AMERICAN BANKRUPTCY INSTITUTE

Northeast Bankruptcy Conference & Consumer Forum

Consumer Track

Credit-Reporting

Hon. Maria de los A. Gonzalez-Hernandez
U.S. Bankruptcy Court (D. P.R.) | Ponce

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CONCURRENT SESSION

2024

ABI's Northeast Bankruptcy Conference & Northeast Consumer Forum Credit Reporting Panel

Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.
&
Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.

Hon. María de los Ángeles Gonzalez
U.S. Bankruptcy Judge for the District of Puerto Rico

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FDCPA Basics

What is the FDCPA?

- The FDCPA is a federal statute, found at 15 USC § 1692, *et seq*.
- Its purpose is to eliminate unfair and abusive consumer debt collection by debt collectors.

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Who is a debt collector?

- Businesses that regularly engage in collecting debts **owed to another**, or has the primary purpose of collecting debts
- Third parties who acquired a debt **after default**
- Loan Servicers
- Lawyers

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Who is not a debt collector?

- Original Creditors are not debt collectors (usually)

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Who does the FDCPA protect? Consumers

A Consumer is:

- A natural person (not a business)
- Obligated or **alleged to be** obligated on a debt
- Could be mistaken identity
- Can deny that they owe the debt

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What type of debts does it apply to?

- Consumer Debts - primarily for personal, family, or household purposes.
- Depends on the use of the money at the time of the transaction.
- Debt primarily for a business purpose is not a consumer debt.
- What about a pickup truck used for work?
- Or credit card debt used for work tools and groceries?

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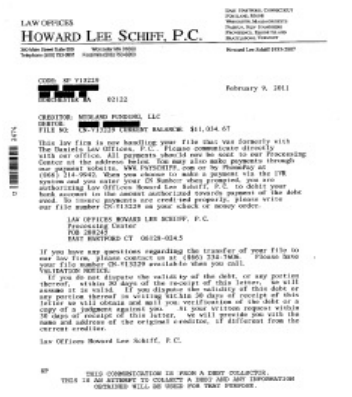
Common letter violations of the FDCPA

Letters that are false or misleading:

- About the amount of the debt.
- About the legal status of the debt.
- About collection costs, attorney's fees, interest.
- About the involvement of an attorney.
- Contain false threats.
- About effect on credit report, or the that the letter is from a credit reporting agency.


LAW OFFICES
HOWARD LEE SCHIFF, P.C.

February 9, 2011

CREDITOR: MIDLAND FUNDING, LLC

This law firm is now handling your file that was formerly with The Daniels Law Offices, P.C. Please communicate directly with our office. All payments should now be sent to our Processing Center at the address below. You may also make payments through our payment website, www.PAYSCHIFF.com or by PhonePay at (866) 314-9042. When you choose to make a payment via the IVR system and you enter your CR Number when prompted, you are authorizing Law Offices Howard Lee Schiff, P.C. to debit your bank account in the amount authorized towards payment of the debt you owe. To ensure payments are credited properly, please write our file number DC-715329 on your check or money order.

LAW OFFICES HOWARD LEE SCHIFF, P.C.
Processing Center
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EAST HARTFORD CT 06128-0245

If you have any questions regarding the transfer of your file to our law firm, please contact us at (866) 334-7660. Please have your file number CR-715329 available when you call.

Very truly yours,

If you do not dispute the validity of the debt, or any portion thereof, within 30 days of the receipt of this letter, we will assume it is valid. If you dispute the validity of this debt or any portion thereof in writing within 30 days of receipt of this letter we will obtain and mail you verification of the debt or a copy of a judgment against you. At your written request within 30 days of receipt of this letter, we will provide you with the name and address of the original creditor, if different from the current creditor.

Law Offices Howard Lee Schiff, P.C.

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

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Unfair or unconscionable collections

- Collecting on time barred debt
- Collecting an amount not permitted by contract or law. Online payment fees?
- Threats to repo property when no right exists. Reaffirmation agreements

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Right to dispute a debt

Within 5 days of first communication debt collector must provide written notice of right to dispute the debt. Failure to send notice is a violation.

- the amount of the debt;
- the name of the creditor to whom the debt is owed;
- a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- a statement that upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.15 U.S.C. § 1692g Dispute Notice Violations.

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Remedies & Practice Points

Remedies

- Actual damages
- Additional damages up to $1,000
- Attorneys' fees and costs

Practice Points

- Often clients will have debts owed to numerous creditors and/or debt collectors – it's important to know who is communicating and what account they're trying to collect on.
- Statute of limitations is one year. Need to act quickly

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FCRA Basics

What is the FCRA?

- The Fair Credit Reporting Act ("FCRA") is found at 15 U.S.C. § 1681, et seq., and applies to all consumer reports (broader than a credit report) including tenant screening and employment background checks.
- Gives consumer the right to have maximum possible accuracy in reports and dispute any inaccurate or obsolete information.
- Actual damages and attorneys' fees for negligent violation plus statutory and punitive damages for willful violations.
- Statute of limitations is 2 years from discovery of violation or 5 years from date of violation, whichever occurs first

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Consumer Protections

Key provisions that give rise to claims

- CRA must use "reasonable procedures to assure maximum possible accuracy" when preparing a report. 15 U.S.C. § 1681e(b)
- CRA must conduct a reinvestigation after a consumer dispute. 15 U.S.C. § 1681i
- CRA must not include obsolete information. 15 U.S.C. § 1681c
- CRA must disclose file to consumer upon request. 15 U.S.C. § 1681g

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What is on a credit report?

- Identification information
- Look at address information **Can be flag for ID theft
- Public record information (judgments, bankruptcies, tax liens)
- Account information and payment history
- Inquiries (hard and soft)

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Who are the players?

- CRA's – Experian, Equifax, Trans Union

- Furnishers – the creditors and debt collectors who report to CRAs

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Common issues

REMEMBER: FTC has said that 20% of consumers have errors on their reports. Look at all account information to make sure it is accurate.

- Failure to update public records Many public records stopped being reported in July 2017. Public records reported by third party vendors, not by the companies involved.
- Mixed files
- Post-bankruptcy inaccuracies
- Expunged criminal records
- Accounts not yours (includes id theft)

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Common issues (cnt'd)

- Disputed debt (medical bills insurance was supposed to cover, etc.)
- Student loans and other co-signed debts that co-signor fails to pay
- Debts allocated to ex-spouse after divorce
- Authorized user accounts
- Accounts which are too old to report
- Failure to remove accounts after judgment for defendant in collection case

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Accuracy Standards

- CRAs are required to "follow reasonable procedures to assure maximum possible accuracy" (15 U.S.C. § 1681e(b)).
- Not strict liability.
- "Technical accuracy" is not sufficient.
- Error Rates (FTC study):
  1. 20% of consumers credit reports have confirmed errors;
  2. for 5% of consumers, errors would cause them to be denied credit or pay more.

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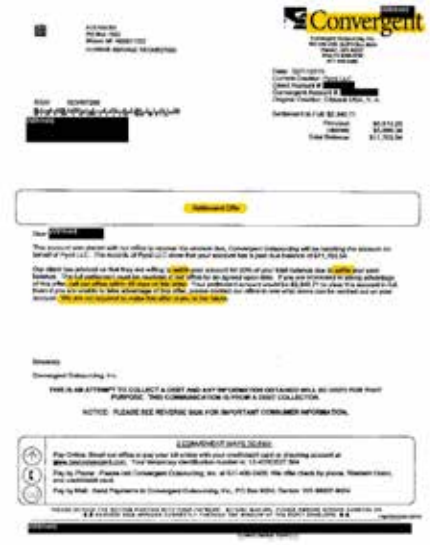
Sample Collection Letters



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Sample Collection Letters

LAW OFFICES
HOWARD LEE SCHIFF, P.C.

February 9, 2011

CREDITOR: MIDLAND FUNDING, LLC
DEBTOR:
FILE NO: CN-Y13229 CURRENT BALANCE: $11,034.67

This law firm is now handling your file that was formerly with The Daniels Law Offices, P.C. Please communicate directly with our office. All payments should now be sent to our Processing Center at the address below. You may also make payments through our payment website, WWW.PAYSCHIFF.com or by PhonePay at (866) 314-9942. When you choose to make a payment via the IVR system and you enter your CN Number when prompted, you are authorizing Law Offices Howard Lee Schiff, P.C. to debit your bank account in the amount authorized towards payment of the debt owed. To insure payments are credited properly, please write our file number CN-Y13229 on your check or money order.

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VALIDATION NOTICE:
If you do not dispute the validity of the debt, or any portion thereof, within 30 days of the receipt of this letter, we will assume it is valid. If you dispute the validity of this debt or any portion thereof in writing within 30 days of receipt of this letter we will obtain and mail you verification of the debt or a copy of a judgment against you. At your written request within 30 days of receipt of this letter, we will provide you with the name and address of the original creditor, if different from the current creditor.

Law Offices Howard Lee Schiff, P.C.

