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# FEATURE ARTICLE

## The Fair Debt Collection Practices Act

### *Recent Developments*

by Daniel A. Edelman

#### I. Introduction

In 1977, Congress enacted the Fair Debt Collection Practices Act ("FDCPA").<sup>1</sup> The FDCPA regulates the conduct of "debt collectors" in collecting "debts" owed or allegedly owed by "consumers."

The FDCPA is based on the premise "[t]hat every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner."<sup>2</sup> Congress recognized and accordingly, articulated the purposes for the enactment of the FDCPA as follows:

[There is] universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule [sic]. . . . [T]he vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.<sup>3</sup>

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There is abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of personal privacy.<sup>4</sup>

Congress stated that the purpose of the FDCPA was to eliminate these practices and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."<sup>5</sup> This article addresses recent issues which have arisen concerning the application of the FDCPA.

#### II. Coverage and definitions

##### A. What is a "Debt"

The FDCPA applies to attempts to collect a "debt." The FDCPA defines debt as "any obligation or alleged obligation of a *consumer* to pay money arising out of a *transaction* in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."<sup>6</sup> As such, business and

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*Mr. Edelman, with co-author O. Randolph Bragg, wrote about the Fair Debt Collection Practices Act in the Loyola Consumer Law Reporter, Volume 7, number 3.*

agricultural loans are not debts covered by the FDCPA.<sup>7</sup> On the other hand, a credit card used primarily to purchase items from retail merchants catering to consumers is covered even though it is also used for a few "business" purchases.<sup>8</sup>

### 1. Debts reduced to judgment

The FDCPA covers consumer debts reduced to judgment.<sup>9</sup> However, in *McCarthy v. Rosenthal*, the District of Maryland recently held that a settlement agreement resolving a lawsuit brought to collect a consumer debt was not covered because the plaintiff "did not incur this obligation to receive consumer goods or services."<sup>10</sup> This holding is clearly wrong; the Act does *not* require that the obligation be incurred to receive consumer goods or services. Rather, a debt is "any obligation . . . to pay money arising out of a transaction" for consumer goods or services.<sup>11</sup> The settlement agreement is an "obligation to pay money" arising from such a transaction. Furthermore, the FDCPA covers this type of obligation even if it "has been reduced to judgment." Therefore, if collection of a judgment resulting from a consumer contract is covered by the Act, an equivalent settlement agreement should also be covered.

### 2. Dishonored checks

Recently, the issue of whether dishonored checks are debts within the meaning of the FDCPA has arisen in a number of cases. Debt collectors persistently contend that a dishonored check is not a "debt."<sup>12</sup> The basic argument proffered by the debt collectors is that the definition of "credit" in the Truth in Lending Act ("TILA")

should be used to limit the definition of debt in the FDCPA. *Zimmerman v. HBO Affiliate Group*<sup>13</sup> is cited for this proposition. In *Zimmerman*, the Third Circuit affirmed the dismissal of plaintiff's FDCPA complaint based on a demand letter sent to persons who allegedly intercepted and stole cable signals.<sup>14</sup> The court held that the illegal interception of signals was not a consensual "transaction" and, therefore, not covered under the FDCPA definition of debt.<sup>15</sup> The court stated:

We find that the type of transaction which may give rise to a "debt" as defined in the FDCPA is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e.*, one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.<sup>16</sup>

In *Zimmerman*, no issue existed as to whether issuance of a check to pay for goods or services constituted an FDCPA transaction. While the *Zimmerman* court referred to FDCPA transactions as involving the same sort of circumstances as other matters regulated by the Consumer Credit Protection Act ("CCPA"), the CCPA covers far more than just credit sales, including transactions which are the functional equivalent of the issuance of a check.<sup>17</sup> The FDCPA definition of creditor, clearly broader than the TILA definition, includes not only someone who "offers or extends credit," but anyone to "whom a debt is owed."<sup>18</sup>

The overwhelming majority of decisions

either hold that dishonored checks issued by the debtor for consumer goods or services fall within the FDCPA, or apply the FDCPA to such debts.<sup>19</sup> Furthermore, the statutory definitions clearly encompass dishonored checks because liability on such a check is an "alleged obligation . . . to pay money arising out of a transaction," subject to the FDCPA if the "property . . . which [is] the subject of the transaction" was "primarily for personal, family, or household purposes."<sup>20</sup>

Moreover, the FDCPA legislative history clearly states that dishonored checks fall under the Act. The Report of the House Banking Committee accompanying H.R. 5294<sup>21</sup> states:

Opponents of this legislation claim that, regardless of the amount of consumer harassment or deception, there should be no legislation because the number of unpaid bills and bad checks keeps increasing. This reasoning is misleading. The issue is not one of uncollected debts, but rather whether or not consumers must lose their civil rights and be terrorized and abused by unethical debt collectors.<sup>22</sup>

The House Report also stated that "the committee intends that the term debt include consumer obligations paid by check or other non-credit consumer obligations."<sup>23</sup>

The Federal Trade Commission ("FTC") has brought several civil actions against debt collectors based on attempts to collect dishonored checks.<sup>24</sup> In addition, the FTC staff commentary on the FDCPA illustrates the definition of debt with the example of an NSF check used to purchase goods or services intended for household or personal use.<sup>25</sup>

The only situation in which the collec-

tion of a check should not be covered is one where no "transaction" transpired. Thus, the statutory liability of a prior endorser on a deposited or cashed checks which thereafter is returned for insufficient funds is not a "debt."<sup>26</sup> In this situation no purchase of goods or services for consumer purposes occurred.

### **3. Rent and condominium assessments**

An issue analogous to the dishonored check issue involves attempts to collect rent. Typically, the tenant is expected to pay for each month's tenancy, in advance, prior to actual occupancy. Notwithstanding the absence of an extension of credit in the sense of incurring an obligation and repaying it over time with interest, an obligation exists to pay money in the future as part of a consensual transaction. In *Travieso v. Gutman*, the Eastern District of New York had no difficulty in concluding that rent was a debt to which the FDCPA applied.<sup>27</sup> The court stated, "rent clearly fits [within] the definition of debt embodied in the FDCPA."<sup>28</sup>

On the other hand, several recent federal district court decisions from Illinois and Florida have held that condominium assessments are not "debts," refusing to follow contrary FTC staff opinions.<sup>29</sup> The conclusions from these courts appear erroneous because a condominium assessment is functionally equivalent to rent—an obligation to pay money in the future incident to a "transaction." The purchase of the condominium by the debtor or his predecessor in interest is the transaction, and results in an obligation to pay monthly assessments for the upkeep of the common areas.

#### **4. Debts expected to be paid by a third party**

A recent Eastern District of Pennsylvania decision, *Adams v. Law Offices of Stuckert & Yates*, rejected a debt collector's contention that a medical bill was not a "debt" because it should have been paid by the patient's insurance carrier.<sup>30</sup> The court reasoned that the method of retiring the outstanding debt, either from the patient's checking account or pursuant to his contract with a health insurance carrier, played no role in defining whether a debt existed.<sup>31</sup>

#### **5. Other "Debt" issues**

Liabilities for per capita taxes<sup>32</sup> and child support obligations<sup>33</sup> are not considered debts within the FDCPA. In addition, liability under an Ohio statute for civil damages arising from alleged shoplifting is not a debt within the coverage of the FDCPA.<sup>34</sup> Finally, tort claims arising from the illegal reception of television signals are not within the definition of "debt."<sup>35</sup>

#### **B. Who is a "Debt Collector"**

Generally, the FDCPA covers the activities of a "debt collector." The definition of debt collector has two parts:

Any person [1] who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or [2] who regularly collect or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.<sup>36</sup>

The creditor is excluded from the definition

of debt collector<sup>37</sup> unless the creditor uses a name which suggests that a third-party debt collector is involved in the collection process.<sup>38</sup> Additional exclusions from the definition of debt collector include: (1) officers and employees of the creditor while collecting the debt in the creditor's name; (2) affiliates of the creditor; (3) officers or employees of the United States or any state; (4) process servers; (5) bona fide non-profit debt counselors; (6) persons who service debts which are not in default (e.g., servicers of mortgages and student loans)<sup>39</sup>; and (7) fiduciaries.<sup>40</sup>

#### **1. Creditor who uses name indicating third party involvement as "Debt Collector"**

Creditors may make themselves "debt collectors" by using names which falsely indicate the involvement of third party debt collectors or attorneys. The simplest situation covered by the "other name" exception of the FDCPA occurs when a creditor sends letters to its debtors demanding payment under the name of either a totally fictitious entity or a real entity which has no significant involvement in the collection of the creditor's debts. The use of the false name simultaneously (1) subjects the creditor to the FDCPA and (2) violates the Act's prohibition against deceptive collection practices.<sup>41</sup>

In order to prevent evasion of the law, the FTC and the courts have applied the "false names" exception to more complex situations where a creditor uses, or authorizes the use of, a name other than the one under which the creditor dealt with the consumer and which is likely to lead the consumer to believe that a third party is attempting to collect the debt. For example, a creditor cannot evade the intent of the FDCPA

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through the simple device of incorporating a wholly-owned subsidiary, called XYZ Collection Agency Corporation, and then sending out collection letters using that name.

The FTC stated that if a creditor uses a name "other than [the creditor's] own" name, then on its face, such conduct "would indicate that a third person is collecting or attempting to collect [the creditor's] debts."<sup>42</sup> Even if the creditor or an affiliate lawfully owns the name used to make collection, the creditor must disclose the relationship between the name used in dealing with the consumer prior to default and the name used in attempting to collect after default.<sup>43</sup> The FTC staff commentary expressly imposes this standard on "affiliates" of a creditor.<sup>44</sup> Similarly, courts have indicated that *all* of the FDCPA exceptions for persons associated with creditors and for servicers are subject to the qualification that there can be no use of a name which conveys the false impression of involvement by an independent third-party debt collector.

One illustration of this principle comes from *Grammatico v. Sterling, Inc.*,<sup>45</sup> where the court rejected a store owner's claim that it came within the "affiliated creditor exception." Sterling owned a jewelry store, Kay, and collected Kay's accounts using the name "Sterling" without disclosure of any relationship between Sterling and Kay. Sterling argued that because it owned Kay it came within the "affiliated creditor exemption." The court held that the various provisions of the FDCPA must be read together and in light of its statutory purpose. Accordingly, the court concluded that the FDCPA applies to the situation where company "A" collected debts for related company "B" without disclosure of the relationship and under circumstances where a consumer would believe that a third party was collecting the outstanding debt. The court stated,

"it's the impact on the consumer, not the technical corporate realities of the situation, which govern the application of the second sentence."<sup>46</sup> Neither the "own name" language nor the "affiliated creditor" exemption of the FDCPA permitted such deception to be practiced on the consumer.

Likewise, in *Little v. World Fin. Network, Inc.*,<sup>47</sup> the court found World Financial Network, a corporate affiliate of Lane Bryant, satisfied the requirements of a debt collector under the FDCPA by collecting a debt owed Lane Bryant using the name "World Financial Network" without any disclosure of the connection between Lane Bryant and World Financial Network.

