SILVERMAN THEOLOGOU

FREQUENTLY ASKED QUESTIONS SEMINAR

The Collections Roundtable Annual Conference

SILVERMAN THEOLOGOU

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A Debtor moved to Florida. Can I sue the Debtor in Maryland?

- Yes.
- The Fair Debt Collection Practices Act allows for law firms to sue where the debtor signed the contract or where the debtor currently resides.
- Example: A debtor makes the loan at the branch in Maryland in April, but by January decides to relocate to Florida. The credit union can sue either in Maryland or Florida.
- Factors to consider in decision
  - Cost of litigation (out-of-state attorneys or in-state attorneys)
  - Cost of enforcement of the judgment. A Maryland judgment must be domesticated in the state of enforcement for garnishment/lien attachment, etc.

What about “online” transactions?

- Let’s say the Maryland credit union has a member in New Mexico who now applies for the loan online and submits an electronic signature. Is the credit union stuck suing the debtor in New Mexico?
- The Law is not clear. A debtor can raise a defense of “lack of personal jurisdiction” that can be a bar to judgment. A debtor could state that an online deal occurred in New Mexico, not the state where the lender is. Courts will look to their own state statutes on what constitutes business in that jurisdiction, as well as a factual analysis of the facts. This might include where did the member join the credit union and where did the credit union solicit loans.
- Credit Unions need to understand the risks of jurisdictional challenges, especially with loans going all over the country, such as increased attorney fees and having to start lawsuits all over again in the proper jurisdiction.
- The good news is loan documents can get rid of this issue if jurisdiction is addressed in the contract.

What language can Credit Unions use to strengthen enforcement?

"In the event of any default or in the event this Agreement is terminated by you or by us for any reason, the entire balance on the Account becomes due and payable forthwith. You also agree that, in the case of default, you will pay all usual and customary costs of collection permitted by law, including court costs and reasonable attorneys' fees. You agree that the jurisdiction in any dispute or for any collection purposes will be in the State of Maryland."

- Acceleration Clauses: This is a provision which means that a default triggers the entire balance being due. This gives the creditor more flexibility in being able to claim complete breach of the contract even if only one payment is missed.
- Forum Selection Clauses: This is important in that the credit union can select the location of any litigation as part of the loan documents. Example, a Maryland credit union can require that all litigation be done in Maryland. This can decrease legal fees and the likelihood of any litigation against the credit union by an out of state member.
- Application of Law: If the contract simply states, "Maryland law will apply," Courts in other states can apply the law of Maryland, and not force the litigation in Maryland courts

What language do I use to ensure I receive attorneys' fees?

- Attorney fees provisions: The U.S. follows the "American rule" on this issue. Without a contractual (or statutory) attorney fees provision, each side pays its own attorneys fees.
- Some courts use 15% of principal as a standard for allowable fees, other courts have local rules which establish what is allowable. Typically these are measured with what an attorney submits in an affidavit. Make sure that the attorney's fees provision applies to the loan document as well as the security agreement.

  MARYLAND SPECIAL ISSUE: The Maryland Court of Special Appeals dismantled contractual provisions establishing % contract recovery in SunTrust v. Goldman 201 Md. App. 390 (2011). The award is limited to what the client actually spent. This is critical because the "Merger Doctrine" eliminates any future recovery of attorney's fees in the enforcement of a judgment.
- Solution: This problem could be avoided by including contract language that expressly excludes the remedy of post judgment attorney's fees from merging into a final judgment. This allows the creditor to move the court to award post judgment attorney fees as incurred.

What is Estoppel and why do I need to include all account information when filing a lawsuit?

- Situation: Member has two loans with the credit union and is paying one but not paying the other. Can/Should the credit union send over both files for suit?
- At the very least, the attorney should be made aware of the second loan. It may be in the credit union's interest to only sue one at a time as a lawsuit on both loans obviously may make the debtor stop paying on the other loan.
- Most credit union loan agreements have a cross-default provision whereby the credit union may claim a non-monetary default on a current loan when another loan is not being paid.
- The legal system expects all claims to be litigated at once and the doctrine of "Collateral Estoppel" requires that all issues be litigated at the same suit.
- Debtors may use this as an equitable defense to judgment in piecemeal lawsuits, particularly if the credit union can bring multiple claims at the time of filing a lawsuit. It is very important that all loans be sent to the lawyer as a final judgment as to one loan may prevent a judgment as to a second loan if the second loan could have been included in the first suit.