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

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Sample Collection Letters

ACI

American Coradius International LLC
2420 Sweet Home Road STE 150
Toll Free: 1-888-400-7808

Creditor	CAVALRY SPV I, LLC
Original Creditor	BANK OF AMERICA/FIA CARD SERVICES
Account Number	[redacted]
Account Balance	$29,877.28
Amount Remitted	$

January 10, 2014

Creditor	Original Creditor	Account #	Account Balance
CAVALRY SPV I, LLC	BANK OF AMERICA/FIA CARD SERVICES, N.A.	[redacted]	$29,877.28

Dear [redacted]

We are writing to you regarding your CAVALRY SPV I, LLC account.
As of the date of this letter you owe $29,877.28.
This letter will serve as confirmation that American Coradius International LLC, is willing to accept $18,585.92 to settle the above referenced account.
This offer requires that American Coradius International LLC receives your funds in the amount of $18,585.92 on or before 01-29-14.
Should you choose not to accept this offer, the account balance may be periodically increased due to the addition of accrued interest or other charges as provided in the agreement with the original creditor or as otherwise provided by state law.
If you wish to discuss this offer further, please contact our office at 1-888-400-7808 at your earliest convenience.
Upon clearance of your payment, we will notify our client so they can update their records accordingly.
Make your check or money order payable to:

AMERICAN CORADIUS INTERNATIONAL LLC
2420 SWEET HOME RD STE 150
AMHERST NY 14228-2244

Should you fail to meet the above arrangement as offered, these payment terms will be cancelled and American Coradius International LLC will initiate collection of the entire outstanding balance.

Sincerely,
American Coradius International LLC
A Professional Debt Recovery Agency

This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.
Calls to or from this company may be monitored or recorded for quality assurance purposes.
MASSACHUSETTS LOCAL ADDRESS: 15 UNION ST., LAWRENCE, MA 01840
PLEASE DO NOT SEND PAYMENTS TO THIS ADDRESS!

NOTICE OF IMPORTANT RIGHTS: YOU HAVE THE RIGHT TO MAKE A WRITTEN OR ORAL REQUEST THAT TELEPHONE CALLS REGARDING YOUR DEBT NOT BE MADE TO YOU AT YOUR PLACE OF EMPLOYMENT. ANY SUCH ORAL REQUEST WILL BE VALID FOR ONLY TEN (10) DAYS UNLESS YOU PROVIDE WRITTEN CONFIRMATION OF THE REQUEST POSTMARKED OR DELIVERED WITHIN SEVEN (7) DAYS OF SUCH REQUEST. YOU MAY TERMINATE THIS REQUEST BY WRITING TO THE DEBT COLLECTOR.

For your convenience you can now resolve this matter online. Logon to www.acibillpay.com to see the repayment options available to you.
You will need your 7 digit ACI reference number 6318438 available when you log in.
You can now make payment arrangements on your account using checking, credit card or debit card account

Office Address: 2420 Sweet Home Rd Ste 150, Amherst NY 14228-2244
Hours of Operation: Mon-Thurs: 8AM-9PM, Fri: 8AM-5PM, Sat: 8AM-12PM EST

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Fair Credit Reporting Act Rights

- Accuracy requirements
- Right to dispute errors
- Right to all information in your file; free annual report
- Notice of adverse action
- Prohibition against "old" information
- Privacy/Restrictions on who can view report
- Fraud blocks and alerts; Security freezes

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Liability of CRAs and Furnishers

- Information must be inaccurate or obsolete (more than 7 years old), 15 U.S.C. §1681c
- Need to show injury per *Spokeo*
- Have to dispute to furnisher before liability arises, 15 U.S.C. §1681s-2(b)
- CRA can be liable for not using "reasonable procedures to insure maximum possible accuracy" at any stage, 15 U.S.C. §1681e(b)
- After dispute CRA has to do reasonable reinvestigation, 15 U.S.C. §1681i
- Impermissible access, 15 U.S.C. §1681b
- CRA has to give you everything in your consumer file, 15 U.S.C. §1681g

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Dispute Rights

- Upon dispute CRA must conduct a "reasonable" investigation, review all relevant information consumer provides and delete or modify information found to be inaccurate or incomplete, or which cannot be verified. Must send consumer written results.
- Furnisher required to participate and conduct its own reasonable investigation. If it finds information inaccurate or incomplete must report results to all CRAs and permanently modify, delete or block the reporting of the information.
- In reality done through electronic back and forth.
- CRA usually just parrots whatever furnisher tells it.

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Obsolete Information

Prohibition against:

- Negative credit information > 7 years
- Bankruptcy information > 10 years
- Criminal convictions can remain forever (but Mass. Law limits to 7 years)
- Lawsuits > 7 years from date of entry or until statute of limitations expires
- CRA will often remove obsolete information on its own after dispute

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Right to have inaccurate or obsolete information removed

How To Dispute:

- **You have to dispute to the CRA not directly to the furnisher**.
- Do it by mail, not online.
- Write a simple letter and attach a copy of the page of the report with the inaccurate information circled.
- Keep copies of everything and mail certified mail with return receipt.
- Smaller providers may not make it easy. Try looking on website for forms, links, or send letter

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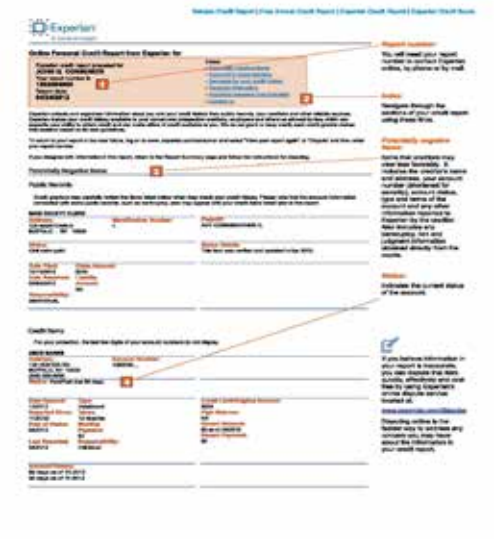
Sample Credit Reports



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Sample Credit Reports

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Jurisdictional Issues

Jurisdiction in General

- District courts have original jurisdiction to consider claims under the Fair Debt Collection Practices Act ("FDCPA") and the Fair Credit Reporting Act ("FCRA") pursuant to 28 U.S.C. § 1331, which provides that **"[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."**
  - 11 U.S.C § 1334 provides that district courts shall have "original and exclusive" jurisdiction of "all cases under title 11," and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."
  - Under 28 U.S.C. § 157(a), the district courts may refer bankruptcy cases under title 11 to bankruptcy courts.
- Section 618 of the FCRA provides in relevant part that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction . . . ." 15 U.S.C. § 1681p.

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Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. § 1692 *et seq.*

Bankruptcy court jurisdiction and claims under the FDCPA: Are FDCPA claims allowed during stages of bankruptcy where a debtor is already protected by the Bankruptcy Code?

- *Resto-Feliciano v. DLJ Mortg. Cap., Inc.*, 2020 U.S. Dist. LEXIS 240073, at *17 (D.P.R. 2020): "[B]ankruptcy courts within the First Circuit have held that the FDCPA and the bankruptcy code are coexistent rather than mutually exclusive."
- *Roman-Perez v. Operating Partners Co. LLC (In re Roman-Perez)*, 527 B.R. 844, 864-65 (Bankr. D.P.R. 2015): "[R]emedies under the FDCPA are available in bankruptcy when Debtors have no other remedies for damages under the Bankruptcy Code for the same actions."
- *Arzuaga v. Quantum Servicing Corp. (In re Arzuaga)*, 2012 Bankr. LEXIS 1443, at *13 (Bankr. D.P.R. 2012): "FDCPA claim does not 'arise under' or 'arise in' a Title 11 case, nor is it 'related to' a Title 11 case because win, lose or draw, the outcome of Plaintiffs' FDCPA claim cannot conceivably have any effect on the bankruptcy estate because the Plan has been completed and because the discharge has been entered."
- *Vienneau v. Saxon Capital, Inc. (In re Vienneau)*, 410 B.R. 329, 334 (Bankr. D. Mass. 2009): The bankruptcy court held that it lacked "related to" jurisdiction in a chapter 7 case because FDCPA claim arising from post-petition was not property of the estate. The court noted that "[w]hatever the outcome of these causes of action, the Debtors' estates will be unaffected."

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Circuit courts are split as to whether the Bankruptcy Code displaces the FDCPA in the bankruptcy context

The Second and Ninth Circuits have held that the Bankruptcy Code displaces the FDCPA in bankruptcy. Under this approach, the FDCPA is not necessary to protect debtors already protected by the bankruptcy court and have no need to supplement the remedies afforded by the Bankruptcy Code.