*Britton v. Weiss*<sup>48</sup> provides additional guidance on the disclosure issue. In *Britton*, a consumer received a collection letter purporting to emanate from an independent law office. Actually, the creditor employed the attorney in its in-house law department. While employees of creditors, like affiliates of the creditor, are normally not debt collectors, the letter conveyed the false impression that it came from an independent law office:

Plaintiff claims here that the March 6, 1988 letter from defendant was deceptive, that defendant clearly represented himself as an independent attorney not collecting debts in the name of the creditor, and that defendant is therefore covered by the terms of the FDCPA. Plaintiff points out that the letter was not written on NYT stationery which bears the well-known "blue bell" logo. While the letter does refer to New York Telephone in the street address, it is printed in small, lower case type. On the other hand, plaintiff states, the designation "attorney" below defendant's signature is in upper-case

letters. Indeed, as plaintiff asserts, it might appear to a debtor that defendant was an independent attorney who had offices in a New York Telephone building, since there is no other representation that he is an employee or otherwise affiliated with the telephone company. The letter, plaintiff maintains, was an attempt to deceive the plaintiff into believing that this was not merely a communication from the collection department of NYT, but a more serious step in the collection process: the intervention of a private attorney.<sup>49</sup>

The court, citing the aforementioned FTC materials, agreed that the letter conveyed the false impression that it came from an independent attorney:

A plain reading of the March 6, 1988 letter from defendant to plaintiff is indicative of defendant's intent to deceive plaintiff into believing he was an independent attorney. The letter is not written on stationery bearing the logo of NYT. Defendant is identified at the bottom of the letter simply as an "attorney," and he in no way indicates that he is an employee of NYT. Several passages in the letter indicate that defendant intends the plaintiff to believe he is acting on his own, and not on behalf of NYT: "Your former telephone account has been referred to me for collection"; "I am writing to permit you to pay this debt at a reasonable rate per month"; "All payments must be made directly to my office"; "So long as you abide by the above terms and conditions, I shall take no further action"; "However, should you fail to make any monthly payment, I shall immediately commence a lawsuit

against you for the recovery of the full balance. . . ." While the words "New York Telephone" appear in small print, it is clear that the "least sophisticated consumer" could believe that the account was being handled by an independent collection agency, with all the attendant serious consequences for the consumer.<sup>50</sup>

Conversely, in *Dickenson v. Townside TV & Appliance, Inc.*, the court held that a creditor which consistently used its assumed business name in dealing with customers, rather than its incorporated name, did not thereby become a "debt collector."<sup>51</sup> Other courts have held that corporate affiliates with similar names could take advantage of the "affiliated creditor" exception,<sup>52</sup> and that a "collection department" of the creditor is not subject to the FDCPA.<sup>53</sup>

## **2. Purchasers of loan portfolios including defaulted debts**

A financial institution which purchases delinquent debts is a debt collector within the meaning of the FDCPA with respect to the delinquent debts. "The legislative history of section 1692a(6) [which defines debt collector] indicates conclusively that a debt collector does not include . . . an assignee of a debt, as long as the debt was not in default at the time it was assigned."<sup>54</sup> Conversely, the assignee of a debt which is in default at the time of the assignment meets the standards of a "debt collector" if the assignee's principal purpose entails the collection of debts or the assignee regularly<sup>55</sup> engages in the collection of debts. For example, "a mortgage servicing company is not considered a debt collector when it acquires loans originated by

others and not in default at the time acquired. However, to the extent the mortgage servicing company receives delinquent accounts for collection it is a debt collector with respect to those accounts.”<sup>56</sup>

The FTC has expressed agreement that, under the current language of the FDCPA, the test of whether an assignee is a debt collector depends on whether the particular debt was in default at the time of its acquisition. In late 1993, the FTC proposed amending the FDCPA so that whether an assignee was a debt collector would “depend upon the nature of the overall business conducted by the party to be exempted rather than the status of individual obligations when the party obtained them.”<sup>57</sup> However, the proposal was not adopted, and the test of whether an assignee is a debt collector under the FDCPA remains the status of individual obligations when they were acquired by the party collecting them.

Under this test, a company which acquires a block of receivables is a debt collector with respect to those receivables in default at the time of acquisition. For instance, in *Kimber v. Federal Fin. Corp.*,<sup>58</sup> a purchaser of credit card receivables was held to be a “debt collector” with respect to those receivables that were delinquent at the time they were acquired. The court stated:

The first part of §1692a (4) defines the universe of creditors as either those who originate a debt or those to whom a debt is owed; in either case, the creditors are not collecting the debts for others. The second part of §1692a(4), the assignee exception, then purports to exclude from this universe those persons who collect assigned or transferred debts that are already in default when assigned or transferred. To say that this exception applies only to those who collect

debts for others would be to render the exception superfluous and meaningless; those who collect debts for others are not in the original definitional universe, and there is therefore no need to exclude them. *Rather, the excluding factors in the exception are that the debts are the result of an assignment or transfer and that the debts were already in default at the time of assignment or transfer.* With the phrase ‘for another’ at the end of the exception, Congress merely intended that the debts should have *originally* belonged to another and that the creditor was therefore in effect a third-party or independent creditor.<sup>59</sup>

Similarly, in *Cirkot v. Diversified Sys.*,<sup>60</sup> the Connecticut District Court held that an entity which attempted to collect delinquent debts in loan portfolios acquired through the FDIC from defunct banks is a debt collector covered by the FDCPA with respect to the delinquent debts.<sup>61</sup>

Thus, “[b]anks are not debt collectors if they service debts that they originated or debts that were not in default when obtained by the bank. However, if a bank services a loan portfolio, it is a debt collector for those loans in the portfolio that it did not originate and which were in default when obtained.”<sup>62</sup>

### 3. Lawyers as “Debt Collectors”

Originally, the definition of “debt collector”—one who “regularly” collects consumer debts—excluded lawyers. However, in 1986, Congress removed the attorney exemption.<sup>63</sup> Now, the “FDCPA does apply to a lawyer . . . with a general practice including a minor but regular practice in debt collection.”<sup>64</sup> The legis-



lative history of the amendment reveals ineffective policing by the legal profession and courts of collection attorneys. The removal of the exemption, therefore, was necessary to "put a stop to the abusive and harassing tactics of attorney debt collectors."<sup>65</sup> The United States Supreme Court, in *Heintz v. Jenkins*,<sup>66</sup> held that litigation conduct of attorneys in collecting consumer debts is not exempt from the FDCPA and rejected the arguments of the collection bar to the contrary.

The amount of collection activity necessary to make a lawyer a "debt collector" is minimal. For instance, a law firm's debt collection work, which amounted to less than 4% of its total business, brought the firm within the definition.<sup>67</sup> "While the ratio of debt collection to other efforts may be small, the actual volume is sufficient to bring [a] defendant under the Act's definition of 'debt collector.'"<sup>68</sup> Thus, an attorney who represented four collection agencies, filed over 150 collection suits in a two-year period and sent one particular collection letter over 125 times in a 14-month period was a debt collector even though debt collection was merely incidental to his primary law practice.<sup>69</sup> On the other hand, an attorney who collected less than 20 consumer debts in a 10-year period was not a debt collector.<sup>70</sup>

A lawyer should be classified as a debt collector if either a volume threshold or a percentage-of-time threshold is met or if the lawyer holds himself out as engaging in consumer debt collection. A volume threshold is necessary because a law firm that handles a modest number of consumer collection matters as part of providing a full range of services to its clients should be required to comply with the FDCPA. In an Eastern District of Michigan case, *Stojanovski v. Strobl & Manoogian, P.C.*, the court held that "it

is the volume of the attorney's debt collection efforts that is dispositive, not the percentage such efforts amount to in the attorney's practice."<sup>71</sup> However, a percentage threshold and a "holding out" test are also necessary because the FDCPA should apply to: (1) a lawyer with a nascent practice which includes consumer debt collection, and (2) a lawyer who actively attempts to obtain collection business (notwithstanding his lack of success in acquiring a substantial amount). The decisions indicate the volume threshold ranges from of five to ten attempts to collect consumer debts per year, and the percentage threshold hovers in the five percent range.<sup>72</sup>

#### 4. Other "Debt Collector" issues

The franchisor of a check collection company, with control over its franchisee, is covered by the FDCPA.<sup>73</sup> Also, check guaranty agencies, which purchase dishonored checks from merchants and seek to collect them from consumers, are debt collectors.<sup>74</sup> However, repossession agencies are generally not debt collectors within the FDCPA unless they perform common collection services such as sending dunning letters or making telephone calls.<sup>75</sup>

#### C. Consumer

Only the collection of consumer debts are covered by the FDCPA. Under the FDCPA, a "consumer" is "any natural person obligated or allegedly obligated to pay any debt."<sup>76</sup> This definition gives a consumer's executor standing to bring an FDCPA action.<sup>77</sup> It should be noted, however, that certain substantive protections of the FDCPA are *not* limited to "consumers."<sup>78</sup>

## D. Communication

Certain substantive prohibitions of the FDCPA apply to "communications." Communications include "the conveying of information regarding a debt directly or indirectly to any person through any medium."<sup>79</sup> Usually communications falling under the provisions of the FDCPA take the form of dunning letters or telephone calls. However, the term is broadly and literally construed to encompass other forms of conveying information as well.<sup>80</sup>

## III. Violations

### A. Least sophisticated or unsophisticated consumer standard

Generally, courts in determining whether a communication or other conduct violates the FDCPA, analyze the conduct from the perspective of the "least sophisticated consumer."<sup>81</sup> This standard ensures "that the FDCPA protects all consumers, the gullible as well as the shrewd."<sup>82</sup>

In *Gannon v. G. C. Servs. L.P.*, the Seventh Circuit held that a violation should be determined from the perspective of the "unsophisticated consumer."<sup>83</sup> Since the "least sophisticated consumer" has never been interpreted to impose liability for bizarre or idiosyncratic interpretations of collection demands,<sup>84</sup> it does not appear that the difference in language represents a significant difference in substance. Most recently, the Seventh Circuit confirmed the lack of significant difference between the two standards in *Avila v. Rubin*.<sup>85</sup>

We reiterate our standard today, but we don't want to be involved in the splitting of

split hairs. Anyway it's viewed, the standard is low, close to the bottom of the sophistication meter.

\* \* \*

*Gammon* does not significantly change the substance of the "least sophisticated consumer" standard as it had been routinely applied by courts. Instead, *Gammon* concluded that the term "unsophisticated consumer" is a simpler and less confusing formulation of a standard designed to protect those of below-average sophistication or intelligence. As a result, the court stated "we will use the term, 'unsophisticated,' instead of the phrase, 'least sophisticated,' to describe the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading." *Gammon*, 27 F.3d at 1257. The new terminology reconciles the former standard's literal meaning with its application. *Id.* As *Avila* correctly observes, the unsophisticated consumer standard is a distinction without much of a practical difference in application.<sup>86</sup>

The court in *Avila* also rejected a defense contention that it is necessary to prove, by direct testimony or survey evidence, that a collection notice actually misled someone:

We also think the defendants' reliance on false advertising cases from trademark law is unavailing here. Section 43(a)(2) of the Lanham Act prohibits statements that are (1) literally false and (2) statements that, while literally not false or ambiguous, convey a false impression or are misleading in context. See *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 13 (7th Cir. 1992). The general rule is that if a state-

ment is literally false, the court may grant relief without reference to the reaction of buyers or consumers of the product. On the other hand, if a statement is not literally false, the court may find that it is impliedly misleading only if presented with evidence of actual consumer deception. *Id.* at 14.

Avila claims Van Ru contradicted the validation notice and that Rubin both contradicted the validation notice and improperly sent attorney form letters. These claims resemble a literally false statement more than an ambiguous but potentially misleading statement. Just as the analysis involved in evaluating a literally false statement turns on whether the statement is true or false, the language in the collection letters either contradicts the validation notice or it does not.<sup>87</sup>

Under either the “least sophisticated” or “unsophisticated” consumer standard, a collection communication which can plausibly be read in two or more ways, at least one of which is misleading, violates the law.<sup>88</sup>

#### **B. Validation or verification notice**

The FDCPA provides:

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.<sup>89</sup>

These warnings are commonly referred to as “civil *Miranda* warnings” by debt collectors. The FDCPA further provides that if the consumer disputes the debt, the collector must cease further collection efforts until the validation procedure is satisfied.<sup>90</sup>

It is not enough for a debt collector to include notice somewhere on the collection letter.<sup>91</sup> The validation notice may not be either “overshadowed” or “contradicted” by other language or material in the original or subsequent collection letters.<sup>92</sup> “A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights.”<sup>93</sup>

Recent cases hold that any contradiction

which has an overshadowing or contradictory effect contravenes the Act.<sup>94</sup> A “threatening” or visually overshadowed contradiction contained within the required within the required notice need not be established.<sup>95</sup> In other words, either a contradiction or overshadowing is sufficient to violate the FDCPA.

