

FAIR DEBT COLLECTION PRACTICES ACT

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I. INTRODUCTION

A. The context of a Fair Debt Collection Practices Act (FDCPA) action.

1. A claim by a debtor that a third part debt collector has engaged in prohibited conduct in collecting or attempting to collect a consumer debt.
2. The creditor is typically not a party.
3. The validity of the underlying debt is not relevant or an issue in the action.

B. The FDCPA mandates three areas of collector compliance.

1. Identifying oneself as a debt collector.
2. Advising the debtor of the right to verify and dispute the debt.
3. Refraining from harassment, false representations and third party communications.

II. PRIMARY SOURCES OF THE LAW

A. Fair Debt Collection Practices Act. 15 U.S.C. § 1692 et seq.

B. Federal Trade Commission Staff Commentary to the FDCPA. 12 C.F.R. Pt. 226, Supp. I, § 226.1 *et seq.*

1. The FTC is statutorily limited from promulgating regulations under the FDCPA - 15 U.S.C. Section 1692l(d); *Harrison v. NBD Inc.*, 968 F.Supp. 836 (E.D.N.Y. 1997).

- a. Contrast to statutory scheme of Truth-in-Lending Act (TILA).
 - b. TILA explicitly delegates regulatory authority to the FTC [15 U.S.C. Section 1604].
 - c. Consequently, FTC regulatory pronouncements are given virtually conclusive effect [*Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980)].
2. Thus, FTC Commentary and staff opinions have limited precedential value - *Heintz v. Jenkins*, 514 U.S. 291 (1995).
- a. In *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 (4th Cir. 1995), the Fourth Circuit rejected Ninth Circuit reliance on FTC informal advisory opinions: “We find the position of the FTC unpersuasive and it is well settled that we need not defer to an agency’s construction of its governing statute if the construction violates an unambiguous statutory command.”
 - b. In *Scott v. Jones*, 964 F.2d 314, 317 (4th Cir. 1992), the Fourth Circuit refused to follow the debt collector’s argument that the court adopt the position of the FTC in the “Federal Trade Commission, Statements of General Policy or Interpretation, Staff Commentary or the Fair Debt Collection Practices Act.”
- C. FDCPA is a remedial statute to be liberally construed. “As remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes.” *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142, 148 (3d Cir.2013). “The Fair Debt Collection Practices Act is an extraordinarily broad statute” and must be construed accordingly. *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir.1992); *see also Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 533 (6th Cir.2014); *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir.2006) (“Because the FDCPA is a remedial statute, ... we construe its language broadly, so as to effect its purpose.”). *Stratton v. Portfolio Recovery Associates, LLC*, 770 F.3d 443, 448 (6th Cir. 2014), as amended (Dec. 11, 2014).

Douglass v. Convergent Outsourcing, 765 F.3d 299, 302 (3d Cir. 2014)

Further, allowing debtors to raise claims under § 1692e without first contesting the debt best promotes the remedial nature of the FDCPA

because it preserves debtors' abilities to obtain a remedy for violations of the statute. See *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561–62, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) (recognizing the canon of statutory interpretation that remedial statutes are to be construed liberally). *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 393 (4th Cir. 2014).

Cirkot v. Diversified Financial Systems, Inc., 839 F. Supp. 941 (D. Conn. 1993); *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006) The remedial nature of the FDCPA requires a court to construe it liberally.

D. Legislative history will seldom be consulted.

1. The bill that became the FDCPA was drafted by the Senate, making Senate Report 382 [S.Rep. No. 95-382] (August 2, 1977), reprinted in 1977 U.S.C.C.&A.N. 1965, the most useful piece of legislative history. It describes the provisions of the bill and the intentions of its drafters. The Senate Report is included with the appendix to this portion of the course materials.
2. The report was written by the Senate Committee on Banking, Housing and Urban Affairs (the Senate Banking Committee) to accompany the bill that was enacted.
3. Legislative activity in the House of Representatives is also important because much of the Act's language and structure were shaped in the House during a three year period of rewrite and debate. However, legislative history of House activity leading to the passage of the FDCPA involves detail beyond the scope of this seminar.
4. The language of the Act is the clearest expression of Congressional will, and is the first point of reference in any litigation under the FDCPA.
5. Ignoring the carefully chosen language and policies of the FDCPA, which Congress spent a great deal of time and effort drafting and enacting, would frustrate Congressional will and authority. *Heintz v. Jenkins*, 115 S.Ct. 1489 (1995); *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.”). *Hamilton v. United Healthcare of Louisiana, Inc.*, 310 F.3d 385 (5th Cir. 2002). (“Fifth Circuit law is clear that when, as here,

the language of a statute is unambiguous, this Court has no need to and will not defer to extrinsic aids or legislative history.”)

6. Where, as in the case of the FDCPA, the statute’s language is plain, the sole function of the courts is to enforce it according to its terms. *Scott v. Jones*, 964 F.2d 314, 316 (4th Cir. 1992). The Fourth Circuit refused to follow the debt collector’s argument that the court resort to legislative history. It similarly refused later in *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007). (W&A asks that we disregard the statutory text in order to imply some sort of common law litigation immunity. We decline to do so. Rather, “where, as here, the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L. Ed. 2d 290 (1989) (internal quotation marks omitted).)

A bigger flaw in W & A’s argument is its faulty premise: in analogizing to § 1983, W & A overlooks the FDCPA’s statutory framework. The FDCPA in form and structure is a far cry from a Reconstruction-era civil rights statute. It is instead a “comprehensive and reticulated” statutory scheme, involving clear definitions, precise requirements, and particularized remedies. Cf. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980) (describing ERISA). The statute contains more words in its first section, the “Congressional findings and declaration of purpose,” than the entirety of § 1983. It is clear that Congress meant not to incorporate common law immunities in this area, such as they may be, but to overwrite them, defining the scope of liability and immunity entirely by statute. Where the intent of Congress is so clearly expressed in the text of one statute (the FDCPA), it may not be turned aside by comparison to an entirely different statute (Section 1983).

Clark v. Absolute Collection Service, Incorporated, 741 F.3d 487, 490 (4th Cir. 2014) “[W]here 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.”

7. Resort to legislative history to determine Congress’ intent is to be undertaken cautiously, and it should not occur unless the statute itself is ambiguous or unclear. *United States v. Oregon*, 366 U.S. 643, 648 (1961).

8. Courts should construe ambiguous or unclear portions of the Act so as to effectuate the Congressional findings and purposes stated in 15 U.S.C. § 1692. Legislative history should be considered only when necessary. *Mourning v. Family Publications Serv.*, 411 U.S. 356, 364 (1973). (Interpreting TILA.)
- E. The Act is primarily self enforcing by consumers through the private attorneys general mechanism.
1. *West v. Costen*, 558 F.Supp. 564 (W.D.Va. 1983) (“The FDCPA ... is ‘primarily self-enforcing’ ... through private causes of action.”)
 2. "The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance" - Senate Report No. 95-382, at 5 (Aug. 2, 1977), reprinted in 1977 U.S.C.C. & A.N. 1695, 1699
 3. Because Congress chose a 'private attorney general' approach to enforcement, the award of fees is mandatory in an FDCPA case. *Carroll v. Wolpoff & Abramson*, 53 F.3d 626 (4th Cir. 1995); *Tolentino v. Friedman*, 46 F.3d 645 (7th Cir.), cert. denied 515 U.S. 160 (1995).

III. COVERAGE UNDER THE ACT

- A. Arises only in a "consumer" "debt" "transaction.", 15 U.S.C. Sections 1692a(3) and (5); *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411 (E.D.Va. 1997).
1. Natural person obligated to pay any obligation or alleged obligation arising from a transaction the subject of which is primarily for personal, family, or household purposes.
 - a. An obligation to make mortgage payments, as well as fees, penalties, and interest on that mortgage, constitutes a "debt" under the FDCPA. *Yarney v. Ocwen Loan Servicing, LLC*, 929 F. Supp. 2d 569 (W.D. Va. 2013) (Citing *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006)).
 2. Underlying debt must arise from a "transaction," thus child support, tort claims, and personal taxes are excluded - *Mabe v. G.C. Services Limited Partnership*, 32 F.3d 86 (4th Cir. 1994); *Zimmerman v. HBO Affiliate Group*, 834 F. 2d 1163 (3rd Cir. 1987); *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367 (11th

Cir. 1998); *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 159 P.3d 10 (Wash.App. Div. 1 Apr 23, 2007) (The Fair Debt Collection Practices Act (FDCPA) does not apply to the collection of subrogation interests arising out of motor vehicle accidents, whether alleged or reduced to judgment, as distinct from a transaction meaning a consumer obligation arising out of consensual or contractual arrangements); *Beggs v. Rossi*, 145 F.3d 511 (2nd Cir. 1998); *Staub v. Harris*, 626 F.2d 275 (3rd Cir. 1980); *Turner v. Cook*, 362 F. 3d 1219 (9th Cir, April 1, 2004).

- a. Note distinction between *Hawthorne*, where debt arising from tortious conduct is not a “consumer transaction,” and
 - b. *Hamilton v. United Healthcare of Louisiana, Inc.*, 310 F.3d 385 (5th Cir. 2002), where a subrogation claim arising from consumer’s transaction of purchasing insurance was a “debt” within the coverage of the FDCPA.
3. When debt incurred for combined consumer and nonconsumer purposes, fact question as to which purpose was primary reason debt was incurred - 15 U.S.C. Section 1692a(5).
- a. Where corporate credit card was used for consumer purposes, the court will look to the substance of the transaction to determine whether the purchases fall within the ambit of the FDCPA. The debt was incurred when Plaintiff used the card for her personal purposes, not when she applied for it. *Perk v. Worden*, 2007 U.S. Dist. Lexis 5450 (E.D. Va. 2007).
 - b. The relevant time is when the debt was incurred, not when collection is attempted, according to the Seventh Circuit. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872, 874 & 75 (7th Cir. 2000)
4. Act applies to bad check debts, condominium assessment fees, residential rental payments, municipal water and sewer service, and other non-credit consumer obligations - *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *FTC v. Check Investors*, 502 F.3d 159 (3d Cir. 2007); *Charles v. Lundgren & Associates*, 119 F.3d 739 (9th Cir. 1997), *cert. denied sub nom Checkrite Ltd., Inc. v. Charles*, ___ U.S. ___ (Dec. 15, 1997); *Snow v. Jesse L. Riddle, P.C.*, 143 F.3d 1350 (10th Cir. 1998); *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998); *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir.

1998); *Brand v. Law Firm of Heldenbrand Cohen*, 2006 U.S. Dist. Lexis 6114 (D. Az. 2006); *Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir. 1997); *Brown v. Budget Rent-a-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997) Claims arising from a traffic accident to a rental truck involved a “debt” covered by the Act. *Newman v. Boehm, Pearstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997); *Pollice v. National Tax Funding, L.P.*, 225 F.3d 385 (5th Cir. 2002).

- a. The ruling in *Newman v. Boehm, Pearestein & Bright, Limited*, 119 F.3d 477 (7th Cir.) 1997, is contrary to *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223 (W.D.Va. 1994), a Western District decision finding homeowners or condominium association assessments not to be covered, relying on *Mabe v. G.C. Services Limited Partnership*, 32 F.3d 86 (4th Cir. 1994).
 - b. *Mabe* held that the obligation to pay child support assigned to the Commonwealth of Virginia is not a debt. In light of *Newman, Bass, Charles, and Brown*, it seems reasonable to think that new Fourth Circuit cases on this issue might not follow *Nance*, since *Mabe* does not address the situation involving homeowners or condominium association assessments.
5. There is no exception to liability for violating the Act as the result of fraud on the part of the consumer - *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998). *FTC v. Check Investors*, 502 F.3d 159 (3d Cir. 2007).
 6. As long as underlying obligation is a "debt," method of collection (e.g., action in tort) is irrelevant - *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992).
 7. Collector does not have to mention the debt for a claim to arise. *Sparks v. Phillips & Cohen Associates, Ltd.*, 2008 WL 2540679 (S.D. Ala. June 20, 2008) A reasonable jury could find that communications not mentioning the debt were in connection with the collection of a debt, since the whole purpose of the interactions was to collect a debt. Court rejected “the proposition that there can be no FDCPA liability if a defendant fails to mention the talismanic phrase ‘collection of a debt,’ or if it does not specifically state that the purpose of its call is to collect a debt. The FDCPA cannot reasonably be read so narrowly.”

