Kentucky Bar Association Annual Convention

MORE THAN A LAWYER

Lexington, Kentucky June 13-15, 2018

THE FAIR DEBT COLLECTION PRACTICES ACT: A PRIMER

Sponsor: Young Lawyers Division
CLE Credit: 1.0
Friday, June 15, 2018
9:00 a.m. - 10:00 a.m.
Elkhorn A-D
Lexington Convention Center
Lexington, Kentucky

A NOTE CONCERNING THE PROGRAM MATERIALS

Printed by: Evolution Creative Solutions
7107 Shona Drive
Cincinnati, Ohio 45237

Kentucky Bar Association

TABLE OF CONTENTS

THE PRESENTER

R. Brooks Herrick
Dinsmore & Shohl, LLP
101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202

R. BROOKS HERRICK is an associate in the Louisville office of Dinsmore & Shohl, LLP where he practices in the areas of commercial litigation and Fair Debt Collection Practices Act litigation and compliance. Mr. Herrick received his B.A., *summa cum laude*, from Bellarmine University and his J.D., *summa cum laude*, from the University of Kentucky College of Law where he was admitted to the *Order of the Coif*. Prior to joining Dinsmore & Shohl, he served as law clerk to Judge Joseph M. Hood of the United States District Court for the Eastern District of Kentucky. Mr. Herrick serves as an online editor for the *Kentucky Law Journal* and is a member of the Louisville and Kentucky Bar Associations and the Young Professionals Association of Louisville. He was named a 2018 Kentucky Super Lawyers Rising Star in Creditor Debtor Rights.

THE FAIR DEBT COLLECTION PRACTICES ACT: A PRIMER

R. Brooks Herrick

I. INTRODUCTION

The Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* (the "FDCPA" or the "Act") was originally enacted in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. §1692(e). Put simply, "[t]he FDCPA is designed to protect against abusive debt collection practices which would likely disrupt a debtor's life." *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 211 F.3d 1057, 1059 (7th Cir. 2000). Additionally, the FDCPA also attempts to avoid "imposing unnecessary restrictions on ethical debt collectors." *Peter v. GC Services, L.P.*, 310 F.3d 344, 351-52 (5th Cir. 2002) (*quoting* S. Rep. No. 95-382, at 1-2, reprinted in 1977 *U.S. Code Cong. & Admin. News* 1695, 1696). To achieve these goals, the FDCPA "prohibits unfair or unconscionable collection methods, conduct which harasses, oppresses or abuses any debtor, and the making of any false, misleading, or deceptive statements in connection with a debt, and it requires that collectors make certain disclosures." *Foti v. NCO Financial Systems, Inc.*, 424 F.Supp.2d 643, 653 (S.D.N.Y. 2006) (*quoting Acosta v. Campbell*, No. 6:04 Civ. 761, 2006 U.S. Dist. LEXIS 4088, at *12 (M.D. Fla. 2006)).

This outline will provide an introduction to the FDCPA, including the elements of an FDCPA claim, specific defenses to an FDCPA claim, and the damages available to a successful consumer. This information should help identify whether your client is subject to the FDCPA, whether you are subject to the FDCPA, and whether your client has a potential FDCPA claim.

II. ELEMENTS OF A FDCPA CLAIM

To establish a claim under the FDCPA, a plaintiff must prove four distinct elements: (1) the plaintiff must be a "consumer;" (2) the "debt" must arise out of transactions which are "primarily for personal, family, or household purposes;" (3) the defendant must be a "debt collector;" and (4) the defendant must have violated a provision of the FDCPA. *See Wallace v. Washington Mutual Bank., F.A.*, 683 F.3d 323, 326 (6th Cir. 2012).

A. What is a "Consumer"?

To assert a successful FDCPA claim, the plaintiff must first show that he or she is a "consumer." The FDCPA defines a "consumer" as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. §1692a. Thus, to be a "consumer" under the FDCPA, the plaintiff must simply be an individual that owes a "debt."

B. What is a "Debt"?

The second element of an FDCPA claim is that the consumer must owe a "debt." However, the FDCPA does not apply to all debts. Rather, the FDCPA defines "debt" such that the Act only applies to consumer debt. Specifically, "debt"

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

15 U.S.C. §1692a(5). In other words, the FDCPA is drafted so that the Act does not apply to commercial debts. *See, e.g.*, *Thomas v. Daneshgari*, 997 F.Supp.2d 754, 763 (E.D. Mich. 2014) ("[T]he FDCPA does not apply to commercial debts.")

If the debt owed consists of debt incurred for personal, family, or household purposes, and business purposes, the consumer bears the burden of proof to show that the debt was incurred "primarily" for personal, family, or household purposes. *See Voris v. Creditors Alliance, Inc.*, No. 05 C 6840, 2007 U.S. Dist. LEXIS 87413, at *17 (N.D. Ill. Nov. 28, 2007) (explaining the consumer's FDCPA claim must be dismissed because the consumer fell "far short of proffering sufficient evidence that the . . . debt was primarily for [the consumer] as an individual and not for his business").

