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September 16, 2010

President/CEO  
The Lombardo, Davis & Goldman Firm, LLC  
735 Delaware Road  
Suite #317  
Buffalo, NY 14223

Re: Potential Assistance in Defending FDCPA Lawsuit  
*v. The Lombardo, Davis & Goldman Firm, LLC*

Dear President/CEO:

For many years I have specialized in defending lawsuits brought under the Fair Debt Collection Practices Act ("FDCPA"). As a service to our clients we monitor FDCPA lawsuits filed in Federal Court in Chicago, to provide advance warning. We recently noticed that your firm was sued in the above captioned lawsuit. The Complaint is enclosed for your reference. As you will see, Plaintiff accuses The Lombardo, Davis & Goldman Firm, LLC of violating the FDCPA in several ways: placing multiple collection calls to Plaintiff that failed to properly identify the caller, misrepresenting that the caller was from a law firm, falsely claiming that a lawsuit had been filed against Plaintiff, and falsely implying that Plaintiff would be arrested if she did not pay her alleged debt. Plaintiff seeks actual and statutory damages as well as attorney's fees and costs.

The Plaintiff's attorney is \_\_\_\_\_ I am quite familiar with \_\_\_\_\_ and his tactics, having defended many of his lawsuits in the past. I would be glad to discuss the lawsuit with you at no obligation so you can make an educated decision regarding whether to fight or settle. If the lawsuit lacks merit I would encourage you to fight. We have a strong track record of winning FDCPA lawsuits. If, however, you decide to settle I can help because I generally know what \_\_\_\_\_ is willing to settle for in FDCPA lawsuits.

To assist in your in decision I have enclosed materials from my July 13, 2009 presentation, "Know When to Hold Them, Know When to Fold Them," at ACA

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 MurphyDesmond  
LAWYERS

Advertising Material

16 September 2010

The Lombardo, Davis & Goldman Firm, LLC  
735 Delaware Road  
Buffalo, NY 14223

Re: Potential Assistance in Defending Lawsuit filed against The Lombardo, Davis & Goldman Firm, LLC

Dear Sir or Madam:

For the past several years I have specialized in defending both individual and class action lawsuits brought under the Fair Debt Collection Practices Act ("FDCPA"), Fair Credit Reporting Act ("FCRA"), Telephone Consumer Protection Act ("TCPA"), and other State specific consumer protection statutes. To provide our clients with advance warning we monitor consumer protection lawsuits filed in Federal Court in the Northern District of Illinois and Eastern and Western Districts of Wisconsin. We recently noticed that your firm was sued in the above captioned lawsuit, and a copy of the Complaint is enclosed for your reference. As you will see, the Plaintiff's Complaint alleges violations of one or more of the above named consumer protection statutes and seeks monetary damages as well as attorney's fees and costs.

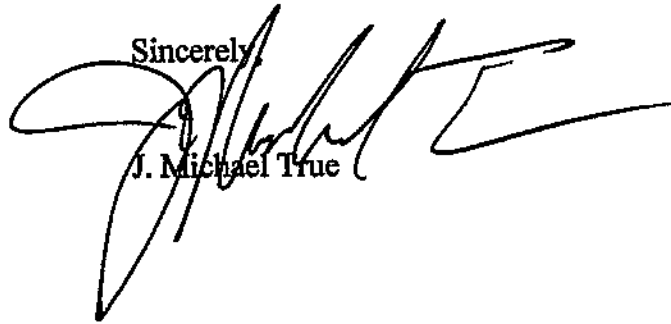
The Plaintiff's attorney is . . . . . I am quite familiar with Attorney . . . . . and his firm's tactics, having defended many of his lawsuits in the past. I would be glad to discuss the lawsuit with you at no obligation so you can make an educated decision regarding whether to fight or settle. If the lawsuit lacks merit I would encourage you to fight. If, however, you decide to settle I can also help because I know the settlement value for these cases and generally know what Attorney . . . . . is willing to settle for in these types of lawsuits.

To assist you in your decision, I have enclosed our firm brochure, which includes my profile and further information about the firm and our Creditor's Rights and Commercial Litigation Practice Group.

16 September 2010  
Page 2

I hope I can assist you with this lawsuit. Thank you for your time and I look forward to hearing from you soon.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Michael True', is written over the typed name. The signature is stylized with large loops and a long horizontal stroke at the end.

J. Michael True

JMT:srp  
Common\JMT MLC  
Enclosures

Admitted to Illinois Bar, Wisconsin Bar, U.S. District Court for Northern and Southern Districts of Illinois, and Eastern and Western Districts of Wisconsin

Advertising Material

September 16, 2010

International's annual convention in Las Vegas, NV. Also enclosed is my White Paper entitled "What to Do If Your Agency is Sued." The Paper was published through the Illinois Collectors Association and has been distributed at many of my presentations. I have also enclosed our firm brochure, which includes a description of our cost effective approach to defending FDCPA lawsuits.

I hope I can assist you with this lawsuit. Thank you for your time and I look forward to hearing from you soon.

Very truly yours,

Joseph S. Messer

Enc.

# Know When to Hold Them, Know When to Fold Them

Presented on July 13, 2009 at ACA International's  
Annual Convention in Las Vegas, Nevada

Joseph S. Messer  
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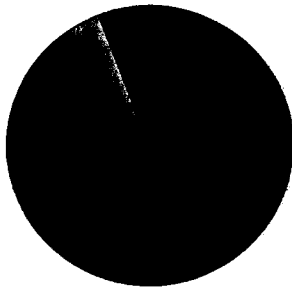
## Common Allegations Under FDCPA

- Threatening Unauthorized/Unintended Collection Methods
- Placing Harassing Calls to Plaintiff's Relatives (3<sup>rd</sup> Party Disclosure)
- Contacting Plaintiff's Relatives After Receiving Plaintiff's Contact Info (3<sup>rd</sup> Party Disclosure)
- Phoning P's Place of Employment After Requests to Desist
- Failing to Give Required FDCPA Warnings (Fof)
- Filing a Lawsuit Without Proof of Debt
- Attempting Collection Without Valid Authority
- Attempting to Collect a Debt After Cease and Desist
- Seeking to Collect Statutory Barred Claims
- Misrepresentation of Interest Rate
- Failing to Send Amount of Debt in Writing
- Failing to Respond to Request for Verification
- False Reporting to Credit Bureaus
- Unauthorized Automatic Withdrawals



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## FDCPA ALLEGATIONS



- Threatening Unauthorized/Unintended Collection Methods- 17%
- Placing Harassing Calls to Plaintiff's Relatives (3<sup>rd</sup> Party Disclosure)- 16%
- Contacting Plaintiff's Relatives After Receiving Plaintiff's Contact Info (3<sup>rd</sup> Party Disclosure)- 11%
- Phoning P's Place of Employment After Requests to Desist- 9%
- Filing a Lawsuit Without Proof of Debt- 9%
- Attempting Collection Without Valid Authority- 9%
- Attempting to Collect a Debt After Cease and Desist- 8%
- Seeking to Collect Statutory Barred Claims- 4%
- Misrepresentation of Interest Rate- 4%
- Failing to Send Amount of Debt in Writing- 4%
- Failing to Respond to Request for Verification- 2%
- False Reporting to Credit Bureaus- 2%
- Unauthorized Automatic Withdrawals- 2%



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## Source of Forgoing FDCPA Allegation Percentages

- Messer & Stilp Tracks All FDCPA Filings in the U.S. District Court for the Northern District of Illinois, Eastern Division (Chicago).
- Percentages Based on Analysis of Approximately last six months of filings.

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## Frivolous Lawsuits Are Part of the Business

- FDCPA's attorneys fee provision has spawned a "cottage industry".
- Plaintiffs can receive up to \$1,000, plus attorneys fees & court costs.
- Class can receive up to 1% of collector's net worth (capped at \$500,000), plus attorneys fees & court costs.



