Debt collection activities are highly regulated by federal law which covers not merely traditional debt collection agencies but also creditors and individuals and entities – including lawyers and law firms – acting on the behalf of creditors to collect the debt. The Fair Debt Collection Practices Act imposes substantial restrictions on what persons and entities trying to collect debts can say and do to debtors. Both the form and the substance of their communications are restricted. Failure to comply with the FDCPA can result in substantial financial liability for both the collector and the creditor. This program will provide you with a practical guide to the law of debt collection, how it applies to lawyers, law firms and the businesses they represent, and best practices for avoiding liability.

**Day 1 – August 20, 2013:**

- Overview of sources of law in this area, including the Fair Debt Collection Practices Act and the Consumer Credit Protection Act
- Who is covered by the act? Are law firms acting on behalf of clients covered?
- Scope of restrictions on debt collectors with emphasis on lawyer activity
- Required disclosures to debtors
- Permissible communications with debtors and third parties – and what crosses the line

**Day 2 – August 21, 2013:**

- Financial liability for those seeking to collect debt, including vicarious liability of creditors for actions of collectors
- Unfair, deceptive and unconscionable practices
- Special issues for lawyers and law firms acting as debt collectors for clients
- Relationship of federal law to state law
- Best practices to avoid liability for businesses, lawyers, and law firms

**Speaker:**

Manuel H. Newburger is a partner in the Austin office of Barron & Newburger, P.C., where his law practice focuses on commercial and consumer protection litigation, including fair debt collection practices, consumer credit, and debtor/creditor disputes. He is co-author of several books on debt collection practices, including *Fair Debt Collection Practices: Federal and State Law and Regulation* (Sheshunoff & Pratt 2002) and *The Guide to Fair Debt Collection Practices Laws in the United States* (Faulkner & Gray 2000). Mr. Newburger also serves as an Adjunct Professor of Law at the University of Texas School of Law. He received his B.A. from Trinity University and his J.D. from the University of Texas School of Law.
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Date: August 21, 2013

Seminar Title: Understanding the Law of Debt Collection for Businesses, Part 2

Location: Teleseminar

Credits: 1.0 General MCLE

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Understanding the Law of Debt Collection for Businesses

Part I and Part II

August 20, 2013 and August 21, 2013

By: Ernest H. Kohlmyer, III, Esquire

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The Fair Debt Collection Practices Act (FDCPA)

Congressional Purpose

The Fair Debt Collection Practices Act (FDCPA) was enacted by Congress in 1977 to satisfy Congressional findings that there is “abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors which contributes to the number of personal bankruptcies, marital instability, loss of jobs and invasion of individual privacy.”1 The FDCPA seeks to “eliminate abusive debt collection practices by debt collectors” and “to promote consistent state action to protect consumers against debt collection abuses.”2

Definitions

15 U.S.C. Section 1692(a)

Id.
In order to determine whether an individual or entity is governed by the provisions of the FDCPA, you must first review some important definitions. Under the FDCPA, a communication is defined as “the conveying of information regarding a debt directly or indirectly to any person through any medium.” The communication involves the collection of a “debt” and must be between a “consumer” and a “debt collector” in order for the FDCPA to apply. The term “debt” is defined as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to a judgment.” The term “consumer” is defined as “any natural person obligated or allegedly obligated to pay any debt.” Most important, the individual or entity seeking the collection of the debt, must be considered a “debt collector.” 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, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owned or due another.”

**Exclusions**

The FDCPA provides that the term “debt collector” shall not include; (a) any officer or employee of a creditor while, in the name of the creditor, collecting debts for

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3 15 U.S.C. Section 1692(a)(1)

4 15 U.S.C. Section 1692(a)(4) (i.e. types of consumer debts; back rent; student loans; mortgages; judgments, medical, retail, and dishonored checks.) (i.e. types of non-consumer debts; unemployment compensation; child support, alimony, subrogation, taxes, tickets and fines, contempt sanction; business and commercial debts)

5 15 U.S.C. Section 1692(a)(3)