What does my lawyer need to file a lawsuit?

- Transaction history with balance information. This will identify what the debtor specifically owes and can form the basis of a “restitution” or “unjust enrichment” lawsuit to show that the debtor actually received money from the credit union—credit card statements are a good example. This is critical when loan documents themselves are lost.
- The Loan Agreement. This can be an individual loan agreement or the master membership agreement or both. These documents are needed to establish the attorney fees provision and the interest rate.
- Other documents can be useful such as: security agreements and vehicle titles (essential in Replevin actions), loan applications, correspondence from the debtor and communication logs should be sent over to the attorney.

What is the best way to manage our in-house collection practices?

- DO NOT contact a Member by telephone outside of the hours of 8:00 a.m. to 9:00 p.m.
- DO NOT engage in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number
- DO NOT communicate with a Member at their place of employment after having been notified that this is unacceptable or prohibited by the employer
- DO NOT misrepresent the debt or use deception to collect the debt, including misrepresentation that you are an attorney or law enforcement officer
- DO NOT publish the Member's name or address on a "bad debt" list
- DO NOT seek unjustified amounts, which would include demanding any amounts not permitted under the loan documents or as provided under applicable law
- DO NOT threaten arrest or legal action that is either not permitted or not contemplated
- DO NOT use abusive or profane language during communication related to the debt
- DO NOT reveal or discuss the nature of debts with third parties
- DO NOT contact by embarrassing media, such as communicating with a Member regarding a debt by post card or social media
- DO NOT report false information to any credit reporting agency or threaten to do so in the process of collection

What should I know about how long to report a delinquent matter?

- NCUA guidelines regarding the information Credit Unions furnish to consumer reporting agencies about consumers relates to the “accuracy” and “integrity” of the information reported.
- How a Credit Union chooses to manage bad debt internally is a decision dictated by the guidelines and regulations established by the Credit Union.
- However, in the event the Credit Union chooses to continue to manage all bad debt in its database, for so long as the debt remains due, and maintains all bad debt accounts in the same manner, such action is permissible.
- There is no legal requirement that a Credit Union remove bad debt from its books or records, as long as all bad debt of all members and former members are treated in the same manner and the information stored and reported is updated and accurate.
- Section 605 of the FCRA dictates the terms under which consumer reporting agencies may report information relating to consumers.
- The obligation to accurately report information provided by creditors, as outlined in § 605 of the FCRA, as well as to remove or correct items, as outlined in § 605 of the FCRA, is the responsibility of the consumer reporting agencies.
- There is no requirement that the creditor remove the accurate debtor information from its reports to the consumer reporting agencies, nor is there a requirement to cease collection activities if it so chooses to pursue the debtor.
- A Credit Union’s obligation is to report information accurately, with integrity and consistently as to bad debt accounts.
- Bad debt remains bad debt until paid (bad debt may remain on the Credit Union’s books so long as the Credit Union is following developed guidelines and regulations established for bad debt reporting).
- FRCA rules regarding consumer credit reporting and timing as to the removal of aged accounts are rules that govern the consumer reporting agencies, not the Credit Union.

Reporting in bankruptcy: can a Credit Union run a credit report after a debtor has filed bankruptcy?

- The credit union must have authorization from the member to run a credit report.
- The automatic stay upon filing prevents “any attempt to collect a debt.”
- There is no case law specifically on this question, the debtor has the burden to demonstrate that the activity is an attempt to collect a debt, while there are many other legitimate reasons to run the credit report, such as verifying the debtor’s representations to the court to do so. Debtor’s counsel are entitled to attorney’s fees if they prevail, use caution when running the credit reports.
- There is case law on the reporting of debts after a discharge order is issued, which also prevents attempts to collect the debt. The key in the cases seems to be what the intent of the creditor is in reporting the debt. If it is a brazen attempt to harass or “punish” the debtor rather than an administrative error, then it probably would be a violation of the discharge order.
- Bottom line: don’t run credit reports in debtors in bankruptcy unless there is a need to do so such as: figuring out what other mortgages may be on property securing a credit union loan or verifying information on the debtor’s schedules, and after discharge report the debts as discharged in bankruptcy.

For Additional Information

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