moved to dismiss for failure to state a claim on which relief can be granted, arguing that Plaintiff did not qualify as a consumer under the DTPA. The district court referred the motion to a Magistrate.
HOLDING: Recommended dismissal.
REASONING: Plaintiff argued that she satisfied the necessary element of consumer status because a mortgagor qualifies as a consumer under the DTPA if (1) her primary objective in obtaining the loan was to acquire a good or service, and (2) that good or service forms the basis of the complaint.

The court rejected Plaintiff's argument, holding that Plaintiff is not a consumer under the DTPA because her complaint is based entirely on Defendants' loan servicing and foreclosure activities, not the goods or services acquired in the original transaction, namely, the home she purchased with the Loan. Because Plaintiff is not a consumer, she may not assert a claim under the DTPA.

Because Plaintiff is not a consumer, she may not assert a claim under the DTPA.

DEBT COLLECTION

EVEN SIXTEEN MINUTES LATE IS TOO LATE FOR FILING AN APPEAL

Chung v. Lamb, ___ Fed. Appx. ___ (10th Cir. 2019).
https://www.accountsrecovery.net/wp-content/uploads/2019/12/Boscoe-Chung-v-Lamb.pdf

FACTS: Plaintiff-Appellant Emily Chung's attorney, Karen Hammer, (collectively, "Chung") filed the underlying case on behalf of her client to redress Defendant-Appellee Timothy Lamb's alleged violation of the FDCPA. The trial court subsequently granted summary judgment to Lamb and entered its final judgment on November 14, 2018. Under Federal Rule of Appellate Procedure 4(a)(1)(A), the deadline to file a notice of appeal expired on Friday, December 14, 2018. Chung filed a motion for an extension of the deadline to file a notice of appeal at 12:16 a.m. on Saturday, December 15, 2018, stating that she encountered several emergencies, including technological issues, that prevented her from filing a timely notice of appeal.

The trial court denied Chung's motion for an extension of time to appeal. Chung appealed the holding.
HOLDING: Affirmed.
REASONING: Chung argued that the clerk's office was "inaccessible" on December 14 because she made attempts to log in to the court's electronic filing system by first mistakenly logging onto the wrong website, and then by logging onto the correct website with incorrect credentials. Chung further argued that, because Federal Rule of Appellate Procedure 26(a)(3) states that the deadline for filing a notice of appeal "is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday" "if the clerk's office is inaccessible" "on the last day for filing," her appeal was timely.

The court rejected Chung's argument, holding that Chung's mistakes did not render the clerk's office inaccessible. The judge reasoned that Chung did not allege that she was attempting to file the notice of appeal when she mistakenly logged in to the wrong website and thereafter used the wrong credentials. Nor did Chung allege that the system would have prevented her from filing the notice of appeal at any time on December 14 had she accessed the correct site and used the correct credentials. Additionally, the court noted that Chung cited no case in which an individual litigant's errors or delays in attempting to file a pleading warranted a finding that the clerk's office was "inaccessible" on the day in question. Accordingly, the court held that the clerk's office was accessible on December 14 and Chung simply failed to access it, rendering her appeal untimely.

DEBT COLLECTOR USING THE TERMS "ORIGINAL CREDITOR" DOES NOT VIOLATE FDCPA

Dennis v. Niagara Credit Sols., 946 F.3d 368 (7th Cir. 2019).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D12-30/C:19-1654:J:Flaum:aut:T:fnOp:N:2451207:S:0

FACTS: Defendant-Appellee LVNV Funding ("LVNV") bought Plaintiff-Appellant Thomas Dennis's defaulted debt from Washington Mutual Bank. LVNV was a client of Defendant-Appellee Niagara Credit Solutions ("Niagara"), who sent a debt collection letter to Dennis on LVNV's behalf. The letter stated that Niagara's "client" had authorized Niagara to offer a payment plan or a settlement of the debt in full. The letter identified Washington Mutual Bank as the "original creditor" and LVNV as the "current creditor." Dennis filed a class action suit against LVNV and Niagara, claiming violation of the FDCPA by the defendants' failure to identify clearly and effectively the name of the creditor to whom the debt was owed.

The trial court granted summary judgement for the defendants, concluding that the letter adequately identified to whom the debt was owed. Dennis appealed.
HOLDING: Affirmed.
REASONING: Dennis argued that the debt collection letter violated FDCPA §1692g(a)(2)'s requirement that debt collectors send consumers a written notice containing the name of the creditor to whom the debt is owed. Dennis argued that the letter did not satisfy the FDCPA because identifying two separate entities as the "current creditor" and "original creditor" led to consumer confusion.

The letter provided information clearly enough that the recipient is likely to understand it.

The court rejected Dennis's argument, holding that the defendants did not violate the FDCPA standards because the letter provided information clearly enough that the recipient is likely

to understand it. The court explained that when a consumer's debt has been sold, it is helpful to the consumer to identify the original creditor and the current creditor. The court cited its holding in *Smith v. Simm* that FDCPA violations are to be viewed through the objective lens of an unsophisticated consumer who, while "uninformed, naïve, or trusting," possesses at least reasonable intelligence and is capable of making basic logical deductions and inferences. Because an unsophisticated consumer would be capable of understanding from the letter that the debt had been purchased by and was now owed to the current creditor, the court held the letter did not violate FDCPA standards.

UNDER FDCPA, DEBT COLLECTOR'S LETTER REGARDING DEBT DISPUTE PROCEDURE MUST INFORM CONSUMER THAT THESE REQUESTS MUST BE MADE IN WRITING

DEBT COLLECTOR'S LETTER LISTING THE "TOTAL DUE" AS $590.00 VIOLATES FDCPA

Hackler v. Tolteca Enters., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2019).
https://scholar.google.com/scholar_case?case=7486268692777974584&q=hackler+v.+tolteca+enterprises&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiff Sadie Hackler leased a home. Upon Plaintiff's moving out, the landlord alleged damage to the home that exceeded the amount of Plaintiff's security deposit. Plaintiff disputed the amount of damage and the landlord turned the disputed debt over to Defendant Tolteca Enterprises, Inc. Plaintiff subsequently received a letter from Defendant attempting to collect the disputed debt ("Letter"). Plaintiff filed suit, claiming the Letter's form and content violated the FDCPA.

Plaintiff moved for summary judgment as to liability for violations of the FDCPA. Defendant did not respond to Plaintiff's motion.
HOLDING: Granted.
REASONING: Plaintiff argued that Defendant failed to notify Plaintiff of her right to make a written dispute of debt by excluding the "in writing" language. Plaintiff also argued the Letter violated the FDCPA's "amount due" requirement because the Letter stated the total amount due of $590.00 without clarifying whether the amount of the collection fee is included in the total due. The court agreed with both arguments.

The court explained that §§1692g(a)(4)-(5) requires debt collectors to inform consumers that requests under the FDCPA must be made in writing, as a matter of law. Because Defendant failed to inform Plaintiff that these statutory requests must be made in writing, the Letter failed to comply with the statutory notice requirements.

Next, the court explained that §1692g(a)(1) and §1692e(2)(A) of the FDCPA requires an initial communication to a consumer to inform them of the amount of the debt. The court observed that the Letter listed the total amount due as $590.00, but the Letter also stated that the balance may reflect a one-time agency collection fee. Because the Letter did not specify how much of the total, if any, was attributable to the collection fee and the Defendant failed to offer any evidence to clarify, the court found the Letter "unacceptably increased the level of confusion for an unsophisticated customer as to the actual amount of debt owed and therefore violated the FDCPA.

DEBT COLLECTION NOTICES SENT UNDER FDCPA, 15 U.S.C.S. § 1692g, NEED NOT REQUIRE THAT DISPUTES BE EXPRESSED IN WRITING

Riccio v. Sentry Credit, Inc., ___ F.3d ___ (3d Cir. 2020).
https://cases.justia.com/federal/appellate-courts/ca3/18-1463/18-1463-2020-03-30.pdf?ts=1585605608

FACTS: Defendant-Appellee Sentry Credit, Inc., bought Plaintiff-Appellant Maureen Riccio's debt. Sentry Credit sent a letter to Riccio notifying her that it sought to collect on the debt. Riccio filed suit against Sentry Credit, alleging the letter violated FDCPA § 1692g by providing a debtor with multiple options for contacting rather than explicitly requiring any dispute be in writing.

Sentry Credit moved for summary judgement on the pleadings. The trial court granted the motion. Riccio appealed.
HOLDING: Affirmed.
REASONING: Riccio argued that Sentry Credit did not comply with FDCPA § 1692g requirements because Sentry Credit was required to inform her explicitly that any dispute must be in writing.

The court rejected Riccio's argument, holding that § 1692g does not require written expression of disputes.

The court began by explaining that § 1692g's plain meaning does not require disputes be in writing. The court noted that § 1692g(a)(3) merely calls for the consumer to dispute the validity of the debt in order to rebut the statutory presumption of validity. But, § 1692g(a)(4) requires consumers to notify the debt collector in writing before forcing the collector to mail documentation verifying the debt, and § 1692g(a)(5) similarly demands that consumers make a written request within a thirty-day period to compel the collector to provide the consumer with the name and address of the original creditor, if different from the current creditor. § 1692g(b) then echoes §§ 1692g(a)(4) and (5), obliging collectors to cease collection until obtaining verification if the debtor notified the debt collector of a dispute in writing. The court reasoned that this intra-section variation strongly signaled that § 1692g permits oral disputes.

The court used the rule against surplusage to determine that inserting a writing requirement into § 1692g(a)(3) would strike that provision from the statute.

Next, the court considered the entirety of the FDCPA to determine that Congress did not inadvertently omit a writing requirement from § 1692g. The court noted that §§ 1692e(8) and 1692h, like § 1692g(a)(3), but unlike §§ 1692g(a)(4), (5), and 1692g(b), discussed disputes without specifying a method of communication. The court determined that this intersection

variation amplifies the variation within § 1692g, stating that where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Finally, the court used the rule against surplusage to determine that inserting a writing requirement into § 1692g(a)(3) would strike that provision from the statute. The court explained that, under § 1692g(a)(3), if a debt is not presumed valid the debt collector must eventually verify it at some point down the road, but §§ 1692g(a)(4) and (b) demand that if a debtor disputes the debt in writing the collector must prove its validity immediately. The court reasoned that because including a writing requirement under § 1692g(a)(3) would also trigger the requirement that a collector prove every debt immediately under §§ 1692g(a)(4) and (b), § 1692g(a)(3) would be left with no independent effect. Because a court will avoid a reading that renders some words redundant, the court declined to read a writing requirement into § 1692g(a)(3).

SUIT AGAINST CONDOMINIUM ASSOCIATION BOARD DIRECTOR TO COLLECT ATTORNEY'S FEES IS NOT FOR A CONSUMER DEBT

Spiegel v. Kim, 952 F.3d 844 (7th Cir. 2020).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-06/C:18-2449:J:Scudder:aut:T:fnOp:N:2484043:S:0

FACTS: Plaintiff Marshall Spiegel served as a director on the board of a condominium's homeowners' association until its members voted to remove him. The association then sued Spiegel in state court, alleging that he took several unauthorized actions leading to and following his removal. The complaint invoked an agreement (the "Restated Declaration") that Spiegel signed when he bought his unit, which provided that condominium owners who violated the board's rules would pay any damages and attorneys' fees that the association incurred as a result. Spiegel filed suit against the association's counsel, Defendant Michael Kim, while the state court litigation was still ongoing.

Spiegel invoked the FDCPA, alleging that Kim's application in state court for attorneys' fees constituted an unfair debt collection practice. Kim moved for summary judgement. The court granted the motion, concluding that Spiegel failed to state a claim because the attorneys' fees Kim requested were not a "debt" within the meaning of the FDCPA. Spiegel moved to vacate the judgment, but the trial court denied the motion. Spiegel appealed.

HOLDING: Affirmed.

REASONING: Spiegel argued that the attorney's fees sought constituted a "debt" under the FDCPA because, but for his condominium purchase, he would not have eventually found himself on the receiving end of Kim's legal demand to pay attorneys' fees.

The court rejected that argument, by first explaining that Congress limited the definition of "debt" under § 1692a(5) of the FDCPA to an obligation "arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." The court further explained that "the FDCPA limits its reach to those obligations to pay arising from *consensual* transactions, where parties negotiate or contract for *consumer-related goods or services.*" Because Spiegel's obligation to pay attorneys' fees arose out of his alleged wrongdoings as a board member, not from a consensual consumer transaction, the court held that the mere fact Spiegel could connect his condominium purchase to the state court litigation did not bring Kim's demand for attorney fees within the FDCPA's reach.

The court further explained that "the FDCPA limits its reach to those obligations to pay arising from *consensual* transactions, where parties negotiate or contract for *consumer-related goods or services.*"

The court further held that Kim's invocation of the Restated Declaration in his state court lawsuit did not change the court's analysis. The court explained that, although no party disputes that Spiegel signed the agreement as part of a consensual transaction, the state court complaint sought to impose a financial obligation on Spiegel only for the way he conducted himself while serving on the association's board. Because the court held there was no way to read Kim's state court complaint as seeking attorneys' fees for any reason connected to Spiegel's purchase of a condominium, the attorneys' fees sought by Kim could not constitute "debt" under the FDCPA.

THE ELEVENTH CIRCUIT CONFIRMED THAT NEITHER JP MORGAN CHASE NOR ITS LAW FIRM VIOLATED THE FAIR DEBT COLLECTION PRACTICES ACT WHEN CHASE NAMED THE SIBLINGS OF A DECEASED MAN IN A STATE-COURT FORECLOSURE ACTION RELATED TO HIS HOME

Anderman v. JP Morgan Chase Bank, ___ Fed. Appx. ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/19-13734/19-13734-2020-02-11.html

FACTS: Plaintiffs were sisters and heirs of decedent Clinton Arbuckle, who passed away while in default on his mortgage. The promissory note and the mortgage both identify Defendant JP Morgan Chase Bank ("Chase") as the lender and Clinton Arbuckle as the borrower. Chase foreclosed on the mortgage and its law firm filed a foreclosure complaint stating the full amount was payable. The foreclosure complaint requested that the court enter a judgment foreclosing the mortgage and retaining jurisdiction. Subsequently, Chase served Plaintiffs with a summons. Plaintiffs filed a federal class-action complaint against Chase and its law firm, alleging that cautionary language in the summons form, as well the fact that the complaint reserved jurisdiction to enter a deficiency judgment, made the foreclosure action an attempt to collect a debt against a deceased borrower's heirs violative of the FDCPA.

The trial court dismissed Plaintiffs' complaint. Plaintiffs appealed.
HOLDING: Affirmed.
REASONING: Plaintiffs argued that Chase and its law firm sought to collect a debt against the potential heirs of a deceased borrower by naming Plaintiffs in foreclosure complaints, in violation of FDCPA § 1692e's prohibition against debt collectors' use of false, deceptive, or misleading representation or means in connection with the collection of any debt, as well as § 1692f's prohibition against debt collectors' use of unfair or unconscionable means to collect or attempt any debt.

The court rejected Plaintiffs' arguments, holding that Plaintiffs failed to properly plead that Chase and its law firm are debt collectors under FDCPA. The court began by explaining that the fact Chase had attempted to collect on the note and mortgage did not sufficiently support the conclusory allegation that the principal purpose of Chase's business is to collect on defaulted debts because Chase, as the payee under the note and mortgage, was attempting to collect the debt for itself and not for others. Because Chase was not attempting to collect the debt for another, Chase did not meet the definition of a debt collector under the FDCPA. Additionally, the court noted that no facts were alleged to support the allegation that the law firm serving as Chase's counsel was a debt collector because the Plaintiff had only offered a conclusory averment that the court held amounted to be a legal conclusion.

Next the court held the complaint and summons were not attempts at debt collection because they did not seek a delinquency against Plaintiffs. The court further held that Defendants' request for the court to retain jurisdiction over the matter to enter other orders, including, if necessary, a deficiency judgment, constituted neither an explicit nor implicit demand for payment. Because Defendants neither sought a delinquency nor demanded payment from Plaintiffs, Defendants' actions did not violate the FDCPA.

SUIT OVER COLLECTION OF PHANTOM DEBT DISMISSED

Darrisaw v. Pa. Higher Educ. Assistance Agency, ___ F.3d ___ (11th Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-12113/17-12113-2020-02-07.html

FACTS: Plaintiff-Appellant Hope Darrisaw was a student-loan borrower who received multiple warning letters from guaranty agency Pennsylvania Higher Education Assistance Agency ("Agency"). The Agency tried to collect a debt Darrisaw had not borrowed. Even though an Agency representative told Darrisaw that the Agency had no record of her outstanding debt, the Agency nonetheless proceeded to garnish Darrisaw's paychecks. Darrisaw filed suit, claiming the Agency violated the FDCPA by attempting to collect a debt Darrisaw never incurred.

The Agency moved to dismiss Darrisaw's claim. The trial court granted the Agency's motion to dismiss under FDCPA § 1692a(6)(F)(i)'s exemption for those who collect debts "incidental to a bona fide fiduciary obligation." Darrisaw appealed.
HOLDING: Affirmed.
REASONING: Darrisaw argued that a guaranty agency is not protecting federal assets when it attempts to collect a nonexistent debt, and therefore does not act "incidental to a bona fide fiduciary obligation" in that circumstance.

The court rejected Darrisaw's arguments, holding that the application of the fiduciary-obligation exception does not depend on whether the debt a guaranty agency attempts to collect is valid or nonexistent. The court explained that § 1692a(6)(F)(i) states the fiduciary-obligation exception applies whenever a person attempts to collect any debt that is "owed or due or asserted to be owed or due another." The court further explained that to collect a debt that is only "asserted to be owed," is different from being "actually owed." Because the Agency attempted to collect a debt it asserted to be owed, it fell under the fiduciary-obligation exception.

The court acknowledged that in order to fall within the fiduciary-obligation exception, a person must act "incidental to a bona fide fiduciary obligation." The court explained that when a guaranty agency "knowingly" attempts to collect nonexistent debt, it does not act incidental to a good-faith fiduciary obligation. However, because Darrisaw failed to argue that the Agency acted in bad faith in attempting to collect the debt, the Agency still fell under the fiduciary-obligation exception.

NINTH CIRCUIT DEFINES DEBT COLLECTOR UNDER FDCPA

McAdory v. M.N.S. & Assocs., LLC, ___ F.3d ___ (9th Cir. 2020)
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/09/18-35923.pdf

FACTS: Defendant DNF Associates, LLC ("DNF") purchased Plaintiff Jillian McAdory's overdue debt to Kay Jewelers, and hired Defendant M.N.S. & Associates, LLC ("MNS") to collect from McAdory. McAdory sued DNF and MNS, alleging eight separate violations of the FDCPA relating to MNS's telephonic message and withdrawal of funds prior to the authorized payment date.

The trial court dismissed McAdory's complaint against DNF, holding that the FDCPA did not apply because DNF had no direct interactions with its debtors and had only hired third parties, such as MNS, to collect debts. McAdory appealed.
HOLDING: Reversed and remanded.
REASONING: DNF argued that it did not qualify as a debt collector under the principle purpose prong of the FDCPA because it outsourced collection activities to third-party contractors and did not directly interacts with its debtors.

The court rejected DNF's argument, explaining that the FDCPA defines debt collectors in two alternative ways: those whose "principal purpose" is the collection of debts, and those who "regularly collect or attempt to collect, directly or indirectly" debts. Citing to the Third Circuit, which

The court held that its understanding of Congress intent in drafting the statute was supported by the "regularly colled" prong, which expressly applies to businesses that indirectly collect debts.

found the the term "collection," as used in the principal purpose prong, should be read as a noun and not a verb, the court held that the plain language of the statute contained no language limiting the application of the statute to those who directly interact with debtors. The court further held that its understanding of Congress' intent in drafting the statute was supported by the "regularly collected" prong, which expressly applies to businesses that indirectly collect debts. Because the court found that DNF's primary business was the collection of debts, the court held DNF is a debt collector under the FDCPA regardless of whether DNF outsources debt collection activities to a third party.

FINANCING STATEMENT DID NOT ADEQUATELY IDENTIFY DEBTOR

In re Keast Enters., Inc., ___ F.3d ___ (Bankr. S.D. Iowa 2020)
https://www.leagle.com/decision/inbco20200204660

FACTS: Russell Keast, acting on behalf of Keast Enterprises, Inc. ("Debtor"), bought agricultural products from Evan Larson, doing business as Larsen Ag ("Larsen"). Debtor subsequently filed for Chapter 11 bankruptcy. Larsen filed a proof of claim, representing that he was a secured creditor. As required to perfect the lien, Larsen filed a financing statement, on which Larsen listed Russell Keast, personally, as the debtor. Debtor objected to Larsen's proof of claim on sufficiency grounds.
HOLDING: Sustained.
REASONING: Debtor argued that the financing statement did not sufficiently identify the debtor because Larsen interchangeably used "Keast Enterprises, Inc." and "Russell Keast" to identify the debtor on the financing statement.

The court agreed with the Debtor, explaining that, under the Iowa UCC, a financing statement is sufficient only if it properly names the debtor, the secured party, and the collateral covered. The court further explained that a financing statement sufficiently provides the name of the debtor who is a registered organization when it provides the name that is stated to be the registered organization's name on the public organic record. Finally, the court explained that where a debtor and an owner are not the same person, the term "debtor" refers to the owner of the collateral in any provision dealing with the collateral. The court reasoned that by filing the proof of claim, Larsen acknowledged that Keast Enterprises, Inc., and not Russell Keast, purchased the goods and produced the collateral that served as the basis for the lien. Because Larsen used Keast's individual name instead of Debtor's registered name, the court held the financing statement was rendered seriously misleading, thus making it ineffective and unperfected.