



**South Carolina Bar**

Continuing Legal Education Division

**2018 SC BAR CONVENTION**

**Consumer Law Section**

*“Consumer Law Futureworld”*

**Thursday, January 18**

*SC Supreme Court Commission on CLE Course No. 180878*



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## **2018 SC BAR CONVENTION**

### **Consumer Law Section**

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Future of Consumer Litigation under Federal  
and State Consumer Protection Laws

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*Bess D. Lochocki*

# **The Future of Consumer Litigation**

Understanding Federal and State Consumer Protection Laws  
from the Perspectives of Debtors and Creditors

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The law firm of Hays Cauley, P.C., was first founded in 2006 in Tuscaloosa, Alabama, by its namesake attorney, Penny Hays Cauley. The firm's practice is primarily focused on consumer protection related to debt and credit.

Ms. Cauley's legal career began in 1994, after graduating from Cumberland School of Law at Samford University. Before going into private practice in Birmingham, attorney Cauley had the privilege of clerking for the Honorable William Robertson, presiding judge of the Alabama Court of Civil Appeals.

Since relocating to South Carolina, the firm has added a second attorney, William Kyle Geddings. With more than 25 years of combined experience, Ms. Cauley and Mr. Geddings are passionate about their work on behalf of clients in South Carolina and Alabama.



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Bess founded Waccamaw Law, LLC in 2016. Since 2010, she's been practicing law in the state courts of South Carolina as well as the U.S. District of South Carolina.

She began her career at a national collection agency as the Director of Compliance where she worked closely with the corporate executive team. Bess then moved into private practice defending the credit and collection industry, collaborating with local counsel across the nation representing large corporations. Her experience litigating high-stakes, complex issues in federal court provided Bess a solid foundation for delivering practical legal counsel to consumers.

# **What types of consumer claims are available?**

## **FEDERAL CLAIMS:**

- FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)
- FAIR CREDIT REPORTING ACT (FCRA)
- TELEPHONE CONSUMER PROTECTION ACT (TCPA)
- ELECTRONIC FUNDS TRANSFER ACT (EFTA)

## **SC STATE CLAIMS:**

- INVASION OF PRIVACY
- NEGLIGENCE, RECKLESS, WANTON TRAINING AND SUPERVISION
- SC CONSUMER PROTECTION CODE
- SC UNFAIR TRADE PRACTICES ACT

MANY STATES HAVE THEIR OWN VERSION OF THE FDCPA OR A CONSUMER PROTECTION CODE

# **FDCPA CLAIMS 15 U.S.C. 1692, *et seq.***

- Because the FDCPA is a remedial, strict liability statute, a consumer does not need to prove intent, deception or actual damages to recover under the FDCPA.
  - *Knoll v. Allied Interstate, Inc.*, 502 F.Supp.2d 943, 948 (D. Minn. 2007); *Hilburn v. Encore Receivable Mgmt., Inc.*, 2007 U.S. Dist. LEXIS 29833 (D. Or. 2007).
- Definitions 1692a
- Communication in connection with debt collection 1692b and 1692c
  - *Fox v. Citicorp Credit Servs., Inc.* 15 F.3d 1507, 1516, 1516 n.10 (9th Cir. 1994) (finding debt collector could be liable under § 1692c(a)(1), for contacting debtor at work after consumer orally informed collector not to do so).

# **FDCPA CLAIMS 15 U.S.C. 1692, *et seq.***

- **Harassment 1692d**

- *Prewitt v. Wolpoff & Abramson, LLP*, 2007 U.S. Dist. LEXIS 19148, 9 (W.D. NY 2007).
- “Whether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the patterns of calls.” *Prewitt*, 2007 U.S. Dist. LEXIS 19148, 8) (quoting *Joseph v. J.J. Mac Intyre Companies, LLC*, 238 F. Supp. 2d 1158, 1168 (N.D. Cal. 2002).
- Six telephone calls in a span of 24 minutes has been held to constitute harassment in violation of the FDCPA. *Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1452-53 (D. Nev. 1994).
- Fifty-four (54) calls to a consumer at work during a time span of approximately six months, with 24 messages actually left for the consumer has also been held to be a violation of §1692d)(5) as a matter of law. *Sanchez v. Client Services, Inc.*, 2007 U.S. Dist. LEXIS 81635 (N.D. Cal. October 29, 2007).

# **FDCPA CLAIMS 15 U.S.C. 1692, *et seq.***

- **False or misleading representations 1692e**
- 16 specific violations – most prevalent:
  - 1692e(2) character, amount, legal status
  - 1692e(3) false implication from an attorney
  - 1692e(4) empty threats of garnishment, seizure
  - 1692e(5) empty threats, e.g. litigation on the debt
  - 1692e(8) false communication, e.g., failure to notify the debt is disputed
  - 1692e(10) using false representations or deception
- Fourth Circuit Opinion:
  - *Russell v. Absolute Collection Services, Inc.*, 2014 U.S. App. LEXIS 15718 (Aug. 15, 2014)

# **FCRA CLAIMS 15 U.S.C. 1681, *et seq.***

- Debt collectors and original creditors can be held liable as data furnishers under 15 U.S.C. §1681s-2(b). The furnisher must:
  - conduct an investigation with respect to the disputed information;
  - review all relevant information provided by the CRA;
  - report the results of the investigation to the CRA;
  - if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
  - if an item of information disputed by the consumer is found to be inaccurate or incomplete, OR cannot be verified: modify; delete; or permanently block the reporting of the item.

# FCRA CLAIMS 15 U.S.C. 1681, *et seq.*

- *Johnson v. MBNA America Bank, NA*, 357 F.3d 426 (4th Cir. 2004).
  - The bank's agents testified when investigating consumer disputes generally, they do not look beyond the information contained in its computer system and never consult underlying documents such as account applications.
  - 4th Circuit held that creditors, after receiving notice of a consumer dispute from a credit reporting agency, are required to conduct a reasonable investigation of their records to determine whether the disputed information can be verified – and a jury could reasonably conclude based on the evidence that the bank acted unreasonably in failing to verify the accuracy of the information in dispute.
- *Saunders v. Branch Banking and Trust Co. of Va*, 526 F.3d 142 (4th Cir., 2008).
- *Brim v. Midland Credit Management, Inc.*, 795 F.Supp.2d 1255 (N.D. Ala. 2011).
- *Freeman v Equifax, Inc.*, CA 6:12-845-HMH, 2012 WL 2502693 (D.S.C. June 28, 2012). Defendant's MTD denied based on language alleging they failed "to act on and investigate [the] allegations of the disputed credit information."
- *Macpherson v. JP Morgan Chase Bank, N.A.*, 665 F.3d 45, 47-48 (2d Cir. 2011) (per curiam); see also, *Galper v. JP Morgan Chase Bank, N.A.* (2nd Cir., 2015). FCRA generally preempts state statutory claims, but specific tort claims may survive.

# TCPA CLAIMS 47 U.S.C. 227, et seq.

- **KEY ISSUES:**

- Did the call go to a cell phone?
- Did caller have the consumer's consent to call?

- **Notable Opinions:**

- *Reyes v. Lincoln Automotive*, 861 F.3d 51 (2nd Cir. 2017). Consent is revocable.
- *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). Allowing revocation of consent.
- *Schweitzer v. Comenity Bank*, 2017 WL 3429381 (11th Cir. Aug. 10, 2017). Substantiates *Osorio* and idea of partial revocation of consent, but completely ignores *Reyes*.
- *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The doctrine of standing “rooted in the traditional understanding of a case or controversy, . . . developed . . . to ensure that federal courts do not exceed their authority as it has been traditionally understood.”
- *Rantz-Kennedy v. Discover Fin. Servs.*, 2013 U.S. Dist. LEXIS 86608 (D. Md. June 20, 2013). Debt collection calls made to a residence are not subject to the TCPA.

# **EFTA CLAIMS 15 U.S.C 1693, *et seq.***

- Electronic funds transfers happen when money is withdrawn from a consumer bank account – an asset bearing account. A credit card account is not an asset bearing account. Paper checks are excluded from the EFTA definition of electronic funds transfer, but caselaw indicates there may room to argue PADD transactions are subject to EFTA restrictions.
- When a consumer agrees to recurring, pre-authorized electronic funds transfers, the consumer must give written authorization and received a copy (if there are multiple payments, you generally need written authorization – for single payments, verbal authorization is fine).
- Consumer and have recourse pursuant to the EFTA if money is removed from their account without authorization – against their own bank as well as the entity that removed the funds without authorization.
- Was it a credit card or a debit card? Or some other transaction?

# EFTA CLAIMS 15 U.S.C 1693, *et seq.*

- **Notable Opinions:**
- *Bendickson v. Messerli & Kramer*, 2016 WL 4408822 (D. Minn.) The plaintiff failed to develop facts and legal argument as to why a withdrawal from the plaintiff's account presented as a paper check could be covered by the EFTA. The court held that the PADD checks were not subject to the EFTA.
- *Ferrier v. Gordon & Wong*, 2015 WL 429737 (ED CA). This was more of a sanctions case than a true EFTA analysis. But the court mentioned that a check by phone (PADD) could potentially be deemed an electronic funds transfer and confirmed that the CFPB opinion regarding verbal authorization for electronic transfers is not binding upon the court.
- *Rounds v. Maryland-National Capital Park*, 109 A.3d 639, 441 Md. 621 (Md., 2015). EFTA does not strictly preempt state claims.
- *Rantz-Kennedy v. Discover Fin. Servs.*, 2013 U.S. Dist. LEXIS 86608 (D. Md. June 20, 2013). Dismissing EFTA claims for failure to plead preauthorized recurring charges.
- Limited SC and 4th Cir. Opinions, but see, *Logan v. Instant Cash*, (D.S.C., 2017). Pro se plaintiff's EFTA claims dismissed for failure allege Defendant held depository account.