6 15 U.S.C. Section 1692(a)(6)
such creditor. (b) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts. (c) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; (d) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; (e) any non-profit organization which, at the request of consumers, performs bona fide consumer credit counseling. . . and (f) any person collecting or attempting to collect any debt owed or due or asserted owed or due another to the extent such activity is (i) incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which is originated by such person; (iii) concerns a debt not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving a creditor.\footnote{15 U.S.C. Section 1692(a)(6)(A-F)}

I. Pre-Collect; Early Out Collections

Many entities have attempted to circumvent the provisions of the FDCPA by engaging in collection activity for creditors on “pre-collect” or “early-out” accounts. In order to do so, the debt collector should elect to act in accordance with one of the

Unfortunately, the FDCPA does not define whether an account is “in default” but the Federal Trade Commission generally holds that when a debt is considered to be in default is controlled by the terms and conditions of the contract creating the debt and applicable state and federal law. See: Hartman v. Meridian Fin. Servs., Inc., 191 F.Supp.2d 47, 53 (D.Mass, 1999)

\footnote{15 U.S.C. Section 1692(a)(6)(A-F)}
II. Debt Collection Communications

A. Communications with Debtors/Consumers

Section 15 U.S.C. Section 1692c(a)(1) prohibits “a debt collector from communicating with a consumer in connection with a debt in any unusual time, place or at time and place known or should be known to be inconvenient for the consumer, unless the collector obtains the prior consent of the consumer or the express permission of the court.” Generally, a debt collector can communicate with the consumer between 8 a.m. and 9 p.m. in the consumer’s time zone. However, it is prohibited to communicate with the consumer outside of this time period, unless the consumer consents to the communication. A debt collector must honor the oral requests of the consumer to be contacted at certain times and locations since such request do not have to be in writing. Communications with the debt collector at his/her is prohibited under the FDCPA if the debt collector knows or has reason to know that the consumer’s employer prohibits such communication.

B. Communications with Third Parties

Section 15 U.S.C. Section 1692c(b) prohibits a debt collector from communicating with any third party regarding the collection of the debt. However, the FDCPA provides some exceptions. A debt collector may communicate with the debtor’s attorney, a consumer reporting agency, the creditor, the attorney for the creditor or the attorney for the debt collector. Section 805(d) also grants permission for the debt collector to speak with the debtor’s spouse regarding the debt. Further, a debt collector does not need to seek permission from the minor before speaking with a minor’s parents regarding their minor’s child’s debt, so long as the debtor is still a minor. See: FTC Informal Staff Letter (February 22, 1990)

8 Please consult any applicable state law regarding communications with consumer’s spouse.
III. **FDCPA Disclosures**

A. **30 day Validation Disclosure**

15 U.S.C. Section 1692(g)(a) states that a debt collector must provide a consumer with written notice of specific rights afforded the consumer under the FDCPA. These rights are generally referred to as the “30 day validation” requirement. An example of a generally accepted “30 day validation statement states the following:

UNLESS YOU NOTIFY THIS OFFICE WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL ASSUME THIS DEBT IS VALID. IF YOU NOTIFY THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT, OR ANY PORTION THEREOF, THIS OFFICE WILL OBTAIN VERIFICATION OF THE DEBT OR OBTAIN A COPY OF A JUDGMENT AND MAIL YOU A COPY OF SUCH JUDGMENT OR VERIFICATION. IF YOU REQUEST THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE, THIS OFFICE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR.

THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED SHALL BE USED FOR THAT PURPOSE.

This 30 day validation statement creates some legal obligations upon the debt collector towards the consumer. First, if the consumer timely disputes the validity of the debt, the debt collector can not assume the debt to be valid and must request verification of the debt and provide the consumer with such verification before further collection activity can proceed. Since, the word “verification” is not defined under the FDCPA, the sufficiency of debt collector’s verification of the debt is determined on a case by case basis. Generally, verification is provided in the form of a signed written agreement between consumer and creditor, billings statements, invoices, etc. As stated above, a timely written request for verification does require the debt collector to cease collection activity until such verification is provided to the consumer. Further, the FDCPA requires
the debt collector to notify any credit bureau reporting agency that the debt is disputed or be subject to damages.

