

**The subscription economy has dawned, creating new challenges for consumers. Subscriptions seem harmless, but when taken as a total, consumers spend an average of \$2,847.96 per year on subscription services.<sup>2</sup>**

As new business models take hold, consumers must adapt to use the tools Congress provided to ensure the accuracy of consumer credit card statements. Additionally, the concept of “negative option marketing,” wherein consumers are forced to cancel a service after a trial subscription, has caught the attention of Nevada’s Attorney General (AG). The AG is considering promoting legislation to require that trial periods conclude the consumer relationship, unless the consumer expressly opts to continue. Attorneys should be aware of the important protections offered to consumers in relation to a document that goes largely ignored, namely a consumer’s credit card statement.

### What is the FCBA?

The Fair Credit Billing Act (FCBA) was designed to meet the mandate of protecting consumers from errors on credit card billing statements. Enacted in 1974, the law is not one of the more popular forms of consumer claims, like the FCRA (Fair Credit Reporting Act) or FDCPA (Fair Debt Collection Practices Act), though it is of the same vintage.<sup>3</sup> The purpose of the FCBA was clear at its origin. “Congress’s clear intent in adopting the FCBA was to prevent a creditor from simply ignoring a billing dispute when attempting to collect a debt.”<sup>4</sup> To highlight the gravity of the problem, the Consumer Financial Protection Bureau indicated that it received in excess of 138,000 consumer complaints with the primary issue of “problems with purchase.”<sup>5</sup> Before understanding the workings of the FCBA, it is important to understand that its procedures for combatting errors can also act as defenses in collection cases related to the misapplied charges.

### Who is Covered by the FCBA?

At its core, the FCBA is a remedial device designed to correct billing errors on computerized credit card statements. The FCBA only applies to those considered “obligors” under the act, as opposed to authorized users. The Ninth Circuit concluded that a cardholder who is not an obligor is not entitled to the protections of the FCBA, requiring the obligor to dispute the charge(s).<sup>6</sup> Although most commonly associated with credit card statements, the FCBA also applies to home equity credit lines.

### Consumer Claims Under the FCBA

In order for the FCBA to be actionable, the billing errors must fall into at least one of the following six categories:

- (1) an extension of credit not made to the consumer, i.e., responsible for the debt of another obligor;
- (2) an unauthorized extension of credit;

# What’s Fair with the Fair Credit Billing Act?<sup>1</sup>

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- (3) an extension of credit not properly within the categories of § 1026.13 *Billing error resolution*;
- (4) an extension of credit not accepted by the consumer;
- (5) an extension of credit for property or services not delivered as agreed—notably this can include untimely deliveries; and
- (6) computational statement errors.<sup>7</sup>

The FCBA also affords consumers protections regarding requests for additional information regarding the extension of credit or for failure to send the required periodic statements.

Importantly for a consumer, the FCBA is designed to protect the consumer from inaccuracy rather than support the creditor. To that end, consumers are not required to have a good faith belief that they do not actually owe the disputed amount in order to benefit from the FCBA procedures.<sup>8</sup> In order for a FCBA claim to be actionable, the consumer must use the billing error procedures by sending a notice of the billing error to the creditor. The notice must be timely in terms of the period statement. Without this notice, the creditor’s obligations under FCBA are never triggered.<sup>9</sup> The notice must be sent to the creditor even if the consumer believes the creditor is already on actual notice of the error. The notice must be sent within 60 days of the billing error, with the





error period running from the date of the notice, making the claim one of constructive notice. The short window does not foreclose a claim for repeated violations of the same issue, as each new periodic statement equates to a new potential claim provided the error remains unchanged.

### Creditors' Reinvestigation Duties

Upon receipt of timely written notice of a billing error, the creditor must acknowledge receipt of the notice to the consumer. The creditor must provide the consumer with an explanation of the right to withhold payment for the disputed amount during the pendency of the reinvestigation. In the event a creditor received a timely notice from a consumer where the creditor is actively seeking collection, the creditor must cease collection efforts until such time as the consumer notice is resolved.<sup>10</sup>

### Remedies for Billing Error Violations

Following a timely dispute and the investigation of that dispute, the consumer must prosecute its claim within

the one-year limitations period. The following are available to the successful FCBA consumer:

- Each violation of the FCBA in terms of billing errors is a separate violation;
- Statutory damages, actual damages, or both;
- Reasonable attorneys' fees and costs;
- Use the FCBA defenses affirmatively against collection action; and
- Potential of injunctive relief for particularly egregious recurring conduct.

The FCBA also protects against the attempted application of a secured card deposit to collection by the creditor during the investigation period.

### Assessing and Protecting Creditor Rights

The FCBA is an important tool against the all-too common error in credit billing and transactions. Using the services of skilled consumer attorneys can benefit clients and counsel alike against the never-ending encroachment of the power

of financial institutions. Without these important protections, consumers would be facing the age-old imbalance between the powerless and the powerful. The FCBA serves to restore that balance.

1. Erik W. Fox, Esq. is an attorney with Cogburn Law, practicing in the area of Consumer Rights claims such as the FCBA.
2. <https://www.fool.com/the-ascent/banks/articles/are-you-overspending-subscription-services/> (last visited December 17, 2019).
3. Pub. L. No. 93-495, 88 Stat. 1500 (Oct. 28, 1974). FCBA was enacted to protect the consumer against unfair and inaccurate credit billing and credit card practices. 15 U.S.C. § 1601(a); 15 U.S.C. §§ 1666–1666j.
4. See *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 885 (9th Cir. 2011).
5. [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_consumer-response-annual-report\\_2017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf) (p. 8, Figure 2, last visited December 17, 2019).
6. *Edwards v. Wells Fargo & Co.*, 606 F.3d 555 (9th Cir. 2010). See also *Lyon v. Chase Bank USA, N.A.*, 2009 WL 2170518 (D. Or. Apr. 27, 2009), rev'd on other grounds, 656 F.3d 877 (9th Cir. 2011).
7. Reg. Z § 1026.13(a)(1)–(20).
8. *Kurz v. Chase Manhattan Bank*, 273 F. Supp. 2d 474 (S.D.N.Y. 2003). See also *Langenfeld v. Chase Bank USA, N.A.*, 537 F. Supp. 2d 1181 (N.D. Okla. 2008); *Cunningham v. Bank One*, 487 F. Supp. 2d 1189 (W.D. Wash. 2007) (following *Kurz*).
9. See *Burnstein v. Saks Fifth Ave.*, 85 Fed. Appx. 430 (6th Cir. 2003) (without adequate notice of a billing error, creditor's duties under FCBA were never triggered).
10. 15 U.S.C. § 1666(a)(3)(B); 12 C.F.R. § 1026.13(d)(1); *Gengo v. Target Nat'l Bank*, 513 F. Supp. 2d 842 (S.D. Tex. 2007).

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