



# SCRA and Military Lending Act Seminar

**Silverman | Theologou, LLP**

COUNSELORS AND ATTORNEYS AT LAW

*Building Relationships, Exceeding Expectations*

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# Discussion Topics

## Best Practices

- **Personal Information Best Practices**
- **FDCPA Insights - In House Collection**
- **Credit Reporting Best Practices**
- **Credit Reporting in Bankruptcy**
- **Death of a Member**
- **1099-A and 1099-C Issuance Best Practices**
- **Third Party Claims – Wage Garnishment - Bank Attachment – Tax Levy**

## Credit Union Actions and Remedies

- **Account Ownership Interest Defined - Attachment of Member Accounts**
- **Setoff - Cross Collateralization – Acceleration**
- **Bankruptcy Basics**
- **Criteria for Referral of Litigation Accounts**
- **Referral of Litigation Accounts**
- **Collateral Estoppel**
- **Statute of Limitations**

## UDAAP and CFPB

- **UDAAP Defined and Best Practices**
- **CFPB Recent Actions**
  - **CFBP v. Navy FCU**
  - **CFPB Law Firm Actions**

# Best Practices

# Personal Information

## *Highlights:*

*The following personal information as to each Member should be obtained and continually updated:*

- Member Name (legal and all aliases)
- Member Home and Work Address
- Member Home and Work Telephone Numbers
- Member Cell Phone Number and Email Information (establish policy for cell and email contact)
- Member Social Security Number or Tax I.D.
- Other Credit Union or Banking Information of Member (including cancelled checks)
- Photocopy of Member's Drivers License or other Picture I.D

## *Practical Tips:*

- Name information is required to accurately determine the Member's credit worthiness, obtain a Member's credit report, check the Member's credit information, prepare and file a lawsuit, and serve court papers
- Home and Work Address information is required to accurately determine the Member's credit worthiness, check the Member's credit information, file a lawsuit, serve court papers, and assists with collections
- Home and work telephone numbers assist with contacting a Member for loan servicing, tracing Member address information, and assists with collections
- Member Tax I.D. or social security number is required to obtain the Member's credit report, assists when tracking personal information, assist when tracking address information, and assists with collections
- Additional credit union or banking information allows for ACH payments, attachment of funds, and assists with collections
- Photocopy of drivers license provides valuable Member information, assists with service of process, and combats fraud allegations.

# FDCPA Insights - In-House Collection

## *Highlights:*

- *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 number (call no more than 2x per week).
- *DO NOT* communicate with a Member at their place of employment after having been notified that it 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 in the course of communication related to the debt.
- *DO NOT* reveal or discuss the nature of debt(s) with third parties (record calls to avoid issues).
- *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.

# Credit Reporting Best Practices

## *Highlights:*

- 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.
- No statute of limitation on collections or requirement to remove debtors account from creditor files
- 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.

## *Practical Tips*

- 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.

# Credit Reporting in Bankruptcy

## *Highlights:*

- 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 on the question of whether or not running a credit report is an attempt to collect a debt. The member 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. Member’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 these 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 member rather than an administrative error, then it probably would be a violation of the discharge order.

## *Practical Tips:*

- Do not run credit reports on members in bankruptcy unless there is a need to do so such as: figuring out what other mortgages may be on the property securing a credit union loan; or verifying information on the debtor’s schedules, and after discharge report the debt(s) as discharged in bankruptcy.

# Death of a Member

- If a deceased member owes the credit union money, the credit union may seize funds in the deceased member's account(s) as the right to offset and the security interest created in the membership agreement survives death. (a word of caution – in joint accounts with the right of survivorship if the surviving member does not owe the credit union money then no offset rights exist.)
- In the event of a vehicle loan, as a secured lien holder the credit union may repossess the vehicle and sell it. However, without an estate opened, there is no way to properly send out redemption notices to the estate, so a claim against the estate later for the deficiency may be denied. Also, the title cannot transfer without an estate being opened for a relative or other person to take over the loan should they wish to do so.
- In the event a deceased member has a loan secured by a home, foreclosure cannot occur without an estate being opened as there is no individual to accept notice or service. The deceased member's relatives may not be interested in opening an estate if the member had more debts than assets or if those assets are only personal property. If this is the case, a petition must be filed for a third party to administer the estate so as to permit the credit union to foreclose on the property securing the debt (in VA the process differs as you can notice heirs).

