

TECHNOLOGY IN THE COLLECTION INDUSTRY: FRIEND OR FOE?

Quantrax

**Buckhead Embassy Suites
Buckhead, GA – June 9, 2009**

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CELL PHONE COMMUNICATION AND THE TCPA

Recent Jury Verdict/Instructions



Daniele Walker v. First National Collection Bureau, Inc.

State Court, Dallas County, Texas, 191st Judicial District

May 6, 2009

Recent Jury Verdict/Instructions



4. . Daniele Walker will be awarded statutory damages by the court based on the federal Telephone Consumer Protection Act.

QUESTION NO. 1:

Were calls made to 214-529-4403 using an automatic telephone dialing system or an artificial voice or a prerecorded voice without the prior express consent of the called party?

Answer "yes" or "no."

Answer: Yes

Recent Jury Verdict/Instructions

If you answered "yes" to Question No. 1, then answer Question No. 3. Otherwise, do not answer Question No. 3.

QUESTION NO. 3:

Did First National Collection Bureau, Inc. willfully and knowingly make or cause to be made calls to 214-529-4403 when an automatic telephone dialing system or an artificial voice or a prerecorded voice was used?

"Willfully and knowingly" means that First National Collection Bureau, Inc. knew or should have known that it was violating the federal Telephone Consumer Protection Act when it called or caused to be called 214-529-4403. A finding that First National Collection Bureau, Inc. acted "willfully or knowingly" does not require a finding of bad faith, but only that First National Collection Bureau, Inc. had reason to know, or should have known, that its conduct would violate federal law.

Answer "yes" or "no."

Answer: _____

Yes

Recent Jury Verdict/Instructions



QUESTION NO. 1:

What sum of money, if any, in addition to statutory damages should be awarded against First National Collection Bureau, Inc. because First National Collection Bureau, Inc.'s conduct was committed willfully and knowingly?

Please award an additional dollar amount per telephone call made. You may award between \$0 and \$1000 in additional damages per telephone call. Answer in dollars and cents.

Answer: \$ 1000.00 per telephone call

Recent Jury Verdict/Instructions

If you answered "yes" to Question No. 1, then answer Question No. 2. Otherwise, do not answer Question No. 2.

QUESTION NO. 2:

How many calls were made by First National Collection Bureau, Inc. or on its behalf to 214-529-4403 using an automatic telephone dialing system or an artificial voice or a prerecorded voice?

Answer with a number.
~~"yes" or "no."~~

Answer: 98

98 calls x \$1,500/call = \$147,000! Ouch!

WHAT NOW?



- Seek specific representations from creditor clients on whether client had prior express consent to call consumer using dialer.
- Have creditor clients include prior express consent in consumer contracts.
- Collectors who “capture” telephone numbers on inbound calls should have their software immediately alert the collector to obtain proper consent.
- Do not capture inbound numbers and dump them into your dialer.
- Train collectors to seek proper consent to call numbers associated with account.
- Disable your random or sequential number generators.
- Be able to distinguish between numbers received from client vs. your own skip tracing efforts.
- Document proper consent! (could avoid class cert.)
- Scrubbing.



COMMUNICATING BY E-MAIL

(Imagine the cost savings!)

Analysis – It Can Be Done!



- E-mails are “writings”
- E-mails benefit from Mailbox Rule
- Comply with E-sign



E-SIGN

(ELECTRONIC SIGNATURES IN GLOBAL
AND NATIONAL COMMERCE)

So How Do You Do It????



- CONSENT:
 - MySpace, Yahoo, Facebook etc.
 - E-sign disclosures in authentication process.
 - Banking Portals
 - E-sign disclosures in click through process.
- No third party disclosure violation in presence of consent.
 - Consent to disclose information to anyone reading e-mail, POE, e-mail vendors, family, friends, roommates, etc.



WEB SITES

Do's and Don'ts:



- Do include state and federal disclosures on the collection site i.e. mini-miranda etc. (perhaps even click through some of them)
 - Hours of Operation
 - Address
 - Toll free number
 - Permit/License numbers
 - Licensing Language (e.g. MN, TN, WI)
 - Credit reporting language (e.g. CA, UT)
 - Other state requirements
- Do include a “re-direct” notice, advising consumers when they leave your site.
- Don't overshadow the validation period.

