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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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37p.

DOLORES GASSER, et al. Plaintiffs -vs- ALLEN COUNTY CLAIMS AND ADJUSTMENT, INC., et al., Defendants	CASE NO. C80-334 JUDGE POTTER BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION.

Defendants' collection practices, as alleged by plaintiffs, violate nearly every provision of the Fair Debt Collection Practices Act. These practices include threats, abuse, and false statements to debtors in telephone calls. (Compl., Pars. 24-26; Intervening Compl., Pars. 19, 29, 34, 50-53). Plaintiffs have charged that defendants made embarrassing personal inquiries to debtors' friends, acquaintances, and employers. (Compl., Pars. 28, 30; Intervening Compl., Pars. 28, 29, 73). Defendants follow a policy of making collect calls whenever they call outside Lima's toll-free area, not only to debtors but also to debtors' employers and relatives. (Crotinger depo., p. 108; Intervening Compl., Pars. 30, 78).

Plaintiffs have also alleged that defendants sent them numerous abusive, deceptive, and unconscionable collection notices. These collection notices alone justify maximum liability under the Act. Defendants persisted in sending these notices even after the Federal Trade Commission advised them in 1978 that many of the notices probably violated the Act. Indeed, defendants have continued to send these abusive notices to debtors after plaintiffs' suit was filed, and up to the present. This motion seeks summary judgment that defendants violated the Act by sending these collection notices to plaintiffs.

II. DEFENDANTS' ACTIONS ARE COVERED BY THE FAIR DEBT COLLECTION PRACTICES ACT.

The Fair Debt Collection Practices Act (hereinafter "FDCPA") prohibits abusive, deceptive, and unfair debt collection practices committed by "debt collectors." "Debt collector" is defined at 15 U.S.C. §1692a(6) as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

Defendants Allen County Claims and Adjustment, Inc. (hereinafter "ACCA") and David Henige have admitted in their joint answer that they are "debt collectors" (Amended Ans. Par. 7). Defendant David Crotinger's deposition testimony shows that he, too, meets the statutory definition of "debt collector," both in his capacity as manager of ACCA and in his capacity as a collection worker. 1/ Defendants have likewise admitted that the plaintiffs and plaintiff-intervenors are "consumers" as defined by 15 U.S.C. §1692a(3) and that this Court has jurisdiction over the suit. (Defendants' Answer at Pars. 3, 2; defendant's Answer to Intervening Complaint at Pars. 3, 2).

III. DEFENDANTS VIOLATED 15 U.S.C. §1692d and 1692e(5) BY SENDING THE "EMPLOYER COMMUNICATION" TO PLAINTIFF GASSER.

Defendants have admitted that they sent Exhibit C, dated June 29, 1979, and entitled "EMPLOYER COMMUNICATION," to plaintiff Gasser. 2/ (Amended Ans., Par. 12). This document, a copy of which is attached as Appendix 1 for the Court's convenience, states in relevant part:

1/ Mr. Crotinger testified that he owns and manages ACCA (Crotinger depo., pp. 21, 24). He is its president, its only officer, and its only shareholder. (Id., p. 22). His specific duties are: "Taking care of the business. Collector." (Id., p. 21). He is responsible for the daily collection work for debtors whose last names begin with M-Z; defendant Henige is responsible for A-M. (Id., pp. 191-192). He sets all the company's polices and practices. (Id., pp. 22, 23). Many of the collection letters, including the "Tell-A-Gram" and the "Notice to Appear", are sent out by the clerical staff as an automatic matter, at his direction. (Id., p. 216).

2/ A copy of this notice was also introduced in defendant Crotinger's deposition as Exhibit III. Crotinger depo., p. 52.

> BECAUSE you have not responded to our requests for payment of the account mentioned above, we are compelled to notify you that:
>
> UNLESS you contact us immediately, we may have no other alternative than to communicate with your employer, in accordance with Title XIII in United States Code Section 1601-Et Seq.
>
> EMPLOYERS generally want employees to take care of their obligations.
>
> YOUR CREDITOR is insisting upon immediate settlement.

The gist of this notice is a threat to communicate with the debtors employer about the debt. Although the specific content of the communication is not described, the clear implication is that it will address the employer's concern that employees "take care of their obligations." Defendants were still sending this form to debtors at the time of Mr. Crotinger's deposition. (Crotinger depo., pp. 52, 233.

15 U.S.C. §1692c(b) prohibits the debt collector from communicating with any person other than the consumer, his attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the debt collector's attorney, except for the purpose of acquiring location information as defined at 15 U.S.C. §1692b. 15 U.S.C. §1692e(5) prohibits "the threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. §1692e(10) prohibits the use of "any false representation or deceptive means."

The "Employer Communication" sent to plaintiff Gasser threatened to contact her employer unless she paid the alleged debt. Since 15 U.S.C. §1692c(b) prohibits such employer contact, the "Employer Communication" threatened action that could not legally be taken. Defendants therefore violated 15 U.S.C. §1692e(5) by mailing this collection notice to plaintiff Gasser.

A federal district court reached the same conclusion in Rutyna v. Collection Accounts Terminal, Inc., 478 F.Supp. 980 (N.D. Ill, 1978). There, the debt collector's threat to communicate with the debtor's employer was held to be "a false representation of the actions that defendant could legally take," and a violation of 15 U.S.C. §1692e(5).

An interpretive letter from the Federal Trade Commission, written in 1978 in response to defendant Crotinger's inquiry, expresses the same view:

> Form B threatens communicating the consumer's debt to the consumer's employer which would violate section 805(b) of the Act if carried out. The threat itself violates the general provisions concerning conduct contained in sections 806 and 808 of the Act. Additionally, in view of the above, it is unlikely that there will be prejudgment contact with the employer. If not, the statements threatening such contact are false or deceptive and violate section 807.

Exh. EEEE, April 20, 1978 letter from Alan D. Reffkin to Stephen J. Mansfield (attached as Appendix 2). See 3rd Interrogs., Pars. 5-8.

The "Employer Communication" is deceptive for a second reason. It refers to "Title XIII in United States Code Section 1601-Et-Seq." as authorizing communication with the debtor's employer. Title XIII of the United States Code regulates the census and has no relation to debt collection or employer contact. This reference is thus a "false representation or deceptive means" prohibited by 15 U.S.C. §1692e(10). 3/

IV. DEFENDANTS VIOLATED 15 U.S.C. §1692e BY SENDING A "NOTICE OF IMPENDING GARNISHMENT AFTER JUDGMENT" TO PLAINTIFFS GASSER AND SKIVER.

Defendants have admitted sending Exhibit D, entitled "Notice of Impending Garnishment After Judgment" to Plaintiff Gasser. (Amended Ans.,

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3/ It may also run afoul of the more specific prohibitions of §1692e (1), (2)(A), (9), and (13).