- *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010): "[N]othing in the FDCPA suggests that it is intended as an overlay to the protections already in place in the bankruptcy proceedings."
- *But see, Garfield v. Ocwen Loan Servicing*, 811 F.3d 86, 91 (2d Cir. 2016): After discharge, the bankruptcy debtor is no longer under the protection of the bankruptcy court and thus, "[n]o irreconcilable conflict exists between the post-discharge remedies of the Bankruptcy Code and the FDCPA."
- *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002): While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."

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Circuit courts are split as to whether the Bankruptcy Code displaces the FDCPA in the bankruptcy context (cont.)

The Third, Fourth, Seventh and Eleventh Circuits have found that the Bankruptcy Code does not displace the FDCPA and have allowed bankruptcy debtors to seek relief under both statutes. In these circuits, debt collectors can be found liable under the FDCPA in bankruptcy cases.

- *Dubios v. Atlas Acquisitions LLC (In re Dubios)*, 834 F.3d 522, 528 (4th Cir. 2016): "Although a proof of claim is filed with the bankruptcy court, it is done with the purpose of obtaining payment from the debtor's estate. That the claim is paid by the debtor's estate rather than the debtor personally is irrelevant for purposes of the FDCPA."
- *Crawford v. LVNV Funding LLC*, 758 F.3d 1254, 1262 (11th Cir. 2014): The Circuit Court determined that the just as the creditor would have violated the FDCPA by filing a lawsuit on stale claims in state court, it violated the FDCPA by filing a stale claim in bankruptcy court.
- *Simon v. FIA Card Servs. N.A.*, 732 F.3d 259, 274 (3rd Cir. 2013): "FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no categorical preclusion of the FDCPA claims."
- *Randolph v. IMBS, Inc.,* 368 F.3d 726, 731 (7th Cir. 2004): "It would be better to recognize that the statutes overlap, each with coverage that the other lacks -- the Code covers all persons, not just debt collectors, and all activities in bankruptcy; the FDCPA covers all activities by debt collectors, not just those affecting debtors in bankruptcy. Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both."
- **The First Circuit Court of Appeals is yet to rule on this issue**. *See*, *Arias v. Franklin Credit Mgmt. Corp. (In re Arias)*, 2023 Bankr. LEXIS 258 (Bankr. D.P.R. 2023) (noting that "Bankruptcy Courts within our First Circuit have held that the filing of a bankruptcy petition does not negate the protections of the FDCPA.").

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Fair Credit Reporting Act ("FCRA") Bankruptcy Court's Positions

- Some bankruptcy courts have dismissed claims under the FCRA for lack of subject matter jurisdiction, while others have considered FCRA claims and entered judgment on the merits. Additionally, some courts have suggested that a violation of the duties set forth in the FCRA may support a claim for violation of the discharge injunction.
- In *In re Johnson*, 2010 WL 3909226 (Bankr. N.D. Ala. Sept. 30, 2010), the Debtor-Plaintiff filed an adversary proceeding against a creditor for alleged violation of the discharge injunction and of the FCRA for furnishing negative and incorrect information to consumer reporting agencies.
- The court found that while "it could be argued that the FCRA claim is related to the Plaintiff's chapter 13 case . . . ", the facts of the case did not meet the test within the Eleventh Circuit for "related to" jurisdiction. The court considered that the bankruptcy estate would not be impacted, that all assets had been administered, and that the FCRA claim arose post-petition.

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FCRA-Bankruptcy Court's Positions (cont.)

- In *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478 (Bankr. S.D.N.Y. 2007), the court ruled the following:

  [T]he Court lacks subject matter jurisdiction over the defamation claims and Ms. Torres' FCRA claim. The plaintiffs contend that these claims are "related to" to their chapter 7 cases for purposes of 28 U.S.C. § 1334(b), **but the plaintiffs, having received their discharges in these fully administered chapter 7 cases, seek damages for themselves, not their estates**. Because, therefore, the proceedings will not affect the bankruptcy estates, they do not fall within the parameters of "related to" jurisdiction . . . . *Id*. at 489.

- In *In re Croft*, 500 B.R. 823 (Bankr. W.D. Tex. 2013), a creditor had filed suit in the U.S. District Court for the Western District of Texas in San Antonio against a Debtor-Defendant and other parties under the FCRA for unlawfully posting her credit report on a web page that such Debtor-Defendant controlled. The District Court referred the matter to the U.S. Bankruptcy Court for the Western District of Texas upon learning that such suit contained many of the same allegations as several adversary proceedings and the Debtor-Defendant consented to the Bankruptcy Court's issuance of a final order.
- The court awarded the creditor "statutory damages in the amount of $1,000.00 and [] punitive damages in the amount of $75,000.00. Additionally, the Court award[ed] reasonable attorneys' fees and costs to [creditor]." *Id*. at 843. The court also found that "the damages awarded to the Plaintiff in the FCRA action were non-dischargeable under § 523(a)(6).

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FCRA-Bankruptcy Court's Positions (cont.)

- In *In re Gill*, 2013 WL 3379542 (Bankr. D. Mass. July 8, 2013), the court dismissed the FCRA claim finding that the complaint failed "to state a plausible claim for a private right of action under the FCRA." *Id*. at *6. The parties did not question the court's jurisdiction and the court did not raise the matter *sua sponte*.

- In *In re Small*, 2011 WL 1868839 (Bankr. E.D. Ky. May 13, 2011), the court found that the creditor never received notification of a dispute from the consumer reporting agency as required for the Debtors-Plaintiffs to have a private cause of action under the FCRA and entered summary judgment in favor of the Defendant. The court also found that the Defendant did not violate the discharge injunction. The parties did not question the court's jurisdiction and the court did not raise the matter *sua sponte*.

- In *In re Frambes*, 2011 WL 4829960 (Bankr. E.D. Ky. Oct. 11, 2011), The court dismissed the claim under the FCRA because the Debtor admitted that he was not seeking to recover for a violation thereunder. However, the court clarified that "[t]his ruling is without prejudice to Debtor's right to argue that [creditor] has violated duties as set forth in the Fair Credit Reporting Act in support of its contempt motion for violation of the discharge injunction." *Id*.

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FCRA & FDCPA Issues in Bankruptcy

What Happens When a Debtor Files Bankruptcy?

- Payment history should generally freeze upon filing the petition.
- The Credit Reporting Agencies ("CRAs"), however, will obtain notice of the bankruptcy petition from the public docket, which will impact a debtor's credit.
- Debtors should check their credit report for inaccuracies.
- A couple months after discharge, a debtor should check their credit report to verify that servicers have updated the accounts they report.

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What is the Cause of Action for a Violation?

- A violation of the discharge injunction is a contempt action, not a cause of action under 11 U.S.C. § 524(a).
  - The discharge injunction provided through 11 U.S.C. § 524(a) does not provide Debtors with a cause of action, nor a right to a jury trial. *See Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000), *amended on denial of reh'g* (Dec. 15, 2000).
  - The Second Circuit "has never identified a private right of action under section 524[.]" *In re Belton v. GE Cap. Retail Bank*, 961 F.3d 612, 616 (2d Cir. 2020), cert. denied, 141 S. Ct. 1513 (2021).
- The FCRA preempts state law actions.
  - *See Wu v. Capital One, N.A.*, No. 12-5000(FSH), 2014 WL 3673041, at * 7 (D. N.J. July 22, 2014) (rejecting claim for credit slander, finding that "[Ole FCRA preempts any state law claim that is predicated on the false reporting of credit activity).
- What about the automatic stay or confirmation order?

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Example

- Debtor files a Chapter 13 bankruptcy, lists mortgage on his schedules and proposes a cure and maintain plan whereby the mortgage arrears will be cured through his payments to the trustee.
- 5 years later, Trustee files a Notice of Final Cure and Completion of Plan Payments, indicating that the Mortgagee's prepetition claim had been paid in full by the Trustee and that the Debtor had completed his payment obligations under the plan.
- Debtor reviews his credit and notices that Mortgagee reported his account as delinquent for 40 out of 48 months during his bankruptcy, and debtor files contempt complaint against Mortgagee for violation of 11 U.S.C. § 362.
- In response, Mortgagee asserts that it did not violate the automatic stay because there is no evidence showing that it took any affirmative steps to collect a debt.
- Outcome?

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In re Franklin, No. 09-13399-JMD, 2017 WL 3701214 (Bankr. D.N.H. Aug. 24, 2017)

- Internal bookkeeping errors do not violate the automatic stay unless the creditor engages in some overt collection activity. *See Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003).
- "Notably, a majority of courts hold that the postpetition reporting of overdue or delinquent payments to credit reporting agencies, without intent to harass or coerce payment, is not a per se violation of the automatic stay. *See, e.g., Keller v. New Penn Fin., LLC (In re Keller)*, 568 B.R. 118, 122 (B.A.P. 9th Cir. 2017); *In re Porcoro*, 565 B.R. 314, 326 (Bankr. D.N.J. 2017); *Hickson v. Home Fed. of Atlanta*, 805 F.Supp. 1567, 1573 (N.D. Ga. 1992), *aff'd*, 14 F.3d 59 (11th Cir. 1994); *but see In re Sommersdorf*, 139 B.R. 700, 700 (Bankr. S.D. Ohio 1991) (negative credit reporting postpetition is a per se violation of the stay)."
- However, Mortgagee was found to have misapplied post petition mortgage payments, debtor was awarded damages of $5,320 plus reasonable attorneys' fees and Mortgagee was ordered to provide a report a report of what errors are contained in debtor's credit history because of erroneous reports by Mortgagee and what steps Mortgagee proposes to take, if any, to correct such errors.
- *See also In re Keller*, 568 B.R. 118 (B.A.P. 9th Cir. 2017) (creditor's postpetition credit reporting of overdue or delinquent payments did not constitute a per se violation of the automatic stay or violation of debtor's confirmation order).

