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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

DEBT COLLECTION:  
PROTECTING CONSUMERS

Wednesday, September 30, 2009

9:00 a.m. - 4:23 p.m.

Workshop held at  
San Francisco State University  
835 Market Street, Rooms 675 and 676  
San Francisco, California

Matter No. PO94806

Reported and transcribed by Susan Palmer, CERT 124

1 Panelists:

2

3 Paul Arons

4 June D. Coleman

5 Andrew R. Estin

6 Jen Flory

7 William R. Gargano

8 Gail Hillebrand

9 Michael D. Kinkley

10 Scott Maurer

11 Harvey Moore

12 Ron Naves

13 Manny Newburger

14 Thomas M. Ray

15 Ronald H. Sargis

16 Tom Surh

17 Paul K. Tamaroff

18 Ronald Wilcox

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## 1 P R O C E E D I N G S

## 2 OPENING REMARKS

3 MR. PAHL: Good morning, everyone. My name is Tom  
4 Pahl. I'm an Assistant Director in the Federal Trade  
5 Commission's Division of Financial Practices. And I want to  
6 welcome you all here to the second day of our Debt Collection  
7 Arbitration and Litigation Roundtable. Today, we will be talking  
8 about debt collection litigation issues.

9 Before we get started I want to go through some  
10 administrative matters. For those of you who were here with us  
11 yesterday, please bear with me, but I'm going to go through  
12 essentially the same subject matter as we did yesterday.

13 The first thing is that the bathrooms are located out  
14 through the elevator banks where you came in.

15 And the second thing is in the case of an emergency San  
16 Francisco State University employees will come down here and  
17 direct us where to go and what to do.

18 The idea would be if the fire alarm goes off or if  
19 there's some other kind of emergency, just stay put, and they  
20 will direct us appropriately. The one thing they did say is in  
21 the event of an emergency do not take the elevators. They will  
22 take us down the stairs.

23 There are light refreshments over on my left on the  
24 countertop. Please help yourselves throughout the day. We break  
25 for lunch. If any of you are looking for a place to go, there is

1 an extensive food court, grocery store, and shopping complex that  
2 you can get to by going to the basement of this building.  
3 Essentially, go out to the elevator banks and press "C," and that  
4 will take you down to the level where you can go over to the food  
5 court.

6           During our panel discussions today if you could turn  
7 off your cell phones or put them on mute, we would appreciate it  
8 so no one gets interrupted.

9           I hope all of you have picked up a packet of materials  
10 for our program today, which are located on the tables that are  
11 off to my right in the back of the room.

12           Each of the panels that we're going to have today will  
13 be a discussion among participants on a particular topic.

14           However, we are also interested in getting the views of  
15 folks who are in the audience, both here in the room and also  
16 those who are participating on the internet.

17           If you're here in the audience and you have a question  
18 that you would like the moderator to pose to the panelists,  
19 please write the question on the card which should be in your  
20 packet. And if you don't have any cards in your packet, there  
21 also are cards located on the table in the back of the room.

22           Just write your question out. Hold your question up.  
23 Someone will come by and collect them, and they will be given to  
24 the moderator. If you are watching online and you want to submit  
25 questions, you should send them to [ConsumerDebtEvents@FTC.gov](mailto:ConsumerDebtEvents@FTC.gov).

1 The same process, one of our folks will print them out and hand  
2 them to the moderator.

3 We'll do our best to get the moderators to pose as many  
4 of those questions as possible. Of course, our time is limited,  
5 and so we may not be able to pose all of the questions that  
6 people submit.

7 We are generally interested in the views of the public  
8 on issues related to debt collection, litigation, and  
9 arbitration.

10 We have a -- on our FTC website we have a place where  
11 you can send written comments. So if there's anything that you  
12 hear today or you hear after this event that you want to send to  
13 us, please feel free to submit written comments through that  
14 method.

15 Well, I'm pleased today to have with us Jeffrey  
16 Klurfeld, who's the Director of the FTC's San Francisco Regional  
17 Office, I guess, Western Regional Office. And he has a lot of  
18 experience in managing debt collection litigation. And so we are  
19 pleased to have him able to speak to us today to kick off our  
20 program.

21 So, Jeffrey.

22 (Applause.)

23 MR. KLURFELD: Before making my opening remarks, I'll  
24 have two of my own housekeeping remarks.

25 Number one, I was -- Mr. Pahl indicated emergencies.

1 Since we are in San Francisco we have arranged that there will be  
2 no seismic activity, other than perhaps the eruption of spirited  
3 discussion this morning.

4 Also we are honored today -- I should now refer to him  
5 as His Honor, and that is Mr. Sargis, soon to be Judge for the  
6 Eastern District of California in terms of bankruptcy.

7 (Applause.)

8 MR. KLURFELD: And this is not in the nature of an  
9 encomienda, because he and I have been spirited opponents on  
10 occasion.

11 But I would just say that he enhances the prestige of  
12 any bench. And California is very fortunate to have someone of  
13 his expertise and stature soon to be on the bench, which I  
14 understand will be in January, sir. So this will probably be the  
15 last time that I can address you as sir, rather than Your Honor.

16 With that I will now launch my own opening remarks.

17 Good morning. I am Jeffrey Klurfeld. And I have the  
18 honor and privilege of serving as the Director of the Western  
19 Region of the Federal Trade Commission.

20 I would like to welcome everyone to day two for the San  
21 Francisco edition of the Roundtable Discussion on debt collection  
22 proceedings against individuals.

23 Today's focus will be the topic of litigation. And, as  
24 with our session yesterday on arbitration, you will hear from  
25 distinguished speakers representing a variety of interests and

1 providing a variety of perspectives as they explore problems and  
2 solutions in a 360-degree forum.

3           Let me make several prefatory comments about  
4 litigation. As with arbitration, litigation is an important  
5 component of the debt collection process. There has, however,  
6 been an increasingly negative reaction among the public to the  
7 propriety or even the organic predicate for litigation.

8           Indeed, the adjective, litigious, is now expansively  
9 used to embrace the full measure of that negativity directed at  
10 litigation, often viewed as the never-ending visit to the  
11 dentist, an experience which is to be avoided at all costs.

12           In recent years, the high volume of debt collection  
13 actions has strained the operations of many court systems,  
14 causing concern about judicial resources being stretched too  
15 thin.

16           Even beyond the sheer number of cases, debt collection  
17 litigation raises a number of consumer protection issues that  
18 need to be carefully considered and addressed. Today each of our  
19 panels is dedicated to a particular aspect of debt collection  
20 litigation.

21           The panel topics will span the life cycle of debt  
22 collection litigation, from the first initiation of a suit to the  
23 appropriate time limitations that apply to the debt underlying  
24 that suit, to what level of evidence is required for a *prima*  
25 *facie* collection suit, to the post-suit enforcement of the



1 judgment by the freezing and garnishing of funds.

2           Finally, we will conclude by tying together these  
3 various aspects with a discussion of productive changes and best  
4 practices. In this session, participants will examine and offer  
5 possible solutions to the issues raised throughout the day. And  
6 now for today's bill of fare.

7           First, some great appetizers, or as we would say in  
8 California, heavy hors d'oeuvres, served up by our first panel.

9           The presenters will discuss the initiation of debt  
10 collection suits and, in particular, the facts and issues  
11 surrounding service of process and default judgments.

12           Drawing on the knowledge and practical experience of  
13 our participants, we expect to be able to compile useful  
14 information about the frequency, types of debt, types of owners  
15 of debt, and costs and benefits of default judgments.

16           Our second panel, a sumptuous entree on the menu, will  
17 focus on the timing of debt collection suits and the statutes of  
18 limitations that apply to the underlying debts.

19           Panelists will examine how often debt collectors  
20 collect or seek to collect on debts that are time-barred. Also  
21 important is whether certain types of debts or types of owners of  
22 debt tend to involve more instances of collection or attempted  
23 collection beyond the applicable time period.

24           Further gustatory pleasure will then be offered by the  
25 next panel. They will tackle the issue of what constitutes in

1 practice a *prima facie* collection case. Panelists will share  
2 their experiences and expertise regarding the evidence that debt  
3 collectors typically provide when they file in court, as well as  
4 assess whether the quality and quantity of such evidence tends to  
5 vary based on the type of debt and the type of debt owner.

6 Also seducing your palate will be our fourth panel of  
7 the day. They will focus on the post-suit issues surrounding the  
8 freezing and garnishment of consumers' accounts.

9 In particular, we will focus on the concern that  
10 accounts that contain exempt federal benefits, such as social  
11 security benefits, are being frozen and garnished after debt  
12 collection judgments.

13 Finally, you will be rewarded by the just desserts  
14 offered by the fifth and final panel who will explore productive  
15 changes and best practices. This session will provide a forum to  
16 discuss examples of states, courts, consumer groups, and industry  
17 members who have been able to implement concrete ideas designed  
18 to solve or improve on issues we have touched on throughout the  
19 day.

20 The final panel of the day is an opportunity for  
21 participants to share productive experiences from their work or  
22 jurisdictions, as well as ask questions about experiences offered  
23 by other panelists.

24 This will enhance the purpose of these discussions,  
25 which is to take the knowledge we have gained here at the

1 Roundtable and ensure that it translates into thoughtful  
2 recommendations designed to implement and strengthen consumer  
3 protections in the area of debt collection proceedings.

4 I am pleased to be here among so many experienced and  
5 knowledgeable participants and audience members. And I look  
6 forward as they carbonate this event with a lively and  
7 informative discussion.

8 And my thanks to the staff, both here in the Western  
9 Region and especially in Headquarters at the FTC who have worked  
10 tirelessly to produce this event. And as any good host or server  
11 says, enjoy. Thank you.

12 (Applause.)

13 MR. PAHL: Thank you, Jeffrey.

14 One thing that we heard a lot about at our Chicago  
15 Roundtable and heard a fair amount about yesterday was the  
16 importance of consumer education about debt collection  
17 litigation, debt collection issues.

18 One thing that the FTC is launching today is a new  
19 consumer ed piece related to debt collection. And we thought  
20 that it would be interesting and informative for folks to view  
21 the new consumer ed piece that the Agency is putting out.

22 So if you can bear with us, we'll run the consumer ed  
23 piece and then we'll ask all the panelists to come forward and  
24 take their seats.

25 (Video played:)

1            "In uncertain times what can you be sure about? The  
2 sun rises in the east. What goes up must come down. Night  
3 follows day. And here's something else. When it comes to  
4 dealing with debt collectors, Federal law gives you rights.

5            "For example, debt collectors can't call before 8:00 in  
6 the morning or after 9:00 at night; can't curse or insult you;  
7 can't demand that you pay more than you owe; can't lie about  
8 anything.

9            "They can't say that papers they send you are legal  
10 ones if they're not. Nor can they make up consequences for not  
11 paying your debt. And they can't call you at work if your  
12 employer doesn't allow it. You also have the right to stop debt  
13 collectors from calling you.

14           "How do you do that? You have to notify them in  
15 writing. Sending them a letter should stop the phone calls but,  
16 of course, it doesn't wipe out your debt. There's helpful  
17 information about dealing with debt at [FTC.gov/moneymatters](http://FTC.gov/moneymatters), a  
18 website from the Federal Trade Commission.

19           "It explains the rules of behavior for debt collectors.  
20 Take a look. There are some that may surprise you. If your  
21 debts have gone into collection, remember that you have rights.  
22 Asserting your rights doesn't make your debt go away, but it does  
23 give you a voice.

24           "The more you know about how to manage your debt and  
25 deal with debt collectors, the better off you can be. After all,

1 money matters. If you think that a debt collector has violated  
2 the law, report it. File your complaint with the Federal Trade  
3 Commission at [FTC.gov/complaint](http://FTC.gov/complaint).

4 "Your complaint gives law enforcement a lead to follow  
5 up on and may stop it from happening to someone else. The  
6 Federal Trade Commission is the nation's consumer protection  
7 agency. For more tips on credit and debt visit  
8 [FTC.gov/moneymatters](http://FTC.gov/moneymatters), or 1-877-FTC-HELP, 1-877-382-4357."

9 (Video concluded.)

10 MR. PAHL: All right. If we could ask all the  
11 panelists to come up and take their seats, we can move forward  
12 with the program.

13 (Panelists are seated.)

14 INTRODUCTION OF PARTICIPANTS

15 MR. PAHL: All right. Well, thank you.

16 In the packets that were available in the back of the  
17 room there is a longer description of the bios of our  
18 participants. We are pleased to have a diverse and experienced  
19 group of folks to work through debt collection litigation issues  
20 with us today.

21 I'm going to go through and very quickly describe each  
22 of the panelists' background to give you a frame of reference.  
23 But definitely if you are interested in more information take a  
24 look at what's in the folders that we have handed out.

25 On my right, starting here -- and we've seated the

1 panelists alphabetically. There's no other magic to how we've  
2 arranged the room -- so on my right is Paul Arons, who is a  
3 lawyer from the State of Washington, who brings class-action  
4 suits under the FDCPA.

5           Immediately to Paul's left is June Coleman, who's a  
6 lawyer from California whose practice focuses on FDCPA and FCRA  
7 litigation.

8           Next to June is Jen Flory, who is a staff attorney at  
9 the Western Center on Law and Poverty, a statewide legal services  
10 support center.

11           To her left is William Gargano, who is a Commissioner  
12 with the San Francisco Superior Court.

13           Continuing around, we have Gail Hillebrand, who is a  
14 senior attorney at the West Coast Office of Consumers' Union.

15           Continuing about our semi-circle is Michael Kinkley,  
16 who is an attorney from the State of Washington, who represents  
17 consumers in lawsuits, including consumer class-action lawsuits.

18           Next to him is Scott Maurer, who is a professor of law  
19 at Santa Clara University School of Law, and a supervising  
20 attorney at Santa Clara's Civil Law Clinic.

21           Continuing around, we have Harvey Moore, who is a  
22 lawyer whose practice focuses on managing and participating in  
23 his firm's consumer, commercial, and merchant collection  
24 practice. Mr. Moore also is the President of the California  
25 Creditors' Bar Association.

1           Immediately to his left is Ron Naves, who is a Senior  
2 Vice President and General Counsel of Encore Capital Group, a  
3 purchaser and manager of charge-off receivables.

4           Continuing around, we have Manny Newburger, who's a  
5 partner with the Law Firm of Barron, Newburger and Sinsley.

6           Our next participant is Thomas Ray, who's a partner in  
7 the Law Firm of Peck and Ray, specializing in retail and  
8 commercial litigation.

9           Our next panelist is Andrew Estin, who is the Chief  
10 Operations Officer of AXZAS --

11           MR. ESTIN: AXZAS.

12           MR. PAHL: -- AXZAS, Legal Support Service Providers.

13           Continuing around, we have Ron Sargis, who is a partner  
14 in the Sacramento Law Firm of Hefner, Stark and Marois.

15           On his left is Tom Surh, who is a Commissioner for the  
16 California Superior Court in Alameda County.

17           Continuing around, we have Paul Tamaroff, who is the  
18 President of the National Association of Professional Process  
19 Servers.

20           And finally we have Ronald Wilcox, who is a consumer  
21 rights attorney based in San Jose, California.

22           The moderator for our first panel will be Dean Graybill,  
23 who is the Assistant Director in the FTC's San Francisco Regional  
24 Office. So we'll turn it over to Dean at this point.

25

1           INITIATING SUITS:   DEFAULT JUDGMENTS AND SERVICES OF PROCESS

2           MR. GRAYBILL:   Thanks a lot.

3           First of all, just let me offer my own welcome to  
4 everybody here on the panel and in the audience. Looking at the  
5 biographies last night, I was pretty blown away by the deep  
6 experience of everybody who's sitting here.

7           It's hard to imagine a better qualified group of people  
8 to comment on the subject at hand which essentially will be the  
9 process by which debts are reduced to judgment, mostly by  
10 default. And much of the discussion will center around how  
11 service of process and various methods of the service of process  
12 relate to that subject.

13           We have -- I think we have until about 10:45 to this,  
14 about an hour and 15 minutes. I'll try to leave maybe 10 minutes  
15 for questions at the end. There may be some questions  
16 circulating up front. I'll try to get to as many as we can. And  
17 I would -- for simplicity's sake I would cast this into four  
18 central categories.

19           It won't be just in a lockstep, 15 minutes, 15 minutes,  
20 but we'll try to touch on, first of all, what is the relationship  
21 between the number of default judgments and methods of service of  
22 process. We'll be asking the panelists to -- and, actually, one  
23 thing in particular we're interested in is, if anybody has  
24 studies or hard data that would suggest that the number of  
25 defaults is somehow related to a particular method of service, we



1 would certainly welcome anything like that, any studies, any  
2 academic studies, any hard data. So that's the first subject.

3           Second, just a survey of current practice in your  
4 various jurisdictions. I realize that could take all day, but  
5 we'll try to do that in some summary form that gives us a  
6 representative idea of how process is served. And my  
7 understanding of it is that it can really vary quite widely,  
8 state by state, court by court.

9           Third, let's talk about possible changes in law or  
10 industry practice that might improve whatever problems there are.  
11 I understand, you know, not everybody at the panel may agree that  
12 there are problems requiring change, but we can at least discuss  
13 potential changes and the pros and cons of each.

14           And then finally, if there's time, we would simply talk  
15 about what are some concrete next steps the various organizations  
16 might be able to take, whether it's private associations, whether  
17 it's the FTC, whether it's the courts.

18           And finally just in terms of how to do all this,  
19 because we have a rather large panel, you know, if we were  
20 discussing this in our livingroom, I'm sure we would be talking  
21 over each other every other second, but this is being  
22 transcribed. So if we can just be attentive to that fact, and  
23 that, you know, talking over each other would be a difficult  
24 thing to deal with for her.

25           So let me just throw it open. The first subject is --

1 and I'll ask this as sort of as a three-part question in a way.

2           How frequently are default judgments entered in debt  
3 collection litigation? In other words, you know, in a sense, how  
4 often are these actions contested?

5           And, secondly, is there evidence of a possible  
6 relationship between default judgments and particular methods of  
7 service of process.

8           And, again, in that regard, are there any studies? Are  
9 there any hard data that's suggesting that. And I'd just throw  
10 it open.

11           MR. MOORE: And I guess I'll be the first one to  
12 address it. California Creditors' Bar Association, as its  
13 President, I did an informal survey of our members to try to find  
14 out what percentage of cases went by default, as opposed to were  
15 contested. And on average we came up with a number of  
16 approximately 80 percent of cases filed and served went by  
17 default judgment.

18           Litigation is a last resort. It is not in the  
19 creditor's best interests to have to file a lawsuit. And we only  
20 file lawsuits when other means of collection activity are  
21 unsuccessful. If letters and calls and communications to the  
22 debtor to get a voluntary payment plan or a voluntary settlement  
23 are unsuccessful, then one of the next steps is to file  
24 litigation, to try to get a judgment and then have post-judgment  
25 remedies to collect the debt.

1           What we do find, though, is litigation oftentimes will  
2 bring about a settlement in the case. When someone is served,  
3 they have a tendency -- I won't say more often than not -- but  
4 they will call our office and they will try to resolve the case  
5 with us, either through a lump-sum payment, be it discounted or  
6 full, or a payment plan over a period of time that allows them to  
7 pay the debt that they might not otherwise have wanted to pay  
8 without the litigation.

9           It is not our intention, as collection attorneys, be it  
10 in California or anywhere in this country, to effectuate bad  
11 service. If we have bad service, we can't get communication with  
12 the debtor. If we have bad service, our judgment may not be  
13 good. If we have bad service, then we cannot levy on the assets,  
14 because somebody's going to come back and attack the judgment and  
15 say you did not have good service and, therefore, your judgment's  
16 no good.

17           And as a collection attorney, I've wasted my time.  
18 I've wasted my client's money. I've gone through the entire  
19 process, and my end game is I have nothing that is valuable to  
20 me.

21           So good process is the most important part or is one of  
22 the most important parts of the litigation process, *per se*,  
23 because it initiates another level of contact with my debtor.

24           We do have -- it's interesting -- the Rosenthal Act,  
25 which is the California Fair Debt Collection Practices Act,

1 actually has an affirmative obligation on behalf of the debtors.  
2 You know, we always talk about the obligations of the creditors  
3 and the debt buyers and the debt servicers.

4           The Rosenthal Act actually has an affirmative  
5 obligation under Civil Code Section 1788.21 that the debtors  
6 notify the creditor of changes of address and changes of  
7 employment.

8           It would be so helpful if the consumers would, you  
9 know, honor that obligation the same way we as collection  
10 attorneys are required to honor our obligations under the  
11 Rosenthal Act. And I think in general collection attorneys in  
12 California do honor their obligations.

13           So the better information we have, the less likely it  
14 is that we'll have bad service. We really don't want bad  
15 service. And I think that goes without saying. Our service, our  
16 process servers provide us with information. We get age. We get  
17 height. We get weight.

18           We get a number of descriptive factors to help us if,  
19 later down the road, our service is attacked as being improper  
20 service. And one of the things we can look at is, okay, this  
21 person is, you know, 5'10", 190 pounds, black hair, blue eyes. I  
22 rarely get in my practice complaints of bad service.

23           I think I can count them annually on one hand. And  
24 usually when I do I can go pull the proof of service that has  
25 been provided to me by my process server, talk to the attorney

1 and say, this is the legal -- this is the description I have.  
2 And usually, that resolves it right there, because usually it is  
3 the description of the person who we intended to serve.

4 MR. GRAYBILL: How is that information you just talked  
5 about, the descriptive information, recorded? Is that in the  
6 actual certificate of service? Is that a log that's available to  
7 the public in any way?

8 MR. MOORE: It is in our proofs of service that are  
9 then filed with the Court. We get actual proofs of service  
10 signed by our process server that says: This is the person I  
11 served; this is the description of the person I served.

12 MR. KINKLEY: I'd like to respond to Mr. Moore.

13 MR. MOORE: Yeah.

14 MR. KINKLEY: First of all, with all the discussion  
15 from Mr. Klurfeld on culinary delights, I'm glad I had breakfast  
16 this morning before I came.

17 But the problem that exists is that people are not  
18 following the recipe, to trade on his theme. The recipe in the  
19 law has existed for a long time.

20 Lawsuits require evidence, and that's not being done.  
21 The problem isn't with the judges who are overwhelmed by the  
22 sheer volume. The problem is the judges are asking the wrong  
23 question. The judges are asking: How do we handle this huge  
24 burden. How do we fulfill our duty to clear these cases?

25 They should be asking: Why should we. Why should we

1 when we get a bad affidavit of service, on its face bad? And I'd  
2 beg to differ with Mr. Moore. I've seen hundreds of service  
3 affidavits that on their face are inadequate; on their face  
4 inadequate.

5 I started in this business of representing consumers  
6 because my 12-year-old son was served and didn't tell me about  
7 it. And I said -- I found the papers a couple of days later, and  
8 I said, "What is this? When did this come in?"

9 He says, "Well, that came in a couple of days ago."

10 I said, "Well, we're getting sued."

11 He said, "Are we poor?"

12 I said, "Well, yes, but --

13 (Laughter.)

14 MR. KINKLEY: -- we're also --

15 (Laughter)

16 MR. KINKLEY: -- we're also trying -- we also need to  
17 know these things. I've vacated dozens of default judgments. I  
18 intend to vacate thousands more because of the affidavits of  
19 service that are inadequate. Judges don't have the time and  
20 don't take the time to sort through this massive amount of  
21 paperwork.

22 They're not following the recipe. The litigation model  
23 that Mr. Moore described is the old model. It almost doesn't  
24 exist anymore. It exists at the local level only, but that's the  
25 smallest part of debt collection. He's talking about the

1 traditional local debt collector.

2           That's not where the debt collection money is these  
3 days. It's in the debt buyers. The debt buyers have -- if you  
4 look at the filings -- run your docket sheets. And for everyone,  
5 every attorney, run the docket sheets. Every county now has the  
6 ability to do that. Run the docket sheets. Run the debt buyers'  
7 names. Those are the mass filers now.

8           The debt buyers don't follow, A, let's call and discuss  
9 and then litigate. Litigate is not a last option. It is the  
10 first option. It is the only option, and the reason why is this.  
11 It's securitization. They've -- they securitized the credit card  
12 debt in the same way that they did the subprime lending.

13           By securitizing that debt they made it an investment  
14 tool and a commodity. When you sue you upgrade your portfolio,  
15 because you take your default, you add attorney fees, you add  
16 interest, now your portfolio is worth more, and now you can sell  
17 that. So litigation is the first option.

18           It's a different model than Mr. Moore is describing.  
19 That model existed 10 years ago, and it was a primary model. It  
20 virtually doesn't exist anymore, except at the local level. The  
21 billion-dollar companies are, you know -- they're billion dollar  
22 in gross revenue each year, compared to the local model that Mr.  
23 Moore's describing.

24           The problem in the service of process area is, it's  
25 again, a cost versus benefit. There is no benefit to

1 scrutinizing or having lawyers scrutinize the affidavits of  
2 service that go down in this big stack of defaults. That costs  
3 money. You have fixed costs already built into your business  
4 model.

5           Now, you have to pay labor, and if you pay labor to go  
6 through every file and make sure it's right before you take it  
7 down for default, that costs you money. So they don't look at  
8 them. You have maybe one lawyer in charge of a large staff,  
9 printing out paperwork and nobody's really looking at it,  
10 including, unfortunately, the judges, oftentimes.

11           And I can't fault the judges because -- I've talked to  
12 one judge who retired rather than act unethically. He said, I  
13 simply can't do the job I'm required to do with the resources I'm  
14 given, and I don't think -- if I can't do the job, I shouldn't do  
15 the job at all. He thought it was unethical to continue signing  
16 defaults.

17           One case I had, the venue requirement in Washington is  
18 that you have to be a resident of that county. The motion for  
19 default, the affidavit in support of default, the first line said  
20 that my client was a resident of a different country and that the  
21 basis for the jurisdiction was her residence in a completely  
22 different county.

23           I found 20 or 30 of those in just that simple case in  
24 one day looking through those files. Affidavits of service; I  
25 have affidavits of service where two different processors were



1 serving the same paper on the same day. We have -- we have a  
2 huge problem with process service in terms of fees.

3 Mr. Moore isn't evaluating the fees that are being  
4 charged by the process servers. There are some companies that  
5 take kickbacks from the process servers. That was one of our  
6 cases. We have a case pending now where process servers have to  
7 be registered. But again, it costs money to register.

8 It costs money -- more money to hire a registered  
9 processor. So what do you do? You save money. Use an  
10 unregistered process server. Well, what's wrong with that?  
11 Well, there's no accountability. The answer to the question, I  
12 think, for the FTC ought to be -- and I'm not sure it's in your  
13 rule-making power to do so -- but a suggestion that there be a  
14 licensing and bonding for all process servers, that process  
15 servers, if they file an affidavit of service that turns out to  
16 be false, that it be declared an unfair and deceptive act or  
17 practice under the FTC Act.

18 We don't have private right enforcement. We need to  
19 include process servers, if we could some way, in the FDCPA, if  
20 it's for a debt collector, the debt collector is responsible for  
21 the process server's actions. The process server should be  
22 swearing to the amount of money.

23 That's added on afterwards by the lawyers or the debt  
24 collectors. They add the money on. It's on the affidavit of  
25 service, but it's not the process server swearing to the actual

1 cost. And they upscale the cost by adding preparation of process  
2 server fees, which I've seen as high as \$30 for an affidavit.

3 They bury it in their attorney fee. They charge on the  
4 quarter-hour. They charge a half-hour to prepare an affidavit of  
5 service.

6 MR. MOORE: And my --

7 MR. KINKLEY: There's the --

8 MR. MOORE: -- I don't know what world you live in.  
9 Everything --

10 (Simultaneous talking.)

11 MR. KINKLEY: I live within Washington --

12 MR. MOORE: -- everything that you have said, it  
13 doesn't apply in my practice. I've been practicing almost 30  
14 years. I am --

15 MR. KINKLEY: Do you --

16 MR. MOORE: -- I am the rule, not the exception. You  
17 must --

18 MR. KINKLEY: -- do you -- here's a thought. Midlife.

19 MR. MOORE: I represent a --

20 MR. KINKLEY: Do you -- tacit acceptance? Do you  
21 represent --

22 MR. MOORE: -- I represent a number of debt buyers and  
23 your example of what the real world is, is not the example of the  
24 real world of collection that I deal with. I represent debt  
25 buyers. I represent direct place clients and litigation is not

1 the first resort. Litigation --

2 MR. KINKLEY: How many cases do you file a month?

3 MR. MOORE: How many -- I file in excess of 400 or 500  
4 a month.

5 MR. KINKLEY: Okay. How many attorneys are handling  
6 those 400 or 500 cases? Two? Maybe two?

7 MR. MOORE: I have more than two attorneys in my  
8 office.

9 MR. KINKLEY: How many?

10 MR. MOORE: I have three attorneys.

11 MR. KINKLEY: Three attorneys, 500 cases a month. Who  
12 in here can do that? Who -- what lawyer in here can -- you can  
13 do that?

14 MR. MOORE: Sir, I --

15 MR. KINKLEY: Good.

16 MR. MOORE: -- I have paralegals that I supervise. I'm  
17 an active participant in my practice, and I will put my model up  
18 against anybody else's, because we do review the files.

19 MR. KINKLEY: Perhaps it --

20 MR. MOORE: We do review the documents.

21 MR. KINKLEY: -- perhaps --

22 MR. MOORE: And -- and -- and --

23 MR. KINKLEY: (Indiscernible) --

24 MR. MOORE: -- for you to say -- for you to say that  
25 service of process is a problem and should be regulated I think

1 is wrong. We use -- we use process service companies that we  
2 review. We keep an eye on their logs. We know what's going on  
3 with them. And I think that you are overstating your position.  
4 I think service of process -- if somebody files a false  
5 affidavit, there are remedies. There's perjury.

6 MR. KINKLEY: When has that ever happened?

7 MR. NEWBURGER: Respectfully, Mike, it does happen.  
8 But I'm going to agree with one thing you said. The idea of  
9 bonding --

10 MR. KINKLEY: Well, thank you, Manny.

11 MR. NEWBURGER: -- the idea of bonding --

12 MR. KINKLEY: That's a start.

13 MR. NEWBURGER: -- well, the idea of bonding process  
14 servers does make good sense to me.

15 MR. KINKLEY: Thank you. I --

16 MR. NEWBURGER: I think they're -- they should be  
17 accountable.

18 MR. KINKLEY: We can all agree on that, can't we?

19 MR. NEWBURGER: But with regard to much of the rest of  
20 it, you know, when I only represented consumers there were things  
21 I knew. I knew them as surely as the sun rose in the morning and  
22 set at night. For example, I knew that every mortgage company  
23 wanted to foreclose on widows and orphans and steal their homes.

24 MR. KINKLEY: On Christmas Eve.

25 MR. NEWBURGER: On Christmas Eve. Okay.

1 (Laughter.)

2 MR. NEWBURGER: I knew that mortgage companies wanted  
3 to foreclose on people. And amazingly, when I started becoming  
4 an industry lawyer, what I learned was in fact, the last thing  
5 any mortgage company wanted was to be stuck with another stinking  
6 piece of real estate in its inventory.

7 And there's a similar problem here. What you've said  
8 about the debt buying industry is just fundamentally incorrect.  
9 Debt buyers spend massive amounts of money on filing and service  
10 fees. They do not view litigation as the first option. In point  
11 of fact, what drives litigation is all too often defective,  
12 dishonest and deceptive information on the internet telling  
13 consumers everything from the fact that the United States never  
14 went off the gold standard, to the fact that they can eliminate  
15 their debts.

16 It is consumer lawyers telling consumers to send  
17 letters saying, cease communicating, leaving debt buyers with no  
18 option but litigation. And it is ultimately the fact that the  
19 courts are the place of last resort. But trust me when I tell  
20 you this, the debt buyers don't make litigation the first option,  
21 because it would cost too much.

22 I see very few instances where consumers are sued where  
23 they have not first been through a collection agency and/or a law  
24 firm that wrote, that called, that tried to resolve the account.  
25 But the -- the introductory premise that you asserted is flawed.

1 Now, the notion that process servers should be accountable,  
2 that's a different story all together.

3 But keep in mind, you've acknowledged that at the local  
4 level lawyers are doing the job. All those debt buyers you  
5 described are typically represented at the local level. When  
6 Harvey is representing them here, he's -- he's the local guy for  
7 those clients.

8 And while in any given group there may be people who  
9 break the rules, which is why the notion of perhaps bonding  
10 process servers is not such a bad idea. The other premises are  
11 just wrong.

12 MR. SARGIS: And I also give Mike the kudos of saying,  
13 I, even though I -- general counsel for the Collectors'  
14 Association agree with him on several of his points, that --

15 MR. KINKLEY: That's even bigger start.

16 MR. SARGIS: You like that. But part of it was that  
17 what I heard yesterday listening to the webcast is some of this  
18 discussion needs to be moved upstream. One, you were talking  
19 about, well, it's the sale of securitized debt that creates  
20 incentives to do the wrong thing.

21 MR. KINKLEY: Is that correct?

22 MR. SARGIS: I said that's what you said. If your  
23 premise is --

24 MR. KINKLEY: Well, do you --

25 MR. SARGIS: -- if your premise is --

1 MR. KINKLEY: Is that one of the points you agree with?

2 MR. SARGIS: I don't -- I won't say that I agree with  
3 it now. But what I'm saying is, if that's one of the premises,  
4 that's what we need to be looking at, rather than saying, let's  
5 figure out how we make life tougher for the debt collector,  
6 because it's not the debt collector, and be it a third party or  
7 be it the debt purchaser that's dealing with it, to be able to  
8 control those dynamics.

9 And the same as you said with, if we have a problem  
10 with process servers then let's focus on the process servers, not  
11 the collectors. Now, if you find a collector that's colluding  
12 with, that's a different situation than the innocent collector  
13 who is getting bad service and -- but believes it's truthful, you  
14 know, doesn't have a situation where 10 of their services have  
15 now come back bad and they're continuing to use the same guy.

16 Some of the data we had -- and this is a collectors'  
17 study from about seven years ago, eight years ago, of all the  
18 accounts assigned for collection, less than one-half of one  
19 percent had a suit brought on them. And in California, part of  
20 that's driven by, it's a very expensive process.

21 Between the filing fees and the legal fees, as Harvey  
22 said, it's the last resort. Collector, creditor believes the  
23 debtor has an ability to pay, can't pay. California, a third  
24 party collector cannot go into Small Claims Court. There are no  
25 discounted fees.

1           It may be that the Washington area's different and  
2 litigation is just the same equivalent of sending a letter cost-  
3 wise, but it's not in the California model, because it's so  
4 expensive.

5           MR. GRAYBILL: I just want to back up to one point that  
6 was made earlier, and that was the overburden of the court  
7 system, and I was wondering if our commissioners might have some  
8 light to shed on that.

9           MR. GARGANO: What everyone has said, there's some  
10 truth in each one of those things, and we've had a lively  
11 discussion. So you've kept everyone awake, if nothing else, you  
12 know.

13           MR. KINKLEY: Thanks, Judge.

14           MR. GARGANO: Yeah, which is great.

15           MR. KINKLEY: I object.

16           (Laughter.)

17           MR. GARGANO: Can you hear me? Can you hear me? All  
18 right. Surely, the courts are overburdened with collection  
19 cases. I think one of the key things for the Court to be  
20 involved in is how well the clerks are trained. And at least  
21 from my experience in San Francisco, our clerks scrutinize their  
22 -- the pleadings that come in.

23           Any one that practices in San Francisco, if you're  
24 trying to get a default you've probably gotten a rejection  
25 letter. I don't know if any of you practice here and have gotten



1 those, but our clerks -- I don't know if they have some sort of  
2 pleasure in doing that, because they're clerks and they're going  
3 to louse up the attorneys' agenda here, but they seem to really  
4 get a microscope and go through those.

5           We were trying to think of what is the most common  
6 method of service. I have no study to show, but I think a lot of  
7 the service, though, is substituted service. But a lot of people  
8 agree on that. You know, we have mail-in acknowledgment. We  
9 have personal service.

10           But I think a lot of it turns out to be substituted  
11 service. And our clerks, I've spoken to the head clerk of the  
12 default department and this is all anecdotal. It's not  
13 scientific. But she has reported that many times the clerks go  
14 over -- they have a little due diligence worksheet that they  
15 follow religiously, where the attempts on the service have to be  
16 made at three different times, one at the home, one at the  
17 workplace, different dates, different times.

18           And if they don't find that that is done to the letter  
19 of the law -- now, this is most of them. There's human error and  
20 some do slip between the cracks -- by and large, they send a  
21 rejection letter out with great pride and they tell you, due  
22 diligence has not been effected.

23           So you have to go back to the table and do it again.  
24 They do that over and over. If you look through some of our  
25 files, there are count -- not countless, but there are many

1 rejection letters in there. And I actually see sometimes an  
2 interplay between the attorney or sometimes a pro per, even, an  
3 attorney and the clerk's office, I've complied with due  
4 diligence, will you please look at this again and let me know,  
5 and they'll get another rejection letter back.

6           If that happens, ultimately it comes to a judicial  
7 officer, and as of almost two years ago I'm the person that it's  
8 going to come to. It used to go to the PJ, the presiding judge,  
9 but of course, the presiding judge assigned it to someone else,  
10 that's me because I handle the default prove-up hearings. And it  
11 makes sense.

12           So if I could resolve it, I'll give a direction to the  
13 clerk, and I know we're overburdened. I mean, you know, we  
14 really don't have a lot of time for all this, but we still have  
15 to do it. And I really believe that this is something sacred.  
16 The Court is the gatekeeper, after all, especially in default  
17 matters.

18           We have to make sure that things are done right for a  
19 number of reasons. Number one, you spoke to that ethical problem  
20 where one judge was just beside himself thinking he can't go on  
21 ethically. Above and beyond that, that's our duty to do that.  
22 We must sure -- we must be sure that due process occurs here.

23           If I can't answer -- we even have research attorneys  
24 that will look at some little arcane section of the -- of due  
25 diligence and what cases are involved in that. We ship it off to

1 them. They get it back to us. Then we either give a directive  
2 to the clerk whether they should enter the default or not.

3 That is -- they're pretty well scrutinized here in San  
4 Francisco. And I must say in one point, it wasn't a collection  
5 case. It was in a -- in the context of a child support case  
6 where there was much more control. The child support agency was  
7 using one or two process servers.

8 And we have a gentleman here that I think is going to  
9 speak to that. He represents the Process Servers' Association.  
10 They had a veteran clerk who was born and raised in San  
11 Francisco. She scrutinized every -- every matter that was  
12 supposedly served properly. And she knew all the streets in the  
13 city.

14 And she brought it to the Commissioner's attention and  
15 she said, come here, look at this; same process server, service  
16 of process was made at 9:00 o'clock on September 4th down at  
17 Fisherman's Wharf. The same person signed that he served someone  
18 over in -- at Hunter's Point at 9:02. But you can get to those  
19 places. Something's going on here.

20 She started collecting a little pattern. Well, the  
21 bottom line was, that's -- well, and this could be done because  
22 that agency that was using that process server had control. They  
23 got rid of him. He's no longer serving. We get collection cases  
24 from all different people.

25 We don't know or we can't control who the process

1 servers are. But the suggestions put forward here with regard to  
2 bonding, with regard to registering, all those -- I think those  
3 are ideas on the right -- they're going in the right direction.  
4 I took an informal survey of the -- some of the default judgments  
5 I signed two weeks ago, and every single one -- I think there  
6 were -- maybe there might have been 12 or 13 on the two days that  
7 I looked -- had a registered process server.

8           Now, whether or not that's a guarantee or whether or  
9 not they could be falsifying a document, sure they can. And we  
10 can't catch everyone, but the -- what I'm getting at is that the  
11 Court does have a role in trying to see that its people are well-  
12 trained. And counsel is right here.

13           We can't look through each and every thing -- each and  
14 every case and each and every box that's checked, but our clerks  
15 have a checklist that they sign off on it before we sign those  
16 judgments in court without hearings. Some of our cases go to  
17 prove-up hearing, which we'll get to later.

18           But the ones that are judicially signed in chambers  
19 without a hearing, we rely on the clerks to go through a  
20 checklist and we check that checklist. If I have a question on  
21 that, because I did the other day in a different issue, I'll  
22 reject it. I won't sign it until we get the matter straightened  
23 out. That was with regard to dismissing Does. It was a  
24 different issue.

25           MR. GRAYBILL: Can I ask? You mentioned the term

1 "registration," and it sounds like it's -- people can be  
2 registered or not. What does that mean, as opposed to licensing?

3 MR. GARGANO: I'm not really sure. I think that has  
4 something to do with -- I think there's more regulation. I'm not  
5 sure if -- it's just not a friend or a nonparty. I think they  
6 have certain standards. We could probably speak to that. I  
7 don't know --

8 MR. ESTIN: If I can speak to that. I wrote and  
9 lobbied for the Process Server Registration Act in California in  
10 1972, and became registered process server number one in Los  
11 Angeles County, and yes, I had a bond posted. We were going for  
12 licensing and Governor Reagan at the time indicated he would veto  
13 any bill that required one state employee to do anything.

