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01 - Debt Collector Defenses

When writing pleadings, you'll need case citations. NCLC has 1,000s of them. Study Jurisdictionary.

Debt Collectors Defenses and Counterclaims: Specific defenses to consumer's claims under the FDCPA are expressly provided by the act itself. FDCPA, and are discussed in this chapter, as are other debt collector claims, defenses, and counter claims. A common debt collector strategy of filing an offer of judgment in response to a consumer's FDCPA suit is discussed in 2.14.13.

2.14.13 - **OFFERS OF JUDGMENT**: Offers of judgment in general. Rule 68 of the FRCP provides a method for Defendants to settle suits that is very frequently used in FDCPA actions. Rule 68 provides that at any time, more than 10 days before trial, the collector may make an offer to allow judgment to be taken against the defending party for the money, or property, or to the effect specified in the offer with costs then accrued. Collectors frequently make offers of judgment in FDCPA cases, sometimes attempting to use Rule 68 to avoid liability for attorney's fees and for class action damages. An offer of judgment may be accepted within 10 days by written notice. Then either party may file the offer and Notice of Acceptance together with Proof of Service after which the clerk enters the judgment. *Ardito v. Wolpoff & Abramson, LLP (Feb 2009) Central District of California*. An offer of judgment may be accepted within 10 days by written notice. Then either party may file the offer. A Notice of Acceptance together with proof of service after which the clerk enters judgment. If the offer of judgment was not accepted, and the judgment eventually obtained is less favorable than the offer, the Plaintiff must pay the Defendant's post-offer court costs. These costs do not include the Defendant's post-offer attorney's fees, because the FDCPA defines "costs" as separate from attorney's fees. *Crossman v. Marcoccio (1986) 806f.2D 329.* As discussed below, Defendants in FDCPA actions sometimes attempt to use the offer of judgment to avoid class action liability altogether, or to avoid liability for the consumer attorney's fees or damages in individual case.

Offers of Judgment in individual cases: Some debt collectors file Offers of Judgment which provide for damages and costs, but do not specifically mention the payment of the consumer's attorney's fees. The debt collector then asserts that acceptance of the Offer of Judgment waive the consumer's right to recover attorney's fees. The DC's position is based on litigation under the Civil Rights Act, where the term "costs" includes the Plaintiff's attorney's fees for the purpose of an Offer of Judgment. The US Supreme Court has reasoned, "Thus absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purpose of Rule 68*." Marek v. Chesny US Supreme Course case 473 US 1,9,105S.CT.* (11:24)

02 – Collector's Use of Affidavits as Evidence

Collector's use of affidavits as to proffer evidence found in the affidavits themselves. This section examines the use of affidavits to authenticate or certify business records that are introduced into evidence. Thus this section examines affidavits meant to constitute evidence rather than those used just to authenticate other documentary evidence. With rare exceptions, affidavits are not admissible at trial *(LHR INC. v Ayree MD (2010) (consumerlaw.org/unreported)),* but collectors often use them to aid a Motion for a Summary or Default Judgment by having an employee state in an affidavit that the fact is true based upon the affiant's personal knowledge. Debt Buyers in particular, may seek to conceal their inability to produce the best evidence of a factual allegation by having an employee state in an affidavit that the fact is true. Affidavits must be made on personal knowledge, and show affirmatively that the affiant is competent to testify as to the matter stated therein. *(Palisades Collection, LLC. v. Gonzalez (2005); Citibank v. Martin; Unifund CCR Partners v. Dover; Luke v. Unifund CCR Partners (Tx Ap 2007))* An affidavit must indicate **the source** of the affiant's knowledge *(Sherman Acquisition II LP v. Garcia (Tx Ap 2007).*

Similarly, an attorney's affirmation, which is not based upon personal knowledge of the fact, has no probative value *(Citibank v. Beckerman (Ny Ap).* Thus when an affiant asserts that a statement was mailed to the consumer, the affiant must either attest to personal knowledge that the statement was mailed, or describe a regular office practice for mailing documents of that type *(Palisades Collection, LLC v. Gonzales; Norfolk Fin. Corp. v. MacDonald (Ma) – Debt Buyer's employee could not prove contract had been sent by creditor to consumer).* It is clearly inadequate for a debt buyer's employee to state in an affidavit without more that the originating creditor had mailed out a contract to the consumer, as the debt buyer's employee has no personal knowledge whether the originating creditor mailed the contract to the consumer.

Similarly, there can be little question that an employee of a third party debt buyer in a chain of transfers cannot authenticate a document memorializing the assignment from the first to the second debt buyer in a chain of transfers *(Wright v. Asset Acceptance Corp (Oh SD 2000); Norfolk Financial Corp v. Mazard (Ma Nov 12. 2009); Colorado Capital Investments Inc. v. Villar (consumerlaw.org/unreported)*. In a typical debt buyer situation, the affiant will not even have reviewed the file, but will have relied upon the fact that others have determined the accuracy of the information in the affidavit. The affiant does little more than sign a stack of affidavits i.e. "robo-signing" without any knowledge of an individual consumer's account, or even any knowledge of what type of information the collector might store on its consumer accounts or what support there might be for the information the affiant is swearing to.

A Federal Court explained how one debt buyer's affidavits were not based upon personal knowledge *(Midland Funding LLC v. Brent (Oh ND 2009).* The office fulfills about 200-400 affidavits per day. One of 10 specialists sign each affidavit after finding a stack of affidavits on a printer. After signing the affidavit, it is sent on to a notary located in a different office to be notarized. [The notary is supposed to witness the signature]. The specialist has no idea where the affidavit comes from, and rarely checks the information found on the affidavit; although the specialist has access to certain data to check in the in information in the affidavit. The affidavit is then sent on to a law firm to attach to a complaint. [Any time you have an affidavit from anyone, make standard procedure to Google the name of the notary and the name of the affiant, along with "robo-signer". This would be evidence that you can use that this is a known robo-signer].

Despite the affidavit claiming personal knowledge, the specialist has no knowledge of the debtor or the debtor's account. The specialist signing a particular affidavit is fairly random, while the affidavit claims that the affiant or one of the affiant's employees, was the one who hired the law firm to process the case. In fact, the affiant has no employees, and has no knowledge as to how the law firm was chosen. The affiant claims personal knowledge of the debt buyer purchasing the account, but the affiant also admits to having no role in the purchase of the account, and to not knowing any of the terms of the purchase.

(16:00) Finally, the affiant claims that the debtor is not a minor or mentally incapacitated, when the affiant has had no contact with the debtor. [How can they make that claim? Make an issue of that! It throws the credibility of the affidavit into question.] And of course, the affiant's signature is not properly notarized, because the notary did not witness the signature.

(17:10) **CONCLUSORY AFFIDAVITS AND MISSING ATTACHMENTS**- The affidavit should not be conclusory *(Luke v. Unifund CCR Partners (Tx Apl Aug 31 2007); Hay v. Citibank (Tx Apl Sep 14 2006)*. General statements in an affidavit which are only conclusions of law or fact do not prove a case *(Thomas v. OSI Funding Group Inc (Fl Cir Feb 2 2004).* Good examples of inadequate affidavits are those that state that the consumer owes a certain amount without attaching any documentation to support that conclusion *(LVNV Funding LLC v. Reilly (Ct Sup Ct Jul 17 2009); Suggs v. Sherman Acquisition LP (Fl Cir 2005); Capital One Bank v. Tony (Oh Ct Apl Mar 2007)*, and an affidavit claiming that an assignment has been made with attaching an actual assignment document *(Powers v. Hudson & Keyse LLC (Ga Ct Apl 2008); PRA III LLC v. MacDowell (Ny Civ Ct 2007); Palisades Collection LLC v. Gonzales (Ny Dec 12 2005).*

It is hearsay and incompetent for an affidavit to state that the affiant has reviewed a loan file, and that the debt is in default without in fact attaching the actual loan documentation *(New England Savings Bank v. Bedford Realty Corp. (Ct 1996); Topps v. Unicorn Insurance Co. (Il App 1995); Cole Taylor Bank v. Corrigan (Il Apl 1992).*

An affidavit clearly provides no evidence as to the nature of account statements, contracts, or other documents that are allegedly attached to the affidavit when the documents in fact are not attached *(Cole Taylor Bank v. Corrigan (Il Apl 1992); Luke v. Unifund CCR Partners (Tx Apl Aug 2007).* Such omissions occur surprisingly often, particularly with debt buyers. Thus an affidavit is inadequate where it references various documents as Exhibit A concerning the debt, but where Exhibit A is not attached to the affidavit *(Powers v. Hudson & Keyse LLC (Ga Apl Ct 2008).* A debt buyer's affidavits often reference a computer tape or schedule of accounts assigned to the debt buyer, but failed to attach the tape or schedule. [If that affidavit references something, it better be attached or you attack it as being hearsay] *(Gigli v. Palisades Collection LLC (Pa MD Aug 2008); Velocity Investments v. Bailey (Ct Sup Jun 2007); Wirth v. Cach LLC (Ga Apl 2009); Unifund CCR Partners v. Vo (Pa Feb 2009) (consumerlaw.org/unreported); Belmont Financial Services Group Inc. v. Hawkins (consumerlaw.org/unreported).*

Carefully review all documents of assignment, because they are often incomplete or illegible. [If they put any documents into a case that you can't read, they're worthless and need to be challenged]. In one case, the court found an assignment to be improper when the debt buyer submitted only4 pages of a 20+ page loan sale agreement. The court observed, the first page entitled "Loan Sale Agreement" merely identifies the parties, and states the effective date of the transaction. The second page contains a pair of signatures. The third page contains a redacted table of four accounts. These three pages do not appear to have any relationship to one another given that they were respectively numbered "I", "7", and "19 of 28" *(C&W Asset Acquisition LLC v. Somogyi (Mo Apl 2004).*

(33:00) **INCONSISTENT, SLOPPY, AND FALSE INFORMATION**- When documents are in fact attached to the affidavit, look for inconsistencies between the documents and the affidavit itself, which will call into question the evidence being proffered by the affidavit and by the documents. Similarly, look for inconsistencies between the affidavit, the complaint, a collector's Summary Judgment Motion, and other affidavits and documents in the case *(Unifund CCR Assignee of Providian v. Ayhen (Wa Apl Aug 2008); Recovery Management Systems Ltd v. Coburn (Oh Apl Nov 2008).* See if the affidavit also contains false statements. Look for statements that the affiant is employed by the Plaintiff, when in fact the affiant is employed by a collection agency hired by the Plaintiff. Does an affiant employed by a debt buyer claim to have personal knowledge of the practices of the original creditor when it would be impossible for the affiant to have that knowledge. In once case, the court cited with disapproval that debt buyer's affidavits and other documents that included three different interest rates, and referred to the debt buyer as being the original creditor, and the entity from whom goods or services were purchased *(Barajas v. Harvest Credit Management VI-B LLC (Tx Apl Aug 2008).*

(39:00) **NOTARIZATIONS AND SIGNATURES**- Look for deficiencies in the affidavit's signature and notarization. Is the name of the individual signing the affidavit disclosed on the affidavit? Is the affidavit properly signed and notarized? [Always do a Google search to see if these people are known robo-signers]. Some states require that an affidavit disclose the affiant's employer. Has the affidavit done this? A number of state laws require that sworn pleadings from other states be accompanied by a certificate authenticating the oath-giver's authority. And courts may reject sworn pleadings submitted without that certificate *(First National Bank of Dillsboro v. Mulford (In Apl (Aug 2011); Citibank v. Suen (Ny Apl 2005); Discover Bank v. Kagan (Ny Apl 2005),* particularly if the consumer objects *(MBNA America Bank v. Stehly (Ny Apl 2008).* Indiana's law, which is typical of such statutes requires out of state affidavits sworn before judges and notaries to be certified under the seal of the clerk of court in the county where such judge or notary practices. Other states may be more liberal in accepting out of state affidavits when they are properly notarized in that state, or even when the witness just affirms under the penalty of perjury. Also look for the sufficiency of the notarization. Robo-signing operations often can be sloppy on the score. For example, it is not uncommon for an affidavit to state that it signed by an affiant in one state, and the notary states that the affiant appeared before the notary in a different state *(HSBC Bank v. Thompson (Oh Apl Sep 2010)*. This in fact, is a felony in a number of states [where they have two different states – one for the affiant and one for the notary]. Look also to see what type of documentation the notary keeps of its notarizations, whether this comports with state requirements, and what information is derived from such documentation if kept. [Check into the Secretary of State and getting copies of the notary books for the dates].

(47:25) **CONSUMER USE OF A COUNTER-AFFIDAVIT**- [It's very important to submit a counter-affidavit] The consumer should consider submitting an affidavit to counter facts alleged in the collector's affidavit, thus placing those facts in dispute. This response should be enough to defeat the collector's Summary Judgment Motion. If the court finds the consumer's affidavit conclusory, or lacking in personal knowledge, the court should apply the same standard to the collector's affidavit. [You can make that an argument and put it in your documents. Don't be conclusory; don't have beliefs/opinions, only firsthand factual knowledge. Just one mistake can discredit the entire affidavit].

(51:05) **PROOF USING DOCUMENTS: THE BUSINESS RECORDS EXCEPTION**- Business records used to prove a collector's Causes of Action are hearsay. FRE 801(c) provides that. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Business records used to prove a collector's Causes of Action are hearsay, and must fit within the business records exception to the rules prohibiting hearsay evidence in order to be admitted into evidence. Most state rules of evidence are similar to federal rule of evidence 803(6),which establishes that a business record is exempt from the hearsay rule if it is "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record or data compilation. All is shown by the testimony of the custodian or other qualified witness, or by certification that complies with federal requirements as to such certification. Unless the source of information, or the method, or circumstances of preparation indicate lack of trustworthiness." *(Great Seneca Financial v. Felty (Oh Apl 2006); Citibank v. Cramer (Wa Apl. 2007).* One requirement is that the record be contemporaneous – that is, the record was created at the same time as the event the record as documenting occurred. The record is not admissible if it was created years later, by either the original creditor or by a debt buyer. The document must be kept in the regular course of a business activity as part of a regular practice of conducting that activity, thus the collector cannot create the record for use in litigation *(Rae v. State (Fl Apl 1994); Reach Out Inc. v. Capital Assoc. Inc. (Ga Apl 1985).* The record also cannot lack trustworthiness. Inconsistencies between the record and collector affidavits, pleadings, or other documents, can suggest a lack of trustworthiness in the records themselves. [Bring this up – "There are too many discrepancies, your honor. This information is not trustworthy."]. If the documents are introduced as true copies of what was sent to the consumer, they should not contain handwritten notes that were added after the document was sent to the consumer.

(56:40) **GENERAL REQUIREMENTS FOR AFFIDAVITS CERTIFYING BUSINESS RECORDS-** General requirements for affidavits certifying business records, when business records are introduced at trial, they are introduced by the testimony of the Custodian of those records, or some other qualified witness - FRE 803(6) [They can't just be introduced by anybody. Not the lawyer]. When they are utilized as attachments of a Summary Judgment Motion, they also must be certified by a Custodian of the records, or other qualified person. ***The witness or affiant must be familiar, not just with the record, but with how the business records were created***.

The Federal Rule concerning this certification states that the business record should be:

(A) Accompanied by a written declaration of it's custodian, or other qualified person [Declaration is a sworn statement], certifying that the record:

(a) was made at, or near the time of the occurrence of the matter set forth, by, or from information transmitted by, a person with knowledge of those matters

(b) was kept in the course of a regularly conducted activity

(c) was made by the regularly conducted activity as a regular practice FRE 902(11).

Documents must be accompanied by an affidavit that is made on personal knowledge, sets forth facts as would be admissible in evidence and shows that the affiant is competent to testify to the matter stated in the affidavit [How can somebody show that they are competent to testify to the matter stated in the affidavit? Can you make an argument? –Do you have knowledge of this? –How do you have knowledge?] *(Great Seneca Financial v. Felty (Oh Apl 2006); Palisades Collection LLC v. Kalal (Wi Apl 2010); Unifund CCR Partners v. Lett (Al May 2009) (consumerlaw.org/unreported)*. This is the case even for an affidavit from the originating creditor. *(HSBC Bank v. Griswold (Wi Apl 2010)*. If the affidavit does not explicitly state that the affiant has personal knowledge of the creation of the records, then the records cannot be introduced. [Somebody says, "I have knowledge of the records." "Really? How"? "I looked at a computer screen." "Do you have knowledge of the creation? How the account is set up? Who does what? What is the procedure? **Where does the original application go**??] *(Chase Bank v. Curren (Oh Apl Dec 2010))*. It is not enough that an affiant is familiar with the business records, the affiant must be familiar with how the records must be created near the time of the charges being incurred. *(HSBC Bank v. Griswold (Wi Apl 2010)*. Business

Records cannot be the basis for the collector's Summary Judgment Motion if they are unaccompanied by an affidavit swearing to, or certifying the records *(Unifund CCR Partners v. Harrell (Ct Aug 2005) (consumerlaw.org/unreported); Suggs v. Sherman Acquisition LP (Fl Cir Sep 2005)*. A debt buyer cannot merely file documents received from the original creditor, even if they are retained in the debt buyer's regular course of business. They must have been kept in the original creditor's regular course of business, and an affidavit must authenticate that fact.

Similarly, an affidavit cannot certify documents if the substance of the documents conflicts with the documents themselves *(Palisades Collection LLC v. Gonzalez (Ny Dec 2005); Barajas v. Harvest Credit Management VI-B LLC (Tx Apl Aug 2008)*. For example, an affidavit may state a total dollar amount owed, while component numbers in the attached business records may add up to a different number. In one case, the court cited with disapproval, a debt buyer's affidavits and other documents that included three different interest rates, and which referred to the debt buyer as being the original owner in the end where goods or services were purchased.

03 - Void Judgments Part 1

NCLC Collection Actions Second Edition

11.3.1 **Introduction**-

Studies find that over 80% of consumer collection actions result in Default Judgments. Later, particularly when a creditor initiates post-judgment remedies [After they get the judgment, and want to come after you and collect], consumers may seek legal representation, or attempt on their own to open the Default Judgment.

Consumers may also seek to set aside a Stipulated Judgment. Stipulated Judgments consented to, in the original credit documents, known as "cognovits" or Confessions of Judgment are generally illegal. They're generally illegal and will not be considered in this publication, nor will this section discuss settlements reached at arms length when the consumer is represented by an attorney [Because then it's a different ball game when you have an attorney]. Such settlements are examined elsewhere in the manual.

When an unrepresented consumer attends a court hearing on the debt, a favorite collector technique, sometimes encouraged by judges or other personnel, is to take the consumer out into the corridor and resolve the matter without appearing before the judge. This procedure has clear potential for abuse, as unrepresented consumers go up against sophisticated collection attorneys, and then sign documents they do not fully understand. Often without being fully informed about their options to contest the matter in court.

Even though the consumer may have valid defenses, collectors may succeed in obtaining more than they could have obtained from the court just by persuading the consumer to sign a stipulation for judgment drafted by the collector's attorney. [If the collector's attorney is drafting something, which way do you think it's going to be tilted?]. The stipulation may be one-sided, including inflated amounts as to the balance due, future interest charges, and attorney's fees. As a result, the ability to set aside a Stipulated Judgment will be considered in this action along with the ability to set aside a Default Judgment.

State rule for setting aside a judgment are generally identical, regardless of whether the judgment is a result of a default, stipulation, or a contested action. As a result, this section considers how to set aside a judgment in any of these situations with special emphasis on Default Judgments and to a lesser extent, on Stipulated Judgments into which a consumer may have entered.

(6:18) 11.3.2 **General Principles**-

The first step in setting aside a Default Judgment should to be to fax or otherwise contact the collector's attorney, and ask the attorney to voluntarily set aside the judgment. [This may seem strange, but practitioners report surprising success with this request. If you're doing this as a Pro Se, you may not have quite as much success as with an attorney, but keep in mind, this is the first step].

Certain trial judges have little sympathy for even unsophisticated Pro Se Defendant's who fail to properly answer and contest a collection action, and are [not inclined] to set aside default judgments.

But state laws generally favorable to allowing a Default Judgment to be set aside. A state's procedure to set aside a judgment is remedial, and should be liberally construed so that "**justice is served**" *(Kay v. Marc Glassman Inc., 665 N.E.2d 1102 (Ohio 1996)*. For example, the New Jersey Supreme Court has stated that a court should view the opening of Default Judgments with great liberality, and should tolerate every reasonable ground for indulgence to the end that a just result is reached *(Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n 625 A.2d 484, 486 (N.J. 1993); Geer v. Jacobsen, 880 So. 2d 717 (Fla. Dist. Ct. App. 2004); LVNV Funding L.L.C. v. DiCicco, 2010 WL 4107856 (N.J. Super ct. App. June 22, 2010); NCO Portfolio Mgmt. v. Lorenzo, 2010 WL 3516751 (N.J. Super Ct. App. Div. Sept 10, 2010)*. Doubts should be resolved in favor of the consumer who is seeking to reopen the Default Judgment *(Mancini v. EDS ex rel. N.J. Auto. Full Ins. Underwriting Ass'n 625 A.2d 484, 486 (N.J. 1993); Portfolio Recovery Associates LLC v. Thacker, 2009 WL 2675665 (Ohio Ct. App. Aug. 28, 2009)*.

Washington Supreme Court has stated that it "Is the policy of the law that controversies be determined on the merits rather than by default". *(Griggs v. Averbeck Realty Inc., 599 P.2d 1289, 1292 (Wash. 1979) quoting Dlouhy v. Dlouhy, 55 Wash. 2d 718 (Wash. 1960)*. A New York Appellate court also has stated that a defendant's default should be reopened in view of the showing of a potentially meritorious defense. The absence of legal prejudice to the Plaintiff, as a result of the delay and a strong public policy of resolving disputes on the merits *(Capital One Bank v. Roman, 841 N.Y.S.2d 825 (N.Y. Sup. Ct. 2007)*.

A number of state Supreme Courts have stated that Default Judgments are disfavored, and the trial court is vested with **broad discretion to set them aside** *(Idaho State Police ex rel. Russell v. Sharp Prop Situated in County of Cassia, 156 P.3d 561 (Idaho 2007); Asset Acceptance LLC v. Moberly, 241 S.W.3d 329 (Ky. 2007); Kennedy v. Black, 424 A.2d 1250 (Pa. 1981); Asset Acceptance LLC v. Moberly (Ky Apl May 15 2009)*. The trial judge's decision will not be disturbed on appeal, absent and abuse of discretion [If the judge hasn't abused his discretion, the appeals court will not change it] *(Atlantic Credit & Finance v. Dustrude (Mn Apl Mar 2008) Mancini v. EDS ex rel. N.J. Auto Full Ins. Underwriting Ass'n (Nj 1993)*.

(19:00) 11.3.3 **State standards for setting aside a judgment-**

The precise standards to set aside a Default Judgment are found in the state statutes or Rules of Procedure. Procedures differ for different level courts within the same state, and from state to state. A good starting point is the Federal Rules of Civil Procedure, because many states pattern their procedures after these rules. FRCP 55(c) states that A Default Judgment can be set aside pursuant to rule 60(b), and most states have a parallel rule. The Federal version of rule 60(b) states that A final judgment can be set aside for the following reasons:

1) Mistake, inadvertence, surprise, or excusable neglect;
2) Certain newly discovered evidence;
3) Fraud, misrepresentation, or misconduct by an opposing party;
4) The judgment is void;
5) The judgment has been satisfied, released, or discharged;
6) Any other reason that justifies relief.

(23:12) Rule 60(d) states that rule 60(b) does not limit a court's power to entertain an independent action to set aside a judgment for fraud on the court [If somebody has made fraud upon the court in getting a judgment against you, you're not prohibited from going after them].

The same standards for setting aside a Default Judgment apply to setting aside a stipulation for judgment or a litigated judgment. State rules generally follow the example of the federal version of Rule 60(b), which states that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons." [1] By its own language, this rule applies to any type of judgment and not just the Default Judgments.

[1]The amount of variation differs by state (see example AZ Rule Civ P 60(c)), largely following the Federal Rule, but shortening the one year period to 6 months. KY – little variation. MN – interpreting any other reason that justifies relief to be limited to a reason that is extraordinary in nature (awful rule). NJ – little variation. NY – time periods are different; 'lack of jurisdiction is a ground' instead of 'judgment is void', and other reason that justifies relief is not included. OH – believes 'judgment is void' as a ground.

Most states enumerate similar ground to those found in Rule 60, but there are variations, and thus it is important to carefully parse a particular state's standards. One court has estimated that 35 states have adopted language substantially the same as the Federal Rules. 8 states have reserved equity, or brought powers to revise a final judgment; and the remainder limit the grounds to be set aside a judgment to specific certain situations *(Andresen v. Andresan (Md 1989).*

Some states also allow a Default Judgment to be set aside within 30 days, without requiring any special reasons for the action. (Example: AK RCP 55(c)). Maine has a second standard applicable specifically to collection actions on consumer debt allowing either the court, on its own, Motion, or the consumer to seek, while the court retains jurisdiction to modify or revoke the order, as the "interest of justice" may require. Maryland's rules allow for a Default Judgment to revised only for fraud, mistake, or irregularity, newly discovered evidence, or clerical mistakes. These terms are strictly applied and thus it is important to carefully parse a particular state's standards. One court has estimated that 35 states have adopted language substantially the same as the Federal Rules. 8 states have reserved equity, or brought powers to revise a final judgment; and the remainder limit the grounds to be set aside a judgment to specific certain situations *(Bland v. Hammond (Md Apl 2007).*

Georgia, Connecticut, and Iowa are other examples of states that are far more restrictive than the Federal Rules, as to the grounds to set aside a judgment. Georgia limits the grounds to lack of jurisdiction, fraud, accident, or mistake, as the acts of the adverse party have mixed with the negligence or fault of the movant. [Movant is the party that's bringing the suit]. Or a non-amendable defect, which appears upon the face of the record or pleadings, showing that no claim in fact existed.

Connecticut sets a strict 4-month time limit on reopening a Default Judgment, and requires a showing of reasonable cause, or that a good cause of action or defense, in whole or in part, existed, and that Plaintiff or Defendant was prevented by mistake, accident, or other reasonable cause for making the defense.

