

SELLING TO CONSUMERS: SALES, FINANCE, WARRANTY & COLLECTION LAW, PART 1 & PART 2

First Run Broadcast: August 5 & 6, 2014

1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. **(60 minutes)**

There is no larger market than sales of goods to consumers. Though the opportunities for your clients are vast, selling to consumers is unlike selling to other businesses. Sales to consumers are governed by overlapping layers of regulations covering how those sales are financed, what warranties are implied by law versus expressly made by the seller, and – when need arises – debt collection of defaulted accounts. Failure to understand and comply with these layers of complexity can lead to consumer complaints and regulatory action, litigation and substantial liability. This program will provide you a framework for understanding the law of consumer sales, including financing those sales, express and implied warranties imposed by law, and debt collection from consumers.

Day 1 – August 5, 2014:

- Essential law governing sales to consumers – sales law, finance, warranties and debt collection
- Sales law – how consumer sales differ from commercial sales
- Consumer finance – securing the sales with collateral and anticipating defaults
- Role of the Uniform Consumer Credit Code and Reg Z
- Emerging role of the new federal Consumer Financial Protection Bureau

Day 2 – August 6, 2014:

- Understanding the role of implied and express warranties in consumer sales under federal law
- Limiting a seller's exposure to warranties
- Overview Fair Debt Collection Practices Act and the Consumer Credit Protection Act
- Permissible debt collection practices in consumer sales and potential liability
- Communications with debtors and third parties and required disclosures
- Best practices to avoid liability for businesses, lawyers, and law firms

Speakers:

Steven O. Weise is a partner in the Los Angeles office Proskauer Rose, LLP, where his practice encompasses all areas of commercial law. He has extensive experience in financings, particularly those secured by personal property. He also handles matters involving real property anti-deficiency laws, workouts, guarantees, sales of goods, letters of credit, commercial paper and checks, and investment securities. Mr. Weise formerly served as chair of the ABA Business Law Section. He has also served as a member of the Permanent Editorial Board of the UCC and as an Advisor to the UCC Code Article 9 Drafting Committee. Mr. Weise received his B.A. from Yale University and his J.D. from the University of California, Berkeley, Boalt Hall School of Law.

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Sales, Finance, Warranty & Collection Law, Part 1
Teleseminar
August 5, 2014
1:00PM - 2:00PM
1.0 MCLE GENERAL CREDITS**

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**Selling to Consumers:
Sales, Finance, Warranty & Collection Law, Part 2
Teleseminar
August 6, 2014
1:00PM - 2:00PM
1.0 MCLE GENERAL CREDITS**

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Seminar Title: Selling to Consumers: Sales, Finance, Warranty & Collections Law, Part 1

Location: Teleseminar - LIVE

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Sponsor: Vermont Bar Association

Date: August 6, 2014

Seminar Title: Selling to Consumers: Sales, Finance, Warranty & Collections Law, Part 2

Location: Teleseminar - LIVE

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Selling to Consumers:

Sales, Finance, Warranty &
Collection Law

Ernest "Skip" Kohlmyer, III
Steve Weise

August 2014

➤ Outline of presentation

- Essential laws:
 - Sales law
 - Consumer credit laws
 - Consumer Financial Protection Bureau
 - Debt collection laws

Sources of rules

- Uniform Commercial Code (UCC)
 - Adopted in every state
- Uniform Consumer Credit Code (UCCC)
 - Adopted in Maine, South Carolina, Wisconsin, Indiana, Iowa, Kansas, Oklahoma, Colorado, Wyoming, Utah, Idaho
- State retail installment sales acts
- Federal laws
- Federal Trade Commission rules

Secured transactions - Article 9

- Article 9 "subject to any applicable rule of law which establishes a different rule for consumers . . ." – UCC § 9-201(b) and (c)

Secured transactions - Article 9

- If other law has a "different rule" in a transaction for an individual involving debt incurred for personal, family or household purposes, other law controls – § 9-404(c)

➤ Sales law - Article 2

- Subject to consumer law – UCC § 2-102
- Statute of frauds – does not apply to sales for less than \$500

