterclaims

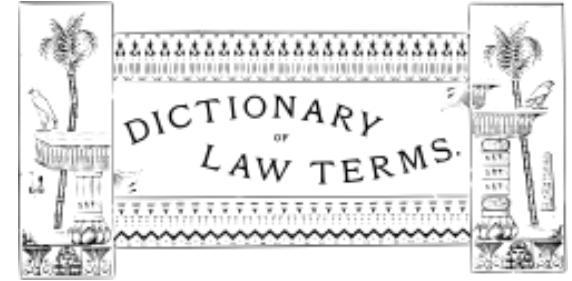
FDCPA - Definitions



1. **Consumer** – natural person obligated or allegedly obligated
2. **Consumer Debt** (or the allegation of a consumer debt) – A debt made for personal, family or household use, whether or not a judgment

Consumer Counterclaims

FDCPA - Definitions



3. **Debt Collector** – regularly collecting debts of another, or a creditor using a false name of a collector, or a creditor who has been assigned a debt already in default.
4. **Violation** of the statute – this is the easy part. There are more than **50 ways** to violate the Act.

Consumer Claims

FDCPA Damages, Fees, and Costs

\$1000 Statutory Damages – Per case, not per violation

Actual Damages, if any – Can include emotional distress damages even without a doctor's testimony

Attorney's fees – Fees for bringing the case often can exceed the value of the claim.

Costs – Court costs paid.



Consumer Claims

FDCPA in Consumer Debt Defense – Part 1

How do I find these claims in a debt defense case?

Counterclaim:

- Wrong debtor
- Statutes of limitation
- Wrong amounts
- Wrong venue
- Credit reporting problems
- Robo-calls



Consumer Claims

FDCPA in Consumer Debt Defense – Part 2

Garnishments:

- Wrong amounts (incl. interest)
- Improper application of payments
- Deceptive/misleading language
- Improper venue (maybe)



Consumer Claims

FDCPA in Consumer Debt Defense – Part 3

Revival of Judgments Rule 74.09 & RSMo. § 511.370:

- Judgment is presumed satisfied per RSMo. § 516.350.1
- Misrep. of party seeking revival
- No proof of assignment = no standing
- Original judgment void
- Improper service of show cause order



FDCPA Final Thoughts

- Only applies to “debt collectors”
- Only applies to consumer debt
- No intent element
- Mandatory attorney’s fees



Author: Oliver Tacke
<https://www.flickr.com/photos/otacke/12221292503>

Consumer Claims

Missouri Merchandising Practices Act

What's the purpose of the law?



Overall Goal:

To protect consumers who are the victim of *unfair behavior*, *deceptive practices* and *sharp dealing* during business transactions.

This includes activities that occur during collection attempts!

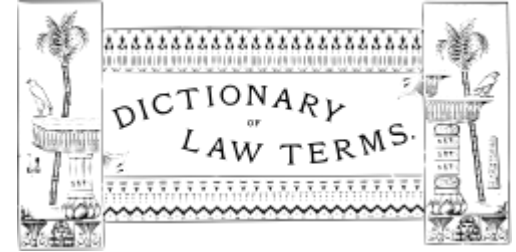
RSMo. § 407.020 et seq.

Consumer Claims

MPA Definitions

Definitions / Terms Part 1:

Merchandise any objects, wares, goods, commodities, intangibles, real estate, or services;



Person any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

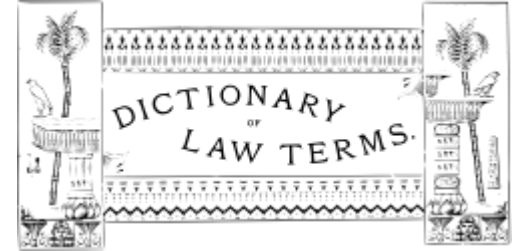
Consumer Claims

MPA Definitions cont.

Definitions / Terms Part 2:

Sale: any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit;

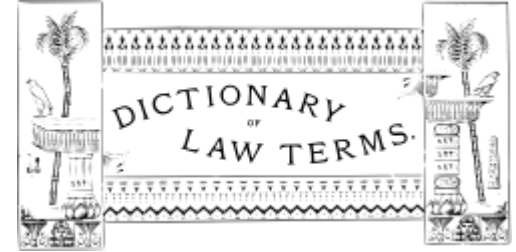
Trade or **Commerce:** the **advertising, offering for sale, sale, or distribution**, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated.



Consumer Claims

MPA Definitions cont.

Definitions / Terms Part 3:



The act, use or employment by any person of **any deception, fraud, false pretense, false promise, misrepresentation, unfair practice** or the **concealment, suppression, or omission of any material fact** in connection with **the sale or advertisement** of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice.

Look to the regulations for specific practices that violate the MPA. 15 C.S.R. § 60-8.010 *et seq.*

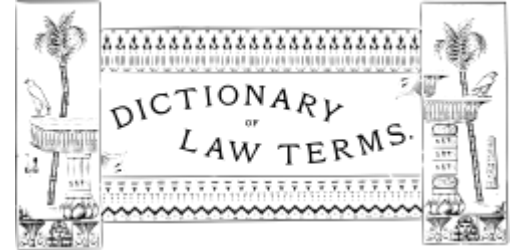
Consumer Claims

MPA Definitions cont.

Definitions / Terms Part 4:

Private right of action to sue under §407.025.

Any person who **purchases or leases merchandise** primarily **for personal, family or household purposes** and thereby suffers an **ascertainable loss of money or property**, . . . as a result of . . . a method, act or practice declared unlawful by section 407.020, may bring a **private civil action** . . .



Consumer Claims

MPA Definitions cont.

Typical Damages and Relief Available:

Actual damages: “. . . may bring a private civil action . . . to recover actual damages.”

Punitive damages: “The court may, in its discretion, award punitive damages”

Attorney’s fees and costs: “. . . and may award to the prevailing party attorney’s fees, based on the amount of time reasonably expended”

Equitable Relief: “. . . and may provide such equitable relief as [the court] deems necessary or proper.”



Consumer Claims MPA Violations

What to look for?

Bad car purchases / no title / rebuilt wrecks

Housing - leases or sales with defects known to seller but not disclosed

Bait and Switch advertising

Mislabeled products (“100% pure” “organic” etc.)



MPA Attack by SB5

- **Currently in the Senate**
- **Terrible bill!**
- **Will give businesses a license to cheat**



www.protectmissouriconsumers.com

MPA Final Thoughts

- Consumers only
- May provide punitive damages and fees
- “Ascertainable loss” required
- Remember to look at the Regs!

Other Possible Claims:

Big claims / bigger results

1. Malicious prosecution / Abuse of process
2. Fraud
3. Invasion of privacy
4. UCC violations

Malicious Prosecution & Abuse of Process

- **Malicious Prosecution requires:** (1) the commencement or prosecution of the proceedings against the present plaintiff; (2) its legal causation or instigation by the present defendant; (3) its termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage by reason thereof
- **Abuse of Process requires:** (1) illegal, improper, perverted, unauthorized use of process, (2) improper purpose, and (3) damage
- Punitive damages available

Intentional Misrep/Fraud

- Elements: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the representation; (5) the hearer's reliance on its truth; (6) the hearer's right to rely thereon; and (7) the hearer's consequent and proximately caused injury.
- Punitive damages are available
- Remember, you need **both intent *and* reliance** for this claim

Privacy torts

- “Invasion of privacy” long recognized in MO
- “Intrusion on seclusion” is main claim
- “False light” recognized by E.D., limited application
- Query: is it just a defamation case? Truth vs. falsity

Uniform Commercial Code Violations

- UCC Art. 2 for sales; UCC Art. 9 for secured transactions
- Short four year statute of limitations works against debt collectors in repo cases, RSMo. § 400.2-725
- Actual and statutory damages, RSMo. § 400.9-625

Real World Examples: PRA v. Mejia

Portfolio Recovery Associates v. Mejia;
1216-CV34184 Jackson County Circuit Court

- Consumer sued on debt that wasn't hers
- PRA continued to sue, despite receiving information on true debtor
- PRA sanctioned for discovery abuses; pleadings were stricken
- Consumer's counterclaims on FDCPA and malicious prosecution proceed to trial on damages only – punitives from the tort claim

Real World Examples: PRA v. Mejia

Jury awards verdict of
\$285,000 in actuals...



Punitive of \$82 Million.

Attorney's fees and costs of almost **\$320k**

Appeal is pending

Real World Examples: CACH v. Dingwall

CACH LLC v. Dingwall;

1416-CV09906 Jackson County Circuit Court

- Consumer hounded for debt that wasn't hers (was late husband's)
- CACH didn't respond to SJ on its claims, lost. Counterclaims proceed
- CACH sanctioned for discovery feet-dragging (\$13k+ attorney's fees)

Real World Examples: CACH v. Dingwall

- Jury verdict of **\$100k** in actuals, **\$1k** statutory...
- Punitives of **\$500k**.
- Attorney's fees/costs of **\$1 mil** requested
- CACH parent filed Chapter 11

Questions or Comments?

The End

Complete materials available at: www.llckc.com/forlawyers

- Complete slideshow
- Electronic copy of written handout (with citations)
- Select pleadings and papers from example cases

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