UNITED STATES FEDERAL TRADE COMMISSION

DEBT COLLECTION:
PROTECTING CONSUMERS

A ROUNDTABLE

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9:00 A.M. TO 5:00 P.M.

FEDERAL TRADE COMMISSION

CONFERENCE CENTER

601 NEW JERSEY AVENUE, N.W.

WASHINGTON, D.C.

Reported by: Susanne Bergling, RMR-CLR

C O N T E N T S

P R O C E E D I N G S

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MR. PAHL: Good morning, everyone. My name is Tom Pahl. I'm an Assistant Director in the FTC's Division of Financial Practices, and I'm glad to welcome you all here today to our third Debt Collection Arbitration and Litigation Roundtable. This roundtable today is going to be focused exclusively on the topic of debt collection litigation.

Before we begin, I have a number of administrative announcements I would like to go through. The first is that we are going to try very, very hard to stay on schedule. So, if you look at the times that are set for the beginning of each panel in our materials, we would ask that you be back in the building and seated at that time so that we can start promptly.

Reentry to the building, if any of you leave during the breaks or over the lunch, the lunch hour, you will have to go back through security in order to get into the room here today. And so please plan on a little extra time, if you leave the building, for the security process.

If you do come back into the room after the session has started, I would ask you to come in the doors near the back so that we don't interrupt the

sessions that are going on.

The bathrooms are located out in the main hallway area, behind the bank of elevators, and so that's -- basically, it's on the -- I guess it's on the southeast side of the building. So, basically it's behind the elevator banks for those of you who are looking for the restrooms.

In the event of an emergency, please leave the building in an orderly fashion. Once you get outside the building, you'll need to find New Jersey Avenue, which is the street which runs right in front of the building, right out here to my left. Across from the FTC is the Georgetown University Law Center. Look to the right front sidewalk, and that's the point where everyone's supposed to come together in the event of an emergency, and you will be instructed at that point where to go and what to do.

Suspicious activity. Our security personnel has said if you see any suspicious activity here today, please let them know.

Refreshments, hot coffee and cold water, will be available at the breaks out on the table outside. If you want other things to eat or drink, there is a cafe that's on the G Street side of our building, and you can go there and pick up something else.

The structure of our panels here today, we are going to have four panels, each of which will have a moderated discussion. Time permitting, we're going to allow members of the audience to pose questions to the members of the panel. In your folders that you picked up when you registered, you'll find note cards. If you have questions, please write them as clearly as you can, as legibly as you can, on those note cards, and hold them up. People will collect them, and then they will be handed to the moderator of the panel sessions, who will read as many of the questions as they can in the time permitted.

For those of you who are viewing this event today by Webcast, you can submit questions to our panelists at consumerdebtevents@ftc.gov. The same process will be used. We will have someone monitoring emails that come in, and they will give the questions that come in by email to the moderators.

If the questions are not asked by the moderators, bear in mind, too, that they are things that we, the staff at the agency, will consider as part of reviewing all of the information that we've received. So, just because a question you may have does not end up being posed, it doesn't mean it's not something that we will not think about and try to figure out, what the

implications are of that question on litigation.

What we will do at the end of each of our panels today is we will have Joel Winston, who is the Associate Director in our Division Of Financial Practices, come up and try to summarize the discussions and provide some brief thoughts about what has been said.

Cell phones. To avoid interruptions, we would ask that everyone turn the ringers on your cell phones off right now. And if you have any questions throughout the day, feel free to ask me, ask any other moderators, or ask the FTC staff out at the registration desk, and we will do what we can to help answer your question.

Without further ado, I'd like to turn to introducing our speaker for our opening remarks. David Vladeck, the Director of our Bureau of Consumer Protection, unfortunately is unable to be here with us today. Fortunately, though, we have a wonderful substitute, Chuck Harwood, who was recently named Deputy Director in our Bureau of Consumer Protection.

For many years, Chuck was the head of our regional office in Seattle. In that position, he was actively involved in a lot of consumer protection litigation, including debt collection litigation. We are pleased that Chuck is here today to provide opening remarks to commence our roundtable.

Welcome, Chuck.

(Applause.)

MR. HARWOOD: Thank you, Tom. Good morning. Glad to see all of you this morning. Welcome to those here in the room and also I want to welcome folks who are on the Internet and viewing this over the Internet.

This is the Federal Trade Commission's third and final roundtable discussion concerning debt collection, and as you already know, today our focus is particularly on debt collection litigation.

In connection with our ongoing review of debt collection practices and through our previous roundtable discussions, we've heard many stories to illustrate why debt collection litigation is a timely topic for this roundtable.

For example, we recently heard from a judge who wanted to be here today but unfortunately could not due to a schedule conflict. The judge explained, though, how debt collection litigation touched his own family and changed his approach on the management of these cases, and this is what he said:

My wife was contacted by an attorney about a credit card account that she had never opened. Upon further investigation, it was found by the collection attorney who had actually contacted his wife that there

was, in fact, no document trail linking the account to the judge's wife, and the attorney ultimately dropped the case.

But, the judge goes on to note, six months later, someone else contacted my wife, again about that same debt. The judge observed that title to the debt continued to change hands from one debt buyer to another over a period of years, and a succession of debt collectors contacted his wife to collect. The debt collectors continued to contact her even though she had disputed the debt and even though there was no documentation linking her to the account.

Because of His Honor's experiences, he said that he's now particularly careful to examine documentation and evidence on title in debt collection cases that come before him while he's sitting on the bench.

Now, careful and conscientious judges like I might have just described are obviously part of the consumer protection solution to the problem we're going to talk about today, but they are not the entire solution. We need to figure out how debt collection litigation can be restructured to protect consumers better.

Too often, collection attorneys file lawsuits against the wrong parties or with little evidence to

substantiate the debt. Too often, consumers find out that a judgment has been entered against them only when their bank accounts are frozen or garnished. These experiences and stories highlight the need to ensure that consumers receive adequate service of process so that they can appear and defend themselves; and the need to ensure that debt collectors provide adequate information about their claim and during litigation, especially their claims and complaints regarding old debts, so the judges have sufficient basis for the decisions they may make about these debts; and the need to ensure that banks and state courts devise a better system for garnishing bank accounts, so that they do not freeze or garnish funds that are exempt from garnishment under federal law.

To evaluate the means of reaching these goals, we will have four panel discussions here today. Our first panel will address issues relating to the service of process. The second panel will examine concerns regarding old debt and statutes of limitations. The third panel will assess issues concerning evidence of indebtedness. And our fourth and final panel will address concerns relating to the garnishment of federally exempt benefits in bank accounts.

To identify possible solutions, we're turning to

the experts, the folks who will be sitting up here, and I'm delighted that so many distinguished individuals from industry, the consumer advocacy community, judiciary, academia, and law enforcement agencies are here today to discuss debt collection litigation, and I thank all of you for helping the Federal Trade Commission to find ways to better protect consumers.

While we will certainly be relying heavily on these experts, we also want to hear from the general public. Individuals and organizations may submit public comments to us in paper or electronic form concerning the topics you're going to be hearing about today until July 8th, 2010.

UNIDENTIFIED SPEAKER: January.

MR. HARWOOD: We are especially -- July -- I'm sorry. January, thank you. January 8th, 2010, an important change. So, January 8, 2010. There are instructions on how to submit comments in our literature and on our Web site.

After our roundtable, we will next turn to developing findings about the functioning of the current debt collection system and recommendations for how to improve it, continue to incorporate these observations into a report articulating changes in the law, policies, and practices, as warranted. We hope to be a catalyst

here at the FTC for reforming debt collection litigation, the debt collection litigation system, and improving the lives of American consumers.

With that, I thank all of you for, again, joining us here today, and I'll turn it back to Tom. Thank you.

(Applause.)

MR. PAHL: Thank you, Chuck.

Before we begin our first panel, we would like to show you a video. As you know, one of our priorities for our consumer protection mission here at the FTC is educating consumers so they can protect themselves. As part of these efforts, our Division of Consumer and Business Education has developed a new video on the rights of consumers on the Fair Debt Collection Practices Act. We will show this video now. It will take about three minutes.

If any of you are interested in this video, we encourage you to link to it on our Web site. The video is available in English and Spanish. We also have copies of the DVD form out in the lobby. So, I would like to ask that the tape be played now, to give you some idea of what we here at the FTC do in terms of trying to educate consumers.

(Videotape played.)

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

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

"They can't say the papers they send you are legal forms if they're not, nor can they make up consequences for not paying your debt, and they can't call you at work if your employer doesn't allow it.

"You also have the right to stop debt collectors from calling you. How do you do that? You have to notify them in writing. Sending them a letter should stop the phone calls, but, of course, it doesn't wipe out your debt.

"There's helpful information about dealing with debt at ftc.gov/moneymatters, a Web site from the Federal Trade Commission. It explains the rules of behavior for debt collectors. Take a look. There are some that may surprise you.

"If your debts have gone into collection, remember that you have rights. Asserting your rights

doesn't make your debt go away, but it does give you a voice. The more you know about how to manage your debt and deal with debt collectors, the better off you can be. After all, money matters.

"If you think that a debt collector has violated the law, report it. File your complaint with the Federal Trade Commission at ftc.gov/complaint. Your complaint gives law enforcement a lead to follow up on and may stop it from happening to someone else.

"The Federal Trade Commission is the nation's consumer protection agency. For more tips on credit and debt, visit ftc.gov/moneymatters, or 1-877-FTC-HELP. 1-877-382-4357.

(Videotape ended.)

PANEL 1: INITIATING SUITS:
SERVICE OF PROCESS AND CONSUMER PARTICIPATION

MR. PAHL: Our first panel today is going to focus on the topic of initiating suits in debt collection litigation. Our panel will be moderated by Dama Brown, who's an attorney in the FTC's Atlanta Regional Office.

At this time, I'd like to ask Dama and our panelists to come forward and take their seats, and we can begin. Thank you.

(Pause in the proceedings.)

MS. BROWN: Good morning. My name is Dama Brown, and I'm from the Atlanta office. It's my pleasure to be here today. I think we've got a great program lined up.

On the panel this morning, we have 16 individuals with really a wealth of expertise. My first task that was assigned to me -- can everybody hear me? Speak up? Maybe I should just use the microphone. I'm always afraid of that because of the echo. Is that better?

The first test that was assigned to me was to give a little bit of background on all the speakers, and honestly, there's just such a wealth of experience that I could just spend a whole hour just talking about their

backgrounds, but let me very quickly summarize just some of the high points of the individuals who we have here and their careers.

We have Judge James Abrams. He is a judge in the Connecticut Superior Court.

Carolyn -- is it Coffey? -- Coffey, and she is with MFY Legal Service, Incorporated. She represents low-income New Yorkers.

Michael Debski is with the firm Rubin & Debski. He is the president and founder of that firm, and he is also president of the Creditors Bar Association in Florida.

We have Judge Peter Evans, who has been on the Fifteenth Judicial Court of Florida in Palm Beach County for over 21 years, I believe.

We also have Joanne Faulkner. She is a sole practitioner who practices consumer law, and she has been the recipient of the Vern Countryman Award, from the National Consumer Law Center.

Cary Flitter is a partner with the firm of Lundy, Flitter, Beldecos & Berger -- and my eyes are failing me here. Cary is a consumer credit -- oh, I'm sorry. Cary specializes in consumer credit and consumer fraud and is the author of Pennsylvania Consumer Law.

Michele Gagnon is with the firm Peroutka &

Peroutka and is the lead attorney and compliance officer of that firm.

Next to me is Mark Groves from the firm Glasser and Glasser. He is also the author of Collection Law in Virginia and Advanced Collection Law in Virginia.

Judge Diane Lebedeff is to the left of me. She has been at the New York City Civil Court for 25 years.

Carlene McNulty is with the North Carolina Justice Center. She does complex litigation on behalf of low-income individuals.

Joann Needleman is from the National Association of Retail Collection Attorneys and is the vice president of Maurice & Needleman and the managing attorney of the Philadelphia office there.

Donald Redmond is coming to us from Portfolio Recovery Associates, where he is the senior counsel.

Yvonne Rosmarin represents individuals and classes who have been injured by unfair and deceptive trade practices.

Marla Tepper comes to us from the New York City Department of Consumer Affairs, where she is the senior legal advisor.

And we have Mr. Larry Yellon, from the National Association of Professional Process Servers, and he is currently the president of the New York State

Professional Process Servers Association.

And finally, Albert Zezulinski -- I'm sorry -- Zezulinski, he joins us from NCO Group, and he is the -- also an executive vice -- where he's the executive vice president and he is on the board of directors of NCO.

So, we have very divergent views and a wealth of experience, so I'm hoping that we can have everybody contribute today.

We'll be following the agenda that is in everybody's binders. The first question that we come to this morning deals with the initiation of lawsuits and service of process and consumer participation.

The first question that is listed is, "Why aren't more consumers defending against collection suits?" But it seems that the question kind of assumes that they're not. So, what I wanted to ask before we got to that first question is, are consumers defending against collection suits?

And if I can turn to Judge Abrams and ask for his perspective.

JUDGE ABRAMS: Yeah. I think we're seeing -- I think there's a natural inclination to behave like an ostrich in these circumstances, stick one's head in the sand. Generally, people who are on the business end of a debt collection lawsuit, it is not the only problem

going on in their lives. They might be facing eviction, a foreclosure, or there might be -- you know, frequently there are medical bills. There might be medical issues in the family. So, it's not a high priority. And I think the natural inclination is just to stick it on a shelf and try and ignore it and hope it will go away, and it generally is not the biggest thing that's going on in these people's lives.

When I was sitting as a small claims magistrate, we would see -- I -- the level of defaults would vary. I'm now doing foreclosures and where the vast majority are undefended, and I think it's -- generally, when we do get self-represented individuals to come into court, there are generally other things going on in their lives, and they're people who are juggling a lot of balls, and the debt collection lawsuit probably is not paramount -- is not number one on their list of concerns. So, I think that's a problem.

MS. BROWN: Do you have any feel for about what percentage of collection suits may end in a default? ?

JUDGE ABRAMS: Well, when I was -- when I sat, it was better economic times. I would say we were running -- and Joanne may have better knowledge than me -- I would say we were running well over -- well over 60 percent.

MS. BROWN: We have three judges on our panel. If I could next turn to Judge Peter Evans. Do you have a feel for how many default judgments?

JUDGE EVANS: Defaults? Again, it would have to be a guess. I think it's a little higher. I would go to 70 or 80 percent probably go by defaults. And I would add to the comments made as far as people not appearing, I think there's also other reasons.

I think not being able to get off of work to come, you know, they're in bad financial situations often, and even if they could, they can't afford the time off, is one of the problems.

Fear of the system, not so much that they don't care, but they -- they're afraid. They don't understand. They don't have -- they have gotten calls from lawyers or law firms. They know they don't have that kind of artillery on their side, and they think it's hopeless.

MS. BROWN: And finally, Judge Lebedeff?

JUDGE LEBEDEFF: Well, interestingly, as a result of this problem -- and you will hear from judge Fern Fisher, who is an administrative judge in the civil court of the City of New York -- in April of 2008, a requirement was added to the civil court rules that in debt collection cases, that a special notice be sent out

so that -- to avoid default judgments, and it's just sent out by regular mail, and the experience has been really relatively positive.

For one thing, comparing a part of 2008 with 2009, the number of defaults has actually gone down, and what that would indicate is that additional notice in a regular mailing, in addition to any service of process, which could be sewer service, really does have an impact in reducing defaults.

And I can give you copies of the rules. Let me just cite it to you so you know what it is. It's New York -- 22 NYCRR, New York City Rules -- New York Compilation of Rules and Regulations, 208.8, has that requirement.

Let me just say basically -- and I have copies that I'll give you -- credit card litigation, what you see basically is that there's very little anybody can say, but where you do see significant problems are that the credit card debt is unidentified, so that many people come in and say, "I don't know what account they're talking about. I never had a relationship with this person." There is a lot of that going on, and in part, that relates to the assignments, which just has been highlighted in recent discussions about foreclosures, where the banks don't track the paperwork.

You see the same thing with credit card debt -- and I suspect it's even more massive -- that the assignments are simply not documented. I have never, ever seen one piece of paper on an assignment.

Now, where that gets really interesting is that there are many state courts, federal courts, and there's also a uniform act which bears on this -- and I'll give you the case citations -- that in order to execute -- in order to get a judgment recorded, generally, the plaintiff has to present a -- if they're benefiting from an assignment -- has to present a copy of the assignment to the county clerk where they're registering their judgment. Now, that's something that I think it would be very important to have enforced, because you just don't find the paperwork.

MS. BROWN: We'll come back to some of the issues of other ways to avoid default, but specifically, right now, let's focus on trying to isolate what the rates of default are.

If I can turn to maybe some of the creditor attorneys on the panel, Donald Redmond, does your firm have any feel for about how many defaults -- how many of the collection suits that are filed end in defaults?

MR. REDMOND: I can't give you a percentage, because we don't -- there is no way for us to aggregate

that kind of data, but it is certainly very high. It is certainly true that many --

AUDIENCE MEMBER: Could you speak up, please?

MR. REDMOND: I can't get it closer.

It is certainly true that many debtors in debt collection lawsuits don't show up. There is no two ways about that. And I don't know what the percentage is, but it is high.

MS. BROWN: Mr. Groves?

MR. GROVES: Thank you, Dama and Don.

We're in Virginia, and we can't speak to New York or New York City's pleading requirements, but we do believe, as a general goal, that clarity and more information and transparency is better, such as the original creditor's name, in the debt buyer cases, the issuer's name, the account number or the charged-off account number if the account number has changed.

We do sense that that is -- there's a direct correlation between more information at the pleadings stage is to avoid those -- well, to get ahead of the game on disputes and to overcome disputes, because at the end of the day, that's what we want to do.

My experience from 13 years now in the industry on the accounts receivable side is that approximately 10 percent to 20 percent of the folks will show up in

Virginia, which in order to contest the case, you must appear on the court date, in the $15,000 and below general district courts, to contest the case and set it for another day.

So, I believe someone -- the judge earlier said, James Abrams, said that transportation may play a point or getting off work may play a point, but then we see, when the folks do appear in court and it does become a default or a work-out, about 29 out of 30 or nine out of ten or four out of five, it's because they showed up and they deal with it, and we're working out a deal in the courthouse or we're continuing over for a consent order or the 1 percent or so that do show up, we go in before the judge and set a trial date.

It's been my -- and I'm not -- I can't speak to New York or any other court. I can only speak to where we are. A good day in court for us is when folks do show up, and it's the first time we can speak with them a lot of times and learn more about their situation, the hardship, the job loss. So, I would say, approximately, that the default rate cited by the judges over there is correct, but oftentimes, folks do appear and it also becomes a default, because -- if they make a general appearance, it's not a default, but they consent to a judgment or they consent to a workout.

MS. BROWN: Ms. Coffey, I believe your organization studied default rates in New York. Could you comment specifically as to New York?

MS. COFFEY: I would like to comment on a few of the statements that have been made.

You know, I think improving pleading requirements and some of these are ideas are great. I think that it's true that a lot of times people who are sued don't know who they're being sued by or perhaps have other things going on in their lives and perhaps, you know, don't need the added stress of a lawsuit, but predominantly, the reason that people are not showing up in these kinds of cases is because of sewer service.

I work for MFY Legal Services. We issued a report last year. We analyzed default judgment rates in New York, and only 10 percent of the defendants appeared in cases, and the predominant reason was because they did not know that they were being sued.

We see hundreds of clients every year, and the first notice that they get of a lawsuit is when their bank account is frozen, when they see it on their credit report and they're denied housing, and -- or when their bank account is frozen. And when they find out about the case, they try to do something about it. They go to court. They try to defend themselves. This is not --

you know, usually it's not a question of them not wanting to deal with it.

The civil court in New York City, I checked the numbers for 2008 recently. Again, 10 percent of people are responding. It's about an 80 percent default judgment rate. And I think that the reason that people aren't showing up is purely because they're not being served. It's a big, big problem.

MS. BROWN: Okay. I think that we've probably touched on it already, but let's turn to the first question that is listed on the agenda. Why aren't more consumers defending against collection suits?

Ms. Faulkner, could you lead off the discussion on that?

MS. FAULKNER: Sure.

First of all, I think everybody has to remember that 40 percent of our population is functionally illiterate. People have a hard time with these summons and complaints, which are drafted by lawyers for lawyers. I think that we need more simple, more consumer-friendly forms. Some people have said we need to know who on earth is suing us, and I think that is exactly true.

Sewer service is a big problem. I've had a couple of clients, one who had been evicted on

foreclosure from her house, and yet she was served there, by the same law firm who had evicted her, three months later at this empty house. So, that was a case of sewer service.

Another one was where the process server said, "I know this is so-and-so's house, because her name is on the mailbox." That was a very clever ploy, but, in fact, nobody's name was on any mailbox in that area of Connecticut. So, obviously, there is some manipulation of service going on there.

Another thing is that the first thing people think when they get a lawsuit is, "I need a lawyer. I can't afford a lawyer. What am I going to do?" I think Mr. Debski has a very nice quote. "A person just served with a lawsuit will be in such an emotional and/or mental state that it would lead them not to use reasonable judgment." I think a person just served with a lawsuit is like a deer in the headlights, frozen, panicked. I don't have any solution to that problem.

We are living in a mobile society. There are some statistics that say one out of every seven households move every year. So, obviously, by the time somebody gets a hold of this account, that person may be long gone. It may not be what they think is sewer service, but it may be a very old address that the

person hasn't lived in in a long time. It may also be a large, low-income housing project where the mail is all left in the lobby on the table and may or may not get to the person who lives in apartment 3-C.

Some people know that their debts have been discharged in bankruptcy, so they will just ignore the lawsuit, and they will have a default judgment, and as Carolyn said, they will find out when their bank account is attached that they should have done something about it.

Some people are the wrong person. If you saw last Sunday's New York Times, the Metropolitan Section, page 1, it talks about a person who was sued. He assured the collector he was not the right person. He didn't have the same last four digits of the Social Security number. They went ahead and sued him anyway. It says in the article, "Every day, 1000 cases, on average, are added to the civil court dockets in New York over credit card debt." That's an astounding number.

We have in Connecticut one law firm of about a dozen lawyers who has 50,000 suits pending in the small claims court. That's astonishing. People cannot be actually looking over the data that they are getting.

The New York Times article says, "Conducting a

digital dragnet, the controllers troll through commercial databases searching for debtors. Because of the vast sloppiness and fraud involved, Attorney General Cuomo has shut down two of the collection firms and is suing 35 law firms tied to the business." Those are law firms that took advantage of a sewer service.

I think the major problem --

MS. BROWN: Ms. Faulkner --

MS. FAULKNER: Just one more point, please.

I think the major problem here is the debt buyers. I think the debt buyers are flooding the courts and bringing old lawsuits, and I think that's going to be the major problem in this area.

Thank you. I'm sorry.

MS. BROWN: No, no problem. I hate to interrupt. I just want to make sure everyone has a chance to speak.

Mr. Debski, did you want to comment on that issue?

MR. DEBSKI: Yes. Thank you for quoting me, Ms. Faulkner, but I did want to make sure that we took into context what that quote was from that I did. Actually, the quote about when entering a courtroom for the first time, they may be in an emotional and mental state, that's actually dealing with an ethical rule of

the Florida Bar, that you should not be at the courthouse steps poaching clients or soliciting clients at the courthouse steps while they're in an emotional state.

And that was in response to Legal Aid trying to set up and meet with clients in the courtroom, while they're trying to go before the judge, right before, and raising their hand and trying to -- "Hey, come and I'll tell you about this. Now, I won't represent you, but -- I'll give you advice, but we won't sign into a representation contract." That was in response to that.

MS. BROWN: Thank you, Mr. Debski. Did you have any comment that you wanted to make about why you believe more consumers are not defending against collection suits?

MR. DEBSKI: Well, I truthfully think that one of the things that we're seeing is that the access needs to be there. In Florida, we have many rules that allow both parties to appear by telephone. I think that a lot of times this should be expanded, where the consumer or debtor should be allowed to appear by telephone, and many of these -- many of our counties, over 30 of our counties, do not allow this type of thing. They wouldn't be missing work. They would be able to appear -- maybe take a break from work and appear at the

court at that time. I think those things would help.

I am interested to find out if any of the judges would like to comment about the service issues and what percentages do you actually see of your cases that are being overturned or judgments set aside based on this. I hear a lot about it in New York, but the rest of the states, I'd like to hear what they have to say about the percentages in their courts that they're setting aside.

MS. BROWN: Judge Abrams, do you have any statistics or any feel for --

JUDGE ABRAMS: No, it is more anecdotal, but I did, in a foreclosure case last week, there was an issue of the -- it was a single-family home, and the return said apartment 27 on it. So, the person came in and said, "I didn't get served." The marshal came in and said they did get served. Well, apartment 27 -- how could he remember -- if he couldn't remember when he did the return three days later that it wasn't a 27-plus unit apartment building but a residential -- but a single-family residential unit, out it went, even though the period for opening a judgment had passed, because there was no personal jurisdiction. So, it does happen.

MS. BROWN: Judge Evans?

JUDGE EVANS: Well, you know, the problem with knowing how -- the sewer service is we don't know. We

don't know because they are not there and we don't know why they are not there and we don't find out until much, much later.

Now, I have, on occasion, inquired of people who appeared how they got notice, and what's interesting is I have found on many, many occasions -- and I wish I had kept statistics, but, again, it's kind of impromptu. "By the way, ma'am, how did you find out about this?" Many found out in much different ways than are reflected on the return of service. Very often, it's a simple, "Well, it was on my door," when the return is personal service with them present. We don't have a posting ability like that in civil cases in Florida. So, the return reflects they were served personally, but they found it on their door, and they showed up.

Those who are not showing up, we don't know why they are not showing up. Everything that I have given, and I'm sure the other judges, it's total speculation. You don't find out about the bad judgments until something happens in their life that brings them back to the court to say, "This is a mess. I don't owe this money. There's been a judgment and I didn't know about it for five years." And it's those people who are telling us that, gee, they got it in ways that are reflected different than what's on the affidavit,

that -- and similar-type things that are causing a lot of concern. But, again, we don't know what's happening, but there are enough red flags going up that we are concerned.

MS. BROWN: Okay. Let me turn to Judge Lebedeff.

JUDGE LEBEDEFF: Yes. First, there are a lot of systems that require use of certified mail, which is particularly difficult. People can't get off of work to pick it up. It's gone by the time they get to the Post Office. The notice goes to the wrong place, the wrong apartment number. I always like to see regular mail.

One problem with service of process, and I wrote a decision about this, but it was in landlord-tenant, where you can track it, and you can get, like, a hundred cases where each follows another and they're requesting default judgments, and what I was able to see was that this process server -- and I wrote an opinion that said "faster than a speeding bullet, more powerful than a locomotive," day after day went to this huge apartment complex and served process five minutes apart for absolutely every case.

Now, that was an instance in which a judge can see the pattern, but I think it would be extremely helpful for someone to really spend some time on how you

pick up and how you can identify process servers who are just flouting the law and engaging in sewer service. It is particularly hard because, unless you see the cases next to another and have a chance to analyze whether this is possible, it's very difficult for the system to identify it.

MS. BROWN: And I think Mr. Yellon has some good ideas that he will be raising, but if we could turn to the third question, which is, what are the other reasons for failure to participate? And, Ms. Needleman, could you comment on some of the other reasons why debtors may not be participating in the collection suits?

MS. NEEDLEMAN: Well, unfortunately, I think that one of the reasons -- and it kind of is tied into what Judge Abrams is saying -- it's not the most important thing in their life, and for some of them, you know, they owe the money, and so they're not sure at this point, you know, what to do. I don't think that there's -- and they're also getting conflicting information.

I think another reason that people aren't showing up is you have a lot of these debt settlement companies, a lot of information on the Internet, that is incorrect to consumers. They're saying, "Well, if you don't owe it, send them a letter and tell them don't

call you, don't respond you to you. If you get a summons or notice, don't show up." They're receiving a lot of bad information, and a lot of these consumers are getting information from these settlement companies, they're paying them fees that says we'll settle your debt, and they don't know that that is a scam. And so they pay -- they send $50, they think that the matter's taken care of, so they get a notice of a summons, and they're like, "Well, this can't be correct, because I sent money to a debt settlement company."

So, I think there's a lot of misinformation out there, and I think that if that is corrected and that is reined in a little bit, I think you will see more participation. But I think all the comments that have been made are -- it's fuel as to reasons why people don't come, and I don't think you can point to one direct reason.

I do believe it has -- I don't believe that service is really the issue. I think you have anecdotal situations, and I'm sure that there's a problem in New York and we've heard about it, it's being addressed, but if you look, as Ms. Faulkner says, we've got all these -- we have got 50,000 lawsuits. We have all these lawsuits out there. The percentage of nonservice is extraordinarily small. I don't think that's the main

issue of why people are not coming.

I think it's a combination of a lot of hardships that people are not there and a lot of fear, and I know that the collection attorneys here want very much for the court to be a place where consumers feel comfortable, that they can come in. We want to be able to communicate with them. If we had better communication with them before filing a lawsuit, I think you would see the amount of lawsuits go down and the unintended consequence of the act itself has prevented that.

MS. BROWN: Ms. Gagnon, can I get your comments on that?

MS. GAGNON: Yes. I just wanted to comment on the issue of service being bad. Service is very important to our firm, and we have really started to track these numbers, and what we've found, that in 0.02 percent of the time, a consumer defendant is filing a motion to vacate claiming lack of service. So, this is after the judgment, after a bank garner or a wage garner, 0.02 percent of the time.

And I tell you this for twofold: One, I don't think the sewer service being the cause of defaults is as big a problem as the perception is, but two, that there is, in the courts, the remedy for that. In our

court, you go down as a consumer defendant, and they'll give you a preprinted, user-friendly form that you can fill out. It's three-part. You fill it out, file it right with the court. They have their copy to take and a copy to mail to us. So, it happens far less than the perception is out there, and there's an easy remedy for it.

MS. BROWN: Please, Judge Evans.

JUDGE EVANS: You know, the remedy is not that easy and especially is not that easy for people who are uneducated and don't understand the system and feel that it's just beyond them. There is no way they are going to beat the system or even deal with it. And it may not also be an issue of do they owe some money, but it also is an issue of how much they owe.

People who show up in my court on a regular basis will admit they don't owe or they do owe some money, they have no idea how this number came about, and it is very rare that I have an attorney who can explain how it came about, other than a general statement, "It's interest and charges." They cannot pinpoint how that interest was computed, what the rate was, where the rate they say does apply came from. It's just a total lack of knowledge as to how those numbers were established.