Iowa has a similar provision with a 60-day deadline. But even in these states, the consumer should be able to set aside the judgment after that period if the court lacked jurisdiction to award the judgment, such as when the consumer was never properly served with process.

(31:20) 11.3.4 **Timing considerations**-

FRCP 60(c) requires that a Motion under rule 60(b) be made within a reasonable time, and for reasons (1), (2), and (3) no more than 1 year after the entry of judgment:

1) Mistake, inadvertence, surprise, or excusable neglect;
2) Certain newly discovered evidence
3) Fraud, misrepresentation, or misconduct by an opposing party *(First Resolution Investment Corp. v. Coffey (Oh Apl Dec 2007)*

(32:50) Some state rules provide on 4 or 6 months (AL – 4, AZ – 6, CA – 6, CT – 4), to make such a Motion, instead of 1 year, while others appear to have no time limits (AR – no time limits). Rule 60(c) does not set a time limit other than within a reasonable time for the other 3 grounds to set aside a judgment (4), (5), (6). In addition, Rule 60(d) states that rule 60(c) on timing does not limit a courts power to entertain an independent action to set aside a judgment for fraud on the court. So that there is no time limit on such an action. [If you have a situation where there is obvious fraud, there is no time limit]. Whether or not there is a 1-year limit, an action under 60(b) must be brought within a reasonable time, which will depend on the totality of circumstances *(Great Seneca Finance Corp. v. Dwek (Nj Apl Apr 2008)*. When a consumer moves to set aside the default shortly after learning of the judgment, the motion will generally be considered to be made within a reasonable time. The sooner the motion is brought the stronger will be the consumer's position. Courts will look for the consumer's diligence in bringing the Motion to Set Aside Judgment after the consumer realizes action is necessary. While the consumer should act promptly when the consumer becomes aware of the need to set aside the judgment, this does not mean the consumer needs to immediately file a motion, but can instead enter into discussions with the other party *(Webb v. Erickson (Az 1982)*. Moreover, courts have stated that it is only a secondary factory whether the consumer showed due diligence in seeking to set aside the default after realizing such action is necessary *(Little v. King (Wa 2007)*. Counting from when a judgment is issued, there is no fixed time frame when the Motion to Set Aside the Judgment must be brought, as long as the action is brought within any maximum time period. (Example is 1 year for certain grounds). Certainly, 1 month is a reasonable time frame *(Columbia Recovery Corp. v. Menchaca (Nj Apl Mar 2008); General Motors Acceptance Corp. v. Deskins (Oh Apl 1984) – motion timely when filed 3* *months after judgment entered, and 1 month after Defendant learned of judgment*. An appellate court has found an 8 month delay to be reasonable where the consumer retained legal counsel after the default, but the counsel failed to take action for 6 months. The consumer then had to retain other counsel explaining the 8 month delay *(Capital One Bank v. Largent (Mo Apl 2010)*. In cases where the consumer seeks to set aside a default for any other reason that justifies relief, courts have also allowed the consumer to bring the action years after the judgment; 4½ in one case, where the individual had no reason to believe the action was related to that individual, and the individual's mental and physical condition was impaired at the time *(Webb v. Erickson (Az 1982)*. In another case, it was allowed 9 years after the judgment *(NY Hospital v. Robinson (Nj Apl May 1999)*. Moreover, where a judgment is void, there should be no limit at all for the consumer's right to bring an action to set aside the judgment.

(41:50) 11.3.5 **Meritorious Defense**-

Before setting aside a judgment, courts typically want to be satisfied that the consumer has a meritorious defense [you have some legitimate sense of why you should be able to do that] *(Geer v. Jacobson (Fl 2004); Asset Acceptance LLC v. Moberly (Ky 2007); Capital One Bank v. Largent (Mo 2010); Asset Acceptance LLC v. Scott (Nj Apl 2007)*. The court may not want to expend resources deciding whether to set aside a judgment, and then retry the case if the consumer has no defense to the action. The meritorious defense should be pleaded with some particularity, more so than in responding to the original complaint. [When you're going back trying to vacate a judgment, you want to come up with some good, solid arguments. Don't have weak arguments, or the court will say you didn't show any good definite reason, so we wont]. *(Meglan, Meglan & Co v. Bostic (OH May 2006)*. Nonetheless, the consumer need only allege a meritorious defense; not prove that the consumer will prevail on that defense. *(Meglan, Meglan & Co v. Bostic (OH May 2006); Portfolio Recovery Assoc. LLC v. Thacker (OH Aug 2009)*. A proffer defense is meritorious when it is not a sham, and when, if true, it states a defense, in part, or whole, to the claims for relief set forth in the complaint. [Go back and look at what the original complaint said] *(Meglan, Meglan & Co v. Bostic (OH May 2006)*.

The consumer's allegation of a meritorious defense certainly can be made by affidavit. There need not be a mini-trial of the facts *(Webb v. Erickson (AZ 1982); (Meglan, Meglan & Co v. Bostic (OH May 2006)*. Courts may not even require that evidence supporting the defense be presented as part of the Motion. [Dave would suggest that when you try to get rid of a default judgment, you want to include an affidavit, because that's putting you on record in a sworn statement that certain things did or did not happen].

Although a meritorious defense can be almost any valid defense, courts may look more kindly on the consumer's Motion when the consumer's defense is apparent on the face of the collector's pleadings. As when the form of the complaint fails to meet state requirements. [Check to see if the complaint they made even met state requirements] *(Atl. Credit & Finance, Inc. v. Guiliana (PA 2003)*. When a complaint fails to meet state requirements or insufficient evidence was presented, to support a prima facie case. [Some of these debt collectors don't even include a lot of what they need to make a case when they file it] *(Morales v. Santiago (NJ Apl 1987)*. Similarly, when the consumer claims never to have opened an account, a meritorious defense is established when the collector offers little evidence that the individual opened the account, or was otherwise obligated on the account *(Columbia Recovery Corp. v. Menchaca (NJ Apl Mar 2008)*.

(51:50) 11.3.6 **Prejudice to the prevailing Party**-

A few courts consider as one factor in determining whether to set aside a judgment, whether setting aside the judgment will cause substantial prejudice to the opposing party *(Rule v. Capital One Bank (KY Apl Mar 2007); Atl. Credit & Finance v. Dustrude (MN Apl Mar 2008); Little v. King (WA 2007)*. But this has been called a secondary factor, just one factor to be weighed among others. Prejudice also is more than that the collector may not win on the merits if the judgment is set aside. The prejudice is not that the case may have a different outcome, but that the other party is no longer able to present its case because of the passage of time. [If a case is too old, and they can't recreate and re-prosecute, that is prejudicial to them]. An example of prejudice that may be sufficient to merit denial a Motion to Set Aside a Default, is the Plaintiff's death, when the Plaintiff's estate would be without a witness if the case had to be re-litigated *(Grunke v. Kloskin (MN 1984)*.

11.3.7 **MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT**-

The most common ground to set aside a Default Judgment is mistake, inadvertence, surprise, or excusable neglect. Most cases focus on whether the consumer's neglect in responding to the case was excusable, but the Federal Rule and similar State Rules also allow a judgment to be set aside because of M, I, S. For example, consider where a consumer was under the impression that a settlement with a collector would result in the case's dismissal, but the collector obtained a default even though the consumer was meeting the terms of the settlement. The consumer's failure to participate could be termed 'mistake' or 'surprise' as easily as 'excusable neglect'. **Mistake may also apply to an unrepresented and unsophisticated consumer's confusion as to what legal rights are available and how to contest a proceeding** ["I didn't know. I want a fair hearing. I just want my day in court"]

Courts generally find that excusable neglect means that the consumer has a reasonable excuse for failing to respond to the complaint. The Ohio Supreme Court has defined excusable neglect in the negative by stating that "The inaction of the Defendant is *not* excusable neglect, if it can be labeled as a complete disregard for the judicial system". [Somebody that's pissed off at the courts, claiming it's corrupt, the courts are not fair at all, etc… Don't present that type of disregard. Using the word "mistake" is very important in legal matters, because "mistakes" can be corrected.] *(Kay v. Marc Glassman Inc. (OH 1996); Asset Acceptance LLC v. Alan (OH 2009) – Consumer has burden of showing excusable neglect.*

The excuse need not be something beyond a consumer's control, thus the United States Supreme Court distinguished excusable neglect from another ground listed in Rule 60 to set aside a judgment which is "Any other reason that justifies relief". The court found that unlike excusable neglect, any other reason that justifies relief only applies to factors of which the consumer has no control *(Pioneer Investment Services Co. v. Brunswick Associates LP (US 1993); Asset Acceptance, LLC v. Moberly (KY 2007)*. Thus excusable neglect by implication can relate to factors over which the consumer has no control. But where the consumer still did not act.

Excusable neglect has been found where:

- The consumer has been out of town for several weeks without checking his mail;
- A Pro Se Defendant was confused as to court procedure, or ignorant concerning the consequences of default *(TCI Group Life Ins. Plan v. Knoebber (9th Cir) – Lack of familiarity with the legal system while not sufficient in itself to demonstrate excusable neglect, is a relevant consideration. So is depression following spouse's death; Canfield v. Van Atta Buick/GMC Truck Inc. (2nd Cir 1997) – Lack of familiarity with court rules may constitute excusable neglect*.
- The consumer, after receiving a complaint, was told to "forget it" by the creditor's attorney *(General Motors Acceptance Corp. v. Deskins (OH 1984)*.
- The consumer promptly asked an attorney for advice. Subsequent court notices went to the attorney, and the attorney never informed the consumer that the attorney was not taking the case.
- A Pro Se litigant failed to inform the court of his new address. The consumer requested a continuance, but never received notice of the new court date, so did not attend. The collector sent the notice to the wrong address.
- The consumer is incarcerated, and did not receive notice of the action.
- The consumer's husband appeared for the 3rd time on behalf of the consumer and the collector suddenly objected to the non-attorney husband representing the consumer, which led to a Default Judgment *(Capital One Bank v. Largent (MO 2010)*.

An important issue is whether failure to understand English can be the basis for excusable neglect. Two Delaware cases show some possible distinctions. In one case, the court found excusable neglect when the Defendant could not speak or write English, and depended on friends for translations, and when this language problem led to actual confusion *(Canton Inn Inc. v. Sec. Ins. Co. (DE Sup Ct. Jan 1986)*. The court found excusable neglect even though the Defendant spoke some minimal English, and ran a successful business. On the other hand, the court found no excusable neglect when the English was the Defendant's second language and the Defendant was somewhat difficult to understand, but spoke and understood English and did not need a translator.

11.3.8 **NEWLY DISCOVERED EVIDENCE**-

FRCP 60(b)(2) Lists that grounds to set aside a judgment newly discovered evidence that with reasonable diligence, could not have been discovered in time to move for a new trial under rule 59(b) *(Cavalry Portfolio Services LLC v. Laufgas (NJ Apl Mar 2010)*. Under Rule 59(b), a party has 28 days to seek a new trial. As a result, if evidence is discovered within 28 days of a judgment, the proper procedure under the Federal Rules is to seek a new trial. After 28 days, the proper practice is to seek to set aside the judgment.

An example of newly discovered evidence might be that a second collector is suing the consumer on the same debt, raising new issues that the collector with the judgment in fact owned the debt.

Another example might be if it's discovered that a particular collector was systematically misrepresenting facts in its affidavits, or improperly signing, or notarizing the affidavits.

11.3.9 **FRAUD, MISREPRESENTATION, OR MISCONDUCT BY AN OPPOSING PARTY**-

The Federal Rules establish two different standards for setting aside a Default Judgment based upon the collector's misconduct. A collector's fraud, misrepresentation, or misconduct relating *to the consumer* is grounds for setting aside a Default Judgment, if the consumer acts within 1 year to set aside the judgment (FRCP 60(b), 60(c)). On the other hand, when there is fraud *on the court*, and not just misconduct affecting the consumer, the judgment can be set aside even after the 1 year period.

A good example of collector misconduct affecting the consumer would be a collector's attorney telling the consumer to "forget about" the complaint served by that attorney. Another good example of collector misconduct involves the collector representing to the consumer that it will dismiss the case if the consumer enters into a repayment program; instead, the collector pursues the case, and obtains a Default Judgment, even though the consumer makes payments as agreed. That is fraud on the court.

Misrepresentation or misconduct can also occur where the collector convinces the consumer to agree to a Stipulated Judgment, including misrepresentations as to the nature of the document the consumer is signing, or the implications of signing that document. Also, grounds to set aside a judgment should be any misrepresentation made by the collector, or its attorney, as to the validity of the consumer's defenses.

Look not only for collector misrepresentations, but also for unethical behavior by the collector's attorney, which should be misconduct sufficient to set aside a judgment. A state's Code of Legal Ethics will have provisions concerning contacts with unrepresented individuals. For example, commentary to the Florida BAR Rule states that the other side's lawyer should not give advice to an unrepresented person, other than the advice to obtain counsel. In other words, you shouldn't be getting advice as an unrepresented individual from the lawyer on the other side.

> One court explained why it was particularly concerned about a stipulated settlement between a debt buyer and a pro se consumer":
>
> The circumstances at hand presented a classic case for such judicial relief. The Defendant, in this case, ignorant of her rights, fined an imprudent settlement agreeing to Plaintiff, a debt buyer, monthly sums otherwise needed for food and rent. The settlement agreement obligated her to make payments to Plaintiff monthly for more than 4 years. Although settlements like this often benefit both debtors and creditors, the Defendant told the court, in no uncertain terms, that she had been intimidated into signing of the settlement, and the Plaintiff had convinced her that she had no choice but to capitulate to Plaintiff's demands.
>
> Under the circumstances presented, it was painfully obvious to the court that Plaintiff obtained a settlement outside of court by taking undue advantage of the Defendant. The judges of this court, and the lawyers practicing before them knew all to well that debt buyers rarely have readily available proof to establish an assigned debt claim. The pennies paid by debt buyers for the right to pursue stale and questionable claims certainly do not justify misleading and heavy-handed collection tactics outside of court. When such matters actually come on for trial, they are typically abandoned, dismissed, or compromised for a small fraction of their hypothetical value. *(LR Credit 21 LLC. v. Paryshkura (NY 2010)*.

Typically, the question of collector's misconduct will be one of credibility between the consumer and the collector's attorney, as to what was said in the corridor. Trying such a dispute may be inconvenient for the collector, because ethical rules may require the collector to find a new attorney to set aside the Stipulated Judgment, because the **collector's first attorney will be a witness in the matter**.

A collector's filing false affidavits with the court should be not just misconduct affecting the consumer, but also fraud upon the court. State rules may require that certain documentation be presented to the court before a Default Judgment will be issued. **False statements in that**

documentation should also be fraud upon the court. An example might be when an affidavit states certain facts upon the affiant's personal knowledge, when the affiant cannot possibly have that personal knowledge. Another example is where the collector signs affidavits in bulk, in one location, then sends them to another to be notarized in bulk. [ROBO-SIGNING]

In arguing for an expansive reading of both collector misconduct and fraud upon the court., remember that the consumer is not seeking damages, and need not prove all the elements of fraud. Instead, the consumer is seeking equity, so that the consumer can be heard upon the merits when the collector's misrepresentation prevented that from occurring.

04 - Void Judgments Part 2

(Continued from last week)

11.3.9.2 – **A Special Case: Mailing Stipulations with the Complaint**-

A number of cases in Florida in 2007 and 2008, dealt with the collector's practice of including a Stipulated Judgment with the initial service of process of the Summons and Complaint. The Process Server would deliver the Summons and Complaint, and a cover letter from the collector's attorney. And a "stipulation for entry of final judgment execution withheld." The cover letter asked the consumer to contact the law firm to negotiate a payment amount that would be included in this stipulated judgment, which would have the judgment amount pre-printed. The letter stated that if an agreed amount is reached, the consumer would not have to go to court. The stipulation called for post-judgment interest of only 20.4% - almost double the statutory rate; and for the consumer to waive garnishment defenses. A number of consumers contacted the law firm were told what amount to include in the stipulation, and sign the stipulation.

Florida courts have had little trouble setting aside such stipulated judgments. The courts point to the fact that the stipulations were illegally included with the court summons, and that this misled the consumer as to the consequences of signing the stipulation, providing grounds to set aside the stipulated judgment *(Capital One Bank v. Mullis (Fl. Nov 28 2007) (consumerlaw.org/unreported); Capital One Bank v. Brannon (Fl Aug 17 2007) (consumerlaw.org/unreported)*. The consumer "was misled as to [the stipulation's] nature", her options and was not informed of important legal rights she was forfeiting by signing same." "Serving the stipulation and cover letter with the initial process simulates legal process and gives the document an air of authority and importance, even though it is not a true legal pleading." *(Star Capital Acquisitions LLC v. Krig (Fl Sep 13 2006); Capital One Bank v. Livingston (Fl. Aug 10 2006)*. Another ground for setting aside the Stipulated Judgment was that the stipulation was unconscionable and thus, unenforceable.

(9:55) 11.3.10 – **The Judgment is Void**-

11.3.10.1 **Improper Service of the Complaint or Notice of the Default Hearing**-

The most common example of a void judgment is where the Defendant has never been properly served with the complaint, and thus has had no notice that a legal proceeding is taking place.

Another example is when the collector fails to provide the required notice to the consumer that a hearing for a Default Judgment is to take place. If service or notice is defective, then the court issuing the judgment does not have personal jurisdiction over the consumer, and the judgment is void. Some state rules explicitly provide that lack of jurisdiction is grounds to set aside a judgment *(Unifund CCR Partners v. Dale (N.Y.S. 2d 782 2005)*. Federal Rule 60(b), and other state rules provide for setting the judgment aside if the judgment is void; lack of personal jurisdiction makes the judgment void *(Wolfe v. Stevens (FL Apl 2007); First Select Co. v. Mastromattei (MA Apl 2007); Dombrowski v. Chute (MA Apl 2000); Gassett v. Snappy Car Rental (NV 1995); Unifund CCR Partners v. Kelley (OR Apl 2010)*.

(15:00) Inadequate service should suffice to set aside a judgment even if a state's rules do not list 'lack of jurisdiction' or 'a judgment being void' as grounds to set aside a judgment *(Peralta v. Heights Medical Center (US 1988) 485 U.S. 80, 108 S. Ct. 896, 99L. Ed. 2d75*. If the judgment is void, it is void.

Lack of jurisdiction can be raised at anytime to attack a judgment *(Fort Trumbull Conservancy LLC v. Alves (CT 2003); Capital One Bank v. Czekala (IL Apl 2008); Young v. Progressive Casualty Ins. Co. (MD Ct. Special Apl. 1996; First Select Co. v. Mastromattei (MA Apl Div 77 2007)*. As a result, there is no time limit to challenge a void judgment *(Master Fin. Inc. v. Woodburn (AZ Apl 2004); United Bank of Boulder v. Buchanan (CO Apl 1992); Faulkner v. Ameritrust Federal Savings & Loan Assoc. (FL Dist. Ct. Apl 1986)*. For example, in one case the Default Judgment was set aside 6 years after it was issued because of defective service *(First Select Co. v. Mastromattei (MA Apl Div 77 2007)*. The consumer did not have to show that the delay was unreasonable *(Capital One Bank v. CZekala (IL Apl 2008)*. While it is prudent to do so, the consumer need not even show a meritorious defense *(Peralta v. Heights Medical Center Inc. (US 1988) 485 U.S. 80, 108 S. Ct. 896 99L Ed. 2d75 (1988); Master Financial Inc. v. Woodburn (AZ Apl 2004)*. Once the lack of personal jurisdiction is established, the court has no discretion but to set aside the judgment *(First Select v. Mastromattei (MA 2007); Enterprise Rent A Car Inc. v. Bigelow (MA Apl Div 165 2004); Dombrowski v. Chute (MA Apl Div 127 2000)*.

(28:00) 11.3.10.1.2 **Sewer Service**-

Where state rules require that a summons be delivered by hand to the consumer's residence, a common cause of defective service is "Sewer Service". Where the individual tasked with visiting the consumer's residence and serving the summons fails to do so, but claims to have done so. For example, the NY Attorney General's office recently alleged that American Legal Process failed to properly serve consumers across NY State with legal papers and sought to throw out an estimated 100,000 default judgments. In addition, Ann Pfau, as Administrative Judge of the NY Unified Court System, commenced a special proceeding against several law firms using American Legal Process seeking to vacate all Default Judgments entered in cases where the service was made by American Legal Process servers. The action was settled by consent order *(See matter of PFau v. Forster & Garbus (NY Sup. Ct. 2009); Palisades Collection LLC v. Cerrito (906 N.Y.S. 2d 774 New York Poughkeepsie City Court 2009))*.

The consumer will have to present evidence that service was not made even though the process server claims to have made service. Seek through Discovery or Subpoena information that determined the actual route the process server used the day, or even just a portion of the day which the consumer was allegedly served. It may be possible to show the process server could not physically travel to all of the locations claimed in the time periods specified. Even the sheer number of locations served in a day create doubt in the court's mind, and lead the court to place more credibility on the consumer's testimony. [Always deal with facts in an Affidavit. That affidavit needs to go with your Motion to Vacate a Void Judgment].

Similarly, the minimal amount the server is paid per summons might indicate pressure on the server to engage in 'sewer service' just to earn a living wage. Also persuasive would be testimony from other consumers denying receipt of process who are allegedly served by the same process server. Sometimes defects as to proper service of process are apparent on the face of the documents. In NY, if the summons is affixed to a door, a copy must also be mailed within 20 days. Where the collector's own documents indicate that the summons was mailed 28 later, service is defective *(Velocity Investments LLC v. McCaffrey (NY Dist. Ct. Feb 2, 2001)*. In CA, both the process server and the process serving company must be listed on the proof of service, and this must include both of their names, addresses, phone numbers, and process serving license numbers.

(35:00) 11.3.10.1.3 **Mail service to the wrong address**-

More common than personal service are state rules that allow service by some combination of Certified and First Class Mail. A common failing with such services that it will be sent to the wrong address. The frequency of this problem is magnified when debt buyers send service years after the consumer last had contact with the original creditor, and the debt buyer relied solely on the information the original creditor provided.

The general rule is that where First Class Mail is not returned, service is presumed received if sent to the consumer's last and usual place of residence, even if the consumer is not at that location at the time *(Sears Roebuck & Co. v. Ford (MA Apl Ct. Div. 172 2006); Asset Acceptance LLC. v. Allen (OH Apl. Sep 30, 2009); Portfolio Recovery Assoc. LLC v. Rohan (NY Sup Ct. 2009)*. If Certified Mail is returned unclaimed, regular mail still constitutes adequate service unless it too is returned *(Asset Acceptance LLC. v. Allen (OH Apl. Sep 30, 2009)*. Of course the rule is different if mail service is returned with an indication that the consumer is not at the address. For example, where a Certified Mail is returned with the notation "in jail", this was sufficient that the service was inadequate *(Palisades Collection LLC. v. Brown (NJ Sup. Ct. Apl. Dec 15, 2010)*.

Where First Class mail is sent and not returned, the consumer's mere denial of receipt without any evidence is usually considered inadequate to defeat service *(ATL. Credit & Finance v. Dustrude (MN Ct. Apl Mar 04, 2008)*. However, mailing the summons is no more than a rebuttable presumption that service has been made *(Asset Acceptance LLC. v. Scott (NJ Sup. Ct. Apl. Oct 30, 2007) (Due process requires the judgment to be set aside); TCC Management Inc. v. Clapp (OH Apl. Ct. Aug 23, 2005)*. The mere fact that a collector sent a number of letters to the address that were not returned does not prove that service was proper *(First Select Co. v. Mastrmattei (MA Dis. Ct. Div 77)*. This presumption disappears when there is conflicting evidence. This is the case even where someone signs for a Certified letter—the consumer can still provide evidence that the consumer did not reside at that address at the time *(Liberty Credit Services Inc. v. Walsh (OH Ct. Apl. Mar 3, 2005)*.

When the consumer advances prove that rebuts the presumption of effective service, the burden may shift to the collector to establish that service was made *(Asset Acceptance LLC. v. Scott (MJ Sup. Ct. Apl. Oct 30, 2007)*. The consumer is entitled to hearing on the factual issue *(Portfolio Recovery Assoc. LLC v. Thacker (OH Ct. Apl. Aug 2009); TCC Management Inc. v. Clapp (OH Ct. Apl. Aug 2005); Ameritrust Co. v. Spigutz (OH Ct. Apl. Nov. 2004)*. This is particularly the case where the consumer offers an Affidavit to prove that the consumer did not reside at the location served at the time of service *(Unifund CCR Partners v. Dale (NY Mt. Vernon City Ct. 2005); Liberty Credit Services Inc. v. Walsh (OH Ct. Apl. Mar 3, 2005)*, or did not see the service *(TCC Management Inc. v. Clapp (OH Ct. Apl. Aug 2005)*. An Affidavit from the present occupant of the address denying the consumer residing there should also be sufficient to provide a hearing on the issue *(First Select Co. v. Mastromattei (MA Dis. Ct. 2007)*. The consumer can also overcome the presumption as to proper service by showing that the consumer was incarcerated at the time of the service *(NCO Portfolio Management v. Lorenzo (NJ Sup. Ct. Applt. Div. Sep 2010)*.

Particularly powerful is the consumer's Affidavit that the consumer has never lived at the address listed in the summons *(First Select Co. v. Mastromattei (MA 2007); Dumbrowski v. Chute (MA Dist. 2000); NCO Portfolio Management v. Lorenzo (NJ Sep 2010)*. This can happen in any number of ways. Sloppy record keeping can result in small errors that send the service to the wrong address. For example, the presumption was rebutted when the consumer lived at 211 Keats Dr. and the Summons and Complaint were mailed to 211 Keats Ct *(Asset Acceptance LLC. v. Scott (NJ Sup. Ct. Oct 2007)*.

Other times, the collector will rely on credit reports or skip tracing to locate the consumer's new address, and errors will occur in that process. Thus, in one case, a skip tracing service's information that someone with the consumer's name lived at the address at the time of Summons was not determinative since the tracing service also listed the consumer as residing at a different address at the same point in time *(First Select Co. v. Mastromattei (MA Dis. Ct 2007)*.

