



Photo provided by LA CVB



AMERICAN BAR ASSOCIATION

**General Practice,
Solo & Small Firm
Division**

Fair Debt Collection Practices Act

Saturday, October 17, 2009

1:15 p.m. - 2:15 p.m.

**2009 Fall Meeting and
National Solo and Small Firm Conference
October 16 - 17, 2009
Millennium Biltmore Hotel
Los Angeles, CA**

American Bar Association
General Practice, Solo and Small Firm Division

FAIR DEBT COLLECTION PRACTICES



Manuel H. Newburger
BARRON, NEWBURGER & SINSLEY, PLLC
1212 Guadalupe, Suite 102
Austin, Texas 78701-1837
(512) 476-9103
Fax: (512) 279-0310
mnewburger@bns-law.com
www.bns-law.com
Texas ★ Florida ★ New York

2009 GP|Solo Fall Meeting & National Solo and Small Firm Conference
General Practice, Solo and Small Firm Division
Los Angeles, CA
October 16 -17, 2009

Copyright Manuel H. Newburger 2009

Manuel H. Newburger
BARRON, NEWBURGER & SINSLEY, PLLC
1212 Guadalupe, Suite 102
Austin, Texas 78701-1837
(512) 476-9103
Fax: (512) 279-0310

BIOGRAPHICAL INFORMATION

Manuel H. (Manny) Newburger is the President of Barron, Newburger & Sinsley, PLLC, and practices in the firm's Austin office. He is also the President of Fair Debt Consultants, LLC, and an Adjunct Professor at the University of Texas School of Law, where he teaches consumer protection law. He has repeatedly been recognized by *Law & Politics* and *Texas Monthly* magazines as a Texas Super Lawyer, and he is a Fellow of the American College of Consumer Financial Services Lawyers

Mr. Newburger received a B.A. in history from Trinity University in 1980 and his J.D. in 1983 from the University of the Texas School of Law. He has been licensed to practice law in the State of Texas since November 4, 1983, and is admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second, Fifth, Seventh, and Ninth Circuits, all United States District Courts in Texas, and the United States District Courts for the Eastern and Western Districts of Wisconsin, the Northern District of Illinois, the Northern and Southern Districts of Indiana, the District of Colorado, and the Western District of Tennessee. He is certified as a specialist in Consumer and Commercial Law by the Texas Board of Legal Specialization, and his practice is almost exclusively in the areas of consumer and commercial law.

Mr. Newburger is a past Chair of the Consumer Law Section of the State Bar of Texas, and the Texas State Bar's Advisory and Exam Commissions on board certification in consumer law. He is a member of the Commercial Law League of America, and he served for four years as Chairman of the Fair Debt Collection Practices Act Committee of that organization and subsequently as the Chair Emeritus of that committee. He testified as the League's representative before a United States Congressional Subcommittee regarding the Fair Debt Collection Practices Act at the last oversight hearing held on the Act.

A frequent speaker at Continuing Legal Education Programs around the United States, Mr. Newburger has a nationally-based consumer law practice in the area of fair debt collection practices. He has been quoted in articles on FDCPA issues in the *National Law Journal*, *Lawyers Weekly USA*, and *The Texas Lawyer*, and in 1995, he represented the Commercial Law League of America as an *amicus curiae* in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489 (1995), *White v. Goodman*, 200 F.3d 1016 (7th Cir. 2000), *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004), and *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457 (5th Cir. 1999). Mr. Newburger is the co-author of M. Newburger and B. Barron, *Fair Debt Collection Practices: Federal and State Law and Regulation* (Sheshunoff & Pratt 2002), M. Newburger and B. Barron, *The Guide to Fair Debt Collection Practices Laws in the United States* (Faulkner & Gray 2000), as well as a number of published articles on consumer law. He was a member of the manual committee for the Texas Collection Manual – Third Edition (State Bar of Texas 2000), and a contributing author to the *Manual of Credit and Commercial Laws* (National Association of Credit Management 2002) and *The Practice of Consumer Law* (National Consumer Law Center) (Chapter 13).

Mr. Newburger was a recipient of the State Bar of Texas' 1999 Frank J. Scurlock Award for voluntary legal services to the poor, the 2006 J. Chrys Dougherty Award from Volunteer Legal Services of Central Texas, the 2005 Don Kramer Award from the National Association of Retail Collection Attorneys, and the 2008 President's Cup from the Commercial Law League of America..

I. INTRODUCTION

This article will provide an overview of the Federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 - 1692o, also cited as Pub.L. 90-321, Title VIII, §§ 802 - 817. It is intended as a guide for those seeking to bring their firms into compliance with the Act, but it does not cover every question that could arise in the daily practice of collections. Texas is the only state whose fair debt law is addressed in this article. Persons interested in a more detailed analysis of the subject matter of this article or in the fair debt laws of other states should refer to M. Newburger and B. Barron, *Fair Debt Collection Practices: Federal and State Law and Regulation* (Sheshunoff & Pratt 2002).

FAIR DEBT CHECKLIST

1. Is the debt a “consumer” debt?¹
2. Is the defendant a “debt collector”?²
3. Is the defendant a “third-party” debt collector”?³ If so, does (s)he have a bond?⁴
4. Did the defendant give the validation notice within five days of the initial communication?⁵
5. Is the validation notice correct?⁶
6. Does the validation notice state the full amount of the debt?⁷
7. Does the demand or other conduct overshadow or contradict the validation notice?⁸

¹See 15 U.S.C. § 1692a; Tex. Fin. Code Ann. § 392.001(2).

²See 15 U.S.C. § 1692a; Tex. Fin. Code Ann. § 392.001(6).

³See Tex. Fin. Code Ann. § 392.001(7).

⁴See Tex. Fin. Code Ann. § 392.101.

⁵See 15 U.S.C. § 1692g.

⁶*Id.*

⁷*Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000).

⁸See *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir. 1988); *Graziano v.*

8. Did the defendant give the correct “mini-Miranda” notice in all communications?⁹
9. Common violations:
 - a. Misrepresenting the character or amount of a debt.¹⁰
 - b. Threatening to take action prohibited by law.¹¹
 - c. Threatening to take action that is not intended.¹²
 - d. Using profane, obscene, or abusive language.¹³
 - e. Threatening violence or Criminal means.¹⁴
 - f. Making repeated calls for the purpose of harassment.¹⁵
 - g. Reporting a disputed debt to a credit bureau without disclosing that it is disputed.¹⁶
 - h. Reporting a “stale” debt to a credit bureau.¹⁷
 - i. Suing on a time-barred debt.¹⁸

Harrison, 950 F.2d 107 (3d Cir. 1991); *Miller v. Payco - General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996); *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

⁹See 15 U.S.C. § 1692e(11).

¹⁰15 U.S.C. § 1692e(2)(A); Tex. Fin. Code Ann. § 392.304(a)(8).

¹¹15 U.S.C. § 1692e(5); Tex. Fin. Code Ann. § 392.301(a)(8).

¹²15 U.S.C. § 1692e(5).

¹³15 U.S.C. § 1692f(2); Tex. Fin. Code Ann. § 392.302(1).

¹⁴15 U.S.C. § 1692d(1); Tex. Fin. Code Ann. § 392.301(a)(1).

¹⁵15 U.S.C. § 1692f(5); Tex. Fin. Code Ann. § 392.302(4).

¹⁶15 U.S.C. § 1692e(8); *Brady v. The Credit Recovery Company, Inc.*, 160 F.3d 64 (1st Cir. 1998). Tex. Fin. Code Ann. § 392.301(a)(3).

¹⁷15 U.S.C. §§ 1692c(b) and 1692e(2)(A), (8), and (10); Tex. Fin. Code Ann. §§ 392.301(a)(3) and (8) and 392.202.

¹⁸15 U.S.C. § 1692e(2)(A); Tex. Fin. Code Ann. § 392.304(a)(8); *Kimber v. Federal Financial Corp.*, 668 F.Supp 1480 (M.D.Ala. 1987); *Stepney v. Outsourcing Solutions, Inc.*, 1997 WL 722972 (N.D.Ill.

- j. Continuing to collect without first complying with a verification request.¹⁹
- k. Communicating improperly with a third party.²⁰
- l. Communicating with a consumer who is known to be represented by counsel.²¹
- m. Communicating with a consumer at improper hours or at a time or place known to be inconvenient.²²
- n. Filing suit in an improper venue.²³
- o. Flat-rating.²⁴

II. OVERVIEW OF THE FDCPA

A. What Is a Debt?

“The term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.”²⁵

On its face, the FDCPA applies only to “retail” or traditional consumer debts. However, those who believe that they only handle commercial collection matters should also familiarize themselves with the Act. While the notion that the Act applies to sole proprietorship debts²⁶ has been discredited,²⁷ it is often difficult to distinguish commercial

1997) (not reported in F.Supp.).

¹⁹15 U.S.C. § 1692g(b).

²⁰15 U.S.C. § 1692c(b).

²¹15 U.S.C. § 1692c(a)(2).

²²15 U.S.C. § 1692c(a)(1) and (2).

²³15 U.S.C. § 1692i; Tex. Bus. & Com. Code Ann. § 17.46(b)(22).

²⁴15 U.S.C. § 1692j.