8. Unemployment insurance contributions for a nanny are primarily for public benefit, therefore not incurred for a consumer purpose - *Berman v. GC Services Ltd. Partnership*, 146 F.3d 482 (7th Cir. 1998).
 9. The alleged obligation which the defendant attempted to collect - a salary overpayment that resulted from an accounting error made by the plaintiff's former employer - was not a "debt" since it did not arise from a consumer transaction. *Orenbuch v. Leopold, Gross & Sommers, P.C.*, --- F.Supp.2d ----, 2008 WL 4927407(E.D.N.Y. Nov 19, 2008) (NO. 08-CV-2027 ADS ARL)
 10. Attempts to collect invalid or void obligations are covered by the Act. *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992)
- B. FDCPA only covers "debt collectors" as statutorily defined. 15 U.S.C. Section 1692a(6).
1. Any person collecting debts on behalf of another. The term "debt collector," was intended to cover all third persons who regularly collect debts. "The primary persons intended to be covered are independent debt collectors." S. Rep. No. 95-382, at 2, 1997 U.S.C.A.A. at 1697. The Senate Committee explained that the FDCPA was limited to third-party collectors of past due debts because, unlike creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," independent collectors are likely to have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696. *FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. N.J. 2007)
 2. Act excludes original creditors and their employees - *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997).
 3. Assignees of debt are not covered, provided that the assignment occurs prior to default. Assignees who obtain debt after it is in default are covered. - *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (D. Ala. 1987). *FTC v. Check Investors*, 502 F.3d 159 (3d Cir. 2007) ((p)ursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA.); *Pollice v. National Tax Funding, L.P.*, 225 F.3d 385 (5th Cir. 2002).

4. Check guarantee companies are considered debt collectors - *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289 (D. Del. 1990).
5. The Act specifically excludes creditor employees, government employees, process servers, "bona fide" consumer credit counselors, and certain fiduciaries and escrow companies - *Buckman v. American Bankers Insurance Co.*, 924 F.Supp. 1156 (S.D. Fla. 1996); *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998); *Brannan v. United Student Aid Funds*, 94 F.3d 1260 (9th Cir. 1996); cf. *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997), compare, *Harrison v. NBD Inc.*, 990 F.Supp. 179 (E.D.N.Y. 1998)(Creditor may be a "debt collector" if it used alias or assumed name to collect its debts, creditor and its affiliated collection agency should be deemed to constitute a single economic enterprise, or creditor controlled almost all aspects of agency's debt collection activities).
6. The Act extends to a creditor who "uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts" – *Catencamp v. Cendant Timeshare Resort*, 471 F.3d 780 (7th Cir. 2006) (The borrower purchased from a company a timeshare interest in one of its resorts. Thereafter, the company assigned his account to the lender. When he fell behind in payments, the borrower received a dunning letter from a third party, which was declared to be a division of another entity. The court noted that when a letter proclaimed that it was coming from someone other than the creditor, a debtor naturally supposed himself to be in contact with a debt collector. The court held that while the letter did come from the lender, the lender did not communicate with the borrower in its own name. It used a trade name that the borrower had never encountered and appended another name that also was novel to the borrower. The lender's name did not appear in the letter, and the document proclaimed that the company was the creditor. The court noted that while a sophisticated person might have guessed that the other entity was an acronym for the lender, the Act did not require either sophistication or guesswork. Having trumpeted the third party as a debt collector, the lender had to comply with all obligations that the Act placed on debt collectors pursuant to § 1692a(6).); *Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232 (2d Cir. 1998); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997).

Cox Medical Center, d/b/a/ Ozark Professional Collections v. Huntsman, 408 F.3d 989 (8th Cir. 2005). Eighth Circuit affirms

district court finding that the creditor was a debt collector that participated in interstate commerce under 15 U.S.C.S. § 1692a and that it used a false and misleading name to collect its debts in violation of the anti-fraud provisions of 15 U.S.C.S. § 1692e(14) of the FDCPA, after finding that the creditor and its affiliate that collected the creditor's debts were not separate entities as alleged by the creditor because the creditor owned and controlled the affiliate and was the registered owner and user of the name of the affiliate. The affiliate was merely an unincorporated division of the creditor. "Cox owns and controls Ozark. Cox is the registered owner and user of the d/b/a "Ozark Professional Collections." Ozark is an unincorporated division of Cox. Approximately 90% of the debt collected by Ozark is for Cox and 10% is for other creditors. All of Ozark's workers are paid and employed by Cox. Cox does all the accounting for Ozark. Ozark's mail is picked up and delivered by Cox's shuttle service and is mailed through Cox's mail room. Cox's chief financial officer, Larry Pennel, controls the amount of vacation time for Ozark workers. If an Ozark worker is terminated, Cox's human resource department sends the COBRA medical coverage notice to the employee, and determines vacation pay. The Ozark training manual instructs its workers to advise Cox if an attorney asks about Ozark's ownership. If a debtor inquires as to ownership, the manual instructs the worker to 'advise them we are not authorized to release ownership, but [the debtor is] welcome to speak with someone in management.'"

7. The common ownership and affiliation exemption of § 1692a(6)(B) is not applicable where affiliate's principal business is the collection of debts for the related entity - *Harrison v. NBD Inc.*, 968 F.Supp. 836 (E.D.N.Y. 1997), later opinion 990 F.Supp. 179 (E.D.N.Y. 1998); *compare, Aubert v. American General Finance, Inc.*, 137 F.3d 976 (7th Cir. 1998).
 - a. In *Aubert*, the affiliate met both prongs of the § 1692a(6)(B) exception, specifically, the second prong, that the affiliate's principal business is not debt collection.
 - b. In *Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232 (2d Cir. 1998), on the other hand, the Citicorp affiliate only collected debts and therefore could not invoke the exception. See also, *Hartman v. Meridian Financial Services, Inc.*, 191 F. Supp. 2d 1031 (W.D. Wis. 2002).
8. Mortgage servicer communicating about a current, non-defaulted forbearance agreement obtained after a prior but now cured default is not a debt collector - § 1692a(6)(F) - *Bailey v. Security National*

Servicing Corp., 154 F.3d 384 (7th Cir. 1998). However, lender who purchased a debt identified as in default, and treated it as such, although it was not in default, is a debt collector – *Schlosser v. Fairbanks Capital Credit Corporation*, 323 F.3d 534 (7th Cir. 2003). A collector could not exclude itself from the definition of debt collector through its contract with the creditor identifying itself as a servicer and the debts it was servicing as delinquent rather than in default when the debt had, in fact, been declared in default before the servicing was transferred. *Dowling v. Litton Loan Servicing*, 2006 U.S. Dist. LEXIS 87098 (S.D. Oh.2006). Because Defendant appears to have acquired Plaintiff's home mortgage loan as a debt in default, and because Defendant engaged in debt collection activities based on its understanding that Plaintiff's debt was delinquent or in default, Defendant is considered a "debt collector" under the FDCPA, regardless of whether Plaintiff's home mortgage loan actually was in default. *Purnell v. Arrow Financial Services, LLC*, 2007 U.S. Dist. Lexis 7630 (E.D. Mich. 2007). *Magee v. Alliance One, Ltd.*, 487 F. Supp. 2d 1024 (S.D. In. 2007) Where account is referred not just for servicing, but for collection because the consumer had "defaulted" as that term is commonly used in the English language, and the dunning letter warns that the debt collector was "committed to provided that effort necessary to collect this debt," Alliance One was in fact acting as a debt collector as defined by the FDCPA. *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355 (6th Cir. 2012) ([w]e find disingenuous Ocwen Bank's argument that "Ocwen also is not a debt collector because servicing transferred to Ocwen on May 1, 2002, and Plaintiffs themselves allege that the account was not in default at that time.". We note this argument is exemplary of an unsettling trend in FDCPA claims. Defendants seek to have it both ways: after having engaged in years of collection activity *claiming a mortgage is in default*, Defendants now seek to defeat the protections of the FDCPA by relying on Plaintiffs' position throughout those years that the *mortgage is not in default* As noted in the analysis of the Third Circuit, FDCPA coverage is not defeated by clever arguments for technical loopholes that seek to devour the protections Congress intended.)

- a. Judge Moon recently discussed this in *Yarney v. Ocwen Loan Servicing, LLC*, 929 F. Supp. 2d 569 (W.D. Va. 2013) as follows: "Ocwen, the loan servicer in this case, is a debt collector under the meaning of the FDCPA. Under the statute, "[f]or an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired."

Bridge v. Ocwen Federal Bank, FSB, 681 F.3d 355, 359 (6th Cir. 2012). "The same is true of a loan servicer, which can either stand in the shoes of a creditor or become a debt collector, depending on whether the debt was [*12] assigned for servicing before the default or alleged default occurred." *Id.* (citations omitted). Accordingly, while there is no statutory definition for loan servicer under the FDCPA, "a loan servicer will become a debt collector under 1692a(6)(F)(iii) if the debt was in default or treated as such when it was acquired." *Id.* at 360 n.4. See also *Castrillo v. American Home Mortg. Servicing, Inc.*, 670 F. Supp. 2d 516, 524 (E.D. La. 2009) ("If AMHSI took the mortgage for servicing before Castrillo was in default, it is not a debt collector subject to the FDCPA. If it took the mortgage after Castrillo's default, it would be a debt collector.") (internal citations omitted). In summary, mortgage servicers are considered debt collectors under the FDCPA if they became servicers after the debt they service fell into default. At the time Ocwen became the servicer on Plaintiff's home loan, the loan was already in default. Therefore, Ocwen is a debt collector seeking to collect an alleged debt for the purposes of FDCPA liability in this case."

b. The Second Circuit, however, rejected the consumer's argument that default automatically occurs immediately after payment becomes due and granted the creditor and servicer great leeway in defining what constitutes default. - *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82 (2nd Cir. 2003).

9. The statutory definitions cover those who collect debts both directly as well as indirectly - *Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1143 (9th Cir. 1998).

C. Attorney debt collectors are covered.

1. 1986 amendment deleted statutory exclusion for attorneys - *Heintz v. Jenkins*, 514 U.S. 291 (1995).

2. Attorneys whose debt collection activities are limited to collection litigation on behalf of creditor clients are covered - *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994).

3. “If the principal purpose of a lawyer’s work is the collection of debts, he is a ‘debt collector’ under the Act.” *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006).
 4. Lawyers who regularly conduct foreclosures to collect consumer debt are “debt collectors” for purposes of the FDCPA. *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Kaltenbach v. Richards*, 464 F. 3d 524 (5th Cir. 2006); *Goodrow v. Friedman & MacFadyen, P.A.*, 788 F. Supp. 2d 464 (E.D. Va. 2011 (“The defendants' argument [that they are not FDCPA “debt collectors”] runs contrary to *Wilson v. Draper & Goldberg, P.L.L.C.*, a Fourth Circuit precedent on all fours with this case.”))
 5. Attorneys are not entitled to statutory exemption for process servers - *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998).
 6. FDCPA liability is imputed to the law firm when the firm is a partnership, allowing the plaintiff to sue the partners as well as the partnership. The partnership is jointly liable for one acting as its associate or partner. – *Bartlett v. Heibl*, 128 F.3d 497, 499 (7th Cir.1997); *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872, 876 (7th Cir. 2000). General partners are liable as indirect debt collectors. *Randle v. GC Services*, 1998 U.S. Dist. LEXIS 16222 (N.D. Ill.).
- D. Collector must "regularly" attempt to collect debts., 15 U.S.C. Section 1692a(6); *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006).
1. Collections need not be majority portion of the collector's business - *Garrett v. Derbes*, 110 F.3d 317 (5th Cir. 1997).
 2. Genuinely sporadic collection activity is not regular - *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223 (W.D.Va. 1994) (When debt collection cases composed only 0.61% of his practice, and composed only 1.07% of his firm’s practice over an 18 month period, defendants were not debt collectors as a matter of law).
 3. Regularly collecting occurs when undertaking collection activity "more than a handful of times per year" - *Crossley v. Lieberman*, 868 F. 2d 566 (3rd Cir. 1989).
- E. Both collection agency/employer and supervisor and offending employee are liable, *West v. Costen*, 558 F.Supp. 564 (W.D.Va. 1983).