# 1099-A and 1099-C Best Practices

## *Highlights:*

- The IRS form 1099 (both A and C) is used by various entities to report income that they have perceived a third party has earned. For example, a credit union issues a credit card, makes an unsecured loan, makes a secured or unsecured auto loan, or mortgage loan, and amounts due and owing are never paid. After some time the credit union should issue the member a 1099.
- The IRS requires financial institutions (including credit unions) to report to them the amount of principal they charge-off for individual borrowers. It is only to be filed after the credit union has stopped collection activity and there has been no payment activity on the account for three years.
- Form 1099-A is used to report that property was received or abandoned by the member. It does not refer to whether or not the debt was cancelled.
- Form 1099-C indicates the cancellation of debt. A 1099-C can be issued on an unpaid debt for the entire balance that is due at the time of issuing the 1099-C or for the canceled portion of the debt when a debt settlement has been agreed to.
- The credit union may issue a 1099-C for the balance due on second mortgage write downs, settlements of unsecured or secured claims or "cram downs" where any or all of the principal balance due to the credit union remains unpaid.
- Collection efforts may continue when a 1099-A is issued.
- The law is unclear as to whether collection efforts may continue once a 1099-C is issued; however common sense would dictate that a creditor can't have it both ways: either you forgive the debt or continue to collect the debt or sell it, but not both.
- Surprisingly the IRS has issued no rulings regarding collections once a 1099-C is issued; although, if payment is received by the creditor once the 1099-C is issued the 1099-C must be reversed.
- Once the credit union issues a 1099-C, the member is required to report this unpaid debt as income on their tax returns.
- As exclusions do exist, not all members issued a 1099-C will be required to pay taxes once the 1099-C is issued.

## *Practical Tips*

- Always issue a 1099-A on abandoned real or personal property.
- Always issue a 1099-C once the debt is uncollectable and cancelled.
- Both form 1099-A and 1099-C must be sent to the member (preferably via certified mail, return receipt requested).
- Once a 1099-A is issued the debt remains collectable and all collection efforts should be pursued.
- Once a 1099-C is issued, although no case law or statutes exist, the Internal Revenue Services has no established guidelines regarding continuing collections efforts, common sense dictates that once a 1099-C is issue collection efforts should cease.
- As exemptions do exist, members may avoid paying taxes once a credit union issues a 1099-C.

# Third Party Claims – Wage Garnishment – Bank Attachment – Tax Levy

## *Highlights:*

- Wage Garnishment
  - Judgment Creditor (employee or Member judgment)
  - Internal Revenue Service or State Authority (employee or Member tax obligation)
- Bank Attachments
  - Judgment Creditor
  - Internal Revenue Service or State Authority
- Tax Levy
  - Internal Revenue Service
  - State or Local Authority
- Child Support Orders
  - Court Orders
  - State or Local Authority

## *Practical Tips*

- Upon receipt of notice of wage garnishment, bank attachment or tax levy the Member's accounts must be frozen.
- Notice should be provided to the Member of the credit union's receipt of notice of wage garnishment, bank attachment or tax levy.
- Member access to accounts may only be permitted when wage garnishment, bank attachment or tax levy is released or satisfied.
- Child Support Orders differ from wage garnishment, bank attachment or tax levy as they typically require weekly or monthly payments that the credit union must reserve and send as required.
- Counsel should be contacted as to the credit union's compliance requirements.
- Garnishments, Attachments or Orders from State authorities where the credit union has no branches or locations, must be domesticated, or the credit union could choose to not comply with the Garnishment, Attachment or Order.
- There is no legal requirement to honor out of jurisdiction garnishments; however make sure they are truly out of jurisdiction (shared access or shared branch agreements will subject a credit union to a States jurisdiction)