General limitations

- UCCC and retail installment sales acts
 - Finance charge
 - Rebates of pre-computed finance charges
 - Late charge
 - Right to prepay
 - Balloon payments
 - Right to refinance

Negotiable instruments - Holder in Due Course

- Holder in due course rules subject to "any law limiting status as a holder in due course in particular classes of transactions" – UCC § 3-302(g)
- In a consumer transaction, if other law requires a statement preserving rights and defenses, obligation enforce "as if" record included the statement – UCC § 9-404(d)
- Assignee subject to claims and defenses – UCCC § 3.404
- Retail installment sales acts
- FTC Trade Regulation Rule Concerning Preservation of Consumers Claims and Defenses

Secured transactions - collateral

- Security interest does not attach to collateral not acquired "within 10 days after secured party gives value" – UCC § 9-204(b)(1)
- UCCC – limitations on cross-collateral – UCCC § 3-302
- Retail installment sales act limitations
- FTC Credit Practices Rule – limitations on wage assignments
- FTC Credit Practices Rule limits on security interest in household goods

Secured transactions - enforcement

- Foreclosure notice timing may be different in consumer transaction – UCC § 9-612(b)
- Form of foreclosure notice different in consumer -goods transaction – UCC § 9-614

➤ Secured transactions - deficiency claims

- Deficiency judgments may be limited in in consumer transactions – UCC § 9-626(b)
- UCCC – limitations on deficiency judgments – UCCC § 5.103
 - Retail installment sales acts

➤ Guarantors

- FTC Credit Practices Rule disclosure requirements
- State disclosure requirements
- Equal Credit Opportunity Act and Regulation B limits

Truth in Lending Act and Reg Z

- Scope
 - Transactions with finance charge
 - Four-installment rule
- Disclosures:
 - Amount financed
 - Finance charge
 - Total of payments
 - Prepayment rights
 - Collateral

Equal Credit Opportunity Act

- Regulation B
- Applies to commercial credit
 - Note discussion in connection with guarantors
- Prohibits wide range of discrimination in considering and providing credit
- Credit applications
- Credit terms
- Credit approval and denial

CFPB Compliance Management System Requirements (CMS)

- To maintain compliance, entities “must develop and maintain a sound compliance management system that is integrated into the overall framework.”
- Management and employees should be responsible for compliance:
 - o Issues should be self-identified
 - o Corrective action initiated

CFPB Compliance Management System Requirements

- Compliance Management System (CMS):
 - o Establishes compliance responsibilities
 - o Communicates responsibilities
 - o Ensures responsibility for meeting legal requirements and internal policies are incorporated into business processes
 - o Reviews operations to ensure compliance
 - o Takes corrective action and updates tools, systems and materials as necessary



CFPB Compliance Management System Requirements

- Effective CMS Components:
 - o Board and management oversight
 - o Compliance program
 - Policies and procedures
 - Training
 - Monitoring and corrective action
 - o Response to consumer complaints
 - o Compliance audit

CFPB Compliance Program

- Formal, **written** compliance program
- Training and reference tool for employees
- **Prevents (or reduces)** violations
- Protects consumers from non-compliance and associated harms
- Aligns business strategies with outcomes

CFPB Exam Procedures

- CFPB Examiners determine whether policies and procedures:
 - o Are consistent with board-approved policies
 - o Address **compliance with applicable law designed to prevent** violations and detect/prevent harm to consumers
 - o Cover life cycle of product/service
 - o **Maintained and updated** to remain current and serve as a reference for employees



CPFB Exam Procedures

- Whether and how policies address new or amended consumer financial laws/regulations
- Outdated content, indicators that policies are overly broad or not tailored to entity
- Different business units and branch offices subject to same corporate-level policies
- Compliance review of business unit procedures and automated tools
- Education of Board, management and staff, appropriately tailored, is essential
- Training is consistent with policies and designed to reinforce policies/procedures
- Compliance system adequately resourced, including outside training
- Availability of training records, attendance and content

Warranty law

- UCC
- Retail Installment Sales Acts
- Magnuson--Moss Consumer Warranty Law

Warranties - state law

- Extension of warranties to third persons who are injured by goods – UCC § 2-318
- State consumer warranty laws

Warranties - federal law

- Magnuson-Moss Warranty Act
- Availability of warranties
- References to "limited warranty"
- Limitations on disclaimers of implied warranties
- Required disclosures and statements

Fair Debt Collection Practices Act

Overview of 15 U.S.C. Section 1692 et seq.