An example of an “overshadowing” case is *Miller v. Payco-General Am. Credits, Inc.*,<sup>96</sup> where a debt collector’s “screaming headlines, bright colors and huge lettering” utilizing the language “IMMEDIATE FULL PAYMENT,” “PHONE US TODAY,” and “NOW,” were held to have overshadowed the 30-day validation notice. A collection letter from an attorney demanding payment within ten days upon the threat of suit also contradicted the 30-day validation notice.<sup>97</sup> Similarly, demands for an “immediate” response have been held to overshadow and contradict the validation notice.<sup>98</sup>

Where the validation notice is placed on the back of the correspondence without a legible and reasonably prominent reference thereto on the front, the FDCPA is violated.<sup>99</sup> Requests that the consumer telephone the debt collector, which effectively induce the consumer to waive his right to verification because a written request is necessary, also violate § 1692g.<sup>100</sup>

The FTC staff has stated that a debt collector may not charge for furnishing validation information. A 1996 Florida District Court decision, *Sandlin v. Shapiro & Fishman*, held that such a charge did not violate § 1692g per se, but found it unlawful under § 1692f on the ground that it was not authorized by contract or law.<sup>101</sup> Another court held that if the debt collector ceases collection efforts upon receipt of a request to validate the debt, the failure to furnish validating information is not a violation of the FDCPA.<sup>102</sup>

### C. Threats of unintended, unauthorized or illegal action

The FDCPA prohibits “the threat to take any action that cannot legally be taken or that is not intended to be taken.”<sup>103</sup> With increasing frequency, collectors are using letters which seek amounts in addition to the face amount of dishonored checks and which threaten the consumers with criminal prosecution or liability for multiple damages or civil penalties. If the collector states or implies that it regularly prosecutes criminally when in fact such message is false, the communications violate the Act. The FDCPA is also violated if the collector misstates the consumer’s liability for multiple damages or civil penalties. For instance, a collector violates the Act by implying that a consumer’s treble damage liability is absolute when the consumer has a right to tender the check amount and avoid liability prior to trial or where a statutory notice is a precondition to liability and no such notice has been given.<sup>104</sup>

Other examples of violations involving threats of unintended, unauthorized, or illegal action include:

1. Threats of suit within a short time when the creditor has not authorized suit or the debt collector does not file suit within the period stated.<sup>105</sup>
2. Threats of suit by an attorney not licensed within the jurisdiction or who does not file suits in the jurisdiction;<sup>106</sup>
3. Threats to take collection action by a debt collector that is required to be, but is not, licensed in the jurisdiction;<sup>107</sup>

4. Threats to file suit in a forum where suit cannot legally be filed under 15 U.S.C. §1692i.<sup>108</sup>

5. Threats to enforce creditor remedies which cannot be enforced at the time stated or to the extent stated. For example, a debt collector may threaten to obtain a wage garnishment or execution without disclosing that this can only be completed after notice, hearing, and judgment. Similarly, a debt collector may threaten to garnish "all" of a consumer's wages when the law clearly imposes limitations on the amount which may be garnished.<sup>109</sup>

#### D. "Debt Padding"

In addition to "the threat to take any action that cannot legally be taken or that is not intended to be taken,"<sup>110</sup> the FDCPA prohibits "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless that amount is expressly authorized by the agreement creating the debt or permitted by law."<sup>111</sup> This practice is typically referred to as "debt padding." In *West v. Costen*,<sup>112</sup> the court interpreted the language of the Act to require either: (1) an express agreement—lawful under applicable state and federal law—for the addition of interest or other charges to the principal amount of a debt, or (2) a statute or common-law principle that permits the addition of interest or other charges to the debt even if not specifically provided for by agreement.

Debt padding is perhaps the most common violation of the "unfair practice" provision of the Act. Typical violations include the imposition of service charges for bad checks where not permitted by agreement and applicable state

law,<sup>113</sup> the imposition of attorney's fees where no contract or statute authorizes them,<sup>114</sup> the addition of unauthorized insurance charges,<sup>115</sup> and other forms of "debt padding."<sup>116</sup>

In *Newman v. Checkrite of Cal., Inc.*,<sup>117</sup> the Eastern District of California made a number of significant rulings regarding the addition of "service charges" and similar fees to the face amount of dishonored checks: (1) "Service charges" could not be added to the amounts of dishonored checks on the basis of posted signs unless there was evidence that the check writer actually saw the sign, or that the charges otherwise actually formed part of the contract entered into with the consumer; (2) For such charges to be valid as incidental damages under the Uniform Commercial Code, debt collectors must establish that "the amount of their service charges is a commercially reasonable incidental damage to the merchant," and the debt collector cannot accomplish this "by referring to its own charge to the merchant as evidence of reasonable or actual cost[.]" and, (3) The debt collector violates the FDCPA by describing demands for additional fees using names such as "legal notice fees" or "legal consideration for covenant not to sue." These names imply that they are authorized legal expenses or obligatory payments to avoid suit.

Under this decision, it is impermissible for a debt collector to send out mass-produced form letters demanding fees in addition to the face amount of dishonored checks. State law, however, may authorize the automatic addition of a fee to a dishonored check. Some states, including Illinois, authorize modest charges of this nature, generally in the \$20-30 range.<sup>118</sup>

A recent decision, *Ducrest v. Alco Collections, Inc.*,<sup>119</sup> held that "debt padding" violations require proof of knowledge and intent, and

that the debt collector can rely on the creditor's statement of the amount due, even where charges have been added to the principal amount of the debt. The decision appears plainly wrong. The FDCPA imposes strict liability in most cases.<sup>120</sup> Those sections which were meant to impose a negligence, knowledge, or intent requirement do so explicitly.<sup>121</sup> Furthermore, the FDCPA provides a general defense of *bona fide* error and lack of intent,<sup>122</sup> which would be meaningless if intent or knowledge were part of a plaintiff's case.

**E. False representation that communication is from an attorney**

Another popular debt collection technique is to have large numbers of collection letters, with implicit or explicit threats of suit, sent under the name of an attorney. The clear implication of any attorney letter is a threat of suit. Unless the attorney has in fact reviewed the debtor's file and made a professional judgment that the threatened action is appropriate and the threatened action has been authorized by the creditor, the use of such letters violates the Act's prohibition of "the false representation or implication that any individual is an attorney or that any communication is from an attorney."<sup>123</sup>

For example, in *Clomon v. Jackson*,<sup>124</sup> the Second Circuit found that the use of an attorney's name in the letterhead and at the conclusion of the debt collector's dunning letter, where the attorney did not review the file, violated the FDCPA. The court concluded that "there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by [the Act]."<sup>125</sup> The court's ra-

tionale is based on the fact that "a debt collection letter on an attorney's letterhead conveys authority and credibility."<sup>126</sup>

In *Avila v. Rubin*,<sup>127</sup> the Seventh Circuit Court of Appeals held that:

[A]n attorney sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply with the strictures of the FDCPA. This may include reviewing the file of individual debtors to determine if and when a letter should be sent or approving the sending of letters based on the recommendations of others.<sup>128</sup>

\* \* \*

An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking.

A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which the letter was sent. That's the essence of the connotation that accompanies the title of "attorney." A debt collection letter on an attorney's letterhead conveys authority. Consumers are inclined to more quickly react to an attorney's threat than to one coming from a debt collection agency. It is reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency. The attorney letter implies that the

attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action. And the letter also implies that the attorney has some personal involvement in the decision to send the letter. Thus, if a debt collector (attorney or otherwise) wants to take advantage of the special connotation of the word "attorney" in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor's file. Any other result would sanction the wholesale licensing of an attorney's name for commercial purposes, in derogation of professional standards:

[A] lawyer has been given certain privileges by the state. Because of these privileges, letters . . . purporting to be written by attorneys have a greater weight than those written by laymen. But such privileges are strictly personal, granted only to those who are found through personal examination to measure up to the required standards. Public policy therefore requires that whatever correspondence purports to come from a lawyer in his official capacity must be at least passed upon and approved by him. He cannot delegate this duty of approval to one who has not been given the right to exercise the functions of a lawyer.<sup>129</sup>

Similarly, other courts have held that a debt collector's use of a form letter which is signed by an independent attorney who has no knowledge of and has not reviewed a particular debt is an unfair collection practice.<sup>130</sup> In some

cases, attorneys purportedly sent out collection letters at the rate of 60,000 per month. "If there has been no individualized review of a debtor's case, a communication from that attorney is considered false and misleading for purposes of the FDCPA."<sup>131</sup>

#### **F. Other false or misleading representations**

The FDCPA prohibits the "use of any false, deceptive, or misleading representation" in an attempt to collect a debt.<sup>132</sup> The FDCPA enumerates sixteen such violations. Common violations include: the false representation of the character, amount, or legal status of the debt; the representation or implication that nonpayment will result in arrest, imprisonment, seizure, garnishment, attachment, or sale of the consumer's property; the simulation of legal process; the use of any name other than the true name of the debt collector; the use of names or statements that falsely suggest affiliation with government agencies;<sup>133</sup> and the representation that the debt collector is part of a credit reporting agency when it is not.

Filing suit on obviously time-barred debts has been held to violate the FDCPA.<sup>134</sup> Sending a consumer a document entitled "final demand before legal action" is illegal when it is not the final demand used by the collection agency, or when no legal action has been authorized.<sup>135</sup>

#### **G. Other unfair practices**

The FDCPA further prohibits "unfair or unconscionable means to collect or attempt to collect any debt."<sup>136</sup> In addition to debt padding, unfair practices include the solicitation and use of post-dated checks under certain circumstances,

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the use of collect telephone calls and telegrams, threats of illegal repossession, and the use of postcards or envelopes that reveal the collection purpose.

#### **H. Harassment or abuse**

The FDCPA also prohibits “any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.”<sup>137</sup> Among the conduct specifically defined as harassment or abuse is the threat of violence, use of obscene or profane language, publication of a list of debtors, advertisement of a debt in order to coerce payment, repeated telephone calls, and telephone calls without disclosure of the caller’s identity. “[C]laims under [the Act] should be viewed from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression, and abuse.”<sup>138</sup> Under this standard, various debt collection letters have been found to be harassing, oppressive, and abusive.<sup>139</sup> Immediate return telephone calls by the debt collector to the consumer containing abusive comments also violate this section.<sup>140</sup>

Debt collectors will sometimes engage in conduct that is both abusive and actually makes it less likely that the creditor will be paid. For instance, contacts with consumers at their place of employment in a manner that jeopardizes their jobs should be found to be unlawful under this standard.

#### **I. Communications with the consumer and others**

The FDCPA provides that the debt collector may not communicate with the consumer at any unusual time or place known, or that

should be known, to be inconvenient to the consumer.<sup>141</sup> Absent knowledge to the contrary, prohibited practices would include communications before 8:00 a.m. and after 9:00 p.m. local time.

The debt collector may not communicate with the consumer known to be represented by legal counsel<sup>142</sup> or at the consumer’s place of employment at which personal communications are prohibited.<sup>143</sup> Collection letters mailed in care of the consumer’s attorney have been held to violate this portion of the FDCPA.<sup>144</sup> In addition, contacts with the consumer’s relatives, other than the spouse, violate the FDCPA.<sup>145</sup> Leaving a message on an answering machine or voice mail system may be an illegal third party communication if it is foreseeable that a third party with whom the collector could not communicate directly would access the device or system.<sup>146</sup> Finally, where the consumer has written to the debt collector to cease further communications, continued collection contacts violate the FDCPA.<sup>147</sup>

On the other hand, where the debt collector did not have knowledge of the consumer’s previous bankruptcy and representation by legal counsel, the FDCPA was not violated.<sup>148</sup> The *bona fide* error defense, discussed *infra*, may protect an otherwise violative communication.<sup>149</sup>

#### **J. Acquisition of location information**

The debt collector may not communicate with someone other than the consumer except to obtain location information.<sup>150</sup> In doing so, the debt collector must identify himself, but may not discuss the debt. Unless requested by that third party the contact may be made only once. However, if the consumer is represented by an attorney, the debt collector may not communicate with



any other person.

#### **K. Legal action by debt collectors**

A debt collector may bring an action to enforce an interest in real property only where the real property is located.<sup>151</sup> Attorneys whose collection activities are limited to purely legal activities, such as the filing of collection actions or mortgage foreclosures are subject to this restriction.<sup>152</sup>

A collection action brought by a debt collector on a personal obligation may be brought only in the "judicial district" where the consumer signed the contract or where the consumer resides at the time the action is filed.<sup>153</sup> A lawyer, whose only action was to bring suit on behalf of the creditor, violated the FDCPA where the action was filed in a jurisdiction other than that where the contract was signed or the consumer resided.<sup>154</sup>

The Seventh Circuit Court of Appeals, in *Newsom v. Friedman*, has held that the six districts of the Municipal Department of the Circuit Court of Cook County are *not* distinct "judicial districts." The court accordingly held that a debt collection lawyer did not violate the FDCPA by filing a case in a municipal district in which no contract was signed and the debtor did not live.<sup>155</sup> The court declined to follow a FTC staff opinion to the contrary.<sup>156</sup> Another staff opinion states, with respect to outlying multi-county circuits in Illinois, that the debt collector must file suit in the county in which the debtor resides or signed the contract.<sup>157</sup>

The protection afforded by the FDCPA is not waived by the consumer's failure to request a change of venue in the debt collection action.<sup>158</sup> By filing suit in an improper forum

and forcing the consumer to either default or appear in the improper forum (in person or by counsel), the debt collector has already inflicted the injury sought to be avoided by the Act.