Do's and Don'ts:



- Don't use harassing domain names:
 - www.payupnow.com
 - www.payuporelse.com
- Don't leave consumer data on the internet unprotected i.e. encryption, authentication etc.
- Don't include e-mail addresses on the web site *unless you're going to check the e-mail at least daily and treat it as written communication.*
- Do make sure all statements and representations on the web site are accurate.
- Do notify consumer of third party payment processing vendors if in use.

Do's and Don'ts:



- Do include Terms and Conditions of use on your site, which may include certain consents and disclosures.
 - “my account is not in dispute”
 - “I have/have not [previously] requested verification of my account”
 - “I am not represented by counsel”
 - “I not a petitioner in any pending bankruptcy petition”
 - “This account has not been discharged in bankruptcy”
- Do make sure the site is clear about who the consumer is communicating with.
- Do create written policies and procedures on how you handle web site communications.
- Create “Redirect” pages.



VOICE MAIL

(To *Foti* or not to *Foti*?)

Unsympathetic Courts:



- Berg v. Merchs. Ass'n Collection Div., 586 F. Supp. 2d 1336 (S.D. Fla. 2008)
 - The Court is aware that this ruling will make it difficult, though perhaps not impossible, for debt collectors to comply with all of §§ 1692c(b), 1692d(6), and 1692e(11) at once in a message left on the consumer's voice mail. However, we follow reasoning similar to Foti to find no reason that a debt collector has an entitlement to use this particular method of communication. Debt collectors have other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone.

So What To Do?



- Pick your poison – minimize risk.
 - Don't leave messages at all?
 - Class liability on non-*Foti* automated messages.
 - Individual liability on third party disclosure allegations.
 - Likelihood of class certification on each?



CALLER ID

ISSUES?



- What does a collector put in their outgoing caller ID without violating:
 - 1692d(6) – meaningful disclosure of caller’s identity
 - 1692e(10) – false and misleading representations
 - 1692e(14) – using any name other than the true name of your business
 - 1692c(b) – third party disclosure

CASES



- **Knoll v. Allied Interstate, Inc.**, 502 F. Supp. 2d 943, 946 (D. Minn. 2007)
 - Caller ID: Jennifer Smith 800-xxx-xxxx
 - Consumer asserts false and deceptive collection, failure to meaningfully disclosure caller's identity etc.
 - Holding: To meet the "meaningful disclosure" requirement, the call identification device need only display the true name, alias or entity placing the call.
 - Defendant's motion to dismiss denied.

CASES



- **Glover v. Client Servs.**, 2007 U.S. Dist. LEXIS 73604 (W.D. Mich. Oct. 2, 2007)
 - Caller ID : “Unavailable”
 - Consumer asserts false and deceptive practices, unfair and unconscionable means to collect debt, no meaningful disclosure of caller’s identity etc.
 - Collector’s motion to dismiss granted.
 - Court distinguishes *Knoll*.



TEXT MESSAGING

INSTANT MESSAGING

No FDCPA But TCPA CASES



- Satterfield v. Simon & Schuster, 2007 U.S. Dist. LEXIS 46325 (N.D. Cal. June 26, 2007)
 - Consumer received text message on cell phone and asserts that it violates the TCPA's prohibitions on calls made using an autodialer without prior express consent.
- Joffe v. Acacia Mortg. Corp., 211 Ariz. 325 (Ariz. Ct. App. 2005)
 - Mortgage company violated TCPA when it sent e-mail advertisements to telephone numbers with wireless domain names which created text messages to consumer cell phones.



Pintos //

FCRA Section



- Abandoned car, expired tag.
- Police impound.
- Towing company sells at auction pursuant to statute.
- Deficiency placed with agency which pulls credit report.
- Consumer sues agency and CRA – no permissible purpose.
- District Court grants summary judgment to agency and CRA, consumer appeals.

FCRA Section



- 15 U.S.C. § 1681b(a)(3)(A)
 - Authorizes furnishing of credit report “in connection with a **credit transaction** *involving* the consumer on whom the information is to be furnished **and** involving the extension of **credit** to, or review or collection of an account of, the consumer.”
 - Pre-FACTA – statute did not define “credit”
 - Pre-FACTA – courts held that “review or collection of an account” applied to all debts. *See Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003)
 - Facts of case occurred *before* FACTA.

