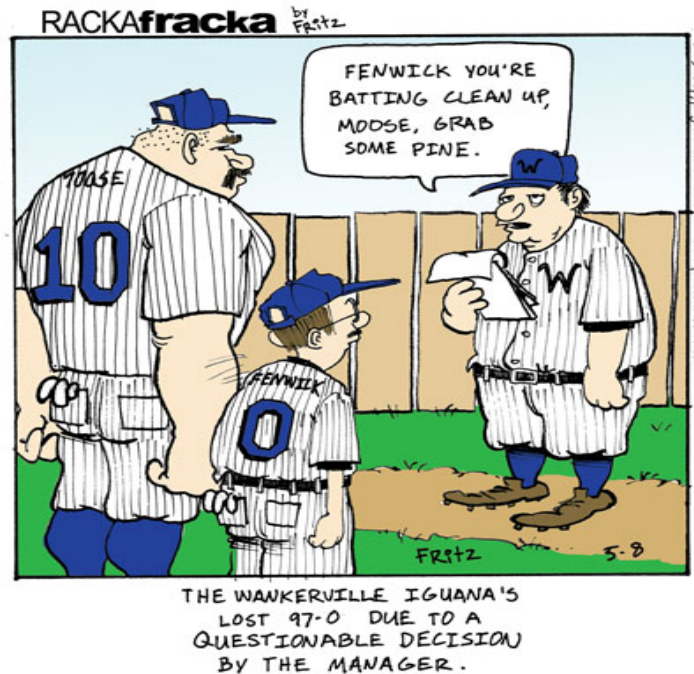


**COMMERCIAL DEBT COLLECTION TIPS AND TACTICS FOR  
DEFENDING DEBTOR COUNTERCLAIMS AND AFFIRMATIVE DEFENSES**

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*LET'S START WITH THE HOME RUNS...*



## I. COMMON COUNTERCLAIMS

### A. FEDERAL FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

The fair debt collection practices act (15 U.S.C. §1692 et seq.) was enacted to curb abusive practices in the collection of consumer debts. It provides consumers with a means to verify information concerning a debt and to dispute that debt. The Act creates guidelines for the business of consumer debt collection and allows for penalties for violations of the Act.

As a lawyer representing a creditor over a commercial debt, the following definitions contained within §1692a of the Act are critical (emphasis added):

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

Thus, a successful FDCPA violation requires a debtor to prove (1) that he/she is a consumer; (2) that the defendant is a "debt collector;" (3) that the debt in question is a

consumer debt; and (4) that the debt collector violated an FDCPA provision either by act or omission. Because the FDCPA only applies to consumer debts, an FDCPA counterclaim against the collection of a commercial debt is impermissible and subject to attack.

## **B. TEXAS FAIR DEBT COLLECTION PRACTICES ACT**

Chapter 392 of the Texas Finance Code prohibits certain actions by a debt collector who is attempting to collect on a *consumer* debt. See TEX FIN CODE §392.001 et seq. The Texas Finance code provides the following relevant definitions in Section 392.001:

(1) "Consumer" means an individual who has a consumer debt.

(2) "Consumer debt" means an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction.

(3) "Creditor" means a party, other than a consumer, to a transaction or alleged transaction involving one or more consumers.

(5) "Debt collection" means an action, conduct, or practice in collecting, or in soliciting for collection, consumer debts that are due or alleged to be due a creditor.

For the same reasons outlined in the FDCPA, a Texas FDCPA counterclaim against a commercial debt should be easy to handle.

Helpful tip: §390.403(c) provides for a mandatory award of attorney's fees and costs if the court finds the counterclaim was brought in bad faith or for purposes of harassment.

## **C. DECLARATORY JUDGMENTS ACT**

The Declaratory Judgments Act is a procedural device that allows a court to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations between the parties. TEX.CIV.PRAC & REM CODE ANN §37.002(b). § 37.004 provides that the subject matter of relief covers the following:

(a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of

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First appeared as part of the conference materials for the  
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