COLLECTION LITIGATION

Volunteer Lawyers Program
Alabama State Bar

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PREFACE

The goal of this manual is to provide an overview of the current state of collection law in Alabama. In addition, this manual focuses on equipping the collections practitioner with a brief introduction to the Fair Debt Collection Practices Act and how it effects a collections practice.

The area of collections law is governed by common law, as well as State and Federal statutes. Before handling a collections matter, the collections practitioner must possess a general working knowledge of the applicable body of law discussed herein, as well as an understanding of any local rules that may exist in the county in which the potential action may be brought. Understanding that collections law is generally a high-volume practice, to insure that you are providing competent representation of your client in a specific collection matter, it is important to devote a considerable amount of time, initially, towards developing a systematic collections procedure. In doing so, the collections practitioner who is handling thousands of files, maximizes efficiency while minimizing the possibility of forgetting to complete one of the numerous procedural steps necessary to obtain a judgment.

In reviewing these materials, keep in mind that although we tried to write them from a neutral point of view rather than from the creditor's perspective, much of what you need to know to defend a collections case relates to the burden of proof that the plaintiff/ creditor bears. Consequently, regardless of which party you are representing, you should pay particular attention to making sure that the elements of the cause of action are proven and that the appropriate legal procedures are followed.

Finally, to maintain an effective and efficient collections practice, the collections practitioner must understand the importance of treating opposing counsel and parties with courtesy and respect. In most collection cases both parties will benefit more if they can reach an amicable settlement before having to go trial. The groundwork for reaching a settlement begins with establishing a working relationship with the opposing counsel and parties that is built on mutual trust and respect. Although the opposing parties' respect can be earned by the presentation of a strong case, it is still essential to make an effort to develop a relationship with the opposition when seeking settlement.

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COLLECTION LAW IN ALABAMA

I. CAUSES OF ACTION

Alabama law recognizes two general categories of debts that are enforceable or collectible through legal action: accounts and contracts.

A. Accounts.

1. Open account.

a. Definition

An open account may be defined as a type of credit extended by a seller to a buyer which permits the buyer to make purchases without signing a contract or note, based on the seller's evaluation of the buyer's credit worthiness. In this type of transaction or business relationship, the specific terms of the sale, such as quantity, date of purchase, etc. are not fixed or determined in advance. When goods are sold or services rendered and knowingly accepted by a buyer, an account is created based on the law's presumption and obligation that the buyer will pay for those goods or services. Car Center v. Home Indemnity, 519 So. 2d 1319 (Ala. 1988); Norton v. Liddell, 194 So. 2d 514 (Ala. 1967); Rose Manor Health Care, Inc. v. Barnhardt Mfg. Co., Inc., 608 So. 2d 358 (Ala. 1992). Generally included in this type of debt are other causes of action such as services rendered and work and labor performed.

b. Prima Facie Case

To prove an open account, the creditor must maintain clear and accurate records showing the creation of the account and all purchases and charges added to the account at the debtor's request. Ala Code § 12-21-42 to 43 (1975); McCurdy v. Miller, 328 So. 2d 594 (Ala. Civ. App. 1976); Livingston v. Tapscott, 585 So. 2d 839 (Ala. 1991); Segars v. Reaves, 567 So.2d 249 (Ala. 1980).

2. Account stated.

a. Definition

An account stated is an agreement between parties who have had prior financial transactions that the statement of account and the balance struck are correct and a promise, express or implied, that the debtor will pay that amount. Wilhite v. Beasley, 497 So.2d 103 (Ala. 1986). When an account billing is prepared and rendered or presented to the buyer and the buyer does not object within a reasonable time, the buyer's failure to object would be regarded by law as an admission of the correctness of the account and the

account becomes an account stated. Gilbert v. Armstrong Oil. Co., Inc., 561 So.2d 1078 (Ala. 1990). In an account stated, the law implies an agreement between the parties that the item or items listed on the account are correct, together with a promise by the buyer for the payment of the account balance. Karrh v. Crawford-Sturgeon, Ins., Inc., 468 So. 2d 175 (Ala. Civ. App. 1985); University of South Alabama v. Bracy, 466 So. 2d 148 (Ala. 1985); Gilbert v. Armstrong Oil Co., Inc., 561 So. 2d 1078 (Ala. 1990); Miller v. Chapman, 674 So. 2d 71 (Ala. 1995); Rutledge Indus. Corp. v. Talladega Foundry and Mach. Co., Inc., 582 So. 2d 436 (Ala.1991).

b. Prima Facie Case

To prove an account stated the creditor must show not only the creation and maintenance of an open account at the debtor's request, but also the creditor's preparation and delivery of the statement of account to the debtor and the debtor's failure to object to the same. The following cases discuss a prima facie case:

Mobile Rug and Shade Co., Inc. v. Daniel, 424 So. 2d 1333 (Ala. Civ. App. 1983) (account is final (balanced) and no further charges are contemplated);

Home Federal Savings and Loan Ass'n. v. Williams, 276 Ala. 37, 158 So. 2d 678 (Ala. 1963) (the account is rendered, that is the account has been presented to the defendant, verbal or in writing);

Hanson v. Kennedy, 40 Ala. App. 161, 112 So. 2d 508, *cert. denied*, 269 Ala. 696, 112 So. 2d 510 (there has been assent of the debtor to correctness and express or implied promise to pay). Defendant's failure to object within a reasonable time is assent. Home Federal, 276 Ala. at 162, 158 So. 2d at 509-510.

Gilbert v. Armstrong Oil Co., Inc., 561 So. 2d 1078, 1081 (Ala.1990) (Once Plaintiff proves prima facie case in action on account stated, the burden shifts to the defendant to assert any legal defense available.)

3. Verified statement of account.

a. Definition

Section 12-21-111 of the Alabama Code provides that in any lawsuit or action based on an account, an itemized and verified statement of the account may be offered and made a part of the suit. Ala. Code § 12-21-111 (1975). The statement must be made

by a competent witness who must verify under oath as to the correctness of the account. The verified statement is filed with the lawsuit, and, absent a proper verified statement or affidavit from the buyer to the contrary, the burden of proof is shifted to the defendant. Defendant's counter-affidavit shifts the burden of proof back to the plaintiff, either with respect to the whole account, or those parts of the account which the defendant disputes. As set forth in the statute, if the court finds that defendant's affidavit was not made in good faith, the court will penalize defendant in a sum not exceeding five percent of the judgment recovered. The following cases and statutes discuss verified accounts.

A suit on verified account is actually a suit on open account, and the filing of an affidavit to verify the account. The sufficiency of the affidavit is an evidentiary rule. Sinclair Ref. Co. v. Robertson, 247 Ala. 260, 23 So. 2d 872 (1945).

A finance company manager's statement that he is familiar with the account is sufficient. Aplin v. Swift Agric. Chems. Corp, 55 Ala. App. 409, 301 So. 2d 171 (1974).

Plaintiff's affidavit, as a matter of evidence, shifts the burden of proof to the defendant. Benson and Co. v. Foreman, 241 Ala. 193, 1 So. 2d 898 (1941).

See also Merchant's Printers, Inc. v. Vulcan Publications, Inc., 597 So.2d 1322 (Ala. 1992) and Pileri Industries, Inc. v. Consolidated Industries, Inc., 740 So. 2d 1108.

4. Venue

Venue for suits on open account is controlled by Alabama Code § 6-3-2, which provides that a suit based on an open account must generally be brought where the defendant resides. Ala. Code § 6-3-2 (1975). Section 6-3-7 provides that if the defendant is a foreign corporation, suit can be brought in any county where the corporation does business. Ala. Code § 6-3-7 (1975). Where the defendant is a domestic corporation, suit is proper in any county where the Corporation is doing business or was doing business when the action arose. Ala. Code § 6-3-7 (1975), Ex parte Graham, 634 So. 2d 994 (Ala. 1993), Ex parte Blount, 665 So.2d 205 (Ala. 1995).

5. Interest

The plaintiff may claim pre-judgment interest. By statute, obligations on open accounts bear interest at a rate of six percent per annum. *See* Ala. Code § 8-8-1, 8-8-8 (1975); Prestridge v. Patrick Irwin and Co., 46 Ala. 653 (1871); Staples v. Jenkins Builders, Inc., 447 So. 2d 779 (Ala. Civ. App. 1984); Bressler v. Dudley, 694 So. 2d. 1355 (Ala. Civ. App. 1996).

