SOLO

LAW OFFICE INFORMATION FOR SOLO & SMALL FIRM PRACTITIONERS

Defending Liberty
Pursuing Justice

winter 2009
Vol. 15, No. 1

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New Deal on SOLO

By Chuck Driebe

SOLO newsletter has appeared in its current printed format since way back in 1993. The concept was that members would have a handy, compact, and easily readable quarterly publication that could be read whenever they had a few free minutes. *SOLO* could be taken to court and perused while waiting for your case to be called, or read on the commute home (but not in your car!) Each issue addressed topics specifically of interest and use to solo and small firm practitioners. The newsletter was mailed to each member for these purposes.

But a new day has dawned within the ABA. Budgets are being reexamined and the General Practice, Solo, and Small Firm Division is feeling the effects. Cuts are being made. And, the *SOLO* newsletter is one of the GPSolo programs to feel the impact.

Beginning with this issue, members will no longer be mailed *SOLO* in a printed format. The only delivery will be via e-mail. This will save our Division more than $30,000 in printing and postage and other costs. *SOLO*'s content will be the same, but how you receive it will not. Our suggestion is that members print out the electronic version and learn how to fold it (please refer a prior newsletter for this technique.) Then it will be just like what you got in the mail—only cheaper for the Division. Or, you can just view SOLO on your iPhone, Blackberry ,or other device. (If you have any tips, share them and we will pass them on to other members.)

The editorial board remains committed to putting out the same quality product as we have done in the past. Just a little extra work on your part will save the GPSolo Division a ton of money. The board is interested in your suggestions for topics that can be covered in brief articles about 400-500 words in length. Just think, you can add to your resumé and see your name and words in print by just volunteering to write an article. Just contact me or any board member.

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Consumer Fraud

Features

When Debt Collectors Call

By Sonya A. Smith-Valentine

Maybe they received an injury due to an automobile accident. Maybe they purchased a car that turned out to be a lemon. Perhaps they were discriminated against in their workplace and lost their job. Or maybe they are getting a divorce. Whatever the reason, your clients are now strapped for cash and the debt collectors are calling.

Many people fall behind in their bills. On top of trying to keep food on the table and the lights on, your clients are experiencing severe anxiety every time the phone rings. Is it the debt collector calling again? Debt collectors add to your clients' initial problem with harassing and abusive phone calls at home and at work, and our clients don't want to talk about it due to embarrassment and shame.

The Fair Debt Collection Practices Act (FDCPA) is the federal law that regulates what actions a debt collector can and cannot take in trying to collect a debt. It covers personal, family, and household debts. Business and commercial debts are not covered. This underutilized law can help your clients sleep better at night without breaking into a cold sweat every time the phone rings.

The deck is stacked against your clients, as most do not know their rights in dealing with debt collectors. Many believe that they have to suffer with the abuse. On the contrary, owing the debt does not prohibit consumers from shielding themselves from these sharp practices and exercising their rights under the FDCPA.

Debt collectors may communicate by mail, in person, or by telephone. Debt collectors cannot contact a person at times or in places that they know are inconvenient, such as at work if the employer does not permit it. Debt collectors cannot contact a person before 8 a.m. or after 9 p.m.

If a written request is sent to the debt collectors demanding that they stop all communication, they must stop contacting the consumer. If the debt collectors are advised that the consumer is represented by an attorney, the debt collectors cannot communicate directly with the consumer; they can only contact the lawyer.

Debt collectors cannot contact any third parties about the debt specifically. Debt collectors can contact other people once (and once only) in an effort to locate the consumer. They cannot call family members or neighbors about the debt. Debt collectors are not permitted to ask family and neighbors to pass on phone messages or tell other people that they are attempting to collect a debt.

Debt collectors may not use any language, communication, or conduct to harass, oppress, or abuse any person. This includes the use of threats of violence or harm to the person, property, or reputation; threats of arrest; using obscene or profane language; or calling people without identifying themselves.

False statements are also prohibited. For example, a debt collector cannot falsely imply that he or she is an attorney or government representative. They cannot falsely imply that a person committed a crime by not paying a debt. Debt collectors cannot misrepresent the character, amount, or legal status of the debt.

Debt collectors routinely report credit information to the major credit bureaus but often fail to report that a debt is disputed, as required by law. Further, after a debt is discharged in bankruptcy some debt collectors nevertheless continue collection efforts or try to get the consumer to reaffirm the debt.

Consumers are entitled to file a lawsuit against any debt collector who violates the FDCPA. In short, the FDCPA allows a consumer to recover actual damages, statutory damages of up to $1,000, and attorney fees and costs.

Sonya A. Smith-Valentine is a member of the Valentine Legal Group, LLC, in Greenbelt, Maryland. She concentrates her practice on debt collection harassment and credit reporting disputes. Visit her Web site at www.valentinelegal.com.

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Making Claims Against Inaccurate Consumer's Credit Report

By A. Thomas Stubbs

What do you do when clients come in and say there's something wrong on their credit reports? Errors on a credit report

Terminology

In the parlance of the FCRA:

can mean many things: a creditor has simply listed something inaccurately; the credit bureau has mixed your client's information with that of another with a similar name or Social Security number; or someone may have stolen your client's identity and established fraudulent accounts. It is important to take the right steps both to diagnose the problem properly and preserve your client's rights.

- credit bureaus are called "consumer reporting agencies" or CRAs;
- credit reports are called "consumer reports";
- entities, such as creditors, that buy credit reports are called "users";and
- entities, such as credit card companies, that report information about consumers to CRAs are called "furnishers."

The principal statute in this context is the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1981, et seq. Although the FCRA provides a basis for many types of claims, this article provides a brief introduction solely to claims arising when a creditor furnishes inaccurate information about your client's account.

First things first: Ask the client to obtain credit reports from each of the three credit bureaus, Equifax, Experian, and Trans Union. Everyone is entitled to a free report once per year from each CRA through the Web site established by the Federal Trade Commission at www.annualcreditreport.com. The attorney should compare the separate credit reports to identify all of the issues that need to be addressed, and how to address them. Two warnings: (1) do not be fooled by Web sites such as www.freecreditreport.com—they are not free; (2) do not use "tri-merge" reports (often used by mortgage companies) that combine the credit reports of the three credit bureaus.

Write the Credit Agency

Once you have identified the inaccurate entries on your client's credit report, ask the client to write the CRA a letter disputing the accuracy of each incorrect entry. Most people write the furnisher who reported erroneous information; that's the wrong way to go under the FCRA. If you remember nothing else from this article, remember that the consumer must *write* the CRA to dispute an erroneous entry to trigger the consumer's rights under the FCRA. You can write the furnisher until the cows come home, but you will not trigger the client's key rights under the FCRA.

Do not file the dispute online; the client should send a letter via certified mail, return receipt requested, with a copy sent (via blind copy, certified mail, return receipt requested) to the furnisher that supplied the erroneous information. The dispute letter should go into as much detail as possible and should include all available supporting documentation.

Investigation

The CRA is required to investigate any item disputed by a consumer. As part of its investigation, the CRA must relay the dispute to the entity that furnished the information within five business days of the CRA's receipt of the letter. The CRAs transmit the information to the furnisher electronically. The furnisher then has 30 days from the date the CRA received the dispute to investigate the consumer's complaint and respond to the CRA by either confirming the entry as it is, modifying the entry to correct an error, or deleting the entry. If the furnisher does not respond within the 30-day period, the CRA must delete the trade line. Deleted information cannot be reinserted to the consumer's credit report without written notice to the consumer.

CRAs and furnishers handle disputes in an extremely cursory fashion. Some disputes are handled by CRAs at offshore call centers where workers literally are allocated just a few minutes to process each dispute. The disputes are usually reduced to a numeric code indicating the basic thrust of the dispute, for example, "account not consumer's." This code is then transmitted to the furnisher, usually without any of the supporting documentation submitted by the consumer. The furnisher frequently simply looks at its records to see if they match what was reported to the CRA, conducting virtually no real investigation.

Claiming Damages

If a CRA and/or the furnisher fails to correct an incorrect entry on a credit report after receiving notice of the error, and that incorrect entry causes a consumer damages, then the consumer may have a claim under the FCRA for failure to investigate. Note, however, that liability is "forward looking" only. Damages may be claimed—but only damages that accrue after expiration of the 30-day investigation period. The consumer has no claim for any damages caused by the erroneous information prior to the time the dispute was filed.

Note that the FCRA is not a strict liability statute: having an inaccurate entry, standing alone, is not enough for a claim. The consumer must show that the CRA failed to follow reasonable procedures to ensure the maximum possible accuracy of information on a credit report ab initio. Even if those procedures are reasonable, liability can still attach if the CRA fails to conduct a reasonable investigation of a consumer's report of incorrect entries.

Other Culprits

Inaccurate information on a consumer's credit report, however, may be a symptom of something other than a furnisher's error. As noted above, it may be due to the credit bureau mixing your client's information with that of another individual. These "mixed file" cases are common. The attorney should focus on whether the CRA's procedure for creating the client's consumer report poses an unreasonable risk of including information about other people. Among the evidence one might seek is the reinsertion of erroneous information that has already been deleted as part of the resolution of a consumer's previous dispute. Accounts that a furnisher states were opened when the consumer was a minor would be another example of information that one might argue constitutes constructive notice to the CRA that the information cannot be correct. Resolution of these kinds of claims should include attention both to damages and equitable remedies under which the CRA agrees not to use the procedures that created the problem.

Those interested in this developing area of the law should start by reviewing *Fair Credit Reporting*, a manual published by the National Consumer Law Center. It is the Bible for practitioners in this field.

