

FDCPA and Collection Suits

The Pen\$ion Right\$ Center
June 16, 2017
Washington, DC

Peter A. Holland – MD
Scott C. Borison -- CA

Overview of Affirmative Claims:

Consumer Finance and Credit

- (FCRA, ECOA, TILA, CROA, MCPA, MMFPA, etc.)

Consumer Debt Collection

- (FDCPA, State Statutes)

Consumer Products and Warranties

- (MMWA, etc.)
- Statutory Damages & Punitive, Actual Damages, Statutory Punitive and Fee Shift Provisions

Challenges in the Case Law

Useful Statutes

Fair Credit Reporting Act, 15 U.S.C. §§ 1681, et seq.

Equal Credit Opportunities Act, 15 U.S.C. §§ 1691, et seq.

Truth in Lending Act, 15 U.S.C. §§ 1601, et seq.

Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j.

Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq.

Maryland Consumer Protection Act, Md. Ann. Code, Com. Law §§ 13-101, et seq.

Maryland Mortgage Fraud Protection Act, Md. Ann. Code, Real Prop. §§ 7-401, et seq.

Maryland Consumer Debt Collection Act, Md. Ann. Code, Com. Law §§ 14-201, et seq.

Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.

Typical Cases: Mortgages

Origination
Broker issues
Refinance issues
Servicing/Collection Abuses
Loan Modifications
Bankruptcy violations

Typical Cases: Cars

Lemon Law
Used as New
Failure to Disclose known defects
Odometer rollbacks
Rebuilt Wrecks
Yo-Yo Sales
Predatory Add-on products
Failure to honor warranty

Typical Cases: Automobile Finance

Bogus repossession fees
Illegal repossession
Failure to abide by repo notice and fees statute
Seeking illegal deficiencies after judgment

Typical Cases: Student Loans

Fraudulent trade schools

Predatory loans

Securitization and ownership issues

Consolidation and forbearance issues

Collection Abuses

Typical Cases: Credit Cards

Fraudulent add-on products (credit protection, etc.)

Misapplication of payments

Fees not bargained for

Pursuing people not obligated on the card (i.e. authorized users who are not co-signers)

Typical Cases: Medical Debt

Bogus fees

Privacy issues in collection

Failure to apply Charity Care requirements

Effects of Debt Collection Abuse

- Emotional Stress
- Physical Stress
- Marital Stress
- Bankruptcy
- Financial Instability
- Trouble Getting Loans
- Credit Score Declines
- Shaken Faith

Enter: FDCPA

- Federal Regulators
- State Regulators
- Private Attorneys

- The Validity of the Debt is Irrelevant. What is outlawed is UNFAIR Debt Collection Practices.

FDCPA Applies To:

- Consumer Loans
- Car Loans
- Student Loans
- Credit Card Debt
- Medical Debt
- Mortgage Debt
- Debt Debt

FDCPA Overlaps With

- Fair Credit Reporting Act
- Telephone Consumer Protection Act
- State Debt Collection Statutes
- State Consumer Protection Statutes
- Common Law Invasion of Privacy

FDCPA Damages

- Actual Damages including Emotional Distress
- Statutory Damages of Up to \$1,000
- Class Action Statutory Damages of up to Lesser of \$500K or 1% of Net Worth
- Reasonable Attorney's Fees

Debt Collection Lawsuits

- Common Problems:
 - Wrong Person Sued
 - Wrong Amount Claimed
 - No Money Owed to This Plaintiff
 - Defendant Never Heard of Plaintiff
 - Statute of Limitations
 - Chain of Title
 - Inaccurate Data
 - Failure to Produce the Representations and Warranties
 - Defendants Fail to Appear

Key Regulatory Findings -- Banks

- Banks Sell Debt With Explicit Disclaimers of Accuracy and Reliability
- Several national banks have signed Consent Orders regarding excessive fees, deceptive acts and/or “unsafe and unsound practices” engaged in prior to selling the debt

CFPB Findings – Debt Buyers

- In 2015, Midland Funding and Portfolio Recovery Associates signed CFPB Consent Decrees that Found for one or both of them:
 - Midland: Average price from 2009 to 2015 is 3 cents on the dollar
 - “Sellers Disclaim the Accuracy and Enforceability of the Debt”
 - “Current balance means ‘the approximate unpaid balance’ ”
 - Know that SOL “may have run”
 - “Collecting without first conducting any investigation” to determine accuracy

