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Consumer Track

FDCPA/FCRA Class Actions: Strategies and Pitfalls

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CONCURRENT SESSION

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CLASS ACTIONS

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I. Advantages

A. The only means for judicial relief when a plaintiff's claim is too small economically to support individual prosecution. *In re Kroger Co. Shareholder Litigation* (Hamilton Cty. 1990), 70 Ohio App.3d 52, 66 ("Class actions serve a useful function in eliminating repetitious litigation and providing relief for small claimants.")

B. Avoids a multiplicity of actions in various jurisdictions.

C. Minimizes the risk of inconsistent rulings.

D. There is a potential for broader discovery than would be permissible if an action were prosecuted individually.

E. There is greater leverage against defendant by creating a larger exposure to liability.

II. Pleading and Procedure

A. The elements of the causes of action alleged in the complaint are the same as if the case were prosecuted on an individual basis.

B. The complaint should allege the definition of the class and the Rule 23 factors.

C. Bifurcated discovery is – almost -- a thing of the past. The Supreme Court has acknowledged, that the Rule 23 analysis often "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S. Ct. 2541, 2551 (2011). But "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Rikos v. P&G*, 799 F.3d 497, 505 (6th Cir. 2015) (*quoting, Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d 308 (2013).)

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D. Motion for Class Certification

1. Burden of proof is on the plaintiff. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule--that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart,* 131 S. Ct. at 2551; *see*, *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012).

E. Tolling of statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974); *see also, Phipps v. Wal-Mart Stores*, 792 F.3d 637, 640 (6th Cir. 2015). Note, *SRM Global Master Fund L.P. v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir., 2016), *cert. pending*, (2016) (whether tolling applies to statute of repose).

F. Settlements must be approved by the court – preliminary approval and final approval.

III. Rule 23(a) Factors -- All Factors Must be Established

A. Implicit Factors

1. Ascertainable Class

a. A properly defined class exists if: (i) the definition specifies a particular group at a particular time frame and location who were harmed in a particular way, and (ii) the definition is such that the Court can ascertain its membership in some objective manner. *Edwards v. McCormick*, 196 F.R.D. 487, 491 (S.D. Ohio 2000).

b. There must be an "administratively feasible" way of identifying class members. *Carrera v. Bayer Corp.*, 727 F.3d 300, 303 (3d Cir. 2013).

2. Plaintiff is a Member of the Class

a. The second implicit requirement of Rule 23 is that "the named representative must be a member of the class." *East Texas Motor Freight Sys., Inc. v. Rodriquez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453, 462 (1977).

B. Numerosity

1. There is no precise number at which joinder becomes impractical and where a class action is the only viable alternative. *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004). *Wilson v. Anthem Health Plans of Ky., Inc.*, 2017 U.S. Dist. LEXIS 572, at *12 (W.D. Ky. Jan. 3, 2017) (27 class members).

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2. "[I]mpracticability of the joinder is not determined according to a strict numerical test but upon the circumstances surrounding the case." *Senter v. General Motors Corp.*, 532 F.2d 511, 523 n.24 (6th Cir.), *cert denied*, 429 U.S. 870 (1976).

3. However, "numbers are not a perfect predictor. Rather than naming a specific number, Rule 23 places the size of the class in the context of actual impracticability of joinder." *Turnage v. Norfolk S. Corp.*, 307 Fed. App'x 918, 921 (6th Cir. 2009).

4. *Wilson*, 2017 U.S. Dist. LEXIS 572, at *18: "The Court agrees, as Wilson points out, that a primary reason no other suits are likely is because 'class members would have little knowledge of the availability of a claim regardless of whether they had the financial resources to pursue the claim.' Without knowledge of such claims, it can hardly be said that class members are fully "able" to institute their own lawsuits."

C. Commonality

1. Common questions are present when a common course of conduct or a common nucleus of operative facts exists from which the defendant's liability arises. *See, Alexander Grant & Co. v. McAllister*, 116 F.R.D. 583, 587 (S.D. Ohio 1987); *Davis v. Avco Corp.*, 371 F. Supp. at 782, 791 (N.D. Ohio 1974); *aff'd,* 739 F.2d 1057 (6th Cir. 1984).

2. "The commonality test is qualitative rather than quantitative, that is, there need only be a single issue common to all members of the class." *In Re American Medical Systems, Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996).

3. Justice Scalia described the commonality inquiry as requiring "significant proof" of common "answers," not common "questions." *Wal-Mart*, 131 S. Ct. at 2551; *In re Countrywide Fin. Corp. Mortgage Lending Practices Litig.*, 708 F.3d 704, 707 (6th Cir. 2013) (single policy or practice).

D. Typicality

1. Commonality and typicality "tend to merge." *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532 (6th Cir. 2012).

2. The "typicality" requirement is satisfied when the representatives' claims are based on the same legal theory, or when the wrongdoing is alleged to have violated the same legal interest of all class members. *In re Revco Sec. Litig.*, 142 F.R.D. 659, 666 (N.D. Ohio 1992). The class representative must have claims and interests similar to those of the whole class.

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E. Adequacy

1. The class representative must: (1) have common interests with unnamed members of the class (common interests), and, (2) vigorously prosecute the interests of the Class through qualified counsel (vigorous prosecution). *Kinder v. Nw. Bank*, 278 F.R.D. 176, 184 (W.D. Mich. 2011).

2. No conflicts among class members.

3. "Class plaintiffs need not demonstrate extensive or sophisticated knowledge about a case, nor are they required to show their participation in the litigation at every step of the way." *In re AEP ERISA Litig.*, 2008 WL 4210352, at *2 (S.D. Ohio 2008); *see, In re Biery,* 543 B.R. 267 (Bankr. E.D. Ky. 2015).

IV. Rule 23(b) Factors – One Factor Must be Established

A. Inconsistent Adjudications. Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing an "incompatible standard of conduct for the party opposing the class." A mandatory class where class members do not have the right to request exclusion ("opt-out") from the class and pursue their individual claims, is available under Rule 23(B)(1) where the relief sought is primarily equitable.

1. Split of authority on whether damages are available and whether notice to the class is required. *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 Geo. Wash. L. Rev. 798 (2014).

B. Declaratory or Injunctive Relief. Rule 23(b)(2) covers class actions for declaratory or injunctive relief where the party opposing the class has acted or refused to act on grounds generally applicable to the class. *Amchem Prods. v. Windsor*, 521 U.S. 591, 630, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

1. Equitable relief must be primary; monetary relief incidental. *Johnson v. Meriter Health Servs. Emple. Ret. Plan*, 702 F.3d 364 (7th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011) (questioning whether damages are permissible at all after *Wal-Mart*); *see also, Wilson*, 2017 U.S. Dist. LEXIS 572, at *38.

C. Damages Class. Rule 23(b)(3) requires that the case meet two criteria beyond the requirements of Rule 23(A): (1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. *Marks v. C.P. Chemical Co., Inc.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987).

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1. Predominance. Plaintiff must show that common questions will predominate over individual ones, but not success on the merits. *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 858 (6th Cir. 2013).

2. Superiority. "[C]ases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Young*, 693 F.3d at 545.

V. The Future?

A. The Latest: The Fairness in Class Action Litigation Act of 2017.

1. Passed by the House of Representatives on March 9, 2017.

2. Referred to Senate Judiciary Committee.

B. Changes

1. Class members must suffer "the same type and scope of injury as the named class representative."

2. Requires the class representative to show that there is an "administratively feasible mechanism" to determine class membership.

a. "Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry." William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 3:3 (5th ed. 2011).

b. "Administrative feasibility" is "an attempt to graft an almost, if not completely, insurmountable burden on plaintiffs in small-claim consumer class action cases." *In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. 36, 49 (D. N.H. 2015).

3. Discovery is stayed while dispositive motions or motions to strike the class allegations are pending.

4. Requires that the complaint allege "the circumstances under which each class representative or named plaintiff agreed to be included in the complaint."

5. Must disclose any litigation funding arrangements.

6. Attorney fees may not be paid until all funds are distributed to the class and the amount of the fee must be tied to the amount actually distributed to the class or the value of the injunctive relief.

7. Appeals of orders granting or denying class certification would be mandatory, not discretionary.

Telephone Consumer Protection Act

I. TCPA OVERVIEW

- Congress enacted in 1991 in response to consumer complaints about telemarketing and debt collection phone calls, and the FCC adopted implementing regulations in 1992.
- Restricts marketing calls and text messages to cell phones and residential landlines, also restricts unsolicited faxes.
- Generally prohibits – without prior express consent – communications using automated dialing systems, artificial callers and prerecorded messages.

A. In General

- Calls to Residential Phone Lines – TCPA prohibits pre-recorded messages, but this only applies to solicitations from telemarketers /sellers with whom the consumer does not have an "established business relationship."
- Calls to Cell Phones – TCPA prohibits use of automated calls, pre-recorded messages, and text messages to cell phones,[1] unless the consumer gives permission. Consumer can revoke consent notifying telemarketer or debt collector.
- Do-Not –Call Registry – TCPA prohibits any solicitation calls to numbers on the registry – both cell phones and residential lines.[2]
- Hours – No calls to residences outside the hours of 8:00 a.m. to 9:00 p.m.
- Several specific requirements for fax machines,[3] autodialers, and voice messaging systems.
- Requires telemarketers using automated devices to self-identify and reveal contact information in the message.

B. Exemptions

- Commercial calls for non-marketing purposes
- Calls from tax exempt, nonprofit entities
- Political calls
- Loan servicer calls:
  - servicing existing commercial debt
  - home loan modifications
  - refinancing of home loans under the American Recovery and Reinvestment Act
- Notices and alerts from:
  - airlines

[1] For purposes of the TCPA, the FCC has interpreted "calls" to include SMS text messages. See 2003 TCPA Order at ¶ 16 (2003).
[2] See 47 C.F.R. § 64.1200 (c)(1)-(2).
[3] See 47 U.S.C. § 227 (1)(b)(1)(C); 47 C.F.R. § 64.1200 (a)(4)(i)-(ii).

- banks and credit card companies (balances and fraud alerts)
- schools and universities
- package delivery services
- wireless carriers (plan usage)

- Research calls or surveys

II. 2013 TCPA RULE CHANGES

A. Protections

The FCC has adopted additional protections for consumers concerning unwanted autodialed and/or robocalls:

1) Opt-Out Mechanism (eff. 1/14/13):

Telemarketers must implement an interactive opt-out mechanism announced at the outset of the call. Upon invocation, the consumer must be automatically added to the seller's do-not-call list and the call must be immediately terminated.

2) Prior express written consent (eff. 10/16/13):

Unambiguous written consent required before telemarketing call or text message.
Exception: calls that are manually dialed and do not contain a pre-recorded message are exempt from the TCPA.

3) No "Established Business Relationship":

Established business relationship no longer relieves advertisers of prior unambiguous written consent requirement. Business between the consumer and the telemarketer/seller within the last 18 months, or an enquiry by the consumer to the telemarketer/seller within the last 3 months leads to presumption of "established business relationship."

B. Damages

The TCPA and the amended rules offer potential of substantial damages:

- statutory damages ranging from $500 to $1,500[4] for each non-complying fax, call, robocall or SMS message, with no cap on total damages. Sec. 227(b)(3)(B).
- Claims may be brought in state court.[5]
- Class actions permitted.

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[4] If a violation was "willful or knowing," a court can triple the damage award. Sec. 227(b)(3)(B).
[5] See 47 U.S.C. § 227(b)(2) et seq. - the TCPA includes a private right of action provision to redress violations in state courts. See § 227(b)(3).

- the FCC recently ruled that a seller can be vicariously liable under the TCPA for calls made by third-party telemarketers.

III. ISSUES UNDER THE TCPA

A. Prior Express Consent

1) Consent must be clear and specific (*Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009)

    - Plaintiff had opted in "to receive promotions from Nextones affiliates and brands" by text message.
    - Publishing company Simon & Schuster purchased an opt-in list from Nextones and text-messaged Plaintiff to advertise new Stephen King book.Plaintiff brought class action claim against Simon & Schuster.
    - The Ninth Circuit took a narrow view of "prior express consent," holding that it must be "clearly and unmistakably stated."
    - Plaintiff had opted in "to receive promotions from Nextones' affiliates and brands."
    - Court held that plaintiff could not have given prior express consent to receive promotional materials from Simon & Schuster since it was neither an affiliate nor brand of Nextones.
    - Parties subsequently settled for $10 million.