B. Mini-Miranda Disclosure and “Debt Collector” Disclosure

The FDCPA further requires that the initial communication contained the following phrase; “This is an attempt to collect a debt and any information obtained shall be used for that purpose.” In 2001, an amendment to the FDCPA eliminated the requirement to have this language in every communication. Under the current FDCPA, the debt collector must identify that the communication is from a debt collector in all subsequent communications.

1. Written Correspondence

In order to satisfy this requirement, debt collectors are instructed and advised to include the following phrase in all subsequent written communications sent to consumers: This communication is from a debt collector. Although it may be permissible to rely on other information contained in the written communication such as “Debt Collection Since 1988, A Debt Collection Agency, or words contained in the name of the collection agency identifying the debt collection purpose, the use of above-mentioned phrase is the most conservative and reliable disclosure to avoid challenges under the FDCPA.

2. Voice Mail and Electronic Messages

Recently, several opinions have created a shock wave in the collection industry regarding this use of this disclosure in voice mail and electronic dialer messages. In Foti v. NCO Fin. Sys, Inc., 424 F.Supp.2d 643 (S.D.N.Y. 2006), the court held that the agency’s failure to include language informing the consumer that the communication was from a debt collector violated the Section 807(11) of the FDCPA. Following Foti, the other jurisdictions including the Middle District of Florida have found FDCPA violations
in reliance on the Foti decision. See: Belin v. Litton Loan Servicing, L.P., 2006 WL 1992410 (M.D. Fla.)

IV. Request to Cease Communications

The FDCPA provides consumers with the ability to inform a debt collector to cease all communications relating to the collection of the debt. 15 U.S.C. Section 1692c(c) states that a consumer may send written notice to cease communications in connection with the collection of the debt or may send written notice that the consumer refuses to pay a debt. Upon written notification, the debt collector must cease communication with the consumer, except, (1) to advise the consumer that the debt collector’s further efforts are being terminated; (2) notify the consumer that the debt collector or creditor may invoke specific remedies which are ordinarily invoked by such debt collector or creditor; (3) where applicable, notify the consumer that the debt collector or creditor intends to invoke a specific remedy. This section requires that the notice be sent directly to the debt collector rather than the creditor and specifically requires that the request be in writing.

V. Consumers Represented by Attorney

The FDCPA further provides that a debt collector must cease communications with consumer once it is notified that the consumer is represented by an attorney. The statute further provides that a debt collector is allowed to contact the consumer directly if the attorney “fails to respond within a reasonable period of time to a communication from the debt collector.” Unfortunately, FDCPA case law has failed to articulate any period of time that has been deemed “reasonable.”
VI. Standard of Review

A. Least Sophisticated Consumer

Most jurisdictions have adopted the “least sophisticated consumer” standard in reviewing alleged violations of the FDCPA. The “least sophisticated consumer” has been judicially defined as “one not having the astuteness of a ‘Philadelphia lawyer’ or even the sophistication of the average, every day common consumer.” However, this definition is tempered by the fact that this hypothetical person does “possess a rudimentary amount information about the world and a willingness to read a collection notice with some care.” This test is to ensure protection of all consumers, even naive and trusting, against deceptive debt collection practices but protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices.

B. Unsophisticated Consumer

The Seventh Circuit has rejected the “least sophisticated consumer standard” and has created the “unsophisticated consumer standard.” This test is similar to the “least sophisticated consumer” however, allows for the admission of objective reasonableness.

VII. Unfair Practices

A. Adding Fees and Unauthorized Charges

The collection of fees, charges, or other expenses in excess of the original debt amount is only permissible when these charges are expressly authorized by a written agreement between the creditor and consumer or when authorized by state law. See: 15 U.S.C. Section 1692f(1). In the absence of an expressed contract to pay such charges or state statutory authority, the collection of such charges is deemed an unfair practice under the FDCPA. Id. This prohibition also applies to court costs and attorney’s fees without a valid judgment awarding such fees and costs. See: Shula v. Lawent, 359 F.3d 690 (7th Cir. 2004); Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2003)
B. **Charges Incurred by the Consumer**

