ILLINOIS CREDITORS BARS ASSOCIATION

FALL ZOOM SEMINAR

MONDAY, OCTOBER 12, 2020

8:45 AM - 3:00 PM

ILCBA.org

AGENDA

8:45- 9:00 a.m.	**Welcome**
9:00 - 10:00 a.m.	**Session One** **Meaningful Attorney Involvement** *David M. Schultz, Partner, Hinshaw & Culbertson, LLP* *Daniel A. Edelman, Partner, Edelman, Combs, Latturner, Goodwin LLC*
10:00 - 10:15 a.m.	**Break**
10:15 – 11:15 a.m.	**Session Two** **Current Compliance Hot Topics** *Barb Nilsen, Compliance Director, Blitt & Gaines, P.C.* *Sarah Grincewicz, Compliance Director, Markoff Law LLC* *Patrick Layton, VP of Managed IT, Impact Networking*
11:15 – 11:30 a.m.	**Break**
11:30 – 12:30 p.m.	**Session Three** **Fear No Evil: Covid19 Driven Anxiety** *Tony Pacione, LCSW, CSADC, Deputy Director* *Lawyers' Assistance Program*
12:30 – 1:00 p.m.	**Lunch Break**
1:00– 2:00 p.m.	**Session Four** **View from the Bench - Zooming on the 11th Floor** *The Hon. James T. Derico, Jr., Cook County Circuit Court Rm 1108* *The Hon. John M. Allegretti, Cook Count Circuit Court Rm 1102*
2:00 – 2:15 p.m.	**Break**
2:15– 3:00 p.m.	**Session Five** **The Logistics of the 30-day Summons** *Robert G. "Bob" Markoff, Partner, Markoff Law LLC* *Michael L. Starzec, Partner, Blitt & Gaines, P.C.*

TABLE OF CONTENTS

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

INNOVATIVE PUBLIC NOTICE SOLUTIONS

LET OUR TEAM OF EXPERTS HANDLE ALL THE DETAILS:

- Publication & placement of public notices
- Track & monitor status of each publication
- Presentation of tear sheets & certificates online
- Responsive customer support
- Timely eInvoicing
- eFiling of certificates
- Easy Cancellation Process

PublicNoticeNetwork.com

A Service of Law Bulletin Media™
publisher of Chicago Daily Law Bulletin since 1854

312.644.7395 • PNN@LawBulletinMedia.com

SPONSORS

Our generous sponsors will be available to answer questions during breaks or after the session. Check the CHAT feature during the webinar for more information.

LAW BULLETIN MEDIA

Mike Szeliga
mszeliga@lawbulletinmedia.com
312-644-4638

WINDY CITY
PROCESS SERVING

Bob Rusch
bob@wcprocess.com
312-296-9506

SPEAKER BIOS

Daniel A. Edelman, Partner, Edelman, Combs, Latturner, Goodwin LLC

Daniel A. Edelman is a member of Edelman, Combs, Latturner & Goodwin, LLC, Chicago, Illinois. He is a 1976 graduate of the University of Chicago Law School. From 1976 to 1981 he was an associate at the Chicago office of Kirkland & Ellis.

In 1981-1985 he was an associate and then a partner at Reuben & Proctor, a medium-sized firm formed by some former Kirkland & Ellis lawyers. From the end of 1985 he has been in private practice in downtown Chicago.

Virtually all of the practice of his 12-attorney firm involves litigation on behalf of consumers, both class and individual actions, including cases under the Fair Debt Collection Practices Act, Fair Credit Reporting Act, Truth in lending Act, Telephone Consumer Protection Act, Real Estate Settlement Procedures Act, and consumer credit laws. He argued Heintz v. Jenkins, 514 U.S. 291 (1995) (FDCPA); and over 100 other appeals. Mr. Edelman is the author of the chapters on the “Fair Debt Collection Practices Act,” “Truth in Lending Act,” and “Telephone Consumer Protection Act” in Illinois Causes of Action (Ill. Inst. For Cont. Legal Educ. 2014 and earlier editions), author of Collection Litigation: Representing the Debtor (Illinois Institute for Continuing Legal Education 2008, 2011, 2014, 2019 editions); and other publications.

Mr. Edelman is also a frequent speaker on consumer law topics for various legal organizations including the Chicago Bar Association, Practicing Law Institute, the National Consumer Law Center, and the Illinois Institute for Continuing Legal Education, and he has testified on behalf of consumers before the Federal Trade Commission and the Illinois legislature. He is a member of the Illinois bar and admitted to practice in the United States Supreme Court and 10 federal Courts of Appeals, as well as the United States District Courts for the Northern and Southern Districts of Indiana, United States District Courts for the Northern, Central, and Southern Districts of Illinois, and the United States District Courts for the Eastern and Western Districts of Wisconsin. He is a member of the Northern District of Illinois trial bar.

SPEAKER BIOS

David M. Schultz, Partner, Hinshaw & Culbertson, LLP

Davis Schultz is nationally recognized in the area of consumer litigation defense at both the trial and appellate levels. He has been lead counsel in more than 250 class action lawsuits involving claims brought under various state and federal consumer laws, including the Fair Credit Reporting Act (FCRA), Fair Debt Collection Practices Act (FDCPA), Telephone Consumer Protection Act (TCPA), and the Chicago Residential Landlord and Tenant Ordinance (CRLTO).

He has defended dozens of class actions challenging food labels and under Illinois' Biometric Information Privacy Act (BIPA). He has represented individuals and businesses in dozens of regulatory matters, including before the CFPB, FTC, Illinois Department of Financial and Professional Regulation (IDFPR), Illinois Attorney General, as well as other state and city regulators and Attorneys General.

Barb Nilsen, Compliance Director, Blitt & Gaines, P.C.

Barbara Nilsen is a partner and Chief Compliance Officer of the law firm of Blitt & Gaines, P.C. She is a graduate of The University of Illinois-Chicago and The John Marshall Law School. She is licensed to practice in the State of Illinois, the State of Missouri and is admitted to the bar of the United States District Court for the Northern District of Illinois.

Prior to joining Blitt and Gaines, P.C. as a Partner, she practiced in the areas of creditor’s rights and residential foreclosures at the law firm of Freedman Anselmo and Lindberg, LLC. She has been practicing in the area of creditor's rights for 14 years and has focused the last 9 years in compliance. She has chaired numerous committees for the National Creditors Bar Association and currently serves on the Executive Board.

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

SPEAKER BIOS

Sarah Grincewicz, Compliance Director, Markoff Law LLC

Sarah Grincewicz is a Partner and runs the Compliance Department at Markoff Law LLC. She has been practicing law since 2006 and is admitted to practice in Michigan, Illinois, Kentucky, and Wisconsin. Ms. Grincewicz earned her undergraduate degree at the University of Michigan and law degree from Wayne State University Law School.

She is currently on the Board of Directors of the Michigan Creditors Bar Association and is a member of the Illinois Creditors Bar Association and National Creditors Bar Association. She has served on numerous National Creditors Bar Association committees and has been a speaker at programs sponsored by the NCBA as well as the Institute for Continuing Legal Education (MI), the Illinois Institute for Continuing Legal Education, and the Independent Finance Association of Illinois.

Patrick Layton, VP of Managed IT, Impact Networking

Patrick Layton is the Vice President of Managed IT Services at Impact Networking. His 25+ years of expertise in Managed IT include network and systems administration for enterprise-level companies including UPS, government organizations, and several dotcom startups.

Since joining the team at Impact in 2014, Patrick has created an entire Managed IT department and full-service MSP program from the ground up that includes over 150 IT professionals across all Impact locations.

Most recently, Patrick developed a team to drive the creation of Impact's Managed Cybersecurity department, offering advanced security to customers. Patrick was awarded Impact Employee of the Year in 2016 for his significant contributions to the growth of the company.

SPEAKER BIOS

Tony Pacione, LCSW, CSADC, Deputy Director, Lawyers' Assistance Program

Tony Pacione, LCSW, CADC, MAEd, is Deputy Director for the Illinois Lawyers' Assistance Program, providing behavioral health and addiction services to attorneys, judges, and law students. Tony possesses a wealth of experience as a clinician and program director in the addiction and behavioral health field since 1982. He has successfully integrated evidence-based treatments such as mindfulness-stress reduction training and cognitive behavioral therapy with intervention strategies in the legal profession.

Tony received an ABA Presidential Appointment to the Advisory Commission on Lawyer Assistance Programs in 2014, and was appointed by the AIOC/Illinois Supreme Court as a Judicial Faculty member for the New Judge Seminar in 2015.

He has published articles on addictions for academic and trade association journals. He has provided training on addiction treatment, and stress management to health care, attorneys, and other professionals at such venues as the Illinois Psychological Association, DePaul University, the American Bar Association, the Chicago Bar Association, and the Northwestern University School of Law. Tony is a Licensed Clinical Social Worker in Illinois and a Certified Supervisor Addiction Counselor. He holds a Master of Social Work and a Master of Arts in Education degrees from Washington University in St. Louis.

SPEAKER BIOS

The Honorable James T. Derico, Jr.

Judge James T. Derico, Jr. is a 1982 graduate of the University of Notre Dame and a 1985 graduate of the University of Pennsylvania Law School. In the 34 years since Judge Derico's graduation from Penn Law he has enjoyed a vibrant and diverse legal career. Judge Derico began his legal practice as an attorney at a large law firm. While there, he worked in the area of public offerings, mergers and acquisitions and public bond offerings. Subsequently,

Judge Derico worked for the City of Chicago in the Office of the Corporation Counsel and as an In-House Corporate Attorney for Borg-Warner Corporation.In 1992, Judge Derico became the owner and founding partner of Derico & Associates, P.C. In that capacity Judge represented Fortune 500 companies and private individuals in a wide range of transactional and litigation matters.

As a partner with Derico & Associates, P.C., Judge Derico achieved some outstanding results for many of his clients and he even made new law in the State of Illinois representing a child social welfare agency against a large insurance company. Judge Derico is also a member of Trinity United Church of Christ (TUCC) on the south side of Chicago. In 2009 and 2014 Judge Derico was the recipient of the Chicago Volunteer Legal Services Distinguished Service Award for his pro bono work the TUCC Legal Clinic

The Honorable John M. Allegretti

Judge John Michael Allegretti is a Cook County Circuit Court Judge assigned to the Municipal Division, where he hears civil disputes. Here, he presides over non-jury civil trials, hears and decides motions, and conducts settlement conferences. Many litigants do not have attorneys. For those unrepresented litigants, a courtroom may initially seem intimidating and scary. As a judge, John Michael makes it his mission to actively listen to all litigants and their counsel. He takes the time to explain, answer questions, and provide legal support for his findings and decisions.

Most of all, he strives to ensure that all litigants and their representatives feel welcomed, respected, and heard when they appear in his courtroom. John Michael's past public and private legal experience as an advocate, an administrative law judge, in-house counsel, and college professor, has been a solid foundation on which he continues to build upon as a judge.

Upon becoming an attorney in 1995, John Michael has and continues earn the respect trust, and confidence of the public, whom he serves. Legal Associations and those who appear in his courtroom describe him as being objective, fair, punctual, prepared, knowledgeable, and even-tempered. John Michael has and continues earn the respect trust, and confidence of the public, whom he serves. Legal Associations and those who appear in his courtroom describe him as being objective, fair, punctual, prepared, knowledgeable, and even-tempered.

SPEAKER BIOS

Bob Markoff, Partner, Markoff Law, LLC

Robert G. "Bob" Markoff graduated from University of Illinois and received his law degree from DePaul University College of Law. Bob has been practicing for 44 years, most of which he has concentrated on creditors' rights, judgment enforcement, and commercial litigation. His publications are many, from his volunteer work with Illinois Institute for Continuing Legal Education, state bills including Public Act 95-0661: Amendments to Illinois Code of Civil Procedure. He is founding member of the ILCBA and past president of NARCA, and the Creditors Bar Coalition of Illinois.

Michael L. Starzec, Partner, Blitt & Gaines, PC

Michael L. Starzec graduated from DePaul University's College of Law in 1995 with a Juris Doctorate and was sworn in as a member of the Illinois Bar in November of the same year. Prior to his legal training, he attended Northern Illinois University, receiving Bachelor of Arts degrees in History and Political Science in 1992.

He is a Partner with the law firm of Blitt and Gaines, P.C., having been with the firm since 1996. He is a member of the Federal Bar for the Northern District of Illinois, as well as being licensed to practice in Indiana (2006) and Wisconsin (2010). Professionally, he is Vice-President of the Illinois Creditors Bar Association, and a member of NARCA, as well as the Commercial Banking, Collections and Bankruptcy Law Section Council of the ISBA. His publication credits include Small Claims Collection, A Smart Guide (IICLE, 2011), The History of Credit in 4,000 Years or Less (Loyola Consumer Law Review, Fall 2013), and Credit Card Litigation (IICLE, 2013). He co-authored NARCA's amicus brief in the Unifund v. Shah II appeal and argued successfully before the 7th Circuit Court of Appeals in the matter of Jackson v. Blitt and Gaines, P.C., which found wage garnishments were not actions against consumers under the FDCPA. Mr. Starzec has presented for the Illinois State Bar and Illinois Creditors Bar Association on the issues relating to creditors rights, and the representation of credit card issues and debt buyers.

Meaningful Attorney Involvement

David M. Schultz
Partner, Hinshaw & Culbertson, LLP

Daniel A. Edelman
Partner, Edelman, Combs, Latturner, Goodwin LLC

DANIEL A. EDELMAN

Edelman, Combs, Latturner & Goodwin, LLC

Chicago

Fair Debt Collection Practices Act Developments

I. Standing for FDCPA violations under *Spokeo, Inc. v. Robins,* ___ U.S. ___, 194 L.Ed.2d 635, 136 S.Ct. 1540 (2016).

A. Cases from other circuits taking restrictive view, requiring some sort of damages or extra difficulty in addressing debt.

1. *Trichell v. Midland Credit Mgmt.,* 964 F.3d 990 (11th Cir. 2020) (case involved allegedly deficient disclosure of time-barred nature of debt; rejects informational injury, risk of being misled; "a statutory violation that poses a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff. Here, neither Trichell nor Cooper has alleged such a particularized injury.")

2. *Frank v. Autovest, LLC*, 961 F.3d 1195 (D.C.Cir. 2020) (case involved allegedly false affidavit filed in collection lawsuit; "In fact, Frank testified unequivocally that she neither took nor failed to take any action because of these statements. . . . Nor did Frank testify that she was otherwise confused, misled, or harmed in any relevant way during the collection action by the contested affidavits. And although Frank stated that Autovest's suit caused her stress and inconvenience, . . . she never connected those general harms to the affidavits . . . . Because Frank was unaffected by the conduct that underlies her FDCPA claims, she lacks Article III standing.")

B. Seventh Circuit:

1. "Procedural" violations

a. In *Casillas v. Madison Avenue Associates,* 926 F.3d 329 (7th Cir.

2019), the court held that the failure of a debt collector to state that disputes must be in writing to require verification represented the deprivation of a "procedural" right that did not cause injury in fact to a consumer who made no effort to dispute the debt and never considered responding in any way.

b. On the other hand, where the consumer was being sued and was in obvious need of information about dispute rights, the omission to provide any "notice of debt" is patently harmful and standing requirements are satisfied. *Lavallee v. Med-1 Sols., LLC*, 932 F.3d 1049, 1053 (7th Cir. 2019).

2. "Substantive" violations – consumers have substantive rights conferred by Congress to be free from misrepresentations, unlawful threats, and similar conduct.

a. In *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), a Telephone Consumer Protection Act case, the Court found standing based on a relatively trivial invasion of substantive rights – the infringement of privacy caused by the chirping of a cell phone upon receiving a single allegedly illegal text message – that Congress prohibited.

b. In *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624-626 (7th Cir. 2020), the court addressed standing under the disclosure requirements of the Illinois Biometric Information Privacy Act, stating:

> If we instead analyze this case as a type of informational injury, we come to the same conclusion. Usually these cases arise when information that is required by statute to be disclosed to the public is withheld. [citation] The injury inflicted by nondisclosure is concrete if the plaintiff establishes that the withholding impaired her ability to use the information in a way the statute envisioned. [citations]

The court described *Casillas v. Madison Avenue Associates,* 926 F.3d 329 (7th Cir. 2019), as a case where plaintiff "admitted that no amount of notice or information would have changed her behavior. In those circumstances, Casillas lacked standing to sue the debt collector for its technical violation of the Act."

c. Same principle applied to misrepresentations:

(1) *Kinnick v. Med-1 Solutions, LLC,* 410 F.Supp.3d 939, 943 (S.D. Ind. 2019) (one letter seeking to collect a discharged

debt; "Kinnick alleges Med-1 sent him the type of false, deceptive claim that Congress sought to prevent with the FDCPA and that he was harmed" through being deprived of a "fresh start").

(2) *Richardson v. Diversified Consultants, Inc.*, 17cv4047, 2019 WL 3216030, *4, 2019 U.S. Dist. LEXIS 118786 (N.D. Ill., July 17, 2019) (standing existed where "Plaintiff received the Letter that allegedly misrepresented the amount of the debt owed. This is an injury of the kind Congress sought to protect against through the FDCPA").

(3) *Africano-Domingo v. Miller & Steeno, P.C.*, 19cv401, 2020 WL 247377, *3, 2020 U.S. Dist. LEXIS 7887 (N.D. Ill. Jan. 16, 2020) (court "distinguished a defendant's 'obligation to provide substantive information from its obligation to give notice of statutory rights.' . . . A violation of a provision that entitles a plaintiff to 'receive and review substantive information' may confer standing even when a violation of a provision that 'protect[s] a consumer's interest in knowing her statutory rights' may not. . . . incomplete debt collection letters often concern notice to a consumer of her statutory rights, while deceptive or confusing debt collection letters involve a consumer's right under the FDCPA to receive substantive information about her debt").

(4) *Wheeler v. Midland Funding LLC*, 15cv11152, 2020 WL 1469449, at *3 (N.D. Ill. Mar. 26, 2020) (procedural violation distinguished "from an informational injury—the latter is sufficient to confer standing. It noted that for an informational injury to occur, the defendant must have failed to comply with its 'obligation to provide substantive information' whereas for a procedural violation the defendant only fails to comply with its "its obligation to give notice of statutory rights.").

(5) *Pierre v. Midland Credit Management, Inc.*, 16cv2895, 2019 WL 4059154, *3-4, 2019 U.S. Dist. LEXIS 146272 (N.D. Ill., Aug. 28, 2019), appeal pending (consumer who receives and is misled by collection notice that fails to adequately disclose time-barred nature of debt, in violation of *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679 (7th Cir. 2017), has standing).

(6) *Oloko v. Receivable Recovery Services, LLC*, 17cv7626,

2019 WL 3889587, *3, 2019 U.S. Dist. LEXIS 140164 (N.D. Ill., Aug. 19, 2019) (allegations that second dunning letter "caused confusion because the second letter demanded immediate payment before the end of the 30-day validation period" sufficient).

(7) *Swike v. Med-1 Solutions, LLC,* 1:17cv01503, 2017 WL 4099307 at *4, 2017 U.S. Dist. LEXIS 149664 (S.D. Ind. Sept. 15, 2017) ("receiving a prohibited debt communication constitutes a real injury in and of itself.").

(8) *Wise v. Credit Control Servs., Inc.*, 16cv8128, 2018 WL 5112983, at *3, 2018 U.S. Dist. LEXIS 179548 (N.D. Ill. Oct. 19, 2018) ("sending plaintiff communications from which she was expressly supposed to be protected . . . constitutes a real injury in and of itself").

(9) *Brown v. I.C. Sys., Inc.*, 16cv9784, 2019 WL 1281972, at *3, 2019 U.S. Dist. LEXIS 45384 (N.D. Ill. Mar. 20, 2019) ("As this Court and numerous courts in this district have explained, a plaintiff who claims that a debt collector made 'unlawful debt collection' demands in violation of the FDCPA . . . has asserted an injury that, even if 'intangible,' is sufficiently 'concrete' to satisfy the standing requirements of Article III under *Spokeo*").

(10) *See generally, Cartmell v. Credit Control, LLC*, 5:19cv1626, 2020 WL 113829, *10, 2020 U.S. Dist. LEXIS 4136 (E.D.Pa. Jan. 10, 2020) (failure to disclose that payment of time-barred debt could revive it; court surveyed cases and concluded that "A debtor who receives a deceptive or misleading communication accordingly need not establish any additional harm to surpass the standing threshold of concrete injury").

C. Illinois courts.

1. *Spokeo* applies only to federal court jurisdiction.

