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DEBT COLLECTION: PROTECTING CONSUMERS

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TABLE OF CONTENTS

P R O C E E D I N G S

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INTRODUCTION AND WELCOMING REMARKS

MR. PAHL: Good morning, everyone, and welcome to our program. We look forward to having a very lively discussion over the next two days about debt collection litigation and arbitration.

I'm Tom Pahl. I'm one of the Assistant Directors in the Division of Financial Practices at the Federal Trade Commission (FTC). And what we'd like to do to start off our program today is to have some opening remarks from Joel Winston, who is my boss, the Associate Director of the Division of Financial Practices at the FTC.

MR. WINSTON: Thank you, Tom, and good morning, everyone. It's a pleasure to welcome you all here to our roundtable discussion on consumer protection and debt collection.

We first want to thank the Searle Center on Law, Regulation and Economic Growth here at Northwestern Law School for hosting this event in this beautiful facility here. I want to thank the discussants, none of whom are actually sitting up here but hopefully are in the first two rows. We have a distinguished group of panelists here who are going to be talking about the issues today.

I want to thank also the attendees we're seeing out here scattered throughout the auditorium. And I always wondered about the science of where people sit during conferences and lectures and such. It reminds me of law school where you've got the first row or two filled up with people who actually had done their homework the night before, and back in the back row, the people who hadn't were invariably called on by the professor. So we'll be calling on all of you back there so be prepared.

This is the first in a series of roundtables that we're going to be holding this year to address issues about litigation and arbitration of debt collection cases and the consumer protection implications of that.

We hope during these roundtables -- and we certainly have done so today -- to gather a diverse group of stakeholders, including state court judges, government officials, debt collectors, consumer advocates, academics, and lots of other people to identify the concerns and the possible solutions for the issues that are raised by debt collection litigation and arbitration.

Also, I want to mention that we're welcoming any public comment from members of the public too --

particularly those who can't attend. If they have something to say about these issues, we urge them to go to the FTC Web site and submit their comments either electronically or they can send them in by paper.

First, I just wanted to review briefly how we got here today. Late in 2007 I'm sure many of you attended our "Collecting Consumer Debts, the Challenges of Change" workshop in Washington, where we explored how changes in the industry were affecting consumers and collectors. And we subsequently issued a workshop report in which we recommended that the debt collection regulatory system be reformed and modernized to address both old problems and new problems that were coming into this industry. And at the time we announced a series of regional roundtables that we would be holding to help us develop policy recommendations on -- specifically on litigation and arbitration, and this is the first of those.

We're going to have two full days of action-packed discussion on a variety of issues. Today the focus is on the litigation issues; tomorrow we'll talk about arbitration.

With respect to litigation, as the volume of lawsuits has grown over recent years, there are a number of consumer protection concerns that have arisen.

Fundamentally, are consumers being treated fairly? is the question we need to answer. Are they getting a fair shake, or is the deck stacked against them when collectors bring suits against them?

Each panel today will be focused on an individual aspect of litigation, which spans the life cycle from filing of the enforcement act -- through filing of the action to the actual enforcement of the judgment at the end of the day.

Our first panel this morning will talk about the initiation of debt collection lawsuits with an emphasis on service of process issues and default judgment issues. We'll be drawing on the experience and wisdom of our expert discussants, and we hope to compile information about how service of process is effectuated and whether consumers are actually getting adequate notice that lawsuits are being filed against them.

We'll also look at the relationship between service of process and default judgments, the frequency of defaults, how often defaults are happening, and are there too many, the circumstances under which defaults are more or less common and the cost and benefits of different ways of addressing these problems.

After a short break, the second panel will discuss statute of limitations issues that arise in debt

collection litigation, including the determination of which statute of limitations applies in particular cases.

One of the focuses of this panel will be on time-barred debts. How often do consumers attempt to collect on a debt that's time-barred and under what circumstances? Should collectors be informing consumers when the statute of limitations has run on their debt when they attempt to collect it?

Then we'll have lunch, followed by our third panel, which will discuss the litigation itself. Specifically, the issue of the quantum and type of evidence that is typically introduced at trial in debt collection cases. Is it sufficient? Does it vary depending on the type of debt or the type of debt owner? Again, is the trial a fair one with adequate proof to establish the case?

The fourth panel will go to the end of the process, the postsuit issues in enforcing a judgment, and one of our focuses there will be on freezing and garnishing of consumers' accounts, including one one specific issue, which is the extent to which collectors are freezing accounts that contain exempt benefits such as Social Security benefits. What are the costs and benefits of different ways of collecting on judgments?

Our fifth and final panel this afternoon will

tie it all together. Are there best practices out in the industry that we should be looking at as models? How have the state laws and courts and the industry self-regulatory efforts been addressing these concerns in ways that we can learn from? What needs to be changed, and how should it be changed? The discussants on this panel will share their efforts and experiences in how any needed reforms should be implemented.

Again, I want to thank you for coming here today, and I look forward to a lively and informative discussion by the real experts in this, our panelists.

So thanks again.

(Applause.)

MS. BUSH: Hi. My name is Julie Bush. I'm a staff attorney at the Federal Trade Commission, and I'm very happy to be here today with such distinguished audience and panel members, as Joel mentioned.

I'll be coming back in a few minutes to deliver some housekeeping remarks about what you can expect today, but, first, I'm very delighted to announce Goeff Lysaught, who is the director of the Searle Civil Justice Center. He's our cohost and partner in bringing you this event today, and we're very delighted that he's here.

MR. LYSAUGHT: Good morning. Welcome to Northwestern University School of Law. We are pleased to have this distinguished group of visitors, as well, visiting our campus here at Northwestern and participating in this important discussion. The Searle Center is pleased to be working with the Federal Trade Commission to host this important roundtable discussion on consumer debt collection.

The Searle Center is a nonprofit research and educational organization based at Northwestern Law that is committed to the study of the impact of laws and regulations on economic growth. Our efforts seek to provide academic public policy and judicial leaders with analytically rigorous and balanced information on important and timely civil justice issues. Our empirical public policy research efforts are organized around the Searle Civil Justice Institute.

In March of this year, the Searle Civil Justice Institute released a preliminary report on consumer arbitration before the American Arbitration Association. This initiative, led by Chris Drahozal, the John M. Rounds professor of law at University of Kansas, remains the most comprehensive empirical study on the use of consumer arbitration.

The report investigated enforcement of due

process protocol in AAA consumer arbitrations as well as the costs, speeds and outcomes of such proceedings. Under Professor Drahozal's leadership, the Searle Civil Justice Institute's empirical research on arbitration, on consumer arbitration, is continuing and is now focused on comparing results for arbitration with court proceedings.

Two weeks ago Professor Drahozal shared preliminary findings from this in-progress work with the congressional subcommittee. These preliminary findings examined how debt collection cases are resolved in court in order to provide a basis for comparison with AAA consumer arbitrations. Interestingly, these preliminary results suggest that robust business win rates in debt collection cases may be due to the types of claims being brought and less to the venue in which these claims are adjudicated. Obviously, a topic that can be a robust discussion over the next two days.

Copies of both the original report are located in the lobby, and additional materials, including the testimony that I spoke of that Professor Drahozal gave last week, are available on our Web site at searlearbitration.org.

Again, given our research activities, we think this is obviously an important and timely topic for

discussion given that an important component of the Searle's Center's mission is to provide not only analytically rigorous analysis but balanced discussion. A roundtable discussion is entirely appropriate and consistent with our mission, manner of investigating this important issue.

I wish all of you the best of luck, and, again, welcome to Northwestern Law.

(Applause.)

MS. BUSH: Okay. Now for our housekeeping remarks.

First, I'd like to remind everyone to please turn their cell phones off so we don't have any interruptions during the program. The restrooms are located outside the auditorium and around to the left, so you know where they are.

This event today is being transcribed and is also being webcast, so people around the country may be watching it from different locations. And the panel -- the format, rather, is we're going to have 20 experts of various backgrounds on stage, and we're going to take turns talking about different topics. There will be a succession of FTC staff moderators covering each of the topics.

The last 10 minutes or so of each session is

intended for questions and answers, not from the facilitator, but from the audience. In your packets that you received today, you'll find two question cards for those in the actual audience here, and you'll want to write out your questions on the cards, pass them to the aisles, and people will be coming up and down the aisles periodically to collect those question cards and bring them to the facilitators.

For those of you in our webcast audience, you, too, will have the opportunity to ask questions. You should e-mail them to consumerdebtevents -- that's all one word -- at ftc.gov.

So you can ask your questions at any point during the discussion, and, in fact, we'll probably get to more of them if the question cards have already been collected by the time that 10-minute window comes along.

Today we're having a couple of breaks. There is some food and beverage that's been graciously provided by the Searle Center. We have to thank them for that. The lunch hour will be from 12:15 to 1:30, and it will be on your own. We have provided maps to local area establishments so you can find places that meet your liking.

At the end of the day, we're hoping you -- those of you who are sticking around will join us at an

informal gathering. It's at a bar called C-View located at 166 East Superior Street. It's very near here. And that will give us a chance to talk less formally about the events we've talked about today and so forth. So please join us, if you can.

And I'd also like to announce that the comment period for this roundtable has been extended. The original deadline was August 1st. We've extended the deadline through September 1st. So if things come up today that you'd like to offer additional information about through written comments to the FTC, we hope you will do so.

And, finally, I'd like to announce the dates for our next roundtable. They will be September 29th and September 30th. It will be at a northern California location, and we don't have the exact details yet, but we will be working on them as soon as we get home from this roundtable.

Thank you very much. I'd like to ask those of you who are today's speakers to gather on the side over there, please. And in an effort not to show any favoritism, we've seated our speakers alphabetically around the horseshoe.

Thank you very much. Again, we're privileged to have such a wonderful audience of experts here today of

varying backgrounds, and I'd like to -- you'll find in your packets a full description of a biography for each of our speakers.

INTRODUCTION OF PARTICIPANTS

MS. BUSH: I'd like to ask today's speakers each to introduce themselves by saying their names, where they're from, and if they'd like to add one brief thing about what they're hoping for today, they can do that.

Would you please start, Rozanne.

MS. ANDERSEN: All right. Thank you, Julie.

My name is Rozanne Andersen. I'm the executive vice president and general counsel of ACA International, the Association of Credit and Collection Professionals. Our primary office is located in Edina, Minnesota, and our satellite office, our government affairs office is located in Washington, D.C., and I am just looking forward to a lively discussion of the issues and an open dialogue so that we perhaps can understand one another better.

Thank you.

MR. BARRY: My name is Pete Barry. I'm a plaintiffs' consumer rights attorney in Minneapolis whose practice focuses exclusively on debt collection litigation.

MS. BROWNE: My name is Lauren Browne. I'm with Consumers Union, a nonprofit publisher of Consumer Reports magazine. We're based in San Francisco, and I'm looking forward to bringing the consumer perspective

today.

MR. BRAGG: I'm Rand Bragg. I'm a consumer attorney here in Chicago. I've been doing FDCPA litigation basically on a class action basis on behalf of consumers for the last 27 years.

MS. BROWN: I'm Lorray Brown. I'm with Michigan Poverty Law Program, which is a statewide resource-backed center for legal services programs in Michigan, and I'm a statewide consumer law specialist for legal services attorneys.

MR. BUCKLES: I'm Mike Buckles. I'm from Beverly Hills, Michigan, which is north of Detroit, home of the Detroit Redwings. I'm a collection attorney. I'm also the government affairs director for the Michigan Creditors Bar Association. I'm the former past president of the National Association of Retail Collection Attorneys, and I'm here to enjoy talking with my colleagues on both sides of the bench and bar -- consumer attorneys and collection attorneys -- to try and arrive at some consensus so that everything can be fair across the board for collection of debts to the consumers and the creditors.

JUDGE DONNELLY: My name is Tom Donnelly. I'm a judge here in Chicago and presided for four years over the collection call here in Cook County, and I'm looking

forward to understanding more about consumer debt from people who know more than I do.

MR. EDELMAN: I'm Daniel A. Edelman. I'm a member of the firm of Edelman, Combs, Latturner & Goodwin. We represent consumers in both affirmative lawsuits, including fair debt lawsuits, and in defending collection cases in Cook County and elsewhere.

MR. LEIBSKER: My name is Ira Leibsker. I'm an attorney from Chicago and partner in the law firm of Blatt, Hasenmiller, Leibsker & Moore. I've been practicing collection law now for 33 years. I'm the immediate past president of the National Association of Retail Collection Attorneys and founder and vice president of the Illinois Creditors Bar Association, and I'm pleased to be a part of this distinguished panel and look forward to the discussion.

MR. LERCH: My name is Steve Lerch. I'm from Fort Wayne, Indiana. I'm a partner in the law firm of Wright & Lerch. We practice collection law throughout the state of Indiana. I've been doing that for 17 years. I'm also the recently elected president of the Indiana Creditors' Bar Association.

JUDGE LIPMAN: My name is Jeff Lipman. I'm a Magistrate Judge in Des Moines, Iowa. I've been appointed about eight years ago, and I'm also the

president of the Iowa Magistrate Judges Association. We handle a great deal of collection law in our area in the magistrate courts, and I'm looking forward to being part of this panel.

MR. LYNGKLIP: My name is Ian Lyngklip. I am a member of Lyngklip & Associates. I'm a private consumer protection attorney practicing in fair debt collection practices and fair debt credit reporting. I'm also a former cochair of the National Association of Consumer Advocates and am currently an adjunct professor at the University of Detroit Mercy School of Law teaching in debt collection.

MR. MARKOFF: Good morning. Bob Markoff. I'm a collection attorney located in Chicago, Illinois. I'm the current president of the National Association of Retail Collection Attorneys. I also serve as vice chair of the Illinois Institute for Continuing Legal Education. I hope to learn today and tomorrow of each others' concerns and that we all better understand all aspects of the debt collection process.

JUDGE MOISEEV: I'm Susan Moiseev. I'm a judge in suburban Detroit in a district that includes Mike Buckles' home and office. I've been on the bench 23 years, and I'm currently the president of the Michigan District Judges Association.

District judges -- district courts have jurisdiction up to $25,000, so we see -- most of our civil practice is consumer debt, and our Court has been particularly proactive on issues of debt collection, as we see such a high volume.

MS. NEPVEU: Good morning. I'm Julie Nepveu. I'm with AARP Foundation Litigation. I litigate and write briefs on behalf of older people in the areas of consumer law, including debt collection and garnishment cases, and I'm interested in ensuring that the perspective of the older consumer is represented here.

JUDGE PANARESE: Good morning. My name is Joe Panarese. I'm a judge in the Circuit Court here in Chicago, and I am in the court that hears the debt collection type of cases on a regular basis. And I would also like to see the concerns on both sides, that it's a situation that's fair for all parties involved, and I'm happy to be here today.

MR. PHILLIPS: Good morning. I'm Dave Phillips with the law firm of Phillips & Phillips in southwest suburban Chicago. I'm also a member of the National Association of Consumer Advocates and the Illinois State coordinator. I represent consumers in debt collection cases and in federal courts suing debt collectors.

Thank you.

MS. SINSLEY: Good morning. My name is Barbara Sinsley. I'm the general counsel for DBA International, and I'm also a partner in the firm of Barron, Newburger & Sinsley. I'm interested in talking about the issues surrounding debt buying today.

MS. WEINBERG: I'm Michelle Weinberg. I'm with Legal Assistance Foundation of Metropolitan Chicago, which is the LSC, Legal Services, for all of Cook County. For eight years I've been running a project doing consumer protection for the elderly. I represent a lot of seniors. I'm also a former board member of the National Association of Consumer Advocates.

I'm particularly interested today in the debt buyer and the nature of the proofs required of debt buyers and also in the garnishment of exempt assets.

MS. BUSH: Thank you very much. Would everyone please join me in a hearty round of applause for our panel.

(Applause.)

MS. BUSH: Next we're going to begin our first panel, which has to do with initiating suits, default judgments and service of process. The moderator for that panel will be David O'Toole, who is an FTC attorney from our regional office in Chicago.

INITIATING SUITS:

DEFAULT JUDGMENTS AND SERVICE OF PROCESS

MR. O'TOOLE: Hi. I'm David O'Toole. We're going to try to figure out how to do this mechanically so that for the next two days the lessons I learn everybody else will be able to apply somehow.

We're going to start off talking about service of process and, in particular, default judgments and how frequent they are. And I was hoping that maybe one of the judicial panelists or a practicing attorney could talk a little bit about how frequently default judgments occur in debt collection cases, and then we can talk a little bit more about some of the aspects of that.

Any one of our judges that specializes?

JUDGE MOISEEV: Sure. I don't specialize but I would say, rough estimate -- because I didn't do any calculations -- 85, 90 percent of the cases go by default.

MR. LERCH: That would sound pretty close to it.

JUDGE LIPMAN: I would say in Iowa that's probably about right, but I would say when I started eight years ago, when we came into work, on the bench we would have a bin that would be about half full with default judgments, and when I come to work now, eight years later, we have about three or four of those

that are heaping over the top with default judgments, and we have about the same amount of judges that are handling these cases that we did eight years ago.

MR. O'TOOLE: So why do you think there's more default judgments now, that volume, than eight years ago?

JUDGE LIPMAN: I think part of it has to do with the economy. I think part of it has to do with the aggressiveness of third-party debt purchasers that have a lot more interest in bringing actions because of the way they purchase the debts.

It's a numbers game and I think the numbers show that the more they file them -- the computerized age of beginning to research the debtors brings a lot more to the table for a debt buyer that have more access to get information on debtors. It's more lucrative for them to file these cases, and I think that's increased the numbers that we see.

MR. LERCH: If I could just ask for a little clarification -- when you say "Are there more," I think quantity-wise there are more, but I think percentage-wise there aren't more.

I think a good example would be in my main county, Allen County, Indiana, 350,000 people. If you go into small claims court, they have baskets there, "No Action," "Default," "To Be Reviewed," et cetera. I don't

think the percentage of the defaults versus the agreed judgments in the basket has changed; it's just that maybe those numbers have changed.

JUDGE LIPMAN: I would agree with that.

MR. LEIBSKER: If you look at the number of consumers that are out there and how much credit has grown since 1990 to the present. It's doubled, maybe tripled, so it would only make sense that those numbers would go up.

MS. BROWN: In terms of -- not knowing the cost, as a legal services attorney -- and I do it statewide, so I get calls from a lot of the legal services attorneys throughout the state of Michigan -- I would say about 90 percent of the clients who walk in our door are coming in postjudgment based on default judgments. When we ask them why didn't they come to us sooner when they got the summons and complaint, a lot of their answers are they never got it, that they're just getting for the first time this writ of garnishment, and so the postjudgment is the scenario we're faced with.

MR. BUCKLES: Let me address that for a moment, if I could. I've been doing this for 35 years, and the amount of default judgments, the percentage of default judgments actually has decreased in the last five years primarily because more answers are filed, either through

debt negotiators who solicit consumers to pay them money and actually engage in the unauthorized practice of law, through Internet answers -- they do -- Internet answers, many protestor answers that you see.

But I agree with my colleagues that the volume of collection work has increased, and everybody would admit that. The number of cases in every court has increased. That's a function of how credit has expanded in our economy, which actually has helped everybody, too. We're a credit economy.

But the number of default judgments is probably, in my practice, around 85 percent. I guess the real question is, why is that an issue and if it's an issue of service of process, then that should be addressed at the very outset. The Michigan creditors bar has best practices on service of process. We have our own unique mode -- I'll talk about later today -- of service of process, but default judgments in and of themselves are not necessarily bad.

I mean, most of the people, in my opinion, don't file an answer because they have no defense. Lorray just mentioned folks coming to her office and saying, "Well, I never got served." The fundamental precept of all of us who went to law school and became lawyers, we all raised our right hands to swear to uphold the

Constitution. It's our obligation, whether you're defense counsel or whether you're plaintiffs' counsel, to ensure that you have correct service of process. I don't think there's anybody in the National Association of Retail Collection Attorneys or the creditors bar or any collection attorney that doesn't want somebody served.

So if the issue is service of process, that's one thing. If the issue is default judgments, I'm not sure why that's something that is necessarily good or bad, it just is, because people don't respond to the summons and complaint.

MR. BRAGG: Well, a lot of that is that consumers don't have legal advice or representation. Those of you who saw this morning's Chicago Tribune, on the front page was an article about the increase in litigants being unrepresented, not primarily about debt collection but just in general.

So it is a common factor. Consumers need assistance and advice about whether the statute of limitations has run, whether the debt is owned properly by the entity that's attempting to collect it, whether the charges in there are proper, all of those things. They need representation.

MR. O'TOOLE: Before we actually go into the

debt collection lawsuits themselves, if I could, let's turn and talk about the service of process issue. That's something that a lot of you have mentioned.

Part of our role here is to be educative, and there's a difference I know in a lot of jurisdictions as to how to effect proper service. Being a lawyer for the federal government, I'll admit I know nothing about the subject. And I practiced in Cook County for several years before going to work for the federal government, and I know I hated everything to do with service. But I know in Chicago the sheriffs serve everything, or you can hire special process servers.

MR. LEIBSKER: In Cook County the sheriff is, at least in municipal courts, to serve the first summons, and then thereafter it would be up to the parties to determine if they want to go with a private process server to serve that summons. The sheriff has a service rate of about 40 percent. The process servers, private process servers, usually have, of that 60 percent that isn't served by the sheriff, probably 75 to 80 percent service rate.

MR. LERCH: I think the threshold question -- and I'm familiar with Indiana, and I realize that every state has their own -- is what has been established as good service of process. Now, in Indiana you go to

trial rules, which are established by the Supreme Court, specifically under 4.1, 2, 3, 4, but the primary one is probably 4.4, and it will tell you, "Personal service, give it to the defendant, certified mail return receipt," and there's seldom problems. I mean, one can't go in front a judge or Magistrate and say, "I didn't get notice." Obviously, unless there's fraud involved, other than that, it's probably good service.

The one in Indiana that probably generates the most problems, to the extent there are problems at least, are in posting and mailing, and no matter who serves it, sheriff, private process server, the plaintiff or whoever, that constitutes putting it in the last known residence that you believe the defendant resided.

Going back, in the case of a small claims complaint sending a notice of claim, in the case of a plenary complaint, a copy of the summons to the address, and if the Court sees that that did not come back to the Court, that is considered good service. I don't know what the other states do, but that's the primary way. We have other ways how to serve the government, how to serve corporations and everything else, but that's the primary rule in 98 percent of all cases.

MR. PHILLIPS: And that's the one that I have

the most difficulty with. Although it might be constitutionally okay, it relies on the fiction that the Post Office is going to deliver it and that if it's a bad address it comes back. And I think it was the Boston Globe or one of the newspapers sent 100 letters out to 100 known wrong addresses. Only 50 of them came back.

I practice in Indiana and in Illinois, and I've done class notices in Indiana. In fact, I did one earlier to 8,000 Indiana residents -- and a bunch of notices came back right away as bad. So under this rule we presume all the rest were good, and default judgment would be entered if I was a collection attorney, God forbid.

MR. LERCH: What does that mean?

MR. PHILLIPS: About 60 of them have been trickling back in August, well after they would have taken a default judgment. So I think copy of service is a real problem from my perspective.

JUDGE LIPMAN: In Iowa we're pretty similar to Indiana. We have a statute that requires personal service. We have an exception where the clerk actually mails certified service.

Now, as a judge, when it comes back, we look at them for default, and what I usually look at is that if it says "unclaimed," or if it says, you know, "unable to

forward" or "undeliverable" -- "undeliverable" or "unable to forward," then I generally -- I'll send notice out to the plaintiff saying, "You need to have actual service; you need to personally serve this or try it again." If it says "unclaimed" or something like that, then for the most part we're probably going to enter default judgment. I don't know if some of the debt attorneys or consumer attorneys think that that's not a good practice, but that's the way we've generally done it in my county.

JUDGE MOISEEV: A lot of creditor attorneys rely on postal checks that they ask the post office, and the Post Office says, "No forwarding order on file," but often I get people who say, "I never lived there, so there was no reason to change my address."

MR. BUCKLES: One of the points in Michigan that her Honor is making is that we first have to have personal service. We have to do that, and it has to be sworn under oath with a notary signing it, unless it's an officer of the Court. If that doesn't work, we have to go to the Court and say, "Here's our reasons why."

And quite honestly a postal check is not sufficient most often with many judges. They want something else. And our process servers will do what we

call -- it's not an affidavit -- "verified statement of attempts." And they'll say they went, "There was this car was in the driveway; there were people inside; I put my card on the door."

You have what we as lawyers call a "totality of the circumstances." We've sent out a demand letter, statements were sent to that account, the letters weren't returned, but better than that, we ask our process servers, "Give us the drivers for this license plate number. Look that up with the Secretary of State; see who owns the car," and if they own the car, then that's something we give to the judge, and it's up to the judge to determine whether they're going to give us default on the service.

I might just add one more thing so that everybody understands something. Many debtors evade service. Not only that, many debtors are told not to accept service.

JUDGE MOISEEV: I'm shocked.

MR. BUCKLES: The debt negotiating companies actually tell the -- and the Internet -- "Don't take any service; don't answer your phone calls; don't answer letters; don't take any service." So that's a factor that needs to be considered in all of this, because it's a balancing.

MR. LYNGKLIP: You're jumping straight to alternate service and you're jumping over the pink elephant sitting in the room, which is what happens when the process server lies.

MR. BUCKLES: They should be prosecuted.

MR. MARKOFF: Send them to jail.

MR. LYNGKLIP: What does that do for the consumer, though? Sending them to jail and leaving this to the judicial system or to a prosecutor or to a DA -- how long did it take Andrew Cuomo to bring that suit that we just saw last week -- 100,000 judgments -- potentially bad judgments can go out.

MR. O'TOOLE: You need to tell them more about that in New York City.

MR. LYNGKLIP: I know what I read in the paper, and the basis of the suit is that there are potentially 100,000 judgments out there in the state of New York that are predicated upon nonpersonal service in the face of an affidavit of a process server.

So before we even jump to alternate service as an appropriate means of -- on state-by-state basis of obtaining service and providing due process, the first problem that I see in my practice is I see people who have never been served and, in fact, are being served at bogus addresses or being served at times and places

where they can demonstrate that they were not either at their homes or in their state or --

JUDGE MOISEEV: Are you suggesting that the judges aren't setting aside that service?

MR. LYNGKLIP: Oh, there are any number of judges who won't set that aside without a meritorious defense and without --

MR. BUCKLES: Not if it's not noticed. That's not -- that is not true. I'm sorry. If you don't have notice -- that's a constitutional right to have notice. Every judge -- every judge in the state of Michigan and in this country will set aside a judgment if a person did not have notice.

MR. LYNGKLIP: I know what due process says, and I know what the requirements are, and I don't think the focus should be on whether a judge is correctly applying the court rules that would allow it to set aside. I think that the judges are greatly overworked, and I think they are underresourced --

JUDGE MOISEEV: And underpaid.

MR. LYNGKLIP: -- and grossly underpaid, and I still see that this happens. But the problem is the process servers are themselves immune from an action under the FDCPA, and we have debt collectors who occasionally are appointing people that they know are a

bad process server -- they know are bad --

MR. MARKOFF: No, no, that is not true. We are not looking to commit fraud. We collect debt ethically. We do not want to have invalid judgments. Do you know what it wastes in our time and resources five years down the road to have a judgment washed when you're in the middle of a wage-deduction proceeding and you have to go and explain to your client that you had bad service? We want good service. And the reason --

JUDGE MOISEEV: You do, but not everybody.

MR. LYNGKLIP: I'm not suggesting that that is the practice, but when it happens -- and we have had instances of attorneys in our state who have falsified service of process and were --

MR. MARKOFF: Attorneys who have falsified?

JUDGE MOISEEV: We did have a situation in Michigan.

MR. BUCKLES: He was disbarred, too.

JUDGE MOISEEV: No, he wasn't disbarred. He was suspended. I think it was 87 counts of contempt in regard to his falsifying proofs of service, and affidavits were substituted.

MS. WEINBERG: I would not -- I think that the judges will typically accept the affidavit of the process server over the client who comes in two years

later when their wages are being garnished and who say, "Oh, I never got served," and they say, "Well, we have an affidavit, a sworn statement that says you were served."

MR. LEIBSKER: Judge Donnelly?

MS. WEINBERG: Judge Donnelly wouldn't do that.

MR. O'TOOLE: The issue of judges being underpaid, I think we can all agree that government employees generally are underpaid. But, sir, what is your docket like? I mean, I practiced in a courtroom a little bit back in the day.

JUDGE DONNELLY: I think the tubs -- Joe Panarese and I are well familiar with -- in the trial court and in collections, the tubs of default records are enormous. So you'll have sometimes, in a collection call, 300 to 600 default orders to go through.

The difficulty I think that's raised by the New York case -- I read the complaint in that case, and it's a very interesting complaint -- is it documents that process servers by an audit conducted internally by the Court, which is something we don't have in Illinois, determined that process servers were claiming to have personally served up to 12 or 13 people simultaneously in different regions of the state. In the complaint, pages 6 through 9 are all these documented occasions of

simultaneous service.

And I have the same attitude as many people here hearing all these complaints of "I wasn't served" at garnishment, that sort of thing, that these people are just making it up. But one day one of my colleagues, Judge Taylor, just took a stack of services from one process server, and this person claimed to be in areas 30 miles apart in the Chicagoland area within minutes. And we brought him in and the law firm in, and we said, "Is he Superman? How can he be doing this?" And he came up with an explanation that he was signing it for other process servers.

But that experience of seeing fraudulent service gave me a lot more skepticism for actual service of process and a lot more belief in what debtors were saying than I had previously. Previously I had dismissed it.

