Fair Debt Collection Practices Act

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July 31, 2013

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

1. WHO IS A "DEBT COLLECTOR"

Basically, an FDCPA "debt collector" includes anyone who regularly collects debts after they have allegedly become delinquent as agent for their owner, as well as anyone who acquires debts for their own account after they have allegedly become delinquent. *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D.Ala. 1987); *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008).

The above conclusion is based on the definition of "debt collector" is found in 15 U.S.C. §1692a(6), which must be read together with the definition of "creditor" in 15 U.S.C. §1692a(4). A "creditor" is "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." A "debt collector" is "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. . . . 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; . . .

[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 . . . (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 . . . ."

a. "Default"

"[D]efault" reflects the meanings found in relevant contractual agreements and state law. *De Dios v. Int'l Realty & RC Invs.,* 641 F.3d 1071, 1074–75 (9th Cir. 2011):

> Although the Act does not define "in default," courts interpreting §1692a(6)(F)(iii) look to any underlying contracts and applicable law governing the debt at issue. See, e.g., Fed. Trade Comm'n, Advisory Op. n.2 (April 25, 1989) ("Whether a debt is in default is generally controlled by the terms of the contract creating the indebtedness and applicable state law."), available at www.ftc.gov/os/statutes/fdcpa/ letters/cranmer.htm; *Berndt v. Fairfield Resorts, Inc.*, 339 F. Supp. 2d 1064, 1068-69 (W.D. Wis. 2004) (examining plaintiff 's timeshare purchase contract and defendant's management agreement to determine if overdue association fees were in default); *Skerry v. Mass. Higher Educ. Assistance Corp.*, 73 F. Supp. 2d 47, 52-54 (D. Mass. 1999) (applying federal regulations governing student loans at issue to determine if they were in default).
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b. "Alleged" default

Since the statute uses "alleged" to modify "debt," an obligation that the defendant treats as being in default is covered even if (a) the defendant is attempting to collect from the wrong person or (b) the debt is not in fact in default. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008).

In *Oppenheim v. I.C. Sys., Inc.*, 627 F.3d 833 (11th Cir. 2010), the court held that an individual's obligation under PayPal's contract to pay back PayPal for funds withdrawn from the individual's PayPal account, as a result of a dishonored deposit to the account by a fraudulent purchaser of the individual's laptop, was a transaction and debt to which the FDCPA applied.

In *Queen v. Walker*, No. 09cv3428, 2010 U.S. Dist. LEXIS 67263, 2010 WL 2696720 (D. Md. July 7, 2010), the court held that the alleged victim of forgery and fraud against whom collection efforts were directed had standing to maintain suit for the resulting FDCPA violations.

In *Whiting v. Deloatch*, No. 09cv3426, 2010 U.S. Dist. LEXIS 65710, 2010 WL 2651656 (D. Md. July 1, 2010), the court held that the victim of a mortgage rescue scam was a ''consumer'' with standing even though title to the property was in the defendant's name and collection actions were aimed at the defendant. "Plaintiff is the true party in interest because what he claims to be his property fraudulently serves as collateral for the delinquent mortgage loan. Because of the alleged fraud, Consumer stands in the shoes of Deloatch and Plaintiff's home may be sold to pay the debt BGW has purportedly attempted to collect, if the Property is foreclosed upon. Moreover, BGW allegedly continued its collection efforts after Plaintiff put the law firm on notice of the alleged fraud."

2. Creditors and furnishers of deceptive forms

The (pre-default) creditor itself is excluded from the definition of "debt collector" unless he "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." 15 U.S.C. §1692a(6) . Illustrative of the type of conduct which may result in a creditor being treated as a "debt collector" are *Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232 (2nd Cir. 1998) (Citicorp Retail Services sent out letters under the letterhead of "Debtor Assistance" to collect private label credit card debts); *Catencamp v. Cendant Timeshare Resort Group -- Consumer Finance, Inc.,* 471 F.3d 780 (7th Cir. 2006) (creditor CTRG used name "Resort Financial Services" on collection letters); and *Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002) (creditor arranged for attorney to send out letters to induce communication with creditor's own collection department on attorney letterhead for small sum per letter).

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.
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> A creditor is a debt collector for purposes of this act if:
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> - He uses a name other than his own to collect his debts, including a fictitious name.
> - 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]. . . .
> - 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).

Another court has stated that "The 'false name' exception applies to any creditor who, in the process of collecting its debts, 'indicate[s] that a third party is collecting or attempting to collect such debts . . . pretends to be someone else or uses a pseudonym or alias . . . or . . . [who] owns and controls the debt collector, rendering it the creditor's alter ego.'" *Wood v. Capital One Servs., LLC*, 718 F. Supp. 2d 286, 291 (N.D.N.Y. 2010), citing *Mazzei v. Money Store*, 349 F. Supp.2d 651, 659 (S.D.N.Y. 2004).

15 U.S.C. §1692j(a) provides that "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." This language covers an attorney who allows a creditor to send out letters on his letterhead, or a collection agency which provides form letters purporting to come from the agency for a creditor to send out. 15 U.S.C. §1692j(b) provides that "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 [15 U.S.C. §1692k] for failure to comply with a provision of this title."

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." *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); *Guest v. Capital One Financial Services,* D. Ct., Conn. Law Tribune, Nov. 18, 1996; *Tatar v. Trott & Trott, PC*, Case No. 10-12832, 2012 WL 6775615 (E.D.Mich., Dec. 17, 2012) (report and recommendation), adopted, 2013 WL 66479 (Jan. 4, 2013) (" *See Payton v. Trott & Trott,* Case No. 10-14916 (E.D. Mich. 2011) (Dkt. 15) (15 U.S.C. § 1692a(6)(F) exempts banks from collecting on their own accounts a subsequent merger does not alter this principle), citing *Orent v. Credit Bureau of Greater Lansing, Inc.,* 2001 U.S. Dist. LEXIS 17683, at *13 (W.D. Mich. 2010) (holding that a lender which assumes the debt of another lender after a merger is not a "debt collector" on that debt under 15 U.S.C. § 1692a(6)(F)").

3. Other statutory exclusions

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

a. Officers and employees of the creditor while collecting the debt in the creditor's name.

b. 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).

c. 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, other courts have held that the student loan guaranty agencies are covered by the fiduciary exception. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1034-5 (9th Cir. 2009); *Davis v. United Student Aid Funds,* 45 F.Supp. 2d 1104 (D. Kans. 1998); *Lasserre v. Educational Credit Management Corp.,* 3:12-cv-00091-JTT- JDK, 2012 U. S. Dist. LEXIS 83043, 2012 WL 2191628 (M.D.La., June 14, 2012)*; Donohue v. Regional Adjustment Bureau, Inc.,* No. 12-1460 (E.D.Pa., Feb. 19, 2013).

d. 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). It also does not cover filing a false affidavit stating that service has been made, when that is not the case. *Sykes v. Mel Harris & Assocs., LLC,* 09 Civ. 8486 (DC), 2010 U.S. Dist. LEXIS 137461 (S.D.N.Y., Dec. 29, 2010).

e. Bona fide non-profit debt counselors.

f. 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).

g. "[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. Similarly, student loan guaranty agencies, which by statute have a fiduciary relationship with the Government in making loans, may be exempt under this exception. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009); *Donohue v. Regional Adjustment Bureau, Inc.,* No. 12-1460 (E.D.Pa., Feb. 19, 2013). 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.

h. Persons who collect debts "originated by such person[s]". 15 U.S.C. §1692a(6)(F)(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).

i. 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, takes the collateral and directs the consumer to pay XYZ, XYZ is not a "debt collector".

j. Certain private entities that operate under the direction, supervision, and control of a state or district attorney in connection with an established bad check program are excluded from the definition of "debt collector" pursuant to 15 U.S.C. §1692p.

4. 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); *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (6th Cir. 2012).

"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 <u>is</u> 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.

Entities subject to the FDCPA under this principle include (1) bad debt buyers that purchase charged-off credit card and other debts, *Kimber v. Federal Financial Corp.,* 668 F.Supp. 1480 (M.D.Ala. 1987); (2) "special servicers" that take over servicing of mortgage loans after they become delinquent, *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); and (3) check guaranty companies that purchase dishonored checks, *Durkin v. Equifax Check Servs.*, 00 C 4832 , 2002 U.S. Dist. LEXIS 20742 (N.D.Ill., Oct. 24, 2002); *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 industry claims that there is a "passive debt buyer" exception. There is no "passive debt buyer" exception. *Fiorenzano v. LVNV Funding, LLC*, C. A. No.11-178M, 2012 U.S. Dist. LEXIS 91405, 2012 WL 2562415 (D.R.I., June 29, 2012). Most cases in which someone has claimed to be a "passive debt buyer" are cases in which suits have been filed by a collection attorney with the "passive debt buyer" as plaintiff. Since the FDCPA covers those who attempt to collect, "directly or indirectly", 15 U.S.C. §1692a(6), authorizing an attorney or other agent to collect does not take one out of the definition. *See Winemiller v. Worldwide Asset Purchasing, LLC*, 1:09-cv-02487, 2011 U.S. Dist. LEXIS 41520 (D.Md., April 15, 2011); *Bradshaw v. Hilco Receivables, LLC*, 765 F. Supp. 2d 719 (D.Md. 2011).

5. 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 consistently 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.

6. FORECLOSURE LAWYERS

Every Court of Appeals to have addressed the issue has held that foreclosure lawyers are subject to the FDCPA, either generally or unless they neither attempt to collect money nor enforce personal liability. *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010) (request for information to evaluate modification covered even if there is no "explicit demand for payment."); *Wallace v. Washington Mut. Bank, F.A.,* 683 F.3d 323 (6th Cir. 2012); *Reese v. Ellis, Painter, Ratterree & Adams LLP*, 678 F.3d 1211, 1217-18 (11th Cir. 2012) (noting that a contrary "rule would create a loophole in the FDCPA. A big one. In every case involving a secured debt, the proposed rule would allow the party demanding payment on the underlying debt to dodge the dictates of §1692e by giving notice of foreclosure on the secured interest. The practical result would be that the Act would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be right. It isn't. A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest. A 'debt' is still a 'debt' even if it is secured."); *Birster v. American Home Mortgage Servicing, Inc.*, 11-13574, 2012 U.S. App. LEXIS 14660 (11th Cir., July 18, 2012) (same); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (FDCPA applies to actions of attorneys hired to initiate non-judicial foreclosure; concerned over the "enormous loophole" that would result otherwise, but also relying on direct requests for payment to conclude that FDCPA applies); *Brown v. Morris*, No. 04-60526, 243 Fed. Appx. 31; 2007 U.S. App. LEXIS 15396 (5th Cir., June 28, 2007) (same); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 233-36 (3d Cir. 2005) (FDCPA applies to collection of overdue water and sewer obligations via lien filed against consumer's house; also relied on letters requesting payment); *Rawlinson v. Law Office of William M. Rudow, LLC,* No. 10-2148, 460 Fed. Appx. 254; 2012 U.S. App. LEXIS 173 (4th Cir. January 5, 2012) (replevin action is covered by FDCPA). *Accord, McDaniel v. South & Assocs*., 325 F. Supp. 2d 1210, 1217 (D. Kan. 2004) (judicial foreclosure is subject to the FDCPA, because it seeks a personal judgment against the consumer; distinguishing cases finding that non-judicial foreclosures are not subject to FDCPA); *Overton v. Foutty & Foutty, LLP*, 1:07-cv-0274-DFH-TAB, 2007 U.S. Dist. LEXIS 61705 (S.D. Ind. Aug. 21, 2007); *Levin v. Kluever & Platt,* 03 C 2160, 2003 U.S. Dist. LEXIS 20861, 2003 WL 22757763 (N.D. Ill. Nov. 19, 2003); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992).

Decisions answering in the negative, at least if only foreclosure of collateral is sought: *Rosado v. Taylor*, 324 F. Supp. 2d 917 (N.D. Ind. 2004) (ruling that issuing a foreclosure summons and complaint did not amount to an attempt to collect a debt); *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) ("[f]oreclosing on a trust deed is distinct from the collection of the obligation to pay money," and is "not an attempt to collect funds from

the debtor," therefore the FDCPA does not apply); *Beadle v. Haughey*, Civil No. 04-272-SM, 2005 U.S. Dist. LEXIS 2473, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005) (attorneys who "conducted a non-judicial foreclosure, and did not seek judgment against the plaintiffs personally," were not subject to the FDCPA); *Golliday v. Chase Home Fin., LLC*, 761 F. Supp. 2d 629 (W.D. Mich. 2011); *Gathing v. MERS, Inc*., No. 1:09-CV-07, 2010 U.S. Dist. LEXIS 22139, 2010 WL 889945, *13 (W.D. Mich. March 10, 2010).

The contrary decisions were soundly rejected in *Glazer v. Chase Home Finance, LLC*, 704 F.3d 453 (6th Cir. 2013), where the court held:

> The FDCPA speaks in terms of debt collection. For example, to be liable under the statute's substantive provisions, a debt collector's targeted conduct must have been taken "in connection with the collection of any debt," e.g., 15 U.S.C. §§1692c(a)-(b), 1692d, 1692e, 1692g, or in order "to collect any debt," id. § 1692f. In addition, to be a "debt collector" under the Act, one must either (1) have as his or her principal business purpose "the collection of any debts" or (2) "regularly collects or attempts to collect, directly or indirectly, debts owed or due ... another." Id. § 1692a(6). Despite the Act's pivotal use of the concept, however, it does not define debt collection. While the concept may seem straightforward enough, confusion has arisen on the question whether mortgage foreclosure is debt collection under the Act. We have not addressed the issue. Nor has the Consumer Financial Protection Bureau offered an authoritative interpretation on the matter. See 15 U.S.C. § 1692l (d).4 Other courts have taken varying approaches on the issue.
>
> The view adopted by a majority of district courts, and the one followed below, is that mortgage foreclosure is not debt collection. This view follows from the premise that the enforcement of a security interest, which is precisely what mortgage foreclosure is, is not debt collection. See, e.g., Rosado v. Taylor, 324 F.Supp.2d 917, 924 (N.D.Ind.2004) ("Security enforcement activities fall outside the scope of the FDCPA because they aren't debt collection practices[,]" and "[n]o different rule applies in cases involving real property [.]"); Hulse v. Ocwen Fed. Bank, 195 F.Supp.2d 1188, 1204 (D.Or.2002). However, if a money judgment is sought against the debtor in connection with the foreclosure, this view maintains, there has been debt collection, because there was an attempt to collect money. See, e.g., McDaniel v. South & Assocs., P. C., 325 F.Supp.2d 1210, 1217–18 (D.Kan.2004). Despite its pervasiveness in the district courts, we find this approach unpersuasive and therefore decline to follow it.
>
> As with all matters requiring statutory interpretation, we begin with the text. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." Caminetti v. United States, 242 U.S. 470, 490, 37 S.Ct. 192, 61 L.Ed. 442 (1917).
>
> Unfortunately, the FDCPA does not define "debt collection," and its definition of "debt collector" sheds little light, for it speaks in terms of debt collection. See 15 U.S.C. § 1692a(6); cf. In re Settlement Facility Dow Corning Trust, 628 F.3d 769, 773 (6th Cir.2010) (noting that a definition containing the defined term is not likely to be helpful). But the statute does offer guideposts. It defines the word "debt," for instance, which is "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[.]" 15 U.S.C. § 1692a(5). The focus on the underlying transaction indicates that whether an obligation is a "debt" depends not on whether the obligation is secured, but rather upon the purpose for which it was incurred. Cf. Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC, 698 F.3d 290, 293 (6th Cir.2012). Accordingly, a home loan is a "debt" even if it is secured. See Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211, 1216–17, 1218 (11th Cir.2012); Maynard v. Cannon, 401 F. App'x 389, 394 (10th Cir.2010); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir.2006).

In addition, the Act's substantive provisions indicate that debt collection is performed through either "communication," id. § 1692c, "conduct," id. § 1692d, or "means," id. §§ 1692e, 1692f. These broad words suggest a broad view of what the Act considers collection. Nothing in these provisions cabins their applicability to collection efforts not legal in nature. Cf. Heintz v. Jenkins, 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (holding that "a lawyer who 'regularly,' through litigation, tries to collect consumer debts" is a "debt collector" under the Act). Foreclosure's legal nature, therefore, does not prevent if from being debt collection.

Furthermore, in the words of one law dictionary: "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." Black's Law Dictionary 263 (6th ed.1990). The Supreme Court relied on this passage when it declared the following in a case concerning the Act's definition of "debt collector": "In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." Heintz, 514 U.S. at 294 (emphasis added). Thus, if a purpose of an activity taken in relation to a debt is to "obtain payment" of the debt, the activity is properly considered debt collection. Nothing in this approach prevents mortgage foreclosure activity from constituting debt collection under the Act. See Shapiro & Meinhold v. Zartman, 823 P.2d 120, 124 (Colo.1992) (explaining that "foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"). In fact, every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (i.e, forcing a settlement) or compulsion (i.e., obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt). As one commentator has observed, the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment. See Eric M. Marshall, Note, The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve From Abusive Foreclosure Practices, 94 Minn. L.Rev. 1269, 1297–98 (2010). Accordingly, mortgage foreclosure is debt collection under the FDCPA.

Other provisions in the Act reinforce this view. The Act nowhere excludes from its reach foreclosure or the enforcement of security interests generally. In fact, certain provisions affirmatively suggest that such activity is debt collection. Section 1692f prohibits "debt collectors" from using "unfair or unconscionable means" to "collect any debt." After stating this general prohibition, the section sets forth a

non-exhaustive list of specific activities prohibited thereunder, one of which is "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property" if, e.g., "there is no present right to possession of the property claimed as collateral through an enforceable security interest[.]" 15 U.S.C. § 1692f(6)(A). Foreclosure in some states is carried out in just this way—through "nonjudicial action," the result of which is to "effect dispossession" of the secured property. See, e.g., Mich. Comp. Laws § 600.3204 (authorizing foreclosure by advertisement only if no lawsuit has been filed to recover the underlying debt); Tenn.Code Ann. § 35–5–101 (permitting foreclosure by advertisement). The example's presence within a provision that prohibits unfair means to "collect or attempt to collect any debt" suggests that mortgage foreclosure is a "means" to collect a debt.

Consider also § 1692i. This section requires a debt collector bringing a legal action against a consumer "to enforce an interest in real property securing the consumer's obligation"—e.g., a mortgage foreclosure action—to file in the judicial district where the property is located. 15 U.S.C. § 1692i(a)(1). Although the provision itself does not speak in terms of debt collection, it applies only to "debt collectors" as defined in the first sentence of the definition, id. § 1692a(6), which does speak in terms of debt collection. This suggests that filing any type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act.

Our holding today is supported by decisions from our sister circuits. . . .

Courts that hold that mortgage foreclosure is not debt collection offer different reasons for this view. Some reason that the FDCPA is concerned only with preventing abuse in the process of collecting funds from a debtor, and that foreclosure is distinct from this process because "payment of funds is not the object of the foreclosure action." Hulse, 195 F.Supp.2d at 1204. We disagree. There can be no serious doubt that the ultimate purpose of foreclosure is the payment of money.

Some courts that hold mortgage foreclosure to be outside the Act rely principally on the definition of "debt collector." After defining a "debt collector" as one whose principal business purpose is the "collection of any debts" or who "regularly" collect debts, the definition's third sentence states: "For the purpose of section 1692f(6) of this title, 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." 15 U.S.C. § 1692a(6). One who satisfies the first sentence is a debt collector for all sections of the Act, but one satisfying only the third sentence is a "debt collector" limited to § 1692f(6) (concerning non-judicial repossession abuses). See Kaltenbach, 464 F.3d at 528; Montgomery, 346 F.3d at 699–701. Therefore, these courts reason, "if the enforcement of a security interest was synonymous with debt collection, the third sentence would be surplusage because any business with a principal purpose of enforcing security interests would also have the principal purpose of collecting debts." Gray v. Four Oak Court Ass'n, Inc., 580 F.Supp.2d 883, 888 (D.Minn.2008). To avoid this result, these courts conclude that the enforcement of a security interest, including mortgage foreclosure, cannot be debt collection. Id.

We reject this reading of the statute. The third sentence in the definition does not

except from debt collection the enforcement of security interests; it simply "make[s] clear that some persons who would be without the scope of the general definition are to be included where § 1692f(6) is concerned." Piper, 396 F.3d at 236; see Shapiro & Zartman, 823 P.2d at 124. It operates to include certain persons under the Act (though for a limited purpose); it does not exclude from the Act's coverage a method commonly used to collect a debt. As the Third Circuit explained in Piper,

> [e]ven though a person whose business does not primarily involve the collection of debts would not be a debt collector for purposes of the Act generally, if his principal business is the enforcement of security interests, he must comply with the provisions of the Act dealing with non-judicial repossession abuses. Section 1692a(6) thus recognizes that there are people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts.

Piper, 396 F.3d at 236. And, in the words of the Fourth Circuit, "[t]his provision applies to those whose only role in the debt collection process is the enforcement of a security interest." Wilson, 443 F.3d at 378.

Other than repossession agencies and their agents, we can think of no others whose only role in the collection process is the enforcement of security interests. A lawyer principally engaged in mortgage foreclosure does not meet this criteria, for he must communicate with the debtor regarding the debt during the foreclosure proceedings, regardless of whether the proceedings are judicial or non-judicial in nature. See, e.g., Mich. Comp. Laws § 600.3205a(1) (requiring the foreclosing party to serve on the borrower before commencing a foreclosure-by-advertisement a written notice containing information about the underlying obligation and stating how to avoid foreclosure); Tenn.Code Ann. § 35–5–101(e) (same); cf. Reese, 678 F.3d at 1217 (noting that a foreclosure notice serves more than one purpose). See also Shapiro & Meinhold, 823 P.2d at 124 (noting that "attorneys are not exempt [from the Act] merely because their collection activities are primarily limited to foreclosures"). Not so for repossessors, who typically "enforce" a security interest—i.e., repossess or disable property—when the debtor is not present, in order to keep the peace.

Finally, the fact that the only provision of the Act applicable to those who satisfy the third sentence in the definition (but not the first sentence) concerns non-judicial repossessions—precisely the business of repossessors—also suggests that the sentence applies only to repossessors. Indeed, all of the cases we found where §§ 1692f(6) and 1692a(6)'s third sentence were held applicable involved repossessors. See, e.g., Montgomery, 346 F.3d at 700 (agreeing that "those who enforce security interests, such as repossession agencies, fall outside the ambit of the FDCPA," except for the purposes of § 1692f(6) (emphasis added)); Nadalin v. Auto. Recovery Bureau, Inc., 169 F.3d 1084, 1085 (7th Cir.1999) (noting that "repossessors" must comply with § 1692f(6)); James v. Ford Motor Credit Co., 47 F.3d 961, 962 (8th Cir.1995) (noting that "a few provisions of the Act subject repossession companies to potential liability when they act in the enforcement of others' security interests"); Jordan v. Kent Recovery Servs., 731 F.Supp. 652, 657 (D.Del.1990).

> For these reasons, we hold that mortgage foreclosure is debt collection under the Act. Lawyers who meet the general definition of a "debt collector" must comply with the FDCPA when engaged in mortgage foreclosure. And a lawyer can satisfy that definition if his principal business purpose is mortgage foreclosure or if he "regularly" performs this function. . . .

Foreclosure should be covered – lender presumably wants debtor to pay, not surrender property. We have rarely seen foreclosure not accompanied by some effort to modify, restructure, induce sale, or otherwise collect money. Section 1692f(6) was intended to cover repossessors of vehicles and similar collateral who try not to have any contact with the debtor.

In any event, if defendant regularly seeks deficiencies, it is a debt collector regardless of whether it is doing so in the particular case. In *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006), the defendant, an attorney hired to conduct an executory process foreclosure, argued that because he was enforcing a security interest, he was not a debt collector under the FDCPA except for purposes of § 1692f(6). The Fifth Circuit disagreed, noting that under § 1692a(6), "a party's general, not specific, debt collection activities are determinative of whether they meet the statutory definition of a debt collector." 464 F.3d at 529. *See Brooks v. Flagstar Bank*, No. 11-67, 2011 U.S.Dist. LEXIS 74676 (E.D.La., July 12, 2011); *Overton v. Foutty & Foutty, LLP*, 1:07-cv-0274-DFH- TAB, 2007 U.S. Dist. LEXIS 61705 (S.D. Ind. Aug. 21, 2007).

7. 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).

8. 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.

9. 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 repossessor does not violate the FDCPA. *Nadalin v. Automobile Recovery Bur., Inc.*, 169 F.3d 1084 (7th Cir. 1999).

10. FIELD AGENTS

"Field agents" who work for creditors, particularly in connection with automobile and mortgage debts, and who visit consumers for the purpose of delivering communications and inducing them to communicate with the creditor, are "debt collectors." *Siwulec v. J.M. Adjustment Servs., LLC*, No. 11-2086, 2012 U.S. App. LEXIS 4201, 465 Fed.Appx. 200 (3rd Cir. March 1, 2012); *Simpson v. Safeguard Properties, L.L.C.,* No. 13 C 2453, 2013 WL 2642143 (N.D.Ill., June 12, 2013). See also, *Cirkot v. Diversified Fin. Sys.*, 839 F. Supp. 941 (D.Conn. 1993), where FDCPA liability was based on the actions of a "Special Investigator" who placed a note in the plaintiff's mail box, stating on the envelope " Urgent - Open Immediately" and on the note "Read my card - I will be handling your case & this area. If you wish not to[,] call 1-800-851-4863 Scott Beatty to settle[.] My special agents will remain in our area to collect. Believe me. Call within 24 hours."

