

Collateral damage

Beyond the personal injury: When creditors and collection agencies stalk your client

By Abbas Kazerounian

When we think of personal injury, we think of pain and suffering brought about by the negligent/bad acts and/or omissions of others. That is obviously the most important and obvious injury, but there is often further collateral damage. It is one thing for the injured party to wait and go through litigation for approximately two years to get their day in court, but there are still injuries that can come after the resolution of the matter. Personal-injury attorneys work hard to resolve the medical liens after there is a settlement or a verdict. But does the damage always stop there?

Too often, medical creditors continue to collect or send resolved liens to collection companies. The clients, sometimes still recovering after the resolution of their case, are left dealing with these unfair debt collection practices. The attorneys' duties are commonly complete because the scope of representation is usually to represent the client only for the recovery due to the personal injury. Too often the clients do not know that they have rights against their creditors in this scenario.

If a client is getting calls or collection letters on resolved liens, there are potentially five statutes that are triggered. Furthermore, if a creditor is collecting on an alleged debt, the chances are high that they are also reporting that alleged debt on the consumer's credit report. The five statutes that can come into play are the federal Fair Debt Collection Practices Act (FDCPA), Rosenthal Fair Debt Collection Practices Act (RFDCPA), the California Consumer Credit Reporting Agencies Act (CCCRAA), the federal Fair Credit Reporting Act (FCRA) and the Telephone Consumer Protection Act (TCPA).

How the FDCPA and RFDCPA are implicated

The RFDCPA is the sister statute of the FDCPA with a few major differences. The CA statute reaches and implicates original creditors whereas the FDCPA only applies to third-party debt collectors. As a rule of general applicability (with some exceptions), if there is a violation of the FDCPA (codified at 15 USC §1692 et seq.), there is also a violation of the RFDCPA because the RFDCPA incorporates the majority of the FDCPA at California Civil Code §1788.17. (See Cal. Civ. Code § 1788.17; see also *Hosseinzadeh v. M.R.S. Assoc.*, 387 F.Supp.2d 1104, 1118 (C.D. Cal. 2005).)

If creditors attempt to collect resolved liens, that conduct is an immediate violation of the Rosenthal Fair Debt Collection Practices Act for trying to collect a debt that is not valid. If it is a third-party debt collector, that will also be a violation of the federal Fair Debt Collection Practices Act for exactly the same reason. They would specifically be violating 15 USC § 1692 e and 1692f (which are incorporated into the RFDCPA as described above). (See *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011).) Furthermore, the collectors would be violating these statutes for contacting a represented party because they were on notice that the personal injury attorney represented the consumer for that alleged debt (which was incidentally resolved). See 15 USC § 1692c(a)(2).

One must remember that the FDCPA and RFDCPA are strict-liability statutes. (*Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162 (9th Cir. 2006).) Furthermore, each violation is measured through an objective test – the least sophisticated debtor standard. "Whether or not a communication or debt collection practice is deceptive under the RFDCPA is [also] determined from the standpoint of the 'least sophisticated debtor.'" (*Munekiyo v. Capital One Bank, N.A.*, 2011 U.S. Dist. LEXIS 140213, 15 (C.D. Cal. Dec. 5, 2011).) Thus, it does not matter how smart your client is; that is not relevant. The pertinent question is whether the conduct in question would have confused the least sophisticated and the most gullible members of our community.

Practice points pertaining to the FDCPA and RFDCPA

As a general rule, it is always worth sending a letter of representation to all medical providers and creditors on a personal-injury matter. That way the attorney can ensure that the communications are going to him/her rather than the client. That has three benefits. First, the attorney will always get the most updated billing information and will not be chasing the client for the information. Second, the client will not be bothered by unwanted creditors and debt collectors for medical services. Third, if collectors do call or try and collect from the client, it gives rise to an immediate cause of action against the collectors/creditors for contacting a represented party. This can assist your client to reduce or even sometimes eradicate the lien(s). Furthermore, the FDCPA and RFDCPA have a one-way attorney fee shifting provision, meaning that the attorney would be paid for his/her efforts.

This again follows through after the resolution of the liens. The important point here is that one should educate the client to call the attorney immediately

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



after being contacted. The client should take notes on who called them, on what dates, at what times, and what was communicated. All of the above information can give rise to a different violation of the FDCPA and the RFDCPA. When consumers are being called by one creditor and/or debt collector, the chances are high that they are being pursued by numerous debt collectors. So unless the consumer can point to specific creditors/debt collectors that potentially violated these statutes, the consumer would have no recourse because his/her attorney would not know who to sue. That is why record keeping is a very important part of the client's education.

How the FCRA and CCCRAA are implicated

Consumers get one free credit report annually from each of the credit bureaus. Approximately 45 days after the resolution of all liens is a perfect time for the consumer to exercise this right. It would be very possible that some of the medical creditors are still inaccurately reporting the status of their accounts. In California that brings about an immediate violation of the CCCRAA against the furnisher. (See Cal. Civ. Code, § 1785.25(a); *Reagan v. American Home Mortg. Servicing Inc*., 2011 WL 2149100, 3.) There is no requirement to dispute the inaccuracy with the CCCRAA and the consumer would have an immediate cause of action against the furnisher. However, this statute does not reach the credit bureaus.