Par. 13). They likewise admit that on January 27, 1981, eight months after the original complaint was filed, they sent an identical collection letter, Exhibit HH, to Intervening Plaintiff Skiver (2nd Req. for Adm., Par. 14 (m)).

The "Notice of Impending Garnishment After Judgment" states in relevant part:

> By virtue of the Garnishment Law of this state, your salary, income, personal property and effects not exempt from execution, may be subjected to a garnishment action for debts incurred.
>
> Therefore, unless the amount you are owing the undersigned is paid within THREE days from date, or arrangements made for a settlement, legal steps may be instituted to compel a sufficient amount of your salary, income, personal property and effects not exempt from execution to be held under garnishment to satisy [sic] said debt, with costs attached thereto as provided under said Garnishment Law, by Creditor's designated Attorney.

A copy of the notice is attached as Appendix 3.

When defendants sent these notices to plaintiffs Gasser and Skiver, they did not have the present ability to garnish their wages, or any reason to expect that they would obtain such an ability soon. Although defendants sent this document to plaintiff Gasser on August 13, 1979, they did not get specific authorization from the creditor to have suit filed against her until Dcember 3, 1979. 4/ (Crotinger depo., p. 179; 2nd Req. for Adm., Par. 3). Indeed, Mr. Crotinger has admitted that no action of any sort was taken within the three day deadline, or even for the next 1 1/2 months:

4/ Except in the case of one client, United Telephone, ACCA never refers an account to an attorney for collection suit until it requests and receives specific individual authorization from the creditor. Crotinger depo., pp. 121-26.

Q. Three days after Exhibit "D" was mailed out was any action taken on Mrs. Gasser's account?

A. No.

Q. After Exhibit "D" was mailed out when was the next time any action was taken on her account?

A. Approximately a month and a half. (Crotinger depo. pp. 180-81).

Defendants' use of this document against defendant Skiver was even worse. They sent her this document, threatening impending garnishment, on January 27, 1981, yet never requested or received authorization for suit from the creditor, or referred the claim to an attorney for suit. (2nd Req. for Adm., Pars. 1(i), 14 (m).

ACCA had no intent to take any action against either plaintiff Gasser or plaintiff Skiver within the three day period. Mr. Crotinger stated his policy is to require the collectors to wait at least ten days after each letter before undertaking any further collection activity. (Crotinger depo., p. 107). In the context of a five-day deadline on another form, Mr. Crotinger stated "it doesn't mean a whole lot of anything. Because the accounts are not handled for ten days afterwards." (Crotinger depo., p. 184). Further, defendants collect only 25% to 50% of the claims they handle, leaving 50% to 75% not fully paid. Yet, they refer only 2% or fewer of the claims they handle to attorneys to file suit against the debtor. (Crotinger depo., pp. 128-29). Thus, the threat of "impending garnishment" was false both as to the specific plaintiffs Gasser and Skiver and as to the generality of claims handled by ACCA.

Under 15 U.S.C. §1692e(2)(A), "the false representation of the character, amount, or legal status of any debt" is a false, deceptive or misleading representation. 15 U.S.C. §1692e(4) further prohibits:

> The representation or implication that non-payment of any debt will result in ... the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

15 U.S.C. §1629e(5) similarly outlaws "the threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. §1692d prohibits "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Plaintiffs contend that defendants violated all these prohibitions, as well as the more general prohibition at 15 U.S.C. §1692e(10) against false representations, by sending the "Notice of Impending Garnishment After Judgment" to plaintiffs Gasser and Skiver.

Two recent federal court decisions under the FDCPA support plaintiffs' claim. Both cases involved collection notices that included and much milder and more subtle misrepresentation than the "Notice of Impending Garnishment".

In Baker v. G.C. Services Corp., 667 F.2d 775 (9th Cir., 1982), the Ninth Circuit affirmed a judgment that a debt collector violated 15 U.S.C. §1692e by sending a notice threatening to "proceed with collection procedures." The collector had no intention of actually suing the debtor. The Court held that the consumer could reasonably interpret the statement as a threat of suit, since it was placed near another statement that referred to the creditor's preference for out-of-court settlements before deciding whether to take legal action.

Lambert v. National Credit Bureau, Inc., No. 80-282-J (U.S.D.C., D. Ore., 4-24-81, copy attached as Appendix 4) found deception both in the content and the threatened imminency of a collection notice similar to the "Notice of Impending Garnishment After Judgment." The plaintiff in Lambert had received a notice entitled "48 Hour Notice Warning - Pay This Amount." The court held:

> I agree that the natural consequence of Exhibit 1 is to harass, oppress and abuse the consumer. The words "48 Hour Notice--Warning--Pay This Amount" are printed in large bold face type on Exhibit 1. At first glance these are the only words one sees. These words appear to be designed to instill in the consumer the belief that if the debt is not payed within 48 hours dire consequences will ensue. I find that a document which is designed to instill such a belief is harassing, oppressive and abusive. This violates 15 U.S.C. §1692d. (Slip op. at 3)

The notice in Lambert also threatened to take "such course of action as we judge necessary and appropriate," and stated that "if this matter should go as far as being sued upon and a judgment entered against you - you could be required to pay court costs." The court found that these two statements, read together, were "designed to create the impression that legal action is imminent." (Slip op. at 3). Since the collector did not intend to take legal action after the 48 hours had elapsed, and had not even begun the internal procedures, such as consultation with the creditor, that it followed before taking legal action, the threat was deceptive and violated 15 U.S.C. §1692e(5).

Here the falsity of defendant's threats is much more palpable. The collection notice does not merely imply that court action is imminent, but is titled "Notice of Impending Garnishment After Judgment." The text of the notice explicitly threatens "legal steps" to garnish the debtor's wages and attach his/her property unless the debtor pays or settles the debt within three days. In actuality, at the time defendants sent these notices to plaintiffs Gasser and Skiver, there was no impending garnishment; the creditor had not taken judgment; and the creditor had not even authorized suit. After three days passed, and plaintiffs Gasser and Skiver failed to pay, defendants still did not file suit or commence garnishment proceedings. This court should find

that defendants violated 15 U.S.C. §§1692e(2), (4), (5), and (10) by sending the "Notice of Impending Garnishment After Judgment" to plaintiffs Gasser and Skiver.

V. DEFENDANTS VIOLATED 15 U.S.C. §1692e BY SENDING THE "3 DAY NOTICE" TO PLAINTIFF HICKS.

Defendants have admitted sending a collection notice entitled "3 DAY NOTICE" to plaintiff Hicks (Exh. DD; Intervening Ans., Par. 65; 2nd Req. for Adm., Par. 14(i). The text of the notice, a copy of which is attached as Appendix 5, reads as follows:

> 3 DAY NOTICE
> Before Suit & Attachment
> After Judgment
>
> Notice is hereby given that unless the above account is paid in full or satisfactory agreement is made with this office before 10:00 A.M. 10-10-80 you will cause same to be litigated and attachment to be issued on wages or property for principal, interest, court costs and attorney's fees as allowed by law.
>
> 10-10-80 by: Wm. S. Miller

This notice suffers from illegalities similar to those in the "Notice of Impending Garnishment" discussed in the previous section. It threatens suit if the debt is not paid by October 10, 1980. Yet ACCA did not then have and had not sought authorization from the creditor to file suit. 5/ Thus ACCA's threat that it would "cause same to be litigated" unless the debt was paid by October 10, 1980, was a sham.

The "3 DAY NOTICE" is additionally deceptive in several other ways. It strongly implies that an attachment of the debtor's wages and property will

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5/ ACCA requested the creditor to authorize suit against plaintiff Hicks only four months later, on February 19, 1981. (2nd Req. for Adm., Par. 11). The creditor never actually authorized suit. (2nd Req. for Adm., Par. 12).

follow immediately if the debt is not paid within three days. This implication is of course false, since the creditor had not taken a judgment against plaintiff Hicks when ACCA sent the "3 DAY NOTICE". The language "After Judgment" is most logically read to indicate that the creditor already has a judgment, a further deception. Finally, the notice threatens the issuance of an attachment not only for principal, interest and court costs, but also for "attorney's fees as allowed by law." Ohio law does not allow a creditor to recover attorney's fees in a collection suit. Sorin v. Board of Education, 46 Ohio St.2d 177, 347 N.E.2d 527 (1976); Rebholz v. Family Loan Co., 6 Ohio Op. 82 (C.P., Hamilton Cty., 1936).

The artfully ambiguous language of these last three threats should not allow defendants to escape liability. 15 U.S.C. §1692e prohibits not only outright misrepresentations but also any other "false, deceptive, or misleading ... means." 15 USC §1692e(4) prohibits the false "implication," as well as the outright misrepresentation, that nonpayment of a debt will result in garnishment or attachment. The caselaw discussed in the previous section compels a finding that the "3 DAY NOTICE", like the "Notice of Impending Garnishment," is deceptive in violation of 15 U.S.C. §1692e(2),(4),(5), and (10).

The "3 DAY NOTICE" is also a violation of the Act because it simulates legal process. 15 U.S.C. §1692e(9) prohibits:

> The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

15 U.S.C. §1692e(13) forbids "the false representation or implication that documents are legal process."

The "3 DAY NOTICE" is couched in formalistic, legal language: "Notice is hereby given ... you will cause same to be litigated ... principal,

interest, court costs and attorney's fees as allowed by law." It contains an official-looking seal and is dated and signed. It includes a vague reference to the law. All these factors result in the false implication that the document is official and legal.

In Williams v. Rash Curtis and Associates, Civil No. C78-1477(A) (U.S.D.C., N.D. Ga., 12-14-78) (Appendix 6), the District Court held that a complaint stated a claim when it alleged that a collection letter simulated or misrepresented court process. The letter was captioned "Re: Medical Center of Columbus vs. Defendant: Princella Williams" and stated "the above mentioned account is being held for a period of ten (10) days to allow you an opportunity to settle the account with Rash, Curtis and Associates before steps are taken to reduce this account to judgment at your expense."

Even before the Fair Debt Collection Practices Act was passed, the federal courts had ruled that the use of simulated legal process or official documents in debt collection violated the prohibition against unfair and deceptive trade practices in the FTC Act, 15 U.S.C. §45(a)(1). The courts held that even subtle means of deception were illegal, if they created an overall impression of a judicial or official source. In Floersheim v. FTC, 411 F.2d 874 (9th Cir. 1969), cert. denied 396 U.S. 1002 (1970), the Court of Appeals upheld an FTC order prohibiting a debt collector's use of forms that created the impression of government issuance through a variety of subtle means. The Court agreed that the forms were obviously deceptive and unfair on their face due to their format, official-sounding language, elaborate type styles and vague references to state laws. 6/ See also, United States Association of Credit Bureaus v. FTC, 299 F.2d 220 (7th Cir., 1962).

6/ The actual forms, which are very creative, can be found in Sydney V. Floersheim, Dkt. No. 8721, 73 FRT Dec. 134 (1963).

Likewise, in Slough v. FTC, 396 F.2d 870 (5th Cir., 1970) the Court of Appeals for the Fifth Circuit affirmed a cease and desist order against a debt collector. Among the practices prohibited were use of "any language that might imply" that Slough was connected with a governmental agency, and representations that the petitioner would institute legal action where the petitioner in good faith had no such intent. The Court was particularly concerned with the overall deceptive nature of the petitioner's practices, which, like those here challenged, were designed to utilize the power and pressure of court action without actually going to court:

> As to the prohibition against falsely threatening legal action, the fault with Petitioner's position is his own readily-made admission that the entire collection scheme is designed to collect without the necessity of legal action, and therein lies the deception.
>
> Id., 396 F.2d at 872.

This Court should therefore rule that defendants' use of the "3 DAY NOTICE" violates 15 U.S.C. §1692e(2), (4), (5), (9), (10), and (13).

VI. DEFENDANTS VIOLATED 15 U.S.C. §1692e BY SENDING THE "NOTICE AFTER" TO PLAINTIFFS INGLEDUE AND GONZALEZ.

Defendants have admitted sending the collection notice entitled "NOTICE AFTER" to plaintiff Ingledue's spouse as Exh. K and to plaintiff Gonzalez as Exh. S. (Intervening Ans., Pars. 17 and 36). The text of this notice is similar in many respects to the "3 DAY NOTICE" and the "Notice of Impending Garnishment" discussed in Section IV above. It reads:

> Notice is hereby given that unless the above account is paid in full or satisfactory agreement is made with this office before 10 A.M. 12-30-1980 you will cause client's attorney to use whatever means the law allows to liquidate this account, and be assured he will utilize them all.
>
> 12-26-1980 By: Wm. S. Miller
>
> Remember, three days is all the time you have.

A copy of this notice is attached as Appendix 7.

Defendants sent the "Notice After" to both plaintiff Ingledue and plaintiff Gonzalez on the dame date, December 26, 1980. In both cases the notice relates to claims by Lima News Co. and United Telephone Co. In neither case did defendants have authorization from either creditor to refer the case to a collection attorney when it sent out the "Notice After." Defendants never referred United Telephone's claim against plaintiff Ingledue or either claim against plaintiff Gonzalez to a collection attorney for suit. The only step ACCA ever took toward filing suit was to seek authorization to refer the claim of Lima News against plaintiff Ingledue for suit on January 7, 1981. ACCA received authorization two weeks later (2nd Req. for Adm., Pars. 6, 7.

