CONSUMER LAW TRIAGE

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1.5 Substantive
0.5 Ethics

BIO OF CARY L. FLITTER

Cary L. Flitter practices Consumer law with Flitter Lorenz, P.C. in suburban Philadelphia and New Jersey.

Cary serves on the adjunct faculty at Temple University Beasley School of Law in Philadelphia and Widener University School of Law in Wilmington, Delaware, where he teaches Consumer Law and Litigation including Fair Credit Reporting, Fair Debt Collection, and class action. He has guest lectured on consumer law issues at Harvard Law School, The University of Pennsylvania Law School, and other venues.

Flitter is a contributing author to *Pennsylvania Consumer Law* by Bisel Publishing Co. This is the leading treatise in Pennsylvania on consumer law. He is also a contributor to *Consumer Class Actions* 5th Ed. by the National Consumer Law Center. Cary was invited by the Federal Trade Commission to participate in its 2007, 2009 and 2011 workshops on *Collection of Consumer Debt.* Cary's consumer cases in the Court of Appeals include *Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006) (seminal circuit case on deception under FDCPA); *Rosenau v. Unifund*, 539 F.3d 218 (3d Cir. 2008) (successful challenge to phony "legal department" in dunning letter), *Gager v. Dell Fin. Serv., LLC*, 727 F.3d 265 (3d Cir. 2013) (holding, in first impression, that consent to receive cellphone calls is revocable under Telephone Consumer Protection Act) and *Douglass v Convergent Outsourcing*, ___ F.3d ___, 2014 WL 4235570 (3d Cir., Aug 28, 2014) (holding, in first impression, that placing the consumer's account number on collection envelope violates privacy provisions of FDCPA)

Cary is the recipient of *pro bono* awards for his work on behalf of low-income consumers from the President of the Pennsylvania Bar Association in 2006 and again in 2011, the Montgomery Bar, and the Pennsylvania Legal Aid Network in 2013. He also served as the Co-Chair of the Federal Courts committee of the Montgomery (County) Bar Association from 2000 to 2012, and has served on the board of the National Association of Consumer Advocates.

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COVERAGE, CONSUMER RIGHTS AND REMEDIES UNDER THE FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA")

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I. COVERAGE OF THE FDCPA

A. Applies only to debt collectors as defined. Who is a "debt collector"?

1. "Debt collector" is defined at 15 U.S.C. § 1692a(6) and includes:

   a. Any person whose principal business is collecting debts, §1692a(6)

   b. Any person who regularly collects debts owed to another. *See Crossley v. Lieberman*, 868 F. 2d 566 (3rd Cir. 1989) ("regularly" collecting means undertaking collection activity "more than a handful of times per year")

   c. Lawyers regularly collecting consumer debts. *See Heintz v. Jenkins*, 514 U.S. 291 (1995)

   d. Creditors using false names. §1692a(6)

   e. Repossession, foreclosure and eviction companies. *Piper v. Portnoff Law Assts.*, 396 F.3d 227 (3d Cir. 2005)

   f. Employees and owners alike can be liable "debt collectors"

      i. Debt collectors employing attorneys or other agents to carry out debt collection practices that violate the FDCPA are vicariously liable for their agent's conduct

ii. Debt collector principle is vicariously liable for the actions of its debt collector agent. *Pollice v. National Tax Funding, L.P.*, 225 F.3d 385 (3d Cir. 2002)

g. Assignees of debt *after* it is in default are covered (e.g. debt buyers). *See Pollice v. National Tax Funding, L.P.*, 225 F.3d 385, 403-04 (3d Cir. 2002)

2. Persons excluded from the term "debt collector"

a. Creditors and their officers and employees, 15 U.S.C. § 1692a(6)(A). *See FTC v. Check Investors, Inc.*, 502 F.3d 159, 173 (3d Cir. 2007) (creditors "generally are restrained by the desire to protect their good will when collecting past due accounts," while independent collectors are likely to have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them.")

b. Companies in common ownership with the creditor, 15 U.S.C. § 1692a(6)(B)

c. State and federal officials, 15 U.S.C. § 1692a(6)(C)

d. Process servers, 15 U.S.C. § 1692a(6)(D)

e. Assignees of debt *before* it is in default are not debt collectors, 15 U.S.C. § 1692a(6)(F)(iii)

B. Only "consumer" debts are covered

1. Obligations incurred primarily for personal, family or household use, 15 U.S.C. § 1692a(5)

2. Consumer obligations arise out of consensual or contractual arrangements

3. "Consumer" debts can include bad check fees, condominium assessment fees, residential rental payments, municipal water and sewer service, and other non-credit consumer obligations. *See e.g. Pollice v. National Tax Funding, L.P.*, 225 F.3d 385 (3d Cir. 2002); *Piper v. Portnoff Law Assts.*, 396 F.3d 227 (3d Cir. 2005)

4. "Consumer" debts do not include child support obligations, tort claims, subrogation claims, and personal taxes. *See e.g. Zimmerman v. HBO Affiliate Group*, 834 F. 2d 1163 (3rd Cir. 1987); *Staub v. Harris*, 626 F.2d 275 (3rd Cir. 1980)

5. Commercial or business debts are not covered by the FDCPA

C. Broad protections for consumer debts

1. Validity of the underlying debt is immaterial. "[A] debtor has standing to complain of violations of the [FDCPA], regardless of whether a valid debt exists." *Baker v. G.C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982) *as quoted in Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 n.12 (3d Cir. 2009)

2. Mistaken and alleged debts are covered, as are "attempts" to collect debts. *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 367 n.4 (3d Cir. 2011)

3. "Communications" – conveying of information regarding a debt directly or indirectly to any person through any medium, 15 U.S.C. § 1692a(2); *Simon v. FIA Card Servs., N.A.*, 732 F. 3d 259 (3d Cir. 2013) (courts are to put a "broad gloss on 'communication'" under the FDCPA)

    a. In the Third (and Seventh) Circuit an FDCPA claim may arise from a debt collector's communications to a debtor in a pending bankruptcy proceeding. *Simon v. FIA Card Servs., N.A.*, 732 F. 3d 259 (3d Cir. 2013); *Cf. e.g. Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002) (in Ninth and Second Circuits communications in bankruptcy proceedings cannot be basis for FDCPA claim)

    b. Indirect communications, including communications to a consumer's attorney are covered. *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011)

4. Activities "in connection with" "collecting a debt"

5. Certain litigation activities, including *in rem* actions, foreclosures, and evictions may be covered. *See e.g. Piper v. Portnoff*, 396 F.3d 227 (3d Cir. 2005)

    a. Litigation privilege does not "absolve a debt collector from liability under the FDCPA" because "common law immunities cannot trump the FDCPA's clear application to the litigating activities of attorneys." *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 369 (3d Cir. 2011)

6. The FDCPA applies to litigation-related activities that do not include an explicit demand for payment when the general purpose is to collect payment. *Simon v. FIA Card Servs., N.A.*, 732 F. 3d 259 (3d Cir. 2013) (citing favorably to *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011))

