

Fair Debt Collection Practices Act -- 2009

DANIEL A. EDELMAN
May 31, 2009

© Daniel A. Edelman 2009

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); FTC v. Check

Investors, Inc., 502 F.3d 159 (3rd Cir. 2007). 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 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) (per capita tax is not a debt as defined by the FDCPA); Coretti v. Lefkowitz, 965 F. Supp. 3 (D. Conn. 1997); Beggs v. Rossi, 994 F. Supp. 114(D. Conn. 1997), *aff'd*, 145 F.3d 511 (2d Cir. 1998) (personal property taxes are not debt as defined by the FCDPA); 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").

One court has held that 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). This seems to be a close case, in part dependent on the absence of any required payment for the basic loan. The court suggested that if there had been a charge for borrowing a DVD or video, there would have been a debt. Certainly, if one pays to rent goods for nonbusiness purposes and there is an extra charge for late return or late payment, both the basic rental and the extra charge are a "debt."

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., servicers 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. To the same effect is Catencamp v. Cendant Timeshare Resort Group -- Consumer Finance, Inc., 471 F.3d 780 (7th Cir. 2006) ("Resort Financial Services" used by CTRG).

"[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

Debt buying is a fast-growing business. According to an industry group, the Debt Buyers Association: "The face value of all such debt sold in 1993 was \$1.3 billion. By 1997, that number had grown to \$15 billion and sales reached approximately \$25 billion in 2000. The Debt Buyers Association estimates that the amount of debt to be sold by the original creditors in 2002 will exceed \$60 billion." By 2007 the amount had risen to \$110 billion per year. Eileen Ambrose, "Zombie Debt; Debt Can Come Back to Haunt You Years Later," *The Baltimore Sun*, May 6, 2007 pg. 1C.

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); McKinney v. Cadleway Props., Inc., 548 F.3d 496 (7th Cir. 2008); FTC v. Check Investors, Inc., 502 F.3d 159 (3rd Cir. 2007); 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., 97 C 5288, 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).

Since litigation is a means of debt collection, Heintz v. Jenkins, 514 U.S. 291, 292 (1995); FTC v. Check Investors, Inc., 502 F.3d 159, 173 (3rd Cir. 2007), someone who acquires debts in default and files collection lawsuits is subject to the FDCPA.

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).

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). Another held that a law firm was subject to the FDCPA when it consistently accepted at least 10 debt collection matters every year. Silva v Mid-Atlantic Mgmt. Corp., 277 F Supp 2d 460 (E.D.Pa. 2003). 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). See also Schroyer v. Frankel, 197 F.3d 1170, 1173, 1177 (6th Cir. 1999) (where firm handled 50-75 collection cases annually, constituting less than 2% of overall practice, maintained no non-attorney staff or computer aids for debt collection, and debt collection activity came from non-collection business clients and was "incidental to, and not relied upon or anticipated in," firm's practice of law, firm was not debt collector); Cashman v. Ricigliano, 3:02CV1423 (MRK), 2004 U.S. Dist. LEXIS 17027 (D.Conn., August 25, 2004) ("The FDCPA applied to attorneys "regularly" engaging in debt collection activity, including such activity in the nature of litigation. Defendants were "debt collectors" under the FDCPA. They issued 97 collection letters during the approximately five-month period relevant to the instant case. Moreover, they initiated 53 collection lawsuits in connection with their collection efforts. It appeared that certain personnel in the firm were devoted, at least in part, to debt collection activity. Defendants put in place facilities designed expressly to facilitate its debt collection activity. Defendants' debt collection activity was undertaken in connection with an ongoing relationship with a licensed collection agency. Since defendants conceded that plaintiffs would prevail on liability in the event the court determined that they are debt collectors under the FDCPA, defendants were not entitled to summary judgment and plaintiffs were entitled to partial summary judgment on liability."); and Heller v. Graf, 488 F. Supp. 2d 686 (N.D.Ill. 2007) (14 collection letters at one time and lawsuits filed on 3 of the cases presents fact issue).

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.

Foreclosure lawyers are subject to the FDCPA, at least unless they neither attempt to collect money nor enforce personal liability. Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 378 (4th Cir. 2006) (definition of "debt collector" does not exclude those who enforce security interests but who also fall under general definition of "debt collector"); Overton v. Foutty & Foutty, LLP, 1:07-cv-0274-DFH-TAB, 2007 U.S. Dist. LEXIS 61705 (S.D. Ind. Aug. 21, 2007).

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

Except for purposes of 15 U.S.C. §1692f(6), repossession agencies are not debt collectors within the FDCPA unless they perform common collection services, such as sending dunning letters, demanding money, 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., No. 3916, 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., 4:97CV00346, 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).

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); Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1171 (9th Cir. 2006); 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).

The Seventh Circuit has also held that where the representation is communicated to the debtor's attorney, the test is whether a competent lawyer would be deceived by a misleading statement, or whether there was a false statement of fact. Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769 (7th Cir. 2007). 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).

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).

However, some courts require that a misrepresentation or omission be material to the unsophisticated or least sophisticated consumer. Wahl v. Midland Credit Mgmt., 556 F.3d 643 (7th Cir. 2009); Hahn v. Triumph P'ships LLC, 557 F.3d 755, 757 (7th Cir. 2009); Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 596 (6th Cir. 2009).

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). See Gionis v. Javitch, Block & Rathbone, LLP, Nos. 06-3048 & 06-3171, 238 Fed. Appx. 24; 2007 U.S. App. LEXIS 14054 (6th Cir., June 6, 2007), aff'g, Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D. Ohio, 2005): "Javitch's failure to assert the attorney fees language in the complaint's 'prayer of relief' section does not cure the threat. See Veach v. Sheeks, 316 F.3d 690, 693 (7th Cir. 2003) ("When there are two different accounts of what a debtor actually owes the creditor, that one version is the correct description does not save the other . . . under the unsophisticated debtor standard . . .")."

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:

§ 1692g. Validation of debts [Section 809 of P.L.]

Notice of debt; contents

(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 the 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.

Disputed debts

(b) Disputed debts. If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) 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. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

No Admission of liability

(c) 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.

(d) Legal pleadings. A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions. The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

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).

Prior to the 2006 amendment to the FDCPA, if the initial communication to the debtor was a summons and complaint, it had to comply with §1692g. Thomas v. Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004); 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 could 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).

The statute has now been amended to provide that a pleading does not trigger the validation notice. However, any other type of communication between the debtor and debt collector does trigger it.

Claims may also be brought for false statements in state court pleadings. Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000); First Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428 (2007); Todd v. Weltman, Weinberg, & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D.Ohio 2004), later opinion, 395 F.Supp.2d 662 (S.D.Ohio 2004); Hartman v. Asset Acceptance Corp., 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845 (S.D. Ohio Sept. 29. 2004); Jordan v. Thomas & Thomas, C-1-04-296, 2007 U.S. Dist. LEXIS 71404 (S.D.Ohio September 26, 2007); Foster v. Velocity Invs., LLC, 07 C 0824 and 07 C 2989, 2007 U.S. Dist. LEXIS 63302 (N.D.Ill., August 24, 2007); Matmanivong v. Unifund CCR Ptrns., 2009 U.S. Dist. LEXIS 36287 (N.D. Ill. Apr. 28, 2009); Ramirez v. Palisades Collection LLC, 2008 U.S. Dist. LEXIS 48722 (N.D. Ill. June 23, 2008); Guevara v. Midland Funding NCC-2 Corp., 2008 U.S. Dist. LEXIS 47767 (N.D. Ill. June 20, 2008); Parkis v. Arrow Fin. Servs., 2008 U.S. Dist. LEXIS 1212 (N.D. Ill. Jan. 8, 2008); Jenkins v. Centurion Capital Corp., 2007 U.S. Dist. LEXIS 85218 (N.D. Ill. Nov. 15, 2007); Chavez v. Bowman, Heintz, Boscia & Vician, 07 C 670, 2007 U.S. Dist. LEXIS 61936 (N.D.Ill., August 22, 2007); Delawder v. Platinum Fin. Servs. Corp., 1:04-cv-680, 2007 U.S. Dist.

