COLLECTION PRACTICE IN NEW JERSEY

PRACTICAL SKILLS SERIES

WRITTEN BY:

Thomas A. Clark III, Esq.
Capehart & Scatchard, P.A.
Mount Laurel, New Jersey

and

Cindy D. Salvo
The Salvo Law Firm, P.C.
West Caldwell, New Jersey

THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION
One Constitution Square, New Brunswick, New Jersey 08901-1520
(732) 249-5100

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Thanks to Jillian Saputelli, for her invaluable assistance in preparing this 2013 update.

--Thomas A. Clark, III, Esq.

Thanks to all of my debt collector clients for entrusting me with their FDCPA defense.

--Cindy D. Salvo, Esq.

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PART ONE - COLLECTION PRACTICE MANUAL

THOMAS A. CLARK, ESQ.

DEFINITIONS

Commercial Collections vs. "Consumer" Collections

The attorney who chooses to become involved in collections, whether on a regular or occasional basis, must differentiate between commercial collections and consumer, or "retail," collections. A commercial debt is generally thought of as a debt owed for goods sold or services rendered in connection with the operation of a business. On the other hand, debts that are incurred by natural persons primarily for *personal, household* or *family* purposes are "consumer" debts for purposes of a number of important federal statutes. The definition of a consumer transaction for purposes of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*, is considerably broader than the three-prong "personal, household or family" test that is often found in federal consumer-related legislation.

The Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C.A. 1692 *et seq.*, applies to the activities of attorneys who "regularly collect or attempt to collect debts owed to another," and is limited to debts incurred by natural persons for personal, household or family purposes. The phrase "regularly collect or attempt to collect" has generated considerable litigation. In *Mertes* v. *Devitt*, the court held that an attorney who averaged less than two collection matters per year, and less than one percent of the total practice, is not a "debt collector" under the FDCPA. 734 F. Supp. 872 (W.D. Wis. 1990). On the other hand, the Act has been held to apply to an attorney whose collection work constituted less than four percent of their practice. *Stojanovsky* v. *Strobel & Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992). In *Stojanovski*, the Court noted, however, that "[i]t [was] the volume of the attorney's debt collection efforts that [was] dispositive, not the percentage such efforts amount to in the attorney's practice." *Id.* at 322. Those attorneys engaged in debt collection have been held to the strict regulations of the FDCPA. *Crossley* v. *Leiberman*, 868 F.2d 566 (3d Cir. 1989); 15 U.S.C.A. § 1692a(6).

It is essential that the attorney make a threshold determination of whether he or she engages in "regular" attempts to collect debts as defined by the Act and if so whether, in a particular case, the debt is a consumer debt as defined by the Act. Any doubt should be exercised in favor of compliance with the Act. The steps required for compliance are, for the most part, fairly straight-forward, whereas the potential consequences for non-compliance are severe. If the Act applies in a given case, the attorney must be cognizant of the Act's requirements prior to commencing *any activity*, as the Act governs the attorney's activities literally from the outset of the attorney's involvement, including all pleadings (at least in the 2d, 7th and 9th Circuits). See also *Heintz v. Jenkins*, 514 U.S. 291, (1995), which held that the Act applies to attorney's activities even when that activity is limited to engaging in litigation. One year after the holding in *Heintz*, however, FDCPA § 1692e(11) was amended to exclude any "formal pleading made in connection with a legal action." 15 U.S.C.A. § 1692e(11), as amended Pub. L. 104-208, § 2305(a), 110 Stat. 3009-425 (1996); *Rhodes* v. *Diamond*, 2010 U.S. Dist. LEXIS 71076 (July 14, 2010), *vacated*, remanded by 433 Fed. Appx. 78 (3d Cir. 2011). The Fair Debt Collection Practices Act is discussed in detail in the second

part of this volume. The remainder of this Part One should be read subject to the procedures and requirements that are described in Part Two.

RECEIPT OF CLAIM, INITIAL INVESTIGATION AND CONTACT

Because of the tendency for an attorney's initial collection contact to result in the debtor making direct contact with the attorney's client, and the attendant prospect that the matter winds up being resolved directly between the parties, it is recommended that an attorney who is retained to collect a delinquent debt clearly establish with the client a fee structure, and that the fee structure and in particular the circumstances that will trigger an entitlement to a fee be confirmed immediately upon retention. Fees for collection work are often based upon a contingent percentage basis, with fees for consumer collections generally involving higher percentage rates than fees for commercial collections. Because many collection cases never result in a recovery (and, when those cases are handled on a contingent fee basis, no fee) the attorney should carefully explain to the client, and immediately confirm *in writing*, that the attorney will be entitled to a fee on any sums paid by the debtor after the time the debtor first learns of the attorney's involvement, whether the payment is made through the attorney's office or directly to the client. The attorney should consider securing the right to endorse checks or other drafts made payable to the client on its behalf. If this authority is forthcoming from the client, it should be confirmed in writing, and the scope of the authority must be crafted in such a way as to take into account applicable Ethics Opinions that deal with the subject.

The rules of professional conduct require that the basis for a fee be confirmed in writing when a lawyer has not regularly represented the client in the past. Rules of Professional Conduct 1.5(b). See also Rule 1:21-7, which requires the attorney to disclose and afford the client an opportunity to elect a fee structure other than a contingent-fee arrangement. Prompt confirmation of the fee arrangement will inevitably serve to prevent misunderstandings between the attorney and the client when a debtor responds to the attorney's initial demand for payment by contacting the client and making direct arrangements for payment. While it may seem to the client that the attorney has not earned a fee in such a situation, in reality such fees are necessary to offset other cases where the attorney expends a considerable amount of time without recovery, and thus without a fee. In those cases where the attorney neglects to confirm the terms of a contingent fee arrangement, a fee may be sought on the basis of *quantum meruit*. See *Starkey, Kelly, Blaney & White v Estate ofNickolaysen*, 172 N.J. 60 (2002).

In order to guard against a misunderstanding, and also for purposes of good collection practice, the attorney should make an initial demand for payment immediately upon receipt of a case for handling, and send a written acknowledgment or receipt of the matter to the client on the same date. Form 1 contains a sample acknowledgment of receipt of claim. This will establish and serve to confirm the date as of which fees may be earned on payments, regardless of the party to whom the payments are actually made.

In addition to clarifying and protecting the attorney's right to a fee, initial contact with the client should also be used to obtain information from the client concerning the case that may be of assistance in the attorney's handling of the case whenever possible. The attorney should review all information regarding the creation of the debt, including information or documents that relate to any other parties who may be responsible for the debt, together with any information the client may have

that will help the lawyer locate assets or sources of income, should that become necessary. In those cases where it becomes necessary to collect a judgment through forced measures, information such as telephone numbers, banking information, taxpayer identification numbers and other information regarding the location, nature and extent of assets and income can be vital to a successful outcome. This information also will assist the attorney in dealing with any legitimate questions from the debtor or his or her attorney regarding the validity or amount of the debt. If a question arises regarding the identity of the party or parties responsible for a debt within the FDCPA's coverage, the attorney must investigate the matter fully before making a demand for payment on parties whose responsibility is unclear. Making a demand for payment upon an individual not legally responsible to pay the bill could be considered a violation of the Act, as could making demands in the wrong amount.

If an attorney's representation in a particular case is subject to the requirements of the FDCPA, the attorney *must* be familiar with the substantive provisions of the Act before making any contact with the debtor, as the requirements of the Act come into play *immediately* upon the initial contact between the attorney and the debtor. The Act contains civil liability provisions to which the attorney is subject. 15 U.S.C.A. § 1692k. Refer to part two of this book for a discussion of the considerations that relate to consumer communications.

In addition, in this text, refer to "Part Two – Fair Debt Collection Practices Act", in the subsection entitled "Overview of Basic Obligations and Prohibitions" for a discussion of the disclosures that are required in all follow up communication with a consumer.

As "communications" with the debtor, the representation letter, and any telephone conversations the attorney has with the debtor, are subject to the substantive provisions of the Act, which regulate the frequency, form and content of the attorney's communications with the debtor. The attorney who regularly engages in collection activities is advised to become completely familiar with all of the provisions of the Act, and to make sure that any support staff is similarly familiar with the provisions of the Act.

Among other things, the attorney is prohibited from contacting the debtor at inconvenient times and places, including the debtor's place of employment, if the attorney knows or has reason to know that the debtor's employer prohibits the debtor from receiving such communication. The attorney must avoid the use of obscene language, threats of violence, or other annoying, abusive or harassing activities. The debtor has the right to force the attorney to cease all communications. In addition, the attorney must not misrepresent the nature of the debt, the nature of the collection activities or the legal significance of documents or letters sent to the debtor.

Because the attorney must not misrepresent the possibility, pendency, or immanency of litigation or execution proceedings, he or she must be careful in wording representation letters and in conversations with the debtors. The attorney is specifically forbidden from communicating with the debtor either by postcards or by envelopes that contain any language or symbol that refers to the debt collection business.

The attorney's initial contact with the debtor can assist the attorney in handling a claim. A number of cases may result in an acceptable voluntary payment arrangement. In other cases, the

initial contact may result in obtaining information that will aid the attorney in identifying any disputed issues or in determining that the debt is uncollectible and that further attorney time is unwarranted.

In commercial matters, an attorney frequently can answer any questions concerning the debtor's legal composition (including its correct name) during the initial contact by simply asking a representative of the debtor for this information. Form 3 contains a suggested commercial demand letter.

INVESTIGATION THROUGH THIRD PARTY SOURCES

Frequently, the information available to the attorney from the client is insufficient for the attorney to locate and identify the debtor and make an intelligent recommendation to the client regarding litigation. A number of sources are available from which the attorney can obtain information as to the legal status or location of a debtor, or whether a debtor will be in a position to satisfy a judgment, if one is entered. The FDCPA regulates communications with third parties made in connection with efforts to collect debts that are within the purview of the Act. It is imperative that the attorney, as well as any staff that may be involved in making such contacts, familiarizes themselves with those restrictions. The most significant restriction forbids any disclosure that the debtor owes a debt. 15 U.S.C.A. § 1692b. Furthermore, the Act limits contact with third persons to obtaining "debtor location information" or information useful in exercising lawful post judgment remedies. Therefore, the attorney apparently is forbidden from obtaining information regarding a debtor's assets and income from third parties, until and unless a judgment is entered. Compare 15 U.S.C.A. § 1692c(b) with 15 U.S.C.A. § 1692b.

Postal Authorities - Freedom of Information Act

There are four basic types of information available from the U.S. Postal Service, each of which is based upon the Freedom of Information Act as interpreted in the U.S. Postal Authority Administrative Support Manual. By typing the words "address correction requested" on an envelope addressed to the debtor, the post office will, in addition to forwarding the letter if a forwarding order is on file, deliver a computerized notification to the sender of the forwarding address on file. In addition, the postal authority will advise whether a forwarding order is on file for a given address for a nominal fee.

If the address provided to the attorney is a post office box, the attorney may, in two sets of circumstances, learn the name and street address provided to the postal authority when the post office box was rented. The first set of circumstances is when the attorney can satisfactorily demonstrate that the post office box is being used in the operation of a business. The attorney may use information on the rental application or supply other information to prove business use of the post office box. The second set of circumstances in which the postmaster must disclose the name and street address of a post office box renter is when the attorney indicates that the information is needed in order to effect service of process in either pending or anticipated litigation. (See U.S. Postal Service, Handbook AS-353, *Guide to Privacy, the Freedom of Information Act, and Records Management*, Chapter 5 ("AS-353")). The attorney requesting the information must identify the parties to the litigation, the court where the case is pending or will be filed, the docket number, a

general description of the nature of the litigation, and whether the renter of the box is either a party to the litigation or will be served as the representative of a party to the litigation. Form 4 contains a "checklist" that can be used to request street address information with reference to a post office box, which is Exhibit 5-2b in the AS-353.

Private Post Office Boxes

Private post office boxes are not governed by the Freedom of Information Act or the US Postal Authority Administrative Support Manual. Nor does there appear to be any assurance that a street address will be available from the owner of the company that is providing the box. Nonetheless, useful location information may be available from the provider of the private post office box, which can be compelled to provide any such information through means of a subpoena issued after suit has been instituted.

Department of the Treasury or Secretary of State

Several types of information are available from the Department of the Treasury or Secretary of State regarding corporations, limited liability companies and limited partnerships, both those that were formed in New Jersey, as well as those that were formed elsewhere but have registered to do business in New Jersey. An attorney can obtain the name and address of the registered agent for service of process of a corporation, limited liability company or limited partnership. This information can be very useful in obtaining service of process, although it is sometimes not particularly helpful in collecting a judgment, when the registered agent is a practicing attorney or a corporate service provider. In addition, one can obtain the name and address of the directors as identified on the most recent annual report filed by a corporation, as well as the name and address of a corporation's incorporators. This information is available online on a fee basis at the state Department of the Treasury's website. Alternatively, the information can be purchased using the state's fax service or by mail.

Certain types of unincorporated businesses (those operating under an assumed or fictitious name) are required to register a fictitious trade name used in connection with the operation of business with the county clerk for the county in which the business is located.. N.J.S.A. 56:1-2. This information is available to the public, although the clerk's office may charge a fee for responding to requests for information. If an out-of-state business owner files a certificate, the filing of the certificate has the effect of authorizing the Clerk to receive service of process on the out-of-state business owner's behalf. N.J.S.A. 56:1-2.

The New Jersey Department of the Treasury now has enhanced fax-filing, same day service programs. Information can be obtained by mail from the Division of Commercial Recording at P.O. Box 308, 820 Bear Tavern Road, Trenton, New Jersey 08625, or by visiting the Department of State's web page. Additional information concerning the most effective current way of obtaining information from the Department of the Treasury for Secretary of State can also be obtained by contacting the Division of Commercial Recording Customer Service Unit at 609-530-6494.

Internet

The Internet offers a wide variety of services that claim to provide the ability to locate persons and/or their assets. These services now provide the ability to search or verify social security numbers, telephone numbers, and a wide variety of different information. Their cost and success rates vary dramatically. These services should be utilized giving due regard to the considerations of the Fair Debt Collection Practices Act discussed at length in the following section of this manual. It is noted that communications on the Internet generally create a record in other computers. For this reason, the form and content of any communications must be carefully analyzed for FDCPA compliance.

Other Sources of Information

Municipal Tax Collectors can provide the name and address of the person or entity that is identified as the owner on its records of real property. This information, including the assessed valuation of the property, is now available online on a statewide basis, by county. The Division of Motor Vehicles, for a fee, will provide information regarding the registered ownership of an automobile and the name and address of the holder of a driver's license. Also widely available online are "reverse" directories that list published telephone information by telephone number and by street address, instead of by name. These directories can be helpful in locating a person from a telephone number and in making contact with a neighbor who may be able to confirm that a person lives at an address.

The Appendix contains additional information concerning professional boards from whom information can be obtained regarding persons involved in various professional activities. In addition, some townships require the issuance of mercantile licenses or Board of Health registrations for certain types of activities. This information is typically available to the public and can be of assistance in determining the location and legal composition of a debtor.

DETERMINING THE IDENTITY OF THE DEFENDANT AND ADDRESSING ALL AVAILABLE CLAIMS

If a lawsuit is to be filed to recover a debt, the complaint must correctly identify the debtor who is legally responsible for the debt, and should include counts against any and all parties defendants who may be liable to the creditor in connection with the debt. It is particularly important for the attorney to determine whether a business is being operated as a proprietorship, a general or limited partnership, or a corporation. The Entire Controversy Doctrine requires the joinder of all germane claims in a single action, at the risk of being precluded from subsequently asserting the omitted claims. See R. 4:30A. Whenever possible, the exact name of the legal entity operating the business should be named as a party defendant, including a reference to any tradename being used in the operation of the business, such as ABC, Inc. t/a Joe's Shoes. The caption of the Complaint should also include the exact name on the debtor's checking account, in order to facilitate execution following entry of a judgment. In most cases, this should correspond to the correct legal name or an established trade name used by the debtor.

If the client has obtained a personal guaranty or surety agreement, a promissory note or other undertaking by which some third party has agreed to be responsible for the debt, the Complaint should include a claim based on such undertaking as well. In addition to contractual undertakings that will lead to liability on the part of persons other than the original debtor, several principles of law occasionally will serve to establish liability on the part of someone other than the debtor.

Piercing the Corporate Veil/Successor Liability

One of the primary reasons for incorporation is to insulate shareholders from liability for the corporation's debts. A fundamental rule of corporate law is that the corporation is an entity separate and distinct from its shareholders. *Lyon* v. *Barrett*, 89 N.J. 294, 300 (1982). Under certain circumstances, the "veil" of protection can be "pierced," and the shareholders of a corporation held liable for the debts of their corporation. The concept of piercing the corporate veil is a highly fact sensitive area of law. The typical situation involves a corporation that is thinly capitalized or not capitalized by its shareholders, the corporate formalities are ignored and the finances of the corporation are mingled with those of the shareholders. See *Coppa v. Taxation Division Director*, 8 N.J. Tax 236 (1986); *Van Dam Egg Co.* v. *Allendale Farms, Inc.*, 199 N.J. Super. 452 (App. Div. 1985). *State Dept. of Environmental Protection* v. *Ventron Corp.*, 94 N.J. 473 (1982), provides a good summary of the theory of piercing the corporate veil according to the New Jersey courts.

A related exception to the general rule that corporate shareholders, directors and officers have no personal liability for the corporation's debts involves the concept of successor liability, which can be imposed in circumstances (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts. *Jackson* v. *Diamond T Trucking Co.*, 100 NJ Super 186, 241 A. 2d 471 (Law Div 1968). Sometimes a fifth exception, "the absence of adequate consideration for the sale or transfer," is included as an element of one of the aforementioned exceptions. *DOT* v. *PSC Resources, Inc.*, 175 N.J. Super. 447, 453 (Law Div. 1980) {*citing McKee* v. *Harris-Seybold Co.*, 109 N.J. Super. 555, 561 (Law Div. 1970), *aff'd on other grounds*, 118 N.J. Super. 480 (App. Div. 1972)).

Actions Based on Bad Checks

Where the debt involves a bad check drawn on a business account, the attorney should carefully review the face of the check and analyze the potential for liability on the part of the person who signed the check. N.J.S.A. 12A:3-403(a) (Uniform Commercial Code) can potentially serve as the basis for personal liability on the part of one who signs a corporate check without clearly indicating that the check is being signed in a representative capacity. See *DeBlanco* v. *Dooley*, 164 N.J. Super. 155 (App. Div. 1978). Collection of amounts owed resulting from bad checks may trigger the application of specific provisions of the FDCPA that regulate the receipt and negotiation of such checks in a consumer setting. See *Holmes v. Telecredit Service Corp.*, 736 F. Supp. 1289 (Del. 1990). In addition, the attorney may wish to advise the client of the availability of criminal proceedings under N.J.S.A. 2C:21-5. Ethical considerations prohibit the attorney (as opposed to the client) from using the threat of such proceedings to obtain payment of the underlying debt.

An action also may lie for a dishonored personal check. N.J.S.A. 2A:32A-1 provides that, subject to specified notice and "cure" requirements, a creditor may recover the face amount of a dishonored check together with attorney's fees, court costs and the cost of mailing a demand for payment. In addition, statutory damages ranging from $100.00 to $500.00 are authorized. N.J.S.A. 2A:32A-1(a). The court has discretion to eliminate the statutory damages in the event the check was dishonored due to economic hardship. N.J.S.A. 2A:32A-1(d).

In order to sustain a cause of action under this statute, the creditor must make a demand, in English and Spanish, to the debtor that the debtor honor the check within thirty-five days and that a failure to do so will result in a suit for the face amount of the check, attorney's fees, court costs and cost of mailing. Form 5 is a demand in the form prescribed in the statute that must be sent (in English and Spanish). If the context of the issuance of the check implicates the Fair Debt Collection Practices Act, care must be given to regard the form as a "communication." When the Fair Debt Collection Practices Act is implicated, the use of the form would need to be accompanied by either a validation notice, a "mini Miranda" notice or a follow-up communication notice.

Actions may also lie against intermediary banks that handle dishonored checks. See, generally, NJSA 12A:4-302 and NJSA 12A:4-104.

Reclamation

The seller of goods may have the right to reclaim goods that have not been paid for. Such rights can exist as a result of having a security interest granted under Article 9 of the Uniform Commercial Code. See NJSA 12A:9-101 *et seq.* Independent of Article 9, a limited right of reclamation is found in two areas of Article 2 of the Uniform Commercial Code. N.J.S.A. 12A:2-507(2) provides a right of reclamation when the goods are sold in circumstances where payment is due and demanded immediately upon delivery of the goods, and is not made as required. This includes sales that are "COD" where a check is accepted that is subsequently dishonored.

In addition, Article 2-702 of the Uniform Commercial Code provides for a limited right of reclamation where goods have been sold on credit and the buyer is insolvent when the goods are received. NJSA 12A:2-702. In this case, the Seller must make demand for return of the goods within ten days after they are received, unless there has been a written misrepresentation of solvency. Both of the Uniform Commercial Code provisions mentioned are subject to defeat by the intervention of rights of third parties in and to the goods in question.

A written demand for possession is generally required for a cause of action in replevin, when the defendant's original possession of the goods was lawful.

Bonded Claims

If the client's claim relates to a construction project, the attorney should investigate whether the client has a right to recover on a labor and material payment bond ("Payment Bond"). Although the existence of a Payment Bond is discretionary for private construction projects, it is generally required for public construction projects. If the project is being performed for the United States of

America or any of its agencies, a Payment Bond is required by the Miller Act, 40 U.S.C.A. § 3131(b). If the public project is owned by the State of New Jersey or any of its political subdivisions, a Payment Bond is required by the New Jersey Municipal Bond Act, N.J.S.A. 2A:44-143 *et seq*.

Labor and material Payment Bonds typically involve multiple time limits, compliance with all of which is required in order to successfully prosecute a claim under the Payment Bond. These time limits vary depending on whether they involve a public project or, if not, the exact language contained in the Payment Bond, but most require written notification of a claim within a specified time period of furnishing the goods or services. In some instances a prescribed notice is required before any goods are sold or services rendered for which a claim is to be made. Almost all Payment Bonds impose a time limit on instituting suit on the bond.

Additionally, Payment Bonds generally only protect creditors who have done business with a contractor that either has a contract with the public body, or has a contract with a contractor that has a contract with the public body. Consequently, the attorney must promptly identify cases where bond rights may be involved and investigate the existence and terms of the bond immediately. In many instances it can be difficult, if not impossible, to determine what rights a creditor has, and what steps need to be taken in order to protect and enforce those rights, without having access to the actual terms of the bond, which can vary considerably as to notice and litigation filing requirements, in a private project setting.

If the claim is for a public work of a political subdivision of the State of New Jersey, the client may have rights under the New Jersey Municipal Mechanic's Lien Law, N.J.S.A. 2A:44-125 *et seq.*, or the New Jersey Trust Fund Act, N.J.S.A. 2A:44-148 *et seq*. These statutes generally involve the imposition of a lien on moneys payable by the public body, and the imposition of a trust on moneys received by a contractor, respectively.

The Law of Necessities

In cases where the debtor is married, the attorney should analyze whether any basis exists to assert an action against the debtor's spouse on the basis of the "law of necessities". Under this doctrine, both spouses are liable for necessary expenses incurred by either spouse during the course of a marriage. The creditor must seek satisfaction first from the income and assets of the spouse who incurred the debt. Only when the spouse who is primarily responsible for the debt based on the privity of contact is unable to satisfy a judgment, will the debtor's spouse be liable. *Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137 (1980). In order to satisfy the requirements of the Entire Controversy Doctrine, the attorney should ordinarily assert its claims in a single action. See R. 4:30A. Application for the entry of judgment can be made against the spouse that is contractually liable. Subsequent proceedings can follow the general pattern approved by the court in *Seventy-Three Land, Inc.* v. *Maxlar Partners*, 270 N.J. Super. 332. (App. Div. 1994).

The Law of Necessities has been held to apply only to marriages that were viable when the debt was incurred. *National Account Systems, Inc. v. Mercado*, 196 N.J. Super. 133, 136 (App. Div. 1984). Accordingly, the attorney seeking to recover from a separated spouse should determine whether the marriage was viable when the debt was incurred before bringing an action against the

debtor's spouse. See also Clark v. Clark, 324 N.J.Super. 587, 737 A.2d 189 (Chancery 1999), in which the court declined to apply the law of necessities to a motor vehicle insurance surcharge.

If the case involves the use of a credit card, the attorney should be familiar with the case of *Sears, Roebuck & Co.* v. *Ragucci*, 203 N.J. Super. 82 (Law Div. 1985), which contains a useful discussion of several issues pertaining to spousal liability in the specific context of a credit card issued to one spouse and used by the other spouse.

Collecting Partnership Debts from a Partner and Vice Versa

New Jersey partnership law provides that a general partner is liable for the debts of a partnership. When a creditor is attempting to collect from a partnership and also from the partnership's general partners for a contractual debt, the creditor must file the action against the partnership, as well as against the general partners individually. *Seventy-Three Land, Inc. v. Maxlar Partners*, 270 N.J. Super. 332 (App. Div. 1994). Upon a finding that the debt is owed, the court will enter final judgment for a sum certain against the partnership and a judgment against the partners for liability only. The judgment against the partners will not be entered as a final judgment for a sum certain until the creditor proves that the partnership cannot satisfy the judgment. *Id.* at 334. It is only after the partnership cannot satisfy the judgment that the partners' assets are at risk. *Id.* at 337.

The rights of a judgment creditor of a partner are spelled out in N.J.S.A. 42:1A-30. That section permits the entry of a charging order in favor of the judgment creditor. The charging order transfers the right to receive distributions made with respect to the judgment debtor's transferable interest in the partnership, and this remedy may be supplemented by an order for the appointment of a receiver or other orders that are consistent with this purpose. The statute makes it clear, however, that the judgment creditor has no right to "interfere with the management or to force dissolution of the partnership or to seek an order of the court requiring a foreclosure sale of the transferable interest." N.J.S.A. 42:1A-30(a). The statute makes it clear that the right to obtain (and enforce) a charging order is the sole right available to a judgment creditor, with respect to the interest of a partner in a partnership. The entry of such an order is subject to the limitations on wage executions contained in N.J.S.A. 2A:17-56. *Zavodnick v. Leven*, 340 N.J. Super. 94 (App. Div. 2001).

Foreign Judgments

New Jersey has adopted the Uniform Enforcement of Foreign Judgments Act, N.J.S.A. 2A:49A-25 *et seq*. This act permits the holder of a judgment entered in a court of record of a sister state to file the judgment with the clerk of the New Jersey Superior Court, who is directed to treat the judgment in the same manner as a judgment of the New Jersey Superior Court. This means that the judgment will be assigned a docket number and, upon the payment of the required fee, will constitute a state-wide lien on real estate owned by the defendant. It then is enforceable and subject to the same enforcement procedures as a judgment originally entered in the New Jersey Superior Court.

The statute requires the filing of an affidavit stating whether the time to appeal has expired, and whether there has been a stay of execution entered by the court of original jurisdiction. The

affidavit must attach a copy of the appropriate court rule or statute on which reliance is placed. In addition, the clerk's office requires the affidavit to set forth the last known post office address of the judgment debtor and the judgment creditor. The affidavit must also disclose if the judgment was entered by default and, if so, when the time to vacate the default expires.

Under the doctrine of merger, a cause of action to enforce a judgment is distinct from the cause of action upon which that judgment was entered. *Arnold, White & Durkee v. Gotcha Covered, Inc.*, 314 N.J. Super. 190, 195 (App. Div.), *cert. denied*, 157 N.J. 543 (1998) (*citing Milwaukee County* v. *M. E. White Company*, 296 U.S. 268, 275 (1935)). Accordingly, the validity of the original claim, as a matter of substantive law or even, as in the *Arnold, White* case, of compliance with procedural safeguards that related to the commencement of the lawsuit, will not be questioned by the court, unless the foreign state lacked jurisdiction, or if the judgment was obtained through fraud or was entered contrary to due process. *See Tara Enterprises, Inc.* v. *Daribar Management Corp.*, 369 N.J. Super 45 (App Div. 2004).

Perishable Agricultural Commodities

The attorney should consider the possibility of asserting a claim under the Perishable Agricultural Commodities Act of 1930 ("PACA") when collecting accounts based on the sale of perishable agricultural commodities. The Act, found at 7 U.S.C. §§ 499a-499s, can be a powerful tool when it is applicable. PACA provides that it is unlawful in connection with any transaction in interstate commerce for a merchant, dealer or broker to fail to make full payment promptly in respect to any transaction involving a perishable agricultural commodity. The Act defines a perishable agricultural commodity as fresh fruits and fresh vegetables of every kind and character, whether or not frozen or packed on ice. A dealer is defined as a person in the business of buying or selling large quantities.

PACA provides that upon receipt by the dealer of the produce, a statutory trust is imposed for the benefit of the supplier of the goods on the goods, and receivables and proceeds from the sale of the goods. 7 U.S.C. 499e(c)(2). This statutory trust supersedes any security interest in assets of the dealer, and is maintained pending full payment of sums owing for the commodities. Claims may lie against corporate officers who fail to arrange for payment. This trust takes precedence even over the rights of a trustee upon the filing of a bankruptcy.

A written notice must be sent in order to claim the benefits of the statute.

MISCELLANEOUS CONSIDERATIONS RE: INSTITUTING SUIT

The attorney should analyze several factors before recommending to the client that suit be instituted. If the client is a foreign corporation not registered to do business in New Jersey, the attorney must consider whether such registration is required. The failure to register may constitute a bar to the client's right to maintain an action in this state if the issue is raised by the defendant. N.J.S.A. 14A:13-11. Because registration can result in a determination of tax liability to the State of New Jersey, the client may be forced to decide between foregoing the attempt to recover the debt or possibly incurring liability for taxes to the State of New Jersey based un matters unrelated to the transaction in question.

Similarly, the requirement that foreign corporations file a Notice of Business Activities Report has even broader applicability than the requirement of registration to do business, and also can constitute a bar to the client's right to maintain an action in the courts of New Jersey. N.J.S.A. 14A:13-15. The latter statute permits a client to cure noncompliance; although, again, the client must consider the potential for the State of New Jersey to assert tax liabilities based upon the totality of the client's business activities in this state.

Any non-resident plaintiff is subject to the defendant's demand for security of costs pursuant to N.J.S.A. 2A:15-67. Because the demand is easily met by posting the sum of $200 with the Clerk of the Court, this consideration should rarely, if ever, cause the client to forego instituting suit.

Rule 4:5-l(b)(2) requires that the first pleading of each party includes a certification

> as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, certification shall identity such actions and all of the parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts.

As a consequence, the client should be questioned concerning the "transactional facts" surrounding the case at the outset in order to ensure that all possible claims are asserted and that all proper parties are either joined or identified. *See* discussion at p. 7, *supra.*

In order to obtain a judgment by default against a natural person, the plaintiff must file a Certification of Non-Military Service, which should set forth facts indicating the declarant's knowledge that the defendant is not in the military service. R. 1:5-7. See generally, the Service Members Civil Relief Act, found at 50 U.S.C.A §§ 501-591. See also N.J.S.A. 38:23C-4. If a possibility exists that the defendant is in the military service, or the client is uncertain, the attorney may contact the Department of Defense Human Resources Activity, Defense Manpower Data Center, or go to www.dmdc.osd.mil/scra to obtain verification of the defendant's involvement in the military. In order to obtain this information from the website, the person's last name and social security number must be provided. Form 11 contains a directive issued by the Department of Defense in 1998, a form issued by the Department of Defense for use in requesting military service verification and a sample Affidavit of Non-Military Service.

It has become increasingly common for creditors to sell debt obligations in bulk. The purchaser of the debt receives an assignment of the account receivable, and thereby becomes the creditor for purposes of enforcement. Attached hereto as Appendix E is a copy of Opinion 37 issued by the Committee on the Unauthorized Practice of Law, pertaining to the right of an assignee to collect money from a judgment debtor and share the proceeds with an original judgment creditor.

PREPARING THE COMPLAINT

Form 6 shows a commonly used four count complaint which appears to satisfy New Jersey's notice pleading requirement for an action for the price of goods accepted by the buyer, as provided for in § 2-709 of the Uniform Commercial Code, as well as an action for the agreed price or fair price for services rendered, based upon New Jersey common law. N.J.S.A. 12A:2-709. If the relief requested be other than a judgment for money damages, the complaint should be drafted in accordance with the facts and applicable law on which the claim is based. Where the damages sought are liquidated, court rules permit and good practice requires that the amount sought be plead, in order to obtain judgment by default from the clerk, without the need for a "proof hearing". R. 4:5-2.

Prejudgment Interest

An award of prejudgment interest should always be demanded in the Complaint, and will be allowed by the Clerk of the Court in the event of default, provided the Clerk receives a certification that contains the calculated amount of interest and the date from which the interest is calculated. R. 4:43-2; R. 6:6-3. As explained in the case of *Tobin* v. *Jersey Shore Bank*, 189 N.J. Super. 411 (App. Div. 1983), prejudgment interest is awarded either on the basis of a contract between the parties or in the discretion of the court. If a provision for interest is part of the contract on which the action is based, *i.e.*, reference to a service charge or finance charge exists in the agreement between the client and the debtor, any rate specified in the agreement will govern the rate at which interest will be calculated on a prejudgment basis, subject to the limitations of the Usury Statute. R. 4:43-2(a). In this case, the Complaint should allege that an agreement exists regarding the payment of a service charge and the rate should be clearly identified for the benefit of the Clerk who will be asked to approve the award of prejudgment interest at the time a judgment by default is entered.

If you are unable to provide the clerk with a "document of obligation that provides the rate of interest," the clerk is nonetheless directed toward prejudgment interests "calculated in accordance with R. 4:42-11(a)." R. 4:43-2(a); R. 6:6-3(a). Prejudgment interest will be awarded "in accordance with the principles of equity." *Bak-A-Lum Corp. v. Alcoa Building Prod.*, 69 N.J. 123, 131 (1976). Wftile the Court in *Tobin* indicated that the rate of interest to be used by the court in awarding discretionary interest ordinarily would be based upon the plaintiffs cost of borrowing, the Clerk of the Court, in considering an application for judgment by default, will not award non-contract pre-judgment interest at a rate in excess of the legal post-judgment rate set forth in R. 4:42-11. R. 4:43-2(a).

If there is no agreement to pay pre-judgment interest at a specified rate, and the plaintiff seeks an award of pre-judgment interest at a rate greater than the post-judgment interest rate, it is obliged to make application to the court to receive interest at a greater rate as provided for in Rules 4:43-2(b) or 6:6-3(c). *See Mid-Jersey National Bank* v. *Fidelity Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975) (holding that pre-judgment interest should be equal to what the plaintiff would have earned on the money due if in its possession). As set forth in the publisher's Note to Rule 4:42-11 as published by Gann Law Books, the legal rate used by the Clerk changes once each year; accordingly, changes in the rate must be taken into account when calculating interest over a period of years.

Post Judgment Interest

Once a judgment has been entered, the underlying obligation merges into and is represented by a new obligation, the obligation of the judgment. R. 4:42-11 provides that the amount of a judgment (which includes any pre-judgment interest) will bear interest at the legal rate set forth in that rule, which changes once each year. Note that judgments in excess of the jurisdictional limit of the Special Civil Part bear interest at a rate that is 2% per annum in excess of the basic rate. R. 4:42-11(a)(iii). If the underlying obligation is based on an unsecured obligation, the judgment creditor will have a difficult time seeking a higher rate of post-judgment interest. In *R. Jennings Manufacturing Company v. Northern Electric Supply Company*, 286 N.J. Super. 413 (App. Div. 1995), the court held that the judgment represents a higher form of security, which the Court held is the trade off for what in many instances will be a lower rate of accruing interest. On the other hand, there is authority for the Court (as opposed to the Clerk) to award a higher rate of post judgment interest, at least where the judgment creditor can show that it is an over-secured creditor. See *Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239 (App. Div. 1997).

Attorney's Fees

An award of attorney's fees may be included in a judgment if authorized by the contract between the parties, by an applicable statute or by court rule. R. 4:42-9. Assuming there is an agreement between the parties that provides for an award of attorney's fees in a specified amount or percentage of the amount recovered, such a provision does not violate public policy and is valid and enforceable, at least where the court is satisfied that the amount specified is not manifestly unreasonable. *Metric Investment, Inc.* v. *Kerner*, 145 N.J.Super. 463 (App. Div. 1976); *New Jersey Higher Education Assistance Authority* v. *Martin*, 265 N.J. Super. 564 (App. Div. 1993). If the agreement calls for an award of attorney's fees in a specified percentage of the amount of the claim, most clerks will consider the award to be contractual damages and will award such an amount as part of their authority under R. 4:43-2 and R. 6:6-3. In this instance, they generally do not require the filing of an affidavit of services rendered. In these cases the award of attorneys fees is regarded as part of the contractual damages, not subject to R. 4:42-9.

In those cases where the agreement provides for a recovery of attorney's fees, but does not mention an amount or formula by which an amount can be calculated, the attorney will be required to submit an affidavit of services rendered. If the attorney's fee agreement provides for the payment of a contingent fee, the attorney should so indicate in the affidavit, and seek the entry of an award of attorney's fees in the specified percentage. The Court's opinion in *New Jersey Higher Education Assistance* v. *Martin* does not indicate that the agreement in that case provided for an award of attorney's fees in a percentage; rather, the Court seems to have relied on the fact that the attorney's agreement with the plaintiff called for a percentage fee.

The award of attorney's fees is not subject to amendment following the entry of judgment to include additional fees for services rendered following the entry of the judgment. *Hatch v. T&L Associates*, 319 N.J. Super. 644 (App. Div. 1999). Because the collection attorney frequently spends far more time on a file after a judgment has been entered, the *Hatch* holding greatly limits a creditor's ability to be made whole, when the creditor's contract with the debtor does not provide for

a specified amount of attorneys fees. In these situations the creditor may be "stuck" with an award of attorneys fees that is based upon only the time spent up to the point where a judgment is entered. If the creditor's fee agreement with its attorney provides for the payment of a fee on the basis of time expended, there can be a significant gap between the fees awarded as part of the judgment versus the total fees incurred by the creditor.

COMMENCEMENT OF ACTION

Where to File Suit

Most collection cases involving amounts in controversy of less than $15,000 may be brought in either the New Jersey Superior Court, Law Division or in the Special Civil Part of the New Jersey Superior Court. R. 6:1-2 provides for cognizability of actions in the Special Civil Part where the amount in controversy does not exceed $15,000.00. This amount includes any prejudgment interest that will be included in the award, but does not include court costs. It has been determined that attorneys fees entered under the Consumer Fraud Act are not included in determining the amount in controversy. *Lettenmaier* v. *Lube Connection, Inc.*, 162 N.J. 134 (1999), and this holding has been extended to all awards of attorney's fees "that are not capable of being calculated when the action is commenced." *Surf Cottages Homeowners Association, Inc.* v. *Janel Associates, Inc.*, 362 N.J. Super. 70 (App. Div. 2003). Venue in the Special Civil Part must be laid in a county where at least one defendant resides. This requirement is contrasted with the Law Division, where the plaintiff has the option of laying venue in the county where the plaintiff resides. If a defendant does not reside in this State, then venue in the Special Civil Part is laid in accordance with R. 6:1-3(a). The attorney should bear in mind that the FDCPA requires that all cases subject to the provisions of that Act be commenced only in the "judicial district" in which the debtor resides at the commencement of the action or in which the debtor signed the contract that is the basis of the suit. 15 U.S.C.A. § 1692i.

Most collection attorneys prefer to bring suit in the Special Civil Part whenever possible, and will recommend to clients that they waive any recovery in excess of the jurisdictional limit for claims that are slightly higher than $15,000, as permitted by R. 6:1-2(c). There are several reasons for this preference: the filing fees are considerably less than in the Law Division, the docket delays for contested cases to reach trial tend to be much shorter, and the rules and time periods pertaining to the conduct of discovery proceedings are streamlined. But by far the greatest reason for choosing to bring a collection case in the Special Civil Part, however, is the fact that post-judgment execution procedures tend to be far more effective in the Special Civil Part. This effectiveness is based principally on the fact that the court officers in the Special Civil Part are compensated directly from monies they collect from execution procedures, including cash and bank accounts, and therefore, tend to take a more aggressive approach to the handling of execution process.

The filing fees for the Special Civil Part can be found in the Lawyer's Diary. Mileage fees also are paid to the Clerk and depend upon the distance the process server must travel from the court to the place of service. These amounts are detailed in the Lawyer's Diary on a county by county basis.

In the Special Civil Part, attorney's fees are allowed as a taxed cost of suit. N.J.S.A. 22A:2-42. The amount of the fee is 5% of the first $500.00 and *2%* on the excess. This fee should be calculated and included on the Summons by the plaintiffs attorney when the suit is instituted so that the fee will be included in the amount of the judgment and costs allowed by the clerk in the event of default. This award of an "attorney's fee" is a court cost, the award of which is not dependent on the actual amount of time spent or fees incurred by the plaintiff, nor is it affected by other statutes governing awards of attorneys' fees. *Chase Bank, USA* v. *Staffenberg*, 419 N.J. Super. 386 (App. Div. 2011).

The form of the Summons currently used in the Special Civil Part, which includes the Court Officer's return of service, appears as Form 7. The attorney is advised to check the Appendix to the Rules of Court (currently Appendix Xl-A) for any changes.

The Small Claims Division of the Special Civil Part has jurisdiction over matters where the amount in dispute, including any applicable penalties, but excluding costs, does not exceed the sum of $3,000. R. 6:1-2(a)(2). Most collection attorneys do not use the Small Claims Division because the proceedings are summary in nature, thereby requiring an appearance in all cases. The form of small claims complaint, summons and return are found in Appendix XI-C to the New Jersey Court Rules.

Rules 4:4-3 and 4:4-4 govern service of process in the Law Division. Generally, *in personam* jurisdiction is obtained by personally serving the defendant within this state. R. 4:4-4(a). In those instances where the defendant cannot be served personally within the state of New Jersey, the attorney may obtain *in personam* jurisdiction by substituted service. If the defendant is outside the State of New Jersey, the attorney may serve the defendant personally or by simultaneous certified/registered mail and ordinary mail. R. 4:4-4(b). Personal service must be by someone authorized to serve defendants in the jurisdiction in which the defendant is located.

R. 4:4-4(a) provides clear direction as to the primary method of obtaining proper service on individuals and partnerships and unincorporated associations and corporations. In each case the rule establishes a priority for *in personam* service on a natural person who is either the defendant, or an agent authorized to bind the defendant.

R. 4:4-4(b) provides for substitute or constructive service. It provides that upon filing of an Affidavit of Diligent Inquiry in accordance with R. 4:4-5, service by mail can be effected in a number of situations. Note that when service by mail is affected in accordance with the rules, three days must be added to the time for an answer to be filed. R. 1:3-3.

Rule 4:4-3 permits summonses to be served by "plaintiffs attorney or the attorney's agent, or by any other competent adult not having a direct interest in the litigation." Due to this provision, private process services can be used to serve the summons in a collection case. Moreover, the Rule appears to contain its own provision for "substituted service" by mail as an alternative to personal service, when "personal service cannot be effected after a reasonable and good faith attempt, which shall be described with specificity in the proof of service required by R. 4:4-7...". In those circumstances where personal service cannot be effected after a "reasonable and good faith attempt", service may be made by mailing a copy of the summons and complaint by registered and certified

mail, return receipt requested, to the usual abode of the Defendant, to a person authorized by rule or law to accept service, or, with special instructions to deliver to addressee only, to the defendant's place of business or employment. If the defendant either refuses to accept or claim delivery of the registered or certified mail, service may be made by ordinary mail.

It is emphasized that service of the complaint made in this fashion constitutes valid service of process for purposes of securing a default. It is distinct from the optional service by mail contemplated by R. 4:4-4(c). Service pursuant to that rule appears to have limited applicability at present. The practitioner is urged to avoid it, as it only results in valid service in the event an answer is filed.

If the defendant signs for the certified/registered mail, service will be deemed complete at that time. R. 1:5-4(b). That rule also permits service by ordinary mail whenever certified mail is appropriate under the rules, and further provides that service will be deemed effected upon mailing the ordinary mailing, in those instances when the certified mail is either refused or unclaimed. R. 1:5-4(a), (b). The court rules provide that the certified receipt "green cards" do not need to be filed with the clerk of the court as proof of service in the case of a summons and complaint, or any other pleading, for that matter. R. 1:5-3.

A party making service by mail pursuant to R. 4:4-3 may, at its option, make service simultaneously by certified mail and ordinary mail. As previously stated, if the addressee refuses to claim or accept delivery of the certified mail and if the ordinary mail is not returned, the simultaneous mailing constitutes effective service.

Service by mail on a post office box is governed by Rule 1:5-2. In all cases a proof of service must be filed in compliance with R. 4:4-7. As previously indicated, this proof of service should contain the facts relating to a failure to effect personal service and the diligent inquiry to determine the defendant's place of abode, business or employment, in those instances where service by mail pursuant to R. 4:4-3 is being relied upon.

Service of process in the Special Civil Part is governed by R. 6:2-3. Service may be made personally, by the Sergeant-at-Arms of the Special Civil Part, or by mail, in those counties which have instituted a service by mail program. R. 6:2-3(a), (b), (d). If the defendant is located in a county other than the county in which suit has been instituted, the Clerk of the Special Civil Part makes service by mail. R. 6:2-3(a).

If the county in which suit is instituted has established a service by mail program, or if substituted service is ordered, initial service of process is made by the Clerk simultaneously mailing by certified/registered mail and ordinary mail. R. 6:2-3(d)(1). After mailing the process, the Clerk will send the plaintiff a postcard indicating the docket number, the date process was mailed and a statement that a default will be entered automatically on a date certain, unless the plaintiff is otherwise notified. The attorney must recognize the possibility that both certified and regular mailings may ultimately be returned to the clerk as undeliverable. If the clerk receives back both the certified/registered mail and the ordinary mail, the clerk will send a follow-up notification to the attorney that the original service is deemed void. If valid service is not affected by mail, the Clerk will notify the plaintiff and request further instructions regarding service of the summons and

complaint. *Id.* If receipt of mail at the address at which service by mail was initially attempted can be confirmed through the postal authorities after the unsuccessful attempt at service by mail, re-service by mail may be requested and must be supported by a postal verification that the defendant receives mail at the address provided. R. 6:2-3(d)(2). A court officer also may make service personally, upon request by the plaintiff. R. 6:2-3(d)(2).

Unless the mail is returned to the Clerk with a mark indicating that the defendant is not located at the address provided, service by mail has the same effect as personal service. R. 6:2-3(d)(4). If the mail is returned after default is entered, the Clerk will automatically vacate the default and notify the plaintiff s attorney. R. 6:2-3(d)(5).

Time to Answer; Judgment by Default

In both the Special Civil Part and the Law Division of the New Jersey Superior Court, a defendant who is served with process within the State of New Jersey, either personally or by mail, must file an answer within thirty-five days of the date service is deemed complete. R. 6:3-1; R. 4:6-1.

In the Special Civil Part, default is entered automatically by the Clerk. As a consequence, a basis for stipulating to extend the time to answer does not exist. The Clerk's automatic default, however, can be vacated, without a court order, provided the defendant applies to vacate within thirty days of the entry of the default. The application must contain the plaintiffs attorney's consent and must be accompanied by a copy of the answer to be filed. R. 6:6-2. In the Law Division, the time to answer the complaint can be enlarged for a period not exceeding sixty days by the written consent of the parties, in a stipulation filed with the Court. Further enlargements require an order of court, for good cause shown. R. 4:6-1(c).

In the Law Division, the plaintiffs attorney must request the entry of default by the Clerk, which usually is accompanied by a simultaneous request for the entry of final judgment by default. Form 8 is a sample request to enter default, which is directed to the Clerk of the Law Division in order to obtain the entry of default. Form 9 is a suggested form of Final Judgment by Default used by the Clerk of the Law Division. R. 4:43-1 requires that a copy of the default be mailed to the defaulting defendant by ordinary mail addressed to the same address at which service of the summons and complaint were made.

In the Special Civil Part and the Law Division, the request for final judgment by default must be accompanied by a Certification of Amount Owed and, if the defendant is a natural person, an Affidavit of Non-Military Service. Form 10 is a sample Certification of Amount Owed that can be adapted for use in the Law Division or the Special Civil Part for collection cases based on either the sale of goods or the delivery of services. In order for the clerk to have the authority to accept an application and award the entry of a judgment, the plaintiff must submit a certification that contains a statement of the items of the claim, their amounts and dates, the amount of any payments or credits and the net amount due. R. 4:43-2; R. 6:6-3. The Certification of Amount Owed should be signed and dated by the client's representative not more than thirty days before the date it is submitted to the Clerk in support of the application for default judgment. If the application for judgment by

default is not made within six months of the date the default was entered, the defendant is entitled to additional notice of the application for judgment. R. 4:43-2(d); R. 6:6-3(d).

Form 11 contains an Affidavit of Non-Military Service which should be filed with the Certification of Amount Owed. R. 1:5-7. If the client or the attorney needs information regarding a defendant's possible military service, the attorney should write each branch of the military requesting the information. The Lawyer's Diary contains a list of the addresses and fees for each branch. Also, see the discussion above concerning the Service Members Civil Relief Act, and the resources available to confirm active military service.

In the Special Civil Part, the Clerk typically sends written confirmation of the entry of judgment by means of a postcard. The postcard includes the amount of the judgment and costs. R. 4:43-2(c) requires service of a copy of a final judgment by default on the defaulting defendant by ordinary mail, within seven days after it is received.

Settling a Collection Case

A very high percentage of collection cases are settled, including those that are initially contested in some fashion. Frequently, the settlement involves an agreement for some type of payments to be made over time. In structuring a settlement, the attorney must be conscious of the FDCPA requirements. In particular, § 1692e(11)'s requirement, that ***all*** communications with a consumer indicate that the communication is an attempt to collect a debt and that any information obtained will be used for that purpose, must be adhered to.

Another concern in structuring a settlement is post-dated checks. The FDCPA, § 1692f(2) considers the practice of accepting post-dated checks an unfair practice, unless the attorney first notifies the debtor, in writing no less than three nor more than ten days before, of the attorney's intent to deposit a post-dated check.

In settling a case, the plaintiff usually wants to obtain a judgment to secure the terms of the settlement. The defendant, on the other hand, wants to avoid having a judgment entered, with the attendant adverse effect upon credit-worthiness. A compromise resolution does not include a judgment immediately, but permits the plaintiff to apply for a judgment automatically in the event of default by the defendant in the making of required payments. Form 12 sets forth a Stipulation in Lieu of Judgment that sets forth settlement terms and gives the plaintiff the right to obtain a judgment in the event of default.

Creditors who forgive debt are required to issue a form 1099(c) in order to comply with applicable IRS regulations. When a settlement involves partial forgiveness of a debt, the creditor should be counseled accordingly.

Full Payment Checks

It is not uncommon for a check to be tendered in "full payment" of an obligation in less than the amount of the obligation. Where checks or other negotiable instruments are concerned, this situation is governed by § 3-311 of the Uniform Commercial Code, N.J.S.A. 12A:3-311. This

section is generally consistent with prior case law in New Jersey that favors the ability of a party to tender a full payment check and be protected from any claim based on the "balance" of the obligation if the check is negotiated, with certain limitations. First, there must be a conspicuous statement either on the check or on a written communication that accompanies the check to the effect that the instrument is tendered in full satisfaction of a claim. Secondly, there must be a bona fide dispute as to the amount due, or an un-liquidated claim. Third, the check and/or written communication must be directed as designated by the obligor, or to a party that has direct responsibility with respect to the disputed obligation.

Finally, a claimant that mistakenly accepts a full payment check can refund the amount of the check within ninety days, and preserve its right to proceed against the obligor for the full amount claimed to be due.

It is critical that the obligee be put on notice in writing that the check is tendered in full payment. For discussion of this factor, see ***Zeller*** v. ***Markson Rosenthal & Company***, 299 N.J. Super. 461 (App. Div. 1997).

POSTJUDGMENT PROCEDURES

The plaintiff or its attorney is required to serve a copy of the final judgment by default on the defaulting defendant within seven days after receipt, by ordinary mail only. R. 4:43-2(c). The steps that follow in attempting to collect the judgment must all be considered subject to the effect of an automatic stay in bankruptcy upon the filing of a bankruptcy proceeding. The collection practitioner is urged to become familiar with the scope and effect of the automatic stay in bankruptcy. 11 U.S.C.A. § 362.

Judgment as a Lien on Real Estate

A judgment for money damages entered in the Law Division serves as a lien against any real estate owned by the defendant in the State of New Jersey from the time that an abstract of the judgment is entered upon the court's docket. N.J.S.A. 2A:16-1; R. 4:101-1. A judgment debtor is unable to convey clear title to real estate in New Jersey without addressing the lien of the judgment. A judgment lien lasts for twenty years, subject to the plaintiffs right to renew the lien. Therefore, a judgment initially considered to be uncollectible may be collectable at some point in the future, if the defendant subsequently attempts to sell (or in some instances, to buy) real estate. For this reason, the attorney should have a system to retain files with judgments closed on the basis that the judgments are uncollectible, to ensure the files are available in the future, should the attorney be contacted regarding a judgment lien.

A judgment does ***not*** constitute an automatic statewide lien on real estate upon its entry by either the clerk or the court. The judgment must be submitted for docketing in accordance with the docketing fee, which is done by submitting a copy of the judgment to the Superior Court Clerk's office in Trenton, in the case of a Law Division judgment, together with the fee for docketing. R. 4:47(a). A Special Civil Part judgment can also be docketed in the Law Division by obtaining a transcript and submitting that to the clerk's office in Trenton for docketing. Once docketed, the judgment will be assigned a docket number beginning with either "J", or "DJ" to indicate that it is a

docketed judgment, and will constitute a lien against real estate. See, NJ.S.A. 2A:16-36. The Penalty Enforcement Act permits administrative agencies of the state to request that the clerk docket a final order assessing a civil penalty or award on the judgment docket. The final order then has the same effect as a judgment entered in court. NJ.S.A. 2A:58-10. The Clerk of the Superior Court in Trenton maintains a book known as the "civil judgment and order docket", which is the record of civil judgments and is the basis for judgment liens. A judgment lien on real property, based on a Special Civil Part judgment, will be effective only upon a notation being made in the "civil judgment and order docket." *Brescher* v. *Gem, Dunetz, Davison & Weinstein, P.C.*, 245 N.J. Super. 365, 369 (App. Div. 1991). After the judgment is docketed, all subsequent proceedings in the case will be governed by the rules applicable to the Law Division.

An attorney dockets a judgment by requesting the Clerk of the Special Civil Part to issue a transcript of the judgment. The Clerk of the Court cannot issue this transcript until any outstanding execution has been returned in the Special Civil Part. Once the Clerk of the Special Civil Part signs and issues a transcript of judgment, the Clerk closes its active file on the case, and it is difficult, if not impossible, for any further proceeding to take place in the Special Civil Part. The attorney must complete the process of docketing by completing and signing the bottom portion of the transcript, which principally contains the attorney's certification as to the actual outstanding balance due on the judgment at the time the judgment is docketed and sending the transcript to the Docketing Section of the Clerk of the Law Division in Trenton, together with the clerk's fee.

The Clerk of the Law Division will docket the judgment, assign a judgment docket number, and return a copy of the transcript to the attorney containing the new docket number. Prom the time the judgment is docketed, all rules, procedures *and fees* of the Superior Court, Law Division apply to the case as if it was originally filed in the Superior Court. Porm 13 sets forth a sample of the transcript of judgment used in Ocean County. In most counties, the attorney completes the top portion of the transcript and sends it to the Clerk of the Special Civil Part who reviews, signs and issues it to the attorney. The attorney then completes the bottom portion of the transcript, signs and forwards it to the Clerk of the Law Division for docketing. In a few counties, the Clerk of the Court will prepare and issue the transcript to the attorney upon request.

The attorney must exercise judgment in deciding whether and when to "remove" a judgment from the Special Civil Part, by docketing it in the Law Division. Exercising this judgment requires the attorney to understand the differences in execution procedures between the Special Civil Part and the Law Division, and the perceived advantages to the judgment creditor that are present in the Special Civil Part.

The Sergeants-at-Arms and Constables of the Special Civil Part receive a fee that is taxed as a cost and collected whenever the service of a writ of execution is "the effective cause in producing payment or settlement of a judgment", of 10% of all amounts paid on the judgment. N.J.S.A. 22A:2-37.2(c)(3). These amounts are added to the judgment, but, as a practical matter, are deducted by the Sergeants-at-Arms and Constables from collections as they are made. These fees are actually paid to the individuals who serve as the Sergeants-at-Arms and Constables, and constitute an important source of income to those individuals.

Although a similar fee is payable to the Office of the Sheriff in connection with the Sheriffs handling of Law Division execution process, the fees collected by the Sheriff are not distributed directly to the Sheriffs Officers who are responsible for handling the particular process. As a result, a direct financial incentive is not present as it is in the case with the Sergeants-at-Arms and Constables who serve execution process in the Special Civil Part. The statute authorizing commissions payable to the Sheriffs Office provides that the Sheriff is entitled to a fee of 6% of the first $5,000 collected and 4% on amounts over $5,000, with a minimum fee to be charged for an execution of sale of $50.00. N.J.S.A. 22A:4-8. Again, these fees are added to the amount of the judgment. The statute provides that the fees are earned upon the conduct of a sale and that, if a settlement occurs without the Sheriff conducting a sale, the Sheriff is entitled to one-half of the amount stated, based upon whatever sums are paid. Because N.J.S.A. 22A:4-8 refers only to "a sale," and given that cash and bank accounts are subject to being turned over, as opposed to being sold, the Sheriffs Officer is not entitled to a commission for levying execution on money (including bank accounts), despite the fact that a Special Civil Part Officer would be entitled to a commission in such a case. *International Brotherhood of Electrical Workers* v. *Gillen,* 174 N.J. Super. 326 (App. Div. 1980).

The attorney must realize that the fees in either case are earned when the Officer's activity is the effective cause of a settlement. *Morris Plan Co. of New York v. Ashdown*, 15 N.J. Misc. 185 (1937). Consequently, the attorney must recognize the financial obligation to either the Special Civil Part Officer or the Sheriffs Officer whenever a judgment debtor attempts to make a settlement following the issuance of execution.

As a result of the financial incentives that apply to the activity of the Special Civil Part Officers, experienced practitioners find that Special Civil Part Officers tend to be more industrious and resourceful in assisting the judgment creditor or its attorney in locating assets on which execution may be levied and in following up on information regarding assets. The Sheriffs Officers simply do not have the incentive to use their time in an attempt to locate the defendant's assets. Accordingly, many experienced collection practitioners will permit a judgment to remain in the Special Civil Part for as long as they believe a meaningful prospect exists for the judgment to be collected on a short-term basis. Only when all presently available efforts to collect a judgment have been exhausted, will the attorney take steps to docket the judgment in the Law Division, immediately prior to closing the file. The obvious countervailing consideration to this approach is the fact that the judgment, once docketed, will constitute a lien against real estate owned by the defendant in New Jersey, whereas the Special Civil Part judgment will not.

It is impossible to establish a hard and fast rule and the attorney must be prepared to exercise his or her judgment. In those instances where a prospect is known to exist for the defendant to sell real estate, the judgment ordinarily should be docketed immediately.

Supplemental Proceedings to Discover Assets

Notwithstanding the comments above concerning the willingness of the Special Civil Part Officers to assist the judgment creditor in locating assets, the law is clear that the judgment creditor is responsible for locating assets or sources of income of the defendant from which a judgment may be satisfied. Neither the Sheriffs Office, nor the Special Civil Part Officers, have any responsibility

to locate a defendant's assets on which execution may be levied. *Spiegel, Inc. v. Taylor*, 148 N.J. Super. 79 (Bergen Cty. Ct. 1977). When the Court Officer has been provided with a Writ of Execution, identification and location information regarding the defendant's assets, instruction and fees, the Court Officer is obliged to follow the creditor's instructions and levy execution in behalf of the judgment creditor. If the court officer fails to do so, they may be held accountable to the judgment creditor under the theory of "amercement". *Vitale* v. *Hotel California*, 184 N.J. Super. 512 (Law Div.) *aff'd*, 187 N.J. Super. 464 (App. Div. 1982). To show liability under such a theory, the plaintiff bears the burden of proof, and is required to "clearly establish some default of duty." *Id.* Additionally, the plaintiff is required to demonstrate that the conduct of the officer "has deprived him of a substantial benefit to which he was entitled under the writ; that but for the officer's conduct, [the plaintiff) would have received such benefit through the execution." *Id.* Proof of damages has been held to be an essential element of an amercement claim. *See Onyx Leasing Systems, Inc.* v. *Stevens*, 2012 N.J. Super., No. A-2552-11T1, LEXIS 2830 (App. Div. 2012). Short of an amercement claim, relief is available in mandamus. *Id.*

The requirement that the judgment creditor identify specific assets is followed as policy to a greater or lesser degree by the various Sheriffs Offices. In the United States District Court, this requirement is clearly followed and the official form of a Writ of Execution includes an Attorney's Certification that discovery was conducted in aid of execution prior to requesting the issuance of the execution. In *Sasco 1997 N.I.* v. *Zudkewich* it was held, for purposes of interpreting the statute of limitations under the Fraudulent Transfer Act, that a reasonable creditor should conduct an asset search when a loan goes into default. 166 N.J. 579 (2001). This holding of *Sasco*, however, is no longer relevant following revisions to N.J.S.A. 25:2-31(a), which contains the statute of limitations for bringing a cause of action under the Fraudulent Transfer Act, in 2002. *Guido v. Spina*, 2010 N.J. Super. LEXIS 1031 (App. Div. May 14, 2010). When *Sasco* was decided in 2001, N.J.S.A. 25:2-31(a) provided in relevant part that a claim for fraudulent transfer must be brought "within four years after the transfer was made" or, "if later, within one year after the transfer . . . was or could reasonably have been discovered by the claimant." Following *Sasco*, N.J.S.A. 25:2-31(a) was amended to remove the phrase "or could reasonably have been" from the statute, thus creating a one-year statute of limitations period commencing when the purportedly fraudulent transfer "was discovered" by the plaintiff. *Guido*, 2010 N.J. Super. at 5-6. Consequently, as *Guido* makes clear, *Sasco's* holding, that creditors should conduct an assert search when a loan goes into default, "was abrogated" upon amendment of the statute. *Id.* at 6.

It is in the area of locating assets where the Sergeants-at-Arms and Constables have historically afforded great latitude (and assistance) to the judgment creditor and its attorney, by following up on instructions regarding execution that might be viewed as insufficiently vague if received by the Sheriffs Office, and by taking initiative to assist counsel in locating assets that are subject to execution. In addition, the Special Civil Part Officer is far more likely to make repeated attempts to locate assets at specified locations and in particular bank accounts.

The Fair Credit Reporting Act contains a "safe harbor" provision that permits a consumer credit reporting agency to provide reports to someone who intends to use the information in connection with the collection of an account of the consumer to whom the information relates. 15 U.S.C.A. § 1681b(a)(3)(A). These reports can offer a significant amount of useful information concerning assets and income, as well as other debts and obligations.

Order for Discovery

The principal means by which the judgment creditor learns of assets out of which a judgment can be satisfied is by supplementary proceedings in aid of execution. R. 4:59-1(e) refers to supplementary proceedings and provides that the judgment creditor may examine the judgment debtor or any other person regarding the judgment debtor's assets and income. R. 4:59-1 specifically references R. 6:7-2. R. 6:7-2 is reprinted in Appendix D.

Pursuant to R. 6:7-2(a), the court may order a judgment debtor or another person having knowledge of the judgment debtor's assets and income to give discovery and produce specified documents at a specified time and place. Forms 14 and 15 contain a form of *Ex Parte* Petition and Order for Discovery in Aid of Execution. The content of the Petition should be varied depending upon the type of information or documents the attorney seeks to investigate. Ordinarily, the Order is made returnable in the attorney's office on a date chosen by the attorney; although discovery must take place in the county where the judgment debtor lives or works. The Order may be served personally or by simultaneous registered/certified mail and ordinary mail at least ten days prior to the return date. R. 6:7-2(c). If discovery is sought from a person other than the judgment debtor, the petition filed with the court should clearly identify the relationship between that person and the judgment debtor and the basis upon which that person is believed to have information concerning the financial affairs of the judgment debtor. In order to be in a position to enforce a failure to comply with the discovery process, the attorney should always attempt to identify a responsible representative of a judgment debtor corporation who is a natural person, such as an officer or a director, and direct the information subpoena to the individual, as opposed to obtaining an order that commands an entity to appear. The latter type order is difficult to enforce, as a practical matter. See R. 6:7-2(e)(3).

Information Subpoenas

The Rules also provide for an Information Subpoena and written questions. R. 6:7-2(b). Form 16 contains the current permitted form for an information subpoena. The attorney should check the Appendix to the Rules of Court (currently Appendix XI-L) for any changes. The judgment debtor must answer the information subpoena within fourteen days of service. R. 6:7-2(b). The Information Subpoena may be served personally or by simultaneous registered/certified mail and ordinary mail. R. 6:7-2(c). It is not necessary for the return receipt cards to be filed with the court. R. 1:5-3. The Information Subpoena cannot be served more often than once every six months without leave of the court. R. 6:7-2(b).

Information subpoenas may also be served upon third-parties, including (i) banking institutions possibly used by the judgment debtor, and (ii) upon possible employers or account debtors (that are business entities) of the judgment debtor. R. 6:7-2(b)(2). In both cases, it must be in circumstances where the judgment-debtor has failed to "fully answer" (emphasis supplied) an information subpoena within 21 days of service. In the case of subpoenas to possible employers or account-debtors, leave of court is required. An *ex parte* application is made, with supporting certification setting forth that the judgment debtor has failed to fully answer an information subpoena, that the third party information subpoena is reasonably necessary to effectuate a post-

judgment judicial remedy, and that the party to whom the subpoena will be directed may have information about the debtor that will assist the creditor in collecting the judgment. Examples of *ex parte* certification and order are found as Forms 17 and 18. Banks are authorized to obtain reimbursement for the cost they incur in producing and analyzing records in response to a subpoena. N.J.S.A. 17:16S-1.

The form of third party information subpoena is prescribed by the appendix to the court rules. The form, which is also found as Form 19 in this book, is currently set forth in appendix XI-R to the New Jersey Court Rules. Please notice that, if the information subpoena is directed to a bank, it must also contain a certification with the information that is required to be submitted to the court in order to obtain the order for the subpoena to issue.

The FDCPA permits an attorney to contact third parties as reasonably necessary to effectuate a postjudgment judicial remedy. 15 U.S.C.A. § 1692c(b). The attorney is thus permitted to seek information that can be utilized to obtain payment of a judgment from various third parties, subject to the Rules of Court and the rule of reason cited in the statute. In addition, and as previously noted, the Fair Credit Reporting Act contains a "safe harbor" provision that permits a consumer credit reporting agency to provide reports to someone who intends to use the information in connection with the collection of an account of the consumer to whom the information relates. 15 U.S.C.A. § 1681b(a)(3)(A). These reports can offer a significant amount of useful information concerning assets and income, as well as other debts and obligations.

In the event a judgment debtor or another individual fails to comply with an Order for Discovery or an Information Subpoena, the judgment creditor may petition the court for an Order Enforcing Litigant's Rights. R. 6:7-2(d), (e). The judgment creditor's attorney typically will choose to file a Notice of Motion along with a supporting certification or affidavit. The Notice of Motion is served on the individual who failed to provide discovery, either personally or by simultaneous certified and ordinary mail, at least ten days before the return date in the Notice of Motion. The Order is returnable in court. The individual must be advised that he or she can avoid a court appearance by answering the Information Subpoena and returning it to the attorney at least three days prior to the return date. R. 6:7-2(d). Forms 20, 21 and 22 contain examples of the Notice of Motion for an Order Enforcing Litigant's Rights and a Certification in Support of the Motion for an Order Enforcing Litigant's Rights. The attorney should check the Appendix in the Rules of Court (currently Appendices XI-M and XI-N) for any changes in these forms.

If the individual appears in court on the return date, the court will direct the individual to immediately make discovery before the attorney. The scope of the permissible examination is quite broad and should be viewed as being co-extensive with the types of assets and income that can be subject to execution. Obviously, if a judgment debtor or individual refuses to answer a question or participate in discovery, such refusal can be punishable by contempt of court. The plaintiff is entitled to have a record of the proceedings prepared.