III. 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). The key elements in this definition are "consumer," which is "any natural person obligated or allegedly obligated to pay any debt," 15 U.S.C. §1692a(3); a "transaction," which excludes certain non-consensual obligations; and "personal, family or household purposes." In addition, the effect of the definition of "debt collector" and the exclusions to that definition is to limit the scope of the FDCPA to debts which are actually or allegedly delinquent when the "debt collector" first becomes involved with them.

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).

Condominium and homeowners' association assessments on property acquired for personal, family or household purposes 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). Because of the definition of "debt collector," a management company that collects such assessments prior to default is not covered by the FDCPA, but a lawyer or collection agency who duns or sues to

enforce defaulted assessments is.

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. *Romea v. Heiberger & Associates*, *supra.* Again, because of the definition of "debt collector," a management company or landlord that collects rent before it is delinquent is not covered by the FDCPA, but a collection agency or lawyer that receives the claim after the rent is overdue is covered. Also, 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 because there is no "transaction." *Hawthorne v. MAC Adjustment, Inc.,* 140 F.3d 1367 (11th Cir. 1998). 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).

However, the fact that a claim arising out of a transaction by a consumer is cast in terms of a tort or statutory violation rather than breach of contract does not deprive the consumer of the protection of the FDCPA when collection agencies or collection lawyers ask the consumer to pay. *Brown v. Budget Rent-A-Car Systems, Inc.*,119 F.3d 922 (11th Cir. 1997) (a claim by a rental company against a consumer for damage to a car that the consumer rented is a "debt" whether brought as a claim for breach of the rental agreement or as one for negligent damage to property).

Thus, it is now settled that dishonored checks are covered, even if liability is based on a bad check statute rather than the contract (check). *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). Also, in the unpublished decision in *Broadnax v. Greene Credit Service*, No. 95-3829, 1997 U.S. App. LEXIS 776 (6th Cir. Jan. 15, 1997), a businessman issued a check to pay a contractor and then prevented its negotiation because of a complaint about the work. The contractor negotiated the check to a merchant to pay a personal debt. The court held that the businessman was protected by the FDCPA when a debt collector for the merchant falsely accused him of passing a bad check, reasoning that "the defendants had attempted to collect a consumer obligation through the use of an arguably abusive, deceptive, and unfair debt collection practice (or practices)."

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 FDCPA); *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 of the book. 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).

Fines for moving violations are not "debts." *Reid v. American Traffic Solutions,* Inc., 10-cv-204-JPG-DGW and 10-cv-269-JPG, 2010 U.S. Dist. LEXIS 134518 (S.D.Ill., December 20, 2010). Parking tickets have also been held not to constitute "debts", at least where the fine was imposed for "parking one's vehicle in an unauthorized location," *Graham v. ACS State & Local Solutions, Inc.,* No. 06-2708 (JNE/JJG), 2006 U.S. Dist. LEXIS 73973, 2006 WL 2911780, at *2 (D. Minn. Oct. 10, 2006), and automobile impoundment and storage fees are not debts, *Betts v. Equifax Credit Information Servs., Inc.,* 245 F. Supp. 2d 1130, 1133-34 (W.D. Wash. 2003). On the other hand, a fee owed for the privilege of parking in an unmanned parking lot is a "debt." *Hansen v. Ticket Track, Inc.,* 280 F. Supp. 2d 1196, 1203 (W.D. Wash. 2003). The fact that the creditor is a governmental entity does not take essentially contractual obligations outside the definition of "debt." *Pollice v. National Tax Funding, LP*, *supra*, 225 F.3d 379 (3rd Cir. 2000).

Yazo v. Law Enforcement Systems, Inc., No. CV 08-03512 DDP (AGRx), 2008 WL 4852965 (C.D.Cal., Nov. 7, 2008), addressed toll road charges. The court held that a fine for using a toll road without payment is akin to a penalty for theft and is not covered. The court left open the possibility that one who has a contract for using the road but is assessed a fine may be protected by the FDCPA.

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).

IV. OTHER STATUTORY DEFINITIONS

1. 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).

A "communication" need not refer to the debt. For example, a request for financial information for the purpose of restructuring or modifying a loan is a "communication," even if there is no "explicit demand for payment." *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010).

A voicemail message is a "communication" within the meaning of 15 U.S.C. §§1692d(6) and 1692e, even if it merely requests a return call. *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009); *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); *Krapf v. Collectors Training Institute of Illinois, Inc.,* 09-CV-391S, 2010 U.S. Dist. LEXIS 13063 (W.D.N.Y., February 16, 2010); *Mark v. J. C. Christensen & Assocs*., 09-100, 2009 U.S.Dist. LEXIS 67724 (D.Minn. Aug. 4, 2009); *Widman v. Monterey Fin. Servs.,* 08-1331, 2009 U.S.Dist. LEXIS 38824 (W.D.Pa., May 7, 2009); *Thomas v. Consumer Adjustment Co.,* 579 F.Supp.2d 1290, 1296-97 (E.D.Mo. 2008); *Ramirez v. Apex Financial Mgmt., LLC*, 567 F.Supp.2d 1035, 1041 (N.D.Ill. 2008); *Chalik v. Westport Recovery Corp.,* 09-60819-CIV, 2009 U.S. Dist. LEXIS 122029 (S.D.Fla., October 30, 2009); *Inman v. NCO Financial Systems, Inc.,* 08-5866, 2009 U.S. Dist. LEXIS 98215 (E.D.Pa., October 21, 2009); *Pollock v. Bay Area Credit Serv., LLC,* 08-61101-Civ, 2009 U.S. Dist. LEXIS 71169 (S.D.Fla., August 13, 2009); *Drossin v. Nat'l Action Fin. Servs.,* 641 F. Supp. 2d 1314 (S.D.Fla. 2009); *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 WL 1992410, 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); *Gryzbowski v. I.C. System, Inc*., 3:cv-08-1884 (M.D.Pa. March 5, 2010); *Pawelczak v. Nations Recovery Center, Inc.*, No. 11 C 3700, 2012 U.S. Dist. LEXIS 82916 (N.D.Ill., June 14, 2012). *See Horkey v. J.V.D.B. & Associates, Inc.*, 333 F.3d 769, 774 (7th Cir. 2003) (message left with coworker).

In *Marx v. General Revenue Corp.*, 668 F.3d 1174 (10th Cir. 2011), the court held that an "employment verification" sent to a consumer's employer was not a "communication" relating to a debt. "The facsimile was sent in September 2008 to Ms. Marx's employer as part of GRC's inquiry into Marx's eligibility for [administrative] wage garnishment. When a GRC agent called Ms. Marx's employer to verify her employment status, the agent was told to make the request in writing. . . . GRC sent its standard employment verification form. This form displays GRC's name, logo, address, and phone number, and bears an "ID" number representing GRC's internal account number for Ms. Marx. The form indicates that its purpose is to "verify

[e]mployment" and to "[request] employment information"; blanks are left for the employer to fill in the individual's employment status, date of hire, corporate payroll address, and position, and to note whether the individual works full- or part-time." The court reasoned that "absent any evidentiary showing that Ms. Marx's employer either knew or inferred that the facsimile involved a debt, the facsimile does not satisfy the statutory definition of a "communication." A party may seek to verify employment status (without hinting at a debt) for any number of reasons, including as part of processing a mortgage, conducting a background check before hiring, or determining eligibility for an extension of credit." The plaintiff "did not call any witnesses from her employer's office to testify as to what they inferred from the facsimile."

2. WHO IS ENTITLED TO SUE

The FDCPA applies to "consumer" debts, and certain substantive provisions, e.g., §1692c(a), 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"); *Thomas v. Consumer Adjustment Co.*, 579 F. Supp. 2d 1290, 1298 (E.D. Mo. 2008); *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 504 n.9 (S.D.N.Y. 2000); *Dewey v. Associated Collectors, Inc.,* 927 F. Supp. 1172, 1174-75 (W.D. Wis. 1996); *Johnson v. Bullhead Invs., LLC*, 1:09CV639, 2010 U.S. Dist. LEXIS 2382 (M.D.N.C., January 11, 2010) ("Because the plain language of Section 1692k does not limit recovery to 'consumers,' courts have recognized that under certain circumstances, third-party, non-debtors may have standing to bring claims under the FDCPA").

There is ample authority that nondebtors have standing to bring a §1692d claim. See 15 U.S.C. §1692d ("A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress or abuse any person...")(bold emphasis added); *Meadows v. Franklin Collection Service, Inc.*, No. 10-13474, 2011 WL 479997, 2011 U.S. App. LEXIS 2779 (11th Cir. Feb. 11, 2011) (unpublished) (reversing grant of summary judgment to debt collector on a § 1692d(5) claim brought by a nondebtor); *Whatley v. Universal Collection Bureau, Inc.*, 525 F.Supp. 1204 (N.D. Ga. 1981) (holding that nondebtors may bring claims for violations of §1692d); *Montgomery v. Huntington Bank*, 346 F.3d 693 (6th Cir. 2003).

V. 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 (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 later Seventh Circuit decisions, *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996); *Durkin v. Equifax Check Servs. Inc.*, 406 F.3d 410 (7th Cir. 2005) . The Eighth Circuit agrees. *Strand v. Diversified Collection Serv., Inc.,* 380 F.3d 316 (8th Cir. 2004).

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 have recently required 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); *Donohue v. Quick Collect, Inc.,* 592 F.3d 1027 (9th Cir. 2010); *Corazzini v. Litton Loan Servicing LLP,* 1:09-cv-199 (MAD/ATB), 2011 U.S. Dist. LEXIS 63565 (N.D.N.Y. June 15, 2011).

"Statements are material if they influence a consumer's decision--to pay a debt in response to a dunning letter, for example, see *Muha*, 558 F.3d at 628--or if they would impair the consumer's ability to challenge the debt at issue. See *Berg v. Blatt, Hasenmiller, Leibsker & Moore LLC*, No. 07 C 4887, 2009 U.S. Dist. LEXIS 26808, 2009 WL 901011, at *7 (N.D. Ill. Mar. 31, 2009). AFNI's false statements are material in both related senses; AFNI's statements that it is "unable to investigate" a consumer's dispute due to "insufficient information" both impair the consumer's ability to challenge the debt at issue and influence his or her decision to pay the debt." *Hale v. AFNI, Inc.*, No. 08 CV 3918, 2010 U.S. Dist. LEXIS 6715, *22 (N.D.Ill., Jan. 26, 2010). Correct identification of the debt collector and the owner of the debt is "material." *Wallace v. Wash. Mut. Bank, F.A.*, 683 F.3d 323 (6th Cir. 2012).

All conduct specifically prohibited or disclosures specifically required by the

FDCPA is "material." *Mark v. J. C. Christensen & Assoc., Inc.*, 09-100, 2009 U.S.Dist. LEXIS 67724, *11 (D.Minn. Aug. 4, 2009); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012) (violations of 1692e(11) are always "material"). For example, disclosing the present owner of the debt is specifically required and should always be "material." *Wallace v. Washington Mutual Bank, F.A.,* 683 F.3d 323 (6th Cir. 2012).

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); *Campuzano-Burgos v. Midland Credit Management, Inc*., 550 F.3d 294, 298 (3rd Cir. 2008) (violation if communication "can be reasonably read to have two or more different meanings, one of which is inaccurate"); *Gonzales v. Arrow Fin. Servs., LLC,* 660 F.3d 1055, 1062 (9th Cir. 2011)("it is well established that '[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate.'"); *Kistner v. Law Offices of Michael P. Margelefsky, LLC,* 518 F.3d 433, 441 (6th Cir. 2008); *Melillo v. Shendell & Assocs., P.A.*, Case No. 11-62048-CIV-COHN/SELTZER, 2012 U.S. Dist. LEXIS 9248, *13 (S.D.Fla., Jan. 26, 2012) ("[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate."); *Nichols v. Northland Groups, Inc.*, Nos. 05 C 2701, 05 C 5523, 06 C 43, 2006 U.S. Dist. LEXIS 15037 (N.D.Ill., March 31, 2006) ("[A] collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate."); *Creighton v. Emporia Credit Serv.*, 3:97CV171, 1997 U.S. Dist. LEXIS 8556, *7 (E.D.Va., May 28, 1997) ("'"a collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate."). *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 . . . ."). *See also*, *Chrysler Corp. v. FTC*, 182 U.S. App. D.C. 359, 561 F. 2d 357 (D.C. Cir. 1977) (an advertisement is considered deceptive if it has the capacity to convey misleading impressions to consumers even though nonmisleading interpretations may be possible).

VI. 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.

The statute requires that the specified information be disclosed in a single notice. *Castro v. Green Tree Servicing,* 10cv7211, 2013 WL 4105196 (S.D.N.Y., Aug. 14, 2013). The consumer is not required to piece the information together from multiple communications.

1. SENDING VS. RECEIPT

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); *Krawczyk v. Centurion Capital Corp.*, 06 C 6273, 2009 U.S. Dist. LEXIS 12204, 2009 WL 395458 at *12 (N.D. Ill. Feb. 18, 2009); *Derricotte v. Pressler*, Civil Action No. 10-1323, 2011 U.S. Dist. LEXIS 78921 (D.N.J., July 19, 2011); *Campbell v. Credit Bureau Systems, Inc*., 655 F.Supp.2d 732, 740 (E.D. Ky. 2009); *Zamos II v. Asset Acceptance, LLC*, 423 F.Supp.2d 777, 785 (N.D. Ohio 2006). However, if the notice is returned and the collector subsequently gets a correct address for the debtor and wishes to communicate with him, the collector must provide another §1692g notice. *Johnson v. Midland Credit Mgmt. Inc.*, 1:05 CV 1094, 2006 U.S. Dist. LEXIS 60133 (N.D.Ohio, Aug. 24, 2006). Similarly, a misaddressed notice that is not in fact received is not sufficient. *Kim v. Gordon*, No. CV-10-1086-HZ, 2011 U.S. Dist. LEXIS 85353 (D.Ore. Aug. 2, 2011); *Palisades Collection, LLC v. O'Brien,* 172 Ohio App. 3d 186; 873 N.E.2d 923 (2007).

2. PLEADINGS NOT COVERED

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.

3. OPTION TO CEASE COLLECTION INSTEAD OF VALIDATING

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.,* Nos. 95 C 4919, 95 C 6665, 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).

If a consumer both exercises her dispute right and directs the collector to cease collection efforts, the collector can simply respond to the dispute and provide necessary verification to comply with §1692g and must do so without seeking payment that would violate §1692c(c). *Johnson v. Equifax Risk Mgmt. Servs*, 2004 WL 540459, *9 (S.D.N.Y. Mar. 14, 2004); *Cohen v. Beachside Two-I Homeowners' Ass'n*, 2006 WL 1795140 *13-14 (D. Minn. June 29, 2006) ("As a result, while Cohen's October 18 letter does inform Krietzman and Felhaber that Cohen wishes to have no further communication with respect to the debt generally, it does not ban any future communication. Cohen solicits Krietzman and Felhaber to communicate with him regarding settlement of the debt."); *Recker v. Cent. Collection Bureau, Inc.,* 2005 WL 2654222, at *4 (S.D. Ind. Oct.17, 2005) ("Contrary to Defendant's assertion, Defendant could have complied with both provisions § 1692g(b) and § 1692c(c) by sending the verification with a communication stating that the Defendant intended to invoke a specified remedy, namely the filing of a suit in a small claims court."); *Marino v. Hoganwillig, PLLC*, 2012 WL 1424733 *2 (W.D.N.Y. April 24, 2012). Once the collector verifies the dispute, the collector is free to bring suit or invoke other remedies.

4. WHAT IS REQUIRED BY VERIFICATION

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.

If the debt has been sold or transferred, the Uniform Commercial Code entitles the putative debtor to proof of the assignment. UCC §9-406, 810 ILCS 5/9-406 (most sales of receivables are subject to Article 9 even though they are not what normally would be thought of as a secured transaction). In addition, Illinois law gives the debtor greater rights in the event of identity theft. 225 ILCS 425/9.4. Finally, many statutes regulating the extension of credit entitle a debtor to an accounting. E.g., Real Estate Settlement Procedures Act, 12 U.S.C. §2605(e); Motor Vehicle Retail Installment Sales Act, 815 ILCS 375/15; Retail Installment Sales Act, 815 ILCS 405/16; Uniform Commercial Code, 810 ILCS 5/9-210 and 810 ILCS 5/9-613.

5. EFFECT OF FAILURE TO DISPUTE

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).

The failure of a debtor to dispute a debt does not preclude an FDCPA violation based on debt collection practices that are otherwise unlawful under the FDCPA. *Gigli v. Palisades Collection, L.L.C.,* 3:CV-06-1428, 2008 U.S.Dist. LEXIS 62684, 2008 WL 3853295 (M.D.Pa., Aug. 14, 2008) (holding that plaintiff's allegation that defendants attempted to apply an interest rate not agreed upon in plaintiff's credit card agreement stated a claim under § 1692f(1); consumer's failure to dispute the amount was not a bar to suit).

6. EACH DEBT COLLECTOR MUST VALIDATE

The better view is that each new debt collector must comply with §1692g. *Griswold v. J & R Anderson Bus. Servs*., 82-1474, 1983 U.S.Dist. LEXIS 20365, *2-4 (D.Ore. Oct. 21, 1983); *Robinson v. Nationstar Mortgage, LLC*, Case No. 2:12-cv-718, 2012 U.S. Dist. LEXIS 163268, 2012 WL 5596421 (S.D.Ohio, Nov. 15, 2012); *Turner v. Shenandoah Legal Group, P.C.,* 3:06cv045, 2006 U.S. Dist. LEXIS 29341, *32-39, 2006 WL 1685698, *11 (E.D.Va. June 12, 2006); *Tipping-Lipshie v. Riddle*, 2000 WL 33963916, *3 (E.D.N.Y. March 2, 2000); *Sparkman v. Zwicker & Assoc., P.C.*, 374 F.Supp.2d 293, 300-01 (E.D.N.Y. 2005); *Stair v. Thomas & Cook*, 254 F.R.D. 191, 197 (D.N.J. 2008); *Sutton v. Law Offices of Alexander L. Lawrence,* 1992 U.S.Dist. LEXIS 22761, *8 (D.Del. June 17, 1992); *Horkey v. J.V.D.B. & Associates*, 179 F.Supp.2d 861, 865 (N.D.Ill. 2002), aff'd, 333 F.3d 769 (7th Cir. 2003); *Minh Vu Hoang v. Rosen*, 2013 WL 781780 (D.Md. Feb. 28, 2013). This is the view of the FTC. FTC Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, at 50108 (Dec. 13, 1988) ("an attorney who regularly attempts to collect debts . . . must provide the required notice, even if a previous debt collector (or creditor) has given such notice"). Otherwise, the consumer has no opportunity to insist that collection efforts cease pending verification in situations where that is clearly required to protect the consumer, such as:

(a) where the consumer claims that the debt was paid to or settled by a prior collector, as in *Chase Bank USA, N.A. v. Cardello*, 2010 NY Slip Op. 20090, 27 Misc. 3d 791, 896 N.Y.S.2d 856, 857, 2010 N.Y. Misc. LEXIS 513, 243 N.Y.L.J. 48 (Richmond Co. Civ. Ct. 2010) ("[O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation. Often these consumers have already entered into stipulations to pay off the outstanding balance due the credit card issuer and find themselves filing an order to show cause to vacate a default judgment from an unknown debt purchaser for the same obligation.");

(b) there is a question whether the new debt collector has an assignment of the debt or is otherwise authorized to act, as in *United States v. Goldberg*, 09-80030-CR (S.D.Fla.) (In 2009, a debt buyer was charged with a scheme to sell 86,000 accounts that he did not own. He had actually sold over 10,000 at the time he was caught);

(c) collection efforts by two or more debt collectors who claim to have been authorized to collect the same debt, as in *Wood v. M&J Recovery LLC,* No. CV 05-5564, 2007 U.S.Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007) (a debtor complained of multiple collection efforts by various debt buyers and collectors on the same debt, and the defendants asserted claims against one another disputing the ownership of the portfolio involved. Shekinah alleged that it sold a portfolio to NLRS, that NLRS was unable to pay, that the sale agreement was modified so that NLRS would only obtain one fifth of the portfolio, and that the one fifth did not include the plaintiff's debt. Portfolio Partners claimed that it, and not Shekinah, was the rightful owner of the portfolio);

(d) collection efforts directed by a subsequent debt collector to the wrong person, as in *Gutierrez v. LVNV Funding, LLC*, EP-08-CV-225-DB, 2009 U.S. Dist. LEXIS 54479 (W.D.Tex. March 16, 2009) (if the subsequent collector is not required to comply with §1692g at all, there would be no duty to advise that person of their rights);

(e) the prior debt collector did not comply with §1692g,

(f) the amount of the debt has substantially changed over the years, either as a result of payments or credits or the addition of fees and charges.

In addition, since the Seventh Circuit has held that a debt collector, upon receipt of a dispute, need not verify but complies with the statute by ceasing collection, *Jang v. A.M. Miller & Assocs.*, 122 F.3d 480 (7th Cir. 1997), holding that a subsequent debt collector has no obligation under §1692g would allow evasion of the debtor's rights by having collector A send the initial letter, stop collecting if a dispute is received, and then have collector B continue collections without anyone complying with §1692g.

However, there are some contrary cases, mostly without analysis. *Senftle v. Landau*, 390 F.Supp.2d 463, 473 (D.Md. 2005); *Nichols v. Byrd*, 435 F.Supp.2d 1101, 1106 (D.Nev. 2006). Some of these erroneously assert that the only purpose of §1692g is to provide the consumer with notice of his rights, when it also requires disclosure of the current creditor, amount of the debt, etc.

7. 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 $178,844.65, and that this did not include unspecified accrued but unpaid interest, unpaid late charges, escrow advances, and other charges authorized by loan agreement). *See also, Veach v. Sheeks*, 316 F.3d 690 (7th Cir. 2003); *Schletz v. Academy Collection Service, 02* C 6484, 2003 WL 21196266 (N.D.Ill., May 15, 2003); *Taylor v. Cavalry Inv., LLC*, 210 F.Supp.2d 1001 (N.D.Ill. 2002); *Ingram v. Corporate Receivables, Inc.*, 02 C 6608, 2003 WL 21018650 (N.D.Ill., May 5, 2003); *Bernstein v. Howe*, IP 02-192-C-K/H, 2003 WL 1702254, 2003 U.S. Dist. LEXIS 5284 (S.D.Ind., March 31, 2003) ($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); *Castro v. Green Tree Servicing,* 10cv7211, 2013 WL 4105196 (S.D.N.Y., Aug. 14, 2013); *Adlam v. FMS, Inc.*, 09 Civ. 9129, 2010 WL 1328958 (S.D.N.Y., April 5, 2010). However, the nature of the number has to be "clearly" described. Obfuscatory statements about the amount due have been found to violate §1692g(a)(1). *Chuway v. National Action Financial Services*, 362 F.3d 944 (7th Cir. 2004) (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). Note that even after a debt has been accelerated non-FDCPA law or a contract may require furnishing a reinstatement amount in addition to the accelerated amount (especially in the case of mortgages, automobile debts).

If the debt is increasing due to interest or the like, the collector should use the safe harbor language prescribed in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000). 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].

Failure to disclose that the debt is increasing due to interest and the like may be a violation. In *Snyder v. Daniel N. Gordon, P.C.*, Case No. C11-1379 RAJ, 2012 U.S. Dist. LEXIS 120659, 2012 WL 3643673 (W.D.Wash., August 24, 2012), the court held:

> Defendants' first letter read, in relevant part: "Demand is hereby made upon you for payment in the sum of $18,026.56." Snyder Mot. at Ex. B. Two subsequent letters made reference to a "Balance Due." Id. at Exs. C, D. None of the letters provided further detail regarding when or how the balance had been calculated, whether it included interest, or whether interest continued to accrue. The court finds that the "least sophisticated consumer" could have read these letters in at least two different ways. On one hand, an unsophisticated consumer could reasonably conclude that the balance was a fixed amount that would not be subject to further interest, late fees, or other charges. On the other, an unsophisticated consumer could just as reasonably determine that the balance would continue to grow over time as interest accrued. One of those meanings would necessarily be inaccurate. Therefore, the court finds that Defendants' letters were deceptive as a matter of law.[2] Courts in other districts have reached the same conclusion on similar facts. See *Michalek v. ARS Nat'l. Sys., Inc*., No. 3:11-CV-1374, 2011 U.S. Dist. LEXIS 142976, 2011 WL 6180498, at *4 (M.D. Pa. Dec. 13, 2011) (holding that the term "balance" has more than one meaning); *Dragon v. I.C. Sys.*, 483 F. Supp. 2d 198, 203 (D. Conn. 2007) (holding that a reference to a "sum certain" was deceptive as a matter of law). The court grants Ms. Snyder's motion for summary judgment on this issue.

Accord, Smith v. Lyons, Doughty & Veldhuis, P.C., No. 07-5139, 2008 U.S. Dist. LEXIS 56725, 2008 WL 2885887, at *6 (D.N.J. July 23, 2008); *Jones v. Midland Funding, LLC,* 755 F. Supp. 2d 393 (D. Conn. 2010), later opinion, 3:08-CV-802 (RNC), 2012 U.S. Dist. LEXIS 50879 (D.Conn., April 11, 2012); *Jackson v. Aman Collection Serv*., No. IP 01-0100-C-T/K, 2001 U.S. Dist. LEXIS 22238, 2001 WL 1708829, at *3 (S.D. Ind. Dec. 14, 2001); *Stonecypher v. Finkelstein Kern Steinberg & Cunningham*, 2:11-cv-13, 2011 U.S. Dist. LEXIS 88319, 2011 WL 3489685, *5 (E.D. Tenn. Aug. 9, 2011) ("many courts have followed Miller to hold that the "amount of debt" requirement in 15 U.S.C. § 1692g(a)(1) requires the debt collector to list the principal balance, indicate specifics about any interest that may be accruing, and include other fees that may be associated with the debt."); *see Curto v. Palisades Collection, LLC,* No. 07-CV-529(S), 2011 U.S. Dist. LEXIS 125493, 2011 WL 5196708, *8 (W.D.N.Y. Oct. 31, 2011)

("Only were Defendants to now seek interest on the debt, would the letter have been misleading.").

