Legal Update: The Good, the Bad and the Ugly

The Changing Retail Banking Environment
What Should We Be Doing Differently?
Strategies for Growth and Risk Management

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Retail Risk Conference
Intercontinental Hotel
Chicago, Illinois
July 11-13, 2007
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I. Litigation Trends under the Fair Debt Collection Practices Act ("FDCPA")

A. Amendments to the FDCPA – what changed and does it matter?

Congress passed amendments to the Fair Debt Collection Practices Act ("FDCPA") in September 2006. Three amendments with significant impact include:

- Formal pleadings will not constitute an initial communication under the FDCPA, and therefore, will not trigger the need for validation notice disclosures as otherwise required by the FDCPA.

- Notices and forms sent by debt collectors, as required by other federal or state statutes or regulations, which are not an attempt to collect a debt, will no longer be considered initial communications under the FDCPA. Specifically, this amendment eliminates conflicts with the FDCPA and sending notices required by the IRS (mandated 1099-C forms), Gramm-Leach-Bliley Act (privacy notices), and state or federal data security breach notification requirements.

- The right to collect during the 30-day validation period, in the absence of a consumer dispute, will be codified in the FDCPA statute.

Specifically, 15 U.S.C. § 1692g now contains new (d) and (e) subsections as follows:

(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.

Further, Section 1692g(b) now includes the following:
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 consumer. 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.

Under the old FDCPA, a complaint filed and served on a consumer was considered an initial communication requiring notice of debt verification. Under the amendment, formal pleadings no longer need to comply with FDCPA requirements for initial communications with consumers. However, the question remains open as to whether other communications involved in litigation such as letters or discovery may be initial communications that require FDCPA compliance.

Likewise, notices required by other laws that do not seek collection of a debt need not conform to FDCPA requirements for initial communications.

Finally, debt collectors no longer need to wait for the 30-day validation period to expire before continuing collection efforts provided the consumer has not disputed the debt or requested the name and address of the original creditor. However, collection activities undertaken during this time frame cannot overshadow or be contrary to the consumer’s right to dispute the debt or request information regarding the original creditor.

B. Telephone messages are subject to FDCPA requirements.

In Leyse v. Corporate Collection Services, Inc., a collection agency left three types of pre-recorded messages with the consumer in which the debt collector identified itself as CCS. A representative provided a fictitious name and requested a return call from the consumer. The consumer claimed the messages violated 15 U.S.C. § 1692d(6), which prohibits “the placement of telephone calls without meaningful disclosure of the caller’s identity.”

A 1692b communication occurs when the debt collector contacts a consumer to obtain the consumer’s location information. In Leyse, the debt collector admitted that the purpose of the recordings was to obtain a return call to collect money. The court addressed whether the callers meaningfully disclosed their identity.

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3 Leyse, at *2.
According to a General Policy Statement promulgated by the FTC, 'a debt collector employee's use of an alias that permits identification of the debt collector (i.e., where he uses the alias consistently, and his true identity can be ascertained by the employee) constitutes a 'meaningful disclosure of the caller's identity.'" 53 F.R. 50097-02.4

The court found that a fact issue existed as to whether the fictitious names given by the debt collector constituted meaningful disclosure. However, the court did find that because the consumer had no prior dealings with CCS, the acronym CCS could have no meaning for the consumer and was not meaningful disclosure.

CCS argued that had it left more information, it would have violated the FDCPA’s privacy provision which states:

Except as provided in Section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.5

By leaving a message, CCS argued it could not guarantee that someone besides the consumer would not hear the message and thus, they could not leave more information without exposing itself to liability under the FDCPA.

The court found that CCS placed itself in its predicament and granted plaintiff’s motion for summary judgment.6 The court further found CCS violated § 1692e(11) which requires a mini-Miranda warning that debt collectors identify themselves and their intention to collect a debt. In Leyse, the messages did not identify CCS as a debt collector or mention debt collection.

Moreover, the court found that CCS violated § 1692e(10) which prohibits debt collectors from using false or deceptive means to collect a debt or obtain information about the consumer.7 The court found that:

The apparent purpose of Messages 1 and 2 was to be vague enough to provoke the recipient to return the calls in haste. Leaving a message that deceptively entices a

4 Id. at *4.
5 Id. (citing 15 U.S.C. § 1692c(b)) (emphasis added).
6 Id. at *5.
7 Id.
consumer to communicate with a debt collector when he is caught off guard is precisely the kind of abuse the FDCPA intended to prevent.\(^8\)

A recent case out of Florida also addressed pitfalls when leaving telephone messages for consumers. In *Belin v. Litton Loan Servicing*, plaintiffs sued defendant for violations of the FDCPA for “(1) repeatedly telling Mr. Belin and Ms. Daffron that the mortgage was in default, when in fact it was not; (2) repeatedly leaving messages on the answering machine at the home of Mr. Belin’s mother, Carol Belin, that only gave the name of Litton, a phone number to call, and directions to have Mr. Belin call that number; (3) speaking rudely to Ms. Belin on several occasions and then hanging up on her; and (4) calling Ms. Belin’s house between 6:00 a.m. and 7:00 a.m. one Sunday morning to speak with Mr. Belin about the debt.”\(^9\) Defendant filed a motion to dismiss, which the court denied.

Defendant argued that the phone messages were not communications under the FDCPA because they did not mention a debt. The court rejected this reasoning finding that messages left on answering machines that do not directly convey information about a debt are still communications under the FDCPA because they convey information about a debt indirectly, and because the message’s purpose is to get the debtor to return the call to discuss the debt.\(^10\)

Likewise, the phone calls with Ms. Belin were communications because the defendant requested a call back from Mr. Belin. The court differentiated the case from cases allowing a debt collector to request to speak with the debtor because in this case, the defendant was requesting a call back similar to the telephone messages.\(^11\)

Defendant argued that plaintiffs failed to state a claim for harassment for speaking rudely to Ms. Belin because rudeness is not actionable under the FDCPA.\(^12\) The court denied the motion to dismiss on this basis because it could not find that plaintiffs could not prove a set of facts showing the natural consequences of the defendant’s rudeness was harassment.

**C. Recent cases regarding validation notice requirements.**

Section 1692g of the FDCPA requires certain notices. Under § 1692e, a creditor may not use false, deceptive or misleading representations or means in connection with collection of any debt, including when complying with § 1692g. The Second Circuit has

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\(^8\) *Id.* at *7.  
\(^10\) *Id.* at *4.  
\(^11\) *Id.* at *5.  
\(^12\) *Id.*
held that 1692g and 1692e are violated when the least sophisticated consumer would not understand the information provided.\textsuperscript{13} Specifically, a collection letter cannot include language that overshadows or contradicts the information regarding a debtor's rights.

In \textit{Rios v. Pinnacle Financial Group, Inc.}, a consumer alleged violations of the FDCPA for failure to provide the required validation notice.\textsuperscript{14} The front of the letter contained five icons for payment options. At the bottom of the letter, in capital letters as large as any other letters on the page, was the phrase “notice: see reverse side for important consumer information.”\textsuperscript{15} The reverse side of the letter contained the validation notice required by the FDCPA.

The court determined that the fact that the notice language was located on the back of the letter did not violate the FDCPA.\textsuperscript{16} Moreover, the payment options listed did not overshadow the debtor's rights because the letter directed the debtor to see the reverse side and the letter did not demand immediate payment.\textsuperscript{17} Thus, the court found the collection letter did not violate the FDCPA in form or substance.

In \textit{McMilan v. Collection Professionals, Inc.}, the Seventh Circuit extended its prior holdings that allegations of a confusing collection notice in violation of 1692g would survive a motion to dismiss to allegations of a false, deceptive or misleading notice under 1692f.\textsuperscript{18} In \textit{McMilan}, the consumer received a collection notice stating in pertinent part:

\begin{quote}
YOU ARE EITHER HONEST OR DISHONEST YOU CANNOT BE BOTH
\end{quote}

Your creditor believed you to be honest when credit was extended. The injustice of permitting this account to become past due and then ignoring all requests for payment, casts a doubt of good intentions. We would like to give you this final opportunity to prove your honesty and good intentions. Payment in full or satisfactory arrangements for payment must be made without further delay.\textsuperscript{19}

The consumer alleged that the letter was false and deceptive under 1692e and attempted to disgrace her in violation 1692e(7). In addition, the consumer alleged that the letter employed unfair or unconscionable means to collect a debt in violation of 1692f. Collection Professionals, Inc. (“CPI”) moved to dismiss.

\textsuperscript{13} \textit{Russell v. Equifax A.R.S.}, 74 F.3d 30, 34 (2nd Cir. 1996).
\textsuperscript{15} Id. at *1.
\textsuperscript{16} Id. at *3.
\textsuperscript{17} Id. at *4.
\textsuperscript{18} \textit{McMillan v. Collection Prof'ls, Inc.}, 455 F.3d 754 (7th Cir. 2006).
\textsuperscript{19} Id. at 756–57.
CPI argued that the letter was true and accurate such that the consumer had no claim under 1692e. CPI argued that no violation of 1692e(7) occurred for trying to disgrace the consumer because the letter did not state or imply that the consumer had committed a crime or other fraud. In addition, because the letter was true, it could not be unfair or unconscionable under 1692f.\(^\text{20}\)

The district court granted the motion to dismiss, finding that the letter stated true statements and thus was not an attempt to disgrace the debtor. The district court distinguished cases surviving motions to summary judgment where violations of 1692g were alleged because Section 1692g requires certain language. Because no violations of 1692g were alleged, the district court granted the motion to dismiss.

On appeal, the Seventh Circuit reversed the district court's dismissal of the consumer's 1692e claim.\(^\text{21}\) The Court of Appeals recognized that 1692g violations require a factual determination to ascertain how a particular notice affects its audience. Thus, 1692g complaints will generally survive a motion to dismiss. The Seventh Circuit applied the same reasoning to claims under 1692e and 1692f finding that the inquiry "requires a fact-bound determination of how an unsophisticated consumer would perceive the letter."\(^\text{22}\)

Although the notice provisions of § 1692g apply to consumer debt rather than commercial debt, distinguishing the nature of the debt has caused problems for debt collectors. In Perk, the Plaintiff alleged violations of the FDCPA on the grounds that the debt collector, Worden, failed to provide notice as required under § 1692g.\(^\text{23}\)

Perk had applied for a corporate credit card in her capacity as the president of a small business.\(^\text{24}\) However, she allegedly used the credit card for personal purchases. In collecting the debt, Worden failed to provide the notices of debtor's rights required by § 1692g. Worden filed a motion to dismiss on lack of subject matter jurisdiction and failure to state a claim.

Section 1692a(5) defines "debt" as:

Any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the

\(^{20}\) Id. at 757.
\(^{21}\) Id. at 758.
\(^{22}\) Id. at 759.
\(^{24}\) Id. at *1.
subject of the transaction are primarily for personal, family, or household purposes.”

The court in *Perk* then reviewed Court of Appeals decisions interpreting this definition. It found that the Ninth Circuit in *Bloom* stated that neither the “lender’s motives nor the fashion in which the loan is memorialized” are definitive in characterizing the debt. The Fourth Circuit interpreted the term “debts” to exclude obligations that “were not incurred to receive consumer goods or services.” In a Fifth Circuit decision, the court held that when distinguishing between consumer or commercial debt,

[A court] must examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether this transaction was primarily consumer or commercial in nature.

The district court found that they must “[look] to the substance of transactions to determine whether they fall under the ambit of consumer protection statutes.” The court concluded that since the plaintiff’s debt was personal in nature, the notice provisions of § 1692g should have applied. The defendant’s motions were denied, and the plaintiff’s complaint was held legally sufficient to state a claim under the FDCPA.

**D. A writing might be required for validation notice disputes.**

The FDCPA requires a validation notice informing the consumer of certain rights in an initial communication attempting to collect a debt. One of these rights is the consumer’s right to dispute the validity of the debt with a debt collector. A split exists between the circuits as to whether the consumer must dispute the validity of the debt in writing.

Section 1692g(a) states:

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—

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26 *Perk*, 2007 WL 219997, at *3 (quoting *Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir. 1992)).
27 Id. at *2 (quoting *Mabe v. G.C. Servs. Ltd. P’ship*, 32 F.3d 86, 88 (4th Cir. 1994)).
28 Id. at *3 (quoting *Tower v. Moss*, 625 F.2d 1161, 1166 (5th Cir. 1980)).
29 Id.
30 Id. at *4.
31 Id.
(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.32

The Third Circuit requires that the dispute be in writing.33 In Graziano, the court reasoned that because a writing is required to trigger the protections in 1692g(a)(4) and (a)(5), then (a)(3) must also require a writing.

In contrast, the Ninth Circuit finds no requirement in 1692g(a)(3) that the dispute be in writing.34 The Ninth Circuit relied on the plain language of the statute and followed Supreme Court guidance on not grafting language into a statue even if it is likely Congress intended it, and found that absent an explicit writing requirement, one does not exist. Moreover, the Ninth Circuit found several rights that are triggered by oral notice of a dispute:

Oral dispute of a debt precludes the debt collector from communicating the debtor's credit information to others without including the fact that the debt is in dispute. Additionally, if a consumer owes multiple debts and makes a payment, the debt collector is prohibited from applying such payment to a debt which is in dispute. Moreover, a debtor's oral notification to a debt collector entitles a debtor to relief under § 1692c(a)(1), which bars communication with a debtor at "a time or place known or which should be known to be inconvenient to the consumer."35

32 15 U.S.C. § 1692g(a) (emphasis added).
34 Camacho v. Bridgeport Fin., Inc., 430 F.3d 1078 (9th Cir. 2005).
35 Id. at 1082 (internal citations omitted).
Recently a Virginia district court found the Ninth Circuit's reasoning in Camacho to be more persuasive than the Third Circuit's rationale in Graziano. In Turner, the collection notice stated:

PLEASE NOTIFY U.S. [sic] IN WRITING WITHIN 30 DAYS AFTER RECEIPT OF THIS LETTER IF YOU DISPUTE THE VALIDITY OF THIS DEBT, OR ANY PORTION OF IT, OTHERWISE, WE WILL ASSUME THAT THE DEBT IS VALID.37

The consumer alleged, among other things, that the notice violated the FDCPA because it required a written dispute. The Turner court found the Ninth Circuit's reasoning more persuasive because it "reinforces the FDCPA's imperative to address abusive debt collection practices. . . ."39

E. Returned validation notice results in FDCPA violation.

In Johnson v. Midland Credit Mgmt., Inc., the court found that a debt collector does not satisfy notice requirements under the FDCPA if the notice is returned by the post office. In Johnson, the debt collector sent a collection letter to a consumer with the required notice, but it was returned undeliverable. The debt collector sent a second collection letter to a different address. The consumer received this second letter, however the letter did not contain the validation notice. The debt collector sent the validation notice separately to the same new address but it was returned as undeliverable. The debt collector then ceased collection efforts.

The court recognized a line of cases which held that a debt collector need only prove that it sent the validation notice, not that the consumer received the notice to fulfill FDCPA notice requirements. The court recognized the issue of whether the notice has been "sent" when the notice is returned as undeliverable as one of first impression. The court found that when a notice is returned as undeliverable the notice has not been "sent" to the consumer because the notice was sent to an improper address, not the consumer. If the debt collector has not sent the notice to a valid address for the consumer, the debt collector has not complied with the plain language of the statute.43

37 Id. at *1.
38 Id. at *3.
39 Id. at *5.
41 Id. at *7.
42 Id. at *11.
43 Id. at *12.
Moreover, the court found that the debt collector’s bona fide error defense did not apply because the debt collector did not have procedures “reasonably adapted to avoid any such error.” The debt collector did not program its system to record this sort of information or act upon it. Essentially, the debt collector disregarded information concerning validation notices returned as undeliverable.

F. Permissible threats in collection letters.

Section 15 U.S.C. § 1692e provides that a debt collector must not use deceptive or false representations including:

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.45

In Guidry v. Clare, a consumer wrote a check that was subsequently returned for non-sufficient funds.46 After several attempts to collect the debt, the debt collector telephoned the consumer and said it would seek a warrant for the consumer’s arrest if payment was not received within 72 hours.47 The consumer did not pay the debt and the debt collector filed a criminal complaint for misdemeanor larceny by check, which resulted in the issuance of an arrest warrant for the consumer. The consumer alleged the collection agency’s filing of the criminal complaint violated 15 U.S.C. § 1692e(4)-(5) because as a debt collector, it was forbidden from filing a criminal complaint.48

The district court found the plain language of § 1692e(4) makes clear that a debt collector may threaten legal action where permitted by law, provided the collector intends to follow through with the threats. Given that the debt collector did seek a warrant, the court found there was no question as to the debt collector’s intent to take action.49

In contrast, in Berger v. Suburban Credit Corp., a collection agency sent a collection letter to a consumer that included the statement: “we shall take whatever steps are necessary to pursue collection.”50 The debt collector admitted that its practice was to return small accounts like the account in this case to the creditor after sending two collection letters and possibly calling the debtor.51 Because there was no evidence to

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44 Id. at *14.
47 Id. at 287.
48 Id. at 290.
49 Id.
51 Id. at *1.
suggest that the collection agency intended to actually pursue "any steps necessary" to collect the debt or that it was even authorized to do so, the court found the agency violated § 1692e(5) of the FDCPA by threatening to take action it never intended to take. See also Brown v. Card Service Center\textsuperscript{52} (reversing district court's finding of no violation because "it would be deceptive under the FDCPA for [the debt collector] to assert that it could take an action that it had no intention of taking and has never or very rarely taken before.").

In Rivera v. Amalgamated Debt Collection Servs., Inc.\textsuperscript{53}, the collection letters at issue stated:

Therefore, unless this matter can be resolved within 30 days of the above date, it will be necessary to consider the institution of legal procedures against you.

... If you dispute the debt in whole or in part within (30) days of the date set forth above, we will mail verification of the debt to you.

... [In the] event of suit, you may be held liable for money damages plus interest, court costs and attorney's fees.

The letters also stated that judgment would be recorded in the debtor's county of residence and that depositions and action by a sheriff may be taken. It was undisputed that the debt collector had never taken any of these actions against anyone to whom it had sent these notices.

The court recognized that the FDCPA requires validation of debt notices and prohibits false or misleading statements to collect a debt.\textsuperscript{54} Because the letter suggested that the debtor had less than 30 days to dispute the debt, the court found a per se violation of § 1692g. The letter should have stated the debtors had 30 days from receipt of the letter to dispute the debt.

As to the § 1692e(5) violation for making an idle threat, the court found that because the parties disagreed on the meaning of the letter, (i.e. whether legal action was imminent or just to be considered by the debtor collectors), summary judgment was not proper. The court did note, however, that other courts have found similar language regarding the threat of legal action to not be a violation. See e.g. Knowles v. Credit Bureau of Rochester, Division of Rochester Credit Center, Inc.\textsuperscript{55} (finding no violation for letter that stated "Failure to pay will leave our client no choice but to consider legal

\textsuperscript{52} Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006).
\textsuperscript{54} Id. at *2; 15 U.S.C. §§ 1692(e) and 1692g(a).
Impermissible threat cases also lend themselves to class actions. In *Hernandez v. Midland Credit Mgmt., Inc.*, the consumer received a collection letter that stated the debt collector might share nonpublic information about the consumer with certain nonaffiliated third parties unless the debtor took certain actions.57 Specifically, the letter stated that the debt collector was

> “delivering this Privacy Notice so that you understand what nonpublic personal information we gather about you, how we use or share that nonpublic personal information, and the safeguards we have in place in order to protect that nonpublic personal information.”58

The collection letter further referenced a number of sources from which the debt collector gathered information. The consumer alleged that the notice violated 1692e(5) of the FDCPA which prohibits all communications “in connection with the collection of any debt” between a debt collector and “any person other than the [debtor], 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” “without the prior consent of the [debtor] given directly to the debt collector.”59

The consumer further alleged that even if disclosures were not made, the notice violated the FDCPA under 1692e(5) which prohibits a “threat to take any action that cannot legally be taken or that is not intended to be taken . . .”.60 The court found the requirements for class certification were met and certified the class.61

**G. “One Time Only” offers.**

Many consumers have brought lawsuits contending that offers that give settlement deadlines are deceptive under the FDCPA. Most courts are finding that offers with deadlines do not violate the FDCPA. For example, in *Jackson v. Nat’l Action Fin. Servs., Inc.*, a class action was brought against a debt collector alleging violation of the FDCPA

58 Id. at 408.
59 Id. at 411–412 (citing 15 U.S.C. § 1692e(b)).
61 Id. at 415.
for false or misleading statements in settlement offer letters.\textsuperscript{62} The letters made offers to settle debt at a percentage of the debt if payment were received by a certain date. Plaintiffs alleged the letters were misleading because plaintiffs later received better offers and alleged the debt collector was willing to settle per the original offer even after the specified date.\textsuperscript{63}

The court heard testimony that when making offers, the debt collector often had authority to settle for less than the offer stated in the letter.\textsuperscript{64} Plaintiffs alleged this misrepresented the duration and extent of the settlement authority in violation of § 1692e.\textsuperscript{65} Despite evidence that the debt collector accepted payments after the settlement deadline and later offered lower settlements, the court denied the plaintiffs’ motion for summary judgment. The letters were not false on their face because the debt collector was willing to settle for the amount specified within the time frame given.\textsuperscript{66}

In contrast, the Fifth Circuit found that a “one time only” letter does violate the FDCPA. In Goswami v. American Enterprise Collections, Inc., the collection letter stated: “[e]ffective immediately, and only during the next thirty days, will our client agree to settle your outstanding balance due” with a certain percentage discount.\textsuperscript{67} The Goswami court determined that the phrase “only during the next thirty days” rendered the letter false because the defendant was actually authorized to settle for less at any time.\textsuperscript{68}

Courts generally have limited Goswami to cases where the collection letter generally contains an explicit statement that the letters were one-time-only offers. See, e.g., Kiliszek v. Nelson, Watson, & Assoc., LLC\textsuperscript{69} (finding that a debt collection agency’s inclusion of a deadline in a settlement letter did not imply that the agency would never again make a similar offer, but instead provided an expiration date for the specific offer in the letter); Hancock v. Receivables Mgmt. Solutions, Inc.\textsuperscript{70} (granting motion to dismiss FDCPA claim because debt collector’s settlement letters did not state that the offers were “only’ valid for the next 30 days”); Headen v. Asset Acceptance, LLC\textsuperscript{71} (granting motion to dismiss where debt collector’s settlement letters did not expressly state that they were “one time only” offers); Kahen-Kashani v. Nat’l Action Fin. Servs.\textsuperscript{72} (granting motion for summary judgment on claim that debt collectors who made a settlement offer violated the FDCPA because the letter did not communicate that it was a “one-time, take-it-or-leave-it

\textsuperscript{63} Id. at 878.
\textsuperscript{64} Id. at 883-884.
\textsuperscript{65} Id. at 884.
\textsuperscript{66} Id. at 885.
\textsuperscript{67} Goswami v. American Enterprise Collections, Inc., 377 F.3d 488, 492 (5th Cir. 2004).
\textsuperscript{68} Id. at 495.
\textsuperscript{71} Headen v. Asset Acceptance, LLC, 383 F. Supp. 2d 1097, 1104–05 (S.D. Ind. 2005).
offer" and, in fact, "explicitly communicated that it may be possible to extend the offer under certain circumstances"); Kalinina v. Midland Credit Mgmt, Inc.,73 (affirming motion to dismiss FDCPA claim where collection letters, despite containing settlement offers with expiration dates, "did not indicate that no other offers would be made").

H. Class actions.

In In re Farmers Insurance Co., Inc., FCRA Litigation,74 policyholders filed a class action lawsuit alleging their insurers violated the FCRA by willfully failing to provide adequate adverse action notices under 11 U.S.C. § 1681m. The plaintiffs contended that the defendant-insurers had policies of pulling consumer reports for underwriting purposes, taking adverse action based on that information, and deliberately failing to provide proper adverse action notices. The named plaintiffs moved to certify the class.75

Attempting to avoid certification of the class, the defendants argued that the three named plaintiffs could not represent the class because they were subject to a unique defense that the insurers asserted would likely play a major role in the litigation.76 Specifically, the defendants pointed out that the named plaintiffs received oral adverse action notices from their insurance agents, which the defendants claimed the FCRA expressly permits.77

The court explained that the unique defense rule is designed to protect class members and not defendants.78 The judge therefore refused to deny certification based on this argument and further noted that the oral adverse action notice would not come into play until it has determined that the written adverse action notices were deficient under the FCRA.79 As such, the defense would not dominate the litigation.80

Where class arbitration waivers are concerned, courts disagree whether they are enforceable or unconscionable. Generally, these waivers ban arbitration as a class and instead restrict arbitration of claims to an individual basis.

In Ornelas, the Colorado District Court declined to hold a classwide ban on arbitration unconscionable.81 However, in Riensche a Washington District Court held

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73 Kalinina v. Midland Credit Mgmt, Inc., 2006 WL 2277936, at *1 (9th Cir. Aug. 9, 2006).
75 Id. at *1.
76 Id. at *5.
77 Id.
78 Id. at *6.
79 Id. at *8.
80 Id.
that a classwide ban on arbitration was unconscionable.82 While the Ornelas court found that the plaintiff could still effectively pursue his claims outside of class certification,83 the Riensche court felt the class prohibition "deprive[d] consumers of an important means for enforcing their rights [under consumer protection statutes]."84 Specifically, the court found that,

The class action prohibition effectively prevents consumers from seeking redress whenever the monetary value of the claim is so small that it is not worth the time or money to pursue in small claims court or arbitration, while allowing Cingular to allegedly cheat large numbers of consumers out of individually small sums of money.85

I. The innocence of the least sophisticated consumer.

Section 1692e prohibiting deceptive or false misrepresentations is governed by the standard of the "least sophisticated consumer."86 However, as one court noted, the "innocence [sic] of the least sophisticated consumer is not unlimited."87

In Kistner, the defendant Law Offices of Michael P. Margelefsky, LLC housed both a law practice and a debt collection agency.88 The LLC sent a collection notice printed on law office letterhead, signed by an account representative, and that expressly stated that the letter was from a debt collector.89 Plaintiff Kistner alleged that the collection letter violated § 1692e(3) which prohibits the "false representation or implication" that a communication is from an attorney when it is not.90

The district court rejected Kistner’s arguments, instead finding that even the least sophisticated consumer would not be deceived by the letter.91 The district court found that the text of the letter clearly stated it was from a debt collector and that it was signed by an account representative, not an attorney.92 As such, the letter could not be construed to have originated from Margelefsky in his capacity as an attorney.93

84 Riensche, 2006 WL 3827477, at *12.
85 Id. at *12 (internal quotations omitted).
88 Id. at *1.
89 Id.
90 Id. at *2.
91 Id. at *4.
92 Id. at *3.
93 Id.
The court in Kistner noted that collection letters might be deceiving when printed on law office letterhead and also signed by an attorney.\(^{94}\) In practice, the use of law office letterhead could be potentially misleading and should probably be avoided. Otherwise, "blunting" language should be used to prevent the communication from being considered deceptive.\(^{95}\)

II. Litigation Trends Under the Fair Credit Reporting Act ("FCRA")

A. When does the FCRA preempt state claims?—against furnishers of credit information

Whether and to what extent the Fair Credit Reporting Act preempts state law causes of action has been an issue confronted by several United States courts. While no circuit court has decided this question, district courts have applied at least three different approaches when attempting to reconcile 15 U.S.C. § 1681t with 15 U.S.C. § 1681h(e). Section 1681t(b)(1)(F) preempts state laws on "any subject matter" regulated by Section 1681s-2, which governs the duties of the furnishers of credit reporting agency ("CRA") information. One of those duties is to provide accurate information. Section 1681h(e) preempts state law claims for defamation "except as to false information furnished with malice or willful intent to injure [a] consumer."\(^{96}\)

The first approach when interpreting these preemption statutes is the "total preemption" approach, which holds that § 1681t preempts all state law claims—statutory and common law—against furnishers of information to credit reporting agencies arising from conduct governed by § 1681s-2.\(^{97}\)

The second approach is the "temporal" approach, which construes § 1681t as preempting all state statutory and common law claims after a credit information furnisher has notice of a consumer dispute.\(^{98}\)

\(^{94}\) Id. (citing Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993)).


And finally, the third approach is the "statutory" approach, which holds that § 1681t preempts only state statutory laws and has no effect on state common law tort causes of action. Federal district courts have applied each of these approaches over the past several years.

The most recent decision to address the preemption issue is *Manno v. American General Finance Co.* In *Manno*, the Mannos purchased furniture from a furniture store, financing a portion of the purchase price. Thereafter, the furniture store assigned the Mannos' account to American General Finance ("AGF"), which accepted $3,961.00 from the Mannos in full satisfaction of their debt. However, the Mannos' credit reports continued to reflect the furniture account as a "charge-off" and AGF failed to change the Mannos' credit report despite their continuous requests to correct the account. Consequently, the Mannos brought suit against AGF for defamation and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

AGF filed a motion for summary judgment arguing that the FCRA preempted the Mannos' claims. The court looked at the two preemption provisions of the FCRA: Section 1681h(e) and Section 1681t(b)(1)(F). In following the "statutory" approach that looks at whether the state law claims could be categorized under tort or in statute for purposes of preemption, the court determined that Section 1681t(b)(1)(F) preempted only state law actions brought under state statutes and that Section 1681h(e) only preempted state law tort claims.

The court, therefore, held that because the Mannos' Pennsylvania Unfair Trade Practices and Consumer Protection Law claims were statutory, those claims were preempted by the FCRA. The Mannos' defamation claim, however, was not preempted by Section 1681h(e) or Section 1681t(b)(1)(F) because it was not statutory in nature.

In *Brewer v. TransUnion, L.L.C., et. al.* the court addressed whether certain state law claims relating to identity theft were preempted by the FCRA. The plaintiff, Brewer, determined that he was the victim of identity theft after receiving a credit report from TransUnion LLC. According to Brewer, Sallie Mae Inc. and its subsidiary Asset Acceptance Corp. furnished false information to the CRAs regarding credit accounts


101 Id.

102 Id. at 429–30.


104 Id. at *3.
fraudulently obtained in Brewer’s name. Sallie Mae and Asset Acceptance continued to report the disputed information after Brewer notified them of the purported false information.

Brewer sued Sallie Mae and Asset Acceptance asserting various violations of the FCRA under 15 U.S.C. § 1681s-2(b) and other state law claims relating to the handling of his credit information and reporting of false information—including negligence and invasion of privacy. The defendants moved to dismiss Brewer’s state law claims, contending that they were preempted by the FCRA.

Under the FCRA section 1681h(e), claims of defamation, invasion of privacy and negligence are not preempted if the plaintiff alleges that false information was furnished with malice or willful intent to injury. Thus, the court partially agreed with the defendants and found that Brewer’s negligence claim was preempted by the FCRA because “negligence” by its very nature can never be intentional.

B. Actual damages may be necessary to maintain action under FCRA.

In Schroeder v. Capitol Indemnity Corp., the insurer of a piece of property owned by plaintiffs accessed the plaintiffs’ credit report after a fire burned the insured property to the ground. Although plaintiffs did not suffer any actual, measurable damages from Capitol’s conduct, they brought suit against Capitol for willful violation of that FCRA.

The particular issue before the court was whether the plaintiffs could maintain a cause of action under the FCRA for statutory damages in the complete absence of proof of actual damages. The Court rejected Capitol’s contention that even claims of willful violation require a showing of actual damages. Under the FCRA a plaintiff can recover either actual damages or “damages of not less than $100 and not more than $1000” for a willful violation. Accordingly, the court held that a showing of actual damages was not a necessary element for an action for willful violation under § 1681n.

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105 Id.
106 Id. at *4.
107 Id.
108 Id. at *6.
109 Id at *12–13.
110 Id at *19.
112 Id.
113 Id. at 5.
114 Id. at 3.
115 Id. at 5.
To the contrary, the plaintiff in *Key v. DSW, Inc.* lacked standing to bring suit because the court found that the damages were too speculative. In *Key*, the plaintiff brought a class action against DSW alleging identity theft. The plaintiff's claims, however, were based on speculative damages that she had not suffered at the time she filed the lawsuit.

DSW Inc. collected and maintained databases of personal information for over 1.5 million consumers. Several unidentified persons accessed the databases and the personal information of some 96,000 consumers. Ms. Key sued DSW alleging that the damages caused by DSW's conduct consisted only of "having been subjected to a substantial increased risk of identity theft or other related financial crimes."

The court noted there was really no way of determining if and when the plaintiff would actually suffer the alleged damages. In the identity theft context, the general rule is that an alleged increase in the risk of some future injury is not an actual or imminent injury. Consequently, Key's claims were too speculative because she did not allege that she suffered an injury-in-fact, and therefore she did not have standing to bring suit.

### C. Liability for credit reporting.

Prior to FACTA, furnishers were only liable for providing inaccurate information if they either "knew or consciously avoided knowing" that the information was inaccurate. However, under the new provisions, a furnisher is liable if it "knows or has reasonable cause to believe" that the information is inaccurate, a far different standard. This changes the standard for furnisher liability from one akin to an intentional tort or a reckless disregard standard to one of negligence. A furnisher must now follow up on facts that give "reasonable cause to believe" the information is inaccurate.

However, if notice of an address for disputing inaccuracies is provided to the consumer, the "knows or has reasonable cause to believe" standard does not apply. A furnisher is not subject to the standard of liability outlined above if the furnisher clearly and conspicuously specifies to the consumer an address for the consumer to notify the furnisher that specific information is inaccurate. To enjoy the protections afforded by this subsection, furnishers should make the address easy to find, read and understand.

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117 Id.
118 Id.
119 Id. at *2.
120 Id. at *6.
121 Id. at *5.
122 Id. at *6.
123 Id.
Under FACTA, the decision of when furnishers are required to reinvestigate a dispute is left up to the FTC. However, FACTA makes it clear that consumers may dispute directly with furnishers if the consumer identifies the specific information disputed, explains the basis for the dispute, and provides all supporting documentation needed to substantiate the basis of the dispute.

Furnishers must respond to a consumer’s notice of dispute by: (1) investigating the disputed information, (2) reporting the results of the investigation to the consumer within thirty days of the dispute, unless the dispute is frivolous; and (3) if the information is incorrect, notifying and correcting the information with each CRA. If the dispute is frivolous, the furnisher must notify the consumer of its decision and the reason for that decision within five days of making the decision. These provisions do not apply if the dispute is prepared by or submitted on a form prepared by a credit repair organization. Furthermore, § 1681s-2(a)(2) imposes upon a furnisher a “duty to correct and update information.”

Nevertheless, potential liability of a furnisher for inaccurate reporting arises only after the consumer disputes the information with a CRA. This gives furnishers one “free bite at the apple” for inaccurate reporting. If a dispute notice is sent to a CRA and the CRA notifies the furnisher of the dispute, the FCRA imposes (i) an obligation to reinvestigate and (ii) potential civil liability on the furnisher for verifying inaccurate or incomplete information. When the consumer notifies a furnisher of a dispute directly, the consumer has no private cause of action if the furnisher verifies inaccurate or incomplete information.

As indicated, a private right of action against a furnisher arises only if the consumer disputes information with the CRA. Since 2002, courts have consistently held that a private right of action exists under § 1681s-2(b) when the plaintiff has notified a CRA of a dispute and the CRA has in turn notified the furnisher of the dispute. In Nelson v. Chase Manhattan Mort. Corp., the Ninth Circuit found that a private right of action exists under FCRA § 1681s-2(b). The Fifth Circuit supports the Ninth Circuit’s conclusion in dicta in Young v. Equifax Credit Info. Services, Inc.

126 Id.
128 The ability of a consumer to directly dispute information with a furnisher is subject to regulations that have yet to be formulated. 15 U.S.C. § 1681s-2(a)(8). The FCRA-imposed duty of accuracy in credit reporting for creditors and furnishers of information is enforced by the Federal Trade Commission (“FTC”) and other public officials, but does not alone create a private cause of action for the consumer.
130 Young v. Equifax Credit Info. Servs., Inc., 294 F.3d 631, 639 (5th Cir. 2002) (declining to rule on whether a private right of action exists under section 1681s-2(b) but noting that if such right exists, it would require proof that a consumer reporting agency notify the furnisher of information pursuant to section 16811(a)(2)).
Likewise, in *King v. Equifax*, the plaintiff alleged violation of the FCRA for reporting an account delinquent which the plaintiff believed had been resolved. The court found a private right of action exists under § 1681s-2(b) citing the Ninth Circuit's decision in Nelson and the Fifth Circuit's dicta in *Mendoza v. Experian Info. Solutions, Inc.* However, the King court did note that a plaintiff must allege that the credit reporting agency notified the furnisher for a cause of action to exist and, as a result, instructed the plaintiff to amend the complaint accordingly or abandon the claim.

A recent Sixth Circuit decision affirmed a jury verdict of $400,000 for willful violation of the FCRA and remanded the issue of the $2.6 million punitive damages award to the trial court. In *Bach*, the 72-year old plaintiff discovered two credit accounts opened in her name after receiving several credit denials. Her credit report identified two delinquent credit card accounts: an American Express credit card account and a First Union National Bank credit card account.

The Plaintiff notified American Express and First Union by letter that both accounts were opened fraudulently without her consent. The letter triggered the furnisher's duty to investigate disputed information discussed supra. American Express responded by directing the CRAs to delete the account from the plaintiff's credit report. First Union took what ultimately became a more costly approach by refusing to take any corrective steps. First Union also repeatedly called the plaintiff requesting payment and refused to remove her name from the account. Because First Union continued to report the delinquent account, multiple creditors rejected the plaintiff's applications for credit.

At trial, the jury awarded the plaintiff $400,000 in compensatory damages and $2,628,600 in punitive damages for First Union's willful violation of the FCRA. The Sixth Circuit affirmed the $400,000 damage. However, the $2.6 million in punitive damages was remanded to the trial court after the court of appeals concluded that the damages were unconstitutionally excessive.

When a consumer does not notify the CRA, the consumer has no private right of action. For example, in *Prakash v. Homecomings Financial a/k/a Home Coming Funding Network*, Prakash sued Homecomings Financial a/k/a Home Coming Funding Network ("Homecomings"), alleging violations of the FCRA, specifically that

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132 *Id.* at *2*.
134 *Id.* at *3*.
136 *Id.*
Homecomings reported incorrect information to credit reporting agencies and that Homecomings then failed to correct their mistake under 15 USC § 1681s.137

Prakash was the victim of identity theft, where a third party fraudulently obtained a mortgage in his name which resulted in a foreclosure by Homecomings. Prakash only learned of his identity theft after being denied re-financing by Chase Manhattan Mortgage Company. Prakash alleged that he had no prior contractual relationship with Homecomings and that, although Prakash informed Homecomings of the problem, Homecomings failed to investigate or remedy the errors.138

The court determined that Prakash had no private right of action under Sections 1681s-2(a), 1681s-2(b), and 1681s-2(b)(1) because he could not show that Homecomings received notice from a CRA of the dispute.139 Prakash argued that Homecomings could have received notice from any entity or person to commence its required investigation. The court held that the plain language of the statute required Homecomings to have received notice of the dispute from a CRA stating that the only instance where a court will expand the plain language of a statute is in “rare and exceptional circumstances.”140 The court held the language of the statute to be unambiguous and, as such, Prakash had no private right of action.

D. Firm offers of credit.

Under the FCRA, a creditor has a “permissible purpose” to access consumer credit reports to extend “firm offers” of credit.141 The FCRA defines a “firm offer” of credit as “any offer of credit . . . to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer . . .”

(a) “firm offer” may be conditioned on any or all of the following:

(b) the consumer meeting specific criteria bearing on credit-worthiness established before selection;

(c) verification that the consumer continues to meet those criteria;

(d) verification that the consumer meets the specific criteria for the credit offered; or

138 Id.
139 Id.
140 Id. at *3.
the consumer furnishing any pre-disclosed collateral required for extension of the credit. If the offer of credit is made subject of any of these condition, the conditions must by disclosed, along with any other statutorily required information, in a clear and conspicuous manner. Thus, as one court has explained, a “firm offer” under the FCRA really means “a firm offer if you meet certain criteria.”142

In Cole v. U.S. Capital, the Seventh Circuit issued a decision that redefined the landscape regarding firm offers of credit. In Cole, the court rejected prior, looser standards enforced by other courts that undermined “the explicit statutory purpose of protecting consumer data and privacy.”143 Ms. Cole alleged violations of the FCRA regarding a flyer she received that stated, among other things, that Ms. Cole was pre-approved to participate in an exclusive offer based on information that was found in her credit report. The flyer further stated that:

Lender reserves the right to require consumer to payoff currently financed vehicles and may require consumer to increase down payment, which will affect equity and collateral. In any event, you are guaranteed to receive a credit line of at least three hundred dollars for the purchase of a vehicle, GRSI, Coral Springs, FL. If at the time of offer consumer no longer meets the initial criteria, offer may be revoked. We hope you are pleased with the opportunity it affords.144

After receiving the flyer, Ms. Cole filed suit seeking statutory damages and attorneys’ fees for violations of the FCRA. Ms. Cole alleged that she never requested the materials that she received from the defendants and that she had not authorized anyone to access her credit report. She claimed that offering a $300 line of credit useable only to finance the purchase of an automobile was a sham. The offer was made, she averred, to obtain credit information and not with the expectation that consumers would avail themselves of the offer. Ms. Cole argued that under the circumstances, the flyer did not qualify as a firm offer of credit and that consequently, the defendants had no legitimate reason to access her credit information.145

The Seventh Circuit stated that although the FCRA requires that an offer of credit be honored in order to qualify as a “firm offer of credit,” this inquiry alone is not dispositive.146 To determine whether the offer of credit comports with the statutory definition, a court must consider the entire offer and the effect of all the material conditions that comprise the credit product in question.

142 Kennedy v. Chase Manhattan Bank USA, N.A., 369 F.3d 833, 841 (5th Cir. 2004).
144 Id at 722–23.
145 Id. at 723.
146 Id at 727.
The Cole court suggested that a "firm offer" must include (1) the amount of credit to be extended, (2) the rate of interest charge, (3) the method of computing interest, and (4) the length of the repayment period. The Cole court explained that the communication cannot be considered a firm offer of credit if, after examining the entire context, the court determines that the "offer" was a guise for solicitation rather than a legitimate credit product.

If, after examining the entire context, the court determines that the "offer" was a guise for solicitation rather than a legitimate credit product, the communication cannot be considered a firm offer of credit. The Seventh Circuit opined that if the allegations contained in Ms. Cole's complaint did prove true, the "offer of credit" had no real value and the lender therefore did not have a permissible purpose to obtain a copy of Ms. Cole's credit report.

In addition, the Cole case set forth standards for compliance with the "clear and conspicuous" requirement of the FCRA. Specifically, the court directed judges to review the location of the disclosures within the document, the type size used within the notice, and the type size in comparison to the rest of the document. The court stated, "there must be something about the way that the notice is presented in the document such that the consumer's attention will be drawn to it." 148

Before Cole, district courts would routinely grant motions to dismiss "firm offer" cases as long as some amount of money, however small, was guaranteed and the offeror demonstrated that it would honor the offer if the consumer responded and satisfied the relevant, pre-selected creditworthiness criteria. 149

Since the Seventh Circuit's decision in Cole, many courts have been faced with interpreting a variety of credit offers to determine whether the offer is a "firm offer" establishing a permissible purpose under the FCRA for creditors' review of consumer credit reports.

In Kudlicki v. Farragut Financial Corp., the court issued an opinion granting summary judgment for the plaintiff on the question of whether the defendant was liable under the FCRA for willfully violating the FCRA's permissible purpose requirement. 150 In Kudlicki, the plaintiff alleged that the lender violated the FCRA when it "sent plaintiff a mailer after 'prescreening' her by obtaining information about her from a consumer reporting agency." 151 According to the court, the mailer "provided no specific details

147 Id. at 728.
148 Id. at 731.
149 Id.
151 Id. at *1.
relating to the amount of credit or the repayment terms, and describe[d] interest rates only as being as low as 5.5% APR.\textsuperscript{152} The mailer also included the statement: "All loans subject to approval. Only funded loans will qualify for any cash back promotion. Rates and terms subject to change at any time."\textsuperscript{153} The court decided, as a matter of law, that the mailer did not qualify as a firm offer of credit.

In addition, the court held that the lender willfully violated the FCRA despite the fact that: (1) the lender employed an in-house compliance officer to review its mailers before they were sent to consumers; and (2) the mailers were "reviewed and approved" by the consumer reporting agency that provided the prescreened list of names and addresses to the lender.\textsuperscript{154}

In reaching its decision, the court relied upon the Seventh Circuit Court of Appeals' decision in \textit{Cole v. U.S. Capital}\textsuperscript{155} and concluded that: "In addition to the requirement that the offer of credit be honored [if accepted by the consumer], an offer is not a 'firm offer of credit' unless it has sufficient value for the consumer to justify the absence of the statutory protection of his privacy."\textsuperscript{156}

The court held that "the statement in the mailer that rates and terms are subject to change at any time precludes defendant's offer from being a firm offer of credit."\textsuperscript{157} Because the lender's mailer did not include sufficient terms of the offer to permit the consumer to assess its value, the court concluded that the lender's FCRA violation was willful because "[i]t is clear from the most cursory glance at defendant's mailer that no firm offer of credit is being extended, and no compliance examiner could conclude otherwise."\textsuperscript{158} The Kudlicki decision expands upon the Cole decision.

The Kudlicki decision further held that because the lender's mailer included the statement "rates and terms subject to change at any time," the mailer could not qualify as a firm offer of credit. However, the court's reasoning and dicta may open the door for others to claim that any prescreened offer that does not include the amount of credit, interest rate, repayment term, and method of computing interest in the four corners of the solicitation will not constitute a firm offer of credit. In such circumstances, plaintiffs may allege that the lender violated the FCRA's permissible purpose requirement.

The Kudlicki court also concluded that despite the lender's substantial compliance efforts, the lender's FCRA violations were nonetheless willful. For willful violations, the
FCRA provides for the consumer’s recovery of actual damages or statutory damages, punitive damages in the court’s discretion, and attorneys’ fees.

Likewise, in *Perry v. First Nat'l Bank*, the plaintiff alleged that First National Bank (“FNB”) violated the FDCPA by impermissibly pulling her credit because the resulting offer of credit was not a “firm offer.”\[^{159}\]

Under 15 U.S.C. § 1681b(c), a credit or insurance provider can obtain a consumer’s credit information from a credit agency without the consumer’s permission only if the provider is making a “firm offer of credit” to the consumer. 15 U.S.C. § 1681b(c)(1)(B)(i). “Firm offer of credit” is defined by statute as “any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of” several conditions that are not relevant to this appeal. 15 U.S.C. § 1681a(l).\[^{160}\]

Plaintiff argued the offer was a sham because the offered amount of credit was so small and it required payment of comparatively large fees. The Seventh Circuit affirmed the district court’s holding that the offer was a firm offer because (i) it was clear from the face of the offer that the plaintiff was pre-approved; (ii) the interest rate of clearly stated; (iii) the card was not limited in use.\[^{161}\]

Similarly, in *Forrest v. Universal Savings Bank F.A.*, the plaintiff alleged a creditor improperly reviewed her credit report because the resulting offer was not a “firm offer” under the FCRA.\[^{162}\] In Forrest, the consumer received a mailer offering credit if the consumer transferred at least $5,000 and maintained a balance of at least $3,500 for 18 months.\[^{163}\] The offer also stated that the consumer was eligible for a credit line of up to $15,000 with no annual fee and a 10.99% variable APR.

Plaintiff alleged the offer was not a “firm offer” because it did not state the minimum amount of credit offered and thus the mailing had no value and was merely a business solicitation.

The court reviewed the offer to determine “whether one could infer from the mailing that a creditor meant to give the consumer a minimum credit offer.”\[^{164}\] The court found a reasonable consumer could infer that the creditor was offering a minimum credit

\[^{159}\] *Perry v. First Nat'l Bank*, 459 F.3d 816, 823 (7th Cir. 2006).
\[^{160}\] *Id.* at 824.
\[^{161}\] *Id.* at 825.
\[^{163}\] *Id.* at *1*.
\[^{164}\] *Id.* at *2.*
line of $5,000. For example, the offer stated that the consumer would be eligible to receive a computer upon transfer of $5,000 of qualifying balances.\textsuperscript{165}

Next the court determined whether the offer had value. The Seventh Circuit has stated that if an offer is nothing more than a solicitation for business, it is not a permissible purpose for accessing a credit report. See \textit{Cole v. U.S. Capital, Inc.} \textsuperscript{166} Plaintiff alleged that through interest and finance charges incurred by transferring balances to the card, the consumer would virtually pay for the “free” computer.\textsuperscript{167}

The court found that offering the computer did not negate the value of the card itself because the creditor offered credit with no annual fee and a competitive interest rate. Therefore, the offer had value as an extension of credit.\textsuperscript{168}

In \textit{Bonner, et al. v. Home 123 Corp., et. al.}, Home123 Corp. and New Century Mortgage Corp. sent the plaintiffs letters offering them high interest rate mortgage loans.\textsuperscript{169} Each of the letters included language that stated: “You have received this offer because we [Defendants] obtained information from one or more credit bureaus identified below...”\textsuperscript{170} Thus, the defendants engaged in “prescreening” of consumers based on information in credit reports provided by a consumer reporting agency.

The plaintiffs who received such letters from the defendants claimed that the terms of the solicitations were vague and therefore did not constitute “a firm offer of credit” in violation of the FCRA. The plaintiffs also maintained that the offers did not contain “clear and conspicuous” disclosures as mandated by 15 U.S.C. § 1681m of the FCRA. Finally, the plaintiffs asserted that these violations were done in a willful manner in violation of 15 U.S.C. § 1681n.\textsuperscript{171}

The court found that amendments to the FCRA by FACTA did away with any private right of action for violations of 11 U.S.C. § 1681m arising from solicitations mailed on or after December 1, 2004. However, the Court found that because a number of the solicitations were mailed before December 1, 2004, the plaintiffs did indeed have a cause of action against the defendants.\textsuperscript{172}

Allegations regarding “firm offers” lend themselves to class actions because the same offer is often mailed to thousands of consumer. In \textit{Kudlicki v. Capital One},

\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Cole v. U.S. Capital, Inc.}, 389 F.3d 719 (7th Cir. 2004).
\textsuperscript{167} \textit{Id.} at *4.
\textsuperscript{168} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.} at *10.
Kudlicki brought a class action against Capital One Auto Finance, Inc. ("Capital One") alleging violation of 15 U.S.C. § 1681b, when Capital One sent a prescreened credit mailer to Kudlicki stating that she was pre-approved for a car loan.¹⁷³ Kudlicki received a mailer stating:

This weekend you’re invited to Castle Motor Sales Honda, where you’re pre-approved for up to $25,000 in auto financing that you can use to get the car, truck or SUV you want. ... [B]ecause you’re pre-approved...there’s no need for dealer credit applications or lengthy paperwork[.]¹⁷⁴

The mailer directed plaintiff on how to take advantage of the offer and contained an opt-out notice on the back.¹⁷⁵

The opt-out notice stated:

‘This ‘prescreened’ offer of credit is based on information in your credit report indicating that you meet certain criteria. This offer is not guaranteed if you do not meet our criteria, including providing acceptable property as collateral.”¹⁷⁶

Kudlicki claimed that Capital One willfully violated the FCRA by obtaining her credit information without written permission or any “permissible purpose.”¹⁷⁷ Over Capital One’s objections, the Court certified Kudlicki’s class.

Likewise, in White v. E-Loan, Inc., a plaintiff received a mailer stating that he pre-qualified for a first mortgage refinance loan of up to $25,000 but that “the availability and amount of your loan depends on the value of your property, your income and other conditions.”¹⁷⁸ Plaintiff sought certification of a 100,000 member class that consisted of all consumers who received the mailing, which the court granted.

In light of these recent decisions, lenders and creditors who make firm offers of credit may want to revisit their FCRA compliance program to determine whether an adjustment is required.¹⁷⁹

**E. Permissible purpose even against consumer’s wishes.**

¹⁷⁴ Id. at *1.
¹⁷⁵ Id.
¹⁷⁶ Id.
¹⁷⁷ Id.
¹⁷⁹ Id.
Under the FCRA, a creditor can access a consumer’s credit for a permissible purpose, even over the consumer’s objections. In Landeis, the plaintiff sued Future Ford alleging violations of the FCRA. Specifically, because Future Ford had previously agreed not to obtain a copy of his credit report, Landeis challenged whether Future Ford obtained his credit for a legitimate business purposes or any other legitimate purpose under 15 U.S.C. § 1681b(a)(3).

Landeis purchased a vehicle with cash from Future Ford. As part of the deal, Future Ford agreed not to pull his credit report. Although Landeis had repeatedly represented that he was going to pay cash for the vehicle, he was unable to immediately retrieve the cash to make the purchase. Rather than lose a potential sale, Future offered to accept his personal check and to hold it for three days. Despite its earlier representations, Future Ford ran Landeis’s credit at closing.

The court held that where, as here, a consumer enters into a credit transaction covered by section 1681b(a)(3)(A), the consumer’s repeated objections do not negate the creditor’s right to perform the credit check. Section 1681b is intended to allow parties to obtain credit reports not only without the consumer’s permission but also over the consumer’s objections, so long as the report is obtained for a permissible purpose.

**F. No private right of action for violating 15 U.S.C. § 1681m notice requirements.**

A once over-looked provision of FACTA is causing a lot of stir lately in recent litigation. Paragraph (8) of the amended 15 U.S.C. § 1681m(h) relates to enforcement of the provisions contained in 15 U.S.C. § 1681m. Under the recent amendments “sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section. This section shall be enforced exclusively under 15 U.S.C. § 1681s by the Federal agencies and officials identified in that section.”

Prior to FACTA, many courts and others in the legal community believed that a private cause of action existed under 15 U.S.C. § 1681n to enforce the provisions of 15 U.S.C. § 1681m. Several recent decisions, however, have held that the FACTA amendments have completely done away with any private cause of action to enforce 15 U.S.C. § 1681m.

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181 Id. at *1.
182 Id.
183 Id.
184 Id. at *4.
185 Id.
187 See e.g. Hernandez v. Citifinancial Servs., Inc. 2005 WL 3430858 (N.D. Ill Dec. 9, 2005); Murray v.
Congress enacted the FCRA to protect consumers' right to privacy. Unless consumers initiate a transaction, their credit reports may be accessed only in limited situations set forth in § 1681(b). Section 1681b(c)(1)(B)(i) allows a creditor to access a person's credit report to make a "firm offer of credit." In addition to making a firm-offer, a creditor must also make "a clear and conspicuous statement" with the following details:

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

Section 1681n provides a private right of action against willful violators of the FCRA.

Numerous district courts have recently held that the FACTA amendments eliminated private rights of action under 15 U.S.C. § 1681m. Section 1681m defines the FCRA's consumer notice requirements and courts have interpreted the phrase "this section" in Section 1681m(h)(8)(A) to apply to Section 1681m as a whole, thus repealing private rights of action under the entire section. See, e.g., Bruce v. Wells Fargo Bank, N.A. (finding that the "plain and unambiguous language of § 1681m(h)(8)(A) indicates that the phrase 'this section' refers to § 1681 as a whole," and therefore "any private right of action for a violation of § 1681m has been eliminated"); Putkowski v. Irwin Home

__Household Bank, N.A., 386 F. Supp. 2d 993 (N.D. Ill. 2005).__

Equity Corp.192 (determining that FACTA eliminated the private right of action under § 1681m); Villagran v. Freeway Ford, Ltd.193 (finding that Congress abolished the private right of action under § 1681m by enacting §1681m(h)(8)).

For example, in Pietras v. Curfin Oldsmobile, Inc. d/b/a Currie Motors Driver’s Edge, Pietras brought a class action against Curfin Oldsmobile, Inc. d/b/a Currie Motors Driver’s Edge (“Curfin”) for violating the FCRA. In that case, Curfin failed to provide clear and conspicuous disclosures of Pietras’ rights to prevent further invasions of privacy after Curfin obtained her credit information from a credit reporting agency.194 Pietras alleged Curfin willfully violated both § 1681b(c)(1)(B)(i), which governs firm offers, and § 1681m(d) which requires privacy notices.

Curfin moved to dismiss the 1681m(d) claim arguing that FACTA eliminated the private right of action to enforce 1681m. The Court granted Curfin’s motion for summary judgment on the grounds that 15 U.S.C. §1681m(h)(8) eliminates a private right of action for violations of 1681m. Section 1681m(h) states:

Enforcement

(A) No civil actions
Sections 1681n and 1681of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement
This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.195

After interpreting the statutory text, the court found that the words “this section” refer not only to 1681m(h) but to all of 1681m.196 Thus, the court dismissed the cause of action alleging violations of § 1681m(d). See also Murray v. GMAC Mort. Corp.197 (“A recent amendment to the [FCRA] abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively ....”).

Likewise, in Hernandez v. Citifinancial the court faced the issue of whether or not there was a private cause of action to enforce any provision contained in 15 U.S.C. § 1681m. After a lengthy discussion of the legislative history of FACTA, other recent

197 See also Murray v. GMAC Mort. Corp., 434 F.3d 948, 951 (7th Cir. 2006).

The only district court holding otherwise was the court in \textit{Barnette v. Brook Road, Inc., et al.}\footnote{Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741 (E.D. Va. 2006).} In \textit{Barnette}, a car buyer brought an action against a car seller alleging violations of the ECOA and FCRA, among other things. The \textit{Barnette} case involved a so-called “yo-yo” car sale.\footnote{Id. at 744.} After receiving a pre-approval letter from the car seller, \textit{Barnette} decided to purchase a car from the seller. When \textit{Barnette} later returned to the dealer to redeem a free car wash certificate, she was informed that her loan was refused based on her insufficient income. Shortly thereafter, the dealer repossessed the automobile.\footnote{Id. at 745.}

\textit{Barnette} never received an adverse action notice from the seller and she brought her claims under 15 U.S.C. § 1681m(a). Faced with the issue of whether consumers have a private cause of action under that section, the court held that the phrase “this section” in 15 U.S.C. § 1681m(h)(8)(A) applied only to that subsection, not affecting the rest of Section 1681m.\footnote{Id. at 749.} Thus, the court concluded that consumers possess a private right of action for violations of the remainder of § 1681m and \textit{Barnette} was entitled to bring her claims.\footnote{Id.}

\textbf{G. Identity theft.}

In \textit{Garcia v. UnionBanCal Corporation}, an employee of Union Bank of California’s (“UBOC”) had his briefcase stolen, which contained personal and financial information belonging to UBOC account holders.\footnote{2006 WL 2619330, at *1 (N.D. Cal. Sept. 12, 2006).} The Garcias maintained accounts with UBOC and alleged that their personal and financial information was in the stolen briefcase. Among the information included were their names, addresses, telephone numbers, account information, and social security numbers.

The Garcias’ class action against UBOC alleged that UBOC recklessly and negligently maintained custody of the Garcias’ data and thereby allowed it to get stolen. The Garcias also allege that they relied upon UBOC’s misleading representation that their information would be secure. They based their damages on 15 U.S.C. § 1681b and §

\begin{itemize}
  \item 198 Hernandez v. Citifinancial, 2005 WL 340858 (N.D. Ill. Dec. 9, 2005).
  \item 200 Id. at 744.
  \item 201 Id. at 745.
  \item 202 Id. at 749.
  \item 203 Id.
  \item 204 2006 WL 2619330, at *1 (N.D. Cal. Sept. 12, 2006).
\end{itemize}
claiming UBOC violated the FCRA by disclosing consumer reports to unauthorized third persons.205

The Court denied the Garcias’ claim, holding that UBOC was not acting as a consumer reporting agency and that the information divulged could not be characterized as a consumer report.

A “consumer reporting agency,” under the FCRA is “an entity that provides ‘consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.”206 Because UBOC did not produce the information that was in the briefcase for the purpose of providing it to a third party, the Garcias’ allegation failed.

The Garcias went further, however, to allege that UBOC sometimes acted as a consumer reporting agency. The court held that sometimes acting as a consumer reporting agency did not establish liability under the FCRA, unless the bank was acting as a CRA when it generated the information.207

The court also rejected the Garcias’ allegation that the materials in the briefcase were consumer reports. Section 1681a(d)(2)(A)(i) broadly defines “consumer reports” but “expressly excludes from that definition any reports ‘containing information solely as to transactions or experiences between the consumer and the person making the report.”208 The court held that the information in the briefcase was solely related to the transactions between the consumer and UBOC and as such, fell within the express exclusion. In response, the Garcias claimed that some of the information in the briefcase did not fall within that exclusion because it related to transactions with other parties that could affect their credit. However, the court again dismissed the complaint, holding that it still related to transactions or experiences between the consumer and the person making the report, here UBOC.209

III. Credit Reporting and Creative Plaintiffs

Debtors and their attorneys may remain a threat long after the discharge is issued and the debt is wiped away. Debtors are suing credit issuers for violations of the discharge injunction and/or automatic stay for reporting the discharged debt on the debtor’s credit report alleging that such reporting is an act to collect the debt. The FTC Commentary suggests that creditors should report discharged debts with a balance of $0

205 Id.
206 Id. at *2 (citing 15 U.S.C. § 1681a(f))(emphasis added).
207 Id.
208 Id.
and indicate that the debt was discharged in bankruptcy. Reporting that strays from this standard is vulnerable to a debtor’s attack.

Case law is limited regarding whether reporting truthful information without affirmative action to collect a debt somehow violates the discharge injunction under 11 U.S.C. § 524 and/or automatic stay under section 362 under the theory that the reporting itself is done with the intent to pressure the debtor into paying the discharged debt.

Courts appear to lean towards letting these cases advance to the discovery state in search of the creditors’ intent to collect the debt. What plaintiffs must show to prove such intent is not well known.

A. Discharge does not erase the debt.

One line of cases suggests that reporting a debt alone does not violate the discharge injunction without other acts to collect the debt. In Vogt, the plaintiffs alleged that the creditor had extracted payment of a discharged debt by promising to withdraw or amend a credit report that showed the debt still due and owing. The five years after receiving their discharge, the plaintiffs applied for a home mortgage and were informed that a debt owed to the creditor was shown as due and owing and assigned to the defendant for collection.

The plaintiffs contacted the defendant/debt collector to inform the defendant that the debt had been discharged. The defendant agreed to correct the “erroneous information” only if they paid the amount of the debt. The plaintiffs paid. The negative information remained on the credit report.

Initially, the court observed that discharge does not wipe away debt. Rather, a discharge only eliminates the debtor’s personal responsibility to pay the debt. The court found that reporting that the debt was still due and owing, notwithstanding the order of discharge was not an act to collect the debt. Thus, “[t]he creditor was under no obligation under the Bankruptcy Code to change the way it reported the status of the loan.” Furthermore, the court did “not consider the demand of the creditor for payment, as a condition changing its credit report, as ‘an act’ to extract payment.”

Similarly, in Irby, plaintiffs alleged that they were denied a lower interest rate on a home mortgage because two creditors continued to report balances owed on debt that was discharged. The court noted that discharge does not extinguish the debt itself. Rather, the debtor’s personal liability is extinguished and the debt remains. Citing Vogt,

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211 Id. at 70.
212 Id. at 71.
213 Id.
the court could not find that "the sole act of reporting a debt, whose existence was never extinguished by the bankruptcy discharge, violates the discharge injunction."\(^{215}\)

However, the court did state that "if the act of reporting a debt was undertaken for the specific purpose of coercing the debtor in paying the debt, a violation of the discharge injunction could be established."\(^{216}\) The act of reporting must be coupled with other actions to collect a debt to run afoul of the discharge injunction. Thus, the court denied the plaintiffs' motion for default "since nothing ha[d] been alleged, beyond the mere reporting of the obligation, that the Defendants undertook any 'action' or 'act' to collect on their claim..."\(^{217}\)

Very recently, the Bankruptcy Court for the Western District of Texas rejected the argument that credit reporting is an "act" to collect a discharged debt in *Mahoney v. Washington Mutual Inc.*:

At the center of the disposition of this case lies a simple question: what constitutes an "act" to collect a discharged debt in violation of the discharge injunction? . . . [T]he mere reporting of credit information about a debtor vel non is not an "act" to collect a discharged debt within the meaning of the statute, unless the evidence shows (or in the context of a summary judgment motion, might show) that there is a linkage between the act of reporting and the collection or recovery of the discharged debt.\(^{218}\)

[R]eporting of a debt to a credit reporting agency—without any evidence of harassment, coercion, or some other linkage to show that the act is one likely to be effective as a debt collection device—fails to qualify on its own as an "act" that violates section 524.\(^{219}\)

\section*{B. Alleging intent gets you to discovery.}

Another line of cases suggests that as long as the plaintiff alleges the creditor's intent to collect the debt, the case will reach the discovery stage. In *Singley*, a debtor and co-debtor sued a creditor for reporting a joint account on the non-debtor's credit report as involved in bankruptcy proceedings.\(^{220}\) The debtor had filed a chapter 13. His wife did not join in the petition but was co-signor on a debt with American General Finance. American General Finance ("AGF") reported the following on the non-debtor/co-debtor's credit report:

\(^{215}\) *Id.* at 295.
\(^{216}\) *Id.* at 296.
\(^{217}\) *Id.* at 297.
\(^{219}\) *Id.* at *8.
As of 10/01/97, this account is included in or completed through bankruptcy chapter 13. Previously was current and all payments were made on time. Months reviewed: 11.

The co-debtor applied for and was refused credit at three retail stores and one car dealership. The plaintiffs alleged the notation was made with intent to collect the discharged debt from the co-debtor in violation of 11 U.S.C. § 1301 (the co-debtor stay). AGF moved for summary judgment.

The court stated that:

(E)ven if it is true that Movant’s report to the credit bureau contains truthful information that is a matter of public record, such a report, if made with the intent to harass or coerce a debtor and/or co-debtor into paying a pre-petition debt, could violate the automatic stays of sections 362 and/or 1301.221

Based on the pleadings before it, the court could not determine that the creditor did not act with the intent to collect the debt from the debtor and/or co-debtor when it made the report to the credit bureau. The creditor did not satisfy its burden to demonstrate absence of issue of a material fact by arguing that it did not have the requisite intent and asserting that the notation on the credit report was void of any indicia of intent. Rather, the court found that:

The notation could be found by a reasonable juror to have been made with the intent to collect the debt from Debtor and/or Mrs. Singley [co-debtor].

AGF further argued that summary judgment was appropriate because the plaintiffs failed to show any injury. AGF speculated that the co-debtor was denied credit for reasons other than the notation on her credit report. Without more, the court could not determine that the co-debtor was denied credit for other reasons.

Moreover, the court recognized that attorneys fees were available under § 362(h) for willful violation of the automatic stay even if the debtor suffered no other compensable harm. In addition, the plaintiffs were not without a remedy because they requested that the court direct AGF to remove the notation from the credit report. The court denied the creditor’s motion for summary judgment.

In Carrierre, the plaintiff had 2 loans with the creditor.222 The debtor paid one debt in full, but the other debt was delinquent when the plaintiff filed bankruptcy. The plaintiff received a discharge, but the creditor continued to report both accounts as “charged off.” In addition, although the plaintiff had paid off the first loan, the creditor reported it had not received two payments and had charged off the amounts not received.

221 Id. at 173.
After disputing the notations on the credit report with the credit reporting agency and the creditor, plaintiff filed suit for, among other things, violation of the discharge injunction. In addressing whether the notations were made with the intent to collect the debt, the court found that “until the parties have had an opportunity to conduct discovery, the Court cannot determine what [the creditor’s] intent might have been when it reported that [the debtor’s] debts had been ‘charged off’.” Thus, the court denied the creditor’s motion to dismiss.

In *Weinhoeft*, the debtors filed a chapter 7 bankruptcy and surrendered their residence to the mortgagee. The debtors received a discharge. Debtors later filed suit against the bank that held the mortgage for the house for, among other things, violation of §§ 362 and 524 alleging that the creditor continued to report the debtors as delinquent on their mortgage payments. The creditor filed a motion to dismiss for failure to state a claim.

The court found that the debtors had alleged sufficient facts to state a claim under §§ 362 and 524. First, the debtors disputed the truthfulness of the reports made to the credit reporting agencies. Second, even if the creditor’s reports contained truthful information, the court found (citing *Singley*) that a violation of the automatic stay may have occurred if the report was made “with the intent to harass or coerce” the debtors into paying pre-petition debt.

In *Smith*, the debtors asserted that American General Finance, Inc. (“AGF”) violated the discharge injunction by reporting her debt to credit reporting agencies as “Account charged off/Past due 180 days. $1,1366. written off;” “Charged Off as Bad Debt;” and “Charge Off” with a past due balance of $1,366. AGF and another creditor moved for dismissal for failure to state a claim. Citing to *Vogt, Sommersdorf* and *Singley*, the court found precedence for finding that the debtors had asserted sufficient allegations of the defendants’ intent to collect; thus, the motion to dismiss was denied.

**C. Simply reporting violates at least the co-debtor stay in at least one court.**

Courts cite to *Sommersdorf* although the opinion appears to lack any legal reasoning or factual finding to support it. In *Sommersdorf*, the court addressed whether notating a co-maker’s credit report regarding a debt in bankruptcy violates the stay against the co-maker. A bank reported on a non-debtor/co-maker’s credit report that it

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223 Id. at *8.
had taken a profit and loss write off on the debt. As a result, the non-debtor/co-maker was denied a home loan.

Without analysis, the court determined that placing the notation on the co-maker’s credit report was “most certainly . . . done in an effort to effect collection of the account. . . . Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay.”

The court found that the creditor’s actions violated the co-debtor stay under 11 U.S.C. § 1301 but did not find that the creditor’s actions rose to civil contempt. The court ordered the creditors to delete the notation from the non-debtor’s credit report and reissue the corrected credit report to the affected parties.

At least one court has criticized Sommersdorf. The Mahoney Court rejected Sommersdorf as making conclusions “without real support.”

D. Evidence of intent.

If cases move past motions to dismiss and summary judgment, what will plaintiffs need to show to prove intent to collect a debt? The court in Helmes addressed whether expert testimony from the plaintiffs proved intent to collect a debt. In Helmes, the debtor received a discharge. While the bankruptcy was pending and for a time after the discharge was granted, Wachovia reported the debt to credit reporting agencies as “Over 120 days Past Due” in the amount of $11,714.00. The debtor complained and the notation was changed to “Discharged in bankruptcy” with an amount due of $0.

The debtor and creditor agreed that industry standards require a debt discharged in bankruptcy to be reported with a notation “Discharged in Bankruptcy” with a $0 balance due.

The debtor asserted that the creditor violated the discharge injunction by reporting the debt “past due” rather than “discharged in bankruptcy” in an effort to collect the debt. The debtor presented two expert witnesses. The first, a mortgage broker, testified that lenders consider credit scores when evaluating loan applications and that as credit scores drop, lending options narrow. In addition, the expert testified that every “past due” notation on a credit report must be resolved and that often applicants simply pay the debt rather than go through the expensive, time-consuming, hassle of correcting notations.

The debtor’s second witness asserted that creditors report “past due” instead of “discharged in bankruptcy” to credit reporting agencies to collect the underlying debt

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227 Id. at 701.
228 Mahoney, 2007 WL 1217851 at *5.
230 Id. at 107-08.
because such reporting increases the chances that the debt will be paid, often when the
debtor seeks new credit.

The creditor defended arguing that the notation was an aberrant mistake that it
corrected once it became aware of the mistake. The creditor described its process for
flagging accounts in bankruptcy to ensure accurate reporting.

The court found that the debtor failed to meet her burden of proof. The court
acknowledged that reporting the debt as “past due” rather than “discharged in
bankruptcy” might cause some debtors to pay the discharged debt, but found that
insufficient to prove the report was submitted with the intention to collect a debt. The
court determined the debtor’s argument would fail as long as there was some other reason
why the derogatory report was made.

The other reason which satisfied the court was that it was simply a mistake. The
court noted that the creditor had a procedure in place to stop such negative reporting; no
other acts were taken to collect the debt; the bank corrected the notation once it was made
aware of the mistake; and there was no evidence of a practice or pattern of reporting
discharged debts in this manner.

In addition, the court found that the debtor did not prove damages because she did
not show that without the improper notations she would have received a different interest
rate or been offered a loan.\textsuperscript{231}

\textbf{E. Conclusion.}

In facing allegations of intent to collect a discharged debt by reporting “charge
off” or “past due” rather than “discharged in bankruptcy”, it seems likely that most courts
will allow the case to get to the discovery state. The issue then becomes what plaintiffs
will find in creditors’ records. If plaintiffs can establish intent or even a pattern of
incorrect reporting, creditors may be found in violation of the discharge injunction.

\textbf{IV. Prudent Call Frequency When Collecting Debts}

According to the Federal Trade Commission (FTC),\textsuperscript{232} in 2005 it received over
66,627 complaints regarding third-party debt collectors which are about 19.1\% of all
complaints received by the agency. As to harassing telephone calls, the Commission
noted that in 2005, in 21.5\% of all debt collection complaints, 14,352 complaints alleged
that collectors harassed them by calling repeatedly or continuously. Another 2.5\% of the
complaints were for calling before 8 a.m. or after 9 p.m. or other times known to be
inconvenient to the consumer.

\textsuperscript{231} \textit{Id.} at 109.
As noted below, the collector calling continuously or repeatedly might be annoying to the consumer, but may not violate any statute or regulation nor would the conduct be considered tortuous. It might be that consumers whose obligations to a creditor have been placed with a third party collector are more likely to feel pressured and harassed by collection calls than others who have debt because these consumers are experiencing greater financial pressure.

Studies have found that increased debt and lack of financial well-being are related to several mental health related concerns such as anxiety and stress which then can have an impact on physical health. Thus, these debt-burdened consumers may suffer additional distress and mental anguish from such calls. While creditors, or debt collectors as their agent, have a right to collect debt owed to them and consumers who borrower on credit should expect creditors to attempt to collect if the debt remains unpaid, the issue is simply what methods of collection are reasonable in such situations.


Congress and state legislatures have made a public policy decision that certain types of telephone calls are considered harassment. Section 806 (5) of the Fair Debt Collection Practices Act ("FDCPA") provides:

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: ....
(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.  

However, what constitutes continuous or repeated communications often varies from state to state or may not even be defined at all. For instance, Ohio does not have a debt collection statute while Massachusetts has one set of debt collection regulations applicable solely to third party debt collectors and another set of regulations applicable only to creditors collecting their own debt. Massachusetts' debt collector regulations, one of the strongest on record, limit creditors to two telephone calls to the debtor's residence within a seven day period and two telephone calls in a thirty day period to locations other than the debtor's residence. Massachusetts does not apply similar restrictions on the number of calls by third party debt collectors.

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233 Patricia Drentea & Pail J. Lavrakas, Over the limit: the association among health, race and debt, 50 Social Science and Medicine, 517–529 (2000).
B. A variety of standards apply depending on jurisdiction.

When determining whether creditor’s activities violate section 1692d, the federal courts have not followed the traditional “reasonable man” standard but rather some significantly lesser standard. An Illinois U.S. District Court held that the creditor’s communication should be viewed “through the eyes of an unsophisticated consumer” to determine if the consumer was harassed or threatened. Citing a number of Seventh Circuit decisions, another district court stated the following in relation to the unsophisticated consumer/debtor:

- “The standard is low, close to the bottom of the sophistication meter.”
- The unsophisticated debtor is uneducated, uninformed, naive, and trusting.
- There is, however, an objective element of reasonableness in the standard which protects debt collectors from liability for “unrealistic or peculiar interpretations of collection letters.”
- Under the unsophisticated debtor standard, a statement will not be confusing or misleading unless a significant fraction of the population would be similarly misled.

Other courts have adopted the least sophisticated consumer standard. The standard requires courts to determine if the least sophisticated consumer would be deceived by the debt collector’s representations. The Fourth Circuit has stated: “The basic purpose of the least-sophisticated standard is to ensure that the FDCPA protects all consumers, the gullible and the shrewd.” The Fourth Circuit further describes the least sophisticated consumer concept as a “doctrine” seeking “to protect naïve consumers, while preserving a quotient of reasonableness and presuming a basic level of understanding.”

235 While the standard was used in some earlier cases, the federal courts have generally rejected it. See: Wright v. Credit Bureau of Georgia, Inc., 548 F. Supp. 591, 599 (N.D. Ga. 1982) reconsidered, 555 F. Supp. 1005 (N.D.Ga.1983).
238 Avila v. Rubin, 84 F.3d 222,226 (7th Cir. 1996).
239 Pettit v. Retrieval Masters Creditors Bureau, 211 F.3d 1057, 1060 (7th Cir. 1996).
240 Gamon v. GC Serv. Ltd., 27 F.3d 1254, 1257 (7th Cir. 1994).
241 Pettit, 2211 F.3d at 1060 (citing Gammon, 27 F.3d at 1260 (Easterbrook, J. concurring)).
242 Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir. 1985).
244 Chaudery v. Gallerizzo, 174 F.3d 394, 409 (4th Cir. 1999).
The Fifth Circuit describes the standard as “designed to protect consumers of below average sophistication or intelligence without having the standard tied to the very last rung on the sophistication ladder.” 245

Closely, related to this standard is whether the consumer is susceptible to harassment, oppression or abuse. The court in Jeter adopted the least sophisticated standard and then specifically addressed § 1692(d) stating “we hold that claims under § 1692d should be viewed from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression, or abuse.” 246

The court opined that whether a consumer is more or less likely to be harassed, oppressed, or abused by certain debt collection practices does not relate solely to the consumer’s relative sophistication. Such susceptibility might be affected by other circumstances. An intelligent and sophisticated consumer might be susceptible to harassment, oppression, or abuse because he is poor (i.e., has limited access to the legal system), is on probation, or is otherwise at the mercy of a power relationship. 247 The Northern District of California provides another example of relative sophistication: physically disabled senior citizen who was not indigent, incurred a $2,000 hospital bill, was making $50 monthly payments but was receiving daily prerecorded collection calls. 248

Courts have quickly dismissed cases in which the debtor’s complaint was that the call was “unwanted.” 249 Just being unwanted doesn’t make it intentionally “annoying” or “abusive” in the legal sense.

C. FTC Commentary.

When would a creditor’s calling a consumer so continuously or repeatedly be considered harassment, oppression or abuse? The Staff of the Federal Trade Commission promulgated a staff commentary which addressed the issue of what are continuous or repeated telephone calls:

Section 806(5) prohibits contacting the consumer by telephone “repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.”

245 Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997).
246 Jeter v Credit Bureau, Inc., 760 F.2d 1168, 1179 (11th Cir. 1985).
247 Jeter, 760 F.2d at 1179.
1. Multiple phone calls. "Continuously" means making a series of telephone calls, one right after the other. "Repeatedly" means calling with excessive frequency under the circumstances.\(^{250}\)

The staff commentary follows the Black's Law Dictionary definition of the adverb *continuously*.\(^{251}\) The Tenth Circuit defined *continuously* to mean "without break or interruption."\(^{252}\)

The adverb *repeatedly* while not defined in Black's Law Dictionary is defined in general dictionaries as "again and again."\(^{253}\) The Supreme Judicial Court of Massachusetts in a case involving harassing telephone calls noted, "we characterized the term 'repeatedly' as an ambiguous term, noting that its meaning depended on the context in which the word is used."\(^{254}\) Although the term *repeatedly* has not been uniformly construed in various jurisdictions,\(^{255}\) the weight of authority clearly indicates that "more than once" within a very short period of time such as a day or two would be an acceptable definition.

In an informal opinion, the FTC noted that a collector is almost certainly entitled to call more than once so long as the calls do not constitute harassment or occur after the consumer decides to cease communications under section 805(c).\(^{256}\) But a call a day before and after a payment is due, for a specific purpose, would not be considered harassment.\(^{257}\)

As to repeated calls, the FTC staff has stated: "If the called party knows the identity of the caller and refuses to accept the call then a second attempted call may not

\(^{251}\) "Uninterrupted: in unbroken sequence; without intermission or cessation: without intervening time: with continuity or continuation." BLACK'S LAW DICTIONARY 393 (Rev. 4th ed. 1968).
\(^{252}\) U.S. v. Wooten, 40 F.2d 882, 887 (10th Cir.1930).
\(^{253}\) "More than once, again and again, frequently."); WEBSTER'S THIRD NEW INT'L DICTIONARY 1924 (1993) ("Renewed or recurring again and again: constant, frequent . 2: said, done, or presented again.").
\(^{255}\) Konrad v. State, 763 P.2d 1369, 1379 (Alaska Ct. App. 1988) (made more than once); People v. Heilman, 25 Cal. App. 4th 391, 400 & n.5, 30 Cal. Rptr. 2d 422, 427 n.5 (1994) (more than one time); People ex rel. VanMeveren v. County Court, 191 Colo. 201, 205, 551 P.2d 716 (1976) (more than one time); State v. Diede, 319 N.W.2d 818, 821 (S.D. 1982) (more than once); But see Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n, 540 F.2d 157, 162 & n.11 (3d Cir. 1976) (more than twice).
violate the statute if it is made at a later date. However, if the second call closely follows
the first call so as to amount to annoyance, then, in our opinion, that practice would
violate Section 806 of the Act. An FTC Informal Staff letter stated “six phone calls in
an hour would be a violation, in our opinion.”

D. Call Frequency under the FDCPA.

Courts also have provided some guidance in construing the term in the debt
collection context. Arrow Financial Services, LLC (“Arrow”) operates a computer-driven
telephone collection call system. In Bennett v. Arrow Fin. Servs., Arrow made five calls
to a consumer between August 28, 2002 to September 27, 2002. In the first call which
lasted 4 minutes, the consumer stated he was not paying the debt. In another call lasting
one minute, the consumer threatened suit. When three other calls were made, no contact
was established. After a short trial, the court found that “two complete calls, spaced
weeks apart, are hardly intentional harassment. However, the court noted if a creditor
called at repeated odd hours of the night and hung-up that would be harassment.

In another case, Bingham v. Collection Bureau, Inc, involving multiple calls, the
court found a series of fourteen calls made between June 11 and July 11 was not
harassment. However, when both parties identified each other, the consumer hung-up,
and then the collector re-called immediately, the court found that action was
harassment.

Relying upon Bingham, another district court found that a collector’s conduct in
calling the consumer twice within five minutes after she hung-up on him was conduct
intended to annoy, abuse and harass. In that case, the collector called a consumer, who
did owe the debt, five times after the initial and continuing hang-ups. Relying on the
Bingham and Kuhn decisions, the court found that the collector violated §1692d(5) and
awarded the consumer $5,000 in actual damages, $1,000 in statutory damages, and
$7,500 in punitive damages as well as attorneys’ fees of $4,613.54.

258 Informal FTC Staff Letter from Alan D. Reffin, Attorney, Division of Credit Practices to James A.
Cathcart, Chief, Bureau of Collection and Investigative Services, Sacramento, Cal.(December 10, 1980).
(Robert J. Hobbs, Fair Debt Collection (National Consumer Law Center) Companion CD-Rom (5TH Ed.
2004).
259 Supra note 24.
261 The calls began on June 11 and were generally a few days apart. The last call was on July 11. All calls
except the call-back of June 19, made at 10:30 to 11:00 p.m., were made 10:30 to 11:00 a.m. Bingham at
868-870.
263 Id.
Recently, in Clark v. Quick Collect, Inc, a district court decided that a debt collector was not entitled to summary judgment on the issue of whether five calls to the plaintiff over 19 days regarding one debt and eight separate calls over 21 days regarding a second debt violated §1692d(5). The court reasoned that whether the volume and pattern of calls were harassment or annoyance was a question of fact for the jury. The court did rule that a collector’s failure to leave a message “does not itself violate § 1692d.” The jury found for the collection agency on the telephone harassment counts.

A district court in Maryland reached the same conclusion. A collection agency called a consumer either 26 or 28 times over a two month period. The record reflected that some “telephone calls were made on a daily basis and three telephone calls being made within five hours on the same day. The court in denying summary judgment found: “The reasonableness of this volume of calls and their pattern is a question of fact for the jury.”

In another case, plaintiff received six messages from the collection agency on her answering machine on December 9, 16, 17, 18, 23 and 29, 2003. All of the messages were similar. The December 16, 2003 message is reflective of the messages left on the answering machine:

This message is for Ashraf. Ashraf, my name is Clarence Davis. I have some very important information to discuss with you. I have to make a decision about a situation that concerns you. I am going to make this decision with or without your input. Contact my office right away at 877-647-5945, Extension 3619. Failure to return my call will result in a decision-making process that you will not be a part of.

Plaintiff alleged these communications were intended “to harass, oppress, or abuse the least sophisticated consumer.” On the defendant’s motion for summary judgment, the court felt that there was a question of fact as to the issue of harassment by debt collection telephone calls under the FDCPA and California Rosenthal Debt Collection Act.

Further, the court granted summary judgment to the plaintiff under Cal. Civ. Code § 1788.11 (b) (2006) because defendant was not a registered collection agency and

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267 Id. (citing Udell v. Kansas at 1144 infra).
271 Id. at 1108.
272 Id. at 1110.
therefore, the collector could not use an alias and the name of the collection agency had to be disclosed.273

Alternatively, a district court in Arizona granted the creditor’s motion for summary judgment in a case where the consumer alleged excessive telephone calls:

Defendant attaches its collection notes to the Motion for Summary Judgment as evidence that the debt collector’s actions did not rise to the level of annoyance, harassment, or abuse. Defendant’s collection notes show three separate discussions with Plaintiff and nineteen telephone calls placed to her house from September to December 2, 2004. Plaintiff does not dispute the accuracy of the collection notes, and agrees that nineteen calls were placed to her house. The Court finds that Defendant placed the calls to resolve the debt, and does not find any evidence of continuous calling with intent to annoy, abuse, or harass.274

Similarly, a district court in New Jersey found that two calls made over a two month period did not violate § 1692d(5). In both calls the collector left a message that “their [sic] was an outstanding debt to be paid and there was a pending legal matter and that Plaintiff should respond promptly...” 275

In deciding a summary judgment motion, a district court in Kansas determined that four automated collection telephone calls placed on May 7, 8, 12 and 13, 2003 in which the phone was not answered and the collection agency chose not to leave a message did not violate the Act on the merits or as a matter of law.276

In conclusion, it appears that whether there is actionable harassment or annoyance under § 1692(d)(5) cannot be based strictly on the number of calls placed, but also on the pattern of calls.277 Repeated calls within a short time frame such as two or three calls a day might be considered harassment but daily calls, at appropriate times, professionally reminding the debtor that payment is due may not be actionable. However, one single call that immediately follows a call terminated by the person answering the call is considered harassment.278 As noted in Akalwaldi, reasonableness of the volume of calls and frequency is usually a jury question.

273 Id. at 1117–1118.
277 Kuhn, at 1453.
278 Bingham, at 873.
E. Call Frequency under The Federal Communication Act of 1934.

Congress in 1968 amended the Federal Communication Act of 1934 to add a new section, 47 U.S.C. § 223, imposing criminal liability for annoying or harassing calls. While this provision was directed at preventing the making of obscene telephone calls across state lines or in the District of Columbia, it also addressed the problem of repeated calls made with the sole intent to harass or annoy, within a conversation that is neither sexual in nature nor anonymous. One of the initial courts to pass upon this provision noted that to impose criminal liability two conditions must be met:

First, the phone calls must be “repeated”. The court takes this to mean repeated in close enough proximity to one another to rightly be called a single episode, and not separated by periods of months or years. This condition both requires the repeatedness as an element of the legally cognizable charge, and at the same time insures that the courts will not be flooded with complaints growing out of a single unpleasant call with some acquaintance. Second, the repeated calls must be made “solely to harass” and not merely to “annoy, abuse, threaten, or harass” as in the case of an anonymous phone call under § 223(a)(1)(B).279

A court of appeals judge noted in a concurring opinion that an average of ten calls per week for a ten month period “constituted an illegal course of conduct proscribed by § 223(a)(1)(D).”280 However, the court noted that an intent to annoy or harasses must be shown before the activity is considered criminal. Section 223 and many states use statutory language requiring specific intent to harass, annoy or alarm.281

Further, there is not a private right of action under the Federal Communication Act and any violation can only be prosecuted by the Federal Communication Commission.282 Given that this is a criminal statute, such a restriction is reasonable.

Various states have enacted criminal statutes prohibiting harassing telephone calls and those statutes closely follow the language or concepts found in § 223(1)(D).283 Further, state courts have relied upon the interpretation and the two part test established in United States v. Darsey that specific intent to harass must be established before imposing criminal liability.284

280 United States v. Lampley, 573 F.2d 783, 793 (3rd Cir. 1978) (Gibbons, J. concurring and dissenting).
281 FLA. STAT. ANN. § 365.16(1)(b) (2006) (“intent to annoy, abuse, threaten or harass”); TEX. PENAL CODE ANN. § 42.07 (2006) (“with intent to harass, annoy, alarm, abuse, torment or embarrass”).
282 Belluso v. Turner Communication Corp., 633 F.2d 393, 397 (5th Cir. 1980).
It is clear that if a legitimate purpose exists for the call, and it is not made with the purpose to abuse, threaten or annoy nor its contents are at all obscene or threatening, then it does not violate section 223.

**F. Limitations on Calls to Cell Phones.**

The Federal Communication Act was amended in 1991 to add a new section 227, which included section 227(b)(1)(A)(iii) prohibiting any person from using an automatic dialing system or an artificial or prerecorded voice to make a call to any telephone number assigned to a paging system, cellular telephone service etc. Section 227(b)(2) states that the Federal Communication Commission shall prescribe rules to implement these requirements. The applicable regulation which closely follows the statute requires that:

(a) No person or entity may:
(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice, ....

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

In contrast to § 223, Congress, in regulating automatic telephone dialing and telemarketing activities, provided consumers with a private right of action to enforce any violation of the statute or the applicable regulations:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

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285 The statutory definition of automatic telephone dialing system means "equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers. 47 U.S.C. 227(a)(1) (2006). However, the definition adopted by the FCC in 2003 defines automatic dialing system and autodialer in a manner very similar to the statute to "mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers." 47 C.F.R. 64.1200(f)(1). The Commission felt that it needed through the regulation to significantly expand the scope of the definition of telephone dialing system to cover newly developed equipment known as predictive dialers. 68 Fed. Reg. 44161 (July 25, 2003).

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.287

The private right of action is limited to actions filed in state court. Initially, significant litigation at the state court and U.S. District Court levels addressed the question of whether an action under section 227 could also be filed in federal court instead of in state court. The United States Courts of Appeal for the Second, Third, Fifth and Eleventh Circuits288 have ruled that state courts have exclusive jurisdiction over private actions filed under section 227 with the sole exception of a Seventh Circuit ruling that because the plaintiff’s claim arose out of federal law, it could be heard in a federal court.289

The FCC in its 2003 amendments to the regulations implementing the Telephone Consumer Protection Act290 and the FCC in the Supplemental Information 291 accompanying the revised regulation, made a finding that predicative dialers fall within the meaning and statutory definition of “automatic telephone dialers.”292

In response to the limitation of the use of autodialers caused by the revised regulation’s definition, the American Collectors Association (ACA) filed a petition with the FCC seeking a declaratory ruling that the restrictions on autodialers should not apply to collectors or creditors because it is the most efficient way to contact consumers and that the calls are not made for advertising or soliciting sales.

ACA argued that that collectors or creditors are trying to complete a transaction for which the consumer has already received a product or service. The ACA also noted

288 Chair King v Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997); Nicholson v Hooters of Augusta, 136 F.3d 1287 (11th Cir. 1998), reh’g granted 140 F.3d 898 (11th Cir. 1998); Foxhall Realty Law Offices v Telecomms. Premium Serv., 156 F.3d 432 (2d Cir. 1998); Erienet, Inc. v Velocity Net, 156 F.3d 513 (3rd Cir. 1998).
289 Brill v Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005).
290 47 C.R. R. § 64.1200 et seq. (2006).
that many consumers now use wireless phones as their preferred method of contact. They further argued that Congress did not intend to cover creditors attempting to collect a debt. To date the FCC has not ruled upon the petition, but its decision will have an impact on telephone debt collection practices, especially since it is sometimes difficult to know whether the call is made to a cell phone or land line.

G. Common law tort actions.

Prior to the enactment of the FDCPA and the various state debt collection regulations, persons who felt abused by the techniques employed by debt collectors relied upon traditional and sometimes developing tort theories for relief. These were generally ineffective due to the burden of proof requirements. Also, because each case was fact specific, no standards for reasonable conduct were established. Various courts recognize, as general rule, that a creditor or collector has a right to urge payment of debts, even if the methods employed result in a limited invasion of the consumer's privacy or causes mental anguish or anxiety.

With regard to calling frequency, two tort theories have traditionally been used by the plaintiff's bar: (i) intentional infliction of emotional distress and (ii) invasion of privacy.

1. Intentional infliction of emotional distress.

The issue in these cases is how far a creditor may go before exposing himself to liability. Each case seems to be fact driven. A cause of action is available under this theory for repeated telephone calls designed to inflict excessive mental distress. This involves a balancing between the collector's privilege to intrude upon a consumer's "emotional tranquility" and the obligation to respect that interest.

Generally, the plaintiff has the burden of showing that the collector's conduct was outrageous, which means conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized community." In the context of debt collection, courts recognize that attempts to collect a debt by its very nature usually cause the consumer to suffer emotional distress. Frequently, the collector intentionally seeks to create concern and worry in the consumer's mind in order to induce payment. Most creditors occupy a position of economic power over the debtor which can make him or her vulnerable to mental anguish.

Such conduct is outrageous only if it exceeds the bounds of decency. The conduct can be offensive, may be irritating, insulting or even distressing but it is not actionable and must simply be endured without resort to legal redress.\(^{295}\) Further, in the area of collections, most courts recognize that creditors have a qualified privilege to protect their economic interest. However the privilege is lost if outrageous or unreasonable means are used to collect a debt.

Most courts when addressing this tort follow the Restatement (Second) of Torts definition:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.\(^{296}\)

The Restatement clearly indicates that the conduct must be extreme and outrageous or recklessly imposing emotional distress. The Reporters’ comment to this section assists in clarifying the extent of liability in the debt collection process:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone’s feelings are hurt.\(^{297}\)

As noted above, the courts have declined to intervene if the collector is inconsiderate, unkind or if someone’s feelings are hurt. The Restatement provides examples involving debt collection which demonstrate the limits of liability.

A, a creditor, seeking to collect a debt from B, sends B a series of letters in lurid envelopes bearing a picture of lightning about to strike, in which A repeatedly threatens suit without bringing it, reviles B as a deadbeat, a dishonest man, and a

\(^{295}\) Id at 1129, 672.
\(^{296}\) Restatement (Second) of Torts § 46 (2006).
\(^{297}\) Id. at cmt. d.
criminal, and threatens to garnish his wages, to bother his employer so much that
B will be discharged, and to "tie B up tight as a drum" if he does not pay. B
suffers severe emotional distress. A is subject to liability to B.

A, a creditor, seeking to collect a debt, calls on B and demands payment in a rude
and insolent manner. When B says that he cannot pay, A calls B a deadbeat, and
says that he will never trust B again. A's conduct, although insulting, is not so
extreme or outrageous as to make A liable to B.298

While not stated in the Restatement, a reasonable test is applied by most courts to
determine whether the infliction of emotional distress is actionable. Thus, before the
plaintiff will be protected from mental distress caused by a creditor's "unreasonable"
conduct, it must be shown that the consumer does in fact fear the economic power of the
creditor. The plaintiff must submit evidence to show that the conduct is unreasonable or
that the plaintiff is in a unique, vulnerable position. These are cases with unusually bad
facts known to the collector which causes the plaintiff mental distress that invokes the
courts sympathy such as: the plaintiff has a heart condition,299 hypertension,300 old age
and poor health,301 is a young child,302 is a woman in the advance state of pregnancy,303 a
woman who can not read,304 or a person who can not speak English.305 The courts require
collectors to respect these conditions.

However, in a case where the creditor calls the consumer on a regular basis
concerning the debt, on several occasions more than once a day, and occasionally at
work, the consumer argued that the creditor's action were unreasonable. The Eighth
Circuit, applying Iowa law, ruled that the "an action for emotional distress lies only
where defendant acts willfully or maliciously.,,306 The court rejected applying the
reasonableness test to this tort.

On the other hand, a district court in Minnesota upheld a jury special verdict
finding that a violation of one or more subdivisions of 15 U.S.C. § 1692d (1), (5) and (6)
could serve as a basis for the finding of intentional infliction of emotional distress.
Plaintiff received six calls from the collection agency during which the creditor called
him a deadbeat and made various threats. The wife received four calls and in one instance
she hung-up and the collector immediately called back. Plaintiff testified that he found

298 Id at cmt. e, illus. 7 and 8.
300 Clark v. Associated Retail Credit Men of Washington, D.C., 105 F.2d 62 (D.C. Cir. 1939).
304 United Fin. & Thrift Corp. v. Smith, 387 S.W.2d 752 (Tex. Civ. App. — Tyler 1965, writ ref'd n.r.e.).
the collector's conduct irritating, insulting, and threatening and that the calls angered him to the point of causing migraines, ulcers and spastic bowel syndrome.

The trial court's instruction to the jury was based upon the Restatement (Second) of Torts § 46 definition of intentional infliction of emotional distress. The Court of Appeals in upholding the verdict for the plaintiff relied upon Comment e to the Restatement which allows recovery if the "collecting creditors have been held liable for extreme abuse of their position." 307

In a recent Texas Supreme Court case involving a commercial transaction, the court reversed a jury verdict for the plaintiff and found that telephone calls by the plaintiff trying to enforce an obligation,

(i) were persistent and often insensitive but never excessive on any one day and always business related,
(ii) never physically threatened the plaintiff or otherwise made threats unrelated to the business contract,
(iii) never subjected the plaintiff to severe verbal abuse by using vulgar or obscene language even though phone calls were unquestionably insensitive, and
(iv) always had a tone that was rude and curt.

Such conduct generally does not rise to the level of extreme and outrageous conduct. 308 In dicta, the Texas Supreme Court noted that:

[O]ccasional malicious and abusive incidents must often be tolerated in our society, once conduct such as that shown here becomes a regular pattern of behavior and continues despite the victim's objection and attempt to remedy the situation, it can no longer be tolerated. 309

2. Invasion of Privacy.

The Restatement (Second) of Torts also addresses invasions of a person's privacy. The Restatement provides:

One, who intentionally intrudes, physically or otherwise, upon the solitude of another or his private affairs or concerns, is subject to liability to the other for

309 Id. at 715.
invasion of his privacy, if the intrusion would be highly offensive to a reasonable man.\footnote{Restatement (Second) of Torts § 628B. (2006).}

In the debt collection context, two illustrations provided by the Reporter are useful. First, Comment b to this Restatement indicates that the invasion can be an unreasonable intrusion into the place the plaintiff has secluded himself. To illustrate this point the following example provides:

A, a professional photographer, seeking to promote his business, telephones B, a lady of social prominence, every day for a month, insisting that she come to his studio and be photographed. The calls are made at meal times, late at night and other inconvenient times, and A ignores B’s request to desist. A has invaded B’s privacy.\footnote{Id. at cmt. b, illus.5.}

In this illustration there is not a contractual or business relationship between the parties. The law therefore is more solicitous as to an individual’s right to be left alone. In reviewing the case law, courts readily impose liability for invasion of privacy if a collector continually calls a party not liable upon the debt or an employer. The Kansas Supreme Court, following the Restatement, found that if the conduct involved would be highly offensive to a reasonable man, then an invasion of privacy has occurred.\footnote{Froelich v. Adair, 213 Kan. 357, 358, 516 P.2d 993, 995 (1973).}

Second, with regard to debt collection and other instances in which contractual obligations exist between the parties, a privilege is recognized to invade the person’s privacy. The consumer’s right to be left alone is qualified by the rights of others. Comment d of the Restatement notes that there is no liability “unless the interference with the plaintiff’s seclusion is a substantial one.”

In the Restatement a creditor would not be liable for knocking on a consumer’s door, or calling him to the telephone “on one occasion or even two or three, to demand payment of a debt.” However, the creditor crosses the line when calls are repeated “with such persistence and frequency as to amount to a course of hounding the plaintiff.” Then, the collector has become “a substantial burden” to the consumer’s existence and “his privacy is invaded.” The Reporter provides an illustration to demonstrate that a consumer’s right to be left alone is qualified by the rights of others.

A, a landlord, calls upon B, his tenant, at nine o’clock on Sunday morning, to demand payment of the rent, although he knows that B is not ready to pay it and that B objects to such a visit on Sunday. B is seriously annoyed. This is not an invasion of B’s privacy.\footnote{Id. at cmt. d, illus.8.}
The right to privacy was established by the Ohio Supreme Court in the often cited debt collection case of *Housh v. Peth*. The syllabus in *Housh v. Peth* has been cited and relied upon by many state and federal courts in deciding whether creditors' actions create a cause of action for invasion of privacy. The syllabus of that case states as follows:

1. The right of privacy is the right of a person to be left alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.

2. An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

3. A creditor has a right to take reasonable action to pursue his debtor and persuade payment.

4. Such action is not reasonable where a creditor or his representative initiates a campaign to harass and torment the debtor, telephones the debtor six or eight times every day at her home and place of employment -- some of the calls as late as 11:45 p.m. -- over a period of three weeks, telephones the debtor's superiors and informs them of the debt, and calls the debtor at her place of employment three times within a period of 15 minutes with a resultant threat of loss of employment.

When a consumer accepts a loan proceeds, the consumer impliedly consents to the creditor taking reasonable actions to collect the loan even though it might result in an invasion of privacy. The consumer's right to privacy is subject to the creditor's right to collect a debt. However, relying upon *Housh v. Peth*, the Supreme Court of Alabama found that a bank "far exceeded the bounds of reasonableness" in its efforts to collect a debt by making twenty-eight to thirty-five phone calls to the consumer's home and place of employment. The court further found that these collection tactics were part of a "systematic campaign of harassment," that violated the consumer's privacy rights.

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314 165 Ohio St. 35, 133 N.E.2d 340 (1956).
315 Id.
In another case, an Alabama court, relying upon illustration 8 to the above
Restatement, found that a jury was correct in awarding compensatory and punitive
damages when a collection agency made about 70 telephone calls during a ten month
period. The consumer worked until midnight and usually slept until about 10 a.m. Over
her protests, the collection agency employees repeatedly called her home at 7:00 a.m. or
later, awakening her. There were many calls to her place of employment, also over her
objections. The jury might have been influenced by the consumer's testimony that the
calls so upset her that they caused flashbacks to her son's suicidal attempt, which
generated hospital bills and she was unable to work for 15 to 30 minutes at her office or
had to go to bed crying at her home.319

Relying upon Housh v. Peth and the Restatement, the Maryland Court of Appeals
reversed a jury finding of invasion of privacy, finding instead "that five or six phone
calls to the Appellee, and two or three to her parents (who actually signed the note), over
a period of eleven months, did not constitute a pattern of harassment." Because it was
"unaccompanied by any degree of persistency" and occurred over eleven months,320 the
court did not find the following language used by the collector objectionable: "You can
be put in jail for this"; and on another occasion, "We have a way of getting our money
and it will ruin your reputation," and you "could lose your job."

Relying on Comment d to the Restatement, the Missouri Supreme Court found
that a series of calls over several months, totaling six or eight from the collector was not
an invasion of privacy. After the plaintiff told the first caller she worked at night, she
received three to five more afternoon calls. Each call awakened plaintiff and caused her
to lose between two and three hours sleep. All of the calls were made to plaintiff's home
and received between 10:00 a.m. and 5:00 p.m. She testified that the collectors were
always polite and courteous. The court found that this activity could not be "found
highly offensive to the ordinary person or to constitute 'hounding.'"321

In King v. Cashland, Inc., a creditor included in loan documents a provision that
the consumer waived "any right of privacy against Cashland." The Ohio Court of
Appeals relying on Housh v. Peth, found the waiver "repugnant to public policy, and
therefore unenforceable."322

An invasion of privacy as established by the Restatement only comes into play
when unreasonable action is taken which the collector could foresee would probably
result in extreme mental anguish, embarrassment, humiliation or mental suffering.
However, as noted by the Supreme Court of Florida in adopting the doctrine, it applies to
a person of:

321 Sofka v. Thai, 662 S.W.2d 503, 510–511 (Mo. 1983).
“ordinary sensibilities,” and “cannot extend to supersensitive or agoraphobia. In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant....”

The right to privacy is not intended to curtail legitimate collection practices but makes oppressive conduct equating unlawful intimidation actionable.

In conclusion, in deciding whether a creditor or debt collector’s actions are an impermissible invasion of privacy under the restatement or statutory provision, several factors are examined by a court when making such a determination: the context of the calls, the content and purpose of the call, and how many and how often the calls were made.

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323 Cason v. Baskin, 155 Fla. 198, 217, 20 So.2d 243, 251 (1944).