

Basic Consumer Protection Law

Basic Business Law 2016

Judge Christopher C. Nash, Thirteenth Judicial Circuit
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Overview

- I. Fair Debt Collection Practices Act &
Florida Consumer Collection Practices Act
- 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*

FDCPA & FCCPA: Prohibited Acts

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

FDCPA & FCCPA: Prohibited Acts

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)

FDCPA & FCCPA: Prohibited Acts

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

FDCPA & FCCPA: Prohibited Acts

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

FDCPA & FCCPA: Prohibited Acts

- 18. communicating with a debtor whom the person knows is represented by counsel with respect to the debt, unless the debtors 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*

FCCPA: Punitive Damages

- 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**

FCRA: Background & Purposes

- "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

FCRA: Requirements

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

FCRA: Requirements

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

FCRA: Damages

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

FCRA: Damages

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

FCRA: Prevailing Party 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

FDUTPA: Prohibitions

1. Unfair methods of competition
2. Unconscionable acts or practices
3. Unfair or deceptive acts or practices

FDUTPA: Prohibitions

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

FDUTPA: Prohibitions

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.