Additional errors as to the mailing address can occur when the consumer is married. In one case, service to the consumer's ex-husband's address was improper because the consumer never resided at that address *(Palisades Collection LLC. v. Lieber (NJ Sup. Ct. Apl. Div. Aug 2007)*. Other times husband and wife will both be sued but service will be received by only one spouse. For example, consider where husband and wife lived at the same address, the husband opened the mail, but never informed the wife about the service. A hearing should be held on whether service on the wife was proper where both husband and wife submit Affidavits that the wife never saw or knew about the summons *(TCC Management v. Clapp (OH Ct. Apl Aug 2005)*.

(54:50) 11.3.10.1.4 **Improper notice of the Default Hearing**-

Obtaining a Default Judgment is a 2-step process in many states. The consumer is summoned with a Complaint, and failure to respond within a specified time period leads to a Default. The collector then files a Motion to turn that Default into a Judgment. State rules patterned after FRCP Rule 55(b)(2) require that the collector serve the consumer with written notice of its application for a Default Judgment if the consumer has filed for an appearance in the case. [Doesn't necessarily mean filing an Answer. Filing a Motion would be considered an appearance] *(The Federal Rule specifies three days Notice, but state rules may require more time); LA 7 days, MA 7 days, OH 7 days)*. When the consumer is not sent the 2nd notice, the resulting Default Judgment can later be set aside *(National City Bank of Michigan/Illinois v. Hayden (MI Ct. Apl. Jan 2003); Lindblom v. Prime Hospitality Corp. (NV 2004); Meglan Meglan & Co. v. Bostic (OH Ct. Apl. May 09, 2006); Asset Acceptance LLC. v. Springer (OH Ct. Apl. Nov 2004)*. Just as a consumer must be properly served the lawsuit itself, the consumer must be properly served the motion for a default judgment.

The Federal Rule and many state rules limit the right to this additional notice to situations in which the consumer has filed an appearance. In a surprising number of Default Judgments, the consumer has in fact filed an appearance, even though the consumer has defaulted. For example, where states require the consumer to file both an appearance and an answer, unrepresented consumers may mistakenly believe that filing an appearance is enough. Merely filing an appearance may not stop a Default, but it entitles the consumer to the 2nd notice.

Moreover, some courts have construed "appearance" broadly to include conduct and communications prior to the filing of an action, even when a Defendant does not make an appearance after the case has commenced *(Lindblom v. Prime Hospitality Corp. (NV 2004) – Pre-suit interactions evinced a clear intent to appear and defend*. In Texas, notice of the Motion of Default Judgment must be sent if the consumer answers, and a verified letter from the consumer was found to be such an answer, even though not in proper form as an answer *(Reid v. Asset Acceptance LLC (TX Apl. Oct 2006)*.

Some states require that the collector serve notice of the hearing on the Default Judgment on the consumer even when the consumer does not file an appearance. In NY, if more than 1 year has elapsed since the Entry of Default, a Defendant, even one who has not filed an appearance, must still be given notice of the hearing for a Default Judgment. Even if 1 year has not elapsed, notice must be sent if the action is based upon the nonpayment of a contractual obligation and is not filed in small claims court. If the notice is returned as 'undeliverable' or if the residence is unknown, then it must be mailed to the party's place of employment if known. If that is unknown, it must be mailed to the last known address.

Notice of the Motion for a Default Judgment is just as important where the parties stipulate to a Default Judgment if the consumer does not make promised payments. For example, in one case, the stipulation provided that the Default Judgment would be entered if the consumer did not make specified payments, but that the consumer would receive 10 days notice before judgment would be entered. The judgment could be vacated because the 10 day notice was not provided *(Capital One Bank v. Hembrick (NY Civ. Ct. 2007)*.

(1:05:10) 11.3.11 **Any Other Reason That Justifies Relief"**-

FRCP 60(b)(6) provides that a Default Judgment can be reopened for "any other reason that justifies relief". There is no 1-year on the consumer's ability to raise this reason for ground for relief, as long as the motion is brought within a reasonable time *(First Resolution Investment Corp. v. Coffey (OH Apl. Dec 2007)*. This approach is an attractive alternative for a consumer when more than a year has elapse, and thus when it is no longer possible to set aside the judgment for excusable neglect.

The United States Supreme Court in interpreting the federal rules finds that "any other reason that justifies relief" is limited to "extraordinary circumstances" beyond the movant's control, and not just to excusable neglect *(Pioneer Investment Services Co. v. Brunswick Assoc. (US Sup. Ct. 1993)*. The circumstances must suggest that the party is faultless in the delay.

State courts and state rules may also limit this basis for relief to "extraordinary circumstances" *(Pioneer Investment Services Co. v. Brunswick Assoc. (US Sup. Ct. 1993); Webb v. Erickson (AZ 1982)* or "exceptional situations" *(N.Y. Hosp. v. Robinson, 1999 WL 34876247 (N.J. Super. Ct. App. Div. May 28, 1999)*, and use this basis sparingly. It should not be used to undermine the time constraints applicable to 60(b)'s other subsections *(Asset Acceptance LLC. v. Moberly (KY 2007)*. As the rule states "any other reason", this section does not include grounds mentioned in the prior sections *(Webb v. Erickson (AZ 1982)* such as excusable neglect.

The standard is not an impossible one to meet. The AZ Supreme Court has quoted the US Supreme Court approvingly regarding this ground to set aside a judgment. It "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice" *(Webb v. Erickson (AZ 1982)*.

The United States Supreme Court found "any other reason that justifies relief" present when an individual's incarceration, ill health, and other factors beyond his reasonable control prevented him from seeking to reopen the Default Judgment for 4 years *(Klapprott v. United States (US Sup. Ct. 1949))*. The AZ Supreme Court has found exceptional circumstances to set aside a Default Judgment after 4½ years when the individual had no reason to believe the action was related to that individual, the summons and writ were confusing, and the individual's mental and physical condition was impaired at the time *(Webb v. Erickson (AZ 1982))*. Another factor was the lack of notice of the Default Judgment.

In another case, a Default Judgment was reopened for exceptional circumstances after 9 years had passed *(NY Hospital v. Robinson (NJ Sup. Ct. Apl May 1999)*. The consumer contacted Medicaid about a hospital bill [hospitals may not sue Medicaid recipients], and was told it would be taken care of. Then, on receipt of the Default Judgment, the consumer contacted the collector's law firm to explain that Medicaid said it would take care of the matter. 9 years later, immediately after the first garnishment of the consumer's wages, the consumer sought to reopen the Default. Upon denial, she sought legal assistance. The court, in these circumstances, found the failure to respond to the Complaint to be justified and allowed the Default Judgment to be set aside.

Reopening a judgment was also proper when the consumer's representative had deceived the consumer into believing that the representative was a licensed attorney *(MBNA America Bank v. Garcia (OR Ct. Apl. 2009)*. An Ohio appellate court has even approved reopening a Default for exceptional circumstances primarily because the consumer's complaint was defective and the consumer denied owing the debt *(Mercy Franciscan Hospital v. Willis (OH Ct. Apl. Sep 2004))*.

Similarly, a trial court found exceptional circumstances to reopen a Default Judgment after 2 years where the consumer's alcoholism made her incapable of managing her affairs *(Asset Acceptance LLC v. Moberly (KY 2007)*. After various appellate decisions, the trial court was eventually overruled because the consumer had failed to present medical evidence of the consumer's incapacity or to show that the consumer was incapacitated over much of the intervening period *(Asset Acceptance v. Moberly (KY 2007))*. Another court refused to reopen a Default Judgment for exceptional circumstances when the consumer was incapacitated for 18 months, but waited over 3 years to move to reopen the Default *(Great Seneca Finance Corp. v. Dwek (NJ Sup. Ct. Apl. Apr 2008)*.

05 - Validation Part 1

NCLC Fair Debt Collection Seventh Edition, Volume One

(Referring to "verification" vs "validation")

(1:20) (pg. 318) **5.7.1 Congress Considered Debt Verification "Significant"**

The rights and obligations established by § 1692g were considered by the senate to be a significant feature of the act. The FDCPA gives consumers the right to obtain verification of a debt from the collector. This is intended to minimize instances of mistaken identity of a debtor, or mistakes over the amount or existence of a debt, or similar errors. It is an informal method of dispute resolution that potentially conserves tax dollars and judicial resources. In the 4th and 9th Circuits, that potential envisioned by Congress, may have been eroded by constricting the verification process to a confirmation by the creditor of its claim. § 1692g is a strict liability provision. An unintentional violation of the verification requirements violates the act. The provision applies to all covered debt collectors. Each of the major bills contained provisions assisting the consumer in verifying the debt or its amount. The first two bills require the debt collector to maintain detailed files and to notify the consumer of his/her right to inspect these files. Subsequent bills followed the present approach of the act. Another federal statute, the Servicer Act, may provide even greater rights to a consumer to determine the charges and payments on their mortgage. The FCRA may also provide strong remedies for disputes that involve an inaccurate credit report.

5.7.2 **The Verifications Rights Notice**

Text of 15 U.S.C. § 1692g(a)

> "Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt; [this is supposed to be the exact correct amount. If $2 off, it's not correct]
>
> (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. "

(7:10) **An overview**- This provision specifies the contents of the written debt verification notice debt collectors are required to send consumers. The courts have determined that the notice be provided in a manner that effectively communicates its contents to the least sophisticated of its consumers [we should all say that we should be treated as the least sophisticated consumer].

(pg 319) **5.7.2.3 <u>Effectively Conveying the Notice</u>**
In the leading case on the placement of a "verification rights notice", *Swanson v. Southern Oregon Credit Service* *(869 F.d 1222 (9th Cir. 1982)*, the 9th Circuit held that a verification rights notice violated § 1692g because it would not effectively convey notice of FDCPA consumer rights to the least sophisticated consumers. The 9th Circuit held:

> The statute is not satisfied merely by the inclusion of the required debt validation notice; the notice Congress required must be conveyed effectively to the debtor. It must be large enough to be easily read and sufficiently prominent to be noticed—even by the least sophisticated debtor. *(Baker, 677 F. 2d at 778).* Furthermore, to be effective, the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication by the collection agency.

The verification rights notice failed these tests because it was dwarfed and contradicted by the dunning message:

> Reviewing the Southern Oregon notice where Swanson received through the eyes of least sophisticated debtor, there is little question that it is both misleading in both form and content. The required debt verification notice is placed at the very bottom of the form in small ordinary face type dwarfed by a bold faced underlined message three-times the size which dominates the center of the page. More importantly, the substance of the language stands in threatening contradiction to the text of the debt verification notice. The prominent and message of the "master file" and "most valuable asset" language, lead the least sophisticated debtor, and quite probably even the average debtor, only to one conclusion: he must ignore his 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.
>
> Congress designed § 1692g to provide alleged debtors to question and respond to the initial communication of a collection agency. The form used by Southern Oregon in this case invokes a shorter response period, promising harm to the debtor who waits beyond 10 days. The form thus represents an attempt on the part of the collection agency to evade the spirit of the notice statute and mislead the debtor into disregarding the [required debt validation] notice." (Collection form requesting payment in 5 days with verification notice printed in small print on reverse did not comply with § 1692g [the mini-Miranda has to be prominent].
>
> Accordingly, we hold the Southern Oregon's initial communication with Swanson violated section 1692g of the Federal Act *(Swanson v. Southern Oregon Credit Serv., 869 F.2d 1222, 1225-1226 (9th Cir. 1988). See also Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85 (2d Cir. 2008) (language unlawfully overshadowed or contradicted debt validation rights notice when it would make least sophisticated consumer uncertain as to his/her rights, regardless of whether plaintiff was actually confused)*.

In a 2006 amendment to the FDCPA, Congress codified important aspects of the *Swanson* decision by adding the following language at the end of section 1692g(b):

> Collection activities and communications that do not otherwise violate this subchapter 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.

[The law says you have 30 days. If they tell you "you don't pay us within 10 days, we're going to come after you with a lawsuit", that's *overshadowing* the 30 days you're supposed to have, and that is a violation of 1692g] (pg. 320)The Swanson decision was followed by the 4th Circuit a few years later in *Miller v. Payco General American Credits, Inc*. *(943 F.2d 482 (4th Cir. 1991)* The debt collector's single letter to the customer was described as follows:

> The front of the Payco form demands "IMMEDIATE FULL PAYMENT" and commands the consumer to "PHONE US TODAY" emphasized by the word "NOW" emblazoned in white letters nearly 2 inches tall against a red background. The message conveyed by those statements on the face of the form, flatly contradicts the information contained on the back.

As such, the verification notice was both contradicted and overshadowed of § 1692g(a). Quoting from *Ost v. Collection Bureau, Inc. (493 F. Supp. 701, 702-703 (D.N.D. 1980).* The 4th Circuit stated:

> The manner of Payco's presentation plainly overshadows and undercuts the message of the validation notice. Screaming headlines, bright colors and huge lettering "<u>all point to</u> a deliberate policy on the part of the collector to <u>evade the spirit of the notice statute</u>, and mislead the debtor into disregarding the notice." [use the language used in this quote in your Complaint, especially the underlined would be good verbiage].

In *Graziano v. Harrison*, the 3rd Circuit adopted the same approach: "To comply with the terms of the Act, statutory notice must not only explicate a debtor's rights; it must do so effectively." Subsequently, debt collectors engaged in extensive litigation over the least effective lawful provision of § 1692g notices as discussed in detail [in another section of the book].

Placing the notice information on the back of a dunning letter may comply with this section if there is a conspicuous reference on the front, and other language on the letter does not further obscure the notice. Other methods of hiding or obscuring such information would clearly violate the act.

(18:25) 5.7.2.4 **<u>Oral Verification Notices</u>**-

Debt collectors who fail to provide the written notice of the consumer's verification rights may seek refuge in an argument that the § 1692g(a) Notice of Verification Rights may be given orally in the initial communication with the consumer. <u>No courts have approved oral verification notices by consumers by debt collectors</u>. Some old FTC informal staff letters and commentary lend support to the argument that oral notices are permitted, while other FTC informal letters disagree [remember, FTC letters are not law. They hold no weight]. There are a number of reasons why this construction of § 1692g(a) should be rejected in favor of requiring written notices.

The purpose of the debt verification notice is to ensure the consumer can avoid mistaken claims without having to go to a court, simply by requiring the collector to verify the debt. This purpose is frustrated by oral notice of verification rights since the content of the notice is too long and involved to be effectively conveyed orally as part of a dunning conversation. In addition, oral notice allows a sharp operator to excuse its failure to provide any verification notice by later falsely asserting that it had given notice orally. The result is a swearing contest with the possibility that a sharp operator may be the more skilled witness.

The potential ambiguity in § 1692g(a) depends upon whether the phrase "following information" refers to the phrase "a written notice" or only to subsections 1-5 in § 1692g(a) which provide the content of the notice. § 1692g(a) reads:

> "Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall ["shall" in legal terms means <u>must</u>], unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—"

[The frequent violated FDCPA guidelines]. The legislative history of this provision only refers to the requirement of written notice of verification rights. This provision was amended several times during the legislative process. There is nothing to suggest that it was amended to permit oral verification notices. Rather, the amendment served to reduce the burden on collectors of providing the written verification notice in two ways; by not requiring a notice to be sent when the consumer pays the debt immediately after the initial communication; and by allowing the verification notice to be sent in the initial communication (rather than in five days after the initial communication), reducing the collector's mailing expense.

The genesis of § 1692g(a) shows that permitting oral verification notice depends upon the assumption that Congress intended to permit oral notice when it changed the word "such" to "the following information". The word "such" more clearly referred to "written notice" than the words "the following information", however, as pointed out above, Congress referred to the verification notice as being written, even after this change in wording. It is likely given the total lack or any congressional reference to oral notices and the notice and the purpose and length of the notice that this change was a stylistic word change, not a substantive change made in connection with amendments which clearly were intended to accomplish other objectives, and since the change resulted at most in ambiguity, that ambiguity should be resolved in favor of a construction requiring written notice to best meet the stated congressional intent. The purpose of promoting informal dispute resolution and the FDCPA statutory purposes.

(26:23) 5.7.2.5 **Providing Verification Notice Rights to Consumers**-

5.7.2.5.1 **Providing the notice before formal pleadings-**

[This is getting to stuff relating to them suing you, there's certain things they can do, and certain things they can't do], the verification rights notice need not be provided until there is a "communication" from the debt collector to the consumer. Notice of verification rights may be sent with, or separately from, the initial communication. When not provided with the initial communication, or when the first contact is not a formal pleading, the verification notice must be given within five days of the initial contact. A 2006 amendment to the FDCPA provided a new exception. A formal legal pleading is not a communication triggering the obligation to provide the debt verification rights notice, postponing the requirement of providing of the notice. Certain types of notices sent to consumers by debt collectors are not considered communications that trigger § 1692g notice requirements as the result of the 2006 amendments.

Most courts require each new debt collector to send a debt verification rights notice [a DC cannot "verify" a debt, only to have a 2nd DC immediately sue you. The 2nd DC must send notice] *(Turner v. Shenandoah Legal Group, PC (VA ea dist. 2006; Horkey v J.V.D.B. and Associates (179 F.Supp. 2d 861 (IL northern dist 2002; Tipping-Lipshie v. Riddle (NY Ct. Ea Dist. 2000; Sutton v. Law Offices of Alexander L. Lawrence (DE US dist ct. June 1992)*. FTC staff at one point believe the FDCPA permitted a creditor to provide the verification rights notice as long as the creditor indicated it was doing it on behalf of the debt collector. If an attorney is hired as a collection agency's agent, he/she must provide the verification notice *(Frey v. Gangwish 970 F. 2d 1516 (6th Circuit 1992); Sampson v. Banchek (OH northern dist 1991 – attorney violated debt verification notice when he failed to send notice after phone call regarding debt)*. A creditor must provide the notice when the creditor is covered by the act [In a lot of instances, a creditor is not covered by the act]. A repossession company that was a DC covered by the FDCPA may need to provide a verification notice, however, **some** other courts [not all] disregarding the plain language and purpose of the provision make an exception by not requiring lawyers to send their own notice when hired by a collection agency that sent the agency's notice.

If the consumer is represented by an attorney, the 4th and 7th Circuits indicate the notice should be sent to the attorney, while a split 9th Circuit decision held the FDCPA inapplicable to communications to a consumer's attorney. FTC staff once believed the notice need not be given to a consumer's attorney (who may be unaware of verification rights), but the safer course is to provide the notice to a consumer's attorney. One court has held a fax about the debt sent to the consumer's attorney was the initial debt collection communication triggering verification notice obligations *(Spencer v. Hendersen-Webb (MD district 1999 – DC's fax of bill to father of consumer's boyfriend in response to his request for information on debt was deemed to be attempt to collect the debt since DC believed father was consumer's attorney and that information would reach consumer indirectly)*. If the consumer requests at the same time the verification of the debt and that the DC cease collection activities under § 1692c(c), the DC should honor both requests by providing the verification of the debt and not requesting payment except by legal action *(Clark v. Capital Credit & Collection Services, Inc. (9th Circuit 2006)*.

A collector must send a separate verification notice for each debt it seeks to collect from a consumer. A collector who fails to properly provide the verification notice violates the FDCPA. Notice should be sent after judgment if that is when a collector begins to collect a debt. A CRA must provide the notice if it acts as a DC.

The FTC staff indicated that the verification notice written on a separate sheet of paper but sent with the initial communication technically violated this section because it was not "contained in the initial communication". If it is on a separate piece of paper, the dunning letter should refer to it. One court found that the debt verification notice on a separate page in the same envelope as the collection letter was effectively provided because there was no concealment of the notice where it was the same size of the collection letter was marked "Notice", was addressed to Plaintiff, and named the Creditor, and amount of the debt. The 10th Circuit held in an unpublished decision that the verification notice provided on a separate page in the same envelope as a summons in foreclosure complaint was not obscure by the summons and complaint.

According to at least one District Court, nothing prohibits DC from sending subsequent verification notices, even if the 30-day period in the initial notice has expired. The court failed to consider that the subsequent notices misrepresented that the consumer's verification rights extended beyond the 30 days after receipt of the first verification rights notice. Another court considering a subsequent partial debt verification rights notice sent by the collector held that the consumer was entitled to the rights embodied in the notice.

A collection agency may not evade the notice requirements of the FDCPA by sending its letters in the creditors name. The FTC staff indicated that a creditor may send a verification notice on behalf of a collection agency if the notice makes clear that the creditor is acting on behalf of the collection agency.

(44:29) One court held that it was unnecessary to provide the verification notice where the collector discovered it "done the wrong person" provided that the collector inform that individual within 5 days of the initial contact, that it was mistaken and cease all future communication with him/her. One court held that a collection attorney, who before he learned of a bankruptcy, mailed a collection letter to a chapter 13 debtor was prohibited under the automatic stay under the bankruptcy code from subsequently mailing a verification notice under § 1692g and was not liable for his FDCPA violation. The notice requirements of § 1692g cannot be avoided by "verifying" the debt in advance of a request *(Beattie v. D.M. Collections, Inc. (DE dist. 1991)*.

The consumer need not dispute the validity of the debt to recover for a verification notice violation *(Baker v. G.C. Services Corporation (9th Cir 1982)*. The burden is on the consumer to establish the violation of not providing a debt verification notice, by showing that it was not mailed or not sent to the proper address. The 9th Circuit held that the debt collection agency must prove only that § 1692g notice was sent, not received by a consumer. Absent any evidence other than consumer's bare denial of receipt, common law mailbox rule controlled where evidence showed the collection agency properly mailed the notice *(Mahon v. Credit Bureau (9th Cir.1999); McLain v. Gordon (WA West. Dist. Aug 2010); Nichols v. GC Services, LP (AZ Dist. Oct 2009)*. Consumer's evidence that he had never resided at, or received mail at the address listed as the address to which the DC sent the validation notice created an issue of fact as to whether the letter was properly sent. The consumer's testimony [done with an affidavit] that she did not receive the notice may be considered evidence of the failure of the collector to mail the notice. Where the collector's defense was that it was not covered by the FDCPA, the consumer should win. To overcome that evidence, the consumer would have to show that the letter was sent to the wrong address, or find other consumers, or locate a credible former employee of the defendant to establish a pattern or practice of not mailing the notice. Courts sometimes compel collectors to reveal other consumer complaints and suits. Where the debt collector's records show that the verification rights notice was returned to the collector as undeliverable, the consumer rebutted the mailbox rule by testifying that he had not lived for 5 years at their address to which the verification rights notice was mailed, and prevailed on the claim that the debt collector subsequently failed to send the notice to the correct address.

Where the debt collector's received returned mail from the post office but had not programmed its computers to generate a new verification rights letter to the consumer at the correct address, the DC could not establish a bona fide error defense pursuant to § 1692k, because its procedures were not reasonably adapted to prevent such a violation.

The consumer need not receive the DC § 1692g(b) notice to claim it violated the FDCPA *(Robles v. Corporate Receivables, Inc. (IL North Dist 2004 – FDCPA violations occur when letter is sent, not when it is received); Wilson v. Collecto, Inc. (IL North dist. Feb 2004)*.

A 2006 amendment to the FDCPA provided this new language to § 1692g a formal legal pleading is not a communication triggering the obligation to provide the debt verification rights notice, postponing the requirement to provide the notice *(Jerman v. Carlisle, McNellie Kramer (OH North. Dist 2007)*. This amendment overruled in part the FTC's first formal FDCPA advisory opinion and holdings in 2nd and 7th Circuits decisions while an amendment should put an end to the confusing practice by some debt collectors of providing the debt verification rights notice in or with a Summons and Complaint, it may raise some legal uncertainty. For example, the term "formal pleading" is not defined. Its ordinary meaning would apply to Complaints, Answers, and Counterclaims. This should mean that the notice be provided at the Discovery stage, or Motion state of the litigation, unless settlement discussions trigger the notification requirement before that [the moment you start talking to them they say you owe a debt, that will trigger it]. It is common for consumers to call debt collectors upon receipt of a debt collection Complaint to explain errors and discuss their options. This phone call would trigger the requirement that the notice be provided.

The 2nd Circuit recently held that an FDCPA debt verification notice was overshadowed by the DCs service of a collection lawsuit on the consumer during the 30-day verification request period. Since the collector failed to explain or clarify in either the dun or in a notice provided with the Summons and Complaint, the commencement of the lawsuit had no effect on the information conveyed in a debt verification notice.

The court pointed out the Congress passed and FDCPA amendment in 2006 adopting the Court's reasoning that a debt verification notice must not be overshadowed by the DCs actions during the 30-day period the consumer may request verification. While the DC may continue some collection activities during that period, overshadowing activities would confuse the consumer about his rights. The Court reviewed several Circuit Court decisions emphasizing the confusion was particularly likely with a Summons issued to a consumer during the 30-day period to request validation.

06 - Validation Part 2

(Referring to "verification" vs "validation")
Continuing from above…

(3:25) (pg. 325) The Court noted that the easiest course for a debt collector was to simply wait until the end of the 30-day debt verification request period to serve a debt collection suit on the consumer. If the DC could not wait, the best practice would be to provide two more notices to the consumer. The first additional notice should be with the initial verification rights notice to the consumer and explain that the consumer's verification right continues even if the DC collector sues the consumer during the 30-day debt verification request period. The 2nd additional notice should be sent to the consumer at the time the Summons and Complaint is served and explain that the consumer still has the right to obtain DV from the DC and that the consumer additionally should respond appropriately in the state court as set out in the Summons [Respond through that as well as through the attorney. When you've been sued you put a dispute into the court case.]. The safe harbor established in 2nd Circuit in this decision will not necessarily be adopted by the other circuits.

The best and simplest practice is to provide the VRN well before initiating litigation. In addition to diminishing confusion, this allows the collector to hear and evaluate the consumer's defenses to, and disputes of the DC's claim before the DC invests in drafting a debt collection suit and pays court filing and service fees. It provides the DC with more certainty and routinization of the timing of the notice. And it avoids the potential of the consumer confusion noted in Ellis, by the 7th Circuit in Thomas v. Law Firm of Simpson & Cybak (2004), when the consumer receives the verification rights notice about the same time as the Summons in a debt collection suit.