So, it's not just simply not owning the debt but

just not even understanding the numbers. And it seems to say, when you say there's an easy remedy, that people understand how "easy" -- and I don't know that it's that easy -- that remedy is, because it's not that easy a remedy. They have to come in after default's been entered, and we're assuming it's good. We've assumed good service. So, they have a burden of showing that it was bad service.

They have a burden of showing that maybe there is a meritorious defense. They have some serious burdens they have to meet, and the fear factor of coming in, I think, is a great deterrent. I think that 0.02 number may be what's coming in, but I don't know that that's reflective of the bad judgments that are being entered.

MS. ROSMARIN: Can you hear from this end of the table?

MS. BROWN: Ms. Rosmarin, I was going to ask you next for your comment. I see that Mr. Groves has a comment, and if you don't mind, I'll let him make his, and I'm happy to hear yours.

MR. GROVES: Just a brief follow-up to the Judge.

When we see a post-judgment communication to us that I did not live there or what's this garnishment

from or why am I being served with an interrogatory or what's this judgment lien against my real estate, the first thing we do is stop everything, and our policy and procedure is within 24 hours, there has to be a resolution, and the resolution, Judge, would be, from our office, a motion to vacate with an accompanying order, overnighted to the court --

JUDGE EVANS: Again, those cases that are brought to your attention, I don't know -- I'm not being even critical of that, because I think the lawyers, once they find out, "Gee, there is no way they could have been served," they very often agree to it. It's just I think we're misleading ourselves if we think only those people who complain and come to us are the ones who have been hurt by it.

MR. GROVES: I certainly agree.

JUDGE EVANS: I think that would be a very poor way of judging that.

MS. BROWN: Ms. Rosmarin, you have a lot of experience dealing with low-income individuals. From your perspective, what do you see?

MS. ROSMARIN: Well, I agree with all of the things that have been said about -- I mean, fear and unfamiliarity is really a big factor. People don't understand the summons that they get in many cases.

Also, I agree about the fact that people often don't know who this is, or if they feel like it's not their debt, they don't understand that they still have to show up or, you know, they think it's the wrong amount, or they may think, "Okay, I owe some money to creditors, but I've never heard of, you know, this person," you know, when it's a debt buyer, so they don't think they owe the money to them, or they think it's a case of mistaken identity or sometimes they change the account number, and so they go, "This isn't my account number." And I have had people come to me and say that this must be theft of identity, okay? So, they think that that's what it is.

And I also agree about the sewer service, although in Massachusetts, there is no requirement for in-hand service for anything in terms of starting a lawsuit, and all it has to be is dropped at their previous or their last known address, okay, which may not be current, and often it's found in the bushes, days later, you know, or the next season if it's the winter and it got under the snow, and then by regular mail.

And, again, if it's sent to a large apartment building or it's in the middle of the city in a very urban area, that may never get to them, and it may never be returned to the Post Office, you know, by return

address.

But something that hasn't been mentioned here is the fact -- except maybe obliquely -- the fact that in an awful lot of these cases, if somebody does show up, especially in small claims, they don't even get to the court. Before they ever get to see anybody, the attorney for the plaintiff takes them, and sometimes they think that they're -- sometimes, in Massachusetts, I've found, they think that they're a clerk with the court, because they're up there in -- you know, at the desk, and they're making deals, and they're telling people, "Oh, just agree to this, and then you don't have to show up in court."

So, then they will get a default judgment against them, and that has happened many, many times, and whether sometimes it's in writing and sometimes it isn't, sometimes it's presented. And the other thing that happens is that people see something on the summons, and they think that they need to call the other lawyer, or they get -- there were also debt buyers who were sending letters saying, "You may not have to appear in court. Call us and make a deal and make payments."

And so people -- everybody who has ever done that, who I've talked to, thought that the case was going to be withdrawn when they made the deal. They had

no idea they were going to enter a default judgment. Some of these people enter a default judgment, get an execution right away and hold it, and as soon as they don't make a payment, you know, and they've been seizing cars, you know, in Massachusetts, but -- putting liens on houses, things like that.

So, people think that they -- if they make a payment, they don't have to go to court, and they're so afraid of going to court and so unfamiliar and they don't have a lawyer, and it's very hard to get lawyers. There aren't that many consumers lawyers around and not too many that can take defense cases, because people can't pay. There's no way to get attorneys' fees unless they have -- you know, they have a really good counterclaim and you want to bring that in state court, where there may not be the best, you know, judges -- not talking about those who are present -- but we have some people in small claims court, they're not even judges. They don't even have to be lawyers. They have clerk magistrates. So, they don't even need to be lawyers.

MS. BROWN: I see that Ms. Needleman wanted to comment, but also, if I could, next I would like to hear from Ms. McNulty.

Ms. Needleman, you had a comment first?

MS. MCNULTY: In North Carolina, we don't allow

sewer service. You have to be personally served, so we don't have that as a problem.

In addition to all of the problems that have already been said, once you're in court, it's designed for lawyers to represent you. If you don't have a lawyer, it's very hard to navigate the system. So, the few people that do try to respond to a lawsuit get kicked out on some technicality down the way.

Some people think in North Carolina that they could just show up in court, and it sounds like in some states, you're able to do that. In North Carolina, you have to file a formal answer within 30 days, and if you don't, a default is entered against you.

For those people that do try to respond, they'll next get served with discovery responses, and if they don't have a lawyer helping them, they'll often trip up on the technicalities required to respond to that, and the next step will be summary judgment based on those lack of responses.

So, even the people that try to navigate pro se, it's impossible -- almost impossible to do without an attorney, and there are just not enough attorneys available to represent consumers.

JUDGE LEBEDEFF: You know -- may I? -- okay. One of the problems is that all of us, I think, who know

commercial cases know chances are if somebody defaults they made a business assessment, whether it's worth the time, whether it's worth the legal fees, and the default's fair enough.

This really is not true in credit cart cases. I don't think I've -- and in New York, we had a special part for consumer debt cases, and we had mediators, trained mediators available, who -- you know, they could go over and talk over the case in a robing room with the collection attorney and the creditor.

I don't think that there is ever a case I saw where somebody did show up that they did not receive a better result, a more favorable result, than if hadn't come. And I suspect that that is -- that that is generally true. It really is not an adequate way of assessing it to say so few people come back.

There are massive differences in documentation, in how high the fees are, in how long they've run, and when a credit card company declares a default and starts charging its credit card rate of interest. You see identity fraud. I saw somebody -- an 85-year-old woman on an auto lease from a city that she had never been in. I mean, you see horrible instances.

MS. BROWN: If I can turn to Ms. Needleman for her comment, and then I'd like to move on to my next

question.

MS. NEEDLEMAN: Well, there's a couple things. In responding to what Ms. Rosmarin said, many of the bigger cities, like Boston, Philadelphia, New York, obviously Virginia, the judges want you to voluntarily try to work it out if somebody does show up. So, this idea that they're forced upon the lawyer and they have to take these terms, I disagree with that, because that's not what happens. That's not what I see, especially in Philadelphia small claims court.

They have specially set up courts, and, you know, court doesn't start for hours, because everybody's got to come in, everybody's got to meet, everybody's got to sit in a room and discuss what's happening. They have special forms that can be given to consumers about the settlements that they're being entered into.

So, I think the courts are really encouraging -- and the judges can chime in on this -- that if people do show up, that it's, number one, a positive experience, but it's an ability to try to resolve the issue.

Now, if the issue is it's not me, there's a problem, then the idea is we're going to set a date and figure out a time to come back so that we can -- so that the case can be tried. But I take exception with, you know, consumers are being forced upon a plaintiff's

attorney to enter into an agreement that they don't want to enter into. I just do not see that.

The other thing, I just want to make the record clear, we're talking about process serving, and process serving can mean a lot of different things. It can be mail. It can mean a private process. But most courts in Pennsylvania, the only county where you can have private process is Philadelphia. Every other county is a sheriff.

So, when we talk about bad service, are we talking about reeducating our court staff? Are we talking about those bad service from private processors? I think we need to be clear, because if we're talking that the court staff isn't serving properly, I don't know whether this is the proper forum to do it.

MS. BROWN: I think you touched on the next question, which is, "What can courts and others do to increase the consumer participation in debt collection suits?" And if I can have Donald Redmond lead off on that discussion.

MR. REDMOND: Well, I'm not sure. I mean, I think Judge Abrams hit the nail on the head. It's simply human nature. If you've ever been -- and, you know, 20 years ago, I owed people money, and I had collection calls and all that kind of stuff, and it's

horrible, and it's even more horrible to be a defendant in a lawsuit about anything.

And so when someone serves process on you and says you need to go to court to pay your $4,000 MasterCard bill, it's a horrible circumstance. And I think it's certainly true that the biggest reason that people don't go to court is -- I can't remember who said it, but it's just the human nature of not wanting to go through that experience. And so I don't know how we can increase participation.

You know, every person who is lawfully served ought to go to court. Even the least sophisticated consumer is a grown man or woman, and all of us, you know, as adults and citizens have some personal responsibilities, and that's just one of the basic tenets of the court system, is if you have rights, you can't sit on them. You have to exercise them.

So, I mean, Mr. Groves put it very well when he said a good day is when people show up. We don't want people to not show up. As a matter of fact, we don't want to go to court in the first place, because it's costly, it's time-consuming, and all that kind of stuff. We would much rather just deal with our customers on the telephone, by mail, you know, whatever. Court is a last resort, and, you know, I don't -- I would love to have

every single defendant show up in court, and I don't know what we can do to increase that.

I'll give you one suggestion. Maybe -- and we're -- I would be totally open to it. Serve people by overnight service, Federal Express, UPS, whatever. You get a signature on the thing, so, you know, there's a receipt. Somebody at the home signed for it. I'd go for that.

MS. BROWN: Ms. Tepper?

MS. TEPPER: Yes. The Department doesn't buy into the ostrich in the sand idea. We think that there are ways to improve service, and at the front end, to improve debt collection practices before that process server issue comes to the foreground.

Among the suggestions the Department has based on its investigations of process servers is closely looking at the methods by which process servers serve process, as well as what documentation is required to show that they have actually served the process.

We know, from our investigations of process servers, that many are not performing service. They are filling out false affidavits of service. They are not going to the addresses. They are not sufficiently checking the addresses of the so-called debtors.

To address these deficiencies, we've come up

with a few ideas to improve documentation --

MS. BROWN: Ms. Tepper, if you can, that is the last question that we have for the day, and I'm happy to hear your input.

I did want to give Mr. Yellon the opportunity to lead off that discussion, but right now we're on question four, which is, "What can the courts and others do to increase participation in debt collection?" So, I'm happy to get back with you on the final question.

MS. TEPPER: Okay.

MS. BROWN: But if I could get Mr. Zezulinski -- I'm so sorry, it's too many Zs. I knew I would do it. I should have called you Al. If I could get Al's comments, please. Do you have any suggestions of what you think could increase consumer participation in the debt collection lawsuits?

MR. ZEZULINSKI: I actually don't have any suggestions on that, but let me just give you some perspective.

We operate two businesses, among many, that are in the debt collection area. One is in the area of purchased portfolio. We've acquired by 40 million accounts -- and I'm just -- don't hold me to the actual numbers, I'm trying to give you proportional. Of those 40 million accounts, about half of them are what we

consider to be active. The other half are warehoused.

And what happens is that on those 40 million accounts or the 20 million that are active, we have about 250,000 outstanding judgments at this point in time, most of which are probably default judgments, probably 80 percent. That's about 1 and a quarter percent. And the return on that is about 3 percent. About 3 percent of them are actually paying.

So, from our perspective, particularly in the purchased portfolio world, unless we find someone who has assets and is hiding or attempting to hide, we're typically not suing a lot.

And the other side of our business is where we are working for creditors, credit issuers, and they give us accounts to collect, and many times, they give us accounts to put into our attorney network, where we have about 200 attorney law firms working around the country, doing the collection work. It's a volume of around 10,000 a month.

Of that 10,000, half are resolved in what we consider to be the precollection activities or prelegal collection activities, where we inform the -- you know, the debtor, the consumer, that we are, in fact, going to start a lawsuit, and before we do so, would you like to try to resolve this? And about half of them do talk to

us and we do come to some arrangement.

The other half, about 80 percent of them, about 4000, don't show up, and I can't tell you the reasons why. I believe it tends to be more helplessness and hopelessness than anything else. They owe the debt. They just don't know what to do about it. And the thousand that do show up, quite frankly, we tend to work it out in the -- in the courtroom and/or on the steps, and whether it's the wrong person, it's something they don't understand, or we enter into a settlement, you know, that typically is what happens.

MS. BROWN: Ms. Rosmarin, do you have any suggestions on how we can increase consumer participation in lawsuits?

MS. ROSMARIN: One thought, besides finding out a way to correct service issues, would be possibly a way to maybe have the courts make available -- and I'm not quite sure how they would do it -- sort of an attorney, maybe Legal Services or something, who could represent people, and then that would be stated.

I mean, you would have to clarify the documents that actually go to people, first of all, and you have to make them very -- as I think Joanne Faulkner was saying, very clear, very plain language. You're dealing with functional illiteracy. You're dealing with

court -- you know, court jargon, legal jargon that people don't understand, and then that increases the fear factor, I believe.

And if there was something very clearly that said -- you know, laid out the steps, what they have to do, simply, and makes maybe more simple requirements, and then say, you know, a lawyer could be available to you at -- and this is who it would be -- not a name, but, you know, where you would find them in the courtroom or how you could contact them ahead of time, and I know part of the problem with using Legal Services is they would have to qualify for their services, and there are plenty of people who are in this problem who may not qualify because they may be temporarily -- not have a lot of money, but they have assets, because maybe they, you know, had a job problem or illness or divorce or whatever.

So, if you had some way that they could know that there would be somebody there for them, you know, to advise them and maybe take some of the fear factor out of it, and with very plain -- very plain language about that, as well as requiring them -- the plaintiffs to -- as some of the courts are starting to do and Massachusetts small claims is starting to do, to state things like who is the original creditor, what is the

original account number, and very clearly say, what is the amount of the debt when it was in default and what are these other charges, so that they can clearly see if that's really theirs.

Because sometimes people have more than one account with another -- you know, with one -- like they might have three CitiBank cards or something or they had -- you know, those sorts of things, so that they can clearly see what's at stake, what it's about, so they can identify it.

MS. BROWN: It looks like we have about 12 minutes, and we have another question to tackle, and I see a number of people are interested in responding to this one. So, if I can remind everyone to please be brief.

Mr. Debski?

MR. DEBSKI: Yeah. I just want to respond. One of the things I've heard from several panelists is that some of the documents are confusing in the court process. I know in Florida we have state bar committees that deal with each of the different rules. I'd really encourage -- and when I served on the state bar committee for the small claims for six years, we made three or four changes to the small claims summons to add different warnings, to add different information, to

help consumers understand, you've got to appear. A letter will not help you.

Different things regarding venue are put right into the summons that were never there before to help people respond to these type things. So, I think that the state bar committees and the different discussions between the judges and the consumer attorneys and anybody else would be a great forum to improve these documents if there is confusion. I think that is really where we should look to, in how do we improve this form.

MS. BROWN: Mr. Flitter?

MR. FLITTER: I see it a little bit differently. Consumer participation I think of more as a ratio, as a percentage, rather than a raw number, and I think a better way to get consumer participation is on the front end; that is, look at the quality of the cases that are being filed. And one of the issues that we see a lot is the lack of requirement that Debt Buyer A advise Debt Buyer B of defenses to which Debt Buyer A has been advised.

There's 29 million cases of identity theft out there, at last count, maybe it's 30. I know your Commission tracks that. So, the underlying assumption, that's been the case for years, that a collect suit that's been filed is owed, it's simply a question of how

much, how quickly can I get it, let's get a consent judgment on the record, that just doesn't hold anymore. There are so many cases against people who do not owe the debt at all, and there are a great many against people who do owe the debt.

So, I think it's important that -- and this requirement does not exist right now -- that there be a requirement that when a debt collector, whether it's a debt buyer or a collection law firm or whatever, is advised of some defense -- I wasn't served, it's not me, it's identity theft, I paid this off, I had a cancelled check, this was settled, it's beyond the statute, and 20 other issues -- that there be a requirement that that -- the most common response to that, in my experience, is the debt gets sold. The debt gets sold.

NCO has it. There's advice that the debt is not owed for a variety of reasons. NCO is not going to deal with it. The next time you hear, it's PRA. The next time you hear, it's Asset Acceptance. The next time you hear, it's the next one, the next one. So, I know there has been some discussion about that, and I think that advising the subsequent buyer will go a long way towards improving the quality of the collection cases that are filed and, therefore, the response rate by the consumer.

MS. BROWN: If I can, I'd like to hear also from

Mr. Groves, Ms. McNulty, Ms. Needleman, and then I'd like a response from the judges. So, again, I'm reminding everyone, please keep it very brief.

MR. GROVES: What can courts and others do to increase consumer participation or debtor participation? We have a lot of common ground here. One would be that identifying for the functionally illiterate population what the charge-off balance is or come to a consistent treatment across the states -- or even in a state -- of clarity, of easy-to-understand balance that was due at the time of charge-off or write-off. We certainly have common ground on that.

With respect to -- with Chuck Harwood's introduction today about the judge who said that his wife was dunned and they closed the account and they resold it, I would say to this, I would refer that person to Dale Pittman or one other -- another good lawyer in Virginia, because the Fair Credit Reporting Act FACTAs provision prohibits that, and I believe they would be able to dovetail that into an FDCPA private attorney action. So, it's unlawful to transfer debt -- and Don Redmond and NCO can speak more to this -- but I would refer that to a consumer counselor. I would say, "Go after that entity," presuming I didn't have a conflict.

And the third point is, I would like to be in the courtroom applauding when New York State puts the folks who are serving these papers and lying about it in jail for a long time, because that brings the reputation of the industry down, our clients' brand, our own brands suffer, and this is not what we want. We actually want to treat people like we would want to be treated, and that's no to lie or cheat about service, because that's under affidavit, it's perjury, and if there's any sewer service issues or like that, let's go ahead and put it out in the open and get rid of those bad actors.

MS. BROWN: Ms. McNulty?

MS. MCNULTY: I just wanted to say what North Carolina did in response to the issue of the notice and people not knowing who it was that was suing them. We passed a law last summer that requires 30 days' advance notice of a lawsuit, and that notice must include the name, address, and telephone number of the debt buyer -- this only pertains to debt buyers -- the name of the original creditor and the debtor's original account number, a copy of the contract or other document evidencing the consumer debt, and an itemized accounting of all amounts claimed to be owed. This will give the consumer more information, provided the debt buyer has this, that will allow them to know who's suing them and

why.

Then, when the debt buyer files a lawsuit, additional documentation has to be included with the complaint, and it has to be valid documentation that the debt buyer is the owner of the debt and reasonable verification of the amount of the debt allegedly owed, including documentation of the name of the original creditor, the name and address of the debtor as appearing on the original creditor's records, the original consumer account number, a copy of the contract or other document evidencing the consumer debt, and an itemized accounting of the amount claimed to be owed, including all fees and charges.

So, we're hoping that if these suits continue, that the defendant will have this information right up front, and that will help them respond to the lawsuit.

MS. BROWN: And I hate to do this to the judges, but if I can, in 15 seconds or less, Judge Abrams?

JUDGE ABRAMS: One issue that only got touched on a little bit are transportation issues. A lot of the defendants do not have access to cars. Outside of the major metropolitan areas, there are not mass transit options.

I live in a city, a gritty old mill town, 60,000 people, they closed the small claims court because of

budget problems. Now you have to go over the mountain. There is really no way to get there.

MS. BROWN: Judge Evans?

JUDGE EVANS: Fifteen seconds, quickly.

There's a couple things that need to be attacked. First is the sewer service problem. One solution to that that I would like to see is requiring private process servers, because that's where I see the problems, in filing -- whether it be a daily, weekly, monthly log of who they have served and when they served it will help us go a long way towards preventing fraud in that case, and there is fraud in that area.

Secondly, I kind of question the ability -- and I think we have some good-meaning ideas -- the ability of a state to or the willingness of a state to provide I assume a state-funded lawyer to give advice to civil defendants. It's just not going to happen in today's economy. We can't even afford to keep the court system open on basically bare bones that we have right now. I just don't see that that's going to happen.

I think the solution there is not to necessarily look to state rule regulation to change the forms, but I think we -- those rules that Mr. Debski talked about go to all types of cases, and these are a unique type of case. I think this is where your federal regulation

comes in, that when a lawsuit is filed, we need to have really good information given to the debtor as to what it's about.

And these -- you know, we have very loose pleading requirements in small claims court, but with federal regulation, where did it come from, what are the --

MR. BROWN: I think that relates to Ms. McNulty's comments.

JUDGE EVANS: Right. How was the interest computed? Where do we get these numbers from. If that's documented, that is going to go a along way to have more meaningful information.

MS. BROWN: And Judge Lebedeff?

JUDGE LEBEDEFF: Well, I thought the comment was well taken that we really need to parse out the places where there's public service through marshals or otherwise, service of process, and places where there are private process servers. I thought that was an excellent point, and I think we should identify the differences.

There was a question apparently from the Web --

MS. BROWN: I am going to get to the questions in a minute.

JUDGE LEBEDEFF: Oh, okay.

MS. BROWN: Hopefully we will have time for questions.

JUDGE LEBEDEFF: I've written a couple of cases. I probably wrote a really significant analysis of the laws relating to credit cards, the laws relating to assignment, the laws relating to default judgments in this area, just because it's a really sticky, sticky legal problem. I brought some copies of those. I'll leave them with you, and I'll put the cites up on the Web.

MS. BROWN: And now we're at the final question, and I had indicated to Mr. Yellon that he would have an opportunity, and though we are pressed for time, I think he has a lot of ground to cover, and I hope that he can educate us on this.

Mr. Yellon, again, is from the process servers industry. He is the president of the New York State Professional Process Servers Association. I think his profession got beat up a little bit today, and I'd like to give him a chance on this final question, which is, "What action can we do to address the issue of service of process?"

Mr. Yellon?

MR. YELLON: Thank you. I left my armored suit in the hotel room.

What I'd like to talk about for a brief few minutes is the existence of several associations that deal -- that involve process servers throughout the country and in specific states.

The National Association of Professional Process Servers, which is what I am vice president of, represents thousands of members across the country who have agreed to abide by best practices and standards acts that we've developed in which the sewer service would be abhorrent and contrary to what they believe in.

Any practicing attorney has access to the members in this association through the Web site, and I'd be glad to give anybody on this panel -- to get a copy of this book to them.

In addition, there are state chartered associations that are members of the national association, and many of these associations, which are on the back cover, of which I am president of the New York State, offer certification classes to process servers.

In New York State, we have certified over 300 members who have taken a class and have been given a test and have passed the test. As a matter of fact, we were privileged to have Wanda Sanchez from the Department of Consumer Affairs of the City of New York

at our March 2008 class, in which we had a very successful class attending of about 80 people. And we have often been in meetings with the Department of Consumer Affairs to assist them in developing an education program, which has been lacking on their part for probably 40 years.

The other factor, what state associations can do, my association, in respect to the law that was put into effect in the civil court that Judge Lebedeff referred to, requiring that additional mailing, which was an excellent law, where the court itself makes the mailing to the defendant with a set of instructions, and if that comes back undeliverable, then judgment cannot be entered.

We took randomly -- and one of my members from the New York state association, Bill Malotot, randomly did ten motor vehicle searches on those same individuals that the mailings came back, and ten of all ten of them came back with good, positive DMV searches at that particular address that the envelope was returned from saying "No such address" or "Unknown address" or "Moved, left no forwarding address."

We presented this to the civil court, and on April 21st, 2009, that law was amended to allow for a good service when a mailing is returned if it was based

on a motor vehicle search, which abstract is attached to the affidavit of service.

In New York State, there are several decisions from the appellate division which say that holding out on a driver's license provides collateral estoppel for the defendant to prevent him from saying he was not served properly if he was served at that address, and that's the reason that this law was amended in the civil court.

So, that's what state associations do. That's what the national associations do. We stress education, certification, and we feel an educated process server is a knowledgeable process server who will not commit sewer service.

MS. BROWN: And I have a question from the audience directed to Ms. Tepper and Mr. Yellon, and essentially it is covering the same issue. What should be done against process servers who are submitting false affidavits?

Ms. Tepper, please.

MS. TEPPER: Yeah. The Department has jurisdiction over process servers, and we investigate faulty service and also welcome referrals from the Bar and from courts to investigate allegations of improper service.

When we find improper service, which we do through a range of activities, such as review of books and records and undercovers, we can prosecute the process server. We can revoke their license, which, of course, means that they cannot serve process in New York City. We can also suspend their license or invoke fines and penalties.

We think that we need to do more than just education. We think that one of the main problems with process servers in New York City who are private process servers, generally they're independent contractors employed by process server agencies, is to ensure that they are paid enough to encourage and motivate them to engage in process server -- in proper service of process. To that end, we are proposing to the New York City Council that process servers be paid a minimum fee of $7 per service, and we encourage the advocates in New York City and others to come forward in support of that.

We also think that it's about time for process servers to use the technology that is available and to mandate that they do so, through use of things like local positioning systems, wi-fi, and other technological systems, so that we can actually track and know where the process servers are when they file affidavits of service. It's fine to have logs; it's

fine to file affidavits of service; but what we need to do now is take into account the technology that is available.

We, of course, welcome the participation of the professional associations in beefing up training, and, as Mr. Yellon said, we have met with professional associations to do so, but we think that more aggressive steps need to be taken now and are trying to get that implemented now through the City Council.

At the front end, for the collection process itself, our new rules and laws take into account many of the concerns raised here. They require increased bookkeeping, increased records, and increased ability of consumers to know exactly what the debt is that is being charged against them. So, we think that we need to take steps from the front end.

For the purposes of this conversation, though, we are very concerned about improving the practices in which process servers engage through the steps that I've discussed today.

MS. BROWN: Ms. Coffey, I believe your organization had some recommendations as well.

MS. COFFEY: Yeah. I think I just want to reiterate something that Ms. Tepper just raised, and I think when you're looking at the big picture here,

particularly in debt-buying cases, you're talking about accounts that are bought in bulk and then distributed to debt collection law firms in bulk, and then the debt collection law firms hire process servers to serve in bulk.

And what we've found and what the Department of Consumer Affairs has found is that a lot of these consumer cases are being served for an extraordinary low amount of money. People are paid approximately $3 to effect service, and what's key is that if you don't effect service, you don't get paid. So, there is really no incentive to perform your job well.

So, I think that part of any solution to the process serving problem has to be tied back to the debt collection law firms and the debt collectors themselves, who have a business model where, as far as I'm concerned, obtaining default judgments because of improper service is the most effective way for them to collect.

I had a couple of other suggestions. In terms of improving the process serving industry, I think greater enforcement by city and state officials is really, really important. In New York State, the Attorney General did an investigation of one particular process-serving company that they knew or suspected of

having problems. They worked with the courts to examine the cases and ended up vacating 100,000 default judgments across New York State, and as was mentioned before, are investigating 35 debt collection law firms who used this particular process serving company.

MS. BROWN: I see that there are three more that want to have very -- four more that want to have very quick responses. If I can have Mr. Debski again, very, very quickly, about two minutes.

MR. DEBSKI: Yes. One thing I would like to just talk about is, at least in Florida, we do not have a choice of which process servers we can use. They're either certified by the chief circuit judge of the circuit or they're appointed by the sheriff or you can use the sheriff. So, there's a limited amount of people that we can use.

And we really hope that they enforce the law, because if you file a false affidavit in Florida, third degree felony, five years in jail, can never serve process again. That's what we want to see enforced.

MS. BROWN: Ms. Needleman?

MS. NEEDLEMAN: I wanted to address what Ms. Coffey was talking about as far as if process goes bad, that it has to go back to the debt collection agency and the law firm. I think you have a fundamental

problem with that, because process servers, in and of themselves, have to be independent. If they become an agent of our law firm, then the service from the git-go is going to be defective. I mean, that's what all the rules of the various states say.

So, there has to be an independent aspect to process serving, which is, you know, I guess the reason in Pennsylvania why 66 counties don't even allow private process. They have the courts to do it.

I agree with you, there's got to be enforcement, and I agree with Mr. Debski, you know, if someone doesn't do good service, there has got to be sanctions and remedies, and we as collection attorneys, who are licensed under our various supreme courts and state bars, in no way, shape, or form ever to want to have bad service. It doesn't look good on us. It's not appropriate for the consumer. And, you know, whatever, I can tell you, the collection bar can do to initiate good service, proper service, ethical service, we want to be a part of that.

MS. BROWN: Ms. Rosmarin?

MS. ROSMARIN: Just a quick two points: One is that in Massachusetts, if you are going to do anything with private process servers, the ones who are actually -- you might consider public, sheriffs and

constables, they're not really. The constables are just private business people; they get appointed by a town or a city. And the sheriffs in Massachusetts are -- they only are process servers, you know, and they man the jails. There's no other function they serve, so -- and they also operate very much almost like a private business.

The other one is that, this need to be independent, that's very important, too, because there are some places -- some of the debt buyers in Massachusetts have these deals with process servers, and they're using them not to serve the process to the -- well, they use them for that, too, at the court, but to do executions on, and they have this arrangement, and these process servers are charging huge amounts for this, and that's their whole business, is based on maybe this one debt buyer or mostly this one debt buyer, and doing these things, and they have this agreement, and it's not -- maybe not in writing, that they -- that they are supposed to do this and, you know, charge this, because we sued them and tried to get them to produce that.

MS. BROWN: If I can, I'd like to give the last word to Mr. Yellon.

MR. YELLON: I agree with Ms. Coffey. The

practice of not paying process servers for attempted services where they cannot effectuate is wrong. It will encourage bad service if you tell someone the only way they are going to get paid is if they serve it. It's not my practice to do that and never has been, and I would never agree to anything like that with any account that I had, and I know many of the members of NAPPS in New York state wouldn't either, and that's very clear.

In addition, you mentioned this $3 service for process servers. At a hearing at the Department of Consumer Affairs in June of '08, an individual testified that the person -- the entity that pays $3 a service, that was involved in the chain of getting $3 service, was the City of New York itself as the contract -- as contracting the services out. So, that -- it's not blanket that everybody gets $3. This person had agreed to a low-ball price with the City of New York in order to get that contract, and it resulted in him having to pay $3 per service to satisfy that contract.

MS. BROWN: It's very hard for me to say no. Judge Evans has one very quick comment that he would like to make, and then Joel Winston will join us.

JUDGE EVANS: I understand we have -- in Florida, they have -- Mr. Debski's plan, we do have these certified process servers; however, there is still

a private, if you will, enterprise aspect to it, and they have to get hired by the law firms, and I'm sure the percentage of successful services that they actually perform will factor in very much into who gets hired by these firms that are filing ten, twenty thousand lawsuits at a time.

Certainly if they have a better percentage, even if they're paying for the bad ones or the ones that don't get served, they are going to go to the firms that get service more often. Having an independent check such as a log or something like could help prevent against that.

MS. BROWN: And I'm sorry that I can't hear more from everybody, but if I can, Joel Winston will be coming up. He is the Associate Director of the Federal Trade Commission's Division of Financial Practices.

MR. WINSTON: Good morning, everyone. Is this on? No?

AUDIENCE MEMBER: Use the other mic.

MR. WINSTON: This one? Okay. Can you hear me now?

AUDIENCE MEMBER: Yep.

MR. WINSTON: Great.

Good morning and thanks to all the panelists for a terrific discussion. I think it sort of ran the gamut

from some serious disagreements to a movement towards consensus at the end, which is the way we like it. We do a lot of workshops here -- I've been through many of them -- and they really do run from near fisticuffs to, you know, "Kum Bay Ya." This one, I guess, is somewhere in between. But let me try to play back what I heard in terms of areas of agreement, areas of disagreement, where we might go from here.

First, I should talk a little bit about what the FTC's role in all of this is other than hosting. We are a law enforcement agency. We have got responsibility for enforcing the FDCPA, which we do quite vigorously. But we have a role to play in education of consumers, education of businesses, and policy-setting, and I think that's where this really falls. What are the right policies? What should we be recommending be done?

At the current time, we don't have rule-making authority under FDCPA, so a lot of these solutions that we might consider as part of a rule-making, we can't do, but we do frequently make recommendations to Congress; we make recommendations to state governments; we make recommendations on self-regulation, industry standards, that sort of thing. So, it's sort of the bully pulpit role that we play that I think is probably most relevant here.

Let me talk first about where I thought there were some areas of consensus. I think there was pretty good -- and if anybody disagrees with me on any of these, feel free -- put your card up vertically, and, you know, let me know. So, I don't want to misstate anybody's views here.

But there seemed to be some agreement that the participation rate of consumers in these collection lawsuits is very low. Now, there is disagreement about why, and I'll get to that in a minute, but most seem to agree that participation rate is very low. Anybody disagree? No? Good.

There's a high percentage of defaults. And there also seemed to be agreement that consumers are better off generally when they do participate. There are lots of things that can happen in the course of the participation that can make it better for them.

I think there was also agreement that the process here, the litigation process is not very consumer friendly. It could be made more consumer friendly -- so far so good here -- and that the process could be improved by making it easier for consumers to participate; giving them incentives, giving them information that enables them to participate at higher rates.

So, here's where I think we ran into some disagreements. What are the reasons for the low participation rates? And they really ranged from consumers don't participate because they realize there's no point in it. They owe the debt, they're not going to win, so they just don't show up, although Judge Lebedeff mentioned that, at least in credit card debt cases, that she doesn't feel that's necessarily the case very often.

Second is that debt settlement companies are out there, and we have a proceeding ongoing with debt settlement companies, but debt settlement companies are out there telling consumers they should not speak with debt collectors, they should not participate in this process, and that's a problem.

Then there's the sort of general idea of panic and fear, misunderstanding, confusion. It's a very complex process. It's legalistic. Consumers fear the system. They're not quite sure what's going on. And that's compounded sometimes by the lack of information that is transmitted through the pleadings in these cases.

Consumers don't really understand who the creditor is. They don't understand where the debt comes from in some cases, and that it would be very hard to navigate the process. So, consumers opt out of it.

Related to that is the issue of illiteracy, that too many consumers just cannot understand the documents.

Then there's the ostrich effect, I think it was referred to by somebody, that consumers are sort of pretending that if they put their head in the sand, then the problem will go away. I think that's another idea that came out.

Then there's sort of practical problems. Consumers don't have transportation, trying to take off work to get to the hearing, and it's just very inconvenient and expensive to do that.

And then finally, of course, we talked a lot about service of process companies. Although there's some -- obviously some disagreement about the extent to which that's a problem, the extent -- we even disagreed about the extent to which service of process is done by private entities as opposed to court entities.

So, then we moved into solutions. What can be done by the courts, by others, to increase participation? So, one comment we heard was, no, nothing can be done. It's human nature. People don't want to show up. People know they owe the debt. They can't do anything about. So, they don't participate.

Another idea was that there ought to be greater transparency in pleadings. They ought to be simpler.

They ought to be more descriptive so that consumers, again, can understand better what the nature of the issue is.

There was discussion about designating an attorney or a professional by the court to be available to represent debtors and letting them know that that's something that they could take advantage of. There was discussion about model pleadings and instructions to make them simpler.

There was discussion about steps that could be taken to prevent the filing of bogus or erroneous suits that, for example, that as debts are passed down the collection chain, perhaps there should be better communication of the defenses that consumers have raised during the process; perhaps this identity theft situation.

It occurred to me one possible offshoot of that would be should the pleadings in the case or the papers filed in the case document what collection efforts were undertaken in the course of collecting this debt and by whom. Is that something that consumers would benefit from having and is that something that would be practical for industry to do?

And then there was discussion about lower-cost proceedings. Should there be a telephone option for

consumers to adjudicate these?

But most of the discussion related to service of process, of course, and there I think we have a number of ideas that people raised. One, obviously, is greater oversight by the court. Should the court require logs by service processors of what they've done? Should we use new technologies to track process servers, to make sure that they're actually doing what they say they do? Should there be greater prosecution of the rogue collectors under the perjury laws and otherwise? Should there be follow-up notice that goes out either by first class mail or by express mail that consumers sign for that, again, would increase participation?

I think one of the judges, I forget who, mentioned that, I think it was in New York, there was some effort made to do these follow-up letters and that that seemed to increase consumer participation rates. So, you know, there are a lot of ideas here.

What I think we still need to think about -- and here I'll profess to being a little bit frustrated, because I like to walk away from these things, "Ah, here's the answer. These are the four things that we need to do and we're done." And it's not obviously that neat or that simple.

But what remains a question in my mind is, what

are the roles of the various parties involved in the solution? What should be done at the industry level? What should be done by the courts at the local levels? What should be done by state law? And ultimately, from our perspective, what can the FTC do? Is there something that Congress ought to be doing that we should be recommending?

Now, that's the sort of specific guidance that would be very helpful to us in the future. So, as we continue to go through the day and as people think about this issue and perhaps file comments on it, I would appreciate, at least, getting beyond the, you know, here's our position, here's your position, and more to, what specifically can be done and who ought to be doing it? What's going to work here?

So, thanks again for the great discussion, and we look forward to the upcoming panels. I think we're going to take a break now.

(Applause.)

MR. PAHL: We will take a break and ask everyone to be back in their seats. We will start promptly at 11:00. Thank you.

(A brief recess was taken.)

PANEL 2: STATUTES OF LIMITATIONS

MR. PAHL: We're about to start our second panel. The moderator of our second panel -- everyone, please take your seats, thank you -- the moderator of our second panel will be Bevin Murphy, who is an attorney in the FTC's Division of Financial Practices, and the topic of our second panel of the day will be statute of limitations issues in debt collection litigations.

Bevin, if you could begin, that would be appreciated. Thank you.

MS. MURPHY: Thank you, everyone. Can you hear me? Okay. How's that? Yes?

AUDIENCE MEMBER: No.

MS. MURPHY: Now?

AUDIENCE MEMBER: Yes.

MS. MURPHY: Welcome back, everyone. As Tom mentioned, we are going to be looking at issues pertaining to statutes of limitations, and essentially this is going to be divided into, I guess, two sub-issues. So, we have what's occurring, what's being said, what's being given during the process of collecting, and then we have what's occurring during litigation, when a suit is being filed.

So, taking those in turn, starting with the

actual process of collecting debts, what we're hoping to talk about is when a debt is past the statute of limitations, how frequently is it being collected on? And so we want to get some experiences, data from you all on that.

We also want to look at what, if anything, should be disclosed to the consumer during collection? Should there be disclosures, for example, that a consumer, if a debt is past the statute of limitations, is not legally obligated to pay or that any sort of small token payment may revive the debt?

And then we also want to tackle the question of, in fact, should a debt be allowed to be collected on if it's past the statute of limitations? So, that's going to be probably the main topic, so I'm sure you all will volunteer other topics as well in terms of collecting.

And then, in terms of when we get into the courtroom and the process of filing suits, what, if anything, should be required there of the attorneys? So, for example, should an attorney have to put in their complaint what was the date of last payment or should they have to somehow swear or affirm that, in fact, the debt is not past the statute of limitations?

And then we also want to look at, should there be a uniform federal statute of limitations, and if not,

is there any room for the states to become involved and legislate there?

So, I am just going to -- I want to start talking about the collections first, and then I'll move into the courtroom scenario. So, assuming that debts are being collected on that are past the statute of limitations, how frequently is this occurring?

Does anyone want to start us off? Yes, Ms. Faulkner.

MS. FAULKNER: There are people in the debt-buying industry that make it a practice to buy primarily out-of -- what they call out-of-statute debt, OOS debt. They make millions of dollars --

AUDIENCE MEMBER: Could you talk a little louder?

MS. FAULKNER: -- collecting out-of-statute debt.

The New Mexico Attorney General is now considering regulations controlling the collection of out-of-statute debt, but there is one person, a debt buyer, who has $100 million worth of out-of-statute debt in his portfolio to sell, and how does he collect it? He has a Web site, and the Web site implies the consumer will be sued if he is not going to pay the debt.

"We believe that the added cost of litigation

and the negative effect on your credit can be overwhelming. While our clients reserve the right to handle this account in civil court under applicable state law should voluntary arrangements not be made, we will make every effort to offer you a plan to resolve this issue."

So, the volume of collection of out-of-statute debts is enormous. I personally think that there should be -- it should be an unfair practice to buy or sell out-of-statute debts, and I think that that would make the problem pretty much go away.

MS. MURPHY: Thank you.

Ms. Needleman?

MS. NEEDLEMAN: Well, the question was, how frequent do debt collectors seek to collect a debt that is beyond the statute of limitations?

AUDIENCE MEMBER: Could you speak up?

MS. NEEDLEMAN: I'm sorry. Can you hear me now? Okay.

The question was, how frequently do debt collectors seek to collect an out-of-stat debt? To my understanding, this is a litigation roundtable, talking about litigation, so to the extent you're talking about collection attorneys that file lawsuits out of stat, I would say if that happens, it is completely

unintentional. On the whole, collection attorneys do not make an intentional attempt to file out-of-stat debt. They will receive information provided by their clients. If they are within the applicable statute of limitations of their state for a credit card, then the suit would be filed if warranted.

MS. MURPHY: We are actually interested in both issues, both collecting on out-of-stat debt, as well as litigating.

MS. NEEDLEMAN: As far as litigation, I would say that is not the purpose of what litigation debt collectors do.

MS. MURPHY: Does everyone agree -- does anyone not agree with that, that attorneys are not suing on out-of-stat debt?

MS. ROSMARIN: Oh, that's not right. People are -- they're suing on it all the time. It may be -- maybe they don't -- maybe the attorneys don't know or maybe they choose not to know. You know, they might -- you know, if they get a -- let's say they get a complaint from somebody or they find out that somebody's -- that they're getting debts from, you know, the -- a particular -- one or more are out of statute of limitations, maybe they choose not to go and look and ask that client whether they -- you know, whether the

rest of them that they're sending them are out of the statute of limitations, but they do all the time.

And, in fact, there are some -- some attorneys -- some attorneys who are also debt buyers. They run their office, they buy the debt, and there is one in Massachusetts that sends out letters to people that they're collecting on saying, "Thank you for your payment of such and such," whatever, which the client -- the debtor has never made that payment, just so that they can later back it up and say that there was, you know, no statute of limitations problem.

MS. MURPHY: Judge Lebedeff?

JUDGE LEBEDEFF: You see this complicated by two practices. First, all of the collection agents that we've mentioned very frequently call up debtors and ask, "Can you just send a payment? Can you send us $5? Can you send us $10?" And then they treat that as waiving the statute of limitations.

And you also see it in cases with dead people, where they'll write you as a child saying, you know, "Your mother had this bill," and all of a sudden, you know, "can you do anything on it or send us $5 on it or whatever?" And all of a sudden, they treat you then as the primary obligor who has waived the statute of limitations. It could be ten years old.

MS. MURPHY: Then should there be some sort of disclosure in your opinion?

JUDGE LEBEDEFF: I don't know what their obligation is to advise people that they're waiving the statute of limitations. You know, that really is a matter of ethics. I know there is an ethical code, which I believe someone here should be able to talk to, that collection agents are not supposed to engage in unethical things, but let me just go back to the question about the lawyer.

These are really medieval terms, champerty and barratry, it's absolutely illegal in New York and probably in every state to -- especially for a lawyer -- to purchase a debt with the intention of going and suing on it. So, there really are some major ethical questions.

MR. GROVES: I agree with the Judge and Joanne and all that has been said, that ethical collection attorneys, whether it be under the FDCPA, in Kimber, in the Kimber lawsuit and its progeny, or the state ethical guidelines that we follow, along with our local rules of court, it's clear that collecting on out-of-stat consumer debt is a bad idea.

And what we do is we initial, scrub -- and I think I speak along with all the fellow NARCA attorneys

here, is that the first thing you do when you receive files is you run scrubs based on the statute of limitations, whether it be date of charge-off, the charge-off amount, the dates of last payment, and the date of first delinquency, as well as any other information, such as whether or not it's a written contract, an implied contract, or an open account based on local rules of statute of limitations.

So, the first thing I want to say is, those lawyers that we see on the list-serves that say it's an affirmative defense, that may well be true, but I would chime up to them offline or online saying it's a bad idea. You need to turn these accounts around and send them back to your clients. We're here for legal debt collections, not to warehouse accounts, and we don't want to have the misinformation being given that we're going to sue them if we're not.

So, the very first scrub we do, along with deceased, bankruptcy, Service Members Act, yada-yada-yada, is the statute of limitations scrub, and we will work with our clients to ask them not to send them in the future. If we find one, I would like -- no one's perfect. I guarantee you there's accounts that go through, but our scrubs are multiple -- and I say "scrub" meaning reviews of the data fields and file

compliance elements -- to ensure that this doesn't happen.

And I don't know how long it's been since Kimber out of the Alabama court came around, but ever since that case came down, ethical and people -- and attorneys that don't want to go out of business don't file suits on out-of-statute as far as I can tell.

MS. MURPHY: So, just to clarify, I had wanted to talk about these issues separately, but I think they are somewhat opposite sides of the same coin. When you're talking about scrubbing, that's before filing suit, not before collecting, correct, or to what were you referring?

MR. GROVES: Well, the file review would be at the time of placement, and if you have an ongoing relationship with a client, you either visit their headquarters or wherever their principal place of business, you work with the client, and if you see that a client or a new client's going to be sending you out-of-statute debt, you are going to go ahead and review with them -- I bet you if you go around this table and in the audience, all the attorneys here, they don't want to handle out-of-statute debt.

Given the ten-point-something unemployment rate and the similar charge-off rate, there is so many

accounts that are pre-statute of limitations, there is no real reason to want to -- there is only trouble coming along with collecting out-of-statute debt. So, the scrub, to answer your question, Bevin, was related to at the time of placement.

MS. MURPHY: Okay.

MS. ROSMARIN: That may not be --

MS. MURPHY: Yes, Ms. Rosmarin?

MS. ROSMARIN: That may not be true for those attorneys who have set up a business of collecting -- you know, of buying debt and collecting it, where they have their own banks of collectors and then they file lawsuits. So, maybe they aren't -- maybe they aren't members of your organization, but that's where I see a lot of it happening here.

MS. MURPHY: Mr. Debski?

MR. DEBSKI: I just want to clarify. My understanding is the FTC has issued an opinion that collecting out-of-stat debt, outside of litigation, is not against the law, and they have issued a formal opinion as to that. So, if it's happening or not, I guess the point is, going forward with litigation, we now have a case that says that that would be a violation of the FDCPA, that it would be unlawful to do that. And I don't think anybody wants to intentionally break the

law, and I don't intentionally break the law, and if they're intentionally breaking the law, then there is the remedy under the FDCPA.

JUDGE EVANS: May I?

MS. MURPHY: Yes.

JUDGE EVANS: Judge Evans. I see out-of-date cases coming before me every day that I handle these cases --

AUDIENCE MEMBER: Can't hear. You need the mic.

JUDGE EVANS: I see out-of-statute cases come before me on a regular basis or at least cases that appear, on their face, to be out of statute and not able -- we have a two-appearance system in Florida. At the initial appearance, very often when they appear to be out-of-stat, the lawyer can't even give me a reason as to what has waived it, whether there's been a payment, et cetera.

Now, what I'd like to point out, when you talk about it being an affirmative defense and whether the litigant has to raise it and et cetera, I think we lose sight of the fact that, hey, most of these cases are in what we call small claims courts. Small claims courts are designed basically for people without formal legal training to be able to come in and get a fair shake.

These people do not know the word "affirmative

defense." They probably don't know "statute of limitations." They may know it's been a long time, but they don't know to raise these things. A simple requirement that people be advised of what their rights are initially will probably go a long way to keeping this, shall we say, more above water.

People do not know what an affirmative defense is. They don't know to raise it. And, again, I think we need to strive for a way to give small claims courts a way to keep that playing field level, the way it was designed and the way it was intended to be, and just someone taking advantage based on a lack of knowledge of a defendant or a consumer does go against the grain of what the philosophy behind small claims courts may be.

MS. MURPHY: And when you say that something on its face appears to be out-of-stat, in your experience, what sort of information do you typically get in your court regarding -- do you get a date of last payment? Do you get --

JUDGE EVANS: No. Typically we get no -- we get nothing from the plaintiff. What we get is a party saying, "I haven't even thought about this account or heard about this account in seven years." Well, you know, that's how we get it. On the face of the complaint, sometimes we can find it, generally not.

The pleading requirements in Florida, at least in these cases, are very lax. There's not strict -- it's very simple pleadings. You don't have to give a lot of information. It's more people coming into our pretrial conferences and indicating that it's been a long time.

MS. MURPHY: And what do you think can be done to, in your words, level the playing field?

JUDGE EVANS: Again, I go back to our last session when we were talking about what information should be given when people are brought into court. I think there was some sort of consensus that perhaps more information should be given out as to where the debt originated, who has held it, if debt buyers are involved, what the date of the alleged last payment was, what the interest rate, whatever information can be determined, I think that can go a long way towards providing that information, along with an explanation of what their rights are on old debt, that they do have -- that they do have a defense there.

They may, however, very well want to work out something, arrangements, because they don't -- most people like to pay their debts. They don't want to be deadbeat. And I think that there's a lot -- there's a good number who would even pay after a statute. But I

think they need to do it knowingly, as opposed to being hoodwinked, and I think that goes with the philosophy of what a small claims court is supposed to be.

MS. MURPHY: Thank you.

Mr. Redmond?

MR. REDMOND: So, I've never had a lot of luck in my life arguing with judges, but I'm going to just take a shot.

So, Judge --

JUDGE EVANS: Yeah?

MR. REDMOND: -- there is no question that nearly everywhere in the country, the statute of limitations is an affirmative defense. We know what that means. Nonetheless, you're the judge. If you see a case that you say, on its face, looks like it's out-of-stat, dismiss the complaint. That's what judges do. I mean, you know, I mean I --

JUDGE EVANS: Without giving a day in court? Maybe some judges do it. I do like to give a day in court. I think that's -- you know, very often, when it appears that way, I have a lawyer in front of me who probably doesn't know much about the case.

MR. REDMOND: Well, I can tell you no --

JUDGE EVANS: Excuse me.

MR. REDMOND: Sorry.

JUDGE EVANS: Mr. Debski and I were talking about this earlier today, where a lot of these firms that handle these work on a statewide or even national basis. They have appearance attorneys in the local areas that come to court with very little information on the case, and basically their response is, "Judge, we'll show you at trial," okay?

MR. REDMOND: With respect to whether or not it's --

JUDGE EVANS: And that's all we can determine at that point, and they're entitled to that. They're entitled to show us at trial.

MS. MURPHY: Judge Lebedeff, do you want to jump in?

JUDGE LEBEDEFF: In New York City, we actually have a requirement that they plead that it's not barred by the statute of limitations or that it's not timely --

JUDGE EVANS: Right. We don't have that in Florida.

JUDGE LEBEDEFF: -- and I think that's a far more positive and effective approach. Just remember, as part of a judicial function, generally when a suit's for money only, the judgment is going to be granted by the clerk. There often isn't a judicial function.

In landlord-tenant, for example, or someplace

where there's a possessory judgment or something other than a state money judgment, a judge often has the ability to look over papers and say, "No-go, they're not good enough." But usually there's quite a restriction either by case law, by statute, or by the appellate courts for judges to jump in on a money suit where there's nobody appearing.

MR. REDMOND: Well, I will only say, Judge --

JUDGE LEBEDEFF: And remember, we already talked about some people saying that there's a 90 percent default rate in credit card suits. So, having this affirmative pleading requirement, I think, is really the best way to go.

MR. REDMOND: It doesn't hurt a thing.

JUDGE LEBEDEFF: Right.

MS. MURPHY: Ms. Gagnon?

MS. GAGNON: I feel it already is out there. With Kimber, it is a violation of the FDCPA to sue on an out-of-statute case. So, you are violating the FDCPA if you're doing that. There is already this line of -- this bright line that we are not to do it, and ethical collection attorneys are simply not doing it. We're not exposing ourselves. We're not violating the law. We're trying to stay within the law.

MS. ROSMARIN: But just because --

JUDGE EVANS: May I make one comment?

MS. MURPHY: Let Ms. McNulty jump in. I want to make sure we get everyone.

MS. MCNULTY: In North Carolina, it's fairly routine to see collection lawsuits brought on out-of-statute debt. We see that all the time. I don't know whether these would be considered the unethical collection attorneys, but it happens all the time.

MS. MURPHY: And I just want to ignore you one more moment.

What do you think we could -- in your opinion, what should be done with that?

MS. MCNULTY: As part of the statute in North Carolina, debt buyers, it's now made explicitly an unfair trade practice, because creditors' attorneys argue that Kimber doesn't apply in North Carolina, whatever, we have had that argument. Now, for debt buyers, it's explicitly an unfair debt collection practice, and we have also put in pleading requirements of when the last payment was made.

MS. MURPHY: Ms. Coffey?

MS. COFFEY: I think the fact that filing out-of-statute cases, which happens all the time, with the cases that I see, just the fact that it's -- the threat of it being a violation of the FDCPA, you know,

really isn't much of a deterrent, especially when you're talking about consumer cases where only 1 percent of defendants are represented by counsel. So, the fact that any of those defendants are going to figure out that this case is a violation of the FDCPA and then be able to bring an FDCPA lawsuit against the creditor is, you know, ludicrous.

MS. ROSMARIN: I have a couple of suggestions, and I --

MS. MURPHY: Yes.

MS. ROSMARIN: -- what I was going to say was basically the same thing that she said about that.

Besides the pleading requirement, which I think is good, and making them have to affirmatively plead it, I think also -- I agree that I have -- most of the people that -- debtors that I've seen, they do want to pay their debts, so I think that an answer to that would be make a payment of something that was out of the statute of limitations not revive the statute of limitations, and make any default judgment that was gotten, you know, or any judgment that was gotten on a debt that was out of the statute of limitations void so that somebody could come back in and challenge it.

MS. MURPHY: Mr. Abrams?

JUDGE ABRAMS: We do not -- in Connecticut do

not have a pleading requirement, unfortunately. So, I would see them fairly frequently, but I felt my hands were tied. It's an adversarial proceeding.

The other thing, as Ms. Coffey said, if no one's there to raise the statute of limitations defense, who's going to raise the unfair trade practice defense? I mean, it's just -- there's nobody there. The threat may be there, but it generally is not going to happen.

MS. MURPHY: Mr. Flitter?

MR. FLITTER: Just to take a step back, I think what's the general state of things is that the majority of states -- I'm from Pennsylvania, that's -- I think the majority of states, including Pennsylvania, say that if the statute of limitations has run, that bars the remedy but not the debt, right?

So, if one were to go to court and there's an affirmative defense on the statute of limitations raised, then that's a reason to have the case dismissed or denied or what have you, but that that alone does not make the debt go away, and it's still a -- it's still -- it's not improper for a debt collector to continue to try to collect the debt through nonlitigation means, as long as you don't reference suit, litigation, court, and things like that.

And that just -- I think that rule in itself has

worked fairly well. I don't see a lot of collection letters coming through from the various debt collectors threatening litigation on time-barred debts. The issue of whether there are suits on time-barred debts, where there's no disclosure up front to the consumer, is really a separate issue. I think one of the issues that goes in tandem with that is exactly what is the statute of limitations?

Now, at the moment, that's on a state-by-state basis, and I don't expect that that will change, I don't know, but even within any given state, what's the statute of limitations? So, there's suits on notes, there's suits on open accounts and things. And I should add, in the case of credit card debt, which is an awful lot of these collection matters, they tend to rely on credit card agreements from MBNAs and -- well, what was MBNA -- and a lot of the Delaware-based banks, incorporating -- specifying Delaware law, and, of course, Delaware has a three-year statute of limitations.

So, then, the question comes up, if you're in Pennsylvania, it generally is four. I don't know what Florida is and some other states. If a debt buyer shows up or a creditor shows up, what's the statute of limitations? Four years is the general presumption, but

it may well be three if you're applying the Delaware law analysis.

And the only thing I wanted to add, in terms of a -- if I may -- a uniform, I don't think that's a great idea, to have a uniform national statute of limitations. I think that's something that's so historically been reserved for the states to decide, how long you want to allow, but if there were to be one, I would think the statute of limitations for the Fair Debt Collection Practice Act ought to be pretty much coextensive. So, the FDCPA is one year right now. I think if you're going to a national statute for debt collection, I think the FDCPA statute of limitation ought to be the same duration.

MS. MURPHY: Okay, let's stick to that topic for a minute. Who has a comment on whether there -- I guess, first of all, is it difficult to determine what the statute of limitations is, and if so, should it be simplified with a federal one?

Yes, Ms. Needleman.

MS. NEEDLEMAN: Well, I would disagree that there should be a federal one. I agreed with about 95 percent of Mr. Flitter said, which should shock him, but there shouldn't be a federal one, and I think a year really harms consumers, because if they feel that

there's a lot of lawsuits now, wait until you have a one-year statute of limitations, you are going to be overburdened with lawsuits. And I don't think it's fair enough to consumers, because in a lot of these cases, we're talking about job loss, we're talking about some sort of catastrophic medical problem that has resulted in them being unable to pay their bills. Those things may pan out after a year or so, give them time try to work it out.

But I think it's best left to the states. The states, I think in Pennsylvania, have done a really good job in developing court systems to handle these types of cases. I see a judge here from Blair County who's done a wonderful job. I mean, they recognized an issue with the citizens of their county and developed a specific court, and I think they're in the best position -- the states are in the best position to determine what is the best statute of limitations to serve their citizens, and that's the way it should remain.

MS. MURPHY: And do you also think it would be helpful if each state set a uniform statute of limitations, for example, so that unwritten contracts and written contracts have the same per each state?

MS. NEEDLEMAN: I think there should be a collaborative discussion about that, absolutely.

MS. MURPHY: Okay. Anyone else? Yes, Judge Evans.

JUDGE EVANS: Having a standard statute of limitations I think would make my life easier. We have all sorts of mixed-up things. We have people -- we have a transient society. We have people who have incurred debt while living in Ohio, who are now in Florida, from a credit card company that was issued out of North Dakota and is now being sought by a debt buyer in New Jersey.

MR. FLITTER: South Dakota, judge.

JUDGE EVANS: Okay, excuse me. I'm sorry. You know, one of those states out there that nobody comes from.

You know, this is a creature of basically federal law. We don't have -- you know, you're able to bring -- these credit cards exist because there's high interest rates that can be brought, different states that don't allow those interest rates, because of federal law. Having a federal statute which applies only to these type of cases, I don't see anything wrong with that, and I don't think -- see it interfering with state law or state rights. It lets everybody know and be on the same page, and it is a creature of federal law.

MS. MURPHY: Thank you.

Mr. Zezulinski?

MR. ZEZULINSKI: Thank you. I know you find this hard to believe, but while we think that legal action is an important remedy in collection, it is not the preferred remedy, which is one of the reasons that you see so few lawsuits.

Now, I know that's shocking to you, because you are the recipient of all of them, but the percentage or the reliance on legal for collection is relatively minuscule in terms of the total number of accounts that we handle. We have 300 million accounts that we deal with; 70 million on a daily basis. We make 600 consumer -- excuse me, 600 million consumer contacts a year; 150 million by letter. The rest are in or outbound phone calls.

When you begin to look at that, legal action is not a remedy that is efficient and effective, and we don't rely on it a lot. That doesn't mean that we don't have 250,000 judgments; we do in our purchased portfolio. I can't tell you the number of judgments that we get on behalf of clients that send accounts to us. That's different. We don't measure that.

But having said that, one of the things -- and I agree with Ms. Needleman -- and that is that shortening

the statute of limitations is going to push more burden on the courts. The collection process, the collection activity, from the point of default to the point it goes to legal, you know, if it's less than a year, you're just going to see the burden. It's just going to overwhelm you.

And to a certain extent, we're in a perfect storm right now because the economy is where it is, but the reality of it is, we are seeing vast changes in consumer debt. It's half of where it was a year ago. It went from over 500 billion -- 5 billion, rather -- 5 trillion, I'll say, to about 2 trillion, and that's just over the course of a year.

It's just going to be very, very difficult. We're going to see that essentially evolve into a separation of class here, those who can get credit and those who can't, and the functionally illiterate, probably the 40 percent, may not get credit. That sounds kind of un-American to me, that we wouldn't give credit to someone because they can't read, but, you know, maybe that's a test that needs to occur.

But the reality of it is, at this particular point in time, you're just -- I know there's a pig in a python going through the state at this time, right now. The reality of it is, that's going to pass through over

the next few years, and the volume of activity is going to decline, and I think that the reliance on litigation as a remedy is going to shrink, primarily because the buying is going to shrink.

There are not many credit cards being issued. We see that coming down the pike in our business. It's just not a -- it's just not going to be the same volumes. Shrinking or shortening the statute, you know, period to one year, two years, or even three years, is, in fact, going to create a problem, because it will push more to legal more quickly.

MS. MURPHY: Judge Lebedeff?

JUDGE LEBEDEFF: Oh, I just wondered what the experience was in bankruptcy court for how they're treating this, because you have some different issues, where with -- with credit card debt in bankruptcy.

MR. ZEZULINSKI: I actually don't. In the area of bankruptcy, that just is something that comes right out of our pile of work. It's not something that we focus on.