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FCRA Prerequisite

- The debtors in *In re Franklin* and *In re Keller* brought claims under the automatic stay, not the FCRA.
- Under the FCRA, a consumer that disputes information contained in his or her credit report is required to notify the consumer reporting agency ("CRA"), and the CRA then may provide notice to the furnisher to investigate the account at issue. 15 U.S.C. § 1681i(a)(2).
- Because a furnisher is not obligated to conduct an investigation until it receives notice of a dispute from a consumer reporting agency, and then has thirty days in which to remedy any information found during such investigation to be inaccurate, a furnisher is not liable for, and a consumer may not recover, any damages suffered by the consumer prior to the end of that thirty-day period. *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 362 n.1 (6th Cir. 2005); *Hariton v. Chase Auto Fin. Corp.*, No. 08-6767, 2010 WL 3075609 (C.D. Cal. Aug. 4, 2010); *Rambarran v. Bank of America, N.A.*, 609 F. Supp. 2d 1253, 1262-63 (S.D. Fl. 2009); *Ferrarelli v. Federated Fin. Corp. of Am.*, No. 07-685, 2009 WL 116972, at *4 (S.D. Ohio Jan. 16, 2009).
- In other words, a consumer must first dispute allegedly inaccurate information with a credit reporting agency before a claim becomes viable. Once the dispute is made, the credit furnisher has a duty to investigate the dispute, and then verify the reporting information.
- Would the outcome in *In re Franklin* and *In re Keller* been different if debtors had filed a dispute with the CRAs and the creditor failed to correct the inaccurate reports?

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Correcting Credit Reporting

- If negative credit reporting is accurate, a servicer cannot simply falsely report that a loan is/was "current" as part of a settlement. However, if a report was inaccurate or is only accurate as a result of a legitimate servicing error, a servicer can correct those errors by submitting a universal data form to the CRAs.
- Relevant codes to correct an incorrect "past due" entry or correct an entry that was caused by a servicing error include the following:
  - [MONTH, YEAR] – Code B: which represents "nothing reported before that date"
  - [MONTH, YEAR] – Code D: which represents "no payment history"
  - [MONTH A through MONTH B, YEAR X] (12 months) – Code 0: which represents "current"
- Importantly, CRAs are independent and a servicer cannot guarantee how they will make adjustments to a borrower's report after receiving a universal data form from a servicer. Accordingly, most servicers would insist on any settlement agreement containing a disclaimer to that effect. It may look something like the following:
  - [SERVICER] is not responsible for actions or omissions taken by the CRA's or those agencies failure to timely or accurately report information [SERVICER] supplies. Borrower expressly acknowledges that [SERVICER] does not own or control the CRA's (which are separate entities) and is not responsible for what actions or inactions they take in response to the foregoing request.
- Depending on the circumstances, some servicers may be willing to issue a letter to borrower explaining their actions and intent in submitting the universal data form and explaining the coding, as described above. Borrowers can use this letter in their negotiations with other lenders to explain the results that lender may have obtained in pulling their credit report.

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FDCPA Issues

- The FDCPA only applies to a communication if "a consumer receiving [that communication] could reasonably understand it to be… in connection with the collection of a debt." *Hart v. LCI Lender Servs., Inc.*, 797 F.3d 219, 225 (2d Cir. 2015).
- In making that determination, courts consider whether the communication (1) directs the recipient to mail payments to a specified address, (2) refers to the FDCPA by name, (3) imposes a timeline for disputing the debt's validity, or (4) explicitly states that it is an attempt to collect upon a debt. *See Carlin v. Davidson Fink, LLP*, 852 F.3d 207, 215 (2d Cir. 2017); *Williams v. Rushmore Loan Mgmt. Servs., LLC*, 2018 WL 1582515, at *7 (D. Conn. 2018).
- Mortgage statements that include language like "[t]his statement is for informational purposes only" and "[i]t is not intended as an attempt to collect a debt from you personally," are relevant to determination of whether the FDCPA applies to a statement. *See Thompson v. Ocwen Fin. Corp.,* 2018 WL 513720, at *4-5 (D. Conn. 2018); *see also Graham v. Caliber Home Loans, Inc.*, 2021 WL 2557502, at *6-7 (N.D. Ga. 2021) (concluding that "[t]he least-sophisticated consumer would read the prominently displayed bankruptcy message and understand that the statements were 'for informational and compliance purposes only'"); *In re Lemieux*, 520 B.R. 361, 366 (Bankr. D. Mass. 2014) ("[e]ven a hypothetical unsophisticated consumer should understand after reading the [ ] disclaimer [ ] that the monthly statements are not demands for payment"); *In re Bates*, 517 B.R. 395, 399 (Bankr. D.N.H. 2014), *aff'd sub nom. Bates v. CitiMortgage, Inc.*, 550 B.R. 12 (D.N.H. 2016), *aff'd*, 844 F.3d 300 (1st Cir. 2016).

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Discharged Debts

- The bankruptcy court has "unique expertise in interpreting its own injunctions and determining when they have been violated," and "respect for judicial process requires us to hold that the bankruptcy court alone has the power to enforce the discharge injunction in Section 524." *In re Anderson*, 884 F.3d 382, 390-91 (2d Cir. 2018).
- Is the creditor seeking to impose *in personam* liability or exercising its *in rem* rights?
- Where the post-discharge conduct involves the juxtaposition of a creditor's *in rem* rights under state law and a debtor's discharge of *in personam* liability, the requisite analysis is a fact-specific inquiry and requires a court to determine whether the exercise of a creditor's *in rem* rights under state law hampers a debtor's right to a fresh start. *See, e.g.*, *Pratt v. Gen. Motors Acceptance Corp. (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006); *Canning v. Beneficial Me., Inc. (In re Canning)*, 706 F.3d 64 (1st Cir. 2013); *see also Kirby v. 21st Mortg. Corp. (In re Kirby)*, 589 B.R. 456, 463 (Bankr. D. Me. 2018) (dismissing FDCPA claims as a matter of law and holding that, after fact-specific analysis, creditor's post-discharge conduct related to its *in rem* rights under state law and did not violate discharge injunction), *aff'd*, 599 B.R. 427 (B.A.P. 1st Cir. 2019).

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Example

- Debtor files Chapter 7 petition and creditor holds secured interest in certain personal property of the debtor, such as appliances or equipment.
- After the debtor receives his discharge, creditor reaches out and proposes that debtor may retain the secured collateral in exchange for the payment of a sum certain, and creditor sends debtor a "redemption agreement".
- Debtor files complaint alleging creditor is attempting to coerce payment of discharged debts in violation of the discharge injunction and FDCPA.
- Outcome?

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Arruda v. Sears, Roebuck & Co., 310 F.3d 13 (1st Cir. 2002)

- Creditor's *in rem* rights to secured collateral passed through bankruptcy.
- The redemption agreement at issue here contains an explicit acknowledgment that "the Debtor's failure to redeem as described within this agreement shall not impose any personal liability on the Debtor." Each agreement adds that "if the debtor fails to pay the redemption amount, [creditor's] only recourse is against the collateral." This language appears just above the agreement's signature line and just below the underscored heading: "No Personal Liability."
- While "the FDCPA's definition of debt is broad," the statute "requires at least the existence or alleged existence of an obligation to pay money." *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 23 (1st Cir. 2002). "To permit the mere mention of a discharged debt, for which the debtor has no personal financial obligation, to satisfy the FDCPA requirement would contradict the plain language of the statute." *Id.*
- "Let us be perfectly clear. We recognize that a plaintiff may bring a claim under the FDCPA by pleading that a debt collector falsely alleged an obligation to pay money. But the complaint in this case fails to state a claim under that theory. The complaint never asserts that [creditor] told the [debtors] that they were obligated to pay money on account of the discharged debts or otherwise, nor does it allege facts sufficient to support an inference that the [creditor] acted so as to create this false impression … Those letters presented the [debtors] with the terms under which [creditor[was willing to abandon its right of repossession, no more and no less." *Id.* at 23–24.

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ABI's Northeast Bankruptcy Conference & Northeast Consumer Forum

Elizabeth Ryan
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Credit Reporting Panel: FDCPA and FCRA Basics

I. Fair Debt Collection Practices Act Basics

A. Highlights

1. The Fair Debt Collection Practices Act ("FDCPA") is found at 15 U.S.C. § 1692, et seq.

2. Its purpose is to eliminate unfair and abusive debt collection practices by **debt collectors,** collecting **consumer debts**.

3. Its protections apply regardless of whether or not there is a valid **debt at issue.**

4. This means that even if the debt collector contacts the wrong person, someone who has nothing to do with the debt, they can bring a claim if there was a violation as to them.

5. The statute provides for "almost" strict liability where there is a violation.

6. Defense of bona fide error exists, but high standard.

7. Statutory damages and attorneys' fees.

B. When does the FDCPA apply?

1. There are four basic elements of an FDCPA claim:

   - **Consumer**. The plaintiff must be a "**consumer.**" Not a business. 15 U.S.C. § 1692a(3).

   - **Consumer Debt**. The debt must be primarily for personal, family, or household purposes. 15 U.S.C. § 1692a(5).

   - **Debt Collector.** The defendant must be a "debt collector." What is a debt collector? Not the original creditor. But includes third parties who acquired the debt after default, and debt buyers. 15 U.S.C. § 1692a(6).

   - The defendant has violated, by act or omission, a subsection of 15 U.S.C. § 1692.

C. Timing - Important Consideration

1. The FDCPA statute of limitations is one (1) year from the date of the violation. 15 U.S.C. § 1692k(d).

2. Important to review debt collection letters right away.

3. Have client bring in all letters regarding debts.

4. Note: in Massachusetts, the state debt collection statute makes a violation of the FDCPA also a violation of G.L. c. 93A. That has a 4 year limitations period.

D. Who is a consumer?

1. Any **natural person** obligated or **alleged to be obligated** to pay a debt. 15 U.S.C. § 1692a(3).

2. Does not have to be liable on the debt. Just alleged to be.

3. Can deny that they owe the debt and still be a consumer.

4. Can have no defense to the debt.

5. Can be a consumer even if debt incurred through their own fraud.

6. Can't be a business or corporation.

E. Who is a Debt Collector?

1. This is an important limitation of the FDCPA

2. The FDCPA defines debt collector as:

   "any person (1) 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 (2) who ***regularly collects*** or attempts to collect, directly or indirectly, debts owed or due or asserted to be ***owed or due another***." 15 U.S.C. § 1692a(6).

3. Original creditors are not debt collectors

F. Debt Buyers As Debt Collectors

1. Debt buyers are usually covered under the first, "principal purpose" portion of the definition in 15 U.S.C. § 1692a(6).

2. Assignees of the original creditor are not usually debt collectors, unless they purchased the debt when it was in default (at least 30 days past due).

15 U.S.C. § 1692a(6)(f).

G. What is a Consumer Debt?

1. A debt in which the transaction from which the debt was incurred was primarily **for personal, family, or household purposes**. 15 U.S.C. § § 1692a(5).

2. Look at the purpose of the debt at the time incurred.

   - Example: a mortgage taken out to buy a family home that was later converted to an investment rental property is still a consumer debt.

   - But debt primarily for a business purpose is not a consumer loan. So debt incurred to buy a commercial truck for a construction business is not a consumer debt.

   - Look at primary purpose – if mixed purpose, was the loan more for consumer purposes or business. Credit card balances or cash out mortgage refi's might require careful math.

   - Fees on consumer debts are consumer debts. E.g., bounced check fees, payment processing fees, rent due in advance is debt.

   - But debts not arising from "transactions" are not consumer debts. E.g., tax debts.

H. Common Letter Violations of the FDCPA

1. False, Deceptive or Misleading Communications: 15 U.S.C. § 1692e

   - The false representation of (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt. 15 U.S.C. § 1692e(2). [See example letter]

     - This might include misrepresenting collection costs, interest, attorneys' fees, court costs.

     - Or collecting on a debt that is not owed.

     - Misrepresenting effect on credit report. E.g., that the debt will stay on the person's report permanently.

   - The false representation or implication that any individual is an attorney or that any communication is from an attorney. 15 U.S.C. § 1692e(3).

- Might be violated by attorney lending letterhead if they did not actually review the letter. (But some courts say OK if there is a disclaimer on the letter).

- The threat to take an action that can't legally be taken or that is not intended to be taken. 15 U.S.C. § 1692e(5).

  - Might be violated by "FINAL DEMAND" that is followed by a series of subsequent demands. Or threat to file a lawsuit when no intention to do so.

I. Notice of Attempt to Collect a Debt, 15 U.S.C. § 1692e(11)

1. Debt collector must disclose in the initial written communication with the consumer:

   - that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose;

   - and in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

J. Unfair or Unconscionable Collections, 15 U.S.C. § 1692f

1. Collecting on time-barred debts likely a violation. Also threats to sue on a time-barred debt.

2. Collecting an amount not permitted by law or contract. For example, payment fees, collection fees. 15 U.S.C. § 1692f(1).

3. Threats to repossess property when no right exists. 15 U.S.C. § 1692f(6).

K. Other Common Violations

1. Rules about who can't be called:

   - Communicating with third parties other than the debtor. See 15 U.S.C. § 1692c(b).

   - Communication with a consumer who is represented by an attorney. See 15 U.S.C. § 1692c(a)(2).

   - Communicating with a consumer after a request to cease communications. See 15 U.S.C. § 1692c(c).

L. 15 U.S.C. § 1692g Dispute Notice Required

1. Under 15 U.S.C. § 1692g(a)(1)-(5), within five days after the initial communication with a consumer, the debt collector must send the consumer a written notice which must include:

   - the amount of the debt;
   - the name of the creditor to whom the debt is owed;
   - a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
   - a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
   - a statement that upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.15 U.S.C. § 1692g Dispute Notice Violations.

M. 15 U.S.C. § 1692g Dispute Notice Violations

1. A debt collector's failure to comply with 15 U.S.C. § 1692g can be a letter violation.

2. Letter violations can lead to a class action.

3. This subsection of the FDCPA is a reason why clients should be educated about the FDCPA and keep all correspondence received from debt collectors.

N. Remedies - 15 U.S.C. § 1692l

1. Remedies available for FDCPA violations include:

   - Actual damages.
   - Additional damages up to $1,000.
   - Attorneys' fees and costs.

- In a class action, actual damages and up to lesser of $500,000 or one percent of the net worth of the debt collector.

O. Defenses?

1. The FDCPA has a statutory bona fide error exception, 15 U.S.C. § 1692k(c).

P. Practice Points

1. Often clients will have debts owed to numerous creditors and/or debt collectors – it's important to know who is communicating and what account they're trying to collect on.

2. Educate your clients – ask them to keep letters, pick up the telephone, keep a log or notes.

II. Fair Credit Reporting Act:

A. Overview

1. The Fair Credit Reporting Act ("FCRA") is found at 15 U.S.C. § 1681, et seq., and applies to all consumer reports (broader than a credit report) including tenant screening and employment background checks.

2. Gives consumer the right to have maximum possible accuracy in reports and dispute any inaccurate or obsolete information.

3. Actual damages and attorneys' fees for negligent violation plus statutory and punitive damages for willful violations.

4. Not strict liability.

5. Statute of limitations is 2 years from discovery of violation or 5 years from date of violation, whichever occurs first.

B. Key Provisions that give rise to claims

1. 15 U.S.C. § 1681e(b): **Credit Reporting Agency ("CRA")** must use "reasonable procedures to assure maximum possible accuracy" when preparing a report.

2. 15 U.S.C. § 1681i: CRA must conduct a reinvestigation after a consumer dispute.

3. 15 U.S.C. § 1681c: CRA must not include obsolete information.

4. 15 U.S.C. § 1681g: CRA must disclose file to consumer upon request.

C. 15 U.S.C. § 1681e(b) - Accuracy

1. CRAs are required to "follow reasonable procedures to assure maximum possible accuracy" (15 U.S.C. § 1681e(b)).

2. Not strict liability.

3. "Technical accuracy" is not sufficient.

4. Error Rates (FTC study):

   a) 20% of consumers credit reports have confirmed errors;

   b) for 5% of consumers, errors would cause them to be denied credit or pay more.

D. 15 U.S.C. § 1681i - Dispute and Reinvestigation Consumer Dispute Process

1. Consumer (not their attorney) sends request to CRA.

2. Upon dispute CRA must conduct a "reasonable" investigation, review all relevant information consumer provides and delete or modify information found to be inaccurate or incomplete, or which cannot be verified. Must send consumer written results.

3. Furnisher required to participate and conduct its own reasonable investigation. If it finds information inaccurate or incomplete must report results to all CRAs and permanently modify, delete or block the reporting of the information.