II. RIGHTS AND CONSUMER PROTECTIONS UNDER THE FDCPA

A. General principals of construction

1. Consumer protective purposes are detailed in the congressional findings and declaration of purpose set forth at 15 U.S.C. § 1692(a)-(e)

2. The FDCPA is a "comprehensive and complex federal statute." *Jerman v. Carlisle, McNellie, Rini, Kramer and Ulrich, LPA*, 559 U.S. 573 (2010)

3. The FDCPA is a remedial statute to be construed broadly to affect its consumer protection purposes. *See Brown v. Card Service Center*, 464 F.3d 450, 453 (3d Cir. 2006)

4. "A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner." *FTC v. Check Investors, Inc.*, 502 F.3d 159, 165 (3d Cir. 2007)

5. The FDCPA is primarily "enforced by debtors acting as private attorneys general." *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991)

6. In interpreting the Act, courts are to apply the objective "least sophisticated debtor" standard. *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *Brown v. Card Service Center*, 464 F.3d 450, 453 (3d Cir. 2006)

    a. The "least sophisticated" consumer can be deceived when a communication can be reasonably read in two or more ways, one of which is inaccurate. *See Rosenau v. Unifund Corp.*, 539 F.3d 218, 222 (3d Cir. 2008)

    b. Standard does not protect "bizarre or idiosyncratic" interpretations of collection communications by "preserving… a modicum of reasonableness," and "presuming a basic level of understanding and willingness to read with care." *Wilson v. Quardramed Corp.*, 225 F.3d 350, 354-55 (3d Cir. 2000); *Campuzano-Burgos v. Midland Credit Management, Inc.*, 550 F.3d 294, 299 (3d Cir. 2008)

7. The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation. *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011)

B. Limits on a collector's communication with the consumer (§1692b, c)

1. Collectors may not call at unusual times – *i.e.*, before 8:00 a.m. or after 9:00 p.m., 15 U.S.C. § 1692c(a)(1), or times known to be "inconvenient" (e.g. no daytime calls to known night-shift worker)

2. Collector cannot contact consumer if known to be represented by an attorney, 15 U.S.C. § 1692c(a)(2); *Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991)

3. Calls to the workplace are restricted if the consumer notifies the debt collector not to call his/her work, 15 U.S.C. § 1692c(a)(3)

4. Collector must cease and desist contact with the consumer if the consumer advises the collector in writing, 15 U.S.C. § 1692c(c); *see Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270 (3d Cir. 2013) (recognizing the FDCPA's "remedial consumer protection ... containing statutory avenues for a consumer to stop unwanted communications")

5. "A communication need not contain an explicit demand for payment to constitute debt collection activity. Indeed, communications that include discussions of the status of payment, offers of alternatives to default, and requests for financial information may be part of a dialogue to facilitate satisfaction of the debt and hence can constitute debt collection activity." *McLaughlin v. Phelan, Hallinan, & Schmeig,* --- F.3d ---- (3d Cir. June 26, 2014)

6. Generally, no third party contact, 15 U.S.C. § 1692c(b)

    a. Third party contact permitted to locate the consumer, 15 U.S.C. §1692b, but only one contact, and no mention of the debt

    b. Also permitted where there is permission from consumer or court

C. Prohibitions on Harassment (§1692d), Deception (§1692e) and Unfair Tactics (§1692f), generally

1. Three central substantive provisions prohibit, without limitation, all abusive, deceptive and unfair practices. 15 U.S.C. § 1692d, 1692e and 1692f

2. Each section contains general prohibitions and, "[w]ithout limiting the general application of the foregoing . . .," provides a list of *per se* violations. *See FTC v. Check Investors, Inc.*, 502 F.3d 159, 166 (3d Cir. 2007) ("Within each broad category of prohibited conduct, the FDCPA includes examples of specific practices that are prohibited.")

3. The listed examples of prohibited conduct do not limit the general prohibitions against abusive, deceptive, and unfair means. *See Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 367 n.4 (3d Cir. 2011) (list of violations is "not exhaustive")

D. Harassment and abuse are banned

1. General prohibition: "A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. §1692d

2. Harassing or abusive conduct includes:

    a. Use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person, §1692d(1)

    b. Use of obscene or profane language, §1692d(2)

    c. Publishing a "shame" list of consumers who refuse to pay their debts, §1692d(3)

    d. Advertising sale of a debt to coerce payment, §1692d(4)

    e. Repeatedly causing the telephone to ring or engaging any person in telephone conversations repeatedly with the intent to annoy, abuse or harass, §1692d(5)

    f. Placing phone calls without meaningful disclosure of caller's ID, §1692d(6)

3. Broad ban on harassment protects "any person", not just the alleged debtor. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 294 (3d Cir. 2006) ("The Fair Debt Collection Practices Act is intended to protect both debtors and non-debtors from misleading and abusive debt-collection practices.")

E. False, deceptive and misleading representations

1. General prohibition: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. §1692e

a. Even if not objectively false, any statement which is capable of deceiving or misleading violates Section 1692e. *See Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006)

b. Section contains a "catch-all" provision at §1692e(10) which generally bans "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

2. Specific false, deceptive or misleading representations banned include:

a. False representation of the character, amount or legal status of the debt. §1692e(2); *see Glover v. F.D.I.C.*, 698 F.3d 139 (3d Cir. 2012)

i. Failing to state a specific amount claimed owed is an estimate violates this section. *McLaughlin v. Phelan, Hallinan, & Schmeig*, --- F.3d ---- (3d Cir. June 26, 2014)

b. The false representation or implication of attorney involvement. §1692e(3); *see e.g. Lesher v. Law Offices Of Mitchell N. Kay, PC*, 650 F.3d 993 (3d Cir. 2011); *Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2008) ("Legal Department" with no lawyer involvement)

c. The representation or implication nonpayment will result in arrest or criminal prosecution. §1692e(4)

d. The threat to take any action that cannot legally be taken or that is not intended to be taken. §1692e(5)

i. Threat of suit or possible suit must be real, not overstated. *See Brown v. Card Service Center*, 464 F.3d 450, 453 (3d Cir. 2006); *Crossley v. Lieberman*, 868 F. 2d 566 (3rd Cir. 1989)

ii. Suit or threat of suit on a time-barred debt is prohibited (however collector may seek voluntary payment on a debt past the statute of limitations by other lawful collection methods). *See Huertas v. Galaxy Asset Management*, 641 F.3d 28, 32-33 (3d Cir. 2011); *Kimber v. Fed. Fin. Corp.*, 668 F.Supp. 1480, 1487 (M.D. Ala.1987)

iii. Threatened wage garnishment, seizure of property, threat to contact third parties – if not permitted by the FDCPA or state law

iv. Defendant law firm's failure to comply with bankruptcy court subpoena rules violated sections of the FDCPA prohibiting a debt collector from making a threat to take action that cannot legally be taken and prohibiting a debt collector from making a false representation that documents are legal process. *Simon v. FIA Card Servs., N.A.*, 732 F. 3d 259 (3d Cir. 2013)

e. The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer. §1692e(7)

f. Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. §1692e(8)

g. Falsely representing affiliation with the government, §1692e(1), (9); *see Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981)

h. The failure to disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose", §1692e(11); *see Dutton v. Wolpoff and Abramson*, 5 F.3d 649 (3d Cir. 1993); *Simon v. FIA Card Servs., N.A.*, 732 F. 3d 259 (3d Cir. 2013)

i. The false representation or implication that documents are legal process, §1692e(13), or are not legal process, e(15)