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Foreclosure Negotiation and Defense

By Wendell Finner

Clients threatened with foreclosure may arrive in the attorney's office due to a variety of circumstances. Whether the core issue is an interest rate reset, loss of job, medical catastrophe, or marital dissolution, the clients' circumstances will usually worsen if they lose their shelter due to foreclosure. The effective advocate has many tools that can keep the home from being taken.

The attorney must first determine how far along the foreclosure has progressed. Although it's best to be retained before formal foreclosure proceedings have begun, clients often don't get to us that quickly. Even though completed sales can be set aside when a lack of due process is shown, an early foreclosure defense can keep the foreclosure from even beginning.

Twenty-six states and the District of Columbia allow mortgagees to conduct a "non-judicial" foreclosure sale without filing suit against the mortgagor. The remaining 24 states require a court action, usually with formal service of process. Even in jurisdictions that allow nonjudicial foreclosure, minimum notice to the mortgagor is required.

If no foreclosure has been started, the advocate can help the client seek forbearance, loan modification, or other "loss mitigation" measures, so called because working with the borrower can avoid the larger loss that the mortgagee will incur upon foreclosure. In late 2008 many large mortgage banks and servicers announced expanded programs to attempt to help borrowers work out mortgage defaults. A notice of representation, power of attorney, or similar document will be required before the servicer can discuss the account of a represented consumer with the advocate, while the borrower's current financial statement will be needed before any workout is offered. These forms are often available at the servicer's Web site. Getting and submitting the attorney authorization and financial statement in advance will save valuable time.

Many loan servicers continue with preforeclosure and foreclosure processes even as they discuss loss mitigation measures with the borrowers. It is essential to monitor public records as appropriate and to respond immediately to demand letters, foreclosure complaints, notices of sale, and other documents received by the borrower while workout negotiations are underway. Forebearance agreements are often conditioned on payments by the borrower to cure the default, set by the servicer to be due with a few days notice. The client who is having mortgage payments returned by the servicer or who is otherwise not making payments will have much more flexibility in a workout if unmade payments are escrowed during negotiations.

Defenses and Counterclaims

The loan closing file and other documents reflecting the servicing of the loan may reflect defenses and counterclaims and should be obtained from the client at the outset. Additional information may be obtained from the mortgage servicer by means of a "qualified written request" under the Real Estate and Settlement Procedures Act. Absence or inaccuracy of the required "truth in lending" disclosures is one closing error that may give the client rescission rights. It is also essential to read the mortgage and check the public records—an improper property description, unrecorded mortgage, or mortgage lacking signatures of all property owners can evoke borrower defenses or counterclaims.

Dishonesty or fraud at closing may give rise to borrower defenses. However, the advocate should be wary of bona fide purchaser claims, parole evidence doctrines, and other mortgagee defenses to borrower claims of impropriety at loan origination. Other borrower defenses may stem from the terms of the contracts themselves, such as the lack of required notices that are conditions precedent to default and acceleration. Servicer errors in accounting are not uncommon—the loan history ledger should be reviewed for unapplied payments and wrongfully assessed fees and charges.

In judicial foreclosure jurisdictions most borrower defenses can be raised as affirmative defenses and counterclaims. Local discovery procedures may be faster and more efficient than the use of qualified written requests to obtain loan history and other documents from the mortgagee or servicer. Judicial foreclosures are also subject to justiciability and standing defenses. Courts in several states have held that a mortgagee must demonstrate through a proper assignment chain that it has standing to bring a foreclosure proceeding.

Borrower defenses in jurisdictions that allow nonjudicial foreclosures must be asserted in independent lawsuits, often seeking an injunction. Filing for injunctive relief before a foreclosure sale has been held, with the recordation of a lis pendens if appropriate, is the best way to avoid a bona fide purchaser at sale asserting intervening rights. However, improprieties in the foreclosure process may permit setting aside even a completed sale.

Restructuring Debt

The client who is unable to negotiate a useful loan modification with the loan servicer or to obtain a judicial rescission or modification may benefit from a restructuring of the debt in bankruptcy court. The most common vehicle for bankruptcy restructuring of a mortgage is a Chapter 13 proceeding in which the debtor pays a portion of the arrearage each month over a period of three to five years, as part of a monthly payment to the bankruptcy trustee, which will also include the ongoing mortgage payment, trustee commissions, and payments to other creditors. Chapter 13 is subject to limitations on total debt, but a debtor who exceeds those caps may be able to catch up the mortgage arrearage in a Chapter 11 reorganization. Current bankruptcy law only permits the cure of a homeowner’s delinquent payments—the principal balance, loan term, or interest rate of an obligation secured by the debtor’s primary residence may not be modified. This limitation may be lifted in the next congressional session. Consumer advocates should monitor legislative developments carefully in 2009 as there may be good news for financially stressed clients.

Most Common Form of Foreclosure

States requiring court foreclosure action	States allowing sale without court case
Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Vermont, Virgin Islands, Wisconsin	Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Guam, Hawaii, Idaho, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wyoming

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