LEXIS 31174 (S.D.Ohio, April 27, 2007), earlier opinion, 2005 U.S. Dist. LEXIS 40139 (S.D.Ohio March 1, 2005); Lee v. Javitch, Block & Rathbone, LLP, 484 F. Supp. 2d 816 (S.D.Ohio 2007); 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); Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D.Ohio, July 8, 2004); Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D.Ohio, 2005); Stolicker v. Muller, Muller, Richmond, Harms, Myers & Sgroi, P.C., 1:04-CV-733, 2005 U.S. Dist. LEXIS 32404 (W.D.Mich., September 9, 2005), later opinion, 2006 U.S. Dist. LEXIS 36000 (W.D. Mich., June 2, 2006)

Section 1692g(b) provides that if the consumer disputes the debt in writing, the collector must cease further collection efforts until the validation procedure is complied with. 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: Clark v. Capital Credit & Collection Servs., 460 F.3d 1162, 1174 (9th Cir. 2006) ("At the minimum, 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."); McCammon v. Bibler, Newman & Reynolds, P.A., 06-2242-JWL, 2007 U.S. Dist. LEXIS 69352 (D.Kan. September 18, 2007); Worch v. Wolpoff & Abramson, L.L.P., 477 F. Supp. 2d 1015 (E.D.Mo. 2007); Stonehart v. Rosenthal, 01 Civ. 651, 2001 U.S. Dist. LEXIS 11566, 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.

Also note that as to a debt buyer, the UCC entitles the putative debtor to proof of the assignment and an accounting.

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).

If the debt collector is attempting to collect the past due portion of an unaccelerated debt, the "amount of the debt" is the past due portion, not the whole debt. Barnes v. Advanced Call Ctr. Techs., LLC, 493 F.3d 838 (7th Cir. 2007). However, the nature of the number has to be "clearly" described.

A letter stating the balance but inviting the debtor to call to obtain "the most current balance information" creates doubt as to whether the balance stated is increasing and violates the FDCPA unless an explanation is provided. Chuway v. National Action Financial Services, 362 F.3d 944 (7th Cir. 2004). 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].

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., 98 C 4245, 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 "overshadowing" doctrine was codified in the 2006 amendment to §1692g.

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 & Spire, 98 C 3957, 1999 U.S. Dist. LEXIS 6912 (N.D.Ill., April 30, 1999). Also, the reference to 30 days should specify "after receipt."

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., 3:97CV171, 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).

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 debtor 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). The debtor may send the dispute within that period; requiring receipt of a response within 30 days is a violation because it shortens the statutory period. Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997). Presumably specifying that a dispute must be sent within 30 days from the date of the letter is a violation for the same reason.

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

The present owner of the debt must be identified in a reasonable manner. Luzinski

v. Arrow Financial Services, LLC, 05-CV-1322, 2007 U.S. Dist. LEXIS 71788 (E.D.Wisc. Sept. 26, 2007) (“Capital One” acceptable where debt is owned by Capital One Bank and serviced by Capital One Services); Bode v. Encore Receivable Management, Inc., 05-CV-1013, 2007 U.S. Dist. LEXIS 64477, 2007 WL 2493898 (E.D. Wis. Aug. 30, 2007) (also no violation where “Capital One Services” used).

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. Filing or threatening suit on debts barred by applicable federal or state statutes of limitation, unless the debt collector has a reasonable basis for contending that the debt is not time-barred. Kimber v. Federal Financial Corp., 668 F.Supp. 1480 (M.D.Ala. 1987); Goins v. JBC & Assocs., P.C., 352 F. Supp. 2d 262 (D.Conn. 2005); Ramirez v. Palisades Collection LLC, 2008 U.S. Dist. LEXIS 48722 (N.D. Ill. June 23, 2008), earlier opinion, 250 F.R.D. 366 (N.D. Ill. 2008); Parkis v. Arrow Fin. Servs., 2008 U.S. Dist. LEXIS 1212 (N.D. Ill. Jan. 8, 2008); Schutz v. Arrow Fin. Servs., LLC, 465 F. Supp. 2d 872 (N.D. Ill. 2006). "A threat to sue a consumer on a claim that the debt collector knows is barred by the statute of limitations violates § 1692e(2)(A) of the FDCPA." Aronson v. Commercial Fin. Svcs., Inc., No. Civ. A. 96-2113, 1997 U.S. Dist. LEXIS 23534, 1997 WL 1038818, at *2 (W.D. Pa. Dec. 22, 1997). It should be noted that the February 2009 FTC report, "Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)," states (pp. 63-64) that "It thus is a violation of the FDCPA to sue or threaten to sue consumers to recover on time-barred debt." This prohibition applies with equal force in all states, regardless of whether expiration of the limitations period completely extinguishes a debt or merely prevents judicial enforcement of it. In states that adopt the latter view, a debt collector may request voluntary repayment of the debt but may not threaten suit based upon it. Freyermuth v. Credit Bureau Svcs., Inc., 248 F.3d 767, 771 (8th Cir 2001); Ehsanuddin v. Wolpoff & Abramson, No. Civ. A. 06-708, 2007 U.S. Dist. LEXIS 11230, 2007 WL 543052, at *4 n.1 (W.D. Pa. Feb. 16, 2007); Wallace v. Capital One Bank, 168 F. Supp. 2d 526 (D. Md. 2001) (holding that when expiration of a limitations period does not extinguish debt, a debt collector may send a collection letter that does no more than request voluntary repayment). At present, only Mississippi and Wisconsin hold that the right is extinguished by passage of the statute of limitations.
2. 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).
3. 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).

4. 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).
5. 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). The Ninth Circuit expressed a contrary opinion in a case involving an "innocuous" letter, Wade v. Regional Credit Ass'n, 87 F.3d 1098 (9th Cir. 1996); the court expressly noted that there was no lawsuit or threat of suit. *See also*, McCorriston v. L.W.T., Inc., 8:07-cv-160-T-27EAJ, 2008 U.S. Dist. LEXIS 60006 (M.D.Fla. August 7, 2008). Some courts hold that a request for payment by a collector who lacks a required license is not a violation but that a threat to file suit is. Goins v. JBC & Associates, P.C., 352 F. Supp. 2d 262 (D.Conn. 2005). Note that if a complaint or other document expressly represents that authority exists when it does not, §1692e is violated.

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);

6. 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).
7. 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).
8. 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))."
9. 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.
10. 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).
11. The statement that "Late payments, missed payments or other defaults may be reflected on your credit report" is unlawful if late or missed payments or other defaults are not in fact reported to credit bureaus after the initial reporting of a defaulted account. Fainbrun v. Southwest Credit Systems, L.P., 05cv4364, 2007 U.S. Dist. LEXIS 70956 (E.D.N.Y. Sept. 25, 2007);

see also, Harrison v. Palisades Collections, LLC, 06cv3239 (E.D.N.Y. May 7, 2007).