If the individual fails to appear in response to a Notice of Motion to Enforce Litigant's Rights, the court may enter an Order to Enforce Litigant's Rights. R. 6:7-2(f). Form 22 contains a sample form; however, the attorney is advised to check the Appendix to the Rules of Court (currently Appendix XI-O) for modifications. If the individual fails to comply with the

discovery order or information subpoena within ten days of serving a signed Order to Enforce Litigant's Rights, either personally or by certified mail, the court will issue a civil arrest warrant. R. 6:7-2(g). In order to obtain a Warrant for Arrest, the judgment creditor's attorney must submit a certification indicating that a signed copy of the Order for Arrest was served on the individual and more than ten days have passed without compliance by the individual. The attorney should be familiar with the following two cases: *New Century Financial Services* v. *Nason,* 367 N.J. Super. 17 (App. Div. 2004) (reviewing in detail the steps that must be taken in order to obtain the issuance of an arrest warrant based upon a failure to respond to an information subpoena (based upon the version of the court rules then in effect)); and *John Cilo, Jr., Assocs., Inc.* v. *Stephenson,* 2013 N.J. Super. LEXIS 516 (App. Div. Mar. 7, 2013) (amplifying and explaining the *Nason* case, specifically in the context of a delay by the Plaintiff in seeking an Order for Arrest). Form 24 contains a sample certification and Form 25 is a sample Warrant for Arrest. The attorney should check the Appendix to the Rules of Court (currently XI-P and Xl-Q) for any changes in these forms. The Warrant may be executed only between the hours of 7:30 a.m. and 3:00 p.m. on days when court is in session. R. 6:7-2(g). If the Order for Arrest was served by mail, the Warrant for Arrest may be executed only at the address to which the Order was mailed. R. 6:7-2(g). The individual brought in will be released upon complying with the discovery order. R. 6:7-2(g). The order for arrest will be returned and deemed to be expired if it is not served within twenty-four months after the date of the entry of the order authorizing the warrant. R. 4:59-1(e); R. 6:7-2(i).

Demand for Production of Schedule of Corporate Assets

As an additional technique to obtain information regarding assets of a corporate judgment debtor, N.J.S.A. 2A:17-74 provides that a corporate officer can be served with a Notice of Demand for Production of Schedule of Corporate Assets. This demand must be served by a Sheriff who holds an outstanding and unsatisfied Writ of Execution. The judgment creditor or its attorney should identify the corporate officer to be served and direct the Court Officer to the corporate officer's address. The statute indicates that if a corporate officer is served with such a demand and fails to comply with it by providing the Court Officer with a Schedule of Corporate Assets, the corporate officer can be held personally liable for the judgment originally entered against the corporation. Form 26 contains a notice of demand for production of schedule of assets.

Mechanics of Execution

In both the Law Division and the Special Civil Part, execution is initiated by requesting the Clerk of the Court to issue a Writ of Execution, which, in turn, is delivered to the Court Officer. The Court Officer then levies execution in accordance with the instructions provided by the judgment creditor's attorney. In the Special Civil Part, the Court Officer and Clerk are in the same office, so that the Writ can be signed and sealed by the Clerk and delivered to the Court Officer for levy in one mailing. Form 27 is a sample Writ of Execution used in the Law Division and Form 28 is a sample Writ of Execution against Goods and Chattels used in the Special Civil Part. The Appendix to the Rules of Court (currently Appendix XI-H) should be consulted for any modifications.

Once the Clerk issues the Writ, it can be used by the Court Officer to levy execution for up to two years in both the Special Civil Part and the Law Division. N.J.S.A. 2A:18-27, R. 4:59-1(a).

(Appendix D of this text contains R. 4:59-1.) Afterward, the Court Officer is required to return the writ to the Court unsatisfied, satisfied, or partially satisfied.

An *Alias* Writ of Execution is a second Writ of Execution while a *Pluries* Writ refers to a third or any subsequent Writ of Execution. Because a Writ of Execution in the Law Division is directed to the Sheriff of a particular county, the plaintiff may obtain multiple Writs of Execution simultaneously, directed to the Sheriffs of different counties. N.J.S.A. 2A:17-4. The statutes proscribe the means by which a conflict among competing executions is to be resolved, and the order of priority of competing Writs of Execution. N.J.S.A. 2A:17-11 *et seq.*

Essentially, as between judgment creditors, the first to levy on property has priority to the proceeds from the sale of the property. N.J.S.A. 2A:17-13; *Wolfson* v. *Bonello*, 270 N.J. Super. 274, 287 (App. Div. 1994). When, however, one creditor obtains a judgment and a Writ of Execution and another creditor obtains a valid Writ of Attachment prior to the first creditor's Writ of Execution (but the judgment was not obtained until after the first creditor's Writ of Execution), the creditor who obtained the Writ of Attachment has priority over the proceeds of a sale of the property which was attached. *Id.* at 289 citing In re *Bobilin*, 83 B.R. 258, 263 (Bankr. D.N.J. 1988) (the execution sale following judgment relates back to the date of the Writ of Attachment). If the Writ of Attachment is invalid, the creditor who levies pursuant to a Writ of Execution first, has priority. See *Id.*

Requirement of Exhausting Personal Property

The judgment creditor is required to exhaust the personal property of a judgment debtor, either by execution, sale or exemption, prior to causing a levy to be made on real estate. N.J.S.A. 2A:17-1. Otherwise, a levy and sale of real estate is void. *Id.*; *Raniere v. I & M Investments*, 159 N.J. Super. 329 (Ch. Div. 1978) *qff'd*, 172 N.J. Super. 206 (App. Div. 1980); *cert. denied*, 84 N.J. 473. See also *Daeschler v. Daeschler*, 214 N.J. Super. 545 (App. Div. 1986), and *Sklar v. Cont'l Cas. Co. (In re Mariano)*, 339 B.R. 344 (Bankr. D.N.J. 2006). Rule 4:59-1(c)(1) provides that no execution sale of real estate may occur until and unless the plaintiff obtains a court order on notice to the defendant, based on a certification outlining in detail that steps taken to attempt to locate the defendant's personalty and to satisfy the judgment out of that personalty.

Upon receiving a Writ of Execution, fees and instructions, the Court Officer will proceed to levy execution on the assets to which the Officer has been directed. The Officer will file his or her return of service with the Court which, in the case of personal property, will contain an inventory of the assets that are subject to the levy. See N.J.S.A. 2A:17-20. The statutes set forth the means for obtaining an appraisal of potentially exempt assets and for protecting the judgment debtor's exemption. N.J.S.A. 2A:17-20 *et seq*. The court officer who makes the levy is obliged to mail a notice to the person whose assets have been levied describing the exemptions from levy and the steps that need to be taken in order to claim those exemptions. R. 4:59-1(g).

In some counties, the judgment creditor or its attorney must prepare Notices of Sale to be delivered to the Court Officer for posting; in other counties, these notices are prepared and posted by the Court Officer, who provides the judgment creditor or its attorney with a copy of the notice so that the judgment creditor may be present at the sale. The Sheriff makes arrangements for a Notice of Sale to be advertised in order to comply with statutory requirements and to generate interest in the

sale. Unfortunately, attendance at execution sales is ordinarily quite limited and the judgment creditor must be prepared to bid against its judgment at the time the goods are offered for sale.

The Sheriff is entitled to fees for conducting a sale. N.J.S.A. 22A:4-8. Usually, the Sheriffs fees are the responsibility of the seller-judgment creditor; however, the burden for fees may be shifted to the bidder-purchaser at the sale. In order for the burden shift to be valid, the Sheriff must clearly advertise that the Sheriffs fees are the responsibility of the bidder, over and above the bid for the property. The burden for fees also must be indicated as a condition of the sale at the time of the sale. *Howard Savings Bank v. Sutton*, 246 N.J. Super. 482, 484 (Ch. Div. 1990).

The levying creditor must provide notice of a pending execution sale at least ten days prior to the date set for the sale, by certified mail served upon every party who has appeared in the action, the owner of record of the property as of the date of the commencement of the action regardless of whether they have appeared, and every other person having ownership or lien interest that is to be divested by the sale. R. 4:65-2.

Given the minimal forced sale value of most household belongings, the attorney must exercise judgment to avoid expending time and fees that will not result in a benefit to the client. The mechanics of execution sales are fully discussed in N.J.S.A. 2A:17-33 *et seq.*

Assets Subject to Execution

Cash

Cash belonging to the judgment debtor is clearly an asset subject to execution. N.J.S.A. 2A:17-15. As with bank accounts, cash obviously cannot be the subject of a sale. Therefore, the execution sale procedures do not apply to a levy on cash. In order to protect themselves against claims regarding the handling of cash, most court officers who receive instructions to levy on cash will insist that the officer be accompanied by either a representative of the judgment creditor and/or a police officer. See *Vitale* v. *Hotel California*, 184 N.J. Super. 512 (Law Div.) *aff'd* 187 N.J. Super. 464 (App. Div. 1982).

Bank Accounts

The funds in bank accounts belonging to the judgment debtor are available for execution. The attorney should provide the Court Officer with as much information as possible regarding the location of the bank account, its name and account number. Upon levying execution on a bank account, the bank will freeze the amount in the account and the return of service filed by the Court Officer will notify of judgment creditor's attorney that a specified amount has been garnished.

A bank account levy is fixed in time as of the date the Writ of Execution is served on the bank. It is not a continuing levy, regardless of the typical language that is used by plaintiffs counsel directing the court officer to levy on all funds "…due or to grow due…" to the judgment-defendant. *T&C Leasing* v. *Wachovia Bank, N.A.*, 421 N.J. Super 221 (App. Div. 2011). Accordingly, the levy will not be effective as to funds deposited after the date of the levy, although the plaintiff is free to have the levy served repeatedly.

The levy, however, is not effective on the full balance available to the debtor in the account at the time the levy is served. A bank is entitled to deduct a service fee, provided the fee is mentioned in the bank's deposit agreement with its customer. N.J.S.A. 17:16S-2. The levy only attaches to the interest of the judgment debtor and is subject to the rights of the bank to reverse a provisional credit upon dishonor of instrument that the deposit of which gave rise to the provisional credit." *DNI Nevada, Inc.* v. *Medi-Pleth Medical Lab, Inc.*, 337 N.J. Super. 313 (App. Div. 2001).

In order to obtain the funds, a Notice of Motion for a Turnover Order must be filed, on notice to the judgment debtor and the bank. See N.J.S.A. 2A:17-63. Forms 29, 30 and 31 set forth a form of Notice of Motion for an Order for Turnover, the Supporting Certification, and an Order for Turnover, respectively, used in the Special Civil Part. This form can readily be adapted for use in the Law Division. After the court signs the Order, it must be served on the garnishee (bank). In the Law Division, service can be accomplished by certified mail. In the Special Civil Part, the Court Officer usually serves the Turnover Order. The monies are paid over by the garnishee bank to the Clerk of the Court, who in turn remits to the judgment creditor's attorney. A levy is not automatically released after the expiration of the writ, and the bank can be held liable for releasing levied funds without a court order to do so. *Sylvan Equipment Rental Corp.* v. *C. Washington & Son, Inc.*, 292 N.J. Super. 568 (Law Div. 1995).

A levy on a joint bank account has the effect of converting a joint tenancy into a tenancy in common. N.J.S.A. 17:161-4 governs the determination of a judgment debtor's interest in a joint bank account, apart from considerations of family law. Essentially, the statute provides that all parties having a right of access to the account are deemed to own equal share, absent proof of net contributions or a contrary provision in the deposit agreement. For a discussion of the procedures that the creditor is to follow in order to enforce its rights, see the discussion in *Kieffer* v. *New Century Financial Services, Inc., 2012 U.S. Dist. LEXIS 70332*.

Individual Retirement Accounts

N.J.S.A. 25:2-1 provides that when funds are deposited into a "qualifying trust," the funds in the trust and any distributions from the trust are exempt from execution. N.J.S.A. 25:2-1(b). A qualifying trust is defined as a trust created and maintained pursuant to federal law, including IRAs and "Keogh Plans", as defined by sections 401 and 408 of the Internal Revenue Code of 1986 (26 U.S.C.A. §§ 401, 408) (relating to IRAs).

Public Assistance Monies

State Assistance

Public assistance money in the form of either old age assistance payments or Aid to Dependent Children pursuant to Title 44, chapter 10 is exempt from execution, while general public assistance pursuant to Title 44, chapter 8 is subject to execution. *Dover Oil Co. v. Sedor*, 178 N.J. Super. 46 (App. Div. 1981); N.J.S.A. 44:10-2 (repealed by L. 1997, c. § 17, eff. March 24, 1997); N.J.S.A. 44:7-35.

Federal Assistance

Under the Social Security statute, "moneys paid" pursuant to that statute are not "subject to execution, levy, attachment, garnishment, or other legal process . . . ." 42 U.S.C.A. § 407. The United States Supreme Court, in *Philpott* v. *Essex County Welfare Board,* 409 U.S. 413 (1973), held that these payments retained the characteristic of "moneys" even after deposited into a bank account. *Id.* at 416. By virtue of the language "other legal process," in the statute, any funds in the account that can be traced back to social security benefits cannot be levied upon. *Id.* at 417. *But see Brown* v. *Brown,* 2010 N.J. Super. LEXIS 1126 (May 25, 2010) (finding *Philpott's* holding was superseded by 42 U.S.C.A. § 659(a), to the extent that money paid by the U.S. will be subject to "income withholing, garnishment, and similar proceedings" to enforce a person's responsibility under the law "to provide child support or alimony").

Wage Executions

In both the Law Division and Special Civil Part, in order to levy execution against a judgment debtor's wages, the judgment creditor must provide notice to the judgment debtor that a wage execution is being sought. R. 4:59-1(d), R. 6:7-3(a). The Notice must state that an application is being made for a wage execution; the debtor has ten days to notify the court clerk and the judgment creditor's attorney that the judgment debtor objects to the wage execution and the reasons for the objection; and, if the debtor objects within ten days, a hearing will be held to determine whether a wage execution should be issued. If proofs are submitted satisfying the requirements of the applicable statute, N.J.S.A. 2A:17-50, the court is without discretion to deny the requested wage execution. *Create Bay Hotel & Casino v. Guido,* 249 N.J. Super. 301 (App. Div. 1991). The Notice must also state the limitations on the amount which can be levied pursuant to 15 U.S.C.A. §§ 1671-1677, inclusive, N.J.S.A. 2A:17-50, *et seq.* and N.J.S.A. 2A:17-57 *et seq.* The Notice of Application for a Wage Execution may be served personally or by simultaneous registered/certified mail and ordinary mail. Form 32 is a sample of the current form for a Notice of Application for Wage Execution. The attorney should consult the Appendix to the Rules of Court (currently Appendix XI-1) for modifications. See also Appendix F of this manual for a "flow-chart" of the steps to obtain a wage execution.

The application will not be considered by the court, and should not be filed with the court, until ten days after the defendant has been served with the Notice of Application. Three days should be added to cover mailing time. If the judgment debtor does not notify the court and the creditor's attorney within ten days, the attorney may file the original Notice of Application for Wage Execution, together with a Proof of Mailing and an Order for Wage Execution, within thirty days from the date of service or the date of hearing. R. 4:59-1(d); R. 6:7-3(aj. *See First Resolution Investment Corporation* v. *Seker,* 171 N.J. 502 (2002), for discussion of the manner by which the service requirement is met, in the case of certified and regular mailings. *First Resolution* makes it clear that the judgment creditor's sole obligation is to send written notice to the Defendant at its last known address by certified and regular mail, so long as the mail is not returned for any of the reasons set forth in R. 6:2-3(d)(4).

If the judgment debtor objects after the Wage Execution is ordered, all moneys received pursuant to the wage execution will be held by the court clerk until further order of the court. A hearing on the wage execution will be held within seven days of the objection. R. 4:59-1(d). Form 33 contains a sample of a combined Order, Certification and Execution Against Earnings used in the Special Civil Part. Form 34 contains a sample Notice of Application for Wage Execution and Form 35 is a sample Order directing the issuance of a Writ of Execution Against Wages used in the Law Division. The attorney should check the Appendix to the Rules of Court for any changes in these forms.

Only one execution against wages may be satisfied at a time. As compensation for the employer's administrative expenses, the employer is entitled to retain 5% of the funds deducted under a wage execution. If the employer fails to comply with a wage execution, the employer may be personally liable to the judgment creditor. NJ.S.A. 2A:17-54. The issue of whether an employer is amenable to the court's ability to compel a wage execution is analyzed in terms of the employer's amenability to *in personam* jurisdiction in the New Jersey Superior Court. See *Mechanic's Finance Co.* v. *Austin,* 8 N.J. 577 (1952); *Little* v. *Little,* 35 N.J. Super. 157 (App. Div. 1955).

Additionally, as *Educap, Inc.* v. *Williams* makes clear, the existence of a wage execution on one defendant provides no basis to deny an order to pay against a different defendant that is jointly and severably liable. 2013 N.J. Super. LEXIS 83.

Goods & Chattels

A levy on goods and chattels, including household belongings or inventory and equipment, can be either an actual levy or a constructive levy. Because most Court Officers require the judgment creditor to post security (to safeguard the Court Officer against a claim of wrongful taking) and storage fees, an actual levy is rarely performed. Ordinarily, goods and chattels are the subject of a constructive levy, by which the Court Officer notifies the person in possession of the assets that the assets are subject to the levy and any transfer of the assets will be subject to the lien of the levy.

As a practical matter, the judgment creditor can levy only on the judgment debtor's equity in the assets. Particularly in commercial matters, the attorney should determine the existence of validly perfected security interests (which will take priority), in order to avoid a waste of time.

Real Estate

Execution on real estate is governed by N.J.S.A. 2A:17-17. The judgment creditor's attorney should begin by investigating the status of title prior to proceeding with a real estate execution, in order to determine if the sale makes practical sense because, as with a levy on any other asset, the sale will be made subject to all existing encumbrances. The Sheriffs Office requires a deposit prior to proceeding with sale, along with a metes and bounds description of the property.

A judgment creditor may execute on real property formally owned by its judgment debtor, even though another now owns the property, where the creditor's judgment was docketed before the deed of conveyance was recorded. *Lieberman* v. *Arzee Mid-State Supply Corp.*, 306 N.J. Super. 335 (App. Div. 1997).

Frequently, a judgment will be obtained against a person who owns real estate with a spouse as tenants by the entireties. *Newman v. Chase*, 70 N.J. 254 (1976), discussing the remedies that are available to a judgment creditor in this situation, held that the judgment creditor ordinarily will be precluded from forcing a partition of the property, at least where the property is the residence of the spouse against whom the judgment creditor does *not* have a judgment. The Court in *Newman* acknowledged, however, that this holding did not stand for the proposition that partition will never be available to a purchaser of a debtor's interest in property held as tenant by the entirety, but instead meant that partition will not be "automatically available". *Id.* at 262, 266. The attorney also should be familiar with *Freda* v. *Commercial Trust Company*, 118 N.J. 36 (1990), which held that the lien of a mortgage (and presumably a judgment) created by one spouse survives a subsequent award of equitable distribution, but does so subject to the other spouse's right of survivorship. *But see Jensen v. Montemoino (In re Montemoino)*, 491 B.R. 580 (Bankr. M.D. Fla. 2012) (interpreting New Jersey law, and holding that with the enactment of N.J.S.A. §§ 46:3-17.2 - 46:3-17.4, applying to tenancies by the entireties created after the effective date of those statutes, creditors of only one spouse may no longer execute on entireties property).

For discussion of the impact of the federal tax lien against one spouse on property owned by the entireties, see *United States v. Avila*, 88 F.3d. 229 (3rd Cir. 1996). See also *United States v. Craft*, 535 U.S. 274 (2002), in which the United States Supreme Court held that a federal tax lien could attach to property held by a husband as a tenant by the entireties, applying Michigan law.

Tax Escrows

A tax escrow account, held by the mortgagee pursuant to a bond and mortgage, is not subject to execution. *American National Bank & Trust of N.J. v. Leonard*, 166 N.J. Super. 216 (App. Div. 1979). The advance tax payments are additional security for the mortgagee, not intended to benefit the mortgagor. *Id.* at 219. Once the tax payment is made, the mortgagors have no control over and no interest in the funds. As a result, the mortgagors have no right to the funds and neither does a mortgagor's judgment creditor. *Id.* See also *1st 2nd Mortgage Co. of N.J., Inc.* v. *Ferandos (In re Ferandos)*, 402 F.3d 147 (3d Cir. 2005), for a more recent case which followed the law as stated in *American National Bank & Trust of N.J.* v. *Leonard.*

Motor Vehicles

In order to effectuate a valid transfer of title to a motor vehicle at an execution sale, the attorney must be familiar with and satisfy the requirements of the New Jersey Motor Certificate of Ownership Law, N.J.S.A. 39:10-1 *et seq*. As indicated, the judgment creditor is in a position to levy execution only on the judgment debtor's equity in the assets. Therefore, before proceeding with a sale, the attorney should determine if there is equity in the motor vehicle. Upon levying execution on a motor vehicle, the attorney should obtain the license place number from the Court Officer's return of service and then determine whether any properly recorded security interests or encumbrances are noted on the title to the motor vehicle. The attorney may accomplish this by writing the Division of Motor Vehicles and sending the appropriate fee.

After levying execution, the Court Officer is required to file a written notice giving a full description of the vehicle on which execution has been levied. After this is done, the Division of Motor Vehicles will provide the Court Officer with a form to be used to apply for a Certificate of Ownership. This form is delivered to the vehicle's purchaser at the time of the execution sale.

Stocks and Bonds

The statutory authority to levy in stocks and bonds is contained in N.J.S.A. 2A:17-16. The precise steps that must be followed in order to levy on securities are detailed in N.J.S.A. 12A:8-112. This section draws a distinction between certificated securities, *see* N.J.S.A. 12A:8-102(a)(4) and un-certificated securities, *see* N.J.S.A 12A:8-102(a)(18).

Order to Pay Out of Income

If a judgment debtor has earnings that are not susceptible to a wage execution, the judgment creditor should seek an order directing the judgment debtor to make payments on account of a judgment. N.J.S.A. 2A:17-64. This statute serves as the legal authority for Consent Orders that are frequently entered into following the entry of judgment by which the judgment debtor agrees to make payments in accordance with some agreed upon schedule. In the absence of the judgment debtor's consent, the judgment creditor may apply to the court on notice to the judgment debtor and demonstrate facts that will support the relief requested of the court. If the Order is entered and the judgment debtor fails to comply, the judgment creditor may seek to have the judgment debtor held in contempt of court.

Rights & Credits

The statutory authority for levying execution on the judgment debtor's rights and credits is found in N.J.S.A. 2A:17-57 through 2A:17-64. If the obligation to the judgment debtor is admitted by the one who owes the debtor (garnishee), the judgment creditor may apply for an Order directing turnover, similar to a bank account levy. If a challenge is raised by the garnishee, the garnishee is entitled to a plenary hearing to determine the validity of the obligation to the judgment debtor. The test of whether an obligation can be garnished is whether it is liquidated, non-contingent and susceptible to assignment. *See, Sears, Roebuck & Co. v. Romano,* 196 N.J. Super. 229 (Law Div. 1984). For public policy reason, some types of rights and benefits are specifically exempt from execution. *See Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F. 3d 487 (Third Cir. 1997), and the cases cited therein, discussing the public policy that prohibits the assignment of a prejudgment tort claim.

Trademarks and Service Marks

Pursuant to N.J.S.A. 2A:17-57, all property is subject to levy in order to satisfy a judgment, including intangibles. Unlike a copyright or patent, however, a trademark or servicemark is not property which can be sold separately from the business to which the mark is associated. *Jacobs, Bell & Baumol* v. *Curtis*, 232 N.J. Super. 155, 157 (Law Div. 1989). Therefore, a trademark or servicemark itself cannot be subject to levy. *Id.* at 158. These marks, however, can be subject to an equitable lien which can be filed in the United States Patent and Trademark Office. *Id.* In satisfying

the lien, the trademark or servicemark, along with the business assets or goodwill with which the mark is identified, may be sold at an involuntary sale. *Id.*

Overdraft Protection Agreements, Home Equity Loans

Overdraft protection agreements have been held to be exempt from execution, at least prior to the issuance of a draft against the account, although the basis for that ruling has recently been drawn into question. *Sears, Roebuck & Co.* v. *Romano*, 196 N.J. Super. 229 (Law Div. 1984). The *Sears* court held that the right to overdraw an account was not an assignable right, but rather was related directly to the individual depositor. *Id.* at 235-36.

However, the obligation of a lender that holds a "reverse" mortgage to make payments in a set amount in regular installments until some specified occurrence (e.g., the death of the mortgagor), has recently been held to constitute a "debt" that is subject to garnishment pursuant to N.J.S.A. 2A: 17-50 and -63 and Rule 4:59-1(c), subject to the limitations contained in N.J.S.A. 2A: 17- 56. *Cameron* v. *Ewing*, 424 N.J. Super 396 (App. Div 2012). The *Cameron* court chose to disregard language in the loan agreement that prohibited assignment of the judgment-defendant's rights in the arrangement, and it cited the Sears case with disapproval, to the extent non-assignability was an alternative grounds for the court's holding in that case. The Court in *Cameron* found the lender's obligation to be "certain and currently payable", *ibid* at 406, and it emphasized the general policy of the law to lend all reasonable assistance to a creditor to enforce its claim. The discussion in Cameron also disregarded the fact that the judgment-defendant was a debtor to the lender, pointing out that each of the parties to the transaction was a creditor of the other.

BODY EXECUTION

Body execution, or *capias ad satisfaciendum*, may be used only in very limited circumstances, and generally, is not available in collection proceedings. In order to understand body execution, one must first understand *capias ad respondendum*.

Capias Ad Respondendum

Since *capias ad satisfaciendum* may issue by the Clerk without a court order if a *capias ad respondendum* has been initially obtained and has not been vacated, it is important to know the basic procedures for obtaining a *capias ad respondendum*.

The attorney may start suit on contract by *capias ad respondendum* ("co. *re.*") when the application supported by an affidavit establishes one of the following:

a. The defendant is about to flee the jurisdiction with his or her property to defraud his or her creditors.
b. The defendant is fraudulently concealing assets.
c. The defendant has or is about to assign, remove or dispose of assets with the intent to defraud his or her creditors.
d. The defendant fraudulently contracted a debt.

At the court's discretion, the Writ of *ca. re.* may be issued against one or more defendants and is returnable at the time the court directs. The Writ is served with the Complaint and the defendant is arrested. The Writ states that the defendant's Answer must be served within twenty days after the arrest. The court then sets the amount of bail which is stated on the Writ and directs the executing officer to release the defendant upon his or her furnishing the officer with a bond or cash deposit in the amount of the bail. If the defendant cannot furnish bail, the Writ must direct the executing officer to bring the defendant before the Judge.

Form 36 is a sample *Capias Ad Respondendum.* Supplies of this Writ may be obtained in the Office of the Special Civil Part Clerk for issuance by the Clerk as Deputy Clerk of the Superior Court. Upon presentation of an original or certified Order for the Writ, the Special Civil Part Clerk is authorized to issue the Writ over his or her own signature. R. 1:34-2.

After starting the suit by *capias ad respondendum*, the collection process, once a judgment is obtained, may begin by *capias ad satisfaciendum*, or actual body execution.

Capias Ad Satisfaciendum

In essence, a Writ of *capias ad satisfaciendum* ("ca. *sa."*) enables a creditor to cause the arrest of the debtor and to keep him or her in custody until he or she either pays the judgment debt or secures the debt's discharge as an insolvent debtor. *Perlmutterv. DeRowe*, 58 N.J. 5 (1971).

By statute, body execution cannot reach certain persons, such as females, certain infants or parties arrested under a *capias ad respondendum* in an action on contract based on fraud in the inception when the court determined at a trial that such fraud did not exist. Further, the attorney must be aware that some doubt exists as to whether a body execution can issue on a judgment docketed in Superior Court from the district courts (now the Special Civil Part). *Messerer* v. *Vannerman,* 63 N.J.L. 535 (Sup. Ct. 1899).

Conditions for Writ to Issue

Unless a *capias ad respondendum* has or could have been issued in a contract action, a Writ of *ca. sa.* may be issued only where the attorney can show that the debtor has assets of $50 or more, but illegally or fraudulently refuses to apply these assets toward payment of the judgment.

Procedure and Form

In general, the terms and procedures that apply to *capias ad respondendum* also apply to body executions. As explained, a Writ of *ca. sa.* may issue without court order if a Writ of *capias ad respondendum* has been obtained against a defendant and has not expired. Where a *capias ad respondendum,* however, has not been issued, the creditor's attorney must present evidence to the court by affidavit to show that the Writ of Body Execution is justified. Should the court find that such proofs have merit, then it may order the Writ to issue.

The Writ of *ca. sa.* is returnable within eight to fifteen days from the day it issues. The Writ commands the Sheriff to arrest the judgment debtor and to keep him or her safely in custody so that

he or she may appear on a designated date to satisfy the judgment debt. Form 37 is a sample Writ of *Capias Ad Satisfaciendum.*

If for some reason the judgment debtor fails to appear before the court on the date set forth on the Writ of *ca. sa.* and he or she previously posted bail or a cash deposit under a Writ of *ca. re.*, then the creditor's attorney may proceed against the bond or deposit on the grounds of breach of conditions. Such proceedings are commenced by summary action. It must be emphasized, however, that a creditor is unlikely to realize the full amount of the judgment debt by undertaking such action since ordinarily the bail furnished under a Writ of *ca. re.* need not be for the same amount as that of the creditor's claim. See, *Perlmutter* v. *DeRowe*, 58 N.J. 5 (1971).

Discharge from Writ

To be released from body execution without paying the judgment debt, the judgment debtor must resort to the statutory provisions relating to the discharge of insolvent debtors. As an insolvent debtor, however, the judgment debtor is required to assign all of his or her estate, real as well as personal, for the benefit of his or her creditors. As to the terms and procedures for obtaining discharge on the grounds of debtor insolvency, see N.J.S.A. 2A:20-1 to 11, inclusive. The insolvency proceedings require the debtor to make a full inventory of his or her property. The court will then appoint one or more assignees to distribute the debtor's assets to the debtor's creditors.

ORDER FORBIDDING TRANSFER OF PROPERTY

In aid of execution, the court may enter an Order forbidding the transfer of specified property. The Order may be directed either to the judgment debtor or to a third party shown to be in possession of property belonging or owed to the judgment debtor.

RECEIVER IN AID OF EXECUTION

In aid of execution, the court may enter an Order directing the appointment of a receiver in aid of execution. This is an extraordinary remedy which requires the judgment creditor to demonstrate that it has exhausted all available statutory remedies for execution, and that such attempts have been unsuccessful. A receiver so appointed has broad power to operate a judgment debtor's business and apply the net proceeds in satisfaction of the judgment. NJ.S.A. 2A:17-66.

EXEMPTIONS AND CLAIMS OF THIRD PARTIES

N.J.S.A. 2A:17-19 provides that property of any kind (including cash) not exceeding $1,000 in value, together with all wearing apparel, are exempt from execution. Although the language of the statute is antiquated, it clearly appears to be limited to natural persons. While it has been held that rings and jewelry are *not* wearing apparel within the meaning of the statute, the exemption for wearing apparel appears to be quite broad, and not subject to any implied limitation based upon the value of the wearing apparel. See *Frazier v. Barnum*, 19 N.J. Eq. 316 (1868). It has also been held that the exemption contained in N.J.S.A. 2A:17-19 applies to a wage execution entered pursuant to N.J.S.A. 2A:17-53. *Chrysler Financial Services* v. *Provenzano, 2011 N.J. Super. Unpub. LEXIS 2658.*

R. 4:59-1(g) requires the court officer or other person levying on property to mail a notice to the person whose assets are to be levied on in the form prescribed in Appendix 6 to the Rules, and found as Form 38.

SATISFACTION OF JUDGMENT

When a judgment is satisfied, the judgment debtor is entitled to receive from the judgment creditor or its attorney, a Warrant of Satisfaction. The Warrant must be executed by someone authorized to receive satisfaction and this signature must be acknowledged or by the attorney of record and be accompanied by the attorney's certification. R. 4:48-1. The Warrant should be delivered to the party making satisfaction or its representative or to the court clerk. *Id.* The judgment creditor's obligation is only to deliver the Warrant.

The Warrant of Satisfaction should contain the judgment docket number or the book and page where the judgment is recorded and the Warrant should direct the clerk to satisfy the judgment of record. R. 4:48-1. The appropriate fee for filing the Warrant of Satisfaction can be found in the Lawyer's Diary. Form 38 sets forth a form of Warrant to Satisfy Judgment that the attorney should file in either the Law Division or the Special Civil Part.

PART TWO – FAIR DEBT COLLECTION PRACTICES ACT
(15 *U.S.C.* §1692 *et. seq.*)

RICHARD EICHENBAUM, ESQ.
2012 REVISION BY ALAN R. OSTROWITZ, ESQ.
2013 REVISION AND NEW SECTION BY CINDY D. SALVO, ESQ.

INTRODUCTION

Attorneys collecting consumer debts for others must have a working knowledge of the *Fair Debt Collection Practices Act*. Even "[s]eemingly benign and ethical collection efforts... directed at an unappealing and even infuriating deadbeat debtor" may result in liability under the FDCPA.[1] AS one judge put it, "the provisions of th[is] statute are...painfully, some might think annoyingly, even nitpickingly, clear. . . ." Violators cannot rely upon courts to ignore the plain meaning of the Act's provisions: "If this statute is harsh, inflexible, hypertechnical, unforgiving, and unfairly burdensome to debt collectors, and if it sweeps into the ambit of its prohibited practices the acts of the virtuous and the vicious alike, the problem is one for legislative correction, not judicial interpretation."[2]

The FDCPA (15 *U.S.C.* §1692 *et. seq.*) was enacted in response to Congressional findings that there was "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," and that then-existing "laws and procedures" for redressing injuries were "inadequate to protect consumers."[3] Declaring that the purpose of the FDCPA was to "eliminate abusive debt collection practices by debt collectors," Congress also sought to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged...."[4] For example, "[d]emanding payment for an uncontested, overdue debt is an entirely valid tool available to debt collectors."[5]

"The Act was intended to shield debtors from abusive collection practices, but it was never intended to shift the balance of power between debtors and creditors such that a debt collector cannot work with a debtor's attorney without exposing itself to liability out of proportion to the debt allegedly owed. Nor was it intended as a sword to be brandished by debtors who have retained counsel – the very debtors least in need of the Act's protections."[6]

"A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner."[7]

The *Fair Debt Collections Practices Act* governs the conduct of those who are defined as "debt collectors"[8] by prohibiting a wide range of abusive collection practices, detailing certain affirmative actions which must be taken by debt collectors, establishing certain specific consumer "rights," and imposing civil liability upon violators. "The FDCPA is not simply a federal codification of common-law negligence. Rather, each section specifies what kind of conduct supports FDCPA liability."[9]

Among other things, the Act prohibits: (1) conduct the "natural consequence of which" is to harass, oppress, or abuse any person in connection with the collection of a debt (§1692d); (2) false, deceptive, or misleading representations (§1692e); (3) use of unfair or unconscionable means to collect a debt (§16920: and (4) the use, design, compilation and furnishing of deceptive forms (§1692j). Each of these sections enumerates specific and detailed examples of acts constituting violations; however, such examples are *not* exhaustive and do not limit the general application of each of these sections.

Other sections of the Act govern and restrict communication with debtors (§1692c); communications with any person other than the debtor for the purpose of acquiring location information about the debtor (§1692b); the procedure to be followed for debt validation (§1692g); and the venue in which any legal action by a debt collector may be brought (§1692i). Actual damages, statutory damages, attorneys' fees and costs of suit can be assessed against violators under §1692k.

The FIX'PA is a remedial statute, and its language is to be construed broadly so as to effect its purpose.[10]

The Federal Trade Commission is charged with enforcement of compliance with the FDCPA (§16921); however, the primary mechanism of enforcement is through private actions. The Federal Trade Commission Official Staff Commentary (issued on December 13, 1988) is the "vehicle by which the staff of the FTC publishes its interpretations of the FDCPA."[11] Although courts may accord the Official Staff Commentary "due weight,"[12] it is not entitled to "conclusive weight" because, among other reasons, the Commentary expressly states that it is not binding on the Commission or the public.[13]

DEFINITIONS

Whether the FDCPA applies to an attorney (or anyone else) is largely determined by the definition of terms *"debt collector," "consumer," "debt," "transaction," "creditor,"* and whether one is *"regularly engaged"* in collection of debts for another. These threshold evaluations are critical in determining whether the FDCPA is applicable to certain types of debt collection efforts or the person(s) conducting them.

With certain exceptions, the FDCPA generally applies to persons or entities defined as "**debt collectors**" under §1692a(6) who seek to collect **consumer** obligations to pay money (**"debts")** arising out of "**transactions**"[14] in which the money, property, insurance or services which are the subject matter of the transaction are primarily for personal, family, or household purposes. The Act does not apply to commercial or business debts.[13]

What is a "Communication?"

A "communication" is defined in §1692a(2) of the FDCPA as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[16]

According to the Court in *Garza* v. *MRS BPO, LLC.*, 2012 WL 3527072 (S.D.Tex., August 15, 2012), a voicemail is only a communication under the definition of the FDCPA when it conveys more information than could be gathered from a missed call. In *Garza*, the Court dismissed Plaintiffs Complaint for failure to provide meaningful disclosure, when she alleged that the debt collector telephoned Plaintiff and left a twenty-second voicemail consisting only of "dead air" on Plaintiff s answering machine.

The Court in *Sussman v. I.C. System, Inc.*, 2013 WL 842598 (S.D.N.Y., March 6, 2013), held that a communication occurs when a debt collector initiates a calls and then hangs up "either prior to or as soon as" the call is answered by the consumer. Here, Plaintiff alleged that Defendant placed over 50 calls to her telephone and hung up "either prior to or as soon as," Plaintiff answered the call. The Court reasoned that if the debt collector hung up, as Plaintiff contends, "common sense dictates that Defendant did not provide meaningful disclosure of the caller's identity, as required by 1692d(6)."

What is a "Debt?"

A "**debt**" is defined in §1692a(5) of the FDCPA as: "any obligation or alleged obligation of a consumer to pay money arising out of[17] 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."

The Act applies to "debts" arising out of consensual consumer transactions such as consumer installment credit, credit cards, residential rent,[18] medical bills, utility bills, condominium and homeowners assessments,[19] insurance bills, bad checks (if the check was written for a consumer transaction),[20] homeowner's water and sewer obligations,[21] enforcement of liens,[22] unpaid administrative fees charged under a rental agreement by an automobile and truck rental company in the event of an accident,[23] contractual subrogation claims arising out of insurance contracts,[24] and costs awarded by a court.[25]

Of course, not all obligations to pay are considered "debts" subject to the FDCPA; the definition of "debt" limits the scope of the Act.[26] "Rather, the FDCPA may be triggered only when an obligation to pay arises out of a specified 'transaction.'"[27] Moreover, at least one appellate court has held that the relevant time for determining the nature of the debt is when the debt first arises, not when collection efforts begin.[28]

In a decision of particular importance for New Jersey attorneys, the Third Circuit clarified the meaning of "debt" in *Pollice* v. *National Tax Funding, L.P.*"[29] In *Pollice*, the court expressly disavowed its earlier suggestion in *Zimmerman* v. *HBOAffiliate Groujr*[30] that an "offer or extension of credit" was an essential component of a "debt" under the FDCPA. Joining the other Circuit Courts of Appeal to address the issue, the Third Circuit declared "In our view, the plain meaning of section 1692(a)(5) indicates that a 'debt' is created whenever a consumer is obligated to pay money as a result of a transaction whose subject is primarily for personal, family or household purposes. *No 'offer or extension of credit' is required"* (emphasis added).[31]

Its statement in *Zimmerman* that a transaction must involve an "offer or extension of credit" was dismissed as non-binding "dictum" and "not necessary to the decision."[32]

In *Pollice*, the Third Circuit found that homeowners' original obligations to pay government entities for water and sewer service constituted "debts" even though the government entities did not extend homeowners any right to defer payment of their obligations. The holding in *Pollice* instructs that the Third Circuit now takes the "broader view that the FDCPA applies to all obligations to pay money arising out of consumer transactions, regardless of whether credit has been offered or extended." [33]

Focusing on the "clear and absolute language in the phrase 'any obligation to pay,'" the 7th Circuit has made clear that "as long as the transaction creates an obligation to pay, a debt is created."[34] Although the Act does not define the term "transaction," the Eleventh Circuit found "the ordinary meaning of 'transaction' implies some type of business dealing between parties;" that is, "consensual or contractual arrangements."[35] Likewise, the Third Circuit states that "transactions" should be limited to consensual events; *ie* contractual relationships, and they should encompass rendition of a service or purchases.[36]

Stating that "we are simply powerless to rewrite the Act's definition of 'debt' by restricting the ordinary meaning of the term 'transaction' to 'credit transaction,'" the 7th Circuit emphasized that "we are prohibited from reading into clear statutory language a restriction that Congress itself did not include." Instead, the Court went on to say, "[t]he ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment." *Bass, supra.* "All that is required," the 7th Circuit declared, "is an obligation to pay arising from a consensual transaction, where parties negotiate or contract for consumer-related goods or services."[37]

In determining whether a particular obligation to pay constitutes a "debt" under §1692a(5), the 7th Circuit articulated a useful two part analysis: The first prong asks whether the sums to be collected are "obligations arising out of a ***consensual transaction*** where parties negotiate or contract ***for consumer-related goods or services***." Next, the inquiry must satisfy the requirement that the "money, property, insurance, or services which are the subject matter of the transaction" be "***primarily for personal, family, or household purposes***" (emphasis added).[38] *Both* prongs must be satisfied for an obligation to qualify as a "debt" covered by the FDCPA.

Under this analysis, dishonored checks[39] and homeowners or condominium association assessments[40] were held to be "debts" covered by the FDCPA, whereas delinquent unemployment insurance contributions were not.[41]

Per capita taxes are not considered "debts" within the meaning of the Act[42], nor are personal property taxes levied on automobiles.[43] Moreover, homeowners' property tax obligations do not constitute "debts" under the FDCPA.[44]

Tortious conduct is not considered a "transaction" within the meaning of the FDCPA; *Zimmerman* v. *HBO*[45] held that the FDCPA did not apply to a claim for recovery of wrongful

interception of microwave television signals. Likewise, the Eleventh Circuit held that an obligation to pay damages arising out of an automobile accident is not a "debt" because such obligation "plainly" does not constitute a consensual or business dealing ("transaction") under the Act.[46] More recently, the 9th Circuit held that an action for wrongful conversion against a rogue employee who stole merchandise, re-sold it a discount and pocketed the proceeds, did not constitute a "debt" under the FDCPA.[47]

The Federal Trade Commission does not believe that the FDCPA applies to car accidents, taxes, fines and child support.[48]

Who is a "Consumer?" [§1692a(3)]

The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

Who is a "Creditor?" [§1692a(4)]

The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. "The FDCPA distinguishes between debt collectors, who are subject to the statute's requirements, and creditors, who are not."[49] "This distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all"[50] except in very limited circumstances defined by the Act.

The Court in *Huy Than Vo* v. *Nelson & Kennard*, 2013 WL 1091207 (E.D. Cal., Mar. 15, 2013), held that while a creditor may not be held directly liable to a consumer under the FDCPA, the creditor may be held vicariously liable for a debt collector's conduct, pursuant to 1692a(6). In *Vo*, the creditor, US Bank, retained a law firm to pursue a collection action for a defaulted consumer debt. The law firm/debt collector obtained a default judgment. The consumer filed an action under the FDCPA alleging that notice of the default judgment was not properly served, and that the debt was not plaintiffs. The Court allowed the case to proceed against the creditor, finding that non-debt-collector creditors may be held vicariously liable for their attorney's actions.

Who is a "Debt Collector?" [§1692a(6)]

The FDCPA covers debt collectors - not creditors. These categories have been deemed "mutually exclusive."[51]

The term "debt collector" means:

> (6) ... any person 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 who **regularly collects or attempts** to collect, *directly or indirectly*,[52] **debts** owed or due or asserted **to be** *owed or due another*. Notwithstanding the

> exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce of the mails in any business the principal purpose of which is the enforcement of security interests.[53]

A detailed list of persons and entities to whom the term does *not* apply is also part of §1692a(6).[54]

For the most part (with certain specific exceptions discussed below), the FDCPA applies only to "debt collectors" and only when their conduct is undertaken in connection with the collection of any debt.[55] Sellers of delinquent credit card accounts, for example, who retain no post sale ownership interest in such accounts are not "debt collectors" within the meaning of the statute.[56]

The Act treats assignees as debt collectors if the debt sought to be collected was in default when it was acquired by the assignee. A purchaser of a debt in default is a debt collector for purposes of the FDCPA even though it owns the debt and is collecting for itself.[57]

The Act is not limited to licensed or registered collection agencies. Instead, the legislative history makes clear that although the "primary persons intended to be covered are the independent debt collectors," whose principal business is debt collection, the term also includes "all third parties" who regularly collect consumer debts for others....[58]

Attorneys who regularly collect or attempt to collect debts due to another are "debt collectors" within the meaning of the FDCPA[59]—even when that collection activity consists of litigation on behalf of their clients.[60] Holding that the *Fair Debt Collection Practices Act* "applies to a lawyer who 'regularly,' *through litigation*, tries to collect consumer debts," the United States Supreme Court declined to recognize an implicit distinction between purely "legal" activities undertaken by attorneys and "debt collection activities" (such as telephone calls and dunning letters).[61]

Although as a general matter, *creditors* collecting debts in their own name are not considered "debt collectors" under the Act,[62] Section 1692a(6) provides that a creditor *is* covered by the FDCPA if the creditor, "in the process of collecting his own debts, uses any name other than his own that would indicate a third person is collecting or attempt to collect such debts." "Although a creditor need not use its full business name or its name of incorporation to avoid FDCPA coverage, it should use the 'name under which it usually transacts business, or a commonly-used acronym,'...or any name that it has used from the inception of the credit relation."[63] Accordingly, an in-house collection unit would not be considered a "debt collector" so long as it collects its own debt in the "true name of the creditor or a name under which it has consistently done business."[64]

In the case of *Maguire* v. *Citicorp Retail Services, Inc* the Second Circuit found that a "least sophisticated consumer" could be misled into believing that a dunning letter from "Debtor Assistance," an internal collection unit of Citicorp responsible for handling certain delinquent accounts, was not from Citicorp, but from an unrelated third party – even though Citicorp and Debtor Assistance were in fact related.[66] However, in the Third Circuit case of *Allen* v. *LaSalle Bank*, 629 F.3d 364 (3rd Cir. 2011), the Third Circuit found that even a communication to debtor's counsel would not be excepted from the "least sophisticated" standard.

Who is Not a "Debt Collector?"

15 *U.S.C.* §1692a(6) not only defines who is a "debt" collector, but expressly states that "the term does not include" certain categories of persons and/or entities. Prior to the 1986 amendment to the Act, attorneys composed one of these categories. Among others, the term "debt collector" does *not* apply to the following:

> (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;[67]
> (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;[68]
> (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
> **(D)** any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
> (E) any nonprofit organization which, at the request of consumers, perforins *bona fide* consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity
>
> **(i)** is incidental to a *bona fide* fiduciary obligation or a bona fide escrow arrangement;[69]
> **(ii)** concerns a debt which was originated by such person;
> **(iii)** concerns a debt which was not in default[70] at the time it was obtained by such person;[71] or
> **(iv)** concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

What Qualifies as "Regularly" Collecting a Debt?

The FDCPA seems to exclude only those who collect debts in truly isolated instances. Collection practice and activity must be truly irregular and incidental to an attorney's overall practice to fall outside scope of the Act.[72] One 6th Circuit opinion observed that in order to "regularly" collect debts under the FDCPA, an attorney or law firm must collect debts "as a matter of course for its clients or for some clients," or must collect debts "as a substantial, but

not principal, part of his or its general law practice."[73] This is a highly fact-specific analysis turning on case-by-case circumstances. If you are seeking to collect consumer debts on behalf of another party, it is best to conduct your collection activities under the assumption that you are governed by the FDCPA.[74]

Factors to consider in weighing whether one is "regularly" engaged in collection of debts for another include the volume of the collection activities, frequent use of collection-oriented form documents or letters, the existence of formal agreements to collect debts and/or a steady "ongoing" relationship with a collection client, establishment of collection procedures, time spent on third party debt collection, the ratio of third party collections to other activities, and the percentage of revenues derived from debt collection activities.[75]

"LEAST SOPHISTICATED CONSUMER" STANDARD

To accomplish the consumer protection purpose of the FDCPA, most courts,[76] including the Third Circuit, apply a "least sophisticated consumer" standard to analyze whether a particular action violates FDCPA.[77] This is an objective test. As one court put it, "[t]he test is how the least sophisticated consumer—one not having the astuteness of a 'Philadelphia lawyer' or even the sophistication of the average, everyday, common consumer—understands the notice he or she receives."[78]

Such a standard "was grounded in an effort to effectuate the goal of consumer protection laws by protecting 'consumers of below-average sophistication or intelligence' who are 'especially vulnerable to fraudulent schemes.'"[79] This hypothetical consumer, however, "can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care."[80] The FDCPA "protects the unsophisticated consumer, but not the irrational one."[81] Moreover, "although this standard protects naïve consumers, it also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and preserving a basic level of understanding and willingness to read with care."[87]

A Court must decide whether the debt collector's actions were unfair or unconscionable or whether the least sophisticated of consumers would have been misled, deceived or harassed by the particular practice in question.[83]

OVERVIEW OF BASIC OBLIGATIONS AND PROHIBITIONS

Demand Letters and Validation of Debts: Elements of Conforming Demand (and Subsequent) Letters to Debtors

Although initial contact with a consumer may be oral, a demand letter is probably the most advisable initial contact between attorneys and consumer debtors. Such communications must not only disclose their debt collection purpose (the "Mini-Miranda" warning) in accordance with §1692e(11), but must also, either in the initial communication or in a written notice within five days thereof, advise consumers of their statutory right to seek

validation of the debt pursuant to §1692g. Even seemingly insignificant variations from the statutory requirements can result in FDCPA violations. Great care must be taken in preparing communications with consumer debtors; an astonishingly large body of reported cases on the topic is ample testimony to the dangers of sending improperly drafted dunning letters.

False Representations of Character, Amount or Legal Status of the Debt (§1692e(2)(A))

Section !692e(2)(A) prohibits misrepresentations regarding the character, amount or legal status of the debt. Although it may seem to be self-explanatory, the District of New Jersey case *of Chulsky v. Hudson Law Offices, P.C., 111* F.Supp.2d 823 (D.N.J., 2011) is instructive. In that case, Hudson, a legal professional services corporation, purchased some 100 accounts from a credit card issuer for collection. The subject action was commenced in its own name and stead (Hudson) and for its own account. However, under New Jersey's *Professional Service Corporation Act*. Hudson engaged in business "outside of [the practice] it was organized to engage in or allowed by law to engage in," and the Court found that such behavior made the collection of the accounts *ultra vires*.

The Court discussed the plaintiffs allegations under §1692e, §1692e(2)(A), and §1692e(10) that Hudson misrepresented the legal status of the debt by attempting to a collect on a debt that is unenforceable under New Jersey law.

> . . . 1 agree that Plaintiff has sufficiently alleged that Hudson Law's operation of the debt collection business would render its attempt to collect the debt unenforceable. Further, that the debt was owned and prosecuted by a law firm could have created in a least sophisticated consumer's mind an impression of legal validity not typically imputed to a creditor's actions. *Cf. Campuzano–Burgos*, 550 F.3d at 301 ("Debtors react more quickly to an attorney's communication because they believe That a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process through which [such a] letter was sent.'") (quoting *Avila* v. *Rubin*, 84 F.3d 222, 229 (7th Cir.1996)). Thus, based on the Third Circuit's holding in *Crossley* and the more recent district court cases that have acknowledged a §1692e violation may be based on a misrepresentation of the ability to collect a debt under state law, I conclude that Plaintiff has sufficiently plead an §1692e claim. At 833-834.

Thus, although not new territory. *Chulsky* does show that §1692e(2)(A) clearly can be used in instances wherein the underlying debt suffers from legal infirmity.

Subsequently, in *Skinner v. Asset Acceptance, LLC*. ____ F.Supp.2d _____2462306 (D.N.J 2012). Judge Rodriguez reached the contrary result in a similar case, although not involving a legal services professional entity. In *Skinner*, the creditor, a collection agency, failed to file a bond as required by New Jersey statute. "Though Defendant's attempt to collect a debt in New Jersey without filing the required bond may have been contrary to New Jersey law, Defendant's challenged conduct must also stand as a violation of the FDCPA in order for

Plaintiff to maintain her claim. The state law violation itself is not a per se violation of the FDCPA." At 5.

In *Ellis* v. *Cohen & Slamowitz, LLP*. 701 F.Supp.2d 215 (N.D.N.Y. 2010), the creditor sent a series of letters to the debtor. The second letter offered to reduce the amount due to the creditor as a "Tax Season Special—*i.e.*, it offered to forgive $1,924.61, or 30% of the debt. However, the Court found that the creditor failed to notify the debtor of the requirement under the Internal Revenue Code that any amount forgiven in excess of $600 must be reported as income on his federal tax return. This judicially engrafted requirement in the Northern District of New York requires the creditor to notify the debtor of the tax consequences of a compromise of the debt, or face a claim that such non-disclosure is a violation of "...15 *U.S.C.* §§1692e(2), 1692e(10), and 1692f, by seeking to deceive and mislead him into accepting the discounted amount." At 220. The Court found that the Complaint, alleging a violation of 15 *U.S.C.* §§1692e(2), 1692e(10), and 1692f stated a cause of action.

However, in *Huertes* v. *Galaxy Asset Management*, 641 F.3d 28 (3d. Cir. 2011), the Third Circuit discussed whether a FDPA violation occurs when a creditor attempts to collect a debt which is otherwise barred by virtue of the statute of limitations. The Court recognized that "…under New Jersey law, Fluertas's debt obligation is not extinguished by the expiration of the statute of limitations, even though the debt is ultimately unenforceable in a court of law." At 32. "Although our Court has not yet addressed the issue, the majority of courts have held that when the expiration of the statute of limitations does not invalidate a debt, but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action in connection with its debt collection efforts." At 33. Although the original demand letter from the creditor contained the statutorily mandated language that "this is an attempt to collect a debt," "[e]ven the least sophisticated consumer would not understand [the creditor's] letter to explicitly or implicitly threaten litigation. Furthermore, the FDCPA *requires* debt collectors to inform a debtor "that the debt collector is attempting to collect a debt." 15 *U.S.C.* §1692e(11). Since it is appropriate for a debt collector to request voluntary repayment of a time-barred debt, *see Freyermuth*, 248 F.3d at 771, "it would be unfair if debt collectors were found to violate the FDCPA both if they include the mandated language (because inclusion would threaten suit) and if they do not (because failure to include a mandatory notice violates the statute)." *Id*. *Compare*, *McCollough* v. *Johnson, Rodenburg & Lauinger*, 637 F.3d 939 (9th Cir. 2011), wherein the creditor's attorney actually commenced suit on the claim which had expired under the applicable statute of limitations. In that case, the lower Court had awarded statutory damages of $1,000; $250,000 for emotional distress; and $60,000 in punitive damages. The debtor had suffered brain damage, and was dragged into Court on three separate occasions despite having advised the creditor of the expiration of the statute of limitations.

Another interesting case out of the Seventh Circuit, *O'Rourke*, v. *Palisaades Acquisition XVI, LLC*. 635 F.3d 938 (7th Cir. 2011), discussed a twist in the misrepresentation made by the creditor. In that case, the misrepresentation was in the form of a manufactured account schedule attached to a Complaint filed in the Cook County Court, intended to allow the creditor to enter a default judgment on Illinois' version of the "book account." Admittedly, the fabricated statement

was never served upon the debtor, and was simply constructed to allow a quick default judgment. The debtor claimed that the FDCPA misrepresentation was in the presentation to the Court itself:

> On appeal, O'Rourke continues to claim that the exhibit is materially false and would mislead the Cook County judge handling his case; thus, it violates §1692e. That section is broadly written and prohibits the use of "any false, deceptive, or misleading representation [] or means in connection with the collection of any debt." 15 *U.S.C.* §1692e. It then has a non-exhaustive list of conduct that violates the Act. O'Rourke specifically alleges that the misleading credit card statement violates §1692e(2)(A) and (10). The first subsection prohibits the false representation of "the character, amount, or legal status of any debt." The second prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt." Nothing in those subsections or in §1692e states that the Act applies to statements made to judges, but at the same time, the Act's language is not specifically limited to statements directed at consumers.
>
> Yet when read in light of the Act's purpose and numerous provisions, the prohibitions are clearly limited to communications directed to the consumer and do not apply to state judges. The Act is meant "to protect consumers against debt collection abuses." 15 *U.S.C.* §1692(e). To accomplish this purpose, §1692e broadly prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* §1692e. Many of the specific instances of conduct that violate this Section are protections for consumers. At 941.
>
> As a general matter, the Act and its protections do not extend to third parties. Although courts have extended the Act's prohibitions to some statements made to a consumer's attorney, *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773–75 (7th Cir.2007), and to others who can be said to stand in the consumer's shoes, *Wright* v. *Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 650 (6th Cir.1994) (*en banc*) (holding that executrix could sue because the Act applies to anyone who "stand[s] in the shoes of the debtor [with] the same authority as the debtor to open and read the letters of the debtor"), none has extended the Act to persons who do not have a special relationship with the consumer. At 943.

Thus, at least in the 7th Circuit, a misrepresentation to the Court, although perhaps unethical conduct, is not violative of the FDCPA. Certainly, this case can be reconciled with the Third Circuit case *of Allen* v. *LaSalle Bank*, 629 F.3d 364 (3rd Cir. 2011), which provides that a misrepresentation is actionable if made to a debtor's attorney.

Disclosure of Debt Collection Purpose of Communication: §1692e(11)

Section 1692e(11) requires debt collector to disclose the collection purpose of the communication in the initial (and in any subsequent) communication with a consumer. This provision must be read in close conjunction with the debt validation mechanisms spelled out in Section 1692g, which is discussed in more detail below.

The **initial written** communication with the consumer **must** state that the debt collector "is attempting to collect a debt and that any information obtained will be used for that purpose."[84] If the initial communication with the consumer is ***oral***, that oral communication must disclose to the consumer that the debt collector is "attempting to collect a debt and any information obtained will be used for that purpose." Note, however, that even if the initial oral communication contains the requisite warning, the initial **written** communication **must also** contain the same disclosure language.[85]

All subsequent communications with the consumer (other than "formal pleadings") must state that they are from a "debt collector."[86] Until the Act was amended in 1996, the full "Mini-Miranda" warning had to appear in **all** communications made to collect a debt including the initial demand letter, any and all follow-up letters, and even all post-suit and post-judgment communications.[87]

According to the FTC, the debt collection identity of the sender "must be clear and unambiguous on its face:" the words "attorney at law" on a law firm's stationary are insufficient, without more, to satisfy the subsequent disclosure requirement.[88]

"Formal pleadings" made in connection with legal action are exempt from the "Mini-Miranda" requirement.[89] The "formal pleadings" exception to §1692e(11) only addresses the need to give the "Mini-Miranda" warning; it does *not* relieve a debt collector from giving the validation notices required under §1692g. Because the amendment fails to define the scope of "formal pleadings," this may become a fertile area for future litigation.[90]

VALIDATION NOTICE AND VALIDATION OF DEBTS: §1692G

Contents of the §1692g Validation Notice

Section 1692g of the Act requires a debt collector to provide consumers with certain information about the debt, the consumer's right to obtain verification of the debt, and the methodology for disputing debts – either within the "initial communication" with the consumer or within five days thereof. This is often referred to as the "§1692g validation notice." The 30-day time frame within which a consumer may dispute the debt and/or make a written request for validation of the debt is frequently referred to as the "§1692g validation period." As one court put it: "The aim of §1692g is to provide a period for the recipient of a collection letter to consider her options. It is also to make the rights and obligations of a potentially hapless debtor as pellucid as possible."[91]

Additional provisions of §1692g – enacted pursuant to an amendment effective in the fall of 2006 – expressly authorize ongoing collection activity during the 30 day validation period,[92] specify that "formal pleadings" in civil actions shall not be treated as "initial communications,"[93] and exclude any non-collection related notices mandated by federal or state law (such as *Grahani-Leach-Bliley Act* privacy notices) from being treated as "initial communications" under this section.[94]

Congress enacted these §1692g debt validation provisions "to guarantee that consumers would receive adequate notice of their rights under the law."[95] Nothing in the letter may cause -- whether through confusing wording, contradiction or intimidation – the "least sophisticated consumer"[99] to misunderstand, overlook, or ignore his/her validation rights. Debt collectors may not confuse debtors by undercutting the required notice or implying a different obligation."[97] On the other hand, "if the letter effectively advises the consumer about the statutory entitlements, then the Act has been satisfied."[98]

The 1692g validation notice must also be accompanied by the full "Mini-Miranda" warning if the letter containing the validation notice is the initial written communication with the debtor. If the validation notice is given within five days of the initial communication, such notice must advise the consumer that it is "from a debt collector."

15 *U.S.C.* §1692g(a) provides that "within **five** days after the initial communication with a consumer in connection with 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" setting forth:

> (1) the amount of debt;[99]
> (2) the name of creditor to whom the debt is owed;
> (3) a statement that unless the consumer disputes validity of the debt, or any portion of it, within 30 days from *receipt*[100] of this notice, the debt will be assumed to be valid by debt collector.[101]
> (4) a statement that if the consumer notifies the collector–in writing–within the 30 day period that the debt, or any portion of it is disputed, the collector will obtain verification of debt (or a copy of a judgment against the consumer) and a copy of such verification or judgment will be mailed to the consumer; 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 the original creditor is different from the current creditor.

Pursuant to §1692g(d), communications "in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection(a)."[102] Section 1692g(d) is far less a "safe haven" than would appear at first blush. Although this provision exempts "formal pleadings" as "initial communications," an attorney *must still* confer the §1692g(d) notices whenever an "initial communication" with a consumer eventually takes place. Such an "initial communication" could be an inbound phone call from the debtor to the attorney's office, a letter to the court upon which the debtor is copied, a meeting in the courthouse hallway, a settlement or mediation conference, or a motion, brief, or discovery request (or response). The term "formal pleading" is not defined by the FDCPA; it is limited to a handful of document types under the *New Jersey Court Rules*.[103]

If an attorney does not provide a pre-litigation §1692g validation notice, he or she must be prepared to do so within five days of the "initial communication" with the debtor.

The validation notice is a "one time" requirement; it is only needed in the *initial* communication, or within five (5) days thereof. It is not required for any subsequent communications.[104]

Placing the validation notice in the initial demand letter fulfills the §1692g validation requirement; if you do not include the validation notice in your initial communication with the consumer, you must send it within five (5) days of your initial communication. By including the validation notice in your initial demand letter, you eliminate the possibility that you might violate the Act by failing to send it within five days. Moreover, providing the §1692g validation in your demand letter allows you to avoid some of the traps presented by §1692g(d).

The Validation Notice Must be "Effectively Conveyed" Without Confusing "the Least Sophisticated Consumer."

To comply with the Act, mere inclusion of the validation notice in the debt collection letter is insufficient. "Although the statute does not specify the manner in which the required disclosures must be provided, it is implicit that the debt collector may not defeat the statute's purpose by making the required disclosures in a form or within a context in which they are unlikely to be understood by the 'unsophisticated debtors' the statute seeks to protect."[105] The validation notice must **"effectively convey"** its contents to the debtor.[106] It must be large enough to be read. It must be conspicuous enough to be noticed by the consumer[107] and should be printed in the same style, color and size typeface as the rest of the demand letter.[108] A validation notice may be printed on the reverse side of the letter as long as there is a "prominent instruction" in the body of the letter warning that there is important information on the other side, and as long as nothing on the front of the letter overshadows or contradicts the validation notice.[109]

Just as importantly, the language in a dunning letter **may not confuse** the least sophisticated debtor about his/her verification rights under the FDCPA.[110] Even if a letter "technically complies with the FDCPA by including the required validation notice," it violates the statute if it is "confusing" to the least sophisticated consumer.[111] It is not enough for a debt collector simply to include the proper validation notice in a mailing to a consumer; the notice must not cause the least sophisticated consumer to become confused or uncertain as to her rights under the FDCPA,[112] or "interpose a strong incentive not to exercise" the validation rights.[113]

"Confusion," according to the 7th Circuit, can be induced in a variety of ways, such as through "**contradiction**," "**overshadowing**," or the "**failure to explain** an apparent though not actual contradiction."[114] These categories, however, are "only three examples" of how a collection letter might be confusing; the heart of the inquiry must focus upon "whether the letter is confusing."[115]

The debtor's right to exercise his validation rights within 30 days of receipt of notice may not, for example, be "overshadowed" by other messages.[116] In *Graziano* v. *Harrison*,[117]

an attorney's demand letter threatened suit within **10 days** and also set forth the statutory notice allowing **30 days** to dispute the debt and to obtain verification. The Court held that such a letter effectively eviscerated the statutory notice because the "least sophisticated consumer," faced with such a letter, would be induced to overlook his statutory right to dispute the debt within 30 days. Section 1692g was violated because of the "juxtaposition of two inconsistent statements;" §!692e(10) was violated because the aforementioned juxtaposition constituted a "false, deceptive or misleading representation.[118]

In *Greer* v. *Shapiro & Kreisman*,[119] a collection letter from a law firm overshadowed the consumer's statutory right to dispute her debt within 30 days. The letter read, in relevant part, "Please be advised that your delinquent account has been referred to our firm for the institution of legal proceedings against you and your property. Legal proceedings have been instituted or will be instituted as soon as possible notwithstanding this notice." The court concluded that "the juxtaposition of [the] statutory rights with an indication that legal proceedings had been instituted (or would be instituted as soon as possible) would make the least sophisticated consumer uncertain as to her rights."[120]

In *Jacobson v. Healthcare Financial Services, Inc.*,[121] language in a demand letter warning "[i]f your payment or notice of dispute is not received in this office within 30 days, we shall recommend further action be taken against you to collect this outstanding balance," was found to contradict Jacobson's rights under §1692g: the letter's requirement that the debtor's notice of dispute be received by the debt collector within 30 days shortened the period of time during which Jacobson could seek verification of the debt. "The recipient of a debt collection letter covered by the FDCPA validly invokes the right to have the debt verified whenever she mails a notice of dispute within thirty days of receiving a communication from the debt collector."[122] In other words, the 2nd Circuit ruled that §1692g gives a consumer 30 days from receipt of a dunning notice to mail her dispute notice; the statute does not impose an obligation upon the debtor to assure that the debt collector receives her notification of dispute.

Demands for "immediate payment," "payment at once," or similar terminology, can easily run afoul of the Act because they tend to "overshadow" the thirty-day validation notice, causing unsophisticated consumers to overlook or become confused about their statutory rights.[123] Several circuit courts of appeal have held (or suggested) that requests for "immediate payment," in and of themselves, do not violate the Act.[124] Unless, however, there is very carefully drafted "transitional language" to help an unsophisticated reader understand how a demand for swift payment of acknowledged debts may be reconciled with the 30-day period to request verification of the alleged debt,[125] demands for "immediate payment" should probably be avoided.[126]

Demand letters appearing to give the consumer a choice between payment prior to the expiration of the 30 day validation period or confronting dire consequences, such as an impaired credit rating, may run afoul of the FDCPA. A letter stating "unpaid collections in the amount of $25 or more," would not be "post[ed] to individual credit records" so long as the debtor did not raise a dispute and tendered payment "within the next ten days" overshadowed the recipient's validation rights. Explaining that a consumer, Donna Russell, was presented with two

different and conflicting statements, the 2nd Circuit set forth her dilemma: "If she believed the message printed on the back of the notice, she would understand, as the Act intends her to, that she had 30 days to contest the claim. But, if she believed what was printed on the front of the notice, she would fear that unless she decided not to dispute the claim and pay it within 10 days, the debt she owed would be 'posted' to her file."[127]

Attempts to be "misleading and tricky" are equally unacceptable. "A validation notice...cannot be cleverly couched in such a way as to eviscerate its message."[128] For example, in *Avita* v. *Rubin*,[129] a demand letter containing the 30-day debt verification notice was followed by a statement that "[i]f the above does not apply to you, we shall expect payment or arrangement for payment to be made within ten (10) days from the date of this letter." The 7th Circuit found that the validation notice "was clearly overshadowed by the language that followed on its heels." "We think," the Court declared, that "the unsophisticated consumer would be scratching his head upon receipt of such a letter. He wouldn't have a clue as to what he was supposed to do before real trouble begins."[130]

In *McKinney* v. *Cadleway Properties, Inc.*,[131] the Seventh Circuit held that a letter containing a section asking the debtor to either confirm the total amount owed or dispute the total and indicate what the amount should be did not contradict any of the clearly expressed statutory notices given in the body of the validation-of-debt notice.[132]

In *Caprio* v. *Healthcare Revenue Recovery*, 2102 W.L. 847486 (D.N.J. 2012), the Collection Letter contained three paragraphs on the front, a detachable payment slip at the bottom, and required validation notice information on the reverse side of the letter. The plaintiff claimed that the collection letter violated 15 *U.S.C.* §1692g because it "could reasonably be read to have two or more different meanings, one of which is inaccurate." The letter provided: "If we can answer any questions, or if you feel you do not owe this amount, *please call* us toll free at *800–984–9115* or write us at the above address." Plaintiff argued that this language gave the option to dispute the alleged debt by either calling Defendant or writing to Defendant. However, the Third Circuit requires that debt disputes be in writing to be effective. [See, *e.g.*, *Graziano*, 950 F.2d at 112 ("We therefore conclude that subsection (a)(3), like subsections (a)(4) and (a)(5), contemplates that any dispute, to be effective, must be in writing.")]. Additionally, the body of the collection letter was alleged to have violated 15 *U.S.C.* §1692g because it contains none of the thirty day time requirements set forth in the FDCPA, and thus conflicts with the validation notice provided on the back of the letter. The Court sided with the creditor and found that the debtor was held to the requirement that he read the entire letter (front and back), and that when the letter was so read, there was no ambiguity or confusion to the least sophisticated debtor. "The validation notice on the back of the Collection Letter clearly sets forth Plaintiffs rights, and informs him that disputes must be in writing. The language on the front of the Collection Letter does not instruct Plaintiff that calling will sufficiently dispute the debt. Nor does that language require Plaintiff to dispute the debt in a period shorter than thirty days, or threaten Plaintiff that if he does not call to dispute the debt he will suffer imminent legal action. A more appropriate reading of the Collection Letter reveals that the language on the front of the letter reflects an invitation to communicate, and the validation notice on the back of the letter sets forth the Plaintiffs rights." At 5.

