Statutory Class Actions: Developments and Strategies

By Michael R. Pennington, John E. Goodman, and Robert J. Campbell

In today's litigation and regulatory climate, class actions alleging statutory violations can pose some of the most persistent and troublesome threats to lenders, mortgage servicers, and financial service businesses. Consumer protection statutes, whether adopted at the federal or state level, frequently go beyond prohibiting certain types of business conduct and impose affirmative obligations on the target businesses, often including highly technical disclosure requirements to consumers. In addition to providing for a private right of action, such statutes often allow for the recovery of statutory damages on behalf of plaintiffs without imposing any explicit statutory requirement of proof of actual damage and injury. Class actions brought under such statutes can represent huge exposure for companies in many cases. The applicability of a uniform federal law for a nationwide statutory damage class action (or a uniform state law for statewide statutory damage class actions brought under state law), combined with judicial constructions loosening or eliminating the necessity of proof of actual injury and causation, make it considerably easier for plaintiffs to obtain class certification and coerce classwide settlement in the statutory context, or alternatively demand disproportionately favorable individualized settlements prior to certification proceedings.

That of course does not mean that surrender is the only option. To obtain class certification and establish liability, a plaintiff still must satisfy Rule 23's requirements as well as those of the statute(s) at issue. *See, e.g., Halliburton Co. v. Erica P. John Fund, Inc.*, — U.S. —, 134 S. Ct. 2398 (2014) (Securities Exchange Act of 1934); *Comcast Corp. v. Behrend*, — U.S. —, 133 S. Ct. 1426 (2013) (Sherman Act); *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541 (2011) (Civil Rights Act). But the strategy for defending such actions will frequently involve considerations that may be given less focus and import in the defense of other forms of class litigation.

I. AN ASPECT OF ADEQUACY: DO TRADITIONAL STANDING REQUIREMENTS APPLY TO STATUTORY CLASS ACTIONS?

Plaintiff standing is rarely the subject of great debate in most forms of litigation, including class litigation. When common law tort or contract claims are at issue, a plaintiff's standing or lack thereof is generally obvious and rarely debatable. Statutory damage actions are different. A statutory damage plaintiff must demonstrate not only statutory standing, but Constitutional standing as well. *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 126 (2d Cir. 2003). Exactly how these two types of standing interrelate is currently the subject of substantial judicial uncertainty and debate.

The necessity and meaning of the traditional "injury-in-fact" component of Constitutional standing in the context of statutorily-based claims is the primary focal point of this debate.. Where a plaintiff brings a putative statutory class action seeking only statutory damages for technical violation of the statute, but asserts no allegations of actual injury to herself or others, some courts have been willing to find the requirements of both statutory *and Constitutional* standing satisfied, even though traditional injury-in-fact does not exist. Such decisions have engendered an ongoing debate over whether a legislative body may, consistent with separation of powers principles, eliminate or modify the Constitutional requirement (or, at the state level, state constitutional or judicially created requirements) that a plaintiff allege and later prove the type of injury-in-fact that has traditionally been required to demonstrate a *bona fide* case or controversy exists between her and the defendant within the meaning of Article III (or its state analogue).

Obviously, this ongoing debate complicates the defense of statutory class actions, but at the same time presents important opportunities for a defendant. A defendant should always evaluate whether the plaintiff has adequately alleged—and can prove—not just a statutory violation, but also whether that violation inflicted an injury in fact on the named plaintiff. The nature of such an injury (particularly if it is individualized in nature), and the associated issue of causal link between the statutory violation and the injury, can impact not just the merits of the named plaintiff's claims but also a company's defenses to class certification

A. WHAT CONSTITUTIONAL PRINCIPLES ARE WE TALKING ABOUT?

At the federal—and often the state—level, courts are subject to restraints on the exercise of their judicial power. At the federal level, such restrictions derive directly from the Constitution. *See* U.S. CONST., art. III., § 2, cl. 1. At the state level, such restrictions may derive from provisions of state constitutions,[1] or they may be creatures of judicial creation.[2] The point is that where constitutional standing rules apply, "threshold individual standing is a prerequisite for all actions, including class actions."[3] "In [this] era of frequent litigation, class actions, sweeping injunctions with prospective

[1] *See, e.g.*, *Gregory v. Shurtleff*, 299 P.3d 1098, 1102-03 (Utah 2013); *Harrison v. Monroe Cnty.*, 716 S.W.2d 263, 265-67 (Mo. 1986).

[2] *See, e.g.*, *IndyMac Bank v. Miguel*, 184 P.3d 821, 830 (Haw. Ct. App. 2008); *State v. Baltimore*, 495 N.W.2d 921, 926 (Neb. 1993).

[3] *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998); *see also Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); *Murray v. Auslander*, 244 F.3d 807, 810-11 (11th Cir. 2001).

effect, and continuing jurisdiction to enforce judicial remedies, courts [should] be more careful to insist on the formal rules of standing, not less so." *Accord Arizona Christian Sch. Tuition Org. v. Winn*, —U.S.—, 131 S. Ct. 1436, 1449 (2011).

In recognition of the fact that their judicial power is not unrestrained, federal courts may entertain only those cases involving "injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A federal court's jurisdiction is only properly invoked when the plaintiff asserts an actual and personally-particularized injury because the court's role is not to resolve "generalized grievances shared in substantially equal measure by all or a large class of citizens" or claims seeking "relief on the legal rights or interests of third parties." *Id.* Therefore, to evidence standing (*e.g.*, to make out the sort of case involving a stake sufficiently personal to the plaintiff to warrant invocation of the court's jurisdiction), a plaintiff "must show (1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc v. Laid-law Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)); *see also Clapper v. Amnesty Int'l USA, — U.S. —*, 133 S. Ct. 1138, 12247 (2013).[4] Courts have long resisted efforts to water down these minimal requirements, including the injury-in-fact requirement. Abundant authority recognizes that it is the necessity of demonstrating a personalized injury, and a casual connection between it and the defendant's conduct, which serve to distinguish those claims properly subject to judicial resolution from the sort of generalized grievances that are best resolved by the legislative branch of government.[5]

---

[4] Most states have adopted similar requirements for establishing a plaintiff's standing. *See, e.g., Ex parte Aull*, — So. 3d —, 2014 WL 590300 (Ala. Feb. 14, 2014); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 753 S.E.2d 846 (S.C. 2014); *Freedom From Religion Found., Inc. v. Brewer*, No.12-cv-0684, 2013 WL 2644702 (Ariz. Ct. App. June 11, 2013); *ORO Mgmt., LLC v. R.C. Mineral & Rock, LLC*, 304 P.3d 925 (Wyo. 2013); *Brown v. Div. of Water Rights of Dep't of Natural Res.*, 228 P.3d 747 (Utah 2010); *Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008); *Hall v. Walter*, 969 P.2d 224 (Colo. 1998). *But see Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010) (standing is a "limited, prudential doctrine" under which "a litigant has standing whenever there is a legal cause of action.").

[5] *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. The party bringing suit must show that the action injures him in a concrete and personal way."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996) (it is "fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III"); *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464, 475 (1982) ("[N]either the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves."); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event ... may Congress abrogate the Art. III minima ...."); *U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("some injury-in-fact must be shown to satisfy constitutional requirements, for Congress cannot waive the constitutional minimum of injury-in-fact."); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated. Although Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone."); *U.S. v. Weiss*, 467 F.3d 1300, 1311 (11th Cir. 2006) ("While it is true that Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury

This is not to say, however, that the standing doctrine requires that the claimed injury be great or "substantial . . . ; an identifiable trifle will [often] suffice." *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cr. 1977) (citing *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669,689 n.14 (1973)). The injury need not even be economic in nature. *Lujan*, 504 U.S. at 562–63; *Assoc. of Data Processing Serv. Orgs, Inc. v. Camp*, 397 U.S. 150, 152 (1970). What is instead required is that the plaintiff evidence *some* injury from the defendant's alleged misconduct: an injury that is "concrete and particularized"—and not "conjectural or hypothetical"—in nature,[6] and "distinct . . . to h[er]self." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *accord In re Carter*, 553 F.3d 979, 989 (6th Cir. 2009) ("Even though an injury need not be economic in nature, it still must cause individual, rather than collective, harm.").

A plaintiff's failure to allege such an injury is a dispositive defect. Numerous courts have dismissed class actions at the pleading stage simply because the named plaintiff failed to adequately plead the fact that she had been personally injured in some way by the defendant's alleged misconduct.[7]

B. IF THE INJURY IN FACT REQUIREMENT IS REALLY SO IMPORTANT, WHY ARE MANY STATUTORY CLASS ACTIONS INVOLVING NO ALLEGATION OF PERSONALIZED INJURY SURVIVING MOTIONS TO DISMISS?

The answer to the question of why so many statutory class actions devoid of any allegations of actual injury seem to be surviving in court today lies in the willingness of some courts to accept a broad notion of what constitutes a sufficient "injury," *at least within the federal statutory context*.

Many statutes have been judicially interpreted to define "injury" as the statutory violation itself, unconnected with any traditional notion of actual harm resulting from the violation. The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*, Real Estate Settlement Procedures Act,

---

exists without the statute, a federal court's jurisdiction can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action.").

[6] *Lujan*, 504 U.S. at 560.

[7] *See, e.g.*, *Birdsong v. Apple, Inc.* 590 F.3d 955, 960-61 (9th Cir. 2009) (holding plaintiffs had no standing because they did not themselves claim injury due to allegedly excessive headphone volume); *Veal v. Citrus World, Inc.*, No. 12–CV–801, 2013 WL 120761, at *4 (N.D. Ala. Jan. 8, 2013) (dismissing putative class action for plaintiff's failure to allege a personalized, actual injury: "plaintiff alleges that his injury was the actual purchase of orange juice. However, he does not explain how buying packaged orange juice, when he wanted packaged orange juice, injured him."); *In re Google, Inc., Privacy Policy Litig.*, No. 12-cv-01382, 2012 WL 6738343, at *4-6 (N.D. Cal. Dec. 28, 2012); *Matte v. Sunshine Mobile Homes, Inc.*, 270 F. Supp. 2d 805 (W.D. La. 2003) (dismissing putative class action because none of the 16 named plaintiffs alleged they were injured by a product *that was manufactured by the defendant*). A*ccord DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299 (Tex. 2008) (dismissing putative class action for lack of standing because plaintiff's alleged injury was based on an unmanifested product defect and, as a result, his alleged injury was conjectural in nature); *Yu v. Int'l Bus. Mach. Corp.*, 732 N.E.2d 1173 (Ill. Ct. App. 2000) (same, with respect to unmanifested software defect); *Ex parte James*, 836 So. 2d 813, 872-73 (Ala. 2002) (dismissing putative class action in part for lack of named plaintiffs' standing: "the plaintiffs did not allege in their complaint that they were harmed through racial discrimination resulting from the application of Amendment 111, they lacked standing to move for a declaration of unconstitutionality."); *Taran v. Blue Cross Blue Shield of Florida, Inc.*, 685 So. 2d 1004 (Fla. Ct. App. 1997) (dismissing putative class action for lack of jurisdiction because named plaintiffs failed to allege they were personally overcharged by the defendant).

12 U.S.C. §§ 2601, *et. seq.*, Fair and Accurate Credit Transactions Act, 15 U.S.C. §§ 1601, *et. seq.,* Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, and many of the other federal alphabet-soup statutes (oftentimes codified in Title 15 of the United States Code) are prime examples of consumer protection legislation that purport to authorize a private cause of action for an award of statutory damages in the absence of allegation or evidence of actual injury. No-injury class actions under these statutes are quite common, particularly in the financial services context, and seem to be growing in number. But lesser encountered statutes contain similar provisions, including the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, and the Store Communications Act, 18 U.S.C. §§ 2701-2712, and putative class actions asserting claims under them are growing in number. *See*, *e.g.*, *In re Google Inc. Gmail Litig*., No. 13-md-2430, 2014 WL 294441 (N.D. Cal. Jan. 27, 2014); *In re Facebook Privacy Litig*., 791 F. Supp. 2d 705 (N.D. Cal. 2011). Actions under any statute which purports to eliminate the necessity of actual injury pose significant risks for companies because they offer the potential for large recoveries even where the evidence of economic injury or causation is absent.

Such statutes also push the Constitutional limits of standing. As explained *supra*, courts have long been hesitant to loosen the standing doctrine's injury in fact requirement. This has been true even within the statutory context, under the rationale that a legislative body like Congress cannot grant jurisdiction on more generous terms than Article III (or a state counterpart) allows. *Summers*, 555 U.S. at 497 ("the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate Art. III minima."); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1977) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). Many courts are unwilling to challenge the legitimacy of the injury in fact requirement head on, even within the context of statutorily-based claims. Instead, some courts have been willing to find standing in putative statutory class actions based purely on the defendant's alleged failure to comply with a statute, whether or not that violation produced tangible harm to the plaintiff and putative class, by adopting a broad notion of what constitutes an "injury" sufficient to satisfy standing requirements.

Most often, they have done so by accepting the idea of an "informational injury," under which plaintiffs contend they were injured simply by being denied information that the defendant was obligated by statute to provide them. At least six federal circuits so far have been willing to accept this notion of injury, at least within the context of *federal* consumer protection statutes.[8] The First Circuit is one of the latest to join this

[8] *See, e.g., Hammer v. Sam's East, Inc*., 754 F.3d 492, 498-99 (8th Cir. 2014) (putative class representatives' allegation that they received receipts "showing … more than the last five digits of the[ir] credit or debit card numbers" in violation of the Fair and Accurate Credit Transactions Act's requirements was "an injury-in-fact sufficient to confer Article III standing."), *petition for certiorari filed* Oct. 13, 2014; *Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 823 (8th Cir. 2013) (finding that consumer had standing to assert putative class action against bank under the Electronic Fund Transfer Act based simply on allegations that the bank failed to have an external notice on its ATMs disclosing that users may be subject to service charges: "an informational injury alone is sufficient to confer standing, even without an additional economic or other injury."), *cert. denied* — U.S. —, 134 S. Ct. 1515 (2014); *Edwards v. First Am. Corp*., 610 F.3d 514, 517-18 (9th Cir. 2010) (consumer had standing to bring putative class action alleging defendant's exclusive referral agreement with title insurer violated the Real

trend, at least within the context of the Fair Debt Collection Practices Act,[9] although not in the context of the Employee Retirement Income Securities Act.[10] The same is true in the Fifth Circuit: an allegation of a bare violation of the Electronic Funds Transfer Act will apparently suffice to satisfy Article III's injury in fact requirement,[11] whereas similar alleged violations of the Americans With Disabilities Act will not.[12] Other circuits have been more hesitant to water down the injury in fact requirement in this manner, refusing to conflate principles of statutory standing with those of Constitutional standing.[13] The position of the Eleventh Circuit is unclear: panels have recently issued

---

Estate Settlement Procedures Act, even though the consumer was not overcharged by the practice: to determine whether Article III's injury in fact requirement was satisfied, "we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III"), *cert. granted in part by* — U.S.—, 131 S. Ct. 3022 (2011), *and cert. dismissed as improvidently granted by*, —U.S. —, 132 S. Ct. 2536 (2012); *Shaw v. Marriott Int'l., Inc*., 605 F.3d 1039, 1042 (D.C. Cir. 2010) ("The deprivation of such a statutory right may constitute an injury-in-fact sufficient to establish standing, even though the plaintiff would have suffered no judicially cognizable injury in the absence of the statute."); *Beaudry v. TeleCheck Serv/, Inc*., 579 F.3d 702, 707 (6th Cir. 2009) ("No Article III (or prudential) standing problem ar[ose]" in lawsuit alleging bare violation of the Fair Credit Reporting Act).

[9] *Pollard v. Law Office of Many L. Spaulding*, 766 F.3d 98, 102-03 (1st Cir. 2014) ("[t]he invasion of a statutorily conferred right may, in and of itself, be a sufficient injury to undergird a plaintiff's standing even in the absence of other harm;" accordingly, a consumer asserting a FDCPA claim does not need to allege she was confused by debt collection-related communications because "the absence of [actual] confusion is irrelevant to the standing inquiry."), *petition for en banc review denied* Oct. 15, 2014.

[10] *Merrimon v. Unum Life Ins. Co. of Am*., 758 F.3d 46, 53 (1st Cir. 2014) ("[A]n insurer's violation of an ERISA-imposed fiduciary duty does not necessarily confer standing on all plan beneficiaries: [to have standing,] a beneficiary must show that the alleged violation has worked some personal and tangible harm to her"). *Accord Conservation Law Found. of New England, Inc. v. Reilly,* 950 F.2d 38, 41 (1st Cir. 1991) (concluding that a statutory violation does not confer Article III standing unless plaintiffs can show they suffered a "distinct and palpable injury" from the violation).

[11] *Mabary v. Home Town Bank, N.A*., 771 F.3d 820, 824(5th Cir. 2014) (in reversing denial of class certification, noting that a bank's failure to attach a user fee disclosure on its ATMs violated the Electronic Funds Transfer Act and alone constituted "an injury-in-fact that allows [the plaintiff] to pursue her claim here"); *but see id.* at 830 (Jolly, C.J., dissenting) (characterizing the majority's holding as "stunning," noting that "Congress's creation of a cause of action can make an injury legally cognizable, but it can't make a non-injury justiciable."). *Accord Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003) ("The 'inability to obtain information' required to be disclosed by statute constitutes a sufficiently concrete and palpable injury to qualify as an Article III injury-in-fact.").

[12] *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998) ("[W]e hold that damages liability under [the Americans With Disabilities Act] must be based on something more than a mere violation of th[e Act's] provision[s]. There must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation.").

[13] *See, e.g., David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (theory that allegation of a statutory violation by the defendant is alone "sufficient to constitute an injury-in-fact for Article III standing …. is a non-starter as it conflates statutory standing with constitutional standing."); *Doe v. Nat'l Bd. of Med. Exam'rs,* 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated. Although Congress can expand standing by enacting a law enabling someone to sue on what was already a *de facto* injury to that person, it cannot confer standing by statute alone."). In the Second Circuit, for example, it seems that a bare allegation of a statutory violation will not satisfy the injury in fact requirement, but such an allegation may do so when accompanied by allegations that the deprivation is presently threatening the plaintiff with a cognizable injury. *Compare Kendall v. Employees Ret. Plan of Avon Prods*., 561 F.3d 112, 121 (2d

contradictory pronouncements.[14] District courts are all over the map on this issue, with some holding that the standing doctrine does not require a plaintiff to allege any specific injury apart from the defendant's alleged statutory violation,[15] while others have held that a bare allegation of a statutory violation does not satisfy standing's injury in fact requirement.[16] As one court has recognized, "[t]he current Supreme Court jurisprudence is not entirely clear as to whether a defendant's violation of a statute that confers a private right of action in and of itself constitutes an 'injury in fact' to those protected under the statute." *Tyler v. Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 449 n.8 (D. Mass. 2012).

The Supreme Court's grant of *certiorari* review of the Ninth Circuit's opinion in *Edwards v. First American Corporation*, 610 F.3d 514 (9th Cir. 2010), was the case that was supposed to resolve this debate. Unfortunately, after briefing and oral argument, *certiorari* was dismissed as having been improvidently granted by the Court on the last day of its 2011-2012 term. — U.S. —, 132 S. Ct. 2536 (2012). However, the issue was

---

Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA," the plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement.") *with Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 307 (2d Cir. 2003) (injury in fact may be established under the FDCPA by showing that the defendant is taking legal action to collect an unlawful debt—actual payment of that debt by the plaintiff is not required). *Accord Salvati v. Deutsche Bank Nat'l Trust Co., N.A.*, 575 Fed. App'x 49 (3d Cir. 2014) (adopting the reasoning of the Second Circuit's *Miller* decision); *Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208 (10th Cir. 2006) (same).

[14] *Compare Morales v. U.S. Dist. Court for Southern Dist. of Florida*, — Fed. App'x —, 2014 WL 5151619, at *5 (11th Cir. Oct. 15, 2014) ("Even if Morales could show that § 3332(a) creates a private right of action in some party under some set of facts, that would not confer standing on [him] in this particular case. The Article III requirements of standing persist, and Morales has not sufficiently alleged a cognizable injury …. The injury prong of standing analysis is designed to ensure that such generalized grievances remain non justiciable. A *statutory violation alone will not suffice to create standing*.") (emphasis added) *with Palm Beach Golf Center-Boca, Inc. v. Sarris*, — F.3d —-, 2014 WL 5471916, at *2-3, 5 (11th Cir. Oct. 30, 2014) ("[W]here a statute confers new rights on a person, that person will have Article III standing to sue based on a violation of the newly created rights:" accordingly, a plaintiff has standing to assert "junk fax" claims under the Telephone Consumer Protection Act even if he "failed to prove that the fax was printed or seen" as long as there is evidence the fax was sent) and *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329, 1334 (11th Cir. 2013) (finding that plaintiff had standing to assert Americans With Disabilities Act access claims even though he was "a tester and 'not a bona fide patron'"—because the court's "task is merely to apply statutory language, not to rewrite it," the "alleged violations of [a plaintiff's] statutory rights under Title III may constitute an injury-in-fact."). Cf. *Trujillio v. Florida*, 481 Fed. App'x 598 (11th Cir. 2012 (affirming dismissal of § 1983 claim because the plaintiff "failed to meet Article III requirements of standing. He did not allege in his complaint any injury in fact that occurred to him as a result of Florida's use of red light traffic cameras."), *cert. denied* — U.S. —, 133 S. Ct. 951 (2013).

[15] *See, e.g., In re Google Inc.Cookie Placement Consumer Privacy Litig.*, 988 F. Supp. 2d 434, 442 (D. Del. 2013) (contending that "a statutory violation, in the absence of any actual injury, may in some circumstances create standing under Article III."); *Amason v. Kangaroo Express*, No. 09-cv-2117, 2013 WL 987935 (N.D. Ala. Mar. 11, 2013) (defendant's failure to sufficiently truncate credit card numbers on consumer receipts in violation of the Fair and Accurate Credit Transaction Act held sufficient to establish an injury in fact for purposes of standing); *In re Hulu Privacy Litig.*, No. 11-cv-3764, 2012 WL 2119193, at *8 (N.D. Cal. June 11, 2012) ("Under current law, … Plaintiffs establish an injury (and standing) by alleging a violation of a statute.").

[16] *See, e.g., Wersal v. LivingSocial, Inc.*, No. 13-cv-381, 2013 WL 3871434, *3 n.4 (D. Minn. July 26, 2013) ("While a violation of a statute can create a legal right, the Court is not persuaded that [plaintiff's] claims of statutory violations do not require satisfaction of Article III's standing requirement."); *Sterk v. Best Buy Stores, L.P.*, No. 11-cv-1894, 2012 WL 5197901, at *5 (N.D. Ill. Oct. 17, 2012) ("[A] plaintiff must plead an injury beyond a statutory violation to meet the standing requirement of Article III.").

presented again to the Supreme Court during the following term in *Mutual First Federal Credit Union v. Charvat*. The Court, however, denied *certiorari* review. — U.S. —, 134 S. Ct. 1515 (2014). The issue has not gone away, and has been presented again for review in *Spokeo, Inc. v. Robins*, No. 13-1339, wherein the petitioner seeks review of the Ninth Circuit's reversal of a trial court's order dismissing a putative Fair Credit Reporting Act class action in which no actual injury was alleged. *See Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). The petition was circulated for conference on September 29, 2014. Rather than deny review outright, the Court sought comment from the Solicitor General on October 6, 2014. Even if the Court does not take up the issue this term, the issue will almost certainly be presented again during the Court's next term. Perhaps the most enticing case to present the issue arises from a recent decision by the Ninth Circuit, in which the court held that the plaintiff had Constitutional standing to assert class action claims under the Fair Debt Collection Practices Act based on allegedly deceptive collection notices, even though the plaintiff admitted that he never personally received those notices himself. *Tourgeman v. Collins Fin. Serv., Inc.*, 755 F.3d 1109 (9th Cir. 2014). The defendant in *Tourgeman* sought *en banc* review on August 13, 2014, and petitioners' response was filed on September 26, 2014. A denial of *en banc* review would position this case for a *certiorari* petition during the Supreme Court's next term.

C. SHOULD A DEFENDANT IGNORE A COMPLAINT'S FAILURE TO ALLEGE ACTUAL INJURY BEYOND A BARE STATUTORY VIOLATION?

Particularly in the class action context, a defendant *should not ignore* a plaintiff's failure to allege some personal, particularized injury caused by the defendant's alleged statutory violation. There are several reasons why.

First, the issue obviously isn't going away (and, in the opinion of the authors, shouldn't go away). If anything, the circuit split (and in cases like the Eleventh Circuit, the intra-circuit split) seems to be deepening. The Supreme Court seems to continue to be interested in this intellectually challenging issue, and likely will eventually resolve the debate over whether the mere allegation of a statutory violation, standing alone, satisfies a plaintiff's obligation under Article III to demonstrate a concrete injury.[17] In light of the continuing uncertainty as to how constitutional standing requirements should be applied in consumer statutory damage-only class actions, especially those brought in federal court, the issue is well worth preserving.

Second, the notion that a defendant's violation of a statutory obligation can alone provide a plaintiff with standing, even though the plaintiff has not been personally injured as a result, appears to conflict not only with established jurisprudence addressing the necessity and Constitutional definition of an injury in fact, but also with the related principle that courts "should not speculate concerning the existence of standing, nor should [they] imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none." *Bochese v. Town of Ponce Inlet*, 405 F.3d

[17] Lest it be forgotten, "[p]laintiffs bear the burden of proving standing." *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 261 (3d Cir. 2001); *see also Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 97 (1st. Cir. 2006); *Bischoff v. Osceola County, Fla*., 222 F.3d 874, 878 (11th Cir. 2000).

964, 976 (11th Cir. 2005).[18] The problem with accepting the idea that a defendant's violation of some statutory requirement will alone provide standing to consumers is that in many cases, the statutory damage plaintiff already had the information defendant was supposed to have provided under the statute. Moreover, defining the mere violation of the statute as injury in and of itself wholly ignores the corresponding requirement that a plaintiff explain how a defendant's wrongful conduct has injured her in a personalized and particular way. Courts have long held that mere violation of a statute will not bestow standing on a plaintiff *unless* she explains how such violations affected her in a personal and particularized way. *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006); *see also Lujan*, 504 U.S. at 560; *Bensman v. U.S. Forest Service*, 408 F.3d 945, 956-61 (7th Cir. 2005). *Accord Conservation Law Found.,* 950 F.2d at 41 (concluding that a statutory violation does not confer Article III standing unless plaintiffs can show they suffered a "distinct and palpable injury" from the violation). This personalized injury is what is necessary to set a plaintiff's claim apart from the sort of generalized grievance over which courts should not take jurisdiction. *Cronson v. Clark*, 810 F.2d 662, 664 (7th Cir.1987) ("Indignation that the law is not being obeyed ... will [not] support a federal lawsuit."), *cert. denied* 484 U.S. 871 (1987).[19] Accordingly, even in the context of a statutory claim based on an alleged "informational injury," Article III arguably requires the plaintiff to allege more than a bare statutory violation: the "more" that is required should come by way of allegations showing how that violation affected the plaintiff in a personal and individualized way, and it is not the proper role of a court to speculate about this. This is an issue worth raising and preserving, not only for its own sake, but also to lay the foundation to later challenge the proposed class definition on overbreadth grounds,[20] or based on the existence of the inter-circuit split itself in the context of a proposed class covering jurisdictions both

[18] *See also Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing."); *Diamond v. Charles*, 476 U.S. 54, 66 (1986) ("[U]nadorned speculation [of injury] will not suffice to invoke the federal judicial power."); *Simon v. Eastern Kentucky Welfare Rights Org*., 426 U.S. 26, 40 (1976) ("[A]bstract concern with [a defendant's conduct] does not substitute for the concrete injury required by Art. III.").

[19] In adopting the notion that a defendant's bare statutory violation can constitute an injury in fact to the plaintiff, many courts have rationalized that the absence of any form of traditional injury is acceptable because the plaintiff is a consumer whose right to receive statutorily-compliant information is within the "zone of interests" designed to be protected by the relevant statutes. *See, e.g., Pollard*, 766 F.3d at 102; *Hammer*, 754 F.3d at 499; *Edwards*, 610 F.3d at 517. *Accord Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 492 (1988) (plaintiff has statutory standing when her interests are "arguably within the zone of interests to be protected ... by the statute," even where there is an absence of any express "indication of congressional purpose to benefit the would-be plaintiff."). But there is a strong argument that such reasoning impermissibly conflates principles of statutory standing with those of Constitutional standing. *Steel Co. v. Citizens for a Better Env't*., 523 U.S. 83, 97 (1998) (The "issue of statutory standing ... has nothing to do with whether there is case or controversy under Article III"). *Accord Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, —, 131 S. Ct. 863, 869 (2011) (differentiating between the requirements of Article III and statutory standing, and concluding that its own prior "dictum that the Title VII aggrievement requirement conferred a right to sue on all who satisfied Article III standing" was "too expansive" because it improperly conflated the two doctrines).

[20] *See, e.g., Mazza v. Am. Honda Motor Co., Inc*., 666 F.3d 581, 594 (9th Cir. 2012) ("No class may be certified that contains members lacking Article III standing.") (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)); *Avritt v. Reliastar Life Ins. Co*., 615 F.3d 1023, 1034 (8th Cir. 2010 ("[A] named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.").

accepting and rejecting the informational injury concept.[21]

Third, even the courts which have held that a bare federal statutory violation will afford plaintiffs with standing have split on the analogous issue of whether allegations of a bare *state* statutory violation will accomplish the same feat. For example, while the Eighth Circuit concluded this year that an informational injury will satisfy Article III's injury in fact requirement within the context of the Electronic Funds Transfer Act and the Fair and Accurate Credit Transactions Act, the same court recently concluded that product mislabeling allegations—an informational injury for sure—do not satisfy Article III's injury in fact requirement absent additional allegations of actual injury, at least in the context of a putative class allegation alleging violations of *state* deceptive trade and consumer protection acts. *Wallace v. Conagra Foods, Inc.*, 747 F.3d 1025 (8th Cir. 2014).[22] Similarly, the Eighth Circuit has questioned whether a putative class representative can satisfy the injury in fact requirement in federal court by simply alleging that the defendant made misrepresentations about its services in violation of Minnesota's Consumer Fraud Act without simultaneously offering allegations explaining how those misrepresentations caused him, "and [the] countless others [within the proposed class], . . . harm[] as a result." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 n.5 (8th Cir. 2012). Even though the Consumer Fraud Act required no showing that "any person ha[d] in fact been misled, deceived, or damaged thereby,"[23] the Eighth Circuit concluded that the injury in fact requirement was not been satisfied by the plaintiff's allegations: "[s]tate courts may afford litigants standing to appear where federal courts would not." *Miller*, 688 F.3d at 934.

The First Circuit has similarly questioned whether alleged violations of state consumer protection statutes will alone satisfy the injury in fact requirement. *Katz v. Pershing, LLC*, 672 F.3d 64, 81 (1st Cir. 2012) ("Standing is not an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed.... Insofar as we can tell from the complaint, no interest or right of the plaintiff has been harmed by any violation of applicable privacy laws."). Courts within the Ninth Circuit have reached conflicting answers on this question. *Compare Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009) (named plaintiffs lacked Constitutional and statutory standing to bring putative class action under California's Unfair Competition Law because they alleged no distinct and palpable personal injuries) *and Cohen v. Facebook, Inc.*, No. 10-cv-5282, 2011 WL 5117164 (N.D. Cal. 2011) (bare allegation of violation of California's publicity act, unaccompanied by allegations of actual injury, held insufficient) *with Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (concluding that similar alleged violations of California's publicity act

[21] *See, e.g., Henry v. Assocs. Home Equity Servs*., 272 B.R. 266, 273-76 (C.D. Cal. 2002), *aff'd.*, 69 Fed. App'x 394 (9th Cir. 2003) (circuit split on the availability of the cause of action to each putative class member precluded certification of nationwide bankruptcy debtor class).

[22] Of course, many states' deceptive trade and consumer protection acts expressly require a plaintiff to allege and later prove actual damage as a prerequisite to recovery. *See*, *e.g.*, *Rollins, Inc. v. Butland*, 951 So. 2d 860, 873 (Fla. Ct. App. 2006) (Deceptive and Unfair Trade Practices Act); *Talalai v. Cooper Tire & Rubber Co*., 360 N.J.Super. 547, 823 A.2d 888, 898-99 (N.J. Super. Ct. Law Div.) (New Jersey Consumer Fraud Act); *Yu v. Int'l Bus. Mach. Corp*., 732 N.E.2d 1173, 1177-78 (Ill. Ct. App. 2000) (Illinois Consumer Fraud and Deceptive Business Practices Act and Illinois Uniform Deceptive Trade Practices Act).

[23] MINN. STAT. ANN. § 325F.69, subdiv. 1.

satisfied Article III's injury in fact requirement).

There is no ready justification for according lesser Constitutional scrutiny to federal statutory violations than state violations: either a statutory violation by itself satisfies the injury in fact requirement or it does not.[24] Defendants should demand, when and where appropriate, that a plaintiff explain why bare allegations of a federal statutory violation should be held to constitute an injury in fact when more is required to evidence standing in the case of alleged state statutory violations, as well as other actions generally. The answer should certainly not be that Congress has the power to tinker with the injury in fact requirement in ways that state legislatures and courts cannot—after all, while "[t]he … injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," *Warth*, 422 U.S. at 500, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. at, 820 n.3; *see also Gladstone Realtors*, 441 U.S. at 100. This is because the "[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Lujan*, 504 U.S. at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738-39 (1972)).[25]

Decisions giving different standing effect to bare allegations of statutory violations depending on whether a federal or state statute is at issue are suspect, because they implicitly assume that Congress somehow has the power to dispense with Article III's injury in fact requirement in ways state legislatures and courts do not. Such an assumption finds no support in existing law, or under the separation of powers principles of the Constitution itself.

Although plaintiffs have plenty of authority on their side of the statutory damage standing debate, raising this issue has practical benefits for the defendant even without a successful adjudication of it. For example, raising the standing issue can force the plaintiff's attorney to spend far more time than he or she planned defending legal issues that pose both a short and long-term threat to any ultimate recovery. Accordingly, raising this issue by way of Rule 12 or similar motion may often produce overtures from opposing counsel for early individual settlement negotiations, or provide leverage for more favorable classwide settlement. At the same time, standing motions may also have

[24] Under analogous circumstances, the Supreme Court recently acknowledged that "[t]he Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. . . . States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, — U.S. —, 133 S. Ct. 2652, 2667 (2013) (concluding that proponents of California's same-sex marriage act lacked Article III standing to defend the act from constitutional challenge, even though the California Supreme Court had authorized them to defend the act in light of the state's refusal to do so). *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court.").

[25] Thus, for example, while the Supreme Court in *Warth* recognized that the injury in fact requirement can be satisfied by allegation of statutory violations, the Court nevertheless found that the plaintiffs lacked standing to assert their statutorily-based claims because they failed to explain how "they personally ha[d] been injured" by the alleged violations. 422 U.S. at 502. As the Court explained, they had to allege more than a bare statutory violation—what was missing was "specific, concrete facts demonstrating" how the defendant's "challenged practices harm[ed]" them, coupled with an explanation of how they "would benefit in a tangible way from the court's intervention." *Id*. at 508.

a useful effect in slowing down discovery and creating more time for the defendant to develop a more comprehensive strategy for defending in the case, as the the pendency of a motion to dismiss is often ground to request a stay of all discovery, including class certification-related discovery, pending a ruling on the motion.[26]

II. THE FAIR DEBT COLLECTION PRACTICES ACT: A CONSTANTLY SHIFTING BATTLEFIELD.

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), was enacted by Congress in 1977 "to eliminate abusive debt collection practices by debt collectors," as well as to "protect consumers against debt collection abuses." *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 442 (5th Cir. 2013). Purposefully broad, the FDCPA endeavors to "protect[] all consumers, the gullible as well as the shrewd," *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993), and therefore unsurprisingly serves as "a breeding ground for class actions." *Sanders v. Jackson*, 209 F.3d 998, 1003-04 (7th Cir. 2000). This has been particularly true in recent years, given the public focus on the mortgage and financial services industries since 2008 coupled with the country's persistently slow economic recovery. *See, e.g.*, Patrick Lunsford, *After Slight Rise in July, FDCPA Lawsuits Still Down Overall for 2014; TCPA Claims Increase*, INSIDEARM.COM, August 22, 2014 (noting the growth in FDCPA litigation since 2007, and while recognizing a recent decline in such filings, showing that 2014 filings will continue to exceed pre-2006 levels), available at http://www.insidearm.com/daily/debt-buying-topics/debt-buying/after-slight-rise-in-july-fdcpa-lawsuits-still-down-overall-for-2014-tcpa-claims-increase/ (last visited Oct. 27, 2014).

If all of that were not bad enough, the FDCPA continues to evolve and change through regulation and judicial construction, complicating companies' efforts to comply with its requirements. In 2014, the circuit courts of appeal alone issued over 30 opinions addressing various aspects of the FDCPA, arising from both individual and class litigation. Regulatory enforcement of the act is now overseen by two federal agencies—the Consumer Finance Protection Bureau and the Federal Trade Commission,

[26] *See, e.g., Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) (the purpose of Rule 12 is to "streamline[ ] litigation by dispensing with needless discovery and factfinding"); *Dynamic Image Tech., Inc. v. U.S.*, 221 F.3d 34, 38 (1st Cir. 2000) ("Where, as here, a defendant challenges a court's jurisdiction, the court has broad discretion to defer pretrial discovery if the record indicates that discovery is unnecessary (or, at least, is unlikely to be useful) in regard to establishing the essential jurisdictional facts.") (bracketed text in original); *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) (affirming order staying discovery pending resolution of motion to dismiss, because such motions test the sufficiency of a complaint under a standard in which "all of the factual allegations in the complaint [are accepted] as true"); *Mann v. Brenner*, 375 Fed. App'x 232, 239 (3d Cir. 2010) (affirming order staying discovery during pendency of motion to dismiss); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense . . . should . . . be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleadings are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion."); *Landry v. Air Line Pilots Ass'n Int'l. AFL-CIO*, 901 F.2d 404, 435-36 (5th Cir. 1990) (affirming entry of protective order staying discovery pending resolution of motion to dismiss, because "no discovery was needed to resolve the motions to dismiss under F.R.Civ.P. 12(b)(6)[, as such] motions are decided on the face of the complaint."); *Thigpen v. U.S.*, 800 F.2d 393, 396-97 (4th Cir. 1986) ("Nor did the court err by granting the government's motion under Fed. R. Civ. P. 26(c) to stay discovery pending disposition of the 12(b)(1) motion . . . . Trial courts . . . are given wide discretion to control this discovery process"), *overruled on other grounds, Sheridan v. U.S.*, 487 U.S. 392 (1988).

and both have recently increased their oversight and rule making efforts. At bottom, while Congress may have adopted the FDCPA in 1977 "to eliminate *abusive* debt collection practices," 15 U.S.C. § 1692(e) (emphasis added), the FDPCA has arguably "transformed into a vehicle for 'gotcha' litigation"[27] over companies' failures to comply its "hyper-technical requirements." *Bailey v. Sec. Nat'l Serv. Corp.*, 154 F.3d 384, 387 (7th Cir. 1998).

A. JUDICIAL TRENDS, DEVELOPMENTS AND OPEN ISSUES.

1. *What Is A Company's Real Exposure From FDCPA Class Litigation?*

This may seem a surprising question. After all, while the FDCPA has been subject to numerous amendments over the years, its civil liability provision has not.[28] And its civil liability provision is arguably among the clearest of the act's terms:

> [A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure;
>
> (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. . . .

15 U.S.C. § 1692k(a). "[U]nder a plain reading of this text" a company's maximum liability seems clear: it "is $1,000 multiplied by the number of named plaintiffs plus $500,000," along with any costs and a reasonable attorneys' fee that may be awarded by a court. *McCall v. Drive Fin. Serv., L.P.*, 440 F. Supp. 2d 388, 390 (E.D. Pa. 2006). Of course, a company's *actual* liability could be much less—the FDCPA directs courts to consider, "in determining the amount of liability in any [class] action," a number of factors, including "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the

[27] *D'Avanzo v. Global Credit & Collection Corp.*, No. 10-cv-01572, 2011 WL 2297697, at *5 (D. Colo. Apr. 18, 2011), *report & recommendation adopted by* 2011 WL 2292190 (D. Colo. June 09, 2011).

[28] In fact, the FDCPA's civil liability provision has been amended only once since the 1970s. *See* Dodd-Frank Wall Street Reform And Consumer Protection Act of 2010, Pub. L. 111-203, Title X, § 1089(1), 124 Stat. 2092 (July 21, 2010).

number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional." 15 U.S.C. § 1692k(b)(2).

So what is the problem? The problem is that the FDCPA's civil liability provision is phrased in terms of "a class action," not in terms of a defendant's course of conduct. Recognizing that this language differs from that employed in the Truth In Lending Act, whose own civil liability provision caps "the total recovery . . . in any class action *or series of class actions arising out of the same failure to comply by the same creditor*" to "the lesser of $500,000 or 1 per centum of the net worth of the creditor," 15 U.S.C. § 1640(a)(2)(B) (emphasis added), courts have held that a plaintiff may seek the certification of a class under the FDCPA even though its membership does not include all those affected by the defendant's conduct.[29]

There are certainly practical grounds to support that finding. After all, the FDCPA says what it says, and "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Moreover, forcing a plaintiff and her counsel to represent persons they are voluntarily unwilling to represent raises Due Process, among other, concerns. But what effect does this have on a company's potential maximum liability? Does it mean that enterprising plaintiff's counsel can turn a company's use of a faulty debt validation letter disseminated to consumers across the country into fifty state class actions, thereby exposing the company to a maximum potential liability of $25,000,000, instead of $500,000? While the answer to this question is surprisingly not well-settled, the few cases that have dealt with the issue have ruled that the FDCPA's damage cap cannot be so easily evaded.

The origin of this issue traces back to the case of *Mace v. Van Ru Credit Corporation*. In *Mace*, the plaintiff alleged that Van Ru Credit Corporation disseminated a misleading demand letter to consumers nationwide, in violation of the FDCPA's terms. *Mace v. Van Ru Credit Corp.*, No. 94-cv-7450, 1995 WL 716636, at *1 (N.D. Ill. Dec. 1, 1995). However, the plaintiff sought to pursue such claims only on behalf of Wisconsin consumers. *Id.* The trial court denied class certification, reasoning in part that certification of a class comprising fewer than all of the consumers who had received the letter would invite "a multiplicity of further class actions against [Van Ru] based on the same alleged violations." *Id.* In response to the plaintiff's subsequent request to certify the court's order denying class certification for interlocutory review, the trial court further elaborated on its prior reasoning: "[i]t would be an abuse of the class action proceeding and certainly an undeniable result to allow the same case, with a different set of identically situated plaintiffs, to progress around the country, from court

[29] *See, e.g.*, *Mace v. Van Ru Credit Corp*., 109 F.3d 338, 347 (7th Cir. 1997) ("[T]he FDCPA does not require [certification of] a nation-wide class."); *Diaz v. Residential Credit Solutions, Inc.*, 297 F.R.D. 42, 54 (E.D.N.Y. 2014) ("The language of the FDCPA does not support the conclusion that the statute requires nationwide class certification."); *Zimmerman v. Zwicker & Assoc., P.C.*, No. 09-cv-3905, 2011 WL 65912, at *6 (D.N.J. Jan. 10, 2011) ("[T]he Court agrees with the view that an FDCPA class does not have to include all potential plaintiffs."); *Lewis v. ARS Nat'l Serv., Inc*., No. 09-cv-1041, 2011 WL 3903092, at *7 (M.D. Ala. Sept. 6, 2011) ("[T]h[e] court will not require [the certification of a class broader than that sought by the named plaintiff] based on the mere possibility that it would advance efficiency."); *Macarz v. Transworld Sys., Inc*., 193 F.R.D. 46, 56 (D. Conn. 2000) (the argument "that a statewide class is improper, [because it] would render the $500,000 per class action damages cap in the FDCPA meaningless[,] …. has been considered, and rejected, in a number of cases.").

to court, exacerbating the costs and penalties that were statutorily prescribed in FDCPA, as well as attorneys' fees sought. *Id.* at *4. Nevertheless, the court granted the plaintiff's request, and certified his order for interlocutory review. *Id.* at *7.

On appeal, the Seventh Circuit reversed the trial court's order denying class certification. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 347 (7th Cir. 1997). In doing so, the court reasoned that nothing in Rule 23 or the FDCPA *required* the certification of a nationwide class over the plaintiff's objection. *Id.* at 341-44. But the Seventh Circuit added an important *caveat* to its holding:

> [T]he case before us does not now present multiple or serial class actions to recover for the same misconduct. Hence, it would be premature to require a nation-wide class at this juncture. If and when multiple serial class actions are presented, it will be time enough to rule on such a pattern. At this point, there is no persuasive reason to require a nation-wide class.

Id. at 344.

Unfortunately, the question of what impact serial class litigation has on the FDCPA's class action damages cap has never been presented to the Seventh Circuit, or to any other Circuit, for resolution. The issue has cropped up on occasion at the district level, but often has produced no answer to the question of whether the $500,000 damages cap applies to each class or instead must be shared or allocated between them. *See, e.g.*, *Nichols v. Northland Grps, Inc.*, Nos. 05-cv-2701, 05-cv-5523, 06-cv-43, 2006 WL 897867, at *8 (N.D. Ill. Mar. 31, 2006) (certifying class of Illinois consumers over defendant's objection that the plaintiffs were "gaming the system by seeking to certify a state-wide class of fewer than all individuals who received [similar] letters from" it: the result of the court's decision was that two classes of plaintiffs had been certified in the same state, comprised of individuals who received the same letter at different periods of time), *subsequent class settlement offering aggregate class relief of $20,000 approved* Apr. 4, 2007; *Mailloux v. Arrow Fin. Serv., LLC*, 204 F.R.D. 38 (E.D.N.Y. 2001) (certifying class of New York consumers even though a class of Illinois consumers had previously been certified to address the defendant's same alleged misconduct), *subsequent class settlement offering aggregate class relief of $75,000 approved* Mar. 25, 2003.

Nevertheless, at least two district courts *have addressed* this issue. In *LaRocque v. TRS Recovery Services, Inc.*, the plaintiffs sought certification of several classes under the FDCPA and state law to address different aspects of the defendant's collection practices. The United States District Court for the District of Maine granted certification to three of the plaintiffs' four proposed classes, resulting in the certification of classes both national and state-only in scope. Decision on Motion for Class Certification, *LaRocque v. TRS Recovery Services, Inc.*, No. 11-cv-91 (D. Me. entered July 17, 2012) (CM/ECF Doc. 56). Subsequently, the defendant moved to expand the scope of the Maine-only FDCPA class, asking that it be broadened into a nationwide one to prevent the plaintiff from evading the FDCPA's class action damages cap. Motion and Memorandum In Support of Defendants' Request That Class One Be Defined As a Nationwide Class, *LaRocque v. TRS Recovery Services, Inc.*, No. 11-cv-91 (D. Me. filed Sept. 24, 2012) (CM/ECF Docs. 66-67). The court denied the motion, concluding that relief sought was unnecessary to accomplish that result in light of the criteria set forth in

Section 1692k(b)(2):

> To the extent that the defendants request that this court certify a nationwide class as a matter of judicial discretion, I decline to do so. If the plaintiff is able to establish the defendants' liability, my discretion will be invoked at the time of determining statutory damages. Then, the defendants can point to the size of the class and the pendency of lawsuits in other jurisdictions (assuming the MDL Panel has not placed them all before a single judge). Nothing in the statute requires that a court set statutory damages at the maximum allowed.

LaRocque v. TRS Recovery Serv., Inc., NO. 11-cv-91, 2013 WL 30055, at *2 (D. Me. Jan. 2, 2013).[30]

The Northern District of Georgia reached a similar conclusion last year in *Myrtle Carr v. Ocwen Loan Servicing, LLC,* No. 13-cv-732 (N.D. Ga.). In *Carr*, the plaintiffs alleged that the defendant loan servicer had disseminated a debt validation notice to consumers across the country which failed to comply with the FDCPA. Subsequently, numerous other putative class actions were filed, seeking the certification of similar nationwide classes or state-only classes. Because the parties in *Carr* had reached a proposed nationwide class settlement, motions by counsel in the later-filed actions to create a multi-district proceeding were denied. *In re: Ocwen Loan Serv., LLC, Fair Debt Collection Practices Act (FDCPA) Litig.*, 988 F. Supp. 2d 1367 (J.P.M.L. 2013). Counsel from the later-filed actions then sought to challenge the proposed class settlement on the ground that subjecting the nationwide class to a single award of the FDCPA's maximum recovery of $500,000 was unreasonable and unfair, because the class members could receive more in the way of relief through pursuit of state only classes.

Reasoning that "[t]he purpose of the statutory damages [provision of the FDCPA] is to punish and deter non-compliance, rather than to provide compensation," the Northern District of Georgia rejected the argument that "the recipients of a uniform debt-related communication must be split up into numerous geographically separate classes for no other purpose than to allow them to argue that each separate class should be allowed to recover the entirety of the FDCPA's $500,000 statutory damage cap for class actions." Findings Of Fact And Conclusions Of Law Regarding Final Approval of Settlement at 14-15, 15-16, *Carr v. Ocwen Loan Serv., LLC*, No. 13-cv-732 (N.D. Ga. entered Apr. 25, 2014) (CM/ECF No. 101). As the court explained, accepting the argument "that the full $500,000 in statutory damages should be available in *any* class action, regardless of scope, counsel would be compelled to try to certify the smallest class possible," leading to such absurd results as efforts to certify "separate classes for each city or county, instead of a state[]." *Id.* at 17-18. Instead, the court concluded that

[30] Further development or appellate review of the *LaRocque* court's reasoning is unlikely. Following its 2013 decision, the court denied the plaintiffs' efforts to certify similar classes on behalf of consumers residing in other states on statutes of limitation grounds. Order on Plaintiffs' Consolidated Motion For Certification of Statewide Classes In The States of California, Kansas, New York and North Carolina, And For Appointment Of An Additional Class Representative In The State of Maine, *In re: TRS Recovery Servs., Inc. And Telecheck Serv., Inc., Fair Debt Collection Practices Act (FDCPA) Litig.*, No. 13-md-2426 (D. Me. entered Mar. 20, 2014) (CM/ECF No. 55). The parties recently indicated that they will be seeking approval of a proposed class action settlement of their remaining claims.

given the non-compensatory purpose of statutory damages under the FDCPA and in light of the fact that Section 1692k(b)(2) requires consideration of the number of persons affected in a action when determining the amount of awardable statutory damages, "the pendency of multiple non-nationwide class actions may require allocation or reduction of the amount of statutory damages awarded in each of them" in order to correspond in an aggregate sense with the FDCPA's $500,000 class action damages cap. *Id*. at 16.

Despite the dearth of authority on this issue, the reasoning of the *LaRoque* and *Carr* courts is as persuasive as it is reasonable. There is no logical reason that Rule 23, which is designed to prevent a multiplicity of actions, should be twisted into a vehicle for creating a multiplicity of actions. Nor is there any logical basis to certify classes on a statewide basis only when the claims at issue arise under a single federal statute applicable to all class members nationwide. In fact, in terms of the FDCPA itself, if a defendant's conduct affects a wide number of people, a court should, and arguably must, take that into account under Section 1692k(b)(2) in determining the amount of statutory damages to award a class comprised of just some segment of that population.

Even assuming that a plaintiff may be entitled to pursue a class comprised of fewer than all of those affected by a defendant's course of conduct, then, that does not mean she is entitled to recover the entirety of the FDCPA's class action statutory damages cap on behalf of that class. Statutory damages are not meant to compensate consumers—if they have actual injuries they are entitled under the FDCPA to pursue the recovery of actual damages. 15 U.S.C. § 1692k(a)(1). Instead, statutory damages are meant instead to punish a defendant for its non-compliance with the FDCPA's requirements. *See*, *e.g.*, *Sanders v. Jackson*, 209 F.3d 998, 1003 (7th Cir. 2000) (noting that statutory damages under the FDCPA are not meant to provide "monetary gain for the class members"). It is for this reason that numerous federal courts have approved FDCPA class action settlements even where the resulting individual recovery of statutory damages by class members is small or even nonexistent.[31] As such, even if the court deems a less-than-nationwide class appropriate, the FDCPA's $500,000 class action statutory damages cap should not be available in full to every less-than-nationwide class attacking the same underlying violation, particularly where parallel classes are being pursued on behalf of different consumers based on the same alleged misconduct.

2. ***Is A Creditor Really Beyond The FDCPA's Reach?***

The answer to this question is "no, not always." While creditors are generally not

---

[31] *See, e.g., Garland v. Cohen, Krassner*, No. 08-cv-4626, 2011 WL 6010211, at *7-8 (E.D.N.Y. Nov. 29, 2011) (approving FDCPA class action settlement that provided for the establishment of a $6,650 common fund, to be shared equally by those 2,500 class members who timely submitted claim forms (for a potential recovery of $2.66 per class member)); *Catala v. Resurgent Capital Serv., L.P.*, No. 08-cv-2401, 2010 WL 2524158, at *3-4, 7 (S.D. Cal. June 22, 2010) (approving FDCPA class action settlement that awarded attorneys' fees of $35,000 and a *cy pres* distribution by the defendant of $35,000, in lieu of affording any individual relief to the 195,561 affected class members); *Dalton*, 2010 WL 5341939, at *7 (approving FDCPA class settlement awarding up to $10 to each class member); *Reade-Alvarez v. Eltman, Eltman, & Cooper, P.C.*, No. 04-cv-2195, 2006 WL 3681138, at *7 (E.D.N.Y. Dec. 11, 2006) (approving FDCPA class settlement that called for defendant to make a $15,000 *cy pres* distribution, and afforded no individual relief to the 45,000 affected class members); *Cope v. Duggins*, 203 F. Supp. 2d 650, 653 (E.D. La. 2002) (approving FDCPA class action settlement awarding $11.90 to class members).

subject to the FDCPA,[32] there are exceptions to this rule. For example, the principle is well established that a creditor's subsequent servicer or other assignee—although it stands in the shoes of the creditor—may be considered a "debt collector," and therefore subject to the FDCPA's requirements, in certain circumstances. *See Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir.2003) (The FDCPA "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not."); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A]n assignee of a debt" is a debt collector for purposes of the FDCPA if the debt was "in default at the time it was assigned.).[33]

Similarly, a creditor—whether he is the original creditor or an assignee of that creditor of the debt—may become a "debt collector" if he "uses any name other than his own [in] . . . attempting to collect the debt." *Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 360 (6th Cir. 2012) (citing 15 U.S.C. § 1692a(6)). Commonly described as the "false name exception," this rule has long been construed as covering a narrow set of circumstances for a fairly simple purpose: "to prevent a creditor from dunning its customers under a false name while maintaining the goodwill associated with the creditor's actual name." *Cangelosi v. New Orleans Hurricane Shutter and Window, L.L.C.*, No. 12-cv-427, 2013 WL 395138, at *5 (E.D. La. Jan. 31, 2013).

However, the Second Circuit recently joined the Fifth and Seventh Circuits in giving much broader effect to the false name exception.[34] A creditor can become subject to liability under the FDCPA, the court reasoned, by hiring outside counsel merely to "operat[e] as a 'conduit' for a collection process that the creditor [really] controls, instead of to "mak[e] *bona fide* attempts to collect the [creditor's] debts." *Vincent v. The Money Store*, 736 F.3d 88, 103 (2d. Cir. 2013), *petition for en banc review denied* Mar. 11, 2014. The plaintiff had alleged that The Money Store retained outside counsel simply to mail *en mass* a form breach letter to its defaulting borrowers, not to perform actual collection activities. *Id.* at 93. The district court granted summary judgment to The Money Store, but the Second Circuit reversed after concluding that the process of resolving the law firm's real role in collecting the debts presented "question[s] of fact" that could not be resolved on summary judgment. *Id.* at 103.

The Second Circuit's *Vincent* decision will almost certainly encourage new

[32] *See, e.g.*, *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000); *Aubert v. Am. Gen. Fin., Inc.*, 137 F.3d 976, 978 (7th Cir.1998); *James v. Ford Motor Credit Co.*, 47 F.3d 961, 962 (8th Cir. 1995). But see Section IIB *infra*, discussing the Consumer Financial Protection Bureau's ongoing consideration of whether to engage in rulemaking efforts with respect to the FDPCA, including with regard to the issue of whether creditors (or at least some creditors) should be made subject to the Act's requirements.

[33] *Accord Stratton v. Portfolio Recovery Assoc., LLC,* — F.3d —, 2014 WL 5394517 (6th Cir. Oct. 24, 2014) (reversing dismissal of putative FDCPA class action against debt buyer because, although it was the assignee of the original creditor, its interests in the debts were acquired only after the creditor had already charged off the loans); *Fenello v. Bank of Am., NA,* — F.3d —, 2014 WL 3906468, at *2 (11th Cir. Aug. 12, 2014) (a mortgage servicer, who acquires servicing rights to a loan prior to default, "cannot transform itself into a 'debt collector' within the meaning of the FDCPA simply by noting in a letter that it may be considered one under the Act."); *Rother v. CitiMortgage Inc.*, 756 F.3d 178 (2d Cir. 2014) (affirming dismissal of FDCPA claims because complaint failed to allege that the defendant had acquired servicing rights to plaintiff's loan after she went into default, and thus failed to plausibly suggest that the defendant was a "debt collector").

[34] *See, e.g.*, *Nielsen v. Dickerson*, 307 F3d 623 (7th Cir. 2002); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997).

litigation, or at least an expansion of the list of defendants named in such cases. Already, a body of jurisprudence had developed over the last decade finding that attorneys may be considered "debt collectors" under the FDCPA,[35] and that the act can regulate many aspects of their collection-related (and even litigation-related) activities.[36] Now the FDCPA is evolving in a new direction: the absence of meaningful activity by a creditor's outside counsel may expose *the creditor itself* to liability.[37] Making matters worse, these courts believe that resolving the issue of a creditor's susceptibility to such liability is an issue not appropriate for resolution at the pleadings stage,[38] and possibly not even at the summary judgment stage. *See*, *e.g.*, *Vincent,* 736 F.3d at 103; *Pollard v. Law Office of Mandy L. Spaulding*, 967 F. Supp. 2d 470, 478-79 (D. Mass. 2013), *aff'd. on other grounds by* 766 F.3d 98 (1st Cir. 2014), *and petition for en banc review denied* Oct. 15, 2014. In fact, at least one court has suggested that a creditor may become subject to liability under the FDCPA for misusing the name of other third parties, such as a short-sale agent, if the third party was retained to do little more than perform a "mass-mailing" on the creditor's behalf. *Haber*, 2014 WL 2921659, at *11-14 (denying creditor's motion to dismiss putative class action because of factual disputes surrounding the question of whether it improperly used agent's name in the process of collecting consumers' mortgage debt). The mischief such holdings may produce is not hard to imagine: delayed dispositive proceedings coupled with broad discovery aimed at creditors' contractual relationships with outside counsel and vendors, including communications associated therewith (which will undoubtedly spark distracting and costly disputes over the validity of objections based on confidentiality and trade secret concerns, as well as the attorney-client privilege and work product doctrine).

---

[35] *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

[36] *See, e.g.*, *Stratton v. Portfolio Recovery Assoc., LLC,* — F.3d —, 2014 WL 5394517, at *6 (6th Cir. Oct. 24, 2014) ("[T]he FDCPA applies to the litigating activities of lawyers, and imposes some constraints on a lawyer's advocacy."); *Simon v. FIA Card Serv., N.A.*, 732 F.3d 259 (3d Cir. 2013) (failure to comply with subpoena rules); *Hemmingsen v. Messerli & Kramer, P.A.*, 674 F.3d 814 (8th Cir. 2012) (false statements in summary judgment pleadings); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011) (s "service of false requests for admission violate[s] the FDCPA"); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007) (misstatements contained in interrogatories). *Accord Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1303 (11th Cir. 2014) (a "letter is a communication in connection with the collection of a debt [for purposes of the FDCPA if] it is an attempt to collect a debt;" nevertheless, affirming dismissal of putative FDCPA class action against law firm because the letter was not misleading in nature).

[37] At the same time courts are expanding the notion of liability based on counsel's activity (or lack thereof), bills have been introduced in the House and Senate seeking to amend the FDCPA's definition of "debt collector" to exclude attorneys and law firms while merely (1) "serving, filing, or conveying formal legal pleadings, discovery requests, or other documents pursuant to the applicable rules of civil procedure," or (2) "communicating in, or at the direction of, a court of law or in depositions or settlement conferences, in connection with a pending legal action to collect a debt on behalf of a client." Fair Debt Collection Practices Technical Clarification Act of 2014, S. 2328, 113th Cong. § 2 (2014), available at http://thomas.loc.gov/cgi-bin/query/z?c113:S.2328.IS: (last visited Oct. 27, 2014); *accord* H.R. 2892, 113th Cong. § 2 (2013), available at http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.2892.IH: (last visited Oct. 27, 2014). H.R. 2892 was introduced by Representative Ed Perlmutter (D-Colo.) on July 31, 2013, and the Senate companion bill was introduced by Senator Pat Toomey (R-Pa.) on May 13, 2014. Both bills have garnered bi-partisan co-sponsorship.

[38] *See, e.g.*, *Haber v. Bank of Am., N.A.*, No. 14-cv-169, 2014 WL 2921659, at *13 (E.D. Pa. June 27, 2014).

3. ***Is A Debt Always A Debt?***

Clearly, "t]he existence of a 'debt' is a threshold requirement" under the FDCPA. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998); *see also Zimmerman v. HBO Affiliate Grp*., 834 F.2d 1163, 1167 (3d Cir. 1987). And the FDCPA even defines the term "debt," namely as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction . . . primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). So far so good: the FDCPA does not apply to debts for commercial purposes[39] and, within the consumer context, the debt must arise from a "transaction"—in other words, from a "consensual or contractual arrangement[]"—whose primary purpose is personal, family, or household in nature. *Gross v. Maitlin*, 519 Fed. App'x 749, 751 (3d Cir. 2013) (quoting *Hawthorne*, 140 F. 3d at 1371); *accord Turner v. Cook*, 362 F.3d 1219, 1227 (9th Cir. 2004) (noting that the FDCPA "is limited in its reach 'to those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services.'") (quoting *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir. 1997)).

Unfortunately, application of these principles has proven difficult. One commentator has devoted 49 pages to trying to answer the question of what types of debts are covered by the FDPCA. Wayne Hill, Annotation, *What constitutes "debt" for purposes of Fair Debt Collection Practices Act (15 U.S.C.A. § 1692a(5))*, 159 A.L.R. FED. 121 (2000). And a recent decision from the Second Circuit evidences not only the difficulty associated with determining whether a debt is a "FDCPA debt," but also how different courts can reach seemingly conflicting answers on whether a particular obligation meets the FDCPA's definition of a "debt."

In *Boyd v. J.E. Robert Co., Inc.*, the Second Circuit affirmed the dismissal of a putative class action alleging that the defendants had violated the FDCPA by seeking unauthorized attorneys' fee and cost awards in connection with actions to foreclose liens "arising out of unpaid municipal property taxes and water and sewer charges." 765 F.3d 123, 124 (2nd Cir. 2014). Because the Second Circuit found that the liens arose out of sewer charges which it did not believe met the FDCPA's definition of a debt, the court concluded that the defendants' collection activities were not subject to the FDCPA's restrictions. *Id.* at 126-27. However, the Third Circuit has held that because "a homeowner's consumption of municipal water/sewer services g[ives] rise to an 'obligation to pay money,'" bills for such services constitute "a 'debt' . . . within the meaning of the FDCPA." *Piper v. Portnoff Law Assoc., Ltd.,* 396 F.3d 227, 232-33 (3d. Cir. 2005). The Second Circuit's *Boyd* opinion is also difficult to reconcile with an earlier opinion by the Southern District of New York. *Polanco v. NCO Portfolio Mgmt., Inc.*, 930 F. Supp. 2d 547 (S.D.N.Y. 2013) (concluding that FDCPA regulated defendant's collection-related conduct because sewer service obligations are debts within the meaning of the act).

Arguably, these decisions can be reconciled by evaluating the manner in which the charges arose: in *Boyd*, the charges arose automatically, but in *Piper* and *Polanco* it appears that the consumers had to voluntarily sign up for municipal sewer service. In other words, the charges in *Piper* and *Polanco* arose from consensual arrangements, whereas the charges in *Boyd* did not. Nevertheless, the point is still evident: the

[39] *See, e.g., Heintz*, 514 U.S.at 293 (the FDCPA "limits 'debt' to consumer debt").

applicability of the FDCPA in any particular case is frequently uncertain. . In any given fact situation, research may reveal that courts have reached conflicting answers or interpretations of the FDCPA's definitions and requirements. The existence of such discrepancies not only undermines a company's compliance efforts, but arguably also the very purpose of the FDCPA's statutory remedial scheme to provide uniformity and consistency in the law as it is applied to both consumers and debt collectors alike. 15 U.S.C. § 1692(e). Companies should not be put to a Hobson's Choice in trying to develop their compliance programs, nor should their counsel in developing a defense strategy to FDCPA class actions. *See, e.g.*, *Castillo v. Carter*, No. 99-cv-1757, 2001 WL 238121, at *4 n.1 (S.D. Ind. Feb. 28, 2001) ("The court doubts that Congress meant to impose liability on debt collectors who do not correctly anticipate the ultimate resolution of … issues that have divided the federal courts in ways that could trigger strict liability in either direction.").

4. ***When Is A Communication Just A Communication?***

Is every letter and notice a debt collector sends to a consumer subject to the FDCPA's requirements? The answer of course is "no," but the process of identifying which communications do not require FDCPA compliance is not always an easy task.

In affirming the trial court's finding that a debt collector's dissemination of a HUD-required occupied-conveyance notice was not a communication subject to the FDCPA's requirements, the Sixth Circuit summed up this area of law as follows:

> The text of [the FDCPA] makes clear that, to be actionable, a communication need not itself be a collection attempt; it need only be connected with one. But it is just as clear that the statute does not apply to every communication between a debt collector and a debtor. For a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor.

Estep v. Manley Deas Kochalski, LLC 552 Fed. App'x 502, 505 (6th Cir. 2014) (quotations omitted). Applying similar principles, the Fourth Circuit recently concluded that a privacy notice sent by the defendants also did not constitute a "prohibited communication under the FDCPA," even though "the only relationship between [the plaintiff and the defendants] was that of a debtor and debt collector"—according to the court, that "relationship alone is not sufficient to plausibly assert that a communication devoid of any reference to [the plaintiff's] outstanding debt is made in connection with an attempt to collect the debt." *Olson v. Midland Funding, LLC*, — Fed. App'x —, 2014 WL 3411147, at *2 (4th Cir. July 15, 2014).

But even this standard is subject to exception and, in some cases, disagreement in application. *Compare McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 246 (3d Cir. 2014) (law firm's letter to consumer was subject to FDCPA regulation: even though the letter made no demand for payment, "[i]t is reasonable to infer that an identity that identifies itself as a debt collector, lays out the amount of the debt, and explains how to obtain current payoff quotes has engaged in a communication related to collecting a debt."), *petition for writ of certiorari filed* Sept. 24, 2014, *with Bailey v. Sec. Nat'l Serv. Co.*, 154 F.3d 384, 388 (7th Cir. 1998) (mortgage servicer's notice that it had acquired loan servicing rights was not a communication subject to the FDCPA: "the letter … demands nothing, and doesn't even imply that anything owed … is overdue. At most the letter contains a warning that a failure to pay the monthly installments [may] … result[] in acceleration. A warning that something bad might happen if payment is not kept current is not a dun, nor does it seek to collect any debt, but rather the opposite because it tries to prevent the circumstance wherein payments are missed and a real dun must be mailed."). Take, for example, the transfer-of-servicing-rights notice Section 2605(b)(1) of the Real Estate Settlement Procedures Act requires be sent to consumers. The vast majority of courts have held that such notices are not communications made in connection with the collection of a debt, nor do they trigger any requirement under the FDCPA that the notice be accompanied or follow up with by a Section 1692g debt validation notice.[40] However, at least two courts have reached the opposite conclusion.[41]

Courts are also divided on whether a hang-up or a non-substantive "please call X at number Y" voice message left by a debt collector on a borrower's voice mail or answering machine is a communication made in connection with the collection of a debt triggering the "mini-Miranda" requirements of the FDCPA. Many debt collectors and servicers hang up or leave simple "call us back" messages in order to avoid disclosing the fact of past due debt to third parties who may overhear the voice message, which could itself be an FDCPA violation. See 15 U.S.C. §1692c(b), a/k/a Section 805(b). *See also Thompson v. Diversified Adjustment Service, Inc.*, No. H–12–922, 2013 WL 3973976 (S.D. Tex. July 31, 2013).Yet, a number of courts have held that the absence of an FDCPA "mini-Miranda" warning in such a message or hang-up is also a statutory violation under 15 USC §1692e (11), putting debt collectors in a "Catch 22."

The path out of this dilemma that some courts are beginning to follow is one that views the hang-up or voice message not in isolation, but in context with the overall history of the debt collector's communications with the borrower. Once verbatim FDCPA mini-Miranda warnings have been made in earlier initial communications with a borrower, with respect to subsequent communications the "FDCPA does not require debt collectors to quote the statutory language verbatim in order to be in compliance. Therefore, [a debt collector's] failure to specifically state that the message[] left on [plaintff's] voicemail w[as] related to debt collection does not necessarily mean the FDCPA was violated." *Beeders v. Gulf Coast Collection Bureau, Inc.*, No. 09-cv00458, 2010 WL 2696404, at * 4 (M.D. Fla. July 6, 2010), aff'd., 432 Fed. App'x 918 (11th Cir. 2011). Instead, for a violation to have occurred under this view, the Court must find that by identifying itself only by name instead of as a debt collector, the borrower must have

[40] *See, e.g.*, *Clark v. Green Tree Serv., LLC*, — F. Supp. 3d —, 2014 WL 4783634 (D. Colo. Sept. 24, 2014); *Cigler v. Ocwen Loan Serv., LLC*, No. 13-cv-00354, 2014 WL 1908435 (N.D. Ind. May 9, 2014), *order vacated by joint request of the parties to facilitate individual settlement* July 9, 2014; *Gregory v. Nationstar Mortg., LLC*, No. 13-cv-6952, 2014 WL 1875167 (D.N.J. May 9, 2014); *Hart v. FCI Lender Serv., Inc.*, No. 13-cv-6076, 2014 WL 198337 (W.D.N.Y. Jan. 15, 2014), *appeal filed* July 1, 2014; *Kelly v. Nationstar Mtg., LLC*, No. 13-cv-311, 2013 WL 5874704 (E.D. Va. Oct. 31, 2013); *Parker v. Midland Credit Mgmt., Inc*., 874 F. Supp. 2d 1353 (M.D. Fla. 2012); *South v. Midwestern Audit Serv., Inc*., No. 09-cv-14740, 2010 WL 5088765 (E.D. Mich. Aug. 12, 2010), *report & recommendation adopted by* 2010 WL 5089862 (E.D. Mich. Dec. 8, 2010); *Thompson v. BAC Home Loans Serv., LP*, No. 09-cv-311, 2010 WL 1286747 (N.D. Ind. Mar. 26, 2010).

[41] *See, e.g.*, *Tocco v. Real Time Resolutions, Inc*., No. 14-cv-810, 2014 WL 3964948 (S.D.N.Y. Aug. 13, 2014), *motion to certify issue for interlocutory appeal granted* Sept. 25, 2014; *Grubb v. Green Tree Serv., LLC*, No. 13-cv-7421, 2014 WL 3696126 (D.N.J. July 24, 2014).

been left not have been reasonably aware that the call was related to collection efforts associated with her mortgage default. Id. at *5. If even the least sophisticated consumer borrower under the same contextual circumstances would know the nature and identity of the caller in the voice mail message[], " then no violation should be found. *Reed v. Global Acceptance Credit Co.*, No. 08-cv-1826, 2008 WL 3330165, at *4 (N.D. Cal. Aug. 12, 2008); *accord Davis v. R&R Prof'l Recovery, Inc.*, No. 07-cv-2772, 2009 WL 400627, at *4 (D. Md. Feb. 17, 2009) (dismissing § 1692e(11) claim based on defendant's failure to disclose it was acting as a debt collector because "the nature of the conversations" between the parties "necessarily advised that [the plaintiff] was speaking with an agent of a debt collector"); *Biggs v. Credit Collections, Inc.*, No. 07-cv-0053, 2007 WL 4034997, at *3 (W.D. Okla. Nov. 15, 2007); *Beard v. Sentry Credit, Inc.,* No. 10-cv 2218, 2012 WL 3778880, at *7 (E.D. Cal. Aug. 31, 2012) (rejecting plaintiff's § 1692e claim because she "knew precisely with whom she was speaking, and at no time requested the speaker to identify him or herself."); *Paul v. Metro Area Collections, Inc.,* No. 10-cv-765, 2011 WL 2270515, at *7 (D. Or. May 4, 2011) (previous disclosures by defendant to plaintiff that it was a debt collector obviated the need for the defendant to repeat that disclosure in a voice mail message left later for the plaintiff), report & recommendation adopted by 2011 WL 2261301 (D. Or. June 8, 2011).

In fact, the Eastern District of New York recently addressed this very sort of claim, that a non-substantive message is an FDCPA violation, characterizing it as "not merely meritless, but . . . frivolous" because "[t]here was no requirement that [the] defendant repeatedly add after its name what plaintiff surely knew, that it was a debt collector." *Majerowitz v. Stephen Einstein & Associates, P.C.,* No. 12-cv-4592, 2013 WL 4432240, at *3 (E.D.N.Y. Aug. 15, 2013). The plaintiff in Majerowitz had earlier been given repeated disclosures that the defendant was a debt collector, and thus knew that the caller who left a message on her answering machine was a debt collector. The court was unwilling to consider the plaintiff's claim in a vacuum, stripped of the context and circumstances surrounding both the message and the plaintiff's prior communications with the defendant. As the *Majerowtiz* court explained, "[t]o find a violation of the statute here would be protecting a known defaulting debtor against a compliant debt collector by a bizarre and idiosyncratic construction of" Section 1692e(11). Id. at *4. *Cf. Shuler v. Ingram & Assoc.*, 441 Fed. App'x 712, 717-19 (11th Cir. 2011) (affirming summary judgment in favor of debt collector because plaintiffs could not establish that debt collector's communications were "false, deceptive or misleading" under Section 1692e because they had been provided previous disclosures by the defendant explaining that it was a debt collector and because their own allegations constituted judicial admissions that they were aware the defendant was a debt collector retained by their creditor to collect on their defaulted accounts). In other words, Section 1692e(11) should not be deemed violated by a defendant's failure to expressly use the phrase "debt collector" in a voice mail message—to the contrary, "[a] debt collector satisfies subsection 11's notice requirement as long as it is clear from the subsequent [communication] that the [caller] is a debt collector." Id. at *3 (quoting Forti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 668 (S.D.N.Y. 2006)).

Indeed, undermining the contrary view (ie, the view that a voice message without the min-Miranda warning is a violation), is a consent decree that the Federal Trade Commission ("FTC")—one of the two federal agencies charged with oversight and enforcement of the FDCPA—recently demanded be implemented by one of the world's largest debt collectors. In 2013, the FTC entered into a consent decree with Expert Global Solutions, Inc. and its subsidiaries, under which they agreed to pay the government the largest civil penalty ($3.2 million) ever assessed against a debt collector. The consent decree also required Expert Global Solutions to implement a number of prophylactic measures dictated by the FTC, including measures governing FDCPA compliance over the content of voice mail messages left for consumers. Specifically, the decree expressly barred Expert Global Solutions from "[l]eaving recorded messages" that identify it as "a debt collector, [as] attempting to collect a debt, or that the debtor owes a debt." *U.S. v. Expert Global Solutions, Inc.*, No. 13-cv-2611, 2013 WL 5870336, at *6 (N.D. Tex. July 16, 2013). *See also,* Michelle Singletary, FTC's $3.2 Million Penalty Against Major Debt Collector May Curb Abuses, WASHINGTON POST (July 10, 2013), available at http://www.washingtonpost.com/business/ftcs-32-million-penaltyagainst-major-debt-collector-may-curb-abuses/2013/07/09/e58f997e-e8d2-11e2-aa9f-c03a72e2d342_story.html (last visited Nov. 24, 2014); Jennifer Liberto, FTC Fines Debt Collector $3.2 Million For Harassment, CNN (Nov. 9, 2013), available at http://money.cnn.com/2013/07/09/pf/ftc-debt-collector-fine/index.html (last visited Nov. 24, 2014). 5870336, at *6 (N.D. Tex. July 16, 2013). The FTC would hardly have done this if it agreed that those very disclosures are actually required to be included in a voice mail message left by a debt collector.

At bottom, there is nothing "false, deceptive, or misleading" about a mere please call x back" voice mail message, even if it is a deemed a "communication.". 15 U.S.C. § 1692e(11). If a borrower merely identifies itself by its actual name, and asked the borrower to call one of its representatives back at her convenience, particularly where the borrower is already clearly aware who the caller is and why it is calling, many courts are increasingly finding that the absence of a mini-Miranda warning in the message is not a violation. Other courts are taking a more concise approach, saying that a non-substantive voice mail is simply not a communication in connection with the collection of a debt. See, e.g, *Zortman v. J.C. Christensen & Associates, Inc.*, No. 10-3086 (JNE/FLN) (D. Minn. May 2, 2012). See also *Abraham Zweigenhaft v. Receivables Performance Management, LLC,* No 14-CV-01074, 2014 WL ------- (E.D.N.Y. Nov. 13, 2014). Remember, though, that the courts are struggling with this issue, and the reported cases do not sing with one voice. See, e.g., *Foti v. NCO Financial Systems, Inc.*, 424 F.Supp.2d 643 (S.D.N.Y. 2006). [42]

5. ***Can You Demand That Consumers Make Disputes Only In Writing?***

The answer to this question is the subject of yet another growing circuit split—whether you can legitimately demand that a consumer dispute her debt only in writing apparently depends on where she lives.

[42] One case often cited for the view that the absence of a mini-Miranda warning in a voice message left by a debt collector is a violation is *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350 (11th Cir. 2009). But that case did not actually address the issue of whether identifying oneself by name only in a voice mail message may constitute a meaningful disclosure of the caller's identity as a debt collector based on the full content and historical context of the message. 584 F.3d at 1352. While the issue was presented, the *Edwards* panel refused to address it because it held that argument had been waived and abandoned by the debt collector by failing to properly raise it in earlier briefing. *Id.*

The FDCPA requires a debt collector to provide a consumer with a debt validation notice "[w]ithin five days after the initial communication with [the] consumer." 15 U.S.C. § 1692g(a). That notice must be in writing and contain, among other things, (a) "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector," and (b) "a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will" provide the consumer with a verification of the debt. *Id.* at § 1692g(a)(3)-(4).

Courts have split on whether these provisions require a consumer to dispute her debt only in writing. This year, the Fourth Circuit joined with the Second and Ninth Circuits in holding that a debt validation notice cannot attempt to restrict the means by which consumers can dispute their debts, and therefore oral disputes are permitted. *Clark v. Absolute Collection Servs., Inc.*, 741 F.3d 487 (4th Cir. 2014); *accord Hooks v. Forman, Holt, Eliades & Ravin*, LLC, 717 F.3d 282 (2d Cir. 2013); *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078 (9th Cir. 2005).[43] *Cf. Brady v. The Credit Recovery Co., Inc.*, 160 F.3d 64 (1st Cir. 1998) ("We therefore conclude that § 1692e(8) does not impose a writing requirement on consumers who wish to dispute a debt."). The Third Circuit, on the other hand, has held that Section 1692g(a)(2) must be read to include a writing requirement. *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991). While the Supreme Court has recognized this split of authority, it so far has refused to resolve it. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 580 n.3 (2010).

6. ***Good Grief, Even Your Office Supplies Can Land You In Hot Water!***

As if the FDCPA's provisions governing the content of debt collection-related communications were not problematic enough, even the envelopes a debt collector uses to send out those communications can expose it to liability. Buried within the FDCPA's terms is a provision prohibiting debt collectors from "[u]sing any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram." 15 U.S.C. § 1692f(8). While at least two circuits have held that this prohibition implicitly incorporates a "benign language exception,"[44] the Third Circuit recently called into question the validity of that exception. *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014). The case proves the old adage that bad facts sometimes can lead to bad law. In *Douglass*, the debt collector used envelopes with clear plastic windows. Unfortunately, the windows apparently didn't line up well with the enclosures, rendering consumers' account numbers visible to anyone examining the envelopes. 765 F.3d at 300. The plaintiff initiated a putative class action alleging that the defendant's use of such envelopes violated Section 1692f(8). The trial court granted summary judgment to the defendant, finding that the disclosures caused by the envelopes were benign in nature. *Id.* at 301.

[43] The defendant in *Clark* sought an extension of time from the Supreme Court in which to file a petition for writ of certiorari, which the Court granted on April 22, 2014. However, the defendant apparently elected to not file a petition. Its reasons for doing so are unclear.

[44] *See, e.g., Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488 (5th Cir. 2004); *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316 (8th Cir. 2004).

The Third Circuit reversed, concluding that the disclosure of a consumer's account number was neither benign or "meaningless—it is a piece of information capable of identifying [the consumer] as a debtor." *Id.* at 306. In reaching its holding, the Third Circuit did not reject the "benign language exception," but it did call its validity into question on statutory construction grounds. *Id.* at 303. The viability of the exception is now likely to become the subject to future litigation.

B. REGULATORY TRENDS AND DEVELOPMENTS.

Class litigation rarely exists in a vacuum, particularly so in the statutory context. The FDCPA is no exception. At the same time the FDCPA continues to evolve through the judicial process, it is also evolving through administrative action and enforcement.

Since its creation, the Consumer Financial Protection Bureau ("CFPB") has exercised its supervisory authority to impose new rules on companies with respect to consumer reporting and debt collection, student loan servicing and international money transfers. Arguably, the CFPB took an even bigger step in November 2013, when it issued an advance notice of proposed rulemaking, inviting public comment about "debt collection practices." Advance Notice Of Proposed Rulemaking: Debt Collection (Regulation F), 78 Fed. Reg. 67848 (Nov. 12, 2013).

Therein, the CFPB took the position that it "is the first Federal agency to possess the authority to issue substantive rules" governing debt collection (including with respect to the FDCPA), and suggested that the agency "may . . . us[e] its authority under the Dodd-Frank Act to issue regulations concerning unfair, deceptive, and abusive acts or practices and to establish disclosures to assist consumers in understanding the costs, benefits, and risks associated with consumer financial products and services." 78 Fed. Reg. at 67848. The CFPB subsequently extended the public comment period,[45] and this summer issued another notice and request for public comment with respect to the agency's proposed plan of conducting a survey to gather information on the public's perception and experience with debt collection. Notice And Request For Comment, 79 Fed. Reg. 42764 (July 23, 2014); *see also* Notice And Request For Comment, 79 Fed. Reg. 13043 (Mar. 7, 2014).

While not drafted in the form of a proposed rule, the CFPB's advance notice does give strong indication as to direction it may be heading: rulemaking efforts aimed at (1) the debt collection-related conduct of originating creditors and lenders; (2) the debt connection-related litigation conduct of debt collectors (including attorneys), and (3) efforts by creditors and debt collectors to recover time-barred debts. *Accord* Richard B. Benenson, *Next Possible CFPB Targets: Foreclosures and Flaw Firms*, LAW360.COM, Sept. 15, 2014, available at http://www.law360.com/articles/577192/next-possible-cfpb-targets-foreclosures-and-law-firms (last visited Oct. 31, 2014). However, the CFPB's rather unorthodox approach to the rulemaking process, coupled with the protracted nature of its efforts to gather public comment, may be due in part to unresolved questions concerning the extent of the agency's rulemaking authority. Nevertheless, the CFPB's potential rulemaking efforts are highly unlikely to end at these areas of market practice alone. In one of the agency's most recent reports, it identified the following as additional areas of concern: the imposition of questionable convenience

[45] Advance Notice Of Proposed Rulemaking: Debt Collection (Regulation F); Extension Of Comment Period, 79 Fed. Reg. 9 (Jan. 14, 2014).

fees on consumers, use of "false" litigation threats by companies in the collection process, and the sufficiency of company's internal controls to prevent prohibited disclosures and to properly disclose information regarding loans sold to third-parties. *Supervisory Highlights,* Consumer Fin. Serv. Bureau at 7-8 (Fall 2014), available at http://files.consumerfinance.gov/f-/201410_cfpb_supervisory-highlights_fall-2014.pdf (last visited Oct. 31, 2014).

Of course, the CFPB is not limiting itself to the rulemaking process. The agency recently filed a civil action against Frederick J. Hanna & Associates, claiming the law firm violated the FDCPA, as well as the Consumer Financial Protection Act, by using "robo-signed" affidavits in "more than 350,000 collection suits [in Georgia] from 2009 through 2013." Complaint at ¶ 13, *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., et al.*, No. 14-cv-02211 (N.D. Ga. filed July 14, 2014) (CM/ECF No. 1). The CFPB also alleged that because the firm employed "only between 8 and 16 attorneys" during the same time period, the collection actions it filed falsely suggested to consumers that there was "meaningful attorney involvement" in the litigation process. *Id.* at ¶¶ 14, 28. The lawsuit seeks not only to permanently bar the firm and its lawyers from committing future violations of the FDCPA, but also seeks to have the defendants "pay restitution to consumers harmed by their unlawful conduct" and to otherwise "disgorge[any] ill-gotten revenues." *Id.* at 13 (Prayer for Relief). A motion to dismiss the action is currently pending.

Of course, the CFPB has filed a variety of other civil enforcement actions this year as well, including to enforce such things as provisions of the Truth in Savings Act, the agency's own mortgage servicing rules, and to address allegations of improper and unfair market conduct by "covered entities" subject to the agency's regulatory authority. *See, e.g.*, *Supervisory Highlights,* Consumer Fin. Serv. Bureau at 19-22 (Fall 2014). At the same time, the Federal Trade Commission ("FTC") has increased its own regulatory enforcement efforts by initiating more civil FDCPA enforcement actions during 2013 than in any previous year. *See, e.g.*, *Federal Trade Commission Enforcement of the Fair Debt Collection Practices Act: Report To the Consumer Financial Protection Bureau*, Federal Trade Commission, Feb. 21, 2014, available at http://www.ftc.gov/system/files/documents/reports/federal-trade-commission-enforcement-fair-debt-collection-practices-act-report-consumer-financial/140305debtcollection-letter.pdf (last visited Oct. 31, 2014).

Continued and constantly evolving rulemaking efforts certainly complicate current company efforts to comply with the FDCPA. Increased regulatory enforcement—whether by the CFPB or the FTC—may well exacerbate the risks of inadvertent or unknowing non-compliance rather than minimize it. Andsuch regulatory actions also increase the risk of collateral class action litigation, both by consumers as well as by shareholders and other investors. Often, class counsel are not only monitoring agency actions, but communicating with agency staff, ever on the "look out" for the opportunity to initiate actions dovetailing the enforcement actions of the government. As such, regulatory investigations should be viewed as potential indicators of future class action filings. *See, e.g.*, Kenneth Ross, *The Effect of Product Safety Regulatory Compliance*, IN-HOUSE DEFENSE QUARTERLY. Winter 2014, at 49 (recommending the "coordination of litigation management and regulatory compliance" by companies to ensure coordination "over strategy in both areas.").

III. TELEPHONE CONSUMER PROTECTION ACT OVERVIEW AND DEVELOPMENTS

The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 in an attempt to protect consumers from unwanted telemarketing calls. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1831 (2012). The TCPA places restrictions on certain telemarketing calls, text messages, and faxes. *See* 47 U.S.C.A. § 227; 47 C.F.R. § 64.1200. The TCPA also provides consumers with a private right of action under which a consumer may recover between $500 and $1,500 for every violation (meaning every improper call, text or fax). 47 U.S.C.A. § 227(b)(3).

Designed primarily to prevent technology-savvy telemarketers from making excessive or unwanted calls, the statute can create enormous liability with minimal showing of proof against anyone who uses an autodialer to make marketing or collection calls. Originally envisioned as a statute that could be enforced through small claims actions, the TCPA has become a favorite weapon of the plaintiff's bar. Filings of TCPA class actions have in recent years risen by more than 50% year over year. Stephanie Levy, *On the Rise: Dept Collection Complaints, TCPA and FRCA Lawsuits*, *available at* http://www.insidearm.com/daily/on-the-rise-debt-collection-complaints-tcpa-and-fcra-lawsuits/; FDCPA Lawsuits Decline, *While FRCA and TCPA Filings Increase*, *available at* http://www.acainternational.org/news-fdcpa-lawsuits-decline-while-fcra-and-tcpa-filings-increase-31303.aspx. The statute in essence imposes strict liability for violations, and contains no cap on damages. With advanced dialing technologies, millions of calls/texts/faxes can be transmitted in minutes; if those communications violate the TCPA, the sender can face seven- and eight-figure liability (or more). In this technological climate, the statutory regime creates unprecedented financial incentives for plaintiffs and their counsel, and extraordinary pressure on class action defendants to settle.

A. February 15, 2012, FCC Revisions

On February 15, 2012, the Federal Communications Commission ("FCC"), charged with implementing the TCPA, adopted new regulations. The rules implementing the TCPA were revised (1) to "require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and residential lines;" (2) to "eliminate the established business relationship exemption for such calls to residential lines;" (3) to adopt rules that allow consumers to opt out of future robocalls during a robocall; (4) to "limit permissible abandoned calls on a per-calling campaign basis;" and, (5) to exempt prerecorded calls to residential lines made by health care related entities, governed by the Health Insurance Portability and Accountability Act of 1996. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. at 1831.

B. What constitutes consent after October 16, 2013?

The new FCC rules regarding consent went into effect on October 16, 2013, working a substantial change from the earlier rules. Now, prior express *written* consent is required for all telemarketing calls using an automatic telephone dialing system or prerecorded voice to any wireless number and for all telephone calls using an artificial or prerecorded voice to any residential line, as opposed simply to prior express consent.

See 47 C.F.R. § 64.1200(a)(2) (regulations provide that no person or entity may "[i]nitiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice to" "any telephone number assigned to a cellular telephone service," "other than a call made with the prior express written consent of the called party."); 64 C.F.R. § 64.1200(3) (regulations provide that no person or entity may "initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party," subject to certain express exceptions.).

The FCC has provided what constitutes adequate "prior express written consent." The prior written consent must be signed. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. at 1843. The "signature" may be in electronic or digital forms recognized as valid under state and federal law, such as the federal E-Sign Act. 47 C.F.R. § 64.1200(f)(8)(ii) Additionally, the consent must show that the consumer "received clear and conspicuous disclosure of the consequences of providing the requested consent" and "having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. at 1843. Finally, the written consent must not be required as a condition of purchasing any good or service. *Id.*

Requiring written consent worked a fairly substantial change from the previous rules. Previously, consent could be oral or written. In fact, under the previous rules, consent could be obtained as easily as when the party gave its phone number to the caller. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 77 FCC Rcd 8752, 8769 (1992) ("persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2008 FCC Ruling), 23 FCC Rcd. 559, 564 ("the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to e contacted at that number regarding the debt."). The previous rules were much more market friendly. The new rules require much more of the caller.

Notably, the new rules concerning consent do not affect non-telemarketing informational calls. The FCC exempted informational calls from the new more onerous requirements in order not to impede informational calls. The types of informational calls the FCC sought not to impede include, for example, calls concerning a "bank account balance, credit card fraud alert, package delivery, and school closing information." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. at 1838. Similarly, debt collection calls do not require prior express written consent, so long as they do not contain telemarketing messages. *Id.* at 1841. Oral consent remains sufficient for non-telemarketing informational pre-recorded or autodialed calls made to wireless consumers; no prior consent is required when non-telemarketing informational calls are made to residential consumers. *Id.* Indeed, the Eleventh Circuit recently confirmed that prior express consent will be found where the consumer provides his phone number. *Mais v. Gulf Coast Collection Bureau, Inc.*, No. 13-14008, 2014 WL 4802457, at *12 (11th Cir. Sept. 29, 2014).

In the non-telemarketing context, the FCC has recently provided that consent need not be provided directly to the caller. *In re GroupMe. Inc/Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, CG Docket No. 02-278, FCC 14-33, at ¶ 9, 11-12. (March 27, 2014). Instead, in certain circumstances, consent may be provided through an intermediary. *Id.* For instance, in the *GroupMe* opinion, the FCC held that where a consumer has agreed to participate in a GroupMe group, agreed to receive associated calls and texts, and has provided his wireless number to the group organizer for the purpose of GroupMe, the TCPA's prior express consent requirement has been satisfied. *Id.* at ¶ 12. In other words, it was permissible for GroupMe to receive the prior express consent from the GroupMe organizer. The Eleventh Circuit recently applied that reasoning in *Mais*, holding that the caller seeking to collect money owed to the hospital had sufficient prior express consent where the consumer's wife provided his cell phone number to the hospital. *Mais v. Gulf Coast Collection Bureau, Inc.*, No. 13-14008, 2014 WL 4802457, at *12 (11th Cir. Sept. 29, 2014). According to the court, it was necessary to have provided the cell phone number directly to the caller.[46] The relevant question turns on "whether the called party granted permission or authorization, not on whether the creditor received the number directly." *Id.* at 11.

Consent for some purposes may not suffice as consent for all purposes, however, as a recent decision by the Second Circuit shows. In *Nigro v. Mercantile Adjustment Bureau, LLC*, 2014 WL 5286002 (2d Cir. Oct. 16, 2014), plaintiff provided his cell phone number to the power company in attempted to get service disconnected to his mother-in-law's home following her death. An unpaid balance remained on the mother-in-law's account, which the power company turned over to a collection agency, resulting in 72 autodialed calls to plaintiff's cell phone. Relying principally on a 2008 FCC ruling, the court held that plaintiff's prior express consent to be called was not present, because plaintiff did not provide his cell phone number during the transaction that resulted in the debt owed.

C. Reassigned numbers – a huge (and growing) land mine

An open question before the FCC currently is whether "calls to wireless numbers for which valid prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another." *Jordan v. Nationstar Mortgage LLC*, No. 14-cv-00787, 2014 WL 5359000, at *10 (N.D. Cal. Oct. 20, 2014); *Petition for Expedited Declaratory Ruling of United Healthcare Servs., Inc.*, CG Docket No. 02-278 (filed Jan. 16, 2014). In other words, the issue is what happens when a wireless telephone number is reassigned: does consent go with the number?

The Seventh and Eleventh Circuits, as well as a number of district courts, have ruled that "called party" does not mean the "intended recipient" of the call from the caller's perspective, but instead means current subscriber under § 227(b)(1)(A). *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 640 (7th Cir. 2012); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1251 (11th Cir. 2014); *Breslow v. Wells Fargo Bank*,

[46] The Eleventh Circuit did not mean to say that a company can provide the consumer's phone number to a debt collector to make unauthorized calls on behalf of other creditors. *Mais*, 2014 WL 4802457, at *12.

755 F.3d 1265 (11th Cir. 2014); *Sterling v. Mercantile Adjustment Bureau, LLC*, No. 11-cv-639, 2014 Wl 1224606 (W.D. N.Y. March 25, 2014); *Moore v. DISH Network, LLC*, 2014 SL 5305960, at *7-8 (N.D. W.Va. Oct. 15, 2014). According to these courts, any consent previously given lapses when a cell number is reassigned. *Soppet*, 679 F.3d at 640-41.

The issue is far from settled, however. A number of courts have held that only the intended recipient of a call, fax or text has a right of action under the TCPA. *See, e.g., Leyse v. Bank of America Nat. Ass'n*, 2014 WL 4426325 at *5-6 (D.N.J. Sept. 8, 2014) (plaintiff was "unintended and incidental recipient of a properly-directed communication to someone else"); *Cellco Partnership v. Wilcrest Health Care Mgt., Inc.*, 2012 WL 1638056 at *7 (D.N.J. May 8, 2012); *Leyse v. Bank of America*, 2010 WL 2382400 at * 4 (S.D. N.Y. June 14, 2010); *Kopff v. World Research Grp, LLC*, 568 F.Supp. 2d 39, 40-42 (D.D.C. 2008).

D. Text Messages

With the development of text message as a marketing tool, it is likely more issues relating to text messages and the TCPA will arise. This is even more likely given the fact that text messages did not exist at the time the TCPA was enacted.

According to the FCC, text messages (or short message service (SMS) calls) are encompassed in the restrictions provided for in Section 227(b)(1)(A). *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. at 1832.

Recently the FCC confirmed that text messages confirming a consumer's opt-out are permissible under the TCPA. *See In re the matter of SoundBit Communications Inc.,* Declaratory Ruling, CG Docket No. 02-278, FCC 12-143. More specifically in the *SoundBit Communications* ruling, the FCC provided that organizations that send text messages to consumers from whom they have obtained prior express consent, are permitted to a final, one-time text to confirm its receipt of the customer's opt-out. *Id.* Notably, this rule only applies where the sender of the text message obtained prior express consent. *Id.* Additionally, the FCC set out guidelines of what a proper opt-out text would look like. First, the opt-out text is limited to merely confirming the consumer's opt-out request and should not include any marketing or promotional message. *Id.* It is the only additional message that may be sent out to the consumer after receiving the opt-out request. *Id.* An opt-out confirmation text sent within five minutes will be presumed to fall within the consumer's prior express consent. *Id.* However, if the text message takes longer to be sent, the sender will have to make a showing that the delay was reasonable. Thus, companies should be careful to comply with the requirements of the opt-out text, and ensure that messages are sent quickly upon the receipt of the opt-out text from the consumer.

E. What exactly is an "automatic telephone dialing system"?

So far the FCC has refused to define exactly what constitute an automatic telephone dialing system ("ATDS"). The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C.A. § 227(a)(1). The key issue it seems in defining an ATDS is to determine what "capacity" means.

There are at least four petitions pending before the FCC requesting that the FCC address the meaning of "capacity." *See In the Petition for Rulemaking of ACA International,* CG Docket No. 02-378 (filed Jan. 31, 2014); *In re YouMail's Petition for Expedited Declaratory Ruling and Clarification*, CG Docket No. 02-278 (filed April 19, 2013); *In re Professional Association for Customer Engagement's Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed October 18, 2013); *Petition for Expedited Declaratory Ruling and Clarification of TextMe, Inc.*, CG Docket No. 02-278 (filed Mar. 19, 2014).

IV. THE FAIR HOUSING ACT: IS PROTECTION FOR LENDERS FROM DISPARATE IMPACT CLAIMS ON THE HORIZON?

Since the 1970s, courts have routinely held that the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. ("FHA"), may remedy housing discrimination proven through use of the disparate impact theory. The doctrine of disparate impact permits a finding of discrimination without a "showing of discriminatory intent," provided the defendant's actions produce a disproportionate and adverse effect on persons with protected traits. *Metropolitan Hous. Devel. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). At least 11 United States Courts of Appeals have affirmed the applicability of the disparate impact theory to the Fair Housing Act. [47]

In 1994, the Department of Housing and Urban Development ("HUD") joined with the Department of Justice and 9 other federal agencies in their 1994 Interagency Policy Statement on Discrimination in Lending, to set forth their policies on "Fair Lending." This joint statement confirmed their view that disparate impact would be a method to prove not merely housing discrimination *but also lending discrimination*. Since that time, lenders—and now even loan servicers—have faced claims that their actions or policies could violate the anti-discrimination provisions of the FHA or the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq*., even though such actions or policies are facially neutral, so long as statistical evidence could demonstrate an adverse impact on persons within a protected class.

More recently, regulatory enforcement of housing discrimination cases (including discrimination in lending) through use of the disparate impact theory has greatly expanded, particularly since the subprime mortgage crisis. In 2009, for example, the Obama administration formed an interagency task force to combat financial fraud.[48] The task force, however, adopted a broad view of the acts constituting "financial fraud," including perceived discrimination in the lending and financial markets.[49] Within a

---

[47] *See, e.g.*, *Langlois v. Abington Hous. Auth*., 207 F.3d 43 (1st Cir. 2000); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1998); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Smith v. Town of Clarkton*,682 F.2d 1055 (4th Cir. 1982); *Hanson v. Veterans Admin*., 800 F.2d 1381 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Metropolitan Hous. Devel. Corp*., 558 F.2d at 1290; *U.S. v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Halet v. Wend Inv. Co*., 672 F.2d 1305 (9th Cir. 1982); *Mountain Side Mobile Estates P'ship v. Secc'y of Hous. Urban Devel.*, 56 F.3d 1243 (10th Cir. 1995); *U.S. v. Marengo Cnty. Comm'n*., 731 F.2d 1546 (11th Cir. 1984).

[48] Exec. Order No. 13519, 74 Fed. Reg. 60123 (Nov. 19, 2009).

[49] Press Release, Department of Justice, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), *available at* http://www.justice.gov/opa/pr/president-obama-establishes-interagency-financial-fraud-enforcement-task-force (last visited Nov. 4, 2014); *accord* Exec. Order No. 13519, 74 Fed. Reg. 60123 (Nov. 19, 2009).

year, the task force had "referred more matters involving a potential pattern or practice of discrimination to the Department of Justice than at any time in at least the last 20 years." Fin. Fraud Enforcement Taskforce, First Year Report at 3.9 (2010), *available at* http://www.stopfraud.gov/docs/FFETF-Report-LR.pdf (last visited Nov. 4, 2014). Advancing housing discrimination claims based on a disparate impact theory, the Department of Justice has reached a number of high-profile settlements, most notably with Countrywide Financial Corporation and with St. Bernard's Parish after Hurricane Katrina. Consumer and civil rights groups regularly applaud the government's use of the disparate impact theory against perceived discrimination by the lending industry. Most recently, one leading advocate noted that "[d]isparate impact is a powerful tool for challenging the structural and institutional inequalities that persist in our housing and financial markets." Press Release, NAACP Legal Defense and Education Fund, New HUD Regulations Will Help Reduce Housing Discrimination (Feb. 8, 2013), *available at* http://www.naacpldf.org/press-release/new-hud-regulations-will-help-reduce-housing-discrimination (last visited Nov. 4, 2014).

Despite the enthusiasm in some quarters over the disparate impact theory, doubts have lingered over whether the doctrine is truly available to enforce the FHA's or the Equal Credit Opportunity Act's terms. These doubts intensified following the United States Supreme Court's decision in *Smith v. City of Jackson*, wherein the Court noted that a federal statute will prohibit practices resulting in a discriminatory impact without evidence of a discriminatory intent only if the statute contains clear language to that effect. 544 U.S. 228, 235-36 (2005). Since *Smith*, challenges to the use of the discriminatory impact theory under the FHA based on the absence of such authorizing language in the statute have been presented to the Supreme Court on three occasions. Although the Court granted certiorari each time, the two earliest cases settled before the issue reached the Court.[50] The third and latest case, however, appears poised to finally present the issue for resolution. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Comtys. Project*, No. 13-1371, — U.S. —, — S. Ct. —, 2014 WL 4916193 (Oct. 2, 2014).

The Supreme Court's apparent willingness to consider this issue has not gone unnoticed by the Obama administration. Within days of the Court's decision to take up this issue for the first time in 2011, HUD provided notice of its intent to adopt the discriminatory impact theory through the administrative rulemaking process.[51] Although the public comment period closed on January 17, 2012, the administration made no effort to issue a final rule until just days after the Supreme Court agreed in 2013 to take up the issue of the availability of the disparate impact theory under the FHA for the second time. The administration's reaction was to announce a final rule adopting the discriminatory impact theory, effective March 18, 2013.[52]

---

[50] *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Comtys. Project*, No. 13-1371, — U.S. —, — S. Ct. —, 2014 WL 4916193 (Oct. 2, 2014); *Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc*., — U.S. —, 133 S. Ct. 2824 (2013), *certiorari subsequently dismissed at request of the parties by* — U.S. —, 134 S. Ct. 636 (2013); *Magner v. Gallagher*, — U.S. —, 132 S. Ct. 548 (2011), *certiorari subsequently dismissed at request of the parties by* — U.S. —, 132 S. Ct. 1306 (2011).

[51] Proposed Rule: Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).

[52] Final Rule: Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

In its new rule, HUD expressly provided that unlawful discrimination in lending and other housing practices may be established by a showing of discriminatory effect, even if not motivated by a discriminatory intent or accompanied by discriminatory treatment. The rule also confirmed that discrimination in loan servicing would be among the unlawful conduct prohibited, so loan servicers expressly face the same issues here as loan originators.

This new rule was almost immediately challenged by numerous parties, including the American Insurance Association. On November 3, 2014, the United States District Court for the District of Columbia upheld the American Insurance Association's challenge, and ordered HUD's adoption of the disparate impact rule be vacated in its entirety. *See Am. Ins. Assoc. v. HUD*, No. 13-cv-00966, — F.3d —, 2014 WL 5702711 (D.D.C. Nov. 3, 2014). In so doing, the court found that the new rule exceeded the agency's rulemaking authority because the FHA does not contain language authorizing its enforcement based on a disparate impact analysis. The court further held that the proposed rule should be vacated because, as applied to the insurance industry, it risked violation of the McCarran–Ferguson Act, 15 U.S.C. §§ 1011 *et seq*., by obligating property and title insurers to race-based data collection requirements at odds with state anti-insurance discrimination laws. The court's opinion pulled no punches, chastising the government in its efforts to apply the discriminatory impact theory against the lending and insurance industries.

While the lasting effects of this decision are presently unclear, it currently serves as a significant stumbling block to the administration's ongoing efforts to regulate the banking and mortgage industries based on the perceived discriminatory effect of their lending practices, as well as a significant weapon for those wishing to challenge or resist any application of the disparate impact theory in the context of public or private FHA claims. Ultimately, however, the legitimacy of the administration's efforts and the applicability of the disparate impact theory to the FHA can only be resolved by the Supreme Court, potentially soon through review in *Texas Department of Housing & Community Affairs*.

V. AFTER TWO DECADES, SHOULDN'T COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT BE EASIER?

The Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. (the "ADA"), was adopted in 1990 to reduce perceived barriers for the disabled in terms of both public access and private employment. In the employment context, the ADA obligates employers to offer reasonable accommodation to employees and applicants with certain disabilities, and bans discrimination against such persons in wage determination, hiring and firing. Although these goals are laudable, questions remain over whether the Act has achieved its intended effect in the employment context. Several studies suggest that that ADA has actually *increased*—not decreased—the labor participation rate of the disabled, even though the wages of disabled persons actually employed have risen over the same period.[53] Separately, courts were initially hesitant to give broad effect to the

[53] *See, e.g.*, Allison V. Thompkins, Abstract, *The Earnings Consequences of the Americans with Disabilities Act on People with Disabilities* (Mathematica Policy Research Nov. 2013), available at http://www.mathematica-mpr.com/~/media/publications/PDFs/Disability/Earning_Consequences_WP.pdf (last visited Nov. 7, 2014); Christine Jolls & J.J. Prescott, Abstract, *Disaggregating Employment Protection: The Case of Disability Discrimination* (Nat'l Bureau of Econ. Research Sept. 2004), available at http://www.nber.org/papers/w10740 (last

ADA as well as the sort of impairments which would be recognized as a protected disability.[54] Despite such concerns, Congress amended the ADA in 2008 to make clear that the Act was intended to give broad recognition to the sort of impairments qualifying as protected disabilities. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (the "ADAAA").

Now six years after the passage of the ADAAA, is applying the ADA any easier for employers? Arguably not. This year alone, the federal circuit courts of appeal have issued more than 70 opinions addressing ADA-related issues, some pre-dating the ADAAA and some applying the standards it adopted. Complaints about perceived ADA non-compliance also continue to be filed at high levels. In fiscal year 2013, for example, the Equal Employment Opportunity Commission ("EEOC") received 25,957 ADA-related complaints, well in excess of the average of 17,640 complaints per year filed between fiscal years 1997 through 1999. Although the vast majority of those complaints were found by the EEOC to lack reasonable cause, others led to resolutions affording more than $109,000,000 in aggregate monetary benefits.[55] In other words, it appears that employer non-compliance—whether perceived or actual—continues despite the novelty of both the ADA and the ADAAA now wearing thin.

Some of this can be attributed to evolving areas of administrative emphasis, as the EEOC remains actively engaged in pursuing enforcement actions based on an arguably broadening range of disabilities. In May 2013, for example, the agency issued four informal documents providing guidance for employers on addressing and accommodating employees with cancer, diabetes, epilepsy and learning-related disabilities.[56] Since then, the EEOC has used its powers to bring enforcement actions emphasizing the proper accommodation of these conditions, particularly diabetes[57] and

---

visited Nov. 7, 2014); Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 JOURNAL OF POLITICAL ECONOMY 915 (Univ. of Chicago Press Oct. 2001); Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REGULATION 21 (Cato Inst. Spring 2000).

[54] *See, e.g.*, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999).

[55] *Americans with Disabilities Act of 1990 (ADA) Charges, (includes concurrent charges with Title VII, ADEA, and EPA) FY 1997- FY 2013*, EEOC, available at http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (last visited Nov. 7, 2014).

[56] *Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA)*, EEOC.GOV, available at http://www.eeoc.gov/laws/types/diabetes.cfm (last visited Nov. 7, 2014); *Questions & Answers about Epilepsy in the Workplace and the Americans with Disabilities Act (ADA)*, EEOC.GOV, available at http://www.eeoc.gov/laws/types/epilepsy.cfm (last visited Nov. 7, 2014); *Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)*, EEOC.GOV, available at http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm (last visited Nov. 7, 2014); *Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA)*, EEOC.GOV, available at http://www.eeoc.gov/laws/types/cancer.cfm (last visited Nov. 7, 2014).

[57] *See, e.g.*, Press Release, EEOC, *Dollar General Sued by EEOC for Disability Discrimination: Diabetic Employee Fired for 'Grazing' to Stave Off Hypoglycemic Episode, Federal Agency Charges* (Sept. 24, 2014), available at http://www.eeoc.gov/eeoc/newsroom/release/9-24-14.cfm (last visited Nov. 7, 2014); Press Release, EEOC, *America's Largest Drug Store Chain to Pay $180,000 to Settle EEOC Disability Discrimination Suit: South San Francisco Walgreens Fired Longtime Employee With Diabetes Over a $1.39 Bag of Chips, Federal Agency Charged* (July 2, 2014), available at http://www.eeoc.gov/eeoc/newsroom/release/7-2-14b.cfm (last visited Nov. 7, 2014).

epilepsy.[58] The agency has also continued to emphasize employer's alleged failures to adequately accommodate workers suffering from psychiatric disabilities, such as depression, anxiety disorders and bi-polar disorder. While most of the agency's actions in this regard have focused on whether sufficient medical leave time was afforded to allow employees to properly address their conditions, the EEOC took the unusual step this year of charging one employer for refusing to allow a worker suffering from anxiety disorder to bring her service dog to work.[59]

The point is that a well-rounded ADA compliance program, along with an ADA-related litigation risk minimization program, should include procedures to carefully and frequently track EEOC pronouncements and publications. Whatever industry may think, the EEOC rarely acts in secret in deeming conditions as protected disabilities, or in defining whether the agency may place new emphasis in the enforcement context. For example, the EEOC gave clear indication of its intent to view diabetes, epilepsy, cancer and learning-related disorders as disabilities within the meaning of the ADA through the rulemaking process,[60] as well as through the issuance in early 2013 of guidelines addressing these conditions. A potential area for future enforcement emphasis may be employer accommodation of wounded veterans, particularly those suffering from posttraumatic stress disorder and similar conditions.

Judicial trends are proving more difficult to spot, largely because the bulk of recent opinions have focused more on defining the contours of a viable ADA claim as opposed to offering novel constructions of the ADA or ADAA. Nevertheless, several of these decisions are worth noting.

A. DOES THE ADA APPLY TO LOAN UNDERWRITING?

While the ADA generally prohibits discrimination against disabled persons in the provision of goods and services, disability discrimination *in the lending context* is typically governed by provisions of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq*. ("ECOA"), and the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. *See*, *e.g.*, *Velasquez v. Chrysler Fin. Corp*., No. 08-cv-1212, 2008 WL 2129163 (N.D. Cal. May 19, 2008) (dismissing plaintiff's ADA claims that defendant's lending practices resulted in disability discrimination: the ADA "prohibits discrimination against disabled persons [only] by employers, by governmental entities, and by private parties who own, lease or operate a place of public accommodation.").

This, of course, has not stopped plaintiffs from occasionally asserting ADA claims challenging the allegedly discriminatory nature of a lender's underwriting practices.

---

[58] *See*, *e.g.*, Press Release, EEOC, *Baptist Health South Florida to Pay $215,000 to Settle EEOC Disability Discrimination Suit: Health Care Organization Refused to Provide Reasonable Accommodation to Doctor With Epilepsy*, *Federal Agency Charged* (Feb. 21, 2014), available at http://www.eeoc.gov/eeoc/newsroom/release/2-21-14.cfm (last visited Nov. 7, 2014).

[59] *See* Press Release, EEOC, *Direct Optical to Pay $53,000 to Settle Disability Discrimination Suit: Farmington Hills Optical Store Fired Employee Because of Request for Service Dog, Federal Agency Charged* (Apr. 14, 2014), available at http://www.eeoc.gov/eeoc/newsroom/release/4-14-14.cfm (last visited Nov. 7, 2014).

[60] *See*, *e.g.*, Final Rule Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978 (Mar. 25, 2011); Notice Of Proposed Rulemaking: Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431 (Sept. 23, 2009).

Recently, for example, the Seventh Circuit was asked to resolve whether a bank's inquiry into the likely duration of the applicants' receipt of social security disability benefits violated the ADA's anti-discrimination provisions. *Wigginton v. Bank of Am. Corp.*, — F.3d —, 2014 WL 5285970 (7th Cir. Oct. 16, 2014). Although acknowledging that provisions of the ECOA addressed the issue and in fact permitted such an area of inquiry by the bank, the court omitted an analysis of why the ADA should be viewed as regulating the bank's underwriting policies. Instead, the court skipped that step. Recognizing that the bank required similar evidence from "*everyone* who applie[d] for a loan to provide a good reason for [the lender] to think that the applicant's current income will continue," the court jumped ahead and concluded that the ADA does not forbid "requests for knowledge that will enable banks to apply uniform standards." *Id.*, at *1. What the court viewed as missing from the plaintiffs' claims was allegation that they were treated differently *because* they were disabled. *Id.*, at *1-2. Although the court's holding is a sound one, the question remains why the ADA should have been viewed (or even assumed) to apply in the first instance. Unfortunately, other courts have dismissed similar ADA claims on substantive grounds as well.[61]

B. ADA In The Employment Context: Defining The Contours Of What Constitutes A Viable Claim.

As previously noted, 2014 saw the release of a plethora of ADA-related decisions by the federal circuit courts of appeal, the bulk of which sought to define the parameters of what constitutes a valid cause of action.

The Third Circuit, for example, clarified that the pleading principles of *Twombly* and *Iqbal* apply with equal affect to an ADA claim. To survive dismissal, a plaintiff must "plead enough facts to state a claim to relief that is plausible on its face," such that "conclusory statement[s] that [a defendant's] 'acts, policies, and conduct' violated the ADA" will not state a viable cause of action. *Twillie v. Erie School District*, 575 Fed. App'x 28, 32 (3d Cir. 2014), *en banc review denied* Sept. 15, 2014.

A number of decisions also addressed the issue of what impairments arise to the level of protected disabilities. Under current regulations interpreting the ADAA, "[a]n impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. [However, a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." 29 C.F.R. § 1630.02(j)(1)(ii).

This year, the Middle district of Pennsylvania provided a good overview of how these revised standards should be applied. To establish a *prima facie* case, a "plaintiff must demonstrate that . . . she is disabled within the meaning of the ADA," which she can do by showing that (1) she has an actual disability, (2) has "a record of such an impairment," or (3) is "regarded [by her employer] as having such an impairment." *Baughman v. Cheung Enter., LLC*, No. 13-cv-1511, 2014 WL 4437545, at *8-9 (M.D. Pa.

[61] *See, e.g.*, *Williams v. First Merit Bank*, No. 05-cv-1939, 2005 WL 2416933 (N.D. Ohio Sept. 30, 2005) (bank did not violate the ADA by denying plaintiff's loan due to his ability to submit uniformly required underwriting information); *Jones v. Penn. Minority Bus. Devel. Auth.*, No. 97-cv-4486, 1999 WL 487025, at *7 (E.D. Pa. July 12, 1999) (denial of loan application due to disabled employee's inability to meet collateral and equity injection requirements of loan program "was not disability discrimination"), *aff'd.*, 229 F.3d 1138 (3d Cir. 2000).

Sept. 9, 2014). The first two require the plaintiff to explain how her impairment somehow "significantly impact[s] her ability to perform [a] function necessary for her job." *Id.*, at *10. By contrast, the "the ADA's 'regarded as' prong is designed to stamp out . . . discrimination against . . . individual[s] to whom the employer ascribes an inability to perform the functions of a job because of a medical condition when, in fact, the individual[s are] perfectly able to meet the job's duties." *Id.*, at *11.

Applying these principles, the Eleventh Circuit held this year that "stress and anxiety" do not amount to a protected disability if those conditions interfere only with inter-personal relationships at work and "not with [the employee's ability] to perform her job." *Word v. AT&T*, 576 Fed. App'x 908, 917-18 (11th Cir. 2014) (noting that to constitute a protected disability, an impairment must substantially limit one or more major life activities of an employee, such as "working"). Similarly, the Ninth Circuit concluded that an employee's attention deficient hyperactivity disorder ("ADHD") did not qualify as a protected disability where the condition simply affected the plaintiff's ability to interact with others—"mere trouble getting along with coworkers is not disabled under the ADA." *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1114 (9th Cir. 2014), *en banc review denied* Oct. 1, 2014. Applying pre-ADAAA law but reaching a conclusion which should still be valid, the Second Circuit held that a university was not liable under the ADA for excluding a student with "shaky hands" from the school's phlebotomy program because the school did not perceive him as having a disability, since it allowed him to continue in the other parts of the school's medical technician program. *Widomski v. State Univ. of New York*, 748 F.3d 471 (2d Cir. 2014).[62] However, an impairment—even a temporary one—*will* constitute a protected disability if a plaintiff can demonstrate that it substantially limits her ability to perform a major life activity, which is implicated by the performance of her job.[63] The point is that while "the ADAAA makes it *easier* to prove a disability, it does not *absolve* a p[laintiff] from proving one." *Tramp v. Assoc. Underwriters, Inc.*, 768 F.3d 793, 804 (8th Cir. 2014) (quoting *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013) (emphasis in original).

A number of decisions also addressed the issue of what accommodations must be provided by an employer to a disabled employee. In general, the ADA's reasonable accommodation requirement obligates an employer to "[m]odif[y] or adjust[] the work environment, or . . . the manner or circumstances under which the position . . . is customarily performed, [to] enable an individual with a disability . . . to perform the

[62] *See also Wolfe v. U.S. Steel Corp.*, 567 Fed. App'x 367, 373 (6th Cir. 2014) (applicant failed to demonstrate employer viewed his monocular vision as a protected disability—employer's decision to revoke conditional job offer was based on business necessity associated with the position and "no accommodation . . . would permit an individual with monocular vision to safely perform the essential functions of the" position); *Washington v. United Parcel Serv., Inc.*, 567 Fed. App'x 749 (11th Cir. 2014) (affirming dismissal of plaintiff's ADA claims because she failed to evidence that her employer viewed her stress problems as a disability which substantially limited her ability to perform her job).

[63] *See, e.g., Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 333 (4th Cir. 2014) (employee's post-accident mobility restrictions, which were anticipated to last no more than 7 months, "f[ell] comfortably within the amended Act's expanded definition of disability"), *en banc review denied* Feb. 19, 2014; *Parada v. Banco Industrail de Venezuela, CA*, 753 F.3d 62 (2d Cir. 2014) (reversing summary judgment, and remanding to district court for determination of whether plaintiff's alleged inability to sit for prolonged periods of time, due to spinal cord injury, constituted substantial limitation of a major life activity).

essential functions of that position," potentially through means such as "[j]ob restructuring; [implementation of]part-time or modified work schedules; reassignment [of the disabled person] to a vacant position; [or through] acquisition or modifications of equipment or devices." 29 C.F.R. §§ 1630.02(o)(1)(ii), (o)(2)(ii). However, such measures may not be required if they would impose an undue hardship upon the employer. *Id.* at §§ 1630.02(o)(4), (p)(1)-(p)(2). In 2014, the Second and Sixth Circuits also affirmed that an employer does not need to create a new position for a disabled employee or applicant who cannot perform the essential functions of her position, and for which reasonable accommodation is not possible.[64]

Other decisions confirmed the literal "two-way street" nature of the process that must be employed in determining what reasonable accommodations may be required. *Reeves v. Jewel Food Stores, Inc.*, 759 F.3d 698, 701-02 (7th Cir. 2014) ("Both parties are responsible for determining what accommodations are needed. Where the employee does not provide sufficient information to the employer to determine the necessary accommodations, the employer cannot be held liable for failing to accommodate the disabled employee."). In other words, an "employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation"—as part of her *prima facie* case, the employee must be able to demonstrate that she requested accommodation *and* sought to invoke an interactive process with her employer to determine what accommodations should be provided. *Parsons v. Auto Club Grp.*, 565 Fed. App'x 446, 448 (6th Cir. 2014).[65] It is also her burden demonstrate that a reasonable accommodation existed,[66] which need not equate to her preferred accommodation.[67]

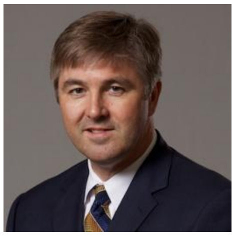
[64] *Wells v. Chrysler Grp. LLC*, 559 Fed. App'x 512, 513 (2d Cir. 2014) ("The ADA does not require Chrysler to have placed Wells in a position that was not vacant at the time[, n]or does the ADA require Chrysler to shift responsibilities among other employees in order to create a position that is not already in existence at the time."), *cert. denied*, — U.S. —, — S. Ct. —, 2014 WL 4054015 (Oct. 14, 2014); *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014) ("An employer need only reassign the employee to a vacant position.").

[65] *But see Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055 (7th Cir. 2014) (reversing summary judgment in employer's favor based on evidence that employer failed to engage in an interactive process with plaintiff to identify reasonable accommodations of her disability); *Rorrer*, 743 F.3d at 1045-46 (reversing entry of summary judgment in favor of employer based on conflicting evidence over whether employer participated in good faith during interactive process to identify potential accommodations).

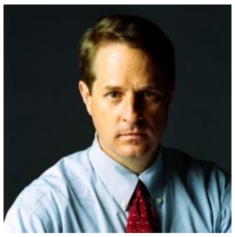
[66] *Petrone v. Hampton Bays Union Free School Dist.*, 568 Fed. App'x 5, 8 (2d Cir. 2014).

[67] *See, e.g.*, *Hamedl v. Verizon Commc'ns, Inc.*, 557 Fed. App'x 68, 70 (2d Cir. 2014) (employee's demand for assignment to a midnight shift was not reasonable given that employer offered him "a shift beginning at 5:30, to prevent the back-pain caused by sitting in traffic"); *Paul v. Hovensa*, 562 Fed. App'x 149 (3d Cir. 2014) (affirming dismissal of ADA claim despite the fact the employer refused to accept the employee's "preferred accommodation:" the employer made numerous attempts to satisfy disabled employee's work-site transportation demands to accommodate her mobility disabilities through other means); *Munoz v. Seton Healthcare, Inc.*, 557 Fed. App'x 314, 319 (5th Cir. 2014) (affirming dismissal of case because the "accommodations [offered to address the plaintiff's rheumatoid arthritis], while not Munoz's preferred accommodations, were enough to satisfy [the employer]'s duties under the ADA."), *cert. denied*, — U.S. —, — S. Ct. —, 2014 WL 3374206 (Oct. 6, 2014); *Obnamia v. Shinseki*, 569 Fed. App'x 443, 445-46 (6th Cir. 2014) (affirming dismissal of case because employee's demand for installation of hallway handrails and a private office assignment were not necessary address her hearing and balance disabilities). *But see Kauffman v. Petersen Health Care VII, LLC*, — F.3d —, 2014 WL 5285979, at *2-3 (7th Cir. 2014) (reversing entry of summary judgment in employer's favor because there was conflicting evidence as to whether job restructuring could have accommodated the plaintiff's medically-related physical exertion restrictions without placing undue burden on the employer, and because employer failed to engage in "an 'interactive process' to determine the appropriate accommodation under the circumstances.").

For more information regarding the topics covered in this white paper, contact:



Michael R. Pennington
Partner, Birmingham
Direct 205.521.8391
Email mpennington@babc.com



John E. Goodman
Partner, Birmingham
Direct 205.521.8476
Email jgoodman@babc.com

Robert James Campbell
Partner, Birmingham
Direct 205.521.8975
Email rjcampbell@babc.com

About Us

Our Class Action Team is nationally recognized for its class action defense, coordinated mass action, mass tort, multidistrict litigation (MDL), CAFA, and appellate experience. The BABC Class Action Team has defended hundreds of class actions and mass actions across more than 30 states, in both state and federal courts. The team's in-depth experience was forged in "bet-the-company"–type litigation brought in what are considered to be the most plaintiff-friendly venues in the United States. The Class Action Team has successfully obtained the dismissal, or defeated certification, of class actions at the trial level and on appeal in dozens of cases. Our team has also designed innovative and cost-effective class settlement strategies when our clients' business objectives dictated that course, thereby assisting our clients in eliminating significant exposure and repetitive claims.

BRADLEY ARANT BOULT CUMMINGS LLP