F. Unfair and unconscionable practices

1. General prohibition: "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. §1692f

2. Specific prohibitions on unfair conduct include:

   a. Attempting to collect any amount not "expressly authorized by the agreement creating the debt or permitted by law" § 1692f(1); *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011); *Pollice v. National Tax Funding, L.P.*, 225 F.3d 385 (3d Cir. 2000)

b. Accepting or soliciting a post-dated check without providing written notice to deposit of at least 3 days. §1692f(2)

c. Depositing or threatening to deposit any postdated check/ payment instrument prior to the date on such check /instrument. §1692f(4)

d. Repossessing property without the present right to possession. §1692f(6); *see Piper v. Portnoff Law Assts.*, 396 F.3d 227 (3d Cir. 2005)

e. Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer. §1692f(8). Placement of the consumer's account number on the collection envelope violates the privacy provisions of the Act. *Douglass v. Convergent*, 2014 WL 4235570 (Aug. 28, 2014).

G. Validation and dispute rights and notice

1. FDCPA provides an informal validation and dispute mechanism for consumers at 15 U.S.C. § 1692g. The section mandates notice of validation and dispute rights, and speaks to the effect of a validation request or dispute

2. Validation notice. §1692g(a)

   a. Mandatory content. In the initial communication or within five days after the initial communication, debt collector must disclose in writing the following:

      i. The amount of the debt

      ii. The name of the creditor

      iii. A statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid;

      iv. A statement that if the consumer notifies the debt collector in writing within the thirty day period that the dispute the debt, or any portion thereof, is disputed, the debt collector will obtain verification thereof;

v. A statement that, upon the consumer's written request within the thirty day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

b. The validation notice must be large enough to be easily read and sufficiently prominent to be noticed. *Graziano v. Harrison*, 950 F.2d 107, 111 (3rd Cir. 1991)

c. Contradictory messages "overshadow" or violate validation disclosure requirements where messages "would make the least sophisticated consumer uncertain as to her rights." *See Caprio v. Healthcare Revenue Recovery Group, LLC*, 709 F.3d 142 (3d Cir. 2013); *Wilson v. Quadramed Corp.*, 225 F.3d 350 (3d Cir. 2000)

d. Formal pleading in a civil action is not an "initial communication" under the FDCPA. §1692g(c)

3. Effect of dispute or validation request

a. In the Third Circuit (only), consumer disputes must be in writing to be legally effective. *Graziano v. Harrison*, 950 F. 2d 107 (3d Cir. 1991); *but compare Camacho v. Bridgeport Fin., Inc.*, 430 F. 3d 1078 (9th Cir. 2005)

b. Pursuant to §1692g(b), if the consumer notifies the debt collector in writing within the thirty-day statutory validation and dispute period, then the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt and mails it to the consumer.

c. FDCPA compliant collection activities may continue during 30 days absent a consumer's request for validation, but collection activity must not overshadow validation rights. §1692g(b)

d. Seeking validation of a debt is not a pre-requisite to filing suit under Section 1692e. *McLaughlin v. Phelan, Hallinan, & Schmeig*, --- F.3d --- - (3d Cir. June 26, 2014)

H. Multiple debts – application of payments

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions. 15 U.S.C. §1692h

I. Venue restrictions

Debt collectors may not file a collection action, including post-judgment execution proceedings, in any venue other than "the judicial district or similar legal entity" where the consumer resides or signed the contract being sued upon (or where real property is located when enforcing an interest in that property). 15 U.S.C. § 1692i; *Piper v. Portnoff Law Assts.*, 396 F.3d 227 (3d Cir. 2005)

III. REMEDIES UNDER THE FDCPA

A. Damages and attorney fees

1. Private remedy available to "any person", not limited to the consumer. §1692k(a)

2. Statutory damages up to $1000, 15 U.S.C. § 1692k(a)(2)(A); *Crossley v. Lieberman*, 868 F. 2d 566 (3rd Cir. 1989)

    a. "Plaintiffs may collect statutory damages under the FDCPA even if there are no actual damages." *Hamid v. Stock & Grimes, LLP*, 876 F.Supp.2d 500, 502 (E.D. Pa. 2012) (citing *Weiss v. Regal Collections*, 385 F.3d 337, 340 & n. 5 (3d Cir.2004)); *Salvati v. Deutche Bank Nat'l Trust,* --- F. App'x. ---- (3d Cir. July 29, 2014)

    b. Amount to be determined by the trier of fact on the basis of the frequency, persistence, and nature of the violation and whether the violation was unintentional. §1692k(b)(1)

    c. A single violation of the Act triggers statutory liability and remedies

    d. Only $1000 statutory damages per plaintiff per suit, not aggregated per violation

e. Strict liability statute, where degree of the defendant's culpability is relevant only in computing damages, not in determining liability

3. Actual damages stemming from the violation, 15 U.S.C. §1692k(a)(1)

   a. Actual damages not only include any out-of-pocket expenses, but also damages for personal humiliation, embarrassment, mental anguish, emotional distress, loss of job opportunity

   b. Alleged actual damages in the form of attorney's fees incurred in defending against state collection complaint are recoverable. *Walton v. Pereira*, 2014 WL 469935 (W.D. Pa. Feb. 06, 2014)

   c. "[W]hen a violation of the FDCPA has been established, actual damages for emotional distress can be proved independently of state law requirements." *Wenrich v. Robert E. Cole, P.C.*, 2001 WL 4994, *6 (E.D. Pa. Dec. 22, 2000)

4. Award of costs and reasonable attorney's fee to prevailing plaintiff. 15 U.S.C. Section 1692k(a)(3)

   a. Award is mandatory once liability is established. *Graziano v. Harrison,* 950 F. 2d 107, 113 (3d Cir. 1991)

B. Class actions

1. FDCPA specifically provides for class action enforcement. 15 U.S.C. § 1692k(a)(2)(B)

   a. Actual damages available. 15 U.S.C. § 1692k(b)

   b. Class shares statutory damages of lesser of $500,000 or 1% of collector's net worth. *McCall v. Drive Financial Services, L.P.*, 440 F. Supp. 2d 388 (E.D. Pa. 2006)

2. "Representative actions ... appear to be fundamental to the statutory structure of the FDCPA." *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004)

C. Statute of limitations and jurisdiction

1. The statute of limitations for claims under the FDCPA is one (1) year. 15 U.S.C.§ 1692k(d); *Glover v. F.D.I.C.*, 698 F.3d 139 (3d Cir. 2012)

2. The FDCPA provides for jurisdiction in either federal or state court. §1692k(d); *see e.g. Itri v. Equibank, N.A.*, 464 A.2d 1336 (Pa. Super. Ct. 1983)