1. Statutory definition includes both - Commentary Sections 803(6)-1, Illustration 1, and 813-1; *Newman v. Checkrite California*, 912 F.Supp. 1354 (E.D.Ca. 1995); *Drennan v. Van Ru Credit Corp.*, 950 F.Supp. 858 (N.D.Ill. 1996); *Ditty v. Checkrite, Ltd., Inc.*, 973 F.Supp. 1320 (D.Utah 1997).
2. Joint and several liability - *Teng v. Metropolitan Retail Recovery, Inc.*, 851 F.Supp. 61 (E.D.N.Y. 1994).
3. Principal/employer who is not a "debt collector" is not vicariously liable for agent/employee's violations - *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103 (6th Cir. 1996); compare, *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994).
4. "Debt collectors employing attorneys or other agents to carry out debt collection practices that violate the FDCPA are vicariously liable for their agent's conduct" - *Martinez v. Albuquerque Collection Services, Inc.*, 867 F.Supp. 1495 (D.N.M. 1994).
5. *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006); General principles of agency--which form the basis of vicarious liability under the FDCPA.
6. *Oei v. N Star Capital Acquisitions, LLC*; 486 F. Supp. 2d 1089 (C.D. CA 2006). Courts routinely hold debt collectors vicariously liable under the FDCPA for the conduct of their attorneys in collecting debts on their behalf. Federal courts that have considered the issue have held that the client of an attorney who is a 'debt collector' is vicariously liable for the attorney's misconduct if the client is itself a debt collector as defined in the statute. Thus, vicarious liability under the FDCPA will be imposed for an attorney's violations of the FDCPA if both the attorney and the client are 'debt collectors'.

F. Repossessions and foreclosures are covered by 15 U.S.C. Section 1692f(6).

1. For conversions occurring in the course of repossessions - *Clark v. Auto Recovery Bureau Conn., Inc.*, 889 F.Supp. 543 (D. Conn. 1994).
2. Repossessor who also regularly collects debts for third parties is subject to the FDCPA in its entirety - *Jordan v. Kent Recovery Services, Inc.*, 731 F. Supp. 652 (D. Del. 1990).

3. A foreclosure is a “dispossession” or “disablement” of property in any sense of the word and unauthorized nonjudicial foreclosures are prohibited by § 1692f. *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 462 (6th Cir. 2013) (“Foreclosure in some states is carried out in just this way—through “nonjudicial action,” the result of which is to “effect dispossession” of the secured property.”); *Hope v. BSI Fin., Inc.*, No. 5:12-CV-00736-AKK, 2012 WL 5379177, at *4 (N.D. Ala. Oct. 26, 2012) (“Since mortgage foreclosure is essentially termination of a mortgagor's interest and repossession of the mortgaged property, see Black's Law Dictionary (9th ed. 2009), the court finds that Plaintiffs sufficiently allege that Defendants attempted to dispossess them of their property [in violation of § 1692f(6)].”

G. Validity of the underlying debt is immaterial. Liability under the FDCPA can be established irrespective of whether the presumed debtor owes the debt in question. *Sykes v. Mel S. Harris & Assocs.*, 2015 U.S. App LEXIS 2057 (2d Cir. 2015.) *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992); *Baker v. G.C. Services Corp.*, 677 F.2d 775 (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.”); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997); *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998); *Turner v. Shenandoah Legal Group, et al.*, 2006 U.S. Dist. Lexis 39341 (E.D. Va. 2006) (The FDCPA may serve its purpose of curtailing abusive debt collection practices even under circumstances where a valid debt exists.) *Nield v. Wolpoff & Abramson*, 453 F. Supp 2d 918 (E.D. Va. 2006) (the presence of a valid debt would not preclude an action under the FDCPA). FDCPA claims focus on the misconduct of the debt collector, regardless of the existence, or amount, of any debt that the debtor might owe. *Karnette v. Wolpoff & Abramson, L.L.P.*, 2007 U.S. Dist. LEXIS 20794 (E.D. Va. March 23, 2007). The focus is on the debt collector's conduct, not the consumer's. *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998). The Act is based on the premise “[t]hat every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner.” 123 Cong. Rec. 10241 (1977) (remarks of Rep. Annunzio). Thus, asserting an affirmative defense of accord and satisfaction is futile, as the settlement of a debt between the consumer and the debt collector is inapposite to the issue of whether the debt collector’s debt collection practices violated the FDCPA. *Herman v. National Enterprise Systems*, 2008 U.S. Dist. Lexis 73603 (W.D. NY 2008).

IV. PERMISSIBLE COLLECTION RELATED COMMUNICATIONS ARE LIMITED

A. When "the debt collector knows the consumer is represented by an attorney" concerning the debt. 15 U.S.C. Section 1692c(a)(2); *Kuhn v. Account Control Technology, Inc.*, 865 F.Supp. 1443 (D. Nev. 1994);

Herbert v. Monterey Financial Services, Inc., 863 F.Supp. 76 (D. Conn. 1994).

1. Representation as to one debt does not automatically extend to another debt - *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991).
2. Informal notification of representation is sufficient. *Yarney v. Ocwen Loan Servicing, LLC*, 929 F. Supp. 2d 569 (W.D. Va. 2013) ("(i)nformal notification of representation is sufficient for the purposes of the statute. See, e.g., *Pearce v. Rapid Check Collection, Inc.*, 738 F. Supp. 334, 337-38 (D.S.D. 1990) (holding that a phone call was sufficient to notify debt collector that debtor had counsel); *Goins v. JBC & Assocs.*, 352 F. Supp. 2d 262, 272-73 (D. Conn. 2005) [*24] (holding debt collector violated 1692c(a)(2) by contacting debtor directly after debtor had previously sued debt collector over debt at issue, and thus debt collector knew that debtor was represented by counsel")).
3. While notice of attorney representation need not be formally conveyed, but creditor's knowledge of attorney representation is not imputed to collector - Commentary Section 805(a)-3.
 - a. *Randolph v. I.M.B.S., Inc.*, 368 F.3d 726, 729 (7th Cir. 2004) (creditors' knowledge is not imputed to debt collectors). *Schmidt v. FMA Alliance*, 398 F.3d 995 (8th Cir. 2005) Where creditor had been advised that consumer was represent by an attorney, the court declined to impute the knowledge of the creditor principal to its debt collector agent, following traditional agency law, while noting that it the record was not clear whether the relationship between a creditor and its debt collector is one of principal-agent.
 - b. Contrast this to *Powers v. Prof'l Credit Servs.*, 107 F. Supp. 2d 166, 169 (N.D.N.Y. 2000) (creditor's actual knowledge can be imputed to collection agent "when the creditor has such knowledge and fails to convey it to . . . the debt collector").
 - c. *Yarney v. Ocwen Loan Servicing, LLC*, 929 F. Supp. 2d 569 (W.D. Va. 2013) ("In this case, Ocwen's transaction log from November 5, 2011, indicates that it received a voicemail from Plaintiff's counsel stating that Ocwen was not to send Plaintiff collection letters or call her due to the settlement agreement, and requesting a letter confirming that Ocwen would no longer contact Plaintiff, to be sent to Plaintiff's counsel. ⁸ Defendants also produced during

discovery a letter dated October 20, 2011, from Plaintiff's counsel, as well as a copy of the settlement agreement and counsel's contact information. Because Plaintiff continued to directly receive bills, statements and phone calls from Ocwen representatives seeking to collect on an alleged debt obligation, despite notice that she was represented by counsel, Plaintiff is entitled to summary judgment that Ocwen violated *section 1692c(a)(2)*."

- B. At any "unusual" or "inconvenient" time or place. 15 U.S.C. Section 1692c(a)(1).
1. Not before 8:00 a.m. or after 9:00 p.m. - *Id.*
 2. When or where the consumer notifies the collector to be inconvenient - *Pittman v. J.J. Mac Intyre Co.*, 969 F.Supp. 609 (D.Nev. 1997).
- C. At consumer's place of employment if debt collector knows or has reason to know the employer prohibits such communication. 15 U.S.C. Section 1692c(a)(3). Where consumer told debt collector that she could not discuss her debt while at work, and debt collector presented no evidence that the employer did allow consumer to take debt-related calls at work, the collector had reason as a matter of law to know that the consumer's employer prohibited her from receiving calls related to debt collection while at work. "Unsophisticated consumers, whatever else may be said about them, cannot be expected to assert their [§ 1692c\(a\)\(3\)](#) rights in legally precise phrases. It is therefore enough to put debt collectors on notice under [§ 1692c\(a\)\(3\)](#) when a consumer states in plain English that she cannot speak to the debt collector at work." *Horkey v. JVDB & Associates, Inc.*, 333 F. 3d 769 (7th Cir. 2003); *Adams v. Law Offices of Stuckert & Yates*, 926 F.Supp. 521 (E.D. Pa. 1996). *Evon v. Law Offices of Sydney Mickell*, 688F.3d 1015 (9th Cir. 2012) (Sending letter to consumer "in care of" her place of employment, even when marked "Personal and Confidential," constitutes a per se violation of the FDCPA. "Mickell knew or could reasonably anticipate that a letter sent to a class member's employer might be opened and read by someone other than the debtor as it made its way to him/her. This is exactly what happened to Evon, causing her stress and embarrassment, precisely what the Act is designed to prevent.")
- D. After written notice by the consumer that consumer refuses to pay or that the consumer wishes the debt collector to cease communication. 15 U.S.C. Section 1692c(c); *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) (The FDCPA prohibits contacting a debtor who has notified a debt collector in writing that the consumer refuses to pay a debt

irrespective of whether the statement is false under state law or otherwise.) *Herbert v. Monterey Financial Services, Inc.*, 863 F.Supp. 76 (D. Conn. 1994) (letter sent by consumer's attorney). An unequivocal demand for payment sent by a debt collector to the consumer after receiving from the consumer a written request that the debt collector not contact the consumer apart from verifying the debt violates § 1692c(c), given the court's obligation to construe broadly the FDCPA to promote its remedial purpose. *Crumel v. Kross, Lieberman & Stone, Inc.*, 2015 U.S. Dist. LEXIS 45853 (E.D.N.C. Apr. 8, 2015).

- E. Generally no third party contacts whatsoever. 15 U.S.C. Section 1692c(b). *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983).
1. Third party contact permitted to locate the consumer - 15 U.S.C. Section 1692a(7).
 2. Strict limitations on content of communication to locate the consumer - *West v. Nationwide Credit, Inc.*, 998 F.Supp. 642 (W.D.N.C. 1998) Third party contact prohibition broadly bars communicating information relating to a debt, and not merely information specifically about a debt. Debt collector left a message with the consumer's neighbor to call about a "very important" matter. The typical collection agency ploy of contacting a neighbor to have the consumer telephone can include no other information at all about the reason for the call.
 3. *Dunaway v. JBC & Assocs., Inc.*, 2005 WL 1529574 (E.D. Mich. June 20, 2005). The uncontroverted fact that the debt collector called the consumer's employer and falsely informed him that a civil lawsuit had been filed and that criminal charges were pending against the consumer for a dishonored check on which both the civil and criminal statute of limitations had expired established the collector's liability as a matter of law for violating §§ 1692b, c, and e.
 4. *Thomas v. Consumer Adjustment Company, Inc.*, 579 F. Supp. 2d 1290 (E.D. MO. 2008). Defendant admits that its employee called [a third party] "to inquire regarding the status of a debt owed by Thomas", and the call ultimately ended not with a simple request for contact information, but with a telephone number at which the debtor, Thomas, could contact Defendant. As such, the call is "in connection with the collection of any debt," within the meaning of 15 U.S.C. § 1692c.
 4. Collectors for payday lenders often contact family members and other third parties, often under the guise of checking "references."

For a discussion of impermissible third party contact with family members, see *Aitken v. Debt Management Partners, LLC*, 2015 U.S. Dist. Lexis 50676 (CD Il. 2015).