²⁵15 U.S.C. § 1692a(5).

²⁶Notwithstanding the express wording of the FDCPA and a strong body of case law, in *Sluys v. Hand*, 831

from consumer obligations, particularly in the area of credit card debts.²⁸ Sometimes consumer debts turn into what falsely appear to be commercial obligations, such as the mortgage on a residence that subsequently becomes a rental property.²⁹ On the other hand, in the case of a commercial loan secured by the borrower's residence, the nature of the loan, rather than the nature of the collateral will control and the FDCPA is not applicable to the enforcement of such a debt.³⁰

For a period of time there was a line of cases that held that there must be an extension of credit in order for an obligation to be a “debt” under the Act.³¹ Those cases have been discredited.³² However, there must be a “transaction” for “personal, family, or household” purposes, and *per capita* taxes,³³ shoplifting claims,³⁴ tort claims,³⁵ and child support obligations,³⁶ have all been held **not** to be debts not covered by the Act.

B. Who Is a Debt Collector?

“The term ‘debt collector’ means any person who uses any instrumentality of interstate commerce or the mails in any business the

F.Supp. 321 (S.D.N.Y. 1993), the Court stated in dicta that the FDCPA applies to debts incurred by a sole proprietorship.

²⁷The “sole proprietorship” language in *Sluys* has been recognized as erroneous dicta. *See Beaton v. Reynolds, Ridings, Vogt & Morgan*, 986 F.Supp. 1360 (W.D.Okla. 1998).

²⁸Furthermore, credit reporting practices create additional dangers. In an unreported opinion dealing with subject matter jurisdiction, the Ninth Circuit Court of appeals indicated that a debt collector's erroneous reporting and treatment of a commercial debt as a consumer obligation might entitle the debtor to invoke the provisions of the Act. *See Morgovsky v. Creditors' Collection Service of San Francisco*, 1993 WL 497226 (9th Cir. Nov. 29, 1993).

²⁹*See, e.g., Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000).

³⁰*First Commerce of America, Inc. v. McDonald*, 1995 WL 592432 (Conn.Super. No. CV-95-0075050-S, Sept. 29, 1995) (Not Reported in A.2d).

³¹*Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987).

³²*See, e.g., Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1977); *Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739 (9th Cir. 1997); *Newman v. Boehm, Pearlstein & Bright*, 119 F.3d 477 (7th Cir. 1997); *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998), *cert. denied*, 525 U.S. 1002, 119 S.Ct. 511, 142 L.Ed.2d 424 (1998); *Pollice v. National Tax Funding, LP*, 225 F.3d 379 (3d Cir. 2000).

³³*Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980).

³⁴*Shorts v. Palmer*, 155 F.R.D. 172 (S.D. Ohio 1994).

³⁵*Hawthorne v. Mac Adjustments, Inc.*, 140 F.3d 1367 (11th Cir. 1998).

³⁶*Mabe v. G.C. Services Limited Partnership*, 32 F.3d 86 (4th Cir. 1994).

principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”³⁷

1. Attorneys: Prior to 1986, attorneys were exempted from the Act. On July 9, 1986, § 1692a(6)(F) of the Act was amended to delete that exemption. Many of the cases cited below involve suits against attorneys for alleged FDCPA violations, and the inclusion of attorneys under the Act has been held not to violate federal separation of powers doctrines.³⁸

REGULAR: In determining whether an attorney has “regularly” collected or attempted to collect debts, the trier of fact can consider the nature and volume of the attorney's case load.³⁹ In *Mertes v. Devitt*,⁴⁰ the court held that an attorney whose collection cases made up less than one percent (1%) of his practice and who had handled fewer than two collection cases per year over a ten year period did not “regularly” collect debts. In *Stojanovski v. Strobl & Manoogian, P.C.*,⁴¹ however, the defendant was a law firm whose collection practice was less than four percent (4%) of its total business. The District Court held that “regular” is not synonymous with “substantial” and that a law firm can **regularly** collect debts even though those services amount to a small fraction of the firm's total activity since it is the **volume** of the debt collection activity that is controlling, not the percentage. In *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*,⁴² the Court of Appeals held that the issue must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity. In the words of that court:

Most important in the analysis is the assessment of facts closely relating to ordinary concepts of regularity, including (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to

³⁷15 U.S.C. § 1692a(6).

³⁸*Newman v. Checkrite California, Inc.*, 912 F.Supp. 1354, 1366 (E.D.Cal. 1995).

³⁹*Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989).

⁴⁰734 F.Supp. 872 (W.D.Wi. 1990).

⁴¹783 F.Supp. 319 (E.D.Mi. 1992).

⁴²374 F.3d 56 (2d Cir. 2004).

assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice.

LITIGATORS: The only FDCPA case ever to reach the United States Supreme Court dealt with the question of whether attorneys who collect solely through litigation are “debt collectors.” In *Heintz v. Jenkins*⁴³ the Court held that the Act must be read to apply to lawyers engaged solely in consumer debt-collection litigation. The Supreme Court has left open in the *Heintz* case the question of whether there may be some narrow exceptions that courts could read as implicitly existing in the Act. It also has given some guidance to lower courts not to allow ridiculous or implausible results.

EVICTION CASES: Unpaid rent for a residential tenancy is a debt for FDCPA purposes, and this can present problems for attorneys who seek to collect rent in connection with eviction proceedings, as a demand for possession in less than thirty days could overshadow the validation notice that must be given in connection with a claim for rent.⁴⁴ A suit solely for possession, not joined with a claim for rent, should not be a collection effort; however, in *Hodges v. Sasil Corp.*⁴⁵ the New Jersey Supreme Court held the Act to be applicable to summary dispossess actions based upon the rationale that in that state such actions are filed for the purpose of coercing payment of rent. Therefore, attorneys should encourage their clients to permit them to demand and file suit for possession only, and should take such cases only when regaining possession of the premises is the objective of the action.

2. **Creditors:** Although creditors who collect their own debts in their own names are generally exempt from the FDCPA,⁴⁶ the Act specifically includes as a debt collector “any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.”⁴⁷ Thus, if the employee of the creditor itself represents to the debtor that (s)he

⁴³514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

⁴⁴ See *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998)

⁴⁵ 189 N.J. 210, 915 A.2d 1 (N.J. 2007).

⁴⁶ 15 U.S.C. § 1692a(6); *Maguire v. CitiCorp Retail Servs., Inc.*, 147 F.3d 232, 235 (2d Cir. 1998); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Doherty v. Citibank (South Dakota) N.A.*, 2005 U.S. Dist. LEXIS 13117 (EDNY 2005).

⁴⁷15 U.S.C. § 1692a(6).

is working for a third party, the creditor will become subject to the Act as a debt collector.⁴⁸

In *Dickenson v. Townside T.V. & Appliance, Inc.*,⁴⁹ the creditor conducted business under an assumed name, and in that assumed name it made demand for payment of a debt. The debtor alleged that such demand subjected the creditor to the Act, in that the creditor was not collecting debts in its own name, as required by § 1692a(6)(A). The Court held that a creditor's use of a business assumed name or trade name was permissible and that collecting debts under a name commonly used by the business did not subject the creditor itself to the provisions of the Act.

A “creditor” who purchased a debt after it was already in default will be treated as a “debt collector” under the Act and is not entitled to avail itself of the creditor exemption.⁵⁰ In *Commercial Service of Perry v. Fitzgerald*,⁵¹ the plaintiff brought suit on a note which it had purchased from the FDIC. In analyzing the plaintiff's status under the Colorado Fair Debt Collection Practices Act⁵² and the FDCPA the appellate court held that one who purchases a defaulted consumer note from the FDIC is a debt collector and not a creditor. A similar conclusion was reached in *Cirkot v. Diversified Financial Systems, Inc.*⁵³

3. Repossessors: For the purpose of 15 U.S.C. § 1692f(6), (“Unfair Practices”), a debt collector is also any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. In *Foster v. Ford Motor Credit Company*,⁵⁴ the Supreme Court of South Carolina reversed a summary judgment against a consumer and held that the FDCPA definition of debt collection includes, as a matter of law, repossessing vehicles when there is no right to effect dispossession.

4. Independent Contractors: A debt collector whose “independent contractor” collection agents are subject to its control is covered by the Act.⁵⁵ This is true even when

⁴⁸*Kempf v. Famous Barr Co.*, 676 F.Supp. 937, 938 (E.D.Mo. 1988).

⁴⁹770 F.Supp. 1122 (S.D.W.Va. 1990).

⁵⁰*Kizer v. Finance America Credit Corp.*, 454 F.Supp. 937 (N.D.Miss. 1978); *Holmes v. Telecredit Corp.*, 736 F.Supp. 1289 (D.Del. 1990); *Pollice v. Nat'l Tax Funding LP*, 225 F3d 379, 403–404 (3d Cir. 2000); *Whitaker v. Ameritech Corp.*, 129 F3d 952, 958–959 (7th Cir. 1997).

⁵¹856 P.2d 58 (Col. App. 1993).

⁵²C.R.S.A. §§ 12-14-101 *et seq.*

⁵³839 F.Supp. 941 (D.Conn 1993).

⁵⁴395 S.E.2d 440 (S.C. Sup. 1990).

