

Hiding in Plain Sight –

How to spot consumer law issues in your daily practice.

1. Introduction – Why should I care? I don't do Consumer Law.

1.1. Reason 1: Your CLIENTS are being swindled, tricked, and lied to everyday.

If your clients are distracted, feeling pressure and are not being well treated, how do you expect them to FOCUS on what you were hired to do? Clearing up even the smallest consumer law matters puts your client's mind at ease, promotes trust between you and you client, and makes your clients happy. And a HAPPY client is a GOOD client.

1.2. Reason 2: Public Policy – It is the RIGHT thing to do.

These laws allow private attorneys to help regulate businesses that would otherwise go unregulated. Consumer attorneys act as private attorneys general in enforcing the rules and regulation of good conduct. Even if you have only business clients, keep in mind that well regulated business is GOOD business. Wouldn't you like to help businesses run fairly and keep the wheels of commerce turning?

1.3. Reason 3: You like MONEY don't you?

In order to promote enforcement and encourage private attorneys to pursue consumer claims that help the general welfare, these types of statutory violations nearly always come with a penalty fee and/or attorney's fees and costs. This means that even if your client cannot pay upfront, or out of pocket damages of the client are minimal, you can still get paid well for your time, so long as your cases are solid.

Don't want to handle these claims yourself? Consumer lawyers are waiting to co-counsel with you, or accept your referral. These cases often settle quickly and can result in a nice bonus for you just by identifying that a problem with an available remedy exists.

Part 2: Consumer Claims YOU are probably missing

There are dozens, if not hundreds, of consumer protection statutes on the state and local level. Nearly all aspects of commerce have some sort of regulation. For simplicity and brevity's sake, this class will only discuss four of these.

2. Improper Debt Collection: FDCPA

15 U.S.C. §1692

2.1. The Purpose of the FDCPA:

In creating the Fair Debt Collection Practices Act (FDCPA) Congress found the following:

§ 802. Congressional findings and declarations of purpose [15 USC 1692]

“...abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. . .”

“... contribute[s] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy”

“Existing laws . . . are inadequate to protect consumers.”

“Means other than . . . abusive debt collection practices are available for the effective collection of debts.”

“It is the purpose of this title to
eliminate abusive debt collection practices by debt collectors,
to insure that those debt collectors who refrain from using abusive
debt collection practices are not competitively disadvantaged, and
to promote consistent State action to protect consumers against debt
collection abuses.”

2.2. The Definitions 1692a

Generally, you need **FOUR things** to have a good FDCPA claim:

2.2.1. A Consumer – A natural person obligated or allegedly obligated on a debt

2.2.2. A Consumer Debt (or the allegation of a consumer debt) – A debt made for personal, family or household use, whether or not a judgment

2.2.3. A Debt Collector (includes an assignment in default creditor) – A person who is regularly or substantially 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.

2.2.4. Bad conduct covered by the statute – The act has over 50 separate subsections that describe bad behavior that debt collectors cannot engage in. There are several major categories of this conduct. Here are the highlights:

2.2.4.1. Third Party Contacts - largely restricted or prohibited 1692 b – When contacting third parties, debt collectors must identify themselves or only seek location information on the consumer, cannot discuss the debt, cannot call more than once, can't use postcards

2.2.4.2. Oppressive Communications Practices 1692c – Generally calling at an improper time, or calling a consumer represented by counsel, improper calls to the workplace of the consumer, or calls after written notice to cease.

2.2.4.3. Harassment or Abusive conduct is prohibited 1692d – Calls without identity, repeated phone calls, profane or abusive language, threats, and other abusive conduct

2.2.4.4. False or Misleading Representations 1692e – This includes a HUGE number of actions, including ANYTHING that is false, deceptive or misleading representation or means in collecting a debt. Can include misrepresentations on the character, status, or amount of the debt itself or almost any kind of trickery. False threats, faking letters that look like legal process, claiming debtor committed a crime, etc.

All initial communications should contain the statement “this is an attempt to collect a debt. Any information obtained will be used for that purpose.” And all further communications must inform the consumer that the communication is from a debt collector.

2.2.4.5. Unfair Practices 1692f – Unfair or unconscionable means to collect a debt are illegal. These include: trying to collect money not authorized by the agreement or law, e.g., fake charges, fees, or interest. Accepting post-dated checks, then threatening bounced check prosecution, threats of unlawful repossession, or communications intended to show it is a debt collection attempt (postcards and window envelopes that show debt collection information).

2.2.4.6. Validation of the Debt 1692g – within 5 days of initial communication, must send a validation notice with specific information. If

consumer wants a validation, the debt collector must: cease collection until validated and provide the necessary info.

2.2.4.7. Multiple Debts 1692h – Collectors cannot dictate which debts get paid first, and cannot force payment on debts consumer disputes.

2.2.4.8. Proper venue of the debt case 1692i – This one is ROUTINELY violated. Must sue a consumer where the consumer resides, or where they signed the contract. No distant forum suits allowed for debt collectors.

2.2.4.9. No deceptive forms by creditor 1692j – Creditor’s primary way to screw up is by pretending to be a third party debt collector and collecting on a debt.

2.3. The Relief Allowed Under the FDCPA 1692k:

2.3.1. Up to \$1000 max penalty damages – Per case, not per violation

2.3.2. Actual Damages, if any – Can include emotional distress damages without a doctor’s testimony

2.3.3. Attorney’s fees – Fees for bringing the case even if they exceeded the value of the claim.

2.3.4. Costs – Court costs paid.

2.4. SOL: Generally you have only **one year** from the time of the violation to make a claim. **This means you must act quickly to allow an evaluation of any potential violations.**

2.5. WHAT TO LOOK FOR: See presentation slides for examples.

3. False Credit Reporting: FCRA

15 U.S.C. 1681 et. seq.

3.1. Purpose and Coverage

3.1.1. Congressional Intent: Congress created the FCRA in order to curb the reporting of false information in consumer reports gathered by consumer reporting agencies. FCRA covers not only credit reports, but all sorts of consumer reports that may have bearing on credit worthiness, character or

general reputation, personal characteristics, or mode of living if that information is being used to rate the consumer.

3.1.2. Maximum Possible Accuracy 1681e(b): all CRAs must follow **reasonable procedures** to assure **maximum possible accuracy** in the information being reported. This is not strict liability for any inaccuracy. Rather liability for unreasonable procedures.

3.2. Definitions §1681-

3.2.1. “Consumer” 1681c – an individual, not a business

3.2.2. “Consumer Report” 1681d – oral, written or other communications of information by a CRA used to establish consumers worthiness for:

- A. Credit or insurance** for personal, family or household services
- B. Employment**
- C. Certain licensures or other benefit** granted by a governmental instrumentality used to determine an applicant’s financial responsibility or status
- D. Any other purpose in 1681b** – mainly, legitimate business needs
- E. Subject to any exceptions**

3.2.3. “Consumer Reporting Agency” 1681f – a/k/a “CRA” anyone who for profit or in a cooperative nonprofit way, assembles or evaluates consumer information for the purpose of furnishing consumer reports to third parties.

3.2.4. “File” 1681g – ALL information recorded and retained by a CRA about a consumer, regardless of how it’s stored.

3.2.5. “Employment Purposes” 1681h – Used in connection with hiring retention, reassignment or promotion.

3.3. Typical Violations – Some of the most common violations that occur include:

3.3.1. Furnishing and Reporting inaccurate information: These are current items on the report that are simply inaccurate or not maximum accuracy.

3.3.2. Furnishing and Reporting outdated information: These are information that should no longer be listed, because it is too old. Example, 7 years for typical credit items, 10 yrs. for bankruptcy.

3.3.3. Re-inserting deleted information: Once a piece of consumer information is deleted, it should stay deleted.

3.3.4. Mixed or Merged consumer files: A mixed file results when a record is added from someone else's file. Other times, two completely different consumers might see items from both on each other's credit file.

3.3.5. Failing to properly investigate disputed information 1681i : proper reinvestigation is required when a consumer makes a dispute. Often, the CRA fails by just taking the word of the creditor over the consumer, without consideration of new information being provided by the consumer. CRA has 30 days to re-investigate, and may extend 15 more in some cases.

3.3.6. Requesting credit reports for improper purpose Car dealers and others do this; they pull credit without first getting consumer's permission. You must have consumer permission or fit one of the exceptions to pull a credit report without permission of the consumer.

3.4. Damages 1681n&o – Actual damages, statutory penalties, punitives available, and attorney's fees and costs paid. Depends on type of violation.

3.4.1. Willful noncompliance: Greater of actual damages or statutory \$100 to 1,000, plus punitive if allowed, and attorney's fees and costs. Willful violation does not require malice, but only knowing and intentional action in conscious disregard for other's rights.

3.4.2. Negligent noncompliance: actual damages and attorney's fees and costs.

3.4.3. Improperly pulling report: any natural person who does this without permission or good reason, greater of actual damages or \$1,000.

3.5. SOL 15 USC 1681p: usually **two years** from the time liability arises.

3.6. WHAT TO LOOK FOR: See presentation slides for examples.

4. Unsolicited, No Consent Phone/Fax/Robocalls: TCPA

15 U.S.C. 1681 et. seq.

4.1. Purpose: The TCPA was created in 1991 to protect consumers from receiving unsolicited autodialed and pre-recorded communications. The premise is that such calls often constitute "a nuisance and an invasion of privacy, regardless of the type of call". Also consumers should not be required to supplement the commercial activities of violators (whether marketing, debt collecting, etc.) in the form of costs

for calls, fax consumables, and text messaging charges. In the modern age, as automated telephone equipment and cell phone use has exploded, so have claims under the TCPA.

4.2. Coverage: There are five major categories of prohibited activities (subject to numerous defenses and objections)

4.3. Key Definitions

4.3.1. ATDS or “autodialer”: Automated telephone dialing system. This includes systems with the capability to make calls without a human dialing, **whether or not** they are used in this capacity.

4.3.2. EBR: Established business relationship. Provides an exception to liability for some, but not all violations of the TCPA.

4.4. Violations

4.4.1.1. Junk faxes 47 USC 227(b)(1)(c): prohibits all unsolicited ads to telefax machines. Big exception is the established business relationship.

4.4.1.2. Autodialed calls to cell phones 47 USC 227 (b)(1)(A): prohibits nonconsensual autodialed calls to cell phones whether the cell phone being called is business or personal.

4.4.1.3. Autodialed, “artificial or recorded voice” calls to cell phones from debt collectors are illegal: unless there is specific consent to the consumer, a debt collector’s prior business relationship does NOT except them from liability.

4.4.1.4. Text messages: A text is no different from a call, as far as TCPA is concerned.

4.4.1.5. Pre-recorded or artificial voice calls to landlines 47 USC 227 (b)(1)(B): prohibits nonconsensual calls with a prerecorded or artificial voice. Residential landlines only, and emergency calls excepted.

4.4.1.6. “Do Not Call” Violations 47 USC 227(c)(5): If telemarketing call is placed, without prior consent to a phone number (cell or residential) that is on the federal or company do-not-call list, then it could be a violation. But to get a private right of action, there must be two or more calls of this type to have a private right of action. **There must be at least two calls.**

4.5. Damages: 227(b)(3)(B) provides a minimum of **\$500.00** in statutory damages per call, fax, or message. **Willful or knowing violations** can allow the court to grant **treble damages, i.e., \$1,500.00** per call, fax, or message. **227(b)(3)(c).**

4.6. Statute Of Limitations: generally, four year federal SOL applies 28 USC 1658. Some courts (rarely) find state law limitations apply instead.

4.7. WHAT TO LOOK FOR: See presentation slides for examples.

5. Crooked Consumer Purchase / Sale: MMPA (UDAP)

RSMo. §407.020 et. seq.

5.1. Purpose and Coverage: Nearly all states have **UDAP** statutes. (Unfair and Deceptive Acts and Practices). There are variations to the scope of the protections under the statute, but the primary basis is the same: to protect consumers who are the victim of unfair behavior and sharp dealing during business transactions, including during the advertising and solicitation of goods and services.

5.2. Definitions: See **§407.010** for complete definitions. In summary, a consumer must take part in a consumer transaction that includes sales of goods, even real property and leases, for personal, family, and household use.

5.3. Violations:

Statute is extremely broad in what is included as a violation

5.3.1. §407.020.1 "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."

5.3.2. §407.020.1 "... Any act, use or employment declared unlawful by this subsection violates this subsection whether committed **before, during or after** the sale, advertisement or solicitation."

5.3.3. Private right of action to sue under §407.025. "1. Any person who **purchases or leases** merchandise primarily for **personal, family or household purposes** and thereby suffers an **ascertainable loss** of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a

private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place”

5.3.4. CAUTION: Must have ascertainable loss. In many instances an unlawful activity takes place, but proving an ascertainable loss becomes difficult. Many claims fail for lack of this requirement. Consider what kind of loss the client suffered? Any pecuniary damages? Loss of a property interest? Something concrete is always easier than “squishy” damages to reputation or inconvenience damages.

5.4. Damages Awardable under §407.025:

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

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

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

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

5.5. Statute of Limitations §516.120.2: five year statute of limitations

5.6. WHAT TO LOOK FOR: See presentation slides for examples.