Basic Consumer Protection Law
Basic Business Law 2016

Judge Christopher C. Nash, Thirteenth Judicial Circuit
Anthony J. Palermo, Holland & Knight LLP
Overview


II. Telephone Consumer Protection Act

III. Fair Credit Reporting Act

IV. Florida Deceptive And Unfair Trade Practices Act
Why pay attention?

- $22,405,000 in statutory damages under TCPA on summary judgment in 2015
- $12 million judgment in Florida under TCPA, insurance coverage litigated for over 7 years
- In 5 year period from 2003-2008, there were 1,744 TCPA cases filed according to CNS
Why pay attention?

- U.S. Supreme Court has held that FDCPA applies to lawyers
- 11th Circuit reversed dismissal of FDCPA class action against law firm
- Florida appellate courts have found FCCPA can apply to lawyers
- Florida appellate court has certified class action against law firm for FCCPA and FDUTPA claims
Why pay attention?

- In 2015, M.D. Fla found “notable exceptions to small damages awards usually given in FDCPA cases”
  - $150,000
  - $75,000

- Court also explained punitive damages have been awarded under FCCPA
  - Awarded $100,000 in punitive damages
  - $204,000 in total damages, attorneys’ fees + costs for FDCPA + FCCPA claims
Why pay attention?

- High exposure under FCRA class actions
  - In 2014, Publix settled for $6,797,475 plus $2,395,483.38 in fees
  - In 2015, Dollar General settled for $4,080,000.00 plus $1,020,000 in fees and costs
FDCPA & FCCPA: Background & Purpose

- FDCPA enacted by Congress “to eliminate abusive debt collection practices by debt collectors”

- FCCPA enacted with similar goal, “to eliminate abusive and harassing tactics in the collection of debts”

- Protects consumers, but protects debt collectors too
FDCPA & FCCPA

Application

- FDCPA applies to debt collectors, NOT creditors
- FCCPA applies to any person attempting to collect a debt
1. simulating law enforcement, government agency, an attorney or affiliate of one, or legal or judicial process

2. using or threatening force or violence

3. telling debtor (who disputes a debt) that you will disclose info affecting debtor’s reputation for creditworthiness without disclosing that the debt is disputed

4. communicating or threatening to communicate with a debtor’s employer
5. disclosing info to someone other than the debtor or his or her family that affects the debtor’s reputation, with knowledge or reason to know that the info is false or that recipient does not have business need for the info.

6. disclosing info. about the existence of a debt known to be disputed without disclosing that debtor disputes it

7. willfully communicating with a debtor (or family) with frequency that can reasonably be expected to harass, or engaging in other conduct that can reasonably be expected to abuse or harass
FDCPA & FCCPA: Prohibited Acts

8. using profanity or obscene, vulgar, or abusive language when communicating with the debtor (or family)

9. claiming, attempting, or threatening to enforce a debt with knowledge that debt is not legitimate, or asserting the existence of some other legal right with knowledge that the right does not exist

10. communications that appear authorized, issued, or approved by government or an attorney (that are not)
11. using instruments, forms, etc. that only attorneys are authorized to prepare, as a guise, when communicating with a debtor

12. orally communicating so as to give the false impression that the person is an attorney or associated with one

13. advertising or threatening to advertise for sale any debt to enforce payment

14. publishing, posting, or threatening to publish or post to the public the name(s) of debtors
15. refusing to identify one’s self, one’s employer, or the entity that one represents/acts on behalf of when requested to do so by a debtor

16. mailing communications in an envelope or postcard that has writing on the outside of it that is “calculated to embarrass [a] debtor”

17. communicating with a debtor between 9 p.m. and 8 a.m. without prior consent
18. communicating with a debtor whom the person knows is represented by counsel with respect to the debt, unless the debtor initiates the communication

19. causing a debtor to be charged for a communication by concealing its purpose
FDCPA & FCCPA: Damages

- Actual damages
- Additional statutory damages up to $1,000
- Court costs + attorneys’ fees for prevailing plaintiffs
  - Even potentially “fees-for-fees”
  - Mandatory
Unlike the FDCPA, the FCCPA provides that "[t]he court may award **punitive damages** and may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations."

