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THE FAIR DEBT COLLECTION PRACTICES ACT

I. What is the FDCPA

In the late-1970's Congress reacted to a national problem. Some debt collectors allegedly used vile language, threats, and unscrupulous means to collect debts. Most did not. Congress wanted to protect debtors from harsh collection techniques. There was evidence the techniques of some debt collectors were causing mental and physical problems, marital instability, and loss of employment. Congress also wanted level the playing field among debt collectors so that the collectors who dealt with debtors humanely were not unfairly disadvantaged. In response, Congress enacted the FDCPA in 1977 to combat the apparent widespread abusive debt collection practices.

The FDCPA states: "There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."

The stated purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."

II. Who is subject to the FDCPA?

The FDCPA applies to persons who are attempting to collect a debt owed to **another**. A company collecting its own debts is not subject to the FDCPA. Whether right or wrong, the drafters of the FDCPA reasoned a company dealing directly with its clients would have sufficient business motivations to prohibit abusive or harassing conduct. Third-party debt collectors were primarily responsible for the deceptive and unfair tactics addressed by the FDCPA.

There is an exception to the above rule if the debt collector and creditor are related through common ownership. Section 1692(a)(6)(b) provides that a person collecting a debt owed to another, both of whom are related by common ownership or affiliated by corporate control, is not controlled by the FDCPA so long as 1) the entity only collects for the affiliated company; and, 2) debt collection is not the entity's principle business.

Similarly, a third-party debt collector must "regularly" attempt to collect debts. Whether one "regularly collects debts" is a subjective standard. In other words, though the FDCPA will not apply unless you regularly collect debts, you may still "regularly" collect debts even if the majority of your work is not debt collection.

Both performing and non-performing debt are frequently sold between creditors and lending institutions. If a debt is assigned before default, the purchasing party is not a debt collector as defined in the FDCPA. If the debt is purchased after default, the buyer may be subject to the FDCPA, but will also likely have the same remedies available as the original creditor, such as arbitration.

The FDCPA also applies to attorneys. The original version of the Act excluded lawyers who engaged in debt collection activities. This exception nearly swallowed the rule. Lawyers collecting debt were not bound by the confines of the FDCPA which instantly created a competitive disparity. This exclusion was written out of the Act in 1986.

III. What debt does the FDCPA apply to?

To fall within the provisions of the FDCPA, the collector must be covered as well as the debt itself. The FDCPA applies only to consumer debt. Business debts are not covered. A consumer debt is one that arises from a transaction primarily for personal, family, or household purposes. It does not have to involve the extension of credit. The FDCPA has been applied to debts arising from rent payments, water bills, and bad checks. *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *Charles v. Lundgren & Associates*, 119 F.3d 739 (9th Cir. 1997); *Snow v. Jesse L. Riddle, P.C.*, 143 F.3d 1350 (10th Cir. 1998); *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998); *Romea v. Heiberger & Associates*, 163 F.3d 111 (2d Cir. 1998); *Ryan v. Wexler & Wexler*, 113 F.3d 922 (11th Cir. 1997); *Brown v. Budget Rent-a-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997); *Newman v. Boehm, Pearstein & Bright, Ltd.*, 1998 F.3d. 477 (7th Cir. 1997); *Pollice v. National Tax Funding, L.P.*, 225 F.3d 385 (5th Cir. 2002).

IV. The Prohibitions of the FDCPA

The FDCPA prohibits harassing, abusive, false, misleading communications as well as unfair collection practices.

a. Communication in general: 1692c

As an initial matter, the FDCPA prohibits communication with a debtor at any unusual or inconvenient time. Absent permission from the debtor, it is assumed that contact before 8:00 a.m. or after 9:00 p.m. local time for the debtor is necessarily inconvenient. 15 U.S.C. §1692c(a)(1). A question arises if the collector calls the debtor's cell phone. What if the collector calls the debtor at 8:52 central standard time, but the debtor is in Atlanta on business? Has the collector violated the FDCPA? If so, does the collector have any defenses? Communication also cannot happen at an unusual place such as the debtor's place of employment **if** the collector knows or has reason to know the employer prohibits such communications. 15 U.S.C. §1692c(a)(3). The same questions involving cell phones apply if the debtor is at work or uses a company issued cell phone.

The FDCPA also prohibits third-party communication. While a debt collector is allowed to speak to third parties in an effort to locate the debtor, the caller cannot state the person owes a debt or that the caller is in the debt collection business. 15 U.S.C. §1692c(b); *see also West v. Costen*, 558 F.Supp. 564 (W.D. Va. 1983); 15 U.S.C. §1692a(7)(*defining* location information as place of abode, telephone number, and place of employment). Accordingly, there can be no communication with a third party about the debt other than with the creditor, a credit reporting agency, or with counsel for either the consumer, the creditor, or debt collector.

What if the debt collector calls the third party and asks the third party to have the debtor return the debt collector's call without disclosing that the call is from a debt collector or concerning a debt? There is a dispute among district courts whether this amounts to communication regarding the debt. In years past, courts almost exclusively found leaving a message with a third party regardless of what the message entailed amounted to communication about a debt. The courts reasoned why else would the debt collector leave contact information and request a return phone call other than the collection of a debt. The tide seems to be turning and the courts are softening their stance finding leaving a return-call message does not explicitly or implicitly imply the collection of a debt.

Consider the case of *Evankavitch v. Green Tree Servicing, LLC,* 2013 WL 5719253 (Oct. 21, 2013, M.D. Pa.). In its efforts to collect the debt, defendant telephoned both plaintiff's daughter and Robert Heim, plaintiff's neighbor. Defendant telephone Heim and left a message. The message was a request for plaintiff to return defendant's call. Defendant did not inform Heim that it was a debt collector. Heim gave the message to plaintiff. The complaint alleged defendant violated § 1692(c)(b) of the FDCPA by asking a third party (Heim) to have a consumer return the debt collector's call.

The court found it was undisputed that in addition to obtaining location information, the debt collector left messages with a third party and requested the third party to ask the debtor to return the call. The court found that this alone did not violate the FDCPA because it did not disclose the debt.

The court focused on whether the voice mail messages constituted communications under the statute. The court noted the content of the messages must be examined. This is a very fact intensive analysis. As the court explained, "words matter in this instance. The words of the voice mails and the words of the statutory definition of a communication." The court concluded the transcripts of the voice mails demonstrated that they conveyed no information regarding a debt. The statutory definition does not include messages or communications that do not impart or are not at least intended to impart information about a debt.

What if the collector leaves a message on the debtor's answering machine that is overheard by a third party? In *Leahey v. Franklin Collection Service, Inc.*, 2010 WL 5279831 (N.D. Ala. Feb. 4, 2010), the collector left the following message:

> This message is for [ ]. If you are not [ ] or their spouse, please delete this message. If you are [ ] or their spouse, please continue to listen to this message. By continuing to listen to this message, you acknowledge that you are the right party. You should not listen to this message so that other people can hear it, as it contains personal and private in-formation. There will be a three second pause in

> the message to allow you to listen to the message in private. (Pause.) My name is John Carter. I am a debt collector with FCSI. This is an attempt to collect a debt, and any information will be used for that purpose. It is important that you return my call at 1-866-550-8949. Again, that's 1-866-550-8949.

The plaintiff was in his bedroom, and his friend was in the living room and heard the message.

The collector argued its message harmonized three potentially competing provisions of the FDCPA: §§ 1692d(6), 1692e(11), and 1692c(b). Under § 1692d(6), a debt collector is prohibited from "the placement of telephone calls without meaningful disclosure of the caller's identity." Section 1692e(11) provides further explanation of the type of disclosures required, prohibiting "[t]he failure to disclose [in the initial oral communication with the consumer] that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose . . . ." This provision is commonly referred to as the "Mini-Miranda" warning. Section 1692c(b), by contrast, regulates to whom disclosures may be made and states in relevant part:

> [W]ithout the prior consent of the consumer given directly to the debt collector, . . . 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.

The court found the collector disclosed the debt to a third party despite the admonition to cease listening if not the debtor and despite the call was made to the plaintiff's home phone number. "The Court is aware that this ruling will make it difficult, though perhaps not impossible, for debt collectors to comply with all of §§ 16992c(b), 1692d(6), and 1692e(11) at once in a message left on the consumer's voice mail. However, we . . . find no reason that a debt collector has an entitlement to use this particular method of communication. Debt collectors have other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone." Id. at 1344. *See also Foti v. NCO Financial Sys., Inc.*, 424 F.Supp.2d 643, 659–60 (S.D.N.Y. 2006)(*rejecting* argument in case involving pre-recorded messages that defendant was presented with a "Hobson's Choice" of complying either with the disclosure requirements or the prohibition on third-party communications, and concluding the court had no obligation to harmonize the law to permit debt collectors to employ a risky method of communication).

The court also found a third party, or the debtor in the presence of a third party, who continues to listen to the message in spite of the warning does not qualify as prior consent directly to the debt collector as required by § 1692c(b). *Id. see also F.T.C. v. Check Enforcement*, 2005 WL 1677480, at *8 (D.N.J. July 18, 2005)(*concluding* collectors engaged in prohibited communications with third parties by leaving messages on home answering machines that were overheard by third parties).

Once the debtor retains a lawyer, the debt collector is required to communicate only with debtor's counsel. This is true so long as the debt collector has the contact information for the lawyer **or** can reasonably obtain it. Telling the collector "I have an attorney" is insufficient. If the debtor's lawyer fails to reply to the debt collector in a reasonable amount of time, however, communication with the debtor can resume. Keep in mind two potential pitfalls when a debt collector is advised that a debtor has retained counsel to file bankruptcy. Not only could subsequent contact with the debtor violate the FDCPA, but the same conduct could constitute a violation of the bankruptcy automatic stay.

If the debtor is unrepresented, the FDCPA allows the debt collector to continue calling and writing the debtor until the debtor advises **in writing** that he refuses to pay the debt or that he wishes no further communication. A debt collector in receipt of a written cease and desist has little option other than to file suit or give up on the debt. Depending on the amount of the debt, it may not be worth initiating litigation. Nonetheless, a debtor who does not want to get sued may not wish to restrict the collector's options. Also keep in mind that the debt collector can still credit report the account as delinquent.

A consumer must not be ambiguous when he notifies the collector to cease communicating. In *Shrestha v. State Credit Adjustment Bureau, Inc*., the consumer conveyed his wishes by stating: "I would be ever grateful to you, if you please do not take any action against me. I would appreciate if you please write me with your advice or give me a call." The court deemed this meek request insufficient to invoke the right to stop communication.

b. What is Harassment or Abuse under 1692d?

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

Assuming the caller is a "debt collector" calling about a "consumer debt" at a time and place not known to be "inconvenient" as defined in the act, the FDCPA still prohibits any conduct which is false, deceptive, or abusive. Section 1692(d) itemizes a non-exclusive list of harassing conduct which includes the threat of violence or any criminal means to harm the consumer physically, or the threat of any harm to the consumer's reputation; profane or obscene language; causing the phone to ring repeatedly or engaging in continuous conversations to annoy or harass the consumer; and calling without a meaningful disclosure of the caller's identify. Nonetheless, **any** conduct, the natural consequence of which is to harass, will violate the FDCPA.