JUDGE LEBEDEFF: Okay, because it can survive, and I wondered how they're treating the statute there.

THE REPORTER: Can you use the microphone, please?

JUDGE LEBEDEFF: My question was how the statute

of limitations is being addressed in bankruptcy court, because you have more survival of credit card debt there, and are they declaring some of that out of bounds? And basically, whenever you talk about changing the statute of limitations, I don't believe you can change it retroactively. It would be prospectively only, just to add a footnote.

MS. MURPHY: Okay. And I guess the question could actually be parsed up to, normatively, should there be a uniform statute of limitations, and as you just mentioned or I've heard a couple mentions that if there were going to be, a year seems to be too short for everyone. So, putting aside whether you believe there should be one, if there were to be some sort of uniformity, what would be the appropriate time periods? Anyone want to take that?

MR. ZEZULINSKI: I would argue that it should match credit bureau reporting, and I would argue for seven years. Now, having said that -- I see a lot of people are shaking their heads --

MS. MURPHY: I do as well. We'll get to them. Anyone else on this side?

MS. COFFEY: I think that's exactly the problem in having a uniform, you know, federal statute of limitations, is that we won't agree on a number, and I

think seven years is a lot longer than most states or many states.

And in terms of the drying up of the credit, I just want to point out that different states do have different statutes of limitations, and as far as I can tell, credit is available in the states where the statutes of limitations are lower. So, I don't know if that should be a big concern.

And I'm sorry, also, the flooding of the courts as a result of a decrease in the statute of limitations, I mean, right now, in New York City, we have 300,000 debt collection cases filed a year in civil court. If the statute of limitations was lowered, I would think that there would be a lot less lawsuits filed there.

MS. MURPHY: Mr. Debski?

MR. DEBSKI: I would just say if -- I think this is exactly why the states have decided on their own statutes of limitations. They have had a chance to look at their rules of evidence. They have had to look at whatever document retention laws they have or any other things relating to their procedures to decide what would be appropriate in their state under their procedures, and I think that's why it should remain a state issue and be determined by those states.

MS. MURPHY: Mr. Flitter?

MR. FLITTER: I just wanted to comment on the availability of credit, if that's an issue. I don't think I agree with the notion that an illiterate borrower is less likely to get credit. I think my sense is it's precisely the opposite. A very literate borrower, you have a banker, an executive, a lawyer, shops credit, is going to get a very favorable rate, and I think the subprime lenders would tell you that their most profitable loans, the ones that are at interest rate ceilings of 15, 18, 22 or more, are going to be from the subprime market; are going to be from a very frequently uneducated and unsophisticated borrower. So, I don't know that that ties together.

MS. MURPHY: Let's take Ms. Faulkner and then Ms. Gagnon and then Ms. Rosmarin.

MS. FAULKNER: First I'd like to comment on the drying up of credit. I've been around a long time, and that's what they were all saying in 1969 when the Truth in Lending Act was enacted. Credit has grown by leaps and bounds since the Truth in Lending Act, which was a horrible thing for creditors.

In addition, the FTC, when it adopted its Credit Practices Rule a long time ago, had a study as to whether adopting consumer protections dried up credit. It did not. So, I think that's just a mirage,

something -- a red flag, whatever.

I wanted to talk about a couple more points, if I may, because the discussion keeps going around. Lawyers filing suits on time-barred debts. It does happen, and the reason it happens is because their clients are giving them bad information. "Oh, yes, so-and-so paid $10 on a check two years ago." And when the attorney goes back and looks, "Oh, sorry, no, we don't have any evidence that that client paid two years ago." So, I think it's bad information from the creditors.

The practice of duping is a recognized practice in the debt collection industry, and that is a practice whereby you try to get somebody to recognize the debt, even though it's beyond the statute of limitations, and, therefore, you can now have this acknowledged debt within the statute of limitations again. One collection agency would send around a letter saying, "Tear off at the bottom. I want to pay this debt, but I can't pay it now. Get back to me later." And that can renew the statute of limitations in some areas.

MS. MURPHY: I definitely want to get back to that issue, but let's just first hear from Ms. Gagnon and Ms. Rosmarin.

MS. GAGNON: I do think that such a short

statute of limitations will cause a chilling on credit, and I understand what you were saying, Mr. Flitter, about the subprime market, you can charge the high interest rates, but at the end of the day, if we cannot collect on these accounts, you will not give credit. And when you're talking about a one-year statute of limitations, and if we're going to harken back to what Ms. Needleman said, then there's absolutely no time for the consumer to rehabilitate themselves, to get over the medical issue, to find a job again, and, therefore, if you cannot collect in that time period, you will not be extending credit.

MS. MURPHY: Ms. Rosmarin?

MS. ROSMARIN: I just -- I want to emphasize, also, I think the idea of a uniform statute of limitations is not -- it's kind of a dead-end, and nobody is going to agree on how long it should be, and it's always been a traditional states area.

I think the focus should be more on, you know, what to do about it -- what to do about when you do have that problem, and the disclosures in the pleadings, affirmatively having to disclose them in the pleadings, barring this duping or any kind of reviving the statute of limitations. I mean, if -- I mean, people do want to pay their debts. If you really want to encourage them

to do that, then don't make them be penalized by more reporting on their credit report, it revives the credit reporting, it revives possibly the statute of limitations if they do pay.

And then the other thing is if they do happen to get a default judgment, because somebody doesn't know or doesn't show up in court, well, then, make it void. I think you've got to remedy it and not focus on the statute of limitations.

MS. MURPHY: Mr. Redmond, I saw you shaking your head.

MR. REDMOND: Well, I don't think reviving the statute of limitations has any impact on credit reporting. Credit reporting is what it is, seven years from the date of first delinquency, period.

I agree with Ms. Rosmarin that, number one, I don't think, you know, the country will ever agree on a uniform statute of limitations. I also agree that as a matter of state law, it must stay a matter of state law, because Nebraska isn't the same as New York, and we've heard a lot of things that go into that. I also think the likelihood of there being a national statute of limitations is so low that it's just not realistic. So, on that, we agree.

MS. MURPHY: Thank you.

Getting back to this issue of whether there is any duping or encouraging of token payments, what can you all comment about on how frequent this is and what consumers understand when they make a small payment? Can anyone take that?

Ms. Faulkner, you had mentioned this issue of a token payment reviving the debt.

MS. FAULKNER: Yes. It does -- it does in many states. I think the Debt Buyers Association recommended a disclosure, and this is to the New Mexico effort.

"Based upon our information, this debt may not be subject to suit; however, you may pay on the debt. If you do pay on the debt, the time to file suit may be renewed. This is not intended to be legal advice. You should always consult your own attorney."

And then the American Collectors Association also recommended language given to the New Mexico Attorney General:

"Based upon our records, this debt may be too old to enforce in a lawsuit, but please remember, the debt may still affect your ability to obtain credit or employment. If you acknowledge you owe the debt or make a voluntary payment, then the statute of limitations may be waived or renewed."

MS. MURPHY: Ms. Gagnon?

MS. GAGNON: Well, the DBA and the ACA are not attorneys. The NARCA members who are sitting here, we are attorneys, and we have a duty to zealously represent our clients, and right now, under the case law, under the FTC opinion, we can collect. We can't sue or threaten to sue on an out-of-statute.

So, by requiring attorneys to put those disclosures in our letters, I think that is running afoul of the ethics. I have the ethical duty to my client to do the best for them, and I think it's a different situation for DBA and the collectors. They don't have that ethical duty.

MS. FAULKNER: These comments were submitted by their lawyers.

MS. NEEDLEMAN: Their lawyers were not collecting the debt. The NARCA members who do collect, who have been retained by their clients, have to zealously advocate for their clients' interests. If I am making disclosures to the debtor that this payment could affect their defense, then I'm running afoul of my duties to my client. So, I mean, I think it puts attorneys, as most portions of the FDCPA do, in a very precarious position.

MS. ROSMARIN: But not all collection attorneys are NARCA members.

MS. NEEDLEMAN: That's true.

MS. ROSMARIN: And maybe they don't all follow your guidelines.

MS. NEEDLEMAN: That's true.

MS. MURPHY: Mr. Flitter?

MR. FLITTER: I don't think there would be any sky falling if there was that kind of a disclosure. Every collection attorney in the room, especially the talented ones here at the table, the NARCA members, already include a 1692(g) notice that the Act requires in every single letter, and sometimes in every single lawsuit, and they do it quite ably and without real event and without, I think, them acting adversely to their clients.

So, if there were to be a federal rule, whether it's a term of art -- I mean, I know the FTC doesn't pass rules under FDCPA, but if there were to be a rule or a statutory amendment requiring a straight-forward disclosure about the effect of making a payment on a time-barred debt, since that would be a required statement, I don't think there would be any issue at all about the creditor counsel giving advice or giving bum advice or acting adversely to the interests of their client.

I would just add, the Pennsylvania rule actually

works pretty well to my mind. It's just the way it's developed into the case law, which is if there is has payment made after the running of the statute of limitations, the payment itself does not revive the debt unless it's accompanied by an unequivocal statement of intent to revive the debt. So, if the statute has not lapsed, then any payment extends the statute of limitations another four years, but if the statute has already run, you need something more than a payment in order to reinvigorate the statute of limitations, some unequivocal statement. "Okay, here's $20, and I agree that a new statute of limitations will run."

I think something like that would be a very -- a sensible approach. I think it would be equitable. I think it would permit consumers who want to pay because they owe the debt and they need more time to do that without duping or without really misleading anyone into reviving a statute of limitations unwittingly.

MS. MURPHY: Mr. Debski?

MR. FLITTER: I need to add one -- just ten seconds.

MS. MURPHY: Sure.

MR. FLITTER: I want to correct myself from a remark in the prior session. In talking about the assignment, I mentioned some debt buyers by name, NCO

and Portfolio Recovery, and I was corrected at the break that they do not sell debt they know to be -- I'll say be problem -- have defenses or statute-barred. So, I only want to mention, I mentioned them because they're the big players in the field, not because I have specific knowledge that they are known to do that.

MS. MURPHY: Thank you.

Mr. Debski?

MR. DEBSKI: I think the number one concern is -- for attorneys -- is when we start dealing with pleadings and different things that deal with the courts, we are now taking what other debt collectors do into the courtroom. And when we start dealing with pleading requirements, pleading specifically that the statute of limitations have not run, where very clearly, in my state, it's an affirmative defense, and I have a duty to my client, we are now taking it into the ethics that is governed by our state supreme courts, and those are issues that should be dealt with with the state supreme courts who govern what I do at the courthouse steps.

I think that it's very different, an initial dunning letter, compared to dealing with pleadings and other things and that notification of their right to dispute. Once we get to court, I think that it's very

clear that these are state issues that deal with the supreme courts or whoever regulates your bar in your state, and I think that is distinguishable.

MS. MURPHY: Ms. Faulkner?

MS. FAULKNER: I just wanted to get one thing in, that in the New Mexico proceeding, the American Collectors Association concurred that it should be an unfair or deceptive trade practice for a debt collector to seek or obtain from the consumer any acknowledgment containing an affirmation of any debt barred by the statute of limitations or a waiver of any legal rights of the consumer without disclosing the nature and consequences of such affirmation and waiver and the fact the consumer is not legally obligated to make such affirmation or waiver.

MS. MURPHY: Thank you.

And getting back to what Mr. Flitter mentioned, that even if -- not so much talking about disclosure, but, you know, what really should -- if you have a debt that is past the statute of limitations, should that even be able to -- should a mere payment be able to extend the time period without something else, some sort of affirmation, some sort of written statement? Who has a thought on that?

MS. FAULKNER: That's a matter of state law, and

it differs in many states.

MS. MURPHY: And what -- Judge Abrams?

JUDGE ABRAMS: Joanne gave me my entree here. I'll put on my old hat. I was a state legislator for ten years, and the issues of both making it a jurisdictional requirement that the -- if you bring the action, it be within the statute, or that you have to affirmatively plead it, and also revival of actions with a payment, would be lobbying the state legislatures and having them enact -- when I was in the state legislature, we had a small claims -- the below $5,000 is in the small claims court, which is not judges, it's part-time magistrates, their service of process is not as strict.

And when I was in the legislature, they raised jurisdictional -- we raised the jurisdictional limit I think from $1,500 to $2,500 and then to $5,000, and all of us thought, this is great for consumers, because you're thinking Judge Wapner; you're thinking people can get in and get access. And now I realize that may have been driven by other forces and other interests to raise that limit. So, if I could take those votes back, I would, and I would lower the -- I would lower the jurisdictional limit.

MS. MURPHY: Okay. But in terms of -- so, is

anyone who -- even if you weren't a state legislator, assuming you are now, let's put on our normative hats here, what should the state legislature rule on that issue? I mean, what should be required of a consumer to affirmatively revive the debt?

MS. ROSMARIN: Can I say something?

MS. MURPHY: Yes.

MS. ROSMARIN: I mean, the only way I would think that they could revive the debt or should be able to revive the debt is by some affirmative statement that they have written, not that somebody sends them and they send something back, something that they actually write and say that -- you know, not only that I would like to pay this debt but that I realize that it's -- you know, you -- you know, it's past the statute of limitations or past the -- you know, they don't have to use that term, but past the time that you can actually collect, but I still want to pay it, and, you know, something to -- clearly to that effect, that they want to do that.

MS. MURPHY: Mr. Debski? And then Judge Evans?

MR. DEBSKI: Just a point of difference here. Obviously, the affirmation, there is nothing wrong with collecting a bill that is out-of-statute. So, therefore, no affirmation would be needed. They would just sign that they would continue to pay that debt, and

we're not dealing with litigation. And I disagree there should be an affirmation.

I think that what the statute of limitations shouldn't be is debt avoidance. It should be that we believe that the statute of limitations was put in place to protect the consumers or whoever it might be from things getting too old, to the point that there aren't documents, we don't remember, all those kind of things, where the evidence would become unclear, and I think that's the basic rules behind the statute of limitations. So, the question is wherever that point is.

If they call me up and say, "I'd like to pay this bill for this thing," I am assuming at that point, when you're making a payment, you're aware of the bill, you know who it's owed, and you're making a decision to send that check. And if they're not doing that, then that's a different issue.

MS. MURPHY: Okay, thank you.

Judge Evans? And then we have a couple questions.

JUDGE EVANS: Okay. Mr. Debski said, you know, it should be allowed, and there are people who wish to, shall we say, waive their rights and proceed and honor the debt; however, we are talking about disclosure here

and we're talking about coming back to even the playing field level. You know, in the legal profession, it's not unusual for people to waive rights; however -- for instance, in the criminal case, people can plead and waive their rights to a jury trial every day and waive their rights to counsel, but we have to make sure they understand what they're doing and they're doing it with knowledge, and a disclosure requirement would let them do it with knowledge.

I think it also -- I can't see the ethical problems that a lawyer has. If they comply with a rule or statute that says you must make disclosure, that's not an ethical violation to your client; that is compliance with the law. And, again, it also makes that waiver, if it occurs, one that is knowledgeable, one done with understanding of what they are doing, and that's what we're doing.

If I could also make one more comment on some of the remedies that have been suggested, and that's making some of the judgments void, that does not solve the problem. Once you have a judgment out there, it affects that consumer, it affects their credit, it affects their ability to get a mortgage, it affects their ability to get a job. They have to come to court to get a declaration that it is void. It just really is not a

remedy.

MS. MURPHY: Thank you.

We have a question from the audience. "Everyone keeps saying that we can't agree on a national statute of limitations. Can we see just how far off the panel is? Go around and very simply answer the following" -- I'm reading this so you know, you can't blame me for this question:

"Should there be a national statute of limitations? Yea or nay. If yea, what should it be in years?" Starting with Judge Abrams.

JUDGE ABRAMS: No, but if there were, I would say three years.

MS. COFFEY: I'd say no, but if there were, it would be two years.

MR. DEBSKI: I'd say no, and in Florida, I don't wish our statute of limitations upon anybody, because I don't think you can figure out what it is, but generally, it's five, I think.

JUDGE EVANS: Well, I guess maybe I'm going to say yes, because I am from Florida, and I sometimes would like to make it easy to figure out what it is, so that it makes it easy. And I think it should be four or five. I'm not saying either way.

MS. FAULKNER: I say no, because Congress made a

mess of it when they preempted usury laws and they made a mess of it when they preempted the statute of limitations for student loans, and I think they would probably make a mess of it again.

MR. FLITTER: I would say no, but if there were, it should be coextensive with the statute of limitations on fair debt claims. So, four years would be four years.

MS. MURPHY: I'm abstaining.

MS. GAGNON: No, and I say it should track with the credit reporting, seven years.

MR. GROVES: I echo Michele, seven years from the date of charge-off, with the charge-off being used as the universal number and trustworthy number and highly regulated number, and then having accrual from the date of charge-off or, in fact, if you want to have a nationalized accrual date as well, and -- but generally I would leave it to the states.

JUDGE LEBEDEFF: Oh, gee whiz. I've been a judge for 30 years. I am so used to deferring to the legislature that I am really going to abstain.

But one thing I would like to mention is we also have the Soldiers' and Sailors' Civil Relief Act, which can extend the statute of limitations. I think short of national banks, that's FDIC, or national banks' credit

cards, I'm not sure that there's a great legal authority for having federal regulation in this area. So, I'm a little dubious about that.

And I know we're talking about statute of limitations, but let me just throw in, there are not only state statutes of limitations, there's state statutes of fraud, which govern the forms of the contracts, and there may be other laws that bear on it, such as New York has provisions in the personal property law which relate to different kinds of credit agreements. So, legally, it's what we really call a rich question, and I really find it is far more complicated than just posing it.

MS. MCNULTY: I would say no, because I'm skeptical, like Joanne, that Congress would get it right.

MS. NEEDLEMAN: I would say no, and I agree with Judge Lebedeff for those reasons, but if we had to make a decision, definitely four years from charge-off date.

MR. REDMOND: I just say no.

MS. ROSMARIN: I agree. I just say no.

MR. ZEZULINSKI: I think you already have my answer.

MS. MURPHY: We have a little bit of time left. Would anyone like to expound on their answer?

Ms. Coffey?

MS. COFFEY: Yes. I just want to say that in terms of national statutes of limitations, you know, credit card debt is a two-year statute -- I'm sorry, telephone debt is a two-year statute of limitations. So, that's something that I find a lot of creditor attorneys forget.

MS. MURPHY: And actually, in terms of the fact that there are state statutes of limitations, I guess I'd like to hear from anyone, but especially our representatives of creditors, how difficult is it when you're, you know, looking at a debt to figure out what the applicable statute of limitations is?

Mr. Redmond?

MR. REDMOND: Sure, I'll take that.

I don't think it's all that difficult. It is certainly true, from time to time, that you -- you know, we have 22 million accounts, and it is -- you know, from time to time, we have data that is unclear. If you have data that's unclear, you don't sue on it. I mean, there's no two ways about it.

And I will say, at the end of this discussion -- it's almost over -- no reputable player in the collection industry, certainly including my company, would ever intentionally sue on an account that is past

the statute of limitations, which doesn't mean that mistakes don't occur, but no one who is a reputable player would intentionally do that.

And for all the -- you know, Ms. Rosmarin and my friends on the plaintiff's bar, if you find somebody who intentionally sues on that kind of stuff, sue their pants off, because they don't do anything for our industry except hurt its reputation and damage those of us who try to do everything we can to be clear about it, so...

MS. MURPHY: And you spoke specifically about suing on a debt, but in terms of if an account is unclear, is it collected on or how does the --

MR. REDMOND: Sure, absolutely. I mean, as -- I think Mr. Debski was the one who mentioned it, that there's nothing wrong with collecting on a debt that's past the statute of limitations. I know people keep quoting your piece that was put out a few years ago, but it's true. The statute of limitations is nothing more than a time period in which we can sue someone. That's all it is.

MS. MURPHY: Judge Lebedeff?

JUDGE LEBEDEFF: Yeah. I'll tell you where I would really think that you might be able to act and it might be helpful, and that's in defining a charge-off

date. When you see this litigation, different institutions, different players, sometimes they let it go, and it also has an incredible effect on the interest rates, the penalty charges, the monthly no-payment charges, all of that stuff, and how it just multiplies and feeds on itself like, you know, The Blob growing.

If there were a uniform charge-off date that everybody could refer to that could be used for computation for the statute of limitations, that would be helpful, and I don't see why you wouldn't have the power to do that.

And let me just say, all the fine collection attorneys here, I really think you're terrific, and I wish that you were cloned in my court and that I didn't see some of the other specimens that come in.

So, but anyway, take a look at a regulation of the charge-off date, because I've seen things carried for five years, and -- I don't know if I should mention, the only bank I ever saw that had a uniform policy was Citibank, and Citibank was the clearest as to its administrative procedures and had a clear operating set of instructions, supplied it on every case, and it really was quite helpful to me as a judge to just know how things were going to get treated, how things were going to get cut off, and what principles they brought

into play.

It's really, really complicated for judges when dates are all over the lot, and, you know, the underlying debt problem is what you don't know. And that -- you know, make it a year, make it two years, make it something, but it would help.

MS. MURPHY: We are going to hear from Mr. Flitter and then Ms. Needleman.

MR. FLITTER: I just have a point of clarification for the Judge. The charge-off date, I understand, for credit reporting purposes under the Fair Credit Reporting Act, the time period starts to run 180 days after the posted profit or less, the charge-off date. For statute of limitations purposes, for -- before. For statute of limitations purposes, it doesn't have anything to do with the charge-off date, Judge, does it? It's the date of default. The date that the creditor could first have sued is the date that starts the clock running for statute of limitations, doesn't it?

JUDGE LEBEDEFF: But just to go back, I don't think that -- the statute of limitations, judges just apply state law, but there's a -- most of actually what goes on with credit card litigation is the intricacies of it, what the interest rates are, what the additional

charges are, how many multipliers you're going to attach to the underlying debt. And generally, at least, it is possible to get a charge-off date, just to start from that date forward applying legal interest, and it would be extremely helpful for that.

And there were some institutions who would only ask for legal interest after the charge-off date, there is some that would ask for all of the credit card rolling charges in all their multifaceted glory, you know, that keep on accruing, and it causes a great deal of lack of uniformity, and it takes a lot of judicial work to sort your way through that stuff.

MS. MURPHY: Thank you.

Ms. Needleman?

MS. NEEDLEMAN: I think the charge-off date is really important, and I think that we are going to get into that in some of the panels later today, because it is the most regulated amount that we have. It's regulated by the FDIC, the Comptroller of Currency. So, I think that's a great starting point, and we can have a discussion. Usually a charge-off date is about six months after last date of payment. So, back it up.

So, if you have the charge-off date, that gives you a clear understanding of where to begin or where to end, so to speak. So, you can look at that and say,

"All right, I'm going to go back 120 days. That's when the clock should start ticking."

But I agree with the judge. That's something the FTC absolutely could do as far as the amount of time after the six months prior to charge-off date, as I think everybody agrees here, that's not a federal issue. That's a state issue.

MS. MURPHY: Okay. We have one final brief question. We have a question from the audience.

Are collectors -- and I assume that would be creditors and buyers as well -- getting sufficient information on accounts in order to allow them to compute the statute of limitations?

MS. GAGNON: I would say yes. And, again, we go back to that charge-off. The charge-off date mandated by the FDIC and the OCC is 120 days from last payment on a closed-end account; 180 days on open-end. So, once you get that charge-off, you can track back to your date of last payment, although many of my debt buyers are also giving me both the charge-off and the last payment and they are computing. So, if your charge-off on the credit card debt, which is open-end is, you know, June, your last payment is January, that's when your statute is running.

MS. MURPHY: Okay, thank you. We have to cut it

off there. Joel Winston is going to be joining us again to summarize.

MR. WINSTON: This is a funny role I'm playing here, but let me start by just sort of summarizing what I think took place here. And thanks, Tom, for your thoughts on this.

There was first discussion about the prevalence of collecting and suing on post-stat debt, and I think it's important to keep those two things distinct.

In terms of collection, mostly what I heard was that there's nothing inappropriate about collecting on post-stat debt, nothing illegal; it happens a lot. But I think Mr. Groves said that in his experience, collectors are scrubbing the lists against the statute of limitations once they acquire them, those lists, and, therefore, they're not collecting on post-stat debt. So, there seems to be some disagreement about the extent to which that happens.

I think there's also disagreement about how often lawsuits are filed on post-stat debt. Some people felt that it never happens and it certainly shouldn't happen; it's a clear violation of ethics rules. Others thought that it happens fairly frequently.

Next, there was some discussion about the extent to which consumers understand these statute of

limitations issues and the difference between an affirmative defense and a bar on filing a lawsuit. I think most agreed that consumers probably don't understand that level of distinction.

And there was some talk about perhaps that should be explained to them when the lawsuit is filed, the lawyer maybe should be putting that into the complaint, as opposed to leaving it to the consumer to figure out that this is a possible defense they might have.

There was a lot of discussion about a uniform statute of limitations, whether at the federal level or the state level. I think everyone but one thought there should not be a federal statute of limitations, and at the least, Congress shouldn't be setting one, which I can't disagree with that -- the FTC should, though -- and then more disagreement about whether it should be done at the state level, and certainly widespread disagreement about what it ought to be, anywhere from, I think, a year to seven years is what I heard.

And then the issue of revival of out-of-stat debt and when that should occur and what should consumers be told about it. I think there was some disagreement about what it should take to revive out-of-stat debt and whether and how it should be

disclosed to consumers that any particular action would revive the debt.

You know, I'd like to go from that to a little bit of my own view on this. This is an issue that we've been talking about and thinking about for quite a while, both the issue of when collectors should be able to collect post-stat debt and under what circumstances it should be revived. And a lot of what I'm hearing today is about the idea of disclosure, that consumers need to know more; they need to understand what the consequences are of making a payment; and they need to understand the difference between paying on a debt versus a collector being able to file a lawsuit on the debt, the idea being that some consumers pay the claim even though it could not be enforced in court.

All this rests on the assumption that this is information that could be effectively disclosed to consumers, and that's where I have some trouble. This agency has spent a lot of time in recent years thinking about and testing the proposition that you can disclose information to consumers in a way that's going to make them understand what are often fairly complex propositions. It's come up in the case of privacy notices, for example.

The approach that this agency traditionally has

taken is that you give consumers more information, you tell them exactly what's going on, what the pros and cons are, and consumers get to make choices. Now, who can disagree with that? That's the way our system runs.

The reality, unfortunately, is quite a bit different, and we are looking at the idea of a post-disclosure world, that there's so much information out there that consumers are getting thrown at and so many complex transactions in which they have to engage that they're really struggling to understand what is going on.

Again, take the privacy notice. When we first started looking at the issue of privacy, the idea was, you tell consumers how their information is going to be collected, what's going to be done with it, who it's going to be shared with. Some consumers don't care. Go ahead and share my information. Other consumers don't want their information shared. Let's tell them what's going on and let the consumer choose.

Well, the reality is, nobody reads privacy policies. Those who do don't understand them. So, a lot of time and a lot of energy is spent by lawyers writing privacy policies that nobody's reading. So, what sense does that make?

I think the same kind of issue is raised here --

I'm not drawing any conclusions from it -- but the notion that you can explain to a consumer, when you are trying to collect post-stat debt, that they owe the debt, and they can pay it if they want, but if they don't, we can't sue you. To me, that's a very difficult message to convey to a consumer. It's almost counter-intuitive or at least confusing.

On the one hand, you are a consumer, you are getting a collection call from a collector, and it's saying you owe this debt and this is how much it is, and we'd like you to pay, and then you're saying, well, but you don't really have to pay, because you have an affirmative defense. That's a very difficult, nuanced message that I think consumers are going to have trouble with.

I think the same issue arises with the issue of revival and how do you explain to a consumer that you don't have to make a payment, no one's requiring you to; you do owe it, we can't sue you for it; and if you do make a payment, even a small one, it's going to revive the statute of limitations? A pretty tough message. You know, I appreciate hearing what some have suggested in response to the New Mexico law.

I would bet you that if you did a test of consumers where you read that disclosure to them, as a

collector might over the phone, and asked them what it meant, that you would get a very low rate of effectiveness. That's what our experience tells us here. We do a lot of consumer testing, and typically, consumers don't understand even the simplest of disclosures, much less things that nuanced. So, that really raised a dilemma. And I know I'm editorializing here.

I don't know what the answer is. I think that's something that we want to think about in terms of making recommendations. You know, the solution could be you can't collect post-stat debt; or the solution could be we have got to come up with a better disclosure for consumers. You know, I don't know what the solution is, but that's the sort of thing that we're really struggling with. And needless to say, if anyone has any data on possible disclosures and what consumer take-away from those disclosures is, that would be very welcomed.

So, again, thanks to a great panel. Thank you very much. And we'll be back at -- what time? --

MS. MURPHY: 1:45.

MR. WINSTON: -- 1:45. Remember, if you leave the building, it will take you a while to get back in.

(Applause.)

(Whereupon, at 12:15 p.m., a lunch recess was

taken.)

AFTERNOON SESSION

(1:44 p.m.)

PANEL 3: EVIDENCE OF INDEBTEDNESS

MR. PAHL: Good afternoon, everyone, and welcome back to those of you who were with us this morning.

Our first panel this afternoon will deal with the issue of evidence of indebtedness in debt collection litigation. The moderator of our panel will be Julie Bush, who is an attorney in our Division of Financial Practices here at the Federal Trade Commission.

MS. BUSH: Thank you, and welcome back, everyone. I hope you had a good lunch. We're so glad that you're here to join us for our afternoon panel. I'd like to start by introducing our distinguished panelists.

First, we have Leslie Bender, who is a Maryland attorney in private practice, specializing in health care collection matters.

Next is Eric Berman, a collection attorney whose eponymous firm operates in New York, New Jersey, North Carolina, Pennsylvania, and South Carolina, and who is president of the Commercial Lawyers Conference of New York.

Next is Brian Bromberg, a New York State attorney with his own private consumer protection law

practice.

And we have Judge Hiram Carpenter, who is a judge of the 24th Judicial District of Pennsylvania and helped originate the Blair County Credit Card Court, which he will get a chance to discuss later in the panel.

Next is Lynn Drysdale, a Florida consumer protection attorney with Jacksonville Area Legal Aid, who is cochairman of the National Association of Consumer Advocates.

And we have Judge Fern Fisher of the New York State Supreme Court, who is the deputy chief administrative judge for New York City courts and has issued city debt collection policy directives.

James Flanagan doesn't --

MR. BERMAN: He was originally going to take the train this morning, so he may have gotten held up.

MS. BUSH: I see, okay. I hope he will be able to join us, and he is a judge on the First District Court in Suffolk County, New York.

Next to me is Connell Loftus, who's the managing partner of Mann Bracken, LLP, a collection and debt-buying firm with offices throughout the country.

Next is Angela Martin, a consumer protection law attorney in private practice in North Carolina with

extensive experience representing military personnel.

Welcome, Judge Flanagan.

JUDGE FLANAGAN: Hello. I'm sorry.

MS. BUSH: Next we have Alexander Mitchell-Munevar, who is a staff attorney with Greater Boston Legal Services, who practices consumer housing and elder law, among other subjects, and for low-income clients and helped draft pending Massachusetts state debt collection legislation.

Next is Jerry Myers, a North Carolina debt collection and creditor rights attorney with the Smith Debnam firm, who was named a "Super Lawyer" by his peers.

Next we have Judge Lorraine Nordlund, who's a judge on the General District Court for Fairfax County, Virginia, and helped develop that county's best practices guide and checklist for debt buyer cases and also helped train other Virginia judges about debt collection litigation issues.

Next is Adam Olshan, a New England consumer collection attorney who participated on both the Massachusetts Small Claims Court Working Group and the Connecticut Bench-Bar Small Claims Committee.

Next is Dale Pittman, a pioneering Virginia consumer protection lawyer who operates a private firm.

And finally, we are joined by Chi Chi Wu, a National Consumer Law Center consumer protection attorney whose expertise encompasses medical debt collection, among other matters.

So, thank you all for being here today.

Our panel will focus on evidence of indebtedness, and I'm going to try and break our discussion into several units.

First I'd like to talk about complaints and pleadings, talking about what evidence is contained or communicated in complaints, what is required in various jurisdictions, and what ought to be required, if anything.

Next, I would like to discuss how does or should the evidence of indebtedness that's provided by collectors differ depending on whether they are seeking a default judgment or whether the case is contested.

Then I'd like to discuss the issue whether the evidence required by courts does or should differ for different types of collectors, such as creditors, third-party collectors, and debt buyers.

And after that, I'd like to raise the issue of how courtroom legal clinics that are staffed by pro bono or legal services attorneys intersect with evidentiary issues, if at all, and whether such programs influence

the amount or type of evidence of indebtedness provided at the outset of a case.

And once we get through all that, we'd like to talk about what we should do going forward, what private or public actors should do to address the issues that we've brought out during the panel.

So, to start it out, I'm wondering if someone would like to discuss what evidence is contained or communicated in the complaints in their jurisdiction and/or what evidence they add to the complaint to inform the consumer about the debt.

Yes, Mr. Berman.

MR. BERMAN: Sure. I would like it to refer to the United States Supreme Court, Bell Atlantic vs. Twombly, which set out the standard which says:

Complaints must contain enough factual allegations to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true, even if doubtful, in fact. Specific facts are not necessary to state. You need only give the defendant fair notice of what the claim is and the grounds upon which it rests.

In regard to what we do, we will name the plaintiff, provide the address -- the defendant, provide the address. If it's a debt buyer, we include that in

ours. We include the cause of action. We include the amount that's due and owing, with the date of default, which is the date usually from which we request interest, depending upon the state and the jurisdiction, and I believe that that standard, what I just described, does fit what the Supreme Court requires.

MS. BUSH: Okay. Would anyone else like to add to that?

Ms. Bender?

MS. BENDER: In the State of Maryland, where I practice, most collection matters are heard in the state district court, which has jurisdiction up to $30,000, and in that instance, the court requires that you attach some type of summary that states, with particularity, what services were rendered or what products were sold or whatever, you know, so some type of at least summary bill.

My own practice is somewhat unique because I only represent health care providers. So, we have to balance what we attach, consistent with Maryland law, with privacy considerations, because under the Health Insurance Portability and Accountability Act of 1996, we are only permitted to disclose the minimum necessary. So, oftentimes, we will need to redact sections of summary bills that we attach to complaints.

There is virtually no pretrial discovery, to speak of, in our district courts. So, the other information would never be provided unless it is specifically requested by the patient.

MS. BUSH: Okay. Thank you.

Mr. Mitchell-Munevar?

MR. MITCHELL-MUNEVAR: Just -- well, two things. One, with respect to the --

MS. BUSH: Oh, and let me remind everyone, when you're talking, to try to talk close to a microphone.

MR. MITCHELL-MUNEVAR: I want to raise one point as to the -- just to give context to the conversation, that part of what I reviewed in Massachusetts and the information that I've received, indicates that the question of the evidence and whether it's supported or not oftentimes isn't even really an issue that gets resolved or disputed upon, for many of the reasons that also got brought up in some of the earlier proceedings, where there isn't anyone on the other side who is disputing the sufficiency of the evidence, but at the same time, within the proceedings themselves, oftentimes, many of these cases -- many of the debtors are -- either because of the court practice and the plaintiff's attorney -- are pushing to resolve the matter. So, the question of whether or not the

underlying evidence actually is sufficient to warrant the claim is something that honestly doesn't -- very rarely does it ever get brought forward as a matter to be resolved.

In terms of the complaints that I've seen -- and, again, I'm not trying to generalize, but just based on my practice -- the complaints are scant, in that they may name the original debtor, provide the address of the original debtor, provide the amount that's being sought. Attached to that is simply a one-page, notarized affidavit from someone who may not necessarily reside in the state, but claiming to be the keeper of records, who certifies the debt, and then there isn't anything else thereafter.

Most of the cases in Massachusetts are brought under small claims, which, as indicated in the newly reformed small claims rule, simply just has to be concise, no technical language, but if the complaint itself fails to allege all the elements of a prima facie case, that will not cause the complaint itself to be inappropriate.

MS. BUSH: Thank you.

Yes, Mr. Olshan?

MR. OLSHAN: Well, I have got good news, Alexander. Massachusetts is the first state -- and I

think the country -- to undergo a 14-month-long bench-bar conversation that was collaborative, and at that discussion, there were members of the National Consumer Law Center, there were members of the creditor bar, there was one legislator, there were judges, there were clerks, and the end result was a knowledge-based recommendation to the chief judge that resulted in itemized information being required in Massachusetts small claims complaints.

The information that's now being filed as of October 1 includes, in the case of debt buyers, the name of the original creditor, the last four digits of the original account number. The plaintiff is also required to indicate the amount sought and all interest thereafter. So, I understand that most plaintiffs are now pleading the charge-off amount and any alleged damage that follows charge-off.

So, the end result is transparency, and I think that we'll talk more about this through the program, but I think that this Massachusetts model and the way that the Massachusetts court went about this is a model that we can look to follow around the country.

MS. BUSH: Yes, Judge Nordlund.

JUDGE NORDLUND: Well, actually, Massachusetts may not be the first. In Fairfax County, our bench

recognized that there were problems with respect to the complaint itself. I know we'll get into sufficiency of the evidence later in the program, but as far as the complaint itself, we had a similar type of event, if you will, where we brought in all of the stakeholders. We had people who represent creditors, we had people who represent debtors, we had national representatives. And what we did was we had an open discussion, we invited participation, invited them to present any evidence or documentation that they had in support of their relative positions. And then we went further than that and also contacted the OCC and looked at the National Banking Act, looked up all the cases in support of the various positions.

And what we came up with was a best practices list, and the part dealing with the complaint itself indicated that in the future, we would require that in the complaint, they identify the original creditor, as well as the fact that the party suing at this time was doing so on the basis of an assignment. So, identifying both parties, because what we had found was a lot of litigants were coming to court saying, "I have no idea who's suing me and for what." So, we have required that they identify -- required that they go through and identify principal, interest, attorneys' fees, separate

that out. We also have the affidavit, but that gets into the sufficiency of the evidence, so I'll reserve for later.

Thank you.

MS. BUSH: Yes, Ms. Wu.

MS. WU: Actually, I think one of the models that I personally would like to -- would support -- and I should say, I wasn't involved with the Massachusetts process. That was one of my colleagues, Bob Hobbs, who's our debt collection expert, and Charles Delbaum, but the standard that I personally like is the one from Arkansas, which requires, for credit card debts, that not only do you have the information, but you have the actual documents, including evidence that the consumer was the one who signed the account application, a copy of the account agreement, and a copy of billing statements, so that you're not only talking about a summary of evidence, but the actual underlying documents to prove the debt. Now, that may not be required under Bell Atlantic v. Twombly, but that's due process under the U.S. Constitution, and certainly states can require a higher standard.

With respect -- my specialty is medical debt. With respect to medical debt, I would have concerns -- I mean, I do recognize that HIPAA does limit the amount of

information that can be in the complaint. On the other hand, one of the problems with medical debt is that, you know, going back before the actual collection lawsuits, what the patients often get is that summary bill, and they don't know whether they actually should owe all the debt that's on the bill, because it's very summary, you know, "Procedure, $25,000," and it doesn't set forth the itemization, and hospitals and other health care providers are notorious for double-billing and overbilling, using wrong codes, and whatnot.

JUDGE CARPENTER: Ms. Wu, actually, in Pennsylvania, as far as I would be concerned as a judge of a general jurisdiction trial court, I'm pretty much on board with you. These are contracts, and contracts are founded on writings, and so right from the get go, if you look at the Pennsylvania Rules of Civil Procedure, there would be a requirement of attaching something that verifies the contract.

And the fact is that's a wonderful defense of the types of pleadings a firm is filling -- you can't come to Pennsylvania or I don't want to hear an argument that there's a Pennsylvania Supreme Court case saying that what I would consider to be an inadequate pleading is okay, and if you polled the Supreme Court on me, I've got problems, but I am on board with you, that the

contractual nature of these, more should be pled.

Now, you can raise a legitimate question, I think, whether you have to put it in the complaint or whether it could be discovered, and in our system -- and I think I'm going to get a chance to talk about it a little bit later -- our credit card court has really removed the problem. We don't have that problem anymore of the inadequacy of the complaint, because we don't have any default judgments, which ought to interest everybody, in terms of participation, which is a problem here. We don't have default judgments, and that's by our court taking an aggressive stance. But in terms of the pleading, I think your view is the better one.

MS. WU: Thank you, I appreciate that.

By the way, the Arkansas court case was based on the Federal Truth in Lending Act, and there is the Federal Truth in Lending Act on that level of proof that's required.

MS. BUSH: I wonder whether -- we will hear in a moment from Mr. Bromberg -- whether Judge Flanagan or Judge Fisher would like to comment on the kinds of evidence that they tend to see in the complaints before them and how that affects the participants in dispute.

JUDGE FISHER: I think the complaints in New York are as Mr. Berman would like them to be --

AUDIENCE MEMBER: Can't hear you, Judge.

JUDGE FISHER: Oh, sorry, I apologize.

I said the complaints in New York are as Mr. Berman would argue that they should be. They're pretty scant, and it is very difficult for litigants to discern what they're being sued for. They often do say the original creditor, but since they have been sold so many different times, it's very difficult for the litigant to figure out who the current plaintiff is, the account numbers are not pled, nor are they even required under New York law.

There is some movement in our state legislature to try to fix all of this, but, as you know, in our media, our state legislature is dealing with some very other serious issues right now, so I don't think that legislation is going anywhere right now.

But I think that litigants are confused when they receive a complaint, that the account numbers would be extremely helpful. And I'm not even sure the last four digits are enough; we probably need the full account number. And since they're all stale accounts, what difference does it make, I think. And also a chain of how the account's been sold from agency to agency would be extremely helpful.

JUDGE CARPENTER: Having the plaintiff prove

they're the plaintiff, at a minimum, doesn't seem too much.

JUDGE FLANAGAN: In my court, very often -- well, most of the cases that come in, if they're not pled by Mr. Berman and other attorneys that practice in the area he does, provide the information they do, very often, when I got pro se litigants -- and that's most of the time -- I will ask them the very simple question when they step up to the bench, and I'll say, "Do you know why you're being sued?"

And if I see XYZ Corporation bought the debt from ABC who bought it from STP who bought it originally from a well-known national credit card or bank, I understand the person's confusion. Very often, though, I'll get cases where they will be sued by a well-known national bank directly, and I'll ask them, "Do you know why you are being sued?" And they'll say no, and then I'll see proof that they signed off on the credit card, et cetera. So, it's a balancing act sometimes.

But the biggest thing that I do is I tell the attorney for the lending institution or the purchaser of the debt, "Counsel, whatever you intend to offer at the time of trial into evidence -- not saying it's getting in -- whatever document you want to give, you will give to them now or you will give it to them within the next

30 or 45 days."

The attorneys in my court have gotten now to the point -- this is my sixth year sitting on the same court -- that they will walk in with it ahead of time. They will say, "Judge," on the record, "we are giving it to them right now." If it's $6,000 or less, we go mandatory arbitration, so they don't come back to see me unless they file for a trial de novo. If it's more than $6,000, I will set a trial data. I can't remember the last time I tried a consumer debt case, because the people either settled or they default.

I can't remember the last time -- Mr. Berman will bear me out on this -- I can't remember the last time I tried a case with a credit card or loan. I may have one coming in Monday, but we'll see.

MR. BERMAN: Not from us.

JUDGE FLANAGAN: Not from you, but it's a defendant who's been very, very diligent, and I keep asking her if there's an attorney in her background or immediate family, and she denies it, but it doesn't pass the sniff test.

I tell them right up front, you have to give them discovery. I don't know whether it's going to get in or not, but give them everything. And I want to see, if they signed anything, all the bills, all the

receipts. I mean, I've seen them give stacks three or four inches thick, and I require it right away, and say, "Sir, ma'am, here it is now. This is what they're claiming. See you at trial."

MR. OLSHAN: Julie, if I may, I was on that Massachusetts Bench-Bar Committee as well as the Connecticut Bench-Bar Committee --

MS. BUSH: If you would, please speak closer to the mic. We have been told that people viewing the Webcast can't hear.

MR. OLSHAN: Thank you. I've never before been told to speak louder, so I'm happy to do that. Thank you. I'm happy to. Thank you.

I served on the Massachusetts Bench-Bar Committee, as well as the Connecticut Bench-Bar Committee. That Connecticut committee met 30 times. I was at 29 of those meetings over a year's time. There was a lot discussed. This morning, Joanne Faulkner was here; she chaired one of those subcommittees. Judge Abrams was also here; he was on that committee, also.

After all those meetings, it was determined that we weren't interested in taking down more trees to go along with the complaints; that in the 21st century, contracts are not always in writing. As a matter of fact, more often than not, they're not. The contract

offer and acceptance occurs when the consumer receives the plastic and uses it at a store. That's the contract.

So, what was agreed to in Connecticut was that the small claims complaint -- again, for purposes of transparency -- should include a lot of information, but not necessarily more paper. The information includes the date of last payment; the last payment amount; the charge-off date, charge-off amount; if you have the open date, plead the open date; the original creditor name; the original creditor account number; and I'll say more. I think that we have consensus here on the roundtables around charge-off.

Michael Kinkley, who is a consumer attorney in San Francisco, agreed at that roundtable that the charge-off was a reasonable place to begin with the checklist, an itemized post charge-off. This morning, too, it seemed like the group had some consensus around charge-off. So, I would suggest that we begin there, and perhaps we can reach some consensus right now about what should be in that checklist.

I have got Connecticut's right here. This isn't a default checklist. This is the Connecticut small claims judgment checklist. So, it was agreed that any judgment that's entered in Connecticut's small claim

system must have this information at the minimum. And I think that with a lot of information, there's transparency. I believe the consumers will better understand what they are being sued for. And in 60 days in Massachusetts, I see that there's more phone calls from people who are getting sued, and that's what this is all about to us. We want to communicate and hopefully resolve the matter so the matter can be dismissed before judgment's entered.

MS. BUSH: Ms. Martin, did you want to add something?

MS. MARTIN: Well, just one thing. I haven't had the opportunity to review either the Arkansas or the Connecticut statutes, and we did change our pleadings in North Carolina, but I will say that if you only come forward with a bare-bones complaint, I have clients who have been sued by two different entities on the same debt, and if you use the Arkansas model, then -- with the original documents, that would lend to a greater credibility as to the person actually having it, as oppose to do just bare-bones pleading.

MS. BUSH: And Mr. Mitchell?

MR. MITCHELL-MUNEVAR: Just to follow up a little bit on what I said before, that the bench-bar committee that resulted in the changes in the small

claims court, which most of the debt collection actions are being brought within, again, just to give context, that came out of a four-part series that The Boston Globe had done called "The Debtor's Hell," which highlighted a number of problems going on and inequities in the process, but that wasn't the only reform that came out of that series, although albeit good reforms, there are other reforms that are also on the way that follow along with what Ms. Wu has pointed out, that there is current legislation pending in Massachusetts, filed by NCLC, that's seeking to require that the contract be attached and be mandated to be part of the complaint.

In addition to that, we've filed other -- to make a more comprehensive reform, I have worked on legislation to increase exemption protection and also to reform the supplementary process in certain specific cases. So, we are moving. I don't see the benchmark as -- the changes in small claims as the end-all be-all, that there's clearly a progressive movement that's been going on to reform both the court system, as well as the requirements in order to bring these actions forward.

MS. BUSH: Ms. Wu.

MS. WU: I would just like to say in response to the statement that contracts aren't in writing, the

Federal Reserve Board would be very interested to know that credit card contracts aren't in writing. I mean, they're obviously in writing. We all get them, and they're required by Regulation Z, and if they're required by Regulation Z, why not attach a copy to the complaints?

JUDGE CARPENTER: Although I'll agree with -- I'm with you on that one, too, but I'll agree with them that a credit card is a continuous contract, so that each time it's swiped, you may be agreeing to new terms and conditions; you may be varying the contract based on the changing terms on your statement. All of that is true, but still, there's some written documentation, even so, just for argument's sake.

MS. BUSH: Okay. I'd like to hear from Mr. Myers.

MR. MYERS: Thank you.

On the issue of the credit card agreement, certainly there is a written set of terms and conditions that each consumer receives, and we all understand that. I think an important part of all this is understanding how the contract actually works. As was said earlier, the issuance of the card is an offer to enter into a contract, and the use of the credit card is, in fact, the formation of the contract, and that can take place

without there ever having been a signature on anything.

It's frustrating sometimes to represent creditors and to be repeatedly asked for a signed agreement or a signed sales slip when no such thing ever existed, all right? It's very easy to go onto the Internet and to apply for a credit card, to be approved, to be given a credit card account number, to go to another Web site and make a charge, and there's never been a piece of paper that was signed by anyone.

And so it is almost as though there's this notion that electronic records are inherently unreliable and should not be depended on, and if that's the case, then we've set this country back tremendously in the advance of commerce.

MS. BUSH: Ms. Bender and Mr. Bromberg, followed by Judge Nordlund.

MS. BENDER: I just wanted to step back for a minute and point out, you know, as some of the earlier panelists today stated, legal remedies and going to court to collect a debt is really not the most cost-effective, because even once you obtain a judgment, you still haven't resolved the consumer receivable. So, I think that it bears mentioning that it is not in any of our best interests, any responsible collection attorney's interest, to have so little information that

it results in consumer confusion over why you are going to court.

The second observation I would make is that there is nary a soul we bring a lawsuit against that we haven't already provided a collection notice to pursuant to the Fair Debt Collection Practices Act and that we haven't offered at least one, possibly two opportunities for debt validation. It's the way that we operate.

Moreover, our clients, who I would respectfully disagree with Ms. Wu, do not regularly and systematically overcharge and overbill and double-bill the hospital patients. Our clients provide several bills pursuant to other federal regulations that control how they bill and receive payment for health care services and have had, on two or three, five, six, sometimes nine times, provided statements to patients and other information.

So, by the time we get to court, there has been a debt validation opportunity. The underlying health care creditor has repeatedly sent and offered statements of account. If there's a health plan involved, they've also sent an explanation of benefits. So, I think that it would be important for this panel to understand that we are probably on the same page. Responsible collection attorneys want there to be sufficient

information attached to a complaint so that a consumer is fully informed regarding what his or her responsibilities are alleged to be.

MS. BUSH: Thank you.

Mr. Bromberg?

MR. BROMBERG: All right. Well, I disagree with that at virtually every point. It is in the debt buyer's interest to get a default judgment. It is in the debt buyer's interest to freeze up the bank accounts. It's in the debt buyer's interest to take that default judgment and start garnishing wages as soon as possible. The goal is to give as little information as possible to get that default judgment and make sure no one fights, okay?

These requirements -- Mr. Berman is absolutely right. You basically have to give name, rank, and serial number. That's all you need to do to make out your claim in the New York courts. And you attach as little as you possibly can, because you want those people defaulting, you want them going under, you want to get that garnishment. If you can still freeze up the bank account, you want to freeze up that bank account. You want to use those four- or five- or six-year-old addresses for where the person lives, those addresses that came from the original creditor that are now

completely out of date, because you want that default judgment, okay?

Now, as for what should be in the rules, as for what should be in there, instead of name, rank, serial number -- and, by the way, just doing name, rank, serial number, that's all the attorneys have, okay? As everyone knows from a few recent cases, that's all they've got when -- they don't do any meaningful attorney review. The case comes in, out goes the initial letter, you know, the initial G-notice letter. If someone responds to the initial G-notice letter with a dispute, they get back a single -- a single -- one paragraph that says, "Gosh, we checked with the creditor and the creditor says you really owe that money."

And under the Fourth Circuit decision of Chaudry, that's all they need to do. And then they go ahead and they send out that name, rank, and serial number complaint that Mr. Berman's so proud of, and the next thing you know, they've got their default judgment based on the three-, four-, five-year-old address, sometimes six.

Now, what should be in there, okay, first of all, you have got to remember, most of this stuff is going on default, okay? No one's going to be coming in and asking for discovery. Most people don't know to ask

for discovery, and there are a lot of affirmative defenses that have to be pleaded, okay? In New York, you lose your right to attack standing if you don't plead it as an affirmative defense. You lose your right to attack statute of limitations if you don't plead it as an affirmative defense.

You might get to use these things later in some hypothetical FDCPA case as a Kimber violation, great, you still get the judgment against you, because you haven't raised them as an affirmative defense. So, things have to be front-loaded. You have to make the debt collectors and make the debt buyers attach the necessary information up front, because no one's ever getting a copy of it at a later date.

First of all, you have to make sure they have the right address, but that's another matter. You have to have a copy of proof that the consumer signed the agreement. You have to have copies of the cardholder agreements, amendments, chains of assignment, proof of assignment. You want to have the name of the original creditor. You want to have copies of bills, if that's possible. That gets a little weird, because you might end up giving away some privacy rights. So, copies of the bills attached, I can go both ways on.

Then you have to have some kind of breakdown.

For God's sake, who knows what's in these things? Who knows how you calculate the interest? You have got some principal from three, four, five years ago, back before it got handed off to a debt buyer. No one knows how you got from the principal amount that was allegedly due three, four, five, six years ago to the present amount. No one knows how the interest was calculated. No one knows how the overlimit fees came in, the late charges. No one can figure this out, okay?

Now, the perfect place to start is with Judge Lebedeff's decision, which is a ground-breaking decision, Citibank v. Martin, 11 Misc 3d 219, that's civil court, New York County, 2005. This is where everyone should start. These are the minimum requirements on what you need to prove up any debt, okay? This is where it all starts. No hearsay, no double-hearsay, no nonsense affidavits. Everything that's in here -- everything you need to prove up a debt is in here, but just -- my basic point, though, is that the initial complaint should have a lot of this stuff, because no one's going to see it again.

MS. BUSH: Just to clarify, are you saying that the initial complaint is required to have the things on your list or --

MR. BROMBERG: No, no, no.

MS. BUSH: No.

MR. BROMBERG: New York -- New York, it's notice pleading. It's name, rank, serial number.

MS. BUSH: Okay. You're just recommending that it include all of these.

JUDGE FISHER: And so would I.

MS. BUSH: Right.

MR. BROMBERG: And Judge Fisher is working very hard to try and get some more requirements in there, okay? The legislature is working very hard. There has got to be more in there. Name, rank, and serial number doesn't do it. And the attorneys, by the way, are just operating with name, rank, serial number, which is why they're violating 1692(g).

MS. BUSH: I know Mr. Berman appreciates your response, but Judge Nordlund and James Fisher were waiting to speak.

JUDGE NORDLUND: First of all, I must say that in Virginia, I'm proud to say that the judges, the creditors' attorneys, the debtors' attorneys, we all seem to be on the same page and on the same side of making certain that justice is done, and there doesn't seem to be this adversary type of stance between us all. We're all seeking the same result, which is justice for all litigants. So, I'm very proud of the attorneys who

appear in our courts, because when we went ahead and put our best practices checklist together, everyone worked together to make certain that the best policy was put forth.

I'd also like to point out that there is a distinction between the level of evidence that's required for a default judgment versus the level of evidence that's required to be put forth at trial, and I can give you a small example.

If you are going to be presenting a copy of bills evidencing that payment has been made or copies of bills evidencing that a purchase had been made or if you actually have the signature card, any one of those three things will establish that the contract, the underlying contract, has been ratified. So, for a default judgment, we require the underlying contract to establish why it is that they're entitled to those interest rates, why they're entitled to attorneys' fees, why they're entitled to compound interest.

We also require that they establish ratification of that contract in the form of a signature card or a proof of a purchase or a proof of a payment. And we don't look behind those documents. We accept them on their face for a default judgment. We aren't looking to create arguments for the debtor. We simply want the

prima facie case established.

And I would refer you to a case out of New York, MBNA v. Nelson, at 15 Misc 3d 1148, where it establishes, very clearly, that an unsigned contract may still be enforceable if objective evidence establishes that the parties intended to be bound. And so we rely upon that. We believe that it's a good recitation of the facts necessary for default judgment.

The distinction that could be drawn between a default judgment and a trial is that if those documents, if that evidence is presented at trial, they could be subject to hearsay objections; they could be subject to a whole series of objections, such as, you know, they're not proper records of the business, that sort of thing, but those are things that are to be presented at trial.

And so when we first began this discussion, it was suggested to us that we, as judges, were going beyond the role of gatekeeper and that we were becoming adversaries for the debtors, and we responded, "No, absolutely not. We are gatekeepers. We are making certain that a prima facie case is established. We are not going to be making the arguments as to the admissibility of these documents. We're not going to be making arguments looking behind the documents. And we're also not going to be putting forth affirmative

defenses for these debtors. We simply want a prima facie case established so that we know this is a valid debt."

MS. BUSH: Yes, Judge Fisher?

JUDGE FISHER: I agree with the Judge, that there are different standards for default judgments based -- as opposed to cases that are going to trial; however, I wanted to backtrack just a bit, and although I do believe that complaints in New York should have more information, we have to wait for our state legislature to do something about it. The courts' hands are tied right now with respect to what we can require in the complaint; however, we have done as much as we can, we think, in New York to address some issues.

But with respect to more paper, I have to talk about the practical realities of what some courts in this country are facing in terms of paper. We don't have electronic filing in New York, and if I require a whole lot more paper, there won't be any room for anybody in the courthouse. Right now, our files are throughout the hallways, in boxes, in stacks, because there are over 300,000 consumer credit cases in just the City of New York alone. So, until we get electronic filing, which would make it more practical, I'm not advocating additional paper.

With respect to the default standards, we can talk about what New York's done later on.

MS. BUSH: Okay. I'd like to hear from Mr. Berman and Ms. Drysdale, and then I'd like to move the discussion to focus on default versus contested judgments.

MR. BERMAN: Yeah. There are a couple of realities that I think have been misstated. Number one, the banks don't get the individual charge slips. The vendor or the retailer keeps those charge slips. The information is provided electronically to the bank, just as we file lawsuits electronically in many courts across the country, including federal courts.

The credit cardholders send statements of account on a monthly basis to cardholders. I have all the cites, but I'm not going to bother with that. That will be in the submission, okay? And those statements require a whole bunch of information, much of which has already been stated. The accountholder has 60 days under the Fair Credit Billing Act to dispute any entry that's on any of those statements. Some courts have held that there's a presumption that if the accountholder does not dispute those, that, in fact, the presumption -- not reality, the presumption -- let me finish, because I didn't interrupt Mr. Bromberg --

there's a presumption that the information on the account is correct. That presumption can be challenged in court.

We have the Fair Credit Reporting Act, which allows a consumer to check one's credit report and see. If an account is charged off pursuant to federal legislation -- and, again, we have the treasury regs, we have the CFR, et cetera, regarding what's required in a charge-off -- the charge-off which appears on the credit report is the amount that the bank charged off. That's another place that a consumer can check to see if the amount is accurate.

As far as signed documents, that was touched by Mr. Myers and Mr. Olshan. In today's world, there aren't, pure and simple. You have got to get off this thing about signed documents, because they simply don't exist, and there's all sorts of federal statutes, as well as a variety of state statutes, which indicate that they want these transactions to be done and maintained electronically. So, there are not going to be signed statements. Look at GLBA, look at HIPAA, look at UEFTA, and 27 others. Again, I have them all here.

In regard to what we provide in New York City, yeah, this bare-bones thing. Well, if a defendant goes to a court in New York City and they speak to a clerk,

the clerk is authorized to provide them with an answer that they can fill out. If they choose not to use it, that's fine. All these affirmative defenses that Mr. Bromberg just talked about -- I do not owe this debt, I did not incur this debt, I am the victim of identity theft, I have paid all or part of the alleged debt, I dispute the amount, I did not have a business relationship with plaintiff, the New York Department of Consumer Affairs shows no record of plaintiff having a license to collect a debt -- I'll skip a few -- statute of limitations, laches, the debt has been discharged in bankruptcy -- frankly, I know a lot of lawyers who don't know what laches is -- the collateral property was sold, et cetera, et cetera, et cetera, violation of the duty of good faith, okay?

This document is readily available in every civil court in the City of New York, and I believe that it's appropriate for the court to work with the pro se defendants, at least to a reasonable level, so that they're not screwed, to put it in the vernacular.

JUDGE FISHER: Thank you, Mr. Berman.

MR. BERMAN: You're welcome, Judge.

And the issue is, how far are we going to go on the other side? Where are the scales of justice going to be balanced? At this point in time -- or I should

say, a few years ago, everybody felt that the creditors were way up here and the consumers were way down here (indicating). Now it's gone the other way, so the consumer protection is way up here, and any creditor trying to collect a debt is way at the bottom of the barrel or some other terms which I will not use.

This information is available. There are specific requirements under the law and under court rules regarding documents, regarding evidence, which the consumer bar often is willing to disregard because they can't win on the rules. So, why not change the rules?

And I'll stop there.

MS. BUSH: Thank you.

Ms. Drysdale?

MS. DRYSDALE: Just very briefly, in Florida -- can you hear me at all?

MS. BUSH: A little bit.

MS. DRYSDALE: In Florida you're required to at attach -- I lost my voice, I apologize, so I'll be very brief -- you're required to attach a copy of the document sued upon or a material part thereof, and I think what I'm hearing is that we're trying to set up sort of a dual-tiered justice system where in certain instances you don't have to have any documentation relating to the amounts that are owed, relating to the

interest rate.

But one of the things that we are seeing in Florida -- and keep in mind, most of the people that are being sued in small claims court or for a lot of debt collection cases are being sued for amounts that do not warrant hiring of an attorney, nor do they have the resources to hire an attorney -- and what we have been seeing in Florida is sort of a perversion of the service of process, where nothing at all is attached to the summons and the complaint, maybe a 2002 generic credit card agreement, when the account was opened in 1995 or in 2008.

But in addition to that or to the exclusion of documentary evidence and information about when the debt was incurred, when the date of default is, who the original creditor was. We have the attorney serving on consumers with initial process a stipulation to try to avoid having the courts realize that they do not have the documentation necessary to prove the debt and the amounts that are due and owing.

MS. BUSH: Thank you.

Ms. Wu?

MS. WU: I just want to respond to a couple of Mr. Berman's points. First of all, the signed document point, it is not true that there are no signed documents

in a credit card transaction. I don't know about you, but when I opened my credit card account, you know, I signed an account application. A lot of credit card accounts are opened with a signed account application, and that is a critical document. That is a really critical document, especially when you're talking about lawsuits against spouses, when you don't know if the spouse is a joint accountholder or an authorized user, and it says that on the account agreement.

MR. BERMAN: What if it's signed -- what if it's opened over the Internet? Where is the signature?

MS. WU: Okay. So, in the case of -- the Arkansas cases actually have a good standard with respect to telephone and Internet account openings, where basically it says, yeah, you don't need a signed account application, although they often exist and should be included, but, you know, you could have telephone logs if it's a telephone transaction; you could have computer logs if it's a computer transaction.

But the fundamental point -- and we have actually advocated to the Federal Reserve Board that accounts should be opened in writing, and by the way, any account for an accountholder under the age of 21 will now have to be in writing under the Credit Card Act, but there should be some quantum of proof,

especially when you're talking about suing a spouse and you don't know whether that spouse is an authorized user or a joint accountholder who is actually liable.

MR. LOFTUS: Don't you have to produce the signature anyway with the spouse? You would have to produce that --

MS. WU: Well, we're talking about what's required in the complaint and so what I'm saying is with the complaint, you should have evidence that that person was the person who actually opened the account is liable on the account, and then you should have the account agreement, and you should have a periodic statement. I mean, this is a -- the last periodic statement. This is a document federal law requires to be sent to the accountholder. So, why not include a copy of it with the complaint?

On the Fair Credit Billing Act, I have heard that it is an absolute abomination. The Truth in Lending Act and Fair Credit Billing Act are consumer protection statutes, and the fact that someone does not raise a claim under the Fair Credit Billing Act does not mean they have given up all rights to contest the validity of the debt. This is an argument that the credit card issuers are pushing out there, and it is absolutely wrong, okay?

Just because a consumer did not send a dispute within 60 days of the last of the periodic activity does not mean that they give up their rights to claim the debt's been paid, the debt was unauthorized use, it was identity theft, somebody else used my credit card, the interest rate was the wrong interest rate. So, they don't give up their rights to make other claims under Truth in Lending or under common law just because they didn't raise a Fair Credit Billing Act dispute.

MS. BUSH: Okay.

Ms. Martin wanted to speak, and then Mr. Loftus and Mr. Olshan.

MS. MARTIN: Unless I misheard Mr. Berman, his attack was that somehow the debt defense attorneys are afraid of the rules because by the rules we would lose, or something like that you said, it was the rules that would prevent us from winning. It's actually the rules that allow me to win and have allowed me to be 100 percent successful as to a debt collector or a debt buyer. The rules of evidence are what do stand in court, and that's what has helped me.

As to the original creditor, when you say about the scales of justice, I do not take cases against original creditors. They do have all the documents they need. If a client comes in with an original creditor

case, I attempt to enter into negotiation or something like that, but if you have third-, fourth-, fifth-tier debt buyers, those are the cases that can be won and should be won, because the original creditor, to my knowledge, has gotten the full value of the charge-off on their account. They were not damaged by the client. The client may owe somebody, but I would argue that it's not the original creditor, because they have been paid in full as to the business loss.

MR. BERMAN: I don't understand how they've been paid in full. Under the federal regs, they have to write it off, under the charge-off regulations. If you're saying that they sold it for a price and that price is sufficient, again, the price that they sell it for is not the amount that's due and owing; otherwise, there would be no debt collection buying.

And I happen to agree with Ms. Wu that a statement of account is not a bad thing. We usually provide them in almost all of our cases, okay? But you have to, again, look at the reality that the law does require certain things, and we have really studied this, okay? I have 20 cases which support what I said about the presumption. I have another 20 cases which go into the issue of the use of the account completes the contract, okay?

And I'm going to -- I will be submitting this and I'll be very interested in seeing the responses, because that will help me down the road. But ethical lawyers -- and I consider myself one, I consider the members of NARCA to be ethical -- we try to provide the information and the evidence and support the evidence that is required. Are we going to win every case? Absolutely not. Judge Flanagan just did a number on me, okay, for the sake of discussion. You may not know it. I do.

But in any case, we try to work within the realm of the law as the requirements of the law go to document production, the authentication of electronic business records, which in a lot of parts of the country are not recognized as valid documents. There are real issues going into the authentication of business records, which I guess will come up later and -- I'm sorry. I'm getting off on the topic. I'll stop.

MS. BUSH: Okay. Mr. Loftus has been waiting to speak for a while.

MR. LOFTUS: Yes. I would just like to say, I mean, we have an adversarial system. I think this panel back and forth demonstrates that we have an adversarial system with the consumer bar and the creditor's bar going back and forth at each other, but -- so, we have

to put things into two buckets.

I mean, there are those cases that are noncontested where someone's been served lawfully and they haven't bothered to appear, and there may be lots of reasons. There could have been transportation reasons, raised earlier, but they haven't bothered to appear for whatever reason, and that's one bucket, and how do we satisfy an initial level, an initial complaint, to put everyone on notice, okay, that a complaint has been filed against them?

I think where it's possible, where you say, if the debt's been assigned, you could clearly outline the assignment trail so the consumer can see it, that's a good thing if you can do it, but then the second issue is, what evidence does the creditor's attorney have to present if it's contested? And obviously there's more evidence to that, and the evidence that's presented will be subject to attack.

So, if Ms. Wu wants to attack the statements and the -- whether it's a joint account allegation, it can be attacked. The rules that Ms. Martin uses so effectively are there for her to attack that evidence, but I think we have to understand that there are two buckets.

So, typically, we practice all over the country.

There's a low level to get a case going. It's usually a complaint which lays out allegations that support the complaint. Sometimes, state forms are hard to read. They're hard for me, as a lawyer, to read when I look at some of these state forms that have been developed by legislators throughout the country, but something that puts the debtor on notice that they've been sued, why they've been sued, and that should be enough to get the case going. That should be enough to get the case going.

If there's a problem with service, as was addressed earlier, that can be addressed at a later date. And obviously, the evidence may balloon from the initial court pleading, as it would in a personal injury case, which is a five-paragraph pleading in most cases that I've seen, and the evidence balloons to 25 boxes of evidence brought in by both sides. So, I think that that's one of the things that we have to live with. We have an adversarial system.

The other comment that was made by Mr. Bromberg -- and I respect Mr. Bromberg -- but as collections lawyers, we don't want to take default judgments. Default judgments don't satisfy our client. I don't know of any client that I have dealt with in the 15 years that I've practiced law that said, "Hey, good

job, Connell, you took 10,000 default judgments."

What I want to do as a creditor's lawyer is I want to get that consumer there so he or she can communicate with me. If they owe the money, I want to hear what they can do to resolve the debt. If they can't resolve the debt, I want to hear what they're planning to do. Are they going to do a bankruptcy? Are they going to take some other step? But we want to have communication.

I'm all for conciliation courts, where creditors' lawyers sit down with debtors, and if there are legal aid people there, fine. That's fine. Let's resolve the cases where people come in.

My experience practicing law in Virginia, I would go on a 40-case docket, five people would show up, four of the five didn't have a defense. They came in because they were good people. They came in because they wanted to try to pay their bill. And I wanted to work with them to pay their bill. I don't want to get a judgment where I have to go search for assets and then spend a heck of a lot of my client's money trying to find the assets and ultimately execute the freezing of a bank account. I understand in New York it's a little easier to freeze bank accounts than it is in most places around the country, but it's not particularly easy to

do. So, getting default judgments is nice, but that's not what we're in the business of doing.

The last thing that I wanted to mention -- and I think it's very real, because there were comments from various members of both sides of this issue and the judiciary -- that we should put account records into the public domain. State after state are requiring us to protect consumers' privacy. We have to be careful about what evidence we put in the public domain. Entire account numbers, I tend to agree with the judge who said that they're stale accounts, but most states don't break that out when they rewrite their rules and their legislation.

So, there is a real concern and a real balancing act between privacy and proof. And once the case gets contested, that can be dealt with by the court. The consumer's privacy can be protected by the court. But just filing that document with a ton of personal information, whether it be medical records or whether it be credit card information or some other bank account information, is a problem.

MS. BUSH: There are quite a number of -- thank you -- quite a number of people who have things to say, but I think this might be a good moment for Judge Carpenter to talk about the credit card court model.

JUDGE CARPENTER: You know, it really is. You have segued into me better than I could have. We had all these problems and heard all these arguments.

Now, I am from a county -- you would describe it as fly-over country, a small county, a small court, but even the couple of judges on our court could not agree, in a general jurisdiction trial court with unlimited jurisdiction, which is what we are in Pennsylvania, we could not agree on these procedures, even among ourselves, trying to follow the same rules, for many of the reasons you've suggested and a bunch more.

Finally, we got so tired of it and so tired of the sloppiness that existed, frankly, on all sides, albeit for different reasons, that we went with something completely new, novel, whatever you want to call it, that effective December '08, following, in our county, the filing of the complaint and service, we stay all proceedings in favor of requiring both sides to appear at a conciliation conference.

So, preliminary objections are gone. Now it doesn't matter what's in the complaint anymore; that we have the complaint, we'll get all the parties in the room. So, you don't have to file POs that something wasn't attached or get into somebody's privacy.

When we schedule this credit card court, we've

stayed everything. We then require the plaintiff to come with some evidence relating to proof of damages, proof that they are the plaintiff, because they usually haven't pled it, and all the various assignments, and some kind of a breakdown.

Now, if plaintiff doesn't come -- remembering, we're fly-over country, there probably aren't ten attorneys in Pennsylvania that are filing suits on behalf of all the credit card companies taken together, so we don't meet any of them, ever, that they won't return a phone call basically, for the most part -- we require them to come. If they don't come, we dismiss their case with prejudice.

If the debtor doesn't come after they've been sued, we grant the default judgment, right then and there, right after the complainant service, no more proceedings. Well, after you do that for a couple of months -- and we have been at this now for ten months -- we start to get what we've been talking about all day that we need. We start to get some participation. And when we get participation, we go right down the avenue of our last speaker, Connell.

We negotiate -- when we get both sides there, what we're looking to do is one of three things: Most of the time, we're settling the case. That's what

happens when you get everybody in the room and you get a consent judgment with a number that the debtor can pay, with all the fancy charges sorted out, and we get something working that gives the creditors that come a judgment when they leave and gives the debtor a schedule of payment. We push the envelope way forward to where we think it should be from everybody's point of view.

Now, if you can't settle the case, then one of two things is going to happen: You may want some of this nifty discovery that we've been talking about that was in a complaint that I think's inadequate, but again, we've removed the issue, because it doesn't matter what's in the complaint now. We're going to solve it by discovery and keep it private. We have a form discovery order -- and I've brought all this stuff if anybody wants it -- in which we require proof of any assignment of the debt, the last statement before the default, the terms and conditions as of the date of the default, and the most recent statement, at a minimum. That's the form.

You get that within 60 days. If the creditor doesn't produce it within 60 days, we may let them have the charges, depending on what it is they failed to produce, but we penalize them their finance charges and their fees. They can get their base debt, but perhaps

not the rest, depending on what the nature of the discovery default is.

Then, the other thing is, you get a trial date, right away. We cut through everything. Coming out of that initial conciliation conference, you have a trial date. And I appreciated the observation of one of my colleagues who does a lot more of this than I do, I'm sure -- I'm too busy with capital homicides -- but that you had tried one case. Well, we've brought all of ours into court, about a hundred a month in our county, and we've tried one in ten months, giving them all a trial date and giving them all discovery, and we've put advertisements on the wall of what the statute of limitations is.

We have pro bono attorneys from our bar who have volunteered to come, not as advocates, but to help negotiate agreements. We put our discovery order right on the wall where people can look at it. This is what I can get. It's all disclosed. So, we teach them. Law clerks basically run it. You don't need a judge, although one of the five of us usually sits there and does a little orientation at the beginning as to what we're trying to accomplish.

But if you think about it, all of our cases after that meeting are either default judgments, albeit

not in the typical sense, they're dismissals with prejudice of creditors, they're agreements, or they're trial dates.

Now, when we first did this -- which side does everybody think balked, didn't want to do this? The credit card companies, right. The attorneys for the credit card companies did not want this system, at least their association wanted to challenge it, but now, I can honestly report to you, after ten months, that I think for some of the reasons you suggested, Connell, I think they're becoming fans, because they're coming out with money, not paper judgments against people they can't find, but consent orders. So, there it is, for what it's worth.

MS. BUSH: Thank you very much, Judge Carpenter.

I'd like to follow this by asking people about default judgments as opposed to contested judgments, about what evidence tends to come into the court for these judgments and whether any different standards ought to be applied, and I'd like to start with Mr. Pittman.

MR. PITTMAN: Well, this is a segue from the prior topic into this, but I just -- to the extent that a record is created out of this, I don't think that the record should be left to reflect on paper that there's

one happy world out there where we're all on the same page, that no one is building a business model to seek defaults.

I just finished suing a debt buyer in Virginia, a Virginia debt buyer, with an in-house collector, and here's their business model. They buy a debt from another debt buyer, knowing that they don't have media -- the debt buyer from whom they buy it does not have media, so they send out a 1692(g) notice that does not say, "In order to obtain verification, you have to make a written request." It says, "If you want to obtain verification, let us know."

And if someone calls during the 30-day validation period, they say, "Well, we'll see what we can get." As soon as the 30-day validation period runs, they're not going to give anything, because you didn't make a request in writing, and they simply avoid ponying up proof. If anyone comes to court, they're going to dismiss, because they can't get the proof, because it doesn't exist either with them or the people from whom they purchased it.

So, I don't know whether -- I think I submitted that complaint before. If not, I would like to submit it for the record, but that is a model designed solely to lull somebody into suffering a default judgment, and

this is a company that does this all over the state of Virginia. They have been around a while.

MS. BUSH: Thank you.

Mr. Olshan?

MR. OLSHAN: Thanks, Julie.

It seemed that there was consensus on the San Francisco panel. It seemed that there was consensus this morning with regard to what should be in an initial pleading. There isn't going to be a consensus on this panel, and that's okay, because I think that the location this conversation should occur at is the state level in those collaborative bench-bar discussions.

There are 12 states that have launched these sort of conversations, and I applaud those 12 states. I think that the FTC should encourage state judiciaries to kick off that very mechanism to ensure that all local stakeholders are right there at the table to have this conversation, to decide what, at the local level, should be included in an initial complaint.

I certainly have my opinion, which I have shared already on the record. I think that this decision should be made state by state. I was part of the Connecticut decision and the Massachusetts decision, and I think that 40 other states -- well, there's ten others that have also begun the conversation. There's 38 that

need to start the conversation.

Transparency is the goal. Communication is the goal. We've talked about this. As Brian talked about, the mill towards defaults, I think that there was a recent newspaper article about "We Live By Defaults." All we want to do is communicate, and that's what I've discussed at the local bench-bar conversations I've been part of.

Judge Fisher mentioned, from New York, that there's boxes of paper out in the hallways. That same topic was brought up at the bench-bar conversations that I've been part of, that the age of paper has passed. We need to find ways for there to be transparency through information in the pleading. And I would encourage the FTC to strongly recommend that every state begin a local bench-bar conversation where collaboration can occur.

MS. BUSH: Thank you.

Mr. Munevar? Mitchell-Munevar?

MR. MITCHELL-MUNEVAR: I would say just a couple things, that both with respect to Massachusetts and in light of sort of how some of these proceedings are run and some of the challenges and lack of participation on the part of debtors. I would support Mr. Bromberg's position that the standard in terms of what should be applied, along with the complaint, I think for all

parties it would make sense to me that it should be set higher for a couple of reasons.

I mean, I would imagine -- I hear the arguments as it revolves around being able to attack the sufficiency of the evidence, but given the fact that debtor participation is so low, that opportunity may not necessarily present itself. Also, unfortunately, in Massachusetts, a lot of these actions are being brought in small claims, and even under the current rules, no discovery shall be allowed, except to find good cause, if that's shown. So, either the debtor would have to affirmatively move for discovery and have that be at the discretion of the clerk magistrate to be approved, or have to affirmatively move this case over to the civil docket.

Now, that's not necessarily an issue on the debt collector's side. I think that it just raises part of the problems within Massachusetts that we have, given our current framework, in that there isn't an opportunity in which to have some of this back-and-forth discovery, and so that's why I would support an up-front submission of more documentation. But also, the reason why I think it would serve the debt collectors is because if more than likely these judgments are going to result in a default, not only do we want to set a

standard that should be sufficient in order to maintain a default, but it seems like at that point, once a default is issued and notice is given of judgment, that's where debtors seem to appear, and in order to not have these defaults later to be removed and later overturned, then you want to be able to at least set the standard and the benchmark that will support the underlying judgment.

MS. BUSH: Yes, I'd like to have you, Judge Fisher, to speak about the default systems in the State of New York that you've implemented.

JUDGE FISHER: Okay, certainly, and let me say before I move on that I think all of the discussions today are in a particular context. Yes, this is an adversarial system, but it's an adversarial system that has changed dramatically in the last five years so that there are more self-represented litigants -- or I call them unrepresented litigants -- coming into the courts than ever before.

I think the chief judges conferences have pretty much conceded the most pressing issue the state courts are facing is unrepresented litigants. So, if you're talking about transparency and rules and all those kinds of things that have to be discussed within the context of a court system, and particularly in this area, the

consumer debt area, where litigants don't have lawyers. So, they don't know what they're looking at when they get it in the mail, and that's what we have to address, and that's probably why we have so many defaults.

In the State of New York, I'd say 98 to 99 percent of consumer debtors are not represented by counsel, so the counsel that are involved in this litigation -- there are a few that come into court, but most of them are policy making who are fighting with Mr. Berman and people like that. So, they are not actually representing people in court because of the cut-backs.

With respect to default judgments -- and this is only the City of New York, not the State of New York, because I'm only in charge of the City of New York, which includes a civil court of the City of New York -- we were slow to realize that the industry had changed, that it was no longer original creditors but debt collection agencies, third-party purchasers, now seeking defaults. And so when our numbers leapt -- and, I mean, they really did all of a sudden increase -- we at first didn't realize it was third-party purchasers, and so our rules stayed the same for a while until we got on top of the issue.

And so as a result of concerns that judges were

raising that came to the administration's attention, that it was very clear that the third-party purchasers who were coming into court really did not have personal knowledge of all the books and records. They had personal knowledge of their own books and records, but not all the books and records of the prior debt collection agencies or even the original creditor, we began to look at our clerk's office operation.

In New York City and New York State, there's a 70 percent default rate. Defaults are only processed through the clerk's office. They are not reviewed by a judge. In some states, I know they are reviewed by a judge, but not in New York State. And although we would like to maybe one day do that, given the fact that we have 300,000 cases and only 51 judges, that would be a little difficult for us to do hearings on every single default judgment. So, it's processed through the clerk's office.

So, the directive that I'm about to talk about is a directive that we issued to the clerk's office with respect to processing default judgments when there is a third-party purchaser, that is a default -- the directive is DRP-182, effective date May 13th, 2009, and it is available on our Web site, newyorkcourts.gov, and if you keep clicking around, you will see directives of

New York City, and you can just print it out, or you can email me and I'll send it out to you.

And this is a procedure that was only to apply to accounts that were purchased after September 1st, 2009, and if you ask us why we picked September 1st, 2009, it was somewhat of an arbitrary picking of the date, but we wanted to give the debt collection agencies notice that they had to now follow this procedure, so that for any account that they purchase, they have to follow this procedure.

What it requires is after they have established a business record -- a foundation for a business record for every single account and to establish a chain of custody, so that there has to be an affidavit from the original creditor establishing that the books and records are accurate, you know, the typical business record foundation requirements, and that the next purchaser has to have the affidavit, and then the final debt collection agency that is in court actually suing has to establish a chain of custody for all of the sales and include all the affidavits from all the other debt collection agencies.

So, that has, as I say, just gone into effect in September, and we do not give a default judgment to any plaintiff seeking a default that hasn't followed this

procedure now.

The other thing I think that Julie wanted to talk about was the statute of limitations, which is also something that we're requiring on a default judgment application, that in the affidavit -- or affirmation if it's an attorney -- applying for a default judgment, they have to indicate whether or not the statute of limitations has run or not. And we did that based on a lone year of stating an affirmative defense. Our interpretation of federal law through our counsel's office is that we believe that they have to comply with the statute of limitations.

MS. BUSH: Thank you.

So, that gets at requirements for default judgments in general, and then it gets at requirements, in particular, for purchased debts. The first directive that you spoke about was applying to purchased debts, correct?

JUDGE FISHER: Purchased debts. The original -- obviously the original creditor has personal knowledge of the books and records. They have books and records. So, you know, they have always put an affidavit on it. This is for a third party.

MS. BUSH: And I think Judge Nordlund would like to follow up on that.

JUDGE NORDLUND: Let me say, I'm not suggesting this was an easy process, trust me, we had to beat some heads about this, but in essence, the overarching concern was the same, that we wanted to have -- all parties wanted justice to be done in order to go forward with competent evidence. The disagreement was what constituted competent evidence, and one of the things that led to that was an apparent misunderstanding that the charge-off, for example, when the debt buyer buys this from the credit card company and they're buying that charge-off amount, that it almost created, in some of their minds, a new cause of action, separate from the original cause of action. And the one thing that we kept going back to -- and eventually we were able to get our point across -- and that is that an assignee has no greater rights than the original assignor, and we kept having to beat this into their heads.

Think about the doctor's office that sues and they're asking for interest and attorneys' fees. They don't get those extras, the higher interest rate or the compounded interest rate or the attorneys' fees, unless they can prove that they have a contractual right to them. They may be able to get the original claim by bringing in those bills of services rendered, but they aren't going to get all those extras unless they can

prove a contractual right to that.

That was the thing that we had to keep pressing, because the other point that we were making was, understand, that charge-off amount isn't just principal. It's a compounded principal. It includes the overdraft fees. It includes the finance charges, and that many times, the final bill, it has no relation whatsoever to the actual principal. And so what we indicated to them was, in order for you to be able to get your compounded interest sum that you've purchased, you're going to have to establish how it got there, the fact that they were entitled to that amount, and all of the things that were included in that.

And this came about because of the National Banking Act and Marquette, which indicated that all of the rights or all of the laws that came from the home state would be imported to our state, and so as a result, there was no more usury provision in Virginia that could prevent these higher interest rates. There was still -- there was nothing -- if the home state allowed compounded interest without proof of that contract or without establishing the contract, we were going to have to go ahead and accept that. So, I'm just saying that this was something we had to do.

And also, it's also the reason why the Virginia

Supreme Court asked our court to come down and speak at the mandatory conference, because there was this amazing split in the urban versus rural areas of Virginia, where many times, people were coming in with these, you know, very basic pleadings and getting default judgments, whereas in Fairfax, there was the Fairfax rule, and so they wanted to have -- they wanted to encourage some consistency among the different parts of the state.

MS. BUSH: I'd like to ask our North Carolina panelists if they can say a little bit about how things are treated differently for purchased debt in North Carolina now.

MR. MYERS: I'll be glad to talk. Yeah, we do have a new law in North Carolina that came effective October 1, and I would not offer it as a model statute for other states. It is very sweeping in its breadth. It was apparently debated very little, according to observations I was able to make. Its underlying policies were actually very good, and the underlying policies, I think, were to make -- to use Adam's word -- make things more transparent, to make it clear who is the owner of the debt; to make it clear what the balance is; and to provide the kinds of evidence that give people some assurance that what is being sought is actually proper.

But as is often the case, the devil was in the details, and if you read this act -- and I won't go through the whole thing, because there are parts of it that really aren't relevant for purposes of talking about litigation today -- but if you just go through the litigation parts, there are pieces that are hard to reconcile. For instance, one of the requirements is that you must have, for your default judgment, the original creditor's account number. Well, there's another North Carolina statute that says you can't put that in the public record, and so how is a debt purchaser to get a default judgment in North Carolina now, because you can't comply with both of those statutes. You're going to violate one or the other.

You need the original creditor's name, certainly that's available; the amount of the original debt. The smart aleck in me wants to say that the original amount on any credit card account is zero, because that's the way it begins. So, I don't know what the original amount of the debt is. That's something that we're hoping someone can explain to us.

An itemization of charges and fees claimed to be owed and the charge-off amount. Well, which is it? Are we going to agree that the charge-off amount is a reliable number? Are we talking about itemization of

things after charge-off or things before charge-off? It's hard to tell from looking at the statute exactly what is being sought.

The amount of interest claimed and the basis for the interest charged, well, if you're seeking statutory -- I mean, excuse me, contractual interest, certainly you need to attach the contract so that one can understand how the charges are calculated, but it's just -- it's an interesting statute. It appears to have been rushed through the legislature, and it's -- I won't say indecipherable, but it's hard to understand.

MS. BUSH: Ms. Martin, would you like to comment?

MS. MARTIN: Just briefly. Actually, the better proponent for this would be Ms. McNulty --

(Cell phone rings.)

JUDGE FLANAGAN: I thought I turned it off. I'm sorry.

MS. MARTIN: I love the North Carolina statute. I think every state should rush to it even faster than North Carolina allegedly has. The great part about this statute from my part, as a consumer advocate, is I think it protects the original creditors to a great deal and any assignee that actually has the documents. The problem is that they don't have the documents, and

that's what the problem is for them.

To my knowledge, since October 1st, not one debt collection suit has been filed in North Carolina. When Mike Bonner, who is the general counsel for LVNV called me, when he found out about its passage, I assured him that there were 49 other states that he could still do business in and he would probably be fine, and I --

MR. OLSHAN: Is that debt avoidance or consumer protection?

MS. MARTIN: I'm sorry?

MR. OLSHAN: Is that debt avoidance or consumer protection?

MS. MARTIN: That's -- I think it's justice. I think it's justice, and this is why: For some reason, in North Carolina, in debt defense -- and I presume it's that way around the country -- there's a different evidentiary model for all other types of cases than debt defense. It's as if -- if a perfect number were seven, that the debt collection model would be 6.9. It almost looks believable, so much that a regular attorney might not even realize how wrong it is to try and accept that affidavit at face value, how wrong it is to accept anything with David Rosenberg's -- one of his nine signatures on it, in any state in this court or in this country.

And also, the chains of titles we have seen, it goes from -- the one affidavit says directly to the debt purchaser, and then in that very same case, they come forward, and the chain of title shows actually there were intervening ones. So, which is it? Do you have it both ways or not? And I just think the evidentiary model for debt collection should be the same as for anybody else. You have to have competent evidence. You have to have any -- and when you say about debt avoidance, that really irks me in a certain respect, because I think the original creditor could have sued on it even earlier and had better records, the records that I would say need to be done, and they stand in much better shoes to prove out the records competently in a court, and that they're the ones -- I mean, so, debt avoidance? No.

Why does a debt collector hang on to the debt exactly to the three-year mark in North Carolina, and then to the ten-year mark in another state and the five-year mark in the other state? Where is the avoidance, or is that the laches that Eric was talking about?

MR. OLSHAN: Angela, I think it's tough to use anecdotes, because I know many clients that will sue quickly at charge-off or in many cases before

charge-off --

MS. MARTIN: And I'm in favor of that.

MR. OLSHAN: -- and that does happen. I don't think that it's fair to paint such a broad brush with that sort of anecdotal evidence. You mentioned there's been no lawsuits since October 1st --

MS. MARTIN: You can ask. Jerry, is it true? Do you know of one? A lawsuit?

MR. MYERS: I'm not aware of any lawsuits that have been filed.

MS. MARTIN: Carlene, any debt collection lawsuits since October 1st in North Carolina?

MS. MCNULTY: Debt buyers.

MS. MARTIN: Right, no debt buyers.

MS. BUSH: I would like to hear from Ms. Bender, but we are in our final five minutes of the panel, and then Bevin Murphy is going to come and hopefully help you give us advice about what actions should be taken in light of what we've uncovered here today, but Ms. Bender?

MS. BENDER: I just wanted to follow on what Ms. Martin said, and I think that as an industry -- I'm a member of ACA International. I'm one of 800 attorneys who are members of ACA International. I also have served on ACA's Ethics and Professional Responsibility

Committee, which receives and vets and resolves complaints from consumers or businesses against its members.

And this issue of data or media retention is a very big issue and has been a big issue for our association, and we are currently supporting legislation on Capitol Hill right now that would require original creditors and any subsequent creditors to retain all of those exact things that you're talking about. So, either debt collectors or debt buyers could subsequently receive and continue that chain of information. And it would be great if the consumer advocates were interested, also, in supporting this type of legislation, because I think that it's very important to point out two things.

First, all debt collectors aren't debt buyers. In my own space, there are very few debt buyers. I do not service for any debt buyers, because there just really aren't very many in health care.

Number two, we want, as an industry -- debt collectors and debt buyers -- we want the media. We would love to get the media. We would love for there to be an industry standard, but we often find ourselves in a spot where what we get is only what the creditors -- just as Your Honor pointed out, we have no more rights

than the prior creditor had or prior assignees, but we similarly -- if our creditors or the sellers are not retaining the media, then it disadvantages us, and we end up being the bad guys at the end of the day.

So, I would like to mention that this legislation is something we are supporting as an industry and that perhaps that is something that people from all sides of this table in this room can gather around and be supportive of.

MR. OLSHAN: And, Julie, they don't have the documents because they rely on the charge-off balance. The doctor bill of $1,800 is very different than that bank charge-off of $1,800, because that bank is so heavily regulated, where the doctor's office is not so much. That bank is regulated -- the Treasury is here. They'll stand up and they'll tell you that their OCC and the FDIC will heavily regulate, so that these banks rely heavily on that charge-off balance, which then is either attempted to be collected or it's sold.

MS. BUSH: Ms. Drysdale had a quick point.

MS. DRYSDALE: Yes. The only thing I wanted to mention, that something Mr. Loftus said struck a raw nerve with me, and I noticed that clinics was one of the last topics in our section. I think consumer knowledge is a really important part of the process, and Judges

Fisher and Carpenter mentioned that with the conciliation and their process, but I know that Mr. Loftus said that they would love to have the Legal Aid attorneys there.

Well, in Jacksonville, where I practice, we wanted to set up a pro bono program where legal aid attorneys came and spoke to the pro se defendants at the small claims hearings. And we met with the judges, and then the president of the creditors bar wrote a four-page, scathing letter about how we were going to be doing solicitations, we were going to impeding the efficiency of the court, and came out very strongly against us being able to speak as pro bono attorneys and nonprofit attorneys to defendants.

So, I guess my question there is, why not, and what are they afraid of? Because they're also trying to streamline and almost get rid of the small claims process -- pretrial process through the bar -- Florida Bar Small Claims Rules Committee.

MR. LOFTUS: I can't speak to what happened in Jacksonville. I can only speak from my own experience in the jurisdiction where Judge Nordlund sits right across the river in Fairfax County, that the Legal Services folks have been there for years, for the entire time that I've practiced, and my dealings with them have

been helpful. They've been helpful. They have informed us of defenses, and they've told us when their folks are in a position to work out a deal. So, I can only speak for my own experience, and I didn't mean to step on your -- in Florida.

MS. BUSH: I'm being told we have to stop. I'm very sorry. The time is up. But Ms. Murphy is going to follow on the panel.

MS. MURPHY: Can everyone hear me? Okay.

Well, I regret to inform everyone, in case anyone has been tuning out for the past hour and 45 minutes, we have not really reached consensus on many of these issues, to state the obvious.

However, what we have seen is that there are a number of different states and different organizations trying a number of different methods, models, and best practices, and I think that we will be able to learn a lot from those, as well as any additional information that I know a lot of you have mentioned and indicated your intent to submit.

So, we have heard a number of different standards and models, and these vary from I think what's been called -- what could be considered notice pleading; you know, Twombly was referenced. I think it was also called name, rank, and serial number. So, we have seen

everything going from a more sort of bare-bones pleading style to a request or concern expressed by others that we really need to have more, more evidence and more information produced in the complaints; that an itemization of information such as account numbers, original creditors, would be helpful. And, in fact, we also heard even beyond information, some expressed the concern that we need documentation attached as well as just the information.

We certainly heard a lot of what I'll call challenges or concerns or issues expressed, and I think one is that, in fact, in general, these issues aren't often expressed because we have this issue of a lot of default judgments. So, sometimes this isn't even discussed, because the adversarial system is not what it is in cases where there are not default judgments.

We heard some concerns expressed about written contracts and whether these should be required, and, in fact, how the advance of technology might affect this, whether there are still written contracts in, for example, telephone or Internet transactions.

We heard some concerns expressed about should there be, either because of current requirements or additional requirements, whether these can be balanced with a number of other legitimate concerns, such as

personal privacy or HIPAA concerns in the medical context. There was a discussion of whether there should be different standards for default judgments versus judgments where a defendant does show up.

We discussed the importance of using the date of charge-off, and although there was no consensus there specifically, I think most could agree that this could be used as a starting point and that it is an important issue to determine to use this date of charge-off.

And finally, there was a discussion of the various goals and incentives of all the parties involved. I know there's dispute over whether an informed consumer is really a goal that all parties have, but I like what Judge Nordlund brought up, that, you know, despite differing goals or opinions, at least in Virginia, the attorneys and members of the bar and all the various stakeholders were able to work together and to come up with at least a model that can be used and tried.

If anyone disagrees with anything I said, please speak up now, but be aware that you're holding everyone else from their break, so do it wisely. Does anyone have any disagreements with what I've said?

Okay. Then in that case, we're going to be taking a break and returning at a time Julie will

announce. I think it's 3:45.

(A brief recess was taken.)

PANEL 4: GARNISHMENT OF BANK ACCOUNTS

MR. PAHL: Thank you, and welcome back for our last panel of the day, which is garnishment of bank accounts, and I will be the moderator of the panel, Tom Pahl. For those of you who weren't around this morning, I'll introduce myself. I'm an assistant director of the Division of Financial Practices here at the FTC.

After the discussion, like the format we've used before, Joel Winston, the associate director of the Division of Financial Practices, will come up, give some thought to try and summarize, and then he will give us some closing remarks, and we will finish up for the day, hopefully on time at 5:00. Without further ado, I will take my seat, and we will get started.

All right. Well, thank you. Our last topic involves the garnishment of bank accounts that contain exempt funds. One thing that we frequently look at are funds that are exempt under federal law, although, of course, there are state law exemptions for funds that are in bank accounts as well. I think one thing that would be useful is to just hear from members of our panel, particularly, I think, representatives of consumer interests, you know, to what extent is the freezing or garnishment of bank accounts with exempt funds really occurring at this point in time.

Maybe we can start with that question, but first I'd like to go around and introduce each of the members of our panel, some of whom have been on prior panels, but I will just introduce everybody very quickly so that we can get started.

Beginning on my right is Hiram Carpenter, who's a judge in the 24th Judicial District of Pennsylvania, Blair County.

To his left is Fern Fisher, who is a judge in the New York City Supreme Court.

On my far right at the head of the panel is James Flanagan, who is a judge in Suffolk County First District Court.

To his left is Gary Grippo, of the United States Department of the Treasury.

Immediately to my right is Kathleen Kerrigan, who is with the Bank of America.

To my left is Lorraine Nordlund, who's a judge in the General District Court, Fairfax County, Virginia.

To her left is Adam Olshan, who is with the law office of Howard B. Schiff.

And to his left is Mark Tenhundfeld, who is with the American Bankers Association.

Continuing around the table, we have Johnson Tyler, who's with the Southern Brooklyn Legal Services.

And finally, we have Claudia Wilner, who is with the Neighborhood Economic Development Advocacy Project.

Well, to go back to the question that I started with, to what extent are exempt funds in bank accounts of consumers right now being frozen or garnished? And maybe we could hear from -- maybe Johnson or Claudia could speak to that.

MS. WILNER: Sure. Well, I can tell you that -- well, first of all, we have a legal services practice essentially, so what we do is help low-income people with consumer debt issues, and I can tell you that up until January 1st of this year, the main thing that we did at our office was try to get exempt funds released. We spent a lot of time trying to get people access to their Social Security and their other benefits that, you know, had been restrained by creditors, even though those benefits are supposed to be and are under law exempt from restraint. So, it's a huge problem.

And I hear, also, from advocates all around the country that it's a problem in their states. You know, we have a wonderful new law in New York that has really helped to address that problem. So, I hope we will have time to talk about the solution that we found in New York. So, it's really not been such a problem for us anymore to the degree that it was before, but I'm sure

that it continues to be, you know, rampant in other parts of the country that don't have the protections that we do.

MR. PAHL: Okay. Johnson or Adam, if you would like to add something?

MR. TYLER: I've been a legal services attorney since 1989, and I specialize in Social Security. I actually never dealt, until 2001, with a frozen bank account involving a Social Security recipient, and after that, it's just been a steady increase until the new law was put in effect in New York that we'll talk about.

But just to give you an idea, I would get three to six calls in 2008 a day from people, in part because they would call 311, which is like the hotline number in New York City, which then sends them to the bar, who then sends them to me. So, I was getting a lot of them.

But if you look at the numbers, in New York City, there are about 500,000 Social Security recipients who get direct deposit and who live in poverty. Ninety percent of their income comes from that Social Security check.

In a five-year period -- we're not even talking about 2008 and 2009 -- there were over 2 million judgments entered in New York, just in the five boroughs. So, lots of those involve people on Social

Security.

And in New York, because it has -- they have that discovery tool that is just incredible, they can do electronic searches of bank accounts once you have a judgment. So, freezing a bank account in New York State, until the amendment -- this new law in 2009, was as simple as simply clicking your mouse. It was so easy that you could freeze a bank account over and over and over again. So, it's been a huge problem in New York.

MR. OLSHAN: Thanks. Simply put, it is never the intention of a collection attorney to attach exempt funds, period. It's a knowledge issue. When we receive knowledge that funds are exempt, and in some cases, the attorneys will release upon being asked to. In other cases, attorneys will ask for some evidence of that, whether it's a bank statement or something else, something simple, brought to their attention as quickly as possible, they will release. It is never the intention of the collection attorney to attach exempt funds. It's a knowledge issue.

MR. PAHL: Let me just back up a little bit and perhaps if I could hear a little about what happens to consumers when their bank accounts are frozen, you know, and they contain exempt funds? What are the practical implications for, for example, recipients of Social

Security benefits if their funds in their bank accounts are frozen?

MR. TYLER: Well, in New York, what happens is they get a notice from the bank, which says, "We've frozen your account under order. If you want to discuss this, you need to call the attorney who did it."

So, then they call the attorney saying, "You froze my bank account," and I know Adam believes this happens, but most times -- I would say in 30 percent of the cases where I have actually called and submitted documents, they do not want to release the account without a payment plan. That is the condition.

And in those cases, I'm not talking about -- I'm not -- you know, I'm a legal services lawyer. I'm not representing people with money and deep pockets. They still want a payment plan. They want $50 a month. They want $100 a month.

So, as a practical matter, once the account is frozen, the debt collector has an incredible amount of leverage now to try to work out a payment plan with the client, who is, if they're on Social Security -- and as I said, in the past -- well, if you look at the statistics, 37 percent of Social Security recipients rely on that check for 90 percent of their income. So, they live -- and the average payment is $1,000 a month.

They don't have a deep pocket.

So, entering into a payment plan with a creditor when you're, in essence, execution-proof, when you're living from check to check, it gets around the exemption provision of the Social Security Act. So, it --

MR. OLSHAN: We don't want to attach it either, Johnson.

MR. TYLER: What's that?

MR. OLSHAN: We don't want to attach that money. That's not the goal of a collection lawyer. We don't want it attached. We understand it's exempt, and that's not our goal. It's really about knowledge.

MS. WILNER: Well, I think it depends a lot on attorney to attorney. I mean, often, as a -- again, we have had some solutions that have really helped, but before, you know, when we would advise clients they had a frozen bank account, they had exempt income, that they would call the creditor's attorney, they might have to send some bank statements to prove that they had exempt income, and then, you know, we would hear, "Oh, you know, that's not actually exempt," or, "Oh, I found a dollar of non-Social Security money in there, so the account's commingled, so we won't release it," or just endless challenges, you know, to be able to hold onto those accounts.

And you asked what was the harm to people when their accounts are frozen. I mean, we have had clients who -- well, first of all, people don't find out about it in advance. So, when they find out about is when they're going to use their card. Maybe they're trying to buy groceries at the store because they have no food, and now their card doesn't work, they have no access to money. So, we have people who need to go to food pantries, who need to borrow money from relatives to survive, but maybe they don't have any relatives or friends.

We have had clients who are, you know, disabled, in wheelchairs, living in public housing, whose SSI benefits are frozen. They have difficulty getting them unfrozen. We have had clients getting eviction notices because they weren't able to pay their rent because of the frozen bank accounts.

And then with the direct deposit, usually once an account is frozen, it might be the first check, but then if they don't get it resolved quickly, then they can't stop the next check from going in. So, it's not just one month of benefits. It's multiple months of benefits. And it causes severe hardship for people.

And if I could say, it's for people on Social Security, but it's not just for people on Social

Security. It's people who are receiving unemployment. It's low-wage workers who are making the minimum wage, and they're living check to check, too, and that money is also exempt under wage laws, and they have the same problems as people on Social Security. So, this is a systemic problem that causes a lot of hardship for low-income people all over the country.

MR. PAHL: Well, you know, since the practice is a violation of federal law, I think it would be helpful to hear from the folks up here who have connections with banks as to, you know, why do banks freeze funds which are supposed to be exempt under federal law?

MS. KERRIGAN: I think that would be me.

MR. PAHL: I'll ask Kathleen and Mark, I think would be the two folks to respond to that.

MS. KERRIGAN: Well, banks are subject to state garnishment law, which when we're -- a bank is served with a garnishment, there is a mandate to freeze accounts, hold accounts.

And also within the state process or procedure, I should say, the garnishment procedure, there is generally a claim process, whereby historically it was thought that the individual claiming the exemption could fill out the paperwork, go to court, claim their exemption, and have that process work. And that is --

you know, when a bank is served with a garnishment, there is potential liability not just to the customer, to our own customer if we get it wrong, there's liability, potential liability, to the creditor if we get that wrong.

So, of course, banks are not the only garnishers, obviously. They are the main, you know, focus, but there is a kind of neutral, if you will, position, unfortunately, to be maintained there.

MR. PAHL: Mark?

JUDGE CARPENTER: Kathleen, could I ask a question?

MS. KERRIGAN: Yes.

JUDGE CARPENTER: Do you think -- this is a big problem in Pennsylvania, the banks doing this. Are they -- and you were saying, Adam, that it's a knowledge issue. Do the banks, do you think, kind of get caught between what they think the law might be or what it is and a court order? Is there confusion that's causing some of this?

MS. KERRIGAN: Well, I don't know if it's confusion, but I think we'll have some good news shortly to talk about in terms of the discussions that the industry and Treasury and the American Bankers have had, but I think there's enough case law out there for banks

to be advised that they have to be careful when --

JUDGE CARPENTER: Is investigation a problem?

MS. KERRIGAN: No. I think it -- I think -- historically, I think the main focus has been this is an issue between the debtor and the creditor, and, you know, that the bank should take some action and then the conversation move to the debtor and creditor and the courts to make sure that everyone is sorting out whatever legal issues there are there.

MR. TENHUNDFELD: Tom, if I could just jump in?

MR. PAHL: Sure.

MR. TENHUNDFELD: My location on this panel is exactly where it should be, between the creditor and the debtor, because that's exactly where banks are in this process. I would only amplify on what Kathleen said by noting -- and this may be responsive to your question, Judge -- that the issue for banks is the fungibility of money. When we're talking about direct deposits of Social Security or VA or whatever into a deposit account that has other funds in it, there is no way to know which electronic blip is a Social Security electronic blip, which came from anybody else.

And so the banks, as Kathleen was noting -- and quite accurately -- find themselves between the proverbial rock and a hard place, where they have

exposure both ways. If they dishonor the garnishment order, in some cases, they are liable for twice the amount of the judgment. If they pay funds that are protected under the Social Security Act and other federal statutes, they have liability to the client.

And so the banks caught in that situation often find that the only situation -- the only solution that they can come up with that really preserves the interests of both sides is to say, "Let's just call a time-out on this. We're just going to put a hold on this account, and we're going to let the parties work it out."

Now, that said, I'll be the first to acknowledge the hardship that has been pointed out, and the banks are not saying that the current solution is the best solution, because there are some very real-world hardships that arise from that. What we have been talking with Treasury and with the banking agencies and with the other agencies about is coming up with a way that preserves a lifeline amount, if you want to call it that, so that you don't have a situation where a Social Security recipient can't buy food or can't --

JUDGE CARPENTER: Or is writing bad checks, yeah.

MR. TENHUNDFELD: Well, the solution that I

think we're all aiming for is maybe not perfect, depending on your perspective, but it, at least from what I can tell thus far, looks like it might be the best solution that addresses as many interests as we can.

MR. PAHL: Let's hear from Judge Nordlund quickly, and then perhaps, Gary, you could talk a little bit more about what the banking agencies have been talking to the banking community about.

JUDGE NORDLUND: And this segues from what Mark has said. In Virginia, we still follow the rule from a 1982 case, Bernardini v. Central National Bank of Richmond, and in that case, there's a pretty hard rule that says that the moment that funds are commingled, that is, if you have an account which has an automatic deposit of these exempt funds and any money comes into it from any other source and begins to be used for general purposes, then the very fact that the funds have been commingled means that the funds lose their exempt status. And under those circumstances, unless the creditor is willing to allow them to trace a portion of that account, the entire account is subject to the garnishment.

This has been brought forth before a number of courts. One of the most recent was in the City of

Richmond, in a 2006 case, where they upheld the Bernardini case, and one of the things that was pointed out in that case was that the Supreme Court in Bernardini distinguished their ruling from Philpott v. Essex County, which was a U.S. Supreme Court case, and in distinguishing it, they held that the federal law regarding Social Security benefits being exempt was distinguished, in part, because of the evidence of commingling. So, they did make that distinction.

And so we are probably due for a change in the law. Whether it comes from the state or it comes from federal law, who knows? But I can tell you that Virginia still follows that.

Now, what happens is that the banks, recognizing that they may be caught between a federal law and a state practice, which is set forth by case law dating back to 1982, what they do is normally they will hold the funds pending direction from the court, and most times they will waive the fees that come from writing these bad checks. There is a spirit of cooperation that exists.

Once again, that may be unique, but I know that many times I've had a situation where a person or a couple is coming in, "Those are my Social Security benefits. What am I going to do? I can't live." And I

look to the attorney, and the attorney says, "Just send them out in the hallway with me. We'll talk about it." And they come back in, and usually they've agreed to trace a portion of those accounts and exempt a portion of those accounts. But that doesn't always happen, and we can't compel it. We cannot compel it. So, many times we do have to impose that hard and fast rule.

MR. PAHL: Okay.

Gary, perhaps if you could speak to what the federal banking regulators have been considering.

MR. GRIPPO: Well, it's been the Treasury Department, along with the benefit agencies, not so much the banking regulators, but the benefit agencies -- which are the entities that have these antigarnishment statutes, not the bank regulators -- that have been working together to issue a rule-making that would address this issue, and for the first time, give clear guidance and really give full effect to the antigarnishment statutes that exist in most federal benefit programs.

So, we've been working on a rule-making that would address this, a proposed rule-making is forthcoming, and by comment from everybody on that, when it comes out, and this rule would deal explicitly with this practice of account freezes, and it would be a rule

that essentially regulates financial institutions.

It would have three goals to it at a high level. One would be to establish some protected amount, pursuant to the antigarnishment authorities, which could not be frozen or seized or turned over to a judgment creditor. A second component would be to make it very simple for the financial institution to determine whether to institute this protected amount, in that they would not have to do any complex accounting or exercise some judgment to figure out what particular dollar was protected or not. And thirdly, it would provide financial institutions with a safe harbor from liability if they complied in good faith with this.

So, it tries to balance these interests of giving effect to the antigarnishment statutes and protecting funds, giving clear instructions to banks to get them out of that position of being between that rock and a hard place, and providing a safe harbor if they do that.

MR. PAHL: Well, that sounds very conceptually similar to what I know some states have done, like California and Connecticut and I believe New York. I was wondering if anyone on the panel has had experience with those kind of state law approaches and how those have worked.

MR. OLSHAN: You know, Thomas, I wouldn't go so far as to say that Connecticut and New York are simple or even fair, but the Connecticut statute is -- and if I may mention what that is. I've spoken to Mark and to Gary and to Kathleen a bit earlier today about the Connecticut model. I think it's a very fair one.

In Connecticut, the consumer bar sat down with the bankers and creditors back in 2002, and through that, again, collaborative, state-level discussion, an agreement was reached, through consensus, as follows:

Where a judgment debtor has exempt funds deposited into their account, readily identifiable electronically, within 30 days of the attachment, the bank, upon receipt of the attachment, leaves $1,000 aside as immune from attachment and doesn't touch it. Anything above that is subject to the attachment. And if the debtor disputes anything above $1,000, they have the right to a hearing, but that's the current process.

I believe that it's fair to the bank and that it's, as you mentioned, it's a simple process for the banks, and the banks do, I think, agree with that. I think it's fair to the consumer. Johnson had mentioned that the average monthly payment is $1,000, and this is a $1,000 immunity.

I also think that it's fair to the banks in that

it gives them some assurance with regard to liability. It's a clear rule that they can apply.

I will say it's also fair to the creditor community. There's no debt avoidance here. I think it's very reasonable. $1,000 should not be subject to attachment under situations like this. And it's up to $1,000. So, if there's $800 in the account and if only $200 turns out to be Social Security, still, the full $800 gets exempted. And I think that that's a very reasonable compromise for everybody and it works for everybody.

MR. GRIPPO: If I could add, we've looked at how these statutes operate at the state level, there are different flavors, and have tried to learn as much as we can and build on that. In our instance, at the federal level, we think a model like this works. Our concern is to ensure that it works well across all federal programs, and we're not just talking about Social Security or retirement benefits.

There are probably a couple of dozen types of benefits with antigarnishment protections, everything down to Medal of Honor recipients are exempt from garnishment. It's amazing how many different programs that this covers.

So, our approach is to come up with some method

that would cover all of these in one uniform manner, such that a financial institution would not need to worry what type of benefit it was and would apply a very simple rule to protect a certain amount.

I think the other thing that we're trying to do at the federal level -- I know we're doing, since we're responsible for these things at Treasury -- is to better encode our direct deposit payments to permit -- by means of both visual inspection of a deposit, either on a customer service account screen or on a bank statement or through an automated inspection of electronic entries, to more readily determine if a benefit is, in fact, exempt.

So, we intend to make some of those changes in the coming months, and this would allow not just financial institutions but hopefully most consumers to be able to look at a bank statement to see whether a transaction represents exempt funds.

MS. KERRIGAN: And from the financial institution perspective, a couple of points following onto those.

The states, California, Connecticut, and New York, which have established what we should call an automatic exemption amount differ in the sense -- primarily California -- I'm sorry, New York, and

Pennsylvania's is this way, as well as other states, where there is an ongoing restraint. The restraining notice in New York, which is valid for a year, and garnishments in Pennsylvania, which are ongoing, present a complete operational obstacle for banks to be able to get that money to the customer.

And one of the things that we, as the industry, has -- in the course of our conversations with Treasury have tried to emphasize, that -- and I guess we'll get into this maybe for a future vision, but that has become -- that has been a real stumbling block in terms of the way a bank account works.

In other words, if you have a system like Connecticut where the garnishment hits and whatever's in the account on that day, the safety amount -- the -- you know, the automatic exemption that's left in there, the rest is pulled out to a general ledger account, the customer can freely use their account. In New York, that is not the case, because the bank is obligated to restrain any additional money that comes in.

And the other point, on the payment side, the Federal Government uses -- follows the Green Book, which is a -- if you will, their version of the National Automated Clearing House Association, the NACHA rules for ACH, and we have files -- electronic files that come

into the bank from the federal agencies for the payments, and they have strings of data, and we're hoping -- what we're hoping for is a fairly bright-line rule that says, "Okay, we're going to put identifiers here and here so that" -- and believe me, this is all manual at this point -- "when the bank employee is looking to try to identify that federally exempt benefit payment, they will have some fairly bright-line rule within the NACHA rules to follow."

But it does not mean that we have gotten to the point of automation. A lot of that has to do with the downstream systems within banks and what data they pull from that original amount of data that comes in.

MR. TENHUNDFELD: Tom, can I just add one thing to your question about what the banking agencies have been doing?

Before Treasury got deeply enmeshed in this issue, the banking agencies went out for comment with proposed guidance. This was, I think, in September of 2007. The problem with that guidance -- and I think the banking agencies -- I don't know if there are any representatives -- I don't recognize anybody from the banking agencies here, but I think they would acknowledge that the problem with that guidance was that it put the onus on banks to distinguish exempt from

nonexempt funds, and, again, when you're dealing with direct deposits and electronic funds, electronic flow of funds, you just can't have a system premised on that.

And so I think to their credit, they have -- they haven't officially withdrawn the guidance, but they have -- I think they have put the brakes on it, and the momentum now has shifted over to Treasury and the paying agencies to fix the problem.

MR. TYLER: I just want to say the New York rule which creates this bright line works very well, except in the situation where Kathleen mentioned, where the balance exceeds -- it's a $2,500 rule in New York. If someone gets a direct deposit by Social Security and the account has less than $2,500, nothing happens, and there is no fee, and it's a dollar above, the dollar gets frozen, and the whole account gets frozen for future payments, and the person has $2,500, and here's where the problem arises, because Bank of America, for example -- and I'm not blaming you for the problem -- but the problem is they can't deal with the next check.

So, what they do is they freeze the whole thing, and they tell you -- actually, I am not going to speak for Bank of America. I will speak for Chase since they're not here, because I actually know what Chase does. What Chase does is they freeze the whole account

and they send a notice saying, "Come into the office, the bank, the local branch, if you want to get your money." But if there are any outstanding checks, they are going to bounce.

So, that person who has a dollar more than the limit ends up with a lot of bounced checks, and the next Social Security check goes into the account, and it's for this reason that I think that Gary and what the Treasury is doing is terrific, because it will -- if I understand from reading all these emails, it's going to adopt the Connecticut approach, which is a snapshot approach of looking at what's in the account on that day, so that we don't have to problem of this ongoing -- the problem we have in New York. So, I think it's a terrific thing for that.

MR. GRIPPO: Yeah. Let me -- as I said, we're in the middle of a rule-making or we will be shortly in a rule-making, so I don't want to comment on any specific provision in it right now, but as a matter of principle, in creating this reg, we feel that all of this must be a one-time event for the parties. If you can identify an exempt deposit and apply a protected amount, what should flow from that is a one-time action that does not need to be revisited.

And there are different ways to implement that,

but our goal would be to have a financial institution take one action, one time, upon one account review, without having to revisit it, or to have an accountholder have to assert something in the future.

MR. PAHL: One thing I did want to ask is the -- what Johnson was talking about kind of raises this, which is under the current system, if a bank account is frozen and fees are assessed and it turns out that the freeze was improper, because, in fact, there were exempt funds in the account, I would just like to ask people's thoughts as to whether banks do and whether they should refund the fees that the consumers were charged because of that improper freezing of the account.

MS. WILNER: Well, one of the things that the New York law provides is that if a bank receives a freeze or a garnishment order and -- or maybe I should go back and explain a little bit the way our law works, because Johnson explained part of it, but it was only a partial explanation, and it's -- actually, it's pretty similar to the Treasury proposal. It's actually a two-tiered protection.

So, for accounts that have had readily identifiable deposits of exempt funds within 45 days prior to the issuance of the restraining notice, there is a protective amount in that account of $2,500, and

for all other accounts, there's a protected amount of $1,740, and that amount is tied to the minimum wage, and it goes up if the minimum wage goes up. And if the account balance is less than that amount, then the restraint or garnishment order is void, and we really don't have any problems -- ongoing restraint problems. The account is not frozen.

Our understanding, because we talked quite a bit with the banks at the time that -- you know, that the bill was being worked out, and a lot of banks did say that it was their policy, for example, in California and Connecticut, which is what we were looking at as models, not to freeze -- not to place fees on accounts that were not frozen because they had less than the protected amount in them. And the New York law also says that no fees can be charged if an account is not frozen, and we're not seeing a big problem with fees being charged in those circumstances. So, my understanding is that, in general, banks are not charging fees when they're not freezing accounts.

And let me say that these fees are substantial. The fee for freezing an account is $125 or in that neighborhood. So, that's a lot of money, and when you're only getting $700 of Social Security, that's a big chunk of your income.

I'll just say, in addition to that, we have a procedure in place that's an almost nonjudicial procedure to deal with the situations when an account has more than that protected amount in the account, and it's basically a simple form that somebody can check off to claim that the rest of the money in the account is exempt, and that process has also worked pretty well. I think we've been able to help people get -- even when there is some freezing in the accounts, to get those accounts released, usually within a week or two.

MR. PAHL: Judge Nordlund.

JUDGE NORDLUND: Now, when I said that we have no federal exemptions if it's commingled, please understand, now, we do have a statute which indicates that a certain level will be exempt, but the effect of the case with our statutes regarding exemptions is that it places the onus on the bank account holder or owner, rather than the bank. So, it shifts the burden from the bank to the bank account owner, that they are the parties that must file the exemptions with the court, and it's not the bank's responsibility to determine classification of various funds within the account. So, it's just simply a shifting of that onus. There are still certain funds, certain levels of funds, which are exempt from garnishment. That was just who has the

responsibility of notifying the court.

MR. PAHL: I have a question from the audience that sort of follows up on our discussion that it would be useful to ask and have answered, and the question is, under the snapshot approach favored by California, Connecticut, and the Treasury, can a creditor garnish an account repeatedly?

MR. OLSHAN: I missed the end part of that.

AUDIENCE MEMBER: Could you repeat the question, please?

MR. PAHL: Sure. Under the snapshot approach favored by California, Connecticut, and Department of Treasury, can a creditor garnish an account repeatedly?

MS. KERRIGAN: I know that in California, or at least my understanding is that in California, there is no limitation, and that question may come about because in New York, there is a restriction. A creditor may only issue two restraining notices a year, the first one without court approval, and the second one, they have to get court approval for. So, in the snapshot situation in California, theoretically, the creditor could come back repeatedly.

MR. OLSHAN: And in Connecticut, the rule does allow the judgment creditor to come back repeatedly. The practice is that through the execution process, if

the collection attorney learns that all of the money in the account is exempt, generally speaking, they'll flag the account, and they won't send a marshal back out for that account.

I just want to mention that in the New York practice right now, $4,250 is automatically immune from exemption, which appears to be the total that Claudia had mentioned, $2,500 plus $1,750. That's just way too much money. I think the California rule is about $2,200, which, again, is -- $1,000 is a reasonable number. And my only add-on to the Connecticut rule, which I would say, would be some sort of expedited hearing, in cases of I'll call it brutal need.

Kathleen had sent me an interesting 1982 law review article about this, and brutal need was talked about there. In cases where there's brutal need, the money over the $1,000 is brutally needed to live on, or where there's money over the $1,000 that's exempt, I would suggest that if Treasury is going to issue a new reg, that it encourage states to look at state-level add-ons to, in cases of brutal need and exempt funds over the $1,000, allow the judgment debtor to go to the bank, authorize the bank to side-step privacy and email the exemption form to the state court so that the state court can be required to docket a hearing within seven

calendar days, which can then result in this money being released quickly. I think through that process all parties are treated fairly.

JUDGE FISHER: Adam, thank you for giving me extra work.

MR. PAHL: Judge Fisher?

JUDGE FISHER: Given that we have about seven judges doing this -- I have 51, seven of them maybe do this kind of work, that's an awful lot to ask some state courts, to do a hearing within seven days. That's a burden that needs to be discussed. I mean, when the legislature docks new legislation, they don't often give the courts the resources that they need to implement new legislation. So, I'm just putting that on the record.

MR. OLSHAN: I understand, Judge.

JUDGE FLANAGAN: And in response earlier to what Mr. Tyler and Ms. Wilner said, in my court, we don't get a lot of accounts that are garnished with these exempt funds, but I'm now in my sixth year in my court, and my clerks have devised a process with me that if the person brings in the proof and, you know, demonstrates it -- now, I grew up -- my father had a bar, and he cashed a lot of checks, and I learned at a very young age the 1st of the month was your pension check, the 3rd of the month was your Social Security check. That's the way it

was.

If I see an account that has the same amount of money coming in the 1st and/or the 3rd every month and they attach that, they ought to show cause, and in the order to show cause, I'll set it down for a -- and when I say immediate, as quickly as possible, but I will lift the garnishment, and I'll also direct that everybody appear, which normally we don't do on our motion calendar. We're usually an absentee motion. So, we try to take care of these things. It's not that we don't, you know, let them lie. But that doesn't happen that often, but when it does, if they provide the proof.

Now, the one stumbling block that happens all the time, we will get an adult parent with an adult child and they'll claim that the money is -- and the adult child is the one who the garnishment's against, and they have a joint account, and then what happens is mom comes in and says, "It's all my money. It's not Sonny Boy's," okay, and it turns out most of it is Sonny Boy's, if not all of it, but mom's on the account for whatever reason. Those are ones that really give us the biggest problems. So -- but we try and do it. And my question is, what are we going to define as brutal?

MR. OLSHAN: That's for state-level collaboration. I think that in Pennsylvania -- in New

York and California, the current laws resulted from the bank and the consumer bar discussing it. I don't think that the creditor bar was part of that discussion. I think that through discussion, as happened in Connecticut, you reach good results.

MR. TYLER: I would just like to point out that SSI, which is essentially a federal welfare program for people who are disabled and elderly, they have a $2,000 asset limitation. The Federal Government has already decided that people are impoverished if they only have $2,000 in an account, and they are giving -- these people are eligible for this benefit of $700 a month.

So, I think bringing it down below $2,000 is -- you are going to have a lot of SSI recipients going into courts trying to get that other $1,000 if you bring it that low. There is no reason to bring it that low.

MS. WILNER: I would just add that we have been speaking to Connecticut advocates, especially legal service advocates and people who work with the elderly about their $1,000 amount, and their one criticism of their statute was $1,000 was not enough for our clients, and $1,000 is not enough for people in New York. I realize that not every area is as expensive on a daily basis as New York is, but many people's rents are more than a thousand dollars. So, I just disagree with the

idea that $1,000 is enough money to really give somebody a -- you know, that sort of basic, minimal subsistence level protection, which is what this is all about.

And not to keep arguing back and forth over, you know, our statute, and we can talk about our things, but I don't believe that our exemptions are stacked per account. So, it's not accurate to say that $4,740, or whatever it is, is an exempt amount. It's one or the other.

MR. PAHL: One question we got from the audience that I think follows up on a point that Judge Flanagan made is to ask, is segregation of funds feasible for consumers? Should there be a mechanism to provide consumers with advance notice of a need to segregate their funds? If so, what should that mechanism be?

Sort of asks the question of, you know, how easy is it to separate out funds, and if that's something that should be done, how can consumers be informed that that is something they should be considering?

MR. OLSHAN: You know, Tom, an exempt income account from the collection attorney perspective would be fantastic, because as I mentioned initially, we don't want to attach this money, and if there was an exempt income account that was set up where the judgment debtor can have those exempt funds electronically deposited

into his account that's exempt from attachment, this would all go away.

I understand that it may not be easy for the banks, because it's another account they have to set up, and there might be an expense to those accounts, but if there could somehow be a forgiveness of the fees on these exempt income accounts, it might be a win-win all around.

MS. KERRIGAN: We would probably have to look into that on the operational side. It sounds like what they're positing is an identified ACH direct deposit -- just one? More than one? I don't know -- coming into an account that otherwise somehow is restricted from any credits going in, whether it's someone transferring something in online banking or depositing something, you know, through an ATM or whatever. I think that would need some real operational sort of brainstorming.

MR. GRIPPO: And one of the things that at the federal level we're always concerned about is assuming or placing some requirement on banks that relates to servicing benefit recipients, and if there's a presumption that some extra service or extra account might be needed to properly service a beneficiary, then that's more expensive, and the banks would be less likely to service those recipients. So, that's

something to think about.

I think, going back to what I said earlier, if -- I think banks would be able to come up with unique and effective solutions when the Federal Government is very clearly encoding its deposits as exempt, because solutions may not be there now, but if a DDA system can clearly identify an exempt deposit automatically, I'm sure that both the large banks and the small banks that use other software products will be able to do things to segregate those moneys somehow.

MR. TYLER: This idea was advanced I think in 1999, and they were called electronic -- ETAs is the acronym, I'm not sure actually what it stands for, and they never -- they never picked up, and some people say it's because the banks didn't push them; some people say the consumers didn't want them.

As a legal services person, I can say that the problem of commingling -- and I've advocated on behalf of clients to release accounts two or three hundred times and looked through the bank records, and people do add money to their account. They need to add money to their account. They've got to make -- they have to have a check clear. They have to make sure rent passes, that sort of stuff.

And I think even Bank of America said in their

comments that when they did an analysis, 92 percent of SSI and Social Security recipients commingled their accounts. So, I -- and I can understand the banks are saying, "Well, we don't know how to deal with this commingling." We advocates believe you can, but be that as it may, the value of what Treasury is thinking of doing by establishing this bright line, no one cares about commingling. You just -- the question is, you know, is the balance below this amount? If it's above the amount, set that money aside for the creditor, and they --

MR. OLSHAN: For the hearing.

MR. TYLER: For the hearing, whatever, but that's the way to do it, and that is of value. It makes the bank's life easier, and it deals with the reality of the low-income person who -- you know, I have clients who, you know, collect bottles and cans and turn them in and put the money in so that they can then use their -- you know, make sure their debit card doesn't bounce. I have other clients who use debit cards, and the debit card, you swipe that, "Oh, you know, I am going to return this, I don't need it." That goes in as a new credit.

I have had creditors say to me, "It's commingled, there's a credit there." I'm like, "Well,

that was the debit card. Like, it was the exact same number as here. It was a returned item." But the law is, if your take the money out, you can't just put it back in and keep the exemption status.

So, there are all sorts of reasons that -- the idea of setting up separate accounts really will not work. The consumer doesn't want it, and the banks have -- it's been out there, it hasn't worked, and more importantly, the idea of the Treasury setting a bright-line rule really has a lot of value in protecting and really giving meaning to the exemption provisions of the Social Security Act.

MR. TENHUNDFELD: I would agree with everything Johnson just said. We looked into that at the point when we were putting together a comment letter I think in response to some regs, because one of the ideas that was discussed amongst the banks was, "Well, how about the idea of dual accounts?" And people pretty quickly came to the realization that we're actually asking a lot of the consumer in that case, to have to manage two accounts. There would be two fees associated with the accounts. It's more of a hassle for the consumer to try to construct that and maintain that going forward than it seemed to be worth.

And so I would agree with Johnson, that I think

the better, cleaner approach would be something like the Connecticut statute, whether it's just a safe harbor, you know, the consumer has enough to live on, but the rest of the process is fairly automatic after that.

MR. OLSHAN: On commingling, Tom, just to throw this out, it may be moot now with what Treasury is talking about doing, but Judge Donnelly in the Chicago roundtable had a terrific suggestion in Illinois that resulted from -- yes, again -- state-level collaboration between the consumer bar, creditor bar, and the bench, and they agreed that when there's commingling, you look back 90 days at the bank account. You look at what moneys were deposited from exempt sources; what moneys were deposited from other sources. Take the percentage -- or I should say, identify the percentage of each, and then look at the money that was actually attached, and take -- and apply those percentages and divvy it that way. And that was actually an agreement in Illinois which was discussed, which is interesting.

MR. PAHL: I'm going to ask one more question that we received from the audience, which relates to essentially when a bank has garnished exempt funds when they should not have, and the question is, what are the panelists' views on creating a private right of action for actual damages, statutory damages, attorneys' fees

and costs to enforce federal protection of exempt bank funds?

I guess the idea would be that there would be a private action to enforce the current federal prohibition on garnishing exempt funds. Who would like to speak to that?

MR. OLSHAN: The collection attorney has no knowledge, so if the collection attorney is potentially liable, that would be wrong.

JUDGE FLANAGAN: And who would the private action be against? The bank is going to get in now.

MR. PAHL: Yeah. I think that would be the -- I think that would be the import of the question.

MR. TYLER: Our office, South Brooklyn Legal Services, did sue Bank of America, North Fork Bank, and a smaller bank for freezing of an account that -- actually, freezing accounts of three clients that had only direct deposit money in them. We did not seek any monetary damages. I mean, we understood that the bank was following New York law. We were challenging the constitutionality of the law.

So, I think creating a law that requires the banks to do all the thinking of trying to determine when an account is completely clean and not commingled actually isn't really the best result here, because

you're going to have low-income clients who need their money, who use their debit card and return items, or get a birthday check or collect cans, and the real relief is really what Treasury is offering, which will provide much better relief than we could have gotten out of our lawsuit and that, frankly, creating a cause of action like this against banks, it's really not going to help the consumers as much as a bright-line rule.

MS. KERRIGAN: And we would agree with that. I think the walking the tight rope that banks have to do between -- you know, between the interests of the creditors and the interests of our own customers and to open things up to, you know, a right of action if we happen to get it wrong or, you know, just happen to misinterpret it, not to mention, in my bank, we handle over a million such garnishments and so forth a year with, you know, the requisite number of full-time employees working on those matters, trying to make sure they are trained and can read legal documents and so on, and the concept of the garnishee, who is in between these other two parties, trying to sort out and figure all of that out, and the cost of it is really -- it just -- I think it throws things way up.

MS. WILNER: I would say as an advocate for consumers, I mean, I'm always happy to have another

remedy that I can use, you know, to protect my clients' rights when their rights are violated, but I would say, you know, I want to push back on this idea that the collection agency or the collection attorney has no idea what's in the account, can't find out, and is just ignorant of the system. I mean, that's not the case. Collection attorneys have plenty of discovery tools. They can find out what information -- what's in the account by sending an information subpoena.

So, I would really actually be interested in seeing more of a duty on the collection bar to determine what's in the account before they freeze it, and I think it should be a violation of the Fair Debt Collection Practices Act and an unfair trade practice for a collection lawyer to seize or garnish exempt funds, and subject to bona fide error, let's adopt some procedures to make sure that it doesn't happen. And if you have your procedures in place, you are not going to be held liable.

But I'd like to see everyone across the country, you know, who's involved in garnishing accounts developing some procedures and putting some energy into making sure that that's not happening anymore.

MR. PAHL: Well, that was an issue that we heard about at our San Francisco roundtable, that suggestion

was made, that there are some states, I believe like Washington State, which require a debt collection attorney, when they go to a court and seek a garnishment order, that the debt collection attorney has to certify that they believe that the funds that they're seeking to garnish are not exempt. I would be interested in people's thoughts as to that as an idea.

MR. OLSHAN: Tom, if I may, Connecticut had a district court case at some point, Atresta v. State Credit Adjustment (phonetic). It's a U.S. District Court, Connecticut District, 2000 case. And the judge stated that exemptions are not self-executing, that the attorneys can't read the judgment debtor's mind.

With regard to a duty to investigate, I have tried in the past, Claudia. I've sent information subpoenas, and I spoke in October of '07 at the FTC workshop on this, and I answered the same question. I sent out hundreds of information subpoenas, and I got maybe a handful back.

I think to put that duty on attorneys is debt avoidance. I don't think an attorney would ever be able to sign that affidavit, because we just don't have the information. We don't want to attach those accounts. We don't do it purposefully. We are just trying to collect the judgment debt. And we don't have any way to

know what's in there.

So, I think what Treasury is talking about is terrific, and I spoke to Gary a bit in the hallway before this program. I look forward to further dialogue and being able to participate in the comment period on that proposed rule. I like the bright-line test, also.

I do think that $1,000 is a very reasonable number for the reasons I've already mentioned, but I don't think there's a duty to investigate, nor should there be, fairly.

MS. WILNER: Well, all I can say is that I've seen collection logs where the collection log says, you know, "SSI income" or "Social Security income" and still the account was frozen. So, you know, if you in your office, you know, may have a certain set of ethical procedures and you don't want to restrain exempt funds, but I don't think that's true of, you know, the entire collection bar, because we see too many problems, you know, for everyone to be doing things correctly.

MR. OLSHAN: If the collection attorney has actual information that the money in the account is from an exempt source and they attach it anyway, that's a problem, but I can say that -- your case is an anecdotal one. I can say, in general, attorneys do not attach exempt funds on purpose.

MR. TYLER: If I can just comment on this, because I'm really hoping that Treasury will come out with this rule, but in the event they don't, I want to make clear a couple of things.

HSBC, a fairly big bank, I once called them about a frozen bank account, and the person said, "Oh, our log shows we told the creditor this money was exempt."

I said, "Why did you freeze it?"

"They told us we had to freeze it."

"You told them that --

"Maybe they wanted their attention."

I said, "Really?"

She said, "Yeah. Actually, we have a whole list of attorneys we do not call anymore on this issue, because they've always told us they want it frozen when we confront them that the account is exempt."

So, banks can tell, and if any of you have parents who are retired, look at their bank statement. It says "Social Security." As the judge was saying, on the 3rd of the month, that's when Social Security comes in. It comes in once a month, and it says "Social Security." Your parent is not an employee of the Social Security administration.

Banks do know. It's based on -- there's a

regulation that requires bank statements to be readable by consumers and to translate where the electronic transfers come from, and I guarantee you every bank statement that you see will not have coding or just numbers. It says "Social Security." So, banks do know.

I agree that banks find it difficult to deal with this concept of commingling, whether the account contains nonexempt money, but every state has accounting principles that are fairly simple. There are basically only two different kinds. So, banks can figure out if they want to, and Citibank has figured it out, Banco Popular has figured it out, a teeny bank, New York community bank, they know how to do it. They do this. They protect exempt money. So, banks can do it if they choose to do it.

MR. TENHUNDFELD: If I could just respond on that, I think the issue of coding is as important for the efficiency point as it is for the ability to know, by looking at a statement, where the funds come from, but it's the commingling that we really have a hard time with. If you have an account where all you have is month after month deposit of Social Security payments, I mean, that's fine, the bank can clearly identify that as funds that are exempt. But the moment you deposit something that's not potentially exempt, you then muddy

the water, and it's very difficult -- and from I hear from the banks I've spoken with, it's impossible for the bank to know reliably what's exempt and what's not.

Now, you could put in place last-in, last-out or first-in, first-out, you know, some sort of construct to try to get around that, but that said, I actually think that the Connecticut solution or whatever Treasury is working towards is probably a cleaner way to do that. You just say to the consumer, "Boom, you know, here's the amount of money that you can live on, and the rest is subject to the garnishment procedures."

MR. GRIPPO: Yeah, and I think that is the approach we're investigating, so that if there is any exempt deposit in the account to whomever, the accountholder, someone for whom they are a representative payee, a child, to an exempt deposit we should apply these protections. And following a rule like that solves all the questions about commingling of funds, joint ownership, whether there is an exception to the exemption for garnishment, which there is for alimony and child support, and any other number of facts or attributes that may be attached to a particular case.

So, as I said earlier, we're in favor of a very simple bright-line test of exempt deposit from whatever source, to whomever, in the account triggers this

protection, without forcing the bank or any other party to sift through and make judgments about a particular dollar amount or other attributes of the account.

MR. TENHUNDFELD: Can I make one last -- well, not one last, but one additional comment about the notion of extended private rights of action? You probably all have seen the FDIC Survey of Unbanked and Underbanked that just came out this week, and I don't have the precise figure off the top of my head, but there's a significant percentage of Americans that are unbanked and a large percentage that are underbanked.

The more private rights you create associated with accounts that could be used to further reach out to the unbanked and underbanked, the more problematic it's going to be to close that gap, and if there are cleaner, more efficient solutions to the problem, I think everybody benefits, not just banks, but consumers, the people -- the creditors. Everybody ultimately wins from a less adversarial process.

MR. GRIPPO: I think that's a comment that I sort of echoed earlier. Anything that adds cost or risk or uncertainty to providing banking services to beneficiaries would lead to some unintended consequences that we need to be mindful of.

MR. OLSHAN: To be clear, Tom, collection

lawyers just want clear rules, clear law. That's a wonderful point we agree completely with. Right now there's a lot of gray out there, and it may work with some people, but it doesn't work when you're attempting to work within a fair system, and we want clarity, and we look forward to participating in the discussion with the Treasury.

MS. WILNER: And from our perspective, I mean, clarity benefits the consumer as well, particularly when determining an exemption, it's much better to, you know, have an amount that you can tell immediately than to spend hours and weeks, you know, faxing back and forth with a collection attorney.

So, just to be clear, we think that the Treasury approach that's coming out, you know, is going to be wonderful. So, we support it. It sounds like, you know, it will be available soon.

MR. PAHL: One question I want to ask is to what extent do consumers understand what their rights are not to have these funds garnished and is there a need to do more to inform consumers what their rights are?

MR. GRIPPO: I can say we are considering, as part of our rule-making, a model or standard notice that we would ask financial institutions to issue upon receipt of a garnishment order and identification that

there are exempt funds in the account. So, a very simple, plain language notice that any financial institution could forward on, sent along perhaps with any other required notices or claims forms that a state might require or sent by itself, is something we're considering to make sure that there's more disclosure here.

MR. TYLER: You know, I think it varies depending on the sophistication of the consumer. I had a very intelligent guy make the exemption claim directly to the debt collector, and in fairness to Adam, what happens is you're not dealing with lawyers when you call a debt collector who's frozen your bank account. You're talking to someone who's working on commission, I think, I think that's how it works. You're definitely not dealing with lawyers. I mean, this guy says, "Social Security? That only applies if something really bad happens to you, like, you know, you lost your leg or you only have one lung." I kid you not.

So, knowing your exemptions doesn't necessarily get you anywhere, other than if you can find a lawyer, like a legal services lawyer, to help you, and there are just not many that can help you, and then you're basically stuck having to -- you know, and then you have to have the temerity to go to court and actually assert

your exemption. Some people just walk away from three or four hundred dollars in a bank account. So, I think it depends.

I actually think education as a solution to this problem so that people know their rights and then go to court more or try to find, you know, me or Claudia -- and we've already got enough work to do -- is not the solution. I think the solution really is to make it automatic, so people actually don't need to know this right, and their account is just safe, and that's what a bank account is for. It's supposed to be safe.

MR. PAHL: I just want to ask one last question to follow up on something that we had heard in prior roundtables as an idea, and one thing that we had heard is that one of the challenges is banks would freeze accounts and they would have up to 30 days to answer a garnishment order, and one of the proposals that we had heard is that if the amount of time that banks had to file an answer to the garnishment order were shortened from 30 days to, like, ten days, for example, that that would be helpful to consumers.

I'd be interested if anybody has any thoughts as to whether shortening the time during which banks have to respond to the garnishment order would be useful or not.

MR. TENHUNDFELD: I'll take a crack at it. To the extent there is a freeze that is placed on the account, there is still hardship that's going to be imposed on the consumer, and so, again, going back to the notion if there is a more elegant solution, if you will, then I think we would all benefit from that. So, you know, ten versus 30 reduces the hardship, but it doesn't eliminate it.

MR. PAHL: Okay. And one last question from some of our folks who are participating through our Web site. I think Kathleen is probably the best person to answer this.

The question is, can banks create standardized coding for exempt accounts so that specific deposits can be coded as exempt when they come into the account?

MS. KERRIGAN: Well, that has -- the concept of coding an exempt deposit is part of the conversation that we have been having for quite some time and that we support, you know, the concepts that Gary's describing that Treasury is working on.

Coding an account as exempt falls into the problem that we've discussed, and from a practical standpoint, you may be able to code an account in a certain way, but that -- how does that -- you know, how does that draw the fence around putting any other funds

in or, you know, the practical use of the account? So, it's -- I don't -- I'm not quite sure I understand that, but I think that we've kind of alluded to some of the difficulties in trying to do that.

The coding of benefits I think -- and we're talking about the future state, and one of the things that we've been discussing with the NACHA group and that they -- they have also participated in the discussions with Treasury, is that the standard entry class code, which is a three-letter code, and eventually we would like to see that become a rule, and that would be a more time-consuming change to the way benefits are, you know, transmitted out there, so that we know not just the federal exemptions, but also state exemptions.

Right now -- and I'm interested in seeing the federal notice that may go out to a consumer, but you may layer a very nice, simple federal notice over top of a slightly more complex state notice that says, "Here's what you do if you have federal exemptions, here's what you do if you have state exemptions," and then you may have two different processes there.

So, ultimately, I think for consumers and for garnishees, such as large banks, large, small, whatever, the idea of creating kind of a uniform, a very, very simple but practical and efficient manner of

transmitting those payments so that we hope -- I think there still are some operational questions on the software side for banks -- we hope that that will lead to something that will be more automated, eventually.

MR. OLSHAN: Tom, if I can just clarify one thing about the Connecticut rule that I mentioned before. I mentioned Social Security funds. I want to clarify that the types of exempt income that are relevant for the Connecticut analysis are as follows: Veterans benefits, federal veterans benefits, number one; number two, Social Security benefits; number three, child support payments received from the State Division of Child Support. I just wanted to clarify that.

MR. PAHL: Okay.

Well, we've heard a lot of things about what the Department of Treasury is doing, a lot of different approaches at the state level, and one thing I wanted to ask the panelists or give anyone an opportunity to ask is, is there anything going forward that the FTC could help with this problem concerning the garnishment of exempt funds? Anything more we at the FTC can do?

MR. TYLER: I have an idea. I had one -- I brought a Fair Debt Collection Practice Act against a lawyer who forced me essentially to go to court -- I'm in Brooklyn -- all the way out in Hempstead to claim my

exemption for my client -- a quick train ride, right? -- even though I gave him all the documentation, and he actually -- in New York, what you do is you freeze the account, and then you execute on the account. You take the money after that.

So, he had already had the money. He had $1,500 in Social Security and child support payments. So, I gave him all the bank statements showing it all went in, and he wouldn't give it back to me. "Well, if you want to go to -- we'll enter a payment plan or you can go to court."

I was, like, "I don't want to go to court, I have to go all the way out to Mineola to file this thing."

So, we did it. I got the money back. I actually had a decision written up by the judge -- he didn't even show up -- which got published. So, that was nice.

But then I brought a Fair Debt Collection Practice Act against him, and the FTC makes recommendations about that. You know, the statutory penalty is a thousand bucks. That's all I can get for the damages. I can get actual damages, but my client -- well, for whatever reason, we didn't get the actual damages. That's what we got or that's what the limit

is, I'll put it that way.

They should raise the limit. It's a parking fee. I mean, it really is no deterrent. The attorneys' fees are much more of a deterrent, and legal services offices that represent these sort of individuals can't collect them under the way that the laws are, so that there really isn't anything making them concerned about -- at least this gentleman -- about violating the Fair Debt Collection Practices Act.

MR. PAHL: One thing I'd just note is that $1,000 amount has been in the statute since 1977. The FTC prepared and sent to Congress a workshop report earlier this year in which the FTC suggested to Congress they consider at least increasing that amount to reflect increase in cost of living since 1977.

Adam?

MR. OLSHAN: Tom, just two points very briefly: First off, I can see increasing the $1,000 where it's appropriate to do so. The challenge is that in 1977, the FDCPA was crafted to be a defensive shield against unfair debt collection and abusive practices. In many cases, the FDCPA is now being used as an offensive sword, inappropriately, to generate attorney fees, and I think that that needs to be taken into account when that $1,000 is potentially raised.

Also, I'd be remiss if I didn't mention that this discussion, there's been a lot of consensus, and there's been consensus because the world has changed. Electronic commerce is the way of the 21st century, and for that reason, the Treasury is going to discuss rule-making. For the same reason, the 21st century is a different age than what we were in just 20 years ago, and evidence has changed, and I wanted to make that point with regard to proof of indebtedness, because I do think that information is now evidence in the 21st century that supports our claim.

MR. PAHL: Well, thank you very much. I think we will finish up at this point. We're going to have some sort of summary remarks from Joel Winston and then some closing remarks for the entire roundtable today. I want to thank all of you for an enlightening and interesting discussion about garnishment. So, Joel.

MR. WINSTON: Nobody's running out the door, terrific.

Let me just summarize in a couple of minutes what I heard here in this last panel, and then I'll talk more generally. I was going to congratulate the panel on having such a civil discussion until about the last two minutes when things got a little dicier, but in general, I think it's been a really good discussion from

three different perspectives, from the bank perspective, from the consumer advocates' perspective, and from the collection perspective.

There seemed to be a fair amount of agreement that there is a problem here, at least there is now, that there seemed to be solutions that are in sight, both through these new state laws and the Treasury proposal, and perhaps technology is the answer here.

There was a discussion about how frequently exempt funds are frozen and why that happens, is that something that's done inadvertently or are there other reasons. There was some discussion also about the dilemma that banks have when they get a garnishment order and is there any way they can tell whether the funds are exempt that are subject to that order; is there any way that that can be segregated.

And what we heard from the bank representatives is that basically money is fungible, and they can't really identify where the exempt funds come from -- where the funds come from, whether they're exempt or not. I think there was some disagreement on that over the course of the panel.

There was discussion about the commingling problem, that if a consumer puts money into the same account that has exempt funds in it, that it may lose

its exempt status, and that's a concern. And there was some discussion about what should be the amount of money that is available to consumers while the issue of exempt funds is thrashed out, should it be $1,000? $2,000? should it be more? But I think everyone agreed, at least in general, that there ought to be enough money that the consumer can access immediately to live on. So, I thought that was a good discussion as well.

And then there was discussion about whether there should be a duty on the collection lawyer and whether the lawyer, before filing for the garnishment, should be doing some due diligence to ensure that they're not going after exempt funds, perhaps with a safe harbor based on bona fide error.

And finally, private rights of action, the pros and cons of that, as well as how do we make sure that consumers do understand what their rights are, and some good ideas, I think, on that that Treasury is considering. So, again, a very civil discussion, I think, and very useful.

But let me talk more broadly just to close this up, and it's 5:00 on Friday, so I'm going to keep it very short.

First I want to thank our staff who put together this workshop, in particular Tom Pahl, Julie Bush, Bevin

Murphy, Parrish Bergquist, Kara Redding, and a host of others who made this thing go as smoothly as it did.

(Applause.)

MR. WINSTON: But I also want to give a special thanks to all the participants who were uniformly excellent. I have been to a lot of these, and this is one of the best I've seen in a long time. So, thank you to all the participants.

(Applause.)

MR. WINSTON: And I hope that over the course of the day and the course of our three roundtables that we've done in the last couple of months, that we've moved the ball forward some and not just kicked the can down the road, and I think we have. Let me just lay out some of the major themes I heard, and, you know, where we might go from here.

Throughout these roundtables, we've talked about really the whole life cycle of debt collection litigation, you know, from the service of process all the way through to garnishment and collection of judgments, and I think everyone would agree that there are no simple answers here, much to my regret.

Throughout these roundtables, there was a vigorous debate about what the problems are, how prevalent are they, what the impact on consumers is, and

what are the solutions to these problems? And, again, I think it's fair to say that there are a lot of good ideas, a lot of good initiatives going on out there, but no one magic bullet.

Personally, I wish we had more data. When we make recommendations here, we like to make sure that they're based on real world data, and while there's a lot of discussion about, you know, again, the prevalence of these problems, how often is service of process ineffective or thrown in the sewer, for example, why aren't consumers participating more in the litigation of their lawsuits, and all these different questions, I think, are really empirical questions, and I realize that there really isn't much data, and I think that's something that we should all think about, is is there a way of getting better answers on the scope of these problems and, you know, what we can do about them?

I think everyone would agree -- at least I think, you know, I think it's the case -- that the consumer experience in debt collection litigation can be improved, that it can be made fairer, that it can be made easier to navigate and more transparent. I think we would all agree that facing collection litigation is a daunting prospect for consumers; it's scary, it's confusing, it's inconvenient. There are many barriers

to participation, and, you know, just in general, I think it's a very difficult process for consumers.

Through the course of these roundtables, I think we came up with some good ideas for improvements in each aspect of debt collection litigation. In service of process, there were a number of ideas about how we could make that better; better disclosures about the process for consumers, better education for consumers on their rights and responsibilities, and more information about the specifics of their case, including what evidence there is against them.

I think there could be improvements in how the statute of limitations issue is handled, which I think, as I said before, is a particularly thorny issue. This is an area where there is a lot of consumer ignorance and misunderstanding and where the consequences of that can be particularly serious for consumers. So, I think, again, we need to go back to the drawing board and think about how we can resolve those issues.

I think there can be improvements in the extent to which there are safeguards to ensure that collection suits are well grounded and that the pleadings allow the courts and consumers to make at least a preliminary assessment as to the merits of the case, and I think there could be improvement in the collection of judgment

process to ensure that consumers' funds that are exempt are not garnished. So, all of those are areas for improvement.

So, how do we go about making these improvements? Well, that's stickier, and I think it's important to recognize that there are legitimate, competing interests and legitimate, competing views on these problems, that consumers have a legitimate interest in having a fair and accessible process, where their lawsuit is adjudicated, and that collectors have a legitimate interest in having a cost-effective way to obtain judgments against those who don't pay their debts.

Both sides have responsibilities, as well, to ensure that the process works as it should. And as always, we all collectively face the issue of how do we go about stopping the abuses without unduly harming or unduly burdening those who are following the system properly?

I think there have been a lot of promising initiatives that have been begun, particularly in the local courts. I think a lot of the ideas that the judges came up with and are implementing in their courts seemed to have been successful, but, of course, every initiative has its consequences, some intended, some

not.

There was some discussion, for example, of the privacy issue that -- the notion of much fuller disclosure of the specifics behind the lawsuit, including account names, account numbers, and that sort of thing, runs into the privacy issue. So, how do we balance all those things out? And it's one of these situations where you push in here and something pops out over there. So, we need to be careful.

And that's why we at the FTC undertake these reviews, these sorts of roundtables that we do. We like to think that we're very thorough, we're very thoughtful, and we're very deliberate in coming up with our recommendations. Some would take all that say that we're slow. Well, maybe we are, but we want to make sure we get it right, and we want to hear all the sides, and we want to make sure everyone has a voice in the process.

So, where do we go from here? Well, we're still collecting information. The comment period is ongoing until January 8th -- not July 8th, January 8th, for those who were here this morning -- and we will be reaching out, I'm sure, to a lot of you to get our questions answered. Ultimately, the end product is some sort of report, perhaps with recommendations to

Congress, perhaps with other ideas on how to address these issues.

But, again, I think it's really important that we all collectively try to move this ball forward. There won't be a magic answer, but we can certainly make things better I think for all sides. So, again, thank you all for attending. Thanks to the participants, and have a good weekend.

(Applause.)

(Whereupon, at 5:09 p.m., the proceeding was concluded.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P074805

CASE TITLE: DEBT COLLECTION ROUNDTABLE

DATE: DECEMBER 4, 2009

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 12/14/2009

SUSANNE BERGLING, RMR-CLR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE