

Fair Debt Collection Practices Act -- 2006

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I. INTRODUCTION

This article provides an overview of recent developments concerning the application of the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA").

The statute regulates the conduct of "debt collectors" in collecting "debts" owed or allegedly owed by "consumers." It is designed to protect consumers from unscrupulous collectors, whether or not there is a valid debt. The FDCPA broadly prohibits unfair or unconscionable collection methods; conduct which harasses, oppresses or abuses any debtor; and any false, deceptive or misleading statements, in connection with the collection of a debt; it also requires debt collectors to give debtors certain information. 15 U.S.C. §§1692d, 1692e, 1692f and 1692g.

In enacting the FDCPA, Congress recognized the "universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule [sic] ... [T]he vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce." S. Rep. No. 382, 95th Cong., 1st Sess., p. 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697.

The FDCPA is liberally construed in favor of the consumer to effectuate its purposes. Cirkot v. Diversified Financial Systems, Inc., 839 F.Supp. 941, 944 (D. Conn. 1993); Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002).

Statutory damages are recoverable for violations, whether or not the consumer proves actual damages.

II. STATUTORY COVERAGE AND DEFINITIONS

A. WHAT IS A "DEBT"

"Debt" is defined as "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." 15 U.S.C. §1692a(5) (emphasis added).

Business and agricultural loans are therefore not "debts" covered by the FDCPA. Bloom v. I.C. System, Inc., 972 F.2d 1067 (9th Cir. 1992) (business loan); Munk v. Federal Land Bank, 791 F.2d 130 (10th Cir. 1986) (agricultural loan); Kicken v. Valentine Production Credit Ass'n, 628 F. Supp. 1008 (D. Neb. 1984), aff'd mem., 754 F.2d 378 (8th Cir. 1984)(agricultural loan).

A personal guaranty of a business loan is also not covered. Ranck v. Fulton Bank, 93-1512, 1994 U.S. Dist. LEXIS 1402, 1994 WL 37744 (E.D. Pa. 1994).

It is now settled that dishonored checks are covered. Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Ryan v. Wexler & Wexler, 113 F.3d 400 (7th Cir. 1997); Charles v. Lundgren & Associates, P.C., 119 F.3d 739 (9th Cir. 1997); Duffy v. Landberg, 133 F.3d 1120 (8th Cir. 1998); Snow v. Riddle, 143 F.3d 1350 (10th Cir. 1998); Hawthorne v. MAC Adjustment, Inc., 140 F.3d 1367 (11th Cir. 1998). Check guaranty companies are statutory "debt collectors" because the check was in default at the time it was acquired by the guaranty company. Ballard v. Equifax Services, Inc., 27 F.Supp.2d 1201 (E.D.Cal. 1998); Holmes v. Telecredit Services Corp., 736 F.Supp. 1289, 1291-94 (D.Del. 1996); Winterstein v. CrossCheck, Inc., 149 F.Supp.2d 466 (N.D.Ill. 2001).

The statutory liability of a prior endorser on a check which is deposited or cashed and returned for insufficient funds may not be a "debt," if there is no purchase of goods or services for consumer purposes. Perez v. Slutsky, 94 C 6137, 1994 U.S. Dist. LEXIS 17711, 1994 WL 698519 (N.D.Ill. 1994). However, Perez was rejected in Byes v. Telecheck Recovery Serv., 94-3182, 1997 WL 736692, 1997 U.S. Dist. LEXIS 18892 (E.D.La., Nov. 24, 1997).

Condominium and homeowners' association assessments are FDCPA debts. Newman v. Boehm, Pearlstein & Bright, 119 F.3d 477 (7th Cir. 1997); Ladick v. Van Gemert, 146 F.3d 1205 (10th Cir. 1998); Thies v. Law Offices of William A. Wyman, 969 F. Supp. 604 (S.D.Cal. 1997); Taylor v. Mount Oak Manor Homeowners Ass'n, 11 F.Supp.2d 753 (D.Md. 1998); Garner v. Kansas, 98-1274, 1999 WL 262100, 1999 U.S. Dist. LEXIS 6430 (E.D.La., Apr. 30, 1999).

Rent for a residential apartment is a "debt" covered by the FDCPA. Romea v. Heiberger & Associates, 163 F.3d 111 (2d Cir. 1998); Wright v. BOGS Management, Inc., 98 C 2788, 2000 WL 1774086, *17 (N.D.Ill., Dec. 1, 2000). The statutory notice in a summary eviction action, *if given by a debt collector*, is subject to the FDCPA, regardless of whether the landlord seeks back rent or merely to evict for nonpayment. The landlord or a management company that accepts payments that are not late is not a debt collector. However, the failure of a five-day notice to comply with the FDCPA does not invalidate it; it merely gives rise to a claim against the debt collector. Dearie v. Hunter, 183 Misc.2d 336, 705 N.Y.S.2d 519 (App. T. 1st Dept. 2000).

Tort claims by a third party with which the consumer has no contractual relationship are not covered. Hawthorne v. MAC Adjustment, Inc., 140 F.3d 1367 (11th Cir. 1998). However, in Brown v. Budget Rent-A-Car Systems, Inc., 119 F.3d 922 (11th Cir. 1997), the Eleventh Circuit held that a claim by a car rental company against a consumer renter for property damage to the rented vehicle was covered by the FDCPA. Other courts have held that the FDCPA does not apply to claims for statutory damages for shoplifting, Shorts v. Palmer, 155 F.R.D. 172 (S.D. Ohio 1994), and claims arising from the illegal reception of microwave television signals. are also not within the definition of "debt". Zimmerman v. H.B.O. Affiliate

Group, 834 F.2d 1163 (3d Cir. 1987).

An Eastern District of Pennsylvania decision rejected a debt collector's contention that a medical bill was not a "debt" because it should have been paid by the patient's insurance carrier. Adams v. Law Offices of Stuckert & Yates, 926 F.Supp. 521, 526 (E.D.Pa. 1996): "Mr. Adams was the party ultimately liable for retiring the debt. Whether he retires the debt with funds from his checking account or pursuant to his contract with a health insurance carrier is of no moment."

Liabilities for taxes are not considered "debts" within the FDCPA. Staub v. Harris, 626 F.2d 275 (3d Cir. 1980); Coretti v. Lefkowitz, 965 F. Supp. 3 (D. Conn. 1997); Beggs v. Rossi, 1997 U.S. Dist. LEXIS 21742 (D. Conn. 1997), aff'd, 145 F.3d 511 (2d Cir. 1998); Berman v. GC Services, LP, 97 C 489, 1997 WL 392209, 1997 U.S. Dist. LEXIS 9558 (N.D. Ill. June 30, 1997), aff'd, 146 F.3d 482 (7th Cir. 1998) (taxes are not covered even if they are imposed on the basis of a "transaction"). A fine for failing to return a library book is not a debt. Riebe v. Juergensmeyer & Assoc., 979 F.Supp. 1218 (N.D. Ill. 1997). However, charges for water and sewer service originally owed to a municipality and purchased by a buyer of bad debts were "debts" subject to the FDCPA, although property tax obligations are not. Pollice v. National Tax Funding, LP, 225 F.3d 379 (3rd Cir. 2000).

Liabilities for child support obligations are not considered "debts" within the FDCPA. Mabe v. GC Services, L.P., 32 F.3d 86 (4th Cir. 1994); Battye v. Child Support Servs., 873 F. Supp. 103 (N.D.Ill. 1994); Brown v. Child Support Advocates, 878 F. Supp. 1451 (D.Utah. 1994); Jones v. U.S. Child Support Recovery, , 961 F.Supp. 1518 (D.Utah 1997).

B. WHO IS A "DEBT COLLECTOR"

Generally, the FDCPA covers the activities of a "debt collector." There is a two-part definition of "debt collector": "any person [1] who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or [2] who regularly collect or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 U.S.C. §1692a(6). The creditor itself is excluded from the definition of "debt collector", unless it uses a name which suggests that a third-party debt collector is involved in the collection process.

Also excluded from the definition of "debt collector" are the following:

1. Officers and employees of the creditor while collecting the debt in the creditor's name.
2. Affiliates of the creditor. Section 1692a(6)(B) creates an exemption for "any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it

is so related or affiliated and if the principal business of such person is not the collection of debts." There is no requirement that the affiliate identify itself as an affiliate of the creditor. Aubert v. American General, 137 F.3d 976 (7th Cir. 1998).

3. Officers or employees of the United States or any state. Private debt collectors collecting student loans and other obligations which meet the definition of a "debt" and were originally owed to a governmental unit do not qualify for this exemption. Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260 (9th Cir. 1996); Jones v. Intuition, Inc. 12 F.Supp. 2d 775 (W.D. Tenn. 1998). However, in Davis v. United Student Aid Funds, 45 F.Supp. 2d 1104 (D. Kans. 1998) the court held that the guaranty agency itself is covered by the fiduciary exception.
4. Process servers. This exemption does not extend to the person who hired the process server. Romea v. Heiberger & Associates, 163 F.3d 111, 117 (2d Cir. 1998); Alger v. Ganick, O'Brien & Sarin, 35 F.Supp.2d 148, 153 (D.Mass. 1999).
5. Bona fide non-profit debt counselors.
6. Persons who service debts which are not in default (e.g., services of mortgages and student loans). Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985); Coppola v. Connecticut Student Loan Found., Civ. A. N-87-398(JAC), 1989 WL 47419, 1989 U.S. Dist. LEXIS 3415 (D.Conn. March 22, 1989). **This "servicer exemption" does not operate in favor of such entities when they acquire a loan after default.** Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, (9th Cir. 1996)("The FDCPA does not provide an exemption for guaranty agencies that acquire a student loan after default in order to pursue its collection"); Student Loan Fund of Idaho, Inc. v. Duerner, 131 Idaho 45, 951 P.2d 1272 (1997). However, where a loan is restructured and the restructured loan is not in default, the fact that the loan was in default prior to being restructured does not make entities purchasing or servicing the loan FDCPA debt collectors. Bailey v. Security National Servicing Corp., 154 F.3d 384 (7th Cir. 1998).
7. "[A]ny person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement" **The fiduciary relationship must exist for purposes other than debt collection.** Thus, a receiver or trustee of a corporate creditor or the personal representative or trustee of an individual creditor are treated as if they were the original creditor. The fact that a collection

attorney or agency is the agent, and therefore the fiduciary, of the creditor does not give rise to an exemption.

8. Persons who collect debts "originated by such person[s]". 15 U.S.C. §1692a(6)(ii). An "originator" is one who played a significant role in originating the obligation. Buckman v. American Bankers Ins. Co., 115 F.3d 892 (11th Cir. 1997), aff'g 924 F.Supp. 1156 (S.D. Fla. 1996).
9. A secured party who takes possession of the creditor's receivables by enforcing its security interest. That is, if consumer lender ABC pledges its consumer receivables to commercial lender XYZ and XYZ, pursuant to its rights under the security agreement, directs the consumer to pay XYZ, XYZ is not a "debt collector".

C. CREDITORS AS DEBT COLLECTORS:

Creditors may become "debt collectors" by using names in collecting their debts which falsely suggest the involvement of third party debt collectors or attorneys. The simplest situation covered by the "other name" exception of §1692a(6) is that where creditor ABC sends its debtors letters which demand payment in the name of XYZ Collection Agency, XYZ either being a totally fictitious entity or a real entity which has no significant involvement in the actual collection of ABC's debts. On its face, such conduct makes ABC a "debt collector" under §1692a(6) and simultaneously violates the prohibition against deceptive collection practices, §1692e. Numerous pre-FDCPA cases held that this practice violated §5 of the FTC Act. Wm. M. Wise Co. v. FTC., 246 F.2d 702 (D.C. Cir. 1957); In re Teitelbaum, 49 FTC 745 (1953); In re Bureau of Engraving, Inc., 39 FTC 192 (1944); In re National Remedy Co., 8 FTC 437 (1925); In re B.W. Cooke, 9 FTC 283 (1925); In re U.S. Pencil Co., 49 FTC 734 (1953); In re Perpetual Encyclopedia Corp. 16 FTC 443 (1932).

The FTC has stated that a creditor is using a name "other than [the creditor's] own" if the creditor is using a name which on its face it "would indicate that a third person is collecting or attempting to collect [the creditor's] debts" and no disclosure is made of the relationship between the name used in dealing with the consumer prior to default and the name used in attempting to collect after default, even if the creditor lawfully owns the name used to make collection. Sept. 19, 1985 opinion letter. The FTC commentary on the FDCPA states:

Creditors are generally excluded from the definition of "debt collector" to the extent that they collect their own debts in their own name. However the term specifically applies to "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is" involved in the collection.

A creditor is a debt collector for purposes of this act if:

- o He uses a name other than his own to collect his debts, including a fictitious name.
- o His salaried attorney employees who collect debts use stationery that indicated that attorneys are employed by someone other than the creditor or are independent or separate from the creditor [the same should apply to salaried nonattorney employees, as herein]. . . .
- o The creditor's collection division or related corporate collector is not clearly designated as being affiliated with the creditor; however, the creditor is not a debt collector if the creditor's correspondence is clearly labeled as being from the "collection unit of the (creditor's name)," since the creditor is not using a "name other than his own" in that instance. (Emphasis added.)

In Maguire v. Citicorp Retail Services, Inc., 147 F.3d 232 (2nd Cir. 1998), the Second Circuit reversed a summary judgment for the defendant in a case where Citicorp Retail Services sent out letters under the letterhead of "Debtor Assistance" to collect private label credit card debts.

"[T]he scope of creditor liability under §1692a(6) goes beyond the creditor's use of aliases or pseudonyms to instances where the creditor merely implies that a third party is collecting a debt when in fact it is the creditor that is attempting to do so." Larson v. Evanston Northwestern Healthcare Corp., 98 C 5, 1999 WL 518901, 1999 U.S. Dist. LEXIS 11380 (N.D. Ill. July 20, 1999).

A creditor collects its own debts by using a different name, implying that a third party was the debt collector, either (a) when the creditor uses an alias, or (b) when the creditor controls all aspects of the collection effort. E.g., Sokolski v. Trans Union Corp., 53 F.Supp. 2d 307, 312 (E.D.N.Y. 1999); Flamm v. Sarner & Associates, P.C., 02-4302, 2002 WL 31618443 (E.D.Pa., Nov. 6, 2002).

D. BAD DEBT BUYERS

Recently, it has become common for banks, credit card companies and other creditors to sell their delinquent debts to companies which specialize in the purchase and liquidation of bad debts. S. Hwang, "Once-Ignored Consumer Debts Are Focus of Booming Industry," Wall Street Journal, Oct. 25, 2004; "Asta Funding's Quarterly, Yearly Profit Grows," CardLine, Nov. 26, 2004, Vol. 4; No. 48; Pg. 1; Deirdre Conner, "Roanoke, Va., debt collector draws complaints of harassment of debtors," The Roanoke Times, Sept. 19, 2004; "Respectability at Last for Buyers and Sellers of Bad Debt," PR Newswire, September 17, 2004, "Sallie Mae Acquires Majority Interest in Arrow Financial Services; Transaction Marks Continued Expansion of Company's Debt Management Operations"; Burney Simpson, "Investors Get in Synch With Debt Buyers", Credit Card Management, September, 2004, Vol. 17;

No. 6; Pg. 44; "Bad debt rising: when to sell your accounts receivable," Healthcare Financial Management, August 1, 2004, No. 8, Vol. 58; Pg. S1; Joanne M. Biemer, "A New Market for Charged-Off Debt", Credit Card Management, September, 2003, Vol. 16; No. 6; Pg. 40; Marilyn Much, "PORTFOLIO RECOVERY ASSOCIATES INC. Norfolk, Virginia; Finding A Gold Mine In Someone Else's Debt," Investor's Business Daily, June 16, 2003; Pg. A07; Sheryl Jean, "Debt collection firm Cavalry plans St. Paul expansion," Saint Paul Pioneer Press (Minnesota), April 17, 2003, Pg. 1B; Credit Risk Management Report, March 23, 1998, v. 8, no. 5; J. Lynn, Update: Bad Debt Business Thriving, Commercial Law Bulletin, March 1, 1998, v. 13, no. 2, pp. 6-7.

A company that regularly purchases delinquent debts is a "debt collector" within the meaning of the FDCPA with respect to the delinquent debts. Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003); Pollice v. Nat'l Tax Funding, 225 F.3d 379 (3rd Cir. 2000); Ballard v. Equifax Check Services, 27 F.Supp.2d 1201 (E.D. Cal. 1998); Kimber v. Federal Financial Corp., 668 F.Supp. 1480 (M.D.Ala. 1987); Durkin v. Equifax Check Servs., 00 C 4832, 2002 U.S. Dist. LEXIS 20742 (N.D.Ill., October 24, 2002); Cirkot v. Diversified Systems, 839 F.Supp. 941 (D.Conn. 1993); Ruble v. Madison Capital, Inc., C-1-96-1693, 1998 U.S. Dist. LEXIS 4926 (N.D. Ohio 1998); Holmes v. Telecredit Service Corp., 736 F.Supp. 1289, 1292 (D.Del. 1990); Farber v. NP Funding II, LP, 96 CV 4322, 1997 WL 913335, *3, 1997 U.S. Dist. LEXIS 21245 (E.D.N.Y. Dec. 9, 1997) ("those who are assigned a defaulted debt are not exempt from the FDCPA if their principal purpose is the collection of debts or if they regularly engage in debt collection"); Stepney v. Outsourcing Solutions, Inc., 1997 U.S. Dist. LEXIS 18264 (N.D. Ill. 1997); Coppola v. Connecticut Student Loan Found., Civ. A. N-87-398(JAC), 1989 WL 47419, 1989 U.S. Dist. LEXIS 3415 (D.Conn. March 22, 1989); Wagner v. American Nat'l Educ. Corp., Civ. No. N-81-541 (PCD), 1983 U.S. Dist. LEXIS 10287 (D.Conn. Dec. 30, 1983) ("The statute permits service debt collection free of the act if, when the debt was acquired, it was not in default"); Commercial Service of Perry v. Fitzgerald, 856 P.2d 58, 62 (Colo.App. 1993) ("[A] company which takes an assignment of a debt in default, and is a business the principal purpose of which is to collect debts, may be subject to the Act, even if the assignment is permanent and without any further rights in the assignor"). As long as the purchaser asserts that the debt was in default when acquired, the FDCPA applies, even if the assertion proves to be false. Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003)

"The legislative history of section 1692a(6) [which defines 'debt collector'] indicates conclusively that a debt collector does not include . . . an assignee of a debt, as long as the debt was not in default at the time it was assigned." Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985), citing S. Rep. No. 95-382, 95th Cong., 1st Sess. 3, reprinted in 1977 USCCAN 1695, 1698. Conversely, the assignee of a debt which is in default at the time of the assignment is a "debt collector," if the assignee's principal purpose is the collection of debts, or the assignee regularly engages in the collection of debts. "For instance, a mortgage servicing company is not considered a debt collector when it acquires loans originated by others and not in default at the time acquired. However, to the extent the mortgage servicing company receives delinquent accounts for collection it is a debt collector with respect to those accounts." Games v. Cavazos, 737 F.Supp. 1368, 1384 (D.Del. 1990).

