LEMBERG LAW

How Fair Debt Collection Laws are Thwarted by Routine Judicial Fee Slashing: A Study

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Executive Summary

The Fair Debt Collection Practices Act (FDCPA) includes a fee-shifting provision whereby the party in violation of the law pays reasonable attorney fees to the prevailing plaintiff. These fee-shifting provisions are included in statutory law to encourage private citizens to implement public policy, i.e., to become private attorneys general.

In an examination of 94 randomly selected FDCPA cases between 2011 and early 2015, courts awarded the dollar amount of fees sought in only 8 percent of non-default judgment cases; courts reduced attorney fees in the remainder of cases. In 56 percent of cases where an attorney fee award was lowered, one or more attorneys' hourly rates were reduced.

The lack of benchmarking of attorney fees may have a chilling effect on consumer access to attorneys willing to take on FDCPA cases. Indeed, the number of FDCPA lawsuits filed in federal court has steadily decreased since 2011. Compared with 2011, when 12,237 cases were filed, there were 7 percent fewer in 2012, 15 percent fewer in 2013, and 20 percent fewer in 2014.

Background

Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (15 U.S.C. § 1692-1692p) was signed into law by President Jimmy Carter on September 20, 1977. The FDCPA amended the Consumer Credit Protection Act and was intended to curtail abusive debt collection practices. The statute applies to third-party debt collectors (as opposed to original creditors) and expresses both prohibitions and requirements of debt collection activity. Prohibited tactics include:

- Calling before 8:00 a.m. or after 9:00 p.m.
- Calling repeatedly or continuously
- Calling a consumer at his or her workplace after being told that such calls are not allowed
- Continuing to contact a consumer after being told to cease and desist (except to inform the consumer that debt collection efforts will stop or that legal action is being taken)
- Contacting a consumer directly after the collection agency is notified that the consumer is represented by an attorney
- Contacting a consumer after he or she requests validation of the debt and before such validation is provided
- Publishing a consumer's name in conjunction with a debt
- Threatening legal action when such action cannot be taken or there is no intention to take such action
- Using abusive or profane language
- Revealing the existence of a debt to third parties
- Communicating via postcard
- Using envelopes that reveal that communication is from a debt collector
- Threatening to provide or providing a false report to a credit reporting agency

The FDCPA requires that third-party debt collectors:

- Identify themselves as debt collectors when communicating with consumers
- Notify that information provided by the consumer will be used to collect a debt
- Provide the consumer with the name and address of the original creditor within 30 days of the consumer's request
- Within five days of a debt collector's initial communication, notify the consumer of his or her right to dispute the debt
- Provide verification of a debt within 30 days of the consumer's requestAppendix: Lorem ipsum

15 U.S.C. § 1692k is the civil liability provision of the FDCPA. It allows individual plaintiffs to recover actual damages and additional damages up to $1,000. For class action lawsuits, the section entitles each named plaintiff to the same potential award, and unnamed class members a collective amount not to exceed $500,000 or one percent of the net worth of the debt collection agency, whichever is less.

Fee Shifting

Under what was termed the "Private Attorney General Doctrine," in the 1970s federal courts awarded attorney fees to successful plaintiffs whose actions supported accountability for federal laws such as the Civil Rights Act of 1964. In 1975, the U.S. Supreme Court ruled in Alyeska Pipeline Svc. Co. v. Wilderness Society that only Congress (as opposed to the courts) could authorize fee shifting. In response to that Supreme Court decision, Congress enacted a number of laws that included fee-shifting provisions. Among these was the Fair Debt Collection Practices Act (FDCPA). Today, there are more than 200 federal statutes that include fee shifting.

Fee-shifting provisions are included in statutory law to encourage private citizens to implement public policy, or to become private attorneys general. In addition, fee-shifting provisions serve to level the playing

field, so that citizens with few resources can assert their rights, and so that attorneys will accept cases from people who have few resources.

In 15 U.S.C. § 1692k, the FDCPA states that a successful plaintiff can recover court costs and attorney fees. In Graziano v. Harrison, the Third Circuit Court of Appeals wrote, “Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather, the Act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general.”

