Your Court Street Lawyer's Guide

Successfully Defending

Your Credit Card Lawsuit

What to do if you are sued for a credit card debt

By Richard A. Klass, Esq.

About this Book

If you are faced with a credit card lawsuit, *Successfully Defending Your Credit Card Lawsuit* may help you present a more robust defense. This book offers sample pleadings and motions, numerous free forms and instructions, and descriptions of the defenses and procedures in the "typical" case.

This book, as helpful as it may try to be, is not intended to substitute for good legal advice, which is recommended. Many bar associations have excellent legal referral services for the public. In addition, pro bono (no cost) legal service organizations can help you defend this type of claim. However, many people may find that no-cost legal service providers, often overwhelmed by demand, are unable to provide immediate assistance, or that private counsel is too costly to retain to defend the typical collection case.

Fortunately, the typical collection case lends itself to streamlined events and uncomplicated pleadings and defenses. This book may be a tremendous help in those situations.

Open the book to find…

- What to do
- Responding
- Best Defenses
- Proof Issues
- Credit Reporting
- Credit Card Litigation Flow Chart
- Responding to the Summons
- Discovery Proceedings
- Summary Judgment
- Trial Matters
- Post-Trial Matters
- Settlements
- Sample Pleadings and Forms
- Relevant Statutes
- Ethical Issues in Collection
- Guide to the Fair Debt Collection Practices Act (FDCPA)
- Glossary of terms and definitions
- Handling Identity Theft
- Helpful Internet Resources

About the Author

Richard A. Klass, "Your Court Street Lawyer," is an attorney in private practice in downtown Brooklyn. He practices primarily in the areas of commercial litigation, debt collection/enforcement of judgments and real estate litigation. His law firm also represents clients in bankruptcy, civil appeals, and federal court litigation.

Published by the Law Firm of Richard A. Klass, Esq.
16 Court Street, Brooklyn, New York 11241

Phone: (718) COURT ● ST or (718) 643-6063
Email: RichKlass@CourtStreetLaw.com
www.CourtStreetLaw.com

E-Book ISBN: 978-0-9836954-0-0

Art Credits:
Cover: GYRO PHOTOGRAPHY/amanaimagesRF/Getty Images
Photo of Richard A. Klass: Robert Matson, The Innovation Works, Inc.

Book design and production by Robert Matson,
The Innovation Works, Inc.
www.TheInnovationWorks.com

About the Author, Richard A. Klass

Richard A. Klass is an attorney in private practice in downtown Brooklyn. He practices primarily in the areas of commercial litigation, debt collection/enforcement of judgments and real estate litigation. His law firm also represents clients in bankruptcy, civil appeals, and federal court litigation.

Mr. Klass serves as a Trustee of the Brooklyn Bar Association, Co-Chairman of the Continuing Legal Education Committee of the Brooklyn Bar Association, Chair-Elect of the General Practice Section of the New York State Bar Association, Co-Editor of the New York State Bar Association's General Practice Section *One on One* Publication, and an Arbitrator, Small Claims Part of the Civil Court of the City of New York, County of Kings. He has also served as a representative to the Statewide Special Counsel for the Commercial Division of the New York State Unified Court System. Mr. Klass also currently serves as a Fee Arbitrator in the Part 137 Attorney-Client Fee Dispute Program.

Mr. Klass received his Bachelor of Arts at Hofstra University in 1989 and Juris Doctorate at New York Law School in 1992. He was the Recipient of the American Jurisprudence Award in Conflict of Laws. Mr. Klass is admitted to the following jurisdictions: State of New York (1992); State of New Jersey (1993); US District Court for the Eastern District of New York (1992); US District Court for the Southern District of New York (1992); US District Court for the District of New Jersey (1993); US Court of Appeals for the Second Circuit (1999); and the US Supreme Court (1997).

Mr. Klass is active in numerous bar organizations and has been counsel in many reported cases. Mr. Klass lectures extensively on legal issues affecting the general community and has been a commentator on television on legal issues. He may be reached by phone by calling *(718) COURT•ST* or by e-mail at *RichKlass@courtstreetlaw.com* with any questions.

Richard Klass's Free Popular Newsletter

Richard Klass's office publishes *Law Currents*, a popular and free quarterly newsletter written specially for clients and colleagues, lawyers and non-lawyers alike. Each issue features an informative (and often entertaining) case study written in plain English. To sign up for the free electronic edition, visit: www.courtstreetlaw.com and look for the "sign up" link at the bottom of the page. *Law Currents* is also available in a full-color print edition and as a download from the firm's website.

1. Introduction

Why write this book?

In 1992, I graduated from law school and took the bar examination. I had to pass the bar exam on my first chance because I had a business plan that needed my swift admission to the bar — I decided to start my own law practice straight out of school. Apparently, very few lawyers decide to start their legal careers in this way. For many lawyers, the fear of being "thrown to the wolves" can be a daunting, intimidating experience.

By starting my own law practice, I had to handle many different areas of law, because I had to take what walked into my door to keep it open. It happened to be that a lot of what came through my door was debt collection. Right away, I jumped into the debt collection arena, representing primarily creditors on a wide range of debts including landlords for rent arrears, building supply companies, doctors, and newspapers. Not too soon after, I began to handle claims for credit card companies, suing consumers who did not pay their accounts.

In 1992, when I would go to court and sit through a calendar call, I would hear the clerk call cases out, such as "Chase vs. ..." "American Express vs. …" and "Citibank vs. …" If a case actually went to trial, the credit card company had a witness in court, ready to testify. Now, the calendar has cases brought by "XYZ Receivables Management vs. …" etc.

The nature of credit card debt has evolved over the last 25 years in different ways. Many people will recall the Savings and Loan ("S&L") Banks' debacle of the 1980s, where entire banks had to be taken over by the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC). The FDIC and RTC came in to take over and manage the assets of the S&Ls, which included the liquidation of debts owed to the banks. A big industry was born at that moment — the sale of large portfolios of debts to companies who pursued the debts against consumers — that is, the debt buyers.

After the debt portfolios of the S&Ls were thoroughly processed, the debt buyers needed more inventory. Separately from that phenomenon, banks figured out that it was in their interest to wipe off of their books old, "charged-off" debt to increase the bottom line. By selling credit card debt portfolios to debt buyers for pennies on the dollar, the banks achieved their goal; debt buyers also achieved their goal of getting more food to eat.

Without turning this introduction into an ideological 'pitch' about the pros and cons of debt buying, this evolution has produced, among other things, the following results: (a) more aggressive forms of debt collection by third parties; (b) separation of the relationship between banks and their customers; (c) banks' willingness to extend credit to consumers who can't handle it; and (d) difficulties in figuring out which entity is really entitled to collect the debt.

Since the average credit card debt sought to be collected ranges from $3,000 to $7,000, the aim of the creditors is to settle with accountholders before litigation ensues. To be fair, settlements help the accountholders as well; they get to pay their debts and avoid hassle, including incessant telephone calls, letter-writing campaigns, and litigation.

My hope is that you will use this book as a guide in defending yourself against the credit card lawsuit. *Your Court Street Lawyer's Guide* offers you sample pleadings and motions, along with descriptions of the defenses and procedures in the typical case.

This book is *not* intended to substitute for good legal advice, which is recommended. Many fine bar associations have legal referral services and pro bono legal service organizations geared towards defending these types of claims. However, many people will find that private counsel is too costly to retain to defend the typical collection case and legal service organizations are overwhelmed by demand. Separate from these constraints, the collection case lends itself well to streamlined events, pleadings and defenses, so this book ought to cover most of the situations that will arise in the typical case.

As I always offer in my numerous and various lectures and seminars, I encourage you to correspond with me with any questions or comments. I may be reached by phone at (718) COURT●ST (718-268-7878) or by e-mail at RichKlass@CourtStreetLaw.com. Thank you for using my book.

2. Notes Regarding Terms Used in this Book

Throughout this book, there may be some terms and symbols of which you are not familiar. Please note the following:

The symbol "§" refers to the term "Section." Statutes, laws and rules are generally organized into volumes dedicated to certain areas of law, such as Domestic Relations Law, Criminal Law, etc. Within those statutes, they are broken down into sections. The reader is free to search by the statute section in order to read the specific statute or find similar cases relying on that statute section.

Case names are identified by *italicized names* and citations for reference. One of the bedrocks of the legal system of most countries is the concept of *stare decisis* — that the court should recognize and follow past precedents adopted by earlier courts. For this reason, judges will generally rely upon prior decisions in making theirs (unless they are looking to either change the law or distinguish the present case from prior ones).

In following up on the above, it is important to be mindful that lower courts are bound by the decisions of appellate courts. In New York State, the highest court is called the *New York State Court of Appeals* (based in Albany). Below the *Court of Appeals* are four appellate courts known as the *Appellate Division* (*First Department* — covering Manhattan and Bronx; *Second Department* — covering Brooklyn, Queens, Staten Island and several other surrounding counties; *Third Department* — covering central and northern counties; and *Fourth Department* — covering western counties). In each of the 62 counties of the State, there is a *Supreme Court*, which is a court of general jurisdiction, which means it can hear any case from a parking ticket to the death penalty. Within each county, there are also courts of limited jurisdiction, which means that they are set up to handle specific matters, such as County Court, Justice Court, District Court or Civil Court. Most of these courts handle cases of lesser monetary value. In New York City, the Civil Court handles cases where the amount claimed is $25,000 or less. In Nassau and Suffolk Counties, the District Court handles cases where the amount claimed is $15,000 or less.

Next to the *italicized names* of cases are the (a) volume and page number in law books where the case can be found — called the "citation" — and (b) the court which rendered the decision and the year it did so. The court which rendered the decision is important because, for instance, if the present case is to be heard in the New York County Civil Court and the Appellate Division, First Department already ruled on the specific legal issue at hand, the Civil Court is "bound" to that ruling. The year may be important too; either an old decision may be so widely accepted that a court cannot ignore it, or a new decision may address a new legal issue not envisioned by an older court decision considering the issue (this especially comes up in matters involving new technologies or methods).

There are some references to federal laws. According to our United States Constitution, when a state law is in conflict with a federal law, the federal law may override the state law. Congress may enact a law that covers the whole country, and may be applied in any court, even if it overrides an existing state law. For this reason, some of the laws and statute relied upon by a state court judge are federal ones, which are then applied to the case at hand.

The term "Plaintiff" refers to the person bringing the law suit (which, in the credit card case, is typically the credit card company). The term "Defendant" refers to the person being sued (usually, the account holder).

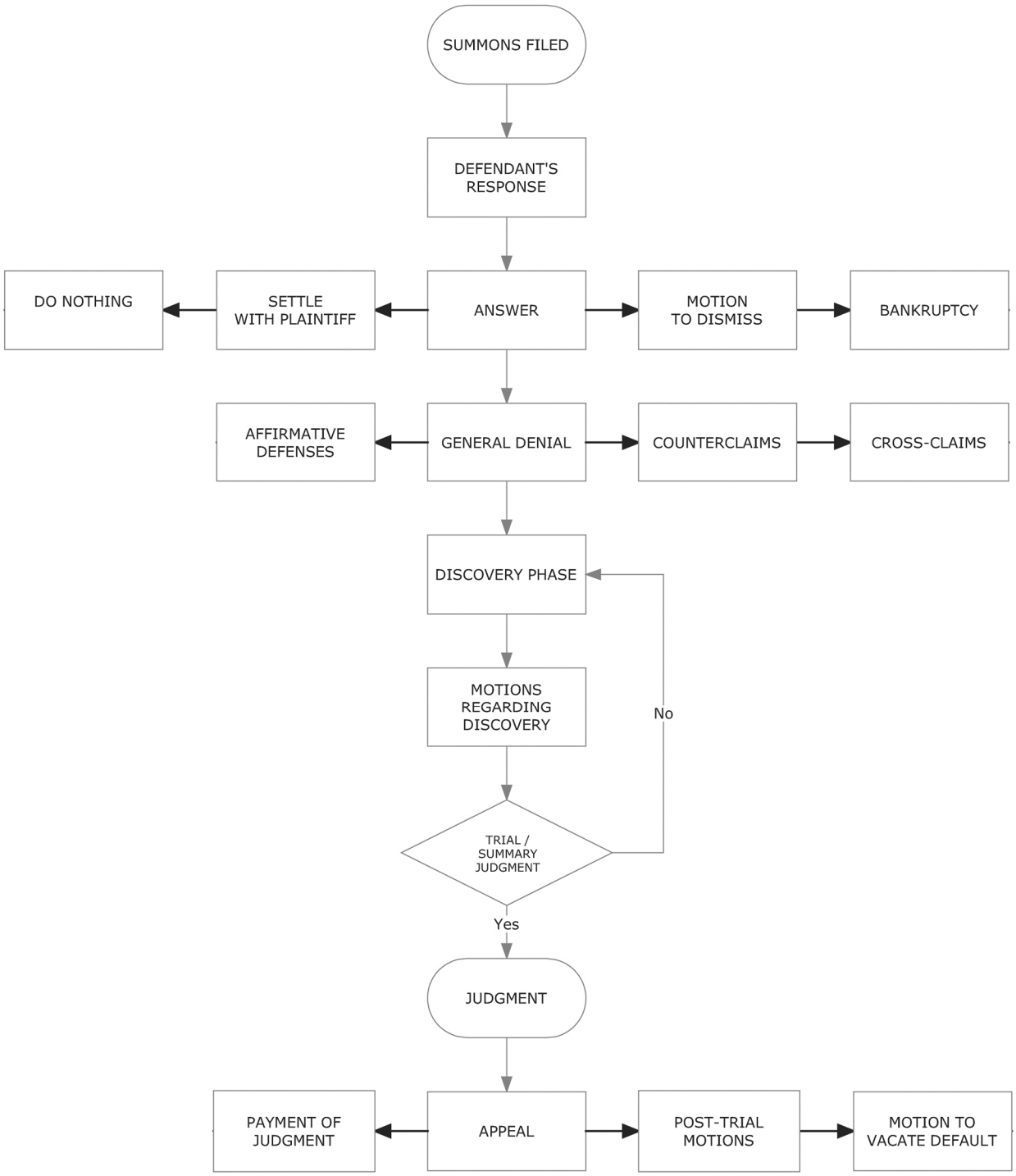
The term "Motion" refers to the method of making a request of a judge to render a decision. There are two types of motions: (a) "Notice of Motion" — where the party first gives notice to the other side that he is going to ask the judge to make a decision; and (b) "Order to Show Cause" — where the party first goes to ask the judge to make a decision on a temporary basis and then notifies the other side of the request. Depending on the situation, a party would use one or the other to make the request; generally, a party will bring a motion by Order to Show Cause when it is necessary to obtain a "stay" (like a "stop sign") of something about to happen or happening, such as a wage garnishment or restraint of a bank account.

The term “CPLR” refers to the “Civil Practice Law and Rules” — the ‘playbook’ for the rules of the litigation game that the parties and judge must follow. The term “Uniform Rules of Court” refers to some administrative rules which, while not part of the general CPLR playbook, also apply to the case because they allow for the general flow of the litigation.

If there is any other question you have concerning the material in this book, PLEASE feel free to contact me for more information.

3. Credit Card Litigation Flow Chart

To download a high resolution copy of the following flow chart, follow this link:
http://courtstreetlaw.com/guide_to_defending/images/Credit_Card_Litigation_Flow_Chart.pdf



4. What do you do if you are sued for a credit card debt?

Without doubt, one of the most important financial tools used in this country is the credit card. While the first credit card was actually metal-plated and similar to a military dog tag, today's credit card may take the form of a plastic card with magnetic strip or merely using the combination of numbers to make all sorts of purchases. At this point, the usage of credit cards by consumers is as ubiquitous as maintaining a bank account or driving a car; in fact, many products and services can only be purchased through the use of a credit card. As a result, most consumers in this country have two or more credit cards.