14 And therefore, we went to a model of registering with  
15 the county clerk in the county you primarily do business, and  
16 that covered your ability to serve throughout the state. And  
17 most process servers are registered in California. If you serve  
18 more than 10 papers per year, you must be registered.

19 MR. GARGANO: And what does it actually mean, that they  
20 know who you are and where your office is?

21 MR. ESTIN: Oh, yes. You've filed. You've posted a  
22 bond. You know, I'd like to say, I've been a professional  
23 process server for 40 years and I'm used to some criticism and it  
24 goes a long way. Shakespeare wrote a play 400 years ago called  
25 "The Winter's Tale," in which a character was described as a

1 process server who was a rogue who should be spit upon. So you  
2 know, this is nothing new to us.

3 (Laughter.)

4 MR. ESTIN: I must say that there is extensive scrutiny  
5 of the work done by process servers, by both the law firms they  
6 submit proofs to who will occasionally call saying, I think  
7 there's a problem with this proof, and with the courts, as has  
8 been indicated.

9 Different courts have different requirements on due  
10 diligence to do a substituted service. And we had one from  
11 Victorville that requires one attempt prior to 7:00 a.m. at the  
12 residence, and there is an attempt at 7:00 a.m. and it was  
13 rejected for default.

14 So you know, there is a lot of scrutiny of the work,  
15 and most process in this country is served by professional  
16 process servers who do a quality job for their clients. And as  
17 in any profession, there may occasionally be someone who does a  
18 bad job.

19 But the fact is that there are bigger problems when,  
20 for instance, process is served by mail, which is a ludicrous  
21 thing that's allowed in some jurisdictions. Even if certified  
22 mail restricted delivery is required, the post office totally  
23 ignores that.

24 We used to have an employee go to the post office to  
25 pick up our mail so we could get it earlier than when it was

1 delivered to our street address, and he was routinely asked to  
2 sign for certified mails. And he was told by employees at the  
3 post office, sign the name it's addressed to.

4           And I'd receive in the office certified mail addressed  
5 to a dead person, certified mail to someone I've never heard of  
6 at that address, certified mail to an ex-employee who'd been gone  
7 for years. So you know, when we talk about the need for notice,  
8 which is an important thing that was discussed in Chicago and  
9 discussed yesterday, the best notice is using professional  
10 process servers who have a vested interest.

11           Our company uses franchise process servers around the  
12 country who average 27 years in business, and 40 percent of our  
13 franchisees average 37 years in business. You get quality work  
14 if you use quality firms. And it's -- you know -- it's  
15 unfortunate that we had problems in New York, but when we look at  
16 New York we see a situation where there were red flags that law  
17 firms could have used to protect themselves.

18           And our company, AXZAS, has developed seven red flags.  
19 I'll just give you two examples how law firms can protect  
20 themselves. Typically, a collection firm serves about 70 percent  
21 of their papers. It varies a little bit, but that's the  
22 ballpark. You've got some bad addresses. You've got some  
23 deceased people, whatever.

24           If you use a process serving firm that's serving 98  
25 percent of your papers, is that good news or is that a red flag

1 that they're dumping papers? And a second one is the price. If  
2 you've got a going rate, say, in New York of \$45 to \$50 for  
3 reputable process serving firms and you have somebody serving  
4 process for \$12, think about it.

5 If they're going to pay their server \$3 or \$4, a server  
6 can't make an honest living. Let me ask you a question. If you  
7 needed some work done in your home and were hiring a general  
8 contractor and got three bids and one was \$48,000 and one was  
9 \$45,000 and one was \$12,000, would you even consider using the  
10 low bidder?

11 So you know, there's some blame to go around here. We  
12 have a list of seven things that law firms can look at, or debt  
13 owners who use contingency law firms can ask about their law  
14 firms to protect themselves. There's things that can be done.  
15 There were other things that were mentioned by the Commissioner  
16 and that also came out in New York.

17 We have proprietary software we've developed that look  
18 for all sorts of things in our database of all the attempts and  
19 services, and it includes the attempts, not just the service,  
20 because the attempts are often not filed with the Court. It  
21 looks for things such as, was an attempt made before the lawsuit  
22 was filed.

23 Was an attempt made before our company received the  
24 service? Is the process server serving an abnormally high  
25 percent of papers received? Were attempts made or services made



1 at two addresses that physically are too far apart for the time  
2 frame shown?

3 So there are companies, and we're not the only one, but  
4 AXZAS has developed this to protect our clients and protect our  
5 clients' clients. And it kind of pains me to hear so much  
6 criticism of process serving. Some of it is honest mistakes, and  
7 when that happens let's not overreact to it.

8 The fact is that millions of papers are served and  
9 there aren't that many problems with the work done by  
10 professional process servers --

11 MR. SARGIS: Well, one quick thing just following  
12 Andrew's. In anticipation of my new employment first of the  
13 year, I do want to note that service by mail appears to work well  
14 in the Bankruptcy Courts, and in my 26 years' experience as a  
15 practitioner there have not been major problems.

16 But I think one of the reasons for that is that the  
17 debtor, be it the consumer or the business, has the affirmative  
18 obligation --

19 MR. GARGANO: Right.

20 MR. SARGIS: -- to say this is where I am. And I --  
21 what I've seen in my practice over the years, part of the problem  
22 comes from the fact that the debtor wants to hide from the  
23 process server. The debtor wants to hide from the creditor. The  
24 debtor really doesn't believe it when we say, look, if you can't  
25 pay we don't want to spend a whole lot of time on your account.

1           And so if we collectively could come up with a  
2 methodology that fosters that communication so at least we know  
3 where the consumer is, then that I think would enhance the whole  
4 process and would do away with some of the problems like Mike was  
5 talking about up in -- up in Washington in his experience.

6           And it takes away someone's excuse of, well, if the  
7 debtor's hiding from me, I don't know where and I had a belief  
8 that the service was good. It just cleans out a whole lot of  
9 problems.

10           MR. GRAYBILL: Yeah. I hear from -- I think Gail had  
11 her hand up earlier.

12           MS. HILLEBRAND: Thank you. We're discussing this  
13 partly because not everybody does the process that's just been  
14 described in terms of the red flag, because law firms in every  
15 jurisdiction aren't liable for bad service, and therefore, don't  
16 have an economic incentive to make certain that these -- this  
17 kind of auditing and checking is done.

18           We heard about bonding and licensing. I think those  
19 are good ideas for more consideration, but I think also making  
20 the person who is choosing the process serving company or process  
21 server responsible for that bad service is going to go a long way  
22 to adding these things.

23           You know, there's been a factual dispute, how often  
24 does it happen. I can't answer that one, but I can tell you it  
25 does happen, because we have consumer lawyers all over the

1 country, especially in legal services, but also just regular  
2 people who represent middle class people who say the client  
3 discovered they had been sued and a default had been taken when  
4 their wages started disappearing, when their bank account was  
5 frozen.

6 Now, some of those people got papers and didn't  
7 understand them. And we'll talk later about, you know, what  
8 needs to be in the papers to address that, and some of those  
9 people probably didn't get the papers at all.

10 In terms of substituted service by mail, I don't think  
11 most people, especially when you're being collected on for a  
12 five- or six- or 10-year-old debt, who you don't even know who  
13 owns it anymore, it's not -- there's -- it's not realistic to say  
14 that consumers should be notifying the current owner of that debt  
15 of their current address.

16 You know, we got that in Rosenthal, but that was a pre-  
17 debt buyer kind of provision, thinking about an ongoing  
18 relationship and collection shortly after the first default. And  
19 I would say, if we're going to talk about mail we should give a  
20 close look, both to these checklists -- I'd really like to see  
21 your form and so forth into the record -- but also to the  
22 Massachusetts Small Claims Court Working Group, recommendations  
23 from 2007.

24 And what they said is before you take -- if the service  
25 was by mail, before taking a default there would be an extra

1 step, and the extra step would require -- although I don't recall  
2 if it was the Court or the party -- but the party looking -- and  
3 the Court looking at, I think it was the Small Claims Court doing  
4 it, to actually look at whether that address was any good.

5           And they identified some specific ways to tell, a  
6 municipal record, a Department of Motor Vehicles record, a  
7 letter, a recent letter from the consumer using that address,  
8 verification -- actual verification from the consumer, a piece of  
9 mail that was sent within the last six months to that address, at  
10 least four weeks before the service plan mail that was not  
11 returned.

12           That one I think we might give a little more thought  
13 to, and then online verification, not just the Yellow Pages or  
14 the White Pages, but you know, there are lots of ways you can pay  
15 a small fee and get online verification. Or there's a catchall  
16 for independent verification, but then the collector would have  
17 to give the source so the clerk could have a look.

18           And the idea there is to make sure before we take a  
19 default that we know if the person had the due process.

20           MR. MOORE: Gail, you raise an interesting issue, and  
21 that is, before we send it out for service our office sends out a  
22 30-day letter, in compliance with Rosenthal and the FDCPA. If I  
23 get a bounce back on that letter, if it's returned to me as a bad  
24 address, I'm not going to sue and I'm not going to send it out  
25 for service until I find a good address.

1           So you know, I agree that, you know, one of the indicia  
2 of a good address is the U.S. Postal Service not sending it back  
3 to me. And we do get a substantial amount of mail bounced back  
4 as wrong address, and we do try to find new addresses. But  
5 again, it is not in my economic best interest to spend my  
6 client's money -- and in California it's \$205 to, you know, \$365  
7 to file a lawsuit, plus, you know, \$50, \$60, \$70, \$80, \$90 for  
8 service -- you know, to spend that sunk cost and get a judgment  
9 that I can't collect on because it's not good service.

10           I agree with you, good service is key, and anybody who  
11 thinks that a collection lawyer wants to have millions of dollars  
12 worth of judgments that are uncollectible because of bad service  
13 doesn't understand what we are trying to do in this industry to  
14 collect money for our clients.

15           MR. NAVES: I'd like to just say something in following  
16 you -- get a chance. Go ahead.

17           MR. RAY: Oh. Well, I've got to echo -- excuse me --  
18 what Harvey's saying. My business model practice in San  
19 Francisco follows just the same thing as Harvey does. I mean, we  
20 don't want to file suits unless we think we've got a good  
21 address. We do the letter writing.

22           We -- our clients generally send us claims that they've  
23 attempted to verify addresses by two independent sources, or  
24 they've verified employed, because it's -- it simply does not  
25 make economic sense to file suit and have a bad serve and have

1 them come back.

2 Harvey just mentioned the filing fees, but that doesn't  
3 cover the cost of the law firms. Most of us who work in the  
4 collection and legal business do it on a contingency fee basis.  
5 So all of the in-house processing of those lawsuits are covered  
6 by us attorneys.

7 And if we can't recover on those claims because they're  
8 bad services, we're definitely losing money. And those cases  
9 where you do come up, there are recourses if there is a bad  
10 service and somebody comes back and says, I wasn't properly  
11 served. More often than not, it's just because they didn't live  
12 at the address where they were served.

13 It doesn't -- our process servers are -- we use  
14 registered default judgments. I monitor them as a part of my  
15 firm. I watch -- each and every time we get a notice or an  
16 allegation of a bad service it comes to my attention, and I look  
17 at our process servers.

18 It's actually fairly rare in terms of the number of  
19 lawsuits that we do file, but occasionally they do come up.  
20 And -- but we look at them, and look at them very seriously, and  
21 probably half of those times they come back. I get notes from  
22 our process servers that show who was served, when they were  
23 served, what their physical description was, and give that to the  
24 defendant's attorney or even to the defendants themselves and  
25 they say, yes, that was me, or it was a relative who was staying

1 with me or something like that.

2           The others, we very quickly vacate those judgments and  
3 move forward with the litigation. But if I had to do that on a  
4 massive spectrum in terms of the lawsuits we filed, I'd be broke.  
5 I'd be in Bankruptcy Court. It just --

6           MR. GARGANO: As soon as you get caught.

7           MR. RAY: Yeah.

8           MS. HILLEBRAND: Yes.

9           MR. ARONS: I mean, you're just understating the  
10 difficulty a consumer has in setting aside a judgment where they  
11 claim there was bad service. I mean, you can't just walk in and  
12 say, I wasn't home, but you know, I didn't get that service and  
13 the judge is going to overturn it.

14           You know, there's a great deal more than that involved.  
15 To begin with, the consumer has to realize that service is an  
16 issue, find a lawyer willing to represent them, get to court with  
17 some sort of persuasive evidence that establishes bad service.  
18 That's very tough to do.

19           And following up on something Commissioner Gargano  
20 said, I saw in the Chicago hearing that there was references to  
21 two reports. One just I think a couple judges who grabbed a  
22 stack of default judgments and started looking at the process  
23 server proofs and seeing that, you know, various process servers  
24 were 30 miles apart.

25           The same process server was serving process 30 miles

1 apart with a five-minute gap in time, like the example  
2 Commissioner Gargano had. If it's that easy to find it's got to  
3 be a pretty common practice, and this comes back to what Gail  
4 Hillebrand said. The reason it happens is the law firm has no  
5 incentive to make sure that service is good.

6 The law firm may not know that service is bad. They  
7 may want the process server to make good service, but as Andrew  
8 Estin said, the process server has a financial incentive to do  
9 bad service if, you know, they're doing it at a cut rate.

10 MR. GRAYBILL: Well, one thing I've heard -- why don't  
11 you go ahead.

12 MS. COLEMAN: Well, I wanted to address some of what  
13 Paul said and some of what other people had said. I represent a  
14 lot of collection attorneys. I represent them not only with  
15 respect to FDCPA claims, but also in front of the State Bar. And  
16 my experience with collection attorneys is that if they have  
17 someone who approaches them about not being served with a lawsuit  
18 when there's a default been taken, they immediately dismiss that.

19 It doesn't even go before the Court except as a  
20 stipulation to dismiss. My experience with the courts and  
21 Commissioner Gargano and the other Commissioner Surh can speak to  
22 this. But my experience with the courts is that if someone  
23 claims that they haven't been served the courts are more likely  
24 to believe that, because the interest is in justice and in  
25 actually litigating the case on the merits.



1           Second of all, there's no -- there's no benefit to a  
2 debt collection attorney, to a collection attorney to pursue a  
3 case where the debtor has claimed that they haven't received  
4 service, because there's a lot of effort put in setting those  
5 defaults aside and starting the lawsuit practice, you know,  
6 process up.

7           And so there's an economic disincentive to pursue cases  
8 when you have a lot of claims that there are bad services. And I  
9 -- the collection of attorneys that I know, when they get claims  
10 that are bad services, they look at their process servers hard.  
11 And if they need to change process servers, they do, because it's  
12 not in their economic interest to pursue those types of claims.

13           MR. KINKLEY: Ninety percent of the cases go to  
14 default, so the debt collection lawyers don't really have to  
15 worry about the service, because people cannot afford the  
16 resources necessary to defend themselves. They can't pay their  
17 debts. They can't hire lawyers.

18           It is true that oftentimes there are some collection  
19 agencies, I'll say most collection agencies now, if I put in a  
20 notice of appearance they dismiss the case just because we tend  
21 to sue people when we appear in cases. That's my business model  
22 and they know it.

23           Most collectors now, if they find any resistance, even  
24 from a pro se person, they sometimes will dismiss. They'll  
25 accept the person's position, just because, again, it's about

1 volume. They're doing huge volume in the information age.  
2 They're not looking at what they're filing because it costs money  
3 to look at it.

4           There is no disincentive -- there is no incentive to  
5 spend the money. There's a huge disincentive, because if you  
6 have the default, then you have now a resource, an asset that you  
7 can collect. They spend far more money after the judgment trying  
8 to find a place for good service of the garnishment than they do  
9 before they serve the process, because as long as they have the  
10 judgment they have an asset.

11           And once they have that asset, now it's worth investing  
12 in that asset to spend more money to find the actual address. I  
13 don't know how many times I've seen garnishments being served on  
14 a different address than the affidavit of service. If I were a  
15 Commissioner I would say, wait a minute; here's the affidavit of  
16 service of a month ago; here's for the process of the summons and  
17 complaint, but here's your garnishment a month later; what's the  
18 discrepancy.

19           But the problem is, when clerks are doing it they're  
20 ill-equipped. With all due respect, clerks don't know the real  
21 party in interest rule and standing. They don't know the hearsay  
22 rules. They don't know the exception to hearsay rules. They  
23 don't know the intricacies of abode service as substitute  
24 service.

25           They don't know these things and they slide by. The

1 Polyanna approach I'm hearing from all the debt collector lawyers  
2 here is that there is no problem in California. I can't speak to  
3 that. Maybe Mr. Wilcox can. But I'll tell you, in the places  
4 that I do know there's a huge problem or we wouldn't be having  
5 this discussion.

6           And the reason that there -- they talk about, well, it  
7 would cost us lots of money to vacate. It's true, but it happens  
8 so rarely because people do not have the resources to do it. If  
9 every time -- if every consumer were represented by an attorney,  
10 then they would make sure that the process service was correct.  
11 But they aren't, so they don't.

12           MR. SARGIS: Since you've chosen to speak in broad  
13 terms about collection agencies do this and collection agencies  
14 do that, again, I'll take you back to, from our last study less  
15 than one-half of one percent of all accounts are the ones that  
16 suit is filed on.

17           The reason it's filed on those suits is because the  
18 collection agency identifies where the debtor is, identifies the  
19 debtor has an ability to pay and then files suit. Again, part of  
20 that may be driven by California and the cost of the litigation.  
21 Another observation I'd just make here, because you know, we all  
22 become zealous advocates for our respective sides, but if this  
23 issue were turned slightly it may fit the model that we've  
24 developed over the years in finding common ground.

25           If, Paul, you went to Harvey and said: Harvey, look,

1 you know you've got -- there can be problems out there with  
2 process servers, it creates headaches for you. Look, let's come  
3 up with a way that we have good process servers that you have  
4 confidence in and the system has confidence in, in doing it, and  
5 I bet you guys would come to a common ground very quickly. Maybe  
6 less things to argue about later, but you'd come to a common  
7 ground quickly.

8 MR. ARONS: I think Gail has an excellent suggestion,  
9 which is to make the attorneys or debt collectors bear some of  
10 the liability of the bad processor.

11 MR. SARGIS: But the problem with that is if you have  
12 that then you're saying, okay, we want to make you, collection  
13 agency, into a process server; we want you to dictate how they're  
14 going to do it. Now, part of that gets picked up already, I  
15 think under the FDCPA and Rosenthal Act, where if you're a debt  
16 collector or if you're the original creditor in California  
17 subject to Rosenthal Act, you're using a process server, you're  
18 getting all of these bad returns coming back, there's a point you  
19 go from, I'm the innocent victim to, yeah, I'm doing it with the  
20 guy and you're going -- and the collector or the creditor under  
21 Rosenthal Act will get slammed.

22 So I mean, there -- some of the tools are there, even  
23 where Gail has -- you know -- has suggested. And maybe, as I  
24 said earlier, we move it up and say, what common ground do we  
25 have to say, what does it take to get good process servers like

1 you've described that are doing the work so that I as a attorney  
2 representing a creditor go, I never have to worry about this.

3           You in representing the consumer -- Ron, if I'm going  
4 to fight with you about something, it's going to be something  
5 other than the process servers.

6           MR. ARONS: Yeah. I think that it's not that the debt  
7 collector necessarily has an incentive to do bad service, but the  
8 debt collector has no incentive to make sure the service is good.

9           MR. SARGIS: Got you.

10          MR. GRAYBILL: Actually, Commissioner Surh.

11          MR. SURH: Yeah. I wanted to just make a couple of  
12 observations about, from the judicial perspective, where we kind  
13 of do scrutinize the whole process, and that is -- first of all,  
14 I want to note that from a judge's perspective the last thing  
15 that we want to be in any situation is a rubber stamp.

16          There's this natural tendency, propensity to want to  
17 question what's being presented, right, and to make sure that  
18 before we put our signature on something that it's right. So  
19 there is that perspective, and I think this perhaps speaks to the  
20 debate that maybe it happened yesterday. I'm sorry I couldn't be  
21 here.

22          But in terms of arbitration versus going to court, I  
23 think that's one advantage that you have in terms of consumer  
24 protection, is because the Court will take an independent look.  
25 When it comes to the proof of service this is the one very clear

1 check that we can make, and that is to at least look on its face  
2 and make sure that it's valid on its face.

3 Now, I can't guarantee that we're going to catch  
4 this -- these patterns that Mr. Gargano mentioned, because we  
5 don't necessarily see the flow and know the city and all of this,  
6 but we do scrutinize those proofs. Before a default is taken in  
7 my court I do look and I -- right now, I'm sitting on small  
8 claims.

9 So there's a lot of scrutinizing of the proof of  
10 service and so forth, because that's jurisdictional. Without the  
11 good proof you do not have jurisdiction to move forward. So we  
12 do take a -- I think a pretty good look here. In my court we're  
13 lucky to have two full-time staff attorneys who do the defaults,  
14 and so it does get a pretty good review.

15 The other point I guess where this review of the  
16 service of process would come up is if a debtor -- let's say it  
17 goes forward. There's a default judgment granted; the debtor  
18 gets garnisheed. He starts losing his wages. That'll bring him  
19 into court very quickly.

20 And if we have personal service and the hearing is set  
21 to review the motion to set aside the judgment, if we have  
22 personal service the plaintiff had better bring their process  
23 server into the hearing. Rarely happens, but if they're -- and  
24 if they're not there the motion to set aside that judgment is  
25 probably going to be granted.

1           The other thing we were talking about is the  
2 substituted service. And just to clarify what that is in  
3 California is, you have to make due diligence, several attempts  
4 to serve personally. And then if you can show that you've made  
5 that due diligence, then you may serve by leaving the papers with  
6 a responsible adult at the residence or place of business, and  
7 then follow it up with a mailing. Just to clarify, that's what a  
8 sub-serve is.

9           If you have a sub-serve the burden is fairly easy on  
10 the part of the debtor or alleged debtor if he or she can show  
11 that that simply wasn't their residence or place of business on  
12 that date. So it's not that difficult. So a debtor who comes in  
13 and tries to get their judgment set aside, if they can get into  
14 court and I agree that that may be a barrier in and of itself,  
15 but if they can get into court the burden's not that great. So  
16 that's sort of the other checkpoint that we have.

17           I did want to mention, too, that the estimate that Mr.  
18 Moore gave at 80 percent, that seems low to me. I think far more  
19 than 80 percent go by default. But in my rough experience I  
20 don't keep statistics, but it's more like 95. It's vast, vast  
21 majority go by default.

22           MR. GRAYBILL: Has there been any sense that a great  
23 proportion -- well, it's the proportion of those that are by  
24 substituted service, as opposed to personal service?

25           MR. SURH: My sense of it just anecdotally is that most

1 of them are substituted service.

2 MR. GRAYBILL: And one follow-up question, too, which  
3 goes to -- as you said, you can look at a piece of paper, but you  
4 can't necessarily discern underlying patterns. One idea that had  
5 been floated before had been the idea of -- whether it be by  
6 court rule or statute or whatever -- requiring process servers to  
7 keep a daily log: I went to the Wharf and I did this; I saw  
8 these people; I then got in my car and it -- it's almost like UPS  
9 does, and have those be filed and made available for public  
10 inspection, so that at least there would be some sense, some  
11 transparency as to what the heck the guy was doing. Does that  
12 sound practical, impractical? What are the pros and cons of  
13 that?

14 MR. SURH: Sounds like a huge additional burden on  
15 everyone. I don't know if it's --

16 MR. GRAYBILL: Do process servers do something akin to  
17 that now?

18 MR. TAMAROFF: If I might -- if I might respond to  
19 that, as well as a couple of other things. If you want to have a  
20 log, if you want to do all that work, then go ahead. It's not  
21 going to really solve your problem, I don't believe. My concern  
22 is not just with California, but with the entire United States.

23 And my association represents over 2,000 professional  
24 process servers throughout the country and throughout Canada,  
25 Europe, and in other countries in the world. And we do our best



1 to make sure our people are qualified professionals. We have  
2 continuing education for them.

3 California Association, many members are here, they  
4 have a continuing education program for their members. But  
5 unlike a number of state bar associations, we can't force process  
6 servers to join our associations. And so we can't force them to  
7 take continuing education.

8 And it seems to me that the solutions that people are  
9 discussing are more after the cow gets out of the barn, so to  
10 speak, rather than being proactive. Harvey mentioned that he  
11 sends a letter out before they go to litigation. Well, I would  
12 say 25 percent of the cases my office gets to serve a debtor, we  
13 have a file that has letters in it to the debtor and we go to  
14 that address and the debtor hasn't been there for over a year.

15 And what generally happens is the process is not  
16 served, unless it's a large amount of money and then we're asked  
17 to go ahead and find the person. And of course, anybody can be  
18 found as long as the client is willing to pay the money. We do  
19 have some process servers that engage in some superhuman feats,  
20 but not being in two -- you can't have your fanny in two places  
21 at the same time.

22 It was mentioned that California has a registration  
23 process, and I know there are a few other states that have  
24 licensing processes. I don't place much value in them. For the  
25 most part, I find licensing and registration as a means to

1 maintain monopolies for those process servers that are already in  
2 business, or in any -- it doesn't make any difference what type  
3 of profession it is.

4           The legal industry, it seems to me, has brought these  
5 problems on itself. As far as the New York -- what happened in  
6 New York, that should have been expected. It's not the first  
7 time it's happened. It's not the first time it's happened in New  
8 York. It happened back in the early 1900s.

9           In fact, New York is where the term "gutter service"  
10 was coined. So what's happened since then in New York? Nothing.  
11 Attorney General Cuomo has gotten some indictments on some  
12 attorneys and on a process server company, and maybe somebody's  
13 going to go to jail and then we can go another 50 years before we  
14 have another episode of gigantic proportions like this where  
15 possibly 100,000 judgments are going to be thrown out.

16           What has any legislator in New York done to try to  
17 solve the problem? What have legislators throughout the country  
18 done to solve the problem of bad process servers? And there are  
19 bad process servers. I've had members of my own associations  
20 take the position that they should not be regulated.

21           They want to be like in the old wild west: I've been  
22 doing this for 25 years; nobody needs to tell me how I'm going to  
23 serve process. And they want the marketplace to weed out the bad  
24 process servers. The problem with that is that by the time the  
25 marketplace gets around to weeding out the bad process server,

1 that particular process server may have served over 1,000 pieces  
2 of process, and so many of those default judgments are going to  
3 have to be thrown out again.

4           So what's the solution? I think the solution belongs  
5 with the courts. I know in Georgia, where I happen to be from,  
6 we have been fighting for six years now, trying to get  
7 legislation that would certify process servers in the State of  
8 Georgia, that would require process servers to take continuing  
9 education and would require testing to know -- to show that they  
10 know the law of the state.

11           I'd like to make one comparison, and it happens to be  
12 with Canada and Europe, as well, not their health insurance,  
13 but --

14           (Laughter.)

15           MR. TAMAROFF: Canada uses bailiffs to serve papers.  
16 Now, bailiffs can't just wake up one morning when they're 18  
17 years old and decide to go out and serve papers. It's not like  
18 Rule 4 of the Federal Rules or the state codes of civil  
19 procedure, which are basically patterned after Rule 4.

20           If you're over the age of 18 and you have a temperature  
21 that hovers around 98.6, go ahead and serve paper. Seems to me  
22 we should have a little more respect for our process servers.  
23 Bailiffs have to go through a couple of years of education before  
24 they can serve papers.

25           And in fact, they are educated to the point where they

1 can represent individuals in the Small Claims Courts that they  
2 have. The hussiers in Europe, the tourist officers, they have an  
3 apprentice system. You don't go out and serve process. You  
4 spend time as an apprentice for a couple of years with a company  
5 before you get to even touch a paper.

6           What do they know that we don't know? What can they do  
7 that we can't do? We have a tremendous court system. We have  
8 probably the best court system, the judicial system in the world.  
9 But the touchstone foundation for a judicial system is to ensure  
10 that a person gets reasonable notice and an opportunity to be  
11 heard.

12           And if you have bad process servers that's not going to  
13 happen. You've got a problem. Process servers need to be  
14 certified as being competent and having the ability to do their  
15 job. And it's the legislatures that need to pass laws, or the  
16 courts that need to pass rules, similar to what we have in the  
17 State of Arizona and in the State of Texas. You don't get to  
18 serve process unless you first get certified in taking their  
19 education programs and showing that you know what you are doing.

20           And if you find -- they find out that you don't know  
21 what you're doing, then you are not going to serve process  
22 anymore, and you won't have to be reviewing laws and you won't  
23 have to be reviewing affidavits of process servers, because you  
24 will have confidence in the process servers that you certify.

25           They will be a part of your court system and they will

1 be able to do the job that we want them to do, because we as  
2 professional process servers do not appreciate the fact that this  
3 kind of stuff happens where people bloody our nose, blacken our  
4 eyes, and people come down on process servers saying, you know,  
5 they're dregs of the earth; no respect for them.

6           And people might start using -- not -- you don't have  
7 to worry about it. An attorney doesn't have to worry about it.  
8 When he or she hires a process server they know that this process  
9 server is on a website put out by the Administrative Office of  
10 the Courts, and these are the people you can use to serve  
11 process; they are qualified.

12           As far as bonding, bonding is a joke. How many  
13 attorneys have ever asked their process server if they carried  
14 professional liability insurance?

15           MR. NEWBURGER: Excuse me. I've actually not only  
16 talked to process servers about it, I've been known to ask a  
17 sheriff and a county attorney or two who their bonding company  
18 was when we thought service was being carried out improperly.

19           MR. TAMAROFF: But a bond, a bond is basically  
20 worthless. You -- how much liability insurance do attorneys  
21 carry?

22           MR. NEWBURGER: A whole lot. Thank you.

23           MR. TAMAROFF: A whole lot is right, and I carry a  
24 whole lot, too, because I know what I'm open to. I use other  
25 process servers to serve papers for my company, and when they

1 screw up I'm the one that's going to be liable.

2 MR. GRAYBILL: David, I want to -- we're getting -- I  
3 have some questions here, unfortunately too many, but I want to  
4 get to Mr. Wilcox, who I think hasn't spoken yet. And after that  
5 I want to address the basic topic of -- presently, under the Fair  
6 Debt Collection Practices Act, and I suspect many laws, process  
7 servers are not explicitly covered.

8 And my general -- and I -- my general question is going  
9 to be, what existing sanctions are there -- and I'm sure it  
10 varies by state and court -- for a -- that would cover attorney  
11 liability for bad process, and/or process server liability? Is  
12 it just -- is a matter of local contempt of court, or there's in  
13 some states statutes that actually address attorney vicarious  
14 liability?

15 I'm just going to ask -- throw that out, but we don't  
16 have a year to discuss it. But first of all, I'd like to hear  
17 from Mr. Wilcox.

18 MS. HILLEBRAND: After Mr. Wilcox could we also hear  
19 from Ms. Flory, who's been trying to get her --

20 MR. GRAYBILL: Oh, yeah. I'm sorry.

21 MS. FLORY: Thank you.

22 MR. GRAYBILL: I'm sorry.

23 MR. WILCOX: I believe it was --

24 MR. MAURER: I've been trying, as well.

25 MR. WILCOX: -- I believe Mr. Maurer wanted to --

1 MR. GRAYBILL: Oh, no, you're right. You have.

2 MR. WILCOX: -- as well, so. There was some discussion  
3 earlier about an obligation that consumers have to provide their  
4 name and -- their address and contact information under  
5 Rosenthal. That's accurate, but the problem I see is the  
6 consumers are not aware of that obligation.

7 And if you take a look at the statute it's pretty  
8 clear. It says, "The responsibility shall apply only if and  
9 after the creditor clearly and conspicuously in writing discloses  
10 such responsibility to such person." I review thousands of  
11 collection letters every year.

12 I probably see a reference to that obligation in one or  
13 two letters out of every 10. So now, look, if I'm a creditor I'd  
14 be thinking, why even bother; they're obviously going to be  
15 ducking me; so asking them for this information is worthless; I  
16 don't know; probably depends upon the individual person.

17 Some people may provide it. Others may not, but it's  
18 somewhat hypocritical to say the consumer should provide the  
19 information when the creditors are not actually conspicuously and  
20 clearly providing them the information and knowledge of that  
21 obligation. So you guys have the ear of the creditors. You may  
22 want to talk with them about that, or you guys who are creditors.

23 To answer the mediator's or moderator's question about  
24 obligations of what do we do here when a process server runs  
25 afoul, there are -- there is a section of Rosenthal that deals

1 with that. If a collection agency or creditor happens to know  
2 that service of process wasn't effected, they're not supposed to  
3 continue with suit.

4 MR. GRAYBILL: By the way, the Rosenthal Act, if you  
5 could just, for the people that aren't familiar with it, just  
6 describe what precise statute that is.

7 MR. WILCOX: Yeah. Well, the Rosenthal Act is simply  
8 California's version of the Fair Debt Collection Practices Act.  
9 It's not identical, but it has incorporated much of the federal  
10 FDCPA. It also allows for liability against original creditors,  
11 which obviously, the federal FDCPA does not.

12 MR. SARGIS: Ron, I'd just like to say, we like to  
13 think of it as the FDCPA is the federal version of the Rosenthal  
14 Act.

15 (Laughter.)

16 MR. SARGIS: The Rosenthal Act predated it.

17 MR. GARGANO: That's right, 20 years.

18 MR. SARGIS: And it's found at 1788 of the Civil Code.

19 MR. GARGANO: Right.

20 MR. GRAYBILL: Correct.

21 MR. SARGIS: 1788 and the following.

22 MR. GRAYBILL: By the way, I'm sorry that I missed you  
23 there, Jen.

24 MS. FLORY: Okay. Well, my point is actually related  
25 to what Ron Wilcox was saying. I work primarily with advocates



1 representing people with medical debt bills, and one of the big  
2 problems there is that consumers actually have no way of  
3 notifying their creditors of anything.

4           For example, if I go into the hospital this week and I  
5 move in the next month, I have no way of notifying everybody who  
6 might send me a bill in the next few years. I could tell the  
7 hospital and hope that they pass it on, but I have no contact and  
8 I don't know who the other people are who even treated me.

9           When you go to a hospital these days, more and more  
10 you're going to get a bill from the hospital, from ancillary  
11 providers, from laboratories. Chances are, you weren't taking  
12 down all their names as you were getting treatment.

13           (Laughter.)

14           MS. FLORY: Chances are, you don't know where all your  
15 medical tests were sent to. So what we do see is a lot of people  
16 who the first time they've heard of a bill -- and this is  
17 sometimes years later -- is when they are served for litigation,  
18 and so there needs to be more in how people are contacted prior  
19 to litigation.

20           And just some of the comments that were made here that,  
21 you know, people are only going to be sued if they've actually  
22 had contact with them, or if they have the ability to pay, the  
23 fact that I work with legal service clients at all, none of them  
24 have the ability to pay and they're still constantly being sued  
25 over medical bills.

1           And in addition to this problem of having no way of  
2 contacting people who might be billing you, we've been working on  
3 legislation with this. We've asked hospitals if they would be  
4 willing to pass this information on. They represent that they  
5 don't even know everybody who might treat you when you go into  
6 one of their hospitals.

7           A further thing that complicates it is it's not always  
8 obvious up front who the correct payer is of a bill. These  
9 things get passed back and forth between an HMO and an  
10 independent physician's association. They will go back and forth  
11 on something for a while. Perhaps someone should have been  
12 covered by government benefits.

13           So sometimes, the person is not receiving anything for  
14 some time, and by then they've moved or there is an incorrect  
15 address or something happened in there. So a lot of this,  
16 it's -- correcting service is one thing, but it also -- things  
17 need to happen before the person gets served to make sure that  
18 they even know that they owe this company they've never heard of,  
19 and why they owe them and they couldn't contest that bill.

20           MR. SARGIS: Jen, you -- your clients and the advocates  
21 suffer from some of the same problems as the collectors who say,  
22 we get a bill and it's from ABC Hospital, but it turns out it's  
23 the anesthesiologist, who's part of this group or whatever, and  
24 unfortunately, what I see sometimes is the consumer doesn't even  
25 tell the hospital when they -- they know they went to Mercy

1 Hospital, but they don't even tell Mercy Hospital.

2           So you can't even say, okay, anesthesiologist, when you  
3 got the mail returned or you didn't know or the address changed  
4 from what the hospital first provided you, you should have gone  
5 back. So I mean, that's a little step there. And the other  
6 thing I was just going to comment on, just because someone may be  
7 seeking legal aid doesn't mean they don't necessarily have the  
8 ability to pay, because if there's -- there's a scale here as to  
9 what some people may think is absolutely necessary to have,  
10 versus in a business sense of an ability to pay.

11           But if someone really doesn't have it, they can't put a  
12 roof over their head, they can't put food on the table, then tell  
13 your collector the collection agency's not going to keep going  
14 after them, because they're going to get 0.00 dollars, which is  
15 zero percent.

16           MR. NEWBURGER: The question you raise actually is the  
17 point, though, that concerns me. First, personal perspective,  
18 I'd be really happy to see process servers who falsify returns  
19 held in contempt or put in jail. I think that's one of the best  
20 solutions.

21           But the minute you talk about the issue you raised,  
22 which is liability, there's a discussion I end up having with my  
23 consumer law students, which is the rule of unintended  
24 consequences. What is the essence of process service? It is  
25 that someone who is independent, unconnected to the case and

1 unconnected to the parties, is serving process.

2           The minute you talk about vicarious liability you  
3 undermine the entire concept of independence, or you turn the law  
4 of vicarious liability and independent contractors on its ear.  
5 You know, to the extent that the complaint is, volume is not an  
6 excuse for sloppy legal work or sloppy service, I agree 110  
7 percent. It is not an excuse.

8           MR. KINKLEY: It's that kind of math that gets the debt  
9 collectors in trouble.

10           MR. NEWBURGER: Yeah, I know that. But you know who I  
11 represent. So it's okay. But to the extent that the argument is  
12 volume is an excuse for creating complete exceptions to well-  
13 established legal doctrines, to creating special classes of  
14 parties whose burdens of service or burdens of proof are  
15 different, I'm sorry, I have to reject that concept.

16           The lady who holds the scales wears a blindfold, and  
17 the people who represent the creditors are entitled to the  
18 same -- the same equality under the law as the people who are  
19 being sued. They're entitled and should be expected to use the  
20 same independent process servers, as we should expect of you.

21           Yet, a well-known consumer lawyer and NACA member uses  
22 his son to serve process. I don't hear a NACA member screaming  
23 about that. The truth is, process servers are supposed to be  
24 independent. If there's going to be liability for bad process  
25 service it must fall on the process servers themselves, because

1 if you create vicarious liability you call into question the  
2 entire set of relationships.

3 MR. GRAYBILL: Although the -- this is just as a -- the  
4 other side of the argument that I've heard, which would be  
5 that -- and again, there -- everybody would recognize that  
6 there's good process servers, ethical process servers that may be  
7 in the majority, whatever, but everybody also has stories of bad  
8 apples, and the New York litigation was one example of that.

9 And so the thought is that what about attorneys who  
10 sort of knowingly hire just that firm that charges \$5 a service  
11 and has this remarkable pattern of 100 percent service, and the  
12 default -- I mean, in the FTC we do have a sense of agency and  
13 vicarious liability that tries to get at -- beneath that veil.  
14 And what's the answer to that?

15 MR. NEWBURGER: But there really is something built  
16 into the system, which is a disciplinary rule called, "Candor to  
17 the tribunal." And a lawyer who submits false evidence to a  
18 court, which would include process service, has an affirmative  
19 duty to correct that record.

20 And a court has the power, as we're seeing more and  
21 more courts doing, to say, fine, I'm referring this lawyer to the  
22 Bar for disciplinary action; I'm treating this as an act of  
23 contempt of court. In fact, Texas has a statute, section 82.065  
24 of our Government Code, which is, a court may treat misconduct as  
25 an act of contempt.

1           The solution is that a law -- lawyer who's participated  
2 in that has violated the duty of candor to the tribunal and  
3 should be sanctioned, but that's different than vicarious  
4 liability.

5           MR. ARONS: Manny, with all due respect, the idea that  
6 courts really police the good ethics and conducts -- conducts of  
7 the attorneys who appear in front of them every day simply does  
8 not bear out in my experience. A lot of stuff happens. I mean,  
9 the idea that a court is going to discipline an attorney on  
10 account of something a process server did just simply does not  
11 seem realistic.

12           MR. NEWBURGER: Well, just --

13           MS. COLEMAN: Well, I can actually speak to that,  
14 because --

15           MR. GRAYBILL: If you could make it short, please.

16           MS. COLEMAN: I can.

17           MR. GRAYBILL: I want to get these -- two individuals  
18 haven't spoken yet, so.

19           MS. COLEMAN: Representing attorneys in front of the  
20 State Bar, I've actually represented attorneys who have been  
21 investigated by the State Bar because they had process servers  
22 who allegedly falsified the proof of service, or the process  
23 wasn't served -- allegedly wasn't served properly.