And that I think is the biggest cause for concern among the judges is that the whole judgment is bad if service isn't good. And I think if there's any area which should be concentrated on it's assuring good service, and I think auditing service by just taking the services, personal service and having -- in Illinois we don't have anybody that does this, but I think it would be very good, because otherwise there's no check on it.

Otherwise, it's just hit or miss by debtors who are motivated enough to file a motion to quash the service of process, which we know is very difficult for them to do without -- in Illinois we have several requirements. They have to have an affidavit attached; they have to comply with certain legal standards. Most of them won't be able to do it.

And I think the importance, the due process importance of notice and an opportunity to be heard, is so important that we shouldn't rest all of that on a slender reading of debtors taking an initiative to file motions to quash. There should be some internal court audit of service so we can do this.

Just one more thing, because I think a lot of the debt collectors and attorneys get their hackles up. My experience is there's an extraordinary range in the ethics of the collection bar, and I think the people who are seated here are among the top drawer of the collection bar, but there are people who are collecting on their own debt who have very great motives -- sole practitioners -- to maybe hire not the best process servers.

We as judges are powerless to figure out -- we can't treat anybody differently; we have to treat everybody the same. We've got this huge volume. We

can't do audits of service of process, and it's very difficult for us to deal with the situation. We get all these claims of people who weren't served. There's nothing we can do but rule on the motions that come before us.

JUDGE MOISEEV: We did have a situation, also, where there was simultaneous service -- within our community, but I know you can't get from one end to the other at the same time. But my clerks picked that up, because they tend to file a handful -- you know, a stack of service at the same time, and so just thumbing through them the clerks found that out right away.

MR. MARKOFF: And process servers aren't particularly smart. That's how you catch them, because -- and it usually is the clerk.

And, frankly, 20 years ago our firm was victimized by a fraudulent process server, and we cooperated with the State's Attorney's office to prosecute the individual, but the point is I didn't knowingly go out to hire a bad process server. And, in fact, we do our best to check process servers.

And I would like to offer a recommendation that we can help ameliorate the situation, and that is when we are alerted by our servers that there has been service of process, we should be able to send out a

letter or a copy of summons and complaint to the consumer. But our fears as a collection attorney, as a collection bar, is that may in some way be violative of the FDCPA and may be giving an overshadowing type of notice, and I leave my colleagues on the panel to think of reasons to sue me if I were to send out such a notice to the consumer. If the consumer wasn't served and I sent this notice but the mail's received and they come to Court and they were personally handed a summons, I don't want to be accused of doing an unfair litigation procedure.

But the point is that there are ways that we can do a better job to ensure that the consumer receives notice. Regular mail as opposed to certified mail -- and Judge Donnelly in particular on motions for special service in unusual circumstances will require posting of the summons and complaint on the gate or door of a house in the case of a gated community and it's locked.

Now, that in itself can be seen as violative of the FDCPA, because it's a public posting of the complaint. But the point is that's the risk we take with that type of service, but we do our best always to obtain service.

JUDGE MOISEEV: But you could also shift the burden back to the process server him or herself. It's

easy for me when the process server writes down that the person was five-two, weighed 180 pounds, and then the person standing in front of me says, "I was never served" is 6 feet tall and 190, and that helps me a lot.

MR. BUCKLES: You know, I would suggest that the consumer attorneys here can get together with the creditors bar in each state, and that's exactly what the Michigan creditors bar did. We have a best practice that requires that. In fact, I reject and will not pay for any proof of service that does not list the physical characteristics of the defendant. I want age, gender, race, hair color, whatever else they can get. So when that debtor comes in front of Judge Donnelly later and says, "I wasn't served," the judge will say, "Well, how do they know that? They couldn't fabricate that. It would be awfully hard to get that much fabrication." There's an example of the data we can use.

MR. BARRY: If I could just jump in here, your Honor, all of that information is available on publicly available databases, LexisNexis, Accurint. There's all kinds of information that for $1 you can pull up that includes driver's license information that would have all of those physical characteristics on it.

I've seen sewer service in Minneapolis. I know I've seen it, because I had a process server who claimed

to have served my client when my client was in a locked facility, a bank facility behind three layers of security. We looked at the security tapes, and it never had anybody -- nobody ever signed in, and that person couldn't physically have gotten in there unless they got past all those guards.

That case got resolved but the fact of the matter is I believe that the attorney probably meant well and believed the debtor was served, but we're talking about default judgments and service of process. I just want to talk a little bit about how it is in Minnesota.

I want to -- it may very well be in Michigan there aren't nearly as many default judgments in Michigan as there were 20 years ago, but I will tell you absolutely -- and I think that was a comment you made.

MR. BUCKLES: I didn't say that. There's more default judgments but I don't think the percentage is any more.

MR. BARRY: Well, I will tell you percentages have skyrocketed in Minnesota, particularly in Hennepin County. There's been numerous television stories and local newspaper clippings about how the Hennepin County court, which would be somewhat comparable to Cook County in Illinois, have been inundated with default judgments by the clerks. And the reason for that is very simple,

because the laws have been designed by the collection -- with all due respect to the collection bar -- by the collection bar to benefit the collection bar.

We've got hip pocket filing in Minnesota, which allows collection attorneys to serve someone without filing a lawsuit with the Court. There's no judicial oversight and all the judges on the panel perked up about "What's our job?" Your job is marginalized in Minnesota; you don't have a job in Minnesota in a default judgment. An administrative default judgment in Minnesota, that's handled by the clerk. You can serve a lawsuit in Minnesota, never file it with the Court and garnish wages when you, as the attorney, the collection attorney, determine that that consumer is in default on that debt.

I think that being able to collect debts without any court intervention or any judicial oversight is absolutely -- it's counterintuitive to any sense of due process, in my mind. And as shocked as these judges are looking, I'm telling you that that's how it exists in Minnesota. You can file -- you can serve a lawsuit, never file it with the court, and the default occurs because the consumer picks up the phone and calls Hennepin County, calls the clerk of the Court and says, "Madam Clerk, I got served with this lawsuit, and it

doesn't have a court file number on it." And the clerk says, "We don't have anything on file." You don't have anything on file because it was never filed with the Court. You initiate a lawsuit in Minnesota by simply serving the summons and complaint.

MR. MARKOFF: That's not the case in Illinois; I assure you.

JUDGE MOISEEV: You never have to file it?

MR. BARRY: Never have to file it.

MR. LERCH: How do you enforce it post judgment?

MR. BARRY: You simply -- if you want judicial intervention, if you want some kind of order -- you can take discovery without judicial order, but if you want some kind of judicial intervention, you can then file it.

MR. O'TOOLE: Is this unusual?

(An off-the-record discussion was had.)

JUDGE MOISEEV: I sanctioned a law firm because they issued a garnishment -- they served a garnishment without it ever getting through the court.

JUDGE DONNELLY: We've had that happen in Cook County.

MR. BARRY: That's rewarded in Minnesota.

JUDGE MOISEEV: Sometimes we'll get the disclosure, and we didn't have the garnishment.

MR. LYNGKLIP: If I can come back to the process

servers, which are the problem -- and I acknowledge that the attorneys on this panel would not want to hire somebody who they know is a bad process server, but the process servers themselves have all the adverse incentives that are documented within the FDCPA itself and fall within the statutory definition of a debt collector and are effectively exempt and are amongst themselves participating in a race to the bottom, same race to the bottom that the statute is trying to avoid.

And without bringing them into the system, at this point I think we're only going to expect to see more and more of these kinds of problems popping up. Because the question, the ultimate question is what's the remedy going to be for the consumer? How are they going to fix it when they have not been served and the judgment's been taken? What's the remedy?

MR. MARKOFF: The remedy is to quash the service and send the process server to jail. First of all you have a judge supervising these cases -- okay -- and Judge Donnelly, who I've known for many years, will not hesitate to use the full authority of his office to punish someone who files false pleadings or does any improper act or in any way harms not only the consumer but the process of law.

So to say that we need more regulation, we have

the regulations on the books; we need better enforcement. Just to pile on more laws or to give consumer attorneys new causes of action -- are you going to have the sheriff's office in there, too?

(An off-the-record discussion was had.)

MR. O'TOOLE: We're degenerating here.

Is there a place like Cook County where sheriffs do service?

(An off-the-record discussion was had.)

MR. LEIBSKER: I actually have more motions to quash on service that has come back from the sheriff than private process servers, and they're serving a lesser amount. So an officer of the court won't necessarily serve process any better than the private process server.

MS. WEINBERG: I would say it's even tougher to get a motion to quash when you've got a sheriff's affidavit.

MR. O'TOOLE: So why would that be, though?

MR. LYNGKLIP: Because you have available a 1983 action, if that's going to be a problem, but for a private process server, I quash service. I mean, I go to court. I've never seen a process server brought into court; I've never seen one prosecuted; I've never seen one sanctioned; I've never seen anything happen to

these cases.

JUDGE MOISEEV: You've been in my court. I do that.

JUDGE DONNELLY: Mr. Markoff, what would you -- I was really impressed by reading about an internal audit that was conducted by the New York courts, and I thought -- and judging from my experience with Judge Taylor's little audit -- we did one spot audit -- what would be your response to spot audits being conducted by some agency, either the Attorney General or something, to check for service and make sure --

MR. MARKOFF: Actually, I would encourage the spot audits, because there's nothing to hide. I want to use the best process servers possible. I use a couple of different process serving firms in the event that someone goes bad or -- you know, to keep them on their toes.

I want good service. I know one of the firms we use -- actually, both of them will tell us, "There may be questionable service here because the person refused to identify herself or himself and we're not sure, but we're going to give you a certificate return and make notations." We have notations available for the Court on most of our services as to just what happened, "Refused to open door, music in the house" or "Person opened door, surly, threatened to shoot me, please don't

send me back there." We have these notations.

And so the point is, we want good service, and I will welcome -- my books are open, so to speak. Pull the court files, look at who we use and what they do. You'll see very few motions to quash on our matters.

MR. O'TOOLE: We have plenty of time, so, please, one at a time.

MR. LEIBSKER: If I could add just one comment, at least in New York, the audit that took place there, from what I understand the Attorney General was able to spread all these services out on a big table and actually look and see where these things were being done. So one law firm that can serve something at 8:00 in the morning and another law firm serve at 8:05 in another part of the state, that particular law firm, if they did their own internal audit, they might not have been able to spot that that is bad service.

I just want to make sure I made that clear that as much auditing as I can do in my office, I don't know if I could spot a fraudulent return. And I think an external audit, sure, I have no problem with that. I encourage it.

MR. EDELMAN: What I think is needed is a means of routinely requiring the process servers to account for their actions in such a manner that makes it easier

to detect this sort of problem.

I would suggest requiring them to keep a log of their daily activities showing who was served, when, where, for whom, and requiring that this be filed with a court or State official so that if there are any anomalies, it can be readily detected.

There's one other problem and I think some of the fault for this lies with the debt collectors and creditors. In Illinois we have substitute service. You can serve a member of a household over 13 and then mail.

The problem is -- and I've personally encountered this on multitude occasions -- somebody is served. That person has nothing to do with the defendant. They're not a member of the household; they're not a relative and in some cases it is a place where the consumer lived some years ago, and in some cases it is a person with a similar name.

And what happens is a return of service is filed saying, "I served XYZ at such and such a place; I mailed it." Somebody actually gets this. I've had cases where they've actually called the plaintiff's lawyer or called a creditor and said, "Hey, I got this. I'm not this person. I've never had a debt like this. My name is misspelled. What should I do with it?" "Oh, forget it."

Thereupon, a judgment is entered against a person -- a debtor -- and when the time comes to enforce the judgment, they more often than not have executed against the right person and sent a wage deduction to the employer of the correct person who for the first time finds out about it.

I think that something needs to be done to ensure that the person served can be identified by address or otherwise with the intended debtor.

MS. BROWN: Just to reiterate that, when, as legal services attorneys, we go in and file a motion to set aside a default judgment because of lack of service or even a foreclosure issue where we have homeowners saying, "I didn't get notice," and the burden is on them, because part of the problem is that when we go in and there in the court files, there's some affidavit from the sheriff saying, "I served this," we lose. Right?

So maybe what needs to happen is maybe a shift, rather than an audit -- it's not going to work with my individual client at this point, but maybe the burden then shifts to the debt collector or the foreclosure attorney to come now with the sheriff and show some kind of log of how many services they did that day, how it jives with the service that the homeowner or the

consumer is saying they didn't receive that service and if it's likely that they would have been able to serve that homeowner on that particular day and time that they say they did.

So maybe that's what needs to happen on an individual case is that we need to shift the burden to the other side when the homeowner claims lack of service.

MS. NEPVEU: If I may, there are additional problems in service beyond not getting service, the abuse of process problems that are happening where the service is accompanied by a testament, stipulation of settlement or something of that nature. Or even in some places, I believe in Maryland they have -- the Court sends a letter that says, "Come to the courthouse and meet with the debt collector and tell them you owe a debt," and then you never get to court.

What is it that's being served? Is it just the warrant, or is it more, and does that "more" create a problem for debt collection in addition to research problems?

MR. O'TOOLE: The letter you're talking about in Maryland, is that actually coming from the Court?

MS. NEPVEU: It comes from the Court, and it tells the debtors to come -- they come to a room

basically like this. They line up and talk to the attorney. They never have a right to get to court; they never get told, "If you have a defense, don't talk to the attorney about it," or "Anything you say will get used against you." They never have an opportunity to find out whether or not they're going to have a court date. They might have to come back several times.

Some of the folks that we're talking about are people that have really a hard time getting to court. A lot of the folks that have high debt or medical debt especially may have disabilities. So it's very difficult for them to get to court several times. So when they were told by the Court "Come and talk" so that they don't have to deal with so many judgments or such a huge docket, this is a way for them -- the courts have set this up to reduce the load.

MS. NEPVEU: This is before --

JUDGE MOISEEV: So they send it out before they file an answer?

MS. NEPVEU: Yes.

JUDGE MOISEEV: Because we use a mediation service after they've filed an answer.

MS. NEPVEU: This is "Come and meet all the debt collectors." They may not even speak English. They've got folks who have time-barred debt that might not be

seen, a lot of older folks who think that when they get the stipulation of settlement they have to sign or they'll go to jail.

I think there are a lot of misconceptions. We people who are lawyers don't understand how people who are not lawyers think anymore -- we've forgotten -- and the people who are out there living, getting this scary notice, not understanding what that means, not understanding what that means for whether they have to do it or not.

If you go to the OCC Web site, it says, "Follow the directions in the letter you got from your debt collector and do what it says." It doesn't say, "Get an attorney." It doesn't -- people need more legal advice; they need better representation, because these service issues do not -- they don't go away just because somebody checked the law.

MR. O'TOOLE: Ms. Andersen.

MS. ANDERSEN: I do not want to misstate my level of experience on a daily basis with the service of process, but I just want to at least take a moment to put some things in perspective here.

From the ACA International's standpoint and I think it's fair to say on behalf of the industry, the collection and asset-buying industry, we absolutely

denounce any practice by the asset buyers or by debt collectors, by collection attorneys that would intentionally or even through oversight suggest that improper service is acceptable. The heart and soul of all of us as lawyers, we know, as you said, Mike, we need to effectuate proper service.

Now, having said that, as an association, we're also very attuned to the fact of the word "accountability." And I think what we're hearing is that we are hearing that there's tremendous differences from jurisdictions, from state to state in terms of how this problem is handled. So I do not want to understate the problem. That's obvious and I applaud the FTC for creating this dialogue and this opportunity to raise not the one service of process issue before us.

But I do think that -- I'll say it this way: The New York City Department of Consumer Affairs called me about a year and a half ago and said, "Rozanne, is there any way your association can put together some best practices for service of process issues?" And I kind of reached out and tried to figure out how to do this. Do you know what I met with? I met with not 50 different variations of the issue; I met with hundreds and hundreds of variations. It's like we're not the right -- I don't want to disavow responsibility,

but it was like an oddball -- not an oddball question so much as it's difficult to find that solution.

And even it sounds like as judges you have different styles and concerns and sensitivities. So what I'm suggesting is that I know that as representatives of the debt collection industry and the asset-buying industry we are here to be accountable for that, which we should be, and to help solve problems. Many of your questions conclude with "What do we do about this?" We will do what we can, but when it comes right down to it, I am not the one to shift blame or responsibility, but it strikes me that sometimes, when the judiciary does meet, perhaps this is the perfect opportunity in your world to either drive initiatives or help the community understand what needs to be done.

Because, I guess, in closing on this issue, clarity of responsibility is all that the industry really wants. So if a certain type of service of process is preferred for the safety and protection of consumers, I don't think anyone would disagree with that. But if it's all over the map and in some states process servers are licensed, other states they're not, there are no best practices at all, and they're not even at the table. So it strikes me that at best when you go from city to city and hear about -- you're going to hear

hundreds of stories in terms of different ways to serve consumers.

But the bottom line is I don't know what the industry can necessarily do but rely on --

MR. MARKOFF: Service of process doesn't really concern just consumers. When you're talking service of process as an issue, you've got personal injury cases; you've got tort cases; you have probate cases; you have supplementary proceedings. So you can't -- you can do anything but I don't think we can just carve out an exception for serving a consumer on a particular type of case.

MR. BARRY: Why not?

JUDGE MOISEEV: Because of the volume.

MR. BARRY: If you require that on any consumer contract case, let's say, in excess of $1,000, if you require a licensed certified process server to serve that and you make the qualifications simple -- you can't be a felon; you've got to be over the age of 18; you've sworn an oath, and you log your service, which would require maybe 10 log entries a day -- I mean, listen, the UPS guy does it every day. My father-in-law was a UPS guy. He did 400 packages a day all signed for all over his route. He knew exactly who got the package, because they had a signature.

You certainly -- and maybe you can't make this a requirement across the board, but I think that, at the one point where due process really matters, we ignore it; we hand it over to 18 year olds who don't have any -- they're not lawyers necessarily; they're not licensed necessarily -- I don't know if any State licenses --

MR. MARKOFF: Yes. In Illinois, it is the local rule in the Circuit Court of Cook County, both in the Chancery Division and the First Municipal District, the Court allows the appointment in contract cases, consumer contract cases of a licensed private detective agency. You must make a motion to the Court; you must identify the agency; you must attach a copy of the license, and the appointment is valid for 90 days.

MR. BARRY: To serve process?

MR. MARKOFF: To serve process. And each collection firm -- or anyone for that matter -- you don't have to be a collection firm -- is entitled to have one licensed agency appointed per quarter, and that is how the Court can then monitor the activities of that agency. And, actually, this came out of the chancery courts with service of foreclosure complaints, and it worked so well there that in the chancery courts I believe the appointment is good for a year and it's

renewable.

So we are moving toward processes. And, also, in Illinois it is within the Court's discretion to appoint a private process server. We may make a motion, but, again, in Chicago municipal court the rule is the sheriff must be allowed to make the first attempt even though the sheriff charges more money and has a lower effective rate of return, we use the sheriff.

JUDGE MOISEEV: The sheriff -- no offense -- has more important things to do.

MR. PHILLIPS: Not the sheriff that we have.

JUDGE MOISEEV: Our sheriff doesn't do process serving. They're too busy with their toys, their helicopter and their phone.

We started a process to appoint court officers, but that's more for execution and eviction. We can't -- we haven't been able to regulate the process server in the same way, so we appoint court officers on a yearly basis. If we get a lot of complaints about a court officer, we don't renew their appointment. But that's a guy or gal who does the more heavy lifting stuff that's a little more dangerous.

The process servers themselves, we prefer to use the people we appoint. I know you mentioned the judge giving more credibility to the sheriff. Sometimes I

look at it, "Well, this is someone we've appointed," but I've gotten a lot more skeptical about that. After 23 years of doing this, you get a lot more skeptical about everything.

JUDGE LIPMAN: That's a frustration from the bench is that -- and here's my frustration. First of all, the audits and everything are never going to happen. There's no resources. We can barely cover the day as it is. But from a judicial perspective, process servers just aren't, for the most part -- in our state and most states -- regulated. Anyone that's over 18 can serve process.

When it comes to me, generally speaking, it will be a motion -- I'll take motions on toilet paper or handwritten; I don't care how it comes to me. If it's in my motion basket, I'm going to address it. But I'll set it for a hearing, and if it's something that hasn't been served, it will go -- you set it for hearing, see a mediator. Generally speaking, the creditors will recognize that's bad process, they'll resolve the issue. It never gets before the Court, because they've resolved the issue on their own they've settled the case.

For the most part, I don't see a lot of bad process where someone's come in and has actually litigated it. I don't know if the rest of the judges

see a lot of it. I see it occasionally but --

MR. O'TOOLE: Would you expect that to be litigated?

MR. LYNGKLIP: It gets litigated when there's a garnishment against them. That's when they're -- if the garnishment comes and the consumer is just getting first notice but there hasn't been any money that's been levied at that point, a debt collector is far more likely, in my experience, to stipulate -- to look at this and to set it aside, but when you've got a garnishment or a judgment for 15, $20,000 and they've been hit for the full load, that attorney --

JUDGE MOISEEV: That happens?

MR. LYNGKLIP: I've got one pending right now.

JUDGE MOISEEV: On a consumer?

MR. LYNGKLIP: On a consumer, because they garnished a joint account. The garnishment -- they hit the daughter of the consumer, and she had the money from a buyout.

That's the situation where the debt collector -- the debt collection attorney is going to have a problem in setting it aside, because they've got to look at their client at this point and say --

JUDGE MOISEEV: But I don't. I don't have to look at their client.

JUDGE LIPMAN: How many of these cases actually get litigated, actually go to court and set aside the case?

MR. LYNGKLIP: All I'm suggesting is I have a much higher opportunity to get a stipulation to set aside improper default judgment when there's no money that's at stake. Once money is at stake, the incentive has changed for everybody.

JUDGE MOISEEV: Except the judge.

MR. EDELMAN: It's much less likely to come to court -- here's the scenario. The person was not served. The garnishment or citation was issued. The person thinks they have no defense. No lawyer is going to go to the trouble of vacating the judgment if there's nothing there. The person isn't going to want to pay a lawyer, and there's no lawyer that's going to take the case.

So you have a lot of cases where, by virtue of the consumer's ignorance of their legal rights, judgments are entered and enforced without service of process. And you don't have the data necessary to catch the problem. If logs by process servers had to be filed and they're open to public inspection, believe me, people would go through it and look for anomalies.

In addition, if you relied on either substituted

service in Illinois or post mail in Indiana and other states that allow it, I think by rule or statute the plaintiff's attorney should be required to explain why it is that they thought the address of the person served has something to do with the person they're suing. Is there a credit card statement within the 18-month forwarding period that has that address on it, and is that the address they went to; was the person served of the same name?

You get a lot of the situations where a neighbor is served, somebody in a different apartment in a large building is served. You get a return of service filed; it's treated as presumptively valid, and if the person does not have a substantive claim of defense to raise, it's not going to get litigated at all.

JUDGE DONNELLY: What about that proposal of filing the logs from the creditors' perspective? Do you have any objection to that?

MR. BUCKLES: No. As a matter of fact, I'm going to recommend that to the Court Officers and Deputy Sheriff's Association when I meet with them this November.

MR. MARKOFF: I think that the servers we use today, I'm sure one of them at least probably has such a log, because the database is online. I can pull down any service from any of my cases by return date, by

client, and find -- it's not necessarily a log. But it's happening today. With computer systems they're getting very sophisticated, and it's much easier to obtain copies of service even years later.

MR. BARRY: But you should also be able to see all the activity of an individual process server.

(An off-the-record discussion was had.)

MR. LEIBSKER: I don't think any of the collection attorneys on this panel have any objection to that kind of audit and log.

JUDGE DONNELLY: That's a practical thing.

MR. LEIBSKER: Again, let me point out, we want them to have good service. We are not trying to not serve defendants and sneak in and try to take judgments.

JUDGE DONNELLY: But you are not all of the people.

MR. LEIBSKER: I understand. You are not all of the judges. They say in law school you should never ask questions you don't know the answers to, but I'm going to ask anyway.

Judge Donnelly, you appeared -- you were in a garnishment court in which you heard every day literally, I'm going to say, probably on an average of 3 to 500 cases a day. Am I correct?

JUDGE DONNELLY: That's correct.

MR. LEIBSKER: Out of these 500 cases a day, 2500 a week, how many people walked into your courtroom and said, "I wasn't served"?

JUDGE DONNELLY: I would get, out of all the people, 25 to 50 people a week, a small percentage.

MR. LEIBSKER: It's 1 percent of the people whose money is on the line at that moment in time that claim they weren't served. And they very well might have been served, they might have not, but assuming even it's 1 percent. We're talking about 1 percent of the people that -- whose money is involved here. I just think that it's a problem; there's no question that this is a problem. There's no question that there are servers out there that are doing stuff illegally, but, in general, people are getting served.

People don't come to court because -- part of it is they don't have representation, but people are afraid to come to court, and part of the reason they don't come to court is they don't have the money.

I think we have to put some of it in perspective. We're dealing with a percentage of people who are not paying their bills and avoiding paying their bills and avoiding service, and this is a very small percentage of the entire consumer population.

(An off-the-record discussion was had.)

JUDGE DONNELLY: From a different perspective, even if it's 1 percent, we presume everything is done right.

MR. LEIBSKER: Then let's work together to try to improve that 1 percent.

JUDGE DONNELLY: I think it's in the interest of the collection industry to close up those gaps. Once we begin to doubt the validity of service, the one bad apple spoils the whole bunch. We begin to doubt even the top drawer firms' service, which is wrong, but it's natural that we have the skepticism.

I wanted to just give one other anecdote to alternative service, which is what we have in Illinois. We have personal service; we have abode service and then alternative service. I would get sent down to Trial Court occasionally where Judge Panarese sits, and we would get hundreds from a certain sole practitioner motions for alternative service, and the clerk told me, "Well, these are routinely signed."

And I started to take a look at them, and they claimed to have tried to do service at the residence address, and they said, "We want to mail it to this address." And I said, "Well, I want to hear what the argument is for this alternative service," and I questioned the attorney, and he said, "Well, we go into

a database, and we get the last address of employment, and then we serve that address, the employment address." And this is places where people worked 5, 10, 12 years ago and I was shocked. I said, "There's no reasonable basis that this will ever get to this person."

And I know that the two of you would never do anything like that, but as judges, you don't know. You're sitting there and you get 500, you know, motions with orders, attached orders, and it's very difficult -- we have 118,000 debt collection cases pending in Cook County now -- to sort the wheat from the chaff.

For the collection industry I think it's in your interest to have some kind of regulation or some kind of thing that will prevent these bad apples from infecting the good bunch, because it creates doubt in the judges presiding over these cases where it should be none.

MR. MARKOFF: In a perfect world you're absolutely correct, and I would love to know that every service is right. We haven't discussed the idea that a process server, being a human being, can make a mistake in identification for various reasons, but there are mistakes that are made, and I'll grant you that but they're not purposeful.

But we don't live in a perfect world. We try to do the best we can. We try to continually improve our

practices. NARCA as an association -- just as ACA as an association -- has established ethical aspirations of practices that are beyond the ethical requirements of the practice of law. And, in fact, I want to publicly thank Judge Donnelly for naming ethical aspirations for the National Association of Retail Collection Attorneys, because that name came from a private discussion in his courtroom relating to how we can do things better.

We constantly strive to do things better. Are we perfect? No. Are process servers perfect? No, but we will do everything we can to better the practice of law and to treat consumers ethically.

MR. BARRY: With process servers specifically exempt under the Fair Debt Collection Practices Act, how do you bring them in under the ethical umbrella that NARCA has?

MR. MARKOFF: You're asking -- frankly, it is the Court and the judicial supervision. I think in the litigation process we are very well regulated, and I don't think --

MR. BARRY: Most of us are not -- that's the weak link. I'm trying to address the weak link.

MR. MARKOFF: We don't need federal regulation inside each courtroom in the Circuit Court of Cook County or in Michigan or in Indiana or in any

other state.

In fact, I did a review of the Illinois Supreme Court Attorney Registration & Disciplinary Commission for the last six years, and these are public records; they're on the Web site. Complaints against attorneys who practice debt collection, credit and collection, were less than 3 percent of all complaints against attorneys for the last six years.

Now, in raw numbers we're talking about between 125 and 175 complaints a year filed against attorneys who collect debt in the state of Illinois, and each one of these cases is investigated by our State Supreme Court.

Now, granted, the investigation may be letter-writing back and forth, but the Supreme Court keeps these records, and if they find a pattern of abuse, they reopen cases and proceed against attorneys.

MR. BARRY: We're back on the issue --

MR. MARKOFF: My point is regulation. The judges in the courtrooms who appoint the process servers have the ability to fine them, sentence them to contempt of court --

MR. BARRY: That's in Illinois. But how about for the rest of us?

JUDGE MOISEEV: I have those in Michigan, too.

MR. BUCKLES: Yeah, get it in Minnesota, dude.

Go to your legislature and lobby and get that law changed. We don't need the Feds coming into every court in the state of Michigan and every other state.

MR. BARRY: The Feds are already in the court in every state in this country with the Fair Debt Collection Practices Act, and process servers are specifically exempt. I don't see a process server on this panel. I don't see the National Association of Professional Process Servers -- I don't know if there is one. That's the problem is that there isn't one. But I think the process servers ought to be covered by the FDCPA, just like debt collectors and collection attorneys.

MS. ANDERSEN: I would just like to go on the record as objecting to that at first blush, because then consumers -- to require process servers to send consumer a notice of validation 30 days prior to the act of serving --

MR. LYNGKLIP: If debts were full-fledged covered, we could treat those process servers the same way we treat repossession companies who take possession, make them responsible only for failures to serve process or to require them to make sure that they are being truthful when they are obtaining service, securing service or preparing affidavits and make them comply

only with that provision of the FDCPA in the same way that repossession companies are only required to comply with F6.