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, 98 C 2457, 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, C-3-94-347, 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, C-3-94-347, 1999 U.S. Dist. LEXIS 1124 (S.D. Ohio, Feb. 2, 1999).

In this regard, the FTC states:

6. *Threat of legal or other action.* Section 807(5) refers not only to a false threat of legal action, but also a false threat by a debt collector that he will report a debt to a credit bureau, assess a collection fee, or undertake any other action if the debt is not paid. A debt collector may also not misrepresent the imminence of such action.

A debt collector's implication, as well as a direct statement, of planned legal action may be an unlawful deception. For example, reference to an attorney or to legal proceedings may mislead the debtor as to the likelihood or imminence of legal action.

A debt collector's statement that legal action has been recommended is a representation that legal action may be taken, since such a recommendation implies that the creditor will act on it at least some of the time.

Lack of intent may be inferred when the amount of the debt is so small as to make the action totally unfeasible or when the debt collector is unable to take the action because the creditor has not authorized him to do so.

FTC Official Staff Commentary on the Fair Debt Collection Practices Act, Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50106 (Dec. 13, 1988).

If the chance that action can be permissibly undertaken against the debtor is zero, qualifying a statement by "to the extent permitted" does not save it. Gionis v. Javitch, Block & Rathbone, LLP, Nos. 06-3048 & 06-3171, 238 Fed. Appx. 24; 2007 U.S. App. LEXIS 14054 (6th Cir., June 6, 2007), *aff'g*, Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D. Ohio,

2005): “And the phrase ‘to the extent permitted’ suggests (at least to the least sophisticated consumer) that some extent is in fact permitted under Ohio law. ‘Why else,’ the consumer would wonder, “would Javitch attach this language to the complaint if Ohio law does not permit attorney fees here?”

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. Seeger v. AFNI, Inc., 548 F.3d 1107 (7th Cir. 2008) (violation of FDCPA to demand collection fee when contract authorizes fee only if owner of debt places it for collection with a third party; debt buyer demanded fee even though it collected its own debts); 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., 97-2273 (JRT/RLE), 1999 U.S. Dist. LEXIS 1745 (D. Minn. Feb. 17, 1999), adopted by, 1999 U.S. Dist. LEXIS 10930 (D. Minn. Mar. 29, 1999), affirmed, Kojetin v. C U Recovery, Inc., 212 F.3d 1318 (8th Cir. 2000). But see Talbott v. GC Services LP., 53 F. Supp. 2d 846 (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, No. 70608, 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, at least absence knowledge of the forgery. 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: ADDING ATTORNEY'S FEES

Requesting attorney's fees is not per se a violation where a contract authorizes "reasonable" attorney's fees.

The cases are divided on whether there is a violation if the request is patently excessive or based on a method (such as a percentage of the debt) not permitted under state law. Cases finding a violation include Cases declining to entertain the claim include Spears v. Brennan, 745 N.E.2d 862 (Ind. Ct. App. 2001). Spears may have turned on the fact that the FDCPA claimant could have challenged the amount in state court, which awarded the challenged fee.

Cases find a violation where the amount is stated as absolutely due instead of the collector's quantification of a contractual claim. Stolicker v. Muller, Muller, Richmond, Harms, Myers & Sgroi, P.C., 1:04-CV-733, 2005 U.S. Dist. LEXIS 32404 (W.D.Mich., September 9, 2005), later opinion, 2006 U.S. Dist. LEXIS 36000 (W.D. Mich., June 2, 2006)

IX. 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.

X. VIOLATIONS: INABILITY TO PROVE WHAT IS DUE

Courts have divided on whether filing unprovable collection cases is actionable.

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.

In Harvey v. Great Seneca Fin. Corp., 453 F.3d 324 (6th Cir. 2006), the courts held that a debt collector's failure to have on hand the proof necessary to establish a debt when the case was filed was not an FDCPA violation. The court expressly refrained from passing on the question of whether a pattern of such conduct violated the FDCPA, such claim having been

waived.

XI. VIOLATIONS: TIME BARRED DEBTS

Suing or threatening suit on time barred debts is an FDCPA violation. Freyermuth v Credit Bureau Serv. Inc., 248 F.3d 767, 771 (8th Cir 2001); Griffith v Capital One Bank, 00-603-GPM, 2001 U.S. Dist. LEXIS 21953, *4-5 (S.D. Ill. July 23, 2001); Goins v JBC & Assoc., P.C., 352 F. Supp. 2d 262, 272 (D. Conn. 2005); Stepney v Outsourcing Solutions, Inc., 97 C 5288, 1997 U.S. Dist. LEXIS 18264, 1997 WL 722972, *12-13 (N.D. Ill. Nov. 13, 1997); Kimber v Federal Fin. Corp., 668 F Supp 1480, 1489 (MD Ala 1987) (leading case); Baptist v. Global Holding & Invest. Co., 04-CV-2365, 2007 U.S. Dist. LEXIS 49476 (E.D.N.Y. July 9, 2007); Reese v. Arrow Financial Services, 202 F.R.D. 83, 92 (D.Conn. 2001); Beattie v. D. M. Collections, 754 F.Supp. 383, 393 (D.Del. 1991); Thompson v. D.A.N. Joint Venture III, L.P., 1:05cv938, 2007 U.S. Dist. LEXIS 10849 (M.D. Ala. Feb. 13, 2007); Deere v. Javitch, 413 F.Supp.2d 886, 891 (S.D. Ohio. 2006); Velderman v. Midland Credit Mgmt., 1:04cv269, 2005 U.S. Dist. LEXIS 42242 (W.D. Mich. Sept. 29, 2005); and Walker v. Gallegos, 167 F.Supp.2d 1105, 1107 (D. Ariz. 2001).

XII. VIOLATIONS: DISCHARGED DEBTS

The Seventh Circuit has held that the attempted collection of debts discharged in bankruptcy is an FDCPA violation:

Dunning people for their discharged debts would undermine the "fresh start" rationale of bankruptcy (bankruptcy as a system of debtors' rights as well as creditors' remedies), and is prohibited by the Fair Debt Collection Practices Act, which so far as relates to this case prohibits a debt collector (a defined term) from making a "false representation of the character, amount, or legal status of any debt." 15 U.S.C. § 1692e(2)(A). Although not aimed specifically at efforts to collect debts that have been discharged in bankruptcy, this provision fits that practice to a T. Turner v. J.V.D.B. & Assocs., Inc., 330 F.3d 991, 994-95 (7th Cir. 2003); cf. Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004) ("a demand for immediate payment while a debtor is in bankruptcy (or after the debt's discharge) is 'false' in the sense that it asserts that money is due, although, because of the automatic stay (11 U.S.C. § 362) or the discharge injunction (11 U.S.C. § 524), it is not").

Ross v. RJM Acquisitions Funding LLC, 480 F.3d 493, 495 (7th Cir. 2007).