# Credit Union Actions and Remedies

# Account Ownership Interest Defined - Attachment of Member Accounts

## *Highlights:*

*In the event account ownership interest is not defined in the Membership Agreement or Loan Documents then Joint Accounts are established by law as follows:*

- Tenants by the Entirety – An account owned 100% jointly by a husband and wife (as well as wife and wife / husband and husband)
- Joint Tenants – An account owned 100% jointly by individuals (similar ownership to Tenants by the Entirety)
- Tenants in Common - An account owned jointly (on a percentage basis) by individuals (differs from Tenants by the Entirety ownership)

## *Practical Tips:*

- Tenants by the Entirety Cross Collateralized and Attachment is permitted where both spouses incur the same debt.
- Joint Tenant Cross Collateralized and Attachment is permitted where both Members incur the same debt.
- Tenant in Common Cross Collateralized and Attachment is permitted where one of the Members has incurred the debt (based on the Member's percentage of ownership of the account, funds on deposit in the account may be attached up to the amount of the debt and the credit union has the option to accelerate the entire debt or just bring the Member current).
- Membership Agreement and Loan Document contract terms and conditions will modify statutory ownership interest protection afforded Tenant by the Entirety and Joint Tenant accounts. CFPB changing the rules to stay current on the most recent cases.

# Setoff - Cross Collateralization - Acceleration

## *Highlights:*

- Setoff - The process of holding or freezing depository account balances upon default of the Member's obligation for the purpose of satisfying the debt.
- Cross Collateralization - A means by which specific collateral can secure various Member accounts (even those accounts which may have existed before the acquisition of the collateral)
- Acceleration - A means by which, in the event of default, the credit union can demand *immediate* payment for all amounts due

## *Practical Tips:*

- Setoff and Cross Collateralization allows the credit union to offset against the Member's accounts and any properly cross collateralized account in the event of default. Setoff and Cross Collateralization allows the credit union to repossess collateral for default of an account other than the loan account associated with the collateral.
- In order to avoid issues with tenants by the entirety and joint Member accounts, Membership Agreements should indicate all joint accounts are owned 100% by each Member. (*notwithstanding the forgoing, all parties to account should be using account and not a party in name only – see Vigil v. Zia Credit Union and Morgan Stanley & Co. v Andrews*)
- Acceleration can be avoided when the credit union establishes a "course of conduct" that modifies the terms of the Membership Agreement or Loan Documents.

# Bankruptcy Basics

## *Highlights:*

- When a Bankruptcy is filed an automatic stay goes into effect. The automatic stay prohibits collection of ANY account (whether listed on their bankruptcy or not and whether secured or not). The filing of a Bankruptcy is essentially divides a person in two – their pre-petition self and their post-petition self. Any action taken post petition IS NOT included in the bankruptcy; and any action taken pre petition IS included in the bankruptcy.

## *Practical Tips:*

- *Setoff:* (other than a credit card) If a debt is owed to the credit union, at the time the Bankruptcy is filed, and there is money on deposit with the credit union, at the time of the Bankruptcy, the credit union can offset the two balances (i.e. the credit union can take funds and apply it to the debt) using the Lift Stay process.
- *Lift the Automatic Stay:* (setoff and secured debt) If the debt is secured by a vehicle or real estate, and if the Member is behind on their payments, the credit union can file a Motion for Relief from Stay to proceed with repossession and/or foreclosure (deficiency balances are included in the bankruptcy).
- *Proof of Claim:* A proof of claim should be filed in ALL Chapter 11, 12 and 13 bankruptcy cases. A proof of claim is only filed in Chapter 7 cases if the Chapter 7 trustee has sent a Notice of Assets.
- *Non-Dischargeable:* If the Member has filed a Chapter 7 Bankruptcy and they have incurred debt within the 90 days prior to the filing, it is PRESUMED non-dischargeable unless the debt was clearly used for necessities (rent, groceries, utilities). Fraud is also non-dischargeable notwithstanding the date of occurrence.
- *Information:* The credit union may ALWAYS provide the Member with any information they request regarding their debts or their assets.
- *Payments:* The credit union may ALWAYS accept a voluntary payment – even after the debt has been discharged. You MAY NOT request a payment, but you MAY accept a payment.
- *Stop Extending Credit:* Once the Member has filed bankruptcy and caused a loss to the credit union you can stop extending additional credit. Lines of credit and credit cards should be terminated. ATM' and debit cards should remain active (see CFPB v. Navy FCU).
- *Providing Services:* A credit union does not have to continue to provide services to a Bankrupt Member. It does not have to continue to allow the members to “bank” with the credit union and may close their account with notice. Notice to discontinue service should be sent 30 days in advance.

