

DEVELOPING A COMPLIANT LETTER THAT SATISFIES YOUR REQUIREMENTS IS A MULTI-STEP PROCESS

1. Review letters from various sources to see how others prepare their letters. A color printer or viewing on your computer screen is required to see colors which identify changes and to attract your attention.
2. Select a sample to customize for your practice. CCEF maintains and updates different samples which are available for its members.
3. Customize the letter for your purposes. Be careful not to change any material portions of the letter without consulting with an attorney to evaluate the effect of the changes.
4. Evaluate whether the statements in the letters are objectively true and accurate.
5. Evaluate whether the letters possess any material omissions or material exaggerations.
 - a. ex1: Statute of Limitations expired on the debt but the letter threatens a lawsuit will be filed.
 - b. ex2: In practice you do not follow a procedure as quickly as you represent in the letter.
6. Have someone not in the industry review the letter for its “feel”. If they find it confusing, others may as well.
7. Identify the states to which the letters will be mailed. Identify any special counties, municipalities, or cities that have special rules (ex: NYC & Buffalo).
8. Consult with an attorney to:
 - a. determine what state laws or city ordinances require additional disclosures or the disclosure of any of your licenses;
 - b. determine whether certain language should be avoided in certain states, circuits, counties, municipalities, or cities;
 - c. review the applicable statutes and case law.
9. Make up templates to address each specific situation.
10. Document the procedure as to how the form letter should be utilized by the staff and store the form. Keep a copy of the procedure. Store backups of all forms in a different location in case the main form is corrupted.
11. Minor changes to the letter could expose your firm and you to liability. Always have an attorney review the final version.
 - a. Example: Balance/Amount is not the same as “Total Balance.”
 - b. If you don’t include documentation, any reference to the documentation must be reviewed. It is strongly recommended that documents supporting the debt accompany the letter.
 - c. Look at the different forms as opposed to changing a form. Be aware of unintended consequences, because you may not have considered an issue.
 - d. When in doubt, ask an attorney why the language was used/not used!
12. Review case law on a regular basis as this area of law is heavily litigated and new theories emerge on a regular basis.

WHAT'S NEW IN THE USER GUIDE – June 2015

1. Time-Barred debt
 - a. Credit reporting of time-barred debts
 - b. NEW FORM LETTER FOR TIME BARRED DEBT
2. “Attorney Meaningful Involvement” cases
3. Ineffective “Greco Disclaimer”
4. “Judgment” - If application in 1692g Notice
5. Cases on “creditor” name
6. Requests for Attorney’s Fees
7. Letterhead issues
8. Filing lawsuits within the 30 day validation period
9. All templates have minor or major revisions and edits based on recent case law

USER'S GUIDE TO SAMPLE LETTERS

Avoid the use of the term “you” to avoid wrong party situations (1)

The use of the word of “you” exposes your company to lawsuit if you contact the wrong party. The use of the terms “you” implies the party to whom the letter is addressed owes the debt, whether or not they owe the money or are the correct party. Possible scenarios include:

- Another party has the exact same name.
- Neither father nor son uses Jr./Sr. and you contact the wrong party.
- “George Foreman scenario,” where George named his sons after himself.
- If you avoid the use of “you”, you may be successful on a 12(c) motion.
- Identity theft situations.
- Potential arguments to avoid a violation for ID Theft:
 - There is no way a collector or anyone except the victim of identity theft can know about the identity theft. A victim of true identity theft will likely not know until he or she is the subject of collection. In the situation in which the debtor is alerted to the ID theft by the collector’s initial communication and reacts, it would be unjust for a court to expect the debt collector to know about the ID theft when the debt collector has no reason or ability to know.
 - Include documents that identify the party liable for the debt and speak for themselves to prevent confusion:

“Here, defendant’s August letter correctly identified the current creditor and account number and, most importantly, attached the relevant account statements for plaintiff to satisfy herself as to the name of the original creditor. The fact that the account number on the cover letter matched the account number contained in the statements would assure even the least sophisticated creditor that any payments would satisfy the debt as to that account number. The statements would also confirm for such a debtor the defendant’s authority to collect this debt. This argument was used in a related argument over another typo with respect to the name of the original creditor.” See *Jeffrey v Gordon*, 2011 WL 2134050 (D.Or. 5/25/11).

Two Favorable Cases for Debt Collectors

1. **Kaniewski v. Nat’l Action Fin. Servs., 678 F. Supp. 2d 541 (E.D. Mich. 2009)** which stated, “[a]pplying this standard, one judge in this district has held that a plaintiff who knew that the defendants were not attempting to collect on a debt owed by him could not sustain an FDCPA claim under § 1692e as a matter of law. *Kujawa v. Palisades Collection, LLP*, 614 F. Supp. 2d 788 (E.D. Mich. 2008) (Cohn, J.). Defendant cites *Kujawa* for the proposition that “because Plaintiff knew that [Defendant’s] communications were not directed at him, but rather at another individual, Plaintiff cannot succeed on his §§ 1692e and 1692f claims.” (Def.’s Mot. Br. at 6.) As further support, Defendant also cites to *Hill v. Javitch, Block & Rathbone, LLP*, 574 F. Supp. 2d 819 (S.D. Ohio 2008) (Beckwith, C.J.). In *Hill*, the court held that the plaintiff failed to state a claim under § 1692f of the FDCPA where he “clearly understood” that the communications were not directed at him and “[e]ven the least sophisticated consumer would have understood” that the defendant “was not attempting to collect a debt from [the plaintiff].” *Id.* at 826. The court agrees with the reasoning of *Hill* and *Kujawa*. There is no dispute that Plaintiff knew that Defendant was not attempting to collect a debt from him. Accordingly, Plaintiff cannot meet the “least sophisticated consumer” test as a matter of law. As Judge Cohn stated, the court “is mindful of [P]laintiff’s situation. . . . However, the aggravation [P]laintiff likely suffered . . . simply does not make out a violation of the FDCPA.” *Kujawa*, 614 F. Supp. 2d at 792. The court will therefore grant Defendant’s motion with respect to Plaintiff’s claims under § 1692e and § 1692f. See also *Covell v. Chiari&Ilecki, LLP*, 2012 U.S. Dist. LEXIS 186330 (W.D.N.Y. Oct. 16, 2012).”

2. ***Harrer v. RJM Acquisitions LLC*, 2012 U.S. Dist. LEXIS 5912 (N.D. Ill. Jan. 19, 2012)**: “More specifically, the Court must determine whether an unsophisticated consumer like Plaintiff, whose name was “Werner Harrer,” not “WenerHarrer,” who has never had a Doubleday Book Club account, and who has never lived at the address identified as the debtor’s address in the collection letter, would believe that he owed the \$91.09 debt to Doubleday.

Although the question is a close one, the Court concludes that “the reasonable consumer, unsophisticated though [he] may be,” would not be confused by the technically false information in the collection letter that Plaintiff received. The unsophisticated consumer knows his account history, see *Wahl*, 556 F.3d at 646, and knows the addresses at which he has lived in the past. This case is different from one in which a plaintiff receives a single collection letter stating that the plaintiff himself owes a debt that has been discharged in bankruptcy. See, e.g., *Turner*, 330 F.3d at 995 (holding that the reasonable unsophisticated consumer could be misled by the receipt of one collection letter that stated that the consumer himself owed a debt that had been discharged in bankruptcy). Plaintiff never owed the Doubleday debt in the past, nor has he ever had a Doubleday Book Club account. Plaintiff himself has not alleged that he was confused or misled when he received the collection letter and the Court concludes that the reasonable unsophisticated consumer would not be confused either. See *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (stating that a plaintiff cannot prevail on a claim under the FDCPA just by contending that *he* was confused; rather “[h]e must show that he is representative of the protected group”).

This is particularly true because the letter that Plaintiff received fully complied with the terms of § 1692g(a) by, among other things, providing a statement that: (1) Plaintiff could, within thirty days after receipt of the letter, dispute the validity of the debt; and (2) if Plaintiff disputed the debt in writing within that time period, the debt collector would obtain verification of the debt and mail it to the consumer. While that fact is not dispositive on a claim under § 1692e, it is relevant here. Based on the statements in the collection letter, even if Plaintiff initially was confused by the request for money addressed to someone with a very similar name, the unsophisticated consumer would be reassured that the letter may have been sent to him in error and would know to contact the debt collector to request verification of the debt.

...

Regardless of whether a collection letter falsely implies that a consumer owes a debt that he does not actually owe, if the letter simply provides to the consumer the information required under § 1692g(a) -- the amount of the debt, the name of the creditor, and the required statements regarding a verification request -- it is not “unfair” for purposes of § 1692f. *Turner*, 330 F.3d at 998 (holding that “a letter simply providing the information required by § 1692g(a) is not an unfair or unconscionable means of debt collection under § 1692f, even when the debt collector may have violated some other provision of the FDCPA”). No reasonable unsophisticated consumer who received a letter like the letter Plaintiff received would conclude that the letter is an “unfair or unconscionable” means of debt collection.... While Defendant’s behavior -- mailing one collection letter to the incorrect debtor -- was in connection with the collection of a debt, the facts alleged here do not plausibly suggest that the natural consequence of Defendant’s conduct was to abuse, harass, or oppress.”

One suggested
modification to
1692 g notice:
avoid suggestion
judgment exists⁽²⁾

It is suggested to clarify whether a judgment exists or not

- (if a judgment exists)
- (if the debt is found upon a judgment)
- (if applicable)

[See *Keasey v. Judgment Enforcement Law Firm, PLLC*, 2014 U.S. Dist. LEXIS 59805](#)

(W.D. Mich. Apr. 30, 2014) Law firm omitted language regarding Judgment, was sued, but NO Violation: Court stated Plaintiff's argument defies reason. Defendants were not obligated to notify Plaintiff of her right to obtain a copy of a non-existent judgment. See *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 507 (6th Cir. 2007 (finding that language notifying the plaintiff of her right to obtain verification of the debt complied with the technical requirements of the FDCPA). In fact, including reference to a non-existent judgment could easily confuse a debtor by causing her to believe there was a judgment against her. See *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 324 (E.D. Mich. 1992) ("If the defendant did falsify and state that it would provide a non-existent judgment against plaintiffs, that would . . . very likely mislead[] unsophisticated plaintiffs into a belief that there had already been a judgment rendered against them."). Accordingly, the Court will grant summary judgment on this claim. **COURT FOUND THAT OTHER VIOLATIONS EXISTED.**

Mini Miranda Statements (3)

15 USC 1692(e) 11

15 USC 1692(e) 11

The failure to disclose in the *initial written communication* with the consumer and, in addition, if the initial communication with the consumer is oral, in that ***initial oral communication***,

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

and the failure to disclose **in subsequent communications** that

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

Samples

Tracking Statue

v1: Tracks the statute -above & may be confusing (not used by most parties).
The debt collector is attempting to collect a debt and any information obtained will be used for that purpose and the communication is from a debt collector

Alternative version used by many debt collectors

CCEF is not aware of any case challenging this verbiage.

Some firms use both disclosures in the first letter. Others just use the mandatory phrase.

This communication is from a debt collector. This is an attempt to collect a debt.
Any information obtained will be used for that purpose.

- Capitalization or bold is unnecessary. If the phrase is capitalized, it is possibly an overshadowing claim by overshadowing the validation notice which is not in capitals or bolded.
- While both phrases are not required under Federal Law at all times, most debt collectors use both phrases for these reasons:
 - They want to make sure their staff doesn't omit one phrase inadvertently.
 - Some states requires both phrases all the time.

Don't forget to use the Mini-Miranda in all subsequent communications (ex: discovery devices, replies to discovery, during motion practice, settlement letters, etc.)

Re:
And or Vs: (4)

Several Courts have held that the use of “vs” implies a lawsuit has been filed. If no lawsuit has been filed, the use of the term can be alleged to be a violation by falsely implying that a filed lawsuit exists. To avoid this issue, it is recommended that you use the term “and” if a lawsuit has not been filed to avoid this issue. Do not use terms Plaintiff/Defendant until a suit is filed.

Don’t use lines to make it look like a lawsuit caption or summons. For example, don’t put at the top of the page:

XXXXXXXXXXXXXXXXXXXXXXXXXXXXX
Financial Institution, Inc.

and

Debtor.
XXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Instead, simply list the parties after a “re” line like a typical business letter.

Our File No. (5):

The “file number” field, while it appears innocuous, could create issues. Use a file number that is distinct in form and substance from the account number used by the client and/or the original creditor to avoid confusing the least sophisticated consumer.

If 2 entities/companies use the same file #, a plaintiff’s attorney could argue that both companies are in fact one company, and expose the creditor to liability under the FDCPA.

The size of the file # could open the door to “Attorney Meaningful Involvement” claims (ex: 1,000,000) or be the basis to establish that the company has significant net worth. Other issues may exist as well and are beyond the scope of this memo.

The file number should not make reference to another law firm or agency in the description. (i.e. if the file was referred to you by another attorney (“John Smith Law Firm”) or agency (“John Smith Collection Agency”) who do not own the debt but you are collecting on behalf of the creditor (“National Original Creditor”) the file number should refer to either “NOC1000” or a general “MISC1000” or some unrelated file number but NOT “JS1000”).

A common mistake is to fill the forwarding company’s reference/file # into the account number field. The debtor will not recognize the agency’s or law firm’s file number for many reasons, including that the law firm has never contacted the debtor and merely referred the matter to a local firm to litigate.

Account No:(6)
Redact

Don’t forget to redact the Account No.: [XXXXXXXXXXXXxxx]
There are several reasons for redaction:

- Your company’s privacy policy.

- The client’s privacy policy.
- State law or Federal law (e.g., *Gramm–Leach–Bliley Act*).

Make sure you use the correct account #. If the account number was changed due to the fact one company acquired another company, then include both account numbers as the debtor may only be familiar with the original account #. Review the documentation to see if any leading zeroes/numbers were inadvertently dropped.

[DATE] (7)

Make sure you use the date you mail the letter (or the day before). Don’t forget to update the date of the letter, if it was not sent right away. If your interest field is tied to the date field, updating the dating will lead to the updating the interest balance, if applicable. Also if you update the interest, please remember to update the date of the letter.

[DATE field]

[DATE] –The date on which the letter is being sent. Some programs such as Microsoft Word provide the option to auto-complete this field with the date the letter is modified/printed. This option was not included in the model letters but may be incorporated.

If an auto-complete option is used, it is encouraged, and required by some jurisdictions, that you retain a copy of the letter (in .pdf or other similar electronic format and/or in physical paper format) actually sent.

If a copy is not retained any attempt to reprint from the editable version will result in a copy containing the wrong date. Manually changing the date at the time of reprinting the letter may be insufficient.

**[CLIENT
NAME]
Original
Creditor**
(8)

Verify the creditor’s name. Make sure it is correct in your letters and complaints. There have been many lawsuits on this issue.

There have been several suits on this field. Make sure the name you use matches:

1. The agreement
2. Invoices
3. The secretary of state website of the creditor’s state of incorporation/registration.

If your client is known by any d/b/a names or trade names, etc., include same. Be careful of trade names. Some courts have held that the use of an *unregistered trade name* is potentially deceptive. See *Boyko v. Am. Int’l Group, Inc.*, 2012 U.S. Dist. LEXIS 81229 (D.N.J. June 12, 2012).

Avoid abbreviations that are not widely accepted. Implement a procedure to address the situation when the computer field is too short to fit the creditor’s name. Use the original creditor’s full legal name. Do not use acronyms unless they are specifically included in your client’s legal name. Acronyms and shorthand may be confusing to the least sophisticated consumer.

- “*NCOP XI, LLC A/P/O CAPITAL ONE*”: The abbreviation “A/P/O” is confusing. See *EunJoo Lee v. Forster & Garbus LLP*, 2013 U.S. Dist. LEXIS 28534 (E.D.N.Y. Mar. 1, 2013) – class action.
- “Naming an entity as “Client” and a different entity as “Current Creditor” especially where the “Client” is named more often than the “Current Creditor” plausibly could create confusion and it is only plausibility that must be shown to withstand a 12(b)(6) motion.” *Deschaine v. Nat’l Enter. Sys.*, 2013 U.S. Dist. LEXIS 31349 (N.D. Ill. Mar. 7, 2013).
- “Cendant’s letter [letterhead of Resort Financial Services – A Division of CTRG – Consumer Finance] stated it was from a debt collector rather than the creditor (identified as Fairfield Communities). Having trumpeted Resort Financial Services as a debt collector, Cendant had to comply with all the obligations that the Act places on debt collectors.” *Catencamp v. Cendant Time Share Resort Group – Consumer Finance, Inc.*, 2006 U.S. App. LEXIS 30614 (7th Cir. 2006).
- “Throughout the eviction suit, defendant incorrectly referred to Emhurst as “Emhurst Lake Apartments” instead of “Emhurst Lake Apartment, LLC.” Debt Collectors that represent real property owners are at a high risk for this type of lawsuit. Many mortgage servicing companies pretend to be the owner of the debt, when in fact the owner is a real estate trust.” *Marciuleviciene v. Emhurst Lake Apt., LLC*, 2012 U.S. Dist. LEXIS 86424 (N.D. Ill. June 21, 2012).
- The record was confusing as to the relationship between SJOH, to whom the Plaintiff owed nothing, and an entity known cryptically as “St. John Oakland Hosp/CRNA,” to whom, according to Defendant, the Plaintiff owed \$85.00. That confusion appears to have never been resolved, and the relationship, if any, between SJOH and St. John Oakland Hosp/CRNA remains a mystery to this day. **(\$90,000 attorney’s fees award)**. *Shields v. Merchs. & Med. Credit Corp.*, 2011 U.S. Dist. LEXIS 90518 (E.D. Mich. June 30, 2011).

CONTINUED
[CLIENT
NAME]

Original
Creditor

(8)

- “Stellar sent letters containing inconsistent statements regarding the current creditor.” *Moore v. Stellar Recovery, Inc.*, 2014 U.S. Dist. LEXIS 95690 (N.D. Ill. July 14, 2014). Class action.
- “[Defendant] may be correct that the FDCPA does not *require* that the original creditor be identified in collection letters sent to consumers - but where a debt collector *has* chosen to identify the original creditor, and has done so inaccurately, the false representation would likely thwart a consumer’s ability to freely navigate a course of action in response to the collection notice. Congress’s recognition in the FDCPA that this information is important - even if not so essential that debt collectors *must* disclose it without first being asked, see 15 U.S.C. § 1692g(a)(5) - supports the conclusion that its false provision could have this type of detrimental impact on the consumer...

“On the contrary, ...[the] letter gives the least sophisticated debtor even less of a clue as to how to investigate the claim being made against him, making it more likely that the consumer will waste valuable time and suffer confusion in his efforts to formulate a response. [defendant] also emphasizes that its letter does correctly identify Tourgeman’s current creditor - Collins Financial Services - but, in fact, the

letter simply states that Collins is the firm's "client." By contrast, Paragon Way's letters clearly describe Collins as Tourgeman's "current creditor." Because the[defendant's]letter does not describe who American Investment Bank purports to be, and as one cannot assume that the least sophisticated debtor understands that the firm's "client" - Collins Financial Services - is the entity to whom he currently owes money, the consumer might very well think that the letter concerns a debt currently owned by American Investment Bank. Such a misunderstanding could further impede the consumer's ability to exercise his rights under the FDCPA.

"The debtor who takes Paragon Way's letters at face value- either because he does not remember the details concerning his financing of a computer bought several years beforehand, or perhaps because he never knew the identity of his original creditor to begin with - might engage in a fruitless attempt to investigate the facts of this non-existent debt, in a responsible effort to determine how to most effectively respond to the collection notice. This debtor might, quite reasonably, contact American Investment Bank to obtain background information so that he can remember what had earlier transpired, or to obtain any records that the bank holds pertaining to his debt so that he can prove he already had paid it off, if he believes such is the case. But, of course, American Investment Bank would have no record of a loan agreement; and the unknown account number certainly is of no help in getting to the bottom of things. Even if the consumer eventually finds his way to learning that the letter referred to the Dell debt he had incurred with CIT Online Bank, the delay already would have cost him some portion of the thirty days that the FDCPA grants to consumers before having to respond to a collection notice, lest the debt collector be entitled to assume the validity of the debt. *See* 15 U.S.C. § 1692g. And such "confusion and delay in trying to contact the proper party concerning payment on [the] loan" is precisely the kind of infringement of the consumer's best interests that the FDCPA seeks to combat. *Wallace*, 683 F.3d at 327." *Tourgeman v. Collins Fin. Servs.*, 2014 U.S. App. LEXIS 11940 (9th Cir. Cal. June 25, 2014).

CONTINUED
[CLIENT
NAME]
Original
Creditor
(8)

- "Plaintiff claims that, in dropping the "Inc." from the case caption, "NCO concocted and used the similarity in names between 'NCO Portfolio Management' and its controlled entity 'NCO Portfolio Management, Inc.' to support and accomplish such fraudulent concealment, and to prevent consumers from undertaking efforts to discover the non-existence of 'NCO Portfolio Management.'" *Hrivnak v. NCO Portfolio Mgmt.*, 2014 U.S. Dist. LEXIS 13848 (N.D. Ohio Jan. 28, 2014). 5 yrs of litigation - expensive victory. (Additional issue in this case: Plaintiff was not required to attach credit card statements to complaint under Ohio pleading standards, where the plaintiff provided an explanation as to why they were not attached.)
- "Defendant next contends that "a mortgage servicer such as [Bank of America] can be a 'creditor' even under Section 1692a(4) of the FDCPA," at 7, and that Bank of America is in fact a creditor (presumably "to whom the debt is owed"). *See id.* at 11. It also asserts that "[t]he terms 'debt collector' in Section 1692a(6) and 'creditor to whom the debt is owed' in Section 1692g are not mutually exclusive.at 2. This latter assertion is not tenable. As a general matter, "debt collectors" and "creditors" are mutually exclusive, at least with respect to the collection of a particular debt. *See McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536

(7th Cir. 2003). There also may be a third category, into which entities that are neither “creditors” nor “debt collectors” fall, see *Carter v. AMC, LLC*, 645 F.3d 840, 843-44 (7th Cir. 2011), but, even so, it does not appear that one can be both a “creditor” and “debt collector” with respect to a specific debt. See *id.* at 843 (“We know from the lease that AMC is the lessor’s agent rather than the building’s owner. This sets up an argument for Carter, because AMC is not her creditor and thus potentially is a debt collector.”).” *Wheeler v. Codilis & Assocs., P.C.*, 2013 U.S. Dist. LEXIS 175848 (N.D. Ill. Dec. 16, 2013).

Watch out for disjunctives (e.g. “either creditor or loan servicer”)

- Defendant's letter to Plaintiff identifies CitiMortgage as “the creditor to which your mortgage debt is owed or the loan servicer for the creditor to which the mortgage debt is owed.” Plaintiff has a plausible claim that the least sophisticated consumer would be confused regarding the identity of her creditor. Based upon the language of the letter, CitiMortgage could be the loan servicer and not the creditor, potentially leaving the creditor unidentified. Although Defendant argues that CitiMortgage is both the creditor and the loan servicer (and that a loan servicer is considered a creditor) this does not necessarily render the letter clear to the “least sophisticated consumer.” *Zapp v. Trott & Trott, P.C.*, 2013 U.S. Dist. LEXIS 176511 (E.D. Mich. Dec. 17, 2013).

[DEBTOR’S NAMES]
(9)

[DEBTOR NAME] – The debtor’s full name. Use the most complete name available which may include any middle initials and/or suffix provided in the debt instrument or application. Using the complete name will allow a similarly named non-debtor to know that the demand is not intended for the non-debtor.

Check for ALIASES

Check the entire loan agreement (both top and bottom – by the signatures), the statements, the loan application, driver’s license, copies of checks, any other applications (ex: insurance) for alternative spellings of the debtor’s name.

Letter Addressed
(10)

Check the loan documents to see if the address provided by the client matches the address on the loan agreement. If the addresses are the same, it is more likely you have the correct party. If the address is different, have the client provide the basis for the new address to protect your entity from pursuing the wrong party

Is an attorney involved

When the debtor has retained an attorney, revise the letter to be addressed to the attorney regarding his client. Several courts which have considered this issue will review the matter from the perspective of a competent attorney standard. By contrast, if you address the matter (c/o) care of the debt, several courts will apply the least sophisticated matter standard, despite the involvement of an attorney.

Never use in care of (c/o)

Principal Balance and Charged-off Principal & other descriptions
(11) or (11a) (11b)
SEE SUPPLEMENTAL SHEET FOR

Review the client’s information to confirm that the principal balance does not including any other amounts (ex: interest, attorney fees, other charges) etc. Look at the loan agreement. The current principal should not be more than the original loan amount. Exceptions exist, but are beyond the scope of this memo. Be careful. Some debts do not have a principal balance. For example a vehicle lease balance will often comprise of the remaining lease payments plus the

**ADDITIONAL
SCENARIOS
FOR
PRINCIPAL,
INTEREST, ETC.**

residue, minus...) The term principal is generally not applicable to lease.

Practice Tip: Don't force the amount into the principal field if it is not principal.

“PRINCIPAL” IS NOT NECESSARILY THE SAME AS “CHARGED-OFF PRINCIPAL.”

Some clients waive interest after charge-off.

**Principal
vs.
Charged off
Principal (11v)**

(11b) At this time our client has instructed us not to seek interest.

Some clients make a business decision and do not seek interest after charge-off.

This language makes it clear to the debtor that interest is not accruing as provided in the agreement.

**Credit Card
Charged-Off
Balance**

A credit card allows for compounded interest. So the Charged-Off Balance includes interest, other charges and principal.

**Chose Field 11
Carefully**

Using the wrong description can expose your company to an alleged FDCPA violation. Principal is not necessary the same as Amount or Original Claim Amount. Avoid using the term “Original Claim Amount” as this could have multiples meanings: (1) The original loan amount or (2) the current balance or (3) charge-off balance. If an item is for goods sold & delivered or services rendered, consider using the term: invoice amount as opposed to the term principal which may imply a loan has been made. Goods Sold: \$___ or Services Rendered \$___ is another option.

**Total
Amount of
Debt Due
(12, 13, 14
& 15)**

Many say the leading case is *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000). In *Miller* the court held that the unpaid principal amount is not the same as the total amount of the debt due.

Do not refer to extra amounts (e.g., interest or attorney fees, etc.) that “may or may not be applicable” or “if applicable” as it is a target for Plaintiff FDCPA attorneys.

See Rozier v. Fin. Recovery Sys., 2011 U.S. Dist. LEXIS 61307 (E.D.N.Y. June 7, 2011), *Jeffrey Lox v. CDA, Ltd.*, 689 F.3d 818 (7th Cir. 2012).

Miller excerpts: What would or might be impossible for the defendants to do would be to determine what the amount of the debt might be at some future date if for example the interest rate in the loan agreement was variable. What they certainly could do was to state the **total amount due**—interest and other charges as well as principal—on the date the dunning letter was sent.

Miller excerpts: “We hold that the following statement satisfies the debt collector’s duty to state the amount of the debt in cases like this where the amount varies from day to day:

**How to
address the
fact the
balance
may
increase
after you
file a
lawsuit (ex:
statutory
costs, post-
judgment**

“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].

“A debt collector who uses this form will not violate the “amount of the debt” provision, provided, of course, that the information he furnishes is accurate and he does not obscure it by adding confusing other information (or misinformation). *E.g., Marshall-Mosby v. Corporate*

interest or
attorney's
fees)

Receivables, Inc., 205 F.3d 323, 326 (7th Cir. 2000); *Bartlett v. Heibl*, *supra*, 128 F.3d at 500. Of course we do not hold that a debt collector *must* use this form of words to avoid violating the statute; but if he does, and (to repeat an essential qualification) does not add other words that confuse the message, he will as a matter of law have discharged his duty to state clearly the amount due. No reasonable person could conclude that the statement that we have drafted does not inform the debtor of the amount due. *Cf. Walker v. National Recovery, Inc.*, 200 F.3d 500, 503 (7th Cir. 1999).

MILLER
language
MODIFIED
Due to real
life other
issues

Miller Language Modified

(13) As of the date of this letter, according to our client's directions, the above amount is the total amount of the debt owed. (15) The above breakdown is furnished for statutory purposes and is not to be treated as payoff or an estoppel. (14) At a later date our client may instruct our firm to collect additional amounts which continue to accrue pursuant to the aforementioned [NOTE AND MORTGAGE/AGREEMENT/CONTRACT – SELECT ONE] or state or federal law.

Why the
Miller
language
was
modified

The Miller language was modified because the safe harbor only applies to the “total amount of debt” provision, and not other provisions of the FDCPA. The *Miller* language could be attacked for other reasons already discussed: **(1)** Third party disclosure & **(2)** wrong party contacted - based on the use of “you.” *Caprio v. Healthcare Revenue Recovery Group, LLC*, 2013 U.S. App. LEXIS 4221 (3d Cir. N.J. Mar. 1, 2013). **(3)** The phrase “an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection” may not conform to a debt-collector’s actual practices. For many, the actual practice is to deposit the check and accept it as full payment or merely apply it to the outstanding balance absent any restrictive language.

More on
Miller
language
modified

(13) As of the date of this letter, according to our client's directions, the above amount is the total amount of the debt owed. (15) The above [breakdown (15a)] is furnished for statutory purposes and is not to be treated as payoff or an estoppel. (14) At a later date our client may instruct our firm to collect additional amounts which continue to accrue pursuant to the aforementioned [NOTE AND MORTGAGE/AGREEMENT/CONTRACT – SELECT ONE] or state or federal law.

- (13) meets the principles of Miller as to the total balance due.
 - The language notifies the debtor of the total balance due on the date of this letter.
 - The language provides additional protection by adding the phrase “according to our client’s directions” and avoiding the use of the term “you.”
 1. It is generally safer for a debt collector to rely on the client’s numbers as opposed to making the bold assumption that the amount matches the client numbers.
 2. The term “you” exposes the debtor collector to wrong party issues.
- (14) meets the principles of Miller as to the fact the balance may increase. Substantial litigation has occurred on this issue in the last two years.
 - At a later date our client may instruct our firm to collect additional amounts which continue to accrue pursuant to the aforementioned
- (14a)[NOTE AND MORTGAGE/AGREEMENT/CONTRACT – SELECT ONE]
- (14b) or state or
 - If you cannot prove the existence of the agreement under your state la, we suggest

omitting (14b). If you are only suing on an account stated theory, then you may be implying that no agreement exists.

- (14c) federal law.
 - Generally during the 30 day period, the balance is considered static by most creditors. Thus, while the balance is increasing, the creditor often chooses to not collect the additional amounts provided for in the agreement.
 - The phrase also provided the debtor notice that the balance may increase at a later date due to the accrual of statutory costs, post-judgment interest or attorney's fees, or a request (discretionary under state law) pre-judgment interest at the legal rate from the date of the lawsuit set forth in the prayer/wherefore clause of the complaint.
 - If you do not sue, you may not want to offer (14b) or (14c) as these amounts can only be awarded by the court after suit.
- (15) also meets the principles of Miller as to fact the balance may increase by reminding the debtor the amount is a "payoff" or an estoppel (i.e.: you are prohibiting from collecting any more).
- (15a) "Breakdown": The word "breakdown" is added to (15) in cases where there are items being collected besides principal, such as interest or fees. Where only principal is being collected, the word "breakdown" is potentially misleading – there is nothing to be broken down.

-

**Our office
Represents....
(16A)- Law
Firm**

(16A)Our office represents [CLIENT NAME] regarding the above account.

Be careful about using the phrase "retained by the above client" as it may not be totally correct. Your company may have been retained by another company who was retained by the client. Unless you have a direct relationship with the client, be careful with this phrase.

(16B)- Agency

Alternative Language to be used by a collection agency

(16B)The above account has been referred to this office by [Client's Name] for collection.

The language in option B sounds more like a collection agency and suggests less attorney involvement. This phrase is also awkward when the client is a debt buyer, as it is not clear who owns the debt.

**Reference to
Documentation
(17) & (23)**

(17) Please see enclosed documentation.(23) Encl. [LIST OF ENCLOSURES]

By referencing enclosures (ex: loan agreement, payment history, etc.), you are accomplishing the following:

1. That you have a “file” and can sue.
 2. Verifying the debt with the initial demand letter process achieves a CFPB goal, that the debtor is informed.
 3. Deters verification requests.
 4. Establishing that the attorney is meaningfully involved and not merely a letter writing service.
 5. Deters shake down lawsuits, as the Plaintiff’s attorney is less likely to challenge an attorney that has documentation to support the debt.
 6. Helps the debtor understand what the debt is about.
 7. [Makes you look professional. Traditional “law firms” send documentation vs. “collection agencies” rarely send documentation.](#)
-

**(18) Works
with Bona Fide
Error Defense**

(18)We are sending this letter based on account information provided by our client.

Caselaw demonstrating that there is no duty to investigate under the FDCPA: *Clark v. Capital Credit & Collection Serv.*, 460 F. 3d 1162 (9th Cir. 2006); *Slanina v. United Recovery Systems*, Civil Action No. 3:11-CV-1391 (M.D. Pa. 2011); *Poulin v. The Thomas Agency*, 760 F. Supp. 2d 151 (D. Maine 2011); *Ducrest v. Alco Collections, Inc.*, 931 F. Supp. 459 (M.D. La. 1996); *McNall v. Credit Bureau of Josephine County*, 689 F. Supp. 2d 1265, (D. Ore. 2010); *Rodriguez v. Discovery Bank*, Dist. Court, (S.D. Cal. 2012); *Jacques v. Solomon & Solomon PC*, (D. Del. 2012); *Landaker v. Bishop, White, Marshall & Weibel, P.S.*, (W.D. Wash. 2012).

[Canham v. Fair Collections & Outsourcing, Inc.](#), 2014 U.S. Dist. LEXIS 111897 (N.D. Ill. Aug. 13, 2014): “[Nothing in the record supports any notion that Fair Collections either knew that the amount it sought to collect was inaccurate or otherwise intended to deceive Canham.](#) Fair Collections sought to collect a debt from Canham that accurately reflected the amount Berkshires claimed was due. Although Canham argues that Fair Collections cannot avail itself of the bona fide error defense because its procedures were not reasonably adapted to avoid errors like the one that Canham alleges occurred here, analysis shows that Fair Collections’ procedures were objectively reasonable.”

Wallace v. Manly Deas Kochalski LLC, 2013 U.S. Dist. LEXIS 92956 (W.D. Ky. July 2, 2013): “Plaintiff argues that statements in the state foreclosure complaint contained false statements as to the character, amount and legal status of the debt allegedly in violation of 15 U.S.C. § 1692e(2)(A). Specifically, Plaintiff takes issue with the allegations that he had defaulted on his mortgage obligations. Plaintiff maintains that Defendant should have conducted an independent investigation of the mortgage before filing the collection action to determine the accuracy of the debt. ...[T]he FDCPA does not impose such an obligation.² See *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1032 (6th Cir. 1992) (holding that the FDCPA does not require a collection agency to perform an independent investigation of the debt referred for collection); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1174 (9th Cir. 2006) (stating that “the FDCPA does not impose upon a [debt collector] any duty to investigate independently the claims presented by [the creditor]”); *Harvey*, 453 F.3d at 331 (stating that the “filing a lawsuit supported by the client’s affidavit attesting to the existence and amount of a debt . . . is not a false representation about the character or legal status of a debt, nor is it unfair or unconscionable.”) (quoting *Deere v. Javitch, Block, & Rathbone, LLP*, 413 F. Supp. 2d

886, 891 (S.D. Ohio 2006)). Accordingly, Plaintiff's 15 U.S.C. § 1692e claim must be dismissed because Defendant's failure to engage in an independent investigation does not support this type of claim."

But See Lee v. Kucker & Bruh, LLP, 2013 U.S. Dist. LEXIS 110363 (SDNY 8/2/13)
A key fact was that "the errors were discernible on the face of [the client's] documents forwarded to [defendant] and therefore readily discoverable . . ." The *Owen* court held that "to qualify for the bona fide error defense, the debt collector has an affirmative statutory obligation to maintain procedures reasonably adapted to avoid readily discoverable errors . . ." *Id.* at 1277. Because the defendant had no "internal, error-correction procedures to avoid miscalculations of debt amount," the court reversed. *Id.* at 1276.

See Basich v. Patenaude & Feliz, APC et al., 2013 U.S. Dist. LEXIS 58875 (N.D. Cal. April 24, 2013): "A debt collector is not entitled under the [Act] to sit back and wait until a creditor makes a mistake and then institute procedures to prevent a recurrence. To qualify for the bona fide error defense under the [Act], the debt collector has an affirmative obligation to maintain procedures designed to avoid discoverable errors. . . . The procedures themselves must be explained, along with the manner in which they were adapted to avoid the error."

The Client has a right to an attorney (19) (19) Please direct any future communications to our office.

This phrase is utilized so that the debtor/debtor's attorney knows not to contact your client directly. This phrase is also a "counter-attack" to attorney meaningful involvement. The client is not required to have to wait until the attorney has reviewed the file to obtain attorney representation. The letter is a *notice letter* as opposed to a demand for payment letter.

(20) & (21) Signature Plaintiff FDCPA attorneys are looking for an attorney's signature. Failure to sign the letter absent a disclosed explanation (ex: Medical condition - Carpal Tunnel Syndrome - disclosed on the letter) is an invitation to be sued on this theory. Whether attaching a Doctor's note or implementing another procedure to show that only a small number of letters are issued each day may be sufficient but it is difficult to determine.

Sign as firm? No signature or facsimile signature (especially with small balance):

Sign as Attorney? a) exposes you to an attorney meaningful involvement claim

Do not Sign? b) A reference to reviewing the file in the letter might protect you, but you are still exposed to the argument that any review was mathematically impossible (i.e., given the number of files you handle, you cannot have spent significant time reviewing the file). One possible solution is to use a disclosure that this letter is 8 of 20 for the day. 15 min per file (4/hr - 5 hrs) 20 per day max per attorney. Any more might be harder to explain to a judge as per-se compliant.

Facsimile Signature? c) Attaching document to letter is helpful to demonstrate attorney involvement.

d) Notwithstanding whether you sign the letters or not, the size of your firm, volume of the cases and your staff's ratio between attorneys and non-attorneys, may increase your firm's exposure to an attorney meaningful involvement claim.

Best Practice:

Greco Disclaimer When permitted, use the *GRECO* disclaimer. The Greco Disclaimer should appear conspicuously near the first paragraph of the collection letter. (First Page). However, one state (NJ) has ruled that the Greco Disclaimer violates the states ethics rules. Also, do not request attorney fees if your firm is disclaiming attorney involvement.

Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360 (2d Cir. 2005)

The firm of Trauner, Cohen & Thomas is a law partnership representing financial institutions in the area of creditors rights. In this regard, this office represents the above named [ORIGINAL CREDITOR] who has placed this matter, in reference to an original account with [sic] for collection and such action as necessary to protect our client.

At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due.

Additional Cautionary language:

At this time our client has instructed us to not file suit nor refer the matter to local counsel.

Ineffective Greco Disclaimers

Nepomuceno v. Legal Recovery Law Offices, Inc., 2014 U.S. Dist. LEXIS 81761 (S.D. Cal. June 16, 2014) Here, the letter was signed by an attorney, Andrew Rundquist. Although the use of an attorney's signature alone may not violate the FDCPA, the legal language in the letter here crosses the line. The letter states that "[i]n the event that *legal action* is pursued and *judgment* is ultimately obtained against you, the judgment may include *court costs*, local *attorney fees*, and interest in addition to the principal amount currently owed." (emphasis added). This legal statement contradicts and overshadows the disclaimer that "no attorney with this firm has personally reviewed the particular circumstances of your account." The threatening language such as "legal action," "judgment," and "court costs" could give the least

sophisticated consumer the impression of impending litigation. *See Robertson v. Richard J. Boudreau & Assocs., LLC*, No. C09-1681 BZ, 2009 WL 5108479 at *2 (N.D. Cal. Dec. 18, 2009) (finding false representation of attorney involvement based on the fact that the disclaimer is contradicted and overshadowed by the threatening language such as “legal dispute,” “legal defense,” and “cost of litigation”).

Make it clear that letter is not an implied threat of suit

Defendant’s reliance on *Greco* is unpersuasive. *Greco*, 412 F.3d 360. First, the Second Circuit case is not binding in this jurisdiction. More importantly, the short letter in *Greco* does not use any language that suggests impending litigation. *Id.* at 361. This case is different. The use of “legal action,” “judgment,” “court costs,” and “attorney fees” in the letter, coupled with an attorney’s signature, overshadows the express disclaimer that no attorney had reviewed the file. Therefore, the Court finds that the letter here could mislead the least sophisticated consumer as to attorney involvement. Accordingly, the Court finds that Plaintiff has stated a plausible claim under Section 1692e(3) and Section 1692e(10) of the FDCPA. Because the Rosenthal Act incorporates the substantive provisions of the FDCPA, Defendant’s violations of the FDCPA also establish violations of the Rosenthal Act. For the same reasons, the Court finds plaintiff has stated a plausible claim under the Rosenthal Act.

See Henggeler v. Brumbaugh & Quandahl, P.C., 894 F. Supp. 2d 1180 (D. Neb. 2012). Docket #8:11CV334. In an unpublished decision court held the Greco disclaimer was ineffective at it was at the bottom of letter and next to some computer codes, and overshadowed by the rest of the letter.

Several Cases say silence is not an implied threat of suit

Several cases have held that an attorney’s letter alone is not an implied threat of suit.

Nichols v. Frederick J. Hanna & Assocs., PC, 760 F. Supp. 2d 275, 279-280 (N.D.N.Y. 2011) held that “[s]everal courts have held that a letter written on a law firm’s letterhead is insufficient, on its own, to imply that litigation is imminent. *See, e.g., Kapeluschnik v. Leschack & Grodensky, P.C.*, No. 96-CV-2399, 1999 U.S. Dist. LEXIS 22883, 1999 WL 33973360, at *6-7 (E.D.N.Y. Aug. 26, 1999) (the assertion that any dunning letter from an attorney is an implied threat of litigation is “not viable”); *Veillard v. Mednick*, 24 F. Supp. 2d 863, 867 (N.D. Ill. 1998) (“[T]he mere inference that legal action could be taken because the letter is on law firm letterhead is not enough for § 1692e(5) purposes.”); *Sturdevant v. Thomas E. Jolas, P.C.*, 942 F. Supp. 426, 430 (W.D. Wis. 1996) (the contention that every dunning letter from an attorney implies imminent legal action is “frivolous”). These cases persuasively point out that to hold otherwise would make any debt collection letter ever sent by an attorney an implied threat for purposes for §1692e(5)...”

Other Liberal Judges suggest otherwise

See Wallace v. Winston & Morrone, P.C, 95-C0354-C (W.D.Wis.1996) for premise that letter alone not a suit threat. [DIRECT PLACEMENT]

If you do not intend to sue, assess the risk.

However, another liberal court disagreed.

Gervais v. Riddle & Assocs., P.C., 479 F. Supp. 2d 270, 272 (D. Conn. 2007)

Facts: The most recent activity on Plaintiff’s account had occurred in 1993, and by 2003 *any litigation to recover the debt was barred by the statute of limitations*. On November 7, 2003, Defendant law firm sent Plaintiff a collection letter seeking payment on the debt and offering a discount for prompt payment. *Letter was from an out of state attorney.*

Holding: this Court affirms its prior finding that Defendant’s communications constituted a

threat of litigation. It is true that past decisions have emphasized the importance of “imminence” in determining whether a threat of litigation exists. See, e.g., Bentley, 6 F.3d at 62; Pipiles, 886 F.2d at 25.... *However, this Court recognizes that an “imminent” threat of litigation may be imparted, perhaps even more effectively so, with skillfully crafted ambiguity and innuendo.* Such an ambiguous threat of imminent litigation would be particularly useful to the debt collector where, as in the instant case, full disclosure of the relevant facts to the debtor would probably decrease the likelihood of payment..... *These cases recognize the common sense notion that “[a]n unsophisticated consumer, getting a letter from an ‘attorney,’ knows the price of poker has just gone up.”* Avila v. Rubin, 84 F.3d 222, 228 (7th Cir. 1996). **[DISTINGUISH - DIRECT PLACEMENT FROM CREDITOR vs. PLACEMENT FROM COLLECTION AGENCY TO CREDITOR]** However, when confronted with nebulous language on law-firm letterhead alluding to a “client” who has “retained” the “law firm” to “collect” in the context of an “important legal matter,” the unsophisticated consumer cannot be faulted for fearing imminent litigation. Indeed, in light of the surrounding circumstances, Defendant’s statement “[i]f you want to resolve this matter, *you must either* pay the Total Amount Due . . . *or* call our law firm . . . and work out arrangements for payment,” (Riddle & Assocs. Collection Letter 1 (emphasis added)), suggests to the least-sophisticated consumer that “legal action . . . is about to be initiated and can be averted from running its course only by payment.” Pipiles, 886 F.2d at 25....By affirming its prior Ruling, this Court does not hold that every collection letter from an attorney carries an implied threat of legal action. However, debt collectors cannot exploit the naivete of consumers through vague and unnecessary legal references. While all communications from Defendant were honest in fact, the least-sophisticated-consumer standard clearly contemplates that debtors shall be protected from nonfeasance as well as malfeasance....The clear implication is that Defendant itself, along with its customers and this Court, recognizes that vague legal references in the context of debt collection can strike fear in the least-sophisticated consumer and thereby secure payment. Such practices are clearly forbidden by the FDCPA.

10 Tips to Avoid/Fight Attorney Meaningful Involvement Cases

- 1) Show how the firm is acting as a law firm and not a “data processor.”
- 2) Explain to the court that accounts are all similar (breach of agreement, account stated, etc.).
- 3) Explain as an attorney you know you have the elements of a cause of action for the theory sued.
a) Parties b) Duty c) Breach d) Proximate Cause and e) Damages.
- 4) Advise that you have reviewed hundreds of credit card agreements and that they have the similar terms that provide for the cause(s) of action you are pursuing. Advise that you have reviewed the specific agreements utilized by the client in question.
- 5) Brief the issues under your state’s law addressing any lack of documentation, the best evidence rule, and your ability to still prove a case. Brief your right to use the debtor as a hostile witness to prove your case. Brief your right to obtain the proof you need to prove your case from your adversary or from third parties.
- 6) Document how you supervise and manage your non legal staff on a day to day basis.

- 7) Have multiple attorneys involved in the review process of the lawsuits. Limit the number of lawsuit filed by each attorney each day. Or document that the review process occurred over a period of time, but the lawsuits were all filed on one day for convenience. Avoid having a single attorney sign the pleadings on all the lawsuits. Split up the caseload evenly among attorneys.
- 8) Document your success rate on similar cases at or before trial to confirm your likelihood of success. If you have won a high percentage of cases with similar facts (i.e. same credit card from the same period of time) chances of success are higher.
- 9) Document you experience on Judges who ignore contract clauses like choice of law, etc., or that creditor can waive it.
- 10) If your staff carry credit cards for creditor clients on whose behalf you're suing, have them keep the terms & conditions organized by client and date. This procedure will allow you to have the terms and conditions available and your staff will have personal knowledge as to the billing process. Both can be used in defense of your cases.

Letterhead
(23)

[Letterhead] – Include your company's standard letterhead in this section. The letterhead should include the name of your company, the address, and a phone and fax number. If you are mailing letters out of state, intentionally or inadvertently, you may need to provide additional disclosures which include:

- 1) **What state the attorneys are admitted to practice law;**
- 2) **Any licenses that are required (closed states);**
- 3) **If you are disclaiming attorney meaningful involvement, do not use an all capitalized or bold letterhead. Do not use a letterhead that takes up 25%-30% of the page or the like. Some courts hold that such letterhead implies a higher level of involvement or makes the "Greco disclaimer" ineffective. The argument is that the letterhead overshadows other language in the letter. Your letterhead can be found to be confusing or deceptive.**

Additional information may be included depending on individual circumstances. You should consult with a qualified attorney regarding the contents of the letterhead.

It is not recommended that you include an email address because:

1. You have a slight risk of 3rd party disclosure which includes not knowing who you got the email from.
2. Aggressive pro se debtors may bombard you with letters

Do not use a name that implies debt collection

Keasey v. Judgment Enforcement Law Firm, PLLC, 2014 U.S. Dist. LEXIS 59805 (W.D. Mich. Apr. 30, 2014) Because JELF's name indicates that it is in the debt collection business, use of the name on the envelope of a collection letter violated the FDCPA. Accordingly, Plaintiff is entitled to summary judgment on this claim.

**(24) (24a) (24b)
(24c)**

The Original Creditor and the client (Current Creditor) should be identified.

Notice of Assignment

These additions serve multiple purposes:

- 1) The transfer has been identified
- 2) An explanation why a new party is attempting to collect the debt is provided.
- 3) It eliminates the alleged defense “I never did business with you” - (ie: debt buyer)

Practice Tips:

Include proof of the Assignment with the initial demand letter. An uptick in lawsuits has occurred due to defective or non-existent assignments. If you do not have the proper assignment, a Plaintiff’s attorney will be able to plead an FDCPA violation and/or sustain a violation. The trend in most states is that you cannot proceed with litigation without said proof. Many state laws are also adopting this requirement.

Multiple Assignments

Multiple Assignments

If multiple assignments occurred, it is suggested that you identify all the assignments.

Example 1:

Our client has acquired the defaulted NOTE AND MORTGAGE/AGREEMENT/ CONTRACT – SELECT ONE] from [debt buyer 1] [debt buyer 2] who acquired the debt from [debt buyer 2] who acquired the debt from [debt buyer 3] who acquired it from [ORIGINAL CREDITOR],

Example 2:

Our client (Debt buyer 4) has acquired the defaulted NOTE AND MORTGAGE/AGREEMENT/ CONTRACT – SELECT ONE] from [debt buyer 1] [debt buyer 2] who acquired the debt from [debt buyer 2] who acquired the debt from [debt buyer 3] who acquired it from [ORIGINAL CREDITOR],

(25) (WR) Debtor has changed address since the loan was executed.

Pursuing the wrong party is a problem. Often the debtor has moved multiple times. To protect against wrong demand, this phrase is suggested if the client provided an address for the debtor which is not listed on the contract.

Sometimes the new address is determined by skip tracing.

Example 1: Our client has advised that the party who owes the above obligation has relocated from [PRIOR ADDRESS] listed in the agreement.

Example 2: Through skip-tracing efforts, upon information and belief, we believe the party who executed the agreement attached hereto, had relocated from [PRIOR ADDRESS].

Example 3:

- (3a) The post-office has notified us of a change of address. (See attached)
- (3b) The Department of Motor Vehicles has notified us of a change of address. (See attached)
- (3c) A skip tracing company has notified us of a change of address.
- (3d) Correspondence in the client’s file has notified us of a change of address.
- (3e) The client’s note’s history has notified us of a change of address.

Not Comfortable with this phrase. *What if it's the wrong "you"?*
Our client has advised that you have relocated from [PRIOR ADDRESS].

**The Above vs.
The above breakdown**

If you do not itemize the debt, then you do not use the term "breakdown"

(26) Interest

(26) Interest

In 2012-2013 there was a large uptick in lawsuits filed on the theory that the debt collector did not advise the debtor that the balance would increase.

If you decide to include interest, verify the client's figures. It happens on occasion where the interest calculation is incorrect:

- 1) The client didn't reduce the per diem when payments were made
- 2) The interest rate of the contract does not match the contract rate in the client's computer system
- 3) The interest calculation is incorrect because
 - a. The client manually calculated the interest amount and/or typed it incorrectly. (This type of error is considered a readily discoverable error.)
 - b. The incorrect interest start date or end date used.
 - c. The incorrect interest rate is used (many scenarios):
 - i. variable rate is incorrect
 - ii. higher state law rate is used over lower contract rate
 - iii. another state law's rate is improperly used
 - iv. client incorrectly compounds the interest
 - v. client calculates interest on principal plus non-principal amounts (ex: attorney fees, late charges or repossession charges. (interest only accrues on principal unless the contract specifically provides for an exception

(29) Interest Rate

Stating the interest rate alerts the debtor that the balance is increasing. A per diem could also be utilized.

(29) Interest Rate

(27) Late Fees:

Check the math. Check to see whether the fee is a one-time fee. (ex: student loans)

(27) Late Fees

(28) Other charges & Attorney's fees.

If you don't have the agreement, it is suggested not to add these other charges or attorney's fees. If it is later determined that the agreement did not provide for the charges (at the time demand), an FDCPA violation could be alleged. Below are some examples of issues that could occur:

(28) Other charges

1. The agreement only provides for the recovery of skip tracing or repossession fees after the vehicles is repossessed
2. The agreement provides for attorney's fees to the winner of a lawsuit (no judgment, no fees).
3. The agreement says the attorney's fee are capped at 15%
4. The agreement says \$X.XX in late charges, but the client's referral sheet or computer screen says Y.YY.

5. The agreement does not provide for those charges

Do you have documentation to support the other charges? If you are not in possession of the invoices or copies of payments, risk exists that an amount being requested is improper due to lack of documentation. Make sure the client has included your collection fee or attorney's fee in this amount.

1. Ex: Contingency fees are included in the other charges.

2. Check that the client should be charged for the fee.

(ex: Flood insurance when the property was foreclosed a year prior.)

Requesting contingency fees in the demand letter or in the lawsuit have led to lawsuits on multiple theories. One theory is that the fee is not due until it is earned, so it cannot be demanded by the attorney. A few reported decision have said that the theory will survive a motion to dismiss. *See SeeArdino v. Solomon and Solomon, P.C.*, 2014 WL 268680 (D.N.J., Jan. 23, 2014) *See Butto v. Collecto, Inc.*, 290 F.R.D. 372 (E.D.N.Y. 2013)

Elyazidi v. Suntrust Bank, 2014 U.S. Dist. LEXIS 26445 (D. Md. Feb. 28, 2014)

There can be little doubt that the assertions in documents attached to the warrant in debt as to the amount owed as attorneys' fees were merely estimates of what would be due at the conclusion of the case. Indeed, the warrant in debt itself is a form complaint published by the Virginia judiciary that requires the aggrieved party to give notice of the total amount sought, including attorneys' fees, at the time of filing.

/See <http://www.courts.state.va.us/forms/district/dc412.pdf> (last accessed Feb. 28, 2014).

Insofar as the total fee amount necessarily has not accrued at the time the warrant is filed, the form appears to call for an estimate. Thus, Plaintiff complains, in effect, that MRA complied with the procedure established by the Virginia court system.

There is no dispute that the underlying service agreement provided that a fee of up to twenty-five percent of the principal debt could be recovered as attorneys' fees; that the total lodestar amount at the conclusion of the case was in excess of the percentage that was awarded; and Plaintiff does not argue that the MRA attorney misrepresented the hours she actually worked in either the original or supplemental affidavits. To the extent that the representations in the state court filings were attributable to MRA - rather than SunTrust - and that they were directed to Plaintiff - rather than the court - they were not false or misleading in any material way. */See Lembach v. Bierman*, 528 Fed.Appx. 297, 302 (4th Cir. 2013) ("a statement must be materially false or misleading to violate the FDCPA"); */Sayyed v. Wolpoff& Abramson, LLP*, 733 F.Supp.2d 635, 648 (D.Md. 2010) (*"finding that a state court fee petition was "a request directed to the court, not a communication directed to the debtor, and certainly not a misrepresentation"*"); */Hart v. Pacific Rehab of Maryland, P.A.*, Civ. No. ELH-12-2608, 2013 WL 5212309, at *23 (D.Md. Sept. 13, 2013) (*"like the request for attorney's fees directed to the court in /Sayyed/, the State plaintiff, through counsel, made a request to the court [for pre-judgment interest that] . . . was not actionable to the debtor under the FDCPA."*).

Mayhall v. Berman & Rabin, P.A., 2014 U.S. Dist. LEXIS 11397 (E.D. Mo. Jan. 30, 2014) Put another way, the motion is only a request for the trial court to exercise its discretion to award a specific fee. Apparently the state court did not elect to elicit further information about the attorney fee request before entering judgment. The request itself does not inaccurately characterize the content of the credit card agreement so as to violate the FDCPA. */Compare Winn v. Unifund CCR Partners*, No. CV 06-447-TUC-FRZ,

2007 WL 974099, at *8 (D. Ariz. March 3, 2007) (holding that the FDCPA is not violated by a simple request for a fixed percentage attorney's fee unless the debt collector asserts that the underlying credit card agreement mandates an award of that specific amount) *___*/with *Stolicker v. Muller, Muller, Richmond, Harms, Myers, and Sgroi, P.C.*,/*___*No. 1:04-CV-733, 2005 WL 2180481, at *1 (W.D. Mich. Sept. 9, 2005) (holding that the FDCPA is violated by a statement in a motion for default judgment that "pursuant to [an] agreement made by [the debtor]," the creditor was entitled to an attorney's fee equivalent to a fixed percentage of the debt)......In sum, because the recovery of reasonable attorney's fees is expressly permitted by the credit card agreement and, as discussed below, a fixed percentage fee is not unreasonable as a matter of law, **Defendant's request for approval of such a fee award did not violate the FDCPA's proscription on the collection of amounts not expressly authorized by the agreement or permitted by law. In addition, a request for a fixed percentage fee award, without more, does not constitute****a false representation of the character, amount, or legal status of any debt or a false representation or deceptive means of collecting a debt with the meaning of the FDCPA. *See Winn*/**, 2007 WL 974099, at *8; **/seealso/**15 U.S.C. §§ 1692e & 1692f.'Finally, Plaintiff's contention that Defendant knew that its request for a fixed percentage attorney's fee was unreasonable or contrary to Missouri law also lacks merit. The record establishes just the opposite, indicating that in previous actions, Missouri courts had awarded Citibank 15% of the outstanding balance as a reasonable attorney's fee, and therefore that Defendant had no reason to believe that such fees were contrary to Missouri law. /See/ Doc. No. 62-8. Further, the Missouri statute, on its face, gives a trial court the ability to award that amount.*_

Good decision *Murr v. Tarpon Fin. Corp.*, 2014 U.S. Dist. LEXIS 16047 (E.D. Tenn. Feb. 10, 2014) "Since the fee arrangement was contingent on sums *collected*, Murr reasons that Jones could not demand a specific amount of attorney's fees because nothing had yet been collected. He cites some cases suggesting such a demand is a violation of the FDCPA. *See Stolicker v. Muller, Muller, Richmond, Harms, Myers, and Sgroi, P.C., No. 1:04-CV-733, 2005 U.S. Dist. LEXIS 32404, 2005 WL 2180481 (W.D. Mich. Sept. 9, 2005); Bernstein v. Howe, IP 02-192-C-K/H, 2003 U.S. Dist. LEXIS 5284, 2003 WL 1702254 (S.D. Ind. Mar. 31, 2003).*⁴

4 Murr also cites *Reichert v. Nat'l Credit Sys., Inc., No. CV-03-1740, 2005 U.S. Dist. LEXIS 5784, 2005 WL 5549677, at *3 (D. Ariz. Mar. 31, 2005)*. However, that case is clearly distinguishable as it involved an attorney's fees clause limited to "the prevailing party" in a "legal action to enforce compliance" with the agreement. Here, on the other hand, the agreement provided for attorney's fees incurred in the collection of Murr's debt; the clause in this case was not limited to fees incurred in a legal action.

Respectfully, the Court declines to follow these cases. *Stolicker* and *Bernstein* both adopt the view that resort to judicial proceedings is necessary before an attorney's fee can be demanded. *Stolicker, 2005 U.S. Dist. LEXIS 32404, 2005 WL 2180481, at *5* ("A reasonable attorney fee requires a judicial evaluation of the evidence regarding the fee."); *Bernstein, 2003 U.S. Dist. LEXIS 5284, 2003 WL 1702254, at *5* ("At most, there was the potential for an award of attorney's fees in the future, in the event that First Card incurred attorney's fees as a result of pursuing legal proceedings against Bernstein."). But as the *Fields* court noted, the approach advocated by Murr, and adopted to some degree by the cases he has cited, "would require every debt collector under the FDCPA to go to court every time it sought to enforce a provision in a payment agreement signed by the debtor that allows reimbursement of attorneys' fees and collection costs." *Fields, 383 F.3d at 564*. The FDCPA does not require this.

Moreover, the case on which *Bernstein* primarily relied, *Veach v. Sheeks*, 316 F.3d 690 (7th Cir. 2003), was distinguished in *Fields* because, whereas *Veach* dealt with a statutory attorney’s fee award that could only be determined in litigation, the plaintiff in *Fields* had contractually agreed to pay attorney’s fees incurred in the collection of his debt. This logic, however, was rejected in *Bernstein*: “Whether contractual or statutory, the fact remains that no attorney’s fees actually were owed by Bernstein at the time Howe sent his letter.” *Bernstein*, 2003 U.S. Dist. LEXIS 5284, 2003 WL 1702254, at *5. Given that this was the basis of the *Fields* decision, which followed *Bernstein*, it is not clear whether *Bernstein* remains good law for this question.

To the extent these cases conflict with the reasoning of *Fields* and *Spangler*, the Court finds the analysis of the latter cases convincing. The agreement Murr signed provided he would pay attorney’s fees if he defaulted on his debt. After he did, the attorney who was assigned the duty of collecting his debt abided by the language of the agreement and demanded attorney’s fees. This was in keeping with the agreement and did not violate the FDCPA.

There is simply nothing improper about basing an attorney’s fee on the percentage of debt collected. See Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5(c) (acknowledging contingent fees are proper in some circumstances). Once the debt is collected, Jones is entitled to take his share. At that point, Tarpon has paid the attorney’s fee. Thus the percentage fee is an actual “cost” incurred by Tarpon in the collection of Murr’s debt and seeking to recoup that cost as agreed in the underlying contract was not a violation of the FDCPA.

Credit Reporting Disclosures

References to credit reporting are a “red flag” to a consumer attorney and invites lawsuits. Very fact specific and high risk.

Slick v. Portfolio Recovery Assocs., LLC, 2014 U.S. Dist. LEXIS 115471 (N.D. Ill. Aug. 20, 2014)

PRA’s first letter to Slick provides: If this account is eligible to be reported to the credit reporting agencies by our company, we are required by law to notify you that a negative credit report reflecting on your credit records may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.

The second and third letters sent to Slick both stated, “If you complete this payment plan and our company is reporting our company’s trade lines for this account to the three major credit reporting agencies, our company will report this account as settled.” *Id.* ¶¶ 46, 70. The “notice” provision on the back of the letters also described PRA’s obligation to report account information to the credit bureaus.

Slick contends that her debt was time-barred and obsolete, so therefore, PRA could not report the debt and it could not appear on her credit report. PRA disagrees, contending that the time period for Slick’s debt to be obsolete had not yet passed, so its assertions in the letters were neither false nor misleading. R. 107 at 2 **In light of that analysis, and because it is undisputed that the three letters PRA sent to Slick were sent after June**

3, 2011, the information contained in the letters was both false and misleading, as well as implied that PRA could take action it was legally prohibited from doing. PRA violated the FDCPA, and the first element for a claim under Section 1692e is satisfied.

The Feel of the Letter

See *Eddis v. Midland Funding, L.L.C.*, 2012 U.S. Dist. LEXIS 22193 (D.N.J. Feb. 22, 2012)

The Four Corners of the Letter

Here, a review of the physical characteristics of the debt collection letter reveals that the required validation notice is on the front of the letter, and, contrary to Plaintiff's claim, is of the same font, size, and format as the rest of the letter. See Def's Brief in Supp. of Mot. to Dismiss Ex. A. In *Panto v. Professional Bureau of Collections*, the court noted that:

Although the validation provision appears in a separate paragraph after [the signature line, and thus technically outside the body of the letter, **its importance is not minimized by its placement in the letter. No emphasis is placed on any particular statement in the letter: the letter does not include any bold-faced text; no statements are typed in all-capital letters (aside from the Plaintiff's address at the top of the letter); and, no one section of the letter is sized differently than any other.** If anything, the conditional language ("Unless you notify this office within 30 days") and placement of the validation provision right after the signature line gives it slightly greater aesthetic emphasis than the rest of the letter.

Thus, analogous to *Wilson*, the disputed language at issue here does not induce the least sophisticated debtor to overlook his statutory rights to dispute the debt within thirty days. The addition of a third option for the Plaintiff to negotiate a payment plan does nothing to increase the confusion or overshadow the option to dispute the debt; it is a milder variant of the "immediate payment" option. The Court finds that the least sophisticated debtor is capable of considering three options in addition to merely two, when described with the clarity presented here. Therefore, the Court will grant Defendant's motion to dismiss with respect to Plaintiff's *section 1692g(a)* claims.

Time barred debt (66), (67), (68) & (69)

Do not threaten or imply that a lawsuit can be filed. Do not use legal terms. These terms could be used to justify a decision saying that your company violated the FDCPA. The seventh circuit said the term "settlement" implied a lawsuit. The CFPB considers collecting time barred debt as "hot issue" and, in the author's opinion, would like to ban it entirely.

When does a material omission become a misrepresentation

McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 3/11/2014). In this case the 7th Circuit court of appeal held "that an unsophisticated consumer could be misled by a dunning letter for a time-barred debt, especially a letter that uses the term "settle" or "settlement." It considered 2 cases: (1) *McMahon v. LVNV Funding* and (2) *Delgado v. Capital Mgmt. Servs. LP*, 2013 U.S. Dist. LEXIS 40796 (C.D. Ill., Mar. 22, 2013).

Challenged Language in two cases considered by 7th Circuit

(1) *McMahon*

An Opportunity: We are pleased to extend to you an offer to settle your account in full for \$233.99. This represents a savings of 60% off your balance.

(2) *Delgado*

Capital Management Services, LP is authorized to accept less than the full balance due as settlement of the above account. The settlement amount of \$721.24, which represents 30% of the amount presently owed, is due in our office no later than forty-five (45) days after receiving this notice. We are not obligated to renew this offer.

Material Omission

The letter said nothing about when the debt was incurred, and it contained no hint that the four-year statute of limitations applicable in Illinois had long since expired.

Excerpts

The proposition that a debt collector violates the FDCPA when it misleads an unsophisticated consumer to believe a time-barred debt is legally enforceable, regardless of whether litigation is threatened, is straightforward under the statute. Section 1692e(2)(A) specifically prohibits the false representation of the character or legal status of any debt. Whether a debt is legally enforceable is a central fact about the character and legal status of that debt. A misrepresentation about that fact thus violates the FDCPA. Matters may be even worse if the debt collector adds a threat of litigation, see 15 U.S.C. § 1692e(5), but such a threat is not a necessary element of a claim.

We do not hold that it is automatically improper for a debt collector to seek repayment of time-barred debts; some people might consider full debt repayment a moral obligation, even though the legal remedy for the debt has been extinguished. But, as we held in *Phillips, supra*, if the debt collector uses language in its dunning letter that would mislead an unsophisticated consumer into believing that the debt is legally enforceable, regardless of whether the letter actually threatens litigation (the requirement the Third and Eighth Circuits added to the mix), the collector has violated the FDCPA. Because it is plausible that an unsophisticated consumer would believe a letter that offers to “settle” a debt implies that the debt is legally enforceable, it was correct in *Delgado* to decline to dismiss the action at this stage, and incorrect to dismiss the class allegations in *McMahon*.

In this case, the CFPB and FTC each filed amicus briefs stating that the omission of the fact that a debt is time barred is deceptive. The CFPB and the FTC both believe in (1) Disclosures; and (2) Information that would change a consumer’s decision.

EXCERPT FROM 7TH CIRCUIT

“As those agencies had argued in other cases, the court held that when “collecting on a time barred debt a debt collector must inform the consumer that (1) the collector cannot sue to collect the debt and (2) providing a partial payment would revive the collector’s ability to sue to collect the balance.”

By contrast

Practice Tip:

Third and Eighth Circuits hold that simply seeking to collect a time-barred debt, by sending a collection letter, does not automatically subject a debt collector to liability under the Act.

Do not use the term “settlement” in any letter.

Could you say “if the amount of \$_____is paid, we will close our file?”

No model language has been approved by any court

USER'S GUIDE TO SPECIAL SAMPLE LETTERS

Replevin Letter

When seeking to recover the client's security interest, the client will often request a stronger letter. A customized letter is recommended.

Includes Fundamentals of the Basic Letter

Fields 1-29 are the same fields from the basic letters.

(22a) Include Enclosures

While some firms may make a business decision as to whether to attach the loan agreement, payment history or other documents in the basic letters, it is strongly suggested that you include the documents when you are pursuing collateral. The agreement and proof of lien establishes the client's perfected security interest. The notices and payment history establish a default. Since a replevin lawsuit is generally filed in these situations, these documents are generally required to support the lawsuit. Filing a replevin action without said proof is extremely risky, and could expose the client to a wrongful repossession claim.

(30a) & (30b) Identify the collateral

The collateral should be clearly identified. The party may have more than one collateral and/or two of the same type of collateral.

(31) Request to surrender

(31)Our client requests that the vehicle be surrendered.

It is suggested that you do not demand a surrender of the collateral as it could be alleged that the demand overshadows 1692 validation notice

The request accomplishes the client's goal to attempt to avoid litigation.

If I surrender, then what (32),(33)& (34)

(32) If vehicle is not redeemed, or the agreement reinstated, the vehicle will then be sold according to our client's regular business practices.

* If the client does not intend to resell the collateral, and instead keep it in full satisfaction, this letter has to be revised. Other issues need to be considered, especially if the collateral is worth more or close to the value of the lien

After you surrender, under the applicable state law, the debtor may the option to redeem the vehicle (buy it) or reinstate the law. In some state, judicial practice (ie: Judges order that the secured creditor provide the debtor the option to reinstate. Although the Secured creditor may find it inconvenient, this option cannot be totally ignored. Attorneys should not take a position that ignores reality, as that practice could be challenged as an unfair practice.

**What happens to
sale proceeds**

The secured creditor has the right to keep the car in full satisfaction of the debt or sell the vehicle in a commercially reasonable matter. Sparse case law suggests a private dealer auction (industry standard) is a recognized market for selling used cars.

**Will the debtor
owe a deficiency
or surplus**

(33) The net proceeds of the sale will be credited against the balance due on the loan.
(34) Our client will notify the account holder of any surplus or deficiency, if any.

This sentence informs the debtor that they are liable for any deficiency as well as a right to receive any surplus.

Under the Uniform Commercial Code (U.C.C.), the debtor is entitled to “Notice of Application of Proceeds after sale. Until that notice is sent to the consumer a lawsuit cannot be filed. One or two states have a statutory time limit period as to when the notice must be sent, or the deficiency will be waived.

**Threatening
or Filing a
Lawsuit
within 30
days**

If the client wants a replevin or foreclosure filed right away because the collateral may disappear or the statute of limitations may expire as to the right to recover the vehicles(sometime shorter than the breach of contract cause of action). If you decide to threaten to file suit within the 30 days, then you need to file suit within 30 days & consider the following language (see below).

- a) Using the See Goldman v. Cohen, 445 F.3d 152 (2d Cir. N.Y. 2006) language
b) File suit within the 30 days and have the service and/or court date occur after the 35th.

See Goldman v. Cohen, 445 F.3d 152 (2d Cir. N.Y. 2006)

“We therefore join the Seventh Circuit in exhorting debt collectors who choose to send § 1692g validation notices along with paperwork initiating legal proceedings to send debtors a notice, such as one containing the following language, that will ensure compliance with the FDCPA while only minimally disrupting the litigation process:

[Suggested Model Language – 3 paragraphs]

This advice pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint [or other legal pleading]. The summons is a command from the court, not from me, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this letter also does not affect my relations with the court. As a lawyer, I may file papers in the suit according to the court’s rules and the judge’s instructions.

**Any future actions taken by our office to begin a legal proceeding does not terminate or limit the thirty-day period to dispute the validity of the debt, or any portion thereof, or your ability to request verification of the debt or the name of the original creditor, as described above.”Lansing v. Wilford, Geske & Cook, P.A., 2013 U.S. Dist. LEXIS 14665, (D Minn 10/10/13)
Motion to Dismiss granted. “ NO VIOLATION**

(51) Pursuant 15 U.S.C. 1692 (g)(b): If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall [hold action]/cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. (See Rivera v. Ralph F. Casale & Assocs., LLC, 2014 U.S. Dist. LEXIS 77820 (D.N.J. June 9, 2014)

See also Ellis v. Solomon & Solomon, P.C., 591 F.3d 130, 136-137 (2d Cir. Conn. 2010)

While the 2006 amendments to the FDCPA superceded Goldman’s holding that the institution of a lawsuit constitutes an initial communication, see § 1692g(d) (added by the Financial Services Regulatory Relief Act of 2006, Pub. L. No.109-351, § 802(a), 120 Stat. 1966, 2006 (2006)), there is still the real potential for confusion when a consumer is served with a lawsuit during the validation period. As explained by the District Court, “[w]ithout some explanation to the consumer of the relationship between [the] suit and [the] provisions in the notice, it may well appear to the least sophisticated consumer that being taken to court trumps any other out-of-court rights she had.” Ellis, 599 F. Supp. 2d at 304. For substantially the same reasons given by the District Court, we affirm, and hold that the validation notice is overshadowed where a debt collector serves a consumer with process initiating a lawsuit during the validation period, without clarifying that commencement of the lawsuit has no effect on the information conveyed in the validation notice. We write principally to explain how debt collectors can avoid running afoul of § 1692g in the future.

Defendants did not have to serve Ellis during the validation period; they could have waited until the validation period expired. It is difficult to discern what tactical advantage was gained by commencing a lawsuit when the validation period had only two weeks to run, especially since the return date on the summons was not until mid July -- a full month after the validation period expired. Of course, debt collectors may continue collection activities, including commencing litigation, during the validation period; but in doing so the debt collector must not transgress § 1692g(b)'s proscription of collections activities that "overshadow or . . . [are] inconsistent with" the validation notice.

If the debt collector chooses not to wait until the end of the validation period to commence debt collection litigation, an explanation of the lawsuit's impact -- or more accurately, lack of impact -- on the disclosures made in the validation notice must be provided. **This explanation should be set forth in either the validation notice itself, or in a notice provided with the summons and complaint.** The best practice is to provide an explanation in both the validation notice and the summons and complaint. **Clarifying that commencement of a lawsuit does not trump the validation notice will come at little or no cost to debt collectors and will ensure that the consumer rights secured under the FDCPA are not overshadowed or contradicted.**

See the following 5 Florida cases found similar violations and held that the validation notice is overshadowed where a debt collector serves a consumer with process initiating a lawsuit during the validation period, without clarifying that commencement of the lawsuit has no effect on the information conveyed in the validation notice. *Desir v. Greenspoon Marder P.A.*, 2014 U.S. Dist. LEXIS 85137 (S.D. Fla. June 18, 2014); *Carbonell v. Weinstein Pinson & Riley, P.S.*, 2014 U.S. Dist. LEXIS 78250 (S.D. Fla. May 30, 2014); *Roundtree v. Bush Ross, P.A.*, 2014 U.S. Dist. LEXIS 57531 (M.D. Fla. Apr. 24, 2014) [underlying lawsuit included this theory]; *Lewis v. Marinosci Law Group, P.C.*, 2013 U.S. Dist. LEXIS 156732 (S.D. Fla. Oct. 28, 2013) *Battle v. Gladstone Law Group, P.A.*, 951 F. Supp. 2d 1310 (S.D. Fla. June 27, 2013)

Threatening suit within first 30 days

See *Tallman v. Freedman Anselmo Lindberg LLC*, 2013 U.S. Dist. LEXIS 17222 (C.D. Ill. Feb. 8, 2013) As noted above, threats to sue do not violate the FDCPA unless the threats are empty ones, "made when litigation was not actually intended." *Porter v. Law Offices of Charles G. McCarthy, Jr. & Assocs.*, 2011 U.S. Dist. LEXIS 84850, 2011 WL 3320331 at *7 (C.D. Ill. 2011). When examining whether a debt collector intended to sue, "[t]here must be a particularized intention to sue a particular debtor if he or she does not pay." *United States v. National Financial Servs., Inc.*, 98 F.3d 131, 138 (4th Cir. 1996).

USER'S GUIDE TO SPECIAL SAMPLE LETTERS

Bankruptcy & Third Party in Possession Replevin Letters

**(9a) The
bankruptcy
debtor's name**

If the debtor's name is different than the name listed in the petition, reference both names. Attach the documentation necessary to establish that the party is the same person, and or is the party in possession of the vehicle.

**(35) Identify the
case #**

The Bankruptcy case is a source of admissions that can be used by the creditor or its attorneys to help them,

**(36) Debtor's
Attorney**

In almost all cases, a debtor who files bankruptcy has retained counsel. Make sure the letter is addressed to the attorney and not to the debtor.

After the lift of stay is obtained, bankruptcy court still needs to be notified as to the results of any sale of collateral. Thus, in 99.99% of the cases, the debtor's attorney will continue be represent the debtor, unless the debt collector is otherwise notified.

**(18a) Information
is obtained from
both the client and
the bankruptcy
docket**

(18a) or information obtained from the bankruptcy docket.

The bankruptcy docket provides the debtor's attorney's information, the debtor's schedules, and whether or not the debtor acknowledges or rejects the lien, as whether provides his/her opinion as to the value of the collateral.

**(36) A debt is not
being collected.**

(36) Notwithstanding the above statutory notices, our office is not attempting to collect a debt from your client. Although we are required by federal law to provide you these statutory notices, **we are only enforcing our client's rights as to the lien on the vehicle which is identified in the bankruptcy petition.**

**(37),(38),(39)
A lien is being
enforced**

(37) This matter does not involve contractual liability currently owed to our client due to the bankruptcy. (38) This letter is not an attempt to collect a debt. (39) Our client is merely exercising its rights pursuant to its perfected security interest/lien.

**(40),(41),(42),(42),
(43) Use the
bankruptcy
docket and public
records to support
the grounds for
possession**

(40) Our client, [CLIENT NAME], advises us that your client is still in possession of the above referenced vehicle, which is subject to our client's perfected unsatisfied lien. **(41)** The bankruptcy docket does not show that the vehicle has been surrendered. **(42)** A recent review of the bankruptcy docket indicates that the lien has not been stripped. **(43)** A recent DMV record search indicates that our client's lien is still valid and your client is still listed as the title owner

**(41a)
(41b)**

[In development.]

DISCLOSURES & DISCLAIMERS

WE ARE AN EDUCATION COMPANY - WE ARE NOT ACTING AS ATTORNEYS

Identifying the form letter to start the process, is just 1 step in the multi-step process

The Model 1692g #1 Letters are intended to be educational model language only. The letters may be updated at any time to account for changes in the law. Each letter must be customized to reflect your business practices and your client's actual business practices and the applicable state or city laws. As a general rule, your written policies should correspond to your actual practices. The same applies to your clients. If your client's business practices do not reflect the client's written policies, you should raise the same with your client as it may expose you and your client to liability. Additional model letters will be added to accommodate additional circumstances.

There are a number of different categories of letters. Each category contains several samples. Most letters provide for two (2) alternate format versions. The language in both alternate versions is the same. The format differs based on preference.

The Model 1692g #1 Letters are not intended to satisfy requirements imposed by individual state or local laws including but not limited to the California's Rosenthal Act and New York City's debt collection laws pursuant to the New York City Rules and Regulations and New York City Administrative Code as enforced by the Department of Consumer Affairs, Colorado, Florida, etc. Supplemental language may be provided by CCEF at a later date which would allow the user to supplement the Model 1692g #1 Letter to comply with particular jurisdictions.

At a later date, additional language may be provided by CCEF for circumstances not covered by the Model 1692g #1 Letters. It is advised that the language not be incorporated without the assistance of a competent attorney. Improper placement of certain language and/or slight variations of wording in a demand letter may be the difference between a compliant letter and a letter containing violations or inviting a consumer protection attorney to test the validity of the language.

Disclaimers:

The Model 1692g #1 Letters have been prepared for use by CCEF members only. The Model 1692g #1 Letters are prepared for education purposes only pursuant to CCEF's stated purpose of providing educational services and promoting a uniform self-regulating system for the fair and ethical treatment of debtors. A uniform system with uniform standards avoids a competitive disadvantage to the debt collectors who actively seek to provide an important service while complying with the precepts set forth by the Fair Debt Collection Practices Act (FDCPA) and other federal, state and local consumer protection laws. The Model 1692g #1 Letters are intended to comply with the spirit and letter of the FDCPA and other federal consumer protection laws and the direction CCEF anticipates will be adopted by the CFPB. The letters are not intended to be compliant with state and local laws to the extent state and local laws are not inconsistent with federal law but provide for additional information to be disclosed to the consumer. These Model 1692g #1 Letters are based upon a reading of the federal statutes and federal cases interpreting said statutes. These Model 1692g #1 Letters have not been specifically tested in any action before any United States court. The Model 1692g #1 Letters are intended for general purposes. There are many circumstances for which a Model 1692g #1 Letter has not been prepared. CCEF will work to continue to expand the library of available Model 1692g #1 Letters. Under any circumstance, it may be necessary to, upon consultation with an attorney, amend or

alter the language of the Model 1692g #1 Letter to conform to the facts of each case and/or to your, your client's and any past creditors' past and current practices.

The Model 1692g #1 Letters are not intended to be legal advice. The Model 1692g #1 Letters are not intended to be a substitution for consultation with a competent attorney. CCEF makes no representation that you will not be sued or that a court will not find a violation based on the use of the Model 1692g #1 Letters. The law changes on a daily basis. Juries and judges may have different interpretations of both the law and the facts. CCEF will continue to update the Model 1692g #1 Letters as changes in the laws arise, but the changes to the Model 1692g #1 Letters may lag behind the changes in the law.

By using, in any way, the Model 1692g #1 Letters or this Memorandum, you expressly agree to abide by the terms and conditions set forth by CCEF, to which you agreed upon joining CCEF, and which are incorporated herein by reference. You are granted a limited license to use the Model 1692g Letters and any subsequent updates thereto. See Terms of the License below. The license is valid for the term of current membership period and under no circumstances is the license valid after one (1) year from the purchase of the license. Your license expires with the expiration of your current membership period or one (1) year from the date of purchase, whichever comes first. You may renew the license at the time you renew your CCEF membership. You will not be permitted this license without renewing your CCEF membership. The Model 1692g #1 Letters may not be shared with any person or party unless expressly authorized in writing by CCEF.

The Model 1692g #1 Letters currently available assume the below.

1. Your client is the owner of the debt. If your client is not the owner of the debt but merely an assignee for collection purposes, the language of the letters may need to be adjusted. Please contact a qualified attorney regarding same.
2. You receive documentation from your client. The minimum documentation you should have in your possession is: (1) a copy of the contract/agreement; (2) the last statement if applicable; (3) a copy of the mortgage, if the loan is secured by a mortgage (i.e. a first mortgage, second mortgage, ship mortgage, etc.) and a copy of the UCC filing or the title if the loan is secured by a lien on personal property; (4) any documentation evidencing the assignment of the loan from inception until your client became the owner. Documentation is not per se required by the statute. However, a lack of documentation may result in a lawsuit by a consumer protection attorney under various theories. Documentation and data integrity appear to be a significant aspect of the debt collection procedures on which the CFPB is focusing. Having the documentation and related practices and policies may help avoid issues with the CFPB in the future. If you do not have the above documentation or any documentation, the language of the letters may need to be adjusted. Please contact a qualified attorney regarding same.