In Evon v. Law Offices of Sidney Mickell, the Ninth Circuit Court of Appeals opined, “The FDCPA is a consumer protection statute and was intended to permit, even encourage, attorneys like [Sergei] Lemberg to act as private attorney generals to pursue FDCPA claims.”

In order for fee-shifting to occur, the plaintiff must prevail in the lawsuit. However, building on the theme of the Private Attorney General Doctrine, it does not follow that a prevailing defendant is entitled to attorney fees. In Christiansburg Garment Co. v. EEOC, the Supreme Court ruled that a prevailing defendant is not akin to a private attorney general because the defendant is not prosecuting those that have violated federal law.

In 15 U.S.C. § 1692k, the FDCPA includes language that allows the court to award attorney fees and costs to a prevailing defendant under two circumstances: for cases brought in bad faith, and for cases brought for the purpose of harassment.

Amount of Attorney Fee Awards

Like similar statutes with fee-shifting provisions, the FDCPA doesn’t specify how much money in attorney fees should be awarded to a prevailing plaintiff; rather, it says that a plaintiff can recover “a reasonable attorney’s fee as determined by the court.” This leaves the court a significant discretion in awarding attorney fees.

In awarding attorney fees, courts most often use the “lodestar” method, multiplying the number of hours worked by the attorney’s hourly rate, and then adjusting that amount up or down. Factors that courts can use to adjust a lodestar figure include:

1. The time and labor required to represent the client(s);
2. The novelty and difficulty of the issues in the case;
3. The skill requisite to properly perform the legal services;
4. Preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee charged for those services in the relevant community;
6. Whether the fee is fixed or contingent;
7. The time limitations imposed by the client or circumstances;
8. The amount involved and results obtained;
9. The experience, reputation, and the ability of attorney(s);
10. The undesirability of the case;
11. The nature and length of the professional relationship with the client; and
12. Awards in similar cases.

So, for example, when determining whether or not the hourly rate reflects those typical in the community, the court may take into account the experience of the individual attorney and his or her skill level. It may also make exceptions in certain cases, such as those where a nonlocal attorney with special expertise must be brought in. When determining the number of hours worked, a court can make adjustments on a variety of grounds, such as hours deemed excessive, hours spent on claims where the plaintiff did not prevail, and hours that weren’t adequately documented.

The federal district courts where FDCPA cases are heard do not have unlimited discretion in adjusting attorney fees. In Moreno v. City of Sacramento, the Ninth Circuit Court of Appeals ruled that the district court could not reduce attorney fees without providing an explanation for its rationale. In its opinion, the appellate court noted:

> *The district court has discretion to determine the appropriate fee award, because its familiarity with the case allows it to distinguish reasonable from excessive fee requests. But gut feelings are not enough; if the district court is going to make substantial cuts to a winning lawyer's fee request, it needs to explain why with sufficient specificity that the lawyer can meaningfully object and we can meaningfully review the objection. We can't defer to reasoning that we can't review; if all the district court offers is a conclusory statement that a fee request is too high, then we can't tell if the court is applying its superior knowledge to trim an excessive request or if it is randomly lopping off chunks of the winning lawyer's reasonably billed fees.*

Nonetheless, courts regularly exercise their discretion by reducing attorney fees in FDCPA cases. They virtually never use their discretion to increase attorney fees in such cases.