2) Consent *must* be given by current phone subscriber (*Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. May 12, 2012)

    - Defendant made telephone call to a reassigned mobile number for which the prior phone subscriber had given consent to receive calls; the new phone subscriber had not given consent.
    - The Seventh Circuit affirmed the district court's holding that only the subscriber assigned to the cell number at the time of the call can provide the requisite consent.
    - The decision turneds on the definition of "called Party" under the TCPA.
        - Language of the statute: "called party" means current subscriber of the cell number
        - Rejected argument that "called party" means "intended recipient of the call"
        - "The phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended recipient of the call'?"
        - Rejected argument that consent is effective until revoked by the new subscriber. "The idea that one person can revoke another's consent is odd."

3) Voluntarily providing a cell number may or may not indicate express consent to be called on that number.

   a) Consent given:

   - FCC Rulings:

     – "Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[6]

     – "We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."[7]

   - *Nigro v. Mercantile Adjustment Bureau*, 769 F.3d 804, 806–07 (2d Cir.2014). The FCC filed an amicus letter, at the request of the court, clarifying a 2008 order. The order said "prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed."

   - *Pinkard v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 160938 (N.D. Ala. Nov. 9, 2012) (Plaintiff provided several pieces of personal information, including cell phone number, when dropping off prescription. Within hours, she began receiving text messages on her cell phone. Motion to dismiss granted where complaint alleged that plaintiff provided her telephone number to defendant at defendant's request).

   - *Mitchem v. III. Collection Serv.*, 2012 U.S. Dist. LEXIS 126017, at *5 (N.D. III. 2012) (Plaintiff gave cell phone number to medical provider when he received treatment. When plaintiff failed to pay bill, debt collection agency attempted to collect debt by contacting plaintiff on his cell phone. Summary judgment for defendant granted where "the record establishes that plaintiff consented to receiving calls about the medical debt on his cell phone by giving the cell phone number to a medical provider.")

   b) No consent:

[6] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992).
[7] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564, para. 9 (2007).

- *Lusskin v. Seminole Comedy, Inc.*, 2013 U.S. Dist. LEXIS 86192 (S.D. Fla. June 19, 2013) (Plaintiff bought ticket to comedy show and provided mobile number as part of transaction. Thereafter, he received text messages alerting him of future events. In rejecting motion to dismiss, Judge Scola held that FCC order was not entitled to deference and concluded that a person who merely releases his or her telephone number to another party has not consented to be contacted by that party with automated technology.)

- *Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 U.S. Dist. LEXIS 65603 (S.D. Fla. May 8, 2013) (Wife provided plaintiff's cellular phone number to hospital during trip to ER. Plaintiff was contacted on his cell phone by debt collector for failure to pay bill. Summary judgment for defendant denied. FCC ruling not entitled to deference—"Although it may be reasonable to presume that an individual, in providing a cell phone number on a credit application, consents to be called at that number by the creditor, such consent is 'implied' through the individual's conduct") (same judge)

B. <u>Revocation</u>

1) <u>Consumers may revoke consent, including orally</u>

It is not clear from the caselaw whether a consumer expresses consent merely by calling a creditor from his cell phone. However, revocation of consent is a simple matter, including oral revocation:

> the United States Federal Communications Commission provided persuasive guidance in a declaratory ruling confirming that called parties may revoke their consent orally. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Red. 15391, 15398* (2012) (explaining that "requests to stop receiving voice calls ... can be confirmed during the same call in which a consumer has expressed a desire to opt out.)

Reid v. GE Capital Retail Bank, No. CV 114-079, 2014 WL 6981426, at *3 (S.D. Ga. Dec. 9, 2014), citing *Osorio v. State Farm Bank. F.S.B.*, 746 F.3d at 1254.

2) <u>Temporal restrictions on right to revoke?</u>

a) No temporal restriction

Gager v. Dell Financial Services LLC, 2013 U.S. App. LEXIS 17579 (3rd Cir. Aug. 22, 2013)

- Gager provided her cell number as part of application when purchasing Dell computer equipment. When she defaulted, Dell began leaving prerecorded messages on her cell phone. Gager sent a letter to Dell with her cell phone number requesting that the calls stop, but the calls continued.
- The Third Circuit held that consumers have the **right to revoke consent** and that there is **no temporal restriction on that right**.
- The court reasoned that consent can be revoked under common law, any ambiguity in the TCPA should be resolved in favor of the consumer, and the FCC's *Soundbite* advisory ruling[8] (2012) suggests that consent under the TCPA can be revoked.
- The court rejected argument that FCC's "absent instructions to the contrary" language in its 1992 Ruling meant that such instructions could only be given at the time the consumer consents to receive autodialed calls.
- Policy: "[A]n individual should be allowed to withdraw consent at any time if she no longer wishes to continue with a particular course of action."

b) Other Courts Disagree – no right to revoke

- *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 468 (E.D.N.Y. 2012) (holding that "there is no provision in the TCPA . . . that allows withdrawal of a voluntarily-given, prior express consent to call a cell phone number").

- *Chavez v. Advantage Group*, 2013 U.S. Dist. LEXIS 110522, at *11-12 (D. Colo. Aug. 5, 2013) ("Consent [once given]…could not be . . . effectively withdrawn").

- *Kenny v. Mercantile Adjustment Bureau*, 2013 U.S. Dist. LEXIS 62415, at *18-19 (W.D.N.Y. May 1, 2013) (suggesting in dicta that revocation is not possible).

3) <u>Written Revocation Required?</u>

a) Verbal revocation not sufficient

- *Starkey v. Firstsource Advantage*, 2010 U.S. Dist. LEXIS 60955, at *16 (W.D.N.Y. Mar. 11, 2010). Explicitly states that verbal revocation is not sufficient under the TCPA. "There is nothing in either the TCPA or the FCC's December 28, 2007 Declaratory Ruling to support plaintiff's

[8] In the Matter of SoundBite Communications, Inc. Petition for Declaratory Ruling, CG Docket No. CG 02-278.

claim that a verbal request is sufficient to cease legitimate debt collection efforts."

- *See also Cunningham v. Credit Mgmt., L.P.*, 2010 U.S. Dist. LEXIS 102802 (N.D. Tex. Aug. 30, 2010) (following *Starkey*); *Moore v. Firstsource Advantage*, LLC, 2011 U.S. Dist. LEXIS 104517, at *33 (W.D.N.Y. Sept. 15, 2011) ("[A] verbal request to cease debt collection calls to a cellular phone will not be sufficient to revoke 'prior express consent' under the TCPA"); *Moltz v. Firstcource Advantage, LLC*, 2011 U.S. Dist. LEXIS 85196, at *15 (W.D.N.Y. Aug. 3, 2011) (noting that the FDCPA written notice requirement "overrides" the TCPA)

b) Verbal revocation sufficient

- *Beal v. Wyndham Vacation Resorts*, 2013 U.S. Dist. LEXIS 89840, at *41 (W.D. Wis. June 20, 2013). "[C]onsumers have the right to revoke consent to receive autodialed calls under the [TCPA] and…they may do so orally or in writing."

- *Adamcik v. Credit Control Servs.*, 832 F. Supp. 2d 744 (W.D. Tex. 2011). Court finds that TCPA's silence on revocation means that oral revocation should be sufficient.

- *Gutierrez v. Barclays Group*, 2011 U.S. Dist. LEXIS 12546 (S.D. Cal. Feb. 9, 2011). Determining that because the FCC indicated that prior express consent need not be in writing, a consumer can revoke consent orally.

C. "Autodialer" (ATDS)

1) "Automatic telephone dialing system" (ATDS) means equipment which has the capacity:[9]

   (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

   (B) to dial such numbers.

2) An ATDS encompasses hardware that "when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, *or from a database of numbers*."[10]

[9] 47 U.S.C. 227 (a)(1); 47 C.F.R. 64.1200(f)(2)
[10] FCC's June 26, 2003 Report and Order ¶ 131.

The "basic function" of an autodialer is the "capacity to dial numbers *without human intervention*."[11]

The FCC "has emphasized that this [ATDS] definition covers any equipment that has the specified capacity to generate numbers and dial them without human intervention *regardless of whether the numbers called are randomly or sequentially generated or come from calling lists*.[12]

The FCC's July 10, 2015 Order (FCC 15-72) provided a broad definition of ATDS that the capacity or capability alone to store or produce and dial random or sequential numbers, regardless of whether such functionalty was utilized or could have been utilized at the time the calls were made, would define whether the equipment constitutes an autodialer. Litigation has continued to produce inconsistent results.[13]

3) Manual dialing is not covered by the TCPA, but "Predictive Dialing" is.[14]

- Predictive dialing – uses complex algorithms to predict when a consumer is home and automatically dial telephone numbers for the agent.

4) "Preview dialing" may be covered
   - This allows an agent to preview information and manually choose a telephone number to call by manually clicking a button. The system then dials the telephone number.
   - *Ashland Hosp. Corp. v. SEIU*, 708 F.3d 737, 743-74 (6th Cir. 2013) (Prerecorded voice messages sent to the homes of residents, who were given the option of being automatically connected to the hospital CEO's direct extension by pressing "1" on their keypad. Calls made to the CEO in this manner were live calls and the "TCPA does not apply.")
   - *but see Nelson v. Santander Consumer USA, Inc.*, 2013 U.S. Dist. LEXIS 40799, at *27 (W.D. Wis. Mar. 8, 2013) (calls made using preview dialing violated TCPA because equipment still had the capacity to make predictive dialing calls).

D. "Confirmatory Texts"

[11] *Id*. at ¶132
[12] FCC's November 26, 2012 Declaratory Order ¶ 5.
[13] *Luna v. Shac, LLC*, 2015 WL 4941781 (N.D.Cal. 2015) (human intervention requirement indicates not an autodialer); *Dominguez v. Yahoo, Inc.*, 629 Fed.Appx. 369 (3d Cir. 2015) ("latent capacity" of equipment to function as autodialer, even if not used that way, satisfies statutory definition.
[14] FCC's June 26, 2003 Report and Order, ¶ 131-33.

1) *Gutierrez v. Barclays Group*, 2011 U.S. Dist. LEXIS 12546 (S.D. Cal. Feb. 9, 2011) – watershed decision that began tread of confirmatory cases. Barclays settled a case for more than $8,000,000.

2) *Ibey v. Taco Bell Corp.*, 2012 WL 2401972 (S.D. Cal., June 18, 2012) – discussed the confirmatory cases and decided that it was against the *intent of Congress*.

E. <u>Class Certification</u>

1) *A Fast Sign Company, Inc. d/b/a FASTSIGNS v. American Home Services, Inc.*, 734 S.E.2d (Ga. Sup. Ct. Nov. 5, 2012)

- Defendant hired company that sent out 306,000 unsolicited fax advertisements on its behalf, including one to FASTSIGNS.
- Class certified and trial court awarded damages in the amount of **$459 million** or $1,500 per fax.
- Georgia Supreme Court reversed and held that a sender is liable for unsolicited advertisements it *attempts* to send, whether or not the transmission is completed or received by the targeted recipient.
- Case remanded to court of appeals for further disposition.
- Largest standing TCPA damages award to date.

2) *Agne v. Papa John's International, Inc.*, Case No. 2:10-CV-01139 (W.D. Wash. Nov. 9, 2012)

- Alleges that Papa John's sent 500,000 unwanted text messages without consumers' consent.
- Certain Papa John's franchisees provided OnTime4U with lists of telephone numbers of individuals who had purchased pizza from them. OnTime4JU then sent text messages advertising Papa John's products to the cell phone numbers on those lists.
- Evidence was presented that OnTime4U told Papa John's franchisees that it was lawful to send texts without express consent because of an existing business relationship between the customers and Papa John's.
- Nationwide class certified Nov. 2012. Ruling appealed to Ninth Circuit.
- Parties settled for $16.5 million in May 2013.

3) Consent may be an individual or a common issue.