2. Under Illinois law, if the legislature authorizes an individual to recover statutory damages or a penalty, that individual may file suit for that purpose. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, 129 N.E.3d 1197 (Biometric Identification Privacy Act); *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, 115 N.E.3d 1080, 426 Ill. Dec. 158 (same); *Soto v. Great Am. LLC*, 2020 IL App (2d) 180911, 2020 WL 359491 (Fair Credit Reporting Act); *Lee v.*

Buth-Na-Bodhaige, Inc., 2019 IL App (5th) 180033, ¶ 64, 143 N.E.3d 645, 436 Ill.Dec. 816 (same); *Duncan v FedEx Office & Print Services, Inc.*, 2019 IL App (1st) 180857, 123 N.E.3d 1249, 429 Ill.Dec. 190 (same); *Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 919 N.E.2d 300, 335 Ill.Dec. 581 (2009) (statutory penalty for a landlord's failure to timely return its tenants' security deposit under the Chicago Residential Landlord Tenant Ordinance ["CRLTO"]); *Namur v. Habitat Co.*, 294 Ill.App.3d 1007, 691 N.E.2d 782, 229 Ill.Dec. 309 (1st Dist. 1998) (tenant whose security deposit is not maintained in special trust account may sue for statutory penalty under CRLTO even if nothing happens to the deposit); *Faison v. RTFX, Inc.,* 2014 IL App (1st) 121893, 6 N.E.3d 376, 379 Ill.Dec. 299 (tenant may recover statutory penalty under CRLTO for failure to provide a receipt for a security deposit containing prescribed information); *Indianapolis and St. Louis R.R. Co. v. People*, 91 Ill. 452, 455–56 (1879) (statutory penalty for defendant's failure to stop trains before crossing another railroad's tracks); *Toledo, Peoria & Warsaw Railway Co. v. Foster*, 43 Ill. 480, 481 (1867) (private action for statutory penalty for a railroad's failure to sound a whistle at crossing, explaining that jury can "tak[e] away a person's property under the form of a fine [if] they should be satisfied the law has been violated"); *Cairo & St. L.R. Co. v. Warrington*, 92 Ill. 157, 159-60 (1879) (penalty on railroad for failure to fence its right of way; court held that "The power to impose fines, penalties and forfeitures for a violation of or the nonobservance of statutory requirements, is believed to be coeval with the common law itself. . . . In some cases the penalty is given to the informer, in others one-half to the government and the other half to the informer, or one-half to the informer and the other half to some charity or specific fund. We are aware of no case since the organization of our government, State or Federal, which has questioned the power of the legislature to thus dispose of a penalty or forfeiture. All must concede that when the General Assembly imposes a forfeiture, that body may dispose of it in such manner as in their wisdom they may see proper. They may appropriate such penalties to the general revenue of the State, to the school or other fund, general or local, or to a private person. This, it is believed, has never been questioned.").

II. FDCPA Statute of limitations

A. An action to recover for a violation of the Fair Debt Collection Practices Act must be brought within one year from the date on which the violation occurs. 15 U.S.C. §1692k(d).

B. The United States Supreme Court has held that the one year does not run from discovery of the violation. *Rotkiske v. Klemm,* 140 S. Ct. 355, 205 L. Ed. 2d 291 (2019).

C. Courts of Appeal have held that where a defendant commits a series of acts

prohibited by the FDCPA, the statute runs on each one separately. *Gomez v. Cavalry Portfolio Services, LLC*, 962 F.3d 963 (7th Cir. 2020); *Bender v. Elmore & Throop, P.C.*, 963 F.3d 403 (4th Cir. 2020); *Purnell v. Arrow Fin. Servs., LLC*, 303 Fed.Appx. 297, 301-02 & n.3 (6th Cir. 2008); *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 694 (8th Cir. 2017); *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1188 (10th Cir. 2013).

III. Supreme Court addresses meaning of "debt collector"

There is a four-part definition of "debt collector" in 15 U.S.C. §1692a(6), with a list of exceptions. In addition, 15 U.S.C. §1692j imposes liability on a fifth group of persons.

The term "debt collector" in 15 U.S.C. §1692a(6) means

> **(1)** "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" ["principal purpose" debt collectors];
>
> **(2)** any person who uses any instrumentality of interstate commerce or the mails and "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" ["regularly collects" debt collectors], and
>
> **(3)** "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." ["false name" provision]
>
> **(4)** A provision closely related to the "false name" provision, 15 U.S.C. §1692j, "Furnishing certain deceptive forms," provides that "It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating," and that "Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter."
>
> **(5)** Finally, §1692a(6) provides that "For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."

A. **"Regularly collects" clause and Supreme Court limitation of its scope.** In *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017), the Supreme Court construed the "regularly collects" clause, and held that it covered only persons who collect for another. It overruled prior decisions holding that a person that purchases after default debts formerly owed to another is thereby a "debt collector." *E.g., Kimber v. Federal Financial Corp.,* 668 F.Supp. 1480 (M.D.Ala. 1987); *McKinney v. Cadleway Properties, Inc.,* 548 F.3d 496 (7th Cir. 2008); *Schlosser v. Fairbanks Capital Corp.,* 323 F.3d 534 (7th Cir.

2003).

B. **Principal purpose clause**. Persons that purchase defaulted debts for their own account may still be covered under the "principal purpose" definition. Several courts have held that debt buyers are covered by this definition. *Barbato v. Greystone Alliance, LLC,* 916 F.3d 260 (3rd Cir. 2019); *McAdory v. M.N.S. & Assoc., LLC,* 952 F.3d 1089 (9th Cir. 2020); *Wheeler v. Midland Funding LLC,* 15cv11152, 2020 WL 1469449 (N.D. Ill. Mar. 26, 2020); *McMahon v. LVNV Funding, LLC*, 301 F. Supp. 3d 866, 884 (N.D. Ill. 2018); *Mitchell v. LVNV Funding, LLC*, 2:12cv523, 2017 WL 6406594, 2017 U.S. Dist. LEXIS 206440 (N.D. Ind. Dec. 15, 2017).

1. Should depend on whether more than 50% of the revenue of the entity comes from the liquidation of debts.

2. The collection industry sometimes argues that even if the sole source of revenue of an entity is the liquidation of defaulted consumer debts which it purchases, it is not a "principal purpose" debt collector if it hires collection agencies as independent contractors to dun consumers and outside law firms as independent contractors to file suits against consumers, in the name of the debt buyer. The debt buyers claim that they are merely acquiring and investing in debts, not "collecting" them.

3. This is incorrect. First, the "principal purpose" of a "business" is the source of its revenue. A "business" is, by definition, an activity conduct for profit. *Drobny v. C.I.R*, 113 F.3d 670, 673 n.5 (7th Cir. 1996) ("[I]n order to constitute a 'trade or business,' the activity in question must have had the 'actual and honest objective of making a profit.'"). Acquiring bad debts by itself is not a potential source of profit and thus not a "business" at all. It is what is done with the debts afterward – selling them, collecting them, etc. – that determines what "business" the entity is engaged in.

4. Second, the fact that the persons engaging in the collection activity are independent contractors rather than employees is not relevant. There is no question but that the dunning of consumers or filing of lawsuits against consumers is authorized by the debt buyer and that the relationship between a collection agency or collection attorney and the owner of the claim is that of agent and principal. Under federal law, the authorized activities of independent contractor agents are imputed to the principal. *AT&T v. Winback and Conserve Program, Inc.,* 42 F.3d 1421, 1434-8 (3d Cir.1994); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982 (3d Cir. 1995); *Smith v. State Farm Mut. Auto Ins. Co.,* 30 F.Supp.3d 765, 773-4 (N.D.Ill. 2014); *Worsham v. Nationwide Ins. Co.*, 772 A.2d 868, 878 (Md.App. 2001); *Hooters of Augusta v. Nicholson*, 537 S.E.2d 468, 472 (Ga.App. 2000). The distinction between employees and independent contractors is relevant only to the principal's liability for negligent physical injury caused by the employee. *AT&T v. Winback and Conserve Program, Inc.*, *supra.* That is why the representations of an attorney bind the client, but the client is not liable if the attorney hits a pedestrian while driving to court.

C. **Security interest enforcers:** For the purpose of 15 U.S.C. §1692f(6) only, "debt collector" "also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." This includes "repo men" who seize cars in the dead of night. It also includes attorneys and others who pursue nonjudicial foreclosures.

1. Although enforcing security interests could be said to be debt collection, in *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 203 L. Ed. 2d 390 (2019), the Supreme Court inferred from the phrasing of the above-quoted language that an attorney who does nothing more than engage in non-judicial foreclosure and send the notices required by state law for that purpose is not within the scope of the primary definition.

2. However, where the attorney sends demands for money, or seeks a deficiency judgment in a judicial foreclosure, or where a judicial foreclosure establishes the amount of a consumer's liability in a later collection action, the attorney is probably a "debt collector." *Bronstein v. Bayview Loan Servicing, LLC*, 18cv4223, 2020 WL 703652, at *6, , 2020 U.S. Dist. LEXIS 23865 (E.D. Pa. Feb. 11, 2020) ("the Court declines to extend *Obduskey*'s holding to Pennsylvania's judicial foreclosure system given its express limitation to apply only to nonjudicial foreclosures"); *Woodard v. Bank of New York Mellon,* 6:18cv02072, 2020 WL 61038, at *7, 2020 U.S. Dist. LEXIS 1512 (D. Or. Jan. 6, 2020) ("The Supreme Court's holding in *Obduskey* extends only to security-interest enforcers engaged in nonjudicial foreclosure proceedings in a manner required by state law.").

3. In *Barnes v. Routh Crabtree Olsen PC,* 963 F.3d 993 (9th Cir. 2020), the court held that the key consideration was not whether foreclosure was judicial but whether a deficiency judgment could be sought:

> We do not agree that, as a categorical matter, a person who initiates a judicial foreclosure proceeding is attempting to collect a debt. Our cases make clear that a plaintiff must identify something beyond the mere enforcement of a security interest to establish that the defendants are acting as debt collectors subject to the FDCPA's broad code of conduct. . . . That additional debt-collection ingredient can be present for judicial foreclosure, provided that state law permits a creditor to recover money from the debtor after foreclosure if the property sells for less than the debt. . . . That remedy, called a deficiency judgment, is often available in judicial foreclosure proceedings (but typically not in non-judicial proceedings). . . . Because Arizona authorizes deficiency judgments as part of judicial foreclosure, we accordingly held in [*McNair v. Maxwell & Morgan PC,* 893 F.3d 680 (9th Cir, 2018)] that the filing of a foreclosure writ in Arizona can qualify as debt collection. 893 F.3d at 683; see also *Cohen v. Rosicki, Rosicki & Associates,* P.C., 897 F.3d 75, 83 (2d Cir. 2018) (reaching same

conclusion for judicial foreclosure under New York law). But unless a deficiency judgment is on the table in the proceeding, a person judicially enforcing a deed of trust is seeking only the return or sale of the security, not to collect a debt.

4. 15 U.S.C. §1692f(6) prohibits "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." For example, repossessing a car without a default would be a violation.

IV. Meaning of "unfairness" – *Zablocki v. Merchs. Credit Guide Co.,* No. 19-2045, 2020 U.S. App. LEXIS 23737 (7th Cir., July 28, 2020). In *Rhone v. Medical Business Bureau, LLC*, 915 F.3d 438 (7th Cir. 2019), the court held that reporting medical debts separately, rather than aggregated together, does not misrepresent the "character" of a debt under §1692e(2)(A). Zablocki contended that same practice violated §1692f.

Court adopted a dictionary definition approach:

> The ordinary meaning of "unfair" is "marked by injustice, partiality, or deception: unjust, dishonest." Webster's Third New Int'l Dictionary 2494 (1976); see also 6); see also *LeBlanc v. Unifund CCR Partners,* 601 F.3d 1185, 1200 (11th Cir. 2010). "Unconscionable" has a similar meaning: "not guided or controlled by conscience: unscrupulous"; "excessive, exorbitant"; "lying outside the limits of what is reasonable or acceptable: shockingly unfair, harsh, or unjust: outrageous." Webster's at 2486; cf. Black's Law Dictionary 1367 (West Special Deluxe 5th ed. 1979) (defining "unconscionability," regarding contracts, as involving terms "unreasonably favorable" to one party and "gross overall one-sidedness").
>
> Viewing Merchants's separate reporting of debts from the perspective of an unsophisticated but reasonable consumer, we see the alleged conduct as falling outside the scope of these terms. It is reasonable, and not at all deceptive or outrageous, for a collector to report individually debts that correspond to different charges, thereby communicating truthfully how much is owed on each debt. Some consumers may prefer to have their debts reported in a way that conceals debt-specific information, like how much is owed on individual debts, when specific debts were incurred, and which debts are stale. Those consumers may be willing to forego the more detailed information on their credit reports if the aggregated reporting increases their credit scores.
>
> But a preference does not necessarily equal an injustice, partiality, or deception. And the debt-reporting rule that the plaintiffs propose would conceal debt-specific information that other consumers may prefer, or be entitled, to see on their credit reports. See *Rhone*, 915 F.3d at 439 (recognizing that aggregated reporting could be misleading). The case before us illustrates the point: had Merchants reported in the aggregate all the debts owed to each creditor, Zablocki's and Johnson's credit reports would not indicate the amounts of each separate debt; when each debt would be removed from the credit report; or other features specific to each

> obligation. A consumer may find this information valuable or necessary to manage his or her debts. . . .
>
> If sorting through and weighing these competing interests ultimately shows the plaintiffs' proposed "aggregation" rule to be a wise public policy, then the adoption of that rule should be done by Congress or through the administrative process. Section 1692f does not create that rule on its own. And the courts are not the proper body to issue that rule. (2020 U.S. App. LEXIS 23737, *15-17)

The term "unfair" came from §5 of the Federal Trade Commission Act, 15 U.S.C. §45, which has prohibited "unfair methods of competition" since 1914 and "unfair or deceptive acts or practices" since 1938. *Jeter v. Credit Bureau, Inc*., 760 F.2d 1168 (11th Cir. 1985). At the time the FDCPA was enacted (1977), "unfair" had been interpreted to mean acts and practices that "offend established policy" and are "immoral, unethical, oppressive, unscrupulous or substantially injurious to customers." See Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8355 (July 2, 1964); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). Three years after the enactment of the FDCPA the FTC narrowed its definition of unfair trade practice to require that the injury to the consumer be substantial; not outweighed by any countervailing benefits to consumers or competition that the practice produces; and cause an injury that consumers themselves could not reasonably have avoided. FTC Policy Statement on Unfairness (Dec. 17, 1980), appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984). The Seventh Circuit had previously commented that the 1980 version would not prohibit some of the specific practices listed in §1692f, *McMillan v. Collection Professionals, Inc*., 455 F.3d 754 (7th Cir. 2006), which suggests that adoption of the earlier version was intended. However, the meaning of a legal term of art that had been around for decades and had been defined in a substantial body of caselaw should not be answered by reference to a dictionary.

V. Meaning of "false":

> A demand for payment cannot be called "false" just because, several years later, a judge disagrees with a legal argument supporting the debt collector's calculation of how much is due. A statement is false, or not, when made; there is no falsity by hindsight. All of the decisions in this circuit in which a letter was deemed to have falsely stated the amount of the debt dealt with errors known or readily knowable when the letter was sent. See, e.g., Seeger v. AFNI, Inc., 548 F.3d 1107, 1111-13 (7th Cir. 2008) (unauthorized collection fee); Shula v. Lawent, 359 F.3d 489 (7th Cir. 2004) (attempt to collect court costs when none had been allowed by a court).

Gomez v. Cavalry Portfolio Servs., 962 F.3d 963, 967 (7th Cir. 2020). Involved letter sent to attorney for debtor.

VI. Other:

A. Repossession claims under FDCPA: where state law allows nonjudicial repossession only where it can proceed without breach of the peace, repossession

that involves a breach of the peace also violates 15 U.S.C. §1692f(6)(A). *Richards v. PAR, Inc.,* 954 F.3d 965 (7th Cir. 2020).

B. Contingent percentage collection fee is "cost incurred in attempting to collect." *Bernal v. NRA Grp., LLC,* 930 F.3d 891, 894 (7th Cir. 2019)}. Disagreed with two other circuits.

C. Envelopes: The words "TIME SENSITIVE DOCUMENT" on the envelope enclosing a debt collector's communication to a consumer violated 15 U.S.C. §1692f(8). *Preston v. Midland Credit Mgmt., Inc.,* 948 F.3d 772, 783 (7th Cir. 2020).

D. Disclosure of name of current creditor. Letter stating "RE: CHASE BANK USA, N.A." with an account number, and that "The above account has been placed with our organization for collections" did not adequately disclose "the name of the creditor to whom the debt is owed" as required by 15 U.S.C. §1692g(a)(2). *Steffek v. Client Servs.*, 948 F.3d 761 (7th Cir. 2020).

E. Tax consequences of settling a debt. Statement that "this settlement may have tax consequences" is not misleading, *Dunbar v. Kohn Law Firm, S.C.*, 896 F.3d 762 (7th Cir. 2018), but statement that "[creditor] may file a 1099C form" is misleading if it will not do so for a debt of the size involved, *Heredia v. Capital Mgmt. Servs., L.P.*, 942 F.3d 811, 815-816 (7th Cir. 2019), the difference being that the former is not within the knowledge of the collector and creditor, while the latter is.

F. "Current balance" or "current amount due," without more, is not misleading. *Koehn v. Delta Outsource Grp., Inc*., 939 F.3d 863, 865 (7th Cir. 2019).

G. 1692g notice accessible only via link in email is not sufficient. *Lavallee v. Med-1 Sols., LLC,* 932 F.3d 1049 (7th Cir. 2019).

H. Statutory damages: Up to $1,000 in statutory damages is available to one plaintiff in one lawsuit. *Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377 (7th Cir. 2018). In *Portalatin*, the plaintiff settled with a debt buyer for an amount which the court concluded included $1,000 in statutory damages. The court held that the plaintiff was not entitled to continue to pursue the debt buyer's collection attorney for the same wrong because the FDCPA limited statutory damages to $1,000 per action, "not per violation and not per defendant." The Seventh Circuit noted that "FDCPA additional damages are not multiplied by the number of defendants where the plaintiff suffered an indivisible harm caused by defendants who did not violate the FDCPA independently of each other." (900 F.3d at 386) Nothing prevents a consumer from filing a separate FDCPA suit for each episode that constitutes a violation of the FDCPA, at least with respect to episodes occurring after the filing of an initial action. *Goins v. JBC & Associates, P.C.,* 352 F.Supp.2d 262 (D.Conn. 2005). Moreover, as noted in *Portalatin* debt collectors whose liability is not purely vicarious may be liable for a separate $1,000 maximum award. *Ganske v. Checkrite, Ltd.,* 96cv0541, 1997 WL 33810208, 1997 U.S. Dist. LEXIS 4345 (W.D.Wis. Jan. 6, 1997).

Rossi v. Kohn Law Firm S.C.

United States District Court for the Western District of Wisconsin

May 18, 2020, Decided; May 18, 2020, Filed

19-cv-192-jdp

Reporter
2020 U.S. Dist. LEXIS 86637 *

NATALIE ROSSI, Plaintiff, v. KOHN LAW FIRM S.C., Defendant.

Core Terms

lawsuit, concrete, signature, spent, misrepresentation, debt-collection, state-court, deposition, paralegals, meaningfully, settlement, conclusory, default, quotation, card, hire

Counsel: **[*1]** For Natalie Rossi, Plaintiff: Briane F. Pagel, Jr., LEAD ATTORNEY, Lawton & Cates, S.C., Madison, WI.

For Kohn Law Firm, S.C., Defendant: David A. Ambrosh, LEAD ATTORNEY, Kohn Law Firm S.C., Milwaukee, WI; Manuel H Newburger, LEAD ATTORNEY, Barron & Newburger, P.C., Austin, TX.

Judges: JAMES D. PETERSON, District Judge.

Opinion by: JAMES D. PETERSON

Opinion

OPINION and ORDER

This case arises out of a complaint filed by defendant Kohn Law Firm, S.C. in Wisconsin state court against Natalie Rossi for defaulting on a credit-card debt owed to Discover Bank. That complaint resulted in a judgment against Rossi for several thousand dollars. Rossi doesn't challenge that judgment in this case, but she contends that Kohn violated the *Fair Debt Collection Practices Act (FDCPA)* by falsely implying that the lawyer who signed the complaint, Kirk Emick, was meaningfully involved in assessing the merits of the claim against Rossi. Rossi's "meaningful involvement" claim is an example of an increasingly common category of FDCPA claim, seeking to extend principles that have been applied to debt-collection letters to debt-enforcement complaints filed in court.

Kohn moved for summary judgment on multiple grounds. Dkt. 10. But neither party **[*2]** addressed an important threshold question, which is whether Rossi suffered an injury that gives her standing to sue under Article III of the Constitution. So the court gave the parties an opportunity to file supplemental materials addressing that question. Dkt. 36. Rossi contends that she has standing; Kohn contends that she doesn't. Dkt. 37 and Dkt. 38. Rossi has also filed a motion to supplement the record with a copy of her deposition, Dkt. 40, which the court will grant. The court will consider Rossi's deposition in evaluating both standing and the merits.

The court will grant Kohn's motion for summary judgment. Rossi doesn't have standing to bring this case because she doesn't identify a concrete injury that she suffered as a result of any representation by Kohn. Although she says that she would have disputed the debt if she realized how little time Emick had spent on her case, she neither supports that assertion with specific facts nor explains what disputing the debt would have gotten her.

Rossi's claim fails on the merits as well because she hasn't shown that there is a genuine issue of material fact on the question whether Kohn was meaningfully

involved in preparing the complaint. Although Emick spent only **[*3]** a few minutes verifying the essential details of Rossi's case, no reasonable jury could find that his signature amounted to a misrepresentation that violated the FDCPA.

ANALYSIS

Rossi's claim against Kohn rests on *15 U.S.C. § 1692e*, which states that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." The statute lists sixteen illustrative examples of the types of prohibited representations, including a "false representation or implication that any individual is an attorney or that any communication is from an attorney." *15 U.S.C. § 1692e(3)*. Rossi contends that Kohn violated *§ 1692e* by falsely representing in its state-court complaint against her that attorney Emick was meaningfully involved in preparing the lawsuit.

The complaint at issue does not contain any express representations about Emick's level of involvement, but Rossi contends that it is implicit from Emick's signature "that an attorney had investigated the matter in a significant and substantial way." Dkt. 21, at 14. And because Kohn's records show that Emick spent fewer than six minutes on Rossi's case, she contends that a reasonable jury could find that Emick was not meaningfully **[*4]** involved.

Kohn seeks summary judgment on several grounds, including: (1) the FDCPA doesn't apply to a lawyer's conduct in litigation generally or to complaints in particular; (2) the "meaningful involvement" doctrine established by courts doesn't apply to complaints; (3) applying the meaningful involvement doctrine in this case would violate Kohn's *First Amendment* rights; (4) Rossi cannot prevail on her claim without an expert; and (5) no reasonable jury could find that Emick was not meaningfully involved in assessing the merits of the state-court lawsuit. And in its supplemental filing, Kohn contends that Rossi lacks standing to sue. Because standing is a jurisdictional question, the court will address that issue first. *See Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009)*.

A. Standing

A plaintiff does not have standing to sue under Article III of the Constitution unless she shows that she suffered an injury in fact that is both fairly traceable to the challenged conduct of the defendant and likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. An injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id. at 560* (internal quotation marks omitted). As with any other factual proposition, **[*5]** the plaintiff must prove standing with specific facts at the summary judgment stage. *Id. at 561*.

Rossi articulates her alleged injury in slightly different ways. In one part of her brief, she says that she suffered an injury in fact because she was "deprived of information she was entitled to, and that deprivation had the potential to affect her actions." Dkt. 37, at 1. In another part of her brief, she says that a violation of *§ 1692e(3)* "creates a concrete injury in and of itself." *Id.* at 7. In her declaration, Rossi says that she "would have disputed the amount of the debt and asked that [Kohn] prove it, or tried to consult with a lawyer to see if there were defenses to the debt" if she had known "how little effort or investigation the Kohn firm, and Attorney Emick performed before suing." Dkt. 28, ¶ 7. From these statements, the court understands Rossi to be raising two contentions: (1) any misrepresentation that violates the FDCPA is an injury in fact; and (2) Rossi suffered an injury in fact because Kohn's alleged misrepresentation dissuaded her from challenging the debt.[1]

The court will first clarify what alleged misrepresentations are at issue and then consider both of **[*6]** Rossi's contentions about how she was injured.

1. Implied representation

---

[1] Rossi also says in her brief that she "suffered emotional distress in part from worrying about a judgment being entered against her," Dkt. 37, at 4 (citing Dkt. 1, ¶ 31), but she does not rely on emotional distress as a basis for standing. That makes sense because any distress would likely be the result of the lawsuit itself and not any alleged misrepresentation about Emick's involvement in the case. *See Diehm v. Messerli & Kramer, P.A., No. 18-cv-830-wmc, 2019 U.S. Dist. LEXIS 215837, 2019 WL 6790432, at *6 (W.D. Wis. Dec. 12, 2019)* ("[The plaintiff's alleged anxiety] is not traceable to the alleged FDCPA violation; instead, it is simply tied to the filing of a valid lawsuit."). In any event, because Rossi doesn't rely on emotional distress as an injury, the court need not decide whether any distress was fairly traceable to Kohn's alleged conduct.

Because Rossi is alleging that she was harmed by misrepresentations in the state-court complaint, it is important to clarify at the outset what representations Kohn made. As noted above, Rossi says in her brief that Emick's signature on the complaint implied "that an attorney had investigated the matter in a significant and substantial way." Dkt. 21, at 14. In her declaration, she frames the issue somewhat differently, saying that she "believed that Attorney Emick had done the kind of work I had seen [my attorney] do on my son's case." Dkt. 27, ¶ 7. And in her deposition, she says she believed that Emick spent more time reviewing her case than he actually had. Dkt. 41-1 (Rossi Dep. 121:24-25).

In support of her contentions about what an attorney's signature implies, Rossi relies on Seventh Circuit cases in which the court determined what an attorney's signature on a debt-collection *letter* implies. *See* Avila v. Rubin, 84 F.3d 222, 228-29 (7th Cir. 1996); Boyd v. Wexler, 275 F.3d 642, 647 (7th Cir. 2001); Nielsen v. Dickerson, 307 F.3d 623, 638-39 (7th Cir. 2002). The focus of the court in each of those cases was whether the debt collector had falsely implied that a letter was "from" a lawyer, in violation of § 1692e(3). And the court held that a debt-collection letter is not truly **[*7]** from a lawyer unless the lawyer was involved in preparing the letter.

Rossi doesn't cite any cases in which the court of appeals has extended the logic of Avila, Boyd, or Nielsen to attorney signatures on a complaint, and the court has found none. And there are reasons to question whether those cases should be applied rotely to complaints. A complaint signed by an attorney is inherently "from" that attorney in a way that a debt-collection letter is not, regardless how personally involved the attorney was in drafting the complaint. Unlike a letter, only a lawyer can sign a complaint on behalf of a company. *See* 1756 W. Lake St. LLC v. Am. Chartered Bank, 787 F.3d 383, 385 (7th Cir. 2015). It is the lawyer who must litigate the complaint and stand by its allegations. And it is the lawyer who will be on the hook for a Rule 11 violation or its state-law equivalent if the allegations turn out to be frivolous. As Kohn points out, a complaint filed in Wisconsin state court is not just a representation to the defendant; it is also a representation to the *court*. Wis. Stat. § 802.05(2). So any misrepresentations in the complaint could subject that lawyer to sanctions. *Id.* § 802.05(3). Because the lawyer is obligated under the law to take responsibility for the complaint, this suggests that the complaint is "from" **[*8]** the lawyer, even if he or she wasn't primarily responsible for drafting it.

But even assuming that letters and complaints should be treated the same, the cases Rossi cites do not hold that an attorney signature means that the attorney "investigated the matter in a significant and substantial way," that the attorney spent a particular amount of time on the case, or that the signing attorney had done similar work as that of a different lawyer in a different type of case. Rather, the court of appeals has held that a debt-collection letter signed by an attorney "implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action" and that "the attorney has some personal involvement in the decision to send the letter." Avila, 84 F.3d at 229; *see also* Nielsen, 307 F.3d at 635 (signature implies that letter is "the product of the attorney's professional judgment" and that he has "independently determined that the debt is ripe for legal action by reviewing the debtor's file"); Boyd, 275 F.3d at 647 (lawyer's letterhead and signature implies that "a lawyer had made a minimally responsible determination that there was probable cause to believe that the recipient actually owed the amount **[*9]** claimed by the creditor").

Under Avila, Boyd, and Nielsen, the implied representation isn't about the quality of the work that the lawyer performed or the amount of time the lawyer spent. It is simply whether the lawyer exercised professional judgment in making the legal determinations in the document. The FDCPA does not create a cause of action for Rule 11 violations. *See* Jenkins v. Heintz, 124 F.3d 824, 833 (7th Cir. 1997). This is a problem for Rossi because her alleged injuries appear to be primarily based on her perception of how much time a lawyer should spend on a case rather than a belief that Emick did or did not exercise professional judgment. This suggests that any injuries Rossi suffered are based on her own assumptions rather any representations by Kohn. And if her injuries are the result of her own assumptions, they are not fairly traceable to Kohn's conduct for the purpose of showing her standing to sue. *See* Parvati Corp. v. City of Oak Forest, Ill., 630 F.3d 512, 517-18 (7th Cir. 2010) (self-inflicted injuries do not provide a basis for standing). But even if the court assumes that time spent is a fair proxy for professional involvement, Rossi's alleged injuries do not meet the constitutional minimum.

2. Violation of § 1692e

Rossi's first contention—that the implied false representation is itself an injury—is inconsistent **[*10]**

with Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), and Casillas v. Madison Ave. Assocs., Inc., 926 F.3d 329 (7th Cir. 2019). In *Spokeo*, the Court held that a violation of the law is not an injury in and of itself; rather Article III "requires a concrete injury even in the context of a statutory violation." Spokeo, 136 S.Ct. at 1549. Even statutory violations that result in the dissemination of false information are not sufficient per se. *Id.* ("[N]ot all inaccuracies cause harm or present any material risk of harm."). As an obvious example, the Court cited a hypothetical requirement to provide a correct zip code. Id. at 1550. The Court stated that "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.*

In *Casillas*, the court of appeals reiterated this point in the context of a claim under the FDCPA: "the fact that Congress has authorized a plaintiff to sue a debt collector who fails to comply with any requirement of the Fair Debt Collection Practices Act does not mean that [the plaintiff] has standing." 926 F.3d at 333 (internal quotation marks, citations, and alterations omitted); *see also* Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727 n.2 (7th Cir. 2016) ("[W]hether the right is characterized as 'substantive' or 'procedural,' its violation must be accompanied by an injury-in-fact. A violation of a statute that causes no harm does not trigger **[*11]** a federal case."). The defendant in *Casillas* had failed to comply with an FDCPA requirement to notify the plaintiff that she had to dispute her debt in writing and that, if she failed to do so, she would forfeit various protections that the FDCPA provided. The court rejected the plaintiff's contention that her "informational injury" provided standing, stating that "the bare harm of receiving inaccurate or incomplete information" isn't enough. *Id.* Rossi cites Pogorzelski v. Patenaude & Felix APC, No. 16-C-1330, 2017 U.S. Dist. LEXIS 89678, 2017 WL 2539782, at *3 (E.D. Wis. June 12, 2017), for the proposition that a plaintiff who receives misinformation in violation of the FDCPA has suffered an injury in fact, but *Pogorzelski* was decided before *Casillas*, so it is not instructive.

Spokeo recognized that there are some situations in which an "intangible harm" can qualify as an injury in fact and that "both history and the judgment of Congress play important roles" in making that determination. 136 S. Ct. at 1549. In this case, neither of those considerations support a view that Rossi suffered an injury in fact. As for history, the Court stated that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or **[*12]** American courts." 136 S. Ct. at 1549. Although misrepresentations serve as the basis for tort claims, common-law misrepresentation claims require the plaintiff to show justifiable reliance. *See* Restatement (First) of Torts *§§ 525*, *552* (1938). So receiving misleading information in violation of § 1692e is not enough on its own. *See, e.g.,* Hagy v. Demers & Adams, 882 F.3d 616, 621-22 (6th Cir. 2018) (failure to disclose status as a debt collector in violation of § 1692e(11) not an injury when the plaintiffs did not show "that this failure to disclose caused them any actual harm beyond [a] bare procedural violation" (internal quotation marks omitted)).

As for the judgment of Congress, the Court stated that "Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," so long as Congress respects the requirements of Article III. Spokeo, 136 S. Ct. at 1549; (internal quotation marks and alterations omitted); *see also* Lavallee v. Med-1 Sols., LLC, 932 F.3d 1049, 1052-53 (7th Cir. 2019) ("[W]hile Congress has the power to define intangible harms as legal injuries for which a plaintiff can seek relief—including violations of the FDCPA—it must operate within the confines of Article III." (internal quotation marks omitted)). Applying this principle, the court of appeals has held that "the plaintiff must show that the **[*13]** statutory violation presented an 'appreciable risk of harm' to the underlying concrete interest that Congress sought to protect by enacting the statute." Groshek v. Time Warner Cable, Inc., 865 F.3d 884, 887 (7th Cir. 2017).

The core purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e); Jackson v. Blitt & Gaines, P.C., 833 F.3d 860, 863 (7th Cir. 2016). The court is not persuaded that the alleged statutory violation in this case presented an appreciable risk of harm to Congress's concrete interest in preventing such abuse. Obviously, signing a complaint without identifying how much time the lawyer spent preparing it is not an inherently abusive practice. Using an attorney to file a defective complaint could be. *Cf.* Murphy v. Stupar, Schuster & Bartell, SC, 337 F. Supp. 3d 837, 848 (W.D. Wis. 2018) ("[C]omplaints that falsely imply that the debt collector has a legally enforceable right [may violate the FDCPA.]"). But Rossi doesn't identify anything about the state-court complaint that would have been different if Emick had spent more time researching and drafting it. So even if Kohn falsely implied that Emick was more involved in preparing the

case than he really was, that misrepresentation is not a cognizable injury in and of itself.

The court agrees with the summary of the rule articulated by the Court of Appeals for the Fourth Circuit:

> An 'informational injury' **[*14]** is a type of intangible injury that can constitute an Article III injury in fact. However, a statutory violation alone does not create a concrete informational injury sufficient to support standing. Rather, a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled *and* that the denial of that information creates a 'real' harm with an adverse effect.

Dreher v. Experian Info. Sols., Inc.: 856 F.3d 337, 345 (4th Cir. 2017) (citations omitted and emphasis in original). The court will consider next whether Kohn's alleged misrepresentation created a real harm with an adverse effect.

3. Effect of Kohn's conduct on Rossi's behavior

Rossi's second contention—that she suffered an injury in fact because Kohn's alleged misrepresentation dissuaded her from challenging the debt—is closer to the mark. In *Casillas*, the court observed that the plaintiff had failed to allege that she would have done anything with the information that the defendant should have provided:

> She did not allege that she tried to dispute or verify her debt orally and therefore lost or risked losing the statutory protections. Indeed, she did not allege that she ever even considered contacting [the defendant] or that she had any **[*15]** doubt about whether she owed Harvester Financial Credit Union the stated amount of money. She complained only that her notice was missing some information that she did not suggest that she would ever have used. Any risk of harm was entirely counterfactual: she was not at any risk of losing her statutory rights because there was no prospect that she would have tried to exercise them. Because [defendant]'s mistake didn't put Casillas in harm's way, it was nothing more than a "bare procedural violation."

926 F.3d at 334. In this case, Rossi does say in her declaration that she would have acted differently if she had all facts. Specifically, she says that she would have disputed the debt or at least consulted with a lawyer if she had known "how little effort or investigation the Kohn firm, and Attorney Emick performed before suing." Dkt. 28, ¶ 7. But because she assumed that Emick had put a lot of work into the complaint, she believed that "there was no chance that I could contest the debt and no chance that I would win that contest." *Id.* Although these are the general type of allegations that could show a concrete injury, they fail in this case for multiple reasons.

a. Specific facts

The first problem **[*16]** is that Rossi's only evidence that she would have disputed the debt is a conclusory assertion in her declaration. At the pleading stage, that assertion might be enough to defeat a motion to dismiss. But "[t]he object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*. Rather, "*Rule 56* demands something more specific than the bald assertion of the general truth of a particular matter. . . . [I]t requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted." *Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998)*.

None of the more specific statements in Rossi's declaration and deposition support a conclusion that any perception Rossi had about Emick's involvement in drafting the complaint affected her decision whether to dispute the debt. In her declaration, Rossi states that she "did not know any attorneys who would defend [her] in a lawsuit" at the time she was served, that she was not aware of laws protecting the rights of debtors, and that she did not believe that she could afford a lawyer. Dkt. 28, ¶ 4. Those concerns have nothing to do with Rossi's perception of Emick's involvement in the case.

Other **[*17]** paragraphs in Rossi's declaration support the view that her reasons for not hiring a lawyer or disputing the debt were that she knew she owed the debt, she was concerned about the cost of a lawyer, and she wasn't rights aware of her rights under the law. She acknowledges that she admitted the amount of the debt she owed in her answer to the state-court complaint. *Id.*, ¶ 6. And she says that she did not consider disputing the debt until after judgment was entered, when she he learned that some lawyers are "often able to represent people on a low-cost or no-cost

basis in these matters" and that "there are in fact defenses to debt collection which do not require me to prove how much (or how little) I owed." *Id.*, ¶¶ 8-10. Finally, she acknowledges that it was the lawsuit itself, rather than any perceptions about Emick's involvement, that led to the perception that she couldn't fight the debt. *Id.*, ¶ 13.

In her deposition, Rossi was unable to say how long she believed that Emick should have spent on her case and she couldn't identify anything that she believes he should have done but didn't. Dkt. 41-1 (Rossi Dep. 97:15-19, 98:11-14). She testified that, when she was served with the complaint, **[*18]** she wasn't thinking about what Emick did or did not review or how much time he spent; she assumed only that he "had what he needed" to file the lawsuit. *Id.* at 122:9-15, 123:10-124:10. She also acknowledges that her decision not to hire a lawyer wasn't based on Emick's signature or any representation in the complaint. *Id.* at 129:10-130:24.

This testimony from Rossi's declaration and deposition makes it clear that her decision not to dispute the debt was based on her knowledge that she owed the debt and her lack of knowledge about the legal resources available to her, not on any belief that Emick was more involved in preparing her case than he really was. Although her declaration also includes conclusory statements that she would have acted differently had she known how much work Emick had really done, "[i]t is well settled that conclusory allegations . . . do not create a triable issue of fact." *Hall v. Bodine Elec. Co., 276 F.3d 345, 354 (7th Cir. 2002)*.

b. Unsophisticated consumer

The second problem with Rossi's allegations is that they are not based on reasonable assumptions. Representations from a debt collector are viewed from the perspective of the "unsophisticated debtor," whose "knowledge is not as great as that of a federal judge," but **[*19]** who nevertheless "possesses reasonable intelligence, and is capable of making basic logical deductions and inferences." *Heredia v. Capital Mgmt. Servs., L.P., 942 F.3d 811, 815 (7th Cir. 2019)*. Even if the complaint against Rossi implied that Emick had conducted a substantial investigation before filing, an unsophisticated consumer would not simply assume that any such complaint was ironclad and impossible to dispute. It is common knowledge that even the best lawyers sometimes bring lawsuits that fail. Because Rossi's decision not to dispute the debt was the result of her own unreasonable assumptions rather than any representations by Kohn, she does not have standing to sue. *See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)* ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

c. Loss of a chance to dispute the debt

Even if Rossi had adduced specific evidence that she would have disputed the debt and even if it would be reasonable to assume that a lawsuit filed on behalf of an attorney could not fail, Rossi still would not have standing to sue under the circumstances of this case. Rossi identifies no concrete harm that she suffered by not disputing the debt. If anything, doing so would **[*20]** only have increased Rossi's losses.

If Rossi had a basis for disputing the debt, she would have a stronger argument. Evidence that the state-court lawsuit might have turned out differently would support a finding that Rossi had suffered an injury in fact. *See Satran v. LVNV Funding, LLC, No. 17-cv-896-jdp, 2018 U.S. Dist. LEXIS 92479, 2018 WL 2464486, at *2 (W.D. Wis. June 1, 2018)* (plaintiff satisfied injury-in-fact requirement by alleging that attorney would have discovered defect with debt-collection lawsuit if he had reviewed the complaint before filing it). And, in her declaration, that is the type of injury that Rossi invokes. She says that she learned later that "there are potential defenses to lawsuits of the sort Attorney Emick and Kohn Law Firm filed against me, defenses that an attorney could have investigated to get the case dismissed, or get the amount I owed reduced." Dkt. 28, ¶ 11. But Rossi doesn't identify in her declaration or her brief any defenses that she could have raised in the state-court lawsuit. In fact, in her deposition, she admits that she had defaulted on her debt to Discover by failing to make a payment for more than a year and that she owed Discover the amount alleged in the state-court complaint. Dkt. 41-1 (Rossi Dep. 99:18-100:10 **[*21]** and 128:12-15).

If Rossi's claim were that Kohn falsely implied that Emick had been meaningfully involved in preparing a debt-collection *letter*, the viability of a potential defense would be less relevant. As the court of appeals has recognized, debt collectors sometimes use a lawyer's signature on a letter to falsely imply that the debtor is about to be sued. *See Avila, 84 F.3d at 228* ("It is

reasonable to believe that a dunning letter from an attorney threatening legal action will be more effective in collecting a debt than a letter from a collection agency."). In that situation, the lawyer's signature might coerce a debtor to make a payment that she otherwise would not have paid, or at least cause greater anxiety about the prospect of a lawsuit. Those are concrete injuries, regardless whether the debt is actually owed. But in the context of a complaint, the debt collector has already taken legal action, and it is the lawsuit itself rather than the attorney's signature that shows that "the price of poker has just gone up." *Id.* Also, a debtor who simply ignores a letter may never have to pay the debt. But if a debtor ignores a complaint, generally that will result in a default judgment against her.[2] Rossi **[*22]** does not allege that Kohn has a practice of filing lawsuits and then abandoning them if the consumer disputes the debt.

In both her brief and her deposition, Rossi says that, regardless whether she owed the debt and regardless whether she had any defenses, she could have reached a more favorable settlement if she had retained an attorney in the state-court lawsuit. Dkt. 37, at 7; Dkt. 41-1 (Rossi Dep. 126:3-11). The loss of a chance to obtain a settlement is a concrete injury. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983, 197 L. Ed. 2d 398 (2017). And it may be true that a lawyer could have negotiated a settlement for Rossi. But that injury is not fairly traceable to Kohn, which did not stop Rossi from retaining a lawyer. As noted above, Rossi says in her declaration that she chose not to fight the debt-collection lawsuit because she believed—based on her assumption that Emick had more thoroughly investigated her case—that "there was no chance that I could contest the debt and no chance that I would win that contest." Dkt. 28, ¶ 7. In other words, Rossi says that she didn't hire a lawyer because she believed that she couldn't win the case, which, as it turned out, was true. If she wanted a lawyer simply to get a better settlement, she could have done **[*23]** that regardless how strong she believed Discover's claims were. Thus, under Rossi's own explanation of her behavior, any implied representation from Kohn about Emick's amount of involvement in the case had no effect on her decision not to hire a lawyer or otherwise dispute the debt.

[2] Rossi acknowledges this distinction in her declaration: "The fact that Discover had a lawyer suing me was significant to me because had Discover demanded that I pay the debt, without suing me, I would have felt more free to negotiate with Discover about how much I owed or how much I could or should pay." Dkt. 28, ¶ 13.

To be clear, the court is not holding that Rossi was required to show that she would have been able to defeat Discover's claims or even obtain a better settlement if she had received the information about Emick's amount of involvement. That much is clear from *Lavallee*, in which the plaintiff debtor alleged that the defendant debt collector failed to notify the plaintiff about her rights to dispute and verify the debt, as required by 15 U.S.C. § 1692g(a). 932 F.3d at 1049. The court held that the plaintiff had standing to sue, even though she had not identified any substantive objections to the debt. The court observed that the debt collector put the debtor at a "distinct disadvantage" by depriving her of knowledge about her rights: "If she had known about her rights, she could have disputed and sought verification of the debts—thereby requiring [the debt collector] to cease the collection action and obtain verification." *Id. at 1053*. The disadvantage **[*24]** was particularly significant in that case because the debt collector had already sued the debtor without giving her notice of her rights.

Lavallee does not help Rossi because the injury in that case was not just the deprivation of information itself. Rather, it was the loss of the debtor's ability to assert her rights and cease collection activities. It was possible that the debtor could have prevented or at least delayed the debt-collection lawsuit had she known about her rights. Rossi's situation isn't comparable. She identifies no right that she lost as a result of any implied misrepresentation by Kohn.

The court of appeals drew a similar line in *Robertson v. Allied Sols., LLC, 902 F.3d 690 (7th Cir. 2018)*, a case brought under the Fair Credit Reporting Act. The plaintiff had received an offer of employment from the defendant, but it rescinded the job offer after obtaining a credit report on the plaintiff, who then sued because the defendant failed to comply with requirements to give her notice and obtain her consent before requesting the report. The court found that the plaintiff had standing to sue, even though she wasn't disputing the accuracy of the report. Again, the injury was more than just the denial of required information. The plaintiff **[*25]** was injured by the loss of the chance "to bring additional facts to the employer's attention that put matters in a better light" or to "convince [the] employer to revisit its decision." *Id. at 696-97*. Here, Rossi hasn't identified a lost chance to do anything that could have made a difference in her case. Her situation is more like that in *Rivera v. Allstate Ins. Co., 913 F.3d 603, 615-17 (7th Cir. 2018)*, in which the court held that the plaintiffs lacked standing to sue because they failed to explain

how they could have used the information denied to them under the *Fair Credit Reporting Act*. *See also Bryant v. Compass Grp. USA, Inc., No. 20-1443, 2020 U.S. App. LEXIS 14256, 2020 WL 2121463, at *6 (7th Cir. May 5, 2020)* ("The injury inflicted by nondisclosure is concrete if the plaintiff establishes that the withholding impaired her ability to use the information in a way the statute envisioned.").

The bottom line is that Rossi hasn't shown that she suffered a concrete harm as a result of an implied representation by Kohn in the state-court complaint. The court will dismiss this case for lack of standing.

B. Merits

Even if Rossi had shown that she had standing, her claim would fail on the merits. Kohn challenges Rossi's claim on multiple grounds, but the court will consider only one of them, which is that Rossi hasn't raised a genuine of material fact on the question whether Kohn **[*26]** violated *§ 1692e* by making a false or misleading representation in the complaint.[3]

As discussed in the previous section, Rossi's claim rests on the view that Kohn falsely implied that the complaint was "from" Emick because he was not meaningfully involved in assessing the merits of the complaint. As also discussed, there is a strong argument that the complaint was from Emick regardless how much time he spent reviewing it. But for the purpose of the merits of Kohn's motion, the court will assume, as Rossi contends, that the standard from *Avila*, *Boyd*, and *Nielsen* is controlling: that Kohn may be held liable under *§ 1692e* if Emick was not personally involved in the decision to file the debt-collection lawsuit and did not make his own professional judgment.

In his declaration, Emick says that he reviewed Rossi's file twice before authorizing a lawsuit, first on October 16, 2018, and again on October 18. Emick doesn't remember Rossi's case specifically, but he explained in both his declaration and deposition the general process he uses in each case review. He first reviews the notes of the paralegals who have prepared the file and the lawyer who authorized sending a collection letter. Dkt. 14, ¶ 17. **[*27]** He then confirms the following information before approving an account for legal action: Kohn is pursuing the correct individual for the correct balance; the account is proceeding in the correct venue based upon the debtor's residence; the statute of limitations has not expired; Kohn had the account terms and conditions; the monthly itemized credit card statements reflect the debtor's name and the last four digits of the account number; Kohn's file balance matches that of the final credit card statements; the debtor is not a minor; and non-lawyer staff have "scrubbed" the account, meaning that they determined whether the debtor is deceased, had filed for bankruptcy protection, or is on active military duty. *Id.*

Following Emick's approval, paralegals draft the complaint. *Id.*, ¶ 19. Emick then reviews the complaint and confirms the following information: the caption is correct; the case is proceeding in the correct venue; all of the substantive information in the complaint is truthful and accurate; the complaint identifies the correct balance; the final credit card statement is attached to the complaint and the balance in the statement matches the balance on Kohn's electronic file; and **[*28]** any private or sensitive information is redacted from the documents to be filed with the court. *Id.*, ¶ 20. Emick also reviews the file notes to determine whether there were any other communications with the debtor since his previous review, whether there was a payment plan or settlement in place, and whether the debtor had asserted a claim of fraud or identity theft. *Id.* Under these procedures, Emick rejected 652 proposed complaints over the course of a year. *Id.*, ¶ 22.

The review described in Emick's declaration is more substantial than the reviews criticized by the court of appeals in *Avila* and *Nielsen*. The lawyer in *Avila* "did not review the debtor's file; he did not determine when particular letters should be sent; he did not approve the sending of particular letters based upon the recommendation of others; he did not see particular letters before they were sent; and he did not even know the identities of the debtors to whom the letters were sent." *Avila, 84 F.3d at 228-29*. In *Avila*, the lawyer contributed nothing but his signature and his letterhead.

The facts in this case are distinguishable from *Nielsen* as well. The court of appeals noted several factors leading to the conclusion that the lawyer had **[*29]** not

---

[3] The Supreme Court and the Court of Appeals for the Seventh Circuit have already rejected Kohn's contentions that the FDCPA doesn't apply to a lawyer's litigation conduct or to misrepresentations in a complaint. *See Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995)* (FDCPA applies to a lawyer's conduct that occurs in the context of litigation); *Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1079 (7th Cir. 2013)* (FDCPA applies to misrepresentations in a complaint).

been sufficiently involved in preparing the collection letter: he was not responsible for deciding whether to send the letter; he did not have access to the information he would need to determine the consumer's liability; the lawyer's review of the file was purely ministerial; he used a form letter; his role in handling responses to the letter was also ministerial; the lawyer received a flat fee of $2.45 for each letter he signed; he never took legal action to enforce a debt. *Nielsen, 307 F.3d at 635-38*. In this case, Emick was responsible for deciding whether to file a lawsuit, he had access to the debtor's file and reviewed it, and he obviously took legal action to enforce the debt by filing the complaint and litigating the case to completion.

Rossi doesn't attempt to show that the facts in this case are comparable to either *Avila* or *Nielsen*. Instead, Rossi relies primarily on *Boyd*. In that case, the lawyer stated that he reviewed each debtor's file to confirm the accuracy of the information in the file and to assess the validity of the debt collector's claim. *Boyd, 275 F.3d at 644*. The court of appeals did not question the sufficiency of the lawyer's stated process. But the court concluded that a jury could reject the lawyer's **[*30]** testimony in light of evidence that his firm of three lawyers mailed out an average of more than 50,000 debt collection letters each month, that all three lawyers also engaged in time-consuming litigation activities, and that the lawyer at issue was also involved in managing the firm. *Id. at 645*. Because the volume of mail was so large and the lawyer had so many other responsibilities, a reasonable jury could find that the lawyer had not actually reviewed the letter but had simply "rubber stamp[ed] his clients' demands." *Id. at 646-47*.

Rossi contends that *Boyd* is like this case and that a reasonable jury could infer from the amount of time that Emick spent on her case—5 minutes and 42 seconds—that he could not have conducted the review that he says he did. Certainly, 5 minutes and 42 seconds is much less time than a lawyer would spend on most types of cases. But a claim for defaulting on a credit card debt of a few hundred or thousand dollars will often be straightforward. Rossi doesn't identify anything about her case that would require more time than Emick spent.

The court in *Boyd* did not quantify the amount of time that a lawyer must spend on a single case. To the contrary, the court acknowledged that it **[*31]** is appropriate in simple cases like Rossi's to delegate some tasks to paralegals, stating that "professionals are not to be criticized for identifying subroutines that paraprofessionals can adequately perform under a professional's supervision." *Id. at 647-48*. But the lawyer in *Boyd* denied that he used paralegals, which further undermined his testimony that he performed all the work he said he did. *Id. at 648*. In this case, Kohn acknowledges that paralegals perform much of the factual investigation for each case.

Rossi contends that a lawyer may not rely on paralegals unless the attorney "has sufficient information and personal knowledge to have a solid belief that the information is reliable." Dkt. 21, at 18. Further, Rossi says that Emick wasn't entitled to rely on paralegals because he didn't personally know their "background, qualifications, education, or training." Dkt. 31, ¶ 27. But *Boyd* doesn't require either of those things. The standard that Rossi proposes would go well beyond a determination whether a lawyer was professionally involved in a case. Rossi does not allege that Emick was responsible for training paralegals or assessing their abilities. Kohn is the employer, not Emick. And Rossi hasn't **[*32]** adduced any evidence that Kohn didn't adequately train its staff or that they weren't qualified to perform their assigned tasks. For the purpose of this case, it is enough that Emick understood what tasks the paralegals were supposed to perform and that he had sufficient information to confirm that they had performed their jobs. In the absence of evidence that Emick knew that Kohn's staff wasn't adequately performing their jobs, he was entitled to rely on the information he received.

Alternatively, Rossi contends that Emick's review wasn't adequate because he didn't say that he checked for potential illegal clauses in the card member agreement and he didn't review Wisconsin law to determine whether a default as defined by Discover is consistent with Wisconsin law. Rossi doesn't explain why a statutory definition of default under Wisconsin law would be relevant to a common-law breach of contract claim, and she doesn't identify any illegal clauses that Emick overlooked. In any event, Rossi is again reading too much into the Seventh Circuit law construing *§ 1692e*. The court has not held that a lawyer's signature implies that the lawyer did a complete and thorough analysis of any issue that might **[*33]** be raised in the case. *Section 1692e* is about misrepresentations, not about the quality of a lawyer's work. Even a poor lawyer is not necessarily deceptive; a lawyer may be professionally involved in a case even if his work is not at the highest level of skill and diligence. In this case, the undisputed facts show that Emick was professionally involved in preparing the complaint, which is all that the case law

requires.

End of Document

C. Conclusion

Rossi's claim has two fundamental flaws. First, she hasn't adduced evidence of an injury in fact that is fairly traceable to Kohn's conduct. A conclusory allegation that Rossi would have hired a lawyer or otherwise disputed the debt doesn't show an injury in the absence of a concrete harm. Rossi doesn't say that a lawyer wouldn't have uncovered any defenses, so the only likely difference a lawyer would have made would be to incur additional legal expenses. Even if a lawyer could have negotiated a settlement, Rossi doesn't allege that the complaint Kohn filed against her led her to believe that a lawyer couldn't help her with that. Rather, she says that she didn't fight the lawsuit because she didn't think she could win. Because that assessment was accurate, any misperception **[*34]** that Rossi had about the amount of time or effort that Emick spent on the case was harmless.

Second, Rossi misunderstands the case law applying the meaningful involvement standard in the context of debt collection letters. The court of appeals has not imposed a minimum time requirement on reviewing debt-collection cases and it has not held that lawyers who perform routine, high-volume work are necessarily liars. Because Emick was professionally involved in preparing this routine breach of contract case, his signature is not a misrepresentation that violates *§ 1692e* under the standard in *Avila*, *Boyd*, and *Nielsen*.

ORDER

IT IS ORDERED that:

1. Plaintiff Natalie Rossi's motion to supplement the record, Dkt. 40, is GRANTED.
2. Defendant Kohn Law Firm's motion for summary judgment, Dkt. 10, is GRANTED, and this case is DISMISSED for lack of subject matter jurisdiction because Rossi lacks standing to sue.
3. The clerk of court is directed to enter judgment in favor of Kohn and close this case.

Entered May 18, 2020.

BY THE COURT:

/s/ JAMES D. PETERSON

District Judge

Consumer Fin. Prot. Bureau v. Weltman, Weinberg & Reis Co., L.P.A.

United States District Court for the Northern District of Ohio, Eastern Division

July 25, 2018, Decided; July 25, 2018, Filed

CASE NO. 1:17 CV 817

Reporter
2018 U.S. Dist. LEXIS 124630 *; 2018 WL 3575882

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. WELTMAN, WEINBERG & REIS CO., L.P.A., Defendant.

Prior History: *Consumer Fin. Prot. Bureau v. Weltman, Weinberg & Reis Co., L.P.A., 2017 U.S. Dist. LEXIS 161004 (N.D. Ohio, Sept. 28, 2017)*

Core Terms

Weltman, consumer, misleading, meaningfully, compliance, scrub, shareholders, deceptive, non-attorney, templates, Interrogatory, preponderance, audit, sophisticated, arbitration, letterhead, lawsuit, staff

Counsel: **[*1]** For Consumer Financial Protection Bureau, Plaintiff: Jehan A. Patterson, Zol D. Rainey, Rebeccah G. Watson, Sarah M. Preis, Consumer Financial Protection Bureau, Washington, DC; Michael G. Salemi, Thomas M. McCray-Worrall, Consumer Financial Protection Bureau, SEFL/Office of Enforcement, Washington, DC.

For Weltman, Weinberg & Reis Co., L.P.A., Defendant: James R. Wooley, Ryan A. Doringo, Tracy K. Stratford, Jones Day - Cleveland, Cleveland, OH.

Judges: Donald C. Nugent, Judge.

Opinion by: Donald C. Nugent

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the Court subsequent to a four-day trial to the Court, with an advisory jury duly empaneled and sworn pursuant to *Fed. R. Civ. Pro. 39(c)(1)*. Following trial, the parties each submitted proposed findings of fact and conclusions of law. The issues have now been fully presented and are ready for the Court's consideration.

PROCEDURAL HISTORY

Plaintiff, the Consumer Financial Protection Bureau ("the Bureau"), filed this action on April 17, 2017, alleging that Defendant Weltman, Weinberg & Reis Co., L.P.A. ("Weltman") violated *Sections 807(3)*, *807(10)* and *814(b)(6)* for the *Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692e(3)*, *(10)*, and *1692l(b)(6)*; and, *Sections 1031(a)*, *1036(a)(1)*, *1054*, and *1055 of the Consumer Financial Protection Act of 2010 ("CFPA")*, *12 U.S.C. §§5531(a)*, *5536(a)(1)*, **[*2]** *5564*, and *5565*, by "misrepresenting the level of attorney involvement in demand letters and calls to consumers. (ECF #1, ¶1,2). Following discovery both parties moved for summary judgment. (ECF # 44, 45). Both of these motions were denied. (ECF #61).

Trial of this matter commenced on May 1, 2018, before an advisory jury, pursuant to *Fed. R. Civ. Pro. 39(c)(1)*. Prior to the jury's empanelment, the Plaintiff voluntarily dismissed Counts 4, 5 and 6, with prejudice, and

withdrew its request for disgorgement. (ECF #79). This left Counts One through Three for trial. Count One alleged that Weltman's demand letters "misrepresented that the letters were from attorneys and that attorneys were meaningfully involved, when in most cases the attorneys were not meaningfully involved in preparing and sending the letters" in violation of *Sections 807(3)* and *807(10) of the FDCPA*, *15 U.S.C. § 1692e(3)*, *(10)*. Count Two alleged that the same letters violated *Section 1036(a)(1)(A) of the CFPA, 12 U.S.C. § 5536(a)(1)(A)*, for the same reason. Count Three alleges that this also constituted deceptive acts and practices in violation of *Sections 1031 (a)* and *1036(a)(1)(B) of the CFPA*, *12 U.S.C. §§5531(a)* and *5536(a)(1)(B)*.

At trial, the Plaintiff called three witnesses: (1) Ms. Eileen Bitterman; (2) Mr. David Tommer; and, (3) Dr. Ronald Goodstein, and submitted exhibits. Defendant called two additional **[*3]** witnesses: (1) Chuck Pona; and, (2) Scott Weltman. On May 4, 2018, after four days of trial, the jury submitted their answers to the following interrogatories:

> 1. Do you find that the Plaintiff proved by a preponderance of the evidence that the initial demand letter sent by Weltman contained any false, deceptive, or misleading representations or means in connection with the collection of a debt? YES (Enter "yes" or "no").
> If your answer to Interrogatory Number 1 is yes, continue to Interrogatory Number 2. If your answer is no, your deliberations are finished and you should not answer any further questions.
>
> 2. Do you find that the Plaintiff proved by a preponderance of the evidence that Weltman's lawyers were not meaningfully involved in the debt collection process. NO (Enter "yes" or "no").
> If your answer to Interrogatory Number 2 is yes, continue to Interrogatory 3. IF your answer is no, your deliberations are finished and you should not answer any further questions.

After the advisory jury returned these findings, the parties were given a final opportunity to present their proposed findings of fact and conclusions of law.

The Court is not bound by the advisory jury's determination, but **[*4]** finds that their answer to Interrogatory Number 2 comports fully with the weight of the evidence presented at trial. The jury's answer to Interrogatory Number 1, however, does not correctly reconcile the evidence presented with the Court's instructions or the standard of proof required of the Plaintiff in this case. Although there was some evidence presented in support of the idea that the letters could be misleading to certain consumers, that evidence came exclusively from an expert that the Court does not find credible. Further, the Complaint relies solely on the assertion that the demand letters were misleading because they were sent from a law firm, and lawyers were not meaningfully involved in the debt collection process. The jury's finding, adopted by this Court, that lawyers were meaningfully involved disproves the Plaintiffs sole theory of liability, and precludes recovery under the Complaint.

ANALYSIS

1. Applicable law

Neither party disputes that Weltman is a debt collector to whom the FDCPA and the CFPA apply, or that Weltman's demand letters were sent in connection with the collection or attempt to collect debts. The question at issue in this case is whether Weltman's debt **[*5]** collection demand letters violated the FDCPA or the CFPA. The FDCPA and the CFPA were violated if the letters used "any false, deceptive, or misleading representation or means in connection with the collection of any debt," or if they falsely represent or imply that communication is "from an attorney." *15 U.S.C. §1692e* and *1692e(3)*. A demand letter is not false or misleading for using letterhead that "accurately describes the relevant legal entities," had an accurate and truthful signature block, and includes a "conspicuous notation that the letter is sent by a debt collector." *Sheriff v. Gillie, 136 S. Ct. 1594, 194 L. Ed. 2d 625 (2016)*.

The letters are alleged to have violated the FDCPA and the CFPA not because they contain false statements, but because they allegedly falsely imply that an attorney was meaningfully involved in the collection of the debts to which the letters relate. According to case law from various circuits, a demand letter indicating that it comes "from an attorney" can be found to be deceptive even if literally true, if the letter is not the product of an attorney's professional judgment, or if the attorney was not sufficiently involved in the collection of the debt or the drafting of the letter. *See, e.g.,* *Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002)*; *Lesher v. Law Offices of Mitchell N. Kay, P. C., 650 F.3d 993, 1003 (3d Cir. 2011)*; *Greco v. Trauner, Cohen & Thomas, LLP, 412*

F.3d 360, 364 (2d Cir. 2005); Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342, 1363 (N.D. Ga. 2015). In order to establish any of **[*6]** the violations alleged in the Complaint, the Plaintiff must show, by a preponderance of the evidence, that:

1. The least sophisticated debtor would believe, based on the initial demand letter, that Weltman was acting as an attorney in the debt collection process;[1] and,

2. Weltman's lawyers were not meaningfully involved in the debt collection process; and,

3. The representation that Weltman was acting as an attorney in the debt collection process was material.

The least sophisticated debtor is to be considered uninformed, naive, and trusting, but also possessing reasonable intelligence, and capable of making basic logical deductions and inferences. Sanford v. Portfolio Recovery Assocs., LLC, NO. 12-11526, 2013 U.S. Dist. LEXIS 101806, 2013 WL 3798285, at *12 (E.D. Mich. July 22, 2013)(citations omitted). It is not a requirement that the Defendant intended to mislead or deceive a consumer. This standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor," Smith v. Computer Credit, Inc., 167 F.3d 1052, 1054 (6th Cir. 1999), but does not give credence to "frivolous misinterpretations or nonsensical interpretations. . . ." Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 592 (6th Cir. 2009).

There is no specific test for what constitutes "meaningfully involved." Cases have held that an attorney has sufficient personal involvement in the process if one reviews the file of the individual consumer **[*7]** to whom the letter was sent and/or exercises some "professional judgment as to the delinquency and validity of any individual debt" before the letter is issued. *See, e.g.* Consumer Financial Protection Bureau v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342, 1363 (N.D. Ga. 2015); Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996); Lesher v. Law Offices of Mitchell N. Kay, P. C., 650 F.3d 993, 999 (3d Cir. 2013). This is not necessarily a set requirement for meaningful involvement, however, as this is a question that must be determined based on the individual facts and totality of the circumstances in each case. *See,* Miller v. Wolpoff & Abramson, LLP, 321 F.3d 292, 304 (2d cir. 2003).

In order for a representation to be material, it must be likely to influence the least sophisticated debtor's decision on whether or not to pay a debt. *See,* Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323, 326-27 (6th Cir. 2012). Creating a legitimate fear of the actual consequences of owing a valid debt is not misleading or deceptive under the act.

2. Stipulated Facts[2]

The parties stipulated to the following facts:

1. The Bureau (Plaintiff) is an independent agency of the United States that enforces and issues regulations pursuant to federal consumer financial law, including the Fair Debt Collection Practices Act and the Consumer Financial Protection Act of 2010.

2. Weltman (Defendant) is an Ohio professional corporation organized under the laws of Ohio that operates as a law firm.

3. Weltman has maintained a website, www.weltman.com, from at least July 21s1, 2011, to date.

4. Weltman **[*8]** is a debt collector under the Fair Debt Collection Practices Act and a covered person under the Consumer Financial Protection Act of 2010.

3. Evidence at Trial

Eileen Bitterman, the compliance officer and a shareholder of Weltman, is a lawyer licensed to practice law in Ohio. She is responsible for creating policies and overseeing training. (ECF #75 at 44). She testified as follows.

Weltman is owned by shareholders, all of whom are attorneys. (ECF #75 at 130). Weltman is hired by creditors to collect a variety of types of consumer debt.

---

[1] A violation of CFPA's prohibition against using deceptive acts or practices uses a "reasonable person" standard rather than a "least sophisticated consumer" standard. The elements otherwise mirror those in the FDCPA. Therefore, if an act or omission does not violate the FDCPA's provisions, it will not violate the less stringent standard under the CFPA. *See, e.g.,* Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1192 (9th Cir. 2016); FTC v. E.M.A. Nationwide, Inc., 767 F.3d 611 (6th Cir. 2014).

[2] The stipulated facts were taken from the Parties' Stipulation of Facts (ECF #66), and from stipulations agreed to by the parties at trial, which were communicated to the Jury through the Court's jury instructions. (ECF #77 at 80-81).

(ECF #75 at 44-45). During the relevant time period, Weltman had up to 7,000 creditor clients. (ECF #75 at 98). Weltman has a consumer collection unit that is staffed by non-attorneys but is overseen by an attorney who is the business unit leader, and collections support attorneys. (ECF #75 at 48). They are paid on a contingency fee basis, based on the amount of money they are able to collect from consumers. (ECF #76 at 94, 107).

In an attempt to collect on consumer debts, Weltman sends out letters that are generated from attorney-approved templates. (ECF #75 at 50-51). One of these templates is an initial demand letter that includes the name of Weltman, **[*9]** Weinberg & Reis Co., L.P.A. and the words "Attorneys at Law," at the top of the letter. (ECF #75 at 57, 86). These letters are signed by Weltman, and are on Weltman letterhead. (ECF 475 at 57-58, 80, 86). Ms. Bitterman testified that 4.2 million demand letters, from these templates, were sent to consumers between July 21, 2011 and October 31, 2017. (ECF #75 at 91). She also testified that some templates for follow-up letters also state that "this law firm is a debt collector attempting to collect this debt for our client," or other references indicating that Weltman is a law firm, which are a truthful statements. (ECF #75 at 64-66).

Weltman does not contend that they are practicing law when they send demand letters. (ECF #76 at 96). They do not require an attorney to review every individual consumer account before a demand letter is sent. (ECF #75 at 98-99). Weltman attorneys do not form a professional judgment about the validity of a debt or the appropriateness of sending a demand letter before the letters are sent. (ECF 475 at 99). Weltman receives information from creditor clients about consumer accounts and data is loaded into Weltman's computer system. (ECF #75 at 73-74). The data **[*10]** is then "scrubbed." Scrubbing is a process by which outside vendors use criteria established by Weltman's lawyers to flag consumers who should not be sent collection letters. (ECF 475 at 102-103).

Some of Weltman's training manuals indicate that "because WWR is a law firm, a consumer may have the incorrect assumption that a legal action will be automatically filed against them" and that "certain consumers may have prioritized paying the debt because the law firm is in a better position to file suit than a collection agency." (ECF #75 at 108, 112). If a client wants advice on whether to pursue litigation, Weltman has non-attorney audit employees review the consumer's information to see if the account is eligible. These employees follow policies and procedures provided to them by Wellman attorneys. (ECF #75 at 114). If an account is flagged as not eligible for litigation, an attorney could then review the file, and before a lawsuit can be filed, an attorney must review the consumer's account. (ECF #75 at 114). Wellman has attorneys licensed in only seven states, but does nationwide debt collection. If an account is elevated to litigation in a state where no Wellman attorney is licensed, **[*11]** Weltman may refer the case to a different law firm, who would then have to send another demand letter informing the consumer that the firm is acting as a debt collector. (ECF #75 at 115-116).

Weltman has a formal compliance program that is developed and approved by attorneys, including the shareholders and the Board. (ECF #130-131). It has hundreds of policies and procedures for delegating, educating, and supervising staff, for auditing compliance across the business units and ensuring compliance with client processes and procedures as well as Weltman's processes and procedures. (ECF #75 at 127-129, 132-134, 180; ECF #76 at 10-36). These are drafted by attorney shareholders, go through several layers of attorney review; and are eventually approved by attorney Board members. (ECF #75 at 128-130, 132, 182-183; ECF #76 at 10-36). They are also enforced by attorneys. (ECF #76 at 11-35). Attorneys are involved in bringing clients to the firm, drafting client contracts, checking their reputation, interacting with the client, and discussing the available data and documentation, the history of their portfolio and types of accounts, which consumers are represented by attorneys, any asset reviews **[*12]** that have occurred, and arbitration or bankruptcy information, reviewing the clients procedures and policies, and evaluating whether the client is a trustworthy and legally compliant creditor. (ECF #75 at 149-150, 167-169; ECF #76 at 72-73). Attorneys assess issues that may arise with statutes of limitations, arbitration clauses, choice of law issues, how interest is calculated, last date of payment, deceased debtors and other legal questions. (ECF # 153-54; ECF #76 at 8-9)). Many of these issues must be addressed by an attorney before a demand letter ever goes out. (ECF #75 at 157). Using their legal knowledge the attorneys create procedures for analysis that can be taught to non-attorney employees or programmed for automated implementation or programming of the "scrubbing" criteria. (ECF #75 at 157-159).

Ms. Bitterman also testified that these same procedures used in the processes complained of in this lawsuit,

including electronic communication and automated scrubbing processes were previously approved by the Ohio Attorney General and used by the firm when working as special counsel for the collection of debts owed to the State of Ohio. (ECF #76 at 43-44, 58-59). The evidence showed **[*13]** that Richard Cordray, who was the head of Plaintiff, CFPB when this lawsuit was filed, was the Ohio Attorney General when Defendant Weltman was hired to collect those state debts. When collecting for the State of Ohio, Attorney General Cordray, the same person ultimately responsible for the filing of this lawsuit, directed Weltman to use the Ohio Attorney General's letterhead on Weltman's demand letters for the state. He also required Weltman to state in the letter that they were "special counsel," and to use the words "Attorney at Law" and "collections enforcement special counsel" on the demand letter. (ECF #76 at 52-54).

Ms. Bitterman testified that as a Weltman attorney, in charge of compliance, having talked to debtors and having access to the complaint log, she is not aware of any complaints given directly to the firm stating that their letters were confusing due to their identification as a law firm. (ECF 476 at 62-64). She also stated that she is not aware of any holding from any court finding that Weltman had misled a consumer. (ECF #76 at 89, 105). She acknowledged, however, being aware of multiple lawsuits, in both state and federal courts, filed against the firm alleging **[*14]** that their demand letters were misleading for implying that there is meaningful attorney involvement in the demand letters. (ECF #76 at 86-89). She testified she is also unaware of any person who prioritized payment, or paid a debt not owed, because the demand letters came from a law firm, rather than identifying simply as a debt collector. (ECF 476 at 63-64). Weltman provided "over a million recorded consumer phone calls," none of which were cited by the Plaintiff as evidence of confusion, materiality, or harm stemming from the alleged misrepresentation in this case. (ECF #76 at 67-68).

Mr. Tommer, the director of consumer collections and a non-attorney, also testified at trial. He testified that he works with law firm attorneys to develop workflow strategies for the collection of consumer debts. (ECF 476 at 114-115). He testified that the supervisors in the "agency unit," which falls under the consumer collection business unit, are not attorneys. (ECF #76 at 117-119). He reports to Chuck Pona, who is an attorney, and who oversees the consumer collection unit. (ECF #76 at 139). He also testified that no attorneys work "directly under " the agency collections group. (ECF # 76 at 120). **[*15]** When accounts are taken in by Weltman, Weltman load the data, scrub the electronic data, and then if the files survive the scrub, and there is a valid address, a demand letter is generated and sent within two to three days from intake. (ECF #76 at 129-130). This entire process is automated. (ECF #76 at 130). Attorneys develop the scrub process, but Mr. Tommer was unaware of any other role attorneys would have in the scrub process. (ECF #76 at 130).

When initial demand letters don't result in payment, clients may reclaim the files or the files may go to the audit department to be assessed for additional actions, including the filing of a suit. (ECF #76 at 133). The suit audit department gathers information to give to the attorneys to make this determination. (ECF #76 at 133-134).

Mr. Tommer testified that attorneys are meaningfully involved in a debt collection before the consumer is mailed an initial demand letter. (ECF #76 at 141). They run the firm, and every day he and his team interact with or take direction from an attorney while doing their jobs. (ECF #76 at 141-142). The demand letters were written by Eileen Bitterman, an attorney, and her team. (ECF #76 at 142). Attorneys make **[*16]** the decision whether to take on a client, and perform the reviews of potential clients' documents, legal terms and conditions relating to the debt. (ECF #76 at 143-144). Attorneys are involved at the onset of the scrubbing process for the high volume clients. (ECF #76 at 144). Attorneys also look at and oversee any alterations and changes in internal processes, implementation of any new letter, and procedures and policies utilized on a day to day basis, scripting for collectors, and training materials. (ECF #76 at 146-147).

The Plaintiff also called Dr. Ronald Goldstein, an associate marketing professor at the McDonough School of Business at Georgetown University, who was asked to assess whether consumers believe a lawyer is involved in reviewing an account, and the decision to send demand letters. (ECF #76 at 154-155). He was offered and accepted as an expert witness. (ECF #76 at 162).

Dr. Goldstein testified that he gave a field study survey to 634 people from the "relevant population," defined as "people who had used their credit card in the last five years for personal or household reasons" or "had borrowed money in the last five years for personal, household reasons," but not from **[*17]** a friend or family. (ECF 476 at 177-180). He stated that he did not

want to survey anyone who actually received Weltman's demand letter, any lawyers, or any marketing researchers because they would be biased, but he did not take any action to determine if anyone in the survey group had actually ever received a Weltman letter. (ECF #76 at 178-180, 195-196). He used three groups. One was shown the Weltman demand letter, and one was given a letter that purported to be from Weltman, Weinberg & Reis Ltd. , used the phrase "collection services" rather than "attorneys at law." The third group used the name WW&R, rather than "Weltman, Weinberg & Reis, Ltd. (ECF #76 at 182-183). Dr. Goldstein then asked a series of questions which led him to the finding that 40% of the first group believed a lawyer reviewed the account, 20% of the second group believed a lawyer reviewed the account, and 13% of the third group believed that a lawyer reviewed the account. (ECF 476 at 191-192). No definition was provided for what it means to "review the account." (ECF #76 at 202). He also tested the question "who sent the letter" and found that 50% of the people with the original letter believed it was sent by **[*18]** a law firm or lawyer. He himself testified that simply the use of the name Weltman, Weinberg & Reis, without any reference to a legal indicator, such as L.P.A. or "attorney at law," was perceived as sounding like a law firm. (ECF #76 at 195).

Dr. Goldstein also testified that while he designed the survey, he did not conduct the initial interviews; did not recruit the people who were surveyed; did not design the technological programming; delegated work to a research team; and, hired graphic designers to make changes to the letters. Nonetheless he testified that he was "meaningfully involved" in conducting the survey because all of the other people were working under his guidance and supervision. (ECF #76 at 199).

Defendant called Charles Pona to testify. He is an attorney who is currently managing the consumer collections department at Wellman, is a shareholder in the firm, and is on the management committee. (ECF #76 at 216-217). There are currently 20-25 attorneys in the consumer collections department. (ECF #76 at 222). The attorneys are continuously available to any non-attorney members of the unit to answer questions and give advice. They hold weekly meetings with the managers, **[*19]** and invite people from the client services area, human resources and IT staff to participate. (ECF #76 at 224). All attorneys are involved in compliance issues, but about 8-10 years ago a full time compliance department was started to focus on compliance with state and federal laws. (ECF #76 at 224). All written procedures and policies are sent to the attorneys on the management committee by a steering committee which includes compliance members. (ECF #76 at 225). Mr. Pona also testified that the firm has never been found to have violated any law related to debt collection practices, and that he is not aware of any ethical violations that have ever been found against the firm in any state. (ECF #76 at 227).

Mr. Pona testified that attorneys are involved in client acquisition and due diligence; IT requirements; contracting, including obtaining warranties as to the validity of the debts put forth for collection; sampling documentation and teems from collection accounts, including calculation of interest rates, analyzing default provisions, reviewing statutes of limitations, and determining when arbitration is required; reviewing for responsible parties; debtor asset review; permissible **[*20]** fees; develop criteria for scrubs that weed out non-collectible accounts; and, drafting the demand letters. (ECF #76 at 230-256).

Mr. Scott Weltman was also called by the defense. He is also an attorney who is currently the managing shareholder of the Weltman firm. (ECF #77 at 28). There are currently 25 attorney shareholders in the firm, and approximately 60 attorneys overall. (ECF #77 at 34). At times the firm has had up to 120-140 attorneys at a time. (ECF #77 at 34). Mr. Weltman testified that the firm has never been found to have violated any law, and that none of the firm's lawyers have ever been found to have committed ethical violations. (ECF #77 at 39). When working for the Ohio Attorney General the firm was chosen and continuously audited and the state never had a complaint with how they managed their debt collection practices. (ECF #77 at 40). He also testified that Ms. Bitterman and Mr. Pona correctly testified as to the involvement that attorneys have in the debt collection processes at Weltman. (ECF #77 at 41-42). Mr. Weltman testified that everything in the demand letter is truthful. (ECF #77 at 62).

FINDINGS OF FACT/CONCLUSIONS OF LAW

The Court makes the following findings **[*21]** of fact and conclusions of law based upon the evidence presented at trial:

1. This Court has subject-matter jurisdiction over this matter under *12 U.S.C. §5565(a)(1)*, *28 U.S.C. § 1331*, and *28 U.S.C. § 1345*.

2. Weltman regularly collects or attempts to collect consumer debts and, therefore, is a "debt collector" as

defined under the FDCPA.

3. Weltman collects debt related to consumer credit, and is, therefore, a "covered person" as defined under the CFPA.

4. Weltman is a legal professional association operating as a law firm, with a fully integrated collection agency. The firm is owned exclusively by attorney shareholders and the Board of Directors consists of five such shareholders.

5. Weltman also employs non-attorneys in the debt collection units.

6. Weltman sends out letters that are generated from attorney created and attorney approved templates. One of these templates is an initial demand letter printed on law firm letterhead, with the name of the firm appearing in all caps and in bold at the top with "ATTORNEYS AT LAW" printed directly beneath. "Weltman, Weinberg & Reis Co., L.P.A." is listed as the signatory on these letters.

7. The demand letters accurately describe the identity and legal description of the entity sending the letter. **[*22]** As such, it cannot be fairly described as false or misleading simply for correctly identifying Weltman as a law firm, and as the signatory.

8. The initial demand letter advises the putative debtor (1) that the debt has been placed with Weltman for collection and (2) that the consumer has specific rights under the FDCPA. These representations are both truthful.

9. The demand letter is sent on Weltman's letterhead, and accurately conveys the fact that Weltman is a law firm that has been retained to collect the putative debt. The letter does not state that an attorney has reviewed the particular circumstances of the account, does not mention any potential legal action, and is not signed by an attorney.

10. The demand letter template, used to generate the demand letters sent by Weltman reads as follows:

> Please be advised that the above referenced account has been placed with us to collect the outstanding balance due and owing on this account to the current creditor referenced above. As of the date of this letter you owe the amount listed above. Therefore, it is important that you contact us at [phone number] to discuss an appropriate resolution for this matter.
>
> This communication is from a **[*23]** debt collector attempting to collect this debt for the current creditor and any information obtained will be used for that purpose. Unless you dispute the validity of this debt, or any portion thereof, within thirty (30) days after receipt of this letter, we will assume the debt is valid. If you notify us in writing within the thirty (30) day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt or a copy of a judgment and a copy of such verification or judgment will be mailed to you. If you request in writing within the thirty (30) day period, we will provide you with the name and address of the orginal creditor if different from the current creditor.
>
> Thank you for your attention to this matter.
>
> Sincerely,
>
> Weltman, Weinberg & Reis Co., L.P.A.

11. Most of the content of the letter follows the language of the FDCPA. The first two sentences provide the information required by *15 U.S.C. §1692g(a)(1)* and *(2)*. The disclosure in the next paragraph that the communication is from a debt collector is nearly identical to the language of *15 U.S.C. §1692e(11)*, and the rest of that paragraph contains the exact language required by *15 U.S.C. §1692g(a)(3)-(5)*.

12. Weltman is not practicing law when they send demand letters.

13. **[*24]** Weltman's demand letters can be interpreted to imply that an attorney is "meaningfully involved" in the debt collection process.

14. Weltman does not require an attorney to review every individual consumer account before a demand letter is sent, and Weltman attorneys do not form a professional judgment about the validity of a debt or the appropriateness of sending a demand letter before the letters are sent.

15. Weltman obtains information from creditor clients about consumer accounts, and data is loaded into Weltman's computer system. Attorneys are involved in bringing clients to the firm, drafting client contracts, checking their reputation, interacting with the client, and discussing the available data and documentation, the history of their portfolio and types accounts, which consumers are represented by attorneys, any asset reviews that have occurred, and arbitration or bankruptcy information, reviewing the clients procedures and policies, and evaluating whether the client is a trustworthy and legally compliant creditor. This takes

place before demand letters are sent.

16. Attorneys obtain warranties as to the validity of the debts put forth for collection; sampling documentation **[*25]** and terms from collection accounts, including calculation of interest rates, analyzing default provisions, reviewing statutes of limitations, and determining when arbitration is required; reviewing for responsible parties; debtor asset review; and the validity of fees.

17. The data provided by Weltman's clients is "scrubbed." Scrubbing is a process by which outside vendors use criteria established by Weltman's lawyers to flag consumers who should not be sent collection letters. Attorneys, using their legal knowledge create procedures and criteria for analysis that can be taught to non-attorney employees or programmed for automated implementation or programming of the "scrubbing" criteria. This takes place before demand letters are sent.

18. Weltman has a formal compliance program that is developed and approved by attorneys, including the shareholders and the Board.

19. Weltman has hundreds of policies and procedures for collecting debts, as well as educating, and supervising staff.

20. Weltman's policies and procedures are drafted by attorney shareholders, go through several layers of attorney review, and are eventually approved by attorney Board members. They are also enforced by attorneys. **[*26]**

21. Weltman conducts routine audits for compliance across the business units and ensures compliance with client's processes and procedures as well as Weltman's internal processes and procedures.

22. Attorneys assess issues that may arise with statutes of limitations, arbitration clauses, choice of law issues, how interest is calculated, last date of payment, deceased debtors and other legal questions. Many of these issues must be addressed by an attorney before a demand letter is sent.

23. Attorneys draft the demand letter templates, and they are approved by the attorneys in Weltman's Compliance Audit Department.

24. Attorneys and non-attorney staff work together on a daily basis, and interact in weekly meetings. Weltman attorneys oversee all departments and are responsible for the training and oversight of all non-attorney staff.

25. Weltman reviews cases for litigation and litigates collection actions in the states where its attorneys are licensed.

26. There has never been a finding in any jurisdiction that Weltman's letters or any other of its statements contain falsehoods or misrepresentations.

27. Weltman collected debts for the State of Ohio using substantially similar demand letters **[*27]** to the ones at issue in this case, and following the same processes and procedures it follows for all other debt collection clients. The Ohio Attorney General, Richard Cordray, approved of these letters and with full knowledge of their content approved the use of these letters for the State of Ohio's collection efforts.

28. Despite requiring similar indications and disclosures of attorney involvement in the debt collection letters used on behalf of the State of Ohio, Richard Cordray, when he became head of the CFPB, authorized this lawsuit against Weltman for truthfully identifying themselves as a lawfirm and as attorneys, and for signing their demand letters with the firm name.

29. Plaintiff offered no evidence to show that any consumer was harmed by Weltman's practice of identifying itself as a law firm in their demand letters.

30. Plaintiff offered no evidence to show that any consumer did or would be inclined to prioritize payment for the debts referenced in Weltman's demand letters over any other debt they may have owed.

31. Plaintiff offered DO evidence to show that any consumer did or would be inclined to pay the amount sought in Weltman's demand letters even if they did not owe **[*28]** the debt.

32. Plaintiffs expert witness did not present credible evidence from which the fact finder could infer that any consumer's were misled by Weltman's demand letter.

33. The expert testified that his research showed that 40% of the people who read the letter would think that a lawyer had "reviewed" the account.

34. His testimony also showed, however, that 20% of people thought a lawyer "reviewed" the account even when DO mention of a law firm, or attorney was made in the letter.

35. His survey did not ask what a consumer meant when they said a lawyer "reviewed" the account; did not ask whether a consumer could have been biased based

on collection actions they may have experienced or other criteria; did not ask whether consumers would have felt misled or confused if they knew an attorney was involved in the debt collection process to the same extent that Weltman attorneys were shown to have been involved; and, did not ask whether a perceived attorney review would have influenced their decisions about whether and when to pay the debt reference in the letter.

36. The FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection **[*29]** with the collection of any debt." *15 U.S.C. §1692e*. This includes using any "false representation or deceptive means to collect or attempt to collect any debt," and making "false representation or implication that. . . any communication is from an attorney." *15 U.S.C. § 1692e(3)*, *(10)*.

37. This determination must be made from the point of view of the "least sophisticated consumer." *Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 438 (6th Cir. 2008)*.

38. The CFPA prohibits any violation of the FDCPA, as well as "any unfair, deceptive, or abusive practice" in connection with consumer products or services. *12 U.S.C. §§ 5481(12)(H)*, *(14)*; *5531(a)*; *5536(a)(1)(A)*, *(B)*. The standard under the CFPA is the same as the standard under the FDCPA, but is viewed from the perspective of reasonable consumers.

39. if there is no violation under the FDCPA in this case, there can be no violation under the CFPA.

40. Courts have held that when an attorney signs a letter on law firm letterhead, the least sophisticated consumer may believe that the attorney was involved in the debt collection process. Thus, they have concluded that if the attorney is not meaningfully involved in that process, the letter may be deceptive or misleading under the FDCPA.

41. Weltman's demand letters were truthful on their face.

42. Weltman attorneys were meaningfully **[*30]** and substantially involved in the debt collection process both before and after the issuance of the demand letters.

43. Plaintiff did not prove by a preponderance of the evidence that Weltman's letters were false, misleading, or deceptive.

44. A misleading representation is only actionable under the FDCPA if it is material. *See FTC v. E.M.A. Nationwide, Inc., 767 F.3d 611, 630-31 (6th Cir. 2014)*.

45. A representation is material under the FDCPA if it would influence the least sophisticated consumer's decision on whether and when to pay a debt. *See, e.g., Boucher v. Fin. Sys. Of Green Bay, Inc., 880 F.3d 362, 366 (7th Cir. 2018)*. Under the CFPA, a false representation is material if it is likely to influence a reasonable consumer to pay a debt. *See Fanning v. F.T.C., 821 F.3d 164, 173 (1st Cir. 2016)*.

46. Even if Weltman's letters had misrepresented the level of attorney involvement, Plaintiff could not prevail because there is no evidence that any consumer's decision on when and whether to pay a debt was influenced by the inclusion of the attorney identifiers in Weltman's demand letters.

47. In light of the above factual findings and conclusions of law, the Court finds that Plaintiff has failed to prove its case by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons this Court finds that Plaintiff failed to prove by a preponderance of the evidence its claims in **[*31]** Counts One, Two, and Three of the Complaint. Therefore, judgment is entered in favor of the Defendant, Weltman, Weinberg & Reis Co., L.P.A. and against Plaintiff, Consumer Financial Protection Bureau, on all of its remaining claims. All costs are assessed to the Plaintiff. This case is hereby terminated. IT IS SO ORDERED.

/s/ Donald C. Nugent

Judge Donald C. Nugent

DATED: July 25, 2018

JUDGMENT ORDER

Pursuant to a Memorandum Opinion of this Court, Judgment is entered in favor of Defendants, Weltman, Weinberg & Reis Co., L.P.A., and against Plaintiff, the Consumer Financial Protection Bureau, on Counts One through Three of the Complaint, all other counts having been previously dismissed by the Plaintiff. Plaintiff has failed to prove any violation of the Fair Debt Collection Practices Act or the Consumer Financial Protection Act

by a preponderance of the evidence. Costs are assessed to the Plaintiffs. IT IS SO ORDERED.

/s/ Donald C. Nugent

Judge Donald C. Nugent

DATED: July 25, 2018

---

12 Statutes Affecting Lawyer Liability

DAVID M. SCHULTZ
Hinshaw & Culbertson LLP
Chicago

The author wishes to thank Palak N. Shah, Hinshaw & Culbertson LLP, Chicago, for her assistance in the preparation of this chapter for the 2014 edition.

defined under the Fair Debt Collection Practices Act and what financial documents sufficiently determine the debt collector's net worth. The FDCPA does not explicitly define "net worth." The seminal case on the issue is *Sanders v. Jackson,* 209 F.3d 998 (7th Cir. 2000), in which the court squarely addressed the question of how net worth should be determined under the FDCPA. The court held that net worth under the FDCPA is book net worth (*i.e.,* a balance sheet net worth), assets minus liabilities. 209 F.3d at 1002, 1004. Goodwill is not factored into the calculation of the defendant's net worth. 209 F.3d at 1004. The court allowed this determination to be made based on the audited financial records of the company.

J. [12.25] Attorney Involvement in Debt Collection

Once the Fair Debt Collection Practices Act applies to an attorney, the issue often becomes a question of the way in which an attorney has violated the FDCPA. There are several areas of attack. A number of common liability pitfalls are discussed in §§12.26 – 12.28 below.

1. [12.26] Meaningful Involvement

An attorney who is not meaningfully involved in reviewing or sending out a dunning letter, but who otherwise allows a letter to be sent out to a debtor on his or her letterhead, faces potential liability under the Fair Debt Collection Practices Act. *Nielsen v. Dickerson,* 307 F.3d 623, 635 (7th Cir. 2002). Under 15 U.S.C. §1692e(3), a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney." This means that unless an attorney actually spent time personally reviewing a dunning letter or file, and the letter is not merely a mass-produced mailing, the attorney may be in violation of 15 U.S.C. §1692e(3) if a letter is sent out on the attorney's firm's letterhead. *Avila v. Rubin,* 84 F.3d 222 (7th Cir. 1996); *Nielsen, supra.*

In *Avila,* the court held that the attorney violated 15 U.S.C. §§1692e(3) and 1692e(9). The court found that the attorney's name was on the letters sent to debtors but the attorney (a) was not personally or directly involved in deciding when or to whom a dunning letter should be sent, (b) did not review the debtor's file, (c) did not determine when particular letters should be sent, (d) did not approve the sending of particular letters based on the recommendation of others, (e) did not see particular letters before they were sent, and (f) did not know the identities of the debtors to whom the letters were sent. The Seventh Circuit agreed with the district court and affirmed judgment for the plaintiff and class. The court reasoned that the "collection letters create the false and misleading impression that the communications were from an attorney when, in fact, they were not really 'from' an attorney in any meaningful sense of the word." 84 F.3d at 229.

The Seventh Circuit reversed summary judgment for the defendant attorney in *Boyd v. Wexler,* 275 F.3d 642 (7th Cir. 2001). In *Boyd,* the defendant attorney's affidavit stated that a lawyer from the law firm reviewed every individual file before a letter was sent and reviewed the plaintiff's letters before they were sent. However, the Seventh Circuit Court of Appeals held that, based in part on the volume of letters sent out by the firm, a jury could find that the defendant did not meaningfully review the letters. The court focused on the fact that pretrial discovery revealed that the defendant's law firm sent out 439,606 pieces of mail in an eight-and-one-half-month

period for an average of 51,718 letters a month. The court noted that the firm consisted of three attorneys and that, if each of the three lawyers spent four hours a day reviewing collection letters at 15 minutes per file, the firm would only send out 1,000 letters per month rather than nearly 50,000 letters per month. The court questioned the credibility of the affidavit filed in support of summary judgment.

In *Berg v. Blatt, Hasenmiller, Leibsker & Moore LLC,* No. 07 C 4887, 2009 WL 901011 at *13 (N.D.Ill. Mar. 31, 2009), the court denied the defendants' motion for summary judgment on the claim that the defendant credit card company falsely represented that its communications were from an attorney. The defendant law firm sent two initial collection letters and then filed suit against the plaintiff. A discrepancy existed between the amount of the debt set forth in the complaint and that in the affidavit attached to the complaint. The defendants presented detailed evidence of procedures regarding the process of preparation and the three-step review involved in generating an affidavit for a collection suit, but the court stated that they failed "to demonstrate any meaningful attorney review of the affidavit's contents as compared to the balances set forth on the face of the complaint or the correctness of the calculated interest." 2009 WL 901011 at *12. The court focused on the "gross discrepancy" between the debts stated in the affidavit and complaint and the fact that this was not the first time this mistake was made. *Id.* Therefore, the court held that a genuine issue of fact existed as to whether the defendant law firm engaged in meaningful review of the collection complaint and affidavit, and summary judgment was denied.

In *Greco v. Trauner, Cohen & Thomas, L.L.P.,* 412 F.3d 360 (2d Cir. 2005), the court of appeals affirmed a decision that dealt with the issue of false representation of attorney involvement, based on a collection letter sent out by the defendant law firm. The court reached the conclusion that attorneys do not violate 15 U.S.C. §1692e(3) when they send out debt letters to persons whose debt has not been personally reviewed, provided a proper disclaimer is contained therein.

> **Put another way, our prior precedents demonstrate that an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes *disclaimers* that should make clear even to the "least sophisticated consumer" that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney.** [Emphasis in original.] 412 F.3d at 364.

The disclaimer at issue read, "although 'this office represents [creditor] . . . [a]t this time, *no attorney with this firm has personally reviewed the particular circumstances of your account.*' " [Emphasis in original.] 412 F.3d at 365. *Cf. Gonzalez v. Kay,* 577 F.3d 600 (5th Cir. 2009) (letter with disclaimer may be misleading if depending on language and placement of disclaimer); *Lesher v. Law Offices of Mitchell N. Kay, PC,* 650 F.3d 993 (3d Cir. 2011) (collection letters violated FDCPA even with disclaimer because they falsely implied that attorney — acting as attorney — was involved in collecting debt).

In *Kistner v. Law Offices of Michael P. Margelefsky, LLC,* 518 F.3d 433 (6th Cir. 2008), the court of appeals reversed the district court's granting of summary judgment to the defendant law office. A form collection letter, printed on the law office letterhead, was sent to the plaintiff. The

court noted that the letter was printed on law firm letterhead, made repeated reference to a law firm, and directed remittance to an individually named lawyer, but also explicitly stated that the letter was from a debt collector and was "signed" by an unnamed "Account Representative." 518 F.3d at 339 – 340. Based on these conflicting aspects of the letter, the court of appeals reversed the district court's grant of summary judgment on behalf of the defendant law office. The court adopted the Second Circuit's " 'more than one reasonable interpretation' standard," which states "that collections notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate." 518 F.3d at 441, quoting *Cloman v. Jackson,* 988 F.2d 1314, 1319 (2d Cir. 1993). Thus, the "question for the jury becomes whether one can reasonably conclude that the letter . . . is susceptible to a reading by the least sophisticated consumer that it is from an attorney, even though [the defendant] has admitted that he had no direct role in sending the letter." *Kistner, supra,* 518 F.3d at 441.

2. [12.27] False Threats

Another problem attorneys face is whether a collection letter contains a false threat of litigation. 15 U.S.C. §1692e(5) provides that it is a violation of the Fair Debt Collection Practices Act to threaten "to take any action that cannot legally be taken or that is not intended to be taken." A threat of litigation can be implicit, and to violate the FDCPA, it only needs to meet the criteria of whether an unsophisticated consumer would consider the language to be a threat of litigation. The "unsophisticated consumer . . . standard is low, close to the bottom of the sophistication meter." *Avila v. Rubin,* 84 F.3d 222, 226 (7th Cir. 1996).

In *Lucero v. CBE Group, Inc.,* No. 09 C 2012, 2010 WL 3894043 at *3 (N.D.Ill. Sept. 29, 2010), the court denied the defendant's motion for summary judgment, reasoning that a jury could find that a dunning letter stating that the debtor's account "may be referred for legal or administrative action" and that "you can stop this action" by paying the debt implies that legal proceedings are imminent or already under way. The court stated that if further legal or administrative process was not in fact contemplated at the time the letter was sent, a reasonable jury could find that the implied imminence of the threats would mislead an unsophisticated consumer. 2010 WL 3894043 at *4.

This is not to say that a threat of litigation in and of itself violates the FDCPA. However, to avoid liability under the FDCPA, if an attorney makes a statement that could be construed as a threat of litigation by an unsophisticated consumer, the attorney should have the authority to follow through with the intention to sue if the debt is not paid, and there should be no legal impediment to filing suit.

The following cases do not address debt collection involving attorneys. These cases provide that a false statement must be material to support a claim under 15 U.S.C. §1692e. Attorneys and law firms should be aware of this developing concept when drafting and sending collection letters.

In *Hahn v. Triumph Partnerships LLC,* 557 F.3d 755, 756 (7th Cir. 2009), a debt collector sent the plaintiff a debt-collection letter that stated the total "amount due." The plaintiff did not deny that she owed that total amount, but alleged that the defendant misrepresented the character

SESSION TWO

Current Compliance Hot Topics

Barb Nilsen
Compliance Director, Blitt & Gaines, P.C.

Sarah Grincewicz
Compliance Director, Markoff Law LLC

Patrick Layton
VP of Managed IT, Impact Networking

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

LITIGATION NUMBERS (2018 AND 2019)

RECENT STATISTICS PROVIDED BY WEBRECON DEMONSTRATE THAT FDCPA AND TCPA LAWSUITS ARE DOWN BUT FCRA LITIGATION IS UP MORE THAN 8 %.

Approximately 9000 FDCPA Lawsuits filed in 2018 and approximately 8,300 filed in 2019

Approximately 4,500 FCRA Lawsuits filed in 2018 and approximately 4,900 filed in 2019

Approximately 3,800 TCPA Lawsuits filed in 2018 and approximately 3,200 filed in 2019

YTD: 4815 FDCPA

3423 FCRA

2571 TCPA

MEANINGFUL INVOLVEMENT

- Sculpted through consent decrees and case law because the term is not found in the FDCPA
  - Bock v. Pressler and Pressler, LLP- there is no set test for meaningful involvement and the four second review of the complaint prepared by non-attorney staff was not sufficient
  - Clomon v. Jackson-collection letters were not from the attorney when the attorney virtually no day-to-day role in the debt collection process
  - Weltman-the court found that the letters at issue were truthful on their face and the attorneys were meaningfully involved in the debt collection process
  - Used in litigation as an alleged violation of 15 U.S.C. § 1692e(3) which prohibits, “the false representation or implication that any individual is an attorney or that any communication is from an attorney.”

LETTERS

FDCPA prohibits the collection of any amount including any interest, fee, charge, or expense incidental to the principal obligation unless such amount is expressly authorized by the agreement creating the debt or permitted by law 15 U.S.C. § 1692f.

FDCPA prohibits the false representation of the character, amount, or legal status of any debt 15 U.S.C. § 1692e.

Bernal v NRA Group, LLC 930 f.3d 891 (7th Cir. 2019)- discusses when it is okay to use a percentage based collection fee where the agreement states the debtor agreed to be billed for any amounts that are due and owing plus any costs, including reasonable attorney's fees, incurred in attempting to collect amounts due.

Koehn v Delta Outsource Group, Inc. 939 f.3d 863 (7th Cir. 2019)- stating "current balance" did not violate section 1692g, rejecting the claim that it implies that a static balance would grow

LETTER SAFE HARBORS

- Miller safe harbor language: As of the date of this letter, you owe $___ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1–800–[phone number]. *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000)*

LETTER SAFE HARBORS (CONT.)

Avila

***AVILA V. RIEXINGER & ASSOC.*, LLC, NO. 15-1584 (2D CIR. 2016)**

SECOND CIRCUIT CASE THAT RECOMMENDS THE USE OF THE MILLER SAFE HARBOR LANGUAGE WHEN THE BALANCE IS ALREADY INCREASING DUE TO ACCRUING INTEREST AND OTHER CHARGES.

Boucher

***Boucher v. Finance System of Green Bay, Inc.*, et al., No. 17-2308 (7th Cir. 2018)**

- Reminds us that we can not use a cookie cutter version of the Miller safe harbor language and that is must be tailored so that the statement is not false of misleading.

Taylor

***Taylor v. Financial Recovery Services, Inc.*, No. 17-1650 (2d Cir. 2018)**

- Provided the answer to the question left open in Avila. Safe harbor language is not required if interest may accrue at some point in the future.

OTHER LETTER ISSUES

- Out of Statute Debt
  - Dunning letter fails to unambiguously inform the consumer that a partial payment or new promise to pay would restart the statute of limitations under Illinois law, and therefore it is misleading and deceptive as a matter of law. Perea v. Portfolio Recovery Associates, LLC 2020 WL 5763647
  - FDCPA violation when offering via website to settle debts without informing the debtors that the debts were time-barred Wheeler v. Midland Funding LLC et al, 2020 WL 1469449
- 1099s/Tax Consequences
  - "We will report forgiveness of debt as required by IRS regulations." None of the debts at issue totaled more than $600 and therefore there was no possibility of IRS reporting (*Schultz v. Midland Credit Management, Inc.,* 905 F.3rd 159 (3d. Cir. 2018)
  - "This settlement may have tax consequences." the court states the tax warning was literally true and not misleading. "May" does not mean "will" and therefor the statement is true on its face. (*Dunbar v. Kohn Law Firm, S.C.*, 896 F.3d 762 (7th Cir. 2018)

OTHER LETTER ISSUES CONT.

- Properly Identifying the Creditor
  - Dennis v. Niagara Credit Solutions, Inc., 946 F.3d 368 (7th Cir. 2019) – listing LVNV as current creditor satisfied 1692g(a) even without explaining the difference between the current creditor and the original creditor
  - Steffek v. Client Services, Inc., 948 F.38 761 (7th Cir. 2020)- listing Re: Chase Bank USA, N.A. did not adequately identify the current creditor
  - Smith v. Simm Associates, Inc., 926 F.3d 377 (7th Cir. 2019) – okay for letter to list client as paypal credit and original creditor as Comenity Capital Bank. The court reasoned that the letter provides a whole picture of the debt for the consumer, identifying the creditor to whom the debt is owed as well as the commercial name the consumer is more likely to recognize
  - Bryan v. Credit Control, LLC, 954 F.3d 576 (2d Cir. 2020)- letter did not properly identify the creditor to whom the debt is owed when it listed the retailer that serviced the private label credit card (Kohls) instead of the bank who owned the debt, Capital One
- Misleading Dispute Instructions
  - Even though letter included the FDCPA required validation notice, the language was overshadowed or contradicted by other language urging the consumer to call the debt collector. *Coulter v. Receivables Management Systems, 367 F.Supp.3d 307 (2019)* and *Guzman v. HOVG, LLC No. CV-18-3013 WL 2018 (E.D. Pa).*

EMAILS

- CFPB NPR provided some guidance on this while we wait for the final rules
  - Sets forth notice and retainability requirements on Reg-F required disclosures
  - Sets forth safe harbors to satisfy the notice and retainability requirements
  - Disclose the purpose of the communication in the e-mail subject line/first line of text message with the name of current creditor and one other piece of information identifying the debt, aside from the amount
  - Monitor undeliverable notices

PHONE MESSAGES AND SAFE HARBORS

- Foti or Zortman
  - Preference seems to be the Zortman message based on client requirements
  - Zortman
    - Does not disclose the consumer's name
    - Does identify the agency/firm
    - Does state the purpose of the call

"This message is for [*debtor name*]. If we have reached the wrong number for this person, please call us at [phone #1] to remove your phone number. If you are not [*debtor name*], please hang up. If you are [*debtor name*], please continue to listen to this message. (pause for 3 seconds)

"[Debtor name], you should not listen to this message so that other people can hear it as it contains personal and private information. (Pause)

This is [*collector name*] from [ABC]Collection Agency. This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose. Please contact me about an important business matter at [phone #2]".

"We have an important message from [company's name]. This is a call from a debt collector. Please call [company's telephone number]."

PHONE MESSAGES AND SAFE HARBORS

- FTC and GC Services Limited Partnership
  - Third party disclosures
  - Repeated phone calls to wrong parties
  - Required GC Services required to leave messages that include both the first and last name of the consumer, that it is a debt collector, attempting to collect a debt, or that the debtor owes a debt when the following conditions were met:
    - The greeting message states only the first and last name of the consumer
    - The consumer has confirmed that they are the only person that can access messages from that number, or
    - GCS obtained prior consent to leave the message

NPR AND PHONE CALLS

- NPR set forth some restriction on calls
  - No more than 7 call attempts within 7 consecutive days permitted
    - Across all numbers per debt
    - Exempts text and email
    - Does include leaving a limited content message

7 Day waiting period after a successful contact

- Leaving a message
- Ringless voicemail left
- Location call or attempted communication can count

What doesn't count?

- Returning a consumer's call who requested a call back, calls that do not connect like a busy signal or disconnected number and calls that went to a number that does not belong to the consumer

FCRA

- The Fair Credit Reporting Act requires a permissible purpose in order to pull a credit report. Permissible purposes include the following:
  - Open or manage credit accounts
  - Offers of credit
  - Employment purposes
  - Underwrite insurance
  - A business transaction initiated by the consumer
  - Court order or federal jury subpoena
  - Valuation of risk of an investor
  - Eligibility for government license
  - Disclosure to the consumer

FDCPA AND FCRA PITFALL

FDCPA PROHIBITS THE USE OF FALSE AND MISLEADING REPRESENTATIONS INCLUDING COMMUNICATING OR THREATENING TO COMMUNICATE TO ANY PERSON CREDIT INFORMATION WHICH IS KNOWN TO WHICH SHOULD BE KNOWN TO BE FALSE, INCLUDING THE FAILURE TO COMMUNICATE THAT A DISPUTED DEBT IS DISPUTED. 15 U.S.C. § 1692E(7).

UPDATING CLIENTS PROPERLY WHEN A DISPUTE IS RECEIVED TO ENSURE ANY UPDATES TO CREDIT BUREAUS ARE MADE TIMELY.

TCPA

- A debt collector may not make automated calls to a mobile phone without prior express consent.
  - Recording of the prior express consent
  - Ways consent can be revoked
  - Cell phone scrubs

CALLS TO REASSIGNED NUMBERS

THE FCC HAD PREVIOUSLY FOUND THAT CALLS TO REASSIGNED NUMBERS VIOLATED THE TCPA EXCEPT FOR A ONE-CALL POST-REASSIGNMENT SAFE HARBOR

IN A RECENT CASE IN THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA SET ASIDE THE FCC'S INTERPRETATION OF THE ONE-CALL SAFE HARBOR AND REASONED THAT A ONE TIME CALL MAY NOT ALERT THE CALLER TO THE FACT THAT THE NUMBER HAS BEEN REASSIGNED. ***ACA INTERNATIONAL V. FEDERAL COMMUNICATIONS COMMISSION***

REVOCATION OF CONSENT

THE CURRENT STANDARD UPHELD RECENTLY IS THAT A PARTY CAN REVOKE CONSENT THROUGH ANY REASONABLE MEANS BY CLEARLY EXPRESSING A DESIRE TO RECEIVE NO FURTHER CALLS OR TEXTS.

COURT SUGGESTED CLEARLY DEFINED AND EASY-TO-USE OPT OUT METHODS TO AVOID REVOCATION PITFALLS

THANK YOU

Illinois Creditors Bar Association

IT Security Issues in a Remote World

impact

Session Host

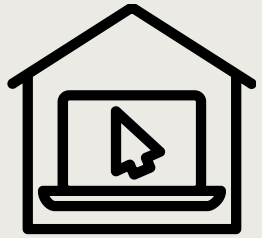
PATRICK LAYTON

Vice President of Managed IT Services,
Impact Networking

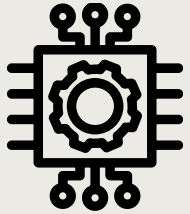
impact

Agenda

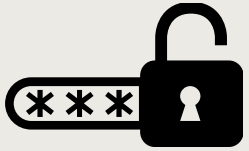
Current Threat Landscape



Working Remotely



Endpoint Technologies



MSP vs MSSP

Impact Services

impact

Current Threat Landscape

“Phishing emails have spiked by over 600% since the end of February 2020 as cyber criminals look to capitalize on the fear and uncertainty generated by the COVID-19 pandemic.”
- *Barracuda*

“Between March 8 and March 22, 2020, VPN usage in the US increased by 124% in response to COVID-19, an indication of how individuals and businesses are reacting to recent rising cybersecurity threats.”
- *Statista*

“Ransomware attacks have increased 97% in the past two years.” - *AttackIQ*

impact

Working Remotely

Tools

- VPN: Virtual Private Network
- Cloud Hosting
- Virtual Desktops
- Productivity Suites (O365 and G-Suite)

Endpoint Protection

Cisco Umbrella

Advanced Endpoint Protection

- NextGen AV
- Umbrella
- Huntress

impact

MSP vs MSSP

MSP	MSSP
IT Operations	IT Security
Network/System Health Monitoring	Security Monitoring/Defense
Management	Management
MSP Role	MSSP Role
Network	Network
Support	Support
Aims	Aims

impact

Impact Managed Services

Managed IT & Cloud Services

- Backup & Business Continuity
- Workspace as a Service – vDesk
- vCIO Consulting
- Cloud Hosting
- Mobile Device Management
- Network Management
- Unified Communications

Cybersecurity Services

- Backup & Disaster Recovery
- Secure Data Protection
- Endpoint Protection
- Network Security Monitoring
- Compliance Services
- Cybersecurity Consulting
- Threat monitoring and alerting
- Identity management

impact

Q&A

Thank You

Patrick Layton
Vice President of Managed IT Services
playton@impactnetworking.com

impact

www.impactmybiz.com

SESSION THREE

Fear No Evil:
Covid19 Driven Anxiety

Tony Pacione

LCSW, CSADC, Deputy Director

Lawyers' Assistance Program

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

Fear No Evil: Covid19 Driven Anxiety

Tony Pacione, LCSW, CSADC

Deputy Director, Illinois Lawyers' Assistance Program

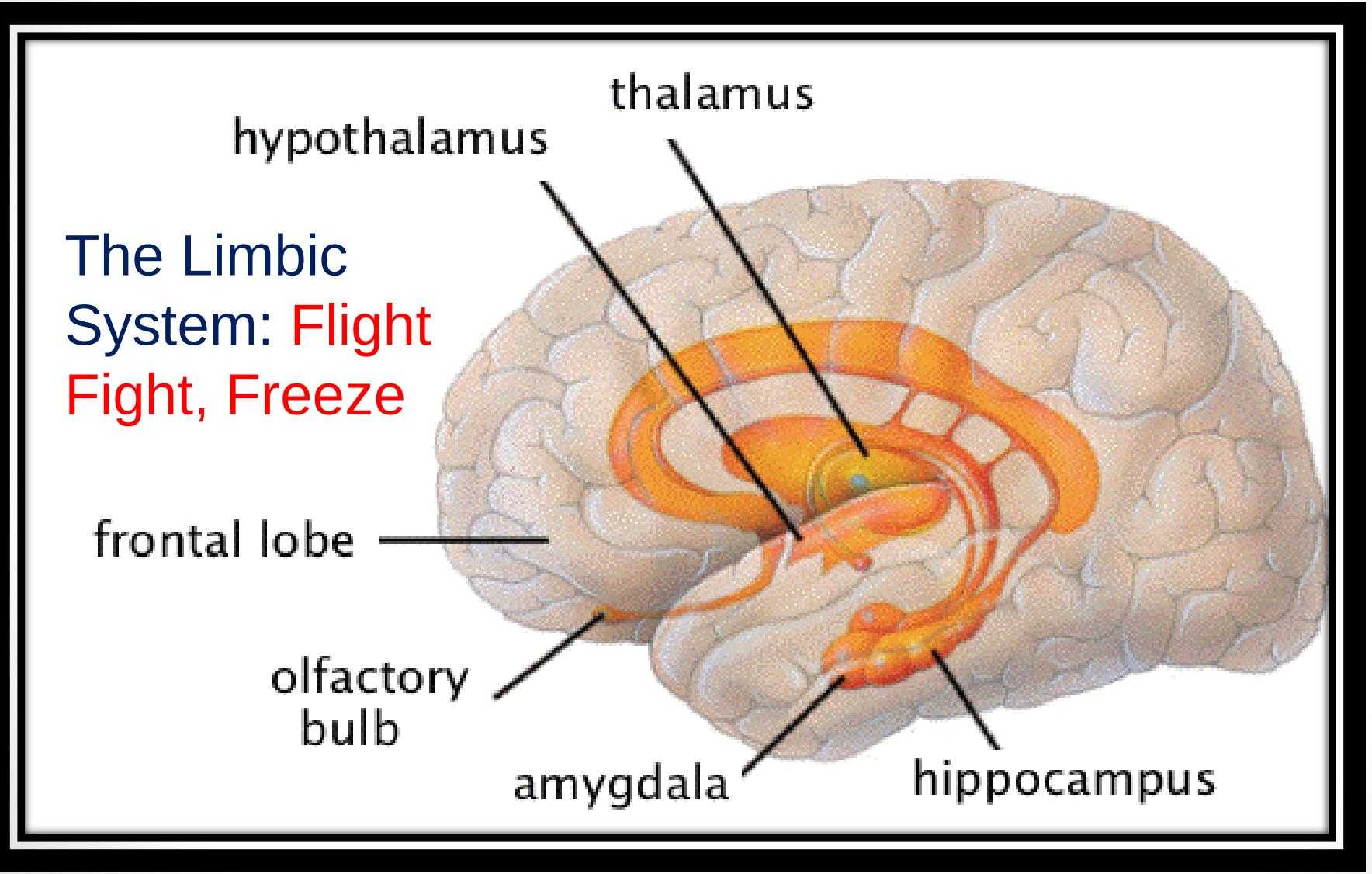
illinoisLAP.org 312.726.6607; 800.LAP.1233

Our GPS Guide

- The New Normal
- The Role of Uncertainty in Creating Anxiety
- The Role of Mental Short Cuts (or heuristics) in maintaining Anxiety
- Strategies to Mitigate our Emotions and Thoughts in Uncertain Times

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

“Anatomy is Destiny” (Sigmund Freud)



Fear and Stress

Event – Response = Stress

"loss aversion effect":
Flight response

"righting reflex":
Fight response

uncertainty:
Freeze response

Attorneys Under Stress

Cognitive depletion

Perceptual narrowing-

Mental short cuts

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

"*Persistent Patience" based* Mindfulness Based Stress Reduction J Kabat-Zinn, 1990

Skills and Principles:

1. Non-judging
2. Patience
3. Beginners Mind
4. Non-striving
5. Acceptance
6. Letting Go
7. Trust

LAP LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

Meditation Practice: Benefits

Immune Function
Kabit-Zinn et all, 2003

Problem Solving
Newberg & D'Aquili, 2001

Insight
Davidson, 2004; Kounios, 2006

Reduce Reactivity
Keng, et al 2011

Positive Emotion & Better Health
Bajbouj et al, 2010

LAP LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

Download Free Audio Files from LAP website

https://illinoislap.org/mental-health-resources/mental-health-videos/

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

Automatic Thoughts/Feelings (Auto Pilot):

- "Mental" reactions to situations
  - Real; imaginary/perceived; anticipatory
- Not fully conscious or deliberate
- Instantaneous and immediate
- Intense emotional associations

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

Challenging Automatic Thoughts

Thoughts are NOT Facts

- **I** – Identify the Thought
- **C** – Challenge the Thought
- **E** – Evaluate the Thought

A Pacione, 2003

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

Challenging Automatic Thoughts

I – Identify the Thought

"My practice will suffer irreparable harm from the pandemic."

Rate how strongly you believe this thought to be mostly true **<u>75%</u>**

A Pacione, 2003

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

Challenging Automatic Thoughts

C – Challenge the Thought

Evidence - thought being mostly true	**Evidence - thought mostly not true**
• this pandemic is creating a recession	• I did survive the 2008 recession
• it will affect millions of Americans	• the State is taking steps to limit the spread
• many court functions are now closed	• The courts will re-open at some point
• I can get sick	• I can take precautions to limit my exposure
• my clients will get sick or can't afford me	• many clients will still need me, and I will still get new clients

A Pacione, 2003

Challenging Automatic Thoughts

E – Evaluate the Thought

A. re- rate how strongly you believe this thought to be mostly true <u>45%</u>

B. re-word the original thought to make it more truthful / evidenced based:

"Like most businesses and people, I will suffer some economic hardship, but with support and hard work I will most likely survive as I've done before."

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

A Pacione, 2003

The Limbic Lyric

Always on, and ready for a fight,
my limbic system is rarely set for flight;

It suppresses doubt and jumps ahead,
Always searching for threats and things I dread;

Once it's on the trap is set,
I may act in ways I'll soon regret;

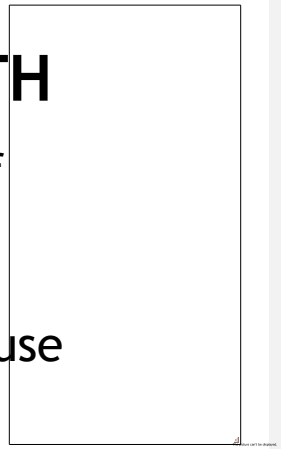
Slow my breath and become more sane,
Then I'll remember thoughts and facts are not the same!

T Pacione, 2018

ILLINOIS LAWYERS' ASSISTANCE PROGRAM

WE CAN HELP WITH

Stress – Anxiety – Grief
Depression
Career Transitions
Addiction – Substance Abuse
& Much More

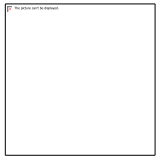


Services tailored to the legal profession:

- Short-term counseling
- Support Groups
- Referrals
- Interventions
- Help with ARDC Concerns

@illinoislap

@illinoislap



@illinoislap

Illinois Lawyers' Assistance Program

www.illinoislap.org

LAWYERS' ASSISTANCE PROGRAM
Real Problems. Real Help. Real Experts.™

CONTACT US

gethelp@illinoislap.org

312-726-6607

COST-FREE

CONFIDENTIAL

LAP HAS YOUR BACK

Suggested Readings

Beck, Judith. (1995). Cognitive Therapy: Basics and Beyond. New York: The Guilford Press.

Brown, K.W. and Ryan, R.M. (2003). The benefits of being present: The role of mindfulness in psychological well-being. *Journal of Personality and Social Psychology*, 84, 822-848.

Burns, David. (1999). Feeling Good (revised edition). New York: Avon Books.

Kabat-Zinn, John. (1990). Full catastrophe living: using the wisdom of your body and mind to face stress, pain, and illness. New York: Dell Publishing.

Kahneman, Daniel (2011). Thinking, Fast and Slow. New York: Farrar, Straus, and Giroux.

SESSION FOUR

View from the Bench
Zooming on the 11th Floor

The Hon. James T. Derico, Jr.

The Hon. John M. Allegretti

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
FIRST MUNICIPAL DISTRICT CIVIL DIVISION
GENERAL ORDER 2020-12
AMENDED

SUBJECT: Procedures for Civil Division Matters Effective July 6, 2020

WHEREAS: Under Illinois Supreme Court Rule 45 "[t]he court may . . . on its own order, allow a case participant to participate . . . remotely, including by telephone or video conference. Likewise, under Illinois Supreme Court Rule 241 "[t]he court may, ... on its own order, for good cause shown and upon appropriate safeguards, allow a case participant to testify or otherwise participate in a civil trial or evidentiary hearing by video conferencing from a remote location."

WHEREAS: In light of the COVIC-19 pandemic, and in order to protect the health and safety of the general public, Cook County Circuit Court Judges and court personnel, and after consultation with the 1st Municipal Advisory Committee; it is hereby ordered:

REMOTE COURT HEARINGS GENERALLY. Beginning July 6, 2020 all First Municipal District Civil Cases will be heard via Zoom conference on the date and time the matter has been set by order of the Court. All parties shall be notified of the date and time by the clerk. Remote participation in court proceedings by video conference requires an internet connection. Parties may enter www.zoom.us in their browser and select "Join a Meeting" on the home page where they will be e prompted to enter the "Meeting ID" and "Password." To access the video conference, parties must enter the Meeting ID Password that corresponds to the courtroom where their case is pending listed in the following "Schedule of First Municipal Courtroom, Zoom Meeting IDs and Passwords" (hereinafter the "Schedule").

ZOOM MEETING IDS AND PASSWORDS

COURTROOM	ZOOM MEETING ID	ZOOM SESSION PASSWORD
409	924 2449 2824	346609

1101	952 3043 8872	317905
1102	941 3131 4606	361176
1104	980 6912 3450	195933
1106	912 0010 9326	455806
1108	964 2925 3412	241565
1110	937 6444 5664	172880
1112	939 2925 9564	821022
1302	922 8830 9469	480525
1304	968 5798 1338	593485
1306	920 4115 9796	715348
1307	947 9378 9734	712192
1308	922 9098 9545	499080
1310	954 2504 0966	029524
1401	930 9949 4868	544388
1402	914 3045 9929	898778
1403	944 1848 7325	087880
1404	938 9278 5386	132873
1406	914 5130 7835	826324
1408	953 1943 0522	159886
1409	973 7875 2758	026297
1410	987 2834 2570	467433
1501	970 2938 9818	380923
1503	939 9214 4482	773102
1505	986 6707 2390	532802
1510	919 3031 9452	814638

Parties will be admitted to a "waiting room" and the court will "admit" them to the "meeting" when the call begins or when their case is called. Absent an internet connection, remote participation in court proceedings is possible by telephone by dialing (312) 626-6799 and, when prompted, entering the same Meeting ID and Password contained in the Schedule. Those who lack access to a computer or smart phone may appear in person on the date and time as notified by the clerk.

FILING AND SERVICE. All pleadings, including initial pleadings, motions, briefs and other court filings must continue to be filed and served in accordance with all applicable statutes and court rules. All emails sent to CCC.FirstMunicipal@cookcountyil.gov shall be copied on all counsel and unrepresented litigants of record.

SUMMONS AND NOTICE OF REMOTE COURT HEARING. Summons shall reflect that litigants shall not appear in court in person on the return date indicated on the summons. Notices of motion for remote hearings shall also reflect that litigants shall not appear in court in person and should instead include the applicable Zoom Meeting ID and Password in the schedule as well as the telephone number for remote participation.

IT IS HEREBY ORDERED: Nothing herein shall limit any judge from issuing standing orders so long as those orders are in compliance with the rules and orders of the Illinois Supreme Court, Chief Judge, or Presiding Judge. Parties shall familiarize themselves with the Supreme Court Policy on Remote Court Appearances in Civil Proceedings, which will be followed in all remote court proceedings.

AGREED ORDERS/ROUTINE MOTIONS. Parties shall submit all proposed agreed orders and routine motions to ccc.firstmunicipal@cookcountyil.gov. Any agreed orders submitted to the Court should list all parties' email addresses and phone numbers so the court may send parties their orders to the contact information provided. Otherwise, litigants and attorneys may pick up their signed order in the dropbox in courtroom 601 at the Richard J. Daley Center. However, to reduce the number of people in the courthouse, it is preferred that parties list their contact information on their agreed orders.

ALL COURTROOMS DISCOVERY. Discovery shall continue. The parties may request relief from deadlines by way of agreed order or through a motion as outlined herein, submitted to the to the email address shown in the Schedule.

STATUS HEARINGS. Parties who have a matter set for status are encouraged to submit an agreed order setting out the status of the case and setting future dates including a trial setting date. Proposed orders may be submitted to ccc.firstmunicipal@cookcountyil.gov.

JURY ROOMS CASE MANAGEMENT AND INTAKE. Unless ordered otherwise by the assigned judge, intake/progress calls for the First Municipal Jury Rooms will not be conducted in person. The parties shall confer and submit a proposed agreed order to ccc.firstmunicipal@cookcountyil.gov for discovery and trial setting dates using the Intake Order form applicable to the jury courtroom where the case is pending. If the parties are unable to agree, the parties shall notify the Court via ccc.firstmunicipal@cookcountyil.gov. The Court will unilaterally select a schedule for the case and notify the parties of the schedule.