Findings

FDCPA Cases Examined

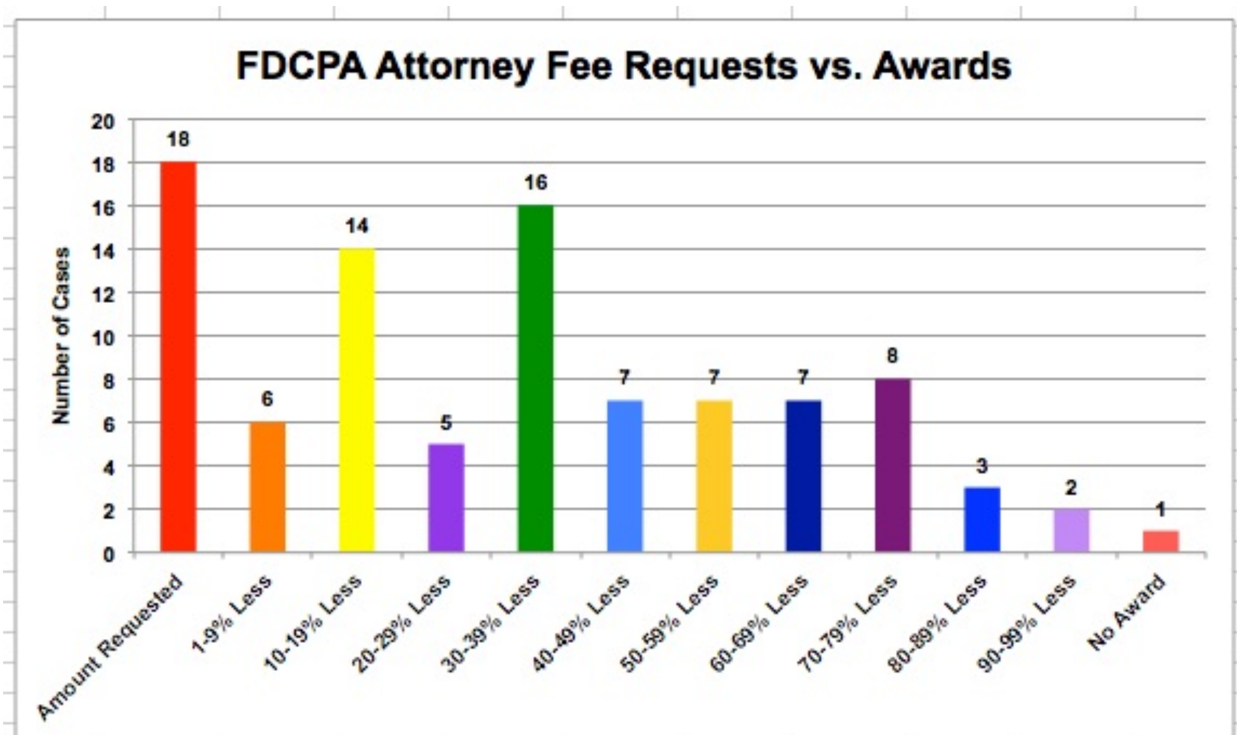
In an attempt to discern patterns of court-awarded attorney fees by district courts in Fair Debt Collection Practices Act (FDCPA) cases, a Westlaw search was conducted using the search term "fair debt fee application award." The results were sorted by date, with the most recent cases listed first. The first 100 cases returned in the results, which spanned from 2011 through 2015, were catalogued.

Of the 100 cases, six were excluded from the survey because either the amount of attorney fees sought was unavailable or the amount of attorney fees awarded was unavailable, or both.

Of the remaining 94 cases, the attorney fees sought ranged from $1,240 to $722,344.74. The attorney fees awarded ranged from $0 to $187,292.25.

In only 19 percent (n=18) of the cases did the court award the amount of attorney fees sought. In 20 percent (n=19) of cases, the attorney fee award was reduced by between one-third and one-half. And in 21 percent (n=20) of cases, the attorney fee award was reduced by more than 60 percent.

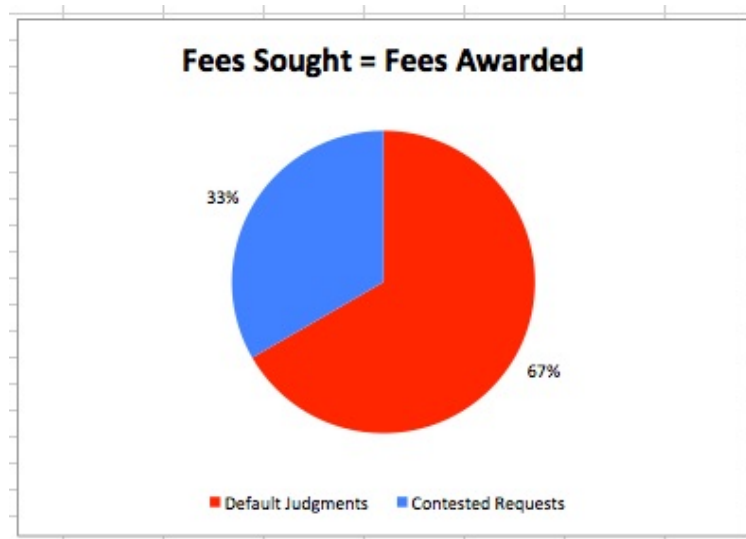
As discussed previously, courts most often use the "lodestar" method of calculating attorney fees, multiplying the number of hours worked by the attorney's hourly rate. They can then either reduce or increase the lodestar. In the 94 cases examined, there was not a single instance when the court increased the lodestar or the amount of attorney fees awarded.