24           So the State Bar, at least the California State Bar, is  
25 looking at those issues and is looking at the attorneys, and

1 that's one of the reasons attorneys say if they run into somebody  
2 who claims they haven't had service, they're protective of their  
3 license. Their immediate response is, let's set it aside, the  
4 Court's going to set it aside if you bring it to them. Let's set  
5 it aside and litigate on the merit of the case.

6 MR. GRAYBILL: I just want to get the two individuals  
7 that didn't have a chance yet.

8 MR. NAVES: Sure.

9 MR. GRAYBILL: Go ahead, Ron.

10 MR. NAVES: I guess I would bring this discussion back  
11 to, it seems very, very focused upon service of process and I  
12 think just about anybody would agree that if service of process  
13 is broken and people aren't getting notice and the opportunity to  
14 defend themselves, something is significantly wrong. And I don't  
15 think anybody would say that that's -- it should be that way.

16 So I think we're on the same page from that  
17 perspective. We've heard very different ideas about what it  
18 means to do that. I've heard, you know, it should fall back on  
19 the courts. It should fall back on the attorneys and they should  
20 be liable for -- it should fall back on various -- various  
21 people, and that's perhaps something better left for the experts  
22 here on the panel to discuss.

23 But from my perspective as the debt buyer here, I want  
24 to sort of reel this in and let's focus on the type of cases that  
25 we are sending to litigation, and let's talk about common

1 business sense for a moment. Our business is based upon the  
2 ability to talk to debtors, and we want to do that in the most  
3 effective and least expensive way, and we don't want to  
4 immediately jump to litigation.

5           It does not make sense to jump immediately to  
6 litigation. Having been a litigator for 20 years, you know, when  
7 I look at attorneys' fees and costs and going to the court  
8 system, it's very expensive. It's very time-consuming. I don't  
9 think anybody in the business world has any different opinion  
10 than that.

11           We look to talk to people. We have to do it under some  
12 very strict constraints that are imposed for good reasons for --  
13 in the federal legislation that exists. We will make phone  
14 calls. We will send letters. We will try to talk to people.  
15 Those are the least expensive methods for us to talk to people  
16 and open a dialogue on settling these debts and getting consumers  
17 an opportunity to get back on their feet, and giving us an  
18 opportunity to try to resolve these issues, short of getting to  
19 litigation.

20           So the notion that we as debt buyers -- and of course,  
21 I can't speak for all debt buyers, but I can speak for Midland or  
22 Encore, and we don't want to go to litigation first. So by the  
23 time we have sent the case to litigation it represents a very  
24 small portion of the overall cases that we deal with, and we have  
25 made many attempts at great expense to talk to people, via



1 letters, via phone calls in a number of different ways.

2           Then we hire attorneys throughout the different states  
3 to take the next step and go to litigation. My point is that  
4 service of process could probably be tightened up, and there are  
5 a lot of good suggestions floating around here and -- but when  
6 you look at consumers who have consistently ignored, assuming we  
7 got to the right consumer, assuming we sent the notices as we are  
8 required to do, they have ignored letters.

9           They have ignored phone calls. There has been many  
10 opportunities for them to engage with us to resolve the issues,  
11 short of litigation. So while I hear default rates are very high  
12 and there's a significant number of concerns, I am starting to  
13 look at the channel itself, in other words, the type of consumer  
14 that is being referred to litigation.

15           And the fact that it is a very small percentage of the  
16 overall consumers that we deal with and the fact that they have  
17 ignored, perhaps many of them, not all of them -- mistakes  
18 certainly happen -- but they have ignored the process and the  
19 opportunities to be able to engage, creates issues to me that  
20 would suggest that there are other reasons for the high default  
21 rates that we're seeing in this industry.

22           MR. GRAYBILL: Okay. Scott.

23           MR. MAURER: I just wanted to put some anecdotal  
24 evidence in the record that there are problems with process  
25 servers in California. At my clinic we get a fairly steady

1 stream of folks who said, I learned about this for the first time  
2 when my bank account got hit or my wages got garnished, and we  
3 don't take them at their word.

4           We make them go down to the courthouse and get the  
5 proof of service, or we go down and get it ourselves and we look  
6 at it. And if the proof of service physically describes our  
7 client, obviously, we're not going to pursue that. And by the  
8 way, we're not even going to pursue it -- we're only going to  
9 even look at this in the cases where the person doesn't owe the  
10 debt.

11           If they owe the debt anyway, what's the point of  
12 getting the default set aside? But in those cases where the  
13 consumer doesn't owe the debt and they say, I wasn't served, we  
14 look at them and we -- we have found a number of examples where  
15 the statements on a proof of service are just objectively false.

16           I served this person by leaving an adult [sic] at his  
17 residence; he wasn't there, but I left it with someone at his  
18 residence. Well, that wasn't his residence. That was his  
19 residence two residences ago, three, four years ago. And what's  
20 odd is the collection agency who is the plaintiff knew where he  
21 was now.

22           They were sending letters to his current address. So  
23 why was he being served at this address from five years ago? And  
24 at the end of the day the garnishment stops, the wages get  
25 returned, but in the particular -- you know -- in some cases it

1 takes months.

2           And there was a question about -- you know -- someone  
3 made the comment, well, when I find out there's bad service I  
4 stipulate right away. Well, if the consumer finds out about the  
5 default judgment before any money's been taken, yes. When the  
6 consumer's bank account has been hit and their wages have been  
7 garnished and the debt collector has thousands of dollars,  
8 sometimes I won't get a stipulation.

9           And then I have to go get the landlord to say, no, I  
10 didn't tell the process server he lived there. I told him he  
11 lived there five years ago. And it takes a lot of work and it  
12 takes time to get that motion heard. And meanwhile, in  
13 California, the wages are still being garnished because the other  
14 side won't stipulate. So that raises a couple points.

15           One, even though my client gets the money back, they  
16 should have a remedy against the process server who filed a false  
17 statement in court, a civil remedy, and they don't. They can  
18 write a letter to the county clerk that registers the process  
19 server and say, this is what he did to me.

20           And who knows what will happen to that and what  
21 incentive really does my client have to do that, other than  
22 altruism? The other point is, aside from vicarious liability,  
23 the attorney that won't stipulate to set aside that default  
24 judgment when I give them all the evidence about, this was bad  
25 service, that's not vicarious liability. That's ratification,

1 and there should be liability on the attorney in that kind of  
2 situation.

3 MR. GRAYBILL: We have about four minutes left. I  
4 think a minute or two extra won't hurt. I got a lot of  
5 questions. They're all good. I'll only be able to get two or  
6 three of them. Well, actually, many of them were sort of  
7 indirectly answered. So I'll try to restrict myself to about  
8 three here.

9 The first question -- and I'll recite it verbatim:  
10 "Please speak to, one, the role of the sheriffs in service of  
11 process, and two, whether the diversity of laws regarding process  
12 servers across the country is itself a problem."

13 MR. ESTIN: Let me address the sheriff's issue.

14 MR. GRAYBILL: If we could hear from both sides, I'd  
15 love it.

16 MR. ESTIN: For sheriffs to serve civil process at a  
17 loss to the taxpayers is ludicrous, and there is no sheriff in  
18 the United States that charges enough to cover their true  
19 expense. Every sheriff that's ever asked what it costs ignores  
20 things like retirement benefits and health insurance.

21 In North Carolina, for instance, where by law all  
22 lawsuits must be served by the sheriff, the sheriff charges \$15.  
23 And we recently had a situation in North Carolina where a person  
24 with an outstanding warrant in Durham committed a serious act,  
25 and there was investigation, why wasn't this person off the

1 street.

2           And after having hearings about the problem the  
3 solution was, they authorized an additional \$500,000 to hire four  
4 more deputies and four more clerks to process part of the 50,000  
5 unserved criminal warrants in Durham County alone, at a time when  
6 90 percent of the sheriffs in the Durham County Sheriff's Office  
7 were serving civil process at a loss to the taxpayer.

8           Respectfully, to my colleague Paul Tamaroff, sheriffs  
9 or bailiffs are not part of the solution. Not only should they  
10 not be serving at a loss to the taxpayer, but when private  
11 process servers serve, they're paying income tax and business  
12 profit taxes and helping with the problems.

13           So they are absolutely not part of the solution, and  
14 they're not needed. In Texas, after years of them serving all  
15 the process on a monopoly -- it was constables in Texas -- now,  
16 the private sector is doing it with no problems for litigants to  
17 get their cases served.

18           Here in California where it's not mandatory to use the  
19 sheriff, but in eight of the 58 counties the sheriffs no longer  
20 serve lawsuits or subpoenas. They'll still serve writs and  
21 certain other things. So the sheriff should not be part of the  
22 solution. It is ludicrous in an era when every state and almost  
23 every county has deficits for them to serve at huge losses where  
24 tens of millions of dollars a year are being done to subsidize  
25 their negative cost service.

1 MR. GRAYBILL: What about the issue of lack of  
2 uniformity of laws in terms of the rigors of -- rigorousness of  
3 service requirements?

4 MR. TAMAROFF: I could respond to that. That is not a  
5 problem if we deal with each state separately. Each state should  
6 have their laws designed to ensure that you've got qualified  
7 process servers. I know my associates in the National  
8 Association of Professional Process Servers, the California  
9 Association of Legal Support Providers, Washington State  
10 Association, we have about 10 associations around the country, we  
11 would be pleased to work with all of you, the Federal Trade  
12 Commission, to come up with a model statute that can be adapted  
13 to any state to make sure that they have qualified process  
14 servers who are available to serve the legal community.

15 And I think that that is really the way to solve the  
16 problems, that and ensuring that process servers have to carry  
17 professional liability insurance so that they can be sued if it's  
18 necessary. These are the ways to solve problems. Make sure  
19 people are qualified, and you don't have serious problems after  
20 that.

21 MR. KINKLEY: I just want to say, I agree  
22 wholeheartedly with Mr. Tamaroff. I think the common ground we  
23 have is debt collectors with the industry -- and I've spoken to  
24 the Washington Association -- he and I have talked about the fact  
25 that Washington statute is inadequate.

1           It requires registration and it's up to the attorney to  
2 enforce it because you're not allowed reimbursement for the  
3 process server fee unless the process server is registered.  
4 Having said that, you're supposed to also put the registration  
5 number on the affidavit of service, and the county of  
6 registration, so there's accountability of some kind; very  
7 little, \$10, you're a process server.

8           It isn't done. Judges are signing fee shifting for  
9 that process server and on the face it's lacking a statutory  
10 element. We have thousands of these. We have two class cases,  
11 three class cases going with thousands and thousands of  
12 judgments. I have another point, though.

13           If we had a statute like you're talking about with  
14 licensing that was uniform, to be adopted with variances at each  
15 state, that would be a very good thing and I think we would all  
16 agree to that because it takes the burden off the process server.  
17 We're suing the lawyers who tried to collect those  
18 reimbursements.

19           Where's the process server's accountability on it? We  
20 can't touch him. The second thing is, we don't -- we have debt  
21 collectors -- you know, if we had process servers like you two,  
22 we wouldn't have as many problems as we have, because you're  
23 taking personal accountability, but you charge for that.

24           You're more expensive than the other guy. And for a  
25 debt collector who's doing 500 cases a month, that difference of

1 \$20 that he might not get back, he says, is a big deal. Plus,  
2 you guys won't stomach the guy who says, well, we'll prepare your  
3 affidavit of service for you so we can charge for that, and most  
4 debt collectors do that. It's a profit center for them.

5 It's not an innocent, hands-off, independent party.  
6 They make money on the process server, in addition. Now, let me  
7 -- one more thing. The -- what I'm calling for here is  
8 transparency, accountability, accountability as a process server,  
9 the attorney, the debt collector.

10 And how about this, judges, debt collectors, how many  
11 times have you seen a process server who did something -- who's  
12 in two places at once? You caught somebody doing that. How many  
13 of those judgments did you require the attorney to go back, bring  
14 that stack in with a series of vacate? Did you go back and  
15 vacate all of the judgments that that processor did, or did you  
16 just do it in one case?

17 MR. GRAYBILL: That's a good question.

18 MR. GARGANO: I wasn't actually the commissioner that  
19 did that, and I don't know what she did --

20 MR. KINKLEY: My experience is -- and we're filing  
21 lawsuits now in a case on lack of subject matter jurisdiction.  
22 Thousands of judgments were entered without the Court even having  
23 the power to act. Jurisdiction is defined as the power to act.  
24 Without subject matter jurisdiction, the judgment's void.

25 We're filing lawsuits to vacate all of those. When you



1 find a process server that has been bad there ought to be more  
2 than vacating the one judgment. You ought to go back and look at  
3 all of the judgments. Now, what a burden does that put on the  
4 creditor?

5 So we do need a system of change, because the creditors  
6 -- not only debt collector creditors -- are being affected. If  
7 we go back and vacate -- when you have one bad process server you  
8 should go back and vacate everything he's ever done. Do you all  
9 agree?

10 MR. GRAYBILL: Yeah. Just to -- I guess we're going to  
11 have to close. I saw your hand go up last, and --

12 MS. HILLEBRAND: Thank you.

13 MR. GRAYBILL: -- for that principal reason, you can  
14 speak last.

15 MS. HILLEBRAND: I agree with what's been said, but I  
16 wanted to comment on the implication in the question that  
17 uniformity is good in itself. I think there's a very big  
18 difference between a minimum uniform federal standard and  
19 allowing states to go forward with their own processes and do  
20 more.

21 That's the basic rule of consumer protection in this  
22 country. There's a possibility for the FTC to say, these  
23 problems don't have to wait to be solved until every state  
24 legislature and every court figures out their resource issues and  
25 the nuances of individual state laws.

1           The FTC can look at minimum standards and that's very  
2 appropriate and it doesn't knock out the possibility of keeping  
3 those places where the courts are ready to do more, where the  
4 state legislatures have or are willing to do more.

5           MR. GRAYBILL: And that concludes this round. I want  
6 to thank everybody. That was fun.

7           (Applause. Recess taken 10:49 a.m. until 11:08 a.m.)

8

1                   TIMING:  STATUTE OF LIMITATIONS ISSUES

2                   MS. THORLEIFSON:  Well, good morning.  Thank you all  
3 for such a lively discussion.  I'm Tracy Thorleifson.  I'm an  
4 attorney with the Northwest Regional Office of the Federal Trade  
5 Commission in Seattle, and I'm pleased to be here moderating a  
6 panel on timing and debt -- collecting on debts that are beyond  
7 the statute of limitations.

8                   Before we start there's a couple of housekeeping things  
9 to go over.  First, please, everybody pay particular attention to  
10 speaking closely into the microphone for the webcasting audience.  
11 So get those mikes close to you and use them, please.  Second, I  
12 want to remind everybody about the evaluations.

13                   There are evaluation forms in your packet if you're  
14 here, and if you're watching on the Web there is an evaluation  
15 form online.  Please fill it out and turn it in.  We appreciate  
16 your feedback.  And finally, for this particular panel I think  
17 there can be a difference between debt buyers and traditional  
18 debt collectors who are collecting on behalf of a creditor.

19                   So I would ask the panelists to specify when they're  
20 responding whether they're responding about debt buyers or debt  
21 collectors.  So without further adieu, let's start.  Oh, one  
22 thing.  There is a fairly lengthy lunch hour.  We're starting 10  
23 minutes late.  So if the discussion warrants it, we will go for  
24 an additional 10 minutes into our planned lunch hour.

25                   So without further adieu, how frequently do debt

1 collectors seek to collect on debt that is beyond the statute of  
2 limitations? Does anybody want to jump in? Mr. Kinkley?

3 MR. KINKLEY: I was afraid that you would ask. I would  
4 say with debt buyers, a lot. With the debt collectors, less,  
5 much less so. The debt collectors tend to be collecting on what  
6 they sometimes call primary accounts. They have a relationship  
7 with a creditor and they collect for that creditor.

8 The debt buyers collect what are called tertiary  
9 accounts. They've been worked. They've gone through  
10 securitization, typically. Their portfolios, it's bits of  
11 information transmitted over the internet. The computers mesh  
12 small, maybe five, six, eight fields is all that's transferred.  
13 So the information that the debt buyer has is not all that good,  
14 oftentimes.

15 And the business model -- I have an article here about  
16 Unifund, and they talk about that as a business model, taking the  
17 old debt, repackaging it, trying to document it in some way.

18 What I see as the biggest problem is transparency.  
19 There are some lawyers who do volume debt collection who put the  
20 date -- they say something like, "owed to us \$5,628.63, plus  
21 interest" from a date.

22 Well, the date they say "plus interest from" is not the  
23 date that the debt went into default. But if you were a judge or  
24 a commissioner looking at that you would probably presume that it  
25 was. The fact is, the date was much, much, much earlier. And so

1 there's no transparency.

2           You cannot tell from the complaint itself what the date  
3 of default was or what the date of last payment was, or whatever  
4 in your state starts the statute of limitations. So there's lack  
5 of transparency.

6           There's a problem with the sale of goods. The other --  
7 the biggest problem with the debt buyers is that there are so  
8 many different states with so many different statutes of  
9 limitations.

10           There has been such a merger of banks that you can't  
11 tell, and each time a new bank takes over an account they send  
12 out different terms and conditions with a different choice of law  
13 provision. And the choice of law provisions vary from a three-  
14 year of statute of limitations, even on a written contract, to 15  
15 years.

16           So it's very difficult to discern from the consumer or  
17 the debt buyer's point of view. Now, for the consumer it's a  
18 problem --

19           MS. THORLEIFSON: And why is that difficult to discern?

20           MR. KINKLEY: Well, because it's -- the records are  
21 insufficient to determine which choice of law provision should  
22 apply and how it should apply, and because -- it's not a problem  
23 for the debt buyers because they're taking defaults. They're in  
24 the business of defaults and nobody really cares.

25           They're -- as long as they get their default it doesn't

1 matter. But from the consumer's perspective, it's very hard to  
2 raise a motion early, as you should, based on statute of  
3 limitations, because you really can't tell. There might be -- if  
4 they bother to attach the terms and conditions, which many don't  
5 -- to the complaint, but when they file their default they attach  
6 a whole, big stack of papers.

7           There might be three or four different sets of terms  
8 and conditions with three or four different choices of law. And  
9 they have the problem of whether or not it's a written or oral  
10 contract, because they can't produce any writing on the  
11 application for credit card.

12           Then we get to the sale of goods, which under the UCC  
13 in most states, all but two, I think, Georgia and in some  
14 circumstances Oregon, it's a four-year statute of limitations if  
15 it's sale of goods. So you have a store credit card, which we  
16 contend is a sale of goods, or you have an auto repossession,  
17 which is clearly a sale of goods, and it's four years, and they  
18 routinely ignore that once it gets into the stream, because you  
19 have to understand the business model.

20           One final point and we can move on. The business model  
21 of the debt -- big debt buyer is to take massive amounts of  
22 information, use information age technology, many, many computers  
23 and servers, multitudes of programs, repackage it up and send out  
24 paperwork.

25           That paperwork is designed to get default judgments,

1 period. The paperwork does not stand up to scrutiny on any  
2 level. And the first thing would be to say, what is the basis of  
3 your statute of limitations, what statute of limitations are you  
4 alleging and how did you arrive at the date that you're claiming?  
5 I think it's --

6 MR. NAVES: I'd like to --

7 MS. THORLEIFSON: Mr. Naves.

8 MR. NAVES: -- just address that briefly. You know, I  
9 think one of the things as a debt buying company and a collector  
10 -- sorry -- as a debt buying company and a collector, you know,  
11 we are buying accounts and relying on the information that is  
12 provided by the creditors, by the issuers many times, or the  
13 person that we bought the debt from.

14 That information is inherently reliable from our  
15 perspective, because they are using that to conduct their  
16 business. The dates that we get for a charge-off, the dates that  
17 we get for date of last payment, the dates that we get for  
18 original default are the dates that are provided by the companies  
19 that have a responsibility to keep those records and they are  
20 indeed the records by which they manage their businesses.

21 So when we get the information I think it is -- as the  
22 new owner of the account it is -- it is certainly reasonable for  
23 us to rely on that information, which has been provided to us, to  
24 make the determinations that we do. And I think the notion that  
25 a debt buying company or a collector would rush or want to get

1 default judgments, I don't see the logic in that at all, because  
2 it's simply not true.

3 I want to talk to consumers. I want to try to resolve  
4 the debt. We've got a number of restrictions upon us in the ways  
5 that we communicate with consumers, and I think what we ought to  
6 be looking at is modernizing the Fair Debt Collection Practices  
7 Act in particular, you know, we can't do anything on the outside  
8 of an envelope that would indicate "this is really important"  
9 because, you know, your rights might be affected here.

10 There's a lot of restrictions that are placed upon our  
11 abilities to communicate with consumers. For instance, we can't  
12 call cell phones. You know, I've seen statistics that say about  
13 50 percent of the people now have dropped their home phones and  
14 use cell phones.

15 My own mother did that recently. It shocked me. In  
16 their 60s and said, why pay for my home cell phone [sic].

17 UNKNOWN PARTICIPANT: Yeah, so does mine.

18 MR. KINKLEY: So are you allowed to call her?

19 MR. NAVES: So I'm looking at --

20 (Laughter.)

21 MR. NAVES: -- well, she blocked the number.

22 MS. COLEMAN: Can't leave a message.

23 MR. NAVES: From a business standpoint, again, we want  
24 to use the most effective means, least expensive means in order  
25 to conduct -- to have that sort of contact with the consumers.



1 And with the data that we get, we are relying on it because it is  
2 the data that the credit card companies, that the issuers are  
3 relying on, and that's what we get. So you know, that's really  
4 the point I want to make.

5 MS. THORLEIFSON: When you say you get the data, what  
6 data do you get from a creditor?

7 MR. NAVES: Thirty days into the job at the company  
8 that I'm at, I wish I could give you a lot more detail about  
9 that.

10 MR. NEWBURGER: I can answer that.

11 MR. NAVES: I know that --

12 MR. NEWBURGER: That one I can actually help with,  
13 because I get hired to defend these cases, and I hear a lot of,  
14 you can't prove the debt, there's no data, there's no information.  
15 Typically, what comes is a spreadsheet attached to the bill of  
16 sale, typical data is not six fields as Michael suggests.

17 It's -- you know -- the first name, the last name, the  
18 last known address, the account open date, the account close  
19 date, the charge-off date, the last payment date, the social  
20 security number, date of birth.

21 I mean, there's a substantial amount of information,  
22 all of which is intended to show that the account pertains to a  
23 particular individual, the two critical pieces obviously being  
24 date of birth and social security number, and the critical,  
25 additional pieces being the date of last payment and charge-off

1 date, together with the balance at time of charge-off.

2 All of this data tends to be there, in addition,  
3 depending on who the bank is that sells it out and how debt buyer  
4 purchases it. There could be anything from a charge-off  
5 statement to a massive amount of account statements. In the last  
6 few months I've time after time had lawyers say things like, your  
7 client sued on a time-barred debt.

8 I go in. I actually look in my client's computer  
9 system and there are a stack of billing statements which in point  
10 of fact show that the account was still being used within the  
11 limitations period. Fax those to the consumer's lawyer and say,  
12 now, will you drop your claim, and we can't get calls back,  
13 literally cannot get returned calls once we show them that the  
14 theory of liability is wrong.

15 MR. KINKLEY: Is part of that that those statements are  
16 just made up?

17 MR. NEWBURGER: No. Excuse me. They're actually  
18 copies of the statements on the bank issuer's letterhead.

19 MR. KINKLEY: And they say facsimile on the bottom and  
20 they're --

21 MR. NEWBURGER: Actually -- excuse me -- no.

22 MR. KINKLEY: -- signed off by --

23 MR. NEWBURGER: Excuse me. The ones that I looked at  
24 in particular were not. I'm aware of the fact that there are  
25 certainly some abuses of documentation, Mike, you're correct.

1 But --

2 MR. KINKLEY: You're familiar with the WaMu problem.

3 MR. NEWBURGER: But the documentation that I'm talking  
4 about was very clear-cut. And this information, depending on the  
5 type of debt, will vary dramatically. If you're talking medical  
6 debt there tends to be a tremendous amount of documentation. If  
7 you're talking auto debt, a few years ago one of my debt buyer  
8 clients got a civil investigative demand from a state AG, and we  
9 had no complaints there.

10 So I called up and said, what's the deal, and they  
11 said, oh, this is a service member serving on a ship, and she  
12 says she never signed any of the documents on this transaction;  
13 she's about to lose her security clearance. Let me get back to  
14 you. Forty-five minutes later I emailed to her the entire loan  
15 file, including four documents bearing the service member's  
16 signature.

17 The documentation can be obtained. It does exist. It  
18 depends on the debt buyer. It depends on the nature of the sale.  
19 And I will still come back to Mike's point, which is, I think  
20 underlying all of it is reliability. And here's the answer on  
21 reliability: these documents were generated by nationally  
22 chartered banks, regulated by the same federal government for  
23 which you work. So either the federal government is requiring  
24 banks to keep --

25 UNKNOWN PARTICIPANT: These are the banks who sank our

1 economy?

2 (Laughter.)

3 MR. NEWBURGER: Understood. But nevertheless, either  
4 the federal government's requiring banks to keep accurate records  
5 or it is not. And if the bank records are accurate, then that  
6 should at least solve part of the concern. The last piece of it,  
7 because it goes to the question you asked, the reason you've got  
8 the limitations issue is that the law -- the choice of law  
9 provisions vary, not only by contract, but by how the various  
10 states apply the choice of law.

11 So for example, in my state a choice of law provision  
12 would be viewed as applying to substantive legal rights, but  
13 statutes of limitations are considered procedural, therefore,  
14 Texas would apply our own local statute of limitations. In other  
15 states they'd say, no, a choice of law clause applies to  
16 limitations. Yet a third rule would be to use the borrowing  
17 statutes and look at how they impact.

18 So the answer is, we get -- we've got -- limitations is  
19 up in the air in multiple states, and then everyone's playing a  
20 game. And the game is, if you represent the creditor you pick  
21 the longest statute of limitations you can argue for the legal  
22 theory you assert.

23 And if you're a consumer lawyer you assert the shortest  
24 statute -- the statute of limitations applies, you can argue  
25 should be applicable. And everyone's fighting over these issues

1 and it's really fun. In Georgia, where the contract statute of  
2 limitations was longer, the consumer lawyers argued vehemently  
3 that a credit card suit should be brought as an account, because  
4 that's a shorter statute of limitations, and they lost.

5 In Pennsylvania, contract was shorter and they argued  
6 vehemently it should be done as a contract, because it was  
7 shorter.

8 MR. KINKLEY: That's not quite right about Georgia.  
9 They -- the commentary to the UCC was adopted uniquely by  
10 Georgia, and that's why that -- they adopted it based on the  
11 unique comment that Georgia made to the UCC, 2725, not for any  
12 other reason.

13 MS. THORLEIFSON: Let's go to Ms. Coleman and then to  
14 Ms. Flory.

15 MS. COLEMAN: Actually, let's go to Ms. Flory because  
16 she waited so long on the first time, okay. And I want to make  
17 sure she has an opportunity to say her --

18 MS. FLORY: Thank you. Just what I wanted to say in  
19 terms of what is passed between debt buyers. There needs to be  
20 another column that includes whether the consumer has raised an  
21 affirmative defense. We have one consumer in Sacramento who had  
22 -- it was a medical bill. She told the provider -- you know --  
23 she had provided her Medi-Cal card.

24 Here in California if you're accepted as a Medi-Cal  
25 patient it's against the law to bill the patient. It has been

1 sold to four different debt buyers. Each time she sends a letter  
2 to the debt buyer and to the provider saying, you are not allowed  
3 to bill me under state law, and these just keep getting passed  
4 down.

5 So whatever that spreadsheet is that's going to debt  
6 buyers, it either doesn't have, hey, this person has a real  
7 defense, or they're ignoring it.

8 MS. COLEMAN: And I wanted to dovetail a little bit  
9 about what Manny had said, because in addition -- I represent  
10 some debt buyers, as well, and in addition to the statements that  
11 I've seen, the debt buyers that I represent have -- we also have  
12 a lot of notes about debt collection activity where the debt  
13 buyer has retained a collection agency.

14 They've spoken with the debtors. The debtors have  
15 admitted they owed the debt. The debtors have negotiated  
16 payments. The debtors have made payments, and then you know, at  
17 some point in time when there's, you know, no further contact  
18 these debtors are then sued.

19 And suddenly, there's questions of, well, you know, is  
20 the debt real; wrongful identify; different things like that. So  
21 you know, there are other indicia that indicate that the debt  
22 buyer actually have valid, accurate debts, but --

23 MR. KINKLEY: It's all about money. It costs money to  
24 get that documentation. So they file the suit without the  
25 documentation. It makes no sense to pay \$100 or \$200 to have the

1 creditor do the research to bring the documents forward, they  
2 file suit and it's only when they're challenged that then they  
3 will pay the money. Most of the sale contracts say: We affirm  
4 nothing; you're buying whatever you're buying.

5 MS. THORLEIFSON: I have a follow-up question for Ms.  
6 Coleman. You say that the account notes exist that prove issues  
7 about the debt. Are those account notes passed from debt buyer  
8 to debt buyer, or is that internal to one client?

9 MS. COLEMAN: Well, these are actually notes that were  
10 compiled by collection agencies. They were then passed back to a  
11 debt buyer when the account was returned to the debt buyer, and  
12 the debt buyer then retained another collection agency to see  
13 what they could do. There was -- there were no questions about  
14 legitimacy of the debt at all.

15 But to bring this full circle back to original comment  
16 and questions, which were not about debt buyers, necessarily, but  
17 about statute of limitations, another thing that I wanted to add  
18 to Manny's comments are that there are many factual issues  
19 involved with determining the statute of limitations.

20 It is not merely, when was the last date of payment or  
21 when the charge-off date was. In addition to the issue of which  
22 laws apply, every statute of limitations in every state has  
23 exceptions that toll the statute of limitations. Those facts may  
24 not be developed at the time that a collection attorney or a  
25 collection agency attempts to collect a debt.

1           In addition, you -- your question dealt with how  
2 frequently are collection attempts made on time-barred debts, and  
3 I think we need to clarify, those debts exist. The statute of  
4 limitations addresses what remedies can be pursued. It addresses  
5 whether you can -- you have a defense in a lawsuit.

6           It doesn't mean that the debts are not still owed. And  
7 so when you asked how frequently are collection attempts made on  
8 time-barred debts, is your question really going to collection  
9 efforts like calls and letters, or is that really going to  
10 lawsuits? Because I can tell you, with all of the collection  
11 attorneys I represent, I don't know of a single collection  
12 attorney that would purposely file a lawsuit on a time-barred  
13 debt.

14           MR. ARONS: I do.

15           MS. THORLEIFSON: Gail.

16           MS. HILLEBRAND: Thank you. I want to agree with Ms.  
17 Flory that if the debt is being transferred from buyer to buyer  
18 it's very important that that information transferred include  
19 everything we heard, which I'm glad to hear some folks are  
20 transferring that.

21           I get reports in the field that suggest that when a  
22 lawyer talks to a debt buyer all they've got is a name and an  
23 amount. So I'm not sure everybody's doing it. But a column that  
24 identified disputed debt, claim of wrong person, bank account has  
25 exempt funds, wrong amount, and this point about, you know,



1 illegal debt, is really important, because consumers shouldn't  
2 have to do this again and again and again.

3 I want to raise the bigger issue of, should all debt  
4 that's sold have a sell by date, that when the creditors first  
5 sell debt there ought to be enough information to show when it  
6 would become time-barred, and that that information should be  
7 transferred with the debt.

8 But in addition, the purpose of statute of limitations,  
9 the purpose of repose, the reason that we think it's not fair to  
10 put someone into court on a very old matter, is it's too late to  
11 prove your defense, the witnesses are gone, the records are  
12 missing.

13 With the way that various big creditors are merging,  
14 records are missing is a real issue; I think, these days for the  
15 consumer to go back and try to find, if they don't have their own  
16 records, or even to get the copy of the canceled check, and your  
17 bank isn't there, it's been bought by two other people and they  
18 don't send you back the checks anymore, it's a nightmare.

19 So I think we ought to be looking not at just, do  
20 people now sue on time-barred debt, but is it good public policy  
21 to allow debt to be collected in a non-litigation part forever.  
22 The same issues with respect to statute of limitations I think  
23 really do apply.

24 And so we would recommend that all debt that is sold  
25 have a sell-by date, after which it cannot be sued on or

1 collected upon. And clearly, that has to be a fairly long date,  
2 but it would deal with the zombie debt issue in a useful way.

3 MR. MOORE: But Gail, what you're effectively trying to  
4 do is override state law. State law says the statute of  
5 limitations prevents you from suing on the debt. But in most  
6 states it does not cancel the debt. The debt is still owed.  
7 It's still reportable on your -- on your credit report for seven  
8 years.

9 The debt continues to exist. You still got the TV or  
10 bought the car or went on the vacation, and you know --

11 MS. HILLEBRAND: Or had your identity stolen or a  
12 variety of other things.

13 MR. MOORE: Well, it's -- no. Identify theft is a  
14 completely different issue, and if you can prove identity theft  
15 to me I will not pursue on a debt. I mean, that's plain and  
16 simple. There are --

17 MS. HILLEBRAND: Well, that's going to be hard to prove  
18 10 years later.

19 MR. MOORE: It's not any harder to prove 10 years later  
20 than it is to prove now. You file a police report. You declare  
21 under penalty of perjury that your identity was stolen and you  
22 did not get the goods and services related to this charge  
23 account, under California law I cannot pursue you. So you know,  
24 what you're asking is the federal --

25 MS. HILLEBRAND: Well, I never read that bill.

1 MR. MOORE: -- you're asking is the federal government  
2 to somehow decide on an national level to completely preempt 50  
3 states' statute of limitations laws, and I think that's  
4 inappropriate.

5 MS. HILLEBRAND: I'm suggesting that we need to  
6 recognize that the -- the distinction between collection and suit  
7 was designed before the debt buying industry existed, and that a  
8 sensible creditor collecting their own debt stops at some point.  
9 But this kind of sale and resale process is a new fact we need to  
10 address.

11 MR. MOORE: I don't think sale and resale is new,  
12 because under the mortgage industry, sale and resale has been  
13 going on since time immemorial.

14 MR. KINKLEY: And we saw how that worked out.

15 MR. MOORE: Excuse me?

16 MS. THORLEIFSON: Let's stop for a moment.

17 MR. KINKLEY: You saw how that worked out. That is  
18 exactly the problem.

19 MS. THORLEIFSON: Mr. Sargis, and then --

20 MR. SARGIS: Thank you. And I want to shock Mike by  
21 agreeing with him a second time --

22 MR. KINKLEY: Oh, my goodness.

23 MR. SARGIS: -- though it's got a little bit different  
24 twist to it.

25 (Laughter.)

1 MR. SARGIS: But I mean, I think in representing the  
2 Collectors' Association and individual clients, predominantly  
3 they're third party debt collectors, though some of them are debt  
4 purchasers who collect their own debt, may sell -- resell some of  
5 it, but aren't in the wholesale/resale of it.

6 But one of the things I think we all have to  
7 acknowledge and realize, is what we would have thought now five  
8 years ago if we sat down with our banker client and said, this  
9 debt is dead, this is uncollectible, it's written off and gone --  
10 a marketplace has been created for it. There's people buying and  
11 selling it, for better or worse.

12 And some of the third party collection agencies are  
13 seeing it come around when a debt purchaser has divided up the  
14 portfolio and it comes back through. So Mike, I think maybe what  
15 we can agree on is something along -- akin to the debt  
16 purchaser's right to full and fair disclosure. And again, I keep  
17 talking about moving it up the stream, is when the financial  
18 institution is going to box up and sell off this debt there's  
19 some agreed minimum standard of information that the debt  
20 purchaser's going to get.

21 MR. KINKLEY: I agree.

22 MR. SARGIS: The debt purchaser is then going to pass  
23 that downstream.

24 MR. KINKLEY: I'll go you one better. When you  
25 grade -- the federal government grades tomatoes. You -- they

1 grade meat. It's fancy, you know, it's better than whatever the  
2 other thing is.

3 (Laughter.)

4 MR. KINKLEY: But the problem with debt is it's a --  
5 that people don't understand, it's a commodity. It's traded as a  
6 commodity. It's packaged as a commodity. Just like tomatoes,  
7 there's rotten tomatoes that are cheap and there's a beautiful  
8 tomato that you want to put a doily on that's expensive.

9 And we don't know which we're getting when we represent  
10 the consumers. Certain debt buyers always seem to have a lot of  
11 junk, and they pursue them as junk and they buy them as junk and  
12 they know they're junk. And in the marketplace they're grading  
13 them, but there's no transparency.

14 And you can't tell me when you buy a debt for one-tenth  
15 of a penny on the dollar because there is lack of documentation  
16 that you don't know down the road that you're going to have a  
17 statute of limits problems. You're going to have an affidavit of  
18 indebtedness to try to avoid the hearsay rule problem. You're  
19 going to have an assignments problem.

20 MS. THORLEIFSON: Can we go -- you're touching on the  
21 next question, which is what substantiation, if any, should  
22 collectors have to have regarding the statute of limitations. So  
23 when a debt is bought what substantiation should they have?  
24 Could we have -- you know -- the eight fields or the 10 fields  
25 and the account notes? What about portfolios where there's less

1 information? How do you handle that?

2 MR. SARGIS: Well, I'll talk to that, but I just -- one  
3 last on your comment about --

4 MR. KINKLEY: I'll give you a last shot.

5 MR. SARGIS: Yeah. No, about the tomatoes and all.

6 MR. KINKLEY: Since you're going to be a judge, I'll  
7 give you a last shot.

8 MR. SARGIS: I know you think there's this monolithic  
9 body of debt purchasers out there who know everything about the  
10 accounts, and it just isn't that way. I mean, one of the common  
11 jokes we have is, we see people go out there and buy debt way  
12 over value because they don't -- because it's still a relatively  
13 new industry, and that's part of the problem we're all dealing  
14 with.

15 MR. KINKLEY: We're in agreement.

16 MR. SARGIS: From my perspective in working with  
17 collection agencies and working with debt purchasers, what I have  
18 them look for -- well, two things. One, the collection agency  
19 with the original creditor -- and it's more than just having  
20 boilerplate language in the contract -- is there's certain  
21 affirmative representations that a creditor's required to make.

22 If you have disputes you tell us on the account. If  
23 they're represented by counsel, it's on the account. Now, of  
24 course, I'm not telling you I represent every collection agency  
25 out there -- they all do this -- but that's the practice that

1 we're trying to build into it.

2 MR. KINKLEY: Well, what I hear you saying, though, is  
3 we don't know. So it's okay to sue and make mistakes.

4 MR. SARGIS: That's not the lawyers' burden. We have  
5 to have a reasonable belief in the law and the facts, and that  
6 includes the statute of limitations.

7 MR. KINKLEY: Right, before you bring the suit.

8 MR. SARGIS: And that's why I said I think that the  
9 debt purchaser or we could say debt collectors, full and fair  
10 disclosure is -- the next thing to get to is what is the date  
11 that they know. Is it -- what's the date of default that you're  
12 going to run the statute of limitations on?

13 MR. KINKLEY: This is where I started, the  
14 transparency, in the complaint, and I'd like to hear the judges'  
15 comments about what they see.

16 MR. SARGIS: Well, I -- and that's -- but I take it  
17 above the complaint. What I tell the collection agency or debt  
18 buyer is: You need to have that date identified when you get the  
19 account. And whether that gets replicated because we standardize  
20 or uniform the process the way the complaints form, that's not a  
21 big deal.

22 But again, we have to push. Just saying it's in the  
23 complaint is not going to drive the marketplace to do it.

24 MR. KINKLEY: No. No. No. I'm agreeing with you in  
25 this way, that if it's required to be in the complaint --

1 MR. SARGIS: Okay. That's one. So that's two to one  
2 and I'm waiting for my second one.

3 MS. THORLEIFSON: Okay. Let's -- let's just go back  
4 to the --

5 MR. KINKLEY: I lost score a long time ago.

6 But if it's -- I'm just agreeing with you that it --  
7 there should be some grading of debt, number one, number two,  
8 some affirmative statement as to what the statute of limitations  
9 is, and then we should have transparency. You're talking  
10 accountability. I want to add transparency so the judges here  
11 can know what they're dealing with.

12 MS. THORLEIFSON: Let's back up a little bit and go to  
13 the substantiation question. And actually, I want to ask Ron,  
14 when you buy debts do you get the charge-off date?

15 MR. NAVES: Generally, we do.

16 MS. THORLEIFSON: And what if you don't?

17 MR. NAVES: And if you don't have a charge-off date I  
18 may have another date from the purchaser's records that also  
19 allows me to calculate a statute of limitations. I think the --  
20 the important thing is when we buy the debt from an issuer we are  
21 getting reps and warranties about the accuracy of the data.

22 So you get that sort of a representation from the  
23 issuers whenever you can. It really depends on the purchase  
24 process and how you've done it. And I can't speak for all debt  
25 buyers. Again, we focus on credit card purchases. We don't do



1 medical. We don't do auto anymore, and so that's where we're  
2 sort of focused.