4. In reality done through electronic back and forth.

5. CRA usually just parrots whatever furnisher tells it.

6. How to dispute: do it by mail, not online.

7. Write a simple letter and attach a copy of the page of the report with the inaccurate information circled.

8. Keep copies of everything and mail certified mail with return receipt.

9. Smaller providers may not make it easy to reach them. Try looking on website for forms, links, or send letter.

E. 15 U.S.C. § 1681c - Obsolete Information

1. Bankruptcies:10 years.

2. Civil cases and arrest records: 7 years or until SOL expires (whatever is longer).

3. Most everything else: 7 years.

4. There are a few exceptions. Check the statute.

F. Common Issues

1. FTC has said that 20% of consumers have errors on their reports. Look at all account information to make sure it is accurate.

    a) Failure to update public records:

        (i) public records reported by third party vendors, not by the companies involved.

b) Mixed files.

c) Post-bankruptcy inaccuracies.

d) Expunged criminal records.

e) Accounts not yours (includes id theft).

f) Disputed debt (medical bills insurance was supposed to cover, etc.).

g) Student loans and other co-signed debts that co-signor fails to pay.

h) Debts allocated to ex-spouse after divorce.

i) Authorized user accounts.

j) Accounts which are too old to report.

k) Failure to remove accounts after judgment for defendant in collection case.

G. Remedies 15 U.S.C. §§ 1681n and o

1. **15 U.S.C. § 1681n(a)(1)**. In case of willful non-compliance – actual damages, or damages of not less than $100 and not more than $1,000, plus attorneys' fees.

2. **15 U.S.C. § 1681o(a)(1)**. In case of negligent non-compliance, actual damages plus attorneys' fees.

H. Liability of CRAs and Furnishers

1. Information must be inaccurate or obsolete. 15 U.S.C. § 1681c.

2. Need to show injury per *Spokeo*.

3. Have to dispute to furnisher before liability arises. 15 U.S.C. § 1681s-2(b).

4. CRA can be liable for not using "reasonable procedures to ensure maximum possible accuracy" at any stage. 15 U.S.C. § 1681e(b).

5. After dispute CRA has to do reasonable reinvestigation. 15 U.S.C. § 1681i.

6. Impermissible access. 15 U.S.C. § 1681b.

7. CRA has to give you everything in your consumer file. 15 U.S.C. § 1681g.

I. Dealing with Debt Collection or Credit Reporting Violations in Bankruptcy: Some Considerations

1. Violations of the automatic stay: giving notice, strict liability, damages, attorneys' fees.

2. Property of the estate and exemptions.

3. Scheduling a claim.

4. Adversary Proceedings.

5. Violations of the discharge.

ABI's Northeast Bankruptcy Conference & Northeast Consumer Forum
Hon. María de los Ángeles Gonzalez
U.S. Bankruptcy Judge for the District of Puerto Rico
Credit Reporting Panel: Jurisdictional Issues

I. Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq.

Bankruptcy court jurisdiction and claims under the FDCPA: Are FDCPA claims allowed during stages of bankruptcy where a debtor is already protected by the Bankruptcy Code?

- District courts have original jurisdiction to consider claims under the FDCPA pursuant to 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
- 11 U.S.C § 1334 provides that district courts shall have "original and exclusive" jurisdiction of "all cases under title 11," and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."
- Under 28 U.S.C. § 157(a), the district courts may refer bankruptcy cases under title 11 to bankruptcy courts.
- "Proceedings 'arise under' title 11 if they involve a 'cause of action created or determined by a statutory provision of the Bankruptcy Code." In re Goldstein, 201 B.R. 1, 4 (Bankr.D.Me 1996).
    - Claims under the FDCPA do not "arise under" title 11. Its causes of action are neither created nor determined by the Bankruptcy Code.
- "Proceedings "arising in" a bankruptcy case "are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.'" In re Goldstein, 201 B.R. at 4.
- A case is "related to" bankruptcy "if the outcome of the case could conceivably have any effect on the estate being administered in bankruptcy." Id. at 4 (quoting Pacor Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).
    - Claims under the FDCPA can be pursued outside of bankruptcy. But, FDCPA claims can exist within a bankruptcy.
- For example, in Resto-Feliciano v. DLJ Mortg. Cap., Inc., 2020 U.S. Dist. LEXIS 240073, at * 17 (D.P.R. 2020), the district court denied a motion for withdrawal of reference

for lack of jurisdiction with respect to FDCPA claims noting that "bankruptcy courts within the First Circuit have held that the FDCPA and the bankruptcy code are coexistent rather than mutually exclusive."

- See also, Roman-Perez v. Operating Partners Co. LLC (In re Roman-Perez), 527 B.R. 844, 864-65 (Bankr. D.P.R. 2015), the bankruptcy court found that the "remedies under the FDCPA are available in bankruptcy when Debtors have no other remedies for damages under the Bankruptcy Code for the same actions." Because the plaintiffs' FDCPA claims would not exist without the Bankruptcy Code and the allegations under the FDCPA were the same ones averred for the violation of stay, the court ultimately found "that the remedies afforded by the Bankruptcy Code to recover damages under 11 U.S.C. § 362(k)(1) preclude further damages under the FDCPA."

- In Arzuaga v. Quantum Servicing Corp. (In re Arzuaga), 2012 Bankr. LEXIS 1443, at *13 (Bankr. D.P.R. 2012), the bankruptcy court held that a "FDCPA claim does not 'arise under' or 'arise in' a Title 11 case, nor is it 'related to' a Title 11 case because win, lose or draw, the outcome of Plaintiffs' FDCPA claim cannot conceivably have any effect on the bankruptcy estate because the Plan has been completed and because the discharge has been entered." The court added that a "FDCPA claim regarding post-discharge conduct that does not impact in any way the bankruptcy estate does not fall under Title 11's jurisdictional umbrella because any remedies gained under the FDCPA inure to the plaintiff and not to the bankruptcy estate."

- In Vienneau v. Saxon Capital, Inc. (In re Vienneau), 410 B.R. 329, 334 (Bankr. D. Mass. 2009), the bankruptcy court held that it lacked "related to" jurisdiction in a chapter 7 case because FDCPA claim arising from post-petition was not property of the estate. The court noted that "[w]hatever the outcome of these causes of action, the Debtors' estates will be unaffected."

- In Goldstein v. Marine Midland Bank (In re Goldstein), 201 B.R. 1, 6 (Bankr. D. Me. 1996) the bankruptcy court dismissed FDCPA claims for lack of subject matter jurisdiction noting that while bankruptcy and FDCPA claims stem from the same "operative facts" and it would be "convenient and economical to resolve all claims in one forum," "judicial economy itself does not justify jurisdiction."

Circuit courts are split as to whether the Bankruptcy Code displaces the FDCPA in the bankruptcy context. The Second and Ninth Circuits have held that the Bankruptcy Code displaces the FDCPA in bankruptcy. Under this approach, the FDCPA is not necessary to protect debtors already protected by the bankruptcy court and have no need to supplement the remedies afforded by the Bankruptcy Code.

- See, Simmons v. Roundup Funding, LLC, 622 F.3d 93, 96 (2d Cir. 2010): The Second Circuit held that the debtor was not entitled to relief under the FDCPA. In doing so, the Circuit quoted Gray-Mapp v. Sherman, 100 F. Supp. 2d 810, 814 (N.D. Ill. 1999) for the proposition that nothing in either the Bankruptcy Code or the FDCPA authorizes a debtor "to bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA" and that "nothing in the FDCPA suggests that it is intended as an overlay to the protections already in place in the bankruptcy proceedings".
    - But see, Garfield v. Ocwen Loan Servicing, 811 F.3d 86, 91 (2d Cir. 2016):
        - After discharge, the bankruptcy debtor is no longer under the protection of the bankruptcy court and thus, "[n]o irreconcilable conflict exists between the post-discharge remedies of the Bankruptcy Code and the FDCPA."
        - "There is no reason to assume that Congress did not expect these two statutory schemes to coexist in the post-discharge context.
- See also, Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002): The Ninth Circuit held that a debtor's remedy for a creditor's alleged violations of the discharge injunction lies in the Bankruptcy Code such as to preclude a simultaneous claim for relief under the FDCPA. The Circuit Court stated that "[w]hile the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."

Also note that in Midland Funding, LLC v. Johnson, 581 U.S. 224, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017), the Supreme Court held that a creditor did not violate the FDCPA by filing a proof of claim for a debt on which the statute of limitations had run. The Court determined that

the debt remained a claim under state law, which provided that the creditor still had a right to payment. But, the Court noted that the expiration of the applicable statute of limitations is an affirmative defense that the trustee may raise in an objection to a proof of claim.

Unlike the Second and Ninth Circuits, the Third, Fourth, Seventh and Eleventh Circuits have found that the Bankruptcy Code does not displace the FDCPA and have allowed bankruptcy debtors to seek relief under both statutes. In these circuits, debt collectors can be found liable under the FDCPA in bankruptcy cases.

- See, Dubios v. Atlas Acquisitions LLC (In re Dubios), 834 F.3d 522, 528 (4th Cir. 2016): The Fourth Circuit held that filing a proof of claim in a bankruptcy case constituted debt collection activity regulated by the FDCPA. The Circuit Court explained that "[a]lthough a proof of claim is filed with the bankruptcy court, it is done with the purpose of obtaining payment from the debtor's estate. That the claim is paid by the debtor's estate rather than the debtor personally is irrelevant for purposes of the FDCPA."

