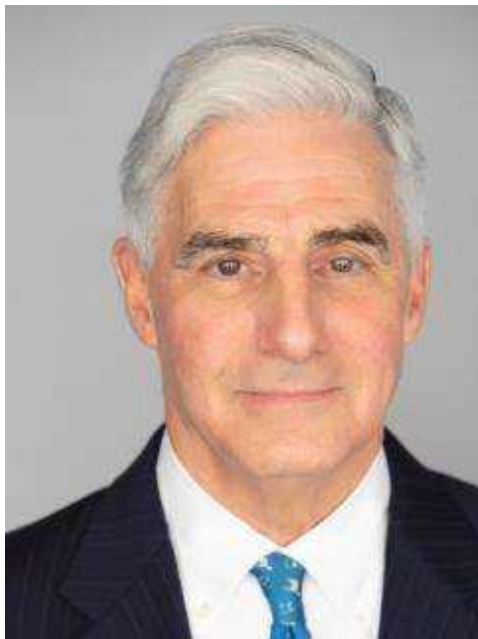


**MEDIATING CONSUMER CREDIT DISPUTES  
UNDER THE FCRA AND FDCPA IN  
DISTRICT COURT AND BANKRUPTCY COURT**

**U.S. District Court, Central District of California, ADR Program  
New Panel Mediator Training  
August 23, 2024**



Leonard L. Gumport  
Gumport Law Firm, PC  
201 South Lake Avenue, Ste. 505  
Pasadena, CA 91101  
[lgumport@gumportlaw.net](mailto:lgumport@gumportlaw.net)

## Table of Contents

|  | <u>Page</u> |
|--|-------------|
| [I] Introduction.....  | 1           |
| [II] Summary of FCRA and FDCPA .....                                 | 2           |
| [A] The FCRA .....   | 2           |
| [B] The FDCPA.....   | 2           |
| [III] Background History of FCRA, FDCPA, and Bankruptcy Code .....   | 3           |
| [A] 1949-1966: Start of General Purpose Charge and Credit Cards..... | 3           |
| [B] 1968 Consumer Credit Protection Act (with TILA).....             | 3           |
| [C] 1970 TILA Amendments and FCRA.....                               | 3           |
| [D] 1970 Bankruptcy Act Amendments .....                             | 4           |
| [E] 1973 Report of Commission on Bankruptcy Laws .....               | 4           |
| [F] 1976 <i>Millstone</i> .....                                      | 4           |
| [G] 1977 FDCPA .....   | 5           |
| [H] 1978 Bankruptcy Code .....                                       | 5           |
| [I] 1984 BAFJA .....   | 5           |
| [J] 1996 FCRA Amendments .....                                       | 5           |
| [K] 2003 FCRA Amendments.....  | 6           |
| [L] 2005 BAPCPA.....   | 6           |
| [M] 2007 <i>Safeco</i> .....   | 6           |
| [N] 2019 <i>Taggart</i> .....  | 6           |
| [O] 2021 <i>TransUnion</i> .....                                     | 6           |
| [P] 2024 <i>Kirtz</i> .....  | 7           |

## Table of Contents

|  | <u>Page</u> |
|--|-------------|
| [IV] FCRA .....  | 7           |
| [A] The FCRA .....   | 7           |
| [B] Jurisdiction & Standing .....                                      | 8           |
| [C] Statute of Limitations .....                                       | 9           |
| [D] Scienter .....   | 9           |
| [E] Inaccurate or Misleading Information .....                         | 9           |
| [F] Remedies .....   | 10          |
| [F.1] Actual Damages – General Rules .....                             | 10          |
| [F.2] Actual Damages – Emotional Distress .....                        | 10          |
| [F.3] Actual Damages – Business Losses .....                           | 10          |
| [F.4] Statutory Damages .....  | 10          |
| [F.5] Punitive Damages .....   | 11          |
| [F.6] Attorney’s Fees .....  | 11          |
| [F.7] One-Satisfaction Rule .....                                      | 11          |
| [F.8] Sovereign Immunity .....   | 11          |
| [G] Reasonable Procedures Claim by Consumer against CRA [§1681e] ..... | 11          |
| [G.1] Statutory Text .....   | 12          |
| [G.2] Elements of Claim .....  | 12          |
| [H] Reinvestigation Claim by Consumer against CRA [§ 1681i] .....      | 13          |
| [H.1] Statutory Text .....   | 13          |
| [H.2] Elements of Claim .....  | 13          |