The FDCPA further prohibits any debt collection action which causes the consumer to incur additional charges. These charges may include long distance telephone charges, telegrams, or pay by phone charges. See: 15 U.S.C. Section 1692f(5)

C. **Postcards and Envelope Restrictions**

One of the purposes of the FDCPA is the protection of consumer’s privacy. Therefore, the FDCPA prohibits the disclosure of the debt collection purpose in written communications by ensuring that postcards or envelopes do not contain information which discloses the name of the debt collector in a manner which also discloses the debt collection purpose. Debt Collectors should only use the return address and mailing address on all envelopes sent to consumers. Some debt collectors have abbreviated its name and registered the abbreviated name as a fictitious name with state licensing agencies. The use of law firm names which do not disclose the debt collection nature of the practice are generally acceptable under the FDCPA. See: 15 U.S.C. Section 1692f(7)

VIII. **Harassment and Abuse**

Under the FDCPA, the statute strictly prohibits debt collection activity which is deemed harassment or abusive. See: 15 U.S.C. Section 1692d. As seen in previous statutory sections, there is no definition for “harassment” or “abuse” to assist the debt collector. However, the FDCPA does provide specific prohibitions against the use of language that is profane, obscene, or other actions which is intended to harass or oppress the consumer. See: *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985). These actions include the threat of violence, calling repeatedly or continuously. See: *Horkey v. J.V.D.B. & Associates, Inc.*, 333 F.3d 769 (7th Cir. 2003)
IX. False and Misleading Representations

A. False Sense of Urgency

Debt collectors should avoid the use of arbitrary deadlines or words such as imperative, immediate, urgent or similar adjectives in any written or verbal communications with consumers. The FDCPA strictly prohibits debt collectors from misleading consumers by falsely implying that the outstanding balance must be paid by creating a false sense of urgency. See: 15 U.S.C. Section 1692e

B. Claiming to be an Attorney

Collection agencies are often tempted to incorporate “attorney letterhead” or legal talk offs as a part of its collection methods. Several cases have prohibited the use of attorney letterhead by collection agencies when there is evidence that the attorney had no “meaningful involvement” in the actual review and collection of the account. Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996) In addition, to the fact that the attorney letterhead may not be coming from an actual attorney, the courts and the FTC have held that the use of attorney letterhead places the consumer on notice that his account status has changed which may also create a false sense of urgency. Id.

C. Government Affiliation

The FDCPA prohibits debt collectors from misleading consumers that the debt collector is affiliated with a governmental agency or department. Debt Collectors should avoid selecting business names, symbols, or acronyms which would give the impression that the communications are from a governmental agency. For example, debt collectors should avoid names such as Indiana Collection Service which implies affiliation with a state agency. Further, debt collectors should avoid symbols such as an American Eagle, Shields, Scales of Justice, or abbreviations such as IRS, CIA, or FBI See: 15 U.S.C. Section 1692e(1)
X. **Credit Reporting and the FDCPA**

A. *What is a dispute?*

The FDCPA prohibits a debt collector from “communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.” See: 15 U.S.C. Section 1692e(8) Therefore, if a debtor communicates a “dispute”, whether written or oral, the debt collector must communicate that dispute to any authorized third party and any credit reporting agency. See: *Brady v. Credit Recovery Co., Inc.*, 160 F.3d 64 (1st Cir. 1998) The courts have provided little guidance as to what should be considered a dispute and therefore, the debt collector should notify any CRA of any written or oral dispute if the debtor gives any reasonable indication that the debt is questioned or disputed.

XI. **Attorney Collectors**

A. *“Meaningful Involvement” for Attorney Collectors*

As mentioned above, the FDCPA prohibits debt collectors from falsely implying that they are an attorney or that a communication is from any attorney when, in fact, it is not. For example, a debt collector is prohibited from sending debt collection correspondence that states the words Legal Department if no department actually exists. Further, the FDCPA prohibits debt collectors from sending correspondence on attorney letterhead unless the attorney is meaningfully involved in the collection of the account. *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292 (2d Cir. 2003); *Boyd v. Wexler*, 275 F.3d 642 (7th Cir. 2001); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993) The Second Circuit in *Clomon* held that the use of attorney letterhead was deceptive since the attorney did not review each file, make any determinations as to whether the letter should be sent out and did not know the identities of the individuals who were sent the particular letter. Although delegation of particular tasks may be assigned to paralegals, the courts
generally require the attorney to be professionally involved in the collection of the account or be subject to the provisions of the FDCPA.

