

Essential Electronic Discovery Strategies for Success

Wednesday, May 7, 2008 • 9:30 a.m. to 5:00 p.m.

The focus of this seminar will be on the new Federal Rules of Civil Procedure for electronic discovery and a comparison of the federal rules with the Michigan rules. Topics will include preparing effective preservation instructions and production requests, evaluating corporate records hold programs, and evaluating corporate records management policies and practices. These topics will assist practitioners who often must face complex corporate IT systems to find the relevant business records and information. Between each topic there will be a panel discussion with consumer law practitioners showing how these ideas can be applied to trial practice.

Presented by: Jeffrey Rigger, Esq.

Location: State Bar Building, Lansing, Michigan

Cost: Free to Consumer Law Section members;
\$125 registration fee for non-members.

Lunch: A box lunch will be available for \$10.

More information at
<http://www.michbar.org/consumer/calendar.cfm>

Mobile Debt Collection Accounts: Debt Collector Liability Under the FDCPA for Failure to Note a Consumer Dispute Before Transfer to Next Collector

By Julie A. Petrik, Ian B. Lyngklip, and Gary M. Victor

Introduction

This is an age of rapid-fire electronic transfer of collection accounts from debt collector to debt collector. These successive transfers can cause a host of problems for consumers. One major problem results from the refusal of collectors to adequately resolve consumer disputes over whether debts are actually owed. Instead of resolving such disputes, collectors usually sell disputed debts to other collectors without marking them as disputed. This practice results in consumers who dispute their debts being subjected to collection efforts from a series of collectors on debts they may not even owe.

Consumer disputes can arise from such sources as identity theft, misapplied payments, billing disputes, or mixed credit files at a credit reporting agency. Efforts to resolve such disputes are compounded by the fact that the collection industry does not require original account documents to be transferred to debt buyers. Generally, original documents are available to debt collectors only for a fee. This pay-per-record system discourages collectors from obtaining and reviewing the documents necessary to validate consumer disputed debts.

The Fair Debt Collection Practices Act (FDCPA)¹ was enacted to protect consumers by eliminating abusive debt collection practices. One critical provision of the act grants consumers the right to dispute debts and gain access to information relied on by collectors to support their collection activities.² Once a collector receives notice of the dispute, the collector must either refrain from collecting the account or provide verification of the account.³

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From the Chair

By Larry Lacey, Chairperson

The Consumer Law Section held its annual meeting and election of officers at the State Bar Annual Meeting in September 2007 in Grand Rapids. Election results are on the website. After the meeting, Michael Nelson and Karen Tjapkes gave a presentation on "The Nuts and Bolts of Litigating a Predatory Mortgage Lending Case."

Predatory Lending

Members of the section have been working with Rep. Tobocman's office on predatory mortgage lending legislation. Rep. Tobocman and his colleagues have also been working with the Center for Responsible Lending (a national group) to draft the bills. While some parts of the package have passed out of committee, the Michigan Home Loan Protection Act, which contains substantive market reforms, is still pending in the House Finance Committee.

Foreclosures

Section members Lorray Brown and Larry Lacey, along with several representatives from Michigan Legal Services, presented a session on predatory lending at the conference on foreclosure held in Detroit in December 2007. It was amazing but very disheartening to put faces to the very large numbers of persons in foreclosure. Section member Dani Liblang, along with a representative from the Real Property Section, were guests on the "Ask the Lawyers" program December 20, 2007. The program dealt with foreclosures. The show originates in Lansing but has affiliate stations around the state.

MCPA FIX

The Consumer Law Section, in conjunction with the Campaign to Protect Michigan Consumers, is working to change the MCPA to make it more effective. Representative Jones presented a workshop for legislatures on October 31, 2007, on the need to fix the MCPA and what other states have done for consumers. Council members Dani Liblang, Josh Ard, Ian Lyngklip, Gary Maveal, and Josh Ard presented at the workshop. The meeting was sparsely attended because the legislature was in session late into the early morning hours working on the budget. A second workshop was presented on January 23, 2008. The next step will be hearings. We need to get some publicity out on how consumers and businesses are being hurt by not having effective consumer laws. Michigan ranked last in the U.S. for effective consumer protection laws in a recent study conducted by the National Consumer Law Center. The Probate and Estate Planning, Elder Law, Negligence Law, and Litigation Sections are willing to partner with us on this issue. There may also be other groups, including minority groups and church groups, who would also be willing to partner, and we should ask them to assist us with this effort. Additionally, at the November 2007 Consumer Law Section council meeting, the council voted to commission a study by the National Consumer Law Center on the state of consumer law in Michigan. It is hoped this will be of use to the Campaign to Protect Michigan Consumers. The Campaign to Protect Michigan Consumers meets every couple of months, usually at the AARP offices in Lansing.