# INVASION OF PRIVACY

- **South Carolina Supreme Court opinions:**

- *Holloman v. Life Insurance Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169 (1940). SC SC for the first time recognized the tort of invasion of privacy, stating, “the right to privacy is correctly defined . . . as the right to be let alone; the right of a person to be free from unwarranted publicity.”
- *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1957). The Court state truth is not a defense and specified three distinct causes of action for invasion of privacy:
  - The unwarranted appropriation or exploitation of one's personality,
  - The publicizing of one's private affairs with which the public has no legitimate concern, or
  - The wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

# NEGLIGENT, RECKLESS, WANTON TRAINING AND SUPERVISION

- *James v. Kelly Trucking Co.*, 377 S.C. 268 (S.C. 2008).
- “[W]here an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.” *Id.* at 631.
- An employer's liability under *James* is not derived from the negligence of an employee, but is directly attributed to the employer.
- Employee negligence in and of itself is not required to maintain a cause of action for negligent training, hiring and supervision.
- South Carolina courts have not ordered nor is it required for an employee to be operating outside of the scope of his employment.

# **SC CONSUMER PROTECTION CODE**

- **SECTION 37-5-108. Unconscionability; inducement by unconscionable conduct.**
- (2) With respect to a consumer credit transaction, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction. In addition, the consumer has a cause of action to recover actual damages and, in an action other than a class action, a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars...
- (6) No action at law claiming unconscionable debt collection may be commenced in any court until at least thirty days after the facts and circumstances of any claim of unconscionable conduct in collecting a debt arising out of a consumer credit transaction has been filed in writing with the administrator of the Department of Consumer Affairs...

# SC UNFAIR TRADE PRACTICES ACT

- Conduct constitutes “trade” or “commerce” as defined by the SCUTPA § 39-5-10(b).
- Conduct was not permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.
- Conduct has substantial potential for repetition that necessarily affects the public interest of the citizens of South Carolina.
- Conduct has been repeated.
- Plaintiff suffered an ascertainable actual loss due to the willful and unlawful actions of Defendant. You really have to show actual damages.

# FACT PATTERN 1

A 72 year old man comes in to your office because he has been served with a Complaint from Bank of America.

His name is George C. Scott. The name of the Complaint is George P. Scott.

George doesn't know if this is his account or not. His wife pays the bills and, while he doesn't recall having a Bank of America account, it could be his.

Also, he recently tried to purchase a car but was denied credit.

He doesn't know what to do about the lawsuit.

Finally, he is getting lots of calls on his home and cell phone but he doesn't always answer the calls because he doesn't recognize the number. When he does answer, no one ever responds to his "hello".

How do you proceed?

## **FACT PATTERN 2**

A husband and wife come in to your office.

Ben and Mary Johnson are getting lots of telephone calls because they are behind on all of their credit cards.

Mr. Johnson has cancer.

In order to get the chemotherapy treatments he needs, the doctor's office requires they pay their co-pay and 20% upfront.

To do that, the Johnsons have maxed out their credit cards.

They do not want to file bankruptcy.

Where do you start?

# FACT PATTERN 3

A woman named Lauren Johnson contacts you about her credit. She requested a copy of her credit reports from Trans Union, Equifax and Experian.

Her Trans Union and Experian credit reports look good. However, Equifax sent her a credit report in the name of Lauren Powell with addresses in Vermont and Maine. Lauren Johnson has never lived in Vermont or Maine.

When you review the Equifax credit report, it shows that Lauren Johnson's SSN ends in 1234. However, Ms. Johnson's SSN actually ends 1243.

Ms. Johnson sent in one dispute letter to Equifax. When she received the results of investigation from Equifax, the name of the credit disclosure was Lauren Powell but with Ms. Johnson's address and phone number.

None of the tradelines on the credit report are derogatory and Ms. Johnson has not been denied credit.

Do you take the case? If so, what do you do first?

## **FACT PATTERN 4**

Theresa Smith calls your office about her Bank of America mortgage. She became disabled and, in an effort to lower her monthly bills, she requested a loan modification from Bank of America on her mortgage. BOA offered Ms. Smith a loan modification but her payments would have actually gone up each month.

Ms. Smith did not sign the loan modification or agree to accept same. She continued to make her monthly mortgage payments like she had always done. Ms. Smith did not miss any payments on her mortgage.

The month after BOA offered Ms. Smith the loan modification, she received her monthly statement showing the amount due had increased because an escrow account had been added to her loan.

Ms. Smith called BOA to correct the bill and was told to make her normal payment and that BOA would get it corrected.

For 9 months Ms. Smith continued to pay her original payment amount to BOA and BOA continued to promise to correct the statements. Unfortunately, BOA did not correct the statements and continued to bill Ms. Smith for the new payment amount.

Additionally, because the payment amount was not corrected by BOA, BOA began holding Ms. Smith's payments until the full amount of the new payment could be paid, thereby making Ms. Smith's mortgage past due.

Is there anything worth getting involved with?

## **FACT PATTERN 5**

Your hair dresser says the other day she checked her online account balance for her TD Bank checking account and noticed that there were huge withdrawals pending: 3 different transactions were pending each for \$969.00! It showed Verizon was taking the money, but she's never had a Verizon account!

She immediately called TD Bank but it was a Sunday and she went through series of representatives on the phone who told her she'd have to wait until the transactions actually posted, then go to a local branch and file a report. She was furious with this response because the transactions were still pending and she wanted them stopped completely.

On Monday she went to the local bank and confirmed the 3 transactions for \$969.00 were withdrawn from her account – overdrafting her account. She filled out some kind of report with TD Bank that day. After about a week or two she said TD Bank refunded her the money that was stolen from her account, but that didn't stop an automatic payment she had set up from bouncing – which cost her \$35 in overdraft fees and a penalty from her utility company for a late payment.

TD Bank eventually refunded her all the money debited about 12 days later. But TD failed to reimburse her overdraft fees. Plus, TD never sent her any investigation results like she requested.

Can you help her?

\*\*\*\*\*

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**A. WHAT TYPES OF CLAIMS ARE AVAILABLE TO CONSUMERS IN SC?**

**I. Fair Debt Collection Practices Act (FDCPA)**

Congress’ stated purpose for enacting the FDCPA was to “eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. §1692(e). Congress also specifically found that there was abundant evidence that the use of abusive debt collection practices was contributing to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” 15 U.S.C. §1692(a). To that end, the FDCPA expressly prohibits debt collectors from engaging in numerous specific acts or practices **and** also requires debt collectors attempting to collect consumer debts for others to affirmatively perform specific acts.

**A. Who is a Debt Collector?**

The FDCPA defines a “debt collector” to include “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 U.S.C. §1692a(6). The term also includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting

to collect such debts. *Id.* “Debt Collector” also includes attorneys so long as the attorney’s practice includes a “regular practice in debt collection.” *Piper v. Portnoff Law Assocs.*, 396 F.3d 227 (3d Cir. 2005). What constitutes a regular practice in debt collection is generally determined on a case by case basis. The FDCPA also applies to the litigation activities of attorneys who qualify as debt collectors under the Act. *See, e.g., Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229 (4th Cir. 2007); *Goldman v. Cohen*, 445 F. 3d 152, 155 (2nd Cir. 2006); *Todd v Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432, 446 (6th Cir. 2006); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 27, 232 (3rd Cir. 2005); *Thomas v. Law Firm of Simpson & Sybak*, 392 F.3d 914, 917 (7th Cir. 2004); *Johnson v. Riddle*, 305 F.3d 107, 1117 (10th Cir. 2002); *Addison v. Braud*, 105 F.3d 223, 224 n.1 (5th Cir. 1997); *but see Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003). A judgment creditor, collecting its debt in its own name does not fall under the definition of a debt collector who regularly collects debts owed or due to another. *Ramsey v. Sawyer Property Management of Maryland, LLC*, 948 F. Supp. 2d 525; 2013 U.S. Dist. LEXIS 77151, \*17 (D.C. Md., May 31, 2013). However, a judgment creditor or other entity may still fall under the definition of “debt collector” if their primary purpose is the collection of debts. *Id.*

Prior to June, 2017, it was well settled law that if an entity purchased a debt or account in default and thereafter sought to collect that debt or account, then the purchasing entity was subject to the FDCPA. In June, 2017, the Supreme Court issued a very important decision on the definition of debt collector which is causing a flurry of new litigation, motions to dismiss, etc. In ***Henson v. Santander Consumer USA Inc.***, the Supreme Court affirmed a Fourth Circuit Court of Appeals decision in finding that individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own benefit are not debt collectors under 1692a(6). *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, \*; 198 L.Ed.2d 177, \*\*; 2017 U.S. Lexis 3722, \*\*\* (2017). LVNV has been repeatedly winning this same argument, that they are simply a debt buyer collecting their own debts and thus not a “debt collector” as defined by the FDCPA. *Mitchell*

*v. LVNV Funding, LLC*, 2017 U.S. Dist. LEXIS 159528, \*23-26, 2017 WL 4303804 (N.D. Ind., Sept. 28, 2017) (holding "a company collecting purchased defaulted debt for its own account" is not a debt collector). These cases are very important to any attorney either bringing or defending claims under the FDCPA. Expect to see more and more debt buyers enter the field purchasing the debt, rather than simply accepting an assignment for collection, as for now, that offers them protection from liability under the FDCPA.

**B. What constitutes a debt under the FDCPA?**

The FDCPA defines "debt" to include 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 obligations have been reduced to judgment. 15 U.S.C. §1692a(5). "Debt" has also been held to include dishonored checks so long as the check was primarily for personal, family or household purposes. *Hamilton v. Am. Corrective Counseling Serv.*, 2007 U.S. Dist. LEXIS 11488 (N.D. Ind. Feb. 14, 2007).