A practical application concerns §1692(c) which prohibits contact with a debtor at the time or place known to be inconvenient, and §1692(d) which prohibits conduct to the natural consequence of which is to harass. If the debtor advises orally she has no intention or ability to pay the debt, or advises orally she does not want any more communication, would a subsequent phone call necessarily violate §1692(c) or §1692(d)? Knowing the debtor has no ability or desire to pay, and knowing the debtor wants no more contact, what possible purpose could a subsequent phone call serve other than to harass or annoy? If the debt collector believes the debtor is lying, why not file suit. In other words, though a written cease and desist is necessary to eliminate future contact, a debt collector may have a hard time articulating his decision to maintain contact under these circumstances.

Can the number or frequency of calls amount to harassment under § 1692(d)? Consider *Meadows v. Franklin Collection Service, Inc.*, 2011 WL 479997 (11th Cir. Feb. 11, 2011). Meadows did not owe any of the debts that were the subject of the telephone calls at issue in this case. The calls concerned the collection of debts owed by Meadows' daughter and by the family that previously owned Meadows' telephone number.

From May 2006 until March 2009, Franklin called Meadows' residence multiple times per week regarding either the debts. Meadows testified she received about 300 calls over a two and a half year period regarding the debts. Meadows received up to three calls a day.

Meadows informed Franklin the debts were not hers in May 2006, yet Franklin continued to call until March 2009. Meadows testified the phone calls eventually made her feel harassed, stressed, upset, aggravated, inconvenienced, frustrated, shaken up, intimidated, and threatened on occasion. Several times the calls woke her up from sleep and caused her difficulty sleeping. Considering the volume and frequency of the calls, Meadows' testimony that she informed Franklin the debts were not her own, and Meadows' testimony regarding the emotional stress caused by the calls, the court found there is a genuine issue of material fact as to whether Franklin caused Meadows' telephone to ring with the intent to annoy or harass her.

The court rejected Franklin's contention that its telephone calls were not harassing because Meadows did not answer them. The plain language of § 1692d prohibits "causing a telephone to ring . . . with intent to annoy, abuse or harass any person at the called number." According to the court, the Act recognizes answering the phone is not necessary for there to be harassment. A ringing telephone, even if screened and unanswered, can be harassing, especially if it rings on a consistent basis over a prolonged period of time and concerns debts that one does not owe. As Meadows testified, even though she did not answer every call, she had to stop whatever she was doing to see who was calling. The reason Meadows did not answer the calls was because she had previously told Franklin multiple times she did not owe the debt and the debtors did not live with her. The court found this evidence sufficient to deny Franklin's motion for summary judgment on the Plaintiff's count of harassment.

c. What is false and misleading communication under 1692e?

Section 1692(e) of the Act prohibits false and misleading misrepresentations. Again, though the drafters of the FDCPA set forward many specific examples of false and misleading misrepresentations, the list is by no means exhaustive. These representations include leading the debtor to believe the collector is affiliated with the United States Government, misrepresenting the amount or legal status of the debt, misleading the debtor to believe you are a lawyer, implying that non-payment will result in an arrest, and the threat to take any action that cannot legally be taken.

This last statement includes threatening to file suit that is time barred, garnishing wages without securing a judgment, taking the debtor's home, and charging fees without a contractual right to do so.

It is also deceptive for the debt collector to fail to disclose in the initial written communication with the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. This is the infamous mini-Miranda warning. If the initial contact with the debtor is oral, this information must be provided not only in the initial phone call, but again in the initial written communication. The mini-Miranda need not be provided if the initial communication is in the form of a legal complaint. All subsequent communications must also disclose that the communication is from a debt collector.

What if the initial communication is returned undelivered? The FDCPA does not require the debtor receive the initial written communication. It requires only the debt collector **send** it. Nonetheless, the debt collector cannot circumvent the purpose of the statute by sending the notice to an address known to be incorrect. However, what if the debt is for a broken apartment lease and the only address the debt collector has is the debtor's apartment address? The collector knows the debtor no longer resides at that address. Does the collector violate the FDCPA by sending the initial correspondence to that address if that is the only address he has for the debtor? Oftentimes the rental application requests the resident's emergency contact and employer. Does the collector violate the FDCPA by sending the initial correspondence to the debtor's emergency contact or employer? If and when the debt collector obtains a valid address for the debtor, the initial notice should be resent.

d. What constitutes unfair practices under 1692f?

Section 1692f of the Act prohibits unfair practices in the collection of debt. This section concerns primarily the regulations pertaining to charges, processing checks, and repossession. A frequently litigated aspect of §1692f is the prohibition against collecting or charging any fees, penalties, or amounts not expressly authorized by the agreement creating the debt or otherwise permitted by law. Accordingly, the debt collection company cannot charge convenience fees, expenses, or other penalties. All fees must be contractually allowed and/or authorized by statute.

This section also requires a lawyer engaged in the debt collection practice to have "meaningful attorney involvement" with the particular account. No communication with a debtor can falsely state or imply it is from an attorney. Because so many law firms engage in debt collection and because debt collection is a volume business, a debtor will frequently receive correspondence on attorney letterhead when no attorney has been involved. This conduct violates the FDCPA unless the letter itself is not misleading.

The FDCPA was never designed to allow a lawyer to sell his letterhead to a collection company. The courts recognize debt collection companies can add undue or misleading legitimacy to their correspondences if it appears to come from an attorney. A letter from a lawyer "connote[s] that a real attorney, acting like an attorney, has considered the debtor's file and concluded in his professional judgment that the debtor is a candidate for legal action. Using the attorney language conveys authority, instills in the debtor, and escalates the consequences." *U.S. v. National Financial Services, Inc.*, 98 F.3d 131, 137 (4th Cir. 1996). To avoid the misleading implication that a lawyer has reviewed the file when one has not, communications from attorneys engaged in the debt collection industry must at least have disclaiming language within the correspondence that no lawyer has yet reviewed the case or made a decision regarding the account. The disclaimer must be **clear, prominent, and conspicuous.**

The question becomes: What is clear, prominent, and conspicuous? Consider *Gonzalez v. Law Offices of Mitchell N. Kay*, 577 F.3d 600 (5th Cir. 2009). The debtor received the following correspondence:

> Please be advised that your account, as referenced above, is being handled by this office. We have been authorized to offer you the opportunity to settle this account with a lump sum payment, equal to 65% of the balance due-which is $291.83!
>
> Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice, this office will: Obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification.
>
> If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

After a large white blank space, the bottom of the letter directed the debtor to "PLEASE ADDRESS ALL PAYMENTS TO" the "Law Offices of Mitchell N. Kay, P.C." Immediately below the payment information, the letter states, "Notice: Please see reverse side for important information." A box surrounds this notice. Below the notice box is a detachable payment stub.

> On the back, the letter stated, in the same font and typeface as the text on the front: This communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose.
>
> Notice about Electronic Check Conversion: Sending an eligible check with this payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount shown on the check-as soon as the same day we receive the check-and the check will be destroyed.
>
> *At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.*

(*emphasis added*).

Kay and the Kay Law Firm asserted the "disclaimer" language is sufficient to notify debtors that lawyers were not involved in the collection of the debt.

The court announced sound policy reasons for the FDCPA's prohibition on a debt collector sending a collection letter that is seemingly from an attorney:

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

Id. (*quoting Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996)). A letter from a lawyer implies the lawyer is involved in the debt collection process. The inherent intimidation stemming from the fear of a lawsuit unfairly motivates debtors to pay and otherwise ignore whatever rights they may have. A lawyer acting as a debt collector only must notify the consumer, through a clear and prominent disclaimer in the letter, that the lawyer is wearing a "debt collector" hat and not a "lawyer" hat when sending out the letter. *Id. see also Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 361–62 (2d Cir.2005).

Some letters are not deceptive as a matter of law based on the language and placement of a disclaimer. The *Greco* court found the following language placed on the front of the letter acceptable:

> At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.

See also Miller v. Wolpoff & Abramson, L.L.P., 471 F.Supp.2d 243, 248 (E.D.N.Y.2007) (*noting* a lawyer need not show "meaningful involvement" to avoid liability for sending a letter if "a debt collection letter is signed by an attorney but includes a disclaimer about the extent to which attorneys are involved in reviewing individual debtors' cases"); *Pujol v. Universal Fid. Corp.*, 2004 WL 1278163, at *5 (E.D.N.Y. June 9, 2004)(*dismissing* case because the least sophisticated consumer would not believe the attorney had individually reviewed the file given the language in the letter stating, "I have not, nor will I, review each detail of your account status, unless you so request").

Sitting at the other end of the spectrum are deceptive and misleading letters that violate the FDCPA as a matter of law because they do not contain any disclaimer regarding the attorney's lack of involvement. *Gonzalez*, 577 F.3d at 603; *see e.g. Martsolf v. JBC Legal Group, P.C.*, 2008 WL 275719, at *10 (M.D. Pa. Jan. 30, 2008) (*finding* liability under the FDCPA because the letter did not include a disclaimer stating no attorney had personally reviewed the debt); *Navarro v. Eskanos & Adler*, 2007 WL 549904, at *6 (N.D. Cal. Feb.20, 2007) (*denying* summary judgment because the letter contained no disclaimer of an attorney's involvement).

Located in the grey area are letters with contradictory messages. *Gonzalez*, 577 F.3d at 603. A grey area includes a letter printed on a law firm's letterhead which makes repeated references to a law firm, but also states it is from a debt collector and signed by an unnamed "Account Representative." *Id. see also Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 440–41 (6th Cir. 2008); *Rosenau v. Unifund Corp.*, 539 F.3d 218, 223–24 (3d Cir. 2008)(*finding* letter could mislead the least sophisticated debtor because it referenced the collector's "Legal Department"). Another grey area is a letter such as this that places the disclaimer on the back of the correspondence. *Gonzalez,* 577 F.3d at 604. A disclaimer on the back of a letter completely contradicts the message on the front of the letter that the creditor had retained the Kay Law Firm and its lawyers to collect the debt. *Id. see also Brazier v. Law Offices of Mitchell N. Kay, P.C.,* 2009 WL 764161, at *3 (M.D. Fla. Mar. 19, 2009)(*finding* use of law firm's letterhead and the placement of the disclaimer on the back made the question of whether the letter was deceptive a factual dispute for the jury to decide.)

V. Least Sophisticated Consumer Standard

Courts employ the "least sophisticated consumer" standard in determining whether a collector has violated the FDCPA. *Sparks v. Phillips & Cohen Assoc., LTD*, 641 F.Supp.2d 1234 (S.D. Ala. 2008). The standard asks whether the "least sophisticated consumer" would have been deceived or misled by the conduct at issue. *Id. see also Jeter v. Credit Bureau, Inc.,* 760 F.2d 1168, 1172–75 (11th Cir. 1985). Claims should be viewed from the perspective of a consumer whose circumstances make him relatively more susceptible to harassment, oppression, or abuse." *Jeter*, 760 F.2d at 1179.

