

## Recovering Costs and Attorney's Fees Defending Debt Collection Cases

### Defending Debt Collection Cases

By Terry Lawson, Lawson Law Center © 2017

1. **Offense:** Use of Counterclaims, Affirmative claims in other courts, Third-party claims
  - 1.1. Basic rule: No fees, no costs: **"American Rule"**
    - a) **-Pay your own way**
    - b) **-Exceptions: statute or contract**
  - 1.2. Award of Costs
    - a) -In most debt defense cases, costs are very small or nonexistent
    - b) -Probably won't have:
      - (1) -Filing fees
      - (2) -Depositions
      - (3) -Mediation
  - 1.3. Statutory Authority for Cost Awards
    - a) **RSMo. § 514.060**
      - (1) Prevailing party gets costs ("shall")
    - b) **RSMo. § 514.170**
      - (2) Costs if Plaintiff dismisses case
    - c) **RSMo. § 514.180; Rule 67.02(d)**
      - (3) Costs if Plaintiff brings case again
  - 1.4. Fees For Enforcing Credit Agreements
    - a) § 408.092 allows attorney's fee awards
      - (1) -"to enforce a credit agreement"
      - (2) -must be in agreement or limited to 15%
      - (3) -Court can award more to prevailing party
      - (4) 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.
    - b) **§ 408.092 is not a magic bullet:**
      - (1) Judges used to seeing Plaintiff's use this statute

(2) 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)

(3) Very little case law to argue either way

c) Defensive Use of § 408.092

(1) **How to do this in practice?**

1.5. Sanctions for discovery abuses

a) Rule 61.01(a): Evasive or incomplete answers

(1) -no fees from Rule

b) Rule 61.01(b): Failure to answer Interrogatories

(1) -no fees from Rule

c) Rule 61.01(c): Failure to answer RFAs

(1) -can get fees from Rule\*

d) Rule 61.01(d): Failure to Produce

(1) -can get fees from Rule

1.6. Sanctions for discovery abuses

a) **NEVER FORGET!** The Court has inherent power to sanction bad faith conduct.

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

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

1.7. Sanctions for discovery abuses

a) Jackson L.R. 32.2.4.2

b) Platte L.R. 32.2.4

c) Clay L.R. 32.2.6.1

1.8. **What constitutes an abuse of discovery?**

a) -Vague, boilerplate objections

b) -Evasive answers

c) -Improper claim of confidentiality, etc.

d) -Failure to produce

1.9. Practice Pointers on Sanctions

a) Judicial resistance requires proof of repugnant behavior

b) Don't whine! Show you are the grown-up

c) Being reasonable wins, being unreasonable loses

d) Make sure your fee agreement addresses fee awards

- e) Your client may get “picked off” by settlement offer
  - f) Remember the “Golden Rule”
- 1.10. “Defense” Takeaways / summary
- a) Several paths to costs
  - b) Fees are tougher to get
  - c) Don’t let discovery abuses slide
2. **Offense:** Most Likely to Succeed:
- 2.1. The two consumer claims associated with debt defense cases:
- a) **FDCPA** - Fair Debt Collection Practices Act
  - b) **MMPA** - Missouri Merchandising Practices Act
- 2.2. Consumer Claims: FDCPA
- a) Definitions
  - b) FDCPA Damages, Fees, and Costs
  - c) How do I find these claims in a debt defense case?
  - d) FDCPA Final Thoughts
    - (1) Only applies to “debt collectors”
    - (2) Only applies to consumer debt
    - (3) No intent element
    - (4) Mandatory attorney’s fees
- 2.3. Consumer Claims: Missouri Merchandising Practices Act
- a) What’s the purpose of the law?
  - b) MPA Definitions
  - c) Typical Damages and Relief Available:
  - d) MPA Violations What to look for?
  - e) MPA Attack by SB5
  - f) MPA Final Thoughts
    - (1) Consumers only
    - (2) May provide punitive damages and fees
    - (3) “Ascertainable loss” required
    - (4) Remember to look at the Regs!
- 2.4. Other Possible Claims: Big claims / bigger results
- a) Malicious prosecution / Abuse of process

- (1) **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
- (2) **Abuse of Process requires:** (1) illegal, improper, perverted, unauthorized use of process, (2) improper purpose, and (3) damage
- (3) Punitive damages available
- b) Fraud
  - (1) 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.
  - (2) Punitive damages are available
  - (3) Remember, you need **both intent and reliance** for this claim
- c) Invasion of privacy
  - (1) "Invasion of privacy" long recognized in MO
  - (2) "Intrusion on seclusion" is main claim
  - (3) "False light" recognized by E.D., limited application
  - (4) Query: is it just a defamation case? Truth vs. falsity
- d) UCC violations
  - (1) UCC Art. 2 for sales; UCC Art. 9 for secured transactions
  - (2) Short four-year statute of limitations works against debt collectors in repo cases, RSMo. § 400.2-725
  - (3) Actual and statutory damages, RSMo. § 400.9-625

### 3. Real World Examples:

#### 3.1. PRA v. Mejia

- a) Consumer sued on debt that wasn't hers
- b) PRA continued to sue, despite receiving information on true debtor
- c) PRA sanctioned for discovery abuses; pleadings were stricken

- d) Consumer's counterclaims on FDCPA and malicious prosecution proceed to trial on damages only – punitives from the tort claim
- e) Punitives of **\$82 Million**.
- f) Attorney's fees and costs of almost **\$320k**

### 3.2. CACH v. Dingwall

- a) Consumer hounded for debt that wasn't hers (was late husband's)
- b) CACH didn't respond to SJ on its claims, lost. Counterclaims proceed
- c) CACH sanctioned for discovery feet-dragging (\$13k+ attorney's fees)
- d) Jury verdict of **\$100k** in actuals, **\$1k** statutory...
- e) Punitives of **\$500k**.
- f) Attorney's fees/costs of **\$1 mil** requested
- g) CACH parent filed Chapter 11