At some point, some consumers will find themselves in a downturn of events due to loss of employment, reduction of salary, illness or divorce, where they may become unable to maintain payment of the balances due on the credit card accounts. Once that happens, the accounts go into delinquency. Due to financial reporting requirements imposed upon banks, credit card delinquencies go through different stages, where the collection of past due amounts will first be attempted internally through the bank's collection department, then through outside collection agencies, and then eventually through litigation by law firms throughout the country. Consumers who have defaulted on their credit card accounts are very familiar with the persistent telephone calls at all hours from debt collectors (who may be located in this country or calling from overseas call centers) and letter-writing campaigns which could make the post office proud (indeed, many consumers who file bankruptcy cite the annoyances of debt collectors as one of the chief reasons for the filings).

It is important for the consumer to understand that, from the perspective of the creditor, settling the debt and collecting a portion of the credit card debt is the main objective. This means that attempts to settle the credit card with the consumer will be pushed by the creditor at every stage of the process. For certain consumers, this is very beneficial, as significant savings can be accomplished through a reduced lump-sum payment.

Once the almost-terrifying debt collectors' campaign has ended, and the debt is still owed, the bank will either pursue collection of the debt itself or by selling the debt to another company, either of which will commence a law suit against the consumer to obtain a judgment.

The first step that the collection law firm will take is to file the case in the appropriate local court where either the consumer/former accountholder resides or where the account was opened. The initial document filed with the court will be a "Summons" (which is typically accompanied with the Complaint, which specifies the details of the claim against the consumer). The credit card company will be referred to as the "plaintiff" and the consumer will be referred to as the "defendant" in the Summons. The next step after the Summons is filed with the court is for the process server to serve a copy of the Summons on the defendant, informing him that a law suit has been filed and that he needs to respond to the Summons and plead any defenses to the case.

Once served, the defendant must serve and file his "Answer." The filing of the Answer will also place the case onto the court's pre-trial conference calendar. Each side will have an opportunity to conduct discovery of the other's evidence, including obtaining copies of credit card applications, agreements, and account statements.

After both parties have completed discovery proceedings, one of them (usually the plaintiff) will make a motion to the judge for "summary judgment," meaning that there is no need for a trial of the facts and the court should award judgment in favor of one of the parties. If the court grants the motion, then the successful party can enter the judgment (either dismissing the case or awarding a monetary amount). If the motion is denied, then the case will proceed to a trial.

5. Responding to the Summons

The filing of the Summons signifies that the credit card company (or its assignee) has elected to sue the account holder to recover for the debt owed on the credit card account. The Summons sets forth the name of the court in which the case has been commenced (for instance, "Civil Court of the City of New York, County of Kings"), and the Index Number and filing date. The Summons must be accompanied with (a) a Notice of the nature of the lawsuit; (b) an Endorsed Complaint (which is similar to the Notice, but is only permitted in certain courts); or (c) the Complaint. The Complaint should set forth the relevant allegations regarding the debt in order to allow for a meaningful response.

It is very important that the Summons is not ignored. If not responded to, then the credit card company may proceed to request that the court enter a "default" judgment because the defendant failed to respond. This will, obviously, have the effects of putting assets and income at risk of collection for the enforcement of the judgment, as well as adversely impacting upon one's credit score.

A. Methods of responding to the Summons

After the Summons is served, the defendant is presented with options as to how to proceed, which typically are: (a) serving an Answer to the Complaint; (b) filing a Motion to Dismiss the case before serving an Answer; (c) contacting the plaintiff's attorney about settling the debt; (d) considering bankruptcy options (generally, people with one credit card debt have a bunch of other credit card debts); or (e) doing nothing! (this option may result in a default judgment in favor of the plaintiff). The decision as to which option to take is part of an overall strategy, and different options may be advisable depending on the particular situation.

1. Pre-Answer Motion to Dismiss

Sometimes, the lawsuit is a "goner" from the start for various reasons. Some of the Affirmative Defenses discussed below should or may be brought before actually serving an Answer to the Complaint. For instance, if the defendant does not believe that he was properly served with the Summons by the process server, he may challenge the court's jurisdiction over him by bringing a Motion to dismiss the case based upon lack of "personal" or "in personam" jurisdiction. Another example would be where the Complaint does not even make out the bare bones requirements to establish a breach of the alleged credit card agreement (called "failure to state of cause of action").

Aside from the possibility of actually having the action dismissed by the court, the Motion to Dismiss may also serve to delay the formal answering of the Complaint unless and until the judge denies the Motion after consideration (be mindful, that delay without any other purpose may be sanctioned by the court if the delay was intended solely to annoy or harass the plaintiff). Many times, this extra time will help the defendant organize and "regroup" to figure out the nature and extent of outstanding debts and obligations (because, as mentioned above, "where there is smoke, there is fire!" that is, a bunch of credit card debts hitting at the same time).

2. Answer with Affirmative Defenses

If no pre-Answer Motion to Dismiss is to be made (or one was made but the court denied the Motion and determined that the action will go forward), the defendant must serve and file his Answer to the Complaint. The Answer may set forth some or all of the following:

a. admissions of facts alleged in the Complaint;

b. denials of allegations made in the Complaint;

c. denials of knowledge or information sufficient to form a belief as to the truth or falsity of allegations made in the Complaint (commonly referred to as "DKI" and typically known as "Dunno!" in Brooklynese!);

d. Affirmative Defenses;

e. Counterclaims against the plaintiff; and/or

f. Cross-Claims against other defendants.

In the typical Complaint, the plaintiff will allege, among other things: (a) its legal status (for instance, whether it is a corporation, limited liability company (LLC), etc.); (b) its state of formation; (c) whether it is licensed as a debt collection agency or does not need to be; (d) the residence of the defendant; (e) identifying the account sued upon; and (f) the nature of the breach of contract, including amounts owed and from which dates.

In answering the Complaint, the defendant needs to decide: whether to admit or deny certain allegations made in the Complaint; which Affirmative Defenses, if any, apply to the particular circumstances of the case; and if there are any Counterclaims or Cross-Claims to be asserted.

3. Counterclaims

Counterclaims are causes of action brought by a defendant in a lawsuit against the plaintiff. They may be related to the causes of action in the Complaint or wholly unrelated. They may ask for monetary damages or for injunctive relief.

There are several Counterclaims that are available to the defendant in the credit card lawsuit. Among others, the defendant may assert a Counterclaim for:

a. Frivolous conduct on the part of the plaintiff

New York Court Rules and Regulations (NYCRR) Part 130-1 permits the court, in its discretion, to award to any party or attorney in an action costs and reasonable attorney's fees resulting from "frivolous conduct" on the part of another party. "Frivolous conduct" is defined at Part 130-1.1(c), as conduct which is: (a) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (b) undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or (c) asserting material factual statements that are false.

b. Award of attorney's fees

General Obligations Law §5-327 provides that: "Whenever a consumer contract provides that the creditor, seller or lessor may recover attorney's fees and expenses incurred as the result of a breach of any contractual obligation by the debtor, buyer or lessee, it shall be implied that the creditor, seller or lessor shall pay the attorney's fees and expenses of the debtor, buyer or lessee incurred as the result of a breach of any contractual obligation by the creditor, seller or lessor, or in the successful defense of any action arising out of the contract commenced by the creditor, seller or lessor. Any limitations on attorney's fees recoverable by the creditor, seller or lessor shall also be applicable to attorney's fees recoverable by the debtor, buyer or lessee under this section. Any waiver of this section shall be void as against public policy." A review of the subject credit card agreement will reveal if the plaintiff may recover attorney's fees upon breach of contract (most do).

c. Violations of debt collection laws

Assuming that the plaintiff is not the direct creditor of the defendant, there may be violations of the federal Fair Debt Collection Practices Act (FDCPA) (which federal statute applies to debt collectors, including debt buyers). Those violations may entitle the defendant/debtor to statutory damages, actual damages, attorney's fees and costs.

It is important to note that there is no counterclaim under New York's Debt Collection Procedures Act, as set forth in General Business Law Article 29-H, as there is no private cause of action thereunder; it may only be enforced by a governmental agency. *Citibank (SD), NA v. Sablic*, 55 AD3d 651 [2 Dept. 2008].

There are other laws that cover violations of debt collection laws. See, *Ethical Issues in Collection*

4. Third Party Summons and Complaint/Cross-Claims
There may be situations where other people have potential liability for the claims brought against the defendant. Those people may be other named defendants in the lawsuit, in which situation the defendant will allege "Cross-Claims" against the other co-defendant; other times, the defendant may need to bring those other people into the lawsuit by filing a "Third Party Summons and Complaint."

B. Affirmative Defenses

The Affirmative Defenses are the "meat" of the defense to the credit card lawsuit. The Affirmative Defenses to a lawsuit are the legal reasons why the defendant does not owe the plaintiff any money. Different defenses apply to different situations.

Some of these Affirmative Defenses must be stated prior to or upon answering the Summons and Complaint, some at a later stage of the litigation and some at any time, even after judgment has been obtained. It is recommended that the defendant review the below Affirmative Defenses to determine whether any of them apply. There may also be other defenses to the lawsuit which are not mentioned below but may apply to the particular situation.

1. Identity theft
Identity theft has been identified by the Justice Department as one of the most prevalent crimes in this country. The news is filled with stories of criminals "hacking" into consumers' credit records to steal data. If the defendant believes that the debt was incurred by someone else pretending to be the accountholder, identity theft may have occurred. In the first instance, the defendant should file a police report, review his credit reports and file any affidavits of forgery as may be requested. Attached to this book is an informational brochure from the Federal Trade Commission (FTC), which outlines the steps to be taken if identity theft may have taken place.

Regardless of whether the debt is legitimate or not, if the plaintiff alleges in the Complaint (or in subsequent affidavits or exhibits) the defendant's Social Security number or other personal, non-public identifying information, the defendant can ask the court to redact that information because it may lend itself to identity theft by others who comb through court records. See, General Business Law §399-dd.

2. Payment (partial or full)
Generally, the credit card agreement will provide that the indication of "payment in full" on a check paid on account will not constitute an "accord and satisfaction." This means that the credit card company may accept the partial payment and not forfeit its rights to pursue the remainder of the debt (even where it does not indicate "without prejudice" or "with reservation of all rights" on the check). However, if the accountholder can demonstrate that there was a genuine dispute as to the debt, which was settled upon a partial payment, the receipt and deposit of the payment can be considered an accord and satisfaction of the disputed debt. *Citibank (South Dakota), N.A. v. Maniaci*, 23 Misc.3d 1103(A) [Dist. Ct., Nassau Co. 2009]. The defendant may also be able to prove that certain payments were not accurately reflected on the account.

3. Amount of debt in dispute
There may be the situation where an amount alleged due on the account is different than the amount actually believed to be owed. This may be for different reasons, such as (a) payments were not applied; (b) payments were not properly applied; (c) interest calculations are incorrect; (d) amount calculated from the wrong date; or (e) other charges were improperly applied.

4. Lack of standing
An "assignee" is defined as the party to which the credit card company sold or transferred the account. There may be several assignments from the original creditor to the ultimate plaintiff, in which there must be proof of the so-called "chain of title." An assignee must prove the assignment of the debt to the plaintiff in order to establish "standing" to bring the action. The issue of whether the plaintiff lacks standing to bring the case because of there being (a) no assignment; (b) lack of proof of assignment; or (c) action was brought prior to the date of assignment to the plaintiff must be raised either pre-Answer or as Affirmative Defense in the Answer.

TPZ Corporation v. Dabbs, 25 AD3d 787 [2 Dept. 2006]; *Portfolio Recovery Associates, LLC v. King*, 55 AD3d 1074 [3 Dept. 2008].

In *CACV of Colorado LLC v. Santiago*, NYLJ 10/29/2009, p. 26 [Civ. Ct. NY Co. 2009], the credit card account was first opened with Direct Merchant Bank through Banco Popular, then assigned to Metris Companies, which was then purchased by HSBC, then assigned to Worldwide Asset Purchasing, and ultimately, to CACV of Colorado. The judge decided that, based upon the evidence presented, there was an incomplete chain of title and dismissed the lawsuit.

5. Lack of license to collect a debt
The New York City Administrative Code, at Section 20-489(a), mirroring the federal statute, defines a "debt collection agency" as "a person engaged in business the principal purpose of which is to regularly collect or attempt to collect debts owed or due or asserted to be owed or due to another." A debt collection agency is required to have a license under the New York City Administrative Code, at Section 20-490. As stated therein: "It shall be unlawful for any person to act as a debt collection agency without first having obtained a license in accordance with the provisions of this subchapter and without first being in compliance with all other applicable law, rules and regulations."

6. Failure to allege licensure in the Complaint
CPLR 3015(e) requires that the assignee of the credit card debt must allege that it has a debt collector's license in the Complaint. The failure to make a specific allegation of the license is a ground to dismiss the action. *PRA III, LLC v. MacDowell*, 841 NYS2d 822 [Civ. Ct. 2008].

7. Statute of limitations
Pursuant to CPLR 213, the statute of limitations in which the plaintiff must commence its lawsuit to recover on a credit card debt (which is a form of breach-of-contract action) is six years from the date of breach.

Under New York choice-of-law principles, contractual choice provisions (for instance, in the credit card agreement) only apply to substantive issues; New York follows its own procedural rules. In New York, statutes of limitations are generally considered procedural because they are viewed as pertaining to the remedy rather than the right. *Tanges v. Heidelberg N. Amer.*, 93 NY2d 48 [1999]. In that vein, and very pertinent to the vast majority of credit card cases, there is a "borrowing statute" [CPLR 202] which provides that if the case accrued in another state and in favor of a nonresident party, then New York will apply the statute of limitations of that other state. Thus, it is possible to shorten the statute limitations period in which a plaintiff may sue a New York defendant. *Portfolio Recovery Associates LLC v. King*, 14 NY3d 310 [2010]. The court said this rule was necessary to prevent "forum shopping," where the nonresident looks to take advantage of the State's more favorable statute of limitations over the time period allowed in the home state or where the cause of action accrued or came into being.

The defendant should be aware that there may be certain circumstances in which the period for computing the statute of limitations can be "tolled" or suspended, such as the period in which the defendant is (a) in military service; (b) in bankruptcy (without having received a discharge of the debt); or (c) absent from the state. See CPLR 207.

The statute of limitations period can also be "revived" in two circumstances, where the defendant (a) makes a part payment on the particular account; or (b) provides a written acknowledgment of the account. In these circumstances, the clock is reset from either of those circumstances for a fresh period of time.

8. Debt has been previously discharged in bankruptcy
If the debt upon which suit is brought was previously included in a bankruptcy petition, and the debt was "discharged" pursuant to Bankruptcy Code Sections 727, 1141, 1228, or 1328, then the plaintiff cannot sue for the debt any longer. Once the plaintiff becomes aware of the discharge, then it must discontinue the lawsuit, or it can face its own lawsuit for violation of the discharge.

9. Claim Preclusion or Issue Preclusion (also known as *res judicata* and *collateral estoppel)*
These terms refer to the circumstances where either the same plaintiff is suing for the same debt or where a different plaintiff is suing for the same debt, and a prior court has already made a determination regarding that matter. The general concept is that everyone gets their day in court — but only one day! If a prior court already decided that the defendant cannot be liable for the debt or that one of the issues in the lawsuit has already been decided, then it cannot revisit the matter.

The First Department noted, in *In re Abady,* 22 AD3d 71 [1st Dept. 2005], the requirements for the application of collateral estoppel: (a) the identical issue necessarily was decided in a prior action and be decisive in the present action; and (b) the party to be precluded must have had a full and fair opportunity to contest the prior determination. Under New York law, "collateral estoppel effect will only be given to matters actually litigated and determined in the prior action." *Kaufman v. Eli Lilly & Co.,* 65 NY2d 449 [1985].