3           When you get the data, let me sort of paint a picture  
4 for you from a business sense, statute of limitations issues --  
5 and also -- I also teach a complex litigation course at  
6 Pepperdine -- can be very complex, can be very difficult to  
7 resolve for a number of reasons.

8           Tolling issues vary state to state. What the right  
9 date is that you picked. Certainly, there could be mistakes in  
10 data. I mean, nobody's arguing nobody makes mistakes. Mistakes  
11 happen. But to calculate a statute of limitations you do need a  
12 reasonable good faith belief.

13           But let me point out from a business perspective, I  
14 don't want to file lawsuits where I'm putting into the pipeline a  
15 series of lawsuits that are going to get torn out at the end of  
16 the day, having invested the court filing fees and costs. It  
17 doesn't make any sense.

18           One of the things that I know we do is we screen out  
19 cases that we send to the attorneys as best we can from the data  
20 that I have. So we will look at cases and try to determine a  
21 very conservative approach to the statute of limitations. And  
22 once we do that we send it to the attorneys.

23           They are doing their own assessment as attorneys and as  
24 specialists in that particular state's law. So there's sort of  
25 two levels of review before our cases get to the court system.

1           So we'll look at charge-off dates, which are, in our  
2 opinion, inherently reliable. It's a good date, but it's  
3 regulated by several banking agencies, and we can sort of look at  
4 that and say: all right, if we've got a conservative of a  
5 statute of limitations of three years, I'm going to use that,  
6 even though the statute of limitations in the state, according to  
7 the attorneys, may be five or four under the UCC or whatever it  
8 is, because the cases that I've put forward into litigation, I  
9 don't want to get tangled up into.

10           It doesn't make sense. So we'll do that level of  
11 screening. Will things slip through the cracks? Just like any  
12 other system, yes, they will. Will mistakes happen? Yes. But  
13 we're not doing that intentionally, and certainly don't want to,  
14 because we couldn't stay in business doing that. So it's a  
15 little bit different.

16           MR. KINKLEY: I want to get something into the record.  
17 You're talking about Midland in a world that doesn't exist.  
18 Maryland has taken away Midland's license because they filed  
19 10,000 -- 1119 complaints for judgments.

20           The Agency had reasonable grounds to believe that all  
21 of respondent's legal actions were time-barred because they were  
22 brought after the expiration of Maryland's Statute of  
23 Limitations.

24           Your company isn't even allowed to operate in Maryland  
25 now. The ruling was DFR, FY 2010-063. They've completely

1 barred --

2 MR. NAVES: Well, Mike, before you give a speech on  
3 that again, let -- as the guy that --

4 MR. KINKLEY: I'm just saying this, you're saying --

5 MR. NAVES: -- as the guy that talked to Maryland  
6 directly, let me tell you what my perception is.

7 MR. KINKLEY: Did they do that, first of all.

8 MR. NAVES: Let's talk --

9 MR. KINKLEY: Am I right about the record?

10 MR. NAVES: You are not.

11 MS. THORLEIFSON: Okay. You -- you guys.

12 MR. NAVES: You are incorrect. What did Maryland do?  
13 I can tell you.

14 MS. THORLEIFSON: Can we stop and get back to the  
15 topic?

16 MR. NAVES: Sure.

17 MS. THORLEIFSON: Thanks.

18 MR. ARONS: I have a question for Ron.

19 MR. NAVES: Yeah.

20 MR. ARONS: Which is, I mean first of all just the  
21 observation, you can do anything you want on 90 percent or more  
22 of the suits because they're going to be deemed default, but my  
23 question is what do you get that tells you what that state's  
24 statute of limitations applies?

25 MR. NAVES: Well, we count on the lawyers that we hire

1 in each state to tell us and we --

2 MR. ARONS: No. But you said you do this screening  
3 first for a statute of limitations.

4 MR. NAVES: We do a -- what I do is more of a  
5 preliminary screen, right. What we're going to do is take a look  
6 at the data that we have. For instance, let's just say the  
7 statute of limitations is five years.

8 MR. ARONS: No, no. What I'm saying is what do you get  
9 in the data that lets you decide what state statute of  
10 limitations --

11 MR. NAVES: We will have a date of --

12 MR. ARONS: -- you're going to abide to a state --

13 MR. NAVES: We will have a charge-off date.

14 MR. ARONS: No. Each state. What tells you what state  
15 statute applies to the debt your --

16 MR. NAVES: The lawyers that we hire to do the  
17 collections will tell us what that is.

18 MR. ARONS: So that's after you send it to the lawyers.

19 MR. NAVES: After we send it to the lawyers for  
20 litigation, correct, in that particular example.

21 MR. ARONS: Okay. So you're not picking a particular  
22 state statute of limitations to apply when you do the initial  
23 screening, before it goes to the lawyers.

24 MR. NAVES: We take a conservative approach. We'll  
25 look at things and say: You know what, if the shortest statute

1 of limitations in the United States is three years, we're going  
2 to try to screen out cases --

3 MR. ARONS: So you're not --

4 MR. NAVES: -- before we get to that point so that  
5 there is less of a chance that a case would be filed after --

6 MR. ARONS: So you're not sending anything to the  
7 lawyers that has more than a three-year statute of limitations  
8 run?

9 MR. NAVES: That is my understanding of how we work  
10 right now.

11 MR. KINKLEY: We have a lawsuit pending to the contrary.

12 MR. NAVES: But we'll work that out in the court  
13 system.

14 MS. THORLEIFSON: Could we shift gears and let's try a  
15 different topic.

16 MR. ARONS: Wait. I'm still trying --

17 MR. NAVES: Sure.

18 MR. ARONS: I'm not involved in debt-buying litigation.  
19 I don't, you know. So I'm just trying --

20 MR. NAVES: Right.

21 MR. ARONS: -- to get an answer, of what do you have or  
22 what do you send to the lawyers that lets them decide what state  
23 statute of limitations applies?

24 MR. RAY: Let me jump in here as well because my firm  
25 represents debt buyers and we represent original credit card

1 holders and so forth. And typically our debt-buying clients send  
2 out notices to their attorneys and they request us to tell them  
3 what the statute of limitations is in our state. And they  
4 compile that data. So most of the lawsuits -- and they do try to  
5 screen that data before it comes to our office.

6 I know affirmatively of that because quite often  
7 they'll notify us when they're sending an account that says this  
8 account is six months or three months before the statute of  
9 limitations. So by that aspect I know that my debt-buying  
10 clients are looking at that data.

11 My firm, from a standpoint, I also -- it's a part of  
12 the checklist with my paralegals who prepare the lawsuits, to  
13 look at what is the statute of limitations and is this case  
14 within the statute, because it's not economically feasible as a  
15 contingency-fee attorney to file a whole bunch of lawsuits that  
16 are beyond the statute, where a defendant could come back in and  
17 raise that affirmative defense. I don't want to get involved in  
18 that. If it's beyond the statute, we just close it up, send it  
19 back to the client, and tell them that.

20 MR. ARONS: I mean you also are going to have a 90-  
21 percent-plus default rate?

22 MR. RAY: But that's irrespective of this. I don't  
23 want to take that gamble.

24 MR. ARONS: I just want to know if that's your  
25 experience.

1 MR. RAY: Right. That's --

2 MR. NEWBURGER: But, Paul, because of *Kimber* and other  
3 FDCPA holdings, that suing on a time-barred debt is an FDCPA  
4 violation, regardless of the whole affirmative-defense issue.  
5 Because there's a line of cases that say that, most of the debt  
6 buyers and their attorneys across the country have decided it is  
7 not economically feasible to deliberately sue on time-barred  
8 debts. I've got clients whose affirmative instruction is: Do  
9 not sue on time-barred debts. You're the lawyer, you're the one  
10 with the expertise, you're the local lawyer on the ground. You  
11 have to make the call, but we do not want you to sue on time-  
12 barred debts.

13 And I can tell you, my firm represents some pretty  
14 substantial debt-buyers in this country, and that's their  
15 position because they don't want to get hit with the FDCPA  
16 lawsuit that is sure to come if they start making it a policy to  
17 sue on time-barred debts.

18 MR. RAY: And, Paul, I could turn that around too. I  
19 mean I'm currently defending two lawsuits from the same law firm.  
20 The complaints are exactly identical. They don't address  
21 anything specific in terms of our case. It's about all the  
22 allegedly bad things that my client has done nationwide, most of  
23 which aren't even causes of action. And in each of those they  
24 allege the claim, you know, we have committed an FDCPA violation  
25 because we've sued on a claim that's time barred.

1           In each of those I have sent the attorneys copies of  
2 actual statements of account from the original creditor, and they  
3 may be duplicates but that's printed from their business records,  
4 showing that charges were made or payments were made that brings  
5 the case within the statute.

6           And when I talk to the attorneys, they don't even want  
7 to talk to me about that. That's just a point, yes.

8           MS. THORLEIFSON: That's a good segue into our next  
9 topic, so thank you. Really, we need to move on.

10           One of the issues is: What gets pled in a complaint  
11 such that you all are reviewing to see if a debt is past the  
12 statute of limitations, but the consumer who receives the  
13 complaint, can they tell the court who is looking at the  
14 complaint, can they tell if an action is beyond the statute of  
15 limitations?

16           MS. HILLEBRAND: I think that the complaint should  
17 serve not only as the "is-this-beyond-the-statute" determination  
18 but also notice to the consumer. Who is this person, why are  
19 they suing me?

20           Any time it's not the original creditor that is a named  
21 plaintiff, the complaint needs to include: The identity of the  
22 original creditor, the identity of the current -- obviously this  
23 is going to include the name of the plaintiff, current creditor;  
24 the original account number; the balance at the time that it went  
25 into default, and the current balance; the last payment charge or



1 date of initial default. Something that allows the consumer to  
2 figure out was this Sears from 1984 or was it Penney's from last  
3 week.

4 And a breakdown -- we discussed this yesterday in the  
5 arbitration context, and I don't think we need to repeat all of  
6 it, but I hope that part of the record will be useful as well, a  
7 breakdown about the nature of the charges by sought.

8 MR. SARGIS: Tracy, being a mic hog, I'd like to yield  
9 to my esteemed panelist on my left.

10 MS. THORLEIFSON: Thank you. I was hoping to hear from  
11 the courts on this question.

12 MR. SUHR: Yeah. thanks. On this issue, I think it's  
13 pretty clear that consumer remedies do lie with the FDCPA, not  
14 with the courts -- at least in California. In California a  
15 statute of limitations is an affirmative defense and must be  
16 raised by the defendant.

17 And as such, I believe it's fairly uniform throughout  
18 the state that on that 80 to 95 percent of the cases that go by  
19 default, we are not going to look at that.

20 MS. THORLEIFSON: Could you look at it? Is it --

21 MR. SUHR: Well, you know, I will have to admit that if  
22 we got one where there was a ten-year-old debt and it was  
23 outrageously beyond any statute, the temptation would be very  
24 great to just deny that, and it might happen. But, as a routine  
25 matter, I believe our judicial officers and staff attorneys and

1 so forth that review these, do not look for statute of limits  
2 problems, that I don't believe they're pled in the complaint.  
3 And it's totally up to the defendant to raise it.

4           So then we get to that second point of scrutiny and  
5 that is if the debtor does move to set aside the judgment, or  
6 whatever, assuming that he or she could show that they weren't  
7 properly served or they're within the very short time limit of  
8 six months for a relatively easy set aside, again, it's an  
9 affirmative defense. And you'd really need an attorney to  
10 effectively raise it.

11           So for the great bulk of consumers I think that the  
12 statute of limitations is not going to be helpful to them in the  
13 litigation itself.

14           MS. COLEMAN: And, Tracy, if I can comment on that as  
15 well. The California Supreme Court has repeatedly said that it  
16 is not a problem to sue on time-barred debts. And although there  
17 is a line of cases that say that suing on a time-barred debt is a  
18 violation of the FDCPA, there is no California case that says  
19 that suing on a time-barred debt is an FDCPA violation.

20           And I really think that the FDCPA has got to be woven  
21 in with every state's laws. And I think you run into what's  
22 appropriate for the state to set up in terms of procedural issues  
23 and what's appropriate for the federal government to have  
24 oversight over.

25           Now that is not to say and I echo Ron's thoughts, I

1 echo Tom's thoughts, that I don't know of a debt collector who  
2 will bring a lawsuit -- knowingly bring a lawsuit on a time-  
3 barred debt. They normally think that the debt is not time  
4 barred.

5           And, again, there are lots of factors that go into the  
6 statute of limitations and whether it's run or not. How has --  
7 has the person left the state? That's a tolling point. And I  
8 believe, and I'm only licensed in California, but I only speak to  
9 California. But I believe that's an issue in every state's -- I  
10 believe that's a factor that can be considered for tolling  
11 purposes.

12           So, again, I think the judge -- the commissioner is  
13 absolutely correct. That's not something they will address, but  
14 I don't think it's something they should address either.

15           MS. THORLEIFSON: Commissioner Gargano.

16           MR. GARGANO: Right, and I concur with Commissioner  
17 Surh there, especially in the bulk of cases that you're speaking  
18 about. I think anecdotally I was referring to a case during the  
19 break in which we had someone that had a debt, it was not one of  
20 these debt sellers or debt buyers, it was not a typical debt  
21 collection action. It was a personal action between someone that  
22 had written a check to another person, and that check was years  
23 and years away. It was one of the causes of action among others.  
24 And in this particular case -- I'm not make precedent, I don't  
25 know if it was done correctly -- I just told the lawyer that this

1 was a prove-up hearing before me. I said this one is too old,  
2 I'm not going to give any judgment on that. It's just too far  
3 gone.

4 But that was a no-brainer, I thought, and it doesn't  
5 really address what happens in our large debt-collection cases.  
6 This was a personal promissory note that was way beyond the  
7 statute of limitations.

8 And this brings up a point in general about the role of  
9 default judgments itself. We do regard ourselves, I believe, as  
10 gatekeepers, to make sure that things are done right, that due  
11 process is done, that what remedies are sought are going to be  
12 legal remedies, that what outcomes come are fair.

13 Mainly, I think, we have a role to ensure that whatever  
14 damages are awarded are in conformity with the way they should  
15 be. In other words, you can't get more damages than you've asked  
16 for. You have to make sure that notice has been properly given.  
17 And we do that as gatekeepers, but then we have to sort of  
18 ethically say: I'm a gatekeeper, but I'm not an advocate for the  
19 defendant's position.

20 And I think sometimes default matters, especially  
21 prove-up matters, are more difficult for a judicial officers in  
22 some ways -- now this is when there is a prove-up hearing in  
23 court -- than if you have an advocate for the other side. You  
24 can weigh -- just like we're here today, we have two or three  
25 sides going. It's a lot easier to try to fashion what you want

1 to do. If it's only one-sided, you could get lulled into that  
2 one side. And I think you do have to be fair and ethical about  
3 things.

4 And that shows the -- when we do these defaults, some  
5 of them are done in chambers, some of them are done without a  
6 prove-up hearing.

7 MS. THORLEIFSON: What is a prove-up hearing?

8 MR. GARGANO: Now a prove-up hearing -- and we'll get  
9 to that later -- a prove-up hearing is where someone actually  
10 comes into court and proves up their case. In San Francisco, we  
11 have a local rule, some might be in disagreement with it, but in  
12 San Francisco we have a local rule in unlimited matters, those  
13 matters that involve \$25,000 or more; that you must come into  
14 court in a default setting and prove up your case. So that means  
15 that you must bring a witness with you too, more than likely.

16 If there's good cause, we can waive the appearance of  
17 the witness, but they have to have evidence by way of a  
18 declaration mainly. And they have to have the physical evidence  
19 as well.

20 And we require an attorney to come into court or a *pro*  
21 *per*, if they're in *pro per*, and -- there's only one side there.  
22 And they have to literally prove up their case to the court. We  
23 don't just look at the complaint and rubber stamp what they want.

24 If they're asking for relief, they have to show us that  
25 there was an obligation that the other side defaulted, that

1 there's a certain amount owing, and they have to give us the hard  
2 evidence, maybe an account or something in writing if there's a  
3 writing involved, of what it is that they want. They have to  
4 prove that the other side defaulted and did not fulfill its  
5 obligation. And they have to show us what damages they want.

6 And we require that in every case where there -- in  
7 unlimited cases, especially, when there is a prove-up hearing in  
8 the courtroom -- we require them to come up and literally prove  
9 up their case. And sometimes they do and sometimes they don't.

10 MS. THORLEIFSON: Under what circumstances would you  
11 require a prove-up hearing?

12 MR. GARGANO: Well, they probably won't take into  
13 account a lot of the smaller debt-collection actions, but when  
14 it's \$25,000 or more, those are unlimited-jurisdiction cases, we  
15 require that that be done.

16 MS. HILLEBRAND: How do you do it in limited  
17 jurisdiction?

18 MR. GARGANO: Limited jurisdiction, they present their  
19 proof of service. They get a default entered by the clerk. And  
20 we do believe that they try to scrutinize those as much as they  
21 can. And then those matters are brought before the court, before  
22 the judge or the commissioner in chambers.

23 And we still go through it -- I always check to make  
24 sure that the amount requested in the proposed judgment is not  
25 more than what they demanded in the complaint. We could check to

1 see that the proofs of service are in order.

2 We usually don't get a lot of detail as to whether or  
3 not there's a statute-of-limitations issue. Sometimes you do,  
4 sometimes you don't. And you're sort of tempted, even though --  
5 I think Commissioner Surh hit it on the button there, that that  
6 is an affirmative defense. And it's very difficult for someone  
7 that's representing the debtor, because there's a default and we  
8 can't hear anything that they have to say. So we do our best on  
9 those and sometimes we're reading between the lines.

10 And I think that's why the earlier discussion about  
11 whether the default should be entered is a key one in all of  
12 those areas. But if it's a prove-up hearing in the courtroom, we  
13 act like any other case that has to be proven up, whatever  
14 subject matter that might be involved, we still require the  
15 attorneys to come in and the parties to prove up their case. And  
16 sometimes they do. Most of the time they do, I have to say that.  
17 Sometimes they're a little short on something. Sometimes there's  
18 just a dispute about damages, and we act accordingly.

19 But what we want to do is justice, because I think if  
20 we don't mirror, if the court does not mirror the fact that we  
21 want due process and fairness to be throughout the system, how  
22 are we going to expect the debtors and the debt collectors to  
23 mirror what should be.

24 And I hope that doesn't sound too naive, but it is sort  
25 of idealistic. I think the court should set the example by

1 expecting certain things to be done and to ensure that there's  
2 fairness in the process, in the procedure. That's very  
3 important.

4           We have substantive roles and we have procedural roles,  
5 but the court should be the gatekeeper and the guarantor that  
6 there's going to be fairness in this process. It doesn't always  
7 please every one. But most people that walk away from a court  
8 proceeding say: Well, at least I thought I got a fair shake  
9 against me. I got a judgment against me, but I think the court  
10 listened to what I had to say. That's if it's not a default.

11           But even if there is a default, they think that the  
12 court is still watching out, not giving more than what was asked  
13 for, making sure to the best of your ability that notice went  
14 out. And I think the court should always ensure that the process  
15 is modeled.

16           MR. MAURER: I'd just like to raise the question, which  
17 is not on the list of questions, whether the remedies that exist  
18 are adequate when and if someone does intentionally file a time-  
19 barred lawsuit, which does violate the FDCPA under *Kimber*.

20           I can't point to a particular collection agency that I  
21 think is doing this, but Mr. Tamaroff talked this morning about  
22 how it was inevitable in New York because of the lack of  
23 controlling remedies, that you were going to have a company come  
24 along or a person come along and file these false proofs of  
25 services.



1           The courts are used to debt buyers coming in and filing  
2 500 complaints in a month. The amounts of the judgments that  
3 could be collected on time-barred debts could be millions of  
4 dollars. Eventually it's inevitable that a debt buyer that acted  
5 like that, intentionally filing time-barred debts, would get  
6 caught, and what's the remedy?

7           Under the federal Fair Debt Collections Practices Act,  
8 it's a \$1,000-cap statutory damages plus actual damages. I don't  
9 know what the actual damages would be in that case. That  
10 statutory-damage amount wasn't indexed for inflation. It was  
11 passed in 1978. In today's dollars it's worth \$295.42, in 1978  
12 dollars.

13           Is that, together with, I'm sure they're going to talk  
14 about, attorney's fees that are going to get added onto that, but  
15 debt collectors when they get caught suing on time-barred debt,  
16 in my experience, and I have had a few of these cases, they want  
17 to settle and they want to keep the attorney's fees to a minimum.

18           Why is there no provision for injunctive relief in the  
19 Fair Debt Collection Practices Act? The Act is meant to protect  
20 consumers and ethical debt collectors from being undercut by  
21 unethical debt collectors. It doesn't help the ethical debt  
22 collectors if there's someone out there intentionally filing on  
23 this stale debt that they can't sue on.

24           So are the remedies adequate? I don't think they are.  
25 And I think there should be a provision for injunctive relief. I

1 have seen some cases where I think the debts were over ten years  
2 old. Information stays on people's credit reports for at least  
3 seven years. The original creditor's trade line was nowhere to  
4 be found on my client's credit reports.

5 We asked for documentation that there was any kind of  
6 activity on the account within the statute-of-limitations period.  
7 We get back a screen shot, a screen shot from a monitor with a  
8 date on it. That was the only evidence. And it makes me  
9 concerned that it's happening and that whatever I could get for  
10 that one consumer isn't going to make up for all that they can  
11 make for filing on stale debts against the 95 percent of  
12 consumers who are going to have default judgments taken against  
13 them.

14 MS. THORLEIFSON: Let me back up because that brings up  
15 a question. In Chicago participants pretty much agreed that  
16 *Kimber* applied and that it's a violation of the FDCPA to file a  
17 time-barred debt -- file a suit on a time-barred debt. Do  
18 participants here agree that it is an FDCPA violation to file on  
19 a time-barred debt?

20 MR. MOORE: Given that there is no Ninth Circuit  
21 decision or no California district court decision, this is that  
22 whole issue that's going to be decided by the Supreme Court in  
23 the *Jerman* case. And that is: Do I get to rely on the lack of a  
24 decision, can I vigorously represent my clients?

25 I don't sue on time-barred debt because what I really

1 don't want to have happened is to be the poster child for the  
2 *Kimber* in California. So I don't sue on time-barred debt if I  
3 have sufficient information in my data file to tell me that it is  
4 not.

5 But in California -- I'm not going to sit here and  
6 categorically say it is an FDCPA violation in the Ninth Circuit,  
7 but I govern my practice to be conservative enough to not want to  
8 draw that lawsuit, not want to be the test case, and not want to  
9 be the poster child, and have everybody say that my firm -- I  
10 don't want to see my case on a definitive decision as suing on  
11 time-barred debt as an FDCPA violation, so I --

12 MR. SARGIS: Because I think the other aspect of  
13 Harvey's comment is he isn't getting paid enough money to deal  
14 with the fact that the creditor slept on that account so long  
15 that the statute could have run.

16 Now if the creditor were to say: Well, Harvey, I got  
17 all these accounts and tell me what it would really cost for you  
18 to do this and build the risk factor in, I'm sure he could come  
19 up with a number, but it's not going to be the same as handling  
20 timely accounts.

21 MS. THORLEIFSON: Manny.

22 MR. NEWBURGER: I'm going to say you almost said it  
23 right. I think the position we've historically taken is *Kimber*  
24 says it's a violation to sue on a time-barred debt unless you  
25 have a reason to believe that the statute has not run.

1           And that's a good concept, because we, obviously as  
2 consumer lawyers, you guys all want to be able to argue discovery  
3 rule and argue that there are reasons why limitations may not  
4 have run as well.

5           We've had a couple of recent decisions which have  
6 recognized that concept pretty clearly and said: Look,  
7 limitations was an open issue. The lawyer had a good-faith basis  
8 for making the argument, at least until I've now decided this  
9 issue, anyone up to this point gets a pass on having tried to  
10 argue one way or the other.

11           And I think that's really what *Kimber* says. It is not  
12 -- it is not a strict-liability standard, even though FDCPA is a  
13 strict-liability statute. *Kimber* interprets it to leave some  
14 leeway if you've got a basis for arguing a tolling, an exception,  
15 a different limitation period than the court ultimately rules is  
16 applicable.

17           MR. ARONS: But if you don't make the strict-liability  
18 statute, what you say is the FDCPA allows me to collect money,  
19 keep it, and then thumb my nose at the FDCPA because I've  
20 established I didn't know I was violating the FDCPA when I  
21 collected the money and kept it.

22           MR. MOORE: No, Paul, what it allows us to do is take a  
23 reasonable position and interpret the law reasonably until a  
24 court says this is the black line that you have to follow.

25           MR. ARONS: But if the court says: You violate -- when

1 the court says: You collected money on a time-barred debt, why  
2 should you get to keep it?

3 MR. MOORE: Because in my state it is not improper for  
4 me to collect money on a time-barred debt.

5 MR. ARONS: But under the --

6 MS. COLEMAN: And in California it's not extinguished  
7 either --

8 MR. ARONS: -- FDCPA, which is federal law and is  
9 supremacy law, --

10 MR. MOORE: Under a court's interpretation of it. The  
11 problem is --

12 MR. ARONS: Under the FDCPA it's not lawful for you to  
13 --

14 MR. MOORE: But, Paul, --

15 MR. ARONS: -- collect that money, so --

16 MR. MOORE: -- if a --

17 MR. ARONS: -- why should you get to keep it?

18 MR. MOORE: -- district court in New York says  
19 something is improper and a district court in Illinois says it's  
20 okay, what am I supposed to do in California? Which court do I  
21 get to listen to or not listen to?

22 MR. ARONS: Well, you have to listen to the court in  
23 California and when the court in California says you weren't  
24 allowed to collect that money, then you have --

25 MR. MOORE: But there is no decision in California.

1 MR. ARONS: There would be in your case.

2 MR. MOORE: Yeah, but, Paul, --

3 MS. HILLEBRAND: This conversation suggests to me the  
4 role of the FTC in advising collectors and giving guidance, so  
5 that we don't have to wait to get this in all nine circuits  
6 before we get --

7 MR. MOORE: And I agree with you. If I knew what the  
8 playing field was and it was a level playing field across the  
9 country, then we would all know exactly what we have to do. I  
10 have asked -- part of what I have asked from a NARCA standpoint,  
11 is we would love the FTC to have rulemaking ability so that they  
12 could design a set of letters that we as collection attorneys  
13 could send out to consumers, first letter, second letter, third  
14 letter, fourth letter.

15 The problem is the FTC does not have the rulemaking  
16 ability to design those letters.

17 So, Paul, I would love to sit down with you and create  
18 letters that you find acceptable that I could send to debtors and  
19 not get sued for, because I want a level playing field.

20 MR KINKLEY: Then a statement that we really can't take  
21 you to court, we can't ever sue you for this, why not put that in  
22 a letter? That's my suggestion.

23 Because then I put it in a letter that says this is  
24 time barred, we can't sue you, we'd really like you to pay,  
25 though, on a moral obligation.

1 MR. MOORE: Well, because --

2 MR. NAVES: Let me just jump in here --

3 MS. HILLEBRAND: May have --

4 MS. THORLEIFSON: One at a time. Stop, stop, stop.

5 Let's hear from one collector and then we'll hear from  
6 Gail.

7 MR. NAVES: I guess my concern is from my perspective  
8 it would be really nice if we had a black-and-white statute of  
9 limitations rule that we could just apply and say: Wow, from  
10 this date to this date don't do this, or do this. From my  
11 perspective, being in business, that's simple, that's really  
12 easy. We don't have that in the current environment.

13 What we have are 50 different states with very complex  
14 rules about when a statute of limitations starts, when it's  
15 tolled, and those sorts of things.

16 So I think it's a bit of a red herring to chase around:  
17 Have we filed debts that are time barred routinely, when you look  
18 at the complexities that go into each of the accounts and where  
19 they were filed and what state's law applies according to the  
20 creditor agreement and what choice of law rules may apply to that  
21 particular agreement and whether or not it was tolled. It is not  
22 a simple matter of me sitting back as a debt buyer going, wow,  
23 you know what, we're going to stop on this particular date  
24 because I can definitely tell what that is.

25 I do know if I take a conservative approach and try not

1 to send cases that are beyond that to attorneys who are qualified  
2 to make these decisions in their states, that they will use their  
3 judgment and the data and make an appropriate determination in  
4 that state. So what we don't have, what you're proposing here  
5 right now, which would be a simple solution, so that's where I  
6 think the fallacy of this argument comes in.

7 MS. THORLEIFSON: Gail.

8 MS. HILLEBRAND: I hear a lot of agreement at this  
9 table that the FTC ought to have FDCPA rulemaking, not just for  
10 -- we wouldn't say just for safe harbor forms, but for other  
11 purposes. Is there anybody that thinks that's a bad idea?

12 MR. NEWBURGER: It would solve the modernization issues  
13 and the technology issues and a lot of other problems that make  
14 the Act too cumbersome to deal with evolving technologies.

15 MS. HILLEBRAND: Good. And then I want to comment on  
16 the --

17 MR. SARGIS: Gail, I'd call for that as long as the FTC  
18 would come in with a rule that says: This is the rule and it's  
19 uniformly applied, as opposed to: This is the rule unless the  
20 states want to say something else, because then we're back --

21 MS. HILLEBRAND: Well, then we got a quibble with the  
22 FDCPA itself, which makes it clear the states can have additional  
23 consumer protections.

24 MR. SARGIS: They can have additional protection. But  
25 if we are going to move forward in the twenty-first century, I



1 think one of the problems we've learned under the FDCPA is we get  
2 conflicting issues and problems between the states.

3 I don't have a problem with having fair consumer and  
4 collector protection, because this is a balanced statute that  
5 protects a legitimate collector as well as a consumer. But I  
6 think we've learned that maybe we need to get more uniformity if  
7 the FTC's going to speak on some of these issues so we can know  
8 where we stand, right or wrong.

9 MR. NEWBURGER: And, Gail, keep in mind too when we  
10 talk about the Federal Trade Commission taking a position which  
11 supersedes state law, what I'm holding here is a May 20th  
12 memorandum of the heads of executive departments and agencies  
13 from the White House, directing federal agencies to take a very  
14 limited position as far as federal preemption and to allow states  
15 to exercise their rights.

16 And so you've got to keep in mind too that the federal  
17 government position right now, at least with regard to the  
18 current administration, is to ease away from preemption. And  
19 what you're talking about is asking an executive agency to do  
20 exactly what President Obama has said they shouldn't be doing.

21 MS. HILLEBRAND: I think what we're talking about is  
22 asking an executive agency to exercise the power to implement the  
23 idea behind the FDCPA preemption provision, which is federal  
24 minimums, states can do more.

25 I wanted to comment on this technology issue --

1 MS. THORLEIFSON: Actually, we're an independent  
2 administrative agency. We're not an executive branch agency.

3 (Laughter.)

4 MS. HILLEBRAND: On this technology issue we've heard  
5 the industry say: Well, we need the ability as more technology  
6 -- the ability to track what is going on with the debt, where it  
7 really came from, how old it is, who's owned it, what these  
8 defenses are. Technology enables that in a way that it didn't  
9 when FDCPA started. And we ought to be looking at the  
10 technological benefits to getting this information in the hands  
11 of the debtor at the time of first collection for each new  
12 collector and before and at the time of litigation.

13 And then I wanted to comment on the cell phone issue.  
14 I know it's not on our agenda, but it was raised. There  
15 certainly are people who don't have land lines, but there also  
16 are people who use their cell phones solely to receive medical  
17 emergency information about elders, to keep track of their  
18 children.

19 And if you move into the cell phone area at all there's  
20 got to be a way to have a right to say "do not call this number."  
21 Because that will interfere with the care-giver function that  
22 many people do use a special cell number --

23 MS. THORLEIFSON: An issue, but --

24 MS. COLEMAN: The FDCPA actually addresses both of  
25 those concerns. If you ask the debt collector to validate your

1 debt within the first 30 days, I don't know a debt collector that  
2 won't provide you with every piece of information they have.

3 MS. HILLEBRAND: There's no reason for that information  
4 flow to go only to people who are represented, who get the right  
5 information, who get information off the net, not bad  
6 information, who know how to ask and ask that question. It  
7 should come with the demand to collect.

8 MS. COLEMAN: But the letter actually says: If you  
9 want this information, all you have to do is ask. I mean it's  
10 not hidden. You don't need an attorney, nothing. I mean --

11 MS. THORLEIFSON: And verification issues are for some  
12 other day, okay?

13 MR. SARGIS: Tracy, I just have a follow-up for both  
14 Mike and Paul.

15 You had asked the question shouldn't the letter say:  
16 We cannot sue you. I would never let someone covered by the  
17 FDCPA write that, because I know it's going to get stuffed back  
18 in their face of: Oh, you used the word "sue." Oh, you talked  
19 about litigation.

20 The poor, least-sophisticated consumer can't understand  
21 the word "cannot," they're just going to see the word "sue." So  
22 I'm just telling you personally as a risk-management practice, I  
23 would not put that in there. The word "sue" only appears, or  
24 "action" or "litigation," if that hammer's being dropped.

25 MR. NEWBURGER: I mean if a class member sends me

1 checks where they were supposed to be getting checks, I can tell  
2 you he's right about the sophistication of the consumers, they  
3 will not read or understand it, when we talk about least-  
4 sophisticated, that's who it is.

5 MR KINKLEY: Real briefly, the problem of the  
6 gatekeeper role of the courts, the default position, if you'll  
7 pardon my pun, of judges is that: Our role in default is  
8 somewhat limited. We're not there to screen statute of lims.

9 And I would say that maybe that's not right, because  
10 the statute of lims is a waiver. You can waive it as an  
11 affirmative defense. Sometimes sophisticated defendants don't  
12 want to raise statute of lims because they want a decision on the  
13 merits. That's an effective waiver of affirmative defense.

14 On the other hand, the legislature has said: You can't  
15 bring this action. You have no right to come into my court --  
16 that's what the legislature told you. And yet, you know, it is  
17 the position of most judges that the defaults are allowed to be  
18 entered even though the legislature said you can't come into that  
19 court.

20 And my problem from the FDCPA is somebody calls me, or  
21 an effective lawyer who's been to some seminars, and says: We  
22 will vacate that. We'll sue the debt collector or debt buyer for  
23 the violation under *Kimber*. It's an unfair practice under  
24 *Kimber*.

25 The FTC has rulemaking authority to declare things

1 unfair practice. They could declare, by suing or threatening to  
2 sue as an unfair practice, and they've done so in some letters.

3 But once we set aside that one default, a thousand  
4 dollar statutory damages, actual damages, that's one person.  
5 Then we take and say: Well, we'll bring a class action because  
6 it's a small amount of money. There aren't enough consumer  
7 lawyers to go around, so we'll bring a class action.

8 And then the defense lawyers come in and say: Ah-ha,  
9 the court already ruled, the state court already entered the  
10 default. This is *res judicata*, or they try to revive the  
11 doctrine of Rooker-Feldman. And they say: You can't do anything  
12 in federal court to fix this.

13 So now we're in the position of going into state courts  
14 and saying: We need to have all of these vacated. So the judges  
15 who have signed all of these orders against the statute of lims,  
16 in violation of a California law that says the courthouse door is  
17 barred to you, but you're giving them access. So those have to  
18 be vacated. It's chaos. It needs to be stopped before it  
19 happens.

20 MR. SARGIS: And there may be a better practice.  
21 California law doesn't say you're barred from the courthouse  
22 door.

23 MS. THORLEIFSON: We haven't heard from Mr. Wilcox yet.

24 MR. WILCOX: I figure we're going to break for lunch  
25 soon and before we close, I just wanted to mention for those of

1 you practicing in California, I think Harvey, whoever else may  
2 have clients here, or within the Ninth Circuit, two district  
3 courts have followed *Kimber: Perretta v. Capital Acquisition and*  
4 *Management*, who I think was pretty much effectively put out of  
5 business by the FTC after that; and *McCullough v. Johnson* in  
6 Montana last year. So you may want to look at those, and you  
7 could follow them or not. You're right, it's not Ninth Circuit  
8 controlling authority, but you should at least be aware of it.

9 MR. MOORE: Like I said, I don't buy any time-barred  
10 debt.

11 MS. THORLEIFSON: Could we --

12 MR. ARONS: I just want to get back to the issue that  
13 was raised as some sort of disclosure in the letter, and Ron  
14 doesn't like the word "sue," so they can come up with --

15 MS. THORLEIFSON: Well, let's --

16 MR. ARONS: -- something else. But it seems to me  
17 we're dealing with protecting consumers. They are by definition  
18 unsophisticated. Manny was mentioning his experience of getting  
19 checks from class members. We've had the same experience where  
20 we've sent out class notices saying: We've sued them, we won,  
21 you're going to get this much money back. And we get back a  
22 check that says: Here's the money, I already paid it twice,  
23 don't bother me again.

24 Okay. So I don't think it's unfair or unreasonable to  
25 have some disclosure of the time-barred status of debt in the

1 letter, and I haven't really heard anything from the other side  
2 other than Ron doesn't like the word sue.

3 MR. SARGIS: Well, I think as a practical part, the  
4 customer understands it, but it's when the consumer and the  
5 consumer's attorney get it in front of the judge that it's to the  
6 hypothetical, least-sophisticated consumer, they're not going to  
7 understand it. And I could see that just coming back and hitting  
8 us.

9 MS. THORLEIFSON: Well, let's back up to the first  
10 question. Do you think that there should be a disclosure to  
11 consumers that a debt is beyond the statute of limitations? And  
12 then we can worry about whether it's practicable.

13 MR. SARGIS: Yeah. no, I don't think so, because I  
14 think that unfortunately opens a whole a can of worms where  
15 you're getting into now I'm advising the debtor of this and that,  
16 as opposed to, and what I tell collectors is: You write letters  
17 and you talk to a debtor -- it's my John Wayne rule, you say what  
18 you mean and you mean what you say. And so if you tell the  
19 debtor we want you to pay, you want it paid. If you tell the  
20 debtor we want to settle and here's the offer, that's what it is.  
21 But don't get into giving legal advice and the theoretical and  
22 the hypothetical. So I would say no.

23 If you're going to sue, tell them you're going to sue.  
24 If the statute of limitations has run and it's sitting on the  
25 person's credit report and you're sending a letter out saying:

1 "Hey, you still owe this debt," there's a reason to be  
2 communicating with them.

3 I mean maybe -- Congress has told us, in the infinite  
4 wisdom of the men and women in Congress, they have said: This  
5 information, irrespective of what statute of limitations are out  
6 there, is relevant for seven years.

7 And maybe that's -- I mean, again, personal risk-  
8 management approach to it, that's a time period I use if you're  
9 going to be sending collection letters out, talking to a  
10 consumer, you've got a good rational basis for saying: This is  
11 why I talked to him. It's on the credit report. It's showing up  
12 there. I don't want to get the call when the person's in trying  
13 to buy an auto and there's a six-year-old debt sitting there and  
14 they're screaming me that somehow I'm breaking the law by having  
15 it there because the statute of limitations has run.

16 So, again, I try to build some rational reason you're  
17 talking, and maybe that's a rational number we start working  
18 from.

19 MR. NEWBURGER: But there is another reason why the  
20 notice is a problem for attorneys. Disciplinary Rule, Model Rule  
21 4.3, Dealing with Unrepresented Persons, a lawyer is not supposed  
22 to give legal advice to an unrepresented person.

23 Every time we give another notice to a consumer, we run  
24 the risk that we're running afoul of that rule. And the  
25 commentary is unbelievable strong on that rule. It says that the



1 only thing you should tell an unrepresented person is that that  
2 person should seek legal advice of their own.

3 MS. THORLEIFSON: That's an attorney communicating.

4 MR. NEWBURGER: That's correct.

5 MS. THORLEIFSON: But what about from a debt collector  
6 or a debt buyer?

7 MR. NEWBURGER: Not an issue at all. I think that's  
8 purely when you're talking about collection attorneys.

9 The other point, though, that Ron just made, which is  
10 also important, is as long as we have a seven-year credit  
11 reporting period the problem is actually a little worse than what  
12 Ron has articulated because the real danger is this: We've got  
13 consumers trying to buy houses or cars and being told: We won't  
14 float your loan unless you clear items on your credit report.

15 Imagine if Ron's getting calls from this company  
16 saying: "We want to pay this," and he'd have to say: "Nope,  
17 sorry. It's five years old. I can't take your money."

18 "But I've got to get it cleared to get my mortgage."

19 "Sorry. That's your problem. I'm not taking your  
20 money. Too bad you can't get your house or your car, I won't  
21 take your money."

22 And so whatever the absolute limit is, it has to be  
23 tied to credit reporting.

24 MR. ARONS: Manny, that's not the issue at all. I mean  
25 the issue isn't whether or not they can take the money. The

1 issue is when they send their letter saying I want your money, do  
2 they have to make a disclosure about the statute of limitations.  
3 I mean there's a lot of stuff that is not disclosed that should  
4 be disclosed. Gail ran through a litany.