Pintos / - Analysis



- By its terms, § 1681b(a)(3)(A) does not provide a permissible purpose for **all** “account collection” – only “account collection” in connection with a “credit” transaction.
- Since “credit” includes the “right . . . to defer payment” a “credit transaction” is a transaction in which the consumer **directly participates** and **voluntarily seeks** credit.
- Therefore, not all debt involves a “credit transaction”
- The “account collection” permissible purpose applies **only** when the consumer directly participates and voluntarily seeks a deferred payment arrangement for the purchase of property, services, or debt repayment.

Holding



- With Respect To The Agency.
- With Respect To CRA.

Post Decision Motion



- Experian requested rehearing *en banc* arguing:
 - Can't be liable post-FACTA for pre-FACTA behavior
 - Court misinterpreted “credit” as requiring bilateral “agreement,” but definition is unilateral *i.e.* “right ***granted by a creditor*** to debtor . . . to defer payment . . .” Statute does not require ***voluntary*** transaction.
 - Holding is inconsistent with legislative history, which was to enable legitimate creditors access to consumer reports.
 - The narrow interpretation is unsupported in the remainder of the statute.
- CDIA files amicus supporting rehearing.

Enter - Pintos //



April 30, 2009

- Court *withdraws* previous decision
- Replaces it with new decision
- Reaches same conclusion, different reasoning
- Rehearing petition denied as moot.

Pintos II - Analysis



- Court completely ignores “credit transaction” analysis (probably because of pre-Facta behavior of Defendant)
- Same two-element requirement for permissible purpose:
 - Credit transaction involving the consumer **and**
 - Involves extension of credit to, or review or collection of and account of, the consumer.
 - 15 U.S.C. § 1681b(a)(3)(A) (Repeat)
 - Authorizes furnishing of credit report “in connection with a credit transaction **involving** the consumer on whom the information is to be furnished **and involving** the extension of credit to, or review or collection of an account of, the consumer

Pintos II - Analysis



- Dictionary meaning of “Involve:”
 - (1) “to draw in as a participant”
 - (2) “to oblige or become associated”
- *Andrews* case – ID theft – 9th circuit held consumer not “involved” because not “drawn in as participant.”
- First definition applies – consumer must be “drawn in as a participant” in order to be “involved” in a credit transaction.

Pintos // - Holding



- Pintos did not seek credit from towing company.
- She had no contact with defendants until car towed.
- Never asked to have vehicle towed.
- She did not initiate the transaction that resulted in pulling credit.
- She was not a participant in the transaction.
- Therefore, Pintos not “involved” in this credit transaction.

Pintos II - Judgment Creditors



- “If a debt has been judicially established, there is a” credit transaction involving the consumer” no matter how it arose.”
- “The obligation is established as a matter of law, and the statute is satisfied.”
 - Authority – FTC commentary.
- Query: Is this true post-FACTA?
- Summary judgment reversed.

Now What?



- Pintos / analysis still applies:
 - Is consumer directly participating in the transaction?
 - Is there a deferred payment arrangement?
 - Is the consumer voluntarily seeking credit?
 - Is there a “direct link” between the consumer’s search for credit and the furnishing for the credit report?
- In addition, Pintos // analysis applies:
 - Was the consumer “drawn in as a participant” in the transaction?
- If all are “yes” then you have a permissible purpose under this specific section of FCRA.

Now What?



- What kind of debt involves a “credit transaction?”
 - Loans, credit cards, etc.
- What kind of debt **does not** involve “credit transaction?”
 - municipal fines, parking tickets, library fines, other statutory debt, subrogation claims
- Maybe or maybe not a “credit transaction?”
 - Medical debt (possibly since consumer was certainly “involved”)
 - Query: Emergency room vs. cosmetic surgery? Clinics?
 - bad checks (arguably consumer is “involved”)
 - Judgment creditors (questionable)
- Does section 1681b(a)(3)(F) “legitimate business need” apply here?
 - Courts have generally construed this section narrowly

Your ideas? Questions?



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