Carefully-worded letters which strongly encourage consumers to *contact* debt collectors appear to be permissible, as long as there is no demand for "immediate payment" and the language does not otherwise undermine the §1692g validation notice, *e.g., Caprio* v. *Healthcare Revenue Recovery, supra*. In *Wilson* v. *Quadramed* Corp.,[133] a demand letter read, in relevant part, "our client has placed your account with us for immediate collection. We shall afford you the opportunity to pay this bill immediately and avoid further action against you." A second paragraph advised "to insure immediate credit to your account, make your check or money order payable to ERI." A third and final paragraph recited the §1692g validation notices. The court held that the first two paragraphs did not overshadow or contradict the required §1692g validation notices.

Although the court acknowledged the letter "presented a close question," it was not convinced that the language in the first two paragraphs overshadowed or contradicted the validation such that the least sophisticated consumer would be confused or mislead as to his rights to dispute or seek validation of the debt. Finding that Quadramed's "use of the word 'immediately' was. . . used to convey its interest in collecting the debt in a timely fashion," the Third Circuit said "we do not believe the least sophisticated debtor would interpret 'afford you the opportunity to pay this bill immediately' as a demand for payment in less than thirty days, especially since this 'opportunity' is followed, almost immediately, by the required notice to dispute the debt."[134] This letter, said the court, did "not contain either an immediate demand for payment or an inadequate validation notice."[135]

In *Terran* v. *Kaplan*,[136] the 9th Circuit upheld a letter which made no demand for payment but did demand an immediate *phone call*. The phrase "[u]nless an immediate telephone call is made to J SCOTT, a collection assistant at our office at (602) 258-8433, we may find it necessary to recommend to our client that they proceed with legal action," (followed by a proper §1692g validation notice) did not contradict the consumer's thirty day right to dispute the debt. This letter passed muster because it did not demand immediate payment; it simply urged the consumer to communicate with the debt collector without in any way suggesting that the consumer had "better pay up" in less than thirty days "or else." The letter adequately informed the consumer of his thirty day right to dispute the debt.

What is an Effective Notification of Dispute?

In 1991, the Third Circuit Court of Appeals held that "any dispute, to be effective, must be in writing."[137] Noting "that there are strong reasons to prefer that a dispute of a debt collection be in writing," the Court reasoned "a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts."[138] The only other Circuit Court of Appeals to consider this point to date, the 9th Circuit, reached the opposite conclusion.[136]

What is an Effective Validation Request?

In order for a validation request to be valid, a consumer's validation request must be made, in writing.[140] within thirty (30) days from the date he/she received the dunning notice. Moreover, a "tardy request" for verification of a debt does not "trigger any obligation" to verify the debt.[141]

What "Validation" Must be Provided to the Consumer?

In *Graziano* v. *Harrision,* the Third Circuit ruled that the computer printouts provided to Graziano were sufficient to inform him of the amount of the debt, the services provided, and the dates on which the debt was incurred.[142]

Moreover, the Fourth Circuit has explained that "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt."[143] Debt collectors do not have to "vouch for the validity of the underlying debt.[1.144] Citing the Act's legislative history, the court observed that "verification is only intended to eliminate the. . . problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."[145] The Fourth Circuit held that an attorney who received assurances from his client that the monies sought were in fact owed, verified the debt amounts in a letter to Plaintiffs counsel and forwarded a copy of the bank's running computerized summary of the loan transactions in question fulfilled the validation requirements of 1692g. "Nothing more is required," wrote the Court. There is "no . . . obligation to forward copies of bills or other detailed evidence of the debt."

Informal Federal Trade Commission letters indicate that the verification should address the facts of the dispute raised by the consumer. Adequate verification should include a statement showing the amount of the debt; the name and address of the creditor to whom the debt was originally owed (as it appeared upon original sales contract or bill of sale), and, where applicable, the name and address of the creditor to whom the debt is currently owed.

A consumer's failure to dispute validity of debt may **not** be construed by a court as admission of liability.

In *McCabe* v. *Eichenbaum & Stylianou, LLC.*, 2012 WL 6624229 (D.N.J., Dec. 19, 2012), Plaintiff brought an action contending Defendant's collection letters were deceptive. Specifically, the letter stated that, if the consumer disputed the debt, he may dispute the debt in writing. Defendants filed a Motion for Judgment on the Pleadings contending the letter did not violate the FDCPA as it tracked the language of the statute. The Court denied Defendants' motion on the basis that the least sophisticated consumer could have interpreted the word "may" to mean that there was another way to dispute the debt, other than written communication. The consumer "could have interpreted the letter to mean that the debt could be contested in writing or through some other form." There is presently a motion for summary judgment pending on the case for the very same issue as to whether the word "may" is misleading.

In *Bandy v. Midland Funding, LLC.*, 2013 WL 210730 (S.D. Ala, Jan. 18, 2013), the Court dismissed Plaintiffs FDCPA claim which alleged a debt buyer who filed a state court lawsuit without sufficient documentation to establish the validity of the debt violated the FDCPA. Midland had previously filed a collection action against Plaintiff which was dismissed as Midland was unable to establish the validity of the debt, as they only had a bill of sale and a computerized summary of the account. After Midland's collection suit was dismissed, the debtor filed an FDCPA lawsuit. The plaintiff alleged that the debt buyer intended to use the collection lawsuit only as a means to obtain a default judgment and that the legal action thereby operated as a false representation that the debt buyer could actually prove its case. In dismissing the suit, the Court relied on a Federal appeal ruling in *Harvey* v. *Great Seneca Financial Corp.*, 425 F.3d 424 (6lh Cir. 2006) which held that filing suit without the ability to prove the debt at the time the complaint is filed is not an FDCPA violation.

In *Samuels v. Midland Funding, LLC*. 2013 WL 466386 (S.D. Ala., Feb. 7, 2013), another Judge in the same District as *Bandy* disagreed with the holding in *Bandy* and allowed an FDCPA claim to proceed based on Plaintiffs allegation that Midland had filed suit with knowledge that it could not prove its collection action. The Court distinguished this matter from the *Harvey* decision, explaining the plaintiff in *Harvey* had merely alleged there was a present inability to prove the claim when the suit was filed, however Plaintiff there never asserted that the debt buyer knew it could not obtain evidence to prove the debt.

What Conduct, if Any, May be Taken by the Debt Collector During the Validation Period?

A 2006 amendment to §1692g(b) expressly recognizes the right of collectors to pursue collection activity, such as sending dunning letters or making phone calls, during the validation period—subject to the consumer's exercise of his/her validation rights.[146] The amendment further provides that "any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."[147]

The 2006 amendment codifies prior case law holding that the validation period is not a grace period. As the 7th Circuit Court of Appeals put it in 2005, "a debt collector is 'perfectly free' to demand payment and pursue collection efforts...within the validation period....Thus, during the validation period, the debtor's right to dispute co-exists with the debt collector's right to collect."[148]

If, during the thirty-day validation period, a consumer gives you written notice that he/she disputes the debt or a part of it, or if the consumer requests the name and address of the original creditor, you must cease collection of the debt (or the disputed portion of the debt) until verification of the debt or judgment, or the name and address of the original creditor, is mailed to the consumer.[144]

The Act does not require debt collectors to actually provide validation if all collection activities are terminated after receiving a validation request.[150] Debt collectors have two options when they receive a validation request: they may provide the requested validations

and continue debt collection activity, or they may cease all collection activity.[151] Noting that "the statute wisely anticipates that not all debts can or will be verified," the 7th Circuit stated, "when a collection agency cannot verify a debt, the statute allows the debt collector to cease all collection activities at that point without incurring any liability. . . ."[152] In short, "a collection agency does not violate the FDCPA by deciding to not pursue a debtor who seeks validation of a debt."[153]

A debt collector may file a lien prior to a consumer's request for debt verification.[154]

Great care must be taken when sending follow-up demand letters within the 30-day validation period.[155] In light of the 2006 amendment to §1692g(b), follow-up letters appear to be permissible so long as they do not "overshadow" or are not "inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."[156] Sending compliant follow-up letters during the validation period "turns on whether the specific text contains any impermissible overshadowing or contradiction with respect to the validation notice."[157] Follow-up letters during the validation period may, in and of themselves, be permissible, but they must be precisely drafted to avoid "impermissible overshadowing or contradiction" of the consumer's validation rights. Cases decided prior to the 2006 amendment can be read in the context of the prohibition against overshadowing a consumer's validation rights.

In *Russell* v. *Equifax*, a follow-up demand letter was sent to a consumer only 20 days after the initial demand letter. The second demand letter warned that "further delay on your part could be costly," and that "payment in full within 5 days is now demanded." This letter violated §1692g. By demanding payment within five days, Equifax gave Ms. Russell only 25 days from the date of the first notice to effectuate her validation rights. This period of time is less than the 30 days mandated by statute. "No consumer—much less that least sophisticated one," said the court, "is expected to know that the language on the back of the first notice takes precedence over the second notice when the instructions contained in the two notices are read in combination. We think it plain," the Second Circuit concluded, "that plaintiff would not realize she had a statutory right to dispute the debt within 30 days in the face of a second notice from the debt collector giving her only 25 days."[158]

Several 7th Circuit decisions suggest, subject to certain restrictions, that a demand letter may assert an attorney's right to file suit within the 30 validation period.[159] In expansive dicta, the 7th Circuit stated in *Bartlett* v. *Heibl*[160] that the FDCPA does not forbid suits within the 30 day period: "A debt collector is perfectly free to sue within thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor."[161] According to the 7th Circuit, the initial demand letter must clearly explain these dynamics to the debtor; it must "reconcile," in language understandable to an unsophisticated consumer, how the creditor's right to initiate suit within the 30 day period "fits together" with the consumer's validation rights.

In *Bartlett*, an attorney's demand letter warned that unless the debtor paid $316 toward satisfaction of the debt or contacted Heibl's office within one week to make suitable

arrangements for payment, "it will be assumed that legal action will be necessary." After an accurate recitation of the §1692g validation notice, Heibl advised "suit may be commenced at any time before expiration of this thirty (30) days." The problem, the court explained, was that Mr. Heibl's letter was confusing (and therefore violated §1692g) because it failed to explain how the 30 day validation notice and the warning about a possible suit within the 30 day period "fit together."

Proclaiming that it was indeed possible to "devise a form of words that will inform the debtor of his risk of being sued without detracting from the statement of his statutory rights," Chief Judge Richard Posner took the most unusual step of drafting a sample collection letter which would comply with the Act[162] "without forcing the debt collector to conceal his intention of exploiting his right to resort to legal action before the thirty days are up." Judge Posner commended this letter as a "safe harbor for debt collectors who want to avoid the kind of suit Bartlett has brought and now won."

Although the 7th Circuit said it could not "require debt collectors to use 'our' form," it cautioned that those who depart from it, at least within the Seventh Circuit, do so at their risk.[163] Moreover, the 7th Circuit has made it quite clear that claims for §1692g violations will not be tolerated where debt collectors follow the safe harbor language set forth in *Bartlett* v. *HeibeL*[164]

Attorneys practicing in the Third Circuit should not place great reliance upon Judge Posner's letter; *it violates the FDCPA*. This "safe harbor" violates §1692e(11) because, as an initial demand letter, it fails to advise the debtor that it is "an attempt to collect a debt and any information obtained will be used for that purpose." Moreover, if suit is not filed within the one week period set forth in Judge Posner's letter, there is a potential violation of §1692e(5)— threatening to take legal action not actually intended to be taken. Finally, the threat of suit within the 30 day validation period raises potential §1692g "overshadowing" violations.[165]

Despite the ruling in *Bartlett*, you may wish to adopt the more cautious approach of not reciting your intention to file suit within the 30 day validation period. An equally prudent course would be to refrain from tiling suit until at least thirty (30) days after sending your initial demand letter. Such a conservative approach will help ensure compliance with the Act.[166]

In *Moriarity v. Henriques*, 2013 WL 1704937 (E.D.Cal. April, 19, 2013) , Plaintiff alleged the debt collector did not properly validate the debt prior to serving the consumer with a summons and complaint in a state court collection action. The debt collector stated it provided the validation required under §1692g(b) in its collection Complaint. The Court rejected Defendant's position holding that pursuing litigation before providing the requested verification of debt violated the FDCPA.

In *Moore v. Morlg. Electronic Registration Sys. Inc.*, 2013 WL 1773647 (D.N.H. April 25, 2013), the Court held that the duty to provide an FDCPA validation notice is not applicable to subsequent debt collectors when predecessor has already satisfied the duty. Plaintiff filed an action against the mortgage loan servicer for failure to provide a validation notice upon Plaintiffs request. However, the loan servicer had already sent Plaintiffs account to a law firm

to initiate foreclosure proceedings. The law firm, acting on behalf of the loan servicer, provided Plaintiff with validation when it began the foreclosure proceedings. Plaintiff then sent a validation request to the original loan servicer, but received no reply and filed the action. The Court determined the loan servicer was not required to send an additional validation notice.

COMMUNICATION WITH CONSUMERS IN GENERAL

Section 1692c governs "communication in connection with debt collection," and, for the purpose of this specific section, §1692c(d) enlarges the definition of "consumer" to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." As a general rule, the same communication rules which apply to a debtor apply to the persons enumerated in §1692c(d).

Without the prior consent of the consumer given directly to the debt collector ***or*** the express permission of a court of competent jurisdiction, a debt collector **may not communicate with a consumer** in connection with the collection of any debt**—**

> (1) at any ***unusual time or place*** or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;
> **(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt**[167] and has knowledge of, or can readily ascertain, such attorney's name and address, *unless* the attorney fails to respond within a reasonable period of time to a communication from the debt collector *or* unless the attorney consents to direct communication with the consumer; **or**
> **(3) at the consumer's place of employment** if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[168]

Ceasing Communication

The consumer may give a debt collector a written directive to cease further communication. Upon receipt of such a request, the debt collector may **not** undertake any further non-legal collection efforts. Section **1692c(c)** provides as follows:

> **(c) Ceasing Communication—** if a consumer notifies a debt collector *in writing* that the consumer **refuses to pay** a debt *or* that the consumer **wishes the debt collector to cease further communication** with the consumer, the debt collector shall *not* communicate further with the consumer with respect to such debt, *except* --
> (1) to advise the consumer that the debt collector's further efforts are *being terminated*;
> (2) to notify the consumer that the debt collector or creditor ***may invoke*** *specified remedies* which are *ordinarily invoked* by such debt collector or creditor; or

> (3) where applicable, to notify the consumer that the debt collector or creditor ***intends*** *to invoke a specified remedy.*
> If such notice from the consumer is made by mail, notification shall be complete *upon receipt*.

In a case of apparent first impression, the 9th Circuit Court of Appeals held that a debtor may waive the rights created by a cease communication directive so long as the "least sophisticated consumer" would understand she was waiving her rights under §1692c(c)." Other than as permitted by §1692c(c), a debt collector who has received a cease communications order from a debtor must not contact the debtor unless it has received a clear waiver of that order."[169]

In *Tinsley* v. *Integrity Financial Partners, Inc.*, 634 F.3d 416 (7th Cir. 2011), the debtor took it one step further. The debtor's attorney had previously advised the creditor's attorney to cease communication with the debtor and the creditor's counsel did cease communications. However, creditor's counsel called counsel for the debtor and requested payment. The argument raised by Tinsley's counsel is stated by the Court of Appeals as follows:

> Tinsley's principal argument on appeal is that, whether or not a debtor's lawyer is "the consumer," the lawyer is the debtor's agent, so notice to the lawyer should be treated as notice to the debtor. Tinsley observes that 15 *U.S.C.* §1692a(2) defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Anything a debt collector says to a debtor's lawyer is an indirect communication to the debtor. Our opinion in *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773 (7th Cir. 2007), relied on §1692a(2) when holding that documents sent to a debtor's lawyer must contain the information that is required to be in documents sent directly to the debtor. Accord, *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011). It follows, Tinsley maintains, that, once a debtor invokes his rights under §1692c(c), any communication to either the debtor or his lawyer is forbidden, unless it comes within one of the subsection's three provisos. 634 F.3d 417.
>
> * * * *
>
> On Tinsley's understanding of "consumer" and §1692a(2), by contrast, once a debt collector knows that a debtor has a lawyer, it becomes illegal to communicate with either the debtor or the lawyer—because any communication with the lawyer is an "indirect" communication with the client, and thus forbidden. That would be an implausible understanding of §1692c(a)(2). Why would Congress have provided that hiring a lawyer makes it impossible for the debtor and debt collector to communicate through counsel?
>
> * * * *
>
> Because Tinsley's understanding causes serious problems for the structure and operation of subsections (a)(2) and (b), and is not supported by subsection (d)—which, recall, does not include the debtor's lawyer in the definition of "consumer"—we conclude that §1692c as a whole permits debt collectors to communicate freely with consumers' lawyers. A debtor who does not want to

be pestered by demands for payment, settlement proposals, and so on, need only tell his lawyer not to relay them. *Id.* at 419.

Hence, at least in the 7th Circuit, communications with counsel are permitted after a §1692c(c) notification, although arguably, after the Third Circuit's decision in *Allen* v. *LaSalle Bank, S.A.*, 629 F.3d 364, 368 (3d Cir. 2011) such communications must be accurate and perhaps should contain the usual Mini-Miranda warnings and disclosures otherwise required in communications to an unsophisticated debtor.

COMMUNICATION WITH THIRD PARTIES

Acquisition of Location Information (15 *U.S.C.* §1692b and §1692c(b)).

"Location information" is defined by §1692a(7) as a consumer's "place of abode, his telephone number at such place, or his place of employment." If you are communicating with any person other than the consumer to obtain "location" information, you **must**:

1. **Identify yourself** and state that you are confirming or correcting location information about the consumer;
2. **Not** state that the consumer **owes a debt;**
3. **Not communicate with any such third person more than once** *unless* you are **requested to do so** *or* unless you reasonably believe that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;
4. **Not communicate by post card;** or use any language or symbol on envelope that indicates that you are in business of debt collection or that the communication is for debt collection; and
5. Once you know that a debtor is represented by an attorney with respect to the particular debt you are attempting to collect, and you know (or can readily ascertain) the attorney's name and address, you may not communicate with "**any** person other than that attorney, unless the attorney fails to respond within a reasonable period of time" to your attempts to communicate with that attorney.

In *Cedeno v. MRS Associates*, 1:12-cv-6347 (D.N.J. June 4, 2013), the Court held that a debt collector's failure to identify itself during a telephone call to debtor's counsel is not a cognizable claim under the FDCPA. Plaintiff brought an action alleging Defendant contacted his counsel and failed to identify itself as a debt collector when attempting to confirm attorney representation. The Court rejected Plaintiffs claim finding that communications directed solely to a debtor's attorney are not actionable. The Court stated "the policy of the FDCPA to protect unsuspecting consumers from deceptive collection practices is not furthered by permitting this case to go forward."

In a case which appears to be a case of first impression, the 10th Circuit has ruled that a creditor may send a telefax to a debtor's employer to attempt to verify employment, as long as the communication does not directly contain any indicia that the subject matter involves the collection of a debt. *Marx v. General Revenue Corp.*, 668 F.3d 1174 (10th Cir. 2011). Perhaps

the case can be used for a broader reach -- to insulate the use of electronic communications such as telefaxes, emails, etc. in debt collection, although such an extension of law should probably await a later date:

> The facsimile in question is not a "communication" under the FDCPA. A third-party "communication," to be such, must indicate to the recipient that the message relates to the collection of a debt; this is simply built into the statutory definition of "communication." This fax cannot be construed as "conveying" information "regarding a debt." Nowhere does it expressly reference debt; it speaks only of "verify[ing] [e]mployment." Nor could it reasonably be construed to imply a debt. In order to substantiate the claim that the facsimile "conveys" information "regarding a debt," either "directly or indirectly," Ms. Marx had the burden of proving such a conveyance; the standard is not whether the facsimile *could have had* such an implication. No testimony shows that Ms. Marx suffered any actual harm (such as embarrassment or a denial of promotion) or that her employer was aware that the facsimile in any way concerned a default on a student loan." At 1177.

If the Court's decision can be used for a broad interpretation of the word "communication" as excluding electronic communications from it definition, perhaps such an extension is possible. However, the present status of the law is unclear.

Communication with Third Parties Other Than for Acquisition of Location Information: §1692c(b)

Unless you are seeking "location information" as provided in §1692b, you may not—as a general rule—communicate with any person other than consumer, her attorney, a consumer reporting agency, or the creditor. You may communicate with other third parties: (1) if you have been given prior consent by the debtor or the express permission of a court of competent jurisdiction, or (2) "as reasonably necessary to effectuate a post judgment judicial remedy."[170]

An exhaustive analysis of types of communications which are permitted, prohibited, and perhaps "in play" is contained in *Zortman* v. *J.C. Christensen & Assocs., Inc.*, F.Supp 2d, ____ 2012 WL 1563918 (D. Minn. 2012). In that case, the collection agency left a message on the debtor's cell phone, advising: "We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866-319-8619." Unknown to the creditor, the debtor had loaned her cell phone to her child, who heard the message.

The case discussed the quandary faced by creditors leaving telephonic messages and thoroughly discussed the current state of the law as respects the use of answering machines, cell phones and other modern communication devices which were not present when the FDCPA was enacted. The case should be read by anyone who thinks that either leaving a bland FDCPA notification (as in this case), simply hanging up, or using masked or disguised telephone number "IDs" is the way to go. The cases on each side are reviewed an analyzed. Suffice it to say, there is authority on both sides for the imposition of liability for each method. However, at least in this instance, the Court held that (1) the use of the telephone as a means of communication is

expressly permitted by the FDCPA. (2) it is essential to leave telephonic messages, and (3) as long as the creditor does not specifically mention the precise debt involved, no liability will ensue:

> Finding that the sort of identifying message left by JCC here is not a third-party "communication" is in harmony with the stated purposes of the Act. The legislative intent of the FDCPA "calls for a broad construction of [the FDCPA's] terms in favor of the consumer." See *Ramirez* v. *Apex Fin. Mgmt., LLC,* 567 F.Supp.2d 1035, 1042 (N.D. Ill. 2008). For the reasons stated, interpreting §1692c(b) to prohibit voicemail messages that merely identify the caller as a debt collector and leave a return phone number does not favor the consumer. The FDCPA should not be interpreted "to create bizarre results likely beyond the scope of Congress's intent in enacting the statute." *Strand* v. *Diversified Collection Service,* 380 F.3d 316, 318 (8th Cir. 2004). Prohibiting voicemail messages, like those left by JCC that provide no more information than would be available through caller ID, does not directly advance the interests Congress set out to protect in the FDCPA.
>
> The messages at issue here did not identify a consumer. They did not identify a debt. They conveyed no more information than would have been obvious in caller ID or could have been acquired in a simple internet search for the caller's phone number. Under these circumstances, and for the reasons stated, JCC is entitled to summary judgment.

PROHIBITED CONDUCT

The following sections set forth an extensive list of prohibited collection practices; however, none of these sections are exhaustive.

Harassment or Abuse: §1692d

A debt collector may not engage in **any conduct** *"the natural consequence of which* **is to harass, oppress, or abuse** ***any*** **person** in connection with the collection of **a** debt."[171] Such conduct includes, but is not limited to:

> (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
>
> (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.[172]
>
> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency
>
> **(4)** The advertisement for sale of any debt to coerce payment of the debt.
>
> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
>
> (6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.[173]

False or Misleading Representations: §1692e

Section 1692e broadly prohibits the use of "any **false, deceptive, or misleading representation** *or* **means** in connection with the collection of any debt." Perhaps more than any other section of the FDCPA, §1692e poses a danger to an unwary collection attorney; the scope of the section is quite wide and encompasses an extensive range of conduct.[174] Noting the extensive sweep of this section, the Seventh Circuit observed, "'[c]onfusing' is not a statutory term; the term is 'false, deceptive, or misleading,' and none of these is a synonym for 'confusing.' But the purpose of the statute is to prevent 'abusive debt collection practices'... and 'false, deceptive, or misleading' should be interpreted accordingly."[175] Knowing or intentional violations are not necessary under this section; §1692e is read as a strict liability statute.[176] In *lieu* of a scienter requirement, the FDCPA provides for a *bona fide* error defense under §1692k(c).[177]

Although §1692e sets forth a catalog of actions deemed to be "false, deceptive, or misleading," this list is **not** exclusive.[178] "Whether conduct violates…§1692e…requires an objective analysis that takes into account whether "the least sophisticated debtor would likely be misled by a communication."[179] Both the Seventh and Ninth Circuits have held, however, that "false but *nonmaterial* representations are not likely to mislead the least sophisticated consumer and therefore are not actionable under §§1692e or 1692f." [Emphasis added].[180]

Significantly, the Third Circuit Court of Appeals, in *Allen* v. *LaSalle Bank*, 629 F.3d 364 (3rd Cir. 2011), discussed a demand letter sent from a mortgagee's counsel to the debtor's counsel in connection with §1692f(1), and whether the same standards govern communications from a debt collector to a consumer's attorney. The Third Circuit joined the Fourth Circuit in holding that a communication to a debtor's attorney is an indirect communication to a debtor, and the substance of the communication must be truthful. "A communication to a consumer's attorney is undoubtedly an indirect communication to the consumer." At 368.

Another interesting, albeit confusing, case to review is the 6th Circuit Court of Appeals decision in *Grden* v. *Leikin, lngber & Winters, P.C.*, 643 F.3d 169 (6th Cir. 2011). In that case, the debtor telephoned the law firm and requested an account statement, as the debtor's figures were considerable less than what was contained in the lawsuit. Counsel forwarded an incorrect account statement. The law firm admitted that the figures were incorrect, but that the same was not actionable, as they were not made "in connection with the collection of any debt." 15 *U.S.C.* §1692e.

> Hlere, on one hand, the balance statements obviously came from a debt collector— indeed from one that had already sued Grden—and they stated a balance "due." On the other hand, the statements themselves did not demand payment or threaten any consequences if Grden did not pay. But for us the decisive point is that Leikin made the balance statements only after Grden called and asked for them. The statements were merely a ministerial response to a debtor inquiry, rather than part of a strategy to make payment more likely. See *Gburek*, 614 F.3d at 384 (letter that was "merely a description of the current

> status of the debtor's account" did not have the requisite connection). Thus, under the circumstances present here, a reasonable jury could not find that an animating purpose of the statements was to induce payment by Grden.

If any conclusion can be drawn from the case, it is that an unsolicited erroneous communication containing incorrect information is not a misrepresentation under §1692e, unless the communication was motivated by a collection attempt. And, clearly, an unsolicited request for information is not a collection attempt by the creditor.

> The statute provides, *inter alia*, as follows:
> *Without limiting* the general application of the foregoing, the following conduct is a violation of this section:
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
> (2) The **false representation** of—
> (A) the **character, amount, or legal status** of any debt;[181] or
> **(B)** any **services rendered or compensation which may be lawfully received by any debt collector** for the collection of a debt.
> (3) The **false representation or implication that any individual is an attorney** or that any communication is from an attorney.[182]
> **(4)** The representation or implication that nonpayment of any debt will result in the *arrest or imprisonment* of any person **or** the *seizure, garnishment, attachment*, or *sale of any property or wages* of any person *unless* **such action is lawful and the debt collector or creditor intends to take such action**.[18.1]
> **(5)** The **threat** to take any action that **cannot legally be taken** *or* that is **not intended** to be taken.[184]

Do not threaten suit if you do not intend to file.[185] Pre-suit demand letters that refer to the creditor as "Plaintiff' should be avoided.[186]

Likewise, your dunning letter should not state that legal action will be recommended to a creditor, if you do not, in fact, intend to make such a recommendation.

> **(6)** The false representation *or* implication that a **sale, referral, or other transfer of any interest** in a debt **shall cause** the consumer to —
> (A) *lose any claim or defense* to payment of the debt; or
> **(B)** become *subject to any practice prohibited by this title*.
> **(7)** The false representation or implication that the consumer **committed any crime** *or* **other conduct in order to disgrace** the consumer.[187]
> **(8)** Communicating or threatening to communicate to any person **credit information which is known or which should be known to be false**, including the failure to communicate that a disputed debt is disputed.[188]
> (9) 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.
> **(10)** The use of any **false representation or deceptive means to collect** or attempt to collect any debt *or* to **obtain information** concerning a consumer.[189]

Letters extending settlement offers are acceptable[190] and will not run afoul of §1692e(10) as long as they are properly drafted; ***ie***. not presented in a "deceitful manner."[191]

> **(11)** The failure to disclose *in the initial written communication with the consumer* and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the **debt collector is attempting to collect a debt and that any information obtained will be used for that purpose**,[192] *and* the failure to disclose in *subsequent communications* that the ***communication is from a debt collector***, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
> (12) The false representation or implication that **accounts have been turned over to innocent purchasers for value.**
> **(13)** The false representation or implication that **documents** *are* **legal process.**
> **(14)** The **use of any business, company, or organization name other than the true name of the debt collector's business**, company, or organization.[193]
> **(15)** The false representation or **implication that documents are** *not* **legal process forms** *or* do not require action by the consumer.
> **(16)** The false representation or implication that a **debt collector operates or is employed by a consumer reporting agency**.

Unfair Practices: §1692f

A debt collector may not use **unfair** *or* **unconscionable means to collect** or attempt to collect any debt. Although specific conduct is identified as "unfair or unconscionable," the term itself is not defined by the Act.[194] *Without limiting* the general application of the foregoing, the following conduct is a violation of §1692f:

> **(1)** The **collection of any amount** (including any interest, fee, charge, or expense incidental to the principal obligation) *unless* such amount is **expressly authorized by the agreement creating the debt** *or* **permitted by law.**[195]
> (2) The acceptance by a debt collector from any person of a check or other **payment instrument postdated by more than five days** *unless such person is notified in writing of the debt collector's intent to deposit such check* or instrument **not more than ten nor less than three business days prior** to such deposit.
> **(3)** The **solicitation** by a debt collector of any postdated check or other postdated payment instrument **for the purpose of threatening or instituting criminal prosecution.**
> **(4) Depositing or threatening to deposit** any postdated check or other postdated payment instrument **prior to the date on such check** or instrument.

(5) **Causing charges to be made** to any person for communications **by concealment of the true propose of the communication**. Such charges include, but are not limited to, collect telephone calls and telegram fees
(6) Taking or **threatening to take any nonjudicial action** to *effect dispossession or disablement of property if* –
(A) there is **no present right to possession of the property** claimed as collateral through an enforceable security interest;
(B) there is **no present intention to take possession** of the property; or
(C) the **property is exempt by law** from such dispossession or disablement.
(7) **Communicating** with a consumer regarding a debt by **post card.**
(8) Using any language or symbol, other than the debt collector's address, on any envelope **when communicating with a consumer by use of the mails or by telegram**, *except* that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.[196]

In *Kieffer v. New Century Financial Services,* 2012 WL 1853895 (D.N.J. 2012), the debtor claimed that the creditor's levy upon a joint bank account, in which only one of the debtors was obligated on the judgment, constituted, *inter alia,* ". . . . conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 *U.S.C.* §1692d. The debtor claimed that the creditor was constrained to *first* conduct pre-levy supplementary proceedings or other post-judgment discovery prior to affixing a levy upon any property. "Plaintiffs cite no legal basis for this purported pre-levy discovery obligation, which would require additional discovery even after the creditor identifies assets held in the name of the debtor. . . . New Jersey law certainly imposes no such requirement, and Plaintiffs cite to no provision of the FDCPA which would require a judgment creditor to go beyond the execution and levy process established by applicable state law. Indeed, the FDCPA expressly states that, except for inconsistencies between state law and the FDCPA, the statute should not be applied to alter the rights and responsibilities of debt collection practice under state law. 15 *U.S.C.* §1692n. The Court further notes that the extensive discovery urged by Plaintiffs as necessary under the FDCPA would place a creditor at a significant disadvantage in collecting on its judgment, as it would provide the judgment debtor with the opportunity to transfer, hide and otherwise shield assets from attachment. On this record, no reasonable jury could conclude that Defendants' conduct in causing a levy to be placed on joint accounts, without limiting the levy to the portion of the accounts actually owned by Plaintiff–Debtor, constituted abusive, harassing and/or unconscionable means of collecting a debt." At 6.

Furnishing Certain Deceptive Forms: §1692j

Section 1692j(a) provides that it is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false sense of belief in a consumer that a person other than the creditor of such consumer is participating in the collection of the debt, when–in fact–such a person is not so participating. Such a practice is often referred to as "flat rating." because the provider of the form presumably charges a "flat rate" for the form."[197]

Section 1692j(b) mandates that any person "who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable..." for failure to comply with a provision of the Act. Accordingly, this section extends FDCPA liability *even to those persons who are not defined as "debt collectors"* under §1692a(6). In its Official Staff Commentary, the Federal Trade Commission explains that this section "prohibits the practice of selling to creditors dunning letters that falsely imply that a debt collector is participating in collection of the debt, when in fact only the creditor is collecting."[198] The "flat-rater is thus not the creditor. . . ;" rather, he "furnishes a deceptive instrumentality to the primary violator."[199]

In May 2012, a Joint Ethics Opinion was issued by the Committee on the Unathorized Practice of Law and the Advisory Committee on Professional Eithics – Joint Opinion 48 and 725 which is reproduced here as Appendix H. In said opinion, the Committees reemphasized prior opinions which held that "flat rating" was and is unethical:

> Since the UPL Committee issued Opinion 8 in 1972, it has been clear that lawyers who send collection letters are engaged in the practice of law. A lawyer cannot disclaim the fact that he or she is engaging in the practice of law when using law firm letterhead. A lawyer who has not reviewed the file, made appropriate inquiry, and exercised professional judgment has engaged in an incompetent and grossly negligent practice of law in violation of *RPC* 1.1(a). A lawyer who permits office staff, or a client, to send collection letters when the lawyer has not individually reviewed the file, made appropriate inquiry, and exercised professional judgment, is assisting in unauthorized practice of law in violation of *RPC* 5.5(a)(2) and engaging in deceitful conduct in violation of *RPC* 8.4(c).
>
> Accordingly, UPLC Opinion 8 and ACPE Opinions 259 and 506 are hereby reaffirmed. A lawyer who fails to exercise professional judgment by independently evaluating collection demands and determining that proceedings to enforce collection are warranted before sending a debt collection letter on law firm letterhead fails to satisfy ethical requirements of competence and has committed gross negligence.

VENUE REQUIREMENTS: §16921

The FDCPA imposes very specific venue requirements for legal action. If you file a lawsuit, you must comply with §1692i or face exposure for noncompliance with the Act. Although the *New Jersey Court Rides* may permit a matter to be venued in a particular county, the provisions of §1692i are controlling and must be carefully followed. Section 1692i provides as follows:

> (a) Any debt collector who brings any legal action on a debt against any consumer shall –
> **(1)** in the case of an **action to enforce an interest in real property** securing the consumer's obligation, bring such action *only* in a judicial district or similar legal entity in **which such real property is located;** *or*

(2) in the case of an action not described in paragraph (1), bring such action only in the **judicial district or similar legal entity**[200] --
(A) in which such **consumer signed the contract sued upon;** or
(B) in which such consumer **resides at the commencement of the action**.[201]
(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

LIABILITY FOR NONCOMPLIANCE: § 1692k

The consequences of a FDCPA violation can be significant. Violation of "any provision" of the Act with respect to any person can result in the imposition of actual damages, additional statutory damages of up to $1,000 per FDCPA lawsuit,[202] and costs of suit plus reasonable attorney's fees. *See*. *McCollough* v. *Johnson, Rodenburg & Lauinger,* 637 F.3d 939 (9th Cir. 2011). wherein the Court affirmed an award of statutory damages of $1,000; $250,000 for emotional distress; and $60,000 in punitive damages. The debtor had suffered brain damage, and was dragged into Court on three separate occasions despite having advised the creditor of the expiration of the statute of limitations on the claim.

The FDCPA does not permit private actions for declaratory or injunctive relief.[203]

Section 1692k provides as follows:

Amount of Damages
(a) Except as otherwise provided by this section, any debt collector who fails to comply with **any provision** of this title with respect to any person is liable to such person in an amount equal to the sum of –
(1) any **actual damage** sustained by such person as a result of such failure;
(2) (A) in the case of any action by an individual, such **additional damages**[204] **as the court may allow**, but **not exceeding $1,000**[205]**;** or
(B) in the case of a **class action**,[206] (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
(3) in the case of any **successful action**[207] to enforce the foregoing liability, the **costs of the action**, together with **a reasonable attorney's fee**[208] **as determined by the court.**[209]
On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.[210]
Factors considered by court
(b) In determining the amount of liability in any action under subsection (a), **the court shall consider,** *among other relevant factors* **–**
(1) in any individual action under subsection (a)(2)(A), the **frequency and persistence of noncompliance** by the debt collector, the **nature of**

such noncompliance, and the **extent to which such noncompliance was intentional**; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

Intent

(c) A debt collector **may not be held liable** in any action brought under this title **if** the debt collector shows by a preponderance of evidence that **the violation was not intentional**[211] *and* **resulted from a bona fide**[212] **error**[213] notwithstanding the maintenance of procedures reasonably[214] adapted[215] to avoid any such error. The bona fide error defense applies only to procedural or clerical errors; it does not apply to mistakes of law.[217]

Jurisdiction

(d) An action to enforce any liability created by this title may be brought in **any appropriate United States district court** without regard to the amount in controversy, *or* in any **other court of competent jurisdiction**, within **one year**[218] from the date on which the violation occurs.

Advisory Opinions of Commission

(e) No provision of this section imposing any liability shall apply to any act done or omitted **in good faith in conformity with any advisory opinion of the Commission,** notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[219]

The Court in *Cohen* v. *American Credit Bureau, Inc.*, 2012 WL 847429 (D.N.J., March 13, 2012), was deciding an application for counsel fees following an acceptance of a Rule 68 offer of judgment. The Court determined that scrutiny over the attorney fee application was justified as the Court has seen an increasing amount of FDCPA cases, which were all very similar, and liability is "nearly always resolved by settlement or offer of judgment" as it is not economically sensible for the parties to battle the merits of the case.

The Court found Plaintiffs counsel's fees were excessive, specifically stating: "The FDCPA was not passed in order to sprout a cottage industry for lawyers who self-interestedly battle over attorney's fees in federal court." Moreover, the Court stated the FDCPA does not mandate a fee award in the typical lodestar amount. Rather, the lodestar "application must be tempered by the overriding principle of reasonableness." Ultimately, counsel's fees were reduced drastically as the Court scrutinized the reasonableness of every time entry counsel asserted in his fee application, and reduced counsel's fees accordingly.

In *Marx* v. *General Revenue Corp.*, 133 S.Ct. 1166 (2013), the United State Supreme Court determined that if a debt collector is successful in defeating a Plaintiffs claim in an FDCPA case, it can recoup its costs at the discretion of the court, without the need to prove the case was brought in bad faith. Costs include things like court filing fees, deposition transcripts costs, etc., but does not include attorney fees.

DEFENDING AGAINST AN FDCPA CLAIM

BY CINDY D. SALVO, ESQ. *{THE SALVO LAW FIRM, P.C.; CSALVO@SALVOLAWFIRM.COM)*

Introduction

Suing debt collectors has become a "cottage industry" for many plaintiffs' counsel. It was not intended to be so. *See Cohen v. American Credit Bureau, Inc.*, 2012 WL 847429, *2 (D.N.J. Mar. 13, 2012) ("The FDCPA was not passed in order to sprout a cottage industry for lawyers who self-interestedly battle over attorney's fees in federal court").

Indeed, there are training courses available which teach attorneys how to prosecute FDCPA claims. And a number of plaintiffs' attorneys use the internet to find clients (just Google "Sue Debt Collectors" and see the wealth of information available).

But because statutory damages in an FDCPA action are only $1,000 per lawsuit (not per violation), many debt collectors make it a practice to settle most or all of the FDCPA litigation brought against them, as settling is almost always less expensive than defending. The problem is, if an agency settles most or all of its claims, it may be painting a big red target on its back -- letting Plaintiffs' counsel know that a claim against them does not even have to have merit in order to get them paid. Therefore, debt collectors are advised to defend against at least some of the meritless FDCPA complaints brought against them. Some tips regarding this type of litigation follow.

The Complaint

When deciding whether you want to settle or defend against an FDCPA action, a careful review of the Complaint is necessary. You need to determine if there is potential liability, or if the Complaint is baseless. One of the simplest things you should check first is whether the Complaint is time-barred. The FDCPA has a one-year statute of limitations. If the alleged violations took place more than one year ago, a motion to dismiss should be filed.

Sometimes while investigating the claim, you will discover there was an actual violation, but not the kind mentioned in the Complaint. For example, perhaps the Complaint says your collector was verbally abusive to the debtor, which you determine is not true by listening to all of the recordings. But, perhaps you discover that a non-Foti-compliant voicemail was left on the account, even though that is not mentioned as a violation in the Complaint. What you have to realize is that, during discovery, it is likely that plaintiffs counsel will discover the Foti violation and can then amend the Complaint. So it is important that you determine if there is any liability at all, even if it is not mentioned in the Complaint, before determining if you want to settle or defend.

If, after reviewing the Complaint, you decide there is potential liability, it may be best to settle the case. If plaintiff s counsel is unreasonable as to settlement, you will have to defend the action, but it may be good strategy to serve plaintiffs counsel with an Offer of Judgment. *{See* "Offers of Judgment," below.)

Jf, on the other hand, you do not see any liability, you will need to file an Answer or a motion to dismiss.

Where Plaintiffs Complaint is "utterly devoid of any factual content – such as the specific debt which Defendant attempted to collect on, or details about the dates, times, and manner of the communications Defendant made to Plaintiff in attempting to collect on that unspecified debt" – a court cannot infer that Defendant's actions violated the FDCPA. A "threadbare formulaic recitation of the elements of an FDCPA claim is insufficient" to survive a motion to dismiss. *Astarita v. Solomon & Solomon, PC,* 2013 WL 1694807, *2 (D.N.J. April 18, 2013).

A Complaint wherein the Plaintiff "broadly alleges a violation of the FDCPA without identifying the debt or the debt collector," and without "alleging] any facts whatsoever to support th[e] claim," must be dismissed pursuant to a FRCP 12(b)(6) motion to dismiss. *Grant v. JPMorgan Chase Bank*, 2013 WL 1558773, *2 (D.N.J. April 10, 2013).

Rule 11 Sanctions

Sometimes a Complaint is so clearly baseless that it may be sanctionable. Pursuant to Federal Rule of Civil Procedure 11(b), when an attorney files with the court "a pleading, motion or other paper," the attorney must certify that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;" and "(3) the factual contentions have evidentiary support, or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation."

FRCP 11(c) goes on to state that "[i]f, after notice and a reasonable opportunity to respond, the court determinates that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."

"The signer's signature on a pleading, motion, or other paper certifies the signer has done three things: (1) read the pleading, motion or paper; (2) made a reasonable inquiry into the contents of the pleading, motion or other paper and concluded that it is well grounded in fact and warranted in law; and (3) has not acted in bad faith in signing the document." *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278 (3d Cir. 1994).

If a debt collector feels that an FDCPA Complaint was brought in bad faith, it can bring a motion for sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violated Rule 11(b). If the court feels it is warranted, it may award to the prevailing party the reasonable expenses, including attorneys' fees, incurred in bringing the motion.

For example, in *Felicia Hudson* v. *MRS Associates, Inc.*, plaintiffs counsel was immediately informed that the Complaint did not state a claim because the debt sought to be collected by the defendant was a parking violation and, as such, was not a consumer debt pursuant to the FDCPA. Despite repeated requests, plaintiffs counsel did not withdraw the Complaint even after he confirmed that the debt at issue was a parking fine. Thereafter, defendant filed a motion to dismiss for failure to state a cause of action. Defendant also filed a Rule 11 motion for sanctions, seeking fees and costs incurred in bringing the motion to dismiss and the motion for sanctions. Before the court could decide the motion for sanctions, plaintiffs counsel agreed to pay almost all of defendant's counsel fees to settle the matter.

Note that New Jersey has its own version of Rule 11 – New Jersey Court Rule 1:4-8. "By signing, filing or advocating a pleading, written motion or other paper, an attorney certifies that to the best of his or her knowledge, information and belief, formed after an inquiry reasonable under the circumstances: The paper is not being presented for an improper purpose…the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law."[220]

Prior to bringing a motion pursuant to this Rule, an attorney must serve a written demand on the attorney who signed or filed the paper. The demand must: (1) state that the paper is believed to violate Rule 11; (2) state the basis for that belief, with specificity; (3) demand that the paper be withdrawn; and (4) give notice that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdraw within 28 days of service of the written demand. New Jersey courts have often refused to award attorneys' fees to a party that failed to follow the notice requirements, so it's important to follow this Rule to the letter. *Community Hosp. v. Blume Goldfaden*, 381 N.J. Super. 119 (App. Div 2005).

Bona Fide Error Defense

Sometimes you will find that even if you violated the FDCPA, you may not be liable to the plaintiff due to a valid bona fide error defense:

> "A debt collector may not be held liable in any action brought under this subchapter 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 such error." 15 U.S.C. §1692k(c).

The FDCPA "provides debt collectors with an affirmative defense called the 'bona fide error' defense, which insulates them from liability even when they have failed to comply with the Act's requirements." *Edwards* v. *Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1352 (11th Cir. 2009).

A "bona fide error" has been defined as an error made in good faith; or a genuine mistake as opposed to a contrived mistake. *Kort v. Diversified Collection Services, Inc.*, 394 F.3d 530 (7th Cir. 2005).

A debt collector bears a three-part burden of proof for a bona fide error defense, demonstrating that its FDCPA violation: "(1) was not intentional; (2) was 'a bona fide error'; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error." *Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008).

The bona fide error defense does not apply to mistakes of law, but only to procedural or clerical errors. *Jerman v. Carlisle, McNellie, Rim, Kramer & Ulrich*, 2011 WL 1436479 (April 14, 2011).

Note, however, that a bona fide error defense usually raises issues of fact that must be decided by a jury, not on a motion for summary judgment.

In order to convince a jury that you qualify for a bona fide error defense, you must show that the defendant intended to do the right thing and had adequate procedures in place to prevent against the kind of violation alleged in the Complaint.

Remember, it is not the behavior that has to be unintentional – it is the violation. Thus, if a collector called a debtor after being asked not to call again, the collector would be able to assert a bona fide error defense if, for example, the telephone equipment had malfunctioned and did not record the fact that the telephone number had been flagged as "do not call." Thus, the behavior would be intentional (the collector intended to make the telephone call), but the violation was not (the collector did not believe the call violated the FDCPA because the telephone equipment had not coded the telephone number as "do not call").

If the collection agency uses modern telephone equipment that is kept in good repair, and if it trains all of its collectors to "flag" a telephone number the debtor has said should not be called and then not call that number again, that would probably satisfy the final prong of the proof necessary to establish a bona fide error defense.

Key Strategies During Discovery

Keep All Audio Telephone Recordings for at Least One Year

In order to properly protect yourself, it is important for you to keep audio recordings of all collection calls for one year, which is the statute of limitations set forth in the FDCPA. These recordings should be maintained in a safe location with proper backup so as to avoid any spoliation allegations.

A recording is often the only way to properly defend yourself against an allegation that your collector was abusive to the debtor, or threatened a lawsuit or wage garnishment, etc.

Interrogatories, Document Demands and Requests for Admissions

When drafting discovery, it is important to include questions about the plaintiffs litigation history over the past five years, particularly as it relates to other FDCPA actions. In addition, if actual damages are claimed, you should ask for full details in your Interrogatories.

Your Document Demands to plaintiff should ask for any tapes, recordings, emails, letters or other communications between the debt collector and the plaintiff which have not already been produced or attached to the Complaint.

Requests for Admissions can also be a very powerful tool. Seek admissions that go to the heart of the FDCPA claims. Remember, if they are not answered within thirty days, they are deemed admitted and may be used as evidence in a motion for summary judgment, or at trial.

Of course, the specific allegations of a particular action will likely suggest additional or alternative discovery strategies.

Protective Order for Confidential Business Information

Many times, plaintiffs will make overly-broad requests for your documents. Be sure to object as to relevance with respect to any questions that go too far afield of the allegations/claims in the lawsuit.

Be sure confidential business information is not being disclosed in any documents that are to be produced. If such documents must be produced, demand that plaintiff's counsel sign a Confidentiality Order so that he/she may not share your confidential information with others, or post it online as an exhibit.

Depositions

Plaintiffs' attorneys very often seek to take the deposition of a corporate representative of the debt collector. It is often up to you to decide which individual to produce based on that person's knowledge and whether or not you think they will be a good witness for the company.

Deposing the plaintiff may or may not be required. If the plaintiff is alleging actual damages, emotional distress, etc., then a deposition is important to learn the specifics of the plaintiff s allegations. Also, if you feel – based on the Complaint and plaintiffs responses to discovery – that the plaintiff is lying, it is probably prudent to take plaintiffs deposition. With respect to taking the deposition of the plaintiff, some important areas of inquiry are the following:

- How many times the debtor has sued debt collection agencies, and what the outcomes of these suits have been;
- All facts concerning any alleged actual damages;
- Specific dates and times of telephone calls (so you can check these against actual telephone records); and
- The names of any third parties who may have been involved and their depositions, if necessary.

Offers of Judgment

Federal Rule of Civil Procedure 68 provides that "[a]t least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment."

If you are liable for violations of the FDCPA, but plaintiffs counsel will not agree to a reasonable settlement, you may want to serve plaintiffs counsel with an Offer of Judgment which will cut off attorneys' fees at a specific date (usually the date of the Offer of Judgment).

Fee Applications

If plaintiffs counsel accepts an Offer of Judgment, the amount of attorneys' fees that is "reasonable" will become an issue. The parties may be able to agree on an amount, but more often they cannot, and the plaintiff will file an application for fees.

It is the job of defendant's counsel to review the fee application very carefully and to file an objection to any questionable services. For example, plaintiffs counsel may claim he/she spent 10 hours preparing a motion that was never filed, so those hours obviously should not be recoverable. Or the motion at issue may have been very short, therefore, not warranting the length of drafting time asserted.

"The party seeking the fees has the burden to come forward with evidence establishing the number of hours worked and the reasonableness of the rate claimed." *Weed-Schertzer v. Nudelman, Klemm & Golub*, 2011 WL 4436553, *2 (D.N.J. Sept. 23, 2011). "The district court should exclude . . . hours that were not 'reasonably expended'" *Thornton* v. *Wolpoff & Abramson, LLP.*, 312 Fed. Appx. 161, 164 (11th Cir. 2008).

Courts have consistently held that compensability of attorneys' fees under the FDCPA is "subject to several limitations." *Cody* v. *Hillard*, 304 F.3d 767, 773 (8th Cir. 2002). One is that plaintiffs "cannot over-litigate. [A]ll work under the fee-shifting statutes must be reasonable in degree." *Id.* "Services that were redundant, inefficient, or simply unnecessary are not compensable." *Id.* "[I]nsofar as legal work for which a fee is being sought represents 'economic waste,' the fee request is unreasonable." *Lee* v. *Thomas & Thomas*, 109 F.3d 302, 306 (6th Cir. 1997).

"Purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *Missouri* v. *Jenkins*, 491 U.S. 274, 288 (1989). "The court should disallow not only hours spent on tasks that would normally not be billed to a paying client, but also those hours expended by counsel on tasks that are easily delegable to non-professional assistance." *Spegon* v. *Catholic Bishop of Chicago*, 175 F.3d 544, 553 (7th Cir. 1999). "Administrative tasks not normally billed to clients such as "opening a file in a database, mailing letters, and copying documents to a CD," may not be recovered by a party through a fee

petition." *Weed Scherzer supra* at *2. "Counsel are not entitled to compensation for purely administrative activities, which include "[e]ntering a case in the management system, mailing letters, preparing a cover letter, and talking with a process server or court clerk to order a transcript." *Brass v. NCO Fin. Sys. Inc.*, 2011 WL3862145 at *5 (E.D. Pa. July 22, 2011).

The Court, in deciding a fee petition, also assesses whether it is necessary to adjust the lodestar amount on the basis of any of the twelve so-called *Johnson–Kerr* factors which were not already taken into account. These twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of the other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

In short, "rote application of the lodestar method must be tempered by the overriding principle of reasonableness, by which necessity must account for the facts and circumstances of the underlying litigation." *Cohen v. American Credit Bureau, Inc.*, 2012 WL 847429, *6 (D.N.J., March 13, 2012).

Remember, if the plaintiff is *pro se*, there are no attorneys' fees!

Trial Techniques

Introduce Your Defendant Debt Collector

As we all know, debt collectors do not have the best reputation. It is against this backdrop that debt collectors need a vigorous defense. One powerful trial technique to help combat this mindset is to simply admit that debt collection is not the most popular profession. Explain that debt collectors perform a vital function in our economy by ensuring payments are rendered for goods and services performed. And that if debt collectors follow the law, they should not be penalized simply because they are debt collectors. This strategy hopefully allows jurors to recognize their biases and perhaps be more willing to listen to the facts, rather than side with the plaintiff for emotional reasons.

Introduce The Plaintiff

If you can catch plaintiff in a lie on the witness stand, be sure and do so! It is particularly good to confront a lying plaintiff with inconsistency testimony from his/her deposition, if possible. Throwing doubt on one thing plaintiff says can make everything else suspect. If the plaintiff can be cast as someone who is trying to take advantage of the system, one would be wise to do so.

Jury Selection

It is also very important to try to select a jury that is likely to be more predisposed toward the debt collector, rather than the debtor. Studies have shown that professional men comprise the best jurors in these cases, followed by professional women. Some say that Republicans are better jurors in these cases than are Democrats, but courts often do not allow you to question jurors about political leanings.

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[1] *Lewis* v. *ACB Business Services, Inc.*, 135 F.3d 389 (6th Cir. 1998), Ryan, Circuit Judge, dissenting.

[2] *Id*

[3] 16 *U.S.C.* §1692(a)

[4] 16 *U.S.C.* §1692(e)

[5] *Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410 (7th Cir. 2005); *Johnson v. Revenue Mgmt. Carp.*, 169, F.3d 1057, 1059 (7th Cir. 1999) ("[Bjona fide debts that are overdue are, well, overdue, and payable pronto").

[6] *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

[7] *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997) (citing *Baker v. G.C. Services Carp.* 677 F.2d 775, *111* (9th Cir. 1982)).

[8] Although for the most part, the Act applies only to the conduct of those defined as "debt collectors," 1692j reaches anyone who designs, compiles or furnishes certain deceptive forms–even if such persons are not "debt collectors" within the meaning of the FDCPA.

[9] *Fox* v. *Citicorp Credit Services*, 15 F.3d 1507, 1516 (9th Cir. 1994).

[10] *Brown* v. *Card Services Center*, 464 F.3d 450 (3d Cir. 2006), citing *Hamilton v. United Health Care of Louisiana*, 310 F.3d 385, 392 (5th Cir. 2002); *Clark* v. *Capital Credit & Collection Services, Inc.* 460 F.3d 1162 (9th Cir. 2006).

[11] See 53 Fed. Reg. 50097-50110 (December 13, 1988).

[12] *Newman* v. *Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477, n.2 (7th Cir. 1997).

[13] The FTC Official Staff Commentary "is a guideline intended to clarify the staff interpretations of the statute." The Commentary itself is "based primarily on issues discussed in informal staff letters responding to public requests for interpretations and on the FTC's enforcement program subsequent to the FDCPA's enactment. It is intended to synthesize staff views on important issues and to give clear advice where inconsistencies have been discovered among staff letters." Notably, the Commentary does "not have the force or effect of statutory provisions." 53 Fed. Reg. 50101. FDCPA liability shall not be imposed for acts done in good faith confonnity with any advisory opinion of the FTC. 15 U.S.C. 1692k(e). To date, only four formal advisory opinions have been handed down by the FTC.

[14] *Fleming* v. *Pickard*, 681 F. 3d 922, 924 (9th Cir. 2009). At a minimum, a "transaction" under the FDCPA must involve some kind of business dealing or other consensual obligation," citing *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.2004).

[15] *Sayyed* v. *Wolpoff & Abramson*, 485 F.3d. 226 (4th Cir. 2007); ("the FDCPA does not apply to commercial litigation...." *S/enk v. Transworld Systems, Inc.* 236 F.3d 1072 (9th Cir. 2001). "The FDCPA precludes debt collectors from implementing unlawful debt collection tactics against consumers. 'Consequently, the [FDCPA] applies to consumer debts and not business loans.'" citing *Bloom v. I.C. System, Inc.* 972 F.2d 1067, 1068 (9th Cir. 1992).

[16] *Wilhelm v. Credico, Inc.*, 519 F.3d 416, 418 (8th Cir. 2008).

[17] "'Arising out of are words of much broader significance than 'caused by.' They are ordinarily understood to mean 'originating fromf,] 'having its origin in,' 'growing out of or 'flowing from,' or in short, 'incident to, or having connection with.'" *Hamilton* v. *United Healthcare of Louisiana, Inc.*, 310 F.3d 385 (5th Cir. 2002), citing *Red Ball Motor Freight, Inc.* v. *Employers Mut. Liab. Ins. Co. of Wise.*, 189 F.2d 374, 378 (5th Cir. 195 O.

[18] *Hodges* v. *Sasil Carp.* 189 N.J. 210, 915 A.2d 1 (NJ 2007); *Romea* v. *Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998) ("Back rent by its nature is an obligation that arises only from the tenant's failure to pay the amounts due under the contractual lease transaction." Under the FDCPA, "back rent is debt.").

[19] *Newman* v. *Boehm, Pearlstein & Bright, Limited,* 119 F.3d *All* (7lh Cir. 1997) ("...the obligation to pay [assessments] ... arose in connection with the purchase of the homes themselves," and derives from "the purchase transaction ....."); *Ladick* v. *Van Gemert*, 146 F.3d 1205 (10th Cir. 1998), *cert. denied,* 525 U.S. 1002, 119 S. Ct. 511, 142 LEd.2d 424 (1998); (Following the reasoning in *Newman,* the Court held "Mr. Ladick became obligated upon purchasing his condominium unit to pay any assessments pursuant to the governing documents of his association....The assessment at issue in this case therefore qualifies as an 'obligation of a consumer to pay money out of a transaction").

[20] Third-party attempts to collect payment on a dishonored check can be debt collection practices within the meaning of the FDCPA. *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.* Ill F. 3d 1322, 1324 (7th Cir 1997; *Duffy* v. *Kevin W. Landberg, Attorney at Law,* 133 F.3d 1120 (8th Cir. 1998), cert denied 119 S.Ct. 62 (1998) ("Nothing in the statutory definition suggests that the only consumer transaction giving rise to a debt under the statute is one involving an offer or extension of credit." Such a reading, the court said, would be "contrary to the plain language of the statute as well as the legislative history."); *Charles* v. *Lundgren & Associates,* P.C. 119, F.3d 739 (9th Cir. 1997)(We find the Seventh Circuit's reasoning [in £:m] to be sound and thus hold that a dishonored check is a 'debt' within the meaning of the FDCPA"); *Snow* v. *Jessie L. Riddle, P.C.* 143 F.3d 1350 (10th Cir. 1998) ("Under the 'plain meaning' test, it would seem to us that a 'debt' is created where one obtains goods and gives a dishonored check in return therefor.")

[21] *Pollice v. National Tax Funding, L.P.,* 225 F.3d 379 (3d Cir. 2000).

[22] *Piper* v. *Portnpff Law Associates, Ltd.* 396 F.3d 227 (3d Cir. 2005). The fact that a challenged communication comes in the context of enforcement of a lien is irrelevant. The 3d Circuit rejected a law firm's argument that its decision to execute on a municipal water and sewer lien—rather than proceed *in personnam*—against the individuals removed its collection efforts from the purview of the FDCPA. The fact that a lien was provided to secure the Pipers's debt did not change its character as a "debt" or turn the law firm's communications to the Pipers into something other than an effort to collect that debt. The same is true where the communication comes in the context of in rem litigation. The FDCPA evidences Congressional intend to extend the Act to consumer debts in suits brought to enforce liens.

[22] Finding the 7th Circuit's analysis in *Bass, supra,* to be persuasive, the 11th Circuit joined the majority position by stating that an "extension of credit is not a prerequisite to the existence of a debt covered by the FDCPA." An obligation to pay "as a result of a consumer transaction suffices to bring the obligation within the ambit of [§1692a(5)] of the FDCPA." *Brown v. Budget Rent-A-Car Systems, Inc.,* 119 F.3d 922 (11th Cir. 1997).

[24] *Hamilton v. United Healthcare of Louisiana, Inc.* 310 F. 3d 385 (5th Cir. 2002). In this case, the 5th Circuit overturned a District Court finding that subrogation claims were not "debts" within the meaning of the FDCPA. The Court rejected the argument that Hamilton's reimbursement obligation arose out of his automobile accident (in which he sustained serious injuries as a passenger) and his subsequent recovery of money from a third party. Instead, the 5th Circuit found "we cannot avoid the inescapable conclusion that the plain meaning of 'debt' encompasses the funds owed in this case. There is no question that the obligation to pay arose out of Hamilton's transaction of purchasing insurance." Distinguishing *Hawthorne* v. *Mac Adjustment, Inc.,* 140 F.3d 1367 (11th Cir. 1998) which involved obligations arising from "tort law," the 11th Circuit held that Hamilton's alleged [subrogation] obligations "arose from a business transaction where Hamilton contracted for personal and family services; ie, insurance."

[25] *Simla* v. *Lawrent,* 359 F.3d 489 (7th Cir. 2004).

[26] *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.* Ill F.3d 1322. 1324 (7th Cir 1997); *Newman* v. *Boehm, Pearlstein & Bright, Limited,* 119 F.3d 477 (7th Cir. 1997); *Berman* v. *GC Services Limited Partnership.* 146 F.3d 483 (7th Cir. 1998).

[27] *Hawthorne v. Mac Adjustment, Inc.,* 140 F.3d 1367 (1 llh Cir. 1998)

[28] *Miller v. McCalla, Raymier, et. als.* 214 F.3d 872 (7th Cir. 2000). In this case, the plaintiff, Kevin Miller, purchased a home and took out a mortgage. Miller lived in the house for several years until he took a job in

another city. From then on he rented the house and derived rental income from his tenant. He thereafter received a dunning letter from a law firm on behalf of the mortgagee. The defendant law firm argued that because Mr. Miller was making a business use of the property, and the mortgage loan was financing a business rather than a consumer debt, the FDCPA did not apply to the firm's collection letter. Declining to accept this argument, the 7th Circuit held that the character of the debt must be based upon "when it arose rather than when it is to be collected. The original creditor is more likely to know whether the debt was personal or commercial at its incipience than either the creditor or the debt collector is to know what current use the debtor is making of the loan (in this case, the plaintiff is using the loan, in effect, to generate income from the house that secures the mortgage)."

[29] 225 F.3d 379 (3d Cir. 2000)

[30] 834 F.2d 1163 (3rd Cir. 1987)

[31] *Pollice* v. *National Tax Funding, Inc., supra* at 401. All of the Circuit Courts of Appeal to visit this issue have declined to limit the definition of "debt" to those transactions involving "an offer or extension of credit." *Romea* v. *Heiberger & Associates,* 163 F.3d 111 (2d Cir. 1998); *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.,* 111 F.3d 1322 (7th Cir. 1997); *Duffy* v. *Kevin W. Landberg, Attorney at Law,* 133 F. 3d 1120 (8th Cir. 1998), cert. denied, 119 S.Ct. 62 (1998); *Charles* v. *Lundgren & Associates, P.C.* 119 F.3d 739, 742 (9th Cir. 1997), cert denied, 66 IJ.S.L.W. 3416 (IJ.S. Dec. 15, 1997); *Snow* v. *Jessie L. Riddle, P.C.,* 143 F.3d 1350, 1353 (10th Cir. 1998); *Brown* v. *Budget Rent-A-Car Systems, Inc.,* 119 F.3d 922 (11th Cir. 1997). By clarifying its holding in *Zimmerman,* the Third Circuit made clear in *Pollice* that it will not limit the definition of "debt" to transactions involving an "offer or extension of credit."

[32] *Id* at 401.

[33] *Id.* at 401.

[34] *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C, supra* at 1324.

[35] *Fleming v. Pickard.* 681 F.3d 922, 925 (9th Cir. 2009) ("We have held that "at a minimum, a 'transaction' under the FDCPA must involve some kind of business dealing or other consensual obligation;" *Hawthorne v. Mac Adjustment, Inc.,* 140 F.3d 1367 (11th Cir. 1998). .See also, *Hamilton* v. *United Healthcare of Louisiana, Inc.* 310 F.3d 385 (5th Cir. 2002), explaining "the ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment," citing both *Bass, supra,* at 1325 and *Webster's New World Dictionary,* 1509 (2d ed. 1986) defining 'transaction' "simply as a 'business deal or agreement.'"

[36] *Staub* v. *Harris,* 626 F.2d 275, 278 (3rd Cir. 1987); *Pollice v. National Funding, L.P.,* 225 F.3d 379 (3rd Cir. 2000).

[37] *Berman v. GC Services Limited Partnership,* 146 F.3d 483 (7th Cir. 1998).

[38] *Id*

[39] *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.* 111, F.3d 1322 (7th Cir. 1997)

[40] *Newman* v. *Boehm, Pearlstein & Bright, Limited,* 119 F.3d *All* (7th Cir. 1997)

[41] *Berman v. GC Services Limited Partnership,* 146 F.3d 482 (7th Cir. 1998). Unemployment insurance contributions, like the taxes in *Staub,* are used for "communal" purposes and thus only "indirectly and remotely" benefit the contributor. Funding a State's payment of benefits to residents during periods of unemployment fulfills a "more general purpose than the FDCPA requires." the Court drew a distinction between individual "personal" benefits and a "general, public benefit."

[42] *Staub v. Harris,* 626 F.2d 275 (3d Cir. 1980); past due tax obligation was not a "debt" because tax dollars are generally used for "communal" rather than "personal, family or household purposes." "At a minimum, the statute contemplates that the debt has arisen as a result of the rendition of a service or purchase of property or other item of value. The relationship between taxpayer and taxing authority does not encompass the type of *pro tanto* exchange which the statutory definition envisages." *Staub* at 278.

[43] *Beggs* v. *Rossi,* 145 F.3d 511 (2d Cir. 1998) (the automobile tax in question was "not levied upon the purchase or registration of the vehicle *per se,* but rather upon the ownership of the vehicle by the citizen....There is simply no 'transaction' here of the kind contemplated by the statute").

[44] *Pollice* v. *National Tax Funding, L.P. supra,* at 401-402. Pronouncing its decision in *Staub v. Harris, supra,* to be "controlling," the Third Circuit stated "Simply put, property taxes are not obligations '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.." Unlike sales taxes, which "arguably" arise from the sales transaction, property taxes, the Court explained, arise not from the purchase of property, *"but from the fact of ownership" Pollice* at 402.

[45] 834 F.2d 1163 (3rd Cir. 1987). Other circuit courts perceive the "true basis" for the decision *Zimmerman* to rest upon the concept that pirating television signals "did not amount to a 'transaction' at all.... Instead of being a consensual transaction for the purchase of consumer goods or services, the alleged conduct in Zimmerman was theft. And although a thief undoubtedly has an obligation to pay for the goods or services he steals, the FDCPA limits its reach to those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services." *Bass, supra.* Likewise, the 8th Circuit agreed that "an obligation arising from theft cannot be a debt under the statute since it does not arise from a consensual transaction for goods or services." *Duffy* v. *Kevin W. Landberg, Attorney at Law,* 133 F.3d 1120 (8th Cir. 1998), cert denied, 119 S. Ct. 62 (1998). In *Pollice* v. *National Tax Funding, L.P., supra,* the Third Circuit removed any doubt that the foregoing analysis was precisely the basis for its decision: "In *Zimmerman,* we held that the FDCPA did not apply to attempts to collect money from persons who allegedly had committed cable television theft." "Clearly," the Court said, "there was no 'debt' in *Zimmerman* because the obligations arose out of theft rather than a 'transaction.' This was our holding and we certainly adhere to it." *Zimmerman, supra,* at 401, Footnote No. 24.