⁵⁵*West v. Costen*, 558 F.Supp. 564 (W.D.Va. 1983). *See also U.S. v. ACB Sales & Service, Inc.*, 590 F.Supp. 561 (D.C. Ariz. 1984). *But, see Scally v. Hilco Receivables, LLC*, 2005 U.S. Dist. LEXIS 13122 (N.D.Ill. 2005).

the independent contractors are attorneys, who may themselves be agents of the collection agency.⁵⁶

5. Vicarious Liability: Even if the collection is being performed by a corporation, an individual who is directly or indirectly involved in the collection of the debt (including by supervising or training employees or reviewing the accounts) will be personally liable under the Act.⁵⁷

The courts have not held that a creditor may be vicariously liable under the FDCPA for the violations of a debt collector whom it employs,⁵⁸ but it appears that such liability will attach to a collection agency whose attorney violates the Act.⁵⁹

Some courts appear to have shredded the corporate veil in FDCPA cases. Corporate officers who direct or control the activities of their corporations have been held to have engaged “indirectly” in debt collection to a sufficient degree so as to be liable under the Act.⁶⁰ The author questions whether this is an inappropriate extension of the rule that a tortfeasor is always liable for his own torts, as it disregards long-standing notions of corporate protections for officers.

⁵⁶*Newman v. Checkrite California, Inc., supra*, at 1370.

⁵⁷*Id.* at 1372. However, see *White v. Goodman*, 200 F.3d 1016 (7th Cir. 2000), indicating that the Act does not permit suing an individual merely because (s)he is a principal of a corporate defendant.

⁵⁸ However, in *Colo. Capital v. Owens*, 227 F.R.D. 181 (E.D.N.Y. 2005) the Court recognized that a creditor could be liable for negligently engaging a collection agency.

⁵⁹ See, e.g., *Newman v. Checkrite California, Inc., supra*; *Martinez v. Albuquerque Collection Servs.*, 867 F. Supp. 1495, 1502 (D.N.M. 1994); *Caron v. Maxwell*, 48 F. Supp. 2d 932, 936 (D. Ariz. 1999); *Alger v. Ganick, O'Brien & Sarin*, 35 F.Supp. 2d 148, 153 (D. Mass. 1999). But, see *Scally v. Hilco Receivables, LLC*, 2005 U.S. Dist. LEXIS 13122 (N.D.Ill. 2005).

⁶⁰ See, e.g.; *Brumelow v. The Law Offices of Bennett and Deloney, P.C.*, 372 F. Supp. 2d 615 (D.Utah 2005); *Brink v. First Credit Resources*, 57 F. Supp. 2d 848, 861-62 (D. Ariz. 1999); *Albanese v. Portnoff Law Assocs.*, 301 F. Supp. 2d 389, 400 (E.D.Pa. 2004); *Musso v. Seiders*, 194 F.R.D. 43, 46-47 (D.Conn. 1999); *Ditty v. Checkrite, Ltd. Inc.*, 973 F. Supp. 1320 (D. Utah 1997). *Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 67 (E.D.N.Y. 1994); *Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354 (E.D. Cal. 1995); *Pikes v. Riddle*, 38 F. Supp. 2d 639, 640 (N.D. Ill. 1998); *United States v. ACB Sales & Serv., Inc.*, 590 F. Supp. 561 (D. Ariz. 1984). *Pope v. Vogel*, 1998 WL 111576 (N.D.Ill. 1998) (Not reported in F.Supp.). But, see, *White v. Goodman*, 200 F.3d 1016 (7th Cir. 2000).

C. Who Is Not a Debt Collector?

1. Officers or employees of the creditor who collect debts in the name of the creditor.⁶¹ An in-house attorney, however, may lose this exemption by sending demand letters which leave the impression that (s)he is independent counsel.⁶² Furthermore, a creditor's use of letterhead purporting to come from an independent attorney will cause it to become a debt collector as it is no longer collecting in its own name.⁶³

2. Any person who acts as a debt collector for another person if: (a) both are related by common ownership or affiliated corporate control; and (b) the person collecting does so only for the persons to whom it is so related; and (c) the principal business of such person is not the collection of debts.⁶⁴

3. Federal and State officers and employees who are collecting debts in the performance of their official duties.⁶⁵

4. Any person serving or attempting to serve legal process in connection with the judicial enforcement of a debt.⁶⁶

5. Non-profit consumer credit counselors.⁶⁷

6. Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (a) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (b) concerns a debt which was originated by such person; (c) concerns a debt which was not in default at the time it was obtained by such person; or (d) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.⁶⁸ (At least one court has indicated that the board of trustees of a condominium association is a fiduciary for all members of the association, and thereby subject to this exemption.⁶⁹)

⁶¹15 U.S.C. § 1692a(6)(A).

⁶²See *Dorsey v. Morgan*, 760 F.Supp. 509 (D.Md. 1991).

⁶³See *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 338 (5th Cir. 1997).

⁶⁴15 U.S.C. § 1692a(6)(B).

⁶⁵15 U.S.C. § 1692a(6)(C).

⁶⁶15 U.S.C. § 1692a(6)(D).

⁶⁷15 U.S.C. § 1692a(6)(E).

⁶⁸15 U.S.C. § 1692a(6)(F).

⁶⁹*Archer v. Beasley*, *supra*.

An assignee of the original creditor who takes such assignment prior to any default is exempt, but one who buys the debt after default is a debt collector.⁷⁰

In *Perry v. Stewart Title Co.*,⁷¹ the Fifth Circuit Court of Appeals held that the definition of “debt collector” does not extend to a mortgage service company that acquired the servicing rights prior to the mortgagor’s default. Other courts have reached the same conclusion.⁷²

D. Required Disclosures and Conduct.

1. Validation of Debts: Within five (5) days of the debt collector's initial communication with the consumer in connection with the collection of any debt the collector must send the consumer a written notice containing:

- a. the amount of the debt;
- b. the name of the creditor to whom the debt is owed.
- c. 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;
- d. 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 a 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
- e. 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.⁷³

These disclosures are the “notice of debt” required by 15 U.S.C. § 1692g. They can be given as part of the initial communication but, if not, must be sent within five days of the initial communication unless the consumer has paid the debt.

GENERAL RULES: In *Beattie v. D.M. Collections, Inc.*,⁷⁴ although the Defendant

⁷⁰*Kizer v. Finance America Credit Corp., supra; Holmes v. Telecredit Corp., supra. See also, Commercial Service of Perry v. Fitzgerald, supra; Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003).*

⁷¹756 F.2d 1197 (5th Cir. 1985).

⁷² See, e.g., *Bailey v. Security Nat’l Servicing Corp.*, 154 F3d 384 (7th Cir. 1998); *Barber v. National Bank of Alaska*, 815 P.2d 857 (Al. Sup. 1991).

⁷³15 U.S.C. § 1692g(a)(1) - (5).

⁷⁴754 F.Supp. 383 (D.Del. 1991).

had contacted the wrong person and, furthermore, had failed to send the validation of debt notice required by § 1692g, the Court found that the notices need not be given provided that within five days of the initial communication the debt collector discovers that (s)he has contacted the wrong person and informs the person who was contacted that (s)he was mistaken and that all collection activity will cease.

The Act does not require the debt collector to ensure actual receipt of the validation notice. However, if the collector knows that the validation notice has been returned by the Postal Service as undeliverable, and if the collector subsequently has an initial communication with the consumer the collector is required to re-send the notice within five days of that initial communication.⁷⁵

Oral verification of a debt is not enough. Upon the consumer's written request under this section, verification must be given in writing.⁷⁶ However, the right to verification persists for only thirty days after receipt of the validation notice.⁷⁷ Nevertheless, a prudent debt collector may still want to provide validation outside of that period.

In *Graziano v. Harrison*,⁷⁸ the attorney's notice stated that he would presume the debt to be valid unless the debtor disputed the debt *in writing*. The Third Circuit held that the attempt to require a written dispute was not a violation of § 1692g, even though the statute does not specifically require that the dispute be in writing in order to avoid the presumption of validity. However, in *Camacho v. Bridgeport Fin., Inc.*⁷⁹ the Ninth Circuit Court of Appeals reached the opposite conclusion, mandating strict compliance with the language of Section 1692g(a)(3).

In *Smith v. Transworld Systems, Inc.*,⁸⁰ the Court held that there is no requirement to send verification, provided that no further action is taken by the debt collector once a verification request is received. Put differently, a debt collector who receives a written request must send the verification if (s)he desires to continue collection activity, but (s)he has the option of deciding to return the claim to the creditor and ignoring the verification request.⁸¹

⁷⁵ *Johnson v. Midland Credit Mgmt. Inc.*, 2006 U.S. Dist. LEXIS 60133 (N.D. Ohio Aug. 23, 2006).

⁷⁶ *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (Wyo. 1989).

⁷⁷ *Mahon v. Credit Bureau of Placer County Inc.*, 171 F.3d 1197 (9th Cir. 1999); *Robinson v. Transworld Systems, Inc.*, 876 F.Supp. 385, 391 (N.D.N.Y. 1995).

⁷⁸ 950 F.2d 107 (3d Cir. 1991).

⁷⁹ 430 F.3d 1078 (9th Cir. 2005).