- See also, Crawford v. LVNV Funding LLC, 758 F.3d 1254, 1262 (11th Cir. 2014): The Eleventh Circuit vacated the district court's dismissal of a Chapter 13 debtor's adversary proceeding alleging defendant consumer debt buyer violated the FDCPA by filing a proof of claim on a debt that was time-barred under state law and thus unenforceable. The Circuit Court determined that just as the creditor would have violated the FDCPA by filing a lawsuit on stale claims in state court, it violated the FDCPA by filing a stale claim in bankruptcy court.

- See also, Simon v. FIA Card Servs. N.A., 732 F.3d 259, 274 (3rd Cir. 2013): The Third Circuit followed the Seventh Circuit's approach in Randolph v. IMBS, Inc., 368 F.3d 726, 731 (7th Cir. 2004) and determined that when "FDCPA claims arise from communications a debt collector sends a bankruptcy debtor in a pending bankruptcy proceeding, and the communications are alleged to violate the Bankruptcy Code or Rules, there is no categorical preclusion of the FDCPA claims."

- See also, Randolph v. IMBS, Inc., 368 F.3d 726, 731 (7th Cir. 2004): The Seventh Circuit held that bankruptcy debtors could bring a suit against creditors under the

FDCPA for violations of the automatic stay. The Circuit Court acknowledged that:

> It would be better to recognize that the statutes overlap, each with coverage that the other lacks -- the Code covers all persons, not just debt collectors, and all activities in bankruptcy; the FDCPA covers all activities by debt collectors, not just those affecting debtors in bankruptcy. Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both.

Id. at 731.

The First Circuit Court of Appeals is yet to rule on this issue. See, Arias v. Franklin Credit Mgmt. Corp. (In re Arias), 2023 Bankr. LEXIS 258 (Bankr. D.P.R. 2023) (noting that "Bankruptcy Courts within our First Circuit have held that the filing of a bankruptcy petition does not negate the protections of the FDCPA.").

II. Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq.

FCRA Jurisdiction

- District courts have original jurisdiction to consider claims under the FCRA pursuant to 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
- Section 618 of the FCRA provides in relevant part that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction . . . ." 15 U.S.C. § 1681p.
- Some bankruptcy courts have dismissed claims under the FCRA for lack of subject matter jurisdiction, while others have considered FCRA claims and entered judgment on the merits. Additionally, some courts have suggested that a violation of the duties set forth in the FCRA may support a claim for violation of the discharge injunction.
- In In re Johnson, 2010 WL 3909226, at *3 (Bankr. N.D. Ala. Sept. 30, 2010), the Debtor-Plaintiff filed an adversary proceeding against creditor First Southern Financial Services of Marshall County, Inc. for alleged violation of the discharge injunction and of the FCRA for

furnishing negative and incorrect information to consumer reporting agencies. The creditor moved to dismiss the complaint and alleged that the court did not have jurisdiction to consider the FCRA claim because it arose post-discharge and did not fall within the bankruptcy court's limited jurisdiction. The Bankruptcy Court for the Northern District of Alabama found that it lacked jurisdiction to consider the FCRA claim. The court stated that its jurisdiction must be found within the parameters of 28 U.S.C. §§ 1334(b) and 157(a). The court found that while "it could be argued that the FCRA claim is related to the Plaintiff's chapter 13 case . . . ", the facts of the case did not meet the test within the Eleventh Circuit for "related to" jurisdiction, which is that "if a resolution of the claim could not conceivably have an effect on the bankruptcy estate or administration of the bankruptcy case, then there is no subject matter jurisdiction under § 1334(b)." In re Johnson at *3. The court ruled the following:

> After applying the same test to the Plaintiff's FCRA claim the Court must conclude that regardless of whether or not the Plaintiff prevails, his bankruptcy estate will not be effected—it no longer exists—all assets have been administered. The FCRA claim arose postpetition, it is not an asset of the estate and any recovery will not benefit creditors; thus, the FCRA claim is not sufficiently related to the bankruptcy case to convey jurisdiction pursuant to § 1334(b).

Id. The court also discussed the Plaintiff's request for the court to exercise supplemental jurisdiction over the FCRA claim under 28 U.S.C. § 1367 and ruled that "the Plaintiff's FCRA claim falls squarely within a district court's federal question jurisdiction under 28 U.S.C. § 1331—FCRA is a federal statue. Thus, district court jurisdiction over the FCRA claim cannot be based on § 1367 supplemental jurisdiction." Id. at *4. The court also considered that "[t]he Plaintiff's two claims—one based on Section 524(a) [of the Bankruptcy Code] and the other on FCRA—both arise out of the same facts, and judicial economy would be served if one court adjudicated both claims. The district court has original jurisdiction to hear both claims, and could do so if the reference were withdrawn." Id. Therefore, the court granted fourteen days for parties to file a motion with the District Court pursuant to 28 U.S.C. § 157(d) seeking withdrawal of the reference of the adversary proceeding and if no such motion was filed, the FCRA claim would be dismissed without prejudice. See, Id. at *5.

- In Torres v. Chase Bank USA, N.A. (In re Torres), 367 B.R. 478 (Bankr. S.D.N.Y. 2007), one of the Debtors-Plaintiffs filed a complaint against Chase Bank USA, N.A. for violation of the discharge injunction, of the FCRA, and defamation for Chase's alleged

failure to update its disclosure to consumer reporting agencies regarding the discharge of the Debtor-Plaintiff's debt. Regarding its jurisdiction over the FCRA claim, the court ruled the following:

> [T]he Court lacks subject matter jurisdiction over the defamation claims and Ms. Torres' FCRA claim. The plaintiffs contend that these claims are "related to" to their chapter 7 cases for purposes of 28 U.S.C. § 1334(b), but the plaintiffs, having received their discharges in these fully administered chapter 7 cases, seek damages for themselves, not their estates. Because, therefore, the proceedings will not affect the bankruptcy estates, they do not fall within the parameters of "related to" jurisdiction articulated in Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir.1984), which at least since In re Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir.1992), generally have been applied in this Circuit . . . Nor does this Court, whose jurisdiction is prescribed by 28 U.S.C. § 1334 and the District Court's general order of reference, have supplementary jurisdiction to adjudicate the plaintiffs' defamation and FCRA claims under 28 U.S.C. § 1367.

In re Torres, 367 B.R. at 481. Therefore, the court dismissed such claims pursuant to Fed. R. Civ. P. 12(h)(3) for lack of subject matter jurisdiction. Even though the FCRA claim was dismissed, the court discussed Chase's duty to furnish accurate information as follows:

> Particularly where Chase has rebuffed the plaintiffs' requests to correct the information it previously provided to the credit reporting agencies, one may, in the context of a motion to dismiss, reasonably infer an improper purpose underlying Chase's conduct to pressure the plaintiffs to pay their debts without having to construe whether Chase has a separate duty under the FCRA to correct its prior reporting . . . Moreover, while noncompliance with the FCRA is not necessary for the plaintiffs to state a claim under Bankruptcy Code section 524(a), Chase's argument that its refusal to correct clearly inaccurate information that it previously reported to the credit reporting agencies does not constitute a violation of the FCRA is questionable.

In re Torres, 367 B.R. at 489.

- In In re Croft, 500 B.R. 823 (Bankr. W.D. Tex. 2013), a creditor had filed suit in the U.S. District Court for the Western District of Texas in San Antonio against a Debtor-Defendant and other parties under the FCRA for unlawfully posting her credit report on a web page that such Debtor-Defendant controlled. The District Court referred the matter to the U.S. Bankruptcy Court for the Western District of Texas upon learning that such suit contained many of the same allegations as several adversary proceedings and the Debtor-Defendant consented to the Bankruptcy Court's issuance of a final order. The Bankruptcy Court consolidated the related

adversary proceedings and found that the Debtor-Defendant willfully violated the FCRA by posting the creditor's credit report without any permissible purpose for doing so. The court awarded the creditor "statutory damages in the amount of $1,000.00 and [] punitive damages in the amount of $75,000.00. Additionally, the Court award[ed] reasonable attorneys' fees and costs to [creditor]." Id. at 843. Additionally, the court found that "the damages awarded to the Plaintiff in the FCRA action are non-dischargeable under § 523(a)(6). Defendant obtained [creditor's] consumer report for the sole purpose of attempting to discredit and embarrass her publicly and within the business community." Id. at 861-862.