The FDCPA defines "consumer" as any natural person obligated or allegedly obligated to pay any debt. 15 U.S.C. §1692a(3).

**C. Specific Violations of the FDCPA**

**a. Communication in connection with debt collection**

Numerous provisions of the FDCPA specify what conduct constitutes a violation of the Act. For example, if a debt collector is attempting to acquire location information about a consumer and fails to identify himself, fails to identify his employer if it is expressly requested, states that the consumer owes a debt, or communicates by post card, then the debt collector has violated the FDCPA and is liable to the consumer for damages. 15 U.S.C. §1692(b)(1), (2), and (4). However, other provisions of the FDCPA are not quite as clear cut. Section 1692c prohibits a debt collector from communicating with a consumer in connection with the collection of a debt at any unusual time or place, or a time or place known or which should be known by the collector to be inconvenient to the consumer. While

calls before 8:00 a.m. and after 9:00 p.m. are presumed to be inconvenient, other factual situations may also result in a violation. For example, a consumer's oral notification to a debt collector that they cannot receive calls at work has been held to entitle the consumer to relief under §1692c(a)(1). *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516, 1516 n.10 (9th Cir. 1994) (finding debt collector could be liable under § 1692c(a)(1) for contacting debtor at work after consumer orally informed collector not to do so).

**b. Harassment or Abuse**

Section §1692d prohibits a debt collector from engaging in “any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” 15 U.S.C. §1692d. Among the conduct specifically identified as harassment or abuse is the threat or use of violence, the use of obscene or profane language, the publication of a list of consumers who allegedly refuse to pay debts, the advertisement of a debt for sale in order to coerce payment, repeatedly causing a telephone to ring, and telephone calls without the disclosure of the caller's identity.

Section 1692d(5) specifically prohibits a debt collector from causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Such conduct is a violation for the FDPCA regardless of whether the calls are answered. *Prewitt v. Wolpoff & Abramson, LLP*, 2007 U.S. Dist. LEXIS 19148, 9 (W.D. NY 2007). “Whether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the patterns of calls.” *Prewitt*, 2007 U.S. Dist. LEXIS 19148, 8) (quoting *Joseph v. J.J. Mac Intyre Companies, LLC*, 238 F. Supp. 2d 1158, 1168 (N.D. Cal. 2002). Six telephone calls in a span of 24 minutes has been held to constitute harassment in violation of the FDPCA. *Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1452-53 (D. Nev. 1994). Fifty-four (54) calls to a consumer at work during a time span of approximately six months, with 24 messages actually left for the consumer has also been held to be a violation of §1692d(5) as a matter of law. *Sanchez v. Client Services, Inc.*, 2007 U.S. Dist. LEXIS 81635 (N.D.

Cal. October 29, 2007).

**c. False or Misleading Representations**

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. 15 U.S.C. §1692e. Because the FDCPA is a remedial, strict liability statute, a consumer does not need to prove deception or actual damages to recover under the FDCPA. *Knoll v. Allied Interstate, Inc.*, 502 F.Supp.2d 943, 948 (D. Minn. 2007). Additionally, it is not necessary for the violation to be intentional. *Hilburn v. Encore Receivable Mgmt., Inc.*, 2007 U.S. Dist. LEXIS 29833 (D. Or. 2007). Sixteen specific violations are enumerated in the FDCPA. The violations which seem to be the most prevalent and thus litigated most frequently are: (2) the false representation of the character, amount, or legal status of a debt; (3) the false representation or implication that a communication (whether written or oral) is from an attorney; (4) the representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person, or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action; (5) the threat to take any action that cannot legally be taken or that is not intended to be taken; (8) communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed; and (10) the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

In *Russell v. Absolute Collection Services, Inc.*, 2014 U.S. App. LEXIS 15718 (Aug. 15, 2014), the Fourth Circuit Court of Appeals considered several issues arising under the FDCPA. First, Absolute argued that Russell's was precluded from bringing claims under §1692e for false, deceptive, or misleading representations because she had failed to dispute the debt in writing according to the validation procedures outlined in 15 U.S.C. §1692g. *Russell*, 2014 U.S. App. LEXIS at \*13. The Court rejected that argument in its entirety

stating that “[n]othing in the text of the FDCPA suggests that a debtor’s ability to state a claim under §1692e is dependent upon the debtor first disputing the validity of the debt in accordance with §1692g.” *Id.* at \*13-14. “Had Congress intended for a debt collector’s liability under the FDCPA to hinge upon a debtor’s compliance with the validation provisions found in §1692g, we suspect that it would have so indicated with conspicuous language to that effect.” *Id.* at \*14. “In sum, a pre-suit validation requirement is unfounded in the text of the statute, contrary to the remedial nature of the FDCPA, and inconsistent with the FDCPA’s legislative purpose of eradicating abusive collection practices.” *Id.* at \*18-19.

## II. Invasion of Privacy

In *Holloman v. Life Insurance Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169 (1940), the supreme court of South Carolina for the first time recognized the tort of invasion of privacy, stating, “the right to privacy is correctly defined . . . as the right to be let alone; the right of a person to be free from unwarranted publicity.” *Holloman*, 192 S.C. at 458, 7 S.E.2d at 171 (citation omitted). Later, in *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1957), the Court specified three distinct causes of action for invasion of privacy:

- [1] The unwarranted appropriation or exploitation of one's personality,
- [2] The publicizing of one's private affairs with which the public has no legitimate concern, or
- [3] **The wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.**

*Meetze*, 230 S.C. at 335, 95 S.E.2d at 608 (quoting 41 Am. Jur. Privacy § 2); see *Todd v. South Carolina Farm Bureau Mut. Ins.*, 276 S.C. 284, 278 S.E.2d 607 (1981). The Court in *Meetze* further noted that truth is not a defense to an action for invasion of privacy. *Id.*

### **III. Negligent, Reckless & Wanton Training and Supervision**

South Carolina has recognized negligent hiring, supervising or training as a cause of action. *See James v. Kelly Trucking Co.*, 377 S.C. 268 (S.C. 2008). The James Court states that "where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public." *Id.* at 631. An employers liability under James is not derived from the negligence of an employee, but is directly attributed to the employer. In other words, employee negligence in and of itself is not required to maintain a cause of action for negligent training, hiring and supervision. Additionally, South Carolina courts have not ordered nor is it required for an employee to be operating outside of the scope of his employment.

In order to bring a claim for negligent or reckless and wanton training and supervision, it is important to allege a duty. Although the common law ordinarily imposes no duty to act, an affirmative legal duty may arise from statute. *Isgett v. Northstar Location Servs., LLC*, Civil Action No. 4:14-cv-4810-RBH, 2015 U.S. Dist. LEXIS 89252 (D.S.C. July 2, 2015). "To establish a defendant owes him a duty of care arising from a statute, a plaintiff must show (1) the purpose of the statute is to protect him from the kind of harm he has suffered; and (2) he belongs to the class of people that the statute is intended to protect. If a plaintiff makes these two showings, he has proven the first element of a negligence claim, i.e., that the defendant owes him a duty of care." *Isgett*, 2015 U.S. Dist. LEXIS 89252, at \*10 (D.S.C. July 2, 2015)(internal citations omitted).

### **IV Fair Credit Reporting Act (FCRA)**

Generally attorneys think of the FCRA as only applying to the credit reporting agencies, such as Equifax, Experian and Trans Union. However, debt collectors and original

creditors can be held liable as furnishers under 15 U.S.C. §1681s-2(b). Under 1681s-2(B), once a dispute is sent to the credit reporting agencies, and then forwarded on to the furnisher, there are certain duties that the furnisher must then comply with. Specifically, the furnisher must:

- (A) conduct an investigation with respect to the disputed information;
- (B) review all relevant information provided by the CRA;
- (C) report the results of the investigation to the CRA;
- (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
- (E) if an item of information disputed by the consumer is found to be inaccurate or incomplete, OR cannot be verified: modify; delete; or permanently block the reporting of the item.

Most furnishers of credit information, particularly debt collectors, do nothing to investigate a consumer's dispute. In *Johnson v. MBNA America Bank, NA*, (4<sup>th</sup> Cir, 2004), MBNA argued that it was only required to conduct a " cursory review of its records to verify the disputed information." The Jury and then the Court of Appeals both disagreed with MBNA. Where an investigation is limited to (1) confirming the name and address on the ACDV were the same as the name and address in their computer; and (2) noting that the computer contained a code that Johnson was the sole responsible party on the account, did not constitute a reasonable investigation. Similarly, in *Brim v. Midland Credit Management*, the jury determined that Midland's process of having a computer electronically review 95% of all disputes received was a willful violation of the FCRA. *Brim v. Midland Credit Management, Inc.*, 795 F.Supp.2d 1255 (N.D. Ala. 2011). In *Brim*, the evidence showed that Midland received 8000 disputes per week and that 95% of them were processed electronically by their computer simply determining whether the information received on the

ACDV matched what was contained within Midland's computer. Because no one was actually reviewing those 95% of disputes received, there was no reasonable investigation of the dispute and that was deemed to not only violate the FCRA but to willfully violate the FCRA. *Id.*

## V. TCPA

The TCPA is a remedial statute that was passed to protect consumers from unwanted automated telephone calls. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013). The TCPA makes it unlawful for any person "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automated telephone dialing system (ATDS) or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service for which the called party is charged for the call." 47 U.S.C. §228(b)(1)(A)(iii). The key factors you need to look for in determining whether you have a viable TCPA claim are: (1) whether your client granted consent for the calls, and if so, whether that consent was revoked; and (2) whether the calls were made to your client's cell phone.