⁸⁰ 953 F.2d 1025 (6th Cir. 1992).

⁸¹ The court reached a similar conclusion in *Jang v. A.M. Miller & Assocs.*, 122 F.3d 480 (7th Cir. 1997). See, also, *Sambor v. Omnia Credit Servs.*, 183 F. Supp. 2d 1234 (D. Haw. 2002). The author notes that in *Powell v. J. J. Mac Intyre Co., Inc.*, 2003 U.S. Dist. LEXIS 24699, (D. Haw. Oct. 16, 2003) the Court

In *Stojanovski v. Strobl & Manoogian, P.C., supra*, the Court found that the failure to offer in the validation notice to send a copy of a judgment when no suit had yet been filed was a *de minimis* violation of the Act, and that no cause of action existed for that technical violation. The Court even went so far, however, as to suggest that a literal restatement of the verification language might have created a violation by falsely implying that there was a judgment against the debtor when in fact, none existed. In *Beeman v. Lacy, Katz, Ryan, & Mittleman*,⁸² the court held that where no judgment existed, reference to a copy of a judgment was not required.

PLEADINGS AS AN INITIAL COMMUNICATION: Prior to the 2006 amendment to the FCPA there was a split between Circuit Courts of Appeal on the question of whether the service of a complaint in a collection suit constituted an initial communication that would trigger Section 1692g.⁸³ The 2006 amendment added Section 1692g(d) which provides: “A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).”

PLACEMENT OF NOTICE: Mere placement of the validation notice on the reverse side of a form letter will not be considered sufficient notice.⁸⁴ The disclosures required by this section must be large enough to be easily read and prominent enough to be noticed by even the “least sophisticated” debtor,⁸⁵ and must be of a type size and color that will render them legible.⁸⁶

OVERSHADOWING/CONTRADICTING THE NOTICE: A fairly solid line of cases holds that the validation notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication, and that any attempt to require

stated that “Section 1692g(b) does not excuse a collection agency from its duty to verify the debt upon request. It merely acts to prevent collection agencies from continuing in their efforts to secure payment from the alleged debtor until the debtor has the necessary information regarding the original creditors.” However, such a statement is not supported by the express wording of the Act nor by the *Smith* and *Jang* decisions. The outcome in *Powell* may be explained by the fact that the decision indicates that the agency may not have actually ceased its collection efforts in that case.

⁸²892 F.Supp. 455 (D.Nev. 1995).

⁸³*Compare Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003) and *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir., *en banc*, 2004). However, the Thomas court noted that the question of whether pleadings constitute “communications” under other provisions of the Act was not before it.

⁸⁴*Riveria v. MAB Collections, Inc.*, 682 F.Supp. 174, 177 (W.D.N.Y. 1988).

⁸⁵*Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988).

⁸⁶*Miller v. Payco - General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991), *Read v. Amana Collection Services*, 1991 WL 5155 (W.D.N.Y. No. CIV.-90-110E January 15, 1991) (Not reported in F.Supp.); *Siler v. Management Adjustment Bureau*, 1992 WL 32333 (W.D.N.Y. No. CIV.-91-65E February 18, 1992) (Not reported in F.Supp.).

the debtor to act immediately and not take the full 30 days to request verification is a violation of § 1692g.⁸⁷ The notice must afford the debtor the full statutory period and may not require payment or even *receipt* of payment by the end of the validation period as that would cut short the time permitted to send a dispute.⁸⁸ Interestingly, the Ninth Circuit Court of Appeals has distinguished between requirements of payment before the end of the validation period and demands that the debtor communicate before the end of the period. In *Terran v. Kaplan*,⁸⁹ the Court prohibited the former but not the latter.⁹⁰

On the other hand, the validation notice does not provide a grace period, and a collector may sue or even threaten to sue, provided that it explains any apparent contradiction with the validation notice on such a manner as to correct any ambiguity as to the consumer's rights.⁹¹ In *Baker v. Citibank (South Dakota), N.A.*,⁹² the Court acknowledged that suit could be filed during the validation period as long as the validation notice is not overshadowed.

The line of cases pertaining to overshadowing has been codified in the 2006 amendments to the FDCPA, which added the following sentences to Section 1692g(b):

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

CONDITIONAL DISCLOSURE: In *Avila v. Rubin*,⁹³ the initial letters included the validation notice, but they also stated: "If the above does not apply to you, we shall expect payment or arrangement for payment to be made within ten (10) days from the date of this letter." The Court of Appeals found this language to be confusing, stating:

⁸⁷*Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988); *Graziano v. Harrison*, *supra*; *Miller v. Payco - General American Credits, Inc.*, *supra*.

⁸⁸*Chauncey v. JDR Recovery Corporation*, 118 F.3d 516 (7th Cir. 1997).

⁸⁹109 F.3d 1428 (9th Cir. 1997).

⁹⁰*See, also, Vasquez v. Gertler & Gertler, Ltd.*, 987 F.Supp. 652 (N.D.Ill. 1997).

⁹¹*Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).

⁹²13 F.Supp.2d 1037 (S.D.Cal. 1998).

⁹³84 F.3d 222 (7th Cir. 1996).

We think that telling a debtor he has 30 days to dispute the debt and following that with a statement that “[i]f the above does not apply” you have ten days to pay up or real trouble will start is entirely inconsistent, and a failure to comply, with the FDCPA. We think the unsophisticated consumer would be scratching his head upon receipt of such a letter. He wouldn't have a clue as to what he was supposed to do before real trouble begins. A debt validation notice, to be valid, must be effective, and it cannot be cleverly couched in such a way as to eviscerate its message. To protect the uninformed, the naive, and the trusting--the sort of people who easily fit under the umbrella of the “unsophisticated consumer”--the notice cannot be as misleading and tricky as the one used here by Van Ru and Rubin. We think the validation notice was clearly overshadowed by the language that followed on its heels. So, like the district court, we believe that both Rubin and Van Ru are guilty of not complying with sec. 1692g of the FDCPA.

SAFE HARBOR LANGUAGE: In *Bartlett v. Heibl*,⁹⁴ the Court held that the Act permits a collector to engage in collection activities during the validation period and to notify the debtor of the intention to do so, provided that the conduct does not overshadow, contradict, nor impair the debtor's validation rights. The Court provided a “safe harbor” form which it states would be protected under the circumstances, on these issues, and in the Seventh Circuit. Unfortunately, the Court's form, itself, does not fully comply with the act. Furthermore, this is a Seventh Circuit case, and the Seventh Circuit does not apply the “least sophisticated consumer” standard. Therefore, collectors in other jurisdictions cannot rely on it, even if their facts are identical to those of the *Heibl* case. Examples of other safe harbor notices are provided at the end of this article.

PROVING THE NOTICE: One of the problems encountered in Fair Debt litigation is that frequently a debtor alleges that (s)he was not sent a validation notice, and the debt collector cannot prove that a notice was sent as no hard copy was retained. In *Robinson v. Transworld Systems, Inc.*, *supra*, the agency did not retain the original demand, but it tendered the affidavit of its president as to the form used, and that was sufficient to establish that the validation of debt notice was given.

2. The “mini-Miranda” Warning: 15 U.S.C. § 1692e(11) requires that certain warnings be given to a consumer by the debt collector. The 1996 amendment to the FDCPA renders the following a violation of 15 U.S.C. § 1692e(11):

The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent

⁹⁴ 128 F.3d 497 (7th Cir. 1997).

communications that the communication is from a debt collector, except that this paragraph does not apply to a formal pleading made in connection with a legal action.

This amendment appears to apply solely to communications with the consumer, as opposed to the previous version, which applied to “all communications made to collect a debt or to obtain information about a consumer.” To that extent, the amendment is certainly more restrictive than the original version. Unfortunately, the amendment creates some significant problems.

Since the 1996 amendment does not specify whether the “initial communication” is the first one sent or the first one received, in the early stages of the collection process it may be unclear which disclosure must be given. It is similarly unclear whether merely using the initial disclosure in all communications will satisfy the requirement for subsequent communications, *i.e.*, does the phrase “this is an attempt to collect a debt” equal “this firm is a debt collector?”

The greatest danger of the 1996 amendment is the provision that “this paragraph does not apply to a formal pleading made in connection with a legal action.” That opens the door to the argument that Congress intended that all other provisions of the Act do apply to litigation. While this author is unwilling to take so broad a view, it seems likely that the argument will be advanced in future cases.

There are two parts to the initial warning. In *Robinson v. Credit Service Company*,⁹⁵ the Court found that the demand did disclose that the Defendant was attempting to collecting a debt, but it had not informed the consumer that any information obtained would be used for that purpose. Accordingly, summary judgment was granted against the collection agency.

This warning is mandatory.⁹⁶ In *Pipiles v. Credit Bureau of Lockport, Inc.*,⁹⁷ the court confirmed that the warning must be given in **all** communications. In that case, the Court found the statutory language to be clear and unambiguous and wholly rejected the rationale of the *Pressley* case. In *Carroll v. Wolpoff & Abramson*,⁹⁸ the Fourth Circuit Court of Appeals held that a law firm had violated the Act in failing to give the warning in a **post-judgment** communication, even though it had given all of the required disclosures in its original communication to the debtor. In *Frey v. Gangwish*,⁹⁹ the Sixth Circuit Court of Appeals also held that the warning must be given to the consumer in post-judgment

⁹⁵1991 WL 186665 (Civ. No. 90-4321 D.N.J. Sept. 16, 1991) (Not reported in F. Supp.).

