Consumer Collections

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I. Introduction

A. First, a Perspective

According the Federal Reserve, there are 59.5 Billion debit or credit card swipes a year in the United States. That boils down to 165 million swipes/day; approximately 15% of which occur in Texas (25 million/day; 1.8 million/hour; 30,000/minute; 500/second). That's a lot of plastic, and much of this article will be geared to the type of consumer debt that is created in the retail debt arena. However, "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes" is likely a consumer debt. [2]

A substantial majority of consumer transactions are related to the use of credit cards; meaning somebody owes somebody money. Historically, the default rate for credit card accounts is about 2.5%, although during the peak of the financial crisis in 2008-2009, that rate was as high as 7%. Since financial institutions are not in the business of losing money and for them the industry is a net-net business, the unfortunate reality is that somebody either collects this debt or all of the remaining credit card holders make up the difference. In 2017 the total amount of credit card debt charged off was greater than $20 Billion, an estimated $3 Billion of that occurring in Texas.

The consumer has defaulted – now what? It all depends on the financial institution. Some try to collect the debt in-house, some send it to collection agencies, some send it straight to legal recoveries, some sell it for whatever the market will offer, and others just sit on it and wait. They each have their philosophies and their strategies. Often times, these strategies take into consideration issues which go beyond simple collectability; issues such as brand protection, consumer loyalty and risk avoidance. In the end, these are business decisions made at the multi-billion-dollar level, and they all have their reasons.

B. Context

This paper is practical, not technical. It is about how the real world works. As such, it provides case citations which are intended to be illustrative, rather than exhaustive. Adding to the complexity of this topic is a myriad of United States District/Appellate Court decisions, each with unique facts spread over time and geography, and which pertain to subjective, fact-laden issues. These decisions reflect both an evolution of thought, as well as a regional perspective which is difficult to summarize into clean rules. The ACA (American Creditor's Association) has some 260 pages of annotations which make for recommended reading for any attorney who regularly practices as a debt collector.[1] Finally, this paper also contains both statements of opinion and prospective. You are free to do with these as you wish.

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[1] Michael J. Scott, presentation at The University of Texas School of Law CLE, The Fair Debt Collection Practice Act and The Texas Debt Collection Act (Practical Approach) (Sept. 1-2, 2011).
[2] Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5) (2011).

C. Putting and Keeping Your Shop in Order

This paper has traditionally focused on basic regulatory compliance, causes of action, limitations and proof. While all are important to consumer collections, changes in the industry have necessitated a greater emphasis on issues surrounding regulatory compliance. Consumer lawsuits are like any other lawsuit and, as such, the core legal challenges and approaches are not unique to consumer collections. What has been unique and what continues to drive the evolution within the consumer space are the regulatory requirements and transitions which are actively occurring in this area of practice. The purpose of this paper is to address the common areas of law which impact collection work in this arena and to provide a context in which to understand the rapidly changing framework in which consumer debt collection now operates.

This paper will work through the primary regulatory schema which impact consumer debt collection. These are:

The Fair Debt Collection Practices Act
The Gramm-Leach-Bliley Act
The Dodd-Frank Act

Finally, the paper will look at some of the key industry events which every consumer collection attorney must be aware.

II. Fair Debt Collection Practices Act

A. Scope

The Fair Debt Collection Practices Act[3] ("FDCPA") and its Texas counterpart, the Texas Debt Collection Act[4] ("TDCA"), inform and regulate almost every aspect of consumer debt collection. As such, this paper does not attempt to provide a comprehensive overview of these statutes, but rather, focuses on those aspects of the statutes which a debt collector may encounter on a regular basis, or which are the most active areas of alleged non-compliance. There are many great presentations regarding the FDCPA/TDCA[5] and you are directed to these for a more thorough treatment of these topics.

B. What is the FDCPA? (short version)

The purpose of the FDCPA is "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors."[6] Section 806 of the FDCPA bars "[e]ngaging in any conduct the natural consequences of which is to harass any person in connection with the collection of a debt"[7] and Section 807 instructs that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[8]

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[3] 15 U.S.C. § 1692, *et seq.*
[4] Tex. Fin. Code § 360, *et seq.*
[5] University of Texas CLE eLibrary Paper: FCRA and FDCPA Issues for Collection Attorneys, Manuel H. Newburger, (2010), http://www.utcle.org/eLibrary; Fair Debt Collections Practice, Manuel H. Newburger, 2011, From: Suing/Defending and Negotiating with Financial Institutions 2011, http://www.texasbarcle.com/CLE.
[6] S. Rep. No. 95-382, at 1(1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.
[7] 15 U.S.C. §1692d (2).
[8] 15 U.S.C. §1692e.

C. Surveying the Landscape

To understand FDCPA/TDCA compliance, you must understand the world in which a debt collection attorney operates. While the statutes may contain various definitions, which are "open to interpretation," the reality is that the language of the statute is routinely stretched to its breaking point for one purpose, and one purpose only: Attorney's Fees. Specifically, the FDCPA provides for an award of attorney's fees in "any successful action" to recover damages.[9] Combine this fact with a quasi-strict liability statute and you have a legal industry.

1. Applicability of the FDCPA

So, what makes the FDCPA so problematic for collection attorneys? The answer can be found in the application of the statute which, at every turn, is interpreted expansively.

a. Are You a Collection Attorney?

If you have to think about the answer to that question – you are. While the legal standard is that a third-party debt collector is a person who "regularly engages in consumer debt collection activity," courts have held that dedicating as little as 4% of one's legal practice to collections may satisfy this requirement.[10] An original creditor is not a third-party debt collector,[11] however, the person who acquires a debt once it is in default, is considered a third-party debt collector.[12]

b. Are You Attempting to Collect a Consumer Debt?

The FDCPA defines the term "debt" to mean:

> "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[13]

The practical application of the provision is this: If there is any way to characterize a debt as a "consumer debt," then treat it like a consumer debt. Courts look to not only the form of the transaction but the substance of the transaction as well (i.e., personal credit card, personal bank account).[14] For example, the debt associated with the leasing of a backhoe by a construction professional utilizing his commercial loan account was treated as a consumer debt because the

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[9] *See id.* at §1692k(a)(3).

[10] *See* Stojanovski v. Strobl & Manoogian, P.C., 783 F.Supp. 319, 322 (E.D. Mich. 1992).

[11] *See* 15 U.S.C. §1692a(6)(A).

[12] *See* McCartney v. First City Bank, 970 F.2d. 45 (5th Cir. 1992) (explaining that a bank that attempts to collect a judgment in connection with the liquidation of another bank is a debt collector, not a creditor, and must follow the requirements of the FDCPA). *See also* Ruth v. Triumph Partnerships, 577 F.3d 790, 796-97 (7th Cir. 2009) (stating that a debt collection company that purchases debts already in default at the time of purchase is considered a debt collector); Pollice v. Nat'l Tax Funding L.P., 225 F3d 379, 403-04 (3d Cir. 2000); Whitaker v. Ameritech Corp., 129 F.3d 952, 958-59 (7th Cir. 1997).

[13] 15 U.S.C. §1692a (5).

[14] *See* Hetherington v. Allied Int'l Credit Corp., Civ. No. H-07-2104, 2008 WL 2838264, at *3 (S.D. Tex. July 21, 2008) (explaining that in determining whether a transaction was for consumer or commercial purposes, the court must examine the whole account from which payment for the specific transaction was made, rather than the specific transaction).

backhoe was actually used to dig a pool at the contractor's home.[15] Consequently, a debt collector may be collecting a consumer debt and not even realize it.

c. Did You Communicate with the Debtor?

15 U.S.C. §1692(a) defines the term "communication" to mean:

- the conveying of information regarding a debt
- directly or indirectly
- to any person
- through any medium.

Therefore, even in circumstances where a document is required as a pre-condition to legal or contractual enforcement, it is nonetheless an FDCPA communication if it conveys information regarding a debt and if its aim, at least in part, is to induce the consumer to pay the debt.[16]

2. Did Your Actions Comply with the FDCPA – *when viewed by the Least Sophisticated Consumer*?

Although the phrase "least sophisticated consumer" does not actually appear in the FDCPA, courts have held that the question of whether an alleged violation of the FDCPA has occurred is to be determined by viewing the events through the eyes of the "least sophisticated consumer." Every circuit describes a hypothetical consumer whose reasonable perceptions will be used to determine if a communication is deceptive or misleading. This articulation generally takes the form of "least sophisticated consumer," although, as noted by a United States District Court for the Western District of Texas, the *least* sophisticated debtor "is a dull bulb indeed." In *Youngblood v. GC Servs., Ltd. P'ship*,[17] the court lambasted the "least sophisticated consumer" standard, opting instead to use the "unsophisticated consumer" standard in evaluating whether a letter violated the FDCPA. The judge noted:

> "These rulings may have been correct under the standard applied, but that test could not properly purport to protect the least sophisticated consumer, for the least sophisticated consumer is a dull bulb indeed…. The unsophisticated consumer standard is more practical, if only because its name accurately describes those whom it protects. It protects those who are not exceptionally bright or blessed with intellect, those who are particularly gullible and credulous, and those who are quite naive and trusting… Any consumer falling beyond that level, is in this context, simply beyond the law's ability to protect."[18] Similarly, the Seventh Circuit has noted that the least sophisticated consumer is "not merely 'below average,' he is the very last rung on the sophistication ladder[,]"[19] being "the single most unsophisticated consumer who exists."[20]

It is important to remember that your debtor *is not*, themselves, the Least Sophisticated Consumer. The Least Sophisticated Consumer is a legal construct; therefore, a particular consumer's confusion regarding collection efforts may not be sufficient to establish a violation.

To understand the Least Sophisticated Consumer, you must understand the construct.

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[15] *See* Slenk v. Transworld Sys., Inc., 236 F.3d 1072, 1075 (9th Cir. 2001).
[16] *See* Thomson v. Prof'l Foreclosure Corp. of Wash., No. 98-CS-478, 2000 WL 34335866, at *5 (E.D. Wash. Sept. 25, 2000), aff'd, 86 Fed. App. 352 (9th Cir. 2004).
[17] 186 F. Supp. 2d. 695 (W.D. Tex. 2002).
[18] *Id*. at 698.
[19] Gammon v. GC Services Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994).
[20] *Id*.

a. Qualities of the Least Sophisticated Consumer
   - He is not shrewd, but not a "dimwit" or a "dolt" either
   - He is generally uninformed, naive and trusting, but not irrational
   - He lacks the sophistication of the average, everyday, common consumer, but this does not relieve him of "all responsibility"
   - He has a modest education and limited commercial savvy
   - He does not believe that it is his responsibility to suspect the honesty of those with whom he transacts business
   - He is probably in the lower quartile of his peer group

b. Capabilities of the Least Sophisticated Consumer

   - He is capable of making basic logical deductions and inferences
   - He has only rudimentary knowledge of the financial world
   - He is inexperienced when dealing with creditors
   - He is capable of understanding who is collecting — the creditor or the debt collector
   - He has reasonable knowledge of the account history

3. If Your Actions Did Not Comply with the Act, Did Your Noncompliance Matter?

Over the past decade, a battle has raged in the District Courts over the issue of technical vs. material violation of the FDCPA. These battles occur mostly in the FDCPA circuits where an aggressive consumer bar has sought to extend the reach of the FDCPA to punish even the most minor or technical violation (i.e., Ohio, California, Florida and New York). A body of case law is now developing that supports the premise that materiality is necessarily a consideration when viewing any alleged violation. As such, the courts are beginning to ask some simple questions.

- Did the debt collector's statement, influence or frustrate the consumer's ability to make an informed decision or an intelligent choice about how to respond or proceed?
- Did the debt collector's statement distort the consumer's perception or intimidate or pressure?
- Would the consumer have acted differently or did they miss out on an opportunity or choice?
- Did the debt collector's statement bolster or enhance the possibility of recovery of the debt, in the consumer's mind?