Contrary cases include *Pifko v. CCB Credit Servs*., No. 09-CV-3057 (JS)(WDW), 2010 U.S. Dist. LEXIS 69872, 2010 WL 2771832, at *3-4 (E.D.N.Y. July 7, 2010); *Schaefer v. ARM Receivable Management, Inc.,* No. 09-11666-DJC, 2011 U.S. Dist. LEXIS 77828, 2011 WL 2847768, *5-6 (D. Mass. July 19, 2011). Some other cases hold that consumers should understand that a credit card in the hands of the original creditor, as opposed to a debt buyer, accrues interest. *Adlam v. FMS*, No. 09 Civ. 9129 (SAS), 2010 U.S. Dist. LEXIS 33433, 2010 WL 1328958, at *3 (S.D.N.Y. April 5, 2010); *Weiss v. Zwicker & Assocs*., 664 F. Supp. 2d 214, 217 (E.D.N.Y. 2009) ("even the most unsophisticated consumer would understand that credit card debt accrues interest").

The basic premise of the latter line of cases is factually incorrect, since most but not all banks cease charging interest after chargeoff, so that the consumer does ***not*** know whether interest is in fact being added. *Curto v. Palisades Collection, LLC*, *supra.*

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

Cases are divided on whether an oral dispute prevents the collector from assuming that the debt is valid. The Third Circuit requires a writing for a dispute. *Graziano v. Harrison,* 950 F.2d 107, 112 (3d Cir. 1991). The Second and Ninth Circuits hold that there is no writing requirement. *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 12-3639-cv (2nd Cir. May 29, 2013); *Camacho v. Bridgeport Financial, Inc.,* 430 F.3d 1078, 1080 (9th Cir. 2005). The vast majority of lower courts have held that §1692g(a)(3) does not impose a writing requirement on a consumer when disputing the validity of a debt. Rather, these courts have reasoned that the plain language of subsection (a)(3) does not require a consumer to dispute the validity of a debt in writing. *Spearman v. Tom Wood Pontiac-GMC, Inc*., IP 00-1340-C-T/K, 2002 U.S. Dist. LEXIS 24389, 2002 WL 31854892 (S.D. Ind. Nov. 4, 2002); *Chung v. Nat'l Check Bureau, Inc.*, No. 1:04 CV 1857, 2005 U.S. Dist. LEXIS 15216, 2005 WL 1541030 (S.D. Ind. June 30, 2005); *Walters v. PDI Mgmt. Servs.*, No. 1:02-CV-1100, 2004 U.S. Dist. LEXIS 13972, 2004 WL 1622217 (S.D. Ind. Apr. 6, 2004) ; *Rosado v. Taylor*, 324 F.Supp.2d 917 (N.D. Ind. 2004); *Edmonds v. Nat'l Check Bureau, Inc.*, No. 01-1289, 2003 U.S. Dist. LEXIS 17476 (S.D. Ind. Aug. 1, 2003); *Register v. Reiner, Reiner & Bendett, P.C.*, 488 F.Supp.2d 143 (D.Conn. 2007); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 464 F.Supp.2d 720 (N.D. Ohio 2006); *Baez v. Wagner & Hunt, P.A.*, 442 F.Supp.2d 1273 (S.D.Fla. 2006); *Turner v. Shenandoah Legal Group, P.C.*, No. 3:06CV045, 2006 U.S. Dist. LEXIS 39341, 2006 WL 1685698 (E.D. Va. June 12, 2006); *Vega v. Credit Bureau Enters.*, No. CIVA02CV1550, 2005 U.S. Dist. LEXIS 4927, 2005 WL 711657 (E.D.N.Y. Mar. 29, 2005); *Nasca v. GC Servs. Ltd. P'ship*, No 01CIV10127, 2002 U.S. Dist. LEXIS 16992, 2002 WL 31040647 (S.D.N.Y. Sept. 12, 2002); *In re Risk Mgmt. Alternatives, Inc., Fair Debt Collection Practices Act Litig.,* 208 F.R.D. 493 (S.D.N.Y. June 14, 2002); *Sambor v. Omnia Credit Servs., Inc.*, 183 F.Supp.2d 1234 (D.Haw. 2002); *Sanchez v. Robert E. Weiss, Inc.*, 173 F.Supp.2d 1029 (N.D. Cal. 2001); *Castro v. ARS Nat'l Servs., Inc.*, No. 99 CIV. 4596, 2000 U.S. Dist. LEXIS 2618, 2000 WL 264310 (S.D.N.Y. Mar. 8, 2000); *Ong v. American Collections Enterprise*, No. 98-CV-5117, 1999 U.S. Dist. LEXIS 409, 1999 WL 51816 (E.D.N.Y. Jan. 15, 1999); *Wyler v. Computer Credit, Inc.,* 04 CV 2762 (CLP), 2006 U.S.Dist. LEXIS 57766 (E.D.N.Y., March 3, 2006); *Reed v. Smith, Smith & Smith*, No. Civ. A. 93-956, 1995 U.S. Dist. LEXIS 22013, 1995 WL 907764 (M.D.La. Feb. 8, 1995); *Harvey v. United Adjusters*, 509 F.Supp.1218 (D.Or. 1981). These courts hold that the plain language of 1692g(a)(3) does not require that the consumer dispute the validity of the debt in writing and that courts are not at liberty to override the language used by Congress. *Camacho v. Bridgeport Financial, Inc.,* 430 F.3d 1078, 1080 (9th Cir. 2005) ("we must give effect to the plain meaning of

the statute . . . "); *Vega v. Credit Bureau Enters.*, No. CIVA02CV1550, 2005 U.S. Dist. LEXIS 4927, 2005 WL 711657 (E.D.N.Y. Mar. 29, 2005);

The Ninth Circuit has held that "A validation notice violates § 1692g(a)(3) only where it expressly requires a consumer to dispute her debt in writing." *Riggs v. Prober & Raphael*, 681 F.3d 1097 (9th Cir. 2012).

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.

9. WHO CAN ASSUME DEBT TO BE VALID

Only the debt collector and perhaps the creditor can assume that the debt is valid. Neither the initial letter nor other correspondence from the debt collector can state that the debt will be assumed to be valid generally, or by a court. *Guerrero v. Absolute Collection Service, Inc.*, No. 1:11-cv-02427-JEC, 2011 U.S. Dist. LEXIS 155541, *10 (N.D. Ga. Oct. 6, 2011) ("ACS's failure to limit its statement that any undisputed debt would be assumed valid to the debt collector violates the notice requirements of §1692g(a)(3) by "making the least sophisticated consumer uncertain as to her rights."); *Koch v. Atkinson, Diner, Stone, Mankuta, & Ploucha, P.A.*, No. 11-80894-CIV, 2011 U.S. Dist. LEXIS 109826, 2011 WL 4499100 (S.D. Fla. Sept. 27, 2011); *Galuska v. Collectors Training Institute of Illinois, Inc.*, No. 3:07-CV-2044, 2008 U.S. Dist. LEXIS 39508, 2008 WL 2050809 (M.D. Pa. May 13, 2008) (holding that failure to include "by the debt collector" or words such as "we" or "this office" in the required disclosure would lead least sophisticated debtor to believe the debt would be assumed valid by some other entity); *Rivers v. Am. Network, Inc.*, Civil Action No. 1:10-cv-2606, at [Doc. 12] (N.D. Ga. May 4, 2011), adopted by [Doc. 13]; *Harlan v. NRA Grp., LLC*, Civil Action No. 10-cv-0324, 2011 U.S. Dist. LEXIS 12751, 2011 WL 500024, at *3 (E.D. Pa. Feb. 9, 2011); *Smith v. Hecker*, No. Civ. A. 04-5820, 2005 U.S. Dist. LEXIS 6598, 2005 WL 894812, at *6 (E.D. Pa. Apr. 18, 2005) (Letter stated, "UNLESS YOU, THE CONSUMER, WITHIN THIRTY DAYS OF RECEIPT OF THIS NOTICE, DISPUTE THE VALIDITY OF THE DEBT, OR ANY PORTION THEREOF, THE DEBT WILL BE ASSESSED VALID"; "[O]mission of 'by the debt collector' would lead a least sophisticated debtor to believe that unless she disputes the validity of the debt . . . her debt will be . . . determined to be valid by a court, credit reporting agency, or other entity of authority [or] imposed upon her using a valid procedure . . . ."); *Philip v. Sardo & Batista, P.C.*, No. 11-4773 (SRC), 2011 U.S. Dist. LEXIS 130267, 2011 WL 5513201 (D.N.J. Nov. 10, 2011); *Pierce v. Carrington Recovery Services, LLC*, No. 09-0787, 2009 U.S. Dist. LEXIS 72049 (W.D.Pa., Aug. 17, 2009); *Orr v. Westport Recovery Corp.*, --- F.Supp.2d ----, 2013 WL 1729578 (N.D.Ga., April 16, 2013).

Greco v. Trauner, Cohen & Thomas, LLP, 412 F. 3d 360 (2d Cir. 2005), found no violation by extending the assumption to the creditor.

10. DISPUTE "PORTION" OF DEBT

The right to dispute a part of the debt is material and the notice must disclose that

right. *Harvey v. United Adjusters*, 509 F.Supp. 1218 (D.Ore. 1981); *Forsberg v. Fidelity National Credit Services*, 03cv2193-DMS(AJB), 2004 U.S. Dist. LEXIS 7622, 2004 WL 3510771 (S.D.Cal., Feb. 26, 2004); *Bailey v. TRW Receivables Mgmt. Servs., Inc.*, Civ. No. 90-192, 1990 U.S. Dist. LEXIS 19638 (D.Haw. Aug. 16, 1990); *McCabe v. Crawford & Co.*, 210 F.R.D. 631 (N.D.Ill. 2002), later opinion, 272 F.Supp.2d 736 (N.D.Ill. 2003); *Beasley v. Sessoms & Rogers, P.A.*, No. 5:09-CV-43-D, 2010 U.S. Dist. LEXIS 52010, 2010 WL 1980083 (E.D.N.C., March 1, 2010).

11. OVERSHADOWING AND CONTRADICTION

"The statute does not say in so many words [at that time] 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).

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 FDCPA requires that, within five days of a debt collector's initial communication with the consumer, the debt collector must 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. 15 U.S.C. § 1692g(a)(l)-(4). In other words, unless a debt collector conveys this statutorily-required information, it violates the Act. Furthermore, '[e]ven if a debt collector conveys the required information, the collector nonetheless violates the Act if it conveys that information in a confusing or contradictory fashion so as to cloud the required message with uncertainty.' DeSantis, 269 F.3d at 161."

Hecht v. Green Tree Servicing, LLC, 3:12CV498 JBA, 2013 WL 164514 (D.Conn., January 15, 2013).

The "overshadowing" doctrine was codified in the 2006 amendment to §1692g.

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 if provided. A very similar solution was endorsed by the Second Circuit in *Savino v Computer Credit, Inc.*, 164 F.3d 81 (2d Cir. 1998).

Debt collectors using the "safe harbor" letter need to adhere to it strictly. The reference to suit within 30 days may not be used without the explanation that exercise of verification rights will halt the collection process. *Freys v. Satter, Beyer & Spires,* 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).

Some courts hold that 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").

However, in *Zemeckis v. Global Credit & Collection Corp*., 679 F.3d 632 (7th Cir. 2012), the court held that if the only statement of the 30-day period is correct – i.e., the consumer has 30 days from receipt of the initial notice to dispute all or part of the debt – general statements in a collection letter which "urge[d] [her] to take action now," as well as to "[c]all [Global Credit's] office today" and warned that"[her] account now meets . . . [the] guidelines for legal action" and that "Capital One Bank (USA), N.A. may be forced to take legal action" are not actionable:

> In analyzing whether a letter, on its face, contravenes Section 1692g(b), this Court

> has distinguished between language rushing the debtor to take action—to "act now"—and provisions that set deadlines contrary or contradictory to the thirty-day validation period. *Compare Taylor*, 365 F.3d at 575 (upholding as not confusing a dunning letter instructing the recipient to "[a]ct now to satisfy this debt"), with *Bartlett v. Heibl*, 128 F.3d 497, 499, 502 (7th Cir. 1997) (rejecting as confusing a letter that contained notice of the thirty-day validation period, but also demanded that the debtor pay $316 toward his debt or call the creditor within a week to avoid legal action), *Chauncey v. JDR Recovery Corp.*, 118 F.3d 516, 518, 519 (7th Cir. 1997) (rejecting as contradictory a letter that required receipt of payment within thirty days, thereby truncating a debtor's validation period), and *Avila*, 84 F.3d at 226 (rejecting as confusing a letter that followed its validation notice with a sentence stating, "[i]f the above does not apply to you, we shall expect payment . . . to be made within ten (10) days from the date of this letter"). We identify the former language as puffery, as "rhetoric designed to create a mood rather than to convey concrete information or misinformation." *Taylor*, 365 F.3d at 575. Puffery, without more, does not violate Section 1692g(b). Even the most unsophisticated debtor would realize that debt collectors wish to expedite payment, and urging him to hurry does not confuse or undermine his right to his validation period. *See id.* at 575-76.
>
> The dunning letter that Global Credit sent to Zemeckis, at worst, contains puffery. Its suggestions to "take action now" and call "today" did not impose a deadline that contradicted her right to a thirty-day validation period. The requests that she call "now" or "today" were not tantamount to a request for payment, nor would an unsophisticated consumer understand them as such. . . .
>
> Global Credit's repeated threat of legal action similarly fails to convert the letter's puffery into a contradictory payment deadline. The letter warns only that Capital One Bank had the right to pursue legal action. It did not go so far as to mention that it had the right, as do all creditors, to initiate suit during the validation period, see *Bartlett*, 128 F.3d at 501. That information, if included, would have rendered the letter even more threatening and still would not have risen to a violation of Section 1692g(b). As written, the letter alerted Zemeckis only to the possible repercussions she faced for failing to pay. (679 F.3d at 636-37)

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).

Other cases hold that 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 form 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.

12. REQUESTS FOR TELEPHONE CONTACT

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).

In *Caprio v. Healthcare Revenue Recovery Group, LLC*, 12-1846, 2013 WL 765169 (3rd Cir. March 1, 2013), a collection letter stated "If we can answer any questions, or if you feel you do not owe this amount, **please call** us toll free at **800-984-9115** or write us at the above address." Under local law, a writing was required. The court held that "the Collection Letter was deceptive because it can be reasonably read to have two or more different meanings, one of which is inaccurate . . . ."

13. TIME PERIOD

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 (DC), 1999 U.S. Dist. LEXIS 3464, 1999 WL 163162 (S.D.N.Y. Mar. 24, 1999), later opinion, 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).

Specifying that a dispute must be sent within 30 days from the date of the letter is a violation for the same reason. *Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F. Supp. 1148, 1151 (E.D.N.Y. 1996) (notice which stated that the consumer could dispute the debt "within thirty (30) days from the date of this notice" is clearly an inaccurate statement); *Rivera v. Amalgamated Debt Collection Servs.,* 462 F. Supp. 2d 1223 (S.D.Fla. 2006) ("By mailing notices stating that debtors have thirty days from the date of the letter to challenge the debt, Defendant led debtors to believe that they had less than thirty days to obtain verification of the debt. That is a clear violation of the statute . . . ."); *Owens v. Hellmuth & Johnson*, 550 F.Supp.2d 1060, 1068 (D.Minn. 2008) ("a dunning letter demanding payment within 30 days of the date thereof violates the statute"); *Swift v. Maximus, Inc.,* 04cv216, 2004 U.S.Dist. LEXIS 13190, 2004 WL 1576618 (E.D.N.Y., July 15, 2004) ("letter stating "[p]ayment in full of this debt must be received within 30 days after the date of this notice to avoid further collection activities" violates FDCPA as a matter of law); *McCafferty v. Schwartzkopf Law Office,* No. 4:10 CV 1401 RWS, 2011 U.S. Dist. LEXIS 119316, 2011 WL 4916382 (E.D.Mo., October 17, 2011), reconsideration denied, 2012 U.S. Dist. LEXIS 6482, 2012 WL 176439, (E.D. Mo. Jan. 20, 2012) (summary judgment granted for consumer where "The validation notice indicated the recipient must dispute the validity of the debt within thirty days of receipt of the letter. However, the letter demanded payment within thirty days [of the] date of the letter."); *Larsen v. JBC Legal Group, P.C.,* 533 F.Supp.2d 290, 306 (E.D.N.Y. 2008) (letter demanding payment within 30 days from the date of a notice violates §1692g as a matter of law*); Edstrom v. All Services and Processing*, C04-1514 BZ, 2005 U.S.Dist. LEXIS 2773 (N.D.Cal. Feb. 22, 2005) ("thirty days from the date of the letter" violates §1692g as a matter of law); *Turner v. Universal Debt Solutions, Inc. (In re Turner),* 07-11450-DHW / 07-1139- DHW, 2008 Bankr. LEXIS 2480, *10-13 (Bankr. M.D. Ala. Sept. 5, 2008), adopted, 436 B.R. 153 (M.D. Ala. 2010) (similar); *Bishop v. Global Payments Check Recovery Services, Inc.*, Civ. No. 03-1018, 2003 U.S. Dist. LEXIS 11013, 2003 WL 21497513 (D. Minn. June 25, 2003) (violation where "Global's letter tells Mr. Bishop that if he does not pay the debt within 30 days from the date of the letter he may face civil and criminal penalties. It also tells him that he can contest the validity of the debt within 30 days from receipt of the letter.");

Turner v. Shenandoah Legal Group, P.C., 3:06cv045, 2006 U.S.Dist. LEXIS 39341, 2006 WL 1685698 (E.D.Va., June 12, 2006) (report and recommendation) (similar); *Spears v. Brennan*, 745 N.E.2d 862, 874 (Ind. App. 2001) (ambiguity as to whether rights run from date of notice or date of receipt violates FDCPA); *Philip v. Sardo & Batista, P.C.*, No. 11-4773 (SRC), 2011 U.S. Dist. LEXIS 130267, 2011 WL 5513201 (D.N.J. Nov. 10, 2011) (statement that debtor had "thirty days from the date of the letter to exercise of preserve certain rights under the FDCPA" is violation even where correct period is stated elsewhere); *Ardino v. Lyons*, No. 11-848 (NLH/KMW), 2011 U.S. Dist. LEXIS 143586 (D.N.J., Dec. 14, 2011) (same).

14. LANDLORD NOTICES

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.

15. THREAT NOT REQUIRED

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.

16. OWNER OF THE DEBT

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); *Braatz v. Leading Edge Recovery Solutions, LLC*, 11 C 3835, 2011 U.S. Dist. LEXIS 123118, 2011 WL 9528479 (N.D.Ill., Oct. 20, 2011); *Walls v. United Collection Bureau, Inc.*, 11 C 6026, 2012 U.S. Dist. LEXIS 68079, 2012 WL 1755751 (N.D. Ill. May 16, 2012); *Lee v. Forster & Garbus LLP*, NO. 12-CV-420 DLI CLP, 2013 WL 776740 (E.D.N.Y. Mar 01, 2013) ("Specifically, the entity is listed in two 'reference' lines as 'NCOP XI, LLC A/P/O CAPITAL ONE.' (Am.Compl .Ex. A.) Listing NCOP on the reference lines, particularly when followed by the unusual abbreviation 'A/P/O' and the name of the original creditor, easily could have failed to alert the least sophisticated consumer that her debt was now owned by NCOP."); *Janetos v. Fulton Friedman & Gullace, LLP*, 12 C 1473, 2013 WL 791325, *5 (N.D.Ill. Mar 04, 2013).

Disclosure of a servicing agent or another debt collector instead of the owner of the debt is not sufficient. *Bourff v. Rubin Lublin, LLC*, No. 10-14618, 674 F.3d 1238; 2012 U.S. App. LEXIS 5613, 2012 WL 971800 (11th Cir. Mar. 15, 2012); *Shoup v. McCurdy & Candler,* 465 Fed. Appx. 882, 2012 U.S. App. LEXIS 6443 (11th Cir. March 30, 2012); *Wallace v. Washington Mutual Bank, F.A.,* 683 F.3d 323 (6th Cir. 2012); *Hepsen v. Resurgent Capital Services, LP*, 09-15435, 2010 U.S.App. LEXIS 12587 (11th Cir., June 17, 2010); *Park v Shapiro & Swertfeger, LLP*, 1:12cv1132, 2013 WL 603880 (N.D. Ga. Jan. 9, 2013).

17. OTHER §1692g VIOLATIONS

a. Notice on reverse

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).

b. Charge for validation

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).

c. Failure to provide mailing address

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. Scrimpsher*, 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)

d. Misdirecting contacts

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.

e. Cannot insist on reason for dispute

The debt collector cannot require the consumer to articulate a reason for disputing the debt. *Sambor v. Omnia Credit Services,* 183 F.Supp.2d 1234 (D.Haw. 2002) (“the FDCPA does not require the consumer to provide any reason at all in order to dispute a debt”); *Whitten v. ARS National Services, Inc.*, . 00 C 6080, 2002 U.S.Dist. LEXIS 9385 (N.D.Ill., May 23, 2002); *Mendez v. M.R.S. Assocs.*, 03 C 6753, 2005 U.S.Dist. LEXIS 13705, *13 (N.D.Ill. June 27, 2005) (consumer can dispute debt for “a good reason, a bad reason, or no reason at all”); *Forsberg v. Fid. Nat'l Credit Servs.,* 03cv2193-DMS(AJB), 2004 U.S. Dist. LEXIS 7622 (S.D.Cal., Feb. 26,

2004).

f. Identification of debt

While §1692g does not require that the original creditor's name and address must be provided except on request, the failure to identify the debt in an intelligible manner in a state court complaint has been held to violate §1692e. *Caudillo v. Portfolio Recovery Associates, LLC*, 12cv200, 2013 WL 4102155 (S.D.Cal., Aug. 13, 2013) ("This Court and others have repeatdly held that a debt collection complaint that fails to identify the original creditor is both deceptive and material under the least sophisticated consumer standard, and thus constitutes a violation of §1692e"); *Heathman v. Portfolio Recovery Associates, LLC*, No. 12–CV–515–IEG (RBB), 2013 WL 3746111, *4-5 (S.D.Cal., July 15, 2013); *Thomas v. Portfolio Recovery Associates, LLC*, 12cv1188 (S.D.Cal., Aug. 12, 2013).

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

15 U.S.C. §1692e(11), as amended in 1996, prohibits:

> 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).

The reason for this requirement is illustrated by decisions under the Federal Trade Commission Act prior to the enactment of the FDCPA, which show that 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).

VIII. VIOLATIONS – TELEPHONE HARASSMENT

The nature and frequency of calls that results in a violation of 15 U.S.C. §1692d is fact-intensive and dependent on such matters as whether calls are answered, whether calls are made immediately after the consumer terminates a conversation, and similar facts. In *Roth v. NCC Recovery, Inc.*, No. 1:10 CV 02569, 2012 U.S. Dist. LEXIS 101592, 2012 WL 2995456 (N.D.Ohio July 23, 2012), the court stated:

> Courts recognize, however, there is no bright line rule regarding the number of calls which creates the inference of intent. Hicks v. America's Recovery Solutions, LLC, 2011 WL 4540755, at *6 (N.D.Ohio 2011). For instance, in Sanchez v. Client Services, 520 F.Supp.2d 1149, 1160 (N.D. Cal. 2007), the court granted summary judgment to the plaintiff on a § 1692d(5) claim based on 54 calls over a six-month period, including a day in which six calls were made. Yet, in Tucker v. The CBE Group, Inc., 710 F.Supp.2d 1301, 1305 (M.D. Fla. 2010), the court granted the defendant's motion for summary judgment despite 57 calls, including 7 in one day. Finally, the court in Akalwadi v. Risk Mgmt. Alternatives, Inc., 336

> F.Supp.2d 492, 506 (D. Md. 2004), determined that intent was a jury question when the defendant placed 28 calls over a two-month period, but the Saltzman court granted summary judgment to the defendant, despite a higher number of calls than in Akalwadi over a similar time period. 2009 WL 3190359 at *6-7.
>
> Defendant argues that the volume and frequency of calls in this case merit summary judgment in its favor. It points to the fact that only 50 calls were made over an eight-month period, a lower volume than many cases in which courts granted summary judgment to the debt collector. Further, NCC claims that it only called twice in the same day on only two occasions.
>
> Yet, the Court determines that the number of calls is not entirely dispositive in this case. Instead, the nature, extent, and context of the calls bear review. Ms. Roth's Affidavit indicates that NCC continued to call her on a regular and frequent basis, despite being advised that the nursing home advised her that her father's final expenses would be covered. There is, further, an indication from both parties that Ms. Roth spoke with NCC representatives on several occasions and that NCC representatives left messages on her phone. As such, the Court does not find a significant disparity between the number of calls placed and answered, a factor that courts, such as the Saltzman court have used to excuse high call volumes on the theory that it indicates a difficulty in reaching the consumer. Given the evidence before the Court, a reasonable jury could find the requisite intent to harass or annoy. Thus, a genuine dispute of material fact remains and summary judgment is denied in this action.