Attorney Fees and Default Judgments

Of the 18 cases in which the court awarded the full amount of attorney fees sought, 12 were default judgments. In 8 other cases involving a default judgment, meaning no objection from the defendant existed, the court initiated a reduction in attorney fees by between 14 and 86 percent.

Out of the 74 cases examined that did not involve a default judgment, the plaintiff's attorney received the full amount of attorney fees requested only 8 percent (n=6) of the time.



Reasons for Attorney Fee Reductions

When a plaintiff's attorney in an FDCPA case files a motion for attorney fees, the defense typically files a response outlining the reasons why the fee award should be reduced. As previously mentioned, courts are given considerable – but not unlimited – discretion in reducing attorney fee awards. When reducing attorney fee awards, courts must disclose their reasoning and details about the reductions.

Of the 94 cases examined, courts in 76 cases reduced the attorney fee awards sought, typically by adjusting the lodestar. Broadly, the courts' rationale fell into two types of reductions: reduction in the number of billable hours and reduction in hourly compensation rates.

Courts reduce the number of billable hours for a number of reasons. For example, the court may rule that three hours spent preparing a complaint is excessive, and deduct .5 hours. Similarly, the court may rule that it was not necessary for two attorneys to attend a deposition, and thus that the hours billed constitute duplicative work. The court may deduct time that it determines to be non-compensable under the statute, and it can deduct time for clerical work or internal communications. For example, the court may rule that time associated with emailing another attorney in the same firm isn't recoverable. The court may also reduce the total number of hours for time spent on unsuccessful or unrelated claims, or when the plaintiff received limited relief. For example, if a plaintiff recovered less than the $1,000 maximum statutory damages under the FDCPA, the court might reduce the attorney fee proportionally. There are times when a settlement offer dictates that fees incurred after the date of the offer aren't recoverable, but the plaintiff's attorney submits billable hours after that date; the court then eliminates those hours. Finally, courts reduce attorney fee awards for vague or "block" billing. While it appears as though most plaintiffs' attorneys submit detailed records to the court – often billing in increments of .1 hours – others are less specific.

As previously mentioned, courts also adjust the lodestar by reducing the hourly compensation rates of attorneys, law clerks, paralegals, and other staff members. This will be discussed in greater detail later. In addition, courts will sometimes deny compensation to out-of-state attorneys.

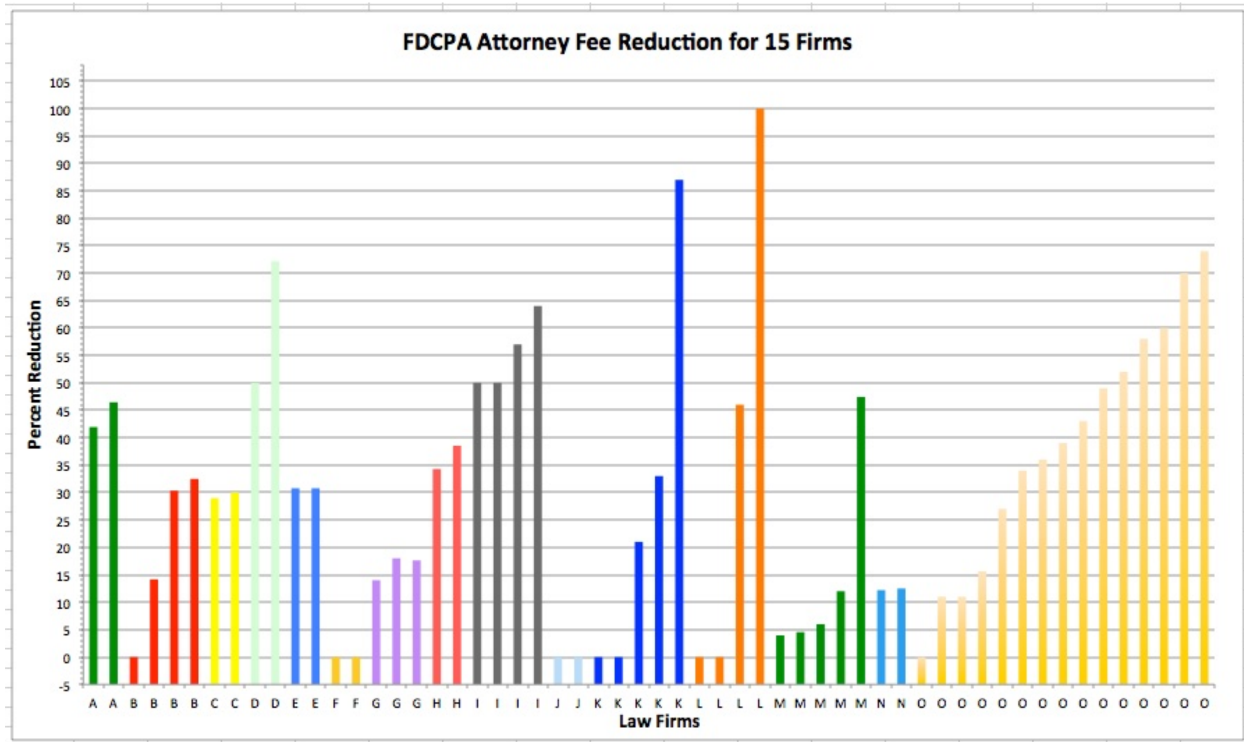
Of the 76 cases examined in which the attorney fee award was less than the amount sought, courts in 53 of the cases reduced fees on two or more bases. Because of that, the total reasons for reduction exceeds 76.

Reason for Reduction	Number of Cases
Reduced Hours:	
Excessive or Duplicative Work	33
Unsuccessful or Unrelated Claim/Post Settlement Work/Limited Relief	22
Non-Compensable Time	11
Vague Billing/Block Billing	10
Clerical Work/Internal Communications	8
Other	5
Reduced Fees:	
Attorneys	42
Staff (Law Clerks, Paralegals)	4
Out-of-State Attorneys	5

While in most instances courts provided precise figures and calculations for lodestar reductions, in nine cases the court chose to reduce either the lodestar figure or the total attorney fee request on a percentage basis, ranging from a 10 percent to a 70 percent reduction.

Attorney Fees and Firms

In the 94 cases examined, 15 law firms had attorneys of record in more than one case. The 15 firms (lettered A to O in the chart below) represented plaintiffs in 60 percent of the cases (n=57) reviewed and accounted for 50 percent (n=47) of the cases with attorney fee reductions. In reviewing court orders and memoranda, firm O was repeatedly admonished for its billing rate and, to a lesser extent, its billable hours.



Lack of Hourly Fee Standards

In 56 percent (n=42) of cases where an attorney fee award was lowered, one or more attorneys' hourly rates were reduced.

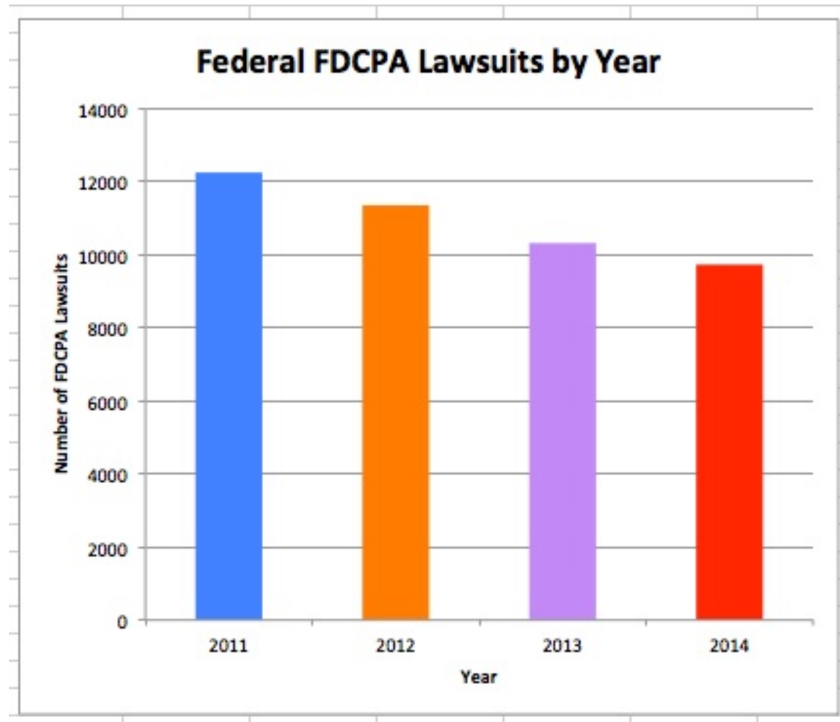
In its effort to arrive at a "reasonable" fee award, courts have the discretion to reduce a plaintiff's attorney's rate so that it aligns with those "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." However, there is no objective reference defining prevailing rates. In their orders and recommendations, judges and judge magistrates rarely cite similar sources. Instead, they rely on a variety of mechanisms to decide upon an hourly rate. For example, a judge may review what other judges in the jurisdiction have awarded that same attorney and mimic that rate. Alternately, a judge may adjust an hourly rate downward because of his or her assessment of the attorney's background and experience with FDCPA cases.

A plaintiff's attorney substantiates a request for his or her hourly rate in a number of ways, including affidavits, billing statements, and previous awards. Attorneys sometimes cite the "United States Consumer Law Attorney Fee Survey Report 2010-2011," which courts usually dismiss. Others cite the Laffey Matrix, which courts reject as applying only to the Washington-Baltimore area.

The absence of rate standards leads to wildly varying hourly rates for plaintiff attorneys. Because attorneys bringing FDCPA actions rely on the statute's fee-shifting provisions, it seems plausible that the lack of predictability and standardization could deter them from accepting FDCPA cases. In turn, that could have a chilling effect on consumers who wish to exercise their rights and seek redress through the FDCPA's private right of action.

FDCPA Cases Over Time

The number of FDCPA lawsuits filed in federal court has steadily decreased since 2011. Compared with 2011, when 12,237 cases were filed, there were 7 percent fewer in 2012, 15 percent fewer in 2013, and 20 percent fewer in 2014.



Conclusion

Statutory law and caselaw give district courts discretion in awarding “reasonable” attorney fees, yet fee-shifting provisions in the Fair Debt Collection Practices Act (FDCPA) exist in order to incentivize those in the private sector to implement public policy, and to act as private attorneys general.

In a survey of 94 federal FDCPA cases, in the absence of a default judgment against a defendant, courts awarded the amount of attorney fees sought in only 8 percent of cases. In 56 percent of cases where an attorney fee award was lowered, one or more attorneys’ hourly rates were reduced. The uncertainty faced by attorneys regarding hourly rates and attorney fee awards may have a chilling effect on attorneys’ willingness to take FDCPA cases. Indeed, since 2011, the number of FDCPA cases filed each year has decreased.

In order to mitigate this factor, it may be helpful to initiate a nationwide survey of prevailing consumer attorney fees that courts could use as a benchmark and that attorneys could rely on when filing motions for statutory attorney fees.

About Lemberg Law

Lemberg Law is a leading consumer law firm that represents clients in actions involving the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, lemon law, and other consumer laws. Based in Stamford, Connecticut, and with of-counsel attorneys in states across the U.S., Lemberg Law has helped more than 11,000 clients recover more than $30 million. Sergei Lemberg, Esq., has been named “most active consumer attorney” by the debt collection industry each year for the past five years.

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