The "Notice After" to plaintiffs Ingledue and Gonzalez was thus deceptive in: 1) its reference to the activities of "client's attorney," when the matter had not been referred to any attorney; 2) in its statement that the client's attorney would take "whatever means the law allows" if the debt was not paid within three days; and 3) in its false implication that legal action was imminent, underlined by the notice's concluding statement, "Remember, three days is all the time you have." This Court should find that defendants omitted abusive and deceptive acts, in violation of 15 U.S.C. §§1692d and 1692e(5) and (10), by sending the "Notice After" to plaintiffs Ingledue and Gonzalez.

VII. DEFENDANTS VIOLATED 15 U.S.C. §§1692e(9) AND (13) BY SENDING THE "NOTICE TO APPEAR" TO PLAINTIFFS GASSER, FIELDS, HENDERSON, ICENOGLE, LITTLE, EVANS, HICKS, AND SKIVER.

One of the mainstays of defendants' illegal and abusive collection practice is a shocking-pink "Notice to Appear." Defendants have admitted sending this notice to eight of the plaintiffs. 7/ An example of this notice is attached as Appendix 8.

Plaintiffs allege that this notice violates 15 U.S.C. §§1692e(9) in that it "simulates .... a document authorized, issued, or approved by any court, official or agency of the United States or any state, or ... creates a false impression as to its source, authorization or approval." Plaintiffs also allege that it constitutes a false representation or implication that it is legal process, in violation of 15 U.S.C. §1692e(13).

Courts that have considered whether debt collection notices simulate legal or official documents have looked to the format and overall appearance of the document rather than to the exact words. (See cases cited in Section V of this brief). This approach allows the law to reach documents that are deceptive in their total appearance even though the wording cleverly avoids a direct misrepresentation.

7/ Defendants have admitted sending this notice to plaintiff Gasser as Exh. E (Amended Ans., Par. 14); to plaintiff Fields as Exh. J (Intervening Ans., Par. 14); to plaintiff Henderson as Exh. N (Intervening Ans., Par. 23); to plaintiff Icenogle as Exh. O (Intervening Ans., Par. 26); to plaintiff Little (Intervening Ans., Par. 43); to plaintiff Evans as Exh. BB (Intervening Ans. Par. 61; and Req. for Adm., Par. 14(g)); to plaintiff Hicks as Exh. EE (Intervening Ans., Par. 66; 2nd Req. for Adm., Par. 14(j); and to plaintiff Skiver as Exh. FF (Intervening Ans., Par. 69; 2nd Req. for Adm., Par. 14(k). Six of these were mailed months after plaintiff Gasser first filed her complaint alleging the illegality of the "Notice to Appear."

Viewed in this light, the "Notice to Appear" clearly violates 15 U.S.C. §1692e(9) and (13). The bold-face title "Notice to Appear" is unconditional and unqualified. The term "appear" is not commonly used in ordinary language but is the usual language of a summons or subpoena. 8/ The notice sets forth an "effective date," as if it has force and effect on a certain date. It includes a space marked "number," which defendants have sometimes filled in with an apparently imaginary number that resembles a court case number. 9/

There are striking resemblances between the "Notice to Appear" and Ohio's standard traffic ticket form. See the forms included in the Ohio Traffic Rules, West's Ohio Rules of Court, 1982, at 604-9. The Notice to Appear is exactly the same size as a traffic ticket. Both are printed on colored stiff paper. See Traffic Rule 3(B). Both are headed by a number and a date. Like the offender's copy of the traffic ticket, the thrust of the "Notice to Appear" is that the recipient must pay or appear. Because of the deceptive format and the emphasized language, it would be easy for a debtor to believe that the "Notice to Appear" had a force and effect equivalent to a summons for an offense. Under the same caselaw as is cited in Section IV of this brief, regarding the "3-DAY NOTICE", this Court should hold that the "Notice to Appear" violates 15 U.S.C. §1692e(9) and (13).

8/ See, for example, the "Summons Upon Complaint/Indictment/Information" and the "Summons in Lieu of Arrest Without Warrant, and Complaint Upon Such Summons", forms VI and XII following the Ohio Rules of Criminal Procedure in Vol. 29 of Page's Ohio Revised Code Annotated. Both inform the recipient that s/he is "summoned and ordered to appear at (time, day, date, room)." To similar effect are Form XIII, "Summons After Arrest Without Warrant, and Complaint Upon Each Such Summons," and Form XIV, "Minor Misdemeanor Citation." See also the federal civil subpoena form, which begins "you are hereby commanded to appear ...."

9/ See Exh. E received by plaintiff Gasser. The notices sent to the other plaintiffs contained the amount of the creditor's claim in the space marked "number."

VIII. DEFENDANTS VIOLATED 15 U.S.C. §1692f(7) BY MAILING THE "NOTICE TO APPEAR" TO PLAINTIFF GASSER IN POSTCARD FORM.

Not only does the content and format of the "Notice to Appear" violate the FDCPA, but the manner in which defendants mailed it to plaintiff Gasser also violated the Act. Defendants have admitted that they mailed the "Notice to Appear," Exh. E, to plaintiff Gasser in postcard form. (2nd Req. for Adm., Par. 32).

15 U.S.C. §1692f(7) provides that a collector uses an unfair or unconscionable means of debt collection by "[c]ommunicating with a consumer regarding a debt by post card." The purpose of this prohibition is to protect the consumer's privacy. Sen. Rep. No. 95-382, 1977 U.S. Code, Cong. & Ad. News 1695. Rutyna v. Collection Accounts Terminal, Inc., 478 F.Supp. 980 (N.D. Ill. 1978), enforced a similar ban against the use of the debt collector's name in the return address of the collection letter envelope. The language of 15 U.S.C. 1692f(7) is unequivocal and defendants' violation here is clear.

IX. DEFENDANTS VIOLATED 15 U.S.C. §§1692e(5) AND (10) AND 1692d BY SENDING THE "INVESTIGATION LETTER" TO PLAINTIFFS GASSER, ICENOGLE, LITTLE, SKIVER AND MARTIN.

One of the defendants' most abusive, and most frequently used, debt collection methods is the "investigation letter" attached as Appendix 9. Defendants have admitted sending this letter to five of the plaintiffs. 10/

10/ Defendants sent this letter to plaintiff Gasser as Exh. F (Amended Ans., Par. 15); to plaintiff Icenogle as Exh. P (2nd Req. for Adm., Par. 14(b)); to plaintiff Little as Exh. V (Intervening Ans., Par. 44); to plaintiff Skiver as Exh. GG (2nd Req. for Adm., Par. 14(l)); and to plaintiff Martin as Exh. II (2nd Req. for Adm., Par. 14(n)). A blank copy of this notice was marked and identified as Exh. GGG in Mr. Crotinger's deposition, p. 51.

