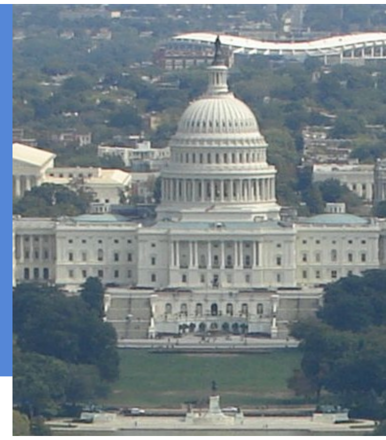
2011 Summer-Fall

Law Notes

Our 50th Year

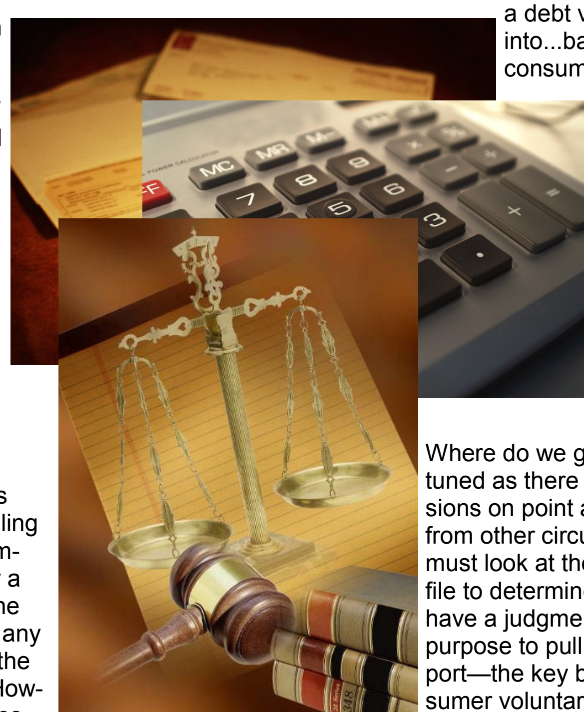
1961-2011



When can a creditor pull a consumer's credit report?

A United States District Court in the Ninth Circuit held that the Fair Credit Reporting Act severely limits when a creditor can access a consumer credit report. Specifically, the court held a consumer credit report (Experian, Equifax, and Trans Union are the key players in this arena) could only be drawn when the underlying debt involves a "credit transaction."

So, what is a CREDIT TRANSACTION? Well, it is where the consumer *voluntarily seeks credit*, such as a credit card, promissory note, or other voluntary credit transaction. Examples of an *involuntary credit transaction, where the creditor can't pull a credit report,* would be where the consumer didn't voluntarily enter into a credit relationship with a creditor, such as where the debt arose from a traffic ticket or towing charges for failure to pay a ticket.



Many industry groups have opposed this ruling as it has become common practice to draw a credit report during the collection process of any debt, no matter how the debt was incurred. However, the United States Supreme Court (in a January 2011 refusal to grant *Certiorari*), has refused to review the Ninth Circuit's decision, thus, the ruling stands.

So, bottom line, a consumer credit report can be drawn only where:

1. There is a judgment against the consumer for a debt, regardless of source. Or,
2. The underlying debt before a judgment is entered is based upon a "credit transaction" which means, according to the court, a *voluntary transaction* such as a credit card, a note, a debt voluntarily entered into...basically, situations where a consumer requested and received credit.

The case was Pintos v Pacific Creditors Association. It was heard in May 2010. The U.S. Supreme Court refusal to review the Ninth Circuit holding was done in January 2011.

Where do we go from here? Well, stay tuned as there may be more case decisions on point as we go forward, perhaps from other circuits. However, for now, we must look at the underlying debt on each file to determine whether (unless we have a judgment) we have a permissible purpose to pull a consumer credit report—the key being whether the consumer voluntarily requested the credit transaction.