- In In re Gill, 2013 WL 3379542 (Bankr. D. Mass. July 8, 2013), the Debtors-Plaintiffs filed an adversary proceeding against creditor Navy Federal Credit Union for violation of the FDCPA and the FCRA. The Debtors-Plaintiffs alleged that the creditor's acts in furnishing information to a consumer reporting agency regarding their lateness in making post-petition and post-discharge payments constituted "a violation of the FCRA and that the Defendant's acts or omissions in continuing to furnish false information to a consumer reporting agency, after the violation was reported to [creditor], was a willful violation of the FCRA, entitling them to damages . . . ." Id. at *1. The Defendant moved to dismiss the FCRA claim arguing that there is no private right of action under the FCRA pertinent to the Debtors-Plaintiffs' allegations. The court dismissed the FCRA claim finding that the Debtors-Plaintiffs' complaint was "devoid of any references to specific subsection of 15 U.S.C. § 1681 or any allegations that the Plaintiffs contacted credit reporting agencies before contacting the Defendant" and concluded that the complaint failed "to state a plausible claim for a private right of action under the FCRA." Id. at *6. The parties did not question the court's jurisdiction and the court did not raise the matter *sua sponte*.

- In In re Small, 2011 WL 1868839 (Bankr. E.D. Ky. May 13, 2011), the Debtors-Plaintiffs filed an adversary proceeding against creditor University of Kentucky Federal Credit Union for alleged violations of the discharge injunction and the FCRA due to an entry in the Debtors-Plaintiffs' credit report from Experian Information Solutions, Inc. regarding a discharged debt. The Debtors-Plaintiffs alleged that the creditor "intentionally violated § 1681 [of] the FCRA by reporting erroneous information and by not updating the information, and violated § 1681o of the FCRA by negligently failing to correct the discharged debt . . . [and] violated the discharge injunction by not correcting the information . . . ." Id. at *1. The court

found that the creditor never received notification of a dispute from the credit reporting agency as required for the Debtors-Plaintiffs to have a private cause of action under the FCRA and ruled as follows:

> The duties imposed under § 1681s–2(b) only arise once the furnisher of information receives notice of a dispute from a credit reporting agency. Nothing in the record indicates that [the creditor] ever received notice of the Debtors' dispute with Experian. Accordingly, because there is no private cause of action for allegations that UK Credit Union violated its duty to provide accurate information under § 1681 s–2(a), and because UK Credit Union was under no duty under subsection (b), UK Credit Union is entitled to summary judgment as to the FCRA claims of the Debtors.

Id. at *3. The court also found that the creditor did not violate the discharge injunction because the Debtors-Plaintiffs did not allege or show that the creditor attempted to collect the discharged debt. In discussing a creditor's failure to correct information provided to consumer credit reports, the court stated the following:

> The truth is a creditor's failure to correct or update such information, standing alone, is not a violation of the discharge injunction. This is because the mere failure to update or remove information posted prepetition does not constitute an "act" in violation of the discharge injunction . . . However, a coercive motive may be inferred if a debtor requests that a creditor correct the information, and the creditor refuses.

Id. at *4-5. The parties did not question the court's jurisdiction and the court did not raise the matter *sua sponte*.

- In In re Frambes, 2011 WL 4829960 (Bankr. E.D. Ky. Oct. 11, 2011), the Debtor filed a motion for contempt against creditor Nuvell National Auto Finance, LLC for violation of the discharge injunction and of the FCRA by continuing to report the discharged debt on the Debtor's credit report. The creditors filed a motion to dismiss the claim under the FCRA for lack of subject matter jurisdiction and pursuant to Fed. R. Bank. P. 7012 for failing to state a claim upon which relief can be granted. The creditor alleged that the Bankruptcy Court lacked jurisdiction because "the claim is a post-petition claim that is not property of the estate and shall have no conceivable effect on the estate. Nuvell also argue[d] that the Debtor cannot prevail under the [FCRA] as the Debtor did not comply with the statute and is ineligible to pursue a claim." Id. at *1. The Debtor responded by stating that he was not seeking to recover under the

FCRA and admitted that he did not take the steps required under the FCRA to pursue a claim. Thus, the Debtor stated that he was "only seeking damages for violation of the discharge injunction and [was] merely using the duties created by [the FCRA] to illustrate Nuvell's duties to provide accurate information to consumer reporting agencies and correct inaccurate information as it relates to potential violations of the discharge injunction." Id. The court dismissed the claim under the FCRA because the Debtor admitted that he was not seeking to recover for a violation thereunder. However, the court clarified that "[t]his ruling is without prejudice to Debtor's right to argue that Nuvell has violated duties as set forth in the Fair Credit Reporting Act in support of its contempt motion for violation of the discharge injunction." Id.

- In In re DiBattista, 615 B.R. 31 (S.D.N.Y. 2020), the Debtor filed a motion with the U.S. Bankruptcy Court for the District of New York for contempt for violation of the discharge injunction against a creditor for furnishing inaccurate information to consumer reporting agencies, among other actions. The Debtor did not raise a claim under the FCRA. The Bankruptcy Court granted the motion and awarded sanctions to the Debtor. On appeal, the U.S. District Court for the Southern District of New York ruled the following:

> A credit report that continues to show an amount past due, especially one that was prepared only after the discharge order, is inaccurate and misleading in a way that causes real harm, and that alone can constitute a violation of a discharge order. Put simply, this is not a case in which a creditor merely neglected to update credit agencies after a discharge. Instead, Selene proactively sent misleading information to credit agencies, suggesting it was in fact trying to collect a debt, especially when taken together with Selene's correspondence and calls to DiBattista and his family. Therefore, the Bankruptcy Court did not clearly err by finding that Selene violated the discharge order.

In re DiBattista, 615 B.R. 31, 43 (S.D.N.Y. 2020).

Faculty

Hon. Maria de los A. Gonzalez-Hernandez is a U.S. Bankruptcy Judge for the District of PUerto Rico in Ponce, appointed on Feb. 11, 2022. She has been involved in bankruptcy law for the entirety of her 30+-year legal career, most of which she has spent with the federal government. Judge González-Hernández's legal career began in 1991 when she clerked for Hon. Enrique S. Lamoutte of the District of Puerto Rico Bankruptcy Court, following her graduation from law school. In 1994, she entered private practice at a law firm in Puerto Rico, where she was head of the consumer bankruptcy division and practiced bankruptcy, banking and real estate law for nearly three years. In 1996, Judge González-Hernández joined the U.S. Trustee's Office in San Juan, P.R., where she was a trial attorney for 10 years, litigating chapter 7 and 11 cases. In 2006, she rejoined Judge Lamoutte's chambers as a law clerk, and, in 2011, she became clerk of court of the District of Puerto Rico Bankruptcy Court. Judge González-Hernández is a member of the Puerto Rico Bankruptcy Bar Association, the American Bankruptcy Bar Association, and the Honorable Raymond Acosta Puerto Rico Chapter of the Federal Bar Association. From 2013-15, she taught bankruptcy law at the University of Puerto Rico School of Law. Judge González-Hernández received her B.A. in 1987 from Colgate University in 1987, her J.D. from Pontifical Catholic University of Puerto Rico School of Law in 1990, and her LL.M. from Boston University Morin Center for Banking Law Studies in 1993.

Michael K. Lane is a trial attorney with Day Pitney LLP in Boston, where he represents corporate clients in an extensive range of litigation matters, including those involving bankruptcy law. He regularly represents consumer lending institutions, such as mortgage lenders, investors and servicers, in connection with the defense of claims by borrowers in state and federal court actions, including adversary proceedings in the bankruptcy forum relating to consumer loans and mortgage servicing. His experience also includes the representation of creditors in corporate aviation/aerospace bankruptcy proceedings, as well as the representation of commercial lessors and other commercial creditors in retail restructurings. Prior to joining Day Pitney, Mr. Lane practiced law at a boutique litigation and bankruptcy firm, representing numerous debtors in chapter 11 restructurings and related litigation, as well as representing consumer debtors in adversary proceedings and contested matters. He also clerked for Hon. Joyce London Alexander and Hon. Judith Dein, both of the U.S. District Court for the District of Massachusetts. Mr. Lane is a member of ABI and the Boston and Connecticut Bar Associations. He received his B.A. in 2005 from Lake Forest College and his J.D. in 2008 from Suffolk University Law School.

Elizabeth A. Ryan is a partner with Bailey & Glasser LLP in Boston, where she concentrates her practice on class actions, representing consumers challenging violations of state and federal consumer protection statutes, as well as employees challenging violations of wage and hour laws. In addition to her class action work, she represents whistleblowers in False Claims Act cases involving fraud against the government. In 2019, Ms. Ryan was named as Bailey Glasser's diversity partner, and she has led the firm's effort to become one of the first mid-size law firms to become Mansfield Rule Certified by the Diversity Lab — signifying that the firm considers at least 30% historically underrepresented attorneys when making hiring, promotion and leadership decisions. She is a member of the National Association of Consumer Advocates and a former Consumer Law Fellow of the National Consumer Law Center (1993). Over the course of her career, Ms. Ryan has been a panelist on consumer law trainings conducted by the National Consumer Law Center and others. Until December 2011, she had been a

partner in the firm Roddy Klein & Ryan, which primarily represented consumers in class actions. Ms. Ryan received her B.A. in 1981 from the College of the Holy Cross and her J.D. in 1985 from Catholic University Law School.