## Table of Contents

|  | <u>Page</u> |
|--|-------------|
| [I] Fraud-Blocking Claim by Consumer against CRA [§ 1681c-2(a)] .... | 15          |
| [J] Claim by Consumer against Furnishers [§ 1681s-2(b)] .....        | 15          |
| [J.1] Statutory Text .....   | 15          |
| [J.2] Elements of Claim .....  | 16          |
| [K] Preemption & State Law .....                                     | 17          |
| [V] FDCPA .....  | 19          |
| [A] The FDCPA .....  | 19          |
| [B] Jurisdiction & Standing .....                                    | 19          |
| [C] Statute of Limitations.....                                      | 19          |
| [D] Scienter .....   | 20          |
| [E] Materiality & Least Sophisticated Debtor Test .....              | 20          |
| [F] Elements of a Claim under FDCPA .....                            | 21          |
| [F.1] The Plaintiff is a Consumer [1st Element] .....                | 21          |
| [F.2] The Defendant is a Debt Collector [2nd Element] .....          | 21          |
| [F.3] The Defendant Violated the FDCPA [3rd Element] .....           | 22          |
| [G] Bona Fide Error Defense .....                                    | 23          |
| [H] Nonjudicial Foreclosure .....                                    | 23          |
| [I] Remedies .....   | 23          |
| [I.1] Remedies – Damages & Fees .....                                | 23          |
| [I.2] Remedies – Business Losses .....                               | 24          |

///

## Table of Contents

|  | <u>Page</u> |
|--|-------------|
| [I.3] Remedies – Emotional Distress Damages .....                          | 24          |
| [I.4] Remedies – Statutory Damages .....                                   | 24          |
| [I.5] Remedies – No Equitable Offsets .....                                | 24          |
| [I.6] Remedies – Attorney’s Fees .....                                     | 24          |
| [J] Preemption & State Law .....   | 25          |
| [VI] California’s Consumer Credit Reporting Agencies Act.....              | 25          |
| [VII] California’s Rosenthal Act .....                                     | 26          |
| [VIII] California’s Fair Debt Buying Practices Act.....                    | 27          |
| [IX] California’s Identity Theft Act .....                                 | 28          |
| [X] California’s Unfair Competition Law .....                              | 28          |
| [XI] Bankruptcy Stay and Discharge Disputes .....                          | 29          |
| [A] The Bankruptcy Estate .....  | 29          |
| [B] The Automatic Stay .....   | 29          |
| [C] The Bankruptcy Discharge.....  | 30          |
| [D] Denial of Discharge and Exceptions to Discharge .....                  | 32          |
| [XII] Panel Mediation Procedures in District Court & Bankruptcy Court..... | 32          |

# MEDIATING CONSUMER CREDIT DISPUTES UNDER THE FCRA AND FDCPA IN DISTRICT COURT AND BANKRUPTCY COURT

by  
Leonard L. Gumport<sup>1</sup>

## [I] Introduction

This outline is an introduction to mediating consumer credit disputes in federal court under the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq., and the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq.

The FCRA and FDCPA authorize one-way attorney’s fees in favor of an individual who prevails on his or her claims for violations of those statutes. Neither statute has a minimum amount in controversy requirement. Although some disputes under those statutes lack merit or are trivial, others may involve significant claims for economic and emotional distress damages in addition to attorney’s fees.

The FCRA and FDCPA aren’t debt cancellation statutes. A consumer with unmanageable indebtedness debts may seek a discharge under the Bankruptcy Code, 11 U.S.C. § 101 et seq. In a debtor’s bankruptcy case, a creditor may seek to deny the debtor a discharge or to except the creditor’s claim from discharge.

Without charge from the mediator, a panel mediation in district court or bankruptcy court may help the parties and their counsel evaluate and settle a consumer credit dispute without the risk, expense, and delay of further federal court litigation.

“Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations.” U.S. District Court General Order No. 11-10 (C.D. Cal.) (“USDC G.O. #11-10”), § 4.2.

“A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.” USDC G.O. #11-10, § 4.2. For example, although the FCRA and FDCPA aren’t debt cancellation statutes, settlements of consumer credit disputes may include consensual debt cancellation.

A second hallmark of mediation is the confidentiality of mediation communications. Their confidentiality is enhanced by the mediator’s requiring all participants in a mediation to sign a confidentiality agreement. *See, e.g.*, USDC G.O. #11-10, §§ 9.1-9.4; U.S. Bankruptcy Court Third Amended General Order No. 95-01 (C.D. Cal.) (“USBC G.O. #95-01”), §§ 6.1-6.7; *see* Cal. Evid. Code §§ 1119-1129; *compare Vargas v. Quest Diagnostics*, 2021 U.S. Dist. LEXIS 157422, at \*7 n.4 (C.D.

---

<sup>1</sup> Leonard Gumport is a mediator and lawyer at Gumport Law Firm, PC in Pasadena, California. This outline is not a substitute for legal advice. The views stated in this outline are his personal opinions. They may change or be revised. They don’t reflect the views of anyone else.

Cal. 2021) (“Even if federal law solely governed the parties’ dispute, the weight of authority persuasively suggests the existence of a federal privilege that would itself prevent the requested discovery.”) (citing *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp. 2d 1164, 1180 (C.D. Cal. 1998), *aff’d without published opinion*, 216 F.3d 1082 (9th Cir. 2000)), with *Yintao Yu v. Bytedance Inc.*, 2024 U.S. Dist. LEXIS 81675, at \*3 (N.D. Cal. 2024) (“The Ninth Circuit has not yet recognized a federal mediation privilege, and district courts within the Ninth Circuit have diverged on the existence of such a privilege.”); *Olam v. Congress Mortg. Co.*, 68 F. Supp.2d 1110, 1125 (N.D. Cal. 1999) (“[T]he federal court must apply state privilege law when state substantive law is the source of the rule of decision on the claim to which the proffered evidence from the mediation is offered.”).

A third hallmark of mediation is the attendance of the clients and their counsel at the mediation session. *See, e.g.*, USDC G.O. #11-10, § 8.5; USBC G.O. #95-01, § 7.9. The mediation session is their opportunity to give their undivided attention to evaluating and resolving the dispute with the assistance of a neutral third party.

### **[II] Summary of FCRA and FDCPA**

#### **[A] The FCRA**

“A credit report can determine everything from whether a person can secure a credit card, purchase a home, win a new job, or start a small business.” *Dep’t of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 45 (2024) (*Kirtz*).

The FCRA provides civil remedies to consumers harmed by credit reporting agencies (“CRAs”) and their sources of information (“Furnishers”). The FCRA is not a strict liability statute. To prevail, the plaintiff consumer must show, among other things, that the defendant negligently or willfully violated the FCRA. Consumers do not have a right of action against a Furnisher unless it received a proper notice from the CRA.

The remedies for FCRA violations include attorney’s fees and actual damages (including damages for emotional distress), statutory damages, and punitive damages for willful violations (including reckless violations). Under the FCRA, a prevailing plaintiff is entitled to attorney’s fees. In contrast, a prevailing defendant generally is not entitled to attorney’s fees unless the plaintiff acted in bad faith. The FCRA has a 2-year statute of limitations and a 5-year statute of repose. The FCRA preempts inconsistent state laws.

#### **[B] The FDCPA**

The FDCPA provides civil remedies to consumers for abusive debt collection practices by debt collectors of consumer debts. Unlike the FCRA, the FDCPA imposes strict liability. There is a narrow defense for violations that result from bona fide errors. The remedies include attorney’s fees, actual damages (including damages for emotional distress), and statutory damages (but not punitive damages).

///

Under the FDCPA, a prevailing plaintiff is entitled to attorney’s fees, but a prevailing defendant generally is generally not entitled to attorney’s fees unless the plaintiff acted in bad faith. The FDCPA has a 1-year statute of limitations. The FDCPA does not preempt state laws that provide more protection than the FDCPA.

