



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Midwestern Bankruptcy Institute

The Alphabet Soup of Consumer Statutes

Dale Irwin, Moderator

Slough Connealy Irwin & Madden, LLC; Kansas City, Mo.

Jennifer A. Donnelly

Bryan Cave LLP; Kansas City, Mo.

Michael Rapp

Stecklein & Rapp; Kansas City, Mo.

THE ALPHABET SOUP OF COMMONLY-LITIGATED CONSUMER STATUTES

MWBI

Fair Debt Collection Practices Act

2

- ❖ Fair Debt Collection Practices Act (FDCPA)
 - ❖ 15 USC 1692
 - ❖ **Triggered after DEFAULT**
 - ❖ **Triggered by a 3rd Party Collector**
- ❖ FDCPA Damages
 - ❖ **Statutory** of up to \$1,000 plus **Actual**
 - ❖ **Class**
 - ❖ 1% of Company's net worth or \$500,000
- ❖ **Attorneys' Fee** provisions

Midland Funding, LLC v. Johnson, No. 16-348,
2017 WL 2039159 (S. Ct. May 15, 2017)

3

- ❖ Issue decided: was the FDCPA violated when a creditor submitted a bankruptcy proof of claim that on its face contained information, described as true by the creditor in submitting the claim, proving that claim was barred by the statute of limitations?
- ❖ No.
- ❖ Court held specifically that the proof of claim was not “false, deceptive, or misleading” or “unfair” or “unconscionable.”

Midland Funding

4

- ❖ Dependent on Alabama law to define a “claim” and when a “claim” is legally enforceable.
- ❖ Submission of a proof of “claim” does not require claim ultimately be meritorious.
- ❖ Bankruptcy process open to a creditor with a claim unlikely to succeed.
- ❖ Statute of Limitations was reason claim failed and was affirmative defense—dependent on borrower to raise and prove.
- ❖ Also dependent on bankruptcy trustee to identify.

Midland Funding

5

- ❖ Creditor's state of mind—"a matter often hard to determine."
- ❖ Deceptive/wrongful intent viewed differently in the context of a bankruptcy—where a debtor's rights and obligations are subject to a "special balancing."

Henson, et al., v. Santander Consumer USA Inc., S.Ct., 2017 WL 2507342 (June 12, 2017)

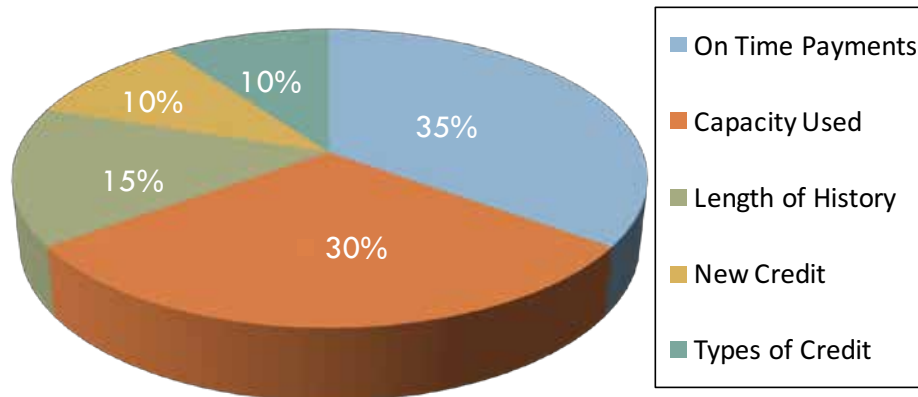
6

- ❖ Unanimous decision authored by Justice Gorsuch Held:
 - ❖ Santander was not a debt collector under the Fair Debt Collection Practices Act's (FDCPA's) second definition of debt collector.
 - ❖ The court found that the statutory phrase "owed or due ... another" does not cover *any debt* that was once payable to someone other than the *current* owner of the debt.
 - ❖ This narrow opinion held that a debt buyer is not subject to the FDCPA as an entity regularly collecting debts "owed or due another," leaving intact the alternative approach of showing that a debt buyer qualifies as a debt collector under the FDCPA because the "principal purpose" of its business is the collection of debts.
 - ❖ These are separate and distinct definitions of debt collector. See *Schlegel v. Wells Fargo Bank, N.A.*, 720 F.3d 1204, 1208 (9th Cir. 2013). An entity meeting either one of the two definitions qualifies as a debt collector. See *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 405 (3d Cir.2000).