The TCPA does **not** provide for liability for automated telephone calls made with "prior express consent". That one phrase is all the guidance the TCPA itself gives on the matter. The FCC has ruled that applying for a credit card is sufficient to indicate consent by a consumer to receive autodialer calls. Therefore, barring cases of mistake on the part of the creditor as to who they are calling, the more important inquiry is whether that consent has been revoked. In *Gager v. Dell Financial Services*, the Third Circuit held that the plaintiff, who had previously consented to be called in an application for a line of credit that she submitted to the defendant, was permitted to later revoke that consent. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. 2013). The Third Circuit was the first appellate court to decide the issue of whether consent could be revoked. In reviewing the TCPA, the Court held that "[a]lthough the TCPA does not expressly grant a right of revocation to consumers

who no longer wish to be contacted on their cellular phones by autodialing systems, the absence of an express statutory grant of this right does not mean that the right to revoke does not exist.” *Gager*, 727 F.3d 265, 270. In making this determination, the Court specifically looked at the common law principle that consent is revocable. “Where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 21, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The basic premise of consent under common law is that it is “given voluntarily”. *Id.* (citing *Black’s Law Dictionary*, 346 (9<sup>th</sup> ed. 2009); *Restatement (Second) of Torts* §892 (“Consent is a willingness in fact for conduct to occur.”). Further, at common law, consent may be withdrawn. *Restatement (Second) of Torts* §892A, cmt.i (1979). The Court went on to hold that as the TCPA is a remedial statute that was passed to protect consumers from unwanted contact from automated dialing systems, consumers have the right to revoke their prior express consent to be contacted on their cellular phones by autodialing systems. *Gager* 727 F.2d at 271-272. In *Osorio v. State Farm Bank, F.S.B.*, the Eleventh Circuit followed *Gager* and held that a consumer who had previously consented to receive autodialed calls, could revoke that consent. 746 F.3d 1242, 1253 (11<sup>th</sup> Cir. 2014). Thereafter, the FCC, in reliance of these two decisions, ruled that “prior express consent” was revocable under the TCPA. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7993-94 (2015).

In June, 2017, the issue of revocation became more complicated. In *Reyes v. Lincoln Auto. Fin. Servs.*, the Second Circuit considered whether a consumer who had specifically consented to autodialed calls as part of a lease could subsequently revoke that consent. *Reyes*, 861 F.3d 51, 2017 U.S. App. LEXIS 11057 (2<sup>nd</sup> Cir. 2017). In that case, the lease signed by Reyes contained a specific provision wherein Reyes agreed to receive manual or automated telephone calls from Lincoln. *Id.* at 53. The court reviewed the prior decisions of *Gager* and *Osorio*, but distinguished those cases on the grounds that the consent given by

Reyes was not freely given, but rather part of a bargained-for exchange. *Id.* at 56. Accordingly, as Reyes' consent was not given gratuitously, but rather was included in an express provision of a contract signed by Reyes, consent was not revocable. *Id.* at 58. Following the *Reyes* decision, it will be even more critical for all attorneys handling TCPA claims, either for the consumer or the business, to first consider the type of consent given, in tort or by contract, and whether that consent can therefore be revoked.

The second key factor to weigh when bringing a claim under the TCPA is what phone was called. The statute itself thankfully provides guidance in this arena. Automated or prerecorded voice calls to a cellular telephone, without prior express consent, violate the TCPA. 47 USCS § 227(b)(1)(A)(iii). Debt collection calls made to a residence are a completely different story. Courts have been beyond clear that such calls are not covered by the TCPA. *Rantz-Kennedy v. Discover Fin. Servs.*, 2013 U.S. Dist. LEXIS 86608 (D. Md. June 20, 2013). It DOES NOT matter whether these calls are automated or even made to an incorrect and unrelated individual - debt collection calls made to a residence are not covered. The reasoning behind this is because calls made to a residence and not a cell phone are governed by Section 227(b)(1)(B). This section, unlike the cellular telephone section, allows for the FCC to enact regulations to exempt calls made to a residence. Under this section, the FCC has exempted telephone calls to residential lines using an artificial or prerecorded voice without prior consent where the call is "made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation." 47 C.F.R. § 64.1200(a)(2)(iii). Debt collection calls have been held to fall into this exemption. *See Rantz-Kennedy*, 2013 U.S. Dist. LEXIS 86608 (collecting cases).

## **VI. CLAIMS for VIOLATION of THE ELECTRONIC FUNDS TRANSFER ACT (EFTA) 15 U.S.C 1693, et seq.**

Electronic funds transfers happen when money is withdrawn from a consumer bank account – an asset bearing account. A credit card account is not an asset bearing account.

Paper checks are excluded from the EFTA definition of electronic funds transfer, but caselaw indicates there may room to argue PADD transactions are subject to EFTA restrictions.

When a consumer agrees to recurring, pre-authorized electronic funds transfers, the consumer must give written authorization and received a copy (if there are multiple payments, you generally need written authorization – for single payments, verbal authorization is fine).

Consumer and have recourse pursuant to the EFTA if money is removed from their account without authorization – against their own bank as well as the entity that removed the funds without authorization.

EFTA 15 U.S.C. 1693a definition: EFTs as, any transfer of funds, other than a transaction originated by check, draft, or similar instrument, which is initiated through an electronic terminal, telephonic instrument, computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account.

The term includes, but is not limited to:

- (1) Point-of-sale transfers;
- (2) Automated teller machine transfers;
- (3) Direct deposits or withdrawals of funds;
- (4) Transfers initiated by telephone; and
- (5) Transfers resulting from debit card transactions, whether or not initiated through an electronic terminal. 12 C.F.R. § 205.3(b) (2002).

**A. Consumer Claims against the Initiating Entity re: recurring, pre-authorized EFTAs: 15. U.S.C. 1693e(a)**

A pre-authorized electronic fund transfer must be authorized in advance to recur at substantially regular intervals and such authorization must be made in writing.

No written authorization is needed for a *single* payment, and maybe not even needed for two or three subsequent payments. Only verbal authorization is required and should be memorialized by audio recording.

Therefore, if a consumer has multiple payments going out of their bank account at regular intervals (monthly payments), the consumer must have provided written authorization for those transactions. Without written authorization there is an EFTA violation against the entity initiating the withdrawals.

**B. Consumer Claims against the Bank for failure to comply with error resolution: 15. U.S.C. 1693f**

Within 60 days of receiving a bank statement that contains the error, the consumer can provide oral or written notice of the error to the Bank (Bank may require written notice within 10 days of the oral notice – but Bank must provide directions at the time of the oral notice).

Notice to the Bank must enable the Bank to identify the consumer and the account number. Notice must advise of an error. Notice should set forth reason for belief that error occurred.

Consumer must give notice of an “error”:

- Unauthorized transfer
- Incorrect transfer (wrong amount, wrong date)
- Omitting a transfer from a monthly statement
- A computational error
- Consumer’s receipt of an incorrect amount of money from an ATM
- Consumer’s request for additional information or clarification concerning an EFT

Then the Bank must:

1. Investigate the error and report the results of investigation to consumer within 10 days, and if Bank finds an error, Bank must correct the error within 1 day; OR
2. the Bank can provisionally re-credit the account within 10 days, take up to 45 days to complete the investigation, and provide Consumer full use of the funds during that time.

When can Consumer sue the Bank for failure to comply with error resolution and 1693f?

- Bank fails to (1) provisionally re-credit or (2) complete an investigation within 10 days: 1693f(a)
- Bank fails to correct the error within 1 day of finding error: 1693f(b)
- Bank fails to deliver results of investigation and provide notice of ability to obtain documents reviewed: 1693f(d)
- NOTE: 1693f(e)(1) & (2) – treble actual damages can be awarded if there was no good faith investigation performed; there was not a reasonable basis for finding there was no error; or knowingly and willfully finding no error when such a conclusion could not be drawn from the information available.

**C. Consumer Claims against the Initiating Entity for Unauthorized Withdrawal:  
15 U.S.C. 1693a(12) and 1693m**

1693a(12): the term “unauthorized electronic fund transfer” means an electronic fund transfer from a consumer’s account initiated by a person other than the consumer without actual authority to initiate such transfer and from which the consumer receives no benefit, but the term does not include any electronic fund transfer (A) initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer’s account by such consumer, unless the consumer has notified the financial

institution involved that transfers by such other person are no longer authorized, (B) initiated with fraudulent intent by the consumer or any person acting in concert with the consumer, or (C) which constitutes an error committed by a financial institution.

**D. Damages 1693m - Very similar to the FDCPA statutory damages:**

- Actual damages and statutory damages not less than \$100 nor greater than \$1,000. The factors used to determine amount are also very similar (persistence of non-compliance, nature of non-compliance, number of persons affected, and extent to which the non-compliance was intentional).
- Attorney fees and costs.
- NOTE: Treble damages under 1693f(e) are only actual damages.

**E. It is critical for the Consumer to understand exactly how they agree to make a payment.**

*Debit cards = EFTA claim*

*Credit cards ≠ EFTA claim*

PADDs v. Electronic Fund Transfers:

A pre-authorized demand draft (PADD) is known by several names: pre-authorized draft, speed pay, auto pay, phone checks and checks by phone. The use of PADDs is governed by the Uniform Commercial Code and is a draft created under § 3-402(a) of the UCC, which provides,

If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the “authorized signature of the represented person” and the

represented person is liable on the instrument, whether or not identified in the instrument. U.C.C. § 3-402(a) (2002).

A debt collector can create a PADD on behalf of the consumer as long as the collector is authorized by the consumer to do so. U.C.C. § 3-402(a) (2002). The collector must be able to prove he or she received the authorization of the consumer. Many collectors record the authorization with the consent of the consumer, or send a notice to the consumer stating that the authorization was received and the check will be deposited as agreed.

Two important decisions re: PADDs and the EFTA:

*Ferrier v. Gordon & Wong*, 2015 WL 429737 (ED CA). The plaintiff failed to develop facts and legal argument as to why a withdrawal from the plaintiff's account presented as a paper check could be covered by the EFTA. The court held that the PADD checks were not subject to the EFTA.

*Bendickson v. Messerli & Kramer*, 2016 WL 4408822 (D. Minn.). This was more of a sanctions case than a true EFTA analysis. But the court mentioned that a check by phone (PADD) could potentially be deemed an electronic funds transfer and confirmed that the CFPB opinion regarding verbal authorization for electronic transfers is not binding upon the court.

F. **Defenses to EFTA:**

- Bona Fide Error Defense is available: 1693m(c). Mirrors FDICPA BFE Defense.
- Acts committed in good faith conformity with any rule, regulation, or interpretation of the rule by Bureau, Board, CFPB or Federal Reserve System: 1693m(d)
- Spokeo opinion could undermine a claim under 1693e(a) for no written authorization of recurring payments. Plaintiff must be prepared to articulate an injury if the defense presents a recording of consumer agreeing to the transfers.

## **WHAT DO I DO AFTER I HAVE FILED THE CLAIMS?**

Regardless of whether you filed the claims as counterclaims or as a separate lawsuit, they now proceed fairly similarly.

1. Issue Discovery - Some sample discovery requests are set forth below.
2. Notice Depositions - Be prepared to take not only the 30(B)(6) witness but also any other witness of the debt collector who may have been responsible for signing the affidavit filed with their complaint; who was responsible for handling ACDVs received from the credit reporting agencies; and who is responsible for maintaining their autodialer.
3. Push, push, push.

These cases take work. Particularly if you filed a separate action in Federal Court, you need to be ready to hit the ground running.

**SAMPLE DISCOVERY INTERROGATORIES AND REQUESTS FOR  
PRODUCTION**

**INTERROGATORIES**

1. Please identify the name, address, job title, and job duties for each and every person with factual information concerning the following:
  - a. All communications, whether written or by telephone, made to the Plaintiffs;
  - b. All efforts to collect on the Plaintiffs' alleged account;
  - c. The Defendant's policies and procedures regarding collection of accounts;
  - d. The Defendant's policies and procedures for monitoring collectors and their collection activities, including, but not limited to, telephone calls;
  - e. The training, supervising and monitoring of collectors;
  - f. The Defendant's use of an autodialer or predictive dialer; and
  - g. The collection activities conducted with respect to the Plaintiffs.
2. Please identify each and every person who spoke with, called, or contacted the Plaintiffs, including their names, all assumed names or aliases, addresses, and home and business phone numbers, the dates they called, the reason for such call or contact, and what specifically was said to the Plaintiffs. State the entire, full, and total conversation.
3. State whether you or your agent, servant or employee has contacted any third persons, including the Plaintiffs' neighbors or relatives at any time in connection with the Plaintiffs' alleged account or for any other reason.
  - (a) State the dates, name of each person making the call or calls, the purpose of each such call, and the details of what was said between said agent, servant or employee and said third person.
4. List and describe the identity and location of each and every policy, procedure, guideline, or any other written or electronic document, however named, that was

- applicable to collections at any time from January 2008 to the present.
5. State the name, address and qualifications of any and all experts you have retained, hired or consulted in this case, which are expected to testify. For each,
    - (a) State the subject matter on which any and all such expert witnesses are expected to testify.
    - (b) Summarize the substance of the facts and opinions to which any such expert witness is expected to testify, including in that summary the grounds for each opinion.
    - (c) List all texts, articles, manuals, or any other materials used by the expert in preparation of this matter.
  6. State the names, addresses, telephone numbers and places of employment of all persons who have factual knowledge regarding the facts and circumstances involving this lawsuit.
  7. State the name and address of any and all witnesses that the Defendant has contacted in connection with this case including, but not limited to, those that are expected to testify at the trial of this case.
  8. Identify the local and long-distance telephone carriers, and account numbers, used or contracted by you or your agents for any phone line, trunk line or number used to make any calls by you or on your behalf within two years of the date this lawsuit was filed.
  9. Describe any and all methods by which you obtain permission to deliver prerecorded voice calls or automatically dialed calls to any person, regardless of whether you believe you are required to obtain such permission, and identify all persons involved in obtaining such permission.
  10. Identify and describe fully the role of all persons or entities who assist in any way whatsoever in the answering or receiving of incoming calls to you or your agents in response to any prerecorded voice call or automatically dialed call delivered by

you or on your behalf within two years of the date of the filing of this lawsuit, and specify the time period(s) that each person provided this assistance.

11. Identify all persons or entities who own any part of any of the equipment used in any part of the process or procedure of delivering any automatically-dialed or computer-dialed or prerecorded voice call by or for you within two years of the date this lawsuit was filed.
12. Describe all facts upon which you rely as a basis for any position you may hold that you are not responsible or liable for the actions alleged and described in the Complaint.
13. Identify all telephone numbers you dialed to reach Plaintiffs.
14. Explain how and when Defendant obtained each of the telephone phone numbers responsive to interrogatory #14.
15. Identify all credit reports, skip-tracing reports or Accurint reports obtained relating to Plaintiffs and for each explain the source of Defendant's authority to obtain the same.
16. Identify and explain all policies, practices, and procedures regarding Defendant's use of automatic dialing systems, predictive dialers, and equipment with the capacity to dial telephone numbers without human intervention and the complete history of each. Please include a detailed description of each policy, practice, or procedure, the date it was first considered, the date it was implemented, all persons involved in its consideration, implementation and, if applicable, termination.
17. Identify and explain all policies, practices and procedures regarding calls made by Defendant to cellular telephones and the complete history of each. Please include a detailed description of each policy, practice, or procedure, the date it was first considered, the date it was implemented, all persons involved in its consideration, implementation and, if applicable, termination.
18. State whether you have ever taken any measures or action to attempt to identify

whether any telephone number was a cellular telephone number. If so, please identify with specificity what measure(s) or actions you took, who took the measure(s) or actions, any third party involved, why the measure or action was taken and what resulted from the measures or actions. If not, please explain why not.

19. Identify the owner, manufacturer, installer, or any other entity responsible for purchasing, installing, maintaining, updating and/or programming all automatic dialing systems, predictive dialers and equipment with the capacity to dial telephone numbers without human intervention used by Defendant.
20. List each and every lawsuit and/or counterclaim filed from January 1, 2009 through the present, against the Plaintiff involving claims related to collection activity by the Plaintiff or the Plaintiff's filing of allegedly false affidavits with collection lawsuits. For each provide the style of the case, the attorneys representing the Defendant(s), the attorneys who represented the Plaintiff, the status of the case, i.e. whether it is pending or has been settled, and the basis of the claims raised in the lawsuit.
21. List each and every complaint filed with the South Carolina Department of Consumer Affairs against the Plaintiff from January 1, 2009 through the present. For each such complaint, list the date of the complaint, the basis of the complaint, and the status of the complaint.
22. Describe all facts upon which you rely as a basis for any position you may hold that you are not responsible or liable for the actions alleged and described in the Defendant's counterclaims.
23. Please describe the pay scale, any incentive, bonus, or other factors affecting compensation for the person(s) who conducted or supervised any collection activity relating to the Defendant.
24. State the address, city, state, and phone numbers for all locations of the Defendant

where the Plaintiff's employees who are responsible for collection of accounts are located.

### **REQUESTS FOR PRODUCTION**

1. The original file, including original file folder, all memoranda, statements, letters, notations, reports, reports and recordings of telephone calls, records of all calls, or other written memoranda, and all communications in Defendant's files concerning or pertaining to the Plaintiffs, in whatever form the name is reflected in Defendant's records.
2. Any and all collection training materials, manuals, written procedures and instructions utilized by the Defendant for the two (2) years prior to the filing of the lawsuit herein which in any way relate to the collections of accounts.
3. Please do a manual and computer search (irrespective of date) for and provide all documents, emails or things in your possession that mention the following specific terms:
  - a. "Telephone Consumer Protection Act";
  - b. "TCPA";
  - c. "autodialer";
  - d. "auto" within 5 words of "dial"; and
  - e. "predictive dialer".
4. Each and every manual, collectors' handbook, document, book, record, instruction, regulation, and memoranda concerning collections from consumers, and collections on consumer accounts, including, but not limited to, telephone calls and written communications, which was in effect and/ or utilized by this Defendant at any time during the two (2) years prior to the filing of this lawsuit.
5. Any and all documents, written statements or reports, records of any kind in your possession which relate to the collection of any alleged debt from the Plaintiffs.
6. All interoffice communications concerning, relating to, or pertaining to the

Plaintiffs.

7. Any and all documents, tape recordings, computer notes, logs, letters, and any other documents or records reflecting attempts to collect sums of money from the Plaintiffs.
8. Copies of any and all computer notes, computer screens, and every computer entry or reference regarding the Plaintiffs, the account, or both.
9. Copies of each and every note, be it computer generated, handwritten, orally recorded or part of a computer screen, noting each and every communication which in any way references notes or documents regarding the Plaintiffs or the account made the basis of this lawsuit.
10. All computer printouts or sheets or copies of computer screens regarding the Plaintiffs, the Plaintiffs' account, collection activity on the account, and the alleged debt.
11. All code indexes for computer printouts, including abbreviation and symbol lists, computer training and procedures manuals, and computer indexes, if separate from policies and procedures manuals previously requested, which were in effect at any time during the two (2) years prior to the filing of this lawsuit.
12. All material, including video and audio tapes/CDs/DVDs, pertaining to training for officers, supervisors and employees of the Defendant regarding collections. This request is limited to the time period of two (2) years prior to the filing of this lawsuit up to the present date.
13. All letters, phone logs, and documents between Defendant and any other person or persons or entity regarding the Plaintiffs and collection of an alleged debt.
14. Provide a list of all employees of this Defendant who engaged in the collection of the alleged debt from the Plaintiffs. Include a job description for each such individual.
15. All manuals, guidelines, instructional literature or other documents relating to the

- maintenance of policies, and/or procedures of this Defendant adapted to avoid any violation of a person's right to privacy.
16. All manuals, guidelines, instructional literature or other documents relating to the maintenance of policies, and/or procedures of this Defendant adapted to avoid any violation of the Fair Debt Collection Practices Act.
  17. Copies of any and all documents received from any source which evidence the purchase or receipt of any account to be owed by Plaintiffs.
  18. Copies of all recordings of conversations between the Plaintiffs and Defendant or their employees.
  19. Copies of all video tape recordings made to monitor the activities of collectors while they are attempting to collect debts. This request is limited to the time period of two (2) years prior to the filing of this lawsuit up to the present date.
  20. All documents between the Defendant and any other person(s) or entity regarding the Plaintiffs and collection of an account the subject of this litigation.
  21. Copies of all reports and documents utilized by an expert which Defendant proposes to call at trial.
  22. The salary, commission, and bonus records for all collectors, supervisors, and employees who engaged in the collection of the alleged debt from the Plaintiffs. This request is limited to one (1) year prior to the filing of this lawsuit.
  23. All manuals and guidelines governing the payment of salary, commission, and bonuses for employees, collecting money in your collection operations, including collectors, supervisors, directors, attorneys, and persons in control, which were in effect at any time during the two (2) years prior to the filing of this lawsuit.
  24. Produce and attach a true and correct copy of each collector's personnel, payroll, and training files, and all complaint letters received regarding each collector that has ever spoken with or communicated with the Plaintiffs.
  25. Copies of any litigation filed against the Defendant within the last two (2) years

- alleging invasion of privacy, Telephone Consumer Protection Act violations or violations of South Carolina law with respect to collection efforts made by Defendant.
26. A copy of each and every monitoring procedure, including all form documents, maintained by the Defendant during the two (2) years prior to the filing of this lawsuit.
  27. A copy of each and every form used to monitor the collection of accounts during the two (2) years prior to the filing of this lawsuit.
  28. A copy of each and every monitoring form completed during the two (2) years prior to the filing of this lawsuit.
  29. A copy of each and every complaint filed against the Defendant with the Federal Trade Commission, Consumer Financial Protection Bureau, United States Attorney General and/or all states Attorneys General from 2011 to the present.
  30. A copy of all complaints received from Better Business Bureaus from 2011 to the present complaining about the collection activities or conduct of the Defendant and/or its collectors.
  31. All invoices for telephone equipment or software, including but not limited to automatic dialing systems, predictive telephone dialing systems, and equipment with the capacity to dial telephone numbers without human intervention.
  32. All documents from any source that concern the legality or propriety of making telephone calls to customers' cellular phones.
  33. All documents concerning or relating to any effort, ever, by Defendant to determine a process, policy or practice whereby it could determine whether a telephone number is or was a cellular telephone number.
  34. All documents concerning or relating to any effort, ever, by Defendant to determine a process, policy or practice whereby Defendant could comply with the TCPA.

35. All insurance policies that could possibly afford coverage with respect to the matters complained of in this case together with all correspondence accepting or declining coverage or reserving rights with respect thereto.
36. All statistics, studies and reports concerning the use of telephony or the use of automatic telephone dialing systems, predictive telephone dialing systems, or equipment with the capacity to dial telephone numbers without human intervention.
37. All documents relating to the maintenance by Defendant of policies, practices, or procedures adapted to avoid calling persons who did not consent, or revoked consent, to be called on their cellular telephones.
38. All documents setting forth defendant's document destruction and retention policies, or any changes made to the same, since January 1, 2009.
39. Your annual financial statements, annual reports, semiannual and quarterly financial statements, credit applications and tax returns for the last three years.
40. If Defendant contends Plaintiffs consented to receive the automated placement of calls to their cellular telephone, then all documents evidencing that consent.
41. If Defendant contends Plaintiff furnished their cellular telephone number to Defendant or any entity, then all documents evidencing that fact.
42. All documents that Defendant reviewed or relied upon in answering the Interrogatories Plaintiffs directed to Defendant.
43. All documents that identify persons involved in Defendant's decision to use predictive dialers.
44. All documents which describe how to determine if a phone number belongs to a cellular telephone.
45. Copies of any and all documents regarding the Plaintiff's purchase and/or receipt of the subject account, including the actual purchase agreement and listing of accounts included in the purchase.

46. All documents evidencing Plaintiff's ownership of the account the subject of this litigation.
47. Copies of any and all documents which evidence or govern the agreement between the Plaintiff and the entity from which the account the subject of this litigation was received.
48. All documents between the Plaintiff and any other person(s) or entity regarding the Defendant and collection of an account the subject of this litigation.
49. Copies of all reports and documents utilized by an expert which Plaintiff proposes to call at trial.
50. All documents received by this Plaintiff from any other source pertaining to the Defendant, and/or the account the subject of this litigation.
51. Produce a copy of the alleged account application, or any other document used to open the account, showing Defendant's signature.
52. Produce copies of all statements showing all charges added to the account from the date the account was opened through the date of charge-off.
53. Produce copies of all payments received from the Defendant to the Plaintiff regarding the account that is the subject of this litigation.
54. Produce copies of all payments received from the Defendant to the Plaintiff's alleged predecessor-in-interest regarding the account that is the subject of this litigation.
55. Produce copies of all documents mentioned in response to the Defendant's First Interrogatories to Plaintiff.
56. Any and all training manuals, policy and procedure manuals, handbooks, packets, and any other documents used to train employees in the following areas: (Said request covers the three (3) years prior to the filing of this lawsuit up to this date.)
  1. Handling of collections from consumers;
  2. Communications with consumers, whether by phone or in person;

3. Collections activities and collection procedures and practices;
4. Compliance with the Fair Debt Collection Practices Act; and
5. Compliance with the South Carolina Consumer Protection Act.



# South Carolina Bar

Continuing Legal Education Division

## **2018 SC BAR CONVENTION**

### **Consumer Law Section**

**Thursday, January 18**

The Future of Credit

*Kelly H. Rainsford*



# Consumer Credit in South Carolina

Kelly H. Rainsford

*Deputy of Regulatory Enforcement/General Counsel*

***This presentation is not meant to serve as a substitute for reading the various laws discussed, seeking legal counsel or otherwise requesting Department guidance and/or interpretations on the laws it administers and enforces. The presentation merely serves as an introduction and overview.***

# History of Consumer Credit

- Evolution of Types of Consumer Credit
  - Pawnbrokering
  - Small Loan Companies
  - Sales Finance
  - Consumer Loans Offered by Banks
  - Credit Cards
  - Payday Loans

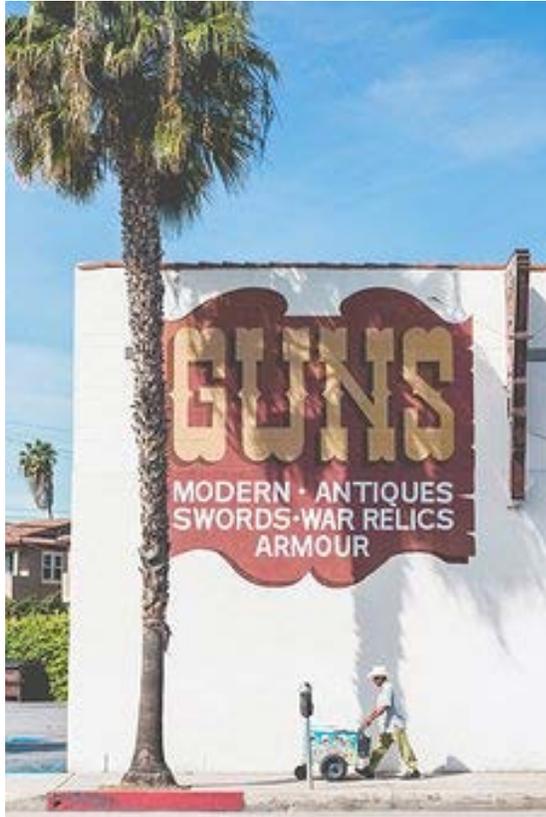


# Evolution of Types of Consumer Credit - Pawnbrokering

- Common throughout Europe
- Used by the disenfranchised and royals alike
- Active pawnbrokering families:
  - Medici
  - Lombard



# Evolution of Types of Consumer Credit - Pawnbrokering



- New York City started regulating pawnshops in 1812
- In 1818, there were **10** pawnbrokers in New York City.
- In 1897, there were **134** pawnbrokers in New York City.

# Evolution of Types of Consumer Credit - Pawnbrokering

Pawnshops in 1897	
New York City	134
Philadelphia	92
Chicago	68
New Orleans	7
Omaha	22
San Francisco	243

# Evolution of Types of Consumer Credit - Pawnbrokering

- Pawnbrokering reached its height in U.S. in 1911 (over 2,000 pawnshops in over 300 cities)
- Typical customer
- Most common type of collateral



# Evolution of Consumer Credit – Small Loan Companies



1816: Philadelphia Savings  
Fund Society

# Evolution of Consumer Credit – Small Loan Companies

First Advertisements for Chattel Loans	
Chicago	1869
Boston	1873
Milwaukee	1875
Minneapolis	1878
New York City	1885

# Evolution of Consumer Credit – Small Loan Companies



Household Finance Company

- Largest small loan company in U.S. in 1900

# Evolution of Consumer Credit – Sales Finance



# Evolution of Consumer Credit – Sales Finance

## Borax Stores

“Cheap, shoddy, overpriced goods sold to low- and moderate-income customers on installments through high pressure sales tactics.”