Schedule of Consumer Law Council Meetings

- May 8, 2008 10 a.m. State Bar in Lansing
- July 10, 2008 10 a.m. State Bar in Lansing
- September 18, 2008 annual meeting at the Hyatt in Dearborn

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Given the manpower and outlays of capital required to meaningfully validate a debt, the economics of collecting a debt militate against providing costly account information to consumers. As such, even though the FDCPA requires that collectors “validate” disputed debts, “validation” rarely occurs in any meaningful sense. Rather than validate disputed debts, collectors often simply sell these debts to another collector. As these second collectors would be reluctant to purchase disputed debts, the original collector will generally sell them without disclosing the prior dispute. The second collector, unaware of the consumer’s dispute, begins collection activities anew. Hence, the consumer is subject to a series of collection-dispute cycles. This article will discuss some of the structural problems of the collection system that lead to collectors selling disputed debts without marking them as disputed, and recent decisions that will hopefully provide consumers with a remedy against for practice.

Industry Framework

The current structure of the collection industry is one that operates largely without reference to any original documentation. This absence of documentation, coupled with the cost of obtaining those documents, encourages debt collectors to engage in “dispute avoidance” as opposed to “debt validation.” Simply, it is cheaper and easier to avoid a dispute than to resolve it. Thus, rather than reviewing original documentation to respond to consumer disputes, collectors will usually transfer or sell these accounts. This strategy presents three immediate benefits to collectors faced with genuine disputes.

First, it relieves them of the cost of acquiring source documents. Even though those source documents may be available pursuant to the terms under which the debt was assigned, those source documents are rarely provided without payment of a “research” or “media” fee imposed by the original creditor. In other words, unless the current owner of the debt is willing to pay for proof of the debt, proof will never be provided to the consumer.

Second, by transferring disputed debts, collectors relieve themselves of the manpower cost of validation. While much of the routine activity of collection, such as autodialing, generating form letters, and preparing lawsuits, can be handled by computers, reviewing account notes and billing statements is time intensive. Resolving disputes could easily cost more than the price paid for the debt and eat into the profitability of the overall collection process. In addition to saving the cost of validation, selling disputed debts frees up employees engaged in the validation process to work on more profitable activities.

“. . . the FDCPA itself and the economics of the collection business create an environment in which problems are kicked down the road to the next collector, subjecting the consumer to an unending cycle of collection and dispute.”

Finally, by selling disputed debts, collectors can avoid legal obligations imposed by the FDCPA. Once a consumer disputes a debt, the act requires the collectors to cease collection efforts or validate the debt.⁴ By selling disputed debts, collectors cease their own collection activities while recouping at least part of the price paid for such debts. Additionally, the collectors avoid possible exposure to suit by ridding themselves of consumers who appear to be knowledgeable about their rights.

In the end, it is cheaper to sell the debt downstream rather than expend time and resources to properly validate. The net effect though, is to send the consumer’s account back into the stream of commerce without the consumer ever having received the benefit of the validation procedure provided for by law.⁵ Thus, the FDCPA itself and the economics of the collection business create an environment in which problems are kicked down the road to the next collector, subjecting the consumer to an unending cycle of collection and dispute.

Failure to Mark Debts as Disputed

Clearly, once debts are disputed, collectors are highly motivated to sell or transfer them. As strong as the collectors’ motivation to transfer disputed debts may be, the incentive to fail to mark them as “disputed” is just as strong. An account that is tainted by the markings of a consumer dispute is worth less, if not worthless. The factors contributing to this decrease in value of disputed accounts is not simply the result of the fact that the consumer might not owe the debt but may be more influenced by potential liability under the FDCPA. An unintended consequence of potential FDCPA liability is that the act encourages both *selling collectors* and *purchasing collectors* to deal only in debts that are not marked as disputed.

First, the FDCPA provides for strict liability for reporting false credit information,⁶ failing to communicate that a disputed account is disputed,⁷ and for collecting amounts that are not due.⁸ There is a *bona fide* error defense available for debt collectors when these violations are unintentional.⁹ However, *purchasing collectors* that receive accounts marked disputed would effectively lose that defense. Thus, when *selling collectors* disclose the disputed status of a debt, the sale of that debt will

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be less profitable if not impossible. This encourages *selling collectors* to hide the fact that debts are disputed.

Second, collectors who attempt to collect amounts that are not owed may be liable under the act.¹⁰ Again, such liability can be defeated by the *bona fide* error defense. However, the defense requires collectors to demonstrate that any violation occurred in spite of procedures reasonably adapted to prevent such violation.¹¹ If debts are received with notices of the dispute, *purchasing collectors* risk jeopardizing their “empty head—clean heart” defense if they proceed to engage in collection activities on those accounts. Indeed, *purchasing collectors* have every reason *not* to want to know whether accounts have been subject to prior disputes to avoid FDCPA liability for their own collection actions.