ALL COURTROOMS/PRETRIALS. Parties desiring a remote pretrial settlement conference may request one including proposed dates and times via email to ccc.firstmunicipal@cookcountyil.gov. The parties shall also submit a written consent to a remote pretrial conference at the time the request is made. The parties shall be advised of the date and time set by the court.

PRESENTATION OF CONTESTED MOTIONS. For any motion set for presentment remotely on or after 7/6/2020, and until further order of the Court, any notice of motion shall contain the following language: "parties wishing to attend the presentment of this motion shall not appear in person in the courtroom, unless specifically ordered to do so by the Court. This motion shall be heard and conducted by video and/or telephone conference." The notice shall also include the applicable Zoom Meeting ID and Password shown on the Schedule.

IT IS FURTHER HEREBY ORDERED: If parties wish to brief a motion set for presentment remotely, they are strongly encouraged to submit an agreed briefing schedule to the court. If all parties waive briefing, and the court does not order otherwise, they shall be prepared to argue the motion when presented. If parties cannot agree on a briefing schedule, they shall so advise the court at ccc.firstmunicipal@cookcountyil.gov. The court will set the briefing schedule and advise the parties of the dates set.

IT IS FURTHER HEREBY ORDERED: All courtesy copies of briefs for contested motions shall be supplied by the movant to ccc.firstmunicipal@cookcountyil.gov on the date the reply is due. Once the

assigned judge has received fully briefed motions the judge will decide whether oral argument is necessary. If so the Court will notify the parties by email of the date and time set for oral argument and whether it will be held remotely or in person. If no oral argument is necessary, the Court shall set the case for ruling on a date certain and advise the parties of the date set. The parties shall not appear on the date set for ruling unless ordered by the Court to appear.

IT IS FURTHER HEREBY ORDERED: Any motion that was previously noticed but has not been heard or rescheduled to a date certain, shall be renoticed by the movant under the procedures set forth in this order.

EMERGENCY MOTIONS. Any attorney or self-represented litigant wishing to have an emergency matter heard shall e-file their motion or place it in the dropbox located in the West Lobby of the Richard J. Daley Center. If the Court finds that the matter is an emergency, the court shall notify the parties of the date and time for the hearing. The Court may order the hearing be conducted remotely or in person as the Court deems necessary.

CASES SET FOR TRIAL. All previously set trial dates between 3/17/2020 and 7/2/2020 have been or are now hereby stricken. Those cases have been or will be given new dates under the Chief Judge's Order continuing cases. The new dates are for "trial setting." No jury trials will be conducted until further order of court. The court will attempt to accommodate any agreement by the parties to maintain the currently scheduled trial date beyond 7/6/2020, assuming court operations allow for such trial to proceed.

ALL COURTROOMS BENCH TRIALS. Parties who desire a remote bench trial may request one by agreement, or by order of Court under Supreme Court Rules 45 and 241 regarding civil proceedings. If the parties are in agreement, they shall advise the court at ccc.firstmunicipal@cookcountyil.gov and submit a written consent to a remote bench trial at the time of the request. If the court agrees to conduct the trial remotely, the court shall enter an order setting the mater for remote bench trial, which will be sent to the parties. If all parties do not consent to a remote bench trial, a party must request a remote bench trial by motion. Remote bench trials will be conducted in accordance with all applicable Supreme Court Rules. The parties shall

familiarize themselves with the Supreme Court Rules and Guidance for Remote Proceedings.

SELF REPRESENTED LITIGANTS. All litigants are strongly encouraged to make remote appearances rather than appear physically in court, in order to diminish the health risks to themselves and the parties. For those self-represented parties who must come to Court in person, said matters will be heard in Courtroom No. 1307 of the Richard J. Daley Center by the team leader judge regardless of which judge has been assigned to the case until further order of the court. If the court determines that remote participation is appropriate for the matter then the Court shall provide a room and equipment with the appropriate technology and staff for the hearing, based upon the Court's finding of the necessary procedures to protect the health and safety of all parties involved taking into consideration social distance guidelines for appearances in court and procedural protections for parties who have no access to video conferencing or a telephone.

RULE 298 PETITIONS. All litigants filing Rule 298 petitions shall not appear in court in person on the return date. Rule 298 petitions may be filed in person or by electronic filing with the circuit court clerk. For any Rule 298 petitions the parties shall schedule the presentment of the Rule 298 petition by calling the judicial clerk at (312) 603-2281. The clerk shall provide the petitioner with the date and time for the petitioner to appear for the Rule 298 hearing.

Dated at Chicago, Illinois this 6th day of July 2020.

Presiding Judge
E. Kenneth Wright, Jr.
JUL 06 2020
Circuit Court-1624

ENTERED:

E. KENNETH WRIGHT, JR.
PRESIDING JUDGE
FIRST MUNICIPAL DISTRICT

SESSION FIVE

The Logistics of the 30-Day Summons

Robert G. "Bob" Markoff

Partner

Markoff Law, LLC

Michael L. Starzec

Partner

Blitt & Gaines, P.C.

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
Illinois Courts Response to	)	
COVID-19 Emergency/	)	M.R. 30370
Reduction of Unnecessary	)	
In-Person Court Appearances	)	
	)	
	)	

Order

In the exercise of the general administrative and supervisory authority over the courts of Illinois conferred on this Court pursuant to article VI, section 16, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, sec. 16); in view of the outbreak of the novel coronavirus (COVID-19); and in accordance with the efforts of this Court to reduce unnecessary in-person court appearances and to promote remote court appearances,

IT IS HEREBY ORDERED:

1. With respect to Applications for Waiver of Court Fees pursuant to 735 ILCS 5/5-105 and Supreme Court Rule 298:

a. Applications by persons who are exempt from e-filing under Supreme Court Rule 9(c) may be filed by United States Mail, third-party commercial carrier, in person, or utilizing an available dropbox. All other Applications shall be e-filed.

b. Upon filing, an Application shall be transmitted to the judge assigned to rule on it.

c. The court shall enter an order ruling on the Application on the basis of the information contained in the Application, without conducting a hearing, unless the court determines that the Application gives rise to a factual issue regarding the applicant's satisfaction of the conditions for a waiver under section 5-105(b) of the Code of Civil Procedure (735 ILCS 5/5-105(b)).

d. If the court determines there is a factual issue regarding the applicant's entitlement to a waiver, the court shall enter an order (i) stating with specificity the nature of the issue, (ii) scheduling a hearing on the Application by telephone or video conference in accordance with Supreme Court Rule 45 and this Court's Policy on Remote Court Appearances in Civil Proceedings, and (iii) specifying any documents to be submitted in support

of the Application at or before the hearing. The hearing shall be scheduled promptly, with due regard for the need to provide reasonable notice to the applicant.

e. The court shall cause the clerk to serve the applicant with a copy of an order entered pursuant to paragraph (c) or (d) by e-mail (if the applicant consented, in the Application, to receive court documents by e-mail), or else by United States Mail at the address stated on the Application.

f. In accordance with Supreme Court Rule 298(b), if the court determines, with or without a hearing, that the conditions for a partial assessment waiver under 735 ILCS 5/5-105(b)(2) are satisfied and if necessary to avoid undue hardship on the applicant, the court may allow the applicant to defer payment of assessments, costs, and charges; make installment payments; or make payment upon reasonable terms and conditions stated in the order.

2. With respect to the provisions of Supreme Court Rules 101, 283, and 286(a) regarding summonses:

a. A summons requiring appearance on a specified day may only be used in an action for eviction, replevin, or detinue.

b. A summons in a small claims action shall use a summons requiring each defendant to file an appearance within 30 days after service. The first paragraph of the summons in a small claims action shall include substantially the following language:

> "You have been named a defendant in the complaint in this case, a copy of which is hereto attached. You are summoned and required to file your appearance, in the office of the clerk of this court, within 30 days after service of this summons, not counting the day of service. If you fail to do so, a judgment by default may be entered against you for the relief asked in the complaint."

c. All proceedings other than those governed by paragraphs (a) and (b) shall use a summons, under Supreme Court Rule 101(d), requiring each defendant to answer or otherwise file an appearance within 30 days after service.

d. The following Supreme Court Rules are suspended, until further order of this Court, to the extent they authorize use of a summons requiring appearance on a specified day or a trial on a day specified in the summons:

> i. Supreme Court Rule 101(b)(1) (actions for money not in excess of $50,000, exclusive of interest and costs, and actions subject to mandatory arbitration where a local rule prescribes a specific date for appearance) and

ii. Supreme Court Rules 283 and 286(a) (small claims actions).

e. In accordance with Supreme Court Rule 101(g), the use of the wrong form of summons, either before or after issuance of this order, shall not affect the jurisdiction of the court.

f. All summonses may include additional information relating to local courthouse access & procedures as provided by order of the circuit's chief judge.

g. In addition to the requirements set forth by Supreme Court Rule 101(a), language that must be contained in all summonses issued in civil cases in Illinois is hereby amended as follows:

"E-filing is now mandatory with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit http://efile.illinoiscourts.gov/service-providers.htm to learn more and to select a service provider.

If you need additional help or have trouble e-filing, visit http://www.illinoiscourts.gov/faq/gethelp.asp or talk with your local circuit clerk's office. If you cannot e-file, you may be able to get an exemption that allows you to file in-person or by mail. Ask your circuit clerk for more information or visit www.illinoislegalaid.org.

If you are unable to pay your court fees, you can apply for a fee waiver. for information about defending yourself in a court case (including filing an appearance or fee waiver), or to apply for free legal help, go to www.illinoislegalaid.org. You can also ask your local circuit clerk's office for a fee waiver application."

3. This order is effective immediately and shall remain in effect until further order of this Court.

Order entered by the Court.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26, 1818

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, this 27th day of August, 2020.

Carolyn Taft Grosboll Clerk,
Supreme Court of the State of Illinois

SEPTEMBER 26, 2020 AMENDMENT

circuit clerk's office. If you cannot e-file, you may be able to get an exemption that allows you to file in-person or by mail. Ask your circuit clerk for more information or visit www.illinoislegalaid.org.

If you are unable to pay your court fees, you can apply for a fee waiver. for information about defending yourself in a court case (including filing an appearance or fee waiver), or to apply for free legal help, go to www.illinoislegalaid.org. You can also ask your local circuit clerk's office for a fee waiver application."

h. The provisions of paragraph 2.b. of this Order shall not apply to any first appearance at which the defendant is required or given the option to appear remotely, including by telephone or video conference. In such cases, the remote appearance option must be made clear on the face of the summons.

3. This order is effective immediately and shall remain in effect until further order of this Court.

Order entered by the Court.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26, 1818

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, this 23rd day of September, 2020.

Carolyn Taft Grosboll Clerk,
Supreme Court of the State of Illinois

Save Judicial Resources: Eliminate Orders for Alias Summons

BY ROBERT G. MARKOFF & STEVEN A. MARKOFF

Judges contemplating how to resume their court calls should consider the following:

Cease granting orders permitting the issuance of alias summonses. Instead, set a specific time period for the plaintiff to obtain service. If service is not effectuated after one year, dismiss the case without prejudice.

Setting cases for status (even by email or Zoom hearing) when there is no service, is a major waste of judicial resources and the time of judges, court clerks and attorneys alike. It is a function of little value to anyone and does not aid in the administration of justice.

The legal authority for this suggestion is based upon our Code of Civil Procedure and Supreme Court Rules.

735 ILCS 5/2-201(a) governs forms of process and states "…the issuance of alias process…shall be according to rules."

Supreme Court Rule 103(a) governs an alias summons. It directs court clerks to issue an alias summons upon request of any party.

Nowhere in the Code or Rules is there a requirement for a court to grant permission to issue an alias summons. In fact, one could argue that local court rules requiring permission to issue an alias summons violate the Supreme Court Rule on point. Given the great backlog courts will face when reopening, this will help with initial case flow while ultimately allowing judges to keep their caseload numbers down.

Cook County's First Municipal District is one of the few courts in the state that does not require court permission to issue an alias summons. This has allowed their courts to focus on matters "at issue" or "in default." Periodic slaughter calls efficiently clean up the docket, specifically unserved cases and matters resolved without entry of a dismissal order.

Imagine the countless hours that could be saved if judges implement this proposal and eliminate unnecessary court appearances and orders. ■

Rule 101

Rule 101. Summons and Original Process--Form and Issuance

(a) General. The summons shall be issued under the seal of the court, identifying the name of the clerk. The summons shall clearly identify the date it is issued, shall be directed to each defendant, and shall bear the information required by Rule 131(d) for the plaintiff's attorney or the plaintiff if not represented by an attorney. All summons issued in civil cases in Illinois must contain the following language:

E-filing is now mandatory for documents in civil cases with limited exemptions. To e-file, you must first create an account with an e-filing service provider. Visit http://efile.illinoiscourts.gov/service-providers.htm to learn more and to select a service provider. If you need additional help or have trouble e-filing, visit http://www.illinoiscourts.gov/FAQ/gethelp.asp, or talk with your local circuit clerk's office.

(b) Summons Requiring Appearance on Specified Day.

(1) In an action for money not in excess of $50,000, exclusive of interest and costs, or in any action subject to mandatory arbitration where local rule prescribes a specific date for appearance, the summons shall require each defendant to appear on a day specified in the summons not less than 21 or more than 40 days after the issuance of the summons (see Rule 181(b)), and shall be prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix.

(2) In any action for eviction or for recovery of possession of tangible personal property, the summons shall be in the same form, but shall require each defendant to appear on a day specified in the summons not less than 7 or more than 40 days after the issuance of summons.

(3) If service is to be made under section 2-208 of the Code of Civil Procedure the return day shall be not less than 40 days or more than 60 days after the issuance of summons, and no default shall be taken until the expiration of 30 days after service.

(c) Summons in Certain Other Cases in Which Specific Date for Appearance is Required. In all proceedings in which the form of process is not otherwise prescribed and in which a specific date for appearance is required by statute or by rules of court, the form of summons shall conform as nearly as may be to the form set forth in paragraph (b) hereof.

(d) Summons Requiring Appearance Within 30 Days After Service. In all other cases the summons shall require each defendant to file his answer or otherwise file his appearance within 30 days after service, exclusive of the day of service (see Rule 181(a)), and shall be prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix.

Rule 283

Form of Summons

Summons in small claims shall require each defendant to appear on a day specified in the summons not less than 14 or more than 40 days after issuance of the summons (see Rule 181(b)) and shall be in the form provided for in Rule 101(b) in actions for money not in excess of $50,000**.**

RE: Supreme Court 30 Day Summons Rule

Your Honor:

On August 27, 2020, the Illinois Supreme Court entered M.R. 30370, mandating use of a 30 day summons in Small Claims matters and in actions for money under $50,000.00. (Rules 283, 286(a) and Rule 101(b)(1)) The order manifests the intent to move away from return dates during the pandemic to reduce court appearances. Obviously, this represents a sea change from decades of practice but this is manageable.

Overall, our initial suggestions are below:

1. **Diligence Date –** at the time the case is filed, there is a 1 year diligence date. If not served, it's either automatically dismissed or subject to a slaughter call. This addresses the need to control dockets and does away with alias orders. (Under Rule 103(a), the clerk issues the alias). This system has been utilized in DuPage County for over a decade.

   We believe this system is in keeping with the intent of the Supreme Court's order which is to reduce unnecessary court appearances.

2. **Control Dates -** All cases could get a control date 9 to 10 weeks from the date the complaint is filed. If it is not served and there is a diligence date, the matter is not called.

   On the control date, if the matter is served, with no appearance, a judgment would enter without further action. If an appearance is filed, this would also be the first appearance date

   If the matter is agreed or being dismissed, the parties can submit orders in advance rather than appearing in court. Alias orders would not be needed unless there is no diligence date system.

   Or

   1st Appearance Dates – The first appearance date is set based on date of filing of the lawsuit. If the summons is served on the 30th day, that would suggest a first appearance date 9-10 weeks after the filing date. This would be a date only for matters where an appearance is filed.

3. **Default Call or Off Call Motions for Default –** If there is no appearance, the matters would not be called. Plaintiff's would submit either orders or a motion, ex parte or with notice, that would not be called unless someone appears. This system is used in the 1st Municipal District (Chicago) and a modified version in the 3rd Municipal District (Rolling Meadows, Cook County)

Thank you for your consideration of these proposals. We are very aware that our bulk filings create significant amounts of work for your staff and clerks and hope to limit the amount of orders and work required to manage service and judgments.

.

PROMOTE ACCESS TO JUSTICE (AND SOCIAL DISTANCING) BY ELIMATING THE DATE-CERTAIN SUMMONS

By: Robert G. Markoff & Steven A. Markoff

In the world of politics, it is said "never waste a good crisis." Modernizing our court system has been a topic of discussion for many years. Our public health emergency has given urgency to new concepts and ideas. Social distancing, e-learning, Zooming have all become part of our vernacular in a month's time. We would be remiss not to stop and examine how our court system operates through the lenses of our new "normal." Coupled with the implementation of state-wide e-filing, what might have made sense in the past may not pass muster today. Holding court sessions as we have for generations may or may not be an option going forward. It certainly is not the best option.

Let's look at the following suggestions within the context of what brings most litigants to court aside from basic traffic citations; consumer contract actions and property damage matters. A good starting point for improvement is by amending Supreme Court Rule 101 and eliminating date-certain summons in favor of the 30-day summons. Logic follows that mandatory court appearances be replaced by a "hearing by request" structure and optional "remote" hearings for those appearances. Think this sounds crazy? Well, a review of some of our neighbor states will show that these proposed structural changes are far from novel. This will greatly reduce court attendance, thus increasing health and safety, increasing efficiency, and leveling the playing field for litigants.

In Illinois, electronic filing has already eliminated the need for attorneys, clerks and self-represented litigants to come into the courthouse to file cases. After filing suit, the next step in the process is having the court clerk electronically issue a summons for the defendant to appear in court. (How to serve a summons beyond personal/abode service or by restricted certified mail is a discussion for another day.)

Illinois Supreme Court Rule 101 provides for two types of summonses. Generally, the procedure for an action for $50,000 or less is to use a summons requiring an appearance on a specified day, typically between 21 and 40 days from the date of issuance. This summons is commonly called a "date-certain" summons. The date the summons is served is not relevant to the court as long as it is served at least 3 days before the appearance date.

The second type of summons is one requiring an appearance within 30 days after service. This summons is commonly known as a "30-day" summons. A 30-day summons is guided by both the date of issuance and the date of service. As long as the summons is served within 30 days of issuance, the defendant has 30 days from the date of service to appear in court.

The practical difference between the types of summonses aside from the set court date is the length of time a defendant has to react to the summons. A date-certain summons may be served 3 days before the court date, allowing a defendant very little time to react. A 30-day summons allows a defendant 30 days to react.

Let's forget efficiency and social distancing for a minute. Some matters like evictions and replevin actions require an expedited process. But for most other cases, a short time between service of process and the necessity to act does not serve the interests of justice.

Almost all counties in Illinois require a defendant receiving a date-certain summons to appear in court either personally or by an attorney. This court date is typically chosen by the Plaintiff or Plaintiff's counsel at least three weeks in advance on a date convenient to them. Defendants on the other hand, often completely unfamiliar with the court system, have as little as three days to react. Defendants that are able to reorganize their schedule (which often requires missing a day of work) such that they can make it to court, usually request a continuance to get their feet under them and seek legal assistance. This is a hardship on the Defendant, a strain on judicial resources, and a waste of time for all parties involved.

The system which was probably meant to simplify and expedite the proceedings is in effect doing the opposite. Today, having the plaintiff and defendant physically appear for what is at best a status date, is unnecessary, and dangerous to everyone in the packed courtroom.

The above only contemplates the first court appearance. Why bring the parties back to the courthouse at all if there is an agreement and a corresponding order that can be submitted electronically to the judge/judge's clerk? If a hearing is requested or required, there's no better time than now to equip our courtrooms with the technology that we're all currently growing accustomed to.

While the courts may not have the funding necessary at the moment to make the technological upgrades we desire, this should not deter us from taking simple steps to ease the burdens on all stakeholders. The administration of justice requires us to rethink case flow management in today's world. A relatively easy step is by amending Supreme Court Rule 101.

Robert G. Markoff
Steven A. Markoff
Markoff Law LLC
29 North Wacker Drive, Suite 1010
Chicago, IL 60606
Email: bob@markofflaw.com
steve@markofflaw.com

THANK YOU

MCLE CERTIFICATES

Please complete your survey in order to receive your MCLE certificate. Survey Link: https://forms.gle/Sc1aaWyAKxpxhWAe7

MEMBERSHIP

The ILCBA offers individual memberships and firm memberships with cost savings for groups of 6 or more. New members are welcome to join at a discounted rate for attending the seminar. Please contact Tricia at ILCBA for more information.

CONTACT INFORMATION

Association Manager: Tricia Fusilero
Email: ILCBA@corpevent.com
Phone: 888-684-4222
Fax: 312-540-9900
website: www.ILCBA.org

ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION