



Legal Strokes on the Collection Fairway

Hot Legal Issues in the Collection Field
Including Legislative Updates

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Speaker

June Coleman, recently opened the Northern California office of Carlson & Messer, a preeminent litigation law firm that represents creditors and collection professionals. Ms. Coleman is a defense litigator with more than 20 years of experience. Her areas of emphasis include consumer rights actions involving statutes such as the FDCPA, TCPA, and FCRA, and their California counterparts. She has a deep understanding of permissible debt collection conduct and how best to defend claims and minimize liability in the collection industry. She also defends collection attorneys before the California State Bar. She is an accomplished author and a well-known presenter who speaks frequently. Since 2008, Ms. Coleman has been voted by her peers as one of the top 5% of lawyers practicing in Northern California, earning her a spot on the Law & Politics' Northern California Super Lawyers list; as well as the Sacramento Business Journal's "Best of the Bar" and Sacramento Magazine's "Top of the Bar" lists. Ms. Coleman is a Martindale Hubbell AV Preeminent rated attorney.

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Scoreboard

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- ▶ Federal Legislative Update
 - ▶ Amendment to the FDCPA and CFPB?
 - ▶ CFPB Debt Collection Rules?
 - ▶ TCPA Rules?
- ▶ Trends in State Law Legislation
 - ▶ Time Barred Debt Collection
 - ▶ Privacy Legislation
- ▶ FDCPA Litigation Hot Issues
- ▶ TCPA Litigation Hot Issues
- ▶ Bankruptcy Hot Issues

FEDERAL LEGISLATIVE EFFORTS



FDCPA AND CFPA LEGISLATION

- ▶ National Creditors Bar Association lobbying for an Amendment to the FDCPA and the CFPA
 - ▶ The Practice of Law Technical Clarifications
 - ▶ Excludes Attorneys and the Practice of Law
- ▶ ABA Joined in Efforts
- ▶ With new legislators in Congress, need new sponsors
 - ▶ House Financial Services and Judiciary Committees
 - ▶ Senate Banking and Judiciary Committees



CFPB Debt Collection Rules – Coming Soon to a Theater Near You?

- ▶ Initial drafts of Proposed Rules publicized in 2016
- ▶ CFPB says Notice of Proposed Rule Making (NPRM) Due Out in Spring
 - ▶ Will contain proposed rules for debt collection
- ▶ Comment Period – 60 days or more
- ▶ CFPB reviews comments for ... 60 days?
- ▶ CFPB announces new debt collection rules – publishes in Federal Register

CFPB Debt Collection Rules – Coming Soon to a Theater Near You? (cont.)

- ▶ Congressional Review Act allows repeal within 60 days from publication of the rules in Federal Register
 - ▶ Excluding recesses
 - ▶ Joint Resolution – simple majority
- ▶ Trump's direction to agencies to not enact new regulation without getting rid of old regulation – what impact will that have on any new debt collection regulation?
- ▶ April 11 Memo from OMB- Rules need to be submitted to OMB for classification as “major” or “minor.” Major rules will need congressional approval before enactment. OMB review and designation must happen before publication in Federal Register.
 - ▶ Memo effective May 11, 2019

FCC Predictive Dialer Rules – Coming Soon to a Theater Near You?

- ▶ Request for comment to define Automatic Telephone Dialing System
 - ▶ Immediately after *ACC v. FCC*, from May 14, 2018 – June 28, 2018
 - ▶ Re-opened immediately after *Marks v. Church San Diego, LLC*, ending October 24, 2018
 - ▶ Does this signal new rules?
- ▶ Composition of 5-Member FCC has changed since 2015 Rule
 - ▶ Two vocal dissenters remain, one now Chairman
 - ▶ One new appointee was advisor to current Chairman

FCC Predictive Dialer Rules – Coming Soon to a Theater Near You? (cont.)

Rule Making Process Is Still Lengthy:

- ▶ FCC Publishes ATDS Definition NPRM
- ▶ Comment Period
- ▶ FCC Reviews of Comments
- ▶ FCC Finalizes ATDS Definition Rules
- ▶ FCC Rules Reviewed by OMB
- ▶ ATDS Definition Rules Published in Federal Register
- ▶ Congress Can Revoke
- ▶ Trump Regulatory Policy – helps or hurts?

State Law Legislation Update



**STAY INFORMED
ON LEGISLATION
AFFECTING
*our industry***



Teeing Up Hot Issues in State Legislation

- Time Barred Debt Notices
- Privacy Laws
 - Federal legislation for uniformity?
- Wage Garnishment Legislation

Handicapping FDCPA Lawsuits



Current FDCPA Litigation Issues

- ▶ More letter violation litigation
 - ▶ Typically prime candidates for class treatment
- ▶ Time Barred Debts
 - ▶ Offer of Payment Plan Creates New Debt
 - ▶ Demands When Payment Will Revive Debt
 - ▶ Settlement Offer Implies Threat of Litigation
- ▶ *Non-Judicial Foreclosures ONLY are not subject to the obligations under the FDCPA other than 1692f(6). Obduskey v. McCarthy & Holthus LLP, __ U.S. __, 139 S. Ct. 1029 (Mar. 20, 2019)*

Staying in the Bankruptcy Fairway



Current Bankruptcy Litigation Issues

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In re Taggart – bankruptcy case taken up by the U.S. Supreme Court has complex procedural background

- Taggart transferred business interest to third party.
- Taggart's partners had right of first refusal and sued to enforce in state court.
- Taggart filed for Chapter 7 bankruptcy and his debts were discharged.
- State court proceeding continued to determine who owned the business interest.
- State court held business interest belonged to partners, and invited partners to bring fee motion for post petition fees and costs.

Current Bankruptcy Litigation Issues-Taggart cont.

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- ▶ State court granted fee motion because Taggart had “returned to the fray” when he continued to participate in the partners’ lawsuit.
- ▶ Taggart re-opened bankruptcy and asked Court to issue sanctions for violating the discharge stay.
- ▶ Taggart took state court order on fees up on appeal and overturned state court ruling that Taggart had “returned to the fray.”
- ▶ Bankruptcy court issued sanctions against partners and attorney.
- ▶ Partners and attorney appealed bankruptcy sanctions to Bankruptcy Appellate Panel. BAP reversed – partners and attorney had a good faith belief that the discharge injunction did not apply to their fee claim – not a “knowing” violation.
- ▶ State Court reversed court order awarding fees because Taggart’s actions did not constitute a “return to the fray.”
- ▶ Taggart appealed to the Ninth Circuit, who ruled that sanctions can only be awarded with actual knowledge – a good faith belief, even if unreasonable, will prevent an award of sanctions.
- ▶ Supreme Court heard oral arguments on April 24.

Whiffing the TCPA Ball



Current TCPA Litigation Issues

- ▶ What is and is not an Automatic Telephone Dialing System Under the TCPA?
- ▶ ACA v. FCC
 - ▶ 2015 Ruling
 - ▶ 2008 Ruling
 - ▶ 2003 Ruling
- ▶ Cases all over the map on this.
- ▶ Many defendants asking for stays and getting the stay pending FCC Rule



Thanks!

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