5 I mean I see letters all the time where it's: "Send us  
6 \$253.17," and you can't tell what's principal, what's interest,  
7 what's collection fees. You know, the debtor calls up -- I mean  
8 they call up the law office of Joe Blow, who's a debt collector,  
9 and his collector has no problem giving legal advice, said if you  
10 don't do this, you're going to get sued.

11 MS. THORLEIFSON: We only have a couple minutes before  
12 I have to turn to questions and I want to ask something that came  
13 up in Chicago was the issue of collectors seeking small payments  
14 to revive or refresh the statute of limitations. And I want to  
15 ask the panel if in their experience that happens and how  
16 prevalent that is.

17 MR. MOORE: The statutes run -- payment after the  
18 statutes run does not revive the statute. Payment has to be  
19 within --

20 MS. THORLEIFSON: It depends on the state.

21 MR. MOORE: Well, in our state --

22 MR KINKLEY: Every state is different.

23 MR. MOORE: In our state, which is the only state --

24 MR KINKLEY: Some require intent, some just require a  
25 payment. Most I would say just require a payment. And there are

1 a lot of debt collectors who sort of trick somebody and say:  
2 Just send me five bucks. You know they're not telling them that  
3 sending them that \$5 now makes a debt that's uncollectible  
4 judicially now collectable.

5 MR. SARGIS: Given that we live in California, the  
6 paradise state, we don't have that problem since it has to be in  
7 writing that a debt would be reaffirmed, but I recognize it could  
8 well be in other states.

9 MS. THORLEIFSON: I see Ms. Flory nodding a lot over  
10 there.

11 Do you want to comment?

12 MS. FLORY: That's why our consumers are told all the  
13 time. Any time there's an issue of our medical bill. Well, just  
14 if you keep us sending a little bit of money it shows good faith.  
15 And sometimes they don't owe the bill, somebody else should have  
16 been paying for it, and they get kind of sucked into this.

17 MR KINKLEY: Do you find them using that payment as the  
18 basis for starting the statute of lms -- restarting it?

19 MS. FLORY: They'll use that payment, they'll use  
20 insurance payments, they'll use anything.

21 MR KINKLEY: To restart the statute of lms, even in  
22 the paradise of California?

23 MS. FLORY: Yes.

24 MS. HILLEBRAND: Or to extend it --

25 MR. SARGIS: Not to restart, but I think what she says

1 --

2 MS. HILLEBRAND: To extend it if it's close to running.

3 MR. SARGIS: It's running from. Using the theory that  
4 on an open-book account it relates from the last date of the  
5 transaction and you get a new issuance, is that really an open-  
6 book account or not a book account, or whatever, in doing it.

7 MS. FLORY: And sometimes later services, like you went  
8 to the hospital in 1984 and then you went to the same hospital  
9 recently, all of a sudden that bill comes back up.

10 MS. THORLEIFSON: Okay. It's now time to turn to  
11 questions, and I have a handful of them and I'm confident that  
12 you will be able -- you will take all of the 15 minutes answering  
13 the three or four I have.

14 But first I'm going to ask one of our law professors to  
15 answer a basic question that I got, which is: What constitutes a  
16 time-barred debt? How is the date established and...

17 MR. MAURER: So this could be a lot more complicated  
18 than it sounds.

19 MS. THORLEIFSON: I ask you to be brief.

20 MR. MAURER: But let's take a car contract and I'm  
21 obligated to make my car payment on the 1st of October, and I  
22 don't. I've breached the contract. So let's say the creditor is  
23 Ford Motor Credit Corporation. They have four years from the  
24 date of my breach in California to sue me for breach of contract.  
25 So they would have until October 1st, 2013.

1           If they sued me on October 2nd, 2013, they have sued me  
2 on a time-barred debt and under *Kimber* and every other decision I  
3 know of, I don't know of any court that disagreed with *Kimber*,  
4 they would violate the FDCPA -- well, if it was a third-party  
5 collection agency they would violate the FDCPA.

6           So breach of contract, the date's established by the  
7 date of the breach.

8           MS. THORLEIFSON: Thank you.

9           Now one of the issues that has come up a lot is how --  
10 today -- is how difficult it is to determine the statute of  
11 limitations and how it's a moving target.

12           One of the questions is: How do panelists feel about  
13 the possibility of adopting a nationwide statute of limitations?  
14 And let me add a caveat to that: Would it depend on whether,  
15 say, for credit card debt, a nationwide statute of limitations,  
16 as opposed to more state-specific issues regarding contracts, or  
17 something? How do people feel about that?

18           MR KINKLEY: The FTC in conjunction with the  
19 Comptroller of the Currency, the Savings Bank people, and all  
20 that, could promulgate a rule because those -- they have  
21 rulemaking authority say all credit card debts is a four-year  
22 statute of limitations.

23           We have a very workable, nationwide statute of  
24 limitations. Almost every state -- well, every state has adopted  
25 a UCC. Every state but Georgia accepts the fact that under 2-725

1 it's a four-year statute of lims on a sale of goods.

2           Establishing a nationwide four-year statute of lims on  
3 credit cards would effectively -- it's been effective already  
4 with sale of goods, all people in all states, all creditors, they  
5 know where they stand. And I think most of the panel would agree  
6 with me that a four-year, nationwide statute of limitations on  
7 credit cards would be appropriate.

8           The problem with credit cards is nobody ever figured  
9 out when they were coming up with credit cards what they really  
10 were. When you sign an application you're asking for someone to  
11 give you a contract that you don't know the terms of. It's only  
12 after they accept you that you get the terms back. And then  
13 those terms can be unilaterally changed with simple mailing.

14           So some states go: Is that a financing agreement, is  
15 it a sale agreement? When you go to the sale are you making a  
16 sale. So nobody really -- it didn't fit in any pigeon holes of  
17 classic law.

18           It's not only the debt-buyer industry that has this  
19 problem, it's credit cards in general. I was shocked when I  
20 first starting looking at what's the statute of lims on a credit  
21 card.

22           I've spent probably a 100 hours figuring it out. I  
23 have a chart of all the states, I've got all the decisions: When  
24 it's tolled, when it's not. And it's a very difficult process.

25           But I would never sue on a debt until I did that, and

1 that's the difference between me and the debt buyer. But it  
2 would help them and --

3 (Laughter.)

4 MR KINKLEY: I thought I'd slide that through.

5 No. I keep hearing: Oh, we didn't know, so we sued.  
6 Well, if you don't know you don't sue. That's the difference.

7 But to get to the point on topic. If we had a four-  
8 year in conjunction with the other agencies that they say: Hey,  
9 look, all credit card issued by any of this type of institution,  
10 it's going to be four years. We all know. Then we just have the  
11 problem with people updating or changing the date of default,  
12 which is a huge problem.

13 MR. MOORE: Mike, how do you deal with is that-  
14 chartered banks and not federally chartered banks?

15 MR KINKLEY: What will happen --

16 MR. MOORE: State -- are you saying that the federal  
17 government has the right to tell every state what to do with  
18 their state-chartered banks and to set a statute of limitations  
19 that preempts state law? I think that's totally inappropriate  
20 and I think you're asking the federal government to do something  
21 they can't do.

22 MR KINKLEY: Well, with state banks, you're right. But  
23 most of the credit cards are done in national banks.

24 MR. MOORE: Most of the credit cards are state-  
25 chartered banks. Cit- -- Citibank.

1 MS. HILLEBRAND: Not by volume.

2 MR KINKLEY: Citibank, Bank of America, Chase, American  
3 Express. You've covered 90 percent of the market.

4 MS. THORLEIFSON: Any other thoughts on a national or  
5 --

6 MR KINKLEY: Ninety-six percent.

7 MR. MOORE: I don't know why you'd put four years --

8 MR. NEWBURGER: Mike's correct, if the sale is for a  
9 type of debt -- or a type of claim that is litigated as often as  
10 credit card debts are, there is an amazing sparcity of case law  
11 on the nature of a credit card account.

12 The case law indicates pretty consistently that the  
13 contract is not the application, that the contract is one formed  
14 not by a witting signature. It's formed through offer, which is  
15 issuance of a card; acceptance, which is user activation of the  
16 card; and that the terms are the terms of the contract which  
17 accompany the card.

18 Now in addition to that, I don't know about you, but I  
19 assume everyone in this room, everyone who is watching, probably  
20 uses credit cards. And when you sign a charge-slip, guess what,  
21 you know, got this one right here and right by my name it says I  
22 promise to pay in accordance with the terms of the credit card  
23 agreement. And so every time I sign I'm signing a new written  
24 promise to pay.

25 Why not use the six-year-statute the UCC provides for



1 negotiable instruments, Mike? I mean one limitation period is  
2 good, but why pick sale of goods? I don't think a credit card is  
3 a sale of goods, I think it's an extension of credit. I think  
4 it's a written promise to pay by the time I sign that slip --

5 MR KINKLEY: So the statute of lims would run from each  
6 credit card transaction? How do you work that? When you bought  
7 that, your statute of lims starts --

8 MR. NEWBURGER: No, no, no, no. Scott got it exactly  
9 right. Excuse me. Scott got it exactly right: A cause of  
10 action accrues when a default or a breach occurs. And because  
11 it's a contract claim, it occurs when the consumer commits the  
12 first uncured breach of the obligation to pay, and that's when  
13 limitations should begin running --

14 MR KINKLEY: But are you paying that charge today or  
15 when you default are you paying a different one? So you go back  
16 to the first, initial charge? It's unworkable.

17 MR. NEWBURGER: First in, first out works just fine  
18 under the Fair Credit Billing Act. It has since the 1970s.

19 MS. THORLEIFSON: Okay. We've got about three minutes,  
20 and this is completely impossible to do in three minutes, so  
21 everybody try and be brief. But what should the FTC and other  
22 public and private actors do to bring about any changes in the  
23 law or industry practice concerning statute of limitations?

24 I'm going to let Ron go.

25 MR. NAVES: Selfishly, from my perspective, clarity is

1 good. I like clarity. It's simple, it's easy to use, it helps  
2 us. So the question then becomes in my mind what is the  
3 appropriate statute of limitations, which is the dialogue we were  
4 starting to engage in here and now.

5 I don't know that four or seven years is unreasonable.  
6 The issue I see here is we have a system in our civil  
7 jurisprudence here to allow debtors to get out of their debts,  
8 and that's bankruptcy court.

9 What I see here is the potential for shortening the  
10 statute of limitations, we then -- if I can't collect on a debt  
11 that is reported through the credit history for seven years,  
12 we're sort of allowing people to take an end-run around the  
13 bankruptcy system because we're sort of giving them a pass on the  
14 debt: You don't have to pay it, you don't have to -- and, again,  
15 we're talking about legitimately-incurred debts.

16 So I think there needs to be more dialogue around what  
17 is the appropriate statute of limitations in these types of  
18 circumstances. But I think clarity on that issue is a welcome  
19 thing.

20 MS. THORLEIFSON: Gail.

21 MS. HILLEBRAND: The FTC has Section 5 authority and  
22 there are some uses of the court system that are unfair and  
23 deceptive and the FTC can do a rulemaking in that.

24 MR. MOORE: You know the one thing that we're all  
25 forgetting with the statute of limitations is the goal here, from

1 a creditor's standpoint, from a collection attorney's standpoint,  
2 is to get the debtor to pay the debt off. They incurred the  
3 charge, they got the benefit of the charge. The fact of the  
4 matter is the longer the statute of limitations, the less likely  
5 it is that a suit's going to be filed quickly.

6 If you shorten the statute of limitations, it's going  
7 to force us to file quicker and over-burden the court quicker and  
8 give the debtor less of a chance to work out a negotiated  
9 settlement. So I would argue that, you know, we don't want to  
10 look at a two-, three-, four-year statute. If we're going to  
11 have a federal statute, make it long enough to give debtors time  
12 to recover from whatever put them in the situation where they  
13 couldn't pay the debt in the first place.

14 We're in a tremendously bad economy today. Our  
15 liquidation rates as an industry have gone down because people  
16 are out of work. You know we've gone from two-family [sic]  
17 incomes to one-family income. Houses no longer fund the ability  
18 to charge, borrow against your HELOC, pay of your credit cards  
19 and do it again. So it's a very different economy.

20 What you don't want to do is shorten the statute of  
21 limitations to the point where we have to sue, we get our  
22 judgments. Give the debtors an opportunity to recover. Give the  
23 economy an opportunity to recover.

24 MR. ARONS: Well, I mean what Harvey's saying though  
25 is: Four years of absolute nonpayment, because if you're paying

1 the statute is being extended, so what Harvey's is saying is four  
2 years of absolute nonpayment, absolute inability or unwillingness  
3 to pay is not enough, we need to be able to keep this debt alive  
4 longer and --

5 MS. THORLEIFSON: Let's get back to the question: What  
6 should the FTC and other -- what should we do?

7 MR. ARONS: I'm going to defer to Gail on this. She  
8 says you have the rulemaking authority. The issue is becoming,  
9 well, what's an appropriate statute of limitations. And four  
10 years is a long time with the idea that the FTC would do  
11 something to extend it even further does not seem to be very  
12 protective of consumers.

13 MR. MOORE: Well, negotiable instruments are six years.

14 MR. NEWBURGER: Why not just put in a truth-in-lending  
15 act, let Congress enact a nationwide statute of limitations.  
16 What I'm hearing from people in the room is everyone would  
17 probably like a fixed statute, why not try and build a consensus  
18 and ask Congress to do something on which everyone agrees?

19 MS. THORLEIFSON: And on that --

20 MR KINKLEY: Well, limitation, we have four years  
21 already.

22 MS. THORLEIFSON: Let's stop. Everyone agrees on  
23 something, that's great.

24 Thank you all for your participation. This has been  
25 really great.

1 (Applause.)

2 MS. THORLEIFSON: And now it's time for lunch.

3 (Luncheon recess taken from 12:26 p.m. to 1:33 p.m.)

4

## 1 PRIMA FACIE COLLECTION CASE AND EVIDENTIARY BURDENS

2 MR. CARTER: Hope everybody had an enjoyable lunch.

3 This next topic for the next hour and 15 minutes seems to be one  
4 that everybody wants to talk about. We kind of bled over into  
5 prima facie case in several of the discussions earlier this  
6 morning, so I don't think that I'll have too much time spent  
7 drawing you all out. But before I completely lose control, let  
8 me say I'd like to break this out into four separate discussions.  
9 Let's try to limit ourselves to each of these, as much as  
10 possible. It might provide some structure and some assistance as  
11 people are reading the transcripts.

12 Our first topic I'd like to talk about is what evidence  
13 of indebtedness is recited in a complaint.

14 And then I'd like to secondly talk about what  
15 substantiation of indebtedness is attached to the complaint.

16 And then I'd like to talk a little bit about if the  
17 requirements are higher before a default judgment is rendered.

18 So the first two are about what comes with the  
19 complaint itself, the third topic is what more you need to  
20 provide before a default judgment is rendered.

21 And, finally, I'd like to talk a little bit about the  
22 business exception to the hearsay rule and what sort of evidence  
23 needs to be provided in order to substantiate the records. This  
24 primarily relates to the debt buyer situation.

25 Those are the four topics that I'd like to run through

1 here. And, if I could, I'd like to start with collection  
2 representatives, collection attorneys with this question: In the  
3 jurisdictions in which you practice, what evidence of  
4 indebtedness is typically provided or recited in the complaints  
5 that you file?

6 Harvey.

7 MR. MOORE: Thank you, Tom. First of all, before I  
8 answer that question there's a misconception going on that I want  
9 to clear up, and that's the 95-percent figure on defaults.

10 MR. CARTER: I've already lost control.

11 (Laughter.)

12 MR. MOORE: Slightly. I promise I'll come back to the  
13 question.

14 MR. CARTER: Okay.

15 MR. MOORE: Ninety-five percent of the cases that go to  
16 judgment may be a more accurate statement as being defaults,  
17 because the number of cases we try is probably five percent or  
18 less. But what you have to take into account is some cases  
19 aren't served and some cases settle. We settle a significant  
20 amount of cases that are filed prior to the time they ever go to  
21 a judge for a default judgment or a trial.

22 So the 95-percent figure that's been thrown out today  
23 is not an accurate number either with regard to cases filed or  
24 cases served. It is probably a more accurate representation of  
25 what percentage of cases that go to judgment are by default. And

1 I wanted to clear up that misconception.

2 California is a notice-pleading state. And different  
3 offices have different requirements for what they plead in a  
4 complaint. There is a Judicial Council-authorized complaint in  
5 California that is, for all intents and purposes, a check-the-box  
6 form that says: Here is who the plaintiff is. The plaintiff is  
7 either a corporation, a partnership, an LLC, or an individual.  
8 Here's who the defendant is, the amount owing is, and it's either  
9 on a contract or an open-book account or on other common  
10 accounts.

11 My office, for the most part, does not use the check-  
12 the-box, fill-in-the-blank complaints. I've been practicing  
13 almost 30 years and I come from a very different background. I  
14 didn't start out in collections, I started out as a business  
15 litigation attorney, so I brought some of that background into my  
16 practice. My complaints are pleadings.

17 If it is purchased debt, I allege who the original  
18 credit grantor is. I allege, to the best of my ability, the date  
19 of the charge-off and the amount of the debt at the date of  
20 charge-off. To the extent I can, I usually seek interest at the  
21 California statutory rate of ten percent from date of charge-off.  
22 It's a nice, safe number and it gives me the ability to use  
23 numbers that are relatively easy to prove.

24 It's easy to prove what the date of charge-off is.  
25 It's easy to prove what the interest rate is from date of charge-



1 off because it's a statutory number. There's a California  
2 statute that says I can get ten percent prejudgment interest at  
3 the time the court awards entry of judgment.

4 So as far as what we plead, we try to plead those  
5 elements that if there is no answer filed, under California Code  
6 of Civil Procedure Section 585, the court is supposed to enter  
7 default and enter a judgment for the amount pled in the complaint  
8 if there is no answer filed.

9 So what I try to do in my complaint is give enough  
10 facts that the clerk has the ability to say: It's a claim on a  
11 contract or for money. Here is the amount being sought, here is  
12 the prayer for the amount being sought, and therefore under 585  
13 I'm supposed to enter judgment for the amount being sought in the  
14 complaint.

15 But in doing so I'm also trying to give the consumer  
16 enough information so that they know why I'm suing them. Am I  
17 suing on a Bank of America card that was sold to my debt buyer  
18 that I represent. And that's why I'll usually allege that it was  
19 originally issued by x, it has been transferred to the assignee,  
20 which may be my client. And to try to get the consumer enough  
21 information so they're not, you know, in the blind as to what  
22 we're suing on.

23 So what's required and what lawyers typically allege in  
24 California may be two different things. We do not attach copies  
25 of invoices. We do not attach copies of terms and conditions.

1 But we plead enough to satisfy the requirements of the State of  
2 California.

3 MR. CARTER: Okay. Mr. Naves, I know that you are  
4 inhouse counsel and so you probably see jurisdictions beyond  
5 California; is that right?

6 MR. NAVES: Yes. But I want to preface that with I've  
7 been in this role for 30 days and I have no prior experience with  
8 the industry.

9 MR. CARTER: Okay.

10 MR. NAVES: So when I'm making my comments, I'm telling  
11 you my best understanding at this particular point of working  
12 with the company for 30 days and how its process --

13 MR. CARTER: Let me do this. Is there an industry  
14 collection representative that practices outside of California  
15 and can talk about what that jurisdiction requires and what you  
16 provide?

17 Okay, Manny.

18 MR. NEWBURGER: Keep in mind, I don't do collection  
19 work, but I can tell you I know what I see in pleadings across  
20 the country, and it varies. There are some firms that will plead  
21 in great detail. I know I have one debt buyer who prefers their  
22 lawyers just simply lay it all out. They'd rather just say who  
23 the original creditor was, what the original account number was,  
24 what the date of default and charge-off were. For very reason  
25 Harvey's articulated: It lets the consumer know why he or she is

1 being sued.

2           One of the points of confusion, and I know at least a  
3 couple of my major clients have tried to deal with this, is that  
4 a couple of the major credit card banks have an unfortunate habit  
5 of changing the card number after charge-off. The account number  
6 changes. And if you're a consumer, you get sued. You say:  
7 Wait, I never had a charge card by this number. So they've asked  
8 their lawyers to try to be careful about pleading in a way that  
9 the consumer can identify what the account is that's being sued.

10           But it really does vary. You will find some states  
11 where they file affidavits with the complaint. Some states where  
12 they file virtually nothing with the complaint. And it's all  
13 based on what the state pleading requirements are and, perhaps  
14 more importantly, what a local judge may require.

15           MR. CARTER: I understand there's some sort of  
16 technical difficulty. We just got an email from the folks  
17 listening on the internet. Something's changed with the sound  
18 and they're getting some reverb. If you all could check on that  
19 while we continue. Thanks.

20           Let me turn to some of the folks representing consumers  
21 here on the panel and ask this question: In your experience is  
22 there enough information provided in the complaints that you see?  
23 And, if not, why is that a problem?

24           Anybody.

25           MR. MAURER: Well, I'm in California and the check-box,

1 fill-in-the-blanks Judicial Council form that was described  
2 earlier is what the consumers bring in when they have been sued I  
3 would say at least 90 percent of the time. It's extremely rare,  
4 one, two, three percent of the time that a contract or even terms  
5 and conditions would be attached to the complaint.

6           There is a box to say who assigned the plaintiff their  
7 rights, and that's something filled in there, which may or may  
8 not be the original creditor. And I would say it's the exception  
9 to the rule that there is an account number there.

10           And there is an allegation that's part of the form that  
11 the consumer breached their obligations within four years  
12 preceding the filing of the lawsuit. And there is a prayer for  
13 interest from a certain date, which may or may not be the date of  
14 the breach of the contract. So very, very limited amount of  
15 information.

16           Why is it a concern? I would say in the last few years  
17 -- and I do perceive this as a debt buyer situation -- there have  
18 been just a lot of mistakes that are made. The wrong person is  
19 being served with a complaint. Maybe somebody named Scott Maurer  
20 owes this debt but it's not the Scott Maurer that got served with  
21 the summons and complaint.

22           It says the account is a book account, but it's  
23 actually a motor vehicle deficiency claim and you can't use the  
24 check-box complaint for that. You have to allege that you  
25 disposed of the motor vehicle in compliance with the UCC and

1 California law.

2           And these complaints, my perception is, are just being  
3 churned out and default rate is extremely high. And it is not  
4 uncommon that after the consumer files an answer there is a  
5 request the default be entered anyway because that was the  
6 expectation, that the consumer wasn't going to answer the  
7 complaint.

8           So that's my experience.

9           MR KINKLEY: I look at it the same way but also from a  
10 different approach, especially from the debt buyer's market.  
11 When you're talking about zombie debt, you know the quarterback's  
12 out there on the coverage here most of the time. Brett Favre can  
13 throw the football 100 yards, but the receiver can only run 60.  
14 Their documentation is the receiver and their lawsuits are Brett  
15 Favre. They're trying to reach for something way beyond their  
16 grasp.

17           And the business model that the debt buyers follow  
18 because of that -- I mean, see, the problem was originally this  
19 debt, the banks didn't think it was worth anything. So they  
20 didn't spend a lot of money keeping records. Storage used to be  
21 expensive. Electronic storage is cheap now, but it used to be  
22 expensive. The paper storage was horribly expensive, so they  
23 didn't keep the paperwork.

24           In the business model the debt buyers and all big debt  
25 collectors, the ones who make money, is to use -- to prepare the

1 complaint, a computer-generated merge file from data that files  
2 in the template. And the data is coming in in as small a size as  
3 you possibly can, whether it's eight or ten fields or six, I'm  
4 not going to debate it, but it's very little. And it costs money  
5 to actually get documentation.

6           And most of the contracts require that the debt buyer  
7 has to pay for the documentation if they want to get the  
8 documentation, but they've already filed a lawsuit without the  
9 documentation, and that's where the problem comes in, they just  
10 can't seem to file a lawsuit where they have accurate  
11 information.

12           So it's, first of all, they just don't fill it in.  
13 It's computer generated, so the person signing it doesn't even  
14 know their own gender. It says: He/she swears that this is  
15 true.

16           It's all form, very generic, the broader terms are  
17 used, the more vague, the more applicable it might be to more  
18 persons. And you don't actually have to spend any money on labor  
19 when you're doing a thousand complaints or 500 complaints a  
20 month. It's impossible to go and look at the documentation like  
21 other lawyers might, of prepare your case, you look at your --  
22 you examine your facts, you examine the law, you see what you  
23 have to prove the case. And that's how most lawyers operate  
24 before they ever even file a lawsuit.

25           The debt buyer lawyers are simply incapable of doing

1 that under the business model that they're operating under. So  
2 the answer is simple. And Washington -- it varies from creditor  
3 to creditor, but in terms of the debt buyers, it verifies with  
4 them as well. But primarily they have a very bare bones  
5 complaint: There is no information on the statute of  
6 limitations. They do not attach the terms and conditions. It's  
7 impossible to determine what -- if there's a choice of law on the  
8 statute of limitations. It's impossible to determine when the  
9 statute of limitations is being alleged to have begun or whether  
10 it's run. It's impossible to determine what late fees, interest,  
11 what's included.

12           And then what happens if a debtor happens to respond or  
13 if they don't, if it goes to default, but if they do respond,  
14 then it goes to summary judgment. Now they attach a whole series  
15 of confusing assignments with no affidavit supporting those  
16 assignments or the verification of those.

17           They come in and they have a huge hole because of their  
18 business model. You're buying the debt cheap because you don't  
19 have the documentation, because it's old debt. It's zombie debt.  
20 So since you don't have the documentation, you have a problem.  
21 How are you going to prove up your case?

22           Well, there's hearsay. But, oh, yeah, hearsay isn't  
23 allowed. So how are you going to press that? You try a business  
24 records, okay. Well, the problem there is there's no personal  
25 knowledge, so we're going to get into that later.

1           But that's the -- the gist of it is they don't have  
2 enough in the complaint and then they don't have enough in the  
3 other documents we're going to be talking about later.

4           MR. CARTER: Let me go to our two judges on the panel,  
5 Commissioners.

6           Commissioner Gargano, the ones that you see, are the  
7 complaints adequate?

8           MR. GARGANO: Well, I distinguish again between those  
9 that I see in court for the prove-up hearing and those that come  
10 through in the office. The prove-up hearing ones, we normally  
11 have an attorney present. Usually there is a witness there.  
12 Sometimes there is a waiver of a witness.

13           If it's based upon a writing, we want to see the  
14 writing. If it's not based upon a writing, we want evidence of  
15 what the transaction was, what was the obligation, how was there  
16 a default.

17           If there's an account-stated type of matter, we usually  
18 have someone with the hard copy of the account with the numbers  
19 there showing when the last payment was made. Testimony that no  
20 payments have been made since then. Testimony that the figures  
21 on the account are accurate and that's the amount owed.

22           Sometimes they will tell you that the parties have paid  
23 a certain amount, because I usually ask: Was there anything paid  
24 at all? And they'll say: Oh, yes, there were payments made.  
25 They have an account of what was paid as well. And then they



1 tell you when the communication stopped. Then they let you know  
2 what the balance is and that nothing's been paid on that. If  
3 there is an account stated.

4 If it was a contract usually they have a copy of a  
5 contract. Sometimes they have lost original documents. I don't  
6 know if that's a pattern, but sometimes I see a declaration of a  
7 lost original document and permission to use a copy of it, which  
8 we will usually grant that.

9 But usually there's some hard evidence in those prove-  
10 up hearings.

11 MR. CARTER: Let me ask you this. The principal focus  
12 here is in terms of what is filed as part of the complaint.

13 MR. GARGANO: Usually we will see the -- what's in the  
14 complaint, we'll usually see an obligation, a breach of the  
15 obligation, and an amount, bare bones. And we do see some of  
16 those forms, too. But usually there might be another page  
17 attached or a little paragraph that explains it a little bit  
18 better. But some of it's bare bones, in others we do see  
19 pleadings as well.

20 MR. CARTER: So most of the complaints that you see are  
21 more bare bones; is that what you're saying?

22 MR. GARGANO: There are a lot of bare bones ones, but  
23 we do see some allegations, as Harvey had indicated, the old type  
24 where they'll actually write it out, what occurred, what the  
25 breach was, what the amount is that's owing and attempts made to

1 collect even some -- or attempts made of payments that have been  
2 made.

3 MR. CARTER: If there was more provided in those  
4 initial filings of the complaint, would there be less need for  
5 the prove-up hearings that you --

6 MR. GARGANO: Well, we have a rule, though, for if it's  
7 an unlimited one, and these are when they're more than \$25,000,  
8 that they still have to come in for a prove-up hearing. So  
9 that's probably going to be there for a while. And some people  
10 don't agree with that rule, but we do have it as a rule.

11 MR. CARTER: Commissioner Surh, I understand you do  
12 more of the limited ones; is that correct?

13 MR. SURH: Yeah. Actually at this point I don't do any  
14 -- well, except for small claims, which is a whole different  
15 game. But in talking to our two staff attorneys and the judge  
16 who supervises them, in our court we take a uniform view that  
17 there is no holding in any California appellate case which says  
18 that a defendant admits all well-pleaded facts in a default  
19 situation. So our court, in addition to looking at the  
20 complaint, requires at the point of the request for a default  
21 judgment, the documents, the documentation.

22 I'm sure that that practice varies widely around the  
23 state. And there are probably some courts that will or would  
24 grant judgment based on the pleadings alone. I don't know if  
25 that's true. I'm assuming that that's true. But our court is a

1 stickler. And I understand that Alameda County is known as the  
2 stickler of the counties. So we kind of have this high-water  
3 mark.

4 And it's true that the pleadings are extremely  
5 variable, the form pleadings as are described by Mr. Moore.

6 MR. CARTER: Let me ask this question: Is there any  
7 support for jurisdictions adopting a requirement for form  
8 complaints? And what I mean by that, the complaint would have to  
9 have some of the things that have been mentioned and that are  
10 typically provided such as: the name of the original creditor;  
11 the amount owed; a breakdown by principal, interest, and fees;  
12 the date of last payment; the governing law; the cause of action;  
13 those kinds of things.

14 Is there any support for jurisdictions requiring that  
15 kind of a form complaint?

16 MS. HILLEBRAND: You're asking is that a good idea, to  
17 require that information in the complaint by form or otherwise?  
18 Yes.

19 MR. CARTER: Anybody else support it?

20 MR KINKLEY: Absolutely.

21 MS. HILLEBRAND: Yes.

22 MR KINKLEY: That's a great idea. It would solve --  
23 but it would be very difficult for the industry to do because  
24 then they would have to look at each file and sort out that  
25 information. And they say you can't always do that. I say if

1 you can't do it, don't bring it.

2 MR. MOORE: It depends on what information they're  
3 asking for.

4 MR KINKLEY: What he said.

5 MR. MOORE: If the information is original credit  
6 granter, charge-off date, balance owing at charge-off, and  
7 perhaps an account number which we have to redact by law these  
8 days, by the way. That's not difficult information to come up  
9 with, whether it's an original credit grantor or a debt buyer.

10 MR. CARTER: What about breaking out principal,  
11 interest, and fees?

12 MR. NEWBURGER: Tom, excuse me, how do you define your  
13 terms?

14 MR. MOORE: Yeah. What's principal?

15 MS. HILLEBRAND: Well, --

16 MR. NEWBURGER: The difficulty, though, is principal is  
17 an elusive term in a credit card account. Past due payments are  
18 capitalized, and the position of the banks, I think, and the  
19 accountants and the debt buyers pretty consistently is balance at  
20 charge-off is technically principal because it's all been -- it  
21 is rolled into the principal balance at that point and that's how  
22 the contracts are set up.

23 Now your answer is: Give us the charge-off balance  
24 which is the last amount that the bank billed, tell us what the  
25 interest is since then, any other fees that are being added in.

1 That should be 100-percent doable by any one in the debt buying  
2 world. If they can't do that, I'm wondering why they're suing.  
3 Because if you don't know the charge-off balance and don't know  
4 what you've added on since then, why are you in court?

5 MR KINKLEY: Well, Manny, if this was Joe's hardware  
6 store and they come into the court and they say: I want this  
7 much money. The judge says: Okay, how much was principal. What  
8 did they buy?

9 Well, they both a hammer. Okay.

10 How much is interest on that hammer?

11 Okay. How much is late fees. Those are important  
12 questions. You and I fundamentally agree on a lot of things  
13 about the way the industry should act. And we fundamentally  
14 disagree on some things. But one thing that I think we  
15 fundamentally disagree on is I don't think just because you do a  
16 lot of them in high volume you get a pass on the basics.

17 My consumers want to know what they actually owe. We  
18 keep talking about, well, after all, they owe the debt. That's  
19 not true. They owe perhaps some part of the debt, but when you  
20 get these credit cards there's all kinds of late -- I see late  
21 fees after the charge-off date. How does that work?

22 MR. MOORE: Mike, you're being unrealistic, because in  
23 the Fair Credit Billing Act --

24 MR KINKLEY: Is it unrealistic to --

25 MR. MOORE: Under the Fair Credit --

1 MR KINKLEY: -- require them to say what's owed?

2 MR. MOORE: Under the Fair Credit Billing Act you have  
3 60 days to dispute a charge on your account. If you don't  
4 dispute the charge in accordance with federal law, then why do  
5 you require a credit grantor to go all the way back to a zero  
6 balance and say: Okay. You bought a hammer on this day and we  
7 charged you \$2.50 in interest. And then you were late, so here's  
8 a \$29 charge, and walk us through five years of the account. I  
9 think that is so unrealistic and unreasonable.

10 The charge-off date and the charge-off balance is a  
11 federally-accepted amount. And if you want to hold me to a  
12 charge-off balance and say: You can sue on the charge-off  
13 balance, that's acknowledged by the Comptroller of Currency,  
14 that's acknowledged under federal banking regulations. That's  
15 all well and good and I can do that.

16 But if you want me to break out five years of charges  
17 and five years of interest and five years of late charges, you're  
18 asking too much of credit grantors.

19 MR KINKLEY: How about just after the charge-off date?  
20 What is the interest rate? How much is interest?

21 MR. MOORE: Well, I didn't say I disagreed with you on  
22 that.

23 MR. NEWBURGER: He's disputing the interest rate, Mike.  
24 But here's the thing. You know when I sued banks, which I did a  
25 lot until they all failed in the '80s, --

1 MR KINKLEY: Resolution Trust.

2 MR. NEWBURGER: Yeah. Well, then we filed with those  
3 guys.

4 We never hesitated to sue a bank for failing to honor  
5 an agreement to provide credit. If a bank made a loan commitment  
6 and didn't honor it, we represented a consumer, and we sued the  
7 bank over that failure to honor that commitment.

8 On the other side, and it really underpins all of these  
9 discussions. When the consumer doesn't pay, the bank has a right  
10 to enforce its contract.

11 And here's the problem: I'm not going to the FCBA  
12 argument, because I understand the other side of it is that  
13 that's really an obligation imposed on the banks to provide  
14 information at the time we dispute his rate, but what about the  
15 credit card agreements themselves? The contract between the  
16 consumer and the bank, which says if I dispute the charges I have  
17 to raise the dispute within 60 days.

18 And the answer is no one -- I mean we can argue about  
19 credit being addictive and what sort of credit-addictive economy  
20 we may have, but the consumer took the card, the consumer used  
21 the card, and the consumer accepted the terms of the contract.

22 And what you really have got to recognize is a really  
23 basic principle: Do we want consumer lending.

24 You can't have lending without repayment. You can't  
25 have repayment without enforcement. If there is no ability to

1 enforce and there's no repayment, consumers will have a fun time  
2 getting cars, houses, sending their kids to school, and we can do  
3 more harm to the banking industry in this country.

4 MR. CARTER: I want to give Mr. Wilcox an opportunity  
5 to weigh in. He's been trying for a while.

6 MR. WILCOX: One of the problems with this FCBA analogy  
7 is it just doesn't work. With the FCBA, what we're dealing with  
8 is a merchant that has an ongoing, continuing relationship with  
9 some consumer. So there's a monthly bill being sent to the  
10 consumer. If the consumer sees it, if the consumer has a dispute  
11 to that, sure, 60 days seems to be a reasonable period of time  
12 for them to dispute it.

13 But the scenario we're more commonly dealing with  
14 today, especially in the debt buyer situation is, a debt buyer is  
15 coming along five years later. The debt buyer is filing a  
16 lawsuit. The debt buyer's lawsuit has an account number that  
17 consumer has never seen before. The debt buyer has a name the  
18 consumer has never seen before. There is no reference to an  
19 original creditor or where this paper trail goes to.

20 So what does a consumer do? A consumer looks at their  
21 credit report, looks at the lawsuit, and sees two different  
22 account numbers and thinks: Maybe I'm the victim of identity  
23 theft, I'm not really sure.

24 So let me send in a letter, which I can do under the  
25 FDCPA and say: Please verify the debt. And there is where we



1 really have the problem, because what's the response many times?

2           The debt buyer that doesn't have any of the data simply  
3 sends back a letter saying: Yeah, we verified the debt and it's  
4 you, you owe it. That's the information, right? Because the  
5 Third Circuit says that's acceptable.

6           MR. RAY: That's not quite true because the letter that  
7 we're required to send, and that the FDCPA says you can also  
8 write us and ask for the name of the original creditor.

9           MR. WILCOX: That's correct. Thank you.

10           MR. RAY: As a practical matter, from a standpoint,  
11 every 30-day validation letter that goes out of our office will  
12 give the original creditor's name and state that it was assigned  
13 our client and it will give the redacted, now-redacted original  
14 account number. And I want to do that because if I don't do  
15 that, I get a call from a debtor, you know on those few occasions  
16 where they actually will respond to the letter as opposed to  
17 responding to the complaint. And what is this about?

18           Well, as a business person I don't want to take time  
19 and have staff people having to respond to those phone calls.  
20 I'd rather give them the information upfront.

21           MR. WILCOX: Absolutely.

22           MR. RAY: The same thing that goes with the complaints.  
23 I mean if a law firm or a collection agency is not provided that  
24 information upfront, I think they're doing themselves a  
25 disservice because they're going to spend a whole lot of time

1 saying: What is this, because I never did business with x, y, z,  
2 debt buyer. I mean I don't recognize --

3 MR. CARTER: So let me see if I hear some agreement --

4 MR. WILCOX: Well, here's the thing.

5 MR. CARTER: Go ahead.

6 MR. WILCOX: And that's great. And I agree with you  
7 and it's wonderful because I just -- I think we just went full  
8 circle and you answered the moderator's question which is:  
9 Wouldn't it better to just have a form that provided all the  
10 information which you claim so you're willing to give?

11 MR. CARTER: Which is where I was headed.

12 Let me see, I think I hear a consensus. And -- go  
13 ahead. Ms. Flory, did you want to make a comment.

14 MS. FLORY: I just want to say I think we all agree  
15 that having more information would be better. And, just to  
16 compare, there are different jurisdictions in California. In  
17 Fresno, for example, one of the attorneys that I work with there  
18 said that almost every time there is a collection suit on a  
19 medical bill, when she files the bill of particulars the case  
20 goes away.

21 So not every model is based on: We're actually going  
22 to be able to prove this case. I mean once in a while you  
23 wouldn't be able to get these cases dismissed so easily.

24 The other thing is the idea that every time there's a  
25 credit card dispute the person actually applied for the credit,

1 that's not true. And that's increasingly becoming a problem in  
2 dental offices and in other medical facilities where people are  
3 going in for some sort of consultation, and they either think  
4 they're setting up a finance plan with a medical provider or  
5 they're told: Oh, we'll just see if you're preapproved for this  
6 lap band, or something.

7           They don't actually get the services, they get a debt  
8 on a credit card that was opened for them when they didn't even  
9 entirely realize they applied for the credit card.

10           So it's not always: Oh, I went and bought these things  
11 and I enjoyed them and now I don't want to pay my bill.

12           We've had people who have been paid, charged \$500 for a  
13 surgery they never received. We've had people signed up under  
14 anesthesia for credit cards that that didn't want. I mean some  
15 of these, and in this case I don't think it's necessarily the  
16 bank that's the problem, but there are people out there who are  
17 fraudulently signing people up for products and then those people  
18 get collected on.

19           MS. COLEMAN: So do you believe some sort of a form  
20 complaint would help some of the problems that you've just  
21 commented on?

22           MS. FLORY: I think as Gail said, a form or at least  
23 this information you could do it either as a written complaint or  
24 -- a standard written complaint or a form, but there is  
25 information that's not always there. People can't always

1 identify who the service provider was or what the services were  
2 that they supposed got. So I think some of these things being  
3 required to be on there would get at some of these issues.

4 MR. GARGANO: It's definitely the better practice, I  
5 think that. And there's a list that probably everyone here could  
6 agree on. That's the basic -- the minimum. And I think --

7 MR. CARTER: We have and that's the point I'm going to  
8 try to make here. I think I hear a consensus that, but for the  
9 part about breaking out the principal, interest, and fees, there  
10 is general support here for form complaints, or at least  
11 jurisdictions adopting requirements that would require certain  
12 set things.