⁹⁶*Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984).

⁹⁷886 F.2d 22 (2d Cir. 1989).

⁹⁸961 F.2d 459 (4th Cir. 1992), *cert. denied*, 506 U.S. 905, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992).

⁹⁹970 F.2d 1516 (6th Cir. 1992).

communications. On the other hand, in *Dikeman v. National Educators, Inc.*,¹⁰⁰ the Tenth Circuit Court of Appeals held that the warning need not be given in letters to an attorney who is representing a consumer. The Court was careful to note, however, that the result would have been different if the attorney had also been the debtor.

In *Sandlin v. Shapiro & Fishman*,¹⁰¹ the Court held that the warning must be given even in settlement letters. The Court rejected the defendant attorneys' argument that the demand letters were part of settlement negotiations and therefore privileged communications. Citing *Heintz*, the Court found that accepting the argument would in effect overrule the deletion of the attorney exemption. In *Johnson v. Eaton*,¹⁰² the defendant mailed the consumer a proposed consent judgment as part of the pre-suit correspondence. The Court held that the proposed judgment was a communication that was required to contain the warning. However, in *Silverman v. Roetzel & Andress, L.P.A.*¹⁰³ the court concluded that cover letters which accompanied court filings were not "communications" which required a mini-Miranda warning. In reaching that conclusion the court noted:

3. Location Information: When communicating with any person other than the consumer for the purpose of obtaining location information, the debt collector must identify him/herself, state that (s)he is confirming or correcting location information concerning the consumer and, only if expressly requested, identify his/her employer.¹⁰⁴

4. Venue in Legal Actions: In any legal action on a debt against any consumer the debt collector must:

- a. in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
- b. in the case of any other action, bring such action only in the judicial district or similar legal entity
 - (1) in which such consumer signed the contract sued upon; or
 - (2) in which such consumer resides at the commencement of the action.¹⁰⁵

¹⁰⁰81 F.3d 949 (10th Cir. 1996).

¹⁰¹919 F.Supp. 1564 (M.D.Fla. 1996).

¹⁰²873 F.Supp. 1019 (M.D.La. 1995).

¹⁰³ 861 N.E.2d 834 (Ohio App. 10th Ap. Dist. 2006).

¹⁰⁴15 U.S.C. § 1692b(1)

¹⁰⁵15 U.S.C. § 1692i.

In *Fox v. Citicorp Credit Services, Inc.*,¹⁰⁶ the consumer sued the creditor's attorneys, *inter alia*, for filing suit in a county other than the one in which the consumer resided or the contract was signed. The attorneys argued that because the State of Arizona is contained within a single judicial district, they could file suit in any county of their choosing. The Ninth Circuit Court of Appeals rejected that argument and held that in state court suits “judicial district or similar legal entity” requires filing by county rather than by federal judicial district.

The Court also held in *Fox* that Section 1692i applies not only to suits against the debtor to enforce a debt, but also to judicial proceedings to enforce judgments, such as garnishment actions.¹⁰⁷ In light of that case, as well as the holdings in *Carroll v. Wolpoff & Abramson* and *Frey v. Gangwish*, it should also be assumed that actions to enforce or register foreign judgments are subject to Section 1692i.

In *Shapiro and Meinhold v. Zartman*,¹⁰⁸ a class action was brought against attorneys for alleged violations of the FDCPA in connection with mortgage foreclosure actions. The Plaintiffs alleged forum abuse in the filing of statutory mortgage foreclosure actions pursuant to C.R.C.P. 120. The Trial Court dismissed the claims against both the attorneys and the court clerks. The Colorado Supreme Court, however, held that the foreclosure actions in question were “debt collection” within the scope of the FDCPA and reversed and remanded the case for proceedings consistent with that ruling.

E. Prohibited Conduct and Disclosures.

1. Communications in General: Unless either the consumer gives prior consent directly to the debt collector, or a court of competent jurisdiction gives express permission, a debt collector may not communicate with a consumer in connection with the collection of any debt:

- a. at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer;¹⁰⁹
- b. if the debt collector knows the consumer is represented by an attorney with respect to the debt¹¹⁰ and has knowledge of, or can readily ascertain, such attorney's name and address, unless the

¹⁰⁶*Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994).

¹⁰⁷*Id.* at 1515.

¹⁰⁸823 P.2d 120 (Col. 1992).

¹⁰⁹The debt collector is required to assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m., local time at the consumer's location. 15 U.S.C. § 1692c(a)(1).

¹¹⁰Knowledge of prior representation with regard to a different debt does not necessarily preclude the debt collector from communicating directly with the consumer on a subsequent collection matter. *Robinson v. Transworld Systems, Inc.*, *supra*, at 390.

- attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or
- c. at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.¹¹¹

In *Clark's Jewelers v. Humble*,¹¹² the debtors hired an attorney who directed the collection agency to communicate solely with him. The agency continued to write to the debtors, in care of the attorney, rather than addressing its correspondence to the attorney himself. The Court of Appeals held that this conduct violated the Act as it was a direct communication with the debtors.

2. Acquisition of Location Information: When communicating with any person other than the consumer for the purpose of acquiring location information about the consumer, the debt collector must not:

- a. state that such consumer owes any debt;
- b. communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
- c. communicate by post card;
- d. use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt;
- e. communicate with any person other than the consumer's attorney, at any time after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.¹¹³

3. Communication with Third Parties: Except as provided in § 1692b, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a

¹¹¹15 U.S.C. § 1692c(a)(1) - (3).

¹¹²823 P.2d 818, 161 Kan.App.2d 366 (Kan. App. 1991).

¹¹³15 U.S.C. § 1692b (2) - (6).

consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.¹¹⁴

In *Masuda v. Thomas Richards & Co., supra*, the Court found, as a matter of law, that contacting the consumer's insurance company without his consent violated § 1692c(b).

4. Harassment or Abuse: A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. The terms “harassment” or “abuse” include expressly, but are not limited to, the following:

- a. the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person;
- b. the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader;
- c. the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of 15 U.S.C. §§ 1681a(f) or 1681b(3) (the sections governing who is a consumer reporting agency and who may be given credit reports);
- d. the advertisement for sale of any debt to coerce payment of the debt;
- e. causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with the intent to annoy, abuse or harass any person at the called number; or
- f. except as provided in § 1692b (acquisition of location information), the placement of telephone calls without meaningful disclosure of the caller's identity.¹¹⁵

5. False or Misleading Representations: A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. The terms “false, deceptive, or misleading” include expressly, but are not limited to:

- a. the false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof;
- b. the false representation of -
 - (1) the character, amount, or legal status of any debt; or
 - (2) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;
- c. the false representation or implication that any individual is an

¹¹⁴15 U.S.C. § 1692c(b).

¹¹⁵15 U.S.C. § 1692d(1) - (6).

- attorney or that any communication is from an attorney;
- d. the representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector intends to take such action;
 - e. the threat to take any action that cannot legally be taken or that is not intended to be taken;
 - f. the false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to -
 - (1) lose any claim or defense to payment of the debt; or
 - (2) become subject to any practice prohibited by the subchapter governing debt collection practices;
 - g. the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer;
 - h. communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed;¹¹⁶
 - i. the use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval;
 - j. the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer;
 - k. except for communications to acquire location information under § 1692b, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer “that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose;”
 - l. the false representation or implication that accounts have been turned over to innocent purchasers for value;
 - m. the false representation or implication that documents are legal process;
 - n. the use of any business, company or organization name other than the true name of the debt collector's business, company or organization;
 - o. the false representation or implication that documents are not legal process forms or do not require action by the consumer; or
 - p. the false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by 15

¹¹⁶ An oral dispute is sufficient for a consumer to invoke the provisions of this section. *Brady v. The Credit Recovery Company*, 160 F.3d 64 (1st Circuit 1998).

U.S.C. § 1681a(f).¹¹⁷

Use by a collection agency of the word “Federal” in its name, combined with a logo resembling the great seal of the United States, has been held to violate § 1692e(1).¹¹⁸ The Court in that case determined that the least sophisticated consumer might be misled into believing that the agency was affiliated with the federal government.

With regard to violations of 15 U.S.C. § 1692e, the trend is to test an alleged violation by whether the “least sophisticated debtor” would tend to be deceived.¹¹⁹

In *Hubbard v. National Bond & Collection Associates*,¹²⁰ collection letters were sent after the filing of the debtor's bankruptcy, but the collection agency and the creditor it represented had no knowledge of the bankruptcy. The Court declined to hold that an unknowing violation of the bankruptcy stay violated Sections 1692e(2), (5), and (10), even though those sections appear to provide strict liability with regard to threatening to take action prohibited by law. The Court held that only knowing and intentional conduct is punishable under Section 1692e, and further stated that, while a mistake of law is never a defense to a FDCPA suit, a mistake as to fact may well excuse conduct which would otherwise violate the Act.

Anthes v. Transworld Systems, Inc.,¹²¹ was a suit against a collection agency alleging, among other things, that the agency had falsely represented that a communication was from an attorney. In this case, the collection agency used a series of five letters, the fourth of which purported to be from an attorney. The attorney's only role in the collection process, however, was to send a dunning letter to selected debtors, urging them to contact their creditors. The attorney did not work for TSI, nor was he paid for each letter sent out on behalf of TSI. Instead, he was paid a flat retainer for his services. TSI would periodically send the names of debtors to the attorney's office, and he would then send out letters to those listed debtors, after using the information provided to him by the collection agency to determine whether a letter was appropriate. The letters were sent from the attorney's office, on his stationery, with his name, address, phone number, and signature. The Court denied summary judgment motions on the question of whether a reasonable trier of fact might find that routine referral of names to the attorney was a deceptive practice under § 1692e(10), in that such referral and the accompanying letters by the attorney might mislead “least sophisticated debtors” into believing that collection efforts against them had entered a new and more serious stage when, in fact, they had not.

¹¹⁷15 U.S.C. § 1692e(1) - (16).

¹¹⁸*Adams v. First Federal Credit Control, Inc.*, 1992 WL 131121 (N.D. Ohio No. 1:91CV2467 May 21, 1992) (Not reported in F. Supp.).

¹¹⁹*Swanson v. Southern Oregon Credit Service, Inc.*, *supra*, at 1227; *Jeter v. Credit Bureau, Inc.*, *supra*; *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

¹²⁰126 B.R. 422 (D. Del. 1991).

¹²¹765 F.Supp 162 (D. Del. 1991).

In *Masuda v. Thomas Richards & Co.*, *supra*, a collection agency had used a form letter signed by an independent attorney who had no knowledge of the case. The collection agency decided when to generate and send the attorney letters, it printed the letters, and the attorney simply signed them at the direction of the agency, without any knowledge of the cases. The Court found, as a matter of law, that this procedure violated § 1692e(3) and was also unfair and unconscionable in violation of § 1692f, in that the attorney letter implied to the recipient that the collection agency considered the debt to be more serious than the agency itself, in fact, considered it to be. The Court held that, under the FDCPA, before the attorney signs a dunning letter (s)he must review the debtor's file and have some knowledge about the alleged debt.

In *Clomon v. Jackson*, *supra*, the Second Circuit found that letters mass-produced by a collection agency, bearing a facsimile signature of the attorney were, as a matter of law, violative of § 1692e. The Court effectively banned all such arrangements in which the mass produced letters purport to be from an attorney, but in which the attorney has not actually reviewed the debtors' files. Although the consumer bar generally contends that *Clomon* requires actual attorney review of every file, at least one court has suggested that the statute might be satisfied if the review is by a legal assistant who is actively supervised by an attorney.¹²² The Second Circuit Court of Appeals has also allowed the use of a disclaimer of meaningful involvement to avoid the consequences of the *Clomon* decision.¹²³

An attorney who sends letters on law firm letterhead, threatening suit, into a state where (s)he is not licensed, and who has not secured local associate counsel violates Section 1692e(5).¹²⁴ An attorney should not threaten to file suit not send the consumer “draft” copies of complaints unless (s)he actually intends to file such complaints.

Suing for legal fees or other charges that are not either agreed to by the debtor or otherwise authorized by law will be a violation of the Act.¹²⁵

In connection with a residential mortgage foreclosure, the failure to give a statutorily required notice of intention to accelerate and of opportunity to cure has been held to violate § 1692e.¹²⁶

One of the interesting questions that has been litigated is whether sending a demand letter into a state in which one is not licensed as a debt collector is a violation of the Act. While such conduct may violate state law, it is not a *per se* violation of the FDCPA, as long

¹²²*Newman v. Checkrite California, Inc.*, *supra*, at 1383.

¹²³ *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F3d 360 (2d Cir. 2005).

¹²⁴*Newman v. Checkrite California, Inc.*, *supra*, at 1380.

¹²⁵*Id.*

¹²⁶*Crossley v. Lieberman*, *supra*, at 571.

as the letter is not otherwise deceptive.¹²⁷

Reference in a letter to a creditor as “plaintiff” and making demand for “plaintiff’s damages and costs” when no suit has yet been filed has been held to violate this section.¹²⁸

6. Unfair Practices: A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. The term “unfair practices” includes expressly, but is not limited to:

- a. the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law;¹²⁹
- b. the acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit;
- c. the solicitation by a debt collector of any postdated check or other postdated instrument for the purpose of threatening or instituting criminal prosecution;
- d. depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument;
- e. causing charges for communications, (including, but not limited to, collect telephone calls and telegram fees) to be made to any person by concealment of the true purpose of the communication;
- f. taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if-
 - (1) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
 - (2) there is no present intention to take possession of the property; or
 - (3) the property is exempt by law from such dispossession or disablement;
- g. communicating with a consumer regarding a debt by post card; or

¹²⁷*Wade v. Regional Credit Association*, 87 F.3d 1098 (9th Cir. 1996), *refusing to follow Sibley v. Firstcollect, Inc.*, 913 F.Supp. 469 (M.D.La. 1995) and *Gaetano, supra*. See, also, *Carlson v. First Revenue Assurance*, 359 F.3d 1015 (8th Cir. 2004).

¹²⁸ *Crossley v. Lieberman, supra*.

¹²⁹ The attempt to collect an unauthorized fee is prohibited by this section, and not just the actual collection of such a fee. *Sandlin v. Shapiro & Fishman, supra*.

- h. using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such names does not indicate that (s)he is in the debt collection business.¹³⁰

Violations of this section are not limited to this list.

A debt collector's filing of suit on a time-barred debt without first making reasonable inquiry as to whether limitations has been tolled is an unfair or unconscionable means of collecting a debt.¹³¹ Debt collectors should not even imply that litigation is a possibility in connection with time-barred debts.¹³²

In *Beattie v. D.M. Collections, Inc.*,¹³³ the Plaintiff alleged that the Defendant made an attempt to collect an amount not expressly authorized by contract or permitted by law in violation of § 1692f(1), and misrepresented the character, amount, or length of status of a debt in violation of § 1692e(2)(A). The basis of this claim was that the Defendant had demanded payment from the debtor's son who, in fact, owed nothing. The Court found that, in the case of a mistake as to identity, merely demanding payment of a debt from someone who did not owe it did not violate these sections.

In *Larranaga v. Mile High Collection and Recovery Bureau, Inc.*,¹³⁴ the trial court originally granted summary judgment against a repossession company because, in repossessing the debtor's car, it had also taken the personal belongings contained in the vehicle. The court found that even though there was a right to repossess the car, taking the personalty contained in the car was an act of conversion and a violation of § 1692f(6)(A). Subsequently, however, that opinion was modified, and the Fair Debt holding was withdrawn. The court left in place, however, the ruling that the taking of such personalty constituted conversion as a matter of law.¹³⁵

7. Multiple Debts: If the consumer owes multiple debts and makes a single payment to be applied to one or more of them, the debt collector may not apply the payment to any debt which the consumer is disputing, and if the consumer has given specific directions as to how the payment should be applied the debt collector must apply the

¹³⁰15 U.S.C. § 1692f(1) - (8).

¹³¹*Kimber v. Federal Financial Corp.*, 668 F.Supp 1480 (M.D.Ala. 1987).

¹³²*Stepney v. Outsourcing Solutions, Inc.*, 1997 WL 722972 (N.D.Ill. 1997) (not reported in F.Supp.).

¹³³754 F.Supp. 383 (D.Del. 1991).

¹³⁴780 F.Supp. 780 (D.N.M. 1991).

¹³⁵*Larranaga v. Mile High Collection and Recovery Bureau, Inc.*, 807 F.Supp. 865 (D.N.M. 1992).

payment in accordance with such instructions.¹³⁶

8. Filing in the Wrong Venue: It is a violation of the Act to file suit in any venue other than that expressly provided for by the Act.¹³⁷ The venue provisions of the Act preempt any state law venue provisions to the contrary.¹³⁸

9. “Flat-Rating:” The Act makes it unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.¹³⁹ Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under § 1692k for failure to comply with a provision of the debt collection subchapter. Thus, a law firm which furnishes its letterhead to a creditor for use in its collection demands will be liable under the Act, regardless of whether that firm otherwise qualifies as a debt collector under Section 1692a.¹⁴⁰

10. Disputed Debts: If the consumer notifies the debt collector in writing within the thirty day period described in § 1692g(a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector may not continue attempting to collect the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of the judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.¹⁴¹

11. Ceasing Communication: If a consumer¹⁴² notifies a debt collector **in writing** that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except -

a. to advise the consumer that the debt collector's further efforts are

¹³⁶15 U.S.C. § 1692h.

¹³⁷15 U.S.C. § 1692i.

¹³⁸*Martinez v. Albuquerque Collection Services, Inc.*, 867 F.Supp. 1495, 1501 (D.N.M. 1994).

¹³⁹15 U.S.C. § 1692j.

¹⁴⁰*See Taylor v. Perrin, Landry, deLaunay & Durand, supra.*

¹⁴¹15 U.S.C. § 1692g(b).

¹⁴²For the purpose of this section, the term “consumer” includes the consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator. 15 U.S.C. § 1692c(d).