# Criteria for Referral of Litigation Accounts

## *Highlights:*

- Establish a criteria for referring accounts.
  - Type of Account
    - Credit Card
    - Automobile Loan
    - HELOC
  - Dollar Amount
    - Over \$5,000
    - Under \$5,000

## *Practical Tips:*

- When referring accounts, the same criteria must be used so that accounts are referred on a uniformed basis thus avoiding any potential CFPB or litigation issues. Other criteria such as "days delinquent" for referral are helpful as well.

# Referral of Litigation Accounts

## *Highlights:*

- In order to proceed with legal collections it is important that all relevant information is forwarded including:
  - Membership Agreement
  - Loan Documents (with complete payment history)
  - Account information
  - Guaranty or other securitization documentation
  - Letters and correspondence
  - Legal Collection Cover Sheet
- Prior to forwarding accounts verify that the telephone number and address information is accurate.
- Include all information relating to additional *Member accounts* and *Cross Collateralized accounts*.

## *Practical Tips*

- Prior to forwarding an account obtain a current credit report.
- To insure proper Member communication it is important to forward current telephone number and address information (and copy of drivers license for verification purposes).
- *Send complete account files suit ready for lawsuit or at least preliminarily suit ready.*

# Collateral Estoppel

- Case Study: 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 for final judgment. If not, and judgment is obtained on one loan it may prevent a judgment as to a second loan if the second loan could have been included in the first suit.

# Statute of Limitations

	Oral Contract	Written Contract	Open End Contract	Under Seal	Auto Deficiency
Maryland	3	3	3	12	4
W. Virginia	5	10	5	10	10
Virginia	3	5	6	6	5
District of Columbia	3	3	3	12	3

## *Highlights:*

- In Maryland, as of October 1, 2016, Section 5-1202 of the Courts Article provides that any creditor of consumer debt may not initiate a collection action of a consumer debt after the expiration of the statute of limitations and that, once the statute of limitations has passed, any subsequent payment, and written or oral affirmation of the debt or any other activity on the debt may not revive or extend the Statute of Limitations. The Statute allows for sanctions to be filed against creditor and attorney for filing an action beyond the Statute.
- Adding the word (Seal) next to the signature line does not itself extend the enforcement period. The Courts will look for additional evidence that the document was intended to be under seal. Such evidence includes if the document was notarized and whether in the body of the agreement it states that the agreement is under seal. The evidence may be as simple as adding the language "witnesseth the parties hereto have set forth their hand and seal".

**UDAAP DEFINED  
AND  
CFPB RECENT ACTIONS**

# UDAAP Defined

## *Highlights:*

- Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”) is very broad in scope and may be applicable to a wide range of practices
- Some UDAAP provisions are already prohibited under FDCPA; entities that violate these provisions may be subject to additional liability
- Although Creditors collecting their own debt may not be subject to the FDCPA, they are still subject to the UDAAP provisions, which may incorporate certain acts or practices that are prohibited by the FDCPA, thus, subjecting creditors to those standards

## *UDAAP Defined:*

- An act or practice is unfair when: it causes or is likely to cause *substantial injury* to consumers; the injury is not *reasonably avoidable* by consumers; and the injury is not outweighed by countervailing benefits to consumers or to competition
- An act or practice is deceptive when: the act or practice *misleads or is likely to mislead* the consumer; the consumer’s interpretation is reasonable under the circumstances; and the misleading act or practice is *material*
- An act or practice is abusive when it: materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or takes unreasonable advantage of (a) a *consumer’s lack of understanding* of the material risks, costs, or conditions of the product or service (b) a consumer’s inability to protect his or her interests in selecting or using a consumer financial product or service, or (c) a consumer’s reasonable reliance on a covered person to act in his or her interests