B. Contracts

1. Definition

In the context of collections, a contract may be defined as a specific agreement, whether oral or written, between the seller and the buyer which describes and makes certain the responsibilities, obligations and rights of each party with respect to the particular business transaction between them. Sales contracts, guaranty agreements, promissory notes and purchase agreements, all creating an obligation on the buyer to pay for products sold or services rendered, are the most common types of contracts encountered in collection cases. Contracts of these types generally contain additional language obligating the buyer or patient, in the event of default or non-payment, to pay all late charges and all costs of collection, including attorney's fees.

2. Prima Facie Case

To prove a debt owed by contract, the plaintiff must establish and prove the existence of an enforceable agreement between the parties. The creditor or plaintiff must maintain clear and accurate records showing the essential terms and conditions of the contract showing the debtor's agreement thereto. Ala. Code § 12-21-112 (1975). The plaintiff must also show that it has performed and satisfied all of its obligations and responsibilities under the contract, usually by establishing delivery of the goods or services to the debtor and that the debtor has breached the terms of the contract by not paying. Finally, the creditor must keep accurate business records showing the dollar amount of all damages it has suffered because of the debtor's breach of contract, usually the unpaid purchase price plus late charges and collection costs.

3. Venue

Section 6-3-2(a)(2) of the Alabama Code provides that all actions on contracts, except as may be otherwise provided, must be commenced in the county in which the defendant or one of the defendants resides if such defendant has within the state a permanent residence. Ala. Code § 6-3-2(a)(2) (1975).

C. Work and Labor

1. Definition

A suit for work and labor is an action on a promise to pay fair and reasonable compensation for services rendered to another, which are knowingly accepted. Irvin v. Strother, 163 Ala. 484, 50 So. 969 (Ala. 1909); Jacks v. Sullinger, 224 So.2d 583 (Ala. 1969).

2. Prima Facie Case

a. There is a prima facie case when:

(1) the plaintiff performed services;

(2) the services are requested or accepted by e defendant;

(3) for a reasonable value (there is a question as to whether expert testimony is needed);

(4) the debt is due and unpaid; and

(5) there is *quantum meruit*;

b. Note: Pre-judgment interest is allowed (six percent on implied contract), Ala. Code §§ 8-8-1, 8-8-8.

3. Venue

Section 6-6-3 of the Code of Alabama provides that venue is proper where the work and labor was performed. Ala. Code § 6-6-3 (1975). Under Rule 82(c) of the Alabama Rules of Civil Procedure venue proper to one is proper to all. Ala. R. Civ. P. 82(c).

D. Other Enforceable Debts.

In addition to accounts and contracts, there are numerous other types of debts or obligations which may be collected or enforced. These are grouped generally under causes of action which serve as the basis for collection of the debt. The most common causes of action encountered in a collections practice are: services rendered, money lent, and goods sold and delivered. These are variations of the underlying theme supporting accounts and contracts and they are enforced and collected in the same manner.

II. The Statute of Limitations

A. Introduction

The statute of limitations is a time limit, established by the Alabama Code, within which legal action must be brought or filed to enforce a claim. The failure to commence the lawsuit within the time period provided by the statute of limitations provides the defendant with an affirmative defense against a lawsuit.

Pursuant to Alabama law, the time periods stated in the statute of limitations are calculated starting from the date the debtor's obligation to pay became enforceable or from the date of the debtor's last payment. The five most common statutes of limitations in the collection area are as follows:

1. Open Accounts

Three years. The statute of limitations for an open account is three years from the date of last item of the account, or from the time when, by contract or usage, the account is due. Ala. Code § 6-2-37 (1975). Some of the claim may be barred by the statute of limitations where the charges were incurred over a term greatly exceeding three years. *See, e.g.*, Humphrey v. Boschung, 47 Ala. App. 310, 253 So. 2d 760 (1970).

2. Account Stated

S**ix years**. Ala. Code § 6-2-34 (1975). *See, e.g.,* Mobile Rug and Shade Co., Inc. v. Daniel, 424 So. 2d 1332 (Ala. Civ. App. 1983).

3. Contracts

Six years. Ala. Code § 6-2-34 (1975). *See, e.g.*, AC, Inc. v. Baker, 622 So. 2d 331 (Ala.1993).

4. Contracts (Sale of Goods)

Four years. Ala. Code § 7-2-725 (1975). *See, e.g.*, Bass Pecan Co. v. Berga, 694 So.2d 1311 (Ala.1997).

5. Contracts (Under Seal)

Ten years. Ala. Code § 6-2-33 (1975); *See e.g.*,Ex parte Ledford, 761 So.2d 990 (Ala. 2000).

B. Defendant Absent From State

When the defendant debtor is absent from the state during the time within which the lawsuit might have been commenced, the time of such absence is not included in the calculation of the permissible time for filing the case. Ala. Code § 6-2-10 (1975), Gulf States Steel, Inc. v. Lipton, 765 F. Supp. 696 (N.D Ala. 1990), *affirmed* 934 F.2d 1265 (11th Cir. 1991). Also, a partial payment made on the debt before the bar is complete removes the bar of the statute and begins anew the applicable time period. Ala. Code § 6-2-16 (1975), White v. Sikes, Kelly, Edwards & Bryant, 410 So. 2d 66 (Ala. Civ. App. 1982).

III. DOCUMENTATION AND SUPPORT

A. Introduction

Assuming that the claim is for a debt which is enforceable at law and that the claim is not barred by the statute of limitations, the collection attorney must then analyze whether the debt can be proven as a matter of law.

B. Burden of Proof

In all lawsuits, the law places the burden of proof on the plaintiff, meaning it is the plaintiff's obligation and responsibility to prove, by a preponderance of the evidence, the existence and the amount of the debt owed by the defendant. If the plaintiff fails to prove any part of its case, the court will enter a verdict or judgment for the defendant and the plaintiff will recover nothing toward the debt.

C. Record Keeping

Regardless of whether the creditor conducts its business on an open account or contract basis, the creditor must prepare and maintain, in the ordinary and regular course of its business, accurate, legible and current records showing all of the charges owed by the debtor and the total amount owed. Records of invoices, ledger sheets, bad or returned checks and any other type of business records are relevant and admissible by law to prove the existence and amount of the debt. The creditor must ensure that its records are kept in an organized and understandable manner to successfully prosecute a collection lawsuit. Ala. Code §§ 12-21-42, 12-21-43 (1975). If the creditor cannot prove the existence and amount of the debt, it will not be enforceable at law.

IV. THE COURT SYSTEM

A. The Complaint.

A lawsuit begins when the plaintiff files with the clerk of the appropriate court, a complaint, a pleading or document stating what the defendant owes to the plaintiff and the conditions under which the obligation arose. Ala. R. Civ. P. 3(a); *see also* Corbitt v. Mangum, 523 So. 2d 348 (Ala. 1988). Under Alabama law, the complaint must state or provide sufficient information to place the defendant upon notice as to the basic nature and substance of the plaintiff's claim. Section 8(a) of the Alabama Rules of Civil Procedure requires that the complaint must contain (1) a short and plain statement of the claim showing that the plaintiff is entitled to relief and (2) a demand for judgment. Bryant v. West Ala. Health Services, Inc., 669 So. 2d 941 (Ala. Civ. App. 1995).

B. Jurisdiction

The lawsuit must be filed in a court having proper subject matter jurisdiction over the claim. The jurisdictions of the Alabama state courts are as follows:

1. District Court - Small Claims; Jurisdiction $1.00 to $3,000.00. Ala. Code § 12-12-31 (1975).

2. District Court - Large Claims; Jurisdiction $3,000.01 to $10,000.00. Ala. Code § 12-12-30 (1975).

3. Circuit Court- Jurisdiction over $10,000.00. Ala. Code § 12-11-30 (1975).

C. Service of process.

1. Introduction

Once the complaint is filed to commence a lawsuit, a copy of the complaint, together with the summons, must be served on or delivered to the defendant. Ala. R. Civ. P. 4. Until the defendant has received proper notice of the lawsuit, the case cannot proceed. Plaintiffs often discover for the first time that their location information for the defendant is insufficient when the summons and complaint are returned to the court as undeliverable or unserved. The lawsuit is then delayed until the plaintiff can verify a new address for service. Of course, these delays are avoidable if the plaintiff has obtained and maintained verified location information throughout its collection procedure.