The FDCPA cautions that it does not confer authority for any legal action by a debt collector. In many jurisdictions, a collection agency may neither file suit in its own name, nor have its attorney file suit in its name, and may not take an assignment of a debt for collection and then have its attorney file suit in its name. If the commencement of legal action by the debt collector is unauthorized or constitutes an unauthorized practice of law under state law, it will also violate the FDCPA.<sup>159</sup>

#### **L. Furnishing deceptive forms**

It is unlawful to design, compile, and furnish any forms knowing that such forms will be used to create the false belief in the consumer that a person other than the creditor is participating in the collection.<sup>160</sup> In one case, an attorney's conduct in furnishing form letters which deceived the consumer was held to violate the FDCPA.<sup>161</sup> As discussed *supra*, an attorney who authorizes a creditor or collection agency to use his letterhead, without his reviewing the files, also violates this section.

### **IV. Remedies**

Federal and state courts have concurrent jurisdiction of FDCPA suits.<sup>162</sup> A single violation is sufficient to support a judgment for the consumer.<sup>163</sup> The validity of the underlying debt, (e.g. whether the consumer owes the alleged obligation), is normally not relevant to the debt collector's liability for violating of the FDCPA.<sup>164</sup> Thus, a successful consumer is entitled to an

award of actual damages, statutory damages up to \$1,000, costs and attorney's fees.<sup>165</sup> Class action relief is also available.<sup>166</sup>

In FDCPA litigation brought against the debt collector, the collector normally may not assert a counterclaim for the underlying debt.<sup>167</sup>

### A. Actual damages

A debt collector who violates any provision of the FDCPA is liable for actual damages.<sup>168</sup> State law requirements regarding the proof of intentional or negligent infliction of emotional distress are not applicable to actual damages under the FDCPA. For example, in *Smith v. Law Offices of Mitchell N. Kay*,<sup>169</sup> the U.S. District Court for the District of Delaware instructed the jury:

First, actual damages may be awarded to the plaintiff as a result of the failure of defendants to comply with the Act. Actual damages not only include any out-of-pocket expenses, but also damages for personal humiliation, embarrassment, mental anguish or emotional distress.

You must determine a fair and adequate award of these items through the exercise of your judgment and experience in the affairs of the world after considering all facts and circumstances presented during the trial of this case.<sup>170</sup>

Although the consumers bore no out-of-pocket losses, the jury awarded them \$15,000 as actual damages for emotional distress. The court granted a remittitur to \$3,000.

A number of other federal cases have likewise held that emotional distress damages are recoverable without regard to state law restric-

tions on emotional distress damages.<sup>171</sup> For example, appellate courts in Ohio and Minnesota have held that the debt collector was "liable for any mental and emotional stress, embarrassment, and humiliation caused" by improper debt collection activities.<sup>172</sup>

In an action alleging that an attorney systematically filed collection actions in improper and inconvenient venues, an Illinois district court held, in *Holloway v. Pekay*, the attorney's fees assessed in the collection actions did not constitute "actual damages."<sup>173</sup>

### B. Statutory damages

Besides actual damages, the consumer may be awarded "such additional damages as the court may allow, but not exceeding \$1,000."<sup>174</sup> The consumer does not need to show any actual damages in order to recover statutory damages.<sup>175</sup> In determining the amount of statutory damages in an individual action, the court considers "the frequency and persistence of non-compliance by the debt collector, the nature of such non-compliance, and the extent to which the non-compliance was intentional."<sup>176</sup>

The statutory language begs in unclear as to what "not exceeding \$1,000" refers. The Sixth Circuit in *Wright v. Finance Servs. of Norwalk, Inc.*<sup>177</sup> and the Eleventh Circuit in *Harper v. Better Business Servs., Inc.*<sup>178</sup> have held that it means that statutory damages of up to \$1,000 are available to one individual plaintiff in one lawsuit. A majority of the district courts considering the issue have reached the same conclusion.<sup>179</sup> However, since a separate FDCPA action could be filed for each communication or other discrete act that violates the law, a substantial argument can be made that "action" means "cause of action."

The consumer need not prove the debt is invalid<sup>180</sup> although payment of amounts not owed as a result of an FDCPA violation would certainly constitute actual damages.

### C. Vicarious liability

A collection agency is liable for the FDCPA violations committed by either its employees or an attorney it hires.<sup>181</sup> However, a creditor is not vicariously liable for the FDCPA violations of its debt collector unless it brings itself within the provisions imposing liability for using a third party name or furnishing deceptive forms. The reason that a creditor is not vicariously liable is that the FDCPA manifests Congressional intent to exclude creditors from the scope of the Act, unless they use the name of a third party or furnish deceptive forms<sup>182</sup>

### D. Attorney's fees

The successful consumer is entitled to an award of costs and reasonable attorney's fees.<sup>183</sup>

Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather the Act mandates an award of attorney's fees as a means of fulfilling Congress' intent that the Act should be enforced by debtors acting as private attorneys general.<sup>184</sup>

In *Pipiles v. Credit Bureau of Lockport, Inc.*, the Second Circuit held that although no actual or statutory damages are awarded, attorney's fees are available.<sup>185</sup> However, the Fifth Circuit, in *Johnson v. Eaton*, reached the opposite conclusion.<sup>186</sup>

In *Tolentino v. Friedman*,<sup>187</sup> the Seventh

Circuit held that the proper rate at which an attorney bringing an FDCPA case is compensated is the rate which his or her services command in the marketplace as established by billings or awards in other cases. Further, it is not proper to have a special reduced rate in FDCPA cases because of the nature of the case or the \$1,000 limitation on actual damages.<sup>188</sup>

### E. Bona fide error defense

In most cases, the debtor suing under the FDCPA need not prove that a violation was intentional or negligent.<sup>189</sup> Accordingly, the Seventh Circuit in *Gammon* stated that the "FDCPA is a strict liability statute."<sup>190</sup> Of course, evidence that the debt collector intended to mislead consumers tends to prove that he selected suitable means to accomplish that end.<sup>191</sup>

The FDCPA does provide an affirmative defense to debt collectors which is similar to the one found in the TILA.<sup>192</sup>

A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.<sup>193</sup>

A mistaken view of the law is not excused under the FDCPA.<sup>194</sup> Moreover, the maintaining of precautions designed to avoid errors is mandatory. Thus, where the debt collector fails to provide any evidence that it maintained proper procedures to avoid error, the *bona fide* error defense was held not to be available.<sup>195</sup> Reliance by the debt collector on an informal FTC

advisory opinion does not establish a *bona fide* error defense.<sup>196</sup>

In the split decision of *Smith v. Transworld Systems, Inc.*, the Sixth Circuit found that the debt collector demonstrated procedures reasonably adapted to avoid violating the FDCPA and, thereby, established a *bona fide* error defense.<sup>197</sup> Although the debt collector, working from plaintiff's California headquarters, sent a second letter to the consumer shortly after receiving the consumer's cease and desist letter at its Ohio office, the debt collector demonstrated "procedures reasonably adapted to avoid any such error"<sup>198</sup> and established a *bona fide* error defense. However, a dissenting judge wrote that the debt collector "has intentionally structured and implemented a system that defies compliance with the absolute duty mandated by [the Act]."<sup>199</sup>

A debt collector telephoning the consumer before 8:00 a.m., demonstrated a *bona fide* error defense where it erroneously failed to consider the consumer's time zone and no damage resulted from the calls.<sup>200</sup> Similarly, an unintentional misstatement of the law of garnishment, where it was demonstrated that the collector's employee had been properly trained on wage garnishment limitations, established a *bona fide* error defense.<sup>201</sup> In a similar matter, a debt collector, which posted a card containing the debt collection warning required by the Act, required its employees to recite this language immediately in all telephone conversations, and trained employees regarding the warning established a *bona fide* error defense to a claim based on failure to provide the proper warning.<sup>202</sup>

An attorney who claims the *bona fide* error defense based on information supplied by his client, the creditor, may waive the attorney-client privilege. This privilege is with respect to

all communications with the client on the relevant subject, even without the consent of the client.<sup>203</sup>

## F. Jurisdiction

FDCPA litigation may be brought in either state or federal court.<sup>204</sup> A suit pursuant to the FDCPA "may be brought in any appropriate United States district court without regard to the amount in controversy" or in the appropriate state court within one year of the date of violation.<sup>205</sup> In *Mattson v. U.S. West Communications, Inc.*, a split decision, the Eighth Circuit calculated the one year statutory limitation to expire on the day before the anniversary date.<sup>206</sup> The Eleventh Circuit has now followed the Eighth Circuit decision.<sup>207</sup>

Most courts have held that FDCPA litigation is appropriately filed within the district where the consumer received the communication.<sup>208</sup> This general rule has been upheld even where the debt collector's letter had been forwarded to a district in which it did not do business.<sup>209</sup> A jury trial is available in FDCPA actions brought in federal court.<sup>210</sup> The debt collector normally may not bring counterclaims for either the underlying debt<sup>211</sup> or for bad faith and harassment.<sup>212</sup>

## G. Class actions

The FDCPA contains special damage provisions for class actions.<sup>213</sup> Under the Act, recovery of statutory damages for the class is limited to one percent of the debt collector's net worth or \$500,000, whichever is less. The named plaintiffs, however, can collect their full statutory damages. Furthermore, the damage limitation does not apply to actual damages.

FDCPA actions based on improper form letters or charges, or similar standard practices, are ideally suited for class action treatment. Under the "least sophisticated consumer" or "unsophisticated consumer" standard of liability, an FDCPA claim for statutory damages presents no issues of reliance or causation: "the question is not whether the plaintiffs were deceived or misled, but rather whether an unsophisticated consumer would have been misled."<sup>214</sup> An FDCPA class action alleging unauthorized charges may technically require proof of causation, but the payment of the unauthorized amount establishes causation. Class actions have been certified under the FDCPA in cases involving false attorney letters,<sup>215</sup> unauthorized charges,<sup>216</sup> improper form letters,<sup>217</sup> and the filing of suits in improper venues.<sup>218</sup>

Some courts have denied certification where the *per capita* recovery of statutory damages was viewed as *de minimis* and there were no actual damages.<sup>219</sup> In *Gammon v. G.C. Servs., L.P.*, a creative decision, the U. S. District Court for the Northern District of Illinois approved of *cy pres* distribution of statutory damages in this type of situation.<sup>220</sup>

The *de minimis* argument is obviously inapplicable where unauthorized charges were sought to be collected. Those class members who paid the unauthorized charges have actual damages, and those class members who have not yet paid are entitled to a judicial determination that they do not owe the questioned charges.

#### H. FTC official staff commentary

The FTC has published an Official Staff Commentary on the FDCPA.<sup>221</sup> The Staff Commentary is a guideline intended to clarify the

staff's interpretations of the statute but does not have the force or effect of law. It is not a formal trade regulation rule or an advisory opinion of the Commission, and thus, is not binding on the Commission or the public.<sup>222</sup> The FDCPA states: "Neither the Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title."<sup>223</sup>

In certain respects, the Commentary reflects the FTC's desire to narrow the FDCPA rather than to enforce it as written. Most notably, it purports to support the efforts of the collection bar to obtain exemption from the FDCPA's strictures. Consequently, several courts have held portions of the FTC's staff commentary to be unpersuasive and flatly contrary to the statute.<sup>224</sup>

Currently, a debt collector's good faith compliance with an FTC advisory opinion insulates the collector from liability.<sup>225</sup> However, at the date of this writing, the FTC has not issued any formal opinions.

#### V. Conclusion

Continuing evidence of debt collection abuse and ongoing issues concerning the application of the FDCPA highlight the vital role served by the statute. In the absence of effective governmental enforcement, vigorous enforcement by private practitioners, particularly through class actions, is essential to ensure that debt collectors comply with this important consumer protection measure.