The successor in interest to a creditor's business or line of business, which became such through corporate changes and is openly identified as such, has been held not to be a "debt collector." Guest v. Capital One Financial Services, D. Ct., Conn. Law Tribune, Nov. 18, 1996; Orent v. Credit Bureau of Greater Lansing, 1:00cv742, 2001 U.S. Dist. LEXIS 17683 (W.D.Mich. Oct. 23, 2001) (successor by merger treated as predecessor).

E. LAWYERS

Lawyers were originally excluded from the definition of "debt collector." In 1986, Congress removed the attorney exemption. See P.L. 99-361, 100 Stat. 768, deleting former 15 U.S.C. §1692a(6)(F), which excluded from the definition of "debt collector" "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client."

Now, the "FDCPA does apply to a lawyer . . . with a general practice including a minor but regular practice in debt collection." Crossley v. Lieberman, 90 B.R. 682, 694 (E.D.Pa. 1988), aff'd, 868 F.2d 566 (3d Cir. 1989). The legislative history of the amendment states that collection attorneys were not being effectively policed by the legal profession and courts, and that the removal of the exemption was necessary to "put a stop to the abusive and harassing tactics of attorney debt collectors." 1986 USCCAN 1756-57.

In Heintz v. Jenkins, 514 U.S. 291 (1995), the United States Supreme Court held that litigation conduct of attorneys in collecting consumer debts is not exempt from the FDCPA, rejecting the arguments of the collection bar to the contrary. Unlawful conduct by collection attorneys in court proceedings is now covered, assuming that there is no Rooker-Feldman or res judicata bar. Watkins v. Peterson Enterprises, Inc., 57 F.Supp.2d 1102 (E.D.Wash. 1999) (unauthorized costs in connection with state court garnishments). However, some judges are nevertheless still reluctant to find violations based on the contents of pleadings. Argentieri v. Fisher Landscapes, Inc., 15 F.Supp.2d 55 (D. Mass. 1998). The court retreated from this position on a motion to reconsider, stating that "I do not suggest here that claims filed in court could not, if intended to harass a debtor, be actionable under the FDCPA." Argentieri v. Fisher Landscapes, Inc., 27 F.Supp.2d 84 (D. Mass. 1998). Contra, Strange v. Wexler, 796 F.Supp. 1117, 1118 (N.D. Ill. 1992).

The amount of collection activity necessary to make a lawyer a "debt collector" -- one who "regularly" collects consumer debts -- is minimal. Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertollotti, 374 F.3d 56 (2d Cir. 2004) (trier of fact could find law firm was subject to FDCPA based on 145 demands during one year even though attorney only received \$ 5,000 in revenues amounting to 0.05% of its \$ 10,000,000 revenue over that period). The Goldstein court considered relevant "(1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, such as use of mailing services, collection software, and use of form letters, and (5)

whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations”, as well as (6) “whether the law practice seeks debt collection business by marketing itself as having debt collection expertise”. Factor (5) includes relationships with collection agencies, “lenders or other creditors, landlords or other lessors, and service providers “.

In Oppong v. First Union Mortgage Corp., 02-2149, 2006 U.S. Dist. LEXIS 37551 (E.D.Pa. Dec. 29, 2005), the court held that “debt collectors are those who frequently and consistent perform debt collection activities as part of their business services,” regardless of “the percentage of debt collection business in relation to the defendant’s other business,” so that acquiring 89 delinquent mortgages within 3 months (356 per year) resulted in “regularly” collecting delinquent debts regardless of the fact that 141,000 were acquired that were not delinquent. The percentage of collection activity was relevant under the “principal purpose” part of the test.

A law firm's debt collection work which amounted to less than 4% of its total business brought it within the definition. "While the ratio of debt collection to other efforts may be small, the actual volume is sufficient to bring defendant under the Act's definition of 'debt collector.'" Stojanovski v. Strobl & Manoogian, P.C., 783 F.Supp. 319, 322 (E.D.Mich. 1992). An attorney who represented four collection agencies, filed over 150 collection suits in a two-year period, and sent one particular collection letter over 125 times in a 14-month period was a debt collector even though debt collection was merely incidental to his primary law practice. Cacace v. Lucas, 775 F.Supp. 502 (D.Conn. 1990). Another decision holds that sending 60 collection letters during a period of several weeks is sufficient. Tragianese v. Blackmon, 993 F.Supp. 96 (D. Conn. 1997). On the other hand, an attorney who collected less than 20 consumer debts in a 10-year period was not a debt collector. Mertes v. Devitt, 734 F.Supp. 872 (W.D.Wis. 1990).

In two questionable decisions, courts held that a nascent collection lawyer who sent out about two dozen or three dozen letters at one time was not engaged in regular debt collection. Mladenovich v. Cannonito, 97 C 4729, 1998 WL 42281, 1998 U.S. Dist. LEXIS 985 (N.D. Ill., Jan. 29, 1998) (two dozen); White v. Simonson & Cohen, 23 F.Supp.2d 273 (E.D.N.Y. 1998) (35 letters sent on one occasion not enough).

A lawyer should be classified as a "debt collector" if either a volume threshold or a percentage-of-time threshold is met, or if the lawyer holds himself out as engaging in consumer debt collection. A volume threshold is necessary because a law firm that handles a modest number of consumer collection matters as part of providing a full range of services to its clients should be required to comply with the FDCPA. One court has held that "It is the volume of the attorney's debt collection efforts that is dispositive, not the percentage such efforts amount to in the attorney's practice." Stojanovski v. Strobl & Manoogian, P.C., 783 F.Supp. 319, 322 (E.D.Mich. 1992), citing Cacace v. Lucas, 775 F.Supp. 502, 504 (D.Conn. 1990); In re Littles, 90 Bankr. 669, 676 (Bankr. E.D. Pa. 1988), aff'd as modified sub nom., Crossley v. Lieberman, 90 Bankr. 682 (E.D. Pa. 1988), aff'd, 868 F.2d 566 (3d Cir. 1989). But see Hartl v. Presbrey & Assoc., 95 C 4728, 1996 WL 529339, 1996 U.S. Dist. LEXIS 13419 (N.D.Ill., Sep. 16, 1996);

Nance v. Petty, Livingston, Dawson & Devening, 881 F.Supp. 223 (W.D.Va. 1994). The Fifth Circuit has held that a law firm that sent out 600 demand letters was a "debt collector" notwithstanding the fact that only a small fraction of its time was spent in that activity. Garrett v. Derbes, 110 F.3d 317 (5th Cir. 1997).

A percentage threshold and a "holding out" test are also necessary because the FDCPA should apply to (i) a lawyer with a nascent collection practice and (ii) a lawyer who attempts to obtain collection business, even if he is not successful in obtaining very much of it.

F. MASS MAILERS

Several decisions held that companies which provide debt collectors with the service of generating and mailing large numbers of form letters, but do not participate in the composition of the letters and are not compensated based on the amounts received, are not debt collectors. Trull v. Lason Systems, 982 F.Supp. 600 (N.D. Ill. 1997); Laubach v. Arrow Service Bureau, 987 F.Supp. 625 (N.D. Ill. 1997); Lockemy v. Comprehensive Collection Servs., 97 C 1180, 1998 WL 832655, 1998 U.S. Dist. LEXIS 18887 (N.D.Ill., Nov. 20, 1998). A related decision held that Western Union is not a "debt collector" where all it does is transmit a collection message. Aquino v. Credit Control Services, 4 F.Supp.2d 927 (N.D.Cal. 1998). However, the Ninth Circuit has held that Western Union could be a "debt collector" as a result of furnishing its "Automated Voice Telegram" service. Romine v. Diversified Collection Services, 155 F.3d 1142 (9th Cir. 1998).

G. CREDITORS THAT USE MASS MAILERS

It should follow from the last point that where a creditor hires a company that merely mails letters without further collection activity, or otherwise engages in conduct not sufficient to make it a debt collector, and the name of the mailer or another third party is used on the mailings, the creditor is both (a) making itself a debt collector under the §1692a(6) proviso and (b) engaging in deceptive collection efforts in violation of §1692e.

H. REPOSSESSORS

Repossession agencies are not debt collectors within the FDCPA unless they perform common collection services, such as sending dunning letters, making telephone calls, etc. Jordan v. Kent Recovery Servs., 731 F.Supp. 652 (D.Del. 1990); Larranaga v. Mile High Collection and Recovery Bureau, Inc., 807 F.Supp. 111 (D.N.M. 1992); Colton v. Ford Motor Credit Co., 1986 Ohio App. LEXIS 7797, 1986 WL 8538 (Ohio App., July 30, 1986). The fact that the repossessed property is sold and applied to the debt is not enough. Tucker v. RAW Recovery, Inc., 1998 U.S. Dist. LEXIS 20162 (M.D.N.C. Oct. 28, 1998). An unusual Seventh Circuit decision holds that the imposition of a modest fee (\$25) by a reposessor does not violate the FDCPA. Nadalin v. Automobile Recovery Bur., Inc., 169 F.3d 1084 (7th Cir. 1999).

I. WHAT IS A "COMMUNICATION"

Certain important substantive prohibitions of the FDCPA apply to "communications." These include §§1692c and several subdivisions of 1692e. A "communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2). Usually this takes the form of dunning letters or telephone calls. However, the term is broadly and literally construed to encompass other forms of conveying information as well. Tolentino v. Friedman, 833 F.Supp. 697 (N.D.Ill. 1993), aff'd in part and rev'd in part, 46 F.3d 645 (7th Cir. 1995) (debt collector sent consumers a copy of the summons and complaint prior to service accompanied by an "IMPORTANT NOTICE" discussing the consequences of filing bankruptcy).

The fact that a communication is sent to the consumer's attorney does not preclude it from being a communication. Rosario v. American Corrective Counseling Services, 2:01-CV-221, 2001 WL 1045585 (M.D.Fla. Aug. 27, 2001).

J. WHO IS ENTITLED TO SUE

The FDCPA applies to "consumer" debts, and certain substantive provisions, e.g., §1692c, only protect "consumers." A "consumer" is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. §1692a(3). The consumer's executrix has standing to bring an FDCPA action. Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994) (en banc); Riveria v. MAB Collections, Inc., 682 F.Supp. 174 (W.D.N.Y. 1988).

It should be noted that certain substantive protections of the FDCPA are not limited to "consumers," e.g., §1692e. West v. Costen, 558 F.Supp. 564 (W.D.Va. 1983); Villareal v. Snow, 95 C 2484, 1996 WL 28254, 1996 WL 28282, 1996 U.S. Dist. LEXIS 667, *6 (N.D.Ill. Jan. 19, 1996); Whatley v. Universal Collection Bureau, 525 F.Supp. 1204, 1205-6 (N.D.Ga. 1981). Persons who do not in fact owe money but who are subjected to improper practices by debt collectors are entitled to the protection of the FDCPA. Dutton v. Wolhar, 809 F.Supp. 1130, 1134-5 (D.Del. 1992); Flowers v. Accelerated Bureau of Collections, 96 C 4003, 1997 U.S. Dist. LEXIS 3354, 1997 WL 136313 (N.D.Ill. Mar 19, 1997), later opinion, 1997 WL 224987, 1997 U.S. Dist. LEXIS 6070 (N.D. Ill. Apr. 30, 1997); Riveria v. MAB Collections, Inc., 682 F.Supp. 174, 175 (W.D.N.Y. 1988) ("any person who comes in contact with proscribed debt collection practices may bring a claim").

III. LEAST SOPHISTICATED OR UNSOPHISTICATED CONSUMER STANDARD

Most courts have held that whether a communication or other conduct violates the FDCPA is to be determined by analyzing it from the perspective of the "least sophisticated debtor." Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Taylor v. Perrin, Landry, de Launay & Durand, 103 F.3d 1232 (5th Cir. 1997); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1028-29 (6th Cir. 1992); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225-26 (9th Cir. 1988); Jeter v. Credit

Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995); Bukumirovich v. Credit Bureau of Baton Rouge, Inc., 155 F.R.D. 146 (M.D.La. 1994); United States v. National Financial Servs., 820 F. Supp. 228, 232 (D.Md. 1993), aff'd, 98 F.3d 131, 135, 1996 U.S.App. LEXIS 26645 (4th Cir. 1996); Moore v. Ingram & Assocs., 805 F. Supp. 7 (D.S.C. 1992). "The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." Clomon, supra.*

The Seventh Circuit has held that a violation should be determined from the perspective of the "unsophisticated consumer." Gammon v. GC Services L.P., 27 F.3d 1254 (7th Cir. 1994) Since the "least sophisticated consumer" has never been interpreted to impose liability for bizarre or idiosyncratic interpretations of collection demands, it does not appear that the difference in language represents a significant difference in substance. This was confirmed by a later Seventh Circuit decision, Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996).

The Fifth Circuit, perceiving no substantial difference between the two standards, has declined to select between them. McKenzie v. E.A. Uffman & Assoc., Inc., 119 F.3d 358 (5th Cir. 1997).

Whichever rule is followed, it cannot be used to *narrow* the scope of liability for deceptive practices. That is, if a representation is misleading to an average consumer – e.g., one at the 50th percentile of intelligence and education – it violates the FDCPA. The “unsophisticated consumer” test is derived from FTC Act and trademark cases, Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1172-75 (11th Cir. 1985), and serves to *extend* the protection of the law to the “vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases [or paying debts], do not stop to analyze, but are governed by appearance and general impressions.” Clomon v. Jackson, 988 F.2d 1314, 1318–19 (2d Cir. 1993); Stork Restaurant, Inc. v. Sahati, 166 F.2d 348, 359 (9th Cir. 1948). However, a defendant cannot prevail by arguing that a misrepresentation is meaningless to a consumer whose education and experience place him or her in the lowest 20th percentile of the population, and that only a reasonable or sophisticated consumer would be deceived. This is because a representation that deceives the average consumer will deceive a large percentage of the population, and a consumer who does not understand the representation may look up what it means or consult someone who does understand it. In other words, under the “unsophisticated consumer” standard a representation by a debt collector is actionable if it would deceive the average consumer *or* an unsophisticated one.

It is not necessary to show that the plaintiff was actually misled by a collection notice. Avila v. Rubin, 84 F.3d at 227 (7th Cir. 1996); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997).

Under either the "least sophisticated" or "unsophisticated" consumer standard, a collection communication which can plausibly be read in two or more ways, at least one of which is misleading, violates the law. Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996).

Accord Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3rd Cir. 2000).

IV. VIOLATIONS: VALIDATION OR VERIFICATION NOTICE

One of the most important rights conferred by the FDCPA is the debtor's right to "validation" or "verification" of a debt under § 1692g. "This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." Sen.R. No. 95-382, 95th Cong., 1st. Sess., p. 4, reprinted in 1977 USCCAN 1695, 1698. Under 15 U.S.C. §1692g:

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. §1692g(a).

It is sufficient that the collector send the notice; nonreceipt does not amount to a violation if it was sent. Mahon v. Credit Bur. of Placer County Inc., 171 F.3d 1197 (9th Cir. 1999).

“The statute does not say in so many words that the disclosures required by it must be made in a nonconfusing manner. But the courts, our own included, have held, plausibly enough, that it is implicit that the debt collector may not defeat the statute's purpose by making the required disclosures in a form or within a context in which they are unlikely to be understood by the unsophisticated debtors who are the particular objects of the statute's solicitude.” Bartlett

v. Heibl, 128 F.3d 497, 500 (7th Cir. 1997)

The debt collector is not precluded from collecting the debt within the validation period. However, if the debt collector threatens action or demands payment within the validation period (30 days from receipt), there is a violation unless the collector explains that upon receipt of a dispute/ request for validation, collection activity will cease until verification is sent. Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997).

If the initial communication to the debtor is a summons and complaint, it must comply with 1692g. Thomas v. Simpson & Cybak, 354 F.3d 696 (7th Cir. 2004) (vacated on rehearing, no new opinion issued yet); Sprouse v. City Credits Co., 126 F.Supp.2d 1083, 1089 n. 8 (S.D. Ohio 2000) (finding that a summons and complaint served in a state court action constitute "initial communications" under the FDCPA); Romea v. Heiberger & Associates, 163 F.3d 111 (2d Cir. 1998) (statutory five-day notice is "communication"); Mendus v. Morgan & Assoc., P.C., 994 P.2d 83 (Okla. App. 1999)(summons is "communication"); contra, Vega v. McKay, 351 F.3d 1334, 1335 (11th Cir. 2003); McKnight v. Benitez, 176 F.Supp.2d 1301, 1306-08 (M.D. Fla. 2001) (holding that a summons and complaint do not constitute "initial communications" triggering the debt validation notice requirements of § 1692g). The requirement in the summons that the defendant answer within 30 days or less will conflict with the validation notice and at least requires the "qualifying language" of Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997). See In re Martinez, 311 F.3d 1272 (11th Cir. 2002).

Claims may also be brought for false statements in state court pleadings. Collins v. Sparacio, 03 C 64, 2003 WL 21254256 (N.D. Ill., May 30, 2003), later opinion, 2004 WL 555957 (N.D. Ill. Mar 19, 2004).

Section 1692g(b) then provides that if the consumer disputes the debt in writing, the collector must cease further collection efforts until the validation procedure is complied with:

Disputed debts

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

Although the notice literally requires the debt collector to provide validation information, the Seventh Circuit has held that the debt collector does not violate the statute if it ceases all further collection activities without providing the information. Jang v. A. M. Miller & Assoc., Inc., 1996 U.S. Dist. LEXIS 10883 (N.D. Ill., July 30, 1996), aff'd, 122 F.3d 480 (7th Cir. 1997)

("When a collection agency cannot verify a debt, the statute allows the debt collector to cease all collection activities at that point without incurring any liability for the mistake"); Sambor v. Omnia Credit Services, Inc., 183 F.Supp.2d 1234, 1242 (D.Haw. 2002); Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1031-32 (6th Cir. 1992).

The Fourth Circuit has held that "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt." Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999). See also, on this issue: Guerrero v. RJM Acquisitions, LLC, 03-00038 HG-LEK, 2004 U.S. Dist. LEXIS 15416 (D.Haw., July 9, 2004); Stonehart v. Rosenthal, 01 Civ. 651, 2001 WL 910771 (S.D.N.Y., Aug. 13, 2001).

Note that Chaudhry involved a case where the debt collector was collecting for a creditor which had more detailed information. It should not be applied to a bad debt buyer where the collector and the owner of the debt are one and the same.

Section 1692g(c) provides that "The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer." Under this section, the initial communication from a debt collector cannot be used as the basis for an account stated. Citibank v. Jones, 184 Misc.2d 63, 706 N.Y.S.2d 301 (Dist. Ct. 2000).