The basic approach of § 1692g(a) was first contained in the 1976 House of Representatives Bill HR11969 and was refined in subsequent major bills. The phrase "unless the following information is contained in the initial communication" was added by [the Legislature], and the phrase "or the consumer has paid the debt". Many of the major debt collection bills required inclusion of the name and address of the OC of the Notice of Verification Rights. The requirement of providing information on request was decided by the Senate Consumer Affairs subcommittee. The 2000 notice for § 1692g(e) states:

> 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 26, 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. [if you get stuff related to the debt collection that's IRS related, that's not an initial communication]

The most likely tax code notice in the debt collection context is an IRS form 1099, notice of forgiven indebtedness as possibly taxable income. However, a 1099 Notice may still trigger debt verification rights if it was not "required" such as when the consumer is insolvent, disputed the debt, discharged the debt in bankruptcy, or if the collector continued to collect the debt. The notice's exemption becomes irrelevant if the notice is sent with a request for payment, as a request for payment triggers 1692g requirements. Where a Gramm-Leach-Bliley Act misrepresented the consumer §1692c(b) "Privacy Protections", it was deceptive violating the FDCPA *(Ruth v. Triumph Partnerships (7th Circuit 2009); Hernandez v. Midland Credit Management, Inc. (IL Northern Dist Sep 2007)*. Under those circumstances, the Gramm-Leach-Bliley Act notice may not be "expressly required" under § 1692g(e), and may act as a trigger for the § 1692 notice requirements.

(11:50) 5.7.2.6 **Content of Verification Notice**-

5.7.2.6.1 **Statutory Requirements**-

An incomplete statement of the § 1692g(a)(1)-(5) information violates the act. However, a photocopy of § 1692g is not a clear notice of the consumer's verification rights since the language of the statute was not written to be understandable to unsophisticated consumers. The languages of the verification notice must be substantively the same as the statutory language [if the language in a dunning letter isn't very very similar to what § 1692g(a)(1)-(5) says, there's probably a violation there] *(Baker v. G.C. Services Corp. 9th Circuit (1982)); Bankston v. Phycom Corp. (CA Nor. Dist. Nov 2007); Dikun v. Streich (VA Eas. Dist 2005)*. The verification notice should be placed and written so as to effectively communication rights to unsophisticated consumers [Remember, no matter how much you study here, you are an unsophisticated consumer, they must assume and treat you as such]. **The DC should not contradict or obscure the notice of consumer's right to verification with its conduct or statements.**

The notice must include:

- the amount of the debt [1692g(a)(1)];
- the name of the current creditor [1692g(a)(2)];
- the DCs name and address;
- a statement of the right to obtain the name of the original creditor [1692g(a)(5)];
- a statement that the DC will assume the debt is valid if the consumer does not dispute the debt or a portion of it in 30 days [1692g(a)(3)];
- and an explanation of the procedure for obtaining verification of the debt [1692g(a)(4)].

The DC should not misstate on the verification notice the time the debtor has to request verification as 30 days from the date of the Notice, rather than the statutorily required 30-days from the consumers *receipt* of the notice [it is 30 days from your receipt of the notice, not 30 days from the date on the letter. If they use that, the DC would put June 1st, and mail it on the 25th. Only you can testify to when you receive it with an affidavit, because they don't spend the money for certified mail or verified delivery.]. In addition, the FDCPA gives the consumer 30 days from the receipt of the notice to mail the request [it only needs to be postmarked. Always send the disputes by certified mail. That way we know they got them, and we can also verify the date we mailed it and show it was sent timely.]. The DC may have violated the act by disclosing the name of the current creditor in a confusing shorthand fashion by using only its first name "Target", that the unsophisticated consumer would not recognize because it identifies several unrelated business identities with the same first name, for example "Target National Bank", "Target Stores". The verification notice must state a *writing* is required from the consumer disputing the debt or requesting verification in order for debt verification to be required of the DC [If you have a conversation with the DC, and you tell them to validate the debt, that is incorrect. It must be in writing]. The verification notice must state that a *portion* of the debt may be disputed or verified. The notice may not state that the consumer must use a writing to dispute the debt to overcome the § 1692g(3) assumption by the DC that the debt is valid [if you don't dispute it within 30 days, they will assume it's valid].

A consumer statement "I dispute the debt" is sufficient to dispute the validity of the debt under FDCPA [no need to write a book, etc…] *(Castro v. ARS National Services Inc. (NY So Dist. Mar 2000))*. In Castro v. ARS, a district court held in NY that a DC violated the FDCPA by including language in its verification notice that the least sophisticated consumer can read as imposing requirements beyond those set out in the FDCPA. According to the court, all that was needed to dispute the validity of a debt was a letter by the consumer with the statement "I dispute the debt". The DC's verification letter to the consumer stated six types of documents that the DC listed as suitable for dispute purposes such as a canceled check or a final billing statement. The court found that by listing the examples, the least sophisticated consumer could reasonably conclude that some form of documentation was necessary to dispute the debt. The court further found that providing a list of "suitable" documentation suggested that some types of documentation might be "unsuitable", since all that is required under the FDCPA is a writing stating that all or a portion of a debt is disputed, a consumer need only send a letter stating "I dispute the debt" to dispute the debt. Because a letter could hamper a consumer's effort to communicate a dispute of a debt, the court held that the letter deprived the consumer of statutory protection [In other words, they violated the law – lawsuit!].

In *Desantis v. Computer Credit Inc.*, the 2nd Circuit found (in 2001) that a DC may not have the requirements that the consumer's request for verification contain a "valid reason for nonpayment":

> Computer Credit's letter to Plaintiff conveyed a message that arguably interfered with a correct understanding with a correct understanding of the message by the act. A recipient, especially if unsophisticated, might well have understood that the collector's obligation to obtain verification would arise only if the consumer prevented a valid reason for nonpayment. That would be inconsistent with the required message.

(24:36) In *McKinney v. Cattleway Properties Inc.*, a divided town of the 7th Circuit held that a debt collector's request that the consumer confirm the amount of the DC's claim was not confusing and deceptive. The dissenting judge and the lower court believe that this was an unlawful impediment to the consumer exercising debt verification rights. However, the majority believe the confirmation would not be confusing and rejected the claim in the absence of expert evidence that a significant portion of unsophisticated consumers would be confused.

The debt verification notice must contain the name of the current creditor to whom the debt is owed, it may be a violation to use a name for the creditor that is unfamiliar to the consumer or otherwise unclear *(Blarek v. Encore Receivable Management Inc. (WI. Ea Dist. Mar 2007) – use of registered acronym which consumers had never encountered before and could be confusing.; Bode v. Encore Receivable Management Inc. (WI Ea Dist. Aug 2007) – using similar name "Captial One Services, Inc." was not confusing; Dewees v. Legal Servicing (NY Ea Dist 2007) – disclosure that debt had been "assigned to this office" might convey that defendant had purchased debt and was confusing about identity of current creditor)*. Notice of the right to obtain the name and address of the original creditor under § 1692g(a)(5) need not be given if there was only one creditor. The 8th Circuit would allow the debt collector to disclose the original creditors and their addresses and omit the offer to provide their name and address.

The FTC once believed the information required by § 1692g(a)(3) and § 1692g(a)(4) may be combined in a single overburdened sentence of the notice. That is not a good approach, and is contradicted by the requirement that notice be effectively conveyed to the least sophisticated consumer [The FTC "once believed". The FTC does not make law; they can give opinion letters, but those are not binding in a court of law].

An FTC staffer believed placing the word "important" on the verification notice labeled it sufficiently. The verification notice need not contain the date it was sent, although it would be better to include that date.

The 6th Circuit considered the collector statement of information required by §1692g(a)(3): "All portions of this claim shall be assumed valid unless disputed within 30 days of receiving this notice." The court ruled "even under the 'least sophisticated consumers' standard" the language satisfied the act. In *Greco v. Trauner Cohen & Thomas LLP*, the 2nd Circuit held that the debt collector's addition to the debt verification notice that the creditor would also assume the debt was valid if consumer did not dispute debt within 30 days was not a violation of the FDCPA.

The FDCPA does not require the debt collector to inform the consumer of the collector's obligation to stop collection that lasts until the verification has been provided, although they may disclose that requirement. The 2nd Circuit held that a letter that asserted that the collector "and creditor" would assume the debt to be valid in the absence of dispute did not violate § 1692g by the addition to the reference to the creditor.

One court held that the verification notice may omit a reference to the provision of a copy of a judgment if the debt had not been reduced to judgment. The FTC staff repeatedly warned collectors to delete the statutory references to "judgment" in § 1692g(a)(4) when there was no judgment against the consumer, and such reference was considered deceptive. Later, the FTC staff took the opposite tact. In *Moore v. Ingram & Associates Inc.*, a court concluded that even the least sophisticated consumer would not be misled by use of the word "judgment" in the verification notice even though a judgment had not been secured.

The right to dispute a portion of the debt was introduced in Bill 3838, and not contained in some subsequent senate bills. Courts recommended additions to verification notice.

5.7.2.6.2 **<u>Courts' recommended additions to verification notice</u>**-

Four appellate decisions have suggested additional language be added to verification rights notices to avoid confusion and deception when a debt collector is demanding immediate payment, threatening suit, or filing suit in the period of the consumer has the right to obtain verification of the debt.

In *Savino v. Computer Credit Inc.*, the collection agent's violations of the FDCPA "consisted of its decision to ask for immediate payment without also explaining that its demand did not override the consumers rights under § 1692g to seek verification of the debt". The court explained:

> CCI could have both sought immediate payment and complied with the act by simply inserting into the text of its letter transitional language that referred the addressee to the validation notice. For example, CCI might have added one of the following paragraphs to its demand letter:
>
> > Although we have requested that you make immediate payment or provide a valid reason for nonpayment, you still have the right to make a written request within 30 days of your receipt of this notice for more information about the debt. Your rights are described on the reverse side of this notice.
> >
> > Our demand for immediate payment does not eliminate your right to dispute this debt within 30 days of receipt of this notice. If you choose to do so, we are required by law to cease our collection efforts until we have mailed that information to you. Your rights are described on the reverse side of this notice."

(37:50) In our view, the inclusion of this, or similar language, would effectively inform a consumer as to his/her rights under the FDCPA without posing an undue burden on a debt collectors legitimate efforts to obtain a prompt payment of debts.

In *Bartlett v. Heibl*, judge Posner announced a "safe haven" debt verification notice for the 7th Circuit where the letter threatened suit during the verification period. That "safe haven" language unfortunately has a legal error in it along with its good ideas.

While the model letter has many salutary features, it fails to clearly inform the consumer that the dispute of a part of a debt, for example a mysterious service charge, or the method by which the current balance was determined triggers the obligation of the collector to validate that part of the debt. Such an omission would violate the FDCPA at least in other circuits. In addition to clarifying that the collector would suspend or terminate collections if requested to validate a disputed debt, the Posner letter breaks up the notice of other aspects of the verification into simpler sentences increasing its readability for unsophisticated consumers [in other words, if you've gotten a dunning letter from somebody, if it's not crystal clear exactly what's meant by it, then you as an unsophisticated consumer are probably looking at a violation of the law]. It also places the verification notice on the front of the letter following the description of the collector state of collection activities, so that it's clear that the verification process will be followed if it is requested, and the stated collection activities will be suspended or terminated.

The 7th Circuit in *Thomas v. Law Firm of Simpson & Cybak*, again took the precautionary step of suggesting how collection law firms could best provide the debt verification rights notice without confusing consumers if the debt collection suit was filed about the same time that the verification notice was provided. The court noted that the consumers might not understand that they had to respond to the summons to avoid the default judgment. While an amended to the FDCPA overruled the main ruling in *Thomas*, the court's advice regarding the notice may still be worth noting.

(41:36) The court recommended that collectors avoid that potential confusion altogether by sending the debt verification notice 30 days before suit, making it easier for the consumers to understand that the requirements of the FDCPA and the summons are separate [Remember, you getting a summons is different than a dunning letter]. Where that was not possible, the court gave collectors in the 7th Circuit sample language to add to the FDCPA debt verification notice that the court believes will reduce consumer confusion.

The 2nd Circuit recently held that an FDCPA debt verification notice was overshadowed by the debt collector's service of a collection law suit on the consumer during the 30-day verification request period. Since the collector failed to explain or clarify in either the dunn or in a notice provided with the summons and complaint that the commencement of the lawsuit had no effect on the information conveyed in the debt verification notice.

The court pointed out that Congress passed and FDCPA amendment in 2006 adopting the court's reasoning that a debt verification notice must not be overshadowed by the debt collector's actions during the 30-day period the consumer request verification. While the debt collector may continue some debt collection activities during that period, overshadowing activities would confuse a consumer about his rights. The court reviewed several circuit court decisions emphasizing that confusion was particularly likely with a summons issued to a consumer during the 30-day period to request verification.

The court noted that the easiest course for a debt collector was to simply wait until the end of the 30-day debt verification request period to serve a debt collection suit on the consumer. If the debt collector could not wait, the best practice would be to provide two more notices to the consumer. First should be with the initial communication rights and explain that the consumer's right to verification continues even if the debt collector sues the consumer during the 30-day request period. The second additional notice should be sent to the consumer at the time the summons and complaint is served explaining the consumer still has the right to obtain debt verification from the debt collector, and that the consumer additionally should respond appropriately in the state court as set out in the summons. The safe harbor established in the 2nd Circuit by this decision might not necessarily be adopted by other Circuits.

(45:46) 5.7.2.6.3 **Notice that oral disputes overcome collector's assumption of validity of debt. 15 U.S.C. § 1692g(a)(3)**-

The verification notice should not state that the consumer must use a writing to raise a dispute that overcomes the § 1692g(a)(3) assumption by the debt collector that the debt is valid. The consumer is entitled to dispute a debt orally to overcome a collector's assumption that a debt is valid. Although only a written dispute of the debt triggers the collector's duty to provide verification of the debt [You can dispute the debt orally in a phone conversation with the debt collector, but if you want them to validate the debt, you can't just tell them that on the phone, you have to send them a written notice – "I dispute this debt"].

In a recent ruling, the 9th Circuit held in *Camacho* that collectors that send out a debt verification notice cannot require that the consumer dispute the debt only in writing *(Camacho v. Bridgeport Finance Inc. (9th Cir. 2005))*. Instead, the consumer's oral notification is sufficient to overcome the debt collector's § 1692g(a)(3) assumption that the debt is valid even though a written request is required to obtain verification of the debt or a response to the dispute. Instead, the consumer can dispute the debt's validity in writing or orally. In reaching this conclusion, the 9th Circuit noted that there are at least three other FDCPA provisions in addition to § 1692g(a)(3) requiring only oral notice by the consumer:

- Notification that the debt is disputed requiring the collector to include that fact when communicating that debtor's credit information to others include CRAs, under section 1692e(8);
- Where a consumer has multiple debts, a payment cannot be applied to a debt which the consumer has notified the collector is in dispute, under section 1692h;
- Notification that a time or place is inconvenient to the consumer for communication from the collector, under section 1692c(a)(1).

Camacho disagreed with *Graziano*, an older decision from the 3rd Circuit, which ruled that all consumer's disputes under § 1692g must be in writing. It is the case that certain FDCPA rights are only triggered by written notice, such as under § 1692g(a)(4), (5) and § 1692c(c). A consumer's notice that a debt is disputed under § 1692g(a)(4) must be in writing if it is to require the debt collector to cease collecting the debt until it provides the consumer a verification of the debt, that it is in response to the dispute.

The 9th Circuit held that the fact that these provisions require written notice will not be exposed on other provisions which expressly require written notice.

In *Camacho*, 9th Circuit followed the lead of the U.S. Supreme Court that the courts should not insert language into a statute unless the failure to do so resulted in absurd or unreasonable results. It also looked to another Supreme Court case indicating "Where Congress includes particular language in one section of a statute, but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion".

(52:24) Because other sections of the FDCPA require debt collectors to listen to consumer's oral disputes, the court reasoned it would not be absurd for Congress to require them to do so in § 1692g(a)(3). This is a particularly holding for consumers because of the increasing number of mistakes by collection agencies and debt buyers in collecting bills that: have been paid, are time barred, are only owed by another consumer, were fraudulent, or were discharged in bankruptcy. If the consumer orally disputes the debt, the debt collector must note it in any report it makes to a CRA or risk FDCPA liability under § 1692e(8) [when you dispute to a debt collector, even if you just dispute it orally, and they do not convey the fact that it's been disputed to the CRA, you have an FDCPA violation under § 1692e(8)]. A verification notice therefore, violated the FDCPA when it stated that the debt would be presumed valid unless the consumer disputed it in *writing*.

The 9th Circuit *Camacho* disagreed with the 3rd Circuit's opposite result in *Graziano*. In *Graziano*, the 3rd Circuit held: "We therefore conclude that § 1692g(a)(3),(4),(5) contemplates that any dispute to be effective must be in writing.

The *Camacho* decision and the plain meaning of § 1692g(a) may result other Circuits disagreeing with the 3rd Circuit on this point. District Courts have rejected *Graziano* knowing that it failed to give effect to the plain language of the statute.

A 1st Circuit decision, *Brady v. Credit Recovery Company*, illustrated the utility of providing this disclosure. In *Brady*, the consumer orally contested the debt, and the collector violated § 1692e(8) by failing to include the fact of the consumer's dispute in its report of the debt to a CRA.

However, one court has held that a debt collector is not required to provide debtors with a telephone number in order to assist debtors in disputing the debt orally. Fortunately, phone numbers have become easier to find on state debt collection licensing and complaint websites.

A bill introduced in the prior Congress would have added the requirement that the consumer's dispute must be in writing to overcome the collector's § 1692g(a)(3) assumption of validation. News of these and other developments may be obtained from NCLC REPORTS, *Debt Collections and Repossessions Edition*, between annual supplements of this treatise.

07 - Real Party In Interest

NCLC Collection Actions Second Edition

4.3 **Collector as Real Party In Interest, Owner of the Debt**-

Chapter 3 examines situations in which the entity collecting the debt does not have authority to use the states courts—such as when the entity is not properly licensed to collect on a debt, or has not properly registered with the state as an out of state corporation. This section examines whether the entity suing on the debt has standing to bring the action—is it the real party in interest?

There are at least 5 different scenarios where a collector is bringing a lawsuit:

1) The collector is the originating creditor and has never assigned the account, even to a securitization trust.
2) The collector is a bank, or other entity, that is usually an originating creditor, but in this case is not the originating creditor and instead has merged with, or purchased the originating creditor or its portfolio of loans.
3) The collector is the originating creditor, but has sold the receivables to a securitization trust and is either servicing the account or purchased the receivables back, pursuant to a recourse agreement.
4) The collector is a debt collection agency that has been assigned the debt solely for collection purposes, and the agency is not the real owner of the debt.
5) The collector is a debt buyer who either purchased the debt from the originating creditor or from some other debt buyer.

(2:18) 4.3.2 **Where a bank or other creditor is the Plaintiff**–

In general, even when a collection action is brought by a bank or other creditor, issues in real parties in interest in proving ownership often arise. The first step is to determine if the entity suing on the debt has the exact same name as the entity that originated the credit [You have to look very carefully at the names of these companies. It could be 'Discover Financial Services' vs. 'Discover Bank']. Often this is not the case.

Increasingly today, the entity collecting the debt has merged with, or purchased the lender who originally extended the credit, purchased the originating creditor's loan portfolio, or has simply changed its name. For example, on January 1, 2006, MBNA Corporation merged with, and into Bank of America with MBNA America Bank becoming a subsidiary of Bank of America. On June 10, 2006, MBNA changed its name to FIA Card Services. When an action is brought in the name of FIA Card

Services, the collector must provide admissible evidence that FIA Card Services has the right to sue on a debt with MBNA *(FIA Card Services v. Thompson (NY Dist. Ct. 2008) – case dismissed when MBNA obtained arbitration award, but sought confirmation under the name FIA Card Services)*. When an action is brought in the name of FIA Card Services, the collector must provide admissible evidence that FIA Card Services has the right to sue on a debt with MBNA.

Similarly, a case has failed where the collector never proved how a Household Bank account became a Bank of America account *(Norfolk Finance Corp. v. Mazard (MA Dis. Ct. Nov 12, 2009))*. Similar problems may arise where a bank ceased to collect on a Providian credit card account where Providian was sold to Washington Mutual which then ceased to exist *(Wirth v. Cach, LLC (GA Ct. Apl. 2009))*. Similarly, Bank One accounts are now being collected by Chase Bank [First USA credit cards were acquired by Bank One who was then acquired by Chase].

In proving the transfer of accounts from one bank to another, the records must meet all evidentiary standards. An appellate court had little trouble rejecting a collector's evidence of JP Morgan's purchase of credit card portfolios from other banks by reference to a NY Times article and to Wikipedia *(Palisades Collection LLC v. Graubard (NJ Sup. Ct. Apl. Div. April 2009))*.Thus, the collector failed to prove that First USC, a division of Bank One, purchased the credit card operations of Chevy Chase Bank, and that Bank One was purchased by JP Morgan Company.

Other confusion is created where the originating creditor brings the collection action but uses the name of a different subsidiary than the entity that originated the loan. Thus a court question to standing of American Express Travel Related Services Company to bring a collection action where the monthly statements were sent by American Express, and the agreement was with American Express Centurion Bank *(American Express Travel Related Services Company v. Assih (NY Civ. Ct. Dec 2009))*. If American Express is an assumed name, the company must comply with any applicable state law requiring corporations to file a certificate of doing business under an assumed name *(Miller v. Wolpoff & Abramson (IN No. Dist. Sep 2007) – affirmed by the Federal Court 7th Circuit in 2009)*.

Even where a credit card issuer brings a collection action in its own exact name, questions can still arise as to whether the obligation was sold to a securitization trust, and what that implies for the card issuer still remaining the Real Party In Interest.

(11:22) 4.3.2.2 **Securitization of credit card obligations**–

It is common knowledge for a credit card issuer to securitize its credit card receivables—for example apparently all Citibank credit card accounts are securitized. There are a number of complex ways in which this is accomplished. To further complicate matters, a credit card securitization is different in many ways than a mortgage loan securitization. To oversimplify, a card issuer will sell the right to receivables from a portfolio of credit card accounts. After changing hands a number of times, ownership of those *receivables* will reside in a trust that can issue securities in the assets held by the trust.

The card issuer continues to "own" the account less the right to the receivables, and thus remains the party with the contractual relationship with the cardholder, and the card issuer services the account *(Tostado v. Citibank (TX We. Dist Jan 2010))*. Thus, the card issuer can change interest rates and amend the contract, and it also receives payments and collects from the consumer where there's a delinquency. The trust owns the receivables on the card accounts—the right to payments. Since the amount owed and paid on a credit card account changes every month, the receivables held by the trust are constantly fluctuating.

The rights of the card issuer and the trust typically are spelled out in a pooling and servicing agreement (PSA). The PSA may provide that upon the occurrence of default as defined in that agreement, the receivable is either automatically transferred back to card issuer, or the trust has the to transfer the receivable back at its election.

(14:14) The PSA may also delegate to the card issuer on behalf of the trust, the right to bring a lawsuit in its own name to collect delinquent accounts [Dave has found the securitization stuff for Bank of

America. The PSA is right there, it's several hundred pages, but the receivables are transferred from FIA Card Services to another entity before it goes to the trust. If you do a little bit of looking, you can find this stuff].

This means that when a credit card issuer is collecting the debt in its own name, any one of a number of different scenarios could be in play. The card issuer may have never securitized the loan, and there will be little question as to its right to bring a collection action in its own name. The card issuer, instead may be suing in its own name as a servicer for the trust *(Capps v. FIA Card Services (ID 2010))*. The trust/trustee is the Real Party In Interest, and the servicers right to bring the action in its own name instead will be determined by state law.

Faced with a challenge as to the servicer's right to bring the action, the servicer will have to identify the owner of the receivables (the trust), and produce evidence that it has been delegated the right to bring the action on behalf of the trust [Usually that evidence will be found in the PSA]. Without this evidence, the servicer has no right to proceed. Even with this evidence, some states place additional restrictions on a servicer's right to do so. For example, Pennsylvania rules of procedure require that a plaintiff acting in a fiduciary or representative capacity disclose the capacity in the caption of the Plaintiff's initial pleading.

Alternatively, the card issuer may be suing after the rights to the receivables on the account have been transferred to the card issuer from the trust. Then, for the card issuer to bring an action, it will have to prove that assignment from the trust back to the card issuer.

Where the PSA provides that the transfer back to the card issuer is automatic on the occurrence of certain events, it is unclear whether proof of this provision in the PSA will be enough, or whether the card issuer must also produce a written transfer back to the card issuer *(Citibank v. Carroll (ID 2009) – originating card issuer has standing to sue although court did not consider whether there must be a separate document evidencing the assignment back to the creditor)*. If the PSA alone is deemed sufficient, then the card issuer will have to show that the events specified in the PSA as triggering the transfer have occurred [In other words, they have to produce documents saying these various things have occurred. A lawyer can't just come in a testify in court].

(19:40) Another scenario is where the card issuer claims that it can bring the action – not as the servicer or the owner of the right to receivables, but based upon its remaining interest in the account after the right to receivables have been transferred to the trust. While at least one court has apparently accepted this basis to bring an action (Tostado v. Citibank West. Dist. TX Jan 2010), this is open to question, since two different entities cannot both have the right to the same receivable. The consumer should not have to pay the amount owed twice.

In an odd twist, if there is no proof of valid transfer of receivable from the card issuer to the trust, then the court may treat the case as properly brought by the card issuer because there is not proof that the issuer ever relinquished the right to payment. Thus, in order to dispute a card issuer's right to bring suit, the consumer must first prove that the right to receivables has been sold to a trust. **This can be most effectively done by sending the card issuer a request to admit this fact** [in your admissions, you add that question]. If the consumer introduces the PSA instead, the consumer will have then introduced the very evidence that the card issuer can help show its right to bring the action [in other words, don't do it].