- *Jamison v. First Credit Servs.*, 290 F.R.D. 92 (N.D. III. 2013) (denying class certification because "issues of individualized consent predominate when a defendant sets forth specific evidence showing that a significant percentage of the putative class consented to receiving calls on their cellphone")

- *Balthazor v. Central Credit Services, Inc., et al.*,--F.Supp.3d--, 2012 WL 6725872 (S.D. Fla. Dec. 27, 2012) (denying motion for class certification for failure to establish commonality and predominance; whether each class member provided express consent would involve individualized inquiries)
- See also *Hicks v. Client Servs.*, 2008 U.S. Dist. LEXIS 101129, at *28 (S.D. Fla. Dec. 10, 2008); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008); *Conrad v. Gen. Motors Acceptance Corp.*, 283 F.R.D. 326, 330 (N.D. Tex. 2012) (denying motions for class certification)
- *G.M. Sign, Inc. v. Finish Thompson, Inc.*, 2009 U.S. Dist. LEXIS 73869, at *18 (N.D. III. Aug. 20, 2009) ("The evidence in the record shows only that the fax was sent to numbers on a third-party list. [Def.] did not review the list and [the list creator] did not seek consent from the persons on the list. As such, predominance is satisfied.")
- *Hinman v. M & M Rental Ctr.*, 545 F. Supp. 2d 802, 807 (N.D. III. 2008 (no individual consent issues because the "fax broadcasts at issue were sent en masse to recipients identified on a singular 'leads' list obtained from a singular source")
- *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 2012 U.S. Dist. LEXIS 178793, at *8 (D. Mass. Dec. 18, 2012) ("Plaintiffs have presented evidence that the faxes were sent to numb ers culled from a general business database," raising an inference that recipients never consented to receipt of defendant's faxes)
- *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 295 (N.D. Cal. 2013) (certifying class in text messaging case)

Fair Debt Collections Practices Act

I. Fair Debt Collection Practices Act: Overview

A. The Fair Debt Collection Practices Act ("FDCPA") was adopted in 1978. The FDCPA applies to "debt collectors" as defined by 15 U.S.C. § 1692a(6).

B. The United States Supreme Court has confirmed that attorneys who regularly collect consumer debts are debt collectors covered by the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

C. The FDCPA generally prohibits collection efforts which harass, cause an invasion of privacy, are abusive, which are false or deceptive, unfair or unconscionable.

D. The FDCPA also outlines specific notice provisions and procedural requirements for debt collectors.

E. Four essential elements of an FDCPA claim:

1. A "consumer," i.e., a natural person. 15 U.S.C. § 1692a(3).
2. A consumer debt, i.e., an obligation arising out of a transaction primarily for personal, family or household purposes. 15 U.S.C. § 1692a(5).
3. A "debt collector" 15 U.S.C. § 1692a(6)
4. A violation of one of the provisions relating to debt collectors' activity:
    a. Acquiring information about consumers. 15 U.S.C. § 1692b.
    b. Communicating with consumers. 15 U.S.C. § 1692c.
    c. Harassing or abusing consumers. 15 U.S.C. § 1692d.
    d. Making false or misleading representations or using unfair or unconscionable means to collect a consumer debt. 15 U.S.C. §§ 1692e, 1692f.
    e. Requiring validation of debts. 15 U.S.C. § 1692g.
    f. Limiting venue of debt collection lawsuits. 15 U.S.C. § 1692i.

II. Who is a Debt Collector?

A. 15 U.S.C § 1692a(6): A "debt collector" is "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, <u>or</u> who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

B. Debt collectors generally include:

1. Collection agencies;
2. Attorneys that regularly collect debts;
3. Creditors using a false name;
5. Drafters or designers of deceptive forms;
6. Credit counselors (for profit); and
7. Check "guarantee" services.

C. Debt collectors do not include:

1. Officers or employees of creditors collecting debts for such creditor in the name of the creditor;
2. A subsidiary or commonly controlled company that collects for its parent or controlling company, but only if the principal business of the company is not the collection of debts;
3. Officers and employees of the United States or any state if collecting as part of their official duties;
4. Process servers;
5. Non-profit credit counseling services;
6. Servicers and assignees collecting debts that were not in default when they obtained them;
7. Creditors collecting their own debts, i.e., retail stores, banks, finance companies. Creditor is defined by the FDCPA 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 the debt in 'default' solely for the purpose of facilitating collection of such a debt for another." 15 U.S.C. § 1692a(4). But note: creditors collecting their own debts may be covered by similar state laws, including for example California, Wisconsin and Florida.

D. Special Cases

1. Debt Buyers. Companies that buy defaulted debt at a deep discount and then seek to collect on it have long been considered debt collectors subject to the FDCPA. *See Bridge v. Ocwen*, 681 F.3d 355 (6th Cir. 2012) ("debt collector includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition"). This changed on June 12, 2017 with the Supreme Court's unanimous decision in *Henson v. Santander Consumer USA, Inc.,* 137 S.Ct. 1718 (2017). The court held that a debt buyer that buys a debt and seeks to collect it is not collecting a debt "owed to another" and, on the facts alleged in this case, the debt buyer is not subject to the FDCPA.

   This decision has not yet been widely applied, but it should not be read to leave the entire debt buying industry unchecked by the FDCPA. The court

specifically declined to consider whether a debt buyer could be a covered debt collector under the first part of the definition (i.e., "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"). The court noted that the defendant's primary business is loan origination, not the collection of debts. This could leave some debt buyers covered by the FDCPA since they never originate any loans and only purchase defaulted debts at a discount in order to collect them such that the "principal purpose" of their business may be the collection of debts.

State law may continue to apply to debt buyers. For example, the Ohio Supreme Court recently held that debt buyers that do not qualify as "financial institutions" are suppliers subject to the act with respect to their collection practices. *Taylor v. First Resolution Investment Corp.*, 148 Ohio St.3d 627, 657-58 (2016).

2. Independent contractor attorneys that collect debts for government entities are not exempt from the FDCPA as officers or employees of the state. In *Sheriff v. Gillie*, 136 S.Ct. 1594 (2016), the Supreme Court declined to reach the Sixth Circuit's holding that contract attorneys collecting for the State of Ohio as "special counsel" to the Ohio Attorney General are not exempt from the FDCPA.

3. Foreclosure activities. The prevailing view is that foreclosure is debt collection but there is disagreement. *Glazer v. Chase Home Finance, LLC*, 704 F.3d 453 (6th Cir. 2013).

4. Servicers. Servicers are covered as debt collectors if they acquired the debt for "servicing" after it was in default. *See Bridge v. Ocwen*, 681 F.3d 355 (6th Cir. 2012).

E. Employees of a debt collector may be individually liable, with their employer, for violations of the FDCPA. 5 U.S.C. § 1692a(6)(A). Likewise, both the debt collector agency and an attorney collecting on its behalf are individually liable for the attorney's violations. *Kistner v. Law Office of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008); *Ditty v. CheckRite, Ltd.*, 937 F. Supp. 1320 (D. Utah 1997).

F. While creditors collecting debts they originated are generally exempt from FDCPA coverage, when they use a fictitious name to conduct debt collection activity they will be subject to liability under the Act. 15 U.S.C. § 1692a(6). The implication of using a false name is that the creditor is not collecting but rather that a third-party debt collector is contacting the debtor.

G. Lawyers. An attorney who "regularly" collects consumer debts is subject to the FDCPA. Unfortunately, there is no clear rule for what constitutes "regularly"

collecting dates and the case law is inconsistent. In *Schroyer v. Frankel*, 197 F.3d 1170 (6th Cir. 1999) debt collection represented from 2 to 7.4% of the attorneys' overall practices, and the attorneys did not collect debts on an ongoing basis for any major client. The court found the firm was not "regularly" engaged in debt collection and thus not covered by the FDCPA. *But see Crossley v. Lieberman*, 868 F.2d 566, 27 Fed. R. Evid. Serv. 544 (3d Cir. 1989) (regular, although minor, debt collection will bring attorney within coverage of the Act); *Stojanovski v. Strobl and Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992) (law firm that regularly collected debts on behalf of its client, Chrysler Credit Corporation, was a debt collector, even though the debt collection business accounted for only 4% of the law firm's business).

III. "Debts" Covered by the FDCPA

A. Statute: 15 U.S.C. § 1692a(5): "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."

B. A broad range of consumer debts are covered under the FDCPA:

1. Dishonored checks;
2. Rent – *Romea v. Heiberger & Associates*, 163 F. 3d 111 (2d Cir. 1998);
3. Medical bills – *Piplies v. Credit Bureau, Inc.*, 886 F. 2d 22 (2d Cir. 1989);
4. Utility bills – *Pollice v. National Tax Funding*, L.P. 225 F. 3d 379 (3d Cir. 2000);
5. Insurance bills and claims – *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489 (1995);
6. Student loans – *Brannan v. United Student Aid Funds, Inc.*_94 F. 3d 1260 (9th Cir. 1996), *cert. denied*, 421 U.S. 1106 (1997);
7. Campground memberships – *Dorsey v. Morgan*, F. 60 F. Supp. 509(D. Nd 1991);
8. Credit cards – *Challen v. Town & Country Charge*, 545 F. Supp. 2d 1361 M.D. Fla. 2002);
9. Condominium fees – *Fuller v. Becker & Poliakoff, P.A.*, 192 f. Supp. 2d 1361 M.D. Fla. 2002); and
10. Attorney's fees – *Person v. Stupar, Schuster & Cooper, S.C.*, 136 F. Supp. 2d 957 (E.D. Wis. 2001).

C. Municipal fines and penalties are generally not covered debts because they do not arise out of a voluntary transaction to incur an obligation. *See Gully v. Markoff & Krasny*, 664 F.3d 1073 (7th Cir. 2011). However, HOA fines may be covered debts. *See Agrelo v. Affinity Management Services, LLC,* 841 F.3d 944 (11th Cir. 2016).

IV. General Principals

A. The FDCPA is a consumer protection statute to be broadly construed in furtherance of that purpose. *Vincent v. The Money Store,* 736 F.3d 88 (2d Cir. 2013) ("Because the FDCPA is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated.").

B. Least sophisticated consumer standard. When analyzing whether conduct giving rise to an FDCPA claim fits within the scope of the FDCPA, the conduct is viewed through the eyes of the "least sophisticated consumer." This standard protects the gullible and the shrewd alike, but also presumes a basic level of reasonableness and understanding on the part of the debtor. *See Currier v. First Resolution Invest. Corp.*, 762 F.3d 529 (6th Cir. 2014).

C. The FDCPA is a strict liability statute. A plaintiff does not need to prove knowledge or intent and does not have to have suffered actual damages in order to recover. *Stratton v. Portfolio Recovery Associates, LLC*, 770 F.3d 443 (6th Cir. 2014); *but see Lyshe v. Yale R. Levy & Associates, LLC*, 2017 WL 1404182 (6th Cir. 2017) (eroding this principle under the Supreme Court's decision in *Spokeo*, holding that "bald allegations of procedural violations that did not result in any concrete harm are insufficient to confer standing").

D. Bona fide error affirmative defense. 15 U.S.C. § 1692k(c). To establish a defense of bona fide error, a debt collector must plead and prove by a preponderance of the evidence that:

1. The error was unintentional;
2. The error was made in good faith;
3. The error resulted from a mistake; and
4. The collector maintained procedures, reasonably adapted to avoid such errors. *See Nielson v. Dickerson*, 307 F. 3d 623 (7th Cir. 2002). Reliance on advice of counsel, is insufficient to raise defense. *Baker v. G.C. Servs. Corp.*, 677 f.2d 7675, 779-80 (9th Cir. 1982). A mistake of law is not a bona fide error under the FDCPA. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573 (2010).

E. The FDCPA has a one-year statute of limitations for private actions. 15 U.S.C. § 1692k(d). In cases arising out of debt collection lawsuits, the time starts running from the date the consumer was served with the complaint, not the date the complaint was filed. *See Langendorfer v. Kaufman*, 2011 WL 3682775 (S.D. Ohio 2011). Note also that each discrete act violating the FDCPA starts the statute of limitations as to that act. *See Purnell v. Arrow Financial Services, LLC*, 303 Fed.Appx. 297 (6th Cir. 2008). But note there are also decisions holding that there is no continuing violation theory under the FDCPA that defense counsel will assert in support of a statute of limitations defense. *See Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed. Appx. 249 (6th Cir. 2014).

V. Communication Requirements and Restrictions

A. Initial communication requirements. 15 U.S.C. § 1692g(a). In a debt collector's initial communication with a debtor, or within five days after the initial communication, the collector must send the debtor a written notice stating:

1. The amount of the debt;
2. The name of the creditor to whom the debt is owed;
3. A statement that if the consumer notifies the debt collector within 30 days that the debt is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and provide a copy; and
4. A statement that the debt collector will provide the name and address of the original creditor if different from the current creditor.

B. A debt collector may not contact a consumer it knows to be represented by counsel. 15 U.S.C. § 1692c(A)(2).

C. A debt collector may not contact at unusual or inconvenient times or prohibited places. 15 U.S.C. § 1692c(A)(1). This provision applies to personal visits and other modes of communicating, including telephone, mail, telegram or e-mail. A collector may not contact at inconvenient times. There is a presumption that any phone call received between 9:00 P.M. and 8:00 A.M. is made at an unusual or inconvenient time.

D. A debt collector must cease communication with a consumer who has notified the debt collector in writing that the consumer refuses to pay the debt or that the consumer wishes the debt collector to cease further communication except to advise the consumer that the debt collector's efforts are being terminated or notify the consumer that the debt collector is pursuing specified remedies. 15 U.S.C. § 1692c(c).

E. Informing third parties of consumer's indebtedness is prohibited. 15 U.S.C. § 1692c(b). Except for:

1. Efforts to locate a consumer, a debt collector may not phone, write or visit a consumer's employer, co-worker, secretary, relatives (except a spouse), friends, social worker, neighbors or any other third parties about the debt without the consumer's direct prior consent, court permission or the effect of a post-judgment or judicial remedy.
2. A collector may contact the following non-consumers in connection with the consumer's debt:
   a. The consumer's attorney;
   b. A credit reporting agency;
   c. The creditor;

d. The creditor or collector's attorney;
e. The consumer's spouse;
f. Parent, if the consumer is a minor;
g. Guardian, executor or administrator; and
h. Co-debtors.

VI. Prohibitions

A. 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. Examples of conduct that violates 1692d include:

1. Threatening violence or criminal conduct. 15 U.S.C. § 1692d(1);
2. Using obscene, profane or abusive language. 15 U.S.C. § 1692d(2);
3. Shaming consumers by publishing lists of consumers who refuse to pay debts except to a consumer reporting agency. 15 U.S.C. § 1692d(3); and
4. Repeated or continuous phone calls. 15 U.S.C. § 1692d(5).

B. False or misleading representations in the collection of debts are prohibited. 15 U.S.C. § 1692f. Examples of false or misleading representations include:

1. Filing a lawsuit to collect a time barred debt or threatening to do so. *Freyermuth v. Credit Bureau Services, Inc.,* 248 F.3d 767 (8th Cir.2001); *Goins v. JBC & Assoc.,* 352 F.Supp.2d 262 (D.Conn.2005); *Shorty v. Capital One Bank,* 90 F.Supp.2d 1330 (D.N.M.2000); *Kimber v. Fed. Fin. Corp.,* 668 F.Supp. 1480 (M.D.Ala.1987).
2. Seeking to recover interest on a debt at a rate higher than that permitted by law or the instrument being sued upon. See Taylor v. First Resolution Invest. Corp., 148 Ohio St. 3d 627 (2016).
3. Suggesting that non-payment will result in arrest, imprisonment, garnishment, attachment, seizure or sale, unless such action is lawful and the debt collector or creditor intends to take such action. 15 U.S.C. § 1692e(4).
4. The false representation or implication that any individual is an attorney or that the communication is from an attorney. 15 U.S.C. § 1692e(3).
5. Offering to "settle" a time barred debt could be misleading. *See Buchanan v. Northland Group, Inc.*, 776 F.3d 393 (6th Cir. 2015).

C. Distant forum violations. Debt collectors that sue consumers must file debt collection actions in either the county where the instrument being sued upon (if any) was signed or the county in which the consumer resides when the debt collection action is filed. 15 U.S.C. § 1692i.

VII. Damages

A. A debt collector that violates the FDCPA is liable for actual damages and up to $1,000.00 in statutory damages, plus reasonable attorney fees. 15 U.S.C. § 1692k(a)(2)(A).

B. Each person affected by a violation of FDCPA may recover a separate statutory award.

C. Class action awards for the class members are capped at $500,000 or one percent of the net worth of the defendant, whichever is less.

IX. Bankruptcy Issues

A. The same conduct may give rise to both an FDCPA claim and a contempt claim under the Bankruptcy Code (i.e., collecting discharged debts). The Bankruptcy Code does not preempt the FDCPA. *In re Marshall*, 491 B.R. 217 (Bankr. S.D. Ohio 2012).

B. There is disagreement among the courts about whether filing a proof of claim in a bankruptcy case subjects the filer to potential liability under the FDCPA. *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014).

C. Filing a proof of claim for a time barred debt is not a violation of the FDCPA. *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407 (2017). The court did not disturb circuit precedent that filing a civil action on a time barred debt is a violation of the FDCPA. The court held that filing a proof of claim in bankruptcy is not similarly misleading or unfair because "the consumer initiates such a proceeding . . . and consequently the consumer is not likely to pay a stale claim just to avoid going to court," because "a knowledgeable trustee is available," and because "the claims resolution process is generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit."

Fair Credit Reporting Act

I. Fair Credit Reporting Act: Overview

A. The Fair Credit Reporting Act, 15 U.S.C. Secs. 1681-1681x ("FCRA") was adopted in 1970. The FCRA regulates the conduct of three types of actors:

1. "Consumer reporting agencies" (CRA's) – have a duty to: protect data and only provide it for a "permissible purpose;" maintain accuracy and investigate disputes; report certain data and not report other data.

2. "Furnishers" of information relating to consumers to consumer reporting agencies – have a duty to furnish information that is accurate and complete, and to investigate consumer disputes about the accuracy of information.

3. "Users" of consumer reports – must certify to the CRA that they have a permissible purpose to obtain a consumer report and must notify consumers when adverse action is taken based on information obtained from a CRA.

B. The FCRA is not limited to credit-related transactions. "Consumer report" is broadly defined as:

"any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily personal, family or household purposes, or (2) employment purposes, or (3) other purposes authorized or approved under section 604 [i.e., insurance underwriting, eligibility for a license or governmental benefit, other "legitimate business need" in connection with a business transaction involving the consumer].

As a result, the FCRA often applies not just to CRA's, but to employers, insurers, landlords, debt collectors, data aggregators and others.

C. Remedies include actual damages and attorney fees for negligent violations and statutory damages of $100-$1,000 plus attorney fees and potential punitives for willful violations. To support a finding of willfulness the CRA's "action must entail an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Smith v. LexisNexis Screening Solutions, Inc.*, 837 F.3d 604 (6th Cir. 2016) (reversing award of punitive damages).

II. Consumer Reporting Agencies

A. Duties of CRA's (15 U.S.C. § 1681e):

1. Reasonable procedures designed to **avoid including outdated information in consumer reports**. Outdated information (15 U.S.C. §§ 1681e(a) and 1681c) includes:
    a. Bankruptcy cases more than 10 years from discharge;
    b. Civil suits and judgments more than 7 years from entry or the expiration of the applicable statute of limitations, whichever is greater;
    c. Paid tax liens more than 7 years past date of payment;
    d. Accounts placed for collection or charged off more than 7 years;
    e. Other adverse information other than criminal conviction more than 7 years old.
    f. Identifying information about medical information furnishers, unless sanitized to prevent identifying the provider and the nature of medical services provided or if for insurance other than property and casualty.

2. Reasonable procedures designed to avoid furnishing consumer reports to **permissible purposes**. Permissible purposes (15 U.S.C. § 1681b) include:
    a. Court order or grand jury subpoena
    b. Written authorization from the consumer
    c. To a person who intends to use the information in connection with a credit transaction or review or collection of an account;
    d. Employment purposes;
    e. Insurance underwriting;
    f. Government license of benefit
    g. A potential investor or servicer, or current insurer, in connection with valuation or assessment of credit risks associated with an existing obligation;
    h. Legitimate business need in connection with a business transaction initiated by the consumer or to review an account to determine whether the consumer continues to meet the terms of the account.

3. "[R]reasonable procedures to assure **maximum possible accuracy** of the information concerning the individual about whom the report relates." (15 U.S.C. § 1681e(b)
    a. What constitute reasonable procedures varies depending on the circumstance, and is generally a jury issue. *Philbin v. Trans Union Corp.*, 101 F.3d 857 (3d Cir. 1996).
    b. But some courts have held that they can hold as a matter of law that the measures a plaintiff contends should have been followed are not reasonable. *Childress v. Experian Information Solutions, Inc.*, 790 F.3d 745 (7th Cir. 2015).

4. Provide mandatory notices to users and furnishers of consumer report information of their responsibilities under the FCRA.

5. Resellers of consumer reports must:

    a. Must comply with the permissible purpose and certification provisions (15 U.S.C. § 1681b);
    b. Provide the originator or the report with the identity of the end user and each permissible purpose for obtaining the report of the end user.

6. Reinvestigate consumer disputes of items in consumer reports within 30 days (15 U.S.C. § 1681i). CRA's must notify furnishers of disputed information within 5 days of receipt of a dispute. Inaccurate or unverifiable information must be deleted or modified "as appropriate, based on the result of the reinvestigation," and the consumer must be notified.

7. Protect consumer privacy and prevent identity theft. The FCRA was amended in 2003 by the Fair and Accurate Credit Transactions Act ("FACTA") to add provisions intended to reduce identity theft and protect consumer information, including:
    a. Consumers can place fraud alerts on their credit files and block information caused by identity theft or fraud;
    b. Consumers have a right to one free credit report annually from the national repositories;
    c. Consumers are entitled to obtain their credit scores for a "reasonable fee."
    d. CRA's must comply with the disposal rule to prevent unauthorized access to consumer information.

III. Users of Consumer Reports

A. Generally - 15 U.S.C. § 1681m(a) provides that any party who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" shall provide to the consumer orally, in writing, or electronically:
    a. notice of the adverse action;
    b. the name, address, and telephone number of the CRA (toll-free telephone number, in the case of a nationwide CRA);
    c. a statement that the CRA "did not make the decision to take the adverse action" and is unable to provide specific reasons for the action;
    d. and notice of the consumer's right to obtain a free file disclosure from the CRA, and to dispute with a CRA the accuracy or completeness of any information in a consumer report furnished by the CRA.
    e. Effective July 21, 2011, the party taking the adverse action must also disclose any numerical credit score that contributed to the adverse action, along with certain related information.
    f. If consumer credit was denied or the charge was increased based on information obtained from third parties other than a CRA, the disclosure must

advise of the consumer's right to request the information that was relied on in taking the adverse action within 60 days of receipt of the adverse action notice

B. Employers using consumer reports to consider employment decisions
    a. Must provide notice before obtaining a report that a consumer report may be obtained for employment purposes. This notice must be a separate, stand-alone, document. 15 U.S.C. § 1681b(b)(2)(A).
    b. Must obtain written authorization from the applicant for procurement of the report.
    c. In addition, employers must provide adverse action notices that comply with 15 U.S.C. § 1681m(a), a copy of the consumer report and a written statement of rights under the FCRA.

C. Insurers
    a. Must provide adverse action notices that comply with 15 U.S.C. § 1681m(a) if they refuse to issue a policy or charge a higher than normal premium based on a consumer report.
    b. Insurers that offer discounted premiums for those with "good credit," must provide adverse action notices when they:
        i. decline to offer the discounted rate upon renewal based on a consumer report;
        ii. offer insurance at a higher rate to a potential customer based on a consumer report;
        iii. quotes the discounted rate to a potential customer but later charge a higher rate due to a consumer report.
    c. Health insurers increasing premiums based on a consumer report must provide adverse action notices.
    d. Mortgage insurers that decline to insure a consumer loan based on a consumer report must provide adverse action notices, even if the loan is later approved with a different insurer.

D. Other users of Consumer Reports (i.e., landlords) must provide adverse action notices where an adverse action is based in whole or in part on a consumer report. Note that adverse action includes declining an application, charging increased rental or requiring a larger deposit.

E. Pre-screening – No adverse action notice is required where consumers are "pre-screened" for credit or insurance by a CRA and a list is provided to a creditor or insurer to market products. If a "pre-screened" applicant is later denied the offered product based on a consumer report, an adverse action notice to that consumer is required.

F. Debt Collectors
    a. Debt collectors (as defined in the FDCPA) receiving notice of possible identity theft must notify the creditor or other third party on whose behalf they are collecting that the information may be the result of identity theft, and

provide the subject consumer upon request with all of the information that the consumer would be entitled to receive if they were not a victim of identity theft and disputed the subject debt.

b. It is prohibited for anyone to sell or place for collection a debt after receiving notice of identity theft under 1681c-2. 15 U.S.C. § 1681m(f)(1).

G. Disposal of consumer reports – users are required to dispose of reports and information gathered therefrom by burning, pulverizing or shredding paper documents and disposing of electronic information so that it cannot be read or reconstructed. 16 CFR 682.3.

H. Investigative consumer reports (15 U.S.C. § 1681d) – these are consumer reports that include information gathered through personal interviews with persons other than the subject relating to the subject's character, general reputation, personal characteristics, or mode of living. The FCRA imposes additional notice requirements on users that request the preparation of investigative consumer reports, including a notice that such a report has been requested within 3 days after the request and a summary of FCRA rights.

IV. Furnishers of Information to CRA's

A. Furnishers are prohibited from providing information the furnisher knowns or has reason to believe is inaccurate." 15 U.S.C. § 1681s-2(a). Furnishers must re-investigate upon notice of a dispute. 15 U.S.C. § 1681s-2(b).

a. Furnishers must update and correct inaccurate or incomplete information;
b. Once notice of a dispute is received, a furnisher may not furnish the information to any CRA without providing notice of the dispute;
c. Furnishers providing information about delinquent accounts or charged off accounts must provide the month and year of delinquency of the account within 90 days after furnishing the information;

B. There is no private right of action for violation of 1681s-2(a), however, the consensus is that there is a private right of action for a furnishers violation of the obligation to investigate upon notice of a dispute. *Ilodianya v. Capital One Bank*, 853 F.Supp.2d 772, 774 (E.D. Ark. 2012) ("Whether a consumer can pursue this type of claim is an open question in our Circuit. But most other Courts of Appeals to consider the issue have answered the question yes.").

C. Furnishers must investigate and respond to disputes submitted to CRA's and directly to the furnisher within 30 days of receipt (*See* 15 U.S.C. § 1881s-2(a)(8(E) and 12 CFR 1022.43.

D. Medical information – furnishers whose primary business is providing medical services, products or devices, and their agents (i.e., debt collectors), must notice each CRA that they are medical providers so that the information can be encoded

to prevent identification of the provider or the nature of the services, products or devices.

V. Bankruptcy-Related Theories

A. Users who obtain consumers' credit reports without a permissible purpose such as collecting discharged debts.

● *Griffin v. Bank of America, N.A.*, 2016 WL 7487724 (N.D. Ohio 2016) (denying motion to dismiss and holding that Article III standing exists for FCRA claim under *Spokeo* where BANA and a debt collector requested and obtained consumer's credit report after debt they held had been discharged in bankruptcy).
● *Buckley v. Afni, Inc.*, 133. Fupp.3d 1140 (S.D. Ind. 2016) (granting summary judgment in favor of consumer on FCRA claim where debt buyer obtained credit report after discharge of debt it held and then attempted to collect discharged debt).
● *Hudson v. Diversified Consultants, Inc.*, 2016 WL 6434971 (D. Or. 2016) (same).

B. Post-discharge reporting of discharged debts.

● *Freedom v. Citifinancial, LLC*, 2016 WL 4060510 (N.D. Ill. 2016) (reporting a zero balance but listing a "scheduled payment of $143" after discharge of debt is sufficient to support a claim under the FCRA).
● *Jackson v. Experian Information Solutions, Inc.*, 2016 WL 2910027 (N.D. Ill. 2016) (post-discharge credit report indicating that debtor continued to make payments on discharged debt is sufficient to state a claim for relief under the FCRA)
● *Nissou-Rabban v. Capital One Bank, N.A.*, 2016 WL 4508241 (S.D.Cal. 2016) (reporting "charge off" of discharged debt rather than coding report according to industry standard "Metro 2" format is potentially misleading and sufficient to state a claim under the FCRA).

C. Reporting debts according to original terms after confirmation of a Chapter 13 plan. *See Hughes v. Equifax, Inc.*, 2017 WL 975969 (N.D.Cal. 2017) (consolidating several of 170 cases based on this theory pending before the Northern District of California).

D. Failing to re-investigate debtor disputes relating to debts discharged in bankruptcy. *See* pending $36.8 million settlement in *Hernandez v. Experian Information Solutions, Inc.*, Case No. 8:05-cv-01070 (C.D. Cal.).

IS BANKRUPTCY COURT THE BEST FORUM FOR YOUR CLASS ACTION?

The decision to bring a class action before a bankruptcy court necessarily includes considerations such as the jurisdiction of the Court, comparisons between procedural issue which would arise before such a court and other venues, and other advantages that may be unique to a bankruptcy court. Some of these factors will be discussed below.

I. JURISDICTION

Bankruptcy Courts are Courts of limited jurisdiction. They have derivative authority to hear matters arising under or related to proceedings under Title 11 of the United States Code, if such matters are referred to them by the Federal District Courts in their particular jurisdiction. *See 28 U.S.C. 157* Most judicial districts have a standing order referring all bankruptcy matters to bankruptcy courts established for the districts.

1. Under the provisions of 28 U.S.C. 157(b)(1) bankruptcy courts may hear and determine, all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11. There are many types of core proceedings described in 28 U.S.C. 157(b)(2), however of particular importance to the resolution of potential class actions are the following:

   a) resolution of matters concerning the administration of the estate;
   b) allowance or disallowance of claims against the estate from property of the estate;
   c) counterclaims by the estate against persons filing claims against the estate.

2. The list of core proceedings setout in 11 U.S.C. 157 is not exhaustive and also includes actions which arise under particular provisions of Title 11. These include:

   a) Actions under 11 U.S.C. 362(k) for violations of the automatic stay. *See MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108-09 (2nd Cir. 2006)
   b) Actions for violation of the discharge injunction. *See In re Humbert*, 2017 Bankr. LEXIS 458, (N.D. Ohio 2017)

Bankruptcy courts may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. 28 U.S.C. 157(c)(1). This type of jurisdiction will authorize the bankruptcy court to hear proceedings that are not core proceedings, such as FDCPA and FCRA claims. That being said, it is always preferable to attempt to ensure that any claims which would otherwise be authorized under this provision are

instead authorized under 11 U.S.C. 157(b)(2)(C), because bankruptcy courts are authorized to enter file judgments in core proceedings, without the necessity of referring such claims to the Federal District Court for final entry as a judgment of proposed findings of fact and conclusions of law made by the bankruptcy court, which is otherwise required for the adjudication of non-core proceedings. *See 11 U.S.C. 157(c)(1).*

The foregoing information is provided for the purpose of allowing potential Plaintiff's counsel to determine if a proposed class action may be brought in bankruptcy court. It is of the utmost importance to give the bankruptcy court a core bankruptcy issue to deal with. Thereafter, if necessary, Plaintiff's counsel can bring non-core proceedings to the Court's attention and seek to obtain an adjudication of such issues.

Discussions of the jurisdiction of bankruptcy courts to adjudicate disputes put before it cannot be limited to a simple review of the applicable statutory authority. Federal case law has significantly reduced this authority starting with a line of cases which came to the forefront with *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594 (2011). The jurisdictional concerns raised by *Stern* and its progeny remain a central concern for those seeking to bring class actions before bankruptcy courts.

It goes without saying that the impact of *Stern* and its progeny is a very complicated issue about which whole seminars have been taught. It suffices to say here that Plaintiff's counsel should be prepared to address with any bankruptcy court before which it files a proposed class action whether the Court will have authority to issue final rulings or whether it must make findings of fact and conclusions of law and refer the matter to the district court for entry of final judgment. More details on the impact of *Stern* on arguments that bankruptcy courts have the authority to refuse to enforce arbitration agreements will be discussed below.

II. CLASS ACTION COMMONLY BROUGHT IN BANKRUPTCY COURT

Bankruptcy Courts have the responsibility to administer Title 11 of the United States Code. The comprehensive bankruptcy system tasks these Courts with ensuring that the rights and obligations of debtors are balanced against those of creditors to effectuate an orderly and expeditious distribution of Estate assets and reorganization of the Debtors' affairs. Thus class actions in bankruptcy should contain allegations which implicate these important judicial functions. The types of matters setout below raise implications related to core bankruptcy issues.

1. Class actions for violations of the discharge injunction.

   i. Proceedings to enforce the discharge injunction, on a class-wide basis, are uniquely questions of bankruptcy law. This is so because the proceeding can only arise in the context of a bankruptcy proceeding as only bankruptcy courts issue discharges. The proceedings are core proceedings as the "arise under" Title 11.
   ii. In the Sixth Circuit, a proceeding for enforcement of the discharge injunction, is a not a cause of action. *See Pertuso v. Ford Motor*

Credit Co., 233 F.3d 417 (6th Cir. 2000), *See also In re Frambes,* 454 B.R. 437 (Bankr. E.D. Ky. 2011).

iii. A proceeding to enforce the discharge injunction is an invocation of the bankruptcy courts inherent authority to enforce its orders and should be brought as a contested matter under the Bankr. R. Civ. P. 9014. *See Bankr. R. Civ. Pro. 9020, See also Biery v. Beneficial Kentucky, Inc. et al*, 2013 Bankr. LEXIS 3622 (Bankr. E.D. Ky 2013), *but see McNamee v. NationStar Mort., LLC (In re McNamee)*, 29014 Bankr. LEXIS 5412. Because the contested matter will not be one to efor

iv. When bringing proceeding to enforce the discharge injunction as a contested matter, Plaintiff's counsel should move under Bankr. R. Civ. P. 9014(c), to apply Bankr. R. Civ. P. 7023 (the rule governing class action) to the proceedings, as Bankr. R. Civ. P. 7023 does not otherwise apply in contested matters. The United States Bankruptcy Court for the Eastern District of Kentucky has issued a decision which strongly supports the position that the application of Bankr. R. Civ. P. 7023 to a contested matter seeking to enforce the discharge injunction on a class wide basis is warranted. *See In re Biery,* 2014 Bankr. LEXIS 1603

v. Although there is some dispute between bankruptcy courts over whether a proceeding to enforce the discharge injunction on a class wide basis should be brought as an adversary proceeding or as a contested matter, an advantage of bringing the proceeding as a contested matter is that Bankr. R. Civ. P. 7068 does not apply in contested matters. Bankr. R. Civ. P. 7068 mirrors the Fed. R. Civ. P. 68, which is commonly used to "pick off" class representatives by forcing them to accept settlement offers and thereby destroying their ability to serve as class representatives. The case of *Conway v. Portfolio Rec. Assocs.,* 840 F.3d 333 (6th Cir. 2016) illustrates how Fed. R. Civ. P. 68 can be used to bring a class action to an early conclusion (although in that particular case the attempt was unsuccessful after appeal). The United States Bankruptcy Court for the Eastern District of Kentucky has issued a strongly worded opinion that found that application of Bankr. R. Civ. P. 7068 to a contested matter seeking to enforce the discharge injunction on a class wide basis would conflict with the Court's ability to ensure the effective enforcement of its discharge injunction. Thus, using a contested matter as a means to enforce the discharge injunction may well serve to insulate class representatives from the effect of Bankr. R. Civ. P. 7068. *See In re Biery*, Bankr. E.D. Ky. Case No. 10-2338 at ECF Doc. 67 (Bankr. E.D. Ky. 2013).

vi. Damages for violation of the discharge injunction includes punitive damages, actual damages which can include compensation for out of pocket expenses, attorneys fees, and coercive fines. Certification of a class action which include claims for actual

compensatory damages for the class members is problematical because of the difficulty in meeting the predominance inquiry necessary under the provisions of Rule 23(b)(3). Requests for relief should be limited to punitive damages, attorney's fees, and a coercive fine calculated to encourage Defendant to implement changes to its procedures designed to ensure that the complained of conduct does not reoccur in the future. *See In re Biery*, 543 B.R. 267 (Bankr. E.D. Ky. 2015)

vii. Issues arise in the prosecution of a class action for violations of the discharge because the authority to issue non-compensatory monetary sanctions (generally referred to as punitive damages) stems not from a specific grant of statutory authority, but instead from the Court's inherent powers to enforce its orders. In the Sixth Circuit, the inherent power of bankruptcy courts to enforce their owns orders, is limited to "…mild noncompensatory punitive damages..." and the must be, "necessary or appropriate toe enforce the bankruptcy code." *See Adell v. John Richards Homes Bldg. Co (In re John Richards Homes Bldg. Co).* 552 F. App's 401 (6th Cir. 2013). The Court in *John Richards Homes* found that sanctions of at least $5,000.00 were authorized. The United States Bankruptcy Court Eastern District of Kentucky implicitly found persuasive arguments that this limit could be applied to each class member to form a constitutional foundation for an aggregate award of noncompensatory monetary sanctions against a class action defendant.

viii. A form motion for redress for systemic violations of the discharge injunction is included at the end of these materials.