In *Wahl v. Midland Credit Mgmt., Inc.*,[21] the court determined that under § 1692e, it is not enough to show that a statement is false; the consumer must prove that the false statement would mislead or deceive an unsophisticated consumer. "If a statement would not mislead the unsophisticated consumer, it does not violate the FDCPA—even if it is false in some technical sense. For purposes of § 1692e, then, a statement isn't 'false' unless it would confuse the unsophisticated consumer."[22]

In *Hahn v. Triumph Partnerships LLC*,[23] the court took up the issue of materiality. At issue was a demand letter which separately identified "amount due" and "interest due" on the account. The

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[21] 556 F.3d 643 (7th Cir. 2009).
[22] *See also* Jensen v. Pressler & Pressler, 791 F.3d 413, 420-21 (3d Cir. 2015); Janson v. Katharyn B. Davis, L.L.C., 806 F.3d 435, 437-38 (8th Cir. 2015) (explaining when no one is misled by a collector's "technically" false statement, there is no violation of §1692(e) or (f)).
[23] 557 F.3d 755 (7th Cir. 2009).

consumer claimed "interest due" was false (under 1692e(2)(a)) because it included only interest that accrued after the account was purchased, not interest accrued before charge-off. The court disagreed, stating "[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement."[24] As such, the court determined that there is no reason not to require a showing of materiality in FDCPA cases. "The statute is designed to provide information that helps consumers to choose intelligently, and by definition immaterial information neither contributes to that objective (if the statement is correct) nor undermines it (if the statement is incorrect)."[25] Put simply, a statement cannot mislead unless it is material, therefore a false but non-material statement is not actionable. The Court expanded on this concept later that year in *Muha v. Encore Receivable Mgmt., Inc.*,[26] when it noted that "The purpose of the Fair Debt Collection Practices Act is to protect consumers, and they don't need protection against false statements that are immaterial in the sense that they would not influence a consumer's decision."[27]

Surprisingly, the Ninth Circuit has joined the materiality debate in favor of the debt collectors. In *Donohue v. Quick Collect, Inc.*,[28] the consumer claimed that a state-court lawsuit which sought to collect the "sum of $270.99, together with interest thereon of 12% per annum . . . in the amount of $32.89." The consumer alleged that based on the charge off date, the calculated interest amount did not equal $32.98. Ultimately, it was determined that the $32.98 was comprised of both pre- and post-charge off interest thus, the statement in the collection complaint was technically false.[29] The court ruled the collection complaint did not violate the FDCPA because the misstatement was not material.[30] The complaint "sought recovery of sums to which Quick Collect was clearly and lawfully entitled" even though it incorrectly labeled the amount.[31] The court noted that had the complaint correctly labeled the amounts, the court could "conceive of no action Donohue could have taken that was not already available to her on the basis of the information in the Complaint—nor has Donohue articulated any different action she might have chosen."[32] The Court went on to note that "In assessing FDCPA liability, we are not concerned with mere technical falsehoods that mislead no one, but instead with "genuinely misleading statements that may frustrate a consumer's ability to intelligently choose his or her response."[33] As observed in *Midland Funding LLC v. Brent*,[34] "[m]aterial facts are ones which, if known, might influence a person's decision on a matter" – do "they make the proposed assertion more or less likely[]" and *Smith v. Greystone Alliance LLC*,[35] holding that materiality turns on whether the statement "impacts an unsophisticated consumer's ability to accurately assess the nature of their debt or their rights under the Act."[36]

This perspective has been further shaped by the United States Supreme Court decision in *Spokeo, Inc. v. Robins*,[37] where the court held that an injury in fact must be both concrete and particularized. Specifically, the court stated that for a plaintiff to have standing, the plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct

[24] *Id*. at 757.
[25] *Id*. at 757-58.
[26] 558 F.3d 623 (7th Cir. 2009).
[27] *Id*. at 628.
[28] 592 F.3d 1027, 1029 (9th Cir. 2010).
[29] *Id.* at 1033.
[30] *Id.* at 1034.
[31] *Id.* at 1033.
[32] *Id.* at 1034.
[33] *Id.*
[34] 644 F. Supp. 2d 961,969 (N.D. Ohio 2009).
[35] 2011WL 1303377, *1 (N.D. Ill. Mar. 29, 2011).
[36] *Id.* at *22.
[37] 136 S. Ct. 1540 (2016).

of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[38] Whether mere technical violations of the FDCPA give rise to such a concrete and particularized injury is something of an open question. Courts have tended to find such an injury except in the most hyper-technical of circumstances. An example of where the courts have found *Spokeo* to be applicable is *Hagy v. Demers & Adams*,[39] wherein the court held that the failure of an attorney to place a Mini-Miranda warning on a document transmittal letter to opposing counsel failed to confer jurisdiction upon the federal court. In *Hagy*, the Court acknowledged that the borrowers made allegations with respect to each element of the cause of action under the FDCPA: (1) the borrowers received a letter from the attorney about a debt implicating a duty established by the FDCPA, (2) the letter failed to include the required disclosure, and (3) they sought statutory damages.

> "These kinds of allegations usually eliminate any doubts about Article III standing and usually allow the parties and the court to move on to the merits. But usually is not always."[40]

The court determined that "[w]hat makes this case different is that [the attorney] challenges Congress's authority to create this injury – to create an injury in fact that involves no harm of any sort that could satisfy the injury-in-fact requirements of Article III."[41]

Here, the borrowers admitted that what the attorney said in his letter "turned out to be true." Moreover, "[f]ar from causing [the borrowers] injury . . . the June 30 letter gave them piece of mind, and they have never testified otherwise," and "no one plausibly argues (or even alleges) that the [borrowers] suffered any actual injury or damages from the letter."[42] Under these facts, the court held that the plaintiff "must point to some harm other than the fact of 'a bare procedural violation,'" because "[n]ot all procedural violations, not even all inaccuracies, cause real harm."[43]

4. Is the Debtor Entitled to Damages as a Result of Your Noncompliance?

Three categories of damages are available in a successful FDCPA action:
Statutory damages
Actual Damages, and
Attorney's Fees

a. Statutory Damages

(1) The Amount

The FDCPA provides for statutory damages of *up to* $1,000 per "action."[44] Taken literally, the range is $0 to $1,000, and, in fact, cases do exist where even in the face of what appears to be an FDCPA violation, the statutory damage award has been $0. Awards of this type generally pre-date the materiality standards which are now being adopted by the courts. As such, a similar case would most likely be classified as a non-violation in the current climate,

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[38] *Id.* at1547.
[39] 882 F.3d 616, 621-22 (6th Cir. 2018).
[40] *Id.* at 621.
[41] *Id.*
[42] *Id.*
[43] *Spokeo*, 136 S. Ct. at 1549-50.
[44] *See* 15 U.S.C. §1692k(a)(2)(A)).

rather than a violation for which there is no award of statutory damages. Nonetheless, low dollar/no dollar awards by both judges and juries underscore the point that despite rumors to the contrary, the consumer is not "entitled" to $1,000 if an FDCPA violation has occurred.

(2) Application

The Debtor can only receive one award. The statute states that "in the case of any action by an individual," a court may award *up to $1,000* as additional damages.[45] Although some early decisions treated this provision as applying per violation, it is now accepted that this provision pertains to each case. Therefore, a case alleging multiple violations may result in, at most, a single $1,000 statutory damage award, regardless of the severity or numerosity of the alleged misconduct. However, if a debt collector runs afoul of the Federal Trade Commission, the consequences may be far more significant.[46]

b. Actual Damages

Actual damages may be determined by a jury. In *Sibley v. Fulton DeKalb Collection Sem.*,[47], the court held a party on timely demand is entitled to a jury trial in an action for damages under the FDCPA. This makes any legitimate claim for actual damages problematic, for it exposes the debt collector to an unliquidated damage amount which may be difficult to determine. Furthermore, actual damages for emotional distress can be proved independent of state law requirements if a violation of the FDCPA has been established.[48]

However, a consumer may not recover actual damages if he cannot establish a relationship or link between the FDCPA violation and the actual damages suffered.[49]

As would be expected, jurisdictions differ when confronted with the issue of actual damages; especially if the only claim is for emotional distress. For example, in *Myers v. LHR, Inc.*,[50] the court awarded $90,000 to compensate the consumer for the harassment, abuse, emotional distress and economic hardships suffered as the result of the collector's continuous, systematic and outrageous conduct. The consumer did not owe the debt and suffered repeated and abusive collection efforts. The court found the award appropriate in proximity to similar claims and awards. However, in *Molina v. Creditors Specialty Serv., Inc.*,[51] the consumer's request for actual damages in the amount of $30,000 for over a month of improper phone collection activity, including threats to garnish the consumer's wages and to commence litigation which the consumer alleged caused stress, anxiety, physical illness and fear that money to provide for her baby would be taken away was considered unreasonable by the court. Other types of damage are less difficult to quantify and are recoverable under the FDCPA; these most often include claims

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[45] 15 U.S.C. §1692k(a)(2)(A).

[46] *See, e.g.,* U.S. v. Nat'l Fin. Services, Inc., 98 F.3d 131, 141 (4th Cir. 1996) (affirming $550,000 in civil penalties for sending millions of "attorney letters" threatening litigation without the requisite validation notice when, in fact, the collection agency had no intention of commencing legal action. The court concluded "the large scale of the violations justifies the penalty. Without a real sting, the defendants would be unlikely to be deterred from violating the Act, in light of the substantial profit to be made using aggressive and improper collection practices.").

[47] 677 F.2d 830 (11th Cir. 1982).

[48] *See* Smith v. Law Offices of Mitchell N Kay, 124 B.R. 182, 188 (D. Del. 1991); *see also* Davis v. Creditors Interchange Receivable Mgmt., L.L.C., 585 F. Supp. 2d 968, 971 (N.D. Ohio 2008).

[49] *See* Thomas v. Law Firm of Simpson & Cybak, No. 00 C 8211, 2006 WL 2037329, at *3 (N.D. Ill. July 17, 2006).

[50] 543 F. Supp. 2d 1215 (S.D. Cal. 2008).

[51] No. CIV. S-08-2975GEBGGH, 2010 WL 235042 (E.D. Cal. Jan. 21, 2010).

for damage to credit and increased borrowing expense. In *Royster v. Pacific Creditors Ass'n*,[52] the consumer was awarded $60,500.50 in actual damages because collector's failure to remove inaccurate/derogatory remark from her consumer report resulted in a significantly higher interest rate on her mortgage.

c. Attorney Fees

Contrary to popular belief among the consumer bar, a violation of the FDCPA does not automatically result in a claim for attorney's fees. The statute is clear in stating that a person may recover "in the case of *any successful action to enforce the foregoing liability*, the costs of the action, together with *a reasonable attorney's fee* as determined by the court."[53] The statutory language immediately brings three questions to bear, the answer to each of which is quite subjective:

(1) What is a "Successful" Action?

In order to recover attorney's fees under the FDCPA, a party must first successfully maintain a cause of action under the act. The Circuits are split regarding what constitutes a "successful" action, with the Fifth and the Seventh Circuits holding that the consumer must obtain actual or statutory damages, while the Second and the Third Circuits hold that the consumer need only prove a violation of the Act.[54]

In *Johnson v. Eaton*,[55] the Court found that to be entitled to an award of attorney's fees under the FDCPA, a party must have *successfully* brought an action to enforce defendant's liability under the FDCPA. Specifically, in *Eaton* the jury found the existence of a violation, but declined to award damages against Eaton (one of two co-defendants); however, the jury did award attorney's fees. On appeal, the court determined that it is not enough that a claimant prove a technical violation of the FDCPA. If such violation will not support an award of actual or additional damages in the claimant's favor, it will not support an award of attorney's fees.[56]

Similarly, in *Dechert v. Cadle Co.*,[57] the Court stated "[A] plaintiff [is] entitled to an award of fees and costs only if his suit could be characterized as a 'successful action to enforce the foregoing liability,' 15 U.S.C. § 1692k(a)(3), meaning liability for either actual or statutory damages."[58]

Specifically, in the *Dechert* case, the bankruptcy trustee obtained a finding of liability and recovered a sanction award against the defendant; however, no damages attached to the liability and the trustee sought attorney's fees arising out of the liability finding only. The court noted:

> "The general, indeed all but invariable, rule is that to be a prevailing party and therefore entitled to an award of fees and costs, you either must obtain a judgment that

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[52] No. 3:08CV009, 2008 WL 4693411 (S.D. Ohio Oct. 23, 2008).
[53] *See* 15 U.S.C. 1692k(a)(3), [*emphasis added*].
[54] *See* Emanuel v. Am. Credit Exchange, 870 F.2d 805, 809 (2d Cir. 1989); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 28 (2d Cir. 1989); Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991).
[55] 80 F.3d 148 (5th Cir. 1996).
[56] *See* Farrar v. Hobby, 506 U.S. 103, 120, (1992) (explaining a civil rights case relied upon by the *Eaton* Court which noted that one of the elements of a civil rights suit for damages is proof of "actual, compensable injury" and that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all").
[57] 441 F.3d 474 (7th Cir. 2006).
[58] *Id.* at 475.

provides you with formal relief, such as damages, an injunction, or a declaration that you can use if necessary to obtain an injunction or damages later, or must obtain a settlement that gives you similar relief."[59]

The "technicality" question goes to the purpose of the FDCPA. It is a consumer protection statute, not a new legal industry statute. As such, courts are becoming increasingly more attuned to the fact that often the consumer's interest is the last thing that is being served by the judicial process. This is not to say that this is a new-found concept. Courts have long noted the significant imbalance between the alleged wrong and the requested recovery. In *Carroll v. Wolpoff & Abramson*,[60] the court affirmed the trial court's decision to award only $500 in attorney's fees when the case was "at most a technical violation" of the § 807 (11) [disclosure requirement] and awarded $50.00 in statutory damages [the consumer had requested nearly $10,000 in attorney's fees]. The court ruled the language of the statute allows the district court to use its discretion in awarding "reasonable" attorney's fees, and therefore the court is not required to follow the "lodestar formula" (multiplying the number of hours by a reasonable hourly rate).[61] Furthermore, "fee calculation is inextricably linked to the facts and circumstances of the underlying litigation."[62]

(2) When is an Action Brought to "Enforce the Foregoing Liability?"

A violation of the FDCPA does not, at least on its face, result in both a claim for statutory damages *and* a claim for attorney's fees. While 15 U.S.C. §1692 does set forth rights to recover both actual and statutory damages in the event of an FDCPA violation, 15 U.S.C. §1692k(a)(3) only provides for the recovery of reasonable attorney's fees "in the case of any successful action *to enforce the foregoing liability*."