- being terminated;
- b. to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
- c. where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.¹⁴³

If the consumer gives such notice by mail, notification is complete upon receipt.

F. Actions Against / Liabilities of Debt Collectors.

As discussed above, several Circuits have held that an alleged violation of the FDCPA is to be decided by a determination of whether the “least sophisticated consumer” would tend to be deceived.¹⁴⁴ The Seventh Circuit, however, has held that the standard to be applied is that of the “unsophisticated” consumer.¹⁴⁵ The distinction is an elusive one, however, even for the Seventh Circuit.¹⁴⁶

1. Civil Liability: 15 U.S.C. § 1692k(a) provides that, except as otherwise provided by this section, any debt collector who fails to comply with any provision of the FDCPA with respect to any person is liable to such person in an amount equal to the sum of:

- a. any actual damage sustained by such person as a result of such failure;
- b. in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or
- c. in the case of a class action, (i) such amount for each named plaintiff as could be recovered in an action by an individual and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and
- d. in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

There is now a split of authority on the issue of attorney's fees. The Second and Third Circuits have held that attorney's fees and costs are to be awarded upon proof of a

¹⁴³15 U.S.C. § 1692c(c).

¹⁴⁴*See, e.g., Clomon v. Jackson* (2d Cir.); *Graziano v. Harrison* (3d Cir.); *Smith v. Transworld Systems, Inc.* (6th Cir.); *Swanson v. Southern Oregon Credit Service, Inc.* (9th Cir.); *Jeter v. Credit Bureau, Inc.* (11th Cir.).

¹⁴⁵*Gammon v. GC Services Limited Partnership*, 27 F.3d 1254, 1257 (7th Cir. 1994).

¹⁴⁶*See Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).

violation, **even if there is no proof of any actual damages.**¹⁴⁷ Only in “unusual circumstances” may a court deny attorney's fees, and in such circumstances, the trial court must formulate particularized findings of fact and conclusions of law to explain its decision.¹⁴⁸ The Fifth Circuit, however, has held that it is a prerequisite to the recovery of fees that there be some award of actual or additional damages under the Act.¹⁴⁹

This split may arguably be harmonized by looking to other cases under the Act. For example, the court may reduce the fee award “if the Plaintiff has only partial or limited success.”¹⁵⁰ Thus, in *Carroll v. Wolpoff & Abramson*,¹⁵¹ the court upheld an award of only \$500.00 in legal fees, even though the plaintiff had prevailed not only at trial but also in a previous appeal to the Fourth Circuit. The fee award was so low because on remand, the plaintiff had abandoned her claim for actual damages and sought only \$1,000.00 in statutory damages. The trial court awarded only \$50.00 in statutory damages and then substantially cut the fees because of the poor degree of success in the case. The Fourth Circuit held that while § 1692k mandates a fee award, it does not require that the fees be in the Lodestar amount.

In determining the amount of legal fees to be awarded, the court is to consider:

- a. the time and labor required;¹⁵²
 - b. the novelty and difficulty of the questions;
 - c. the skill requisite to perform the legal service properly;
 - d. the preclusion of other employment by the attorney due to acceptance of the case;
 - e. the customary fee (for similar work in the community);
 - f. whether the fee is fixed or contingent;
 - g. any time limitations imposed by the client or the circumstances;
 - h. the amount involved and the results obtained;
 - i. the experience, reputation, and ability of the attorneys;
 - j. the “undesirability” of the case;
 - k. the nature and length of the professional relationship with the client;
- and

¹⁴⁷*Emmanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2d Cir. 1989); *Pipiles v. Credit Bureau of Lockport, Inc.*, *supra*, at 28; *Graziano v. Harrison*, *supra*, at 113-114.

¹⁴⁸*Id.*

¹⁴⁹*Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996).

¹⁵⁰*Id.*

¹⁵¹53 F.3d 626 (4th Cir. 1995).

¹⁵²Attorneys fees may be discounted when full time has been charged for work that was actually recycled from other cases. *Avila v. Van Ru Credit Corporation*, 1995 WL 683775 (N.D.Ill. Nov. 16, 1995) (Not Reported in F.Supp.).

1 awards in similar cases.¹⁵³

It could therefore be said that the Fifth Circuit holding in *Johnson v. Eaton* is merely a recognition by the Court that recovering neither actual nor additional damages under the Act is so poor a result that fees should be reduced to zero.

The Seventh Circuit has stated that the most critical factor in determining the reasonableness of the award is the degree of success obtained,¹⁵⁴ and that success must be measured not only in the amount of recovery but also in terms of the principle established and the harm checked.¹⁵⁵ The Court observed that “the cumulative effect of petty violations . . . may not be petty, and if this is right then the mere fact that the suit does not result in a large award of damages or the breaking of new . . . ground is not a good ground for refusing to award any attorneys’ fees.”

In *Harper v. Better Business Services, Inc.*,¹⁵⁶ the Eleventh Circuit upheld a trial court's refusal to allow in-house union attorneys to recover attorney's fees at the market rate for private attorneys, finding that such a recovery would constitute illegal fee splitting with a non-attorney. The court did leave open, however, the possibility that a market rate recovery might be permitted in cases where “there is a showing that any recovered fees do not benefit the union and do not result in unethical fee-splitting.”¹⁵⁷ In *Hollis v. Roberts*,¹⁵⁸ the union made its adequate showing and successfully recovered fees at the market rate.

Any person who comes in contact with a violation of the Act has standing to maintain an action, even the administratrix of an estate upon whom a demand is made.¹⁵⁹ The purpose of the FDCPA was to allow consumers to act as “private attorneys general” and Congress intended that the Act be enforced primarily by aggrieved consumers in bringing civil actions against offending debt collectors.¹⁶⁰

In the case of multiple violations, the Eleventh Circuit has held that there may only

¹⁵³*Tolentino v. Friedman*, 46 F.3d 645 (th Cir. 1995); citing *Hensley v. Eckerhart*, 461 U.S. 424, 441, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

¹⁵⁴ Citing *Farar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed. 2d 494 (1992).

¹⁵⁵*Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164 (7th Cir. 1997).

¹⁵⁶961 F.2d 1561 (11th Cir. 1992).

¹⁵⁷*Id.* at 1564.

¹⁵⁸984 F.2d 1159 (11th Cir. 1993).

¹⁵⁹*Riveria v. MAB Collections, Inc.*, *supra*, at 175.

¹⁶⁰*Beattie v. D.M. Collections, Inc.*, 764 F.Supp. 925 (D.Del. 1991), citing S.Rep. No. 382, 95th Cong., 1st Sess. 5, reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 1699.

be one award of the statutory additional damages.¹⁶¹ A panel of the Sixth Circuit had issued an opinion allowing up to \$1,000.00 per violation, on rehearing *en banc* the Court issued an opinion also limiting plaintiffs to \$1,000.00 per suit.¹⁶²

In *Smith v. Law Offices of Mitchell N. Kay*,¹⁶³ the court held that state law standards for recovery of emotional distress damages are not applicable to a recovery of damages for emotional distress under the FDCPA, and a Plaintiff need not meet the same degree of proof as would be required under state law.¹⁶⁴ (In that case, the Court appears to have specifically rejected the notion that proof of physical injury is necessary to recover for emotional distress under the FDCPA.) Nevertheless, there must be a reasonable nexus between the nature of the defendant's conduct and the emotional and physical distress claimed to have been suffered.¹⁶⁵

2. Factors Considered by the Court: In determining the amount of liability in any action under this section, the court shall consider, among other relevant factors:

- a. in any individual action, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or
- b. in any class action under this section, the frequency and persistence of noncompliance by the debt collector, the nature of such non-compliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.¹⁶⁶

The Act has been held to be a strict liability statute,¹⁶⁷ and the degree of a defendant's culpability may be considered only in computing damages.¹⁶⁸

3. Bad Faith Actions: On a finding by the court that an action under this

¹⁶¹*Harper v. Better Business Services, Inc., supra.*

¹⁶²*See Wright v. Finance Service of Norwalk*, 22 F.3d 647 (6th Cir. 1994).

¹⁶³124 B.R. 182 (D.Del. 1991).

¹⁶⁴ *See, also, Teng v. Metropolitan Retail Recovery Inc.*, 851 F. Supp. 61, 68-69 (E.D.N.Y.1994); *Donahue v. NFS, Inc.*, 781 F. Supp. 188, 193-94 (W.D.N.Y.1991); *Crossley v. Lieberman*, 90 B.R. 682 (E.D.Pa.1988), *aff'd*, 868 F.2d 566 (3d Cir.1989).

¹⁶⁵*Donahue v. NFS, Inc.*, 781 F.Supp. 188 (W.D.N.Y. 1991).

¹⁶⁶15 U.S.C. § 1692k(b).