The "investigation letter" begins with the statement, "An investigation is now being made into your circumstances, and we are surprised at the information contained in the first report from the investigators." It concludes by saying, "you have just five days to stop these proceedings by sending us your remittance of $ _____ in full." On the reverse side the letter lists a number of questions that the "Investigation Department" is apparently pursuing. These include:

> Does employer speak well of him or her? _____
> Former employer _____
> Does he speak well of him or her? _____
> Was debtor ever discharged? _____
> For what reason? _____
> Do neighbors speak well of him or her? _____
> Character: Good, Fair, Bad? _____
>
> . . .
>
> Any home debts to banks or friends? _____
>
> . . .
>
> Has debtor ever been arrested? _____
> For what? _____
> Where does he or she spend his or her evenings? _____

It also contains a section for the investigator to check one of several "Causes of Delinquency," including "intoxicants," "extravagant," and "lazy," and a space for checking whether "the Debtor's Husband, Wife, Children, Relatives, Doctor, [and] Grocer know he or she does not pay this bill?" In plaintiff Little's case, the bill at issue was a $68.00 debt to an ambulance company; in plaintiff Skiver's case it was a $36.00 telephone bill.

Defendant David Crotinger, manager of ACCA, admitted that these threats are wholly a sham. Referring to the investigation letter sent to Mrs. Gasser, he testified:

Q. On the reverse of Exhibit "F" I believe there's some various forms. Was any investigation done as indicated on the reverse of Exhibit "F"?

A. No.

Q. Did you intend to contact the various sources contained on the reverse of Exhibit "F"?

A. No.

Q. Was any contact made on any of these particular people listed on the back of Exhibit "F"?

A. There's no people listed on the back of it.

Q. Individuals?

A. They're not individuals. It's just names of different things, it's not the name of any person.

Q. I believe at the bottom there's a statement, "Does the debtor's husband, wife, children, relative doctor, grocer know he or she does not pay this bill."

A. No, they don't get contacted.

Q. Did you ever intend to contact any of those people?

A. No.

Q. If you never intended to contact any of those people what's the purpose of having that on the back of Exhibit "F"?

A. Just nothing. It's just on there.

(Crotinger depo., pp. 183-84).

Mr. Crotinger gave the same testimony with respect to the general use and purpose of the form:

Q. Now, you state that the back of "GGG" is never really used. By that do you mean that you don't check out these various items listed here?

A. No.

Q. So, for example, when it refers to "Do neighbors speak well of him or her", you wouldn't conduct that type of investigation?

A. You're not allowed to.

Q. Do you ever ask to speak to neighbors about character or reputation about any of the debtors?

A. I don't talk to the neighbors about anything except location. In other words, I might ask the neighbor, "Do you know where he works, do you know a relative, do you know a friend, or anything like this where I might be able to locate him? That's the only thing that is asked.

Q. Again referring to the back of "GGG", there is at the bottom "Causes of Delinquency. Incompetency, intoxicants, spendthrift, extravagant, lazy, sickness, other troubles." What does that refer to?

A. Nothing. It's just on there. This thing's been on there for the last twenty years. And it isn't designed to do anything except let somebody read the thing and see what maybe could happen. No one's saying anything about it is happening. It could happen. And even now you can't even do a lot of things that says. You know, twenty years ago you could.

(Crotinger depo., pp. 95-96; emphasis added).

15 U.S.C. §16923(5) prohibits "the threat to take any action that cannot legally to taken or is not intended to be taken." The "investigation letter" violates both parts of this standard. First, because of the Act's strict limitation on communications with third parties (15 U.S.C. §1692c(b)), the debt collectors cannot legally contact the debtor's current and former employers, neighbors, children, relatives, doctor, and grocer, particularly when the questions relate so closely to the debt. Thus, the letter threatens to take illegal action. Second, Mr. Crotinger's deposition testimony shows that the defendants do not intend to take the action threatened by the letter. The deceptiveness of the letter therefore violates 15 U.S.C. §1692e(5) and (10).

In Rutyna v. Collection Accounts Terminal, Inc., 478 F.Supp. 980 (N.D. Ill., 1979), a federal court imposed liability under 15 U.S.C. §1692e(5) against a debt collector that sent a very similar collection letter. The collection letter stated:

> You have shown that you are unwilling to work out a friendly settlement with us to clear the above debt.
>
> Our field investigator has now been instructed to make an investigation in your neighborhood and to personally call on your employer.
>
> The immediate payment of the full amount, or a personal visit to this office, will spare you this embarrassment.

The District Court concluded:

> Defendant's letter threatened embarrassing contacts with plaintiff's employer and neighbors. This constitutes a false representation of the actions that defendant could legally take. §1692c(b) prohibits communication by the debt collector with third parties (with certain limited exceptions not here relevant). Plaintiff's neighbors and employer could not legally be contacted by defendant in connection with this debt. The letter falsely represents, or deceives the recipient, to the contrary. This is a deceptive means employed by defendant in connection with its debt collection. Defendant violated §1692e(5) in its threat to take such illegal action.

The sending of the "investigation letter" also violates 15 U.S.C. §1692d, which provides in relevant part that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Defendant Crotinger admitted, in so many words, that the purpose of the "investigation letter" is to terrorize the debtor:

> Q. I notice on the back of "GGG" there's some notations about an "Investigation Department (for office use only.)" What does that refer to?

A. Nothing. That's just on there. It's never used for anything. It's just on there. It's psychological, I guess.

Q. You think that this might intimidate the person?

A. Not unless you'd have anything to hide.

(Crotinger depo., p. 95; emphasis added).

In Rutyna, the District Court found that the similar "investigation letter" sent by the defendant collector violated 15 U.S.C. 1692d:

> Without doubt defendant's letter had the natural (and intended) consequence of harassing, oppressing, and abusing the recipient. The tone of the letter is one of intimidation, and was intended as such in order to effect a collection. The threat of an investigation and resulting embarrassment to the alleged debtor is clear and the actual effect on the recipient is irrelevant. The egregiousness of the violation is a factor to be considered in awarding statutory damages (§1692k(b)(1)). Defendant's violation of §1692d is clear.

See also Harvey v. United Adjusters, 509 F.Supp. 1218 (D. Ore., 1981), holding that an insulting letter violated this same prohibition.

The defendants have shown their contempt for the law in their use of the "investigation letter." They sent it to Intervening plaintiffs Icenogle and Skiver months after plaintiff Gasser filed her original complaint. (2nd Req. for Adm., Pars. 14(b)&(14(1)). Indeed, the defendants are still sending the "investigation letter" to debtors. (2nd Req. for Adm., Par. 20). Plaintiffs urge this Court to follow Rutyna and to rule that the defendants violated 15 U.S.C. §§1692d and 1692e(5) and (10) by sending them the "investigation letter".