[46] *Hawthorne* v. *Mac Adjustment, Inc.,* 140 F.3d 1367 (11th Cir. 1998). "Quite simply, Hawthorne's alleged obligation to Mac Adjustment does not arise out of a consumer transaction; it arises from a tort. In conducting herself in an allegedly negligent manner that precipitated an accident, Hawthorne engaged in no consumer transaction." "In other words" said the Court, "when we speak of 'transactions,' we refer to consensual or contractual arrangements, not damage obligations thrust upon one as a result of no more than her own negligence. *See Bass,* 111 F.3d at 1326."

[47] *Fleming* v. *Pickard,* 581 F.3d 922, 926 (9th Cir. 2009) "Having recognized that a consensual obligation must be the basis for a transaction covered by § 1692a(5), we have little difficulty concluding that Defendants' cause of action against Plaintiffs for wrongful conversion does not, as a matter of law, constitute a debt for purposes of the FDCPA."

[48] 53 Fed. Reg. 50102.

[49] *Ruth* v. *Triumph Partnerships,* 577 F. 3d 790, 798 (7th Cir. 2009)

[50] *Randolph* v. *IMBS, Inc.,* 368 F.3d 726 (7th Cir. 2004).

[51] *Ruth* v. *Triumph Partnerships,* 577 F.3d 790, 796, citing *McKinney* v. *Cadleway Properties Incorporated,* 548 F. 3d 496, 500 (7th Cir. 2008); *Schlosser* v. *Fairbanks Capital Carp.,* 323 F.3d 534 (7th Cir.2003).

[52] The FDCPA establishes two alternative predicates for 'debt collector' status—engaging in such activity as the 'principal purpose' of the entity's business and 'regularly engaging in such activity.' *Kaltenbach* v. *Richards,* 464 F.3d 524 (5th Cir. 2006). In *Romine* v. *Diversified Collection Services, Inc.* 155 F.3d 1142 (9th Cir. 1998) the 9th Circuit noted that although the term "indirectly" is not defined in the Act and that no reported decisions have defined the term, "its inclusion in the FDCPA must be taken into account." The court concluded that a service "specially developed for the credit and collections industry" by Western Union to (1) retrieve unavailable phone numbers for creditors and collection agencies; and (2) to catalyze debt collection activity through telegrams bearing the Western Union name "leaves open the possibility" that such activities "amount to an indirect attempt to collect a debt."

[53] "By the plain language of the statute, a person whose principal business is the enforcement of security interests, but who does not otherwise satisfy the definition of 'debt collector' is subject only to 1692f(6). *Kaltenbach v. Richards,* 464 F.3d 524 (5th Cir. 2006). Indeed, the entire FDCPA can apply to a party whose principal business is enforcing security interests but nevertheless fits 1692a(6)'s general definition of a 'debt collector.'" A repossession agent not otherwise meeting the definition of 'debt collector' is subject only to 1692f(6). *Montgomery v. Huntington Bank,* 346. F.3d 693 (6th Cir. 2003). See also, *Wilson v. Draper & Goldberg, PLLC,* 443 F.3d 373 (4th Cir. 2006) stating that the last sentence of 1692 a(6) applies to those

whose only role in the debt collection process is enforcement of security interests. *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti,* 374 F.3d 56 (2d Cir. 2004).

[M] One court described the definition of "debt collector" under 1692a(6) as "long and somewhat convoluted." *Wadlington* v. *Credit Acceptance Corp.* 76 F. 3d 103 (6th Cir. 1996).

[55] *Neff* v. *Capital Acquisitions & Management Company,* 352 F.3d 1119 (7th Cir. 2003); *Pettit* v. *Retrieval Masters Credit Bureau, Inc.,* 211 F.3d 1057, 1059 (7th Cir. 2000).

[56] *Neffv. Capital Acquisitions & Management Company.* 352 F.3d 1119 (7th Cir. 2003). Collection activity on the part of Capital One's successor in interest did not make the debt seller, Capital One, a "debt collector" within the meaning of the FDCPA.

[57] *Ruth* v. *Triumph Partnerships,* 577 F.3d, 790 (7th Cir. 2009); *McKinney* v *Cadleway Properties, Inc.* 548 F.3d 496. 501 (7th Cir. 2008)

[58] *Routine* v. *Diversified Collection Services, Inc.,* 155 F.3d 1142 (9th Cir. 1998) citing S. Rep. No. 95-382, 95th Cong. IstSess. 2 (1977).

[^] Prior to 1986, "any attorney at-law collecting a debt as an attorney on behalf of and in the name of a client" was expressly excluded from FDCPA coverage; however, effective July 9, 1986, this limited attorney exemption was eliminated. By removing the attorney exemption, Congress sought to stop lawyers from using "harassment techniques that other [non-attorney] debt collectors were forced to abandon with the enactment of the FDCPA." *Green* v. *Hocking,* 9 F.3d 1507 (6th Cir. 1993).

[60] *Heintz* v. *Jenkins,* 514 U.S. 291, 115 S.Ct. 1489 (1995). *Sayyedv. Wolpoff & Abramson,* 485 F.3d 226 (4th Cir. 2007), reaffirming yet again that law firms regularly collecting debts are 'debt collectors' and their litigation activity falls within the FDCPA. Law firms engaged in summary dispossess actions are 'debt collectors." *Hodges v Sasil Corp.,* 189 N.J. 210. 915 A.2d 1 (NJ 2007). Finding that summary dispossess actions are in fact a "powerful debt collection mechanism," the New Jersey Supreme Court rejected an argument that attorneys bringing summary dispossess actions fall outside the scope of the FDCPA because such actions are designed to regain possession – not to collect rent. Trustees, including attorneys acting in connection with a foreclosure can be 'debt collectors under the FDCPA. If a law firm meets the definition of a 'debt' collector. it can be covered by all sections of the FDCPA regardless of whether it is also enforcing a security interest. In *Wilosn* v. *Draper & Goldberg, PLLC,* 443 F.3d 373, 378 (4th Cir. 2004), the 4th Circuit held that a trustee's actions to foreclose on a property pursuant to a deed of trust are not 'incidental' to its fiduciary obligation; they are "central" to it.

[61] "Litigating. . . seems simply one way of collecting a debt." *Heintz,* 514 U.S. at 297. "In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Id.* at 294. *Piper v. Portnojf Law Associates, Ltd.* 396 F. 3d 227, 232 (3d Cir. 2005).

[62] 15 U.S.C. !692a(6)(A); *Alibrandi* v. *Financial Outsourcing Services, Inc.,* 333 F.3d 82 (2d Cir. 2003); *Maguire* v. *Citicorp Retail Services, Inc.,* 147 F.3d 232 (2d Cir. 1998); *Schlosser v. Fairbanks Capital Corporation,* 323 F.3d 534 (7th Cir. 2003).

[6?] *Maguire* v\ *Citicorp Retail Services, Inc., supra,* citing Federal Trade Commission Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50107 (1988); and *Dickenson v. Townside TV. & Appliance, Inc.* 770 F. Supp. 1122, 1128 (S.D.W.Va. 1990). *Catencamp* v. *Cendant Timeshare Resorts Group—Consumer Finance, Inc.* 471 F.3d 780 (7th Cir. 2006). A letter from an acronym that is self proclaimed not to be the creditor must be treated as one from a 'debt collector.'" When a letter proclaims, as this one did, that is coming from someone other than the creditor, a debtor naturally supposes himself to be in contact with a 'debt collector." Here, a debtor received a dunning letter from "Resort Financial Services," (which in small type declared itself to be a division of CTRG Consumer Finance."

[64] *Maguire* v. *Citicorp Retail Services, Inc., supra,* citing *Kempfv. Famous Bass Co.,* 676 F. Supp. 937, 938 (E.D. Mo. 1988); but *c.f Aubert v. American General Finance, Inc.,* 137 F.3d 976 (7th Cir. 1998), reaching the opposite outcome under similar facts based upon the "corporate affiliate" exclusion under 15 U.S.C. 1692a(6)(B).

[65] *Maguire* r. *Citicorp Retail Services, Inc.,* 147 F.3d 232 (2d Cir. 1998).

[66] The court based its decision upon a number of factors including: (1) Citicorp's failure to use the name "Debtor Assistance" from the beginning of the credit relationship; (**2**) the letter bore the letterhead "Debtor Assistance" creating the impression that a third party was collecting the debt; (**3**) Maguire's deposition testimony that she had "no clue" as to the identify of "Debtor Assistance" and did not understand the letter was actually from Citicorp; (**4**) prior correspondence between Citicorp and Maguire did not indicate or even suggest that Citicorp was affiliated with Debtor Assistance; (5) although the phone number cited on the letter was issued to and paid for by Citicorp, the letter did not reveal those facts; (6) phone calls were answered by personnel identifying themselves as employees of Debtor Assistance; and (7) there was nothing whatsoever in the letter clearly identifying Debtor Assistance as a unit of Citicorp. The court did not examine or even discuss the "corporate affiliate exemption" under 1692a(6)(B)–an analysis that places it at odds with the 7th Circuit's decision in *Aubert* v. *American General Finance, Inc.mw* , 137 F.3d 976 (7lh Cir. 1998).

[67] "The FDCPA distinguishes between debt collectors, who are subject to the statute's requirements, and creditors, who are not." *Ruth* v. *Triumph Partnerships,* 577 F. 3d, 790, 796 (7th Cir. 2009). A creditor is not a debt collector under the FDCPA. *Rowe* v. *Educational Credit Management Corp.* 559, F.3d 1028, 1031 (9th Cir. 2009); *McKinney* v. *Cadleway Properties Incorporated,* 548 F.3d 498 (7th Cir. 2008). "Creditors–as opposed to 'debt collectors'–generally are not subject to the FDCPA." *Pollice* v. *National Tax Funding, L.P., supra* at 403: *Alibrandi* v. *Financial Outsourcing Services, Inc.* 333 F.3d 82 (2d Cir. 2003). "Because the FDCPA defines a 'debt collector' as a person who endeavors to collect the debts owed to 'another,'... creditors who are attempting to collect their own debts generally are not considered debt collectors under the statute." *Nielsen* v. *Dickerson.* 307 F.3d 623 (7th Cir. 2002). Explaining that "creditors are generally presumed to restrain their abusive collection practices out of a desire to protect their corporate goodwill," the 7th Circuit made clear that creditors' "debt collection activities are not subject to the Act unless they collect under a name other than their own." *Aubert* v. *American General Finance, Inc.* 137 F.3d 976 (7th Cir. 1998), *see also, Harrison* v. *NBD Inc.*, 968 F.Supp. 837 (E.D.N.Y. 1997). *Catencamp* v. *Cendant Timeshare Resorts Group–Consumer Finance, Inc.* 471 F.3d 780 (7th Cir. 2006). The term 'creditor' does not include the creditor itself. The Federal Trade Commission's 2007 Annual Report on the FDCPA states although creditors' unfair or deceptive practices are not covered by the FDCPA, they are prohibited under Section 5 of the FTC Act. A copy of the 2007 Annual Report appears in the Appendix to this publication.

[68] *Aubert* v. *American General Finance, Inc.* 137 F.3d 976 (7th Cir. 1998), held that under 1692a(6)(B) "a corporate affiliate is excluded from the Act's coverage so long as it satisfies two conditions: (1) the affiliate collects debts only for entities with which it is affiliated or related; and (2) the principal business of the affiliate is not debt collection." Service Bureau of Indiana ("SBI") provided a wide range of services to its parent company, American General Finance, Inc. such as answering customer service phone lines, cardholder services, customer service, marketing and mail solicitations, overseeing the computerized credit card system, compliance with MasterCard and VISA rules, security services and fraud investigation. An internal corporate division of SBI, "AGFC Collection Group," provided collection services *exclusively* for the parent company. SBI's principal business was *not* the collection of debts.

Acknowledging that a creditor collecting its own debts under "any name other than its own" is considered a "debt collector" under 1692a(6), the Court cited the "plain language" of 1692a(6)(B) which "enables an ***affiliate*** of that creditor to collect debts under *any name that it chooses,* so long as the affiliate otherwise satisfies the conditions required for exclusion from the Act [emphasis added]." Accordingly, it refused to read an additional condition into 1692a(6)(B) that would require corporate affiliates to collect debts in the name of the creditor. Only Congress, said the Court, was "free to amend the FDCPA and add conditions to the 1692a(6)(B) exclusion."

As discussed above, the Second Circuit's decision in *Maguire v. Citicorp Retail Services, Inc.147 F.3d* 232 (2d Cir. 1998) is quite different from the *Aubert* decision. For reasons not apparent from the text of the *Maguire* opinion, the Second Circuit never mentioned the "common ownership or affiliate" exemption under 1692a(6)(B). Instead, it confined its analysis to whether "the least sophisticated consumer" would believe that the dunning letter in that case was from a third party instead of Citicorp. In *Maguire,* the Second Circuit seems to ignore, however, the plain language of the 1692a(6)(b) exemption. Perhaps it was reading into the Act an implicit condition–rejected by the 7lh Circuit in *Aubert* - that corporate affiliates must collect debts in the name

of the creditor. If it did so, however, the Second Circuit did not articulate such a reading as the basis for its decision.

[69] *Rowe* v. *Educational Credit Management Corp.*, 559, F.3d 1028, 1031 (9th Cir. 2009). Noting that "neither "fiduciary obligation" nor 'incidental to" is defined in the FDCPA. the 9th Circuit held that while a "guaranty agency" owes a fiduciary obligation to the Department of Education under the Higher Education Act ("HEA"), the collection activity in this case was "not incidental to" that obligation within the meaning of the FDCPA because the defendant acted solely as a collection agent." The 9th Circuit made clear that two requirements must be satisfied for an entity to come within the exception under 1692a(6)(F)(i). First, the court said, the entity must have a "fiduciary obligation" – defined by Black's Law Dictionary as a requirement to "exercise a high standard of care in managing another's money or property." Next the entity's collection activity must be "incidental" – not central – to its fiduciary obligation.. "The function of this requirement is to exclude fiduciaries whose sole or primary function is to collect a debt on behalf of the entity to whom the fiduciary obligation is owed." *Rowe* at 1034.

[70] *In McKinney* v. Cadleway Properties, Inc., 548 F.3d 496, 502 (7th Cir. 2008), the 7th Circuit observed that "the FDCPA does not define 'default,' but it is undisputed that McKinney's debt had been delinquent for at least two years when Cadleway purchased it, and we think this suffices to establish that the debt was 'in default' when it was acquired.

The FDCPA uses the status of the debt at the time of the assignment to distinguish between a debt collector and a creditor. *McKinney* v. *Cadleway Properties, Inc.*, 548 F.3d 496 (7th Cir. 2008). "The Act draws this distinction in a rather indirect way, however—by the exclusionary language...in the statutory definitions of creditor and debt collector. That is, the definition of creditor excludes those who acquire and attempt to collect a 'debt in default,' §1692a(4), while the definition of debt collector excludes those who acquire and attempt to collect 'a debt which was not in default at the time it was obtained,' §1692a(6)(F). So one who acquires a 'debt in default' is categorically not a creditor; one who acquires a 'debt not in default' is categorically not a debt collector. "*McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, 501 (7th Cir., 2008).

In *Ruth* v *Triumph Partnerships*, 577 F.3d 790 (7th Cir. 2009) the Seventh Circuit rejected a debt buyer's argument that it fell outside the definition of 'debt collector' because it merely purchased the debt and hired others to collect it. Instead, the Seventh Circuit made clear that a party's status under the FDCPA turns on whether the debt was in default at the time it was acquired.

Under the FDCPA, an entity cannot be a "debt collector" unless the debt it attempts to collect is in default. *Alibrandi* v. *Financial Outsourcing Servcies, Inc.*, 333 F.3d 82 (2d Cir. 2003). The FDCPA, however, "does not define so key a term as 'default." In *Alibrandi* the Second Circuit refused to hold, without more, that a debt was in "default" as soon as it became past due. Citing a variety of federal regulations with delinquency periods ranging from 30 to 270 days before a debt goes into default after it is past due, and noting that "courts have repeatedly distinguished between a debt that is in default and one that is merely outstanding," the Second Circuit observed "although these judicial decisions and regulations reflect inconsistent periods of time preceding default, they all agree that default does not occur until well after a debt becomes outstanding." For purposes of its decision, the Second Circuit used the term "outstanding" to refer to debts that are past due. A "default," on the other hand, exposes "debtors to the sort of adverse measures, such as acceleration, repossession, increased interest rates, and negative reports to credit bureaus, from which the Act intended to afford debtors a measure of protection." Accordingly, the court concluded "the FDCPA's broad, pro-debtor objectives would not be served if we adopted Alibrandi's argument that default occurs immediately after payment becomes due."

In a footnote, the Second Circuit said "Until Congress ends the statutory silence surrounding the term 'default,' we conclude that the interests of debtors, creditors, collectors, and debt service providers will best be served by affording creditors and debtors considerable leeway contractually to define their own periods of default, according to their respective circumstances and business interests. Once the parties have contractually set the period of delinquency preceding a default, it will be a relatively simple matter to determine whether the Act applies." *Alibrandi* v. *Financial Outsourcing Servcies, Inc.*, 333 F.3d 82 (2d Cir. 2003), Note 5.

In *Alibrandi*, First Union Bank placed Alibrandi's account with a collection agency, North Shore Agency, who--in communicating with Alibrandi–in effect declared his debt to be in default. Alibrandi neither paid the debt nor responded to this letter. Several months later, First Union placed Alibrandi's account with another agency, Financial Outsourcing, which was under the impression–pursuant to its arrangement with First Union–that it

was "servicing" a debt not yet in default. Financial Outsourcing's correspondence to Alibrandi failed to give the requisite §1692g validation notice and FDCPA litigation ensued. The 2nd Circuit concluded that North Shore's "self-identification as a debt collector constituted a declaration that Alibrandi's debt was in default—" a status Financial Outsourcing had no ability to change through an agreement with First Union. Holding "if First Union had, through North Shore, declared Alibrandi's outstanding debt to be in default," then "the default would have continued during Financial Outsourcing's subsequent collection efforts and Financial Outsourcing would have been obligated to include in its correspondence with Alibrandi the warnings required by the Act."

[71] In *Schlosser* v. *Fairbanks Capital Corporation*, 323 F. 3d 534 (7th Cir. 2003), the 7th Circuit examined the rationale underlying the §1692a(6)(F)(iii) exception: "For purposes of applying the Act to a particular debt," the categories of debt collectors and creditors are "mutually exclusive. However, for debts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category." Explaining "if the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt," the 7th Circuit warned that "on the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." To distinguish between these two possibilities, the Act refers to the status of the debt at the time of assignment. "In other words," said the court, "the Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not."

In *Schlosser*, the 7th Circuit refused to extend the §1692a(6)(F)(iii) exclusion to a debt buyer (Fairbanks Capital) who acquired a debt it mistakenly understood and believed to be in default, when—in fact—such debt was *not* in default. Fairbanks' demand letter to Schlosser omitted the §1692g validation notice and FDCPA litigation ensued. Although the District Court granted Fairbanks' motion to dismiss on the ground that it was not a "debt collector" within the meaning of the FDCPA because the debt was not actually in default when Fairbanks acquired it, the 7th Circuit reversed on the basis that such a literal analysis "produces results that are odd in light of the conduct regulated by the statute [ie: the §1692(g) validation provision aimed at preventing collection efforts based on mistaken information]."

Finding that Fairbanks acquired the debt in this case as one in default, and its collection activities were based on that understanding, the 7th Circuit emphasized "if the parties to [an] assignment are mistaken about the true status, that status will not determine the nature of the activities directed at the consumer. It makes little sense, in terms of the conduct to be regulated, to exempt an assignee from the application of the FDCPA based on a status it is unaware of and that is contrary to its assertions to the debtor. The assignee would have little incentive to acquire accurate information about the status of a loan because, in the context of the mistake in this case, its ignorance leaves it free from the statute's requirements." Interestingly, the court asserted—in a footnote—"if the mistake in this case went the other way, and Fairbanks purchased the loan for the purpose of servicing and treated it as such, but it turned out to actually be in default, then under §1692a(4) it would be classified as a creditor and therefore outside the scope of the Act." *Schlosser* v. *Fairbanks Capital Corporation*, 323 F. 3d 534 (7th Cir. 2003), Note 1.

In *Bailey* v. *Security National Servicing Corporation*, 154 F.3d 384 (7th Cir. 1998), April and Clifford Bailey bought a home with a mortgage guaranteed by HUD. They defaulted and the loan was assigned to HUD. Thereafter, the Baileys and HUD entered into a series of payment plans, or forbearance agreements, with HUD, whereby HUD agreed to refrain from foreclosure so long as the Baileys honored the tenns of the payment plan. HUD later sold the Baileys' forbearance agreement (and other loans) to private investors. Because the forbearance agreement was not in arrears ("and obviously not in default") at the time it was acquired by the defendants, the 7th Circuit held that "[t]he plain language of sec. 1692a(6)(f) tells us that an individual is not a 'debt collector' subject to the Act if the debt he seeks to collect was not in default at the time he purchased (or otherwise obtained) it."

See also, *Wadlington* v. *Credit Acceptance Corp.*, 76 F.3d 103 (6th Cir. 1996), holding that a creditor, Credit Acceptance Corp., who took assignments of retail installment sales contracts entered into between a consumer and an automobile dealer prior to the consumer's default was not a "debt" collector within the meaning of §1692a(6). This exemption did *not* apply, however, to the third party debt collector attorneys representing Credit Acceptance Corp. in collection litigation allegedly filed in an improper venue.

[72] The case of *Catherman* v. *First State Bank*, 796 S.W.2d 299 (Tex Ct. App. 1990) provides a useful example of a when a law firm and one of its lawyers were *not* "debt collectors" under the FDCPA. In that instance, less than five of the firm's 750 active files concerned consumer debts, there were 10 to 15 consumer loan cases over

five years; the lawyer spent less than half of one percent of his time collecting consumer debts; the firm sent fewer than 5 letters concerning consumer debts over a five year period; and typically spent no time on consumer collection for months at a time.

Conversely, a law firm which collected debts approximately 4% of the time was held to be a "debt collector" because such activity was "regular." *Stojanovski v. Strobl & Manoogian*, 783 F. Supp. 319 (E.D. Mich. 1992).

An attorney may regularly render debt collection services, even if these services are not a principal purpose of his business. In *Garrett* v. *Derbes*, 110 F. 3d 317 (5th Cir. 1997), the 5th Circuit held that an attorney, Richard S. Derbes, who, during a single nine-month period, attempted to collect debts owed by 639 different persons "regularly" attempted to collect debts owed to another within the meaning of §1692a(6). The court reached this conclusion even though Derbes' collection work consisted of less than .5 percent of his entire practice during the nine-month period in question. "If the volume of a person's debt collection services is great enough," the court said, "it is irrelevant that these services only amount to a small fraction of his total business activity; the person still renders them 'regularly.'"

In *Goldstein v Hutton, Ingram, Yuzek Gainen, Carroll & Bertolotti*, 374. F.3d 56 (2d Cir. 2004, the Second Circuit held that sending 145 pre-eviction notices in a 12 month period was "regular" collection activity even though the fees from these letters amounted to only .05% of a law firm's revenues during that period. Stating that the focus should be on the " 'regularity' of a debt collector's activity rather than principally upon the proportion of business devoted to debt collection," the Second Circuit cautioned that if a 'regularity' inquiry centered upon the proportion of overall work or firm revenue the distinction between the 'principal purpose' and 'regularity' aspects of the statutory definition of 'debt collector' would be blurred. "The question of whether a lawyer or law firm 'regularly ' engages in debt collection activity within the meaning of 1692a(6) of the FDCPA must be assessed on a case-by-case basis in light of factors bearing on issues of 'regularity." The Court set forth an "illustrative," but not exhaustive list of factors.

The reasoning in *Goldstein, supra*, was followed in an unreported Third Circuit decision in *Oppong* v. *First Union Mortgage Corporation*, 2007 WL 216061 (3d Cir. 1/26/2007). In *Oppong*, the Third Circuit upheld the District Court's finding (set forth in an extensive opinion exploring this section of the Act in some detail) that it did not matter that the percentage of collection activity to all other activity was small so long as a law firm "frequently and consistently" made attempts to collect on defaulted loans as part of its business activities. *Oppong v. First Union Mortgage Co*, (D.C. Civ. No. 02-CV-02149 (E.D. PA 2005).

[77] *Schroyer v. Franked* 197 F.3d 1170 (6th Cir. 1999), holding that a law firm was not a "debt collector" under the FDCPA where only 2% of its overall practice consisted of debt collection cases; that only 7.4% (29 of 389) cases annually consisted of debt collection cases, and that the firm did not employ individuals full-time for the purpose of collecting debt. Indeed, the court found that although the firm did engage in some debt collection work, it was not "in the business" of debt collection or in the debt collection industry. The firm's debt collection activities were "incidental to, and not relied upon or anticipated in, their practice of law," said the court; therefore it should not be held liable as a "debt collector" under the FDCPA.

[74] *Schroyer* v. *Franked* 197 F.3d 1170 (6th Cir./1999), citing *Cacace* v. *Lucas*, 775 F. Supp. 502, 504 (D. Conn. 1990); and *Von Schmidt v. Kratter*, 9 F. Supp. 2d, 102 (D. Conn. 1997).

[75] *Id.*

[76] *McStay* v. *I.C. System, Inc., 308 F. 3d 188 (2d Cir. 2002); Russell* v. *Equifax A.R.S.*, 74 F.3d 30,34-35 (2d Cir. 1996); *Brown* v. *Card Service Center*, 464. F.3d 450 (3d Cir 2006); *Wilson* v. *Quadramed Corp.* 225 F.3d 350, 354-355 (3d Cir. 2000); *Graziano* v. *Harrision*, 950 F.2d 107, 111 & n. 5 (3d Cir. 1991); *United States* v. *Nat'l Fin. Serv., Inc.*, 98 F.3d 131, 136-39 (4th Cir. 1996); *Smith v. Computer Credit, Inc.* 167 F.3d 1052, 1054 (6th Cir. 1999); *Terran* r. *Kaplan*, 109 F. 3d 1428, 1431-34 (9th Cir. 1997); *Jeter* v. *Credit Bureau*, 760 F.2d 1168, 1175 (11th Cir. 1985).

[77] In *Brown* v. *Card Service Center*, 464. F.3d 450 (3d Cir 2006), the Third Circuit confirmed that—as in most federal courts—any lender-debtor' communications potentially giving rise to claims under the FDCPA should be analyzed from the perspective of the least sophisticated consumer. An earlier Third Circuit decision in *Wilson v. Quadramed Corp. supra*, at 354-355, stated "although we have not expounded upon the definition of the 'least sophisticated debtor,' other courts of appeal which have adopted that standard have." The Court then canvassed these opinions in some detail.

See also, Campuzano-Burgos v. *Midland Credit Management*, 550 F.3d 294 (3rd Cir., 2008); *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 221 (3rd Cir., 2008).

"[T]least sophisticated standard safeguards bill collectors from liability for "bizarre or idiosyncratic interpretations of collection notices" by preserving at least a modicum of reasonableness, as well as "presuming a basic level of understanding and willingness to read with care [on the part of the recipient]." (quoting *Wilson* v. *Quadramed Carp.*, 225 F.3d 350, 354-55 (3d Cir.2000)). Although established to ease the lot of the naive, the standard does not go so far as to provide solace to the willfully blind or nonobservant. Even the least sophisticated debtor is bound to read collection notices in their entirety." *Campuzano-Burgos* v. *Midland Credit Management*, 550 F.3d 294, 299 (3rd Cir. 2008)

[78] *Equifax ARS* v *Russell*, 74 F.3d 30, 34 (2d Cir. 1996).

[70] *Gammon* v. *GC Services, Ltd. Partnership*, 27 F.3d 1254, 1257 (7th Cir. 1994), citing *Clomon* v. *Jackson*, 988 F.2d 1314 (2d Cir. 1993)

[80] *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993); *Campuzano-Burgos* v. *Midland Credit Management*, 550 F.3d 294 (3rd Cir., 2008)

[81] *White* v. *Goodman*, 200 F.3d 1016 (7th Cir. 2000).

[82] *Wilson* v. *Quadramed Corp*, 225 F.3d 350, 354 (3d Cir. 2000) citing *Clomon* v. *Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993).

[83] Substituting the "least sophisticated consumer" standard with an "unsophisticated consumer" standard, the 7th Circuit noted [i]t strikes us virtually impossible to analyze a debt collection letter based upon the reasonable interpretations of the least sophisticated consumer. Literally, the least sophisticated consumer is not merely 'below average,' he is the very last rung on the sophistication ladder. Stated another way, he is the single most sophisticated consumer who exists. Even assuming that he would be willing to do so, such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion. Courts which use the 'least sophisticated consumer' test, however, routinely blend in the element of reasonableness. In maintaining the principles behind the enactment of the FDCPA, we believe that a simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence should be adopted. Thus, 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."

The Court observed that this modified test protects "uninformed, naive or trusting" consumer, yet admits an objective element of reasonableness which shields complying debt collectors from unrealistic or peculiar interpretations of collection letters. *Gammon* v. *GC Services, Ltd. Partnership, supra*, at 1257 (7th Cir. 1994).

Applying the ''unsophisticated consumer" standard to the case before it, the 7th Circuit in *Gammon* found that an unsophisticated consumer could reasonably interpret the statement (in a collector's demand letter) "[w]e provided the systems used by a major branch of the federal government and various state governments to collect delinquent taxes," to imply that those governmental bodies vouched for or were affiliated with GC Services in violation of §1692e(1).

As far as the Third Circuit is concerned, the distinction between "least sophisticated" consumer and "unsophisticated" consumer appears to be nothing more than one of terminology. In a footnote in *Brown* v. *Card Sendee Center*, 464 F.3d 450 n.] (3d Cir 2006), the Third Circuit made clear that the terms "least sophisticated debtor" and "unsophisticated consumer" can be used interchangeably; the focus, said the court, should be upon the level of a consumer's sophistication.

The 8th Circuit has also adopted the "unsophisticated consumer" standard. *Peters v. General Service Bureau, Inc.*, 277 F. 3d 1051 (8th Cir. 2002); *Duffy* v. *Landherg*, 215 F.3d 871, 873 (8th Cir. 2000).

Finding the distinction between the "least sophisticated consumer" and "unsophisticated consumer" to be *"de minimis* at most," the 5th Circuit has "explicitly avoided ruling on which of these standards, if either, we use." *Peter v. GC Sendees L.P.*, 310 F.3d 344 (5th Cir. 2002), Note 1.

[81] This phrase has often been referred to as the ^Mini-Miranda" warning in the debt collection industry.

[85] 15 U.S.C. §1692e(11)

[80] *See, Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1353 (11th Cir. 2009). An amendment to §1692e(11)—effective December 31, 1996—modified, to some extent, the requirement to give the full "Mini-Miranda warning" in subsequent communications and eliminated the requirement entirely for "formal pleadings."

The 1996 amendment changed 15 U.S.C. § 1692e(11) to read as follows:

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

[87] *Carroll* v. *Wolpoff & Abramson*, 961 F.2nd 459 (4th Cir. 1992).

[88] Kramer, FTC Informal Staff Letter (Nov. 13, 1996)

[89] 15 U.S.C. § 1692e(11)

[90] *New Jersey Court Rule* 4:5-1 limits "pleadings allowed" to the Complaint; an Answer, an Answer to Counterclaim; an Answer .to a Cross-Claim; a Third Party Complaint; and an Answer to Third Party Complaint. It is unclear as to whether motions, discovery, briefs and other documents served upon parties and filed with the Court during the course of litigation will be considered "formal pleadings." Literalists may argue that the amendment specifically excludes "formal pleadings" only, and that all other "communications" directed to consumers, or upon which they are copied (such as motions, discovery, and letter memoranda, etc.) must include a statement to the effect that the "communication" is from a "debt collector."

[91] *Jacobson* v. *Healthcare Financial Services, Inc.*, 516 F.3d 85, 95 (2nd Cir. 2008).

[92] §!692g(b) was expanded to expressly codify a collector's right to continue collection activities and communications during the 30 day validation period.

[93] Effective on October 13, 2006, §1692g was amended to add two new subsections including §1692g(d), which provides "a communication in the form of a legal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)." This amendment resolved an existing split of authority among the federal appellate courts to consider the issue. In *Vega* v. *McKay*, 351 F.3d 1334 (11th Cir. 2003), the 11th Circuit held that a summons and complaint filed in a state court collection action was not an "initial communication" under the Act. The 7th Circuit in *Thomas* v. *Law firm of Simpson & Cyback*, 392 F. 3d 914 (7th Cir. 2004) and the 2nd Circuit in *Goldman v. Cohen*, 445 F. 3d 152 (2d Cir. 2006) reached the opposition conclusion.

The full text of §1692g, with the 2006 amendments, is as follows:

Validation of debts 115 U.S.C. § 1692g

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

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal Pleadings- A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice Provisions- The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

[04] §1692g(e). Although notices mandated by federal or state law are not to be treated as "initial" communications under the Act so long as they "do not relate to the collection of a debt," the new section does not define what is meant by "relate[d] to the collection of a debt." Moreover, nothing in the Act appears to exclude these kinds of statutory notices from the obligations associated with any *subsequent* communications. If a federally mandated notice such as a Gramm-Leach-Bliley Act privacy notice is sent by a debt collector as a "subsequent" communication, it must be accompanied by the "Mini-Miranda" warning.

[05] *Wilson* v. *Quadramed Carp.*, 225 F.3d 350, 354 (3d Cir. 2000) (citing S.Rep., No. 382, 95th Cong., 1st Sess. 4. 8, reprinted in 1977 Li.S.Code Cong & Admin News 1695, 1702).

[06] *Wilson* v. *Quadramed Corp. supra, at 354* (the validation notice required by the Act "is to be interpreted from the perspective of the 'least sophisticated consumer.'"); *Graziano v. Harrison,* 950 F.2d 107, 111 (3d Cir. 1991); *Greer* v. *Shapiro & Kreisman,* 152 F. Supp 2d 679 (E.D.P.A. 2001).

[91] *Johnson* v. *Revenue Management Corporation, et. al.,* 169 F.3d 1057 (7th Cir. 1999), citing *Bartlett* v. *Heibl* 128 F.3d 497 (7th Cir. 1997).

[08] *Id*

[99] *Wahl* v. *Midland Credit Management,* 556 F. 3d, 643 (7th Cir. 2009)["Debt collectors need not say anything more than the amount sought, but if they do elect to specify principal and interest components, they must state principal and interest levied by the original account holder and the interest levied by the debt collector. In the context of a debt buyer, interest charged by the original creditor was part of the entire debt acquired by a purchaser, therefore the entire original creditor's debt– including interest, could be very much part of 'principal' in a debt buyer's eyes."

In *Hahn* v. *Triumph Partnerships, LLC,* 557 F. 3d 755, 757 (7th Cir. 2009), the 7th Circuit held an "amount that is due can include principal, interest, penalties, attorney fees and other components. Interest can then be added to that total." The court further explained "[w]e know from *Wahl* v. *Midland Credit Management,* Inc., that there would be no falsity [in stating the amount of debt] even if the 'amount due' had been described as 'principal due'—for *Wahl* observes that when interest is compounded, today's interest becomes tomorrow's principal, so all past-due amounts accurately may be described as "principal due". *Hahn* at 757. Citing *Barnes v. Advanced Call Center Technologies, LLC 493 F.3d. 838 (7th Cir. 2007),* the 7th Circuit reiterated "that a debt collector need not break out principal and interest; it is enough to tell the debtor the bottom line." *Hahn* at 757.

In *Barnes v. Advanced Call Center Technologies, LLC* 493 F.3d. 838 (7th Cir. 2007), the 7th Circuit found that a demand letter referring to the past due amount as "current amount due" does not fail to state the "amount of the debt" under §1692g. Finding Barnes's argument to be "absurd," the court refused to adopt an interpretation that only the consumer's overall credit card balance is the "amount of the debt." The 7th Circuit made clear that it has "never" required the use of the exact term "Amount of the Debt" in a demand letter. Use of the phrase "Current Amount Due" is perfectly acceptable so long as there was nothing else in the letter to cause an unsophisticated consumer to interpret anything other than the "Current Amount Due" was the "amount of the debt."

Olson v. *Risk Management Alternatives, Inc.,* 366 F. 3d 509 (7th cir. 2004). The use of two different numbers in dunning letters–one for the total account balance and the other for the amount now due does not violate §1692g(a) because even an "unsophisticated consumer able to make basic logical deductions and inferences" would "understand that the amount of the debt is the 'balance' and that the amount 'now due' is the portion of the balance that the creditor will accept for the time being until the next bill arrives." Explaining that an "unsophisticated consumer" would understand the distinction between "balance" and "now due" to mean that

the debt collector is willing to accept less than the total balance of the debt to bring the account to a current status, the 7th Circuit found it clear such a letter gave the consumer the option of paying the "amount due," the total balance, or doing neither and contesting the debt. These options, the court held, "do not contradict one another." *Olson* v. *Risk Management Alternatives, Inc.*, 366 F. 3d 509 (7th cir. 2004).

Fields v. *Wilbur Law Firm*, 383 F.3d 562 (7th Cir. 2004). "When debtor has contractually agreed to pay attorney fees and collection costs, a debt collector may, without a court's permission, state those fees and costs and include that amount in the dunning letter. Doing so does not violate the FDCPA."

Citing *Fields* v. *Wilbur Lem Firm*, the 7th Circuit made clear in *Singer* v. *Pierce & Associates, P.C.* 383 F. 3d 596 (7th Cir. 2004) that no §1692g(a) violation occurs when attorney fees were determined, requested and obtained without court approval for the amount of such attorney fees where such attorney fees were authorized in the contract between the parties.

A demand letter citing a specified balance due ($367.42 in this case) and then further instructing the debtor to call a 1-800 number "to obtain your most current balance information" was deemed confusing on its face and failed to specify a balance due under §1692f(1). The 7th Circuit held that a debtor must be able to tell the exact amount due from the demand letter or, if the balance was subject to adjustment, the letter must state that the amount due is *as of the date of the letter only* and may be subject to changes. *Chuway* v. *National Action Financial Services, Inc.*, 362 F. 3d 944 (7th Cir. 2004).

A dunning letter must state the amount of the debt clearly so that the recipient is likely to understand it. Letters that clearly convey the principal balance, interest due and the total balance due accompanied by a further statement that the balance might be increased by additional accrued interest was not a violation of the Act. *Taylor* v. *Cavalry Investments, LLC*, 365 F. 3d. 572 (7th Cir. 2003).

In *Peach v. Sheeks*. 316 F.3d 690 (7th Cir 2003), the 7th Circuit held that an attorney's notice of claim for the "remaining principal balance of $1,050.00; plus reasonable attorney fees as permitted by law, and costs if allowed by the court" violated §1692g(a)(1) because it did not properly specify the amount of the debt. Although Indiana law authorized claims for treble damages in NSF cases, the attorney ran afoul of the FDCPA because his notice to the debtor in a $350.00 NSF case asserted a principal balance due of $1,050.00 *before* treble damages had been awarded. The 7th Circuit held that Sheeks improperly "took it upon himself to hold Veach liable for legal penalties that had not yet been awarded." Such penalties, said the Couirt, "should have been separated out from the amount of the debt" for FDCPA purposes. "Since Veach cannot be held liable for treble damages, court costs or attorneys fees *until* there has been a judgment by a court, they cannot be part of the 'remaining principal balance' of a claimed debt." The 7thCircuit affirmed the rationale underlying its decision in McCalla, Raymer: "The 'amount of debt' provision is designed to inform the debtor (who, remember, has a low level of sophistication) of what the *obligation* is, *not* what the final, worst-case scenario *could* be."

The **total amount due**, including "interest and other charges as well as principal" as of the date the dunning letter is sent must be specified. *Miller* v. *McCalla, Raymer, Padrick, Cobb, Nichols and Clark, LLC*, 214 F.3d 872 (7th Cir. 2000). In *Miller*, a law firm sent Kevin Miller a dunning letter stating that the "unpaid principal balance" of his loan was $178,844.65 but that "this amount does not include accrued but unpaid interest, unpaid late charges, escrow advances or other charges for preservation and protection of the lender's interest in the property as authorized by your loan agreement. The amount to reinstate your loan changes daily. You may call our office for complete reinstatement and payoff figures."

Holding that this language did not comply with 15 U.S.C. §1692g(a), the 7th Circuit admonished "[t]he unpaid principal balance is not the debt; it is only a part of the debt...." It is "no excuse," said the court. "that it was 'impossible' for the defendants to comply when as in this case the amount of the debt changes daily." Instead, the law firm could have complied with the Act by using the following "safe harbor" language:"As of the date of this letter, you owe $___ [the exact amount due. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence if you pay the amount shown above, an adjustment may be necessary after we receive your check in which event we will inform you before depositing the check for collection."No reasonable person, declared the court, "could conclude that the statement we have drafted does not inform the debtor or the amount due."

[100] An attorney demand letter advising a consumer that he had "thirty (30) days ***from*** the date of this notice" to dispute the validity of the debt failed to comply with §1692g(a)(3) because it misstated the time to respond. *Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F.Supp. 1148 (E.D.N.Y. 1996). A consumer must

be informed of his/her right to dispute a debt within thirty days from *receipt* of the validation notice. "By specifying that the debt must be disputed within thirty days from the date of receipt of the notice, Congress has consciously protected against abusive tactics of debt collectors, such as the backdating of notices or other practices that might shorten debtors time to respond." *Id.* at 1154.

[101] Where a debt collector does not receive a notice of a dispute within 30 days from the debtor's receipt of the dunning letter, the collector is permitted to assume the debt is valid. In *Richmond* v. *Higgins*, 435 F. 3d 825 (8th Cir. 2006), the debtor's notice of dispute did not arrive until after six months from the date of the dunning letter.

In *Morse* v. *Kaplan*, 468 Fed.Appx. 171, 2012 WL 2087198 (3d Cir. 2012), the creditor's demand letter did not contain the language ". . . the name and address of the original creditor, if different from the current creditor." However, the demand made it clear, in the "re:" portion of the letter, that the creditor "was collecting the debt for JFK, the original creditor, so inclusion of such language would be confusing. It would make little sense to differentiate between the original and current creditor in this case as they are the same entity." Because the creditor was collecting on behalf of the original creditor, the debtor's argument that the creditor violated § 1692(a)(5) was held to be meritless.

[102] §1692g(d) - enacted by a rare amendment to the Act in the fall of 2006.

[103] As mentioned in a previous note, New Jersey Court Rule 4:5-1 limits "pleadings allowed" to the Complaint; Answer; Answer to Counterclaim; Answer to a Cross-Claim; Third Party Complaint; and Answer to Third Party Complaint. It is unclear as to whether motions, discovery, briefs and other documents served upon parties and filed with the Court during the course of litigation will be considered "formal pleadings.

[104] In *Durkin* v. *Equifax Check Services, Inc.*, 406 F. 3d 410 (7th Cir. 2005), the 7th Circuit declined to establish a rule compelling repeat validation notices in follow-up letters sent during the initial 30-day validation period. Once the validation notice requirement is fulfilled "§1692g(a) does not mandate that further validation notices be sent." The test, said the court, is whether "the specific text contains any impermissible overshadowing or contradiction with respect to the validation notice."

[105] *McKinney* v. *Cadleway Properties, Inc.*, 548 F.3d 496, 503 (7th Cir., 2008)

[106] A debt collector "has the obligation, not just to convey the information, but to convey it clearly." *Jacobson v. Healthcare Financial Sendees, Inc.*, 516 F.3d 85, 90 (2nd Cir., 2008); *Wilson* v. *Quadramed Corp. supra*, at 354; *Graziano* v. *Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *McStay v. I.C. System, Inc.*, 308 F.3d 188 (2d Cir. *2002*); *Smith* v. *Computer Credit, Inc.*, 167 F. 3d 1052 (6th Cir. 1999); *Greer* v. *Shapiro & Kreisman, supra* at 683.

[107] *Wilson* v. *Quadramed Carp. supra*, at 355; *Graziano* v. *Harrision*, 950 F.2d 107, 111 (3rd Cir. 1991); *Adams* v. *Law Offices ofStuckert & Yates*, 926 F. Supp. 521, 527 (E.D.Pa. 1996).

[108] Bold red capital letters directing consumers to "SEE REVERSE SIDE" and a validation notice in gray capital letters did not violate the Act. Sims v. G.C. Services, L.P., 445 F.3d 959 (7th Cir. 2006). Accord, Zemeckis v. Global Credit & Collections, 679 F.3d 632 (7th Cir. 2012). Additionally, in Zemeckis, the creditor's insertion of language indicating that the debtor was "urge[d] to take action now" as well as to "[c]all [creditor's] office today", that the "account now meets . . . [the] guidelines for legal action" and that the creditor "may be forced to take legal action" merely "contains puffery" and did not overshadow the statutory language required by §1692g: "The dunning letter that Global Credit sent to Zemeckis, at worst, contains puffery. Its suggestions to "take action now" and call "today" did not impose a deadline that contradicted her right to a thirty-day validation period. The requests that she call "now" or "today" were not tantamount to a request for payment, nor would an unsophisticated consumer understand them as such."

[109] *Sims* v. *G.C. Services, L.P.*, 445 F.3d 959 (7th Cir. 2006), *See also, McStay v. I.C. System, Inc.*, 308 F.3d 188 (2d Cir. 2002); *Miller* v. *Wolpoff & Abramson, L.L.P.* 321 292 (2d Cir. 2003).

[110] *Johnson* v. *Revenue Management Corporation*, 169 F.3d 1057 (7th Cir.1999); *Mosby v. Corporate Receivables, Inc*, 205 F.3d 323 (7th cir. 2000); *Walker v. National Recovery, Inc.*, 200 F.2d 500 (7th Cir. 1999).

[111] *Mosby v. Corporate Receivables, Inc., supra.*

[112] *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996)

[113] A woman stopped payment on a check issued to a car dealership for repairs when she discovered her car had not been repaired properly. A collection letter informed her that "until this is resolved, we may not approve your checks or the opening of a checking account at over 90,000 merchants and banks who use Telecheck nationally....Any delay, or attempt to avoid this debt, may affect your ability to use checks." The district court found that this language "overshadowed" the §1692g validation notice. Even if the woman wished to assert a defense for nonpayment, the court found, she may have feared that she really did not have 30 days to dispute the debt if so doing would be "punishable by a sudden inability to write checks." *Ozkaya* v. *Telecheck Services, Inc.* 982 F. Supp. 578 N.D. 111. 1997).

[114] *Johnson* r. *Revenue Management Corporation, supra*; *Mosby* v. *Corporate Receivables, Inc. supra,*

[115] *Johnson v. Revenue Management Corporation, supra*; *Mosby v. Corporate Receivables, Inc. supra.* Although the Act "does not say in so many words that the disclosures required by it must be made in a non confusing manner," the courts have held, "plausibly enough, that it is implicit that the debt collector may not defeat the statute's purpose by making the required disclosures in a form or within a context in which they are unlikely to be understood by ...unsophisticated debtors...." *Bartlett v. Heibl,* 128 F.3d 497 (7th Cir. 1997).

[116] "[T]he debt collector must not obscure (or, as the cases often say, 'overshadow') the statutorily required validation notice." *Muha v. Encore Receivable Management, Inc.,* 558 F.3d 623, 629 (7th Cir. 2009).

[117] 950 F.2d 107 (3rd Cir. 1991).

[118] A similar finding was reached in *United States of America* v. *National Financial Sendees, Inc.,* 98 F.3d 131 (4th Cir. 1996) because letters which demanded payment in "ten days," or demanded "immediate payment" conflicted with the 30 days allowed in the validation notice itself, which was printed on the back of the form. Moreover, "the bold commanding type of the dunning text" overshadowed the smaller, less visible, validation notice printed on the back in small type and light grey ink.

[119] 152 F. Supp. 2d 679 (E.D.P.A. 2001).

[120] *Id* at 685. "From the perspective of the least sophisticated consumer, the indication that legal proceedings have been instituted 'notwithstanding' the notice would indicate that the validity of the debt had already been decided. The notice, however, also informs the consumer that she has 30 days after receipt of the notice to dispute the validity of the debt.. Upon reading this notice, the least sophisticated consumer might wonder what purpose lodging a dispute would serve if legal proceedings had been instituted as soon as possible."

[121] *Jacobson v. Healthcare Financial Services, Inc.,* 516 F.3d 85, 95 (2nd Cir., 2008).

[122] *Jacobson* v. *Healthcare Financial Sendees, Inc.,* 516 F.3d 85, 95 (2nd Cir., 2008)

[123] *Graziano* v. *Harrison.* 950 F.2d 107 (3rd Cir. 1991); *Wilson v. Quadramed Corporation,* 225 F. 3d 350 (3d Cir. 2000); *Bartlett v. Heibl,* 128 F.3d 497 (7th Cir.1997); *Johnson v. Revenue Management Corp.,* 169 F.3d 1057 (7th Cir. 1999);*Walker v. National Recoveiy,* 200 F.3d 500 (7th Cir., 1999).

In *Bartlett v. Heibl,* 128 F.3d 497 (7th Cir.1997), the 7th Circuit held that §1692g obliges the collector to refrain from confusing the debtor by undercutting the required notice or implying a different obligation.

[124] The Second, Seventh and Third Circuits have commented or remarked in dicta, that demands for immediate payment, in and of themselves, do not necessarily violate the Act. See Note 125 *infra.*

In *Jacobson v. Healthcare Financial Services, Inc.,* 516 F.3d 85, 91 (2nd Cir. 2008), the Second Circuit made clear that debt collectors are "as a general matter, entitled to demand immediate payment of a debt, and to threaten further action in the event of non-payment." Nevertheless, the court warned "such demands may cause confusion about the right to dispute and will sometimes, in that way, lead debt collectors to run afoul of the Act." Reinforcing its earlier decision in *Savino v. Computer Credit, Inc.,* 164 F.3d 81 (2d Cir. 1998), the 2nd Circuit held that demands for immediate payment do not violate the FDCPA provided they are accompanied by "transitional language" explaining the recipient's validation rights and her option to submit a notice of dispute rather than pay the claimed sum.

The letter sent by Healthcare Financial Services to Jacobson, "though it demanded payment, adequately explained that the recipient had the right to seek verification of the debt. It presented Jacobson with two alternate ways of avoiding 'further action: 'either pay the debt 'within 30 days,' or submit a notice of dispute 'within 30 days.' This right to seek validation of the debt was further explained, not on the back of the demand letter, but on its face, below the initial statement, and in clear terms. In these circumstances, even the least

sophisticated debtor would understand that she had the option to submit a notice of dispute, rather than pay the claimed sum." *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 921 (2nd Cir., 2008)

[125] In *Savina* v. *Computer Credit, fnc.,\64* F.3d 81 (2d Cir. 1998) the 2nd Circuit held that a demand letter seeking "immediate payment" violated the Act because it did not include an explanation how such a demand could be consistent with the consumer's §1692g validation rights. Properly drafted letters the court said, may seek immediate payment and comply with the Act so long as they include appropriate "***transitional language***" effectively informing a consumer of his rights under the FDCPA. The court then offered two examples of language that would pass muster – at least in the Second Circuit (and possibly in the Third and Seventh Circuits as well). In particular, the court said: "CCI could have both sought immediate payment and complied with the Act simply by inserting into the text of its letter transitional language that referred the addressee to the validation notice. For example, CCI might have added one of the following paragraphs to its demand letter:

x Although we have requested that you make immediate payment or provide a valid reason for nonpayment, you still have the right to make a written request, within thirty days of your receipt of this notice, for more information about the debt. Your rights are described on the reverse side of this notice.

x Our demand for immediate payment does not eliminate your right to dispute this debt within thirty days of receipt of this notice. If you choose to do so, we are required by law to cease our collection efforts until we have mailed that information to you. Your rights are described on the reverse side of this notice.

Surveying cases involving demands for immediate payment, the Third Circuit observed two years later in *Wilson* v. *Quadramed Corporation*, 225 F. 3d 350 (3d Cir. 2000) "that the debt collector's request for immediate payment did not, standing alone, violate the Act" in *Savino,* The violation of the Act [in *Savino]* consisted, rather, of the debt collector's decision to ask for immediate payment without also explaining that its demand did not override the consumer's rights under section 1692g to seek verification of the debt."

In *Walker* v. *National Recovery,* 200 F.3d 500, 501 (7th Cir., 1999), the 7th Circuit stated "[d]emands for immediate payment, or threats of immediate suit, may confuse recipients about their rights under the Act. A demand for immediate payment is not necessarily at odds with the statutory rights; consumers who acknowledge the validity of the debt must pay immediately, and if they do not pay they may legitimately be sued. But to an unsophisticated person—the Act's benchmark -the combination of a demand for prompt action with a notice that the recipient has 30 days to seek verification may produce befuddlement. *Bartlett* v. *Heibl* gave debt collectors a plain language reconciliation that if used produces a safe harbor from suits alleging confusion."

See also, *Bartlett* v. *Heibl,* 128 F.3d 497 (7th Cir.1997) and *Johnson* v. *Revenue Management Corp.*, 169 F.3d 1057 (7th Cir. 1999).The *Bartlett* "safe harbor" letter is reproduced in *Appendix B* to this publication.

[126] To date, there is no published Third Circuit opinion expressly approving specific "transitional" or explanatory language reconciling a demand for immediate payment with the consumer's validation rights. Moreover, the closest Third Circuit opinion on point, *Wilson* v. *Quadramed, supra,* drew a somewhat confusing distinction between a demand letter "affording" a debtor the "opportunity to pay this bill immediately" (OK) and one that expressly called upon a debtor to pay his bill in less than 30 days (not OK).

[127] *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (2d Cir. 1996).

[128] *Avila v. Albert G. Rubin and Van Ru Credit Corporation,* 84 F.3d 222 (7th Cir. 1996).

[129] *Id*

[130] *Id.*

[12|] *McKinney* v. *Cadleway Properties, Inc.,* 548 F.3d 496, 504 (7th Cir., 2008)

[132] "A form permitting the consumer to either confirm the debt or to dispute it and insert any other amount (including "'zero') does nothing to imply that confirmation is obligatory. Asking the consumer to confirm or dispute the debt--and providing a form on which to do so—does not obscure or overshadow the information provided earlier in the validation-of-debt notice." *McKinney v. Cadleway Properties, Inc.,* 548 F.3d 496, 504 (7th Cir. 2008)

[132] 225 F.3 350 (3d Cir. 2000)

[134]*Wilson v. Quadramed Corp,* 225 F.3d 350, 357 (3d Cir. 2000). Contrasting the offending dunning letter in *Graziano v. Harrision, supra* (which demanded payment within ten days and threatened immediate

legal action if payment was not made in that time), with the Quadramed letter, the Third Circuit found that the "Quadramed letter makes no such demand or threat." Instead, the court observed that Wilson was "presented with two options: (1) an opportunity to pay the debt immediately and avoid further action, or (2) notify Quadramed within thirty days after receiving the collection letter that he disputes the validity of the debt. As written, the letter does not emphasize one option over the other, or suggest that Wilson forego the second option in favor of immediate payment. Thus, we find the least sophisticated debtor would not be induced to overlook his statutory right to dispute the debt within thirty days."ff//so/7 v. *Quadramed, supra*, at 356. The Third Circuit thereupon declared: " In so holding, we reject Wilson's argument that the statement "affording him] an opportunity to pay immediately and avoid further action" is the equivalent of demanding payment within a period of less than thirty days." *Wilson* v. *Quadramed\ supra*, at 356.

[135] *Id* at 358. Moreover, the Third Circuit stated "We find the language in Quadramed's letter 'avoid further action,' does not convey a sense of urgency or threat of specific action which overshadows the validation notice. Accordingly, we find the least sophisticated debtor in this case would not feel pressured to overlook his statutory right to dispute the validity of the debt after reading Quadramed's \e\tex."*Wilson* v. *Quadramed Carp, supra*, FN 6 at 360.

[136] 109 F.3d 1428 (9th Cir. 1997)

[137] *Graziano* v. *Harrison*, 950 F.2d 107, 112 (3rd Cir. 1991).The statutory language set forth in §1692g(a)(3) does not expressly require that a debtor's *dispute* be in writing. The Third Circuit Court of Appeals found, however, that because §1692g(a)(4) (which allows the debtor to obtain verification of the debt from the debt collector), and §1692g(a)(5) (which allows the debtor to obtain the name and address of the original creditor) expressly provide that the debtor communicate in writing, the ***statutory scheme*** of these sections reveals a Congressional intent that any dispute, to be effective, must be in writing. *Graziano* v. *Harrison*, 950 F.2d 107,112 (3rd Cir. 1991).

A contrary holding was reached by the 9th Circuit in *Camacho* v. *Bridgeport Financial, Inc.*, 430 F.3d 1078 (9th Cir. 2005). *See, Riggs* v. *Prober & Raphael*, 68 IF.3d 1097 (9th Cir. 2012), which held, however, that *impliedly* requiring a dispute in writing is not a violation.

[138] *Graziano v. Harrison, supra*, at 112.

[139] *Camacho v. Bridgeport Financial, Inc.*, 430 F. 3d 1078 (9th Cir. 2005). Concluding that it must "give effect to the "plain meaning" of the statute," the 9th Circuit "respectfully" disagreed with *Graziano* because of a "statutory scheme" under the FDCPA "which assigns lesser rights to debtors who orally dispute a debt and greater rights to debtors who dispute it in writing." "The plain meaning of §1692g is that debtors can trigger the rights under subsection (a) (3) by either an oral or written 'dispute,' while debtors can trigger the rights under subsections (a)(4) and (a)(5) only through written dispute." Flad Congress intended to impose a writing requirement in §1692g(a)(3) it could have done so in the subsection itself,, as it did in the later subsections of §1692g(a).

Although the 9th Circuit agreed there "is much to be said for the Graziano' court's conclusion that policy considerations weigh in favor of its interpretation," the plain meaning of the FDCPA, according to the 9th Circuit. compelled the result reached in *Camacho*. "We can only insert language into a statute if its plain meaning is absurd....Because we conclude that the FDCPA's statutory scheme, which assigns lesser rights to debtors who orally dispute a debt and greater rights to debtors who dispute it in writing, is not absurd, we are not at liberty to insert any additional language."

[140] 15 U.S.C. §1692g(a)(4)

[141] *Mahon v. Credit Bureau*. 171 F.3d 1197 (9th Cir. 1999).

[142] *Graziano* v. *Harrison*, 950 F.2d 107 (3rd Cir. 1991)

[143] *Chaudry* v. *Gallerizzo*, 174 F.3d 394 (4th Cir. 1999).

[144] *Chaudry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999).

See also, *Clark v. Capital Credit & Collection Services, Inc.*, 460 F. 3d 1162, 1173-1174 (9th Cir. 2006). Citing *Chaudry* as a "reasonable standard," the 9th Circuit agreed that debt collectors are, within reasonable limits, entitled to rely upon their clients' statements to verify a debt. *Clark* v. *Capital Credit & Collection Services*, Me..460 F.3d 1162 (9th Cir. 2006).

[145] *Chaudry* v. *Gallerizzo, supra*, citing S. Rep. No. 95-382, at 4 (1977).

[146] The 2006 amendment expanded §1692g (b) by adding the following sentence: "Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (1) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30 day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor."
The FTC Official Staff Comment on §1692g states that a debt collector need not cease normal collection activity within the consumer's 30 day period to give notice *until* he receives a notice from the consumer. The 2006 amendment reinforces the FTC's earlier interpretation—set forth in its first ever formal advisory opinion—that "the thirty-day time frame set forth in Section [§1692g] is a *dispute* period within which the consumer may insist that the collector verify the debt, and not a *grace* period within which collection efforts are prohibited." *Mezines, FTC Advisory Opinion* (March 31, 2000).

[147] §1692g (b)

[148] *Durkin* v. *Equifax Check Sendees, Inc.*, 406 F. 3d 410 (7th Cir. 2005).

[149] §1692g(b); *Guerrero* v. *RJM Acquisitions, 499* F.3d 926 (9th Cir. 2007) (We...hold that the Act requires a debt collector who receives notice that a consumer disputes an alleged debt to cease collection efforts *until* it provides the consumer with verification of the debt. The Act does not impose an independent obligation to verify a debt where the collector ceases all collection efforts directed at the consumer.

[150] *Jang* v. *A.M. Miller and Associates*, 122 F 3d. 480 (7th Cir. 1997) held that a collection agency, A.M. Miller and Associates, did ***not*** violate §1692g even though it had agreed in advance with its client, Discover Card, to return any file where the debtor requested verification. A.M. Miller provided the proper notice mandated by §1692g and then ceased collection activities after receiving requests for validation. According to the 7th Circuit, this was a perfectly appropriate course of action. "After requiring debt collectors to promise verification upon request, the statute allows debt collectors to sidestep this requirement by ceasing all collection activities." Said the Court: "[w]hen a debt collector provides the language required by the statute, and only the language provided by the statute, we hold that a collection letter cannot be false, misleading or deceptive merely because the collection agency always chooses one statutorily allowed path (ceasing all collection activity) over the other (providing debt verification)."

[151] *Guerrero* v. *RJM Acquisitions, 499* F.3d_926 (9th Cir. 2007). "The plain language of the statute is clear. When a debt is disputed, collectors must stop until the debt is verified. Once the debt is verified, collection efforts may continue. Nothing in the provision suggests an independent obligation to verify a disputed debt where the collector abandons all collection activity with respect to the consumer." The 9th Circuit agreed with the 7th Circuit's decision in *Jang* v. *A.M. Miller and Associates*, 122 F 3d. 480 (7th Cir. 1997).
Jang v. *A.M. Miller and Associates, supra,* citing *Smith* v. *Transworld Systems, Inc.* 953 F.2d 1025, 1031 (6th Cir. 1992)(debt collector does not violate the FDCPA by ceasing collection activity after receiving request for validation; debt collector need not first send validation before ceasing collection activity).

[152] *Jang* v. *A.M. Miller and Associates, supra.*

[153] A collector may either provide the requested validations and continue its collection activity or it may cease all collection activities. Observing that "a collector, notified that a debt is disputed, thus has a choice," the 9th Circuit held "[i]t would make little sense to impose an independent obligation to verify an alleged debt on a collector who, for example, decides a disputed debt is not worth the effort and chooses to close or sell the account. Or, as the court in *Jang* noted, on a collector who, upon receiving a dispute notice, realizes the consumer does not in fact owe the debt and so abandons all costly collection efforts." *Guerrero* v. *RJM Acquisitions,* 499 F.3d 926 (9th Cir. 2007).
See also, Eschbach, Circuit Judge, concurring in *Johnson* v. *Revenue Management Corporation, supra,* citing *Jang v. A.M. Miller and Associates, supra.*

[154] *Shimeck v. Forbes,* 374 F.3d 1011 (11th Cir. 2004), "The plain language of §1692g(b) does not extinguish a collector's right to secure a debt under state law (by filing a lien) prior to the consumer's request for debt validation."

[155] *Durkin v. Equifax Check Services, Inc.* 406 F. 3d 410 (7th Cir. 2005). In *Durkin,* the 7th Circuit held that a demand letter succeeded by two follow-up letters during the thirty day validation period did not "create

an unacceptable level of confusion so as to entitle the plaintiffs to summary judgment. To be clear, the validation period is not a grace period." Rejecting Durkin's argument that demands for payment during the validation period confuse the unsophisticated consumer as a matter of law, the 7th Circuit declared that such a view "is unsupported by the FDCPA and runs contrary to our case law." The fact that a debt collector demands payment during the validation period "does not, in and of itself, justify an award of summary judgment to the plaintiffs." Although some follow-up letters might "certainly go over the line," the court said, "in general, not every follow-up letter demanding payment during the validation period overshadows or contradicts a validation notice." Moreover, not every follow-up letter sent during the validation period must automatically reiterate the safe-harbor validation notice [set forth in *Bartlett* v. *Heibl*, 128 F. 3d 497 (7th Cir. 1997)], refer back to that notice, or remind debtors about the validation period and the time remaining in that period."

[156] §1692g(b). See also, *Durkin* v. *Equifax Check Services, Inc.* 406 F. 3d 410 (7th Cir. 2005).

[157] *Durkin* v. *Equifax Check Services, Inc.* 406 F. 3d 410 (7th Cir. 2005). Follow-up letters sent during the thirty day validation period may not indicate that the time for disputing the debt has passed. They may not misrepresent or cloud the amount of time remaining to dispute the debt. They may not "contain any overt misinformation, apparent contradiction, or noticeable lack of clarity concerning the validation period or the debtor's rights under §1692g." Indeed, such letters may even "encourage debtors to pay their debts by informing them of the possible negative consequences of failing to pay." According to the 7th Circuit, "undeniably, one way to encourage someone with a true dispute to come forward and resolve that dispute is to inform him of the possible negative consequences of his continued inaction."

[158] At least one court has held a follow-up demand letter within the 30 day validation period to be permissible when the ten day period for payment provided in the second letter (which was sent nearly 30 days after the first letter) expired outside of the thirty day validation period. *Sturdevant* v. *Thomas E. Jolas, P.C.* 942 F. Supp. 426, 430 (W.D. Wis. 1996). The letter in question stated "payment in full or arrangement for payment must be made to my office within ten (10) days of receipt of this letter." The first letter was sent on August 7, 1995; the second letter was sent on August 28. 1995. The court found that the ten day period for payment in the August 28 letter did not overshadow or contradict the validation notice in the August 7 letter.

The 9th Circuit appears to have drawn a distinction between follow-up letters within the initial 30 day validation period that *demand* payment and those that merely "*request*" prompt payment. In *Renick* v. *Dun & Bradstreet*, 290 F.3d 1055 (9th Cir. 2002), Dunn & Bradstreet sent a second dunning notice twenty days after its initial demand letter. On the front, it asked Renick to '[u]se the tear-off portion of this letter . . . to send your payment today .' The reverse side provided the validation information required by §1692g(a) and stated that "PROMPT PAYMENT IS REQUESTED." Because the 9th Circuit viewed the instruction that Renick "[u]se the tear-off portion of this letter. . . to send your payment today" as a "request rather than a demand" and "carried no sense of urgency," this "request" did not overshadow the language advising the debtor that he had 30 days in which to dispute the debt. Moreover, the statement on the reverse " 'PROMPT PAYMENT IS REQUESTED' was in the same font as the accompanying validation notice; was followed by a statement informing Renick that he had 30 days to challenge the debt's validity; and did not convey a threat that could induce Renick to 'ignore his right to take 30 days or to verify' his debt and act immediately,'" citing *Swanson* v. *S. Or. Credit Service, Inc.* 869 F.2d 1222, 1226 (9th Cir. 1988).

[159] *Bartlett* v. *Heibl*, 128 F.3d 497 (7th Cir. 1997); *Johnson v. Revenue Management Corporation*, 169 F.3d 1057 (7th Cir. 1999); *Walker v. National Recovery, Inc.*, 200 F.3d 500 (7th Cir. 1999).

[160] *Bartlett* v. *Heibl. supra*, In *Johnson* v. *Revenue Management Corporation, supra,* the 7th Circuit stated that "the creditor is entitled to file suit whenever it chooses. though progress in the suit may be delayed by verification."

[161] If a debtor properly requests validation of his debt, *all* collection efforts—"through litigation or otherwise"—must be suspended until the requested verification is provided. *Bartlett v. Heibl, supra*.

But, *c.f Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F.Supp. 1148, 1155 (E.D.N.Y. 1996), where the court found that an attorney's demand letter statement that "we are not required to wait during the thirty (30) day period and may commence legal proceedings against you at any time, could reasonably "lead a jury to find that the least sophisticated consumer would be intimidated by the looming suit into foregoing their right to dispute the debt and/or force them to rush their response." Accordingly, the District Court denied the law firm's motion for summary judgment on this issue.

[162] A copy of Judge Posner's letter appears in Appendix A.

[163] In a later decision, the 7th Circuit reminded debt collectors of the "safe harbor" letter introduced in *Bartlett: "Bartlett* gave debt collectors a plain-language safe harbor from suits alleging confusion. When the Bartlett language is not employed, however, a debt collector must meet on the merits a contention that the letter would confuse an unsophisticated reader." *Walker* v. *National Recovery, Inc200* F.3d 500 (7th Cir. 1999).

[164] In *Riddle & Associates, P.C.* v. *Kelly,* 414 F. 3d 832 (7th Cir. 2005), the 7th Circuit vigorously reinforced its position that debt collectors using verbiage "virtually identical" to the "safe harbor" language set forth in *Bartlett* would not be subject to FDCPA liability under §1692g. Indeed, the court upheld sanctions against an attorney who demanded $3,000 from a collection attorney where a dunning letter was "virtually identical" to the *Bartlett* safe haven letter. Upholding the district court's finding that Kelly's attorney, Edelman, Combs & Lattumer, was "trying to extort money from Riddle by saying it would go away for $3,000, even though it could not have believed that its overshadowing argument had any chance of success in court," the 7th Court warned that by "threatening to file a baseless suit, Edelman apparently did not believe [we meant] what we said in *Bartlett* - we do. There was no conceivable basis for a §1692g claim."