Consequently, a tender of damages *prior to suit* should have the effect of rendering a subsequent suit for attorney's fees as moot.[63] "If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents."[64] In other words, if a case becomes moot, the parties lose standing to maintain their claims.[65]

This author is personally aware of multiple instances where *a tender of maximum statutory damages have been made*, along with an offer to pay some attorney's fees, only to have legal action initiated in order to collect additional attorney's fees. In each such case, the matters were resolved after the trial courts expressed grave concerns about the "consumer's" ability to recover anything more than what had already been offered.

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[59] *Id.* (citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 602 (2001); King v. Illinois State Bd. of Elections, 410 F.3d 404, 414 (7th Cir. 2005); Palmetto Properties, Inc. v. Cty. of DuPage, 375 F.3d 542, 547 (7th Cir. 2004); Crabill v. Trans Union, L.L.C., 259 F.3d 662, 666-67 (7th Cir. 2001); and Nagle v. Experian Info. Solutions, Inc., 297 F.3d 1305, 1307 (11th Cir. 2002).

[60] 53 F.3d 626 (4th Cir. 1995).

[61] *Id*. at 627-28.

[62] *Id*. at 629.

[63] *See* Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 525 (5th Cir. 2008).

[64] *Id*.

[65] *See also* City of L.A. v. Lyons, 461 U.S. 95, 105-06 (1983); Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004) (nothing that an offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation); Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake").

As a practice note, the tender of statutory damages will likely result in the consumer attorney foregoing any pre-suit demand in any subsequent case so as to avoid the possibility of a settlement offer which would moot the claim. This is, in fact, a primary focal point of the National Creditor's Bar Association in their efforts to modify the FDCPA. However, until such time, it is important for any debt collector to document all encounters with consumer attorneys so as to demonstrate a willingness to address alleged wrongs and to bolster future claims that the level of attorney involvement by opposing counsel was unreasonable and unnecessary.

(3) What constitutes "A Reasonable Attorney's Fee?"

Reasonableness is certainly in the eye of the beholder. As will be discussed, *infra*, there exists a sophisticated group of FDCPA consumer attorneys which will routinely request $3,500 as their "reasonable attorney's fee" for simply presenting a demand letter. Fortunately, courts do not always see things their way. More and more, courts are looking critically at the nature of the recovery to the consumer, and are attempting to balance the purpose of the statute with the interest of the consumer. In so doing, courts have read into the reasonableness requirement the question of whether the attorney's fees were, in fact, necessary. In one case which, unfortunately, is not as uncommon as hoped, the consumer's attorney performed significant work on a case *after* receiving an offer of judgment for $1,000 in statutory damages, $200 in actual damages plus reasonable attorney's fees as determined by the court. The attorney accepted the offer of judgment, but presented the court with more than $12,700 in attorney's fees; much of which occurred only after the offer was received. The court noted "waste is not in the public interest. The Congress that passed the Fair Debt Collection Practices Act in 1977 could hardly have wished to reward lawyers for doing non-productive work and wasting their adversaries' time and the time of the court as well."[66]

In determining the reasonableness of attorney's fees, the Seventh Circuit has stated that the court should take into consideration the degree of success obtained, as well as the principles established and the harm checked.[67]

Similarly, courts have begun asking the question about whether the present litigation is necessary in light of pre-suit settlement efforts. Additionally, the issue of necessity can be raised without the need for an offer of judgment. Reasonableness goes beyond the procedural rules and can be invoked simply by documenting prior settlement offers which ultimately represent more than a debtor's actual recovery.

Finally, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,[68] Justice Sotomayor noted that "[t]he FDCPA contains several provisions expressly guarding against abusive lawsuits and gives courts discretion in calculating additional damages and attorney's fees."[69] Justice Kennedy's dissent, however, was not so optimistic, noting that many of the strict liability provisions of the FDCPA invite a multiplicity of claims, even when the alleged violation is harmless in nature. This remains a battle of perspective, even at the highest levels.

(4) Special Circumstances

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[66] *See* Lee v. Thomas & Thomas, 109 F.3d 302, 306 (6th Cir. 1997).
[67] *See* Farar v. Hobby, 506 U.S. 103, 120 (1992); *see also* Zagorski v. Midwest Billing Services, Inc., 128 F.3d 1164, 1166-67 (7th Cir. 1997).
[68] 559 U.S. 573 (2010).
[69] *Id*. at 575.

In *Crystal Davis v. Credit Bureau of the South,*[70] the Fifth Circuit upheld the trial court's denial of attorneys' fees in the amount of $130,410. The court had found for Davis and had awarded $1,000 in statutory damage. However, the magistrate judge found that the case involved "special circumstances," making an award of attorneys' fees unjust. Specifically, the judge found that because there was evidence of apparent collusion between Davis and her counsel to create the claim, forum manipulation by counsel to bring the case within a district in which they were licensed, and inflation of their billable rate and billable hours, the requested $130,410 in attorney's fees was "excessive by orders of magnitude." The Court of Appeals, in affirming the trial court's judgment, stated "given the district court's desire to 'disincentivize the conduct of Plaintiff's counsel,' coupled with an additional, punitive reduction (or outright denial) for [counsel's] exorbitant fee request, it was not an abuse of discretion for the district court to deny Davis' motion for attorney's fees." [71] The case includes a broad discussion regarding the court's authority to control unreasonable attorney's fees.

(5) Fight Over Attorney Fees at Your Own Risk

A battle over attorney's fees is often times self-defeating. Simple FDCPA litigation which results in a nominal award to the consumer, may give rise to tens-of-thousands of dollars in attorney's fees.[72] In *Garcia v. Stanley,* the court awarded more than $60,000 for a technical violation of the FDCPA and what amounted to a lack of diligence by the collection attorney in defending the litigation.[73] Further, an appeal of such an award may be charged as well. While the result would seem unreasonable, as the losing party, the decision to disengage is largely within your control.

5. Limitations

Claims for recovery under the FDCPA must be brought within one year. 15 U.S.C.S. § 1692k. The cause of action accrues when the occurrence of the violation first becomes known to the consumer.[74]

D. Knowing Your Obligations

1. Getting the G-Notice Right

15 U.S.C. §1692g sets forth the specific requirements which must be included in a communication which is either the debt collector's initial communication with the debtor or which must be sent to the debtor within five (5) days after of the collector's initial communication with the debtor.

a. What, exactly, is the G-Notice? (15 U.S.C. §1692(g))

The "G-Notice", referring to the section of the FDCPA which describes its requirement, is a communication which must be a clear, concise statement of the claim which the debt collector is seeking to collect, and which provides to the debtor a statement of his rights to contest the claim.

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[70] 908 F.3d 972 (5th Cir. 2018).
[71] *Id.* at 981.
[72] *See, e.g.*, Garcia v. Stanley, No. 14-cv-01806-BLF, 2017 WL 897429, at *2 (N.D. Cal. Mar. 7, 2017).
[73] *Id*. at *7.
[74] *See* Benzemann v. Citibank N.A., 806 F.3d 98, 103 (2d Cir. 2015).

Unfortunately, the G-Notice is a source of common problems many of which are simply practical in nature. Every debt collector wants their collection letter to have impact! No one wants an ineffective letter. Further, collectors want to "get the ball rolling" on the collection process; after all, clients expect results. Unfortunately, the G-Notice is not the place to accomplish either of these objectives. Instead, the G-Notice should be geared toward satisfying the requirements of the statute, and that alone.

b. What Does 15 U.S.C. §1692g Require? (Part 1)

15 U.S.C. §1692g requires that the debt collector send to the debtor a written communication which advises the debtor of the following:

- the amount of the debt,
- the name of the current creditor,
- the debtor's right to dispute the debt – verbal,
- the debtor's right to request verification of the debt – written,
- the debtor's right to obtain the address of the original creditor – written.[75]

Be aware, however, that 15 U.S.C. §1692e(11) also requires that *in any initial communication,* the debt collector disclose:

- that they are a debt collector,
- that they are attempting to collect a debt, and
- that any information obtained will be used for that purpose.

Since the G-Notice is often the initial communication, this language should also be considered required content in any standard form demand letter.

c. What Does 15 U.S.C. §1692g Require? (Part 2)

(1) State the G-Notice Elements Clearly and Completely

Below is a restatement of the G-Notice requirements, with notes and/or sample language, and with problematic areas *highlighted*:[76]

- the amount of the debt — give a *single amount as of a date certain*
- the name of the current creditor — make sure you *keep the affiliates straight*

[75] *See* 15 U.S.C. §1692g(a)(1)-(5).
[76] *Note:* The above is *not required language*. It is simply an example of how the requirements of the statute may be met.

▸ the debtor's right to dispute the debt (oral dispute provision)	"Unless you dispute the validity of the debt, or any portion thereof, within thirty days after you receive this letter, we will assume that the debt is valid."
▸ the debtor's right to request verification (written dispute provision)	"If, within thirty days *after you receive this letter*, you notify our law firm in writing that you dispute the debt, *or any portion of the debt*, we will obtain a *verification of the debt from our client* and a *copy of such verification will be mailed to you*."
– or –	
▸ the debtor's right to request a copy of the Judgment (written dispute provision)	"If, within thirty days *after you receive this letter*, you notify our law firm in writing that you dispute the debt, *or any portion of the debt*, we will obtain *verification of the debt or a copy of the judgment* against you from our client and a *copy of such verification or judgment will be mailed to you*."
▸ the debtor's right to obtain creditor address of the original creditor	"Within 30 days of your receipt of this letter, you may send to us a written request that we provide to you the name and address of the original creditor, if different from the current creditor, and we will do so."
▸ debt collector disclosure (Mini-Miranda)	"This law firm is a debt collector, and this is an attempt to collect a debt. Any information which you provide to this firm may be used by this firm for that purpose."

Finally, while the above information fully complies with the historical requirements set forth by the FTC and prior case law regarding the content of a G-Notice, consumer attorneys continue to attempt to enlarge the obligations imposed upon debt collectors. For example, in *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*,[77] the court held that a validation requires providing enough information to allow consumer to sufficiently dispute the debt, such as how and when debt incurred.[78] If such a trend continues, the collection attorney will be tasked with anticipating that which the consumer may or may not need in order to dispute the debt. The bottom line is this. If you have access to account information which is reliable, adding it to the G-Notice may alleviate future issues and promote the resolution of the account.

(2) Correct Any Mistake Timely

15 U.S.C. §1692g does not require that the required elements of a G-Notice need be contained in a single document. Should it become clear that a collection letter erroneously omitted one or more of the required disclosures, these disclosures can be communicated in a subsequent communication; however, the five-day requirement of the G- Notice provisions of the FDCPA remains applicable.

(3) Do Not "Overshadow" the G-Notice

The G-Notice provides to the debtor a 30-day period during which the debtor may exercise certain rights which require the debt collector to investigate the claim and to provide certain information. Anything that "overshadows" these rights is a violation of the FDCPA.[79] Overshadowing occurs when language in either the initial or subsequent communication threatens or encourages the least sophisticated consumer to "waive his statutory right to challenge the validity of the debt."[80]

The following conduct has been held ***TO*** overshadow the G-Notice:

- A collection letter requesting "immediate payment,"[81]
- A collection letter stating the consumer's dispute *must be received* within 30 days,[82]
- A debt collection letter which stated the consumer would be sued within one week,[83]
- A debt collection letter which stated, "Please call … if you feel you do not owe this amount."[84]

The following conduct has been held ***TO NOT*** overshadow the G-Notice:

- The statement "Full Collection Activity Will Continue until This Account is Paid"[85]
- A second letter requesting the consumer "[u]se the tear-off portion of this letter ... to send your payment today."[86]
- A collection letter asking the consumer to contact the debt collector "upon receipt of this letter"[87]

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[77] 758 F.3d 777 (6th Cir. 2014).
[78] *Id.*
[79] *See* 15 U.S.C. § 1692g(b).
[80] Renick v. Dun & Bradstreet Receivable Mgmt. Services, 290 F.3d 1055, 1057 (9th Cir. 2002).
[81] Savino v. Computer Credit, Inc., 164 F.3d 81, 84 (2d Cir. 1998).
[82] Jacobson v. Healthcare Fin. Serv., Inc., 516 F.3d 85, 89-90 (2d Cir. 2008).
[83] Bartlett v. Heibl, 128 F.3d 497, 499 (7th Cir. 1997).
[84] Caprio v. Healthcare Revenue Recovery Group, L.L.C., 709 F.3d 142, 145 (3d Cir. 2013).
[85] Peter v. GC Services L.P., 310 F.3d 344, 347 (5th Cir. 2002).
[86] *See* Renick v. Dun & Bradstreet Receivable Mgmt. Serv., 290 F.3d 1055, 1057 (9th Cir. 2002).
[87] *See* McCabe v. Crawford & Co., 210 F.R.D. 631, 636 (N.D. Ill. 2002) (noting that the collection letter did not

- The statement "Act now to satisfy this debt" in a G-Notice[88]

d. What Does 15 U.S.C. §1692g *Not Require*? (Part 3)

(1) You are Not Required to Meet the Consumer's Demands

The internet is a strange and terrifying thing when it comes to the FDCPA. It is full of misinformation, a prime example of which is the question of what, exactly, must be provided to a consumer who has disputed a debt. Although a debt collector may be presented with demands for original applications, charge slips, promissory notes, call logs, etc.; in fact, the only thing that the client/collector is actually required to do is: (1) determine that the debt upon which it sought to collect remained a valid and continuing obligation, (2) determine that the amount which it is pursuing is the correct amount of the debt, and (3) satisfy itself that the debtor is the correct party responsible for payment of the debt.

The Federal Trade Commission has stated that 15 U.S.C. 1692g(b) is ". . . intended to assist the consumer when a debt collector inadvertently contacts the wrong consumer at the start of his collection efforts."[89] The Courts have adopted a similar interpretation, stating:

> "[V]erification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt. . . [V]erification is only intended to eliminate the . . . problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer already paid."[90]

(2) You Are Only Required to Stop, You Are Not Required to Take a "Positive Action"

A request for verification of a debt only requires that the debt collector stop collection efforts which are within its control, not that it make every effort to undo actions which were previously undertaken. Consequently, a debt collector is not required to release a lien that was previously initiated or dismiss a case which had already been filed. While staying or abating such proceedings is certainly the prudent approach, there is no requirement that they be undone.[91]

That having been said, ***do not confuse*** the requirements regarding a verification request with those related to an automatic stay in bankruptcy. Within the bankruptcy context, a bankruptcy court may expect you ***to take every action necessary*** to cease collection activities.

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contradict the consumer's rights under the FDCPA, it merely suggested the consumer contact the debt collector as soon as possible).

[88] *See* Taylor v. Cavalry Inv., L.L.C., 365 F.3d 572, 575 (7th Cir. 2004) (The *Taylor* Court reasoned that the use of the statement "Act now to satisfy this debt" in a validation notice is merely puffing, or language designed to create a mood rather than to convey concrete information. The statement does not overshadow the validation notice as even the "dimmest" consumer would know the debt collector would like to have the consumer pay the debt immediately in order to spare further collection expenses).

[89] FTC Statements of General Policy or Interpretations of Staff Commentary on the FDCPA, 53 Fed. Reg. 50097 (Dec. 13, 1988).

[90] Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999), cert. denied, 528 U.S. 891 (1999). *See also* Alexander v. US. Bank, NA, No. 3:07-CV-1239-L, 2008 WL 3152989, at *4 (N.D. Tex. July 30, 2008) (holding "§ 809 does not require the collector to provide the consumer with the original signed note which created the underlying debt").

[91] *See* Alexander, 2008 WL 3152989, at *4.

Also, please note that Sec. 392.202 of the Texas Finance Code contains certain requirements regarding the notification of credit reporting agencies and responses back to the consumer. As discussed *infra*, these requirements largely overlap with the responsibilities imposed upon credit reporters under the Fair Credit Reporting Act and may well be preempted by that statute. The most cautious approach would be to meet the response requirements of the Texas statute.

2. The First and All Subsequent Communications

a. Debt Collector Disclosure

All communications with the consumer, including your initial communication, are required to disclose to the consumer that the communication is from a debt collector.[92] Mere use of the word "collection" or the phrase "collection agency" may not be sufficient to reveal to the least sophisticated consumer that the communication is, in fact, from a debt collector. Although the FTC has acknowledged that literal compliance with the requirements of section 807 (11) would require a debt collector to state "This communication is from a debt collector" in all communications with a consumer, courts have indicated that a collection notice must simply convey the intended message, but are not necessarily required to follow the precise language of section 807(11).

b. Third-Party Communication

(1) Third Party Communications are Restricted

When communicating with consumers it is important to avoid prohibited communication with third parties. Specifically, section 805(b) states:

> "Except as provided in §804 of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post-judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."[93]

(2) Who IS NOT a Third Party

(3) Messages, the Disclosure Trap, and *Foti* and *Zortman*

Voice messages, especially on semi-public phones such as home-based answering machines, are problematic for debt collectors. While historically, such messages had contained innocuous language such as "this call is for [Consumer's Name]. Please call [Collector Name] at [Phone Number] regarding an important matter," *Foti v. NCO Financial Systems, Inc.*[94] changed all of that. In *Foti*, the United States District Court held that if a debt collector leaves a message on a debtor's answering machine that merely invites a return phone call, the message amounts to a "communication" within the meaning of the FDCPA. As such, the court said the message must state it is from a "debt collector" in order to comply with section 1692e(11) of the Act. The debt

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[92] *See* 15 U.S.C. § 1692e (11).
[93] *Id.* at § 805(b).
[94] 424 F. Supp. 2d 643 (S.D.N.Y. 2006).

collector argued that since the FDCPA was designed to protect a debtor's privacy, the provisions of section 1692e(11) could not be met, given that parties other than the debtor (such as a roommate, parent or guest) might retrieve or hear a collector's voice mail message and know that the call was from a "debt collector."

This, the collector argued, necessarily puts the collector at a Hobson's choice; risk violating the prohibition on third party disclosures, or comply with the act. The court disagreed, holding that a third choice existed; not to leave a message at all. However, if the debt collector makes a choice to leave a message, they must either (a) comply with section 1692e (11) and risk third party disclosure under section 1692c, or (b) violate the Act. This has become the prevailing view.[95]

Initially, the collection industry responded to the *Foti* line of cases by recommending that any message left on an answering machine begin with a statement that the message (1) is intended only for the consumer: (2) should not be played in front of others; and (3) provides a pause before providing the required FDCPA disclosures. Unfortunately, even this message may not be sufficient to withstand an alleged third-party disclosure. In *Leahey v. Franklin Collection Service, Inc.*,[96] the court declined to grant a 12b (6) motion regarding a Foti-compliant message. As noted by many collection attorneys, decisions like *Foti* run contrary to the purposes of the FDCPA by depriving debt collectors of legitimate pre-litigation resolution devices and ensuring a greater number of collection law suit.

Recently, a separate line of cases have developed wherein the message is "We have an important message from [Firm Name]. This is a call from a debt collector. Please call [Firm Phone Number."[97] This message has been held by multiple courts to meet both the disclosure requirements of the FDCPA, as well as its non-disclosure requirements. Note, at no point is the consumer's name utilized, thereby avoiding a third-party disclosure, yet the caller has properly identified themselves and their role as a debt collector.

(4) Obtaining Location Information

The FDCPA does allow a debt collector to contact and communicate with a third party if the communication is not regarding a debt. Therefore, it is permissible for debt collectors to communicate with third parties regarding the location of a consumer. In so doing, the collector must:

- Identify themselves,
- state that they are confirming or correcting location information concerning the consumer, and,
- only identify their employer if expressly requested to do so, and
- only contact the third party once, unless
  - otherwise requested to do so, or
  - the collector reasonably believes the person has additional information.[98]

3. Do Not Harass the Debtor

a. It's Not Professional

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[95] *See, e.g.*, Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350, 1354 (11th Cir. 2009) (explaining it is not reasonable for a debt collector to fail to comply with § 807(11) when leaving messages on a consumer's answering machine in order to avoid the possibility that some messages might lead to a violation of § 805 (b)).

[96] Leahey v. Franklin Collection Serv., Inc., 756 F. Supp. 2d 1322, 1328-29 (N.D. Ala. Feb. 4, 2010).

[97] *See* Zortman v. J.C. Christensen & Associates, Inc., 870 F. Supp. 2d 694, 696 (D. Minn. 2012).

[98] *See, e.g.*, Evankavitch v. Green Tree Servicing, L.L.C., 793 F.3d 355, 357-60 (3d Cir. 2015).

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."[99]

In civil litigation, the recourse most requested from the court is the payment of money. Collection attorneys are no different than other civil litigators; they simply function in a high volume, fast-paced arena. There is no reason for them not to behave with the dignity and integrity which accompanies the profession.

b. It's Not Legal

15 U.S.C. §1692d sets forth six classes of action which, by definition, are harassment. Many of these are obvious and the list is not intended to be exhaustive. The following is a short description for reference purposes only:

- Threats to harm the person, property or reputation of the debtor
  However, the suggestion of litigation is not such a threat. In *Harvey v. Great Seneca Fin. Corp.*,[100] found that the filing of a collection lawsuit without the immediate means of proving the debt does not have the natural consequence of harassing, abusing or oppressing a consumer.
- The use of obscene/profane language[101]
- The publication of the debtor's identity (except with consumer reporting agencies)
- Calling the debtor repeatedly or continuously *with the intent* to annoy, abuse or harass
  Courts have repeatedly held that a debt collector is entitled to attempt to contact the consumer to collect a debt. Therefore, the issue does not, per se, turn on the number or frequency of the calls; but rather, the *intent* of the deb collector. That having been said, if the frequency of the phone calls *necessitates* the inference of an improper intent then the debt collector may be held liable.
- Calling the debtor without disclosing the caller's identity.[102]

c. It's Not Effective

Finally, harassing the debtor is not an effective collection technique. "Old school" collections often focused on verbal intimidation as a method of driving recoveries. More recently, industry studies have shown that investigation of the consumer's circumstances and the events that lead to the delinquency, the amount of disposable income the consumer has, and a reasonable expectation of repayment is a far more effective means to recovery. Put simply, treat them with compassion, let them participate in establishing the repayment plan and don't try to take their

[99] Texas Disciplinary Rules of Prof'l Conduct, Preamble, Paragraph 1.
[100] 453 F.3d 324 (6th Cir. 2006).
[101] *See* Guajardo v. GC Servs., L.P,, No. H-08-119, 2012 WL 5419505, at *5 (5th Cir. Nov. 7, 2012) (holding that a collector's remarks demanding payment within 24 hours, calling the consumer a liar, and criticizing the consumer by stating, "I can tell the kind of life you live by the fact that you don't pay your bills on time," did not rise to the level of abuse or harassment as a matter of law).
[102] *Note*: Baker v. Allstate Fin. Services, Inc., 554 F. Supp. 2d 945, 950-51 (D. Minn. 2008) (finding that §806(6) applies to voicemails left by collector; however, in a slightly more relaxed perspective); Youngblood v. GC Services Ltd. P'ship, 186 F. Supp. 2d. 695, 700 (W.D. Tex. 2002) (holding that debt collectors may use aliases, rather than their actual names when collecting a debt. The court noted the aliases were assigned to particular employees and have been registered with the appropriate state agency).

last dime. An attorney's net effectiveness will be greatly diminished it he or she resorts to harassment.

4. Avoid Deceptive or Misleading Statements

According to the FDCPA, 15 U.S.C. §1692e, there are at least sixteen ways to mislead a debtor. Many of these areas are the purview of the incompetent and the disreputable, and are behaviors that almost anyone would recognize as improper. However, §1692e(10) is a different beast altogether, for it identifies the following as actionable under the FDCPA:

> "The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[103]

a. What Types of Misstatements Are There?

- Labeling or Descriptive Errors in Your Collection Products - These are generally no big deal and make up a large majority of the "technical" violations which are commonly seen in the collection industry.
- Inconsistencies or Conflicts Between Your Collection Products - These can be trouble because they mean that at least one of your collection products sought to collect an improper amount and suggests a possible process breakdown with potential wide-ranging impacts.
- False Claims in Your Collection Products - You should expect a maximum judgment against you and/or your client . . . and you should call your insurance carrier.
- Sins of Omission (when required) - These are *per se* violations of the FDCPA and you should try to minimize your damages.
- Misrepresentations - These are easier to make than you would expect (see below).

b. Misrepresentations are Particularly Problematic

(1) Misrepresentations in the Collection Process

Misrepresentation in the collection process often takes the form of suggesting that an attorney has become involved in the collection effort when, in fact, such is not the case. Often referred to as "flat rating," the selling of one's letterhead is both an ethical violation and actionable conduct under the FDCPA. In *Taylor v. Perrin, Landry, DeLaunay & Durand*,[104] the court held that the law firm violated the FDCPA by designing and furnishing a form letter designed to create the belief that persons other than the creditor, namely an attorney and law firm, were involved in the collection of a debt when in fact this was not the case. In determining the firm's involvement, the court observed that the firm never billed the creditors or received any income from the demand letter, the firm was not involved in selecting the accounts to receive the letters, and the firm kept no records indicating to whom the letters were sent.[105]

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[103] 15 U.S.C. § 1692e (10).
[104] 103 F.3d 1232 (5th Cir. 1997).
[105] *See also* U.S. v. Cent Adjustment Bureau, Inc., 667 F. Supp. 370, 380 (N.D. Tex. 1986), aff'd & modified, 823 F.2D 880 (5th Cir. 1987) (holding that it is unethical and a violation of the FDCPA to permit a collection agency to prepare and mail collection letters using attorney's letterhead or to send collection letters which have been prepared and sent to an attorney's office by the collection agency).