The exact structure of a particular securitization can be both complex and unique, and there is little case law as to the right of a card issuer to bring a collection action after an account has been involved in a securitization. Suffice it to say, it may be difficult to unravel the rights of the parties, and the consumer attorneys may soon feel out of their debt. On the other hand, the collection attorney may not want to devote the resource to investigating and explaining to the court how the securitization works in the case of an individual consumer, and why the card issuer has the right to pursue the case in its own name. It may be that a collection attorney facing consumer discovery or legal challenges concerning the securitization will opt to dismiss the case.

(23:06) 4.3.3 **Collection agency's ability to bring an action in their own name on behalf of another**-

It is important to distinguish between a case brought by a debt buyer to collect a debt it claims to own, and that brought by a debt collection agency suing on behalf of another such as the originating creditor. In that latter case, the debt collection agency does not own the debt, and it will turn over at least a portion of what it collects on the debt to the account's owner.

Whether the action is brought on behalf of another or by a debt buyer in its own right, there must be a written assignment to the Plaintiff giving it the right to sue on the debt. When challenged, the collector must produce such a written assignment. An affidavit stating there is such an assignment is not sufficient *(Unifund CCR Partners v. Shah Il. Feb 2011)*. And of course, there must be proof that the entity that is assigning those rights has the right to pursue the collection action.

Additional requirements apply where a collection agency is suing on behalf of another. Where an entity is in the business of collecting debts for another, there can be little question that the entity is covered by the state debt collection statute. In that case, the state debt collection statute may place various limits on a debt collector collecting on the debt. It may prohibit outright, the collection agency from bringing legal actions to collect on the debt of another. It may prohibit an unlicensed collection agency from bringing suit. In other states, the debt collector will have to disclose in the pleadings on whose behalf it is suing. For example, PA Rules of Procedure require that a Plaintiff acting in a fiduciary or representative capacity disclose the capacity in the caption and in the Plaintiff's initial pleading (PA Rules of Civil Procedure Rule 2002(b)).

Typically, the collector's authority to sue on behalf of another is based upon a written assignment and state debt collection statutes may specify the nature of that assignment from the debt owner to the collection agency. In OH, for example, there must be a writing authorizing the collection agency to refer the matter to an attorney. The writing must specify the consideration to be received by the collection agency. The matter can only be brought in the county where the consumer resides, and the matter must be brought by an attorney admitted to practice in the state *(Recovery Management Systems, Ltd. v. Coburn (OH, Nov. 2008))*. FL has a requirement that the consumer be notified within 30 days of when a debt is assigned to another (FL Statute § 559.715), and this would seem to apply to an assignment for collection purposes only.

Because these requirements may apply only to a debt collector suing on behalf of another, and not to a debt buyer, it is important to carefully read the assignment document to determine the exact relationship between assignor and assignee. Is the assignment transferring ownership, or only the right to sue on the debt for another? The need to review the assignment document is another reason why the collector must produce the actual assignment and not an affidavit stating the debt has been assigned. Particularly where the affidavit is vague as to whether the assignment is for collection purposes only. An internet search, or contacting the state debt collection licensing agency can also provide some rough indication of whether the collector is primarily in the business of purchasing debts, or collecting debts on behalf of creditors.

(30:00) 4.3.4 **Debt Buyer's Proof of Ownership of the Debt**-

4.3.4.1 **Ownership is a Precondition to a Collection Suit**-

[Obviously, if they don't own a debt, they do not have standing to make a claim to bring a suit.] A debt buyer seeking to sue on a debt it alleges it owns has the burden of proof to show that it does own the consumer's obligation *(Great Seneca Finance Corp. v. LeAnna (CT Aug 15, 2006); LVNV Funding, LLC v. Shecter (FL June 2009) – www.consumerlaw.org/unreported); Ray Klein, Inc. v. Kerr (MO 2008); Midwestern Health Management, Inc. v. Walker (MO 2006); New Century Financial Services v. Sanchez (NJ Apr 2002) – www.consumerlaw.org/unreported))*. A consumer defendant should always put the debt buyer to its proof that it owns the debt—debt buyers often cannot meet this burden. The consumer should not have to pay a debt to one party only to find out later that another party is the true owner, and the consumer must now pay the same debt again to the second party *(Miller v. Wolpoff & Abramson (IN Sep 2007))*.

The difficulty of the collector's proof that it owns the debt and the risk that more than one debt buyer will seek payment on the same debt both increase as the debt is transferred from debt buyer to debt buyer. In one case, the successor company to Providian, assigned a debt to Vision Management Services, which then assigned it three days later to Great Seneca Financial Corp., which a month later, assigned it to Account Management Services. Four months later, Account Management Services, which shortly thereafter changed it's name, assigned the account to Madison Street Investments, which then assigned the account five months later to Jackson Capital, which on that same day assigned that account to Centurion Capital. Three weeks later, Centurion hired Wolpoff & Abramson as their attorneys to collect on the debt. After the transfer to Jackson Capital, but before the transfer to Centurion Capital, the consumer was sued on the account by Melville Acquisitions Group., which appears nowhere in the above chain of ownership.

Debt buyers purchase large portfolios of account from creditors and then subdivide the portfolios into smaller segments, and sell off those segments to different debt buyers. The same segment of a portfolio may be sold to multiple buyers, or the seller may not actually own a portfolio put up for sale *(United States v. Goldberg (FL Mar 5 2009) – www.consumerlaw.org/unreported. Debt buyer obtained accounts without paying for them, and then resold them, even though original seller had void the sale because of nonpayment); Wood v. M&J Recovery, LLC. (NY Apr 2007) – at least 3 different entities claim ownership of a debt)*. For example, debt buyers may purchase accounts with the debt buyer's payment to the assignor due in the future, and the assignor may take back the account if the debt buyer fails to make payments when due. But there is little to prevent the defaulting debt buyer from selling the accounts to another debt buyer, even though the original debt buyer takes back the same accounts *(United States v. Goldberg (FL Mar 5 2009)*. The sale to the debt buyer may be evidence by no more than a computer tape that can be easily duplicated and sold without the authority to do so.

Debt buyers' business model is to purchase debt for pennies on the dollar, and then seek payments with a minimal investment of effort. The debt buyer is unlikely to put much effort into establishing proper documentation of an assignment when it is suing the consumer on one relatively small debt, and if challenged by the consumer will often have difficulty meeting its burden of proving that it owns the debt.

(38:55) 4.3.4.2 **Adequate Proof of Transfer of Ownership to a Debt Buyer**-

A debt buyer must prove that it has been assigned an account through tender of proper documentation specifically related to the particular account at issue *(New Century Financial Services v. Sanchez (NJ Apr 2002) – www.consumerlaw.org/unreported; Citibank v. Martin (NY 2005); Palisades Collections, LLC v. Gonzales (NY Dec 2005))*. It is insufficient to introduce a notice from the assignor to the consumer that it is assigning the debt to the assignee *(Wright v. Asset Acceptance Corp.(OH Jan 2000))*. The actual assignment document should be introduced into evidence.

A memorandum or other statement from the debt buyer stating that it has received assignment of account at issue is also insufficient *(New Century Financial v. Sanchez (NJ Apr 2002) – www.consumerlaw.org/unreported)*. Mere affirmation of the assignment in an affidavit is also insufficient. The debt buyer must submit actual contracts of assignment identifying the accounts at issue [They can't just put a copy of a supposed sale agreement with names and info redacted with no individual account listings. If it doesn't specifically list that account and other pertinent info, like your SSN and name, that's not sufficient] *(LVNV Funding, LLC v. Shecter (FL June 2009) – www.consumerlaw.org/unreported; Palisades Collection, LLC v. Thomas (FL Apr 2009)- www.consumerlaw.org/unreported)*.

The assignment document is a business record that needs authentication through proper affidavit. If the debt buyer's employee is the affiant attesting to a document assigning that debt to the collector, the affidavit must meet all the requirements necessary to satisfy the business records exception to the hearsay rule.

There can be little question that an employee of a third-party debt buyer in a chain of transfers cannot authenticate a document memorializing an assignment from the first to the second debt buyer in a chain of transfers *(Wright v. Asset Acceptance (OH Jan 2000); Norfolk Finance Corp. v. Mazard (MA Nov 2009); Colorado Capital Investments, Inc. v. Villar (NY June 2009)- www.consumerlaw.org/unreported)*. The collector's employee has no knowledge of the nature of the assignment or of those entity's business records.

Thus, in one case, the debt buyer submitted an affidavit from its agent with a printed copy of several pages from an electronic spreadsheet, listing consumer's account as one of the accounts sold to the debt buyer. The appellate court found this insufficient where the affidavit was not a proper foundation for the spreadsheet for the business record *(Palisades Collection v. Kedik (NY 2009))*. The agent did not establish that he was familiar with the debt buyer's business practices and procedures, or establish when, how, or by whom the electronic spreadsheet submitted in paper form was made. Furthermore, the agent failed to establish that the printed spreadsheet was a true and accurate representation of the electronic record.

Debt buyers usually can produce a quite detailed contract or bill of sale delineating the relationship between the debt buyer's assignor and the debt buyer, but the document will make reference only generally to thousands of accounts being purchased at the same time, and will not identify the consumer's account [If it doesn't specifically specify your account, it's worthless and you need to challenge it]. This evidence is not enough. Each assignment document must indicate that one of the thousands of accounts the collector has purchased is the account at issue in the lawsuit. The debt buyer's documentation of each assignment must reference the specific account at issue *(Kendall Bankruptcy Court Northern District OK 2007; Persolve v. Uribe (CA Dec 2010)- www.consumerlaw.org/unreported; Velocity Investments v. Bailey (CT June 2007); Unifund CCR Partners v. Riley (MI Feb 2010))*.

Debt buyers may seek to rectify this failing by saying they are attaching to the affidavit or other document the actual computer tape or spreadsheet listing all the assigned accounts, including the consumer's account. Nevertheless, in a surprising number of cases, the debt buyer will not attach the computer tape or offer any evidence that the particular consumer's account being sued on is on that computer tape. This evidence is not sufficient to prove assignment *(Wright v. Asset Acceptance Corp. (OH Jan 2000); Bullock v. Worldwide Asset Purchasing, LLC (KY Sep 2008))*. Other times an affidavit or other documentation will refer to a schedule or appendix that allegedly will identify the account, but no schedule or appendix will be attached *(Gigli v. Palisades Collection, LLC (PA Aug 2008); Velocity Investments v. Bailey (CT June 2007); Worth v. Cach, LLC (GA 2009))*. Similarly, an affidavit cannot refer to an appendix that lists accounts in the plural, but then only attach the consumer's account number and not other accounts *(Colorado Capital Investments, Inc. v. Villar (June 2009)- www.consumerlaw.org/unreported)*.

Carefully review all documents of assignment, because they are often incomplete or illegible. In one case, the court found an assignment to be improper when the debt buyer submitted only four pages of a 20+ page loan sale agreement *(C&W Asset Acquisition, LLC v. Somogyi (MO 2004))*. The court observed:

> The first page, entitled "Loan Sale Agreement" merely identifies the parties and states the effective date of the transaction. The second page contains a pair of signatures. Third page contains a redacted table of four accounts. These three pages do not appear to have any relationship to one another given that they were respectively numbered "i", "7", and "19 of 28."

In another case, the debt buyer produced a series of exhibits that showed the defendant's name, address and account number on a blackened out photocopy that purported to evidence several transfers of the debt. The court found this evidence inadequate without a supporting affidavit *(Great*

Seneca Financial Corp. v. LeAnna (CT Aug 2006)). In another case, the debt buyer's affidavit specified a date of assignment over three months after the date specified in the alleged "Bill of Sale" *(Unifund CCR, Assignee of Providian v. Ayham (WA Aug 5 2008))*.

Some states may also have statutory requirements which apply to the assignment document. Ohio, for example, has detailed provisions relating to assignments to a collection agency. Florida law requires that an assignee must give a debtor written notice of the assignment within 30 days of the assignment. If the collector cannot produce evidence of this notice, the case should be dismissed *(LVNV Funding, LLC v. Harris (FL June 2009)- www.consumerlaw.org/unreported)*.

08 - Litigation And Remedies

NCLC Fair Debt Collection Seventh Edition Volume One

6.2.2 **Considerations Concerning Remedies**-

6.2.2.1 **Increasing FDCPA Individual Awards**-

Most FDCPA cases historically have been based on violations in dunning letters—a false threat, an improper notice, a misstatement of the amount of the debt. This approach has provided the advantage of the streamline suit often seeking only statutory damages and attorney's fees without contested facts with liability often decided on summary judgment. Such suits require minimal discovery and result in a judgment with relative speed. With the passage of time since the enactment of the FDCPA, however, the real value of statutory damages under the FDCPA has declined substantially, because the $1000 ceiling in individual actions and the $500,000 ceiling in class-actions have remained unchanged since 1977. In addition, the deterrence and compliance objectives of the private attorney general enforcement mechanism have to some extent been successful over the years, and the frequency and regularity of some types of violations have decreased [the whole idea of the people bringing in the action as private attorney generals is so the government isn't swamped with doing it themselves].

One strategy to increase FDCPA awards in individual actions is to focus on cases that involve egregious debt collector abuse and the resulting significant consumer injury. An award of punitive damages in such cases pursuant to a state law claim will further enhance the consumer's recovery.

Another strategy is to focus on cases with overcharges and seek those overcharges as actual damages for the class. Another possibility to produce a sizable actual damages award is bringing an FDCPA case alleging litigation misconduct by a debt buyer or other collector in bringing prior collection action against the consumer or a class of consumers. The consumer's actual damages may include the attorney fees the consumer had to expend to prevail in the collection action or other cost to defend the suit.

(4:25) 6.2.3 **A Wide Range of Parties May Bring FDCPA Actions**-

A private right of action is available not only to the "consumer", that is, the putative debtor, but also to "any person" adversely affected by FDCPA violation [if someone is bothering you because they're trying to find someone else, you're not the debtor but you can bring FDCPA actions against them] *(Villarreal v. Snow (IL 1996)- individual who was not actually obligated had signed as owner of the collateral loan and was an addressee of the deceptive dunning letters)*. Moreover, most FDCPA provisions protect not just consumers, but everyone affected by violations occurring during the collection of consumer debts. Therefore, friends, relatives, neighbors, or an employer, even though not obligated or alleged to be obligated on a debt may bring an action under the act *(Heard v. Bonneville Billing & Collections (10th Circuit 2000); West v. Costen (VA 1983))*. The equities of a case may be improved with the joinder of non debtor plaintiffs whose claims may create additional sympathy. An executor of a deceased party also has standing to bring an FDCPA claim that the deceased could have brought *(Wright v. Financial Services Inc. (6h Circuit 1993); Kaschak v. Raritan Valley Collection Agency (NJ 1989))*.

(9:20) 6.2.4 **A Wide Range of Defendants May Be Named Under the FDCPA**-

6.2.4.1 **Employees and Officers**-

The FDCPA defines debt collector to include any person who regularly collects debts and therefore coverage is not limited to collection agency, despite dicta in a 7th Circuit decision. **Agency employees and officers are individually liable under the act to the extent to which they participate in the FDCPA violation** *(Kistner v. Law Offices of Michael P. Margelefsky, LLC (6th Circuit 2008); Thinesen v. J.B.C. Legal Group, P.C. (MN 2005))*. **Liability is based upon these individual's participation in the violation though, and not simply on their association with the collection** agency [If you are wanting to go after additional people, they would have to have played some part in the violations which you're dealing with].

Corporate officers and members of law firms may be named as individual defendants where they are personally involved in establishing or carrying out the prescribed activities of the corporation or law firm [if you're a principal of a law firm, you're involved in establishing or carrying out the prescribed activities. You lay down the rules by which the law firm is supposed to operate, therefore you incur liability] *(Kistner v. Law Offices of Michael P. Margelefsky, LLC (6th Circuit 2008); Albanese v. Portnoff Law Associates, Ltd. (PA 2004)*. The Fiduciary Shield Doctrine does not insulate officers or employees who determine how collections are conducted *(Brujis v. Shaw (IL 1995))*. **Even if officers are not directly involved in the collection efforts, they can be liable if they exercise supervisory authority over the corporation, are intimately involved with the practices and procedures of the corporation, or developed and implemented the particular collection practice challenged** *(Brumbelow v. Law Offices of Bennett & Deloney P.C. (UT 2005); Musso v. Seiders (CT 1999); Pope v. Vogel (IL 1998))*. An attorney in a sole-proprietorship should be individually liable in addition to the sole proprietor's liability *(Kistner v. Law Offices of Michael P. Margelefsky, LLC (6th Circuit 2008); Bartlett v. Herbl (7th Circuit 1997))*.

While most debt collection employees and officers are impecunious, others, such as a person who is both the owner and actively involved in the collection activities of a small company, may be wealthier than the company itself. Joining as a party, an employee or officer involved in the debt collection also facilitates discovery, which is typically more expensive and cumbersome against a non-party. Care should be taken that the employee not be one that may solicit undue sympathy from a jury *(Kistner v. Law Offices of Michael P. Margelefsky, LLC (6th Circuit 2008)*. Because collection employees often use fake names while collecting a debt, it may be necessary to sue them as "John Doe a.k.a. Robert Smith", and discovery may be needed to obtain the information necessary to serve them.

(20:55) 6.2.4.2 **Owners, Partners, Franchises and Parent Companies**-

By piercing the corporate veil, the owner of a collection agency may be held liable for FDCPA violations committed by agency employees, if there is sufficient evidence to pierce the veil *(KLCO v. Elmhurst Dodge (IL 2002); Byes v. Accelerated Cashflow, Inc. (LA 1996))*. In addition, even if owners are not directly involved in the collection efforts, they can still be liable if they exercise supervisory authority over the corporation, are intimately involved with the practices and procedures of the corporation, or developed and implemented the particular practice challenged.

Under partnership law, the general partners of limited partnership debt collection agencies are vicariously liable for the limited partnership's violations. A franchiser may be liable for those acts of its franchisee debt collector which it controls *(Taylor v. Check Rite, Ltd. (OH 1986))*. **A parent company can be found liable for the FDCPA violations of its corporate subsidiary collection agency, even where the subsidiary collects debt in the subsidiary's own name**. This liability can be shown where the subsidiary was merely an instrumentality for the parent and the entire group of corporations constituted a single economic enterprise *(Jenkins v. Union Corp. (IL 1998)- the parent corporation could be liable but in this case, insufficient evidence to create such liability was produced; Avila v. Van RU Credit Corp. (IL 1995); United States v. ACB Sales & Service, Inc. (AZ 1984))*.

(28:05) 6.2.4.5 **Joining parties otherwise exempt from FDCPA Liability**-

Creditors are generally exempt from FDCPA liability so a state claim is usually the best course of action to challenge the creditor's debt collection activities. Creditors and others exempt from the

FDCPA may be joined as co-defendants in a federal court FDCPA action against the collection agency if the court accepts supplemental jurisdiction over state law claims against these other parties.

(28:55) 6.2.5 **Trial by Jury**-

The 7th amendment to the United States Constitution guarantees the right to a jury trial in FDCPA private right of action seeking actual or statutory damages. Collectors have argued that the use of the word "court" in 15 USC § 1692k and evidence they congressional limit actions to bench trials. This argument has been consistently rejected *(Kobs v. Arrow Service Bureau Inc. (7th Circuit 1998); Sibley v. Fulton Dekalb Collection Service (11th Circuit 1982))*. The word "court" is not the equivalent of the word "judge", and is used in numerous federal statutes to include both the judge and jury in circumstances that merely beg the 7th amendment question. As and FDCPA action is similar to types of actions recognized in common law, the 7th amendment guarantees the right to a jury trial to any party in an FDCPA seeking damages.

(31:00) 6.3 **Actual Damages, 15 U.S.C. § 1692k(a)(1)**-

This provision establishes a cause of action for actual damages sustained by any person as a result of a failure of a collector to comply with any FDCPA provision.

Neither the FDCPA nor any other part of the Consumer Credit Protection Act defines 'actual damage'. *Black's Law Dictionary* defines 'actual damage' as: "an amount awarded to a complainant to compensate for a proven injury or loss; damages that may repay actual losses.—Also termed *compensatory damages*".

Congress left it to the courts to apply the term "actual damage" to particular cases in accordance with the purposes of the FDCPA and with developing principles of federal common law. Actual damages commonly included pecuniary damages such as lost wages or the cost of obtaining an unlisted telephone number, and physical injuries such as heart attacks, ulcers, vomiting, and insomnia. **In addition, the courts commonly allow recovery of damages for emotion distress, and relational injuries under the FDCPA**. Decisions awarding actual damages for these and other types of harm caused by abusive debt collection are discussed in another section of the book.

(34:00) 6.3.2 **Emotional Distress Damages**-

Courts generally agree that emotional distress damages can be awarded under the FDCPA without having to meet state tort requirements for recovery of emotional distress damages *(Johnson v. McCollough (9th Circuit 2011); Ortega v. Collectors Training Institute of Illinois, Inc. (FL 2011); Poniewaz v. Regent Asset Management Solutions, Inc. (MO 2010); Newsome v. Regent Asset Management Solutions, Inc. (FL 2010); Henneberger v. Cohen & Slamowitz, LLP (NY 2010) [many many more case citations]*. **For example, one court used the following jury instruction: "First, actual damages may be awarded to plaintiff as a result of the failure of defendants to comply with the act. Actual damages not only include any out of pocket expenses, but also damages for personal humiliation, embarrassment, mental anguish, or emotional distress."** *(Smith v. Law Offices of Mitchell N. Kay (DE 1991))*.

Several decisions from the eastern district of California take the opposite approach and impose on FDCPA emotional distress damages the same requirements as state court standards to recover under an intentional infliction of emotional distress theory *(Hartung v. JD Byrider, Inc. (CA 2009); Bolton v. Pentagroup Financial Services LLC (CA 2009))*. These decisions can be criticized because Congress passed the FDCPA to overcome the inadequacy of state tort remedies. The FDCPA's findings and declaration of purpose states "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers". Representative Annunzio the primary House FDCPA sponsor stated that "[p]assage of the Debt Collection Practices Act is important if consumers throughout this country are to be protected from the mental anguish and intimidation that are consequences of abusive debt collection practices."

Courts are required to give the term "actual damages" a construction which will best accomplish the legislative purpose which is specifically "to eliminate abusive collection practices." *(15 U.S.C. §*

1692e. See also Schein, FTC Informal Staff letter (Oct. 27, 1980) (in the absence of statutory or legislative history to the definition of "actual damages," the term should be given its ordinary meaning of compensatory damages; it should include damages for mental anguish and not be limited to out-of-pocket losses). "The imposition of actual damages should be interpreted as a message to all debt collectors that such conduct is inappropriate. To not award actual damages would encourage 'a race to the bottom' as debt collectors could operate in an inappropriate manner with little consequence" *(Becker v. Montgomery Lynch (OH 2003))*.

At the time the FDCPA was enacted, case law under other titles of the Consumer Credit Protection Act (CCPA) such as the Fair Credit Reporting Act (FCRA) and the Equal Credit Opportunity Act (ECOA) had awarded damages to the sensibility or psyche without proof of the state tort elements for emotional distress. When Congress enacted the term "actual damages" in the FDCPA, it was aware of how the term was used in other pre-existing CCPA titles "Where Congress borrows terms of art and which are accumulated… legal tradition meaning… it probably knows and adopts the cluster of ideas that were attached… and the meaning its use will convey to the judicial mind" *(Morissette v. United States (US 1952); United States v. Merriam (US 1923))*. For example, the availability of FCRA emotional distress damages without reference to state tort law requirements indicates a congressional intent to allow the same under FDCPA *(Smith v. Law Offices of Mitchell N. Kay (DE 1991))*.

(47:20) Several United States Supreme Court cases also support the conclusion that emotional distress should be awarded to injured individuals and that emotional harm should be compensated as an actual injury. In *Gerts v. Robert Welch, Inc.* (US Supreme Court 1974), a defamation case pre-dating the FDCPA raising 1st amendment issues, the court did not define actual injury, but held that it was not limited to out of pocket loss. The court noted that the more common types of harm inflicted by defamatory falsehoods include loss of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Gerts* can be analogized to typical FDCPA cases in which embarrassment, emotional distress, and loss of reputation are commonly incurred injuries.

In *Carey v. Piphus* *(US Supreme Court 1978)*, a procedural due process case brought under 42 USC § 1983, the court stated that "[d]istress is a personal injury familiar to the law," and that "[w]e use the term 'distress' to include mental suffering or emotional anguish." The court thus defined 'actual injury' to include a variety of psychological harms as well as pecuniary loss and physical injury. More recently in *Doe v. Chao* (US Supreme Court 2004), the court noted that the circuit courts were divided on the issue whether non-pecuniary psychological harms qualify as actual damages as used in the privacy act, but declined to rule on the issue. **The court "[did] not suggest that out-of-pocket expenses are necessary for recovery" on claims for actual damages, but the "conclusory allegations" of emotional distress with "no corroboration" did not rise to the level of actual damages** [you can't just say "I was really nervous". You have to say how it affected you – that you lost sleep, you were nervous, you became afraid to talk to your neighbors, you were afraid you would be fired from your job, etc… You have to state what happened, not just that you were harmed].

(52:12) 6.3.3 **Proof of actual damages**-

Often in FDCPA cases, proof of actual damages is introduced in evidence only after the consumer has prevailed on a partial summary judgment motion on liability. By resolving liability issues first through a partial summary judgment motion, court and litigation resources are conserved, because proof of actual damages can be focused on those claims on which the consumer prevailed on summary judgment, and not on the consumer's other claims.

Nonpecuniary damages must be based on evidence *(Pipiles v. Credit Bureau Inc. (2nd Circuit 1989); Bassett v. IC System, Inc. (IL 2010); Crass v. Marval & Assoc. LLC (WI 2010); Molina v. Creditors Specialty Service, Inc. (CA 2010))*. For example, many of the cases cited in the previous subsection, such as *Doe v. Chao, Terry v. Carey v. Piphus, Gerts v. Robert Welch, Inc., Racer v. Retail Credit Co., and Schuman v. Standard Oil Co. of California,* hold that mental anguish and other injuries claimed as actual damages must be proved by competent evidence.

Proof that a claimed injury occurred might consist of testimony of the consumer, or of a witness that the consumer had, or complained of, a headache shortly after an offensive phone call *(Read v. Amana Collection Services (NY 1991)- emotional distress damages not established by consumer's testimony)*.

Evidence of the extent and duration of the injury should also be introduced. While it is the province of the jury to determine the causal link between the violation and the injury, it is usually critical to provide evidence of causation. Testimony regarding the value of some types of injuries such as lost wages and property values must also be introduced. Evidence of the value of pain and mental suffering is not required. The jury is guided in its determination by its own experience by the arguments of counsel and by the instruction of the judge *(Smith v. Law Offices of Mitchell N. Kay (DE 1991); Grassley v. Debt Collectors Inc. (OR 1992); Carrigan v. Central Adjustment Bureau, Inc. (GA 1980))*. **A number of courts have held that expert testimony is not necessary to prove emotional distress damages** [you are the best person to speak to that] *(McNally v. Client Services, Inc. (PA 2008)- consumer's testimony sufficient; DeGeorge v. LTD Financial Services LP (NY 2008)- family member's testimony sufficient; Nelson v. Equifax Information Services, LLC (CA 2007)- medical testimony unnecessary)*.

09 - FCRA & CRA Actions Part 1

NCLC Fair Credit Reporting Seventh Edition
Discussing Negligent Violations

Chapter 10 (pg. 395) **Available claims for consumer reporting disputes**-

10.2 **FCRA Claims** -

In general, FCRA Claims can be raised in a private action for either willful or negligent noncompliance with the act (1681n, 1681o), and the two may be pleaded in the alternative [that means you can plead one, or state "in the alternative, we bring this cause of action before the courts"] *(If the consumer wants to stay in state court, another approach is to bring a state deceptive acts challenge based on the facts that it is a deceptive practice to violate the federal FCRA – State v. TRW Clearing House (VT 1991)) (Stevenson v. Employers Mutual Association (IL 1997))*. (This section focuses on the elements of FCRA claims based on negligent noncompliance. The issue of whether noncompliance was willful is discussed in the next chapter).

Although a private right of action exists for violation of most FCRA requirements, a number of provisions explicitly state that their violation does not lead to a private right of action. **But for the remaining FCRA provisions that a consumer may enforce any "person" who fails to comply with that provision regarding a consumer is liable to that consumer. Any "person" includes not only CRAs, including resellers, but also those using information from CRAs and those furnishing information to CRAs, including creditors.**

To recover damages for an FCRA violation, the consumer must show that the defendant's noncompliance was negligent. Congress explicitly rejected a gross negligent standard. **The *Restatement (Second) of Torts*, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm". This would indicate that any violation of the FCRA is negligent because it is a standard established by law**.

Nevertheless, some courts view the FCRAs phrase "negligent failure" as a reflection that Congress intended not to impose a duty of strict liability whereby a person would be automatically liable for any innocent unintentional "slip-up not attributable to lack of due care." As a result, it would be prudent to show that the violation was more than an isolated innocent unintentional error.

Whether defendant is negligent would depend on applicable standards in the consumer reporting industry. Even so, the industry standards as to normal practices may themselves fall below reasonable standard of care. If the industry practice is not facially inadequate, plaintiffs may need an expert witness as to the standard of care.

(7:50) 10.2.2 **FCRA claims against Consumer Reporting Agencies**-

10.2.2.1 **Claims Relating to Inaccurate Reports**-

In general, the FCRA does not require that all consumer reports be accurate, but instead requires that CRAs follow reasonable procedures to ensure maximum possible accuracy of information in a consumer report. To prove *negligent* noncompliance with this requirement, the consumer must show the following by a preponderance of the evidence:

- The defendant failed to follow procedures to ensure maximum possible accuracy;
- The consumer report in fact contained an inaccurate entry;
- The consumer suffered injury;
- The injury was caused in part by the inaccuracy.

Note that many courts do not require the Plaintiff demonstrate the last two elements for a claim of *willful* noncompliance. *(Beaudry v. Telecheck Int'l, 579 F.3d 702 (6th Cir. 2009); O'Connor v. Trans Union Corp., 1999 U.S. Dist. LEXIS 14917 (E.D. Pa. Sept. 28, 1999))*

The consumer can recover even if the consumer did not first notify the consumer reporting agency of the inaccuracy. The FCRA does not define accuracy with respect to claims against CRAs but there is a definition that governs furnisher accuracy.

10.2.2.1.2 **Reasonable procedures**-

The consumer must show that the CRA was negligent in failing to "follow reasonable procedures to ensure the maximum possible accuracy" of the reported information. **Whether procedures are adequate and reasonable under the FCRA is for a jury to decide**.

When procedures that should be in place are not in in place, the consumer litigant will have little difficulty establishing a violation. For example, **the CRA is negligent where it has no procedure to verify the fact that the individual about whom it receives unfavorable information is the same person about whom it is preparing a report** *(Dalton v. Capital Associated Industries, Inc. (4th Circuit 2001); Miller v. Credit Bureau (D.C. Superior Court 1973))*. Similarly, where the CRA itself has a procedure requiring verification of unfavorable information by at least one other source, failure to verify is negligent misconduct. Whether procedures are reasonable may be judged by what a reasonably prudent person would do under the circumstances.

Although most FCRA provisions require an entity to "maintain" reasonable procedures, the FCRA section regarding "maximum possible accuracy" requires the CRA to "follow" such reasonable procedures. "Follow" implies a double requirement, that the CRA have reasonable procedures in place, and that the CRA actually follow those procedures. The CRA should be liable if it maintains reasonable procedures but its employees do not follow them *(King v. Credit Bureau, Inc. of Georgia (DE 1975))*.

The FCRA requirement also states that the procedures should assure maximum possible accuracy. The *Webster's Dictionary* definition of "assure", among others is "to make safe," "to insure," "to make certain." Procedures do not make accuracy certain if they are followed at some times and not others.

CRAs must institute additional procedures to ensure that the basic procedures are consistently followed. CRAs should institute special procedures to ensure that deleted inaccurate information is not reinserted into the consumer's file. Such reinsertion will face greater scrutiny than the original inaccuracy, because not only does the FCRA contain special requirements for reinsertion of previously deleted information, it is unreasonable for a CRA not to follow procedures that make especially certain that such correct information does not reappear.

Nevertheless, the FCRA standard is that a CRA must be found to be *negligent* in failing to follow procedures. One instance of a trusted employee's failure to follow procedures because of an unavoidable accident which is unique, and that employee's 10 years of reports is unlikely to be viewed as negligence on the part of the CRA. The consumer must show that the lapse was not an isolated instance. In other words, that the inaccuracy could happen again.

Information as to defendant's procedures and whether the CRA followed them is, of course, exclusively within the defendant's knowledge and control. The consumer, however, must show at least an inaccuracy in order to shift the burden to the defendant, who will then have to show what procedures it followed. Some courts, however, require a Plaintiff show more than a mere inaccuracy at this stage of the proceedings. For those courts, indirect evidence can allow a fact-finder to infer the absence of reasonable procedures, such as inconsistencies between two reports (it is important for the consumer to request the 'audit trail' in discovery to see what the creditor actually received. Often the CRA will send the consumer a report different from what the creditor received. This is because the CRA asked the consumer for a great deal more identifying information than it asks the creditor to provide. So that what it sends the consumer will be more precisely tailored than what the creditor received).

10.2.2.1.3 **The report must in fact, be inaccurate**-

While the FCRA standard is that CRAs must follow reasonable procedures to ensure accuracy, courts usually require consumers to prove not only that a CRA failed to follow such procedures, but that the report was in fact inaccurate. This extra hurdle is not found in the statute and stems from a judicial aversion to hearing complaints where the report was in fact accurate. Nonetheless, in showing the report was inaccurate is not part of the statutory provision, the consumer need not show that the inaccuracy in a particular report arose from negligence, only that there was an inaccuracy, and that the CRA was negligent in failing to follow reasonable procedures to prevent that, or other inaccuracies.

(18:11) 10.2.2.1.4 **Injury and causation**-

For a claim of negligent violation, courts also require that an inaccuracy injure the consumer. All courts agree that emotional distress is one of the components of damages. Causation – the link between the inaccuracy and the injury may be based on inference [in other words, it doesn't have to be based on evidence] *(Philbin v. TransUnion Corporation (3rd Circuit 1996); Sampson v. Equifax Information Services, LLC (GA Aug 29 2005))* .

It is enough that a reasonable fact-finder could infer that the inaccurate entry was a "substantial factor" in the denial [of credit] *(Philbin v. TransUnion Corporation (3rd Circuit 1996))*, but where the CRA shows that the inaccurate entry was not the basis for a credit denial, for instance by affidavit of the creditor, the consumer proof requirements become that much greater *(Cahlin v. General Motors Acceptance Corp. (11th Circuit 1991); Heupel v. TransUnion, LLC (AL 2002))*.

(22:37) 10.2.2.1.5 **Relation of claim to one based on the failure to reinvestigate**-

Where difficulties arise in showing that the CRA was negligent in failing to follow reasonable procedures to ensure maximum accuracy, a better approach may be to show that the CRA was negligent in failing to correct the report after the inaccuracy was brought to the CRAs attention. The FCRA specifies in detail requirements on handling consumer disputes of inaccurate or incomplete information. As described in the next section, negligent noncompliance with these procedures violates the act irrespective of the CRAs procedures to prevent the inaccuracy from first occurring. Negligent noncompliance violates the act irrespective of the CRAs procedures. Of course, this FCRA claim is applicable only if the consumer disputed the report with the CRA. **The CRA did not properly respond, and this improper response (as opposed to the initial inaccuracy) damaged the consumer**.

In addition, even where the claim is based upon the failure to follow reasonable procedures in the initial receipt of the information, it is helpful to also point out the CRAs failure to properly reinvestigate. Damage awards are likely to be greatest where the consumer has made repeated vain attempts to correct a report.

(25:07) 10.2.2.2 **Claims for Failure to Properly Handle Consumer Disputes, Reinvestigations**-

The FCRA establishes procedures in case of disputed accuracy of a report. The dispute resolution process is several statutorily required steps, including the following:

- Reinvestigation, correction or deletion of inaccurate or unverifiable information;
- Notification of the results of the investigation;
- Notification when the information has been reinserted into a consumer's file.

Unless the consumer has been notified that the CRAs has deemed the dispute frivolous, the investigation at the very least must involve contacting the creditor or other person who furnished the information to the CRA in the first place.

Negligent or willful failure to follow these procedures is actionable. Even if the inaccurate information in a report was not initially actionable because the CRA had followed reasonable procedures, the CRAs failure to properly handle a consumer's dispute concerning that information provides a separate cause of action for the consumer. Of course, in that case the consumer can only obtain damages flowing from the CRAs subsequent failure to correct the information and not from the CRAs initial publication of the inaccurate information. Moreover, the consumer must have properly disputed the information to trigger operation of these procedures *(Ruffin-Thompkins v. Experian Information Solutions In. (7th Circuit 2005)- this is affirming summary judgment for the CRA where the Plaintiff failed to establish damages suffered during the CRAs period of liability which did not start until she notified the CRA of her dispute); Caltabiano v. BSB Bank & Trust Co. (NY 2005))*. Increasingly, courts are also requiring that the disputed information be actually inaccurate.

The dispute and reinvestigation procedure present brightline obligations for CRAs. The maintenance for reasonable procedures is not a defense to a failure to fulfill these obligations, nor should it be difficult to show that failure to fulfill these specific obligations was negligent in most cases.

Nevertheless, issues will arise as to negligence. For example, is a CRA negligent if it believes (incorrectly) that it has reasonable grounds for treating a dispute as frivolous? Has the degree of diligence in the reinvestigation inquiry been sufficient? How much reliance may the CRA continue to place on the party who furnished the disputed information? While the total failure to follow prescribed reinvestigation procedures is almost certainly negligent, or willful, the actual reinvestigation procedures that the CRA practices can raise triable questions of reasonableness *(McKeown v. Sears Roebuck & Co. (WI 2004))*.

(30:52) 10.2.2.3 **Claims relating to obsolete reports**-

CRAs can violate the FCRA by issuing obsolete reports in two different ways. First, the CRA is liable under § 1681c if it is negligent in making any consumer report that contains any obsolete information. Second, the CRA is liable under § 1681e(a) if it is negligent in maintaining reasonable procedures designed to avoid reporting of obsolete information.

Thus, consumers can bring actions based on reporting of obsolete information whether or not a CRAs procedures are reasonable as long as the CRA is negligent in reporting the information. If the consumer cannot prove negligence in reporting the obsolete information, the consumer instead can show negligence in failing to maintain reasonable procedures.

This distinction is largely academic because in most cases the two claims should involve the same proof. Nonetheless, occasionally a consumer can show that a CRA negligently provided an obsolete report but will not want to become meshed in the CRAs general procedures for preventing the reporting of obsolete information.

(33:24)10.2.2.4 **Claims Relating to Consumer Reporting Agencies Furnishing Reports for Impermissible Purposes**-

FCRA liability concerning the providing of reports for impermissible purposes is very similar to liability concerning the providing of obsolete reports. The act establishes CRA liability under two different provisions. First, the CRA is liable if it is negligent in providing any consumer report in any circumstance other than the circumstances explicitly permitted in the statute. Second, the CRA is liable if it negligent in maintaining reasonable procedures designed to avoid such reporting.

In other words, just as with obsolete information, a consumer can sue when a CRA provides a report for impermissible purposes, whether or not the CRAs procedures are reasonable, as long as the CRA was negligent in providing the information. Some courts suggest that if the CRA has reason to believe the requestor has a permissible purpose to use the report, the CRA is not negligent, even if the user ends up putting the report to an improper use *(Andrews v. TRW, Inc. (9th Circuit 2000))*. In such circumstances, if the consumer cannot prove the CRAs negligence in the provision of the specific information, the consumer instead can show that the credit reporting agency was negligent in its efforts to maintain reasonable procedures.

The Act clarifies what most reasonable procedures are to meet the standard for permissible purposes. **The CRA must maintain procedures to require that prospective users identify themselves, certify the purpose for which the information is sought, and promise that the information will be used for no other purpose**. A CRAs failure to maintain all specified procedures should clearly suffice to show negligent noncompliance with the requirements for permissible purposes, even if the consumer cannot prove negligence in providing the report to a particular user. Intentional failure to comply with the specified procedures may also support a punitive damages claim, even if the CRA did not intend to provide the report for an impermissible purpose.

Nevertheless, the consumer should still prove that the CRA in fact provided the report for an impermissible purpose even if the consumer proves that it was negligent in its procedures. As with the accuracy standards, courts may not be impressed with cases where faulty procedures nonetheless produced correct results.

(37:08) A history of reports given to users without permissible purposes can be a key factor in proving that a CRA has not maintained reasonable procedures. What is reasonable depends, in part, on patterns and practices of abuse by particular users or groups of users. When a CRA has reason to doubt a user's compliance with the permissible purposes provision, it must take additional steps to ensure compliance or to deny the user access to reports altogether. For example, when Vermont found that Equifax was failing to reasonable ensure that users obtain prior consumer consent to access consumer reports as required by Vermont law, Equifax agreed to require audits of user practices and to terminate users who failed to promise to follow new prophylactic procedures imposed by Equifax. Evidence of prior abuse by a particular user of widespread abuse in a particular industry such as car dealers is relevant to the reasonableness of CRA procedures to avoid the provision and use of consumer reports for impermissible purposes.

On the other hand, even if a CRA maintains all the procedures specified in the statute, the consumer still has a valid claim if the CRA was negligent in providing a particular report on the consumer for an impermissible purpose. "Reasonable procedures" is not a defense to a consumer's action for negligent provision of a report—the CRA can only defend itself on the ground that it was not negligent. When the FCRA wants reasonable procedures to act as a defense it explicitly so provides. In the case of reports provided without permissible purposes, maintaining reasonable procedures is a defense to an attack on the CRA's procedures relating to permissible purposes, not on a claim based on the CRA's negligent reporting of information without a permissible purpose.

(39:38) 10.2.2.5 **Claims Relating to Medical Information Reported Without Consumer Consent**-

The FCRA has strict rules about a CRAs release of medical information to a user without the consumer's consent, and a consumer has a cause of action against a CRA that negligently fails to follow those rules. There is no "reasonable procedures" defense to the improper furnishing of medical information without the required consumer consent. If medical information is released without proper consent it should present a prima facie case, or at least a rebuttable presumption of negligence.

(40:35) 10.2.2.6 **Claims Relating to Investigative Reports**-

A CRA may not prepare or furnish an investigative report unless it has received a proper certification from the person requesting the report [FCRA 1681d]. The CRA also has additional obligations to re-verify negative information in an investigative report, and it may not prepare a report for employment purposes if the making of investigative inquiries by an employer would violate an federal or state Equal Employment Opportunity law.

A CRAs negligent failure to comply with these requirements is actionable. The FCRA provides no "reasonable procedures" defense for the CRA. For example, a CRA will normally be liable to the consumer when a report is provided without the proper certification required from an employer *(Obabueki v. International Business Machines Corporation (NY March 2001))*. The only defense for the failure to obtain certification is that the CRAs conduct was not negligent.

10.2.2.7 **Claims Related to Adverse Public Record Information for Employment Purposes**-

A CRA must either notify the consumer that it is reporting adverse public record information for employment purposes, or must maintain strict procedures to ensure that the information is complete and up to date. The CRA can defend against an allegation that it failed to send a notice by alleging that the CRA had instituted strict procedures, and vice-versa. The consumer will have to allege that the CRA complied with neither option, and was negligent in that failure. "Strict procedures" appears to be a more stringent requirement than "reasonable procedures" so it should be easier to show that a CRAs failure in procedures was negligent.

(43:55) 10.2.2.8 **Claims for Failure to Disclose the Content of a Consumer's File**-

The FCRA requires that CRAs disclose the contents of the consumer's file to the consumer under specified conditions and in specified ways. Negligent failure to comply with these requirements is actionable. The act does not mention reasonable procedures as either a substantive requirement or as a defense. Accordingly, the only possible defense to the failure to act as required is that the CRA's conduct was not negligent.

(44:40) 10.2.3 **Claims against resellers**-

Smaller consumer reporting agencies, providers of "tri-merge" reports, and others buy information from CRAs for resale to various end-users, particularly mortgage brokers and lenders. Most typically, these agencies merely purchase information from the three major nationwide CRAs and recompile it for an end-user often providing a credit rating or score.

These resellers are CRAs, and are subject to all of the restrictions and mandates that the FCRA places on CRAs. Resellers must also meet additional requirements which focus on the role as a conduit of consumer reporting information requiring a reseller to establish and comply with reasonable procedures to ensure that reports and information within reports are resold only for permissible purposes.

Failure by reseller to establish reasonable procedures to ensure that reports are resold only for permissible purposes and to previously identified end-users suffices to show negligent noncompliance with the requirements. Even if the reseller has established reasonable procedures, the consumer may still have a valid claim against a reseller who has resold consumer reporting information for an impermissible purpose, or to an end-user who is not properly identified to the original CRA. In addition, the reseller, like any CRA, is liable for negligently furnishing a consumer report to a user without a permissible purpose. There is no separate requirement for reasonable procedures. A reseller may also be liable for negligently failing to maintain or comply with its own procedures. Resellers also have an explicit though limited obligation to reinvestigate a dispute.

(47:47) 10.2.4 **FCRA Claims Against Creditors and Others Furnishing Information to Consumer Reporting Agencies**-

10.2.4.1 **Private FCRA Right of Action Not Available for Many Furnisher Violations**-

Creditors and others who furnish information to CRAs are subject to a number of FCRA requirements placed on such furnishers, but the FCRA explicitly states that there is no private right of action for many of these requirements. **There is no private right of action related to the following obligations of furnishers**:

- To refrain from furnishing information about a consumer to a CRA if the furnisher knows or has reason to believe that the information is inaccurate [but you have a situation to cover that under FDCPA] *1681s-2(a)(1)(A)*;
- To refrain from furnishing information if the furnisher has been notified by a consumer that the information is inaccurate and is in fact inaccurate *1681s-2(a)(1)(B)*;
- To correct and update information *1681s-2(a)(2)*;
- To notify a CRA that a consumer has disputed the furnished information *1681s-2(a)(3)*;
- To notify a CRA that a consumer has voluntarily closed an account *1681s-2(a)(4)*;
- To comply with date delinquency provisions when furnishing account delinquency information *1681s-2(a)(5)*;
- To put in place reasonable procedures for responding to a CRA's notice that the CRA has blocked furnished information on the grounds that it was the result of fraud or identity theft *1681s-2(a)(6)*;
- In the case of furnishers who are financial institutions to notify customers that the institution has furnished negative information about the customer to a nationwide CRA *1681s-2(a)(7)*;
- To notify a CRA of the furnisher status as one furnishing medical information *1681s-2(a)(9)*;
- To conduct a reasonable investigation in response to a consumer who has directly disputed with the furnisher the accuracy of an item of information in a consumer report *1681s-2(a)(8)*.

In short, furnishers are not liable under the FCRA for inaccuracy in the initial information they furnish and are not even liable for their misconduct where the consumer contacts the furnisher to dispute information or seeks reinvestigation from the furnisher.

Creditor and other furnisher liability is further diminished by two additional FCRA provisions. One provide that no state law may impose any responsibility or prohibition with respect to the subject matter of section 1681s-2 relating to several furnisher obligations. The other provides qualified immunity that parties have from certain tort claims. The extent to which these provisions do or do not protect creditors is examined in other sections.

Nevertheless, as discussed in the next subsection, there is an FCRA private right of action to sue creditors and other furnishers who fail to properly participate in any CRA reinvestigation concerning the accuracy or completeness of information they supplied to the CRA, including steps to correct erroneous information.

(52:52) 10.2.4.2 **Claims Relating to a Furnisher's Reinvestigation in Response to a Consumer Reporting Agency Request**-

Creditors and others who furnish information to CRAs must participate in reinvestigations conducted by the CRAs when consumers dispute the accuracy or completeness of information with the CRA. **Specifically, once a furnisher has received notice of a consumer's dispute from the CRA, the furnisher must do the following**:

- Conduct an investigation of the dispute;
- Review all relevant information provided by the CRA;
- Report the results of the investigation to the CRA;
- If the information is incomplete or inaccurate, report those results to the other nationwide CRAs to which the furnisher has furnished the information;
- In the case of inaccurate, incomplete, or unverifiable information, promptly modify, delete, or permanently block the reporting of the information.

Consumers may bring claims for damages against furnishers who fail to comply with these reinvestigation requirements. This private right of action is only triggered where a CRA asked the furnisher to reinvestigate, and not where a consumer disputes the information directly with the furnisher.

Only two decisions, which grow increasingly isolated with each new opinion upholding private actions have misconstrued the provision as only allowing CRAs—and not consumers—to bring civil actions. Nevertheless, counsel should not assume that the plain language of the act will automatically prevail, and should carefully explain the importance of private enforcement in the statutory scheme.

To sustain a claim against a furnisher, the consumer should allege that they notified the CRA of a dispute with "all relevant information." Some courts have held that the consumer must also allege that notice of the dispute was in fact received by the furnisher from the CRA. Thus it would be prudent that the consumer's claim to include this allegation.

Once the furnisher receives notice of the dispute from the CRA the furnisher must then conduct a timely investigation of the disputed information and review all relevant information provided by the CRA. The furnisher must then report the results of the investigation to the CRA and if the investigation reveals that the original information is incomplete or inaccurate must report the results to all other CRAs to which it supplied such information.

Negligence will be apparent where the furnisher makes no attempt to reinvestigate, or fails to report the results to the CRA requesting the reinvestigation and, when required, to other CRAs as well. Moreover, as part of its reinvestigation, the furnishers must review all relevant information provided by the CRA. Where a consumer has continued to dispute an item, a furnisher who fails to telephone, email, or send a facsimile to the CRA in addition to attempting to correct the inaccurate information by electronic Automated Consumer Dispute Verification (ACDV) may be negligent.

The reasonableness of a reinvestigation will depend on the circumstances, including the nature of the dispute and available documentation. The allegation that a report is inaccurate, without explanation, will require a different investigation than a consumer complaint that identifies a specific payment that is missing or that the creditor agreed to waive a late payment on a specific date. The more specific the dispute, the more likely the creditor will correct it.

Whether a reinvestigation was adequate will be a question for the trier of fact [court]. As with other claims under the FCRA the best cases included evidence of damages such as a denial of credit and monetary and emotional harm that resulted from the failure to comply with the FCRA's reinvestigation requirements.

10 - FCRA & CRA Actions Part 2

NCLC Fair Credit Reporting Seventh Edition

Chapter 11 **Private Remedies and Public Enforcement**-

11.1 **Introduction**-

Once the theory of the case and nature of the claims have been decided upon, the practicalities of litigation must be considered. This chapter covers everything from selection of parties and court, to private remedies following successful court challenge to consumer reporting practices. It is worth noting however, the consumers also have non-litigation approaches to dealing with credit reporting problems. Approaches provided by the Fair Credit Reporting Act. An example, disputing an inaccurate report or discovering the contents of the consumer's file. Avenues provided by other laws, for example Real Estate Settlement Procedures Act and Fair Credit Billing Act dispute rights, or by no particular law. For example, explaining a bad credit rating to a potential creditor. These non-litigation consumer options are described throughout the manual. This chapter focuses specifically on litigation and its remedies, with a brief discussion of public enforcement as well.

An FCRA case should be undertaken from the beginning with an eye to establishing damages and obtaining an award of attorney's fees. The scope of damages under the act is broad and may include actual, statutory, and punitive damages. The damages suffered by an individual consumer from an inaccurate consumer report or from other FCRA violations may not always be apparent.

Building a case for damages begins with attorney's initial contact with the consumer, similarly a successful claim for attorney's fees… [Get your facts together before you begin this process. Know what you have on hand as far as credit reports, have an understanding of the law to understand where the violations are].

Maximizing damage awards and recovering the full amount of attorney's fees to which one is entitled serves several purposes. In addition to fully recompensing injury and the expense of litigation, adequate awards to plaintiffs create incentives to defendants to police themselves and avoid further FCRA violations. The large volume of bad reporting in the number of unresolved consumer complaints is evidence of the need for greater enforcement of the FCRA. Since little public enforcement occurs, private enforcement is the primary method of assuring compliance and policing the industry. Substantial damage award should bring about greater compliance and serve users and consumers well.