[165] *See, Cavallaro* v. *Law Office of Shapiro & Kriesman,* 933 F. Supp. 1148, 1155 (E.D.N.Y. 1996)

[166] *Ellis* v. *Solomon & Solomon, P.C.,* 591 F.3d 130 (2nd Cir. 2010) illustrates the pitfalls awaiting attorneys who commence suit within the 30 validation period.

In *Ellis,* the 2nd Circuit upheld the District Court's conclusion that a law firm violated the FDCPA by personally serving Ellis with a summons and complaint during the thirty-day validation period, without explaining that commencement of the lawsuit did not affect the rights set forth in the validation notice. Holding that service of process during the validation period must, at a minimum, be preceded or accompanied by notice to the consumer clarifying that the lawsuit does not in any way alter the information contained in the validation notice, the 2nd Circuit made clear that although commencement of litigation is permissible during the 30 day validation period, the debt collector must provide an explanation – preferably in both the validation notice and in a notice accompanying the summons and complaint–that the lawsuit will not have any impact upon the disclosures given in the validation notice. *Ellis* v. *Solomon & Solomon, P.C.,* 591 F.3d 130, 131 (2nd Cir. 2010). "We affirm, and hold that the validation notice is overshadowed where a debt collector serves a consumer with process initiating a lawsuit during the validation period, without clarifying that commencement of the lawsuit has no effect on the information conveyed in the validation notice."

Finding it "difficult to discern what tactical advantage was gained by commencing a lawsuit when the validation period had only two weeks to run,," the Second Circuit nevertheless went on to declare "[o]f course, debt collectors may continue collection activities, including commencing litigation, during the validation period; but in doing so the debt collector must not transgress §1692g(b)'s proscription of collections activities that "overshadow or... [are] inconsistent with" the validation notice.

Finally, the court offered specific advice for those attorneys choosing to commence suit before the end of the validation period: "[A]n explanation of the lawsuit's impact — or more accurately, lack of impact — on the disclosures made in the validation notice must be provided. This explanation should be set forth in either the validation notice itself, or in a notice provided with the summons and complaint. The best practice is to provide an explanation in both the validation notice and the summons and complaint. Clarifying that commencement of a lawsuit does not trump the validation notice will come at little or no cost to debt collectors and will ensure that the consumer rights secured under the FDCPA are not overshadowed or contradicted."

[167] Section §1692c(a)(2) re-enforces the 9th Circuit's view that Congress treated attorneys as intermediaries between debtors and debt collectors; a debtor's attorney does not require the same protections as a debtor himself. Declaring that "the Act's purposes are not served by applying its strictures to communications sent only to a debtor's attorney, particularly in the context of settlement negotiations," the 9th Circuit held "when the debt collector ceases contact with the debtor, and, instead communicates exclusively with an attorney hired to present the debtor in the matter, the Act's strictures no longer apply to those communications." *Guerrero v. RJM Acquisitions,* 499 F.3d 926 (9th Cir. 2007).

But *c.f Evory* v. *RJM Acquisitions Funding, L.L.C.* 505 F.3d 769 (7th Cir. 2007) holding, among other things, that "any written notice sent to the [consumer's]lawyer must contain the information that would be required by the Act if the notice were sent to the consumer directly." Moreover, the 7th Circuit held that a letter

misrepresenting the unpaid balance of a consumer's debt "would be actionable whether made to the consumer directly, or indirectly through his lawyer."

In *Schmitt* v. *FMA Alliance*, 398 F. 3d 995 (8th cir.2005), the 8th Circuit refused to impute a creditor's knowledge of attorney representation to a debt collector; a debt collector must, under this section [§1692(a)(2)], have actual knowledge of representation. Observing that knowledge of a principal will not be imputed to an agent, the court declined to embrace the FDCPA as a special exception to "well settled rules of general agency law" – especially where it found no textual basis in the FDCPA for such an exception. Information in a creditor's file–including bankruptcy, representation by counsel or that a debt is paid–or even bogus– is not imputed to a debt collector unless such information is, in fact, transmitted to the debt collector. According to the 7th Circuit, §1692(a)(2), makes liability contingent upon the debt collector's knowledge. *Randolph* v. *IMBS, Inc.*, 368 F. 3d 726 (7th Cir. 2004).

[108] In *Horkey* v. *J.V.D.B. & Associates, Inc.*, 333 F.3d 769 (7th Cir. 2003), a consumer–Amanda Horkey– responded to an incoming collection call at her place of employment by advising the debt collector that she could not talk with him at work. Horkey told him, however, that she could call him back from her home and arrange a payment schedule. Shortly after Horkey terminated the conversation, the debt collector called Horkey's place of employment two more times. Because J.V.D.B. did not have Horkey's prior consent or a court's permission to communicate with her at work, the 7th Circuit stated the "salient question" was whether J.V.D.B "knew or had reason to know" that Horkey's employer prohibited her from receiving collection calls at work. Affirming the district court's summary judgment in favor of Horkey, the 7th Circuit made clear that [unsophisticated consumers, whatever else may be said about them, cannot be expected to assert their §!692c(a)(3) rights in legally precise phrases. It is therefore enough to put debt collectors on notice under §1692c(a)(3) when a consumer states in plain English that she cannot speak to the debt collector at work. That is what Horkey did."

In *Evon* v. *Law Offices of Sidney Mickel*, — F.3d —, 2012 WL 3104620 (9th Cir. 2012), despite the debtor's request not to contact the debtor at the place of business, the creditor sent a demand letter to the place of business. To make matters worse, the letter was mailed in a window envelope, which plainly stated below the mailing address: "Creditor: CACH, LLC Our File Number: xxxxxxxxxxxxxxxx Original Creditor: Maryland National Bank Original Account Number: xxxxxxxxxxxxxx Balance: Sxxxx.xx". And, the name and address of the attorney was contained on the envelope as a return envelope. "Mickell knew or could reasonably anticipate that a letter sent to a class member's employer might be opened and read by someone other than the debtor as it made its way to him/her. This is exactly what happened to Evon, causing her stress and embarrassment, precisely what the Act is designed to prevent."

Finally, the return address on the envelope was from the "Law office of Sidney H. Mickell." Any person handling Evon's mail would therefore know that Evon was receiving legal mail, a fact many people would prefer be kept private. Other than holiday greetings, correspondence from an attorney's office rarely relays good news and often communicates information that can be embarrassing or even frightening to the recipient. As the Senate Report noted, disclosing a consumer's personal affairs to his or her employer is a form of collection abuse. The Act was explicitly intended to protect consumers from these types of communications.

The Federal Trade Commission (FTC) Commentary prohibits this type of conduct. In its Staff Commentary, the FTC states:

Accessibility by third party. A debt collector may not send a written message that is easily accessible to third parties. For example, he may not use a computerized billing statement that can be seen on the envelope itself. A debt collector may use an "in care of" letter only if the consumer lives at, or accepts mail at, the other party's address.

Staff Commentary, 53 Fed. Reg. 50097–02 (Dec. 13, 1988).

[169] *Clark* v. *Capital Credit & Collection Services*, 460 F.3d 1162 (9th Cir.2006). In Clark, a consumer disputed the alleged debt, requested verification and directed the collection agency not to make any calls to his place of business or residence. Several months after this cease and desist directive, the consumer, Mrs. Clark, placed a call to the collection agency's attorney's office to request information about the alleged debt. She left a message with the attorney's secretary. When the secretary contacted Capital Credit to relay this message, Capital instructed the attorney not to return the call. Instead, a Mrs. Brumley from the collection agency returned the call to Mrs. Clark.

Reasoning that a debtor's right to direct a collector to "cease and desist" comes into existence only when the debtor affirmatively directs the debt-collector to cease communications, the 9th Circuit further stated that "permitting the debtor to waive or revoke such a directive is hardly inconsistent with the provision creating the right or with the public policy of the FDCPA." "Certainly," said the Court, "there is nothing inherently abusive, harassing, deceptive or unfair about a return phone call." In applying its "newly articulated waiver standard" to the facts of this case, the 9th Circuit said "it is obvious that even the least sophisticated consumer would recognize Mrs. Clark's request constituted consent for Mr. Hasson, Capital's attorney, to return Mrs. Clark's telephone call in order to provide the specific information she requested."

Not so for Mrs. Brumley. The court declined to "create a rule that by waiving the protection of §1692c(c) as to one debt collector, a debtor waives that protection with regard to any other debt collector with which the debt collector may be collaborating to collect the same debt." In a holding the dissent proclaimed "nonsensical" and lacking in "common sense," the 9th Circuit ruled "it is obvious that Mrs. Clark did not realize that by calling Hasson, she was consenting to a return call from Brumley."

[170] 15 U.S.C. §1592c(b)

[171] "Even when viewed from the perspective of an unsophisticated consumer, the filing of a debt collection lawsuit without the immediate means of proving the debt does not have the 'natural consequence of harassing, abusing or oppressing' a debtor. *Any* attempt to collect a debt will be unwanted by a debtor, but employing the court system in the way alleged [here] cannot be said to be an abusive tactic under the FDCPA." *Harvey* v. *Great Seneca Financial Corporation,* 453 F. 3d 324 (6th Cir. 2006). In upholding the dismissal of a consumer's claim, the 6th Circuit noted that "the simple fling of a lawsuit is an authorized method of collecting a debt. The examples of oppressive conduct listed in §1692d are not comparable to the single filing of a debt collection lawsuit."

[172] A debt collector's message to a consumer's co-worker that the consumer should "stop being such a [expletive] bitch," was "unequivocally" abusive as a matter of law. *Horkey* v. *J.V.D.B. & Associates, Inc.,* 333 F.3d 769 (7th Cir. 2003).

[173] *Hosseinzadeh* v. *MRS Associates,* 387 F. Supp. 2d 1104 (W.D. Cal. 2005). "Meaningful disclosure presumably requires that the caller must state his/her name and capacity and disclose enough information so as not to mislead the recipient as to the purpose of the call." The court concluded that a debt collector violated §1692d when its employees failed to disclose defendant's identity and the nature of defendant's business in the messages left on plaintiffs answering machine." See also, *Foti* v. *NCO Financial Systems, Inc.* , 424 F. Supp. 643 (S.D.N.Y. 2006) and *Belin* v. *Litton Loan Servicing, LP.,* 2006 WL 1992410 (M.D. Fla.). See also, *Edwards* v. *Niagara Credit Solutions, Inc.,* 584 F.3d 1350 (11th Cir. 2009).

[174] *Campuzano-Burgos v. Midland Credit Management,* 550 F.3d 294, 298 (3rd Cir. 2008). "A communication is deceptive for purposes of the Act if "it can be reasonably read to have two or more different meanings, one of which is inaccurate." *Rosenau v. Unifund Corp.,* 539 F.3d 218, 222 (3d Cir.2008); *Brown* v. *Card Serv. Ctr.,* 464 F.3d 450, 455 (3d Cir. 2006).

[175] *Muha v. Encore Receivable Management, Inc.,* 558 F.3d 623, 629 (7th Cir., 2009). For example, "Confusing language in a dunning letter can have an intimidating effect by making the recipient feel that he is in over his head and had better pay up rather than question the demand for payment." *Muha* at 629.

[176] *Ellis* v. *Solomon and Solomon, P.C.* 591 F.3d 130, 135 (2nd Cir. 2010); *LeBlancv. Unifund CCR Partners,* 2010 US APP LEXIS 6501 (11th Cir. March 30, 2010)("The FDCPA does not ordinarily require proof of intentional violation, and, as a result, is described by some as a strict liability statute"); *Donohue v. Quick Collect, Inc.,* No. 09-35183 (9th Cir. 1/13/2010) ("The FDCPA is a strict liability statute that makes debt collectors liable for violations that are not knowing or intentional"); *Ruth* v. *Triumph Partnerships,* 577 F.3d 790, 806 (7th Cir 2009) ("The FDCPA is a strict liability statute, and debt collectors whose conduct falls short of its requirements are liable irrespective of their intentions"); *Miller v.l Javich Block & Rathbone,* 561 F.3d 588, 592 (6th Cir 2009); *Clark* v. *Capital Credit & Collection Services, Inc.* 460 F. 3d 1162 (9th Cir. 2006); *Randolph v. IMBS, Inc.,* 368 F. 3d 726 (7th Cir. 2004). "§1692e(2)(A) creates a strict liability rule. Debt collectors may not make false claims, period." *Turner* v. *J.V.D.B. Associates, Inc.,* 330 F. 3d 991 (7th Cir. 2003) ("Knowledge is not an element of §1692e(2)(A)").

[177] *Clark* v. *Capital Credit & Collection Sendees, Inc.* 460 F. 3d 1162 (9th Cir. 2006); *Randolph v. IMBS, Inc.,*

368 F. 3d 726 (7th Cir. 2004); *Owen* v. *I.C. Systems, Inc.*, 629 F.3d 1263 (11th Cir. 2011) discussed a collection agency's use of erroneous figures received from a creditor, without actually verifying the figures, but having, *inter alia,* a written agreement with the creditor to insure that figures are accurate, and requiring immediate notification of changes:

At the outset, we agree with the Tenth Circuit that "the procedures component of the bona fide error defense involves a two-step inquiry." Johnson v. Riddle, 443 F.3d 723, 729 (10th Cir.2006); see also Reichert v. Nat'l Credit Sys. Inc., 531 F.3d 1002, 1006 (9th Cir.2008) (quoting same). The first step is "whether the debt collector 'maintained'— i.e., actually employed or implemented—procedures to avoid errors." Johnson, 443 F.3d at 729; Reichert, 531 F.3d at 1006. The second step is "whether the procedures were 'reasonably adapted' to avoid the specific error at issue." Johnson, 443 F.3d at 729; Reichert, 531 F.3d at 1006." [629 F.3d 1274]

However, to qualify for the bona fide error defense, the debt collector has an affirmative statutory obligation to maintain procedures reasonably adapted to avoid readily discoverable errors, such as the interest errors here. See 15 IJ.S.C. § !692e(2)(A) (prohibiting the false representation of "the character, amount, or legal status of any debt"); id. § 1692f(l) (prohibiting "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law"). A debt collector does not fulfill this affirmative obligation by delegating it entirely to creditors, such as AAA, whose actions are not even regulated by the FDCPA. See 15 IJ.S.C. § 1692k(a) (subjecting debt collectors to civil liability for FDCPA violations)." [629 F.3d 1277]

[178] *Hartman* v. *Great Seneca Financial Carp.*, 569 F.3d 606 (6th Cir. 2009); *Miller* v. *Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Muha* v. *Encore Receivable Management, Inc.*, 558 F.3d 623 (7th Cir. 2009); *Donohue* v. *Quick Collect, Inc.*, No. 09-35183 (9th Cir. 1/13/2010) (9th Cir. 2010).

A state court complaint that allegedly failed to adequately explain the relationship between a creditor, transaction processor and merchant did not violate §1692e. *Beler* v. *Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F. 3d 470 (7th Cir. 2007). Although the 7th Circuit made clear that certain required notices "must be clear rather than muddy," it stated the FDCPA "does not require everything frm a debt collector's pen to be in plain language." However desirable it might be, §1692e does not impose a "plain language" requirement. "A rule against trickery differs from a command to use plain English and write at a sixth grade level."

[179] *Campuzano-Burgos* v. *Midland Credit Management*, 550 F.3d 294, 298 (3rd Cir. 2008); *Donohue* v. *Quick Colled Inc.*, No. 09-35183 (9th Cir. 1/13/2010)

[180] *Donohue* v. *Quick Collect, Inc.*, No. 09-35183 (9th Cir. 1/13/2010) (9th Cir. 2010); *Hahn v. Triumph Partnerships LLC*, 557 F.3d 755 (7th Cir. 2009).

In *Donohue*, the 9th Circuit rejected an assertion that a debt collection complaint violated 15U.S.C. § 1692e because of an alleged false representation of the character of the debt Donohue owed. In particular, Donohue's suit claimed Quick Collect violated § 1692e by "misrepresenting the amount of interest" — i.e., the Complaint incorrectly stated that $32.89 was "interest [on the principal] of 12% per annum."

"We recognize, as the Seventh Circuit already has, that the materiality requirement functions as a corollary inquiry into whether a statement is likely to mislead an unsophisticated consumer." "In assessing FDCPA liability," the 9th Circuit declared, "we are not concerned with mere technical falsehoods that mislead no one, but instead with genuinely misleading statements that may frustrate a consumer's ability to intelligently choose his or her response. Here, the statement in the Complaint did not undermine Donohue's ability to intelligently choose her action concerning her debt. Based on the information in the Complaint, Donohue could have challenged the accuracy or legality of the total debt and principal owed, futile as that may have been, or Donohue could have paid the accurately stated sum to settle her debt. Even if the Complaint had separated $32.89 into interest and finance charges, we can conceive of no action Donohue could have taken that was not already available to her on the basis of the information in the Complaint—nor has Donohue articulated any different action she might have chosen. Therefore, we conclude that the statement in the Complaint was not material and hence not actionable under §§ 1692e and 1692f."

[181] *Donohue* v. *Quick Collect, Inc.*, No. 09-35183 (9th Cir. 1/13/2010) (9th Cir. 2010). The amounts sought to be collected in *Allen* v. *LaSalle Bank*, 629 F.3d 364 (3rd Cir.. 2011), were inappropriate, and not to be ignored just because the communication of the inappropriate amounts were made to counsel and not to the debtor directly.

Inappropriate or unjustified demands for relief constitute FDPCA violations. In *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992) a lawsuit containing a claim for non-compensable relief was deemed to be a violation of §1692e(2)(B). An attorney filed a collection suit to recover an unpaid real estate broker's commission. Modifying a standard form complaint he often used in NSF check cases (which included an attorney fee in accordance with state law), the lawyer failed to remove the attorney fee provision in his suit for unpaid commission. The Court found that inclusion of the demand for attorney's fees was a misrepresentation of the compensation which may be lawfully received by the debt collector under §1692e(2)(B).

In *Jenkins* v. *Heintz*, the plaintiff alleged that Heintz's attempts to collect force placed financial insurance premiums~(which covered a lender's expenses associated with the customer's default, such as repossession costs) violated this section because such insurance was not authorized by her loan agreement. After the United States Supreme Court remanded the case for further proceedings, the district court (and later, the 7th Circuit Court of Appeals) upheld Heintz's motion for summary judgment on the ground that even if some of the forced placed insurance charges were unauthorized, Heintz could not determine the same from the agreement and was under no duty "to conduct a independent investigation into the legal intricacies of the client's contract with the consumer...." *Jenkins* v. *Heintz*, 124 F.3d 824, 833 (7th Cir. 1997).

[182] *Rosenau* v. *Unifund Corp.*, 539 F.3d 218 (3rd Cir., 2008); *Gonzalez* v. *Kay*, 577 F.3d 600 (5th. Cir., 2009); *Kistner* v. *Law Offices of Michael P. Margelefsky*, 518 F.3d 433 (6th Cir., 2008).

In *Rosenau* v. *Unifund Corp.*, 539 F.3d 218 (3rd Cir., 2008), the Third Circuit addressed the question of "whether a letter from a Legal Department that employs no lawyers is misleading under § 1692e(3)." Because "the least sophisticated debtor" could reasonably conclude that a letter, which came from the debt collector's 'Legal Department,,'suggested current attorney involvement,, the Third Circuit held that a"debt collection letter can be deceptive under the FDCPA even if it only implies that it is from an attorney *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 224 (3rd Cir., 2008).

In *Rosenau*, Unifund, a debt buyer, sent a collection letter to Richard Rosenau stating in relevant part: "If we are unable to resolve this issue within 35 days we may refer this matter to an attorney in your area for legal consideration. If suit is filed and if judgment is rendered against you, we will collect payment utilizing all methods legally available to us, subject to your rights below.... This communication is from a debt collector. This is an attempt to collect a debt...." In place of a signature, the bottom of the letter read: "Unifund Legal Department." On appeal, Rosenau successfully argued that the letter was deceptive because (1) it implied to the least sophisticated consumer that it came from an attorney and (2) it stated that it came from the "Legal Department." Accordingly, the 3rd Circuit overturned the district court's judgment on the pleadings in favor of Unifund and remanded for further proceedings to determine whether the phrase "LegalDepartment" could imply to the least sophisticated debtor that a lawyer was involved in drafting or sending the letter. *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 224 (3rd Cir., 2008).

However, in *Lesher v. Law Offices of Mitchell N. Kay, P.C.*, 650 F.3d 993 (3d Cir. 2011), the Third Circuit reviewed the Kay law firm's language in its demand letter which stated, on reverse side that "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." The said language was contained within the letter which was upon the law firm's letterhead, thereby plainly indicating it was from an attorney. The Court stated that "the FDCPA . . . .prohibits the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. $ 1692e. The sixteen subsections of section 1692e set forth a non-exhaustive list of practices that fall within this ban. These subsections include:

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

...

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken."

The Court discussed the *Gonzalez* v. *Kay*, 577 F.3d 600 (5th. Cir., 2009) case is discussed separately below) in making its determination, as the said demand letter was virtually identical. The Third Circuit came to the same conclusion, i.e., that ". . . the Kay Law Finn's letters violate section 1692e's general prohibition against "false, deceptive, or misleading" communications because they falsely imply that an attorney, acting as an attorney, is involved in collecting Lesher's debt. In our view, the least sophisticated debtor, upon receiving these letters, may reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action. We do not believe that such a reading would be "bizarre or idiosyncratic." *Wilson*,

225 F.3d at 354–55 (internal quotation marks and citation omitted)."

In Gonzalez v. *Kay*, 577 F.3d 600 (5th. Cir., 2009) neither Mitchell Kay nor any lawyer in the Kay Law Firm reviewed Gonzalez's file or were actively involved in sending a demand letter containing a disclaimer on the reverse side stating, in relevant part, "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." Rejecting Kay's assertion that such disclaimer language was sufficient to notify Gonzalez that lawyers were not involved in the debt collection, the 5th Circuit held that the district court prematurely dismissed Gonzalez's complaint.

The 5th Circuit distinguished *Greco* v. *Trauner, Cohen & Thomas, LLP*, 412 F. 3d 360,361 (2d Cir. 2005) — which upheld virtually identical disclaimer language (discussed in greater detail below)—by pointing out the disclaimer language in Kay was printed on the back of the letter, whereas the disclaimer in *Greco* was on the front of the letter and within the "body" of the main text of the letter. Finding that the "disclaimer on the back of the letter completely contradicted the message on the front of the letter—that the creditor had retained the Kay Law Firm and its lawyers to collect the debt," the Fifth Circuit declared "the disclaimer on the back may not have been effective. There was also ample room on the front of the letter to include this disclaimer so as to clearly articulate to the consumer the nature of the law firm's involvement. Accordingly, this letter falls in that middle ground in which the letter is neither deceptive as a matter of law nor not deceptive as a matter of law because the "least sophisticated consumer" reading this letter might be deceived into thinking that a lawyer was involved in the debt collection."

Acknowledging "this is a close case," the 5th Circuit stated "reasonable minds can differ as to whether this letter is deceptive. Although the mere presence of disclaimer language might be dispositive in certain circumstances, the context and placement of that disclaimer is also important. We do not construe the disclaimer in isolation but must analyze whether the letter is misleading as a whole. We caution lawyers who send debt collection lettersto state clearly, prominently, and conspicuously that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time. Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the "price of poker has gone up." *Gonzalez* v. *Kay*, 577 F.3d 600,607 (5th. Cir., 2009).

In a strong dissent, Judge Jolly declared: "I respectfully dissent. Contrary to the majority's analysis, I can only conclude that this collection letter conforms in every respect to the standards for legality recognized by the Second Circuit in *Greco* v. *Trauner, Cohen & Thomas*, Gonzalez v. Kay, 577 F.3d 600, 607 (5th. Cir., 2009).

Kistner v. *Law Offices of Michael P. Margelefsky*, 518 F.3d 433 (6th Cir., 2008), involved a collection letter from The Law Offices of Michael P. Margelefsky, LLC. Printed on letterhead reading The Law Offices of Michael P. Margelefsky ,' the letter contained a block signature declaring the letter was sent by an 'Account Representative,' made repeated references to "The Law Offices of Michael P. Margelefsky" and included a payment voucher directing remittance to "Michael P. Margelefsky." Margelefsky asserted he had no personal involvement in sending the letter to Kistner and the letter was not sent by "an attorney."

Based on the conflicting aspects of the letter, the 6th Circuit concluded a genuine issue of material fact existed under the 'least sophisticated consumer" standard whether the letter could be "susceptible to a belief that it is from an attorney. Holding that the district court erred in granting summary judgment to Margelefsky, the 6th Circuit would "not go to the other extreme either by granting summary judgment to Kistner. Instead, a jury should determine whether the letter is deceptive and misleading — specifically, whether the letter gives the impression that it is from an attorney even though it is not." *Kistner* v. *Law Offices of Michael P. Margelefsky*, 518 F.3d 433, 441 (6th Cir., 2008).

In *Greco* v. *Trauner, Cohen & Thomas, LLP*, 412 F. 3d 360 (2d Cir. 2005), the 2nd Circuit held that a debt collection letter contained sufficient disclaimers sufficient to bar, as a matter of law, any recovery under the FDCPA. A law firm's letter not signed by any individual attorney (but containing the finn's name as a signature block), stated among other things: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. Flowever, if you fail to contact this office, our client may consider additional remedies to recover the balance due."

Rejecting Greco's contention that the letter's presentation. its letterhead and its signature block over-represented the level of attorney involvement," the 2nd Circuit emphasized that although one cannot "mislead the debtor regarding meaningful 'attorney' involvement in the debt collection process," it did not follow that

attorneys may participate in this process only by providing actual legal services." In other words, said the court, "our prior precedents demonstrate that an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes disclaimers that should make clear even to the 'least sophisticated consumer' that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney."

The FDCPA provides no definition or reference to "meaningful involvement." A line of cases, including *Miller* v. *Wolpoff & Abramson LLP*, 321 F. 3d 292 (2d Cir. 2003); *Nielsen* v. *Dickerson*, 307 F. 3d 623 (7th Cir. 2002)and *Boyd* v. *Wexler*. 275 F.3d 642 (7th Cir. 2001) all explore, in some detail, the concept of an attorney's "meaningful involvement" in handling collection matters.

In *Boyd* v. *Wexler*, a three attorney law firm sent 439,600 dunning letters on firm letterhead over an eight month period. Overturning the district court's summary judgment order in favor of the defendant law firm (Wexler), the 7th Circuit found Wexler's affidavit testimony that he personally reviewed most of these collection letters himself to be "incredible, or at least highly implausible," and that a reasonable jury could infer that the dunning letters were not, in fact, reviewed by Wexler or any other lawyer. Citing *Crossley* v. *Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989), the 7th Circuit stated " '[a] debt collector letter on an attorney's letterhead conveys authority and credibility.' " An attorney, said the 7th Circuit, violates §1692e(10) if he sends a dunning letter that he has not reviewed, "since his lawyer's letterhead then falsely implies that he has reviewed the creditor's claim."

Notably, the 7th Circuit declined to determine "the minimum amount of lawyer review required to avoid misleading the debtor into thinking that a lawyer has made a responsible professional judgment about the existence of a legally enforceable debt." Moreover, the court clearly acknowledged the role of delegation in the review process: "the Act can be complied with by delegation of part of the review process to a paralegal or even to a computer program" so long as the "ultimate professional judgment concerning the existence of a valid debt is reserved to the lawyer." The 7th Circuit recognized that "in an era of specialization, professionals are not to be criticized for identifying subroutines that paraprofessionals can adequately perform under a professional's supervision." For example, the court noted, paraprofessionals could ascertain whether the amount of the claim submitted by the client is the same as the amount that appears on the form letter prepared by non-lawyer agents. In this case, however, Mr. Wexler made no argument regarding delegation; instead, he insisted that he performed these tasks himself, "implying that if he is not telling the truth, no one performs them."

In *Nielsen* v. *Dickerson*. 307 F. 3d 623 (7th Cir. 2002), the 7th Circuit held that an attorney, David D. Dickerson, violated 15 U.S.C. §1692e(3); 15 U.S.C. §1692e(10); and §1692j(a) where he sent thousands of dunning letters on behalf of Household Bank when he "did little more than lend his name and firm letterhead to the debt collection effort."

The court considered the following combination of factors in its determination that Dickerson falsely implied that an attorney had been engaged to held Household collect on overdue GM Card accounts: (1) Dickerson's "legal services" consisted of nothing more than issuing a form "past due" letter; (2) the letter itself instructed debtors to make payment directly to Household or call Household directly at its 800 number; (3) such calls were handled by Household in-house collection personnel, who were instructed to handle the calls themselves and not to refer inquiries to Dickerson; **(4)** even though Dickerson's firm regularly received written and telephone inquiries and responses from cardholders and their attorneys, he was not empowered to settle or otherwise resolve matters on Household's behalf and did not so; **(5)** any written or telephonic responses received by Dickerson's office were forwarded to Household; (6) Dickerson took no further action on any account once responses were handed over to Household; (7) Household—not Dickerson—handled any debt verification requests; (8) Household never asked Dickerson to pursue litigation or entry of judgment on its behalf—nor did Dickerson ever undertake any legal action in pursuit of Household's debts; (9) thirty days after Household referred a delinquent account to Dickerson, the firm returned the account to Household; **(10)** Household paid Dickerson a fiat fee of $2.45 per account regardless of the effect (if any) that his letter had upon the debtor; and (II) Household did not forward any debtor files to Dickerson, but only the bare minimum information Dickerson needed to complete his form letter to each debtor (name, address, account number, account balance and amount past due).

Notably, the 7th Circuit stated "our point is not that a form letter rules out the possibility of an attorney's genuine, professional involvement in the collection of a debt," but rather, the factors outlined above "betray the purely nominal nature of [Dickerson's] participation in the collection process."

For an extensive discussion of "meaningful attorney involvement" under the FDCPA, see Eric Berman, "Why Changes Must Be Made to the Standards of Review Used to Determine Meaningful Attorney Involvement Under the Fair Debt Collection Practices Act," *De Paul Business & Commercial Law Journal*, Vol. 2, No. 1, Fall 2003.

In *Taylor* v. *Perrin, Landry, deLaunay & Durand and USI Financial Sendees, Inc.*, 103 F.3d 1232 (5th Cir. 1997), USI Financial Services violated §1692e(3) because it sent collection letters on attorney letterhead when, in fact, there was no attorney involved in the collection process.

In *Clomon* v. *Jackson*, (998 F.2d 1314 2nd Cir. 1993), a lawyer employed by a collection agency as general counsel allowed the agency to use his letterhead and digitized signature on dunning letters prepared by the agency's computer and mailed en masse to consumers. The attorney had not looked at the letters or reviewed the accounts involved. Holding that this was a "false, deceptive, misleading practice" in violation of both §1692e(3) and §1692e(10), the Second Circuit found that the "least sophisticated consumer" could believe that the letters were from lawyer when, in fact, they were not. The result: $1,000.00 statutory damages; $120.00 court costs and $2,975.00 in counsel fees to plaintiffs attorney!

In *Avilia* v. *Rubin*, 84 F.3d 222 (7th Cir. 1996), the 7th Circuit found that at attorney was not the real "source" of mass produced letters. "'Albert G. Rubin & Associates, Ltd.' is a collection agency, not a law Finn at all in any real sense of the term. The Maw firm' does not have a retainer agreement with plaintiffs creditor. No attorney working in the Maw Finn' ever Files a lawsuit or goes to court on behalf of a client." Citing the attorney's complete lack of professional involvement in the mass mailing of some 270,000 dunning letters–including his failure to review debtor Files or detennine which letters should be sent–the court followed Clomon in concluding that Rubin's collection letters violated §1692e(3) and §1692e(9) because they created "the false and misleading impression that they were from an attorney when, in fact, they were not really 'from an attorney' in any meaningful sense of the word."

[183] In *Drennan* v. *Van Ru Credit Corp.* 950 F. Supp. 858 (N.D. Ill. 1996), a debt collector's notice entitled "NOTICE OF POSSIBLE WAGE GARNISHMENT" contained a false representation or implication that nonpayment of any debt will result in the garnishment of wages in violation of 1692e(4). Its opening statement ("if you are currently employed, your wages may now be withheld monthly to pay your defaulted student loan pursuant to Federal Law") could be fairly understood by any unsophisticated consumer as a statement that wage garnishment was a remedy immediately available to the creditor. Although the debtor did not pay the alleged loan balance after his receipt of this notice, nearly a year elapsed without enforcement action of any kind. "Without question, " the court said, this inaction leads to a "reasonable inference" that the debt collector did not intend to garnish the debtor's wages. *Id* at 861.

[184] *LeBlanc* v. *Unifund CCR Partners*, No. 08-16031, 2010 U.S. App. LEXIS 6501 (11th Cir. March 30, 2010). In *LeBlanc*, the 11th Circuit held that a federal cause of action pursuant to Section 1692e of the FDCPA for threatening to take an action that cannot legally be taken is cognizable when premised upon failure to register as a consumer collection agency as required by state law, namely, Section 559.553 of the Florida Consumer Protection Act (FCCPA. According to the 11th Circuit, Unifund's lack of registration with the State of Florida is an appropriate consideration in deciding whether Unifund's "means" of collection were "unfair or unconscionable."

The 1 Ith Circuit went on to state, however, that "we do not hold that all debt collector actions in violation of state law constitute per se violations of the FDCPA. Rather, the conduct or communication at issue must also violate the relevant provision of the FDCPA." Citing *Carlson* v. *First Revenue Assurance*, 359 F.3d 1015 at 1018 (8th Cir.2004), the 11th Circuit warned "The FDCPA was designed to provide basic, overarching rules for debt collection activities; it was not meant to convert every violation of a state debt collection law into a federal violation. Only those collection activities that use "any false, deceptive, or misleading representation or means," including "[t]he threat to take any action that cannot legally be taken" under state law, will also constitute FDCPA violations."

In Wilhelm v. *Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008) the 8th Circuit found a demand letter reading "YOU WILL BE SUED — UNLESS YOU MAKE ARRANGEMENTS TO PAY YOUR BILL. THIS LETTER IS NO IDLE THREAT — THE PAPERWORK HAS BEEN ORDERED TO BEGIN A LAWSUIT AGAINST

YOU. WE ONLY SEND THIS LETTER TO PEOPLE WE INTEND TO SUE!" was Ma categorical threat to sue...in a letter that failed to disclose that Credico would not sue any consumer who timely disputed the debt and requested its validation. That appears to be a threat to take action "that cannot legally be taken" within the meaning of § 1692e(5)." The 8th Circuit also observed there was no evidence on the record that debt collector ever provided Wilhelm with the initial notice of his right to dispute the debt and request verification required by § 1692g(a). "Absent compliance with this disclosure provision, a threat to sue is an action "that cannot legally be taken" for purposes of § 1692e(5)."*Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 419 (8th Cir. 2008). Accordingly, the District Court's grant of summary judgment in favor of the debt collector was reversed.

The manner in which a law firm used pre-judgment garnishment procedure was held to violate Minnesota state law (and therefore §1692e(5)) in an attorney's attempt to collect on worthless checks. *Picht* v. *Jon R. Hawks, Ltd.* 236 F. 3d 446 (8th Cir. 2001). After an extensive review of Minnesota's worthless check and garnishment statutes together with relevant provisions of Minnesota's Rules of Civil Procedure, the 8th Circuit concluded that the particular facts and procedural history of this case did not authorize the action taken under a Minnesota garnishment statute.

Collection notices violate §1692e(5) if (1) the "least sophisticated debtor" would reasonably believe that the notices threaten legal action; *and* (2) the debt collector does not intend to take legal action. *United States of America v. National Financial Services, Incorporated,* 98 F.3d 131 (4th Cir. 1996).

A series of offending letters reviewed in *National Financial Services* were textbook illustrations of §1692e(5) violations. The Court concluded that all of the following statements would lead the least sophisticated consumer to believe that legal action would be threatened:

''ONLY YOUR IMMEDIATE PAYMENT WILL STOP FURTHER LEGAL ACTION;" or

"I am the collection attorney hired by American Family Publishers to protect their interests in the United States. I have fled suits and obtained judgments on small balance accounts just like yours. My authority to collect these accounts includes the enforcement of judgments..;" or

"I HAVE THE AUTHORITY TO FILE SUIT IN THIS MATTER...UNLESS PAYMENT IS RECEIVED IN THIS OFFICE WITHIN FIVE DAYS...I WILL BE COMPELLED TO CONSIDER THE USE OF THE LEGAL REMEDIES THAT MAY BE AVAILABLE TO EFFECT COLLECTION;" or

"INSTRUCTIONS HAVE BEEN GIVE TO TAKE ANY ACTION, THAT IS LEGAL, TO ENFORCE PAYMENT;" or

"If you fail to pay your bill by the DEADLINE, we will then take appropriate action. Remember your attorney will also want to be paid."

Observing that "using the attorney language conveys authority, instills fear in the debtor, and escalates the consequences," the court went on to say that "no reasonable juror could conclude that those statements were not meant to make debtors fear that they would be sued. To find otherwise would undermine the consumer protection goals of the statute...." Under these circumstances the 4th Circuit agreed with the district court that the debt collector threatened to take legal action which he had no intention of taking in violation of §1692e(5). Because the court agreed that the notices falsely threatened legal action, it upheld the district court's conclusion that the notices also violated §1692e(10), which prohibits "the use of any false representation or deceptive means to collect or attempt to collect any debt..."

[185] *Brown* v. *Card Service Center,* 464 F. 3d 450 (3d. Cir. 2006). A demand letter saying a debtor's account "could" be placed with an attorney and suit "could" be filed (where it was, in fact not taken and where suits were rarely filed by the debt collector), resulted in the 3rd Circuit overturning a district court dismissal. "Though we express no opinion as to whether the language of the [Card Service Center] letter constitutes a 'threat' under §1692e(5), we believe the facts as alleged in Brown's complaint, if proven, could render the [Card Service Center] Letter a 'deceptive' or 'misleading' communication, in violation of §1692e. The 3rd Circuit overturned the district court's dismissal because "we conclude that it would be deceptive under the FDCPA for CSC to assert that it could take an action it had no intention of taking and has never or very rarely taken before." In other words, said the court, if it were proven that CSC had reason to know that the legal action described in its letter to Brown was unlikely, its statement that legal action was possible could be deemed misleading.

[186] In *Crossley* v. *Liebennan,* 868 F.2nd 566 3rd Cir. 1989), an attorney's pre-suit demand made reference to the creditor as "Plaintiff." The Court observed, however, that until suit is filed *there is no plaintiff* such a reference implies legal action is already under way when it is not. Likewise, in *Greer* v. *Shapiro & Kreisman,*

152 F. Supp. 2d 679 (E.D.P.A. 2001), a pre-suit collection letter signed "Samantha A. Clifford, Attorney for Plaintiff' was deemed inaccurate because a plaintiff is non-existent until the filing of a lawsuit.

[187] A debt collection letter informing a debtor that she is "either honest or dishonest, you cannot be both," may violate §1692e(7). "Calling into question another's honesty and implying that the individual has dishonest intentions arguably raised the level of language that could shame or humiliate the debtor." *McMillan* v. *Collection Professionals, Inc.*, 455 F. 3d 754 (7th Cir. 2006).

[188] In *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008), Wilhem's credit card account was placed for collection with a collection agency, Credico, Inc. He disputed his debt and demanded verification. Credico discontinued its collection efforts. After independent credit reporting agencies reported that Wilhelm's debt was outstanding but not disputed, Wilhem sued claiming the agency violated 15 U.S.C. § 1692e(8) by failing to communicate that the debt was disputed. Rejecting Wilhelm's assertion that § 1692e(8) imposed an affirmative duty on debt collectors to disclose that he had disputed the debt, the 8th Circuit noted Wilhelm's failure to cite any case law supporting his contention, and, said the court, "we reject it." Instead, the court observed that *if* a collector elects to communicate "credit information" about a consumer, it must not omit a piece of information that is always material, namely, that the consumer has disputed a particular debt. This interpretation is confirmed by the relevant part of the Federal Trade Commission's December 1988 Staff Commentary on the Fair Debt Collection Practices Act." *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 418 (8th Cir. 2008).

[189] "This subsection is a catchall-type provision prohibiting "[t]he use of any false representation or deceptive means to collect ... any debt." *Rosenau* v. *Unifund Corp.*, 539 F.3d 218, 224 (3rd Cir., 2008). See also, *Hartman* v. *Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir., 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Muha* v. *Encore Receivable Management, Inc.*, 558 F.3d 623 (7th Cir., 2009); *Donohue* v. *Quick Collect, Inc.*, No. 09-35183 (9th Cir. 1/13/2010) (9th Cir., 2010).

In *Hartman* v. *Great Seneca Financial Corp.*, 569 F.3d 606 **(6th Cir., 2009)** a law firm attempted to collect on defaulted Providian Bank credit care debts by filing collection complaints in Ohio state court. In each of those complaints. Great Seneca and Javitch, the law firm, asserted that a copy of the debtor's "account" was attached to the complaint. as "Exhibit A." In each case, the document that Great Seneca and Javitch attached as an "account" facially resembled a credit-card statement but had been generated on Great Seneca's behalf. Reversing the District Court's summary judgment in favor of Great Seneca and its law firm, Javitch, Block & Rathbone. LLP, the 6th Circuit found there was a genuine issue of material fact as to whether this behavior violated §1692e(10) the FDCPA. Holding that the document identified as Exhibit A "appears to be a recent credit-card bill, which it is not, and with few indications to the contrary," the Sixth Circuit found there was "a genuine issue of material fact as to whether this document would mislead the least sophisticated consumer.". *Hartman* v. *Great Seneca Financial Corp.*, 569 F.3d 606, 613 (6th Cir., 2009).

In *Miller* v. *Javitch, Block £ Rathbone*, 561 F.3d 588 (6th Cir. 2009), the 6th Circuit declined to hold a state court collection complaint to recover monies due on an assigned Providian Visa Card as a "false or misleading representation" where the complaint was captioned "Complaint for Money Loaned." Holding the complaint's references to "money loaned" were not actionable as false statements, the 6th Circuit found that the complaint, as a whole—which referred to a charge card, a specific account number and a balance due on the account—was not misleading. *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 595 (6th Cir., 2009).

Muha v. Encore Receivable Management, Inc., 558 F.3d 623 (7th Cir. 2009) involved a challenge to a dunning letter reading. in relevant part, as follows: "The above referenced account has been referred to our office for collection of the balance in full. Previous attempts have been made by our client to resolve this debt voluntarily. As of this date, those attempts have not been successful. Therefore, your original agreement with the above mentioned creditor has been revoked. Encore Receivable Management, Inc. has been authorized by our client to provide the necessary effort to collect this debt. We recommend that you take advantage of this opportunity to pay the balance in full to prevent further collection activity." Stating that we "cannot understand the function of the challenged sentence," the 7th Circuit found that "the defendant's letter was not so palpably misleading as to entitle the plaintiffs to summary judgment, but neither was it so palpably not misleading as to entitle the defendant to summary judgment." Overturning the District Court's grant of summary judgment in favor of the defendant, the 7th Circuit remanded the case with instructions to the District Court to "focus" on the critical issue: "confusion." and to have the defendant "explain why the sentence was included and justify the inclusion." *Muha* v. *Encore Receivable Management, Inc.*, 558 F.3d 623, 629-630 (7th Cir. 2009).

In *Harvey* v. *Great Seneca Financial Service Corp.*, 453 F. 3d 324 (6th Cir. 2006), the 6th Circuit held that "filing a lawsuit without the immediate means of proving the existence, amount or true owner of the debt" did not violate §1692e(10). "A debt may be properly pursued in court even if the debt collector does not yet possess adequate proof of its claim."

[190] *Campuzano-Burgos* v. *Midland Credit Management*, 550 F.3d 294, 299 (3rd Cir.2008). In *Campuzano-Burgos* , the 3rd Circuit held that a debt collection company did not violate the Act by sending debtors settlement offers bearing the name of one of the company's senior, non-attorney executives who had no personal involvement in the collection of the debts. Stating it is "immaterial that [the executives] did not personally write or authorize their staff to send the specific letters to plaintiffs, the Third Circuit held that "the defendants' settlement offers cannot reasonably be read to have more than one meaning. Even the least sophisticated debtor, possessing some common sense and a willingness to read the entire document with care, would not have believed that he had received a personal communication from [the executives]. *Campuzano-Burgos v. Midland Credit Management*, 550 F.3d 294, 301 (3rd Cir.2008)."Rather, the letters resemble an advertisement, and the use of the officers' names and titles, but not signatures at the close of the letters' text, is consistent with a form notice. The communications' content further militates against finding that the leastsophisticated debtor would believe he received a personal letter from the named officers instead of a notice from a company." *Campuzano-Burgos* v. *Midland Credit Management*, 550 F.3d 294, 300 (3rd Cir.2008).

Morever, the Third Circuit made clear that settlement offers are perfectly acceptable: "Some creative collectors, convinced that conflict is counterproductive, choose conciliation over confrontation. They do this through communications that are civil and cajoling, yet conforming with the statute — 'settlement letters.' These notices advise the debtor that he may settle the claim by paying a percentage of the amount owed rather than the total." Citing *Evory* v. *RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 at 775 (7th Cir.2007), the court emphasized that "There is nothing improper about making a settlement offer." Forbidding settlement offers, the court said, "would force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance efforts to resolve the debt—something that is clearly at odds with the language and purpose of the [Act]." *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 399 (6th Cir.1998). Permitting the use of settlement letters may allow resolution of a claim without the "needless cost and delay of litigation . . . [and] is certainly less coercive and more protective of the interests of the debtor." *Id.* Nevertheless, in keeping with the statutory requirements, collection agencies "may not be deceitful in the presentation of th[e]settlement offer." *Goswami v. Am. Collections Enter.*, 377 F.3d 488, 496 (5th Cir.2004).*Campuzano-Burgos* v. *Midland Credit Management*, 550 F.3d 294, 299 (3rd Cir.2008).

Viewed as a whole, the settlement offers [in *Campulzano-Burgos*] were not considered deceptive. "On their face, the notices do not appear to be letters from a corporate executive to an individual. Their font does not comport with that found in a routine business letter. The frequent use of capital letters, exclamation points, and boldfaced type, as well as the employment of various other items — such as indented text, bar-codes, a toll-free telephone number, lines, boxes, and perforation— do not fit the format to be expected in a routine commercial communication." See also, *DeKoven v. Plaza Associates*, No. 09-2016 (7th Cir. 3/17/2010) (7th Cir. 2010).

[191] In *Goswami* v. *American Collections Enterprise, Inc.* 377 F. 3d 388 (5th Cir. 2004), the 5th Circuit found an offer of a 30% discount in a settlement letter was a false representation. Although the court made clear that settlement offers are acceptable so long as they are not presented in a deceitful manner, it held that language informing the debtor that "only during the next thirty days will our client agree to settle your balance for a 30% discount...was false because the collector was, in fact, authorized to give the debtor a 30% discount at any time—not just for a 30 day period. The court said the offer was phrased to "push" the debtor to make a rapid payment to take advantage of the "purported limited time offer."

In *Jackson* v. *Midland Credit Management, Inc.* 445 F. Supp. 1015 (N.D. Ill 2006), the Northern District of Illinois declined to apply *Goswami*. Observing that "all courts to have considered *Goswami* have limited *Goswami's* holding to the situation in which the letter contains an explicit statement that the letter is presenting a one time only offer." Jackson's reliance upon *Goswami* was therefore deemed misplaced. Settlement offers that do not contain explicit statements presenting "one time only" or "take it or leave it" offers are acceptable. The court held there was no FDCPA violation of the face of a letter offering a "positive and flexible option to resolve your account for 50% off the Current Balance. If we receive payment by [one month after th date of the

letter], in the amount of [50% of the current balance due], we will consider the account balance paid in full." Indeed, the court further pointed-out that the fact that Midland Credit Management "was willing to accept less than 50% of the debt does not make the 50% option presented on the letter false or misleading...." A debt collector is not required under the FDCPA "to list the lowest amount at which it is willing to settle in the original letter." "This court concludes that an unsophisticated consumer is often aware that he or she is able to negotiate a better deal on his debt in the same way that a consumer negotiates a price below an automobile's sticker price."

[192] This is the "Mini-Miranda" warning.

[193] In *Lester E. Cox Medical Center* v. *Huntsman*, 408 F. 3d 989 (8th Cir. 2005), the 8th Circuit upheld the district court's finding of a §1692e(14) violation because the Lester E. Cox Medical Center used a "false and misleading name" to collect its debts. The medical center referred Huntsman's account to a fictitious registrant of Cox, "Ozark Professional Collections," an unincorporated division of Cox owned and almost completely controlled by Cox. Notably, even though the court held that the Act had been violated, damages were *de minimus*: the court awarded $1.00 statutory damages.

A collection agency, GC Services, that sent a demand letter on behalf of the U.S. Department of Education in an envelope bearing the name and return address of the U.S. Department of Education in the upper left hand corner violated §1692e(14) because it represented the sender of the mail as the Department of Education, when the sender was in fact GC Services. "By making the letter appear to come from the United States Department of Education, Defendants created a false sense of urgency as to the letter's contents through a practice specifically prohibited in § e(14)." *Peters* v. *GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002).

[194] *Beler* v. *Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F. 3d 470 (7th Cir. 2007). "What is 'unfair or unconscionable?' queried 7th Circuit: "The statute does not say." Indeed, the court commented the phrase to be "as vague as they come." The court further stated this is not a piggyback jurisdiction clause; none of the conduct set forth by way of example in §1692f implies that federal courts should make new rules that change how state court (in this case, Illinois) judgments are collected. A bank levy in effect for 23 days and its subsequent release upon a law firm's acceptance of proof of the debtor's SSI exempt funds was not a violation of the FDCPA. Declaring that "state judges may decide how their judgments are to be collected," the 7th Circuit underscored that §1692f "certainly implies that federal judges ought not use this ambulatory language to displace decisions consciously made by state legislatures and courts about how judgment creditors collect judgments entered under state law." A pre-citation(bank freeze) hearing was not mandated by the FDCPA.

A debt collector's contemporaneous filing of a lien with the clerk of a state court and the sending of a dunning letter to a consumer prior to the consumer's request for debt validation does not violate §1692f. *Shimek* v. *Forbes*, 374 F. 3d 1011 (11th Cir. 2004).

[195] *Seeger* v. *Afni, Inc.*, 548 F.3d 1107 (7th Cir., 2008). Afni, Inc. a debt buyer, purchased Seeger's Cingular cell phone phone account. The underlying Cingular creditor-debtor agreement specified if Seeger's account was referred to a third party by Cingular for collection, then Seeger would be responsible for a collection fee (and /or reasonable attorney fees) equal to 33% of the balance due. Cingular's contract did not, however, provide that it could impose such a collection fee in the event it undertook collection action *on its own behalf*. Accordingly, Afni's inclusion of a collection fee as part of its demand to Seeger violated § 1692f(1).

The 7th Circuit upheld the reasoning of the district court: The district court held that the contracts did not authorize Cingular to charge its customers a fee when it handles the collection process on its own; instead, they authorized a fee only when Cingular farmed out the process to a third party. The district court concluded that Cingular itself could not charge a collection fee that was neither the result of a referral of an account, nor reimbursement of fees charged to it by a collection agency, nor as part of an incurred cost. Noting the use of the word "referral" implies the existence of a third party;, the court observed that Cingular was not"referring" accounts to itself. Nor did it make sense to think that Cingular was charging itself acollection fee, which plaintiffs then would have to reimburse. *Seeger v. Afni, Inc.*, 548 F.3d 1107, 1113 (7th Cir., 2008)

Olivera v. *Blilt & Gaines, P.C.*, 431 F.3d 285 (7th Cir 2005) (under Illinois law an assignee of a debt is permitted to charge the same rate of interest as the original creditor); *Fields* v. *Wilbur Law Firm*, 383 F. 3d 562 (7th Cir. 2004).

In *Johnson* v. *Riddle*, 305 F. 3d 1107 (10th Cir. 2002), the 10th Circuit explored the meaning of the phrase "amount . . . permitted by law" in the context of a collection law suit brought to collect a statutory shoplifting fee of $250 on a dishonored check. Although there was no dispute that Utah statutory law authorized

the holder of a dishonored check to collect from the person who wrote the check its face amount and a "service charge that may not exceed $15," Riddle's alleged violation of § 1692f(1) arose from his conclusion that a separate Utah shoplifting statute (which authorized penalties of up to $500) applied to persons who passed checks that were later dishonored.

To evaluate whether something is "permitted by law," the 10th Circuit said "it is necessary to determine which 'law'" the suit or amount sought "must be permitted by." Citing decisions from other circuits, the 10th Circuit found "every circuit court decision that has applied the 'permitted by law' standard has asked simply whether state substantive law permitted the FDCPA defendant to collect the money that it demanded." After analyzing Utah statutes and case law, the 10th Circuit declared: "By seeking to collect a shoplifting penalty where no shoplifting (as the term is defined by Utah statute) occurred. Riddle sought to collect an amount not permitted by law in violation of the FDCPA."

In *Lockett* v. *Freedman*, 2004 U.S. Dist. LEXIS 6857 (N.D. Ill 2004), the Northern District Court of Illinois held where the text of an automobile contract specifically defined creditor's rights—including attorneys fees in connection with the repossession and sale of a vehicle—but was silent as to attorneys fees in the context of a repossession deficiency action, "there is little basis to conclude that fees and costs applicable to expenses of *repossession* [emphasis added] can be extended to a deficiency action." Accordingly, the court was not satisfied the contract specifically allowed for attorneys' fees in a deficiency collection suit.

In *Rizzo* v. *Pierce & Associates*, 351 F. 3d 791 (7th Cir. 2003), a foreclosure proceeding was dismissed after the borrowers (Rizzo) reinstated their loan after paying all required fees and expenses—including a late charge on the post-acceleration to pre-reinstatement period. Holding the "terms of the note the mortgage explicitly require payment of all sums which would be then due had no acceleration occurred," the 7th Circuit rejected Rizzo's claim that the post-acceleration, pre-reinstatement late fees violated the FDCPA. After examining the relevant provisions in both the note and mortgage, the court found "this language. . . unambiguously require[s] plaintiffs to pay the late fees." Indeed, said the court, '[reinstatement essentially allows the borrower a second 'bite at the apple.' It follows that the lender should not be penalized, nor the borrower rewarded, for a breach on the part of the borrower."

i% Envelopes bearing the initials of the debt collector, "D.C.S., Inc," a corporate logo of a grid, the term "personal and confidential" in capital bold face letters and the term "immediate reply requested" in capital, reverse typeface were held to be "benign" because they did not, individually or collectively, reveal the source or purpose of the enclosed letters. Benign language and symbols do not violate §1692f(8). According to the 8th Circuit "even from the perspective of an unsophisticated consumer, the envelopes must have appeared indistinguishable from the countless items of so-called junk mail found daily in mail boxes across the land." *Strand* v. *Diversified Collection Service, Inc.*, 380 F. 3d 316 (8th Cir. 2004).

A collection agency's use of the United States Department of Education's name and address on an envelope, as well as a marker that the envelope is not to be used for private communication, "violated the plain language of $1692f(8)." *Peters* v. *GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002). Noting that one of the deceptive practices with which Congress was concerned when enacting the FDCPA was impersonation of public officials by debt collectors, the 5th Circuit proclaimed "Defendant's impersonation of the Department of Education is certainly not benign." Moreover, the Court further declared that because such impersonation of the Department of Education "implicates this core concern of the FDCPA," "any implicit exception for benign language cannot be stretched to cover that thoroughly disapproved practice."

197 "The classic 'flat rater' effectively sells his letterhead to the creditor, often in exchange for a per letter fee, so that the creditor can prepare its own delinquency letters on that letterhead. Use of a third party's letterhead gives the delinquency letters added intimidation value, as it now suggests that a collection agency or some other party is now on the debtor's back." *Nielson v. Dickerson*, 307 f. 3d 623, 633 (7th cir. 2002).

In *White* v. *Goodman*, 200 F.3d 1016 (7th Cir. 2000), Judge Posner explained "[t]he element of deception lies less in the misrepresentation that a third-party debt collector is involved than in the signal, conveyed by turning over a debt for collection, that the creditor does not intend to drop the matter."

1pX 53 Fed. Reg. 50109.

In *Taylor* v. *Perrin, Landry, deLaunay & Durand*, 103 F. 3d 1232 (5th Cir. 1997), an attorney, Allan Durand and his law linn, Perrin. Landry, deLaunay & Durand ("PLdD") prepared a form letter for use by a credit grantor. USI Financial Services, Inc. in collecting or attempting to collect from its debtors. The form letter, which bore the letterhead of the PLdD law firm and a facsimile signature of Allan Durand, informed

consumers that USI had retained Durand to collect the balance due and that he had been instructed to file suit if the past due amount was not paid within ten days of receipt of the letter. If USI's initial demand letter (on USI stationary) went unheeded, the USI computer system would generate Durand's "attorney demand letter."
Durand and his firm had absolutely no involvement whatsoever in the collection process. They did not review any accounts, balances, or the letters themselves; they did not evaluate the merits of any claims; they did not send the demand letters. They never billed USI or received any income from USI for the demand letter or for any other legal services. Indeed, they vigorously asserted that he had never been in the business of regularly collecting debts. In view of these circumstances, the 5th Circuit found that "Allan Durand and PLdD acted as persons subject to the provisions of the Act, and by the same token, violated [§1692j of] the FDCPA, because...they designed and furnished a form letter to USI knowing that USI would use it to create the belief in consumers that persons other than USI, namely Durand and his law firm, were participating in attempts to collect debts, when in truth Durand and PLdD were not participating.". Their liability, the Court noted, did not depend upon whether they fell within the definition of a "debt collector" who regularly collects debts for others as defined by §1692a(6) of the Act.

[199] *White v. Goodman, supra.*

[200] In *Hess* v. *Cohen & Slamowitz, LLC*, 637 F.3d 117 (2d Cir. 2011), the 2nd Circuit Court of Appeals discussed meaning of the language "the judicial district or similar legal entity ... in which [the] consumer resides at the commencement of the action." 15 U.S.C. § 1692i(a)(2)(B). The creditor brought suit in the Syracuse, New York City Court, although the debtor resided in a contiguous town, but not in Syracuse proper. Although the debtor resided in the same county in which the Syracuse City Court was located, the suit was brought within the proper "judicial district or similar legal entity. . . "
In *Newsome* v. *Friedman*, 76 F.3d 813 (7th Cir. 1997), the 7th Circuit explored the meaning of the phrase "judicial district or similar legal entity." Although the phrase is not defined in the statute, the court did not find it to be "ambiguous." After extensive discussion of the Illinois court structure, the court concluded that "in Illinois, Circuit Courts constitute judicial districts under the plain meaning of the FDCPA."

[201] In *Scott* v. *Jones*, 964 F.2d 314 (4th Cir. 1992) , the Fourth Circuit Court of Appeals held that an attorney's failure to file suit in the county where the debtor resided was a violation of the venue provisions of §1692i. Jones, a Richmond attorney, filed an action to recover a credit card debt against Scott. The suit was filed in Richmond – notwithstanding that Scott, a Lynchburg resident neither lived in Richmond nor signed the contract upon which suit was based in Richmond.

[202] For *de minimus* or technical violations, however, some courts refuse to award statutory damages. *Lester E. Cox Medical Center* v. *Huntsman*, 408 F. 3d 989 (8th cir. 2005), citing *Pipiles* v. *Credit Bureau of Lockport, Inc.*, 886 f.2d 22, 28 (2d Cir. 1989); *Fasten* v. *Zager*, 49 F.Supp. 2d 144, 150 (E.D.N.Y. 1999).

[203] *Weiss* v. *Regal Collections*, 385 F. 3d 337 (3d Cir. 2004). The 3rd Circuit observed that most courts have found that private actions for declaratory or injunctive relief is not available to private litigants under the Act; such actions may be brought only by the Federal Trade Commission.

[204] "The decision to award statutory damages under the FDCPA and the size of the award are matters committed to the sound discretion of the district court. All that is required for an award of statutory damages is proof that the statute was violated, although a court must exercise its discretion to determine how much to award, up to the $1,000.00 ceiling." *Savino* v. *Computer Credit*, 164 F.3d 81 (2d Cir. 1998).

[205] A debt collector may be liable for additional statutory damages of up to $1,000.00 per FDCPA action–*not* per violation; $1,000.00 is the statutory maximum in a single action involving more than one violation. In *Wright* v. *Finance Service of Norwalk, Inc.*, 22 F.3d 647 (6th Cir. 1994), the 6th Circuit, sitting *en banc*, vacated an earlier three judge panel decision to clarity that the *maximum* amount of **statutory damages** recoverable in any one FDCPA lawsuit is $1,000.00 – even though the debt collector may have committed as many as 30 separate violations in a series of 14 dunning letters.
In an unpublished decision, the 3rd Circuit explained that "§16922(a)(2)(A) is best read as limiting statutory damages to $1,000 per successful court action." *Goodmann* v. *People's Bank*, 2006 U.S. App. Lexis 3155 (3d Cir. 2006).
See also, *Teng* v. *Metropolitan Retail Recovery, Inc.*, 851 F.Supp 61 (E.D.N.Y. 1994); *Crossley* v. *Lieberman*, 868 F.2nd 566 (3rd Cir. 1988); *Harper* v. *Better Business Sendees, Inc.* 961 F.2d 1561 (11th Cir. 1992 *y.Masuda v. Thomas Richards & Co.* 759 F. Supp.1456 (D. Cal. 1991); *Beatiev. DM Collections, Inc.* 764

F. Supp. 925 (D.Del 1991).

[206] See *Beck* v. *Maximus, Inc.,* 457 F.3d 291 (3d Cir. 2006) for an extensive discussion of the elements necessary to establish and certify a viable class under the Federal Rules of Civil Procedure in the context of a FDCPA case. In *Beck*, the 3rd Circuit vacated the district court's order certifying a class. Aligning itself with "our sister courts of appeals," the 3rd Circuit held that a "proposed class representative is neither typical nor adequate if the representative is subject to a unique defense that is likely to become a major focus of the litigation."

[207] "Successful" has been defined as a judgment in favor of the plaintiff or a settlement giving similar relief. In *Dechert* v. *Cadle Company,* 441 F. 3d 474 (7th Cir. 2006), the 7th Circuit held that a plaintiff is entitled to an award "of fees and costs only if his suit can be characterized as "'successful to enforce the foregoing liability,' meaning either actual or statutory' damages." This, said the court, is the general, "indeed all but inevitable rule."

In determining the degree of "success" a plaintiff has obtained, factors to be considered include "the difference between the judgment recovered and the recovery sought, the significance of the legal issues on which the plaintiff prevailed and, finally, the public purpose served by the litigation." *Zagorski* v. *Midwest Billing Sendees,* 128 F.3d 1164 (7th Cir. 1997) citing *Cartwright* v. *Stamper,* 7 F.3d 106, 109 (7th Cir. 1993).

[208] "Plaintiffs who prevail under the Fair Debt Collection Practices Act are entitled to an award of costs and reasonable attorney's fees." *Schlacher* v. *Law Offices of Phillip J. Rotche,* 574 F.3d 852, 856 (7th Cir., 2009).

In *Schlacher* v. *Lem Offices of Phillip J. Rotche,* 574 F.3d 852 (7th Cir. 2009) the 7th Circuit upheld a district court finding that is was unreasonable to require a debt collector defendant to pay for time that four attorneys had collectively put into the case because their work overlapped and one competent lawyer would have sufficed. Stating there is no one precise formula for determining a reasonable fee, the 7th Circuit said the inquiry' starts by calculating the "lodestar" – the attorney's reasonable hourly rate multiplied by the number of hours reasonably expended. A court can then adjust the fee to reflect various factors, including the complexity of the legal issues, degree of success obtained and the public interest advanced by the litigation. *Schlacher* v. *Law Offices of Phillip J. Rotche,* 574 F.3d 852, 857 (7th Cir. 2009).

"A reasonable fee. . . is one that is adequate to attract competent counsel, but [does] not produce windfalls to attorneys." *Lee* v. *Thomas & Thomas,* 109 F.3d 302 (6th Cir. 1997).Lee upheld a ruling finding it unreasonable for a plaintiffs attorney to expend further time and effort on a case after receipt of an offer to confess judgment for everything to which plaintiff "could reasonably be entitled, including an attorney fee that appeared reasonable in light of the circumstances existing at the time...." The 6th Circuit agreed with a lower court magistrate that it was "unreasonable" for Ms. Lee's lawyer to "keep his meter running" for performing legal services after the offer of judgment; any fee for such services "would clearly be unreasonable." "Waste is not in the public interest," chided the court. "In directing the courts to award 'reasonable' fees. . . Congress undoubtedly wished to ensure that the lawyer representing a successful plaintiff would receive a reasonable fee for work found reasonably necessary - nothing less, and nothing more."

In *Tolentino* v. *Friedman,* 46 F.3d 645 (7th Cir. 1995), cert. denied, 515 U.S. 1160 (1995), the 7th Circuit, citing *Hensley* v. *Eckerhart,* 461 U.S. 424, 441 (1983), enumerated a number of factors a court should consider when calculating attorney's fees, including (1) the time and labor required; (2) the skill requisite to perform the legal service properly; **(4)** the preclusion of employment by the attorney due to acceptance of the case; **(5)** the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; **(8)** the amount involved and the results obtained; **(9)** the experience, reputation, and ability of the plaintiffs attorney; **(**10**)** the 'undesirability' of the case; **(**11**)** the nature and length of the professional relationship with the client; and (12) awards in similar cases.

[209] Courts have read the structure of this section to mean that "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's intent that the Act should be enforced by debtors acting as private attorneys general." *Graziano* v. *Harrision, supra,* at 113. "The award of costs and fees to a successful plaintiff appears to be mandatory." *Jacobson* v. *Healthcare Financial Sendees, Inc.,* 516 F.3d 85, 95 (2nd Cir. 2008).

In *Gastineau* v. *Wright,* No. 09-1003 (7th Cir. 1/19/2010), the 9th Circuit stated "[t]he touchstone for a district court's calculation of attorney's fees is the lodestar method, which is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended" (citing *Hensley* v. *Eckerhart,* 461 U.S. 424, 433-37

(1983)). If necessary, the district court has the flexibility to "adjust that figure to reflect various factors including the complexity of the legal issues involved, the degree of success obtained, and the public interest advanced by the litigation." "The standard is whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case."

In *French v. Corporate Receivables, Inc.* 489 F.3d 402 (1st Cir. 2007), the 1st Circuit upheld a "substantial reduction" of an attorney fee request from nearly $21,000 to $2,500 "because the Frenches obtained only 'de minimus' success at trial. In arriving at its decision, the 1st Circuit gave an excellent overview of attorney fees under §1692k (a)(3): (1) the FDCPA allows attorney fees only to "successful plaintiffs—those who obtain awards of statutory and/or actual damages; (2) An award of attorney fees to a "successful" FDCPA plaintiff is "obligatory;" (3) the amount of attorney fees awarded is what is "reasonable" under the circumstances - not necessarily the amount the plaintiff believes he is entitled to; (4) in calculating attorney fees, courts should avoid compensating "wasteful litigation" (citing *Lee* v. *Thomas*, 109 F. 3d 302, 306-307 (6th Cir. 1997); and (5) limited success at trial is an accepted ground for limiting attorney fees under the FDCPA.

See also, DeJesus v. *Banco Polular de Puerto Rico*, 918 F.2d 232, 235 (1st Cir. 1990); *Emanuel* v. *American Credit Exchange*, 870 F.2d 805, 809 (2d cir. 1989); *Caroil* v. *Wolpoff & Abramson*, 53 F.3d 626, 628-29 (4th Cir. 1995); *Zagorski* v. *Midwest Billing Services*, 128 F.3d 1164 (7th Cir. 1997)(". . . the award of attorney's fees to plaintiffs for a debt collector's violation of 'any provision' of the FDCPA is mandatory").

In *Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996), the 5th Circuit expressly declined to follow the analysis in *Graziano* and *Emanuel* which state that any plaintiff who proves a violation of the Act is "successful" even if that plaintiff is unable to prevail on his claim for actual and additional damages. Instead, it held that a FDCPA plaintiff must prove either actual damages or establish a defendant's liability for additional statutory damages in order to receive attorneys fees and costs. §1692k(a)(3) provides that reasonable attorney fees and costs may be awarded "in the case of any *successful* [FDCPA] action...." According to the 5th Circuit, a "successful" FDCPA lawsuit within the meaning of § 1692k(a)(3) occurs only when a plaintiff proves actual damages *or* receives "additional" statutory damages under §1692k(a)(2)(B)—even if the plaintiff demonstrates an actual FDCPA violation.

Finding the *Graziano* and *Emanuel* readings of the statute "out of context," the 5th Circuit explained "a more plausible reading of the FDCPA which accounts for the statute's structure and its language is that the most a plaintiff can win is actual damages, additional damages and attorneys fees and costs. However, this does not mean that every time a violation occurs, a plaintiff will win all three." Such an approach, the court said, "will require attorneys to look for more than a technical violation of the FDCPA before bringing suit and will deter suits brought only as a means of generating attorney's fees."