# E N D N O T E S

<sup>1</sup> 15 U.S.C. § 1692 *et seq.* (1977).

<sup>2</sup> 123 CONG. REC. 10241 (1977) (Remarks of Rep. Annunzio); *see Baker v. G. C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982).

<sup>3</sup> S. REP. No. 382, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697.

<sup>4</sup> 15 U.S.C. § 1692(a).

<sup>5</sup> *Id.* § 1692(e).

<sup>6</sup> *Id.* § 1692a (5) (emphasis added).

<sup>7</sup> *Bloom v. I.C. System, Inc.*, 972 F.2d 1067, 1068-69 (9th Cir. 1992) (business loan); *Munk v. Federal Land Bank of Wichita*, 791 F.2d 130, 131-32 (10th Cir. 1986) (agricultural loan); *Kicken v. Valentine Production Credit Ass'n*, 628 F. Supp. 1008, 1011 (D. Neb. 1984), *aff'd without opinion*, 754 F.2d 378 (8th Cir. 1984) (agricultural loan).

<sup>8</sup> *Gladstone v. Master Collectors, Inc.*, Civ. A. No. CIV 1: 94-CV-413-PMH (N.D. Ga. July 5, 1996).

<sup>9</sup> *Frey v. Gangwish*, 970 F.2d 1516, 1518 (6th Cir. 1992).

<sup>10</sup> *McCarthy v. Rosenthal*, No. HAR 95-3188, 1996 U.S. Dist. LEXIS 6437, at \*8 (D. Md. Jan 5, 1996).

<sup>11</sup> 5 U.S.C. § 1692a (5) (emphasis added).

<sup>12</sup> *McClean v. Melville Collections*, No. 94-C50253, 1995 U.S. Dist. LEXIS 16364, at \*7-8 (N.D. Ill. Oct. 25, 1995); *Charles v. Checkrite, Ltd.*, No. Civ. 95-2263 PHX PGR (D. Ariz. May 9, 1996).

<sup>13</sup> *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1168-69.

<sup>17</sup> *E.g.*, Electronic Funds Transfer Act, 15 U.S.C. § 1693a (6); Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*

<sup>18</sup> 15 U.S.C. § 1692a (4).

<sup>19</sup> Decisions specifically holding that checks are subject to the FDCPA include *Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354 (E.D. Cal. 1995); *In re Scrimpsheer*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982); *Keele v. Wexler*, No. 95-C3483, 1995 U.S. Dist. LEXIS 13215 (N.D. Ill. Sept. 11, 1995); *Bass v. Stopler, Kopritzinsky, Brewster, & Neidler*, 95-C-470-C, *appeal pending*; and *Narwick v. Wexler*, 901 F. Supp. 1275 (N.D. Ill. 1995). Decisions which apply the FDCPA to checks include *Shifflett v. Accelerated Recovery Systems, Inc.*, No. 95-00070, 1996 U.S. Dist. LEXIS 8515 (W.D. Va. May 23, 1996); *Stewart v. Slaughter*, 165 F.R.D. 696 (M.D. Ga. 1996); *Byes v. Credit Bureau Enterprises*, No. 95-239, 1996 U.S. Dist. LEXIS 2870 (E.D. La. Mar. 5, 1996); *Edwards v. National Business Factors*, 897 F. Supp. 455 (D. Nev. 1995);

*Pearce v. Rapid Check Collection*, 738 F. Supp. 334 (D.S.D. 1990); *Hutchinson v. Russian*, No. 92-2225, 1992 U.S. Dist. LEXIS 18891 (D. Kan. Oct. 29, 1992); *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289 (D. Del. 1990); *West v. Costen*, 558 F. Supp. 564, 581-84 (W.D. Va. 1983) (FDCPA regulates addition of charges to dishonored checks issued in payment for goods and services at grocery stores); *Ransom v. Telecredit Service Corp.*, H-91-897 (D. Md. Feb. 5, 1992) (same); *Taylor v. Checkrite, Ltd.*, 627 F. Supp. 415 (S.D. Ohio 1986) (FDCPA applied to attempt to collect bad check); *McGilvray v. Hallmark Financial Group, Inc.*, 891 F. Supp. 265 (E.D. Va. 1995); *Bukumirovich v. Credit Bureau of Baton Rouge, Inc.*, 155 F.R.D. 146 (M.D. La. 1994) (court held that attempt to collect bad check is covered by the FDCPA where "[t]he debt represented by the check is a consumer debt"); *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (1989) (FDCPA applies to collection agency's attempt to collect check issued in payment for merchandise, and specifically regulates the addition of charges to the face amount of such a check); *See also*, International Bureau of Fraud Control v. Clayton, 188 Ill. App. 3d 703, 544 N.E.2d 416 (1989) (company which guarantees checks issued to merchants for goods and services purchased was debt collector under the Illinois Collection Agency Act, which applies to any person who "offers services to collect an alleged debt").

<sup>20</sup> 15 U.S.C. § 1692a (4).

<sup>21</sup> H.R. REP. 29, 95th Cong., 1st Sess. (1977). This was the version of the FDCPA passed by the House. The Senate Banking Committee substituted the text of its bill for H.R. 5294, and the substitute bill was passed by both houses. S. Rep. No. 382, 95th Cong., 1st Sess., at 1, 1977, *reprinted in* USCCAN 1695, 1695-6. However, the definition of "debt" was substantially identical in both bills. The Senate broadened the definition to include "alleged" debts and collection of judgments. Significantly, prior versions of the FDCPA limited "debt" to transactions "in which credit is offered or extended to an individual." H.R. 13720, 94th Cong., 2d Sess. (1976); H.R. 29, 95th Cong., 1st Sess. (1977).

<sup>22</sup> H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977).

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *United States v. Renner*, No. 89-1503-CIV-T-10(A) (M.D. Fla. Nov. 7, 1989) (complaint filed); *United States v. Telecheck, Inc.*, Civ. No. JH-80-710 (D. Md. Mar. 27, 1980) (complaint filed).

<sup>25</sup> Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,102 (FTC 1988).

<sup>26</sup> *Perez v. Slutsky*, No. 94-C6137, 1994 WL 698519, 1994 U.S. Dist. LEXIS 17711 (N.D. Ill. Dec. 12, 1994).

<sup>27</sup> *Travieso v. Gutman*, No. 94-CV-5756, 1995 WL 704778, 1995 U.S. Dist. LEXIS 17804, at \*8 (E.D.N.Y. Nov. 16, 1995).

<sup>28</sup> *Id.* *See also Emanuel v. American Credit Exchange*, 870 F.2d

805 (2d Cir. 1989) (treating rent as a "debt" subject to the FDCPA).

<sup>29</sup>Riter v. Moss & Bloomberg, 932 F. Supp. 210 (N.D. Ill. 1996); Vosatka v. Wolin-Levin, Inc., No. 94-C4129, 1995 WL 4439507, 1995 U.S. Dist. LEXIS 10415 (N.D. Ill. July 11, 1995); Azar v. Hayter, 874 F. Supp. 1314, 1318-19 (N.D. Fla. 1995), *aff'd without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, 133 L.Ed. 2d 666 (1996). *Accord* Archer v. Beasley, No. 90-2576, 1991 WL 34889, 1991 U.S. Dist. LEXIS 2994 (D.N.J. Mar. 5, 1991).

<sup>30</sup>Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D. Pa. 1996).

<sup>31</sup>*Id.* at 526.

<sup>32</sup>Staub v. Harris, 626 F.2d 275 (3d Cir. 1980).

<sup>33</sup>Mabe v. G.C. Services, L.P., No. Civ.A.93-0234-B, 1994 WL 6920, 1994 U.S. Dist. LEXIS 162 (W.D. Va. Jan. 6, 1994), *aff'd*, 32 F.3d 86 (4th Cir. 1994); Battye v. Child Support Servs., 873 F. Supp. 103 (N.D. Ill. 1994); Brown v. Child Support Advocates, 878 F. Supp. 1451 (D. Utah. 1994).

<sup>34</sup>Shorts v. Palmer, 155 F.R.D. 172 (S.D. Ohio 1994).

<sup>35</sup>Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987).

<sup>36</sup>15 U.S.C. § 1692a (6).

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985); Coppola v. Connecticut Student Loan Found., No. N-87-398, 1989 WL 47419, 1989 U.S. Dist. LEXIS 3415 (D. Conn. Mar. 22, 1989).

<sup>40</sup>*E.g.*, a receiver or trustee of a corporate creditor or the personal representative of an individual creditor.

<sup>41</sup>15 U.S.C. § 1692e.

<sup>42</sup>*Id.* § 1692a (6).

<sup>43</sup>An FTC opinion letter of Sept. 19, 1985 discusses a situation in which XYZ and ABC were two entities under common ownership, XYZ handled the collection of ABC's delinquent debts, XYZ's principal business was *not* debt collection, and XYZ failed to disclose its relationship with ABC in effecting collections. The FTC stated that these facts *would* result in an FDCPA violation:

[T]he [affiliate] exclusion does not necessarily apply if a creditor "in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is attempting to collect such debts." Strictly speaking, this provision does not make XYZ subject to the Act because XYZ is not the creditor. However, because the collection activity would assumably be conducted under the XYZ name, its debt collection activities may subject the creditor, ABC Corporation, to the Act. For example, if, as your letter suggests (and is necessary for XYZ to come within the 803(6)(B) [§1692a(6)(B)] exception), XYZ is not fully independent of ABC Corporation but uses a name which conveys the impression that it is independent, the use of such name in collecting ABC Corporation's debts would (a) bring ABC Cor-

poration within the scope of the Act and (2) violate the Act's Section 807(10) [§1692e(10)] and 807(14) [§1692e(14)]. [f.n.: Section 807(10) prohibits the use of false representations and deceptive collection means when collecting debts. Section 807(14) prohibits the use of any name other than the true name of the collector when the collector is engaged in collection activities.] The Commission staff has stated that it would generally be a violation of 807(10) for a creditor to use a controlled entity to collect its own debts under a name that conveys the impression that a third party is collecting the debts.

Under the circumstances outlined in your letter, and in view of the ownership overlap and on-going business connections, it appears that ABC Corporation could not successfully maintain that XYZ was an independent collection entity at the same time it sought 803(6)(B) exemption[.]

<sup>44</sup>The FTC Staff Commentary to the FDCPA states:

3. *Application of definition to creditor using another name.* Creditors are generally excluded from the definition of "debt collector" to the extent that they collect their own debts in their own name. However the term specifically applies to "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is" involved in the collection.

A creditor is a debt collector for purposes of this act if:

- He uses a name other than his own to collect his debts, including a fictitious name.

- His salaried attorney employees who collect debts use stationery that indicates that attorneys are employed by someone other than the creditor or are independent or separate from the creditor. . . .

- The creditor's collection division *or related corporate collector is not clearly designated* as being affiliated with the creditor; however, the creditor is not a debt collector if the creditor's correspondence is *clearly labeled* as being from the "collection unit of the (creditor's name)," since the creditor is not using a "name other than his own" in that instance. Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,102 (FTC 1988) (emphasis added).

<sup>45</sup>Grammatico v. Sterling, 91 CV 467 (N.D.N.Y. 1991).

<sup>46</sup>*Id.*

<sup>47</sup>Little v. World Financial Network, Inc., Civ. No. N-89-346, 1990 WL 516554, (D. Conn. July 26, 1990).

<sup>48</sup>Britton v. Weiss, No. 89-CV-143, 1989 WL 148663, 1989 U.S. Dist. LEXIS 14610 (N.D.N.Y. Dec. 8, 1989).

<sup>49</sup>*Id.* at \*2, 1989 U.S. Dist. LEXIS 14610, at \*6-7 (N.D.N.Y. Dec. 8, 1989).

<sup>50</sup>*Id.* at \*4, 1989 U.S. Dist. LEXIS 14610, at \*10-11. *See also* Cramer v. First of America Bank Corp., No. 93-C3189, 1993 WL 478997, 1993 U.S. Dist. LEXIS 16276 (N.D. Ill. Nov. 16 1993) (opinion later withdrawn per settlement). Cramer bought a used car which was financed by the "National Bank of Bloomington." He defaulted and the National Bank of Bloomington repossessed the car. Ten years later, after hav-

ing lived in another state and heard nothing more about the debt, Cramer received a collection demand that (i) came from "First of America Bank Corporation" and (ii) did not comply with the FDCPA. At some point during the intervening decade First of America Bank Corporation acquired, through a series of mesne transactions, the business of what was once "National Bank of Bloomington," and operated it under the name of "First of America Bank — McLean" and "First of America Bank — Champion." Neither the collection letter nor any previous document disclosed the corporate relationships. The court found the FDCPA applicable.