The least sophisticated standard is an objective one. *See e.g. David v. FMS Services,* 475 F.Supp.2d 447, 449 (S.D.N.Y. 2007). Does the debtor's education or profession matter? What if the debtor is an attorney who defends FDCPA claims? The *Sparks* court found the debtor's profession and education level irrelevant. In *Sparks* the debtor was a lawyer yet, because the communication could have confused society's least sophisticated, it violated the FDCPA.

VI. The Debtor's Right to Dispute the Debt.

By law, the collector shall provide the debtor specific information regarding the debt within five days of the initial communication. This information must contain the following advisements:

1. The amount of the debt;
2. The identity of the creditor to whom the debt is owed;
3. A statement the debt will be assumed valid by the collector unless the debtor disputes the debt within 30 days of receipt of the notice;
4. Advise the debtor the debt collector will obtain verification of the debt or a copy of a judgment against the consumer, and a copy of such verificationor judgment will be mailed to the consumer by the debt collector if disputed **in writing** within 30 days; and,
5. Upon written request, the collector will provide the name of the original creditor.

Once the debt is disputed per §1692g, the collector must cease collection of the debt until verification of the debt is obtained and mailed to the debtor. The FDCPA allows, however, the collection of the debt during the initial 30 day period as long as it is not disputed in writing. If disputed, the debt collector can comply with the FDCPA simply by ceasing the debt collection process. Verification need never be sent if the debt collector does not continue to collect the account. Furthermore, failing to dispute the debt allows the collector to assume the validity of the indebtedness, but it is not an admission that the debtor is liable on the account.

Debt collectors know the initial collection period (the first 30 to 60 days) is the most lucrative timeframe for collecting a debt, especially if the collector is the first third-party to attempt collection. The collector must use pressing language to persuade the debtor to pay and paint a sense of urgency. Does a debt collector violate the FDCPA by using such language during the first thirty days of collection? How can collectors balance the need of urgency with presenting the debtor with his right to dispute?

In *Renick v. Dun & Bradstreet Receivable Management Services*, 290 F.3d 1055 (9th Cir 2002), the initial notice informed the debtor he had the right to dispute the validity of the debt within thirty days. Twenty days later, however, the collector sent a second notice. On the front, it asked the debtor to "[u]se the tear-off portion of this letter . . . to send your payment today." The reverse side provided the validation information required by the FDCPA, and stated that "PROMPT PAYMENT IS REQUESTED."

The debtor sued alleging the second notice violated the FDCPA because it confused him. He argued the second notice misled him into abandoning his statutory right to contest the validity of the debt within thirty days from the first notice because it came within twenty days after the first collection notice, and it requested "prompt" payment and payment "today."

The court considered whether the second notice overshadowed the first notice. The court found the second collection notice did not violate the validation provision of the FDCPA because the "please pay now" language was in the same font as the surrounding text, it was not emphasized in any other way, it was in the nature of a request rather than a demand, and it carried no sense of urgency. The request, therefore, did not overshadow the language in the notice that the alleged debtor has thirty days in which to dispute the debt and did not convey a threat to the debtor or induce him to ignore his rights.

VII. Legal Remedies and Damages under the FDCPA

The FDCPA is a strict liability statute. Innocent violations are as punishable as a purposeful violation. In addition to the claims per the FDCPA, there are a variety of state law claims routinely alleged, including invasion of privacy, negligent hiring, training and supervision, and outrage. These state law claims will be addressed in detail below.

A violation of the FDCPA is punishable by statutory damages up to $1,000.00. If suit is filed for multiple violations the maximum statutory recovery remains $1,000.00. The court or jury may award less. The fact finder is to consider the frequency, persistence, and nature of the violation in assessing damages, as well as whether the violation was intentional. Culpability is relevant only to compute damages not to determine liability.

The FDCPA also provides that debt collectors who fail to comply with the Act are, in the case of class actions, liable to all class members for the lesser of $500,000 or 1% of the net worth of the debt collector. 15 U.S.C. § 1692k(a)(2)(B). Net worth is not defined by the FDCPA and only one court has definitely addressed its meaning. According to *Sanders v. Jackson*, 209 F.3d 998 (7th Cir. 2000), net worth means "book value net worth" or the collection agency's assets minus its liabilities without factoring in the agency's goodwill.

The plaintiff is also entitled to recover actual damages. Actual damages have been ruled to include out-of-pocket expenses, increase in interest payments, lost credit opportunities, or any other provable loss. Emotional distress is also recoverable under the FDCPA as "actual damages." This is true even if there is no accompanying out-of-pocket loss. The standard to recover for emotional distress is not well defined. While some circuits hold the plaintiff must meet the evidentiary standard to recover for the intentional infliction of emotional distress, Alabama courts are silent on this issue. **Punitive damages are not allowed under the FDCPA.**

The incentive to bring FDCPA actions lies in the fact the prevailing party is entitled to recover attorney fees. The reasonableness of the fee is subject to a loadstar analysis, but is not subject to limitation based on the amount of the recovery for the plaintiff. Because the actual and statutory damages suffered in these cases are routinely very small, it would thwart the legislative purpose if lawyers refused to prosecute FDCPA violations if their fees were reduced in proportion to the judgment.

FDCPA claims are routinely settled for the statutory amount plus some for actual damages with attorney's fees left open for court determination. If presented to the court for determination, the plaintiff bears the burden to establish his entitlement to fees and, to provide documentation of a reasonable hourly rate and reasonable expenditure of hours. Fee applicants must exercise what the Supreme Court termed "billing judgment." *ACLU of Georgia v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999)(*citing Hensley v. Eckerhart,* 461 U.S. 424, (1983). The exercise of billing judgment requires fee applicants to exclude from their fee applications excessive, redundant, or otherwise unnecessary hours, which are hours that would be unreasonable to bill one's client and, therefore, to one's adversary irrespective of the counsel's skill, reputation, or experience. *Id.* If fee applicants do not exercise billing judgment, courts are obligated to do so for them by pruning excessive, redundant, or otherwise unnecessary hours. *Id.* at 429.

The starting point in fashioning an award of fees is to calculate the "lodestar" by multiply the number of hours reasonably expended by a reasonable hourly rate. *See Dempsey v. Palisades Collection, Inc.*, 2010 WL 923473 at *2 (S.D. Ala. March 11, 2010); *see also Moton v. Nathan & Nathan, P.C.*, 297 Fed. Appx. 930, 931–32 (11th Cir. 2008). The "lodestar" requires the court to evaluate whether attorneys billed a reasonable number of hours, whether they billed reasonable hourly rates, and whether a downward adjustment of the lodestar is warranted. *Johnson v. Mutual Sav. Life Ins. Co.*, 2004 WL 3715479 (N.D. Ala. October 29, 2004). The lodestar determination does not end the inquiry. *Miller v. Kenworth of Dothan, Inc.*, 117 F.Supp.2d 1247 (M.D.Ala. 2000). Other considerations remain that may lead the district court to adjust the fee downward, including the important factor of the limited results obtained. *Id.*

The Eleventh Circuit held the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), may be applied to determine a reasonable hourly rate in the course of a lodestar analysis, and whether to adjust the lodestar downward. *Dempsey*, 2010 WL 923473 at *3. The *Johnson* factors are as follows:

> 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and, 12) awards in similar cases.

Id. (*citing Johnson*, 488 F.2d at 717–19). Moreover, counsel may not recover fees at an attorney's hourly rate for time spent performing tasks which could be performed by a paralegal or secretary, i.e. scheduling, calendaring, and file management. *Id.*

VIII. Are there any Available Defenses per the FDCPA?

The FDCPA is a strict liability statute so lack of intent is not a recognizable defense in general. The FDCPA does specifically provide for a bona fide error defense. This defense is found in 15 U.S.C. §1692k(c) and provides a debt collector may not be held liable in any action brought under the FDCPA if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. This defense can subject the debt collector to extended discovery regarding its policies and procedures.

As a general rule, "an FDCPA defendant seeking the protection of the bona fide error defense carries the burden of proving that the violation was 1) unintentional; 2) a bona fide error; and, 3) made despite the maintenance of procedures reasonably adapted to avoid the error." *Johnson v. Riddle*, 443 F.3d 723, 727–28 (10th Cir.2006). The "intent prong of the bona fide error defense is a subjective test" turning on the defendant's subjective intent to violate the FDCPA. *Id.* at 728. The "bona fide" requirement "serves to impose an objective standard of reasonableness upon the asserted unintentional violation." *Id.*

A collector's intent to violate the FDCPA can be inferred if his conduct is contrary to his employer's training manuals. *Sparks v. Phillips & Cohen Assoc., LTD*, 641 F.Supp.2d 1234 (S.D. Ala. 2008). The bona fide error defense also does not apply to mistakes of law, that is, a violation of FDCPA resulting from a debt collector's incorrect interpretation of the legal requirements of the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 130 S.Ct. 1605 (2010). However, a collector's misapplication of non-FDCPA law, such as the running of the statute of limitations, can support the bona fide error defense. *See e.g. Hare v. Hosto and Buchan, PLLC*, (S.D. Tex. March 30, 2011).

OTHER CONSUMER LAWS

OTHER CONSUMER PROTECTION LAWS AND THEIR IMPACT ON DEBT COLLECTION

The FDCPA is the most commonly litigated consumer protection law. Its lure of quasi-strict liability, statutory damages, and attorney fees attracts 'professional' consumer lawyers as well as the occasional personal injury lawyer. I have heard one seasoned consumer professional explain his fondness for consumer suits by stating: there is just no way out from under the statute. While that is not true, or at least should not be true, there are a multitude of other consumer protection laws governing debt collectors that deserve mention, and the focus of this presentation is to familiarize you with the mechanics of some of the more important. This will address not only Federal statutes of relevance, but also state law claims that frequently accompany an FDCPA claim.

The TCPA

This statute was on the books for a decade before consumer lawyers began to utilize it against debt collectors. It is almost the perfect plaintiff statute: damages are awarded without regard to the harm caused, and defenses are few and far (even described by some as being non-existent). To fully understand the scope and purpose of the TCPA you must begin not with the language itself, but with the statutory history.

The TCPA was enacted in 1991 as the Telephone Consumer Protection Act (47 U.S.C. § 227). It had a laudable goal- to restrict the ability of telemarketers to deploy automated and unsolicited phone calls using either a fax machine or an automatic dialer. Back in 1991, many of you may recall the annoyance of receiving unwanted fax solicitations from local restaurants, cell phone dealers, or local merchants. Telemarketing calls have never been welcome (and this is written by a guy who worked as a telemarketer in college). However, when telemarketers were able to reduce costs and increase volume by using recorded calls and automated dialers, these solicitations went from being unwelcome to unbearable. Thus, the TCPA has a noble origin and against this backdrop it is easy to understand why the penalties are so severe: those incurring liability would surely deserve it.