## Explosion in FDCPA Lawsuits

- In 2008, 5,383 cases were filed against collection agencies in U.S. District Courts.
- This was a **41% Increase** in FDCPA litigation in 2008 over 2007 case volumes
- As of end of 1<sup>st</sup> Quarter of 2009, 2,390 cases had been filed.
- At this rate, expect 9,560 cases in 2009.

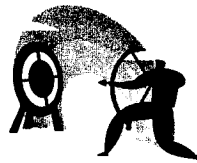


## What's Driving the Explosion?

- Many law firms now do exclusively plaintiffs FDCPA work.
- For these "predatory attorneys" it's all about volume.



## How Do I Keep My Agency from Becoming A Target?



- Don't cave-in by paying "ransom" to settle frivolous lawsuits.
- Predatory attorneys keep track, and agencies that pay "ransom" are "low hanging fruit".



## How Do I Keep My Agency from Becoming A Target?

- Settle legitimate lawsuits as early as possible.
- Consider making a Rule 68 Offer of Judgment.
  - Not appropriate for class actions and cases where actual damages are pled.



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## How Do I Decide Whether to Fight?

- First Step: Determine if the lawsuit "has teeth".
  - Often requires analysis by experienced defense counsel.
- Need to know the law of the Jurisdiction where sued.
  - How will the Court handling my case rule?



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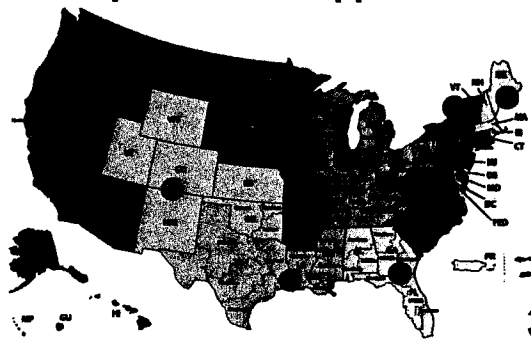
## The Federal Court System

- There are 94 U.S. District Courts.
- They are organized into 12 regional Circuits.
- Each Circuit has a U.S. Court of Appeals, which hears appeals from the District Courts in its Circuit.



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## Map of District/Appellate Courts



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### **Determining The Law of The Jurisdiction Where Sued**

- Has the U.S. Court of Appeals for your District ruled on the claim in your case?
  - If not, what about similar cases?
- Have the District Courts in your District ruled on the claim in your case?
  - How has the your Judge ruled?
    - In identical or similar cases?
    - In FDCPA cases in general?



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### **What If The Law of Your Jurisdiction Is Unclear?**

- Determine the legal trends regarding the claim in other jurisdictions.
- Determine how your Judge and Appellate Court usually rule on FDCPA cases.
- Before fighting, consider making a settlement offer based on "uncertainty".



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### **How Do I Decide Whether to Fight?**

- Next Step: Determine what you are in for if you litigate.
- Can you win a Motion to Dismiss?
- Will you have to file a Motion for Summary Judgment?



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### **What's a Motion to Dismiss?**

- A "motion to dismiss" asks the Court to decide that Plaintiff's claim is not one for which the law offers a legal remedy.
- The Court assumes the truth of the factual allegations in the Complaint, but holds that the Complaint fails to state a valid claim.
- The claim is dismissed without evidence being presented by either side.



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## What's a Motion for Summary Judgment?

- Summary judgment is a Court determination (a Judgment) *without* a full trial. Summary judgment may be issued on the entire case, or on specific issues in the case.
- Asks the Court to apply the law to the facts and decide whether the Collector should win without having to go through a jury trial.
- Not eligible until after discovery, including interrogatories, depositions and full disclosure of evidence to Plaintiff.



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## What's a Motion for Summary Judgment?

- The collector attempts to win by demonstrating to the Court, through sworn statements and documents, that there are no material issues of fact to be tried by a jury.
- The collector also attempts to persuade the court that the undisputed material facts require judgment to be entered in its favor.



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## Examples of Motion to Dismiss Cases

- Lawsuit was filed after FDCPA's one year statute of limitations has expired.
- Plaintiff is not a FDCPA defined "Consumer" (e.g., wrong number cases).
- Exhibit to Complaint shows debt was commercial.
- Identical claim rejected in prior decision.



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## Examples of Motion for Summary Judgment Cases

- "He said- she said case" alleging collector swore at Plaintiff or threatened legal action.
  - Even if outright lie, Court assumes it's true.
  - Need outside evidence – such as call recordings – to prevail.



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## Examples of Motion for Summary Judgment Cases

- Allegation that “unsophisticated consumer” would be confused by collection letter.



- Burden is on Plaintiff to demonstrate how unsophisticated consumers would interpret letter.
- Requires consumer survey, but by close of discovery not produced by Plaintiff.



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## How Do I Decide Whether to Fight?

- Next Step: Weigh the Cost of Fighting.
- A **Motion to Dismiss** is much less expensive than a **Motion for Summary Judgment**.
- Paying “ransom” is often the less expensive than a **Motion for Summary Judgment**.



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## Weighing the Cost of Fighting

- Although settling a frivolous lawsuit is usually less expensive than a Motion for Summary Judgment, **consider the hidden costs of paying the “ransom”**.
- Throw a bone, and as Arnold Schwarzenegger says: **“I’ll be back”**.



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## Weighing the Cost of Fighting

- Does the lawsuit attack an effective collection practice you want to continue?
  - Is it worth the cost of establishing new case law to protect that practice?
- Does the lawsuit attack a routine collection practice you have additional exposure for?
  - Will you likely be sued on an identical case if you settle?



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## **"Bet the Farm" Cases You Can't Afford to Settle**



- Sometimes you have no choice but to fight.
  - Class Action lawsuits with high net worth exposure (1% of net worth).
  - Outrageous claims of "actual damage" (e.g., emotional damage and mental anguish).



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## **Occasional Pleasant Surprises When You Fight**

- The disappearing Plaintiff:
  - Vanishes into Cyberspace.
  - Refuses to Cooperate: "You didn't tell me that they could depose me".
  - Loses interest.
  - Runs from the case when sued on the underlying debt.



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## **Occasional Pleasant Surprises When You Fight**

- The clueless Plaintiff:
  - Don't remember receiving calls or letters.
  - Can't describe the claim in the Complaint.
  - Mixes up your agency with another agency.
  - Admits that they didn't really incur actual damages.



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## **Don't Just "Cave" When You Settle**

- Demand Plaintiff attorney's billing records.
  - If they refuse, tell the Court.
- Take advantage of Court settlement programs.
  - File a motion for a settlement conference if you reach an impasse.
  - Embarrass Plaintiff's attorney about their fees.



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### **Maximize Court Settlement Through "Show and Tell"**

- Show the Court how many identical cases the Plaintiff's attorneys have filed.
  - Same Plaintiff & same claims.
- Show the Court how difficult the Plaintiff's attorney was in prior negotiations.
  - Email strings are great.



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### **Make Plaintiff's Attorney Work for Free When You Settle**

- They won't get additional attorneys fees for attending settlement conferences.
- In the future they will think twice if they know you involve the Court when they are unreasonable.



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### **Make Your Agency An Unattractive Class Action Target**

- Class action lawsuits are the major exposure to collection agencies.
- The class can be awarded up to 1% of the Agency's net worth (not to exceed \$500,000).



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### **Make Your Agency An Unattractive Class Action Target**

- The key to limiting exposure is to keep your agency's net worth to a minimum.
  - Set up another corporation or LLC to lease equipment to your agency and don't own significant assets in the name of the agency's name (e.g., your office building).
  - Never list "good will" on your agency's balance sheet. Assets minus liabilities on the balance sheet equals net worth (*Sanders v. Jackson*).
  - Set up another corporation or LLC to purchase debt and hire your agency to collect it.



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### **Make Your Agency An Unattractive Class Action Target**

- Immediately give the Class Counsel information regarding your agency's lack of net worth to convince them not to pursue class status.
- If that doesn't work, present it to the Court.



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### **Seeking Sanctions for Frivolous Lawsuit**

- Predatory attorneys usually shy away from agencies that seek sanctions for frivolous suits.
- Consider seeking attorneys fees and costs under § 1692k(a)(3) of the FDCPA or sanctions under Rule 11 of the Rules of Federal Procedure or 28 U.S.C. §1927.



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### **§ 1692k(a)(3) of the FDCPA**

- § 1692k(a)(3) allows the judge to award the defendant their reasonable attorneys fees and costs expended in defending the case upon a finding that the lawsuit was brought in bad faith and for the purposes of harassment.



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### **Rule 11 of the Federal Rules of Civil Procedure**

- Rule 11 requires attorneys to have a good faith belief that their pleadings (1) are not being filed for an improper purpose; (2) are warranted under the law (or a nonfrivolous extension of law); and (3) are likely to have evidentiary support.



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## §1927 of the U.S. Code

- §1927 imposes liability on an attorney who intentionally files and continues to prosecute a claim that lack a plausible legal or factual basis.



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## Sanctions are Difficult to Obtain, but Often Worthwhile

- Although it is difficult to prevail on motions under § 1692k(a)(3), Rule 11 and §1927, predatory attorneys who are met with such motions are less likely to repeat file against the collection agency.



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## Taking Advantage of the FDCPA's Bona Fide Error Defense

- "A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. 1692k(c)



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## The Law: 3 Requirements

- (1) Unintentional violation
- (2) Bona fide error
- (3) Reasonable procedures in place to avoid the error



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## Bona Fide Error Defense Reasonable Procedures Requirement

- 2-Step Inquiry:
  - Debt collector must maintain and implement procedures to avoid errors
  - Procedures must be reasonably adapted to avoid the specific error at issue
    - Often requires both general and specific procedures



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## Reasonable Procedures

- To qualify for the defense, the defendants are not required to take every conceivable precaution to avoid errors, but only reasonable precaution

□ *Kort v. Diversified Collection Serv., Inc.* 394 F.3d 530, 539 (7th Cir. 2005)



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## Reasonable Procedures: Examples

- FDCPA Compliance Training & Testing:
  - Continuous staff FDCPA training
  - Compliance testing
  - Collection Call Monitoring/Recording
- Documentation of Procedures:
  - FDCPA manuals/Information
  - Legal Opinions and Guidance
  - Written updates on legal/statutory changes



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- The Bona Fide Error Defense Requires a Motion for Summary Judgment.
- It won't Stop Lawsuits, But Allows Collectors to Win.



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## Conclusion

Questions and Hopefully, Answers



## About Messer & Stilp, Ltd.

Messer & Stilp, Ltd. specializes in the representation of collection agencies, debt purchasers and debt sellers throughout North America. We provide comprehensive counseling to assist clients in complying with the FDCPA, FCRA and other consumer protection statutes. We regularly defend consumer lawsuits, and provide transactional representation. We add value through efficient and cost effective representation. Contact Joe Messer at (312) 334-3440 or by e-mail: [Messer@MesserStilp.com](mailto:Messer@MesserStilp.com)



## Disclaimer

These materials have been prepared for educational purposes. They are not intended to give legal advice, nor should they be relied upon as such. Because specific circumstances affect compliance with the laws described herein, you are advised to review your circumstances with qualified legal counsel to ensure proper implementation.







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## **What to Do If Your Agency is Sued** **(or, how to avoid being sued in the first place)**

### **Presentation to the Illinois Collectors Association By Joseph S. Messer**

#### **I. Frivolous Lawsuits Are Part of the Business.**

A. The Fair Debt Collection Practices Act ("FDCPA") and the Federal courts have spawned a "cottage industry" for plaintiffs' attorneys who make a living off of the FDCPA's attorneys' fee provision.

1. The FDCPA gives plaintiff \$1,000, plus their attorneys fees and court costs. In class action lawsuits the plaintiff class can be awarded up to 1% of the net worth of the collection agency (not to exceed \$500,000), plus attorneys fees and costs.

(a) For the "predatory attorneys" who enjoy this cottage industry, it's all about attorneys' fees.

2. The situation is especially bad within the area covered by the 7<sup>th</sup> Circuit Federal Court of appeals (*i.e.*, Indiana, Illinois and Wisconsin). The "Mighty 7<sup>th</sup>" is home to the most "debtor friendly" or "agency hostile" court decisions in the nation.

(a) As a result, several lawyers and law firms in the "Mighty 7<sup>th</sup>" do exclusively plaintiffs FDCPA work.

#### **II. How Do I Keep My Agency from Becoming A Target for Predatory Attorneys?**

A. Don't cave-in by paying "ransom" to settle frivolous lawsuits.

1. If the "wolf is at the door" don't throw him a bone, or, in the words of Arnold Schwarzenegger, "I'll be back".

(a) Agencies that routinely settle frivolous suits are viewed as "low hanging fruit" for predatory attorneys.

**(b) Conversely, predatory attorneys often shy away from agencies that aggressively defend frivolous suits.**

**(i) If you adopt this approach, use a lawyer with FDCPA expertise. Nothing allows a predatory attorney to rack up attorneys fees more than an inexperienced attorney who mistakenly believes he is defending a frivolous case.**

**B. If the lawsuit is frivolous file a motion for attorneys fees and costs under § 1692k(a)(3) of the FDCPA or seek sanctions under Rule 11 of the Rules of Federal Procedure or 28 U.S.C. §1927.**

**1. § 1692k(a)(3) allows the judge to award the defendant their reasonable attorneys fees and costs expended in defending the case upon a finding that the lawsuit was brought in bad faith and for the purposes of harassment.**

**2. Rule 11 requires attorneys to have a good faith belief that their pleadings (1) are not being filed for an improper purpose; (2) are warranted under the law (or a nonfrivolous extension of law); and (3) are likely to have evidentiary support.**

**3. §1927 imposes liability on an attorney who intentionally files or prosecutes a claim that lack a plausible legal or factual basis.**

**4. Although it is difficult to prevail on motions under § 1692k(a)(3), Rule 11 and §1927, predatory attorneys who are met with such motions are less likely to repeat file against the collection agency.**

**C. Settle legitimate lawsuits as early as possible.**

**1. Immediately determine if the lawsuit is legitimate.**

**(a) When the Complaint is served, compile a package and ship it to your defense attorney. Include the following:**

- \_\_\_ The Summons and Complaint;**
- \_\_\_ Your agency's collector notes on the plaintiff;**
- \_\_\_ Dates of each activity on the Plaintiff's file;**
- \_\_\_ All letters your agency sent to the plaintiff;**
- \_\_\_ All letters received by your agency regarding the plaintiff; and**
- \_\_\_ Names and numbers for each collector who worked the file.**

**(b) Conduct a conference call with your attorney to discuss the merits (or lack thereof) of the claim or lawsuit. Have the collectors who worked the file available to candidly report any communications or activities that were not recorded in the collector notes.**

**2. If the lawsuit "has teeth", settle it ASAP.**

(a) Unless it is a valid class action lawsuit, consider making an Offer of Judgment under Rule 68 of the Rules of Federal Procedure.

(i) To be valid, it must be an offer to pay the Plaintiff everything they would be entitled to receive if they were to prevail on their Complaint, plus their court costs and "reasonable" attorneys' fees.

(ii) Regardless of whether the Complaint contains multiple Counts alleging multiple FDCPA violations, they are entitled to \$1,000 for the underlying violations. Don't offer more.

(iii) Don't agree to pay "blackmail" attorneys' fees. If the predatory attorney demands unreasonable attorneys' fees, tell him you will file a fee petition with the Court. If he persists, file the petition. As the saying goes, "pigs get fat, hogs get slaughtered".

(iv) If the plaintiff rejects your valid Rule 68 Offer of Judgment, it should cut-off their right to additional attorneys fees incurred after the offer was made. This kills the predatory attorney's incentive to continue the lawsuit.

(b) If you receive a non-class action type claim that is not yet a lawsuit, "take the wind out of the predator attorney's sails" giving him a settlement offer that amounts to an Offer of Judgment and informing him you will serve him with the same offer, pursuant to Rule 68, if he files suit.

(i) Inform the predator attorney you will make the judge aware of your pre-suit offer of judgment if they sue.

(ii) Be careful not to make such a pre-suit offer if the lawsuit could be brought as a legitimate class action lawsuit.

(c) If it is a valid class action lawsuit, try to settle it by demonstrating to the predatory attorney that he should settle the case on a non-class action basis. Reasons to settle on a non-class action basis may include:

(i) Your agency's net worth is too low to make it worthwhile to pursue the 1% class award;

(ii) The form letter was sent to so many debtors that the award would be spread too thinly among the class to result in a meaningful settlement;

(iii) Your agency is unable to determine to whom the form letter was sent (but only if this is true).

(d) The prospect of attorneys' fees is what drives predatory attorneys. If you're facing a valid lawsuit that you're sure to lose, it's usually cheaper to settle the lawsuit from the outset, even if you must pay "blackmail" attorneys' fees and a settlement to the plaintiff class. Slugging it out through protracted litigation will only crank up the attorneys' fees for both sides, which you may be forced to pay in the end.

(i) If you settle, negotiate the best terms possible in the settlement agreement. In addition to a complete waiver of claims and dismissal of the lawsuit with prejudice try to include: (1) a full indemnification, including attorneys fees, if the plaintiff breaches the waiver; (2) a confidentiality provision; and (3) a representation by the plaintiff's attorney that there are no potential additional lawsuits against your agency and that they will not solicit any such lawsuits.

**C. Have your collection letters reviewed for FDCPA compliance.**

**1. Use the ACA International's program to have your letters reviewed.**

(a) Many of the letters we review are not FDCPA compliant. Removing these non-compliant letters from the "stream of commerce" has saved agencies from hundreds of lawsuits.

(b) If you do a high volume of collection work in other states, consider having your letters reviewed for state law compliance in those states.

(i) Collection agencies are regulated even on the local level. For example, in New York City a collection agency must be licensed by the City and their letters must contain the agency's license number.

**D. Appoint and train a "Compliance Supervisor" to field potential FDCPA and Fair Credit Reporting Act ("FCRA") claims in-house. Pre-arrange a system with a qualified FDCPA and FCRA defense attorney to assist the Compliance Supervisor with the analysis of potential claims.**

**E. Train your collectors to spot potential claims and create a system to "stop the conveyor" so the claim can be analyzed by the Compliance Supervisor.**

**1. Collectors should be taught to press the "stop button" and ask for guidance from Compliance Supervisor whenever they receive correspondence or a phone call from an attorney or an "I got my rights" "sophisticated debtor".**

(a) When a collection letter or call goes to the debtor after their attorney has communicated with the agency the debtor often has a “slam-dunk” FDCPA claim. This is a common ploy of the predator attorney. Your letter service must be able to “stop on a dime”.

(b) If the Compliance Supervisor does not know the appropriate response or it looks like “the horse is out of the barn” on the claim, they should freely seek guidance from their defense attorney “partner”.

(c) If the debtor disputes the debt or seeks validation during the 30-day validation period, stop all collection activity until you investigate and provide the debtor with validation. You need good records to properly validate the debt. It may not be enough to send the debtor a copy of the electronic transmission you received from your client.

(i) Agree with your client that unless they provide you with adequate validation materials for any account upon request, your obligation to collect on that account will cease.

(ii) If you purchase debt, purchase sufficient validation materials (if available) or be prepared to drop collections on those debtors who seek validation. A cost-benefit analysis may be appropriate to determine the percentage of the debt that is uncollectible (*i.e.*, the percentage of debtors that typically seek validation). Remember, the larger the balance the more likely they debtor will seek validation. It may make sense to have your defense attorney review the validation materials you are purchasing to determine if they are sufficient.

(d) If the debtor disputes the debt before your agency has reported it to a credit-reporting agency (“CRA”), report the debt as disputed. If the debtor disputes the debt after you have reported it to the CRA, amend your report the next time you report to the CRA.

(i) If the CRA seeks verification of the debt, undertake the verification process like you would the debt validation process. Do not automatically send the CRA a letter stating that you have investigated the debt and it is valid. If you are unable to verify the debt, allow the CRA to remove the credit reporting. Inform your client that unless they provide you with sufficient materials to verify the debt, the credit reporting will be removed.

2. Train your Compliance Supervisor to avoid the trap of “trick bag” letters from predator attorneys.

(a) A common ploy of predator attorneys is to attempt to elicit a response in which the agency admits it violated the law, giving the impression that if they correct their "error" everything will be O.K. (See, Exhibit C.)

(i) Don't take the bait.

(ii) And don't just send back a letter stating that there was no violation.

(iii) Work with your defense attorney to prepare a detailed response letter stating why there was no violation. Doing so "takes the wind out of their sails".

### **III. Keep You Agency's Net Worth As Low As Possible**

A. Legitimate Class action lawsuits are the major exposure to collection agencies under the FDCPA. In a class action lawsuit the plaintiff class can be awarded up to 1% of the net worth of the collection agency (not to exceed \$500,000).

1. Limit your exposure is to keep your agencies net worth to a minimum.

(a) Set up another corporation or LLC to lease equipment to your agency.

(b) Never own significant assets in the name of your agency (*e.g.*, your office building).

(c) Never list "good will" on your agency's balance sheet. Assets minus liabilities on the balance sheet equals net worth (*Sanders v. Jackson*).

(d) Set up another corporation or LLC to purchase debt and hire your agency to collect it.

2. If sued, lead with information regarding your agency's lack of net worth to disincentivise the predatory attorney.

#### **The Law Firm of Messer & Stilp, Ltd.**

**The Chicago law firm of Messer & Stilp, Ltd. provides comprehensive legal services to large and small collection agencies. We understand collection agencies' unique legal needs and specialize in defending collection agencies in lawsuits brought under the Fair Debt Collection Practices Act, Fair Credit Reporting Act and other State and Federal consumer protection laws.**

**Collection agencies provide an invaluable service. We believe their rights should be protected to the fullest extent of the law. Messer & Stilp, Ltd. provides creative and cost-effective legal representation. We strive to terminate frivolous and abusive lawsuits rapidly and decisively, and devote the time and attention necessary to handle difficult cases.**

**Feel free to call Joe Messer at (312) 334-FIRM (3476) for a complementary consultation.**

**Visit us at [WWW.MesserStilp.Com](http://WWW.MesserStilp.Com)**

**JOSEPH S. MESSER  
BIOGRAPHY**

**Joseph Messer earned a Bachelor of Arts from Lake Forest College and Juris Doctor from Chicago-Kent College of Law. After working at a large Chicago law firm, Mr. Messer and his partner opted for a more specialized, boutique firm to provide personalized attention to their clients, and opened Messer & Stilp, Ltd. Mr. Messer and the attorneys at Messer & Stilp provide comprehensive legal services to many large and small collection agencies located in Illinois and throughout the nation. Mr. Messer specializes in advising agencies on legal compliance and defending agencies in lawsuits brought under the Fair Debt Collection Practices Act, Fair Credit Reporting Act and other State and Federal consumer protection laws. In addition to his business and litigation practice, Mr. Messer advises collection agencies about HIPAA compliance.**

**DISCLAIMER**

**These materials have been prepared for educational purposes. They are not intended to give legal advice, nor should they be relied upon as such. Because specific circumstances affect compliance with the laws described herein, you are advised to review your circumstances with qualified legal counsel to ensure proper implementation.**

# Debt collector fights back ... COURT MAKES LAWYER PAY UP for "unreasonable" pursuit of a lawsuit!

CASE STUDY #3  
FROM THE FILES OF THE  
CREDIT & COLLECTIONS  
DIVISION OF  
MESSER & STILP, LTD.

*Unwitting errors frequently put debt collectors at risk from opportunistic attorneys. One firm decided not to take it any more!*

*Section 1927 of the U.S. Code forbids lawyers from pursuing lawsuits "unreasonably and vexatiously." The following case study illustrates how an attorney who used a case of mistaken identity to press a lawsuit against a bill collector had the tables turned and wound up paying attorneys' fees to the defendant.*

***Under the fair Debt Collection Practices Act, it can be unlawful for a debt collector to attempt to collect a debt that has been discharged in bankruptcy. Attorney David Philipps, attempting to sue a debt collector under this rule, ran into serious trouble under Section 1927.***

***In 2003, a debt collection agency sought to collect a credit card debt from a Mr. Russell McComb. Through a Lexis-Nexis search, the agency mistakenly located Russell McComb, Sr. and contacted him in an attempt to collect.***

***McComb, Sr. had previously gone through a bankruptcy in which he discharged a different debt to the same credit card company.***

***Learning of the agency's contact, David Philipps (McComb, Sr.'s attorney) sued the agency for violating the Fair Debt Collection Practices Act.***

***The agency explained to Philipps how McComb, Sr. was mistakenly identified by Lexis-Nexis and that it was not attempting to collect the debt that McComb, Sr. had discharged. Philipps pressed the lawsuit regardless of the mistaken identity revelation.***

***The collection agency retained Messer & Stilp, Ltd. of Chicago to defend the suit. Senior partner Joseph Messer headed the defense team.***

***"When Philipps was made aware of the Lexis-Nexis error and learned that the agency would not pursue any claim against McComb, Sr., we would have expected Philipps to drop the matter," Messer said.***

***"However, Philipps pursued the case, hoping perhaps that the agency would offer a settlement," Messer stated. But this agency did not intend to fold.***

***"So we went after Philipps under Rule 1927. Not only did we want to win the case for the agency," he said, "we wanted Philipps to pay our client's legal fees."***

***The case was heard by the Honorable Milton I. Shadur, judge in the U.S. District Court's Northern District of Illinois, Eastern Division.***

***Judge Shadur pointed out that Philipps' own notes confirmed he knew the agency's contact with his client was a case of mistaken identity and, despite this knowledge, continued to pursue litigation "as though the agency had deliberately and wrongfully targeted" McComb, Sr. in violation of FDCPA.***

***The judge further stated that the act of "simply sending an entirely legitimate claim to an incorrect address, which is***

***what occurred here" is not, in fact, a violation.***

***According to Messer, the Court did not approve of Philipps' acknowledged practice "to shoot first and ask questions later" wherein he would file suit rather than make inquiries that might lead to a more reasonable course of action.***

***In his ruling, Judge Shadur dismissed the suit against the collection agency "with prejudice" and ruled that Philipps pay the agency's legal fees to the tune of \$12,000.***

***Attorney Messer summed up the case as follows:***

***"Debt collectors trying to operate within FDCPA, remain vulnerable to falling afoul of the Act's provisions. Predatory attorneys make good money filing – and settling – lawsuits when inadvertent errors occur. Our client could have settled, but refused to be victimized. The collection agency defended this suit instead. We hope this victory will make other attorneys think twice before suing another debt collector pursuing a debt and acting in good faith."***

***The Credit & Collections Division of Messer & Stilp, Ltd., protects the rights of debt collectors. For more information, contact: Joseph Messer, Messer & Stilp, Ltd., 166 W. Washington St., Chicago, IL 60602, (312) 334-FIRM (3476).***



# Judge rules in collector's favor ...and awards legal costs!

*A debtor's confusing bankruptcy filing helped entrap a well-known collection firm, but fails to cloud the court's judgment. Plaintiff loses case!*

*A leading debt collection firm acquired a delinquent \$574.72 consumer account as part of a group of receivables purchased from Fingerhut Credit Advantage. Part of the purchase agreement expressed Fingerhut's intention not to include accounts in bankruptcy and to notify the collection agency of any bankruptcies that arose.*

A letter, attempting to collect, was addressed to "Lisa Ross" who was identified as the debtor. Subsequently, Ross filed a Chapter 7 bankruptcy petition, but listed her Name as "Delisa Ross." In the filing she admitted to owing the \$574.72, but she incorrectly identified the original owner of the debt. As a result, Fingerhut did not learn of the bankruptcy filing and, thus, was incapable of advising the debt collection firm. In addition, the collection firm's standard bankruptcy search procedures failed to identify any such proceedings on behalf of "Lisa Ross."

The year following Ross' discharge by the bankruptcy court, the debt collector sent two collection letters to "Lisa Ross" making settlement offers. Approximately two months later, the attorney for Ross advised the collection firm that (a) Ross had filed for bankruptcy and (b) she had retained counsel.

The collector immediately stopped trying to collect the debt and did not contact Ross again.

Ross and her attorney filed suit.

They claimed the debt collector violated the Fair Debt Collection Practices Act by "demanding payment of a debt that had been discharged in bankruptcy, and by communicating with a consumer who was represented by counsel."

According to the collector's law firm, Messer & Stilp, Ltd., Chicago, "Our client was clearly shielded from liability. We had a defense."

U.S. Magistrate Judge Geraldine Soat Brown agreed.

She denied Ross' motion for summary judgment, and she granted judgment in favor of the collection firm. Further, she awarded costs to Messer & Stilp's client.

Judge Brown said the FDCPA affords debt collectors a "bona fide error" defense if (a) a violation was not intentional, and (b) the error occurred despite maintenance of procedures "reasonably adapted" to avoid such errors.

Messer & Stilp partner, Joseph Messer, said the judge recognized that it was Ross' own errors in her bankruptcy petition that prevented the collection company from receiving notice of her bankruptcy or discovering it through their own search procedures.

The court further noted that Ross filed for bankruptcy less than 60 days after receiving a collection letter addressed to "Lisa Ross" but never listed the name "Lisa Ross" on her bankruptcy filing. At the same time she admits to the debt but claims she never uses the name "Lisa

CASE STUDY #5  
FROM THE FILES OF THE  
CREDIT & COLLECTIONS  
DIVISION OF  
MESSER & STILP, LTD.



Joseph Messer Senior Partner  
Messer & Stilp, Ltd.

Ross." Attorney Messer states "these issues had a major influence on the court's ruling and, we believe, will negatively impact the plaintiff's appeal."

Whether the confusion created by the bankruptcy filing was deliberate or not, Messer points out, "It certainly opened the door for an FDCPA claim Ross and her attorney hoped would result in a profitable judgment or settlement. We're proud our client refused to roll over."

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*Finally some common sense ...*

# SETTLEMENT OFFERS ARE "OKAY" ... *if you act now!!!!*

Debt collectors have the right to make "urgent" settlement offers without violating the Fair Debt Collection Practices Act.

**CASE STUDY  
FROM THE FILES OF THE  
CREDIT & COLLECTIONS  
DIVISION OF  
MESSER & STILP, LTD.**

*In 2004, the 5th Circuit Court placed a deadly chill on normal and necessary collection practices: the Court's infamous Goswami v. American Collections Enterprise, Inc. decision essentially ruled that "limited time" debt settlement offers were misleading and abusive to debtors and thus constituted an unfair collection practice.*

*This ruling was soundly rejected this year by Judge David Frank Hamilton of the U.S. District Court for the Southern District of Indiana in his consolidated opinion in the following three cases: Headen v. Asset Acceptance, LLC; Evory v. RJM Acquisitions Funding, LLC; and Hubbard v. M.R.S. Associates, Inc. Collectively, these cases are referred to as the Headen decision which involved three separate "limited time" settlement offers as delivered via three letters:*

## **LETTER #1: TIME'S A WASTIN'!**

Dear KEVIN L. HEADEN,

Act now and receive 30% off (\$414.13) if you pay by March 31st, or receive only 25% off (\$345.11) if you pay by the April 15th tax filing deadline.

Remember, time's a wastin'!

## **LETTER #2: TWO OPPORTUNITIES**

Previously, we offered you the opportunity to settle this account with a lump-sum payment of \$259.64, a 20% discount on the balance due.

While some people were very interested in this offer, they found that raising the full amount required to settle the account within the specified time was just too difficult.

### **OPPORTUNITY #1**

(RJM) would like to re-offer the same 20% discount to be paid in seven (7) consecutive monthly payments of \$37.09.

### **OPPORTUNITY #2**

If you cannot take advantage of opportunity #1, (RJM) is pleased to accept \$18.54 per month until the balance of \$324.55 is paid.

These two offers are valid through May 30, 2004.

## **LETTER #3:**

We are presenting the option that will enable you to avoid further collection activity being taken against you. **OPTION 1: A settlement of 25% OFF of your current balance, SO THAT YOU ONLY PAYMENT [sic] \$329.99 IN ONE PAYMENT that must be received no later than 40 days after the date on this letter.**

*Time limits add urgency to any offer, whether it is a furniture store's advertised "clearance sale" or a written settlement offer from a debt collector to a debtor.*

Retail marketing guru, Merrill Ehrenberg states: "Time limits stimulate action and whether it is an auto manufacturer announcing cash rebates, a retailer announcing free financing or a debt collector offering a settlement, nothing says that this offer can't be extended, reinstated at a later date or replaced by a different offer."

Attorney Joseph S. Messer of Messer & Stilp, Ltd., Chicago, represented RJM Acquisitions Funding, LLC, in this action. He argued that limited time settlement offers (1) were necessary and valid collection practices and (2) did not, in and of themselves, indicate that the settlement offer was a "final" offer or the "last time" that offer or another offer would be made.

Judge Hamilton agreed. The Court found that the limited time settlement offers did not violate the FDCPA. Moreover, the Court flatly rejected the Goswami decision stating:

"The practical result of the Goswami holding ... is to deter settlement,

not to deter abusive collection tactics. Both debtors and upstanding debt collectors – the parties Congress aimed to protect – would be harmed."

According to attorney Messer, the Court was clear the FDCPA should not make it "more difficult for debtors to resolve their debts at a discount" and the Headen decision is the first step toward a more reasonable interpretation of the Act. He added Judge Hamilton's ruling "sets a precedent that can greatly influence future decisions in similar cases."

Mr. Messer offered some practical advice: "When composing limited time settlement offers, debt collectors should take care to avoid language that states 'this is a final offer' or 'your last chance to settle' at a discount. There is a line between 'honest urgency and deception,' and it's a line the debtor shouldn't cross."

Messer & Stilp, Ltd. is one of a very few law firms with a Credit & Collection Division devoted solely to protecting the rights of debt collectors in the pursuit of their profession. Messer & Stilp is located at 166 West Washington Street, Suite 300, Chicago, Illinois 60602. For more information on this case or other similar matters, contact Joseph Messer at (312) 334-FIRM (3476).

*This may be construed as advertising material.*

*Specious claim denied ...*

# “REASONABLE PRECAUTION” PROTECTS DEBT COLLECTOR!

## Summary judgment throws case out of court!

***A prominent debt collection firm attempted to collect a delinquent \$4,000 account on behalf of a lender. The following month, the debtor, through her attorney, disputed the claim.***

***The collection firm immediately requested verification of the debt from the lender AND made no further attempt to contact the debtor. While waiting to hear from the lender, and before the collector could respond to the debtor, she filed suit. She claimed the collector violated the Fair Debt Collection Practices Act by “falsely implying she is obligated to pay a debt she did not owe.”***

CASE STUDY #4  
FROM THE FILES OF THE  
CREDIT & COLLECTIONS  
DIVISION OF  
MESSER & STILP, LTD.

One day after the debtor filed her complaint, the collector received a copy of a cancelled check from the lender made out to and purportedly endorsed by the debtor. The collector faxed a copy of the check to the debtor's attorney as verification of the debt. The debtor responded by claiming to be a victim of identity theft. She reported a former roommate had intercepted a pre-approved credit application from the lender, forged the signature and pocketed the \$4,000 loan. The debtor further claimed she had sent the lender a completed identity theft affidavit more than a year before being contacted by the collector.

However, the debtor had never informed the collector of the alleged identity theft prior to filing her complaint. Nor, in fact, had the lender.

The collector found itself in an awkward position – one the debtor and her attorney tried to exploit through their lawsuit.

“We felt the collector did nothing wrong,” stated Joseph Messer of Messer & Stilp, Ltd., attorneys in the case. “We felt this was a bogus suit filed to gain a financial windfall. We didn't want to let this debtor and her lawyer get away with it. And, in fact, we didn't.”

Messer reviewed the facts and surveyed the collector's standard practices to determine the best defense.

The FDCPA requires a debt collector to advise a debtor in writing that if the debtor does not dispute the validity of the debt within thirty days after receipt of the notice, the debt collector will assume the debt to be valid. The notice must also state that if the debtor disputes the debt in writing within the 30 day period, the debt collector will “obtain verification of the debt” and mail a copy of the verification to the debtor.

“Our review showed the collector's correspondence with the debtor clearly met FDCPA requirements, and their procedures shielded the collector from liability,” Messer said.

Messer had found the firm had in place its own procedures to prevent errors that may occur in the normal course of business:

1. Upon receipt of evidence that a debt might not be legitimately owing, the collector automatically ceases all collection activity and subjects the account to management review.
2. This evidence is reviewed by the collector's legal department who will remove an account from collection if appropriate.
3. The collector reviews the creditor's documentation to be sure the documentation supports the creditor's claim that an account is owed.

According to Messer, “If we assume that the debtor was, in truth, a victim of identity theft and was not liable for the debt, we must also recognize that the collector instituted its collection attempt in good faith. At worst this must be considered a “bona fide error.”

Messer's strategy was to seek summary judgment under the FDCPA's “bona fide error defense.”

“Essentially, we asked the court to enter judgment in the collector's favor and save our client the costs and stress of a trial. Although judges are reluctant to deny a plaintiff a day in court, we believed we could persuade the court this case was without merit,” Messer said.

The debtor claimed the collector “misrepresented that it could collect a debt ... when she was a victim of forgery and identity theft.” Messer argued that there was no misrepresentation because the validation language of the collection letter

“mirrored” the language in the FDCPA, and the collector's validation process had served the purpose intended by the FDCPA. Further, Messer argued that once the debt was disputed, the collector ceased all collection efforts and subjected the account to its review procedures.

Messer's arguments prevailed.

The case was heard by Chief Judge Michael P. McCuskey of the U.S. District Court, Central District of Illinois, Urbana Division. He ruled that “to be entitled to summary judgment under the bona fide error defense, a debt collector need not ‘take every conceivable precaution to avoid errors; rather it only requires reasonable precaution.’ Because (the collector) employed such reasonable precaution, summary judgment is appropriate.”

***“It's no secret that debt collectors operate in a minefield of potential legal hazards. A legitimate collection attempt or an innocent stumble might open the door to a proceeding that can generate a handsome settlement or jury award for a debtor with an aggressive lawyer,” Messer points out.***

***“Too few people in the industry mount a serious defense against claims that are often specious,” he said, “and feel a quick settlement is the least costly solution. Our client did it right. First, with the foresight to have clearly defined procedures in place to prevent errors. Second, our client was not going to submit to a claim that was not supported by fact. Our client refused to be an easy target, and the court threw out the case.”***

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THE CREDIT & COLLECTIONS DIVISION OF MESSER & STILP, LTD.

Messer & Stilp is one of the few law firms in the country with an entire division of experienced attorneys dedicated to protecting debt collection firms and the creditors they serve from predatory lawsuits in FDCPA and FCRA cases.

OUR APPROACH IS A THREE-PRONGED PRO-ACTIVE STRATEGY:

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**WILL WE DO COLLECTIONS OURSELVES?**

Because of our experience and reputation in the field, we are often asked to do collection work for our creditor clients and/or collection agencies we've worked with. In cases where we believe our expertise will maximize our clients' returns and minimize their risks, we will take on collection assignments.

**For more information, please contact:  
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## LEARNING LESSONS FROM LITIGATION

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## LEADING THE CHARGE

### JOSEPH S. MESSER, FOUNDING PARTNER



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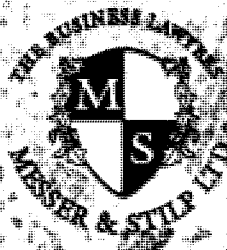
### THOMAS R. STILP, FOUNDING PARTNER



Thomas Stilp has handled collection cases for 20 years and is a recognized expert in Debtor-Creditor Law and post-judgment collection in Illinois, including the Special Remedies Section of the Illinois Circuit Court. He has conducted more than 150 bench and jury trials in both state and federal courts. He is the author of a number of articles on collection and business litigation used by bar associations and law schools throughout the United States.

Stilp is admitted to practice before Illinois and several federal courts and is a member of various collection industry and bar organizations. In addition to law degrees from Loyola University School of Law (JD) and John Marshall Law School (LLM), he also holds a Master of Management/Master of Business Administration (MM/MBA) from Northwestern's Graduate School of Management.

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At Messer & Stilp, Chicago, we're known as "The Business Lawyers." The clients who come to us again and again are growing and mid-size businesses. Serving these businesses is our core competency.

Our philosophy is simple and straightforward:

"Messer & Stilp is committed to providing you with first class legal services with a personal interest in your legal matters."

By employing our skills on your behalf, you can become more profitable and more secure as owners and/or operators of your business. Do you need to raise money? Do you need to incorporate or otherwise structure your business?

Are you being sued?

Do you have trouble collecting past due accounts?

Do you need to negotiate a lease or write an important contract?

Talk to us:

**MESSER & STILP, LTD.**

166 West Washington Street

Suite 300

Chicago, Illinois 60602

Phone: (312) 334-FIRM (3476)

Fax: (312) 634-3434

[www.messerstilp.com](http://www.messerstilp.com)

Protecting  
the rights  
of debt  
collectors...

M



# Protecting the rights of debt collectors in the hostile environment of FDCPA and FCRA law

## BEWARE THE PREDATORY PLAINTIFF ATTORNEY.

When Congress passed the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA), our legislators spawned a cottage industry for plaintiffs' attorneys who make a living off the attorney's fee provisions built in to these statutes.

Potential judgments available to an actual plaintiff are severely limited by law. But the potential to run up and collect substantial (and often rapacious) attorney's fees, has generated a feeding frenzy among predatory attorneys. And thus, debt collectors must navigate a treacherous sea of potential violations wherein with even the best intentions a collection agency may find itself afoul of the law.

Because the FDCPA is a strict liability statute, lawsuits against collection agencies can be difficult to defend, especially in Indiana, Illinois and Wisconsin, the states served by the 7th Circuit Federal Court of Appeals, home to some of the most "debtor friendly" or "agency hostile" court decisions in the nation.

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Further, Messer works with the Illinois Collectors Association (ICA) and is MAP liaison to the ICA. He often speaks at ACA and ICA events and to bar associations on consumer protection laws as they pertain to debt collection.

## THOMAS R. STILP, FOUNDING PARTNER



Thomas Stilp has handled collection cases for 20 years and is a recognized expert in Debtor-Creditor Law and post-judgment collection in Illinois, including the Special Remedies Section of the Illinois Circuit Court. He has conducted more than 150 bench and jury trials in both state and federal courts. He is the author of a number of articles on collection and business litigation used by bar associations and law schools throughout the United States.

Stilp is admitted to practice before Illinois and several federal courts and is a member of various collection industry and bar organizations. In addition to law degrees from Loyola University School of Law (JD) and John Marshall Law School (LLM), he also holds a Master of Management/Master of Business Administration (MM/MBA) from Northwestern's Graduate School of Management.

## RECENT CASE HISTORIES:

### "REASONABLE PRECAUTION" DEFENSE SWAYS DISTRICT COURT. SUMMARY JUDGMENT THROWS CASE OUT OF COURT!

A debt collector tried to collect a delinquent \$4,000 account. The debtor disputed the debt. The collector immediately sought verification of the debt and made no further attempt to collect. The debtor filed suit claiming the collector violated the FDCPA by "falsely implying she is obligated to pay a debt she did not owe."

When the collector subsequently provided verification of the debt, the debtor claimed she was a victim of identity theft, but only after filing suit. Messer & Stilp argued even if identity theft occurred, and the debtor was not liable for the debt, "the collection attempt was made in good faith" and at worst, this was a "bona fide error." Further, it was shown that the collector had procedures in place designed to prevent errors which regularly occur in the normal course of business.

The court granted summary judgment in favor of the collector stating that the bona fide error defense only requires a defendant to take "reasonable precaution" against errors made in good faith.



### IMPORTANT VICTORY IN DISTRICT COURT RE-AFFIRMS DEBT COLLECTORS' RIGHT TO MAKE "LIMITED TIME" SETTLEMENT OFFERS WITHOUT VIOLATING THE FDCPA!

In 2004, several courts had ruled that "limited time" debt settlement offers were misleading and abusive to debtors and thus constituted an unfair collection practice. Defending a collector in Indiana District Court, Messer & Stilp argued that limited time settlement offers were (1) necessary and valid collection practices and (2) did not, in and of themselves, indicate that the settlement offer was a "final" offer or the "last time" that another offer would be made. The court agreed, rejecting prior contrary decisions. The court found that the practical result of outlawing limited time settlement offers would be to "deter settlement, not to deter abusive collection tactics. Both debtors and upstanding debt collectors ... would be harmed." Messer & Stilp noted the FDCPA should not make it "more difficult for debtors to resolve their debts at a discount" and that this ruling "provides a road map that can greatly influence future decisions in similar cases."

### A CONFUSING BANKRUPTCY ENTRAPPED A COLLECTION AGENCY. JUDGE RULES IN COLLECTOR'S FAVOR ... AND AWARDS LEGAL COSTS!

A debt collector sent a collection letter to a debtor. The debtor subsequently petitioned for bankruptcy ... under a slightly different first name than listed on the original debt. Thus, the debt collector's standard search failed to identify the debtor as engaged in bankruptcy.

The debt collector sent additional collection letters. The debtor's attorney advised that (a) the debtor had filed for bankruptcy and (b) had retained counsel. Although collection efforts immediately stopped, the attorney sued the agency for "demanding payment of a debt discharged in bankruptcy and communicating with a consumer who was represented by counsel."

Whether the "name confusion" created by the bankruptcy filing was deliberate, Messer & Stilp pointed out, "it opened the door for a FDCPA claim the debtor and her attorney hoped would result in a profitable judgment or settlement."

Messer & Stilp argued the collector's error was not intentional and it was the debtor's own errors in bankruptcy filing that prevented the collection agency from learning of the bankruptcy through their own search procedures.

The court granted summary judgment in the collection agency's favor ... and awarded costs pursuant to the action to the agency.

### DISTRICT COURT SANCTIONS PREDATORY LAWYER; RULES IN FAVOR OF COLLECTOR!

Section 1927 of the U.S. Code forbids lawyers from suing "unreasonably and vexatiously." In 2003, a collection agency tried to collect a credit card debt from a Russell McComb. Lexis-Nexis mistakenly located Russell McComb, Sr. who was sent a collection letter. The true debtor was Russell McComb, Jr.

McComb, Sr. had recently filed for bankruptcy in which he discharged a different debt to the same credit card company. McComb, Sr.'s attorney, David Philipps, sued the agency for violating FDCPA. The agency explained the Lexis-Nexis error and said it was not attempting to collect the debt that McComb, Sr. had already discharged. But Philipps pressed the suit.

Messer & Stilp argued the suit should have been dropped after the identity error was revealed, and that Philipps was suing "unreasonably and vexatiously" in hopes of a profitable settlement. The court agreed, dismissing the case "with prejudice," and ordered Philipps to pay the collection agency \$12,000.

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## CREDITORS' RIGHTS & CONSUMER CLAIMS DEFENSE



**J. Michael True**  
Attorney

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## J. MICHAEL TRUE

Michael True is a litigation attorney who represents defendants in consumer law and commercial litigation matters. He has extensive experience defending individual and class action claims against businesses, corporate entities, creditors, debt assignees and collection agencies alleging violations of federal and state consumer protection statutes, including the Fair Debt Collection Practices Act (FDCPA), Fair Credit Reporting Act (FCRA), Telephone Consumer Protection Act (TCPA), state interest acts, state collection agency acts and state consumer fraud and deceptive business practices acts.

Mr. True provides counsel, consultation and litigation services to law firms, debt buyers, and debt purchasers throughout the country. He also has extensive appellate practice experience, representing clients on appeal in both state and federal courts.

### Admitted to Bar

- Wisconsin; Illinois; U.S. District Court, Northern & Southern Districts of Illinois and Eastern & Western Districts of Wisconsin; and U.S. Court of Appeals, Seventh Circuit

### Education

- DePaul University College of Law, Chicago, Illinois, 2003 J.D., cum laude
- University of Dayton – Dayton, Ohio, 1996 B.S.

### Member

- ACA International, Members Attorney Program
- American Bar Association
- State Bar of Illinois
- Illinois State Bar Association
- State Bar of Wisconsin

### Awards & Honors

- Abraham Lincoln Marovitz Lend-A-Hand Program "Mentor of the Year Award" (July 2006)



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## CREDITORS' RIGHTS & COMMERCIAL LITIGATION

As one of the largest creditors' rights and business bankruptcy practices in the state of Wisconsin, our attorneys have represented creditors, debt assignees, and collection agencies in both state and federal courts. Our Creditors' Rights & Commercial Litigation practice group represents clients in:

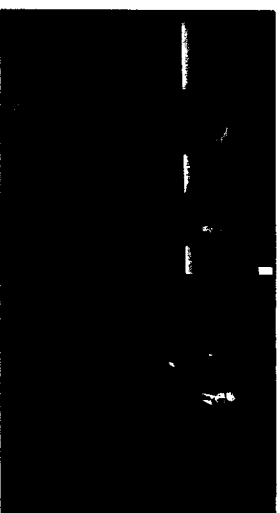
- Fair Debt Collection Practices Act Defense
- Fair Credit Reporting Act Defense
- Telephone Consumer Protection Act Defense
- Collections & Consumer Law
- Commercial Law

Debt collection organizations need representation from a law firm that has had success in defending agencies from lawsuits that are oftentimes frivolous and can impede the collections process.

Murphy Desmond can address debtors' complaints and answer your compliance questions to help prevent complaints in the first place.

Our attorneys have served many clients nationwide. We believe that representation by the same law firm for agencies that operate in multiple jurisdictions provides consistency in litigation philosophy and legal positions. As we become more familiar with your agency's policies and procedures, we are able to develop more efficient and effective defense strategies. Although plaintiffs' complaints are a cost of doing business, let us help you minimize those costs and assist you with developing a well-rounded plan to reduce and address future complaints.

Murphy Desmond's accomplished team of lawyers is ranked #1 in Madison, WI, and in Wisconsin overall for "Bankruptcy and Creditor-Debtor Rights Law" by Best Lawyers in America for 2010. Many members of our group have been recognized by Best Lawyers in America, Wisconsin Super Lawyers, Wisconsin Rising Stars, and "Top Lawyers" by *Madison Magazine*, in addition to other various honors. Contact the law firm of Murphy Desmond S.C. to protect your interests.



## ABOUT MURPHY DESMOND S.C.

The law firm of Murphy Desmond was founded in 1931 by people with an unwavering belief in the principles of reliable client service, legal integrity and community involvement. Those values remain at the core of our firm as we work to anticipate our clients' needs and exceed their expectations. With nearly 50 attorneys in offices in Madison and Janesville, WI, Murphy Desmond provides our clients with timely and innovative solutions to their legal challenges. Throughout the years, we have earned various accolades for the firm as well as for individual attorneys.

Commitment to our communities is important to Murphy Desmond, as well. Our attorneys and staff are active volunteers in many charitable and community organizations, and the firm contributes financially to causes in health, human services, education, athletics, arts, special events, and local business development.

Murphy Desmond is also intent on reducing our environmental imprint. Our office, which we helped design in 2007, integrates numerous earth-friendly features and materials. On a day-to-day basis, we work to incorporate processes and supplies that benefit the environment whenever possible.

When you seek legal advice, choose lawyers who value relationships with their clients and the community. Choose Murphy Desmond lawyers.

# Collection Attorneys for Debt Collectors, Debt Buyers and Creditor Clients



FOR MORE INFORMATION ON OUR  
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• Flexible contingent fees for collection  
success

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range of related associations

Messer & Stilp provides legal collection services in metropolitan Chicago including Cook, Lake, DuPage, Kane, McHenry and Will Counties in Illinois and Lake County in Indiana. The lawyers at Messer & Stilp are specialists in Credit & Collections Law. The firm built its reputation defending collection agencies in lawsuits filed under the FDCPA, FCRA and other state and federal statutes governing the consumer debt collection industry. "Our clients call on us to handle their most difficult collection assignments," states founding partner, Thomas R. Stilp.

## Aggressive. Ethical. Effective.

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Jeff Rumowski  
Collection Masters, LLC  
Chicago, Illinois

Recalcitrant debtors are more responsive when facing the legal professionals from Messer & Stilp ... and frequently more willing to settle in our clients' favor. Why? We

believe it's well known that when required, our hard-hitting litigation skills deliver favorable verdicts time after time.

**Messer & Stilp's collection activities include, but are not limited to, the following areas:**

- Early-Outs ■ Pre-Chargeoff ■ Primary ■ Secondary ■ Tertiary
- Judgment Enforcement ■ Skip Tracing ■ Asset Location

**Clients can depend on Messer & Stilp to provide:**

- Immediate response to client inquiries ■ Consistent, accurate, scheduled reporting ■ Privacy and data protection
- On-site training systems to keep staff up to date on all aspects of collections law