### **[III] Background History of FCRA, FDCPA, and Bankruptcy Code**

#### **[A] 1949-1966: Start of General Purpose Charge and Credit Cards**

“In 1949-1950, Diner’s Club issued the first general purpose charge card, meant for high-end customers who used them for travel and entertainment purposes and paid the full amount of such charges each month. The American Express card and a Bank of America credit card, later to become Visa, were first issued in 1958. Other general purpose credit cards appeared in 1966.” *Bourgeois v. Live Nation Entm’t*, 430 Md. 14, 59 A.3d 509, 523 n.24 (Md. Ct. App. 2013) (citing Douglas Akers, Jay Golter, Brian Lamm, & Martha Solt, “Overview of Recent Developments in the Credit Card Industry,” 17 FDIC Banking Rev. 23 (2005)).

#### **[B] 1968 Consumer Credit Protection Act (with TILA)**

In 1968, Congress enacted the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146. Its stated purpose was “[t]o safeguard the consumer in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit; by restricting the garnishment of wages; and by creating the National Commission on Consumer Finance to study and make recommendations on the need for further regulation of the consumer finance industry; and for other purposes.” 82 Stat. at 146. Title I of the 1968 statute included the Truth in Lending Act (“TILA”), now codified at 15 U.S.C. § 1601 et seq.

#### **[C] 1970 TILA Amendments and FCRA**

In 1970, Congress enacted a law “[t]o amend the Federal Deposit Insurance Act to require insured banks to maintain certain records, to require that certain transactions in United States currency be reported to the Department of the Treasury, and for other purposes.” Act of Oct. 26, 1970, Pub. L. No. 91-508, 84 Stat. 1114.

Title V of Public Law 91-508 amended TILA to regulate the credit card industry. The amendments to TILA prohibited the unsolicited distribution of credit cards and limited cardholder liability to \$50 for unauthorized use of a credit card. 84 Stat. at 1642-1644. Those amendments now appear in 15 U.S.C. §§ 1642-1644.

///

///

///

Title VI of Public Law 91-508 enacted the FCRA as an amendment to the 1968 Consumer Credit Protection Act. *See* Pub. L. No. 91-508, Title VI, 84 Stat. 1127-1136; *see also Kirtz*, 601 U.S. 42, at 45 (“Recognizing the importance of accuracy in credit reporting, Congress adopted the Fair Credit Reporting Act in 1970 (FCRA).”) The FCRA is now codified at 15 U.S.C. § 1681 et seq.

As enacted, the FCRA primarily imposed duties on CRAs and certain users of CRA-prepared reports. FCRA granted consumers a private right of action to recover actual damages, costs, reasonable attorney’s fees, and, in the case of willful violations, punitive damages. Before 1996, FCRA did not grant consumers a private right of action against Furnishers for providing misinformation to CRAs. FCRA granted federal district courts jurisdiction without regard to the amount in controversy. 84 Stat. at 1134. The FCRA did not preempt State laws except to the extent that those laws were inconsistent with the FCRA. *Id.* at 1136.

#### **[D] 1970 Bankruptcy Act Amendments**

In 1970, in amendments to the 1898 Bankruptcy Act, Congress significantly centralized non-dischargeability litigation by authorizing bankruptcy courts to determine the non-dischargeability of specified claims (including claims for fraud) of creditors against the debtor. Act of Oct. 19, 1970, Pub. L. No. 91-467, 84 Stat. 990.

#### **[E] 1973 Report of Commission on Bankruptcy Laws**

In 1970, Congress created a “Commission on the Bankruptcy Laws of the United States” to “study, analyze, evaluate, and recommend changes” in existing bankruptcy laws “to reflect and adequately meet the demands of present technical, financial, and commercial activities.” Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

In 1973, in a report to Congress, the Commission stated: “The rapid growth of consumer installment and home mortgage credit since the end of World War II, resulting in greater personal and family ownership of residences, motor vehicles, major appliances, and other substantial household assets, has been a necessary condition to the rise in nonbusiness bankruptcy rates.” Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess., Pt. I, p. 49 (1973).