XIII. 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.

XIV. VIOLATIONS: VOICEMAIL MESSAGES

A voicemail message is a “communication” within the meaning of 15 U.S.C. §§1692d(6) and 1692e. Foti v. NCO Financial Systems, 424 F.Supp.2d 643, 669 (S.D.N.Y. 2006); Hosseinzadeh v. M.R.S. Associates, Inc., 387 F.Supp.2d 1104, 1112, 1118 (C.D.Cal. 2005); Joseph v. J. J. MacIntyre Cos., 281 F.Supp.2d 1156 (N.D.Cal. 2003); Stinson v. Asset Acceptance, LLC, 1:05cv1026, 2006 WL 1647134, 2006 U.S. Dist. LEXIS 42266 (E.D. Va., June 12, 2006); Belin v. Litton Loan Servicing, LP, 8:06-cv-760-T-24 EAJ, 2006 U.S. Dist. LEXIS 47953 (M.D.Fla., July 14, 2006); Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943, 946 (D.Minn. 2007) (“a debt collector violates § 1692d(6) if the collector leaves an answering machine message

under an alias and fails to disclose that the call is related to debt collection”); Knoll v. IntelliRisk Mgmt. Corp., Civil No. 06-1211 (PAM/JSM), 2006 U.S. Dist. LEXIS 77467 (D.Minn., October 16, 2006) (similar).

Messages left by debt collectors will often violate 15 U.S.C. §§1692c-e and 1692g. Potential violations include:

a. Failure to include the warning required by 15 U.S.C. §1692e(11) and, if the initial communication, failure to provide the §1692g notice within 5 days.

b. If the voicemail is not solely accessed by the debtor, illegal third party communications.

c. Failure to identify the caller’s company. 15 U.S.C. §1692d(6) makes it unlawful for a debt collector to engage in the following conduct: “Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.”

XV. 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, 97-1309, 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).

XVI. VIOLATIONS: USE OF CREDITORS' NAME

The use by a collection agency of the name of the creditor in communicating with the debtor may violate the FDCPA. First Nationwide Collection Agency, Inc. v. Werner, 288 Ga.

App. 457, 654 S.E.2d 428 (2007).

XVII. 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, 97-1309, 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.

XVIII. 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*, 93 C 4183, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D.Ill. 1993).

XIX. 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).

XX. 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.

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, 481 F. Supp. 2d 1 (D.D.C. 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.

Misrepresentation of a debtor's rights or liabilities under the Internal Revenue Code in connection with the collection of a debt is an FDCPA violation. Kuehn v. Cadle Co., 5:04-cv-432-Oc-10GRJ, 2007 U.S. Dist. LEXIS 25764 (M.D.Fla., April 6, 2007). This includes a statement that a 1099 must be issued when a 1099 is not required. Wagner v. Client Services, Inc., 08-5546, 2009 U.S. Dist. LEXIS 26604 (E.D.Pa., March 26, 2009); Sledge v. Sands, 182 F.R.D. 255 (N.D. Ill. 1998).

XXI. VIOLATIONS: CONDUCT OF COLLECTION LITIGATION

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

The representation that a demand has been made when no demand has been made violates the FDCPA. First Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

Other decisions holding that filing false pleadings or affidavits in state court collection litigation is actionable include Todd v. Weltman, Weinberg, & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D. Ohio 2004), later opinion, 395 F. Supp. 2d 662 (S.D. Ohio 2004); Hartman v. Asset Acceptance Corp., 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845 (S.D. Ohio Sept. 29, 2004); Jordan v. Thomas & Thomas, C-1-04-296, 2007 U.S. Dist. LEXIS 71404 (S.D. Ohio September 26, 2007); Foster v. Velocity Invs., LLC, 07 C 0824 and 07 C 2989, 2007 U.S. Dist. LEXIS 63302 (N.D. Ill., August 24, 2007); Matmanivong v. Unifund CCR Ptnrs., 2009 U.S. Dist. LEXIS 36287 (N.D. Ill. Apr. 28, 2009); Ramirez v. Palisades Collection LLC, 2008 U.S. Dist. LEXIS 48722 (N.D. Ill. June 23, 2008); Guevara v. Midland Funding NCC-2 Corp., 2008 U.S. Dist. LEXIS 47767 (N.D. Ill. June 20, 2008); Parkis v. Arrow Fin. Servs., 2008 U.S. Dist. LEXIS 1212 (N.D. Ill. Jan. 8, 2008); Jenkins v. Centurion Capital Corp., 2007 U.S. Dist. LEXIS 85218 (N.D. Ill. Nov. 15, 2007); Chavez v. Bowman, Heintz, Boscia & Vician, 07 C 670, 2007 U.S. Dist. LEXIS 61936 (N.D. Ill., August 22, 2007); Delawder v. Platinum Fin. Servs. Corp., 1:04-cv-680, 2007 U.S. Dist. LEXIS 31174 (S.D. Ohio, April 27, 2007), earlier opinion, 2005 U.S. Dist. LEXIS 40139 (S.D. Ohio March 1, 2005); Lee v. Javitch, Block & Rathbone, LLP, 484 F. Supp. 2d 816 (S.D. Ohio 2007); 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); Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D. Ohio, July 8, 2004); Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D. Ohio. 2005); and Stolicker v. Muller, Muller, Richmond, Harms, Myers & Sgroi, P.C., 1:04-CV-733, 2005 U.S. Dist. LEXIS 32404 (W.D. Mich., September 9, 2005), later opinion, 2006 U.S. Dist. LEXIS 36000 (W.D. Mich., June 2, 2006). 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.

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).

However, it is not necessary for the debt collector to write pleadings that are intelligible to the "unsophisticated consumer." Belser v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 480 F.3d 470 (7th Cir. 2007).

The FTC has stated that it "may take law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other laws the Commission enforces." "Collecting Consumer Debts: The Challenges

of Change: A Federal Trade Commission Workshop Report (February 2009),” p. 66.

XXII. REMEDIES AND PROCEDURE

A. JURISDICTION

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., 90 C 20182, 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., 90-5535, 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).

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, 3:02CV577, 2002 U.S. Dist. LEXIS 26788, 2002 WL 32173704 (D.Conn., Oct. 29, 2002) (must phrase request clearly); Kimbrow v. IC System, 3:01CV1676, 2002 WL 1816820 (D.Conn. July 22, 2002); Boutvis v. Risk Management Alternatives, Inc., 3:01 CV 1933 (DJS), 2002 U.S. Dist. LEXIS 8521 (D.Conn., May 3, 2002) (price paid is relevant to the nature of the relationship between the alleged assignee and prior owner, i.e. had the company actually bought the debt). A low price is also relevant to whether the purchaser is on notice that the debt is time-barred or discharged in bankruptcy.
2. How amount sought was calculated. Coppola v. Arrow Financial Services, 3:02CV577, 2002 U.S. Dist. LEXIS 26788, 2002 WL 32173704 (D.Conn., Oct. 29, 2002); Kimbrow v. IC System, 3:01CV1676, 2002 WL 1816820 (D.Conn. July 22, 2002).
3. Where in issue, list of reports to credit bureaus. Coppola v. Arrow Financial Services, 3:02CV577, 2002 U.S. Dist. LEXIS 26788, 2002 WL 32173704 (D.Conn., Oct. 29, 2002).
4. Documents conferring authority on defendant to collect debt. Coppola v.