X. DEFENDANTS VIOLATED 15 U.S.C. §1692e BY SENDING THE "NOTICE BEFORE" TO PLAINTIFF GONZALEZ.

Defendants have admitted sending the "Notice Before" to plaintiff Linda González on about December 10, 1980. (Ans. to Intervening Compl., Par. 35). This document, a copy of which is attached as Appendix 10, 11/ begins with the ominously vague headline "NOTICE BEFORE." After identifying the debtor, creditor, date, and balance in formal fashion, the notice announces in legalistic language:

> Repeated demands for payment of this just obligation have been ignored; THEREFORE, You are hereby notified that unless settlement is made within seven days from date, legal action may be authorized to recover this claim in full, together with interest and costs.

The notice concludes with a tear-off form for the debtor to return. This form states in large boldface type "DO NOT TAKE ACTION AGAINST ME." It concludes with "I enclose $_____ as full payment of your demand" and spaces for the debtor's name, address, home telephone number, and place of employment.

ACCA is still using this form, and in fact it is the second in the series of automatic mailings sent out by the ACCA office staff at defendant Crotinger's direction. First the "Tell-A-Gram" is sent out. Then, after ten days with no response, the "Notice Before" is sent. Ten days later, if the debtor still has not responded, a third collection notice, the "Notice After," is sent out (Crotinger depo., pp. 73, 215-218). The account does not even go to a collector until these three notices are sent out. (Crotinger depo., pp. 215, 218).

11/ The "Notice Before" was identified as Exh. R in the complaint and Exh. BBB in the depositions. Intervening Compl., Par. 35; Crotinger depo., p. 47.

There is no legal action in process when the "Notice Before" is sent out. ACCA does not contact the creditor to seek authority to have collection suit filed during the series of three "automatic" mailings that includes the "Notice Before." The only exception is if the consumer contacts ACCA and announces a flat refusal to pay. (Crotinger depo., p. 74). But if the consumer simply fails to respond, the three "automatic" mailings go out as a matter of course, ten days apart. (Crotinger depo., p. 73).

The false statements and deceptive implications of the "Notice Before" are numerous. First, it threatens legal action within seven days unless the debtor settles the account. In actuality, ACCA does not have authorization to sue when it sends the "Notice Before." If the debtor fails to pay, ACCA does not seek authorization for suit, but merely continues with the series of automatic mailings. The seven-day deadline is also false, since the next collection letter is not even sent out until ten days have elapsed.

These deceptions are underscored by the formal, official-looking format of the notice and the legalistic language of the text, which tend to resemble an official or court-sanctioned document. The use of "DO NOT TAKE ACTION AGAINST ME" also falsely implies that legal action is imminent and that ACCA has authority to cause suit to be filed.

The "Notice Before" headline is also deceptive. It is calculated to awaken fears of a lawsuit in the debtor, particularly in light of the other language in the notice regarding "legal action." As was true with the "investigation letter" discussed in Section IV of this brief, the "Notice Before" language has no legitimate meaning or purpose. Mr. Crotinger testified:

> Q. Now, the "Notice Before" in "BBB," what does that refer to?
>
> A. Nothing.
>
> (Crotinger depo., p. 72).

Court decisions regarding similar false, misleading, and deceptive collection notices have been discussed in Sections IV and V of this brief. This Court should hold that defendants' use of the "Notice Before" violates 15 U.S.C. §1692e(5), (9), (10), and (13).

XI. DEFENDANTS VIOLATED THE FDCPA BY MAILING EXH. G, THE "COPY LETTER" TO PLAINTIFF GASSER.

Exhibit G purports to be a copy of a letter from the debt collector to the creditor, enclosing the "necessary forms for the purpose of filing legal action against the [debtor]." (See copy in Appendix 11). The sum to be demanded in the suit is stated, and is said to include "filing of fees, serving of papers, costs of levy, interest and execution". The letter recites: "A copy of this letter is being sent to the debtor, and if we do not receive payment in full within five days, please proceed without further notice." It concludes with the fear-inspiring statement that "[w]age garnishments and property levies may be made from the information enclosed." Defendants sent this form to plaintiff Gasser on September 26, 1979. (Amended Ans., Par. 16, Crotinger depo., p. 161).

Exhibit G is deceptive in numerous ways. First, although it purports to be a copy of a letter sent to the creditor, or the creditor's attorney, in actuality nothing was sent to anyone except Mrs. Gasser. (2nd Req. for Adm., Par. 16; Crotinger depo., pp. 186, 187). The "cc" at the bottom of the letter stands for "carbon copy", but this is deceptive, too:

> Q. I believe at the bottom of Exhibit "G" there's a small cc. Does that mean a carbon copy was sent out?
>
> A. No, it didn't have anything beside it. It just says cc. That's what it means, carbon copy, but there wasn't anything sent.
>
> (Crotinger depo., p. 187).

Second, contrary to the thrust of the letter, suit against Mrs. Gasser had not yet been authorized, and would not be authorized until December 3, 1979, over two months later. (2nd Req. for Adm., Par. 3). The matter would not be referred for suit until January 14, 1980. (2nd Req. for Adm., Par. 5). By the same token, the latter's five-day deadline was spurious and deceptive.

Finally, the reference to information for "wage garnishments and property levies" was wholly false:

> Q. Exhibit "G" states that, "Wage garnishment and property levies may be made from the information enclosed." Is that true?
>
> A. No.

(Crotinger depo., pp. 186-87).

Much less overt deception about the legal status of a debt and the creditor's intent to take legal action was held to violate 15 U.S.C. §1692e(5) in Baker v. G. C. Services Corp., 677 F.2d 775 (9th Cir., 1982). In Minick v. First Federal Credit Control, Inc., No. C79-2112 (U.S.D.C., N.D. Ohio, 6-9-81) (see copy in Appendix 12), a debt collector was held liable under similar facts, for sending out a collection letter on an attorney's letterhead stating that an attorney had been retained, when no attorney had actually been retained. This Court should find that defendants' use of Exhibit G violated 15 U.S.C. §1692e(2), (4), (5), and (10).

XII. DEFENDANTS VIOLATED 15 U.S.C. §1692e BY MAILING THE "TELL-A-GRAM" TO PLAINTIFFS HENDERSON, GONZALEZ, MASON, MARVA ALLEN, EVANS, AND HICKS.

Defendants have admitted sending the notice entitled "Tell-A-Gram" (Appendix 13) to six of the plaintiffs. In each case, the notice, despite its title, was not telegraphically transmitted but was mailed to the debtor. 12/

12/ Defendants have admitted mailing the Tell-A-Gram to plaintiff Henderson as Exh M. (Intervening Ans., Par. 22); to plaintiff Gonzalez as Exh. Q.

The "Tell-A-Gram" deceptively resembles a telegram, thereby conveying a false sense of urgency. Even before the FDCPA was effective, such deception was held to violate the prohibition in the FTC Act against unfair and deceptive trade practices, 15 U.S.C. §45. Trans World Accounts, Inc. v. FTC, 594 F.2d 212 (9th Cir., 1979) dealt with a collection agency's use of a collection letter entitled "Trans-O-Gram" which was mailed to the debtor instead of being telegraphically transmitted. The Ninth Circuit affirmed the FTC's finding that this practice was deceptive and a violation of the statute.

The holding in Trans World was recently applied in an FDCPA case in In re Scrimpsher, No. 80-01549 (U.S. Bksy. Ct., N.D.N.Y., 3-5-82; copy attached as Appendix 14). There the debtor received two collection notices which had large headings "SPEED-O-GRAM" and "Urgent Message." Slip op. at 21. Both notices were mailed rather than telegraphically transmitted to the debtor. Id. at 12. The Court found this "simulated telegram format" to be deceptive, in violation of 15 U.S.C. §1692e. Id., at 21-22.

The Federal Trade Commission has also applied the Trans World Accounts rationale in interpretive letters since the enactment of the FDCPA. Exh. EEEE is an FTC interpretive letter sent in response to defendant Crotinger's request four years ago; Par. 16 recommends discontinuance of the title "Tell-A-Gram" because it creates "a false sense of urgency." (See 3rd Interrogs., Pars. 5-8; Appendix 2).

Defendants are still sending debtors a modified version of the "Tell-A-Gram" in the form of Exh. AAA. (Crotinger depo., p. 55). A copy of Exh. AAA is attached as Appendix 15. Defendants have deleted the offending

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12/ cont'd

(Intervening Ans., Par. 33; 3rd Interrog., Par. 10); to plaintiff Mason as Exh. T (Intervening Ans., Par. 39; 3rd Interrog., Par. 11); to plaintiff Marva Allen as Exh. Y (2nd Req. for Adm., Par. 14(e); to plaintiff Evans as Exh. AA (2nd Req. for Adm., Par. 14(f); and to plaintiff Hicks as Exh. CC (2nd Req. for Adm., Par. 14(h).

title "Tell-A-Gram" from Exh. AAA but have introduced other abusive statements. The notice now states:

> "MATTER OF FACT - if suit is filed by creditor" judgments are published in the FINANCIAL NEWS AND BECOME A MATTER OF PUBLIC RECORD, as well as retained on your credit record.

This statement strongly implies that the filing of suit automatically results in a judgment, and is deceptive in violation of 15 U.S.C. §1692e. Further, plaintiffs expect to show at trial that there is no paper known as the "Financial News" that publishes judgments in the Lima area. The reference to this publication on the face of both the current and the original version of this notice is therefore deceptive. Finally, the reverse side of the new form describes the alleged requirements of "Federal Law P.L. 95-195." This enactment is the Siletz Indian Tribe Restoration Act (1977), found at 25 U.S.C. §711, which has nothing to do with debt collection requirements.

This Court should therefore find that defendants violated 15 U.S.C. §1692e(5), (9), and (10) by sending the "Tell-A-Gram" to plaintiffs Henderson, Gonzalez, Mason, Marva Allen, Evans, and Hicks.

XIII. DEFENDANTS VIOLATED 15 U.S.C. §§1692d BY SENDING PLAINTIFF LITTLE THE NOTICE ENTITLED "WHICH SIDE OF THE FENCE ARE YOU ON?"

Exhibit W is entitled "Which side of the fence are you on?" Its message is that the debtor is dishonest, or that s/he will be dishonest if s/he does not pay or make arrangements to pay the bill. (See copy in Appendix 16).

The notice pictures a fence and a man in prayer or deep thought. On one side of the fence are listed characteristics of "HONEST PEOPLE," such as:

> Honest people do not ignore letters written to them about their accounts.
>
> Honest people keep their promises.

> Honest people cooperate.
>
> Honest people never avoid their just debts.

On the other side are listed the characteristics of "DISHONEST PEOPLE," including:

> Dishonest people make promises and don't keep them.
>
> Dishonest people do not cooperate.
>
> Dishonest people willfully avoid payment of their just debts.

The notice concludes:

> We know you were honest when this obligation was made, and we believe you are still honest. But ..... the really big and all important question is this:
>
> "Can you remain honest if you don't pay and don't make arrangements to pay?"
>
> We think you will agree, that in order to keep your honesty unquestioned, and your name above reproach, you will need to do one of two things:
>
> (1) Either pay the account in full NOW, or
> (2) Make satisfactory arrangements with us no later than 7-14-80.

Defendants admit that they sent this notice to plaintiff Lucyna Little in connection with a $68.00 debt she owed to an ambulance company. (2nd Req. for Adm., Par. 14(d); intervening Ans., Pars. 42 and 45).

15 U.S.C. §1692d prohibits harassment or abuse in debt collection. It reads in relevant part:

> A debt collector may not engage in any conduct the natural consequence of which is to harass oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ....

> (2) The use of ... language the natural consequence of which is to abuse the hearer or reader.

Plaintiffs contend that the use of Exhibit W in debt collection violates this standard.

In Harvey v. United Adjusters, 509 F.Supp. 1218 (D. Ore. 1981), the district court held that a similarly abusive and insulting collection notice violated 15 U.S.C. §1692d. There the collection notice showed a picture of a decapitated man and implied that "the debtor removes her head when she receives letters from the defendant, that she ignores her mail and her bills, and lacks the common sense to handle her financial affairs properly." Id., 509 F.Supp. at 1221. The court found that the natural effect of this notice was to harass, oppress, or abuse the debtor in violation of 15 U.S.C. §1692d. Accord, Dixon v. United Adjusters, Inc., Civil No. 79-179 (U.S.D.C., D. Ore., - copy attached as Appendix 17). See also, Rutyna v. Collection Accounts Terminal, 478 F.Supp. 980 (M.D Pa., 1979), discussed supra in Section IX of this brief.

Exhibit W is more abusive and oppressive than any of the notices described in Harvey, Dixon, or Rutyna. In Harvey and Dixon the collection notices impugned only the debtor's common sense and efficiency in responding to mail. These qualities may be important but they are not as central to a person's reputation as honesty. Exhibit W impugns the debtor's honesty and integrity, qualities that are so important in our society that to malign them is defamation per se. Exhibit W is an egregious violation of 15 U.S.C. §§1692d and 1692d(2), and this Court should so hold.

XIV. DEFENDANTS VIOLATED 15 U.S.C. §§1692e(4) AND 1692e(c) BY SENDING THE "EMPLOYMENT VERIFICATION" LETTER TO PLAINTIFF GASSER.

Defendant Crotinger testified in his deposition that ACCA sent Exh. JJJ to plaintiff Gasser on June 16, 1979 at her place of employment.

(Crotinger depo., p. 156). Exh. JJJ includes space for reciting the amount and nature of the debt, and then states:

> Your employment has been verified at _____.
> Your employer might deduct this from your salary.
> Is it alright if we call or write and ask him to
> do this?
>
> HOWEVER, IF YOU PLAN TO HANDLE THE MATTER YOURSELF,
> JUST SEND PAYMENT IN FULL TO US IMMEDIATELY.

A copy of Exh. JJJ is attached as Appendix 18. ACCA is still using this form. (Crotinger depo., pp. 55, 233).

The statement "Your employer might deduct this from your salary" is extremely deceptive. Its import is that the employer is currently able to deduct the alleged debt from the worker's wages. The statement neither expresses nor implies any limitations on this possibility. Yet at the time this notice was sent the creditor did not have a judgment against Mrs. Gasser and had not even authorized suit, so had no ability to garnish her wages. (Crotinger depo., p. 179; 2nd Req. for Adm., Par. 3).

Mr. Crotinger stated in his deposition that Exh. JJJ referred only to voluntary wage deductions initiated by the employee-debtor. (Crotinger depo., p. 131). Such a meaning is nowhere expressed in the notice. The language of Exh. JJJ violates the prohibition against "the representation or implication that nonpayment of any debt will result in the ... garnishment ... of any ... wages of any person unless such action is lawful and the creditor intends to take such action." 15 U.S.C. §1692e(4). It also violates the more general prohibitions against deceptive and misleading representations at 15 U.S.C. §1692e(5) and (10).

The "employment verification" letter also implies a threat of contact with the debtor's employer. It asks: "Is it alright if we call or write ask ask him [the employer] to do this?" Its conclusion - <u>"If you plan to handle the matter yourself</u>, just send payment in full to us immediately" -

clearly implies that the debtor's only two choices are to pay in full or to suffer employer contact. As discussed fully in section III of this brief, these threats to make illegal contact with the debtor's employer violate 15 U.S.C. §§1692e(5) and 1692c.

This Court should therefore hold that defendants violated 15 U.S.C. §§1692e(4), (5), and (10) and 1692c by sending Exh. JJJ to Mrs. Gasser.

XV. DEFENDANTS VIOLATED 15 U.S.C. §1692e BY TAKING A COGNOVIT NOTE WITH FALSE AND MISLEADING LANGUAGE ON IT FROM PLAINTIFF SKIVER.

Whenever a debtor comes into ACCA's offices and wants to make arrangements to pay a debt in installments, ACCA has the debtor sign a cognovit note. (Crotinger depo., p. 81). A cognovit note signed by plaintiff Lorraine Skiver is included in Exh. VV, the workfile and account card maintained by ACCA. (Crotinger depo., p. 41).

The note contains a confession of judgment clause and the following warning:

> WARNING -- BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU OR YOUR EMPLOYER REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

The warning is printed in bold-face type directly above the consumer's signature to ensure that the consumer will see it. (See copy in Appendix 19). In actuality, confession of judgment clauses have been ineffective in consumer transactions in Ohio since 1974. §2323.13 O.R.C. Thus the warning statements on the face of the note are entirely false.

Defendant Crotinger testified that he "explains" the cognovit note clause to debtors before they sign in the following language:

Q.....is the cognovit note provision explained to the debtor at the time they sign it?

A. Yes.

Q. And what is explained to the debtor at that time?

A. There's no such thing as a cognovit, it's all promissory.

(Crotinger depo., p. 82). He elaborated:

> I tell them, "Before you sign anything, read it." Okay, and then I'll tell them, "If you're going to make a payment as agreed to the way it's on there, it doesn't mean anything if you sign it. If you don't intend to make it like that, don't sign it."

(Crotinger depo., p. 82). These ambiguous, misleading explanations couched in shoptalk do not clarify the legal effect of the note. Even if they did, they would not excuse the bold-face warning on the note which is totally misleading and inaccurate.

Defendants' use of the cognovit note with the false warning violates the prohibitions against "false, deceptive, or misleading representation or means in connection with any debt." 15 U.S.C. §1692e. In particular, this practice violates 15 U.S.C. §1692e(2)(A), (6)(A), and (10). Plaintiffs urge this Court to so hold.

XVI. CONCLUSION.

For the foregoing reasons, plaintiffs' Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOLORES GASSER, et al. Plaintiffs -vs- ALLEN COUNTY CLAIMS AND ADJUSTMENT, INC., et al. Defendants	)	CASE NO. C80-334 JUDGE POTTER APPENDICES TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The following is a list of the attached Appendices to Plaintiffs' Motion for Partial Summary Judgment:

App. 1: Exh. C, "Employer Communication"

App. 2: Exh. EEEE, FTC Interpretive Letter to Stephen J. Mansfield

App. 3: Exh. D, "Notice of Impending Garnishment After Judgment"

App. 4: Lambert v. National Credit Bureau, Inc., No. 80-282-J (U.S.D.C., D. Ore., 4-24-81)

App. 5: Exh. DD, "3 Day Notice"

App. 6: Williams v. Rash, Curtis and Associates, No. C78-1477A (U.S.D.C., N.D. Ga., 12-14-78)

App. 7: Exh. S, "Notice After"

App. 8: Exh. FF, "Notice to Appear"

App. 9: Exh. GG, "Investigation letter"

App. 10: Exh. R, "Notice Before"

App. 11: Exh. G, "Copy letter"

App. 12: Minick v. First Federal Credit Control, Inc., No. C79-2112 (U.S.D.C., N.D. Ohio, 6-9-81)

App. 13: Exh. M, "Tell-A-Gram"

App. 14: Scrimpsher v. Wegmans Food Markets, Inc., No. 80-01549 (U.S. Bksy. Ct., N.D.N.Y., 3-5-82)

App. 15: Exh. AAA, "Letter By Mail"

App. 16: Exh. W, "Which side of the fence are you on?"

App. 17: Dixon v. United Adjusters, Inc., No. 79-179 (U.S.D.C., D. Ore., 2-17-81)

App. 18: Exh. JJJ, "Employment Verification Letter"

App. 19: Exh. VV, Cognovit note.

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S E R V I C E

A copy of the foregoing Appendices to Plaintiffs' Motion for Partial Summary Judgment was served upon Harland M. Britz, Attorney for Defendants, 340 Spitzer Building, Toledo, Ohio 43604, this _____ day of _____, 1983.

Attorney for Plaintiffs