D. Bona fide error

1. The FDCPA at 15 U.S.C. §1692k(c) provides for an affirmative defense for the debt collector's *bona fide* error where debt collector shows by a preponderance of the evidence:

    a. Violation was not intentional, and

    b. Resulted from a bona fide error; and

    c. Debt collector maintained procedures reasonably adapted to avoid any such error

2. Bona fide error defense only applies to clerical or factual errors; a mistake as to the law is not a bona fide error. *Jerman v. Carlisle, McNellie, Rini, Kramer and Ulrich, LPA*, 559 U.S. 573 (2010)

E. Costs and fees to defendant

1. Availability of attorneys fees to prevailing defendant where action under the FDCPA was brought in bad faith and for the purpose of harassment, 15 U.S.C. § 1692k(a)(3)

2. Costs to prevailing defendant are available under Fed. R. Civ. P. 54 regardless of any showing of bad faith and harassment. *See Marx v. General Revenue Corp.*, 133 S.Ct. 1166 (U.S. 2013)

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COMMON FAIR DEBT COLLECTION PRACTICE ACT VIOLATIONS

FDCPA violations being perpetrated among low income consumers are almost too numerous to mention. (Copy of FDCPA appended). While not intending to be inclusive, some of the more common violations include:

(a) Calls or contact at work, including communications at the place of employment or with the consumer's employer. The debt collector is not permitted to **communicate with a consumer at his place of employment** if the collector has been advised that the employee is not permitted to receive such calls at work. 15 U.S.C. §1692c.

We have seen a significant rise in the number of cases where a collector will write directly to the Payroll or Human Resource Department of an employer seeking to "confirm employment information" or the like. Although there is a narrow exception in the FDCPA for acquiring locator information, §1692b, the general rule is that any communication with third parties (other than the consumer, his attorney, a spouse, etc.) is prohibited. §1692b. *But see Marx v. General Revenue*, 668 F.3d 1174 (10th Cir. 2011) *aff'd* 133 S. Ct. 1166 (2013). Such contacts are not merely statutory violations, but can result in embarrassment and potential impairment of job or promotional opportunities yielding substantial awards.

(b) **Misrepresentation of the character, status or amount of debt**. The FDCPA prohibits any false, misleading or deceptive representations in communications with consumers. §1692e. Without limiting the general application of that section, it is a specific violation of the Act to render a "false representation of the character, amount or legal status of any debt." §1692e(2). It is a separate violation to collect or seek to collect any amount including fees or other charges unless such amount is expressly authorized by the contract or affirmatively permitted by law. §1692f(1). *See Allen v. LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011).

Increasingly, we see collection letters and even Small Claims suits and Proofs of Claim that are loaded up with inexplicable charges including excess interest, so-called late charges, miscellaneous fees, attorney's fees, etc. A collector misrepresents the amount of the debt when it fails to give the consumer credit for payments received or adds illegal, unauthorized or unaccrued charges to the balance of the debt. Similarly, collection notices which purport to add "return check" or "bad check" charges may be unlawful unless there is an express agreement between the consumer and the creditor permitting such a charge. In Pennsylvania, return check charges are only permissible by statute upon criminal conviction. *See* 18 Pa. C.S.A. §4105.

(c) **False threat of suit or garnishment.** The Act prohibits any representation or implication that non-payment of any debt will result in garnishment unless such action is lawful and the debt collector intends to take such action. §1692e(4), (5). Surprisingly, collectors still send notices to Pennsylvania consumers which threaten wage garnishment upon entry of judgment – even though wage garnishment is all but prohibited under Pennsylvania law except in very narrow circumstances. 42 Pa. C.S.A. §8127. *See McCall v. Drive Financial*, 236 FRD 246, 248 (E.D. Pa. 2006).

(d) **False representation of legal action.** With considerable frequency, collectors will state or imply that a lawsuit will be filed, even though they never file suit or the debt is so small that they would not follow suit. §1692e(4), (5). The FTC has taken the position that such statements may only be made if it is an action the collector intends to take and regularly takes. *See Brown v. Card Service Center*, 464 F.3d 450 (3d Cir. 2006). *See also Rosenau v. Unifund*, 535 F.3d 218 (3d Cir. 2008).

(e) **The least sophisticated consumer.** The perspective from which one judges whether collection notices are deceptive or confusing is from the perspective of the least

sophisticated consumer. The Third Circuit has the endorsed approach of the Second Circuit that a notice is deceptive if it can reasonably by read in two or more different ways, one of which is inaccurate. *Brown*, 464 F.3d at 452. This is not a high burden.

(f) **Envelope violations**. Owing to concerns of consumer privacy, and that people should not be shamed or embarrassed into paying a debt, the Act clearly prohibits a collector from using any words or name on an envelope which would indicate that the letter pertains to debt collection. §1692f(8). This notwithstanding, many collectors still send out notices where the name "Adjustment Bureau" or the like appears as the sender or where the words "delinquent account" can be read through the window envelope. These are clear violations. Less clear is whether "benign" or innocuous words or symbols may appear; most courts say it's okay. *See Waldron v. Prof. Mgmt.*, 2013 WL 978933 (E.D. Pa. Ma. 13, 2013)(QR Code not a violation).

(g) **Attorney Involvement**. Attorney must have meaningful involvement in the transmittal of collection letters. Mass-produced collection letters on lawyer letterhead with no attorney involvement will violate the Act, and may violate even if the letter "discloses" a legend "at this time no attorney has reviewed your account." *Lesher v. Law Office of Mitchell N. Kay, P.C.*, 650 F.3d 933 (3d Cir. 2011). There are still collection agencies that masquerade as law firms in practice and this is prohibited.

(h) **Remedies**. Under the Act, the consumer is entitled to any actual damages which can be proven (such as emotional distress, loss of income), statutory damages of up to $1,000.00 plus reasonable counsel fees and costs. §1692k. Many FDCPA claims, especially those based on form letters or routine overcharges are well-suited to class action treatment. *See*

Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004). Private counsel fees are awarded separately and need not be capped by or limited to the underlying recovery.

(i) **Telephone Consumer Protection Act Claims**. 47 U.S.C. § 227; *Mims v. Arrow Fin.*, 132 S. Ct. 740 (2012). Restricts most telemarketing calls, junk faxes and calls/texts to cell phones. If a client is receiving unwanted calls or texts, she should write or text sender to stop. Failure to honor should lead to a violation. Remedy $500 to $1500 per call.

DEBT COLLECTION
Sample Letter #1: Cease and Desist Letter

Date

ABC Collection Agency
123 Main Street
Anytown, USA ZIP
Attn: Mr. Joe Smith, Collection Agent

RE: CEASE & DESIST COLLECTION

RE: Creditor Name:_____
Account #:_____
Your name:_____ (As it appears on the account.)

Dear Mr. Smith:

(You may, but do not have to state the type of harassing contact you have received from the collector. Be specific with names, dates, times and quotes from conversations with collectors.)

Effective today, please **Cease and Desist** all collection efforts and contact regarding the above account.