2. Methods of Service

Pursuant to Alabama law, each defendant must be served with a copy of the summons and complaint through one of several methods:

a. Personal service, by delivery by a process server. Ala. R. Civ. P. 4.1(b).

b. Service by certified mail. Ala. R. Civ. P. 4.1(c).

c. Service by regular mail. Ala. R. Civ. P. 4(e).

d. Service by agent. (Individuals - Ala. R. Civ. P. 4(c)(1), Corporations, Ala. R. Civ. P. 4(c)(6), (9).

e. Service by a special process server. Ala. R. of Civ. P. 4.1(b)(2).

f. Service by publication. Ala. R. Civ. P. 4.3.

g. Service out-of-state. Ala. R. Civ. P. 4.2.

D. Entry of judgment.

1. Default Judgement

Once the defendant has received proper notice of the pending lawsuit, he must respond to the court within fourteen days in district court cases and thirty days in circuit court cases. Ala. R. Civ. P. 12(a); Ala. R. Civ. P. 12(d)(c); *see also* Ala. R. Civ. P. 6(e), which allows for additional time to respond for service by mail. If the defendant does not contest the suit and does not file an answer or response to the plaintiff's summons and complaint, the plaintiff may apply to the court for entry of a default judgment for the amount stated in the plaintiff's complaint. Ala. R. Civ. P. 55. Most District Courts have unique procedures and requirements for default judgments so check with the clerk's office or judge's secretary.

2. Trial Judgment

If the defendant elects to respond, he may either admit all or a portion of the debt or he may deny the debt. When the defendant files an answer or response to the lawsuit denying the debt, the case will be set for trial. Most courts have proceedings available that are intended to resolve those cases which have no facts in dispute or which do not warrant a full-scale trial for resolution. Also, the Alabama Rules of Civil Procedure provide the parties the opportunity to "discover" the opposing parties' evidence and testimony. Ala. R. Civ. P. 26. If the case cannot be concluded by an application for

default or a pretrial motion, the case will be set for a final hearing or trial at which time both parties will provide and submit their evidence to the court. The conclusion of the lawsuit is the court's order, called the judgment, which establishes the amount, if any, owed by the defendant.

3. Other Judgment Concerns

a. Practical Use

A judgment has little or no value in and of itself since it merely restates what the creditor knew from the beginning. Further, the judgment itself cannot collect the debt for the creditor. The real value and benefit of a judgment for the creditor can be realized only if the creditor uses the judgment as part of its collection process. After the entry of judgment, the creditor must enforce the judgment against the assets owned by the debtor to satisfy the debt.

b. Automatic Stay

Rule 62 of the Alabama Rules of Civil Procedure contains an automatic stay forbidding collection efforts on a judgment for a period of thirty days after its entry in circuit court cases and fourteen days after its entry in district court cases. Ala. R. Civ. P. 62(d)(c). Rule 62 also gives the court latitude and discretion in extending or shortening the stay of execution based on the circumstances of the case. Recording the judgment within thirty days of its entry is not a violation of the Rule 62 stay.

c. Appeal from Final Judgment

Any party may appeal from a final judgment of the district court to circuit court in a civil case by filing notice of appeal in the district court within fourteen days from the date of judgment or the denial of a post-trial motion, whichever is later. Ala. Code § 12-12-70 (1975). Appeals from final judgments of the district court shall be to the circuit court for trial de novo. Ala. Code § 12-12-71 (1975). To appeal from a final judgment of the circuit court, the notice of appeal must be filed with the clerk of the trial court within forty-two days (six weeks) of the date of the entry of the judgment or order appealed from, or within the time allowed by an extension pursuant to Rule 77(d), of the Alabama Rules of Civil Procedure. Ala. R. App. P. 4.

V. COLLECTING ON A JUDGMENT

A. Creation of Judicial Lien.

A Judicial Lien is created by filing a certificate of judgment with the Office of the Judge of Probate. Recording the certificate of judgment creates a lien on all the debtor's property in that county. The certificate of judgment should contain the following information:

1. style of the case including the name of the court entering judgment;
2. amount of judgment;
3. judgment date;
4. amount of cost;
5. name of parties;
6. name of plaintiff's attorney;
7. address of each defendant or respondent as shown in the court proceedings;
8. clerk's signature.

Ala. Code § 6-9-210 (1975).

Prior case decisions indicated that all the statutory requirements must be met to create a lien. The most recent cases regarding this issue have held that the requirements must be viewed in relation to the purpose of the requirement, to impart notice of a judgment lien to title searchers. Bowman v. SouthTrust, 551 So. 2d 984 (Ala. 1989); John Deere Co. v. Blevins, 696 So. 2d 1080 (Ala. Civ. App. 1996), but see AmSouth Bank v. Holberg, 789 So.2d 833 (Ala. 2001) for the proposition that merely filing a copy of the judgment does not meet statutory requirements.

B. Revival of Judgment

A judgment is conclusively presumed to be satisfied after twenty years have passed since its entry. Henry v. State ex rel. Rambow, 16 Ala. App. 670, 81 So. 190 (1919). After twenty years have elapsed, the judgment cannot be revived. Ala. Code § 6-9-190 (1975).

After ten years have passed since the entry of judgment or the date of last execution on a judgment, the judgment is presumed to have been satisfied. Ala. Code § 6-9-191 (1975). To execute on a judgment between ten and twenty years old, the plaintiff must file a Motion to Revive Judgment and obtain an order reviving the judgment. Davis International, Inc. v. Berryman, 730 So. 2d 242 (Ala. Civ. App. 1999) Powles v. Kandrasiewicz, 886 F.Supp. 1261 (W.D.N.C. 1995). The burden to prove that the judgment has not been satisfied rests on the plaintiff. Ala. Code § 6-9-191 (1975), Littlefield v. Cupps, 371 So.2d 51 (Ala. Civ. App. 1979); Hays v. McCarty, 239 Ala. 400 (1940).

> [S]o strong is this presumption of satisfaction which the law raises by lapse of time..., it will prevail until overcome by clear and decisive proof to the contrary or by the establishment of facts and circumstances from which nonpayment may be clearly inferred...The evidence to rebut must be strong and convincing to the effect of producing a reasonable conviction that the judgment had not been paid or satisfied.

Davis International at 245, quoting Gambill v. Cassimus, 247 Ala. 176, 178 (1945).

A judgment creditor may overcome this presumption by presenting testimony of a person familiar with books and records of the creditor who can verify that the judgment remains unsatisfied. Slay v. McKean Print and Hardware Store, Inc., 317 So. 2d 326 (Ala. Civ. App. 1975).

The judgment lien continues for ten years after the date of such judgment. A judgment may be revived by filing a motion supported by an affidavit in the court that originally entered the judgment. Ala. Code § 6-9-192 (1975). The Code provides that after twenty years from the date the judgment was entered, the judgment is irrefutably presumed to have been satisfied. Ala. Code § 6-9-211 (1975). A judgment lien is discharged upon satisfaction and extinguishment of judgment, since a judgment lien cannot exist independently of judgment. In re Ogburn, 212 B.R. 984 (Bkrtcy, M.D. Ala. 1995).

C. Discovery of Assets.

When an execution is issued and not satisfied, Ala. Code §§ 6-6-180 through 187 provide that the plaintiff may file a complaint to compel the defendant to disclose assets. This complaint may be filed in either the county that rendered the original judgment or in the county of the debtor's residence. The pleading requires the debtor to answer the complaint and further that the debtor discloses the nature and whereabouts of all assets owned by the debtor. The court then is authorized to make whatever findings are necessary to reach and subject such assets to sale for satisfaction of the judgment. The court is authorized to appoint a receiver for assembling and recovering the assets pursuant to this Section.

Additionally, Rule 69 of the Alabama Rules of Civil Procedure provides for post-judgment discovery to aid in the execution of a judgment. More specifically, Rule 69(g) of the Alabama Rules of Civil Procedure makes Rules 26 through 37 of the Alabama Rules of Civil Procedure available to the judgment creditor to aid in the execution of the judgment. Discovery in district court is allowed at the discretion of the court. Ala. R. Civ. P. 26(dc). If the debtor fails to respond to the requested discovery, creditor may move to compel.

Finally, section 6-6-200 of the Alabama Code provides for a "statement of assets." Ala. Code § 6-6-200 (1975). This section deals with the return of an execution issued by any court indicating "no property found." The section provides that after such a return, upon written request of the judgment creditor filed with the clerk, the clerk shall issue notice to the judgment debtor requiring him to file within thirty (30) days from the service of such notice, a statement, under oath, of all the assets of such person. The best way to facilitate this request for information is to file interrogatories. If you are not satisfied with the answers provided in response to the interrogatories, the creditor may submit an affidavit that to his best information and belief the statement of assets does not contain a full, true and correct statement and description of such assets. The court shall enter an order requiring the judgment debtor to appear before the court and submit to oral examination under oath. The court must give the debtor ten (10) days notice. Ala. Code § 6-6-201 (1975).

The failure of the judgment debtor to comply with post-judgment discovery subjects the debtor to Rule 37 sanctions under the Alabama Rules of Civil Procedure. If the debtor fails to respond, a motion may be filed for the court to hold the debtor in contempt for his failure to appear at the various discovery procedures. The court may then issue an order to show cause as to why debtor should not be held in contempt.

D. Uniform Enforcement of Foreign Judgments Act

Alabama, in Act No. 86-713, adopted and codified the Uniform Enforcement of Foreign Judgments Act at §§ 6-9-230 through 238 of the Code of Alabama. Ala. Code § 6-9-230 to 238 (1975). This Act provides an efficient and prompt means of enrollment of sister states' judgments, pursuant to the full faith and credit and due process provisions of all state constitutions and the United States Constitution.

A judgment is enrolled under this Act by filing a certificate of judgment exemplified under Acts of Congress along with the pleadings and affidavits stating that the judgment is just and correct and is unpaid and unsatisfied. These pleadings are filed in the circuit court of the county in which the debtor resides. The court, in turn, mails a copy of the pleadings and a notice of the filing for enrollment under this Act to the last known address of the judgment debtor. There is no requirement that the judgment debtor actually receive the pleading, but merely that the pleadings be mailed to the last known address. If no objection is filed to the enrollment of the judgment within thirty (30) days from the date of the mailing, the judgment is considered proper and a certificate may be requested and shall issue from the clerk of the circuit court in the county in which it has been enrolled. The foreign judgment will, at this point, have all force and effect of a circuit court judgment originally entered in this state.

E. Garnishment.

1. Property Subject to Garnishment

Garnishments are appropriate when the property of the defendant is in the hands of a third party. The property subject to garnishment is set forth in § 6-6-370 of the Alabama Code. Ala. Code § 6-6-370 (1975). The different types of property available for garnishment area as follows:

a. money or other effects;

b. debts owing to the defendant or liability on contracts for delivery of personal property;

c. contracts for payment of money which can be discharged by delivery of personal property;

d. contracts payable and personal property of a defendant in a judgment or in pending action which is in possession or under control of a third party and such third party is called the garnishee.

2. Procedure

The Alabama courts have jurisdiction for issuance of garnishment over non-residents if they are found to be "doing business" in the state for the purposes of this evaluation. Ala. R. Civ. P. 4.2; Pepperell Mfg. Co. v. Alabama Nat'l Bank of Montgomery, 261 Ala. 665, 75 So. 2d 665 (1954); *see also* Baker v. Bennett, 644 So. 2d 901 (Ala. 1994).

Garnishments are available and may be issued on any judgment on which execution may issue subject to the automatic stay of Rule 62 of the Alabama Rules of Civil Procedure.

To issue a garnishment, the plaintiff, his agent or attorney, must file an affidavit with the clerk stating the amount due, that the garnishment is believed to be necessary, and the person to be summoned as garnishee is indebted to the defendant. Ala. Code § 6-6-391 (1975).

Upon filing of the garnishment, the garnishee is summoned and must make answer within thirty (30) days of service of process. The garnishee's answer must state the following: (1) whether at the time of service, whether at the time of making the answer, and during the intervening time between the service or answer, (2) he was indebted to the defendant or will be under a then existing contract, or whether by existing contract he is

liable for the payment of money or for delivery of personal property. Ala. Code § 6-6-393 (1975).

The Alabama Supreme Court promulgated Rule 64(a) of the Alabama Rules of Civil Procedure, which requires the defendant receive notice of the process of garnishment contemporaneously with service on the garnishee.

If notice is not perfected on the defendant, the garnishee is entitled to a judgment discharging him from liability. South Highlands Infirmary v. Imperial Laundry Co., 25 Ala. App. 461, 149 So. 106 (1933). Rule 4.3 of the Alabama Rules of Civil Procedure allows notice by publication. The garnishee must answer within thirty (30) days. Ala. Code § 6-6-450 (1975). If indebted, the garnishee must so answer and pay the money into court and await further orders of court pursuant to §§ 6-6-452 through 463. Ala. Code §§ 6-6-452 to 463 (1975). If the monies are not paid into the court by the garnishee, then the garnishee is liable to the defendant for interest at the rate of twelve (12) percent pursuant to § 8-8-19. Ala. Code § 8-8-19 (1975). Additionally, the garnishee is liable to the plaintiff as if it had admitted indebtedness for the amount of such money.

After the monies are paid into the court the court shall then enter an order of condemnation. Ala. Code § 6-6-454 (1975). If the garnishee fails to answer within thirty days, a conditional judgment may be entered. An order of conditional judgment and sciere facias (sci. fa.) must be served on the garnishee along with a notice of final judgment to be entered in thirty days if the garnishee does not appear and answer. Ala. Code § 6-6-457 (1975). Fruittacher v. Ebersol, 10 Ala. App. 411, 64 So. 650 (1914).

There are two means by which answers of the garnishee may be disputed. Both must be done within thirty (30) days of notice of the answer. The first of these allows the garnishee to be cited into the court for oral examination pursuant to § 6-6-450. Ala. Code § 6-6-50 (1975). This does not toll nor extend the time for filing a contest of the answer. To contest the answer of the garnishee under § 6-6-458, one must make an oath within thirty (30) days that the movant filing the contest believes the answer to be incorrect or untrue and the specifics of why it is believed to be untrue must be enumerated. Ala. Code § 6-6-58 (1975). Failure to file this contest within thirty (30) days is fatal unless the court grants an extension; however, unless there is a showing of extraordinary circumstances, extensions are not freely granted. Cross v. Spillman, 93 Ala. 170 (1981).

The filing of a bankruptcy petition invokes an automatic stay and prohibits commencement or continuance of any process of garnishment. 11 U.S.C. § 362(a); 11 U.S.C. § 1501.

Garnishments for wages have certain restrictions as to the maximum amount which can be withheld. Section 6-10-7 provides an exemption from garnishment of seventy-five

percent of all wages and the garnishee is instructed to retain twenty-five percent of wages on the garnishment order. Ala. Code § 6-10-17 (1975). The Alabama Mini-Code transactions governed by § 5-19-15 require that twenty-five percent or thirty times the federal minimum wage, whichever is less, be withheld from the judgment debtor's wages. Ala. Code § 5-19-15 (1975). These percentages apply to disposable earnings, which is that part remaining after deduction of the amount required by law to be withheld, not including periodic payments pursuant to a pension, retirement or disability program, except in Mini-Code transactions which do allow them to be included in legal deductions.

Salaries of state officials are subject to garnishment. State officials' salaries are subject to garnishment in actions by contract and there are no garnishments allowed on judgments ex delicto. Lasseter v. Lasseter, 266 Ala. 459, 9 So. 2d 555 (1957). The garnishment procedure for a debtor who is an active member of the Armed Services or the Coast Guard is set forth in 5 U.S.C. § 5520A, EO 9397. That section requires the completion and submission of an "Involuntary Allotment Application", DD Form 2653, to the Defense Finance and Accounting Service (for members of the Army, Navy, Air Force and Marine Corps), and to the Coast Guard Pay and Personnel Center (LGL), for members of the Coast Guard.

3. Federal Employee Wage Garnishment

The Federal Employees Political Activities Act of 1993 became law on October 6, 1993 and was fully implemented by February 1994. The Act provides that the service of garnishment is made by certified mail, return receipt requested, registered mail or personal service upon the designated appropriate agent, or if no agent has been selected, upon the head of the agency. The agency then has thirty (30) days within which to respond to the garnishment. This is an about face from the historical rule against garnishment of federal employees which had originally been implemented as an advantage to federal employees due to the fact that they were generally paid less than the private workforce. The prohibition was also in place for security reasons. Now federal employees receive competitive salaries and the security argument has lost favor and has been abolished as of the signing of this Act.

F. Execution

Execution is an appropriate remedy when property owned by the judgment debtor is in the hands of the judgment debtor.

1. Procedure

Jurisdiction for executions is found at Ala. Code § 6-9-20. Ala. Code § 6-9-20 (1975). It is available thirty (30) days after the entry of judgment in circuit court and fourteen days in district court. Ala. R. Civ. P. 62(a), 62(dc).

Appeals from the district court to the circuit court stay the issuance of executions without the necessity of the judgment debtor posting bond. However, appeals from the circuit court to any appellate court do not stay executions on the judgment and the defendant must under these circumstances post a supersedeas bond in order to prevent further execution or collections procedures. Upon proper showing, time limits can be shortened pursuant to §§ 6-9-22 and 23 and Rule 62 of the Alabama Rules of Civil Procedure.

Section 6-9-80 of the Alabama Code requires that the sheriff make return of the process of execution within ninety (90) days from the date of the writ. Ala. Code § 6-9-80 (1975). Section 6-9-181 authorizes any sheriff to require the posting of an indemnity bond before or after the execution of the writ. Lauretta v. Holcombe, 98 Ala. 503 12 So. 788 (1893). Section 6-9-92 requires the sheriff to give notice of recovery of proceeds within ten (10) days after the sale. Ala. Code § 6-6-92 (1975). The purchaser at a sheriff's sale, pursuant to section 6-9-140, obtains all rights, title and interest in the defendant's property that the defendant owned at the time of the sale. Ala. Code § 6-9-140 (1975). Section 6-9-142 specifically declares that the caveat emptor doctrine of "buyer beware" is applicable in this process. Ala. Code § 6-9-142 (1975).

2. Property Subject to Execution

The classifications of property subject to writs of execution are enumerated in § 6-9-40 of the Alabama Code. They are as follows:

a. real property to which the defendant has a legal title or perfect equity or vested legal interest in possession, reversion or remainder, whether the entire estate or in common with others;

b. personal property of defendant except things in action whether absolute title or right to possession for life, life of another or shorter period but does not apply to possession required by a bona fide hiring of chattel;

c. on an equity of redemption.

3. Exemptions

Exemptions from levy and sale from writs of execution and writs of garnishment are set forth in §§ 6-10-1 through 6-10-126. Real property is subject to a homestead

exemption of $5,000 and 160 acres. Mobile homes or like structures, if deemed the debtor's principal place of residence, are also subject to this exemption. Homestead exemptions, as referenced above, are not available for judgments based on tort actions. Schuessler v. Dudley, 80 Ala. 547, 250 So. 526 (1887).

In addition to wearing apparel, family portraits or pictures or books used in the family, personal property, not including wages, is exempt to the extent of $3,000 in value. Alternatively, the $1,000.00 state constitution personal property exemption, which may include wages, is still available.

G. Waiver of Exemptions

Section 6-10-120 of the Code of Alabama provides that any person may waive, by a written instrument, his right to claim an exemption to any property. Ala. Code § 6-10-120 (1975).

1. Waiver - Personalty

The defendant may waive his right to claim exempt personal property either by separate instrument or by inclusion in any contract. *See* Solomon v. David Rothchild and Co., 211 Ala. 313, 100 So. 230 (1924). However, the FTC "credit practices rule" which became effective on March 1, 1985, prohibits any consumer lender or seller from taking a waiver of exemption in a consumer credit contract. *See* 16 CFR, § 444.2(a)(280 Stat. 383, as amended, 81 Stat. 54)(5 U.S.C. 522); Ala Code § 6-10-121.

2. Waiver - Real Property

Waivers of the homestead exemption in Alabama must be made by separate instrument in writing subscribed by the party and attested by one witness. If property is held jointly by husband and wife then the waiver of one is not the waiver of the other. Ala. Code § 6-10-122 (1975).

3. Pleading Waiver

Ala. Code § 6-10-123 provides that plaintiff must affirmatively plead that defendant has waived his right of exemption and if plaintiff fails to so plead, the court is without jurisdiction to enter judgment declaring such a waiver. *See* Hurt v. Knox, 220 Ala. 448, 126 So. 110 (1930).

H. Contest of Claims of Exemption

Rule 64(a) of the Alabama Rules of Civil Procedure requires that notice of the process of garnishment be served upon the defendant. Previously, there was no requirement pursuant to section 6-6-394 as to the substantive content of the notice to be given to the defendant nor any time requirements with respect to the service of the notice. However, as a result of the United States District Court Order in Green v. Harbin, Civil Action No. 82-C-5598-Northeast, the District Court for the Northern District of Alabama the Alabama Supreme Court adopted Emergency Garnishment Rule 64(a) effective on June 18, 1985. Emergency Garnishment Rule 64(b) replaces the provisions set forth in § 6-10-37 which set forth the original procedure wherein a garnishment defendant might claim his exemption after service and notice of the garnishment writ. These provisions are as follows:

> The defendant shall file his claim of exemption in writing verified by oath; the court, which issued the writ of garnishment, accompanied by a statement scheduling his personal property, money, location and value thereof as required by § 6-10-29 in the Alabama Code. Ala. Code § 6-10-29 (1975).
>
> The plaintiff is required to institute a contest of the claim, if he chooses, within ten (10) days after service of the notice of the claim of exemption upon him. If the notice of the claim of exemption is mailed to the plaintiff then an additional three (3) days is afforded to the plaintiff within which to institute his contest.
>
> In the event the plaintiff does not institute a contest to the claim of exemption and fifteen days has expired from the filing of the claim of exemption, the garnishment is dissolved.
>
> If a timely contest of claim of exemption is filed by the plaintiff, a hearing to determine said contest is to be scheduled within seven (7) days after the contest is filed.
>
> The new rule provides that if the defendant has notice of the garnishment but fails to interpose a claim of exemption before judgment of condemnation of the funds, this does not impair or affect his claim of exemption.

The aftermath of Green v. Harbin and the adoption by the Supreme Court of the Emergency Garnishment Rules resulted in the Supreme Court amending Rule 69 of the Alabama Rules of Civil Procedure governing execution on judgments. This new rule was effective December 2, 1985. The amended Rule 69 provides that at the time the sheriff either seizes personal property or levies on a debtor's real property, the sheriff must serve the debtor with a copy of the prescribed written notice of exemption rights. Ala. R. Civ. P. 69(b), (c), (d), (e), (f) Form 92.

VI. FAIR DEBT COLLECTIONS PRACTICES ACT

The Fair Debt Collections Practices Act, hereinafter referred to as the "FDCPA,"

was enacted by Congress to eliminate abusive, deceptive and unfair debt collection practices used by debt collectors that led or contributed to the number of personal bankruptcies, marriage instability, job loss and invasion of individual privacy. Another purpose was to regulate collection activities of independent debt collectors. 15 U.S.C. § 1692-1692(o).

The FDCPA is a federal law that regulates the collection of consumer debts by third-party debt collectors. The FDCPA generally prohibits debt collectors from engaging in harassing or abusive conduct, from using any false or misleading representations, or from using any unfair means to collect debts. Violations of the FDCPA can result in liability for actual damages, additional statutory damages of up to $1,000, and attorney fees and costs.

A. Parties Covered by the Act.

The FDCPA covers "debt collectors," defined as entities "the principal purpose of which is the collection of any debts, or who regularly collects . . . debts owed . . . another." 15 U.S.C. § 1692a(6). Attorneys who regularly collect consumer debts are debt collectors. *See, e.g.*, Heintz v. Jenkins, 115 S. Ct. 1489 (1995); Wadlington v. Credit Acceptance Corp., 76 F.3d 103 (6th Cir. 1996); Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995); Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989). Also covered are assignees of debts already in default and check guarantee and collection services. *See* Holmes v. Telecredit Service Corp., 736 F. Supp. 1289 (D. Del. 1990); Kimber v. Federal Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).

However, the FDCPA does not apply to the original creditor collecting its own debts in its own name, government agencies, or assignees of debts not in default when assigned. 15 U.S.C. §§ 1692a(4) & 1692a(6)(A)-(C), (F). It is unclear whether the FDCPA applies to private agencies collecting student loans for the Department of Education. *Compare* Games v. Cavazos, 737 F. Supp. 1368 (D. Del. 1990) *with* Richardson v. Baker, 663 F. Supp. 651 (S.D.N.Y. 1987).