Arrow Financial Services, 3:02CV577, 2002 U.S. Dist. LEXIS 26788, 2002 WL 32173704 (D.Conn., Oct. 29, 2002); Kimbro v. IC System, 3:01CV1676, 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 U.S. Dist. LEXIS 3314, 2002 WL 246771 (E.D.N.Y., Feb. 21, 2002); Trevino v. ABC Am., Inc., 232 F.R.D. 612 (N.D.Cal. 2006); Barkouras v. Hecker, 06-366, 2007 U.S. Dist. LEXIS 12772 (D.N.J., March 12, 2007).
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); Kelly v. Montgomery, Lynch & Associates, Inc., 1:07cv919, 2007 U.S. Dist. LEXIS 93651 (N.D. Ohio. Dec. 13, 2007). If class members are witnesses there is no reason they cannot be identified before certification. Best Buy Stores v. Superior Court, 37 Cal. App. 4th 772, 40 Cal. Rptr. 3d 575 (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. ABC Am., Inc., 232 F.R.D. 612 (N.D.Cal. 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. ABC Am., Inc., 232 F.R.D. 612 (N.D.Cal. 2006).

11. 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). However, if it is time-barred it is actual damages. Gervais v. O'Connell, Harris & Assoc., 297 F.Supp.2d 435 (D.Conn. 2003).

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, 95-1409(CC), 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).

Awards in harassment cases:

1. Panahiasl v. Gurney, 04-4479, 2007 U.S. Dist. LEXIS 17269 (N.D. Cal., March 8, 2007): \$50,000 to one plaintiff and \$10,000 to another for repeated telephone abuse, upon testimony of embarrassment, fear, anger, panic, humiliation, nervousness, crying fits, difficulty eating and sleeping, and diarrhea.
2. Robertson v. Horton Bros. Recovery, 02-1656, 2007 U.S. Dist. LEXIS 48602 (D. Del. July 3, 2007). \$75,000 actual damages awarded for receipt of threatening and vulgar calls, visits.
3. Southern Siding Co. v. Raymond, 703 So.2d 44 (La. App. 1997) (\$5,000 actual and \$2,000 statutory damages awarded to husband and wife under FDCPA for emotional distress upon proof of undue street, anxiety, sleeplessness, and depression after receipt of threatening letter).
4. Venes v. Professional Service Bureau, 353 N.W.671 (Minn. App. 1984) (\$6,000 for stress caused by telephone harassment).
5. Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991) (\$3,000 for emotional distress).

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., C2-97-1204, 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, Evanauskas 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., 01-00380 HG-LEK, 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, 92-2225-L, 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., 96-C-0541-S, 96-C-0743-S, 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., Jan. 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., 96-C-0541-S, 96-C-0743-S, 1997 U.S. Dist. LEXIS 4345 (W.D.Wis. 1997).

In Overcash v. United Abstract Group, Inc., 2008 U.S. Dist. LEXIS 18272, *6-7 (N.D.N.Y. Mar. 10, 2008), the court held:

In this case, each defendant violated the FDCPA on more than one occasion. Additionally, although there is no evidence of intent, the nature of the defendants' noncompliance is relatively egregious; United Abstract sold a debt which had already been repaid, and American Credit attempted to recover in excess of \$ 41,000 on a debt originally worth only \$ 1,353.15. Accordingly, in consideration of the frequency and nature of the noncompliance, the court awards the full amount of "additional damages" available under the statute: \$ 1,000 per defendant.

At least one court has held that the FDCPA limits the total recovery of additional damages to \$ 1,000. See Dowling v. Kucker [*7] Kraus & Bruh, LLP, No. 99-cv-11958, 2005 U.S. Dist. LEXIS 11000, 2005 WL 1337442, at *3 n 3 (S.D.N.Y. Jun. 6, 2005). By its terms, however, the statute does not impose such a limitation. The statute provides, in part, that "any debt collector . . . is liable" for additional damages not to exceed \$ 1,000. 15 U.S.C. §1692k(a). In other words, the limitation that the statute imposes is cast not in terms of the plaintiff's recovery, but in terms of the defendant's liability. Thus, in the case of multiple defendants, each may be liable for additional damages of up to \$ 1,000. See Ganske v. Checkrite, Ltd., No. 96-cv-0541, 1997 U.S. Dist. LEXIS 4345, 1997 WL 33810208, at *5 (W.D. Wis. Jan. 6, 1997). As a corollary to this, United Abstract and American Credit are not jointly and severally liable for the full \$ 2,000 in additional damages that the court imposes; rather, each is individually liable for \$ 1,000 in additional damages.

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. RELATIONSHIP TO STATE LAW CLAIMS

If a plaintiff has state law claims, he cannot recover the same elements of actual damages under both the state law claim and the FDCPA. If punitive damages or injunctive relief is available under state law, that can be awarded. Gervais v. O'Connell, Harris & Associates, Inc., 297 F. Supp. 2d 435 (D.Conn. 2003); Spicer v. Lenahan, 2004 WL 3112554 (D. Conn. Sep 14, 2004); Chiverton v. Fed. Fin. Group, Inc., 399 F.Supp.2d 96 (D.Conn.2005).

F. 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., CV-96-4322 (CPS), 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 II L.P., CV-96-4322 (CPS), 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., 224 Ill. 2d 274; 864 N.E.2d 227 (2007).

Direct involvement in wrong of another is not vicarious liability. Gionis v. Javitch, Block & Rathbone, LLP, Nos. 06-3048 & 06-3171, 238 Fed. Appx. 24; 2007 U.S. App. LEXIS 14054 (6th Cir., June 6, 2007), aff'g, Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D. Ohio, 2005): "One more hurdle remains in this matter: Javitch did not utter the statement in the Affidavit; Erica Vick did. Javitch therefore contends that imputing Erica Vick's words onto it would essentially amount to impermissible 'vicarious liability.' This is not so. Had Vick independently made the threat to Gionis (with no assistance from Javitch), the imposition of liability on Javitch for Vick's threatening words could be classified as 'vicarious liability.' See Restatement (Third) of Torts § 13 (2000). But Javitch did not passively stand by as Vick made the threat. It instead chose to communicate the threatening language to Gionis--in a lawsuit no less. And any consumer, especially the least sophisticated one, could view the very act of doing so as an adoption of Vick's threat--and thus a 'threat' within itself. Cf. United States v. Cox, 957 F.2d 264, 266 (6th Cir. 1992) ("A threat is . . . an appearance to the victim.") (internal quotation marks omitted). This is all the more true in Ohio given that Ohio's Civil Procedure Rule 10(C) provides that "[a] copy of any written instrument attached to a pleading is part of the pleading for all purposes." Ohio Civ. P. R. 10(C) (emphasis added). Hence, to hold Javitch liable for its own actions does not invoke vicarious liability."

G. 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).

H. 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., 6:95CV00776, 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); Brujis 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).

I. 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*, 97 C 8512, 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, 95 C 3483, 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, 97-1309, 1998 U.S. Dist. LEXIS 19648 (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).

XXIII. 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); Seeger v. AFNI, Inc., 548 F.3d 1107, 1114 (7th Cir. 2008) ("This court has not yet decided whether the bona fide error defense applies to mistakes of law."); 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*, 93 C 4183, 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).

Assuming that a mistake of law is cognizable, the debt collector must show that it "relied on an informed, but mistaken, legal opinion." Seeger v. AFNI, Inc., 548 F.3d 1107 (7th Cir. 2008). It is not enough "that its ignorance of the law should be excused because it attempted to keep itself informed about the law through the various trade association communications."