Yours truly,

John Doe
Address
City, State, ZIP

Note:
1) Make a copy of the letter you send for your files.
2) Send this letter by Certified Mail, Return Receipt Requested
3) Mark your calendar indicating the date your letter was mailed.

DEBT COLLECTION
Sample Letter #2: Validation & Itemization Letter

Date

ABC Collection Agency
123 Main Street
Anytown, USA ZIP
Attn: Mr. Joe Smith, Collection Agent

RE: Validation & Itemization of Debt

RE: Creditor Name:_____
Account #:_____
Your name:_____ (As it appears on the collection letter)

Dear Mr. Smith:
I am in receipt of a letter from your company dated, mo/day/year. This letter claims that I owe a debt to (name of creditor) in the amount of (state amount.)

I dispute this debt.

Would you please send me validation of the debt, showing that it is mine. I would like to receive a signed copy of an agreement between me and the creditor, confirming this is my debt.

In addition, I would like you to provide me with documentation itemizing the calculation of the amount you claim that I owe. I would like you to show me the dates and amounts of any charges, interest charges, over-the-limit fees, collection fees, attorney's fees and any other additional fees that may have been added to the total amount of the debt listed above.

Please send me your written response within 14 days.

Yours truly,

Your name
Address
City, State, Zip
Your Phone number

Note:
1)Make a copy of the letter you send for your files.
2)Send this letter by Certified Mail, Return Receipt Requested
3)Mark your calendar indicating the date your letter was mailed.

DEBT COLLECTION
Sample Letter #3: Statement of Third Party Contact

It is important for the person contacted by the Debt Collector, referred to as the Third Party (a *relative, friend, neighbor, co-worker*), to document the following from the collector's contact: Date, Time of Day, Name of Caller and Collection Agency, Phone number of the collection agency, Phone number *where the call was received* by the third party, Details of the phone conversation.

STATEMENT

Date

Name of Third Party
Home Address
City, State, ZIP
Home Phone:
Cell Phone:

SAMPLE FACTS

On 00/00/0000, at 00:00pm, I received a phone call at my home phone, #000-000-0000, from a person named Miss Jones. Miss Jones said she needed to speak with my neighbor, Albert Smith. She asked if I had his phone number. I asked what the call was about. Initially Miss Jones said she couldn't tell what the call was about, but was insistent on getting Mr. Smith's phone number right away.

I kept asking Miss Jones why she needed the number and what the call was about. She said she couldn't tell but it was really BAD. It involved him and his son! This seemed strange because Mr. Smith's son, George, is 14 years old.

I asked Miss Jones which company she works for and for her phone number. Reluctantly she gave me the number, 800-456-7890. She said it wasn't important for me to know the company she was with. She said that Mr. Smith would have until 9pm today to call back.

I asked Miss Jones why it was so urgent and why he had to call today.
I explained that I might not be able to contact Mr. Smith today.

Miss Jones said, if Mr. Smith didn't call today, she'd need to turn the matter over to the authorities and a suit would be pursued. Miss Jones said, "Mr. Smith and his son owe a lot of money. Either find a way to contact them, or expect the authorities in your neighborhood!"

I hung up the phone. I called my neighbor, Mr. Smith, and relayed the conversation. He assured me that he would handle the matter, and that I should not worry. These threats were ridiculous.

Signature of Third Party

DEBT COLLECTION
Sample Letter #4: Stop Automatic Withdrawal from Bank Account

Date

Name of Your Bank Manager
Branch Location
Name of Your Bank
Address
City, State, ZIP

RE: Cancel/Cease Automatic Withdrawal by
Name of Debt Collector
Account #: 0000-00-000-0

Dear

Effective immediately, *Name of Your Bank* is no longer permitted to accept an automatic withdrawal from any of my accounts from the following company:

Name of Debt Collector
Address
City, State, ZIP

Thank you for your prompt attention to this matter.

Yours truly,
Your signature
Your name
Address
City, State, ZIP
Your Phone number

Note: Take two copies of this letter to your bank and present it to the bank manager. Request that the bank manager sign one copy with a signature, the date and time of day. Keep that copy with your financial records for that creditor.

STATUTORY ATTORNEYS FEE AWARDS

by **Cary L. Flitter, Esq.***

The recoverability of counsel fees may affect key decisions, including how to settle

More than 100 federal laws, and selected statutes of most states, provide for an award of attorneys fees and costs to the party prevailing under those statutes. Although one normally thinks of statutory fees as being available to a prevailing plaintiff under civil rights, consumer or environmental laws, a number of statutes provide for an award of fees and costs to a prevailing defendant.[1] The availability of statutory counsel fees will often affect important litigation decisions, including choice of forum, pleading and motion strategy, and even the terms of a settlement.

The fee-shifting statutes generally allow counsel fees to a "prevailing party" or in the case of a "successful action" as the language of the particular statute requires.[2] These statutes are designed to enable an individual to hire a law firm to pursue a case even if the dollar sum involved is relatively small.[3]

Who is entitled?

Prior to 2001, "prevailing party" or "successful action" status could be conferred through a verdict, equitable relief, judgment, grant of dispositive motion or settlement. Such a disposition entitled that party to an award of counsel fees and costs under most fee-shifting statutes. However, in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, the Supreme Court held that a "prevailing party" is one who has been accorded some relief by a judgment on the merits or a court-ordered consent decree because both create a material alteration of the parties' legal relationship and permit an award.[4] If there is no judicially-sanctioned change in the parties' legal relationship, counsel fees and costs may not be awarded. Therefore, under *Buckhannon*, a settlement agreement that is not enforceable by a court does not confer "prevailing party" status (even if "approved" by the court) and generally does not entitle that party to an award of attorneys fees and costs, as it had previously.

Several appellate courts have tried to ameliorate the effect of *Buckhannon*. For example, in *Adams v. Bowater, Inc.*, the First Circuit noted that the fee restrictions of *Buckhannon* may only apply to the particular statutes at issue in that case – the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of

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1990 (ADA). The court stated, "[T]he ERISA statute is differently phrased and conceivably the result could be different."[5] In one case, the Third Circuit noted that according to *Buckhannon*, a private settlement between two parties does not confer "prevailing party" status even though it does alter the parties' legal status, while a court-approved settlement *does* confer "prevailing party" status when the court can enforce it.[6] In another, the Court recently held that a preliminary injunction issued by a judge can satisfy *Buckhannon*, and qualify for an award of statutory fees.[7] The Eleventh Circuit has found that an accepted offer of judgment under Federal Rule of Civil Procedure 68 has the "necessary judicial imprimatur of the court" to satisfy the "prevailing party" test.[8] A decision on the merits should not be necessary, but a plaintiff wishing to clarify and preserve entitlement to a statutory fee should obtain in a settlement some functional equivalent of a consent decree, whereby he could return to court for enforcement.[9] Just recently the Third Circuit denied statutory fees to a civil rights plaintiff for lack of "prevailing party" status, post-*Buckhannon*. It was not enough that the plaintiff was granted a TRO, even though a preliminary injunction was denied because the defendant changed its practice in response to the suit.[10]