In *Dudis v. Mary Jane M. Elliott, P.C.*, No. 11-14024, 2012 U.S. Dist. LEXIS 108069, 2012 WL 3150821 (E.D.Mich., August 2, 2012), the court held:

> [T]he Court must determine whether Defendant's behavior amounts to harassment, oppression, or abuse within the meaning of the statute's general provision; and whether its phone calls occurred repeatedly [*8] or continuously with the intent to annoy, abuse, or harass. "The determination of whether a debt collection agency's telephone calls amount to actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls. Saltzman v. I.C. Sys. Inc., No. 09-10096, 2009 WL 3190359 at *7 (E. D. Mich. Sept. 30, 2009) (quoting Akalwadi v. Risk Management Alternatives, Inc., 336 F. Supp.2d 492, 505 (D. Md. 2004)) (internal quotations omitted)). Additionally, "intent may be inferred from the . . . substance of the telephone calls that [the Plaintiff] received from the debt collector or the place to which the calls were made." Young v. Asset Acceptance, LLC, No. 3:09-2477, 2011 WL 1766058 (N.D. Tex. May 20, 2011) (citing Kerwin v. Remittance Assistance Corp., 559 F. Supp.2d 1117, 1124 (D. Nev. 2008)). Although the volume, pattern, time, and setting of phone calls is susceptible to a degree of subjectivity, some factual benchmarks include: multiple calls made over a two-day period that included implications of threats (see Bassett v. I.C. Systems, Inc., 715 F. Supp.2d 803 (N.D. Ill. 2010); continuous calls placed over several days to both the plaintiff's home [*9] and cell phone (see Rucker v. Nationwide Credit, Inc., No. 09-2420, 2011 WL 25300 (E.D. Cal. Jan. 5, 2011)); multiple phone calls placed in one day before 9:00 A.M. (see Kerwin, 559 F. Supp. 2d 1117); 200 calls made over the course of nineteen months, included multiple calls in one day after the debtor warned the defendant (see Josephine v. J.J. MacIntyre Cos, LCC, 238 F. Supp. 2d 1158 (N.D. Calif. 2002)); and three calls in a five hour period with messages (see Akalwadi, 336 F. Supp. 2d 492).

> Plaintiff asserts that his complaint is based on three to four phone calls, to his house, over the course of a month. Dudis, however, does not offer any evidence that conversations took place during these calls or that these calls were made with the intent to annoy, abuse, or harass. Here, the Court finds that no reasonable juror given the facts, even when viewed in a light most favorable to the non-moving party, could possibly find in favor of Dudis. Furthermore, none of the benchmarks used to establish intent to harass or annoy are present. Accordingly, the Court finds Defendant is entitled to summary judgment.

In *Hoover v. Monarch Recovery Mgmt., Inc.*, No. 11-cv-04322, 2012 U.S. Dist. LEXIS 120948, 2012 WL 3638680 (E.D.Pa., August 24, 2012), the court held:

> § 1692d(5): Calling repeatedly or continuously
>
> Next, plaintiff contends that defendant violated subsection 5 of § 1692d, which prohibits "[c]ausing 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." 15 U.S.C. § 1692d(5). Hence, plaintiff must provide sufficient facts to support a plausible claim not only that defendant contacted her by telephone repeatedly or continuously, but also did so with intent to annoy, abuse, or harass her.
>
> Plaintiff avers that defendant contacted her by telephone, on average, more than ten times per week, for approximately eleven weeks.[25] To determine whether plaintiff has pled conduct by defendant constituting "actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of the calls." Shand-Pistilli v. Professional Account Services, Inc., 2010 U.S.Dist. LEXIS 75056, at *11 (E.D.Pa. July 26, 2010)(O'Neill, S.J.).
>
> In Shand-Pistilli, my colleague Senior United States District Judge Thomas N. O'Neill, Jr. concluded that plaintiff pled sufficient facts to support a reasonable inference that the purpose of defendant's repeated phone calls was to harass or annoy plaintiff. Id. at *11-12. While unlike in Shand-Pistilli, plaintiff in this case does not aver that she asked defendant to stop contacting her, plaintiff does aver that the calls made to her home telephone were constant and continuous,[26] as plaintiff in Shand-Pistilli also alleged. Id. at *12.
>
> Furthermore, the volume of calls in this case, 110 times over an eleven-week period, is significantly higher than other cases in which courts in this judicial district permitted the parties to reach the discovery stage. For example, in Shand-Pistilli, the court denied a defendant's motion to dismiss a § 1692d(5) claim when plaintiff averred that defendant had made "continuous" calls to plaintiff, without specifying an amount. Id. at *12-13.
>
> In addition, my colleague United States District Judge Gene Pratter denied defendant's motion to dismiss a § 1692d(5) claim when plaintiff identified nine times when defendant called her in a thirty-day period, and averred that defendant called her other times as well. Carr v. NCO Financial Systems, Inc., 2011 U.S.Dist. LEXIS 145993 (E.D.Pa. Dec. 20, 2011) (Pratter, J.).
>
> Plaintiff cites the decision in Krapf v. Nationwide Credit Inc., 2010 U.S.Dist. LEXIS 57849 (C.D.Cal. May 21, 2010), where the United States District Court for

> the Central District of California noted that district courts disagree as to the volume of calls sufficient to raise a plausible claim under § 1692d(5).[27] Although the cases cited by the district court in Krapf require plaintiff to meet a high threshold of call volume, plaintiffs in those cases were permitted to proceed through discovery before summary judgment was granted for failure to meet that threshold.
>
> For example in Tucker v. The CBE Group, Inc., 710 F.Supp.2d 1301 (M.D.Fla. 2010) the court granted defendant's motion for summary judgment when plaintiff averred that defendant called her 57 times over an unspecified period, and once called her seven times in one day. In Saltzman v. I.C. System, Inc., 2009 U.S.Dist. LEXIS 90681, at *10-11 & n.4 (E.D.Mich. Sept. 30, 2009) the court granted defendant's motion for summary judgment when plaintiff averred that defendant called plaintiff between ten and twenty times successfully and between twenty and fifty times unsuccessfully over approximately one month.
>
> Defendant cites no instances where courts precluded a case with such a high volume of calls from proceeding to the discovery stage. Rather, Shand-Pistilli and Carr, discussed above, reveal that in this judicial district, judges lean toward giving plaintiff an opportunity to conduct discovery if plaintiff alleges a significant volume of calls, even without alleging separate facts supporting defendant's intent.
>
> Defendant cites a Western District of Washington case in which the United States District Court found that § 1692d(5) "does not even prevent a collector from calling multiple times in a week, or even in a day.[28] Allegations of daily, or nearly daily, phone calls do not raise a triable issue of fact to claims under § 1692d(5)." Dudley v. Powell Law Office, P.C., 2011 U.S.Dist. LEXIS 111688, at *2 (W.D.Wash. Sept. 29, 2011).
>
> In Dudley, the court granted defendant's motion to dismiss plaintiff's § 1692d(5) claim. However, the Dudley case is distinguishable from the instant matter because in Dudley, defendant called plaintiff only four times in one day, and at no other time. On the other hand, in the case before this court, defendant called plaintiff twice per day, each day for eleven weeks.
>
> As noted above, "whether conduct harasses, oppresses, or abuses will be a question for the jury". Regan, 2009 U.S.Dist. LEXIS 112046, at *18 (quoting Jeter, 760 F.2d at 1179). Absent authority in this district that the volume and pattern of calls in this case fails to demonstrate an intent to harass, I find that plaintiff has pled sufficient facts to support a reasonable inference that defendant violated § 1692d(5) of the FDCPA. Accordingly, defendant's motion for judgment on the pleadings regarding plaintiff's § 1692d(5) claim is denied.

In *Dunning v. Portfolio Recovery Associates, LLC*, No. 11–62080, 2012 WL 5463294 (S.D.Fla., Nov. 9, 2012), the court held:

> . . . The parties agree that Defendant called Plaintiff between 50 and 100 times in 2011, and not more than 20 times in 2012. . . . Plaintiff alleged in his amended complaint that since approximately June 2011, Defendant called Plaintiff up to four times per day, called Plaintiff from various numbers, and continued to call Plaintiff after Plaintiff asked Defendant to stop calling. The Court finds that, based upon the evidence presented in the record, there is a genuine issue of fact

regarding whether anyone from Portfolio ever actually spoke to Plaintiff in connection with collecting his debts and, if so, over the substance of the communication. Plaintiff testified at his deposition that he spoke with Portfolio representatives over the telephone on nine or ten occasions. . . . Plaintiff also testified at his deposition that, after Plaintiff requested that Defendant cease communication, Defendant placed more than eighteen phone calls to Plaintiff. . . . Plaintiff testified at his deposition that, during a phone conversation, Defendant's representative "got very rude" and "was, like, a sergeant to me." . . . However, Defendant has no record of actually speaking with Plaintiff. . . .

Plaintiff maintains that it has presented evidence sufficient to create a fact issue for the jury as to the harassing nature of Defendant's calls. Plaintiff relies upon Valentine v. Brock & Scott, PLLC, 2010 WL 1727681, *5 (D.S.C. April 26, 2010) (allegation that defendant called plaintiff 11 times over a period of 19 days, with two of those calls occurring on the same day, sufficient to withstand motion to dismiss plaintiff's § 1692d(5) claim); Bingham v. Collection Bureau, Inc., 505 F.Supp. 864 (D.C.N.D.1981) (a single recall by debt collector after plaintiff hung up phone constituted harassment under § 1692d). Additionally, Plaintiff cites cases demonstrating that a debt collector's continued calls following a verbal demand to cease calling may violate § 1692(d). See, e.g., Pratt v. CMRE Financial Services, Inc., 2012 WL 86957, *3 (E.D.Mo. Jan.11, 2012) (holding that intent to harass "may be inferred by evidence that the debt collector continued to call after being asked not to call.") (citing cases holding same). Plaintiff also correctly notes that intent to annoy, abuse, or harass may be inferred from the substance of calls received from the debt collector. See, e.g., Dudis v. Mary Jane M. Elliott, P.C., 2012 WL 3150821, *3 (E.D.Mich. Aug.02, 2012).

Defendant, on the other hand, argues that the volume of calls to Plaintiff in this case is insufficient as a matter of law to constitute harassment under § 1692d and § 1692d(5). Defendant relies heavily on three unreported cases from the Middle District of Florida: Waite v. Financial Recovery Services, Inc., 2010 WL 5209350 (M.D.Fla. Dec.16, 2010) (granting summary judgment in favor of debt collector who made 132 collection calls to plaintiff over nine month period, unaccompanied by any other egregious conduct evincing an intent to harass, annoy, or abuse); Tucker v. CBE Group, Inc., 710 F.Supp.2d 1301 (M.D.Fla. May 05, 2010) (granting summary judgment in favor of debt collector who made fifty-seven calls to plaintiff, where there was no demonstration of oppressive conduct such as repeatedly making calls after it was asked to cease, nor was there a verbal request to cease calling); and Druschel v. CCB Credit Services, Inc., 2011 WL 2681637 (M.D.Fla. June 14, 2011) (recommending summary judgment in favor of debt collector who called debtor fourteen times within two weeks).

Defendant's argument is misplaced, as it is directed at the call volume, and disregards the remainder of the Plaintiff's contentions in this action that Defendant engaged in harassment through the content of its calls to Plaintiff, and by continuing to call him multiple times after Plaintiff asked Defendant ten times to stop calling. Rather, the Court finds that Plaintiff has presented sufficient evidence to create a fact issue for the jury as to the harassing nature of Defendant's calls. Defendant called Plaintiff between 50 and 100 times in 2011, and not more than 20 times in 2012. There are genuine issues of material facts regarding whether any representative of Defendant spoke to Plaintiff, what Defendant's representatives said to Plaintiff, whether Plaintiff repeatedly requested that Defendant cease

> communication, and whether Defendant continued to call Plaintiff after Plaintiff repeatedly requested that Defendant cease calling him. . . .

In *Stinson v. Receivables Management Bureau Inc.*, No. 2:12-cv-02558-AKK, 2013 WL 1278966 (N.D.Ala. March 26, 2013), the court held:

> Taking the facts in the light most favorable to Stinson, RMBI called Stinson's home "approximately 100 times" between March and September 2009, left between 34 and 37 voicemails, and made clear that it was attempting to collect a debt from only Michael Bole. Doc. 16-1 at 12, 25, 52. It is also undisputed that RMBI never spoke with Stinson and that Stinson never informed RMBI that it had the wrong number or asked RMBI to stop calling. *Id.* at 52-53. Instead, RMBI's computer automatically stopped calling after it made a certain number of attempts. *Id.* at 18. Since RMBI did not attempt to wrongfully collect the debt from Stinson, call at inappropriate times or an inappropriate number of times per day, or use otherwise offensive language, Stinson's claim under § 1692d is based solely on the allegedly high volume of calls. Doc. 20 at 30. A claim based solely on the number of calls is insufficient to raise a cause of action because, as courts in this circuit have generally found, a plaintiff must also show that the creditor engaged in other inappropriate conduct.

In *Nigro v. Mercantile Adjustment Bureau, LLC*, No. 10-CV-1037S, 2013 WL 951497 (W.D.N.Y., March 12, 2013), the court stated:

> Defendant correctly asserts that, under the circumstances of this case, the 72 phone calls in a nine-month period are insufficient as a matter of law to establish a violation of § 1692d(5). Even a high call volume will be insufficient to raise a triable issue of fact with respect to this provision where, as here, there is an absence of some indicia of egregious conduct. Carman, 782 F. Supp. 2d at 1232 (over 140 calls in two month period insufficient to establish violation where record lacked any evidence of egregious conduct); See Chavious, 2012 WL 113509, *2 (defendant entitled to summary judgment where 36 calls in less than two months were made at reasonable times and not immediately following another); Lynch v. Nelson Watson & Assocs., LLC, No. 10-2025-EFM, 2011 WL 2472588, *2 (D. Kan. June 21, 2011)(56 calls in three month period, without more, insufficient to establish violation).

In *Chavious v. CBE Group, Inc.*, 2012 U.S Dist. LEXIS 4362 (E.D.N.Y. Jan. 12, 2012), the court held:

> Plaintiff has not established a triable issue of fact in this case. Courts have awarded defendants summary judgment where the volume and pattern of calls demonstrates an intent to contact debtors rather than an intent to annoy, abuse, or harass them. See Carman v. CBE Group, Inc., 782 F. Supp. 2d 1223, 1232 (D. Kan. 2011) [*6] ("[T]he evidence suggests an intent by CBE to establish contact with plaintiff, rather than an intent to harass."); Tucker v. CBE Group, Inc., 710 F. Supp. 2d 1301, 1305 (M.D. Fla. 2010). In these cases, as here, the caller was unable to reach anyone on the other end of the phone or the call recipient did not ask the defendant to refrain from calling. Carman, 782 F. Supp. 2d at 1232; Tucker, 710 F. Supp. 2d at 1305. In the Court's view, the volume and pattern of calls in this case--thirty-six calls over approximately two months, all made at reasonable times and not one immediately following another--is consistent with cases in which other courts have

awarded defendants summary judgment on Section 1692d(5) claims. See, e.g., Lynch, 2011 U.S. Dist. LEXIS 66031, 2011 WL 2472588, at *2 (fifty-six calls over approximately three months, without more, was not an FDCPA violation); Carman, 782 F. Supp. 2d at 1227 (149 calls over two months, without more, was not a violation); Clingaman v. Certegy Payment Recovery Svcs., No. 10—2483, 2011 U.S. Dist. LEXIS 56368, 2011 WL 2078629, at *4 (S.D. Tex. May 26, 2011) (fifty-five calls between March 4 and June 18 was not a violation where plaintiff never asked defendant to stop calling); Jones v. Rash Curtis & Assocs., No. 10-CV-0225, 2011 U.S. Dist. LEXIS 59703, 2011 WL 2050195, at *2-3 (N.D. Cal. Jan. 3, 2011) [*7] (179 calls was not a violation where, among other things, plaintiff did not ask defendant to stop calling).

Instead, plaintiff requests that the Court consider only the call volume to determine that a genuine issue of material fact exists for trial. Although plaintiff correctly identifies some disagreement among district courts as to the specific volume and pattern of calls that allows a plaintiff to raise a triable issue of fact regarding the defendant's intent to annoy or harass, plaintiff fails to note that district courts generally require a high call volume coupled with egregious conduct in order for the court to find harassment. See Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D. N.D. 1981) (fourteen calls in a one month period is not harassment but when calls were coupled with the immediate recalling of a debtor after the debtor hung up, the calls were harassment); Chiverton v. Fed. Fin. Group, Inc., 399 F. Supp. 2d 96, 101 (D. Conn. 2005) (using abusive language is a violation of FDCPA); Kuhn v. Account Control Technology, Inc., 865 F. Supp. 1443, 1453 (D.Nev. 1994) (six phone calls in twenty-four minutes, including immediately recalling the debtor after she hung up on the collector, was harassment). However, merely placing calls, without any other abusive conduct, is not harassment. See Shand-Pistilli v. Prof'l Account Servs., 2011 U.S. Dist. LEXIS 64446 (E.D. Pa. June 16, 2011) (ten calls over seventy-three days was not sufficient by itself to raise a genuine issue of material fact as to defendant's intent in making the phone calls); Waite v. Fin. Recovery Servs., 2010 U.S. Dist. LEXIS 133438 (M.D. Fla. Dec. 16, 2010) (placing four calls within a single day without other oppressive conduct did not constitute harassment under § 1692d (5)); Tucker v. CBE Group, Inc., 710 F. Supp. 2d 1301, 1305-1306 (M.D. Fla. 2010) (making no more than seven calls in a single day and not calling back after leaving a message demonstrated that defendant made calls to reach plaintiff rather than to harass her).

In *Griffiths v. Sentry Credit, Inc.*, Civil No. 10-6338-AA (D.Ore. Aug. 11, 2011), the court stated:

In the context of collection calls, "[w]hether there is an actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of the calls." Joseph v. J.J. MacIntyre Companies, 281 F.Supp.2d 1156, 1168 (N.D.Cal. 2002). For example, where the "collection agency's employees had made more than 90 calls to consumer's home, the content of the calls had been harassing in nature, employees had failed to identify themselves when called, had allowed the phone to ring repeatedly and called back immediately after consumers hung up the phone raised fact issues as to whether employees' conduct was offensive, precluding summary judgment." Arteaga v. Asset Acceptance, LLC, 733 F.Supp.2d 1218, 1227 (E.D.Cal. 2010). Moreover, the court looks to whether the calls were made to debtor's work place or to debtor's residence at inconvenient hours. Id. Finally, the court looks to the number of calls made and whether the calls were made numerous times in the same day or within a short period of time.

Id.

None of the egregious types of conduct identified above are present in this case. Plaintiff presents no evidence that defendant called his place of employment, called at odd hours, called continuously, or conveyed any misleading information. Moreover, there is no evidence defendant caused plaintiff's telephone to ring continuously or repeatedly engaged any person in telephone conversations with the intent to annoy or harass. 15 U.S.C. § 1692d(5). Indeed, defendant never actually spoke with anyone, it merely left messages at the phone number its client provided it to contact plaintiff.

Numerous courts construing Section 1962d have held that more egregious conduct on behalf of credit collection agencies is not sufficient to maintain a viable claim under Section 1962d. For example, this court, in Arteaga, held that "`daily' calls alleged by [plaintiff] failed to raise a genuine issue of material fact as to whether the communications were so frequent as to be unreasonably or to constitute harassment under the circumstances."; in Arteaga, 733 F.Supp.2d at 1229; see also Jiminez v. Accounts Receivable Mgmt., Civ No 09-970, 2010 WL 5829206 at *6 (C.D. Cal. 2010) (granting defendant collection company summary judgment because there was no evidence of defendant's intent to annoy, abuse or harass where defendant placed sixty-nine calls over a 115 day period, placed more than two calls in a day, but did not make calls to defendant's work, and never received a response to defendant's voice messages); compare Joseph, 281 F.Supp.2d at 1156 (N.D. Cal. 2003) (holding that 75 calls made to plaintiff's residence created genuine issue of fact as to whether collector's calls were part of a pattern of harassing conduct; Horkey v. J.V.D.B. & Associates, Inc., 333 F.3d 759 (7th Cir. 2003) (upholding statutory damages under § 1692d for collection agency's phone calls to plaintiff at her place of employment).

Similarly, here, fourteen calls over a period of four months, where the majority of the calls were placed approximately *once every seven days* is not sufficient to establish that "the natural consequence" of defendant's calls was to "harass, oppress or abuse" plaintiff. (DUF ¶ 18.) On these facts, "the [c]ourt concludes that any reasonable juror would only find that [defendant] placed its calls to [p]laintiff with the intent to reach [him] to collect the [d]ebt, and not because it intended to annoy, abuse, or harass [him]." Jiminez, 2010 WL 5829206 at *6.

Moreover, plaintiff's own actions, or lack thereof, supports granting defendant summary judgment on this claim. More specifically, neither plaintiff nor the other residents of the home ever returned any of defendant's calls. See Tucker v. The CBE Group, Inc., 710 F.Supp.2d 1301 (M.D. Fla 2010) (granting debt collector defendant summary judgment were defendant made 57 calls to plaintiff, including seven calls in one day, because the debt collector never spoke to the debtor, was never asked to cease calling, and never called back on the same day it left a message.)

In *Miller v. Prompt Recovery Services, Inc.*, 5:11cv2292, 2013 WL 3200659 (N.D.Ohio June 24, 2013), the court held:

To determine whether a debt collector's calls “amount to harassment, annoyance or abuse, the volume of the calls must be examined along with the pattern in which they were made and whether they were accompanied by oppressive conduct.”

Pugliese v. Prof'l Recovery Serv., Inc., No. 09–12262, 2010 WL 2632562, at *9 (E.D.Mich. June 29, 2010). "The practice of calling a debtor outside of his or her home—by calling the debtor's workplace or the homes of a debtor's family and friends—or calling at inconvenient hours"—can serve as further evidence of harassment. Arteaga, 733 F.Supp.2d at 1228 (collecting cases involving egregious conduct offered in addition to a high volume of calls); see Brown v. Hosto & Buchan, PLLC, 748 F.Supp.2d 847, 852 (W.D.Tenn.2010) ("the nature of telephone calls, including their frequency, substance, or the place to which they are made, provides grounds to infer a debt collector's intent to annoy, abuse, or harass without any other evidence of the debt collector's motive in calling").

While plaintiff suggests that defendant's agents contacted her with "great frequency," she insists that the exact number of calls is disputed and must be determined by a jury.5 (Doc. No. 29–1 at 337.) Even when all inferences are drawn in a light most favorable to plaintiff, however, it is clear that the volume of the calls—32 or 33 over a four month period, and the frequency of the calls—"including multiple times per day"6—alone, do not create an issue of fact. (Id.) Courts have found a much higher volume of calls, alone, insufficient to defeat summary judgment. See, e.g., Wait v. Fin. Recovery Servs., Inc., No. 8:09–cv–02336, 2010 WL 5209350 (M.D.Fla. Dec.16, 2010) (granting summary judgment, notwithstanding evidence that debt collector made 132 calls in a nine month period, often calling four times per day); Carmen v. CBE Group, Inc., 782 F.Supp.2d 1223 (D.Kan.2011) (granting summary judgment although debt collector called 139 times during two months); Pugliese, 2010 WL 2632562 (finding evidence that the debt collector called 350 times during eight months insufficient, as a matter of l aw, to establish harassment under the FDCPA). Courts have also found that even "daily" calls, unaccompanied by other egregious conduct, do not establish harassment. See Arteaga, 733 F.Supp.2d at 1229 (allegations of "daily" or "near daily" phone calls alone do not raise an issue of fact as to harassment); see, e.g., Saltzman v. I.C. Sys., Inc., No. 09–10096, 2009 WL 3190359, at *7 (E.D.Mich. Sept.30, 2009) ("[A] debt collector does not necessarily engage in harassment by placing one or two unanswered calls a day in an unsuccessful effort to reach the debtor, if this effort is unaccompanied by any oppressive conduct such as threatening messages.") (quoting Akalwadi v. Risk Mgmt.Alternatives, Inc., 336 F.Supp.2d 492, 505 (D.Md.2004)).

*6 In Durthaler v. Accounts Receivable Mgmt., Inc., 854 F.Supp.2d 485 (S.D.Ohio 2012), the court rejected the consumer's argument that evidence of 32 calls placed by the defendant credit collection agency over a 73–day period, including two calls placed to the consumer's roommate, constituted harassment. In reaching this conclusion, the court found that there was no evidence "indicating the nature or the context of the calls were harassing." Id. at 491. Here, plaintiff points to no evidence that, if believed, would show that the 32 or 33 calls were made at inconvenient times or places, that she asked defendants' representatives to stop calling, or that defendant's agents placed calls to plaintiff's family members or friends in an effort to coerce her into satisfying the debt. (See Doc. No. 23 at 199.) While plaintiff notes that she "indicated during each communication that she could not make the payments" (Doc. No. 29–1 at 337), the transcripts she relies upon demonstrate that she continued to engage the representatives in discussions of possible payment options (often volunteering information or asking questions to further the discussions), that she agreed to have an agent call again at a later date, and that she even suggested that the agent should call back at a time when he could

> also speak with plaintiff's husband. (See Doc. Nos. 25–2, 3 and 4; Doc. No. 23 at 199 [plaintiff admits that she wanted to work something out with the agents that called, and that the agents were trying to help her come up with payment options, which included the possible forgiveness of part of the debt].)
>
> Instead, plaintiff points to a single incident wherein she maintains that defendant's representative "belitted [her] and ridiculed her financial situation, advising her that it would take twenty or nineteen years to pay off the debt." (Doc. No. 29–1 at 337.) It is clear from the uncontested transcript that defendant's agent was merely informing plaintiff that her proposed payment schedule would not effectively resolve the debt. (See Doc. No. 25–3.) In fact, plaintiff admits that the agent's comment constituted a true statement, as the agent accurately explained that plaintiff's proposed monthly payments would not even cover the accruing interest. (See Doc. No. 23 at 172–3.) Even assuming, as plaintiff suggests, that the agent's tone was "rude" (see Doc. No. 23 at 176), this one true and accurate remark, amidst considerable evidence that defendant's agents dealt with plaintiff with professionalism and patience, does not create a triable issue of fact as to the existence of sanctionable harassment. See, e.g., Durthaler, 854 F.Supp.2d at 491–92 (noting that the agent was "respectful and polite" to the plaintiff even though the plaintiff was "clearly upset with the representative"); Gallagher v. Gurstel, Staloch & Chargo, P.A., 645 F.Supp.2d 795, 799 (D.Minn.2009) (single laugh by employee of debt collector during phone call with debtor was not harassing, oppressive, or abusive conduct violative of FDCPA). Accordingly, the Court grants summary judgment in favor of defendant on plaintiff's allegations under § 1692d.

If sufficient, call volume may establish harassment. In *Neu v. Genpact Services, LLC*, No. 11–CV–2246 W(KSC), 2013 WL 1773822 (S.D.Cal., April 25, 2013), the facts showed "Genpact's placement of 150 telephone calls to Neu within a 51 day period in an attempt to collect a debt. . . . On one occasion, Genpact called Neu 6 times in one day. . . . Genpact alleges it left Neu no voice messages to avoid the possibility of third parties overhearing the messages." The court held that this raised a jury question concerning intent to annoy, abuse or harass:

> Section 1692d(5) prohibits debt collectors from "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." 15 U.S.C. §1692d(5). Intent may be inferred from the "nature, pattern, and frequency of debt collection calls." Stirling, 2012 WL 952310 at *4 (holding that harassment could be inferred from a debt collector calling a debtor five to six times a day for almost four months); see also Joseph v. J.J. Mac Intyre Companies, L.L.C., 238 F.Supp.2d 1158, 1168 (N.D.Cal.2002) ("Whether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls."). However, no bright-line rule exists for the amount and pattern of calls necessary to raise a triable issue of harassment, and courts disagree on the issue. Krapf v. Nationwide Credit Inc., No. 09–00711, 2010 WL 2025323 at *3–4 (C.D.Cal. May 21, 2010) (collecting cases and illustrating the disagreement across districts); see Arteaga v. Asset Acceptance, LLC, 733 F.Supp.2d 1218, 1227 (2010) (holding that eighteen calls over a four-month period does not constitute harassment); Young v. Asset Acceptance, LLC, No. 09–CV–2477, 2011 WL 1766058 (N.D.Tex. May 10, 2011) (holding triable issue of fact when collection agency called debtor thirty-three times in seventy-three day window, including calls before 8 a.m. and after 9 p.m.).

> In situations with similar call volume and pattern, several courts found triable issues of intent to harass. For example, in Bassett v. I.C. System, Inc., a debt collector called a debtor thirty-one times in a twelve-day period-approximately two to three times per day. Bassett v. I.C. Sys., Inc., 715 F.Supp.2d 803, 810 (N.D.Ill.2010). The court held that this situation presented a genuine issue of material fact as to whether the debt collector had violated § 1692d(5) and denied the debt collector's summaryjudgment motion on the issue. Id. In another case, a debt collector called plaintiff twenty-six to twenty-eight times in just over one month. Akalwadi v. Risk Mgmt. Alt's, Inc., 336 F.Supp.2d 492, 506 (D.Md.2004). The court found a triable issue of fact regarding plaintiff's § 1692d(5) claim because the debt collector called on a daily basis and called the plaintiff three times within five hours on one day. Id.
>
> Genpact cites a number of out-of-district cases in support of its MSJ. (MSJ, 22–26.) While the number of calls here far exceeds the number of calls in most of Genpact's support, one case is factually similar. In Carman v. CBE Group, Inc., the court granted summary judgment against the debtor, holding that the debt collector's actions-calling the plaintiff on two phone numbers 149 times in 55 days-evidenced intent to establish contact, not intent to harass. 782 F.Supp.2d 1223 (D.Kan.2011). While Genpact and the debt collector in Carman both called the debtors two to three times per day for a similar period of time, the debt collector in Carmen never called the debtor six times in one day. See Carman, 782 F.Supp.2d 1223. A reasonable trier of fact could find that this fact alone, apart from the sheer volume of calls placed by Genpact, is sufficient to find that Genpact had the "intent to annoy, abuse or harass" Neu. 15 U.S.C. § 1692d(5). Genpact also contends that the number of calls it placed was "simply a function of the fact that Genpact had two numbers potentially applicable to Plaintiff and that Plaintiff did not respond to any of Genpact's attempts to reach him." (MSJ, 15–16.) Thus, it appears that Genpact is suggesting that this Court should somehow discount the number of calls it made because it had two different contact numbers for Neu. However, a reasonable trier of fact could find that a debt collector intended to harass a debtor by continuously calling not one, but two different numbers belonging to the debtor.

In *Turner v. Professional Recovery Services, Inc.*, Civil No. 11-3356(JS) (D.N.J., July 9, 2013), the court held:

> The Court concludes that a reasonable jury could determine that the volume and pattern of PRS's phone calls demonstrate it intended to annoy, abuse, or harass plaintiff. First, as in Majeski and Akalwadi, there was a high volume of calls made by PRS to plaintiff. Although the parties dispute the exact number of phone calls, there is no dispute that PRS called plaintiff's landline or cellular phone at least 133 times in five months. According to PRS's records, on some days plaintiff received no phone calls from PRS, however, on other days PRS made multiple phone calls. See, e.g., PRS Records at 4, Affidavit of Scott Stearn, Ex. 1 [Doc. No. 14-4]. Further, it appears that PRS left multiple messages for plaintiff in one day. See PRS Records at 5. Second, PRS's records and the transcripts suggest that on two occasions a PRS collector called plaintiff back shortly after she hung up on PRS. The conversation on October 8, 2011, proceeded as follows:
>
> FEMALE VOICE: Good morning.
> CALLER: Hello. Bessie Turner please.

FEMALE VOICE: Who is this?
CALLER: This is Harry Cavanero calling from Professional Recovery Services. Is this Bessie Turner? Bessie, you hung right up. That wasn't polite.

Defendant's Statement ¶ 7. On November 17, 2011, the PRS records indicate that PRS called plaintiff at 11:39 a.m., and contain a note stating "unempl living off". PRS Records at 11. The transcript of the November 17, 2011, conversation reflects that plaintiff told the PRS collector she was living off her elderly parents and the conversation ended abruptly. Defendant's Statement ¶ 11. The next entry in the records indicates PRS placed a call at 11:42 a.m., within minutes of the 11:39 a.m. conversation. The jury may consider these multiple calls to plaintiff in one day when it decides whether PRS intended to annoy, abuse, or harass plaintiff. Third, PRS's records indicate PRS called plaintiff twice within a matter of minutes on numerous occasions.[3] Fourth, on October 10, 2011, the conversation between a PRS collector and plaintiff proceeded as follows:

CALLER: Hello, Bessie Turner please.
MS. TURNER: Who's calling?
CALLER: Harry Cavanero's calling. Is this Bessie Turner? I'm calling from Professional Recovery Services.
MS. TURNER: I told the gentleman the other day that I'm not working.
CALLER: Well, we still have to call Ma'am until payment is made on the account.
MS. TURNER: Okay, well I'm not working.
CALLER: But that's not my fault Ma'am. You must have some type of an income or how are you living?
MS. TURNER: I'm not barely —
CALLER: Hello?
MS. TURNER: I'm not. I'm really not. I'm just waiting for whatever utility there is to be cut off in the next day or two.
CALLER: Well, you have a good day Ma'am. We will be calling again.

Defendant's Statement ¶ 8 (emphasis added). After this conversation, PRS collectors continued to call plaintiff until December 30, 2011. See PRS Records. The jury may infer from PRS's threat to continue to call plaintiff that it intended to annoy, abuse, or harass her until she capitulated and paid the debt.

PRS cites numerous cases to support its argument that the pattern and volume of its phone calls do not demonstrate an intent to annoy, abuse, or harass plaintiff. See Defendant's Memo at 8-9. These cases, however, are all distinguishable because the alleged violation of § 1692d was only the excessive volume of phone calls. In this instance, the volume of calls combined with evidence regarding the pattern and content of the phone calls creates a jury question. Based on the evidence, a reasonable jury could conclude PRS intended to annoy, abuse, or harass plaintiff. Consequently, summary judgment is denied as to Counts Two and Three.

Compare *Sanchez v. Client Services,* 520 F. Supp. 2d 1149 (N.D. Cal. Oct. 29, 2007) (summary judgment for plaintiff where the collector placed 54 calls over a timeframe of 6 months, with 12 calls in one month, 6 calls in one day, and 25 voice messages); *Kuhn v. Account Control,* 865 F. Supp. 1443 (D. Nev. Oct. 7, 1994) (summary judgment for plaintiff where six calls were placed within a 24-minute period); *Tucker v. CBE Group, Inc.,* 710 F. Supp. 2d 1301 (M.D. Fla. May 5, 2010) (court granted defendant’s motion for summary judgment and held that 57 calls made to a

nondebtor (never more than seven times a day) was not a violation of the FDCPA. Plaintiff never spoke to defendant, never requested that defendant cease calling and knew that the calls were not directed to him. Also, defendant never called back on the same day after leaving a message. Therefore, the court concluded that the intent was to reach the debtor and not to harass plaintiff); *Katz v. Capital One,* 2010 WL 1039850, *3 (E.D. Va. Mar. 18, 2010) (summary judgment for defendant where the collector never received a cease and desist letter and did not call more than twice a day. The court held that to determine whether a violation occurred, the court must analyze not only the amount of calls but also the "pattern of calls." If the plaintiff fails to establish any indicia of an unacceptable pattern of calls, then there is no violation for harassment. The court found for defendant in this case because it never called plaintiff right after plaintiff hung up, there were no back-to-back calls, the calls were not made at inconvenient times and defendant never received plaintiff's request to cease calling); *Arteaga v. Asset Acceptance L.L.C.,* 2010 WL 3310259 (E.D. Cal. Aug. 23, 2010) (summary judgment in favor of defendant, which had made 18 calls to plaintiff over the course of five months. The court held that there was no violation because defendant never called plaintiff after she hung up, did not call plaintiff multiple times a day, did not call plaintiff after she made a request to cease, and did not call plaintiff or her family or friends at odd hours.); *Meadows v. Franklin,* 2010 WL 2605048 (N.D. Ala. June 25, 2010) (summary judgment for defendant and against a nondebtor plaintiff where the collector placed 200 to 300 calls over 2.5 years. The court ruled in favor of defendant because "a handful of calls" a week, when the vast majority of the calls were not answered, did not constitute a violation. The nondebtor plaintiff admitted that she only answered a few times, and that she knew the calls were not for her.); *Saltzman v. I.C. Sys., Inc.,* 2009 WL 2190359, *7 (E.D. Mich. Sept. 30, 2009) (summary judgment for defendant where only one in five calls were answered. The court held that this ratio showed a difficulty in reaching plaintiff rather than an intent to harass.); *Jiminez v. Accounts Receivable, Inc.,* Case No. CV-09-9070 (C.D. Cal. Nov. 15, 2010) (summary judgment for defendant where the collector placed 69 calls in just over three months); *Basset v. I.C. Sys., Inc.,* 715 F. Supp. 2d 803 (N.D. Ill. June 1, 2010) (whether 31 calls in 12 days qualified as harassment was a question for the jury as plaintiff stated that he felt abused); *Krapf v. Nationwide Credit Inc.,* 2010 WL 2025323, *4 (C.D. Cal. May 21, 2010) (defendant's motion for summary judgment was denied as the question of whether more than 180 calls in a single month qualified as harassment was one for the jury. The court allowed the case to go to the jury because some of the calls were separated by a matter of minutes); *Akalwadi v. Risk Management Alternatives,* 336 F. Supp. 2d 492 (D. Md. Sept. 22, 2004) (whether 28 calls over the course of two months qualified as harassment was a question for the jury); *Joseph v. J.J. Macintyre,* 238 F. Supp. 2d 1158 (N.D. Cal. Dec. 12 2002) (whether 200 calls over the course of 1.5 years qualified as harassment was a question for the jury. On three different days, defendant attempted to telephone plaintiff after having spoken with her on the same day. Plaintiff had been contacted on the same day after she requested that the calls cease. On two other occasions, defendant telephoned plaintiff on the same day after she had hung up on it.).

IX. 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); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, No. 09-35767, 2011 U.S. App. LEXIS 4072

(9th Cir., March 4, 2011); *Huertas v. Galaxy Asset Management,* No. 10-2532, 2011 U.S. App. LEXIS 7397 (3rd Cir., April 11, 2011); *Goins v. JBC & Assocs., P.C.,* 352 F. Supp. 2d 262 (D.Conn. 2005); *Ramirez v. Palisades Collection LLC*, 07 C 3840, 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*., 07 C 410, 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).

6. 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 *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010) (yes, if result of lack of license is that debt collector is threatening action (e.g., suit) that cannot be lawfully taken); *Smith v. LVNV Funding, LLC,* 2:11-CV-379 et al., 2012 U.S. Dist. LEXIS 127185 (E.D.Tenn., Sept. 7, 2012) (same); *Goins v. JBC & Assocs*., 352 F. Supp. 2d 262, 271 (D. Conn. 2004); *Cox v. Hilco Receivables, L.L.C.,* 3:09-CV-897-M, 2010 U.S. Dist. LEXIS 124605 (N.D.Tex., Nov., 24, 2010); *Hauk v. LVNV Funding, LLC,* 749 F. Supp. 2d 358 (D.Md. 2010); *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783 (S.D.Ohio. 2006); *Sibley v. Firstcollect, Inc.,* 913 F.Supp. 469, 471 (M.D. La. 1995); *Russey v. Rankin*, 911 F.Supp. 1449, 1459 (D. N.M. 1995); *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); *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); *Skinner v. Asset Acceptance, LLC*, No. 10-2453 (D.N.J. June 26, 2012) ("The state law violation itself is not a per se violation of the FDCPA. See e.g., LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1192 (11th Cir. 2010); Wade v. Regional Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996). Plaintiff does not argue that she was misled by Defendant's communication, that it was false, or that it was a product of unfair or unconscionable practices. As Plaintiff's only basis for a violation of the FDCPA is Defendant's attempt to collect the debt without having filed the bond, which the Court has concluded did not violate the FDCPA, Plaintiff has not come forward with facts or evidence in support of its contention that the challenged letter violated any other provisions of the FDCPA."). Note that if a complaint or other document expressly represents that authority exists when it does not, §1692e is violated.

In *Grant-Fletcher v. The Brachfeld Law Group, PC.*, Civil No. WMN-11-2072, 2012 U.S. Dist. LEXIS 89721 (D.Md. June 28, 2012), the court stated:

> Maryland commercial law requires that a person have a license

when doing business as a collection agency in the state. Md. Code Ann., Bus. Reg. § 7-301(a). A license authorizes the person to do business as a collection agency at only one place of business, and requires a separate application and fee if it wishes to act as a collection agency from another place of business. Id. at §§ 7-305, 7-302(c).

A violation of the Maryland Collection Agency Licensing Act ("MCALA") will not give rise to a private cause of action. Id. at § 7-401; see also Bradshaw v. Hilco Receivables, LLC, 765 F. Supp. 2d 719, 727-28 (D. Md. 2011). This Court, however, has held that a violation of the MCALA licensing requirement may support a cause of action under FDCPA Section 1692e(5) or MCDCA § 14-202(8), which prohibits a debt collector from threatening to take any action that cannot legally be taken to collect debts. Bradshaw, 765 F. Supp. 2d at 728, 733. This is because, if a collection agency is not licensed to do business in Maryland, it would be illegal for it to threaten to take legal action against a debtor. See Nat'l Fin. Serv., 98 F.3d at 235-36; see also Bradshaw, 765 F. Supp. 2d at 729.

Courts have split over whether a debt collector who has not been properly licensed by the state has violated § 1692e by simply attempting to collect a debt. Compare Wade v. Reg'l Credit Ass'n, 87 F.3d 1098, 1100 (9th Cir. 1996) (holding that defendant's collections, although apparently in violation of state law, were innocuous and not in violation of the FDCPA), Niemiec v. NCO Fin. Sys., No. 1:05cv219, 2006 WL 1763643, at *9 (N.D. Ind. June 27, 2006), and Pescatrice v. Elite Recovery Servs., No. 06-61130-CIV-COHN, 2007 WL 1192441, at *4 (S.D. Fla. Apr. 23, 2007); with Sibley v. Firstcollect, Inc., 913 F. Supp. 469, 471 (M.D. La. 1995) (holding that two letters that were designated as "attempting to collect a debt" sent by defendant company not licensed to collect debts in the state violated § 1692e), Kuhn v. Account Control Tech., 865 F. Supp. 1443, 1452 (D. Nev. 1994) (holding that unlicensed collection actions that involved telephone calls demanding payment violated § 1692e); see also Gaetano, 774 F. Supp. at 1414.

This Court recently held in Bradshaw that "a violation of Maryland's MCALA licensing requirement may support a cause of action under the FDCPA." Bradshaw, 765 F. Supp. 2d at 729 (emphasis added). Notwithstanding, this Court declined to hold that any violation of state law amounted to a per se violation of the FDCPA. See id. (emphasis added). In Bradshaw, the defendants filed lawsuit without a license, which the court held was a violation of the FDCPA. See id.

In the present case, however, the faxed letter did not threaten legal action, and would be viewed by the "least sophisticated debtor" as a reminder and not as a threat. See Wade, 87 F.3d at 1100. The letter "contain[s] no reference, either direct or implicit, to suit, lawsuit, legal action, or litigation." Gaetano, 774 F. Supp. at 1408. The only

language that could potentially be construed as threatening is that which is expressly required by 15 U.S.C. § 1692e(11)[5], but such language merely informs a consumer that the correspondence is connected to an attempt to collect a debt and does not itself threaten legal action or even indicate that any action will be taken from the unlicensed location sending the correspondence. As such, the Court holds that the faxed letter is not plausibly a threat to take action that could not legally be taken, so the claims brought under 15 U.S.C. § 1692e(5) and Md. Code Ann., Com. Law § 14-202(8) related to Defendant's unlicensed Ohio office will be dismissed.

7. Generally, "a debt collector violates the FDCPA when it actually files suit to collect a debt for which it knows, or reasonably should know, the defendant is not liable." *Royal Financial Group, LLC v. George*, ED92972, 2010 Mo.App. LEXIS 399, *11 (March 30, 2010) (wrong person sued, no evidence of assignment). For example, the filing of a collection action barred by res judicata violates the FDCPA. *Montgomery v Donnett*, . 1:05-CV-00476, 2006 U.S. Dist. LEXIS 7377, 2006 WL 293727 (S.D. Ohio Feb. 7, 2006).

8. 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).

9. 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).

10. 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)).”

11. 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.

12. 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).

13. 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, 867 (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?'" *Accord, Ruth v. Triumph P'ships,* 577 F.3d 790 (7th Cir. 2009) ("to the extent permitted by law"); *Veach v. Sheeks,* 316 F.3d 690 (7th Cir. 2003) ("as permitted by law").

In *Lox v. CDA, Ltd.*, 689 F.3d 818 (7th Cir. 2012), the Seventh Circuit held that a letter stating that attorney's fees could be awarded violated the FDCPA where there was no contractual or statutory basis for fees. "[I]t is improper under the FDCPA to imply that certain outcomes might befall a delinquent debtor when, legally, those outcomes cannot come to pass." The court relied on *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055 (9th Cir. 2011), and *Ruth v. Triumph P'ships*, 577 F.3d 790, 794 n.2 (7th Cir. 2009).

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).

X. VIOLATIONS -- ACTUAL TAKING OF UNLAWFUL ACTION

While a few cases hold that a "threat" to take illegal action does not include the actual taking of action, *Fick v. Am. Acceptance Co.*, No. 3:11 CV 229, 2012 U.S. Dist. LEXIS 43761 (N.D. Ind. Mar. 28, 2012), most courts hold that it does. *Allen v. LaSalle Bank*, 629 F.3d 364 (3d Cir. 2011); *Bradshaw v. Hilco Receivables, LLC,* 765 F. Supp. 2d 719, 730 (D. Md. 2011) ("Section 1692e(5) of the FDCPA . . . include[s] the taking of 'action that cannot legally be taken.'"); *Balthazor v. Sec. Credit Servs., LLC,* No. 11-60867-CIV-COHN/SELTZER, 2012 U.S. Dist. LEXIS 6495 (S.D.Fla. Jan. 20, 2012); *Heathman v. Portfolio Recovery Associates, LLC*, No. 12-CV-201-IEG (RBB), 2013 WL 755674 (S.D.Cal., February 27, 2013); *Sprinkle v. SB & C Ltd.*, 472 F.Supp.2d 1235, 1247 (W.D. Wash.2006) ("[C]ourts have recognized the futility of a statutory scheme that would provide more protection to debt collectors who violate the law than to those who merely threaten or pretend to do so . . . The opposite conclusion would be akin to attaching liability to one who merely threatens a tortuous act while absolving one who unabashedly completes is [sic]. It is safe to say that such an interpretation veers sharply from the legislative purpose behind the FDCPA."); *Marchant v. U.S. Collections West, Inc.*, 12 F.Supp.2d

1001, 1006 (D.Ariz. 1998) ("defendants assert that they made no threat; they simply took action . . . such argument elevates form over substance. To argue that a collection agency can avoid the strictures of the FDCPA simply by acting where it has no legal authority . . . would defy the very purpose of the section.").

In this regard, the actual taking of action is usually a threat to take further action, e.g., filing a lawsuit is a threat to obtain a judgment. *Royal Financial Group, LLC v. Perkins*, ED98991, 2013 WL 4419343 (Mo. App. Aug. 20, 2013).

XI. 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).

Section 1692f(1) has been regularly interpreted to cover the attempted collection of such amounts. *Williams v. Edelman*, 408 F. Supp. 2d 1261, 1268-69 (S.D. Fla. 2005); *Gigli v. Palisades Collection, L.L.C.*, No. 3:CV-06-1428, 2008 U.S. Dist. LEXIS 62684, 2008 WL 3853295, at *5 (M.D. Pa. Aug. 14, 2008); *Shepherd v. Liberty Acquisitions, LLC*, No. 11-cv-00718-CMA-MEH, 2012 U.S. Dist. LEXIS 94199 (D.Colo. July 9, 2012).

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 Scrimpsher,* 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); *Lox v. CDA, Ltd.*, 689 F.3d 818 (7th Cir. 2012).

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, 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, 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, Civil No. 2:95-CV-430C, 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 by statute modest charges of this nature under specified circumstances, generally in the $20-30 range.

XII. 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.

In *Kojetin v. C U Recovery, Inc.*, Civil No. 97-2273 (JRT/RLE), 1999 U.S. Dist. LEXIS 10930 (D. Minn. Mar. 29, 1999), aff'd per curiam, 212 F.3d 1318 (8th Cir. 2000), the court interpreted the phrase "reasonable costs incident to collection" to include only "actual costs," and then determined that "actual costs" could not include a percentage-based fee.

Similarly, in *Som v. Daniels Law Offices, P.C.*, 573 F. Supp. 2d 349 (D.Mass. 2008), the court held that it "cannot find as a matter of law that the language 'all costs incurred' necessarily authorizes a percentage-based attorney's fee. Depending on the facts, a percentage-based fee might or might not be part of the actual 'costs incurred' by the creditor, and the actual underlying facts will have to await discovery. Indeed, even under the arguably broader contract language of 'reasonable attorney's fees,' courts have found that liquidated or percentage-based attorney's fees can violate the FDCPA."

In *Richard v. Oak Tree Group, Inc.,* 614 F. Supp. 2d 814 (W.D.Mich. 2008), the court held that a collection notice violated §1692f(1) where plaintiffs agreed "to pay ACI for ACI's collection costs and expenses incurred" due to their default. "This agreement limited plaintiffs' liability to ACI's collection costs 'incurred,' i.e., their 'actual' collection costs. The fact that defendant added its maximum possible commission to the account balance does not establish that ACI incurred this amount as a collection cost. On the contrary, ACI would not incur any collection costs until defendant successfully collected some of the debt from plaintiffs. Requiring plaintiffs to pay collection costs consisting of 28% of the outstanding principal balance amounts to charging plaintiffs liquidated damages, something to which she did not agree." "In summary, plaintiffs agreement to pay ACI's 'collection costs and expenses incurred,' is not an agreement to pay a collection agency's maximum potential commission based upon a percentage of plaintiffs' unpaid account balance with ACI. Accordingly, plaintiffs are entitled to summary judgment with respect to their claim brought pursuant to § 1692f."

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).

In *Winn v. Unifund CCR Partners*, 06-cv-447, 2007 U.S. Dist. LEXIS 95705, 2007 WL 974099, at *8 (D. Ariz. Feb. 13, 2007), the court noted the defendant "quotes a specific level of attorney's fees in his prayer for damages, but he does not allege that this specific amount is required by the terms of the credit card agreement. Instead, he acknowledges the creditor is entitled only to 'reasonable' attorney's fees and invites the court to find that this specific amount is reasonable." The court found Stolicker distinguishable because the fee request was not represented as part of the debt and did "not inaccurately characterize the content of the credit card agreement." Id.

XIII. 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.

XIV. 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 court 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. However, the court expressly refrained from passing on the question of whether a pattern of such conduct violated the FDCPA, such claim having been waived. Furthermore, although "mere filing of a lawsuit without the immediate means of proof is not a violation of the FDCPA," it is a violation to file a debt collection lawsuit without a good faith belief that one could eventually prove the facts alleged in the complaint, especially if the lawsuit is filed with the intent "to either obtain a default judgment or coerce [the debtor] into a settlement. Accord, *Kuria v. Palisades Acquisition XVI, LLC*, No. 1:09-cv-03321-JOF-RGV, 2010 WL 4780769 at *6 (N.D. Ga. 2010)(holding that FDCPA complaint was sufficient to make out a plausible claim under Twombly and Iqbal). *Kuria* lists several common debt buyer practices that provide the "more": (1) pattern and practice of abusive, scattershot litigation to collect debts. (at 1302.) (2) intent to either obtain a default judgment or enter into voluntary settlement. (at 1303.) (3) bad faith, reckless disregard towards debtors, and abuse of process (*id*.) (4) no intent to investigate or verify a debt's validity. (*id*.) (5) general practice of filing coercive

lawsuits to collect debts not actually owed. (*id*.)

In *Royal Financial Group, LLC v. Perkins*, ED98991, 2013 WL 4419343 (Mo. App. Aug. 20, 2013), the court held that a practice of filing lawsuits with the intent of obtaining a default judgment or settlement, but not of ever proving a case, is a violation of the FDCPA. ". Recalling that the purpose of the FDCPA is to deter abusive debt collection practices, we see no meaningful distinction, from the perspective of an unsophisticated consumer, between an empty threat to file a lawsuit and empty threat to actually prosecute one once filed. Both tactics violate the spirit and letter of section 1692(e)(5)." (*8)

XV. VIOLATIONS -- TIME BARRED DEBTS

1. CASELAW PRIOR TO 2012

Filing or threatening suit on debts barred by applicable federal or state statutes of limitation is a violation, 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); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011); *Freyermuth v. Credit Bureau Serv. Inc*., 248 F.3d 767, 771 (8th Cir 2001); *Jackson v. Midland Funding, LLC*, 754 F. Supp. 2d 711 (D.N.J. 2010); *Griffith v Capital One Bank*, 00-603-GPM, 2001 U.S. Dist. LEXIS 21953, *4-5 (S.D. Ill. July 23, 2001); *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); *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); *Walker v. Gallegos,* 167 F.Supp.2d 1105, 1107 (D.Ariz. 2001); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262 (D.Conn. 2005); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 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.*, No. 07 C 410, 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); *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). This has been found to violate both §1692e and §1692f.

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).

Generally, "a debt collector violates the FDCPA when it actually files suit to collect a debt for which it knows, or reasonably should know, the defendant is not liable." *Royal Financial Group, LLC v. George*, ED92972, 2010 Mo.App. LEXIS 399, *11 (March 30, 2010) (wrong person sued, no evidence of assignment). For example, the filing of a collection action barred by res judicata

violates the FDCPA. *Montgomery v Donnett*, . 1:05-CV-00476, 2006 U.S. Dist. LEXIS 7377, 2006 WL 293727 (S.D. Ohio Feb. 7, 2006); *Donley v. Nordic Properties, Inc*., 2003 WL 22282523 (N.D. Ill., Sept. 30, 2003).

2. 2012 CONSENT DECREES

In *United States of America (For the Federal Trade Commission) v. Asset Acceptance, LLC*, Case No. 8:12-cv-182-T-27EAJ (M.D.Fla.), the FTC sued a major debt buyer, alleging that Asset Acceptance regularly collects debts that are past the statute of limitations. (Complaint, ¶30) The FTC alleged (¶34) that "Many consumers do not know if the accounts that Asset is attempting to collect are beyond the statute of limitations. Consumers also do not realize that making a partial payment on a debt, or making a written promise to pay will, in many instances, revive the debt. When Asset contacts consumers to collect on a debt, many consumers believe they could experience serious negative consequences, including being sued, if they fail to pay the debt. Similarly, many consumers believe that making a partial payment on a debt in response to Asset's collection efforts is a positive action that can avert the negative consequences of nonpayment. If consumers knew, in connection with a past-statute debt, that Asset had no legal means to enforce collection of the debt, or understood that making a partial payment or a written to promise to pay would revive it, some consumers would likely choose not to make a payment or a written promise to pay."

The FTC alleged that by dunning consumers on time-barred debts without disclosure of the fact, Asset Acceptance violated both §5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a) ("FTC Act") (¶¶56-58), and the FDCPA (¶¶81-83). Both 15 U.S.C. §45(a) and 15 U.S.C. §1692e prohibit deceptive acts and practices. Indeed, §1692e represents a codification and expansion of precedent relating to FTC actions with respect to debt collection practices under §45(a). *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985).

The same day as the complaint was filed, Asset Acceptance consented to a judgment in which it was required to disclose (¶IV.A-D), "for any debt that the Defendant knows or should know may be beyond the applicable statute of limitations," that "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it." The judgment also required Asset to pay $2.5 million. The Commissioners of the FTC approved the Consent Decree.

The FTC also issued a news release setting forth its position concerning collection of time-barred debts. The release stated:

> "Most consumers do not know their legal rights with respect to collection of old debts past the statute of limitations," said David Vladeck, Director of the FTC's Bureau of Consumer Protection. "When a collector tells a consumer that she owes money and demands payment, it may create the misleading impression that the collector can sue the consumer in court to collect that debt. This FTC settlement signals that, even with old debt, the prohibitions against deceptive and unfair collection methods apply."

Finally, the FTC issued a notice to industry in which it described Asset's violation as having "failed to disclose that debts were too old to be legally enforceable or that a partial payment would restart the clock".

The FTC's action in the *Asset Acceptance* case followed five years of investigation and study of debt collection abuses generally and the collection of time-barred debts in particular.

In late 2007, the FTC conducted a series of public workshops to evaluate the need for reform in the debt collection system. Its subsequent report, *Collecting Consumer Debts: The Challenges of Change* (2009),[1] identified the advent and growth of the debt buying industry as the most significant change in debt collection practices since the enactment of the FDCPA more than 30 years ago, and discussed some of the consumer challenges raised by this industry change. The report noted (pp. 3-4) that large amounts of debts are sold to debt buyers, such as the defendants herein, who generally pay 5% or less of the amount allegedly owed.

> The most significant change in the debt collection business in recent years has been the advent and growth of debt buying. Some companies simply buy debt and seek to recover on it. In addition to these companies, debt buyers also include collection law firms, contingency collection agencies, and investors who purchase and resell portfolios of delinquent debt. Debt buyers purchase charged-off debt from credit card issuers, retail merchants, telecommunications providers, utilities, and other credit providers. Purchased debt typically is classified by its age and the number of debt collectors who have attempted to collect it before it was sold. . . . Debt buying increased substantially over the decade between 1997 and 2007, and industry analysts estimate that debt buying will grow at an 11% rate over the next five years and reach annual revenues of $6.2 billion by 2011." (Id., 13-14)

Moreover, debt buyers receive only minimal information about the debts they claim to purchase: "A leading association of debt buyers, DBA International ('DBA'), acknowledged that it is common for a debt buyer to receive only a computerized summary of the creditor's business records when it purchases a portfolio . . . ." (Id., 22).

This practice of acquiring debts without any evidence of them directly impinges on the interest served by statutes of limitation. "By requiring that owners of debt file suit relatively close in time to the delinquency, statutes of limitations help ensure that courts have necessary evidence available to resolve disputes, and thus assist consumers in defending themselves." (Id., 62-63) The FTC noted that ". . . .there is a consensus that suing or threatening to sue to collect time-barred debt is unlawful and unethical for debt collectors. . . ." (p. 64), but noted that further measures may be necessary.

The FTC concluded that it needed more information before adopting a position. To obtain more information, during the latter part of 2009 the FTC convened public roundtables in Chicago, San Francisco, and Washington, D.C. These events brought together representatives of the debt collection industry, consumer advocates, private attorneys, academics, government officials, arbitration providers, judges, and others specifically to discuss issues related to debt collection litigation. To supplement the information gleaned from the discussions at these roundtables, the Commission also solicited and received public comments. The Commission's 2010 Debt Collection and Arbitration Roundtables Report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (2010),[2] examined the deficiencies in debt collection lawsuits at the filing and default stages, particularly in actions brought by debt buyers.

The 2010 Report again noted "that the FDCPA bars actual or threatened suit to collect on time-barred debts." (Report, p. 23) However, the FTC went further and concluded (pp.

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[1] Available at www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

[2] Available at http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

26-28) that other attempts to collect time-barred debt were misleading:

> The Commission takes no position on whether the FDCPA should be amended to preclude collectors from collecting debt that they know or should know is time-barred. Nevertheless, because most consumers do not know or understand their legal rights with respect to the collection of time-barred debt, the Commission believes that in many circumstances such a collection attempt may create a misleading impression that the collector can sue the consumer in court to collect the debt, in violation of Section 5 of the FTC Act and Section 807 of the FDCPA. To avoid creating this misleading impression, collectors would need to disclose clearly and prominently to consumers before seeking payment on such time-barred debt that, because of the passage of time, they can no longer sue in court to collect the debt or otherwise compel payment.
>
> The second issue related to collecting on time-barred debt roundtable participants addressed was the "reviving" of such debt. In many states, making a payment on a debt after it has gone into default triggers the start of a new statute of limitations period for the entire debt, even if the original statute of limitations period has already expired. . . . Debt collectors generally do not disclose to consumers that making any payment on a time-barred debt revives the collector's ability to sue to collect on the entire debt. . . .
>
> In states where laws continue to provide that a partial payment on a time-barred debt revives it, the Commission believes that in many circumstances a collector's attempt to collect a debt that it knows or should know is time-barred may create a misleading impression as to the consequences of making such a payment, in violation of Section 5 of the FTC Act and Section 807 of the FDCPA. To avoid creating a misleading impression, collectors would need to disclose clearly and prominently to consumers prior to requesting or accepting such payments that (1) the collector cannot sue to collect the debt and (2) providing a partial payment would revive the collector's ability to sue to collect the balance.

Among the reasons cited by the FTC for adopting this position were that debt buyers in particular frequently threatened or filed suits to collect time-barred debt notwithstanding the existing prohibition on doing so, apparently with the expectation that the consumers would default and allow judgments to be entered against them. (2010 Report, pp. 29-30).

On October 1, 2012, the Consumer Financial Protection Bureau, which has taken over much of the FTC's enforcement responsibility and has been granted rule-making authority with respect to debt collection, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of the Comptroller of the Currency entered into consent orders with three American Express-related entities requiring disclosure that debts they attempt to collect were time-barred. 2012-CFPB-0002; 2012-CFPB-0003; 2012-CFPB-0004. The orders require that "the Bank shall continue to provide disclosures concerning the expiration of the Bank's litigation rights when collecting debt that is barred by the applicable state statutes of limitations . . . ." (2012-CFPB-0002, p. 6 of 35, 2012-CFPB-0003, p. 5 of 28). Thus, five agencies have entered into four consent decrees explicitly based on the duty-to-disclose theory advanced by plaintiff here. The orders further require disclosure of "all material conditions, benefits and restrictions concerning any offer of settlement. . . ." (2012-CFPB-0002, p. 7 of 35, 2012-CFPB-0003, p. 6 of 28). Thus, they recognize that "settlement offers" that fail to disclose material information may be misleading.

Most recently, the consent decree obtained by the Attorney General of Minnesota in *State v. Midland Funding*, LLC, 27-CV-11-11510 (Hennepin Co. Dist. Ct.), requires disclosure in collection letters (par. 16(h)) of the time-barred nature of debts.

Administrative agencies make law through adjudication as well as by rulemaking. *SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947). The decision of the FTC to file a complaint represents its construction of the relevant statutes, in this case both the FTC Act and the FDCPA, even if the proceeding is resolved by a consent decree. *FTC v. Mandel Bros.*, 359 U.S. 385, 391 (1959); *Ramson v. Layne*, 668 F.Supp. 1162, 1168-69 (N.D.Ill. 1987); *In re TJX Companies Retail Security Breach Litigation*, 564 F.3d 489, 496-97 (1st Cir. 2009); *Schubach v. Household Finance Corp.*, 375 Mass. 133, 135, 376 N.E.2d 140 (1978), *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596, 321 N.E.2d 915 (1975), *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 747-48, 897 N.E.2d 548 (2008); *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980). The FTC's interpretation of what is "deceptive" in the area of debt collection is entitled to deference by the courts. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "Deceptive" is a very general term that the FTC was to define through adjudication. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965).

3. ACCEPTANCE BY COURTS

One court has declined to defer to the FTC position. *McMahon v. LVNV Funding, LLC*, 12 C 1410, 2012 U.S. Dist. LEXIS 92655 (N.D.Ill., July 5, 2012). However, the court thought that any reference to the date of acquisition or other dates in connection with the debt, without revealing its time-barred nature, were misleading. In a subsequent opinion, the court held that an offer of settlement on a time-barred debt was at least potentially misleading. *McMahon v. LVNV Funding, LLC*, 12 C 1410 (N.D.Ill., August 13, 2012).

XVI. VIOLATIONS -- COLLECTING DEBTS OF THE DECEASED

Just prior to transferring authority to the new Consumer Financial Protection Bureau, the Federal Trade Commission issued a "Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts," 76 FR 44915 (Wednesday, July 27, 2011), which:

1. States that enforcement action will not be brought based on communication regarding debts of decedent with widow/ widower or "an individual who has the authority to pay the debts out of the assets of the decedent's estate," even if not formally appointed by a court. Includes "persons who sign declarations or affidavits to effectuate the transfer of estate assets" pursuant to small estates procedures and "persons who dispose of the decedent's assets extrajudicially."

2. States that attempts to identify the person authorized to pay the decedent's debts will be treated as location communications (15 U.S.C. §1692b) if they state that the collection is trying to identify and locate the person who has the authority to pay any outstanding bills of the decedent out of the decedent's estate, but cannot make any reference to a specific debt or the fact that it is delinquent.

3. Does not permit correspondence to be sent to generic "estate of -----" if it specifically identifies a delinquent debt.

4. Authority to pay the decedent's debts is not established by the fact that someone is opening mail addressed to the decedent or paid for his or her funeral or is "handling the decedent's final affairs."

XVII. VIOLATIONS -- COLLECTING 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).

XVIII. 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. The Second and Fifth Circuits have held such disclaimers to be effective. *Greco v. Trauner, Cohen &*

Thomas, LLP, 412 F.3d 360, 364 (2d Cir. 2005) ("at this time, no attorney with this firm has personally reviewed the particular circumstances of your account"); *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009) (if "clear and prominent"; not sufficient when on back of letter). Other courts have disagreed regarding the efficacy of such disclaimers, either generally or based on the overall message conveyed by the letter. *Lesher v. Law Office of Mitchell N. Kay, P.C.,* 1:09-CV-0578, 2010 U.S. Dist. LEXIS 58263 (M.D.Pa., June 14, 2010) (violation even if disclaimer was on front of letter); *Robertson v. Richard J. Boudreau & Assocs., LLC,* C09-1681 BZ, 2009 U.S. Dist. LEXIS 117885 (N.D.Cal., Dec. 18, 2009) ("the brief Greco letter does not contain any of the threatening language in defendant's letters and appended a statement of the debtor's rights that fairly tracked the FDCPA. The Greco letter does not use language like 'litigation' or 'any valid legal defense' or any of the inconsistent language this letter contains"); *Henggeler v. Brumbaugh & Quandahl*, 8:11CV334, 2012 U.S. Dist. LEXIS 93402, *10-11 (D.Neb., July 5, 2012) ("Defendants' reliance on the disclaimer that 'there was no attorney involvement in sending this letter' is misplaced. The letters contain contradictory statements that 'this office [known to be a law office] represents [the respective creditors],' and are written on law firm letterhead, which could be misleading to an unsophisticated consumer.").

Greco appears inconsistent with the treatment of disclaimers under the Federal Trade Commission Act, where disclaimers which purport to negate a central message are generally not considered sufficient to avoid deception, *In re Cliffdale Associates*, 103 FTC 110, 184 (1984) ("the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller"), and in trademark law, where it is not permissible to use an established trademark coupled with a disclosure that the trademark 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). 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.

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.

XIX. VIOLATIONS -- VOICEMAIL MESSAGES

A voicemail message is a "communication" within the meaning of 15 U.S.C. §§1692d(6) and 1692e. *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009); *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); *Krapf v. Collectors Training Institute of Illinois, Inc.*, 09-CV-391S, 2010 U.S. Dist. LEXIS 13063 (W.D.N.Y., Feb. 16, 2010); *Mark v. J. C. Christensen & Assocs.*, 09-100, 2009 U.S.Dist. LEXIS 67724 (D.Minn. Aug. 4, 2009); *Widman v. Monterey Fin. Servs*., 08-1331, 2009 U.S.Dist. LEXIS 38824 (W.D.Pa., May 7, 2009); *Thomas v. Consumer Adjustment Co.*, 579 F.Supp.2d 1290, 1296-97 (E.D.Mo. 2008); *Ramirez v. Apex Financial Mgmt., LLC*, 567 F.Supp.2d 1035, 1041 (N.D.Ill. 2008); *Chalik v. Westport Recovery Corp.,* 09-60819-CIV, 2009 U.S. Dist. LEXIS 122029 (S.D.Fla., Oct. 30, 2009); *Inman v. NCO Financial Systems, Inc.*, 08-5866, 2009 U.S. Dist. LEXIS 98215 (E.D.Pa., October 21, 2009); *Pollock v. Bay Area Credit Serv., LLC*, 08-61101-Civ, 2009 U.S. Dist. LEXIS 71169 (S.D.Fla., Aug. 13, 2009); *Drossin v. Nat'l Action Fin. Servs.*, 641 F. Supp. 2d 1314 (S.D.Fla. 2009); *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 WL 1992410, 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). See *Horkey v. J.V.D.B. & Associates, Inc.*, 333 F.3d 769, 774 (7th Cir. 2003) (message left with coworker).

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." Under §1692d(6), it is essential that the caller provide the name of the debt collection business. In *Torres v. Procollect, Inc*., No. 11-cv-02989-LTB, 2012 U.S. Dist. LEXIS 76985, *8-9 (D.Colo., June 1, 2012), the court held:

> While neither a circuit court, see Costa v. Nat'l Action Fin. Servs., 634 F.Supp.2d 1069, 1074 n.5 (E.D. Cal. 2007), nor this Court has addressed whether § 1692d(6) requires disclosure of a debt collector's company name, courts in other jurisdictions have. They "have uniformly held that it requires a debt collector to disclose the caller's name, the debt collection company's name, and the nature of the debt collector's business." Baker v. Allstate Financial Services, Inc., 554 F. Supp. 2d 945, 949 (D. Minn. 2008) (emphasis added); accord Valencia v. Affiliated Group, Inv., 2008 U.S. Dist. LEXIS 73008, 2008 WL 4372895, *3 (S.D. Fla. Sept. 24, 2008) (unpublished); Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F.Supp.2d 1104, 1112 (C.D. Cal. 2005); Gilmore v. Account Mgmt, Inc., 2009 U.S. Dist. LEXIS 79508, 2009 WL 2848278, *5 (N.D. Ga. 2009); Davis v. Bonewicz, 2011 U.S. Dist. LEXIS 133410, 2011 WL 5827796, *2 (E.D. Mo.

2011); Fry v. Berks Credit and Collections, Inc., 2011 U.S. Dist. LEXIS 140256, 2011 WL 6057781 (N.D. Ohio 2011); Wright v. Credit Bureau of Georgia, Inc., 548 F.Supp. 591, 597 (N.D. Ge. 1982); Frazier v. Absolute Collection Serv., Inc., 767 F. Supp. 2d 1354, 1364 (N.D. Ga. 2011); [*9] c.f. Beeders v. Gulf Coast Collection Bureau, 796 F.Supp.2d 1335, 1339 (M.D. Fla. 2011) ("FDCPA Section 1692d(6) does not prohibit a debt collection agency employee from using an alias during a telephone call, as long as the employee accurately discloses the name of the debt collection agency and explains the nature of its business.") (emphasis added) (quoting Knoll v. Allied Ins., Inc., 502 F.Supp.2d 943, 946 (D. Minn. 2007)). For example, in Savage v. NIC, Inc., 2009 U.S. Dist. LEXIS 65071, 2009 WL 2259726, *3 (D. Ariz. July 28, 2009), a plaintiff sued a debt collector under § 1692d(6) when the debt collector's employee failed to identify his employer's name in a voicemail left for the plaintiff. Even though the employee had left his personal name, the court found that "no reasonable jury could find in favor of the Defendant" because the employee had not disclosed the debt collection company's name. Id.

XX. 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). One case states that the collector must intend to communicate with a third party, *Mostiller v. Chase Asset Recovery Corp.,* 09-CV-218A, 2010 U.S. Dist. LEXIS 5208 (W.D.N.Y. January 22, 2010), but this seems clearly wrong, and most other decisions are to the contrary. *Thompson v. Diversified Adjustment Service, Inc.*, H-12-922, 2013 WL 3973976, *6 (S.D.Tex., July 31, 2013), holds:

> Other courts have consistently concluded that debt collectors may be liable under §1692c(b) for attempting to collect debts by leaving voicemail messages that were inadvertently heard by third parties. See, e.g., Marisco v. NCO Fin. Sys., Inc., —— F.Supp.2d ——, 2013 WL 2285195, at *5 (E.D.N.Y. May 23, 2013); Travers v. Collecto, Inc., 2013 WL 55819, at *3 (D.Mass. Jan.2, 2013) (holding that a debt collector violated the FDCPA when it left a message on an answering machine "directed to a number which, according to the plaintiff, was never associated with him, at a residence where he had not resided for eight months, and as a result information regarding the plaintiff's debt was communicated to the new resident."); Friedman v. Sharinn & Lipshie, P.C., 2013 WL 1873302, at *4 (E.D.N.Y. Mar.28, 2013) ("[P]laintiff sufficiently alleges that the

defendant violated Section 1692c(b) of the FDPCA by sharing personal and confidential information about an alleged debt—presumably without plaintiff's permission via answering machine messages that were overheard by third parties."); Zortman v. J.C. Christensen & Assocs., Inc., 819 F.Supp.2d 874, 879 (D.Minn.2011) ("[It is] possible to communicate with someone in spite of lacking a deliberate or purposeful intent to convey something to that particular person—for example, one may communicate with an unintended audience."); Cordes v. Frederick J. Hanna & Assocs., P. C., 789 F.Supp.2d 1173, 1174 (D.Minn.2011); Leahey v. Franklin Collection Serv., Inc., 756 F.Supp.2d 1322, 1327–28 (N.D.Ala.2010); Leyse v. Corporate Collection Servs., Inc., 2006 WL 2708451, at *4 (S.D.N.Y. Sept.18, 2006); F.T.C. v. Check Enforcement, 2005 WL 1677480, at *8 (D.N.J. July 18, 2005). But see Collier v. Professional Bureau of Collections, 2012 WL 3745720, at *4–5 (D.Md.2012) ("Looking at the message in the light most favorable to Ms. Collier, it was neither deceptive, threatening, coercive, or abusive. In fact, the message provided ample opportunity for a person, other than Ms. Collier, who received the message to ignore it or delete it. The communication was very specific in that it was directed only to Ms. Collier.").

Communications by postcard are expressly prohibited because of the risk that third parties will inadvertently see the message, 15 U.S.C. §§1692b(4) and 1692f(7), and a message sent by fax or left on a voicemail not known to be used solely by the debtor is the electronic equivalent of a postcard.

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)*; Krapf v. Collectors Training Institute of Illinois, Inc.,* 09-CV-391S, 2010. U.S. Dist. LEXIS 1306, 2010 WL 584020 (W.D.N.Y. Feb. 16, 2010); *Romano v. Williams & Fudge, Inc.,* 644 F.Supp.2d 653 (W.D.Pa. 2008); *Thomas v. Consumer Adjustment Co.*, 579 F.Supp.2d 1290 (E.D.Mo. 2008); *Krug v. Focus Receivables Mgmt., LLC*, 2010 U.S.Dist. LEXIS 45850 (D.N.J. May 11, 2010); *Leyse v. Corporate Collection Services*, 03 Civ. 8491 (DAB), 2006 U.S.Dist. LEXIS 67719 (S.D.N.Y. Sept. 18, 2006); *Wideman v. Monterey Fin. Servs.*, No. 08-1331, 2009 U.S.Dist LEXIS 38824 (W.D.Pa. May 7, 2009).

In *Marx v. General Revenue Corp.*, 668 F.3d 1174 (10th Cir. 2011), the court held that an "employment verification" sent to a consumer's employer was not a "communication" relating to a debt. "The facsimile was sent in September 2008 to Ms. Marx's employer as part of GRC's inquiry into Marx's eligibility for [administrative] wage garnishment. When a GRC agent called Ms. Marx's employer to verify her employment status, the agent was told to make the request in writing. . . . GRC sent its standard employment verification form. This form displays GRC's name, logo, address, and phone number, and bears an "ID" number representing GRC's internal account number for Ms. Marx. The form indicates that its purpose is to "verify [e]mployment" and to "[request] employment information"; blanks are left for the employer to fill in the individual's employment status, date of hire, corporate payroll address, and position, and to note whether the individual works full- or part-time." The court reasoned that "absent any evidentiary showing that Ms. Marx's employer either knew or inferred that the facsimile involved a debt, the facsimile does not satisfy the statutory definition of a "communication." A party may seek to verify employment status (without hinting at a debt) for any number of reasons, including as part of processing a mortgage, conducting a background check before hiring, or determining

eligibility for an extension of credit." The plaintiff "did not call any witnesses from her employer's office to testify as to what they inferred from the facsimile."

In *Muzuco v. Re$ubmitit, LLC*, Case No. 11-62628-Civ-SCOLA, 2012 U.S. Dist. LEXIS 110373 (S.D.Fla., August 7, 2012), the court held that the purchaser of a dishonored check cannot resubmit it to the debtor's bank because doing so is communicating with a third party about the debt.

XXI. 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).

XXII. 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.

XXIII. VIOLATIONS -- PLACE OF 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).

Cases are divided with respect to whether postjudgment collection proceedings must comply with 15 U.S.C. §1692i. Decisions holding that they must include *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994), in which the Ninth Circuit held that the venue provision reaches a writ of garnishment proceeding. Id. at 1515 ("The plain meaning of the term `legal action' encompasses all judicial proceedings, including those in enforcement of a previously-adjudicated right."). *Accord, Adkins v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 2:11-cv-00619, 2012 WL 604249 (S.D. Ohio Feb. 24, 2012); *Blakemore v. Pekay*, 895 F.Supp. 972, 982-83 (N.D. Ill. 1995).

Some decisions hold otherwise, relying on the ill-conceived notion that a postjudgment collection proceeding is not really "against the consumer" even though their purpose is to get the consumer's wages or assets. In *Pickens v. Collection Servs. of Athens, Inc.,* 165 F. Supp. 2d 1376, 1377 (M.D. Ga. 2001), aff'd, 273 F.3d 1121 (11th Cir. 2001), the court

held that a wage garnishment action did not fall within the FDCPA's venue provision because the action was not against "a consumer." Id. at 1380. *Accord, Smith v. Solomon & Solomon, P.C.,* CIV.A. 12-10274-RBC, 2012 WL 3636861 (D. Mass. Aug. 23, 2012); *Schuback v. the Law Offices of Phillip S. Van Embden, P.C.*, No. 1:12-CV-320 (M.D.Pa., Feb. 1, 2013).

XXIV. 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).

XXV. VIOLATIONS – FALSE STATEMENT OF LEGAL RIGHTS

The FDCPA prohibits a debt collector from misrepresenting its legal rights, even if no threat is made. *Easterling v. Collecto, Inc.*, 692 F.3d 229 (2nd Cir. 2012) (statement that student loan could never be discharged in bankruptcy, unaccompanied by any threat, is false and violated FDCPA).

XXVI. VIOLATIONS – SUIT BY PERSONS LACKING STANDING

If an entity does not own the account, or if it is not owed, the collector may not collect or sue. E.g., *Cox v. Hilco Receivables, L.L.C.*, 726 F.Supp.2d 659, 666 (N.D. Tex. 2010) ("Improperly identifying oneself as the owner of a debt is certainly a misrepresentation of that debt's legal status"); *Wallace v. Washington Mut. Bank, F.A.*, 683 F.3d 323 (6th Cir. 2012) (suing before ownership documents transferred); *Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238, 1241 (11th Cir. 2012) (misidentification of BAC as creditor); *Shoup v. McCurdy & Candler, LLC, 465* Fed. Appx. 882, 885 (11th Cir. 2012) (misidentification of MERS as creditor); *Gearing v. Check Brokerage Corp*., 233 F.3d 469, 472 -73 (7th Cir. 2000) (allegation in its state court complaint that it was "subrogated" to Ayerco's rights gave a false impression as to the legal status); *Grant-Hall v. Cavalry Portfolio Services, LLC*, 856 F.Supp.2d 929, 942 (N.D. Ill. 2012) (misrepresenting that CPS had the right to file suit); *Manlapaz v. Unifund CCR Partners* , 2009 WL 3015166 *5 (N.D. Ill. 2009) (suing on a debt it did not own); *Matmanivong v. Unifund CCR Partners*, 2009 WL 1181529 *5 (N.D. Ill. 2009) (same); *Hepsen v. J.C. Christensen and Associates, Inc.*, 2009 WL 3064865 *5 (M.D. Fla. 2009) (false representation of creditor's name); *Braatz v. Leading Edge Recovery Solutions, LLC,* 2011 WL 9528479 *1 (N.D. Ill. 2011) (identifying two companies might cause consumer to be concerned about the possibility she was being defrauded or that she might pay the incorrect creditor and continue to have outstanding debt).

XXVII. VIOLATIONS -- FALSE REPRESENTATIONS REGARDING TAX CONSEQUENCES

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.

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).

XXVIII. 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).

Suing the wrong person is a violation. *Heathman v. Portfolio Recovery Associates, LLC*, 12-cv-201, 2013 WL 755674 (S.D.Cal., Feb. 27, 2013) ("Section 1692e prohibits the use by a debt collector of 'any false, deceptive, or misleading representation or means in connection with the collection of any debt.' Donohue, 592 F.3d at 1030. Filing a state court complaint alleging a nonexistent debt clearly violates this section. See, e.g., Cox v. Hilco Receivable, L.L.C., 726 F.Supp.2d 659, 666 (N.D.Tex.2010) ('a debt collector's representation that a debt is owed to it when it in fact is not, amounts to a misrepresentation barred by the FDCPA.'). Here, the undisputed facts establish that PRA filed a state court collections complaint against Heathman alleging a debt not in fact owed by Heathman. . . . Thus, the record supports summary judgment as to liability under section 1692e.").

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 cases involving false statements in state court pleadings include *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, No. 09-35767, 2011 U.S. App. LEXIS 4072 (9th Cir., March 4, 2011); *Todd v. Weltman, Weinberg, & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006); *Hartman v. Great Seneca Financial Corp.,* 569 F.3d 606 (6th Cir. 2009); *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.*, Case No. 08 CV 6415, 2009 U.S. Dist. LEXIS 36287 (N.D. Ill. Apr. 28, 2009); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S. Dist. LEXIS 48722 (N.D. Ill. June 23, 2008); *Guevara v. Midland Funding NCC-2 Corp*., No. 07 C 5858, 2008 U.S. Dist. LEXIS 47767 (N.D. Ill. June 20, 2008); *Parkis v. Arrow Fin. Servs*., No. 07 C 410, 2008 U.S. Dist. LEXIS 1212 (N.D. Ill. Jan. 8, 2008); *Jenkins v. Centurion Capital Corp*., No. 07 C 3838, 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., Sept. 9, 2005), later opinion, 2006 U.S. Dist. LEXIS 36000 (W.D. Mich., June 2, 2006); *Reyes v. Kenosian & Miele, LLP,* 619 F.Supp.2d 796 (N.D.Cal. 2008); *Eckert v. LVNV Funding, LLC*, 4:08cv1802,

2009 U.S.Dist. LEXIS 65295 (E.D.Mo., July 28, 2009). 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.

In *Avery v. Gordon*, 08-139, 2008 U.S.Dist. LEXIS 86811 (D.Ore., Oct. 27, 2008), an action was sustained for attaching "generic" documents to complaints.

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." *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC,* 480 F.3d 470 (7th Cir. 2007).

Beler is often overstated by defendants: "Despite Beler, other district courts in the Seventh Circuit have allowed debtors to bring FDCPA claims alleging false statements and unfair acts during state court proceedings. *E.g., Guevara v. Midland Funding NCC-2 Corp.*, 2008 U.S. Dist. LEXIS 47767, 2008 WL 4865550, *5 (N.D. Ill. Jun. 20, 2008) (plaintiff may state FDCPA claim based on alleged misrepresentation and unfair collection practices in state court complaint); *Polzin v. Unifund CCR Partners*, 2008 U.S. Dist. LEXIS 112356, 2008 WL 2324618, *4 (E.D. Wis. Jun. 5, 2008) (granting leave to proceed on a FDCPA claim that creditor falsely stated amount of legal interest associated with debt in state court filings); *Parkis v. Arrow Fin. Servs.,* 2008 U.S. Dist. LEXIS 1212, 2008 WL 94798 (N.D. Ill. Jan. 8, 2008) (denying summary judgment on FDCPA claim for filing state court complaint that attempted to collect time-barred debt); *Jenkins v. Centurion Capital Corp.*, 2007 U.S. Dist. LEXIS 85218, 2007 WL 4109235, at *2-3 (N.D. Ill. Nov. 15, 2007) (denying motion to dismiss claim alleging failure to attach contract and details of assignments to state court complaint); *Foster v. Velocity Investments, LLC,* 2007 U.S. Dist. LEXIS 63302, 2007 WL 2461665, at *2 (N.D. Ill. Aug. 24, 2007) (denying motion to dismiss claim alleging misstatement of principal balance as including both principal and interest in state court complaint). These courts note that although the Seventh Circuit has questioned the applicability of the FDCPA to state court filings, it has not decided that issue. *Guevara,* 2008 U.S. Dist. LEXIS 47767, 2008 WL 4865550, *5; *Foster*, 2007 U.S. Dist. LEXIS 63302, 2007 WL 2461665, *2. Defendants distinguish *Beler* on the additional ground that the plaintiff in that case challenged the form or sufficiency of a state complaint and not any false representations in the pleadings. [¶] I find the reasoning in these district court cases to be persuasive. . . ." *Eichman v. Mann Bracken, LLC*, 689 F. Supp. 2d 1094, 1100 (W.D.Wisc. 2010).

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.

The Seventh Circuit has held that "fraud on the court" is not permissible theory and that FDCPA only applies to representations to debtors and persons standing in shoes of debtors. *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011).

Other courts hold that representations to third parties are actionable. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432,437-447 (6th Cir. 2006) (debt collector which submitted affidavit to court which falsely attested that the debtor's assets were not exempt was not immune from FDCPA liability); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 448-451 (8th

Cir. 2001) (service of garnishment summons, not authorized by law, on a bank holding a debtor's funds violated the FDCPA); *Sykes v. Mel Harris & Assoc., LLC*, 757 F. Supp. 2d 413, 423-424 (S.D.N.Y. Dec. 29, 2010)("sewer service" – presenting a court with an affidavit that knowingly and falsely stated that the defendant had been served with process, when the defendant had not been served – was covered by the FDCPA, even though an affidavit of service filed with the court is purely a representation to the court and not the debtor); *Spiegel v. Judicial Attorney Services, Inc.*, 09 C 7163, 2011 U.S. Dist. LEXIS 9350 (N.D.Ill., Feb. 1, 2011) (also involving sewer service); *Bowens v. Mel S. Harris & Assoc., LLC*, 07-CV-459S, 2008 U.S. Dist. LEXIS 16120 (W.D.N.Y., March 3, 2008) (same); *Campos v. Brooksbank*, 120 F. Supp. 2d 1271 (D.N.M. 2000) (same); *Owings v. Hunt & Henriques*, 08-cv-1931, 2010 U.S. Dist. LEXIS 91819 (S.D. Cal. 2010) (filing a false affidavit that a defendant is not protected by the Servicemembers Civil Relief Act).

In *Bandy v. Midland Funding, LLC*, No. 12–00491, 2013 WL 210730 (S.D.Ala., Jan. 18, 2013), the defendant debt buyer filed a case and appeared at trial without any witnesses or evidence, resulting in judgment for Bandy. Bandy filed an FDCPA action alleging that "Midland's intent, at the time of filing and throughout the [state court] litigation, was *not* to initiate the action and prove its claims in court; but rather, to imply to [Bandy], through its collection law firm and its collection lawsuit, that it was *willing* to prove its claims and thereby intimidate or otherwise coerce [Bandy] into 1) paying [Midland] or 2) taking no action and allowing [Midland] to obtain a default judgment." Bandy also alleged that Midland "routinely does so in many other state-court collection suits, without obtaining evidence and without ever intending to actually prove those claims." The court refused to find an FDCPA violation absent a specific misrepresentation: "Bandy cites several district court cases that have distinguished *Harvey* and *Deere* in declining to dismiss FDCPA claims arising from collection lawsuits in state courts. However, the Court is not persuaded by those cases. Unlike Bandy, who does not allege that the collection complaint contained *any statement* that Midland knew or should have known was false, in three of those cases the consumer-plaintiffs successfully stated FDCPA claims by alleging that representations made in the state court collection complaints themselves were intentionally false or deceptive. . . . Bandy's FDCPA claims rest on the allegation that Midland *chose* not to acquire evidence needed to prove its case, not that it was *incapable* of doing so or that it could *never* do so."

On the other hand, an essentially identical complaint was sustained in *Samuels v. Midland Funding, LLC*, 12-0490, 2013 WL 466386 (S.D.Ala., Feb. 7, 2013), which expressly rejected *Bandy*.

XXIX. VIOLATIONS – USING FALSE NAME

Courts have held that a debt collector avoids violating §1692 e(14) if "it properly registers its incorporated name and any alternate trade names in any of 1) the debt collection company's place of incorporation, 2) the debt collection company's principal place of business, or 3) the state in which the plaintiff was injured." *Boyko v. Am. Int'l Group, Inc*., 2012 U.S. Dist. LEXIS 81229, *8-9 (D. N.J. 2012).

The unsophisticated consumer should be able to tell without too much trouble what debt collection entity it is dealing with.

XXX. REMEDIES AND PROCEDURE

1. 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).

2. DISCOVERY

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

a. 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); *Kimbro 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.

b. 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); *Kimbro v. IC System*, 3:01CV1676, 2002 WL 1816820 (D.Conn. July 22, 2002).

c. 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).

d. 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).

e. Number of times offending collection letters were used. *Yancey v. Hooten*, 180 F.R.D. 203 (D.Conn. 1998)

f. 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). Discovery as to net worth includes financial statements, *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281 (C.D. Cal. 1998), bank statements, tax returns, back up documentation for any lines of credit, and credit card statements. *Duval v. Law Offices of Andreu*, CASE NO. 09-22636-CIV-UNGARO/SIMONTON, 2010 U.S. Dist. LEXIS 70617 (S.D. Fla. 2010). See also, *del Campo v. Am. Corrective Counseling Servs*., Case No.: C 01-21151 JW (PVT), 2009 U.S. Dist. LEXIS 103771 (N.D. Cal. Oct. 23, 2009); *Smith v. Greystone Alliance LLC*, 09 C 5585, 2011 U.S. Dist. LEXIS 95368 (N.D.Ill. Aug. 23, 2011).

g. 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).

h. 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).

i. 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."

j. Manuals relating to the practices in question. *Trevino v. ABC Am., Inc*., 232 F.R.D. 612 (N.D.Cal. 2006)*; Seifried v. Portfolio Recovery Associates, LLC*, 12-cv-0032, 2013 WL 3340685 (E.D.Okla., July 2, 2013).

k. Items which should generally be requested include:

(1) 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.

(2) Identify any testing done of defendant's collection letters.

(3) 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.*, 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.

(4) 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).

(5) 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).

3. QUESTIONS OF LAW VS. FACT

All Courts of Appeal other than the Seventh Circuit treat the issue of whether a collection letter complies with the FDCPA as one of law. *Terran v. Kaplan*, 109 F.3d 1428, 1432-33 (9th Cir. 1997) (determination of whether language in collection letter overshadowed or contradicted validation notice, like interpretation of language in contracts or similar written documents, does not turn on the credibility of extrinsic evidence and, therefore, presents a question of law to be reviewed de novo); *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225-26 (9th Cir. 1988); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33, 35 (2d Cir. 1996); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3rd Cir. 2000); *Peters v. General Service Bureau, Inc*., 277 F.3d 1051 (8th Cir. 2002).

The Seventh Circuit treats the issue as one of fact. The question is one for the trier of fact unless a reasonable trier of fact would have to find that the statement is or is not false or deceptive. In a case where the misleading or false character of the representation is not clear, the Seventh Circuit requires evidence such as a survey that people exposed to the statement were confused. *Hahn v. Triumph Partnerships LLC,* 557 F.3d 755, 757-58 (7th Cir. 2009); *Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643, 645-46 (7th Cir. 2009); *Muha v. Encore Receivable Mgmt*., 558 F.3d 623, 267 (7th Cir. 2009); *Williams v. OSI Educational Services, Inc.,* 505 F.3d 675, 678 (7th Cir. 2007); *Johnson v. Revenue Management Corp.*, 169 F.3d 1057 (7th Cir. 1999).

Finally, some statements are sufficiently confusing or misleading that a court should find them to violate the FDCPA unless the defendant explains why they are not confusing. *Muha v. Encore Receivable Mgmt*., 558 F.3d 623, 267 (7th Cir. 2009).

4. MATERIALITY

Several circuits have imposecd a materiality requirement on false or deceptive statements. *Hahn v. Triumph Partnerships LLC*, 557 F.3d 755, 757-58 (7th Cir. 2009); *Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643, 645-46 (7th Cir. 2009); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2010); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Corazzini v. Litton Loan Servicing LLP,* 1:09-cv-199 (MAD/ATB), 2011 U.S. Dist. LEXIS 63565 (N.D.N.Y. June 15, 2011).

"Statements are material if they influence a consumer's decision--to pay a debt in response to a dunning letter, for example, see *Muha*, 558 F.3d at 628--or if they would impair the consumer's ability to challenge the debt at issue. See *Berg v. Blatt, Hasenmiller, Leibsker & Moore LLC*, No. 07 C 4887, 2009 U.S. Dist. LEXIS 26808, 2009 WL 901011, at *7 (N.D. Ill. Mar. 31, 2009). AFNI's false statements are material in both related senses; AFNI's statements that it is "unable to investigate" a consumer's dispute due to "insufficient information" both impair the consumer's ability to challenge the debt at issue and influence his or her decision to pay the debt." *Hale v. AFNI, Inc.*, No. 08 CV 3918, 2010 U.S. Dist. LEXIS 6715, *22 (Jan. 26, 2010). Misrepresenting the financial consequences of not paying a debt is "material." *Lox v. CDA, Ltd.*, 689 F.3d 818 (7th Cir. 2012). Correct identification of the debt collector and the owner of the debt is "material." *Wallace v. Wash. Mut. Bank, F.A.*, 683 F.3d 323 (6th Cir. 2012).

All conduct specifically prohibited or disclosures specifically required by the FDCPA is "material." *Mark v. J. C. Christensen & Assoc., Inc.*, 09-100, 2009 U.S.Dist. LEXIS 67724, *11 (D.Minn. Aug. 4, 2009); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012) (violations of 1692e(11) are always "material"); *Garo v. Global Credit & Collection*

Corp., CV-09-2506-PHX-GMS, 2011 U.S. Dist. LEXIS 7737 (D.Ariz. January 26, 2011).

In *Massey v. On-Site Manager, Inc.*, 285 F.R.D. 239 (E.D.N.Y. 2012), the court stated (*20-22):

> Defendant's reliance on cases applying a materiality requirement to FDCPA §1692e claims is misplaced. Those cases address the provisions of FDCPA §1692e that prohibit false representations. In other words, they address the anti-fraud provisions of FDCPA §1692e. Materiality is almost always a required element in proving a fraud. See Hahn v. Triumph P'ships, 557 F.3d 755, 757 (7th Cir. 2009) ("Materiality is an ordinary element of any federal claim based on a false or misleading statement."). But FDCPA §1692e also contains other provisions that do not require a showing of materiality. For example, FDCPA §1692e(11) mandates that debt collectors disclose in the initial communication with a consumer that they are attempting to collect a debt. The failure to give the required disclosure is actionable *per se*, without any requirement of materiality. Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 374 (4th Cir. 2012) ("whether a materiality requirement attaches to other violations of §1692e has no impact on [plaintiff's] allegations that the defendants violated § 1692e(ll)."). Statutory damages are available for every consumer who has suffered a violation of FDCPA §1692e(ll), regardless of whether they were actually injured or not. See 15 U.S.C. §1692k(a)(2)(A).

For example, disclosing the present owner of the debt is specifically required and should always be "material." *Wallace v. Washington Mutual Bank, F.A.,* 683 F.3d 323 (6th Cir. 2012).

5. 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).

Cases are divided as to whether payment on a valid debt induced by an FDCPA violation constitutes actual damages. *Wiginton v. Pacific Credit Corp.,* 2 Haw. App. 435, 634 P.2d 111, 118 (1981), and *Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097 (W.D.Wash. 2012) (under state debt collection statute), hold that it does not. *Alonso v. Blackstone Financial Group*, 1:11cv1693, 2013 WL 3992122 (E.D.Cal., Aug. 2, 2013), *Hamid v. Stock & Grimes, LLP*, 876 F.Supp.2d 500 (E.D.Pa. 2012), and *Abby v. Page*, 1:10cv23589, 2013 WL 141145 (S.D.Fla., Jan. 11, 2013), hold that it does. If the debt is time-barred or there is another defense payment is actual damages. *Gervais v. O'Connell, Harris & Assoc*., 297 F.Supp.2d 435 (D.Conn. 2003).

Failure to verify a debt before proceeding with a collection lawsuit may entitle the consumer to damages, but not to dismissal of the collection case. *Midland Funding v. Pipkin*, 2012 UT App 185, 283 P.3d 541 (2012), at n. 1.

> Pipkin also argues that the Fair Debt Collection Practices Act (FDCPA), see generally 15 U.S.C.A. §§ 1692-1692p (2009 & Supp. 2012), precluded Midland from filing a collection action against Pipkin until Pipkin received information that he timely requested from Midland regarding the debt in accordance with the terms of the initial collection letter Midland sent Pipkin. The letter stated that Midland would "suspend [its] efforts to collect the debt (through a lawsuit, arbitration or otherwise) until [it] mail[ed] the requested information to [Pipkin]," pursuant to the FDCPA. See generally id. § 1692g(b) (2009) ("If the consumer notifies the

debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector."); id. § 1692k(a) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . . ."). While Midland's alleged failure to comply with the FDCPA may subject it to liability under the act, such failure is not a defense to liability for the underlying debt. See Balsly v. West Mich. Debt Collections, Inc., No. 3:11cv642-DJN, 2012 WL 628490, at *12 (E.D. Va. Feb. 27, 2012) (mem.) ("Pursuant to the FDCPA, [the alleged debtor] has a right to pursue his claim regardless of whether he is found liable on the debt . . .—the two rights are not coterminous."); United States v. Iwanski, 805 F. Supp. 2d 1355, 1359 (S.D. Fla. 2011) ("[A] violation of th[e FDCPA] does not relieve Defendant of his obligation to pay the underlying debt."); Vitullo v. Mancini, 684 F. Supp. 2d 760, 765 (E.D. Va. 2010) (mem.) ("Nothing in the FDCPA suggests, explicitly or implicitly, that debtors might seek declaratory judgments cancelling or extinguishing accrued debts, in lieu of damages, for FDCPA violations . . . ."); see also Schroyer v. Frankel, 197 F.3d 1170, 1178 (6th Cir. 1999); Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998); McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992) ("'The [FDCPA] is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists.'" (quoting Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982))); Torres v. ProCollect, Inc., No. 11-cv-02989-LTB, 2012 WL 1969280, at *3 (D. Colo. June 1, 2012) (mem.); Kolker v. Duke City Collection Agency, 750 F. Supp. 468, 471 (D. N.M. 1990) [**4] (mem.). . . .

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:

a. *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.

b. *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.

c. *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).

d. *Venes v. Professional Service Bureau*, 353 N.W.671 (Minn. App. 1984) ($6,000 for stress caused by telephone harassment).

e. *Smith v. Law Offices of Mitchell N. Kay,* 124 B.R. 182 (D.Del. 1991) ($3,000 for emotional distress).

6. 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).

Some cases have held that "frequency and persistence of noncompliance" pertains only to the debt collector's noncompliance with respect to the plaintiff. See, e.g., *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.Wisc. 1996). Other courts, in assessing statutory damages, appear to have considered the debt collector's noncompliance as to other debtors. *See, e.g., Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1459, 1467 (C.D.Cal. 1991); *Riveria v. MAB Collections, Inc.,* 682 F.Supp. 174, 179 (W.D.N.Y. 1988).

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.

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.

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); *Evanauskas 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); *Owens v. Brachfeld*, C07-4400, 2008 U.S.Dist. LEXIS 63701 (N.D.Cal., Aug. 20, 2008).

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*, 352 F.Supp.2d 262 (D.Conn. 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 serendipitiy 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.*, 549 F. Supp. 2d 193 (N.D.N.Y 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).

7. 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).

8. 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)."); *Oei v. N. Star Capital Acquisitions, LLC,* 486 F.Supp.2d 1089, 1095 (C.D. Cal.,2006) ("courts routinely hold debt collectors vicariously liable under the FDCPA for the conduct of their attorneys in collecting debts on their behalf").

In *Newman v. Checkrite*, 912 F.Supp. 1354 (E.D. Cal. 1995), the court stated:

> In this circuit, however, it is established that, under the FDCPA, a debt collector may be found vicariously liable for the conduct of its attorney. See *Fox v. Citicorp Credit Servs., Inc., 15 F.3d 1507, 1516 (9th Cir. [**31] 1994);* see also *Martinez v. Albuquerque Collection Servs., 867 F. Supp. 1495 (D.N.M. 1994);* and see 17 Am.Jur.2d Consumer Protection § 200 (1990). n19 The fact that an attorney may act as an independent contractor does not require a different result. Under general rules of agency, one who contracts to act on behalf of another and is subject the other's control, may be both an agent and an independent contractor. See Restatement of Agency Second §§ 2, 14N; *Harby v. Saadeh, 816 F.2d 436, 439 (9th Cir. 1987).* Accordingly, employers may be liable for the acts of independent contractors when an agency relationship is demonstrated. See *Sugimoto v. Exportadora de Sal, S.A. de C.V., 19 F.3d 1309, 1311-12 (9th Cir. 1994),* cert. denied, *130 L. Ed. 2d 496, 115 S. Ct. 581 (1994).* It has generally been said that an attorney is an agent even if employed for a single transaction and as an independent contractor. See Restatement (Second) of Agency § 1.

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."

9. 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).

Fee awards may exceed the damages. *Silver v. Law Offices Howard Lee Schiff, P.C,* Civil No. 3:09cv 912 (PCD) (D. Conn. Dec. 16, 2010) ($26,962 fees and costs on $1,001 statutory recovery); *Ellis v. Solomon & Solomon P.C.*, Civil No. 3:05CV1623, 2009 U.S. Dist. LEXIS 96785 (D. Conn. Oct. 20, 2009) ($36,000 fees and costs on $1,000 statutory recovery); *Carter v. Reiner, Reiner & Bendett, P.C.*, Civil No. 3:06CV988 (AWT) (D. Conn. Aug. 28, 2008) ($34,000 in fees and costs on $1,000 statutory recovery); *Goray v. Unifund CCR Partners*, Civ. No. 06-00214 HG-LEK (D. Hawaii June 13, 2008) ($53,522.50 in fees and $2048.57 in costs on $1000 statutory recovery); *Register v. Reiner, Reiner & Bendett, P.C.*, Civil No. 3:06CV987 (JCH) (D. Conn. Oct. 19, 2007) ($37,000 in fees and costs on $1,000 statutory recovery); *Torgersen v. Arrow Fin. Servs.,* 2007 U.S. Dist. LEXIS 50156 * 11-12 (N.D. Ill. June 29, 2007) ($8,427.98 in fees and costs on $1,500 Offer of Judgment); *McKinney v. Cadleway Props., Inc.*, 04 C 8248, 2007 U.S. Dist. LEXIS 41588 * 2, 7 (N.D. Ill. June 8, 2007), *affd McKinney v. Cadleway Props., Inc.,* 2007 U.S. Dist. LEXIS 79786 (N.D. Ill. Oct. 23, 2007) (affirming $40,595.50 in attorneys' fees and costs of $ 1,192.62 on a $1,000 judgment for statutory damages), revd on other grounds, 548 F.3d 496 (7th Cir. 2008) (reversing summary judgment entered in favor of the plaintiff); *Nelson v. Select Fin. Servs., Inc.*, 05-3473, 2006 U.S. Dist. LEXIS 42637 *4 (E.D. Pa. 2006) ($24,600 in fees on $1,000 statutory recovery); *Gradisher v. Check Enforcement Unit*, Case No. 1:00-CV-401, 2003 U.S. Dist. LEXIS 753, * 1, 29, 2003 WL 187416 (W.D. Mich. Jan. 22, 2003) ($69,872.00 in attorneys fees and $7,808.44 in costs on $1,000 statutory damages); *Armstrong v. The Rose Law Firm, P.A.*, Civil No. 00-2287 (MJD/SRN), 2002 U.S. Dist. LEXIS 16867, 2002 WL 31050583 (D. Minn. Sept. 4, 2002) ($43,180.00 in attorneys fees on recovery of $1,000.00 statutory damages)*; In re Martinez,* 266 B.R. 523, 544 (Bankr. S.D. Fla. 2001), aff'd 271 B.R. 696 (S.D. Fla. 2001) (affirming bankruptcy court's award of attorney's fees of $29,037.50 on recovery of $1,000 statutory damages); and *Perez v. Perkiss*, 742 F. Supp. 883 (D. Del. 1990) (the district court awarded $10,110 in attorneys fees where the plaintiff's recovery was $1,200).

The provision in §1692k that "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" is not a basis for a counterclaim; the relief must be sought by motion. *Rodriguez v. Portfolio Recovery Associates, LLC,* 841 F. Supp. 2d 1208 (W.D.Wash. 2012); *Kropf v. TCA, Inc.*, 752 F. Supp. 2d 797 (E.D. Mich. 2010) ("the Fair Debt Collection Practices Act does not create an independent cause of action for attorney's fees"); *Perry v. Stewart Title Co.*, 756 F. 2d 1197, 1211 (5th Cir. 1985) ("[t]o recover attorney's fees under the FDCPA, the prevailing defendant must show affirmatively that the plaintiff brought the FDCPA claim in bad faith and for the purpose of harassment"); *Hardin v. Folger*, 704 F.Supp. 355, 356-57 (W.D.N.Y.1988) (dismissing the counterclaim because section 1692k(a)(3) "provides relief, but not a claim, to defendants"); *Kirscher v. Messerli & Kramer, P.A.*, No. 05-1901 (PAM/RLE), 2006 U.S. Dist. LEXIS 3346, 2006 WL 145162 at *7 (D. Minn. Jan. 14, 2006) (dismissing the defendant's counterclaim, but permitting it to request attorney's fees by a separate motion filed at a later stage in the proceedings); *Young v. Reuben*, No. 04-0113, 2005 WL 1484671 at *1-2 (S.D. Ind. June 21, 2005) (same); *Allen v. Scott*, No. 3:10-CV-02005-F, 2011 U.S. Dist. LEXIS 8350, 2011 WL 219568 at *2 (N.D. Tex. Jan. 19, 2011) (noting that the "conclusion that § 1692k does not permit a bad faith counterclaim is consistent with the majority of decisions reached by other courts"); *Allers-Petrus v. Columbia Recovery Group, LLC*, C08-5533 FDB, 2009 U.S. Dist. LEXIS 41151, 2009 WL 1160061 at *1 (W.D. Wash. Apr. 29, 2009) ("if a plaintiff brings an FDCPA action and loses, subsection 1692k(a)(3) permits the court to award attorney's fees and costs to the defendant"). *Contra: Hylkema v. Palisades Collection, LLC,* C07-1679RSL, 2008 U.S. Dist. LEXIS 21241, 2008 WL 623469 (W.D. Wash. Mar. 4, 2008); *Ayres v. Nat'l Credit Mgmt. Corp.,* Civ. A. No. 90-5535, 1991 U.S. Dist. LEXIS 5629, 1991 WL 66845, at *5 (E.D. Pa. Apr. 25, 1991).

10. PERSONAL JURISDICTION

Most courts have held that FDCPA litigation is appropriately filed within the district where the consumer received the communication. *Pelaez v. MCT Group, Inc.*, 2:1-cv00733-KJD-LRL, 2011 U.S.Dist. LEXIS 13899 (D.Nev. Feb. 10, 2011); *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."); *Norton v. Local Loan*, 251 N.W.2d 520 (Iowa 1977) (a telephone call from the defendant's agent in Nebraska to the plaintiff in Iowa constituted "conduct in [the] state" sufficient for Iowa to exercise personal jurisdiction over the defendant). There is one case to the contrary: *Krambeer v. Eisenberg*, 923 F.Supp. 1170 (D.Minn. 1996).

The existence of jurisdiction and venue in the district where the communication was received is supported by *Felland v. Clifton*, No. 11-1839, 2012 U.S. App. LEXIS 11380 (7th

Cir., June 6, 2012), where the court held that a consumer who received a fraudulent misrepresentation in Wisconsin from an Arizona land developer could sue in Wisconsin. The complaint alleges that repeated communications to plaintiffs' Wisconsin home were part of a deliberate attempt to create a false sense of security and to induce plaintiffs to make payments. The communications are critical to the claim of intentional misrepresentation. Defendant was aware that the harm would be felt in Wisconsin. The allegations are sufficient to establish minimum contacts necessary to satisfy due-process requirements for jurisdiction in Wisconsin.

In *Vlasak v. Rapid Collection Systems, Inc.*, 962 F. Supp. 1096 (N.D. Ill. 1997), the defendant Arizona collection agency ("Rapid') challenged personal jurisdiction in Illinois because it had no offices there, did not solicit or conduct business there and, in its five year history, alleged it made "only two 'contacts' with Illinois in relation to its debt collection activities." *Vlasak* at 1097. In rejecting Rapid's position, the court in *Vlasak* explained: "Rapid clearly committed a 'tortious act' as defined by the long-arm statute." The court also explained that the phrase "tortious act" under Illinois' long-arm statute "is not limited to acts which create common law liability; instead, 'it encompasses any act that constitutes a breach of duty to another imposed by law'" (citations omitted). *Vlasak* at 1100. The court concluded "a violation of the FDCPA unquestionably constitutes a breach of a legal duty," noting that the FDCPA imposes a series of behavioral obligations on debt collectors, "and collectors who fail to comply with the provisions of the Act [FDCPA] may be liable for damages and attorneys fees." Id., citing *Bailey v. Clegg, Brush &Assocs., Inc.*, No. 90 CV 2702,1991 WL 143461 at 2 (N.D. Ga. 1991)(finding that alleged violations of the FDCPA "are analogous to the commission of a tortious act" under the Georgia long-arm statute.) Applying the *International Shoe* analysis, the court in *Vlasak* also noted "based on its [debt collection] phone calls and letters to *Vlasak*, Rapid had fair warning that it might be called before an Illinois court." *Vlasak* at 1101. The court explained "the main factor in the minimum contacts inquiry is not physical presence in the forum state but rather 'foreseeability'" ld., at 1102. Thus, "Rapid obviously had a very clear purpose in mind when it communicated with Vlasak in Illinois: to collect a debt on behalf of one of its clients." Id.

More recently, a California debt collection lawyer challenged personal jurisdiction in Ohio because "he has never been to Ohio and maintains no contacts with the state, business related or otherwise." *Vlach v. Yaple*, 670 F.Supp.2d 644,646 (N.D. Ohio 2009). Therein, the consumer alleged that Yaple engaged in debt collection communications with her in Ohio that violated the FDCPA as well as the Ohio Consumer Sales Practices Act ("OCSPA"). Citing *Vlasak* and other cases, the court found that Yaple [who sent three written communications that allegedly violated the FDCPA and the OCSPA] "should have reasonably expected that the recipient would have been injured in this state, given that the letter was addressed to an Ohio resident" (citations omitted). *Vlach* at 648.

The rulings of *Vlasak* and *Vlach* are supported by many other cases involving venue and jurisdictional challenges in debt collection cases filed in consumer's home states. See, i.e., *Sluys v. Hand*, 831 F. Supp. 321,324 (S.D.N.Y. 1993) (suits over alleged unlawful debt collection communications will be brought where the consumer receives the communication; «[o]therwise, one could invoke the protection of distance and send violative letters with relative impunity, at least so far as less well-funded parties are concerned."); *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2d Cir. 1992)(noting the harm does not occur until receipt of the collection notice, the court concluded that receipt of a collection notice "is a substantial part of the events giving rise to a claim under the Fair Debt Collection Practices Act."); *Murphy v. Allen County Claims & Adjustments, Inc.,* 550 F. Supp. 128, 132 (S.D. Oh. 1982)(venue and jurisdiction for a claim involving alleged unlawful debt collection communications are in the place where the telephone calls were received, and thus the place where the harm occurred, and

not the place where the calls were initiated as alleged by a nonresident collection agency).

The jurisdictional principles enunciated by the foregoing cases were not limited to written communications; rather, they apply to telephone calls, repossessions, or other tortious conduct that allegedly violates the FDCPA or state debt collection laws. Many courts have held that a single contact, even a single telephone call made to collect an alleged debt, provides sufficient contact for due process purposes to invoke the jurisdiction of the court in the state where the communication was received. In *Hyman v. Hill & Associates*, 2006 WL 328260 (N.D.III), the court found venue and jurisdiction proper for a nonresident debt collection agency that had made "more than one call to Illinois," noting "a single telephone call or letter directed by a defendant debt collector to a plaintiff debtor's home state may support venue in that state in an FDCPA action" citing several other cases discussed herein above. Similarly, in *Brooks v. Holmes. Rich & Sigler. P.C.*, 1998 WL 704023 (N.D.III.), the court found venue to lie based on a single act directed by the nonresident collection agency to the consumer's state of residence; when an individual receives allegedly unlawful calls or letters from a distant collection agency "it makes sense to permit the individual to file suit where he receives the communications." See also *Norton v. Local Loan*, 251 N.W.2d 520 (Iowa 1977) (a single allegedly unlawful debt collection call from another state into Iowa constitutes "conduct in this state" for due process purposes; the maker of such a telephone call assumes the burdens of Iowa law); *Heritage House Restaurants v. Continental Funding Group. Inc.*, 906 F.2d 276, 281 n. 6 (7th Cir. 1990) (a single transaction which gives rise to the cause of action amounts to purposeful availment of the privilege of conducting activities within the forum state; physical presence of a nonresident defendant when the transaction is not necessary to obtain jurisdiction); *Paradise v. Robinson and Hoover*, 883 F. Supp. 521,526 (D. Nev. 1995) (in a challenge to jurisdiction over an alleged unlawful debt collection communication the court noted 'it is well-settled that a single contact with the forum state, not involving the physical presence of the defendant, can be a sufficient basis upon which to establish jurisdiction over the defendant").

The court in *Paradise* explained the important distinction between telephone calls and letters made for other purposes and alleged unlawful communications:

> This is not a case where the communication involved is merely a means of conducting some other primary business within the forum. Here, the Robinson Defendants' 'communications in the forum state ... are the precise subject matter of this action pursuant to the FDCPA.' Paradise at 526 (citations omitted) (emphasis added).

See *Myers v. Bennett Law Offices,* 238 F.3d 1068 (9th Cir 2001)(good personal jurisdiction analysis in FCRA case); *Silva v. Jason Head, PLC*, 2010 WL 4593704, at *2-3 (N.D. Cal. Nov. 4, 2010) (a debt collection voicemail is an affirmative act conferring jurisdiction)*; Maloon v. Schwartz Zweben & Slingbaum,* 399 F. Supp. 2d 1108 (D. Haw. 2005).

11. 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:

a. Phony attorney letters, *Avila v. Rubin, supra; Stewart v. Slaughter*, 165 F.R.D. 696 (M.D.Ga. 1996);

b. "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);

c. 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, 2:95-CV-430C, 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).

d. 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).

e. 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).

f. 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).

XXXI. DEFENSES

1. 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.

The United States Supreme Court has held that errors as to one's obligations under the FDCPA are not protected by the bona fide error provision. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 176 L.Ed.2d 519, 130 S.Ct. 1605 (2010). Although the case dealt with an error in construing the FDCPA, its logic would lead to the same conclusion regardless of whether the error is one of construing the FDCPA, another federal statute, or state law.

A majority of lower courts hold that the defense is limited to clerical errors and cannot protect against 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).

If the bona fide error defense has any application to a mistake of law, an opinion of competent counsel or a regulatory agency should be required. *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008) ("relied on an informed, but mistaken, legal opinion"). 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).

2. 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.

The one year is subject to tolling under appropriate circumstances. *Kubiski v. Unifund CCR Partners,* 08 C 6421, 2009 U.S. Dist. LEXIS 26754 (N.D.Ill., March 25, 2009).

In the case of FDCPA claims based on violations in connection with the filing of legal actions, the statute runs from the filing of suit, subject to tolling if through the delay of service, "sewer service" or the like the debtor does not learn of the violation in time to bring suit within one year. *Serna v.Law Office of Joseph Onwuteaka, PC,* No. H-11-CV-3034 (S.D. Tex. June 19, 2012). The statute should not be routinely treated as running one year from the date of service, e.g., if it is served within a month or two of filing.

Decisions applying the FDCPA limitations period generally hold that, depending on the relationship between the acts, the plaintiff can either recover for an entire course of improper collection conduct continuing within a year prior to filing or for the acts committed during the year prior to filing. *Joseph v. J. J. MacIntyre Cos., L.L.C.*, 281 F.Supp.2d 1156 (N.D.Cal. 2003); *Arvie v. Dodeka, LLC*, H-09-1076, 2010 WL 4312907 (S.D.Tex., Oct. 25, 2010).

The Sixth Circuit holds that where there is a series of FDCPA violations in the course of collecting a single debt, beginning before the one-year limitations period and continuing into it, the consumer may recover for those violations within the one-year period. *Purnell v. Arrow Financial Services, LLC*, 303 Fed. Appx. 297 (6th Cir. 2008) (where the debt collector was asked to validate a debt prior to the one-year period, but failed to do so and continued collection activity, the consumer could recover for whatever collection activity occurred within the one year).

In *Langendorfer v. Kaufman*, 1:10cv797, 2011 WL 3682775, *3-4 (S.D.Ohio, Aug. 23, 2011), a court within the Sixth Circuit applied *Purnell* to hold that a violation of 15 U.S.C. §1692i, prohibiting legal action to collect a debt in a venue other than that where the consumer resides or signed the contract sued upon, continues as long as the collection litigation is being prosecuted, because "being forced to defend a collection action in a different venue is the very wrong that the statute intends to prevent and address." *Accord, Kline v. Mortgage Electronic*, 659 F.Supp.2d 940, 951-52 (S.D.Ohio 2009); *Solomon v. HSBC Mtge. Corp.*, 395 Fed.Appx. 494, 497-8 (10th Cir. 2010) (court agrees that "the *entire* amended complaint should not have been dismissed simply because *one* allegedly wrongful act occurred outside of the limitation period").

The court took the same approach in *Blakemore v. Pekay*, 895 F. Supp. 972, 982-83 (N.D.Ill. 1995) (Coar, J.), holding that where a collection lawsuit was filed in the wrong county more than one year previously, but postjudgment wage deductions occurred within one year, FDCPA claims based on conducting the wage deduction proceedings in the wrong county were timely. The consumer is harmed by the post-judgment collection proceedings in the wrong venue (the consumer may be compelled to appear, and is hampered by the distant forum in asserting any claim of exemption or other objection), and the wrong can be stopped at any time by the debt collector transferring the collection proceedings to the correct venue.

In *Hockenhull v. Law Office of Howard Lee Schiff, PC*, C.A. No. 12-415 S, 2012 WL 6525504 (D.R.I., December 13, 2012), the court held:

> While this Court has not yet addressed the issue of how the one year statute of limitations applies when some of the conduct occurred within the limitations period and some occurred outside of it, the courts that have considered the issue have found the continuous violation doctrine applicable and the action timely. See, e.g., Devlin v. Law Offices Howard Lee Schiff, P.C., Civil Action No. 11-11902-JGD, 2012 WL 4469139, at *7 (D. Mass. Sept. 25, 2012) (citing cases). As the Northern District of California put it:
>
> > The key is whether the conduct complained of constitutes a continuing pattern and course of conduct as opposed to unrelated discrete acts. If there is a pattern, then the suit is timely if "the action is filed within one year of the most recent date on which the defendant is alleged to have violated the FDCPA."
>
> Joseph v. J.J. Mac Intyre Cos., 281 F. Supp. 2d 1156, 1161 (N.D. Cal. 2003) (quoting Padilla v. Payco Gen. Am. Credits, Inc., 161 F. Supp. 2d 264, 273 (S.D.N.Y. 2001)).
>
> This Court agrees with the reasoning of its sister courts. The Complaint alleges that Defendants repeatedly called and harassed Hockenhull from December 2010 through November 19, 2011. (Compl. ¶¶ 7-12.) This is a clear pattern of conduct and not a group of unrelated, discrete acts. Thus the continuing violation doctrine applies and the applicable date for statute of limitation purposes is the date of the last phone call: November 19, 2011. The Complaint was filed on May 31, 2012, well before the one year statute of limitations deadline of November 19, 2012. Thus, all of Hockenhull's claims are timely.

3. *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 generally 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. 2007), 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)

4. 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.

5. 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,* 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 frustreate the underlying purposes of [the Colorado Employment Security Act] and collateral estoppel").

6. 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.

7. 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); *Cappetta v. GC Services LP*, 3:08cv288, 2009 U.S.Dist. LEXIS 80619, *27-30 (E.D.Va., Sept. 4, 2009); *Gonzalez v. Codilis & Assocs., P.C.,* No. 03 C 2883, 2004 U.S. Dist. LEXIS 5463 (N.D.Ill., March 30, 2004); *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).

Hamid v. Stock & Grimes, LLP, 876 F.Supp.2d 500 (E.D.Pa. 2012), rejects application of a state law voluntary payment defense:

> S&G contends that the Pennsylvania state law voluntary payment doctrine precludes Hamid from recovering the amount she paid in settlement of the underlying state action at trial in this case. We disagree. The FDCPA is a federal law and accordingly state law defenses are not relevant here.[2] See, e.g., Allen v. LaSalle Bank, 629 F.3d 364, 369 (3d Cir. 2011); see also Cappetta v. GC Servs. L.P., 654 F. Supp. 2d 453, 464 (E.D. Va. 2009). In Allen, our Court of Appeals determined that a New Jersey state litigation privilege did not "absolve a debt collector from liability under the FDCPA" because "common law immunities cannot trump the FDCPA's clear application to the litigating activities of attorneys." Allen, 629 F.3d at 369 (internal citations and quotations omitted). Similarly, here S&G may not use a state common law doctrine to avoid paying damages required by the FDCPA.
>
> We therefore turn to the FDCPA itself to determine whether Hamid may recover at trial the amount she paid to settle the underlying debt collection action. Congress has stated that its purpose in enacting the FDCPA was "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." 15 U.S.C. § 1692(e); see also Allen, 629 F.3d at 367. As our Court of Appeals observed in FTC, "[a] basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in

> default on their debt, deserve the right to be treated in a reasonable and civil manner." 502 F.3d at 165 (internal quotation omitted).
>
> The court in FTC explained that in enacting the FDCPA Congress noted, "`[o]ne of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay debts is minuscule.'" Id. at 165-66 (quoting S. Rep. No. 93-382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. at 1696)). The court further stated that "Congress recognized that `the 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.'" Id.
>
> It is clear from its underlying purpose that debtors may recover for violations of the FDCPA even if they have defaulted on a debt. It follows that debtors may recover the amount paid to settle a debt, if the debt collector violated the FDCPA in making the collection, as occurred here. Hamid paid some or all of the money she owed to Discover Bank only as a result of the untimely lawsuit filed by S&G on behalf of the Bank. If her payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected. We do not believe that Congress intended this result.
>
> Accordingly, Hamid may present evidence to the jury of all the actual damages she sustained, including the amount of money she paid to Discover Bank to settle the state court collection action. The court will then determine any statutory damages, costs, and attorneys' fees owed to her.

Similarly, in *Abby v. Paige*, Case No. 10-23589-CIV-KING (S.D.Fla., January 11, 2013), the court held:

> However, the voluntary payment doctrine does not have the effect of precluding FDCPA claims. Scott v. Fairbanks Capital Corp., 284 F. Supp. 2d 880, 895 (S.D. Ohio 2003). "The FDCPA is a federal law and accordingly state law defenses are not relevant here." Hamid v. Stock & Grimes, LLP, No. 11-2349, 2012 WL 2740869, at *2, ___ F. Supp. 2d ___ (E.D. Pa. 2012). Moreover, because the FDCPA permits a plaintiff to recover for violations of the law even when he defaulted on a debt, "[i]t follows that debtors may recover the amount paid to settle a debt" if the debt collector violated the FDCPA in connection with collecting that debt. Id. at *2.

"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).

Except as specified in the FDCPA, consent or waiver should not be a defense: "Out of an abundance of caution, we further note what should be obvious: a consumer's consent cannot waive protection from the practices the FDCPA seeks to eliminate, such as false, misleading, harassing or abusive communications. Permitting such a waiver would violate the

public policy goals pursued by the FDCPA." *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1171, fn. 5 (9th Cir. 2006).

8. 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). See *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011).

Todd involved allegations that exempt Social Security income had been seized because a collection attorney filed a false affdavit 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

§ 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 "Bureau" means the Bureau of Consumer Financial Protection.

(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 6a(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 Bureau. 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 Bureau, 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.

§ 1692l. Administrative enforcement

(a) Federal Trade Commission. The Federal Trade Commission shall be authorized to enforce compliance with this title [15 USCS §§ 1692 et seq.], except to the extent that enforcement of the requirements imposed under this title [15 USCS §§ 1692 et seq.] is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 USCS § 5511 et seq.]. For purpose of the exercise by the Federal Trade 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 USCS §§ 1692 et seq.] shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act [15 USCS §§ 41 et seq.] are available to the Federal Trade Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this title [15 USCS §§ 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. Subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 USCS §§ 5511 et seq.], compliance with any requirements imposed under this title [15 USCS §§ 1692 et seq.] shall be enforced under--

(1) section 8 of the Federal Deposit Insurance Act [12 USCS § 1818], by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to--

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(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 25A of the Federal Reserve Act ; and

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

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

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

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

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

(6) subtitle E of the Consumer Financial Protection Act of 2010 [12 USCS §§ 5561 et seq.], by the Bureau, with respect to any person subject to this title [15 USCS §§ 1692 et seq.].

The terms used in paragraph (1) that are not defined in this title [15 USCS §§ 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 USCS §§ 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 USCS §§ 1692 et seq.] any other authority conferred on it by law, except as provided in subsection (d).

(d) Rules and regulations. Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010 [12 USCS § 5519(a)], the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this title [15 USCS §§ 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 Bureau shall make reports to the Congress concerning the administration of its functions under this title [15 USCS §§ 1692 et seq.], including such recommendations as the Bureau deems necessary or appropriate. In addition, each report of the Bureau shall include its assessment of the extent to which compliance with this title [15 USCS §§ 1692 et seq.] is being achieved and a summary of the enforcement actions taken by the Bureau under section 814 of this title [15 USCS § 1692l]

(b) In the exercise of its functions under this title [15 USCS §§ 1692 et seq.], the Bureau may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title [15 USCS § 1692l].

§ 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 Bureau shall by regulation exempt from the requirements of this title [15 USCS §§ 1692 et seq.] any class of debt collection practices within any State if the Bureau 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 USCS §§ 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.