XII. **Liability under FDCPA**

A. **Statutory Damages**

Under the FDCPA, statutory damages are capped at a maximum of $1,000.00 per case, not per violation. *Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992) In determining the extent of the violation, the court should consider (1) the frequency of the violation, (2) the nature of the non-compliance; and (3) the extent to which the non-compliance was intentional.

B. **Actual Damages**

In addition to statutory damages, a plaintiff may be entitled to actual or compensatory damages. Several courts have interpreted actual damages to include damages for humiliation, embarrassment, mental anguish or emotional distress. Since the plaintiff bears the burden of proof to demonstrate actual damages, the plaintiff must demonstrate a reasonable connection between the debt collector’s behavior and the emotional distress.

C. **Punitive Damages**

Under the FDCPA, a plaintiff is not entitled to punitive damages.

D. **Class Action Damages**

In the event that a plaintiff seeks class certification for a particular alleged violation, the FDCPA may award each named class member up to $1,000.00 in statutory damages, plus up to $500,000.00 or one percent of the debt collector’s net worth which ever is less.
XIII. “Bona Fide Error” Defense

The FDCPA provides debt collectors with a bona fide error defense. The statute provides that a debt collector shall not be held liable for the violation if the debt collector can demonstrate by the preponderance of the evidence that the violation was not intentional and the debt collector maintained procedures reasonably adapted to avoid such errors. See: 15 U.S.C. Section 1692k(c) This defense is effective against alleged violations that are clerical in nature and not effective against alleged violations of harassment or abuse.

Part II:

DEFENDING AGAINST DEBT COLLECTION HARASSMENT CLAIMS

Jurisdiction Guidelines and Issues

Removal of FDCPA claims to Federal Court

The Fair Debt Collection Practices Act (“FDCPA”) is a federal statute which allows the Defendants to remove the action from state court to federal court pursuant to 28 U.S.C. Section 1331. Section 1331 states “The federal district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States. Any action which asserts a claim under the FDCPA may properly be removed to a federal district court pursuant to 28 U.S.C. Section 1441 which states in pertinent part as follows:

Except as otherwise expressly provided by act of Congress, any civil action brought in a state court of which the district courts of the United States has original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . .”
Even if the Complaint alleges additional state law claims, the Complaint can be removed to federal court since the federal court can resolve the state law claims as supplemental jurisdiction. 28 U.S.C. Section 1441(c) provides as follows:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by Section 1331 of this Title, is joined within one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.”

Statute of Limitations

Statute of Limitations under the FDCPA is 1 year from the date of the occurrence. Actions arising out the filing of litigation runs from the date of service of the lawsuit under the case law in the Southern District of Florida. However the Middle District of Florida held the statute of limitation period begins to run when the violation occurred, in this instant matter the filing of the allegedly time-barred lawsuit. See, Cooper v. F.A. Management Solutions, Inc., Slip Copy, 2007 WL 4326800 (M.D. Fla. 2007), citing Naas v. Stolman, 130 F. 3d 392, 893 (9th Cir. 1997) (“[T]he statute of limitations began to run on the filing of the complaint...”). In Calka v. Kucker, Kraus & Bruh, LLP, 1998 WL 437151 (S.D.N.Y. 1998), the Court found that with respect to 15 U.S.C. §1692e and §1692f violations, the cause of action accrues when the state action was filed, and a new violation did not occur when the Defendants filed an amended complaint and motion for summary judgment. The Court based its ruling on the fact the Plaintiff was on notice that the debt was misrepresented and the unconscionable debt collection means at the time State Action was filed, therefore it was at that time the cause
of action accrued. Id. The Middle District of Pennsylvania, recently held that the course of litigation is not, in itself a continuing violation of the FDCPA, Schaffhauser v. Burton Neil & Associates, 2008 WL 857525 (M.D.Pa. 2008), citing Nutter v. Messerli & Kramer, P.A., 500, F.Supp.2d 1219, 1223 (D.Minn. 2007); see Joseph v. J.J. MacIntyre Co., L.L.C., 281 F.Supp.2d 1156, 1160 (N.D.Cal.2003); Sierra v. Foster & Garbus, 48 F.Supp.2d 393, 395 (S.D.N.Y. 1999). The Court further held that “[F]or conduct during litigation to be actionable, a plaintiff must allege, and on summary judgment offer proof, that the conduct is a violation of the FDCPA independent of the act of filing suit.” Id. citing Nutter.