[210] "The FDCPA provides for fee-shifting as a matter of course to successful plaintiffs, 15 U.S.C. § 1692k(a)(3), but also gives the district court the power to award fees against abusive plaintiffs." *Jacobson* v. *Healthcare Financial Sendees, Inc.*, 516 F.3d 85, 95 (2nd Cir. 2008).

Previously, the 9th Circuit did not permit "fee shifting" in FDCPA cases, i.e., *Hyde* v. *Midland Credit Management, Inc.*, 567 F.3d 1137 (9th Cir. 2009), held that §1692k(a)(3) does not authorize the award of attorney's fees and costs against an *attorney* of an unsuccessful abusive plaintiff. Finding section 1692k(a)(3) to be silent as to who should pay attorney's fees and costs, the court observed that Congress in the FDCPA failed to indicate any intention to authorize the award of attorney's fees and costs against attorneys representing debtors. Accordingly, "based on the text and legislative history of § 1692k(a)(3) . . . and on the presumption against awarding attorney's fees against attorneys, we believe that the better analysis of § 1692k(a)(3) is that it authorizes attorney's fees and costs only against the offending plaintiff or plaintiffs. *Hyde v. Midland Credit Management, Inc.*, 567 F.3d 1137, 1141 (9th Cir. 2009). The 9th Circuit suggested that an application for sanctions was the appropriate method of relief against abusive plaintiffs' attorneys. However, *Ceresko v. LVNV Funding, LLC*, 2012 WL 1943683 (9th Cir. 2012) upheld an award of costs and attorneys' fees against the debtor, in a case wherein the debtor was found to have had no cause of action and had, on numerous occasions, made the same or similar arguments to the Court in similar cases without legal basis. And, *De Dios v. International Realty & Investments*, 641 F.3d 1071 (9th Cir. 2012), upheld a $500.00 sanction against the debtor's **counsel** for vexatious litigation, and an attorneys' fee award for defense of the litigation.

[211] "As our colleagues in other circuits have concluded, this broad language seems to make the FDCPA a strict liability statute." *Clark* v. *Capital Credit*, 460 F.3d 1162 (9th Cir. 2006). Agreeing with both the 2nd and 7th Circuits that "requiring a violation of §1692e to be 'knowing or intentional' would render §1692k(c)

"superfluous," the 9th Circuit has "endeavored to adopt a construction of the FDCPA that recognizes there is room within the FDCPA for ethical debt collectors to make occasional unavoidable errors" and to "avoid imposing unreasonable restrictions on collection of debt."

"A debt collector need only show that its FDCPA violation was unintentional, not that its actions were unintentional. To hold otherwise would negate the bona fide error defense." *Kort* v. *Diversified Collection Services, Inc.*, 394 F. 3d 530 (7th Cir. 2005), citing *Lewis* v. *ABC Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998).

In *Kort*, the 7th Circuit held that the use of a form tracking specific language mandated by a government agency for use in an administrative garnishment entitled a debt collector to the bona fide error defense.

[212] "Bona fide" has been defined as "an error made in good faith; a genuine mistake as opposed to a contrived mistake." *Kort v. Diversified Collection Services, Inc.* 394 F. 3d 530 (7th Cir. 2005); *Edwards* v. *Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1353 (11th Cir. 2009).

"To establish the bona fide error defense, a debt collector must prove by a preponderance of the evidence that its FDCPA violation was unintentional and was caused by an objectively bona fide error (i.e., one that is plausible and reasonable) made despite the use of procedures reasonably adapted to prevent that specific error." *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 420 (8th Cir. 2008).

[213] The bona fide error defense is an affirmative defense that insulates debt collectors from liability even when they have violated the FDCPA. *Johnson* v. *Riddle*, 443 F. 3d 723 (10th Cir. 2006). *Johnson* contains an extensive discussion of the bona fide error defense.

§1692k(c) "does not require every conceivable precaution to avoid errors; rather it only requires reasonable precaution." *Kort* v. *Diversified Collection Services, Inc.*, 394 F. 3d 530 (7th Cir. 2005.

Attorney debt collectors accused of seeking to collect amounts not expressly authorized by contract may escape liability if they can show, by a preponderance of the evidence, that they did not know of the unauthorized nature of such amounts and that they maintain sufficiently extensive procedures to guard against attempts to intentionally collect such unauthorized sums. In *Jenkins* v. *Heintz*, 124 F.3d 824, 833 (7th Cir. 1997) the 7th Circuit held that debt collector attorneys are not obliged to conduct "an independent investigation into the legal intricacies of [a] client's contract with the consumer..." because such a requirement would create "a double standard for the bona fide error doctrine based upon the identity of the collector." The 7th Circuit upheld the district court's finding that bona fide error defense applied in this case because Heintz and his firm showed that their efforts to collect unauthorized charges were not intentional and occurred despite an extensive system designed to prevent such errors.

[214] In *Ross v. RJM Acquisitions Funding, LLC*, 480 F. 3d. 493 (7th Cir. 2007) the 7th Circuit found that a debt buyer/collector who mailed two dunning letters to a bankrupt consumer was shielded from liability under §1692k(c) because the collector had reasonable procedures in place to minimize mistakes of this nature.

Holding that "a mistake is not fatal if was committed even though reasonable procedures for avoiding mistakes were followed," the 7th Circuit emphasized "the word 'reasonable' in the FDCPA defense cannot be equated to 'state of the art,' which is to say at the technological frontier. For then whenever a new, more powerful [product] came on the market, debt collectors who failed to purchase it post haste..."could find themselves sued. A defense under this section "forgives mistakes even though they inflict harm, when the cost of avoiding a mistake would be disproportionate to the harm."

"Modest" procedures, such an understanding with firms that sell debt (or place accounts for collection) that discharged debt would not knowingly be sold or placed; an agreement that a debt collector would be notified if the party selling or placing the account learned of a debtor's bankruptcy; prompt cessation of any attempt to collect a debt upon notification of a bankruptcy, and reliance upon a computer search by a third party were "reasonable."

Indeed, said the 7th Circuit, even just an understanding between a debt collector and a creditor that bankrupt accounts would not knowingly be placed with the debt collector together with prompt cessation of any attempt to collect a debt "are enough to discharge the duty of reasonableness." (Citing *Hyman v. Tate, 362* F.3d 965, 968-69 (7th cir. 2004).

In *Hyman* v. *Tate*, 362 F.3d 965, 968-69 (7th cir. 2004), the 7th Circuit held that debt collector who sent a dunning letter over a year after a bankruptcy was filed (because it was unaware of the bankruptcy) met the requirements for the bona tide error defense. In particular, an "informal" understanding between the collector and the creditor that accounts known to be bankrupt would not be referred for collection – coupled with a

collector training program—constituted sufficiently reasonable procedures under §1692k(c) Stating that the FDCPA does not require collectors to independently verify the validity of a debt to qualify for the bona fide error defense, the 7th Circuit said there is no FDCPA requirement that a debt collector check bankruptcy records or use a service such as "BANKO."

[215] Whether a defendant has made "a sufficient showing that it employed procedures 'reasonably adapted to avoid' the error that occurred. . . is a fact-intensive inquiry that few prior cases have addressed." *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 421 (8th Cir. 2008). Despite receiving specific instructions, a former employee responsible for setting-up new accounts failed to segregate principal and interest on Wilhelm's claim causing interest to be charged on interest. Because Wilhelm "failed to depose Credico's president or any other employee, did not seek to discover the identity of the former clerical employee, and offered no affidavits, depositions, or other evidence disputing Credico's affidavits" 8th Circuit had "no difficulty concluding that Credico's interest-on-interest violation was unintentional and was caused by a bona fide error of a clerical or data entry nature." *Wilhelm* v. *Credico, Inc.*, 519 F.3d 416, 421 (8th Cir. 2008).

[217] *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200 (U.S. 4/21/2010) (2010). The FDCPA's bona fide error provision applies only to procedural or clerical errors such as stating incorrectly the amount owed or inadvertently mailing a required communication to the wrong address – not to legal errors. Holding that the bona fide error defense does not apply to mistakes of law, the United States Supreme Court resolved a split among the circuit courts of appeal. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200 (U.S. 4/21/2010) (2010).

The Supreme Court concluded "[w]e draw additional support for the conclusion that bona fide errors in §!692k(c) do not include mistaken interpretations of the FDCPA, from the requirement that a debt collector maintain 'procedures reasonably adapted to avoid any such error.' The dictionary defines 'procedure' as 'a series of steps followed in a regular orderly definite way'.' *Webster's Third New International Dictionary* 1807 (1976). In that light, the statutory phrase is more naturally read to apply to processes that have mechanical orother such 'regular orderly' steps to avoid mistakes—for instance, the kind of internal controls a debt collector might adopt to ensure its employees do not communicate with consumers at the wrong time of day, §1692c(a)(1), or make false representations as to the amount of a debt, §1692e(2)." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200 (U.S. 4/21/2010) (2010). Legal reasoning, the Court found, "is not a mechanical or strictly linear process" like one designed to avoid clerical or factual mistakes."

[218] Circuit courts of appeals are split as to when the one year limitations period begins to run when the alleged FDCPA offense is the filing of a collection suit.

Rejecting an attorney's argument that an alleged FDCPA violation occurs upon the *filing* of suit (where such suit itself gives rise to the FDCPA claim), the 10th Circuit held "where the plaintiffs FDCPA claim arises from the instigation of a debt collection suit, the plaintiff does not have a 'complete and present cause of action,' (citation omitted) and thus no violation occurs within the meaning of §1692k(d), until the plaintiff has been served." *Johnson* v. *Riddle*, 305 F.3d 1107 (10th Cir. 2002). The court explained "if the limitations clock began to run with service of process rather than with filing suit, somebody in Riddle's position could effectively block any action under the federal statute by filing suit and then delaying service. In fact, a delay of service for an entire year (so that the debtor remained unaware of the lawsuit during that time) could cause the limitations period to run out before there was any opportunity for the debtor to bring suit under the FDCPA.

Moreover, the 10th Circuit also declared that the day of the violation is not counted in calculating the statute of limitations. According to the 10th Circuit, "general principals of statutory construction" mean that a FDCPA suit must be fled on or before the one year anniversary date of the event giving rise to the claim—not the day before the anniversary. Accordingly, the calculation of the one year limitations period began on the day after Riddle served Johnson in the collection action (August 25, 1997), and Johnson's FDCPA suit (filed on August 24, 1997) was therefore timely.

A contrary conclusion was reached in *Naas* v. *Stolman*, 130 F.3d 892 (9th Cir. 1997, which held that when the alleged FDCPA violation is the bringing of a suit itself, the limitations period begins to run on the filing of the complaint. In *Naas*, the 9th Circuit looked to *Maloy v. Phillips*, 64 F. 3d 608, 608 (11th Cir. 1995) and *Mattson v. US. West Communications*, 967 F. 2d 259, 261 (8th Cir. 1992) which held that the limitations period begins

to run when a harassing collection letter is mailed. According to the 9th Circuit, "these courts reasoned that the purpose of the Act is to regulate the actions of debt collectors; because the mailing date was the debt collector's 'last opportunity to comply with the [Act], . . . the mailing of the letters, therefore, triggered section 1692k(d).' *Mattson,* 967 F.2d at 261; see *Malay,* 64 F.3d at 608. In addition, "the date of mailing is a date which maybe 'fixed by objective and visible standards,' one which is easy to determine, ascertainable by both parties, and may be easily applied." *Mattson,* 967 F.2d at 261; see *Maloy,* 64 F.3d at 608.These considerations apply equally to this case. Filing a complaint is the debt collector's last opportunity to comply with the Act, and the filing date is easily ascertainable."

[210] In March 2000, the FTC issued its first ever formal advisory opinion. Mezines, FTC Advisory Opinion (March 31, 2000). The defense set forth in §1692k(e) does not include reliance upon informal staff opinions or the Official FTC Commentary. To date, only three additional advisory opinions have followed.

[220] FDCPA claims can be brought in state court, but they truly belong in federal court as federal judges are far more familiar with these kinds of claims than are state judges. Often, Plaintiffs' counsels bring FDCPA claims in state court because they are unfamiliar with, or fearful of, federal court. If an FDCPA claim is brought against you in state court or small claims court, you should probably remove it to federal court. A Notice of Removal must be filed within thirty days after receipt of the Complaint by the Defendant. 28 U.S.C. §1446(b).

APPENDIX A
FORMS

Form 1 - Acknowledgment of Receipt of Claim

[Date]

To: Client

Re: Client v. Debtor
Amount: $

Dear Client:

1 acknowledge, with thanks, receipt of the above claim. 1 am, on this date, directing a written demand to the debtor at the address provided by you in the materials forwarded. I will also attempt to make telephone contact with the debtor to determine its intentions in this matter. A written report setting forth the results of my investigation, and my recommendations, will follow within two weeks.

In order to maximize the prospects for a successful outcome in this matter, if you have not already done so, please be sure to provide me with copies of any written credit application or other banking information that the client has in its possession concerning the debtor, together with any personal guaranty or other information regarding additional potentially responsible parties.

This will confirm that you have authorized me to endorse checks or drafts payable to your order to the order of my attorney trust account, for the purpose of clearing this draft and permitting me to deduct my fees.

[If a new client, add language confirming the fee arrangement.]

Very truly yours,

Form 2 – Consumer Demand Letter

[Date]

Mr. John Q. Consumer
123 Blank Street
Anytown, NJ 01234

RE: Creditor, Inc.

OUR FILE #: ABC456
YOUR ACCOUNT #: 123456-789
BALANCE DUE: $1,234.56

Dear Mr. Consumer:

Your account has been placed with this office by the creditor set forth above. As of the date of this letter, there is due and owing to Creditor, Inc. the sum of $1,234.56.

We will assume that this debt is valid unless you dispute the same, or any portion thereof, within thirty (30) days from your receipt of this notice. If, for any reason, you dispute this debt or any portion thereof, you may notify us of same in writing within thirty (30) days from receipt of this notice. We will then obtain verification of your obligation or, if the debt is founded upon a judgment, a copy of the judgment, and we will mail you a copy of such verification or judgment.

We will provide you with the name and address of the original creditor, if different from the current creditor, if you make written request for the same within thirty (30) days from receipt of this notice.

Please send payment directly to this Office and include our file number on the same.

This is an attempt to collect a debt and any information obtained will be used for that purpose.

Yours Truly,

Law Firm

Form 3 - Commercial Demand Letter

[Date]

Debtor

Re: Creditor, Inc. - $00.00

Debtor:

The above claim against you has been turned over to us for collection. If we do not have your payment by return mail, we will be required to follow our client's instructions as to filing suit against you. Such a suit would increase your indebtedness by costs of suit, statutory attorney's fees and following any judgment, the charges of the sheriff or court officer in levying upon and selling your property.

You can avoid these additional expenses and embarrassment by dropping in to see us at once, or sending us your payment for the above amount by return mail.

Hoping to avoid any unpleasantness in this matter, we remain,

Very truly yours,

cc: Client

Form 4 - Street Address Information Checklist

LETTERHEAD

U.S. Postmaster
ADDRESS

DATE

Request For Change of Address or Boxholder Information Needed For Service of Legal Process

Please furnish the new address or the name and street address (if a boxholder) for the following:
Name:
Address:

NOTE: The name and last known address are required for change of address information. The name, if known, and post office box address are required for boxholder information. The following information is provided in accordance with 39 CFR 265.6(d)(4)(ii). There is no fee for providing boxholder information. The fee for providing change of address information is waived in accordance with 39 CFR 265.6(d)(1) and (2) and corresponding *Administrative Support Manual* 352.44a and b.

1. Capacity of requester (e.g., process server, attorney, party representing self):

2. Statute or regulation that empowers me to serve process (not required when requester is an attorney or a party acting *pro se* -- except a corporation acting *pro se* must cite statute):

3. The names of all known parties to the litigation:

4. The court in which the case has been or will be heard:

5. The docket or other identifying number if one has been issued:

6. The capacity in which this individual is to be served (e.g., defendant or witness):

WARNING

THE SUBMISSION OF FALSE INFORMATION EITHER (1) TO OBTAIN AND USE CHANGE OF ADDRESS INFORMATION OR BOXHOLDER INFORMATION FOR ANY PURPOSE OTHER THAN THE SERVICE OF LEGAL PROCESS IN CONNECTION WITH ACTUAL OR PROSPECTIVE LITIGATION OR (2) TO AVOID PAYMENT OF THE FEE FOR CHANGE OF ADDRESS INFORMATION COULD RESULT IN CRIMINAL PENALTIES INCLUDING A FINE OF UP TO $10,000.00 OR IMPRISONMENT OF NOT MORE THAN 5 YEARS, OR BOTH (Title 18 U.S.C. Section 1001).

I certify that the above information is true and that the address information is needed and will be used solely for service of legal process in connection with actual or prospective litigation.

Signature	Address
Printed Name	City, State ZIP Code

FOR POST OFFICE USE ONLY

POSTMARK

____ No change of address order on file.
____ Not known at address given.
____ Moved, left no forwarding address.
____ No such address.

NEW ADDRESS OR BOXHOLDER'S NAME AND STREET ADDRESS:

Form 5 - Demand for Payment of Bad Checks

Demand for Payment of Dishonored Check

Date: _____

To:

_____

_____

_____

Name of Maker

Warning: You may be sued if you do not make payment of the amount shown on this notice within 35 days after the date this notice was mailed.

_____

_____

_____

Last Known Residence Address or Place of Business

Our check/draft/order in the amount of $ _____, dated _____, payable to the order of

_____

_____

_____

has been dishonored by the bank or other depository upon which it has been drawn because:

[] The maker had no account with such bank or depository

[] The maker had insufficient funds on deposit with such bank or depository

If you do not make payment within 35 days after the date this notice was mailed, you may be sued to recover payment. If a judgment is rendered against you in court, it will include not only the original face amount of the check/draft/order, but also additional liquidated damages of not less than one hundred dollars ($100) nor more than the face amount of the check/draft/order plus five hundred dollars ($500).

Please make payment in the amount of $ _____ to:

_____

Name of Payee

_____

_____

Address To Which Payment Should Be Delivered

[As required by statute, the next page contains the Spanish version of this form.]

Form 5 (continued)

Demande Para el Pago de Cheque Deshonrado

Fecha: _____

Para:

_____

_____

_____

El Nombre de Fabricante

Advertir: Usted puede ser demandado si usted no hace el pago de la cantidad mostrada en esta nota dentro de 35 dias despues que la fecha que esta nota se envio.

_____

_____

_____

Ultima Direccion Conocida de la Residencia o el Lugar del Negocio

Nuestro cheque/giro/la orden en la cantidad de $ _____, pasado de moda _____, pagadero a la orden de _____

_____

_____

ha sido deshonrado por el banco u otro depository sobre que se ha dibujado porque:

[] El fabricante tuvo no cuenta con tal banco ni depository

[] El fabricante tuvo los fondos insuficientes en el deposito con tal banco o depository

Si usted no hace el pago dentro de 35 dias despues que la fecha que esta nota se envio, usted puede ser demandado para recuperar el pago. Si un juicio se rinde contra usted en el tribunal, incluira no solo la cantidad original de cara del cheque/giro/la orden, pero los danos liquidados tambten adicionales de no menos que cien dolares ($100) ni más que la cantidad de la cara del cheque/giro/la orden más quinientos dolares ($500).

Por favor pago de marca en la cantidad de $ _____ a:

_____

El Nombre de Beneficiario

_____

_____

La Direccion A Cual Pago se Debe Entregar

Form 6 - Four Count Complaint for Price of Goods and Agreed Price or Fair Price of Services Rendered

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiff(s)

_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

COMPLAINT

Defendant(s)(on Contract)

_____x

The Plaintiff, _____, residing at _____ _____, says:

FIRST COUNT

There is due from the Defendant the sum of $ _____, on a certain book account, a true copy of which is annexed hereto. Payment has been demanded and has not been made.

SECOND COUNT

The Plaintiff sues the Defendant for goods sold and delivered and/or services rendered by the Plaintiff to the Defendant, upon the promise by the Defendant to pay the agreed amount as set forth in Schedule ____ annexed hereto. Payment has been demanded and has not been made.

Form 6 (continued)

THIRD COUNT

The Plaintiff sues the Defendant for the reasonable value of goods sold and delivered and/or services rendered by the Plaintiff to the Defendant upon the promise of the Defendant to pay a reasonable price for same, as set forth in Schedule ____ annexed hereto. Payment has been demanded and has not been made.

FOURTH COUNT

The Defendant, being indebted to the Plaintiff in the sum of $ _____ upon an account stated between them, did promise to pay to the Plaintiff said sum upon demand. Payment has been demanded and has not been made.

Judgment is demanded for $ _____ together with lawful interest and costs of suit.

I certify that the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated, and that no other parties should be joined in this action. R. 4:5-1.

Dated:

_____
Attorney for Plaintiff

Form 7 - Special Civil Part Summons & Return of Service

THE SUPERIOR COURT OF NEW JERSEY
Law Division, Special Civil Part

SUMMONS

YOU ARE BEING SUED!
IF YOU WANT THE COURT TO HEAR YOUR SIDE OF THIS LAWSUIT, YOU MUST FILE A WRITTEN ANSWER WITH THE COURT WITHIN 35 DAYS OR THE COURT MAY RULE AGAINST YOU. READ ALL OF THIS PAGE AND THE NEXT PAGE FOR DETAILS.

In the attached complaint, the person suing you (who is called *the plaintiff)* briefly tells the court his or her version of the facts of the case and how much money he or she claims you owe. Yon are cautioned that if you do not answer the complaint, you may lose the case automatically, and the court may give the plaintiff what the plaintiff is asking for, plus interest and court costs. If a judgment is entered against you, a Special Civil Part Officer may seize your money, wages or personal property to pay all or part of the judgment and the judgment is valid for 20 yean.

You can do one or more of the following things:

1. *Answer the complaint.* An answer form is available at the Office of the Clerk of the Special Civil Pan The answer form shows you how to respond in writing to the claims stated in the complaint If you decide to answer, you must send it to the court's address on page 2 and pay a S15 filing fee with your answer and send a copy of the answer to the plaintiffs lawyer, or to the plaintiff if the plaintiff does not have a lawyer. Both of these steps must be done **within 35 days (including weekends)** from the date you were "served" (sent the complaint). That date is noted on the next page.

AND/OR

2. *Resolve the dispute.* You may wish to contact the plaintiffs lawyer, or die plaintiff if the plaintiff does not have **a** lawyer, to resolve this dispute. **You do not have to do this unless you want to.** This may avoid the entry of a judgment and the plaintiff may agree to accept payment arrangements, which is something that cannot be forced by the court. Negotiatiating with the plaintiff or the plaintiffs attorney will not stop the 35-day period for filing an answer unless a written agreement is reached and filed with the court

AND/OR

3. *Get a lawyer.* If you cannot afford to pay for a lawyer, free legal advice may be available by contacting Legal Services at _____. If you can afford to pay a lawyer but do not know one, you m*y call the Lawyer ReferraJ Services of your local county Bar Association at _____.

If you need an interpreter or an accommodation for a disability, you must notify the court immediately.

La trsducddn aJ espaftoi se encuentra ai dorso de esta pigina.

_____
Clerk of the Special Civil Part

Form 7 (continued)

EL TRIBUNAL SUPERIOR DE NXJEVA JERSEY
Divsi6n de Derecho, Parte Civil Especial

NOTIFICACI6N DE DEMANDA

¡LE ESTAN HACIENDO JUICIO!
SI UD. QUIERE QUE EL TRIBUNAL VEA SU VERSI6N DE ESTA CAUSA, TIENE QUE PRESENTAR UNA CONTESTACltfN ESCRITA EN EL TRIBUNAL DENTRO DE UN PERfODO DE 35 DIAS O ES POSIBLE QUE EL TRIBUNAL DICTAMINE EN SU CONTRA. PARA LOS DETALLES, LEA TODA ESTA PAGINA V LA QUE SIGUE.

En la demand* adjunta, la persona que le esti haciendo juicio (que se llama *el demandante)* da al juez su version breve de los hechot del caso y la suma de dinero que alega que Ud. le debe. Se Be advierte que si Ud. no contests la demanda, es posible que pierda la causa automiticamente y que el tribunal *66* ai demandante lo que pide *mis* intereses y costas. Si se registra una decision en su contra, es posible que un Oficial de la Parte Civil Especial (Special Civil Pan Officer) embargue su dinero, salario o bienes muebies para pagar toda o parte de la adjudicacidn, y la adjudicacibn tiene 20 alios de vigencia.

Usted puede escoger entre las siguientes opcSones:

1. *Contesiar la demanda.* Puede conseguir un formulario de comestad6n en la Oficina del Secretario de la Parte Civil Especial. El formulario de comestaddn le indica cbmo responder por escrito 8 las alegaciones expuestas en la demanda. Si Ud. dedde contesiar, tiene que ertviar su contestadbn a la direceibn del tribunal que figum en la pdgina 2, pagar un gasto de iniciacidn de la demanda de $15 ddlares y cnviar una copia de la contestacidn al abogado del demandante, o al demandante si el demandante no dene abogado. Tiene 55 dfas (que indoyen fines de semana) para hacer los trimites a partir de la fecha en que fue "notificado" (le enviaron la demanda). Esa fecha se anoia en la p$gina que sigue.

ADEMAS, O DE LO CONTRARIO, UD. PUEDE

2. *Resolver la disputa.* PosibJemente Ud. quiera comunicarse con el abogado del demandante, o el demandante si el demandante no tiene abogado, para resolver esta disputa. No tiene que hacerlo si no quiere. Esto puede evitar que se registre una adjudicacidn y puede ser que el demandante est6 de acuerdo con aceptar un convenio de pago Jo cual es algo que el juez no puede importer. Negodaciones con el demandante o ei abogado del demandante no suspenderin el tbrmino de 35 dfas para registrar una comesiacidn a mcnos que sc lleguc a un acuerdo escrito que se registra en el tribunal.

ADEMAS, O DE LO CONTRARJO, UD. PUEDE

3. *Conseguir un abogado.* Si Ud. no bene dinero para pagar a un abogado, es posible que pueda recibir consejos legales gratuitos comunicindosc con Servirios Legalcs (Legal Services) al _____. Si tiene dinero para pagar a un abogado pero no conoce ninguno puede llamar a Servicios de Recomer›daci6n de Abogados (Lawyer Referral Services) del Colgeio de Abogados (Bar Associaition) de su condado local al _____.

Si necesita un imerprete o alguna acomodacibn para un impedimento, bene que notifk&selo inmediatamente al tribunal.

_____
Secretario de la Fane Civil Especial

Form 7 (continued)

SPECIAL CIVIL PART SUMMONS AND RETURN OF SERVICE - PAGE 2

Plaintiff or Plaintiffs Attorney Information:
Name:
Address:
Telephone No.: (___)_____-_____

Demand Amount: $_____
Filing Fee: $_____
Service Fee: $_____
Attorney's Fees: $_____
TOTAL: $_____

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, SPECIAL CIVIL PART

_____ COUNTY

L_1_____-_____

Plaintiffs)

versus

Defendants)

Docket Number: _____
(to be provided by the court)

Civil Action

SUMMONS

(Circle one): Contract or Tort

Defendant(s) Information: Name, Address & Phono

Date Served: _____

RETURN OF SERVICE IF SERVED BY COURT OFFICER (For Court Use Only)

Docket Number: _____ Date: _____ Time: _____

WM__ WF__ BM__ BF__ OTHER__ HT___ WT___ AGE___ MUSTACHE___ BEARD ___ GLASSES _____
NAME: _____ RELATIONSHIP: _____
Description of Premises

I hereby certify the above to be true and accurate:

_____Court Officer

RETURN OF SERVICE IF SERVED BY MAIL (For Court Use Only)

L _____, hereby certify that on _____, I mailed a copy of the within summons and complaint by regular and certified mail-return receipt requested.

_____

Form 8 - Request to Enter Default (Law Division)

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

REQUEST TO ENTER DEFAULT
WITH CERTIFICATION

Defendant(s)

_____x

Please enter upon the docket the default of the Defendant, _____, in the above-entitled action for failure to plead or otherwise defend as provided by the rules of civil practice or by an Order of this Court, or because the Answer of the Defendant has been stricken.

By:_____
Attorney

CERTIFICATION

1. I am the attorney for the Plaintiff.

2. The Summons and a copy of the complaint in this action were served upon the Defendant, _____, on _____, _____ as appears from the return of process filed with the Court.

3. The time within which the Defendant may answer or otherwise move as to the said Complaint has expired, has not been extended or enlarged, and no Defendant named herein has answered or otherwise moved.

Form 8 (continued)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

_____
Attorney

Form 9 - Final Judgment by Default (Law Division)

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

FINAL JUDGMENT BY DEFAULT AND TAXING OF COSTS

Defendant(s)
_____x

The defendant, _____, having been duly served with process and a copy of the Complaint in the above-entitled action, and having been defaulted for failure to answer, appear or otherwise move as to the Complaint, and defendant not being an infant or incompetent person; and plaintiff having filed a Certification setting forth a particular statement of items of the claim, their amounts and dates, a calculation in figures of the amount of interest, the payments or credits, if any, and the net amount due;

FINAL JUDGMENT is on this _____ day of _____, ___, signed and entered in the sum of $ _____, with costs, in favor of plaintiff _____, and against the defendant _____.

_____
Clerk

Form 10 - Certification of Amount Owed

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

CERTIFICATION
OF AMOUNT DUE

Defendant(s)
_____x

I, _____, hereby certify as follows:

1. I am the _____ (enter title or position) of the plaintiff, its agent in this matter and I have competent knowledge of the matters set forth in this Certification.

2. There is due to the Plaintiff from the Defendant the sum of $ _____, all of which sums are liquidated damages due as a result of a written agreement entered into between Plaintiff and Defendant, a copy of which is attached to this Certification and identified as Exhibit A.

3. There are no credits, deductions, offsets or allowances to the sum aforementioned except as have been specified and credited.

4. Defendant is a corporation and is thus not subject to the military service of the United States.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: _____

Form 11 - Affidavit of Non-Military Service and Military Status Verification Request

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

AFFIDAVIT OF
NON-MILITARY SERVICE

Defendant(s)
_____x

L _____, of full age, being duly sworn according to law upon my oath depose and say:

1. 1 am the _____ of the Plaintiff, authorized to give this Certification in its behalf, and I have competent knowledge of the facts set forth in this Certification.

2. I know that no defendant named herein is in the military service of the United States. The source of my knowledge is

   a. give facts supporting knowledge

_____

Sworn to and subscribed before me
this _____ day of _____, ____.

_____
Title

Form 11 (continued)

DEPARTMENT OF DEFENSE
HUMAN RESOURCES ACTIVfTY
DEFENSE MANPOWER DATA CENTER
1000 WILSON BOULEVARD SUfTE 400
ARLINGTON VA 22209-2583

December 21, 1998

N O T I C K

As the Department of Defense downsizes, there are many efforts underway to economize and streamline activities. At the Defense Manpower Data Center, we are also seeking ways to conduct business more efficiently. My staff has provided many offices with military status verification for some time now. The volume of these requests from law firms and other offices around the country has reached almost 4000 per month and continues to increase.

For DMDC to continue providing this service, I must ask you to share the cost we incur. We will fax responses only to toll-free fax telephone numbers, which many offices have already established, or to local firms within the Washington area. Please provide your toll-free or Washington-area telephone number to Virginia Brooks (703-696-6762) or Deborah Watson (703·696-6767). Requests should be faxed to Military Verification at (703) 696-4156. If you ore unable to provide a toll-free number, we will accept mailed requests if a self-addressed, stamped envelope and a duplicate copy of the request are included. For overnight services, we will accept FedEx or UPS. There will be no exceptions *to* the above. Ail requests (faxed and mailed) should be provided on the attached funn, and mailed requests should be addressed to:

Defense Manpower Data Center
1600 Wilson Boulevard, Suite 400
ATTN: Military Verification
Arlington, VA 22209-2593

I appreciate your assistance in this matter. If you have questions or comments, please contact Mr. Alex Sinaiko at (703) 696-7422.

End

s Kenneth C. Schcflen
Direclor

Form 11 (continued)

Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940, specifically, 50 U.S.C.A. Section 501 ET SEQ., please provide us with the current military status of the following:

NAME	SSN/DOB	NOT IN MIL	IN MIL	SERVICE

VIRGINIA BROOKS_____ Date:_____
OR
DEBORAH WATSON _____ Date:_____

Form 12 - Stipulation in Lieu of Judgment

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

STIPULATION IN
LIEU OF JUDGMENT

Defendant(s)
_____x

The matter and things in controversy having been discussed by and between the parties, and a settlement having been agreed upon:

It is on this _____ day of _____, ____ STIPULATED by and between the parties as follows:

1. Defendant agrees to pay the sum of $ _____, which sum Plaintiff agrees to accept in full settlement of its claim herein, inclusive of interest, counsel fees and court costs.

2. The sum aforesaid shall be paid by Defendant to the attorneys for Plaintiff in the following manner:

[$ _____ on or before _____, ____.]

[$ _____ on or before the _____ day of each [week/month].]

3. In the event Defendant fails to pay in accordance with the terms set forth in this Stipulation, then, and in that event, Plaintiff shall be entitled to obtain the entry of Judgment against Defendant *ex parte*, in the sum of $ _____, giving Defendant credit for any sums actually paid pursuant to the terms of this Stipulation.

Form 12 (continued)

4. In the event of default as aforesaid, Plaintiff shall be entitled to obtain the entry of Judgment upon *ex parte* application, with supporting certification, and with notice to Defendant only in the form of a copy of the application addressed to _____ Esq., attorney for the Defendant, by first class mail, postage prepaid.

We hereby consent to the form and entry of the within Stipulation.

_____
Attorney for Plaintiff

_____
Attorney for Defendant

Form 13 - Transcript of Judgment

Plaintiffs)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SPECIAL CIVIL PART
vs.	ON ( ) CONTRACT: ( ) TORT DOCKET NO.
	STATEMENT FOR DOCKETING
Defendant(s)	Plaintiffs Attorney

Judgment in the above entitled cause was entered in the Ocean County Special Civil Part in favor of the Plaintiffs) and against the Defendant(s)

Execution was issued on _____
and returned on _____
monies received by Constable $_____
total credits _____
Execution was issued on _____
and returned on _____
monies received by Constable $_____
total credits _____
Execution was issued on _____
and returned on _____
monies received by Constable _____
total credits _____

Judgment date ..... _____
Judgment amount _____
Costs & Atty. fees _____
Additional costs . _____
Total ..... _____
Credits, if any ..... _____
Total ..... _____

1 HEREBY CERTIFY that the foregoing reflects the judgment and costs of record in this Court, as of this time.

DATED:_____ _____
CLERK

SEAL

I, the undersigned, am (attorney for) the above named plaintiff, certify that at the present time there is due upon the above mentioned judgment, which is about to be docketed in the Court of New Jersey, as herein set forth.

Total Judgment due ..... $_____
Total Credits ..... _____
Sub Total ..... _____
Interest ..... _____
Total due this date ..... _____
(being a sum not less than $10.00)

I CERTIFY that the foregoing statements made by me are true. 1 am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED:_____ _____

Form 14 - *Ex Parte* Petition for Discovery

Plaintiffs Attorney
Address
Telephone No.
Attomey(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

EX PARTE PETITION
FOR DISCOVERY

Defendant(s)
_____x

The Petition of _____, attorneys for the plaintiff in the above-entitled cause, respectfully shows that:

1. On _____, ____, the plaintiff recovered a judgment against the defendant for $ _____, together with costs of suit.

2. There remains due on said judgment the sum of $ _____, plus supplemental costs and interest.

3. Petitioner prays Your Honor make an Order requiring Defendant _____ to appear and make discovery upon oath, concerning the property and things of the defendant before _____, Esq., at a time to be designated in said Order, and to bring with him the following designated items:

____ a. Copy of Defendant's Certificate of Incorporation or Articles of Partnership;
____ b. Copy of the Certificate of Incorporation, Articles of Partnership or other documentation reflecting any other entity in which Defendant has an interest;
____ c. Defendant's cash receipt and disbursements ledger;
____ d. All deeds to real property in which Defendant has an interest;

Form 14 (continued)

____ e. Appraisals of all real property in which defendant has an interest;
____ f. Records, statements and canceled checks reflecting all bank accounts in which defendant has had an interest for the past two (2) years;
____ g. Schedule of all property/assets of defendant and their location, including, but not limited to: all goods, chattels, debts or loans due or to become due to defendant, accounts receivable, vehicles, machinery and equipment;
____ h. Documents setting forth the names and addresses of all officers, directors and shareholders of defendant;
____ i. Copies of all of defendant's tax returns and appended schedules filed for the past two (2) years.

4. The individual who is the subject of the Order sought by this application resides and/or works in the County where the Order is proposed to be made returnable.

Dated:

_____
Attorney for plaintiff

CERTIFICATION

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

_____
Attorney for plaintiff

Form 15 - Order for Discovery

Plaintiffs Attorney
Address
Telephone No.
Attomey(s) for Plaintiff(s)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiff(s)

Docket No.:

vs.

Civil Action

ORDER FOR
DISCOVERY

Defendant(s)
_____x

Upon reading the foregoing duly verified Petition in this case, presented to me by the plaintiff herein, I do hereby order and require _____ to appear and make discovery on oath, concerning Defendant's property and things in action before _____, Esq. at _____, New Jersey on the _____ day of _____, ____ at the hour of _____ ____m.; and

IT IS FURTHER ORDERED that _____ bring with him the documents and writings set forth in the Petition upon which this Order is based; and

IT IS FURTHER ORDERED that a copy of this Order and the Petition upon which it is based, which need not be certified, be served upon said _____ at least _____ days before the return date hereof by certified and/or regular mail, by the attorneys for the plaintiff.

Given under my hand this _____ day of _____, ____.

_____
J.S.C.

Form 16 - Information Subpoena

IMPORTANT NOTICE
PLEASE READ CAREFULLY
FAILURE TO COMPLY WITH THIS INFORMATION SUBPOENA MAY RESULT IN YOUR ARREST AND INCARCERATION

NAME:
ADDRESS:
TELEPHONE NO.:
Attorneys for

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SPECIAL CIVIL PART
_________ COUNTY

Plaintiff,
-vs-
Defendant

DOCKET NO.
CIVIL ACTION
INFORMATION SUBPOENA

THE STATE OF NEW JERSEY, to:

Judgment has been entered against you in the Superior Court of New Jersey, Law Division, Special Civil Part, _________ County, on _________, 20 __, in the amount of $_________ plus costs, of which $_________ together with interest from _________, 20__, remains due and unpaid.

Attached to this Information Subpoena is a list of questions that court rules require you to answer within 14 days from the date you receive this subpoena. If you do not answer the attached questions within the time required, the opposing party may ask the court to conduct a hearing in order to determine if you should be held in contempt. You will be compelled to appear at the hearing and explain your reasons for your failure to answer.

If thi[illegible] resulted from a [illegible]ault, [illegible] may [illegible] wtbSkSSflhetLrtlwinfdSion **vac**[illegible] mating Ji appropriate motion to the cou[illegible] Cont[illegible]an mto[illegible]y **on** Si[illegible]e such a motion. Even if you dispute the judgment you must answer all of the attached questions.

You must answer each question giving complete answers, attaching additional pages if necessary. False or misleading answers may subject you to punishment by the court. However, you need not provide informal concerning the income and assets of others hvmg in your household unless you have a financial intercsttothe assets or income. Be sure to sign and date your answers and return them to the address in the *upper* left hand comer **within 14 days.**

Dated:_________________, 20__.

_________________ _________________
Attorney for Clerk

QUESTIONS FOR INDIVIDUALS

1. Full name _________________
2. Address _________________
3. Birthdate _________________
4. Social Security # _________________
5. Driver's license # and expiration date _________________
6. Telephone # _________________
7. Full name and address of your employer _________________
____
   (a) Your weekly saiaiy: Gross _________ Net _________
   (b) If not presently employed, name and address of last employer.
8. Is there currently a wage execution on your salary?
   Yes ______ No ______
9. List the names, addresses and account numbers of all bank accounts on which your name appears.
10. If you receive money from any of the following sources, list the amount, how often, and the name and address of the source:

Form 16 (continued)

Type	Amount & Frequency	Name & Address of Sources
Alimony		
Loan Payments		
Rental Income		
Pensions		
Bank Interest		
Stock Dividends		
Other		

11. Do you receive any of the following, which are exempt from levy? Any levy on disclosed exempt funds may result in monetary penalties including reimbursement of the debtor's out-of-pocket expenses.

Social Security benefits	Yes ___	Amount per month	No___
S.S.I. benefits	Yes ___	Amount per month	No___
Welfare benefits	Yes ___	Amount per month	No___
V.A. benefits	Yes ___	Amount per month	No___
Unemployment benefits	Yes ___	Amount per month	No___
Workers' compensation benefits	Yes ___	Amount per month	No___
Child support payments	Yes ___	Amount per month	No___

Attach copies of the three most recent bank statements for each account listed in Question 9 that contains funds from these sources.

12. Do you own the property where you reside?
Yes _____ **No** _____ If Yes, state the following:
(a) Name of the owner or owners _____
(b) Date property was purchased _____
(c) Purchase price _____
(d) Name and address of mortgage holder _____
_____
(e) Balance due on mortgage _____

13. Do you own any other real estate?
Yes _____ **No** _____ If Yes, state the following for each property:
(a) Address of property _____
(b) Date property was purchased _____
(c) Purchase price _____
(d) Name and address of ail owners _____
_____
(e) Name and address of mortgage holder _____
_____
(0 Balance due on mortgage _____
(g) Name and address of all tenants and monthly rental paid by each tenant

14. Does the present value of your personal property which includes automobiles, furniture, appliances, stocks, bonds, and cash on hand, exceed Si,OCX)?
Yes _____ No _____ If the answer is "yes," you must itemize all personal property owned by you.
Cash on band: $_____
Other personal property: (Set forth make, model and serial number. If financed, give name and address of party to whom payments are made).

Item	Date Purchased	Purchase Price	If Financed Balance Still Due	Present Value

15. Do you own a motor vehicle?
Yes _____ No _____ If yes, state the following for each vehicle owned:
(a) Make, model and year of motor vehicle _____
(b) If there is a lien on the vehicle, state the name and address of the lienholder and the amount due to the 1icnholdcr _____
_____

Form 16 (continued)

(c) License plate # _____
(d) Vehicle identification # _____

16. Do you own a business?
Yes _____ **No** _____ If Yes, state the following:
(a) Name and address of the business

(b) Is the business a Corporation _____, sole proprietorship _____ or partnership _____?
(c) The name and address of aJJ stockholders, officers and/or partners
(d) The amount of income received by you from the business during the last twelve months

17. Set forth all other judgments that you are aware of that have been entered against you and include:

Creditor's Name	**Creditor's Attorney**	**Amount** Due	Name of Court	**Docket #**

I hereby certify that the foregoing statements made by me are true. 1 am aware that if any of the foregoing statements made by me arc willfully false, I am subject to punishment.
Date: _____ _____

QUESTIONS FOR BUSINESS ENTITY

1. Name of business including all trade names. _____
2. Addresses of all business locations. _____
3. If the judgment-debtor is a corporation, the names and addresses of all stockholders, officers and directors.
4. If a partnership, list the names and addresses of all partners. –
5. If a limited partnership, list the names and addresses of all general partners.
_____
6. Set forth in detail the name, address and telephone number of all businesses in which the principals of the judgment-debtor now have an interest and set forth the nature of the interest.
7. For all bank accounts of the judgment-debtor business entity, list the name of the bank, the bank's address, the account number and the name in which the account is held. ____
8. Specifically state the present location of all books and records of the business, including checkbooks.
9. State the name and address of the person, persons, or entities who prepare, maintain and/or control the business records and checkbooks. _____
10. List all physical assets of the business and their location. If any asset is subject to a lien, state the name and address of the lienholder and the amount due on the lien. _____
11. Does the business own any real estate? Yes _____ **No** _____
If yes, state the following for each property:
(a) Namc(s) in which property is owned _____
(b) Address of property _____
(c) Date property was purchased _____
(d) Purchase price. _____
(e) Name and address of mortgage holder _____
(f) Balance due on mortgage _____
(g) The names and addresses of all tenants and monthly rentals paid by each tenant. _____

NAME AND ADDRESS OF TENANT	MONTHLY RENTAL

12. List all motor vehicles owned by the business, stating the following for each vehicle:
(a) Make, model and year _____
(b) License plate number _____
(c) Vehicle identification number _____
(d) If there is a lien on the vehicle, the name and address of the lienholder and the amount due on the lien ____
13. List all accounts receivable due to the business, stating the name, address and amount due on each receivable.

Form 16 (continued)

NAME AND ADDRESS **AMOUNT DUE**

14. For any transfer of business assets that has occurred within six months from the date of this subpoena, specifically identify:

(a) The nature of the asset _____

(b) The date of transfer _____

(c) Name and address of the person to whom the asset was transferred

(d) The consideration paid for the asset and the form in which it was paid (check, cash, etc.)

(e) Explain in detail what happened to the consideration paid for the asset

15. If the business is alleged to be no longer active, set forth:

(a) The date of cessation _____

(b) All assets as of the date of cessation _____

(c) The present location of those assets _____

(d) If the assets were sold or transferred, set forth:

(1) The nature of the assets _____

(2) Date of transfer _____

(3) Name and address of the person to whom the assets were transferred

_____

(4) The consideration paid for the assets and the form in which it was paid _____

(5) Explain in detail what happened to the consideration paid for the assets _____

16. Set forth all other judgments that you are aware of that have been entered against the business and incluck the following:

Creditor's Name	Creditor's Attorney	Amount Due	Name of Court	Docket Number

17. For ail litigation in which the business is presently involved, state:

(a) Date litigation commenced _____

(b) Name of party who started the litigation _____

(c) Nature of the action _____

(d) Names of all parties and the names, addresses and telephone numbers of their attorneys _____

(e) Trial date _____

(f) Status of case _____

(g) Name of the court and docket number _____

18. State the name, address and position of the person answering these questions. _____

1 hereby certify that the foregoing statements made by me are true. 1 am aware that if any of the foregoing statements made by me are willfully false, 1 am subject to punishment

Date: _____ _____

Form 17 - *Ex Parte* Application for Issuance of Third Party Information Subpoena

CURETON CLARK, P.C.
3000 Midlantic Drive, Suite 200
Mount Laurel, New Jersey 08054
(856) 824-1001
Attorneys for

	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY
	DOCKET NO.
	Civil Action
	***EX PARTE* APPLICATION FOR ISSUANCE OF THIRD PARTY INFORMATION SUBPOENA (R. 6:7-2(b)(2)**

The *ex parte* application of Cureton Clark, P.C., respectfully shows that:

1. They are the attorneys for the Plaintiff in the above entitled action.

2. Judgment was entered in favor of the Plaintiff and against the Defendant on _____, 2000 for damages in the amount of $_____. The sum of $_____ remains due unpaid and owing on the judgment, together with such additional interest as shall accrue on the judgment.

3. On _____, 2000 an Information Subpoena was served on the Defendant in accordance with R. 6:7-2(b)(1). The subpoena was addressed to the judgment Defendants last known address and was served by certified mail, return receipt requested, and simultaneously by regular mail.

Form 17 (continued)

4. The judgment Defendant has failed to respond to the Information Subpoena, and at least twenty one (21) days have elapsed from the date of service.

5. I believe that _____, may have information in its possession that may assist my office in collecting the judgment that is due to our client in this matter. The basis for my belief that _____ may have this information, and the nature of the information I believe they may have is as follows:

6. The issuance of this Subpoena is reasonably necessary to effectuate a post-judgment judicial remedy.

CURETON CLARK, P.C.
Attorneys for

Dated: _____
Thomas A. Clark, Esquire

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____

Form 18 - Order for Issuance of Third Party Information Subpoena

CURETON CLARK, P.C.
3000 Midlantic Drive, Suite 200
Mount Laurel, New Jersey 08054
(856) 824-1001
Attorneys for

	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY
	DOCKET NO.
	Civil Action
	ORDER FOR ISSUANCE OF THIRD PARTY INFORMATION SUBPOENA (R. 6:7-2(b)(2)

THIS MATTER having been opened to the Court upon the application of Cureton Clark, P.C., attorneys for the Plaintiff, and the Court having reviewed and considered the *ex parte* application for the issuance of a Third Party Post-Judgment Subpoena dated _____, and good cause for the entry of this Order having been shown;

IT IS on this _____ day of _____, 2000 ORDERED, ADJUDGED AND DIRECTED that a Third Party Information Subpoena shall issue to _____, in accordance with R. 6:7-2(b)(2).

_____
J.S.C.

Form 19 - Information Subpoena and Written Questions to Non-Parties

INFORMATION SUBPOENA AND WRITTEN QUESTIONS TO NON-PARTIES

IMPORTANT NOTICE – PLEASE READ CAREFULLY FAILURE TO COMPLY WITH THIS INFORMATION SUBPOENA MAY RESULT IN YOU BEING PUNISHED BY THE COURT

Name:

Address:

Telephone No.:

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, SPECIAL CIVIL PART

_____ COUNTY

DOCKET NO _____

Plaintiff,

v.

Defendant.

CIVIL ACTION

INFORMATION SUBPOENA

Social Security Number (If known) _____

THE STATE OF NEW JERSEY, TO:

Judgment has been entered against _____ (the name of defendant) whose last know address is in the Superior Court of New Jersey, Law Division, Special Civil Pan. _____County.

Attached to this Information Subpoena is a list of questions that the Court Rules of New Jersey require you to answer within 14 days from the date you receive this subpoena. You must answer the questions in section __ A, B, or __ C. If you do not answer the attached questions within the rime required, the judgment creditor or judgment creditor's attorney may ask the Court to conduct a hearing in order to determine if you should be held in contempt. You will be compelled to appear at the hearing and explain your reasons for your failure to answer.

You must answer each question giving complete answers, attaching additional pages if necessary. False or misleading answers may subject you to punishment by the Court. Be sure to sign and date your answers and return them to the address in the upper left hand corner within 14 days.

TAKE NOTICE THAT SINCE THIS IS AN OFFICIAL FORM OF THE COURTS OF THE STATE OF NEW JERSEY, YOU CANNOT REFUSE TO ANSWER ANY OF THE QUESTIONS ON THE GROUNDS THAT THE INFORMATION IS PRIVILEGED.

DATED:_____

_____ _____

Attorney For Cleric

Form 19 (continued)

SECTION A TO BE ANSWERED BY BANKING INSTITUTIONS

1. Docs the named defendant have any checking, savings or other accounts at your bank? Yes _____ No _____

2. If yes, for ail such accounts set forth the type of account, the account number and the current balance in the account.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED:_____ _____

Signature

_____

Print your name and title

SECTION B TO BE ANSWERED BY EMPLOYERS

1. Does the named defendant work for your business at the present time? Yes _____

No _____

2. If yes, set forth the named defendant's gross and net weekly salary, including any overtime if applicable.

3. If the named defendant is no longer employed by your business, and if you know, state the name and address of the named *defendant's* current employer.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED:_____ _____

Signature

_____

Print your name and title

SECTION C TO BE ANSWERED BY THOSE CONDUCTING BUSINESS WITH THE NAMED DEFENDANT

1. Has your business ever purchased goods and/or services from the named defendant? Yes _____ No _____

2. Does your business presently purchase goods and/or services from the named defendant? YES ___ NO ____

3. In the future, will your business purchase goods and/or services from the named defendant? YES ___ NO ___

4. Does your business owe any money to the named defendant? YES _____ NO ____ If yes, state the amount currently owed.

I hereby certify that the foregoing statements made by roe are true. I am aware that if any of the foregoing statements made by me are willfully false. I am subject to punishment.

DATED:_____ _____

Signature

_____

Form 20 - Notice of Motion to Enforce Litigant's Rights

NOTICE OF MOTION FOR ORDER ENFORCING LITIGANT'S RIGHTS

Name:

Address:

Telephone No.:

Plaintiff,

v.

Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: SPECIAL CIVIL PART

_____ **COUNTY**

DOCKET NO _____

CIVIL ACTION

Notice of Motion for Order

Enforcing Litigant's Rights

TO: _____. Defendant

PLEASE TAKE NOTICE that on _____. 19___ at _____ __.m, I will apply to the above-named court, located at _____, New Jersey, for and Order

(1) Adjudicating that you have violated the litigant's rights of the plaintiff by failure to comply with the (check one) ❑ order for discovery,

❑ information subpoena served upon you;

(2) Compelling you to immediately furnish answers as required by the (check one) ❑ order for discovery, ❑ information subpoena;

(3) Directing that, if you fail to appear in court on the date written above, you shall be arrested by an Officer of the Special Civil Part or the Sheriff and confined in the county jail until you comply with the (check one)

❑ order for discovery, ❑ information subpoena;

(4) Directing that, if you fail to appear in court on the date written above, you shall pay the plaintiffs attorney fees in connection with this motion;

(5) Granting such other relief as may be appropriate.

If you have been **servcd** with an information subpoena, you may avoid having to appear in court by sending written answers to the quesuons attached to the information subpoena to me no later than three (3) days before 0>e court date.

I will rely on the certification attached hereto.

Date: _____

_____

Attorney for Plaintiff or Plaintiff, Pro Se

Form 21 - Certification Supporting Motion to Enforce Litigant's Rights

Name:
Address:
Phone No.:

_____	SUPERIOR COURT OF NEW JERSEY
)	LAW DIVISION, ____ COUNTY
)	SPECIAL CIVIL PART
Plaintiff,)	
vs.)	DOCKET NO. ____
)	
)	Civil Action
)	
Defendant)	CERTIFICATION IN SUPPORT OF
_____)	MOTION FOR ORDER ENFORCING
	LITIGANTS RIGHTS

The following certification is made in support of plaintiffs motion for an order enforcing litigant's rights:

1. I am the plaintiff or plaintiffs attorney in this matter.

2. On ____, 20__, plaintiff obtained judgment against the defendant, _____, for $_____ damages, plus costs.

3. (Check all applicable boxes below)

☐ a. On ____, 20__, an Order was entered by this Court ordering defendant ____ to appear at _____ on _____, __, at __.m. and make discovery on oath as to the defendant's property and on ____, 20__, a copy of the Order was served upon _____ (check one) ☐ personally, ☐ by sending it simultaneously by regular and certified mail, return receipt requested to defendant's last known address as set forth.

☐ b. On ____, __, I served an information subpoena and attached questions as permitted by the Rules of Court on the defendant, _____, (check one) ☐ personally, ☐ by sending it simultaneously by regular and certified mail, return receipt requested to defendant's last known address as set forth.

☐ c. The regular mail has not been returned by the U.S. Postal Service.

☐ d. The regular mail has been returned by the U.S. Postal Service with the following notation: _____.

☐ e. The certified mail return receipt card has been signed for and returned to me.

☐ f. Though the certified mailing has been returned by the U.S. Postal Service, it was not returned in a manner that would indicate that the defendant's address is not valid. It was not returned with any of the following markings by the U.S. Postal Service: "Moved, unable to forward," "Addressee not known," "No such number/street," "Insufficient address," "Forwarding time expired," or in any other manner that would indicate that service was not effected.

4. _____ has failed to comply with (check one) ☐ the order, ☐ the information subpoena.

5. I request that the Court enter an order enforcing litigant's rights.

6. On _____, 20__, I served copies of this motion and certification on _____ (check one) ☐ personally, ☐ by sending them simultaneously by regular and certified mail, return receipt requested to _____ (Name and address).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: _____ _____

Form 22 - Order to Enforce Litigant's Rights

ORDER TO ENFORCE LITIGANT'S RIGHTS
FAILURE TO COMPY WITH THIS ORDER MAY RESULT IN YOUR ARREST

Name:

Address:

Telephone No.:

Plaintiff.

v.

Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: SPECIAL CIVIL PART

_____ COUNTY

DOCKET NO _____

CIVIL ACTION

ORDER TO ENFORCE LITIGANT'S RIGHTS

This matter being opened to the court by _____ on plaintiffs motion for an order enforcing litigant's rights and the defendant having failed to appear on the return date and having failed to comply with the (check one) ☐ order for discovery previously entered in this case, ☐ information subpoena;

It is on the _____ day of _____, 20___, ORDERED and adjudged:

1. Defendant _____ has violated plaintiffs rights as a litigant;

2. Defendant _____ shall immediately furnish answers as required by the (check one) ☐ order for discovery, ☐ information subpoena

3. If defendant _____ fails to comply with the (check one) ☐ order for discovery, ☐ information subpoena within ten (10) days of the certified date of personal service or mailing of this order, a warrant for the defendant's arrest shall issue out of this Court without further notice;

4. Defendant shall pay plaintiffs attorney fees in connection with this motion, in the amount of $ _____.

_____

, J.S.C.

PROOF OF SERVICE

On _____, 20___, I served a true copy of this Order on defendant _____ (check one) ☐ personally, ☐ by sending it simultaneously by regular and certified mail, return receipt requested to:

(Set forth address) _____

1 certify that the foregoing statements made by me arc true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Date: _____ _____

Form 23 - Order for Arrest

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division, Special Civil Part
County

Plaintiffs)

Docket No.:

vs.

Civil Action

Defendant(s)

ORDER FOR ARREST

_____x

This matter being opened to the court by _____ on plaintiffs motion for an order enforcing litigant's rights and the defendant having failed to appear on the return date and having failed to comply with the [order for discovery previously entered in this case/information subpoena];

It is on the _____ day of _____, ____ ORDERED and adjudged:

1. Defendant _____ has violated plaintiffs rights as a litigant;

2. Defendant _____ shall immediately furnish answers as required by the [order for discovery/information subpoena];

3. If defendant _____ fails to comply with the [order for discovery/information subpoena] within ten (10) days of the certified date of personal service or mailing of this order, a warrant for the defendant's arrest shall issue out of this Court without further notice.

_____
J.S.C.

Form 23 (continued)

PROOF OF MAILING

On _____, ____, I served a true copy of this Order on defendant _____ [personally/by sending it simultaneously by regular and certified mail, return receipt requested to: (set forth address) _____,]

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date:

_____

Form 24 - Certification in Support of Warrant for Arrest

CERTIFICATION IN SUPPORT OF APPLICATION FOR ARREST WARRANT

Name:
Address:
Telephone No.:

Plaintiff,
v.
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, _____ COUNTY
SPECIAL CIVIL PART
DOCKET NO _____
CIVIL ACTION
Certification in Support of Application for Arrest Warrant

The following certification is made in support of plaintiffs application for an arrest warrant:

L I am the plaintiff or plaintiffs attorney in this matter.

2. On _____, 20__, plaintiff obtained a judgment against the defendant, _____, f0T $ _____ damages, plus costs.

3. (Check all applicable boxes below)

❑ a. On _____, 20___, an Order was entered by this Court ordering defendant, _____, to appear at _____ on _____, 20___, at _____ __.in. and make discovery on oath as to the defendant's property and on ____, 20___, a copy of the Order was served upon _____ (check one) ❑ personally, ❑ by sending it simultaneously by ordinary and certified mail, return receipt requested to ——_____'s last known address as shown on the discovery Order referenced above.

❑ b. On _____, 20__, I served an information subpoena and attached questions as permitted by Court Rules on the defendant, _____, (check one) ❑ personally, ❑ by sending it simultaneously by regular and certified mail, return receipt requested, to defendant's last known address, as shown on the accompanying notice of motion.

❑ c. The regular mail has not been returned by the U.S. Postal Service.

❑ d. The regular mail has been returned by the U.S. Postal Service with the following notation: _____.

❑ c. The certified mail return receipt card has been signed for and returned to me.

❑ f. Though the certified mailing has been returned by the U.S. Postal Service, it was not returned in a manner that would indicate that the defendant's address is not valid. It was not returned with any of the following markings by the U.S. Postal Service: "Moved, unable to forward," "Addressee not known," "No such number/street," "Insufficient address," "Forwarding time expired," or in any other manner that would indicate that service was not effected.

4. The defendant, _____, has failed to comply with (check one) ❑ the Order, ❑ the information subpoena

5. On _____, 20___, I served a true copy of my notice of motion for an order to enforce litigant's rights on defendant (check *one*) ❑ personally, ❑ by lending if simultaneously by regular and certified mail, return receipt requested, at the address shown on the proof of service at the conclusion of the Order to Enforce Litigant's Rights.

6. Neither the regular mail nor the certified mail containing the notice of motion has been returned by the U.S. Postal Service in a manner that would indicate that the defendant's address is not valid. Neither the regular nor certified mail was returned marked "Moved, unable to forward," "Addressee not known," "No such number/street," "Insufficient address," "Forwarding time expired," or in any ocher manner that would indicate that service was not effected.

7. On _____, 20__, the Court entered an Order to Enforce Litigant's ^ wb‹‹ defendant ‹‹‹‹ ‹‹ appear on the return doy of my motion for an order enforcing litigant's rights.

8. On _____, 20___, I served a true copy of the Order to Enforce Litigant's Rights on defendant (check one) ❑ personally, ❑ by sending it simultaneously by regular and certified mail, return receipt requested at the address shown on the Proof of Service at the conclusion of the Order to Enforce Litigant's Rights.

9. Neither the regular mail nor the certified mail has been returned by the U.S. Postal Service in a manner that would indicate that the defendant's address is not valid. Neither the regular nor certified mail was returned marked "Moved, unable to forward," "Addressee not known," "No such number/street," "Insufficient address," "Forwarding time expired," or in any other manner that would indicate that service was not effected.

10. Ten days have passed since I served a copy of the Order to Enforce Litigant's Rights on defendant, and defendant has not complied with the (check one) ❑ information subpoena, ❑ Order for Discovery.

1L I request that the Court issue a warrant for the arrest of defendant

I certify that the foregoing statements made by roe are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment

Form 25 - Warrant for Arrest

WARRANT FOR ARREST

Name:

Address:

Telephone No.:

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, SPECIAL CIVIL PART

_____ COUNTY

DOCKET NO _____

Plaintiff,

v.

Defendant.

CIVIL ACTION

WARRANT FOR ARREST

TO: A Court Officer of the Special Civil Part or the Sheriff of _____ County

You are hereby commanded to arrest _____, at (check one) ☐ any location, ☐ the address set forth in the **annexed** order to enforce litigant's rights between the hours of 7:30 a.m. and 3:00 pm. cm a day when the court is in session, and bring him *or* her forthwith before a Judge of the Superior Court to await the further order of the Court in this matter.

Local police departments are authorized and directed to provide assistance to the officer executing this warrant

Date: _____

WITNESS:

_____
Judge of the Superior Court

_____
Clerk of the Special Civil Part

Form 26 - Notice of Demand to Produce Schedule of Assets

Creditor vs. Debtor

TO: Agent or individual having charge or control of property of the above corporation re:

Docket No.:

TAKE NOTICE that pursuant to N.J.S.A. 2A:17-74, you shall furnish to the Officer of the Court having for service a Writ of Execution against the defendant corporation and serving this demand, the following information:

1. Names and addresses of all officers of the corporation;

2. Names and addresses of all directors of the corporation;

3. Schedule of all property of the corporation and its location, including but not limited to, all debts due or to become due to the corporation together with evidence of same so far as you have knowledge or as reflected in books over which you have charge or control; accounts receivable; all loans due from officers or others; a designation as to the amount of capitalization and whether same has been paid; all goods and chattels; all cash on hand and where located; the amount of all bank accounts and checking accounts; real estate or goods and chattels held in trust; as well as stock in any other corporation.

DEMAND is further made of you pursuant to N.J.S.A. 2A:17-75 that you deliver to the Court Officer, with a transfer in writing for the use of the plaintiff in the above matter, all of the debts due and owing to the defendant corporation.

BE ADVISED that the laws of this State require you to provide this information and that any person who shall neglect or refuse to comply shall himself be liable to pay to the plaintiff the amount due with costs. If, upon the Court Officer's return of service, he advises service of this Notice but does not provide therewith a copy of the schedule demanded or notification by you or the officer that such a schedule has been provided, we will understand this to constitute your neglect or refusal to comply and will take appropriate action to satisfy against you personally that obligation which is outstanding against the corporation.

_____

Attorney for Plaintiff

Form 26 (continued)

The above demand is made herewith at the request of the undersigned Court Officer pursuant to N.J.S.A. 2A:17-74 and 2A:17-75.

Dated:

_____

Form 27 - Writ of Wage Execution (Law Division)

Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
DIVISION, **COUNTY**

Plaintiff,

DOCKET NO:

vs.

WRIT OF WAGE EXECUTION

Defendant.

THE STATE OF NEW JERSEY

TO THE SHERIFF OF _____COUNTY

YOU ARE HEREBY COMMANDED that of the weekly earnings which the Defendant _____receives from employer _____ whose address is _____, you take the sum of 10% of the gross weekly pay or 25% of disposable earnings for that week or the amount by which the designated Defendant's disposable weekly earnings exceed S175.50 per week, pursuant to the Order for Wage Execution entered with this Court on _____, a copy of which is attached hereto and Certification of the Court entered in the sum of S _____ plus interest and fees until $ _____ plus interest and fees is paid and satisfied, and that you pay weekly to the Plaintiff s duly authorized attorney said amount of reservation of salary.

YOU ARE FURTHER COMMANDED that the employer shall immediately give the designated defendant a copy of this order. The designated defendant may object to the wage execution or apply for a reduction in the amount withheld at any time. To object or apply for a reduction, a written statement of the objection or reasons for a reduction must be filed with the Clerk of the Court and a copy must be sent to the creditor's attorney or directly to the creditor if there is no attorney. A hearing will be held within seven days after filing the objection or

Form 27 (continued)

application for a reduction. Accordmg to law, no employer may terminate an employee because of a garnishment.

YOU ARE HEREBY FURTHER COMMANDED that upon satisfaction of Plaintiff's damages, costs and interests, plus subsequent costs, or upon termination of the Defendant's salary, you will immediately thereafter return this Writ to the Court with a statement as to the execution annexed.

WITNESS, the Honorable _____, Judge of the Superior Court, this _____day of , 200 .

_____, **CLERK**

ENDORSEMENT

Judgment Amount*.....	S
Additional Costs.....	S
Interest thereon.....	S
Credits.....	$
Sheriff s Fees.....	S
Sheriff's Commissions.....	S
TOTAL:	$

* "Judgment Amount" includes amount verdict or settlement, pius pre-judgmcm com "sb. plus any applicable statutory attorney's fe

Post- t interest applied Required by Rule 4:59-1, cTpLTn ' 4:42-11 must be calculated as **simple** interest. As the method by which interest has been calculated, taking into account all partial payments made by the defendant.

_____
Attorney for Plaintiff

Dated: _____, 200 __

[Nole. Form adopted » Appendix XIJ-EJuly 27. 2006 to be effectve September 1. 2006; amended September 11. 2006 to be effective immediately; amended July 3. 2007. io be effective July 24. 2007.]

Form 28 - Writ of Execution Against Goods & Chattels (Special Civil Part)

DOCKET NO.: ___DC-____-___
JUDGMENT NO.: ___VJ-____-___
WRIT NUMBER: _____

SUPERIOR COURT OF NEW JERSEY
SPECIAL CIVIL PART
_____ COUNTY
STATE OF NEW JERSEY
EXECUTION AGAINST GOODS AND CHATTELS

PLAINTIFF(S),

DEBTORS: _____
_____

vs.

DEFENDANT(S),
ADDRESS OF FIRST DEBTOR:
STREET ADDRESS
CITY, NJ ZIP

TO: _____
COURT OFFICER OF THE SPECIAL CIVIL PART

YOU ARE ORDERED to levy on the property of any of the debtor* designated herein; your actions may include, but are not limited to, taking into possession any motor vehicJe(s) owned by any of the debtors, taking possession of any inventory and/or machinery, cash, bank accounts, jewelry, electronic devices, fur coats, musical instruments, stock certificates, securities, notes, rents, accounts receivable, or any item(s) which may be sold pursuant to statute to satisfy this execution in full or in part All proceeds arc to be paid to the court officer who shall pay them to the creditor or the attorney for the creditor, or, if this is not possible, to the court. This order for execution shall be valid for two years from this date.

Local police departmenu arc authorized and requested to provide assistance, if needed, to the officer executing this writ. This docs not authorize entry to a residence by force unless specifically directed by court order.

Judgment Date ..... _____
Judgment Amount.. $ _____
Costs and Atty. Fees 5 _____
Subsequent Costs... 5 _____
Total ..... $ _____
Credits, if any..... $ _____
Subtotal A ..... $ _____
Interest ..... % _____
Execution costs and
mileage..... $ _____
Subtotal B ..... $ _____
Court officer fee..... S _____
Total due this date.. S _____
Date:
Property to be Levied
Upon and Location of Same:

_____

_____

CITY _____ ST 3F
CREDITOR'S ATTORNEY AND ADDRESS:

_____

_____

_____

CITY NJ ZIP
Telephone: ____ - _____

Date _____
_____
Judge

_____
Clerk of the Special Civil Part

I RETURN this execution to the Court
( ) Unsatisfied _____
( ) Satisfied ( ) Partly Satisfied

Amount Collected _____

Fee Deducted _____

Amount Paid to Atty _____

Date _____/

_____
Court Officer

Form 29 - Notice of Motion for Order for Turn-Over

Plaintiff s Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

NOTICE OF MOTION
FOR TURN-OVER OF FUNDS

Defendant(s)
_____x

TO: Defendant or Attorney for Defendant and Bank

SIRS:

PLEASE TAKE NOTICE, that the undersigned attorneys will apply to this Court, located at _____, on the _____ day of _____, ____ at _____ ___m., or as soon thereafter as counsel may be heard, for the entry of an Order for the turn-over of funds, served and filed together herewith. The grounds for this motion are as set forth more fully in the Certification attached hereto, and served and filed together herewith. This Motion seeks the turn-over of the sum of $ _____ by the _____ (bank) to _____ (court officer) by virtue of a levy duly made upon said funds pursuant to a Writ of Execution of this Court.