A. AMOUNT OF THE DEBT

Section 1692g(a)(1) requires the "amount of the debt" to be stated in the initial letter. This requires the entire amount the collector is authorized to collect at the time a collection demand is sent to be stated. Miller, v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000) (not sufficient to state that unpaid principal balance of residential mortgage loan was \$178,844.65, and that this did not include unspecified accrued but unpaid interest, unpaid late charges, escrow advances, and other charges authorized by loan agreement). See also, Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2003); Schletz v. Academy Collection Service, 02 C 6484, 2003 WL 21196266 (N.D.Ill., May 15, 2003); Taylor v. Cavalry Inv., LLC, 210 F.Supp.2d 1001 (N.D.Ill. 2002); Ingram v. Corporate Receivables, Inc., 02 C 6608, 2003 WL 21018650 (N.D.Ill., May 5, 2003); Bernstein v. Howe, IP 02-192-C-K/H, 2003 WL 1702254 (S.D.Ind., March 31, 2003) (\$x plus unspecified interest and attorney's fees violated statute); Bawa v. Bowman, Heintz, Boscia & Vician, PC, IP 00-1319-C-M/S, 2001 WL 618966 (S.D.Ind., May 30, 2001); Wilkerson v. Bowman, 200 F.R.D. 605 (N.D.Ill. 2001); Valdez v. Hunt & Henriques, 01-01712 SC, 2002 WL 433595 (N.D.Cal. March 19, 2002); Jackson v. Aman Collection Service, IP 01-0100-C-T/K, 2001 WL 1708829 (S.D.Ind., Dec. 14, 2001); Sonmore v. Checkrite Recovery Services, Inc., 187 F.Supp.2d 1128 (D.Minn. 2001); Dechert v. Cadle Co., IP 01-880-C(B/G), 2003 WL 23008969 (S.D.Ind., Sept. 11, 2003); McDowall v. Leschack & Grodensky, P.C., 279 F.Supp.2d 197 (S.D.N.Y. 2003); Armstrong v. Rose Law Firm, P.S., 00-2287, 2002 WL 461705 (D.Minn. March 25, 2002)..

In Chuway v. National Action Financial Services, 362 F.3d 944 (7th Cir. March 30, 2004), the Seventh Circuit held that the following letter violated the FDCPA as a matter of law.

Creditor: Capital One Services, Inc.
Reference: XXXXXXXXXXXX
Balance: \$367.42

* * *

CAPITAL ONE SERVICES, INC. HAS ASSIGNED YOUR DELINQUENT ACCOUNT TO OUR AGENCY FOR COLLECTION PLEASE REMIT THE BALANCE LISTED ABOVE IN THE RETURN ENVELOPE PROVIDED. TO OBTAIN YOUR MOST CURRENT BALANCE INFORMATION, PLEASE CALL 1-800-XXX-XXXX. OUR FRIENDLY AND EXPERIENCED REPRESENTATIVES WILL BE GLAD TO ASSIST YOU AND ANSWER ANY QUESTIONS YOU MAY HAVE.

The violation is the confusion regarding what is to be paid.

If the debt is increasing due to interest or the like, the collection should use of the Miller safe harbor language. The Miller language is as follows:

As of the date of this letter, you owe \$ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number].

In Taylor v. Cavalry Investment, No. 02-2509, 2004 WL 856553, F.3d (7th Cir. April 22, 2004), aff'g, Taylor v. Cavalry Investment, 210 F.Supp.2d 1001 (N.D.Ill. 2002), and Schletz v. Academy Collection Service, 2003 WL 21196266 (N.D.Ill., May 15, 2003), the Taylor collection letter (which is reproduced in the District Court opinion), stated the following regarding the amount of the debt:

PRINCIPAL BALANCE	\$1,802.90
INTEREST	\$511.23
ACCRUED INTEREST	\$ 0.00
OTHER CHARGES	\$ 0.00
TOTAL BALANCE DUE	\$2,314.13

The others (reproduced in the Schletz district court opinion) stated:

PRINCIPAL BAL:	\$62.77
INTEREST OWING:	\$0.00

TOTAL BALANCE DUE: \$62.77

The letters also stated that “Your account balance may be periodically increased due to the addition of accrued interest or other charges as provided in your agreement with your creditor” or “if applicable, your account may have or will accrue interest at a rate specified in your contractual agreement with the original creditor.” The debtors complained that the letter “is unclear as to whether she owes the amount listed next to the total balance due or whether there have been additional charges since that total was calculated.” (210 F.Supp.2d at 1003)

The district courts held that the zeros next to “accrued interest” and “other charges” made clear that no such amounts had been assessed yet, and that “The statement regarding future increases in the amount due does not undermine the clarity of the total amounts provided at the time the letter was sent out.” (210 F.Supp.2d at 1003)

The Seventh Circuit affirmed, holding that the letters were not on their face confusing, and that the debtors had not presented evidence from which a reasonable jury could find that a significant number of persons were in fact confused. Both cases were treated as having been disposed of at summary judgment, after the debtors had been given adequate opportunity to provide evidence that the letters did produce confusion, but had not done so.

In addition, 15 U.S.C. §1692e(2) prohibits “The false representation of– (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.”

B. RELATIONSHIP BETWEEN §§1692g AND 1692e(8)

Cases are divided on whether an oral dispute prevents the collector from assuming that the debt is valid. Jolly v. Shapiro, 237 F.Supp.2d 888 (N.D.Ill. 2002); Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991); Sturdevant v. Jolas, 942 F.Supp. 426, 429 (W.D.Wisc. 1996); Castillo v. Carter, 99-1757, 2001 WL 238121 (S.D.Ind. Feb. 28, 2001) (all requiring writing); with Spearman v. Tom Wood Pontiac-GMC, Inc., IP 00-1340-C-T/K, 2002 WL 31854892 (S.D.Ind., Nov. 4, 2002) (no writing requirement).

Section 1692g is related to §1692e(8). Under §1692e(8), if a consumer disputes a debt, either orally or in writing, Brady v. Credit Recovery Co., 160 F.3d 64 (1st. Cir. 1998), the debt collector cannot report it as undisputed to a credit bureau. Thus, if the consumer orally disputes the debt, the debt collector cannot assume that the debt is valid or report it as undisputed to a credit bureau, but need not provide validation information to the debtor.

If the consumer requests a credit bureau to remove a tradeline or note that the debt is disputed, the furnisher of information, which can be a debt collector, violates the Fair Credit Reporting Act as well as the FDCPA by verifying or continuing to report it as undisputed.

C. OVERSHADOWING

Under §1692g, is not enough for a debt collector to merely include the notice somewhere on the collection letter. Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Riveria v. MAB Collections, Inc., 682 F.Supp. 174 (W.D.N.Y. 1988). The notice must be large and prominent enough to be noticed and easily read. Riveria v. MAB Collections, Inc., 682 F.Supp. 174, 177 (W.D.N.Y. 1988); Rabideau v. Management Adjustment Bureau, 805 F.Supp. 1086, 1093 (W.D.N.Y. 1992). The validation notice may not be either "overshadowed" or contradicted by other language or material in the original or subsequent collection letters sent within 30 days after receipt of the first one. Swanson v. Southern Oregon Credit Service, Inc., *supra*, 869 F.2d 1222 (9th Cir. 1988); Harris v. Payco General American Credits, Inc., 1998 U.S. Dist. LEXIS 20153 (N.D. Ill. Dec. 9, 1998). "A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights." Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).

The Seventh Circuit has held that demands for "immediate" or "urgent" payment overshadow and contradict the §1692g notice unless a full explanation of the relationship between the demand and the debtor's validation rights. In Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997), the Seventh Circuit held that a letter insisting that the collector receive a check within 30 days in one paragraph (a demand which would require the debtor to transmit the check in less than 30 days) followed by the §1692g notice in the next, and concluding with a demand for a "prompt response" to avoid "further collection activities" violated §1692g. The text of the letter was as follows:

Dear Carl P. Chauncey,

Please be advised that we have been requested by [Bridgestone/ Firestone] to assist them in the collection of the amounts due set forth above. Unless we receive a check or money order for the balance, in full, within thirty (30) days from receipt of this letter, a decision to pursue other avenues to collect the amount due will be made.

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of this debt, or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice that you dispute the debt or any portion of it, this office will obtain verification of the debt or obtain a copy of the judgment and mail you a copy of such judgment or verification. If you request this office in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor if different from the current creditor.

This is an attempt to collect on this debt. Any information obtained will be used for that purpose.

You may contact Ms. Mackenzie at (800) 793-3369 if you have any questions or if

you would like to discuss this matter further.

Please include the above JDR number on the outside of your remittance envelope to insure proper credit. We trust your prompt response will make any further collection activities unnecessary. In the event we do not hear from you within the next thirty (30) days, further collection activities will be pursued to the extent permitted by law.

The Court of Appeals agreed that "the thirty-day payment requirement set out in the [first paragraph of the] collection letter contradicts the mandatory validation notice disclosures allowing thirty days to dispute the debt." It explained:

The statement in the first paragraph of defendant's letter -- "Unless we receive a check or money order for the balance, in full, within thirty (30) days from receipt of this letter, a decision to pursue other avenues to collect the amount due will be made" -- contradicts the language in the letter explaining the plaintiff's validation rights under the FDCPA, which allows plaintiff 30 days in which to dispute the debt and request verification. We believe that the contradictions in the letter, as in Avila, would leave an unsophisticated consumer confused as to what his rights are and therefore violate the FDCPA.

Defendant argues that the letter contains no contradiction because plaintiff is given the same amount of time to pay as to contest the debt (i.e., "within thirty (30) days"). But the letter required that plaintiff's payment be received within the 30-day period, thus requiring plaintiff to mail the payment prior to the thirtieth day to comply. In contrast, subparagraphs (3) and (4) of §1692g(a) give the consumer thirty days after receipt of the notice to dispute the validity of a debt. It is clear that Mr. Chauncey had the full thirty days to send his notification to defendant. Nothing in Section 1692g requires, and we have found no other court decision which has required, that the debt collector must receive notice of the dispute within thirty days as defendant insists. . . .

In Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997), defendants' letter threatened legal action within the 30-day validation period by demanding that the debtor make payment within one week or other suitable arrangements. The letter also contained a paraphrase of § 1692g's language. Even though the letter did not misstate either parties' legal rights, the Seventh Circuit found that the letter was confusing and violated § 1692g because it contained the seemingly contradictory statements that the debtor had 30 days to verify his debt and that he could also be sued in one week.

The Bartlett court concluded, by way of an exemplary "safe harbor" letter, that if a debt collector threatens suit or demands action of the debtor within the 30-day validation period, it should also provide the debtor with a full explanation of the relationship between the creditor's right to sue and the debtor's right to verification, namely, that if the debtor disputes the debt and

requests verification all collection efforts must be halted until verification is provided. A very similar solution was endorsed by the Second Circuit in Savino v Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998).

Debt collectors using the "safe harbor" letter need to adhere to it strictly. The reference to suit within 30 days may not be used without the explanation that exercise of verification rights will halt the collection process. Freys v. Satter, Beyer & Spires, 1999 U.S. Dist. LEXIS 6912 (N.D.Ill., April 30, 1999). Also, the reference to 30 days should specify "after receipt."

In Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999), the Seventh Circuit held that two letters could be found to violate §1692g, if they in fact increased consumer confusion. Both letters contained a paraphrase of the statutory notice. The letter to Lenora Johnson added:

If you fail to make prompt payment we will have no alternative but to proceed with collection, which may include referring this account for legal action or reporting this delinquency to the credit bureau.

Should you wish to discuss this matter, contact our office and ask for extension 772.

The letter to Brendt Wollert added:

The above account has been placed with our firm for payment in full. Call our office immediately upon receipt of this letter. Our toll free number is 1-800-521-3236.

The Johnson court stated that survey or similar evidence may be necessary to establish that the quoted statements in fact increased consumer confusion as to their §1692g rights.

Any language suggesting that action within 30 days is necessary, may create a §1692g problem. Seplak v. IMBS, Inc., 1999 U.S. Dist. LEXIS 2106 (N.D.Ill. Feb. 23, 1999). Prior cases to the contrary may be invalid under Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997).

In Ozkaya v. Telecheck Services, 982 F. Supp. 578 (N.D. Ill. 1997), the district court dealt with a letter which stated:

Telecheck has purchased the check referenced in this notice. As a result, we have entered your name in our NATIONAL COMPUTER FILES. Until this is resolved, we may not approve your checks or the opening of a checking account at over 90,000 merchants and banks who use Telecheck nationally.

We have assigned your file to our Recovery Department where it will be given to a professional collection agent. Please be aware that we may take reasonable steps to contact you and secure payment of the balance in full.

In order for us to update your file quickly, send a cashier's check or money order for the Total Amount Due in the return envelope provided.

It is our intent to resolve this as quickly and as amicably as possible for all parties concerned. Any delay, or attempt to avoid this debt, may affect your ability to use checks.

The court held that the demand for "quick" payment coupled with the suggestion that the debtor's credit could be adversely affected resulted in a valid overshadowing claim:

The Bartlett court's generous definition of overshadowing and its willingness to direct judgment for the debtor, as well as the factual congruence between this case and Russell and Swanson, convince us to allow the claim to proceed. Telecheck's warning that "any delay" in payment "may affect your ability to use checks" could confuse the unsophisticated consumer because it fails to explain how this comports with her thirty-day right to contest the debt. See Bartlett, 128 F.3d at 500 (explaining that creditor's right to sue and debtor's right to dispute the debt are "not inconsistent, but by failing to explain how they fit together the letter confuses."). Ozkaya may well have wished to assert a defense for nonpayment -- that the car repairs were not made correctly -- but feared that she did not really have thirty days to dispute the debt if doing so would be seen as "a delay" or an "attempt to avoid the debt" punishable by a sudden inability to write checks. Compl. Ex. A. Telecheck compounded the confusion by urging Ozkaya to resolve the dispute "quickly" when, in fact, she had at least thirty days.

Just as in Russell and Swanson, which involved implied threats to a debtor's credit purchasing power, Ozkaya could "readily believe" that her ability to undertake a fundamental financial transaction -- writing checks -- would be severely affected if she did not pay the debt with haste. In its first communication to Ozkaya, Telecheck stated that it had already entered her name into its "national computer files." This language creates an even greater sense of urgency than the Swanson debt collector's statement about posting the debtor's account to its "master file" after ten days should the debtor fail to pay. Telecheck's letter also presents a stronger case for overshadowing than the communications in Russell or Swanson because they involved implied threats (posting the collections to the agency's file), not explicit threats to ruin the debtor's credit. Telecheck's language is far more direct; the letter told Ozkaya that she could be prevented from writing checks or opening a checking account "at over 90,000 merchants and banks who use Telecheck nationally . . . until this is resolved." An unsophisticated consumer could interpret this to mean that until she pays, she will not be able to write checks

-- anywhere -- because her name is already on some "bad check" list that has been distributed across the country. (982 F.Supp. at 583-4).

Another example of "overshadowing" is furnished by Miller v. Payco-General American Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991), where the debt collector's "screaming headlines, bright colors and huge lettering" utilizing language "IMMEDIATE FULL PAYMENT", "PHONE US TODAY" and "NOW", were held to have overshadowed the 30 day validation notice. Another letter disapproved by a court stated in type several times that of the required validation language "IF THIS ACCOUNT IS PAID WITHIN THE NEXT 10 DAYS IT WILL NOT BE RECORDED IN OUR MASTER FILE AS AN UNPAID COLLECTION ITEM. A GOOD CREDIT RATING -- IS YOUR MOST VALUABLE ASSET." Swanson v. Southern Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988).

In Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996) the court held:

A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights. It is not enough for a debt collection agency simply to include the proper debt validation notice in a mailing to a consumer -- Congress intended that such notice be clearly conveyed. See Swanson v. Southern Or. Credit Serv., Inc., 869 F. 2d 1222, 1225 (9th Cir. 1988) (per curiam). Here the initial February notice failed to convey the validation information effectively. We recognize there are many cunning ways to circumvent §1692g under cover of technical compliance, see Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 485 (4th Cir. 1991), but purported compliance with the form of the statute should not be given sanction at the expense of the substance of the Act. Since the language on the front of the notice overshadowed and contradicted the language on the back of the notice, causing the validation notice to be ineffective, the February notice violated § 1692g as a matter of law.

A collection letter from an attorney demanding payment within ten days upon the threat of suit was held to have contradicted the 30 day validation notice. Graziano v. Harrison, *supra*, 950 F.2d 107 (3d Cir. 1991) (threat to sue if payment was not received within ten days rendered the validation notice ineffective); Morgan v. Credit Adjustment Board, 999 F.Supp. 803 (E.D. Va. 1998); Cortright v. Thompson, 812 F.Supp. 772, 778 (N.D.Ill. 1992) (attorney demand letter stating that "in the event the balance is not paid in full or satisfactory payment arrangements made within ten days, it may be necessary to file at any time thereafter a lawsuit to recover the amount due if so requested by my client . . . Although the letter is not as threatening visually as some described in cases finding violations of §1692g(a), [citation], defendant's letter appears on law firm stationery and states that it may be necessary to file a lawsuit at any time after 10 days . . ."); Swanson v. Southern Oregon Credit Service, Inc., *supra*, 869 F.2d 1222, 1225 (9th Cir. 1988) (§1692g notice accompanied by demand that account be paid within 10 days to avoid adverse credit report is not effectively conveyed, and demand violates statute; such a communication would "lead the least sophisticated debtor, and quite probably even the average debtor, only to one conclusion: he must ignore the right to take 30 days to verify his debt and act

immediately or he will be remembered as a deadbeat in the 'master file' of his local collection agency and will, accordingly, lose his 'most valuable asset,' his good credit rating"); United States v. National Financial Services, Inc., 820 F.Supp. 228 (D.Md. 1993), aff'd, 98 F.3d 131 (4th Cir. 1996) (letter containing §1692g notice and also stating that matter would be referred to an attorney in ten days violated §1692g because the ten day demand "contradict[s] the validation notice's declaration that the debtor has thirty days to dispute the debt"); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995); Gary v. Kason Credit Corp., No. 3:95CV00054, Conn. Law Tribune, Dec. 9, 1996 (D.Conn. Nov. 1, 1996); Creighton v. Emporia Credit Service, Inc., 1997 U.S. Dist. LEXIS 8556 (E.D. Va., May 20, 1997) ("Your unpaid bill must be paid in full to this office upon receipt of this notice"; court described case as "borderline"); later opinion, 1997 U.S. Dist. LEXIS 16356 (E.D.Va. Sept., 25, 1997), later opinion, 981 F.Supp. 411 (E.D.Va., 1991), later opinion 1998 U.S. Dist. LEXIS 6589 (E.D. Va., April 8, 1998).

Similarly, demands for an "immediate" response or "immediate payment" have been held to overshadow and contradict the validation notice. Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F. Supp. 405, 407-8 (N.D.N.Y. 1995) ("Please immediately send your remittance, in the above amount, payable to [the defendant], or communicate your failure to do so."); Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D.Pa. 1996) ("immediate payment").

Confusing statements such as "if the above does not apply to you, we shall expect payment or arrangement for payment within ten (10) days from the date of this letter," also violate the statute. Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997).

Sending a subsequent letter demanding action prior to the expiration of the validation period violates §1692g. It is not proper to send a second letter demanding payment within the validation period, without explaining that the period has not ended. Trull v. GC Servs., LP, 961 F.Supp. 1199 (N.D.Ill. 1997); Flowers v. Accelerated Bureau of Collections, 96 C 4003, 1997 WL 224987, 1997 U.S. Dist. LEXIS 6070 (N.D.Ill. April 30, 1997); Badon v. Transworld Systems, Inc., No. 97-18, 1997 WL 149986, 1997 U.S. Dist. LEXIS 3596, *12-13 (E.D. La. March 26, 1997) ("barrage of letters and their language could lead the least sophisticated consumer to disregard his validation rights or believe that they did not exist" where one subsequent letter "conveys a sense of urgency and implies that the debt is valid and not contestable" and a second "states that plaintiff has two options in settling a legitimate debt -- timely payment or through a collection effort"); Robinson v. Transworld Systems, Inc., 876 F.Supp. 385 (N.D.N.Y. 1995)(similar); Rabideau v. Management Adjustment Bureau, 805 F.Supp. 1086, 1094 (W.D.N.Y. 1992) (initial notice followed within validation period by second letter demanding payment within 5 days); Booth v. Collection Experts, Inc., 969 F.Supp. 1161, 1166 (E.D.Wis. 1997) ("Language in communications sent after the validation notice may also violate §1692g (a) by contradicting or overshadowing the prior notice"); Chapman v. Ontra, Inc., 96 C 0019, 1997 WL 321681, 1997 U.S. Dist. LEXIS 8331, *7 (N.D.Ill 1997) ("language in letters sent during the validation period must not overshadow or contradict the [§1692g] notice"); Gaetano v. Payco of Wisconsin, Inc., 774 F.Supp. 1404, 1411 (D.Conn. 1990) (initial notice followed by second communication eight days later demanding payment within 72 hours).