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. ROOKER-FELDMAN DOCTRINE

In Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005), the Supreme Court held: "The Rooker- Feldman doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of

injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”

As narrowed by the Supreme Court in Exxon, the doctrine only applies where someone against whom a judgment has been entered files a later action complaining of injury “caused by [the] state court judgment.” “Under the Rooker-Feldman doctrine an individual is precluded from petitioning the federal court only when they seek review of a state-court judgment entered against them.” Chavez v. Bowman, Heintz, Boscia & Vician, 07 C 670, 2007 U.S. Dist. LEXIS 61936 (N.D.Ill., Aug. 22, 2007). Where an FDCPA violation is committed by a debt collector in the course of collection litigation prior to judgment, the consumer may be barred from recovering actual damages resulting from entry of the judgment, but can recover statutory damages and any actual damages not caused by entry of the judgment. McCammon v. Bibler, Newman & Reynolds, P.A., 06-2242, 2007 U.S. Dist. LEXIS 69352 (D.Kan. Sept. 18, 2007); Foster v. D.B.S. Collection Agency, 463 F.Supp.2d 783, 798 (S.D. Ohio 2006); Kelly v. Wolpoff & Abramson, L.L.P., 07cv00091, 2007 U.S. Dist. LEXIS 60528, *11-16 (D.Colo. Aug. 17, 2007); Johnson v. CGR Services, Inc., 04 C 2587, 2005 U.S. Dist. LEXIS 7889 (N.D.Ill., April 7, 2005).

Decisions applying Rooker-Feldman as interpreted by Exxon to FDCPA claims uniformly limit its application to claims for actual damages resulting from the issuance or execution of a state court judgment.

In Todd v. Weltman, Weinberg & Reis, 434 F.3d 432 (6th Cir. 2006), an FDCPA plaintiff complained that a debt collector had filed a false affidavit in a state court garnishment proceeding. Rejecting the collector’s Rooker-Feldman argument, the Sixth Circuit held that “This argument ignores the fact that Plaintiff here does not complain of injuries caused by this state court [garnishment] judgment, as the plaintiffs did in Rooker and Feldman. Instead, after the state court judgment, Plaintiff filed an independent federal claim that Plaintiff was injured by Defendant when he filed a false affidavit. This situation was explicitly addressed by the Exxon Mobil Court when it stated that even if the independent claim was inextricably linked to the state court decision, preclusion law was the correct solution to challenge the federal claim, not Rooker-Feldman.” (434 F.3d at 437) Accord, Foster v. D.B.S. Collection Agency, 463 F.Supp.2d 783, 798 (S.D. Ohio 2006); Kelly v. Wolpoff & Abramson, L.L.P., 07cv00091, 2007 U.S. Dist. LEXIS 60528, *11-16 (D.Colo. Aug. 17, 2007).

The Seventh Circuit anticipated Exxon in Long v. Shorebank Development Corp., 182 F.3d 548 (7th Cir. 1999), where an FDCPA defendant had obtained a state court judgment evicting plaintiff from her home. Plaintiff then filed a federal FDCPA action alleging that a notice demanding payment of rent sent by defendant prior to the eviction judgment violated the FDCPA. The court held that Rooker-Feldman did not bar the FDCPA claim, *even though the eviction order was for nonpayment of the rent demanded in the notice*, because the FDCPA violations were “independent and complete prior to the entry” of the state court judgment. 182 F.3d at 556.

The same principle is followed in Sides v. City of Champaign, 496 F.3d 820, 825 (7th Cir.), a case involving a criminal conviction. The Court of Appeals recognized that under Exxon “Arguments concerning events that precede the conviction – arguments that would be equally strong (or weak) if Sides had been acquitted – likewise are outside the scope of the Rooker-Feldman doctrine.”

Johnson v. CGR Services, Inc., 04 C 2587, 2005 U.S. Dist. LEXIS 7889 (N.D.Ill., April 7, 2005), is also closely in point. “Plaintiff’s FDCPA claims against CGR involve the representations made in filings in the state court and other actions taken by CGR that were allegedly false, deceptive, or misleading, but are not specifically predicated on the entry of the money

judgment.” (*12) The court held that the plaintiff could recover statutory damages for such violations without running afoul of Rooker-Feldman, even though actual damages resulting from enforcement of the judgment could not be recovered. The court specifically rejected defendant’s argument that plaintiff “had a reasonable opportunity to present her claims” in the state court, because that “is an *exception* to an otherwise appropriate application of the Doctrine.” (*13-14)

D. CLAIM PRECLUSION

The Seventh Circuit has held that an Illinois state court default judgment on a debt is not res judicata with respect to FDCPA claims for illegal collection activity. Whitaker v. Ameritech Corp., 129 F.3d 952, 958 (7th Cir. 1997).

“[T]here are no compulsory counterclaims in Illinois.” Peregrine Fin. Group v. Martinez, 305 Ill. App. 3d 571, 712 N.E.2d 861, 868 (1st Dist. 1999). “If . . . the defendant did not interpose counterclaims in the earlier action, and was not required to do so, there is no bar from raising them in a subsequent action.” Peregrine, 712 N.E.2d at 867.

Indeed, even in states which have compulsory counterclaim rules, state court debt collection actions and federal FDCPA actions challenging pre-judgment collection conduct do not “arise out of the same transaction or occurrence” and are not the same “cause of action.” 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., 90 C 20182, 1991 U.S. Dist. LEXIS 12153 (N.D.Ill. 1991); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. App. 1984); Hart v. Clayton-Parker & Assoc., 869 F. Supp. 774 (D.Ariz. 1994); Ayres v. National Credit Management Corp., 90-5535, 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).

In Foster v. D.B.S. Collection Agency, 463 F.Supp.2d 783, 797 (S.D. Ohio 2006), the court held that “All of the underlying debt collection cases were actions on account, which addressed the class members’ alleged liability to repay certain debts. Plaintiffs’ federal court claims, on the other hand, address the allegedly unlawful misrepresentations Defendants made during the process of collecting such debts.” Even though the misrepresentations – which went to the collector’s capacity to sue, whether the debts had been assigned to the collector, and similar matters – could have given rise to defenses to the collection suits, the court held that unasserted issues of that nature did not bar the FDCPA claims on a res judicata theory.

In Davis v. Unifund CCR Partners, 07-1767, 2007 U.S. Dist. LEXIS 44606, *7 (N.D. Cal., June 20, 2007), a consumer brought an FDCPA action alleging he had been sued on a time-barred debt. The debt collector asserted that the consumer had been required to file the FDCPA claim as a compulsory counterclaim in the state court action and was barred by res judicata for failing to do so. The court rejected this contention: “Although the FDCPA and Rosenthal Act [state FDCPA] claims are generally related to the subject matter of the state collection action – plaintiff’s Citibank debt – the FDCPA and Rosenthal Act claims arise out of a different set of facts related to defendant’s alleged unfair and illegal practices in their efforts to collect on that debt. Other courts have agreed that collection claims and FDCPA claims do not arise out of the same set of operative facts” A fortiori, the same result obtains in a state, such as Illinois, which does not even have compulsory counterclaims.

E. ISSUE PRECLUSION

Illinois law is clear that “parties will not be collaterally estopped unless the precise

facts and issues were clearly determined in the prior judgment.” Nowak v. St. Rita High School, 197 Ill. 2d 381, 390-91, 757 N.E.2d 471, 477-78 (2001). “The judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which might have been litigated and determined.” Id. “A judgment is conclusive in a subsequent action between the same parties on any issue actually litigated and determined if its determination was essential to that judgment.” S & S Automotive v. Checker Taxi Co., 166 Ill. App. 3d 6; 520 N.E.2d 929, 931 (1st Dist. 1988). “The party asserting the doctrine of collateral estoppel bears the ‘heavy burden’ of demonstrating with clarity and certainty what the prior judgment determined.” Peregrine, supra, 305 Ill.App.3d at 581, 712 N.E.2d at 868.