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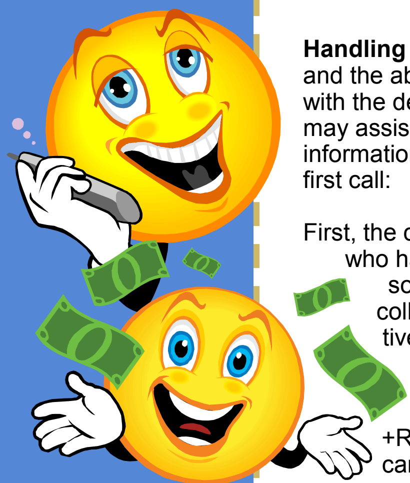
Effective Calling



Handling the claim involves a sense of urgency and the ability to think fast while on the phone with the debtor. These two practical suggestions may assist in the process of gaining money and information from the debtor on that all-important first call:

First, the collector should be contacting a person who has authority to write a check. If that person stalls on payment in full up front, the collector can suggest the following alternative ways to settle the account:

+Post-dated checks

+Return of merchandise or equipment (be careful, some clients don't like this option)

+Bank loans

+Loan from an officer to the company

+Promissory note

+Mortgage of equipment

+Re-prioritizing other debts so this one can be paid first!

Second, the initial contact by the collector may be by phone rather than by a demand letter. Try to catch the debtor off guard.

First things first: verify the address, phone number, the exact name of the debtor business and even try to verify the legal composition (corporation, partnership, proprietorship) before proceeding further.

This can sometimes be done with the receptionist or the person that answers the phone.

These front-line customer service people have been trained to be helpful to their clients and, at this point in the conversation, that person thinks that the collector is a client rather than a bill collector!.

"verify the address, phone number, the exact name of the debtor business and even try to verify the legal composition"

Making Clear Business Contracts

Business contracts are always the subject of much litigation. It seems that there is no such thing as a "bullet proof" contract or a contract which just can't be interpreted more than one way.

So, when is this a problem? Well, to start with, any ambiguity in a contract is generally held to be the fault of the drafter (author) of that contract. Simply put, if there is a vague term in a contract, the courts will side against whoever wrote it!

That having been said, we can't always adopt a philosophy of letting the "other guy" write up the business agreements we enter into for the simple reason he won't include many of the terms or conditions we think are essential! So, we write contracts as best we can.

A Michigan case involved a contract between a manufacturer's representative and the company he represented. The company made steel wheels for the automobile industry. Interestingly enough, the parties entered into a written contract which left out a very important term: how much commission the representative would earn on sales of the wheels!

After obtaining several lucrative contracts with Ford and Chrysler, the rep and the company couldn't agree on a commission

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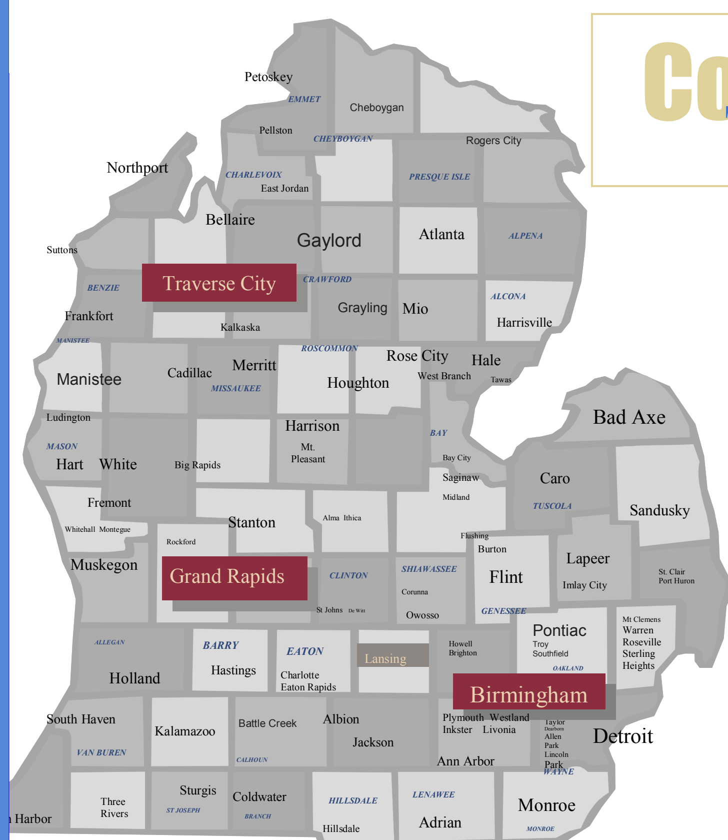