10. General denial
Aside from all of the other defenses that a defendant may have to the action, the defendant may simply deny the plaintiff's claim — essentially, the "Prove It!" defense.

In *Bobby D. Associates v. Ohlson*, NYLJ 7/9/2009 p. 26 [Civ. Ct. NY Co. 2009], the defendant simply stated in his defense, "I do not recall opening the account." The judge considered that as "honest a denial as a person could make." This defense essentially puts the plaintiff to its proof, to prove the existence of the defendant's debt (by showing that there is an absence of evidence on the plaintiff's part).

11. Minor or incapacity at time of making contract
Where the person who entered into the contract was a minor (in New York, someone under the age of 18 years) or declared mentally incompetent, the contract may be voidable by the person. If voided by the person, then the debt resulting from the contract becomes unenforceable. The burden of proving mental incompetence is on the party asserting it. *Smith v. Comas*, 173 AD2d 535 [1991].

12. Failure to state a cause of action
It is essential to any lawsuit that the Complaint makes out a valid "cause of action" against the defendant. The Complaint should set forth, with particularity, the allegations of the nature and facts of the case and why it is alleged that the defendant is liable to the plaintiff. In the credit card case, the plaintiff must prove, at a minimum:

i. Evidence of (a) existence of an agreement to extend credit to the defendant; (b) the issuance of credit cards at the defendant's address; (c) his use of the credit card; (d) his retention of account statements; and (e) payments on account, if any. *PRA III, LLC v. Gonzalez*, 54 AD3d 917 [2 Dept. 2008];

ii. Proof itemizing the various purchases or transactions allegedly made with the credit card. *Adverlight Collections Inc. v. Naydensky*, Slip Copy 25 Misc.2d 126(A), 2009 WL 3297494 [App. Term, 2, 11, and 13 Jud. Dists. 2009]; *Discover Bank v. Williamson*, 14 Misc.3d 136(A) [App. Term, 9 and 10 Jud. Dists. 2007].

13. Failure to satisfy a condition precedent
Having title to the credit card debt would be a condition precedent to the right to sue on that debt. *Deutsche Bank National Trust Company v. Abbate*, Slip Copy 25 Misc.3d 1216(A) [Sup.Ct. Richmond Co. 2009]. In other words, if the plaintiff suing does not have proof that it owns the debt, it cannot bring the lawsuit.

If there is an assignment of the debt from the original creditor, there has to be proof that notice of the assignment was given to the debtor. *Chase Bank USA, NA v. Cardello*, NYLJ 3/15/10 [Civ. Ct., Richmond Co. 2010].

Dove-tailing with the requirement that there be particularity in pleadings in general, the plaintiff must allege that it is either a domestic organization organized under New York State law (such as a corporation, limited

liability company (LLC), or partnership) or an out-of-state entity duly authorized to do business in New York State. If the plaintiff is not registered with New York State, then it has not satisfied a "condition precedent" before suing the defendant. See, Business Corporation Law §1312.

14. No account stated, as proper objection was made
That there was an account between the parties and that a specified balance was found to be due. *Citibank (SD), NA v. Jones*, 272 AD2d 815 [2 Dept. 2000].

There must be proof regarding (a) the specific monthly statements allegedly mailed to the defendant-account holder; and (b) that the account holder retained the alleged stated account for an unreasonable period of time without objecting thereto. *Citibank (SD), NA v. Goldberg*, 2009 WL 2447833 [App. Term, 2, 11, and 13 Jud. Dists. 2009].

By federal law, a consumer in a credit card transaction has the obligation to send a written notice indicating that he believes there is a billing error within 60 days after receiving the account. The credit card company is then required to acknowledge receipt of the notice and investigate the claim. 15 USC 1666(a).

15. Arbitration
In order for an award from an arbitration to be "confirmed" or approved by a court for entry of a judgment against a person, it must be proven that: (a) the case to confirm the award (known as a special proceeding) was timely commenced (within one year of the delivery of the award); (b) there existed a written agreement to submit to arbitration; (c) proof that the respondent agreed to arbitration in writing or by conduct; and (d) there was proper service of the notices of the arbitration hearing and award. *MBNA America Bank, NA v. Straub*, 12 Misc.3d 963 [Civ. Ct., NY Co. 2006].

If the matter was already submitted to arbitration and an award was made, then there are very limited occasions that there will be judicial review of the award. Those circumstances are generally where there is an allegation of corruption, fraud, misconduct in procuring the award, or partiality of the arbitrator that "so prejudiced the rights or the integrity of the arbitration process." *MBNA America Bank, NA v. Karathanos*, 65 AD3d 688 [2 Dept. 2009].

16. Improper venue
The term "venue" refers to the county in which the action is brought against the defendant. In a credit card case, the action may only be brought in one of two counties: (1) the county in which the defendant resides; or (2) the county in which the transaction took place. 15 USC §1692i. According to CPLR 305, the Summons in an action arising out of a consumer credit transaction shall prominently display at the top of the summons the words "consumer credit transaction" and, where a purchaser, borrower or debtor is a defendant, shall specify the county of residence of a defendant, if one resides within the state, and the county where the consumer credit transaction took place, if it is within the state.

17. Lack of personal jurisdiction
This Affirmative Defense calls into question two different aspects concerning the jurisdiction of the court over the defendant: (a) whether the Summons itself is defective on its face; and (b) whether the Summons was improperly served upon the defendant. (The methods of service authorized by CPLR 308 upon a natural person are set forth in the Relevant Statutes section of this book.)

18. Lack of subject matter jurisdiction
If the plaintiff cannot show that it had title to the subject matter of the controversy (that is, the debt itself), the court may lack jurisdiction over the "subject matter." *Deutsche Bank National Trust Company v. Abbate*, Slip Copy 25 Misc.3d 1216(A) [Sup.Ct. Richmond Co. 2009]. If a case is brought in a court of limited jurisdiction, and exceeds the court's limits, the court lacks subject matter jurisdiction (for instance, suing for $30,000 in Civil Court, where the limit is $25,000).

19. Fraud, duress or mutual mistake
In proving fraud, a party must prove (a) a misrepresentation or a material omission of act which was false and known to be false by defendant; (b) made for the purposing of inducing the other party to rely upon it; (c) justifiable reliance of the other party on the misrepresentation or material omission; and (d) injury. *Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413. It is possible that the credit card issuer defrauded the borrower into entering into the agreement or into taking some sort of action.

Duress would be an extremely rare defense to the credit card case, but it would be where the person was forced into entering into the agreement. It may be a defense to a post-dispute settlement, where the person was forced into making the settlement by the creditor.

If one side to a contract makes a mistake, it is not the problem of the other side; however, if both sides make a mistake about the contract, then it may be an "oops," and the agreement may be voided because there was no "meeting of the minds."

20. Failure to comply with agreement or law
The credit card agreement may have particular provisions which either require the credit card issuer to do something or not do something. A law may require the same thing. For example, recently-enacted federal legislation called the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act) put in place a laundry-list of changes to how credit cards may be marketed, rates computed and charges imposed.

A credit card agreement typically set forth a "choice of law" provision, which allows the credit card company to select, among other things, the interest provisions of another state to be applied towards any balances due on the account. Generally, courts enforce these agreements, except where (a) the chosen state has no substantial relationship to the parties; or (b) the application of the law of the chosen state would be contrary to a fundamental policy of the state which has a materially greater interest than the chosen state. *American Equities Group, Inc. v. Ahava Dairy Products Corp.*, 2004 WL 870260 [SDNY 2004]. New York courts have held that New York State has a strong public policy against enforcing excessive, usurious interest rates. *American Express Travel Related Services Co., Inc. v. Assih*, NYLJ 1/11/2010 [Civ. Ct., Richmond Co. 2009].

21. Active military status
If the defendant is in the military, there may be a stay of proceedings until the defendant is no longer on active duty. See, Federal Servicemembers Civil Relief Act and New York State Soldiers' and Sailors' Civil Relief Act — Military Law, Article 13.

22. Payment protection insurance
Sometimes, an account will be opened by a consumer with an added benefit, a payment protection plan. This type of insurance plan is an extra cost for the consumer but will provide coverage for the possibility that the accountholder becomes incapacitated; the plan will cover finance charges and other fees, resulting in no fees being due on the account. *Discover Bank v. Washington*, 31 Misc.3d 1239(A) [Civ.Ct., Richmond Co. 2011].

23. Usury
Usury is the term for an interest rate charged by a creditor above the highest rate permitted by law. New York State's highest interest rate for loans to individuals is 16% per annum. Credit card issuers that are either a national bank or a bank insured by the FDIC may impose interest rates higher than this State's because of federal preemption laws, which essentially permits use of the lawful rates of a bank's home state. *See, Marquette National Bank of Minneapolis v. First of Omaha Service,* 439 US 299 [1978].

24. No basis for legal fees
While Personal Property Law §413 allows for an award of attorney's fees, there are some circumstances where they will not be awarded. Those exceptions would include: (1) fee award cannot be based upon a cause of action for an account stated, *HSBC Bank USA v. Schulze*, 9 Misc.3d 128(A) [App.Term 9&10 J.D. 2005]; and (2) no

award for mere collection efforts prior to litigation, *Broadstreets Inc. v. Parlin*, 75 Misc.2d 662 [Civ.Ct. NY Co. 1973].

25. Unconscionability

The doctrine of unconscionability contains both substantive and procedural aspects, and whether a contract is unconscionable or grossly unreasonable is measured by the court from looking at the commercial setting, purpose and effect. *Sablosky v. Gordon Co.*, 73 NY2d 133 [1989].

As a corollary of unconscionability, there are also requirements that a printed contract involving a consumer transaction be legible and of sufficient type size (CPLR 4544) and written in a clear and coherent manner using common, every-day meanings of words (General Obligations Law §5-702).

6. Discovery Proceedings

During the course of litigation, each of the parties to the action is entitled to "discover" all of the relevant information and documents that the other side has concerning the matter. Article 31 of the CPLR governs disclosure, including (a) the nature and scope of discovery; (b) timing of discovery requests, objections and responses; and (c) remedies for non-compliance.

A. Methods of obtaining disclosure

There are various methods used to obtain disclosure from the plaintiff. Some of these methods are used to obtain information and testimony and others are used to obtain records and other items.

1. Interrogatories

The term "Interrogatory" is another word for "question." The service of interrogatories allows the defendant to ask questions of the plaintiff about the case without having to conduct a formal deposition. Interrogatories are useful in credit card cases because the expense and hassle of conducting a deposition may not be justified based upon the amount involved, but there may be questions that the defendant needs answered in order to defend the case.

2. Document Production

Perhaps the most important discovery device utilized in litigation is the demand to see all of the documents in the possession, custody or control of the plaintiff. Documents in the credit card case may and probably should include the (a) account application; (b) credit card agreement; (c) amendments to the agreement; (d) account statements; (e) records of charges; (f) written disputes; (g) bills of sale regarding the chain of title to the account, if applicable; and (h) notices or other correspondence. The demand may be referred to as a "Notice to Produce," "Request for the Production of Documents and Things," or "Demand for Discovery and Inspection."

3. Depositions

Each side to the action has the right to depose the other before a court reporter as to the facts and circumstances of the matter. In most collection cases, there are no depositions conducted because there is the associated cost of the court reporter's bill for the deposition transcript. However, in the appropriate case, such as proving that the plaintiff has no personal knowledge of the case or establishing the basis for any asserted counterclaims, it may be advisable to depose the plaintiff. In this situation, a notice to take the plaintiff's deposition should be served, along with the specification that a witness with personal knowledge of the facts be presented.

4. Notice to Admit

One of the least-used but most effective discovery devices is the "Notice to Admit" (sometimes referred to as the "Request for Admissions"). The Notice to Admit asks the party served to admit that the fact or statement alleged is true; if denied, an explanation as to why it is denied must be provided. In a credit card case, the plaintiff may use this discovery device to attempt to prove the existence of the account or the charges incurred, which may be refuted. If there is no response to the Notice to Admit from the party served, then the allegations of fact contained in it are deemed true and irrefutable.

5. Subpoena

Sometimes, the information or document needed to disprove the plaintiff's case or prove a defense may be in the possession of a third party, such as the original credit grantor. In this case, a Subpoena may be served requiring the testimony and/or production of documents by that third party. A Subpoena for documents is known as a "Subpoena Duces Tecum." By statute, the third party must receive a fee for its appearance, which must accompany the Subpoena.

6. Expert witness disclosure

In the vast majority of credit card cases, there will be no expert witness testimony. However, it is possible that an expert will be presented at trial to testify as to certain aspects of the case that may be more complex than the typical juror may encounter, and which necessitate the assistance of an expert (for instance, the expert may be

called to testify as to the methods of compliance by the credit card company with the law). Upon being served with a demand for disclosure, the party must provide expert witness disclosure, including: the qualifications of the expert; the information relied upon in coming to an expert opinion; and the report itself.

B. Timing of discovery requests, objections and responses

Once both sides have served their pleadings (such as the Complaint; Answer; Reply to Counterclaims; etc.), the litigation enters into the "discovery" phase. All of the available discovery devices are available for use. The defendant should serve discovery demands with the Answer so that the plaintiff is forced to comply with them; the demands not only lead to useful information and documents to defend the case but "slow down the plaintiff's truck" a bit.

For the most part, the party served with discovery demands must answer or respond to them within twenty days. Many times, the demands request responses that may have nothing to do with the case or are extremely onerous. The answering party is allowed to "object" to the demands on various grounds, including relevancy, vagueness, broadness, attorney-client privilege, and others.

In credit card cases, the plaintiff may serve a Notice to Admit preemptively, trying to nail down all of the facts of the case as soon as the defendant answers the Summons and Complaint. The hope is that the defendant does not timely respond to the Notice, so that the allegations contained in it are deemed "admitted" and not subject to controversy later. This is one example of the caution to be mindful of discovery timing.

Generally, discovery comes to a conclusion once the case has been placed onto the court's trial calendar. Once this happens, discovery may only be had pursuant to further court order.

C. Remedies for non-compliance

If a party does not respond in a timely fashion to discovery demands, then the requesting party can request that the court take certain actions, including:

1. Compelling responses

Having the judge order the plaintiff to produce the requested information or documents by a certain date.

2. Preclusion of witnesses or documents

The judge can "preclude" or stop people from being witnesses at trial or certain documents from being accepted into evidence.

3. Striking a pleading

The ultimate remedy — dismissing the lawsuit altogether because the plaintiff is not complying with the discovery rules. This usually happens after the plaintiff has received a prior warning that it is not "playing by the rules."

7. Summary Judgment

The term “summary judgment” means that a litigant is claiming that there is no reason to have a trial (either by judge or jury) because the case can be decided based solely upon application of the law. A “motion” is basically a request for a judge to take some sort of action.

Summary judgment is a drastic remedy, as it deprives a party of his day in court, and should be granted when it is clear that there are no triable issues of fact. See, *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]. The burden is upon the moving party to make a *prima facie* (Latin term for “by its first instance”) showing that the movant is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. See, *Giuffrida v. Citibank*, 100 NY2d 72 [2003]. The failure to make that showing requires the denial of the motion regardless of the adequacy of the opposing papers. See, *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]. Once a *prima facie* showing has been made, the burden of proof shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact which necessitate a trial.

Affidavits which are signed and notarized outside of New York State should be accompanied by a Certificate of Conformity pursuant to CPLR 2309(c). This certificate informs the court that the procedures for the signing of an affidavit in-state were complied with even though executed out-of-state.

It is important to note that affidavits in support or in opposition to summary judgment motions must be made by someone with personal knowledge of the facts of the case. In many credit card cases, this necessarily means that the original credit card company must provide an affidavit of an officer attesting to the facts, and that the affidavit of a successor debt buyer will not suffice. See, *JMD Holding Corp. v. Cong. Fin. Corp*., 4 NY3d 373 [2005].