13 And let me go back to the list that I had mentioned  
14 when I asked the question originally. The original creditor, the  
15 amount of debt owed, and the date of the last payment, the  
16 governing law, and the cause of action.

17 And the only other thing that I mentioned in my list  
18 when we set it out was breaking it out by principal, interest,  
19 and fees. So --

20 MS. HILLEBRAND: I think --

21 MR. CARTER: -- setting that aside for a moment, do we  
22 have a general agreement on that.

23 MS. HILLEBRAND: Yeah, but I think if we went a little  
24 further, people were saying the redacted account number, the  
25 original account number is valuable.

1           And I also did not -- I heard a lot of disagreement  
2 about breakdown of things that happened before charge-off, but I  
3 didn't hear anyone saying there's anything wrong with saying:  
4 For the amount you are seeking after charge-off, how much of it  
5 is statutory, other types of post-charge-off interest, how much  
6 of it is other additional fees or charges post charge off, and  
7 how much is attorney's fees. So I would add those to the list.

8           MR. CARTER: So some think that the list of things in  
9 the form should be longer, but does everybody agree that at least  
10 --

11           MS. HILLEBRAND: We have agreement on that part, not  
12 about the fee charge.

13           MR. NEWBURGER: Keep in mind, though, from an FDCPA  
14 perspective, a collection lawyer who pleads a specific amount of  
15 attorney's fees will probably be sued under the FDCPA. And I can  
16 show you cases where lawyers pled generally and were sued under  
17 the FDCPA and cases where they plead specifically and were sued  
18 under the FDCPA.

19           So from the defense lawyer perspective, I'd love a rule  
20 that says you have to say one or the other because then the  
21 collection lawyers would at least know how they had to lay it out  
22 and that would be a good thing as well.

23           MR. CARTER: Let me ask one final question on this  
24 topic, then I'd like to move to our second topic.

25           Would this kind of a form complaint be appropriate for

1 both, let's say in California, the limited and unlimited suits?

2 MR. GARGANO: Absolutely. That shouldn't make a  
3 difference.

4 MR. MOORE: If we can agree to what the items were in  
5 the form.

6 MR. CARTER: Understood, but I think we have agreed on  
7 at least some of them, right?

8 MR. MOORE: We have agreed as to some, but not all.

9 MR. CARTER: Okay.

10 MS. COLEMAN: But I think we're kind of overlooking the  
11 process. Form complaints are drafted and authorized through the  
12 Judicial Council, correct? And so they're designed to meet the  
13 pleading requirements for certain causes of action.

14 And so, again, the federal oversight that says we're  
15 going to require this of state law complaints, I think there's  
16 going to be some bounce back against setting up a national  
17 standard. I mean it definitely doesn't comport with the  
18 requirements under California law about how those complaints are  
19 generated.

20 And I think the judges will agree that those form  
21 complaints actually satisfy the pleading requirements required by  
22 law under California law.

23 MR. SARGIS: And, Tom, I think you're putting some of  
24 the atoms together to form the nucleus of a consensus here. One  
25 thing that I was pleased to hear is people have kept it pretty

1 straightforward and simple. Because we've got the other extreme  
2 is, put this on the consumer side of the table, how much do you  
3 really want in this complaint that's a public record?

4 So I like the idea of the amount, the original  
5 creditor, and get that basic information out. And, as June  
6 pointed out, it may at the end of the day, if what the FTC can  
7 do, may not so much be a form as to say these are the five key  
8 data points or elements that you need to have in it. And then  
9 that way we aren't trying to figure out how do we make sure that  
10 California and Nevada and Massachusetts are all -- well, take  
11 Massachusetts out -- Connecticut are all covered.

12 MR KINKLEY: Wherever it plays on the bona fide error.  
13 If the FTC comes out and says: Hey, if you're going to add fees  
14 and costs after charge-off, you're going to add late fees, you're  
15 going to add after charge-off, you're going to add interest rates  
16 of 30 percent when it shouldn't be, you know you're running afoul  
17 of 15 USC 1692(a)(1) and Part (E) and it's not going to be bona  
18 fide error because the FTC said you were supposed to figure that  
19 out before you filed the suit.

20 MR. CARTER: Harvey, last worked. Then we're going to  
21 go onto the next topic.

22 MR. MOORE: There's a different way to deal with this.  
23 and I think there's a way to deal with the federal versus the  
24 state issue. The federal is the FDCPA requires us to send out an  
25 initial letter. And I think the answer to all of this is let's

1 decide what needs to go in that initial letter. Let's decide  
2 what we notify the consumer about in privacy, not as a matter of  
3 public record, but in privacy: We have been assigned your debt  
4 for collection. The original credit grantor was x. The date of  
5 charge-off was y. The balance of charge-off is z. It has been  
6 assigned to ABC debt buyer, and I am their attorney.

7           If you get that letter and you don't send me anything  
8 back, then under federal law I'm allowed to assume that the debt  
9 is valid. When I feel my complaint I shouldn't have to put  
10 everything in because that's a state issue. State pleadings are  
11 governed by state law.

12           I have no problem dealing with the FDCPA and providing  
13 you with whatever information I am allowed to under federal law.  
14 But as far as state pleadings, I think it is inappropriate for  
15 the federal government to sit there and say: For collection  
16 cases, you have a different standard of pleading than you have  
17 for any other case that you may file in that state.

18           I think it is trying to trump states' rights.

19           MR. CARTER: We need to move onto the next topic, which  
20 is similar. Okay. So we've been talking about the things that  
21 you recite in the complaint. Now I want to talk about the  
22 substantiation that you attach to a complaint when it's initially  
23 filed.

24           And this is for anybody; What kinds of requirements do  
25 the jurisdiction that you're familiar with have in terms of



1 attachments?

2 MR. GARGANO: Well, in San Francisco I think as  
3 Commissioner Surh pointed out, in Alameda we have pretty high  
4 standards with regard to triers of fact getting evidence  
5 presented to them to establish what is in the complaint.

6 So we would want -- if it's based upon a writing, we  
7 would want to see what the writing is. We would want a  
8 declaration if there's not going to be a prove-up hearing. A  
9 declaration by someone in the know that knows exactly when the  
10 obligation began, how much money was owing, what the account is.  
11 And we would probably want copies of the account stated. We need  
12 some hard evidence of that.

13 MR. CARTER: Would you like to see those things filed  
14 and attached?

15 MR. GARGANO: Not necessarily filed. But if it's going  
16 to be those defaults where we handle them outside of a court  
17 hearing, yes, file them. And, if we don't get them, we could  
18 probably connect up with the attorney and tell him we want to see  
19 copies of these things.

20 If it's at a prove-up hearing, we want them to be  
21 brought and they could introduce them. And then we give them  
22 right back. We don't clog up the files with them.

23 MR. CARTER: Let's talk about substantiation attached  
24 to the complaint as filed. What would you like to see?

25 MR. GARGANO: At least a declaration, I think, and then

1 some times a declaration could have as an attachment, an Exhibit  
2 A or B, just giving us an account or a copy of a note or a copy  
3 of an agreement. At least that at the bare minimum.

4 And then a declaration that the person that is giving  
5 the declaration was familiar with the account and knew that they  
6 didn't get paid and this amount is owing. That's bare bones, but  
7 it would be enough for me to establish that there was an  
8 obligation, there was a breach of the obligation and what the  
9 amount is.

10 MR. CARTER: Anybody else?

11 MS. COLEMAN: So California law requires that if you're  
12 going to plead a contract cause of action, you either need to  
13 attach the contract or you need to state the relevant terms of  
14 the contract. That's what California requires. So whether it's  
15 an attachment or not-- and to require an attachment would be to  
16 change California law.

17 MS. HILLEBRAND: I appreciate the Commissioner  
18 describing this as bare bones, because I think in the debt buyer  
19 contact, even if there is a declaration it's not going to be from  
20 the person who has the personal knowledge that this debt was  
21 owed, it's going to be, we bought it and here's our little  
22 spreadsheet.

23 MR. GARGANO: Well, we've had cases, I mean where I  
24 recall, where people have bought the disk, but they bring in the  
25 creditor.

1 MS. HILLEBRAND: I mean I agree with you, I think it's  
2 essential, but I think we can't assume it's going to be happening  
3 nationwide.

4 And I want to take issue with this idea that as long as  
5 we've written you a letter we have to put the information in the  
6 complaint or provide it in some other way to the Court and to the  
7 individual.

8 This morning the process servers told us they often  
9 will go out to the address that has been -- that all the letters  
10 have gone to, and the person hasn't lived there for several  
11 years. So when we're talking about the information in the  
12 complaint and in the court process, the fact that it's been sent  
13 privately to what might or might not be the right address isn't  
14 enough.

15 MR KINKLEY: Now maybe the debt buyers have it  
16 different now. But the way it works now is you get a declaration  
17 that's supposed to get past the hearsay rule. It's supposed to  
18 be a business records exception, but it's from the debt buyer's  
19 employee, not Citibank, any of the brokers or any of the stream  
20 of accounts.

21 I've got a list of six or seven cases, probably 20 of  
22 them, that I'll put into the record later, but I'd like to read  
23 you one thing that an appellate judge in Ohio said about Midland  
24 -- sorry, picking on Midland again. But it said, "It is unclear  
25 to this Court why such a patently false affidavit would be the

1 standard form used at a business that specializes in the legal  
2 ramification of debt collection. Midland, MCM, JBR could easily  
3 prepare a form affidavit that achieved the same goals without  
4 being misleading by reflecting the truth, plain and simple.  
5 Rather than basing the affidavit on the false personal knowledge,  
6 they could base it on the accuracy of the records kept and the  
7 accuracy of the debt."

8           What you get is a conclusory affidavit from somebody at  
9 Unifund at Midland who knows nothing about the accounts, they  
10 know nothing about the recordkeeping practices of the original  
11 creditor or anybody who had it. They have nothing about access  
12 to those records, how they're controlled. But they come in and  
13 say: On personal knowledge, this debt is owed.

14           And then they oftentimes don't even attach the actual  
15 records. And when they do, a lot of times it's a facsimile.  
16 They're recreated later. They're recreated just for litigation.

17           They're trying to blow by judges the fact that they  
18 don't have any evidence, the fact that everything that they have  
19 to say is hearsay. And they try to bring it as a business  
20 records exception, except they meet none of the requirements of a  
21 business records exception. Nor do they meet the requirements of  
22 foundation or authentication.

23           A great case, that provides us all a blueprint for what  
24 should be included, if you want to bring in a business record, is  
25 the *Vinhee* case, V-i-n-h-e-e, 336 BR 437. It's a Bankruptcy

1 Appellate Panel decision out of the Ninth Circuit.

2           That judge, *sua sponte*, rejected American Express'  
3 attempt to obtain a default judgment because the records were  
4 insufficient. And she laid out a 14-point test that I think is  
5 very good and that all judges should take a look at and use as  
6 their blue print is whether the record is truly a business  
7 records affidavit.

8           So what they're trying to do is blow by, as this judge  
9 says, with a false and misleading affidavit that when you look at  
10 it on its face, it looks like somebody knows something, and the  
11 records mean something, but the slightest inquiry tells you they  
12 don't.

13           And what we found sometimes, like the WaMu accounts,  
14 the person who is doing all the affidavits wasn't even signing  
15 them even though her signature was notarized. We see false  
16 affidavits all the time. People -- they have a department. What  
17 do they need? They need a document so they can blow it be judge.  
18 So, hey, they need a document, we'll sign a document. It is --  
19 who will sign it? It doesn't really matter, we'll sign  
20 somebody's name. And they notarize it.

21           I've got the deposition right here if you'd like to  
22 read it.

23           Case after case, the *Palisades v. Gonzalez*, New York  
24 2004, New York slip opinion, 520, '15. Same thing, it's not  
25 business records. It's his affidavit. It's not based on

1 personal knowledge.

2 *Midland v. Brent*, 2009 WestLaw 243 7243, lack of  
3 documentation as to Northern District --

4 MR. MOORE: Mike, since you like Ohio cases, why don't  
5 you talk about *American Express v. Silverman*, where the Ohio  
6 Court of Appeals said that Silverman's required to dispute any  
7 charges on his account within 60 days of the billing statement,  
8 and he failed to do so. They didn't have to produce all those  
9 charges. They didn't need to make those levels of proof because  
10 he was contractually bound to raise his dispute.

11 You like Ohio cases, that's a good one. You know,  
12 what's wrong with hearsay. It is every lawyer's job to prove his  
13 her client's case at the least cost with the greatest efficiency  
14 and with the evidence that is reasonably available. And there is  
15 no lawyer in this room with any litigation experience who has not  
16 at some point attempted to prove a case or part of it with what  
17 you knew was less-than-adequate evidence. And it's what we do as  
18 attorneys, and there's not a darn thing wrong with it.

19 Trying to get hearsay in is what every trial lawyer  
20 does when it's good hearsay. I used to have a law professor who  
21 had a sign with a three-judge panel arguing and it says: Yeah,  
22 it's hearsay, but it's good hearsay. And that's what we do as  
23 lawyers.

24 MR KINKLEY: The problem is a false affidavit, making  
25 it appear not to be hearsay, making it appear to be an exception

1 to hearsay.

2 MR. MOORE: You know, Mike, I'll take it one step  
3 further --

4 (Simultaneous talking.)

5 MR. MOORE: In California -- you can cite all the cases  
6 you want, but let's talk reality. In California the statute says  
7 that a physical manifestation of computer data is not only not  
8 hearsay, it is presumed to be reliable. And if you want to  
9 attack physical manifestations of computer data, such as monthly  
10 billing statements -- because that's what they really are -- they  
11 are not technically hearsay business records.

12 MR KINKLEY: You know as well as I do the billing  
13 statements attached are charge off --

14 MR. MOORE: It is -- sir, --

15 MR KINKLEY: -- late fee -- late fee, interest --

16 MR. MOORE: Let me finish.

17 MR KINKLEY: -- no charge off --

18 MR. MOORE: Under California law, those billing  
19 statements are presumed to be reliable and the burden is on you  
20 to come back and prove their unreliability.

21 MR KINKLEY: So this poor consumer who can't afford a  
22 lawyer, can't pay their debt, is supposed to come in and play  
23 cute lawyer tricks?

24 MR. MOORE: The poor consumer that got the monthly  
25 statement month in and month out, who bought the TV, who was

1 charged a reasonable rate of interest over time, who failed to  
2 pay the charge, who, if they came into court and I could put them  
3 on the stand, would say: Yes, I bought the TV. Yes, I got the  
4 billing statements, but instead chooses not to answer. And,  
5 therefore, I am required to prove a higher standard of proof at  
6 default than I am at trial.

7           That poor consumer, I -- there are a lot of people that  
8 can't pay bills for a number of reasons. But you have to  
9 understand that for the most part the people that we sue got the  
10 benefit of the bargain.

11           MR KINKLEY: Or what part of it. You're suing for more  
12 than they got the benefit of. And I just want to tell --

13           MR. MOORE: Because they signed a contract that said  
14 they would pay interest.

15           MR. GARGANO: I have one other point to raise as a  
16 Judicial Officer, the gatekeeper role. We discussed earlier the  
17 statute of limitations. Now something like hearsay, is that the  
18 judicial officer's role to make a hearsay objection? We're not  
19 the defendant. We have to make sure things are done legally, but  
20 I don't know if it's our role to raise hearsay objections when  
21 there's no defendant there to do that. Or is that one of those  
22 areas where we should object because -- there's sort of a divided  
23 look there. We're gatekeepers, yes. But is it our role when  
24 there's no other side there to raise every possible defense that  
25 could be raised.



1 (Simultaneous talking.)

2 MR. CARTER: Wait, wait. Okay. Obviously you all want  
3 to talk about my third topic, so we'll just roll with it. Mr.  
4 Sargis, go ahead.

5 MR. SARGIS: I was just going to say with respect to  
6 the judge's role, I thought that the classic response to that is:  
7 The evidence has not been objected to, it comes in, and the court  
8 will give it the due weight it deserves. Which is -- as I  
9 understand, and you know in the court, the judge-speak is: Yeah,  
10 I'm going to tell you whether this is worth anything or not worth  
11 anything. It's coming in, but it's not taken as a the gospel  
12 truth. I'm going to look at it.

13 MR. CARTER: Does that makes sense to you, Commissioner  
14 Surh?

15 MR. SURH: Well, I'll tell you, in our court, if we're  
16 talking about default situations where you're presenting it on  
17 documents, if it is clearly hearsay. If you're presenting a  
18 business record and it's not properly authenticated, it'll be  
19 sent back. You won't get your judgment.

20 MR. SARGIS: That's all I ask.

21 MR. ARONS: I think what Hank's talking about, I don't  
22 think he's attacking directly the accuracy of the information.  
23 He's saying what debt buyers are doing is they're submitting  
24 fraudulent affidavits from someone who has no knowledge claiming  
25 they have knowledge, and they may not even be the person who name

1 appears on the affidavit.

2           Now whether or not a record can come in is a lot  
3 different than whether or not something has been fraudulently  
4 submitted. And I think if we were to talk about burdens of  
5 proof, I think the court is free to infer from the fact that a  
6 federal record is submitted, that an accurate record would not  
7 support the plaintiff's case.

8           MR. CARTER: Here's my question: Should the business  
9 records of an original creditor be treated as the business  
10 records of a subsequent purchaser.

11           MR. ARONS: Again, I don't do debt buyer work, but it's  
12 my understanding they don't have the records of the original  
13 creditors.

14           MR. MOORE: They actually do. In many cases you can  
15 get copies of the actual monthly billing statements. You can get  
16 copies of the application. You can get copies of the terms and  
17 conditions. In some cases you can even get copies of the  
18 collection notice.

19           MR. ARONS: Well, that's a much different situation  
20 than looking at the third version of a spreadsheet that a  
21 subsequent debt buyer has.

22           MR KINKLEY: You have to go back to the basic of  
23 evidence rules. It's very, very simple. The reason an exception  
24 to the hearsay rule exists under the business records label is  
25 this: It is so inherently reliable -- the information is so

1 inherently reliable it needs no cross-examination.

2 MR. MOORE: But, Mike, under the federal --

3 MR KINKLEY: Let me just finish this point because it's  
4 an evidentiary point. I'll start at the beginning. Let's follow  
5 this recipe. This recipe has been around for a long time, about  
6 evidence makes judgments. And we're getting judgments without  
7 evidence. And if it's not inherently reliable, it shouldn't be  
8 an exception. And it's not inherently reliable because it's  
9 prepared solely for litigation in the interests of the debt  
10 buyer.

11 The records that were kept by the original creditor, if  
12 you brought something from the original creditor, said: Here's  
13 our computer system. Here it is. We have access. Here's how we  
14 track changes. All the things *Vinhee* requires. And then say:  
15 Well, that's inherently reliable, because they're doing at the  
16 time there wasn't a dispute.

17 Now you come back later, somebody is in litigation,  
18 buying it for litigation and makes up stuff, big difference.

19 MR. MOORE: But, Mike, there is case law that  
20 specifically says that in debt purchase cases, the business  
21 records of the original credit grantor become the business  
22 records of the debt buyers if you can establish how those records  
23 were transferred.

24 MR. SARGIS: Because I think that's the answer to  
25 Paul's question, --

1 MR. MOORE: That's correct.

2 MR. SARGIS: -- is chain of custody. Because if you  
3 start with the original creditor's business records, then there's  
4 the acquisition of the debt by the purchaser, the business  
5 records go there, it's maintained. For example, you've got  
6 Washington Mutual that's become part of Chase, if I've got my  
7 institutions correct.

8 MR KINKLEY: Every Washington Mutual account is based  
9 on a fraudulent affidavit --

10 MR. SARGIS: Well, put that aside. I don't think  
11 anybody's going to say that when --

12 MR KINKLEY: Seriously.

13 MR. SARGIS: -- Chase acquired Washington Mutual's  
14 business records, all of a sudden they just as a matter of law  
15 disappear and no one could ever rely upon them then. Inside I  
16 think you got -- again, it's the chain on custody to say here's  
17 where we got them from. We got it from this person that had  
18 maintained them there.

19 MS. HILLEBRAND: You're talking about the real records,  
20 not the kind of let's-construct-them-after-the-fact records.  
21 That's a fundamentally different thing.

22 (Simultaneous talking.)

23 MR. NEWBURGER: What if you're a debt buyer who has  
24 those records. You've got copies of original account statements.  
25 You've got billing payment history. You've gotten that from the

1 original issuer. Because let's say you're a debt buyer who tends  
2 to buy fresh charge-offs, which means you possibly have much  
3 greater access to that. How are you any different,  
4 fundamentally, from Chase acquiring WaMu's records or from Bank  
5 of America's acquiring MBNA's records? Are we going to say Bank  
6 of America cannot enforce its debts because the records were  
7 created by MBNA?

8 MS. HILLEBRAND: I'm worried about when you're debt  
9 buyer number 3 and all you have is a spreadsheet and,  
10 nonetheless, you are attempting to say this is owed to me because  
11 somebody who I bought it from, who didn't show me any  
12 documentation, told me it was owed to the person who they bought  
13 it from.

14 MS. COLEMAN: But those business records include  
15 electronic data. And so if that electronic data is passed from  
16 debt buyer -- from creditor to debt buyer one to debt buyer two,  
17 it doesn't change their accuracy. I mean just because they're  
18 electronic, --

19 MS. HILLEBRAND: If it's original --

20 MS. COLEMAN: -- instead of paper.

21 MS. HILLEBRAND: -- unauthorized data as opposed to if  
22 it's altered and remixed? Yes.

23 MR. GARGANO: Well, I think there would have to be an  
24 inquiry, though, because I think Mike here had said if they're  
25 just fabricated by the latest person that has the debt, the

1 judicial officer doesn't know that, if it's a prove-up hearing.  
2 That must be our duty to ask how long have you had these records,  
3 and I don't know if we always do that, to be quite honest.

4 MR KINKLEY: They're on the face. They're on the face.  
5 It goes like this: Unifunds, Kim Kenny, Kunkle for a bunch of  
6 companies, even WaMu, say, -- and Midland, I forgot who the guy  
7 was -- I won't pick on Midland anymore -- they say: I have  
8 personal knowledge that this is da-da-da-da-da.

9 All they do is sit in a room all day signing thousands  
10 and thousands of affidavits. They don't check records, they  
11 don't have any records. They don't know anything about Citibank,  
12 Chase, WaMu, Providian. It's gone through all those banks. They  
13 have no idea how any of those records were kept, but they come  
14 tell you: I know the business records of all of those people and  
15 you should rely on these records that I'm now bringing to you.

16 I'm not objecting that these records can't be  
17 introduced, they just have to do it with the basics that we all  
18 learned in the rules of evidence. You don't change the rules of  
19 evidence just because they're filing a lot of cases, just because  
20 it's expedient. And that's what we're talking about here.

21 They make money by expediency. And we've got to avoid  
22 the seductive nature of saying: We've got to clear our desks,  
23 we've got to move these cases off our desks, we've got to keep  
24 the flow going. No, we don't.

25 They have to come in there like a real lawyer and a

1 real plaintiff and say: I've investigated this. This is the  
2 fact. And come in with real affidavits that meet the rules of  
3 evidence that have been around for hundreds of years --

4 MR. GARGANO: Now I dealt with a case just yesterday it  
5 was a woman that had been involved with her company for like 35  
6 years. She had all of the old books with her and all, I mean  
7 that's totally different from what you're saying you've  
8 experienced. And we as judicial officers take each case as they  
9 come before us. We don't really -- you know, this person  
10 happened to have all the evidence here. All the numbers were in  
11 order. It was a joy to go ahead. We had the right evidence.

12 And we're not on an agenda. I'm not searching out to  
13 get debt buyers or to put them through a heavier standard, or  
14 whatever. All I want to know is that whoever is presenting the  
15 case has evidence that's going to be admissible that we could  
16 rely on, that's accurate, and --

17 MR. CARTER: I'm going to jump in now.

18 MR. GARGANO: Yeah.

19 MR. CARTER: I'm going to follow up on something Ms.  
20 Coleman said. The question is: Have technological advances made  
21 it feasible for debt buyers to establish a debt's chain of title?

22 MR. NEWBURGER: I'm not seeing any evidence they  
23 haven't, Tom. Other than cases where there is identity theft,  
24 fraud, or forgery alleged, in virtually every other instance  
25 where I get hired to defend a case and we go in and we dig, turns

1 out the person who's asserting the claim really established the  
2 account, the account really existed, that the credit was  
3 extended, that the billing statements were sent.

4           And what it is, it's a function of cost. You know,  
5 when I was a consumer lawyer and I sued a car dealer, I might not  
6 spend the money to buy an expert report at the time I filed the  
7 suit because I knew that through discovery I could probably prove  
8 my case out of the mouth of the defendant.

9           And the same thing seems to be true here. If there's  
10 not a forgery, fraud, or I.D. theft, what I know is virtually  
11 every time I look at one of these, what I find is the numbers are  
12 right, the person owes the money, and it's pretty consistently  
13 accurate. And if that's true and we can see that across the  
14 board, then the answer to your question should be yes.

15           MR. CARTER: Okay. Well, I want to make sure you're  
16 answering my question. The debt's owed, but my question is: Can  
17 you prove up a chain of title that it's owed to the person that's  
18 in the courtroom today asking that it be paid?

19           MR. RAY: I think if I can address that in terms of our  
20 getting defaults and so forth, I mean usually that's something  
21 that the courts require of us. The gatekeepers here, they look  
22 at that, and we have to have an affidavit that comes in, says  
23 here's a copy of the bill of sale and it says I own this debt.  
24 And not to mention the fact that they have alleged that in the  
25 complaint, and you've made allegations in the complaint.



1           And then where's the responsibility of the debtor-  
2 consumer out there who's had telephone calls, who's had letters  
3 written to them. A lawsuit, they've been properly served with  
4 lawsuit, and then they still fail to respond to the lawsuit. I  
5 mean they've had multiple, multiple chances to dispute this debt  
6 and request additional documentation.

7           MR. CARTER: Question to our judges then: Would it be  
8 helpful to require that chain of title be attached to the  
9 original complaint?

10          MR. GARGANO: Well, I mean you talk about better  
11 practice, I mean sure, if you could do -- I don't know that it  
12 would be essential. I think it would be certainly helpful, but  
13 whether you would require that, I don't know, as long as we would  
14 at some point have that before us. Probably a better practice if  
15 you could get it and do it. Whether it would be mandatory --  
16 again, I don't know if that would be mandatory.

17          (Simultaneous talking.)

18          MR. SURH: I wouldn't welcome a lot of documentation  
19 with the complaint. It just would create far bigger files than  
20 necessary. I'm okay with the way it works now, with pleading and  
21 with minimal documentation or none, and then if it comes to a  
22 request for a judgment, then you produce your chain, and that's  
23 fine.

24          MR. CARTER: Okay. Mr. Ray.

25          MR. RAY: The plaintiff established a prima facie case

1 that they own the debt. The declarations all say: We own this  
2 debt. We've purchased it.

3 MR. CARTER: Okay. Well, that's --

4 MR. RAY: And it is the obligation then of the  
5 defendant-debtor to come back in and contest that and says:  
6 Well, I don't believe you do own the debt, and so forth. And  
7 then at some point in time you can produce the evidence of  
8 ownership or the chain of title.

9 MR KINKLEY: That's not the affidavit. The affidavit  
10 says: Attached is a copy of a bill of sale of all of these debts  
11 and a list, as attachment B, of all of the debts, but it's not  
12 attached to the affidavit.

13 MR. MOORE: That's not true.

14 MR KINKLEY: I've got case after case --

15 MR. MOORE: I don't know what goes on in Washington,  
16 but we don't do that in California, sir.

17 MR KINKLEY: I've seen it in many jurisdictions --

18 MR. NEWBURGER: In deference to Mike, yeah, it does go  
19 on in a number of states where the bill of sale comes without the  
20 exhibit, but it's a privacy issue. Mike, I agree with you, that  
21 is done very often, but it's done because what is attached to the  
22 bill of sale, as Exhibit A, is a spreadsheet containing massive  
23 amounts of nonpublic consumer data.

24 And what you could do is, if you had to, you could  
25 extract the one line of the spreadsheet and attach a redacted

1 Exhibit A, but you'd have to double redact it because you'd have  
2 to redact the exhibit, then you have to redact the line of data  
3 pertaining to the particular consumer. And by the time you've  
4 done all that, you've got nothing any more meaningful left  
5 attached to the complaint --

6 MR KINKLEY: We file stuff like that all the time. You  
7 can file it redacted. There is nothing, so it is nothing. The  
8 affidavit says attached is proof that we have the debt, see the  
9 list of accounts, there is no list of accounts. So what have you  
10 said? You've said nothing. But you can file it in camera with  
11 that one line and let the judge see it and redact --

12 MR. NEWBURGER: Would you like a 300-page exhibit  
13 attached --

14 MR KINKLEY: You don't need a 300 page, you can --

15 MR. NEWBURGER: -- to every filing in camera with every  
16 suit?

17 MR KINKLEY: You can take out that one line and show  
18 that judge, because what happens, and the reason they don't, is  
19 because the numbers don't match what's on the complaints  
20 oftentimes.

21 MR. MOORE: Not true.

22 MR KINKLEY: I'm not making this up.

23 MR. MAURER: I just want to insert a concern beyond  
24 like perfectly authenticated business records, because we're  
25 making a record with some very good gatekeeper judges here, but

1 in California there's no requirement that any judge review a  
2 clerk's judgment. And you can get a clerk's judgment if what you  
3 are seeking can be determined simply by math.

4 So a credit card statement, medical bills, anything  
5 where there was some kind of a contract and a list of charges,  
6 you can get a clerk's judgment. And no judge will ever review  
7 the papers, simply the clerk.

8 And I've seen declarations in support of default  
9 judgments that were granted that said: My name is Scott Maurer.  
10 this guy, Mike Kinkley, opened a book account with me, and after  
11 considering all the credits and debits, he owes me \$10,000,  
12 period. Nothing more than that, no documents whatsoever. And,  
13 by the way there was never an agreement.

14 And the example that I'm thinking of is there are these  
15 consumers who get their cars towed and then the company wants to  
16 charge \$3,000 for the towing and storage of some consumer's car.  
17 That's not based on a contract. In California you can get \$600  
18 in attorney's fees added onto your judgment if you claim that  
19 it's a book account based on a contract. So they did that. They  
20 put that in their declarations, which are objectively false. And  
21 they collected, no doubt, tens of thousands of dollars. And all  
22 those judgments essentially are invalid because a clerk can't  
23 determine whether someone has a valid deficiency claim or not.  
24 That has to go to the judge. The clerk can only add numbers up  
25 and down.

1           But how does the judge know that the clerk is being  
2 given a declaration based on a deficiency claim if the plaintiff  
3 doesn't reveal that they're seeking something that's not just a  
4 promissory note or a book account? They don't. So there's no  
5 judicial review and there's no way that's even going to be  
6 exposed unless the consumer goes to a lawyer who figures it out.

7           And I brought that case to my local DA and as far as I  
8 know nothing ever happened with it. But they're getting money  
9 and they're collecting money from consumers that they're not  
10 entitled to. They're using objectively false statements and  
11 declarations. And judges are never even seeing it.

12           MR. CARTER: I got a couple of audience questions that  
13 are actually a pretty insightful.

14           The question is: How does the information flow from  
15 the original creditor to the first, second, and third buyer, and  
16 so forth? How does it flow? Is it a standard flow? Does it  
17 vary? Is it paper? Is it electronic? How does it work?

18           MR. NAVES: Again, I'm going to preface my remarks with  
19 I haven't been there that long, --

20           (Laughter.)

21           MR. NAVES: -- but my understanding is it varies. It  
22 varies depending on the issuer. It varies upon a lot of  
23 different factors, so I don't know there's a one-size fits all  
24 and how it flows. If there were, it would certainly be a good  
25 thing, I would imagine.

1 MR. CARTER: Mr. Newburger, I know you know a lot about  
2 this, why don't you give me answer?

3 MR. NEWBURGER: It does vary, but there's a tremendous  
4 amount of electronic data that can flow. Certainly with the  
5 initial purchase with what Mike and I are talking about as the  
6 exhibit to the bill of sale come with these various data fields  
7 that we're talking about that carry the critical data on who the  
8 person is, the Social, the date of birth, the charge-off date,  
9 the account balance, et cetera. Some of my clients will get  
10 automatically get charge-off statements, so they've got at least  
11 the last billing statement from the bank.

12 Some of them sometimes get substantially more. I find  
13 in medical collections, the clients I've represented get  
14 tremendous amounts of data. With auto loan files they may get  
15 complete auto loan files at the time. It's imaged, obviously,  
16 but it's there.

17 MR. CARTER: Is it pretty much all electronic these  
18 days or are people dumping boxes?

19 MR. NEWBURGER: I recently visited a client, while  
20 we're talking about this, they actually had paper, they actually  
21 had boxes of paper on some of the accounts they had --

22 MR KINKLEY: Well, that's Texas, Manny.

23 MR. NEWBURGER: Actually it wasn't. But don't forget,  
24 Tom, I practice in a state that was founded by people who didn't  
25 pay their bills. Remember, "Gone to Texas" meant you fled your

1 creditors.

2           So the answer is it varies. But I think what we're  
3 seeing is certainly more and more electronic records. The banks  
4 have been talking to some people about trying to essentially  
5 warehouse electronic data where you'd have the ability to go out  
6 and have sort of a central storehouse, for debt purchasers, where  
7 you could go in and access tremendous amounts of the account data  
8 at once.

9           My criticism is normally leveled at the banks. I've  
10 not been shy about this. I don't like the way the banks have  
11 done this.

12           I had an exchange with a lawyer some years ago who was  
13 inhouse at a bank who had observed the two-year document  
14 retention policy under Reg. Z. And I said, "Well, if it's two  
15 years how come you guys always say you don't have the documents  
16 when I ask for them?"

17           And he wrote back, he says: We have to keep them it  
18 doesn't mean we have to make them easy to find.

19           And so the real culprit here is ultimately the banks  
20 and if what we're talking about should the federal government  
21 require the banks to transfer certain amounts of data at the time  
22 of the sale, I think that would be cool. Should the federal  
23 government require more than a two-year document retention  
24 policy, given the low cost of maintaining electronic records? I  
25 think that would be cool.

1 I can't imagine the consumer lawyers over there would  
2 disagree with either of those propositions.

3 MR KINKLEY: I agree a hundred percent and two years  
4 sounds like a wonderful period for statute of limits, because  
5 that's the records they have.

6 (Laughter.)

7 MR. CARTER: That was the last discussion.

8 MR. SARGIS: And building on Manny's comments.

9 MR. CARTER: Go ahead.

10 MR. SARGIS: It really pushes it back to something  
11 we've discussed several times: Which is the right level, at  
12 where you really need to get the right people, doing the right  
13 thing?

14 And I remember about 10, 12 years ago an agency client  
15 that was just getting into debt buying, was talking with a major  
16 bank about buying part of the debt, and the bank says: We're  
17 just going to destroy all the records when we give them to you.

18 And so then we had to have a discussion with the bank  
19 representative, of: You do that, you render this stuff virtually  
20 worthless for this client, to go through it.

21 So, again, for as different as many of our opinions are  
22 sitting here, we're all kind of again coming to a same consensus  
23 of it's the debt buyer's bill of rights for financial information  
24 when they buy this stuff, so we know it all flows through the  
25 system.



1           MR. NEWBURGER: And if the bank regulators did as good  
2 a job as the Federal Trade Commission does at regulating  
3 industries, we wouldn't be discussing this topic.

4           MR. CARTER: I got ten minutes left. We've been  
5 talking primarily about what should be filed, and so forth. And  
6 we got off on the business records. But I'd like to ask this  
7 question, and I know we've heard a little bit about this in  
8 earlier discussions today from our judges: What should the  
9 standard be before a default judgment is rendered?

10           So let me pitch it to the judges. I want to hear more  
11 about these proves ups.

12           MR. GARGANO: I don't know that they say the standard  
13 should be higher, but it should be what is just. We have to have  
14 due process here. We have to have prove-up before we make a  
15 decision. We have to have enough facts.

16           It wouldn't be any higher than it would be anywhere  
17 else. But certainly if you have a prove-up hearing in court, we  
18 do need the evidence that what the plaintiff is claiming is true  
19 and the amounts that they're claiming are true. And we need  
20 evidence for that, as we would in a two-month trial from general  
21 law firms.

22           MR. CARTER: Yeah. But in a lot of jurisdictions when  
23 the defendant no-shows, they don't have prove-ups, you don't have  
24 witnesses come in, they just hammer it down, and we're gone. So  
25 do you think that would be wrong?

1 MR. GARGANO: Well, I mean this is so alien to the  
2 culture that I was brought up in in the court Here. If we have a  
3 default judgment, we have it proved up. And that's just not in  
4 collection cases, but any case. And we deal with all sorts of  
5 cases on the default calendar.

6 And we don't make federal cases out of them. Sometimes  
7 people can do an offer of proof. We don't have people on the  
8 witness stand for hours, but we want the basics there, sort of  
9 bare bones, but we need to have some basic things there.

10 As a trier of fact, we need to have -- their action has  
11 to be proved up. You don't just file a complaint and get your  
12 money. You have to come in and prove that what you claim in the  
13 complaint occurred, that there was a breach, that there's money  
14 owed and we want to know how much.

15 And we have to make sure as gatekeepers that you only  
16 get what you asked for. And that's why certainly the amount  
17 should always be on the complaint. You pray for a certain amount  
18 and you can't get more than that.

19 MR. CARTER: Ms. Hillebrand, do you think that would be  
20 good in all jurisdictions, that kind of prove up?

21 MS. HILLEBRAND: Yes, I do. And I think when you asked  
22 the question, should it be stronger than it is now, the  
23 Commissioner's answering: We're already doing it right in San  
24 Francisco. But what we're seeing from around the country is it's  
25 not enough. And it can't be enough if we know that somewhere

1 around 95 percent of those that go to judgment go back default.  
2 If we know it's 95 percent, there's got to be more than you pled  
3 it, you served it you're done.

4 MR. CARTER: Anybody from the industry want to comment?

5 MR. MOORE: I am very troubled. I am very troubled  
6 that, Gail, you would require a different standard for collection  
7 cases than any other case that I file as an attorney in the state  
8 of California. If I -- let me --

9 MS. HILLEBRAND: I said with someone's permission, I'm  
10 not sure it's a different standard.

11 MR. MOORE: Let me finish. California has CCP Section  
12 585. CCP 585 says if I had pled it and the defendant chooses,  
13 elects, makes a conscience decision not to file an answer, not to  
14 defend the case, not to appear in court, that I am entitled, as a  
15 matter of law, to a default judgment in the amount pled in my  
16 complaint.

17 The debtor has had a sufficient amount of opportunity  
18 to participate in the process. The debtor can even appear  
19 without paying a filing fee to file an answer because they can  
20 get a waiver of fees. If the debtor chooses not to participate,  
21 then the debtor is choosing to have a judgment entered against  
22 that person.

23 Now everybody is up in arms and says, well, the  
24 judgment may be wrong. The debtor hasn't participated, the  
25 service may be bad. But one of the tests that I go through in my

1 practice is what happens when I do garnish wages? What happens  
2 when I take the judgment that's entered and I get a writ of  
3 execution and I go to the sheriff and the sheriff serves the  
4 employer. Do I hear from the debtor at that point? Do I hear  
5 the debtor coming to me and saying: You have the wrong person,  
6 or you have the wrong amount, or I've never heard of you, or why  
7 are you taking my wages?

8           Because I have heard number of times today, people  
9 saying the first time I hear from the debtor is when their wages  
10 are garnished.

11           And I will tell you that a significant amount of the  
12 money that I collect in my practice, probably a quarter of what I  
13 collect on a monthly basis, is from wage garnishments. And I  
14 can't, for the life of me, over the last year recall more than  
15 one person calling in and saying: You've got the wrong person,  
16 the wrong amount, I've never heard of you, et cetera.

17           And I don't get much communication from debtors even  
18 when I garnish their wages. They ignore me. I get checks from  
19 the sheriffs on a regular basis, where people are having two,  
20 three, four, five, six, a thousand dollars taken out of their  
21 paychecks, sent to me to satisfy this judgment. They're not  
22 calling in and saying you've got the wrong person.

23           So I am very troubled when you -- when you start saying  
24 that there should be a higher standard of proof for a simple  
25 collection case, a simple collection case, than the proof that I

1 would have to bring for any other case of similar value. Why  
2 should it be different?

3 MS. HILLEBRAND: I want to answer the rhetorical  
4 question, so other people can speak to this.

5 We've heard the judges from the two counties that are  
6 represented here say, in fact, they do require prove-ups for  
7 defaults and what's being suggested is that same standard apply  
8 as well.

9 MR KINKLEY: Congress said, not us, Congress in  
10 1692(a), state procedures are inadequate. It is the preamble on  
11 the basis for the FDCPA. California law, fine, you can come in  
12 there, you can blow the default judgment by, but these are people  
13 who are in a regulated industry. You don't hold dynamite without  
14 doing it a certain way.

15 Debt collection is like dynamite, it's regulated by  
16 federal law. So you do have a higher standard. There's no  
17 question about it. It isn't debatable.