2. Class actions which police the claims process.

In this age when the debt purchasing industry has ballooned, it is becoming ever more important that Debtor's counsel actively make efforts to protect the integrity of the claims allowance process. At present over $143,000,000,000.00 of consumer debt are held by debt purchasing companies. As part of their business model, these companies aggressively seek to participate in the claims process, particularly in the context of Chapter 13 bankruptcy.

The practices of these debt purchasers lend themselves to abuses of the claims allowance process. These practices include the following:

1. Debt buyers receive few underlying documents regarding the debts;
2. For most portfolios, debt buyers did not receive any documents at the time of the purchase;
3. The debts were purchased without recourse and the accuracy of the information regarding the debt purchases at the time of sale was not guaranteed.

The non-recourse nature of the transactions between the debt buyer and the debt purchases creates a negative incentive in the debt purchaser to "scrub" the accounts for stale or void debt. As a result proofs of claim will often be filed on time barred or otherwise compromises debt. Claims will also be filed with interest included that is not owed or at rates which constitute usury.

Debt purchasers regularly take advantage of the provisions of Fed. R. Bankr. P. 3001(f), which provides that a claim filed which meets the requirements of the Federal Rules of Bankruptcy Procedure constitute prima facie evidence that the claim is valid. 11 U.S.C. 502 provides that a proof of claim which is not objected to is allowed. It is the responsibility of the Debtor's bar and by extension the Plaintiff's bar to review proofs of claim for evidence of systemic abuse. In the event that evidence of systemic abuse of found, class actions can be maintained to remedy the situation.

i. Class actions for abuse of the claims process are generally commenced with the filing of an objection to claim filed by the offending creditor. The filing of a claim by a creditor is an act which subjects said creditor to the jurisdiction of the bankruptcy court. *See Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade (In re Wade)*, 500 B.R. 896, 907 (Bankr. W.D. Tenn. 2013). Claims objections are contested matters.

ii. The status of the creditor as a claimant against the Estate means that counterclaims against the Creditor constitute core proceedings under the provisions of 11 U.S.C. 157(b)(2)(c). Plaintiffs may then commence an adversary proceeding against the creditor and use 11 U.S.C. 157(b)(2)(c) as a jurisdictional basis. An action for declaratory relief and injunctive relief which will resolve the issues which form the basis for the objection to claim can be maintained. Additionally, claims for violation of other state and federal causes of action can be asserted which will be non-core proceedings, but will be able to claim "related to" jurisdiction under the 11 U.S.C. 157(a). Common non-core causes of action would include claims for violation of state consumer protection laws, usury, FDCPA, and possible an Electronic Fund Transfer Act (if the claim was paid outside of bankruptcy by electronic withdraw and the appropriate federal statutory and regulatory requirements were not met).

iii. Claims advanced by Plaintiffs for systemic abuses of the claims process would generally be brought as a contested matter, however by framing the determination of these issues as a claim for declaratory relief, the matter may be addressed in an adversary proceeding. Additionally injunctive relief may well be appropriate to remedy any systemic violations which the Court concludes occurred. Relief available by injunction could include disgorgement of all wrongfully acquired funds distributed to the

offending either by Plaintiff or the Trustee of the class members various Estates.

iv. Two pending proceedings of the type addressed above are *Kiskaden vs. LVNV Funding LLC*, Bankr. E.D. Ky Adv. No. 16-2008, and *Katrina Long Jones et al. v. Atlas Acquisition LLC et al.*, Bankr. S.D. Tx Adv. No. 16-3235.

3. Class Actions for violating the automatic stay

i. An action for violation of the automatic stay can be maintained pursuant to 11 USC 362(k). Damages for violation of the automatic stay include actual damages, attorney's fees, and if appropriate punitive damages.

ii. A class action for violation of the automatic stay would be much like an action for violation of the discharge injunction describe at length above, with the exception that the procedural issues unique to contested matters discussed above would not apply. Additionally the due process concerns regarding the limits on the amounts of sanctions discussed above would not apply as the authority of the bankruptcy court to issue punitive damages for systemic violations of the automatic stay are statutory and not based upon the inherent authority of the court.

4. Arbitration agreements in the bankruptcy context.

Perhaps the major barrier to the successful prosecution of a class action proceeding is the presence of and arbitration agreement in the underlying contractual agreement between the class representative and the defendant. As of 2015 the CFPB found that over ½ of all consumer credit cards contained arbitration agreement. Many telecommunication companies such as Verizon and AT&T contain arbitration agreements. Arbitration agreements require litigants to submit their disputes to mandatory binding arbitration which denies Plaintiffs their day in court. Such agreements almost always contain class action waivers.

Entire treatises have been written on the validity of arbitration agreements. suffice to say that such agreements are rigorously enforced to effectuate the public policies contained in the Federal Arbitration Act (FAA). The public policies contained in the FAA, as strictly interpreted by Supreme Court cases such as *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), general dictate that arbitration agreements must be enforced.

The public policies contained in the FAA are not the only public policies that must be reviewed when the decision is made whether to enforce an arbitration agreement when the proceeding is brought in bankruptcy court. When the proceeding is brought in bankruptcy court, the presiding court must balance the public policies of the bankruptcy code against those of the FAA. This provides an opportunity to argue that the arbitration agreement should not be enforced and that the matter should proceed to final adjudication before the bankruptcy court.

The issue of whether an otherwise enforceable arbitration agreement should be given effect in a proposed class action proceeding has recently been addressed by the United States Bankruptcy Court for the Eastern District of Kentucky in the matter of *Kiskaden v. LVNV Funding, LLC*, Bankr. E.D. Ky Adv. No. 16-2008. That proceeding, which is still pending, involves claims that the Defendant engaged in conduct which constitutes an abuse of the bankruptcy claims process by filing or receiving payments on claims which were void under applicable state law. The Plaintiff, on behalf of himself and other bankruptcy debtors similarly situated, also brought claims that the Defendant had violated the FDCPA, as well as claims of unjust enrichment based upon the receipt of payment for usurious claims by the Defendant. Defendant responded to the suit by filing a motion to dismiss or compel arbitration.

The United States Bankruptcy Court for the Eastern District of Kentucky sought to apply the dictates of *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). Focusing on the third prong of the *McMahon* test the Court focused in deciding whether an inherent conflict existed between the proposed arbitration and the Bankruptcy code's underlying purpose. The Court, giving great weight to the decision of the Fourth Circuit Court of Appeals in *Moses v. CashCall, Inc.* 781 F.3d 63 (4th Cir. 2015), concluded that the damage claims, which she categorized as statutorily core, but constitutionally infirm under *Stern v. Marshall* must be referred to mediation. However, she found that the claims for declaratory and injunctive relief involved the claims process and implicated core functions related to the administration of the bankruptcy court and would not be referred to arbitration. *See Kiskaden v. LVNV Funding, LLC*, 2017 Bankr. LEXIS 996 (Bankr. E.D. Ky 2017).

The result of the aforementioned decision is that the Plaintiff in *Kiskaden* will be able to attempt to prove that the Defendant received payments on proofs of claims which asserted a right to payment on void debts. Additionally, if successful, the Court left open the door for awarding an equitable remedy or injunction to remedy the abuse of the bankruptcy process. The utility of being able to take advantage of the bankruptcy process to pierce an arbitration agreement to obtain a binding adjudication of the complained of conduct is great.

Although the matter was not appealed, opportunity still exists to attempt to obtain in future proceedings or forums to convince bankruptcy courts that statutorily core *Stern* claims should also not be subject to arbitration agreements when brought in conjunction with other statutorily core non-Stern claims. The line of reasoning contained in the original bankruptcy court decision in *Moses*, as well as the District Court which reviewed, it and the dissent in *Moses v. CashCall, Inc.* 781 F.3d 63 (4th Cir. 2015) is very strong and has yet to be presented to a Federal District Court or Appellate Court in the Sixth Circuit. Winning that battle would make bankruptcy courts a very strong forum for class actions where the class representative has executed an arbitration agreement and a sufficient nexus with a bankruptcy proceeding can be established.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

IN RE: **Chapter 13**

Case No.: 16-20207-TNW

JIMMY L. KISKADEN
TINA M. KISKADEN

Debtors. /

JIMMY L. KISKADEN,

Plaintiff,

vs.

Adv. Case No. 16-02008

LVNV FUNDING, LLC
Serve Registered Agent:
Corporation Service Company
1703 Laurel St.
Columbia SC 29223
/

FIRST AMEND CLASS ACTION COMPLAINT

Plaintiff Jimmy L. Kiskaden ("Plaintiff") brings this action both individually and on behalf of a class of persons defined below against Defendant LVNV Funding, LLC, ("LVNV") and for his complaint states as follows:

I. JURISDICTION AND VENUE

1. Jurisdiction in this action arises under 28 U.S.C. §§ 151, 157(b), 1331, 1332 and 1334, and 11 U.S.C. §§ 105, 502 and Federal Rules of Bankruptcy Procedure 7023 and 3007. Plaintiff's claims for declaratory relief and relief pursuant to Federal Rule of Bankruptcy Procedure are core matters. Plaintiff's remaining claims are related to a case arising under the provisions of Title 11 and constitute non-core claims. Plaintiff

consents to entry of final judgment on all claims presented in this matter by the Bankruptcy Court.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1409 and because a substantial portion of the events giving rise to Plaintiff's claims occurred in this district. Debtors filed for bankruptcy protection in this District, payments were demanded in this District, and Defendant transacts business in this District.

3. Plaintiff's action for declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

4. Plaintiff's request for class relief is authorized by Federal Rule of Civil Procedure 23 and Federal Rule of Bankruptcy Procedure 7023.

5. Plaintiff is a natural person, who resides in the Commonwealth of Kentucky, County of Bracken, and who filed a petition for relief under the provision of Chapter 13 of Title 11 of the United States Code on February 25, 2016.

6. Defendant, LVNV Funding, LLC, is a limited liability company organized under the law of the state of Delaware that does business in the Commonwealth of Kentucky. LVNV has further subjected itself to the jurisdiction of this Court by the filing of a proof of claim in action assigned Case No.: 16-20207. The claim is noted as claim #9-1 in the claims register maintained in that action.

7. The actions complained of hereinafter occurred in the Commonwealth of Kentucky.

8. That pursuant to Bankruptcy Rules of Civil Procedure 7008 and 9027(a), Plaintiff consents to entry of final orders and judgment by the Court as to all issues raised or to be raised in this proceeding.

II. PARTIES

9. Plaintiff is a resident of Bracken County, Kentucky. Plaintiff is a "consumer" as defined by 15 U.S.C. § 1692a(3).

10. Defendant, LVNV Funding, LLC is a limited liability company organized under the law of the state of Delaware that does business in the Commonwealth of Kentucky. It maintains its principal place of business in Greenville, South Carolina. LVNV purchased loans from CashCall which is a for-profit California corporation with a principal place of business at 1600 South Douglass Road, Anaheim, California 92806. These loans contained interest rates and charges which are illegal under Kentucky law. CashCall was engaged in the business of offering, making, purchasing, servicing, and collecting on consumer loans. CashCall does not hold any other license issued by the Kentucky Department of Financial Institutions and does not hold a license to make consumer loans in Kentucky. LVNV is a "debt collector" as defined by 15 U.S.C. § 1692a(6).

III. FACTS

11. This is an action for damages and injunctive relief against Defendant LVNV Funding, LLC arising from collecting on fraudulent and illegal consumer loans made to Kentucky borrowers that were purchased by LVNV.

12. At sometime prior to June 25th, 2007, CashCall (an organization which does business in California) entered into an unfair and deceptive scheme with First Bank of Delaware (a bank chartered under the laws of the state of Delaware) and First Bank & Trust (a bank chartered under the laws of the state of South Dakota). First Bank of Delaware and First Bank & Trust are collectively referred to in this Complaint as "State Chartered Banks." CashCall and State Chartered Banks agreed to market, make,

fund, purchase, service, and collect on illegal loans to borrowers -- including Kentucky consumers like Plaintiff – which accrue interest at rates far in excess of those allowed under Kentucky law. This scheme has been the subject of review and recrimination by both state and federal regulators and has further been the subject of a successful enforcement action by the Attorney General of West Virginia that sought and obtained damages for the residents of the State of West Virginia who were damaged by the illegal scheme. In this scheme, Cashcall and the State Chartered Banks sought to evade the Commonwealth of Kentucky's licensure and laws by using the State Chartered Banks as a front for loans which would in fact be funded and marketed by CashCall. State Chartered Banks would write the loans which would be immediately purchased by CashCall. CashCall then would take the position that because it was an assignee of a state chartered bank, it was entitled to assert that the loans were exempt from the usury and licensing laws of any state, other than those of the jurisdiction where the State Chartered Banks did business, pursuant to Section 27 of the Federal Deposit Insurance Act codified at 12 USC 1831(d)(a). Courts and regulators have found that because the State Chartered Banks were acting as a proxy in writing the loans for CashCall, that CashCall was the real party and interest and was not entitled to assert the provisions Section 27 of the Federal Deposit Insurance Act. 12 USC 1831(d)(a). The loans which were the result of the illegal scheme are referred to in this Complaint as the "FBD Loans".

13. The State Chartered Banks were nothing more than a pass-through for loans advertised, underwritten, funded, serviced, and collected by CashCall.

14. CashCall was the real or "*de facto*" lender in these loan transactions, and it controlled virtually all aspects of the transactions. Pursuant to its arrangement with

First Bank of Delaware, among other activities, CashCall, itself or through subsidiaries, creates and distributes advertising materials for the loans; reviews all loan applications for underwriting requirements; funds the loans; assumes all risk of loss on the loans; receives all payments on the loans; services the loans; and indemnified the State Chartered Bank for all costs and any liability associated with the loans.

15. Based on these facts, regulators and courts have concluded that the State Chartered Banks were nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Section 27 of the Federal Deposit Insurance Act.

16. Because of the torrent of lawsuits which this scheme brought about, CashCall subsequently sold a portion of its illegal loan portfolio containing FBD loans to LVNV in 2011, without recourse. LVNV has since been attempting to collect upon the illegal loans which it purchased without regard to the unenforceability of the loan under Kentucky law.

17. Plaintiff brings this claim on his own behalf, and on behalf of a Class of all persons who obtained a "FBD Loan" in Kentucky, who subsequently filed a petition for relief under the provisions of Title 11 in the Eastern District of Kentucky, and in which Defendant LVNV later filed proofs of claim in that bankruptcy proceeding. Plaintiff seeks to recover all amounts paid to LVNV and for damages, attorneys' fees, and such other relief as allowed by law. Plaintiff also seeks declaratory and injunctive relief including a declaration that the loans are void and, supplementary to that injunction, for a refund of the amounts collected on the FBD Loan.

18. Defendant also purports to commit consumers to an arbitration provision contained within the Loan Agreement. The arbitration provision itself is fraudulent and unconscionable in that it purports to set up a fair dispute resolution process. In fact, the

arbitration provision requires arbitration by two organizations which have a record of unfairly and illegally favoring corporations such as LVNV and CashCall. The organizations required to conduct the arbitration in the agreement no longer perform consumer arbitrations and are thus unavailable to arbitrate the dispute between the parties. Furthermore, the public policy behind the Bankruptcy Code is such that this Court is authorized to not enforce the arbitration agreement.

19. That the agreement between CashCall and Plaintiff required that Plaintiff agree to ACH withdraws from his bank account of the monthly payment on the loan. The loan was conditioned upon Plaintiff agreeing to this requirement. This requirement was in violation of the Electronic Funds Transfer Act and constitutes an unfair and deceptive trade practice.

A. Plaintiff's dealings with Defendant

20. On June 25th 2007 Plaintiff electronically signed a First Bank of Delaware Note and Disclosure Statement purporting to be made between him and First Bank of Delaware.

21. The Agreement purported to loan Plaintiff $2,525.00 at 99.11% per annum to be repaid with one payment of $258.15, 40 monthly payments of $216.55, and then one payment of $215.49. The total amount financed was $2,525.00 plus an origination fee of $75.00. The total payments on the loan, if made as scheduled, totaled $9,135.64.

22. Within days after entering onto the Consumer Loan Agreement, Plaintiff was advised that the loan had been assigned to CashCall.

23. Plaintiff made payments to CashCall on the loan through August 2007.

24. After Plaintiff was no longer able to make payments on the loan, CashCall continued to try and draft Plaintiff's checking account, thereby causing Plaintiff to incur over-draft charges.

25. Plaintiff filed for relief under Chapter 13 of Title 11 of the United States Code on April 29, 2009. The case was assigned case No.: 09-20930. CashCall was schedule as a creditor. CashCall filed a claim on May 18, 2009. That claim was listed as claim #5 in the claims register. The claim was for $6,966.39 and asserted a right to distribution from the bankruptcy estate for the illegal debt. The claim was transferred to LVNV on December 9, 2011 and a transfer of claim was filed in the proceeding on May 1, 2012.

26. Plaintiff again filed for relief under Chapter 13 of Title 11 of the United States Code on April 18, 2014. The case was assigned case No.: 14-20599. LVNV filed a claim on September 3, 2014. That claim was listed as claim #17 in the claims register. The claim was for $6,966.39 and asserted a right to distribution from the bankruptcy estate for the illegal debt. The claim stated fraudulently that it was for a credit card and the summary of account also fraudulently stated that the claim included no interest.

27. Plaintiff again filed for relief under Chapter 13 of Title 11 of the United States Code on February 25, 2016. The case was assigned case No.: 16-20207. LVNV filed a claim on June 22, 2016. That claim was listed as claim #9 in the claims register. The claim was for $6,966.39 and asserted a right to distribution from the bankruptcy estate for the illegal debt. The claim stated fraudulently that it was for a credit card and the summary of account also fraudulently stated that the claim included no interest.

28. At all times relevant hereto LVNV knew or should have known that the FBD Loan which it purchased from CashCall was void and unenforceable against the Debtor and that its proofs of claim were both false and fraudulent.

29. At all times relevant hereto, CashCall and LVNV have actively and fraudulently misrepresented and thus concealed the illegal and actionable nature of the FBD Loan preventing Plaintiff and the class members from prosecuting claims against them.

30. That as the successor in interest of CashCall to the FBD Loan, the liability created by the acts of CashCall complained of herein are imputed to LVNV, in addition to any liability for direct actions of taken by agents or servants of LVNV.

IV. CLASS CERTIFICATION

31. Pursuant to Rules 23(a), (b)(3), (b)(2) and (c)(4) of the Federal Rules of Civil Procedure, Plaintiff brings this class action on behalf of himself and all others similarly situated. Specifically, Plaintiff seeks to represent the following persons ("the Class" or "Class Members"):

32. All residents of the Commonwealth of Kentucky who executed a promissory note with either First Bank of Delaware or First Bank & Trust who subsequently filed a petition for relief under the provisions of title 11 in the Eastern District of Kentucky, and in which Defendant LVNV later filed or received a transfer of proofs of claim for such loans in the bankruptcy proceedings after having purchased such loans from CashCall.

33. Excluded from the Class are LVNV, its employees, agents and assigns, and any members of the judiciary to whom this case is assigned, their Court staff, and Plaintiff's counsel.

34. Members of the above-defined Class can be easily identified through Defendant's records.

A. Numerosity

35. The proposed Class is so numerous that individual joinder of all Members is impracticable.

36. The subject involves hundreds if not thousands of Class Members. While the identities of Class Members are unknown to Plaintiff at this time, such information can be readily ascertained through appropriate investigation and discovery. The disposition of the claims of the Class Members in a single action will provide substantial benefit to all parties and to the Court.

B. Predominance of Common Questions of Law and Fact

37. Common questions of law and fact exist as to all Members of the Class and predominate over any questions affecting only individual Class Members. These common legal and factual questions include, but are not limited to, the following:

(a) Whether the loans violate the usury laws;

(b) Whether the loans are fraudulent;

(c) Whether the loans violate the Kentucky Consumer Protection Act;

(d) Whether the LVNV violated the Fair Debt Collection Practices Act;

(e) Whether LVNV engaged in unfair, deceptive, and unconscionable practices in connection with the loans;

(f) Whether, as a result of LVNV's illegal activities, Plaintiff and Class Members have suffered damages and, if so, the appropriate amount of such damages; and,

(g) Whether, as a result of LVNV's illegal activities, Plaintiff and Class Members are entitled to declaratory and injunctive relief, or other relief, and, if so, the nature of such relief.

38. Pursuant to Rule 23(b)(2) as made applicable to this proceeding by Bankruptcy Rule of Civil Procedure 7023, LVNV has acted or refused to act on grounds generally applicable to the Class, thereby making final injunctive or corresponding declaratory relief appropriate with respect to the Class as a whole. In particular, LVNV has sought to collect upon void obligations by filing fraudulent proofs of claim with the United States Bankruptcy Court for the Eastern District of Kentucky.

C. Typicality

39. Plaintiff's claims are typical of the claims of the Members of the Class. Plaintiff shares the aforementioned facts and legal claims or questions with Class Members, and Plaintiff and all Class Members have been similarly affected by LVNV's common course of conduct of collecting illegal loans in the Commonwealth of Kentucky.

D. Adequacy

40. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in handling complex class action litigation, including complex questions that arise in this type of financial and consumer protection litigation.

41. Plaintiff and his counsel are committed to the vigorous prosecution of this action.

E. Superiority

42. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy for at least the following reasons:

(a) The claims presented in this case predominate over any questions of law or fact affecting individual Class Members;

(b) Individual joinder of all Class Members is impracticable;

(c) Absent a Class, Plaintiff and Class Members will continue to suffer harm as a result of Defendant's unlawful conduct;

(d) Given the amount of individual Class Members' claims, few, if any, Class Members could afford to, or would, seek legal redress for the wrongs Defendant committed against them, and absent Class Members have no substantial interest in individually controlling the prosecution of individual actions;

(e) Even if individual Class Members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed;

(f) Adjudications of individual Class Members' claims against Defendant would, as a practical matter, be dispositive of the interests of other Class Members who are not parties to the adjudication and may substantially impair or impede the ability of other Class Members to protect their interests; and,

(g) This action presents no difficulty that would impede its management by the Court as a class action, which is the best available means by which Plaintiff and Class Members can seek redress for the harm caused by Defendant.

43. LVNV knowingly purchased and participated in collecting usurious loans which resulted in uniform damage to Plaintiff and Class Members. As a result, Defendant has acted or refused to act on grounds generally applicable to each Class Member, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

44. Because Plaintiff seeks injunctive and corresponding declaratory and equitable relief for the entire Class, the prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications with respect to individual Class Members, which would establish incompatible standards of conduct for Defendant. Further, bringing individual claims would overburden the courts and would be an inefficient method of resolving the dispute at the center of this litigation.

V. CLAIMS

A. COUNT 1 – Violation of the Consumer Loan Act against LVNV

45. Plaintiff incorporates, as if fully rewritten herein, the allegations of each of the preceding paragraphs.

46. The loans made to Plaintiff and Class Members are not secured by a lien on real property.

47. Neither LVNV nor CashCall, the entity from which LVNV purchased the FBD Loan, are registered as a bank, credit union, finance company, or pawnbroker in the Commonwealth.

48. Pursuant to KRS 286.4-420 no person shall, without first obtaining a license from the Commissioner, engage in the business of making loans in the amount or of the value of fifteen thousand dollars or less at a greater rate of interest, or consideration therefore than otherwise permitted by law.

49. CashCall, the entity which wrote the FBD Loan, failed to obtain a license from the Commissioner.

50. The maximum interest rate which may be charged by non-license holders is 8%. KRS 360.010. All FBD Loans purchased by LVNV exceed 8%.

51. KRS 286.4-991(1) makes any loan issued by an unlicensed lender which charges in excess of these rates void. LVNV has no right to collect any principal, charges or recompense whatsoever for the FBD Loans.

52. The loans made to Plaintiff and Class Members are void and unenforceable.

B. COUNT 2 – Violation of the Kentucky Consumer Protection Act ("KCPA") against LVNV

53. Plaintiff incorporates, as if fully rewritten herein, the allegations of each of the preceding paragraphs.

54. Pursuant to Section 367.220(1) of the KCPA, Plaintiff and Class Members are authorized to bring this civil suit to recover the actual damages sustained by them as a result of the unlawful acts of LVNV constituting violations of the KCPA.

55. Plaintiff's and Class Members' participation LVNV's unlawful loan scheme was for their own personal, family or household purposes within the meaning of the KCPA - namely, providing for the economic security of their families.

56. LVNV's unlawful loan scheme constitutes unfair, unconscionable, false, misleading and deceptive acts or practices in the conduct of trade or commerce in that, without limitation:

(a) The FBD Loans which LVNV purchased and attempted to collect knowingly charge illegal interest rates on loans.

(b) LVNV purchased and attempted to collect on loans when LVNV knew CashCall was required to register as a consumer loan company in order to lawfully write such loans.

(c) That the FBD Loans which LVNV purchased from CashCall were the result of an unfair and deceptive collusion between CashCall and the State Charted Banks, and were further unfair and deceptive in that the granting of the loans was conditioned upon borrowers -- and Plaintiff in particular -- agreeing to electronic withdraw of the loan payments from their bank accounts in violation of the Electronic Funds Transfer Act.

57. As a direct and proximate result of LVNV's and its predecessor in interest's violation of the KCPA, Plaintiff and Class members have suffered losses and damages in amounts in excess of the jurisdictional limits of this Court as may be determined by the trier of fact.

C. COUNT 3 – Fraud against LVNV

58. Plaintiff incorporates, as if fully rewritten herein, the allegations of each of the preceding paragraphs.

59. CashCall made false representations concerning the loans and LVNV later ratified those representations, including;

60. That the State Chartered Banks were making the loans when, in fact, the loans were advertised, administered, and funded by CashCall.

61. That the loans were lawful and valid.

62. That CashCall had the legal right to collect payments on the loans.

63. That CashCall could legally charge interest rates which exceed those allowed in the Commonwealth of Kentucky to Kentucky residents and otherwise fail to abide by the laws of the Commonwealth of Kentucky.

64. LVNV made false representations concerning the loans, including;

65. That the loans were legally enforceable and that LVNV was entitled to participate in any distribution from Plaintiff's and Class Members' bankruptcy estate.

66. Plaintiff reasonably relied to his detriment on the misrepresentations because if CashCall and had truthfully disclosed or caused to be disclosed that the loans were harmful and illegal, Plaintiff and Class Members never would have entered into a Consumer Loan Agreement. As a result of CashCall's fraud which is imputed to LVNV, Plaintiff and Class Members have been harmed.

67. As a direct and proximate result of LVNV's fraud, Plaintiff has been injured, and the Plaintiff is entitled to an award of monetary damages and declaratory and injunctive relief.

D. COUNT 4 – Violation of the Fair Debt Collection Practices Act ("FDCPA") against LVNV

68. Plaintiff incorporates, as if fully rewritten herein, the allegations of each of the preceding paragraphs.

69. Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). To effectuate this purpose, the FDCPA regulates interactions between consumers and debt collectors by imposing affirmative statutory obligations upon debt collectors and proscribing certain abusive conduct.

70. Among other prohibitions, it is unlawful for debt collectors to make false or deceptive statements in the course of their collection activities.

71. Whether a communication is false, misleading, or deceptive in violation of § 1692e is determined from the vantage of the "least sophisticated consumer."

72. LVNV violated the FDCPA by, including but not limited to:

(a) Attempting to collect a void loan in violation of 15 U.S.C. § 1692e, and 15 U.S.C. § 1692f.

(b) Falsely representing the amount and nature of the FBD Loans in the proofs of claim which it filed in each class member's bankruptcy proceeding in that it stated that the claim was based upon a credit card and that the claim included no interest, and further that it had a right to participate in any distribution from the bankruptcy estate.

73. As a result of LVNV's violation of the FDCPA, Plaintiff and Class Members are entitled to recover damages, statutory damages, and costs of the action including reasonable attorney fees.

E. COUNT 5 – Injunctive Relief Against Defendant

74. Plaintiff incorporates, as if fully rewritten herein, the allegations of each of the preceding paragraphs.

75. Class Members and Kentucky consumers generally remain unaware that the FBD Loan scheme is illegal.

76. LVNV is engaged in business activities, continuing in nature, instrumental to the carrying out of the ongoing criminal enterprises directed at Class Members and Kentucky consumers generally.

77. LVNV is in possession of and has control over funds belonging to Class Members, obtained pursuant to void and illegal consumer loans.

78. LVNV, on a continuing basis, is engaged in transferring Class Members' funds outside the state of Kentucky and into accounts in other states for purposes of obtaining payment on illegal loan transactions. Class Members are generally unaware that payments from their trustee's of funds committed by them to such trustee's are illegal, that the interest rate is illegal and that the loans are not owed.

79. Class Members and the general public will suffer continuing, immediate, and irreparable injury, absent the issuance of injunctive and equitable relief by this Court.

80. Class Members have no complete, speedy, and adequate remedy at law with respect to Defendant's continuing conduct.

81. Preliminary and final injunctive relief is necessary to prevent further injury to Class Members and to the general Kentucky public, including:

82. An order enjoining LVNV from continuing to collect on the illegal FBD loans.

83. An order enjoining LVNV from receiving payments from any Bankruptcy Trustee serving in the Eastern District of Kentucky for an FBD loan.

84. An order that LVNV hold in trust, until further direction of this Court, all proceeds accepted or transferred from Class Members or by others for the benefit of Class Members, for FBD accounts.

85. An order directing that LVNV timely provide a complete accounting of: i) the identities of each Class Member; ii) the funds accepted or transferred from the accounts of each Class Member; and iii) the identities of each person or entity to whom distributions of the funds of Plaintiff and Class Members have been made and the amounts of such distributions.

86. A final order directing the disbursal of funds held in trust pursuant to order of this Court.

87. An order enjoining Defendant from engaging in further business activities violating the Consumer Loan Act or CPA.

F. Count 6 - Request for Declaratory Relief

88. As outlined in the preceding counts and the preceding factual allegations, the Defendant has filed proofs of claim on illegal FBD loans. Plaintiff seeks a declaration that LVNV has acted unlawfully and fraudulently in filing and/or receiving transfers of materially false proofs of claim, and that it therefore holds in trust for each of the trustee's appointed in the various Class Members bankruptcy proceedings any proceeds which it has received from said trustees and is further liable to said trustees for prejudgment interest on the liquidated sums held in trust for such trustees.

89. Plaintiff and the plaintiff class further seek a declaration that LVNV's conduct constitutes an abuse of process, and that such conduct knowingly violated and violates Federal and Local Rules of Bankruptcy Procedure and therefore constitutes

offenses against the dignity and authority of the Bankruptcy Court of the Eastern District of Kentucky.

VI. DEMAND FOR RELIEF

Plaintiff therefore requests on behalf of himself and the proposed Class, the following relief:

(i) An order certifying Class Members' claims pursuant to Fed. R. Civ. P. 23(b)(3) and/or 23(b)(2), or certifying such issues as may be deemed appropriately treated on a class basis;

(ii) An order appointing named Plaintiff as representatives of the Class and appointing undersigned counsel as Class counsel;

(iii) An order and decree issuing the preliminary and final injunctive relief demanded in this Complaint;

(iv) An award of damages, jointly and severally, as against LVNV, in an amount to be proven at the time of trial;

(v) An award of exemplary damages in the amount of three times the damages or loss suffered by each Class Member;

(vi) An award of prejudgment interest on liquidated damages;

(vii) An award of attorney fees, including those provided for in Chapter 367;

(viii) An award of litigation costs; and

(ix) Such other declaratory or injunctive relief as the Court may deem fair and equitable.

DATED this 26th day of May, 2017.

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FDCPA, FCRA & TCPA Basics

August 24, 2017

Christian Jenkins

Minnillo & Jenkins Co., LPA

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Debt Collectors Who Posed as Process Servers and Intimidated Consumers Settle with FTC

Defendants Required to Pay More Than $4 Million to Consumers, and Banned from Collecting Debt

FOR RELEASE

May 21, 2014

TAGS: deceptive/misleading conduct | Finance | Bureau of Consumer Protection | Consumer Protection | Credit and Finance | Debt Collection

A Southern California debt collection operation, Asset Capital and Management Group, will surrender more than $4 million for consumer redress to settle Federal Trade Commission charges that it extorted payments from consumers using false threats.

The defendants behind the scheme will turn over their personal assets and give up any claim to the business assets, under the FTC settlements. They also are banned from the debt collection industry.

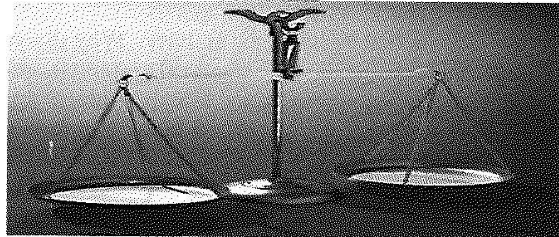
"Consumers shouldn't be subjected to threats and intimidation," said Jessica Rich, Director of the FTC's Bureau of Consumer Protection. "We're pleased that victims of this scheme will be getting money back from the defendants."

The FTC alleged the defendants used a sprawling network of intertwined companies and dozens of fictitious names to illegally extract payments from consumers for credit card debt that they had purchased from creditors. According to the FTC, the defendants employed an assortment of deceptive and abusive tactics in collecting on the credit card debt, violating both the FTC Act and the Fair Debt Collection Practices Act. The FTC charged that the defendants posed as process servers in calls to consumers and third parties, falsely threatened consumers with lawsuits, wage garnishment, seizure of their property, and arrest, and disclosed debts to consumers' employers, colleagues, and family members. The FTC also alleged that the defendants violated the FDCPA by failing to tell consumers they were attempting to collect a debt, and failing to notify consumers of their right to dispute and obtain verification of their debt.

At the FTC's request, a federal court in Los Angeles halted the operation in July 2013, froze the defendants' assets, and appointed a receiver to take charge of the defendants' business.

Cartwright Mediation Firm ™©

Pre-Legal Division



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1/23/2013

FAX or EMAIL:

RE: Out-of-Court Settlement via case dc# **8-42709023 USGOV 7023/4380/A**

Contents: • LEGAL NOTICES'

- Affidavit of Out-of-Court settlement perimeters
- Methods of Remittance options RE: Out-of-Court Settlement
- Affidavit of intent & mediation assignment
- Original Student Loan Contracts

Phone: 888-289-8703 Ext. 208 C/o Mrs. Angela Carroll

SUTHERLAND

OUTLINE OF TCPA RULES

	LANDLINE		CELLPHONE	
	Marketing	Non-Marketing	Marketing	Non-Marketing
Autodialed Calls/Texts	Do not call list+		prior express written consent[1] *	prior express consent[2]
Prerecorded Voice	prior express written consent *		prior express written consent *	prior express consent
Manually Dialed	Do not call list		Do not call list	
Fax	Prior express permission or established business relationship *			

[1] "Prior express written consent" requires a written agreement, signed by the consumer, that includes among other things the telephone number, that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

[2] For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶31 (1992).

+ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. ***The chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.*** *If you have any questions about this chart, please contact the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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