- **Congressional Purpose**

- The Fair Debt Collection Practices Act (FDCPA) was enacted by Congress in 1977 to satisfy Congressional findings that there is *“abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors which contributes to the number of personal bankruptcies, marital instability, loss of jobs and invasion of individual privacy.”*¹
- The FDCPA seeks to *“eliminate abusive debt collection practices by debt collectors”* and *“to promote consistent state action to protect consumers against debt collection abuses.”*²
- ¹15 U.S.C. Section 1692(a)
- ² Id.

What is the FDCPA?

- **Definitions**

- Under the FDCPA, a communication is defined as *“the conveying of information regarding a debt directly or indirectly to any person through any medium.”*³
- The communication involves the collection of a “debt” and must be between a “consumer” and a “debt collector” in order for the FDCPA to apply.
- The term “debt” is defined as *“any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to a judgment.”*⁴
- The term “consumer” is defined as *“any natural person obligated or allegedly obligated to pay any debt.”*⁵ Most important, the individual or entity seeking the collection of the debt, must be considered a “debt collector.”
- A “debt collector” is *“any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owned or due another.”*⁶
- ³ 15 U.S.C. Section 1692(a)(1)
- ⁴ 15 U.S.C. Section 1692(a)(4) (i.e. types of consumer debts; back rent; student loans; mortgages; judgments, medical, retail, and dishonored checks.) (i.e. types of non-consumer debts; unemployment compensation; child support, alimony, subrogation, taxes, tickets and fines, contempt sanction; business and commercial debts)
- ⁵ 15 U.S.C. Section 1692(a)(3)
- ⁶ 15 U.S.C. Section 1692(a)(6)

Debt Collection Communications

- A. Communications with Debtors/Consumers

- Section 15 U.S.C. Section 1692c(a)(1) prohibits “*a debt collector from communicating with a consumer in connection with a debt in any unusual time, place or at time and place known or should be known to be inconvenient for the consumer, unless the collector obtains the prior consent of the consumer or the express permission of the court.*” Generally, a debt collector can communicate with the consumer between 8 a.m. and 9 p.m. in the consumer’s time zone. However, it is prohibited to communicate with the consumer outside of this time period, unless the consumer consents to the communication. A debt collector must honor the oral requests of the consumer to be contacted at certain times and locations since such request do not have to be in writing. Communications with the debt collector at his/her is prohibited under the FDCPA if the debt collector knows or has reason to know that the consumer’s employer prohibits such communication.

- B. Communications with Third Parties

- Section 15 U.S.C. Section 1692c(b) prohibits a debt collector from communicating with any third party regarding the collection of the debt. However, the FDCPA provides some exceptions. A debt collector may communicate with the debtor’s attorney, a consumer reporting agency, the creditor, the attorney for the creditor or the attorney for the debt collector. Section 805(d) also grants permission for the debt collector to speak with the debtor’s spouse regarding the debt.⁸ Further, a debt collector does not need to seek permission from the minor before speaking with a minor’s parents regarding their minor’s child’s debt, so long as the debtor is still a minor. See: FTC Informal Staff Letter (February 22, 1990)
- ⁸ Please consult any applicable state law regarding communications with consumer’s spouse.



Initial “30 day” Validation Statement

- 15 U.S.C. Section 1692(g)(a) states that a debt collector must provide a consumer with written notice of specific rights afforded the consumer under the FDCPA. An example of a generally accepted “30 day validation statement states the following:
- UNLESS YOU NOTIFY THIS OFFICE WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL ASSUME THIS DEBT IS VALID. IF YOU NOTIFY THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT, OR ANY PORTION THEREOF, THIS OFFICE WILL OBTAIN VERIFICATION OF THE DEBT OR OBTAIN A COPY OF A JUDGMENT AND MAIL YOU A COPY OF SUCH JUDGMENT OR VERIFICATION. IF YOU REQUEST THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE, THIS OFFICE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR.
- THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED SHALL BE USED FOR THAT PURPOSE.

Mini-Miranda Disclosure and “Debt Collector” Disclosure

- The FDCPA further requires that the initial communication contained the following phrase; “*This is an attempt to collect a debt and any information obtained shall be used for that purpose.*” In 2001, an amendment to the FDCPA eliminated the requirement to have this language in every communication. Under the current FDCPA, the debt collector must identify that the communication is from a debt collector in all subsequent communications.
- 1. *Written Correspondence*
- In order to satisfy this requirement, debt collectors are instructed and advised to include the following phrase in all subsequent written communications sent to consumers: *This communication is from a debt collector.* Although it may be permissible to rely on other information contained in the written communication such as “Debt Collection Since 1988, A Debt Collection Agency, or words contained in the name of the collection agency identifying the debt collection purpose, the use of above-mentioned phrase is the most conservative and reliable disclosure to avoid challenges under the FDCPA.
- *Voice Mail and Electronic Messages*
- Several opinions have created a shock wave in the collection industry regarding this use of this disclosure in voice mail and electronic dialer messages. In Foti v. NCO Fin. Sys, Inc., 424 F.Supp.2d 643 (S.D.N.Y. 2006), the court held that the agency’s failure to include language informing the consumer that the communication was from a debt collector violated the Section 807(11) of the FDCPA. Following Foti, the other jurisdictions including the Middle District of Florida have found FDCPA violations in reliance on the Foti decision. See: Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410 (M.D. Fla.) Since the Foti decision, numerous decisions, especially in Florida’s federal Southern District have dealt with the use of automated calls left on consumer’s voice mails.

Request to Cease Communications

- The FDCPA provides consumers with the ability to inform a debt collector to cease all communications relating to the collection of the debt. 15 U.S.C. Section 1692c(c) states that a consumer may send written notice to cease communications in connection with the collection of the debt or may send written notice that the consumer refuses to pay a debt. Upon written notification, the debt collector must cease communication with the consumer, except, (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) notify the consumer that the debt collector or creditor may invoke specific remedies which are ordinarily invoked by such debt collector or creditor; (3) where applicable, notify the consumer that the debt collector or creditor intends to invoke a specific remedy. This section requires that the notice be sent directly to the debt collector rather than the creditor and specifically requires that the request be in writing.
- **Consumers Represented by Attorney**
- The FDCPA further provides that a debt collector must cease communications with consumer once it is notified that the consumer is represented by an attorney. The statute further provides that a debt collector is allowed to contact the consumer directly if the attorney *“fails to respond within a reasonable period of time to a communication from the debt collector.”* Unfortunately, FDCPA case law has failed to articulate any period of time that has been deemed “reasonable.”



Standard of Review: Least Sophisticated Consumer Standard

- Most jurisdictions have adopted the “least sophisticated consumer” standard in reviewing alleged violations of the FDCPA. The “least sophisticated consumer” has been judicially defined as “one not having the astuteness of a ‘Philadelphia lawyer’ or even the sophistication of the average, every day common consumer.”
- However, this definition is tempered by the fact that this hypothetical person does “possess a rudimentary amount information about the world and a willingness to read a collection notice with some care.” This test is to ensure protection of all consumers, even naive and trusting, against deceptive debt collection practices but protect debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices.

Examples of Unfair Practices

- Adding Fees or Unauthorized Charges;
- Charges Incurred by the Consumer
- Postcard and Envelope Restrictions
- False Sense of Urgency
- Claiming to be an Attorney
- Government Affiliation

Liability and Damages under the FDCPA

- A. Statutory Damages
 - Under the FDCPA, statutory damages are capped at a maximum of \$1,000.00 per case, not per violation. Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992) In determining the extent of the violation, the court should consider (1) the frequency of the violation, (2) the nature of the non-compliance; and (3) the extent to which the non-compliance was intentional.
- B. Actual Damages
 - In addition to statutory damages, a plaintiff may be entitled to actual or compensatory damages. Several courts have interpreted actual damages to include damages for humiliation, embarrassment, mental anguish or emotional distress. Since the plaintiff bears the burden of proof to demonstrate actual damages, the plaintiff must demonstrate a reasonable connection between the debt collector's behavior and the emotional distress.
- C. Punitive Damages
 - Under the FDCPA, a plaintiff is not entitled to punitive damages.
- D. Class Action Damages
 - In the event that a plaintiff seeks class certification for a particular alleged violation, the FDCPA may award each named class member up to \$1,000.00 in statutory damages, plus up to \$500,000.00 or one percent of the debt collector's net worth which ever is less.

Bona Fide Error Defense

15 U.S.C. § 1692k(c)

- 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. (emphasis added)

“Unintentional Violation” vs “Unintentional Act”

Kort v. Diversified Consultants, Inc. 394 F.3d 530 (7th Cir. 2005)

- A debt collector need only show that its FDCPA violation was unintentional, not that its actions were unintentional. See [Nielsen v. Dickerson, 307 F.3d 623, 641 \(7th Cir.2002\)](#) (debt collector “may avail itself of the bona fide error defense because it had no intent to violate the FDCPA, although its actions were deliberate”);
- [Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 402 \(6th Cir.1998\)](#) (“The debt collector must only show that the violation was unintentional, not that the communication itself was unintentional. To hold otherwise would effectively negate the bona fide error defense.”).

➤ “Reasonably Adapted” Procedures

- Nevertheless, [§ 1692k\(c\)](#) does not require debt collectors to take every conceivable precaution to avoid errors; rather, it only requires reasonable precaution. See [Hyman v. Tate, 362 F.3d 965, 968 \(7th Cir.2004\)](#) (“Although [the debt collector] could have done more ..., [§ 1692k\(c\)](#) only requires collectors to adopt reasonable procedures”).

Reliance Upon Creditor Information

- The bona fide error defense “does not protect a debt collector whose reliance on a creditor's representation is unreasonable.” [Reichert, 531 F.3d at 1006](#) (citing [Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162, 1177 \(9th Cir.2006\)](#) (debt collector attempting to collect disputed debt was not entitled to summary judgment on bona fide error defense because evidence indicated the debt collector knew of creditor's serious bookkeeping difficulties and billing problems. Debt collector presented no evidence that its reliance on the creditor's information was reasonable or that it maintained procedures to avoid errors)).
- The bona error defense requires a debt collector to show that it maintains procedures reasonably adapted to avoid error. [Reichert, 531 F.3d at 1006](#).

 Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich, LPA.
559 U.S. 573 (2010)

- (a) A violation resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA cannot be “not intentional” under [§ 1692k\(c\)](#).
- It is a common maxim that “ignorance of the law will not excuse any person, either civilly or criminally.”
[Barlow v. United States, 7 Pet. 404, 411, 8 L.Ed. 728](#)



Post-Jerman [time-barred debt]
Puffinberger v. Comercion, LLC
2014 WL 120596 (D. MD 2014)

- However, the Court expressly declined to reach the question of whether the bona fide error defense would apply to a mistaken interpretation of the requirements of state law. [*Id.* at 580 n. 4](#) (stating “[t]he parties disagree about whether [§ 1692k\(c\)](#) applies when a violation results from a debt collector's misinterpretation of the legal requirements of state law or federal law other than the FDCPA ... [b]ecause this case involves only an alleged misinterpretation of the requirements of the FDCPA, we need not, and do not, reach those other questions.”).
- Therefore, *Jerman* is not dispositive.

Standard Requests for Production of Documents from Plaintiff to Debt Collector

- Collection history/account notes for any accounts maintained on the consumer
- Identity of the collectors or other personnel who worked on the collection file
- Any insurance or indemnification agreement for the collector or original creditor
- Any **policy and procedure manuals, training manuals** which related to the allegations of violations of the statute (FDCPA, State Law, TCPA and/or FCRA)
- Any written correspondence or **audio recordings** between the collector and consumer
- Any **documentation regarding the debt to establish validation and accuracy**