18 MR. MAURER: And I object to the concept that consumers  
19 who don't answer make a conscious choice not to do so. There's  
20 just plenty of literature out there on the lack of lawyers who  
21 can represent consumers in cases like this.

22 (Simultaneous talking.)

23 MR. SARGIS: But let's also recognize, and this is one  
24 of the things, the challenges put out to the consumer industry,  
25 and this is one of the things that dilutes efforts to try to deal

1 with identity theft, are the numbers of consumers who won't  
2 address issues, who it's not me, it's not happening, I never was  
3 there. I mean that chaff is up all over the place. And that's  
4 the environment -- when you look on our side of it, we're  
5 operating in that chaff.

6 MR KINKLEY: We need more Legal Services lawyers.

7 MR. SARGIS: No. We need more people to just up and  
8 say, yeah, I had the dental treatment, I can't pay you, and we'll  
9 figure out what we do, as opposed to: Oh, it's not me. I'm  
10 going to sue because you are trying to collect money from me and  
11 I don't recognize the dentist ever did the work.

12 So, in part of -- I don't think that Congress intended,  
13 with what you read there, to say the FDCPA is going to override  
14 the state law. The FDCPA is going to override judicial process.

15 The FDCPA was never intended to interpose itself with  
16 respect to the obligations of the debtor to pay the debt. It's  
17 there to say: We don't want you, the collector, to engage in  
18 unfair practices. We don't want you lying, we don't want you  
19 cheating, we don't want you stealing.

20 Now you cited several situations where you say: I  
21 think this rises to the level of, where you have a big stack of  
22 declarations that you say nobody knew what they were, in doing  
23 it. Okay, that may be a case. But, again, we've got to look at  
24 the totality of the circumstances. And to take an entire  
25 industry and say: We're effectively going to create special

1 judicial rules for you to have the right to access the court.  
2 This is using the dynamite in your hand to get the little  
3 mosquito.

4 Let's figure out how we deal with the mosquito and  
5 protect -- and get consumer focus on the real bad actors; have  
6 reasonable protections for the average actors, the guys that try  
7 to comply or people being people, people will screw up, but you  
8 know you deal with those.

9 So I back off. I mean Gail and I agree on a lot of  
10 things. I back off --

11 MS. HILLEBRAND: I always worry when you say that.

12 (Laughter.)

13 MR. SARGIS: Hey, don't worry now, because I back off  
14 from this and see where it really needs to be different for the  
15 collector accessing the courts.

16 MR. CARTER: We've got just two minutes left --

17 MR. RAY: And, Mike, I also have to take issue that  
18 these consumers out there don't know what they're doing. I mean  
19 what I see are there are plenty of legal clinics out there, self-  
20 help agencies. Almost every single court we see has a self-help  
21 site on it. I see *in pro per* debtors filing answers all the  
22 time. And they come in -- or they've gone to some clinic, free  
23 clinic where they could get an answer drafted for them.

24 Nobody has ever sat down with those debtors, though,  
25 and said: Well, do you really owe this, and so you're going to

1 deny it in its entirety and deny it and say you don't owe it, but  
2 don't you really owe it. And wouldn't be better to call the  
3 attorney and try to work that out. They don't do that. They've  
4 got plenty --

5 (Simultaneous talking.)

6 MR. RAY: They've got plenty of access to do that.  
7 Additionally, --

8 MS. FLORY: Actually, I know consumer attorneys in L.A.  
9 who represent for debt collection exclusively. We try to punt  
10 them around, but there are no free legal services for this type  
11 of thing. A self-help can only help you to the extent you can  
12 understand the forms they're helping you with.

13 MR. RAY: But they do get there.

14 And the other part is, that nobody seems to have  
15 addressed here as well, when we take a default judgment, there is  
16 a part of the California Judicial Council form that requires you  
17 to mail a copy of that default request, have the clerk enter the  
18 default. You have to mail that to the same address in which you  
19 serve the debtor.

20 And I can tell you half the time when I do that, that's  
21 when I get a call from the debtor or now the debtor has got an  
22 attorney: Well, woe is me, don't take this default or we want to  
23 try to settle with you. And then they'll --

24 MR. GARGANO: May I add, too? I think it ties into  
25 what Harvey was saying earlier about the 95-percent figure. I



1 don't know if it's that high in our county for sure, and some of  
2 those numbers might figure into matters that go to judgment that  
3 are settled.

4           We actually preside over settlements sometimes  
5 involving these cases where you might have a *pro per* and debt  
6 collection attorney. I don't know if Michael would agree with  
7 this, but I have seen debt collection attorneys bend over  
8 backwards to give deals to people, especially when they're -- you  
9 know some man came in, his wife was sick, he was off work, and  
10 they are bending over backwards, to say: Well, what about \$25  
11 every two months, or what about \$15 a month. I do see people try  
12 to work things out and they're not all there like Simon Legree,  
13 ready to pounce on their homes. So I mean that goes all the time  
14 in the courtroom, so, and I don't know if you've seen that.

15           MR. CARTER: I'm sorry. As is always the case, the  
16 judge gets the final word.

17           (Laughter.)

18           MR. CARTER: Thank you, all.

19           (Applause. Recess taken from 2:47 p.m. to 3:02 p.m.)

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## 1 GARNISHMENT

2 MS. BUSH: Thank you. After this last session I hope  
3 you'll have as much as to say on the next topic, which has to do  
4 with the debt collection process. We started talking about  
5 initiating suits and we talked a lot about what goes into the  
6 debt collection suits.

7 And now we're going to talk about garnishment. In  
8 particular, I'd like to talk, start a discussion by talking about  
9 the roles of the different players in the garnishment process.  
10 What are the roles of the courts, the banks, the collectors, and  
11 of the judgment debtors in protecting exempt federal funds and in  
12 other issues to do with garnishment.

13 Ms. Hillebrand, would you like to begin.

14 MS. HILLEBRAND: Thank you. We heard this morning and  
15 I think we heard a little bit yesterday too that sometimes the  
16 first time people know that something is going on in the legal  
17 system is when the bank account is frozen or the wages are  
18 garnished.

19 We have a unique protection in California that I'd like  
20 to -- and the issue of exempt funds and exempt accounts, and the  
21 difficulty when the consumer has to make a claim to get the bank  
22 account that holds basic household funds, like next week's rent,  
23 unfrozen, that's a tremendous burden on individuals around the  
24 country.

25 It's actually such a problem that the Legal Services

1 lawyers have a list serve about it where they talk to each other  
2 about, you know: Chase has frozen my client's bank account. What  
3 should I do. And people talk about who to talk to, how to get it  
4 undone, how to expedite, particularly if the client comes to the  
5 person, they're already in trouble, they need to make their rent  
6 payment tomorrow and the account's been frozen.

7           We have a unique protection in California, a couple of  
8 other states have it, and the advocates have been asking the  
9 Treasury Department to require it as a matter of federal --  
10 protection of federally-protected benefits. And that's to  
11 identify a specific amount in the account and to say that if  
12 there's a direct deposit coming in -- and the California statute  
13 -- I'm sorry, I haven't got the cite on the top of my head. I  
14 want to say it's 7040.2(o), but I'm not quite sure. It's in the  
15 section on exempt property. It's the amount in the bank account  
16 that will be exempt without claim. So it will be exempt without  
17 the consumer having to get a lawyer. It should basically never  
18 be frozen, this amount.

19           And rather than trying to trace which funds are exempt  
20 and which funds are not, it's a dollar amount. If the account is  
21 receiving federally-exempt funds by direct deposit, Social  
22 Security primarily or SSI, and our statute has a lower dollar  
23 amount if the account is receiving public-benefit funds by dollar  
24 amount. But in both cases the way in which this works better for  
25 consumers than in many parts of the country is the funds are

1 exempt without a claim, the banks shouldn't be freezing that  
2 account at all unless it has -- if there's an indication that  
3 there's direct deposit coming in from a protected source, unless  
4 the account has more in it than the dollar threshold amount, and  
5 then they should only freeze the amount over the threshold.

6           That means that income that is being provided federally  
7 and is exempt because it's supposed to be basic subsistence,  
8 income for the household, veterans payments, railroad retirement,  
9 Social Security, and income that's coming out of taxpayer money  
10 for income support is not being tied up in the collection  
11 process.

12           And we need to be looking at a standard like that in  
13 state legislatures. We need to be looking at Treasury giving us  
14 a standard like that for accounts, so that the bank's obligation  
15 is pretty simple. When they set up the account and when they  
16 turn on the direct deposit, they can put a computer flag on that  
17 account saying: This one is receiving direct deposit of exempt  
18 funds. Once that flag is in place, the bank would be protected  
19 if the Treasury comes out with its rule from any allegation that  
20 it's in violation of state law, because the federal law would  
21 say: Hey, if it's direct deposit of federally exempt funds and  
22 it's up to this amount, you are done. Bank, you are not  
23 obligated to freeze this account. In fact, you're not supposed  
24 to freeze the account.

25           That's good for the bank. What's good for the consumer

1 is the account is not frozen and has to be undone. And I do have  
2 reports from Legal Services lawyers around the country who say:  
3 My client's account was frozen three or four times because each  
4 time the debt is sold there's another freeze on the account, or  
5 each time the judgment is transferred there's another freeze on  
6 the account. This is a really serious problem, access to basic  
7 funds.

8 MR. MAURER: I agree with everything Gail said. I'm  
9 pretty sure the amount, if there's a single Social Security  
10 direct deposit, it's \$2,425. They start it out at 2,000, and now  
11 they're indexing it for inflation, which is a good idea. If  
12 there's two, a married couple, and they both get direct deposit,  
13 then it's like \$3,500.

14 And so the banks are not supposed to -- and  
15 California's not really a freeze, it's a levy, and the sheriff is  
16 actually holding the money outside the account. The banks are  
17 not supposed to turn it over to the sheriff. They're supposed to  
18 essentially ignore the levy order when the account is in that  
19 situation.

20 Occasionally, rarely they turn the money over anyway.  
21 And also occasionally they charge a fee because they had to  
22 process this levy that they weren't supposed to process. And the  
23 banks take the position sometimes that they're not subject to  
24 state law because they're federally-chartered banks.

25 Other than that I think California's system works

1 extremely well and we could deal with the issues with the banks  
2 by having the same regulation at the federal level.

3 MS. BUSH: I know Mr. Ray wanted to say something, but  
4 I wonder if, Professor Maurer, we could step back for a minute  
5 and you could go over the process in California? What kind of  
6 notice is provided to whom at what point?

7 MR. MAURER: Yeah.

8 MS. BUSH: And how does the sheriff levy work?

9 MR. MAURER: Well, basically the consumer gets a notice  
10 after the fact. The judgment creditor provides the sheriff with  
11 a copy of their notice of levy. The sheriff or a registered  
12 process server hired by the sheriff serves that order on the  
13 bank. And let's say they are not exempt funds, there is not  
14 Social Security, then the bank will turn the funds over and at  
15 the same time the consumer will get the notice. And the notice  
16 says in California you have ten days to make a claim of  
17 exemption.

18 So the consumer, in theory, could say these are exempt  
19 wages and trace them back. And then at that point they submit a  
20 form to the sheriff. The sheriff has some number of days to  
21 transmit the form to the judgment creditor.

22 The judgment creditor then has ten days to accept a  
23 claim of exemption or to challenge it. And if the judgment  
24 creditor wants to challenge it, they have to schedule a court  
25 hearing and they have to state the basis that they're challenging

1 a claim of exemption and serve a copy of that on the consumer, so  
2 the consumer knows: I have to show up in court on this day at  
3 this time and I have to fight over why they're saying it's not  
4 exempt.

5 For wage garnishments oftentimes the consumer has to  
6 submit a form with all their finances and say they need them all  
7 to support themselves and their dependents.

8 So what this means is when the banks turn the funds  
9 over, if there is a hearing and ultimately the consumer wins, by  
10 the time the sheriff gets the order from the court saying: This  
11 is exempt, it has to go back to the consumer, they have been  
12 without those funds for maybe a month. And if it's all the money  
13 in their bank account or if it's 25 percent of their wages, it's  
14 going to result in all kinds of bank charges, they might have  
15 missed their rent payment, and so it's a real hardship.

16 So having something on the front end like this that  
17 keeps the bank from turning the money over in the first place is  
18 extremely helpful.

19 MS. BUSH: Mr. Ray.

20 MR. RAY: I was going to comment. I think from the  
21 creditors' bar standpoint, if these are exempt funds because  
22 they're Social Security payments or because they're some kind of  
23 federal or state exempt funds, we have absolutely no problem.  
24 And actually we would prefer that there are rules in place for  
25 federal and/or state banks that say: You can't touch those,

1 because if that's the case we don't want to be fighting over  
2 having to respond to a claim of exemption.

3           And when you say that the sheriff sends a notice to the  
4 creditor's attorney saying that the defendant has filed a claim  
5 of exemption, we have ten days to respond from the date that they  
6 mail the letter to us. And in some cases we get those seven days  
7 after they've mailed them, which means we've got a three-day  
8 turnaround to file a response to that and ask for a hearing.  
9 It's a very, very short deadline. But we do do that in cases.  
10 And we always only have to overnight those to the sheriff,  
11 overnight them to the court, and follow up with those processes.

12           So, from a standpoint, we're perfectly fine with that.  
13 And it would ease our job if there was a rule that the banks had  
14 to comply. I would say it is an issue from a standpoint and I  
15 think this is beginning to change in California.

16           It will be helpful if the banks were required by law to  
17 designate a service place as opposed to having to serve a  
18 specific branch where somebody has their bank account. And I  
19 think that's coming about, but these exemptions with the bank  
20 accounts, we're fine.

21           With regards to wage-garnishment exemptions and so  
22 forth, those are a little bit of a different issue and things.  
23 But, again, we're okay with a defendant filing a reasonable claim  
24 of exemption, as long as they set out their assets, set out their  
25 income and be honest about that.



1           If anything, what we would like to see is a tougher  
2 requirement on employers in responding to the wage garnishment by  
3 giving us the data that says: Here is what the debtor is earning  
4 and here is what we intend on withholding.

5           A lot of times we're hampered in responding to a claim  
6 of exemption because the employer hasn't responded adequately to  
7 tell us what a debtor actually earns and things. Because we do  
8 see differences in terms of what a debtor will claim on their  
9 form is their net earnings after required deductions. And  
10 sometimes we begin looking at those and says, 'Oh, well, you're  
11 putting \$150 per month, or per pay period, into a 401(k) plan.'  
12 And commonly we see those where they are funding their  
13 retirements without paying their creditors.

14           So all of those issues would be very helpful to us and  
15 have a good national standard, I wouldn't have a problem with.

16           MR. MOORE: I think for once we actually have a  
17 complete consensus, which is kind of nice. Bank levies are not  
18 as common in California as they are in other states because we do  
19 have wage-garnishment laws that I think make it more economical  
20 and more feasible and give us a greater chance of recovering  
21 debt.

22           The issue of bank levies and bank garnishments I think  
23 is an issue that needs to be addressed on a national basis. As  
24 an industry, we don't disagree with you at all. The question is  
25 where is the remedy to come from.

1           And from the collection side, I think the answer is it  
2 needs to come at the federal banking level, because the banks are  
3 the ones that have the information. The banks know where the  
4 money is coming from. They know which accounts are direct  
5 deposit accounts of federal benefit, Social Security, VA checks.

6           We as collectors, we as collection attorneys have no  
7 idea where that money is coming from, how it gets into that bank  
8 account. Nor should we be held responsible for levying on an  
9 account that has those funds in it, because we don't have the  
10 knowledge. The banks do.

11           MS. BUSH: So what I'm getting is that the  
12 responsibility rests largely with the banks and then with the  
13 law; is that your position?

14           MR. MOORE: I think that would be a fair statement,  
15 that the banks -- and I think we and the consumers can -- Mike,  
16 can you agree with me on this one?

17           MR KINKLEY: Let Gail speak. I've had enough comment.

18           MS. HILLEBRAND: Yeah. But the obligation must be on  
19 the bank to identify that the account contains exempt funds. But  
20 for states that don't have a provision like California, they need  
21 a statutory provision with respect to the public benefits, the  
22 state-paid or state-transferred public benefits.

23           We need the Treasury rule, we need a new Treasury rule  
24 because at the moment all we have is this like OCC best  
25 practices. And even the OCC's website says: Well, your bank

1 doesn't have to do this if they don't feel like it.

2           The banks actually need a Treasury rule because in this  
3 one area you do need to preempt. You need to say that the bank  
4 is not obligated to follow the state levy or freeze requirement  
5 if it's this kind of account with direct deposit of federally-  
6 protected funds coming in.

7           So there's a role for Treasury first, to have this rule  
8 for Social Security and federal funds. There's a role for state  
9 legislatures, to have a similar rule for state public-benefits  
10 funds. There's certainly a role for banks to honor those state  
11 and federal requirements when we get them into place.

12           I think there's also a role for the FTC to, by rule, to  
13 say if the account has been identified as exempt and the judgment  
14 debt is being transferred to another collector or another buyer,  
15 that information: Hey, this account is getting exempt funds  
16 only, ought to be transferred in some way, so that consumers  
17 don't have to go through this treadmill again and again.

18           MR KINKLEY: I think that the technology has caught up  
19 to the point where it's a very doable, low-cost solution that  
20 works. And actually Jen earlier today was telling me about it.  
21 I said that sounds great to me. But it doesn't relieve the debt  
22 collector of their own obligation, and we're only talking about  
23 one state.

24           I think that -- first of all, most garnishment statutes  
25 don't require banks to withhold exempt funds, but the reality of

1 it is their lawyers are saying: Hey, you know, if you don't pay  
2 this and we're wrong, there will be a judgment against you. If  
3 you do withhold it, nothing bad will happen. So they withhold  
4 even exempt funds even when they know it. And that's why this  
5 rule is so good, but it doesn't relieve the debt collector's  
6 responsibility.

7 Washington is unique in that it has a statute that  
8 requires a certified statement from the debt collector or the  
9 attorney for the debt collector that they believe that the funds  
10 are not exempt and that they have a reason to believe. And that  
11 puts a burden on them to investigate before they fire off  
12 garnishments and exempt.

13 Washington is unique. Now Ohio had that statute until  
14 the case of *Todd v. Weltman*, and then the legislature through  
15 some trade-outs took that out of the Ohio legislation.

16 So I think that as far as it goes in protecting -- and  
17 Scott's right and Gail's right and Jen's right -- that we have a  
18 case called *Mathews v. Eldridge* and one of the problems is the  
19 risk of erroneous deprivation and you have to have a prompt  
20 postdeprivation hearing. But that prompt hearing is maybe three  
21 to five days, if it's done at all in that timeframe, and that's  
22 too long.

23 So if you can avoid the problem, I think it's great,  
24 but at the same time I don't think we can say it's the only --  
25 it's only the responsibility of the banks. It's also the

1 responsibility of the debt collectors.

2           And that's where I differ with you, Harvey. I just  
3 went a little bit further than you.

4           MR. MOORE: Well, you know I was hoping that you and I  
5 could finally agree on something, Mike. We came so close.

6           MR KINKLEY: Well, I think --

7           MR. MOORE: But my question is what do you require --  
8 I'm listening to what you say and you're saying a debt collector  
9 has to somehow reasonably investigate to ascertain whether or not  
10 the account does or does not have exempt funds.

11           MR KINKLEY: That's right.

12           MR. MOORE: How is the debt collector supposed to get  
13 information that under Graham-Leach-Bliley and under all the  
14 other consumer protection laws we have no access to in the first  
15 place?

16           MR KINKLEY: You can do supplemental proceedings, but  
17 you already know --

18           MR. MOORE: Wait. What type of supplemental  
19 proceedings? Am I supposed to send an interrogatory to the  
20 debtor that they're going to ignore?

21           MR KINKLEY: You can bring them to court --

22           MR. MOORE: Am I going to bring them in for a judgment-  
23 debtor examination that I have to personally serve them with  
24 process for?

25           MR KINKLEY: But, see, again you're asking the wrong

1 question. You assume --

2 MR. MOORE: No. I'm trying to figure out what you want  
3 me to do to do my job.

4 MR KINKLEY: And I'd like to answer. The assumption  
5 you're making is that you have a right to garnishment and: Gee,  
6 how do we exercise that right? You don't. Your right to  
7 garnishment begins when you determine that there are nonexempt  
8 assets. Again, CR 11 is the rule.

9 MR. MOORE: Now I have a right to collect the debt  
10 using all legal procedures. Garnishment is a legal procedure.

11 MR KINKLEY: But you have to have a factual --

12 MR. MOORE: An exemption says I have a right, but the  
13 consumer owns something that is exempt from execution. So I go  
14 back to my simple question: What would you have me do to  
15 ascertain that that bank account is a direct deposit account of  
16 Social Security funds? Tell me what I can do, because you've  
17 shifted the burden --

18 MR KINKLEY: Let me -- no.

19 MR. MOORE: -- in one state unreasonably in my opinion.

20 MR KINKLEY: Well, it isn't unreasonably and it's been  
21 examined by federal courts. It's not been held to be a part of  
22 the due process requirement -- 20 years ago. I think that  
23 revisited with the flexible nature of due process, that it would  
24 be different now.

25 But here's what the truth is. If you're doing the

1 collection process as you described before, you've had collectors  
2 from your office calling the people up and talking to them. They  
3 always say, 'I'm on Social Security.' And they, your people --  
4 not your, I won't pick on you, but I don't know, but generally  
5 debt collectors will say, 'That doesn't make any difference.  
6 We're still going to collect this debt.'

7           And by the time you do the garnishment, I've filed  
8 several class actions on garnishment scandal, quite a number of  
9 garnishment cases, most of mine have to do with fees, the  
10 unlawful fees that are being added, which we're not to yet. But  
11 the fact is when I pull the collector's notes it says, 'I'm on  
12 Social Security.' So they knew.

13           I had one case where a Legal Services -- and this is a  
14 great plan for all Legal Services, they should all do it -- it  
15 was Northwest Justice Project, I believe, but the Legal Services  
16 person had the consumer send a registered letter saying: This is  
17 my bank account. Here's my number. All the funds going in there  
18 are exempt. It's all Social Security. Here's my branch. And as  
19 a registered letter.

20           Well, the debt collector had that in their file and  
21 they garnished anyway. That cost the debt collector a good sum  
22 of money, and it should.

23           MR. RAY: I say that's the major exception to the rule.  
24 I mean I don't think a reasonable attorney would want to go  
25 garnish that account if that's the case. But then, on the other

1 hand, you don't know. Just because somebody's on Social Security  
2 doesn't mean that they're not getting funds from other sources  
3 that are also going into the bank account.

4 I've levied on bank accounts and somebody says, well,  
5 one spouse is on Social Security and their Social Security funds  
6 are being direct-deposited. The other one's out there still  
7 working as a major wage-earner and their funds are going into the  
8 same bank account.

9 MR KINKLEY: Garnishment is an extraordinarily harsh  
10 remedy and it should only be applied with care and caution. And  
11 you should have a strong factual and legal basis. It's not a  
12 discovery tool. You're supposed to -- garnishments are probably  
13 the leading cause of bankruptcies in this country. People get  
14 garnished, they file bankruptcy. That, and their mortgage  
15 foreclosure are the two leading causes of driving people into  
16 bankruptcy --

17 MR. RAY: But garnishments from a law firm are a last  
18 resort. And that's because the debtor hasn't responded to phone  
19 calls, they haven't responded to letters, they haven't responded  
20 to a lawsuit. They haven't responded to the judgment being  
21 taken. They haven't -- generally, by the time we can do a bank  
22 levy or a wage garnishment, we've also requested an abstract in  
23 California and recorded that. When that gets recorded, they get  
24 notice that a judgment lien had been placed against them. And  
25 you go through all of those processes.



1           If what you want to happen you want to shift this  
2 burden, then let's go a step further and require a national  
3 database where a consumer has to list their bank account and  
4 swear under penalty of perjury that all of the funds that are  
5 going into that bank account are exempt. If you do that, I'm  
6 happy. Fine, we'll check that first and not spend the money and  
7 the time and the effort on doing a bank levy where we're not  
8 going to be able to get any funds.

9           MR KINKLEY: Well, your obligation as an attorney  
10 already requires you to do that. You're just saying it's hard,  
11 so I don't have to.

12           MR. MOORE: No, Mike.

13           MR. SARGIS: Yeah. But, Mike, when you start from what  
14 I think is an incorrect premise where you say, well, wage  
15 garnishments are extraordinary. Wage garnishments are just  
16 enforcing a judgment for a debt that's gone unpaid.

17           Now in listening to the discussion, it kind of harkened  
18 back to some of the discussions Gail and I have had out in the  
19 halls in the legislature, but, look, here's what I would put to  
20 the consumer representatives: You've heard the collection  
21 industry say: Fine, we don't want to take their Social Security  
22 money away, but you've got to give us the tools and the access to  
23 the information so we can determine it.

24           You can't just say, well, it's Social Security and  
25 you're going to be damned if you do and damned if you don't, and

1 we're not going to let you get to the information. So I think --  
2 again, another one of those constructive, middle-ground areas  
3 where come to us and say: We don't think this is too big of an  
4 intrusion on the privacy of a consumer debtor for you to go  
5 forward to make sure you aren't asking the bank to pay Social  
6 Security money and the bank has its burdens with its tracking as  
7 well to some mechanism.

8           Because I think -- again, this is one of those issues  
9 we're a whole lot closer than, but I always -- and what got my  
10 dander up was it started to sound like, 'Well, we want to come up  
11 with rules to make wage garnishments harder because we want to  
12 avoid paying the debt.'

13           And while I agree, and I'll let you -- I'll stop in a  
14 second -- while I agree consumers need to be protected from  
15 unscrupulous activity, at the end of the day we're talking about  
16 a debt that's due to be paid and how we get it fairly paid.

17           MR KINKLEY: When you garnish exempt funds you are  
18 disallocating economic resources from the intended purpose that  
19 our tax dollars are supposed to be spent. It's supposed to be  
20 paying their rent, food, a minimal subsistence standard. And  
21 when you take that away from somebody, you're taking something --  
22 it's horrible to do that.

23           MR. SARGIS: But give me some tools so I can know that.  
24 Don't just say: Don't do it.

25           MS. BUSH: Right. I think --

1 MR. SARGIS: You've got to do it with your hands over  
2 your eyes.

3 MS. BUSH: When I introduced the question about the  
4 relative roles of different players, it sounds like there should  
5 be a role of the consumer judgment debtor? Would people agree  
6 with that?

7 MR KINKLEY: Absolutely not.

8 MR. MOORE: Julie, here's the problem. If you'll  
9 forgive me, --

10 MS. BUSH: In communicating about the exemptions that  
11 they're eligible for.

12 MR. NEWBURGER: The consumer --

13 MS. HILLEBRAND: Part of the difficulty is that there  
14 needs to be -- if the consumer has to communicate something,  
15 there needs to be a way to have that communication process occur  
16 before and not after the assets that are so essential for the  
17 household, running the household budget, have been locked up.

18 MR. NEWBURGER: The difficult --

19 MS. HILLEBRAND: And that's part of why this is a  
20 difficult issue.

21 MR. NEWBURGER: The difficulty, though, is you're right  
22 about the devastating effect of having your funds seized under  
23 those circumstances. However, at least in my state I've seen --  
24 well, we don't have wage garnishments, but bank accounts, you can  
25 seize the entire account. Wages are exempt till they hit a bank

1 account, and they're fair game.

2 I've seen far more consumers file bankruptcy over the  
3 burdens of postjudgment discovery, which is where you're going to  
4 send this. People who are terrified to answer postjudgment  
5 discovery, who can't afford to miss work to be hauled down for a  
6 debtor examination, and the burdens of postjudgment discovery I  
7 think quite often are really far more intimidating to a consumer.  
8 They're terrified to have to go down and answer a lawyer's  
9 questions. They're scared to death to produce the required  
10 documents in aid of judgment.

11 And if you're going to put -- if you're saying the  
12 lawyers have a duty to verify this information as opposed to  
13 putting the burden on the banks, the only remedy you'll leave  
14 them with is to conduct those very mechanisms of postjudgment  
15 discovery that really have the effect you're worried about, Mike.  
16 And, I'm sorry, but in representing consumers, and I've seen it  
17 time and again, people are just terrified of postjudgment  
18 discovery. They feel it's --

19 MS. HILLEBRAND: I think it's --

20 MR. NEWBURGER: I'm sorry. Go ahead.

21 MR KINKLEY: And real quickly, I'm not saying on the  
22 debt collector as opposed to the bank. I like the bank solution;  
23 that's a great solution. But I'm saying at that point it still  
24 doesn't relieve the debt collector. It solves a lot of the  
25 problems, but it doesn't relieve the debt collector, their

1 primary obligation to be right when they do something so harsh.

2 MR. NEWBURGER: Then you force them to impose those  
3 very burdens on consumers that trouble me a lot. Because Joe  
4 Blow working for a fairly low salary or low wages can't afford to  
5 miss a day of work to come down and do a debtor exam. And what  
6 happens when the debtor doesn't show up for an exam, you know  
7 what happens. The next thing that comes is a motion for  
8 contempt. And, before you know it, the person's driven into  
9 bankruptcy or picked up by a constable or sheriff, and that is  
10 not a goal that any of us should wish to impose on consumers.

11 MR. RAY: And the other part is why should these  
12 consumers who have dodged these debts, and in most cases that's  
13 exactly what they've done, impose a huge additional burden on the  
14 creditors, the creditor's attorney, and the court system?  
15 Because when we have to go in and do a debtor examination, there  
16 are -- we're taking up massive amounts of the court's time as  
17 well, and dragging out court reporters, perhaps, down there for  
18 the examination and the judges and their clerks who have to swear  
19 these people in. That takes up a huge amount of other resources.

20 And so what I don't hear is any obligation on the part  
21 of the debtor-consumer out there. I mean they're not doing  
22 anything other than hiding from these debts. And the other part  
23 is if they would communicate with us. From a standpoint, we have  
24 a short form financial statement, and we're happy to send that  
25 out to them, that says just fill this out, give us a copy of your

1 W-2 or something to verify part of what you're telling us, and  
2 we'll work with you.

3           It may be \$50-a-month payments. I've got some people  
4 that make \$20-a-month payments, but that's because they've  
5 cooperated with us and we've gotten a reasonable payment plan  
6 based upon their economic situation.

7           When we're levying on a bank account it's because  
8 they've refused to cooperate with us.

9           MS. HILLEBRAND: For me at least this conversation  
10 illustrates the value and importance of treating exempt-fund  
11 accounts differently and putting that obligation on the only  
12 party who actually knows both that the funds coming in are exempt  
13 and what an exemption is, and that's the bank.

14           MR. RAY: Gail, I agree with a hundred percent. Thank  
15 you.

16           MS. BUSH: Commissioner Gargano, do you have any thing  
17 to add?

18           MR. GARGANO: Well, I haven't dealt with any claims of  
19 exemptions or the issue. In the role that I play now that has  
20 not come up. I don't know if it comes up that often. It might  
21 go to a different department than I am.

22           But I could just sort of get a sense here that if it  
23 was that straightforward, if indeed there was a claim of  
24 exemption and there was evidence that it was an exempt fund, I  
25 think it would almost be an open-and-shut case. We would hope it

1 wouldn't have to get that far and take up the court's time and  
2 take up all of the other parties' time to come in for that.

3 I don't know that we're getting a lot of those even in  
4 the law and motion department or the presiding judge's  
5 department. I haven't seen them in my department, so I don't  
6 know. I'm sure that we have a few, but I wouldn't say that is a  
7 great bulk of cases that is coming in. I don't know if anyone in  
8 San Francisco has had that similar a view. I just don't see that  
9 much. And this is certainly something that could be headed off  
10 with the proposals that you've made here. It just seems to be a  
11 no-brainer with regard to wasting judicial resources over that.

12 MS. HILLEBRAND: You shouldn't be getting those now,  
13 because if you are someone's violating a recent California law.

14 MR. GARGANO: Yeah. Because I haven't seen any at all,  
15 so I'm glad that confirms that.

16 MR KINKLEY: I think we agree California is the model  
17 for that particular problem of federal benefits. Now California  
18 law has been from the state legislature.

19 MS. HILLEBRAND: California has two dollar amounts, the  
20 ones that Professor Maurer mentioned, which are one amount for a  
21 single recipient, a higher amount if it's a joint. And then  
22 there is a lower, a pair of dollar amounts for public benefits.

23 So, yeah, we did look at that question and it came in  
24 about ten years after the public benefits protection. Because  
25 that's tax payer money. It's designed to both support the family

1 and get into the economy. And it's not going to do that if it's  
2 going off for these other purposes.

3 I wanted to make a correction. There were a lot of  
4 assertions about what causes people to go into bankruptcy. The  
5 most recent study I've seen, which is pre-mortgage meltdown, says  
6 the top three reasons are medical conditions and medical debt,  
7 unemployment and under employment, and divorce.

8 MR. NEWBURGER: I'd agree with that as well. But my  
9 only point is this, in terms of people coming to us devastated,  
10 it wasn't the bankruptcy that got them to tear off, it wasn't the  
11 bank garnishment that got them there, Mike. It was the fact that  
12 someone was saying, 'Tell me where all your assets are.'

13 MR KINKLEY: Don't do that either.

14 (Laughter.)

15 MR. NEWBURGER: Well, if you impose the burden on the  
16 lawyers, you force them to do that. And that's why Gail is so  
17 correct, that if you put the burden on the banks you avoid  
18 forcing part of that burden back on the consumers. That's just  
19 not a desirable goal.

20 MR KINKLEY: I agree with you a hundred percent. And  
21 my caveat is the debt collector's mantra is: Let's put burdens  
22 on the consumer. We don't have any responsibilities.

23 If you can find a system that protects the consumer,  
24 protects the debt collector, as this system seems to do, we're  
25 all all for it. You're not going to get sued for taking exempt



1 money. And that's a good case for me because when you take  
2 exempt money, I've got great emotional damages. And so it  
3 protects you from me. Not you. Your clients from me.

4 MS. BUSH: In Chicago a lot of the conversation focused  
5 on issues of notice to customers and to banks and issues of what  
6 happens before and after the freeze, the freeze of funds. Now in  
7 California, as I understand it, that's not an issue right now.

8 MS. HILLEBRAND: Right. I mean any time you're getting  
9 into the funds have been frozen and now we're talking about who  
10 has how much time to get them undone, they're already incurring  
11 the -- if it's an exempt fund, the agency has incurred cost to  
12 levy on something they're not going to be able to get. And the  
13 household is experiencing a loss of their funds for whatever  
14 those time periods are. Once you're into a notice and claim, the  
15 system's already broken.

16 MR. MOORE: Yeah. And the really sad part about all  
17 this is it's a communication issue. All through today's  
18 discussions, the one thing that's been missing is the concept of  
19 communication. If both sides communicate, if both sides come  
20 together and we can reach an agreement, you know, the lump sum  
21 payment, payment over time, a lot of these problems can be  
22 avoided.

23 I'm not going to levy, I'm not going to garnish your  
24 bank account, exempt funds or otherwise, if I'm getting some kind  
25 of payments on a regular basis. If a consumer would call my

1 office and communicate with me, instead of getting my letters and  
2 putting them in the same place they get all the other letters,  
3 getting my lawsuit and putting it somewhere else.

4           The people that call my office -- we have a very high  
5 settlement rate. Of the calls that are made to our office by  
6 consumers, I would have to think that we're at a 95-percent  
7 settlement rate.

8           Let's throw out a number that seems to be going around  
9 the table these days. Ninety-five percent of the consumers that  
10 call my office reach some agreement with us, be it prelitigation,  
11 during litigation, or postlitigation. As an industry, we  
12 encourage the people on the other side of the table from us, the  
13 consumer bar, the attorneys that represent consumers and both in  
14 connection with Legal Services, Legal Aid, and those attorneys  
15 that represent in connection with the FDCPA and Rosenthal  
16 violations.

17           Communicate with us, call us first. If the debtor owes  
18 the money, let's cut an agreement. Let's work on getting  
19 something resolved. Let's get the debtor making some type of  
20 reasonable payment so that I'm not out wasting time and money  
21 levying on an account that may or may not be exempt, so that I'm  
22 not going and levying on wages because they're making a voluntary  
23 payment to me.

24           And it's a whole lot easier for me if the debtor is  
25 making monthly payments than for me to have to start a wage

1 garnishment.

2 MR KINKLEY: Now when you're negotiating, would you  
3 agree with me then we should have Legal Services better funded  
4 and lawyers dedicated just to help debtors, so when they want to  
5 call you instead of being over matched with a very competent  
6 lawyer and a person not trained in negotiation or law, that they  
7 have their own lawyer so that the settlement is a little bit  
8 more, the negotiation is a little bit more fair?

9 MR. MOORE: You know, I don't think my settlements with  
10 the people that call my office are unfair. I don't ask a debtor  
11 --

12 MR KINKLEY: Would they be more fair if they had a  
13 lawyer?

14 MR. MOORE: I don't think it necessarily would follow.  
15 If a debtor gives me their financial condition and they tell me  
16 their rent is x and their utilities are y and they've got three  
17 kids and they have to do x, y, z, and they think all they can  
18 afford to pay is a number, if they're being honest with me about  
19 their income and their expenses and that's the number that they  
20 think they can pay me on a monthly basis, guess what, Mike, I'm  
21 going to take it, because my goal is to have a debtor become a  
22 paying debtor.

23 MS. COLEMAN: So Mike when you say more fair do you  
24 just mean lower?

25 MR KINKLEY: Generally speaking, that's what a consumer

1 lawyer would be looking for.

2 MS. COLEMAN: Because I'm thinking if Harvey had to  
3 negotiate with you, he would realize that he'd have to spend more  
4 time at it and then he couldn't go as low as he could.

5 MR. MOORE: That's right.

6 MR KINKLEY: But the thing is I see --

7 MR. MOORE: He'd be checking to be sure his wallet is  
8 still in his pocket --

9 MS. BUSH: Ms. Flory was waiting...

10 MS. FLORY: Well, I just wanted to get to some of these  
11 issues and how they play out in the hospital context here. We  
12 have a state law that caps what people of certain income can be  
13 charged for hospital bills if they're uninsured.

14 And like when you said that you will work out their  
15 expenses, we've heard from people in the hospital industry, the  
16 law requires that they cap it at roughly the Medicare rate and  
17 they work out a reasonable payment plan. Well, we've been told  
18 by people in the industry that a reasonable payment plan means  
19 within a year, so if it's a hundred thousand bill, then they  
20 aren't going to cut it down to something that somebody making  
21 just over the poverty level can actually pay.

22 Now the other part of this bill, which to my knowledge  
23 has not been tested yet, is now there is a requirement in  
24 California if you do have a judgment on a bill that came from a  
25 hospital, that you're required to have a special notice-pled

1 hearing going over the expenses, including what their future  
2 medical expenses would be. I am concerned that this is not being  
3 implemented at all since these are generally not collected by the  
4 hospital itself and are identified as hospital debt, but that is  
5 an additional protection that's there.

6 MS. HILLEBRAND: That was the point I wanted to make  
7 sure we got in. So anyone who's collecting debt in California  
8 that was generated by hospitals, you can't use the regular  
9 garnishment procedure. The garnishment has to also take into  
10 account and make a showing to the court there will be enough  
11 money left over to pay the ongoing medical expenses.

12 MS. BUSH: Has anyone encountered that?

13 MS. HILLEBRAND: It's a fairly new statute.

14 MR. MOORE: We don't do medical.

15 MS. HILLEBRAND: I want to ask a question.

16 MS. FLORY: What?

17 MS. HILLEBRAND: Last January or this last...

18 MS. FLORY: It was 2007.

19 MS. HILLEBRAND: '07.

20 MS. BUSH: Okay. One proposal that we have heard is  
21 that states require that a certain amount of money in bank  
22 accounts be exempt from -- or be protected from a freeze or  
23 protected from a garnishment. How would people feel about that  
24 kind of an approach to this issue?

25 MS. HILLEBRAND: I think it's very helpful. I think

1 actually Ron, somebody was telling me we have that in California  
2 with respect to some -- there's some dollar amount you can't  
3 touch, and may be wrong about that --

4 MS. BUSH: Oh, is that --

5 MS. HILLEBRAND: Separate and apart from the public  
6 benefits exempt funds. Whether we have it or not, the premise  
7 and the idea there is that there is some money that -- you know,  
8 you don't want to leave a person penniless when there's food to  
9 be bought and kids to be sent to school and rent to be paid. So  
10 the idea of coming up with a dollar number and saying as a matter  
11 of social policy, taking an amount that leaves the household with  
12 less than this in their primary bank account is going too far, I  
13 think is an appropriate way to balance the interests of the  
14 collectors in collecting debt on which they have a judgment and  
15 the use of the public system to take money out of private bank  
16 accounts. I think that's worth considering.