With these goals in mind, the TCPA was originally written as follows:

47 U.S.C. § 227(b),provides:

> (b) Restrictions on use of automated telephone equipment
> (1) Prohibitions
> ***It shall be unlawful*** for any person within the United States, or any person outside the United States if the recipient is within the United States
> (A) ***To make any call*** (***other than a call*** … ***made with the prior express consent of the party called***) using any ***automatic telephone dialing system or an artificial or pre-recorded voice***
> (i) to any emergency telephone line. . .

> (ii) to the telephone line. . .of a hospital …
> (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***;
> (B) ***to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice*** to deliver a message ***without the prior express consent*** of the party, ***unless the call***. . .***is exempted by rule or order*** by the Commission. . .

47 U.S.C. § 227(b). At first, this appears to hit the nail on the head. Aimed directly at automated calls, the statute prohibits those made to cell phone or landlines that deliver pre-recorded messages. Calls made with the prior express consent of the recipient are exempt from the statute. Another exception was carved out for automated calls placed by a company with a prior existing business relationship with the recipient. But, as with many statutes, the laws of unintended consequences came into effect.

The drafters seemed to understand that debt collection calls would not be impacted by the TCPA. The Notice of Proposed rule Making from the Federal Communications Commission noted that debt collection calls are presumed to be based on prior existing business relationships and thus beyond the scope of the TCPA. Moreover, calls made to collect debts are not solicitations or advertising opportunities. But the actual language of the TCPA did not make this clear. Whereas calls to residential lines were subject to exemption by the rulemaking authority of the FCC, calls to wireless phones were prohibited without any limitation other than prior express consent.

As a consequence, debt collection calls placed by an auto-dialer, even if a live person was on the other line, violated the TCPA in the absence of express consent to the call. It was no defense that the caller did not know the number was tied to a cell phone. The law created no duty to mitigate: the receiving party did not need to advise the number was a cell phone. In fact, answering the call was not a prerequisite for damages as it was the *placing* of the call that triggered liability. And now to the best part: damages:

> (1) "actual monetary loss" (**47 U.S.C. § 227(b)(3)(A)**); and/or
>
> (2) a $500 statutory damage for each violation **(47 U.S.C. § 227(b)(3)(B)**); and
>
> (3) a penalty of treble statutory damages up to $1,500 in the court's discretion where an individual plaintiff is able to establish that the defendant knowingly or willfully violated the TCPA.

(**TCPA, 47 U.S.C. § 227(b)(3)**).

Though fee-shifting is not available, the per-call calculation of damages quickly escalates, especially if the court decides the violation was 'knowing' or 'willful.' Consequently, several vendors began to provide cell-phone scrubbing services so collections can eliminate cell numbers from their pool. Creditors have done a better job providing applications and other documents that may evidence "prior express consent." Debt collectors have enacted policies and procedures to obtain consent and /or cull cell phone numbers from the accounts. But only consent is a defense. This can be difficult to prove if it is verbal (which is easy to gainsay) or if there is any ambiguity about it. For all these reasons, consumer lawyers found the TCPA to be a nice compliment to the standard FDCPA claim.

Have you violated the TCPA? Begin by answering this question: did you call a landline or a cell phone?

If a cell phone, any call placed by an automatic telephone dialing system (ATDS) OR using an artificial or pre-recorded voice is prohibited with one exception: calls placed after obtaining express consent.

At this time, consent need not be written, but it must still be clear and unambiguous. Providing your cell number as part of a business transaction qualifies as prior consent so long as the number was not provided for a specific limited purpose. This type of consent is transferrable to a third party calling for same purposes that the first party could call for, i.e, about the account or business transaction in question.

If the call is placed to a landline the regulations are different. Rather than focus on the use of an ATDS, the statute prohibits calls initiated using an artificial or pre-recorded voice to deliver a message. Prior express consent is still an exception, but a prior established business relationship (EBR) will not exempt any from the statute. However, calls that do not include unsolicited advertisements or are not made for commercial purposes are exempt. Debt calls are not solicitations or made for commercial purposes, an automatic message left by a collector should not trigger liability under the TCPA.

There is at least one case indicating a 'good faith' defense exists for TCPA violations (Chyba v. First financial Asset Management, 2013 U.S. Dist. LEXIS 165276) but it is a glaring exception. The TCPA is commonly understood to be strict liability statute. Because most courts, and in passing the FCC, seem to recognize debt calls to a residence are not a violation, the emphasis from consumer lawyers has been on calls to cells.

If you cannot demonstrate prior consent (verbal consent is enough, but that lends itself to factual disputes (i.e., no summary judgment)), the best available defense is to show you did not use an ATDS to place the call. The statute defines an ATDS as equipment having the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and, of course, to be able to dial the numbers as well. Courts have, frustratingly, focused on the word 'capacity' and interpreted it to mean a system capable of generating such calls even if it was not being used in actuality for that purpose. Courts have been encouraged to extend the concept of 'capacity' to systems that could store and produce random phone numbers if the system were to be modified or upgraded. In other words, if the phone system did not have the existing capacity to auto dial, but could be changed such that it was capable of doing so, it would be an ATDS per the statute. Courts have refused to take this second leap, but many still refuse to look at how the system was actually used when placing the offending call(s) and instead focus on how it could have been used.

Injecting some degree of human interaction is a key component to defeating TCPA liability, but a system calling numbers off a list still may violate the law. Even if an agent personally created the call list and hit the 'dial' button, the capacity of the equipment to auto-dial may render the process illegal. Decisions go both ways on this important, factually specific issue.

If prior consent is the defense, be sure the owner of the phone is the one who gave consent. A debtor cannot consent on behalf of the debtor's spouse. When relying on prior consent, keep in mind consent could be revoked. Gager v Dell Financial Services, 2013 U.S. App. LEXIS 17579 holds that the TCPA is a consumer protection statute and should be read to favor consumer rights. Hence, if a consumer purports to revoke consent to call his cell phone, common law would allow him to do so. However, the TCPA is silent on the issue and other courts have held that revocation is not allowed (Saunders v. NCO Fin. Sys., 910 F.Supp. 2d 464 (E.D.N.Y. 2012) or at least must be in writing if it concerns a debt call, to mirror the FDCPA's requirement that a cease and desist be written. Starkey v. Firstsource Advantage, 2010 U.S. Dist. LEXIS 60955.

Also note that text messages are governed by the TCPA as well. Few debt collectors opt to send text messages, but those that do must be sure either to manually dial the cell phone or else obtain prior consent.

Damages under the TCPA can be 'out-of-business' bad. The law allows for $500.00 per attempted call, and $1,500.00 per attempted call if the violation was willful or purposeful. There is no cap on damages. There is no duty to mitigate damages. Vicarious liability is available if legal agency is proven.

INTRODUCTION TO THE FAIR CREDIT REPORTING ACT

I. Purpose

In 1971, Congress enacted the Fair Credit Reporting Act ("FCRA") (15 U.S.C. § 1681, *et. sec.*), to protect both consumers and lenders from inaccurate credit reporting by providing a mechanism for improving the confidentiality and accuracy of credit reports. As explained in the statute itself, "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system."

I. **Does the FCRA Apply to Debt Collectors?**

The FCRA primarily governs "consumer reporting agencies" ("CRA"). Defined at 15 U.S.C. § 1681a(f), a CRA includes "any person which, for monetary fees, dues, or on a cooperative, non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purposes of furnishing consumer reports to third-parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." The three major CRAs are: Experian, Transunion, and Equifax.

The FCRA also governs furnishers of information. A furnisher of information is typically any organization wishing to extend credit (credit card companies, automobile lenders, mortgage company). However, other examples of information furnishers are collection agencies (third-party collectors), state or municipal courts reporting a judgment of some kind, past and present employers, and bonders.

Persons requesting information about a consumer are also governed by the FCRA. Section 1681b discusses permissible purposes of requesting consumer reports. For example, a person who intends to use the information in connection with a credit transaction may request a consumer report. Once the entity has the report, § 15 U.S.C. 1681m addresses the requirements on users of consumer reports who, for example, intend to take adverse action on the basis of information contained in consumer reports.

III. **Permissible Uses of Credit Reports?**

As you would expect, the FCRA allows consumer reports to be furnished to the consumer to whom it relates. A consumer is entitled to one free credit report per year, unless the consumer is a victim of identity theft and then other provisions allow the consumer to have greater access to his/her report. The free report can be requested by telephone, mail or through the government authorized website, annualcreditreport.com. However, the free consumer report does not include a "credit score," a number within a range of 300 to 850. The higher the number, the better your credit worthiness. The five general categories that affect a consumer's score are: payment history, amounts owed, length of credit history, new credit, and the types of credit used.

A report may also be furnished to a person who intends to use the report for credit transactions, employment purpose (certain conditions apply, such as requiring notice to the consumer, *see* 1681b(b)), underwriting insurance, eligibility for a license or other government benefit, potential investment venture, or other "legitimate business need."

To protect abuses by creditors, the FCRA imposes limitations on the information which may be contained within a consumer report. *See* 15 U.S.C. § 1681c. Another aspect of the FCRA is the amount of time negative information may remain on a consumer's credit report. Civil suits, judgments, and even arrests may stay on a consumer's credit report 7 years from the date of the delinquency. Bankruptcies may report for 10 years and tax liens report 7 years from the time they are paid. However, there are exceptions; these limitations do not apply for credit transactions of $150,000 or more if the creditor is seeking employment for a salary of $75,000 or more.

IV. Duties under the FCRA.

As mentioned, the FCRA primarily governs the duties of CRAs (Experian, TransUnion, and Equifax). Our discussion will focus instead on the duties of the furnishers of information.

Section 1681s-2 discusses the responsibilities of furnishers of information to consumer reporting agencies. Under 1681s-2(a), a furnisher of information has a duty to provide accurate information as discussed below. However, by statute, there is no private right of action for violating this section. A furnisher of information may, however, be liable for violations of section 1681s-2(b), which describes the duties of furnishers of information when such entity is notified of a dispute regarding the completeness or accuracy of the information. A consumer may bring a cause of action for failure to comply with Section 1681s-2(b). *See e.g. Brewer v. TransUnion, LLC,* 2006 U.S. Dist. LEXIS 70292, at *10 (S.D. Ala. 2006)(*denying* motion to dismiss on the grounds that plaintiff's allegations appear to state claim against the defendants under 1681s-2(b); *see also Pinckney v. SLM Financial Corp.*, 433 F. Supp. 2d 1316 (N.D. Ga., 2005).

Under Section 1681s-2(a), a "person" may not furnish information to a CRA if the person knows or has "reasonable cause" to believe the information is incorrect. "Reasonable cause" means having knowledge other than solely allegations from the consumer that would cause a reasonable person to have substantial doubts as to the accuracy of the information. Nor shall a "person" furnish information if the person has been notified by the consumer that specific information is inaccurate and the information is in fact inaccurate.