# UDAAP Analysis

## *Analysis Highlights:*

- *Substantial injury:*
  - Will typically take the form of monetary harm; for example, fees or costs paid by consumers as a result of the unfair act or practice
  - An act or practice that causes a small amount of harm to a large number of people may be deemed to cause a substantial injury
  - However, substantial injuries do not necessarily have to result in monetary harm
- A *reasonably avoidable act or practice* is not considered unfair if consumers may reasonably avoid injury; however, consumers cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury
  - *For example, injuries caused by transactions that occur without a consumer's knowledge or consent or injuries that can only be avoided by spending large amounts of money or other significant resources are likely not reasonably avoidable*
- **Misleading Act or Statement:** whether an act or practice is misleading or is likely to mislead, the CFPB considers the totality of circumstances:
  - Deceptive acts or practices can take the form of a representation or omission
  - A representation may be an express or implied claim or promise, and it may be written or oral
  - "Target audience" and "least sophisticated consumer standard" to be considered
- Material information is information that is likely to be important to consumers, for example, information that may affect a consumer's choice of, or conduct regarding, the product or service in question

# CFPB v. NAVY FCU

## *Highlights:*

- The CFPB Consent Order took exception to practices and procedures as following:
  - Misrepresentation of Legal Action (threatening to file suit when only 3% of accounts were forwarded to collections; threatening to garnish accounts where suit had not been filed)
  - Disclosure of Information to Third Parties Without Consent (threatening to contact commanding officers without members consent; consent was not granted even though permitted by contract as contract "print was too small"; NFCU did not follow through on threats)
  - Misrepresentations Regarding Credit Reporting and Credit Repair (claiming that members would be unable to obtain credit or that NFCU could repair credit)
  - Deceptive Debt Collection Communications (NFCU took the actions as outlined above via telephone as well as in writing)
  - Unfair Electronic Account Access Restrictions (improperly denied electronic access to accounts once accounts were in default)

## *Practical Tips*

- Never threaten a practice or procedure that will not be utilized or followed
- Do not use definitive words such as "will" or "shall"; use "may" or "might"
- Develop specific policies when communicating with members; referring claims for lawsuit
- Only disclose information when granted written authority
- No misleading communications; only say what you "can and will" do (cannot fix credit)
- Do not deny electronic access to members accounts – CFPB believes it violates public policy considerations
- Maintain policies and procedures and conduct regular training sessions

# CFPB Law Firm Actions

## *Highlights:*

- CFPB v. Pressler and Pressler – The CFPB ordered the law firm of Pressler & Pressler, LLP, its two principal partners, and New Century Financial Services, Inc. (a debt buyer), to stop churning out unfair and deceptive debt collection lawsuits based on flimsy or nonexistent evidence. The consent order bars the companies and individuals from illegal practices that can deceive or intimidate consumers, such as filing lawsuits without determining if debts in question are valid.
- CFPB v. Hanna and Associates – The CFPB alleged that the defendants relied on deceptive court filings and faulty evidence to churn out lawsuits. The CFPB order, if approved by the court, would bar the firm and its principal partners from illegal debt-collection practices, including filing lawsuits without being able to verify the consumers' debt is owed, and intimidating consumers with deceptive court filings.
- CFPB v. Lentz and Works – The CFPB took action against Lentz and Works for falsely representing that letters and calls were from attorneys attempting to collect a debt when no attorney had yet reviewed the account. The law firm also did not ensure the accuracy of the consumer information they furnished to credit reporting companies and used improperly notarized affidavits in lawsuits filed against consumers.

## *Practical Tips*

- Prior to forwarding an account, obtain a credit report with current member information
- Account should be internally verified as follows: amount of total debt; whether member is in the armed forces; good address and telephone number
- Forward complete file (include all accounts held by member)
- Make sure the referral is "suit ready" or close to it, to avoid FDCPA and CFPB violations

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