Another misrepresentation is the inclusion of an attorney or collection fee in a demanded account balance when there is no basis in law or contract to request such a fee.[106] This often occurs within the context of service-related debt where no formal agreement exists between the parties. Additionally, referring to a creditor as the "plaintiff" or the consumer as the "defendant" prior to the initiation of legal process has been held to be a misrepresentation.[107]

(2) Misrepresentations in the Settlement Process

While not as serious as the selling of an attorney's letterhead, it can be equally problematic to make a misrepresentation when trying to induce settlement. These misrepresentations are oftentimes fairly innocuous. In *DeKoven v. Plaza Associates.*,[108] for example, the court held that when a settlement offer letter is not intended to be a final offer, a settlement letter is misleading if the language is presented in such a way that the offer to settle appears to be a final offer). Similarly, in *Goswami v. American Collections Enter., Inc.*,[109] the court held that a debt collector made a false representation and used deceptive means to collect the debt where the collection letter offered the consumer a 30 percent discount on the debt but only if she paid within 30 days when the creditor had, in fact, authorized the collection agency to offer up to a 50 percent discount with no specific time limits. In *McMahon v. LVNV Funding, LLC*,[110] the court held the words like "settle" in a letter seeking payment on an out of statute debt are misrepresentations. These are prime examples of behaviors which have been construed by the courts as misleading because they were technically false.

Does this mean that the collector has to negotiate with all of their cards showing? No. But it does mean that the collector must be careful about how they represent their settlement authority to the consumer. As reflected in *Kalinina v. Midland Credit Management., Inc.*,[111] the court found that the debt collector did not make a false representation by setting forth a settlement offer containing an expiration date. Here, the letters did not indicate no other offers would be made and the expiration date was simply a term of the specific offer. As such the representation was not technically false, even though it may have left an impression which was incorrect.

How are Misstatements Evaluated?

The 7th Circuit summarizes the issue of deceptive or misleading statements as essentially a three- category test, the question being, into which category does the statement at issue belong?[112]

The **"Never-in-a-Million Years"** Test - The representation is neither false, deceptive nor misleading on its face – in which case, the debt collector wins.

The **"It Depends"** Test - The representation might be false, deceptive or misleading – in which case the finder of fact decides (will probably require proper survey evidence).

The **"Potter Stewart"** or the **"Duh"** Test - The representation is false, deceptive or misleading on its face – in which case, the consumer wins.

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[106] *See* Dimatteo v. Sweeney, Gallo, Reich & Bolz, L.L.P., 619 Fed. Appx. 7, 11 (2d Cir. 2015) (explaining an FDCPA violation for seeking attorney fees not authorized by state law).
[107] *See* Crossley v. Lieberman, 868 F.2d 566, 571 (3d Cir. 1989).
[108] 599 F.3d 578 (7th Cir. 2010).
[109] 377 F.3d 488 (5th Cir. 2004).
[110] 744 F.3d 1010 (7th Cir. 2014).
[111] 197 Fed. Appx. 573 (9th Cir. 2006).
[112] *See* Ruth v. Triumph Partnerships, 577 F.3d 790, 800-01 (7th Cir. 2009).

Cases involving the Never-in-a-Million Years Test and the Potter Stewart Test are subject to dispositive motions as to the issue of liability. That having been said, courts are more likely to opt for the It Depends route. For example, in *Richardson v. LVNV Funding, LLC*,[113] the court held that LVNV's statement that it *would not* file suit on a time- barred debt might be misleading, because LVNV *could not* file suit on a time-barred debt. This is the Least Sophisticated Consumer construct in action.

5. Respect a Request that you Cease and Desist Communications?

Section 1692c of the FDCPA provides:

> "If a consumer notifies a debt collector ***in writing*** that the consumer refuses to pay a debt or that the consumer wishes the debt collector to ***cease further communication with the consumer***, the debt collector shall not communicate further with the consumer with respect to such debt, ***except***—"[114]

The key phrases are highlighted. For a Cease and Desist (C&D), to be valid, it must (1) be in writing and (2) pertain to all communications. A request, even if written, which states that the debt collector is only to contact a particular number is not a C&D within the meaning of the statute. Furthermore, even if a valid C&D is received, it can be waived if the consumer subsequently requests that they be contacted.[115]

a. What You Must Not Do

Setting aside the "except" portion of the statement for a moment, if a C&D is received, any attempts to contact the consumer by phone or in person must cease. In addition, certain types of mail must cease as well – however, see the exceptions below.

b. What You Can Do

Section 1692c(c) of the FDCPA contains several exceptions allowing a debt collector to contact a consumer after receipt of a C&D.[116] The statute allows a debt collector to (1) advise the consumer that the collector's efforts are being terminated; (2) notify the consumer that the collector or creditor may invoke specified remedies which are ordinarily invoked by the collector or creditor; or (3) where applicable, to notify the consumer that the collector or creditor intends to invoke a specified remedy.

In *Lewis v. ACB Business Services, Inc.*,[117] the Sixth Circuit dealt with the issue of whether an offer of settlement following a C&D violated the provisions of § 1692c. In *Lewis* the debt collector sent a settlement letter presenting several payment arrangements as a means of settling the debt and asked the debtor to contact it with any questions regarding payment plans.[118] The court held that even though sent after the consumer's demand to desist, the communication was permissible under §1692c(c) "because it is a notice of specified potential remedies ordinarily

[113] No. 16 C 9600 (N.D. Ill. Oct. 31, 2017).
[114] 15 U.S.C. § 1692c
[115] Clark v. Capital Credit & Collection Serv, Inc., 460 F.3d 1162, 1170-71 (9th Cir. 2006).
[116] *See* 15 U.S.C. § 1692c(c)(1)-(3).
[117] 135 F.3d 389, 398-99 (6th Cir. 1998).
[118] *Id.* at 396.

invoked by ACB."[119] The court specifically declined to characterize the letter as a demand for payment couched as a remedy, believing that such an interpretation would be contrary to the purpose of the Act. This is because the FDCPA was intended to eliminate abusive collection, and any other reading of the statute would prohibit a collector from sending non-coercive settlement offers as a remedy, which is "plainly at variance with the policy of the legislation as a whole .... To hold that a debt collector cannot offer payment options as part of an effort to resolve an outstanding debt, possibly without litigation, would force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance efforts to collect the debt —something that is clearly at odds with the language and purpose of the FDCPA."[120]

The Fifth Circuit Court of Appeals has agreed with *Lewis* in *Goswami v. American Collections Enterprise, Inc.*[121] In that case, the Court recognized that courts favor such settlement offers because they "result in the resolution of the debt without resorting to litigation, saving all parties involved the needless cost and delay of litigation."[122] In a similar vein, in *Jenkins v. Heintz*,[123] the court noted that letters seeking "amicable practical resolution" of a matter have not been found to violate the FDCPA, even when containing "much harsher language" than preferred and even when the letter was sent after a lawsuit was filed.

6. Ensure All Calling Efforts are Proper

Causing a telephone to ring or engaging a person in conversation "repeatedly or continuously" is one of the harassing actions specifically enumerated in § 806. That having been said, it can be difficult to determine what exactly constitutes a violation of the Act. The Federal Trade Commission (FTC) Staff has indicated that a consumer is called "continuously" if the consumer receives a series of collection calls, one right after another. Further, the Commission staff defined "repeatedly" as "calling with excessive frequency under the circumstances."[124]

In attempting to determine issues of telephone harassment, courts will generally look at the frequency of the calls, as well as the pattern in which the calls are made. As would be expected, courts addressing alleged § 806 (5) violations are divided, with cases turning on the particular facts and circumstances of each case. However, the key issue for these courts is the question of the caller's intent. Were the calls made with the "*intent to annoy, abuse, or harass any person*?"

To determine the issue of intent, courts will look to issues such as

- Did the collector call immediately after the consumer hung up?
- Did the collector call multiple times in a day?
- Did the collector call the consumer's place of employment, family or friends?
- Did the collector call at odd hours?
- Did the collector call after the consumer requested the collector cease calling?

It is a general practice among collection agencies and collection attorneys to:

- Only call between the hours of 8:00 a.m. and 9:00 p.m. local time,
- To not call more than 2 to 3 times per day,

[119] *Id.* at 398.
[120] *Id.* at 399.
[121] 377 F.3d 488 (5th Cir. 2004).
[122] *Id.* at 495-96.
[123] 124 F.3d 824, 833 (7th Cir. 1997).
[124] FTC Statements of General Policy or Interpretation Staff Commentary on the FDCPA, 53 Fed. Reg. 50097, 50105 (Dec. 13, 1988).

- If multiple calls per day, to not call in close succession, and
- To not call every day.

Whether a court will find that these guidelines are sufficient will, however, be a case-by-case determination.[125]

7. Call Volume Cases and Third-Parties

Call volume issues can arise in the context of location calls as well. The FDCPA provides that a debt collector "not communicate with any such person more than once . . . unless the debt collector reasonably believes that the earlier response of such person is . . . incomplete and that such person now has . . . complete location information."[126] However, as noted in *Worsham v. Accounts Receivable Mgmt.*,[127] although third parties may understandably find debt collection calls bothersome or inconvenient, Congress has allowed debt collectors to call third parties on multiple occasions in certain instances; observing that the use of the word "reasonably" indicates that this is an objective standard.

E. The Bona Fide Error Defense – Not So Much

15 U.S.C. 1692k(c) provides:

> "A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

It sounds good in theory, but ultimately it may not afford as much protection as one might think, due to the complications which invoking the Bona Fide Error defense causes and the uncertainty of prevailing at trial.

1. The Elements of the Defense

The key components of the Bona Fide Error Defense are:

a. The Violation was not Intentional

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[125] *E.g.,* Jones v. Rash Curtis & Assoc., No. C 10-00225 JSW, 2011 WL 2050195 (N.D. Cal. Jan. 3, 2011) (explaining that placing 179 calls in one year did not constitute harassment under the FDCPA); Katz v. Capital One, No. 1:09CV1059(LMB/TRJ), 2010 WL 1039850 (E.D. Va. Mar. 18, 2010) (stating that placing 15-17 calls to a consumer after a consumer's attorney sent a dispute letter to the collector, which was never received, provided no evidence the calls were made with the intent to annoy, abuse and harass the consumer in violation of the FDCPA); Waite v. Fin. Recovery Services, Inc., No. 8:09-cv-02336-T-33AEP, 2010 WL 5209350 (M.D. Fla. Dec. 16, 2010) (stating it was not a violation of the FDCPA for a collector to place 132 calls to a consumer over a nine-month period when no more than four calls are made in a single day); Jiminez v. Accounts Receivable Mgmt., Inc., No. CV 09-9070-GW(AJWx), 2010 WL 5829206 (C.D. Cal. Nov. 15, 2010) (explaining that sixty-nine calls over 115 days, where on one occasion three calls were placed in a single day, was not harassment when all the collector's attempts to reach the consumer were unsuccessful); Beeders v. Gulf Coast Collection Bureau, Inc., No. 8:09-cv-00458-EAK-AEP, 2010 WL 2696404 (M.D. Fla. July 6, 2010) (explaining that placing 40 calls and leaving 15 messages over five months did not constitute harassment under the FDCPA); Saltzman v. I.C. Sys., Inc. No. 09-10096, 2009 WL 3190359 (E.D. Mich. Sept. 30, 2009) (stating it was not a violation of the FDCPA to place 20-50 unsuccessful calls and 2-10 successful calls to a consumer over the period of one month).

[126] Evankavitch v. Green Tree Servicing, LLC, 793 F.3d 355, 357-58 (3d Cir. 2015).

[127] 2012 U.S. App. LEXIS 23491 (4th Cir. 2012).

The burden is on the debt collector to show not only error, but lack of intent to commit the error. The Ninth Circuit has held that because the FDCPA is a strict liability statute, it does not require evidence to establish knowledge or intent on behalf of the collector. Thus, a debt collector may be held liable for unintentional violations of the FDCPA when the collector fails to raise the bona fide error defense or to contest the fact that its actions constituted an unintentional violation.[128]

b. The violation resulted from a bona fide error

Courts have typically viewed bona fide errors as being clerical in nature.[129] However, with the advent of automated systems, process errors are becoming a prevalent type of mistake which debt collectors seek to claim as bona fide error. Whether such process errors are defensible as a bona fide error largely turns on the issue of a firm's internal procedures. These, in turn, may be a function of both training and automation.

c. The violator maintained procedures reasonably adapted to avoid any such error

Not only must the violation be a bona fide error, but the violator must have in place procedures designed to prevent such an error. In *Liu*, a debt collector who failed to place ten accounts on hold so collection efforts would not proceed was not entitled to the bona fide error defense because adequate procedures were not in place to prevent the error and the action did not fall within the parameter of a "clerical error."[130]

Courts differ over whether a debt collector can rely upon its client's information in performing its duties. In *Johnson v. Professional Collection Consultants*,[131] the debt collectors' bona fide error defense failed because the debt collector provided no evidence of procedures designed to verify the accuracy of an incorrect address received from a creditor prior to mailing letters to the consumer. However, *Johnson* is certainly not the standard. The court in *Moya v. Hocking*,[132] dismissed a statute of limitations case on the grounds the defendants "had reasonable procedures in place to prevent the collection of accounts that were outside the statute of limitations" and that the defendants *were entitled to rely on information they received from the credit grantors* as being accurate without having to conduct an independent examination.