As a part of a credit card issuer's presentation of a prima facie case, the motion papers must include an affidavit sufficient to tender to the court the original agreement, as well as any revision thereto, and the affidavit must aver that the documents were mailed to the card holder. The same affidavit typically advances copies of credit card statements which serve to evidence a buyer's subsequent use of the credit card and acceptance of the original or revised terms of credit (*Chase Manhattan Bank [Nat. Ass'n], Bank Americard Division v. Hobbs,* 94 Misc.2d 780, 405 N.Y.S.2d 967 [Civ.Ct. Kings Co.1978], also holding statements admissible as business record; *Citibank [S.D.] N.A. v. Roberts,* 304 A.D.2d 901, 757 N.Y.S.2d 365 [3d Dept.2003], payments indicated acceptance of credit arrangement). The affidavit often addresses whether there was any proper protest of any charged purchase within 60 days of a statement (15 U.S.C. § 1601; 12 C.F.R § 226.13[b] [1], a provision in 12 C.F.R, part 226, referred to as “Regulation Z” or “Truth in Lending” regulations).

8. Trial

Assuming that, after all of the pleadings, discovery and motions are done, the case doesn't get dismissed, result in a judgment for the plaintiff, or get settled, the case will move forward to an actual trial. For the most part, credit card cases are tried before a judge and not a jury. (Sometimes, courts have "mediators" who will meet with each side to see whether a settlement can be effectuated before sending the case out to trial).

The main question presented to the trial court is: Did the plaintiff make out a prima facie case based upon credible proof in admissible form? If so, then the next question the trial court has to answer is: Did the defendant prove a defense which rebuts that case? If not, then the court is going to grant a judgment in favor of the plaintiff. If so, then the case will be dismissed after trial — finally and forever. See, for example, *Staten Island N.Y. CVS, Inc. v. Gordon Retail Dev. LLC*, 57 AD3d 760 [2 Dept. 2008].

When the plaintiff puts forth as evidence the various documents constituting its case, including the account application, agreement, and statements, those documents must be admitted into evidence by the judge. Account statements must be authenticated as "business records" under CPLR 4518(a). This is the process where someone on behalf of the plaintiff testifies about being the custodian of the records, how the records were created, and how they were maintained.

As for business records, it must be shown that they were made in the regular course of business and reflected a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the business, made pursuant to established procedures for the routine making of such a record, and made at the time of the acts, transactions, occurrences or events described therein or within a reasonable period of time afterwards. *People v. Cratsley*, 86 NY2d 81 [1995].

The trial court (whether by judge or jury) can determine whether the witnesses presented are credible. *Brennan v. Bauman & Sons Buses, Inc.*, 107 AD2d 654 [2 Dept. 1985].

9. Post-Trial Matters

Once the trial has concluded, one of two results will have occurred: (a) the court dismissed the lawsuit brought by the plaintiff and no debt is owed; or (b) the court rendered a judgment in favor of the plaintiff against the defendant for the money owed.

1. Entry of Judgment

In either circumstance, one of the parties to the lawsuits (typically, the winning party) needs to prepare a "Judgment" for the clerk of the court to enter in the court records. Thereafter, there will be a record of the proceedings, evidence by the Judgment.

2. Payment of Judgment Amount

Either before the Judgment is entered, or after it is entered, the defendant may choose to pay the amount due. In that case, all of the enforcement proceedings will come to an end and the matter resolved. (Many times, a defendant found liable to the plaintiff by the court will immediately contact the plaintiff to pay the debt so that there is no reflection of a Judgment on the defendant's credit card, which may affect the person's credit score.)

3. Appeals

If a party to the action believes that the trial judge made an error, the party may file a Notice of Appeal within thirty days after the service of "Notice of Entry" of the Order or Judgment. The filing of an appeal preserves the right of the party to appeal the case to an appellate court. Afterwards, it will be incumbent upon the party (now referred to as the "Appellant") to order the transcript of the court proceedings, assemble the relevant exhibits, and "perfect" the appeal by filing the record and an appellant's brief with the appellate court.

4. Stays

The losing party has the right to request, in conjunction with the appeal of the case, that the court grant a "stay" of the enforcement of the Order or Judgment. The request for a "stay" is basically a request for the court to put up a stop sign from anyone taking any actions on the Order or Judgment. Generally, in credit card cases, the only way to obtain the stay is by posting an undertaking or bond in the amount of the Judgment.

5. Vacating a Default Judgment

If the defendant fails to appear in court, either to answer the initial Summons or misses one of the court hearing dates, a "default" will be entered by the court. That will give the plaintiff the right to enter a Judgment against the defendant. Once that happens, the defaulting party must file a motion called an Order to Show Cause to Vacate Default Judgment. The party will have to prove (a) that there was an excusable default for not answering or responding to the case; and (b) there is otherwise a meritorious defense to the case.

10. Settlements

Settlements are typically the main objective of both parties to the credit card case. There is a sense of finality that the matter is resolved and behind the parties. For the plaintiff, a settlement brings some but not all of the fruit from the collection process. For the defendant, a settlement allows the person to get back to worrying about all of life's other problems and issues and stop worrying about this one. A settlement is considered a good one where each side is both satisfied and dissatisfied at the same time.

Agreements to settle may be made at any stage of the collection process: pre-suit; post-filing but pre-judgment; and post-judgment. The agreement, at a minimum, will contain the following provisions:

1. An acknowledgment or admission of the debt or liability;

2. Settlement amount, either with or without interest;

3. Payment terms, such as a lump-sum figure or regular installments over a certain period of time;

4. The steps to be taken by the plaintiff after the settlement amount has been paid to dispose of the matter; and

5. Entry of judgment or continuation of enforcement proceedings if the defendant defaults in making the settlement payment.

Once the matter has been settled, there are different types of documents which the plaintiff will file to acknowledge the settlement:

1. Stipulation of Discontinuance

The Stipulation of Discontinuance is filed by the parties to the action with the clerk of the court. It informs the court that the parties have agreed to discontinue the case voluntarily and that no further court intervention is needed. The stipulation should state that the discontinuance of the action is "with prejudice," meaning that the party may not reinstitute proceedings on the claim.

2. Satisfaction of Judgment

Once the Judgment has been entered by the clerk of the court, the parties satisfying the Judgment debt ("judgment debtor") would be entitled to a Satisfaction of Judgment, which is filed by the judgment creditor or its attorney, signifying that the Judgment has been paid.

3. Release

The Release is a document that provides that the settling party waives all claims against the other party. It may be a "General Release," which releases the party from any and claims and causes of action the other party from the beginning of time through the date of the Release, or it may be a "Limited Release," which releases the party from all claims relating solely to the claims in the action. In credit card cases, the Release will generally be limited to the relevant account, as many consumers have more than one account with the same lender.

4. Credit Reporting Agencies

Most consumers are already aware that lawsuits and judgments appear on their credit reports, and there is a harmful effect to their credit scores as a result. Accordingly, it will be important to ensure that the credit reporting agencies (Experian, Equifax or Trans Union) are informed of the settlement. A dispute or update to the consumer's credit report may be warranted or necessary in order to ensure that the report is accurate, as well as to alleviate any harmful effects to the credit score.

The contact information for the three major credit reporting agencies are:

Equifax
P.O. Box 740241

Atlanta, GA 30374
1-800-685-1111
www.equifax.com

Experian
P.O. Box 2002
Allen, TX 75013
1 888 397 3742
www.experian.com

TransUnion
P.O. Box 1000
Chester, PA 19022
1-800-888-4213
www.transunion.com

Every consumer is entitled to review his or her credit report from each of the above three credit reporting agencies but accessing them at www.annualcreditreport.com.

11. Sample Pleadings and Forms for Defending Credit Card Lawsuits

These forms are intended as being illustrative only and are not to be relied upon for any specific matter. The reader should seek legal advice concerning a specific matter, as many issues must be determined on a case-by-case basis.

To download any of the forms for your e-reader, follow the links after the short description. The complete list of forms is available on-line at:
http://courtstreetlaw.com/guide_to_defending/forms/

Form 1. Answer to Complaint (Written Answer Consumer Credit Transaction)
Information on Answering a Consumer Credit Transaction
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_1-WrittenAnswerConsumerCreditTransaction.pdf

Form 2. Notice for Discovery and Inspection
May be served together with the Answer to Complaint or within a reasonable amount of time thereafter.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_2-NoticeForDiscoveryAndInspection.pdf

Form 3. Combined Demands
May be served together with the Answer to Complaint or within a reasonable amount of time thereafter.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_3-CombinedDemands.pdf

Form 4. Interrogatories
May be served together with the Answer to Complaint or within a reasonable amount of time thereafter.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_4-Interrogatories.pdf

Form 5. Notice to Take Deposition
May be served together with the Answer to Complaint or within a reasonable amount of time thereafter.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_5-NoticeToTakeDeposition.pdf

Form 6. Motion to Dismiss Action
Should be served within the same period of time as the Answer to Complaint, above, with a return hearing date of about 25 days later.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_6-MotionToDismissAction.pdf

Form 7. Motion for Summary Judgment
May be served once the discovery phase of the litigation has ended.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_7-MotionForSummaryJudgment.pdf

Form 8. Motion to Compel Disclosure or Strike Complaint
May be served in the event that the plaintiff does not comply with discovery demands.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_8-MotionToCompelDisclosureOrStrikeComplaint.pdf

Form 9. Notice of Appeal
Must be served within 30 days after service of the Order or Judgment with notice of entry.

Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_9-NoticeOfAppeal.pdf

Form 10. Stipulation of Settlement
Used anytime that the case is being settled.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_10-StipulationOfSettlement.pdf

Form 11. Satisfaction of Judgment
Used once the judgment has been paid.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_11-SatisfactionOfJudgment.pdf

Form 12. Stipulation of Discontinuance
Used either when the parties settle or if the plaintiff decides to dismiss the action.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_12-StipulationOfDiscontinuance.pdf

Form 13. General Release
Used anytime that money is paid, a release should be given so that other claims don't surface.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_13-GeneralRelease.pdf

Form 14. Notice of Entry of an Order or Judgment
Notice to the other side that the judge made a decision. It also starts the “appeals clock” of 30 days ticking.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_14-NoticeOfEntryOfAnOrderOrJudgment.pdf

Form 15. Affidavit of Service
Filed together with any motion practice.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_15-AffidavitOfService.pdf

Form 16. Subpoena Duces Tecum
Used whenever records or documents are needed.
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_16-SubpoenaDucesTecum.pdf

Form 17. Affidavit in Support of an Order to Show Cause
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_17-AffidavitInSupportOfAnOrderToShowCause.pdf

Form 18. Affidavit in Support of an Order to Show Cause
Download here:
http://courtstreetlaw.com/guide_to_defending/forms/Form_18-AffidavitInSupportOfAnOrderToShowCause(2).pdf

12. Relevant Statutes

State and City Statutes
Civil Practice Law and Rules (CPLR):

1. Section 213

2. Section 308

3. Section 2214

4. Section 2309

5. Section 3015

6. Article 31 (select provisions)

7. Section 3211

8. Section 3212

9. Section 4518

General Obligations Law:

1. Section 5-327

New York Court Rules and Regulations (NYCRR):

1. Uniform Rules of Court Part 130-1

New York City Administrative Code:

1. Section 20-489

2. Section 20-490

Federal Statutes
Fair Debt Collection Practices Act (FDCPA) (Title 15 of the United States Code Section 1692 – not reproduced herein)

Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act). (Public Law 111-24 which amended various sections of law contained in Title Nos. 5, 11, 15, 20 and 31 of the United States Code — not reproduced herein.)

§ 213. Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director, officer or stockholder; based on fraud.
The following actions must be commenced within six years:

1. an action for which no limitation is specifically prescribed by law;

2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law;

3. an action upon a sealed instrument;

4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;

5. an action by the state based upon the spoliation or other misappropriation of public property; the time within which the action must be commenced shall be computed from discovery by the state of the facts relied upon;

6. an action based upon mistake;

7. an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith;

8. an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

§ 308. Personal service upon a natural person.

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or

mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section;

6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

§ 2214. Motion papers; service; time

(a) Notice of motion. A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. Relief in the alternative or of several different types may be demanded.

(b) Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands, whereupon any reply or responding affidavits shall be served at least one day before such time.

(c) Furnishing papers to the court. Each party shall furnish to the court all papers served by him. The moving party shall furnish at the hearing all other papers not already in the possession of the court necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced by him at the hearing on notice served with the motion papers. Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct.

(d) Order to show cause. The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion at a time and in a manner specified therein. An order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated, or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county.

§ 2309. Oaths and affirmations

(a) Persons authorized to administer. Unless otherwise provided, an oath or affirmation may be administered by any person authorized to take acknowledgments of deeds by the real property law. Any person authorized by the laws of this state to receive evidence may administer an oath or affirmation for that purpose. An oath to a juror or jurors may be administered by a clerk of court and his deputies. This section shall not apply to an oath of office.

(b) Form. An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.

(c) Oaths and affirmations taken without the state. An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

(d) Form of certificate of oath or affirmation administered by officer of the armed forces of the United States. The certificate of an oath or affirmation administered within or without the state or the United States by

an officer of the armed forces of the United States authorized by the real property law to take acknowledgment of deeds, shall state:

1. the rank and serial number of the officer before whom the oath or affirmation is taken and the command to which he is attached;

2. that the person taking the oath or affirmation was, at the time of taking it, a person enlisted or commissioned in or serving in or with the armed forces of the United States or the dependent of such a person, or a person attached to or accompanying the armed forces of the United States; and

3. the serial number of the person who takes, or whose dependent takes the oath or affirmation, if such person is enlisted or commissioned in the armed forces of the United States. The place where such oath or affidavit is taken need not be disclosed.

§ 3015. Particularity as to specific matters

(a) Conditions precedent. The performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified.

(b) Corporate status. Where any party is a corporation, the complaint shall so state and, where known, it shall specify the state, country or government by or under whose laws the party was created.

(c) Judgment, decision or determination. A judgment, decision or other determination of a court, judicial or quasi-judicial tribunal, or of a board or officer, may be pleaded without stating matter showing jurisdiction to render it.

(d) Signatures. Unless specifically denied in the pleadings each signature on a negotiable instrument is admitted.

(e) License to do business. Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs of the city of New York, the Suffolk county department of consumer affairs, the Westchester county department of consumer affairs/weight-measures, the county of Rockland, the county of Putnam or the Nassau county department of consumer affairs, the complaint shall allege, as part of the cause of action, that plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license; provided, however, that where the plaintiff does not have a license at the commencement of the action the plaintiff may, subject to the provisions of rule thirty hundred twenty-five of this article, amend the complaint with the name and number of an after-acquired license and the name of the governmental agency which issued such license or move for leave to amend the complaint in accordance with such provisions. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter.

§ 3101. Scope of disclosure.

(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will

not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

(b) Privileged matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.

(c) Attorney's work product. The work product of an attorney shall not be obtainable.

(d) Trial preparation.

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

* (iv) In an action for podiatric medical malpractice, a physician may be called as an expert witness at trial.

* NB Effective February 17, 2014

2. Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been

made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

(e) Party's statement. A party may obtain a copy of his own statement.

(f) Contents of insurance agreement. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement.

(g) Accident reports. Except as is otherwise provided by law, in addition to any other matter which may be subject to disclosure, there shall be full disclosure of any written report of an accident prepared in the regular course of business operations or practices of any person, firm, corporation, association or other public or private entity, unless prepared by a police or peace officer for a criminal investigation or prosecution and disclosure would interfere with a criminal investigation or prosecution.

(h) Amendment or supplementation of responses. A party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading. Where a party obtains such information an insufficient period of time before the commencement of trial appropriately to amend or supplement the response, the party shall not thereupon be precluded from introducing evidence at the trial solely on grounds of noncompliance with this subdivision. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. Further amendment or supplementation may be obtained by court order.

(i) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.

§ 3102. Method of obtaining disclosure.

(a) Disclosure devices. Information is obtainable by one or more of the following disclosure devices: depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission.

(b) Stipulation or notice normal method. Unless otherwise provided by the civil practice law and rules or by the court, disclosure shall be obtained by stipulation or on notice without leave of the court.

(c) Before action commenced. Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.

(d) After trial commenced. Except as provided in section 5223, during and after trial, disclosure may be obtained only by order of the trial court on notice.

(e) Action pending in another jurisdiction. Except as provided in section three thousand one hundred nineteen of this article, when under any mandate, writ or commission issued out of any court of record in any other state,

territory, district or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in the state, he or she may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.

(f) Action to which state is party. In an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person.

§ 3103. Protective orders

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(b) Suspension of disclosure pending application for protective order. Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

§ 3120. Discovery and production of documents and things for inspection, testing, copying or photographing

1. After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum:

(i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served; or

(ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

2. The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity.

3. The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof.

4. Nothing contained in this section shall be construed to change the requirement of section 2307 that a subpoena duces tecum to be served upon a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof, requires a motion made on notice to the library, department, bureau or officer, and the adverse party, to a justice of the supreme court or a judge of the court in which the action is triable.

§ 3126. Penalties for refusal to comply with order or to disclose.

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

§ 3130. Use of interrogatories.

1. Except as otherwise provided herein, after commencement of an action, any party may serve upon any other party written interrogatories. Except in a matrimonial action, a party may not serve written interrogatories on another party and also demand a bill of particulars of the same party pursuant to section 3041. In the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court.

2. After the commencement of a matrimonial action or proceeding, upon motion brought by either party, upon such notice to the other party and to the non-party from whom financial disclosure is sought, and given in such manner as the court shall direct, the court may order a non-party to respond under oath to written interrogatories limited to furnishing financial information concerning a party, and further provided such information is both reasonable and necessary in the prosecution or the defense of such matrimonial action or proceeding.

§ 3131. Scope of interrogatories.

Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the depositions of a party. Interrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded.

§ 3132. Service of interrogatories.

After commencement of an action, any party may serve written interrogatories upon any other party. Interrogatories may not be served upon a defendant before that defendant's time for serving a responsive pleading has expired, except by leave of court granted with or without notice. A copy of the interrogatories and of any order made under this rule shall be served on each party.

§ 3133. Service of answers or objections to interrogatories.

(a) Service of an answer or objection. Within twenty days after service of interrogatories, the party upon whom they are served shall serve upon each of the parties a copy of the answer to each interrogatory, except one to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity.

(b) Form of answers and objections to interrogatories. Interrogatories shall be answered in writing under oath by the party served, if an individual, or, if the party served is a corporation, a partnership or a sole proprietorship,

by an officer, director, member, agent or employee having the information. Each question shall be answered separately and fully, and each answer shall be preceded by the question to which it responds.

(c) Amended answers. Except with respect to amendment or supplementation of responses pursuant to subdivision (h) of section 3101, answers to interrogatories may be amended or supplemented only by order of the court upon motion.

§ 3211. Motion to dismiss

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

10. the court should not proceed in the absence of a person who should be a party; or

11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph, the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

(g) Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(h) Standards for motions to dismiss in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

§ 3212. Motion for summary judgment

(a) Time; kind of action. Any party may move for summary judgment in any action after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule, the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

[*(d) Repealed.*]

(e) Partial summary judgment; severance. In a matrimonial action summary judgment may not be granted in favor of the non-moving party. In any other action, summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct:

1. that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or

2. that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(g) Limitation of issues of fact for trial. If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts, and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action.

(h) Standards for summary judgment in certain cases involving public petition and participation. A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis

in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(i) Standards for summary judgment in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in fact and in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

§ 4518. Business Records

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

(c) Other records. All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician. Where a hospital record is in the custody of a warehouse, or “warehouseman” as that term is defined by paragraph (h) of subdivision one of section 7-102 of the uniform commercial code, pursuant to a plan approved in writing by the state commissioner of health, admissibility under this subdivision may be established by a certification made by the manager of the warehouse that sets forth (i) the authority by which the record is held, including but not limited to a court order, order of the commissioner, or order or resolution of the governing body or official of the hospital, and (ii) that the record has been in the exclusive custody of such warehouse or warehousemen since its receipt from the hospital or, if another has had access to it, the name and address of such person and the date on which and the circumstances under which such access was had. Any warehouseman providing a certification as required by this subdivision shall have no liability for acts or omissions relating thereto, except for intentional misconduct,

and the warehouseman is authorized to assess and collect a reasonable charge for providing the certification described by this subdivision.

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose, or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall, if unrebutted, establish the paternity of and liability for the support of a child pursuant to articles four and five of the family court act.

(e) Notwithstanding any other provision of law, a record or report relating to the administration and analysis of a genetic marker test or DNA test certified in accordance with subdivision (d) of this rule and administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law is admissible in evidence under this rule without the need for foundation testimony or further proof of authenticity or accuracy unless objections to the record or report are made in writing no later than twenty days before a hearing at which the record or report may be introduced into evidence or thirty days after receipt of the test results, whichever is earlier.

(f) Notwithstanding any other provision of law, records or reports of support payments and disbursements maintained pursuant to title six-A of article three of the social services law by the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions are admissible in evidence under this rule, provided that they bear a certification by an official of a social services district attesting to the accuracy of the content of the record or report of support payments and that in attesting to the accuracy of the record or report such official has received confirmation from the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions pursuant to section one hundred eleven-h of the social services law that the record or report of support payments reflects the processing of all support payments in the possession of the office or the fiscal agent as of a specified date, and that the document is a record or report of support payments maintained pursuant to title six-A of article three of the social services law. If so certified, such record or report shall be admitted into evidence under this rule without the need for additional foundation testimony. Such records shall be the basis for a permissive inference of the facts contained therein unless the trier of fact finds good cause not to draw such inference.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish paternity, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

General Obligations Law

§ 5-327. Consumers' right to recover attorney's fees in actions arising out of consumer contracts

1. As used in this section, the following terms shall have the following meanings:

(a) "Consumer contract" means a written agreement entered into between a creditor, seller or lessor as one party with a natural person who is the debtor, buyer or lessee as the second party, and the money, other personal property or services which are the subject of the transaction are primarily for personal, family or household purposes;

(b) "Creditor" means a person who regularly extends, or arranges for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required;

(c) "Seller" means a person who sells or provides or agrees to sell or provide the subject of a consumer transaction;

(d) "Lessor" means a person who regularly leases, or arranges for the lease of, personal property which is the subject of a consumer contract.

2. Whenever a consumer contract provides that the creditor, seller or lessor may recover attorney's fees and expenses incurred as the result of a breach of any contractual obligation by the debtor, buyer or lessee, it shall be implied that the creditor, seller or lessor shall pay the attorney's fees and expenses of the debtor, buyer or lessee incurred as the result of a breach of any contractual obligation by the creditor, seller or lessor, or in the successful defense of any action arising out of the contract commenced by the creditor, seller or lessor. Any limitations on attorney's fees recoverable by the creditor, seller or lessor shall also be applicable to attorney's fees recoverable by the debtor, buyer or lessee under this section. Any waiver of this section shall be void as against public policy.

New York Court Rules and Regulations (NYCRR):

Uniform Rules of Court Part 130-1
§ 130-1.1. Costs; Sanctions
(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion, may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

New York City Administrative Code:
§ 20-489. Definitions

a. "Debt collection agency" shall mean a person engaged in business the principal purpose of which is to regularly collect or attempt to collect debts owed or due or asserted to be owed or due to another and shall also include a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt. The term does not include:

(1) any officer of employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(2) any officer or employee of a debt collection agency;

(3) any person while acting as a debt collection agency for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collection agency does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(4) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(5) any attorney-at-law or law firm collecting a debt in such capacity on behalf of and in the name of a client solely through activities that may only be performed by a licensed attorney, but not any attorney-at-law or law firm or part thereof who regularly engages in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt or other activities as determined by rule of the commissioner;

(6) any person employed by a utility regulated under the provisions of the public service law, acting for such utility;

(7) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow agreement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person as a secured party in a commercial credit transaction involving the creditor;

(8) any officer or employee of the United States, any state thereof or any political subdivision of any state to the extent that collecting or attempting to collect any debt owed is in the performance of his or her official duties;

(9) any non-profit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists customers in the liquidation of their debts by receiving payments from such customers and distributing such amounts to creditors.

b. The term "child support" means a sum to be paid by either or both parents pursuant to court order or decree or pursuant to a valid agreement between the parties for care, maintenance and education of a child.

c. The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

d. 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, or any obligation or alleged obligation arising out of a judgment or valid agreement for the payment of child support.

§ 20-490. License required.

It shall be unlawful for any person to act as a debt collection agency without first having obtained a license in accordance with the provisions of this subchapter, and without first being in compliance with all other applicable law, rules and regulations.

13. Ethical Issues in Collection

A. Aggressive Collection Practices

In the book entitled *"Lost Rights: The Destruction of American Liberty,"* author James Bovard presented the following story:

> IRS seizure actions sometimes resemble hostage taking. On November 28, 1984, IRS agents raided the Engleworld Learning Center in the Detroit suburb of Allen Park, Michigan, because of overdue taxes. The IRS agents then set up a creative scheme to force parents to pay the center's taxes when they came to pick up their children. As the Washington Times reported:
>
> "Inside the Learning Center were a handful of bewildered parents, unable even to see their children until they paid money for taxes they did not owe to two IRS agents sitting near the entrance. Allegedly, the children – as many as 30 of them – could not run to greet their parents…as ordinarily was their custom. IRS agents kept them closely guarded in Room C of the day-care center. At least one agent was posted in another room where pre-schoolers, some still in diapers, were detained."
>
> Sue Stoia, a parent of one of the children, observed: "It was like something out of a police state. They indicated you could not take your child out of the building until you had settled your debt with the school, and you did that by signing a form to pay the IRS. What we were facing was a hostage-type situation. They were using children as collateral." Engleworld director Marilyn Derby said, "Parents were not allowed to see their children until they had signed an agreement with the IRS. It was a very scary situation, like the Gestapo was here. Children were crying, parents were trembling. I told one woman whose hands were shaking that she shouldn't sign anything she didn't want to. She signed anyway.

Leaving this extreme situation aside, many people are familiar with "war stories" of the extreme measures taken by debt collectors to extract money from debtors.

Aside from the remedies granted under the Fair Debt Collection Practices Act (FDCPA), there are other various tort and criminal grounds that someone may pursue against an aggressive debt collector:

- False imprisonment or false arrest.

- Conversion/wrongful levy or attachment.

- Slander of title.

- Extortion.

- Assault and battery. Most collectors know better than to make personal appearances at a debtor's home or workplace.

- Intentional or negligent infliction of emotional distress. The general elements of such a cause of action are: conduct that is either intentional or reckless; outrageous or unreasonable; undertaken without a legal privilege; with the proximate causing of severe mental distress. Many cases under this cause of action are derived from a series of otherwise reasonable contacts that become unreasonable when a lot of them are made within a very short period of time. No doubt, many times people file for bankruptcy protection it is as much to end the ceaseless collection calls as it is to discharge debts.

- Invasion of privacy (highly intrusive conduct – cyberspace issues)

- Interference with business or contractual relationships. This may include prospective economic relations, including employment.

- Defamation. This includes false statements (Fair Credit Reporting Act may control false marks on credit report).

- Abuse of process (such as filing a baseless lis pendens or lien)

It is important to note that the FDCPA does not preempt other claims that a debtor may have against a debt collector.

B. Unauthorized Practice of Law

In New York, Judicial Law §489 prohibits a collector from taking an assignment of a debt solely for the purpose of pursuing a law suit (champerty).

Unethical conduct of collection attorneys may put them at exposure for grievances for unauthorized practice of law, including:

- Allowing collection employees to act in the attorney's name

- Routinely signing pleadings and other documents prepared by attorneys not licensed to practice in the State

- Designing demand letters or other correspondence to simulate legal process

- Threatening criminal prosecution in an attempt to collect a debt

- Harassment to collect the law firm's debt, including threatening to reveal the client's secrets

C. Reporting Professional Misconduct

The New York State Attorney General brought suit against all of the major debt collection firms for entering default judgments based upon one process service agency's affidavits, which turned out to be predominantly 'sewer service.' According to the lawsuit, 37 debt collection firms relied upon affidavits of service from American Legal Process, who apparently failed to properly serve the Summonses; this put debtors in the position of having to bring Orders to Show Cause to vacate their defaults. In the case, the court vacated over 100,000 default judgments.

New York City recently enacted new rules governing process service which will affect every area of the law but especially debt collection because so many cases are filed and wind up with the default judgments.

There is the availability of an action under General Business Law Section 349, which is New York's version of the Unfair and Deceptive Trade Practices case.

D. Communication with Parties and Disclosure Issues

In communicating with other parties and disclosing information relating to a debt or consumer account, there are also various other statutes and rules that govern the communications and disclosures required, including:

- The Fair Credit Reporting Act (FCRA). This Act regulates the dissemination of credit reports and reporting of credit information. These days, given the prevalence of financial institutions relying upon 'credit scoring' one's credit report is more important than ever. Ensuring accuracy is very important. Viewing information is regulated under the FCRA.

- The Driver's Privacy Protection Act (DPPA). This Act works to restrict disclosure of information by the various state Department of Motor Vehicles offices.

- The Telephone Consumer Protection Act. Among the protections afforded to debtors under the TCPA, there is a prohibition on the use of auto-dialers to known cellular phones without the consumer's prior written consent. Hand-in-hand is the Truth in Caller ID Act which prohibits the transmission of misleading or inaccurate caller ID with the intent to defraud, cause harm or wrongfully obtain anything of value. Therefore, it is important to (a) check documentation to see if there is written consent from the consumer to contact him on his cell phone; scrub telephone numbers for those with cell phones and those with land lines; and review telephone call collection procedures.

- Gramm-Leach-Bliley Act (GLB): In 1933, Congress enacted the Glass-Steagall Act to prohibit banks, investment houses and insurance companies from acting in combination. The GLB repealed this law, creating the ability, for example for Citibank, Smith Barney and Travelers to merge. Aside from this aspect, the GLB is also known to consumers today because it imposes upon financial institutions the duty to notify consumers of their privacy rights concerning their data. The GLB requires those institutions to inform consumers as to how their information is collected, used and kept protected. The Safeguards Rule requires institutions to develop an information security plan.

- Health Insurance Portability and Accountability Act (HIPAA): Congress enacted the law to provide, among other things, confidentiality in a patient's health care information.

- NYC Administrative Code: Title 20 – Consumer Affairs, Chapter 2.

- Various states have adopted rules that debt buyers must have proof of original receipts/contract before even making a telephone call to the debtor to collect a debt.

- Documentation generally provided to debt buyers are address and social security number; amount due, last payment and charge-off dates; and possibly monthly account statements. Where will the future of this multi-billion dollar industry be? Will there be no debt buyers? Will credit card companies retain their own charged-off debts? Will documentation be more amply supplied by the credit card companies, with availability of witnesses and admissible evidence? How will technology deal with these issues?

E. Hey! Someone pulled my credit report!

It is no secret that the crime of identity fraud is one of the most prevalent crimes today, which both the federal government and state governments are attempting to prevent and prosecute. Identity fraud is the intentional taking of a person's identity for purposes of defrauding either that person of his/her property or the property of others through applying for credit in that person's name.

As our society has become more and more dependent upon credit reports for all types of determinations regarding financial obligations, there has been an increased need to ensure that credit reports are not accessed for impermissible purposes, especially including those who are viewing the reports to elicit information to commit these crimes. The Fair Credit Reporting Act (FCRA), codified in Title 15 of the United States Code, is a federal act designed to restrict access to one's credit reports for several permissible reasons; if there is not a permissible purpose, then the one accessing the report may be subject to governmental penalties and civil liability.

Section 1681b(a) of FCRA provides: [A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of title 42 for use to set an initial or modified child support award.

If the person who accesses a consumer's credit report does not have a permissible purpose for accessing the same, there are potential civil liabilities, which depend upon whether the person accessed the credit report intentionally or negligently.

If the person did so willfully or intentionally, then the civil liabilities may be:

Section 1681n: Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

If the person did so negligently, then the civil liabilities may be:

Section 1681o: Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

14. Guide to the Fair Debt Collection Practices Act [FDCPA]

The *Fair Debt Collection Practices Act*, as codified in 15 USC §1692, is a federal statute which governs the practices of "debt collectors." The Fair Debt Collection Practices Act is commonly referred to by its acronym, the "FDCPA."

The FDCPA applies to a wide range of debt collectors, including collection agencies, collection attorneys, debt buyers, skip tracers, foreclosure firms, eviction attorneys, and investigators. Attorneys engaged in the general practice of law, and debt collection in particular, should be mindful of the rules of this federal law.

As stated in §1692 of the FDCPA, Congress found that there had been widespread abuses on the part of debt collectors, and saw the need for federal legislation to fill the gaps in enforcement that various state laws could not fill. The purpose of enacting the FDCPA was to protect consumers from abusive tactics and practices which were rife within the collection industry. In recent years, the number of complaints against abusive debt collectors has dramatically risen nationwide; and the number of actions filed under the FDCPA against debt collectors has significantly risen in response. While other federal and state statutes may apply to a particular situation involving the collection of a debt, the primary statute utilized to address abusive collection practices is the FDCPA.

1. General definitions

There are a couple of important terms under the FDCPA which must be analyzed to determine whether the actions to be taken by a person are covered by the statute.

A. What types of debts are covered under the statute.

The term "debt" means any obligation of a consumer arising from a transaction whose primary subject is for personal, family, or household purposes. §1692a(5). The definition of a consumer debt covered under the FDCPA is intended to be very broad, so as to ensure enforcement of the statute to the fullest extent. Consumer debts have been defined to, inter alia, include:

i) rent arrears. *Romea v. Heiberger & Associates*, 163 F3d 111 [2 Cir. 1998]; *Garmus v. Borah, Goldstein, Altschuler & Schwartz, PC*, 1999 WL 46682 [EDNY 1999];

ii) medical bills. *Pipiles v. Credit Bureau, Inc.*, 886 F2d 22 [2 Cir. 1989];

iii) obligations discharged in bankruptcy. *Degrosiellier v. Solomon & Solomon, PC*, 2001 US Dist. LEXIS 15254 [NDNY 2001];

iv) dishonored check written in payment for consumer goods. *Snow v. Jesse L. Riddle, PC*, 143 F3d 1350 [10 Cir. 1998]; and

v) automobile liability insurance premiums. *Kahn v. Rowley*, 968 F. Supp. 1095 [MD.La. 1997].

Some debts have been found to be outside the realm of consumer debts, including:

i) claims for theft. *Coretti v. Lefkowitz*, 965 F. Supp. 3 [D Conn. 1997];

ii) property taxes. *Beggs v. Rossi*, 145 F3d 511 [2 Cir. 1998];

iii) leases for business equipment of family-owned business. *Garza v. Bancorp Group*, 955 F. Supp. 68 [SD Tex. 1996];

iv) child support obligations. *Mabe v. G.C. Services*, 32 F3d 86 [4 Cir. 1994];

v) foreclosing on property pursuant to a deed of trust. *Hulse v. Ocwen Federal Bank*, 195 F.Supp.2d 1188 [D Minn. 1999]; and

vi) enforcement of marital property settlement obligations. *Hicken v. Arnold*, *Anderson & Dove, PLLP*, 137 F.Supp.2d 1141 [D Minn. 2001].

It is important to note that the definition of a consumer debt covered under the FDCPA may be determined on a case-by-case basis, as well as a state-by-state basis. For instance, the above example of foreclosing on property pursuant to a deed of trust in Minnesota was not determined to be a consumer debt but in New York State, many would hold that it is. Most attorneys err on the side of caution and treat a debt as a consumer debt covered under the FDCPA if there is a doubt as to how to characterize the debt.

B. Who is defined as a "debt collector"?
The term "debt collector is defined as being a person whose principal business is the collection of debt, or who regularly collects debts on behalf of another. §1692a(6). Such term does not include the creditor to which the debt is owed, or its employees; process servers; or enforcement officers of the United States or of a State (such as a Sheriff or Marshal).

The term "debt collector" also includes attorneys regularly engaged in debt collection. *Heintz v. Jenkins*, 115 S.Ct. 1489 [1995]. Even individual employees of a debt collector can be liable with their employer for their violations of the Act. *Reade-Alvarez v. Eltman, Eltman & Cooper, PC*, 369 F. Supp.2d 353 [EDNY 2005]. Some courts have held that an attorney not regularly collecting debts is not a debt collector as defined by the statute. *Schroyer v. Frankel*, 197 F3d 1170 [6 Cir. 1999]. However, the Second Circuit found that, even though the collection work of an attorney amounted to less than 5% of his revenues, the ongoing issuance of rent demands amounted to "regularly" collecting debts. *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F3d 56 [2 Cir. 2004].

Included in the definition of "debt collector" would be a debt buyer who engages in debt collection activities. *Federal Trade Commission v. Check Investors, Inc.*, 502 F3d 159 [3 Cir. 2007]. A "debt buyer" is a company that has purchased a debt belonging to another and begins pursuing the same on its own behalf. The proliferation of the sale of credit card debt to third party debt buyers brought into focus one of the big areas in which FDCPA violations were identified.

However, the term has been found not to include:

i) mortgage company. *Oldroyd v. Associates Consumer Discount Company*, 863 F. Supp. 237 [ED Pa. 1994];

ii) student loan servicing company prior to borrower's default. *Fischer v. UNIPAC Service*, 519 NW2d 793 [Iowa 1994];

iii) bank which issued credit card. *Meads v. Citicorp Credit Services*, 686 F. Supp. 330 [SD Ga. 1988]; and

iv) repossessors. *Seibel v. Society Lease*, 969 F. Supp. 713 [MD Fla. 1997], except that repossessors must abide by the Act with respect to Section 1692f(6) (concerning taking or threatening to take non-judicial actions if there is no right to possession of the property).

2. Communication with parties concerning a debt.
Concerning the collection of a consumer debt by a debt collector, the debt collector must follow certain rules in communicating with the debtor or other parties.

A. How may a "debt collector" communicate with the debtor?
The debt collector must ensure that the following practices are taken:

i) Not contact the debtor at unusual times or places. Before 8AM and after 9PM are presumed to be unusual times. §1692c(a)(1);

ii) Communicate through the debtor's attorney, if the debt collector has been informed or is aware that the debtor is being represented by an attorney. §1692c(a)(2); *Graziano v. Harrison*, 950 F2d 109 [3d Cir. 1991] (no violation occurred where collection agency was not aware that the debtor retained counsel with respect to the particular debt);

iii) If the debt collector knows that an employer prohibits communications concerning debts, not contact the debtor during his/her employment. §1692c(a)(3); *Austin v. Great Lakes Collection Bureau*, 834 F.Supp. 557 [D. Conn. 1993] (collection agency's disregard of debtor's request not to contact her at her office was a direct violation of the statute);

iv) Cease communication with a debtor who has informed the debt collector in writing that he/she refuses to pay the debt or wishes the debt collector to cease further communications. However, the debt collector may inform the debtor that specific legal remedies will be taken. §1692c(c);

v) Send the debtor a written notice, known as a "validation" notice or "initial demand letter," within 5 days of initial communication with a debtor concerning the collection of a consumer debt, advising: (a) the amount of the debt owed; (b) the name of the creditor to whom it is owed; (c) that the debtor has thirty days to dispute the validity of the debt; (d) that the creditor will obtain verification of the debt, if the debtor makes a dispute in writing within such 30-day period; and (e) the name of the original creditor, if the debt has been assigned to another. §1692g(a). This obligation of written notice has often been referred to in the collections industry as the "mini-Miranda" rule. The standard to be applied towards correspondence with the debtor is the "least sophisticated consumer" standard. *Russell v. Equifax*, 74 F3d 30 [2 Cir. 1996] (Using an objective method, the court measures how the most unsophisticated consumer would interpret a notice received from a debt collector).

B. How can other parties be contacted regarding a debtor?
There are severe restrictions to contacting other parties regarding collection of a consumer debt by a debt collector.

As set forth in §1692c(b), other than for the purpose of obtaining information concerning the debtor's location, a debt collector may not contact someone other than:

a) debtor's attorney;

b) creditor or debt collector's attorney;

c) consumer reporting agency, such as Equifax, Experian, or Trans Union;

d) court-authorized entities;

e) such persons, as reasonably necessary, to effectuate a post-judgment remedy; or

f) those persons with whom the debtor has given his/her express permission to communicate.

In obtaining location information under §1692b, a debt collector must:

a) identify him/herself and state he/she is confirming location information;

b) not state that a debt is owed;

c) not communicate with someone more than once unless requested to or where the debt collector believes the information may have been erroneous;

d) not communicate by post card;

e) make sure that return addresses on envelopes do not identify that the communication is from a debt collector; and

f) communicate only with an attorney identified as representing the debtor, unless the attorney fails to communicate with the debt collector beyond a reasonable period of time.

C. Prohibited acts of debt collectors.
In addition to the prescriptions and proscriptions mentioned above, specific more-abusive practices are prohibited by several provisions of the FDCPA.

a) Harassment (§1692d): A debt collector may not harass or abuse any person to collect a debt, including:

(i) threatening violence against the person or property of the person;

(ii) using obscene or profane language *Horkey v. JVDB & Associates*, 179 F.Supp.2d 861 [ND Ill. 2002] (debt collector left a profane message for debtor to "quit being such a fucking bitch" with co-worker);

(iii) publishing a list of "deadbeats";

(iv) advertising for sale the debt for the purpose of coercing payment;

(v) repeatedly or continuously telephoning someone; *Bingham v. Collection Bureau*, 505 F. Supp. 864 [DCND 1981] (collector's immediately recalling debtor after the debtor hung up constituted harassment); or

(vi) telephoning someone without identifying himself. *Kleczy v. First Federal Credit Control*, 486 NE2d 204 [Ohio App. 1984] (debt collector who used an alias, but accurately identified her employer and the nature of the call did not violate the act).

b) False or misleading representations (§1692e): A debt collector may not make any false or deceptive representations, including any representations:

(i) that the debt is associated with the United States or a State, including displaying a badge or uniform; *Johnson v. Statewide Collections*, 778 P.2d 93 [Wyo. 1989] (actual name of collection agency may have been interpreted by the least sophisticated consumer as a governmental agency);

(ii) regarding the nature or legal status of the debt; *Simmons v. Miller*, 970 F. Supp. 661 [SD Ind. 1997] (attorney did not violate the act where he brought action upon a time-barred claim, as he believed that a longer statute of limitations period applied to the debt);

(iii) that the person is an attorney (when such debt collector is not an attorney); *Russey v. Rankin*, 911 F. Supp. 1449 [DNM 1995] (collection agency sent a letter purporting to be from an attorney, but the attorney never reviewed the letter but merely had his name affixed to form correspondence);

(iv) that nonpayment may result in arrest or seizure of any property, unless such action is lawful and the collector intends to do the same;

(v) threatening to take any actions that cannot legally be taken; *In re Belile*, 209 BR 658 [Bkrptcy. ED Pa. 1997] (threatening to take imminent action, where no one in the creditor's legal department was admitted to practice in the debtor's jurisdiction was a violation of the act);

(vi) implying that transfer of the debt will cause the debtor to lose any claims or defenses to payment of the debt;

(vii) informing the debtor that he committed a crime in order to disgrace him;

(viii) communicating false credit information, including the omission of any dispute by the debtor;

(ix) simulating documents intended to appear as court documents;

(x) using deceptive means to obtain information about the debtor;

(xi) failing to disclose to the debtor that the collector is attempting to collect a debt and that any information obtained may be used for such purpose (except such statement need not be made in formal court pleadings);

(xii) stating that accounts have been turned over to innocent purchasers;

(xiii) stating that documents are legal process which are not; *Marchant v. U.S. Collections West*, 12 F. Supp.2d 1001 [D Ariz. 1998] (officer of collection agency engaged in unauthorized practice of law in Arizona, when she signed an application for a writ of garnishment);

(xiv) using a business name other than the true name of the business;

(xv) stating that documents are not legal process which are, or implying that no action is required relating to such legal process; or

(xvi) stating that the collector works for a consumer reporting agency.

c) Unfair practices (§1692f): A debt collector may not use unfair or unconscionable practices to collect a debt, including:

(i) collection of any amount not authorized by the contract or law; *Patzka v. Viterbo College*, 917 F. Supp. 654 [WD Wis. 1996] (it is unconscionable for a debt collector to collect any amount in excess of those charges expressly authorized by the terms of the agreement);

(ii) accepting post-dated checks unless collector notifies debtor of intent to deposit checks not more than 10 or less than 3 days before doing so;

(iii) soliciting post-dated checks for the purpose of threatening a crime;

(iv) depositing a check prior to the date thereon, or threatening to do so;

(v) causing charges to be made to a person by concealment, including the placement of collect calls, etc.;

(vi) taking or threatening to take non-judicial action to repossess property where there is no present right to do so, there is no intent to do so, or the property is exempt by law from such repossession;

(vii) communicating with a debtor by postcard; or

(viii) using language or symbols on an envelope other than the collector's address and business name, providing such name does not indicate that it is a collector; *Johnson v. NCB Collection Services*, 799 F. Supp. 1298 [D Conn. 1992] (return address of "Revenue Department" did not necessarily indicate that the entity was a debt collector, as it could have been a direct bill from a creditor).

d) Legal actions to be brought in proper venue (§1692i): Legal actions taken must be brought in the proper venue, which is either the venue in which the debtor entered into the contract or where the debtor resides at the time of commencement of the action. Actions to enforce debts against real property must be brought in the venue in which the real property is located. Martinez v. Albuquerque Collection Services, 867 F. Supp. 1495

[DNM 1994] (collection agency could be held vicariously liable for actions taken by attorneys it employed to file an action, where the attorney erred in venue selection).

e) Multiple debts (§1692h): A debtor's payment to a collector for multiple debts shall not be applied to any debt which is disputed.

f) Furnishing deceptive forms (§1692j): A debt collector may not furnish forms which are intended to show that the collector is participating in the collection of the particular debt when he is not. This discourages "flat-rating" by collectors (transmission of dunning letters where the collector has no connection to the collection of the involved debt); *Randle v. GC Services*, 48 F. Supp.2d 835 [ND Ill. 1999] (agency created a false impression that another party other than the creditor was involved in the collection process, where it instructed the debtors to mail payments to the creditor, creditor referred fewer than 20% of the debtors for collection, and agency was paid a flat fee for each letter as opposed to a fee relating to collection of the debt).

3. Penalties for non-compliance

There are several manners in which penalties can be imposed upon a violator of the regulations under the FDCPA.

A. Civil action by debtor.

The statute authorizes a private cause of action by a person, including the debtor or any other person affected by the provisions of the statute, to be brought against the collector within one year from the date of violation. The standard of proof is the "unsophisticated consumer standard." Section 1692k provides that a debt collector may be liable to a person in an amount equal to:

i) any actual damage sustained as a result of the violation; *Smith v. Law Offices of Mitchell Kay*, 124 BR 182 [D Del. 1991] (actual damages for emotional distress under the FDCPA can be proved independently of state law requirements for a tort action); *Milton v. Rosicki, Rosicki & Associates, PC*, 2007 WL 2262893 [EDNY 2007] ("Actual damages compensate a plaintiff for out of pocket expenses, personal humiliation, embarrassment, mental anguish, and/or emotional distress that results from defendant's failure to comply with the FDCPA.");

ii) statutory damages of up to $1,000; *Wright v. Finance Service of Norwalk*, 22 F3d 647 [6 Cir. 1994] (plaintiff is limited to additional damages of $1,000 per proceeding, and not per violation); *Savino v. Computer Credit Inc.*, 164 F3d 81 [2 Cir. 1998];

iii) in the case of a class action, statutory damages to each named plaintiff and amounts to other class members not exceeding $500,000 or 1 percent of the collector's net worth; *Sanders v. Jackson*, 33 F. Supp. 693 [ND Ill. 1998] (net worth is interpreted as being the difference between assets and liabilities, and not the fair market value); and

iv) the costs of the action, including reasonable attorney's fees; *Edwards v. National Business Factors*, 897 F. Supp. 458 [D Nev. 1995] (court was to determine consumer's reasonable attorney's fees utilizing the lodestar method of calculating time by the usual and customary rate); *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 493 F3d 110 [2 Cir. 2007], amended on other grounds, 522 F3d 182 [2 Cir. 2008] (Federal courts in the Second Circuit now set forth a standard that termed the "presumptively reasonable fee.")

Section 1692k also authorizes a court to award a defendant attorney's fees where it is determined that the civil action by a party was brought in bad faith or solely for harassment. *Mendez v. Apple Bank for Savings*, 541 NYS2d 920 [Civ.Ct., NY Co. 1989] (for a court to award a defendant attorney's fees, it is not enough for such party to have plaintiff's case dismissed; it must prove bad faith).

The court in a civil action may consider, inter alia, the frequency and persistence of non-compliance by the debt collector; whether the actions were intentional; or whether the actions were bona fide errors notwithstanding the maintenance of procedures to prevent such errors. 1692k(b) and (c). *Cavallaro v. Shapiro & Kreisman*, 933 F. Supp. 1148 [EDNY 1996] (a single violation is sufficient to establish liability).

Further, the debtor's mere allegations that the debt sought to be collected is not owed, standing alone, is not the basis for a false and misleading practices claim under the FDCPA, where the debt collector included appropriate language regarding debt validation procedures. *Bleich v. Revenue Maximization Group, Inc.*, 233 F. Supp.2d 496 [EDNY 2002].

B. Federal Agencies.
The Federal Trade Commission (FTC) and the newly-created Consumer Financial Protection Bureau (CFPB) have enforcement power over the rules of the FDCPA, including the assurance of compliance and administrative enforcement. Other federal agencies, including the Comptroller of the Currency, Office of Thrift Supervision, Secretaries of Transportation and Agriculture, may take appropriate actions with respect to particular types of collectors. *Hicks v. Intercontinental Acceptance Corp.*, 154 FRD 134 [EDNC 1994] (decisions of the FTC to investigate or prosecute alleged violations of the FDCPA are completely discretionary).

C. State enforcement.
The FDCPA is specifically not designed to annul or affect any laws of a particular state to regulate conduct of a person relating to debt collection practices, so long as those laws are not inconsistent with the Act. Section 1692n.

New York State allows the Attorney General or the District Attorney of a particular county to bring an action against a debt collector under General Business Law §600, et. seq., for violations of New York's debt collection practice statute codified therein. Unlike the FDCPA, the New York statute does not afford an individual a private cause of action. An individual may be entitled to assert a claim for deceptive practices under General Business Law §349.

15. Glossary

The following are common terms that one may encounter in the New York City Civil Court system. The definitions are provided by the Civil Court's website at:
http://www.nycourts.gov/courts/nyc/civil/definitions.shtml

325D or 325(d)

A shorthand reference to "CPLR 325(d)," the New York statute which allows a court to transfer a matter to a lower court. Pursuant to CPLR 325(d), the Supreme Court may transfer claims to the Civil Court which appear to have a value of no more than $25,000, but which were brought in Supreme Court claiming a greater amount. Once transferred, however, a potential verdict is not limited to the $25,000 maximum of the Civil Court.

A

action: a civil judicial proceeding whereby one party prosecutes another for a wrong done or for protection of a right or prevention of a wrong; requires service of process on adversary party or potentially adversary party

adjournment: a temporary postponement of the proceedings of a case until a specified future time

adjudicate: to hear or try and determine judicially

adversary: an opponent. The defendant is the plaintiff's adversary

adult: a person over 18 years old

affiant: one who swears to an affidavit; deponent

affidavit: a sworn or affirmed statement made in writing and signed; if sworn, it is notarized

affirmed: upheld, agreed with (e.g., The Appellate Court affirmed the judgment of the Civil Court)

allegation: the assertion, declaration, or statement of a party to an action, made in a pleading, setting out what the party expects to prove

allege: to assert a fact in a pleading

allocution: a formal address by a trial judge to the parties on the record to find out if they understand the terms of a stipulation of settlement

amend: to change

answer: a paper filed in court and sent to the plaintiff by the defendant, admitting or denying the statements in the plaintiff's complaint, and briefly stating why the plaintiff's claims are incorrect and why the defendant is not responsible for the plaintiff's injury or loss

appeal: in an appeal, either plaintiff or defendant (or sometimes both) asks a higher reviewing court to consider a lower court judge's decision. One may only appeal a judge's ruling, not an arbitrator's ruling.

appeal as of right: the ability to bring an appeal of an order or a judgment without seeking permission of the court

appear/appearance: the participation in the proceedings by a party summoned in an action, either in person or through an attorney

appellant: the party who takes an appeal to a higher court

appellee: the party against whom an appeal is taken

arbitration: a process in which an impartial attorney trained in arbitration or a retired judge decides a dispute instead of the court; if the parties consent to arbitration, the arbitrator's decision is final; otherwise, a dissatisfied party may request a trial before the court

arbitrator: a disinterested person trained in arbitration who hears evidence concerning the dispute and makes an award based on the evidence

argument: a reason given in proof or rebuttal

attachment: the taking of property into legal custody by an enforcement officer

B

bill of particulars: factual detail submitted by a claimant after a request by the adverse party which details, clarifies or explains further the charges and/or facts alleged in a pleading

brief: a written or printed document prepared by the lawyers on each side of a dispute and submitted to the court in support of their arguments - a brief includes the points of law which the lawyer wished to establish, the arguments the lawyer uses, and the legal authorities on which the lawyer rests his/her conclusions

C

calendar: a schedule of matters to be heard in court

calendar call: the calling of matters requiring parties, or their attorneys, to appear and be heard. There is usually one at the beginning of each court day. Other calendar calls take place throughout the day.

caption: in a pleading, deposition or other paper connected with a case in court, it is the heading or introductory clause which shows the names of the parties, name of the court, number of the case on the docket or calendar, etc.

cause of action: grounds on which a legal action may be brought (e.g., property damage, personal injury, goods sold and delivered, work labor and services)

certified copy: a document which contains a seal that establishes the document as genuine, as a true copy, so that it may be used as evidence at a trial or a hearing. A document may be certified by an official record keeper, a clerk of the court, or any other authorized person, for example, an attorney.

certified statement: a statement which has been sworn to before a Notary Public or Commissioner of Deeds as a true statement

change of venue: the removal of a suit begun in one county to another county for trial, though the term may also apply to the removal of a suit from one court to another court of the same county

charge to jury: an address delivered by the court to the jury at the close of the trial instructing the jury as to what principles of law they are to apply in reaching a decision

chattel: article of personal property

civil contempt: a failure to comply with a court order. Civil contempt is committed when a person violates an order of the court which specifically requires that the person do or refrain from doing an act. Punishment for civil contempt may be a fine or imprisonment, and the goal of the punishment is to have the person comply with the original order of the court.

Clerk's Return On Appeal: a form filled out by the Civil Court Appeals Clerk certifying that the record on appeal is complete and ready to be transmitted to the Appellate Term

complaint: a paper filed in court and delivered to the party(ies) being sued, stating the plaintiff's claims against the defendant

costs: the statutory sum awarded to the successful party when a judgment is entered (Section 1901 all Court Acts)

counterclaim: a legal claim by the defendant against the plaintiff

court record: a documentary account of what happened in the action or proceeding, which includes the court file, exhibits and transcripts

court reporter: a person who transcribes by shorthand or stenographically takes down testimony during court proceedings

CPLR: the abbreviation for the Civil Practice Law and Rules, which is the New York state statute that sets forth the rules of civil procedure governing how a lawsuit is conducted in the courts of this state

cross-appeal: an appeal by one who has received a notice of appeal from their opposing party

crossclaim: claim litigated by co-defendants or co-plaintiffs against each other and not against a party on the opposite side of the litigation

cross-examination: questioning by a party or his attorney of an adverse party or a witness called by an adverse party

D

decision: the determination reached by a court in any judicial proceeding, which is the basis of the judgment

default: a "default" occurs when a party fails to plead or otherwise defend within the time allowed, or fails to appear at a court appearance

default judgment: a judgment against a defendant as a result of his/her failure to appear or submit papers at an appointed time during a legal proceeding

defendant: the one being sued. This party is called the "respondent" in a summary proceeding

defenses, legal or equitable: a stated reason why the plaintiff has no valid case against the defendant

deliberation: the process by which a panel of jurors comes to a decision on a verdict

de novo: from the beginning, a new trial

deposition: sworn testimony of a witness.

direct examination: the first interrogation of a witness by the party on whose behalf the witness is called

directed verdict: an instruction by the judge to the jury to return a specific verdict

disbursements: out of pocket expenses awarded to the winner in a judgment

discovery: the efforts of a party to a lawsuit to get information about the other party's contentions before trial. The range of information which each party must exchange in discovery is broad, because all parties should go to trial with as much information and knowledge about the lawsuit as possible. During discovery a party may: (1) demand that the other party produce documents or other physical evidence, (2) request written interrogatories, which are questions and answers written under oath, and (3) take depositions, which involve an in-person session at which one party has the opportunity to ask oral questions of the other party or his or her witnesses.

dismissal: termination of a proceeding for a procedurally prescribed reason

dismissal with prejudice: action dismissed on the merits which prevents renewal of the same claim or cause of action

dismissal without prejudice: action dismissed, not on the merits, which may be re-instituted

disposition: the result of a judicial proceeding by withdrawal, settlement, order, judgment or sentence

E - F

entry of judgment: in order to start enforcing a judgment, the judgment must be "entered." Entry occurs after the clerk of the court signs and files the judgment.

eviction proceeding: any proceeding which could result in the eviction of a respondent, such as a holdover or nonpayment proceeding

evidence: a form of proof or probative matter legally presented at the trial of an issue by the acts of the parties and through witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or the jury

examination before trial: a formal interrogation of parties and witnesses before trial

execution: (1) the performance of all acts necessary to render a written instrument complete, such as signing, sealing, acknowledging, and delivering the instruments (2) supplementary proceedings to enforce a judgment, which, if monetary, involves a direction to the sheriff to take the necessary steps to collect the judgment

exhibit: a paper, document or other article produced and exhibited to a court during a trial or hearing and, on being accepted, is marked for identification or admitted in evidence

ex parte: a proceeding, order, motion, application, request, submission etc., made by or granted for the benefit of one party only; done for, in behalf of, or on application of one party only

G - H

garnish/garnishment: to attach (seize) a portion of the wages or other property of a debtor to repay the debt. The garnishing party notifies a third party, such as a bank or an employer, to retain something it has belonging to the defendant-debtor, to make disclosure to the court concerning it, and to dispose of it as the court shall direct.

guardian ad litem: a person appointed by the court to represent a minor or an adult, not able to handle his or her own affairs, during a legal proceeding. The person appointed does not need to be a lawyer. The guardian ad

litem is the guardian just for the purpose of the particular lawsuit. The person acting as the guardian ad litem has the responsibility to pursue the lawsuit and to account for any money recovery.

I

income execution: the legal process of enforcing a judgment. To enforce the judgment, the judgment creditor may seek an order from the court to have the appropriate authority seize property of the judgment debtor in order to satisfy the judgment. In the case of an income execution, or a "garnishment," the court might order a portion of the judgment debtor's wages or other property held in an amount to satisfy the judgment. This might be done over time in increments.

index number: a number issued by the county clerk, which is used to identify a case - in civil court there is a charge of $45.00

infant's compromise: a civil proceeding or motion for obtaining court approval of the settlement of an infant's claim

information subpoena: a legal document that requires a person, a corporation, some other business, or the judgment debtor him or herself to answer certain questions about where the judgment debtor's assets can be found

inquest: a non-jury trial for the purpose of determining the amount of damages due on a claim, if a party has not appeared or defended against the claim, and after the merits of the claim have been proven

interpreter: a person sworn at a judicial proceeding to translate oral or written language

interrogatories: written questions propounded by one party and served on an adversary, who must provide written answers thereto under oath

J - K

judgment: the final decision of the judge. It is a determination of the rights and obligations of the parties. In a given lawsuit, a judgment may direct a dismissal of the lawsuit, order payment of a money amount or a direct one or more of the parties to do an act.

judicial hearing officer (JHO): a person who formerly served as a judge or justice of a court of record of the Unified Court System

jurisdiction: the court's authority to hear and decide a case. It is based upon the geographical, subject matter and monetary limitations of a court. To hear and decide a case a court must have both "personal jurisdiction" and "subject matter" jurisdiction. Personal jurisdiction refers to the court's power over the parties involved in the lawsuit. Subject matter jurisdiction refers to the court's power over the type or category of the lawsuit.

jury demand: a request for a trial by jury by either party. There are specific procedures for making a jury demand, which include filing a written demand with the clerk and paying a fee. The procedural rules place time restrictions on when a jury demand must be made.

jury instructions: directions given by the judge to the jury

L

legal advice: involves applying or interpreting the law to your individual problems and recommending the best way for you to handle your case. Only an attorney, who is not a court employee, can provide legal advice. Court staff can't offer legal advice to anyone. The court's role is to be neutral, without favor to any party. Court

employees may only provide legal and procedural information. Legal and procedural information involves providing general information and does not include telling you how to best deal with your legal issues.

lessee: a person who has signed a lease to rent real property

levy: a seizure; the obtaining of money by legal process through seizure and sale of property

liability: an obligation to do, to eventually do, or to refrain from doing something; money owed; or according to law one's responsibility for his/her conduct; or one's responsibility for causing an injury

lien: a claim on specific property for payment of a debt

litigant: party to a legal action

M

marshal: an officer of the United States, whose duty it is to execute the process of the courts of the United States. His duties are very similar to those of a sheriff.

marshal's notice: a notice from a Marshal informing the recipient that they will be evicted after a certain time period

mediation: a free, voluntary and confidential service that helps people who have a dispute to reach their own settlement. Instead of asking a judge to make a decision in court, the people meet with a trained mediator who helps them make their own decision on how to settle the dispute. If a settlement is reached, it is then put in writing and signed. This written settlement then becomes a legal contract. If the people in the dispute are not able to reach an agreement that is acceptable to everyone involved, they are then free to ask a judge to hear their case and make a decision in court.

minor: a child under 18 years old

minutes: notes of what happened in the courtroom

mistrial: a trial which has been terminated and declared void prior to the reaching of verdict due to extraordinary circumstance, serious prejudicial misconduct or hung jury - it does not result in a judgment for any party but merely indicates a failure of trial

mitigation: to make less severe

motion: a request to the court, usually in writing, for relief before the trial on the parties' claims, or for different or additional relief after the trial decision

motion to reargue or renew: an application which seeks to persuade a judge that the decision/order rendered is incorrect, because the judge has misapprehended the facts or the applicable law, or because new evidence has become available which would change the prior decision and there is a good reason why the evidence was not presented earlier

moving party: the party who is making an application to the court for relief

N

nonpayment proceeding: a court case started by the landlord to collect unpaid rent and to evict the tenant if the tenant cannot pay the rent that is owed

notarize: to have a notary public attest to the authenticity of a signature on a document by signing the document and affixing his/her own stamp

notary public: a person authorized by the State of New York to administer oaths, certify documents and attest to the authenticity of signatures

notice of appeal: a notice to the opposing party that an appeal of the court proceedings will be taken. The notice must be served and filed within 30 days of service of the order or judgment appealed from with written notice of entry.

notice of claim: a paper required to be sent to the city or a public authority when a person claims a city agency, official, or employee of a public authority caused the person damage. The notice of claim informs the city or public authority of the nature of the claim within a short time after it occurs. A notice of claim must be timely sent to the city or public authority prior to filing a lawsuit.

notice of entry: a notice with an affidavit of service stating that the attached copy of an entered order or judgment has been served by a party on another party

notice of motion: a notice informing the court and your opposition when and where your motion will be heard, which lists the relief requested, the grounds for that relief, and provides a list of the supporting papers upon which the motion is based

notice of petition: a petitioner's written notice delivered to the respondents of when the court will hear the attached petition

nunc pro tunc: (now for then) presently considered as if occurring at an earlier date; effective retroactively

O

objection: a formal protest made by a party over testimony or evidence that the other side tries to introduce

order: an oral or written command or a direction from a judge

order to show cause: a written direction by the court, usually prepared and presented to the court by a party, that the court is shortening the required advance notice of a motion to the other parties. Sometimes the order to show cause contains a direction to the parties that they stop some specific activity until the court hears the motion.

P - Q

party: person having a direct interest in a legal matter, transaction or proceeding

peremptory challenge: the challenge which may be used to reject a certain number of prospective jurors without assigning any reason

perfect appeal: to take all legal steps necessary to complete the process of appealing an order or judgment. These steps may include ordering and securing a transcript, drawing up a record, writing, serving, and filing a brief, getting the case onto the appellate court’s calendar for argument, and finally, arguing and submitting the case.

Personal Appearance Part: a Part in the Civil Court where cases are heard if one or both sides are self-represented litigants. The Judges presiding in this Part oversee all conferences, discovery and in some boroughs all motion practice and even the trial.

petition: in special or summary proceedings, a paper like a complaint filed in court and delivered to the respondents, stating what the petitioner requests from the court and the respondents

petitioner: in a special or summary proceeding, one who commences a formal written application, requesting some action or relief, addressed to a court for determination. Also known as a plaintiff in a civil action.

plaintiff: the one suing. This party is called the "petitioner" in a summary proceeding

pleadings: complaint or petition, answer, and reply

poor person's relief: when a party to a lawsuit cannot afford the costs of a lawsuit, the Court may permit that party to proceed without being required to pay for court costs

possession: the right to occupy a premises

proceeding: a type of lawsuit. In Housing Court a nonpayment proceeding seeks past-due rent; a holdover proceeding seeks possession of the premises.

pro se: a party who does not retain a lawyer and appears for him/herself in court

proof of service: an affidavit filled out by the person who served legal papers on behalf of a party, or by a party if so permitted by the Court

R

record: a permanent written account of some act, court proceeding or transaction that is drawn up by a proper officer and designated to remain as permanent evidence of what has been done in a lawsuit

referee: a person to whom the court refers a pending case to take testimony, hear the parties, and report back to the court. A referee is an officer with judicial powers who serves as an arm of the court.

relevant: logically connected and tending to prove or disprove a matter at issue

replevin: an action brought for the owner of items to recover possession of those items when those items were wrongfully taken or are being wrongfully kept

reply: a plaintiff's response to a defendant's answer when the answer contains a counterclaim

requisition: a request to obtain something, such as court records, subpoenaed documents or copies of trial tapes

respondent: one who formally answers the allegations stated in a petition which has been filed with the court. Also known as a defendant in a civil action.

restore/reinstate to calendar: to reinstate the action to active inventory

S

seizure: the process by which a person authorized under the law to do so takes into custody the property, real property or personal property, of a person against whom a judgment has been issued or might be issued. The seized property may be held to guarantee a judgment or be sold to satisfy a judgment.

self-represented litigant: a party who does not retain a lawyer and appears for him/herself in court. Also known as a Pro Se litigant.

service of process: the delivery of copies of legal documents to the defendant or other person to whom the documents are directed. Legal documents which must be served include a summons, complaint, petition, order to show cause, subpoena, notice to quit the premises and certain other documents. The procedure for service of process is specifically set out in statutes.

settle the minutes: the process by which the transcript of the proceeding is finalized

sheriff: the executive officer of local court in some areas. In other jurisdictions the sheriff is the chief law enforcement officer of a county.

standing: the right to make a legal claim, or to seek judicial enforcement of a duty or a right

statement in lieu of record on appeal: a statement prepared by parties to an appeal indicating the question for appellate review, and providing a limited record necessary only to decide the question

stay: the postponement or halting of a proceeding, action, or the enforcement of an order or judgment

stipulation of settlement: a formal agreement between litigants and/or their attorneys resolving their dispute

subpoena: a court document used to compel a witness to testify at the hearing or to produce records

sum certain: liquidated damages pursuant to contract, promissory note, law, etc.

summary judgment: a determination in an action on the grounds that there is no genuine issue of fact

summons: a plaintiff's written notice, in a specific form, delivered to the parties being sued, that they must answer the plaintiff's attached complaint within a specific time

T

testimony: an oral declaration made by a witness or party under oath

transcript: the written, word-for-word record of all legal proceedings, including testimony at trial, hearings or depositions. A copy of the transcript may be ordered from the court reporter and a fee must be paid for the transcript.

trial: the formal examination of a legal controversy in court so as to determine the issue

trial de novo: a new trial (see: 22NYCRR 28.12)

turnover proceeding: a hearing after a judgment has been issued, in which a creditor seeks to establish through evidence that the debtor (or a third party who is in possession of the debtor's property) is in possession of money or property that would satisfy, or partially satisfy, the judgment

U

unbundled legal services: a practice in which the lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. Simply put, the lawyers perform only the agreed upon tasks, rather than the whole “bundle,” and the clients perform the remaining tasks on their own.

undertaking: deposit of a sum of money or filing of a bond in court

use and occupancy: Payment by an occupant to the landlord for the right to use and occupy a premises. The occupant is not a tenant, or once may have been a tenant, but the landlord/tenant relationship has since been terminated.

V

vacate: to cancel or invalidate

venue: the place within the court's jurisdiction where a lawsuit will be decided. For example, venue in a Civil Court action may be placed in Manhattan, Queens, Staten Island, Bronx or Brooklyn.

verdict: the determination of a jury on the facts

verification: confirmation of the correctness, truth or authenticity of pleading, account or other paper by an affidavit or oath

voir dire: a questioning of prospective jurors by the attorneys, and, on application of any party, by the judge, to see if any of them should be disqualified or removed by challenge or examination

W - Z

waste: permanent harm to real property

witness: one who testifies to what he/she has seen, heard, or otherwise observed

16. Identity Theft

The Federal Trade Commission (FTC) publishes helpful information on their website about how to protect yourself against identity theft. Visit http://www.ftc.gov and use their search tool with the terms "identity theft" to find useful publications. You might also look for information at http://www.ftc.gov/idtheft (please note that this website address may change).

The following short article, reprinted from a brochure published by the FTC in May 2010, introduces the major and common concerns regarding identity theft.

As with all the information and forms provided in this book, this article and the FTC's brochure on identity theft from which it comes are intended as being illustrative only and should not to be relied upon for any specific matter. The reader should seek legal advice concerning a specific matter, as many issues must be determined on a case-by-case basis.

Fighting back against identity theft

Identity theft is a serious crime. It occurs when your personal information is stolen and used without your knowledge to commit fraud or other crimes. Identity theft can cost you time and money. It can destroy your credit and ruin your good name.

Common ways that ID Theft happens:
Identity thieves use a variety of methods to steal your personal information, including:

1. Dumpster Diving. They rummage through trash looking for bills or other paper with your personal information on it.

2. Skimming. They steal credit/debit card numbers by using a special storage device when processing your card.

3. Phishing. They pretend to be financial institutions, companies or government agencies, and send email or pop-up messages to get you to reveal your personal information.

4. Hacking. They hack into your email or other online accounts to access your personal information, or into a company's database to access its records.

5. "Old-Fashioned" Stealing. They steal wallets and purses; mail, including bank and credit card statements; pre-approved credit offers; and new checks or tax information. They steal personnel records from their employers, or bribe employees who have access.

Deter identity thieves by safeguarding your information:
- Shred financial documents and paperwork with personal information before you discard them.
- Protect your Social Security number. Don't carry your Social Security card in your wallet or write your Social Security number on a check. Give it out only if absolutely necessary or ask to use another identifier.
- Don't give out personal information on the phone, through the mail or over the Internet unless you know who you are dealing with. Avoid disclosing personal financial information when using public wireless connections.
- Never click on links sent in unsolicited emails; instead, type in a web address you know. Use firewalls, anti-spyware and anti-virus software to protect your home computer; keep them up-to-date. If you use peer-to-peer file sharing, check the settings to make sure you're not sharing other sensitive private files. Visit *OnGuardOnline.gov* for more information.
- Don't use an obvious password like your birth date, your mother's maiden name or the last four digits of your Social Security number.
- Keep your personal information in a secure place at home, especially if you have roommates, employ outside help or are having work done in your house.

Detect suspicious activity by routinely monitoring your financial accounts and billing statements.
Be alert to signs that require immediate attention:
- Bills that do not arrive as expected.
- Unexpected credit cards or account statements.
- Denials of credit for no apparent reason.
- Calls or letters about purchases you did not make.
- Charges on your financial statements that you don't recognize.

Inspect your credit report.
Credit reports contain information about you, including what accounts you have and your bill paying history. The law requires the major nationwide credit reporting companies—Equifax, Experian, and TransUnion—to give you a free copy of your credit report every 12 months if you ask for it. Visit www.AnnualCreditReport.com or call 1-877-322-8228, a service created by these three companies, to order your free annual credit report. You also can write: Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348-5281.

If you see accounts or addresses you don't recognize or information that is inaccurate, contact the credit reporting company and the information provider. To find out how to correct errors on your credit report, visit ftc.gov/idtheft.

Defend against ID theft as soon as you suspect it.
- Place a "Fraud Alert" on your credit reports, and review the reports carefully. The alert tells creditors to follow certain procedures before they open new accounts in your name or make changes to your existing accounts. The three nationwide consumer reporting companies have toll-free numbers for placing an initial 90-day fraud alert; a call to one company is sufficient:
Experian: 1-888-EXPERIAN (397-3742)
TransUnion: 1-800-680-7289
Equifax: 1-800-525-6285

Placing a fraud alert entitles you to free copies of your credit reports. Look for inquiries from companies you haven't contacted, accounts you didn't open and debts on your accounts that you can't explain.

- Contact the security or fraud departments of each company where an account was opened or charged without your okay.
-- Follow up in writing, with copies of supporting documents.
-- Use the ID Theft Affidavit at ftc.gov/idtheft to support your written statement.
-- Ask for verification that the disputed account has been dealt with and the fraudulent debts discharged.
-- Keep copies of documents and records of your conversations about the theft.

- File a police report. File a report with law enforcement officials to help you correct your credit report and deal with creditors who may want proof of the crime.

- Report the theft to the Federal Trade Commission. Your report helps law enforcement officials across the country in their investigations.
Online: http://ftc.gov/idtheft
By phone: 1-877-ID-THEFT (438-4338)
or TTY: 1-866-653-4261
By mail: Identity Theft Clearinghouse
Federal Trade Commission, Washington, DC 20580

To learn more about ID theft and how to deter, detect, and defend against it, visit ftc.gov/idtheft. Or request copies of ID theft resources by writing to:
Consumer Response Center

Federal Trade Commission
600 Pennsylvania Ave., NW, H-130
Washington, DC 20580

17. Helpful Internet Resources

(Please note that website addresses may change.)

Civil Legal Advice and Referral Office (CLARO)
E-mail: feerickcenter@law.fordham.edu
http://www.claronyc.org/claronyc/default.html

The Civil Legal Advice and Resource Office (CLARO) provides limited legal advice to low-income New Yorkers being sued by debt collectors. CLARO is organized through the New York State Courts Access to Justice Program.

The offer information and advice for those who have encountered issues with consumer debt (credit cards, cell phones, store cards, student loans, utilities, car loans, medical debt, etc.) that might lead to a court case.

Neighborhood Economic Development Advocacy Project
Phone: (212) 680-5100
http://nedap.org/

NEDAP is a resource and advocacy center for community groups in New York City. They state their mission as being to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty.

Bar Associations
New York State Bar Association
http://www.nysba.org

The New York City Bar Association
http://www.nycbar.org

The Brooklyn Bar Association
http://www.brooklynbar.org

The Richmond County Bar Association
http://www.thercba.com

The Queens County Bar Association
http://www.qcba.org

The Bronx County Bar Association
http://www.bronxbar.org

Specialty bar associations throughout New York State
http://www.nysba.org/Content/NavigationMenu/SectionsCommittees/ResourcesforLocalBars/LinkstoLocalMinorityandSpecialtyBarAssociations/Bar_Association_Link.htm

This website, hosted by the New York State Bar Association, offers an extensive, but not exhaustive, list of local, regional, minority, women and specialty bar associations throughout New York State, with links to their home pages.

Federal Trade Commission
http://www.ftc.gov

The Federal Trade Commission ("FTC") is the nation's consumer protection agency. The commission's website contains helpful information.

Fair Debt Collection Practices Act
http://www.ftc.gov/os/statutes/fdcpa/fdcpact.shtm

At the time of writing, details on the Fair Debt Collection Practices Act (FDCPA) are at the website immediately above. Over time, this site's location may change, therefore it may be helpful to visit the FTC's website first (www.ftc.gov) and search for "Fair Debt Collection Practices Act" for the latest information.

Bureau of Consumer Protection
http://www.ftc.gov/bcp/index.shtml

The FTC's Bureau of Consumer Protection works for American consumers to prevent fraud, deception, and unfair business practices in the marketplace. They enhance consumer confidence by enforcing federal laws that protect consumers and empowering consumers with free information to help them exercise their rights and to spot and avoid fraud and deception. The Bureau of Consumer Protection wants to hear from consumers who want information or wish to file a complaint about fraud or identity theft.

New York State Unified Court System website
http://www.nycourts.gov

This site provides information and downloads on subjects such as the law, the courts, representing yourself, programs, services, and also provides links to informational publications. In addition, it provides some computer assisted "Do It Yourself" forms.

New York State Legislature's website
http://public.leginfo.state.ny.us

This site includes legislative session information going back to 1995, including bill texts, statuses, summaries, sponsor memos and floor votes. The site also contains a search function for New York State NYS Legislative Bills, New York State Legislative Resolutions, and the Laws of New York. Among its menu of items, information and features, the system includes and disseminates information created by Journal Operations in each house of the Legislature concerning the activities of such house.

Credit CARD Act Law
At the time of writing, the text of the bill may be found at:
http://www.gpo.gov/fdsys/pkg/BILLS-111hr627enr/pdf/BILLS-111hr627enr.pdf

The Credit Card Accountability Responsibility and Disclosure Act of 2009 or Credit CARD Act of 2009 is a federal statute passed by the United States Congress and signed by President Barack Obama on May 22, 2009. It is comprehensive credit card reform legislation that aims "...to establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan, and for other purposes." ["Text of H.R. 627 (111th)". Govtrack.us. Retrieved 28 M] The bill was passed with bipartisan support by both the House of Representatives and the Senate.