“[C]ollateral estoppel bars subsequent actions only as to the point or question actually litigated and determined in the prior suit and not as to matters that might have been litigated and determined.” FTC v. QT, Inc., 448 F.Supp.2d 908, 971 (N.D.Ill. 2006). Even where the prior case is litigated, “The reviewing court has a duty to study the record to determine whether the trier of fact in the prior adjudication could have based its decision, verdict or judgment upon a matter other than that which the party asserting collateral estoppel attempts to preclude from consideration in the subsequent action.” Peregrine, supra, 305 Ill.App.3d at 581-82, 712 N.E.2d at 868.

Other courts have likewise held that FDCPA claims are not barred by state court default judgments on debts. Foster v. D.B.S. Collection Agency, 463 F.Supp.2d 783, 796 (S.D. Ohio 2006) (“those default judgments do not satisfy the ‘actually litigated’ element of issue preclusion”); Kelly v. Wolpoff & Abramson, L.L.P., 07cv00091, 2007 U.S. Dist. LEXIS 60528, *22-24 (D.Colo. Aug. 17, 2007).

Also, the small size of a default judgment is material. Illinois law is clear that “the doctrine of res judicata need not be applied where fundamental fairness so requires.” People v. Somerville, 42 Ill. 2d 1, 4, 245 N.E.2d 461 (1969). It cannot be applied “unless it is clear that no unfairness results to the party being estopped.” Talarico v. Dunlap, 177 Ill.2d 185, 685 N.E.2d 325, 328 (1997). Applying this principle, the Seventh Circuit has actually held that collateral estoppel should not be applied where the Illinois state court decision is plainly wrong. Sornberger v. City of Knoxville, 434 F.3d 1006, 1022 (7th Cir. 2006).

“Even where the threshold elements of the doctrine are satisfied and an identical common issue is found to exist between a former and current lawsuit, collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped.” Talarico v. Dunlap, supra, 177 Ill. 2d 185, 192, 685 N.E.2d 325 (1997). The Supreme Court elaborated in that case:

In deciding whether the doctrine of collateral estoppel is applicable in a particular situation, a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case. 50 C.J.S. Judgments § 779 (1997). In determining whether a party has had a full and fair opportunity to litigate an issue in a prior action, those elements which comprise the ‘practical realities of litigation’ must be examined. 47 Am. Jur. 2d Judgments § 651 (1995). In some circumstances the absence of an incentive to vigorously litigate in the former proceeding is relevant in the application of collateral estoppel. See Housing Authority for La Salle County v. Young Men's Christian Ass'n, 101 Ill. 2d 246, 255, 461 N.E.2d 959 (1984); Restatement (Second) of Judgments § 28(5)(c) (1982); see also 47 Am. Jur. 2d Judgments § 651 (1995). There must have been the incentive and opportunity to litigate, so that a failure to litigate the issue is in fact a concession on that issue. A. Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa L. Rev. 281, 288-89 (1980).

Incentive to litigate might be absent, for instance, where the amount at stake in the first litigation was insignificant, or if the future litigation was not foreseeable. 47 Am. Jur. 2d Judgments § 651 (1995). In the context of prior criminal proceedings, the seriousness of the allegations or the criminal charge at the prior hearing is a factor to be considered. If the offense charged is of a minor or trivial nature, defendant might not be sufficiently motivated to challenge the allegations made at trial and, in such a case, it might be unfair to allow collateral estoppel to be asserted later. However, even summary offenses, when they provide sufficient incentive and opportunity for a defense, may be the basis of collateral estoppel in a subsequent civil proceeding as, for instance, when they are part of another important charge. 50 C.J.S. Judgments § 922 (1997). (Talarico v. Dunlap, 177 Ill. 2d 185, 192-3, 685 N.E.2d 325; emphasis added)

In Talarico, the court refused to give collateral estoppel effect to a criminal conviction based on plaintiff's plea of guilty to two counts of misdemeanor battery. The plaintiff, a medical student who had previously had a clean record, had been charged with aggravated battery, aggravated unlawful restraint, armed violence and aggravated criminal sexual abuse based on bizarre acts of violence, but was given a year's probation with mandatory psychiatric treatment and a monetary assessment in exchange for pleading guilty to the battery charges. Recognizing his predicament, the Supreme Court refused to allow use of the battery convictions in subsequent civil litigation concerning the administration of drugs that allegedly caused the bizarre behavior. Subsequent cases confirm that when very serious criminal charges are reduced to a misdemeanor and a light sentence is imposed, the conviction cannot be given collateral estoppel effect, as "Even an innocent defendant would have to be of stout heart to reject such an offer." Metropolitan Prop. & Cas. Ins. Co. v. Pittington, 362 Ill.App.3d 220, 841 N.E.2d 413 (3rd Dist. 2005) (defendant facing 31 years to life allowed to plead to reckless conduct, a misdemeanor).

Other courts generally do not give small claims judgments preclusive effect, either by decision or rule. Restatement 2d, Judgments, §28(3) and comment d; Sanderson v. Niemann, 17 Cal.2d 563, 573, 110 P.2d 1025 (1941) (small claims judgments not given collateral estoppel effect); Village Supply Co. v. Iowa Fund, Inc., 312 N.W.2d 551 (Iowa 1981) (refusing to give collateral estoppel effect to small claims judgment); Indiana Small Claim Rule 11(f) (a judgment in small claims court shall be res judicata only as to the amount involved in the particular action and shall not be considered an adjudication of any fact at issue in any other action or court); State Farm Fire & Cas. Co. v. Emde, 706 S.W.2d 543 (Mo.App. 1986) (small claims judgment denied preclusive effect); Henriksen v. Gleason, 264 Neb. 840, 643 N.W.2d 652 (2002) (same); Quinn v. DiGiulian, 81-1921, 1983 U.S. Dist. LEXIS 16618, 97 Lab. Cas. P10,163 (D.D.C. May 29, 1983) (refusing to give collateral estoppel effect to small claims judgment for \$230); Salida School District v. Morrison, 732 P.2d 1160, 1165 (Colo. 1987) ("The use of an unemployment compensation decision to bind the parties in a subsequent section 1983 action in which the employee seeks reinstatement and over \$31,000 in back pay and costs would be wholly inappropriate, and would frustrate the underlying purposes of [the Colorado Employment Security Act] and collateral estoppel").

F. LITIGATION PRIVILEGE

Federal decisions reject application of any common law litigation privilege to FDCPA claims. Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 233-34 (4th Cir. 2007):

Ultimately, W&A's specific arguments are manifestations of the same general claim: that it simply cannot be the case that the FDCPA covers litigation, the entire purpose of which is to arrive at the truth through the clash of the adversarial process. This

argument may have some intuitive appeal, but the fact that an interpretation may seem appealing does not mean that it is correct. While the district court stated, "I cannot see how commercial litigation could proceed" if the statements at issue in this case were subject to the FDCPA, the FDCPA does not apply to commercial litigation: it covers debt collection where "debt" is defined as an obligation of a "consumer," defined as a "natural person," for "personal, family, or household purposes." 15 U.S.C. § 1692a(3), (5). And, in any event, "[i]n the ordinary case, absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it." *Hubbard v. United States*, 514 U.S. 695, 703, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (internal quotation marks omitted). Operating from "the understanding that Congress says in a statute what it means and means in a statute what it says there," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000), we reverse the district court's dismissal of the action.