Fair Credit Reporting Act

7

Credit report? Isn't that just a FICO Score?



Summary: The Statute

8

- ❖ Like it or not,
- ❖ **every consumer has at least one, if not several, “report cards” that purport to assess the consumer about a variety of qualities such as creditworthiness, or quality as employee or tenant**



Summary: The Statute

9

- ❖ Fair Credit Reporting Act (FCRA)
 - ❖ 15 U.S.C. §§1681 et seq.
 - ❖ For **CRA**: always available
 - ❖ For **Furnisher**: triggered by Dispute
- ❖ Damages
 - ❖ Actual
 - ❖ In case of willful
 - ❖ Statutory \$100 to \$1,000
 - ❖ Punitives
 - ❖ No class limitations
- ❖ Attorneys' Fee provisions

Summary: The Statute

10

Two purposes:

- ❖ For credit industries (including banking system)
 - ❖ "The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." §1681(a)(1).
- ❖ For consumers:
 - ❖ "a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." §1681(a)(4).

FCRA Guiding Principles

11

Three Principles:

❖ **Privacy**

- ❖ Limited third party access to consumer reports

❖ **Accuracy**

- ❖ Responsibilities of consumer reporting agencies and data furnishers
- ❖ dispute resolution process

❖ **Fairness**

- ❖ Adverse action notices to affected consumers
- ❖ Obsolete information cannot be reported

Summary: The Statute

12

- ❖ Intended to protect consumers from the **willful** and/or **negligent** inclusion of **inaccurate** information in their credit reports.
- ❖ To that end, the FCRA **regulates** the **collection**, **dissemination**, and **use** of consumer information, including consumer credit **information**
 - ❖ full text of statute is available here:
<http://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf>
- ❖ **Enforced** by the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB) and private litigants.
 - ❖ powerful federal consumer statute that often works in conjunction with other federal consumer statutes (FDCPA, FCBA, TCPA).
 - ❖ State Counterpart (KSA §50-701)

FCRA and Consumer Reports

13

- ❖ What are consumer reports?
 - ❖ See §1681a(d)(1)
- ❖ **Any** written, oral, or other **communication** of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is **used or expected to be used or collected** in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:
 - ❖ credit or insurance to be used primarily for personal, family, or household purposes;
 - ❖ employment purposes; or
 - ❖ any other purpose authorized under section 604 [§ 1681b].

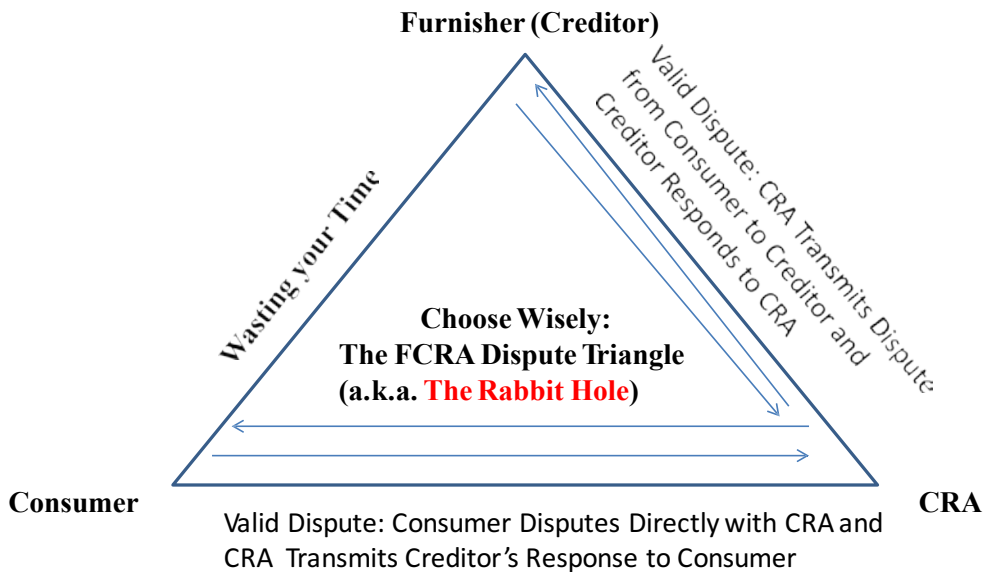
Private Causes of Action Pursuant to FCRA

14

- ❖ **CRITICAL POINT:**
 - ❖ There is **NO** private cause of action against a **furnisher** unless and until 30 days **after a dispute** is filed with a credit bureau
- ❖ What Actually Happens in a Dispute?
 - ❖ CRA reduces dispute to a code according to the METRO 2 guidelines
 - ❖ That code is transmitted to furnisher via E-OSCAR system
 - ❖ Furnisher typically does a cursory review to confirm that the information being reported is the same as what furnisher intended to report
 - ❖ essentially parroting back the information to CRA
 - ❖ case after case has held that this is not a reasonable reinvestigation

Private Causes of Action Pursuant to FCRA

15



Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (U.S., 2016)

16

- ❖ Robins's suit alleged that Spokeo willfully violated various procedural requirements under FCRA, including that Spokeo failed to “follow reasonable procedures to assure maximum possible accuracy” of the information in his consumer report. *Id.* § 1681e(b).
- ❖ He alleged that, as a result, Spokeo published a report which falsely stated his age, marital status, wealth, education level, and profession, and which included a photo of a different person. Robins alleged that such errors harmed his employment prospects at a time when he was out of work and that he continues to be unemployed and suffers emotional distress as a consequence.

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (U.S., 2016)

17

The Fallout is as Clear as “Concrete”

- ❖ Questions Presented:
 - ❖ whether a plaintiff who cannot show any actual harm from a violation of the FCRA nevertheless has standing under Article III of the U.S. Constitution to sue for statutory damages in federal court.
- ❖ District Court:
 - ❖ No.
- ❖ Ninth Circuit:
 - ❖ Yes. “Spokeo violated his statutory rights” and the fact that Robins’ “personal interests in the handling of his credit information are individualized,” the court held that Robins had adequately alleged an injury in fact.
- ❖ SCOTUS:
 - ❖ Punt.
 - ❖ Ninth failed to determine whether website operator’s alleged violations of the FCRA caused concrete injury required for Article III standing, and
 - ❖ consumer could not satisfy the injury-in-fact demands of Article III standing by alleging a bare procedural violation of the FCRA
- ❖ Ninth Circuit:
 - ❖ Yes. It is “Individualized,” “Particularized” and “Concrete.”

Truth-in-Lending Act: Rescission of Residential Mortgage Loan

18

- ❖ TILA: applies to closed-end first lien mortgage loan that is not a PMSI: 15 U.S.C. § 1602(h)/ 15 U.S.C. § 1635(e)(1-4).
- ❖ Requires certain disclosures, including of right to rescind transaction—as if it never occurred.
- ❖ Rescission right exists: 15 U.S.C. § 1635(a, b, f, g) & 12 C.F.R. § 226.23(d)(4).
- ❖ Rescission right expires up to 3 years after the date of closing or when the property is sold: 12 C.F.R. § 226.23(a)(3) and 15 U.S.C. § 1635(f).

TILA: *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S.Ct. 790 (2015)

19

- ❖ Did decision eliminate tender as a requirement for rescission under TILA:
- ❖ No: as interpreted by the trial court following the Supreme Court's decision: "reached the narrow issue of whether Plaintiffs had to file a lawsuit to enforce a rescission under 15 U.S.C. § 1635, or merely deliver a rescission notice, within three years of the loan transaction . . . The Court discerns nothing in the Supreme Court's opinion that would override TILA's tender requirement. Specifically, under 15 U.S.C. § 1635(b), a borrower must at some point tender the loan proceeds to the lender. Plaintiffs testified that they do not presently have the ability to tender back the loan proceeds. Because Plaintiffs have failed to point to evidence creating a genuine issue of fact that they could tender the unpaid balance of the loan in the event the Court granted them rescission, their TILA rescission claim fails as a matter of law on this additional ground." *Jesinoski v. Countrywide Home Loans, Inc.*, 196 F. Supp.3d 956, 962 (D. Minn. 2016).

TILA: *Post-Jesinoski*

20

- ❖ *Gilbert v. Deutsche Bank Trust Co. Americas for Residential Accredit Loans, Inc.*, No. 4:09-CV-181-D, 2017 WL 1012981, at *2 (E.D.N.C. Mar. 14, 2017) (rejecting plaintiffs' interpretation: "conflate[d] the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided.").
- ❖ *Murphy Brown v. Gorman*, No. 1:15CV01265LMBMSN, 2016 WL 3702974, at *3 (E.D. Va. July 7, 2016) ("The sole principle that *Jesinoski* clarified was that the three year limitation on notice did not extend to the filing of a lawsuit.").

TILA: Post-*Jesinoski*

21

- ❖ *Mikels v. Estep*, No. 12-cv-00056, 2016 WL 1056067, at **5-6 (N.D. Cal. March 17, 2016) (“Plaintiff’s underlying TILA right of rescission was extinguished in August 2010 when the property was sold despite his timely notice of rescission.”)

Telephone Consumer Protection Act

22

- ❖ Telephone Consumer Protection Act (TCPA)
 - ❖ 47 U.S.C. 227
 - ❖ limits the use of automatic telephone systems and artificial or prerecorded voice, text, SMS, and fax messages.
- ❖ TCPA Damages
 - ❖ **Statutory** of \$500 **per call**
 - ❖ Possible treble damages (\$1,500)
 - ❖ No Class Limitations
 - ❖ Can apply to non-consumer debts
- ❖ No Attorneys’ Fee provision

Reyes v. Lincoln Auto. Fin. Svcs., 2017 WL 2675363 (2d Cir. 2017)

23

- ❖ **Held** that the TCPA does not permit a consumer to revoke his or her consent to be called when that consent was provided as consideration in a binding contract.
- ❖ Seemingly contradicting 2015 FCC revocation order.
 - ❖ The order never mentions any contractual consent in its discussion (despite being an issue it was rejecting in some of the petitions) and only references common law principals of revocation.
- ❖ In addition, there are 3 cases going the other way:
 - ❖ *Gager v. Dell Financial Services LLC*, 727 F.3d 265 (3d Cir. 2013)
 - ❖ *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)
 - ❖ *Stevens-Bratton v. Trugreen, Inc.*, 2017WL108032 (6th Cir. Jan. 11, 2017)

Closer to Home: The Missouri Merchandising Practices Act

24

- ❖ RSMo. §§ 407.010 et seq.
- ❖ “The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce ... is declared to be an unlawful practice.”
- ❖ “Merchandise”: any objects, wares, goods, commodities, intangibles, real estate or services. RSMo. § 407.010 (4).
 - ❖ Elements: (1) purchased real estate; (2) for personal, family, or household purposes; (3) suffered an ascertainable loss of money or property; (4) resulting from the use or employment by any other person of an act declared unlawful by the Act. *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 81 (Mo. App. 2011).

MMPA: Now Applies to Certain Aspects of Mortgage Loan Servicing

25

- ❖ Application of MMPA to servicing of residential mortgage loans has had recent and extensive coverage by the Missouri Supreme Court.
- ❖ August 2014: Supreme Court reversed State ex rel. Koster v. Prof. Debt Mgmt., LLC, 351 S.W.3d 668 (Mo. App. 2011) (assignees of original mortgage debt holders were exempt from the MMPA on their loan servicing activities).
- ❖ Companion cases issued same day: Conway v. CitiMortgage, Inc., et al., 438 S.W.3d 410, 415-16 (Mo. 2014), and Watson v. Wells Fargo Home Mtg., Inc., et al., 438 S.W.3d 404 (Mo. 2014).

MMPA: Elements and Proof

26

- ❖ Elements: (1) purchased real estate; (2) for personal, family, or household purposes; (3) suffered an ascertainable loss of money or property; (4) resulting from the use or employment by any other person of an act declared unlawful by the Act. Hope v. Nissan N. Am., Inc., 353 S.W.3d 68, 81 (Mo. App. 2011).
- ❖ Statutory penalty v. ascertainable loss.
- ❖ Causation required: Williams v. HSBC Bank USA, NA, 467 S.W.3d 836, 843 (Mo. App. 2015).

MMPA: Timing: “In Connection With”

27

- ❖ Conway and Watson held that the Act applies to certain aspects of mortgage loan servicing occurring after the loan is originated as being “in connection with” the sale of the services purchased by the borrower in taking out the loan.
- ❖ “For the purposes of the MMPA, a loan is an agreed upon bundle of services being ‘sold’ by the lender to the borrower.” Conway, 438 S.W.3d at 412.
- ❖ “Services”: “agreed to at the outset of the loan.” Conway, 438 S.W.3d at 412.
- ❖ Groh v. JPMorgan Chase Bank, N.A., No. 14-cv-578-W-DKG, 2015 WL 58461 (W.D. Mo. Jan. 5, 2015) (pleading governs identification of time of selling of services).

MMPA: Services Must be Expressly Agreed to

28

- ❖ Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887, 899 (8th Cir. Mo. 2014) (“Watson and Conway prescribe that some but not all of Wells Fargo’s conduct occurred ‘in connection with the ‘sale of the loan.’”).
- ❖ Services “fixed at the outset when the parties agree to the terms of the loan.” Watson, 438 S.W.3d at 408.
- ❖ Services identified within a borrower’s loan documents signed at origination: promissory note & deed of trust
- ❖ Services have an end date: “the ‘sale’ of a loan lasts until the last service is performed or the loan is repaid.” Conway, 438 S.W.3d at 412.

MMPA: Services Found to be Purchased

29

- ❖ Events during the foreclosure process, including not applying insurance claim monies to address the default and thereby avoid a foreclosure under the deed of trust. Conway, 438 S.W.3d at 414, 413 (“CitiMortgage would not apply the \$15,000 balance from the escrow account to the balance owed on the [] loan...”)
- ❖ Catch-all: debt collection activities; White v. CitiMortgage, Inc., 859 F.3d 630 (8th Cir. Mo. 2017) (post-foreclosure reinstatement of debt at borrower’s initiation)
- ❖ New transaction or separate sale. Watson, 438 S.W.3d at 406; Groh v. JPMorgan Chase Bank, N.A.

MMPA: Services Found Not to be Purchased

30

- ❖ Approving a loan modification: “[t]he parties’ loan documents did not obligate Wells Fargo to negotiate or agree to a loan modification ...” Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887, 899 (8th Cir. Mo. 2014); Ancell v. U.S. Bank, N.A., No. 2:13-cv-04251-NKL, 2014 WL 2048200 at *8 (W.D. Mo. May 19, 2014).
- ❖ Negotiating a loan modification. Watson, 438 S.W.3d at 406-07.
- ❖ Making representations about the status of a loan modification or application for a loan modification. Watson, 438 S.W.3d at 406-07.
- ❖ Geran v. Xerox Educ. Serv., Inc., 469 S.W.3d 459, 466 (Mo. App. 2015). “[T]he renegotiation of the terms of repayment and the modification of the repayment schedule were not services the lender agreed to sell or the borrower agreed to buy when the parties agreed to the [] loan ... [w]hile ... a borrower could request a new repayment plan, the lender was not obligated to grant such a request.”

Closer to Home: The Kansas Consumer Protection Act

31

- ❖ No “supplier” shall engage in any “deceptive” or “unconscionable” act or practice in connection with a “consumer transaction.” K.S.A. 50-626(a); K.S.A. 50-627(a).
- ❖ “Consumer transaction”: “a sale, lease, assignment or other disposition for value of property or services within this state ... to a consumer; or a solicitation by a supplier with respect to any of these dispositions.” K.S.A. 50-624(c).

KCPA: Developing Law on Excluding Banks

32

- ❖ “Services”: personal services, privileges, and “any other act performed for a consumer by a supplier.”
- ❖ “Supplier”: “manufacturer, distributor, dealer, seller, lessor, assignor, or other person” who engages in “consumer transactions.”
- ❖ Is a mortgage loan servicer a “supplier?” Not according to a line of developing cases. In re Larkin, 553 B.R. 428, 442-43 (D. Kan. 2016); Kalebaugh v. Cohen, McNeile & Pappas, P.C., 76 F. Supp.3d 1251 (D. Kan. 2015).

KCPA: Elements of Claim

33

- ❖ Depends on KCPA section implicated.
- ❖ Knowingly, with reason to know, willful.
- ❖ Via Christi Regional Med. Center, Inc. v. Reed, 314 P.3d 852 (Kan. 2013) (handling of billing and collection for medical services provided).
- ❖ Who decides? Unconscionable v. deceptive (jury)
- ❖ Extent of damages: are de minimis damages enough?

Thank You and Contact Us with Questions

34

Michael Rapp

Stecklein & Rapp Chartered

748 Ann Ave

Kansas City, KS 66101

T: 913.371.0727

E: mr@kcconsumerlawyer.com

L: www.linkedin.com/in/michael-rapp-8627452

Thank You and Contact Us with Questions

35

Jennifer Donnelly

Bryan Cave LLP

1200 Main Street, Suite 3800

Kansas City, MO 64105

T: (816) 374-3200

E: jadonnelli@bryancave.com