HOW TO SPOT ISSUES AND REMEDIES FOR CONSUMERS IN FINANCIAL CRISIS

People overwhelmed and immobilized by debt problems may have remedies under the Bankruptcy Code, or other consumer protection laws. Set forth below is some basic information designed to assist attorneys in spotting issues when they are speaking with their clients about debt problems.

1. Basic Information about Chapter 7 and Chapter 13

Bankruptcy cases can be filed under chapters 7, 11, 12, and 13 of the Bankruptcy Code. Most individuals file cases under chapters 7 or 13. In a Chapter 7 case an individual discharges, or eliminates, personal liability for most unsecured debts, such as credit card debt and medical bills, and keeps property that is within the amounts of the applicable exemptions. A Chapter 7 trustee liquidates a debtor's nonexempt assets and makes payments to the creditors according to certain statutory rules of priority.

Cases filed in Illinois generally use the Illinois exemptions, although there are situations in which other state or the federal exemption laws apply if the debtor has resided in another state for a certain period of time in the past. The Chapter 7 Trustee has broad powers to avoid transfers and recover nonexempt property to pay to the debtor's creditors.

In a Chapter 13 case a debtor proposes a repayment plan for all or of a percentage of the unsecured debts. At the end of a Chapter 13 plan, as in a Chapter 7, the debtor receives a discharge of personal liability for most unsecured debts. If the debtor's gross income is too high, he or she may not qualify for a Chapter 7. A Chapter 13 case may allow a debtor to retain nonexempt property that would be at risk of being sold by a Chapter 7 trustee. In a Chapter 13 a debtor may be able to cure an arrearage on a mortgage or a car loan by paying the arrearage through the Chapter 13 plan. Chapter 13 also provides substantial opportunities to reduce car loan balances on loans for older vehicles and to eliminate second or third mortgages when the property's value is less than the balance owed on the first mortgage.

In order to properly advise a client regarding which chapter may be the best course, it is critical to know the amount and types of debt, the value of the debtor's assets, the current monthly income, the amount of income over the previous six months, and the financial picture of the debtor over the last couple of years.

There are limitations in the bankruptcy law, which may require a debtor to file a chapter 13, rather than a chapter 7. The "means test" is a formula required to be completed and serves as a mechanism to determine if a debtor has too high of an income to file a chapter 7, and also determines the minimum a debtor must pay every month to his or her unsecured creditors in a Chapter 13. However, Chapter 13 has debt limits: the secured debt limit is $1,149,525 and unsecured debt limit is $383,175. The unsecured portion of mortgage debt is counted toward the unsecured debt limit. A frequent problem occurs when a debtor has too high of an income to qualify for a chapter 7, but too high and amount of secured or unsecured debt to file a Chapter 13. In this situation, an individual Chapter 11 case may be a viable option to enable a debtor to eliminate debt and obtain freedom from bad economic times.

There are several strategic reasons to choose a Chapter 13 over a Chapter 7. In addition to the ability to strip junior mortgages in a Chapter 13, a debtor may be able to use a Chapter 13 to obtain relief from tax debt or to manage student loan payments. In addition, marital debt is treated differently in Chapter 7 and Chapter 13.

The amendments instituted by the Bankruptcy Abuse and Consumer Protection Act ("BAPCPA") relative to the definition of a Domestic Support Obligation ("DSO") have increased the ability of creditors owed a DSO to collect that debt. In order for a particular debt to be considered a DSO, the debt must meet the four elements contained in the statutory definition. DSO debts are not dischargeable under any provision of the Bankruptcy Code.

If a divorce-related debt is not a DSO but a property settlement debt, the debt will frequently still be excepted from discharge under Bankruptcy Code section 523(a)(15). Section 523(a)(15) provides that a debt is excepted from discharge if it meets these three statutory elements:

1. the debt must be to a spouse, former spouse, or child of the debtor;
2. the debt must not be a DSO; and
3. the debt must have been incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court.

Section 523(a)(15) does not apply in Chapter 13 cases, so a Chapter 13 can provide a powerful mechanism for discharging nonsupport, property settlement debts.

The decision regarding which chapter to file may be dictated by the law, such as when a debtor has too high of an income to file a chapter 7. However, the decision is not black or white, because Chapter 13 has debt limits and there may be strategic advantages to filing a chapter 13 rather than a chapter 7.

2. Overview of the Fair Debt Collection Practices Act

Individuals with financial problems also should be aware that they have rights against debt collectors and collection agencies who may be harassing them to collect unpaid bills. To state a claim alleging violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA"), a plaintiff must show: (1) that [s]he is a consumer; (2) that the debt arises out of a transaction entered into for personal purposes; (3) that the defendant is a debt collector; and (4) that the defendant violated one of the provisions of the FDCPA.

The Fair Debt Collection Practices Act (FDCPA) is a federal law which protects consumers from harassing, oppressive, or abusive debt collection by collectors who are trying to collect a consumer debt. Consumers have a right to be treated with **truth, fairness, dignity, and respect** in all communications with a debt collector or collection agency.

What is a covered "debt?"

In order to be covered by the FDCPA, the debt must be primarily used for personal, family, or household purposes. The Act only applies to debts which arise out of consumer, but not business transactions. Courts have excluded claims involving taxes, child support and shoplifting because they do not involve a contract. The FDCPA applies to collection of condominium fees, collection of checks written to purchase personal or household goods, collection of rent, medical bills, utility bills, insurance bills, student loans, credit cards, attorney's fees, judgments, discharged debts, mortgages. Cases find that the following transactions are not consumer debts under the FDCPA: taxes, child support, shoplifting civil claims, fines, license fees, parking tickets, car accidents, and torts.

Who is a debt collector under the FDCPA?

The collector's principal business purpose must be to collect consumer obligations. The FDCPA also applies to persons regularly collecting debts for another. The FDCPA covers debt collection agencies, debt buyers, collection lawyers, most foreclosure attorneys, and mortgage serving companies that obtain servicing rights after the loan goes into default. The FDCPA does not include creditors collecting their own debts, such as retail stores, banks, and finance companies. However, a creditor is subject to the FDCPA when it uses a name other than its own which indicates the involvement of a third party collector. The FDCPA does not include assignees before the debt is in default.

What conduct is prohibited?

The FDCPA prohibits a debt collector from using false, deceptive, or misleading representation or means in connection with the collection of a debt. This includes false representation of the character, amount of, or legal status of any debt, and includes false representation of any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt. 15 U.S.C. §1692e.

The FDCPA prohibits the false representation or implication that an individual is an attorney or that any communication is from an attorney. 15 U.S.C. § 1692e(3); *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996). Other violations include the threat to take any action that cannot legally be taken or that is not intended to be taken (15 U.S.C. § 1692e(5)), or the false representation that the person committed any crime in order to disgrace the consumer (15 U.S.C. § 1692e(7)). The FDCPA protects consumers from invasion of privacy, harassment, abuse, false or deceptive representations, and unfair or unconscionable collection. A debt collector may not communicate with a consumer at any unusual time or place or a time or place known to be inconvenient to the consumer. 15 U.S.C. § 1692c(a)(1). This can mean the workplace if the debt collector has reason to know that the employer prohibits the consumer from receiving such communication. This includes late night or repetitive calls and false threats of legal action. Any call between 9:00 pm and 8:00 am is presumed to be unusual or inconvenient. Contacting friends, neighbors, relatives, employer is usually prohibited, unless the contact is only to find the location of the person.

There is potential liability of collection attorneys for threatening to sue on a time barred debt, misrepresenting the consumer's liability, threatening to sue when there is no intention to do so, stating false deadlines, or submitting misleading affidavits or documents in support of a debt collection against a consumer. A collector may not contact a consumer if it knows that the person is represented by an attorney.

It is a violation of the FDCPA to fail to validate the debt. 15 U.S.C.§1692g requires the debt collector's initial written communication to the consumer to contain the following information: amount of the debt, name of the entity to whom the debt is owed, and the language in section 1692g. This written communication must be sent within 5 days after the first collection phone call. 15 U.S.C. §1692(c) provides that if the consumer notifies the collector in writing that the consumer refuses to pay a debt or that the consumer wants the collector to cease further communication with the consumer, the debt collector must stop communications except for limited purposes (i.e. that the collection efforts will cease or to notify the consumer that the collector intends to invoke a specific remedy).

The remedies under the FDCPA are statutory damages are up to $1000.00 for individual actions, actual damages, reasonable attorney's fees and costs to the prevailing party. Actual damages are not a prerequisite to statutory damages. Courts have not authorized punitive damages under the FDCPA. In a class action, the class can receive up to the lesser of $500,000 or 1% of a debt collector's net worth. The Act is a strict liability statute: there is no requirement of intent or knowledge or the willfulness of the violation. However, the violation must be material (i.e., affect the consumer's decision to pay or not). The standard in Seventh Circuit is that of an "unsophisticated consumer." *Gammon v. GC Servs*., 27 F.3d 1254, 1257 (7th Cir. 1994). That standard seeks to protect naïve consumers. There is a one year statute of limitations under the FDCPA.

Bona Fide Error Defense

A debt collector can avoid liability by providing by the preponderance of the evidence that the violation was unintentional, resulting from a bona fide error, and the error occurred notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. This is a high burden to prove that the debt collector maintained procedures reasonably adapted to avoid the error. *Turner v. J.V.D.B. & Associates*, 330 F.3d 991, 996 (7th Cir. 2003).

Comparison with Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. COMP.STAT. 505/1 *et seq.* ("ICFA")

Section 2 of the ICFA prohibits unfair or deceptive conduct. The ICFA designed to protect consumers, borrowers, and business people against fraud, unfair methods of competition, and unfair or deceptive practices in the conduct of a trade or business. Section 10 allows private individuals to file a complaint for damages. The ICFA has broader protection than common law fraud.

Big differences of the ICFA from the FDCPA:

The consumer may be able to assert a claim against the creditor under the ICFA. The ICFA has a 3 year Statute of Limitations: 3 years from the time the cause of action accrued. The ICFA does NOT apply to attorneys. Defendant's intent to induce reliance by consumer is necessary element to proving claim under section 2 (deception). Individuals must show that their injury was actually caused by the defendant's unlawful conduct. *People ex rel. Madigan v. United Constr. Of Am., Inc. et. al.* , 2012 IL APP (1st) 120308, 2012 WL 5911795. Individuals must be able to establish actual damages in order to recover under the Illinois Consumer Fraud Act – there is no statutory damages provision. Available remedies under the ICFA: actual damages, punitive damages, injunctive relief, and reasonable attorney's fees and costs to the prevailing party.

3. The Telephone Consumer Protections Act

The TCPA, 47 USC Section 227(b)(3), states:

Private Right of Action

A person or entity may, if otherwise permitted by the laws or rules of court of a state, bring an appropriate court of that State—

(A) an action based on a violation of this subsection or regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

The TCPA, 47 U.S.C. b(1)(B), states:

It shall be unlawful for any person…to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)…

Pre-recorded messages, left by a debt collector, on the answering machines of a non-debtor violates the TCPA. See *Watson v. NCO*, 462 F. Supp. 2d 641 (E.D.Pa. 2006).

4. Student Loan Law May Provide Some Relief

Student loans are very difficult, but not impossible, to discharge in bankruptcy. The standard is one of "undue hardship." However, federal student loans may be dischargeable by the Department of Education due to total and permanent disability or school related reasons. Borrowers may be able to cure a default and move the loan into rehabilitation status, or obtain income contingent repayment plans (ICR) or income based repayment plans (IBR) to reduce their monthly payment and improve their ability to repay the loans. With IBR and ICR the balance is forgiven after 25 years. There is also a Public Service Loan Forgiveness Program which may be available to employees of nonprofit or government employers. Loans may also be eligible for forbearance.

Borrowers with private student loans which have been turned over to collection agencies may have remedies against the collectors under the FDCPA, or have defenses to the collection action.

5. Importance of educating clients about their rights

Inform clients that if they want to stop collection calls, they need to send a letter by regular and certified mail (keeping a copy) saying "do not contact me again" or "I refuse to pay," in addition to the fact that they are represented by an attorney (if applicable). If the calls are at work, they should send letter saying they cannot receive calls at work. If they want to dispute the debt, they need to send dispute letter within 30 days of the initial contact. If the client has given the creditor or collection agency his or her cell phone, the client should revoke consent in writing. Advice clients to answer their phones and to keep a log of all phone calls and content, keep all collection letters and envelops, and to save any voice mail messages from debt collectors. Clients need to open their mail and know who is trying to collect against them. Remind them of their rights and that debt collectors cannot use methods that are unfair, untrue, undignified, or disrespectful in collection of a debt. Be aware that Illinois is a two party state for telephone recordings.

Prepared by Diane Brazen Gordon
Law Office of Diane Brazen Gordon, LLC
175 Olde Half Day Rd. Suite 140-2
Lincolnshire, IL 60069
(847) 383-5647
diane@brazengordon.com

©Diane Brazen Gordon