Must make showing under section 768.72, Florida Statutes
FDCPA & FCCPA: Defense fees

- In contrast to mandatory prevailing fees for plaintiffs:
  - FCCPA: “If the court finds that the suit fails to raise a justiciable issue of law or fact, the plaintiff is liable”
  - FDCPA: if plaintiff's action "was brought in bad faith and for the purpose of harassment"
FDCPA & FCCPA: Defenses

- Intent/bona fide error
  - Defendants not be held liable if show evidence that any violation was unintentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonable adapted to avoid such error

- Standing
TCPA: Background & Purpose

- TCPA enacted to protect the **privacy interests** of telephone subscribers by placing restrictions on unsolicited, automated telephone calls

- TCPA designed to facilitate interstate commerce by restricting certain uses of fax machines and automatic dialers
TCPA: Prohibitions

1. using an automatic telephone dialing system to make calls (other with prior, express consent) to a cell phone

2. calling a residential phone using an artificial or prerecorded voice without prior, express consent

3. sending unsolicited ad. to a fax machine, unless sender has established business relationship with the recipient or recipient made its fax number public
TCPA: Damages

- Actual monetary loss or $500 *per violation*, whichever is greater

- If defendant willful or knowingly violated TCPA, court can increase damages up 3x ($1,500 *per violation*)

- Also, potential civil forfeiture/criminal penalties, fines
TCPA: Defenses

- Standing?
- Prior, express consent
  - Intermediary can provide
  - Forms
- Can be revoked
Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote **efficiency** in the **banking system**, and **protect consumer privacy**."

Meet the needs of **commerce** for consumer credit information

Be fair to the **consumer**, provides for confidentiality, accuracy, relevancy, and proper use
Credit Reporting Agencies

- May only furnish consumer reports for permissible purposes
- May not make consumer report with certain information
- Must follow certain procedures when consumer reports fraud or identity theft
FCRA: Requirements

Credit Reporting Agencies

- Must reasonably investigate accuracy of disputed info.
- Must notify consumer when report public record information if furnish reports for employment purposes that likely to have adverse effect on employment
  - And must ensure complete + up-to-date
FCRA: Requirements

Users of Consumer Reports

- Must notify a consumer of any adverse action taken with respect to the consumer that is based in whole or in part on any information contained in a consumer report

- Must notify a consumer if use a consumer report in connection with an offer of credit on terms that are less favorable than the most favorable terms available to a substantial portion of consumers
Users of Consumer Reports

- Must obtain consumer reports for permissible purposes, certify the purpose for which the info. is sought and that info. will be used for no other purpose

- Must follow procedures before extending credit if fraud alert in consumer report
FCRA: Requirements

Furnishers of Information

- Must not furnish info. if know or have reasonable cause to believe info. is inaccurate or if a consumer notifies the furnisher that the info. is inaccurate

- Must notify CRA of any corrections or additional info. necessary to make info. provided complete and accurate
FCRA: Requirements

Furnishers of Information

- Must not furnish info. to CRA if the consumer disputes info. without also notifying CRA that consumer disputes
- Must conduct an investigation into disputed information after receiving a notice of dispute from a consumer
If defendant *willfully* fails to comply with FCRA:

- Actual damages *or* damages of not less than $100, not more than $1,000

If defendant obtains report under false pretenses or *knowingly* without permissible purposes:

- Actual damages *or* $1,000, whichever is greater
Defendants who **willfully** fail to comply with FCRA also liable for:

- Punitive damages if court allows
- Costs + attorneys’ fees
FCRA: Damages

Defendants who **negligently** fail to comply with FCRA liable for:

- Actual damages
- Costs + attorneys’ fees
Only possible if court finds that an unsuccessful pleading, motion, or other paper filed in bad faith or for purposes of harassment

Award only those attorneys' fees related to the pleading, motion, or paper
FCRA: Defenses

- Report at issue is not a “consumer report”

- Reasonable procedures employed in generation of inaccurate report / credit report was accurate as a matter of law

- Causation

- Damages

- Statute of Limitations
FDUTPA: Background & Purposes

- “The Florida legislature enacted FDUTPA in 1973 to protect consumers against commercial wrongdoing"

- Protect *entire* consuming public

- Protect *legitimate* business enterprises

- Provide remedies for conduct beyond reach of fraud
1. Unfair methods of competition

2. Unconscionable acts or practices

3. Unfair or deceptive acts or practices
Deceptive Act

- representation, omission, or practice likely to mislead consumer acting reasonably in the circumstances, to the consumer's detriment

- This standard requires a showing of probable, not possible, deception that is likely to cause injury to a reasonable relying consumer
Unfair Practice

- offends established public policy

- immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers
FDUTPA: Damages

- Actual damages
- Attorneys’ fees + costs
- Declaratory + injunctive relief
- Civil penalties (enforcement action)
FDUTPA: Defense Fees

- Defendants may file a motion alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment

- Court may, after hearing evidence, require plaintiff to post a bond for a reasonable amount to indemnify the defendant for any damages incurred, including attorneys' fees
FDUTPA: Defenses

- Act of practice required or permitted by federal or state law
- No actual damages
- Retailer
- Publisher, broadcaster, printer, etc.