If the consumer disputes these negative marks with the credit bureaus and the inaccurate reporting is not corrected within 30 days, that gives the consumer standing to sue under the federal FCRA also (against the furnisher and the credit bureaus). But when the dispute is sent, the dispute should have enough information and/or documentation so that the bureau can conduct a reasonable investigation into the dispute. (See *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009).)

Practice points pertaining to the FCRA and CCCRAA

It is again of paramount importance to educate your clients to keep up to date with their credit score. That means that the attorney should point to the fact that medical creditors do in fact frequently make inaccurate marks on consumers' credit reports and, more importantly, that the consumers have recourse. It should be noted that like the FDCPA and RFDCPA these statutes also have an attorney fee provision, meaning that the assistance given to clients will not be unrewarded (for the attorneys). This should encourage the clients to return to see the attorneys to assist in checking their credit report, making the dispute/s, and analyzing the results of any disputes.

As a practical matter, the attorney should try and pull a credit report from each of the major bureaus rather than pulling a tri-merged report. This can be done on sites such as www.AnnualCreditReport.com. This website does actually give consumers a truly free credit report for all of the major bureaus once every year. When disputing, make sure that the disputes are submitted with as much information and documentation as possible to obtain a better result in litigation if the inaccuracies are not resolved. (See *Matracia v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 50685 (E.D. Cal. 2011).) Try to send the disputes via certified mail to avoid a "we did not receive the dispute" defense. Do not attempt disputing directly with the furnishers of the information, i.e., the creditors.

How the TCPA is implicated

Generally speaking, one has a TCPA cause of action if he/she receives a call on their cellular phone via an automated telephone dialing system (ATDS) or a prerecorded voice without prior express consent. There are two main areas of inquiry here. The first is whether the right mechanism was used to call. For the purposes of this article, the consumer needs to listen for clicks or pauses when they pick up the telephone for tell-tale signs of an ATDS. Also, large number of calls in a day/week/month are indicative of an auto dialer. However, full discovery is usually needed to establish this as a matter of law. What creates an ATDS is very much a gray area on a legal level. The statute is written in the disjunctive so if the call is made with a pre-recorded voice or a robotic voice, that will satisfy the statute for liability (and the ATDS analysis will no longer be needed).

The second main level of inquiry is *prior express consent*. In the collection context, this is read very liberally in the light most favorable to the collector. If the cellular phone number is provided in *any* manner, per the 1992 FCC Declaratory Order, that will satisfy prior express consent in the collection context. (See *Hill v. Homeward Residential, Inc*., No. 14-4168, 2015 WL 4978464 (6th Cir. Aug. 21, 2015).)

However, per the omnibus July 2015 FCC Declaratory Ruling, prior express consent can be revoked in any reasonable manner, meaning in writing or orally.

Practice points pertaining to the TCPA

If in the original representation letter the attorney states unequivocally not to call the client in any manner (including on his or her cellular telephone), then any prior express consent that may have existed would have been revoked. The practice point here is that the attorney should not leave any room for the classic "he said-she said." To avoid that issue, the correspondence should be sent via facsimile or email if possible so that there is no doubt that the letter was sent. If those modes of communication are not possible, certified mail should be utilized.

As can be seen, the initial representation letter that I referenced in the FDCPA/RFDCPA section can assist consumers in several areas outlined in this article. It is an easy procedure to

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



incorporate into the personal injury practice and carries with it many benefits as described above.

Though the TCPA does not offer attorneys' fees, the statute does permit stacked statutory damages in the amount of $500 for every negligent violation and $1500 for willful violations. There is some good case law standing for the notion that calls post-revocation are willful. (See *King v. Time Warner Cable*, 113 F. Supp. 3d 718.) It does not take a lot of calls to stack damages into five or six figures.

The trick here is to encourage clients to keep their phone bills and attempt to keep good records of who is calling regarding what alleged debts. This will in turn assist the attorney in determining who to sue and on what causes of action.

Conclusion

I have laid out three areas of law where ancillary damages (to the damages obtained in the underlying personal injury case) could be obtained when dealing with personal injury matters. Of course, there will be occasions where these statutes can be used in conjunction with each other. It is very possible to have a case that alleges all of the above-mentioned statutes together. They are all remedial consumer protection statutes and inevitably they cross over frequently.

It should be noted that all these statutes carry with them potential statutory damages, actual damages and four of the statutes have an attorney's fees provision. It should cost the consumer no money to deal with these issues – they just have to know that they have rights. With this type of foresight, any personal injury attorney who adds this service to their repertoire, would be distinguishing their practice from the masses.


Kazerounian

Abbas Kazerounian is one of the founding partners at Kazerouni Law Group, APC, in Costa Mesa. Mr. Kazerounian's area of specialty is consumer rights, especially regarding debt collection and telephone consumer protection, representing consumers in both individual and class actions. In 2014, 2015 and 2016 he was selected as a Super Lawyer.

Copyright © 2017 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**