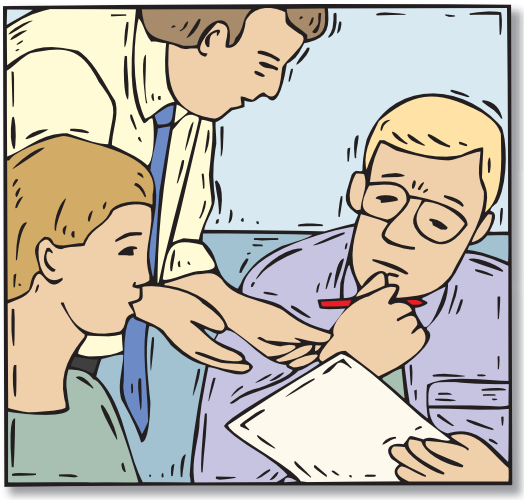
Pre-Judgment Collection of Legal Fees

A Right Without a Remedy?



By Manuel H. Newburger *

I. Introduction

One of the most troubling problems for collection attorneys who collect consumer debts is that of when and how to enforce a client's contractual or statutory rights to collect legal fees from a debtor who is in default. Although the courts have recognized the enforceability of such rights, recent case law under the Fair Debt Collection Practices Act (FDCPA)[1] forces collection attorneys to choose between fully enforcing their clients' rights on the one hand and protecting themselves from FDCPA liability on the other. This article will examine the underlying liability issues and recent case law developments.

II. The Underlying Legal Issues

Ordinarily, a creditor is not entitled to recover legal fees or other collection costs unless the debtor has contractually agreed to pay such fees or a statute provides for the recovery of such fees. Various types of statutes may allow a creditor to recover its legal fees incurred in pursuing a debtor,[2] and the forms of contract provisions allowing creditors to recover fees are so varied that they could be the subject of multiple articles.

An attorney who sets out to seek legal fees or collection costs from a consumer debtor faces a number of dangers under the FDCPA. Among the protections afforded to consumers under the FDCPA are the following prohibitions:

Section 807. False or misleading representations [15 U.S.C. section 1692e]

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of --

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

Section 808. Unfair practices [15 U.S.C. section 1692f]

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without

limiting the general application of the foregoing, the following conduct is a violation of this section:
(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

In an ideal world, an attorney who wants to seek collection fees for a creditor would simply file suit and let the court decide the issue. Unfortunately, such an approach is not viable for the average attorney. Most creditors want a series of letters and/or phone calls prior to suit, if only to save the filing fees. However, a collection attorney who communicates with a debtor in connection with the collection of a consumer debt will be subject to the FDCPA's validation notice requirement:

Section 809. Validation of debts [15 U.S.C. Section 1692g]

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing --

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

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

The mandate that the validation notice state the "amount of the debt" forces the collection attorney to decide whether or not he or she will try, prior to suit, to enforce the creditor's contractual or statutory right to recover legal fees. Unfortunately, the slightest misstep is likely to result in a class action against the attorney.

A collection attorney who attempts to collect legal fees that are not expressly authorized by a contract or by statute will be in violation of the provisions of FDCPA sections 1692e and 1692f quoted above. However, an attorney who fails to attempt to collect contractual fees may be shortchanging his or her client. Either way, the attorney faces a potential lawsuit.

It is not uncommon for a credit card agreement, mortgage, or promissory note to contain a provision requiring the debtor to pay the legal fees incurred by the creditor in the event that the debtor defaults. The question is whether a collection attorney may enforce such a provision by demanding or collecting legal fees from a consumer prior to an award of such fees as part of a judgment on the debt. Although the courts recognize the right (under some circumstances) to make such a demand, many attorneys cannot or will not do so in a manner that satisfies the interpretations of the FDCPA**.**

III. The Recent Case Law

An analysis of the current situation should probably begin with the case of *Miller v. McCalla, Raymer*.[3] In that case the defendant, a collection firm specializing in mortgage foreclosures, sent a validation notice demanding an "unpaid principal balance" of $178,844.65. The notice also informed the debtor that:

> . . . this amount does not include accrued but unpaid interest, unpaid late charges, escrow advances or other charges for preservation and protection of the lender's interest in the property, as authorized by your loan agreement. The amount to reinstate or pay off your loan changes daily. You may call our office for complete reinstatement and payoff figures.