In a questionable decision, Ninth Circuit held that in order to give rise to a valid overshadowing claim, the action or response which the collector must demand "immediately" is payment. Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997).

However, the Seventh Circuit held to the contrary in Johnson v. Revenue Mgmt. Corp., supra, 169 F.3d 1057 (7th Cir. 1999).

Even where a demand for immediate payment is required, it can be implied as well as express. A letter may overshadow if the overall effect is to convey that message. In Jenkins v. Union Corp., 999 F.Supp. 1120 (N.D. Ill. 1998), the court considered a letter which stated:

URGENT - THIS ACCOUNT HAS BEEN ASSIGNED TO OUR AGENCY FOR IMMEDIATE COLLECTION.

PLEASE BE ADVISED THAT WE HAVE BEEN AUTHORIZED TO PURSUE COLLECTION AND ARE COMMITTED TO MAKE WHATEVER EFFORTS ARE NECESSARY AND PROPER TO EFFECT COLLECTION.

STRONGLY RECOMMEND YOU CONTACT OUR CLIENT TO MAKE PAYMENT ARRANGEMENT.

The court found this to violate §1692g, holding:

Terrafino likewise challenges the legality of his initial dunning letter, dated August 22, 1995. although this letter does not use the words "immediate payment," we conclude that, viewed as a whole, the letter creates an apparent and unexplained contradiction between message and the thirty-day validation rights discussed at the bottom of the letter.

The letter begins with the declaration "URGENT," this is followed by a statement informing Terrafino that his account has been "assigned to our agency for immediate collection." Contrary to Transworld's assertions, the unsophisticated consumer is likely to understand "immediate collection" as an effort to extract immediate payment from him, not as a reference to the collector's duties. While Bartlett, makes clear that a debt collector need not suspend collection efforts during the validation period, these efforts run afoul of the FDCPA if they create an unexplained contradiction that confuses the debtor. 128 F.3d at 500. The confusion in this letter is compounded by its last sentence, which "[s]trongly recommend[s] you contact our client to make payment arrangement." Read together, the reference to "immediate collection" and the "strong" recommendation to contact the creditor to arrange for payment are the substantive equivalent of the request for immediate payment in Jenkins' first letter.

A collection letter that does not expressly request immediate payment can also

overshadow the validation notice by creating a confusing impression of urgency, when, in reality, the consumer has thirty days in which to decide on his course of action. See Ozkaya v. Telecheck Servs., Inc., 982 F.Supp. 578, 583-84 (N.D. Ill. 1997) (plaintiff stated valid overshadowing claim where offending letter was confusing because it "urg[ed] [plaintiff] to resolve the dispute 'quickly' when, in fact, she had at least thirty days.") Terrafino's letter begins by proclaiming that it is "URGENT"; the sense of urgency is further communicated by the "immediate collection" language and in the letter's express request for action -- a "strong" recommendation in the final paragraph that Terrafino contact the creditor to make payment arrangement. The middle paragraph sounds pressing and ominous as well: "Please be advised that we have been authorized to pursue collection and are committed to make whatever efforts are necessary and proper to effect collection." We find that this language creates an apparent contradiction with the validation notice by creating a false sense of urgency.

Accordingly, we grant Terrafino summary judgment on his overshadowing claim premised on the language in his first letter, and deny defendants' cross motion for summary judgment on this claim. We emphasize, however, that our decision to grant Terrafino summary judgment on this ground is based on the letter read as a whole, not on any one phrase scrutinized in isolation.

Requests that the consumer telephone the debt collector induce the consumer to waive his right to verification by failing to make the request in writing, as required. Miller v. Payco-General American Credits, Inc., *supra*, 943 F.2d 482 (4th Cir. 1991); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724, 726 (D. Conn. 1990); Flowers v. Accelerated Bureau of Collections, 96 C 4003, 1997 U.S. Dist. LEXIS 3354, 1997 WL 136313 (N.D.Ill. Mar 19, 1997). *Contra*, Terran v. Kaplan, *supra*. "A consumer calling the defendant would not be exercising her validation rights and would not be entitled to the statutory cessation of debt collection activities." Gaetano v. Payco of Wisconsin, Inc., 774 F. Supp. 1404, 1412 (D. Conn. 1990). On the other hand, the inclusion of a settlement offer that expired shortly before the end of the validation period has been held not to violate §1692g. Harrison v. NBD, Inc., *supra*, 968 F. Supp. 837 (E.D.N.Y. 1997).

The notice should specify that the debt has 30 days after receipt of the letter to dispute the debt. Vera v. Trans-Continental Credit & Collection Corp., 98 Civ. 1866, 1999 WL 292623, 1999 U.S. Dist. LEXIS 3464 (S.D.N.Y. May 10, 1999).

Eviction notices that are sent out by a "debt collector" and demand money in less than 30 days violates the FDCPA. Romea v. Heiberger & Associates, 163 F.3d 111 (2d Cir. 1998). However, if the landlord or servicing agent sends the notice it is not a "debt collector" subject to the FDCPA.

Recent cases hold that any contradiction of the §1692g warnings is a violation, and that it is not necessary to establish a violation that the contradiction be "threatening" or visually

overshadow the required notice. Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996); Adams v. Law Offices of Stuckert & Yates, 926 F.Supp. 521 (E.D.Pa. 1996); Flowers v. Accelerated Bureau of Collections, 96 C 4003, 1997 U.S. Dist. LEXIS 3354, 1997 WL 136313 (N.D.Ill. Mar 19, 1997). In other words, anything that confuses unsophisticated consumers as to their § 1692g rights, is sufficient to violate §1692g.

D. OTHER §1692g VIOLATIONS

Where the validation notice is placed on the back of the correspondence, without a legible and reasonably prominent reference on the front, §1692g is violated. Riveria v. MAB Collections, Inc., *supra*, 682 F. Supp. 174, 178 (W.D.N.Y. 1988); Ost v. Collection Bureau, Inc., 493 F.Supp. 701 (D.N.D. 1980); Phillips v. Amana Collection Servs., 89-CV-1152, 1992 WL 227839, 1992 U.S. Dist. LEXIS 13558 (W.D.N.Y. Aug. 25, 1992); *see also*, Rabideau v. Management Adjustment Bureau, 805 F.Supp. 1086 (W.D.N.Y. 1992); Colmon v. Payco-General American Credits, 774 F. Supp. 691 (D.Conn. 1990). *Contra*: Blackwell v. Professional Business Services, Inc., 526 F.Supp. 535 (N.D.Ga. 1981). However, the enclosure of a separate 8-1/2 x 11" validation notice in the same envelope has been found to be acceptable. Cavallaro v. Law Office of Shapiro & Kreisman, 933 F.Supp. 1148 (E.D.N.Y. 1996).

The FTC staff has stated that a debt collector may not charge for furnishing validation information. One decision held that such a charge did not violate §1692g per se, but found it unlawful under §1692f on the ground that it was not authorized by contract or law. Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564 (M.D.Fla. 1996); *see also* Harvey v. United Adjusters, 509 F.Supp. 1218, 1221 (D.Ore. 1981) (defendant's choice of validation notice language cannot impose additional burdens on the debtor).

A debt collector violates §1692g by failing to provide its address so that the debtor can exercise his right to validate the debt. Failure to include the collector's address violates §1692g even if the complete text of the §1692g notice is provided and nothing requires action in less than 30 days. Cortez v. Trans Union Corp., 94 C 7705, 1997 WL 7568, 1997 U.S. Dist. LEXIS 31 (N.D. Ill. Jan. 3, 1997); Wegmans Food Markets, Inc. v. Scrimpsheer, 17 B.R. 999, 1014 (Bankr. N.D.N.Y. 1982) ("The absence of a return address on a debt collector's notices effectively nullifies the consumer's rights set out in 15 U.S.C 1692g, which arise from a consumer's written notification to the debt collector"; emphasis in original)

Directing the consumer to contact the creditor rather than the debt collector if he disputes the debt violates §1692g. Blair v. Collectech Systems, Inc., 97 C 8630, 1998 WL 214705, 1998 U.S. Dist. LEXIS 6173 (N.D. Ill. April 24, 1998); Macarz v. Transworld Systems, 26 F.Supp. 2d 368 (D.Conn. 1998). Contacting the creditor does not preserve the consumer's rights.

V. VIOLATIONS: DEBT COLLECTION WARNING: 15 U.S.C. §1692e(11)

Since December 30, 1996, 15 U.S.C. §1692e(11) has prohibited:

The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

Section 1692e(11) formerly required that the debt collector "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. §1692e(11).

Prior to the enactment of the FDCPA, debt collectors would send people mail purporting to seek employment references, inviting the recipient to collect a prize, or otherwise disguising its true purpose. One enterprising pair of debt collectors operated under such names as "National Research Company," "National Marketing Service," "United States Credit Control Bureau," "Claims Office," "Bureau of Verification," "Bureau of Reclassification," "Reverification Office" and "Disbursements Office". They would disseminate -- at the rate of 700,000 every six months -- forms with titles such as "Current Employment Records" and "Change of Address" and requesting address, employment, banking, and similar information. They also sent out "Claimants Information Questionnaires" asking the recipient to verify that he or she was the party entitled to receive unclaimed money. Mohr v. FTC, 272 F.2d 401 (9th Cir. 1959) (affirming first cease and desist order); People v. National Research Co., 201 Cal.App.2d 765, 20 Cal.Rptr. 516 (1962) (injunctive action to restrain practices); In re Floersheim, 316 F.2d 423 (9th Cir. 1963) (contempt proceeding based on first cease and desist order); Floersheim v. FTC, 411 F.2d 874 (9th Cir. 1969) (affirming another cease and desist order); Floersheim v. Weinburger, 346 F.Supp. 950 (D.D.C. 1972), aff'd, Floersheim v. Engman, 161 U.S.App. D.C. 30, 494 F.2d 949 (1973) (attempted declaratory action by collectors seeking to determine whether they were in compliance with the second cease and desist order); United States v. Floersheim, . CV 74-484-RF, 1980 WL 1852, 1980 U.S.Dist. LEXIS 11788, 1980-2 CCH Trade Cas. ¶63,368 (C.D.Cal. 1980) (civil penalty action for noncompliance with second cease and desist order).

Other debt collectors used notices representing that the sender had correspondence or packages for delivery to a debtor; these would be sent to references used by a debtor. Dejay Stores, Inc. v. FTC, 200 F.2d 865 (2d Cir. 1952); Rothschild v. FTC, 200 F.2d 39 (7th Cir. 1952).

In In re London Credit & Discount Corp., 78 FTC 541 (1971) (consent order), debt collectors sent letters purporting to be connected with auditing procedures. The collectors were enjoined from "Representing, directly or by implication, that any letter, demand, inquiry or other communication originated by respondents was originated by an independent auditing or any other person, firm or corporation."

Another such consent order was entered in In re Marjorie P. Ingram, 67 FTC 1065 (1965), where the collectors were enjoined from falsely "[r]epresenting, directly or by implication, that the respondents are engaged in the business of auditing the accounts and records of others." (67 FTC at 1072) See also, Opinion of the Attorney General of the State of Arizona, 77-174, 1977 Ariz. AG LEXIS 66 (Sept. 5, 1977), finding it improper for a collection agency to send out documents entitled "Audit Verification."

Yet other collectors called themselves "State Credit Control Board", Slough v. FTC, 396 F.2d 870 (5th Cir. 1968), "Business Research" and "Affiliated Credit Exchange," Bernstein v. FTC, 200 F.2d 404 (9th Cir. 1952), "Manpower Classification Bureau" and "American Deposit System," Rothschild v. FTC, supra, 200 F.2d 39 (7th Cir. 1952), "General Forwarding System," Silverman v. FTC, 145 F.2d 751 (9th Cir. 1944), "National Retail Board of Trade" and "National Liquidators, Inc.", In re National Retail Board of Trade, 57 FTC 666 (1960), "Retail Board of Trade," In re Rice, 53 FTC 5 (1956), "Allied Information Service" and "National Deposit System," In re Wacksman, 56 FTC 1615 (1960), "Cavalier Reserve Fund" and "Liberty Reserve Fund," In re Pitler, 56 FTC 803 (1960) and "National Clearance Bureau," National Clearance Bureau v. FTC, 255 F.2d 102 (3d Cir. 1958).

Another collection agency called itself the "United States Association of Credit Bureaus." The use of this name was held to violate §5 of the FTC Act on the ground that it was not an "association," or a "credit bureau," nor connected with the "United States." In re United States Ass'n of Credit Bureaus, Inc., 58 FTC 1044 (1961), aff'd United States Ass'n of Credit Bureaus, Inc. v. FTC, 299 F.2d 220 (7th Cir. 1962).

VI. VIOLATIONS: THREATS OF UNINTENDED, UNAUTHORIZED OR ILLEGAL ACTION

The FDCPA prohibits "the threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. §1692e(5). Examples of violations include:

1. Threatening criminal prosecution or liability for multiple damages or civil penalties, when collecting bad checks. If the collector states or implies that it regularly prosecutes criminally when it does not, its communications violate §1692e(5). Alger v. Ganick, O'Brien & Sarin, 35 F.Supp. 2d 148 (D.Mass. 1999); Davis v. Commercial Check Control, Inc., 98 C 631, 1999 WL 89556, 1999 U.S. Dist. LEXIS 1682 (N.D.Ill. Feb. 16, 1999).
2. Section 1692e(5) is also violated if the collector misstates the consumer's liability for multiple damages or civil penalties, such as by implying that liability for multiple damages is absolute when the consumer has a right to tender the amount of the check prior to trial and avoid liability for multiple damages, or where a statutory notice is a precondition to liability and no such notice has been given. Stadler v. Devito, 931 P.2d 573 (Colo. App. 1996) (where bad check statute required notice by certified mail before

debtor was liable for enhanced damages, collection agency that filed action without giving proper notice violated state analog of FDCPA); but see Davis v. Commercial Check Control, Inc., 98 C 631, 1999 WL 89556, 1999 U.S. Dist. LEXIS 1682 (N.D.Ill. Feb. 16, 1999).

3. The threat to file suit or take other collection actions within a short time when the creditor has not authorized the action or the debt collector does not take the action within the period stated. Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993); Graziano v. Harrison, *supra*, 950 F.2d 107 (3d Cir. 1991); Pipiles v. Credit Bureau of Lockport, Inc., *supra*, 886 F.2d 22 (2d Cir. 1989) (48 hour notice); Oglesby v. Rotche, 93 C 4183, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D.Ill. 1993).
4. Threats of suit by an attorney not licensed within the jurisdiction or who does not in fact file suits in the jurisdiction. Rosa v. Gaynor, 784 F.Supp. 1, 5 (D.Conn. 1989). Courts have divided with respect to whether any threat to take collection action by a debt collector that is required to be, but is not, licensed in the jurisdiction, violates the FDCPA. Courts finding a violation include United States v. National Financial Services, Inc., 820 F.Supp. 228, 235-36 (D. Md. 1993), *aff'd*, 98 F.3d 131 (4th Cir. 1996); Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D.La. 1995); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995); Kuhn v. Account Control Technology, Inc., 865 F. Supp. 1443, 1451-52 (D.Nev. 1994); In re Belile, 209 B.R. 658 (Bankr. E.D. Pa. 1997); Rosa v. Gaynor, 784 F.Supp. 1, 4-5 (D. Conn. 1989); and Gaetano v. Payco of Wisconsin, Inc., 774 F. Supp. 1404, 1413-14 (D.Conn. 1990). Contra, Wade v. Regional Credit Ass'n, 87 F.3d 1098 (9th Cir. 1996).

Other cases supporting the proposition that a violation of state law is also a violation of the FDCPA include Veach v Sheeks, 316 F.3d 690, 693 (7th Cir. 2003); Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 448 (8th Cir. 2001) ("The FDCPA prohibits, inter alia, the use of debt collection practices that violate state law"); see §§1692f(1) ("permitted by law" not limited to state law); §§1692e(5) ("action that cannot legally be taken") not limited to state law; §§1692e(9) (misrepresentation of document's federal or state source); Romine v. Diversified Collection Services, Inc., 155 F.3d 1142, 1149 (9th Cir. 1998) (federal tariff applied to determine FDCPA violation); Talbott v. GC Services Limited Partnership, 53 F. Supp. 2d 846 (W. D. Va. 1999) (same); Adams v. First Federal Credit Control, Inc., 1992 U.S. Dist. LEXIS 8306, 1992 WL 131121 (N.D. Ohio May 21, 1992) (using the name "First Federal Credit Control" plus a letterhead that resembled the seal of the United States and a bald eagle violated the FDCPA, citing 18 U.S.C. §§ 712);

5. Threatening to take or taking action which constitutes the unauthorized

practice of law, such as when a collection agency files suit in its own name to collect a debt when not permitted to do so under state law. Poirier v. Alco Collections, Inc., 107 F.3d 347 (5th Cir. 1997); Marchant v. U.S. Collections, Inc., 12 F.Supp. 2d 1001 (D.Ariz. 1998).

6. Threats to file suit in a forum where suit cannot legally be filed under 15 U.S.C. §1692i. Wiener v. Bloomfield, 901 F. Supp. 771 (S.D.N.Y. 1995).
7. Threats to enforce creditor remedies which cannot be enforced at the time stated or to the extent stated. For example, a debt collector may threaten to obtain a wage garnishment or execution without disclosing that this can only be done after notice, hearing and judgment, or may threaten to garnish "all" of a consumer's wages when the law clearly imposes limitations on the amount which may be garnished. Oglesby v. Rotche, 93 C 4183, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D.Ill. 1993) (threat to garnish all wages and attach all property); Woolfolk v. Van Ru Credit Corp., *supra*, 783 F.Supp. 724 (D. Conn. 1990) (oppressive list of post-judgment remedies); Seabrook v. Onondaga Bureau of Medical Economics, Inc., 705 F.Supp. 81 (N.D.N.Y. 1989) (threat to garnish wages in excess of amounts permitted under federal law); Cacace v. Lucas, 775 F.Supp. 502 (D.Conn. 1990) (letter stating that litigation could result in seizure of real estate and bank account deceptive; mere filing of litigation could not have any of stated effects); Young v. Dey, 93 CV 690 (D.Conn. 1994) (reference to attachment without mention of exemptions); Holt v. Wexler, 98 C 7285, 1999 U.S. Dist. LEXIS 8785 (N.D. Ill. 1999) ("Additional legal proceedings will be implemented to enforce collection; credit bureaus have recorded the fact in your credit report that you are a judgment debtor and skip tracers may contact your references, your former employers, your relatives and your neighbors in an effort to gain information about your assets."). *But see* Kleczy v. First Federal Credit Control, Inc., 21 Ohio App.3d 56, 486 N.E.2d 204 (1984) ("avoid further action" was not sufficiently threatening to violate §1692(e)(5)).
8. A debt collector which also functions as a credit reporting agency cannot threaten to disseminate credit information in a manner prohibited by the Fair Credit Reporting Act or the FDCPA (15 U.S.C. §1692c(b)) unless the debtor pays the debt.
9. Threats to contact employers or take other action prohibited by the FDCPA or other law, Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1226-27 (9th Cir. 1988). or which is not in fact taken. Beasley v. Collectors Training Institute of Ill. Inc., 98 C 8113, 1999 WL 675196, 1999 U.S. Dist. LEXIS 13275 (N.D.Ill. August 19, 1999).

Threats may be implicit as well as express. Statements that a debt will be subject to "legal review" or "will be transferred to an attorney" are implicit threats of suit. Drennan v. Van Ru Credit Corp., 950 F.Supp. 858 (N.D.Ill. 1996); United States v. National Financial Services, Inc., 98 F.3d 131 (4th Cir. 1996). A statement by an attorney that "all necessary actions" will be taken is a threat of suit. Strombach v. Knepper & Moga, 1998 U.S. Dist. LEXIS 15533 (N.D.Ill., Sept. 23, 1998). "Because to most consumers, the relevant distinction between a collection agency and an attorney is the ability to sue, . . . the debtor would understand the disparate treatment to be the institution of suit." United States v. National Financial Services, Inc., *supra*. A statement that action "could be" or "can be" taken is a "threat." Vaughn v. CSC Credit Services, 93 C 4151, 1994 WL 449247, 1994 U.S. Dist. LEXIS 2172, *24 (N.D. Ill. March 1, 1994) (Magistrate Judge's opinion), adopted, 1995 WL 51402, 1995 U.S. Dist. LEXIS 1358 (N.D. Ill. Feb. 3, 1995). A statement that the debtor would be "susceptible to immediate criminal prosecution" if a check was not made good in 10 days conveyed the impression that "prosecution would follow non-payment". Boyce v. Attorney's Dispatch Service, 1999 U.S. Dist. LEXIS 1124 (S.D. Ohio, Feb. 2, 1999).

A statement that suit would be "recommended" is misleading where the collector knows suit is never filed because of the small size of the debt. Boyce v. Attorney's Dispatch Service, 1999 U.S. Dist. LEXIS 1124 (S.D. Ohio, Feb. 2, 1999).

A collection letter that stated that the creditor had authorized whatever legal means were necessary to collect the debt and that referred to post-judgment attachment and garnishment implied that legal proceedings were imminent when they were not and violated 15 U.S.C. §1692e(5). Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993).

VII. VIOLATIONS: UNAUTHORIZED CHARGES

The FDCPA prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law" and "[t]he false representation of . . . (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt". 15 U.S.C. §§1692f(1), 1692e(2).

The FTC Staff Commentary provides that "A debt collector may attempt to collect a fee or charge in addition to the debt if either (a) the charge is expressly provided for in the contract creating the debt and the charge is not prohibited by state law, or (b) the contract is silent but the charge is otherwise expressly permitted by state law. Conversely, a debt collector may not collect an additional amount if either (a) state law expressly prohibits collection of the amount, or (b) the contract does not provide for collection of the amount and state law is silent." Federal Trade Commission Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50,097, at 50,108 (Dec. 13, 1988). This is the rule followed by the courts. West v. Costen, 558 F.Supp. 564 (W.D.Va. 1983); Pollice v. National Tax Funding, L.P., 225 F.3d 379, 408 (3rd Cir. 2000) ("[D]efendants presumably have violated section 1692f(1) regardless of the

presence of any agreement authorizing the rates of interest and penalties, because state law specifically prohibits charging interest in excess of ten percent on the assigned claims”); Johnson v. Riddle, 305 F.3d 1107, 1117-18 (10th Cir. 2002); In re Scrimpsheer, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (unauthorized "service charge" on NSF checks). "Under this provision, it is unconscionable for a debt collector to collect any amount in excess of the principal amount of a loan, including collection charges, unless these charges are authorized expressly by the terms of the agreement creating or evidencing the debt or unless the charges are authorized explicitly by applicable state law." Patzka v. Viterbo College, 917 F.Supp. 654, 658 (W.D. Wisc. 1996). Substantive state law is to be determined in the usual way under Erie. Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002).

Typical violations include (1) collection of usurious interest, Pollice, supra, Nance v. Ulferts, 282 F.Supp.2d 912 (N.D.Ind. 2003); Patzka, supra; Martinez v. Albuquerque Collection Services, Inc., 867 F.Supp. 1495 (D.N.M. 1994); (2) the imposition of service charges for bad checks where not permitted by agreement and applicable state law, and the imposition of attorney's fees where no contract or statute authorizes them. Strange v. Wexler, 796 F.Supp. 1117 (N.D.Ill. 1992).

Bad debt buyers frequently commit violations of this nature, because they acquire debts with little or no documentation and charge interest rates that can only be charged by supervised lenders (e.g., banks, consumer small loan licensees) without possessing such licenses.

Percentage attorney's fees or collection fees are often not permitted under state law, including the law of Illinois (except for credit union debts and federally-guaranteed student loans) and Indiana (except for federally-guaranteed student loans). Kojetin v. C.U. Recovery, Inc., 1999 U.S. Dist. LEXIS 1745 (D. Minn.Feb. 17, 1999). But see Talbott v. GC Services LP., 1999 U.S. Dist. LEXIS 8254 (W.D.Va 1999). Rather, the debtor is liable for attorney's fees on collection agency fees computed on a "lodestar" basis.

One court held that a statement that the debtor might "also be responsible for interest and any other fees to which we are legally entitled, along with the original balance," did not violate the FDCPA because of the qualification "to which we are legally entitled." Hodrosky v. Polo Club Apartments, 1997 Ohio App. LEXIS 1330 (8th Dist., April 3, 1997). This decision would appear to be correct only insofar as it was legally possible to claim interest and costs.

Filing suit on an allegedly forged instrument is not a violation. Transamerica Finan. Services, Inc. v. Sykes, 171 F.3d 553 (7th Cir. 1999).

One frequent area of litigation is charges on bad checks. In this area, courts have held:

1. "Service charges" could not be added to the amounts of dishonored checks on the basis of posted signs unless there was evidence that the check writer actually saw the sign, or that the charges otherwise actually formed part of

the contract entered into with the consumer. Newman v. Checkrite of California, Inc., 912 F. Supp. 1354 (E.D.Cal. 1995).

2. For such charges to be valid as incidental damages under the Uniform Commercial Code, debt collectors must establish that "the amount of their service charges is a commercially reasonable incidental damage to the merchant." A debt collector cannot do this "by referring to its own charges to the merchant as evidence of reasonable or actual cost." Newman v. Checkrite of California, Inc., 912 F. Supp. 1354 (E.D.Cal. 1995); Ballard v. Equifax Services, Inc., 27 F.Supp. 2d 1201 (E.D.Cal. 1998), class certification granted, claim dismissed, Ballard v. Equifax Check Servs., 186 F.R.D. 589 (E.D. Cal. 1999). The Second Circuit has approved charges in the \$20 range on this theory. Tuttle v. Equifax Check Services, Inc., 190 F.3d 9 (2d Cir. 1999).
3. A debt collector violated the FDCPA by describing demands for additional fees as "legal notice fees" or "legal consideration for covenant not to sue," as such names imply that they are an authorized legal expense or an obligatory payment to avoid suit. Newman v. Checkrite of California, Inc., 912 F. Supp. 1354 (E.D.Cal. 1995); Ditty v. Check Rite, Ltd., 973 F.Supp. 1320 (D.Utah 1997), class certification granted, in part, class certification denied, in part, 182 F.R.D. 639 (D. Utah 1998), mot. granted, 1998 WL 663357, 1998 U.S. Dist. LEXIS 12,940 (D. Utah Aug. 13, 1998).
4. Where state law requires a formal demand by certified mail before statutory damages are available, it is improper to represent that the check writer is potentially liable for those damages when the demand requirement is neither complied with nor disclosed. Newman v. Checkrite of California, Inc., 912 F. Supp. 1354 (E.D.Cal. 1995); But see Davis v. Commercial Check Control, Inc., 98 C 631, 1999 WL 89556, 1999 U.S. Dist. LEXIS 1682 (N.D.Ill. Feb. 16, 1999).

Some states, including Illinois, authorize modest charges of this nature under specified circumstances, generally in the \$20-30 range.

VIII. VIOLATIONS: OBFUSCATING ADDITION OF CHARGES

In Fields v. Wilber Law Firm, P.C., 383 F.3d 562 (7th Cir. 2004), a \$250 attorney fee was added to a \$122 vet bill. Defendant's dunning letter described the combined total of \$388 as an "account balance," not disclosing that most of it was attorney's fees and interest. The court found the letter misleading: "Even if attorneys' fees are authorized by contract, as in this case, and even if the fees are reasonable, debt collectors must still clearly and fairly communicate

information about the amount of the debt to debtors. This includes how the total amount due was determined if the demand for payment includes add-on expenses like attorneys' fees or collection costs." 383 F.3d at 566.

IX. VIOLATIONS: INABILITY TO PROVE WHAT IS DUE

In In re Maxwell, 281 B.R. 101 (Bankr. D. Mass. 2002), Fairbanks Capital Corporation obtained a mortgage loan that was allegedly in default. It did not have the note, an account history, or other information from which the amount due could be accurately computed. It demanded more money than was due. The court held that it violated 1692f and could not qualify for a good faith defense.

X. VIOLATIONS: FALSE REPRESENTATION THAT COMMUNICATION IS FROM AN ATTORNEY

Another popular recent debt collection technique is to have large numbers of collection letters, with implicit or explicit threats of suit, sent under the name of an attorney. The courts have recognized that "A debt collection letter on an attorney's letterhead conveys authority and credibility." Crossley v. Lieberman, 868 F.2d 566, 570 (3d Cir. 1989). The clear implication of any attorney letter is a threat of suit.

Unless the attorney has in fact reviewed the debtor's file and made a professional judgment that whatever action is threatened is appropriate, and the threatened action has been authorized by the creditor, the use of such letters is a violation of §1692e(3), which prohibits "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney." Clomon v. Jackson, 988 F.2d 1314, 1321 (2d Cir. 1993); Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002); United States v. National Financial Services, Inc., 98 F.3d 131 (4th Cir. 1996); Taylor v. Perrin, Landry, DeLaunay & Durand, 103 F.3d 1232 (5th Cir. 1997); Bitah v. Global Collection Servs., 968 F.Supp. 618 (D.N.M. 1997); Masuda v. Thomas Richards & Co., 759 F.Supp. 1456, 1461-2 (C.D.Cal. 1991) ("the letter falsely suggests to the least sophisticated debtor that an attorney has been retained to collect his or her particular debt. Thus, the letter implies to the recipient that TRC considers the debt to be more serious than TRC, in fact, considers it to be. . . . The representation that independent outside counsel has been hired may unjustifiably frighten the unsophisticated debtor into paying a debt that he or she does not owe. The FDCPA must be construed to proscribe this means of collection"); United States v. Central Adjustment Bureau, Inc., 667 F.Supp. 370, 380-81 (N.D.Tex. 1986) ("The attorney must have sufficient information to satisfy himself that it is proper to send the dunning letter, i.e., he must investigate the merits of the claim before making a demand for payment. . . . the attorney must have the file for review to determine the merits of the claim, as well as the limits of his authority"); Federal Trade Commission, Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50,097, at 50,105 (1988) ("a debt collector may not send a computer-generated letter deceptively using an attorney's name"). "[A]n attorney sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply

with the strictures of FDCPA. This may include reviewing the file of individual debtors to determine if and when a letter should be sent or approving the sending of letters based on the recommendations of others. [citation] Given these requirements, . . . there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by section 1692e." Avila, 84 F.3d at 228. The court explained:

An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking.

A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which the letter was sent. That's the essence of the connotation that accompanies the title of "attorney." A debt collection letter on an attorney's letterhead conveys authority. Consumers are inclined to more quickly react to an attorney's threat than to one coming from a debt collection agency. It is reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency. The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action. And the letter also implies that the attorney has some personal involvement in the decision to send the letter. Thus, if a debt collector (attorney or otherwise) wants to take advantage of the special connotation of the word "attorney" in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor's file. Any other result would sanction the wholesale licensing of an attorney's name for commercial purposes, in derogation of professional standards:

[A] lawyer has been given certain privileges by the state. Because of these privileges, letters . . . purporting to be written by attorneys have a greater weight than those written by laymen. But such privileges are strictly personal, granted only to those who are found through personal examination to measure up to the required standards. Public policy therefore requires that whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of approval to one who has not been given the right to exercise the functions of a lawyer.

American Bar Association, Formal Opinion 68 (1932). (84 F.3d at 229)

A number of collection lawyers have recently sent out letters on attorney

letterhead which purport to state that the sender has not reviewed the debtor's file. This would not appear to eliminate the deception, as it is possible the consumer will not notice the disclaimers. Furthermore, the mere sending of an attorney letter is a representation that the lawyer is acting as a lawyer:

The committee believes that before a lawyers letter goes to a debtor the file must have been turned over to the lawyer for collection. The lawyer must determine what rights the parties have and whether applicable statutory or other legal requirements have been met. The lawyer must have authority as well as responsibility to determine the legal steps to be taken and to negotiate in behalf of the client. None of these factors can exist if all the lawyer does is lend the lawyer's name and letterhead to the client's use. (Iowa ethics opinion 91-24, Nov. 14, 1991.)

Similarly, Texas Ethics Opinion 484 states:

When an attorney signs a debtor letter or authorizes someone under his or her direct supervision to sign such a letter, such action manifests that the attorney has exercised professional judgement that the particular letter is appropriate for the particular debtor and for a debtor's particular account. The rules require that an attorney should review the debtor's file and determine that the letter to be sent is appropriate for this particular debtor. A lawyer must exercise care and independent judgement to make sure that each debtor's letter is accurate and appropriate as to the account of the debtor.

In trademark law, it is not permissible to use an established trademark coupled with a disclosure that the owner has not authorized the defendant's product. Boston Professional Hockey Ass'n v. Dallas Corp. & Emblem Mfg., Inc., 510 F.2d 1004, 1013 (5th Cir. 1975). Similarly, FTC Act § 5 cases generally find disclaimers inadequate, at least where they go to the central message conveyed. In re Cliffdale Associates, 103 FTC 110 (1984). If an attorney has not acted as such with respect to a debt, the use of an attorney letterhead serves no legitimate purpose other than to deceive those who do not notice or grasp the disclaimer.

XI. VIOLATIONS: CONTACTS WITH THIRD PARTIES

Section 1692c provides debtors the "extremely important protection" of prohibiting debt collectors from contacting third parties, including a debtor's employer, relatives (other than the debtor's spouse), friends or neighbors, for *any purpose* other than obtaining "location information." See also S. Rep. No. 382, 95th Cong. 2d Sess. 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1698-99. There are a few highly regulated exceptions where the debtor consents, a court has granted permission or to effect a post-judgment judicial remedy. § 1692c; F.T.C. Official Staff Commentary § 805(b), 53 Fed. Reg. 50104; S. Rep. No. 382, at 4. As stated by the Senate, "[s]uch contacts are not legitimate collection practices and result in serious invasions of privacy, as well as loss of job." Id. Debt collectors cannot communicate a consumer's

personal affairs to third persons". Id.

Contacts with the consumer's relatives, other than the spouse, violate the FDCPA. West v. Costen, supra, 558 F.Supp. 564 (W.D.Va. 1983). Leaving a message on an answering machine or voice mail system may result in an illegal third party communication if it is foreseeable that a third party with whom the collector could not communicate directly would access the device or system. Chlanda v. Wymard, C-3-93-321, 1995 U.S. Dist. LEXIS 14394 (S.D.Ohio 1995). See Committe v. Dennis Reimer Co., L.P.A., 150 F.R.D. 495 (D.Vt. 1993).

The section is violated by any communication to a third party, even if the debt is not expressly referenced, other than one that strictly complies with the provision allowing location information to be gathered. Thus, a message left with a neighbor for the debtor to call regarding some urgent matter is illegal. West v. Nationwide Credit, Inc., 998 F. Supp. 642 (W.D. N.C. 1998); Shaver v. Trauner, 1998 U.S. Dist. LEXIS 19648 (C.D.Ill., Jul. 31, 1998) (class and adoption of denial of motion to dismiss), 1998 U.S. Dist. LEXIS 19647 (C.D.Ill., May 29, 1998) (Magistrate Judge's denial of motion to dismiss).

XII. VIOLATIONS: MISREPRESENTATION OF SETTLEMENT AUTHORITY

Although a debt collector is not required to offer a settlement, if it does so it cannot misrepresent its authority. For example, if the creditor has authorized it to accept x% of a debt at any time, it cannot represent that it has been authorized to offer x% if accepted within the next 30 days. Goswami v. American Collection Enterprise, Inc., 377 F.3d 488 (5th Cir. 2004); Jackson v. Midland Credit Mgmt. Inc., 04 C 5056 (N.D.Ill., Oct. 12, 2004).

XIII. VIOLATIONS: MISCELLANEOUS MISREPRESENTATIONS

A debt collector's misrepresentation that it is a subrogee is actionable. Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000).

Gearing also holds that misrepresentations are actionable regardless of intent. 233 F.3d at 473. The "FDCPA is a strict liability statute," and "proof of one violation is sufficient to support summary judgment for the plaintiff." Cacace v. Lucas, 775 F. Supp. 502, 505 (D. Conn. 1990).

XIV. VIOLATIONS: ACQUISITION OF LOCATION INFORMATION

The debt collector may not communicate with someone other than the consumer except to obtain location information. 15 U.S.C. §1692b. In doing so the debt collector must identify himself but not discuss the debt. He also cannot request more explanation than specified in the statute. Shaver v. Trauner, 1998 U.S. Dist. LEXIS 19648 (C.D.Ill., July 1, 1998), adopting, 1998 U.S. Dist. LEXIS 19647 (C.D. Ill., May 29, 1998). Such a communication can be made only once unless requested by that third party. If the consumer is represented by an attorney, the debt collector may not communicate with any other person. Furthermore, if the collector already

has the permitted information, he should not be able to request it in order to harass the debtor. Id.

XV. VIOLATIONS: LEGAL ACTION BY DEBT COLLECTORS

A debt collector may bring an action to enforce an interest in real property only where the real property is located. 15 U.S.C. §1692i(a)(1). This includes attorneys whose collection activities are limited to purely legal activities, such as the filing of collection actions or mortgage foreclosures. Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992).

A collection action brought by a debt collector on a personal obligation may be brought only in the "judicial district" where the consumer signed the contract or in which the consumer resides at the time the action is filed. 15 U.S.C. §1692i(a)(2). Scott v. Jones, supra, 964 F.2d 314 (4th Cir. 1992); Dutton v. Wolhar, 809 F.Supp. 1130 (D.Del. 1992); Oglesby v. Rotche, supra, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D.Ill. 1993).

XVI. VIOLATIONS: EXTRANEOUS MATERIAL ON ENVELOPES

Section 1692f(8) prohibits "Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." Putting "U. S. Dept. of Education" on the return address portion does not comply. Peter v. GC Services, LP, 310 F.3d 344 (5th Cir. 2002).

XVII. VIOLATIONS: AMOUNT OF INTEREST IN DEBT

The Internal Revenue Code treats cancellation of debt as income under specified circumstances. 26 U.S.C. §6050P; 26 C.F.R. §1.6050P. The owner of a debt who cancels it must file an informational form 1099-C if the amount cancelled exceeds \$600.

Generally, cancellation of debt is income unless (a) there is a bona fide dispute concerning the debtor's obligation to pay, (b) the debtor is insolvent, (c) the debt is discharged in bankruptcy.

The amount that might constitute income is only the principal amount. On a credit card debt this is the purchases and cash advances. The failure to collect interest, finance charges, penalties, and fees is not income and has no tax consequence. See Debt Buyers' Ass'n v. Snow, 06-101, 2006 U.S. Dist. LEXIS 6527 (D.D.C., Jan. 30, 2006).

Because of this, the portion of the debt that consists of "principal" as opposed to "interest" is material, and falsely stating the amounts should violate 15 U.S.C. §1692e.

Debt buyers traditionally have not obtained the requisite information from the owner of the debt to make an accurate report. See Debt Buyers' Ass'n v. Snow, 06-101, 2006 U.S. Dist. LEXIS 6527 (D.D.C., Jan. 30, 2006). They are obligated to do so if it is available.

The regulation contains standards for determining when a debt is cancelled. Generally, a debt is **not** cancelled if (a) collection activity has occurred within 36 months (b) the debt is packaged for sale.

XVIII. VIOLATIONS: CONDUCT OF COLLECTION LITIGATION

Filing false affidavits in state court collection litigation is actionable. Delawder v. Platinum Financial, 1:04-cv-680 (S.D.Ohio March 1, 2005); Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D.Ohio, July 8, 2004); Gionis v. Javitch, Block & Rathbone, 2:04cv1119, 2005 U.S.Dist. LEXIS 30147 (S.D.Ohio., Nov. 30, 2005); Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C., 1:04cv733 (W.D.Mich., Sept. 8, 2005). This is commonly alleged to be done by bad debt buyers, whose employees have no knowledge of the underlying debt and usually no records, in order to obtain default judgments.

Courts have divided on whether filing unprovable collection cases is actionable. Harvey v. Great Seneca Financial Corp., C-1-05-047, 2005 U.S.Dist. LEXIS 37002 (S.D.Ohio July 18, 2005), and Kelly v. Great Seneca Financial Corp., 04-615 (S.D.Ohio June 16, 2005), suggests that it is not, without further conduct such as that outlined above.

The party initiating the state court litigation cannot claim "witness immunity" as a defense. Todd v. Weltman, Weinberg & Reis Co., L.P.A., No. 04-4109, 2006 U.S. App. LEXIS 808 (6th Cir., January 13, 2006). That case involved allegations that exempt Social Security income had been seized because a collection attorney filed a false affidavit stating that he had reason to believe a bank account held nonexempt assets. The court thought that an independent witness would have immunity, but not a complaining witness:

Defendant's actions could properly be characterized as malicious prosecution. As a result, it is a complaining witness without absolute immunity. The fact that Plaintiff is suing under the FDCPA and not the common law claim does not affect the immunity status of Defendant. As the Supreme Court stated in *Kalina*, "in determining immunity, we examine the nature of the function performed." 522 U.S. at 127 (internal quotations and citation omitted). In this case, Defendant functioned as a complaining witness, so it may not assert absolute immunity against any claim in connection with this role.

From a practical perspective, treating Defendant as a complaining witness without immunity simply makes sense. The Court reserves absolute immunity for individuals when they functionally serve as "integral parts of the judicial process," such as judges, advocates, and witnesses in their ordinary judicial roles. *Briscoe*, 460 U.S. at 335. The purpose of this immunity is to preserve the integrity of our judicial system, not to assist a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding. (*40-41)

XIX. REMEDIES AND PROCEDURE

Federal and state courts have concurrent jurisdiction of FDCPA suits. 15 U.S.C. §1692k(d).

A single violation is sufficient to support judgment for the consumer. Cacace v. Lucas, 775 F.Supp. 502, 505 (D.Conn. 1990); Supan v. Medical Bureau of Economics, Inc., 785 F.Supp. 304, 305 (D.Conn. 1991).

A successful consumer is entitled to an award of actual damages, statutory damages up to \$1,000, costs and attorney's fees. 15 U.S.C. §1692k(a). Class action relief is also available. 15 U.S.C. §1692k(a)(2)(B).

In FDCPA litigation brought against the debt collector, the collector normally may not assert a counterclaim for the underlying debt. Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981); Leatherwood v. Universal Business Service Co., 115 F.R.D. 48 (W.D.N.Y. 1987); Gutshall v. Bailey & Assoc., 1991 U.S. Dist. LEXIS 12153 (N.D.Ill. 1991); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. App. 1984) (is permissive); Hart v. Clayton-Parker & Assoc., 869 F. Supp. 774 (D.Ariz. 1994); Ayres v. National Credit Management Corp., 1991 U.S. Dist. LEXIS 5629, 1991 WL 66845, at *4 (E.D. Pa. April 25, 1991); Zhang v. Haven-Scott Assoc., Inc., 95-2126, 1996 WL 355344, 1996 U.S. Dist. LEXIS 8738 (E.D.Pa., June 21, 1996).

A. MOTION TO DISMISS/ SUMMARY JUDGMENT

1. SEVENTH CIRCUIT

The Seventh Circuit has held that many issues as to whether debt collection notices are misleading or confusing present questions of fact. In Johnson v. Revenue Management Corp., 169 F.3d 1057 (7th Cir. 1999), the court held:

Rule 12(b)(6) should be employed only when the complaint does not present a legal claim. A contention that a debt-collection notice is confusing is a recognized legal claim; no more is needed to survive a motion under Rule 12(b)(6). See Bennett v. Schmidt, 153 F.3d 516 (7th Cir. 1998). Such a claim may fail on the facts, but assessing factual support for a suit is not the office of Rule 12(b)(6). Moreover, as we observed in Bartlett, although many opinions inquire whether language in a dunning letter "contradicts or overshadows" the statutory notice, these words are not themselves the applicable rule of law; a court must inquire whether the letter is confusing. 128 F.3d at 500-01. Language that contradicts or overshadows the statutory notice may make a letter confusing, but to say that these are sufficient means of showing confusion is not to say that they are necessary.

"A contradiction is just one means of inducing confusion; 'overshadowing' is just another; and the most common is a third, the failure to explain an apparent though not actual contradiction". Id. at 500 (emphasis in original). .

The two dispositions in the district court share an additional assumption: that whether a dunning letter is "confusing" is a question to be answered solely by applying the rules of logic to the text of the letter. But why should that be so? As we noted in Bartlett, a letter may confuse even though it is not internally contradictory. Unsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade. To learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence. A concurring opinion in Gammon suggested that this evidence might include the kind of surveys used to measure confusion in trademark cases. 27 F.3d at 1260.

Accord, Walker v. National Recovery, Inc., 200 F.3d 500, 503 (7th Cir. 1999); Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323 (7th Cir. 2000).

On the other hand, some violations are so clear that summary judgment for the plaintiff is proper. In Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997), involving a threat to sue within the validation period, the court reversed a judgment for the defendant entered after a bench trial and ordered judgment for the plaintiff – the same test applies as is required to grant summary judgment for the plaintiff. Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997), affirmed a summary judgment for plaintiff where the collection letter required action within 30 days after its date, rather than after receipt.

2. APPLICATION

A District Court should enter judgment for the plaintiff in an FDCPA case based on the text of a collection letter, without extrinsic evidence that it is confusing or misleading, if:

- a. A required disclosure is simply absent, as in Miller, v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000) (statute requires "amount of the debt"; letter stated that unpaid principal balance of residential mortgage loan was \$178,844.65, and that this did not include unspecified accrued but unpaid interest, unpaid late charges, escrow advances, and other charges authorized by loan agreement).
- b. The letter contains statements contradicting the required disclosures, such as in Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997) (threat to sue within the validation period; court reversed a judgment for the defendant

entered after a bench trial and ordered judgment for the plaintiff); and Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997) (court affirmed a summary judgment for plaintiff where the collection letter required action within 30 days after its date, rather than after receipt);

- c. The letter contains statements which are obviously false, such as in Kort v. Diversified Collection Services, 270 F.Supp.2d 1017, 1025 (N.D.Ill. 2003) (collection letter inaccurately stated that administrative wage garnishment could begin during the validation period); Whitten v. ARS National Services, Inc., 2002 WL 1332001, 2002 U.S. Dist. LEXIS 10828, *15 (N.D.Ill. June 18, 2002) (“this court did not consider it necessary to require plaintiff to put on additional evidence of actual consumer confusion”);
- d. “[I]t is apparent just from reading the letter that it is unclear”, Chuway v. National Action Financial Services, Inc., 362 F.3d 944, 948 (7th Cir. March 30, 2004).

Other decisions granting summary judgment for plaintiffs include Kort v. Diversified Collection Services, 270 F.Supp.2d 1017 (N.D.Ill. 2003) (collection letter indicated that administrative wage garnishment could begin during validation period).

A literally false statement in a collection document does not require proof of its likelihood to mislead. Frye v. Bowman, Heintz, Boscia & Vician, P.C., 193 F.Supp.2d 1070, 1083-84 (S.D.Ind. 2002).

3. ELSEWHERE

Most other courts treat whether a collection letter is misleading as a question of law. Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir.1996); Valdez v. Hunt & Henriques, 01-1712, 2002 WL 433595 (N.D.Cal. Mar 19, 2002) (“the Ninth Circuit has repeatedly held that whether a collection letter would confuse the least sophisticated debtor is a question of law”).

B. DISCOVERY

Among the areas that have been held discoverable in FDCPA cases:

1. The source of a debt and the amount a bad debt buyer paid for plaintiff’s debt. Coppola v. Arrow Financial Services, 302CV577, 2002 WL 32173704 (D.Conn., Oct. 29, 2002) (must phrase request clearly); Kimbro v. IC System, 301CV1676, 2002 WL 1816820 (D.Conn. July 22, 2002).
2. How amount sought was calculated. Coppola v. Arrow Financial Services,

302CV577, 2002 WL 32173704 (D.Conn., Oct. 29, 2002); Kimbrow v. IC System, 301CV1676, 2002 WL 1816820 (D.Conn. July 22, 2002).

3. Where in issue, list of reports to credit bureaus. Coppola v. Arrow Financial Services, 302CV577, 2002 WL 32173704 (D.Conn., Oct. 29, 2002).
4. Documents conferring authority on defendant to collect debt. Coppola v. Arrow Financial Services, 302CV577, 2002 WL 32173704 (D.Conn., Oct. 29, 2002); Kimbrow v. IC System, 301CV1676, 2002 WL 1816820 (D.Conn. July 22, 2002); Yancey v. Hooten, 180 F.R.D. 203 (D.Conn. 1998).
5. Number of times offending collection letters were used. Yancey v. Hooten, 180 F.R.D. 203 (D.Conn. 1998)
6. In a class action, tax returns, financial statements. Mailloux v. Arrow Financial Services, LLC, 01 CV 2000, 2002 WL 246771 (E.D.N.Y., Feb. 21, 2002).
7. With respect to class numbers and issues, see Gray v. First Winthrop Corp., 133 F.R.D. 39 (C.D.Cal. 1990) ("[O]rder staying discovery pending class certification would be unworkable, since plaintiffs must be able to develop facts in support of their class certification motion"); Zahorik v. Cornell University, 98 F.R.D. 27 (N.D.N.Y. 1983) (discovery is often necessary before plaintiffs can satisfy the requirements of Fed.R.Civ.P. 23(a)); Walker v. World Tire Corp., Inc., 563 F.2d 918, 921 (8th Cir. 1977)(the propriety of class action status can seldom be determined on the basis of pleadings alone, and parties must be offered the opportunity to discover evidence on the issue.); McCray v. Standard Oil Co., 76 F.R.D. 490, 500 (N.D.Ill. 1976). If class members are witnesses there is no reason they cannot be identified before certification. Best Buy Stores v. Superior Court, 2006 Cal. App. LEXIS 337 (March 13, 2006).
8. Proof of prior illegal acts is admissible to show knowledge and intent. Joseph Taylor Coal Co. v. Dawes, 122 Ill.App. 389 (1905), aff'd. 220 Ill. 147, 77 N.E. 131 (1906); Edgar v. Fred Jones Lincoln-Mercury, 524 F.2d 162, 167 (10th Cir. 1975); Eaves v. Penn, 587 F.2d 453, 463-4 (10th Cir. 1978)(in civil action for breach of fiduciary duty, evidence of breaches of fiduciary other than one for which recovery was sought properly admitted to show intent); Welch v. Barnett, 34 Okla. 166 125 P. 472 (1912) (that five Indians willed property to the same unrelated white men in different transactions is convincing proof that undue influence and fraud were practiced on all); Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 494 A.2d 804, 814 (1985).
9. Where a good faith defense is asserted, prior claims. Trevino v. ACB American, C05-00239 JF (HRL), 2006 U.S. Dist. LEXIS 3194 (N.D.Cal. Jan. 27, 2006). "In their answer to the complaint, defendants claim that they had a

good faith belief that their collection efforts were lawful. While plaintiffs' requests may be phrased too broadly, information relating to whether or not defendants had claims filed against them, participated in litigation or arbitration, or received demand letters from attorneys about the legality of this particular type of collection effort under the FDCPA is relevant and must be disclosed.”

10. Manuals relating to the practices in question. Trevino v. ACB American, C05-00239 JF (HRL), 2006 U.S. Dist. LEXIS 3194 (N.D.Cal. Jan. 27, 2006).

Items which should generally be requested include:

All insurance policies that may afford coverage with respect to the matters complained of, together with all correspondence accepting or declining coverage or reserving rights with respect thereto.

Identify any testing done of defendant’s collection letters.

Communications from recipients of the letters containing inquiries about the allegedly misleading item in the letter, or complaints that the letters were incorrect or incomprehensible. The Seventh Circuit has suggested reference to trademark cases by analogy, Johnson v. Revenue Management Corp., *supra*, 169 F.3d 1057 (7th Cir. 1999), and “evidence of actual confusion” is one of the “most important factors” in a trademark case. Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 898 (7th Cir. 2001). The Johnson court specifically encouraged inquiry into evidence of actual confusion by debtors. 169 F.3d at 1061.

A claim that a person lacks knowledge is generally not an appropriate reason for refusing to produce him, as the opposing party is entitled to test the alleged lack of knowledge. Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121, 122 (D.Conn. 1974).

The consumer’s motives in filing suit and the circumstances regarding same are generally not a proper subject of discovery in either a class or an individual action. Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121 (D.Conn. 1974); Cresswell v. Prudential-Bache Securities, Inc., 105 F.R.D. 64 (S.D.N.Y. 1985).

C. ACTUAL DAMAGES

A debt collector who has violated any provision of the FDCPA is liable for actual damages. 15 U.S.C. §1692k(a)(1).

The amount of a valid debt does not constitute actual damages. Wiginton v. Pacific Credit Corp., 2 Haw. App. 435, 634 P.2d 111, 118 (1981).

Actual damages include emotional distress. The debt collector may be held "liable for any mental and emotional stress, embarrassment, and humiliation caused" by improper debt collection activities. Kleczy v. First Federal Credit Control, Inc., 21 Ohio App.3d 56, 486 N.E.2d 204, 207 (1984); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984); Baez-Martinez v. PMS, 1997 U.S. Dist. LEXIS 3314 (D.P.R. 1997); McGrady v. Nissan Motor Accep. Corp., 40 F.Supp. 2d 1323 (M.D.Ala. 1998); Carrigan v. Central Adjustment Bureau, 502 F.Supp. 468 (N.D. Ga. 1980); Rawlings v. Dovenmuehle Mtge, Inc., 64 F.Supp.2d 1156 (M.D.Ala. 1999). State law requirements regarding the proof of intentional or negligent infliction of emotional distress are not applicable to actual damages under the FDCPA. Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182, 185 (D.Del. 1991); Howze v. Romano, 92-644, 1994 WL 827162, 1994 U.S. Dist. LEXIS 20547 (D.Del. Dec. 9, 1994); Crossley v. Lieberman, 90 B.R. 682 (E.D.Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989); Teng v. Metropolitan Retail Recovery, 851 F.Supp. 61, 68-9 (E.D.N.Y. 1994); Donahue v. NFS, Inc., 781 F.Supp. 188, 193-4 (W.D.N.Y. 1991).

D. STATUTORY DAMAGES

In addition to actual damages, if any, the consumer may be awarded "such additional damages as the court may allow, but not exceeding \$1,000." 15 U.S.C. §1692k(a)(2). The consumer need not show any actual damages in order to recover statutory damages. Bartlett v. Heibl, *supra*; Baker v. G.C. Services Corp., 677 F.2d 775, 780-81 (9th Cir. 1982); Harvey v. United Adjusters, *supra*, 509 F.Supp. 1218 (D.Or. 1981); Woolfolk v. Van Ru Credit Corp., 783 F.Supp. 724, 725 (D.Conn. 1990); Cacace v. Lucas, 775 F.Supp. 502 (D.Conn. 1990); Riveria v. MAB Collections, Inc., 682 F.Supp. 174, 177 (W.D.N.Y. 1988); Kuhn v. Account Control Technol., 865 F.Supp. 1443, 1450 (D.Nev. 1994). It follows that where only statutory damages are claimed "any FDCPA or related lawsuits filed in the past by this plaintiff have no bearing on whether the letter sent by [the collector] violated the FDCPA" and are not discoverable. Lee v. Robins Preston Beckett Taylor & Gugle Co., L.P.A., 1999 U.S. Dist. LEXIS 12969 (S.D. Ohio July 9, 1999).

In determining the amount of statutory damages in an individual action the court is to consider "the frequency and persistence of non-compliance by the debt collector, the nature of such non-compliance, and the extent to which the non-compliance was intentional". 15 U.S.C. §1692k(b)(1). One court has held that continued use of an unlawful letter after being placed on notice of its illegality warrants the maximum. Cacace v. Lucas, 775 F. Supp. 502, 507 (D. Conn. 1990). Others hold that the factor requires a court to consider whether the defendant "has a history of violating the Act." Blum v. Lawent, 02 C 5596, 2003 WL 22078306 (N.D.Ill., Sept. 8, 2003). Accord, Evanuskas v. Strumpf, 300CV1106JCH, 2001 WL 777477 (D.Conn. June 27, 2001), *6; Yancey v. Hooten, 180 F.R.D. 203 (D.Conn. 1998); Miller v. McCalla, Raymer, Padrick Cobb, Nichols & Clark, LLC, 198 F.R.D. 503, 506 (N.D.Ill. 2001) ("The noncompliance here involved thousands of individual violations over several years"); Creighton v. Emporia Credit Service, Inc., 981 F.Supp. 411, 417 (E.D.Va. 1997) (lack of other complaints in 19 years collection agency was in operation is favorable factor). In King v. Int'l Data Servs., 2002 U.S. Dist. LEXIS 26426 (D.Haw.), the court found that the fact that the debt collector had sent out thousands of similar letters to other debtors was the "frequency" referred to in the statute.

Similar language is used in NLRB cases. Power, Inc. v. NLRB, 40 F.3d 409, 422 (D.C.Cir. 1994).

On the other hand, some courts consider that in an individual action the conduct of the debt collector towards third persons is not relevant. Cusumano v. NRB, Inc., 96 C 6876, 1998 WL 673833, 1998 U.S. Dist. LEXIS 15418 (N.D.Ill. Sept. 23, 1998); Powell v. Computer Credit, Inc., 975 F.Supp. 1034, 1039 (S.D. Ohio 1997); Dewey v. Associated Collectors, Inc., 927 F.Supp. 1172, 1175 (W.D. Wis. 1996); Byes v. Credit Bureau Enterps., Inc., 1995 U.S. Dist. LEXIS 13559, Civ. A No. 95-239, 1995 WL 540234, at *1 (E.D. La. Sept. 11, 1995). This appears to be wrong. The only justification was offered by the court in Dewey, which stated that “number of persons adversely affected” would be superfluous if “frequency and persistence of noncompliance” included violations committed with respect to others. The short answer is that “number of persons adversely affected” refers to the number of persons affected by one violation, whereas “frequency and persistence of noncompliance” refers to the overall track record of the defendant.

The Sixth Circuit, in Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994) (en banc), the Fifth Circuit, in Peter v. GC Services, LP, 310 F.3d 344, 352 n. 5 (5th Cir. 2002); and the Eleventh Circuit, in Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992), have held that up to \$1,000 in statutory damages is available to one plaintiff in one lawsuit. A majority of the district courts to have considered the issue have reached the same conclusion. White v. Bruck, 927 F.Supp. 1168, 1169 (W.D. Wisc. 1996); Barber v. National Revenue Corp., 932 F. Supp. 1153, 1156 (W.D. Wisc. 1996); Dewey v. Associated Collectors, Inc., 927 F.Supp. 1172 (W.D. Wisc., 1996); Teng v. Metropolitan Retail Recovery, Inc., 851 F.Supp. 61, 69 (E.D.N.Y. 1994); Hutchinson v. Russian, 1992 U.S. Dist. LEXIS 18891 (D. Kan. Oct. 29, 1992); Donahue v. NFS, Inc., 781 F.Supp. 188, 191 (W.D.N.Y. 1991); Ganske v. Checkrite, Ltd., 1997 U.S. Dist. LEXIS 4345 (W.D. Wisc., Jan. 6, 1997); Beattie v. D.M. Collections, Inc., 764 F.Supp. 925, 928 (D. Del. 1991); Harvey v. United Adjusters, 509 F.Supp. 1218, 1222 (D. Ore. 1981); Raimondi v. McAllister & Assocs., 50 F.Supp. 2d 825, 828 (N.D. Ill. 1999); Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C., 242 F.Supp.2d 273, 277 (S.D.N.Y. 2002); Evanaskas v. Strumpf, 300CV1106JCH, 2001 WL 777477 (D.Conn. June 27, 2001); In re Hart, 246 B.R. 709, 732 (Bankr. D. Mass. 2000); Spencer v. Hendersen-Webb, Inc., 81 F.Supp.2d 582, 594 (D.Md. 1999); Nielsen v. Dickerson, 98 C 5909, 1999 WL 350649 (N.D.Ill. May 20, 1999); Blum v. Lawent, 02 C 5596, 2003 WL 22078306 (N.D.Ill., Sept. 8, 2003).

However, since a separate FDCPA action could be filed for each communication or other discrete act that violates the law, a substantial argument can be made that "action" means "cause of action" in that sense. Kaschak v. Raritan Valley Collection Agency, 88-3763, 1989 WL 255498 (D.N.J. May 23, 1989); Rabideau v. Management Adjustment Bureau, 805 F.Supp. 1086, 1095 (W.D.N.Y. 1992).

Nothing prevents a consumer from filing a separate FDCPA suit for each episode that constitutes a violation of the FDCPA, at least with respect to episodes occurring after the filing of an initial action. Goins v. JBC, 3:03cv636, 2005 US Dist LEXIS 761, (D.Conn., January 14, 2005) (“There is no prohibition in the FDCPA against separate lawsuits for separate statutory violations by

the same defendant. Where, as here, the subsequent action is not duplicative and would not be barred under the claim preclusion doctrine, plaintiff may avail herself of the serendipity of an additional FDCPA violation by the same defendant subsequent to initiation of a prior lawsuit and thereby avoid a per action damages limitation, as is undoubtedly plaintiff's strategy here").

Moreover, each collection agency and individuals associated with it are liable for a separate \$1000 maximum award. Ganske v. Checkrite Ltd., 1997 U.S. Dist. LEXIS 4345 (W.D. Wis. 1997).

The statutory damages must be assessed by a jury if a party timely demands a jury trial. Kobs v. Arrow Service Bureau, Inc., 134 F.3d 893 (7th Cir. 1998). Accord, Vera v. Trans-Continental Credit & Collection Corp., 98 Civ. 1866, 1999 WL 292623, 1999 U.S. Dist. LEXIS 3464 (S.D.N.Y. May 10, 1999); Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 834 (11th Cir. 1982).

E. VICARIOUS LIABILITY

A collection agency which employs an attorney who violates the FDCPA can be held liable for his actions. Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1516 (9th Cir. 1994); Martinez v. Albuquerque Collection Servs., 867 F. Supp. 1495, 1502 (D.N.M. 1994); Kimber v. Federal Fin. Corp., 668 F. Supp. 1480, 1486 (M.D. Ala. 1987); Ditty v. Check Rite, Ltd., 973 F.Supp. 1320 (D.Utah 1997); Jones v. Wolpoff & Abramson, L.L.P., 05-5774, 2006 U.S. Dist. LEXIS 4031 (E.D.Pa., February 1, 2006). . See also Alger v. Ganick, O'Brien & Sarin 35 F.Supp. 2d 148 (D. Mass. 1999); Farber v. NP Funding II L.P., 1997 U.S. Dist. LEXIS 21245, 1997 WL 913335 at *2-3 & n.4 (E.D.N.Y. Dec. 9, 1997).

A collection agency is liable for the FDCPA violations of its employees. West v. Costen, 558 F. Supp. 564, 573 (W.D.Va. 1983). "[N]umerous courts utilize agency principles to make a principal vicariously liable for the acts of his authorized or apparent agent under the FDCPA". Alger v. Ganick, O'Brien & Sarin, 35 F.Supp. 2d 148, 153 (D.Mass. 1999); accord, Pettit v. Retrieval Masters, 211 F.3d 1057, 1059 (7th Cir. 2000); Pollice v. National Tax Funding, L.P., 225 F.3d 379, 404 (3d Cir. 2000) ("Although there is relatively little case law on the subject of vicarious liability under the FDCPA, there are cases supporting the notion that an entity which itself meets the definition of "debt collector" may be held vicariously liable for unlawful collection activities carried out by another on its behalf. In Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994), the court indicated that a company which had been asked to collect a defaulted debt could be held vicariously liable for its attorney's conduct which was in violation of the FDCPA. See *id.* at 1516. By contrast, in Wadlington, *supra*, the Court of Appeals for the Sixth Circuit declined to impose vicarious liability on a company for the actions of its attorney; in the court's view, vicarious liability could not be imposed because the company itself did not meet the definition of "debt collector"); Flamm v. Sarner & Associates, 02-4302, 2002 WL 31618443 (E.D.Pa., Nov. 6, 2002); Piper v. Portnoff Law Associates, 274 F.Supp.2d 681, 689 (E.D.Pa. 2003); Havens-Tobias v. Eagle, 127 F.Supp.2d 889, 898 (S.D. Ohio 2001); Campion v. Credit Bureau Services, CS-99-0199-EFS, 2000 WL 33255504 (E.D. Wash. Sept. 20, 2000); In re Hart, 246 B.R. 709, 731 (Bankr. D.Mass. 2000); Mizrahi v. Network Recovery Services, Inc., 98-CV-4528, 1999 U.S. Dist. LEXIS 22145, 1999 WL 33127737 (E.D.N.Y. Nov. 5, 1999)("debt collectors

employing attorneys or other agents to carry out debt collection practices that violate the FDCPA are vicariously liable for their agent's conduct."); Caron v. Charles E. Maxwell, P.C., 48 F.Supp.2d 932, 935 (D.Ariz. 1999) ("courts have held that the client of an attorney working as a "debt collector" as defined in § 1692a(6) of the FDCPA is only liable for his attorney's violations if both the attorney and the client are debt collectors within the meaning of the statute"); Randle v. GC Services, L.P., 25 F. Supp. 2d 849, 851 (N.D.Ill. 1998); Ditty v. CheckRite, Limited, Inc., 973 F. Supp. 1320, 1333-1335 (D.Utah 1997) ("a debt collector may be held vicariously liable under the Act for the conduct of its attorney. . . . DeLoney & Associates acted as CheckRite's agent. That the law firm might also have been an independent contractor does not relieve CheckRite of vicarious liability"); Farber v. NP Funding ILL.P., 1997 U.S. Dist. LEXIS 21245, 1997 WL 913335 *2-3 & n.4 (E.D.N.Y. Dec. 9, 1997); Newman v. CheckRite California, Inc., 912 F. Supp. 1354, 1369-1372 (E.D.Cal. 1995); Taylor v. CheckRite, Ltd., 627 F. Supp. 415, 416-417 (S.D. Ohio 1986); West v. Costen, 558 F. Supp. 564, 573 & n.2 (W.D.Va. 1983); Martinez v. Albuquerque Collection Servs., 867 F. Supp. 1495, 1502 (D.N.M. 1994) ("debt collectors employing attorneys or other agents to carry out debt collection practices that violate the FDCPA are vicariously liable for their agent's conduct"); First Interstate Bank of Fort Collins v. Soucie, 924 P.2d 1200, 1202 (Colo. Ct. App. 1996) ("Federal courts that have considered the issue have held that the client of an attorney who is a 'debt collector,' as defined in § 1692a(6), is vicariously liable for the attorney's misconduct if the client is itself a debt collector as defined in the statute. Thus, vicarious liability under the FDCPA will be imposed for an attorney's violations of the FDCPA if both the attorney and the client are debt collectors as defined in § 1692a(6).").

However, a creditor which does not (i) bring itself within the proviso in §1692a(6) imposing liability for using a third party name or (ii) violate §1692j is not vicariously liable for the FDCPA violations of its debt collector, on the ground that with those two exceptions the FDCPA manifests Congressional intent to exclude creditors from its scope. Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 108 (6th Cir. 1996); Caron v. Maxwell, 48 F.Supp. 2d 932 (D.Ariz. 1999); Claussen v. Chase Manhattan Visa, 87-4146, 1989 WL 87996, 1989 U.S. Dist. LEXIS 9076 (D.Kan. July 26, 1989); First Interstate Bank of Fort Collins, N.A. v. Soucie, 924 P.2d 1200 (Colo.App. 1996).

Vicarious liability against creditors may be available under state collection practices laws, such as the Illinois Collection Agency Act. 225 ILCS 425/1 et seq. In Sherman v. Field Clinic, 74 Ill.App.3d 21, 392 N.E.2d 154 (1st Dist. 1979), the court held that a complaint stated a claim on the theory that a medical clinic hired a collection agency which, in the course of employment, committed a practice made unlawful under the Collection Agency Act.

General partners of a debt collector organized as a partnership are liable. Bartlett v. Heibl, *supra*, 128 F.3d 497, 499 (7th Cir. 1997); Peter v. GC Services, LP, 310 F.3d 344, 353 (5th Cir. 2002); Pollice v. National Tax Funding, LP, 225 F.3d 379, 405 (3rd Cir. 2000); Randle v. G.C. Services, LP, 25 F.Supp. 2d 849 (N.D.Ill. 1998), *related proceedings*, Roe v. Publishers Clearing House, Inc., 39 F. Supp. 1099 (N.D. Ill. 1999), *summ. judgment granted*, Randle v. GC Servs. L.P., 48 F.Supp. 2d 835 (N.D. Ill. 1999); Peters v. AT&T, 179 F.R.D. 564 (N.D.Ill. 1998).

Illinois law holds that a parent corporation that directly participates in the unlawful act of its subsidiary is liable. Forsythe v. Clark USA, Inc., 361 Ill.App.3d 642, 836 N.E.2d 850 (1st Dist.

2005).

F. ATTORNEY'S FEES

The successful consumer is entitled to an award of costs and reasonable attorney's fees. 15 U.S.C. §1692k(a)(3).

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.

Graziano v Harrison, *supra*, 950 F.2d at 113.

The proper rate at which an attorney bringing an FDCPA case is to be compensated is the rate which his or her services command in the marketplace, as established by billings or awards in other cases, and it is not proper to have a special reduced rate in FDCPA cases because of the nature of the case or the \$1,000 limitation on actual damages. Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995).

G. PERSONAL JURISDICTION

Most courts have held that FDCPA litigation is appropriately filed within the district where the consumer received the communication. Brink v. First Credit Resources, 57 F.Supp.2d 848 (D.Ariz. 1999); Pope v. Vogel, 97 C 1835, 1998 WL 111576, 1998 U.S. Dist. LEXIS 2868 (N.D. Ill. March 5, 1998); Flanagan v. World Wide Adjustment Bureau, Inc., 1996 U.S. Dist. LEXIS 8257 (M.D.N.C., May 3, 1996); Murphy v. Allen County Claims & Adjustments, 550 F.Supp. 128 (S.D. Ohio 1982); Lachman v. Bank of Louisiana in New Orleans, 510 F.Supp. 753, 758 (N.D. Ohio 1981); Russey v. Rankin, 837 F.Supp. 1103 (D.N.M. 1993); Sluys v. Hand, 831 F. Supp. 321, 325 (S.D.N.Y. 1993); Fava v. RRI, Inc., 96 CV 629, 1997 WL 205336, 1997 U.S. Dist. LEXIS 5630 (N.D.N.Y. April 24, 1997); Brujij v. Shaw, 876 F. Supp. 975 (N.D. Ill. 1995); Bailey v. Clegg, Brush & Assocs., Inc., 1991 WL 143361 (N.D. Ga. 1991); Stone v. Talan & Ktsanes, 91-244-FR, 1991 WL 134364, 1991 U.S. Dist. LEXIS 9632 (D. Ore. July 2, 1998), later opinion 1991 WL 226939, 1991 U.S. Dist. LEXIS 15599 (D. Or. Oct. 15, 1991); Paradise v. Robinson & Hoover, 883 F. Supp. 521 (D. Nev. 1995); Hyman v. Hill & Associates, 05 C 6486, 2006 U.S. Dist. LEXIS 5496 (N.D. Ill., February 9, 2006); Vlasak v. Rapid Collection Systems, Inc., 962 F. Supp. 1096, 1102 (N.D. Ill. 1997) ("When an individual receives calls or letters from a distant collection agency--and when those calls or letters are allegedly illegal under the FDCPA--it makes sense to permit the individual to file suit where he receives the communications."). There is one case to the contrary: Krambeer v. Eisenberg, 923 F.Supp. 1170 (D. Minn. 1996).

H. CLASS ACTIONS

The FDCPA contains special damage provisions for class actions. 15 U.S.C. §1692k. Recovery of statutory damages for the class is limited to 1% of the debt collector's net worth or

\$500,000, whichever is less. The named plaintiffs, however, can collect their full statutory damages. The damage limitation does not apply to actual damages.

“Net worth” means accounting book value. Sanders v. Jackson, 209 F.3d 998 (7th Cir. 2000).

FDCPA actions based on improper form letters or charges, or similar standard practices, are ideally suited for class action treatment. Under the objective “least sophisticated consumer” or “unsophisticated consumer” standard of liability, an FDCPA claim for statutory damages presents no issues of reliance or causation. “The question is not whether the plaintiffs were deceived or misled, but rather whether an unsophisticated consumer would have been misled.” Beattie v. D.M. Collections, Inc., 754 F.Supp. 383, 392 (D.Del. 1991); see also, Stewart v. Slaughter, 165 F.R.D. 696 (M.D.Ga. 1996). An FDCPA class action alleging unauthorized charges may technically require proof of causation, but the payment of the unauthorized amount establishes causation.

Class actions have been certified under the FDCPA in cases involving:

1. Phony attorney letters, Avila v. Rubin, supra; Stewart v. Slaughter, 165 F.R.D. 696 (M.D.Ga. 1996);
2. “Flat-rating”, Arellano v. Etan Industries, Inc., supra, 1998 U.S. Dist. LEXIS 11352 (N.D. Ill., July 16, 1998); Davis v. Suran, 98 C 656, 1998 WL 474105, 1998 U.S. Dist. LEXIS 12233 (N.D.Ill. Aug. 3, 1998);
3. Unauthorized charges, West v. Costen, 558 F.Supp. 564 (W.D.Va. 1983); Duran v. Credit Bureau of Yuma, Inc., 93 F.R.D. 607 (D.Ariz. 1982); Keele v. Wexler, 1996 U.S. Dist. LEXIS 3253, 1996 WL 124452, *6 (N.D.Ill. 1996), aff’d, 149 F.3d 589 (7th Cir. 1998); Ditty v. CheckRite, Ltd., 182 F.R.D. 639 (D. Utah, 1998), later opinion, 1998 U.S. Dist. LEXIS 12940 (D.Utah, Aug. 13, 1998); Pikes v Riddle, 38 F.Supp. 2d 639 (N.D.Ill. 1998); Francisco v. Doctors & Merchants Credit Service, Inc., 98 C 716, 1998 WL 474107, 1998 U.S. Dist. LEXIS 12234 (N.D. Ill., July 29, 1998); Cheqnet Systems, Inc. v. Montgomery, 322 Ark. 742, 911 S.W.2d 956 (1995) (class certified in FDCPA action challenging bad check charges).
4. Improper form letters, West v. Costen, 558 F.Supp. 564, 572-573 (W.D.Va. 1983) (FDCPA class certified regarding alleged failure to provide required “validation” notices); Brewer v. Friedman, 152 F.R.D. 142 (N.D.Ill. 1993) (FDCPA class certified regarding transmission of misleading collection demands to consumers), earlier opinion, 833 F.Supp. 697 (N.D.Ill. 1993); Vaughn v. CSC Credit Services, 93 C 4151, 1994 WL 449247, 1994 U.S. Dist. LEXIS 2172, *24 (N.D. Ill. March 1, 1994) (Magistrate Judge’s opinion), adopted, 1995 WL 51402, 1995 U.S. Dist. LEXIS 1358 (N.D. Ill. Feb. 3, 1995); Beasley v.

Blatt, 93 C 4987, 1994 WL 362185, 1994 U.S. Dist. LEXIS 9383 (N.D.Ill., July 11, 1994) (letters threatening action which was not intended to be taken and could not legally be taken); Carr v. Trans Union Corp., 94-22, 1995 WL 20865, 1995 U.S. Dist. LEXIS 567 (E.D.Pa. Jan. 12, 1995); Colbert v. Trans Union Corp., 93-6106, 1995 WL 20821, 1995 U.S. Dist. LEXIS 578 (E.D.Pa. Jan. 12, 1995); Villareal v. Snow, 95 C 2484, 1996 WL 28254, 1996 WL 28282, 1996 U.S. Dist. LEXIS 667, *6 (N.D.Ill. Jan. 19, 1996); Peters v. AT&T Corp., 179 F.R.D. 564 (N.D. Ill. 1998); Arango v. GC Services LP, 97 C 7912, 1998 WL 325257, 1998 U.S. Dist. LEXIS 9124 (N.D.Ill. June 11, 1998); Arellano v. Etan Industries, Inc., 97 C 8512, 1998 WL 417599, 1998 U.S. Dist. LEXIS 11352 (N.D. Ill., July 20, 1998); Wells v. McDonough, 97 C 3288, 1998 WL 160876, 1998 U.S. Dist. LEXIS 4441 (N.D. Ill., March 31, 1998); Miller v. Wexler & Wexler, 97 C 6593, 1998 WL 60798, 1998 U.S. Dist. LEXIS 1382 (N.D. Ill., Feb. 6, 1998); Shaver v. Trauner, 1998 U.S. Dist. LEXIS 19698 (C.D. Ill., July 31, 1998); Wilborn v Dun & Bradstreet, 180 F.R.D. 347 (N.D.Ill. 1998).

5. Filing of suits in improper venues, Zanni v. Lippold, 119 F.R.D. 32, 35 (C.D.Ill. 1988); Holloway v. Pekay, 94 C 3418, 1995 U.S. Dist. LEXIS 18331, 1995 WL 736925 (N.D.Ill. 1995).
6. The class may be defined in any manner that results in a cohesive group of claimants with similar characteristics. In Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir., 1997). the Seventh Circuit rejected the notion that the court is obligated to define the class as broadly as possible:

[O]ur only task on appeal is to determine whether the FDCPA authorizes statewide (in contrast to nation-wide) class actions. We note first that we know of no authority requiring the participation of the broadest possible class. On the contrary, the class requirements found in the Federal Rules of Civil Procedure encourage rather specific and limited classes. Fed. R. Civ. P. 23. The typicality and commonality requirements of the Federal Rules ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class. *

* *

The defendants, however, advance a policy argument, from which the district court constructed a requirement for a nation-wide class. The district court reasoned that, if the damage cap of \$ 500,000 can be applied anew to a series of state-wide (or otherwise limited) class actions, the damage limitation would become meaningless. This contention may be correct as far as it goes, although there is, of course, no way of telling whether such repeated class actions are possible or likely, here or generally. The other side of the coin is that to require a nation-wide class as the district court did here brings with it other problems that will be

discussed later. There are other possible problems with the district court's reasoning. The FDCPA has a short, one-year statute of limitations making multiple lawsuits more difficult. Further, if a debt collector is sued in one state, but continues to violate the statute in another, it ought to be possible to challenge such continuing violations. Given the uncertainty of those policy considerations, there is no compelling reason to ignore the plain words of the statute. In any event, the case before us does not now present multiple or serial class actions to recover for the same misconduct. Hence, it would be premature to require a nation-wide class at this juncture. If and when multiple serial class actions are presented, it will be time enough to rule on such a pattern. At this point, there is no persuasive reason to require a nation-wide class.

In a class action alleging that unauthorized charges were demanded, a plaintiff who did not pay the charge may represent a class consisting of both people that did pay and people that did not pay. Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998).

XX. DEFENSES

A. BONA FIDE ERROR DEFENSE

The FDCPA does provide an affirmative defense to debt collectors:

A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. §1692k(c). The provision is somewhat similar, but not identical, to one found in the Truth in Lending Act. 15 U.S.C. §1640.

It is uncertain whether a mistaken view of the law is not excused under 15 U.S.C. §1692k(c). Federal courts have split on the issue. A majority hold that the defense is limited to clerical errors and cannot protect mistakes of law. Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir.2001) (stating that bona fide error defense does not apply to mistakes of law); Hulshizer v. Global Credit Servs., Inc., 728 F.2d 1037, 1038 (8th Cir.1984) (per curiam); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27 (2d Cir.1989) (same); Baker v. G.C. Servs. Corp., 677 F.2d 775, 779 (9th Cir.1982) (mistake of law "insufficient by itself to support the bona fide error defense"); Hartman v. Meridian Fin. Servs., Inc., 191 F.Supp.2d 1031, 1045-46 (W.D.Wis.2002) (does not apply to mistakes of law and generally is limited to clerical mistakes); Arroyo v. Solomon & Solomon, P.C., No. 99-CV- 8302, 2001 WL 984940, at *6 (E.D.N.Y. July 19, 2001), amended and superseded by 2001 WL 1590520 (E.D.N.Y. Nov. 16, 2001) (does not apply to mistakes of law, and collecting cases); Wilkerson v. Bowman, 200 F.R.D. 605, 608-09 (N.D.Ill.2001) (does not apply to mistaken view of the obligations imposed by the FDCPA); Edwards v. McCormick, 136 F.Supp.2d 795, 800 (S.D.Ohio 2001) (limited to clerical errors);

Spencer v. Hendersen- Webb, Inc., 81 F.Supp.2d 582, 591 (D.Md.1999) (does not apply to mistakes of law and generally is limited to clerical mistakes); Booth v. Collection Experts, Inc., 969 F.Supp. 1161, 1165 (E.D.Wis.1997) (same).

However, a growing minority of courts reach the contrary conclusion. Johnson v. Riddle, 305 F.3d 1107, 1121-22 (10th Cir. 2002); Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002); Jenkins v. Heintz, 124 F.3d 824, 832 & n. 7, 833 (7th Cir.1997) (stating that bona fide error defense not limited to clerical errors and can apply to mistakes of law); Nance v. Ulferts, 282 F.Supp.2d 912, 920 (N.D.Ind. 2003) (errors of law, if “reasonable”); Frye v. Bowman, Heintz, Boscia & Vician, 193 F.Supp.2d 1070, 1085-86 (S.D.Ind.2002) (same; attorneys made exact copy of summons provided by state court clerk, which did not accurately describe defendant’s rights); Filsinger v. Upton, Cohen, & Slamowitz, No. 99-CV-1393, 2000 WL 198223, at *2 (N.D.N.Y. Feb. 18, 2000) (not limited to clerical errors); Taylor v. Luper, Sheriff & Niedenthal Co., 74 F.Supp.2d 761, 765 (S.D.Ohio 1999) (not limited to clerical errors and can apply to mistakes of law); Watkins v. Peterson Enters., Inc., 57 F.Supp.2d 1102, 1107-08 (E.D.Wash.1999) (can apply to mistakes of law where the mistake stemmed from an official interpretation of the law); Aronson v. Commercial Fin. Servs, Inc., No. Civ.A. 96-2113, 1997 WL 1038818, at *5 (W.D.Pa. Dec.22, 1997) (not limited to clerical errors and can apply to mistakes of law).

Furthermore, the maintenance of precautions designed to avoid errors of the sort that caused the violation is mandatory. Where the debt collector "failed to provide any evidence that it maintained proper procedures to avoid error", the bona fide error defense was held not to be available. Carrigan v. Central Adjustment Bureau, Inc., 494 F.Supp. 824, 827 (N.D.Ga. 1980); Oglesby v. Rotche, *supra*, 1993 U.S. Dist. LEXIS 15687, 1993 WL 460841 (N.D.Ill., Nov. 4, 1993). The mere assertion by a defendant that it tries to comply with the law is not enough. Dechert v. Cadle Co., IP 01-880-C(B/G), 2003 WL 23008969 (S.D.Ind. Sep. 11, 2003).

B. LIMITATIONS

The one-year statute of limitations begins to run when a collection letter is mailed or an improper legal action is filed. Naas v. Stolman, 130 F.3d 892 (9th Cir. 1997); Maloy v. Phillips, 64 F.3d 607, 608 (11th Cir. 1995); Mattson v. U.S. West Communications, 967 F.2d 259, 261 (8th Cir. 1992); Prade v. Jackson & Kelley, 941 F.Supp. 596, 599-600 (N.D. W. Va. 1996), *aff'd mem.* 135 F.3d 770 (4th Cir. 1998); Blakemore v. Pekay, 895 F.Supp. 972, 982-83 (N.D. Ill. 1995). The Eighth Circuit has held that the one year statutory limitation expires the day before that anniversary date, Mattson v. U.S. West Communications, Inc., 967 F.2d 259 (8th Cir. 1992), but all other circuits are contrary. Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002); United Mine Workers v. Dole, 870 F.2d 662, 665 (D.C.Cir.1989); Frey, 748 F.2d at 175.

C. OTHER DEFENSES

Nonstatutory defenses should not be recognized under the FDCPA. Generally, when dealing with a statutory cause of action which enumerates defenses, it is not appropriate to add to the list. People v. Theobald, 43 Ill.App.3d 897, 356 N.E.2d 1258 (3rd Dist. 1976). It is particularly

inappropriate to recognize the common law “voluntary payment” doctrine as a defense to a statute which makes it unlawful to induce the payment of money through deceptive or unfair practices. Scott v. Fairbanks Capital Corp., 284 F.Supp.2d 880 (S.D.Ohio 2003); Harper v. American Tel. & Tel. Co., 54 F.Supp.2d 1371, 1380-81 (S.D.Ga. 1999) (state law regarding voluntary payments cannot be used to prevent recovery of money obtained through mail fraud). “When an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express.” Village of Bloomingdale v. CDG Enterprises, Inc., 196 Ill.2d 484, 493, 752 N.E.2d 1090 (2001).

D. WITNESS IMMUNITY

In several recent cases, FDCPA defendants have claimed that “common law witness immunity” insulates them against liability for false statements in pleadings, affidavits, etc., filed in state courts. If the allegedly false statement was essential to a judgment adverse to the consumer, it cannot be challenged in federal court under Rooker-Feldman and collateral estoppel. If it was not (e.g., the state court case was dismissed), most recent decisions reject the “witness immunity” claim. Blevins v. Hudson & Keyse, Inc., 1:03-cv-241, 2004 U.S. Dist. LEXIS 24843 (S.D. Ohio Sept. 29, 2004), and 2004 U.S. Dist. LEXIS 24844 (S.D. Ohio Sept. 29, 2004); Hartman v. Asset Acceptance Corp., 1:03-cv-113, 2004 U.S. Dist. LEXIS 14845 (S.D. Ohio Sept. 29, 2004); Todd v. Weltman, Weinberg, C-1-03-171, 2004 U.S. Dist. LEXIS 24886 (S.D. Ohio, Aug. 3, 2004). As pointed out in these decisions, the Seventh Circuit has imposed liability for a false statement in a complaint. Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000) (false statement that plaintiff was “subrogated” to rights of creditor). Contra, Beck v. Codilis & Stawiarski, 4:99cv485, 2000 U.S. Dist. LEXIS 22440 (N.D. Fla. Dec. 27, 2000).

XXI. RELATED STATE LAW ISSUES

A. STATE PROCEDURAL LAW

1. Is plaintiff real party in interest or collection agency suing without assignment as required by Collection Agency Act? A collection agency which does not obtain an assignment for collection that complies with the Act is not entitled to sue. Business Serv. Bureau v. Webster, 298 Ill. App. 3d 257; 698 N.E.2d 702 (4th Dist. 1998).

2. Is there compliance with 735 ILCS 5/2-403: “(a) The assignee and owner of a non-negotiable chose in action may sue thereon in his or her own name. Such person shall in his or her pleading on oath allege that he or she is the actual bona fide owner thereof, and set forth how and when he or she acquired title. . . .” The assignee “must, therefore, set out the facts showing in what manner he obtained possession and ownership thereof. It is not a sufficient allegation in such a case to allege that the plaintiff is the actual bona fide owner for value . . . A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by [this section] . . . showing the assignment of the chose in action, the actual ownership thereof by him, and setting forth how and when he acquired title.” Ray v. Moll, 336 Ill. App. 360, 84 N.E.2d 163 (4th Dist. 1949). The section is former section 22 of the Civil Practice Act of

1933.

3. Is contract and assignment attached to complaint as required by 2-606 of Code of Civil Procedure? With respect to assignment, see Candice Co. v. Ricketts, 281 Ill.App.3d 359, 362, 666 N.E.2d 722 (1st Dist. 1996).

4. Are there false statements in complaint, affidavits, etc., e.g., that affiant has personal knowledge of records establishing debt, that plaintiff is holder in due course, etc.

5. Improper allegations of account stated, or allegations of account stated without attaching statement of account and underlying contract. "An account stated has been defined as an agreement between parties who have had previous transactions that the account representing those transactions is true and that the balance stated is correct, together with a promise, express or implied, for the payment of such balance." McHugh v. Olsen, 189 Ill.App.3d 508, 514, 545 N.E.2d 379 (1st Dist. 1989). "An account stated is merely a form of proving damages for the breach of a promise to pay on a contract." Dreyer Medical Clinic, S.C. v. Corral, 227 Ill.App.3d 221, 226, 591 N.E.2d 111 (2d Dist. 1992). A cause of action for an account stated therefore requires allegation and proof that (1) there was a contract between the parties, such as a credit card agreement or a contract for the sales of goods or services, Dreyer, 227 Ill.App.3d at 226-27, (2) a statement of account was sent to the party sought to be held liable, and (3) the statement was agreed to, expressly or by implication. Thomas Steel Corp. v. Ameri-Forge Corp., 91 C 2356, 1991 WL 280085 (N.D.Ill., Dec. 27, 1991). Agreement may be inferred from payment or retention for a substantial period without objection. However, both the basic agreement and the rendition of an account must be proven. "[T]he rule that an account rendered and not objected to within a reasonable time is to be regarded as correct assumes that there was an original indebtedness, but there can be no liability on an account stated if no liability in fact exists, and the mere presentation of a claim, although not objected to, cannot of itself create liability. . . . In other words, an account stated cannot create original liability where none exists; it is merely a final determination of the amount of an existing debt." Motive Parts Co. of America, Inc. v. Robinson, 53 Ill.App.3d 935, 940, 369 N.E.2d 119 (1st Dist. 1977). Thus, a cause of action for an account stated is founded on both (a) the underlying contract and (b) the statement of account sent to the debtor and agreed to by the debtor. Both must be attached.

6. Certain collection lawyers/ debt buyers file state court collection complaints using "generic" contracts that have nothing to do with the particular account.

7. Suing on time barred debts; issue of whether IL statute of limitations for credit cards is 5 or 10 years

8. Proof problems:

a. Absent an account stated, it is difficult for the bad debt buyer to prove anything is due. Affidavits are often submitted to prove default that are conclusory and insufficient. Manufacturers & Traders Trust Co. v. Medina, 01 C 768, 2001 WL 1558278 (N.D.Ill., Dec. 5, 2001); Cole Taylor Bank v. Corrigan, 230 Ill.App.3d 122, 595 N.E.2d 177, 181 (2d Dist. 1992); Asset

Acceptance Corp. v. Proctor, 156 Ohio App. 3d 60; 804 N.E.2d 975 (2004). Computer-generated bank records or testimony based thereon are often offered without proper foundation, or are summarized without being introduced. Manufacturers & Traders Trust Co. v. Medina, *supra*, 01 C 768, 2001 WL 1558278 (N.D.Ill., Dec. 5, 2001); FDIC v. Carabetta, 55 Conn.App. 369, 739 A.2d 301 (1999).

b. Testimony, whether live or in the form of an affidavit, to the effect that the witness has reviewed a loan file and that the loan file shows that the debtor is in default is hearsay and incompetent; rather, the records must be introduced after a proper foundation is provided. New England Savings Bank v. Bedford Realty Corp., 238 Conn. 745, 680 A.2d 301, 308-09 (1996), later opinion, 246 Conn. 594, 717 A.2d 713 (1998); Cole Taylor Bank v. Corrigan, *supra*, 230 Ill.App.3d 122, 595 N.E.2d 177, 181 (2d Dist. 1992). It is the business records that constitute the evidence, not the testimony of the witness referring to them. In re A.B., 308 Ill.App. 3d 227, 719 N.E.2d 348 (2d Dist. 1999).

c. Nor is such an affidavit made sufficient by omitting the fact that it is based on a review of loan records, if it appears that the affiant did not personally receive or observe the reception of all of the borrower's payments. Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1, 10 (2000). If the underlying records are voluminous, a person who has extracted the necessary information may testify to that fact, but the underlying records must be made available to the court and opposing party. In re deLarco, 313 Ill.App.3d 107, 728 N.E.2d 1278 (2d Dist. 2000).

9. Beware of "facsimile" records, which are computer-generated, non-image documents. If the records are generated by computer, a person familiar with the computer system who can testify that the output is an accurate reflection of the input must lay a foundation. *In re Vinhnee*, 2005 Bankr. LEXIS 2602, 2005 WL 3609376 (9th Cir. BAP, Dec. 16, 2005). Among pertinent subjects of inquiry are "system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records." (*Id.*, *25-26) In that case, "The trial court concluded that the declaration in the post-trial submission was doubly defective. First, the declaration did not establish that the declarant was 'qualified' to provide the requisite testimony. Second, the declaration did not contain information sufficient to warrant a conclusion that the 'American Express computers are sufficiently accurate in the retention and retrieval of the information contained in the documents.'" (*22-23)

10. Supreme Court Rule 222 went into effect ten years ago. It applies to all cases subject to mandatory arbitration (except small claims cases) and all cases where money damages of \$50,000 or less are sought. But it does not apply to small claims cases, evictions, family law cases or actions seeking equitable relief. The rule requires both parties to provide a list of case-related information to the opposing party, such as names and addresses of witnesses, factual basis of the claim, the legal theory of each claim or defense, etc., automatically, without request. The disclosures must be made within 120 days of the filing of the responsive pleading to the Complaint. Rule 222 has been ignored in Cook County but two recent articles, including one in the February 2006 Illinois Bar Journal, suggest this rule can no longer be disregarded.

The Rule has a “gotcha” provision, Rule 222(g), which states that “the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown. If a defendant moves, on the day of trial, to exclude all evidence given the plaintiff’s failure to file a Rule 222 disclosure statement, a court is likely to grant the request, dooming the plaintiff’s action. One case, Kapsouris v. Rivera, 747 N.E.2d 427 (2nd Dist. 2001) suggests (but does not hold) that if specific information is provided through other discovery, such as a Rule 213 interrogatory response, the failure to file a Rule 222 response will not trigger the exclusion of that evidence. Bottom line: Another article at <http://www.isba.org/Sections/Tortlaw/11-05.html#Anchor-Rule-11481> calls Rule 222 a “ticking time bomb.”

B. STATE COMMERCIAL CODE

1. An absolute assignee (bad debt buyer, as opposed to one taking assignment for collection or collection agency) is subject to Article 9 of the UCC, which covers sales of receivables as well as security interests.

2. Send a certified or faxed letter requesting assignment or assignments necessary to show title in plaintiff under UCC 9-406, 810 ILCS 5/9-406. An example is in K:\general\fdcpa\verification. The way 9-406 is written the debt buyer is not entitled to payment unless it provides a copy of the assignment(s). Wait about 10 days after receipt and then move to dismiss on the ground that there is no obligation to pay

3. Section 9-210 of the Uniform Commercial Code gives right to accounting, defined as breakdown of what debt consists of. Unlike the case with 15 U.S.C. 1692g, the debt buyer does **not** have the option to cease collection but decline to respond. There is \$500 statutory damages for noncompliance.

C. INTEREST STATUTES

1. Claiming (directly or through collector) interest exceeding 5% (IL) or 8% (IN) or attorneys fees, where assignment to debt buyer or predecessor only transfers “receivables.” (Need to get assignment)

2. Bad debt buyers that try to collect more than **21% interest on Indiana consumer debts** for period when debt is held by bad debt buyer. See Mitchell v. Primary.

D. TRUTH IN LENDING ACT

1. 15 U.S.C. § 1643(b) applies to bad debt buyers and requires them to show “authorized use” for charges.