V. ALL ABUSIVE, FALSE, AND UNFAIR COLLECTIONS PRACTICES ARE PROHIBITED

- A. Three central substantive provisions prohibit, without limitation, all abusive, false and unfair practices. 15 U.S.C. Sections 1692d, 1692e and 1692f.
1. Each section contains in identical format general prohibitions and, "[w]ithout limiting the general application of the foregoing . . .," provides a list of *per se* violations.
 2. Each section lists examples of prohibited conduct which does not limit the general prohibitions against abusive, false, and unfair means - Commentary, Sections 806-1, 807-1, and 808-1; accord, *United States v. National Financial Services, Inc.*, 98 F.3d 131,135 (4th Cir. 1996) (§ 1692e provides a non-exhaustive list of prohibited conduct); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2nd Cir. 1993). *McMillan v. Collection Professionals, Inc.*, 455 F.3d 754 (7th Cir. 2006).
 3. The U. S. Supreme Court has directed that statutory proscriptions using general terms such as unfairness are to be given effect by "consider[ing] public values beyond simply those enshrined in the letter or encompassed in the spirit of" the statute - *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).
- B. Frequent violations.
1. Threatening to take or taking any action that cannot legally be taken or is not intended to be taken - 15 U.S.C. Section 1692e(5); *Withers v. Eveland*, 988 F. Supp. 942 (E.D. Va. 1997); *Morgan v. Credit Adjustment Board*, 999 F.Supp. 803 (E.D. Va. 1998). *Francis v. Snyder*, 389 F. Supp. 2d 1034 (N.D. Ill. 2005). *Fariasantos v. Rosenberg & Associates, LLC*, 2014 WL 928206, 2014 U.S. Dist. Lexis 30898, (E.D. Va. 2014) (Law firm's dunning letter to Virginia consumer stating that bank had referred the account to the law firm "for legal action" when Virginia is a nonjudicial foreclosure state and the law firm knew that it had been referred the case to institute foreclosure proceedings was a threat to take action that was not intended to be taken); *Gonzales v. Arrow Financial Services, LLC.*, 660 F.3d 1055 (9th Cir. 2011) Debt collector who sends collection letters attempting to collect debts

that are more than seven years old and are accordingly obsolete for purposes of credit reporting under the Fair Credit Reporting Act makes a false threat to report obsolete debts when it sends dunning letters saying that “Upon receipt of the settlement amount and clearance of funds, and *if we are reporting the account, the appropriate credit bureaus will be notified that this account has been settled.*”

A collection letter violated 15 U.S.C. § 1692e(5) by indirectly threatening legal action by stating “a bad check can be considered a violation of Illinois Statutes” because it indicates to the debtor that she may be sued particularly since the letter was from an attorney. Legal action was unavailable for a stopped payment check under the Illinois Statute. *Faila v. Cohen*, 2005 WL 3032560 (E.D.N.Y. Mar. 10, 2005). The court denied the collection firm’s motion to dismiss finding that the language “[w]e may proceed with suit against you without waiting 30 days if so requested by our client” stated a claim for violation of 15 U.S.C. § 1692e(5) and e(10) where the collectors would allegedly never sue on such a small claim.

Payday loan debt collectors often make false threats of jail time. "Not being able to pay a debt is not a crime of any sort and Illinois residents are not jailed for failing to pay their debts. ... The representation that the Plaintiff committed a crime constitutes a "false, deceptive, or misleading representation or means in connection with the collection of any debt" and "the use of any false representation or deceptive means to collect or attempt to collect any debt." [15 USC §§ 1692e](#) and [e\(10\)](#). False statements made by a debt collector in the course of collecting a debt are *per se* violations of [§§ 1692e](#) and [1692e\(10\)](#)." *Aitken v. Debt Management Partners, LLC*, 2015 U.S. Dist. Lexis 50676 (CD II. 2015).

A “threat” to take an illegal action encompasses actually taking the illegal action as well. *Marchant v. U.S. Collections West, Inc.*, 12 F. Supp. 2d 1001, 1006 (D. Ariz. 1998) (court rejects defendants' argument that e(5) prohibits only the "threat" to take illegal action, where the defendants only took the illegal action, stating that the argument elevates form over substance and noting that the introductory portion of 1692e bars the "use" of prohibited means). *Harrington v. CACV of Colorado, LLC*, 508 F.Supp.2d 128, 136-37 (D.Mass. 2007) collects the cases to the date of the opinion: The Fifth Circuit and district courts in the Sixth and Ninth Circuits have held that [§ 1692e\(5\)](#) covers completed illegal acts as well as the threats to commit those acts. See [Poirier v. Alco](#)

Collections, Inc., 107 F.3d 347, 350-51 (5th Cir.1997); *Marchant v. U.S. Collections West, Inc.*, 12 F.Supp.2d 1001, 1006 (D.Ariz.1998) (“defendants assert that they made no threat; they simply took action. I think that such argument elevates form over substance. To argue that a collection agency can avoid the strictures of the FDCPA simply by acting where it has no legal authority ... would defy the very purposes of the section.”); *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783, 803 (S.D.Oh.2006); *Sprinkle v. SB & C Ltd.*, 472 F.Supp.2d 1235, 1247 (W.D.Wash.2006) (“[C]ourts have recognized the futility of a statutory scheme that would provide more protection to debt collectors who violate the law than to those who merely threaten or pretend to do so.... The opposite conclusion would be akin to attaching liability to one who merely threatens a tortious act while absolving one who unabashedly completes it.”)

- a. Threatening to contact third parties - *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980 (D. Ill. 1979);
- b. Action constituting the unauthorized practice of law under applicable state law – *Withers v. Eveland*, 988 F. Supp. 942, 946 (E.D. Va. 1997); *Poirier v. Alco Collections, Inc.*, 107 F.3d 347 (5th Cir. 1997); *Jones v. Vest*, 2000 U.S. Dist. Lexis 18413 (E.D. Va. 1999)
- c. Filing time-barred collection litigation - *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (D. Ala. 1987);
 - i. Threatening to sue on time-barred debt. *Freyermuth v. Credit Bureau Servs.*, 248 F.3d 767 (8th Cir. 2001). (“[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid”). *Thinesen v. JBC Legal Group, P.C.*, 2005 WL 2346991 (D. Minn. Sept. 26, 2005). The complaint alleged facts sufficient to show that the defendants violated the FDCPA by threatening suit on time-barred dishonored checks. *Gervais v. Riddle & Assoc., P.C.*, 363 F. Supp. 2d 345 (D. Conn. 2005). A debt collector may seek voluntary payment on a time-barred debt, as long as there is no threat of legal action. The mere inference that legal action could be taken because the letter is on law firm letterhead is not sufficient to create FDCPA liability. In the absence of express language

threatening a legal action, the source of the letter is a persuasive factor to be considered in conjunction with the statements contained in the collection letters and over the telephone.

- ii. A debt collector's failure to move to set aside an underlying state court default judgment after a summary judgment ruling that the underlying state court action violated the FDCPA because it was time-barred constituted violated the FDCPA. *2. *Thompson v. D.A.N. Joint Venture III, L.P.*, 2007 WL 1625926 *2 (M.D. Ala.).

- d. Threatening collection litigation which is in fact not intended or then authorized by the creditor – *U.S. v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996); *Withers v. Eveland*, 988 F. Supp. 942 (E.D. Va. 1997); *Morgan v. Credit Adjustment Board*, 999 F.Supp. 803 (E.D. Va. 1998);

- e. Suing on debt when consumer is not in default - *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994);

- f. Sending dunning letters in the name of a non-existent person - *Supan v. Medical Bureau of Economics, Inc.*, 785 F.Supp. 304 (D. Conn. 1991);

- g. Threatening to sue in nonpermitted venue - *Wiener v. Bloomfield*, 901 F.Supp. 771 (S.D.N.Y. 1995);

- h. Threatening garnishment or other post judgment remedies exceeding that permitted by law - *Seabrook v. Onondaga Bureau of Medical Economics*, 705 F.Supp. 81 (N.D.N.Y. 1989);

- i. Demanding payment of illegal or unauthorized amounts - *West v. Costen*, 558 F.Supp. 564 (W.D.Va. 1983) See attached excerpt discussing the applicable portion of the ruling; Misrepresenting the “debt” [as defined by the FDCPA] as including treble damages, court costs, and attorney’s fees, before there has been a judgment by a court - *Veach v. Sheeks*, 316 F.3d 690 (7th Cir. 2003);

- j. Sending letter from layperson falsely claiming to have been sent by an attorney - *Taylor v. Perrin, Landry, deLaunay &*

Durand, 103 F.3d 1232 (5th Cir. 1997); *Russey v. Rankin*, 911 F.Supp. 1449 (D.N.M. 1995);

- k. Implying future judicial remedies are a virtual certainty - *Schimmel v. Slaughter*, 975 F.Supp. 1357 (M.D.Ga. 1997);
- l. Failure to report to credit bureau that a known disputed debt is disputed - *Brady v. Credit Recovery Company, Inc.*, 160 F.3d 64 (1st Cir. 1998); Reporting outstanding unpaid check to Wal-Mart without stating that the debt was disputed - *Perez v. Telecheck Services, Inc.*, 208 F. Supp. 2d 1153 (D.Nev. 2002).
 - i. *Semper v. JBC Legal Group*, 2005 WL 2172377 (W.D. Wash. Sept. 6, 2005). Collector must communicate that a debt is disputed. The FDCPA does not give debt collectors the authority to determine unilaterally whether a dispute has merit.
 - ii. Congress has identified as harmful the failure to report a disputed debt as disputed, and, whatever the wisdom of that policy choice, Congress did not distinguish between communications that were intended and knowing as opposed to unintended and automatic. Indeed, the "directly or indirectly" language of *Section 1692a(2)* suggests that Congress saw no difference between the two. From the perspective of a consumer disputing a debt, it similarly matters not how it is that a dispute marker is lost. The harm inheres in the simple fact that information about an apparently undisputed debt in that person's name exists in the credit reporting industry, which can have untold negative consequences for people who engage in commerce.
- m. Threatening to take legal action when debt collector's authority is limited to making telephone calls and writing collection letters. *Morgan v. Credit Adjustment Board*, 999 F. Supp. 803 (E.D.Va. 1998). *Cambron v. Medical Data Systems, Inc.*, 379 B.R. 371 (M.D. Al. 2007). (Collection agency, whose authority was limited to collection calls and letters, violated §§ 1692e(5) and (10) in letter which implied to the least sophisticated consumer that her assets and wages may be in jeopardy, the letter stating that the

collector was seeking information "to determine what further collection effort to take.")

2. Attempting to collect any amount not "expressly authorized by the agreement creating the debt or permitted by law" - 15 U.S.C. Section 1692f(1).

Attempting to collect court costs before a judgment has been entered awarding costs can result in both 1692e [misrepresentation] and 1692f [unfairness] liability. Including court costs in the representation of the amount of a consumers alleged debt prior to the entry of judgment is deceptive as a matter of law. *Shula v. Lawent*, 359 F.3d 489, 490-92 (7th Cir. 2004) (affirming summary judgment for the plaintiff and holding that the defendant violated section 1692e when it represented to the plaintiff that the plaintiff owed court costs incurred in an abandoned proceeding because no Illinois law permitted the defendant to collect costs prior to judgment); *Fritz v. Resurgent Capital Servs., LP*, 955 F. Supp. 2d 163, 171-72 (E.D.N.Y. 2013) (denying the defendant's motion to dismiss an FDCPA claim for allegedly misrepresenting the amount of the plaintiff's debt to a credit reporting agency because, under New York law, "a party is not liable for court costs unless and until there is a judgment in favor of the opposing party" and "[b]y including court costs in the debt it reported to credit reporting agencies, [the defendant] misrepresented the amount of the debt").

Under California law, costs are only recoverable by the prevailing party. *See* Cal. Code Civ. Proc. § 1032 ("Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."). *Smith v. Law Offices of Patenaude & Felix, A.P.C.*, 2014 U.S. Dist. LEXIS 175072 (S.D. Ca. 2014).

Inclusion is a state foreclosure complaint of attorney's fees and property inspection fees for work that had not yet been performed was both a § 1692e misrepresentation and a § 1692f unfair practice, even though the amounts recited were later actually incurred and were admittedly reasonable. *Kaymark v. Bank of America, N.A., Udren Law Offices, P.C.*, 2015 U.S. App. 5548 (3d Cir. 2015).

- a. Interest - *Venes v. Professional Service Bureau, Inc.*, 353 N.W.2d 671 (Minn. App. 1984); *Patzka v. Viterbo College*, 917 F.Supp. 654 (W.D.Wis. 1996);

- b. Dishonored check charges - *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983) [See attached excerpt discussing the applicable portion of the ruling]; *Ozkaya v. Telecheck Services, Inc.*, 982 F.Supp. 578 (N.D.Ill. 1997);
 - c. Credit insurance - *Jenkins v. Heintz*, 25 F.3d 537 (7th Cir. 1994);
 - d. Various unauthorized fees - *Newman v. Checkrite California*, 912 F.Supp. 1354 (E.D.Ca. 1995);
 - e. Collection fees - *Patzka v. Viterbo College*, 917 F.Supp. 654 (W.D.Wis. 1996); *Fields v. Western Mass. Credit Corp.*, 2007 U.S. Dist. LEXIS 20735 (D. Conn. 2007) (Collection agency added 15% collection fee to the amount owed to the holder of an installment automobile loan contract, an amount not allowed by state law governing retail installment sales financing.)
 - f. A fee for providing the mandatory debt validation notice- *Sandlin v. Shapiro & Fishman*, 919 F.Supp. 1564 (M.D.Fla. 1996);
 - g. Additional assessments only available from a court - *Ditty v. Checkrite, Ltd., Inc.*, 973 F.Supp. 1320 (D.Utah 1997);
 - h. A debt that is in fact not owing - *Finnegan v. University of Rochester Medical Center*, 21 F.Supp.2d 223 (W.D.N.Y. 1998).
3. False sense of urgency - Commentary, Section 807(10)-2; *Morgan v. Credit Adjustment Board, Inc.*, 999 F.Supp. 803, 808 (E.D.Va. 1998); *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411, 416 (E.D.Va. 1997) (Embodies the concept without using the term “false sense of urgency”); *Schweizer v. Trans Union Corp.*, 136 F.3d 233 (2nd Cir. 1998); *Ozkaya v. Telecheck Services, Inc.*, 982 F.Supp. 578 (N.D.Ill. 1997). *Peter v. GC Services L.P.*, 310 F.3d 344 (5th Cir. 2002) (Section 1692e was enacted against a backdrop of cases in which courts held that communications designed to create a false sense of urgency were deceptive.).