Caution is in order, however. For example, in a fee-shifting class action arising under the Civil Rights Act, the parties settled and the district court approved the class settlement as "fair, reasonable and adequate." The district court's award of over $300,000 in class counsel fees was reversed by the Eighth Circuit on the theory that a class settlement is still a "private contract" – even if subject to court approval, where no judgment or consent decree is entered.[11] Therefore, practitioners seeking to recover fees and costs when a case settles should seek a court-approved and court-enforceable settlement agreement, or place language in the settlement agreement acknowledging that plaintiff has prosecuted a "successful action" entitling him to an award of fees in an amount to be agreed upon (if not already settled) or awarded by the court upon petition. In one recent case, the parties settled a Fair Debt Collection lawsuit but could not agree on fees. The district judge marked the case "settled; a fee application will be filed by October 9, 2009." Plaintiff timely filed the petition. The magistrate judge agreed with defendant that the dismissal did not create "prevailing party" status upon the plaintiff, and denied all fees.[12] Although the district judge rejected the magistrate judge's recommendation, this close-call warrants the attention of counsel.

Statutory attorneys fee awards tend to be circuit-specific, even judge-specific. To the extent that counsel cannot choose the circuit in which they find themselves litigating a fee-shifting case, they should, at a minimum, have a thorough knowledge of the leading counsel fee decisions in their circuit and district as early in the case as possible – preferably before accepting the engagement. But, regardless of where one practices, there are measures that can be taken before and during the litigation, and at the fee petition stage, to maximize the allowable award so as to receive for the client a fully compensatory fee.

Fee Arrangements

When initially undertaking representation in a fee-shifting case, counsel should start with a good fee arrangement. This sounds obvious, but there frequently are cases in which attorneys either do not have written fee agreements with clients or use an old personal injury-style retainer agreement that provides for some percentage of gross recovery as the plaintiff's counsel fee. This is not preferred.[13]

A fee agreement should instead set forth the firm's hourly fees for partners, associates and paralegals, and any additional percentage or contingency. It should also spell out potential areas of costs – filing fees, mailing costs and experts – and how they will be calculated and reimbursed.

The fee-shifting statutes control "what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer."[14] For that reason, a flat "percentage of recovery" fee agreement – still popular in negligence or employment law cases – may prove ill advised; fees on an hourly basis sometimes exceed the underlying amount in controversy, and an award of fees is not capped by the size of the underlying claim.[15] Conversely, in a substantial case, an early settlement may provide a windfall to counsel at the client's expense if a percentage fee is applied. This principle of law is also important for compensation to public interest or legal services lawyers. Simply because that lawyer is charging a nominal fee, or no fee, the defendant is not relieved of the obligation to pay a reasonable fee at market rates if the plaintiff is successful.[16]

The retainer agreement should contain a provision that the client will cooperate in pursuing any fee application and an assignment to the law firm of the right to petition for and collect statutory counsel fees. Because a fee award otherwise belongs to the client, not the lawyer,[17] the firm will lack standing to prosecute the fee petition should the client, for whatever reason, opt not to.

Counsel should bear in mind that the fee agreement is probably discoverable, indeed may become a public document, and should draft it accordingly.

Meticulous Time Records

Irrespective of the particular fee agreement, if a fee petition is filed, it is all but certain that the lawyers will have to submit to the court an affidavit of their credentials, and their firm's time spent on the case. For this reason, it is critical to keep meticulous, detailed, contemporaneous time records.

This means lawyers must be specific in their entries. They should avoid generalities and encrypted abbreviations, if possible. Entries such as "Tel. call, defense counsel 0.6" may draw objection. Instead, an entry such as "Tel. call with defense counsel McNulty to discuss insufficient document production (0.4) and need for site visit (0.2)" will tell a more complete story and better help counsel meet his or her burden.

Counsel seeking attorneys fees must document the hours for which payment is sought with sufficient specificity "to allow the district court to determine if the hours claimed are unreasonable for the work performed."[18]

Although the exact number of minutes and "the precise activity to which each hour is devoted" are not mandatory, the daily activity reports of each professional and a general description of the tasks performed are expected.[19] Thus, a lawyer must keep discrete, specific entries, even for items such as legal research and document review. He or she should record what was researched and the specific category of documents reviewed. Lawyers and other billing professionals should resist the urge to procrastinate, which results in having to "re-create" time records.

Likewise, lawyers and para-professionals who bill their time should avoid "block billing" – lumping together an unrelated string of activities in a single, large block of time – because it is frowned upon and may provide the basis for a reduction in the award.[20]

Time spent litigating "wholly or partially unsuccessful claims" may be reduced or eliminated altogether.[21] Similarly, time spent litigating state law or other non-fee-shifting claims is compensable only if closely intertwined under particular state statutes, time spent on non fee-shifting counts may be entirely disallowed even if factually relevant. If the court cannot disaggregate the unsuccessful and non-fee-shifting claims from the time records, the prevailing attorney may not be pleased with the resulting reduction.

It is important to focus on this at the pleading stage, when plaintiffs often have a tendency to overplead. A blockbuster demand for multiple levels of damage or assertion of numerous, distinct counts and causes of action may ultimately provide the basis for the fee opponent or the judge to assert that the prevailing party had a low "degree of success" and to reduce the award accordingly.[22] The district courts have discretion to equitably apportion fees among multiple defendants, based upon conduct or culpability.[23]

Some courts will allow lawyers' conference time; others will not.[24] It is prudent to state in the time record who was present and what was accomplished in the conference. Counsel should also keep time in increments of one tenth of an hour (0.1). Most judges, like most clients, disapprove of quarter-hour or half-hour billing.[25] An associate, paralegal or law clerk should handle tasks requiring less skill or expertise. Their time is compensable.[26]

Depending on the case, the court generally expects that junior attorneys or paralegals will be used for more routine work, including legal research or case preparation, especially if the firm has the depth to assign qualified, junior staff. As several courts have observed, "A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."[27] Like lead attorneys, associates and paralegals should record their time in a precise and clear manner daily.

The party seeking attorneys fees bears the burden of proof that the request is warranted and reasonable. To meet that burden, the fee petitioner must submit evidence

supporting the hours worked and the hourly rates claimed.[28] This produces the familiar "lodestar," which is presumed to be the reasonable fee, although the court has the discretion to make certain adjustments.[29]

Counsel must produce sufficient evidence of what constitutes a reasonable fee by demonstrating, through his or her own affidavit and the affidavits of others, what constitutes a reasonable market rate, given the essential character and complexity of the legal services rendered.[30] This is an area that is sometimes overlooked or insufficient developed by petitioning counsel. Counsel's own affidavit should articulate counsel's credentials and accomplishments. It should read somewhat like an expert's curriculum vitae, for example, setting forth by caption prior cases in which counsel have had success and providing citations to counsel's published articles.

The lodestar (time x rate) is strongly presumed to yield a reasonable fee.[31] The supporting affidavits should reflect personal knowledge of hourly rates customarily charged in the relevant market.[32] If factors other than the lodestar are at issue – such as the prevailing party's degree of success – they should be addressed in the supporting affidavits.

The Prevailing Market Rate

The concept of "relevant legal community" or "relevant market" can have a significant impact on a client's fee entitlement. Petitioning counsel is entitled to be paid an hourly rate defined as "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation."[33]

Counsel's usual rate – and even the actual rate, if any, being charged the client – is not dispositive, though it is evidentiary. Most courts base an appropriate hourly fee on what is reasonable in the forum where the district court sits.[34] The court in *Apple Corp.* therefore, awarded New Jersey rates rather than the higher rates sought by the petitioner's New York counsel.[35] Thus, if plaintiff has a choice of several venues, the lawyer and client should know that he or she will likely not be reimbursed New York rates for litigating in Oklahoma. An exception to the local-rate rule may lie if the petitioner can prove in the record that the case was so highly specialized, or unattractive, that there was no local law firm prepared to handle the matter.[36]

Most circuits hold that once the plaintiff carries his or her burden, the fee-opposing party may contest that *prima facie* showing only with appropriate record evidence.[37] In the absence of such contrary evidence, the prevailing party must be awarded attorneys fees at the requested rate.[38] In other words, if a fee petition is appropriately documented with affidavits, complete time records and adequate descriptions of what work has been done on the client's behalf, in most circuits (in an individual, non-class case) the district court lacks the discretion to reduce the fee petition *sua sponte*,[39] absent a losing party's specific documented challenge to the petition.[40] A

reply brief thus becomes critical because it is the petitioner's first opportunity to rebut the specific fee issues or time entries to which the losing party has chosen to object.

Counsel also must keep accurate, detailed records of all costs and expenses. Items that might otherwise be treated as office overhead may be compensable in the context of a counsel fee petition if adequately documented. Although the practice is not uniform, many courts will award reasonable expenses such as long-distance telephone charges, faxes and photocopies,[41] as well as the reasonable costs of computer research.[42] The cost of visual aids or technology for the presentation of trial evidence has also been awarded at the judge's discretion.[43] Counsel will be aided in this quest by an accurate counting of photocopies, by keeping copies of Westlaw or Lexis and vendor bills and by a written compilation of dates, amounts and the need for the miscellaneous charges.

Conversely, expert witness fees are not recoverable under the federal fee-shifting statutes unless a statute with a fee-shifting provision explicitly provides for such compensation.[44] For example, the Toxic Substances Control Act states that the prevailing party may recover "the costs of suit and reasonable fees for attorneys and expert witnesses."[45] The Civil Rights Act has been amended to provide for recovery of expert witness fees in the court's discretion.[46] The Consumer Credit Protection Act does not provide for shifting of costs for expert witnesses. Some state CPL statutes do, however. Practitioners should be aware of whether or not the applicable statute provides for the recovery of expert witness fees when deciding whether to hire an expert witness and how much money to pay him or her.

A detailed fee petition, affidavit and brief, coupled with review and proofreading of many months of time sheets, may take a day or a couple of days to complete. Most courts hold the time and expenses associated with preparation of the fee petition to be compensable.[47] Substantial and reasonable market rates may be awarded even in proceedings involving smaller sums.[48]

Counsel should file a supplemental petition or affidavit if the latest time records are not available when a fee petition is to be filed.[49] They should anticipate issues in the brief in support of the petition.

Success is Relative

Victory may entail a modest (though statutory maximum) recovery, or final injunctive or declaratory relief with little or no money damages. However, success is relative. Counsel may want to point out the important public interest being vindicated and to remind the court that the purpose of most fee-shifting statutes is to attract competent counsel to act as "private attorneys general."[50] They might also point out, with appropriate citation to the record, instances in which the opponents' own litigation tactics escalated the cost of the litigation, if such is the case.[51]

For example, in *Diettrich v. Northwest Airlines, Inc.*,[52] the defense was vigorous, including intense motion practice, filing several briefs during trial and bringing boxes of

documents to trial, which plaintiff's counsel had to review. Each of these meant more work, and more time billed, by the plaintiff's lawyers. The court noted that when the time came to award fees, it could not penalize the plaintiff's counsel for responding in kind to the defendant's actions. In this respect, a defendant risks paying twice for every motion filed and deposition taken – once for its counsel and later for plaintiff's counsel.

The appellate courts have held that there is no rule of proportionality per se; fees need not bear a given ratio to the dollar size of the case.[53] Nonetheless, a fee request larger than the damages will probably draw comment, if not objection, perhaps as reflecting a "low degree of success."[54] Any such disparity may be readily explained in the moving papers.

Courts have discretion in apportioning fees among multiple defendants. Fees may be apportioned equally, among equally culpable defendants, or apportioned according to relative culpability. Or, fees may be allocated based upon time spent litigating against each defendant, according to the "real source of the offense."[55] It is not appropriate in federal fee-shifting practice to mechanically divide fees and expenses by the number of defendants present in the case.[56]

Settlement Implications

An issue unique to statutory counsel fees is the tax implication of the fee award to the plaintiff himself. Although a full discussion is beyond the scope of this article, the reader should know that under most fee shifting statutes the plaintiff himself may be required to declare as income the entirety of the counsel fee award – even though those fees are received exclusively by the plaintiff's lawyers.[57] Although Congress has amended the tax code to ameliorate the problem in part, the tax code amendment focuses on civil rights and employment cases, not to consumer fee awards.[58]

Litigation under fee-shifting statutes carries special implications for settlement. Depending on the precise wording of the underlying attorneys fee statute at issue, in several circuits, claims for prevailing party attorneys fees are not extinguished by a broad form general release. Thus a settlement with a consent judgment will entitle the party to statutory fees unless they are specifically mentioned and waived.[59]

A stack of time sheets and a bit of argument will no longer carry the day. But a cogent and well-supported petition with detailed daily time records will help to assure that lawyer and client maximize the fee award that the law – and the judge's discretion – will allow.

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[1] The Healthcare Quality Immunity Act is such an example. 42 U.S.C. §11113 (2008).

[2] *See, e.g.*, 42 U.S.C. §1988(b) (Civil Rights Attorney Fees Act); 15 U.S.C. §1640 (Truth-in-Lending Act).

[3] *Student PIRG of N.J., Inc. v. AT&T Bell Lab.*, 842 F.2d 1436, 1450 n. 13 (3d Cir. 1988).