17 MR. MOORE: Isn't it a timing issue? And here's my  
18 concern: Somebody could make \$10,000 a month and I could levy on  
19 their account on a specific day. And there might be \$750 in that  
20 account because that person has paid his mortgage and his  
21 utilities and his Mercedes and his Jaguar and all those payments  
22 that he's paying instead of paying off the credit card debt. My  
23 concern in establishing an exempt bank account amount is it does  
24 come down to timing. Because my levy, my garnishment on the bank  
25 account is only good for the amount that's in the bank on the day

1 that I do my levy. It's --

2 MS. HILLEBRAND: You have to figure out what day that  
3 guy gets direct deposit, and hit the account on that day.

4 MR. MOORE: And I wish that we could actually do  
5 service in that way, but it's not always that easy. I'm just  
6 suggesting that in principle I don't disagree with you. But from  
7 a timing standpoint it is much easier for me to accept a  
8 limitation when somebody's making minimum wage or living at or  
9 below the poverty level than it is when I finally find the bank  
10 account of the guy who just got his \$50,000 Christmas bonus and  
11 --

12 MS. COLEMAN: Oh, he's a state worker.

13 (Laughter.)

14 MS. COLEMAN: But he only gets paid once a month. He  
15 gets paid on the 1st of the month.

16 MR. MOORE: I mean there's so many timing issues  
17 involved. I think we can agree in principle, but creating the  
18 workable way of doing it I think would be very difficult.

19 MR. SARGIS: You also have then the issue, you used the  
20 term, primary account. So then do we say, okay, the consumer  
21 needs to have that identified at the bank? Because as you were  
22 talking about, I --

23 MS. HILLEBRAND: If you find out someone has three bank  
24 accounts, I'm not going to suggest there ought to be an amount in  
25 each one of them you can't --

1 MR. SARGIS: Right. No, well, I know that's what  
2 you're not doing. But, again, in my bunker world in representing  
3 collection agencies, I could see the debtor's got three bank  
4 accounts, so do I pick two of the three, do I pick one? What do  
5 I do? And then whatever I do is going to be wrong. The  
6 complaint's going to come. You know, Mike's going to be saying:  
7 Oh, no, this was primary.

8 So I mean, again, as Harvey said conceptually, I don't  
9 think any of us disagree, just cut to the mechanics of it. And  
10 the second thing, and I'll say this again so everyone out there  
11 can hear it, is the for the vast majority of collectors, when  
12 they sit there, they're going to look at credit report  
13 information and they're talking to the debtor, be it a consumer  
14 debtor or a commercial debtor.

15 And the debtor's saying: Look, I got three kids. I'm  
16 doing this, this, this, this, and this. As Harvey said, the  
17 collector's going to size it up pretty fast and is going to come  
18 to say: Okay, I can get 40 bucks a month out of this person.  
19 I'm not going to 120, I can get 40.

20 Now there's going to be the rogue, there's going to be  
21 the person that doesn't understand the economics. But, again,  
22 that's the ten percent or the five percent -- sticking with  
23 Harvey's 95 percent -- and if we could get the system in place  
24 that's gets the 80 or 85 or 90 percent moving all together in a  
25 way that we think is good, then we get the focus on and figure



1 out how to deal with the last ten percent, rather than trying to  
2 make the system fit the last ten percent and wreck it for the 90.

3 MR. RAY: There is also an economic impact for  
4 creditors. Most of our creditors give us a budget on the amount  
5 of money we can spend for litigating their files, and that  
6 includes filing wage garnishments or bank levies. And so they're  
7 looking at this from a practical standpoint. And they don't want  
8 to spend money levying on a bank account and process server fees  
9 and so forth to hit an account that they can't get money out of,  
10 at least enough to justify all of their out-of-pocket expenses  
11 and the overhead expenses that Harvey and I would have in our law  
12 firm of processing those and following up with the sheriffs and  
13 following up with the banks and so forth. Well, geez, I mean how  
14 much money did you take out of their account? Because the banks  
15 aren't giving us that information in a timely fashion either.  
16 And that's a big part of it.

17 MS. BUSH: What about commingled accounts? Accounts  
18 either that belong to multiple people, one of whom is the  
19 judgment debtor, or accounts that have multiple-fund sources, do  
20 those raise any issues for purchase sense?

21 MR. MOORE: There's procedures in place for commingled  
22 accounts for the third parties to make claims to those funds, I  
23 mean at least in California. I don't know what happens outside  
24 of California as well as I do in California. It's where I  
25 practice, it's my home base.

1           It is very rare when we levy on a bank account that we  
2 get a third-party claim or a claim that it's really: You know,  
3 it's my mother in my account and I'm only on the account so that  
4 if she dies, I have the right to go in and take the money out.

5           But, again, if people call us up, we work things out.  
6 We don't want to put people out of their homes on Christmas Eve  
7 and take all the presents.

8           What we're trying to do is get legitimate debt paid  
9 back by the people that owe it in some way, shape, or another.  
10 And do we get a hundred cents on the dollar? No. Do we get a  
11 lesser amount overall? Absolutely.

12           Yes, commingled accounts create some issues. And, yes,  
13 multi-source accounts create some issues, but in California at  
14 least there are policies -- there are procedures in place for  
15 people to do something about it. And --

16           MR KINKLEY: A lot of debt collectors take the position  
17 that if they're commingled, if there's 50 cents in there that is  
18 not a government benefit, it changes the character of the  
19 account.

20           MR. MOORE: Because that's what the law is.

21           MR KINKLEY: Or -- it is not the law, and if you want  
22 to litigate that we will. We've won that issue every time we've  
23 brought it up. But we shouldn't have to bring it up and it's  
24 wrong, because you can trace the money. It's just like the  
25 divorce situation, you can trace money in and money out, what's

1 separate property and what's community property. Use tracing.

2 The judges will tell you that we use tracing all of the  
3 time, so all but 50 cents is exempt. It doesn't change the  
4 character of the fact that they draw the money --

5 MR. MOORE: First out and first out earlier --

6 MS. HILLEBRAND: That's a commingling that we're  
7 talking about. There's commingled exempt and nonexempt funds.

8 MR. MOORE: That's right.

9 MS. HILLEBRAND: And we have a good solution for that  
10 in California which is if exempt funds go in, it's protected up  
11 to x dollar amount, --

12 MR. MOORE: Right.

13 MS. HILLEBRAND: -- regardless. You don't have to  
14 trace.

15 MR. MOORE: You don't have to trace.

16 MS. HILLEBRAND: Nobody has to do accounting. It's  
17 just this dollar amount is protected if direct deposits were  
18 coming in, period, full stop, no matter what else has gone into  
19 that account. And that's a sensible, low-cost, efficient way to  
20 do it.

21 MR. MOORE: Right.

22 MR KINKLEY: Agreed.

23 MS. HILLEBRAND: If you're talking about two persons on  
24 the account, one's the debtor and one's not, I think that is more  
25 difficult because there are issues of due process and access to

1 funds for the co-account owner. And we certainly -- there's a  
2 Reporter -- I believe it's Reporter case in California, Sarmanto  
3 (phonetic), involving Bank of America, where the, I think it was,  
4 the son and the girlfriend had an account in which there was  
5 alleged fraud. And then mom and son had an account. Basically,  
6 and then mom had a separate account.

7 Mom never signed in the account where the fraud was,  
8 and Bank of America went and tried to take all the money out of  
9 mom's account anyway, because she was a co-signer with somebody  
10 who was a co-signer on the fraudulent account. I mean that was  
11 illegal and the court said so and there's just no two ways about  
12 it. She wasn't responsible for the account on which two other  
13 people were joint parties, even though she was a joint account  
14 holder with one of those parties on an account different from the  
15 account that they chose to empty under the banker's right of  
16 offset. That's a different kind of collection problem because it  
17 was a bank exercising independently, saying: You owe us money,  
18 we're just taking it out of your account.

19 But I think it illustrates the kind of problems that  
20 individuals can have if it is a truly commingled account with one  
21 debtor and one nondebtor. And there I think you do have to get  
22 into tracing and you have to -- maybe there ought to be some  
23 additional burden to try to figure out whose money it is as early  
24 as possible in that process.

25 MS. BUSH: An issue elsewhere is fees, when funds are

1 improperly frozen. Often there are fees for the freeze itself,  
2 there could be NSF fees because the consumer usually doesn't  
3 receive notice until after the freeze has been imposed. Who  
4 should be responsible for those fees?

5 MS. HILLEBRAND: If the account's exempt and the bank  
6 has frozen it anyway, the bank shouldn't be passing those fees  
7 onto the customer.

8 MS. BUSH: If the account contains exempt money or if  
9 the entire account is exempt?

10 MS. HILLEBRAND: If the account is exempt. If the --  
11 if the freeze was appropriate under existing state and federal  
12 law, then I think the question about the fees really is the  
13 reasonableness and whether it's a true transaction fee and not a  
14 profit scheme.

15 MR. NEWBURGER: We actually have a very troubling  
16 problem in my state. In Texas a bank is considered an innocent  
17 party to the garnishment, therefore they're entitled to recover  
18 their legal fees and the fees come out of the account. So  
19 obviously the consumer's paying them.

20 Even worse, banks have salaried, inhouse lawyers who  
21 are seeking to recover fees at private counsel rates. So you got  
22 a guy who's working for a salary and the bank wants to be  
23 compensated \$600 for doing an answer to a writ of garnishment  
24 saying, well, he spent two hours of time and that's what the law  
25 firm down the street would have charged, that's what he should

1 get.

2           You know there's actually a Fair Debt case in which UAW  
3 Legal Services got burned saying: No, no, those moneys go into  
4 union coffers, you can't charge market-rate lawyer fees. You've  
5 got to take that lawyer's salary and divide by the number of  
6 hours he works a year and multiply it by the amount of time he  
7 spent. But that's not how they're doing it in Texas, and it's  
8 very, very troubling. You could have a consumer whose resources  
9 in the account are chewed up. And, by the way, what the bank  
10 gets doesn't diminish the judgment either, --

11           MS. HILLEBRAND: Right.

12           MR. NEWBURGER: -- so the consumer's getting doubly  
13 burned on that. It's a deeply disturbing practice and the judges  
14 don't seem to have much of a problem in awarding the bank those  
15 fees at market rates.

16           MS. BUSH: How would you resolve that?

17           MR. NEWBURGER: I'd tell them -- what I'd really do is  
18 I'd set a fixed fee for doing it, because it's just not that hard  
19 to answer a garnishment. Again, we're back to electronic data  
20 that's available to the banks. It should be a nominal amount  
21 that a bank can get for answering a garnishment. So in my state  
22 you'd have to say how much was in your possession on the date the  
23 garnishment was served and how much is there on the date you  
24 answer. And, come on, it's just not that hard.

25           MR KINKLEY: Clerical.

1           MR. NEWBURGER: That's right. It's a nominal amount of  
2 effort and they should get a nominal fee for doing it. And it  
3 should not be a profit center for the banks, and that's what it  
4 is.

5           MR KINKLEY: Your question, though, was if the account  
6 is wrongfully garnished who has to pay, I believe -- as I recall  
7 the question. The debt collector does. And there's torts in  
8 most states of wrongful garnishment in addition to the FDCPA, in  
9 addition to state statutes if they're a collection agency. And  
10 then in addition the garnishment statutes themselves often tell  
11 how that burden is to be shifted.

12           But if it's wrongfully garnished, it's no different --  
13 let's say it was negligently wrongfully garnished, it's no  
14 different than an auto collision. If you rear-end somebody you're  
15 responsible, you have to pay. So if a debt collector rear-ends  
16 the consumer by grabbing funds that are exempt, then they have to  
17 pay. It's just individual responsibility.

18           Again, there is no right to garnishments. And when you  
19 choose to do something you'd better be right about it. And if  
20 you cause that cost, then you owe that person that cost.

21           Now I have no problem with what Manny said about the  
22 banks overcharging, but that should be a fight between the debt  
23 collector and the bank, not the consumer. The consumer shouldn't  
24 have to pay anything when they were wrongfully garnished. In  
25 fact, that is in fact is a good emotional distress case in most

1 instances.

2 MS. HILLEBRAND: I think I want to agree with Manny.  
3 Even if the consumer is rightfully garnished, it shouldn't be a  
4 profit center for the banks, to say: Gee, we could have pushed  
5 the button and it took ten minutes, but instead our guy spent two  
6 hours and, by the way, we want to pay him at a higher rate than  
7 what we paid him. Yeah.

8 MS. COLEMAN: And I think under California law, under  
9 state law there would be no recovery for the debt collector,  
10 because that would be subject to litigation privilege.

11 MR KINKLEY: That's not true, but we'll -- we've won  
12 litigation privilege every time it's gone up to the courts, so.  
13 As recently as a week ago I had --

14 MS. COLEMAN: You're in a different state, right?

15 MR KINKLEY: I have also read the litigation privileges  
16 cases in California.

17 MR. MOORE: Have you read *Rusheen*?

18 MR KINKLEY: I have, yeah.

19 MR. MOORE: Which gives us pretty broad litigation  
20 privilege in California.

21 MS. COLEMAN: My firm --

22 MR KINKLEY: Way beyond the scope of this discussion.  
23 We'll probably be seeing each other on that at some point  
24 somewhere.

25 MR. MOORE: Mike, is the sky blue?



1 (Laughter.)

2 MR KINKLEY: Not always. Sometimes it's gray when  
3 there's clouds. At night it's black. It changes. Of course  
4 it's not always blue, and that's the problem, you think in black  
5 and white and there's a lot of gray issues here, or blue and blue  
6 --

7 MR. RAY: Mike, I do see a common theme in most of your  
8 comments, is --

9 MR KINKLEY: Debt collector.

10 MR. RAY: -- the consumer has absolutely no burden, no  
11 obligations whatsoever. And anything that happens to them,  
12 somebody else ought to be punished and somebody else ought to  
13 have to pay.

14 MR KINKLEY: It isn't --

15 MR. RAY: If you really want to go your route it ought  
16 to be a two-way street. Maybe let's follow the British system,  
17 the loser pays, from a standpoint that if you want to say: Well,  
18 geez, they levied on this bank account. The debtor comes up and  
19 files some kind of a claim of exemption and they lose, then  
20 shouldn't they have to pay the attorney's time who fought that  
21 claim of exemption?

22 MR KINKLEY: Most garnishments --

23 MR. RAY: I mean that's fair.

24 MR KINKLEY: -- actually have that built in. There is  
25 a discretionary award for someone who wrongfully claims exemption

1 also.

2 MR. RAY: No, let's not make it discretionary, let's  
3 make it mandatory, just like you want to make mandatory the fact  
4 that the debt collector should pay for wrongfully levying on this  
5 bank account.

6 MS. HILLEBRAND: It's rhetorical or do we have to  
7 object to it?

8 (Laughter.)

9 MS. BUSH: Well, if anyone wants to speak to the issue  
10 of repeat filings, they're welcome, but I'm going to read a  
11 question that we got from the audience right now. As we heard  
12 before, the collector generally receives a date of birth from a  
13 debtor. Is looking at dates of birth for whether the judgment  
14 debtor is 65 or older a best practice for potentially identifying  
15 exempt debtors?

16 MR KINKLEY: I've made that argument before that when a  
17 debt collector claimed bona fide error: We didn't really mean to  
18 garnish exempt accounts, I said: Come on now. You had a date of  
19 birth. She's 76 years old. There's a real good chance that  
20 she's getting some kind of a benefit.

21 MR. MOORE: Why?

22 MR KINKLEY: Because she's 65 years old and she's  
23 probably getting some kind of a benefit at that point. She's  
24 getting Social Security.

25 MR. SARGIS: Well, the problem is in California that

1 could be a big chunk of the population. If you really wanted to  
2 say who's getting some sort of government benefit or some type of  
3 assistance. And so -- Harvey doesn't have to jump up on this  
4 one, but I'll say the fact that some -- my mother passed away two  
5 years ago. She had bank accounts. She received her railroad  
6 retirement in lieu of Social Security. It went into an account.

7 Being of her generation, she kept more money in that  
8 checking account than we would. There's no reason, if she hadn't  
9 paid her debts, that she shouldn't have been garnished. And  
10 there's no reason why a collector would say merely because she  
11 was 82, that shouldn't be levying on that account.

12 But, again, I think part of what we've all said is  
13 there's a lot of fighting that could take place, but we all agree  
14 on what the FTC should be doing, say: Let's just get the  
15 standard, uniform rule where we have the government benefits  
16 going into, that we know we protect a baseline level so that --  
17 and none of us want to see the person receiving those benefits  
18 not putting food on table, not paying the electric bill.

19 We can have fun arguing about a lot of the other  
20 points, but --

21 MR KINKLEY: I just have one question, Ron, on your  
22 mom's account: Did you garnish it?

23 (Laughter.)

24 MS. BUSH: Okay. Well, I appreciate all of the  
25 contributions that you've made. And I think we're going to not

1 take a break right now, but we're going to pull up for the  
2 conclusion. And if there are speakers who don't have water who  
3 need it, would you just -- I'll come around with some water,  
4 okay?

5 MR. SARGIS: Mike, when you and Harvey want to have  
6 that case about -- that you're going to litigate, you can do it  
7 in the Eastern District of California in the bankruptcy courts.

8 (Laughter.)

9 MR KINKLEY: Well, I would, but *Walls v. Wells Fargo*  
10 keeps me out of your court, for FDCPA, unfortunately.

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## 1 CLOSING ISSUES AND FUTURE DIRECTIONS

2 MR. PAHL: All right. Thank you, everyone. We're  
3 going to move onto the last session of our program today. And I  
4 would describe it -- it's described on the agenda as being a  
5 conclusion, but I prefer to describe it as being the final word.  
6 And I think what I would like to do, is we've had a number of  
7 interesting ideas that have been floated today, lots of  
8 productive discussion. What I'd like to do is go around and ask  
9 each panelist to identify one thing that they think the FTC  
10 should do, if anything, to help with the problems that we've seen  
11 in debt collection litigation.

12 Some of this is helping us to sort of sift through all  
13 of the things we've heard. Try to figure out what people think  
14 are the most important things for our agency to focus on as we go  
15 forward.

16 I guess we will start over with Paul Arons and go from  
17 there.

18 MR. ARONS: It came up a little bit before, and I'm  
19 uncertain of the FTC's authority in this, but the FTC's express  
20 authorization of the FDCPA for injunctive relief has been  
21 interpreted by most courts to mean that private parties cannot  
22 seek injunctive relief.

23 Injunctive relief is often in the cases I do a very  
24 important tool in preventing abuse by debt collectors. We file a  
25 lawsuit, that they're typically class actions. We're going after

1 a debt collector who is collecting more money than they should on  
2 dishonored checks.

3 By the time I get through the 12(b)(6) motions, class  
4 certification, and to summary judgment, two or three years may  
5 have passed during which the debt collector has continued to do  
6 everything it wants to do in collecting money and, either right  
7 before the summary judgment or right after I actually get a  
8 judgment entered, the debt collector may file bankruptcy. So we  
9 never get any money back, we don't stop them from doing anything,  
10 generate a lot of fees for defense counsel who also gets stiffed  
11 when the debt collector files bankruptcy, but not for as much as  
12 I do.

13 Okay.

14 MR. PAHL: Thank you.

15 MR. ARONS: Anyway, injunctive relief is a very  
16 important tool and if an opinion by the FTC that the FDCPA does  
17 not preclude private causes of action for injunctive relief would  
18 be possible that would actually relieve a lot of the work, both  
19 -- done both by private counsel and the complaints the FTC  
20 receives.

21 MR. PAHL: Thank you.

22 Ms. Coleman.

23 MS. COLEMAN: Well, in sitting here I'm trying to  
24 narrow this down, and I think I have two thoughts. One is is I'd  
25 like to see the standard for attorney's fees awarded to

1 defendants for frivolous lawsuits lowered from what it is. I'd  
2 like to see that be recoverable not only against the debtor but  
3 also against the plaintiff's counsel, because what I see, -- and  
4 I'm going to name a name -- Krohn & Moss, who is out of Illinois,  
5 they have a California office, they have attorneys that are not  
6 licensed in California who are sending demand letters into  
7 California. It's a form demand letter. It says: We think  
8 you've violated seven sections of the FDCPA. We're entitled to  
9 emotional distress. You really ought to settle with us for  
10 \$10,000.

11           Their complaints are form complaints which say: You  
12 call too much. You've called these two or three numbers. The  
13 debt collector let the phone ring and didn't let it ring long  
14 enough for the debtor to answer. And when the -- and they left  
15 messages that violated the FDCPA. And that complaint, I have 40  
16 of them in my office.

17           I know that every one of the debt collectors here has  
18 10, 20, 50, 100 -- and those types of complaints, the first one I  
19 received was on a commercial debt. I mean and so by changing the  
20 standard for the attorney's fees provision, I think you end up  
21 evening the playing field, because I think what happens is there  
22 are an awful lot of frivolous complaints out there. Granted,  
23 there are some valid ones, but there are an awful lot of  
24 frivolous complaints out there. And what we're seeing is that  
25 that's costing debt collectors \$5,000 a pop because I can't

1 defend the case for less than \$5,000. It's cheaper for them to  
2 settle.

3 And the other thing I would like to see, and I think  
4 somebody else will end up hitting on it, that the FDCPA be  
5 updated to modernize it for how technology is used by the  
6 collection agencies, the collection industry, by businesses, and  
7 by consumers.

8 MR. PAHL: Thank you.

9 Just one thing I would note for the record is the FTC  
10 issued its debt collection workshop report last February and that  
11 was one of our recommendations as well, is that the act needs to  
12 be updated to reflect changes in technology.

13 Ms. Flory.

14 MS. FLORY: Well, first I'd just like to point out you  
15 are asking more debt collectors how to protect consumers than  
16 you're asking consumer advocates. So just to note that, but I'd  
17 just like to go back to what we were talking about before, about  
18 proper notification to consumers in the complaint on what the  
19 debt actually is and who it's from, particularly in the area that  
20 I work in and that are medical bills. It's really chaotic.  
21 People don't always know what they're getting. And to the extent  
22 that we have so many of these going to default judgment, that  
23 means it's a lot of *pro per* people trying to figure out what they  
24 just got.

25 MR. PAHL: Thank you.



1 MR. GARGANO: I would note that the complaint  
2 requirements here, and while I don't believe that the feds should  
3 be dictating what the states do, and I don't think they could,  
4 maybe as a best practices or a recommendation that uniformly the  
5 states look into this, if the FTC could just sort of nudge states  
6 to look into it, I think there was almost a consensus here about  
7 that issue, about the complaint, who was the original debtor, how  
8 much it is. I think that would really clarify things in the  
9 litigation process.

10 Again, I'm not advocating that they dictate that it  
11 become a law, but I think if they could just sort of nudge in  
12 that direction it would be a good thing for all of the states to  
13 look into that.

14 MR. PAHL: Thank you.

15 Ms. Hillebrand.

16 MS. HILLEBRAND: I have two primary recommendations.  
17 The first was that the FTC work to develop and establish, whether  
18 by rule or by statute, a national sell-by date, an expiration  
19 date for debt that is too old to be sold, collected, or sued  
20 upon. And I think a lot of the problems we're dealing with would  
21 be addressed with that.

22 I also think it's important to acknowledge that the use  
23 of litigation can in some circumstances be an unfair practice,  
24 and the FTC has a role to define and describe when the use of  
25 litigation is an unfair practice. And I think that's a way in

1 which this information about what information should be in the  
2 prelitigation communication, in the complaint, and should be  
3 provided before it's appropriate to seek default judgment, not  
4 interfere with the role of the court, but the FTC can say a  
5 collector ought to be offering this proof when it seeks a  
6 default. And I think that would take us a long way.

7 MR. PAHL: Thank you.

8 MR KINKLEY: The 15 USC 1692(g) requires a debt  
9 collector to identify the debt. What does that mean? When we  
10 talk about identifying the debt I think that the things Gail has  
11 mentioned should be included. If you want to start with the  
12 charge-off date, I'll settle for that now. I don't quite agree  
13 with any, but let's start with that, because we're all in  
14 agreement from that point.

15 From the charge-off point, what possible problem could  
16 there be in identifying how much is interest and what the rate  
17 is; how much is an add-on charge, how much is this late charge.

18 What I see is after charge-off and the debt buyer gets  
19 it, they look at the terms and conditions. They say: Oh, we  
20 could add late fees. And then they start adding late fees after  
21 it's already been charged off.

22 So the statements you see attached to the lawsuits  
23 frequently are -- there are no charges on there. They're just  
24 additional late fees and interest. That's all that's presented  
25 to the court.

1           So this idea of more transparency in exactly what is  
2 being collected. How do you determine if you're trying to  
3 collect an amount that's not allowed by law or contract, which is  
4 15 USC 1692(f)(1) of course. And how do you determine that fact  
5 if you don't have it in front of you? How does a judge determine  
6 statute of limitations? Whether they choose to be the gatekeeper  
7 on statute of limitations or not, at least they should have that  
8 choice. So the date of default ought to be identified.

9           These are all basic things that we've always done in  
10 all other litigation, simply because they're doing it in great  
11 volume, that they shouldn't get a pass on the basics of  
12 litigation that have always been required.

13           As to the process server, transparency, accountability,  
14 and sanctions. I agree with the professional process servers  
15 here, who are well spoken, say we need accountability -- I like  
16 insurance better than a bond. I just think a bond is easier to  
17 get passed.

18           Attorneys responsible? Under some circumstances it can  
19 be -- I think you can declare part of your, under 1692(1) -- I  
20 think it's (1) -- that gives you the authority to declare what is  
21 unfair and deceptive as a violation of this Act. I think it's  
22 unfair and deceptive for an attorney to continue to use a process  
23 server that they have determined may not be correct all the time.

24           There's others, but we've got limited time.

25           MR. PAHL: Sure.

1 Mr. Maurer.

2 MR. MAURER: Just by way of shorthand, I'd like to  
3 incorporate Gail's recommendations by reference.

4 And also I think a lot of the unfair and deceptive acts  
5 and practices that we've heard about, the problem there is are  
6 already prohibited by the federal Fair Debt Collection Practices  
7 Act, but the remedies are inadequate. And the Federal Trade  
8 Commission should recommend to Congress that the statute be  
9 amended to provide for an express provision for injunctive  
10 relief.

11 MR. PAHL: Thank you.

12 Mr. Moore.

13 MR. MOORE: Tom, when you said one I was worried until  
14 Mike had four, so I figure I can get two in response.

15 There are two things I'd like to see the FTC do. One  
16 is I would like to see the FTC take a look at the cottage  
17 industry of lawyers who do not bring suits to remedy the abuse  
18 that the Senate observed originally when they sponsored and  
19 passed the FDCPA.

20 And I would cite the FTC to the Sixth Circuit Court of  
21 Appeals, case *Federal Home Loan Mortgage Corp. v. Lamar*, 503 F.3d  
22 504, 2007, a Sixth Circuit case. There's some good language in  
23 there about what's happening in the industry and the fact that  
24 collection agencies and collection attorneys are being sued  
25 unnecessarily for technical violations that may not even be

1 technical violations.

2           Having said that, I think there is also other positive  
3 things that can be done with the FDCPA. I think lawyers should  
4 have a litigation exemption specified in the FDCPA. When we were  
5 practicing law as lawyers, we should be allowed to practice law  
6 based on the rules that are established by the court system, by  
7 our state bars.

8           I also think that the FTC and the federal government  
9 should stay out of the state courts. We should be allowed to  
10 practice law the way our judges tell us to practice law. If  
11 there is a pleading requirement set by the Judicial Council or by  
12 our rules of practice, that's what I need to satisfy because that  
13 is what I as an attorney in the state of California am required  
14 to do in representing my client.

15           The FTC should basically allow the judges, the  
16 commissioners, the Judicial Council, the Supreme Court of the  
17 State of California, State Bar, to tell me how to practice law,  
18 not a federal entity that is not in the trenches with us, does  
19 not see what's going on on a day-to-day basis. Whereas our  
20 courts, our judges, our Judicial Council, and the State Bar do.

21           MR. PAHL: Thank you.

22           Mr. Naves.

23           MR. NAVES: It's Naves.

24           MR. PAHL: Naves. Sorry.

25           MR. NAVES: It's okay.

1 I'd just like to say thank you, first of all, for  
2 having the roundtable discussions. I mean for me I think this  
3 has been very meaningful to hear the many different points of  
4 view and the concerns that have been raised here today. It gives  
5 you a lot to think about, it gives you sort of a new appreciation  
6 for the issues at hand and the difficulties in solving them. So  
7 I'd just like to get that on the record here.

8 From my perspective, I think, as new as I am to the  
9 industry, there are some things I think we could do to make  
10 communications with consumers easier. From our perspective, I  
11 think the FDCPA could use some improvement in terms of modern  
12 technology, cell phones, email.

13 There's got to be a better balance between protecting  
14 consumers' right to privacy and our ability to communicate with  
15 them so that we can avoid a lot of the issues that we had to  
16 discuss here today. And I think that if we took a look at that  
17 and tried to find some common ground and some ways to be able to  
18 communicate with people a little more effectively, that we could  
19 resolve more of the issues before they come to the litigation  
20 phase.

21 MR. PAHL: Thank you.

22 Mr. Newburger.

23 MR. NEWBURGER: I'd like to actually first add my  
24 thanks to those Ron expressed. I know the staff has worked  
25 tremendously hard. I know the Commission has limited staff and

1 resources. This was a tremendous amount of work. And I really  
2 appreciate all the effort that's gone into it.

3 I have two things that would be on my wish list. One  
4 that is near and dear to my heart. I'm pretty well known for my  
5 dislike of SLAPP suits. And to me a SLAPP suit is when a lawyer  
6 sues another lawyer, another party to chill their participation  
7 in litigation.

8 When a collection lawyer sues a consumer lawyer it's  
9 called a SLAPP suit. When a consumer lawyer sues a collection  
10 lawyer or its client to stop them from collecting debts, no one  
11 seems to mind that. It's a sort of do unto others, but when  
12 you're on the consumer side, it's do unto them before they do  
13 unto you. And it bothers me. We've lost a very important right  
14 as a result of FDCPA litigation -- or, privilege, to be precise.  
15 And it is the litigation privilege.

16 The doors of the courthouse should be open to all. We  
17 should not be chilling attorneys from representing their clients.  
18 It is fundamental to the nature of what we do as attorneys, that  
19 we should be zealously representing our clients -- and I know the  
20 rest of the phrase -- within the bounds of the law, but we want  
21 lawyers to represent their clients, to present their clients'  
22 positions. And, as the Restatement of Torts says, the client's  
23 entitled to have those positions represented even if the lawyer  
24 thinks the client will lose, as long as the lawyer can satisfy  
25 the equivalent of Federal Rule 11.

1 I'd like to see the Commission endorse the restoration  
2 of the litigation privilege or build it into the Act, to be quite  
3 blunt. We're not talking about protecting collectors who work  
4 for lawyers. We're not talking about calls. But we're talking  
5 about the activities that open the doors to the courthouse. And  
6 it's a very important right to the parties whom the lawyers  
7 represent to be represented effectively.

8 The other thing: I don't think you have the power to  
9 do it, but I'd sure like to see you as an agency of the federal  
10 government get behind putting some heat on the banks to fix these  
11 other issues, to force the banks to get in line on things like  
12 data retention, document transfer, chain of title, all these  
13 things that I think we agree on.

14 I realize that as much as I wish you could do it, the  
15 Commission does not regulate banks. But anything that the  
16 Commission could do to endorse putting heat on banks would be a  
17 very positive thing for everyone.

18 MR. PAHL: Thank you.

19 Mr. Ray.

20 MR. RAY: Well, you know coming this far in the game,  
21 it's Manny and Harvey and June Coleman have expressed a lot of my  
22 thoughts. I think it's great that attorneys and judicial  
23 officers in different fields have all come together to work these  
24 things out, because I think as a group we all want to do the  
25 right thing. And we don't want to do things that are illegal.



1 We don't want to do things that are overtly punitive.

2           But the FTC does need to even the playing field, as  
3 June has said and Manny has indicated in part with the litigation  
4 privilege, from a standpoint, because there are groups of  
5 attorneys out there who are abusing the law with their frivolous  
6 lawsuits. And when they do that, there needs to be a major  
7 consequence to the attorney who filed those frivolous lawsuits,  
8 not the debtor, because I think what we see in that case is I'll  
9 bet those attorneys have never expressed and fully advised their  
10 clients that: Geez, if you lose this you may be stuck with a  
11 whole round of court costs, which will push you into bankruptcy  
12 if you're not already there.

13           The final issue would be -- and it hasn't been  
14 discussed at this roundtable, would be perhaps the Federal Trade  
15 Commission should look into regulating debt negotiators and  
16 things. I think a lot of those are probably more harmful to  
17 their clients than helpful. At least the ones we've worked with,  
18 they refuse to supply any kind of financial information. They  
19 want us to take a payment plan without any kind of documentation.  
20 They're taking money from these people that I think is  
21 unjustified, making unjustified promises to them.

22           And I think in the worst-case scenario I had one that  
23 came through the other day, not only did it represent that they  
24 represented the debtor, but they also represented their inhouse  
25 counsel represented the debtor. And when I spoke to this --

1 tracked the attorney down, she didn't work inhouse for that  
2 company, had never worked inhouse for that company, and had told  
3 them multiple times to quite using her name in their documents,  
4 and you get that.

5           And what I found out was they were taking automobiles  
6 as donations to their nonprofit and then putting them on their  
7 used car lot. That would be a big area for the FTC to look at.

8           MR. PAHL: Yeah. One thing I would note is that the  
9 FTC this summer commenced a rulemaking to cover certain debt  
10 settlement activities under our telemarketing sales rule, so that  
11 is something that we currently are looking at and are in the  
12 midst of a rulemaking on that topic, so.

13           Mr. Sargis.

14           MR. SARGIS: Thank you. And I'd also like to thank  
15 everybody here today. We had a very dynamic discussion. I'll  
16 put in a plug for the West Coast, that maybe just kind of the way  
17 we live out here and what we do, that we can sit around a table  
18 and put ideas out and have such a dynamic discussion and see a  
19 lot of common ground.

20           First, in looking at it, what I'd recommend to the  
21 Federal Trade Commission is as it goes forward in looking at the  
22 FDCPA and adjustments to be made, recognize that this is an act  
23 to stop bad conduct that's detrimental to both the consumers and  
24 people in the collection industry. It's not intended to be  
25 interposed as a debt-avoidance or debt-defensive tool.

1           That as part of that, as we've seen, a lot of this ends  
2 up being driven by economic issues above and outside of the  
3 direct debt collector. And if you're taking a stick and pounding  
4 on the debt collector, you're not getting to some of the bigger  
5 issues or factors pushing it, and would say remember that to the  
6 extent you give and help create an environment for reasonable  
7 collectors to act in a reasonable manner, to squeeze out the bad  
8 actors, so you don't give the bad actors an economic advantage  
9 who aren't going to follow the law and you make it more  
10 burdensome, you're actually advancing consumer protection.

11           And I will use also the dreaded p word, preemption.  
12 And as you go back through the FDCPA, whether it's full or a  
13 partial preemption, I think you should seriously consider to say:  
14 Look, states, you can have greater protection if you want. But  
15 if you're -- if, consumer, you're going to bring a claim under  
16 the FDCPA and allege this conduct violates the FDCPA, you can't  
17 start doubling up and tripling up the damages under the state  
18 act.

19           So it's partial preemption at least, but it's election.  
20 You can go one or the other, but you don't get to double up the  
21 damages because the state act isn't really providing any greater  
22 protection if it's already violated.

23           And then, finally, with respect to injunctive relief,  
24 I'm not quite onboard with the professor on that and would say  
25 let's look at it very carefully because I'm leery about having a

1 judge in the Seventh Circuit say: You have to write your notice  
2 this way, when I know the judges in the Ninth Circuit are going  
3 to say there's no way that it should apply. So let's look very  
4 carefully at the type of cases where injunctive relief is really  
5 perceived as necessary and there may be another better remedy  
6 that could be fashioned for it.

7 MR. PAHL: Thank you.

8 Mr. Tamaroff.

9 MR. TAMAROFF: I would like to thank you for allowing  
10 me to participate with this group. I've had a fantastic time. I  
11 didn't participate too much this afternoon, but I really had a  
12 great time listening to everybody go back and forth. I've  
13 learned an awful lot today.

14 A couple of points I would like to make. I was asked  
15 by Steve Janney, who's the president of the California  
16 Association of Legal Support Providers, to mention the fact that  
17 earlier in the day when we were talking about bad and good  
18 service, that probably the better terms would be lawful and  
19 unlawful service. Because it's a subtle point, I guess, but  
20 lawful, you can have lawful service, which may not be what we  
21 term good service because the person may very well, even though  
22 it's lawful, not actually receive notification.

23 The other point I would like to make is that our  
24 National Association's Membership Directory and Civil Rules  
25 Guide, the fall edition, will be coming out shortly. With that

1 we have our -- we always have our best practices listed in there,  
2 along with our Code of Ethics. And if anyone would care to  
3 receive a copy of this, I'd be happy to have it shipped to you.  
4 Just give me your business card before you leave.

5 My wish would be if there's any way at all to influence  
6 any state legislators to take consideration of the problems they  
7 have with process servers and service of process in their  
8 particular states, that they should start considering legislation  
9 that I believe can solve the problem, and that we're here to work  
10 with them. Thank you very much.

11 MR. PAHL: Thank you.

12 And, Mr. Wilcox.

13 MR. WILCOX: Just a few bullet points. And I think a  
14 few people touched on this already. Going last, that's what  
15 happens.

16 Injunctive relief. If there is an abusive, false,  
17 deceptive, or misleading practice, let's just put a complete stop  
18 to it. Why not?

19 The remedy section, 1692(k), is out of date. Statutory  
20 damages of \$1,000 was \$1,000 in 1978, but it's \$290 now. There  
21 should be some provision to allow for some cost-of-living  
22 adjustment, or something like that, so we don't have to go back  
23 in and relook at the statute every five or ten years.

24 Punitive damages. The Fair Credit Reporting Act has  
25 punitive damages, so should the FDCPA.

1           And then just one final comment. There was some talk  
2 earlier about perhaps lowering the standard for debt collectors  
3 to try to recover attorney's fees or something else that would  
4 appear to me to just chill the statute. The FTC puts out their  
5 annual report every year. It's very helpful. I use it in  
6 mediations. The evidence in there is wonderful. And one of the  
7 first things mentioned in the report is that, once again,  
8 complaints from consumers led the type of the category of  
9 complaints to the FTC. It's not: Gee, there's been an abundance  
10 of evidence this year that there are frivolous lawsuits brought  
11 by consumers.

12           Are there no frivolous lawsuit? Probably not, maybe  
13 there are some, but that's not what the problem is. The annual  
14 report's been consistent every year. Complaints from consumers  
15 about debt collectors engaging in abusive, false, deceptive, and  
16 misleading practices leads to category of complaints. Let's keep  
17 our eye on the ball. There's no reason to change the statute and  
18 have a chilling effect, which would merely just give unscrupulous  
19 debt collectors the ability to sue consumers or try to leverage  
20 against consumers and, more than likely, just to beat the  
21 statute.

22           MR. PAHL: All right. Thank you.

23           Two announcements to make as we finish up here. One  
24 is, as I mentioned earlier, we at the FTC are accepting public  
25 comments about debt collection litigation, arbitration issues.

1 If you are interested in commenting on anything that you heard  
2 today, feel free to send us a comment and you can go to the FTC  
3 website to find the link for that.

4 The second thing is both in your folders and in the  
5 back of the room are evaluation forms. I appreciate if people  
6 could take a moment and fill one of those out to help us planning  
7 future roundtables and similar events.

8 Lastly, I'd like to thank a whole lot of people for  
9 doing things to help put this program on, on behalf of the FTC.  
10 Primarily, I'd like to thank all the panelists for their  
11 insightful remarks and their spirited debate today.

12 I'd like to thank San Francisco State University for  
13 making this room and the rest of their facilities available to  
14 us.

15 I'd like thank the stenographer, the sound folks, and  
16 the camera man for being here for two days and keeping us up and  
17 running.

18 I also would like the thank the FTC staff from our San  
19 Francisco Regional Office who helped out: Jeffrey Klurfeld, Dean  
20 Graybill, Craig Kauffman. From our Seattle Regional Office:  
21 Tracy Thorleifson and Laureen France. And from our Dallas  
22 Regional Office: Tom Carter.

23 One of the things we are doing with these  
24 roundtables is moving to different locations about the country,  
25 and so this one definitely had a western emphasis. And it's

1 great that people who work in our regional offices in the western  
2 part of the country were able to help out and play such a key  
3 role.

4           Most of all, though, I'd like to thank Julie Bush,  
5 Bevin Murphy, and Parrish Bergquist, who are the FTC Headquarters  
6 staff who were primarily responsible for putting the program on  
7 today. I'd like to ask us all give a round of applause to all of  
8 the people who worked so hard to make this possible.

9           (Applause.)

10           MR. PAHL: Thank you. And, with that, we are  
11 adjourned.

12           (The meeting was adjourned at 4:23 p.m.)

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CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER:  
CASE TITLE: FTC  
HEARING DATE: September 30, 2009

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the digital audio recording transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

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\_\_\_\_\_  
SUSAN PALMER

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation, and format.

\_\_\_\_\_  
STEVEN PALMER