Standing and Personal Jurisdiction

Under the provisions of the FDCPA, third parties have standing to bring actions against debt collectors. These actions usually arise out of incidents of mistaken identity; repeated skip-tracing attempts or family members receiving communications for debts owed by an adult child or ex-spouse. Under the provisions of the FCCPA, the statute conveys standing to individuals who are either the debtor or alleged debtor.

Litigation Privilege Defense against FDCPA and FCCPA claims

In Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So.2d 380 (Fla. 2007) the Florida Supreme Court recently held the litigation immunity privilege applies to all causes of actions, including statutory claims, and is not limited to common law torts. In Myers v. Hodges, 53 Fla. 197, 44 So. 357 (1907), the principle of litigation privilege established an immunity for actions that occurred in a judicial proceeding. The
Court extended this holding in Levin, Middlebrooks, Mabie, Thomas, Mayes, Mitchell, P.A. v. United States Fire Insurance Co., 639 So.2d 606, 608 (Fla. 1994) by stating “absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior. . .so long as the act has some relation to the proceeding.” The Court in Levin concluded that “the holding was without qualification as to the nature of the judicial proceedings, whether based on common law, statutory authority, or otherwise.” Id.; see also, Echevarria. “Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil suit for misconduct.” Id.

More recently, in McCorriston v. L.W.T, Inc., et al, 8:07-CV-160-T-27-EAJ (June 15, 2007), a plaintiff asserted a FDCPA and FCCPA violation based on the defendant’s actions in filing a lawsuit on a ‘time-barred’ debt. Judge Whittemore held the litigation privilege “may be considered in resolving a motion to dismiss when the complaint affirmatively and clearly show the conclusive applicability of the defense to bar the action.” McCorriston, citing Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1277 (11th Cir. 2004) (internal quotations and citations omitted). Further, in relying on the holding in Echevarria, Judge Whittemore stated “the litigation privilege applies to causes of action brought pursuant to statute, including the FCCPA.”
The Southern District of Florida has also stated the litigation privilege applies to the filing of FCCPA claim in state court. Gaisser v. Portfolio Recovery Associates, LLC, et. al., 2008 WL 3824746 at 7 (S.D.Fla. Aug 5, 2008). In ruling, the Court cited to the Echeverria opinion and the Middle District of Florida’s opinion in Trent v. Mortgage Elec. Registration Sys. Inc., Slip Copy, 2007 WL 2120262 (M.D.Fla. Jul. 20, 2007), which found the holding in Echeverria “precludes communications attached to or made part of a foreclosure complaint from forming the basis of a FCCPA or FDUTPA claim.”

**Litigation Costs vs. Possible Damages**

*Cost Benefit Analysis in Evaluating the Defense of a Consumer Protection Lawsuit*

Given the statutory framework of both the FDCPA and FCCPA, it is critically important to conduct a cost benefit analysis before deciding to defend a claim under either statute. The primary reason for this early stage analysis is that the both statutes provide great incentive to plaintiff’s counsel to run up attorney’s fees and costs by asserting a “laundry list” of alleged violations in hopes of finding one actual violation. This incentive arises out of the attorney’s fee provision under 15 U.S.C. Section 1692k.