[4] 532 U.S. 598 (2001).
[5] *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242 (2010).
[6] *Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159, 164 (3d Cir. 2002).
[7] *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008).
[8] *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc.*, 298 F.3d 1238 (11th Cir. 2002).
[9] *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 907 (11th Cir. 2003).
[10] *Singer Mgmt Consultants v. Milgram*,650 F.3d 223 (3d Cir. 2011).
[11] *Christina A v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003).
[12] *Quinones-Malone v. Hayt, Hayt & Landau*, D.N.J. Civil Action No. 08-4310(JAP)(TJB), doc. 25, Report and Recommendation, March 17, 2010, R & R rejected 2010 WL 4338325 (Oct. 27, 2010).
[13] In *Stair v. Turtzo, Spry, Sbrocchi, Faul, & Labarre*, 768 A.2d 299 (Pa. 2001), for example, the Pennsylvania Supreme Court ruled that the statutory attorneys fee award may have to be shared with the client as a product of inartful language of the engagement letter.
[14] *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990); *see also Gisbrecht v. Barnhart*, 535 U.S. 789, 806 (2002).
[15] *See City of Riverside v. Rivera*, 477 U.S. 561, 578-81 (1986); *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 471-75 (3d Cir. 1989).
[16] *See Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (civil rights case).
[17] *Venegas*, 495 U.S. at 88-89 *(citing Evans v. Jeff D.*, 475 U.S. 717, 731-32 (1986)).
[18] *Washington v. Philadelphia Co. Court of Common Pleas*, 89 F.3d 1031, 1037 (3d Cir. 1996); *U.A.W. Local 259 v. Metro Auto Ctr.*, 501 F.3d 283, 291 (3d Cir. 2007).
[19] *Washington*, 89 F.3d at 1037.
[20] Success may not be measured by the amount of the recovery, but may implicate policy factors. *See Zagorski v. Midwest Billing Serv., Inc.*, 128 F.3d 1164, 1166 (7th Cir. 1997).
[21] *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990); *see also Loughner v. Univ. of Pittsburgh*, 290 F.3d 173, 178 (3d Cir. 2001); *Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983).
[22] *Compare with Hensley*, 461 U.S. at 424.
[23] *Dixon-Rollins v. Experian Info. Sys.* 2010 WL 3734547 (E.D. Pa. Sept. 23, 2010).
[24] *See, e.g., Apple Corp. Ltd. v. Int'l Collectors Soc.*, 25 F. Supp. 2d 480 (D.N.J. 1998) (allowing conference time as helpful); *DiSciullo v. D'Ambrosio Dodge, Inc.*, 2008 WL 4287319 (E.D. Pa. Sept. 18, 2008)(same allowing fees and costs of $151,000 upon settlement at $45,000).
[25] *Reed v. Rhodes*, 934 F. Supp. 1492, 1506-07 (N.D. Ohio 1996) (time kept in half-hour increments is unacceptable); *Zucker v. Occidental Petroleum.*, 968 F. Supp. 1396, 1403 (C.D. Calif. 1997), *aff'd* 192 F.3d 1323 (9th Cir. 1999)(criticizing quarter-hour increments).
[26] *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).
[27] *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983); *Southwest Ctr. For Biological Diversity v. Bartel*, 2007 WL 2506605 (S.D. Cal. Aug. 30, 2007).
[28] *Rode*, 892 F.2d at 1183 (*citing Hensley*, 461 U.S. at 433); *Strange v. Monogram Credit*, 129 F.3d 943, 946 (7th Cir. 1997).
[29] *Hensley*, 461 U.S. at 433.
[30] *Washington*, 89 F.3d at 1037 (civil rights case).
[31] *Purdue v. Kenny A ex. rel Winn*, 130 S.Ct. 1662,1673 (U.S. 2010).
[32] *Becker v. Arco Chem. Co.*, 15 F. Supp. 2d 621, 628 (E.D. Pa. 1998).
[33] *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1387, 1389 (11th Cir. 1997) (*quoting Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, (11th Cir. 1988)).
[34] *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 369 F.3d 91, 96 (2d Cir. 2004).
[35] *See Apple Corp. Ltd.*, 25 F. Supp. 2d at 480.
[36] *See, e.g., Howes v. Medical Components, Inc.*, 761 F. Supp. 1193 (E.D. Pa. 1990) (awarding fees at New York City rates to New York City law firm litigating a patent infringement action in Philadelphia).
[37] *See, e.g., Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997).
[38] *Smith v. Philadelphia Housing Auth.*, 107 F.3d 223, 225 (3d Cir. 1997)
[39] *Rode*, 892 F.2d at 1188-89; *Bell v. United Princeton Prop. Inc.*, 884 F.2d 713, 719 (3d Cir. 1989).
[40] *Rode*, 892 F.2d at 1183; *Nelson v. Select Fin. Servs., Inc.*, 2006 WL 1672889 (E.D. Pa. June 9, 2006).

[41] *Material Techs., Inc. v. Carpenter Tech. Corp.*, 2004 U.S. Dist. LEXIS 28893 (D.N.J. Sept. 16, 2005); *see also Smith v. Great Am. Restaurants, Inc.* 969 F.2d 430, 440 (7th Cir. 1992).

[42] *Arbor Hill*, 369 F.3d at 98.

[43] *Newsome v. McCabe*, 2002 U.S. Dist. LEXIS 8413 *45 (N.D.Ill. May 10, 2002); *see also Moore v. University of Notre Dame*, 22 F.Supp. 2d 896, 912 (N.D.Ind. 1998).

[44] *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 88 (1991).

[45] 15 U.S.C. §§ 2618(d), 2619(c)(2).

[46] 42 U.S.C. § 1988(c).

[47] *See Hernandez v. Kalinowski*, 146 F.3d 196, 199 (3d Cir. 1998); *Washington*, 89 F.3d at 1042; *Southwest Ctr.*, 2007 WL 2506605 (citing *Thompson v. Gomez*, 45 F.3d 1365 (9th Cir. 1995)); *Harlan v. NRA*, 2011 WL 813961 (E.D. Pa. March 2, 2011).

[48] *See e.g. Munits v. D. Scott Carruthers*, 2011 WL 5075079 (E.D. Pa. Oct. 3, 2011)(approving $555/hr for senior partner, $245/hr for associate and $160/hr. for paralegal upon default award of $1000 in FDCPA action).

[49] There are timetables in the federal and/or local rules for filing a fee petition. *See* Fed. R.Civ.P. 54(d)(2)(B)(motions for attorneys fees and expenses must be filed within 14 days of judgment).

[50] *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991); *Student PIRG of N.J*, 842 F.2d at1450 n. 13; *Tolentino v. Freidman*, 46 F.3d 645, 651 (7th Cir. 1995); *Harlan v. NRA*, *supra* at fn. 45.

[51] The Fifth Circuit Court of Appeals decision in *McGowan v. King*, is oft-quoted:

> The borrower's counsel did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.

661 F.2d 48, 51 (5th Cir. 1981).

[52] 967 F.Supp. 1132 (E.D. Wis. 1997).

[53] *See City of Riverside v. Rivera*, 477 U.S. 561 (1986); *See also Braun v. Wal-Mart Stores*, 24 A.3d 875, 976-81..

[54] *See, e.g., Strange*, 129 F.3d at 943.

[55] *Dixon-Rollins v. Experian Inf. Sol. Inc.*, 2010 WL 3734547 (E.D. Pa. Sept. 23, 2010)

[56] *Id.*

[57] *See C.I.R. v. Banks*, 543 U.S. 426 (2005).

[58] *See American Jobs Creation Act of 2004*, 118 Stat. 1418, amending 26 U.S.C. § 62(a)(19).

[59] *Lima v. Newark Police Dept.*, 658 F.3d 324 (3d Cir. 2011).