PLEASE TAKE FURTHER NOTICE that, pursuant to R. 1:6-2, this motion shall be deemed uncontested and the proposed form of Order signed by the Court unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought.

Dated:

_____
Attorney for Plaintiff

Form 30 - Certification in Support of Motion for Turn-Over

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiff(s)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiff(s)

Docket No.:

vs.

Civil Action

CERTIFICATION IN
SUPPORT OF MOTION

Defendant(s)
_____x

L _____, at attorney-at-law duly licensed to practice before the Courts of the State of New Jersey, and the attorney for the plaintiff, respectfully certifies as follows:

L On _____, ___, this Court entered a Judgment in favor of the plaintiff and against the defendant, in the sum of $ _____, together with costs.

2. Thereafter, a Writ of Execution was forwarded to _____ (Court Officer) of this Court, for levy upon the defendant's bank account at the _____ (Bank).

3. Pursuant thereto, _____ (Court Officer) levied upon the said bank account in the sum of $ _____, as evidenced by the Notice of Levy of said _____ (Court Officer), a true copy of which is attached hereto and marked as Exhibit A.

4. By virtue of the levy, I respectfully request that this Court sign and enter the within Order requiring the _____ (Bank) to turn-over to the said _____ (Court Officer) the subject funds.

5. True copies of the within Certification, Notice of Motion and proposed Order have been served upon the said _____ (Bank), the attorney for the judgment-debtor, and the debtor this date.

Form 30 (continued)

6. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

_____
Attorney for Plaintiff

Form 31 - Order for Turn-Over of Levied Property

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

ORDER FOR TURN-OVER
OF LEVIED PROPERTY

Defendant(s)
_____x

This matter being opened to the Court upon application by counsel for plaintiff for an Order requiring turn-over of the sum of $ _____ of defendant's funds held by the _____ (Bank), and the said application having been deemed uncontested for lack of opposition with respect thereto;

IT IS, in this _____ day of _____, ____,

ORDERED that the motion of the plaintiff, be and the same is hereby granted, and it is further

ORDERED that the sum of $ _____ held by the _____ (Bank) which has been levied upon by _____ (Court Officer) be forthwith tumed-over to said _____ (Court Officer) to satisfy part of the Judgment of the plaintiff herein.

_____
J.S.C.

Form 32 - Notice of Wage Execution (Special Civil Part)

Attomey(s): ._____
Office Address *Si* Tel. No. _____
Attorney for

_____
Plaintiff(s)

v.

_____
Defendant(s)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SPECIAL CIVIL PART
_____ COUNTY
Docket No. _____

CIVIL ACTION

NOTICE OF APPLICATION
FOR WAGE EXECUTION

To:
Name of Judgment-Debtor
_____
_____
Address

TAKE NOTICE that an application is being made by the judgment-creditor to the above-named court, located at _____, New Jersey for a Wage Execution Order to issue against your salary, to be served on your employer, _____ (name and address of employer), for: (a) 10% of your gross salary when the same shall equal or exceed the amount of $175.50 per week; or (b) 25% of your disposable earnings for that week; or (c) the amount, if any, by which your disposable weekly earnings exceed SI 75.50, whichever shall be the least Disposable earnings are defined as that portion of the earnings remaining after the deduction from the gross earnings of any amounts required by law to be withheld. In the event the disposable earnings so defined arc $175.50 or less, no amount shall be withheld under this execution. In no event shall more than 10% of gross salary be withheld. Your employer may not discharge, discipline or discriminate against you because your earnings have been subjected to garnishment.

You may notify the Clerk of the Court and the attorneys for judgment- creditor, whose address appears above, in writing, within ten days after service of this notice upon you, why such an Order should not be issued, and thereafter the application for the Order will be set down for a hearing of which you will receive notice of the date, time and place.

If you do not notify the Clerk of the Court and judgment-creditor's attorney, or the judgment-creditor if there is no attorney, in writing of your objection, you will receive no further notice and the Order will be signed by the Judge as a matter of course.

You also have a continuing right to object to the wage execution or apply for a reduction in the amount withheld even *after* it has been issued by the Court. To object or apply for a reduction, file a written statement of your objection or reasons for a reduction with the Clerk of the Court and send a copy to the creditor's attorney or directly to the creditor if there is no attorney. You will be entitled to a hearing within 7 days after you file your objection or application for a reduction.

CERTIFICATION OF SERVICE

I served the within Notice upon the judgment-debtor _____, on this date by sending it simultaneously by regular and certified mail, return receipt requested, to the judgment-debtor's last known address, set forth above. 1 certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to the punishment.

Date _____, 20___

_____
Attorney for Judgment-Creditor
or Judgment-Creditor Pro Sc

[Adopted July 13, 1994, effective September 1, 1994; amended September 27, 1996, effective October 1, 1996; amended July 30, 1997, effective September 1, 1997; amended July 28, 2004, to be effective September 1, 2004; amended July 3, 2007, to be effective July 24, 2007.)

Form 33 - Order, Certification & Execution Against Wages (Special Civil Part)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION. SPECIAL CIVIL PART
_____ County

ORDER. CERTIFICATION AND
EXECUTION AGAINST EARNINGS
PURSUANT TO 15 U.S.C. 1673
and N.J.S.A. 2A:17-56

Docket No. _____

Street Address of Court
Town. NJ ZIP
Tel. No of Court

Plaintiff

vs

Designated Defendant
(Address)

Name and Address of Employer Ordered lo Make Deductions

The employer is ordered to deduct from the earnings which the designated defendant receives and to pay over to the court officer named below, the lesser of the following: (a) 10% of the gross weekly pay; or (b) 25% of disposable earnings for that week; or (c) the amount, if any, by which [illegible] disposable earnings exceed $175.50 per week until the total amount due has been deducted or [illegible] termination of employment. Upon euherof theseeZs, << immediate accounting is to be made to the court officer. Disposable earnings are defined as that portion of the earnings remaining after the deduction from gross earnings of any amounts required by law to be withheld. In the event the disposable earnings are less, no [illegible] shall be withheld under this execution. In no event shall [illegible] than 10% of [illegible].

The employer shall immediately give the designated defendant a copy of this order. The designated defendant may object to the wage execution or apply for a reduction in the amount withheld at any time. To object or apply for a reduction, a written statement of the objection or reasons for a reduction must be filed with the Clerk of the Court and a copy must be sent to the creditor's attorney or directly to the creditor if there is no attorney. A hearing will be held within 7 days after filing the objection or application for a reduction. According to law, no employer may terminate an employee because of a garnishment.

Judgment Date ..... ____
Judgment Amount ..... $ ____
Costs and Atty. *Fees* ..... $ ____
Subsequent Costs ..... S ____
Total ..... $ ____
Credits, if any ..... $ ____
Subtotal A ..... $ ____
Interest ..... $ ____
Execution cost and
Mileage ..... $ ____
Costs of Application ..... $ ____
Subtotal B ..... S ____
Court Officer Fee (10%).. $ ____
Total due this date ..... $ ____

I CERTIFY that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me arc willfully false, I am subject to punishment.
Date: _____

By: _____
(Typed name of signator)
Firm Name: _____
Address: _____

Date _____

_____
Judge

Make payments at least monthly to
Court Officet as set forth:

_____
Court Officer

I RETURN this execution to the Court
( ) Unsatisfied
( ) Satisfied ( ) Partly Satisfied
Amount Collected ..... $ ____
Fee Deducted ..... $ ____
Amount Due to Atty ..... S ____
Date: _____

_____
Court Officer

Form 33 (continued)

HOW TO CALCULATE PROPER GARNISHMENT AMOUNT

(1) Gross Salary per pay period ..... _____

(2) Less:

Amounts Required by Law to be Withheld:

(a) U.S. Income Tax ..... _____

(b) FICA (social security) ..... _____

(c) State Income Tax, ETT, etc..... _____

(d) NJ. SUl ..... _____

(e) Other State or Municipal Withholding..... _____

(0 TOTAL ..... _____ - _____

(3) Equals "disposable earnings" ..... = _____

(4) If salary is paid:

– weekly, then subtract SI 75.50

– every two weeks, then subtract $351.00

– twice per month, then subtract $380.25

– monthly, then subtract S760.50

(Federal law prohibits any garnishment when "disposable earnings" are smaller than the amount on line 4) ..... - _____

(5) Equals the amount potentially subject to garnishment (if less than zero, enter zero) ..... = _____

(б) Take "disposable earnings" (Line 3) and multiply by .25:

S_____ x .25 = S_____ ..... _____

(7) Take the gross salary (Line 1) and multiply by .10:

S_____ x .10 = S_____ ..... _____

(8) Compare lines 5, 6, and 7–the amount which may lawfully be deducted is the smallest amount on line 5, line 6, or line 7, i.e.,

..... _____

Source: 15 U.S.C. 1671 *etseq*.; 29 C.F.R. 870; *N.J.S.A.* 2A:17- 50 *etseq*.

[Note: Former Appendix XM adopted effective January 2, 1989; amended June 29, 1990, effective September 4,

iSSSESSi-

Form 34 - Notice of Application for Wage Execution (Law Division)

Plaintiffs Attorney
Address
Telephone No.
Attomey(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

NOTICE OF APPLICATION
FOR WAGE EXECUTION

Defendant(s)
_____x

TO:

TAKE NOTICE that application is being made by the Plaintiff to the above-named Court, located at _____, New Jersey for an Order that execution be issued against your salary or earnings and served upon your employer _____ for such amount as the Court shall determine, within the limitations prescribed by 15 U.S.C.A. 1671-1677, inclusive and N.J.S.A. 2A:17-50 *et seq*. on the amount of your salary which may be levied upon, which limitations are set forth on the reverse side hereof.

You may notify the Clerk of Court, located at _____, New Jersey, and also the Plaintiff through the undersigned attorney, whose address appears above, in writing, within 10 days after service of this notice upon you, of your reasons why such an Order should not be entered and thereafter the application for the Order will be set down for a hearing of which you will receive notice of time and place.

If you fail to give such notice in writing to the aforesaid Clerk, and also to the Plaintiff through the undersigned attorney, you will receive no further notice and an Order will be entered as of course.

Dated:

_____
Attorney for Plaintiff

Form 34 (continued)

PROOF OF SERVICE

I served the within Notice upon the Defendant _____, on _____, ___ in the following manner:

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

_____
Attorney for Plaintiff

Form 35 - Order for Writ of Execution Against Wages (Law Division)

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

ORDER FOR
WAGE EXECUTION

Defendant
_____x

This matter being opened to the Court by _____, Esq., attorney for Plaintiff, upon his Petition for an Order for a Wage Execution, and good cause being shown therefore:

IT IS on this _____ day of _____, ____

ORDERED that Execution issue against the salary of the judgment-debtor, _____ _____, located at _____. The weekly amount to be levied upon and withheld under this Execution shall be $ _____ which is based upon the allegations of the Petition annexed hereto and is the lesser of the following: (a) 10% of the gross weekly pay; or (b) 25% of disposable earnings for that week; or (c) the amount, if any, by which the defendant's disposable weekly earnings exceed $175.50 per week, until the total amount due has been deducted or the complete termination of employment. Disposable earnings are defined as that portion of the earnings remaining afer the deductions from gross earnings of any amounts required by law to be withheld. In the event the disposable earnings so defined are $175.50 or less, no amount shall be withheld under this execution. In no event shall more than 10% of gross salary be withheld. In accordance with the Federal Consumer Credit Disclosure Act, no employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness. Whoever willfully violates this provision shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

_____
Judge

Form 36 - *Capias Ad Respondendum*

Plaintiffs Attorney
Address
Telephone No.
Attorney(s) for Plaintiff(s)

_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

CAPIAS AD RESPONDENDUM
(with Summons and
Complaint annexed)

Defendant(s)

_____x

The State of New Jersey to the Sheriff of _____ County and to _____ _____, the Defendant named in the action above:

1. You, the Sheriff, are hereby ORDERED

(a) to take into your custody _____ and then to release him as soon as he has deposited with you $ _____ in cash or approved bond. The cash or bond is to be held to assure that the Defendant will appear in Court in response to Court process during the pendency of this action and until any resulting judgment against the Defendant is satisfied. Failure of the defendant to appear may result in use of the cash deposit or bond to satisfy judgment in the action.

(b) Should the Defendant fail to furnish the specified bond or cash deposit you shall bring him immediately before:

Judge _____ (Judge issuing Writ)

Office address:
Telephone:
Residence address:
Telephone:

Form 36 (continued)

If this Judge is not available bring him before:

Judge _____

Office address:
Telephone:
Residence address:
Telephone:

(c) You are further ORDERED to take the steps listed above and then return this Writ to the Superior Court Clerk, Trenton, on or before _____, ___.

2. You, _____, the Defendant, are hereby ORDERED

(a) to answer the attached Complaint made by the Plaintiff _____;

(b) to deliver to _____, attorney for the Plaintiff at _____, a copy of your answer to the Complaint within 20 days after the service of this Writ (not counting the day of service);

(c) to file the Answer, together with proof of its delivery to Plaintiffs attorney, in duplicate with the Clerk of the Superior Court, _____, New Jersey, in accordance with the Rules of Court. If you fail to do these things, judgment by default may be entered against you.

This Writ is issued by order of Judge _____ of _____ Court of New Jersey at _____.

_____
(Name of Clerk)

Dated: _____

By: _____
Deputy Clerk of the Superior Court

Form 37 - *Capias Ad Satisfaciendum*

Plaintiff s Attorney
Address
Telephone No.
Attorney(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

WRIT OF *CAPIAS AD SATISFACIENDUM*

Defendant(s)
_____x

TO: The Sheriff of the County of _____

Whereas, judgment was entered on the _____day of _____, ___, and filed in the Office of the Clerk of the Superior Court in the above captioned action in favor of Plaintiff _____ and against the Defendant, _____, for $ _____, damages and $ _____ costs; and

Whereas, the sum of $ _____ damages and $ _____ costs remains unpaid; and

Whereas [a *capias ad respondendum* has previously been issued on the _____ day of _____, ___ and] an Order of this Court was entered on _____ day of _____, ___, directing that a *capias ad satisfaciendum* issue against the body of the Defendant, _____, to satisfy the amount unpaid in said judgment;

NOW THEREFORE, we command you to execute this Writ and take _____ _____, if he can be found in your County and keep him safely that you may bring him before the Superior Court, Law Division, at _____, at _____ on the _____ day of _____, ___ to satisfy the Plaintiff, _____, for the amount due on said judgment.

Witness _____, a Judge of the Superior Court at _____, New Jersey, this _____ day of _____, ____.

Form 38 – Notice to Debtor

NOTICE TO DEBTOR
RULES 4:59-1(g) AND 6:7-1(b)
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SPECIAL CIVIL PART
COUNTY

Re: _____ **v.** _____
Docket No.: _____

To: _____, designated defendant:

Your asset, automobile (plate number _____ or account no. _____) in the amount of $_____ at the _____ has been levied upon at the instruction of _____ to satisfy in whole or in part the judgment against you in the above matter. Some property may be exempt from execution by Federal or State law, including but not limited to clothing and a total of $1,000.00 of cash and personal property, except for goods purchased as part of the transaction which led to the judgment in this case. In addition, welfare benefits, social security benefits, S.S.I. benefits, V.A. benefits, unemployment benefits, worker's compensation benefits and child support you receive are exempt, even if the funds have been deposited in a bank account.

If the levy is against a bank account, the bank has already been notified to place a hold on your account. However, the funds will not be taken from your account until the Court so orders. You may claim your exemption by notifying the Clerk of the Court and the person who ordered this levy of your reasons why your property is exempt. This claim must be in writing and if it is not mailed within 10 days of service of this notice, your property is subject to further proceedings for execution. The address of the Court is: _____. The address of the person who ordered this levy is: _____.

CERTIFICATION OF SERVICE

I mailed a copy of this notice to the defendant(s), the Clerk of the above named Court and the person who requested the levy on _____, 20_____, the same day this Levy was made. I certify that the foregoing statements made by me are true. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment.

Date: _____, 20__ _____
(Signature)

_____
(Court Officer)

Form 39 - Warrant of Satisfaction

Plaintiffs Attorney
Address
Telephone No.
Attomey(s) for Plaintiffs)
_____x

Superior Court of New Jersey
Law Division
County

Plaintiffs)

Docket No.:

vs.

Civil Action

WARRANT OF
SATISFACTION

Defendant(s)
_____x

TO THE CLERK OF THE ABOVE NAMED COURT:

WHEREAS, Judgment was entered in the above-entitled action in favor of the Plaintiff, _____, and against the Defendant, _____ _____, as appears by the record thereon in Judgment Book _____, on Page _____, or Docket No. _____, Judgment No. _____;

NOW THEREFORE, this is your warrant and authority to enter on the aforesaid record, this satisfaction of Judgment.

By:_____
Attorney for Plaintiff

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

_____
Attorney

APPENDIX B

Text of Judge Posner's sample "safe harbor" initial demand letter for third party attorneys and debt collectors in the Seventh Circuit case of *Bartlett v. Hiebl*, 128 F.3d 497 (7th Cir. 1997)

WARNING: This letter is a "safe haven" only for those collecting debts within the 7th Circuit; moreover, *it violates the FDCPA* by failing to give the "Mini Miranda" warning required by §1692e(11).

The letter, which redrafts Hiebl's original letter, **reads as follows**:

Dear Mr. Bartlett:

I have been retained by Micard Services to collect from you the entire balance, which as of September 25, 1995, was $1,656.90, that you owe Micard Services on your MasterCard Account No. 5414701617068749.

If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Micard $316 against the balance that you owe (unless you've paid it since your last statement) or call Micard at 1-800-221-5920 ext 6130 and work out arrangements for payment with it. If you do neither of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over.

Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, I'll assume that it's valid. If you do dispute it—by notifying me in writing to that effect—I will, as required by the law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor (Micard Services), I will furnish you with that information too.

The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.

Sincerely,
John A. Heibl

APPENDIX C

TEXT OF THE FAIR DEBT COLLECTION PRACTICES ACT

15 U.S.C. § 1692 etseq.

TITLE VIII - DEBT COLLECTION PRACTICES
[Fair Debt Collection Practices Act]

Sec.

* FDCPA section numbers appear in brackets [] in the headings.

15 USC 1601 note Short Title [§ 801]

This title may be cited as the "Fair Debt Collection Practices Act."

15 USC 1692 Congressional findings and declaration of purpose [§ 802]

(a) 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 individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 USC 1692a Definitions [§ 803]

As used in this title—

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

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

(6) The term "debt collector" means any person 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 who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the

last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

15 USC 1692b Acquisition of location information [§ 804]

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is

erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

15 USC 1692c Communication in connection with debt collection [§ 805]

(a) COMMUNICATION WITH THE CONSUMER GENERALLY. Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) COMMUNICATION WITH THIRD PARTIES. Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) CEASING COMMUNICATION. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify

the consumer that the debt collector or creditor intends to invoice a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

15 USC 1692d Harassment or abuse [§ 806]

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)[1] of this Act.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

1. Section 604(3) has been renumbered as Section 604(a)(3).

15 USC 1692e False or misleading representations [§ 807]

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The 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.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or

wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) 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.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

15 USC 1692f Unfair practices [§ 808]

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true propose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

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

15 USC 1692g Validation of debts [§ 809]

(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 the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification

of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

15 USC 1692h Multiple debts [§ 810]

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

15 USC 1692i Legal actions by debt collectors [§ 811]

(a) Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

15 USC 1692j Furnishing certain deceptive forms [§ 812]

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

15 USC 1692k Civil liability [§ 813]

(a) Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

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

(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 USC 16921 Administrative enforcement [§ 814]

(a) Compliance with this title shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this title is specifically committed to another agency under subsection (b). For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this title shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Compliance with any requirements imposed under this title shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act, in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act, by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) the Acts to regulate commerce, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this title or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law, except as provided in subsection (d).

(d) 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.

15 USC 1692m Reports to Congress by the Commission [§ 815]

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Commission under section 814 of this title.

(b) In the exercise of its functions under this title, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

15 USC 1692n Relation to State laws [§ 816]

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

15 USC 1692o Exemption for State regulation [§ 817]

The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

15 USC 1692p Exception for certain bad check enforcement programs operated by private entities [§ 818]

(a) In General.—

(1) TREATMENT OF CERTAIN PRIVATE ENTITIES.—

Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 803(6), with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) CONDITIONS OF APPLICABILITY.—Paragraph (1) shall apply if—

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is

not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(111) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain Checks Excluded.—A check is described in this subsection if the check involves, or is subsequently found to involve—

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions.—For purposes of this section, the following definitions shall apply:

(1) STATE OR DISTRICT ATTORNEY.—The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1, United States Code), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, whomay be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) CHECK.—The term ''check" has the same meaning as in section 3(6) of the Check Clearing for the 21st Century Act.

(3) BAD CHECK VIOLATION.—The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

15 USC 1692 note Effective date [§ 819]

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

Legislative History

House Report: No. 95-131 (Comm. on Banking, Finance, and Urban Affairs) Senate Report: No. 95-382 (Comm. on Banking, Housing and Urban Affairs) Congressional Record, Vol. 123 (1977)

April 4, House considered and passed H.R. 5294.

Aug. 5, Senate considered and passed amended version of H.R. 5294.

Sept. 8, House considered and passed Senate version.

Enactment: Public Law 95-109 (Sept. 20, 1977)

Amendments: Public Law Nos.

99-361 (July 9, 1986)

101-73 (Aug. 9, 1989)

102-242 (Dec. 19, 1991)

102-550 (Oct. 28, 1992)

104-88 (Dec. 29, 1995)

104-208 (Sept. 30, 1996)

109-351 (Oct. 13, 2006)

APPENDIX D

SELECTED NEW JERSEY RULES OF COURT

4:59-1. Execution

(a) In General. Process to enforce a judgment or order for the payment of money and process to collect costs allowed by a judgment or order, shall be a writ of execution, except if the court otherwise orders or if in the case of a *capias ad satisfaciendum* the law otherwise provides. Except with respect to writs issued out of the Special Civil Part, the amount of the debt, damages, and costs actually due and to be raised by the writ, together with interest from the date of the judgment, shall be endorsed thereon by the party at whose instance it shall be issued before its delivery to the sheriff or other officer. The endorsement shall explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant. Except with respect to writs issued out of the Special Civil Part, the judgment-creditor shall serve a copy of the fully endorsed writ, personally or by ordinary mail, on the judgment-debtor after a levy on the debtor's property has been made by the sheriff or other officer and in no case less than 10 days prior to turnover of the debtor's property to the creditor pursuant to the writ. Unless the court otherwise orders, every writ of execution shall be directed to a sheriff and shall be returnable within 24 months after the date of its issuance, except that in case of a sale, the sheriff shall make return of the writ and pay to the clerk any remaining surplus within 30 days after the sale, and except that a *capias ad satisfaciendum* shall be returnable not less than eight and not more than 15 days after the date it is issued. A writ of execution issued by the Civil Part of the Law Division shall not be directed to a Special Civil Part Officer except by order of the Civil Presiding Judge and such order shall specify the amount of the Officer's fee. One writ of execution may issue on one or more judgments or orders in the same cause. The writ may be issued either by the court or the clerk thereof.

(b) Execution to Enforce a Court Order for the Support of Dependents. Income withholding to enforce a judgment or order for the periodic payment of alimony or child support shall be governed by R. 5:7-5(b), (c) and (d). The Presiding Judge of the Family Division in each vicinage may issue a standing or special order authorizing the Probation Division to execute on cash or cash-equivalent assets, as defined herein, to collect child support or alimony judgments payable through the Probation Division, and directing that writs of execution to collect past-due child support or alimony be served on the holder of such assets by the Probation Division. In vicinages where such an order is issued, an execution to enforce an alimony or child support judgment against cash or cash-equivalent assets shall be governed by R. 5:7-5(e) and the Vicinage Chief Probation Officer shall be designated Deputy Clerk of the Superior Court for the limited purpose of certifying writs of execution for alimony or child support judgments payable through the Probation Division. Cash or cash-equivalent assets include bank accounts, retirement accounts, trusts, insurance proceeds, net monetary awards and settlements from civil lawsuits, non-court settlements, proceeds from estates, investments, commissions, bonuses and any other asset from which funds are readily available without the need for seizure, inventory or public sale.

(c) Execution First Made Out of Property of Party Primarily Liable. If a writ of execution is issued against several parties, some liable after the others, the court before or after the levy may, on application of any of them and on notice to the others and the execution creditor, direct the sheriff or other officer that, after levying upon the property liable to execution, he or she raise the money, if possible, out of the property of the parties in a designated sequence.

(d) Wage Executions; Notice, Order, Hearing. Proceedings for the issuance of an execution against the wages, debts, earnings, salary, income from trust funds or profits of a judgment-debtor shall comply with the requirements of paragraph (a) of this rule and shall be on notice to the debtor. The notice of wage execution shall state (1) that the application will be made for an order directing a wage execution to be served on the defendant's named employer, (2) the limitations prescribed by 15 U.S.C.A. §§ 1671-1677, inclusive and N.J.S. 2A:17-50 et seq. and N.J.S. 2A:17-57 et seq. on the amount of defendant's salary which may be levied upon, (3) that defendant may notify the court and the plaintiff in writing within ten days after service of the notice of reasons why the order should not be entered, (4) if defendant so notifies the clerk, the application will be set down for hearing of which the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course, and (5) that defendant may object to the wage execution or apply for a reduction in the amount withheld at any time after the order is issued by filing a written statement of the objection or reasons for a reduction with the clerk and sending a copy to the creditor's attorney or directly to the creditor if there is no attorney, and that a hearing will be held within seven days after filing the objection or application for a reduction. The judgment-creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers. The notice of wage execution shall be served on the judgment-debtor in accordance with R. 1:5-2. A copy of the notice of application for wage execution, together with proof of service in accordance with R. 1:5-3, shall be filed with the clerk at the time the form of order for wage execution is submitted. No order shall be entered unless the form of order was filed within 45 days of service of the notice or 30 days of the date of the hearing. The writ shall include a provision directing the employer immediately to give the judgment-debtor a copy thereof and it shall also include a provision that the judgment-debtor may, at any time, notify the clerk and the judgment-creditor in writing of reasons why the levy should be reduced or discontinued. If an objection from the judgment-debtor is received by the clerk after a wage execution has issued, all moneys remitted by the employer shall be held until further order of the court and the matter shall be set down for a hearing to be held within seven days of receipt of the objection.

(e) Supplementary Proceedings. In aid of the judgment or execution, the judgment creditor or successor in interest appearing of record, may examine any person, including the judgment debtor, by proceeding as provided by these rules for the taking of depositions or the judgment creditor may proceed as provided by R. 6:7-2, except that service of an order for discovery or an information subpoena shall be made as prescribed by R. 1:5-2 for service on a party. The court may make any appropriate order in aid of execution. If the warrant for arrest is not executed within 24 months after the date of the entry of the order authorizing it, both the order and the warrant shall be deemed to have expired and to be of no further effect.

(f) Sheriffs Costs. The sheriff shall file a bill of taxed costs with the final report with the clerk of the court.

(g) **Notice to Debtor.** Every court officer or other person levying on a debtor's property shall, on the day the levy is made, mail a notice to the person whose assets are to be levied on stating that a levy has been made and describing exemptions from levy and how such exemptions may be claimed. The notice shall be in the form prescribed by Appendix VI to these rules and copies thereof shall be promptly filed by the levying officer with the clerk of the court and mailed to the person who requested the levy. If the clerk or the court receives a claim of exemption, whether formal or informal, it shall hold a hearing thereon within 7 days after the claim is made. If an exemption claim is made to the levying officer, it shall be forthwith forwarded to the clerk of the court and no further action shall be taken with respect to the levy pending the outcome of the exemption hearing. No turnover of funds or sale of assets may be made, in any case, until 20 days after the date of the levy and the court has received a copy of the properly completed notice to debtor.

(h) The forms in Appendices XI-I and XI-L through XI-R, inclusive, shall be used in the Law Division, Civil Part, as well as in the Special Civil Part.

Note: Source – R.R. 4:74-1, 4:74-2. 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17. 1975 to be effective September 8. 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b). (c), (d). and (e) redesignated (c), (d), (e) and (0 respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13. 1982: paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (0, and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (e), and (g) amended July 5, 2000 to be effective September 5, 2000; paragraph (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (d) amended, and new paragraph (h) adopted July 27, 2006 to be effective September 1, 2006; paragraphs (a) and (0 amended July 9, 2008 to be effective September 1, 2008.

6:7-2. Orders for Discovery; Information Subpoenas

(a) Order for Discovery. The court may, upon the filing by the judgment creditor or a successor in interest (if that interest appears of record) of a petition verified by the judgment creditor or the creditor's agent or attorney stating the amount due on the judgment, make an order, upon good cause shown, requiring any person who may possess information concerning property of the judgment debtor to appear before the attorney for the judgment creditor or any other person authorized to administer an oath and make discovery under oath concerning that property at a time and place therein specified. The location specified shall be in the county where the person to be deposed lives or works.

No more than one appearance of any such person may be required without further court order. The time and place specified in the order shall not be changed without the written consent of the person to be deposed or upon further order of the court.

(b) Information Subpoena

(1) To Judgment Debtor. An information subpoena may be served upon the judgment debtor, without leave of court, accompanied by an original and copy of written questions and a prepaid, addressed return envelope. The information subpoena and written questions shall be in the form and limited to those set forth in Appendix Xl-L to these Rules. Answers shall be made in writing, under oath or certification, by the person upon whom served, if an individual, or by an officer, director, agent or employee having the information sought, if a corporation, partnership or sole proprietorship. The original subpoena, with the answers to the written questions annexed thereto shall be returned to the judgment creditor, if pro se, or judgment creditor's attorney within 14 days after service thereof.

An information subpoena shall not be served on a judgment debtor more frequently than once in any six-month period without leave of court.

(2) To Other Person or Entity. An information subpoena may be served upon banking institutions possibly used by the judgment-debtor without leave of court or upon possible employers or account-debtors (who are business entities) of the judgment-debtor upon ex parte application, supported by certification, and court order, if the judgment-debtor has failed to fully answer an information subpoena served pursuant to subparagraph (1) within 21 days of service. The application shall be granted if the court determines that the information subpoena is reasonably necessary to effectuate a post-judgment judicial remedy and that the party receiving the subpoena may have in their possession information about the debtor that will assist the creditor in collecting the judgment. The information subpoena shall be accompanied by an original and copy of written questions and a prepaid, addressed return envelope. The information subpoena and written questions shall be in the form and limited to those set forth in Appendix XI-R to these Rules, except that an information subpoena served upon a banking institution shall contain a certification by the judgment-creditor or the creditor's attorney that the debtor has failed to fully answer an information subpoena served pursuant to R. 6:7-2(b)(1) within 21 days of service, that the information subpoena is reasonably necessary to effectuate a post-judgment judicial remedy, and that the bank may have in its possession information about the debtor that will assist the creditor in collecting the judgment. Answers shall be made in writing, under oath or certification, by the person served, if an individual, or by an officer, director, agent or employee having the information sought, if a corporation, partnership or sole proprietorship. The original subpoena, with the answers to the written questions annexed thereto, shall be returned to the judgment creditor, if pro se, or judgment creditor's attorney within 14 days after service thereof.

(c) Service of Proceedings. A copy of the order for discovery as provided in paragraph (a) of this rule shall be served personally or by registered or certified mail, return receipt requested, and simultaneously by regular mail, at least 10 days before the date for appearance fixed therein. The information subpoena, as provided for in paragraph (b) of this rule shall be served personally or by registered or certified mail, return receipt requested, and simultaneously by regular mail.

Service of an order for discovery or an information subpoena shall be effective as set forth in R. 6:2-3(d)(4). Upon completion of service, the failure to comply with an information subpoena

shall be treated as a failure to comply with an order for discovery entered in accordance with paragraph (a) of this rule.

(d) Enforcement Against Other Person or Entity. Proceedings to seek relief pursuant to R. 1:10-3, when a person who is not a party fails to obey an order for discovery or an information subpoena, may be commenced by order to show cause or notice of motion.

(e) Enforcement by Motion. Proceedings to seek relief pursuant to R. 1:**10-3**, when a judgment-debtor fails to obey an order for discovery or an information subpoena, shall be commenced by notice of motion supported by affidavit or certification. The notice of motion and certification shall be in the form set forth in Appendices XI-M and N to these Rules. The notice of motion shall contain a return date and shall be served on the judgment-debtor and filed with the clerk of the court not later than 10 days before the time specified for the return date. The moving papers shall be served on the judgment-debtor either in person or simultaneously by regular and certified mail, return receipt requested. The notice of motion shall state that the relief sought will include an order:

(1) adjudicating that the judgment-debtor has violated the litigant's rights of the judgment-creditor by failing to comply with the order for discovery or information subpoena;

(2) compelling the judgment-debtor to immediately furnish answers as required by the order for discovery or information subpoena;

(3) directing that if the judgment-debtor fails to appear in court on the return date or to furnish the required answers, he or she shall be arrested and confined to the county jail until he or she has complied with the order for discovery or information subpoena;

(4) directing the judgment-debtor, if he or she fails to appear in court on the return date, to pay the judgment-creditor's attorney fees, if any, in connection with the motion to enforce litigant's rights; and

(5) granting such other relief as may be appropriate.

The notice of motion shall also state, in the case of an information subpoena, that the court appearance may be avoided by furnishing to the judgment-creditor written answers to the information subpoena and questionnaire at least 3 days before the return date.

(f) Order to Enforce Litigant's Rights. If the judgment-debtor has failed to appear in court on the return date and the court enters an order to enforce litigant's rights, it shall be in the form set forth in Appendix Xl-**O** to these Rules and shall state that upon the judgment-debtor's failure, within 10 days of the certified date of mailing or personal service of the order, to comply with the information subpoena or discovery order, the court will issue an arrest warrant. The judgment-creditor shall serve a copy of the signed order upon the judgment-debtor either personally or by mailing it simultaneously by regular and certified mail, return receipt requested. The date of mailing or personal service shall be certified on the order.

(g) **Warrant for Arrest.** Upon the judgment-creditor's certification, in the form set forth in Appendix XI-P to these Rules, that a copy of the signed order to enforce litigant's rights has been served upon the judgment-debtor as provided in this rule, that 10 days have elapsed and that there has been no compliance with the information subpoena or discovery order, the court may issue an arrest warrant. If the judgment-debtor is to be arrested in a county other than the one in which the judgment was entered, the warrant shall have annexed to it copies of the order to enforce litigant's rights and the certification in support of the application for the warrant. The warrant shall be in the form set forth in Appendix XI-Q to these Rules and, except for good cause shown and upon such other terms as the court may direct, shall be executed by a Special Civil Part Officer or Sheriff only between the hours of 7:30 a.m. and 3:00 p.m. on a day when the court is in session. If the notice of motion and order to enforce litigant's rights were served on the judgment-debtor by mail, the warrant may be executed only at the address to which they were sent. In all cases the arrested judgment-debtor shall promptly be brought before a judge of the Superior Court in the county where the judgment-debtor is arrested and released upon compliance with the order for discovery or information subpoena. When the judgment-debtor has been arrested for failure to answer an information subpoena, the clerk shall furnish the judgment-debtor with a blank form containing the questions attached to the information subpoena, as set forth in Appendix XI-L to these Rules.

(h) Execution of Warrants by Special Civil Part Officers and Sheriffs. A warrant may be directed to the sheriff in the first instance, but a warrant directed to a Special Civil Part Officer shall remain with the Officer for execution for six months, at the conclusion of which the Officer shall furnish a certification of his or her efforts to serve the warrant and the judgment creditor may apply ex parte for an order directing the issuance of a warrant to the sheriff.

(i) Expiration of Unserved Warrants. If the warrant for arrest is not executed within 24 months after the date of the entry of the order authorizing it, both the order and the warrant shall be deemed to have expired and to be of no further effect.

Note: Source—*R.* 7:11-3(a)(b), 7:11-4. Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 17, 1975 to be effective September 8, 1975; amended July 21, 1980 to be effective September 8, 1980; caption amended, paragraph (a) caption and text amended, paragraph (b) adopted and former paragraph (b) amended and redesignated as paragraph (c) June 29, 1990 to be effective September 4, 1990; paragraph (a) amended and paragraphs (d), (e) and (f) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (b), (d), (e) and (f) amended July 13, 1994 to be effective September 1, 1994; former paragraph (b) redesignated as subparagraph (b)(1), subparagraph (b)(2) adopted, paragraph (c) amended, paragraph (d) adopted, former paragraph (d) amended and redesignated as paragraph (e), former paragraphs (e) and (f) redesignated as paragraphs (f) and (g) June 28, 1996 to be effective September 1, 1996; subparagraph (b)(2) and paragraph (g) amended July 10, 1998 to be effective September 1, 1998; paragraph (h) adopted July 5, 2000 to be effective September 5, 2000; new paragraph (h) added, and former paragraph (h) redesignated as paragraph (i) July 12, 2002 to be effective September 3, 2002; paragraphs (f) and (g) amended July 28, 2004 to be effective September 1, 2004.

APPENDIX E

Opinion 37 of the Committee on the Unauthorized Practice of Law
Assignee of Judgment Sharing Collected Funds with Assignor

The issue considered in this Opinion is whether an individual or entity not licensed to practice law in this State may engage in the commercial practice of obtaining an assignment of judgment from a judgment creditor, collecting monies from the judgment debtor and then sharing the proceeds with the original judgment creditor.

Under this arrangement, the collector does not purport to act on behalf of the original judgment creditor, because any action taken in that capacity would unambiguously constitute the unauthorized practice of law. In order to avoid the appearance of acting on behalf of a "client," the collector takes an assignment of the judgment from the creditor and becomes the legal owner of the right to collect the judgment. The assignment, however, does not operate as an outright purchase transferring ownership of the judgment in exchange for a sum certain. Rather, the assignment provides that if the assignee's collection efforts are successful, the assignee will receive a fixed percentage of the amount collected and the former judgment creditor will receive the balance. Depending upon the terms of the contract, the judgment creditor's percentage may be payable before or after deduction of expenses, and the assignee may or may not have discretion to settle for less than the face value of the judgment. Despite variations, the terms of these assignments closely track the terms of typical fee agreements between collection attorneys and their clients.

Pursuant to Art. VI, § 2, ¶ 3 of the New Jersey Constitution of 1947, the Supreme Court has exclusive and plenary jurisdiction to regulate the practice of law. The "Court's power over the practice of law is complete" and includes "the power to permit the practice of law and prohibit its unauthorized practice." *In re Opin. No. 26 of the Committee on Unauth. Pract.*, 139 N.J. 323, 326 (1995). The practice of law by an individual or entity not licensed to do so is unauthorized and proscribed by *R.* 1:21-1(a).[1]

One who seeks to collect a judgment makes use of the courts and thus engages in activity which entails "specialized knowledge and ability" and constitutes a "litigious" practice. As such, the activity would plainly constitute the practice of law. *New Jersey State Bar Ass'n* v. *Northern New Jersey Mortgage Associates*, 32 N.J. 430, 437 (1960) and *Stack* v. *P.G. Garage, Inc.*, 7 N.J. 118, 120-121 (1951). The crucial inquiry is whether the device of assignment operates to effectively insulate the assignee's activity from the practice of law.

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[1] The New Jersey State Legislature has also provided for the criminal prosecution of the unauthorized practice of law. *N.J.S.A.* 2C:21-22 authorizes prosecution of the unauthorized practice of law as either a disorderly persons offense or a crime of the fourth degree.

There is no question but that an assignment of judgment is expressly permitted under *N.J.S.A.* 2A:25-1. Nor do there appear to be any restrictions upon the terms of such an assignment. Clearly, an individual may make use of the judicial system to collect debts and judgments on a *pro se* basis. If such an arrangement is valid on a casual or incidental basis, may its practice on a regular basis nonetheless constitute the unauthorized practice of law?

The ultimate touchstone in the analysis of whether an activity constitutes the unauthorized practice of law is the public interest. *In re Opinion 33*, 160 N.J. 63, 78-79 (1999); *In re Opin. No. 26 of the Committee on Unauth. Pract., supra*, 139 N.J. at 327. The touchstone has relevance to the present question in at least two respects. First, where the public interest is concerned, as it is here, with the enforceability of a contractual obligation, equitable considerations are paramount. One of those considerations is that "equity looks to the substance rather than the form." *Fidelis Factors Corp. v. P. Lane Hatchery, Ltd.*, 47 N.J. Super. 132, 138 (App. Div. 1957); *Applestein v. United Board & Carton Corp.*, 60 N.J. Super. 333, 348 (Ch. Div. 1960), *affd o.b.*, 33 N.J. 72 (1960). It appears immaterial for purposes of understanding the practice that under one set of documents the collector is acting on behalf of the creditor and under another set of documents he is acting on behalf of himself. To hold that nomenclature is the controlling factor in this case would be to exalt form over substance and, in effect, permit an unlicensed individual or entity to practice law.

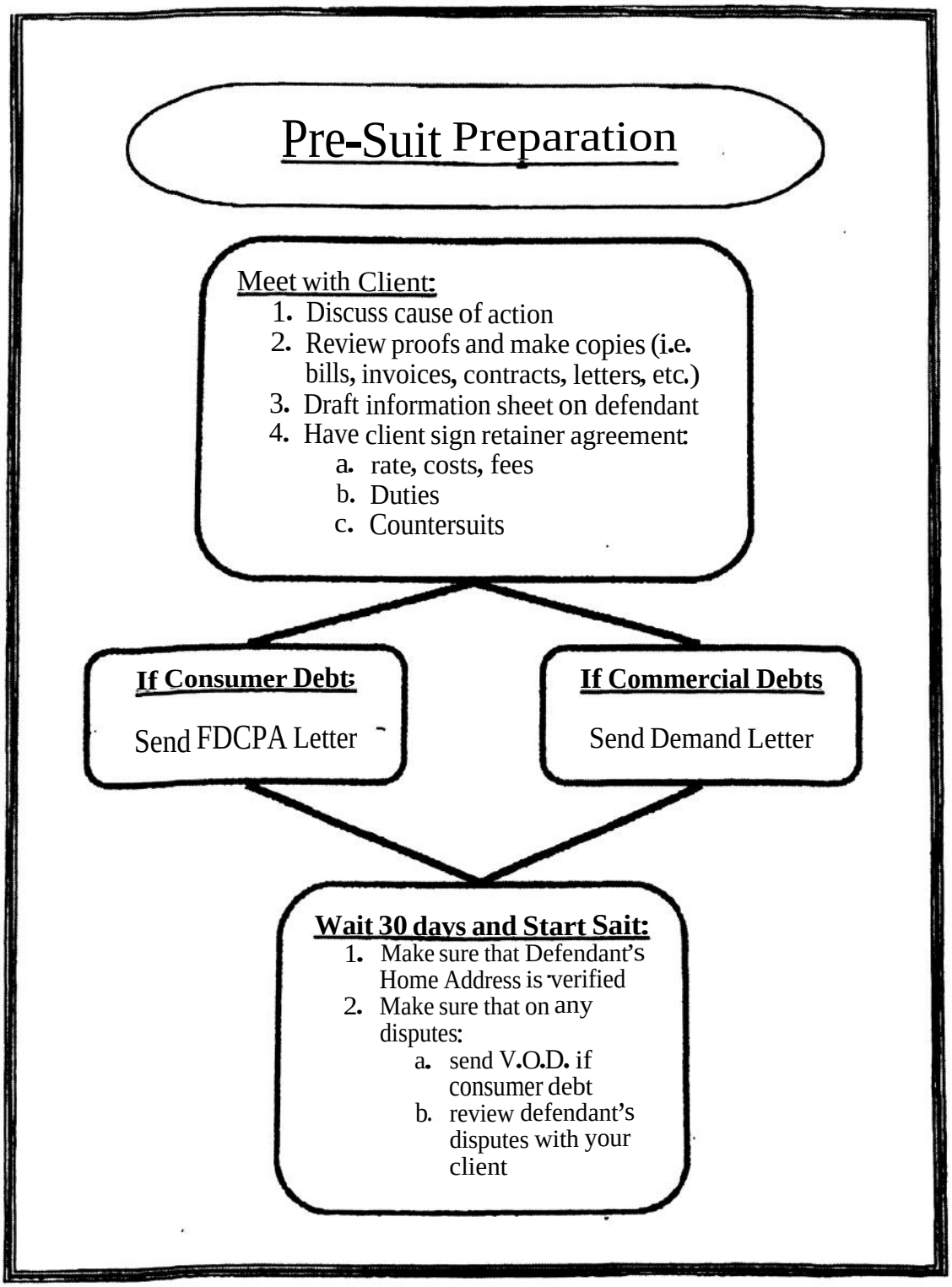
Second, it is clear that there will be a continuing risk to the public if the practice under review is left unregulated. The original judgment creditor's reasonable expectation of payment could readily be drained away through unwarranted deduction of the assignee's "expenses," through bad faith exercise of the right to compromise, or through incompetence on the part of the assignee. There is little probability that the assignee would be held accountable in any given instance because the stakes in any one case are generally too small. Moreover, even if the assignee were to be pursued civilly in one instance, he or she would likely be free from constraint in the vast majority of cases. Unlike an attorney, the assignee is not concerned about licensure or discipline.

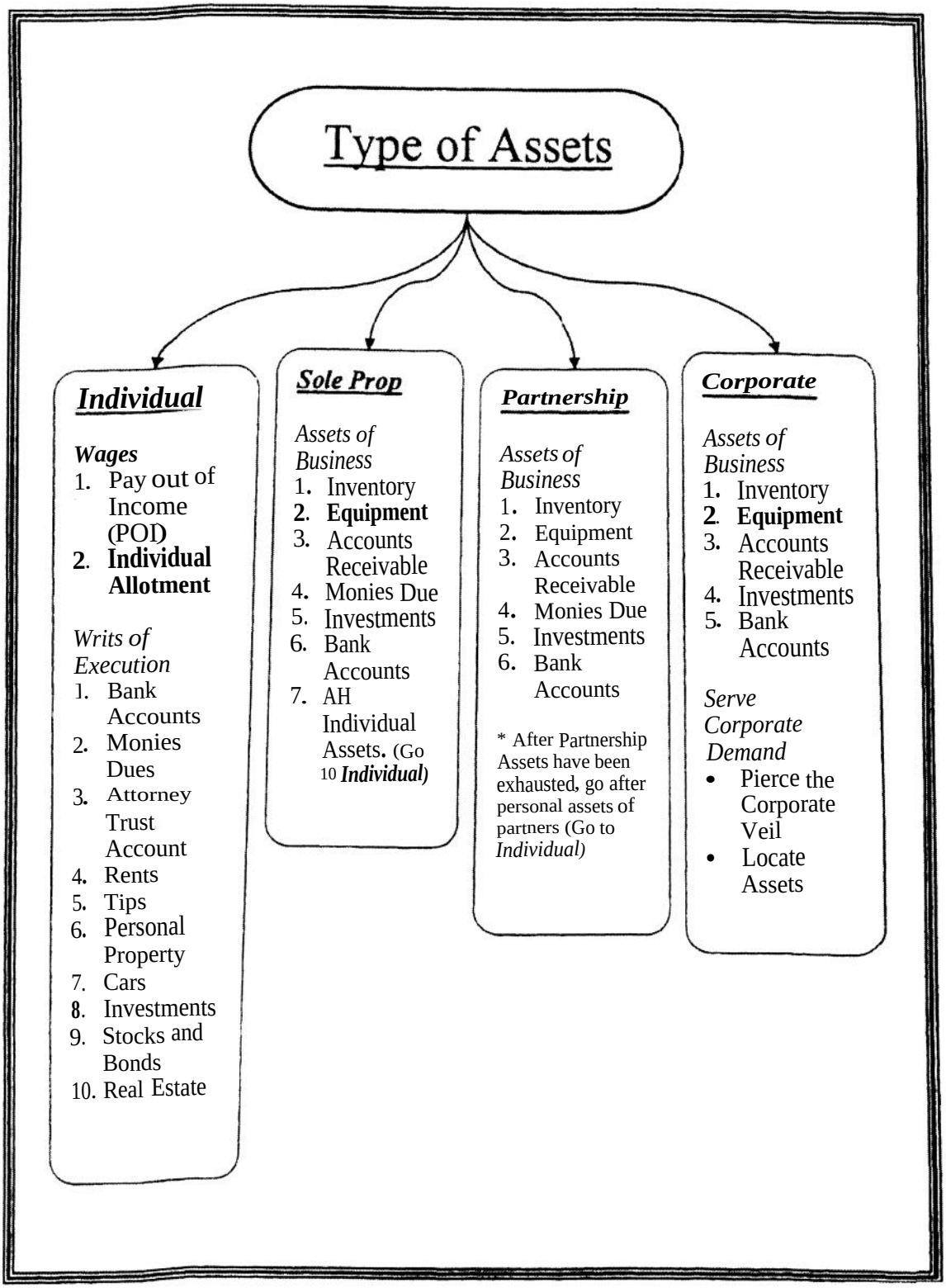
Finally, there is a very real possibility that the original judgment creditor may lose touch with the assignee and never know if or when the judgment has been collected. An attorney, however, would have the ethical obligation to keep the client informed about the status of a matter, RPC 1.4(a), and, upon receiving funds in which the client has an interest, promptly notify the client that the funds have been received, RPC 1.15(b). The widespread utilization of the assignment device by unregulated judgment collectors has every probability of posing a substantial risk of danger to judgment creditors, particularly those creditors who are relatively unsophisticated or possess relatively small judgments.

For the foregoing reasons, it is the Committee's opinion that the practices described above constitute the unauthorized practice of law and are, therefore, prohibited.

APPENDIX F
FLOW CHARTS

The flow charts in this appendix are provided by Gerard J. Felt, Esq., from Pressler and Pressler in Cedar Knolls, New Jersey and Syosset, New York


Pre-Suit Preparation
Meet with Client:
1. Discuss cause of action
2. Review proofs and make copies (i.e. bills, invoices, contracts, letters, etc.)
3. Draft information sheet on defendant
4. Have client sign retainer agreement:
a. rate, costs, fees
b. Duties
c. Countersuits
If Consumer Debt:
Send FDCPA Letter
If Commercial Debts
Send Demand Letter
Wait 30 days and Start Sait:
1. Make sure that Defendant's Home Address is verified
2. Make sure that on any disputes:
a. send V.O.D. if consumer debt
b. review defendant's disputes with your client

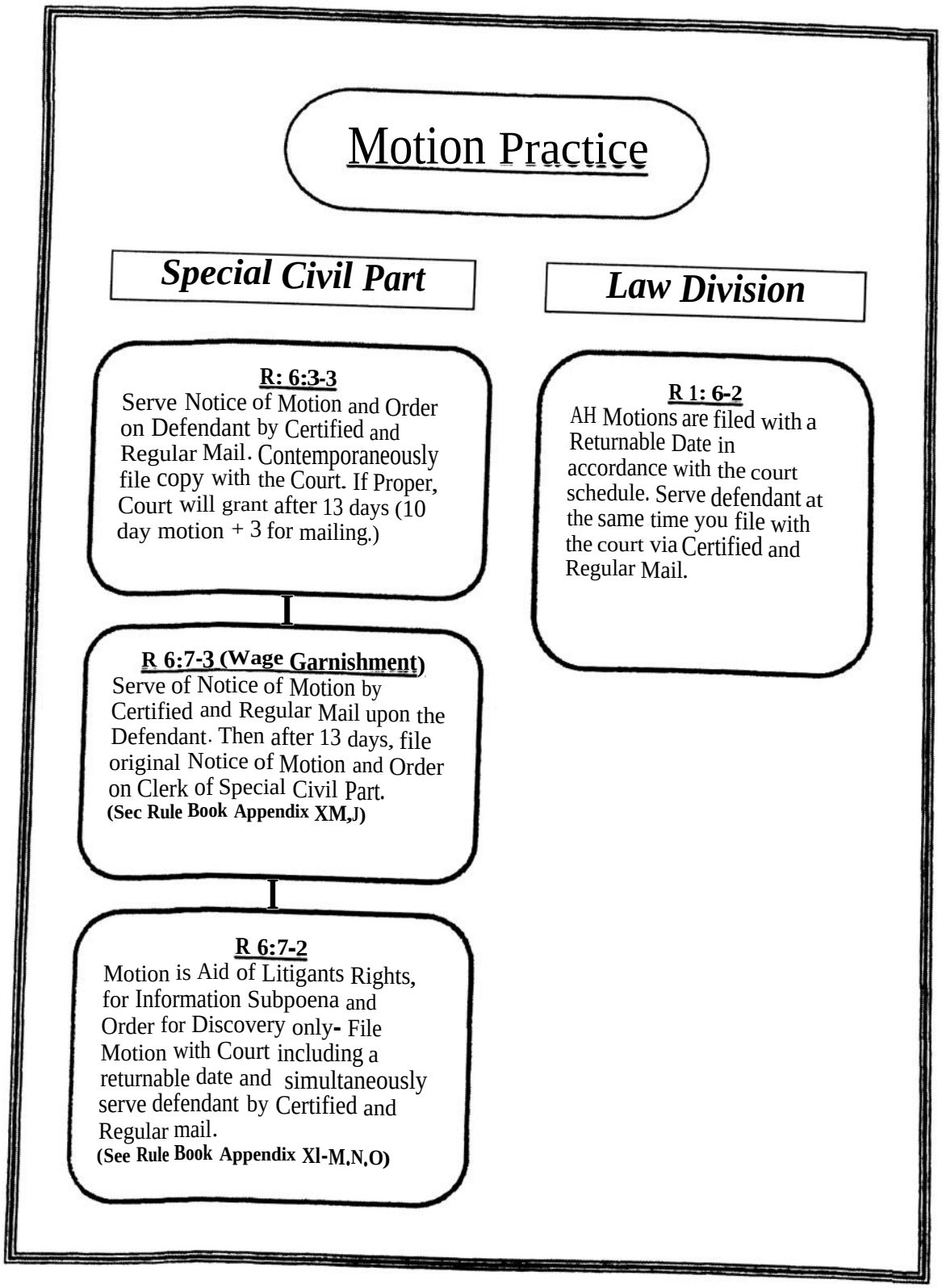

Type of Assets
Individual
Wages
1. Pay out of Income (POD)
2. Individual Allotment
Writs of Execution
1. Bank Accounts
2. Monies Dues
3. Attorney Trust Account
4. Rents
5. Tips
6. Personal Property
7. Cars
8. Investments
9. Stocks and Bonds
10. Real Estate
Sole Prop
Assets of Business
1. Inventory
2. Equipment
3. Accounts Receivable
4. Monies Due
5. Investments
6. Bank Accounts
7. AH Individual Assets. (Go 10 Individual)
Partnership
Assets of Business
1. Inventory
2. Equipment
3. Accounts Receivable
4. Monies Due
5. Investments
6. Bank Accounts
* After Partnership Assets have been exhausted, go after personal assets of partners (Go to Individual)
Corporate
Assets of Business
1. Inventory
2. Equipment
3. Accounts Receivable
4. Investments
5. Bank Accounts
Serve Corporate Demand
• Pierce the Corporate Veil
• Locate Assets

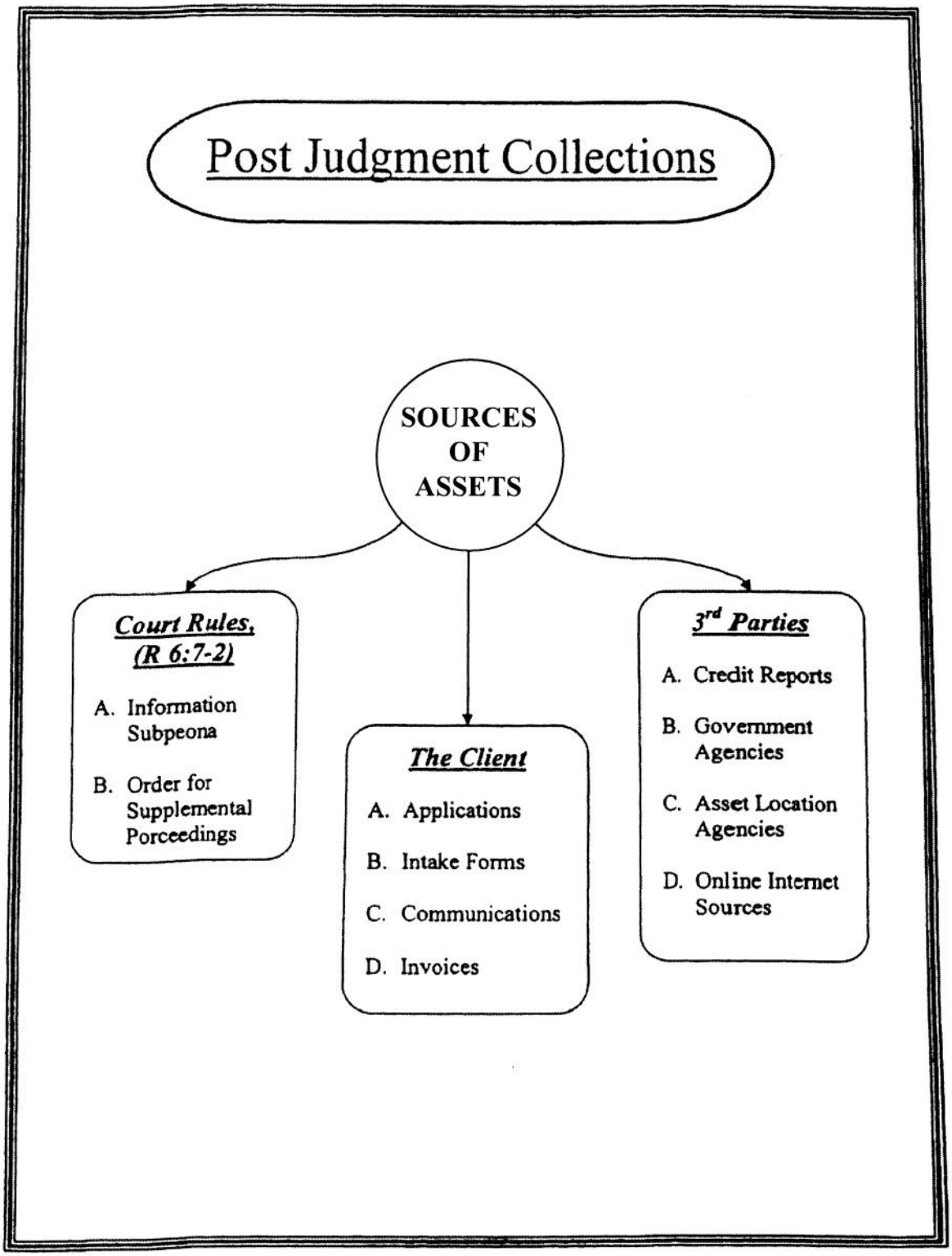
Uncontented CUM J

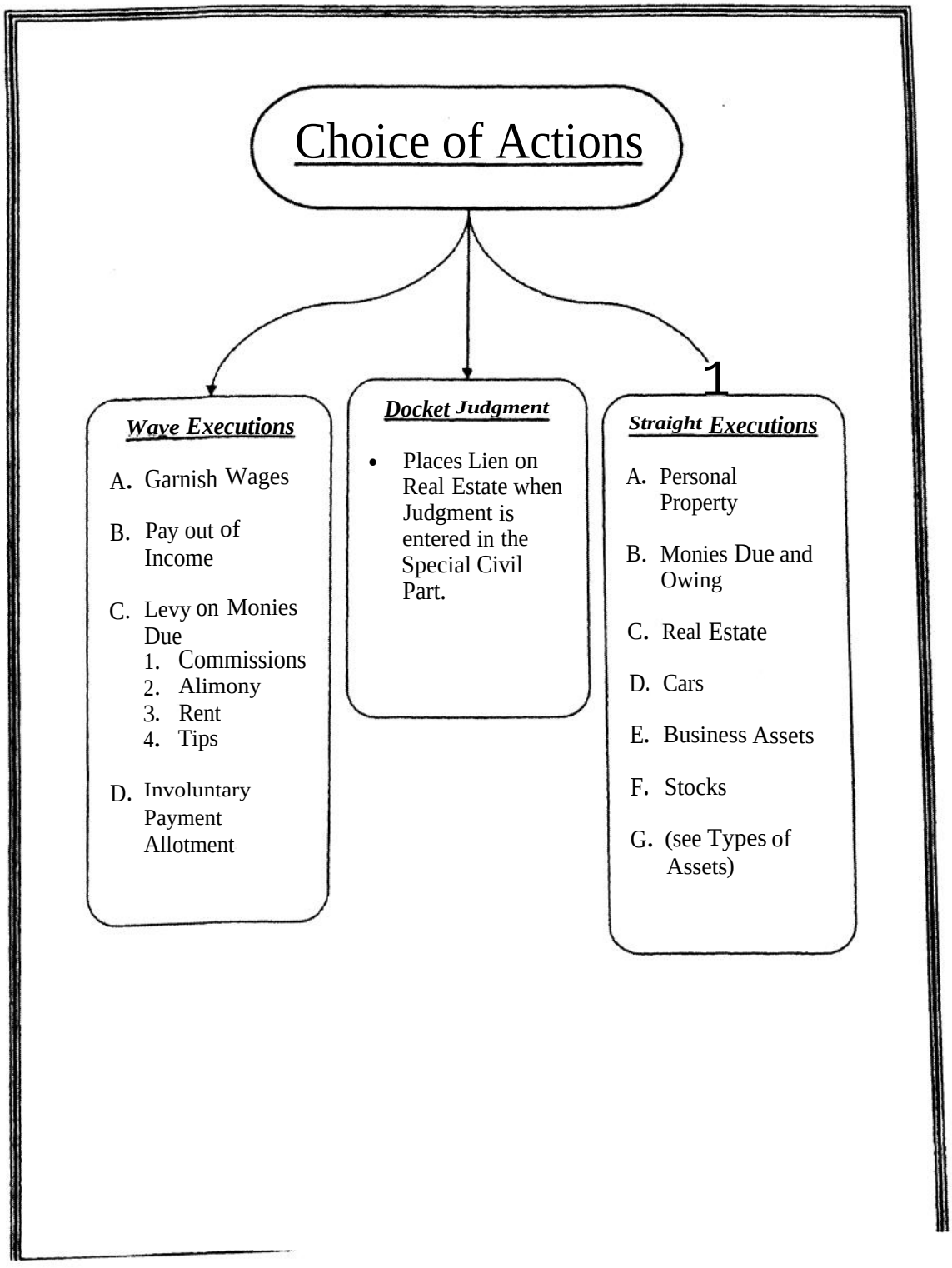
Small Obimi	Special Civil Part	Superior (Law Division)
Under $3,000	Uodor SI3,000	Over SI5,000
	(SAC Cost $32 under $3000, $48 over $3000)	(SAC Cost $200 + $24 for Sheriff ID serve)
SAC Served by Clerk with Hearing Dale.	SAC Served by clerk by Regular and Certified Mill or You cao request personal service	File Complaint; then issue to sheriff to serve. Ijf no good, do diligent inquiry ud (hen Sub-Serve. Rule *4-3(o)
No Answer	35 Days to Fife rod Answer	33 Days to Pile tnd Answer
No Auto Default Must Appear for Trial	Auto Default	Must Request Default
	Judgment entered by Affidavit of Proof, Certification of Non-Military Service, and Certification of source of Home Address.	Must Apply for Judgment with Affidavit of Proof, Certification ofNoo-Miiitary Service, and Certification of source of Home Address.
	Serve Notice of Judgment on Defendant	Serve copy of Default, tnd Judgment on Defendant. File judgment with Trenton with $35 fee.
	Requires motion to enter Judgment after 6 months have passed, strike granted, default in court or supresrion granted.	

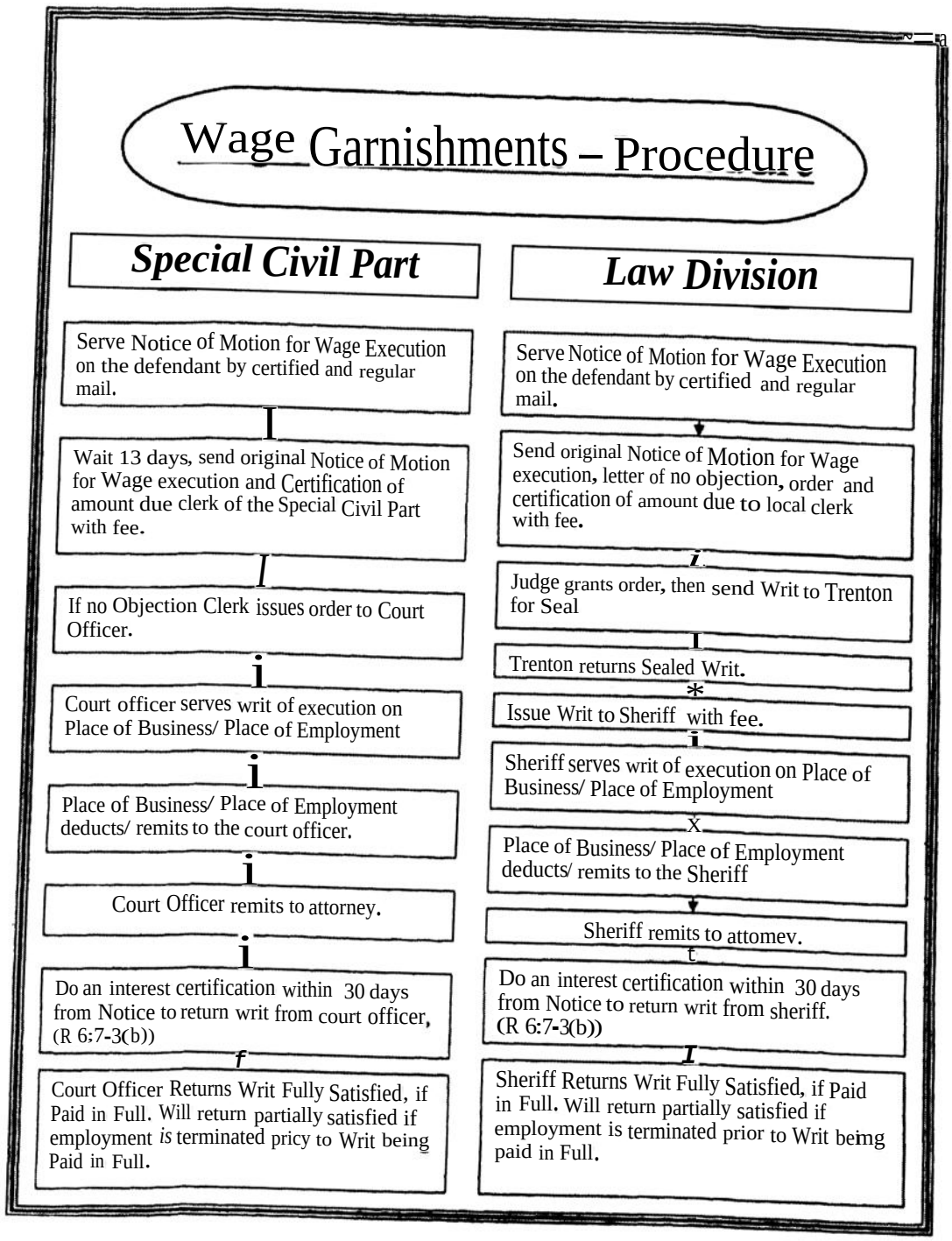
C Contested Cases I

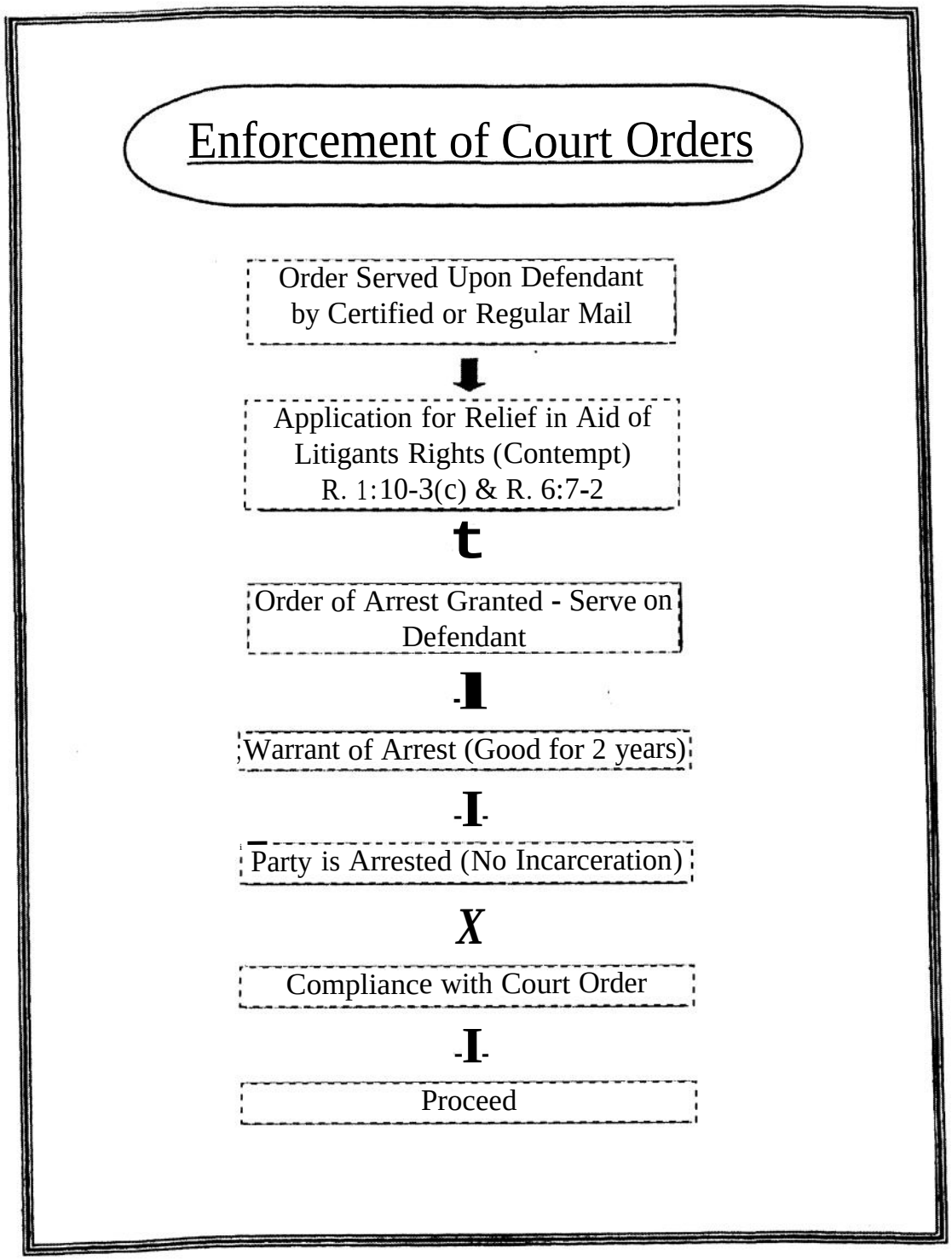
Small Claims	Special Civil Part	Superior (Law Division)
No Discovery, No Rules, No Procedures	90 days of Discovmy from the date the answer is served. If Amount less than $3000, limited to 5 questions (no subparts) without a court order.	3 tracks for discovery; 150 days, 300 days, 450 days.
	Initial discovery must be seat out within 30 days*	Initial discovery seat out with in 45 days.
	Adjournments based on discovery do not require adversary consent. Adjourxnent? for any other reason require adversary consent	
Appear and tell story.	30 days to answer interrogatories,	60 days to answer interrogatories.
Hearsay 1» admissible	Motions - 10 day rule.	Motions - R 1.6-2 with return date. (3 weeks)
Don't need an Attorney.	Motions free	Motions $30
	No Depositions without a Const Order	Depotrtaoos permissible.