¹⁶⁷*Russell v. Equifax A.R.S., supra.*

¹⁶⁸*Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993).

section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.¹⁶⁹ The Fifth Circuit has held that a plaintiff who proves a violation of the Act cannot be held liable under this provision, even if (s)he recovers no damages.¹⁷⁰ Courts have split over whether the claim for attorney's fees should properly be brought as a counterclaim or whether it needs to be brought by motion, subsequent to trial.¹⁷¹

4. Jurisdiction/Limitations: An action to enforce any liability created by the FDCPA may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.¹⁷² The statute of limitations begins to run from the date that the notice is mailed, rather than from when it is received.¹⁷³ When the FDCPA violation complained of is the filing of a lawsuit, the statute of limitations begins to run on the date that the lawsuit complained of was filed.¹⁷⁴

For venue purposes, it is the receipt of the collection notice that gives rise to both venue and jurisdiction in a particular forum.¹⁷⁵ This is a dangerous doctrine because a letter that is forwarded out of state can create venue in a forum where the debt collector never intended to incur such exposure.

5. Right to a Jury Trial: Although the statute speaks expressly of findings of the "Court," the Eleventh Circuit has held that consumers are entitled to jury trials in FDCPA actions,¹⁷⁶ and the Seventh Circuit has held that a jury trial may be had even on the statutory damages.¹⁷⁷

6. Class Actions: In seeking to certify a class, it is not necessary that plaintiff have suffered the same actual damage as every other class member, but only that the named

¹⁶⁹15 U.S.C. § 1692k(a)(3).

¹⁷⁰*Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996).

¹⁷¹See *Ayres v. National Credit Management Corp.*, 1991 WL 66845 (E.D.Pa. No. 90-5535 April 25, 1991) (Not reported in F.Supp.); *Hardin v. Folger*, 704 F.Supp. 355 (W.D.N.Y. 1989).

¹⁷²15 U.S.C. § 1692k(d).

¹⁷³*Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992).

¹⁷⁴*Naas v. Stolman*, 130 F.3d 892 (9th Cir. 1997).

¹⁷⁵*Bates v. C & S Adjustors, Inc.*, 908 F.2d 865 (2d Cir. 1992); *Paradise v. Robinson & Hooper*, 883 F.Supp. 521 (D.Nev. 1995).

¹⁷⁶*Sibley v. Fulton Dekalb Collection Service*, 677 F.2d 830 (11th Cir. 1982).

¹⁷⁷*Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 (7th Cir. 1998).

plaintiff can adequately represent the class.¹⁷⁸ Furthermore, the mere fact that class members will receive only a *de minimis* recovery is not a basis for denying certification in an FDCPA case.¹⁷⁹

7. Statutory Defenses: The section of the Act which provides for liability, also provides two statutory defenses. These are:

a. INTENT / BONA FIDE ERROR: A debt collector may not be held liable in any action brought under the FDCPA if (s)he shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.¹⁸⁰

Intent to violate the Act is not an element of the consumer's case because "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."¹⁸¹ Unintentional conduct will still violate the FDCPA, subject to the debt collector's right to assert the bona fide error defense.¹⁸²

Most courts have held that the term "error" does not include mistakes of law,¹⁸³ and that the bona fide error defense provided by the FDCPA is available only in the case of clerical or mathematical errors and applies only to those who have done all that they can to avoid violations of the Act.¹⁸⁴ However, the Tenth Circuit has held that a mistake of law can be a bona fide error.¹⁸⁵ The Seventh Circuit has held that complying with Section 1692k(c) does not necessitate that debt collectors take every conceivable precaution to avoid errors; rather, it only requires reasonable precaution.¹⁸⁶

¹⁷⁸*Keele v. Wexler*, 1996 WL 124452 (N.D.Ill. March 19, 1996) (Not Reported in F.Supp.)

¹⁷⁹*Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997.)

¹⁸⁰15 U.S.C. § 1692k(c).

¹⁸¹*Russell v. Equifax A.R.S.*, 74 F.3d 30 (2d Cir. 1996), citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85 S.Ct. 1035, 1047, 13 L.Ed.2d 904 (1965), quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 330-31, 96 L.Ed. 367 (1952).

¹⁸²*Patzka v. Viterbo College*, 917 F.Supp. 654 (W.D.Wis. 1996).

¹⁸³*Id.*; *Pipiles v. Credit Bureau Inc.*, 886 F.2d 22, 27 (2d Cir.1989); *Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir.1982); and *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1167 (7th Cir.1974).

¹⁸⁴*Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1992); *Dutton v. Wolhar*, 809 F.Supp. 1130 (D.Del. 1992); *Read v. Amana Collection Services*, 1991 WL 5155 (W.D.N.Y. No. CIV.-90-110E January 15, 1991), (Not reported in F.Supp.).

¹⁸⁵*Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002).

¹⁸⁶*Kort v. Diversified Collection Services, Inc.*, 394 F.3d 530, 537 (7th Cir. 2005); *Bell v. Bowman, Heintz, Boscia & Vician, P.C.*, 370 F. Supp. 2d 805 (S.D. Ind. 2005).

In *Smith v. Transworld Systems, Inc.*, *supra*, the debt collector made a mistake as to the amount of the debt due to a clerical error on the part of the creditor. The Sixth Circuit upheld a District Court finding that the Act “does not require an independent investigation of the debt referred for collection” and found bona fide error on the part of the agency. In this case, however, the collection agency used a referral form that was completed and signed by the creditor, and containing instructions to claim only amounts legally due and owing, thereby providing a procedure reasonably adapted to avoid the error. Other courts have recognized a debt collector’s right to rely on the information furnished by the client.¹⁸⁷

For an extensive example of how a “bona fide error defense” can be created, see *Beattie v. D.M. Collections, Inc.*,¹⁸⁸ in which the Court found that the Defendant's failure to give the “Miranda warning” in all phone conversations, (if such failure even existed), was bona fide error as a matter of law.

b. **FTC ADVISORY OPINIONS:** No provision of the FDCPA imposing any liability shall apply to any act done or omitted in good faith in conformity with any opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded or determined by judicial or other authority to be invalid for any reason.¹⁸⁹ The procedure for requesting such opinions may be found at 16 C.F.R. Ch. 1, Subpart A.

8. **Counterclaims for the Underlying Debt:** At least two federal courts have found that a counterclaim on the debt which was being collected, arising under state law, is not a compulsory counterclaim in a fair debt action and dismissed the claim without prejudice to refile it in the appropriate forum.¹⁹⁰

The fact that the underlying debt is valid and due does not bar the bringing of a suit for FDCPA violations.¹⁹¹ Attorneys and other debt collectors should therefore avoid defenses based on equitable arguments that the debtor is merely trying to evade a just debt.

9. **Suing the Attorney As a Third-Party Defendant:** At least one court has found it inappropriate to permit a defendant in a debt collection suit to file a third-party

¹⁸⁷ *Jenkins v. Heintz*, 124 F.3d 824, *cert. denied*, 523 U.S. 1022, 118 S.Ct. 1304, 140 L.Ed.3d 469 (1998); *Amond v. Brincefield, Hartnett & Associates, P.C.*, 175 F.3d 1013 (Table, Text in Westlaw at 1999 WL 152555) (4th Cir. 1999).

¹⁸⁸ 754 F.Supp. 383 (D.Del. 1991).

¹⁸⁹ 15 U.S.C. § 1692k(e).

¹⁹⁰ *Ayres v. National Credit Management Corp.*, *supra*; *Gutshall v. Bailey & Associates*, 1991 WL 166963 (No. 90 C 20182, N.D.Ill. Feb. 11, 1991) (Not reported in F. Supp.).

¹⁹¹ *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992).

FDCPA suit against the Plaintiff's attorney.¹⁹²

10. Administrative Enforcement: The FTC has the power to enforce compliance with the FDCPA, and to treat any violations as a violation of the FTC trade regulation rule.¹⁹³

G. Preemption of State Law.

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

Under the Supremacy Clause of the Constitution,¹⁹⁴ state regulation must yield to the FDCPA to the extent that there is a conflict.¹⁹⁵ Thus, the Act will “trump” state laws regulating the conduct of attorneys.¹⁹⁶

¹⁹²See *Yale New Haven Hospital v. Orlins*, 1992 WL 110707 (Cn. Super. No. CV6-10396 May 11, 1992).

¹⁹³15 U.S.C. § 1692l.

¹⁹⁴U.S. Const. Art. 6, cl. 2.

¹⁹⁵*Newman v. Checkrite California, Inc.*, *supra*, at 1365.

¹⁹⁶*Id.*

APPENDIX

Basic Validation and mini-Miranda Notices:

Unless, within thirty days after receipt of this notice, you dispute the validity of the debt or any portion thereof, we will assume the debt to be valid. If, within that thirty-day period, you notify us in writing that the debt or any portion thereof is disputed, we will obtain a verification of the debt or, if the debt is founded upon a judgment, a copy of any such judgment, and we will mail to you a copy of such verification or judgment. If the original creditor is different from the creditor named above, then upon your written request within that thirty-day period we will provide you with the name and address of the original creditor.

This firm is a debt collector. We are attempting to collect a debt and any information obtained will be used for that purpose.

Sample “Safe Harbor” Disclaimers That Have Been Approved By Courts:

The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you. Source: *Bartlett v. Heibl*, 128 F.3d 497 (7th Cir. 1997).

This advice pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint. The summons is a command from the court, not from me, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this letter also does not affect my relations with the court. As a lawyer, I may file papers in the suit according to the court's rules and the judge's instructions. Source: *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir., en banc, 2004).

As of the date of this letter, you owe \$ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1-800-[phone number]. Source: *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000).

At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due. Source: *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005).