

The Crossover of FDCPA and Bankruptcy

Making the connection between the 2 will make both better

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RESOURCES

- This PowerPoint and many related documents are available at
- <http://www.Krumbeinlaw.com/NACA>
- Should also get the Pete Barry Call log and Violations worksheet
 - http://www.lawpoint.com/images/lawpoint/collection_log.pdf

FDCPA Considerations before Bankruptcy

- Why do people file for Bankruptcy?
 - Too much debt?
 - Overspending?
 - Job loss?
 - Divorce?
 - Medical bills?
 - All of these are great thoughts, and they are indicators for a Bankruptcy, but they are WRONG.
- **PEOPLE FILE FOR BANKRUPTCY BECAUSE A DEBT COLLECTOR IS HARASSING THEM.**

The real reason for Bankruptcy

- Debt collectors are harassing the consumer
 - Some methods are legal.
 - Lawsuits
 - Garnishment
 - Bank account seizures
 - Foreclosures/reposessions
 - Some methods are not
 - Threats
 - Downright extortion
 - Lies
 - Deception

Purpose of FDCPA

- To prevent debt collectors from acting in a manner that is
 - Abuse or harassment
 - False or misleading
 - Unfair or deceptive.
- Gee- this sounds familiar. These are things that drive the consumer to a BK lawyer.

Purpose of Bankruptcy

- To provide a “fresh start” to the well meaning, but unlucky Debtor (as defined by the Bankruptcy code). (Chapter 7)
- To allow a consumer the ability to readjust debts and decelerate secured debt. (Chapter 13)
- Is not a complete “get out of jail free” card.

Chapter 7 Bankruptcy outline

- Person must generally have less income than expenses
- Must have less income than median for state (note- there are exceptions)
- List all assets (real property and personal property)
- List all debts (secured, unsecured, special [priority], and special [non-dischargeable]).
- Trustee is tasked with taking all non-exempt assets and liquidating for purpose of payment to creditors.

Chapter 13 Outline

- For people who have more income than expenses or who are above median income
- List all assets and debts like in a Chapter 7
- Pay the excess income to a Chapter 13 trustee who distributes proceeds to creditors
- Assets are generally not liquidated
- Often used for purpose of saving house or car.
- Discharge is entered after all payments have been made, but Automatic Stay is in effect the entire time.

Chapter 12 Outline

- Similar to Chapter 13, only limited to farmers or fisherman
- Debt limits are higher

Chapter 11 Outline

- Usually done by corporations, but CAN be done by individuals.
- Much more complex type of Bankruptcy.
- Can manipulate many other things that cannot change in Chapter 7, 12 or 13.

Few if any consumers have no illegal collectors

- Look at the list of “creditors” they bring in.
 - There will ALWAYS be debt collectors.
 - Few debt collectors can help themselves.
- Standard FDCPA rules apply.
 - 3rd party contacts are illegal
 - Threats and harassment are illegal
 - False and misleading statements are illegal
 - Unfair and deceptive statements are illegal

FDCPA can PAY FOR the Bankruptcy

- Even “technical” or statutory damages only violations entitle the consumer to money.
- Actual damages violations can generate lots of money.
- Depending on the price of the Bankruptcy, and the market, usually only 1 or 2 FDCPA claims will pay for a Bankruptcy.

AFTER The Bankruptcy

- Here is where it gets sticky.
 - Some courts hold that Bankruptcy “occupies the field” and therefore a debt collector who’s only violation is collecting on a Stayed or Discharged debt is subject only to the Bankruptcy.
 - *Walls v. Well Fargo*, 276 F3d 502 (9th Cir, 2002)
 - *Hubbard v. National Bond*, 126 BR 122 (D. Del, 1991), aff’d without opinion at 947 F2d 935 (3rd Cir, 1991).

Confused yet?

- Some courts hold that there is NO conflict between FDCPA and Bankruptcy, and it is NOT preempted.
 - *Randolph v. IMBS*, 368 F.3d (7th Cir, 2004)
 - *Turner v. JVDB & Assoc.*, 330 F.3d 997 (7th Cir, 2003) (stating that collecting on a discharged debt falsely represented the amount character or legal status of the debt.)

BUT the Bonafide Error Defense is a problem

- *Hyman v. Tate & Kirlin*, 362 F. 3d 965 (7th Cir, 2004) (subject to Bonafide error, where the creditor agreed to only refer non-BK debt, and in fact, less than 0.1% were BK)
- *Ross v. RJM Acquisitions*, 480 F. 3d 493 (7th Cir, 2007) (similar outcome, but their “search” was outsourced, and deemed good enough)

Lots of courts have not ruled

- So here is the argument to make as to why *Randolph* and *Turner* are better thought out.
 - The stay and the Discharge are INJUNCTIONS against any effort to collect.
 - An injunction is only valid as against one who knows of it (statutory, constructive or actual).

Practice tip for Bankruptcy lawyers

- Know who the collectors are and who they collect for.
 - Make sure when you see the collector that the creditor is listed.
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WAR STORY

- Client had a collector who dunned for creditor
- Failed to list collector in the Bankruptcy, even though they listed the creditor.
- Collector sued for dunning post-Bankruptcy.
 - Note- case is not over yet, but I am predicting the outcome.
- Court will rule that intentionally missing the debt collector who does do a scrub is not only not a violation, but brought in bad faith and for the purposes of harassment.
- 4th cir case— Look for *Suh v. The Fitzpatrick Law Office, P.C.* (D. MD, 8:12-cv-00329)

All Circuits allow

- True ABUSE claims. (d claims)
- Most other false/misrepresentation claims (e)
- Most unfair and deceptive claims (f claims)
- Generally allow improper communication claims (b and c claims)

Special Considerations for Chapter 13

- Time barred debts as proof of claim
 - NOT like a lawsuit. NO COA for filing a time barred claim in ANY circuit.
 - *Simmons v. Roundup Funding, LLC*, 622 F3d 93 (3rd Cir, 2010)
 - Collection efforts that continue should be covered just the same as collecting on a Discharged debt.
 - 7th Cir did not distinguish between Discharged and Stayed.

Jurisdiction of the Court

- Bring in State or Federal Court.
 - Jurisdiction based on 15 USC 1692k.
 - Selection based on how the judges are in your area.
- Do NOT bring in Bankruptcy Court
 - Statutory jurisdiction but
 - NO CONSTITUTIONAL Jurisdiction
 - *Stern v. Marshall*, 131 S. Ct. 2594 (2011)
 - Equivalent to licking a flagpole in Wisconsin in February.