Furnishers of information also have a duty to correct and update information if they "regularly and in the ordinary course of business" furnish information to the consumer reporting agencies and they have furnished information which is not complete or accurate. If the consumer disputes the accuracy of information provided by a furnisher of information, the furnisher may not furnish the information to a CRA without notice that such information is disputed. Furnishers of information must also notify CRAs of a voluntary closure of a credit account. Keep in mind, however, that under this section, there is no private right of action for violations.

The FCRA further governs the reporting of delinquencies, identity theft, and negative information by furnishers of information such as providing notice to the consumer, in writing, within 30 days, that it is providing negative information to the CRAs. The notice must be conspicuous, but it can also be printed on the consumers regular billing statement, a notice of default, or "any other materials provided to the customer."

> Statements to Consumers:
> Notice before negative information is reported: "We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report."

> Notice after negative information is reported: "We have told a credit bureau about a late payment, missed payment or other default on your account. This information may be reflected in your credit report."

The furnisher of information has a duty to investigate disputed information. *See* 15 U.S.C. § 1681s-2(a). The consumer can submit a dispute notice directly to the furnisher of information explaining the basis for the dispute and include "all supporting documentation required by the furnisher to substantiate the basis of the dispute." At which point, the furnisher must then "conduct an investigation," review all relevant information provided by the consumer. Once the furnisher receives notice of the dispute, they are required to "'conduct a reasonable investigation of [their] records to determine whether the disputed information can be verified.'" *Brewer v. TransUnion, LLC*, 2006 U.S. Dist. LEXIS 70292, at *9 (S.D. Ala. 2006)(*quoting Johnson v. MBNA America Bank, NA,* 357 F.3d 426, 431 (4th Cir. 2004)). "Moreover, such an investigation 'requires some degree of careful inquiry by creditors.'" *Id*. at *10–11.

Section 1681s-2(b) also provides a mechanism for disputing information. This section requires that, upon receipt of a notice of dispute from a credit reporting agency, a furnisher of information is required to conduct an investigation, review relevant information provided by the credit reporting agency, report the results of the investigation, and, in the event the investigation determines that the information is either incomplete or inaccurate, report those results to all agencies to whom the furnisher reports such information. 15 U.S.C. § 1681s-2(b)(1)(A)-(D). A prerequisite for a claim under § 1681s-2(b) is that the furnisher of information receive notice of a dispute from the CRA. *See Loftin-Taylor v. Verizon Wireless*, 2006 U.S. Dist. LEXIS 83684, at *15 (S.D. Ala. 2006), citing 15 U.S.C. §§ 1681i, 1681s-2(b); *see also Abbett* v. *Bank of America*, 2006 LEXIS 12649, at *16–17 (*stating:* "To prevail on a § 1681s-2(b) claim, Mr. Abbett must show that a CRA notified the furnisher of information about the consumer's dispute pursuant to § 1681i(a)(2). This notice triggers the furnisher's duties under § 1681s-2(b)."); *Young v. Equifax Credit Info. Servs. Inc*., 294 F.3d 631, 639 (5th Cir. 2002) (*finding* duty arises only after receiving notice of a dispute from a credit reporting agency).

CRAs and furnishers of information generally communicate through a system known as "e-OSCAR," the **O**nline **S**olution for **C**omplete and **A**ccurate **R**eporting, which was developed by Equifax, Experian, and TransUnion. "e-OSCAR" was designed to provide furnishers with online access for processing **A**utomated **C**redit **D**ispute **V**erifications (ACDVs) and **A**utomated **U**niversal **D**ata forms (AUDs).

V. Causes of Actions for Violations of the FCRA.

The statute of limitation is either "two years after the date of discovery by the plaintiff of the violation that is the basis of such liability; or [f]ive years after the date on which the violation that is the basis for such liability occurs." The damages for *willful* non-compliance are explained as follows:

> Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of (A) any actual damages sustained by the consumer as a result of the

> failure or damages of not less than $100 and not more than $1,000, or (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater, plus such amount of punitive damages as the court may allow; and in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.
>
> Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency of $1,000, whichever is greater.

15 U.S.C. § 1681n.

Over-zealous consumers should be warned, however, if the court finds an unsuccessful "pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment," the court may award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

In the case of *negligent* failure to comply with the requirements, the party is liable to that consumer in an amount equal to the sum of (1) any actual damages sustained by the consumer as a result of the failure; and (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court. *See* 15 U.S.C. § 1681o.

Again, as with the willful non-compliance claim, if the court finds that that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court may award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

VI. Preemption

The FCRA actually contains two sections addressing preemption. Section 1681h(e) specifically addresses claims of defamation, invasion of privacy, and negligence. Section 1681t appears to address all other state laws to the extent they conflict with the FCRA; however, the district courts are split on this issue.

Claims for defamation, invasion of privacy, negligence cannot be brought except as provided in § 1681n (willful noncompliance) and §1681o (negligent noncompliance) unless the plaintiff alleges that the false information in the report was furnished with malice or willful intent to injure plaintiff. *See* 15 U.S.C. § 1681h(e). In *Brewer v. Transunion, LLC,* 2006 U.S. Dist. LEXIS 70292, at *15 (S.D. Ala. 2006), the court held "1681h(e) preempts state tort actions which do not allege malice or willful intent to injure" and 1681t preempts "only those causes of actions created by state statute that relate to consumer protection." Consider the tort actions may not, by their nature, include malice or willful intent to injure.

In *Brewer,* the court explained negligence is usually characterized as inattention, thoughtlessness, or heedlessness, a lack of due care. Simple negligence is the inadvertent omission of duty. The element of intent, or knowledge, is not present in simple negligence, and the element of intent does not raise a person's conduct to merely a greater degree of negligence as, for instance, gross negligence. The plaintiff's claim for negligence, which did not allege malice or willful intent, was dismissed. It appears this defect could have been cured by simply *alleging* the plaintiff acted "maliciously negligent"—an oxymoron. The same is true of wantonness, which is not listed in 1681h(e), but which court held was governed by this section. Again, the *Brewer* court found that "wantonness does not include malice or willful intent as a required element." This claim was also dismissed. Would the result have been different if plaintiff had pleaded malice or willful intent to injure? This would be less of a contradiction in terms.

As for his invasion of privacy claims, the plaintiff alleged the "defendants' actions were made with malice and/or with willful intent to injure Plaintiff." *Id*. at *22. Therefore, the defendant's motion to dismiss was denied. *Id*. at *24. The plaintiff's defamation claim also alleged the communications were brought with malice and/or with willful intent to injure Plaintiff. *Id*. Therefore, the defendant's motion to dismiss was denied. *Id*.

Contrast *Brewer, supra*, with *Woltersdorf v. Pentagon Federal Credit Union*, 320 F. Supp. 2d 1222 (N.D. Ala. 2004) (*holding* § 1681h(e) applies "both before and after a consumer reporting agency notifies a furnisher of information about a dispute" and § 1681t (b)(1)(F) preempts all claims relating to a furnisher's conduct only *after* notice of a dispute is received.)

VII. Defenses to FCRA claims.

a. Qualified Privilege.

Claims for defamation or libel may be defended by claiming qualified privilege exists. *See e.g. Hood v. Dun & Bradstreet, Inc.* 486 F.2d 25, 29 (5th Cir. 1973) (*holding* "matters of general and public interest do not include libelous and defamatory publications of such a commercial nature as credit reports").

b. "Accurate" Reports

If the court finds that a credit report was "accurate," the agency may be entitled to summary judgment. *See e.g., Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151 (11th Cir. 1991).

c. Reasonable Procedures

Once a plaintiff demonstrates inaccuracies in a credit report, the burden then shifts to the defendant to prove the presence of reasonable procedures. As a general rule, absent reason to doubt the reliability of the consumer reporting agency's sources, a consumer agency acts reasonably by relying upon reputable sources of information. *See e.g. Thomas v. Gulf Coast Credit Services*, 214 F. Supp 2d 1228 (M.D. La. 2002).

ARE FDCPA AND TCPA CLAIMS REMOVALABLE TO FEDERAL COURT?

FDCPA claims are removable to federal district court. Pursuant to 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The FDCPA provides: "An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy . . . ." 15 U.S.C. § 1692k(d). Actions brought in state court under the FDCPA are removable to the appropriate Federal District Court. *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1263 (11th Cir. 1999). According to 28 U.S.C. § 1441(b), a defendant in a state court action may remove the action to a federal court if the federal district court has "original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States." Moreover, removal pursuant to 28 U.S.C. § 1441(b) is proper "without regard to the citizenship or residence of the parties."

TCPA claims, however, were generally not removable based on federal question jurisdiction alone. There is a heavy split among federal courts on whether a TCPA claim by itself can be removed on federal question jurisdiction. (Generally there is a claim for violation of the FDCPA as well and it can be removed via the FDCPA claim). Most current cases, though, find in favor of removal.

The TCPA allows private causes of action for violations of its provisions. The TCPA also allows governments to bring an action for pattern and practice of violations. All courts agree federal question jurisdiction exists when a government brings suit. Section 227(b)(3) of the TCPA creates a private cause of action for individuals and entities and states as follows: "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" an action for a violation.

Most courts find this creates exclusive jurisdiction in state courts. Some courts find in favor of concurrent jurisdiction because the section does not expressly prohibit federal jurisdiction. The Eleventh Circuit has not ruled.

Assertion of FDCPA claims based on violation of the Bankruptcy Code.

A common scenario involves a debt collector telephoning a debtor or sending the debtor a demand letter to collect a debt after the debtor filed for bankruptcy. This can occur even though the collector scrubbed its file and performed a thorough bankruptcy search. The post-petition demand letter and telephone call demanding payment violates the Bankruptcy Code's automatic stay provisions and the discharge injunction. The post-petition contact, however, also violates the FDCPA by virtue of demanding payment which cannot legally be sought due to the Bankruptcy Code's automatic stay provisions or the discharge injunction. The debtor invariably sues the debtor collector alleging violations of the FDCPA or both the Bankruptcy Code and the FDCPA.

Section 362 of the Bankruptcy Code establishes the automatic stay. Section 362(k)(1) provides "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages." In seeking sanctions against a creditor pursuant to §362(k), the debtor bears the burden of demonstrating the actions taken were in violation of the automatic stay, the violation was willful, and the conduct caused harm to the debtor. To prove a "willful" violation of the automatic stay, the debtor does not need to demonstrate the creditor possessed the specific intent to violate the stay; instead, the debtor need only demonstrate the creditor was aware of the bankruptcy case and the creditor's actions that violated the stay were intentional. Awarding actual damages is mandatory if the debtor proves a willful violation of §362. An award of punitive damages is within the discretion of the court, and is granted in circumstances where the creditor engages in egregious misconduct.

The entry of a discharge releases the debtor from her obligation to pay pre-petition indebtedness and serves as a permanent injunction against any act to collect a discharged debt. Section 524(a) does not include a specific provision setting forth available remedies for a violation of the discharge injunction. Bankruptcy courts generally enforce the discharge injunction using a civil contempt action. In a civil contempt proceeding, the violator's state of mind is irrelevant, and good faith or the absence of intent is not a defense. Sanctions for a violation of the discharge injunction may include actual damages, attorney's fees and, possibly, punitive damages.