Lendol Calder – Financing the American Dream

# Evolution of Consumer Credit – Sales Finance



Spiegel

# Evolution of Consumer Credit – Sales Finance



- 1908: Ford Motor Co. introduced Model T
- 1913: Assembly Line
- 1916: Price of Model T decreased from \$860 to \$360
- First known automobile financier: L.F. Weaver in California

# Evolution of Consumer Credit – Sales Finance

1919: General Motors starts General Motors Acceptance Corporation

1923: Ford starts its Weekly Purchase Plan

1927: Ford starts financing arm, Universal Credit Corporation (sold in 1932)

1959: Ford Motor Credit Corporation founded



# Evolution of Consumer Credit – Consumer Loans Offered by Banks

Banks Begin Offering Consumer Loans	
1920	Bank in Bridgeport, CT is first to advertise personal loans
1924	New Jersey bank opens personal loan department
1928	National City Bank of New York (nation's largest bank) opens personal loan department

# Evolution of Consumer Credit – Consumer Loans Offered by Banks

## Banks Offering Consumer Loans (cont.)

1929	298 banks had personal loan departments
1936	685 banks made consumer loans
1936	Banks' personal loans balances were more than those of credit unions and were almost as much as small loan companies
1939	First year that banks made more consumer loans than small loan companies
1940	First year that banks became largest holder of sales finance paper

# Evolution of Consumer Credit

## World War II

- Consumer lending goes down for 2 reasons:
  - Rationing
  - Inflation



# Evolution of Consumer Credit – Credit Cards

- To get around Regulation W (discussed later), stores offered revolving credit using “Charga-Plates”
- A Charge Plate revolving credit account was either store specific or limited to a small group of stores



# Evolution of Consumer Credit – Credit Cards



# Evolution of Consumer Credit – Credit Cards



## Diners' Club

- Paper, not plastic
- Balances had to be paid in full each month
- Annual Member Fee: \$3
- Transaction Fee: 7%

# Evolution of Consumer Credit – Credit Cards

## American Express

- 1850: Formed to ship packages
- 1891: Starts issuing travelers checks
- 1958: introduces first plastic credit card



# Evolution of Consumer Credit – Credit Cards

- 1959: Introduction of BankAmericard
  - Only available to Bank of America customers, so only available in California
- 1966: BankAmericard goes national; Group of California banks start MasterCharge
- 1970: BankAmericard program sold off to other banks



# Evolution of Consumer Credit – Credit Cards



- 1977: BankAmericard becomes VISA; MasterCharge becomes MasterCard
- 1986: Sears starts the Discover Card through a subsidiary bank
- 1987: American Express enters the revolving credit market with its Optima card

# Evolution of Consumer Credit – Credit Cards

Percentage of Americans with Bank Credit Cards		
1968	17%	(62% of Americans have a gas credit card)
1973		(Citibank starts issuing credit cards to non-customers)
1979		(50% of Americans have a Sears card and 30% have a J.C. Penney card)
1980	35%	
1998	66%	

# Evolution of Consumer Credit – Payday Loans

- 1990 = Zero!
- 2003 = 14,000



# History of Consumer Credit

- Evolution of Lending Laws
  - Arthur Ham's 1913 Model Law
  - Uniform Small Loan Act
  - Regulation W
  - SC Consumer Protection Code



# Evolution of Lending Laws

## *Russell Sage Foundation*

“...to make a study of the Remedial Loan Associations in this country, to give advice to societies already established as to methods of work, and to give advice to those who wish to know about the formation of such societies.”

# Evolution of Lending Law – Arthur Ham’s 1913 Model Law

- Licensure and bonding for all lenders charging more than the banking rate
- Maximum rate of 2% to 3% a month
- State supervision of lenders
- Adequate penalties for noncompliance
- Wife and employer consent to wage assignments
- Copies of the law being provided to borrowers



# Evolution of Lending Law – Uniform Small Loan Act

- 1913: Arthur Tolman convicted of usury
- 1914: New Jersey passed the Egan Act
- 1916: American Association of Small Loan Brokers is formed
- 1916: Uniform Small Loan Act
- 1932: 25 states had some version of the Act

# Evolution of Lending Laws

## REGULATION W

- Applied to installment sales only (not direct loans)
- Required down payments between 15% and 33%
- Set maximum term for financing at 18 months

# Evolution of Lending Laws – SCCPC



- 1968: Congress passed Consumer Credit Protection Act
- 1974: S.C. General Assembly passed Consumer Protection Code

# Evolution of Lending Laws – SCCPC

- Became effective 1/1/1975
- Combination of 1968 and 1974 versions of Uniform Consumer Credit Code (“UCCC”)
- Created the Department of Consumer Affairs

# Future of Consumer Credit

- Litigation Funding
- Probate Lending
- Future Income Investment Agreements
- Lead Generators
- Small Dollar Loan Rule



# Litigation Funding



- What is Litigation Funding?
- AKA:
  - “third-party litigation financing”
  - “lawsuit lending”
  - “pre-settlement funding”
  - “litigation funding”
  - “non-resource cash advances
- Key Consideration: Is it a loan?

# Litigation Funding - *What is a “consumer loan”?*

“**Loan**” includes, among other activities, “the creation of debt by the lender’s payment of or agreement to pay money to the debtor or to a third party for the account of the debtor, and “the forbearance of debt arising from a loan.”

§ 37-3-106(1) & (4)

A “consumer loan” is defined as:

a loan made by a person regularly engaged in the business of making loans in which:

- (a) the debtor is a person other than an organization;
- (b) the debt is incurred primarily for a personal, family, or household purpose;
- (c) either the debt is payable in installments or a loan finance charge is made; and
- (d) either the principal does not exceed twenty-five dollars [ninety thousand as adjusted] or the debt is secured by an interest in land.

“**Loan finance charge**” is defined as:  
The sum of all charges **payable directly or indirectly** by the debtor and **imposed directly or indirectly by the lender** as an incident to the extension of credit, including any of the following types of charges which are applicable: interest or any amount payable under a point, discount or other system of charges, however denominated . . .

§ 37-3-109(a)

*Emphasis added.*

S.C. Code Ann. Section 37-3-104

# Litigation Funding (cont.)

- Litigation funding product background:
  - **advancement of funds** to a plaintiff in a civil action for the purpose of paying living expenses by someone who is not a party or who does not otherwise have a role in the lawsuit.
    - See Oasis Legal Fin. Group, LLC v. Suthers, 2013 COA 82, P2 (Colo. App. 2013); American Legal Finance Association, <http://www.americanlegalfin.com> (last accessed October 28, 2014).
  - The contract delineates a **sum certain due** pursuant to a delineated schedule after a settlement or court award and net litigation proceeds are paid.

# Litigation Funding (cont.)

- Some payment schedules include an **increased amount** due over time while others impose a **monthly use fee** in addition to the initial amount funded.
  - Odell v. Legal Bucks, 665 S.E.2d 767, 770-771 (N.C. App. 2008), *review denied* 676 S.E.2d 905 (N.C. 2009); Fausone v. U.S. Claims, Inc., 915 So.2d 626, 627 (Fla.App.2005).
- Interest rates in these transactions can reach the **triple digits**.
  - *See* Odell, 665 S.E.2d at 770-771 (Interest rate capped at 325% of loan amount); Fausone, 915 So.2d at 627 (Interest rate imposed exceeded 200%).
- If the consumer receives less than the amount owed, the full amount received is due to the litigation funder, while no monies are required to be paid if the consumer fails to collect any funds.

• *See* Oasis, 2013 COA at P3 (Colo. App. 2013); Odell, 665 S.E.2d at 770-771.

# Litigation Funding (cont.)

- South Carolina Supreme Court found the practice of advancing funds to workers in exchange for a portion of their unearned wages amounted to a loan, as opposed to a “bill of sale” as argued by the plaintiff.
  - Martin v. Pacific Mills, 160 S.C. 458, 158 S.E. 831 (1931).
  - *“the scheme of the plaintiff was cunningly devised, but thinly veiled, to make what was plainly a loan a bill of sale—an attempted evasion of the usury law.”* 160 S.C. at 462, 158 S.E. at 832.
- No unconditional obligation to repay
  - B4 exemption, Code covered pawn transactions, transactions in which the consumer is not “unconditionally obligated” to repay the loan/ redeem the pawn.

• § 37-1-202(4); Administrative Interpretation No. 1.202-8108 (September 8, 1981); *see also* Unif. Consumer Credit Code § 1.202(4), 7 U.L.A. 511 (1997).

# Litigation Funding (cont.)

- Refund anticipation loans = subject to the Code.
  - Income Tax Buyers v. Hamm
    - The transaction was structured in a manner where the consumer if, and only if, the tax refund was not received from the government within a specified time period, would be obligated to pay what was borrowed.
    - Viewing the true substance of the transaction as opposed to the form, the court stated the absence of such an obligation by the consumer would not have convinced the judge to rule otherwise.
      - = Loans
      - *see also State ex rel. Salazar v. Cash Now Store, Inc., 31 P.3d 161 (Colo. 2001) (Colorado Supreme Court adopted the Hamm reasoning in holding a similar tax refund advancement was a loan as opposed to a sale and assignment).*

# Litigation Funding (cont.)

- The broad concept of a “loan” under the UCCC encompasses those circumstances where the consumer does not have an unconditional obligation to repay.
- Based on the information reviewed, the loans also meet the definition of “consumer loan.”
  - The persons engaging in lending do so on a regular basis;
  - the debtors are consumers using the funds for medical expenses, to avoid foreclosure or other personal, family or household purposes;
  - a finance charge is imposed either in the form of an interest charge or other additional amounts added to the initial sum advanced; and
  - the monies given to the consumer do not exceed \$90,000.