Collections Throughout Michigan

Visit our Blog, updated often on topics of interest to collection professionals:

http://steveharms-creditandcollections.blogspot.com/

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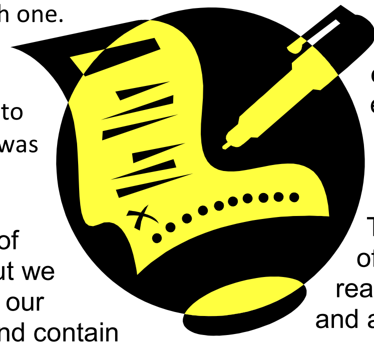
Making Clear Business Contracts (Continued from page 2)

rate, and a law suit was started to establish one. Although the court did not leave the rep without a remedy, it did admonish both parties that this was really "an agreement to make an agreement" and therefore there was no contract!

The court did award damages in favor of the representative on other theories, but we are once again reminded to make sure our contracts are clear, easy to interpret, and contain the important terms!



One good thing the Uniform Commercial Code (UCC) does for us, is to fill in some essential terms such as delivery terms, and even a price term. Why wasn't the UCC used by plaintiff manufacturer's rep in the case cited above? Simple.

The UCC only applies to the sale and leasing of goods, and a representative's contract is really a service contract between a manufacturer and a representative.

In the news.....

Garnishments affected by Social Security Electronic Payments. Mortgages which can't be foreclosed

Garnishments:

It has always been improper to take anyone's SS or SSI or similar benefit from a bank or credit union pursuant to a garnishment ...the change you may be hearing about, which supposedly took place on May 1 made it more of a requirement for banks and other financial institutions to identify and exclude those funds from disclosures (the funds are being "tagged electronically" somehow) as the financial institution usually doesn't KNOW what funds are garnishable and what funds are excluded.

Some banks have been disclosing (that is, holding for the creditor) all the deposited funds, requiring the parties to fight about what should be excluded. Some banks have been attempting to disclose only exempt funds...the practice by banks has varied widely, to be blunt about it...and the practice from state to state has also varied widely.
The May 1st requirements may put a big burden on these financial institutions not to disclose any excluded funds.

So, while creditors shouldn't have been able to get at excluded funds, such as social security benefits, prior to May 1st…the confusion lies in the new requirement for banks to be more proactive in excluding those funds from any garnishments.

There may be some further clarifications of the changes in how garnished financial institutions of individuals (not businesses) are to be handled....if I get any, I'll post 'em for you.

That's my understanding. This is not legal advice, merely my comments and casual statements.

Mortgages:

This is hot and important news for debtors and creditors who have mortgages expedited (how ironic) through MERS (Mortgage Electronic Registration Systems, Inc.) in Michigan. The Michigan Court of Appeals just ruled in a 17 page opinion that MERS can't act to foreclose or evict in its name, because MERS, simply put, is not the owner of the debt which underlies the mortgage (a mortgage is just a lien, a debt is evidenced by a note).

So, MERS based mortgages are halted, but what about the foreclosures and evictions which have already occurred....no cases on that issue...yet. However, there are lots of mortgages in foreclosure right now, where the process of foreclosing *may* have to be re-started as the result of this ruling.

As many as 60 million mortgages were written by MERS, which is a company set up by big financial institutions to expedite the process.

Perhaps the underlying law may be changed. Perhaps future foreclosures will be done under the lender's name...who knows.

This information came through several sources. Michigan Lawyers Weekly, Vol. 25 No. 25 page one has a great write up on the topic. Its web site is attached: http://www.milawyersweekly.com/. The case name is *Residential Funding v. Saurman.*

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