Thus, *selling collectors* have an incentive to fail to mark debts as disputed in order to sell them, and *purchasing collectors* are discouraged from buying disputed debts to protect their *bona fide* position. This results in a high likelihood that consumer disputed debts will be sold or transferred without being marked as disputed. Consumers who dispute collection attempts are, therefore, subject to a continuous series of collection attempts as their debts go down the line. Consumers who sue the *purchasing collectors* are usually defeated by the *bona fide* error defense and, until recently, *selling collectors* who transfer disputed debts without marking them as disputed have escaped FDCPA liability.¹²

The FDCPA prohibits debt collectors from making false or misleading representations about a debt.¹³ This prohibition has usually been applied to representations made by collectors to consumers. The issue is whether a consumer states a cause of action under the FDCPA when a *selling collector* makes a false representation—that is, debt is not disputed when it is in fact disputed—to a *purchasing collector*. That right to a cause of action is just starting to be established.

Cases Providing for a Consumer Cause of Action

The first case to hold that the consumer has a FDCPA cause of action when a selling collector fails to mark a debt as disputed when selling a debt to a purchasing director was the 9th Circuit case of *Magrin v Unifund CCR Partners, Inc.*¹⁴ In *Magrin*, the consumer had sued both the *selling collector* and the *purchasing collector*. The consumer’s FDCPA claim against the *selling collector* was based on its failure to mark the debt as disputed. The trial court dismissed the consumer’s claim against the *selling collector* on the basis that the act did not provide a cause of action for a misrepresentation made by one collector to another. The *Magrin* court reversed, holding:

Under 15 U.S.C. § 1692e, a debt collector violates the Act if it uses “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” This prohibition includes false representations as to “the character, amount, or legal status of any debt.” 15 U.S.C. § 1692e(1)(A). Thus, a consumer states a valid claim for relief under the Act when he alleges that a debt collector has made false representations as to the legal status of a debt in connection with the sale, transfer or assignment of a debt to another debt collector, with the knowledge that the purchaser, transferee or assignee intends to initiate or continue attempts to collect the debt.¹⁵

Two recent district court decisions have also reached similar conclusions. In *Burdick v Palisades Collection LLC*,¹⁶ the debt collector, LVNV, received notice of the consumer’s dispute and then sold the account to another collector without disclosing the disputed nature of the account. The court denied LVNV’s motion to dismiss the FDCPA claim, holding that the consumer stated a claim against LVNV because the debt collector “failed to disclose that the debt was disputed when it assigned the account to other debt collectors and sold the debt.”¹⁷

Similarly, in *Kinel v Sherman Acquisition II, LP*,¹⁸ the court refused to dismiss the FDCPA claims against Wolpoff & Abramson, LLP, (W&A), one of the nation’s largest debt collector law firms. It held that a jury could reasonably find that W&A’s communications to the *Sherman* defendants were false or deceptive by virtue of its failure to state that consumer’s debt was disputed.¹⁹

Conclusions

Ideally, a consumer dispute should forestall or even stop collection efforts until the validity of the underlying account is determined. The economics of debt collection encourages debt collectors to transfer debts once they are disputed by consumers and to make those transfers without marking the accounts as disputed. When an account is transferred without dispute information, the consumer becomes the victim in a vicious collection cycle. Under the rationale of *Magrin*, *Burdick*, and *Kinel*, *selling collectors* assume a real risk of liability under the FDCPA when selling or transferring accounts without disclosing their disputed nature. Debt collectors can no longer pass on disputed debts as undisputed with impunity. How the industry will respond to this new environment is as yet unknown. Collectors may keep disputed debts and establish procedures to validate them, or they may still pass them on as undisputed and take their chances of incurring FDCPA liability. It can be reasonably anticipated that

many disputed accounts will continue to be transferred without being marked as disputed until such time as the cost of FDCPA lawsuits exceeds the profitability of this practice.

In terms of the practical application, for consumers to fully protect their rights, it is important that they make detailed disputes to collectors including supporting evidence. If a disputed account is nonetheless transferred to a second collector and that collector engages in unlawful collection activity, the filing of the federal lawsuit against both selling and purchasing collector will enable the consumer to uncover where the violation occurred. The possibilities are not numerous; either the *selling collector* failed to disclose that the account was disputed, or the *purchasing collector* received notice of the dispute and continued to collect anyway. While consumers can feel trapped in this collection-dispute cycle, the FDCPA now may well provide a remedy for them when debt collectors sell disputed accounts without marking them as disputed.

Julie A. Petrik is an attorney with Lyngklip & Associates Consumer Law Center, PLC, and litigates FDCPA cases on behalf of consumers. Ian B. Lyngklip is the principal in that law firm and represents consumers in FDCPA cases as well as advances consumer rights under the Fair Credit Reporting Act, Truth in Lending Act, and other consumer rights laws. Gary M. Victor is of counsel to that firm, a sole practitioner, and a professor in the College of Business at Eastern Michigan University.

Endnotes

- 1 15 USC §1692, *et seq.*
- 2 15 USC §1692g.
- 3 *Id.*
- 4 *Id.*

- 5 The validation procedures provided for by the FDCPA are mirrored in the Michigan Occupational Code, M.C.L. § 339.918.
- 6 15 USC §1692e(8).
- 7 *Id.*
- 8 15 USC §1692f.
- 9 The bona fide error defense states: “A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 USC §1692k.
- 10 15 USC §§ 1691e and 1691f.
- 11 15 USC §1692k.
- 12 Current industry practice dictates that such disclosures are never made. Thus, it is difficult to predict how the collection industry will respond to requirements that such disclosures be made. In light of the fact that collectors routinely sell portfolios of time-barred and bankruptcy-discharged portfolios, it is unlikely that the disclosure would do little more than require a reduced price for such accounts.
- 13 For example, 15 USC 1692e(8) specifically provides that it is a violation to communicate “to any person credit information which is known or which should be known to be false, **including the failure to communicate that a disputed debt is disputed.**” (Emphasis added.)
- 14 52 Fed Appx 938 (CA 9, 2002).
- 15 *Id.* at 938.
- 16 2008 WL 80943 (CD Cal, 2008).
- 17 *Id.* at 2.
- 18 2007 WL 2049566 (SDNY, 2007)
- 19 Also relying on 15 USC §1692e(8).



Understanding Auto Leases

By Michael O. Nelson

According to published reports, some 20 to 30 percent of new cars are leased rather than sold outright. The percentage is greater for more expensive vehicles. Leasing enables consumers to drive cars they can't afford, at least for a while, and reduces the possibility that the consumer will understand much about the terms of the transaction beyond the monthly payment. Auto leases are governed by Article 2A of the UCC,¹ the Consumer Leasing Act,² and Regulation M.³

The CLA is a part of the Truth in Lending Act and, like TILA, is primarily a disclosure statute. It requires certain disclosures before consummation of the lease. Understanding those terms is necessary to analyze the transaction. (1) The **agreed upon value of the leased vehicle** is self-explanatory. (2) The **gross capitalized cost** is the agreed upon value plus any items that are paid for during the lease term, i.e., service contracts, insurance, or balance from a prior loan. (3) The **capitalized cost reduction** is the total amount of any cash payment, rebate, net trade-in, or other credit that reduces the gross capitalized cost, but not a security deposit, first month's payment, or fees that do not reduce the capitalized cost. (4) The difference between the gross capitalized cost and the capitalized cost reduction must be disclosed as the **adjusted capitalized cost**. (5) The **residual value** is the estimated value of the vehicle at the end of the lease. It is often obtained from accepted guides, such as the Automotive Lease Guide. (6) **Depreciation and any amortized amounts** is the difference between the adjusted capitalized cost and the residual value. Since the gross capitalized cost includes charges in addition to the agreed upon value of the vehicle, those charges are also included here, in addition to the vehicle's depreciation. That is essentially what the consumer is buying. It is the first component of the monthly payment. (7) **Rent** is the difference between the total base periodic payment and the "depreciation and any

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other amortized amounts." "Rent" is somewhat analogous to a finance charge. (8) The **total of base periodic payments** equals depreciation plus rent. Base periodic payments do not include taxes and possibly other charges forwarded to other parties. Finally, the lease must disclose (9) the **base periodic payment**, (10) itemization of the total monthly payment, and (11) the **total monthly payment**.

UCC Article 2A is analogous to UCC Article 2 governing sales. Comment No. 4 to UCC Section 2A-104 says: "Consumer protection in lease transactions is primarily left to other law." (It doesn't identify the other law). Nevertheless, Article 2A does include a few substantive provisions. As with sales, Article 2A provides for express⁴ and implied warranties,⁵ which can be modified or excluded.⁶ The lessee has the right to reject nonconforming goods,⁷ and to later revoke acceptance.⁸ Leases are subject to a four-year statute of limitations.⁹

Leases can be "open end," in which the lessee assumes the risk that the vehicle will be worth less than the residual value at lease termination and is liable for the difference, or closed end—the lessee is not liable for the vehicle's value at the end of the lease (but may be liable for excess mileage, excess wear and tear, and other charges.) Open-end leases are rare, perhaps because the CLA limits the lessee's liability for the difference in value.¹⁰

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The CLA requires a statement of the conditions under which the lessor or lessee may terminate the lease and the method for determining the amount of any penalty or other charge for early termination.¹¹ In addition, any method for determining penalties or other charges for default or early termination of a lease must be reasonable in light of the anticipated or actual harm caused by the default or early termination.¹² Article 2A provides a formula for calculating a lessor's damages for early lease termination.¹³ In the usual case, where the lessor takes possession of the vehicle and then resells, rather than re-leases it, the lessor's damages are the unpaid lease payments up to the time he took possession or the lessee tendered possession plus the present value of the remaining lease payments minus the present market value of the remaining lease payments. In practice, the later number will be minimal, which may explain why lessors usually prefer an alternative method, which the UCC permits. However, Article 2A, like the CLA, requires that any liquidated damages formula be "reasonable in light of the then anticipated harm caused by the default..."¹⁴

A lessor that violates the CLA is liable for statutory damages of up to \$1,000 plus any actual damages, costs, and attorney fees under TILA.¹⁵ The CLA is subject to an important limitation: it does not apply when the total lease obligation exceeds \$25,000. The total of lease payments is not defined. The official staff commentary indicates it does not include the residual value or amounts paid to others such as taxes or license fees.

Michael O. Nelson is an attorney in private practice in Grand Rapids.

Debt Collection and Older Consumers

By Valerie L. Rice

In less than a decade, debt for the older consumer grew 217 percent due to issues like limited or fixed income, higher expenses, and looser credit practices. Consequently, many seniors have to deal with unaffordable debt and bill collectors. With Social Security and Medicare benefits facing future limitations, the situation isn't likely to improve. Consumer law attorneys need to know about this elder law issue because with people living longer and the senior population of the country estimated to reach 71.5 million in a few decades, it's inevitable that attorneys who do direct client work will encounter this issue in the process of helping solve other problems.

Debt collectors have an important job to do. Unfortunately, some of them use vexatious and coercive practices, especially on seniors, who tend to have stronger morals about paying their debts. It's important we have competent attorneys who can assist seniors to maintain a quality of life free from injury such as invasion of privacy and harassment due to debt collection. Accordingly, this article contains an overview of the issue, five strategies to handle bill collectors before a lawsuit or bankruptcy looms, five truths to credit myths, and several practice tips.

Seniors and Debt

Some examples:

- Following a stroke, 70-year-old John Brown resorted to plastic to pay the costs of his home care services after his Medicare Advantage Plan deemed that they were not medically necessary. Each credit card payment went to service the 22.99 percent finance charges and punitive fees as Mr. Brown also tried to keep up with property taxes, insurance, and basic home maintenance on a fixed income. His fragile health got worse, mainly due to annoying collection calls adding to the emotional distress associated with his physical problems.
- Two years into her senile dementia and before nursing home placement, Mrs. Jones opened a number of credit cards, racked up debt, and had the bills sent to a post office box, all without her husband's knowledge. So 86-year-old Mr. Jones, on top of the guilt of having to send his wife away and anxiety about her declining health, was left to deal with debt collection harassment even after pleading with creditors to stop calling.

Endnotes

- 1 MCL 440.2801 *et seq.*
- 2 15 U.S.C §1667 *et seq.*
- 3 12 C.F.R. Part 213
- 4 MCL 440.2860
- 5 MCL 440.2862
- 6 MCL 440.2864
- 7 MCL 440.2960
- 8 MCL 440.2967
- 9 MCL 440.2956
- 10 15 U.S.C. §1667b
- 11 15 U.S.C. §1667a(110); 15 C.F.R. §213.4(g)
- 12 15 U.S.C. §1667b(b)
- 13 MCL 440.2978
- 14 MCL 440.2954
- 15 15 U.S.C. §1640(a)(2)(A)(ii).

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- Following the death of her spouse, something as simple as a minor home repair and a new prescription not covered by Medicare became a crisis for 66-year-old Ms. Smith, who paid with plastic for handy work around the house and other household expenses. Each month, she struggled to pay the credit card debt, until she realized she couldn't do it anymore and still pay for basic needs.

Historically, those who experienced the Great Depression or grew up during hard times are very reluctant to take on new debt, and have the mentality to save for tomorrow and pass assets on to heirs. The reality is that the golden years have forced many to do an about-face on these attitudes. It's becoming increasingly difficult for seniors to survive. Limitations on what Medicare covers require seniors to pay for uncovered treatment and prescription costs. Seniors face loss of income when their spouse or long-term partner dies. Fixed or limited Social Security and pension income often is not enough to make ends meet. Add in the never-ending hikes in the cost of living, and the safety net unravels until it gives way and the senior falls into the hands of bill collectors.

Hope of getting out of debt is dimmer for seniors than for the younger generation. Physical constraints and fewer employment opportunities due to ageism prevent many seniors from earning additional income. While some can and do work, realistically, few will be able to work long enough to pay off their credit card debt. Debt management programs, consumer counseling, budgets, and debt consolidation programs are not feasible for many seniors because of their meager incomes.

Seniors often have less credit card savvy than do others. They're often hit with late fees, cash advance fees, over-the-limit fees, and other punitive charges during times when they can least afford them, and the overload sends them on a downward spiral. Because family members may deem this a sign of senility, which can lead to out-of-home placement, many seniors keep their credit woes and debt collection harassment under wraps. Ruthless creditors exploit these fears and intimidate seniors into using their limited income to pay debts in lieu of basic needs, or to turn to other financially adverse options like home-equity loans.

Strategies to Deal with Collectors

Review Applicable Laws

The Fair Debt Collection Practices Act ([FDCPA] 15 USC § 1601 et seq.) is a federal law that comes into play when bill collectors, including attorneys, attempt to collect personal debts for another, e.g., the original creditor. Basically, the FDCPA promotes fair treatment and establishes procedures to protect invasion of privacy. Although the FDCPA does not apply to

original creditors, the Michigan Collection Practice Acts (MCL 339.901 et seq. and MCL 445.251 et seq.) contain provisions that do. Becoming familiar with these laws, along with the ones that follow, is critical to competence in this arena.

Assess Time-barred Aspect

The concept of credit stems from the basic laws of contract—offer, acceptance, and consideration. When the consumer stops paying, it's a breach of contract, and this starts the clock running. MCL 600.5807(8) provides that the statute of limitation for breach of contract is six years. MCL 600.5866 governs the requirements to revive a time-barred debt. Always assess the legal status of a debt. When applicable, notify the collector of the defense and how claiming that a time-barred debt is due may be a violation of §1692e (2)(A) of the FDCPA. Remember to counsel clients about how to avoid reviving time-barred debts.

Dispute Debt if Applicable

Pursuant to § 1692g(b) of the FDCPA, within 30 days of the initial contact, debt collectors must verify a debt when requested to do so. The verification must be responsive. Mr. John Doe, Sr. might be charged with being responsible for a debt that his son, Mr. John Doe, Jr., incurred. The debt verification for this is quite different from that for Ms. Johnson, who asserts that she paid the debt or a part of it.

During the verification period, debt collectors must honor the request without charging the debtor a fee for the information,¹ cease contact with the debtor until the debt has been verified,² update information with the credit bureau,³ and stop reporting the debt to the credit reporting agency until it has been verified.⁴

Educate yourself about the Fair Credit Reporting Act (FCRA). (See 15 USC §1681 et seq.) The FCRA promotes accuracy in credit reporting. Debt collectors use reporting as a strategy to persuade debtors to pay debts whether legally obligated or not. One way to check debt collectors' compliance with accurate and proper reporting is to review your client's credit reports. Consumers have a right to obtain a free annual credit report.⁵ Sending a letter to the collector and all three major credit bureaus disputing the debt, coupled with the next strategy, is another effective way to handle debt collectors who engage in abusive and deceptive practices.

Stop Debt Collector Calls

One of the most encouraging provisions of the FDCPA—§ 1692c(c)—is the right to stop the annoying collection calls. Under this provision, debt collectors must cease contact if requested

by debtors to do so. Collectors can, however, make contact to inform the debtor that collection efforts will cease or that another action is going to be taken, such as filing a lawsuit.

While the client can stop the calls by writing a letter to the creditor, the distinction of having the attorney write the letter on behalf of the client may make all the difference. Section 1692c(a)(2) of the FDCPA prohibits debt collectors from contacting debtors who are represented by an attorney as long as the debtor's attorney communicates with the collector. Moreover, attorneys who attempt to collect debts are also bound by the Michigan Rules of Professional Conduct. Rule 4.2 provides that attorneys shall not communicate with a party whom they know is represented by an attorney.

Report Violations

Complaining to the proper agencies may combat unscrupulous debt collection tactics. Admittedly, reporting is not a lawsuit, and often it is a way to compile information about misconduct for later use. Without this action, however, the prevalence of the problem remains unknown or at least underestimated by authorities. Meanwhile, debt collectors continue with their deceptive and prohibited practices. For examples of reports filed, review the Federal Trade Commission 29th Annual Report 2007: Fair Debt Collection Practices Act.⁶

Consider filing a FDCPA complaint with consumer protection agencies like the Federal Trade Commission and the Michigan Department of Attorney General (AG), Consumer Protection Division. The AG's Office has compiled a complaint directory for Michiganians that includes these and other agencies' information, such as the Office of Comptroller of the Currency, with which consumers can file complaints regarding national banks.⁷ The Attorney Grievance Commission for the State of Michigan is the authority to file a grievance regarding an attorney's actions.⁸ Allegations may stem from ethics rules 4.1 (truthfulness in statements to others), 4.3 (dealing with unrepresented persons), 4.4 (respect of the rights of third parties), and 8.4 (attorney misconduct), to name a few.

Credit Card Myths

To win unfair leverage over debtors, some creditors and bill collectors propagate and nurture a number of falsehoods about debts. Some of these myths have been repeated often and long enough to have gained general credence, even within the law profession.

Liability for Spouses

One common misconception about credit card liability, sometimes exploited by creditors, is that one spouse is responsible for the other's debts. Without express agreement, no one is responsible for another's debts.

Another myth about joint liability is that when a spouse agrees in a divorce decree to pay the debts of the other, this creates liability. It has been uniformly held in Michigan through a long line of cases that divorce decrees are statute-driven and determine rights and obligations only between the husband and the wife. Even though a court has jurisdiction to allocate debts between the parties, it can't compel one of them to pay the debt to a third party.

Some bill collectors will claim that the common-law doctrine of necessity applies to credit card debt. In some states, this principle is reflected in laws that provide that a person is responsible for necessities such as food, clothing, and medical care obtained by his or her spouse—including, in some cases, when paid for with the spouse's credit card. But in Michigan, the issue of spousal support is well-settled law: the doctrine of necessities is abrogated⁹ and so has no bearing on credit card liability.

Moreover, spouses or life partners often name the other companion as an authorized user on credit cards. Misinformation about this classification leads authorized users to believe that they are legally obligated to pay—which is a myth.

Authorized Users

Seniors commonly name adult children or grandchildren as authorized users on accounts for the sake of convenience for the senior. Let's say 80-year-old Mary Denis names her adult granddaughter Sarah as an authorized user on the credit card so that she can pay for and pick up prescriptions for Ms. Denis. Sarah decides to also use the card for a full tank of gas at \$3.10 a gallon, her dry cleaning, a new cashmere sweater, and groceries for a month. Is Ms. Denis responsible for the charges now that Sarah has exceeded the scope of the permission?

Often, consumers think that misuse of a credit card by an authorized user is unauthorized use, so the primary cardholder is not liable for the balance of such charges—another dangerous myth. Section 1643 of Title 15 of the U.S. Code known as the Truth in Lending Act (TILA) limits liability for cardholders to \$50.00¹⁰ if the credit card has been accepted for an *unauthorized use*.¹¹ Therein lies the kicker.

The term *unauthorized use*, as used in § 1643 of the TILA, basically means that someone other than the primary cardholder used the credit card without actual or apparent authority for such use. (See 15 USC 1602(o).) Actual and apparent authority are concepts in the law of agency, which is state law. In Michigan, as with many other states, apparent authority describes the situation in which a principal leads a third party to believe that an agent has authority to bind the principal, even where the agent lacks the actual authority to bind the principal. This belief must be a result of actions on the part of the principal, not the agent. Under such circumstances, the principal is liable for the agent's actions.¹²

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Debt Collection. . .

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In terms of credit cards, the principal, also known as the cardholder, is the person who receives the credit card from the card issuer. The agent is the one named to use the card—the authorized user. Consequently, a cardholder is not entitled to rely on the provisions contained in § 1643 of the TILA and is responsible for any purchases made on the credit card when the cardholder voluntarily authorizes another to use it. Where the authority to use the card, if not actual, remains apparent to a third party (e.g., the merchant in the store) even though the purchases exceeded the amount actually authorized or consisted of items other than those authorized by the cardholder, the cardholder is generally liable because the agent was cloaked with apparent authority. If the collector initiates a lawsuit, the principal is estopped from denying the agent's authority. Instead, a cardholder should report a misused credit card lost to put the credit issuer on notice and obtain a new card with a new account number.

Another's Credit Information

Sometimes a creditor will list the primary cardholder's credit history on an authorized user's account even though the authorized user is not liable to pay the debt. Not being educated about this issue, consumers often succumb to the blackmail and pay the debt hoping to make it go away. That's not the answer to the problem.

The board of governors of the Federal Reserve System in § 202.10 of its Staff Commentary of Regulation B, which implements the Equal Credit Opportunity Act (ECOA) of 1974, provides that credit issuers may list the payment history on the cardholder's credit report and all authorized users' credit reports. This is a boon when timely payments are being made, but if the cardholder falls behind, the delinquent payments are reported on the authorized user's credit report irrespective of knowledge of or contribution to the account balance. An authorized user can be removed by requesting the card issuer to do so. If the request is not honored, file a complaint with the proper authority (for national banks, it's the Comptroller Office).

Credit Piggybacking

Cardholders can have several authorized users on their credit cards, and such users don't have to be family members. Some credit-repair companies have exploited this loophole in the ECOA, in a practice known as credit piggybacking, to manipulate consumers' credit scores. Piggybacking allows the credit history of those with no or blemished credit to boost their credit score literally overnight by renting an authorized user slot from those with well-established stellar credit.

There is no indication that this issue is prevalent among seniors. Nonetheless, this unethical but legal practice is certainly one to look out for, since it can be very enticing as a way to make ends meet during retirement. Someone may offer \$900 for the use of a person's good credit history and up to several thousand dollars for a couple of rental slots. Often the risks of invasion of privacy and use of someone else's credit are minimized while the benefit—easy money—is touted in glowing colors.

The Connecticut Appeals Court decision in *Citibank (South Dakota) v. Mark Gifelman* is an example of how bad piggybacking can be. In that case, the authorized user racked up over \$50,000 in debt, and the court held that the cardholder conferred apparent authority on the authorized user to use the card. The court rejected the cardholder's argument that the facts constituted unauthorized use under the TILA because the definition of unauthorized use excludes any transaction for which the cardholder receives a benefit, such as the rental fee for the slot.