There is simply no regulation under our State law -- and, certainly, the judges have the authority to do it, and I know that Judge Moiseev will discipline them, but she's one of many who don't have time or the resources to personally take each process server, each of the hundreds or thousands of process servers in our state by the hand and rap them on the knuckles when they simply are lying about whether they served somebody.

(An off-the-record discussion was had.)

MR. O'TOOLE: We can only have one person talk at a time.

MS. ANDERSEN: With all due respect we are literally opening the door to a discussion of federal preemption using the FDCPA to control the practices that we're talking about, so be it. But, otherwise, I would like -- what I'm trying to suggest is that the controls over process servers may be most appropriately handled at the State level.

There are some states that license those individuals. I have no idea if they have a best practices or an ethical practices guideline. I have no idea and that's maybe something that we can all learn

from this discussion today that we need to know that we don't know.

But I do not think the FDCPA -- unless we're talking about the benefits of federal preemption over all these activities --

MR. PHILLIPS: Ms. Anderson, that's why we have the FDCPA to begin with, because the existing State law remedies -- hit-or-miss actions by judges who are conscientious -- were not effective.

MS. ANDERSEN: Not the rules of civil procedure.

MR. PHILLIPS: Let me finish. I let you finish.

That's why we have attorneys covered by the FDCPA, because initially they weren't covered. Then they started advertising, "Hey, we can do stuff that the debt collectors can't do," and they got themselves covered. And we're saying right now as consumer attorneys we see a big hit-or-miss problem.

We have some good, conscientious judges who'll take it seriously and do things; others are overwhelmed, and some couldn't care less. All right? So there's no reason not to regulate them. They're abusing all of us.

As Mr. Markoff correctly said, they want good service. Mr. Lerch -- right?

MR. LERCH: Yes.

MR. PHILLIPS: Yeah. He wants good service. He

probably doesn't like that copy service in Indiana. He knows that's ineffective and garbage, but that's the State rule.

MS. ANDERSEN: Everybody, I agree, wants good service. I'm just saying the FDCPA may not make any sense whatsoever with regard to this issue.

MR. BARRY: It apparently made sense to carve them out of it when the law was passed, so why not carve them back in. I'm not suggesting that they have to send a G notice or maybe they do have to give them the 11, the minimum Miranda warning, but it seems to me that the weak link in all of this is the critical link, the due process notice, the right to notice and opportunity to be heard, and without notice, you have no opportunity to be heard, and we're taking and we're giving license to people who really have no vested interest in making sure --

MR. MARKOFF: Your claim is in the State court where the process server is alleged to have done something wrong. What you're really attempting to do is send to federal court every question of service that you may have for one of your clients. I would prefer to see issues related to -- collateral issues related to judgment, service of process, they belong in State court, and your claims for ineffective service or

damages should be brought in that case in front of the jurist hearing the case.

You don't need the federal courts to be flooded with additional litigation of this nature, and, frankly, it's my belief that, by incorporating them into the FDCPA, we're asking for additional frivolous litigation in many circumstances that only will only serve to line the financial pockets of certain attorneys who --

MR. BARRY: Are you seriously suggesting that the federal court cannot handle frivolous litigation --

MR. MARKOFF: No, I didn't say that.

MR. BARRY: -- that the federal court permits, tolerates frivolous litigation. In my district it doesn't. I practice all over the country. I'm unaware of any federal courts that tolerate --

MR. MARKOFF: Look on the NARCA Web site, and you'll see --

MR. BARRY: That allegation of frivolous litigation on behalf of plaintiffs' attorneys, it's absolutely outlandish to suggest that a jurist in this country can't -- don't know how to handle me or any other --

MR. MARKOFF: On the NARCA Web site you will find a review of litigation, comments by judges on cases filed by attorneys against attorneys or collection

agencies -- I think Judge Shadur in the District Court here in Chicago recently said, "No, this case filed by the consumer attorney does not reach the brass ring of attorneys fees," which is the way that they make money. And although he did not sanction the consumer attorneys, the playing field isn't level. Consumer attorneys are incentived to sue collection agencies and collection attorneys, because there are very few penalties if they lose the case. If we, the collection attorneys --

MR. BARRY: Wait.

(An off-the-record discussion was had.)

MR. MARKOFF: -- the attorneys fees, and even if we're right, we still wind up paying lot of money. So, therefore, we wind up settling these cookie-cutter lawsuits, many which are groundless.

(An off-the-record discussion was had.)

MR. O'TOOLE: We need to stop. We need to stop. It's question time. I've got a stack of questions here, some which I can't possibly read, but I'm going to try, and some of this is actually related to what we're talking about right now.

Somebody in the audience asked, if process servers were licensed and were subject to FDCPA, would the debt collection attorney be liable in the lawsuits you're proposing? There are no federal judges here, so

it shouldn't be any problem.

MR. BARRY: I don't think there would be terrific liability except in the event that that process server was an employee. If they're an independent contractor, I don't think that liability ties back to the attorney unless the attorney somehow had knowledge as to the bad practices of the process server.

MR. BUCKLES: Pardon me, but I think that's disingenuous. The consumer attorneys would say that they knew or they should have known that this process server was going to do that, and then we'd still get sued on bogus cases.

MR. LERCH: You'd be named in the suit, and you'd have to settle it, because you can't afford -- just based on what Mike said -- to fight it. You'd have to look at your insurance, look at your deductible and say, "What do you really want to get out of this?" That's what's going to happen.

MR. O'TOOLE: Would it be different than the attorneys currently being sued?

MR. BUCKLES: One more opportunity for bogus lawsuits.

MS. SINSLEY: I think they'd still be covered if they're a principal of the agency, I suppose. I think the key point about standards for consumers with process

is I'm concerned about the judiciary being overwhelmed by different standards for service of process. I applaud the efforts to try to come up with a reasonable way to serve consumers so they have notice. The problem is a lot of legislators around the country are coming up with different laws, different for the debt bar versus consumers, and all of this gets dumped back on the judiciary to look at different standards of how service of process works.

So there really should be one standard for service of process, not a whole bunch of different standards for a commercial debt or a consumer debt.

MR. LYNGKLIP: Well, there won't be any different standards in relation to service. The standard is, is it truthful. If somebody is lying, they should be responsible for that. False, fraudulent, misleading statements made to a court, made to an attorney, made to a consumer to either request, obtain or effect service should not be shielded under the statute.

MR. BUCKLES: In Michigan that's already prohibited.

MR. LYNGKLIP: But not by process servers.

MR. BUCKLES: Yes, it is. Every process server in the state of Michigan has to sign a proof of service

that's notarized. Michigan has a notary law. I'm not --

MR. LYNGKLIP: Which has no remedy.

MR. BUCKLES: It's a civil remedy. It's a criminal act. For every criminal act there's a civil remedy, Ian, in the state of Michigan.

MR. LYNGKLIP: That is not the law.

(An off-the-record discussion was had.)

JUDGE MOISEEV: Somebody ought to go after some of these notaries, the ones that sign papers for the Moors and the indigenous nation and sovereign people, and they get all these notaries signing them.

(An off-the-record discussion was had.)

MR. LYNGKLIP: What's the remedy in a civil cause of action where you have to prove underlying damages that you don't owe the debt? You've lost your rights of due process, and your damages are relegated to proving that you didn't owe the debt? That makes no sense. It's not a remedy. It's absolutely -- it's vacant of any form of remedy, and it doesn't do the thing that you need most it to do, which is to reign in the process servers and give them an incentive to actually do the things that they're making affidavits that they say that they're doing, and you need to have proper supervision.

It's no answer that "Well, you're going to throw

open the floodgates." Well, the fact of the matter is, if it's the only way to provide those process servers with an incentive to actually do the things they've been hired, paid to do and that they're swearing under oath that they have done, then that's exactly what this statute is intended to do. It's intended to provide those people with an incentive so that everybody out there gets the message that you don't make money by lying, by filling out these false affidavits by the thousands.

It's the same set of incentives that caused debt collectors to be regulated in the first instance. It's the same set of incentives that brought attorneys within the Act again, and -- we're preaching to the choir here. The attorneys who are here on behalf of the debt collection bar, you guys are out there trying to do your best, trying to do a good job for your clients. You're out there doing that, fine.

We're not talking to you. We're talking to the people who are out there who are purposely seeking out perhaps debt collectors or process servers who are not going to be doing the best job, and we're also looking at the process servers who are knowingly trying to profit by filling out these false affidavits. So -- because they know that many people will not defend the

suits in the first instance. No harm, no foul. "I can sign this. They wouldn't defend it anyway."

MS. WEINBERG: We'd all agree it's like a tiny percentage of people that come back and say, "I wasn't served" on the volumes of lawsuits. What kind of floodgates are you talking about opening?

JUDGE MOISEEV: There are all those people who don't know how to get in the courthouse door and just accept it.

(An off-the-record discussion was had.)

MS. WEINBERG: I think that all the consumer attorneys would probably agree, we don't automatically always believe it when somebody comes to us and says, "I wasn't served," because we don't always believe our clients.

MR. MARKOFF: By the way, why don't you write us letters first? Before you sue us on cases, why don't you check with us to see our side of the story before an FDCPA action is filed against us?

(An off-the-record discussion was had.)

MR. MARKOFF: We send consumers demand letters suggesting that our client says they owe a debt and they have a chance to dispute. However, our office will receive FDCPA complaints from federal court where this is the first we've heard of it. We didn't know that

someone says -- a consumer says that our firm did something wrong, "We'd like to see what you have to say about it; we'd also like to see if this case can be settled before the case is filed in court." We, as collection attorneys, always attempt to settle prior to filing litigation, but we don't get that courtesy.

MR. PHILLIPS: You can thank one of your NARCA members, Jesse Riddle, for his extreme advocacy in filing class suits when I send you that letter if I'm a Michigan attorney, and all of a sudden you're suing me in State court for defamation. Jesse Riddle, one of your head NARCA guys --

MR. MARKOFF: No, he's not a head NARCA guy.

MR. PHILLIPS: Let me finish -- slap lawsuits against attorneys. That's why you cut off that demand letter. So your bar cut off the demand letter.

MR. BARRY: If you want to include a litigation immunity exception for a plaintiff's attorney to be allowed to send a demand within the FDCPA next time we amend it, I'd be happy to send it. Otherwise, unfortunately, you're just going to get sued.

MR. MARKOFF: One of the things you do do is you put us in conflict with our clients, and this is an ethical conflict, when in response to a claim that we make, you say, "Mr. Markoff, you've violated the FDCPA.

We're going to sue you unless your client drops this case or settles this case on favorable terms." That is an ethical problem that I'm now dealing with my client that basically will disqualify me from continuing to represent my client, because now I'm in the position of defending myself whether or not your claim is correct.

That is why I believe, if there are claims to be made, they should be brought in the action pending in the Circuit Court, but that's just my opinion.

JUDGE DONNELLY: I want to get back to your point about -- I tend to think that the collection bar is correct in adding another layer of FDCPA regulations not being appropriate, and I think that the State courts are the right place for this. The difficulty, though, is that we don't really have an understanding of how deep the problem is.

I think the metric that Ira suggests in that a motion to quash is not an appropriate metric. I think there's a lot of problems because people minimize the greater problem in America, because not many are reported. So the Justice Department went and researched unreported instances and that we can't just look at the motions to quash being filed as the appropriate method. I'm not sure how big the problem is. I suspect that it's larger than we as judges know, and the New York

lawsuit brings that to bear.

I think maybe one thing that could be done is perhaps FTC or other organization doing spot checks throughout the country and informing the judiciary, "Your service is better than you think it is" or "not as good." By doing some auditing, it would give us an idea, and that would motivate regulation or say it's not necessary, some more information that was available.

MR. O'TOOLE: We're going to have to stop there. As to the FTC doing something else, I think we're going to have to stop at this point right now.

I want to thank the panel. I hope for the rest of the day there will be more energy, because you're a little low-key right now. We're going to take a break right now and be back in 15 minutes.

MS. BUSH: Be back at 11:00.

MR. O'TOOLE: Be back at 11:00. Thank you.

TIMING:

STATUTE OF LIMITATION ISSUES

MS. BUSH: Thank you for coming to your seats. Our next session on statute of limitations issues will be moderated by Tracy Thorleifson from the FTC's Northwest Regional Office in Seattle.

MS. THORLEIFSON: Good morning, everybody. I hope that we can have as lively a discussion on issues of the statute of limitations as we did earlier.

The discussion earlier, however, was so lively that the Court Reporter had difficulty transcribing everyone's comments, and as she observed, most of you are attorneys or judges, and you should all know better.

She is transcribing these proceedings, and the transcript is important, because it will be made public, and we'll use a transcript to write a report from. So it's important for posterity that it be as clear as possible. So if we could raise hands and go one at a time, that would make things much better.

A couple of things that I would like people to think about when they comment is, first of all, on this particular issue I think there might be a difference between debt collectors and debt buyers. If you think that there's a difference or if you're going to be speaking as to one group as opposed to the other, please

say so in your comments. And the other theme that I think might make a difference is the impact of automation on how this issue is being dealt with.

With those sort of initial thoughts in mind, let's just ask the first question. How often do you think suits that are beyond the statute of limitations get issued?

Mr. Edelman.

MR. EDELMAN: I've had a lot of experience in this area. I think it is very common among the debt buyers, in part because there's more economic incentive for filing than holding debts; they're cheaper. In Illinois we've recently had a series of decisions, both in the State court and the FDCPA, involving whether the ordinary credit card is subject to 5-year statute or the 10-year. I think the law is very clear for 30 years that it isn't, but it was necessary to litigate that.

We've had a number of cases involving the two-year statute of limitations for federally regulated telcom debt, which was, as of a few years ago, being discarded by people that bought this stuff in bulk for pennies on the dollar and just filing on it.

The most recent trend that I've been seeing is filing cases which have a purported date of last payment issued, which under most states' laws extends the

statute of limitations. That involves a small payment just in the nick of time to avoid a time bar, and in many cases it's my belief that the claim is bogus. In some cases I think -- and these are debt-buyer cases. In some cases I think that they may be putting down money received for the sale of a debt at one time or another. In other cases it appears to be just totally fictitious.

Another variant is that I've seen debt buyers and their collectors attempt to get somebody -- to badger somebody into making a small payment under circumstances where it's quite clear that the only purpose is to revive -- prevent the statute of limitations on a debt. In many cases suits are filed on this basis, which, if somebody knew their rights and somebody actually saw a lawyer and litigated, it is quite clear that there is no way that the debt buyer could prove a payment.

I just in the last month had to try a case where, if you looked through the collection letters and so forth that were sent out, it is absolutely clear no credit was given with the supposed payment, but the suit got filed anyway.

In other cases -- in Illinois there's a requirement that the creditors' notations, a note or

record by itself of a small payment are not enough to prove the payment. Either the defendant has to admit it or you have to have a signature or a picture of a check and they never have it, but they file a suit anyway. Then if somebody calls them on it, well, it's a good faith error.

So I think there's a major problem with filing time-barred lawsuits. I filed some in which I advocated in Wisconsin and Mississippi, namely, if it's beyond the statute of limitations, we can't try to collect it.

MS. THORLEIFSON: Ms. Sinsley.

MS. SINSLEY: I think the problem is the question is kind of like the law school question "When did you stop beating your wife?" It assumes that it is occurring and, in fact, it is not occurring that collection lawyers are often suing beyond the statute of limitations. As you know, that's a fair debt violation under the Kimber case.

So the lawyers are not intentionally filing for debt buyers or for creditors time-barred cases. I think what has happened is there are some technical nuances that you, Ian, and your colleagues have found in different areas where there's been a debate over the statute of limitations.

I think there are issues about payment which are

quite valid. Sometimes consumers are making payments for years, stop making those payments, and then you have a totally new issue on your hands. It's not like there's a frequent duping program going on out there that the collectors are saying, "Okay. Send us a dollar. We'll toll the statute of limitations, and then we'll file it."

The problem is the question itself assumes, in fact, that that is a valid practice when, in fact, it is not a valid practice.

MR. EDELMAN: I would disagree as to the prevalence of the practice, and I think that when a debt collector calls up and gets somebody to agree to make payments, which, if made, will not even pay the interest on the debt, that that is an abusive practice and that there is no reason to do that, other than to get somebody to waive the statute.

MS. THORLEIFSON: You've got two different issues going on here. Maybe we can split them up for clarity.

We have the prevalence of filing past stat actions and -- where there might be a debate about the appropriate statute of limitations and the issue of a payment reviving the debt.

So let's try to take them one at a time so we

can be clear about it.

I saw her hand first.

MS. BROWN: I just want to comment on the prevalence of this. Just as recently as last week, a legal services attorney called me about a consumer who -- a senior who had basically been in a nursing home for the last 10 years and received a letter. So not only is there a complaint sometimes that they're filing but a letter from a debt buyer saying, "We're collecting on this debt and you owe this." So to some extent this is a debt that was well before he went into the nursing home, but they're trying to collect on this well beyond the statute of limitations.

So I think -- and this wasn't an isolated incident that I received this call. I receive these calls from legal service attorney firms lots of times, and they a lot of times start with the letter being sent to try to get that debt remediated.

MS. SINSLEY: That's actually a third issue, which is can you collect on a debt that's past the statute of limitations without being sued, and the FTC alert on collecting past debts says that's fine; do it as long as you don't threaten to sue.

MR. PHILLIPS: I think, just as the judge has noted, we don't know what the instance is of filing

suits beyond the statute of limitations, because we don't have the data. All we have is the people who come who, A, figure it out, B, find a lawyer and C, complain.

If you try to survey many complaints in the Circuit Court of Cook County, there's not even a date of default or date of last payment pled in the complaint. So you couldn't even tell it's beyond the statute of limitations until you do a bunch of detective work on your own. So even if you had some outside person look to find out what happened, you wouldn't know.

In fact, I conversed with Mr. Lerch at an Indiana judicial seminar, and that's one of the things the judges there criticized some of the debt buyers and their attorneys for doing, which is not telling you where this debt came from -- or as I said, the begats, like biblical, whom begat whom begat whom, or for Cubs fans, Tinker to Evers to Chance. It wasn't even in there; there was no date of default that anybody was trying to claim was the last date of default.

And I thought that was a fundamental problem, because, if you don't claim that there's a last date of default, why do you have a right to sue somebody? If I'm not in default, then why can you sue me?

MS. SINSLEY: What's your requirement in Illinois?

MR. PHILLIPS: In Illinois they're supposed to attach or plead the assignments, and there's not actually a rule that says you have to have the date of default, but I think it's a best practice for some of the panel that they advocate it. That certainly would be a best practice, actually say when was this debt formed, with whom, and who did they sell it to and who did they sell it to and who did they sell it to and what's the alleged last date of payment, whether it's a legitimate last date of payment or perhaps it's a date of last payment that's going to have to show that it's a legitimate date of last payment.

MS. THORLEIFSON: Judge Donnelly?

JUDGE DONNELLY: I think from the judges' perspective, one of the things, in addition to the volume and in addition to the due process, is the anger of people coming into the courtroom at not knowing where this debt is from, and that's especially true in debt-buyer cases.

And the complaint is of no help to you. There was a recent 7th Circuit opinion by Judge Manion who really, I didn't think, grasped the problem here. Sometimes the amount of the debt is very helpful to the consumer to try and figure out where this debt came from. It was in that case a BP credit card that was a

$95 charge, and the consumer just didn't understand where initially it was from. That is what we get as judges is they're like, "Where is this from?" With interest piled onto that, it often confuses them into saying, "I never had a $3500 charge from anybody," and it is just very confusing and humiliating for them, because they don't know where that's from; they don't know when it was racked up.

So I agree there's no way from the complaint that you would know whether we have a statute of limitations problem. Mr. Markoff, I agreed with you when we were in the hallway, the pleadings in that regard are so lax that we don't know.

MS. THORLEIFSON: If we could hear from the judiciary again, we'll go back.

JUDGE LIPMAN: Just another perspective from the judiciary, just to expand on that, in our state we have multiple problems with cases that are being brought outside the statute of limitations.

The first is as you stated, we don't know what the underlying debt was. And in our state we had one case we called the Zimmerman case, and I think that's cited all the time, and I'd venture to say half the people that cite it never read it, because they have no idea what it says, but, basically, it gives the

minimal requirements of what you need in a default in order to prove a debt.

Basically, you need the assignment, you need to be able to have some way of calculating the debt, and you need to be able to show that the debtor is actually the debtor and the creditor is actually the creditor. Other than that, there's nothing else that's needed in order to prove that default judgment.

MS. THORLEIFSON: So you don't need to show that the statute of limitations --

JUDGE LIPMAN: In our state the statute of limitations is an affirmative defense. As a judge, we're not supposed to be making that call. People can sue outside the statute of limitations, and if the other side disagrees with them, they have to come in and say, "It's beyond the statute of limitations." So even if we had one, it's questionable as a judge whether or not we can entertain sua sponte and say, "No, this is beyond the statute of limitations."

MS. THORLEIFSON: So we know that 85 to 90 percent of all actions filed result in a default. We don't know what, if any, percentage of that would be based on debt beyond the statute of limitations?

JUDGE MOISEEV: Absolutely. I mean, it's rare that that's raised.

But the anger that Judge Donnelly talked about is pervasive. "I don't know who this bank is; I never had their card; I don't know this company; I only had a $500 credit limit; how can they sue me for so much more?" Those kind of -- ignorance of the consumers about what is -- what's going on is rampant and amazing.

Again, we have to learn to think like the litigants.

MS. NEPVEU: That's exactly my point, which is that we cannot understand these problems, because we assume that people will understand what we're talking about when we say "statute of limitations."

Nobody out there knows what that is or even knows that it matters how long ago something happened. I mean, if you even put it in English so they could understand it, most of the people still wouldn't know that that matters in your lawsuit. So maybe they have a debt that is 10 years old that some debt buyer got a hold of and they don't know they can fight it so they don't.

MR. BARRY: A couple points I want to make. First of all -- again, I'm about to throw Minnesota under the bus. In order to get a default judgment in Minnesota, there's no judicial involvement. That's a rubber stamp process by the clerk, and defaults, if it's

for a liquidated amount and there's some circumstances with attorneys' fees, that's just a rubber stamp. There is no judge that oversees that; that's the clerk that oversees those default judgments, which is very problematic, because you can go through lots and lots of stuff without a judge ever looking at it. That's my first point.

The second point I wanted to make with respect to default judgments is the issue of standing. You know, Judge Donnelly pointed out the anger of consumers. Well, I'd like to point out the anger of the bar. In having said that, consumers are angry about not knowing who sued them, my understanding -- my understanding of restatement says -- and it may not apply in all states, but at least it does in Minnesota, is that there can be one cause of action by a creditor against a consumer, and you cannot subject a consumer to multiplicity of lawsuits, at least in Minnesota.

So when you have a debt buyer who is bringing suit and hasn't named all the parties of interest, at least under restatement as it's been applied since the 1890s in Minnesota, that they lack standing, that that debt buyer lacks standing to even bring the action.

Standing is an issue -- that's an issue the Court certainly can address sua sponte and should

address sua sponte. If I've got, let's say, Allied Debt Buyers suing Ian Lyngklip, Allied Debt Buyers versus Ian Lyngklip, when a consumer looks at that and says, "I don't know who Allied Debt Buyers is. I never had an account with Allied Debt Buyers," that's the problem.

The problem is that's staring -- with all due respect to the Court, that's staring the Court in the face. That raises the issue of standing. What is that particular named party doing in this lawsuit when the named defendant has no clue, they don't have any clue who the debt is -- who the debt is from? That's because it's been bought and sold and traded, and in Minnesota under Minnesota law, they've got no standing bringing the claim in the first place.

JUDGE LIPMAN: The standing is the -- that's the problem. The judge can't sua sponte say the party of interest isn't suing. We don't have assignment from the original creditor all the way to the debt buyer.

MR. BARRY: Even with an assignment, your Honor, even with an assignment you don't know whether or not that assignment assigns the whole of the contract, whether it was specific, whether or not the consumer had notice.

There are a tremendous number of defenses -- they aren't even defenses. It's a basic standing issue.

This person who appears before you hasn't pled the basic minimal elements to show that he has standing to even be in your courtroom.

MS. THORLEIFSON: It's kind of beyond the topic now, but it's an issue we want to hear more about, and we do have a comment period, so I'd encourage you to give us a response explaining the standing issue.

I think Mr. Edelman and then Judge Donnelly.

MR. EDELMAN: One problem with anything other than barring consumer debt past the statute is this: It invites debt buyers mainly to see how close they can come to the line without violating the law. I have seen innumerable letters on out-of-statute debts asking consumers if they want to settle their obligation. It doesn't actually say, "I'm going to sue you." I would venture to say that most of the consumer lawyers in this room have not filed an FDCPA case based on that, but it certainly has -- is written in an attempt to convey that that is a binding, legally enforceable obligation. When the consumer objects, it isn't. And anything other than the prohibition invites that type of response.

Another good one, which I have filed some cases on, is attempting to roll over a post stat debt into a new credit card, some type of obligation often using some type of subtle issue concerning what the person is

getting into. And it is simply an invitation for that type of abuse.

MS. SINSLEY: I think we've established some of the case law on standing whereby the 7th District said the debt buy was to stand in the shoes of the original creditor. So the standing issue is not there, and the courts have said the debt buyer has the right to stand in the shoes of the original creditor.

But with respect to your comment that the debt buyer is coming close enough to the line to try violate the law, I don't know what that means, but it's not true. Debt buyers, like creditors, don't want to waste their money filing lawsuits, because the filing fees are quite significant, and to file a lawsuit means they've gotten to that point where they've exhausted their remedies and they're spending more money trying to go after that consumer.

So the comment that they're coming very close to the line on violating these laws is wrong, and it's also -- the point that you fail to make is that this is more of an expense to the debt buyer or the creditor to file these lawsuits, because the consumer hasn't paid on it. So it really doesn't make sense for them to be trying to come close enough to the statute of limitations and then filing suit.

MR. EDELMAN: I'm talking about attempting to get a payment or get a new obligation out of the debtor by suddenly suggesting that "This is a binding, legal obligation, so you better pay it." Then, of course, once they get the money or a new obligation, they sue.

MS. WEINBERG: I was going to say two things.

Some debt buyers I see don't make any attempts to collect; they just go straight to the lawsuit. But a lot of them I find are making phone calls. They might send a letter with a G notice that they're following the FDCPA, but what I find to be particularly true with seniors is they call somebody up; they say, "You have this debt." The senior says, "Oh, my God, I didn't know about this. It's been so many years. I don't remember."

But they're persuaded and they're frightened because this debt collector is calling them. They've paid their bills all their life, so they're not used to fending off debt collectors, and they are persuaded to make a telephone-authorized payment of $25 or $50 or $100 on a debt that they really don't recognize, and in Illinois that retriggers the statute of limitations, and then the debt buyers file a lawsuit.

I also want to say one other thing. There's a tremendous amount of misrepresentation -- there's

omission. People are not told and have no idea about the statute of limitations.

But I had an attorney in court, one of my staff attorneys who went in shortly after the Feldman decision came down, which affirmed that it's a five-year statute of limitations. We had filed a motion actually before the decision came out, but my attorney went in after the decision came out, and the debt buyer sitting in court told my attorney, "Oh, no, it's seven years." And I don't think we have a seven-year statute on anything.

So, you know, there's a lot of misrepresentation on that.

MS. THORLEIFSON: I did see the judge first.

JUDGE DONNELLY: I had a question in terms of -- not being an expert in this area -- is the FDCPA binding on State court judges. And if it is, does it convert the statute of limitations, which is in Illinois an affirmative defense, into part of the cause of action?

MS. SINSLEY: You're asking whether --

JUDGE DONNELLY: Is it binding on the State court, or attempts to enforce a time-barred debt would be a violation of FDCPA, and, therefore, is it now converted from an affirmative defense into -- now into the cause of action for consumer debt? I don't know the answer to that question.

MR. MARKOFF: This is one of the conundrums of applying the FDCPA -- of simply removing the attorney exemption from the FDCPA. It is in most states, I believe, an affirmative defense, as we've discussed. However, my comment is that we, as attorneys, don't want to violate the law; we don't want to violate the FDCPA, and we do not look to sue on time-barred debt.

Now, there has been lively discussion in the state of Illinois as to whether a credit card debt was 5 years or 10 years. It is now clear to me and most of my colleagues that it is five years unless this case is overturned, and that's not likely.

When I say "I don't care," as attorneys, we don't care. We can follow the law. If the law says it's five years, we will follow that law.

Now, as to a State court action, we may be able to file a case that is beyond five years because it is an affirmative defense in State court, but I also know that my colleagues sitting on this panel would just love to find a case like that filed by my office, because that will result in an FDCPA complaint being filed against me for filing that action, and I don't want to do that.

So what we do -- and most of my colleagues do the best they can not to sue on debts that are

time-barred. Yes, we do bump up against the statute, and sometimes we have a gun to our head as attorneys, because we have the obligation -- just like a personal injury case, you have two years. "Oh, oh, this case is right up against the statute." The person may have a job, may own property my client may want to lien. Now I have an ethical obligation to get this suit on file as quickly as possible because the client has authorized it, but it is a business decision.

And speaking to who the original creditor is, I would like to have as much information as I can to give the consumer at all times, because it benefits the settlement process. If I can tell the consumer that the original creditor was XYZ Company and it's now owned by ABC Finance, that's to my benefit as a collection attorney, because it encourages the dialogue and the ability to resolve the matter.

And one major unintended consequence of the Fair Debt Collection Practices Act is to allow consumers to say, "Cease and desist communication." Because, if I cannot write a letter or make a phone call, what avenue -- representing the credit grantor -- debt buyer or original credit grantor -- what avenue do we have, do I have to talk to the consumer but to bring the case to court, wherein, I am then accused the promoting court

filing. We're not trying --

MS. WEINBERG: Just to get back to the statute of limitations, I mean, so many of the debt buyers have no information or no reliable information as to the date of last payment or date of default, so I don't think -- and you are very conscientious, as we know, but I think a lot of lawsuits are filed where the lawyer has made no effort to determine whether it's beyond the statute of limitations, because they have no information.

MR. LERCH: I disagree with that. It's standard policy in my office that we receive what was the date of last payment. So I disagree with that. They do have information. We receive that information.

Secondly, I agree we have no desire to sue outside the statute of limitations.

Third, I can tell you I can probably buy this whole panel dinner tonight at a very nice restaurant here in Chicago with the number of people that come in to me and say, "Well, isn't there some kind of statute of limitations on this? Isn't this past time that you can sue on?"

And, fourth, to say that they don't have any idea, one, we've sent them a letter, and on that letter we identified our client and the original creditor, and in that letter we say, "You have a right to get further

information," and frequently they do, which information includes not only the original creditor but the original credit address and the account number, and I don't know any competent attorney that's going to file a lawsuit that says, "This is from ABC, Inc.," and that they won't include "assignee of" Bank of America.

JUDGE LIPMAN: I see it.

MR. LERCH: That is sloppy legal work, but I understand you may not get that information.

JUDGE DONNELLY: Did anyone answer my question about whether the FDCPA is enforceable in federal court?

MR. PHILLIPS: Just after the fact, obviously, though, judge, maybe there hasn't been lot of cases, but the consumer could counterclaim in State court under the Fair Debt Act, and state and federal jurisdiction frequently could move that case then to federal court.

But it's hit or miss. Once again, some judges would welcome a good Fair Debt complaint, but many of the high-volume courts don't want anything other than is it a case -- is there a judgment being entered, or is it being dismissed? It's hit or miss.

MR. BUCKLES: Tracy, other than the question -- and, Barb, you may be able to chime in or my colleagues. Our office made the decision 10 years ago to represent only first-party creditors, a decision my wife and my

law partner and I made. It made things a little bit easier for us, a lot easier now. But all of my clients give us the last date of payment for the last transaction -- last purchase or the charge-off date.

Now, I'm pretty sure in debt buyers -- I know a lot of my colleagues and friends and attorneys that represent them, they get a download of information from these creditors, and from what I've seen, from what they've shown me, there's always at least a charge-off date. And a charge-off date is the most regulated piece of banking information under the FDIC, and that charge-off date is the debtor has not made a payment for six months generally, no payment for six months. So you know the statute must be six months prior to that.

MS. THORLEIFSON: Is there a difference in the quality of information that you get from your first-party creditor than a debt buyer might get?

MR. BUCKLES: Well, I get downloaded this information the same way as the debt buyer.

MS. SINSLEY: The answer to your first question is yes, debt buyers do get the date of charge-off, and most of the time they do get the date of last payment. But you have the date of charge-off; you have the charge-off policy from the creditor. So it's 120 days. You back it up 120 days, and there's your date of

default, because they won't charge it off until that time period.

So yes, they do have that information. What I'm hearing here is that consumers may not be seeing it because it's not a pleading requirement. I think that they have it, and they have the business records from the purchase. And that's something that we forget a lot is people are looking for a smoking gun piece of paper that says, "Here's the date of last payment; it was mailed to the consumer" but forget about the business-records exception and the law of how proof comes from the business records transmitted to the debt buyer.

MS. THORLEIFSON: So when you say "the business records," what do you mean?

MS. SINSLEY: Well, the business records, of course, can be the documentation on the account, but business records also include electronic summaries of the account, which are purchased by a debt buyer and have such things as charge-off and date of last payment.

MS. THORLEIFSON: Mr. Edelman?

MR. EDELMAN: As to the prevalence of the accuracy of information, on July 31st -- I'm just using a quote from -- this is a case out of the Court of Appeals of Texas. A suit was brought by the Worldwide Asset Purchasing, Atlantic Credit and NCOP Capital,

three very large debt buyers, and Rent-A-Center, and they're referred to as Worldwide Purchasers.

"Worldwide Purchasers presented summary judgment evidence which they contend demonstrates overwhelmingly high percentages of information in the asset schedule was inaccurate or incomplete, including customer information, references, Social Security numbers, inventory descriptions, inventory status, account and sales balances, as well as what the rental agreements were."

Somebody paid $5 million for this stuff, and the Court of Appeals said, "You're out of luck, because your purchase agreement said 'as-is; we're not warranting anything.' You paid $5 million for this; you're stuck with it."

And I've seen lots of cases like this. I've seen lots of cases -- and we've cited some of the comments we filed in which people collect debts without any title to them in which information was obtained through a sample or otherwise and lawsuits were filed. Sometimes the debt buyers are suing one another who get this kind of allegation. Sometimes people have been prosecuted for selling debts that they didn't own. It is a major problem.

MR. BARRY: A couple things I want to point out. I think that the -- I think you have to look to kind of

the follow-up conduct that happens with debt buyers in particular when confronted with an answer and discovery request.

We find -- we've got a case right now -- we've got a case in our office right now where the attorney bringing the case -- and this is a big collection -- a very large collection outfit in Minneapolis, a law firm. When confronted with an answer and discovery request, their response is to no-show at the deposition and to send over a stip of dismissal. When confronted with a defense on the merits of the claim, they want to get rid of the lawsuit. They want to say, "Gee, you know, we don't want any part of this anymore."

And I think that that really defines what abuse of the process is, and I think if these cases were properly defended, what we would find is sort of a -- kind of a house of cards with respect to the documentation. I recognize that some debt buyers and some collection attorneys -- and I would imagine all the collection attorneys on this panel don't sue without all of the documentation in that file, but I can tell you that you are the exception rather than the rule.

MS. THORLEIFSON: Mr. Phillips?

MR. PHILLIPS: You know, the Indiana judge described it best, Mr. Lerch, I thought. On a debt-

buyer suit, you're being given totally bold hearsay. It's not the admission of a business record, an electronic business record, which you can go ahead and get admitted. In Illinois you can testify to the software and the hardware and all that sort of stuff. It's somebody three steps removed testifying about not even their hardware and software, not even this person's hardware and software, not even this person's hardware and software; they're trying to say what somebody four steps removed did, and that is bold hearsay.

MS. THORLEIFSON: And we have a whole panel for that right after lunch.

MS. NEPVEU: To follow up on Mr. Barry's point, we do -- I have talked to attorneys that say to me when someone shows up to court to defend a lawsuit, they do get dismissed, and they file it again at another time and hope to catch the person out of court one day and default them. It's not unheard of and it's very common in certain jurisdictions.

JUDGE LIPMAN: Back to that statute of limitations question. One of the issues that we confront, especially in the credit card era is, are we looking at a written contract, which is a 10-year statute of limitations, or are we looking at an oral contract where there's a 5-year statute of limitations?

Of course, we have no idea what we're really looking at, and there's no way to gauge that. Even in court when they come in to contest it, assuming -- and I'm talking about first-party debts, because on third-party debts the debt purchaser normally says, "We're going to dismiss the case" and don't bring in witnesses. But I'm just wondering from the other judges in your states if you've had issues with trying to figure out, first of all, not only what is the statute of limitations but are we dealing with a written contract versus an oral contract?

MR. LERCH: In Indiana we have --

MS. THORLEIFSON: I'm sorry.

MR. LERCH: I listen to such stuff, and I try to say that's a problem we don't have.

JUDGE DONNELLY: Judge Panarese may speak to this, but I received many complaints with an affidavit from the debt buyer saying, "We purchased the debt in this amount."

So there's no information from the complaint that would give you a clue as to what the statute of limitations is or even what the original company was. So you can't tell and you're often -- we enter an order of discovery to produce some statements from the original, and many of the debt buyers can't produce any

statements, and so they end up stipping to dismiss, because they don't have access to it.

And, of course, the other secret here that I often felt dirty in participating in proceedings is that in 80 percent of them, if you say "I'm going to trial," there will be a stipulation to dismiss it. Debtors, if they press it, if they press it to trial, they aren't going to fly in -- even if they do have a witness, they aren't going to fly in a witness to lay the foundation for the hearsay.

So there's that sort of thing that's lurking in the background that, if they had any advice from a qualified attorney who had knowledge of the strategic realities of the courtroom, they would just say, "Set it for trial." And then -- that's the other aspect of these proceedings. It's very strange.

MR. BUCKLES: I respectfully disagree for this reason. Most of these people owe this money. If I -- I deal with debtors' attorneys all the time; all the time I deal with them. I have the records; I'll show them to you. What's the guy going to say? "I never had the account. I never used the account. I never paid on the account." That's perjury if they say that and they really did. So in my situation I show them the records, and I set my cases -- or I'll go to trial. I don't have

a problem with that.

MR. EDELMAN: But you're representing creditors.

MR. BUCKLES: I just want to make the point it's not true across the board.

MR. EDELMAN: Debt buyers, yes; creditors no.

MR. BUCKLES: It's not always true with debt buyers. I have several colleagues who are debt buyers, belong to the creditors bar that get records. They get a consumer under 90211, which is the Michigan rule complementary with the federal, and still do that. You can all sit here and say "many" or "a lot" or this and that, but there's also still "many" or "a lot" that still have those records. They can either subpoena them from the creditor or get them given a little more time. It's a problem that's beginning to get resolved within the industry itself.

MS. THORLEIFSON: And how is it getting resolved?

MR. BUCKLES: Well, for one thing the debt buyers see this problem to begin with. If they're going to file these suits, they want to get this money. They want to get these records.

One of the ways to get these resolved is there's a gentleman in the audience that owns a company that is becoming a housing area, an electronic housing area for

this debt. They're only doing it for some first-party creditors. They will then do it for debt buyers, and, eventually, that information -- which all exists, by the way. It's just hard to get.

This is information -- unless you've got something that's, you know, 10, 15 years old, I'll grant you, you can't get it, but anything within 7 years, creditors generally have this stuff. It's going to be housed, and then it is going to be electronically downloaded to wherever the attorney wants it when they need it. I don't like keeping that as an attorney -- because I have to wait the 30 days or whatever these people are, they have to to get records and so forth. They have to wait 15 or 30 days. A lot of debt buyers may give them 60 or 90 or whatever. This is a situation where these records are going to be downloaded. That's going to solve a lot of the problem.

MR. BARRY: Isn't the point, though, that they should have those records 60 to 90 days before they file suit? In other words, how do you meet your burden under Rule 11 as a collection attorney if you're bringing a lawsuit without any evidentiary basis in your possession at the time? I don't know how that's possible.

MS. SINSLEY: Let me address what we're doing about it, because debt buyers, as Mike said, we are --

they are getting documentation, they're getting more documentation, but we are working directly with the creditors. Rozanne and I and several people in the audience were at a meeting with the ABA working directly with the creditors to jointly get this documentation, jointly work through the issues, talk about how the information can be accessed.

So the industry hears this issue. It isn't, I don't think, as global as some of these cases that you're talking about. I understand there's some cases that are filed perhaps that are dismissed right before trial, and that's aggravating but the industry itself is addressing this problem with the FTC, who is at this meeting, as well. So there are substantial efforts to get this information, and we're also working with the courts.

I work with a lot of judges around the country to talk about best practices. In the city of New York, we developed a chain of assignment, so that is filed with the collection case. In Fairfax, Virginia, we worked with best practices with the judges there. Because sometimes it's not so much an issue that it's a problem with debt buyers; it could be a problem with misunderstanding of how really the judges want to see cases filed. So the attorneys in that area need to work

with the judges, work with the clerk and get the information they need so the judgments can be signed.

MR. BARRY: I guess I just don't think that -- I don't think that meeting the requirements, the pleading requirements under Rule 11 or under the state court counterparts in the various states, I don't see that as best practice. I see that as minimal ethical practice, not something new to be kind of explored and start doing now, but it should have been done before.

That all of these suits that are filed where they're immediately dismissed as soon as an answer is put in and discovery is served, in our cases they dismiss them left and right, which tells me you didn't have anything to begin with to justify filing the suit in the first place.

MS. SINSLEY: Or it could be a strategy decision not to --

JUDGE DONNELLY: That's what I've heard from the collection people is they don't want to fight it, because it's not worth it.

MR. BARRY: But don't you kind of take your victim as you find them? I mean, that still subjected my client to an unnecessary lawsuit, your Honor. Why does my client have to -- if you filed a $3,000 lawsuit without the intention of following through -- you were

just kind of hoping for a mulligan, kind of an attaboy? You were hoping to get a default? I mean, I think that's ridiculous.

MS. THORLEIFSON: Judge Moiseev hasn't had it for a while.

JUDGE MOISEEV: I know that not having documentation at the start of a lawsuit is a huge problem. They're getting better at it, because I know about 10 years ago I pushed Mr. Buckles' firm to the limit on a case with Sears. It cost me lot of money, because he financed an opponent against me, and that's the only thing I can really figure out that I ever did to him. But now -- I've never held it against you in court, though. But now they're coming in with pages and pages and pages.

But most of what I see from the debt buyers is just a printout or an affidavit from a person who facilitated the sale. And I had a case where a gentleman came in on objections to garnishment, a $1400 debt that -- the debt buyer was Palisades. They had sent the case to one of the big national collection firms. They sued him. His lawyer from the UAW Legal Services filed an answer. They negotiated a deal. He paid it. Then Palisades sent it to another big national collection firm to collect the balance.

Now, fortunately, he had saved the paperwork. Fortunately, he hadn't moved; both cases were in our court. But I -- with all due respect to my colleagues out there, I brought in every lawyer -- because you never know what lawyer is handling the case, because every lawyer in the office signs. So I brought in every lawyer that represented Palisades who had to come in from New Jersey, the main partner in the law firm that came in from D.C., and the representative from the debt buyer said, "We have so many cases; I didn't know I had already sent this out for collection."

Well, you know, the consumer -- this was a lucky man who had the paperwork, had access to a lawyer the first time and was able to resolve it. Most of these cases we don't know if there's a statute problem; we don't know if they got a letter in the nursing home or somewhere and made a payment to revive it. We don't know that, because they quietly go away because the creditor can't prove it or they settle.

MS. THORLEIFSON: Ms. Andersen?

MS. ANDERSEN: I would just like to clarify that I realize you may not know whether the statute of limitations has expired. My point is this: I'm assuming that much of the discussion that just transpired was we were talking in general about lawsuits

and not necessarily the narrow question of the appropriateness of threatening suit or filing suit on an out-of-statute debt, because that's just plain illegal. And there is a requirement placed upon debt collectors and all of the debt collectors subject to the FDCPA to, well, establish policies and procedures, if you will, to prevent the violation of the law from occurring.

So I would like to suggest or make clear that the technical answer in terms of how frequently do debt collectors or debt buyers seek to collect debt that is beyond the statute, the answer really should be zero. I realize there may be a problem -- I don't know if anyone has empirical evidence to explain if there is a trend to literally look for or ignore the statute of limitations and file suit nonetheless. That is just plain illegal under the law already.

I have no idea where we are with the time, but just as you hear the discussion about which statute of limitations applies -- and I'm not sure, you know, which facts support which interpretation. There is some discussion among the states anyway that debt collectors and debt-collection attorneys should be required to provide notice to consumers if they have no legal obligation to pay the debt because the statute of limitations has expired.

That's a very challenging burden, I will say, for a nonlawyer. See, so if you start with the premise that they shouldn't be threatening suit or suing, then it's a little difficult to put nonlawyers in particular in a position to advise a consumer that the statute of limitations has expired. Some states consider that the unauthorized practice of law.

(An off-the-record discussion was had.)

MS. WEINBERG: They're supposed to know that they're not supposed to collect.

MS. ANDERSEN: They should have policies and procedures that "Have we looked at the documentation? Have we done our best to consider is this a credit card debt? Is it open-end credit, closed-end credit? Blah, blah, blah. That's to protect -- they should have those procedures in place. But are those -- should those procedures be so soaked down that they can now make a representation to the consumer? I say no.

MS. THORLEIFSON: But if they can't make the representation to the consumer, how can they make the representation to the court when they sue them?

MS. ANDERSEN: They shouldn't. Remember, what I'm saying is they should not be suing out-of-statute debts.

JUDGE LIPMAN: If there's nobody at the level of

the debt purchaser that knows that it's an out-of-statute debt and you have the debt purchaser getting the claim who doesn't have enough information even from the debt purchaser's attorney, they're shooting first and asking questions later. So the problem for us from the Court's perspective is we have no idea what's going on in this.

MS. THORLEIFSON: Let's, if we can, move on to one of the questions that we're supposed to answer today, was posed, and that is, should collectors be required to disclose to consumers that a payment on a past-stat debt will revive the debt or that the debt is past stat and that they have no legal obligation to pay?

MS. SINSLEY: What he was talking about is different states already have different proposals out there to have debt collectors tell consumers when the debt's past the statute of limitations in collection correspondence, and the problem with that is, as you mentioned, it can be the unauthorized practice of law. And that's because, as we look at the model rules in most states, which follow the ABA model rules, I think it's 4.3, you're not supposed to be also talking to a consumer and giving them legal advice. But, more importantly, what you have is account representatives being on the phone to consumers, they are not lawyers,

and they are going to have to tell that consumer, "Well, I think it might be this," and there might be lot of nuances.

So what the person is actually engaging in is actually representing that consumer. They're not an attorney and engaging in the practice of law, but, moreover, nothing within the FDCPA says you have to tell the consumers advice about payments and about tolling and about the statute of limitations. And if that were to happen, then what you would have is consumers obviously not paying the bills, and you'd also have consumers claiming that there was misrepresentations because they disagreed with how the statute was determined, so they'll sue that debt collector for that determination that they just made.

JUDGE LIPMAN: I have a question. I have to comment on the unauthorized practice of law commission. I agree that people shouldn't be out there practicing law without a license, but why should there ever be an instance where a debt purchaser or a debt collector is collecting a debt that there is no legal obligation to pay? Why should they ever be collecting a debt past the statute of limitations ever?

MS. SINSLEY: Because the FTC says they can in their publication, and case law says that it's fine to

ask for the money as long as you don't threaten to sue.

For example, the statute of limitations, with the exception of Wisconsin and Mississippi where you can't ask for it -- but, for example, in the state of Delaware, if it goes past that, you can send them letters, "Can you please pay? Can you pay this now?" But you can't say, "I'm going to sue you."

And there's a reason for that. Some consumers actually want to pay an aged debt, because they've finally come back onto their feet and want to pay off this debt, and it may still be on their credit bureau.

MS. THORLEIFSON: One of the things that I'm hearing that seems to be internally inconsistent, though, is that you're saying that these collectors act differently if it's past stat, that they aren't allowed to threaten suit but that they can't tell the consumer that a debt is past stat. So how are the collectors figuring out what to do?

I think this gentleman is shaking his head.

MR. EDELMAN: Every automated computerized debt collector has a screen describing the debt. That screen will normally have a field where it says is it within the statute, it is without the statute and normally what the statute date has been calculated to be. This is not done by an account representative when they get the

portfolio to input that information. Sometimes it's systematically wrong but the account representative isn't making a decision in that regard.

MS. SINSLEY: Well, the problem with that assumption is that it would assume that all of the account representatives have gone to law school and can understand the nuances of tolling and statute of limitations, and, number two, that they should be representing that consumer and giving them legal advice.

MR. BARRY: Except they consistently apparently give legal advice when they say that "This is an attempt to collect a debt, and any information can be used for that purpose." That's required from the FDCPA.

We'd like another requirement that isn't beyond best practice of law under the FDCPA, as well, namely, the disclosure of the statute having expired.

MS. ANDERSEN: If we move forward with that line of thinking, we should have an opportunity to discuss, what about a mistake? You're off by six months one way or another in determining the statute of limitations.

But should there not also be a counter-notice that would then be required that debt collectors -- if they're required to send a notice about the statute having been expired and you have no legal obligation -- or I should say this: If we cannot threaten to sue you

or sue you, should there not be a counter-notice that would be required to insert into their notice prior to the expiration of the statute of limitations that would advise consumers that they do have a legal obligation to pay and that the statute of limitations has not expired and that litigation may be pursued if payment is not made?

MR. BARRY: They do already.

MS. WEINBERG: That's what they say in every demand for payment.

MS. ANDERSEN: Right now it's prohibited unless you have the intent to sue.

MS. THORLEIFSON: Judge Donnelly?

JUDGE DONNELLY: I'm not sure if there was that advice it would do any good, and I think -- is it Julie Nepveu?

I think the majority of the folks -- and I've talked about this with Mr. Markoff -- don't understand the warnings they're given now. They're given an abundance or warnings about exemption rights under the collection law. They don't understand those. If you told them that they may not have an obligation to pay because of the statute of limitations, that would simply -- for the vast majority of them, they wouldn't know what that meant.

MR. BARRY: I disagree completely. I work with individual plaintiffs. Every single day consumers come to my office, and I will tell you that that mischaracterizes the population that I serve.

JUDGE DONNELLY: No, no, I mean, the consumers that come are already people who are very aware. I think the people that -- the seniors and elderly that we see in large numbers in our courtrooms are not the people who would go and search out somebody to represent them.

MR. BARRY: My clients --

MS. THORLEIFSON: Okay. We've got questions now and we just have one that ties into some of the things we've been talking about.

It seems like one of the themes here is that there's uncertainty as to what the appropriate statute of limitations is at many levels. And the question is, why should debt-collection lawyers be subject to claims under the FDCPA when there's uncertainty as to what the applicable statute of limitations under the Act is, for example, credit card debt in Illinois and toll the case.

Are attorneys subject to -- collection attorneys subject to the FDCPA in lawsuits if they bring a case where the statute is unclear?

JUDGE LIPMAN: If there's really unclarity and

if there's unsettled law, I think that's bona fide error. I think really what we're looking at is the systematic violations.

Again, systematically does the debt purchaser know that they even have an oral contract? Does the debt purchaser even know they have a written contract? Are they filing lawsuits that they should know are time-barred because they don't have the requisite information before they file the lawsuit, something I think you mentioned? And I think that's the problem I'm seeing in my court.

MR. EDELMAN: I have seen cases in which the nature of the debt is totally misdescribed. It's described as a credit card when it's a telcom debt. It's described as a credit card debt when it's an overdraft for a bank account. Nobody looked at it so that -- I do see a lot of that.

I also don't think that, for example, a lot of this uncertainty is really that uncertain. 30 years ago our Appellate Court said that an open-end credit account is subject to a shorter statute unless somebody proves a writing. If nobody comes up with a writing or nobody asks is there anything which would even arguably be a written contract, that's not a certainty.

MS. SINSLEY: But I don't think we've answered

the question. The question is, are litigation attorneys immune from these types of suits?

The answer is no under the FDCPA. It is under the Florida Act, but you do have a bona fide error defense and mistake of law at least in the 10th Circuit right now, and it's going up to the Supreme Court in the Jerman case as to whether or not bona fide error in State law is going to survive.

Currently the answer is yes. But should lawyers have some sort of immunity? I would argue yes, they should have some sort of immunity. Now, that is not the current state of the law. The current state of the law is whether or not they can use bona fide error. I would assume, if a mistake was made, it was made unintentionally by collection lawyers and that they should have a right to assert that they did have a bona fide error notwithstanding they had procedures to avoid it.

MR. LEIBSKER: In Illinois there was case law that said there was a 10-year statute of limitations, and most of the judges and the judges that are sitting on this panel used the 10-year statute of limitations. If they felt if it was a five-year, they should have conveyed that to the attorneys in Illinois that it is a five-year statute. I don't think anybody else is going to be using anything other than a five-year statute,

because now it's determined it is a five-year.

JUDGE DONNELLY: If part of the immunity, though, was created by the complaint, when you looked at the complaint and didn't know whether it was an account-stated or an oral contract -- what I found is that in small claims the complaints were just "They owe us $5,000" on many complaints, and so you didn't know even what statute would apply.

MR. LEIBSKER: This is a situation where the judge comes into play, and there could be some additional information as to what statute should be involved.

JUDGE DONNELLY: Generally, though, as judges, we're faced with 3 to 600 default judgments entered, and so it's difficult for us to enforce any statements.

MR. EDELMAN: There's no date.

JUDGE LIPMAN: The other problem is, are we looking at something that is an affirmative defense? Should we actually be looking at that?

JUDGE DONNELLY: If there's no motion to dismiss pending, how can we rule on whether the --

MS. THORLEIFSON: We have another question from the audience, and that is whether or not you need to have documents in your file before you sue.

And the question is, as attorneys, aren't we

allowed to rely on our clients' information, even though we do not have the documents?

MR. EDELMAN: I think if you're alleging a written contract, which means writing, and no record -- I mean, where is the writing?

MR. BUCKLES: Well, if you're writing -- in Michigan and I believe in the case law throughout the nation, if you have a credit card agreement, it does not have to be signed. You can attach a facsimile of the credit card. That's the law; that's the writing.

If you want to go to the next step -- we can go into that whole thing about proofs later. We get affidavits. I get an affidavit from my client, I get a charge-off statement, and I get a credit card agreement. Those are my writings. Do I have to have 44 months of statements or 7 years back? No, not when I file my case. But if the debtor says, "Hey, I dispute the debt because XYZ," they've got a bona fide dispute; by then I would have gotten my documents and proof. I can rely on what my client's given me, my affidavit, charge-off statement and credit card agreement.

MR. PHILLIPS: Would you file suit on a case if your client told you, "The debts that I bought have a no-media request and a no-contact request"? In other words, you know going in your client can never get you

the media and can't even contact the original creditor to get anything.

MR. BUCKLES: I'm going to answer that by saying that I only represent first-party creditors, because I'm not going to --

MR. PHILLIPS: So that would be a yes, you would file suit on those; right?

MR. BUCKLES: I've already answered that by the way I've practiced law for the last 35 years. If it's yes or no, don't try to back me in a corner, because I've answered the question beyond that by saying there's nothing wrong with somebody who relies upon what their client gives them. The --

MR. PHILLIPS: The --

MR. BUCKLES: I'm not done; I'm not done; I'm not done.

MR. PHILLIPS: Motion to strike, nonresponsive.

MR. EDELMAN: Get the judges to rule on it.

MR. BUCKLES: You have to rely on what they give you. If you have somebody that's going to tell you "I'm never going to give you anything," I wouldn't file it.

MS. THORLEIFSON: Are you going to ask the question?

MR. PHILLIPS: He just did.

MS. THORLEIFSON: No. I said are you going to

ask the question of your client whether in this scenario --

MR. BUCKLES: I did that in the past already.

MS. SINSLEY: How come you can rely on someone who just walked in your office and said they have a consumer problem but you can't rely on a creditor of a national bank? Why is it --

MR. PHILLIPS: You don't.

MR. BARRY: They're completely different evidentiary problems of proof.

MS. SINSLEY: My point is, shouldn't he have the right to rely on his client and the trust --

MS. THORLEIFSON: Mr. Lyngklip can have the last word.

MR. LYNGKLIP: You certainly can't rely on your client to the extent that the court rules require you to do something different.

So, for instance, in the case of a contract of assignment, which in many states is a statute of fraud requirement and in many states where you're required to produce and attach to every single complaint every instrument upon which you rely, which would include an assignment of a chosen action, you cannot rely on your client solely. There were solely -- in sending the complaint without attaching it, you haven't seen that

attachment, which you were required to attach.

The same thing is true with documents which would be a statute of frauds contract of a sale of goods over $5,000 or $1,000, whatever your state is. If your state requires you to have a document as a condition of pleading and putting that before the Court, you cannot rely on your client's word alone to initiate a suit if you don't have it in front of you. I don't think that that's a fair practice.

MS. THORLEIFSON: Thank you. And thank you all. This has been a lively session.

(Applause.)

Please submit written comments. We never got to the revival of debt issue, so please send us comments.

MS. BUSH: Now it's time for the lunch hour. The next session will start at 1:30, so please try to be back here no later than 1:25 so we can start on time.

Thank you so much.

(A brief recess was taken.)

PRIMA FACIE COLLECTION CASE
AND EVIDENTIARY BURDENS

MR. PAHL: Okay. Everyone, I think we're ready to start with our first panel of the afternoon.

I'm quite pleased to introduce Julie Mayer, who is from FTC's northwestern office in Seattle, who will be the discussion leader for our first panel this afternoon.

MS. MAYER: Hello, everybody -- or almost everybody. We'll just go ahead and start and jump in as they come back.

I think some of the issues that we'll explore more in this panel came up in the prior discussion, but we'll go a little deeper into some of those issues now.

As just kind of an overview, I'd like us to explore what the rules of the game are for evidence that is provided in pleadings and at default, and are those requirements sufficient from your perspective or your client's, and, if not, what would be sufficient evidence and then going towards some fixes that might exist, either pleadings requirements or best practices.

So if we could maybe start with just looking at the status quo, what are the pleadings requirements in your jurisdictions? I don't know if even --

You're making eye contact. Feel free to start.

MR. LYNGKLIP: I guess the starting point for our pleading requirements -- again, I want to draw the distinction between cases involving first-party creditors and debt buyers.

At least as it relates to debt buyers, there is a requirement that all contracts for a chosen action be evidenced in writing. We have a court rule that requires that all instruments upon which the collection is founded have to be attached to the complaint.

We regularly see -- and I would say it's a rule, not the exception -- from the debt bar that there is virtually no information contained within the complaint that would identify the time, place, manner of assignment, set forth the specifics that are required by the statute. We see very little in the way of information about the underlying debt and its origins as it comes down through the chain of title.

So we see these routinely being -- not being observed by the debt buyers. They don't get enforced by the Court unless somebody brings it to the Court's attention.

As the judge pointed out, Judge Donnelly pointed out, consumers get very upset, and they're very confused, at least when they land in my office, about what it is -- who these debts are about and where they

come from. And it's not simply the problem that arises from the assignments of a first-party creditor to a debt buyer. It is also the result of a lot of consolidation that has occurred within the banking industry.

And in many instances the servicing of debts is done by one bank while an obligation is owned by another, and we see that there is no apparent rhyme or reason to what name gets put in that first creditor's slot when it is in relation to the debt that winds up getting transferred between banks as a result of consolidation. So we see a real need for additional enforcement in that area.

MS. MAYER: That's a good outline of what you perceive in Michigan, but Judge Donnelly or --

MR. BUCKLES: Well, I would go on and address what Ian has brought up.

First of all, what he's referring to is the court rule in Michigan, which mirrors the federal rule, which requires that you attach a copy of the written instrument to your complaint. The complaint is based on a release, and he and I don't agree, but I don't think the complaint's based upon assignment; it's based upon the debt that's owed, and evidence of that debt. In my opinion, some evidence is shown. You have the pleading, but the Michigan creditors bar has taken the position in

filing a memo with the Supreme Court that you do not have to attach the assignment. Now, if it's requested -- if the Court wants it, then you provide it, but we don't have to attach it to the complaint.

It's notice pleadings. One of the things we want to have in the proposed court rule is that we name the creditor. Now, I can tell you all the attorneys I know name the creditor and name the account number and name the balance due. My office also puts in the date of last payment and charge-off and so forth. We put it all in there, because we have all that, so why not. But to require a creditor to attach every statement of the account back to a zero balance doesn't make any sense to me. I think you should have something that reflects the debt whether it's a charge-off account or some statement.

Now, one of the issues that came up today was about the debt-buyers' records. If there's a legal issue, there's been case law both in Connecticut and Massachusetts that the business records of the creditor are the business records of the debt buyer, that you can transfer those business records. Some people get kind of fixated on paper, pieces of paper, "Do you have a piece of paper?" And what the two courts talked about was if you download the electronic records from a

creditor to a debt buyer, then that's their business records. So if you have an account statement from a debt buyer -- one that reflects the debt buyers, by the way, doesn't try to present an image as to somebody else's statements, but that should be adequate at least for purposes of the prima facie case.

JUDGE LIPMAN: I should say, in Iowa in due process before we have notice of pleadings, we have what's called the Zimmerman case, which basically is a case that was done in 1989, which is the only case in Iowa that talks about what is needed for a debt, and that case basically says you need to identify who the current creditor is, not the original creditor. You have to have information -- not evidence, but information -- of the debt sufficient to calculate the amount of debt, and you have to show that all the proper assignments are there so you have the right party's interest.

For the purpose of a default, that is all that is needed in order to enter a default judgment against them. Unfortunately, the Court -- in my opinion, it said the Court "shall" enter the default judgment if that information is entered.

Now, the trick here is what information is then needed to prove that. In our state right now our

Supreme Court has up in front of it a case that was appealed from the small claims court where the judge basically allowed business records of the debt purchaser to be entered, basically saying it's a business record exception to the hearsay rule.

The other side says no, there's no foundation. The creditor said, "Well, this is small claims. It's supposed to be relaxed; you're not supposed to apply strict rules of procedure," although it doesn't specifically say relaxed evidentiary rules, but that is what is implied.

Our Supreme Court has that up right now; it's on cert. So it's possible in Iowa that we will have a strict proof requiring that you have to have the first-party person there present to establish the case, or we might have a relaxed Supreme Court ruling that says, "No, all you need is that information. There's an exception, and it can be introduced."

So we're kind of in flux right now. We're not sure how the Court's going to rule on that.

MS. MAYER: Mr. Edelman.

MR. EDELMAN: Illinois has fact pleading but the general nature of at least debt-buyers' pleadings is the same as I've just heard described. Sometimes they identify who the original creditor is. Quite often they

do not. They usually contain -- or sometimes they contain dates, sometimes not. There is generally little or nothing in the way of documentation attached. If any document is attached, there may be some form set of terms that more often than not has nothing to do with the particular account. In many cases it has nothing to do with the type of account, that somebody once got hold of a Citicorp credit card agreement and attached it to all the Citicorp debts.

The chain of title is usually not provided. I rarely see assignments which actually reference a specific debt. There are numerous cases from Illinois in which there have been problems with the title to debts. People provide debts which they don't own, cases where the same debt is sold to more than one person or allegedly sold to more than one person, or a person settles or pays the debt, and one debt buyer is then by another debt buyer or another collection agency what turns out to be the same obligation.

So, basically, the complaints are lacking in first credibly showing that the plaintiff in the case, as opposed to -- is entitled to some money. There is usually no basis for the amount of money claimed. Sometimes they'll have some kind of a last statement before default from the original creditor, which would

establish an amount.

I've seen a lot of plaintiffs tacking on enormous amounts of interest. There's no -- where the interest comes from is completely unclear. I've yet to see a debt buyer that has the information necessarily properly calculated. You often see debts doubled or even more based on supposed interest and fees.

And you have a situation where I think the complaints are filed, most people default, they get judgments against the ones that default, and if somebody really tries to put them to their proof, they dismiss the case and go away.

MS. MAYER: Mr. Barry?

MR. BARRY: I just want to make, I think, a couple of really important points. Again, I can speak to Minnesota, but I think it's fairly universal to the United States that the assignments -- the law is that you get one bite at the apple. You cannot subject -- I'm going back to the point I made earlier, but maybe it's more appropriate to make now. You cannot have more than one bite at the apple with respect to suing a consumer.

And these -- we're not suing on debts; we're suing on contracts, credit card contracts that involve frequent flyer miles, extended warranties, that

involve -- there may be life insurance involved in these credit card contracts; there could be all kinds of other -- every one of us with a credit card in this room, that is not a debt to the credit card but rather a contract with that credit card company that involves a whole bunch of different tentacles.

So when you see these assignments, it says, "Well, this debt, this assignment was from a credit card company to a debt buyer." Well, that's the debt. It doesn't say whether or not the interest was assigned, the right to the interest; it doesn't say whether other rights and responsibilities were assigned, and all of those have to be resolved within a single lawsuit. So that person -- and, again, I could be wrong about the law in other states, but, generally speaking, it's the law that you cannot subject the party to a multiplicity of lawsuits.

So when you really break these things down, you have to look at whether or not all the parties' interests -- the original creditor and everybody in the chain of title may have some derivative rights from that the contract. Have they all been named in the suit? And the answer to that is almost inevitably never; it never happens. It's always debt buyer versus consumer. Maybe they say debt-buyer's assignee. Assignee of what?

So even assuming that all of that assignment was made -- the other problem that you have is providing notice. I never see this pled, and it has to be pled, and that's that the consumer received notice of the assignment or that they consent to being sued separately. I never see it pled, because everybody just ignores it. This is debt so -- we've assumed the debt, we're going to sue separately for the debt, but if the consumer has maybe a counterclaim against the creditor, they'll have to bring that as a creditor separate and apart.

The whole point of having the single-suit rule is to prevent kind of the bifurcation and the divvying up of the various contractual rights, and I think that the debt buyers ignore this, and I think that the debt-collection attorneys who are collecting for the debt buyers are all -- I've never seen anyone plead in a Minnesota pleading that there was notice of the assignment received by the consumer or that the consumer consented to the multiplicity of suits. I'd like somebody in the collection attorney realm, NARCA to address that.

MS. MAYER: We'll take Barb, since she hasn't had an opportunity, and then I have a question.

MS. SINSLEY: Certainly, in reverse order of what you said, the notice of assignment, there's only

one state that requires a notice of assignment to be given in the debt-collection scenario, and that's Florida. No other states have an assignment statute that has to be pled. And, in fact, in the Florida statute it doesn't have to be pled.

But I think the essential problem you're talking about here --

MR. BARRY: Well, Minnesota requires it. So unless you're -- I practice both under statutory law as well as case law. Case law applies in Minnesota, and there are Supreme Court decisions that say what I'm telling you, which is --

MS. SINSLEY: Okay. So there's cases in Florida and there's a statute -- there's a case in Minnesota, and there's a statute in Florida, but, generally speaking, that's not the universal problem, but I think what we're talking about is two different standards. One is a pleading --

MR. BARRY: I take issue with whether or not it's a universal problem, and I challenge every attorney in this room to go back to their state after this and do research, and anybody who e-mails me, I'll send you my research. This is stuff that comes back from the 1890s out of restatement. This isn't a new obligation.

MS. SINSLEY: Okay. Well, I'm not that old, but

let me get to my next point, which is --

MR. BARRY: Your ideas might be.

MS. SINSLEY: All right. Well, you know, there's nothing wrong with that.

So my first point is that the pleadings, notice of pleadings, is what is in most states, so you've got to have --

MR. BARRY: But you've got to have standing.

MS. SINSLEY: Can I finish? We can wrestle outside later.

MR. PHILIPPS: Keep it clean.

MS. SINSLEY: The point is, notice pleading is what's required in most states, and then we have proofs pleading secondarily. I went to court the other day on a Fair Debt where one of my debt buyers was sued, and the complaint said, "Something bad happened; you violated the Fair Debt Collection Practices Act; we get money." That's really all the claim said.

So I said to the Court, "Wait a minute. How am I supposed to answer? I have no affirmative defenses. This is like free discovery. We can go on for years, but I can't even plead an affirmative defense. I don't know dates, I don't know anything."

The judge said to me, "Ms. Sinsley, this is notice pleading. That's all they have to do. You have

Fair Debt; you have this consumer and they were harmed; that's it; go on your way." So why is the standard for your suits different than the standard for our suits, number one?

Number two, the judges are going to determine at the time of signing a default judgment or at trial the trustworthiness of the evidence. They're going to give the weight to the evidence and the trustworthiness of the evidence.

So that -- what you're talking about is a lot of the up-front things that you want is what the Courts are requiring at the time of judgment.

MR. BARRY: The Court can always take judicial notice of statutes.

MS. MAYER: We want to have -- to hear from Mr. Philipps. And I'm also curious, since you're addressing some of the quality of this evidence submitted, are there particular concerns, for example, about affidavits that might be used to introduce some of the business records of the original creditor?

MR. LYNGKLIP: Well, going back to just in reverse order of what Ms. Sinsley said, I disagree with her that it's not universally the law. It may be the law in relation to credit card debt, I don't know, but I can say under Article 9 you're always entitled to notice

of assignment and virtually under all recent contracts. We see those all the time. You are required to give a notice of assignment, and if the consumer relies on Rule 9, requests that information, it's got to be provided by the assignee.

So I disagree with that. Universally it is required under Article 9. So some of the contracts that we see action on, it's got to be given; you've got to tell the consumer who owns this debt.

As to the issue of what has to be in these complaints -- and going back to something that Mr. Buckles said, one of the things that is absolutely missing, and I've yet to see anybody put this in any complaint -- and maybe Mr. Buckles is the exception to the rule, but I've never seen any attorney plead the appropriate law that governs the contract.

At least for my state that has to be pled. It's in the court rules you're required, if you have a foreign jurisdiction whose law governs the contract at issue, that must be pled, and I think it should be attached. And we can have a debate about whether it's true in Michigan or not, but I think in virtually all of the states and any foreign jurisdiction's law has to be pled and proven at the time of the complaint.

And this is -- it's not simply academic. For

the judges, how do you know what law governs? How do you know what defenses are available? How do you know what statute of limitations governs? Your state may have a rule that says substantive versus procedural, but even before you get to that, you can't even begin to do an analysis on what law governs and what -- how the judge is going to figure out who is responsible for this debt unless somebody puts in the complaint what law is governing this contract. How do you know the interest you assert? How do you know if the interest is even allowable by a debt collector, as in Illinois where it certainly is or maybe another state where they don't allow that?

So the pleadings -- I have yet to see anybody ever put the law governing the contract, and it goes back down to what's in the pleadings, and it depends on what kind of a cause of action you're alleging. Maybe it's not necessary for certain forms of action if there is -- and I've yet to see a contract where you would be allowed to actually plead to recover on a quantum meruit theory along with a contract theory, but whatever it is, somehow or another those proofs have to be -- what's in that pleading must be appropriate to the cause of action that you are alleging.

And for a contract it's a different set of

elements than it is for an account stated than it is for some states which have statutory account stated than it is for an equitable claim for quantum meruit, unjust enrichment. The complaints we're seeing simply -- I don't see any cause of action. So-and-so borrowed money or took the money from so-and-so. They didn't pay, end of story.

MR. LEIBSKER: Then you must win every one of them, because there's never been a pleading that you've filed yet that meets the requirements. So any one of your clients that settled any debts over that, then maybe you're committing malpractice.

(An off-the-record discussion was had.)

MS. MAYER: Let's hear from Mr. Phillips.

MR. PHILIPPS: I agree with you, that's a defective Fair Debt complaint and the judge is wrong. Fair Debt complaints that I've filed are detailed. They say who, what, where, when, how, whom; there's dates. And I think that to require the debt buyers or the first-party creditors to plead that same sort of specificity of who, what, when, where, how, the dates, it's not a problem. I would agree to apply the same standards to me that I meet in federal court and don't get Rule 11-sanctioned to the debt-buyer lawsuits.

MS. MAYER: Let's hear what the judge has

to say.

Judge Donnelly?

JUDGE DONNELLY: Under the law extremely little is required, and that's the difficulty as a judge. In small claims matters, in Illinois under $10,000, it's really -- I mean, the complaints that have been upheld are ludicrous. Basically, a complaint that says, "He owes me $10,000" passes muster under the small claims rules.

The other difficulty is there's differences between default and ex parte judgments in Illinois, but it's not enforced, because there's no one to advocate for the debtors. So in Illinois if they file an answer and later fail to appear, you cannot enter a default judgment, but yet, we enter them on the 11th floor all the time because no one is there to later vacate that and inform the judges that you can. You have to require a prove-up, trial in an ex-parte situation where an answer has been filed.

And that's one of the problems I have in these courtrooms generally is -- there's one side of the V is represented, and the other side is never represented. So as a judge, you never learn of the law that might benefit one side; you just don't -- there's no advocate there as you would if you're in a criminal case and you

have a lively defense and lively State's Attorney. They inform you of the law. You never learn, because there's never or almost never an advocate for one side.

The other difference in Illinois we have is that in terms of prove-up, the judge -- it's discretionary as to whether to require prove-up on default judgment. So some judges require it; others just require an affidavit of damages.

So the rules themselves provide very little guidance for the Court. I would always require a prove-up affidavit of the cause of action. So I want somebody saying under oath that there was some basis for this lawsuit, not just "They owe us $10,000." But I think that many judges wouldn't do that on a routine basis, because it's going against the grain. When you have 600 default cases, it's very difficult to sort of stop the flow of cases and say, "Hey, there's something wrong with these complaints." There's 118,000 pending credit card collection cases in the courthouse, and there are only how many judges?

JUDGE PANARESE: About seven.

JUDGE DONNELLY: Seven. It's very hard to do anything amid that flood of litigation. It's very hard to stand up and say maybe it should be better or different, and the rules don't help very much.

MS. MAYER: Well, you've made a very compelling pleading for more resources, which is what is facing this area. And I wanted to get back to the question do you require prove-ups, but I also want to just ask, for consumers who are fortunate enough to have the representation of those who are at this table or elsewhere, who are represented, what kinds of challenges -- we've heard a little bit about hearsay challenges and business records exception. What kinds of challenges can be made to the evidence that is submitted?

Judge Lipman?

JUDGE LIPMAN: That's part of, again, the frustration on the difference between the default stage and then we have the challenges of trial.

At the default stage you're talking about information of the debt, nothing about evidence. You're not looking at what's admissible; you're looking at a verified counteraffidavit. You don't even need a credit card statement to take a default. When it comes time for dispute at trial, then the rules of evidence come in, and they have to prove the debt.

My experience is -- especially on third-party debt cases -- I have never seen Mr. Capital One in my courtroom; he's never appeared -- or whoever they assign

it to, whoever the first-party debt person is. So traditionally some of the challenge is that it's not mediated and settled, and that frustrates me, because I see people mediating cases they shouldn't be mediating, but if it's not settled, the creditor drops the case. Because they don't have their witnesses there, they can't prove their case, they dismiss their case, and, unfortunately, a lot of times they file it again. And a lot of times we can't catch that, because it's sometimes coming under a different name. As a court officer, we don't have 107,000 cases pending, but we have a lot for our county and few resources. We just can't catch all that, so invariably it happens.

MS. MAYER: Did you have anything to add on that or just agree?

MS. WEINBERG: I'll pass for now.

MS. BROWN: At least in Michigan I know -- and I agree the rules are pretty much sort of limited sometimes, especially in cases where we would see -- you know, where they're going to sue to collect on an agreement and we asked -- the rule allows to attach the contract, and then the Court can respond by asking them to file something or submit that as now an account stated. So there's now bringing in other things in account stated.

And what we've also seen is just folks file an affidavit, not even giving the actual account or account stated, that's signed by the attorney that's bringing the lawsuit, the affidavit, "This is what I've been told is owed."

So, you know -- and the rule is pretty limited, though, because we even tried to challenge that on the account stated rule, and the response says that the account stated rule says that it just means that if they -- if it's accurate, then it's a prima facie case, that the debt is fair, but if it's not, then it means we go to trial on that. So that's been pretty difficult for us to overcome.

JUDGE LIPMAN: What happens when it's challenged in court?

MS. BROWN: Well, usually, what we do, you know, is we file a motion for summary disposition and get a response that it's an account stated and it's not prima facie evidence, so we proceed and then, you know, I've had cases where they then ultimately get the status -- I mean later on -- because we've lost on some of these positions at that point, and now we need to go to trial.

MS. MAYER: Dan, did you want to say something?

MR. EDELMAN: In Illinois the individual creditors, credit card companies will engage in bringing

in witnesses and prove a case. Debt buyers generally make no attempt to get somebody from the regional creditor. I've had a couple of occasions where they've done it. In one case, which I remember quite well, the person came in from the original creditor, asked him to explain what the account number means, and it turns out this was not, in fact, part of the portfolio sold that the debt buyer was claiming under; it went off elsewhere.

So you cannot, I think, trust debt-buyer records or debt-buyer-generated affidavits. Usually, they will get -- they will either dismiss the case or try to have some employee of the debt buyer testify that he has a business record of A, who sold it to B, who sold it to C, who sold it to us. I don't think that's legitimate testimony. I think it's only accurate to be familiar with business records.

And what the debt buyers do is try to take cases involving situations where a going business sold accounts or sold the bank to another going business and the records were actually tested in the course of business. You have actual customers who complained of the account if the statements were inaccurate, try to use that to justify debt-buyers' testimony, which is only done for litigation purposes.

MS. MAYER: I have a couple of hands, but I just want to ask, just following up on that -- and we can get back to other comments, but particularly with tertiary debt and where you're up to G or whatever in the alphabet and there's been -- even though there are warranties in the person's agreement when the accounts are sold, you know, are things that happen in the interim to that account data perhaps compromising the accuracy, repeated skip tracing or --

MR. EDELMAN: Here are the things which we find. First, skip tracing by the original creditor or the interim debt buyers is just a good pass. To take a case, which is an actual reported case, somebody named Gabriel Gutierrez, I believe it was the Republic of Texas, was sued for a debt. He knew nothing about it, but he had the sense to hire an attorney. There was an affidavit filed saying, "I have personal knowledge that this defendant owes this money."

Well, when you do a little checking, first, there are over 700 people with the name Gabriel Gutierrez or some very close variant within the state of Texas. The person had actually been contacted by telephone by the debt buyer and had asked for the last four digits of the Social Security number of the debtor. They did not match, and they went ahead and sued him

anyway. Somebody somehow printed out a list of Gabriel Guiterrezes and just guessed that this one must be the one, and so they sued him, but it was totally meaningless.

Even with names that aren't that common, if you actually do a search, you may find more than one of them, and you have certain odds of guessing the right one, but that's what it is; it's a guess.

MR. BARRY: I just want to make a comment. I think in the last week to 10 days I saw an advertisement in one of the major trade publications for a debt buyer who is advertising to hire a professional witness to travel throughout the United States, that travels 90 percent of the time -- and I'll make that advertisement part of this record -- but I find that that does violence to the notion of a custodian of records.

You have a person who is traveling 90 percent of the time, 90-plus percent is what the ad said. That person is going to testify all over the United States, hopping from jurisdiction to jurisdiction testifying about what? How they travel, airport food, what? I don't know what else they could testify on. That person hasn't worked there previously. Now suddenly they get hired in and brought in to be a professional witness for

that debt buyer.

I just find it -- I mean, would the Court chime in how they would weigh that testimony from a professional witness by a debt buyer?

JUDGE MOISEEV: Worthless.

MS. MAYER: Judge Moiseev.

JUDGE MOISEEV: How do they establish a foundation?

JUDGE LIPMAN: The debt radius -- it's got to be the original creditor. The debt radius is someone with personal knowledge.

MS. MAYER: Do you want to respond?

JUDGE DONNELLY: Well, I was trying to actually come back to the initial prima facie case and I'm late.

And one of the things, Mr. Leibsker at one point when we were in our first municipal committee was advocating, which I thought was a great idea -- and I don't remember when, because I went off to criminal call -- but was a uniform complaint. And I thought it would be a great idea. Ms. Weinberg was involved in that, too.

This is from the Court's perspective is it's really -- the anger of this is when they don't know what they're facing. And I thought it would be wonderful. These cause of actions aren't that complicated. But for

an account stated you were sent a notice on June 1st, 2007. After seven days or seven weeks you didn't respond, and, therefore, now we have an account stated cause of action, but none of the complaints are like that. They don't state the elements or "I entered into a contract on June 1st; you racked up charges over this period, and you defaulted on," you know, a date certain, "and now we're suing on the contract."

You know, something that would -- you know, if this information is available, I think it would benefit the public image of the collection industry, and it would eliminate at lot of the bottom feeders who don't have the information, who can't plead it if there were a uniform rule of some uniform complaint that would inform citizens of what they're being charged with and will state a cause of action.

MS. MAYER: Judge Moiseev.

JUDGE MOISEEV: Well, we've been working on getting more uniformity in the complaints that are filed, but, frankly, most of the time what the complaint says doesn't mean a lot to me, because very few defendants have an attorney who is going to say they didn't meet the standard for X, Y, and Z cause of action.

But what we've been looking at is making sure that the original creditor is named, the original

account number, the dates on the account so that the person who gets served hopefully knows what debt they're defending against.

But most of the people that I see are unrepresented. So whether or not they pled the elements of a contract action or whether they pled all that doesn't ever get raised, because I don't think it's my job to raise it.

I mean, that's one of the issues for us is how far do we get into the case without becoming an advocate for the unrepresented defendant, and that's an argument I've been having with one of my colleagues. I've got a decision he made on an issue, and I said "How did this even come up unless you raised it." And I don't understand his ruling, either, but we have to deal with that.

So the form of the complaint, other than the information it provides, cause of action doesn't typically come up, and it's pretty straightforward on all of our complaints. We've been working with Mr. Buckles and some of the other gentlemen out there for several years on getting more information in the complaint, so that saves the creditor some time and money. Because people don't come in and say, "I don't owe this." They know that they do, and they can prepare

their defense better because they know who is suing them.

MS. MAYER: Ms. Weinberg.

MS. WEINBERG: To brief Judge Donnelly, we've been meeting, this committee, to talk about the nature of complaints in collections, particularly with credit cards. We've been meeting for over a year. We've gotten as far as discussing what might be required in a complaint by an original creditor, and we pretty much -- we have people, you know, on both sides of the bar discussing that.

We pretty much agree on that, but what we haven't been able to agree on and now theoretically we're going to tackle the tough one is what's required in a debt-buyer's complaint, because I think most of us would agree it's a little different as far as what's required to be pled.

This first came up because the courts were overwhelmed with the flood of cases, and they have to -- they said they review the default files to decide whether they need to go to prove-up or not, and so there was some kind of checklist idea of what should the clerk look for to require prove-up or is there enough in the file to recommend it for default judgment.

We proposed a checklist of basic things that we

feel should be required as, you know, the evidentiary burden of proof even in a default, and -- in the debt-buyers' cases. And when we first proposed the list, the response of the judge who has been working with us was, "Well, you've got to be realistic." Well, this is what the rules require.

Whether it's required in the initial pleading, you know, may be not as much as what is required to obtain a judgment, but we have this -- and I don't know if it's true in any other state. We have this thing in Illinois where it's odd, because we're a fact pleading state; we're not a notice pleading state. So there is a little bit different requirements, but anything under $10,000 we can't file a motion to dismiss, and no discovery in cases under $10,000.

So what ends up happening is, you know, that the case will get -- someone comes in, particularly a pro se comes in and disputes it, "Identity theft, it's not me," whatever, and the case will be continued and continued until the person finally doesn't show up one day, and then judgment is entered on what I feel is wholly inadequate proof.

Again, whether it needs to be in the prime facie initial pleading -- since they're frequently filing verified complaints, the idea is that everything should

be there on the initial filing so that they can more efficiently obtain the judgment.

I also wanted to mention on the account stated pleadings, sometimes I'll come in where it's more than 10,000 and I can file a motion to dismiss. So they offer to replead. The first complaint doesn't really plead anything. The second complaint they'll try to plead an account stated. Account stated requires that the defendant have agreed that the balance was correct, that somewhere along the way they agreed, oh, yes, they owed this amount of money. And that's never the case, or at least I've never seen it to be the case in any of these kind of cases where -- it's not even usually pled, but it should be pled.

MR. LEIBSKER: I think what Michelle brings up is that we are working, at least in Cook County, to try to come to some kind of resolution. Everything that you want is not everything that we want, of course, and there will be some kind of happy medium by the judge who is supervising the judges in court.

I think the important point is that we're actually meeting and we're actually discussing it, and we're working to try to resolve this. We have the judiciary; we have the consumer's side all represented, and we have the creditor's side represented. I think

that is important. That's what is taking place in New York, and that's what's taking place in New Jersey, and that's what taking place in Indiana and other states, and I think the important thing is that we are reaching out, and I think when we get to the point -- I think what Judge Donnelly is saying as to having a uniform complaint --

So things are being done to try to achieve -- yes, it's a slow process, as we all know -- okay -- but it's moving forward. And it's not just moving forward here; it's moving forward across the nation.

MS. SINSLEY: And debt buyers don't object to that, either. What debt buyers object to is being put into a different category that's actually requiring more proof than an individual creditor would be required to prove.

For example, on a credit card debt when it's charged off, it's got to charge off its principal -- principal gets charged off, so late fees, principal and interest all rolls into one big snowball, and that's all principal. That's all they have to show. But there are some states that are trying to legislate new laws that says a debt buyer has to break that down. Well, the creditor doesn't have to break it down.

So that's our objection is you can't require

debt buyers to do more than the creditor, but form complaints, yes.

MR. LEIBSKER: And there's case law that Judge Tom Donnelly described, the debt buyer doesn't need to prove anything further than that.

MS. ANDERSEN: The discussion is focused on the evidentiary burden and the nature of the complaint itself.

The approach that ACA has toyed with seriously is not only looking at the evidentiary requirements for filing suit but at some point should we talk about the suitability or the adequacy of the fundamental asset before it is introduced into the stream of commerce? And these characteristics of that asset may not satisfy every court's evidentiary requirement, but if you understand what I'm saying, are there some fundamental characteristics about an account as an asset, because it has value, that need to be attached to it.

And forgive me for the simplicity, but if I were to sell a car in Minnesota, the odometer reading actually has to be correct. You know what I mean? I can't fuss was it. There are certainly inherent characteristics of an asset. I think you know what I'm saying.

So if I'm at a federal level and working with

the banks and the credit card companies, we've actually made an attempt to have a dialogue about what makes that asset ready to be introduced into the stream of commerce, and whether it be the attorney, the debt collector, the debt buyers, you name it, has possession of the required documents -- let's leave it at that -- or access to is unimportant.

One -- the other way of saying it, as an industry, we are not concerned or afraid of talking about uniform standards to make this information clear, to make sure that consumers do not end up in your courtroom -- pretty much they're just irate and confused. That is not a goal, but we do need to include all members of the -- or all parties to the credit transaction, and it begins with the issuers, and we think that if we can create some definitional boundaries around an asset as appropriate to be introduced, we can solve a lot of these problems from the inception.

MS. MAYER: Well, it sounds like there's a lot of productive dialogues going on in different jurisdictions about different stages of the collection process, including what's in the pleading, what should or could be attached, and depending who is initiating the suit and at what state we're talking about in a proceeding and also the pleadings, the language of the

pleadings, the uniformity but also clarity and plain English. And I know Julie talked about some folks that AARP represents not understanding a lot of the terminology and how maybe what's in the complaint can be contributing to that or hopefully alleviate that, but are there some other sort of best practices or changes people have to discuss? And then there's also questions we're getting from the audience.

So we haven't heard from Bob Markoff.

MR. MARKOFF: I wanted to point out once again, as Judge Donnelly mentioned and Michelle, there are specific rules on small claims that provide for simplified actions, and the intention of the small claims rules are to benefit consumers to make life in court easier. The unintended consequence is they can make life harder for both parties.

With the simplified pleading rules, as Michelle pointed out, we don't get motion practice. Frequently consumers will file an answer that says, "Well, I owe them money, but I just can't afford to pay," and that's considered an answer that will have the case set for trial. So now the plaintiff has to bring in a witness from out of state to try a case where the consumer, in effect, admits the debt.

It's a two-way street and, as we approach these

rules and as we change practices, I just want us to be mindful of unintended consequences.

MS. MAYER: Let's hear from Judge Moiseev and then Michelle.

JUDGE MOISEEV: Small claims are $3500. Lawyers cannot be involved. When you get up to $10,000, the creditors have professional people come in and professional collectors come in and make it complicated for the debtor. So $10,000 doesn't seem to me small. It doesn't seem to me the definition of small.

You know, the credit union hires somebody who does all their small claims work who gets more sophisticated, who knows more sometimes than the lawyers who come in, but it kind of defeats the purpose of small claims, which in our courts is more like Judge Judy. Both sides are unrepresented; I swear them both in; they both get their opportunity to talk, and I play King Solomon.

MR. BUCKLES: In small claims we have to follow all the rules of evidence and prove our case.

MS. WEINBERG: We have like the rule of relaxed evidence in small claims, and I think -- although the rule is not written this way -- but I think that's really intended for where you're talking about you have two pro ses, they don't know the rules of evidence, they

can't articulate all the foundations that a lawyer would, so that makes sense. But if you have a case where you have two lawyers -- and I did have one case go to trial, and I presented all my objections to hearsay and all of that. The judge said, "Well, we relax the rules of evidence," so she allowed it all in, and this was two lawyers.

I think our -- this committee process or whatever has been very agreeable so far, but I think it's really going to break down to a serious disagreement on what really constitutes business records evidence, that you're going to disagree on what we think is inadmissible and you're going to think it is admissible, and the other question that comes up is, is the same evidence required in a default situation? And I think the answer has to be yes.

MS. MAYER: We have two questions. So we have time, I just want to make sure I put them out there. And I think one tends to go back to what you were saying, Rozanne, about earlier in the process, and someone is just suggesting requiring title for homes or autos that you require registration and title and have key data points, account attributes and all associated documents at charge-off.

MS. ANDERSEN: Correct. I think we could make

great improvements across the board if we took a serious look at what does establish the attributes of an asset that we're talking about. Also, how do you establish a chain of title appropriately? How do we communicate that information effectively to consumers along the way so that we can allow judicial proceedings to occur, to go forward?

I don't want to forget -- assuming I owed the debt and I'm being sued, I'll just have to admit then I kind of think I should pay for it. All right? Now, having -- let's not forget at least that piece in all of this, and I know, but I've done -- I've been in enough situations like this where we are worried about the exception. We're worried about that person that is either incapable of defending themselves or explaining their situation or my mother who couldn't figure out a summons if it was served on her dinner plate. So I get the situation.

But I also think another point of discussion that is outside the judicial system but important to the process is the fact that is an asset suddenly defective when a consumer has lawfully disputed a debt under the FDCPA? Because I will tell you on behalf of the members of ACA, we are not particularly huge fans of the system where a consumer exercises their rights under the FDCPA,

they dispute a debt, they request verification -- which I will add is a different topic than the rules of evidence for suing on an account -- but anyway, that dispute is not somehow -- that doesn't follow the account.

Because what happens is then the account is returned to the creditor. For whatever reason that account is reassigned to a debt collector. That new debt collector should be aware, should somehow be made aware you now have an asset that has dispute -- you know, a big D on it? That is something that from the industry's standpoint we'd like -- we want proper notice; we want good service; we want debts that we have access to the appropriate documentation; we want the chain of title, and we don't want defective debts to keep flowing in and out of the system, because it serves no good for anyone.

MR. MARKOFF: You're right, and there's -- private industry is moving in that regard. I see representatives from two companies that can provide chain of title, a secure chain of title with debt, the registration of the debts, the charge-off balance documents.

Due to the passage of time and the improvement of technology within the industry, the ability to store vast amounts of data and charge-off statements, we are

moving in that direction, we as an industry. I assure you, NARCA members, we want the information. If I could voluntarily give every consumer every piece of paper that they wanted, at least charge-off statements of accounts, I would do that. I don't need -- and we, NARCA members, you don't have to file a motion for discovery. If we've got it, we're going to give it to the consumers, because we know that it promotes resolution of the matters even prior to litigation.

And I think the debt buyers -- actually, it's the debt-selling industry. It's not so much the debt purchasers. It's the original credit grantors who are selling debt, and truthfully it may be another discussion as to the benefits of selling debt. But in our economy it spreads the risk of loss, there are big policy considerations, and what is the United States of America talking about doing now but taking delinquent debt from banks and then going out to collect that debt in some other fashion.

So this is not just about consumers; this is about the entire ability of this country -- its economic system. The collection of debt benefits us all, everyone in this room as a consumer, and we have to understand that, too.

MS. MAYER: And Judge Panarese.

JUDGE PANARESE: I was going to say, like Mr. Markoff, even though it's a small claim, I think every judge -- if someone -- a defendant in a case or a debt ower requests the documents, everyone allows it. Everyone wants the documents there, and when they're provided, I think it helps speed up the process. And most of the time what I see in my court is not the idea of if they owe, it's how much, what late charges and additional charge is involved. It's not necessarily -- I think they all agree that they owe something, and they understand that, and they want the documents to see it. So I think most of the judges would allow limited discovery to help the process along.

MS. MAYER: Judge Donnelly.

JUDGE DONNELLY: One of the things I found, even determining when the contract is formed, when the transactions occurred also may determine the interest rate, which determines how much. So when there's no evidence of the last transaction, which is what triggers the operating customer agreement -- under Illinois law it's the last transaction determines the date of the operative customer agreement.

So that when they attach customer agreements to contracts but don't indicate when that customer agreement was in effect and when the last date of

purchase was, use of the card -- I don't know what the private law is -- what the contract is in terms of adjudicating how much. Most of the time it is a dispute about what the operative interest rate is, because as we know, under the Credit Card Agreement Act the interest rate has changed dramatically over the last 20 years.

It really is important what customer agreement was in effect at the time of the last transaction, and those two things are never provided in the contract, so we can never determine actually the amount owed. So it is often a question, I think Judge Panarese is right, as to how much is owed, but the question is whether it's $94 or $3,000, and that's often where the fight is.

But better pleadings would help us, as judges, to determine the interest rate, what agreement was in effect, and that's where I think that -- the other thing about better pleadings is I'd like to, as a judge, explain to people what occurred. So if you have a pleading that you went and got a credit card in June of 2004, you racked up charges for two years and then you defaulted in December of 2007, that's something very simple just pled, because we're faced with the angry person saying, "I don't owe this," and we can't explain anything, because there's not a complaint that tells us the story of the underlying debt.

JUDGE MOISEEV: Or they say "It was charged off, so I shouldn't have to pay it," or "My credit limit was $500; why should I have to pay more than $500?" There's a great deal of economic financial illiteracy out there, and then we have to try to educate them, and it ain't easy.

MS. MAYER: That's something our agency is working on in a variety of scenarios. But our time is up. I don't know if Dan had something quick.

MS. BROWN: I was going to say I was actually following up to the judge and saying not only interest history but also payment history, which is something we see in foreclosure cases where the consumer is saying "I paid XYZ," and it's not actually logged in or documented. So if we have that kind of record, the payment history, we can go through and say, "Well, these are the payments." There's proof of payments.

So that's also important as to why the documents are important to consumers.

MR. EDELMAN: The question is I think whether the defendant owes the amount of money claimed to this plaintiff. In a debt-buyer case the defendant does not have any knowledge or information about why this plaintiff is suing him, and as to the amount, I have repeatedly seen cases where they're not suing for the amount charged off by the original creditor but for

several times that amount, and there's no justification and no proof of how they got it.

MS. MAYER: Well, I think -- okay. She looks so desperate, but I just want to remind everyone that there's no break and you've got to stay where you are.

MS. WEINBERG: I want to bring up a completely different topic that's not really in your list of questions, but it's the issue of attorneys, the collection attorneys who own the debt-buying company that is the plaintiff in the cause of action -- where they're representing that plaintiff, and, yeah, it's a separate corporation, but I mean, I think that has always been considered champerty and maintenance, and it's unethical and I think there should be some actual legal prohibition, because there's no limit to it.

MS. MAYER: I think people might want to respond to it at some point, although, keep in mind, as I said before, our comments process is still open, and I know we have great questions from the audience about the effect of automation on all of this and how that impacts individual complaints, so there's a lot to be considered here.

And thank you for your time and focus and attention, and we'll turn our attention now to garnishment issues.

MS. MURPHY: Hello. We are actually just going to continue on in that concept, and then you all will get a well-earned break.

I'm Bevin Murphy. I'm a staff attorney in the Washington, D.C., office. And we're going to continue onward, and we're actually continuing sequentially through the timeline of debt collection.

So we've gone from early this morning about how to initiate a suit, if there's any statute of limitations issues or if proof has to be offered up. That now then brings us to the point postsuit where we are looking at the postjudgment issue of garnishment. Generally, the issue -- I should back up and say freezing of an account and/or garnishment.

Generally, we are talking about the issue of federal benefits and/or exempt funds, but by all means -- you don't appear to be a shy crowd by any stretch. If there's another issue you feel to be especially important, please let me know; I'll get to you in a moment.

As we've been doing with the other topics, we want to lay a foundation to get our arms around what is the situation now and how often is garnishment of exempt funds occurring, to whom, by whom and what sort of

solutions or reactions do we have to that.

Yes.

MR. MARKOFF: Garnishing accounts, wages or bank accounts is probably the most effective tool that a collection attorney has short of settling a matter or setting up a payment plan.

Unfortunately, particularly garnishing bank accounts, this has become a serious problem for our office and most of my colleagues, because there are federal laws that say certain funds are exempt, and banks know that there are exempt funds and accounts, and for many banks, at least here in Chicago and in Illinois, they do not properly respond, and they freeze accounts that have exempt funds.

We, the attorneys for the creditors, do not know that funds are exempt unless one of three things happen. One, we received an answer from the bank saying there are exempt funds; two, we get a call from a debtor saying they're exempt funds, or three, we get a call from an attorney saying they're exempt funds.

We, the creditors bar, many years ago identified this as a problem. We started using forms that required or at least asked the banks to tell us which funds are exempt. Judge Donnelly built upon those forms and established a form answer to citations or garnishments

that required the banks to respond to what funds are exempt and, in addition, not to freeze exempt funds.

Banks are under this obligation by federal law. I happen to represent and file answers for Banco Popular. Banco Popular, as a policy, for probably 10, 15 years has not been freezing exempt funds. We identify them on our answers. We tell the Court that such funds are not frozen, and in all my years of doing this, I've never had a problem with an attorney coming after me representing the bank for releasing funds that I believed were exempt.

But the issue is knowledge, and, also, many banks do not, when they finally respond -- a garnishment settlement is returnable generally in 30 days. That's when a bank is required to file an answer. Many banks, if not most banks, refuse to file answers until just before the end of the 30-day period. So we, the attorneys for the creditors, are left clueless as to how much money is in the bank and whether or not there is -- there are any exempt funds.

I hope that most of my colleagues do release, as our office does, exempt funds upon the claim of the attorney or the debtors, say "These are exempt funds." But the point is, the best practice, our ethical aspirations would tell us to release exempt funds. In

the first place, they should never have been frozen, and that's a banking issue. And I personally would like to see some additional -- I believe it may be FDIC or the OTC that would be the proper body to make sure that banks don't freeze these funds.

It is a problem and we do our best as a collection industry to address it.

MS. MURPHY: There are I'm sure a number of points we want to circle back to.

Ms. Nepveu.

MS. NEPVEU: This is a multimillion dollar industry to garnish funds, because the bank makes $200 just for being contacted by the collection attorney for receiving garnishment out of the exempt funds and then piles on top of that all of the insufficient funds fees and orders the checks so that they bounce the highest one first and then the next and then the next so that people get multiple overdraft fees on their account.

It's a multibillion dollar industry, and it's not going to go away until the Treasury has issued some regulations that they've been pretending they were going to issue for many years now and they haven't.

This all started in 1999 when they started the Electronic Funds Transfer Act. They did not protect the

people whose funds were being electronically transferred in that. So since 1999, for 10 years now, they've had all these banks who know exactly where that money is coming from, because it says right on the electronic transfer whether this is Social Security or whatever. There are certain states where local law requires it, but the Feds are -- there's a mixed message.

If you look on the OCC Web site, it says, "Well, it's the best practice, but we think the law is unclear, and so we're not going to require it. FTC says -- or Social Security, "It's not a best practice; we think the law is clear." So even if there was something saying what is or isn't required here, there are a lot of consumer advocates who believe that it is required, that the law is clear. It says "No garnishment, levies," on and on, "shall be issued against these exempt funds." But they constantly are and although there are some best practices being followed out there, the very banks that say they have a best practice will still be the same ones that are doing it.

It's a huge, huge problem, and it's not going to go away until they cannot make these fees off of those banks anymore.

MS. MURPHY: I definitely want to get back to cost and responsibility and who knows what and who

should do what, but before we even get there, I was hoping we could have some feedback on how often does this happen to how many people or for what amounts.

MS. WEINBERG: I don't have statistics but I do know this used to be a huge problem in Cook County, and I was getting calls daily from people whose all-exempt funds accounts were being frozen, and we were in court a couple times a week usually on motions. Some of the collectors will accept an affidavit if we provide it, and lots of people -- Judge Donnelly really deserves tremendous commendation for getting going the change in the forms that happened about a year ago -- I guess that is when that went into effect -- that at least it's narrowed the problem. It's been tremendously helpful.

The forms used to -- the banks would read the forms, and on their face it would appear to say, "Well, freeze everything until we figure out everything else." And we would say that the banks can tell it's all exempt, and the banks would come back and say, "Well, this court order says we have to freeze everything regardless."

So now the form has, I think, the first three yes-or-no questions, which basically help the bank determine that the only deposits in the last 90 days were federally exempt funds or similar, you know,

teachers' pensions, federal benefits, things like that. And I think it's only the deposits in the last 90 days and the total amount in the account is not more than the total amount of those deposits over the last three months, it clearly says not to freeze the account. And that has tremendously reduced the problem in Cook County.

But it's still a big problem, because we have people who -- you know, I still get lots of clients who maybe they had a $25 birthday gift, a check that they got somewhere or a refund or something, they made some deposit, so then the yes-or-no questions would lead the bank to freeze the account anyway.

And, again, there's a huge profit incentive for the banks to go ahead and freeze the account and charge the fees, and it's very -- it's not difficult to get the bank accounts unfrozen, but by then so much damage is done. The rent check bounces and now they're facing eviction; there's $200 that is now not in their account that they -- you know, they need every penny.

So I think some federal regulations of this --

MS. BROWN: Can I just add something?

MS. MURPHY: Yes.

MS. BROWN: This has been a huge problem, as well, among legal services clients. The majority of our

cases, as I said earlier on, we're seeing postjudgment, and it's through the writ of garnishment. And a lot of our clients have exempt funds, and so we're trying to initiate and file the objection, but by the time we get into court with the objection the client is facing tons of other financial problems, as well as the bank fees that have accumulated, because their money has actually been frozen.

A couple of the things that we're facing problems with; that is, one, you have to actually contact the banks, and the banks will say, "Well, you know, we're not lawyers; we can't do anything. We get the disclosure statement, so it's free, so we're not going to do anything." A couple of times as legal services attorneys what we've done is taken them to task, and once the bank gets these notices to come into court, they release the funds, especially if it's exempt.

The other thing, in terms of the collection attorneys, I mean, we would contact them -- you know, they don't -- I know you said if we sent proof over, you'll release that. But no, we've contacted them, and "Well, you've got to show objection, show proof." So we go through the same whole process here before it gets released.

So what we have actually started doing, as well, is that same collection attorney, we would send him a letter, "This puts you on notice that our client has purely exempt funds and that's purely income." But then after the objection is granted and the writ of garnishment is released, a couple months later the same attorney filed the same writ of garnishment against the same client and the same bank account when they have been put on notice that they're exempt funds, and that's why we're sending the letters.

I know in the next section Mike and I are going to talk about what we did in Michigan, but the bottom line is at some point in the process of what we went through where we got the forms changed to at least tell the banks, if it's purely exempt funds, federally exempt funds, check that off. If it's released funds -- I don't know if you want to go into that process now or wait until the next session.

MS. MURPHY: Let's jump over to Mr. Buckles right now.

MR. BUCKLES: Lorray and I did work on this. At the beginning when we introduced ourselves one of the things I wanted to do is see if we could get some sort of consensus. I would urge the consumers' attorneys and the creditors' attorneys in each state to do what we've

done in Michigan and what you've done here and in other states and what the FTC should suggest. The complicated State rules that aren't really subject to the uniform federal application in some of these instances, whether you've got exemptions in different states or burden of proof or whatever, and it requires on a state-by-state basis for the bench and bar together -- in fact, in September we have a bench and bar dialogue on that issue of prima facie case and so forth.

You ask me how often does it happen. Our office files probably between 7,000 and 10,000 lawsuits annually, at least that many garnishments, maybe more, maybe as many as 16 to 20,000 garnishments that run the gamut of wage garnishments, bank garnishments -- in Michigan, in fact, you can file a tax refund garnishment. We have a policy in our office. It's a policy that, if anybody calls in and says it's exempt funds -- by the way, not just exempt, but third-party funds, too, both together, that immediately has to be addressed.

The goal is to resolve it that day. Now, if the banks would cooperate with us, we'd get it a lot quicker. But we try to work with the debtor. We go to the bank. We run into these problems with banks that say, "Oh, this is confidential. I can't give you that."

I'm thinking, good Lord, you just got served with a garnishment; you should respond.

So the way that I've been working with the bankers association -- and I would encourage everybody to get involved politically within your state, that you chair the basic legislative committees and so forth. Get involved with these people, because they want to know -- we worked and we have a garnishment rule that prohibits the bank from seizing any funds that are clearly identifiable as five categories, Social Security, Social Security disability, veterans, railroad and black lung that are direct deposit.

Now, we haven't got any paperwork on that, so I understand that, but we don't want -- and I'm here to say on behalf of every NARCA attorney, we don't want that money. We don't want to get in trouble; we don't want to take that from those people. But there needs to be -- there needs to be some onus on the bank to communicate with us.

Now, in Michigan we have a court rule developed in 1985. It was before the Internet, it was before fax machines, and it required the bank to disclose in 14 days. What's going on? I don't know why I can't get something by an e-mail from a bank with a PDF copy of the bank statement saying, "Here it is."

So we've got some -- I can make that decision that day. And that's the next thing I want to work on with Lorray is to develop what I call expedited disclosure where we can force the banks to give us that information, give us those records before they run up a bunch of NSF charges and so forth. We don't want that.

So we can go on later, but, basically, I would encourage everybody, consumers' attorneys, collections attorneys and judges, to start this conversation with the -- like you've done here in Chicago to develop these rules, and you may not come to exactly what they want, but we've got to get better than what we have.

MS. MURPHY: So can I get a reaction from the judges?

JUDGE DONNELLY: One of the things we did in Chicago, the creditors, the banks and the consumers all got together, and we created a rule -- again, I left the court after we enacted that, but it also encompasses that within that 90 days there's a lot of banks prorating commingled funds to a percentage of that 90-day period, and the creditors really could have challenged that, but they said, "Look, we want to go along with this. To solve the problems, just take the 90-day window and say, what's the percentage of commingled funds that were nonexempt, and we'll take that amount. That's the

amount that will be frozen, only that amount, and then you'll go to court about that frozen amount," which I thought was a great show of good faith on the creditors' part, of, "Here, we're taking the window. The bank says it's 90 days they have accessible statements online." And they can work -- I don't know how -- from the creditors' side how that works in terms of banks requiring --

MR. MARKOFF: We're not seeing any problems, our office hasn't.

JUDGE DONNELLY: So the banks have complied?

MR. LEIBSKER: That's another story maybe.

MR. MARKOFF: Bank compliance remains a major problem. In fact, I brought a rule to show cause against a major national bank for freezing funds and not informing the Court what's going on, filing amended answers. This bank processes everything in Louisiana. The response was, "We're a big bank and we have all 50 states to cover, and we can't get answers out in a timely fashion," et cetera, et cetera.

The bank in response to the rule to show cause called the home office in New York, called the credit grantor, a major credit card company, and I was threatened with a loss of all my accounts from this credit card company if I didn't withdraw my rule to show

cause why the bank -- garnishing bank should not be held in contempt. I don't know if you remember this, Judge Donnelly, but I really -- it's been a major push that I wanted this bank to comply with the law. So that I'm being a fair, ethical collection attorney, and this bank went so far as to threaten me with loss of business for my client if I proceeded. And I withdrew the rule, I admit, but I still fight the bank from time to time today.

MR. LEIBSKER: This is one issue that I can't believe anyone at this table would disagree. We're all on the same page. This is not something for the collection attorney to know if funds are exempt. There's no way we can know funds are exempt. Yes, we do know sometimes the defendant is on Social Security or has benefits coming from Social Security, and in many of those cases we won't go forward, but if we have some other additional information that we believe the defendant has other assets, we are going to go forward with that bank citation against that third party.

But I can't imagine anyone here who would disagree that this is really a bank issue. This is something the banks could solve pretty quickly if they wanted to spend a little money and fix it. The problem is it's hard to fix the problem if we have -- if the

banks even respond to us and give us an answer. Usually, we go past two or three days before we even get an answer, and these people's funds are locked up. If we get any kind of response even from the debtor itself, they say, "These funds are Social Security," even if I don't have a dollar amount. And I'm going to say in 90 percent of -- that doesn't affect their fees that they're going to get charged, by the way, but we will make our effort to try to avoid this from happening as much as possible, and I can't imagine there's any consumer lawyer or any judge that feels any differently.

MS. MURPHY: Does anyone feel differently?

JUDGE LIPMAN: I have a question just from a judicial perspective. I hear about these problems, and, of course, we see the motions saying motion to quash, exempt funds, and they're always resolved before they get to me. So obviously creditors are doing a good job, ones that become aware of a problem, of fixing the problem.

My question is, what happens between the creditor and the debtor after this problem arises before you've frozen these funds, the person's bounced checks, the person's late on their rent or late on their mortgage? What happens after that motion is filed? We don't see it before it's been resolved.

MS. BROWN: That's one example I was going to give you in terms of what the judges should feel about this. We have actually in one case where the collection attorney went through, but at that point the consumer, the client, had like $2,000 in bank fees, and right away the amount of the garnishment was, but they had a huge set of bank fees, and we were left with who is going to pay this.

So the collection attorney and the legal services attorney went to the judge and said, you know, someone has to pay this, either the collection attorney is going to pay for the wrongful garnishment or the bank fees. So what the judge did at that point is asked the bank's attorney to have the bank show up and scheduled a new date. So, of course, at that point the bank's attorney didn't even show up but just called and said, "Okay. We're eliminating the fees. Thank you," and so it got resolved that way.

So maybe that's something maybe the judges could think about.

MR. MARKOFF: They do. Judge Donnelly has done it regularly, and we -- to aid the consumer, we, the collection lawyers, when we're releasing funds will put in our orders that the bank is not to charge -- make any charges against exempt funds or to reverse any fees

taken or things like that, and we've been doing that for years.

MS. MURPHY: Ms. Andersen.

MS. ANDERSEN: We believe that the banks could be instrumental in solving this problem, and one way to slice the accountability and responsibility for the problem a different way would be to require banks or strongly encourage them to hold for their clients uniform exempt fund accounts, and what we've considered -- the reason we think that makes sense, just like there are accounts for minors that have all sorts of almost Teflon-like protections around them, so, too, there could be accounts established that don't -- the responsibility for the consumer comes from the fact that, if you bother to open this account, try to remember to not put the birthday money or at least freeze that account from accepting anything else other than those direct deposits, because it is automated.

So there would be a way to at least help the consumer maintain some degree of protection, help the bank identify -- I mean, actually, I would think through technology a garnishment -- it would almost get kicked back if there was any attempt to freeze those funds.

So I throw that out. I will say in speaking to the Social Security Administration about this issue,

they -- this was a little bit before the issue became rather problematic, at least in these kinds of dialogues, and they kind of said, "We don't even tell consumers about this issue. When we expect those people to come in and they sign up for Social Security or disability, we don't even talk to them or have messages that explain how you need to protect your funds," and they actually -- the way I left the meeting, they contemplated it was like "Maybe we should." Because every single person that starts to receive Social Security or disability, they have to go in and affirmatively sign up for those kind of benefits.

JUDGE DONNELLY: I think one of the points that Mike raises is a good point and affects even those who don't have exempt funds, and that is the lengthy return dates on bank garnishments is a killer for consumers. And they come in running with the creditors often to agree to an order so they can access their bank account again, and often the judgment will be for $1,000 and the freeze is covering everything -- in our case the citation is double the amount of the judgment, so it can cover much more.

A faster return date I think is something that should be explored in terms of getting the information from the bank, and getting an order entered would

benefit I think both the collector and the debtor, as well.

MR. MARKOFF: At least an expedited answer date regardless of the return date. There is no reason today a bank, as suggested earlier, cannot fax or e-mail an answer immediately. A shorter return date actually is difficult in court processes because of the court clerk's filing and things like that, and I think those of us in Cook County understand that process, but the filing of an answer by a bank, at least sending it to an attorney and to the consumer, that can be immediate. The turnaround time should be less than a week actually.

MS. WEINBERG: That I agree with. We also have an issue of banks taking forever and being very resistant to lift the freeze even after we get a court order and definitely not when just the collection firm will send a notice of withdrawal or dismiss the citation, and the bank ignores it, and we have to call and call and call to finally get the bank to lift the freeze, and occasionally I've come in on a rule because they wouldn't lift the freeze, and at the time it was a big problem.

I'd like to -- Rozanne suggested about people putting money in separate accounts. When I'm speaking to groups of seniors and advising people, what I tell

them is, if they have substantial assets other than Social Security, it makes sense to keep that in a separate account. If they have more than $4,000, wildcard exemption, basically I tell them, "If you have more than $4,000 in a bank that's not Social Security money, you really should keep it in a separate account."

But it's completely impractical and very costly for our clients to have separate accounts. They do a little babysitting, maybe they get $100 a week or $100 a month. The cost and fees and monthly charges on small bank accounts -- the direct deposit accounts, benefits accounts are generally no fees -- no regular monthly fees, but if they want to just have a separate checking account, separate account for such small amounts of money, the charge --

JUDGE MOISEEV: The mattress.

MS. WEINBERG: The mattress. Yeah. Or they have to go to the currency exchange and pay exorbitant amounts. I just don't think that's very practical. I think the real answer is to have some kind of minimal amount, like the bank account either is all exempt benefits or is, you know, less than $2,000, or some flat amount; the bank should not freeze the account. Now, if they have multiple accounts, it's only the first 2,000 or whatever.

But I think that would make it simple. The banks don't have to do any kind of complicated accounting, first in and first out; if it's commingled, how do you know which dollars were Social Security and which dollars withdrawn were non-Social Security. I think the banks could do it, but that makes it more complicated. Just have a flat figure, don't freeze the account.

MR. BUCKLES: The credit bar -- that may make it easy for you, but that doesn't make economic sense, because most garnishments are under $1,000 or $2,000. And, quite honestly, what happens is, the reality is when you garnish somebody -- let's assume you have a $7,000 balance and you get $500. The reality is, you've got contact; they're communicating with you; you make a payment arrangement.

So when you set up this $2,000 limit -- and I know NCLC has proposed that. I'm opposed to that because of the reason that, if you get 100 to 200 to 300, 4 or 5 or whatever, you're going to start getting communication. You're going to know what the person makes, where they work, and you begin to work with the consumer.

What I think some of the people miss here is that our collectors who work out of our office, and me

and my wife, we want to work with consumers; we want them to pay their bills. We'll even reduce interest or this or that, depending on bona fide situations. If they're elderly, if they've got a severe situation, health situation, all of those things impact that.

Those banks that aren't paying attention to you, the ones that stiff you and don't release those -- and, Lorray, you had problem with a bank -- those banks need to be taken to task. You're an attorney; you're a member of the bar; you've got judges here; there's the press out there. Anybody that's doing that, anybody that's intentionally violating a court order of a release should be taken to task. Once you do it one time, you'll get their attention, and that will be the end of the road, and it will not happen again. If not, you've got an action against the bank.

MS. MURPHY: I want to focus on something that you had said. What can we all say about types of debt and types of garnishments that tend to generate these problems?

You mentioned they tend to be under 1,000 or under 2,000. Do they tend to be certain types of debts? Does this come more from debt collectors or debt buyers?

MR. MARKOFF: It's across the board.

(An off-the-record discussion was had.)

MR. MARKOFF: It could be an account where an individual is doing business and he goes out of business or we have a judgment against him. The funds in the account, if it's a personal account, he still would have a wildcard exemption. He may also be putting Social Security funds into his business account, if you will.

So it's not one type of debt; it's across the board for all garnishment proceedings.

MS. NEPVEU: I would agree generally that, yes, all kinds of debt gets there, but we do see -- when I talk to elderly folks across the country, we do see that there tend to be more problems with medical debt. And maybe it's just that those folks tend to have SSDI or something like that because they have more medical problems. I don't know. I wouldn't say that that's across the board. We just know that that's an issue.

In the Miller versus Bank of America case there were 1.1 million class members. That's a lot of people who are receiving exempt benefits who are getting their accounts frozen. It's all well and good to say we should be going after -- changing the court rules and we should be going after the banks and making them do what they need to do, but right now they are sitting pretty. They've got the court rules on their side, and if you try to change the court rules, you've got them opposing

it, because they like the system the way it is. In New York they were able to change it; in Pennsylvania they were able to get them to start looking at what is the source of funds. It doesn't happen often and when they do try to get them to change it, it's a huge fight.

MR. MARKOFF: You're right. The banks are fighting this, but, again, as I said earlier, I represented Banco Popular for many years, and they for many years have followed the law.

The law is clear to me; it is clear to my colleagues who collect debt: Exempt funds may not be garnished. And for the banks to fight it, this shouldn't even be a subject for us to discuss here. They should be following the law.

MS. NEPVEU: The law -- according to the U.S. government, it's not clear.

MR. MARKOFF: Is it clear to you?

MS. NEPVEU: It is to me.

MR. MARKOFF: It's clear to me.

MS. BROWN: I was going to make a comment spilling over into the next section, but when Mike talks about the rules being changed, this actually got initiated from legal services, and we submitted the rule change proposal, and Mike's -- the credit bar association opposed it, and the banks opposed it.

So they had an initial fight, but we started it in terms of doing the initiation, and then in Michigan to get the rules changed you have to go before the Supreme Court. And the Michigan Supreme Court, when they rejected our proposal -- because they initially rejected it based on the objection, the opposition from Mike's group and the bankers -- said all interested parties should just sit around and talk.

And so the consumers and banks, we sat and talked and realized like here that we're all in the same agreement and we want to have this done, and so that's when we had the agreement, after we sat around and talked and came up with our issues and addressed the concerns.

I mean, if you do it on your own as a consumer, you probably will get the opposition, but we were able to include the banks, because the banks' association folks were at that table with us, and they were in agreement with that.

MR. BUCKLES: Let me just follow up on that, because what happened was Lorray's group tried to just change the form, and all of a sudden we just learned of it without knowing it. We opposed the form change more than the rule change, and it then became a bank issue. We had the banks' association at our table. Now, this

is what they said to us: They loved the fact that they could start developing some rules where they knew what they could take and not take. They'd love to be able to resolve it. Now, I'm not sure they'd be happy about expedited disclosure, but there has to be some sort of resolution on that one way or the other.

So I agree that, if we could get people -- if you don't just do the issue on your own, if you bring in the other interested parties in your state, you're more likely to develop something like we did that works.

JUDGE DONNELLY: I had a question whether the judges have had a problem that we had in Illinois, and it is with wage deduction orders in terms of illegal wage deduction orders in which the employer can calculate a minimum wage ceiling, and we changed the form to require the employer to calculate minimum wage income. Whereas, before it was either calculate the minimum wage or take 15 percent, and we had employers who are paying somebody $250 a week and were taking 15 percent of the $250 in fear of violation of our State exemption, which bars garnishments for a person making under 45 times the minimum wage.

And at least from my understanding, that stopped. That no longer occurs as the people are garnished who are making more than 45 times the minimum

wage, but I wondered if other jurisdictions had the same problems on garnishments or what we call wage deduction orders.

MS. MURPHY: Does anyone have a response to that particular question?

MR. BUCKLES: We have calculations on our form. The State Court Administrator's Office -- it's an arm of the Court -- it creates these forms, and on the back is a calculation sheet, and they have to do that first. They have to do the math basically, and that form also lists all of the exemptions, too, on that.

MR. LERCH: We have it the same way, and we haven't had that problem.

JUDGE LIPMAN: We have the same format.

MR. LERCH: We don't necessarily have the same form, but "Here's the calculation; do it this way, or else."

MS. MURPHY: Getting back to an issue that's been discussed a bit here today, representation, once we're at a stage where an account was frozen and a consumer wants to dispute this, wants to get the funds unfrozen, are most of them trying to do that on their own? Are they doing it with some formal application? Are they represented? Who can speak to that?

Judge Moiseev?

JUDGE MOISEEV: Most of the time they're unrepresented, but our state has a form that they can plead their objections to garnishment, and they just need to check off the box, and then they come in on their own, and often the creditor will cancel -- will be able to cancel the hearing in advance or just not appear, so I can just take care of it.

But the issue of getting them to disclose faster is a big one, because often I'm seeing these people, and the bank didn't serve them with their copy of the garnishment, and they're finding out about it when their checks are bouncing. So that's a big issue.

MR. MARKOFF: In Illinois we worked with legal assistance approximately 10 to 15 years ago to change the State law with respect to notification.

Once a bank garnishment is filed, the person serving the garnishment must within three days mail a copy of the garnishment -- not only the garnishment affidavit, but also the notice of rights listing exemption to the consumer by regular mail.

So within three days of a freeze, theoretically the consumer has some type of notice that something's happening to the bank account. That was one way that we tried to initiate. In addition, the consumer has the right to immediately come into court and request a

hearing as to the freeze and claim their exemptions.

JUDGE DONNELLY: The other thing we put in the form was we required the bank to comply with the law, sending a copy of the answer to the debtor, which the law required, but it wasn't in the attestation, so we made them sign under oath that they had mailed a copy to the debtor. Because often the debtor wouldn't have a copy of the answer, wouldn't know if the bank is saying this is exempt or nonexempt, and they'd be clueless as to what the bank was representing to the Court.

MR. MARKOFF: But, again, the bank doesn't file the answer promptly, so the consumer doesn't have the benefit of the bank's answer until after.

How many court appearances have you seen, Judge, where the consumer comes to court -- and even forget the exemption issue. A consumer comes to court and says, "I've got $1,000 in a bank account. I'd like to enter a payment plan. Take $250 from the account, release the rest of the funds." And Judge Donnelly's answer is -- if I may say this -- "I'm sorry, but I don't know what's in the bank account. There's no answer on file, no one has a copy. The bank's not produced it. I will not enter the turnover order; I will not release the account until I have evidence as to what the bank is doing."

And there the judge, who would like to help the

consumer, if anybody, his or her hands are tied.

JUDGE DONNELLY: Or at least get the case off our docket.

MR. LERCH: In Indiana we're required when we file the supplemental garnishment to attach a form, and it is a very simple form. And what the defendant most often does is fills it out, runs immediately to the courthouse, and it has been my experience and it's one of the -- I think it's a good occasion that the judge will immediately set up a conference call and say, "What's going on here and what are these funds." And yes, we don't have an answer, but let's face it, we have a person that's telling the judge, "Judge, I'm on Social Security disability."

So the answer is they're given the notice of how to file the exemption claim with the Court immediately. It doesn't stop the account from getting frozen, doesn't prevent those other problems, but at least they are given notice immediately that they have these rights.

MS. MURPHY: Ms. Nepveu?

MS. NEPVEU: I want to underscore what we're really talking about here, because when we're talking about folks who are getting exempt funds, we're talking about like $1,000 a month, maybe 1200 for a really, really well-off exempt fund person. When those accounts

are frozen, they don't have money for food; they don't have rent; they don't have medicine, and they usually don't have it for like a month. And who has to pay for it? The social services agencies sometimes will come and save the day. Sometimes they go without their medicine. This is very a huge problem. It's not just, oh -- that's their whole life.

MR. MARKOFF: But at the same time, I do want to remind all of us that not all seniors are poor people, and while they may be depending on their Social Security income or their checks -- and by the way, I'm sympathetic to what you're saying, but I do want to point out that there are many senior citizens who are millionaires who still say, "I don't have any money because my Social Security hasn't come in."

MS. NEPVEU: My point is that for the people who are getting garnishments and who, in fact, are living on their Social Security or SSDI or SSI, those -- veterans benefits, those people are not typically very well off. And possibly they have a home, possibly they have other assets but not usually. I mean, I would not disagree with you that there are some very well-off folks who receive Social Security. What I'm disagreeing with is, once those funds are exempt, we need to understand that for many of the recipients what we're talking about is

an absolute basic need, and we need to address it.

MR. MARKOFF: And I agree that we should never garnish exempt funds, but I also don't want to lose sight of the fact that in representing our clients we have a right to inquire and learn what other assets a consumer may have even when they're living off Social Security. And I'm not talking about a house. They can have other funds or --

MS. MURPHY: I'm going to interrupt, because we're starting to run short on time.

Ms. Weinberg.

MS. WEINBERG: I would agree about that you're entitled to an answer from the bank. You're entitled to know if a person has -- maybe they're not a millionaire, but maybe they have $50,000 or $100,000 in other deposits in the bank. I haven't run into that. I think people in that situation are much less likely to be in debt and in garnishment proceedings.

MR. MARKOFF: You'd be surprised.

MS. WEINBERG: But what I do see is that -- where somebody calls, they get the notice, they see their exemptions, so they have some understanding that their funds are exempt. They call the collector, they say, "It's all Social Security. I need this money," and then not you, but the bad collectors will say, "Well,

how would you like to work out a payment? We can lift that account if you agree to make payments," and they have to sign a payment plan. Or they'll say something like, "Well, everybody has to pay something," even though that's not true. "Well, you have a moral obligation to pay." They'll use the bank freeze -- even though they know it's unlawful and all exempt, they'll use the bank freeze to get people to agree to make payments that they absolutely cannot afford.

MR. MARKOFF: Well, I aspire and hope that my colleagues who are collection attorneys will use their best efforts not to use that as a hammer and that once they know that funds are exempt, those funds -- that's the law. We follow the law.

MS. WEINBERG: But you also -- I've heard you say, "Well, people have the right to make voluntary payments from exempt funds."

MR. MARKOFF: But wait, wait. An interesting point, Michelle, because it was raised earlier, and that is, I have some consumers pay me $10 a month. It doesn't pay for me to accept payments of $10 a month, but these generally are elderly people who admit they owe the debt, and it makes them feel good that they're doing something to pay down their debt, and who am I to say, "You can't pay. You can't use your funds as you

see fit."

Again, the cost of maintaining the accounting for that money is more than it's worth, but it makes them feel good as consumers. They really do want to pay, and I will accept their payment.

MS. WEINBERG: I believe people want to pay. It's not the same as saying, "Well, we can't take $10. You've got to the pay 50," and that really is cutting into their budget.

MS. MURPHY: Judge Donnelly.

JUDGE DONNELLY: I think I want to bring up a point that was mentioned, and that is third-party bank accounts. This is an issue that affects seniors predominantly where they'll have a son or daughter or grandson on the account for purposes of getting the money out of the account. That son or daughter or grandson acquires a debt, they're sued, and then when the bank is answering, they'll say "Do you have any assets belonging to a grandson or a son," and they say, "Yes, but all the money is really the property of the older person."

And as with -- this happens in exemption cases, but it happens in these third-party cases. One of the difficulties is even conducting a hearing is sometimes difficult if the person's not able to leave the house.

Just as an issue that is -- for instance, a difficulty is sometimes you'll have a son or daughter trying to assert an exemption, and you're trying to work with court rules that require the person to come in and exert the exemption -- they can't be represented by a relative -- or in this case where you're trying to conduct an evidentiary hearing as to the nature of the funds in the account. And often the collectors will say, "Well, we can conduct it telephonically, get this person to testify by phone." But it's an issue that crops up with an enormous amount of frequency with respect to elderly people and presents a lot of problems with the Court.

MR. BUCKLES: Wouldn't the bank statement show that, though, where they're from? Isn't that what you really want is the bank statements?

JUDGE DONNELLY: Well, it is a question of what is necessary for the evidentiary hearing. If the creditor will stipulate to the source of funds and control of funds, then there's no issue, but where the creditor is contesting -- and often it's not clear from the statement alone. So the creditor has a right to contest and find out, you know, was there any use of the funds by the grandson or son or daughter, and they have the right to do that. The question is how and in what

way to protect the elderly person's rights as well as the creditor's rights.

MS. MURPHY: I'm actually going to jump in. We're at the 10-minute mark for questions. We actually don't have any questions, so I'm going to squeeze mine in.

We've been discussing the moment at which the consumer is even aware of this debt collection. They haven't received notice; suppose there's a default judgment. How often is it in your experience that the freezing of the account or the garnishment notice might be the first the consumer is even hearing of this?

JUDGE LIPMAN: I would say that we have as many appearances by debtors in our court when they are garnished the first time as people that actually answer the petitions for a variety of reasons. Some of them are claiming that they never had knowledge of the debt; some are claiming they never got served with the debt. Again, when they find out about the garnishment is the first time they have an interest in defending that debt.

In our court we have very liberal rules on setting aside a big push to hear cases on the merits. For a lot of creditors, they actually like it when the debtor finally objects even at the garnishment level, because it's their opportunity to have a face-to-face

with that debtor and get something worked out. So I think that even when you get answers -- correct me if I'm wrong, but you like it better normally when someone answers a lawsuit than when it goes into default, because that's communication. Go ahead.

MR. LERCH: One is correct, they've been served, this is their first time on the call, but also sometimes three is, "Finally we got your attention. We've written you; we've sued you. You've gotten notice, but now all of a sudden we're going to take your paycheck," and they come in and say, "Can I make a payment arrangement here?" I don't know what the percentage breakdown would be, but it's probably -- as we repeatedly said here, we then get communication going to resolve the issue.

MS. ANDERSEN: And I would say that --

MR. BARRY: Is that a proper purpose for litigation, to get their attention?

MR. LERCH: Communication.

MR. BARRY: Yeah. But I mean, my question to you is, is that a proper motive in bringing litigation, getting their attention? Is that proper?

MS. MURPHY: We're going to jump in with Ms. Andersen now. I wish we had more time.

MS. ANDERSEN: What I was going to say before you asked a question, Michelle, absolutely it is the

first time oftentimes for the debt collector certainly to ever have the opportunity to have a conversation with the consumer.

I would absolutely reject the notion that lawsuits, default judgments, any of those costly procedures are -- that they're disingenuous. It's because people are advocating on behalf of their client. That's the reason for it, just that.

But I don't want the record to be unclear on this: Consumers do need to be treated with integrity and respect, and that is a fundamental principle of the code of ethics for the ACA International members.

So to misuse that garnishment proceeding inappropriately would not be condoned, but we just can't forget that that may be the first real conversation. So, you know, it's really slicing and dicing the nuances and the tones of voice over it, but it's just a reality. Sometimes it takes that for people to call.

JUDGE DONNELLY: You know, I think there is, though, temptation, and I think it is -- some collectors yield to it, of filing garnishments where there's no judgment. I've had that happen in my courtroom; I've seen attorneys doing that. Or serving citations and sending them by mail where personal service is required and hoping the debtor will show up.

So while it may not be the best to succumb to these temptations, there often is a lot of those on sort of the bottom rungs who will do things to start the communication going that aren't quite legal, but they don't see the harm in it, because it's starting the communication going. So I think it's something I've seen. It's not widely prevalent, but any instances of it are scary.

MR. BARRY: This may relate to Minnesota, but I'd like to tell you that the District Court system, because you can initiate a lawsuit in Minnesota without filing the lawsuit in court, it's a freebie to send a letter for a dollar with a postage envelope, to send summons and complaint with acknowledgement of service, to send that in the mail, not have to pay your $320 filing fee, not having to pay a motion for default fee, not having to pay anything to get the attention of the consumer or even use the process server who is engaged in nailing complaints to people's doors, stuffing them under the doors by the dozens every day that -- for $300 debts.

See, you're maybe in a place -- a state that doesn't do that, but I see the use of our District Court system -- rather than bringing these claims into the conciliation court for up to $7500 where they belong,

they're using District Court process because it's free. It doesn't cost them anything to threaten suit. When the consumers get those lawsuits and get served with them, inevitably they're told there's nothing on file, therefore, the consumer concludes in their own mind there is no lawsuit.

MS. BROWN: I just wanted to remind you folks earlier we talked about some of the reasons why there are default judgments is because most our clients are saying they're not receiving the complaints and service. So when you say, "Well, now we get their attention." It's not necessarily because they have been ignoring it; it's because they have not received it. And that's the very first time that they actually had, you know, some kind of contact is because, yes, they have a bank account that got frozen. And so that's why it's the very first time they're responding, not because they had ignored all of -- your complaint and judgment, but because there were no --

MR. LERCH: You didn't hear what I said. I said I agree with the magistrate that -- and I don't know what the percentage breakdown is.

But, secondly, the gentleman and I have a total disconnect. When you use the pronoun "they," are you talking about lawyers or the creditors themselves can

send out this notice or what? And if I'm a collector, then I guess why should I go to law school and why should I pass the bar exam in the state of Minnesota if I want to be a collector?

MR. BARRY: Nonattorneys can represent debt buyers, and nonattorneys can appear in conciliation. They pay their 50 bucks, whatever the fee is now -- 60, 75 -- $75. In District Court you have to be an attorney to appear in court, but collection attorneys can send a summons and complaint certified mail, and if the consumer signs the acknowledgement of service, that lawsuit is initiated. It never gets filed with the Court. It may later get filed with the Court, but if you don't need any judicial intervention because they're going to default, they're not going to answer, you can do prejudgment garnishment.

MS. MURPHY: Final comment right there.

JUDGE LIPMAN: I would say it's an observation at least from my court is that when the consumer finally files a motion to set aside, that's really the first opportunity that the judge can really do some good, because we can establish payment plans, things that we can't do outside the realm of these garnishment proceedings where we can actually get them off the garnishment, which is a win-win for the creditor

attorneys and the creditors, because they'd rather have people voluntarily pay than have them hanging over their head.

In that case they know that they can go ahead and file the garnishment, but we're preventing people from garnishing; we're putting people on payment plans; the judge is able to assess the income of the defendant and assess what his real ability to pay is. We're not getting them into a situation where they're paying interest and the debt keeps accumulating over time and putting them into the so-called "debtor's hell."

So that opportunity when they're finally appearing on garnishment sometimes is the first time as a judicial officer we can do some good in the process, as well.

MS. MURPHY: I know we have more to say, but I do want to thank our panel. Very interesting, very informative. I think one thing we can all agree on is that it's break time. We'll have a break from 3:30 to 3:45.

Thank you.

PRODUCTIVE CHANGE and

BEST PRACTICES

MS. BUSH: Okay. My name is Julie Bush, and I'll be moderating the final session today. It's been a long day, hasn't it? It seems like we've gotten a lot done. We've discussed a lot of important issues, and we've also uncovered a lot of things that keep -- that those of us from around the table from different perspectives have concerns about to some degree.

I'd like to start this session, which has to do with productive changes and identifying best practices, with an example of collaborative problem solving in Michigan about garnishment. Both Lorray and Mike have talked a little bit about this, but there is a handout that you should have in your packets that -- they weren't actually in the original packets. We asked people to pick them up -- I need a copy of it -- that has to do with the garnishment rule in Michigan.

There you go. It says "Order" on the top. It's a garnishment order, and it's signed by a clerk Corbin R. Davis on the back. If you don't have one, raise your hand, and there are people around distributing them.

And I'd like Mike and Lorray to talk a little bit about how this came into being, what the original impetus was and what kinds of difficulties and successes

you encountered in working together to achieve the order that resulted.

MS. BROWN: We touched on this a little bit. What you have here now is an order from Michigan Supreme Court that says this rule will be effective September 1 of this year, and, basically, now it instructs the bank that they shouldn't withhold funds that are from an account in which only exempt funds are directly deposited, and they are clearly identified as officially exempt funds, Social Security, SSI, railroad and black lung.

As I mentioned earlier -- and this was a long process. As I mentioned earlier, legal services attorneys had been faced with a lot of our clients walking through the door whose bank accounts had been frozen based on the exempt funds, and we had to go through the whole process of notifying the attorney, going into court, objecting, and in the meantime the clients were racking up all these bank fees that were outrageous, and we had clients not being able to pay bills or pay their rent, and so that's just been a frustrating process and a problem.

At the same time, I think that other jurisdictions had been faced with this and at the National Consumer Law Center there have been a number of different sessions on this

and a number of consumer rights litigation conferences. I won't take personal credit on that.

So, you know, we decided that, let's see if we can get the court forms changed. Because one of the things we would encounter when we called up the banks and said, you know, "Look, these funds are exempt," the banks would say, you know, "I don't know. I'm not a lawyer. I can't make that determination myself." So we thought the best thing is if we could give the banks a form on the disclosure -- the garnishee's disclosure forms that say if it's exempt, don't withhold. So that's the route we went.

We started in 2006 to go through the process. In Michigan you have to go through the State bar to get to court, and we went through all the different committees and submitted this proposal for changing of the court forms. The State bar supported it. It went through all the channels, and when we got to Michigan Supreme Court in 2007 -- actually, we finally got to the Supreme Court in 2008, and that's when Mike's group, the credit bar association, and the banks I guess first got wind of it and opposed it, and we got rejected and denied by the Supreme Court saying, "Sorry, we're not going to do that, but by the way, these are the people who opposed your proposal. Maybe you guys want to sit around and talk about it; maybe you can come up with an

agreement, resubmit, and you might be able to be successful."

So that's when we met last April or May -- or March 2008. The banks' association, bank representatives, and Mike representing the credit bar association, and we came up with commonalities, common issues and realized, all right, they don't want exempt funds, they can't take exempt funds, and let's see what we can agree on.

There were a lot of issues that we were unable -- commingling issues. We couldn't agree on that. So we decided, let's focus on what we can agree on, and what we could agree on was federally exempt funds, clearly identified exempt funds, and came up with this proposed court rule and submitted that, and, of course, that went to public comments, and the Supreme Court accepted it, and we have this order of September 1, 2009.

You wanted to add more?

MR. BUCKLES: Well, one of the things that's really important is how the process came about and what we'd do better in the future and what other consumer and collection attorneys and members of the bar can do. We learned about this because it was a change in the form. This isn't the first time we've seen a form

change and asked, "Well, what's going on. The rules should be changed first, and then the forms should follow the rule." But we weren't necessarily in disagreement with the intent of the form, but we wanted the rules to be changed, and so we did work together.

The advantage that we had is for at least 9 or 10 years the Michigan creditors bar had worked lobbying the legislature preparing bills and proposing bills. So we had contact with the bankers association and other operative parties. One of the things I was telling Lorray is anytime you want to get a law changed, you need to basically find out who all the players are, because that's the first thing the legislature is going to ask you, "What does the consumer bar think?"

So we got together, we worked on this, and we pounded out a language. And, by the way, it does require a few more things. It requires the garnishee to indicate on the disclosure the basis for its claim of exemption. So now we can go back to the bank and say, "He says it's exempt. Well, why?" And I've had them say stuff was exempt, but it's not. And cite the legal authority for the exemption. So we did that.

I want to touch upon the topic that you have here, "How have industry members, consumer advocates and court personnel worked together or separately for

possible changes?"

One of the other things that happened last year is Ian, Ian Lyngklip met with Judge Lowe -- well, actually, I think Ron came to you -- because Judge Lowe was setting up the Michigan District Judges Association conference; he was kind of like the conference guy who had to set up the program. And he went to Ian, and he wanted to have something on collection cases, because there's so many of these. And I think he asked you for somebody from the credit bar, and Ian suggested me.

So we got to both go in front of the MDJA, which is about 100 judges, and they loved it, because they got -- anybody loves a presentation where you hear both sides of the story, and it was a little dog and pony show. I felt your video stuff was nice, the pictures were good, and we gave them points that they really didn't know. And since we've gotten -- the creditors bar has had meetings with some of the judges. In the meantime, the 46th District Court, Judge Moiseev, they're developing a call, and we worked with them.

My point is simply this: If you're a consumer attorney and you're not happy with what's going on or you're a creditors attorney and you're not happy with what's going on, the first thing I'd do -- of course, you've got a part-time legislature, which also makes it a

little more difficult -- is I would go to some of the key players and begin to do some of this networking with them, because if you can reach some sort of consensus and commonality, you may be able to change these problems like you've done here in Chicago and Illinois.

So that's kind of what we've done. I've enjoyed working with Lorray and members of the state bar and members of the banking association and so forth. We're not always on the same page, but we always try to reach some sort of resolution.

MS. BUSH: Thank you for describing that. And I'm wondering, was there any point when you were working together that you thought you had reached an impasse?

MS. BROWN: No. After our first meeting -- actually, what I took away from that first meeting is that, boy -- this was in 2008. We started this process in 2006 -- maybe we should have had this meeting two years earlier, because then it dragged on for so long -- and it might be just because we had it at a fancy restaurant where the State bar paid and we were eating good food.

But we sat down and started talking, and we all realized, all right, we can all agree at the very beginning. The impasse, though, was the commingling piece, that they weren't ready at that point to deal

with the exemption of funds -- the freezing of accounts where there were exempt and nonexempt funds. And so this, of course, didn't address that, and so we only focused on federally exempt funds.

Also, we didn't really come up with agreement on the exempt and state exempt funds, because, you know, there's a dispute of what funds are exempt under the state law. But we also did agree when we came up with this that this was an ongoing process, that we would first get this passed and get this done, and then we would continue to meet to address the other issues such as the commingling and the state exempt funds.

MS. BUSH: And are you still working on those issues?

MR. BUCKLES: We still communicate, and, in fact, I think this is an opportunity for Lorray and I to set up a time and let's talk about the commingling of funds.

We did end up talking about possibly amending our garnishment statute to make it a little bit more simplified and less costs and fees for everybody. But when we did that, we sent out a letter to the District Judges Association and to the state bar and to the consumer law section, and they raised some issues about it and concerns, which is good, because instead of us spending

a bunch of time going to the legislature, drafting a bill, putting it in and then hearing what they had to say, instead of that, they told us what their concerns were. And at this point we said, it's not that big an issue to us to take the next step, so I think we're going to come back and work on that now.

MS. BUSH: Thank you. I'm wondering if anyone else on the stage has had experiences in collaborative problem solving that has to do with debt collection litigation.

MS. WEINBERG: Here in Cook County is a very similar kind of experience, except that we didn't get to the legislature before we -- actually, it was really spearheaded by Judge Donnelly, who I guess has left for the day. But he saw this problem in his courtroom every day, people coming in saying "My Social Security, that's all I have," day after day after day, and he contacted me and, I assume, the creditors bar, and sort of put together a committee.

It was already in our statutes that the bank is not allowed to freeze exempt funds, but the banks said they couldn't tell. And, of course, we know they can with electronic deposits. But then we had this collaborative discussion, and we got stuck on the same issue, and the only thing we could agree on was

basically 100 percent of the funds. And I described the form earlier. It seems to be working very well.

MR. LEIBSKER: Actually, long before that when the garnishment form was changed we went to the consumer bar and asked them to -- a proposal to put together what they wanted in the garnishment form, and we had our thoughts about it, and we eventually changed the garnishment form, and it worked for everybody at that time. Since then it's evolved and changed some more.

I think what comes about is there's opportunities for the consumer bar, the creditors bar, and the judiciary to work together and try and resolve a lot of these issues. Of course, we unfortunately want everything all at one time, or we want to try to agree to something more than one side is willing to give up, and I think that's some of the biggest problems.

And I know that's one of the biggest issues in previous discussions with NCLC in some issues is not being able to give a little to get something, such as debt settlement companies. We talked about it, "Well, this is an issue that NCLC and the creditors bar could work together in trying to resolve," and they really didn't want to speak to us about it, and I thought that was a disservice to the consumer bar because they didn't want to do that.

I think what we're doing in Cook County, we've been working together for three years, we haven't come to any conclusion. Are we closer? Absolutely. Will we get to some conclusion? We will. Will I be happy about it? Probably not 100 percent. Will Michelle be happy about it? Not a chance. But it's something.

MR. BARRY: Can I just --

MS. BUSH: Actually, Julie was waiting to speak, if you don't mind.

MS. NEPVEU: I do feel encouraged by this collaborative effort, because I think we've had some significant problems with claims saying they're taking people's money without notice. And all the courts eventually said yes, you know, "We do the balancing test. We can't give them notice ahead of time. We have to do it afterwards, because that's how it works."

Well, you know, I think that they can do it ahead of time. Technology has made that possible, and most of the states have not updated their rules and their forms to take advantage of the changes, and I think there are some lawsuits in the works that will declare all of these court rules possibly unconstitutional.

So to the extent that the creditors bar is out there saying "We're going to fix the problem so that we

can actually collect money for a couple of years," that would be great, but I haven't seen enough progress on that to make me stop saying, gee, somebody should bring a lawsuit to have those rules declared unconstitutional.

MR. BARRY: Two points I want to make. First of all -- and my name tag says NACA, and while I'm a member of NACA just like you're a member of NARCA, and maybe you speak for NARCA, NACA doesn't speak for me. And I don't have any idea why it says NACA, because I'm a member of NACA, but that wasn't in my bio. I don't even know if I mentioned it. And my issue is in 13 years of practice never once has NACA, ACA or anybody else approached -- that I'm aware of -- and, again, Rozanne, you correct me if I'm wrong -- has ever approached the consumer bar in Minneapolis, which is, I would say -- you know, with six consumer attorneys in my offices -- a fairly robust consumer bar, and there's lots of other people in Minneapolis, and I think -- but no one has ever approached us from the creditors bar to ask us what our opinion of what constituted due process was. In fact, most of that stuff has been done Paul Revere style in the middle of the night.

So I guess I wanted to say two things. One, the NACA/NCLC position is their position. It certainly isn't my position as a litigator. So I want to make

clear that, you know, when you look at stakeholders -- and you've got a New York problem and an Illinois problem and a Michigan problem and a Minnesota problem -- that turning to NCLC -- with all due respect for them, they're academics. They're wonderful people, but they're not practicing. You're practicing; I'm practicing. So make sure that you know -- you made a good point, Mr. Buckles, about turning to the stakeholders. Make sure you know who the stakeholders are.

MR. LEIBSKER: No question about it.

MS. BUSH: I'd like to hear from Dave, and then I'd like to turn the discussion a little bit.

MR. PHILLIPS: It's good to hear from my colleagues on the collection bar on a collaborative effort, in part, but one of the things that they did without a collaborative effort is they went to the legislature and tried to strip the judiciary from having discretion to vary from the garnishment procedure.

In fact, that's a matter on appeal now. But they didn't involve the consumer bar in that; they didn't involve the judiciary in that. They went to the legislature and got them to strip out a little provision of the statute. So leaving it to the legislature and collaborative efforts is not enough. That's why we have

the Fair Debt Act.

In Illinois we don't elect a governor. We elect the next "Public Official A" who is going to be the person named in the next round of federal indictments. It's pay to play in some states, and there's not this Kumbaya, hugging everybody, rowing the boat together. It's pay to play in some places. To say we're going to leave it all to everybody rowing the boat together I think is Pollyanna and wrong.

MS. WEINBERG: Let's get a commitment from the creditors bar that the next piece of stealth legislation that takes away consumer protection, takes away judicial discretion to reduce the wage garnishment for hardship reasons, you know, I'd like to hear a firm commitment from you all to let us know before it's passed by the government.

MR. PHILLIPS: In fact, when that appeal was pending I got appointed pro bono by the judges on the 14th floor because they were so disturbed by this stealth, and it was a case brought by Wells Fargo who got $25 billion dollars in TARP money and wanted to beat that extra 1 percent or 2 percent out of the consumer's pocket on an expedited appeal. Existing laws are not adequate.

MR. MARKOFF: This is something that I was very active in this particular bill that you've mentioned.

What you failed to mention is that the bill --

MR. BARRY: Which consumer rights attorneys in this group did you involve in that?

MR. LEIBSKER: Why don't you let him finish his comment.

MR. MARKOFF: The bill itself has new consumer protections and actually advances collection law in many respects. For example, it puts -- it, in fact, takes sheriff revenue sales away from the sheriff's office and puts it under judicial supervision. It also gives judicial notices in wage garnishment proceedings.

There are judicial protections. I happen to have been very active in the bill, and what you think is judicial discretion in wage deduction, there were only three or four judges in the entire State of Illinois for 50-plus years who thought they had some discretion. So I beg to disagree, respectfully, that they didn't have discretion.

But the point is -- wait, wait, there's a new rule -- there's a new rule under the Supreme Court Rule 277. The creditors bar has proposed some amendments, but we have not taken it to the Supreme Court. What did I do first? Michelle, you have a copy. Judge Donnelly. We've sent it to the banks for comment. We're not doing anything stealth here. We're still awaiting your

comments, and, actually, one consumer attorney said, without even reading our proposal, "We're going to fight you." Wait a minute.

MS. BUSH: Okay. I don't want us to get bogged down. What I'd like to do now is, instead of focusing on collaborative problem solving (laughter), I'd like us to talk about what needs changing.

I'd like to go around the room and talk about something big -- some of the biggest problems in debt-collection litigation that need changing, and I'd like to start with Michelle and work our way this way.

MS. WEINBERG: I think the prima facie evidence, business records, those issues with the debt buyers are probably one of the biggest, and the garnishment.

MS. SINSLEY: The debt buyers hear that issue, and we've been addressing it, and we acknowledge that that is an issue, but I think it's gotten, as the judge has said, a lot better. And we realize that that is an issue.

But the collaborative issues -- going back to that -- which is also working in Virginia when we worked with the consumer advocacy groups, the judges, and the debt buyers got together on best practices on how the pleadings could be filed, what documents were necessary. So in that regard we hear you, and we're working on it.

The other issue that we find is a problem is that states are enacting laws or trying to pass laws where they want debt collectors to give legal advice to consumers, and that is -- what we talked about earlier about telling consumers about the statute of limitations. At what point does the debt collector become the advocate for the consumer, and where does that end? And that is a problem that needs to be addressed, because the debt collectors cannot be the advocate for the consumer.

MS. BUSH: Thank you.

Dave.

MR. PHILLIPS: The biggest problem I see is the debt collection bar needs to say "no" to trying to collect on junk where their clients have actually no proof and never will put forth any proof.

One of the most telling comments I ever got was where I asked the debt-collection attorney whether you have any proof, and a month later she came back and said, "Oh, my God, I finally got a case where they had some proof that the debt exists."

This whole reliance on plastic versus paper is just wrong. If you've got no proof of the debt other than a blip of data that's been passed around from Tinkers to Evers to Chance, the debt collection bar needs to learn to say no and not file those cases.

MS. BUSH: Is that a problem that you would say applies to the entire debt collection bar or to some segments of it?

MR. PHILLIPS: The entire debt collection bar needs to say no to some cases.

MS. SINSLEY: Are you guys going to do that when you say you're going to sue the debt collectors?

MR. PHILLIPS: We do.

MS. WEINBERG: We turn people away all the time.

MS. BUSH: Julie, what do you think is the biggest problem?

MS. NEPVEU: More and more seniors are incurring incredible amounts of debt, that never in the history of the world has there been the amount of debt that we have today, but as they advance in age, they cannot pay off these debts.

We're seeing a lot of predatory practices that are increasing, these credit card companies that have huge interest rates and huge fees upon fees. And once they go into default, what is that interest rate? How do you prove what that interest is? What are the terms of that contract? Nobody even knows what the terms of that contract are, because it changes every three days, anytime they want to. What is the payment? Did they default n it or not. We don't even know.

I know some of those practices have been recently addressed in the credit card situation, but I think that only makes it even more complicated. Did this credit card charge come before the law went into effect or after the law went into effect?

What happens is we have these problems with proof, and then it's going to eventually trickle down into the problem of garnishment. People are going to start to think they don't know how much they owe. We don't know how much they owe; the creditors don't know how much they owe. What are those terms?

It's very complicated and I think that that's going to be an increasingly difficult problem, because there's so much debt out there and because people, as they age, are going to have a harder time paying them off.

MR. MARKOFF: I would like to see -- several things come to mind. One, getting banks to follow the law on garnishment. That should be very easy. I'm surprised that it is this hard.

Two, the ability to communicate with the consumers to discuss repayment plans in a reasonable manner so we don't have to resort to garnishment and wage deduction.

Three, consumer education, financial literacy. A lot of our problems are related to that issue alone.

Consumers don't know how to budget. I know it doesn't start here. It probably starts in grammar school or high school, but that's an important thing that should be brought into the discussion.

And I'd also like to clarify that the Fair Debt Collection Practices Act should not apply to courtroom processes and procedures that are supervised by a sitting judge.

MS. BUSH: In what sense do you mean that?

MR. MARKOFF: What sense? If a case is filed in a Circuit Court or any court -- let's not even quibble about what court it is, but if there's a case that is capable of being brought into a courtroom for a judge to monitor the proceedings, the pleadings, the proofs, trial, judgment, garnishment, citation, whatever it is, that this is not part of the Fair Debt Collection Practices Act as representative DeNunzio stated in removing the attorneys exemption -- the FDCPA is meant to regulate backroom procedures, not courtroom procedures. And right now we are being bombarded by suggestions where the FDCPA is subject to interpretations on interpretations on interpretations, and we don't know that we have violated the Act until a new creative theory is allowed by a judge, the splits between the circuits, what can they do in one circuit

versus another.

We can follow rules. Clarify the rules, but we do not need private corollary actions to State court process. When we are in front of a judge, that judge has the ability to sanction us, to monitor the proceedings. Plus, our law licenses are worth more than simply allowing us to collect debt. With my law license I can do probate work, mergers and acquisitions. So the point is, our supreme courts regulate us severely.

MS. BUSH: Okay. Thank you.

Ian.

MR. LYNGKLIP: I think the three biggest problems that I see, the first one is one that has not been redressed by the statute, and that is service of process. It is a problem that does not start with judicial supervision. It starts with the process server making a decision to do something outside the courtroom; namely, not serve that process on the defendant, on the consumer, and that needs to be remedied.

We need to have some mechanism by which those process servers are realistically going to be held accountable and by which that kind of conduct is going to be deterred. It is becoming more and more prevalent as time goes on, and we still don't see any remedies emerging from the state courts that are readily

available to consumers, and I don't see anything meaningful.

The second thing is affidavits that are not necessarily what they're purporting to be and documents that are not what they are purporting to be.

I continue to see, coming out of banks and debt-buyers, documents which purport to be things that they are not, things like statements that purport to be, quote, "photocopies," of statements sent to consumers which are, in fact, regenerated copies using data that has been altered. So these documents are not what they purport to be, and the Court should be apprised of what those documents are before they receive them, and that needs to change.

But the affidavits that we're seeing from record keepers, record keepers in the consumer bar are very well familiar with several professional affidavit signers who in any given month can be executing affidavits being authorized record keepers for 20, 30, 40 companies. These record keeping affidavit signers effectively are signing anything that is being put before them without knowledge of anything that they're attesting to. That has to stop.

MS. BUSH: Thank you.

Steve.

MR. LERCH: One is the evidentiary issue, prima facie, however you want to phrase it, but I think that that is being addressed in most states in which I've talked to attorneys, and there are active committees in Indiana that are working on that.

Second, as mentioned, the ability to communicate with the consumer, which leads to the third issue, the inability to communicate with consumers, leading to a tremendous burden on the courts and which many of them cannot keep up with in terms of funding and staffing.

And I can tell you that for 16 years I was a part-time deputy prosecutor in Allen County, Indiana, with 350,000 people. My sole job for most of those years was to handle residential burglary, but I saw the criminal system and how it was overburdened, and I'm seeing that also in this portion of the civil system and the problems the courts are having with that.

Now, maybe resolving the rules and statutes as they relate to evidentiary issues will help relieve that burden, but I do think that that is a problem, and a lot of these judges are frustrated -- magistrates are very frustrated with the case load.

MR. LEIBSKER: Well, I'll repeat some and add another comment.

I think the garnishment issue is an important

issue, very important both to senior citizens and to all consumers. I think this is a federal issue, something that has to be resolved on the federal side.

Evidentiary issues I believe is a State and local issue to be resolved, and I think we're moving toward that. Maybe it should have been sooner than it has been, but I think we're also making some progress that way.

During this whole conversation that we've had this whole morning and afternoon, nothing was mentioned about consumer education, and I think that's something definitely missing. I don't know how we get out to the consumer; I don't know if you do this in grammar school or high school or college, but the consumer needs to be educated, and they're not educated. They don't know to go to a lawyer to fight a consumer issue. They're afraid.

Why are they afraid? What makes them fearful of all of this? The only time a consumer ever gets to speak to somebody to resolve a matter is when they're sued. That's when they come and get to meet me in court or meet Steve in court or Mike and try to resolve their issues. No other time in the process is there that personal contact that ever takes place, and if the debtors and consumers know that this isn't the time

we're going to try to resolve it -- as much as you may think that we are doing them wrong or we're doing a disservice to them, I think you would hear from Judge Donnelly and Judge Panarese that we treat consumers with respect, and we try to resolve these matters in a fair and an equal way.

My last point is that there are literally probably tens of millions of lawsuits being filed, and more will be filed as time goes on, and as part of our system of economics, we are that linchpin that keeps things going. If it's taken away, the whole system which we live in right now, credit system, will just fall apart.

If a credit grantor cannot recover his funds, then he won't issue credit any longer. And you're seeing that right now in some respects. They don't feel that they can recover their money, whether it's foreclosure, whether it's credit card. As much as we'd like to solve all the problems, they're not going to get solved; it's something that's going to take time.

MS. BUSH: Dan.

MR. EDELMAN: I'd like to see some things defined by the FTC as an unfair or deceptive practice.

The first is filing a false return of service in a collection case. The second is seizing assets which

the collector knows to be exempt. The third is collecting debts beyond the statute of limitations.

I agree that the requirement of disclosure is kind of pointless, because collectors provide enough information, mostly inaccurate, to debtors. To begin with, it simply should be prohibited. In most states the statute is long enough that it provides ample time in which to file a collection case.

I would like to see the FTC define as an unfair and deceptive practice filing statements of account which are not what they purport to be. I think Mr. Lyngklip referred to affidavits that are purported to be made on personal knowledge but are, in fact, recitations of what somebody sees on the computer screen but knows nothing about.

And, finally, I'd like to have the FTC define as an unfair and deceptive practice the filing of lawsuits by someone other than the original creditor without showing an unbroken chain of title starting with the original creditor and ending with the plaintiff and showing that the account sued upon was transferred from the original creditor to the plaintiff. Most consumers do not realize that this may not be the case, that they should inquire about this, and I think it has to be brought about by a rule.

Finally -- and this has to do with the problem of payments -- I think that the same restrictions we put on telemarketers in terms of generating checks on behalf of a consumer need to be applied to debt collectors. In other words, it cannot be done unless you have a verifiable authorization in writing or recorded in which the consumer authorizes specific checks to be issued at specific times.

MS. BUSH: Thank you.

MR. BUCKLES: Whew, you're getting longer than me now.

First of all, I agree with Dave, and I do say no, and at the risk of irritating some of my fellow colleagues, I think if more collection attorneys said no, to the debt buyers who didn't have the records, more of them would have records in the future, and I'm here to tell the consumer attorneys that will happen. Sooner or later there will be more records, and it will be a nonissue or the issue will shrink dramatically.

I'd like to see the FTC step up and educate consumers. No offense, Julie, but they need to know a lot of stuff. I don't understand why there's not TV ads -- I see TV ads for debt negotiators. Of course, they're making money off consumers cheating them, taking their assets and practicing law without a license. I

don't understand why the FTC -- now, I know you went after Solidium, I know you went after some of the other big guys out there, but these debtors should be going to you guys, not to debt negotiators, and the consumers are losing on this. I spoke to Congressman Peters about this; he's interested in it. There needs to be something done about that.

I think the exempt funds issues is a big issue. I think that's something we can work collaboratively on. We have worked on the court rules.

I don't agree with Ian's assessment of service of process. I think you're making a bigger deal out of it than it is. It's a very small thing. It's important, but it's not as important as the exempt funds. Also, I think service of process should be dealt with on a state level. I don't think it should be an FDCPA issue. I guarantee you it will just turn out to be a bunch of frivolous lawsuits that will interfere with the collection process. But that's my opinion, for what it's worth.

And, lastly, everything Bob said about the banks can be worked out. Same thing with the garnishments. But I think that's something we can all work on.

MR. BUSH: Thank you.

Ms. Brown.

MS. BROWN: I have three. One -- the biggest -- I think is the evidentiary issues, that we really need to have the debt collectors required to have proof of indebtedness, the date that it was incurred, date of last payment, identity of the original creditor, the amount of the debt, itemization, chain of title. I think it's really important so that consumers defending against it at least have this information.

I think one of the things that we see -- we see consumers come to us, but what about the ones that are unrepresented, and if they don't have this information, how are they going to defend themselves? So I think it's really a critical thing.

The other one is the time bar issues. I really think that sending out those letters, collectors -- even if it's time-barred, even though they're not, I think they should have some statement that collectors -- that the consumer cannot be sued because this is time-barred or they don't have a legal obligation to pay it. I think something needs to be done to include such a statement. It's important so that the consumer will really know that and wonder where this debt is coming from.

Also, the third one I think is exempt funds. I think nationally -- you have pockets of different states

or communities working on this issue collaboratively or resolving these issues, but I think nationally there might need to be some federal statute or regulation that prohibits banks from freezing accounts with federally exempt and state exempt money.

MS. BUSH: Rand.

MR. BRAGG: Each of the major topics that we addressed today are important and need to be, you know, changed.

The default judgments that are arising at least in part are because of no process served. The process servers need to be required to keep logs and make them public as to what they do each day when service was made.

With regard to the statute of limitations, as Lorray said, there needs to be a rule that debt collectors disclose to consumers that they are not legally obligated on this and they cannot be sued to collect a debt.

With regard to proof of the debt, each of the defaults needs to be proved up even though there is a default, showing, you know, that -- when the statute of limitations began and show that it's a timely brought lawsuit.

Itemization of the debt showing what amounts are

owed and why, particularly with regard to that, attorneys around this country are bringing collection actions, seeking to add on their attorneys fees without authority to do so. There are a number of decisions finding that practice to be illegal.

And, finally, garnishment, the banks should be prohibited from garnishing or allowing garnishment of any exempt funds.

MS. BUSH: Thank you.

Lauren.

MS. BROWNE: I think information flow has been the primary theme discussed all day or lack thereof, and basic validation information should really be included with the complaint to facilitate better communication between the debtors and the creditors, and an agreement as to what consists of basic validation information should be discussed and agreed upon, possibly by creating a definition in the FDCPA to build off standards in the validation that's already required but expanding upon it, making it a little bit more broad.

One example: in California small claims court, in order to bring an action to -- a debt action, the plaintiff must file a statement of calculation of liability, which includes the original debt and a payment history including all payments credited to the

debt, fees and charges that have been added, and an explanation of the nature of those fees. And that can be used as guidance for passing laws in other states and, also, just to clarify that in small claims court in California, assignees are prohibited from bringing a suit actually, and that law does not apply to superior court, and so that would be something that's beneficial as providing more information at the complaint stage.

MS. BUSH: Thanks.

MR. BARRY: The collection industry as a whole and collection attorneys in particular are a legitimate industry, and they're a necessary industry in this country. Collections is part of that kind of unbroken chain of our economy, and debt collectors are part of the economic lubricant that we need in our society. Consumers should pay their just and owing debts.

Now, I represent consumers who sue debt collectors. I sue debt collectors for a living. I sue debt collectors because they've treated my clients unfairly and untruthfully and in an undignified manner or they've been disrespectful to my client, they've violated their rights. So I will not -- I won't sit here and say anything against the collections industry other than it's a legitimate industry as a whole and should continue in that vein.

With that said, I want to say a couple of things about frivolous lawsuits. When you have 250,000 lawsuits and you have eight attorneys handling those files, I call that McLaw. I don't know how it's possible to serve 250,000 lawsuits or have 250,000 litigation files active in one state with no more than 8 or 10 attorneys handling those files. That is not the practice of law; that's mass produced, kind of Henry Ford-style litigation. It may have worked for Henry Ford, but it doesn't work for debt collectors, and it doesn't work in collection litigation.

So when you talk about consumer education -- we all want consumer education -- but the fact of the matter is where you need education is first and foremost is with the credit card companies who issued this credit. I mean, nobody had a gun to their head and told to issue, you know, a 50 or 100 thousand dollar line of credit to these people who couldn't pay it.

And then I also -- with all due respect to what my distinguished colleagues on the panel think, I take umbrage for those clients who lost their jobs, who have been put in situations that make it essentially impossible for them to pay their bills, that we're going to somehow reeducate those folks. "Here, we're going to teach you how not to lose your job," or "We're going to

teach you how not to get laid off from the factory; we're going to teach you how not to lose that great $200,000-a-year job at a biomedical company."

The fact of the matter is credit cards take risks, and they're rewarded for those risks, and they're well rewarded with 19 to 29 and 39 percent interest rates in some cases, late fees, over-the-limit fees. The risk meets the reward for credit cards. They don't have any security, and there's a reason for that; there's a reward behind that. And to suggest that somehow we're going to be able to educate people on how not to lose their job or not have some sort of personal earthquake happen to them, I just don't know how that's possible.

But I also want to make this point --

MS. BUSH: Try and sum up.

MR. BARRY: -- mass produced litigation -- mass produced litigation creates a vacuum, because when you inundate the courts with these lawsuits, due process starts, procedures start to slip, and you start to see the problems we're talking about here today.

MS. BUSH: Thank you.

Rozanne.

MS. ANDERSEN: I'll just make a few points.

First of all, debt collectors, third-party debt

collectors in particular, can only be accountable for the information that they actually have access to. And in saying that, that means that in terms of any requirements for itemization of finance charges, interest, fees, you name it, we are prepared to address the need for itemization from the point that the debt is assigned to the debt collection but not to take responsibility for an itemization of 5, 10 or 8 years of history with the credit card company itself. So I think we need to problem solve on that portion of it.

Another point I'd like to make is that debt collection, when you reduce it to its simplest form, is about communication, and the role of the debt collector, including the -- and I would say, Ira, the debt buyer, as well -- I'm not going to speak for the collection attorneys at this moment but communication is key. And let me just say to the extent we continue to have envelopes -- all the validation notices, all the communications going to consumers, there's no meaningful return address.

To the extent we continue to have issues as to when -- not when but how we can communicate with consumers, and if cell phones are shut down -- and I inappropriately wrote down, we are kind of in voice mail hell as an industry. There's not a lot of clarity in

these issues and that is important, because as soon as you stop -- actually, you can't even start to communicate with a consumer -- you can't effectively collect that debt, and there is one option, and that is sue them.

So the communication and the ability to communicate fairly and respectfully using modern technology as approved by the consumer is fundamental, I think, to understanding what can be done prior to litigation.

I don't want people to forget about the rules of privacy should not be overlooked when we talk about these pleadings and what should be attached, whether it's HIPAA, whether it's 37 states that have privacy laws controlling what -- what personal financial information can be shared. These are public documents. I think it's a consideration that somebody needs to pay attention to. We cannot attach all the personal financial information, in my opinion, of these individual debtors to these complaints helter-skelter. Whether we talk about access or possession of the documentation, that's a different story, in my opinion, but attaching that to the pleadings runs a tremendous -- we could end up with a new problem.

And in terms of consumer education, I would just

talk -- if collaboration didn't seem particularly apparent on the panel today, I would say that we will continue to ask the FTC to work with the industry on consumer education models.

I cannot close without saying "Ask Doctor Debt" has been incredibly successful. It is a consumer education outreach program that's being carried on many, many television stations, has now been converted into Spanish, and when you say, no, we cannot educate people on how to get that super-duper job back or -- you know what I'm saying.

MR. BARRY: Hurry up. They cut me off.

MS. ANDERSEN: We can tell people how to deal with the debt collectors and how to deal with collection attorneys and how to pull your head out of the sand so that bad things or things that you don't expect do not happen to you.

MS. BUSH: Thank you.

Unfortunately, people had so many "one things" to say that it's time for questions. I don't know if we have questions from the audience yet, but I certainly have more questions for the panel.

What I'd like to know is what role you see for the FTC in the kinds of problems you've lain out and what you think about the -- how much it depends on

FDCPA, as opposed to state law issues.

Would someone like to start out with that? I know we talked about so many different things.

MR. MARKOFF: Basically, on behalf of NARCA and the collection attorneys, we believe the litigation process should be left to the various states, pure and simple, and the regulation of the practice of law as a practice of law should be left to the states, and we are responsible to our supreme courts and disciplinary committees.

So far as we would -- the FDCPA -- we would like to see some amendments so that it clarifies the rules as to what we must respond to and how we should respond, because once the rules are black and white and not subject to interpretations on interpretations, which is what we're dealing with today, it makes the process unfair, and I promise you on behalf of NARCA that we will continue to work with not only the FTC but with our colleagues in the local courts. Whether we agree to disagree or we can reach some areas of agreement, we will continue to strive to do so.

But, again, to have the federal government try to regulate the practices in 50 states, I think you're binding up more than you really would care to chew.

MS. NEPVEU: With regard to garnishment, I think

the government needs to regulate the issues to protect the funds. Seriously, the banks don't think it's clear, and until the banks start to believe that they cannot freeze those funds and then charge a gazillion dollars every time somebody's got a garnishment, until that happens, the Treasury tells them they can't do this, that's going to happen. But then as soon as the Treasury changes ranks, the banks are still going to say "Well, I still have to follow the state law."

MS. BUSH: Dan.

MR. EDELMAN: I think that the regulation of the debt-collection litigation is in the same position that the regulation of debt collection was in the 1970s, the same argument is it should be left to the states, but it doesn't work.

A distinct disciplinary committee or an individual litigant cannot present the entire picture. It is necessary to look at overall practices. Are lawsuits being filed by people who either don't own the debts or can't show that they own the debts? Are affidavits and documents that are basically fraudulent being presented en masse in collection litigation? One litigant cannot raise that. All he knows is the facts perhaps of his case. State disciplinary authorities are not equipped to conduct the kind of investigation that

is necessary to uncover these practice. A federal minimum standard is absolutely essential.

MS. SINSLEY: I think it's very helpful that the FTC in the last couple years has issued formal opinion letters -- which you only issued four, though. Those are helpful in guiding collection attorneys that are covered under the Fair Debt Collection Practices Act. In the future -- because one of the letters address foreclosure attorneys and what they could say and couldn't say. So more of that is helpful, because it provides a defense to the attorneys. Secondly is the FTC can support the state law which is on cert to the Supreme Court.

MS. NEPVEU: I would say the opposite, that the FTC could help by supporting consumers in that lawsuit.

MR. BUCKLES: I think that what Bob said, as a collection attorney, I would like to have a little bit more certainty. I see a lot of case decisions that come out there, and the one that troubles me the most is the Foti decision in which they effectively -- if I leave a telephone message or one of my people do -- that I have to mention that we're debt collectors attempting to collect a debt and so forth.

The problem is, if I leave that message and it's on an answering machine and some third party hears it,

somebody might say, well, I'm disclosing it to a third party. It's kind of a catch-22. We would love to see the FTC just have some certainty one way or the other.

MS. BUSH: The FTC is certainly aware of the tension between those two provisions in the FDCPA, and we discussed -- as we discussed in our workshop report in February. But I understand that that lack of clarity can leave people in a catch-22 situation.

MR. BARRY: I would dispute that. I think that that's not a catch 22, that that's false logic. Certainly a debt collector has the ability, presumably, if they made the telephone call to hang up. So to the extent that they leave a message -- I mean, there is a third option that doesn't violate the law which still allows the debt collector to make those phone calls. They just can't leave a message.

MR. BUCKLES: The problem with that is lack of communication, which I think all of us want. We want communication -- you know, let me finish just once.

Most problems in life, in politics, in whatever result from a lack of communication. I just want to make my point to somebody is what I'm doing and trying to get them to get back to me. I'm not trying to harass; I'm not trying to bother somebody; I'm trying to get communication. In fact, by just hanging up, and it

leaves a phone number on the autodial -- not the autodial but the caller ID. Now they say, "Well, you're calling them, and you're not advising them who you are." So there's a problem with hanging up.

MS. BUSH: Okay. So what about FTC enforcement priorities? Do people think those are properly aligned or that those should change?

MR. BARRY: If I could speak to that, I think that the FTC has turned their backs on the giant collection law firm mill, and I think that they should turn front and square and confront those collection attorneys just like they went after CAMCO in 2005 or anybody else.

The fact that attorneys are attorneys doesn't exempt them from coverage under the FDCPA, and I think the FTC is -- with all due respect, the FTC has really turned their back on some bad practices, and it's not in this room, but certainly there have been state court actions in my state and others to go after some of these attorneys. The most recent action we saw was by our Attorney General with respect to an eight-month period, and some other collection firms were involved in that, and my question is, where is the FTC? What's their position? Do they just ignore it if they're attorneys? If somebody has a law license on the letterhead, is it

over and the FTC just leaves that up to state regulators, or do they step in and say "These are debt collectors just like any other debt collectors and they ought to be regulated"?

MS. BUSH: Okay.

Bob?

MR. MARKOFF: I agree that it's important to enforce the laws that we already have on the books, and we hear we need increased regulation, we need more regulation. In truth, we have the laws and ability if they will only be enforced.

And the prime example of this would have been to base my report on the fraudulent activities of some alleged debt collectors and alleged attorneys I believe out of Buffalo, New York, calling consumers and saying, "We're the Bethesda, Maryland, police; we're coming to arrest you." The outrageous conduct -- Rozanne was interviewed for that report, but the upshot of that report was we need more regulation.

In truth, the authorities -- I don't know about the FTC, but state authorities knew of the illegal activities of these individuals. They were not collectors; they were not attorneys. These people should have been arrested promptly. In fact, one of our NARCA board members represented a plaintiff in the case

in I believe Maryland at an injunction prohibiting these acts, but because it was across state lines, the authority didn't take action. This was known.

We don't need more rules. Please enforce and shut down improper collectors, and don't just layer more regulations and say, "Oh, we've done a great job; we have more rules."

MS. BUSH: Rozanne.

MS. ANDERSEN: Briefly. Bob, you've said many, many times -- it's now in a public forum. There is a conclusion that one could draw that ends that sentence was going to be "we need more regulation." I just have to publicly say my hands were absolutely tied to begin to talk about self-regulation, and that has always been a misunderstood concept. So I just have to say that, and I will say no more, because you were so kind to let me speak earlier beyond my time.

MS. BUSH: I have one question from the audience. "Speaking of a new milestone, the second half of July saw us crack 5,000 FDCPA and FDRA lawsuits for the year. This is nearly two months ahead of last year. In 2008 we didn't reach 5,000 lawsuits until the second week of October."

Does anyone have any comments about that?

MR. MARKOFF: Do you want to take that, Mike?

MR. BUCKLES: Were they filed by consumer attorneys operating a mill of cases but didn't have any merit to them, or were they bona fide cases that were filed?

MS. BUSH: I can't say. This is from a questioner.

MR. MARKOFF: Cookie cutter lawsuits where consumer attorneys are bragging in published media reports that "We're making a living suing debt collectors." In fact, we're supporting our law firms, families, and we recruiting more people to sue collection agencies and collection attorneys. When we suffer in our burden with a claim for attorneys' fees upon the filing of a lawsuit, "I want $5,000 plus $1,000 statutory damages" for a cookie cutter lawsuit.

This is going on; it does affect our industry adversely, and I recognize this is really not on your agenda, because you're here to protect consumers, but we're part of this process, and it is happening, and we believe that the FDCPA is being misused to benefit some attorneys. And I'm not naming names or trying to point fingers. I'm just saying, look at the explosive growth. It's a cottage industry. As bankruptcy practices went down, FDCPA practices went up.

(Applause.)

MS. BUSH: I would like to acknowledge that the FTC believes, among other things -- or at least this FTC attorney believes that compliance helps protect consumers, teaching compliance, as well.

Michelle.

MS. WEINBERG: I just want to say 5,000 FDCPA lawsuits out of how many millions and billions of communications to debtors on millions of accounts per year. That doesn't sound like a mill. We all make a living doing what we do and feed our families that way.

MR. BARRY: I feed my family suing debt collectors. I'm proud of what I do. I'll do it until the day I die -- as long as I've been practicing law. So I'm not going anywhere. So unless there's some plan for me after this that shortens my life, I'm going to do it, just like you sue consumers for their unpaid debts. And I will tell you this, just like I said consumers should pay their just and owing debts, debt collectors must comply with the FDCPA.

MR. MARKOFF: I agree.

MR. BARRY: To the extent that they don't, I will make it my life goal to ensure that they get sued.

MR. MARKOFF: But you're making up new claims against us and --

MR. BARRY: No one is making new claims

against you.

MS. BUSH: I'm being informed that time is up. Thank you.

(Applause.)

MS. BUSH: We really are glad that you've been here today. Thank you.

(Whereupon at 5:00 p.m., the hearing was adjourned.)

C E R T I F I C A T I O N O F R E P O R T E R

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CASE TITLE: DEBT COLLECTION: PROTECTING THE CONSUMER

DATE: AUGUST 5, 2009

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 08/10/09

PAULA M. QUETSCH,
CSR-RPR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

MARG H. DUNLAP