In a case involving the collection of defaulted student loans, the court held that a non-profit student loan guaranty agency was excepted from the application of the FDCPA through § 1692(a)(6)(F)(I), under the "bona fide fiduciary" exception. In that case, although the collector obtained assignment of the loans after they were in default, the collector was still obligated as a "bona fide fiduciary" to the Department of Education. The court came to this conclusion because a federal statute makes the reserve funds of guaranty agencies property of the United States, regardless of who holds or controls the assets or funds. Pelfrey v. Educational Credit Management Corp., 71 F. Supp. 2d 1161 (N.D. Ala. 1999); 20 U. S. C. § 1078(c). In another case, the court held that a bondsman was entitled to the originator exception, even though he was not the original lender,

because he played a significant role in originating the transaction, and therefore he was not covered by the FDCPA. Buckman v. American Banker's Ins. Co. of Florida,115 F.3d 892 (11th Cir. 1997).

B. Debts Covered.

The FDCPA only covers debts "primarily for personal, family, or household purposes"; that is, consumer debts. 15 U.S.C. § 1692a(5). The FDCPA has been held to apply to student loans, but not to taxes or tort debts. Hawthorne v. Mac Adjustment, 140 F.3d 1367 (11th Cir. 1998); Mabe v. G. C. Services Ltd. Partnership, 32 F.3d 86 (4th Cir. 1994); Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987); Staub v. Harris, 626 F.2d 275 (3d Cir. 1980); Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824 (N.D. Ga. 1980).

C. Prohibited Acts.

1. General Standard.

In determining whether actions are deceptive, misleading, or harassing in violation of the FDCPA, the appropriate standard is whether the "least sophisticated consumer" or a "consumer whose circumstances make him relatively more susceptible to harassment, oppression, or abuse" would be deceived, misled, or harassed. Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Smith v. Transworld Systems, Inc., 953 F.2d 1025 (6th Cir. 1992); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1172-1179 (11th Cir. 1985). But cf. Bammon v. G. C. Services Ltd. Partnership, 27 F.3d 1254 (7th Cir. 1994) (adopting higher "unsophisticated consumer" standard).

2. Harassment or Abuse.

The FDCPA lists examples of harassing or abusive conduct as threats of violence or criminal acts, use of obscene or abusive language, publication of debtor's lists (other than to consumer reporting agency), or repeated telephone calls to harass debtor. 15 U.S.C. § 1692d. *See generally* Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th. Cir. 1985); Wright v, Credit Bureau of Georgia Inc., 548 F. Supp. 591(C.A. 11 GA. 1985).

3. False or Misleading Representations

Specific examples of false, deceptive or misleading representations are listed in the FDCPA. These include falsely representing the amount or legal status of any debt, the implication that nonpayment will result in the seizure, garnishment, or attachment, or sale

of property or wages unless the action is lawful and intended to be taken; the threat to take any illegal or unintended action; and failing to disclose clearly in all communications that the communication is from a debt collector. 15 U.S.C. § 1692(e).

FDCPA violations have been found where a lawyer sent form collection letters without reviewing them or the underlying accounts, and where the letters' language indicated that the lawyer had personally considered the accounts. Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993). Violations of this section have also been found where a debt collector sued on a claim knowing it was time-barred, and where a consumer was told his transcript would be withheld even though the debt had been discharged in bankruptcy. Kimber v. Federal Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987); Juras v. Aman Coll. Serv., Inc., 829 F.2d 739 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 192 (1988). A letter stating that a judgment would result in wages being garnished and cars, trucks, houses, land, furniture, and appliances being seized and sold by the sheriff stated a claim under the FDCPA, where the letter did not distinguish between exempt and non-exempt property under Alabama law. *See* Bice v. Merchants Adjustment Service, Inc., 85-0283-H-S (S.D. Ala. 11/20/85) (unpublished). A collection notice, which falsely implied that some type of legal action, had been or would be taken violated the FDCPA. Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989). An implied threat that legal action was imminent when it was not violated the act, as did the mention of possible post-judgment remedies when suit was highly unlikely. Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993); United States v. National Fin. Serv., Inc., 820 F. Supp. 228 (D. Md. 1993). A threat to sue in an improper venue and the inclusion of court documents not yet filed both violated the FDCPA. Wiener v. Bloomfield, 901 F. Supp. 771 (S.D.N.Y. 1995).

A threat to investigate employment and assets suggested that creditor would illegally contact consumer's employer and therefore violated the FDCPA. Swanson v. South Oregon Credit Service, 869 F.2d 1222 (9th Cir. 1988). A letter, which could be interpreted as a threat to sue in seven (7) days, was deceptive where under state lawsuit could not be filed for thirty (30) days. Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989). A letter containing a suit caption in the heading accompanied by a proposed consent judgment violated the FDCPA where no lawsuit had been filed. Johnson v. Eaton, 873 F. Supp. 1019 (M.D. La. 1995). A post-judgment letter falsely implying the existence of a lien violated the FDCPA. Dutton v. Wolpoff and Abramson, 5 F.3d 649 (3d Cir. 1993).

A debt collector's statement about bringing California counsel into the picture would violate the FDCPA if the debt collector did not intend to employ counsel in California. Juras v. Aman Coll. Serv., Inc., 829 F.2d 739 (9th Cir. 1987), *cert. denied* 109 S. Ct. 192 (1988). A letter threatening to garnish ten (10) percent of wages violates the FDCPA where the debt collector does not know whether the consumer makes enough

to be garnished. Seabrook v. Onondaga Bureau of Medical Economics, Inc., 705 F. Supp. 81 (N.D.N.Y. 1989). An implication that the debt collector was affiliated with the government was actionable under the act. Gammon v. G. C. Serv. Ltd. Partnership, 27 F.3d 1254 (7th Cir. 1994). Similarly, a threat to sue by an out-of-state lawyer not licensed in the consumer's state violates the FDCPA. Rosa v. Gaynor, 784 F. Supp. 1 (D. Conn. 1989).

D. Unfair Practices.

Unfair practices listed in the FDCPA include the collection of any amount (including any interest, fee, charge, or expense) unless such amount is expressly authorized or permitted by law, the acceptance of postdated checks except under specific circumstances, causing a person to accept collect calls by concealment of the purpose of the call, threatening to repossess property with no present right or intention to repossess, and using a post card or any indication on an envelope that would reveal that the sender is a debt collector. 15 U.S.C. § 1692f(1)-(8). Jang v. A.M. Miller & Assoc., 122 F3d 480 (CA7 IL, 1997). Thus, an Alabama federal district court held that filing a time-barred lawsuit violated this section. Kimber v. Federal Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).

E. Contacts with Third Parties

A debt collector can contact third parties to find out the location of the consumer. In doing so, the debt collector must identify himself and state that he is trying to find the consumer, but he cannot say that the consumer owes a debt. The debt collector can identify his employer only if asked. 15 U.S.C. § 1692(b)(1). Otherwise, except to effectuate a post-judgment remedy, without permission of the consumer or a court the debt collector cannot contact anyone other than the consumer, the consumer's attorney, the creditor, the creditor's attorney, the debt collector's attorney, or a consumer-reporting agency. 15 U.S.C. § 1692(c)(b). If the debt collector knows or should know that the consumer has an attorney, the debt collector cannot communicate with anyone other than the attorney, unless the attorney fails to respond within a reasonable time. 15 U.S.C. § 1692(b)(6). When communicating with third parties for location information, the debt collector must identify himself and, only if expressly asked, identify his employer; not state that the consumer owes a debt, not communicate with a person more than once. 15 U.S.C. §1692(b), and §1692(c).

F. Initial Contact with Debtor.

As part of or within five (5) days after the debt collector's initial contact with the consumer, the debt collector must send a written notice (validation notice) containing the amount of the debt, the name of the creditor, a statement that unless the consumer

disputes the debt within thirty (30) days it will be assumed to be valid, a statement that if notified in writing within thirty (30) days that the debt is disputed, the debt collector will obtain verification of the debt, and a statement that if requested within thirty (30) days the debt collector will provide the original creditor's name (if different from the current creditor). The initial communication notice must also state that "This is an attempt to collect a debt and any information obtained will be used for that purpose." 15 U.S.C. § 1692(g)(a). If the consumer contacts the debt collector in writing within the thirty (30) day period, the debt collector must cease collection efforts until the debt collector provides the requested information. 15 U.S.C. § 1692(g)(b). A consumer's failure to dispute the debt cannot be considered an admission of liability. 15 U.S.C. § 1692(g)(c). A collection letter whose form and text merely requests repayment, without threatening or encouraging the least sophisticated debtor to ignore his thirty (30) day statutory validation period complies with the FDCPA. Smith v. Computer Credit Inc., 167 F.3d 1052 (6th Cir. 1999).

The validation notice must be conveyed effectively, and must not be overshadowed or contradicted by other information in the notice. Courts have held that a letter containing both a validation notice and demand for immediate payment or a threat to sue in ten (10) days violates the FDCPA. See, e.g., Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Miller v. Payco-General American Credit, Inc., 943 F.2d 482 (4th Cir. 1991); Swanson v. South Oregon Credit Service, 869 F.2d 1222 (9th Cir. 1988). The validation notice must inform the consumer that a portion of the debt can be disputed, Baker v. G. C. Serv. Corp., 677 F.2d 775 (9th Cir. 1982), and must be provided even if the first contact by the debt collector is a post-judgment letter. Frey v. Gangwish, 970 F. 2d 1516 (6th Cir. 1992). There is a "safe harbor" letter, although heavily criticized for overshadowing purposes, that is supposed to provide a "safe harbor" against suits alleging confusion. Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997).

G. Restrictions Regarding Contacts with Debtor

A debt collector must disclose clearly in all communications made to collect a debt that the communication is from a debt collector. 15 U.S.C. § 1692(e)(11). *See* Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995); Dutton v. Wolpoff and Abramson, 5 F.3d 649 (3d Cir. 1993); Frey v. Gangwish, 970 F. 2d 1516 (9th Cir. 1992); Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992); Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989); Emanuel v. American Credit Exchange, 870 F.2d 805 (2d Cir. 1989); Hulshizer v. Global Credit Serv., Inc., 728 F.2d 1037 (8th Cir. 1984). But see Pressley v. Capital Credit & Coll. Serv., Inc., 760 F.2d 922 (9th Cir. 1985).

A debt collector cannot communicate with a consumer "at any unusual time or place or a time or place known or which should be known to be inconvenient to the

consumer," and presumptively prohibits calls before 8 a.m. or after 9 p.m. in the debtor's time zone, but not the creditor's. 15 U.S.C. § 1692(c)(a)(1). A debt collector cannot contact the consumer at work "if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication." 15 U.S.C. § 1692(c)(a)(3).

If the consumer informs the debt collector in writing that the consumer refuses to pay the debt or that the consumer wants the debt collector to stop contacting the consumer, the debt collector must cease all contacts, except to advise the consumer that contacts are being terminated, or to notify the consumer that "the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor" or that "the debt collector or creditor intends to invoke a specified remedy." 15 U.S.C. § 1692(c)(c). If a consumer owes multiple debts, the debt collector must apply payments in accordance with the consumer's instructions. 15 U.S.C. § 1692(h).

The FDCPA prohibits "flat-rating"; that is, selling sets of dunning letters with the debt collector's letterhead to misrepresent whom is actually sending the letters. 15 U.S.C. § 1692(j). Thus, attorneys have been held liable for allowing a debt collector to send form letters drafted by the attorney on his letterhead where he was not retained to collect the specific debt and did not review the specific letter. See Rosa v. Gaynor, 784 F. Supp. 1 (D. Conn. 1989); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal. 1991); Littles v. Lieberman, 90 B.R. 700 (E.D. Pa. 1988). *But see* Anthes v. Transworld Systems, Inc. 765 F. Supp. 162 (D. Del. 1991).

H. Venue Requirements of Debt Collection Actions.

The FDCPA provides that actions to collect a debt can only be brought in the judicial district or circuit where the consumer signed the contract, or where the consumer resides at the commencement of the action, 15 U.S.C. § 1692(i)(a)(2); *see* Newsom v. Friedman, 76 F.3d 813 (7th Cir. 1996); Fox v. Citicorp Credit. Serv., Inc., 15 F.3d 1507 (9th Cir. 1994); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992), possibly even if the contract itself provides for a different venue. Wadlington v. Credit Acceptance Corp., 76 F.3d 103 (6th Cir. 1996). Mortgage foreclosures must be brought in the judicial district or circuit where the property is located. 15 U.S.C. § 1692(i)(a)(1). An application for a post-judgment writ of garnishment is subject to the FDCPA's venue requirements. Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994); Blakemore v. Pekay, 895 F. Supp. 972 (N.D. Ill. 1995).

I. Civil Liability

The FDCPA is a strict liability statute, and one violation is sufficient to establish liability. Bentley v. Great Lakes Coll. Bureau, 6 F.3d 60 (2d Cir. 1993). A debt collector who violates the FDCPA is liable for actual damages, additional statutory damages up to $1,000 per action, attorney fees, and costs. 15 U.S.C. § 1692(k)(a); Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995); Wright v. Finance Serv. Of Norwalk, Inc., 22 F.3d 647 (6th Cir. 1994) (*en banc*); Hollis v. Roberts, 984 F.2d 1159 (11th Cir. 1993); Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991) (FDCPA requires that attorney fees be awarded at fully compensable rates). But cf. Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995) (attorney fees may be reduced where success is limited in suit for technical violation of FDCPA). Actual damages include any psychological or physical harm resulting from the debt collector's illegal actions. Cf. Phillips v. Smalley Maintenance Service, Inc., 435 So. 2d 705 (Ala. 1983) (a sexual harassment case discussing recoverable damages, holding that psychological harm without physical harm was sufficient to support an award of damages); Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182 (D. Del. 1991). In determining the amount of statutory damages, the court is to consider the frequency and persistence of non-compliance by the debt collector, the nature of such non-compliance, and the extent to which non-compliance was intentional. 15 U.S.C. § 1692(k)(b)(1). Statutory damages and attorney fees are available without proof of damages. Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Pipiles v. Credit Bureau of Lockport, 886 F.2d 22 (2d Cir. 1989); Emanuel v. American Credit Exchange, 870 F.2d 805 (2d Cir. 1989); Baker v. G. C. Serv. Corp., 677 F.2d 775 (9th Cir. 1982). Whether the consumer is actually liable for the underlying debt is irrelevant. McCartney v. First City Bank, 970 F.2d 45 (5th Cir. 1992). Class actions are authorized, with statutory damages to unnamed class members limited to the lesser of $500,000 or 1% of the debt collector's net worth, together with actual damages, costs, and attorneys' fees. 15 U.S.C. § 1692(k)(a) & (b).

A debt collector is not liable if the debt collector shows that the violation was unintentional and resulted from a bona fide error despite maintaining reasonable procedures to avoid the error. 15 U.S.C. § 1692(k)(c); *see* Fox v. Citicorp Credit. Serv., Inc., 15 F.3d 1507 (9th Cir. 1994); Smith v. Transworld Systems, Inc., 953 F.2d 1025 (6th Cir. 1992). A mistake as to whether conduct violates the FDCPA is not a bona fide error. Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989).

A consumer can bring an FDCPA suit in federal or state court, and has a right to a jury trial. 15 U.S.C. § 1692(k)(d). Sibley v. Fulton Dekalb Coll. Serv., 677 F.2d 830 (11th Cir. 1982); *cf.* McGilvray v. Hallmark Fin. Group, Inc., 891 F. Supp. 265 (E.D. Va. 1995) (lawsuit containing FDCPA claim was properly removed to federal court). An FDCPA action must be brought within one year of the debt collector's violation. 15 U.S.C. § 1692(k)(d); *see* Maloy v. Phillips, 64 F.3d 607 (11th Cir. 1995) (for statute of limitations purposes, FDCPA violation occurred on date debt collection letter was mailed rather than when it was received, but validation information claim arose five days

thereafter); James v. Ford Motor Credit Co., 47 F.3d 961 (8th Cir. 1995); Blakemore v. Pekay, 895 F. Supp. 972 (N.D. Ill. 1995) (filing garnishment in wrong venue within past year is actionable, even though venue was never challenged in collection lawsuit in same venue years earlier).

The FDCPA is silent on the issue of venue in cases where a debtor sues a debt collector.

28 U.S.C. Section 1391(b) states, in relevant part:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district where any defendant resides, if all omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated. . .

However, venue of an FDCPA suit may be proper where a consumer receives letters or phone calls that violate the FDCPA. Bates v. C & S Adjusters, Inc., 980 F.2d 865 (2d Cir. 1992); Paradise v. Robinson and Hoover, 883 F. Supp. 521 (D. Nev. 1995); Gachette v. Tri-City Adjustment Bureau, 519 F. Supp. 311 (N.D. Ga. 1981). The Court may elect to transfer any civil action to any other district where it might have been brought for the convenience of the parties and witnesses, and in the interest of justice. 28 U.S.C. Section 1404.

A federal court has pendent jurisdiction to consider a consumer's state claims for debt collection harassment asserted along with a FDCPA claim, but does not have jurisdiction to consider a creditor's state law counterclaim based on the underlying debt. Juras v. Aman Coll. Service, Inc., 829 F.2d 739 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 192 (1988). An FDCPA claim apparently is not a compulsory counterclaim, and therefore does not have to be raised in a debt collector's collection lawsuit. Peterson v. United Accounts, Inc., 638 F.2d 1134 (8th Cir. 1981); Azar v. Hayter, 874 F. Supp. 1314 (N.D. Fla. 1995).

I. Coverage

§ 1692(a)(5) - Does this involve a consumer (not commercial) debt?
§ 1692(a)(6) - Does this involve a debt collection agency, a lawyer, or a repossession company as a forms writer?
§ 1692(a)(6)(A)-(F) - Does this involve a person not generally covered: a creditor using its own name, corporate affiliate, government officers, process server, nonprofit counselor, or servicing company?

II. Notice Violations

§1692(e)(11) - Does any communication, either written or oral, fail to contain the consumer warning, "This is a communication from a debt collector"?
§1692(q) - Did the debt collector fail to send the consumer a validation notice within five days of the initial communication?
§1692(q) - Did the validation notice fail to contain all of the required information?
§1692(q) - Does the demand for payment overshadow the disclosure of the consumer rights in the validation notice?
§1692(q) - Does the validation notice and/or debt collection warning appear on the reverse side of the demand letter or in another document without reference thereto?
§1692(q) - Has the client failed to request validation? *If so request validation by certified mail.* § 1692q - If the consumer made a timely validation request, did the debt collector continue collection activities?

III. False or Misleading Representations

§1692(e)(1) - Does the communication give the false impression that the debt collector is affiliated with the United States or any state, including the use of badge, uniform or facsimile?
§1692(e)(2) - Does the communication contain a false impression of the character, amount, or legal status of the alleged debt?
§1692(e)(3) - Does the communication give the false impression that any individual is an attorney or that any communication is from an attorney?
§1692(e)(4) - Does the communication give the impression that non-payment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action?
§1692(e)(5) - Does the communication threaten to take any action that cannot legally be taken or that is not intended to be taken (e.g. suit, harm to credit reputation)? §1692(e)(6) - Does the communication give the false impression that a sale or other transfer of any interest in the debt will cause the consumer to lose any claim or defense to payment of the debt?
§1692(e)(7) - Does the communication give the false impression that the consumer committed any crime or other conduct in order to disgrace the consumer?
§1692(e)(8) - Does the communication communicate or threaten to communicate to any person credit information which is known or should be known to be false, including the failure to communicate that a disputed debt is disputed?
§1692(e)(9) - Does the communication simulate or falsely represent the document to be authorized, issued, or approved by any court, official, or agency of the United States or state?

§1692(e)(12) - Does the communication give the false impression that the debt has been turned over to innocent purchasers for value?
§1692(e)(13) - Does the communication give the false impression that documents are legal process?
§1692(e)(14) - Does the communication contain any name other than the true name of the debt collector's business?
§1692(e)(15) - Does the communication give the false impressions that documents are not legal process forms or do not require action by the consumer?
§1692(e)(16) - Does the communication give the false impression that a debt collector operates or is employed by a consumer-reporting agency?
§1692(e) preface and (10) - Has the debt collector used any other false, deceptive or misleading representation or means in connection with the debt collection?

IV. Unfair Practices

§1692(f)(1) - Does the debt collector attempt to collect any amount (including interest, attorney's fees, collection costs or expenses) not authorized by the agreement creating the debt or by law?
§1692(f)(2)-(4) - Has the debt collector accepted, solicited, deposited or threatened to deposit any post-dated check in violation of the Act?
§1692(f)(5) - Has the debt collector caused any charges to be made to the consumer, e.g. collect telephone calls?
§1692(f)(6) - Has the debt collector taken or threatened to unlawfully repossess or disable the consumer's property?
§1692(f)(7) - Has the debt collector communicated to the consumer by postcard?
§1692(f)(8) - Is there any language or symbol other than the debt collector's address on the envelope that indicates the communication concerns debt collection?
§1692(f) preface - Does the debt collector use any other unfair or unconscionable means to collect or attempt to collect the alleged debt?

V. Harassment or Abuse

§1692(d)(1) - Has the debt collector used or threatened the use of violence or other criminal means to harm the consumer or his/her property?
§1692(d)(2) - Has the debt collector used profane language or other abusive language?
§1692(d)(3) - Has the debt collector published a list of consumers who allegedly refuse to pay debts?
§1692(d)(4) - Has the debt collector advertised for sale any debts?
§1692(d)(5) - Has the debt collector caused the phone to ring or engaged any person in telephone conversation repeatedly?

§1692(d)(6) - Has the debt collector placed telephone calls without disclosing his/her identity?
§1692(d) preface - Has the debt collector engaged in any other conduct the natural consequences of which is to harass, oppress, or abuse any person in connection with the collection of the alleged debt?

VI. Communications with the Consumer and Third Parties

§1692(c)(a)(1) - Has the debt collector communicated with the consumer at any unusual time or place or any time or place known or which should have been known to be inconvenient to the consumer?
§1692(c)(a)(2) - Has the debt collector communicated with the consumer after it knows the consumer to be represented by an attorney?
§1692(c)(a)(3) - Has the debt collector contacted the consumer's place of employment when the debt collector knows or has reason to know that the debt collector's employer prohibits such communications?
§1962(c)(c) - Has the debt collector contacted the consumer after the consumer 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?
§1692(b)(1) - In contacting persons other than the consumer, has the debt collector failed to identify himself/herself, or failed to state that he/she is confirming or correcting location information concerning the consumer?
§1692(b)(2) - In communicating with persons other than the consumer, has the debt collector stated that the consumer owes any debt?
§1692(b)(3) - In communicating with persons other than the consumer, has the debt collector contacted that person more than once (unless requested to do so)?
§1692(b)(4) - In communicating with any person other than the consumer, has the debt collector utilized postcards?
§1692(b)(5) - In communicating with any person other than the consumer, has the debt collector used any language or symbol on any envelope or in the contents of any communication indicating that the sender is in the debt collection business?
§1692(b)(6) - In communicating with any person other than the consumer, has the debt collector done so after knowing the consumer is represented by an attorney?

VII. Other Violations

§1692(I)(a)(2) - Has the debt collector brought any legal action to collect the debt against the consumer in a location other than (1) where the contract was signed or (2) where the consumer resides?
§1692(I) - Have forms been designed, compiled, and/or furnished knowing that such form would be used to create the false belief in the consumer that a person other than the

creditor of such consumer is participating in the collection of or in the attempt to collect a debt?

Annotated Bibliography

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Consumer Law Manual, Alabama Consortium of Legal Services Programs, 2nd Ed. (1990) - Comprehensive Resource Regarding How to Proceed With, and in Particular, How to Defend Debt Collection Actions. Also include sample pleadings, sample forms and strategies for proceeding.

Principles of Business Collections, publication of National Association of Credit Management, 1992 -Chapter Two "Legal Guidelines: Maintaining Legality in Everyday Practices" written by Jeffery H. Wertheim. This is an excellent overview of the collection process and provides a good "how to" approach to handling collection matters in general.

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Collection Law in Alabama, publication of Lorman Education Services-1999, Chapter One “Amicable Demand and Judgments a.k.a. The Debt Collection Process” written by Jeffrey H. Wertheim. Chapter 3, “The Fair Debt Collection Practices Act”, written by W. McCollum Halcomb.