Motion Practice
Special Civil Part
Law Division
R: 6:3-3
Serve Notice of Motion and Order on Defendant by Certified and Regular Mail. Contemporaneously file copy with the Court. If Proper, Court will grant after 13 days (10 day motion + 3 for mailing.)
R 6:7-3 (Wage Garnishment)
Serve of Notice of Motion by Certified and Regular Mail upon the Defendant. Then after 13 days, file original Notice of Motion and Order on Clerk of Special Civil Part.
(Sec Rule Book Appendix XM,J)
R 6:7-2
Motion is Aid of Litigants Rights, for Information Subpoena and Order for Discovery only- File Motion with Court including a returnable date and simultaneously serve defendant by Certified and Regular mail.
(See Rule Book Appendix Xl-M,N,O)
R 1: 6-2
AH Motions are filed with a Returnable Date in accordance with the court schedule. Serve defendant at the same time you file with the court via Certified and Regular Mail.


Post Judgment Collections
SOURCES OF ASSETS
Court Rules, (R 6:7-2)
A. Information Subpeona
B. Order for Supplemental Porceedings
The Client
A. Applications
B. Intake Forms
C. Communications
D. Invoices
3rd Parties
A. Credit Reports
B. Government Agencies
C. Asset Location Agencies
D. Online Internet Sources


Choice of Actions
Wage Executions
A. Garnish Wages
B. Pay out of Income
C. Levy on Monies Due
1. Commissions
2. Alimony
3. Rent
4. Tips
D. Involuntary Payment Allotment
Docket Judgment
• Places Lien on Real Estate when Judgment is entered in the Special Civil Part.
1
Straight Executions
A. Personal Property
B. Monies Due and Owing
C. Real Estate
D. Cars
E. Business Assets
F. Stocks
G. (see Types of Assets)


Wage Garnishments – Procedure
Special Civil Part
Serve Notice of Motion for Wage Execution on the defendant by certified and regular mail.
Wait 13 days, send original Notice of Motion for Wage execution and Certification of amount due clerk of the Special Civil Part with fee.
If no Objection Clerk issues order to Court Officer.
Court officer serves writ of execution on Place of Business/ Place of Employment
Place of Business/ Place of Employment deducts/ remits to the court officer.
Court Officer remits to attorney.
Do an interest certification within 30 days from Notice to return writ from court officer, (R 6:7-3(b))
Court Officer Returns Writ Fully Satisfied, if Paid in Full. Will return partially satisfied if employment is terminated pricy to Writ being Paid in Full.
Law Division
Serve Notice of Motion for Wage Execution on the defendant by certified and regular mail.
Send original Notice of Motion for Wage execution, letter of no objection, order and certification of amount due to local clerk with fee.
Judge grants order, then send Writ to Trenton for Seal
Trenton returns Sealed Writ.
Issue Writ to Sheriff with fee.
Sheriff serves writ of execution on Place of Business/ Place of Employment
Place of Business/ Place of Employment deducts/ remits to the Sheriff
Sheriff remits to attomev.
Do an interest certification within 30 days from Notice to return writ from sheriff. (R 6:7-3(b))
Sheriff Returns Writ Fully Satisfied, if Paid in Full. Will return partially satisfied if employment is terminated prior to Writ being paid in Full.


Enforcement of Court Orders
Order Served Upon Defendant by Certified or Regular Mail
Application for Relief in Aid of Litigants Rights (Contempt) R. 1:10-3(c) & R. 6:7-2
Order of Arrest Granted - Serve on Defendant
Warrant of Arrest (Good for 2 years)
Party is Arrested (No Incarceration)
Compliance with Court Order
Proceed

APPENDIX G

FEDERAL TRADE COMMISSION ANNUAL REPORT 2010: FAIR DEBT COLLECTION PRACTICES ACT

INTRODUCTION

The Federal Trade Commission ("FTC") is pleased to submit to Congress this annual report summarizing the administrative and enforcement actions it has taken under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p, during the past year.[1] These actions are part of the FTC's ongoing effort to curtail deceptive, unfair, and abusive debt collection practices in the marketplace. Such practices cause substantial consumer injury, including payment of amounts not owed, unintended waivers of rights, invasions of privacy, and emotional distress. In some circumstances, illegal collection practices can place consumers deeper in debt.

The FDCPA prohibits deceptive, unfair, and abusive practices by third-party collectors. For the most part, creditors are exempt when they are collecting their own debts. The FDCPA permits reasonable collection efforts that promote repayment of legitimate debts, and the FTC tries to ensure compliance without unreasonably impeding the collection process. The FTC recognizes that the timely payment of debts is important to creditors and that the debt collection industry assists creditors in collecting what they are owed. The FTC also appreciates the need to protect consumers from those debt collectors who engage in deceptive, unfair, and abusive collection practices.

The FDCPA vests the FTC with primary enforcement responsibility. It shares overall enforcement responsibility, however, with other federal agencies.* In addition, consumers who believe they have been victims of FDCPA violations may seek relief in state or federal court.

As in past years, the FTC took significant steps in 2009 to curtail illegal debt collection practices. This report summarizes: (1) the types of consumer complaints the FTC received in 2009; (2) recent developments in FTC law enforcement; and (3) the FTC's 2009 consumer and industry education and policy initiatives.

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[1] Section 815 of the FDCPA, 15 U.S.C. § 1692m, requires the FTC to report annually to Congress concerning the administration of its functions under the FDCPA.

[2] Section 814 of the FDCPA, 15 U.S.C. § 1692/, places enforcement obligations upon seven other federal agencies for the organizations they regulate. These agencies are the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Department of Transportation, and the Department of Agriculture. Almost all of the collectors these agencies regulate are creditors collecting on their own debts, and, as such, largely fall outside the FDCPA's coverage. If these agencies receive complaints about debt collection firms that arc not under their jurisdiction, they generally forward the complaints to the FTC or suggest that the consumer contact the FTC directly.

CONSUMER COMPLAINTS

BACKGROUND

The FDCPA requires the FTC to report on the level of industry compliance with the law. Historically, the FTC has received much of its information about the conduct of debt collectors directly from complaints consumers file with the FTC[3] and from its enforcement work. The FTC uses complaints for general monitoring of the industry, target selection, and preliminary analysis that might, with further factual development, reveal or help prove a law violation.

Based on the FTC's experience, many consumers never file a complaint with any organization other than the debt collector itself. Others complain only to the underlying creditor or to enforcement agencies other than the FTC. Some consumers may not be aware that the conduct they have experienced violates the FDCPA or that the FTC enforces the FDCPA. Therefore, the total number of consumer complaints the FTC receives may understate the extent to which consumers have concerns about the practices of debt collectors.

On the other hand, the FTC acknowledges that not all of the debt collection practices about which consumers complain are law violations. Certainly, many consumers do complain of conduct that, if accurately described, violates the FDCPA.[4] The FTC, however, does not verily that the information consumers provide is accurate unless the agency undertakes such an inquiry in connection with its law enforcement activities.

Even if accurately described, some conduct about which consumers complain does not violate the FDCPA. For example, consumers sometimes complain that a debt collector will not accept partial payments on the same installment terms that the original lender provided when the account was current. Although a collector's demand for accelerated payment or larger installments may be frustrating to the consumer, such a demand generally does not violate the FDCPA. Also, for example, if a consumer complains that a debt collector has threatened to file a civil lawsuit to collect a debt, the

[3] Consumers may file complaints with the FTC via its toll-free hotline (1-877-FTC-HELP), online complaint forms, or United States mail.

[4] Much of the conduct, as alleged, also would violate Section 5 of the FTC Act as an unfair or deceptive act or practice in or affecting commerce.

FTC cannot determine whether such conduct violates the FDCPA without investigating whether the debt collector had the requisite intention to file suit.[5]

Despite their limitations, the FTC believes that consumer complaint data provide useful insight into the acts and practices of debt collectors. The FTC describes below the trends it has observed in the overall number of debt collection complaints it has received as well as the types of practices about which consumers most frequently complain.

TOTAL NUMBER OF COMPLAINTS

Hundreds of thousands of consumers contact the FTC every year about all kinds of consumer protection issues. With respect to debt collection, the FTC receives both consumer inquiries and complaints. The FTC's Consumer Response Center ("CRC") makes every effort to distinguish between these two categories of contacts. The data presented here include only consumer contacts that the CRC has identified as complaints. When this report refers to "complaints," the term refers solely to complaints that consumers have filed directly with the FTC.

In 2009, consumer complaints to the FTC about third-party debt collectors[6] ("FDCPA complaints") increased in absolute terms, but decreased as a percentage of all complaints[7] that consumers filed directly with the FTC. The FTC received 88,190 FDCPA complaints about third-party debt collectors in 2009. This represents 16.8% of

[5] Section 807(5) prohibits debt collectors from threatening "to take any action that cannot legally be taken or that is not intended to be taken," a prohibition that includes false threats of suit. 15 U.S.C. § 1692e(5).

[6] "Third-party debt collectors" include contingency fee collectors and attorneys who regularly collect or attempt to collect, directly or indirectly, debts asserted to be owed or due another, as well as debt buyers collecting on debts they purchased in default.

[7] Last year, the FTC received 524,509 complaints directly from consumers about all industries, up from the 416,284 complaints received in 2008. As in past years, complaint numbers in this report do not include complaints about identity theft or violations of the FTC's Do Not Call Registry.

all complaints received directly from consumers in 2009.[8] By comparison, in 2008,[9] the FTC received 78,925 third-party debt collector complaints, representing 19% of the complaints received directly from consumers that year.

The FTC recognizes that third-party collectors contact millions of consumers each year. The number of consumer complaints the FTC receives about these collectors is therefore only a small percentage of the overall number of consumers contacted. Nevertheless, the FTC receives more complaints about the debt collection industry than any other specific industry.[10]

Last year, the number of complaints the FTC received about creditors' in-house collectors increased in absolute terms but decreased slightly as a percentage of total complaints. In 2009, the FTC received 32,076 complaints about in-house collectors, representing 6.1% of all complaints the FTC received. In 2008, the FTC received 26,652 complaints about in-house collectors, representing 6.4% of all complaints received.

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[8] Because absolute numbers of complaints fluctuate from year to year, this report analyzes collection industry trends by comparing the number of debt collection complaints each year to the number of all complaints the FTC has received. The percentage figures this analysis produces portray industry trends more accurately than would reliance on absolute numbers of complaints.

[9] The 2008 complaint numbers identified in this year's report differ slightly from those identified in last year's report because, in connection with a continuous quality assurance review, the FTC staff reviewed and re-coded some complaints after the 2009 Annual Report was issued.

[10] The FTC does not count any identity theft or Do Not Call Registry complaints that may involve debt collection in determining the total number of debt collection complaints. The agency does not consider identity theft complaints and Do Not Call Registry complaints to be reports about any specific industry. Identity theft complaints are excluded because such complaints relate to a variety of actors, rather than a single industry. Do Not Call Registry complaints similarly are excluded because the complaints capture the actions of a variety of industries that use telemarketing as a tool to contact consumers.

Note also that, based on the FTC's law enforcement experience, some identity theft and Do Not Call Registry complaints arise out of deceptive, unfair, or abusive debt collection practices. For example, a consumer may complain about identity theft if a debt collector is contacting him or her about a debt he or she does not owe. To that extent, the FDCPA complaint data may under-report complaints about debt collection practices.

Combined, complaints about third-party debt collectors and in-house collectors in 2009 totaled 119,364 complaints[11] and accounted for 22.8% of all complaints the FTC received. This represents an increase in absolute terms from the 2008 figure, and a decrease as a percentage of total complaints: in 2008, the agency received 104,766 debt collection complaints, accounting for 25.2% of all complaints to the FTC.

In evaluating the complaints the FTC received in 2009 relative to those received in 2008, it is important to recognize that in June 2008 the agency substantially changed the way it processes complaints it receives over the Internet. The agency changed from a form-based web complaint system to an interactive, question-based web complaint system. Although both systems permit a single complaint to be coded for multiple law violations, this change in the FTC's web-based complaint system appears to have resulted in an increase in the number of law violations reported per complaint.[12] To evaluate possible changes in underlying debt collector behavior, it is useful to compare complaint information during periods in 2008 and 2009 in which the FTC was using the same complaint system. Accordingly, the FTC has supplemented its annual complaint comparisons by comparing complaints received from July through December 2009 with complaints received from July through December 2008.

For the July through December period, total FDCPA complaints increased slightly from 56,160 (or 24.2% of FTC complaints) in 2008 to 57,926 (or 23.5% of FTC complaints) in 2009. For each category of complaints below, a similar comparison of the July through December data will appear in footnotes.

COMPLAINTS BY CATEGORY

In addition to evaluating the total number of complaints about third-party debt collectors, it also is instructive to consider the specific types of debt collection practices about which consumers complain. Because consumers frequently complain about more than one debt collection practice, the CRC historically has assigned many complaints

[11] Some complaints are directed toward both third-party debt collectors and in-house creditor collectors. Thus, the total number of complaints against all debt collectors can be less than the sum of all third-party complaints and all in-house creditor complaints.

[13] For example, among all complaints received directly by the FTC on the web, the average number of law violations per complaint increased from 0.93 in early 2008 to 1.97 after the FTC switched to the new web complaint system in June 2008. This increase was even greater for FDCPA complaints: the average number of law violations per web complaint rose from approximately 0.98 under the old system to 3.5 under the new web complaint system.

more than one code. Thus, if one adds together all the complaints for each of the fifteen debt collection codes each year, the total exceeds the number of FDCPA complaints the FTC actually received in that year.

HARASSING THE ALLEGED DEBTOR OR OTHERS: This complaint category encompasses four distinct violation codes. Under the FDCPA, debt collectors may not harass consumers to try to collect on a debt.[13] In 2009, 46.5% of FDCPA complaints the FTC received, or 41,028 complaints, claimed that collectors harassed the complainants by calling repeatedly or continuously. This was the most frequent law violation about which consumers complained during 2009, as it was in 2008, when 27,413 complaints, representing 34.7% of FDCPA complaints, stated that collectors harassed them by calling repeatedly or continuously. Also in 2009, 14,321 complaints, or 16.2% of FDCPA complaints, claimed that a collector had used obscene, profane, or otherwise abusive language. Nine thousand, six hundred eighty-four complaints (9,684), or 11% of 2009 FDCPA complaints, said that collectors called before 8:00 a.m., after 9:00 p.m., or at other times that the collectors knew or should have known were inconvenient to the consumer. Two thousand, five hundred seventeen (2,517) complaints, or 2.9% of 2009 FDCPA complaints, reported that collectors used or threatened to use violence if consumers failed to pay.[14]

DEMANDING A LARGER PAYMENT THAN IS PERMITTED BY LAW: This category includes two different FDCPA law violation codes. First, the FDCPA prohibits debt collectors from misrepresenting the character, amount, or legal status of a debt.[15] The types of complaints that fall into this category include, for example, reports that a collector is attempting to collect either a debt the consumer does not owe at all or a debt larger than what the consumer actually owes. Other complaints in this category state that collectors have sought to collect on debts that have been discharged in bankruptcy. For the second consecutive year, this was the second most common category of FDCPA complaint. In

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[13] Section 806. 15 U.S.C. § 1692d.

[14] For the July through December period, 47.8% of FDCPA complaints (20,603 total) in 2009 claimed repeated or continual harassing calls, up from 43.7% (18,018 total) in 2008; 16.3% of FDCPA complaints in 2009 (7,021 total) reported use of obscene, profane, or otherwise abusive language, down slightly from 16.7% (6,863 total) in 2008; 11.5% of complaints in 2009 (4,940 total) reported that collectors called before 8:00 a.m., after 9:00 p.m., or at other inconvenient times, up from 10.5% (4,317 total) in 2008; and the percentage of complaints reporting that collectors used or threatened to use violence increased from 2.4% (971 complaints) in 2008 to 3.2% (1,394 complaints) in 2009.

[15] Section 807(2). 15 U.S.C. § 1692e(2).

2009, however, there was an increase in the number but a decrease in the percentage of complaints of this law violation compared to 2008. In 2009, 31.1%, or 27,420 FDCPA complaints, described this conduct; in 2008, 32.5% of FDCPA complaints, or 25,684 complaints, reported that collectors engaged in these practices.[16]

Second, the FDCPA prohibits debt collectors from collecting any amount unless it is "expressly authorized by the agreement creating the debt or permitted by law."[17] In 2009, 10.9% of FDCPA complaints, or 9,632 complaints, asserted that collectors demanded interest, tees, or expenses that were not owed (such as collection fees, late fees, and court costs), up from 7.5% of FDCPA complaints (5,948 total) in 2008.[18]

THREATENING DIRE CONSEQUENCES IF CONSUMER FAILS TO PAY: The FDCPA bars debt collectors from making threats as to what might happen if the consumer fails to pay the debt, unless the collector has the legal authority and the intent to take the threatened action.[19] Among other things, collectors may threaten to initiate civil suit or criminal prosecution, garnish wages, seize property, cause job loss, have a consumer jailed, or damage or ruin a consumer's credit rating. In 2009, 20.9% of FDCPA complaints, or 18,438 complaints, reported that third-party collectors falsely threatened a lawsuit or some other action that they could not or did not intend to take, an increase from the 15% of complaints (11,804 total) that reported the same conduct in 2008. Also in 2009, 13% of FDCPA complaints, or 11,505 complaints, alleged that such collectors falsely threatened arrest or seizure of property, up from the 8.1% of FDCPA complaints (6,412 total) reporting such conduct in 2008.[20]

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[16] For the July through December period, there was a small decrease in the number and the percentage of complaints received about misrepresenting the character, amount, or legal status of a debt in 2009 compared to the same period in 2008. During those months in 2009, the FTC received 12,701 such complaints, amounting to 29.5% of FDCPA complaints, while during the same months in 2008, the FTC received 12,787 complaints, or 31% of FDCPA complaints.

[17] Section 808(1), 15 U.S.C. § 1692f(1).

[18] For the July through December period, the number and percentage of consumer complaints concerning collecting unauthorized amounts held relatively steady: 4,555 complaints, or 11.1% of FDCPA complaints, in 2008; to 4,571 complaints, or 10.6% of FDCPA complaints, in 2009.

[19] Sections 807(4)-(5), 15 U.S.C. §§ 1692e(4)-(5).

[20] For the July through December period, the percentage of FDCPA complaints for false threats of lawsuits or other unintended actions rose slightly: it constituted 21.9% of FDCPA complaints in 2009 (9,434 complaints), up from 20.4% of FDCPA complaints in 2008 (8,387

(continued...)

IMPERMISSIBLE CALLS TO CONSUMER S PLACE OF EMPLOYMENT: Under the FDCPA, a debt collector may not contact a consumer at work if the collector knows or has reason to know that the consumer's employer prohibits such contacts.[21] By continuing to contact consumers at work under these circumstances, debt collectors may put them in jeopardy of losing their jobs. In 2009, 13.6% of FDCPA complaints, or 11,973 complaints, related to calls to consumers at work. This is an increase from 10.3% of FDCPA complaints, or 8,103 complaints, in 2008.[22]

REVEALING ALLEGED DEBT TO THIRD PARTIES: The FDCPA generally prohibits third-party contacts for any purpose other than obtaining information about the consumer's location. Collectors calling to obtain location information also are prohibited from revealing that a consumer allegedly owes a debt.[23]

Improper third-party contacts typically embarrass or intimidate the consumer who allegedly owes the debt and are a continuing aggravation to the third parties. Contacts with consumers' employers and co-workers about consumers' alleged debts also may jeopardize continued employment or prospects for promotion. Relationships between consumers and their families, friends, or neighbors also may suffer from improper third-party contacts. In some cases, collectors reportedly have used misrepresentations as well as harassing and abusive tactics in their communications with third parties, or even have attempted to collect from the third party.

In 2009, 12.2% of all FDCPA complaints, or 10,758 complaints, reported that debt collectors illegally disclosed a purported debt to a third party, up from 8.8% of FDCPA complaints, or 6,955 complaints, in 2008. The third parties contacted included employers, relatives, children, neighbors, and friends. This past year, 19.2% of complaints, or 16,926 complaints, claimed that collectors called a third party repeatedly

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[20](...continued)
complaints). Similarly, the percentage of FDCPA complaints during those months for false threats of arrest or seizure of property also rose from 11.6% in 2008 (4,782 complaints) to 14.2% in 2009 (6,120 complaints).

[21] Section 805(a)(3), 15 U.S.C. § 1692c(a)(3).

[22] For the July through December period, the percentage of FDCPA complaints claiming impermissible calls to consumers at work rose from 13% in 2008 (5,337 complaints) to 14.3% in 2009 (6,161 complaints).

[25] Section 804(2), 15 U.S.C. § 1692b(2).

to obtain location information about the complainant,[24] up from 16.1% of FDCPA complaints, or 12,710 complaints, in 2008.[25]

FAILING TO SEND REQUIRED CONSUMER NOTICE: The FDCPA requires that debt collectors send consumers a written notice that includes, among other things, the amount of the debt, the name of the creditor to whom the debt is owed, and a statement that, if within thirty days of receiving the notice the consumer disputes the debt in writing, the collector will obtain verification of the debt and mail it to the consumer.[26] Many consumers who do not receive the notice are unaware that they must dispute their debts in writing if they wish to obtain verification of the debts. Last year, 25.7% of the FDCPA complaints, or 22,708 complaints, reported that collectors did not provide the required notice, up from 15.7% of all FDCPA complaints, or 12,374 complaints, in 2008.[27]

FAILING TO VERIFY DISPUTED DEBTS: The FDCPA also mandates that, if a consumer submits a dispute in writing, the collector must cease collection efforts until it has provided written verification of the debt.[28] Many consumers complained that collectors ignored their written disputes, sent no verification, and continued their collection efforts. Other consumers reported that some collectors continued to contact them about the debts between the date the consumers submitted their dispute and the date the collectors provided the verification. Last year, 11.5% of all FDCPA complaints, or 10,158

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[24] Section 804(3) prohibits a debt collector contacting a third party for location information from communicating with the third party more than once, unless the third party requests it or the collector reasonably believes the third party's earlier response was erroneous or incomplete and that the third party now has correct or complete location information.

[25] For the July through December period, the percentage of FDCPA complaints in 2009 related to third parties held steady at 2008 levels. The percentages of FDCPA complaints during those months reporting that a collector impermissibly disclosed a debt to a third party was 12.3% in both years (5,285 complaints in 2009, 5,055 complaints in 2008). The percentage of FDCPA complaints stating that collectors called a third party repeatedly to obtain location information increased from 18.1% in 2008 (7,467 complaints) to 19.7% in 2009 (8,507 complaints).

[26] Section 809(a), 15 U.S.C. § 1692g(a).

[27] For the July through December period, 26.2% of FDCPA complaints (11,272 total) in 2009 claimed that collectors did not provide the required notice, an increase from 24.2% (9,971 total) in 2008.

[28] Section 809(b), 15 U.S.C. § 1692g(b).

complaints, claimed that collectors failed to verify disputed debts, up from 8%, of all FDCPA complaints, or 6,345 complaints, in 2008.[29]

CONTINUING TO CONTACT CONSUMER AFTER RECEIVING CEASE COMMUNICATION NOTICE: The FDCPA requires debt collectors to cease all communications with a consumer about an alleged debt if the consumer communicates in writing that he or she wants all such communications to stop or that he or she refuses to pay the alleged debt.[30] This "cease communication" notice does not prevent collectors or creditors from filing suit against the consumer, but it does stop collectors from calling the consumer or sending dunning notices. In 2009, 8.4% of FDCPA complaints, or 7,411 complaints, reported that collectors ignored "cease communication" notices and continued their collection attempts, up from 6.4 % of complaints (5,013 complaints) reported by such complainants in 2008.[31]

ENFORCEMENT

The FTC's debt collection program has three prongs: (1) vigorous law enforcement; (2) consumer and industry education efforts; and (3) research and policy initiatives.

The FTC's FDCPA enforcement actions begin with investigations of debt collectors identified through complaints and other sources. If an investigation reveals FDCPA violations, the FTC proceeds in one of two ways. Through its own attorneys, the FTC can file suit in federal court seeking preliminary and permanent injunctive relief, restitution for consumers, disgorgement of ill-gotten gains, and other ancillary relief under Section 13(b) of the FTC Act.[32] Alternatively, the FTC may request that the

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[29] For the July through December period, 11.3% of FDCPA complaints (4,869 total) in 2009 reported a failure to verify a disputed debt, compared to 11.7% (4,803 total) of FDCPA complaints in 2008.

[30] Section 805(c), 15 U.S.C. § 1692c(c).

[31] For the July through December period, 8% of FDCPA complaints (3,448 total) in 2009 reported continued collector contact despite a consumer's sending a "cease contact" notice, compared to 8.9% (3,680 total) in 2008.

[32] Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to sue in federal district court to obtain a preliminary injunction against entities that the FTC has reason to believe

(continued...)

Department of Justice file suit in federal court on behalf of the FTC, seeking a civil penalty, other monetary relief, and injunctive relief that would prohibit the collector from continuing to violate the FDCPA.

The FTC currently is conducting a number of non-public investigations of debt collectors to determine whether they have engaged in violations of the FDCPA or the FTC Act. It has also filed or settled four public law enforcement actions in the past twelve months: two new law enforcement actions alleging FDCPA and Section 5 violations against companies collecting debts, and settlements in two previously filed cases.

In June 2009, the FTC settled an action against Oxford Collection Agency, Inc., its officers, and an attorney who acted as its agent, for collection practices allegedly in violation of the FTC Act and the FDCPA.[33] The FTC's complaint alleged that the defendants falsely threatened to garnish consumers' wages, bring lawsuits against them, or have them arrested. It also charged that the defendants used illegal and abusive collection methods such as calling consumers before 8 a.m. or after 9 p.m.; calling their workplace when the collectors knew or had reason to know that the calls were inconvenient; telling employers, co-workers, relatives, and neighbors about the consumers' debts; continuing to call after receiving consumers' written demands to stop; calling consumers repeatedly throughout the day; calling back immediately after the consumer hung up; and using profane or other abusive language. Separate FTC settlements, one with Oxford and its officers, and the other with the attorney and his law firm, each imposed a $1,060.00 civil penalty which was partially or wholly suspended based on inability to pay. Both settlements enjoin the defendants from violating the FDCPA, and from making misrepresentations in connection with the collection of a debt.

In September 2009, the FTC concluded its case against Academy Collection Service, Inc., by settling with the two remaining corporate officer defendants, Albert

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*[2](...continued)
are violating any law the FTC enforces. The court may grant a preliminary injunction or a temporary restraining order if the FTC shows that, weighing the equities and considering the FTC's likelihood of ultimate success, the action would be in the public interest. Section 13(b) also permits federal district courts to issue a permanent injunction if the FTC seeks that remedy. Section 13(b)(2) of the FTC Act, 15 U.S.C. § 53(b)(2).

[33] *U.S. v. Oxford Collection Agency, Inc.*, No. 2:09-cv-02467-LDW-AKT (E.D.N.Y. June 10, 2009). *See* Press Release, Federal Trade Commission, *Debt Collectors Settle with FTC; Abusive Practices Affected Consumers Nationwide*, available at http://www.ftc.gov/opa/2009/07/oxlbrd.shtm.

Bastian and Edward Hurt III, who operated Academy's Las Vegas collection center.[14] The complaint alleged that the individual defendants "formulated, directed, participated in, controlled, or had the authority to control" the actions of Academy's collectors, which included (1) misleading, threatening, and harassing consumers; (2) depositing postdated checks early; (3) falsely threatening or implying that the company would garnish consumers' wages, seize or attach their property, or initiate lawsuits against the consumers if they (ailed to pay; (4) making unfair and unauthorized withdrawals from consumers' bank accounts; (5) communicating impermissibly with third parties about consumers' alleged debts; and (6) engaging in harassing or abusive behavior, such as threatening the use of physical violence, using obscene or profane language, and repeatedly or continuously causing the telephone to ring. The settlement imposes civil money judgments against Mr. Bastian and Mr. Hurt of $375,000 and $300,000, respectively, which were partially suspended based on their inability to pay. The consent decree enjoins them from violating the FDCPA and from, in connection with debt collection, making withdrawals from consumers' bank accounts without express informed consent and from making misrepresentations.

In October 2009, the FTC and the State of Nevada settled an action filed in November 2008 against an international Internet payday lending operation that used unfair and deceptive debt collection tactics.[15] The defendants, ten related Internet payday lenders (including Cash Today) and their principals, operated from the United Kingdom and targeted consumers in the United States. The FTC charged them with, among other things, violating the FTC Act by: (1) falsely threatening consumers with arrest or imprisonment; (2) falsely claiming that consumers were legally obligated to pay the debts when they were not; (3) making false threats to take legal action that they could not take; (4) repeatedly calling consumers at work; (5) using abusive and profane language; and (6) disclosing consumers' purported debts to third parties. Under the terms of the settlement, the defendants had to pay $970,125 in consumer redress for distribution by the FTC and $29,875 to the State of Nevada. They are enjoined from, in connection with

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[14] *United States v. Acad. Collection Serv., Inc.*, No. 2:08-cv-01576-KJD-GWF (D. Nev. Sept. 9, 2009). *See* Press Release, Federal Trade Commission, *Debt Collection Supenhsors Settle FTC Charges* (Jan. 7, 2010), available at http:/7www.ftc.gov/opa/2010/01/academy.shtm.

[35] *Federal Trade Commission and State of Nevada* v. *Cash Today, Ltd.*, No. 3:08-cv-00590 (D. Nev. Oct. 27, 2009). *See* Press Release, Federal Trade Commission, *Internet Payday Lenders Will Pay SI Million to Settle FTC and Nevada Charges; FTC Had Challenged Defendants' Illegal landing and Collection Tactics* (Sept. 21, 2009), available at http://www.ftc.gov/opa/2009/09/cash.shtm. Because the defendants were creditors collecting their own debts, they wrere not charged with violating the FDCPA.

debt collection, making misrepresentations or engaging in unfair practices in violation of the FTC Act.

In February 2010, the FTC settled an action against Credit Bureau Collection Services and two of its officers to resolve allegations that the defendants violated the law in the course of collecting debts from consumers.[36] Among other things, the complaint alleged that the defendants violated the FDCPA by misrepresenting both to consumers and to consumer reporting agencies ("CRAs") that consumers owed the debts and by failing to inform the CRAs that those debts were disputed by consumers. The complaint also alleged that the defendants violated the FTC Act by misrepresenting that consumers owed debts or by failing to have a reasonable basis for such representations. The consent decree filed requires the defendants to pay a $1,095,000 civil penalty. Among other things, it also prohibits violations of the FDCPA, and requires the defendants to have a reasonable basis for representations that a consumer owes a debt, and requires them to conduct a reasonable investigation when the truth of those representations is cast in doubt.

CONSUMER AND INDUSTRY EDUCATION

The FTC's consumer and industry education efforts are the second prong of its FDCPA program. Consumer education informs consumers nationwide of their rights under the FDCPA and its requirements on debt collectors. With this knowledge, consumers can determine whether collectors are violating the FDCPA and exercise their rights under the statute. An informed public that enforces its rights under the FDCPA operates as a powerful mechanism for deterring law violations. Industry education informs collectors on various FDCPA issues. With this knowledge, industry members can take all necessary steps to comply with the FDCPA.

TOOL FOR BOTH CONSUMERS AND INDUSTRY: The Staff Commentary on the FDCPA is useful in both the consumer and industry education initiatives. The Commentary, issued in 1988, provides the staffs detailed analysis of every section of the FDCPA and gives guidance to consumers, their attorneys, courts, and members of the collection industry.[37] The Commentary is available on the FTC's FDCPA web page, located at http://www.ftc.gov/Wstatutcs/fdcpaiump.shtm.

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[36] *United States v. Credit Bureau Collection Sens* NO. 2:10-cv-00169-ALM-NMK (S.D. Ohio filed February 24, 2010).

[37] 53 Fed. Reg. 50,097 (1988).

TOOLS SPECIFICALLY FOR CONSUMERS: The FTC informs consumers about their rights and responsibilities under the FDCPA by means of written materials, one-to-one guidance, and speeches and presentations.

First, the FTC provides written materials for consumers, including a "Facts for Consumers" brochure entitled "Debt Collection FAQs: A Guide for Consumers" that explains the FDCPA in plain language.[58] In 2009, the FTC distributed 123,500 paper copies of the brochure to consumers in response to inquiries to the FTC and through non-profit consumer groups, state consumer protection agencies, Better Business Bureaus, and other sources of consumer assistance. In addition, online users accessed the brochure on the FTC's website 456,162 times in 2009.

The FTC also publishes Spanish-ianguage versions of the "Debt Collection FAQs: A Guide for Consumers" brochure and several related consumer brochures, including "Credit and Your Consumer Rights" and "Knee Deep in Debt."[39] The FTC distributed 12,400 paper copies of the Spanish version of "Debt Collection FAQs: A Guide for Consumers" in 2009. Online users accessed the brochure in Spanish 7,792 times in 2009.

In addition, in September 2009, the FTC released a video explaining consumer rights regarding debt collection. The video can be found at http://www.ftc.gov/debtcollection and www.youtube.com/ftcvideos.

Second, the FTC provides consumer education through its Consumer Response Center, whose highly trained contact representatives respond to telephone calls and correspondence (in both paper and electronic form) each weekday from consumers. A toll-free number, 1-877-FTC-HELP, makes it very easy for consumers to contact the CRC. As discussed above, a large percentage of consumer contacts with the FTC relate to debt collection. For those consumers who complain about the actions of third-party collectors, the CRC contact representatives provide essential information about the

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[38] The FTC's "Debt Collection FAQs: A Guide for Consumers" brochure is accessible at http://www.ftc.gov/bcp/cdu/pubs/consumer/credit/crel 8.shtm.

[39] The Spanish-ianguage version of "Debt Collection FAQs: A Guide for Consumers" ("Preguntas Frecuentes sobre Cohranza de Deudas: Una Guia para Consumidores") is accessible at http://www.ftc.gov/bcp/edu/pubs/consumer/crediryscrel 8.shtm; "Credit and Your Consumer Rights" ("El Credito y Sus Derechos como Consumidor") is accessible at hup://www.ftc.gov/bcp/cdu/pubs/consumer/credit/screOlshtni; and "Knee Deep in Debt" ("Fndeudado Hasta el Cuello") is accessible at http://www.ftc.Rov/bcp/eda/pubs/consumer/credit/screl 9.shtm.

FDCPA's self-help remedies, such as the right to obtain written verification of the debt and the right to demand that the collector cease all communications about the debt.[40]

Third, the FTC extends the reach of its consumer education initiatives through public speaking engagements to groups across the country. In all types of venues, the FTC informs consumers of their rights under the FDCPA and other consumer finance statutes and responds to a wide range of questions and concerns.

TOOLS SPECIFICALLY FOR THE COLLECTION INDUSTRY: The FTC also delivers speeches and participates in panel discussions at industry conferences throughout the year. In addition, the staff maintains an informal communications network with the leading debt collection trade associations and consumer groups, which permits staff members to exchange information and ideas and discuss problems as they arise. The FTC also provides interviews to general media and trade publications. These interviews serve as yet another vehicle to make agency positions known to the nation's debt collectors.

ADVISORY OPINIONS: The FTC, where appropriate, responds to requests for formal advisory opinions regarding the application or interpretation of the FDCPA.[41] In June 2009, the FTC issued an advisory opinion to ACA International regarding a potential conflict between FDCPA § 805(c) and one provision of the FTC's new Furnisher Rule, 16 CFR § 660.4(e)(3). Section 805(c) prohibits debt collectors from continuing to contact a consumer after receiving a "cease communication" notice from that consumer. The Furnisher Rule requires that if a consumer has disputed directly to the furnisher the accuracy of information that the furnisher has provided to a consumer reporting agency, then the furnisher must report back to the consumer the results of its investigation of the consumer's dispute. Debt collectors were concerned that they could not comply with the Furnisher Rule without violating the FDCPA if a consumer had sent a cease communication notice and then subsequently disputed the debt to the furnisher, triggering the requirement that the dispute be investigated and the result reported to the consumer. The advisory opinion concluded that a debt collector does not violate the FDCPA if a consumer directly disputes information after sending a written "cease communication" notice to the collector, and the collector responds to the consumer with

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[40] For those consumers who contact the CRC seeking only information about the FDCPA, the contact representatives answer any urgent questions and then either mail out the "Fair Debt Collection" brochure and any other responsive consumer education materials, or refer the consumer to the appropriate web pages within the FTC's website, **located** at **http://www.ftc.gov**.

[41] The FTC issues advisory opinions pursuant to Sections 1.1-1.4 of the FTC's Rules of Practice, 16 C.F.R. §§ 1.1-1.4.

a communication that has no purpose other than stating: (1) the results of the collector's investigation; or (2) the collector's belief that the communication is frivolous or irrelevant.[42]

RESEARCH AND POLICY INITIATIVES

The third prong of the FTC's FDCPA enforcement program is research and policy initiatives. In the past year, the FTC has continued to monitor and evaluate the debt collection industry and its practices.

In February 2009, the FTC issued a report[43] setting forth Findings, conclusions, and recommendations derived from an October 2007 FTC Workshop assessing the need for change in the debt collection system. In that report, the FTC recommended amendments to the FDCPA, including a grant of rulemaking authority to promulgate rules to implement the FDCPA. The FTC continues to advocate the recommendations in the report.

In the wake of the issuance of the FTC's debt collection workshop report, FTC staff has undertaken a comprehensive review of debt collection litigation and arbitration. In 2009, the FTC hosted a series of regional roundtables relating to these issues.[44] These events brought together debt collector representatives, consumer advocates, academics, government officials, arbitration providers, judges, and others to discuss consumer protection problems arising in debt collection litigation and arbitration as well as possible solutions to those problems. To supplement the record compiled from the roundtable discussions, the FTC also solicited comments from the public. The FTC anticipates that in the near future it will issue a report setting forth findings, conclusions, and recommendations related to debt collection litigation and arbitration.

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[42] The text of the advisory opinion can be accessed at http://www.ftc.gov/os/statutes/andcrsonbeatolctter.pdf.

[41] *Collecting Consumer Debts: The Challenges of Change – A Workshop Report*, available at http://www.ftc.gov/bcp/workshQps/deblcQllection/dcwr.pdf.

[44] The roundtables were held in Chicago, San Francisco, and Washington, D.C. *See* Announcement, Federal Trade Commission, *Protecting Consumers in Debt Collection Litigation and Arbitration: a Roundtable Discussion* (December 4, 2009), available at http:/Av\vw.ftc.gov/bcp/workshops/debtcollcctround/index.shtm.

The FTC's 2009 debt collection workshop report also noted major problems in the flow of information among creditors, debt buyers, and collection agencies, which may be resulting in attempts to collect debts from the wrong consumers or in the wrong amounts. To learn more about such problems, the FTC issued orders in December 2009 to nine of the nation's largest debt buying companies, requiring them to produce information about their practices in buying and selling consumer debt. The FTC anticipates issuing a report with possible recommendations upon completion of this study.

CONCLUSION

Through its debt collection program of enforcement, education, and policy initiatives, the FTC encourages collectors who comply with the law to continue to do so, and provides strong incentives for those who are not complying to conform their future practices with the dictates of the law. Vigorous federal and state law enforcement in this area is essential to stop those debt collectors who fail to follow the FDCPA.

APPENDIX H
JOINT ETHICS OPINION 48 AND 725

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW
&
ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

– *N.J.L.J.* –
(June –, 20) 2)
Issued by UPLC and ACPE May 30, 2012

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

JOINT OPINION

OPINION 48

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

OPINION 725

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Debt Collection Practices
Reaffirming UPLC Opinion 8 and
ACPE Opinions 259 and 506

The Supreme Court requested the Committee on the Unauthorized Practice of Law (UPLC) and the Advisory Committee on Professional Ethics (ACPE) to review UPLC Opinion 8 and ACPE Opinions 259 and 506 in light of current methods used by collections firms and consider whether modification to the opinions may be appropriate. The Committees hereby reaffirm the basic holdings of these opinions. The Committees further reaffirm that, before sending a debt collection letter, lawyers must exercise professional judgment by independently evaluating collection demands and determining that proceedings to enforce collection are warranted.

The Court requested the Committees to review these opinions after it imposed discipline on a New Jersey lawyer for having lent his name and letterhead to a collection agency in exchange for a monthly fee. The lawyer permitted the collection agency to use his law firm letterhead and status as an attorney. Collection agency employees, not the lawyer, exercised judgment in collection efforts. The collection agency was found to have engaged in the unauthorized practice of law and the lawyer was found to have violated RPC 5.5(a)(2) (assisting a nonlawyer in the unauthorized practice of law) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

As the UPL Committee expressly stated forty years ago in Opinion 8, 95 N.J.L.J. 105 (February 10, 1972), when a collection agency sends a letter to a debtor threatening legal action or implying that the collection letter is sent at the direction of a lawyer, the agency is engaging in the unauthorized practice of law. In contrast, when a law firm sends a debtor a collection letter, the recipient has reason to believe that "there has been an evaluation by an attorney of the claim asserted with a determination by the attorney that proceedings to enforce collection are warranted."

In accordance with these principles, the ACPE thereafter issued two opinions, ACPE Opinion 259, 96 N.J.L.J. 754 (June 21, 1973), and Opinion 506, 110 N.J.L.J. 408 (October 7. 1982), expressly stating that a lawyer may not lend law firm letterhead to clients to write and send collection letters. The ACPE concluded in those opinions that a lawyer who lends letterhead to clients is engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c).

This issue was also addressed by the American Bar Association in 1976. ABA Informal Ethics Opinion 1368. "Mass Mailing of Form Collection Letters" (July 15,

1976). The inquiring lawyer represented a large retail organization that sold consumer goods on credit. The lawyer drafted three form letters seeking payment from debtors for amounts past due and stated that "the letters will be prepared and dispatched under his 'direct supervision' but that he will not review any account to determine its 'validity' before any of the letters is sent. He will rely on the client's written certification that the debts on each list furnished are 'justly due.'" The ABA concluded that "it is not enough that the lawyer rely upon the client's certification of the 'validity' of the account. The lawyer must take responsibility for the reasonable accuracy of each letter and must exercise due care that no letter misstates a fact with respect to the account of the debtor." The ABA stressed that the lawyer must "accept[] full professional responsibility" for the collection effort; "independent judgment [is] required to see that each letter sent is accurate and appropriate as to the account of the debtor when it is sent." The UPLC and ACPE agree with this ABA opinion.

Exercising independent professional judgment is a fundamental and indispensable element of the practice of law. A lawyer who fails to exercise independent professional judgment has abdicated the practice of law, has demonstrated a lack of competence, and has committed gross negligence, in violation of RPC 1.1(a).[1]

When a lawyer does not properly supervise nonlawyer staff, or the supervision is merely illusory, the nonlawyers are engaging in unauthorized practice of law. In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 128 N.J. 114, 127 (1992). Similarly, when a lawyer permits his or her nonlawyer staff, or a client, to

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[1] RPC 1.1(a) (Competence) provides that "[a] lawyer shall not . . . [h]andle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence."

send collection letters that the lawyer has not personally reviewed under the professional standard set forth above, the lawyer has assisted in the unauthorized practice of law in violation of RPC 5.5(a)(2)[2], and engaged in deceptive conduct in violation of RPC 8.4(c).[3]

While the New Jersey ethics rules and the federal Fair Debt Collection Practices Act. 15 U.S.C.A. Section 1692 et seq. (FDCPA), are distinct bodies of law, developments in FDCPA case law touch on the analysis of the practice (and unauthorized practice) of law. FDCPA cases differentiate between lawyers acting in a "lawyer capacity" – which would require the exercise of professional judgment and meaningful involvement in the collection matter – and lawyers not acting in a "lawyer capacity," acting as a lay debt collector. Hence, FDCPA case law provides that when a law firm sends a debtor a collection letter and clearly explains that no lawyer has reviewed the file, the law firm is not acting in a "lawyer capacity" but, rather, is acting as a mere lay debt collector. See, e.g., Gonzalez v. Kay, 577 Fpd 600, 607 (5th Cir. 2009) ("The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time"); Miller v. Wolpoff & Abramson, 321 F.3d 292. 301 (2nd Cir. 2003) ("some degree of attorney involvement is required before a letter will be considered 'from an attorney' within the meaning of the FDCPA"); Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996) ("The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is

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[2] RPC 5.5(a)(2) (Lawyers Not Admitted to the Bar of this State and the Lawful Practice of Law) provides that "[a] lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

[1] RPC 8.4(c) (Misconduct) provides that "(i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

delinquent and is a candidate for legal action"); Lesher v. Law Offices of Mitchell N. Kay, PC, 650 FJd 993, 1003 (3d Cir. 2011), cert. den. __ U.S. __ (2012) (the recipient of a demand letter sent by a law firm "may reasonably believe that an attorney has reviewed his file and has determined that he is a candidate for legal action").

While the FDCPA arguably permits a law firm to send debt collection letters in a lay capacity, New Jersey ethics rules have always prohibited the practice. The ACPE, in Opinion 657, 130 N.J.L.J. 656 (February 24, 1992), 1 N.J.L. 129 (February 17, 1992), found that a lawyer may engage in both a legal and a nonlegal business provided the two businesses are entirely separate, in physically distinct locations, and there is no joint advertising or marketing or demonstration of a relationship between the two businesses. Hence, while a lawyer may engage in a nonlegal or lay debt collection business, a lawyer may not operate that nonlegal business from a law firm. Therefore, a New Jersey law firm may not engage in the lay debt collection business.

Since the UPL Committee issued Opinion 8 in 1972, it has been clear that lawyers who send collection letters are engaged in the practice of law. A lawyer cannot disclaim the fact that he or she is engaging in the practice of law when using law firm letterhead. A lawyer who has not reviewed the file, made appropriate inquiry, and exercised professional judgment has engaged in an incompetent and grossly negligent practice of law in violation of RPC 1.1(a). A lawyer who permits office staff, or a client, to send collection letters when the lawyer has not individually reviewed the file, made appropriate inquiry, and exercised professional judgment, is assisting in unauthorized practice of law in violation of RPC 5.5(a)(2) and engaging in deceitful conduct in violation of RPC 8.4(c).

Accordingly, UPLC Opinion 8 and ACPE Opinions 259 and 506 are hereby reaffirmed. A lawyer who fails to exercise professional judgment by independently evaluating collection demands and determining that proceedings to enforce collection are warranted before sending a debt collection letter on law firm letterhead fails to satisfy ethical requirements of competence and has committed gross negligence.

APPENDIX I

GASKILL V. CITI MORTGAGE, INC.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5832-10T2

ROBERT D. GASKILL and KATHLEEN GASKILL, h/w,

Plaintiffs-Appellants,

vs.

CITI MORTGAGE, INC., f/k/a CITICORP MORTGAGE, INC.,

Defendant-Respondent.

APPROVED FOR PUBLICATION

September 28, 2012

APPELLATE DIVISION

Argued: February 16, 2012 - Decided: September 28, 2012

Before Judges Cuff, Waugh and St. John.

On appeal from the Superior Court of New Jersey, Chancery Division, Burlington County, Docket No. C-176-05.

Joseph M. Pinto argued the cause for appellants (Polino and Pinto, P.C., attorneys; Mr. Pinto, on the brief).

Mary Lynn McCaffrey argued the cause for respondent (Isabel L. Becker, LLC, attorneys; Ms. McCaffrey, on the brief).

The opinion of the court was delivered by

CUFF, P.J.A.D.

In this appeal, we address *N.J.S.A.* 2A:16-49.1, which permits a debtor, who has received a discharge of his debts in bankruptcy, to cancel a judgment entered in state court and discharge the record of that judgment. The Chancery Division judge held that the debtors could not avail themselves of this remedy against the judgment creditor because the judgment creditor did not receive notice of the bankruptcy proceedings, including the discharge of debts, and could not, therefore, levy on the debtors' property within the year permitted by statute. We affirm.

Plaintiffs Robert D. Gaskill and Kathleen Gaskill took title to real property located at 73 Hartford Road in Delran on January 31, 1991, encumbered by a purchase money mortgage issued by Bank of Mid-Jersey in the original amount of $63,200. The balance on the mortgage was $47,896 on October 11, 2005. Plaintiffs reside at 3524 Klockner Road in Hamilton. They acquired this real property with a purchase money mortgage in June 1986. In 1997, defendant Citi Mortgage, Inc. (Citi) obtained a default judgment against plaintiffs in the amount of

$107,453.08 plus costs. The judgment was recorded and docketed and constitutes a judgment lien on the Delran and Hamilton properties.

On December 17, 2001, plaintiffs filed a Chapter 7, no asset, no bar date bankruptcy petition. Citi was not listed as a creditor and was not served with the petition. Plaintiffs listed Fein, Such, Kahn & Shepard, P.C., the firm that represented Citi in the 1996-97 litigation that produced the 1997 default judgment, as a creditor holding an unsecured claim in the amount of $107,453.08. The firm was served with the petition.

Plaintiffs claimed the Hamilton residence as exempt property. On January 28, 2002, the trustee filed a notice of intention to abandon certain property, including the Hamilton and Delran properties, "as being of inconsequential value to the estate." By order dated March 25, 2002, plaintiffs received a discharge pursuant to 11 *U.S.C.A.* §727. Following discharge in 2002, plaintiffs' bankruptcy attorney informed a collection agency acting on behalf of Citi to cease collection efforts, citing the discharge in bankruptcy. The record reflects no further collection efforts by or on behalf of Citi.

On November 10, 2005, plaintiffs filed a complaint against Citi pursuant to *N.J.S.A.* 2A:16-49.1 seeking cancellation of the judgment lien on the Hamilton and Delran properties recorded in February 1997. Plaintiffs alleged Citi failed to levy on the real property prior to the initiation of bankruptcy proceedings; therefore, the lien was subject to avoidance pursuant to 11 *U.S.C.A.* §544(a)(1). Plaintiffs alleged the lien was also subject to avoidance under other provisions of the Bankruptcy Code. In its answer, Citi denied that plaintiffs listed any real property as exempt and denied that the judgment lien was subject to avoidance under the Bankruptcy Code and subject to cancellation and discharge of record. In its amended answer, Citi alleged that certain misrepresentations made by plaintiffs during the bankruptcy proceedings prevented discharge of its judgment lien.

In response to cross-motions for summary judgment, the motion judge issued four tentative decisions between February 2, 2006, and February 2, 2007. The record reveals plaintiffs' Chapter 7 bankruptcy proceeding was re-opened to the extent that the trustee in bankruptcy sent a notice to creditors in 2007 permitting submission of proofs of claim, and Citi submitted one in the amount of $171,731.67. Citi filed a motion for various forms of relief in Bankruptcy Court, including a declaration that its lien was not intended to be discharged. The Bankruptcy judge denied the relief.

Finally, on August 21, 2009, another judge issued a decision and order denying each party's motions. In doing so, the motion judge found that Citi had not received notice of the bankruptcy petition and the trustee did not have an opportunity to assess the Citi judgment lien. He directed plaintiffs to return to the Bankruptcy Court to permit a determination of the Citi judgment lien by the trustee.

The record reflects that following submission of information of Citi's judgment lien to the trustee-in-bankruptcy, he concluded plaintiffs' bankruptcy estate had been fully administered. The trustee did not avoid Citi's judgment lien and abandoned the Delran property.

The parties then renewed their motions for summary judgment. On June 17, 2011, Judge Hogan granted summary judgment in favor of Citi. In his written opinion, the judge found the Citi judgment lien is unaffected by discharge if the lien has not been avoided, paid, or modified. 11 *U.S.C.A.* §522(c)(2). The debtors' personal liability for the underlying debt is discharged in

bankruptcy, but the lien created before bankruptcy against real property survives. The judge stated that *N.J.S.A.* 2A:16-49.1 provides the debtor with an ancillary remedy to achieve his "fresh start" to assure that judgments intended to be discharged are removed from the official record and will not continue as a cloud on title. Therefore, judgment creditors whose liens were subject to discharge or release in bankruptcy and who did not levy on the real property prior to the bankruptcy filing may enforce a valid lien on real property post-discharge but must do so within one year of discharge. If the judgment creditor has not levied within one year of discharge, the lien is subject to cancellation pursuant to *N.J.S.A.* 2A:16-49.1.

Judge Hogan noted that neither party disputed that Citi levied only on a bank account of plaintiffs pre-petition but did not levy on plaintiffs' real property pre-petition or within one year of discharge. Therefore, the judge held the judgment lien was subject to cancellation pursuant to *N.J.S.A.* 2A:16-49.1.

However, he also held that a court of equity could not permit the failure to levy within one year of discharge to control the disposition of Citi's lien because it had no notice, until plaintiffs filed this complaint, of the bankruptcy filing, the discharge in bankruptcy, and the need to act within one year of that event. He ruled that to permit cancellation under the circumstances of this case would deny Citi's property rights without due process of law. The judge determined that the one year statutory period applies as of the date Citi had actual notice of the discharge, and that date was as of the filing date of plaintiffs' complaint to cancel the Citi judgment lien. Moreover, because the validity of the judgment lien was at issue in this litigation, Judge Hogan noted Citi could not exercise its right to levy. Therefore, he held that Citi should have one year to levy on plaintiffs' real property "as of the closing of this case." By order dated July 28, 2011, Judge Hogan denied plaintiffs' motion for reconsideration.

On appeal, plaintiffs argue that due process principles do not require Citi receive actual notice of a discharge in bankruptcy to permit plaintiffs to exercise the statutory remedy. Furthermore, Citi is not entitled to equitable tolling of the one year period provided by statute because Citi had notice of the bankruptcy filing or discharge in time to exercise its right to levy, and the statute does not require the judgment debtor to notify the judgment creditor of the discharge. Citi responds it is undisputed it lacked actual knowledge of the bankruptcy filing until plaintiffs sought to cancel the Citi judgment. Citi also contends the judge acted within his authority to equitably toll the one year period under the undisputed facts of this case.

N.J.S.A. 2A:16-49.1 provides:

> At any time after 1 year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order shall be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by entering on the record or in the margin of the record of judgment, that the same is canceled and discharged by order of the court, giving the date of entry of the order of discharge. *Where the judgment was a lien on real*

> *property owned by the bankrupt prior to the time he was adjudged a bankrupt, and not subject to be discharged or released under the provisions of the Bankruptcy Act, the lien thereof upon said real estate shall not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy.* Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the manner prescribed in R.R. 4:5-1 . . . ; provided, however, nothing herein contained shall prevent said judgment notwithstanding such discharge of record from being used as a set-off in any action in which it otherwise could be used. (Emphasis added.)

This statute has been described as a housekeeping measure to assure that judgments discharged in bankruptcy do not remain of record, cloud title, and require payment in the future. *The Party Parrot, Inc.* v. *Birthdays & Holidays, Inc.*, 289 N.J. Super. 167, 173, 673 A.2d 293 (App. Div. 1996); *Assocs. Commercial Corp.* v. *Langston,* 236 N.J. Super. 236, 240, 565 A.2d 702 (App. Div.), certif. denied, 118 N.J. 225, 570 A.2d 979 (1989). If the judgment sought to be discharged through the procedure afforded by this statute is also a lien on real property, the threshold and controlling issue is whether the judgment was subject to discharge or release in bankruptcy. *Ibid.; Chem. Bank* v. *James,* 354 N.J. Super. 1, 9, 803 A.2d 1166 (App. Div. 2002). If the lien was not subject to discharge, the statutory housekeeping remedy is not available to the judgment debtor. *Ibid.* Moreover, in determining whether a lien is subject to discharge or release in bankruptcy, it is enough that the debtor could have obtained a discharge of the lien through the bankruptcy proceedings, the debtor need not have actually obtained a discharge of the lien. *Ibid.; Assocs. Commercial, supra, 236* N.J. Super. at 241, 565 A.2d 702. Abandonment of property by the trustee does not affect whether a judgment lien is subject to discharge or release. *Chem. Bank, supra,* 354 N.J. Super. at 10, 803 A.2d 1166.

In *Party Parrot*, we explained the effect of a determination that a judgment, which also serves as a lien on real property, is subject to discharge or release in bankruptcy. We said:

> *Section* 524(a) of the Code [11 *U.S.C.A.* §524(a)] indicates that a discharge voids any judgment only "to the extent that such judgment is a determination of the personal liability of the debtor with respect to [a discharged] debt" and operates to foreclose any act to collect "any such debt as a personal liability of the debtor." While a discharge in bankruptcy generally prohibits further *in personam* actions against the discharged debtor, it does not prohibit creditors from proceeding *in rem* against the debtor's property. *See Johnson v. Home State Bank,* 501 U.S. 78, 82-83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66, 74 (1991); *Furnival Machinery Co. v. King,* 142 N.J. Super. 251, 254, 361 A.2d 91 (App. Div. 1976); 3 *Collier on Bankruptcy* ¶ 522.27, at 522-92 (15th ed. 1995). *Compare New Brunswick Savs. Bank* v. *Markouski,* 123 N.J. 402, 411, 587 A.2d 1265 (1991) (explaining that a valid lien is established by docketing a judgment, and a levy and execution are unnecessary) *and In re Arevalo,* [142 B.R. 111,] 112 (citing *Estate of Lellock v. Prudential Ins. Co. of Am.,* 811 F. 2d 186, 189 (3d Cir. 1987) (stating that a valid lien passes through bankruptcy unaffected)) *and PNC Bank, Nat. Ass'n v. Balsamo,* 430 Pa. Super. 360, 634 A.2d 645 (1993) ("[I]f valid liens on property

> were extinguished along with personal debts and liabilities, this would effect more of a 'head start' than a 'fresh start,' and such a policy could have the detrimental effect of unreasonably encouraging homeowners and other property owners to file bankruptcy petitions"; citing numerous bankruptcy court decisions to the same effect), appeal denied, 538 Pa. 659, 648 A.2d 790 (1994).

[*Party Parrot, supra,* 289 N.J. Super. at 173-74, 673 A.2d 293.]

Here, the Citi judgment lien was subject to discharge or release in the plaintiffs' bankruptcy proceeding. In *Party Parrot*, we explained that a trustee in bankruptcy has a variety of powers to administer a bankrupt estate. The trustee stands in the position of a hypothetical lienholder at the time the debtor files its bankruptcy petition. *Id.* at 174, 673 A.2d 293. Section 544(a)(2) permits the trustee to avoid certain liens over which he has priority as determined by state law. *Ibid.* Under New Jersey law, priority is determined by order of executed liens and execution is determined by the date of delivery of a writ of execution to the sheriff and actual levy on the debtor's property. *Id.* at 175, 673 A.2d 293. In other words,

> [t]he trustee, as a hypothetical executing judicial lienholder . . . would have been without power under §544(a)(2) to avoid plaintiffs interest in defendant's real property if there was a levy before defendant's bankruptcy filing. If, however, no levy had been [made], plaintiffs lien was subject to complete avoidance and therefore would now be unenforceable and subject to discharge of record.

[*Id.* at 175, 673 A.2d 293.]

A trustee can also avoid a judicial lien if it is a preference pursuant to 11 *U.S.C.A.* §547, or a fraudulent conveyance pursuant to 11 *U.S.C.A.* §548. The trustee may also seek to reduce the creditor's lien to the judicially determined value of the property pursuant to 11 *U.S.C.A.* §506(d) or avoid a pre-petition judicial lien when it impairs his exemption right whether or not there has been a levy. *Ibid.*

Citi levied on a personal bank account but not the real property pre-petition. That levy did not perfect its lien to the Hamilton and Delran real property. Therefore, Citi's judgment lien was unperfected at the time plaintiffs filed their bankruptcy petition and was subject to avoidance under the Bankruptcy Code. *Party Parrot, supra*, 289 N.J. Super. at 171, 673 A.2d 293. Citi also did not levy on plaintiffs' real property within one year of discharge; therefore, the Citi judgment lien was subject to cancellation pursuant to *N.J.S.A.* 2A:16-49.1. If Citi had levied on the real property pre-petition, the trustee would have had no pre-petition power to avoid that lien. The judgment lien would have survived bankruptcy, and it would not be a candidate for cancellation pursuant to *N.J.S.A.* 2A:16-49.1, but the lien would not apply to real property acquired post-discharge.

As noted, the discharge in bankruptcy only discharges the personal liability incurred by the debtors. Unless avoided or released during the bankruptcy proceeding, the judgment remains enforceable against the real property owned by the debtor, and the judgment creditor has one year to levy against that property. Debtors, such as plaintiffs, cannot utilize the state statutory remedy until one year has elapsed from the date of discharge to permit a judgment creditor to enforce its lien against real property retained by the debtor. Without notice of the discharge, however, the remedy available to the judgment creditor is a hollow one.

Plaintiffs contend that *N.J.S.A.* 2A:16-49.1 does not contain a notice requirement. Notice is implicit to invoke this remedy and is supplied, if the debtor included the names, addresses, and a description of the amount and nature of the claim in the bankruptcy petition. If that occurs, a judgment creditor, such as Citi, receives the order disposing of the bankruptcy petition and notice of the discharge. At this point, a judgment creditor obtains the information upon which it may act within a year to pursue enforcement of its judgment.

Here, plaintiffs never listed Citi as a creditor, but listed only the lawyer and never identified the firm that represented Citi in the civil action in which Citi obtained the $107,453.08 claim as a money judgment recorded and docketed in the Superior Court; thus, Citi never received the information it needed to protect its interests. *Maldonado v. Ramirez,* 757 F.2d 48, 51 (3d Cir. 1985). Citi never received notice that plaintiffs had received a discharge in bankruptcy; therefore, Citi could not exercise its right to enforce its judgment within one year of the discharge in bankruptcy. Whereas *N.J.S.A.* 2A:16-49.1 does not require debtors, such as plaintiffs, to send a new round of notices of their discharge to their judgment creditors, the statute assumes each creditor has received the requisite notice through the bankruptcy proceeding. If a judgment creditor has not received that notice, the debtor should not receive the benefit of this "fresh start" remedy until the judgment creditor receives notice and an opportunity to protect its interests.

Plaintiff also argues that Judge Hogan improperly invoked his equitable powers to toll the one year period permitted by *N.J.S.A.* 2A:16-49.1. The one year period in which a creditor may enforce a judgment that has survived bankruptcy has the features of a limitations period. A debtor must wait at least a year following a discharge in bankruptcy to apply to cancel a judgment that survived bankruptcy. If the judgment creditor enforces the judgment within that period, the debtor loses the statutory remedy. After one year, if the debtor applies to cancel the judgment before the judgment creditor seeks to enforce it, the debtor is entitled to cancellation of the judgment assuming it was not subject to discharge or release in bankruptcy.

New Jersey law distinguishes between substantive and procedural statutes of limitations: substantive ones occur in legislation that creates causes of action, whereas procedural ones place a time-limit on common law causes of action. *LaFage v. Jani,* 166 N.J. 412, 421-22, 766 A.2d 1066 (2001). Both may be adjusted by equitable principles. *See ibid. Roa v. Roa,* 402 N.J. Super. 529, 955 A.2d 930 (App. Div. 2008), affd in part, rev'd in part, 200 N.J. 555, 985 A.2d 1225 (2010), specifically applies these principles to a statute of limitations. There, the court held that it could equitably toll a statute of limitations for failure to provide notice in a Title VII action, so long as the party seeking an equitable tolling exercised "reasonable insight and diligence" in trying to discover the problem within the statutory limitations period. *Id.* at 544, 955 A.2d 930. *See also Bernoskie* v. *Zarinsky,* 383 N.J. Super. 127, 135, 890 A.2d 1013 (App. Div.) (internal citations omitted) (wrongdoer who concealed his identity cannot benefit from a statute of limitations), certif. denied, 186 N.J. 604, 897 A.2d 1059 (2006); *Dunn* v. *Borough of Mountainside,* 301 N.J. Super. 262, 280, 693 A.2d 1248 (App. Div. 1997) (wrongdoer who omits identifying information and fails to file report cannot garner benefit of limitations period), certif. denied, 153 N.J. 402, 709 A.2d 795 (1998)).

Under the unique circumstances of this case, Judge Hogan properly exercised the equitable powers vested in him. As we have discussed, the remedy afforded by *N.J.S.A.* 2A:1b-49.1 is a corollary of a bankruptcy proceeding that permits a debtor to obtain a discharge of debts and a creditor to object to the allowance of some claims, the disallowance of other claims, the

priority afforded to some claims, and the discharge of some or all of the debtor's obligations. Notice to all creditors of the existence of the proceeding and the relief sought in that proceeding is a prerequisite to receiving the relief provided by the Bankruptcy Code. If the underlying proceeding is compromised by a lack of notice to a debtor's largest creditor, the terms of the ancillary remedy available to the creditor should be subject to adjustment. Here, it is undisputed that Citi did not receive actual knowledge of the Chapter 7 proceeding and the discharge obtained by plaintiffs until November 10, 2005, when plaintiffs filed this complaint to cancel the mortgage. Moreover, the validity of Citi's judgment was contested in this litigation which prevented it from seeking to enforce its judgment.

Plaintiffs cannot equitably obtain the benefit afforded to them by *N.J.S.A.* 2A:16-49.1 against a record that demonstrates their largest judgment creditor lacked the knowledge to enforce its judgment due to their omission in the underlying proceedings. Unlike *Lever v. Thomas,* 340 N.J. Super. 198, 774 A.2d 511 (App. Div. 2001), Citi did not enforce its judgment because it lacked knowledge not only of the bankruptcy proceeding but also the discharge in bankruptcy.

Plaintiffs' final argument, that disputed issues of material fact precluded entry of summary judgment in favor of Citi, is without sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(E). Plaintiffs conceded at various times throughout this protracted proceeding that the only mention of the Citi claim appeared in its petition under the name of the law firm that represented Citi in the civil action that produced the 1997 judgment without any mention that the claim had been reduced to judgment. It is undisputed that Citi never received actual notice of the petition or the discharge.

We, therefore, affirm the June 17, 2011 order granting Citi's motion for summary judgment and the July 28, 2011 order denying plaintiffs motion for reconsideration.