In reviewing a new claim under either the FDCPA or FCCPA, defense counsel should review the following factors to determine if the case is economically defensible. First, defense counsel should review the nature of the court that the lawsuit is filed. Matters filed in small claims court are generally resolved quickly through either mediation or a “fast track” trial. Second, defense counsel should evaluate whether the lawsuit is bring brought by a pro se plaintiff or a consumer plaintiff’s attorney and
determine the “end result” the plaintiff’s counsel is seeking from the lawsuit. If the lawsuit is filed in state court but can be removed to federal court, it is generally advised to remove the case to federal court rather than remain in state court. In my experience, federal court rules of procedure are more cost effective and structured than the state court system. For example, the federal court system has established the electronic filing system and it generally save considerable overhead costs and expenses. Second, the federal court establishes an attorney recommended scheduling process which establishes key deadlines for the administration of the case. Deadlines can be established based on the nature of the allegations and at the convenience of attorney’s trial schedule. More importantly, the federal system requires very few in person court appearances which saves the client the expense of preparation and travel to routine hearings.

Next, the defense lawyer should separate out the claims that can be resolved by motion for summary judgment, bona fide error defense and/or jury verdict. I usually evaluate the defense of the case based on the strength or weakness of the jury issues since both statutes only require the finding of one violation to award reasonable attorney’s fees and costs.

**Possible Damages under the FDCPA and FCCPA**

The entitlement to statutory damages under the FDCPA and FCCPA were brought into uniformity during the 2001 amendment to the FCCPA. Presently, the maximum statutory damages under the FDCPA is $1,000 per case. The same statutory limitation
was established under the FCCPA and until recently, the “per case” restriction was recognized by the federal courts as well.

Secondly, the FDCPA generally recognizes a plaintiff’s entitlement to actual damages which may include emotional distress. However, the determination as to what standard should be used to determine emotional distress is widely disputed in which some courts generally incorporate emotional distress into the allegations of damages where other courts require a higher threshold similar to the state’s intentional infliction elements in order to bring a claim for emotional distress damages. Under the FCCPA, whether emotional distress is provided as a remedy by this statute is still unclear. I have had two recent decisions striking emotional distress damages from consideration since the statute does not specifically provide for such damages.

Third, both the FDCPA and FCCPA provide for declaratory relief to the plaintiff however, only the FCCPA provides for injunctive relief. In addition, the FCCPA provides for potential entitlement to punitive damages whereas the FDCPA does not have such relief.

**Attorney’s Fee and Costs Entitlement (Plaintiff and Defendant)**

Most, if not all, consumer protection lawsuits for debt collection harassment are brought to financially benefit the consumer’s lawyer rather than seek and meaningful relief for the consumer. Routinely, standard debt collection defense cases can’t be resolved in mediation or by voluntary agreement between counsel because of the amount of attorney’s fees sought by plaintiff’s counsel. Both statutes provide for the award of
reasonable attorney’s fees and costs to the plaintiff’s counsel while entitlement to attorney’s fees to the Defendant is only available if the action was brought in bad faith and with an intent to harass the Defendant. Many times, Defendants are denied attorney’s fee awards because the “intent to harass” could not be demonstrated from the evidence from the case since the Plaintiff’s counsel state of mind cannot be derived from the normal discovery process. Often times plaintiff’s counsel will assert that the statutes were adopted to encourage plaintiffs to prosecute “novel” claims without fear of sanctions or attorney’s fees which may “chill” future litigation.

**Sanctions, Effective Defenses and Counter-claims**

Irrespective of the difficulty in obtaining attorney’s fees and costs under the FDCPA and FCCPA, defense counsel have tried to implement the following defense tactics to prohibit the filing of frivolous lawsuits or maintaining lawsuits unnecessarily to increase an attorney fee award or to sanction the Defendant by running up its defense costs.

*Rule 11 Sanctions*

Rule 11 under the Federal Rules of Civil Procedure may provide Defendant’s relief against the plaintiff and deter plaintiff’s counsel from continuing with a lawsuit which is frivolous. The sanctions available under Rule 11 are activated normally by the motioning attorney serving a proposed motion for sanctions upon the plaintiff’s counsel. The plaintiff’s counsel is then provided a “safe harbor” period of twenty-one (21) days from the date of service to dismiss the lawsuit in an effort to avoid sanctions by the court.
If the plaintiff’s counsel fails to dismiss the lawsuit within the safe harbor period, the moving party can then file the motion with the court and seek damages in the form of reimbursement for attorney’s fees as a sanction. Of course, a court that is normally opposed to awarding attorney’s fees and costs under the statutory entitlement will similarly be resistant to awarding sanctions against a plaintiff’s counsel under Rule 11. Please note that claims brought under state law may also be subject to sanctions pursuant to Section 57.105 Fla. Stat. Although the safe harbor requirement is virtually the same, this statute no longer requires proof of frivolousness and may be direct to specific claims and factual allegations which lack support in either fact or law.

**Offers of Judgment under Rule 68 of the Federal Rules of Civil Procedure**

Another method of deterring the increase of costs and litigation expenses may arise out of the use of Rule 68 of the Federal Rules of Civil Procedure. Offers of Judgment must be used with particular caution and should only be used in one of the following circumstances (1) the evidence in the case clearly demonstrates at least one violation of the statute and therefore the continued defense of the case would only increase the attorney’s fees and costs for both sides. An Offer Judgment which provides the plaintiff with the maximum relief possible may render the case moot and divest the court of subject matter jurisdiction. (2) An Offer of Judgment may be used tactically to lessen costs in which the amount offered is reasonable but less than what the plaintiff is willing to accept to settle the lawsuit. Under this situation, the court may prohibit the award of any costs and expense incurred following the expiration of the offer and may
consider lessening the amount of attorney’s fees award to the plaintiff after the period of
time in which the reasonable offer should have been accepted by the Plaintiff.

**Strategies During the Discovery Process**

*Use of Written Interrogatories and Request for Production of Documents*

The use of written discovery by the plaintiff is generally used as a “defense
deterrent” rather than a fact finding tool of litigation. It is very common that plaintiff’s
interrogatories and requests for production of document are “standardized” requests that
cover a wide range of voluminous and private information in the hopes that the
production of the records or even the effort of gathering this material will force the
Defendant to settle the case. However, the following list of items will be required for
either the production or the defense of the case:

- The collection history or account notes for any accounts maintained on the
  consumer;
- The identity of the collectors or other personnel who worked on the
  collection file;
- Any insurance or indemnification agreement for the collector or original
  creditor
- Any policy and procedure manuals, training manuals which related to the
  allegations of violations of the statute;
- Any written correspondence or audio recordings between the collector and
  debtor;
Any documentation regarding the debt to establish validation and accuracy

Use of Request for Admissions for Factual Clarification and Attorney’s Fees

Although requests for admission of facts are helpful at the beginning of the discovery process to eliminate issues and claims prior to any deposition of the Plaintiff, it is also very helpful to conclude the discovery process with requests for admissions to aid in the evidence associated with preparing for a motion for summary judgment or any other pre-trial statements. It is common experience that plaintiffs will deny everything at the beginning of the case and render any serious discovery efforts meaningless. However, both the federal and state rules of civil procedure allow the requesting party to obtain attorney’s fees should denied facts be proven to be true requiring an admission.

Use of Depositions, including video-taped depositions of the Plaintiff

I have found that the use of depositions against the Plaintiff to be a valuable tool to determine the accuracy of the allegations as well as the seriousness of the plaintiff to prosecute the litigation. First, many consumer attorneys only to seek the maximum settlement amount for the minimum effort and expense and generally have not even appropriately evaluated the accuracy of the allegations. I have found that the threat of a plaintiff’s deposition usually causes the plaintiff or the plaintiff’s lawyer to begin serious settlement discussions either out of fear of being deposed under oath or based on the cost and expense likely to be incurred by plaintiff’s counsel. However, if the plaintiff is willing to submit to a deposition and testifies as to the allegations contained in the complaint under oath, the result is still a very useful tool to advise the client as to the
merits of the case and the impression that such testimony, if duplicated, would be to a jury.

Further, I have found that the video taping of the plaintiff’s deposition testimony has greatly aided the quality of the testimony but has also enhanced its usefulness at trial. The video deposition allows the client to observe the demeanor, personality and quality of the testimony before mediation and/or trial. Also, the deponent is usually better behaved during questioning since the deponent knows that his/her facial expressions, behavior, and body language are also on display for future analysis. Finally, I have experienced that a plaintiff’s memory, demeanor and cooperation level is far different during deposition than at trial.