<sup>51</sup> *Dickenson v. Townside TV & Appliance, Inc.*, 770 F. Supp. 1122, 1128 (S.D.W. Va. 1990) ("[A] creditor may use any established name under which it is known to collect its debts from a particular debtor as long it has consistently dealt with such debtor since the beginning of the credit relationship at issue under such name"). *Id.*

<sup>52</sup> *Young v. Lehigh Corp.*, 1989-2 Trade Cas. (CCH) ¶68,790, No. 80-C4376 1989 U.S. Dist. LEXIS 11575 (N.D. Ill. Sept. 26, 1989); *Meads v. Citicorp Credit Services, Inc.*, 686 F. Supp. 330 (S.D. Ga. 1988) (debt owed on Visa card issued by Citibank (North Dakota), N. A.; dunning letters on Citicorp Credit Services, Inc. letterhead).

<sup>53</sup> *Vasquez v. Allstate Ins. Co.*, No. 96-C2771, 1996 WL 523044, 1996 U.S. Dist. LEXIS 13577 (N.D. Ill. Sept. 12, 1996).

<sup>54</sup> *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985), *citing* S. REP. No. 382, 95th Cong., 1st Sess. at 3, *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

<sup>55</sup> *Games v. Cavazos*, 737 F. Supp. 1368, 1385 (D. Del. 1990). "The word 'regularly' means 'normally, usually, or customarily.' [citations] The Act was not intended to cover an entity that collects a debt for another in an isolated instance, but it does apply to entities that collect debts for others 'in the regular course of business.' [citations]" *Id.* See also *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990) (attorney who represented four collection agencies, filed over 150 collection suits in a two-year period, and sent one particular collection letter over 125 times in a 14-month period was a debt collector even though debt collection was merely incidental to his primary law practice).

<sup>56</sup> *Games v. Cavazos*, 737 F. Supp. 1368, 1384 (D. Del. 1990).

<sup>57</sup> BNA Banking Report, v. 61, no. 21, p. 899 (Dec. 6, 1993).

<sup>58</sup> *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987).

<sup>59</sup> *Id.* at 1485 (emphasis added).

<sup>60</sup> *Cirkot v. Diversified*, 839 F. Supp. 941 (D. Conn. 1993).

<sup>61</sup> *Id.* See also *Commercial Service of Perry v. Fitzgerald*, 856 P.2d 58, 62 (Colo.App. 1993) ("[A] company which takes an assignment of a debt in default, and is a business the principal purpose of which is to collect debts, may be subject to the Act, even if the assignment is permanent and without any further rights in the assigner"); *Wagner v. American Nat'l Educ. Corp.*, Civ. No. N-81-541 (PCD) (D.Conn., Jan. 3, 1984) ("The statute permits service debt collection free of the act if, when the debt was acquired, it was not in default"); *Coppola v. Connecticut Student Loan Found.*, No. N-87-398, 1989 WL

47419, 1989 U.S. Dist. LEXIS 3415 (D. Conn. Mar. 22, 1989), In *Coppola*, the court stated:

The parties agree that the debt in this case was not in default when CALS began to service the loan for NELLIE MAE. In these circumstances, CALS is excluded from the Act's definition of "debt collector" by 15 U.S.C. §1692a(6)(F)(iii). See Letter from Attorney Rachelle V. Browne, Division of Credit Practice, Federal Trade Commission, to John Silko (dated February 21, 1985) (informal FTC opinion noting that 15 U.S.C. §1692a(6) "would exempt servicing activities for loans that were not in default at the time they were transferred" to New Mexico state student loan servicing foundation), reprinted in Text of Informal FTC Letters (1986 Supp.) App. H (Sept. 19, 1985); see also *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (mortgage servicing company servicing a debt not in default when assigned is exempt from definition of "debt collector"); *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1486 (M.D. Ala. 1987) (relevant distinction is whether debt was in default when assigned to collector). Accordingly, CSLF is entitled to summary judgment in this case because CSLF and its relevant department, CALS, is not a "debt collector" under the Act. *Coppola*, 1989 WL 47419, at \*2-3 (emphasis added).

<sup>62</sup> "Questions and Answers About Interpretations of the Fair Debt Collection Practices Act," *Regulatory Compliance Watch*, vol. 2, no. 4, p. 5 (Feb. 3, 1992).

<sup>63</sup> Pub. L. No. 99-361, 100 Stat. 768 (deleting former 15 U.S.C. § 1692a(6)(F), which excluded from the definition of "debt collector" "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.")

<sup>64</sup> *Crossley v. Lieberman*, 90 B.R. 682, 694 (E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989).

<sup>65</sup> Fair Debt Collection Practices Act, Pub. L. No. 99-361, 1986 U.S.C.C.A.N. 1756-57.

<sup>66</sup> *Heintz v. Jenkins*, 115 S.Ct. 1489 (1995).

<sup>67</sup> *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 321 (E.D. Mich. 1992).

<sup>68</sup> *Id.* at 322.

<sup>69</sup> *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990).

<sup>70</sup> *Mertes v. Devitt*, 734 F. Supp. 872 (W.D. Wis. 1990).

<sup>71</sup> *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 322 (E.D. Mich. 1992). See also *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990); *Hartl v. Presbry & Associates*, 1996 U.S. Dist. LEXIS 13419 (N.D. Ill. Sept. 11, 1996); In re *Littles*, 90 Bankr. 669 (Bankr. E.D. Pa. 1988), *aff'd as modified*, *Crossley v. Lieberman*, 90 Bankr. 682 (E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989).

<sup>72</sup> However, in *Garrett v. Derbes*, No. CIV.A.93-823, 1996 U.S. Dist. LEXIS 11519 (N.D. La. July 8, 1996), a court held that an attorney who allowed his name to be used in 639 collection letters without obtaining or receiving the files was not subject to the FDCPA because he spent essentially no time on the files. The decision seems obviously wrong. If the attorney had received the files as he was professionally obligated to do, he would have spent a substantial amount of time on them.



- <sup>73</sup> Taylor v. Checkrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986).
- <sup>74</sup> Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990) (The FDCPA's definitional language, "owed or due another," means *originally* owed or due to another.) Kimber v. Federal Financial Corp., 668 F. Supp. 1480, 1485 (M.D. Ala. 1987).
- <sup>75</sup> Jordan v. Kent Recovery Servs., 731 F. Supp. 652 (D. Del. 1990); Larranaga v. Mile High Collection and Recovery Bureau, Inc., 807 F. Supp. 111 (D.N.M. 1992); Colton v. Ford Motor Credit Co., No. 3916, 1986 WL 8538 (Ohio Ct. App. July 30, 1986).
- <sup>76</sup> 15 U.S.C. § 1692a (3).
- <sup>77</sup> Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994); Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988).
- <sup>78</sup> West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983). One need not be a consumer to recover under provisions of the FDCPA which apply to any "person," *e.g.*, 15 U.S.C. § 1692e. Other provisions of the FDCPA, *e.g.*, 15 U.S.C. § 1692c, only protect a "consumer."
- <sup>79</sup> 15 U.S.C. § 1692a (3).
- <sup>80</sup> Tolentino v. Friedman, 833 F. Supp. 697 (N.D. Ill. 1993), *aff'd in part and rev'd in part*, 46 F.3d 645 (7th Cir. 1995) (debt collector sent consumers a copy of the summons and complaint prior to service accompanied by an "IMPORTANT NOTICE" discussing the consequences of filing bankruptcy).
- <sup>81</sup> Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1028-29 (6th Cir. 1992); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225-26 (9th Cir. 1988); Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995); Bukumirovich v. Credit Bureau of Baton Rouge, Inc., 155 F.R.D. 146 (M.D. La. 1994); United States v. National Financial Services, 820 F. Supp. 228, 232 (D. Md. 1993) *aff'd* 1996 U.S. Appl. LEXIS 26645 (4th Cir., Oct. 12, 1996); Moore v. Ingram & Assocs., 805 F. Supp. 7 (D.S.C. 1992).
- <sup>82</sup> Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993).
- <sup>83</sup> Gammon v. G.C. Services L.P., 27 F.3d 1254 (7th Cir. 1994).
- <sup>84</sup> Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993).
- <sup>85</sup> Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996).
- <sup>86</sup> *Id.* at 226-27.
- <sup>87</sup> *Id.* at 227.
- <sup>88</sup> Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).
- <sup>89</sup> 15 U.S.C. § 1692g (a).
- <sup>90</sup> *Id.* § 1692g (b).
- <sup>91</sup> Rivera v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988).
- <sup>92</sup> Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222 (9th Cir. 1988).
- <sup>93</sup> Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).
- <sup>94</sup> *Id.*; Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (Ed. Pa. 1996).
- <sup>95</sup> Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (Ed. Pa. 1996).
- <sup>96</sup> Miller v. Payco-General American Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991).
- <sup>97</sup> Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991) (threat to sue if payment was not received within ten days rendered the validation notice ineffective); Cortright v. Thompson, 812 F. Supp. 772, 778 (N.D. Ill. 1992) (attorney demand letter stating that "in the event the balance is not paid in full or satisfactory payment arrangements made within ten days, it may be necessary to file at any time thereafter a lawsuit to recover the amount due if so requested by my client . . . Although the letter is not as threatening visually as some described in cases finding violations of § 1692g(a), [citation], defendant's letter appears on law firm stationery and states that it may be necessary to file a lawsuit at any time after 10 days . . ."); Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225 (9th Cir. 1988) (§ 1692g notice accompanied by demand that account be paid within 10 days to avoid adverse credit report is not effectively conveyed, and demand violates statute; such a communication would "lead the least sophisticated debtor, and quite probably even the average debtor, only to one conclusion: he must ignore the right to take 30 days to verify his debt and act immediately or he will be remembered as a deadbeat in the 'master file' of his local collection agency and will, accordingly, lose his 'most valuable asset,' his good credit rating"); United States v. National Financial Services, Inc., 820 F. Supp. 228 (D. Md. 1993) (letter containing § 1692g notice and also stating that matter would be referred to an attorney in ten days violated § 1692g because the ten day demand "contradict[s] the validation notice's declaration that the debtor has thirty days to dispute the debt"); Russey v. Rankin, 911 F. Supp. 1449 (D.N.M. 1995).
- <sup>98</sup> Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F. Supp. 405 (N.D.N.Y. 1995).
- <sup>99</sup> Riveria v. MAB Collections, Inc., 682 F. Supp. 174 (W.D.N.Y. 1988); Ost v. Collection Bureau, Inc., 493 F. Supp. 701 (D.N.D. 1980); Phillips v. Amana Collection Services, Nos. 89-CV-1152S, 90-CV-149S, 1992 WL 227839, 1992 U.S. Dist. LEXIS 13558 (W.D.N.Y. Aug. 25, 1992). *See also*, Rabideau v. Management Adjustment Bureau, 805 F. Supp. 1086 (W.D.N.Y. 1992); Clomon v. Payco-General American Credits, 774 F. Supp. 691 (D. Conn. 1990). *Contra* Blackwell v. Professional Business Services, Inc., 526 F. Supp. 535 (N.D. Ga. 1981).
- <sup>100</sup> Miller v. Payco-General American Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724, 726 (D. Conn. 1990).
- <sup>101</sup> Sandlin v. Shapiro & Fishman, 919 F. Supp. 1564 (M.D. Fla. 1996).
- <sup>102</sup> Jang v. A.M. Miller Assoc., Inc., Nos. 95-C4919, 95-C6665, 1996 WL 435096, 1996 U.S. Dist. LEXIS 10883 (N.D. Ill. July 30, 1996).