# Probate Lending

- Heirs or beneficiaries sell their future inheritance rights for cash
- Nicknamed “Catching bargains”
- Horton & Chandrasekher, Probate Lending, Yale Law Journal, Vol. 126, 2016



# Probate Lending

- Relevant considerations:
  - Transfers between family members vs. Transactions involving 3<sup>rd</sup> parties
  - Timing of assignment

# Probate Lending

- California enacted Section 11604.5:
  - Requires probate lenders to file contracts within 30 days after they are signed
  - Permits judges to refuse to honor deals if they are “grossly unreasonable”

# Probate Lending

- In California, not considered a loan because no requirement to repay
- In South Carolina, is considered a loan

# Probate Lending

- Kidd, Clarifying the “Probate Lending” Debate: A Response to Professors Horton and Chandrasekher, 2016
- Challenges finding that transactions are loans, etc.

# Future Income Investment Agreements

What is a Future Income Investment Agreement (“FIIA”)?

- Advancement of funds to a consumer for the usual purpose of paying college-related expenses (i.e., tuition, books, room and board, etc.)
- Repayment Structure
  - Consumer is required to pay a fixed percentage of his or her future income for a specified period
  - Amount advanced **not** taken into consideration when determining required payments
  - Installments based on consumer’s income (i.e., gross wages, salaries, commissions, and benefits from pension plans)
  - Total amount repaid varies based on flow of consumer’s income during the repayment period (may be more or less depending on periods of employment vs. unemployment)



# Future Income Investment Agreements

A FIIA **is a loan** and further meets the definition of a **consumer loan** as:

- The persons engaging in lending do so on a regular basis;
- The debtors are consumers using the funds for tuition, housing, or other personal, family or household purposes;
- The consumer repays the loan in installments upon which a loan finance charge is imposed (the difference between the amount advanced and the amount paid by the debtor); and
- The monies given to the consumer do not exceed \$90,000.



# Future Income Investment Agreements



Implications of FIAs being loans:

- Persons offering and/or providing FIAs must comply with all applicable provisions of the Code
- Due to the requirement to interpret the Code's provisions liberally, transactions similar to FIAs may constitute loans pursuant to the Code
- The Consumer Protection Code contains limitations on agreements
  - One such provision prohibits a lender from taking an assignment of earnings for payment or as security for a consumer loan debt. § 37-3-403(1); *See also* § 37-2-410, -710.
  - Pursuant to a FIA, a consumer transfers the right to a specified percentage of the debtor's future, unpaid earnings in exchange for an amount advanced by the lender.
  - The Department finds such practice is prohibited in South Carolina.

# Lead Generators (cont.)

## Minnesota Debt Settlement Statute: 332B.02

"Lead generator" means a person that, without providing debt settlement services:

- (1) solicits debtors to engage in debt settlement through mail, in person, or electronic Web site-based solicitation or any other means,
- (2) acts as an intermediary or referral agent between a debtor and an entity actually providing debt settlement services, or
- (3) obtains a debtor's personally identifiable information and transmits that information to a debt settlement services provider.

## Lead Generators (cont.)

Utah Debt Management Services Act: 13-42-102 (12)

"Lead generator" means a person who, in the regular course of business, supplies a provider with the name of a potential customer, directs a communication of an individual to a provider, or otherwise refers a customer to a provider

# Lead Generators (cont.)

Indiana Debt Management Services Act: 28-1-29-1(21)

"Lead generator" means a person that, in the regular course of business:

- (A) supplies a debt management company with the name of a potential contract debtor;
- (B) directs an individual to contact or communicate with a debt management company; or
- (C) otherwise refers a debtor to a debt management company

# Lead Generators (cont.)

## Washington Small Loan Agent Rule: WAC 208-630-110

- "Small loan agent services" include, but are not limited to:
  - (a) Marketing and advertising small loans;
  - (b) Collecting nonpublic personal information from consumers in anticipation of selling the information to potential licensed lenders or other entities providing small loan agent services;
  - (c) Assisting consumers in completing small loan documentation;
  - (d) Providing required applicable state and federal disclosures in connection with small loans; and
  - (e) Collecting on small loans.

# Lead Generators (cont.)

FTC

Lead generation is the practice of identifying or cultivating consumer interest in a product or service, and distributing this information to third parties.

# Lead Generators (cont.)

- Lead generators:
  - Work for
    - Insurance companies
    - Finance companies (small loans, mortgage)
    - Preneed funeral contracts
    - Student loans
  - Use
    - Snail Mail
    - Phone
    - E-mail
    - Banner Ads/ Internet ads
- Follow the Lead
  - [www.ftc.gov/news & events/ events calendar –10/30/15](http://www.ftc.gov/news&events/events-calendar-10/30/15)

**2015 BENEFIT INFORMATION  
FOR SOUTH CAROLINA CITIZENS ONLY**

You may qualify for a state-regulated program to pay for your final expenses.  
It is important you know how to qualify for this benefit available to you. This benefit will pay for 100% of all funeral expenses up to \$35,000. This payment is tax-free for SOUTH CAROLINA residents.  
You are entitled to receive no-cost information as a resident of SOUTH CAROLINA. IMPORTANT - Return this postage-paid card within 5 days.

Name \_\_\_\_\_  
Home Address \_\_\_\_\_  
(Must provide physical home address. No PO boxes, please)  
Phone (803) \_\_\_\_\_  
(Please include area code & phone number to ensure proper routing)  
Age 81 Spouse's Age \_\_\_\_\_  
Spouse's Name Deceased  
Not to be used without approval by any government agency.

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**Follow the Lead**

An FTC Workshop on Lead Generation

# Small Dollar Loan Rule

- 10/5/2017: CFPB issues first part of final rule
- Addresses payday and car title lending

# Small Dollar Loan Rule (cont.)

- Ability-to-repay determination
  - Full-payment test
  - Principal-payoff option (alternative for certain short-term loans)

# Small Dollar Loan Rule (cont.)

- Less Risky Loan Options
- Reporting Requirements
- Penalty-Fee Prevention

# QUESTIONS?





# South Carolina Bar

Continuing Legal Education Division

## **2018 SC BAR CONVENTION**

### **Consumer Law Section**

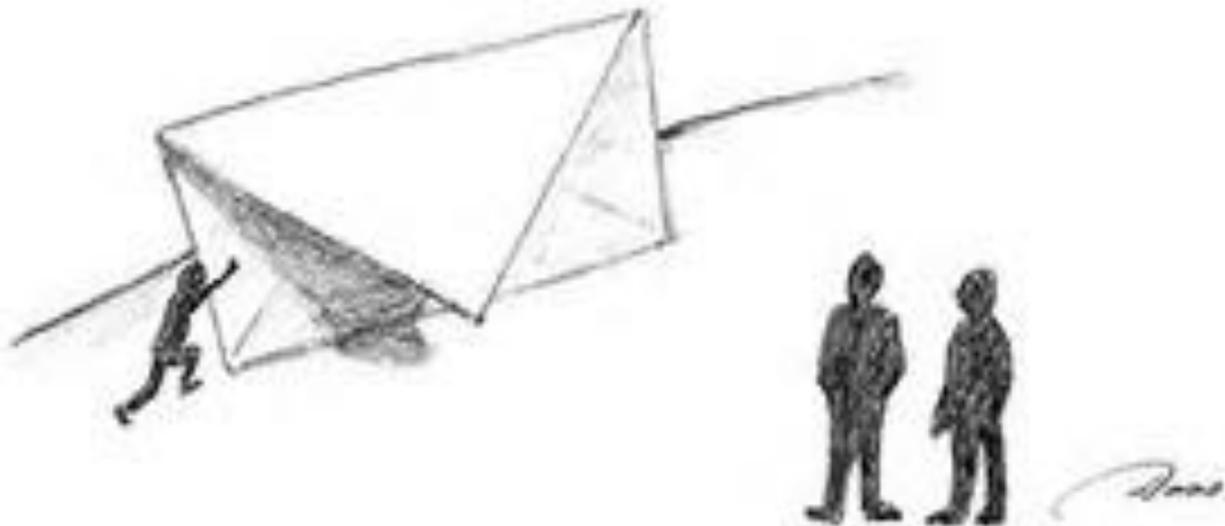
**Thursday, January 18**

Pushing the Ethics Envelope

*Roundtable Discussion*  
*Moderator: Susan P. Ingles*

# Pushing the Consumer Law Ethics Envelope

A Panel Discussion with  
Penny Cauley, Bess Lochocki and Kelly Rainsford  
Moderators: Susie Ingles and Marti Phillips



# Consumer Protection Law Ethical Issues Nationally and In South Carolina

- Settlement Agreement Clauses
- Debt Ownership
- Other Litigation Issues

# Settlement Agreements

- Confidentiality Clauses
- Non-disparagement Clauses
- Indemnification of opposing parties and others

# Confidentiality Clauses

- Discussion with Client
- Discussion with Opposing Counsel
- Educating Both

# Questions for the Panel

## To sign or not to sign?

- **Discussing with Your Client**
  - Education
  - Explanation
- **Discussing with Parties**
  - When?
  - How?
- **Other Considerations**
  - Rejection education
  - Insistence of parties, judges, mediators
  - Deal breaker

# Non-disparagement Clauses

- Discussion with Client
- Discussion with Opposing Counsel
- Educating Both

# Questions for the Panel

- **Discussing with Your Client**
  - Education
  - Explanation
- **Discussing with Parties**
  - When?
  - How?
- **Other Considerations**
  - Rejection education
  - Insistence of parties, judges, mediators
  - Deal breaker

# Indemnification Clauses

- Indemnifying opponents
- Indemnifying others
- Risks

# Questions for the Panel To Sign or Not To Sign?

- Can/should client sign?
  - What if attorney advises against it?
    - Client has right to sign
- Can/should attorney sign?
  - Considerations for attorneys
    - Liability
    - Representing future clients

# Debt Ownership

- What can be ethically alleged?
- What can be ethically denied?
- What issues can be raised?

# Questions for the Panel To Deny or Not To Deny?

- Responding to Complaint
- Responding to Requests to Admit
- Responding to other discovery tools

# Other Issues

- Credit Counseling Services
- Credit Repair Scams

# Questions for the Panel on Other Litigation Issues