Fortunately, piggybacking might be over before it really begins to cause too much more damage. On June 5, 2007, the Fair Isaac Corporation announced that it would correct the problem.¹³ But, as with any new program, implementation and updating can take up to 18 months, if not longer, before a system works as planned.

Charge-Offs

When consumers see the word *charge-off* on their credit reports, rarely do they understand what it means. Most think that if the charge has been written off, it means they don't have to pay it. A charge-off—a business expense that reduces net income—comes about when a credit issuer thinks a debt is uncollectible and writes it off as a bad debt. This doesn't mean, however, that collection actions will stop. Just the opposite—collection agencies or lawyers become involved for quite some time in an attempt to collect the debt. Some may even file a lawsuit. If money is collected, it's treated as income.

Practice Tips

Participate in training sessions about debt collection and older consumers. Those sponsored by organizations that provide legal training for elder law attorneys, such as the National Academy of Elder Law Attorneys and the Elder Law and Disability Rights Section of the State Bar of Michigan, are good places to start. Meanwhile, to keep up to date with fair debt collection issues and trends, subscribe to newsletters such as the National Consumer Law Center Reports regarding debt collection and read their special report about debt and the older consumer.¹⁴

Finally, consider incorporating this consumer elder law issue into your firm's questionnaire as a way to screen for the problem and to help seniors deal with it.

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Endnotes

- 1 15 USC §1692f(5).
- 2 15 USC §1692g(b).
- 3 15 USC §1692e(8)
- 4 Cass, FTC Informal Staff Letter (December 23, 1998) <http://www.ftc.gov/os/statutes/fdcpa/letters/cass.htm>.
- 5 www.annualcreditreport.com
- 6 <http://www.ftc.gov/reports/fdcpa07/P0748032007FDCPARReport.pdf>
- 7 http://www.michigan.gov/documents/Complaint_Directory_59572_7.pdf
- 8 www.agcmi.com/ Michigan Attorney Grievance Commission 243 W. Congress, Ste. 256, Detroit, MI 48226.
- 9 *North Ottawa Community Hospital v Kieft*, 457 Mich 394, 409; 578 NW2d 267 (1998)
- 10 Cardholder is not liable if credit issuer does not comply with certain requirements. See 12 CFR §226.12(b)(2)(i)-(iii). When card issuer complies with conditions, cardholder's liability is \$50 or amount of unauthorized use, whichever is less. See 12 CFR § 226.12(b)(1)-(2).
- 11 TILA does not usually apply to all forms of credit cards, but its protections apply to all credit cards for the purpose of unauthorized use. Board of governors of the Federal Reserve System Reg. Z §226.3 FN4 (Noting exemption transaction and in footnote 4 stating that TILA applies to all credit card when issued is unauthorized use).
- 12 *Central Wholesale Company v Sefa*, 351 Mich 17; 87 NW2d 94 (1957) (Discussing general principal and agency concepts in detail.) Also see M Civ JI 38.10. *Martin v American Express, Inc.*, 361 So. 2d 597 (Ala. Civ. App 1978) (Stating agency concept in context of credit cards.)
- 13 <http://www.fairisaac.com/fic/en/news/press-releases/fico-abuse-nr.htm>.
- 14 See <https://shop.consumerlaw.org/> and http://www.consumerlaw.org/news/content/rising_debt.pdf.

SBM to Present "Tips and Tools for a Successful Practice" Workshop on Wednesday, May 7

The State Bar of Michigan will present a one-day seminar designed to strengthen and streamline legal practices. The workshop, titled "Tips and Tools for a Successful Practice," will take place 9 a.m.-4:30 p.m. on Wednesday, May 7 at State Bar headquarters in Lansing.

Highlights include presentations about maintaining mutually beneficial client relationships, drafting effective fee agreements, managing trust and business accounts, and law office management. Speakers represent a variety of legal organizations, including the State Bar of Michigan, the Attorney Grievance Commission, the Attorney Discipline Board, and private law firms.

The cost to attend the seminar is \$75, and registration and payment must be received by Wednesday, April 30. A seminar registration form in PDF format can be downloaded from the State Bar of Michigan website at <http://www.michbar.org/pmrc/pdfs/seminars.pdf>. Participants can reserve their spot by signing up online at <http://www.michbar.org/pmrc/registration.cfm>, faxing the registration form to the State Bar at (517) 346-6365, or mailing the form with check or credit card payment to:

ATTN: Tips and Tools for a Successful Practice Workshop

State Bar of Michigan, 306 Townsend Street, Lansing, MI 48933-2012

For more information on the workshop, contact Karen Spohn in the State Bar of Michigan Professional Standards Division at (517) 346-6309 or via e-mail at kspohn@mail.michbar.org.

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