Leyse v. Corporate Collection Services, Inc., 2006 U.S. Dist. LEXIS 67719 (S.D. N.Y. 2006). Messages stating "I'm calling re - [sic] - I need a return call tomorrow or today It's urgent that I speak to you today." This message not only describes the matter as

"urgent", but the caller's voice stutters briefly, as if he is pressed and attending to an especially troubling matter, not stating that it pertains to a financial matter, reasonably could pertain to a host of issues - including family or medical matters - which may be viewed by a consumer as much more pressing than a debt owed. The apparent purpose of messages was to be vague enough to provoke the recipient to return the calls in haste. Leaving a message that deceptively entices a consumer to communicate with a debt collector when he is caught off guard is precisely the kind of abuse the FDCPA intended to prevent.

Thomas v. Consumer Adjustment Company, Inc., 579 F. Supp. 2d 1290 (E.D. MO. 2008). A trier of fact could find that could find that the CACi caller used deceptive means to obtain information concerning a consumer by falsely identifying himself using a name associated with Thomas's file, and also indirectly caused a false sense of urgency by stating to the consumer's girlfriend that he needed the consumer's number "real quick."

Compare *Peck v. Bonneville Billing and Collections, Inc.*, 2013 U.S. Dist LEXIS (D. Utah 2013), where voice mails including language to the effect that Defendant needed a call that day did not constitute a false sense of urgency, with the court comparing the messages before it to the message in *Leyse*.

4. False representation of the imminence of any action - Commentary, Section 807(5)-6; *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411, 416 (E.D.Va. 1997); *Rosa v. Gaynor*, 784 F. Supp. 1 (D. Conn. 1989); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2nd Cir. 1993).
5. Immediately re-calling the consumer who has hung up the telephone on the collector - *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D. N.D. 1981); *Kuhn v. Account Control Technology, Inc.*, 865 F.Supp. 1443 (D. Nev. 1994); *Chiverton v. Fed. Fin. Group, Inc.*, 399 F. Supp. 2d 96, (D. Conn. Sept. 30, 2005). The debt buyer violated § 1692d(5) by repeatedly calling to collect a paid debt after the consumer had hung up the phone.
6. Telephone inquiry about personal assets that refers to highly personal items like wedding bands has a natural consequence to harass - *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).
7. Using profane or obscene language or language the natural consequence of which is to abuse the hearer or reader. - *15 U.S.C.*

§ 1692d(2). Collector's telephone message to consumer's coworker to "(T)ell Amanda to quit being such a (expletive) bitch" was abusive as a matter of law. *Horkey v. JVDB & Associates, Inc.*, 333 F. 3d 769 (7th Cir. 2003)

C. False Representations.

1. Any representation which is objectively false constitutes a *per se* violation of Section 1692e - *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411 (E.D.Va. 1997).
2. Even if not objectively false, any statement which is capable of deceiving or misleading violates Section 1692e - *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).
 - a. Deception is tested under the standard of the "least sophisticated consumer" - *U.S. v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996). *Turner v. Shenandoah Legal Group, et al.*, 2006 U.S. Dist. Lexis 39341 (E.D. Va. 2006). (The Fourth Circuit has found that to prove a violation of § 1692e(10), a statement must have the capacity to mislead. *U.S. v. Nat'l Fin. Servs., Inc.*, 98 F.3d at 139. However, proof of subjective deception of the consumer, or an intent to deceive by the debt collector, is not a necessary element.)
 - b. Standard measures tending to deceive "consumers of below-average sophistication or intelligence" - *Clomon v. Jackson*, 988 F.2d 1314 (2nd Cir. 1993).
 - c. Any "plausible" interpretation of a representation which is deceptive or false to the "least sophisticated consumer" violates the FDCPA - *Dutton v. Wolhar*, 809 F. Supp. 1130 (D. Del. 1992).
 - d. A "message that is open to an inaccurate yet reasonable interpretation by the consumer...is...deceptive as a matter of law" - *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411, 416 (E.D.Va. 1997) *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996); *accord, Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232 (2d Cir. 1998). Applied in *Turner v. Shenandoah Legal Group, et al.*, 2006 U.S. Dist. Lexis 39341 (E.D. Va. 2006). When a statement has two possible meanings, one of which is inaccurate, the statement has the capacity to deceive consumers, under the least sophisticated consumer standard. *Rosenau v. Unifund*

Corp. 539 F. 3d 218 (3d Cir. 2008); *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008). *Tjartjalis v. Professional Claims Bureau, Inc.*, 2015 U.S. Dist. Lexis 122881 (E.D. NY 2015)

3. Falsely simulating judicial or official documents - 15 U.S.C. Section 1692e(9); *Tolentino v. Friedman*, 833 F.Supp. 697 (N.D. Ill. 1993), aff'd on other grounds 46 F.3d 645 (7th Cir.), cert. denied 515 U.S. 160 (1995); *Wiener v. Bloomfield*, 901 F.Supp. 771 (S.D.N.Y. 1995).
4. Attempting to collect a known time-barred account - *Lindbergh v. Transworld Systems, Inc.*, 846 F.Supp. 175 (D. Conn. 1994); *Martinez v. Albuquerque Collection Services, Inc.*, 867 F.Supp. 1495 (D.N.M. 1994).
5. Making "final demand" for payment yet continuing collection activities - *Herbert v. Monterey Financial Services, Inc.*, 863 F.Supp. 76 (D. Conn. 1994).
6. Any "contradicting and inaccurate" statements - *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994).
7. Any demand for payment that does not comply with relevant state law - *Newman v. Checkrite California*, 912 F.Supp. 1354 (E.D.Ca. 1995).
8. "Flat rating," i.e. designing, compiling, and furnishing forms knowing that they will be used to create the false impression that a person other than the creditor is involved in the collection process - *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997).
9. Misrepresenting affiliation with credit reporting agency - *McKenzie v. E.A. Uffman and Associates*, 119 F.3d 358 (5th Cir. 1997).
10. Misrepresenting the "character, amount, or legal status" of the debt; e.g. by collecting a debt which is not owing - *Finnegan v. University of Rochester Medical Center*, 21 F.Supp.2d 223 (W.D.N.Y. 1998).
11. Debt buyer's letter stating that it came from the "Legal Department," where there are no lawyers, is misleading to the Least Sophisticated Consumer under § 1693e(3) as a false representation or implication that the communication was from an

attorney, because it could be interpreted as having come from an attorney when it did not. *Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2008).

D. Violations by Attorney Debt Collectors.

1. Lawyer letters “connote that a real attorney, acting like an attorney, has considered the debtor’s file and concluded in his professional judgment that the debtor is a candidate for legal action. Using the attorney language conveys authority, instills fear in the debtor, and escalates the consequences.” Attorney letters generally imply the threat of litigation. *U.S. v. National Financial Services, Inc.*, 98 F.3d 131, 137 (4th Cir. 1996). *Campuzano-Burgos v. Midland credit Management, Inc.*, 550 F. 3d 294 (3rd Cir. 2008) Under the Act, attorney debt collectors warrant closer scrutiny because their abusive collection practices “are more egregious than those of lay collectors.” *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989). The state has given lawyers certain privileges – such as the ability to file a lawsuit – not applicable to lay debt collectors. *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996). Debtors react more quickly to an attorney’s communication because they believe “that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which [such a] letter was sent.” *Id.* (“It is reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency.”). Accordingly, lawyers “sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply with the strictures of [the Act].” *Id.* at 228
2. A dunning letter sent on attorney letterhead violates numerous provisions of the Act if the lawyer does not personally review the debtor's file and have some knowledge about the alleged debt - *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996); *Boyd v. Wexler*, 275 F.3d 642 (7th Cir. 2001); *Nielson v. Dickerson*, 307 F. 3d 623 (7th Cir. 2002); *Miller v. Wolpoff & Abramson*, 321 F.3d 292 (2nd Cir. 2/25/03).
 - a. *Semper v. JBC Legal Group*, 2005 WL 2172377(W.D. Wash. Sept. 6, 2005). Letter on law office stationery, not signed by an attorney, and the lack of any indication that the communication was administrative or otherwise n-lawyer employee of the firm, was a false implication of attorney involvement.

- b. *Goins v. Brandon*, 367 F. Supp. 2d 240 (D. Conn. 2005). The court granted summary judgment on liability against the attorney collector who signed the dun but who had no personal involvement whatsoever in handling the consumer's debt, since the attorney's defense that another attorney in the office had performed the necessary personal review was insufficient as a matter of law to excuse the defendant attorney's violation of § 1692e(3).
- 3. A communication purportedly signed by an attorney violates Section 1692e unless the attorney reviews the debtor's file, determines when particular letters should be sent, approves the sending of particular letters that are based upon the recommendations of others, and does not see particular letters before they are sent - *Clomon v. Jackson*, 988 F.2d 1314 (2nd Cir. 1993).
- 4. Attorney debt collectors may not file a collection action, including post-judgment execution proceedings, in any venue other than "the judicial district or similar legal entity" where the consumer resides or signed the contract being sued upon (or where real property is located when enforcing an interest in that property) - 15 U.S.C. Section 1692i; *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994). *Rutgers-The State University v. Fogel*, 403 N.J.Super. 389, 958 A.2d 1014, 238 Ed. Law Rep. 317 (N.J.Super.A.D. Nov 07, 2008) Law firm violated the FDCPA's venue provision 1692i by bringing the action in the creditor's county, rather than the county of the student's residence. Judicial district" has generally been construed as referring to the geographic units into which a state divides its judiciary, rather than the federal judicial district. The FDCPA sets forth a bright-line venue rule. It does not require a case-by-case inquiry into the relative sophistication of each debtor (here, the debtor was a lawyer), nor into the relative hardship posed by the collection attorney's choice of venue.

E. Affirmative disclosure requirements.

- 1. Collector must disclose in the first written communication with the consumer that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose" and in all others that "the communication is from a debt collector"- 15 U.S.C. Section 1692e(11). 1996 amendment provides that only "communication is from a debt collector" need be included in communications after the first written.

- a. The FDCPA “expressly prohibits this exact *omission* by requiring debt collectors to disclose their status in every communication with a consumer.” *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 374 (4th Cir. 2012).
2. 15 U.S.C. Section 1692g validation notice.
- a. In the initial communication or within five days after the initial communication, debt collector must disclose in writing the following:
 - i. The amount of the debt;
 - a. The amount must be precisely stated.
 - b. A statement in the first dun of the accelerated unpaid balance plus unspecified interest, late charges, etc., that “changes daily” and an 800 number to call to get the current amount owed violates the § requirement that the dun state the “amount of the loan.” - *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000)
 - i. Dunning letter that states the correct amount of the debt but then goes on to add various components of the debt that do not add up to the correct amount of the debt results in confusing language under the least sophisticated consumer standard - *Kelly v. Nationstar*, 2013 U.S. Dist. Lexis 156515 (E.D. VA 2013)
 - c. Dunning letter stating that the “balance” is \$367.42, the adding “(T)o obtain your most *current balance information*, please call 1-800-916-9006. Our friendly and experienced representatives will be glad to assist you and answer any questions you may have,” would not allow the least sophisticated consumer to know the exact amount of the debt without making a further inquiry. “It is not enough that the dunning letter state the amount of the debt that is due. It must state it clearly enough that the recipient is likely to

understand it.” (emphasis supplied) - *Chuway v. National Action Financial Services, Inc.*, 2004 U.S. App. LEXIS 5836 (7th Cir., March 30, 2004).

d. Misrepresenting the amount of the debt as including treble damages, court costs, and attorney’s fees, before there has been a judgment by a court assumes the outcome of future events, in violation of 15 U.S.C. § 1692g(a)(1). The collector may not demand an amount that is unliquidated. - *Veach v. Sheeks*, 316 F.3d 690 (7th Cir. 2003).

i. Debt collectors cannot adjudicate the amount of the debt. This is the “*moving target*” scam - putting the squeeze on the consumer to pay more -- a conscientious debtor might find out the real amount of the debt and pay it. § 1692g(a), e(2)(A), and f(1) violations arise.

e. *Snyder v. Gordon*, 2012 U.S. Dist. Lexis 120659 (W.D. Wa. 2012) (Defendants' first letter read, in relevant part: "Demand is hereby made upon you for payment in the sum of \$18,026.56." Snyder Mot. at Ex. B. Two subsequent letters made reference to a "Balance Due." *Id.* at Exs. C, D. None of the letters provided further detail regarding when or how the balance had been calculated, whether it included interest, or whether interest continued to accrue. The court finds that the "least sophisticated consumer" could have read these letters in at least two different ways. On one hand, an unsophisticated consumer could reasonably conclude that the balance was a fixed amount that would not be subject to further interest, late fees, or other charges. On the other, an unsophisticated consumer could just as reasonably determine that the balance would continue to grow over time as interest accrued. One of those meanings would necessarily be inaccurate. Therefore, the

court finds that Defendants' letters were deceptive as a matter of law.)

- ii. The name of the creditor to whom the debt is owed; *Bourff v. Rubin Lublin, LLC*, No. 10-14618, 674 F.3d 1238; 2012 U.S. App. LEXIS 5613, 2012 WL 971800 (11th Cir. Mar. 15, 2012) (stating “[t]he identity of the “creditor” is a serious matter”); *Shoup v. McCurdy & Candler*, 465 Fed. Appx. 882, 2012 U.S. App. LEXIS 6443 (11th Cir. March 30, 2012).
Walls v. United Collection Bureau, Inc., 2012 U.S. Dist. LEXIS 68079 (N.D. Il.2012) (“Defendants assert repeatedly that the letter is not confusing because it accurately specifies that LVNV is the “current owner of the debt.” First, LVNV is not so identified. The letter refers to LVNV simply as “Current Owner.” Current owner of *what?*, a significant number of unsophisticated debtors might reasonably ask themselves. Second, defendants ignore the plain language of the statute, which requires that the “creditor to whom the debt is owed” be identified, not the “current owner of the debt.” This statutory language makes sense because an unsophisticated consumer likely does not ask himself, “Who owns the debt?” or think about debt in terms of “ownership.” Rather, he wants to know who is owed the money. In addition, the letter’s designation of the “original creditor” can be viewed as making the letter even more confusing in light of the fact that no phrase like “current creditor” is used.

We reject defendants' contention in their reply brief that what plaintiff is complaining of is "immaterial" information. The statute expressly requires identification of the creditor to whom the debt is owed; when that information is presented in an arguably confusing manner, it could influence the consumer's decision. For example, it could cause an unsophisticated consumer to be concerned about the possibility of being defrauded or about paying the incorrect creditor and continuing to have outstanding debt.”)

- iii. 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 - § 1692g(a)(3) ;
 - a. The failure to include the language "by the debt collector" or similar language does not comply with § 1692g(a)(3). The use of the passive voice effectively obscures the identification of the subject who is acting out the verb of the sentence. The Letter's failure to state who will assume the validity of the debt does not fulfill Rosenberg's clear obligation under the statute to tell the consumer that it is *the debt collector* who will assume the debt to be valid, and not, for example, a court or a credit reporting agency. *Fariasantos v. Rosenberg & Associates, LLC*, 2014 WL 928206, 2014 U.S. Dist. Lexis 30898, (E.D. Va. 2014).
 - b. Section 1692g(a)(3) "plainly" does not contain a writing requirement. *Clark v. Absolute Collection Service, Incorporated*, 741 F.3d 487 (4th Cir. 2014).
- iv. A statement that if the consumer notifies the debt collector in writing within the thirty day period that the dispute the debt, or any portion thereof, is disputed, the debt collector will obtain verification thereof; § 1692g(a)(4) - The failure to include the 1692g(a)(4) "in writing" requirement violated subsections (a)(4) and (5) because it failed to inform Plaintiffs that their requests under those subsections needed to be made in writing. *Bicking v. Law Offices of Rubenstein and Cogan*, 783 F. Supp. 2d 8410 (E.D. Va. 2011) (The plain meaning of § 1692g is that debtors can trigger the rights under subsection (a)(3) by either an oral or written 'dispute,' while debtors can trigger the rights under subsections (a)(4) and (a)(5) *only* through written dispute. If a consumer contests a debt by telephone rather than in writing, the consumer will inadvertently lose the protections for debtors set forth in the FDCPA; the debt collection agency

would be under no obligation to verify the debt and cease all collection efforts as required by § 1692g(b).)

- v. 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. § 1692g(a)(5).

- b. The validation notice "must be large enough to be easily read and sufficiently prominent to be noticed" - *Swanson v. Southern Oregon Credit Service*, 869 F.2d 1222 (9th Cir. 1988). Format overshadowing results from smaller print or size or contrasting color - *Miller v. Payco General American Credit, Inc.*, 943 F.2d 482 (4th Cir. 1991).
 - i. *Clark v. Absolute Collection Service, Incorporated*, 741 F.3d 487 (4th Cir. 2014). Section 1692g clearly defines communications between a debt collector and consumers, and the various subsections of § 1692g each have their own particularized requirements and unique importance.

- c. Adequacy and legality of section 1692g notice is a question of law tested by the least sophisticated consumer standard - *U.S. v. National Financial Services, Inc.*, 98 F.3d 131, 135 (4th Cir. 1996); *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411, 415 (E.D.Va. 1997).

- d. Contradictory messages violate validation disclosure requirements.
 - i. Demand for payment within a time less than thirty days contradicts thirty-day validation period - *U.S. v. National Financial Services, Inc.*, 98 F.3d 131, 139 (4th Cir. 1996); *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411 (E.D.Va. 1997); *Withers v. Eveland*, 988 F.Supp. 942 (E.D. Va. 1997); *Morgan v. Credit Adjustment Board, Inc.*, 999 F.Supp. 803 (E.D.Va. 1998); *Talbott v. GC Services Limited Partnership*, 53 F. Supp. 2d 846 (W.D. Va. 1999). *Chauncey v. JDR Recovery Corporation*, 118 F.3d 516 (7th Cir.) (Dunning

letter required that Plaintiff's payment be received within the 30 day period, thus requiring Plaintiff to mail the payment prior to the 30th day to comply.) *Turner v. Shenandoah Legal Group, et al.*, 2006 U.S. Dist. Lexis 39341 (E.D. Va. 2006) (SLG's demand for payment within thirty days of the *date* of the letter contradicts the information in the validation notice that would allow thirty days from the date the letter was *received* to dispute the validity of the debt. The letter contained two thirty-day periods: (1) payment is demanded within thirty days from the letter's draft, and (2) dispute of the debt is also allowed within thirty days from the letter's receipt. The first sentence of the closing paragraph does not specify which thirty-day period it is referencing. That the payment period and the dispute period are both thirty days long, but from different starting dates, may confuse and mislead the least sophisticated consumer.) *Rivera v. Amalgamated Debt Collection Services, Inc.*, 2006 U.S. Dist. Lexis 75001 (S.D. Fl. 2006) ("...unless this matter can be resolved within 30 days of the above date, it will be necessary to consider the institution of legal procedures against you." Also, Plaintiff alleged that the letter was backdated four days from the date of the postmark.). *Jacobson v. Healthcare Financial Services, Inc.*, 2008 U.S. App. LEXIS 3144 (2d Cir. 2008) Statement, in letter containing a correct validation notice, saying "If your payment or notice of dispute is not received in this office within 30 days" would require the consumer to send her dispute within the thirty day validation period in order for it to be received by the debt collector within thirty days. "we cannot adopt a construction of the Act that would not only shorten the debtor's period of reflection, but also leave that debtor uncertain as to just when - given the vagaries of the mails - she must, to be safe, send out a notice of dispute. ... By requiring the notice to be received by the debt collector within thirty days, the letter shortens the period during which the recipient may seek verification of the debt."

- ii. Demand for payment or action "immediately," "today," "at once," or the like similarly contradicts thirty-day validation period - *Miller v. Payco*

General American Credit, Inc., 943 F.2d 482 (4th Cir. 1991); *U.S v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996); *Morgan v. Credit Adjustment Board*, 999 F.Supp. 803 (E.D. Va. 1998).

- iii. Otherwise proper notice with emphasis in body of the letter to telephone the collector obscures required disclosure that an effective dispute must be in writing - *Miller v. Payco General American Credit, Inc.*, 943 F.2d 482 (4th Cir. 1991); *Withers v. Eveland*, 988 F. Supp. 942, 947 (E.D. Va. 1997).
- iv. Contradictory messages sent in separate communications but during the validation period also violate FDCPA - *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996).
- v. The contradictory message need not be "threatening" – *Creighton v. Emporia Credit Service, Inc.*, 1992 U.S. Dist. Lexis 8556 (E.D. Va. 1997), *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996).
- vi. Overshadowing or contradiction occurs where messages "would make the least sophisticated consumer uncertain as to her rights;" *Talbott v. GC Services Limited Partnership*, 53 F. Supp. 2d 846, 853 (W.D. Va. 1999); *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411, 416 (E.D.Va. 1997); or where notice can be reasonably read to have two different meanings, one of which is inaccurate - *Id.*
- vii. Language, that, while not directly contradictory to or irreconcilable with the validation notice, that could confuse the least sophisticated consumer and leave him unsure about his right to dispute the debt, violates the Act. *Talbott v. GC Services Limited Partnership*, 53 F. Supp. 2d 846 (W.D. Va. 1999).

VI. STATUTORY REMEDIES

- A. The FDCPA “provides a remedy for consumers who are subjected to abusive, deceptive, or unfair trade collection practices by debt collectors.” *Pollice v. Nat’l Tax Funding, L.P.*, 225 F. 3d 379, 400 (3d Circ 2000).

- B. A single violation of the Act triggers statutory liability and remedies., *Morgan v. Credit Adjustment Board, Inc.*, 999 F.Supp. 803 (E.D.Va. 1998); *Clomon v. Jackson*, 988 F.2d 1314 (2nd Cir. 1993).
- C. Up to \$1,000 in statutory damages., 15 U.S.C. Section 1692k(a)(2)(A)
1. Statutory damages available even in absence of actual damages - *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982); *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998).

Salvati v. Deutsche Bank National Trust Company, N.A., 575 Fed.Appx. 49 (3d Cir. 2014) - The District Court held that dismissal of Count IV was warranted because "Salvati has paid none of the alleged illegal fees and costs and, thus, has not suffered any actual damages" in connection with his FDCPA claim. J.A. 24a. However, the District Court's conclusion was error because it ignored the fact that, under the FDCPA, a plaintiff may collect statutory damages even if he has suffered no actual damages. See [15 U.S.C. § 1692k\(a\)](#); see also [Federal Home Loan Mortg. Corp. v. Lamar](#), 503 F.3d 504, 513 (6th Cir. 2007) "[A] consumer may recover statutory damages [under the FDCPA] if the debt collector violates the FDCPA even if the consumer suffered no actual damages."; [Miller v. Wolpoff & Abramson, L.L.P.](#), 321 F.3d 292, 307 (2d Cir. 2003) ("[C]ourts have held that actual damages are not required for standing under the FDCPA."). See generally [F.T.C. v. Check Investors, Inc.](#), 502 F.3d 159, 166 (3d Cir. 2007) ("The FDCPA allows consumers to sue an offending creditor for actual damages, attorney's fees and costs, as well as statutory damages up to \$1,000.") (emphasis added). The District Court incorrectly concluded that because Salvati had not paid any of the allegedly unlawful fees or expenses, the FDCPA claim must fail.
 2. Amount to be determined by the trier of fact on the basis of the frequency, persistence, and nature of the violation and whether the violation was unintentional - 15 U.S.C. Section 1692k(b)(1).
 3. Equitable defenses are not available - *Newman v. Checkrite California*, 912 F.Supp. 1354, n.30 (E.D.Ca. 1995).
 4. Strict liability statute, where degree of the defendant's culpability is relevant only in computing damages, not in determining liability – The E.D. Va. has previously observed the well established rule that the FDCPA is a strict liability statute. *Morgan v. Credit Adjustment Board*, 999 F. Supp. 803, 805 (E.D.Va. 1998) (Judge

Merhige), citing *Russell v. Equifax A.R.S.*, 74 F.3d at 33; *Jones v. Vest*, 2000 U.S. Dist. LEXIS 18413, *4 (E.D. Va. 1999) (Judge Dohnal), citing the Fourth Circuit's opinion in *U.S. v. National Financial Services, Inc.*, 98 F.3d at 139. See, also *Turner v. Shenandoah Legal Group, et al.*, 2006 U.S. Dist. Lexis 39341, * 8 (E.D. Va. 2006) (The FDCPA is a strict liability statute). "The FDCPA is a strict liability statute." *McLean v. Ray*, 2011 WL 1897436, *5 (E.D.Va., May 18, 2011) (Judge O'Grady) "(B)ecause the FDCPA is a strict liability statute, evidence of actual deception is unnecessary. Whether the debt collector's letter complies with the statute is determined objectively; the inquiry is whether an unsophisticated consumer or debtor would be confused by the contents of the letter. *Bicking v. Law Offices of Rubenstein and Cogan*, 783 F. Supp. 2d 8410 (E.D. Va. 2011) (Judge Hudson) *Reichert v. National Credit Systems, Inc.*, 531 F.3d 1002 (9th Cir.) Exceptions to liability under the FDCPA are narrowly construed in this strict liability statute.

Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1175-76 (9th Cir. 2006) (The FDCPA is a strict liability statute, meaning violations need not be knowing or intentional for liability to attach.) (Latching onto that conclusion, the Seventh Circuit has held that "§ 1692e applies even when a false representation was unintentional." *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000) (holding unintentional misrepresentation of debt collector's legal status violated FDCPA); see also *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 995 (7th Cir. 2003) (holding unintentional misrepresentation that debtor was obligated to pay a debt discharged in bankruptcy violated FDCPA); *Patzka v. Viterbo College*, 917 F. Supp. 654, 658-59 (W.D. Wis. 1996) (holding that an attempt to collect fee prohibited by law and threat to take action that could not be taken legally violated FDCPA). Second Circuit has adopted a similar position. See *Russell*, 74 F.3d at 33, 36 (holding that sending contradictory notices violated FDCPA even though plaintiff did not offer proof of intent); *Cacace v. Lucas*, 775 F. Supp. 502, 505-06 (D. Conn. 1990) (holding that an overstatement of debt "that was a mistake" violated FDCPA).

The

Russell v. Equifax A.R.S., 74 F.3d 30 (2nd Cir. 1996); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2nd Cir. 1993); *Pittman v. J.J. Mac Intyre Co.*, 969 F.Supp. 609 (D.Nev. 1997).

- a. Plaintiff therefore need suffer no actual injury whatsoever to recover - *Id.*

- b. Whether plaintiff even receives or reads an offending communication is irrelevant to liability - *Morgan v. Credit Adjustment Board, Inc.*, 999 F.Supp. 803, 805-06 (E.D.Va. 1998).
 - c. That the offending conduct is not unreasonable is not a defense - *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994).
 - d. Intent is not an element of liability - *Patzka v. Viterbo College*, 917 F.Supp. 654 (W.D.Wis. 1996).
 - e. FDCPA is a remedial statute to be liberally construed, imposing strict liability excused only by the bona fide error defense - *Harrison v. NBD Inc.*, 968 F.Supp. 836 (E.D.N.Y. 1997). Because the FDCPA is designed to protect consumers, it is liberally construed in favor of consumers to effect its purpose. *Ramirez v. Apex Financial Management, LLC and Hilco Receivables, LLC*, 567 F. Supp. 2d 1035, (N.D. Ill. 2008)
 - f. Neither knowledge nor intent necessary to establish liability - *Pittman v. J.J. Mac Intyre Co.*, 969 F.Supp. 609 (D.Nev. 1997).
5. Fourth Circuit has exhibited a lack of judicial tolerance for failure to comply with the FDCPA. *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411, 417 (E.D.Va. 1997); citing *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *U.S. v. National Financial Services, Inc.*, 98 F.3d 131 (4th Cir. 1996).
- a. *Creighton* therefore juxtaposed debt collector's good faith efforts and its comparatively less explicit or graphic violations with Congress' goal of deterring unfair debt collection practices, and imposed \$750 in statutory damages, plus costs, expenses, and attorney's fees. *Id.*
 - b. Because the FDCPA requires the debt collector to do more than follow "the spirit of the law," the debt collector was subject to a civil penalty in an amount that will deter him from engaging in future improper collection practices; therefore, the Court awarded the maximum \$1,000 statutory damages, plus costs and attorney's fees. *Withers v. Eveland*, 988 F. Supp. 942, 947-48 (E.D. Va. 1997).

- c. Award of costs and reasonable attorney's fee to prevailing plaintiff - 15 U.S.C. Section 1692k(a)(3).
6. Award is mandatory once liability is established - *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628 (4th Cir. 1995) (“...the fee award under § 1692k is mandatory in all but the most unusual circumstances...”) The FDCPA is a fee-shifting statute that provides separately for the award of attorneys fees. 15 U.S.C. § 1692k(a)(2). *Randle v. H&P Capital, Inc.*, 513 Fed. Appx. 282, 283 (4th Cir. 2013). *Withers v. Eveland*, 997 F.Supp. 738 (E.D.Va. 1998); *Morgan v. Credit Adjustment Board*, 1998 U.S. Dist. Lexis 8135. The “purpose of attorney’s fees is to encourage attorneys to prosecute cases that vindicate the objectives” of the FDCPA, citing *Dennis v. Columbia Colleton Medical Ctr., Inc.*, 290 F.3d 639, 652 (4th Cir. 2002), a Title VII case. *McHugh v. Check Investors, Inc.*, 2003 U.S. Dist. LEXIS 9065, *9 (W.D. Va. 2003).
- a. The Fourth Circuit, in *Barber v. Kimbrell’s, Inc.*, 577 F.2d 216 (1978), *cert. denied*, 439 U.S. 934 (1978), held that, when determining the amount of attorney’s fees to be awarded under the Truth in Lending Act [Title I of the Federal Consumer Credit Protection Act, Congress’ plenary regulation of the national consumer credit industry, of which the FDCPA is Title VIII], district courts must consider the twelve factors specified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974). *Barber* at 226.
 - b. The *Johnson* factors are:
 - (1) the time and labor required;
 - (2) the novelty and difficulty of the questions;
 - (3) the skill requisite to perform the legal services properly;
 - (4) the preclusion of other employment by the attorney due to acceptance of the case;
 - (5) the customary fee in the community;
 - (6) whether the fee is fixed or contingent;

- (7) time limitations imposed by the client or the circumstances;
 - (8) the amount of time involved and the results obtained;
 - (9) the experience, reputation, and ability of the attorneys;
 - (10) the “undesirability” of the case;
 - (11) the nature and length of the professional relationship with the client; and
 - (12) awards in similar cases.
- c. Courts should award fees and costs to lawyers fulfilling the important public service of providing representation to consumer debtors in FDCPA cases.

“Finally, the Court is satisfied that but for the few attorneys in central Virginia like Mr. Pittman willing to take cases on behalf of clients such as Mr. Jones, an important public service would go unfulfilled. Indeed, it is not unreasonable to conclude that it would be difficult for a debtor-client such as this plaintiff to retain a private attorney to prosecute a claim because of the dearth of attorneys who appear in this and other courts willing, let alone able to pursue such matters. Mr. Pittman responded to Mr. Jones' request to enforce Mr. Jones' rights as a consumer and his efforts should therefore be recognized by an award of the costs and fees he reasonably earned for this type of specialized representation in this marketplace.”
Jones v. Robert Vest, 2000 U.S. Dist. Lexis 19026, *15 (E.D. Va. 2000)

- 7. Award proper in post-judgment enforcement action - *Nunez v. Interstate Corporate Systems, Inc.*, 799 P.2d 30 (Ariz. App. 1990).
- 8. Attorney's fees are not "costs" which shift pursuant to Rule 68 - *Marek v. Chesny*, 473 U.S. 1 (1985), Appendix to opinion of Brennan, J., dissenting, Section B(17). Where a civil rights plaintiff accepts an offer under Rule 68 that does not specify whether attorney's fees are included in the amount offered, he shall

be entitled to recover his costs, including attorney's fees, limited to the costs that had accrued up to the time that the offer was made. *Said v. Virginia Commonwealth University/Medical College*, 130 F.R.D 60 (E.D. Va. 1990).

9. Jury should normally not be advised in that fees are triggered by any award under the Fifth Circuit rule - *Addison v. Braud*, 34 F.Supp.2d 407 (M.D.La. 1998).

D. Actual damages. A debt collector who violates any provision of the Act is liable for actual damages. 15 U.S.C. §1692k(a)(1). State law elements of proof for intentional or negligent infliction of emotional distress claims are not applicable to actual damages under the FDCPA. In *Smith v. Law Offices of Mitchell N. Kay*, 124 B.R. 182 (D.Del. 1991), the court instructed the jury:

1. First, actual damages may be awarded the plaintiff as 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.
2. You must determine a fair and adequate award of these items through the exercise of your judgment and experience in the affairs of the world after considering all facts and circumstances presented during the trial of this case.
3. Consumers had no out-of-pocket losses, jury awarded \$15,000 for their emotional distress, on their testimony describing suffering as a result of receiving the collection firm's three dunning letters. The court remitted to \$3,000.

E. Private remedy available to any aggrieved person, not limited to the consumer.

1. The Act does not only protect consumers, but is designed to discourage certain debt collection practices. *West v. Costen*, 558 F.Supp. 564 (W.D.Va. 1983).
2. Personal representative or other person who "stands in the shoes" of the consumer - *Wright v. Finance Service of Norwalk, Inc.*, 996 F.2d 820 (6th Cir. 1993), aff'd 22 F.3d 647 (1994) (en banc).

F. Right to jury trial., *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830 (11th Cir. 1982); *Kobs v. Arrow Service Bureau*, 134 F.3d 893 (7th Cir. 1998).

- G. One year statute of limitations., 15 U.S.C. Section 1692k(d). Violations barred by the statute of limitations are nonetheless admissible to show a pattern of abuse and harassment or other evidentiary purpose - *Pittman v. J.J. Mac Intyre Co.*, 969 F.Supp. 609 (D.Nev. 1997).
1. Where multiple demand letters are sent or other communications made, some of which are time-barred, those within the limitations period give rise to FDCPA claims. *Purnell v. Arrow Financial Services, LLC*, 2007 U.S. Dist. Lexis 7630 (E.D. Mich. 2007); *aff'd*, 2008 U.S. App. LEXIS 25817 (6th Cir. 2008); *Pittman v. J.J. Mac Intyre Co. of Nevada, Inc.*, 969 F. Supp. 609 (D.Nev. 1997). *Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355 (S.D. Fl. 2000); *McCorrison v. L.W.T., Inc.* 536 F. Supp. 2d 1268 (M.D. Fla. 2008).
 2. Continuing violation. Debt collection agency's alleged repeated calls harassing debtor, including automated phone calls, were not discrete acts, but rather, amounted to pattern of conduct warranting application of continuing violation theory, and thus, agency's conduct which occurred outside of limitations periods under the Fair Debt Collection Practices Act (FDCPA) and California's Rosenthal Fair Debt Collection Practices Act was actionable. *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, 281 F.Supp.2d 1156 (N.D.Cal.2003).
- H. No explicit provision for injunctive relief. Declaratory judgment nevertheless is an appropriate remedy. *Gammon v. GC Services*, 162 F.R.D. 313 (N.D.Ill. 1995).
- I. Collector's bona fide error defense., 15 U.S.C. Section 1692k(c).
1. Limited defense available only for violations resulting from unintentional error notwithstanding maintenance of reasonable procedures adopted to avoid the error - *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994) (The bona fide error defense is an affirmative defense, for which the debt collector has the burden of proof.) The defense requires the debt collector to show that it maintains procedures to avoid errors. It fails to meet its burden when it does not produce evidence of reasonable preventive procedures aimed at avoiding the specific errors at issue. *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006). Loose, indefinite, and unpredictable procedures that are not reasonably adapted to avoid violating the FDCPA will prevent the “bona fide error” defense from applying.

Ramirez v. Apex Financial Management, LLC and Hilco Receivables, LLC, 567 F. Supp. 2d 1035, (N.D. Ill. 2008).

"This provision offers a kind of qualified immunity to debt collectors, protecting actions which otherwise are covered by the statute but arose from bona fide error and were not intentional violations." *Sayed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007).

The burden is on the debt collector to prove that there was a "bona fide error." [Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 375 \(4th Cir. 2012\)](#) ("Such a "bona fide error" defense is one that a defendant must prove.")

2. Mere fact that error was unintentional is insufficient - *Russell v. Equifax A.R.S.*, 74 F.3d 30 (2nd Cir. 1996). The defense involves a two step inquiry – first, whether the debt collector maintained, *i.e.*, actually employed and implemented, procedures to avoid errors, and second, whether the procedures were reasonable adapted to avoid the specific error at issue - *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002). To qualify for the bona fide error defense, the debt collector has an affirmative obligation to maintain procedures designed to avoid discoverable errors – *Reichert v. National Credit Systems*, 531 F.3d 1002 (9th Cir. 2008).
 - a. The bona fide error defense requires more than a mere assertion to that effect. The procedures must be explained, along with the manner in which they were adapted to avoid the error - *Reichert v. National Credit Systems*, 531 F.3d 1002 (9th Cir. 2008), citing *Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008).
 - b. Summary judgment for debt collector affirmed based on its showing that its procedures were reasonably adapted to prevent the type of error that occurred – *Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008).
3. In *Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich L.P.A.*, 559 U.S. 573 (2010), the Supreme Court held that mistakes of law regarding the FDCPA itself constitute violations of the Act for which a debt-collector attorney may not invoke the Act's bona fide error defense, 15 U.S.C. § 1692k(c). *Id.* at 604–05. The Supreme Court declined to address whether the defense is available for mistakes of law other than those with respect to the FDCPA itself, *id.* at 580 n.4, but the discussion of the affirmative defense makes clear that mistakes of state law can give rise to liability.

4. The defense is not intended to “shield collectors from liability for systemic errors or abuses” but to protect collectors in cases of inadvertent “clerical errors;” therefore, where the collector “routinely applied the wrong” legal standard, “it could not have maintained procedures reasonable adapted to avoid” the violation - *Martinez v. Albuquerque Collection Services, Inc.*, 867 F. Supp. 1495 (D.N.M. 1994).
5. Fact that violation claimed to be the result of a bona fide error actually occurred is evidence of absence of required precautionary procedures to prevent the error - *Sluys v. Hand*, 831 F.Supp. 321 (S.D.N.Y. 1993).
6. “The debt collector must have in place some ongoing policy that operates to detect, correct and prevent errors. An isolated, one-time action taken to avoid violations will not suffice.” - *Adams v. Law Offices of Stuckert & Yates*, 926 F.Supp. 521 (E.D. Pa. 1996). Unless a party maintains reasonable procedures to avert a violation, the defense does not apply. *Seeger, et al. v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008)
7. Absence of adequate procedures frequently explains how the purported error occurred - *Bitah v. Global Collection Services, Inc.*, 968 F.Supp. 618 (D.N.M. 1997).

That Mr. Zaffran disciplines collectors “all the time” suggests that Audubon's training of collectors is ineffective. Moreover, the blatant violations of the FDCPA ascribed to Ms. Mottorn acting while using the name “Monica” occurred when she was far more than a neophyte also points to the ineffectiveness of Audubon's training procedures. And the fact that Monica was able to blatantly violate the FDCPA on two separate occasions, together with Brandi Hill's disclosure of Aitken's debt to his mother, suggests that Mr. Zaffran's efforts to monitor his collectors by walking around and listening to their conversations is not a procedure “reasonably adapted to avoid” the errors resulting in violations of the FDCPA. *Aitken v. Debt Management Partners, LLC*, 2015 U.S. Dist. Lexis 50676 (CD II. 2015).

8. For a detailed analysis of the “bona fide error” defense, see *Whitaker v. Hudson & Keyse, LLC*, 2007 U.S. Dist. LEXIS 57706 (S.D. In., 2007).
9. Bona fide error defense applied where suit was filed in wrong venue: collector had no reason to believe the Cook County address

was not good as it had received no indication that the address was in error. Collector did not receive a notice of change of address from the Accolade or the National Change of Address database, nor did it receive returned mail from the United States Postal Service for mail sent to Plaintiff, nor did it receive any returned calls from the Plaintiff. Collector has procedures to scrub and screen the address and zip code, in order to make sure that venue was proper. The preponderance of the evidence shows that collector did not intentionally file in the wrong venue, and acted in bona-fide error notwithstanding procedures reasonably adapted to avoid any such error. *Parkis v. Arrow Financial Services, LLC*, 2008 WL 94798 (N.D. Ill. Jan. 8, 2008)

10. Because “bona fide error” is an affirmative defense, courts should not consider it at the Rule 12(b)(6) motion to dismiss stage. *Lockett v. Freedman*, 2004 U.S. Dist. Lexis 6857, *8-9 (N.D. Ill. 2004)

- J. No common law litigation immunity for attorneys covered by the FDCPA. *Sayed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007). *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432 (6th Cir. 2006) The Court reserves absolute immunity for individuals when they functionally serve as "integral parts of the judicial process," such as judges, advocates, and witnesses in their ordinary judicial roles. The purpose of this immunity is to preserve the integrity of our judicial system, not to assist a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding.

Holding a law firm liable for filing false or misleading affidavits in litigated matters to facilitate its business of debt collection does not contravene either the underlying goals of witness immunity or the spirit of the letter of the FDCPA. *Cole v. Portfolio Recovery Associates*, 2008 U.S. Dist. LEXIS _____ (D. Montana 2008).

- K. Availability of attorneys fees to prevailing defendant., 15 U.S.C. § 1692k(a)(3).

1. Defendant must have prevailed in all respects - *Savino v. Computer Credit, Inc.*, 164 F.3d 81 (2d Cir. 1998).
2. Filing case must be show to have been in bad faith - *Id.*
3. Even then, matter of discretion - *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985).

4. *Jacobson v. Healthcare Financial Services, Inc.*, 2008 U.S. App. LEXIS 3144 (2d Cir. 2008). Consumer's subjective reaction, that he did not feel "harassed, threatened or misled by the letter," is neither here nor there.
- L. Class action remedy, 15 U.S.C. § 1692k(a)(2)(B).
1. Actual damages.
 2. Named plaintiff entitled to same statutory damages as in individual action.
 3. Class shares statutory damages of lesser of \$500,000 or 1% of collector's net worth per case - *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997).
- M. No defense that violation was not "abusive" - *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998).

VII. PROCEDURAL ISSUES

- A. Jurisdiction and venue are proper in forum of consumer's residence, even where debt collector's contacts with jurisdiction are limited to a single letter or telephone call. *Russey v. Rankin*, 837 F.Supp. 1103 (D. N.M. 1993).
- B. FDCPA lawsuit and action to collect underlying debt are not compulsory counterclaims. *Peterson v. United Accounts, Inc.*, 638 F.2d 1134 (8th Cir. 1981). Consumer is therefore not barred from filing separate FDCPA action even when previously sued on the debt. Debt collector may not maintain collection action as counterclaim in federal court - *Kuhn v. Account Control Technology, Inc.*, 865 F.Supp. 1443 (D. Nev. 1994).
- C. Preemption of state law under Section 1692n is limited to inconsistent, less protective (to the consumer) state laws. *Sibley v. Firstcollect, Inc.*, 913 F.Supp. 469 (M.D.La. 1995) .

EXCERPT ON THE LEAST SOPHISTICATED CONSUMER STANDARD

The FDCPA states that its purpose, in part, is "to eliminate abusive debt collection practices by debt collectors", 15 U.S.C. §1692(e). It is designed to protect consumers from unscrupulous collectors, whether or not there is a valid debt. *Baker v. G.C. Services Corp.*, *supra* at 777 (9th Cir. 1982). *Keele*, *supra* at 594; *Mace v. Van Ru Credit Corporation*, 109 F.3d 338, 341 (7th Cir.1997). The FDCPA broadly prohibits unfair or unconscionable collection methods; conduct which harasses, oppresses or abuses any debtor; and any false, deceptive or misleading statements, in connection with the collection of a debt, 15 U.S.C. §§1692d, 1692e, and 1692f, and requires the debt collector to provide the consumer with his or her rights, 15 U.S.C. §1692g, under the Act.

The Fourth Circuit has held that whether a communication or other conduct violates the FDCPA is to be determined by analyzing it from the perspective of the "least sophisticated debtor." *U.S v. National Financial Services, Inc.*, *supra* at 135-36. "The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993). "While protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *U.S. v. National Financial Services, Inc.*, *supra* at 136 (citation omitted). Also, see: *Russell v. Equifax A.R.S.*, *supra*; *Bentley v. Great Lakes Collection Bureau*, *supra*; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232, 236 (2nd Cir. 1998); ("The (dunning) letter must be assessed in terms of 'the impression likely to be left upon the unsophisticated consumer.'") (Citation omitted); *Avila v. Rubin*, 84 F.3d 222, 226-27 (7th Cir. 1996) ("the standard is low, close to the bottom of the sophistication meter"). The debt collector may not defeat the statute's purpose by making the required disclosures in a form or within a context in which they are unlikely to be understood by the unsophisticated debtors who are the particular objects of the statute's solicitude. *Bartlett v. Heibl*, *supra*, at 500 (7th Cir.1997). An outright contradiction is not required for a violation of the FDCPA. "A letter can be confusing even to a sophisticated reader though it does not contain an outright contradiction. *Chuway v. National Action Financial Services, Inc.*, 2004 U.S. App. LEXIS 5836 (7th Cir., 2004)

"As the FDCPA is a strict liability statute, proof of one violation is sufficient to support summary judgment for the plaintiff." *Cacace v. Lucas*, *supra*, at 505 (D.Conn. 1990). See also, *Stojanovski v. Strobl and Manoogian, P.C.*, 783 F. Supp. 319, 323 (E.D. Mich. 1992); *Riveria v. MAB Collections, Inc.*, 682 F. Supp. 174, 178-9 (W.D.N.Y. 1988). "Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages." *Russell v. Equifax A.R.S.*, *supra* at 33. Also, see: *Bentley v. Great Lakes Collection Bureau*, *supra* at 62; *Clomon v. Jackson*, *supra* at 1318. Furthermore, the question of whether the consumer owes the alleged debt has no bearing on a suit brought pursuant to the FDCPA. *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992); *Baker v. G.C. Services Corp.*, *supra* at 777.

EXCERPT ON THE INCLUSION OF UNAUTHORIZED CHARGES

In *West v. Costen*, 558 F.Supp. 564 (1983), the United States District Court for the Western District of Virginia was faced with the question of whether dishonored check service charges that the debt collector added to the amount that he was attempting to collect resulted in a violation of 15 U.S.C. § 1692f(1). The charges were neither specifically prohibited nor specifically authorized by Virginia law. The issue was whether Virginia's silence constituted legal permission to add the charges. The court held that it did not. Noting that "permitted by law" differs from "not prohibited by law", the court ruled that permission requires an affirmative authorization, not just indulgent silence. *Id.* at 581.

In *Costen*, Judge Turk found that the service charges sought to be collected by the debt collector were not expressly authorized by the agreements creating the underlying debts. *Id.* at 581. The Court thus concluded that the debt collector's collection of the service charges would be lawful under 15 U.S.C. § 1692f(1) only if the charges were "permitted by law." The Court went on to state:

Plaintiffs argue that because no Virginia or federal statute or other law authorizes the practice, the charges cannot be said to be "permitted by law." The defendants counter this thrust by "the fact that [the practice] is not prohibited by Virginia law." ... In other words, the defendants argue that the very absence of any statutory authority concerning service charges justifies the practice because such charges are at least not prohibited by law. As defendants correctly point out, resolution of this issue depends on the interpretation of the phrase "permitted by law." In turn, interpretation of this phrase can only be done in context with the entire provision. Looking to the plain language of 1692f(1), the court interprets the section to permit the collection of a fee in addition to the principal obligation if such fee is expressly authorized by the agreement creating the debt or is otherwise permitted by state law. Thus, the agreement creating the debt need not expressly authorize the fee if state law affirmatively permits a collection fee even if not specified in the agreement. However, the agreement must expressly authorize the fee if state law permits such a fee only if specified in the agreement. And no such fee may be collected even if provided for in the agreement if state law prohibits a collection fee in addition to the principal obligation because a contract can never impose charges that are prohibited by state law. But Virginia law neither expressly permits nor expressly prohibits a third party debt collector from collecting add-on fees. Thus, if valid under state contract law, an agreement relative to such fees would be permitted because it would not be expressly prohibited by state law. But when, as here, the agreements creating the debts did not expressly authorize the fee, the question is whether Virginia's silence on this specific issue constitutes legal permission to collect the fee. The court holds that it does not. In the context of this case, the court interprets section 1692f(1) to mean that if state law does not expressly permit or prohibit a debt collector from collecting a service charge in addition to the amount of a dishonored check, then such charge is lawful only if the agreement creating the debt expressly authorizes it. Simply stated, "permitted by law" is different from "not prohibited by law." Permission requires an affirmative authorization, not just indulgent silence. So the

fact that Virginia does not expressly prohibit such charges does not mean that state law permits them in the absence of an agreement providing for such; rather, it means the contrary. Therefore, the court holds that the service charges collected by [the debt collector] were not "permitted by law" as that phrase is used in the FDCPA. *Id.* at 581 & 82.

The case *sub judice* falls squarely within the factual circumstances in *Costen*. No Virginia law expressly permits the addition of skip tracing charges to a collection account by a debt collector. The addition of skip tracing charges to the amount that the Defendants were collecting from Ms. Consumer was an unfair practice that violated the FDCPA.