G. 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). For example, it is 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).

H. 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. Most recent decisions reject the "witness immunity" claim on the ground that it does not apply to a complaining witness. *Todd v. Weltman, Weinberg, & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006); *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); *Jordan v. Thomas & Thomas*, C-1-04-296, 2007 U.S. Dist. LEXIS 71404 (S.D. Ohio September 26, 2007); *Foster v. Velocity Invs., LLC*, 07 C 0824 and 07 C 2989, 2007 U.S. Dist. LEXIS 63302 (N.D. Ill., August 24, 2007); *Chavez v. Bowman, Heintz, Boscia & Vician*, 07 C 670, 2007 U.S. Dist. LEXIS 61936 (N.D. Ill., August 22, 2007); *Delawder v. Platinum Fin. Servs. Corp.*, 1:04-cv-680, 2007 U.S. Dist. LEXIS 31174 (S.D. Ohio, April 27, 2007); *Lee v. Javitch, Block & Rathbone, LLP*, 484 F. Supp. 2d 816 (S.D. Ohio 2007). Contra, *Beck v. Codilis & Stawiarski*, 4:99cv485, 2000 U.S. Dist. LEXIS 22440 (N.D. Fla. Dec. 27, 2000).

Todd 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)

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)

TEXT OF FDCPA AS AMENDED IN 2006

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 1692a. Definitions

As used in this title --

- (1) The term "Commission" means the Federal Trade Commission.
- (2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- (3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

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

(6) The term "debt collector" means any person 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 who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes 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 collecting or attempting to collect such debts. For the purpose of section 808(6) [15 U.S.C. § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) 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;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall--

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

§ 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties. Except as provided in section 804 [*15 U.S.C. § 1692b*], without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined. For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) of this Act [*15 U.S.C. §§ 1681a(f) or 1681b(3)*].

- (4) The advertisement for sale of any debt to coerce payment of the debt.
- (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
- (6) Except as provided in section 804 [*15 U.S.C. §1692b*], the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

- (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
- (2) 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.
- (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
- (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
- (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
- (6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--
 - (A) lose any claim or defense to payment of the debt; or
 - (B) become subject to any practice prohibited by this *title* [*15 U.S.C. §§ 1692 et seq.*].
- (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
- (8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) 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.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act [*15 U.S.C. § 1681a(f)*].

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The 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.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) 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.

§ 1692g. Validation of debts

(a) Notice of debt; contents. 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 the 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.

(b) Disputed debts. If the consumer notifies the debt collector in writing within the thirty-day period

described in subsection (a) 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. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability. 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.

(d) Legal pleadings. A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions. The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986 [26 U.S.C. §§ 1 et seq.], title V of Gramm-Leach-Bliley Act [15 U.S.C. §§ 6801 et seq.], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 1692i. Legal actions by debt collectors

(a) Venue. Any debt collector who brings any legal action on a debt against any consumer shall--

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity--

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions. Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 [15 U.S.C. §1692k] for failure to comply with a provision of this *title* [15 U.S.C. §§ 1692 et seq.].

§ 1692k. Civil liability

(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$ 1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$ 500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court. In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent. A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of 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.

(d) Jurisdiction. An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Commission. No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 1692i. Administrative enforcement

(a) Federal Trade Commission. Compliance with this *title* [15 U.S.C. § § 1692 et seq.] shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this *title* [15 U.S.C. § § 1692 et seq.] is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act [15 U.S.C. § § 41 et seq.], a violation of this *title* [15 U.S.C. § § 1692 et seq.] shall be deemed an unfair or deceptive act or practice in violation of that Act [15 U.S.C. § § 41 et seq.]. All of the functions and powers of the Commission under the Federal Trade Commission Act [15 U.S.C. § § 41 et seq.] are available to the Commission to enforce compliance by any person with this *title* [15 U.S.C. § § 1692 et seq.], irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act [15 U.S.C. § § 41 et seq.], including the power to enforce the provisions of this *title* [15 U.S.C. § § 1692 et seq.] in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law. Compliance with any requirements imposed under this *title* [15 U.S.C. § § 1692 et seq.] shall be enforced under--

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], in the case of--

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) [25A] of the Federal Reserve Act [12 U.S.C. §§ 601 et seq. or §§ 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. §§ 1751 et seq.], by the Administrator of the National Credit Union Administration [National Credit Union Administration Board] with respect to any Federal credit union;

(4) the Acts to regulate commerce [49 U.S.C. §§ 10101 et seq.], by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) the Federal Aviation Act of 1958 [49 U.S.C. §§ 40101 et seq.], by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act [49 U.S.C. §§ 40101 et seq.]; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. §§ 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. §§ 226 and 227]), by the Secretary of Agriculture with respect to any activities subject to that Act [7 U.S.C. §§ 181 et seq.].

The terms used in paragraph (1) that are not defined in this *title* [15 U.S.C. §§ 1692 et seq.] or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers. For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this *title* [15 U.S.C. §§ 1692 et seq.] shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this *title* [15 U.S.C. §§ 1692 et seq.] any other authority conferred on it by law, except as provided in subsection (d).

(d) Rules and regulations. Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this *title* [15 U.S.C. §§ 1692 et seq.].

§ 1692m. Reports to Congress by the Commission; views of other Federal agencies

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this *title* [15 U.S.C. §§ 1692 et seq.], including such recommendations as the Commission deems

necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this *title* [15 U.S.C. § § 1692 et seq.] is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this *title* [15 U.S.C. § 1692I]

(b) In the exercise of its functions under this *title* [15 U.S.C. § § 1692 et seq.], the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this *title* [15 U.S.C. § 1692I].

§ 1692n. Relation to State laws

This *title* [15 U.S.C. § § 1692 et seq.] does not annul, alter, or affect, or exempt any person subject to the provisions of this *title* [15 U.S.C. § § 1692 et seq.] from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this *title* [15 U.S.C. § § 1692 et seq.], and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this *title* [15 U.S.C. § § 1692 et seq.] if the protection such law affords any consumer is greater than the protection provided by this *title* [15 U.S.C. § § 1692 et seq.].

§ 1692o. Exemption for State regulation

The Commission shall by regulation exempt from the requirements of this *title* [15 U.S.C. § § 1692 et seq.] any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this *title* [15 U.S.C. § § 1692 et seq.], and that there is adequate provision for enforcement.

§ 1692p. Exception for certain bad check enforcement programs operated by private entities

(a) In general.

(1) Treatment of certain private entities. Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 803(6) [15 U.S.C. § 1692a(6)], with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) Conditions of applicability. Paragraph (1) shall apply if--

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)--

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph--

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that--

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain checks excluded. A check is described in this subsection if the check involves, or is subsequently found to involve--

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions. For purposes of this section, the following definitions shall apply:

(1) State or district attorney. The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in *section 2 of title 1, United States Code*), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) Check. The term "check" has the same meaning as in section 3(6) of the Check Clearing for the 21st Century Act [*12 U.S.C. § 5002(6)*].

(3) Bad check violation. The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

C:\Documents and Settings\Administrator\Desktop\Edelman\8art.new_4.wpd