CFPB Midland / Encore Findings Cont’ d

- “Scattershot Litigation”
- Placed 100,000 accounts with a law firm that employed only 16 attorneys
- Prohibited Lawyers from contacting original creditors for account documents
- Lawyers don’t know if the Seller disclaimed the accuracy of information in the data file
- Lawyers don’t know about prior disputes
- “Misleading Affidavits”

PRA Consent Order With CFPB

- “Aware that significant inaccuracies may exist”
- VP for collections: “90% of our cases are default judgments. We show the judge the math and if no one disputes we get our judgment....If they show payments we’ve missed we amend the complaint.”
- Did not verify accuracy of accounts
- Many of the same issues as Encore
- Misleading Affidavits
- Collection of Time Barred Debt

CFPB’s Role in Debt Collection

- Oversees Debt Collectors:
<http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-oversee-debt-collectors/>
- Is Writing New Rules:
http://files.consumerfinance.gov/f/documents/20160727_cfpb_outline_of_proposals.pdf
- Issues Reports:
<http://www.consumerfinance.gov/newsroom/consumer-s-report-being-hounded-about-debts-not-owed/>
- Enforces Law:
<http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/>

CFPB’s Role Cont’d

- Issues Bulletins:
http://www.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf
- Publishes Supervision and Examination Manuals:
http://www.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf

CFPB's Role Cont'd

- Maintains Searchable Complaint Database:
<https://data.consumerfinance.gov/dataset/Consumer-Complaints/x94z-ydhh?>

OCC's Role in Debt Collection

- OCC Statement Regarding Oversight of Debt Collection and Debt Sales:
<http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-116.html>
- Issues Bulletins on Consumer Debt Sales:
<http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html>

OCC Role Cont'd

- Enforcement Actions for Unfair Billing Practices: <http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-142.html>
- Enforcement for Debt Collection Litigation Abuse: <http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-139.html>

Unlicensed Debt Buyers

■ Recent Cases:

- Finch v. LVNV Funding, LLC, 212 Md. App. 748, 71 A.3d 193 (2013)
- Jason v. Nat'l Loan Recoveries, LLC, 227 Md. App. 516, 134 A.3d 421 (2016)
- CLIFFORD CAIN, JR. v. MIDLAND FUNDING, LLC, No. 45, 2017 WL 1101804 (Md. Mar. 24, 2017)

Fair Credit Reporting Act (FCRA), 15 USC § 1681 *et seq*

■ *Longstanding, widespread and systemic* failures of credit reporting agencies to prevent *avoidable* inaccuracies that *harm* consumers:

- Mixed files
- Identity theft
- Furnisher errors

FCRA -- Mixed files

- Mixed or mis-merged files occur when credit information of one consumer is placed in credit file of another consumer
- Caused by CRAs' practice of intentionally over-inclusive collection of information
- Significant errors through common practice of:
 - Incomplete matching of SSNs--only 7 of 9 digits
 - incomplete matching of names

FCRA – Furnisher errors

- Furnisher errors –
 - Incomplete payment history, payment status or balance
 - “ownership disputes” – attributing debts to authorized users not liable for debt
 - failure to mark disputed debts as disputed

FCRA – FTC report

- FTC Report to Congress Under Section 319 of FACTA, 12/2012
 - 21% of consumers had verified errors
 - 13% with affected credit score
 - 5% with serious impact on credit score → denial or high priced credit
- Exceptionally high error rate in credit reports =
 - 40 million Americans affected
 - 26 million have lower credit scores
 - 10 million severely damaged – credit or insurance denied, or expensive or job denied

SCREENING FOR AFFIRMATIVE CLAIMS

BEST CASE:

#1: Collecting from people who literally do not owe the money because:

- wrong person
- debt was already settled or litigated
- discharged in bankruptcy

AFFIRMATIVE CLAIMS: BANKRUPTCY DISCHARGE

- collection letters on discharged debt
- Sending notices related to a house (i.e. foreclosure or forced place insurance notices) that include demands for payment of money
- Making phone calls regarding discharged debt
- Reporting discharged or litigated debt on the credit report. (Have all clients pull credit reports 6 months after discharge)

IMPERMISSIBLE PULLS

The only permissible purposes are:

- a. Review of an existing account
- b. In connection with an unsolicited firm offer of credit
- c. As part of an application for credit

ANYTHING ELSE: 15 USC 1681b
(no dispute requirement)

TO DO:

- Subscribe to Consumer Law and Policy Blog
- Subscribe to CFPB Notifications
- Co-Counsel Your Cases with Other NACA Members

QUESTIONS?

Scott Borison: Scott@LawZebra.com
301 620 1016

Peter Holland: Peter@Hollandlawfirm.com
410 280 6133

Sample of AT&T overpayment/recoupment cases

In 2017, the Western States Pension Assistance Project was contacted by about 6 retirees with similar fact AT&T recoupment fact patterns. Below is an overview of a few cases where we have done more than advice and counsel.

AT&T had reached out to our clients to inform them about their pension eligibility/encourage commencement in most all of our cases. In most cases, the retiree did not think that they were due anything from AT&T, would not have pursued a benefit from AT&T, and questioned their eligibility when contacted by AT&T, and before applying. Of course, in all cases, AT&T confirmed eligibility, and our clients commenced benefits to which they were not entitled to.

Primary issues of concern:

- Whether the use of a debt collector, and the debt collector's demand to send a check in full, absent a court order, is in accordance with ERISA? Legal vs. equitable remedies.
- Retirees who spent the pension money as they received it (100% of our clients), and do not have the funds to repay an overpayment may have their credit negatively affected if the debt collector reports the uncollected debt (all due to AT&T's error).
- Retirees were not explicitly afforded an opportunity to utilize the plan's claims/appeals procedures, and they were not warned that if they do not repay the overpayment, then the debt will be sent to a debt collector. Also, the retirees were not provided any repayment options other than to return the overpayment as lump sum. Any return of lump sum by most participants in this situation would be done by using their personal funds/assets, and not the pension funds (since pension funds had been spent), and so the demand may violate ERISA because this is not an equitable remedy available to the plan to recoup this type of overpayment.

Retiree #1, lives in Virginia, 68 years old

He worked from 1972-2001 for different phone companies. He had a bankruptcy attorney send a letter to Fidelity for more information about the overpayment, but then ended the relationship because ERISA was outside the attorney's scope of expertise, and the client lacks money for legal fees due to high medical expenses. He commenced the AT&T pension benefit in 2013.

12/8/2016 Overpayment letter from AT&T: During a recent review of the Nonbargained Program of AT&T Pension Benefit Plan, it was determined that your service ported to Telcordia, under the Mandatory Portability Agreement (MPA), and you are not entitled to \$803.55/month, and it will stop effective 12/7/2016, and you were overpaid \$32,116.05. Please send check payable to FIIOC, FBO AT&T Pension Trust, and return to the Fidelity Service Center in the enclosed envelope. Note that the overpayment isn't eligible for favorable tax treatment -- if you return it in 2016, then you may be eligible for either a credit or itemized deduction, failure to repay means taxable income, and ineligible rollover/will send 1099R. No deadlines, no warning about overpayment debt being sent debt collector, no right to submit hardship claim or appeal the adverse benefit determination.

December 2016: Client called Fidelity, and they said he may be able to establish a payment plan. Client told me that due to his medical expenses, he wouldn't be able to pay more than \$10-15/month.

1/13/2017: Letter from AT&T to client in response to attorney request for information. Letter stated in chart form information about the overpayment. No deadlines, no warning about overpayment debt being sent debt collector, no right to submit hardship claim or appeal the adverse benefit determination.

1/31/2017: I first spoke with client, and advised about his legal rights and options -- *Montanile*/hardship waivers. Let him know that it was unlikely that the plan would pursue, and ultimately, they would have to sue to attempt to collect anything since the money was all spent.

2/20/2017: Lyon Collection Services debt collection letter mailed to client with standard 30 day language to dispute/verify the debt.

2/27/2017: Contact from client re: letter from debt collector with 30 day deadline.

3/13/2017: I sent a letter to Lyon requesting detailed verification of the alleged debt and legal authority authorizing debt collector to recover benefits under ERISA. I cited relevant equitable relief in ERISA and *Montanile*, and mailed copy to AT&T.

3/17/17: I sent a brief letter to ATT requesting waiver of alleged overpayment due to hardship, and *Montanile*.

3/31/2017: Letter from Fidelity: received my "claim" and will reply in 90 days.

Status, as of 6/5/17: Waiting on response to claim, due by end of June.

Retiree # 2, lives Arizona, 64 years old

He worked for Southwestern Bell which became AT&T from 1974-1996. From 1996-2009 he worked for QWEST/Century Link.

12/8/2016 Overpayment letter from AT&T: During a recent review of the Nonbargained Program of AT&T Pension Benefit Plan and the Southwest Program of the AT&T Pension Benefit Plan, it was determined that both your Southwest Program and Nonbargained Program service had been ported out to QWEST under the MPA, and you are not entitled to \$693.22/month as of 12/7/16, and were overpaid \$38,130.25. Please send check payable to FIIOC, FBO AT&T Pension trust and return to the Fidelity Service Center using enclosed envelope. Note that the overpayment isn't eligible for favorable tax treatment -- if you return it in 2016, then you may be eligible for either a credit or itemized deduction, failure to repay means taxable income, and ineligible rollover/will send 1099R. No deadlines, no warning about overpayment debt being sent debt collector, no right to submit hardship claim or appeal the adverse benefit determination.

1/6/2017: Fidelity letter to client in response to a recent request to Fidelity. Letter includes a chart showing monthly benefit, and overpayment. No deadlines, no warning about overpayment debt being sent debt collector, no right to submit hardship claim or appeal the adverse benefit determination.

2/17/2017: Lyon Collection Services debt collection letter mailed to client with standard 30 day language to dispute/verify the debt.

Early March 2017: Client called Fidelity. They said they would temporarily suspend collection process but will not remove it from collections while they investigate a QDRO concern client had. Fidelity case manager told client that after 3 letters asking for the overpayment and not receiving anything, then they send it to the collection agency. NOTE: this was not the fact pattern for any of the cases we have encountered.

3/13/2017: We sent a letter to Lyon, similar to above case.

4/20/17: We received a letter from AT&T in response to the letter that we sent Lyon for verification of debt and authority to collect debt – there were plan documents enclosed, and a general reference to a broad plan provision regarding overpayment/recoupments. Nothing helpful.

Status, as of 6/5/17: Client will submit his own recoupment waiver request using a template we will provide. No additional correspondence from plan or Lyon since April.

Retiree # 3, lives in Washington, 67 years old

He worked 37.5 years for AT&T and then QWEST. He retired from QWEST in 2009, and as he understood it, his CA AT&T service went with him to WA/QWEST. In 2015, he was contacted by AT&T to start a pension, he called and disputed his eligibility, but was told he is entitled to the benefit. Client applied 6 months later, and he again confirmed his entitlement. He refinanced his house one month before he received the overpayment letter, and used a higher income than what he now receives. He checked his credit report in May, and so far nothing has been reported.

12/9/2016 Overpayment letter from AT&T: Recent review of the West Program of the AT&T Pension Benefit Plan – determined an error and your West Program service had ported out to QWEST under MPA. Not entitled to \$1,203.28/month, and will stop effective 12/7/2016. Overpaid \$26,257.25. Please send check payable to FIIOC, FBO AT&T Pension trust and return to the Fidelity Service Center using enclosed envelope. Note that the overpayment is not eligible for favorable tax treatment -- if you return it in 2016, then you may be eligible for either a credit or itemized deduction, failure to repay means taxable income, and ineligible rollover/will send 1099R. No deadlines, no warning about overpayment debt being sent debt collector, no right to submit hardship claim or appeal the adverse benefit determination.

December 2016: Client called Fidelity and shared the facts, and stated that he does not have any money to repay. No guidance/assistance was provided.

February 2017: 1st Lyon Collection Services debt collection letter was mailed to client with standard 30 day language to dispute/verify the debt. Client called them and shared the facts, but was not given any advice/assistance.

3/23/2017: 2nd letter from Lyon Collection Services: we sent a first notice over 30 days ago, we have not heard from you or received payment. It is imperative that payment in full be made immediately, make check out to AT&T Corporation.

March 2017: Client called Lyon in response to the 3/23 letter, however, still no help/advice re: the fact that he cannot repay/he did not request this pension.

4/12/2017: 3rd and "final" demand letter from Lyon. Immediate action needed. In order to satisfy claim, payment in full requested.

6/1/2017: I submitted a formal claim to plan with copy to Lyon, relied on *Montanile*/equitable relief and hardship waiver/facts.

Status, as of 6/5/17: Waiting on response to recently submitted claim. No additional contact from plan or Lyon since April.

See also:

- **Sample of the December 2016 AT&T overpayment letter**
- **Sample of the Lyon Collection Services demand letters (1, 2 and 3)**



December 8, 2016

Fidelity Service Center

1-800-416-2363

International Access

Dial AT&T Direct[®] access number,
then 800-416-2363

TDD Service for the Hearing Impaired

1-888-343-0860

Fidelity NetBenefits[®]

<http://netbenefits.fidelity.com>

Re: Nonbargained Program of the AT&T Pension Benefit Plan

Dear 

During a recent review of the Nonbargained Program of the AT&T Pension Benefit Plan (the "Program"), it was determined that an error was made in calculating your final pension benefit. After a review of your employment history, it has been determined that your Nonbargained Program service had been ported out to **Telcordia** under the terms of the Mandatory Portability Agreement (MPA). As a result, you were not entitled to a benefit under the Program and the annuity you are receiving in the amount of \$803.55 will stop effective 12/07/2016. As you were not entitled to an annuity under the Program you have been overpaid in the amount of \$32,116.05.

The Program is a tax-qualified defined benefit retirement plan under the Internal Revenue Code. To maintain the Program's tax-qualified status, the Plan Sponsor must ensure that all covered employees, retirees and beneficiaries receive only the benefits to which they are entitled under the Program. In the event of an overpayment, the Program is required to recover the gross amount of the overpayment.

To return the overpayment to the plan, please send a certified check, money order or personal check payable to FIIOC, FBO AT&T pension trust, in the amount of \$32,116.05. Please complete the enclosed *Repayment Form* and put reference number W239706-07DEC16 on the check, with a note stating this is a return of a Plan overpayment. The check and repayment form should be returned to the Fidelity Service Center in the enclosed envelope.

Please note that the overpayment amount is not eligible for favorable tax treatment accorded to distributions from qualified plans, and is *not* eligible for rollover to another employer-sponsored retirement plan or IRA. Therefore, if you rolled over the original lump sum distribution, you should contact your new plan sponsor or IRA custodian immediately to arrange to have the overpayment returned to the Plan. Your new plan sponsor or IRA custodian can follow the instructions in the preceding sentence in order to return the amount.

If you return the overpayment in 2016 you may be eligible for either a credit or an itemized deduction on your taxes for the current calendar year. Please see IRS publication 525, *Taxable and Nontaxable Income*, for more information. In order to understand all of the options available to you, including the

**AT & T
REPAYMENT FORM**

Please return this form with your repayment, and complete sections 3 and 4 below.

1. Repayment on behalf of:	XXXXXXXXXXXX
2. Participant's Work Item or Reference #:	XXXXXXXXXXXX
3. Contact Name:	
4. Contact Phone Number:	

Make a copy of this form for your files and return the original in the enclosed return envelope or mail to:

Fidelity Service Center
PO Box 770003
Cincinnati, OH 45277-0070





**Lyon
Collection
Services, Inc.**

February 17, 2017

#1

RIVE

Creditor : A T & T CORPORATION
Claim No : 308959
Account No : W235636-07DEC16
Amount Due : \$38,130.24

This account has been listed with our office for collection.

If paid in full to this office, all collection activity will be stopped.

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days after receiving this notice that you dispute the validity of this debt or any portion of it, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification.

If you request of this office in writing within 30 days after receiving this notice this office will provide you with the name and address of the original creditor, if different from the current creditor.

This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

Very truly yours,

LYON COLLECTION SERVICES, INC.
Jim Gustafson
Receivables Associate
(212) 967-6161 ext. 4289

7924 West Sahara Avenue • Las Vegas, NV 89117 • (702) 838-6100 • FAX (702) 838-6109





March 23, 2017

#2

Creditor : A T & T CORPORATION
Claim No : 308973
Account No : WB02991-08DEG16
Amount Due : \$26,257.25

We sent you a first collection notice more than 30 days ago regarding the above referenced claim. To date, we have not yet heard from you or received payment.

It is imperative that payment in full be made immediately. Your check for the full amount should be made payable to A T & T CORPORATION and mailed to 7924 West Sahara Avenue, Las Vegas, NV 89117.

If you wish to discuss this matter, please call us immediately at the number listed below.

This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

Very truly yours,

LYON COLLECTION SERVICES, INC.

Jim Gustus

Receivables Associate

(212) 967-6161 ext. 4289





April 12, 2017

#3rd final

Creditor : A T & T CORPORATION
Claim No : 308973
Account No : W302991-08DEC16
Amount Due : \$26,257.25

Lyon Collection Services, Inc. is committed to collecting the above referenced claim. Our records indicate that the balance remains unpaid. Prior efforts to fully resolve this claim have been unsuccessful.

This is a final demand letter. Immediate action on your part is needed. In order to satisfy this claim, your payment in full should be made payable to: A T & T CORPORATION and mailed to 7924 West Sahara Avenue, Las Vegas, NV 89117.

If you wish to discuss this matter, please call us immediately at the number listed below.

This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.

Very truly yours,

LYON COLLECTION SERVICES, INC.
Jim Gustus
Receivables Associate
(212) 967-6161 ext. 4289