- <sup>103</sup> 15 U.S.C. § 1692e (5).
- <sup>104</sup> *Newman v. Checkrite of California*, 912 F. Supp. 1354 (E.D. Cal. 1995).
- <sup>105</sup> *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60 (2d Cir. 1993); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991); *See Pipiles*, 886 F.2d at 22 (48 hour notice); *Oglesby v. Rotche*, No. 93-C4183, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D. Ill. Nov. 5, 1993).
- <sup>106</sup> *Rosa v. Gaynor*, 784 F. Supp. 1, 5 (D. Conn. 1989).
- <sup>107</sup> *Sibley v. Firstcollect, Inc.*, 913 F. Supp. 469 (M.D. La. 1995); *Russey v. Rankin*, 911 F. Supp. 1449 (D.N.M. 1995); *Kuhn v. Account Control Technology, Inc.*, 865 F. Supp. 1443, 1451-52 (D. Nev. 1994); *Gaetano v. Payco of Wisconsin, Inc.*, 774 F. Supp. 1404, 1413-14 (D. Conn. 1990). *Contra* *Wade v. Regional Credit Ass'n*, 87 F.3d 1098 (9th Cir. 1996).
- <sup>108</sup> *Wiener v. Bloomfield*, 901 F. Supp. 771 (S.D.N.Y. 1995).
- <sup>109</sup> *Oglesby v. Rotche*, No. 93-C4183, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D. Ill. Nov. 5, 1993) (threat to garnish all wages and attach all property); *Woolfolk v. Van Ru Credit Corp.*, 783 F. Supp. 724 (D. Conn. 1990) (oppressive list of post-judgment remedies); *Seabrook v. Onondaga Bureau of Medical Economics, Inc.*, 705 F. Supp. 81 (N.D.N.Y. 1989) (threat to garnish wages in excess of amounts permitted under federal law); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990) (letter stating that litigation could result in seizure of real estate and bank account deceptive; mere filing of litigation could not have any of stated effects). *See Kleczy v. First Federal Credit Control, Inc.*, 21 Ohio Ct.App. 3d 56, 486 N.E.2d 204 (1984) ("avoid further action" was not sufficiently threatening to violate § 1692(e)(5)).
- <sup>110</sup> 15 U.S.C. § 1692e (5).
- <sup>111</sup> *Id.* § 1692f (1).
- <sup>112</sup> *West v. Costen*, 558 F. Supp. 564, 581 (W.D. Va. 1983).
- <sup>113</sup> *Id.*; *In re Scrimpsheer*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) (unauthorized "service charge" on NSF checks); *Clark v. Marine Midland Bank*, 67 A.D.2d 846, 413 N.Y.S.2d 9 (1979) (same).
- <sup>114</sup> *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992).
- <sup>115</sup> *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994), *aff'd*, 115 S. Ct. 1489 (1995).
- <sup>116</sup> *People ex rel. Daley v. Datacom Sys. Corp.*, 146 Ill. 2d 1, 585 N.E.2d 51 (1991) (collection agency hired to collect parking fines tacked on unauthorized fees); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990) (lawyer demanded excessive amounts); *Duran v. Credit Bureau of Yuma*, 93 F.R.D. 607 (D. Ariz. 1982) (unauthorized collection fees); *Sandlin v. Shapiro & Fishman*, 919 F. Supp. 1564 (M.D. Fla. 1996).
- In addition to §§ 1692f and 1692e (5), debt padding also violates § 1692e(2), which prohibits "[t]he false representation of . . . (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." 15 U.S.C. § 1692e(2).
- <sup>117</sup> *Newman v. Checkrite of California*, 912 F. Supp. at 1368-69.
- <sup>118</sup> Illinois has a non-standard provision that expressly allows such damages for a dishonored check. 810 ILCS 5/3-806 (West 1993).
- <sup>119</sup> *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459 (M.D. La. 1996).
- <sup>120</sup> *Baker v. G.C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).
- <sup>121</sup> 15 U.S.C. §§ 1692d (5); 1692b (6); 1692c (a) (1)-(2); 1692e (8); 1692j (a).
- <sup>122</sup> *Id.* § 1692k (c).
- <sup>123</sup> *Id.* § 1692a (3).
- <sup>124</sup> *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).
- <sup>125</sup> *Id.* at 1321.
- <sup>126</sup> *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989).
- <sup>127</sup> *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996).
- <sup>128</sup> *Id.* at 228.
- <sup>129</sup> *Id.* at 229.
- <sup>130</sup> *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456, 1461-2 (C.D. Cal. 1991) ("the letter falsely suggests to the least sophisticated debtor that an attorney has been retained to collect his or her *particular* debt. Thus, the letter implies to the recipient that TRC considers the debt to be more serious than TRC, in fact, considers it to be . . . The representation that independent outside counsel has been hired may unjustifiably frighten the unsophisticated debtor into paying a debt that he or she does not owe. The FDCPA must be construed to proscribe this means of collection") (emphasis added). *Accord* *United States v. Central Adjustment Bureau, Inc.*, 667 F. Supp. 370, 380-81 (N.D. Tex. 1986), *aff'd*, 823 F.2d 880 (5th Cir. 1987) ("The attorney must have sufficient information to satisfy himself that it is proper to send the dunning letter, *i.e.*, he must investigate the merits of the claim before making a demand for payment. . . the attorney must have *the file* for review to determine the merits of the claim, as well as the limits of his authority") (emphasis added); *Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50,097, 50,105 (FTC 1988) ("a debt collector may not send a computer-generated letter deceptively using an attorney's name").
- <sup>131</sup> *Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354, 1382 (N.D. Ill. 1995).
- <sup>132</sup> 15 U.S.C. § 1692e.
- <sup>133</sup> *Gammon v. G.C. Services L.P.*, 27 F.3d 1254 (7th Cir. 1994) (debt collector stated in collection letter that it had designed collection systems used by federal and state tax collection authorities; Court of Appeals characterized the statement as having no conceivable purpose other than to convey the impression that the tax collection systems could in some manner be used in debt collection); *Adams v. First Federal Credit Control, Inc.*, No. 1:91-CV-2467, 1992 WL 131121 (N.D. Ohio 1992) (use of the word "federal" and seal emblem improperly suggested affiliation with federal government).
- The FDCPA prohibits: "[t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the

use of any badge, uniform, or facsimile thereof. . . ,” 15 U.S.C. § 1692e(1), and “The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval. . . .” *Id.* § 1692e(9).

<sup>134</sup> *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987).

<sup>135</sup> *Herbert v. Monterey Financial Services*, 863 F. Supp. 76 (D. Conn. 1994) (“The court is persuaded that the least sophisticated consumer would interpret ‘final demand’ to mean that MFS was affording Herbert one last opportunity to resolve her alleged debt before it took further steps against her. Yet, as MFS’s subsequent efforts to contact Herbert demonstrate, the dunning letter of September 21 was not, in fact, a final demand. Thus, the court finds that the “final demand” language contained in that letter was objectively false and that its use by MFS violates §1692e.”). *Id.* at 80.

<sup>136</sup> 15 U.S.C. § 1692f.

<sup>137</sup> *Id.* § 1692d.

<sup>138</sup> *Jeter v. Collection Bureau, Inc.*, 760 F.2d 1168, 1179 (11th Cir. 1985).

<sup>139</sup> *Harvey v. United Adjusters*, 509 F. Supp. 1218 (D. Or. 1981) (letter implying that the debtor is financially irresponsible and ignores her mail violated §1692d); *Rutyna v. Collection Accounts Terminal, Inc.*, 478 F. Supp. 980 (N.D. Ill. 1979) (letter using an intimidating tone and threatening an investigation and embarrassment violates §1692d).

<sup>140</sup> *Bingham v. Collection Bureau, Inc.*, 505 F. Supp. 864 (D.N.D. 1981).

<sup>141</sup> 15 U.S.C. § 1692c (a) (1).

<sup>142</sup> *Id.* § 1692c (a) (2).

<sup>143</sup> *Id.* § 1692c (a) (3).

<sup>144</sup> *Clark’s Jewelers v. Humble*, 16 Kan. App. 2d 366, 823 P.2d 818 (1991).

<sup>145</sup> *West v. Costen*, 558 F. Supp. 564, 570 (W.D. Va. 1983).

<sup>146</sup> *Chlanda v. Wymard*, No. C-33-93-321, 1995 U.S. Dist. LEXIS 14394 (S.D. Ohio Sept. 5, 1995). See *Committee v. Dennis Reimer Co., L.P.A.*, 150 F.R.D. 495 (D. Vt. 1993).

<sup>147</sup> *Carrigan v. Central Adjustment Bureau, Inc.*, 494 F. Supp. 824 (N.D. Ga. 1980).

<sup>148</sup> *Hubbard v. National Bond & Collection Associates*, 126 B.R. 422 (D. Del. 1991), *aff’d*, 947 F.2d 935 (3d Cir. 1991).

<sup>149</sup> *Juras v. Amana Collection Service, Inc.*, 829 F.2d 739 (9th Cir. 1987); *Biber v. Associated Collection Services, Inc.*, 631 F. Supp. 1410 (D. Kan. 1986).

<sup>150</sup> 15 U.S.C. § 1692b.

<sup>151</sup> *Id.* § 1692i (a) (2).

<sup>152</sup> *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992).

<sup>153</sup> 15 U.S.C. § 1692i (a) (2).

<sup>154</sup> *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Dutton v. Wolhar*, 809 F. Supp. 1130 (D. Del. 1992); *Oglesby v. Rotche*, No. 93-C4183, 1993 WL 460841 (N.D. Ill. Nov. 5, 1993).

<sup>155</sup> *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996).

<sup>156</sup> Letter from Rachele V. Browne to George W. Heintz (March 23, 1989).

<sup>157</sup> Letter from Rachele V. Browne to John P. Schwulst (Sept. 12, 1988); see *Fox v. Citicorp Credit Services*, 15 F.3d 1507 (9th Cir. 1994).

<sup>158</sup> *Oglesby v. Rotche*, No. 93-C4183, 1993 WL 460841, 1993 U.S. Dist. LEXIS 15687 (N.D. Ill. 1993); *Blakemore v. Pekay*, 895 F. Supp. 972 (N.D. Ill. Nov. 5, 1995).

<sup>159</sup> *Kolker v. Duke City Collection Agency*, 750 F. Supp. 468 (D.N.M. 1990); *Kolker v. Sanchez*, No. CIV. 90-1082, 1991 U.S. Dist. LEXIS 20783 (D.N.M. Dec. 10, 1991) (where commencement of suit by collection agency is unauthorized practice of law under state law, it also violates FDCPA). See *Gaetano v. Payco of Wisconsin, Inc.*, 774 F. Supp. 1404 (D. Conn. 1990) (threats to collect a debt were deceptive, violating 15 U.S.C. §1692e(5) where the collector did not have the required state license to collect the debt).

<sup>160</sup> 15 U.S.C. § 1692j.

<sup>161</sup> *Littles v. Lieberman*, 90 B.R. 700 (E.D. Pa. 1988).

<sup>162</sup> 15 U.S.C. § 1692k (d).

<sup>163</sup> *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990); *Supan v. Medical Bureau of Economics, Inc.*, 785 F. Supp. 304, 305 (D. Conn. 1991).

<sup>164</sup> *Baker v. G.C. Services Corp.*, 677 F.2d 775, 778 (9th Cir. 1982); *McCartney v. First City Bank*, 970 F.2d 45 (5th Cir. 1992); *Adams v. First Federal Credit Control, Inc.*, No. 1:91CV2467, 1992 WL 131121 (N.D. Ohio May 21, 1992). The only exception is that one ground of liability under the FDCPA is when a debt collector attempts to collect a debt which is obviously not owed. See *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987) (debt collector held liable for attempting to collect obviously time-barred debt).

<sup>165</sup> 15 U.S.C. § 1692k (a).

<sup>166</sup> *Id.* § 1692a (2) (b).

<sup>167</sup> *Peterson v. United Accounts, Inc.*, 638 F.2d 1134 (8th Cir. 1981); *Leatherwood v. Universal Business Service Co.*, 115 F.R.D. 48 (W.D.N.Y. 1987); *Gutshall v. Bailey & Assoc.*, No. 90-C20182, 1991 U.S. Dist. LEXIS 12153 (N.D. Ill. Feb. 11, 1991); *Venes v. Professional Service Bureau, Inc.*, 353 N.W.2d 671 (Minn. App. 1984) (permissive); *Hart v. Clayton-Parker & Assoc.*, 869 F. Supp. 774 (D. Ariz. 1994); *Ayres v. National Credit Management Corp.*, No. CIV.A.90-5535, 1991 WL 66845, 1991 U.S. Dist. LEXIS 5629, (E.D. Pa. Apr. 25, 1991); *Zhang v. Haven-Scott Assoc., Inc.*, No. 95-2126, 1996 WL 355344, 1996 U.S. Dist. LEXIS 8738 (E.D. Pa. June 21, 1996).