(5:33) 11.2 **Selecting the Parties**-

11.2.1 **Plaintiffs**-

The FCRA provides that any person who fails to comply with any FCRA requirement with respect to any consumer is liable to that consumer. A consumer is broadly defined as any individual. Consequently, any individual can bring an FCRA action where an FCRA requirement has been violated "with respect to" that individual.

Thus, a consumer may have standing to sue even where the reported issue is on the consumer's spouse, not on the consumer, and contains no information about the consumer provided that the information in the file adversely affects the consumer. A wife, for example, may sue where information in the husband's report impaired the wife's ability to obtain financing on jointly owned property *(Roybal v. Equifax (CA Oct 2008)- finding wife had standing based on joint mortgage account listed on husband's credit report because it bears on her creditworthiness; Barron v. TransUnion Corp. (AL 2000)- Wife had standing to sue credit reporting agency with respect to wife and husband's joint application for consumer loan that was denied based on alleged inaccurate information contained in husband's consumer report. In as much, husband's consumer report had negative bearing on wife's creditworthiness)*. On the other hand, a merely derivative claim, where the information does not refer or relate to the plaintiff at all, will likely be dismissed [In other words, there has to be a connection how it affects you] *(Cain v. TransUnion, LLC (WA Feb 2006)- Wife lacks standing to recover separate damages even if CRAs allegedly willful failure to correct a trade line in husband's credit report injured marital community by impairing couple's ability to obtain loan to purchase a home)*. Because the FCRA is remedial in nature, the estate of a decedent may sue *(Saturno v. Dovenmuehle Funding, Inc. (CT Feb 2001); White v. Imperial Adjustment Corporation (LA Feb 2005))*. However, a claim may not be brought for improperly accessing the consumer's report when the consumer predeceased the allegedly impermissible access [if the person died before the credit pull occurred, the person isn't here to be harmed by it].

(11:30) Suit by an association of individuals is also problematic. A consumer may sue under the FCRA for inaccurate information relating to a business debt, so long as it appears in a consumer report *(Tilley v. Global Payments, Inc. (KS 2009); Hunt v. Experian Information Solutions (NE 2006))*.

Nor is there any requirement that the plaintiff have "clean hands" or that the action be in the public interest. For example, a consumer can bring an FCRA claim against a user even if the consumer had submitted a fraudulent insurance claim to the user *(Saint Paul Guardian Insurance Company v. Johnson (5th Circuit 1989); Klapper v. Shapiro (NY 1992))*.

(14:34) 11.2.3 **Defendants**-

In general, any "person" who fails to comply with any requirement with respect to consumer may be liable under the FCRA. Consumer reporting agencies, users of consumer reports, and those who furnish information to CRAs are liable for violations. "Consumer reporting agency" is a defined term but "user" and "furnisher of information" are not. Nevertheless, the FCRA sets out several requirements for those who use consumer reports as well as for those who furnish information to CRAs. While there should generally be little questions whether an entity is covered as a user or furnisher of information, issues sometimes arise. In *Reynolds v. Hartford Financial Services Group*, for example, the 9th Circuit held that several affiliated insurers could be held liable as users for failing to provide adverse action notices even though only one of them issued a policy to the insured. Whether an employer of a user may *also* be a user subject to suit will depend on whether the employee-user is acting within the scope of employment *(Graves v. Tubb (MS 2003)).*

In suing a CRA, consider any corporation in the chain of corporate ownership and all the CRAs in the chain of distribution. Be sure to identify the correct entity. For example, "Equifax, Inc.", is merely a holding company, not a CRA *(Ransom v. Equifax, Inc. (FL 2010))*. A consumer may sue both the national repository of credit information and the local or regional entity which provided the consumer report based on information gleaned from the national repository *(Verdin v. Equifax Services, Inc. (LA May 1992))*. Also consider not only the corporate entities involved in violating the act, but also individuals who actually participated in the violation for instance, by obtaining a report impermissible purposes *(Mone v. Dranow (9th Circuit 1991); Yohay v. City of Alexandria Employees Credit Union (4th Circuit 1987))*. Likewise, the employer of a rogue employee who pulls another's credit report for personal reasons may be held liable for impermissible pull on the basis of both an agency theory and respondeet superior if the employee was acting within the scope of her employment *(Mahjan v. Kumar (CA May 2008); Ellis v. Pennsylvania Higher Education Assistance Agency (CA Sep 2008)-Denying Summary Judgment to Keybank as it may have controlled how the agency conduct the responsibilities Key Bank delegated to it)*. Remember, however, that the act permits information to be shared freely among affiliates outside the strictures of the law largely without regard for FCRA privacy protections and requirements for accuracy.

Where a creditor is found to furnish the inaccurate information to one CRA, it probably has furnished the same inaccurate information to other CRAs as well. Information obsolete at one CRA will be obsolete at another CRA as well. Where an individual has no permissible purpose to obtain reports from one CRA, it will have no permissible purpose to obtain reports from another CRA. There is thus a strong potential that where one CRA has violated the FCRA, another has too in the same way. It thus may make sense to bring different but similar actions against various CRAs.

An additional reason to sue more than one CRA is that losing a case against a CRA may bar a separate case raising the same issue against a different CRA, but the reverse is not true. A Pro Se consumer who litigated the reasonableness of one CRA's procedures has been held to be collaterally stopped from re-litigating the reasonableness of the same procedures against a different CRA *(Houston v. TransUnion Credit Info Co. (NY Sep 1990))*. In considering which defendants to include in the action, attention should also be paid to whether there is a colorable claim of personal jurisdiction over the particular defendant [discussed in another section].

(26:00) 11.3 **Case selection**-

There is no magic formula for winning an FCRA case. The odds of prevailing are high if the facts strongly point to a clear injustice. Where common sense indicates that there has been a violation and the result emerges without any apparent weighing or balancing test. Examples include where a file is on the wrong consumer because the CRA ignored the proper social security number or where a CRA is specifically apprised of an error and has to correct it, but continues to furnish incorrect reports or reinserts the same erroneous information after deleting it.

A case is more attractive if the consumer suffered direct injury from the violation, such as being turned down for credit. Nevertheless, compelling evidence of mental anguish, embarrassment, humiliation, and/or loss of reputation will enhance damages from what will be difficult to quantify economic losses.

A negligent case cannot succeed and therefore should not be brought in the absence of some evidence of actual damages. Statutory damages are available in the alternative for willful violations, however, as well as punitive damages in appropriate circumstances.

It also helps a case to emphasize CRA delays, runarounds, and obfuscations. Detail the amount of time the consumer spent trying to straighten out the record [When you are working on these things, try and keep some sort of log or notes as to roughly how much time you have spent in writing these letters, lawsuit, research, education, so you can take this action.].

(29:32) Often, CRAs can take up to 6 months to handle a complaint, and this may not appear reasonable to judges or juries.

In recent years, two possible hurdles to bringing claims against CRAs and furnishers have arisen. One is that the consumer may need to prove that a disputed item was in fact inaccurate and bringing cases challenging CRA procedures for maximum possible accuracy and increasingly in cases for failure to conduct a reasonable investigation. The information at issue must actually be inaccurate for liability to incur [You can't just allege something is inaccurate, it has to be]. The more an inaccuracy can be documented and objectively shown, the stronger the case. The other is that at least in some jurisdictions, the heightened pleading standards of *Bell Atlantic v. Twombley* and *Ashcroft v. Iqbal*, may be a barrier to discovery needed to show that the CRA conveyed the dispute to the furnisher. The effect of this new pleading standard is discussed in greater depth [in another part of the book] [Those arguments haven't made that much of a difference if you have a good pleading that you're writing. They are meant more to keep the ridiculous suits out].

As in any area of litigation, filing a frivolous case can subject a consumer and her attorney to monetary sanctions for violation of Rule 11 of the FRCP which requires an attorney who multiplies to proceedings in any case unreasonably and vexatiously to pay fees reasonably incurred because of such conduct [In other words, you need to write a good complaint and there needs to definitely be a violation there, otherwise if you get ridiculous and don't do your homework, but you must be pretty foolish to get to that point]. Further, an FCRA litigation 18 USC § 1681n(c), entitles a prevailing defendant to an award of reasonable attorney's fees from plaintiff who proceeded under the FCRA "in bad faith or for the purposes of harassment" *(Mayle v. Equifax Information Systems, LLC (IL Mar 2005)-Monetary sanctions ordered for frivolous claim on disputed debt involving funds deposited into plaintiff's account)*. For this reason, it is also prudent to resolve questionable claims by settlement and mutual release in order to prevent a subsequent motion for fees by defense counsel [If you have a situation where somebody gets real aggressive that's more of an incentive to work out a settlement with them rather than being stuck in a corner].

(35:24) 11.4 **<u>Selecting a court</u>**-

11.4.1 **<u>FCRA Claims May Be Brought in Federal or State Court</u>**-

The FCRA provides that actions may be brought in federal courts without regard to the amount in controversy or in any other court of competent jurisdiction (15 USC §1681p). Bringing an action in state court does not alter substantive rights *(Ackerley v. Credit Bureau of Sheridan, Inc. (WY 1974); Emerson v. JF Shea Co. (CA Appeals reported 170 1978))*. If state court is a preferred forum, one advantage of including an FCRA claim is that it authorizes an award of punitive damages under certain circumstances while state claims may not [mistake to mean "federal court may not"?]. However, **if an FCRA claim is included in the state court action, the defendant has the option of removing the case to federal court**. Take note too that certain fair credit reporting claims may be available under a state statute, but not the FCRA. For example, though although there is no private right of action to enforce the 15 USC § 1681s-2(a), such a right is available under the analogous California statute, and this claim is not pre-empted by the CRA.

In general, bankruptcy courts do not have subject-matter jurisdiction of a debtor's claims against a CRA *(Kasim v. Equifax Information Services, LLC (OR Nov 2008); Duke v. TransUnion (OR Sep 2008))*. On the other hand, a federal district court which an FCRA claim for inaccurate reporting of a discharged debt is pending may be able to hear a related claim for violation of the discharge injunction. Indeed, the failure to assert this claim in the pending district court preceding may bar its later assertion in the bankruptcy court [You'd have to file your claim in district court as opposed to bankruptcy court].

(40:50) 11.4.2 **<u>Bringing Related State Law Claims in Federal Court</u>**-

It often makes sense to join related common law tort or statutory claims in an FCRA claim in federal court. Like most other federal statutes, the FCRA contains no provision on joining state law claims, so practitioners must turn to the federal statute on supplemental jurisdiction *(Pletz v. MBNA America (IL Feb 2006))*. The test is whether the claim for which jurisdiction is sought as "part of the same case or controversy [as the FCRA claim] under article 3 of the United States constitution." This test turns on whether there is a "common nucleus of operative facts" between the federal and state law claims [If there are common facts between the state and federal claims, then you can do it]. If this test is met, the district court nevertheless has discretion to exercise supplemental jurisdiction over the state law claim if:

1) The claim raises a novel or complex issue of state law;
2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction [They don't want something where the state claim is a bigger deal than any federal claims];
3) The district court has dismissed all claims for which it has original jurisdiction [which means the federal court will be dealing strictly with a state issue];
4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction [That's where the federal court may choose to decline to exercise supplements jurisdiction].

This statutory test is somewhat more conducive to a court accepting supplemental jurisdiction than the pendent jurisdiction test which prevailed prior to the statute's enactment in 1990, so caution should be exercised in relying on prior case law. However, it is worth bearing in mind that a connection between the state and federal claims is not necessarily sufficient. For example, state law claims arising from a "yo-yo" sale have been held not to share a common nucleus of operative facts with an FCRA impermissible pull claim, even though the pull was with respect to the earlier sale *(Tregp v. Germain Ford of Columbus (OH Sep 2009))*. The court further held even if it had discretion to consider the state law claims, it would not have exercised it because the state claims predominate over the federal one.

Defendant furnishers may file a state law based counterclaim against the consumer to collect the underlying debt.

(46:20) 11.4.3 **Personal jurisdiction**-

Personal jurisdiction must exist to proceed against a defendant. If the suit is brought in state court, state jurisdictional rules will, of course, apply. Even for cases brought in federal court whether personal jurisdiction exists may be a matter determined under state law. The FRCP limit federal courts' authority to serve nonresident defendants to those who can be served under the forum state's law (FRCP Procedure 4(e). When personal jurisdiction is raised as an issue, courts will determine whether the forum state's long arm statute provides a basis for jurisdiction [It is much simpler to bring these FCRA actions into federal court than state court]. If a basis for jurisdiction exists, it is possible that a second question will arise. That is whether the defendant has had sufficient minimum contacts with the forum state to satisfy questions of the 14th amendment due process rights. Often, state law permits personal jurisdiction to the maximum extent allowed by due process, i.e. provided there are minimum contacts [There are multiple problems and issues you can have if you bring litigation under the FCRA in a state court].

In suits against CRAs, the question of personal jurisdiction will rarely arise. Most CRAs, and certainly the nationwide CRAs, will be doing business in every state. However, when a defendant is out of state *and* a user of a consumer report or a furnisher of information to a CRA, or has obtained a report improperly, questions of personal jurisdiction can sometimes arise. In such cases, the law of the state in which the court is located must be considered.

The Supreme Court has held that "where a defendant who purposefully has directed his activities at forum residence seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." It is also held that personal jurisdiction is available in defamation cases where the victim is harmed even if "publication" originates elsewhere *(Calder v. Jones (LA 1984); Brown v. Flowers Industries (5th Circuit 1982))*.

Personal jurisdiction has thus frequently been found proper in the state where the subject of the consumer report resides or allegedly suffered the harm *(Scott v. Real Estate Finance Group (2nd Circuit 1999); Hahn v. Star Bank (6th Circuit 1999))*. For example, personal jurisdiction was found where the defendant knew or should have known that the disputed consumer report would have adverse effects in the plaintiff's forum, and voluntarily generated contacts in the forum to collect the disputed debt. Similarly, personal jurisdiction was held proper even if the defendant did not intend to target the debtor in another state because the defendant was informed of the harm to plaintiff's credit record in his home state, where the jurisdiction was sought.

Likewise, a complaint sufficiently alleged jurisdiction by asserting the defendant, an investigative services company, "cause[d] tortious injury by an act or omission in this commonwealth" when it obtained her consumer credit report without a permissible purpose because the defendant knew that the effects of his actions were going to be felt within Massachusetts, although the defendants place of business was in New York, and he made the inquiry from a computer in New York to a CRA located in New York, the court ruled that it was reasonable to conclude that the defendant knew his actions would have specific effect in Massachusetts because he had inputted the plaintiff's Massachusetts address in order to obtain the report. Furthermore, the knowledge fulfilled the constitution's requirement that the defendant "reasonably anticipate being hailed into court" in Massachusetts *(Worldwide Volkswagen, Corp. v. Woodson (Supreme Court 444 US 286, 297, 100 S. CT. 559, 62 L. Ed. 2d. 490 1980))*.

However, where the tortious conduct is not expressly aimed at the forum state, jurisdiction may be lacking. Even where some conduct is aimed at the forum state it may be insufficient to establish personal jurisdiction. Thus a New York investigator who obtained a consumer report on a Maryland resident and hired a Maryland company to conduct a criminal check has been held not subject to personal jurisdiction in Maryland. Defendant's only contacts with Maryland were it's occasional placement of telephonic orders for, and consequent receipt of, investigation services from Maryland which it then furnished to clients in other states *(Stover v. O'Connell Associates, Inc. (4th Circuit 1996))*.

Personal jurisdiction over employees of a CRA may also be more difficult to obtain. A state's long arm statute may not reach individuals whose only connection with the local jurisdiction is activity is within the scope of their employment with the CRA.

11 - FDCPA Case Law - Bits & Pieces

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(pg. 856) *(Arlozynski v. Rubin & Debski, P.A., 2010 WL 1849081 (M.D. Fla. May 7, 2010))* The court denied a Motion to Dismiss because individuals who control and direct the practices of a collection firm can be personally liable, even if they act under the auspices of a corporate entity. In addition, they may be liable as persons who "directly or indirectly" collect or attempt to collect a debt.

(pg. 856) *(Belin v. Litton Loan Serv., L.P., 2006 WL 1992410 (M.D. Fla. July 14, 2006)* The employees of a debt collection agency who actually engaged in the allegedly unlawful misconduct in the collection agency itself are jointly and severally liable for the resulting FDCPA violations.

(pg. 857) *Kort v. Diversified Collection Services., Inc., 270F. Supp. 2d 1017 (N.D. Ill. 2003)* Private guaranteed student loan debt collectors are subject to the FDCPA.

(pg. 858) *Munoz v. Pipestone Fin., L.L.C., 397 F. Supp 2d 1129 (D. Minn. 2005)* The purchaser of defaulted debt portfolios was a debt collector, notwithstanding that it itself did not communicate with the consumer in an attempt to collect debt and where instead the actual collection efforts were performed by another debt collector with whom it contracted.

(pg. 859) *Krapf v. Professional Collection Services, Inc., 525 F. Supp. 2d 324 (E.D. N.Y. 2007)* Employees of the debt collector personally involved with the violative conduct are personally liable under the FDCPA.

(pg. 859) *Ohlson v. Cadle Co., 2006 WL 721505 (E.D.N.Y. Mar. 21, 2006)* The court rejected the defendant's contention that only collection agencies and not individuals are not liable under the FDCPA, holding to the contrary "that officers and employees of the debt collecting agency may be jointly and severally liable with the agency where they have affirmatively acted."

(pg. 859) *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 369 F. Supp. 2d 353 (E.D.N.Y. 2005)* The individuals who were personally involved in the collection of the debts at issue were "debt collectors" subject to the FDCPA.

(pg. 859) *Alamo v. ABC Financial Services, Inc., 2011 WL 221766 (E.D. Pa. Jan. 20, 2011)* Merely identifying one's self as a debt collector does not make one a debt collector under the FDCPA [you must state that they are a debt collector, you can't rely on self-admission].

(pg. 860) *Hester v. Graham, Bright & Smith, P.C., 289 Fed. Appx. 35 (5th Cir. 2008)* Where an attorney is a "debt collector" is a determination to be made on a case-by-case basis applying the following principles: "Attorneys qualify as debt collectors for purposes of the FDCPA when they regularly engage in consumer debt collection such as litigation on behalf of a creditor client. A person may 'regularly' collect debts even if debt collection is not the primary principal purpose of his business. If the volume of a person's debt collection service is great enough it is irrelevant that these services only amount to a small fraction of this total business activity. Whether a party 'regularly' attempts to collect debts is determined of course by the volume of frequency of his debt collection activities." The defendant attorneys were acting regularly and thus were debt collectors as defined when over the previous two years they attempted to collect debt on 450 occasions for 4 clients and filed nearly 200 collection suits.

(pg. 861) *Addison v. Braud, 105 F.3d 223 (5th Cir. 1997)* Attorneys who regularly engaged in debt collection litigation were "debt collectors" for the purposes of FDCA.

(pg. 861) *Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992)* The validation notice must be provided within 5 days of the initial communication even where the first communication was an attorney's post-judgment letter to the consumer.

(pg. 861) *Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir 1992)* The 1968 amendment to the FDCPA to eliminate the exclusion of attorneys from the definition of "debt collector" was a repeal, not a re-enactment, which generally incorporates prior judicial decisions.

(pg. 861) *Crossley v. Lieberman, 868 F.2d 566 (3rd Cir. 1989)* An attorney routinely collecting debts is a debt collector under § 1692a(6).

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(pg. 861) *Newman v. CheckRite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995)* The FDCPA applies to lawyers engaged in litigation.

(pg. 861) *First Interstate Bank v. Soucie, 924 P.2d 1200 (colo. App. 1996)* Vicarious liability will be imposed on an attorney's client for the attorney's FDCPA's violations if the attorney and the client were both debt collectors.

(pg. 862) *Woolfolk v. Rubin, 1990 U.S. Dist. LEXIS 20964 (D. Conn. Feb. 2, 1990)* Definition of debt collector includes any attorney who engages in debt collection more than a few times a year.

(pg. 862) *Yale New Haven Hospital v. Orlins, 1992 WL 110710 (Conn. Super. Ct. May 11, 1992)* "Simply stated, if an attorney regularly engages in debt collection activities, that attorney is a 'debt collector under the FDCPA, and is subject to its provisions'… This court holds there is no addition implied exemption for 'attorneys when performing tasks of legal nature.'"

(pg. 862) *Agan v. Katzman & Korr, P.A., 2004 WL 555257 (S.D. Fla. Mar. 16, 2004)* The court applied *Heintz v. Jenkins* holding that an attorney can be a debt collector under the FDCPA, if he regularly engages in consumer debt collection activity.

(pg. 862) *Donley v. Nordic Properties, Inc., 2003 WL 22282523 (N.D. Ill. Nov. 8, 2001)* A creditor seeking to collect its own debt was not a "debt collector"; however, its attorney seeking to collect its debt was a "debt collector."

(pg. 862) *Laws v. Cheslock 1999 U.S. Dist. LEXIS 3416 (N.D. Ill. Mar. 8, 1999)* By listing his own name and "attorney at law" in large font at the top of the page, the creditor's in-house collection lawyer gave the misleading impression that he was a solo practitioner. Other factors included the statement that the matter had been "referred to me for collection"; the reference to "my office"; and the use of plural pronouns. The presence of the creditor's name in the letterhead was only one factor in determining whether the attorney employed by the creditor acted in the name of the creditor. Whether a lawyer was a debt collector could be decided as a matter of law, where dunning letter could lead an unsophisticated consumer into believing the lawyer did not work as an employee of the creditor.

(pg. 862) *Egli v. Bass, 1998 WL 560270 (N.D. Ill. Aug. 26, 1998) Allegations of the attorney's personal involvement in collection activities was sufficient to hold him or her personally liable under the FDCPA.*

(pg. 863) *Johnson v. Eaton, Clearinghouse No. 49,970 (M.D. La. 1994) 1986 deletion by Congress of the attorney exemption from the definition of "debt collector" left nothing "to indicate that attorneys in the course of litigation, or engaged in purely legal activities—activities that can only be performed by an attorney—should be excluded from the requirements of the FDCPA."*

(pg. 864) *Stojanovski v. Strobl & Manoogian, 783 F. Supp. 319 (E.D. Mich. 1992) Law firm which collected debts only 4% at the time was a "debt collector" because such activity was regular and brought law firm within § 1692a(6).*

(pg. 864) *Chulsky v. Hudson Law Offices, P.C., 2011 WL 500202 (D.N.J. Feb. 10, 2011) The court rejected the defendant's motion to dismiss the claim against her individually because the allegations spoke to actions completed in her professional capacity as an attorney for the law firm that owned the plaintiff's debt. Attorneys may be held liable for misleading statements made on behalf of their clients.*

(pg. 864) *Kolker v. Sanchez, 1991 WL 11691589 (D.N.M. Dec. 10, 1991) An attorney who regularly files lawsuits to collect consumer debts was a debt collector.*

(pg. 865) *Dolente v. McKenna, 1996 WL 304850 (E.D. Pa. June 6, 1996) The court denied the motion to dismiss by the law firm representing a creditor as it found the law firm was a debt collector under the FDCPA as it regularly engaged in debt collection for others.*

(pg. 865) *Crossley v. Lieberman, 90 B.R. 682 (E.D. Pa. 1988), aff'd, 868 F.2d 566 (3d Cir. 1989) FDCPA applies to an attorney whose collection work is a minor but regular part of his general practice.*

(pg. 866) *Tomas v. Bass & Moglowski, 1999 U.S. Dist. LEXIS 21533 (W.D. Wis. June 29, 1999) Filing a Complaint and other aspects of litigation were actions in connection with the collection of a debt.*

(pg. 903) *Schwarm v. Craighead, 552 F. Supp 2d 1056 E.D. Cal. 2008) Personal FDCPA liability can be imposed on employees, shareholders, officers and directors without piercing the corporate veil, as long as the individual: (1) materially participated in collecting the debt at issue; (2) exercised control over the affairs of the business; (3) was personally involved in the collection of the debt at issue; or (4) was regularly engaged, directly and indirectly, in the collection of debts. The individual defendant had FDCPA liability where, as a director and president, the individual saw collecting debts pursuant to contracts with the district attorneys' offices, was one of only three individuals that had final authority over the company's collection procedures, developed the automated software the company used, and was solely responsible for managing and maintaining the automated computer system that implemented the collection program.*

(pg. 903) *First Interstate Bank v. Soucie, 924 P.2d 1200 (Colo. App. 1996) Vicarious liability will be imposed on an attorney's client for the attorney's FDCPA violations if the attorney and client were both debt collectors.*

(pg. 903) *Cashman v. Ricigliano, 2004 WL 1920798 (D. Conn. Aug. 25, 2004)* *Partnership may be sued under the FDCPA since it is responsible for the acts of its partners.*

(pg. 903) *Leblanc v. Unifund CCR Partners, G.P., 552 F. Supp. 2d 1327 (M.D. Fla. May 8, 2008)* *FDCPA liability was imputed under the FDCPA and state partnership law to the general partners of the defendant that only participated indirectly in its actual collection efforts.*

(pg. 905) *Martinez v. Albuquerque Collection Servs., 867 F. Supp. 1495 (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 agents conduct."

(pg. 906) *Albanese v. Portnoff Law Assocs., Ltd., 301 F. Supp. 2d 389 (E.D.Pa. 2004)* The law firm's president, with duties of supervision and overall responsibility, and the attorney who signed the letters could both be liable under the FDCPA.

(pg. 906) *Brumbelow v. Law Offices of Bennett & Deloney, P.C., 372 F. Supp. 2d 615 (D. Utah 2005)* *Even if shareholders were not directly involved in the collection efforts, there was a factual question whether they could be liable as indirect debt collectors, since they exercise supervisory authority over the corporation, were intimately involved with the practices and procedures of the corporation, and, in fact, developed and implemented the particular collection practice.*

(pg. 906) *West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983)* A collection agency and its individual collection employees are all "debt collectors" separately liable for their separate violations of the FDCPA. By piercing the corporate veil, the owner of the collection agency was also found liable for FDCPA violations.

(pg. 908) *Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208 (10th Cir. 2006)* Actual damages are not required for standing under the FDCPA as the attempt to recover unlawful fees was made actionable by Congress.

(pg. 908) *Montgomery v. Huntington Bank & Silver Shadow Recovery, Inc., 346 F.3d 693 (6th Cir. 2003)* A non-debtor who was subjected to abusive collection tactics may not maintain an action for violations of § 1692c(c), since that section is limited to violations directed at a "consumer" as defined in the Act, but may maintain an action for violation of §§ 1692d and 1692e, which have no such limitation and therefore apply to anyone who is the victim of prescribed misconduct.

(pg. 908) *Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998)* "[T]he FDCPA is designed to protect consumers from the unscrupulous antics of debt collectors, irrespective of whether a valid debt actually exists."

(pg. 908) *Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982)* "The Act is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists."

(pg. 908) *Sparks v. Phillips & Cohen Assocs., Ltd., 641 F. Supp. 2d 1234 (S.D. Ala. 2008)* "Any person," can be a plaintiff, not just a consumer.

(pg. 909) *Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992), aff'd, 5 F.3d 649 (3d Cir. 1993)* "The protections of the FDCPA are not limited to "consumers"; liability is imposed upon a debt collector who has failed to comply with the Act with respect to "any person" pursuant to § 1692k.

(pg. 909) *Drossin v. Nat'l Action Fin. Servs., Inc., 255 F.R.D. 608 (S.D. Fla. 2009)* "Plaintiff, who received an initial prerecorded telephone message from the debt collector and then a letter from the same entity stating that she owed a debt, had standing to assert FDCPA claims arising from the telephone message that was allegedly intended for another person with the same last name as plaintiff. The FDCPA is broadly written to provide standing to "any person" and should be liberally construed to protect "alleged" debtors.

(pg. 909) *Fuiten v. Creditor Servs, Bur., Inc. 2006 WL 1582459 (C.D. Ill. June 7, 2006)* The court denied the collection agency's motion to dismiss the FDCPA claims finding that plaintiff, a former collection attorney for the collection agency, had sufficiently stated a cause of action by alleging that the collection agency forged his signature to at least 29 legal documents filed in court in connection with the collection agency's efforts to collect debts violating § 1692e(3). The collection attorney withdrew the forged complaints and terminated his relationship with the agency. The court noted that the FDCPA was broadly written to accord a private right of action to "any person".

(pg. 909) *Harvey v. Nat'l Action Fin. Servs., 79 F. Supp. 2d 896 (N.D. Ill. 1999)* Plaintiff filed bankruptcy after receiving collection letter. Plaintiff had standing to pursue FDCPA suit based on the collection letter where plaintiff amended her personal property schedule to include her FDCPA claim as one hundred percent exempt and the trustee did not object to the listing or assert a right to control the claim.

(pg. 909) *Flowers v. Accelerated Bureau of Collections, Inc., 1997 WL 136313 (N.D. Ill. Mar. 19, 1997)* The Spouse of a consumer may bring FDCPA claim if debt collection efforts that would violate the Act were targeted at her. A husband to which a collection call was targeted had standing to sue where the threats to sue and garnish his wages were received by his wife.

(pg. 910) *Kaniewski v. Nat'l Action Fin. Servs., 678 F. Supp. 2d 541 (E.D. Mich. 2009)* One who knows that he is not alleged to owe the debt is not a "consumer" and does not have standing to bring claims under §§ 1692e and 1692g, but does have standing as any person to bring claims pursuant to § 1692d.

(pg. 910) *Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290 (E.D. Mo. 2008)* Third party who answered the call had standing to sue the debt collector: the focus of §§ 1692c(b) and 1692b is not solely on communications with the consumer; it also regulates the content of the communication with third parties and proscribes certain conduct, such as communicating with the third party more than once. Under the unique facts here, where the third party alleges direct harm and actual damages, she has standing.

(pg. 910) *Bank v. Pentagroup Fin., L.L.C., 2009 WL 1606420 (E.D.N.Y. June 9, 2009)* The court erroneously held that one who received recorded calls aimed at a different consumer has no standing under § 1692c. "[Plaintiff] lacks standing to bring a claim under § 1692c because: (1) he was not obligated or allegedly obligated to pay any debt; and (2) he has not alleged that he is a consumer's spouse, parent, guardian, executor or administrator. Accordingly, [defendant's] motion to dismiss [plaintiff's] § 1692c(b) claim is granted."

(pg. 911) *Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C., 2000 U.S. Dist. LEXIS 14043 (S.D.N.Y. Sept. 22, 2000)* Husband who was not a consumer could pursue FDCPA claims under sections not restricted to consumers, such as a § 1692e(5) claim. Since husband did not owe the rent debt or receive the three-day demand letter, his claim for violation of the notice requirements, which applied only to consumers, was dismissed.

(pg. 911) *Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988)* The FDCPA private remedy is available to "any person," not just consumers. Therefore, the administrator who had received dunning letters regarding a consumer debt had standing to sue under FDCPA.

(pg. 911) *Johnson v. Bullhead Invs., L.L.C., 2010 WL 118274 (M.D.N.C. Jan. 11, 2010)* The consumer, a person with a name similar to the actual debtor, who was served with the actual debtor's state court collection suit even after she notified the collector of the mistaken identity and who incurred attorney fees in having the collection case against her dismissed and incurred other actual damages as a result of the debt collector's collection efforts, had standing FDCPA violations.

(pg. 911) *Woodside v. New Jersey Higher Educ. Assistance Auth., 1993 WL 56020 (E.D. Pa. Mar. 2, 1993)* Plaintiffs were consumers protected by the FDCPA despite defendant's argument that they are not because plaintiffs have the ability but not the desire to pay the collector's claim.

(pg. 912) *Donohue v. Quick Collect, Inc., 592 F.3d 1027 (9th Cir. 2010)* "[A state court] complaint served directly on a consumer to facilitate debt-collection efforts is a communication subject to the requirements of §§ 1692e and 1692f."

(pg. 912) *Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350 (11th Cir. 2009)* Telephone answering machine messages that asked the consumer to return calls from the defendant debt collector and that did not convey any specific information about a debt were nevertheless "communications" subject to the FDCPA since the reason for the calls was to collect a debt and they thus indirectly conveyed information about the debt.

(pg. 912) *Goldman v. Cohen, 445 F.3d 152 (2nd Cir. 2006)* A legal pleading was a "communication" within the meaning of the FDCPA.

(pg. 913) *McClenning v. NCO Fin. Sys., Inc., 2010 WL 4795269 (C.D. Cal. Nov. 15, 2010)* A question of fact was raised as to whether or not the defendant failed to cease collection of the debt in violation of § 1692g(b) when it made a soft-pull credit inquiry.

(pg. 913) *Koby v. ARS Nat'l Servs., Inc., 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010)* Voicemail messages from debt collectors to debtors are "communications" regardless of whether a debt is mentioned in the message.

(pg. 913) *Costa v. Nat'l Action Fin. Servs., 634 F. Supp. 2d 1069 (E.D. Cal. 2007)* Telephone messages left by a debt collector are "communications" subject to the FDCPA.

(pg. 913) *Hutton v. C.B. Accounts, Inc., 2010 WL 3021904 (C.D. Ill. Aug. 3, 2010)* Leaving a voicemail message to call back is a "communication" because the purpose was to induce the consumer to discuss her outstanding debt.

(pg. 913) *Matmanivong v. Unifund CCR Partners, 2009 WL 1181529 (N.D. Ill. Apr. 28, 2009)* Communications to lawyers and the court are subject to § 1692e of the FDCPA just like communications to consumers.

(pg. 913) *Ramirez v. Apex Fin. Mgmt., L.L.C., 567 F. Supp. 2d 1035 (N.D. Ill. 2008)* The court rejected *Biggs v. Credit Collections, Inc., 2007 WL 4034997 (W.D. Okla. Nov. 15, 2007)*, and followed the overwhelming majority rule of Foti, et al., that the debt collector's voicemail messages were FDCPA "communications."

(pg. 914) *Gathing v. Mortgage Elec. Registration Sys., Inc., 2010 WL 889945 (W.D. Mich. Mar. 10, 2010)* Since FDCPA prohibits actions and unfair practices that may not involve communicating directly with the consumer, pro se allegations that co-defendant was debt collector's servicing agent and that co-defendant debt collector is vicariously liable for its servicing agent's acts under the doctrine of respondeet superior, survives motion to dismiss. Summary judgment denied where co-defendant servicing agent offers no support for its contention that statements made in a letter that also includes language required by law or in a response to an inquiry by a plaintiff are exempt from compliance with the FDCPA.

(pg. 914) *Edeh v. Midland Credit Mgmt., Inc., 2010 WL 3893604 (D. Minn. Sept. 29, 2010)* "The Court has learned, through its work on countless FDCPA cases, that threatening to report and reporting debts to CRAs is one of the most commonly-used arrows in the debt collector's quiver. Consistent with the views of the FTC-and consistent with the views expressed in Purnell, Quale, and Semper-the Court finds that Midland was engaged in "collection of the debt" in violation of § 1692g(b) when it reported Edeh's disputed debt to the CRAs before sending verification of that debt to Edeh."

(pg. 914) *Seaworth v. Messerli, 2010 WL 3613821 (D. Minn. Sept. 7, 2010)* The court concluded that a pleading sent to the pro se consumer's home but never received was not a "communication."

(pg. 914) *Mark v. J.C. Christensen & Assocs., Inc., 2009 WL 2407700 (D. Minn. Aug. 4, 2009)* Messages left by the debt collector on the consumer's answering machine are "communications" under the FDCPA.

(pg. 914) *Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290 (E.D. Mo. 2008)* Even though the debt collector did not disclose any information about the account, since the call was made for the purpose of contacting the debtor to obtain collection, it was a "communication" within § 1692a(2).

(pg. 915) *Davis v. Trans Union, L.L.C., 526 F. Supp. 2d 577 (W.D.N.C. 2007)* Reporting to credit bureaus is a communication within the FDCPA. Allegation that collection agency falsely reported the balance of an account to a credit bureau survived motion to dismiss.

(pg. 915) *Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009)* "Affidavits attached to complaints for money themselves constitute communications for the purposes of the FDCPA.

(pg. 915) *In re Gunter, 334 B.R. 900 (Bankr. S.D. Ohio 2005)* Summons and complaint are "communications" within the FDCPA.

(pg. 915) *Mendus v. Morgan & Assoc., 994 P.2d 83 (Okla. Ct. Ap. 1999)* A pleading or a summons was a communication under the FDCPA and was the initial communication triggering the validation notice requirements.

(pg. 915) *Capital Credit & Collection Serv., Inc. v. Armani, 206 P.3d 1114 (Or. Ct. App. 2009)* A "false, deceptive, or misleading representation or means in connection with the collection of any debt" under § 1692e includes communications by the debt collector to the debtor's attorney, since the FDCPA applies to direct and indirect collection efforts.

(pg. 915) *Henry v. Shapiro, 2010 WL 996459 (E.D. Pa. Mar. 15, 2010)* The FDCPA includes the contents of formal pleadings within its scope except where formal pleadings are explicitly exempted by §§ 1692e(11) and 1692g(d).

(pg. 915) *Inman v. NCO Fin. Sys., Inc. 2009 WL 3415281 (E.D. Pa. Oct. 21, 2009)* Followed *Foti*, holding prerecorded messages left on an answering machine were communications.

(pg. 915) *Sullivan v. Equifax, Inc., 2002 WL 799856 (E.D. Pa. Apr. 19, 2002); Blanks v. Ford Motor Credit, 2005 WL 43981 (N.D. tex. Jan. 7, 2005)* The court rejected the argument that sending false information about a delinquent payment to a credit reporting agency was not debt collection conduct.

(pg. 916) *Reyes v. Kenosian & Miele, L.L.P., 619 F. Supp. 2d 796 (N.D. Cal. 2008)* State court collection complaints are generally subject to the FDCPA.

(pg. 917) *Ruth v. Triumph P'ships, 577 F.3d 790 (7th Cir. 2009)* The FDCPA is a strict liability statute, and debt collectors whose conduct falls short of its requirements are liable here respective of their intentions.

(pg. 917) *Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85 (2d Cir. 2008)* The "Act is primarily a consumer protection statute, and we have consistently interpreted the statute with that congressional object in mind."

(pg. 917) *Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006)* The FDCPA is a remedial statute to be broadly construed so as to effect its purpose.

(pg. 917) *Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002)* The FDCPA is a remedial statute to be liberally construed to accomplish its purpose.

(pg. 917) *Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992)* The FDCPA is "an extraordinarily broad statute" and must be enforced "as Congress has written it."

(pg. 917) *Scott v. Jones, 964 F.2d 314 (4th Cir. 1992)* Sparse legislative history has relatively little persuasive weight in comparison to the plain meaning of the statute.

(pg. 917) *Jeter v. Credit Bureau, Inc. 760 F.2d 1168 (11th Cir. 1985)* Since the purposes of the FDCPA state in § 1692 included the strengthening of federal protections for consumers, courts should interpret the FDCPA to be at least as protective of consumers as was the FTC Act at the time when the FDCPA was enacted. Thus, the FDCPA's objective standards should be construed to be protective of consumers who are unsophisticated and relatively more susceptible to abuse.

(pg. 918) *Federal Trade Comm'n v. Shaffner, 626 F.2d 32 (7th Cir. 1980)* "Although Congress intended the Act to be enforced primarily by consumers… it also authorized the FTC… to use all its functions and powers to enforce compliance."

(pg. 918) *Hayden v. Rapid Collection Sys., Inc., 2006 WL 1127180 (D. Ariz. Apr. 27, 2006)* Collector's reliance on information from the creditor was immaterial since the FDCPA is a strict liability statute. The court recognized that such reliance might be an aspect of the bona fide error defense.

(pg. 918) *Reyes v. Kenosian & Miele, L.L.P., 619 F. Supp. 2d 796 (N.D. Cal. 2008)* Contents of state court complaint are subject to the FDCPA.

(pg. 918) *Cassady v. Union Adjustment Co., 2008 WL 4773976 (N.D. Cal. Oct. 27, 2008)* The U.S. Supreme Court's decision in *Heinz* strongly suggest that the *Noerr-Pennington* doctrine does not apply to FDCPA actions.

(pg. 918) *Irwin v. Mascott, 94 F. Supp. 2d 1052 (N.D. Cal. 2000)* Since the FDCPA is a strict liability statute, no showing of intent was necessary to establish liability.

(pg. 918) *O'Connor v. Check Rite, 973 F. Supp. 1010 (D. Colo. 1997)* FDCPA is a strict liability statute and only one violation need be shown to entitle consumer to summary judgment.

(pg. 918) *Cirkot v. Diversified Fin. Sys., Inc., 839 F. Supp. 941, 944 (D. Conn. 1993).* "[T]he FDCPA is remedial in nature and should be liberally construed"

(pg. 918) *Ayala v. Dial Adjustment Bureau, Inc., 1986 U.S. Dist. LEXIS 30983 (D. Conn. Dec. 4, 1986)* The FDCPA should be construed to accomplish the regulatory goals intended by Congress.

(pg. 918) *Chalik v. Westport Recovery Corp., 677 F. Supp. 2d 1322 (S.D. Fla. 2009)* The FDCPA establishes a strict liability standard and requires only one violation for a consumer to prevail. A debt collector may still violate the FDCPA while simultaneously following an authorized state procedure.

(pg. 918) *Pollock v. Bay Area Credit Serv., L.L.C., 2009 WL 2475167 (S.D. Fla. Aug. 13, 2009)* FDCPA is a strict liability statute, so the consumer need not show that the violation was intentional.

(pg. 918) *Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336 (S.D. Fla. 2008)* The FDCPA's prohibition barring collector's from leaving pre-recorded voicemail collection messages that are heard by unauthorized third parties does not violate the First Amendment since the prohibition "is narrowly tailored to serve the significant government interest of protecting consumers' privacy" and "[d]ebt collectors have several alternative channels of communication available to them, including live conversation via telephone, in person communication, and postal mail."

(pg. 918) *Kaplan v. Assetcare, Inc., 88 F. Supp. 2d 1355 (S.D. Fla. 2000)* The FDCPA was a strict liability statute and knowledge or intent need not be pleaded.

(pg. 918) *Milton v. LTD Financial Services, 2011 WL 291363 (S.D. Ga. Jan. 25, 2011)* "[T]he FDCPA as a strict liability statute, such that no evidence of intent to mislead or deceive is necessary."

(pg. 918) *Ross v. Commercial Fin. Serv. Inc., 31 F. Supp. 2d 1077, 1079 (N.D. Ill. 1999)* "Because it is designed to protect consumers, the FDCPA is generally liberally construed."

(pg. 919) *McDaniel v. South & Associatew., P.C., 325 F. Supp. 2d 1210 (D. Kan. 2004)* FDCPA is a remedial statute which should be construed liberally in favor of the consumer.

(pg. 919) *Bishop v. Global Payments Check Recovery Services, Inc., 2003 WL 21497513 (D. Minn. June 25, 2003)* FDCPA imposes strict liability without regard to whether the consumer was misled by the violation.

(pg. 919) *Picht v. Hawks, 77 F. Supp. 2d 1041, 1043 (D. Minn. 1999), aff'd, 236 F.3d 446 (8th Cir. 2001)* The FDCPA is a "remedial, strict liability statute which was intended to be applied in a liberal manner."

(pg. 919) *Pittman v. J.J. Mac Intyre Co., 969 F. Supp. 609 (D. Nev. 1997)* There was no requirement under § 1692e that false representations be intentional to be actionable. Because the FDCPA is a strict liability statute, the defendant's culpability was a consideration only in computing damages under § 1692k(b). The consumer had a reasonable expectation of privacy at her work during the working hours that arose from a desire to be left alone to perform the duties for which she was hired. She stated a claim for invasion of seclusion.

(pg. 919) *Boyko v. American International Group, Inc., 009 WL 5194431 (D.N.J. Dec. 23, 2009)* The FDCPA is generally a strict liability statute and does not require proof of actual damages to support a claim.

(pg. 919) *Cavallaro v. Law Offices of Shapiro & Kriesman, 933 F. Supp. 1148 (E.D.N.Y. 1996)* The FDCPA is a strict liability statute. Quotes Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996): "[I]n the general context of consumer protection—of which the Fair Debt Collection Practices Act is a part—'it does not seem unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'"

(pg. 919) *Deere v. Javitch, Block & Rathbone L.L.P., 413 F. Supp. 2d 886 (S.D. Ohio 2006)* "The Sixth Circuit has described the statute as 'extraordinarily broad' and its terms must be literally enforced."

(pg. 919) *Becker v. Montgomery, Lynch, 2003 WL 23335929 (N.D. Ohio Feb. 26, 2003)* FDCPA is, for the most part, a strict liability statute.

(pg. 919) *Mushinsky v. Nelson, Watson & Associates, L.L.C., 642 F. Supp 2d 470 (E.D. Pa. 2009)* FDCPA is a remedial statute and should be construed broadly.

(pg. 919) *Reed v. Pinnacle Credit Services, L.L.C., 2009 WL 2461852 (E.D. Pa. Aug. 11, 2009)* FDCPA is a remedial statute and should be construed broadly.

(pg. 919) *Agueros v. Hudson & Keyse, L.L.C., 2010 WL 3418286 (Tex. App. Aug 31, 2010)* "The FDCPA is a strict liability statute, and only one violation of the FDCPA is necessary to establish civil liability."

(pg. 938) *Kaschak v. Raritan Valley Collection Agency, 1989 U.S. Dist. LEXIS 19103 (D.N.J. May 22, 1989)* The requirement that a collector cease communication under § 1692(c) is effective upon the collector's actual receipt of the consumer's request that communications cease, even if the collector has not processed the request and has no actual knowledge of the request.

(pg. 938) *Johnson v. Equifax Risk Management Services, 2004 WL 540459 (S.D.N.Y. Mar. 17, 2004)* A consumer's written demand to the collector that it verify the debt pursuant to § 1692g and otherwise cease all other communication effectively invoked the § 1692c(c)'s cease communication remedy and did not improperly attempt to "have it both ways," and the collector's subsequent communications other than to provide verification, comprised of an additional dun and affidavits of forgery for the consumer to sign, violated § 1692c(c).

(pg. 938) *Lamb v. M & M Associates, 1998 WL 34288694 (S.D. Ohio Sept. 1, 1998)* Debt collector's continued collection efforts after receipt of consumer's letter stating that she would not pay until she received the requested breakdown did not violate § 1692c(c) because refusal was conditional.

(pg. 939) *Chalik v. Westport Recovery Corp., 677 F. Supp. 2d 1322 (S.D. Fla. 2009)* The FDCPA does not guarantee a debt collector the right to leave answering machine messages; debt collectors have other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone.

(pg. 939) *Spearman v. Tom Wood Pontiac-GMC, Inc., 2002 WL 31854892 (S.D. Ind. Nov. 4, 2002)* Legal pleadings constituted a "communication" as defined by the FDCPA.

(pg. 940) *Herbert v. Wexler & Wexler, 1995 WL 535107 (N.D. Ill. Sept. 5, 1995)* The statement "You cannot even begin to know the trouble and expense that is about to come into your life over this matter as we intend to do whatever is necessary to compel you to pay this obligation" stated a cause of action for violation of § 1692d(2) as the unsophisticated consumer may construe the language as having the natural consequence to harass, oppress or abuse the debtor.

(pg. 940) *Hoffman v. Partners in Collections, Inc., 1993 WL 358158 (N.D. Ill. Sept. 14, 1993)* Plaintiff was not required to identify in the complaint the particular abusive words alleged to violate § 1692d(2) in order to survive defendant's motion to dismiss.

(pg. 940) *McCollough v. Johnson, Rodenberg & Lauinger, 610 F. Supp. 2d 1247 (D. Mont. 2009)* "The inescapable conclusion is that [the debt collection attorney] asked a *pro se* defendant to admit false information. He either did so knowingly, or neglected to review his minimal file before signing the requests. He served the requests with no ostensible reason to believe that the [consumer] defendant would understand their import. The requests for admission appear to be designed to conclusively establish each element of [the collection law firm's] case against [the consumer] and to use the power of the judicial process against a *pro se* defendant to collect a time-barred debt. This conduct is abusive, unfair and unconscionable."

(pg. 940) *Arroyo v. Solomon & Solomon, P.C., 2001 U.S. Dist. LEXIS 21908 (E.D.N.Y. Nov. 7, 2001)* Student loan collector's insulting statement, if proven, that consumer who couldn't afford $100 monthly payment should have thought about that when she entered a student loan, would violate § 1692d.

(pg. 940) *McNall v. Credit Bureau, 2008 WL 188796 (D. Or. Apr. 18, 2008)* Consumers stated a claim for relief for defendants' violation of § 1692d when their agents, while attempting to serve process, stood at the entrance of the consumers' home and "in a very loud voice repeatedly yelled plaintiff's name…'come out of your house,' 'I have legal papers for you,' 'you need to come out and get these legal papers now,' 'you need to get your ass out here and open your gate now,' 'I'm not leaving until you come out and open this gate.' "

(pg. 940) *Frew v. Van Ru Credit Corp., 2006 WL 2261624 (E.D. Pa. Aug. 7, 2006)* The assertion that the "Defendant allegedly likened Plaintiff to a 'scumbag' "stated a claim for using an abusive collection practice prohibited by the FDCPA.

(pg. 941) *Meadows v. Franklin Collection Services, Inc., 2011 WL 479997 (11th Cir. Feb. 11, 2011)* The court reversed the lower court's entry of summary judgment for the collector on the § 1692d(5) claim. The collector called the plaintiff's (the parent of a debtor) residence over 300 times in a two and a half year period, sometimes up to three times a day, using mostly robocalls but also personal calls. In addition, the collector sought contact information regarding the plaintiff's daughter and another debtor who previously had the same telephone number. The court found that a reasonable jury could conclude that the collector caused the phone to ring with the intent to annoy or harass her in view of the volume and frequency of the calls, the fact that the plaintiff had informed the collector that she did not owe the debts, did not wish to share her daughter's contact information, asked that the calls stop, and stated the calls caused her emotional distress. The court found that the fact that telephone calls were not answered was no defense to the § 1692d(5) claim, since that provision specifically prohibits merely "causing a telephone to ring" with the requisite intent: "The statute itself recognizes that answering the phone is not necessary for there to be harassment. This makes good sense because a ringing telephone, even if screened and unanswered, can be harassing, especially if it rings on a consistent basis over a prolonged period of time and concerns debts that one does not owe."

(pg. 942) *Clarke v. Weltman, Wienberg & Reis, Co., L.P.A., 2010 WL 2803975 (S.D. Fla. July 15, 2010)* A complaint alleging that over a two and a half month period twenty-six messages were left on the consumer's cell phone was sufficient under Twombly and Iqbal to constitute a violation of § 1692d even if they also constituted a violation of the TCPA. "Each element of the particular statutory claim must be met, regardless of whether the same facts support multiple claims."

(pg. 943) *Atchoo v. Redline Recovery Services, L.L.C., 2010 WL 1416738 (W.D.N.Y. Apr. 5, 2010)* The court found that it was not necessary in a claim under § 1692d(5) for the consumer to allege that the defendant made a certain number of phone calls. Also, there is no requirement under this section that the consumer answer the phone. Instead, it is enough that the defendant merely causes the phone to ring continuously with the intent to annoy, abuse, or harass.

(pg. 943) *Clark v. Quick Collect, Inc., 2005 WL 1586862 (D. Or. June 30, 2005)* The court denied summary judgment to defendant where it had called multiple times without leaving messages. "Whether there is actionable harassment or annoyance turns on the volume of the calls made and on the pattern of calls" within § 1692d.

(pg. 944) *Brown v. Hosto & Buchan, P.L.L.C., 2010 WL 4352932 (W.D. Tenn. Nov. 2, 2010)* The court denied the motion to dismiss where the frequency of the debt collector's calls to the plaintiff's telephone and the manner in which the collector called the plaintiff's cellular telephone using an automatic telephone dialing system could plausibly cause an unsophisticated consumer to feel harassed, oppressed, or abused.