The question is whether the Bankruptcy Code precludes the maintenance of an FDCPA claim when the FDCPA claim is based upon a violation of the Bankruptcy Code. For example, a debt collector may send one collection letter to a debtor and that letter may satisfy all FDCPA requirements; however, if the creditor sends the letter to a debtor who filed a bankruptcy petition the day before the letter was sent, the creditor has violated the automatic stay and violated the FDCPA by collecting a debt for which the creditor is not legally allowed to collect.

A split exists among the circuits on whether the Bankruptcy Code trumps the FDCPA claims. The Ninth Circuit held the Bankruptcy Code precludes the FDCPA. In a more recent opinion, the Seventh Circuit held the Bankruptcy Code does not preclude or impliedly repeal the FDCPA. A divide rests upon whether a district court holds the Bankruptcy Code is comprehensive and contains the only remedies for violations which occur during bankruptcy or whether the district court finds no irreconcilable conflict exists between the two Acts. Another divide rests upon whether the alleged FDCPA violation stems from a violation of the automatic stay or the discharge injunction, or whether the alleged FDCPA violation stems from an improperly filed claim with the bankruptcy court.

a. Courts finding the Bankruptcy Code precludes the FDCPA.

b.

In *Walls v. Wells Fargo Bank N.A.*, 276 F.3d 502 (9th Cir. 2002), the court held a debtor may not prosecute simultaneous claims against an offending creditor under both the Bankruptcy Code and the FDCPA. In *Walls*, the debtor filed for bankruptcy and received a discharge. Following the discharge, Wells Fargo started foreclosure proceedings. The debtor filed suit against Wells Fargo asserting a violation of the FDCPA. The debtor asserted that because her bankruptcy case was "over and done with," she needed to rely upon the FDCPA to protect her from unfair collection practices.

The Ninth Circuit disagreed with the debtor: "there is no escaping" that Walls' FDCPA claim is based on a violation of §524; therefore, her sole remedy lies in the Bankruptcy Code. "To permit a simultaneous claim under the FDCPA would allow through the back door what Walls cannot accomplish through the front door—a private right of action. This would circumvent the remedial scheme of the Bankruptcy Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies for violating the discharge injunction to contempt.

"A mere browse through the complex, detailed and comprehensive provisions of the lengthy Bankruptcy Code . . . demonstrates Congress' intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike. Nothing in either the FDCPA or the Bankruptcy Code persuades us that Congress intended to allow debtors to bypass the Bankruptcy Code's remedial scheme when it enacted the FDCPA. While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."

Thus, the Ninth Circuit held a debtor's sole remedy for a violation of the discharge injunction exists under the Bankruptcy Code, and a debtor cannot bypass the Bankruptcy Code's "remedial scheme" by filing an FDCPA action against a creditor. Most courts which find the Bankruptcy Code precludes the FDCPA do so in the context of actions filed to combat improper claims. The case of *B-Real LLC v. Chaussee*, 399 B.R. 225 (9th Cir. B.A.P. Dec. 18, 2008) demonstrates this trend. In *Chaussee*, the Bankruptcy Appellate Panel ("BAP") for the Ninth Circuit analyzed whether the act of filing a proof of claim in a bankruptcy case subjects a claimant to liability for violation of the FDCPA.

The debtor filed a Chapter 13 petition. B-Real filed two claims against the debtor's estate. Two months later, the debtor filed a complaint against B-Real in the bankruptcy court alleging B-Real violated the FDCPA because the two claims were barred by the applicable statute of limitations and, therefore, were attempts to collect debts the debtor did not owe in violation of the FDCPA. B-Real filed a motion to dismiss arguing the Bankruptcy Code precluded the FDCPA claim. The bankruptcy court denied the motion, concluding the Bankruptcy Code did not preclude the FDCPA claims because the assertion of the debtor's rights under the FDCPA did not interfere with the bankruptcy proceedings.

On appeal, the BAP reversed, holding the Bankruptcy Code precluded the debtor's FDCPA claim. The BAP distinguished *Randolph* which allowed simultaneous FDCPA and bankruptcy claims (discussed below) in several ways. First, the claim in *Randolph* was based on actions that took place *after* the conclusion of the bankruptcy case, while Chaussee's actions was based on filing a proof of claim during the bankruptcy proceeding. Second, the BAP reasoned that if a creditor is to share in any sort of distributions in a bankruptcy case, it must file a proof of claim, and if doing so, also placed the creditor in harm's way under the FDCPA, then the potential liability under the FDCPA would impede the claims resolution process under the Code. Third, the BAP distinguished the Code's claims process from the FDCPA's debt validation procedures. A proof of claim constitutes *prima facie* evidence of its amount and validity, and is deemed allowed unless the debtor files an objection. Under the FDCPA, a consumer's failure to dispute the validity of a debt after receipt of an initial communication is not an admission of liability. The FDCPA states: a "communication in the form of a pleading" is not treated as an "initial communication." According to the BAP, a debt collector, in addition to filing a proof of claim under the Code, would also be required to send a separate communication with the statutory notice under the FDCPA, something that has been held to violate the automatic stay. The BAP held the Bankruptcy Code precludes the FDCPA in actions over alleged improper claims because the Bankruptcy Code provides an effective remedy for addressing improper claims, and it is impossible to reconcile the claims procedures under the Bankruptcy Code with the FDCPA.

Likewise, the court in *McMillen v. Central Financial Credit Control*, (Bankr, N.D. Ga. 2010) held the filing of a claim does not trigger the FDCPA. The debtor filed suit against Central Financial alleging FDCPA violations based on its filing of a duplicate proof of claim.

> The only activity mentioned in plaintiff's complaint is that defendant filed, in error, a duplicate proof of claim in a bankruptcy proceeding, and defendant voluntarily withdrew one of the proofs of claim. No allegations suggesting collection activity on defendant's part have been made, and filing a proof of claim, by itself, is not a debt collection activity. To the contrary, creditors have a right to file a proof of claim and are advised of the deadline to file the claim in the Chapter 13 order for relief. The filing of a proof of claim is meant to assert a right to payment against a debtor's estate, so that the court can determine whether the claim is allowed under the Bankruptcy Code, and it is not viewed as an effort to collect a debt from the debtor, who enjoys the protections of the automatic stay. The Bankruptcy Code and Federal Rules of Bankruptcy Procedure provide for a procedure whereby a debtor can object to a claim. *See* 11 U.S.C. § 502; Fed. R. Bankr. P. 3007. Courts recognize the efficiencies of the claims objection process and the need for practitioners to respect that process and refrain from filing unwarranted FDCPA claims. The right of a creditor to file a proof of claim is explicit and fundamental to the proper administration of a bankruptcy case, and courts are wary of any ruling that impinges on a creditor's right to follow the procedural provisions of the Bankruptcy Code.

The *Chaussee* and *McMillen* courts exemplify district courts across the country which hold the Bankruptcy Code precludes the FDCPA in an action based on an improper claim filed in the bankruptcy court. *See e.g. Jacques v. U.S. Bank N.A.*, 416 B.R. 63 (Bankr. E.D.N.Y. 2009)(*holding* the filing a proof of claim is not a prohibited activity under the FDCPA); *In re Williams*, 392 B.R. 882 (M.D. Fla. 2008)(*holding* a debtor's sole remedy for creditor's filing of allegedly time-barred claim was under bankruptcy law, and any FDCPA remedy was precluded); *In re Varona*, 388 B.R. 705 (Bankr. E.D. Va. 2008)(*stating* "it appears that a majority of courts that have considered whether a proof of claim may be the subject of a FDCPA violation have concluded the FDCPA is not intended to provide a remedy for claims filed in a bankruptcy proceeding"); *Rice–Etherly v. Bank One*, 336 B.R. 308 (Bankr. E.D. Mich. 2006)(*holding* the FDCPA does not apply to a proof of claim filed in a bankruptcy case); *Kaiser v. Braje & Nelson, LLP*, 2006 WL 1285143 (N.D. Ind. May 5, 2006) (*holding* FDCPA claims are pre-empted by the Bankruptcy Code remedies such as the filing of an objection to the claim); *Cooper v. Litton Loan Servicing*, 253 B.R. 286 (Bankr. N.D. Fla. 2000)(*finding* "the filing of a proof of claim in a bankruptcy proceeding does not trigger the FDCPA); *Baldwin v. McCalla*, 1999 WL 284788 (N.D. Ill. 1999)(*holding* the debtor can only attack a proof of claim in the bankruptcy court, and only by using remedies provided in the Bankruptcy Code); *Pariseau v. Asset Acceptance, LLC* (M.D. Fla. 2008)(*holding* debtors' remedy was not under the FDCPA, but under the Bankruptcy Code where debtor filed adversary complaint against creditor for improper claim).

The question is why would a debtor seek to proceed under the FDCPA and not the Bankruptcy Code when damages for a violation of the Bankruptcy Code are not limited to $1,000.00 as in the FDCPA and punitive damages are allowed under certain circumstances? (Punitive damages are never allowed for an FDCPA violation). The answer lies in the burden of proof required under each statute and the required imposition of attorney's fees under the FDCPA. To prove a violation of the Bankruptcy Code, the plaintiff must show the violation was willful and the conduct caused harm to the debtor. On the other hand, the FDCPA is a strict liability statute. The prevailing plaintiff in an FDCPA action is entitled to an award of reasonable attorney's fees per the statute. Also, if the violation relates to the discharge injunction, the debtor's remedy is limited to a contempt action.

b. Courts finding the Bankruptcy Code does not preclude the FDCPA.

In direct contrast to the result reached in *Walls*, the Seventh Circuit in *Randolph v. IMBS Inc*., 368 F.3d 726 (7th Cir. 2004), concluded the Bankruptcy Code does not repeal the FDCPA. As such, a debtor may bring an action against a creditor under both the Bankruptcy Code and the FDCPA.

In *Randolph*, following confirmation of the debtor's Chapter 13 plan, her dentist attempted to collect an account which had been listed on her schedule of unsecured, non-priority claims. The debtor filed suit under the FDCPA, claiming the collector attempted to collect a debt she was not legally obligated to pay. The magistrate judge concluded §362(h) preempted the FDCPA because the Bankruptcy Code occupied the field of debtor-creditor relations to the exclusion of other laws after a federal bankruptcy proceeding is commenced.

The Seventh Circuit reversed and held the Bankruptcy Code, especially the automatic stay and discharge injunction, does not implicitly repeal the FDCPA. When two federal statutes address the same subject in different ways, a court must inquire as to whether one statute implicitly repeals the other or if an irreconcilable conflict exists between the statutes. The court found the Bankruptcy Code does not implicitly repeal the FDCPA. The court found the two statutes overlap; however, it found an irreconcilable conflict did not exist. Thus, a debtor can seek to enforce both the FDCPA and the Bankruptcy Code.

The *Randolph* court noted the following differences between the Bankruptcy Code and the FDCPA:

a. The automatic stay can be violated by any creditor, while the FDCPA only applies to "debt collectors";

b. § 362(h) affords no defense to a creditor, while § 1692k(c) provides a "bona fide error" defense for a violation of the FDCPA;

c. The Bankruptcy Code has no cap for damages, while the FDCPA contains a $1,000 maximum "additional damages" provision per action;

d. Punitive damages may be awarded by a bankruptcy court for a violation of the Bankruptcy Code, while the FDCPA contains no provision for punitive damages;

e. The Bankruptcy Code contains no provision for awarding attorneys' fees to the debtor, while § 1692k(a)(3) of the FDCPA specifically provides for the recovery of attorneys' fees; and,

f. The Bankruptcy Code does not specify a statute of limitations for bringing an action for a violation of the stay, while § 1692k(d) provides for a one-year statute of limitations.

The court also focused on the "scienter" requirement of each statute. While §362(h) makes liability depend on the creditor's knowledge, § 1692e(2)(A) creates a strict-liability rule.

The majority of district courts follow the Seventh Circuit finding the application of the FDCPA to issues involving the automatic stay or dischargeability is different than the issues surrounding the creditor's right to file a claim in a bankruptcy case. See for example the following cases: *Turner v. J.V.D.B. & Associates, Inc*., 330 F.3d 991 (7th Cir.2003)(*applying* the FDCPA when a debt collector sent a post-petition letter to collect a debt discharged in bankruptcy from a former Chapter 13 debtor); *In re Baxter*, (Bankr. M.D. Ala. 2007)(*allowing* plaintiff to maintain cause of action for violation of the FDCPA and automatic stay for creditor's post-confirmation misconduct); *Lisenby v. J.A. Cambece Law Office, P.C.,* (Bankr. M.D. Ala. 2006)(*allowing* FDCPA claim for violation of discharge injunction); *Dougherty v. Wells Fargo Home Loans, Inc.*, 425 F.Supp.2d 599 (E.D. Pa. 2006)(*holding* discharged Chapter 13 debtor was not precluded by the Bankruptcy Code from challenging mortgagee's assessment of post-petition, post-confirmation attorney fees, by asserting claim under the FDCPA because Bankruptcy Code's provisions for administration of debtor's estate would not be undermined by the FDCPA claim); *Drnavich v. Cavalry Portfolio Service, LLC* (D. Minn. 2005)(*allowing* plaintiff to proceed under FDCPA for post-discharge violation); *Peeples v. Blatt*, 2001 WL 921731 (N.D. Ill. Aug. 15, 2001)(*finding* the plaintiff's FDCPA claim would not contravene the Bankruptcy Code's central purpose which is "to adjudicate and conciliate all competing claims to a debtor's property in one forum and one proceeding" because the plaintiff's claim concerned a collection action that did not occur until after the bankruptcy proceedings had closed); *Molloy v. Primus Automotive Financial Services*, 247 B.R. 804 (C.D. Cal. 2000)(*holding* the Bankruptcy

Code does not preclude plaintiff's FDCPA claim when FDCPA claim is based on violation of automatic stay and discharge injunction provisions).

The *Molloy* court reasoned that because the plaintiff had been discharged from her bankruptcy, there was "no danger that allowing her to bring a claim under the FDCPA would interfere with the administration of her bankruptcy." *Id.* at 820–21. Moreover, the court concluded: "Inasmuch as the FDCPA's purpose is to prevent bankruptcy, a debtor who has been discharged is still in need of and entitled to [FDCA] protection." *Id.*

In other words, an FDCPA claim based on a violation of the automatic stay or the discharge injunction concerns a collection activity occurring outside the bankruptcy case and is, therefore, allowed.

In *Bacelli v. MFP, Inc.*, 729 F.Supp.2d 1328 (M.D. Fla. 2010), the debtor brought an action alleging the debt collector and creditor violated the FDCPA by demanding immediate payment on a debt while she was in bankruptcy, after the debt's discharge, and while she was represented by an attorney with respect to the debt. The court held a debtor may maintain a cause of action for violation of the FDCPA based on violation of the discharge injunction. "In sum, although there is some authority supporting the proposition that remedies under the Bankruptcy Code are the only recourse against post-bankruptcy debt-collection efforts, *see e.g., Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-11 (9th Cir.2002), those authorities either do not involve FDCPA claims based on a violation of the stay or the discharge injunction."

In conclusion, most district courts, including those in the Eleventh Circuit, will allow an FDCPA claim to proceed when based on a violation of the automatic stay or the discharge injunction, and most district courts, including at least one in the Eleventh Circuit, will preclude an FDCPA cause of action based on an improperly filed claim in the bankruptcy proceeding.

STATE LAW CLAIMS ROUTINELY ALLEGED WITH THE FDCPA

In addition to violations of the FDCPA, plaintiffs routinely allege violations of various common laws. The most prominent are invasion of privacy, outrage, negligent hiring, training and supervision, and private nuisance.

II. Invasion of Privacy

The tort of invasion of the right of privacy, insofar as it applies to actions of a creditor in regard to his debtor, is "the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Liberty Loan Corp. of Gadsden v. Mizell*, 410 So. 2d 45 (Ala. 1982)(*citing Norris v. Moskin Stores, Inc*., 132 So.2d 321 (1961). Not every effort by a creditor to collect a debt amounts to an invasion of privacy: "The mere efforts of a creditor . . . to collect a debt cannot without more be considered a wrongful and actionable intrusion. A creditor has and must have the right to take reasonable action to pursue his debtor and collect his debt . . . ." *Id.* at 48–49. Violations of the tort of invasion of privacy generally patterns of repeated conduct equating to deliberate harassment, or systematic campaigns designed to vilify the debtor or expose him to public ridicule. *Id.* at 49.

In the context of debtor-creditor relations, the Alabama Supreme Court declared "a creditor has a right to take reasonable action to pursue his debtor and persuade payment, although the steps taken may result to a certain degree in the invasion of the debtor's right to privacy, but that the debtor has a cause of action for injurious conduct on the part of the creditor which exceeds the bounds of reasonableness." *Windsor v. General Motors Acceptance Corp.*, 323 So.2d 350, 351 (1975)

The question becomes: What constitutes deliberate harassment or a systematic campaign sufficient to violate the debtor's right to privacy? Courts tend to examine the frequency and volume of calls. There is a trend, however, to examine the quality of calls and not the quantity of calls. This requires courts to consider additional factors such as the content of the communication and other extenuating circumstances.

In *Windsor*, the creditor contacted the debtor, either in person or by telephone, approximately 15–20 times concerning her delinquent payments. The creditor spoke to the debtors mother (with whom the debtor lived) several times, and visited the debtor's house even after the mother informed the creditor the plaintiff was not home. The creditor was condescending to the debtor's mother, to the point where after he called she "just went crazy," and on one occasion she even "went to the hospital and stayed there." *Id.* at 352.

The court, however, found in favor of the defendant. "Such minor irritations and intrusions are, at most, the sort of inconvenience and nuisance with which every participant in modern-day society must deal on a routine basis." *Id.* It is unlikely a current court would find such conduct acceptable in modern-day society.

Six to eight polite telephone calls made by collection agency to debtor over period of several months also does not amount to invasion of privacy. *Sofka v. Thal*, 662 S.W.2d 502 (Mo. 1984). However, 259 times calls over a three month period, including on many occasions 10 to 12 calls in a single day does constitute invasion of privacy. *Thompson v. Chase Bank N.A.*, 2010 WL 1329061 (S.D. Cal., March 30, 2010).

In *Marseglia v. JP Morgan Chase Bank*, 2010 WL 4595549 (S.D. Cal., Nov. 12, 2010), the debtor failed to state a claim against the bank for invasion of privacy under California law for the bank's actions in attempting to collect debt, because the debtor failed to allege the bank's behavior was highly offensive even though the bank placed a total of 50 calls to the debtor in one week and called on a daily basis, including early morning and late at night. The debtor failed to show he answered any of these calls or otherwise made direct contact. The court found a ringing telephone, without more, insufficient to amount to an invasion of privacy.

The court in *Oppenheim v. I.C. Sys.*, 695 F.Supp.2d 1303, 1310 (M.D.Fla. 2010) found 35 to 40 calls over three months insufficient to "rise to the requisite level of outrageous and unacceptable conduct contemplated by the tort of invasion of privacy based on intrusion."

What extenuating circumstances might change a sway a court into finding a potential claim for invasion of privacy? Compare *Oppenheim* with *Jacksonville State Bank v. Barnwell*, 481 So. 2d 863 (Ala. 1985). In *Jacksonville*, the defendant made twenty-eight to thirty-five phone calls over approximate two month period to debtor's home and place of employment. The court found this amounted to invasion of privacy, especially because the debtor requested the bank not call him at work as his employer reprimanded him for the calls.

Does a violation of the FDCPA equate to violation of state common law, especially the tort of invasion of privacy? The debtor in *Leahey v. Franklin Collection Service, Inc*., 2010 WL 5279831 (N.D. Ala. Feb. 4, 2010) argued the court "can look at the standards of the FDCPA to see when an invasion of privacy has occurred." The court disagreed finding a violation of the FDCPA does not necessarily constitute an invasion of privacy under Alabama law. Efforts to collect a debt may be annoying, embarrassing, and upsetting without rising to the level of an invasion of privacy. *Id. see also Sparks v. Phillips & Co-hen Assocs.*, Ltd., 641 F.Supp.2d 1234, 1252–53 (S.D.Ala.2008)(*finding* a violation of the FDCPA but applying Alabama law and determining a creditor did not commit the tort of invasion of privacy by contacting an attorney more than once about a debt for which she had no responsibility, contacting her minor daughter, and engaging in rude and combative conversations).

II. Outrage/Intention Infliction of Emotional Distress

Outrage and intentional infliction of emotional distress are one and the same under Alabama law. Outrage was traditionally limited in Alabama to claims dealing with extreme sexual harassment, mishandling dead bodies, and oppressive conduct to resolve insurance disputes. The claim was extended to include collection of debts based on its limited application to the insurance industry. To prevail on an outrage claim for collection of debts, the debtor must prove harrowing conduct by the collector. Consider the case of *Black v. Aegis Consumer Funding Group, Inc.*, 2001 WL 228062 (S.D. Ala. Feb. 8, 2001).

Melissa Black financed a 1996 Hyundai from Grady Buick on November 19, 1996. Aegis provided financing for the vehicle. Black made monthly payments in a timely manner for approximately six to seven months. In June of 1997, Black and her husband began experiencing financial difficulties and missed the June 1997 payment.

On June 15, 1997, Rocky Ford, a collection agent for Aegis, contacted Black for the first time. Ford made over fifteen phone calls to Black's home and at least one to her employer, despite her request he not do so. The telephone calls were made both early in the morning and late at night. Several calls were made after 11:00 p.m. On one occasion, Ford called at 11:30 p.m. threatening Black he would be at her house "bright and early" to repossess the vehicle; he stated "I will get the money from you either one way or the another, and I'll start with your kids' clothing." The following morning Ford called at 7:00 a.m. and denied making the phone call the previous night. He told Black she must be losing her mind. This behavior became repetitive.

Ford asked questions regarding Black's personal life. He asked where she worked, how much she made, whether she was married, had kids, and whether marital or financial troubles were the reason she was not paying her debt. He would make references to Black's psychological state in an attempt to harass and intimidate her. He routinely used profanity. He would tell her she needed to get her "s**t straight." Ford's late night phone calls were the worst. He would make comments such as, "Who the f**k do you think you are that you can walk around and not make your car notes."

Ford called Black at work. When she requested he not call her at work, he responded:

> Well, if you lose your job, then we can come get the car…Your boss must be f***ing stupid to have you, I wonder if he knows you can't even pay your own car note, if we come get the car, you won't be able to get to work and you will lose your job…I can send somebody to get the car in front of your work and embarrass you…How do you know that I am not across the street watching you, [y]ou don't know where I am calling from, and how do you know I can't see your car right now.

Ford went so far as to contact Black's supervisor making derogatory remarks about Black and asking whether she was going to lose her job because of her marital problems. The supervisor told Ford not to call the office again. Ford ignored the demand and called several more times.

Ford did not limit his communications to Black. He spoke with her parents, husband, child, and babysitter. Ford called Black's parents telling them they were responsible for the debt, and he would place a lien on their home should they not pay the debt. Black's husband spoke with Ford on three occasions. On a separate occasion, Mr. Black listened in on one of Ford's calls to Mrs. Black. Mr. Black recalled Ford saying he was going to "get his money and that he would do so by selling everything in our home starting with our f*** ing kids' clothing and working his way . . . through the house." Mr. Black noted that Ford's tone was very harsh and he was slurring his words as if he were drunk.

Ford spoke to Mrs. Black's six year old son telling the child his mommy would be going to jail. On a weekend, Ford telephoned the Black's residence and the babysitter answered the phone. The babysitter advised Black was not home. He responded by screaming, "Tell the b***h to get her s**t out of my f***ing car." He stated that if the car were locked in the "f***ing" garage, he would break down the door. He further screamed, "don't think I won't and don't get in my way!" Ford called on three other occasions while the babysitter was there.

Not unsurprisingly, the court held Ford's "systematic campaign of harassment and intimidation was reckless and intentional." Ford's conduct implicating her, her husband, her children, her parents, her babysitter and employer caused the plaintiff to suffer anxiety, concern and mental anguish. Ford's "campaign of intimidation" caused the plaintiff not just to fear for her own safety, but the safety of her children. Black suffered psychological illness as a result of Ford's actions which impacted her family and her job. Because of this extreme conduct and consequences the court held Black had established the tort of outrage in the debtor-creditor collection context.

No other Alabama case law has found a creditor's conduct violated the tort of outrage.

III. Negligent/Wanton Training and Supervision

This claim is dependent on notice; the plaintiff must prove the collection agency had notice of its collector's improper conduct or else in the exercise of due care could not have helped but discover the harassment or dissemination.

To sustain a claim for negligent or wanton hiring or supervision, training and/or retention, "the plaintiff must establish that the allegedly incompetent employee committed a common-law, Alabama tort." *Leahey v. Franklin Collection Service, Inc.*, 2010 WL 5279831 (N.D. Ala. Feb. 4, 2010); *see also Thrasher v. Ivan Leonard Chevrolet, Inc.,* 195 F.Supp.2d 1314, 1320 (N.D. Ala.2002); *Thomas v. Util. Trailer Mfg. Co*., 2006 WL 2480057, at *3 (M.D. Ala. Aug. 28, 2006). The plaintiff must prove a tort such as invasion of privacy or outrage in order to sustain a claim for negligent hiring or training.

In addition, the plaintiff must prove 1) the employer had actual notice of this conduct or would have gained such notice if it exercised due and proper diligence and 2) the employer failed to respond to this notice adequately. *Shuler v. Ingram & Assoc*., 710 F.Supp.2d 1213 (N.D. Ala. 2010); *see also Edwards v. Hyundai Motor Mfg. Ala., LLC,* 603 F.Supp.2d 1336, 1357 (M.D. Ala.2009); *Voyager Ins. Cos. v. Whitson,* 867 So.2d 1065, 1070-71 (Ala. 2003). To prove wantonness, the plaintiff must show the defendant had actual knowledge that "injury is likely to result from his act or omission." *Id.*

What can a plaintiff use to prove negligent hiring or training? Typically the plaintiff will request the collector's personnel file, training materials used for debt collection, and recordings of calls made to the plaintiff. The agency's knowledge of the collector's prior bad acts and hiring process of the collector become relevant as well as all complaints lodged against the collector.

IV. Private Nuisance

As with outrage, plaintiffs routinely plead private nuisance without success. Private nuisance is typically reserved for claims involving damage to property (operating a dirt-bike racing track next to a residence; it isn't illegal to do so, but the noise, traffic, and dirt operate as a nuisance to the adjoining property owner). While the law does allow "anything" to work a nuisance, this tort has been almost exclusively reserved for situations where possession and use of property is disrupted by the conduct of third parties.

At least one case has allowed a private nuisance claim in the debtor-creditor context. The court in *Wiggins v. Moskins Credit Clothing Store*, 137 F.Supp. 764 (E.D.S.C. 1956) found a collector who called the debtor's landlady repeatedly and used abusive, vile, and opprobrious language invaded the landlady's proprietary interest in her home by conduct tantamount to nuisance.

The court in *Sofka v. Thal*, 662 S.W.2d 502 (Mo. 1984) considered the type of conduct required to support a claim for private nuisance. The court explained that private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land. However, the law does not concern itself with trifles, and there is liability for nuisance only to those whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose. Significant harm is that which is of importance, involving more than slight inconvenience or petty annoyance determined by the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion as definitely offensive, seriously annoying or intolerable, it is significant. If normal persons in the locality would not be substantially annoyed or disturbed, the invasion is not significant, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.

A nuisance could not be said to occur until the number of calls or their frequency reached a highly offensive or intolerable level. The allegation of "repeated telephone calls" simply does not give rise to the essential inference that their number or frequency was great enough to seriously annoy a person of ordinary sensibilities in plaintiff's locality. Repeated telephone calls are an accepted feature of everyday life, and maintaining telephone service evidences the expectation if not the hope of calls from time to time.

V. Malicious Prosecution

The Alabama Supreme Court described the heavy burden the plaintiff faces in sustaining a malicious prosecution claim in the 1992 case *of McLain v. NurseFinders of Mobile, Inc*.:

> Malicious prosecution is an action disfavored in the law. *Cutts v. American United Life Ins. Co.*, 505 So. 2d 1211, 1212 (Ala. 1987). The reason for such disfavor is clear: Public policy requires that all persons shall resort freely to the Courts for redress of wrongs and to enforce their rights, and that it may be done without the peril of a suit for damages in the event of an unfavorable judgment, by jury or judge. *Boothby Realty Co. v. Haygood*, 269 Ala. 549, 114 So. 2d. 555, 559 (1959).

McLain v. NurseFinders of Mobile, Inc., 598 So. 2d 853. The plaintiff must present proof that the defendant initiated a judicial proceeding, that the proceeding was instituted without probable cause, that the proceeding was instituted with malice, that the judicial proceeding had been terminated in favor of [the malicious prosecution plaintiff], and that the malicious prosecution plaintiff suffered damages proximately caused by the initiation of the judicial proceeding. *Smith v. Wendy's of the South, Inc.*, 503 So. 2d 843, 844 (Ala. 1987).

A malicious prosecution claim is due to be dismissed if the plaintiff cannot provide evidence of both malice and bad faith in the initiation of the underlying claim. According to the Alabama Supreme Court, "if there are **any** undisputed facts of record establishing that [the malicious prosecution defendant] had probable cause to bring the former action . . . against [the malicious prosecution plaintiff] then [the malicious prosecution plaintiff] cannot recover for malicious prosecution and summary judgment is appropriate." *Eidson v. Olin Corp.*, 527 So. 2d 1283, 1285 (Ala. 1988) (bold added).

Furthermore, if the trial court grants summary judgment on a malicious prosecution claim, and the plaintiff appeals, the reviewing Court <u>must</u> use the following standard to determine whether the trial court erroneously granted summary judgment for lack of probable cause:

> Can one or more undisputed facts be found in the record below establishing that the defendant acted in good faith on the appearance of things as they existed when suit was filed, based upon direct evidence, or upon circumstantial evidence and the inferences that can reasonably be drawn therefrom?

Id. This is a simple and easy standard for the defendant in a malicious prosecution case to meet, and the bar is set low "because an action for malicious prosecution is not favored at law." *Alabama Power Co. v. Nabors*, 402 So. 2d. 958, 962 (Ala. 1981). "Anyone who has reasonable cause to believe that there is reasonable cause for legal redress and protection has a lawful right to seek such redress without risk of being sued and having to respond in damages for seeking unsuccessfully to enforce his rights." *Stacks v. Pate*, 561 So. 2d 1072, 1074 (Ala. 1990) (quoting from *Alabama Power Co. v. Nabors*, 402 So. 2d at 958, 962 (Ala. 1981)).

These cases have risen in popularity, and typically follow an unsuccessful debt collection lawsuit. The debtor will attend trial and claim ignorance as to the balance on the debt, or as to the true owner of the debt, or else will retain counsel at the last minute and skip trial altogether. If the owner of the debt has no witness or records in the court room, and the suit is resolved in favor of the debtor, a malicious prosecution claim may follow.

Few of these cases have gone to trial so there are few demonstrative cases. However, the successful defense to these cases lies in the origination and collection of the underlying debt. Documents showing the debt was purchased from the original creditor, and that the creditor's data is being supplied to the debt-buyer is an important first step. . "A debt collector should be able to rely on the representation and implied warranty from its client that the amount was due under either the lease or the law." *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459, 461 (M.D. La. 1996); (citing *Howe v. Reader's Digest Ass'n, Inc.*, 686 F. Supp. 461, 467 (S.D.N.Y. 1988)). If the underlying information is substantiated, this alone could be 'good faith' to proceed.

The same is true of the facts underlying the subsequent collection of the debt. Unanswered calls and unreturned mail indicate the debtor has been reached and is not initially disputing the debt. This doesn't mean the debt is valid. It merely serves as additional grounds to file suit if no communication with the debtor can be achieved. Any available media is useful as well. Account statements will contain the name of the original creditor, payment and charge histories, the debtors name and address, and provide other items for direct or cross examination. Even if not allowed into evidence, the relevant question is the belief of the debt owner that a good faith basis exists to think the debtor owes the debt. Expecting the debtor to tell the truth at trial, there is an argument for a good faith basis to think you can prevail as well.

Finally, advice of counsel is an affirmative defense to malicious prosecution, and should be an absolute bar if honestly sought and honestly rendered. This defense carries with it the risk of waiving the attorney client privilege. However, if collection counsel testifies in her personal judgment that the suit appeared valid and worth pursuing, even without a witness at trial, the court should consider this testimony as well when ruling on a malicious prosecution claim.