The United States Court of Appeals for the Seventh Circuit held that the notice violated 15 U.S.C. section 1692g(a). In reaching this conclusion the court stated:

> The unpaid principal balance is not the debt; it is only part of the debt; the Act requires statement of the debt . . . It is no excuse that it was "impossible" for the defendants to comply when as in this case the amount of the debt changes daily. What would or might be impossible for the defendants to do would be to determine what the amount of the debt might be at some future date if for example the interest rate in the loan agreement was variable. What they certainly could do was to state the total amount due--interest and other charges as well as principal--on the date the dunning letter was sent. We think the statute required this.[4]

Miller involved a demand for an accelerated mortgage debt, and it left an unresolved issue for collection attorneys. If a debt has not yet been accelerated should the validation notice state as the "amount of the debt" the total arrearages on the date of the notice or the total payoff amount? An attorney who demands only the total arrearages is subject to the assertion that the notice fails to state the total debt, while the attorney who states the total debt is subject to the accusation that he or she has misrepresented the character or status of the debt by demanding a balance that is not yet due. This has led some attorneys to state, out of an abundance of caution, both the "amount now due" and the "total loan balance," or similarly designated amounts.[5]

The same court's decision in the 2003 case of *Veach v. Sheeks*[6] provides some guidance in how to resolve the *Miller* dilemma. The facts giving rise to that case are as follows. Veach's girlfriend's son was behind in his payments on his car, which was in danger of repossession. As a favor, Veach mailed to CreditNet, the finance company, a check for $350 to help reduce the overdue balance on the car. When the car was repossessed, Veach stopped payment on the check. CreditNet then sent Veach a written notice that the check had been dishonored, demanding that Veach make full payment on the check or face a lawsuit for legal remedies under state law, including three times the amount of the check, interest, attorney's fees and court costs. When Veach ignored the notice, CreditNet retained Sheeks to file suit against Veach on

the dishonored check. Sheeks mailed Veach a validation notice pursuant to the FDCPA, which also served as a summons and complaint for Indiana small claims court proceedings. In the small claims court case the court found in CreditNet's favor and issued a judgment against Veach for $1,050, attorney's fees of $350, and court costs.

When his bank account was frozen, Veach appealed the small claims court judgment to the district court. After the appeal was filed, CreditNet voluntarily moved to set aside the underlying small claims court judgment without prejudice, and Veach never made any payments on the check. Veach then filed suit against Sheeks, which proceeded to a jury trial. At the close of Veach's case, Sheeks moved for judgment as a matter as a law, which the district court granted. Veach appealed that ruling.

Although the dishonored check had been in the amount of $350, Sheeks' validation notice described the "amount of the claimed debt" as "Remaining principal balance $1,050.00; plus reasonable attorney fees as permitted by law, and costs if allowed by the court." Veach alleged that the inclusion of statutory treble damages in the "amount of the debt" violated 15 U.S.C. section 1692e. He also asserted that because the amount of attorney's fees and court costs due was not specified, Sheeks had violated 15 U.S.C. section 1692g(a)(1).

With regard to the $1,050 figure, Sheeks argued that the demand was appropriate because that amount was an "alleged obligation,"[7] incorporating the treble damages that he was allowed to pursue under Indiana Code section 34-24-3-1. Veach asserted that he was not liable for treble damages, fees, and costs until such time, if ever, as a court judgment awarded such amounts, and thus those amounts could not be part of the "amount of the claimed debt" stated in the validation notice.

The Seventh Circuit concluded that by stating the amount of the debt as $1,050, Sheeks took it upon himself to hold Veach liable for legal penalties that had not yet been awarded, and that for FDCPA purposes those penalties should have been separated out from the amount of the debt:

> The "amount of the debt" provision is designed to inform the debtor (who, remember, has a low level of sophistication) of what the *obligation* is, *not* what the final, worst-case scenario *could* be. The definition of a "debt" according to the FDCPA is of an "obligation or alleged obligation . . . *whether or not* such obligation has been reduced to judgment." 15 U.S.C. [section] 1692a(5). Since Veach cannot be held liable for treble damages, court costs, or attorney's fees *until* there has been a judgment by a court, they cannot be part of the "remaining principal balance" of a claimed debt. Therefore, Sheeks' notice misrepresented the actual debt CreditNet claimed that it was owed by Veach, a misrepresentation that violated 15 U.S.C. [section] 1692e.[8]

The Seventh Circuit did not address the failure to specify the amount of attorney's fees. However, *Miller* and *Veach* established the following principles:

$ A debt collector's validation notice must state the total amount due as of the date of the notice; and

$ the "debt" that must be stated is to be actual debt and not potential debt.

These principles appear to resolve the dilemma created by *Miller.* A collector who makes demand on an unaccelerated debt should not demand the total loan balance because that payoff figure merely represents a potential liability if the arrearages are not cured. Unfortunately, the *Veach* decision left open the question of whether pre-judgment legal fees are a potential liability or an actual liability. If the fees are an obligation that is actually due at the time of the validation notice *Veach* indicates that not only should they be stated as part of the validation notice, but it might be an FDCPA violation not to do so. On the other hand, including in the "amount of debt" legal fees that are a mere potential liability would be a violation of sections 1692e, 1692f, and 1692g. In the last few years there have been a number of decisions in suits that were based upon *Veach*.

In *Bernstein v. Howe*,[9] attorney Howe's dunning letter listed the principal amount due "plus interest and attorney's fees." The debtor alleged that the letter violated section 1692g by not assigning a dollar amount to the interest owed as of the date the letter was sent and by representing that attorney's fees that had not been awarded by a court were part of the debt owed.

On the interest issue, Howe attempted to distinguish *Miller* by arguing that in the case of a credit card debt (as opposed to the mortgage debt in *Miller*) it was impossible to determine the exact amount of interest owed as of the time of the letter because "the exact interest rates chargeable to the debtor over time may not be known to the current holder of the debt because rates change over time." Relying on the plain language of the Act, the Court rejected that argument, concluding that "if the creditor's records are insufficient to calculate that amount, the debt collector proceeds at his peril."

Bernstein further argued that the inclusion of a demand for attorneys fees violated Section 1692e(2)(A) by falsely representing the character, amount, or legal status of a debt. Howe attempted to distinguish *Veach* on the theory that the contract between Bernstein and First Card expressly provided that Bernstein would pay "costs, including 'reasonable attorney's fees, incurred by First Card in legal proceedings to collect the debt," whereas the potential attorney's fees in *Veach* were based solely on a statutory claim.

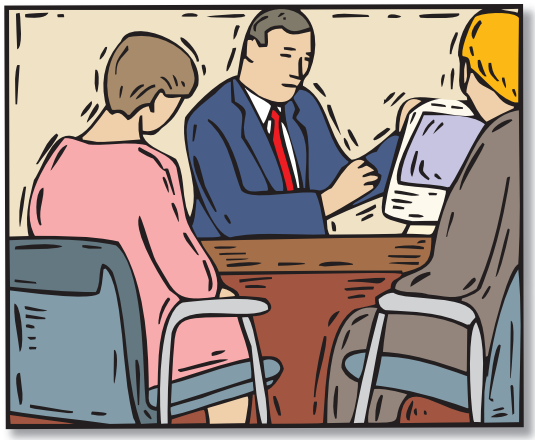
The Bernstein court concluded that no attorney's fees were actually owed by Bernstein at the time Howe sent his letter. At most, the credit card agreement provided the potential for a future award of attorney's fees in the event that First Card incurred attorney's fees as a result of pursuing "legal proceedings" against the debtor. Relying on *Veach*, the court held that a debt collector violates the FDCPA by representing that potential for fees as a part of the debt owed.[10]

Some debtors' attorneys have taken the position that *Veach* and *Bernstein* created a complete bar to any demand by a collection attorney for prejudgment legal fees. That position exaggerates the scope of those two decisions, as indicated in subsequent cases.

In *James v. Olympus Servicing, L.P.*,[11] for example, the plaintiff brought suit under the FDCPA because the defendant had added attorney's fees, legal fees, and related expenses to the borrower's account when those fees had not been awarded

or approved by a court. However, the promissory note that the debtor had signed stated:

> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.



Similarly, the mortgage that the debtor in *James* had signed stated: "Lender shall be entitled to collect expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorney's fees and cost of title evidence."

The *James* court rejected the plaintiff's argument that the assessment of attorney's fees without court approval violated the FDCPA. Because the claim for fees was based upon contractual provisions that did not refer to legal proceedings, the debt collector was permitted to demand pre-judgment legal fees.[12]

Similarly in *Whaley v. Shapiro & Kreisman, LLC*,[13] the court noted that it is generally in the debtor's interest that the FDCPA does not require court approval to collect contractually agreed-upon attorneys' fees:

> It is not uncommon for a mortgagor to fall behind, for the mortgagee to engage an attorney to obtain collection or initiate foreclosure proceedings, for the attorney to so advise the mortgagor, for the mortgagor or her attorney to seek and obtain a payoff letter which contains a reasonable attorney's fee figure as authorized by the mortgage documents, and for the mortgagor then to resolve the matter by payment. No court has been involved, unless the complaint has already been filed. If the mortgagee's attorney had to initiate a legal proceeding to obtain court approval of fees, the mortgagor would become liable for additional fees as well as the costs of that proceeding.[14]

Although the *Whaley* court's observation was correct in terms of the benefit to consumers in allowing pre-judgment demands for legal fees, that benefit will not save a debt collector who makes such a demand when there is not a contract or a statute that expressly authorizes such fees.[15] *James* and *Whaley* did not overrule *Bernstein*, as the cases are factually dissimilar. Bernstein's note required payment of fees only when "incurred by First Card in legal proceedings to collect the debt."

Subsequent to *Bernstein,*, three federal appellate decisions have recognized the right to recover prejudgment legal fees: *Shapiro v. Riddle & Associates, P.C.*,[16] in the Second Circuit, and *Fields v. Wilber Law Firm*[17] and *Singer v. Pierce & Associates, P.C.,*[18] both in the Seventh Circuit. A review of these cases reveals four fundamental principles for attorneys who want to demand pre-judgment legal fees for their clients. These principles are:

- $ The fees must be expressly authorized by contract or statute.
- $ The contract or statute must allow the fees to be recovered prior to the filing of suit or the granting of judgment.
- $ The fees demanded must be reasonable.
- $ The fees must be identified as an amount that is in addition to the amount of the debt.

IV. Express Authorization

As a result of the "American Rule,"[19] a creditor will not be able to recover its legal fees in a lawsuit unless there is an express statutory or contractual provision for the recovery of such fees. The FDCPA extends that rule to the pre-litigation context, forbidding an attorney even to demand legal fees unless the fees are expressly authorized by the agreement creating the debt or by other law.[20] Even when fees are authorized by the contract, however, a collection attorney must be careful about the type of fees that are demanded.

In *Kojetin v. C U Recovery, Inc.*,[21] the debt collector's validation notice added fifteen percent of the principal balance to Kojetin's obligation, based on a provision in the note that required Kojetin "to pay reasonable attorney's fees and costs incident to collection of due and unpaid installments." The Eighth Circuit U.S. Court of Appeals affirmed a judgment in favor of the debtor, holding that the defendant violated the FDCPA when it charged Kojetin a collection fee based on a percentage of the principal balance that remained due rather than the actual cost of the collection.

Debt collectors are likely to argue that the contingent percentage paid by the creditor is the actual cost of collection. Such an argument disregards the nature of a contingent fee. Contingent fee agreements shift the costs and risks of all collection cases onto those claims that are actually collected. The debt collector hopes that the percentage recovery on those debts that it collects makes up for the time and effort spent on the debtors who did not pay. Fundamentally, the contingent fee is not an "actual cost of collection," although there are certainly times when the actual cost and the contingent percentage will be the same.

Attorneys who are paid on a flat fee or an hourly basis will not have to deal with this issue (assuming that the debt agreement or a statute allow for recovery of fees). They will, however, have to comply with the reasonableness requirement addressed below.

V. No Tie to Legal Proceedings

Another limit on the ability to recover pre-judgment legal fees is that the right to such fees must not be tied to legal proceedings. In *Bernstein,* the debt agreement provided for payment of costs, including reasonable attorney's fees, *incurred by First Card in legal proceedings* to collect the debt. Clearly, no pre-litigation fees could be demanded under such a contract as the debtor did not owe any fees until they were incurred in a legal proceeding.

On the other hand, had the defendant in that case demanded legal fees subsequent to the filing of suit but prior to rendition of judgment, it appears that he could have demanded those fees as a condition of settling the litigation. Again, however, such a demand would be subject to the requirement that the fees be reasonable.

Similarly, in *Veach,* the statute under which attorney Veach made the demand provided:

> If a person suffers a pecuniary loss . . . the person *may bring a civil action* against the person who caused the loss for . . .
>
> (1) An amount not to exceed three

> times the actual damages of the person suffering the loss.
> (2) The costs of the action.
> (3) A reasonable attorney's fee.[22]

Clearly, the statute authorizes a debt collector to "bring an action" for such sums. It does not authorize demanding treble damages or fees prior to the filing of an action.

Ironically, this result ultimately serves to harm consumers. A creditor that wants to be made whole has an incentive to push a case to trial, just so that it will have the ability to demand the legal fees that it incurs. Even worse, if the agreement or statute under which fees are sought provides only that "any *judgment* shall include all of the prevailing party's legal fees and costs," it appears that the collection attorney could not demand fees and costs prior to final judgment. Under such circumstances a creditor that wanted to be made whole and the attorney seeking to represent that creditor would have little choice but to refuse to provide a payoff amount and to insist on proceeding to trial and judgment. Such an approach ties up the courts unnecessarily, it burdens consumers with the additional fees incurred in getting to judgment, and it impairs what should be a strong public interest in settling disputes.

Your author suggests that a way out of this problem (at least in the context of a pending collection suit) is to present the fee demand solely as a settlement offer and not as a liquidated debt.

Your author suggests that a way out of this problem (at least in the context of a pending collection suit) is to present the fee demand solely as a settlement offer and not as a liquidated debt. A demand might pass muster if it states: "At present, no court has determined the amount of legal fees and costs to which my client is entitled. My client is willing to settle for the total amount of $XXXXX, which includes legal fees of $YYYYY and court costs of $ZZZZZ. If you are not willing to accept this offer, my client prefers to proceed to trial[23] to secure a judicial determination of its fees and costs." Again, however, the fee will still be subject to a reasonableness test.

VI. Reasonableness of the Fee

In *Shapiro v. Riddle,*[24] the defendant law firm was retained by one of its clients to recover a $309.76 debt allegedly owed by Shapiro. The agreement between Shapiro and the creditor provided:

> If we are required to use a collection agency or attorney to collect money that you owe to us . . ., you agree to pay the reasonable cost of collection or other action. These costs might include, but are not limited to, the costs of the collection agency, reasonable attorney fees, and court costs.[25]

Riddle sent a collection letter to Shapiro, in which Riddle demanded the balance of the debt, together with an additional $98 in "attorney/collection costs." Shapiro sued, alleging that the inclusion of a demand for fees violated 15 U.S.C. sections 1692e(2) and 1692f(1). In the words of the Second Circuit, "[t]he principal issues on appeal are whether the $98 charge was expressly allowed by the agreement and, if so, whether the inclusion of the charge in the letter was a false representation because the charge was unreasonable." The Second Circuit affirmed the district court's decision that answered "yes" to the first of those questions and "no" to the second.

What made Riddle's victory possible was the fact that it presented evidence to the district court of the eighteen-step procedure that it employed, before sending out debt-collection letters, to ensure that: (1) an agreement between a debtor and creditor authorized the debt collection; (2) Riddle had the requisite and accurate information on a debtor's account; (3) a debtor had no legal defenses, such as bankruptcy, to assert against his or her debt; (4) a debtor's account met Riddle's criteria, such as minimum balance due and whether partial payment has been made; and (5) a collection letter to the debtor complied with the FDCPA, based upon the determination of Riddle's full-time compliance attorney. Both the district court and the Second Circuit concluded that the $98 charge was reasonable in light of the undisputed evidence of Riddle's work on Shapiro's case.

Attorneys who seek pre-suit legal fees should be prepared to demonstrate the time and expense that go into every file, the time and expense necessary to the specific debtor's file, and the overhead expenses associated with the case. In light of the *Shapiro v. Riddle* decision, such evidence should be useful is establishing the reasonableness of the fees demanded.

VII. Itemization of Fees

In *Fields v. Wilber*[26], the debtor had incurred a $122.06 debt that the Wilber Law Firm was hired to collect. Their initial dunning letter stated that the "account balance" was $388.54, a sum which actually reflected the original $122.06, plus interest and service charges assessed pursuant to the contract signed by Fields, and $250 in attorneys' fees for the collection of the debt by Wilber. Three subsequent letters sought additional accumulated interest, but no additional attorneys' fees.

Wilber had included the $250 in fees pursuant to a clause in the contract that stated: "I understand that if collection action should become necessary for recovery of any monies due under this contract, I agree to pay any and all collection costs and attorney fees." However, the collection letters did not itemize the expenses nor explain how the "amount of the debt" was calculated.

The Seventh Circuit rejected Fields' contention that under the FDCPA a debt collector must go to court every time it seeks to enforce a provision in a payment agreement signed by the debtor that allows reimbursement of attorneys' fees and collection costs. In the words of the Seventh Circuit:

> To collect attorneys' fees from Fields, Wilber necessarily had to specify an amount that it intended to charge (or had already charged) for its services. Fields, of course, could negotiate this payment or contest the reasonableness of the fees through a lawsuit. But when a debtor has contractually agreed to pay attorneys' fees and collection costs, a debt collector may, without a court's permission, state those fees and costs and include that amount in the dunning letter. Doing so does not violate the FDCPA. Indeed, refusing to quantify an amount that the debt collector is trying to collect could be construed as falsely stating the amount of debt.[27]

Had the Seventh Circuit stopped there, many future problems might have been avoided. However, the Seventh Circuit further stated that even if: (a) the attorneys' fees are authorized

by contract; and (b) the fees demanded are reasonable, debt collectors must still clearly and fairly communicate information about the amount of the debt to debtors. "This includes how the total amount due was determined if the demand for payment includes add-on expenses like attorneys' fees or collection costs." The Seventh Circuit concluded that Fields had made allegations sufficient to state a claim under the FDCPA. Wilber's letter was misleading because it gave a false impression of the character of the debt, and the Seventh Circuit stated that it is "unfair to consumers under the FDCPA to hide the true character of the debt, thereby impairing their ability to knowledgeably assess the validity of the debt.[28]

In *Singer v. Pierce*,[29] defendant Pierce had filed a mortgage foreclosure action, in which his client was awarded $1,100 in attorneys' fees. Prior to the foreclosure sale the debtor found a buyer for the property and she obtained a payoff quote.[30] She settled with the lender and the interlocutory order was vacated and the foreclosure action was dismissed. She then sued Pierce under the FDCPA, alleging that including $2,574 in fees in the payoff quote when the interlocutory order awarded only $1,100 in fees was a violation of the FDCPA.

Because the judgment was interlocutory, the Seventh Circuit found that it did not bind the parties. Because the payoff quote was itemized, the Seventh Circuit found that the requirements of *Fields* had been satisfied and it affirmed the dismissal of the FDCPA action.

In light of the *Fields* and *Singer* decisions, a debt collector must segregate the fees being demanded from the remainder of the debt. The implication of those decisions is that other charges such as interest and late fees might also have to be segregated, a position not supported by the FDCPA, which only requires a statement of the "amount of the debt" in the validation notice.

Realistically, the more numbers that an attorney states in a demand letter, the greater the opportunity to make a mistake. While a defendant in an FDCPA case can raise the *bona fide* error defense[31] with regard to a clerical error, such a defense will merely "beat the rap, but not the ride." The ride in such a case can be quite costly. One possible solution may be to state that the "amount of the debt is $_____, which includes principal interest, and late fees." It remains to be seen whether the courts will approve such n approach.

VIII. Conclusion

While collection attorneys can demand pre-suit attorney's fees, the reality of collection practice may seem to make this a right without a remedy. Attorneys with high-volume collection practices may not have the time or resources to review every debtor's contract prior to the initial demand to determine the existence and nature of an attorney's fee provision. Even when a contract contains such a provision, many collection attorneys have been unable or unwilling to go through the exercise of tracking and demonstrating their time, expenses, and overhead. Certainly, a contingent collection practice does not lend itself to the same sort of time-keeping as a commercial or insurance litigation practice permits, and it is doubtful that the average collection attorney will have time records to support the fees claimed. Finally, the duty to segregate the fees ensures frequent fights as to the propriety and reasonableness of the fees, fights that delay the collection of the debt and often destroy the profitability of any victory for the collector.

An attorney has a duty to pursue the client's claim and to seek to enforce the client's rights. However, when a client requests that the attorney demand pre-suit legal fees, the attorney should educate the client about these pitfalls, pointing out that often the creditor, too, can be sued for a wrongful claim of fees, either under state law or, in the case of debt buyers, under the FDCPA, too. A well-educated creditor is less likely to force the attorney to choose between protecting himself or the client.

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1. 15 U.S.C. §§1692-1692*o*.
2. *See, e.g.,* Indiana Code § 34-24-3-1 allowing fees on hot checks, and Tex. Civ. Prac. & Rem. Code Ann. § 38.001, allowing attorney's fees in suits on oral or written contracts.
3. Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC, 214 F.3d 872 (7th Cir. 2000).
4. *Id.* at 875.
5. *See, e.g.,* Olson v. Risk Management Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004).
6. Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2002).
7. Under the FDCPA, the term "debt" means "any obligation or alleged obligation of a consumer to pay money 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, whether or not such obligation has been reduced to judgment." 15 U.S.C. §1692a(5).
8. *Veach,* 316 F.3d at 693 (emphasis in original).
9. Bernstein v. Howe, 2003 U.S. Dist. LEXIS 5284 (S.D. Ind. 2003).
10. Id.
11. James v. Olympus Servicing, L.P., 2003 U.S. Dist. LEXIS 7468 (N.D. Ill. 2003).
12. A similar result occurred in Porter v. Fairbanks Capital Corp., 2003 U.S. Dist. LEXIS 8636 (N.D. Ill. 2003).
13. Whaley v. Shapiro & Kreisman, LLC, 2003 U.S. Dist. LEXIS 16982 (N.D. Ill. 2003).
14. *Id.* at 2. See also Whaley v. Shapiro & Kreisman, L.L.C., 2004 U.S. Dist. LEXIS 4262 (N.D. Ill. 2004) (Memorandum Opinion and Order granting leave for the plaintiff to file an amended complaint as to the allegation that the defendant's attorney fees were unreasonable and therefore the payoff letter was misleading under the FDCPA, but denying leave to amend as to the claim that reasonable fees permitted by the contract could not be set by the defendant).
15. *See, e.g.,* Shula v. Lawent, 359 F.3d 489 (7th Cir. 2004)
16. 351 F.3d 63 (2d Cir. 2003).
17. 383 F.3d 562 (7th Cir. 2004).
18. 383 F.3d 596 (7th Cir. 2004).
19. *See* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).
20. 15 U.S.C. §1692f(1).
21. 212 F.3d 1318 (8th Cir. 2000).
22. Indiana Code §34-24-3-1 (emphasis added).
23. Pursuant to 15 U.S.C. §1692e(5), an attorney should not state that the creditor prefers to proceed to trial unless the creditor is actually prepared to do so.
24. 351 F.3d 63. *See supra* note 16.
25. *Id.* at 64. See also supra this text and notes 13-14.
26. 383 F.3d 562. *See supra* note 17.
27. Fields, 383 F.3d at 565.
28. *Id.* at 566.
29. 383 F.3d 596. *See supra* note 18.
30. The payoff quote was actually furnished by the lender, but Singer sued Pierce, a fact that clearly troubled the Seventh Circuit.
31. *See* 15 U.S.C. §1692k(c).