Similarly, in *Hyman v. Tate*,[133] the court concluded that the defendant had reasonable procedures in place to avoid sending a collection notice to a consumer who had filed for bankruptcy.[134] The defendant's understanding with its creditor client was that the creditor would not refer accounts for collection if those accounts were in bankruptcy. The court held that the defendant reasonably relied on the representation by its creditor-client, that they immediately ceased all collection efforts upon learning of a bankruptcy filing and that the defendant presented evidence that only .01% of all accounts referred for collection were found to have been in bankruptcy.[135] The Court noted that the FDCPA does not require collectors to independently verify the validity of the debt to qualify for the bona fide error defense.[136] The court went on to note that although the

[128] *See* Beuter v. Canyon State Prof'l Serv, Inc., 261 Fed. Appx. 14, 15 (9th Cir. 2007).
[129] *See* Liu v. Arrow Fin. Servs., LLC, No. CIV.A. H-08-3116, 2010 WL 1994190 (S.D. Tex. May 17, 2010).
[130] *Id.*
[131] No. 09CV159G-WQH-BLM, 2010 WL 2196571 (S.D. Cal. May 28, 2010).
[132] 10 F. Supp. 2d 847 (W.D. Mich. 1998).
[133] 362 F.3d 965 (7th Cir. 2004).
[134] *Id.* at 968.
[135] *Id.*
[136] *Id.*

defendant could have done more to assure that bankruptcy proceedings had not been initiated, the FDCPA only requires collectors to adopt reasonable procedures.[137]

Finally, in *Smith v. Transworld Sys. Inc.*,[138] a misstatement regarding the amount of the debt by a collection agency due to erroneous information received from the creditors was not a violation of § 807(2)(A) because the debt collector was able to demonstrate procedures reasonably adapted to prevent such errors.[139]

2. The Bona Error Defense Only Applies to Issues of Fact, Not Issues of Law

In a 5-4 decision, the United States Supreme Court held that the bona fide error defense does not apply to mistakes of law.[140] Writing for the majority, Justice Sotomayor stated: "We are unpersuaded by what seems an implicit premise of [Appellant's] arguments: that the bona fide error defense is a debt collector's sole recourse to avoid potential liability."[141] However, the Justices provided no other defense to a mistake of law. Put simply, a debt collector can obtain all the legal opinions they want, from the best of the best – but, they will only be helpful in minimizing statutory damages.[142]

3. The Consequences of Invoking a Bona Fide Error Defense Could Be Significant

The practical implication of asserting a bona fide error defense is that a debt collector's "procedures reasonably adapted to avoid any such error" are now open to investigation by opposing counsel. As one would expect, the scope of discovery becomes quite broad, leading to discovery disputes and increased litigation activity on the part of both the debt collector and opposing counsel.

4. The Practical Result of Standing Behind a Bona Fide Error Defense

The Bona Fide Error Defense is a defense for when there are real and potentially significant actual damages. Absent the threat of significant liability, the Bona Fide Error Defense can result in a nominal alleged violation moving forward with significant legal effort by both sides: effort by the collector because they feel they did nothing wrong – it was an honest mistake – and effort by the consumer attorney – because they are looking to land a whale.

F. Five Things You Must Get Right

1. Handling a Request for Verification

a. Determine the Validity

- The request must be in writing. No writing, no validation requirement.
- This request must be within thirty days of the debtor's receipt of the G-Notice. Do not become enamored with your collection time line. Any written dispute within 45 days of a G-Notice having been mailed should probably be considered timely (even if technically it is not).

[137] *Id.*
[138] 953 F.2d 1025 (6th Cir. 1992).
[139] *Id.* at 1032.
[140] See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605 (2010).
[141] *Id.* at 599.
[142] *Id.* at 584.

- Treat any written communication, which raises an issue about the amount of the debt or the liability of the debtor as a request for verification of the debt. The debtor does not need to use magic language, they simply need to contest the claim as it was stated in the G-Notice. This includes the debtor's assertion that he did not have an account "with that company."

b. Understand What You are Dealing With

- A request for verification of the debt is often the printout off an internet web page which makes numerous, often onerous demands. Unless the request is coming from a true consumer attorney, it is fairly innocuous. That having been said, you still must honor the verification request.

c. Do What is Required

- Cease Communications.
- Cease All Other Collection Activity.
- Obtain Verification of the debt from your client.
- Mail Verification of the debt to the debtor.
- You must terminate all collection efforts until your client has verified the debt.
- Verification of a debt involves nothing more than the debt collector confirming in writing that the debt being demanded is what the creditor is claiming is owed.

d. Don't Do What is Not Required – Unless You Just Want To

- The debt collector is not required to keep or provide detailed evidence of the alleged debt.
- The debt collector is not required to meet all of the challenges set forth by the debtor.
- Technically, a verification is not required *if* you simply close the file and cease all collection activity.

2. Handling a Written Dispute

a. What is Required

Section 809 (a) (3) provides a significant safe-harbor in that it allows the debt collector to presume the validity of the debt, in the absence of a dispute. However, when a written dispute is made by the debtor, it invokes the following duties:

- the debt collector must investigate the debt to attempt to verify the validity of the debt;
- the debt collector must note the debt is disputed and report this to any person to whom credit information was previously provided; and
- the debt collector should notify its client of the dispute so that the client can conform its conduct to the requirements of the Fair Credit Reporting Act.

3. Handling a Verbal Dispute

a. What is Not Required

Verbal disputes require only that the debt collectors satisfy themselves that they are pursuing a proper debt against the proper debtor. There is no requirement that anything be forwarded to the consumer or that the consumer be notified of the results of this inquiry.

b. Meet Your Client's Expectations

In the cautionary world in which debt collection is now conducted, the collection attorney must not only comply with the law, but they must also meet their client's expectations as well. A client that maintains an internal policy of handling verbal disputes as if they were written disputes may find themselves in violation of their own internal policies if the collection attorney does not timely and properly advise the client of a verbal dispute. Consumer collections are not only about following the law; it is about living within the regulatory and service paradigm that the industry has become.

4. Handling a Cease & Desist

a. Determining the Validity of a Cease & Desist
- The request must be in writing. If there is no writing, there is not an enforceable C&D.
- The request must pertain to all communications. You cannot have a partial C&D.

b. What is Required
- You must cease all phone calls.
- You must stop sending collection mail (however, see below).

c. What is Not Required
- You can still send mail to the debtor:
  - to advise the consumer that the debt collector's further efforts are being terminated;
  - to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
  - where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[143]

- Finally, you can still file a lawsuit to enforce the obligation

5. Notice of Attorney Representation

a. Determine the Scope of Representation
- Does the attorney actually represent the consumer on the debt?
- What debt does the attorneys representation cover?[144]

[A word of caution: While the law is fairly clear regarding debt-by-debt representation, a simple phone call may avoid $10,000 in FDCPA defense cost.]

b. What is Required
- You must cease all communication with the consumer
- You are not relieved of any of your obligations under the FDCPA
- Notices, verifications, etc., must be sent to the attorney rather than the consumer

c. What is the Legal Standard
- The legal standard for attorney communications is not the "Least Sophisticated Consumer Attorney."

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[143] *See* 15 U.S.C. §1692c(c).
[144] *See* Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991) (A debt collector who knows a consumer is represented by counsel on one debt is not precluded from contacting the consumer on other debts until the collector knows the consumer is represented by counsel with respect to the other debts).

d. Consider Challenging Their Authority
- Is the Attorney licensed to practice in Texas?
- Is the Attorney actually representing the Consumer?
- Send written discovery.

6. A Bankruptcy Notice
- Verify Bankruptcy Case Information.
- Shut Down Collection Efforts Immediately.
- Pull Back ALL Outstanding Collection Activity (i.e., in process suit filings, outstanding service of process efforts, garnishments or executions, etc.) [Note: Bankruptcy judges are notoriously protective of the debtor and will expect you to utilize reasonable diligence to avoid any impact to the consumer.]
- File Proof of Claim.

G. Practical Advice

1. Read Everything with a Novice Eye

Every printed product generated by a debt collector must be read as if it is about to become "Plaintiff's Exhibit 1." Since the least sophisticated debtor is only a legal construct, "they" are essentially re-born in every proceeding. Therefore, make sure everything generated by your firm is capable of withstanding the least of these constructs. You are looking for the "not-in-a-million years" version of any document.

2. Prioritize Critical Communications

Most correspondence under the FDCPA is effective upon receipt. These include request for verifications of debt, notices of attorney representation, cease and desist, etc. Develop a mechanism to triage all incoming mail/faxes so as to quickly locate and process those items.

3. Have a Mechanism for Stopping Your Processes

Critical communications generally require that you cease all collection efforts and/or communications immediately. Develop operational mechanisms to stop any calling or mailing activity upon receipt of a critical communication device and train your personnel regarding the importance of following these procedures.

4. Understand That There is Only So Much That Can Be Done

FDCPA lawsuits are a matter of probabilities. The better you are at what you do, the less likely it is that you are going to be presented with a claim. That having been said, every call, every letter, every communication which originates from your office has the potential of creating an FDCPA claim. All you can do is have good systems in place, train your staff well, and remain focused on your responsibilities. Even with this, if you are active enough in the debt collection arena, you will eventually be sued. Accept this as a simple fact of the debt collection industry and notify your insurance carrier.

H. In Spite of Your Best Efforts, Something Goes Wrong – Now What?

So, you worked hard, looked at your legal product, maintained good processes and procedures, and trained your staff well – and yet, you are facing a demand letter or lawsuit. What now? The following is purely opinion; so do with it as you would like.

1. First, a Quick Reminder About Settlement Offers

a. Offer of Settlement - Texas

Under Texas Rules of Civil Procedure Rule 167, a party against whom a claim is asserted can make an offer of settlement pursuant to the terms of the rule and the requirements of Chapter 42 of the Texas Civil Practice and Remedies Code. The Rule sets forth the methods of invoking the Rule, the necessary components of an offer and the effect of such an offer.[145]

b. Offer of Judgment - Federal

Under Federal Rules of Civil Procedure Rule 68, a party against whom a claim is asserted can make an offer of judgment. Unlike a settlement offer, an Offer of Judgment, if accepted, results in an actual judgment against the offering party. Because an Offer of Judgment has consequences to the offering party, which may go beyond the present litigation, a simple settlement offer may be desirable unless it appears that an Offer of Judgment is required to drive an opposing counsel to the table.

Given that most FDCPA cases revolve around attorney's fees, it can hardly be surprising that the seminal point of disagreement in any settlement discussion is the amount of those fees. The following language is a useful construct from which to draft your own settlement offer:

> In order to settle any and all claims which Plaintiff has against the Defendant at this time, whether known or unknown, Defendant offers to pay to Plaintiff (a) the sum of _________, (b) Plaintiff's taxable costs, and (c) Plaintiff's reasonable attorney's fees accrued as of the date of this offer; such cost and fees to be determined by agreement of the parties and in the event the parties cannot so agree, by the Court upon motion by Plaintiff and response by the Defendant.

The key components are:

- The settlement is only directed toward the Plaintiff's case, not the underlying claim;
- The dispute over attorney's fees is removed as a point of contention;
- The offer must include taxable court costs;
- The offer cuts off attorney's fees at the point the offer is made; and
- Courts, especially federal courts, are fairly harsh on attorney's fees in these types of cases.

2. The Consumer Is Not Entitled to as Much as Counsel Thinks - Mooting the Claim

Recall that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake[.]"[146] A recent Supreme Court decision has caused some confusion around the issue of mooting a claim by making an Offer of Judgment. In *Campbell-Ewald Co. v. Gomez*,[147] the Court held that the unaccepted settlement offer or offer of judgment is a legal nullity that cannot moot a case. However, the Court left

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[145] TEX. R. CIV. P. 167.
[146] Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991).
[147] 136 S. Ct. 663, 577 U.S., 193 L. Ed. 2d 571 (2016).

open the possibility that payment of complete relief may suffice.[148] As such, an offer of judgment combined with the interpleading of those monies to the court may, in fact, moot a case if the offer of judgment is not accepted.[149]

Consumer attorneys tend to be very proud of their claim; so proud that it is not uncommon for them to refuse a settlement offer, which in effect would have rendered their client whole. The problem is that in most cases, the result would not have been as profitable for the consumer attorney as they might have liked. This is a conundrum for the consumer attorney, which should be created as early as possible. The more an attorney works on a case, the more justifiable will be their fee application. Whatever strategy is selected, choose it early, document it well, and don't cut corners with dollars. Your goal is to settle the matter fairly; but failing that, to moot the claim.

3. Whether to Settle Depends on Your Circumstance, and Who is On the Other Side

a. Negotiate Your Way Out of the One-Offs

If you are an occasional collection attorney dealing with a non-money-seeking attorney, then any FDCPA claim is simply a negotiating chip. For all practical purposes, the consumer now has a $1,000 claim, which they may attempt to utilize in order to remove your client's claim. It is only worth $1,000 (assuming no actual damages, because they rarely exist), so do not treat it like it's a major threat. Furthermore, unless you have asserted a bona fide error defense, the bulk of the legal work in the case will revolve around the underlying debt claim; obscuring opposing counsel's ability to delineate his FDCPA related fees.

b. Settle the Mistakes

If you have made a real mistake, settle the claim and settle it quickly. The FDCPA is a strict liability statute. As such, you are going to lose. The goal at this point is to minimize the damage. Consider invoking a rule-based settlement option in order to control the battleground.

c. Fight the Invading Army

If you do collection work as a primary focus of your practice, and if you are dealing with a FDCPA litigation firm, you have a choice to make: fight or pay. This is not to say that you have done anything wrong. Many of the "claims" are manufactured, most of these deal with technical violations at best, and others are truly bona fide errors. The simple truth is that in the short run, it is going to cost more to fight than to pay; however, in the long run, the additional monies may show a return. One thing is for certain, if you stay and fight, you will become rather good at managing FDCPA cases and minimizing FDCPA exposure.

4. Consider Making a Settlement Offer – Better Yet, Throw Money at the Consumer

The statutory damage cap on an FDCPA claim is $1,000; the cap on a TDCA claim is $100 per incident. If an FDCPA violation has occurred, settle early. It can only get worse. An approach, which you may consider, is to simply tendering maximum statutory damages without reservation, save and except that it apply to the alleged violation. This places the opposing counsel in a strange position. The dispute now becomes all about attorney's fees. In light of the fact that the FDCPA provides for the recovery of reasonable attorney's fees "in the case of any successful action

[148] *Id.* at 670.
[149] *Id.* at 665.

to enforce the foregoing liability," it becomes problematic when the "foregoing liability" was satisfied prior to suit.[150] This is an aggressive strategy, but one that may prove to be a successful defensive tactic.

I. A Few Comments About the TDCA[151]

1. Overview

The Texas Debt Collection Act (TDCA) prohibits debt collectors from using wrongful practices in the collection of consumer debts. In many ways the TDCA is the little brother to the FDCPA in that it covers similar territory, pertains to similar prohibited conduct and provides for civil enforcement of its provisions. However, the TDCA, while casting a wider net in terms of its statutory reach, is more limited in terms of the remedies provided.

2. Who Does It Pertain To?

a. Debt Collectors – Creditors

Under the TDCA, the term "debt collectors" *pertains to both creditors and third-party debt collectors*. As such, certain conduct by a creditor, which would not have been actionable under the FDCPA, may be actionable under the TDCA.

b. Attorneys

The TDCA generally looks to the FDCPA for defining third-party debt collectors; however, the Texas statute does have a carve-out to protect many Texas attorneys from falling within the purview of the statute. Attorneys who could be considered a third-party debt collector under the FDCPA are not third-party debt collectors under the TDCA unless such attorney has a non-attorney employee who (1) regularly solicits debts for collection, or (2) regularly makes contact with debtors to collect or adjust debts.[152]

3. Bonding Requirement

Any person who is a third-party debt collector under the TDCA is required to obtain a surety bond in the amount of $10,000 and submit of copy of such bond to the Secretary of State.[153] However, the lack of a bond may not, per se, result in an actionable violation of the statute. In *Elston v. Resolution Services*,[154] the court dismissed a consumer's claim that the third-party debt collector violated the statute when the consumer was unable to prove any resulting injury and the debt collector obtained a bond during the course of the proceedings.[155]

4. Attorney's fees

The attorney fee granting provisions of the Texas Debt Collection Practices Act (TDCA) states:

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[150] Expedited Funds Availability Act, 12 U.S.C. § 4010(A).
[151] TEX. FIN. CODE §392.001 (West 2018).
[152] *Id.* at § 392.001(7) West (2018).
[153] *Id.* at § 392.101 West (2018).
[154] 950 S.W.2d 180, 184 (Tex. App.—Austin 1997, no writ).
[155] *Id.* at 184-185.

"A person who successfully maintains an action under Subsection (a) is entitled to attorney's fees reasonably related to the amount of work performed and costs."[156]

As such, to be entitled to an award of attorney's fees under this act, a person must "successfully [maintain] an action under Subsection (a)" which states:

A person may sue for:

(1) injunctive relief to prevent or restrain a violation of this chapter; and

(2) actual damages sustained as a result of a violation of this chapter.[157]

Therefore, to be entitled to an award of attorney's fees under the TDCA, a claimant must either recover actual damages or obtain injunctive relief as a result of their case. Given that neither of these outcomes are ever substantively pursued, this renders the TDCA largely inconsequential.

5. Credit Reporting Requirements

The TDCA attempts to impose a debt dispute process similar, but not identical to the credit reporting standards promulgated by federal regulations. Two federal courts in Texas have held that the Fair Credit Report Act, 15 USC §1681, *et seq.* ("FCRA") preempts state statutory claims related to information furnishers to credit reporting bureaus.[158]

III. Dodd-Frank Act

A. Context

Both the Dodd-Frank Act and the Gramm-Leach-Bliley Act are directed toward institutional participants in the financial market place and, as such, lack specific civil enforcement provisions, which can be invoked by a consumer. They are addressed here for two reasons: the first being to provide a broader perspective of the consumer collection industry and second, to alert the collection attorney to the issues these acts address. While no specific civil authority exists under these statutes per se, the precluded conduct can easily be characterized as violation of the FDCPA and, thus, give rise to legal exposure.

B. Background

The Dodd-Frank Act (Dodd-Frank),[159] also known as the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, arose in the wake of the financial and credit crisis of 2008. The Act consists of two primary sections: Unfair Acts and Abusive Practices. These are collective referred to as unfair, deceptive, or abusive acts and practices; generally referred to by their acronym "UDAAP." At the core of the Act is the perspective that unfair, deceptive, or abusive acts and practices can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Act, it is unlawful for

[156] TEX. FIN CODE §392.403(b) (West 2018).
[157] *Id.* at §392.403(a) (West 2018).
[158] See Shaunfield v. Experian Info. Solutions, Inc., 991 F. Supp. 2d 786 (N.D. Tex. 2013); Pachecano v. JPMorgan Chase Bank Nat'l Ass'n, No. SA-11-CV00805-DAE, 2013 U.S. Dist. LEXIS 121139 (W.D. Tex. Aug. 26, 2013).
[159] DODD-FRANK ACT, 12 USC § 5301.

any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive, or abusive act or practices.

C. Unfair Acts or Practices

The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when:

- It causes or is likely to cause substantial injury to consumers;
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to competition.[160]

1. The act or practice must cause or be likely to cause substantial injury to consumers

Substantial injury usually involves monetary harm. Monetary harm includes, for example, costs or fees paid by consumers because of an unfair practice. An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury. Actual injury is not required in every case. A significant risk of concrete harm is also sufficient. Trivial or merely speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm also will not ordinarily amount to substantial injury. Nevertheless, in certain circumstances, such as unreasonable debt collection harassment, emotional impacts may amount to or contribute to substantial injury.

2. The Consumers must not be reasonably able to avoid the injury

Consumers cannot reasonably avoid injury if the act or practice interferes with their ability to effectively make decisions or to take action to avoid injury. When material information about a product, such as pricing, is modified or withheld until after the consumer has committed to purchasing the product, the consumer cannot reasonably avoid the injury. A key question is not whether a consumer could have made a better choice, but rather, the question is whether an act or practice hinders a consumer's decision-making. Moreover, consumers cannot avoid injury if they are coerced into purchasing unwanted products or services or if a transaction occurs without their knowledge or consent.

3. The injury must not be outweighed by countervailing benefits to consumers or competition

To be unfair, the act or practice must be injurious in its net effects - that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition. Costs that would be incurred for measures to prevent the injury also are taken into account in determining whether an act or practice is unfair. These costs may include the costs to the institution in taking preventive measures and the costs to society as a whole of any increased burden and similar matters.

4. Examples of Unfair Acts or Practices
   - Refusing to provide full satisfaction on an account after it has been paid in full.
   - Refusing to honor a settlement agreement that has already been put in place.
   - Requiring a consumer to make payments only by cash when other forms of payment are allowed.

[160] *Id.*

Deceptive Acts or Practices

A representation, omission, act or practice is deceptive when:

- The representation, omission, act, or practice misleads or is likely to mislead the consumer;
- The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
- The misleading representation, omission, act, or practice is material.

1. There must be a representation, omission, act, or practice that misleads or is likely to mislead the consumer

A representation may be an express or implied claim or promise, and it may be written or oral. If material information is necessary to prevent a consumer from being misled, it may be deceptive to omit that information. Acts or practices that may be deceptive include: making misleading cost or price claims; offering to provide a product or service that is not in fact available; using bait-and-switch techniques; omitting material limitations or conditions from an offer; or failing to provide the promised services.

2. The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances.

Whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the representation. When representations or marketing practices target a specific audience, such as older Americans, young people, or financially distressed consumers, the communication must be reviewed from the point of view of a reasonable member of that group.

3. The misleading representation, omission, or practice must be material

A representation, omission, act, or practice is material if it is likely to affect a consumer's choice of, or conduct regarding the product or service. Information that is important to consumers is, by definition, material.

4. Examples of Deceptive Acts or Practices
   - Using confusing terms to describe a payment arrangement.
   - Misleading a consumer as to whether a payment arrangement will improve his/her credit score.
   - Entering into a payment arrangement with a consumer when the person knows that the consumer does not understand the arrangement.
   - Telling the consumer that they do not need to appear in court and thereafter allowing a default judgment to be entered against the consumer.
   - Making any untrue statement which the person knowingly uses to attempt to persuade the consumer to make payments and which the consumer may rely upon to his/her detriment.

D. Abusive Acts or Practices

1. Description of Abusive Acts or Practices

Dodd-Frank establishes that an abusive act or practice is one that materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or takes unreasonable advantage of one or more of the following:

- Materially interferes with the ability of a consumer to understand a term or condition of a

consumer financial product or service; or

- Takes unreasonable advantage of: (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (b) the inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or (c) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[161]

2. Examples of Abusive Acts or Practices

Intimidating a consumer by taking advantage of his/her lack of understanding about the legal process to coerce the consumer into making a payment.

- Intimidating a consumer by taking advantage of his/her lack of understanding about the legal process to coerce the consumer into making a payment.
- Calling a consumer after the consumer requests a cease and desist.
- Failing to note a consumer's dispute as to, or allegations of fraud concerning, the consumer's account.
- Treating a consumer disrespectfully or using foul or derogatory language in communications with a consumer.

E. The Consumer Financial Protection Bureau

Dodd-Frank regulates the consumer financial marketplace through the Consumer Financial Protection Bureau (CFPB). The CFPB is a regulatory agency charged with overseeing financial products and services that are offered to consumers. Unlike the Federal Trade Commission, the CFPB has a single director (the FTC has five commissioners), is self-funded by the Federal Reserve (the FTC is funded through congressional appropriations), has civil litigation authority (the FTC must act through the Department of Justice), has broad supervisory authority over all aspects of the financial and consumer debt markets and has rule-making authority.

1. Regulation by Enforcement Action

Although the CFPB has rule-making authority, only recently has it begun to do so with regard to collection activities; opting instead for what has been described as regulation by enforcement action. Relying on its civil litigation and investigative authority, the CFPB has brought enforcement actions against a myriad of banks, debt purchasers and collection law firms; ultimately resulting in a series of consent orders between the Bureau and the various business entities. These consent decrees provide insight into the Bureau's perspective regarding consumer debt, assignability and collections, and likely foretell the impetus of the CFPB's rule-making efforts once that process has begun. Additionally, the CFPB believes that it enjoys a seven-year look-back authority, meaning that these criteria comprise the standards by which any entity is likely to be measured should it become the target of a civil investigative demand (CID).

2. Regulation of Debt Purchasers

In September 2015, the CFPB entered into consent decrees with two of the largest debt-purchasers: PRA Group, including Portfolio Recovery Associates, LLC,[162] 7 and Encore Capital

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[161] *Id.*

[162] In the Matter of Portfolio Recovery Assoc., LLC, 2015 CFPB-0023 (Sept. 9, 2015).

Group, including Midland Funding, LLC.[163] The two consent decrees mirror the Bureau's expectations for debt purchasers.

a. Prohibited Conduct - The following conduct is prohibited:

1. Collecting or attempting to collect time-barred debt through litigation or arbitration, and
2. Collecting or attempting to collect time-barred debt through any means, including but not limited to telephone calls and written communication, without clear and prominent disclosures to the consumer that no litigation will be initiated to collect the debt.

b. Mandated Conduct - PRA and Encore ("Respondents" to Bureau's enforcement actions) must maintain:

1. Comprehensive, written policies and procedures designed to:
   a. prevent violations of consumer financial protection laws;
   b. ensure Respondents conduct due diligence regarding the accuracy of the information it acquires from Creditors;
   c. ensure that law firms engaged by Respondents do not violate any consumer financial protection laws (See 2.5.3 below);
2. An effective training program that relates to consumer protection laws;
3. An enhanced and documented internal risk-focused monitoring process designed to detect and promptly correct compliance weaknesses that impact Consumers;
4. An effective consumer complaint monitoring process; and
5. Effective independent audit coverage of the Compliance Program.

c. Requirements for the Litigation of Assigned Debt Claims

In order to forward a claim to a law firm for collection, a forwarding debt purchaser (Debt Buyer) must meet certain specific requirements. Specifically, the Debt Buyer must possess "Original Account-Level Documentation," a term of art which has been adopted by the CFPB to refer to the minimum level of evidence of a claim. Original Account Level Document ("OALD") means:

- any documentation that a Creditor or that Creditor's agent (such as a servicer) provided to a Consumer about a Debt;
- a complete transactional history of a Debt, created by a Creditor or that Creditor's agent (such as a servicer); or
- a copy of a judgment, awarded to a Creditor.

OALD must reflect, at a minimum, (1) the consumer's name, (2) the last four digits of the account number associated with the debt at the time of charge-off, and (3) the claimed amount, excluding any post charge-off payments.

In addition, the Debt Buyer must provide a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the creditor at the time of charge-off. In conjunction with this listing, or as a method of delivery, the Debt Buyer must provide a "certified or otherwise properly authenticated copy of each bill of sale or other document evidencing the transfer of ownership of the debt" at the time of charge-off to each successive owner, including the current owner. These documents evidencing the transfer of

[163] In the Matter of Encore Capital Group, Inc., 2015 CRPB-0022 (Sept. 9, 2015).

ownership of the Debt must include a specific reference to the particular debt being collected upon; as well as at least one of the following:

- A document signed by the Consumer evidencing the opening of the account made the basis of the Debt; or
- Original Account-Level Documentation reflecting a purchase, payment, or other actual use of the account by the Consumer.

Finally, if the law firm will be suing under a breach of contract theory, the Debt Buyer must also provide the contractual terms and conditions applicable to the debt.

The most common mechanism the Debt Buyer utilizes in addressing these requirements is to ensure that it has the following documents prior to referring and account to legal:

- The charge-off statement
- The last-activity statement (payment or purchase)
- Chain of Title documentation

3. Regulation of Collection Law Firms

In addition to the PRA Group and Encore Capital Group consent decrees, the CFPB has entered into consent decrees with two prominent debt collection law firms, Frederick J. Hanna & Associates, P.C.,[164] Pressler & Pressler, LLP. [165] It should be noted that each of these law firm ardently defended their collection practices and maintained that the requirements set forth in the consent decrees represented their current business practices. Notwithstanding, the consent decrees entered into by Frederick Hanna and Pressler & Pressler provided the clearest available guidance as to the expectations of the CFPB with regard to litigation practices.

a. Collection Activity Prior to Suit

From the CFPB perspective, if an attorney is threatening to initiate a collection suit the attorney must have in their possession OALD reflecting, at a minimum, the consumer's name, the last four digits of the account number associated with the debt at the time of charge-off, the claimed amount, and excluding any post charge-off payments. In addition, if the creditor is a debt buyer, the attorney must also have a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the creditor at the time of charge-off. Please note, however, that the CFPB has not reduced these expectations to actual regulations.

From the FDCPA perspective, numerous courts have held that the sending of a demand letter on attorney letterhead is tantamount to a threat of litigation. It may become necessary to either have the above-described documentation in the attorney's possession at the time of the initial demand letter or disclaim attorney review/involvement and threat of legal action.[166] The

[164] Available at http://files.consumerfinance.gov/f/201601_cfpb_stipulated-final-judgment-and-order-frederick-j-hanna.pdf

[165] Available at http://www.consumerfinance.gov/policy-compliance/enforcement/actions/pressler-pressler-llp-sheldon-h-pressler-and-gerard-j-felt

[166] See McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014) (collection letter that offers to "settle" a time-barred debt may be inferred by a least sophisticated consumer as an threat of suit); see also Buchanan v. Northland Grp., 776 F.3d 393 (6th Cir. 2015) (settlement offer as to time-barred debt could falsely imply that payment could be compelled through litigation); see also Greco v. Trauner, Cohen & Thomas, LLP, 412 F. 3d 360 (2nd Cir. 2005) (affirming the district court's finding that no FDCPA violation could possibly have occurred when the collection attorney stated: "At this time, no attorney with this firm has personally reviewed the particular

statement disclaimer contained in the *Greco* demand letter is now generally referred to by the case name as a Greco Notice.

There is an active debate within the industry as to whether it is better for a collection attorney to ensure that they have the necessary media, but stand behind a Greco Notice or to engage in a higher level account review prior to the sending of an initial demand letter. Further complicating the analysis is that if the decision is to engage in such a review, does the review require the attorney to conduct a full suit decision process before ever sending a first communication to the consumer.

b. Initiating Suit

An attorney who signs a debt collection law suit must:

1. Create an electronic or physical record that the attorney has reviewed the consumer's file;

2. Review OALD to include, at a minimum, the Consumer's name, the last four digits of the account number associated with the debt at the time of charge-off, the claimed amount, excluding any post charge-off payments, and if the attorney is suing under a breach of contract theory, the contractual terms and conditions applicable to the debt;

3. Confirm that the applicable statute of limitations has not run on the Consumer's debt;

4. Confirm that the Consumer's debt was not discharged in bankruptcy or subject to a pending bankruptcy proceeding; and

5. Confirmed the Consumer's correct identity and current address to determine the appropriate venue for a Collection Suit.

In the event that the attorney is suing under a breach of contract theory, the attorney must also have reviewed the contractual terms and conditions applicable to the debt, and if suing on behalf of a debt buyer, the chronological listing of prior owners.

Finally, the attorney who signs a debt collection law suit must certify (either in writing or in the case management system via an electronic record) that the attorney has exercised independent professional judgment in initiating the litigation.

This section utilizes the word "must" to characterize the attorney's duties with respect to clients who are under the requirements of a consent decree. Whether these are actual requirements of the legal practice or simply represent best practices is a topic for debate and raises the question of federal regulation of the state-level practice of law. As discussed below, the reach of the CFPB into the professional services of an attorney may be limited.

IV. Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act ("GLBA"),[167] also known as the Financial Modernization Act of 1999, arose in the wake of the Enron scandal and, in part, controls the ways that financial

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circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.").

[167] GRAMM-LEACH-BLILEY ACT, 15 USC §6801.

institutions deal with the private information of individuals. The Act consists of three sections: the Financial Privacy Rule, which regulates the collection and disclosure of private financial information; the Safeguards Rule, which stipulates that financial institutions must implement security programs to protect such information; and the Pretexting provisions, which prohibit the practice of pretexting (accessing private information using false pretenses). The Act also requires financial institutions to give customers written privacy notices that explain their information-sharing practices.[168]

A. Financial Institution Defined

The GLBA defines "financial institutions" as: "…companies that offer financial products or services to individuals, like loans, financial or investment advice, or insurance."[169] According to the Bank Holding Company Act provision and regulations established by the Federal Reserve Board, "financial activities" include:

- lending, exchanging, transferring, investing for others, or safeguarding money or securities. These activities cover services offered by lenders, check cashers, wire transfer services, and sellers of money orders,
- providing financial, investment or economic advisory services. These activities cover services offered by credit counselors, financial planners, tax preparers, accountants, and investment advisors,
- brokering loans,
- servicing loans,
- collecting loans (debt),
- providing real estate settlement services, and
- career counseling (of individuals seeking employment in the financial service industry).[170]

Whether or not a financial institution discloses nonpublic information, compliance is mandatory. If your client engages in these financial activities the Federal Trade Commission (FTC) regulations consider them financial institutions and GLBA may apply.[171]

B. The Financial Privacy Rule

The GLBA created a Financial Privacy Rule which requires financial institutions to provide each consumer with a privacy notice at the time the consumer relationship is established. The privacy notice must explain the information collected about the consumer, whether that information is shared, how that information is used, and how that information is protected. The notice must also identify the consumer's right to opt out of the information being shared with unaffiliated parties pursuant to the provisions of the Fair Credit Reporting Act.

1. Privacy Notice

Financial institutions must give their consumers a "clear and conspicuous" written notice describing their privacy policies and practices.[172] The Privacy Rule protects a consumer's "nonpublic personal information" (NPI). NPI is:

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[168] *Id.*
[169] *Id.* at § 6809(3).
[170] 12 U.S.C. § 1843(k)(4).
[171] GRAMM-LEACH-BLILEY ACT, 15 USC §6801.
[172] *Id.* at § 6801(b).

- Any "personally identifiable financial information" that a financial institution collects about an individual in connection with providing a financial product or service, (for example, name, address, income, Social Security number, or other information on an application); unless that information is otherwise "publicly available."
- Any information you get about an individual from a transaction involving your financial product(s) or service(s) (for example, the fact that an individual is your consumer, account numbers, payment history, loan or deposit balances, and credit or debit card purchases); Any information you get about an individual in connection with providing a financial product or service (for example, information from court records or from a consumer report); or
- Any information obtained by a client as part of an extension of credit.[173]

If financial institutions share NPI with non-affiliated third parties, they also must give their consumers:

- An "opt-out" notice as to the individual's right to direct you not to share their NPI with a non-affiliated third party;
- A reasonable way to opt out; and
- A reasonable amount of time to opt out before you disclose their NPI.

2. What Information is Covered?

The firm must safeguard all consumer financial information in its possession. Examples include:

- Credit card account numbers,
- Bank account numbers,
- Income histories,
- Credit histories,
- Name, address, and phone numbers when collected with Financial data, and
- Details of any financial transactions

3. Who Gets a Privacy Notice?

Simply put, privacy notices are for the consumer. Whether or not financial institutions share consumer NPI, it must give all consumers a privacy notice. The GLBA notice identifies the consumer's right to "opt-out" of the information being shared with unaffiliated parties pursuant to the provisions of the Fair Credit Reporting Act (FCRA).

The "initial notice" must be given at time the consumer relationship is established unless it would substantially delay the consumer's transaction; in which case, the notice may be provided within a reasonable time after the consumer relationship is established, but only if the consumer agrees.

C. Safeguard Rules

GLBA creates certain Safeguard Rules, which require financial institutions to develop a written information security plan that describes how the company is prepared for and plans to continue to protect consumer's nonpublic personal information. As a service provider to covered financial institutions, these requirements extend to collection attorneys as well. This plan must include:

- Designation of at least one employee to manage the safeguards,

[173] *Id.* at § 6809(4).

- Constructing a thorough risk analysis on each department handling the nonpublic information,
- Develop, monitor, and test a program to secure the information, and
- Change the safeguards as needed with the changes in how information is collected, stored, and used.

This rule is intended to ensure that businesses do what they should already be doing: protecting their clients. The Safeguards Rule forces financial institutions to take a closer look at how they manage private data and to do a risk analysis on their current processes. No process is perfect, so this has meant that every financial institution has had to make some effort to comply with GLBA.

D. Pretexting Provisions

GLBA prohibits obtaining customer information from a financial institution, such as a bank, credit card company, or credit-reporting agency, under false pretenses. Pretexting (sometimes referred to as "social engineering") occurs when someone:

- Tries to gain access to personal nonpublic information without proper authority to do so.
- Requests private information while impersonating the account holder, by phone, by mail, by email, or even by "phishing".
- Accesses financial information through third parties.

V. Developing Issues in Consumer Collections

A. Meaningful Attorney Involvement

There is a developing theory of recovery asserting that a consumer collection attorney must be “meaningfully involved” in the suit worthiness decision prior to the commencement of litigation; although there is no clear authority regarding the source of liability. The FDCPA is silent to the issue generally. While the filing of a lawsuit may be construed to be a communication under the FDCPA, there are no expressed requirements regarding the method of preparation of such a lawsuit. This, however, has not prevented some consumer attorneys from asserting that collection litigation is tantamount to harassment because of a perceived lack of meaningful attorney involvement. Courts are attempting to wrestle with the issue of what, if any, is their role in regulating the actual practice of law.

Recently the CFPB brought suit against the consumer collection firm Weltman, Weinberg & Reis Co., LPA[174] alleging that its attorneys were not meaningfully involved in preparing and sending the initial demand letter (G-Notice).[175] Weltman prevailed in a four-day trial in which it offered evidence of attorney involvement in the design and oversight of its account validation processes.[176] The case is noteworthy in that the court relied upon an advisory jury to assist in the finding of facts and it was the advisory jury’s finding, adopted by the court, that the process and procedures of Weltman constituted meaningful attorney involvement.[177] The consumer collection litigation industry has so far resisted the temptation to put “shop hours” on its legal product; which is to say that there is no standard for how long an attorney should review a file prior to authorizing suit, or how considered should an attorney’s testimony be when testifying to the military status of a

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[174] Consumer Fin. Prot. Bureau v. Weltman, Weinberg, & Reis Co. L.P.A., No. 1:17 CV 817, 2018 U.S. Dist. LEXIS 124630, at *1 (N.D. Ohio, July 25, 2018).
[175] *Id.* at *2.
[176] *Id.* at *31.
[177] *Id.* at *24.

consumer. The current consensus is that attorneys must review account- level documentation showing the debt and be deliberate in documenting their interactions with a consumer's account as a way of evidencing their actual involvement in the handling of the account.

VI. Conclusion

Ultimately, consumer collections are like most other types of legal collection activity; a balance between an expectation of recovery and economic loss to the creditor. While regulatory compliance issues will continue to be a major component of consumer collections, in the end they should reflect nothing more than fair collection practices and should be respected and promoted. Whether such guidelines continue to seek a reasonable balance between the needs of the creditor and the protection of the consumer; especially in light of the current regulatory atmosphere, is a matter of supposition. One thing is certain; consumer collections have changed dramatically over the past five years and will continue to do so. Law firms and lawyers who seek to be conscientious actors in what is ultimately a necessary aspect of debt collections will serve themselves, their clients and the industry well as this area of practice continues to evolve.