<sup>168</sup> 15 U.S.C. §1692k (a) (1).

<sup>169</sup> *Smith v. Law Offices of Mitchell N. Kay*, 124 B.R. 182, 185 (D. Del. 1991).

<sup>170</sup> *Id.*

- <sup>171</sup>Howze v. Romano, No. CIV-D92-644-SLR, 1994 WL 827162, 1994 U.S. Dist. LEXIS 20547 (D. Del. 1994); Crossley v. Lieberman, 90 Bankr. 682 (E.D. Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989); Teng v. Metropolitan Retail Recovery, 851 F. Supp. 61, 68-69 (E.D.N.Y. 1994); Donahue v. NFS, Inc., 781 F. Supp. 188 (W.D.N.Y. 1991).
- <sup>172</sup>Kleczy v. First Federal Credit Control, Inc., 21 Ohio App. 3d 56, 486 N.E.2d 204, 207 (1984); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984).
- <sup>173</sup>Holloway v. Pekay, No. 94-C3418, 1996 WL 19580, 1996 U.S. Dist. LEXIS 377 (N.D.Ill. Jan. 18, 1996).
- <sup>174</sup>15 U.S.C. § 1692k (a) (2).
- <sup>175</sup>Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981).
- <sup>176</sup>*Id.* § 1692k (b) (1).
- <sup>177</sup>Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994).
- <sup>178</sup>Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992).
- <sup>179</sup>White v. Bruck, 927 F. Supp. 1168 (W.D. Wis. 1996); Barber v. National Revenue Corp., 932 F. Supp. 1153 (W.D. Wisc., 1996); Dewey v. Associated Collectors, Inc., 927 F. Supp. 1172 (W.D. Wis. 1996); Teng v. Metropolitan Retail Recovery, Inc., 851 F. Supp. 61, 69 (E.D.N.Y. 1994); Hutchinson v. Russian, No. 92-2225-L, 1992 U.S. Dist. LEXIS 18891 (D. Kan. Oct. 29, 1992); Donahue v. NFS, Inc., 781 F. Supp. 188, 191 (W.D.N.Y. 1991); Beattie v. D.M. Collections, Inc., 764 F. Supp. 925, 928 (D. Del. 1991); Harvey v. United Adjusters, 509 F. Supp. 1218, 1222 (D. Or. 1981). *Contra* Kaschak v. Raritan Valley Collection Agency, No. CIV.A.88-3763, 1989 WL 255498 (D.N.J. May 23, 1989); Rabideau v. Management Adjustment Bureau, 805 F. Supp. 1086, 1095 (W.D.N.Y. 1992).
- <sup>180</sup>Baker v. G. C. Services Corp., 677 F.2d 775 (9th Cir. 1982); McCartney v. First City Bank, 970 F.2d 45 (5th Cir. 1992); Adams v. First Federal Credit Control, Inc., No. 1:91CV24-67, 1992 WL 131121 (N.D. Ohio May 21, 1992).
- <sup>181</sup>West v. Costen, 558 F. Supp. 564, 573 (W.D. Va. 1983).
- <sup>182</sup>First Interstate Bank v. Sovcie, No. 95-CAD976, 1996 Colo. App. LEXIS 234 (Aug. 8, 1996).
- <sup>183</sup>15 U.S.C. § 1692k (a) (3).
- <sup>184</sup>Graziano v. Harrison, 950 F.2d 107, 113 (3d Cir. 1991).
- <sup>185</sup>*See Pipiles*, 886 F.2d at 28.
- <sup>186</sup>Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996).
- <sup>187</sup>Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995), *cert. denied*, 132 L. Ed.2d 856, 115 S. Ct. 2613 (1995).
- <sup>188</sup>*Id.*
- <sup>189</sup>Baker v. G. C. Services Corp., 677 F.2d 775, 778 (9th Cir. 1982). Those sections which include a culpability requirement explicitly impose it (e.g., 15 U.S.C. §1692d(5) prohibits the making of repeated telephone calls to a debtor "with intent to annoy").
- <sup>190</sup>Cacace v. Lucas, 775 F. Supp. 502, 505 (D. Conn. 1990).
- <sup>191</sup>Gammon v. G. C. Services L.P., 27 F.3d 1254 (7th Cir. 1994).
- <sup>192</sup>15 U.S.C. § 1640.
- <sup>193</sup>*Id.* § 1692k (c).
- <sup>194</sup>*See Pipiles*, 886 F.2d at 27; Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982); Hulshizer v. Global Credit Servs., 728 F.2d 1037, 1038 (8th Cir. 1984); Newman v. Checkrite California, Inc., 912 F. Supp. 1354 (E.D. Cal. 1995); Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D. La. 1995).
- <sup>195</sup>Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824, 827 (N.D. Ga. 1980); Oglesby v. Rotche, 1993 No. 93-C4183, 1993 U.S. Dist. LEXIS 15687, WL 460841 (N.D. Ill. Nov. 5, 1993).
- <sup>196</sup>Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992); Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984).
- <sup>197</sup>Smith v. Transworld Systems, Inc., 953 F.2d 1025 (6th Cir. 1992).
- <sup>198</sup>*Id.*
- <sup>199</sup>*Id.*
- <sup>200</sup>Juras v. Amana Collection Service, Inc., 829 F.2d 739 (9th Cir. 1987).
- <sup>201</sup>Biber v. Associated Collection Services, Inc., 631 F. Supp. 1410 (D. Kan. 1986).
- <sup>202</sup>Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 389-390 (D. Del. 1991).
- <sup>203</sup>Jenkins v. Heintz, 93 C 1332 (N.D. Ill.). Rule 1.6 of the Model Rules of Professional Conduct provides that a lawyer may waive the client's privilege if he is accused of wrongdoing. Federal S. & L. Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567 (S.D.N.Y. 1986); Apex Municipal Fund v. N-Group Securities, 841 F. Supp. 1423 (S.D. Tex. 1993); Farnsworth v. Van Cott, Bagley, Cornwall & McCarthy, 141 F.R.D. 310 (D. Colo. 1992).
- <sup>204</sup>Itri v. Equibank, N.A., 464 A.2d 1336, 1342 (Pa. Super. Ct. 1983).
- <sup>205</sup>15 U.S.C. § 1692k (d).
- <sup>206</sup>Matteson v. U.S. West Communications, Inc., 967 F.2d 259 (8th Cir. 1992). *See also* Seabrook v. Onondaga Bureau of Medical Economics, 705 F. Supp. 81, 83-84 (N.D.N.Y. 1989).
- <sup>207</sup>Maloy v. Phillips, 64 F.3d 607 (11th Cir. 1995). *Accord* Drumright v. Collection Recovery, Inc., 500 F. Supp. 1 (M.D. Tenn. 1980).
- <sup>208</sup>Flanagan v. World Wide Adjustment Bureau, Inc., No. 6:95CV00776, 1996 U.S. Dist. LEXIS 8257 (M.D.N.C. May 3, 1996); Murphy v. Allen County Claims & Adjustments, Inc., 550 F. Supp. 128 (S.D. Ohio 1982); Lachman v. Bank of Louisiana in New Orleans, 510 F. Supp. 753, 758 (N.D. Ohio 1981); Russey v. Rankin, 837 F. Supp. 1103 (D.N.M. 1993); Bailey v. Clegg, Brush & Assocs., Inc., No. 1:90-CV-2702-CAM, 1991 WL 143361 (N.D. Ga. June 14, 1991); Stone v. Talan & Ktsanes, No. 91-244-FR, 1991 WL 134364 (D. Or. July 2, 1991); Paradise v. Robinson & Hoover, 883 F. Supp.

- 521 (D. Nev. 1995). *Contra* Krambeer v. Eisenberg, 923 F. Supp. 1170 (D. Minn. 1996).
- <sup>209</sup> Bates v. C & S Adjusters, Inc., 980 F.2d 865, 868 (2d Cir. 1992); Sluys v. Hand, 831 F. Supp. 321 (S.D.N.Y. 1993).
- <sup>210</sup> Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982). *But see* Dewey v. Associated Collectors, Inc., 927 F. Supp. 1172 (W.D. Wisc. 1996) (statutory damages for court).
- <sup>211</sup> Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981); Leatherwood v. Universal Business Service Co., 115 F.R.D. 48 (W.D.N.Y. 1987); Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671 (Minn. Ct. App. 1984).
- <sup>212</sup> Hardin v. Folger, 704 F. Supp. 355 (W.D.N.Y. 1988).
- <sup>213</sup> 15 U.S.C. § 1692k.
- <sup>214</sup> Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 392 (D. Del. 1991).
- <sup>215</sup> Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996); Stewart v. Slaughter, 165 F.R.D. 696 (M.D. Ga. 1996).
- <sup>216</sup> West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983); Duran v. Credit Bureau of Yuma, Inc., 93 F.R.D. 607 (D. Ariz. 1982); Keele v. Wexler, No. 95-C3483, 1996 WL 124452, 1996 U.S. Dist. LEXIS 3253, (N.D. Ill. Mar. 19, 1996).
- <sup>217</sup> West v. Costen, 558 F. Supp. 564, 572-573 (W.D. Va. 1983) (FDCPA class certified regarding alleged failure to provide required "validation" notices); Brewer v. Friedman, 152 F.R.D. 142 (N.D. Ill. 1993) (FDCPA class certified regarding transmission of misleading collection demands to consumers), earlier opinion, 833 F. Supp. 697 (N.D. Ill. 1993); Beasley v. Blatt, No. 93-C4978, 1994 WL 362185, 1994 U.S. Dist. LEXIS 9383 (N.D. Ill. July 11, 1994) (letters threatening action which was not intended to be taken and could not legally be taken); Carr v. Trans Union Corp., No. CIV.94-0022, 1995 WL 20865, 1995 U.S. Dist. LEXIS 567 (E.D. Pa. Jan. 12, 1995); Colbert v. Trans Union Corp., No. CIV.A.93-6106, 1995 WL 20821, 1995 U.S. Dist. LEXIS 578 (E.D. Pa. Jan. 12, 1995); Villareal v. Snow, No. 95-C2484, 1996 WL 28254, 1996 U.S. Dist. LEXIS 667 (N.D. Ill. Jan. 19, 1996). (whether form notice violated the Act.)
- <sup>218</sup> Zanni v. Lippold, 119 F.R.D. 32, 35 (C.D. Ill. 1988); Holloway v. Pekay, No. 94-C3418, 1995 WL 736925, 1995 U.S. Dist. LEXIS 18331 (N.D. Ill. Dec. 11, 1995).
- <sup>219</sup> Mace v. Van Ru Credit Corp., No. 94C7450, 1995 WL 549088, 1995 U.S. Dist. LEXIS 13254 (N.D. Ill. Sept. 11, 1995), *cert. granted*, 1995 U.S. Dist. LEXIS 18022 (N.D. Ill. Dec. 1, 1995). This decision is on interlocutory appeal.
- <sup>220</sup> Gammon v. G. C. Services, L.P., 162 F.R.D. 313 (N.D. Ill. 1995). Following a settlement, statutory damages were in fact distributed in this manner. Gammon v. GC Services, L.P., CCH Consumer Credit Guide ¶95,441 (N.D. Ill. 1995).
- <sup>221</sup> 15 Fed. Reg. 50,097, 50,110 (FTC Dec. 13, 1988).
- <sup>222</sup> *Id.* at 50,101.
- <sup>223</sup> 15 U.S.C. § 16921 (d).
- <sup>224</sup> *E.g.*, Scott v. Jones, 964 F.2d 314, 317 (4th Cir. 1992) ("We decline to adopt the FTC's position"); Carroll v. Wolpoff & Abramson, 961 F.2d 459, 461 n. 4 (4th Cir. 1992) ("We find the position of the FTC unpersuasive"); *See Pipiles*, 886 F.2d at 22; Hulshizer v. Global Credit Servs., Inc., 728 F.2d 1037 (8th Cir. 1984); Cortright v. Thompson, 812 F. Supp. 772 (N.D. Ill. 1992).
- <sup>225</sup> 15 U.S.C. § 1692k (e).