C. Who is a "Debt Collector"?

An FDCPA claim will only lie if the claim is against an individual or entity that meets the definition of a "debt collector." *Kelly v. Montgomery Lynch & Assocs*., No. 1:07-CV-919, 2008 U.S. Dist. LEXIS 30917, at *10 (N.D. Ohio Apr. 15, 2008) ("To be liable under the FDCPA, a defendant must be a 'debt collector' as defined in §1692a(6).")

1. Who is a "debt collector"?

The FDCPA defines a "debt collector" as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . [T]he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For

> the purpose of [15 USCS §1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

15 U.S.C. §1692a(6).[1]

2. Who is <u>not</u> a "debt collector"?

Based on the language of §1692a(6), a person attempting to collect his or her "own" debt, is not a "debt collector" under the Act. *Lott v. HMP of Wood Cty., PLLC*, No. 2:13-cv-463, 2013 U.S. Dist. LEXIS 84689, at *4 (S.D. Ohio June 17, 2013) *("*The FDCPA's definition of debt collector does not include a consumer creditor attempting to collect its own debt.") Stated differently, "a creditor is not a debt collector for the purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts." *Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003).

---

[1] In addition to identifying who is a debt collector, the Act also excludes certain individuals from the definition of "debt collector." These individuals include:

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

15 U.S.C. §1692a(6)(A)-(F).

The Act defines a "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. §1692a(4). Thus, if the individual attempting to collect the debt is the so-called "original creditor," a consumer cannot maintain an action against that individual.

Additionally, even if the person attempting to collect the debt is not the "original creditor," the person is excluded from the definition of "debt collector" if the debt was transferred to that person before the consumer defaulted on the debt. *See* 15 U.S.C. §1692a(6)(F); *Justice v. Ocwen Loan Servicing, LLC*, No. 2:13-CV-00165, 2014 U.S. Dist. LEXIS 15800, at *13 (S.D. Ohio Feb. 7, 2014) ("[I]f Ocwen acquired the servicing for the loans before they were in default, then it is not a debt collector under the FDCPA."). Thus, an FDCPA claim can only be made against a person attempting to collect a consumer debt that was not originated by that person, and that was transferred to that person after the consumer defaulted on the debt.

3. Attorneys can be "debt collectors."

Individuals <u>not</u> excluded from the definition of a "debt collector" include attorneys. In *Heintz v. Jenkins*, 514 U.S. 291 (1995), the U.S. Supreme Court was asked to determine whether an attorney "who regularly through litigation tries to collect consumer debts" was a "debt collector" as defined by the Act. *Id.* at 292. The Supreme Court determined "that the Act applies to attorneys who 'regularly' engage in consumer-debt-collection-activity, even when that activity consists of litigation." *Id.* at 299.

The Supreme Court primarily based its decision on the fact that the plain language of the definition of "debt collector" included an attorney that regularly sought to collect consumer debts. Additionally, the FDCPA previously exempted attorneys from the definition of "debt collector," but Congress repealed that exemption in its entirety. *See id.* at 294-95. The Supreme Court rejected Jenkins's argument that making attorneys subject to the Act would result in FDCPA liability simply for losing a lawsuit, stating that "we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it" an act resulting in FDCPA liability. *Id.* at 295-96.

After *Heintz*, Congress amended the FDCPA "to exempt any 'formal pleading made in connection with a legal action' from the FDCPA's notice requirements. *Simon v. FIA Card Services, N.A.*, 732 F.3d 259, 265 n.3 (3d Cir. 2013) (*quoting* 15 U.S.C. §1692e(11)). However, "Congress did not otherwise limit the FDCPA's applicability to lawyers using litigation to collect debts."

Id. Thus, except for the notice exception, all activities to collect a consumer debt by an attorney that "regularly" attempts to collect consumer debt, including legal pleadings filed with a court, are subject to the Act's requirements.

Thus, the only question that remains is what amounts to "regular" collection of consumer debts that will subject an attorney to the requirements of the Act. The Sixth Circuit has held that for an attorney or law firm to be subject to the FDCPA "a plaintiff must show that the attorney or law firm collects debts as a matter of course for its clients or some clients, or collects debts as a substantial, but not principal, part of his or its general law practice." *See Schroyer v. Frankel*, 197 F.3d 1170, 1176 (6th Cir. 1999). The Sixth Circuit also noted several factors that should be analyzed to determine whether an attorney or law firm meets this definition.

> [O]ther courts have relied upon a variety of factors, including the volume of the attorney's collection activities, the frequent use of a particular debt collection document or letter, and whether there exists a steady relationship between the attorney and the collection agency or creditor he represented. Courts have considered what portion of the overall caseload debt collection cases constitute, and what percentage of revenues derive from debt collection activities. Some have maintained that even where debt collection takes up a minor portion of a law practice, "debt collector" liability may lie where the defendant has an "ongoing relationship" with a client whose activities substantially involve debt collection.

Id. (citations omitted).

Accordingly, if an attorney is determined to "regularly" collect consumer debts, all actions taken by that attorney to collect a consumer debt are subject to the requirements of the FDCPA, and can subject an attorney to FDCPA liability.

While it is clear litigation activity can result in FDCPA liability, courts have clarified that taking a legitimate legal position that is ultimately wrong does not result in FDCPA liability. For example, in *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015), a debt collector obtained a writ of garnishment against a debtor in state court. *Id.* at 1294. The consumer filed a claim of exemption, and the collector filed a sworn reply disputing the consumer's right to assert an exemption. *Id.* at 1295-96. After exchanging discovery, the debt collector voluntarily dismissed its attempt at a garnishment. *Id.* at 1296. The consumer filed an FDCPA suit alleging the debt collector's sworn reply violated the

FDCPA. The Eleventh Circuit affirmed the district court's dismissal of the consumer's claim stating "it would be passing odd to find that allegations that a state court filing asserted a legal position contrary to that of the consumer was sufficient to state a claim." *Id.* at 1307.

III. DAMAGES FOR A SUCCESSFUL FDCPA CLAIM

If an FDCPA lawsuit is successful, the FDCPA provides specific damages the consumer may recover from the debt collector. Generally, the FDCPA allows for the recovery of actual damages suffered as a result of the FDCPA violation, statutory damages up to $1,000, costs, and reasonable attorney's fees.

> Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title [15 USCS §§1692 *et seq.*] with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure;
>
> (2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. §1692k(a).

In assessing statutory damages, the court awarding damages must consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional." *Id.* at §1692k(b)(1). Statutory damages are limited to $1,000 "per proceeding," rather than $1,000 "per violation." *Wright v. Finance Service of Norwalk, Inc.*, 22 F.3d 647, 651 (6th Cir. 1994).

When seeking actual damages, a consumer will frequently allege damages for anxiety, emotional suffering, embarrassment, and distress. If a court awards actual damages for emotional distress, it does so only where "the illegal debt collection practice was extreme and outrageous." *See, e.g.*, *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783, 806 (S.D. Ohio 2006). However, courts have held that "bare allegations by a plaintiff that the defendant's conduct made him 'depressed,' 'humiliated,' or the like are not sufficient to establish injury unless the facts underlying the case are so inherently degrading that it would be reasonable to infer that a person would suffer emotional distress from the defendant's action." *Bassett v. I.C. Sys.*, No. 09-C-0301, 2010 U.S. Dist. LEXIS 53697, at *18 (N.D. Ill. June 1, 2010).

Punitive damages are not available for a violation of the FDCPA. *See, e.g.*, *Boyce v. Attorney's Dispatch Serv.*, No. C-3-94-347, 1999 U.S. Dist. LEXIS 12970, at *9-10 (S.D. Ohio Apr. 27, 1999) ("The Plaintiffs are not entitled to recover punitive damages under the FDCPA." (citations omitted)).

In addition to the damages available to consumers, in rare circumstances, the Act allows a successful debt collector to recover its attorney's fees and costs. 15 U.S.C. §1692k(a)(3). Specifically, the Act provides: "On a finding by the court that an action under [the FDCPA] was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Id.*

IV. WHAT DOES THE FDCPA PREVENT?

The FDCPA includes provisions that require a "debt collector" to take affirmative actions and also that prevent a "debt collector" from taking certain actions. If a debt collector fails to comply with any of the requirements of the FDCPA, "the FDCPA imposes strict liability, therefore alleviating the need of the plaintiff to prove knowledge or intent, and actual damages need not be suffered." *Perkins v. LVNV Funding, LLC (In re Perkins)*, 533 B.R. 242, 255 (W.D. Mich. Bankr. 2015). Accordingly, a plaintiff "need not show intentional conduct by the debt collector to be entitled to intentional damages." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996).

A. The Least Sophisticated Consumer Standard

In most cases involving allegations of a violation of the FDCPA, but specifically when a consumer alleges that a collection action was misleading or unfair, most courts including the Sixth Circuit apply the "least sophisticated consumer" standard to determine whether the debt collector's actions violated the FDCPA. This standard is most often applied to communications with consumers or legal pleadings filed in litigation to collect a debt.

The Sixth Circuit has explained the "least sophisticated consumer" test as follows:

> The least-sophisticated-consumer test is objective and is designed "to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. [A]lthough this standard protects naive consumers, it also prevents

> liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.

Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 438-39 (6th Cir. 2008) (internal quotation marks omitted) (*quoting F. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509-10 (6th Cir. 2007)). In other words, courts "will not countenance lawsuits based on frivolous misrepresentations or nonsensical interpretations of being led astray." *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 592 (6th Cir. 2009).

However, a minority of courts, including the Seventh Circuit, apply the "unsophisticated consumer standard." The Seventh Circuit rejected the "least sophisticated consumer" test because it believed this standard required a court to view the communication from the perspective of "the single most unsophisticated consumer who exists." *Gammon v. GC Services Ltd. Partnership*, 27 F.3d 1254, 1257 (7th Cir. 1994). Thus, the Seventh Circuit applies the unsophisticated consumer standard, which "protects the consumer who is uninformed, naïve, or trusting, yet it admits an objective element of reasonableness. The reasonableness element in turn shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters." *Id.*

B. Communications after Notice a Consumer is Represented by an Attorney

15 U.S.C. §1692c(a)(2) prevents a debt collector from communicating with a consumer if the debt collector knows the consumer is represented by an attorney.

> Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt . . . if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.

15 U.S.C. §1692c(a)(2).

C. Communications with Third-Parties about a Debt

The FDCPA generally prevents a debt collector from communicating with a third-party about a consumer's debt.

> Except as provided in section 1692b of this title [which governs acquisition of location information], without the

> prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, ***a debt collector may not communicate***, in connection with the collection of any debt, ***with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.***

15 U.S.C. §1692c(b) (emphasis added).

For the purpose of §1692c only, "consumer" is defined to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator." 15 U.S.C. §1692c(d). Thus, a debt collector can communicate about a debt with a consumer's spouse, but a debt collector cannot communicate about a consumer's debt with the consumer's employer, children, or grandparents. *See id.*

D. Harassing, Oppressive, or Abusive Actions

The FDCPA provides that 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." 15 U.S.C. §1692d. The Act includes a non-exhaustive list of activities that are deemed to be harassing, oppressive, or abusive, which include:

> (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
>
> (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
>
> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) [604(a)(3)] of this Act [15 USCS §1681a(f) or 1681b(a)(3)].
>
> (4) The advertisement for sale of any debt to coerce payment of the debt.
>
> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804 [15 USCS §1692b], the placement of telephone calls without meaningful disclosure of the caller's identity.

Id.

The Sixth Circuit has explained that §1692d covers actions taken by debt collectors that are intended to "embarrass, upset, or frighten a debtor. They are likely to cause the suffering and anguish which occur when a debt collector attempts to collect a money which the debtor, through no fault of his own, does not have." *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 330 (6th Cir. 2006) (citations omitted). Based upon these definitions, the Sixth Circuit determined that "the filing of a simple lawsuit, which is an authorized method of collecting a debt," did not violate §1692d because filing a simple lawsuit did "not concern coercion, scare tactics, or fraud." *Id.*

E. False or Misleading Representations

One of the most litigated sections contained within the FDCPA is 15 U.S.C. §1692e, which prohibits a debt collector from using "false, deceptive, or misleading" representations or means in connection with the collection of any debt. 15 U.S.C. §1692e. The Act includes a non-exhaustive list of means of collecting a debt that are considered "false, deceptive, or misleading":

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

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

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

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

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title [15 USCS §1692 *et seq*.].

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

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

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

> (13) The false representation or implication that documents are legal process.
>
> (14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
>
> (15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
>
> (16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act [15 USCS §1681a(f)].

15 U.S.C. §1692e.

One of the most important requirements contained in §1692e is subsection 11, which places an affirmative obligation on debt collectors to include the following information in every communication: "This is an attempt to collect a debt. Any information will be used for that purpose. This communication is from a debt collector." The information required by §1692e(11) is often called the "mini-*Miranda* warning."

An example of a "misleading" action taken by a debt collector is found in *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169 (6th Cir. 2011). There the consumer incurred a healthcare debt and a law firm was retained to collect the outstanding debt. *Id.* at 171. When the consumer failed to pay the debt, the law firm filed a state court collection lawsuit against the consumer. Attached to the state court complaint was a document entitled "Combined Affidavit of Open Account and Motion for Default Judgment." *Id.*

The consumer responded by filing an FDCPA claim, alleging that the "motion for default" was misleading because "it falsely suggested [the consumer] had already missed the deadline to respond" to the collection action. *Id.* at 172. The Sixth Circuit agreed, finding that the document attached to the complaint could be "misleading" to the least sophisticated consumer.

> The relevant document was entitled a motion; and a motion's factual basis usually precedes the motion itself. That is not an abstruse concept: even unsophisticated people understand that there are rules against filing baseless documents with the courts. And thus an unsophisticated consumer who is served with a motion for entry of default judgment might well think he has somehow already defaulted. . . . In the [debt collector's] view, the least sophisticated consumer would understand from [the words "upon default"] that he had not already defaulted.

> But to us those words are an exercise in studied ambiguity. They merely recite the necessary condition for relief, rather than saying anything about whether the condition has already occurred. Thus, there is nothing about the motion for default judgment that would upend the consumer's natural inclination to think there must be some factual basis for it – *i.e.,* that he has already defaulted.

Id. at 172.

The Sixth Circuit decision in *Gionis v. Javitch, Block, Rathbone, LLP*, 238 F.App'x 24 (6th Cir. 2007) provides another example of activity courts have found to be "false, deceptive, or misleading" under §1692e. In that case, the consumer entered into a credit card agreement with an original creditor that allowed for the collection of reasonable attorney's fees upon default. *Id.* at 25. When the consumer defaulted, a law firm filed a collection lawsuit in Ohio state court against the consumer, but did not request attorney's fees because Ohio law does not permit the recovery of attorney's fees in connection with any claim involving "personal, family, or household" debt. *Id.* However, attached to the complaint was an affidavit of indebtedness signed by the original creditor. That affidavit provided: "The credit card agreement specifically provides that [the original creditor] is entitled to recover, *to the extent permitted by applicable law*, its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement." *Id.* (emphasis in original). The creditor alleged that the FDCPA was violated because the affidavit attached to the complaint was "threatening and misleading" because attorney's fees could not be sought under Ohio law, but the least sophisticated consumer would believe he or she owed attorney's fees as a result of the affidavit. *Id.* at 27-28.

The Sixth Circuit first noted that "in a strict sense," §1692e had not been violated, but when viewed through the lens of the least sophisticated consumer, the affidavit was a threat to take an action that could not legally be taken. The Sixth Circuit reasoned:

> Yet, the threatening language appeared in a court filing – where one seeks remedies, not make empty threats – and that arguably could be understood by the least sophisticated consumer as an actual "attempt" to collect attorney fees... After all, "What other reason would the statement appear in a court proceeding if Javitch were not *attempting* to collect attorney fees?" the consumer may... ask... No semantical recasting alters the intimidating effect on the least sophisticated consumer: that she "would be confused, and reasonably might feel pressured to immediately pay the debt, even if she disputed its validity, in order to avoid the possibility of having to also pay [the debt collector's] attorney fees at some later date.

Id. at 28-29.

The Sixth Circuit continued: "[the] failure to assert the attorney fees language in the complaint's 'prayer for relief' section does not cure the threat. The least sophisticated consumer would not realize what a trained lawyer would – that a failure to assert a request for attorney fees in a complaint's 'prayer for relief' generally bars recovery of such relief." *Id.* at 29. Thus, the Six Circuit determined that "an unlawful 'threat' to collect attorney fees was made in the Affidavit, violating §1692e(5), which also amounted to a 'false representation or deceptive means to collect or attempt to collect a debt,' violating §1692e(10). *Id.*

F. Unfair or Unconscionable Means of Collecting a Debt

Another of the most litigated sections of the FDCPA is 15 U.S.C. §1692f, which prohibits a debt collector's use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. §1692f. The Act includes a non-exhaustive list of acts that violate §1692f, which include:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.
>
> (7) Communicating with a consumer regarding a debt by post card.
>
> (8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

Id.

An example of an action that has been found to be "unfair or unconscionable" can be found in *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529 (6th Cir. 2014). In *Currier*, a debt collector obtained a default judgment against the consumer in Kentucky state court on October 1, 2012. *Id.* at 532. On October 5, the consumer filed a motion to vacate the default judgment. Under Kentucky law, the consumer's motion to vacate the default judgment stayed the finality of the default judgment. *Id.* However, on October 8, the debt collector filed a judgment lien. The Sixth Circuit noted that, at that time, the lien was invalid because, under Kentucky law, a judgment lien can only arise from a final judgment. *Id.* The consumer filed an FDCPA suit in federal court as a result of the debt collector's filing of the judgment lien. *Id.*

The *Currier* court determined that filing an invalid lien on the consumer's property was an "unfair or unconscionable" means of collecting a debt in violation of §1692f. The court reasoned:

> The judgment lien placed an improper legal burden on [the consumer's] home, restricting her rights in her own property until [the debt collector] decided to release the lien or until [the consumer] undertook the burden of filing an action to quiet title. . . . The least sophisticated consumer, indeed most consumers, would regard filing a lien on the debtor's home using a state procedure that does not authorize such action as an 'unfair or unconscionable means to collect or attempt to collect' the debt. . . . Though invalid, the judgment lien appears valid on its face, thus representing to the least sophisticated consumer and the public that the creditor had a final

> judgment, had a right to execute on that judgment, and had a valid interest in the debtor's home. [The consumer] has plausibly alleged an unfair debt collection practice under the broad meaning of §1692f.

Id. at 535.

Additionally, based upon recent decisions from the Sixth Circuit and the Kentucky Supreme Court, under Kentucky law, seeking prejudgment interest in a complaint seeking to collect consumer debt may give rise to a claim under §1692f(1), which prohibits the collection of any amount, including interest, not permitted by law. *See* 15 U.S.C. §1692f(1).

First, in *Stratton v. Portfolio Recovery Associates, LLC*, 770 F.3d 443 (6th Cir. 2014), the Sixth Circuit was faced with the question of whether, under KRS 360.010, a party that waives its right to contractual interest, also waives its right to collect statutory interest under Kentucky law. *Id.* at 445. In *Stratton*, the debt collector filed a collection lawsuit against the consumer in Kentucky state court, alleging the consumer owed the liquidated balance, plus 8 percent prejudgment interest from the date of default, which was the prejudgment interest rate set by KRS 360.010. *Id.* at 446. The consumer alleged that by seeking prejudgment interest, the debt collector had sought an amount not permitted by law. The Sixth Circuit agreed.

In rendering its decision, the Sixth Circuit relied on the text of KRS 360.010, which provides: "The legal rate of interest is eight percent (8%) per annum, but any party or parties may agree, in writing, for the payment of interest in excess of that rate; . . . and any such party or parties, and any party or parties who may assume or guarantee any such contract or obligation, shall be bound for such rate of interest." *Id.* at 447. The Sixth Circuit interpreted KRS 360.010 as setting a default rule, and found that if the parties by contract displaced the default rule, "[a] party's right to collect statutory interest is extinguished." *Id.* at 447. Because the consumer's credit card agreement imposed a rate of interest higher than eight percent, the Sixth Circuit determined that the default rule was displaced, and if the original creditor waived the right to collect contract interest, the debt collector was not assigned the right to collect any prejudgment interest. Thus, according to the Sixth Circuit, if the original creditor waived the right to contract interest, the debt collector violated §1692f(1) by seeking to collect prejudgment interest pursuant to the rate set forth in KRS 360.010 and Kentucky case law, which generally provides that a party is entitled to prejudgment interest on a liquidated amount. *Id.* 447-48.

Just last year, the Sixth Circuit's interpretation of KRS 360.010 and the right to collect prejudgment interest under Kentucky law was accepted by the Kentucky Supreme Court in *Unifund CCR Partners v. Harrell*, 509 S.W.3d 25 (Ky. 2017). The Kentucky Supreme Court was faced with the exact same facts as the Sixth Circuit – a debt collector sought eight percent prejudgment interest in a collection lawsuit, rather than the higher rate of interest specified in the consumer's credit card agreement.

The Supreme Court agreed with the Sixth Circuit's interpretation of KRS 360.010 finding that "KRS 360.010 does not create an entitlement to statutory interest, rather, it sets the default interest rate in the absence of a contractually agreed upon interest rate." *Id.* at 29. Thus, under Kentucky law, depending upon the underlying facts, seeking prejudgment interest on a consumer debt, may result in FDCPA liability under §1692f(1).

G. Validation of Debts

The FDCPA also requires debt collectors to provide specific notices to a consumer when the debt collector initially contacts a consumer in an attempt to collect a debt, in addition to the "mini-*Miranda* warning" that must be included in subsequent communications. Specifically, 15 U.S.C. §1692g(a) requires a debt collector to do the following when making an initial communication with a consumer, or within five days of making the initial communication:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing:
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
>
> *Id.* 1692g(a).

The notice required by 15 U.S.C. §1692g(a) is commonly referred to as a "G-notice." The debt validation notice requirements included in §1692g were included by Congress to guarantee that consumers would receive adequate notice of their rights under the law. *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000). Accordingly, failure to provide any of the required notices in the §1692g will constitute an FDCPA violation.

Typically, a debt collector will comply with 15 U.S.C. §1692g by including the required information in its initial communication with the consumer, rather than sending a separate communication within five days of the initial communication. Thus, a paragraph similar to the following is typically included in initial communications:

> 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 that you dispute the validity of this debt or any portion thereof, 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.

When drafting such a provision, debt collectors should pay particular attention to the fact that, while the consumer must request certain information in writing, a consumer need not dispute the debt in writing. *See* 15 U.S.C. §1692g(a); *see also Camacho v. Bridgeport Financial, Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005) ("[T]he plain language of the text of §1692g(a)(3) does not state that the consumer must dispute the debt in writing.") Moreover, "in order to comply with the requirements of section 1692g, more is required than the mere inclusion of the statutory debt validation notice in the debt collection letter – the required notice must also be conveyed effectively to the debtor." *Wilson*, 225 F.3d at 354.

The Act specifically exempts a legal pleading from being an initial communication that must contain the "G-notice." *Id.* at 1692g(d) ("A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).") Thus, if the first communication a debt collector has with a consumer is filing a complaint to collect the debt, the debt collector is not required to include the "G-notice" in the complaint. Furthermore, notice that a debt collector is required by law to send to the consumer, and is not related to collecting the debt will not be treated as an "initial communication" that must include the "G-notice." *Id.*at 1692g(e) ("The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986 [26 USCS §§1 *et seq.*], title V of Gramm-Leach-Bliley Act [15 USCS §§6801 *et seq.*], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.")

The importance of including a "G-notice," and why attorneys must be cognizant of the requirements of the FDCPA, is illustrated by *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992). In *Frey*, a consumer incurred a debt to a company, who retained an attorney to file suit to collect the debt. The attorney filed the suit, which resulted in an agreed judgment that required the consumer to make monthly payments. *Id.* at 1517. However, the consumer failed to make all the monthly payments as required by the agreed judgment, and the attorney sent the consumer a letter stating:

> Even though this office obtained a Judgment in favor of J.C. Penney Company, Inc. against you in the JEFFERSON DISTRICT Court on June 28, 1988, our records show that you still owe $354.84 on that judgment, plus court costs, and interest which is added every day at 12% per year. At that rate, $500 would grow to $800 in a little less than five years.
>
> Under Kentucky law, a judgment is good for up to fifteen years. That means that we have up to fifteen years from June 28, 1988 to garnish wages from any job you have, to attach any monies you might have in any bank account, or to file a foreclosure on any real estate you might own. Needless to say, fifteen years is a long time.
>
> Our office practice is to re-check employment every year to see if we can issue a garnishment. Even though you may not be working now, we will re-check every year for fifteen years after June 28, 1988 to find out if we can issue a garnishment.
>
> Naturally, it is in your best interest, and ours, to pay this judgment off as soon as possible. If you would like to make periodic payment arrangements, please call us immediately.

Id.

The consumer responded to this letter by filing a lawsuit against the ***attorney***, alleging that the attorney was a debt collector that failed to provide the consumer with the required "G-notice." *Id.* The Sixth Circuit agreed, finding that the attorney had violated the FDCPA by attempting to collect a debt due another without including the validation notice requirements in the attorney's initial communication with a consumer. *Id.* at 1519.

V. SPECIFIC DEFENSES TO THE FDCPA

Because the Act imposes strict liability, the FDCPA also includes specific defenses that can be asserted by a debt collector.

A. The *Bona Fide* Error Defense

Even if a plaintiff proves that the debt collector violated a provision of the FDCPA, a debt collector will be absolved of liability if the debt collector can show its violation of the Act was the result of a "*bona fide* error."

The Act provides:

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

15 U.S.C. §1692k(c). Thus, to meet its burden of proving the *bona fide* error defense, a debt collector must show, by a preponderance of evidence, the following three elements: "(1) the violation was unintentional; (2) the violation was a result of a *bona fide* error; and (3) the debt collector maintains procedures reasonably adapted to avoid any such error." *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606, 614 (6th Cir. 2009).

To show that a violation of the Act was "unintentional," the debt collector need only show that its violation of the FDCPA was unintentional, not that the act that gave rise to the alleged violation was unintentional. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). An error will be "*bona fide*" where it "is one that is made in good faith; inadvertently; without fraud or deceit." *Durthaler v. Accounts Receivable Management, Inc.*, 854 F.Supp.2d 485, 494 (S.D. Ohio 2012). Finally, "[t]he procedures component of the *bona fide* error defense involves a two-step inquiry: first, whether the debt collector 'maintained' – *i.e.,* actually employed or implemented – procedures to avoid errors; and, second, whether the procedures were 'reasonable adapted' to avoid the specific error at issue." *Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006) (citations omitted).

For many years, federal circuit courts were split on whether the *bona fide* error defense applied to mistakes of law. In 2010, the United States Supreme Court partially answered this question in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573 (2010). The Supreme Court was asked to determine "whether the '*bona fide* error' defense in §1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA." *Id.* at 577. The Supreme Court held that "the *bona fide* error defense in §1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of [the FDCPA]." *Id.* at 604-05.

Importantly, the Supreme Court did not address whether the *bona fide* error defense applied to mistakes of state law or mistakes of federal law other than the FDCPA. Specifically, the Supreme Court stated: "The parties disagree about whether §1692k(c) applies to mistakes of state law or federal law other than the FDCPA. . . . Because this case involves only alleged misinterpretation of the requirements of the FDCPA, we need not, and do not, reach those other questions." *Id.* at 580 n.4. Thus, the only clear answer provided by the Supreme Court was that a mistaken legal interpretation of the FDCPA's requirements could not be a *bona fide* error.

In 2015, the Sixth Circuit determined that, although the Supreme Court failed to address whether mistakes of state law could be a *bona fide* error, the Supreme Court's "discussion of the [*bona fide* error] defense makes clear that mistakes of state law can give rise to liability." *Wise v. Zwicker & Associates, P.C.*, 780 F.3d 710, 713 (6th Cir. 2015); *see also Ballou v. Law Offices of Howard Lee Schiff, P.C.*, 713 F.Supp.2d 79, 82 (D. Conn. 2010) ("[T[he reasoning of *Jerman* would seem to apply to all mistakes of law.") Thus, in the Sixth Circuit a mistake of state law or federal law other than the FDCPA could result in liability to a debt collector, even if the debt collector could otherwise meet the requirements of the *bona fide* error defense.

While *Jerman* and *Wise* would appear to significantly limit the applicability of the *bona fide* error defense, there is little doubt that factual errors are still protected by the *bona fide* error defense (assuming the debt collector could show that making the factual error was unintentional and was made despite the debt collector's maintenance of procedures reasonably adopted to avoid such errors). *See Jerman*, 559 U.S. at 575 (noting that even after its decision the *bona fide* error defense remains "when a violation results from a qualifying factual error").

Indeed, *Durthaler v. Accounts Receivable Management, Inc.*, 854 F.Supp.2d 485 (S.D. Ohio 2012), serves as a good example that the *bona fide* error defense may be successfully asserted under the right circumstances. In that case:

> [The debt collector] made 32 telephone calls in an attempt to collect the debt owed by the [consumer]. Two of the calls were made to the [consumer's] roommate, who [was] also his landlord. Following the first call to the roommate, the [consumer] requested that the [debt collector] not call that number again. After that request, the [debt collector] once again called the roommate. Thereafter, the [consumer] telephoned the [debt collector] and asked it not to call his roommate and also informed it . . . that he could not currently pay the debt.

Id. at 487. The consumer alleged that the debt collector violated the FDCPA's anti-harassment provision, and that it failed to give the consumer the "mini-*Miranda*" warning, required by §1692e(11). *Id.* at 488.

The *Durthaler* court granted summary judgment to the debt collector on the basis of the *bona fide* error defense based on the evidence presented by the debt collector. Specifically, the debt collector provided evidence that:

> The [debt collector's] policy is to monitor its collectors telephone calls to consumers and routinely record them to ensure that they are complying with the FDCPA. . . . In the event that collector continuously fails to set forth "this is an attempt to collect a debt and any information will be used for that purpose," it is grounds for immediate discipline.

Id. at 495. Moreover, the debt collector provided evidence that the particular employee involved had passed initial training and on-the-floor training; the employee was provided a copy of the FDCA; and the employee had attended mandatory continuing training sessions related to the FDCPA, including providing the "mini-*Miranda* warning." *Id.* Based on this evidence, the court determined that the debt collector "employed both general procedures to comply with the FDCPA and specific procedures designed to avoid the error at issue." *Id.*

Additionally, because it was undisputed that the employee had previously left two messages that were in total compliance with the FDCPA, the court inferred that the employee's subjective intent was not to intentionally violate the FDCPA, and that the employee's acts, albeit incorrect, were made in good faith and with a "lack of deceit and fraud." *Id.* Accordingly, the court found that the debt collector had satisfied all elements of the *bona fide* error defense.

B. Acts Taken in Conformity with FTC Decisions

In addition to the *bona fide* error defense, the FDCPA provides a defense if the allegedly offending act was "done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade Commission], notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. §1692k(e).

C. One Year Statute of Limitations

While not specific to the Act, debt collectors and consumers should be aware of the one-year statute of limitations provided by the FDCPA. "An action to enforce any liability created by [the FDCPA] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of appropriate jurisdiction, ***within one year from the date on which the violation occurs.***" 15 U.S.C. §1692k(d) (emphasis added). Based upon the plain language of this provision, courts agree that an FDCPA cause of action accrues, and the statute of limitations begins to run, on the date of the alleged violation. *See, e.g.*, *Purnell v. Arrow Fin. Servs., LLC*, No. 07-1903, 2008 U.S. App. LEXIS 25488, at *10 (6th Cir. Dec. 16, 2008) ("[P]laintiff's FDCPA claims were not barred to the extent they alleged a discrete violation of the FDCPA within the limitations period.")

To survive the statute of limitations, an FDCPA complaint must allege a discrete FDCPA violation within the one-year limitations period, and not merely a "later effect[] of an earlier time-barred violation.'" *Slorp v. Lerner, Sampson & Rothfuss,* 587 F.App'x 249, 259 (6th Cir. 2014). In the FDCPA context, "discrete acts" have been defined as "easily identified actions which constitute actionable unlawful practices." *Nelson v. Credigy Receivables*, No. 13CVH-09-9885, 2015 Ohio Mis. LEXIS 8491, at *5 (Ohio Ct. Common Pleas April 13, 2015).

As a result of the plain language of §1692k(d), many courts, including the Sixth Circuit, have refused to apply the "continuing violation" doctrine to an FDCPA claim. *See, e.g.*, *Kirscher v. Messerli & Kramer P.A.*, No. 05-cv-1901, 2006 U.S. Dist. LEXIS 3346, at *11 (D. Minn. Jan. 14, 2006) ("The sparse case law addressing this issue indicates that a continuing violation theory is not available under the FDCPA.") Under the "continuing violation" doctrine, "violations which occur beyond the limitations period are actionable where a plaintiff challenges not just one incident of unlawful conduct but an unlawful practice that continues into the limitations period." *Slorp*, 587 F.App'x at 257.

In *Slorp*, the Sixth Circuit explicitly refused to apply the continuing violation doctrine to an FDCPA claim. There the consumer alleged that a debt collector filed an unfair, deceptive, and fraudulent foreclosure action against the consumer. *Id.* at 251. The federal district court dismissed the consumer's FDCPA claim because the consumer filed her complaint more than one year after the allegedly offending foreclosure action was initiated. *Id.* at 257. The consumer appealed, arguing that the continuing violation doctrine applied to the consumer's FDCPA claim.

The Sixth Circuit recognized that the effects of the foreclosure action may continue, but noted that courts have been reluctant to expand the "continuing violation" doctrine beyond Title VII claims. *Id.* at 257. The Sixth Circuit refused to apply the continuing violation doctrine to FDCPA claims, and found that "when a debt collector initiates a deceptive, abusive, or otherwise unfair lawsuit, there is no doubt that the FDCPA claim – insofar as it is viable – accrues on that date. Although the subsequent prosecution of that suit may exacerbate the damages, the continued accrual of damages does not diminish the fact that the initiation of the suit was a discrete, immediately actionable event." *Id.* at 258.

VI. CONCLUSION

The FDCPA itself is fairly straightforward, setting forth standards with which a debt collector must comply in order to protect consumers, and reward those debt collectors who strictly follow the Act's requirements. However, in the courts, the interpretation of the FDCPA's requirements, and application of the "least sophisticated consumer" standard can get quite complicated. Thus, this outline should merely serve as an introduction to the Act, which should help identify if your client is subject to the FDCPA, if you are subject to the FDCPA, and whether or not your client has a potential FDCPA claim.