#### **[F] 1976 *Millstone***

In *Millstone v. O’Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976), the Eighth Circuit ruled that, under the FCRA, the “much maligned rule that there should be no recovery in tort for mere mental pain and anxiety” was “inapplicable” because the FCRA was “an independent cause of action.” *Id.* at 834-835 (distinguishing *Southern Express Company v. Byers*, 240 U.S. 612, 615 (1916) (McReynolds, J.)).

///

///

### **[G] 1977 FDCPA**

In 1977, Congress enacted the FDCPA, Pub. L. No. 95-109, 91 Stat. 874-883, to prevent abusive collection practices by debt collectors. The FDCPA is codified at 15 U.S.C. § 1692 et seq. As enacted, the FDCPA authorized the recovery of actual and statutory damages, plus costs and reasonable attorney's fees. The FDCPA did not preempt State laws except to the extent they were inconsistent with the FDCPA. It also provided: "For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title." 91 Stat. at 883.

### **[H] 1978 Bankruptcy Code**

In 1978, Congress enacted the Bankruptcy Code, 11 U.S.C. § 101 et seq., also known as the Bankruptcy Reform Act of 1978. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549. Section 362(a) of the Code, 11 U.S.C. § 362(a), provides that the filing of a bankruptcy petition automatically stays collection by creditors on their claims against the debtor, subject to specified exceptions. Grounds for excepting a creditor's claim from discharge are set forth in 11 U.S.C. § 523(a). Grounds for denying a debtor a discharge are set forth in 11 U.S.C. § 727(a). Section 524(a) of the Code, 11 U.S.C. § 524(a), provides that the debtor's discharge operates as an injunction.

### **[I] 1984 BAFJA**

Six years later, Congress amended the Bankruptcy Code by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA). Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333.

Section 304 of BAFJA added 11 U.S.C. § 362(h), which provided: "An individual injured by any willful violation of a stay provided by [11 U.S.C. § 362(a)] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 98 Stat. at 352. In 2005, §362(h) became § 362(k).

### **[J] 1996 FCRA Amendments**

In 1996, as part of an omnibus appropriations act, Congress amended the FCRA by enacting the Consumer Credit Reporting Reform Act of 1996 (the "1996 Amendments" or "1996 Reform Act"), Pub. L. No. 104-208, Div. A, Title II, Subtitle D, Ch. 1, 110 Stat. 3009-426 through 3009-454.

The 1996 Amendments authorized recovery of statutory damages (110 Stat. 3009-449 (amending 15 U.S.C. § 1681n)), imposed duties on Furnishers (110 Stat. 3009-447 through 3009-449 (codified at 15 U.S.C. § 1681s-2)), and modified the FCRA's preemption clause (110 Stat. 3009-452 through 3009-453).

///

As a result of the 1996 Amendments to the FCRA, “[w]here it had once authorized consumer suits against only consumer reporting agencies and users of their information, Congress now authorized consumer suits against ‘[a]ny person’ who willfully or negligently fails to comply with ‘any’ of the law’s ‘requirement[s].’” *Kirtz*, 601 U.S. at 47 (citing 110 Stat. 3009-446 and 15 U.S.C. §§ 1681n(a) and 1681o(a)).

### **[K] 2003 FCRA Amendments**

In 2003, Congress amended the FCRA by enacting the Fair and Accurate Credit Transactions Act of 2003 (“FACTA” or “the 2003 Amendments”), Pub. L. No. 108-159, 117 Stat. 1952-2012.

### **[L] 2005 BAPCPA**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) made numerous revisions to the Bankruptcy Code. Act of April 20, 2005, Pub. L. No. 109-8, 119 Stat. 23. Among other things, the BAPCPA renumbered 11 U.S.C. § 362(h) so that it became 11 U.S.C. § 362(k)(1).

### **[M] 2007 *Safeco***

In *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 71 (2007)), which construed the scienter requirements of FCRA, the Supreme Court decided that a “willful” violation of the FCRA includes a reckless FCRA violation.

### **[N] 2019 *Taggart***

The Bankruptcy Code does not give debtors an express private right of action against creditors who violate the discharge injunction. In *Taggart v. Lorenzen*, 587 U.S. 554 (2019), the Supreme Court held: “[A] court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor’s conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful.” *Id.* at 556 (emphasis in original)

### **[O] 2021 *TransUnion***

The FCRA does not contain an express amount in controversy requirement. In *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) (*TransUnion*), the Supreme Court ruled that a plaintiff lacks standing to assert an FCRA claim unless the plaintiff shows that he or she suffered a concrete harm.

///

///

///

## **[P] 2024 *Kirtz***

In 2024, in *Kirtz*, the Supreme Court decided that the FCRA “effects a clear waiver” of federal sovereign immunity. *Id.*, 601 U.S. at 50. In *Kirtz*, the Court did not decide whether the FCRA validly abrogates State sovereign immunity. *Id.* at 59 n.2. (“We do not face today any question about Congress’s power under the Constitution to abrogate state sovereign immunity, only a claim against the USDA, a federal agency whose immunity Congress is free to waive as it wishes.”). *See id.* at 60-61.

## **[IV] FCRA**

### **[A] The FCRA**

The Fair Credit Reporting Act (i.e., FCRA), 15 U.S.C. §§ 1681-1681x (as amended), was enacted “to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.” *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir. 2009) (*Gorman*). Section 1681(a)(4) of the FCRA states: “There is a need to insure [sic] that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” 15 U.S.C. § 1681(a)(4).

The FCRA gives a “consumer” a right of action for damages and attorney’s fees against a “person” who negligently or willfully violates the FCRA. 15 U.S.C. §§ 1681n-o. The FCRA states that “consumer” means “an individual.” *Id.*, § 1681a(c). The FCRA states that “person” includes an individual, partnership, corporation, trust, estate, cooperative, association, or governmental entity. *Id.*, § 1681a(b).

The FCRA imposes duties on consumer credit reporting agencies (i.e., “CRAs”). Section 1681a(f) states: “The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” 15 U.S.C. § 1681a(f). Experian, Equifax, and TransUnion are CRAs. *TransUnion*, 594 U.S. 413, at 419.

The FCRA requires CRAs to maintain reasonable procedures in consumer credit reporting and investigating consumer disputes. *See, e.g.*, 15 U.S.C. §§ 1681e(a), 1681i(1); *Avetisyan v. Experian Info. Sols., Inc.*, 2016 U.S. Dist. LEXIS 188845, at \*17 (C.D. Cal. 2016) (*Avetisyan*). “The FCRA also requires CRAs [to] reinvestigate credit report information whose accuracy the consumer disputes (15 U.S.C. § 1681(a)(1)(A)) and to ‘block’ the reporting of information that a consumer claims was the result of identity theft (15 U.S.C. § 15 U.S.C. 1681c-2(a).” *Avetisyan*. 2016 U.S. Dist. LEXIS 188845, at \*18.

///

///

The FCRA also prohibits CRAs from reporting certain items (regardless of their accuracy), except under specified circumstances. Such items include: (1) bankruptcy cases in which the order for relief is more than 10 years old, (2) civil suits and civil judgments that antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period, (3) paid tax liens which, from the date of payment, antedate the report by more than seven years, (4) accounts placed for collection or charged to profit and loss which antedate the report by more than seven years, (5) “other adverse information, other than records of convictions of crimes[,]” which antedates the report by more than seven years, and (6) specified veterans’ medical debts. 15 U.S.C. § 1681(c)(1)-(8).

In addition, the FCRA imposes duties on “Furnishers,” i.e., the entities who furnish credit information to CRAs. 15 U.S.C. § 1681s-2; *Miller v. Westlake Servs. LLC*, 2022 U.S. Dist. LEXIS 197076, at \*18 (C.D. Cal. 2022) (*Miller*); *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*7; see *Kirtz*, 601 U.S. at 46-47. “The relevant provision of the FCRA, 15 U.S.C. § 1681s-2(b), imposes four duties on Furnishers once they have received of a dispute from a CRA: (1) conduct an investigation, (2) review all relevant information received from [the] CRA, (3) report any inaccuracies found, [and] (4) modify or delete any incorrect information. 15 U.S.C. § 1681s-2(b)(1)(A)-(E).” *Dorian v. Cmty. Loan Servicing, LLC*, 2023 U.S. Dist. LEXIS 12915, at \*12 (N.D. Cal. 2023) (*Dorian*) (bracketed information added); see *Gorman*, 584 F.3d at 1154.

The Furnisher’s investigation must be reasonable. *Gorman*, 584 F.3d at 1155 (“By its ordinary meaning, an ‘investigation’ requires an inquiry likely to turn up information about the underlying facts and positions of the parties, not a cursory or sloppy review of the dispute.”).

The duties of a Furnisher under 15 U.S.C. § 1681s-2(b) are *not* privately enforceable by a consumer *unless* he or she first notifies the CRA and the CRA then notifies the Furnisher of the dispute. “[N]otice of a dispute received directly from the consumer does not trigger furnishers’ duties under [§ 1681s-2(b)].” *Dorian*, 2023 U.S. Dist. LEXIS 12915, at \*12 (brackets in original; quoting *Gorman*, 584 F.3d at 1154).

A consumer does not have a private right of action against a Furnisher for violating 15 U.S.C. § 1651s-2(a). *Mortimer v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 51877, at \*22 (N.D. Cal. 2013) (“Duties imposed on furnishers under subsection (a) [of § 1651a-2(a)] are enforceable only by federal or state agencies.”) (citing *Gorman*, 584 F.3d at 1154).

## **[B] Jurisdiction & Standing**

The FCRA grants federal district courts subject matter jurisdiction of FCRA claims without regard to the amount in controversy. 15 U.S.C. § 1681p. The absence of any amount in controversy requirement does not excuse the plaintiff from carrying the burden of showing that the plaintiff suffered a concrete harm. “No concrete harm, no standing.” *TransUnion*, 594 U.S. at 442.

“The mere presence of an inaccuracy in an internal credit file, if not disclosed to a third party, causes no concrete harm.” *Id.* at 434 (emphasis added). *See also Aguilar v. Lab. Corp. of Am.*, 2023 U.S. Dist. LEXIS 18839, at \*2 (C.D. Cal. 2023) (“While it is theoretically possible that there could be standing to pursue the FCRA claim in state court even if no federal standing exists, California courts also require a ‘concrete injury’ for standing to pursue a FCRA claim.”) (citing *Limon v. Circle K Stores Inc.*, 84 Cal. App. 5th 671, 707 (2022)).

### **[C] Statute of Limitations**

An action to enforce liability under the FCRA must be brought not later “than the earlier” of “(1) 2 years after the plaintiff’s discovery of the violation that is the basis for the plaintiff’s claim, or (2) 5 years after the date on which the violation that is the basis for such liability occurs.” 15 U.S.C. § 1681p.

The 5-year period is “statute of repose.” *Grigoryan v. Experian Info. Solutions, Inc.*, 84 F.Supp. 3d 1044, 1057-1058 (C.D. Cal. 2014). The defendant has the burden of proving that a reasonably diligent plaintiff would have discovered the facts constituting the violation. *Id.* at 1058.

### **[D] Scienter**

Unlike the FDCPA, The FCRA is not a strict liability statute. Instead, the FCRA requires the plaintiff to show that the defendant willfully or negligently violated the FCRA. 15 U.S.C. §§ 1681n-o. Even if the plaintiff establishes the elements of his or her FCRA claim, the defendant will not be liable under the FCRA if the defendant proves that it followed reasonable procedures to ensure the maximum possible accuracy of the information. *E.g.*, *Grigoryan v. Experian Info. Solutions, Inc.*, 84 F.Supp. 3d 1044, 1067 (C.D. Cal. 2014); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995) (*Guimond*) (“[A]n agency can escape liability if it establishes that an inaccurate report was generated despite the agency’s following reasonable procedures.”).

### **[E] Inaccurate or Misleading Information**

Under the FCRA, “information can be inaccurate ‘because it is patently incorrect, or because it is misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions.’” *Miller*, 2022 U.S. Dist. LEXIS 197076, \*30 (quoting *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010) (*Carvalho*)).

“The alleged inaccuracy must be a factual inaccuracy; ‘the presentation of legal defenses to payment will not suffice.’” *Lee v. JP Morgan Chase Bank, N.A.*, 2023 U.S. Dist. LEXIS 20807, at \*9 (C.D. Cal. 2023) (quoting *Biggs v. Experian Info. Sols., Inc.*, 209 F. Supp. 3d 1142, 1144 (N.D. Cal. 2016)).

///

///

## [F] Remedies

Sections 1681n-1681o of the FCRA provide civil remedies for willful and negligent violations of the FCRA. *Guimond*, 45 F.3d at 1332. A defendant commits a willful violation when the defendant either deliberately violates the FCRA or acts with “reckless disregard of a requirement” of the FCRA. *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, \*38 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 71 (2007)).

A consumer does not have a remedy under §§ 1681n-1681o against a Furnisher for violating 15 U.S.C. § 1681s-2(a). The consumer’s remedies under §§ 1681n-1681o against a Furnisher for violating § 1681s-2(b) only arise when the Furnisher receives notice of dispute from a CRA. “[N]otice of a dispute received directly from the consumer does not trigger furnishers’ duties under subsection (b).” *Gorman*, 584 F.3d at 1154.

**[F.1] Actual Damages – General Rules:** A person who willfully or negligently violates the FCRA is liable to the consumer for “actual damages” sustained by him or her as a result of the FCRA violation. 15 U.S.C. §§ 1681n(a)(1)(A), 1681o(a)(1).

Only damages caused by the FCRA violation are compensable. *Gorman*, 584 F.3d at 1173-1174. Evidence that the FCRA violation resulted in a denial of credit to the plaintiff or caused the plaintiff to borrow at inflated rates may satisfy this requirement. *Ibid*. Evidence that a plaintiff “lost wages from the time spent dealing with his credit problems” may also satisfy this requirement. *Id.* (citing *Dennis v. BEH-I, LLC*, 520 F.3d 1066, 1069-70 (9th Cir. 2008)).

The mere risk of harm from the presence of inaccurate information in the consumer’s file does not constitute actual damages where the information was never communicated to a third party. *TransUnion*, 141 S.Ct., at 2210.

**[F.2] Actual Damages – Emotional Distress:** “Actual damages” include emotional distress damages. *Miller*, 2022 U.S. Dist. LEXIS 197076, at \*34 (quoting *Drew v. Equifax Info. Sys., LLC*, 690 F.3d 1100, 1109 (9th Cir. 2012)); *see also Guimond*, 45 F.3d at 1332-33.

**[F.3] Actual Damages – Business Losses:** “Courts that have considered the question have concluded that the FCRA does not apply where a consumer report is used to obtain credit for business purposes, as opposed to personal purposes.” *Dorian*, 2023 U.S. Dist. LEXIS 12915, at \*15 (citing *Grigoryan v. Experian Info. Sols., Inc.*, 84 F. Supp. 3d 1044, 1081-1083 (C.D. Cal. 2014) (granting summary judgment on an FLCRA claim based on the use of a credit report for plaintiff’s real estate investment business)).

**[F.4] Statutory Damages:** For a willful violation of the FCRA, the plaintiff is entitled to recover statutory damages of not less than \$100 nor more than \$1,000 instead of proving an amount of actual damages. 15 U.S.C. § 1681n(a)(1). Such statutory damages are not available for negligent violations.

///

**[F.5] Punitive Damages:** For a willful violation of the FCRA, the plaintiff is entitled to recover “such amount of punitive damages as the court may allow[.]” 15 U.S.C. § 1681n(a)(2). Punitive damages are not available for negligent violations.

**[F.6] Attorney’s Fees:** A person who willfully or negligently violates the FCRA is liable to the prevailing consumer for his or her costs and reasonable attorney’s fees as determined by the court. 15 U.S.C. §§ 1681n(c), 1681o(a)(2). The costs and fees under these provisions are only available to the consumer in a successful action to enforce liability under the FCRA. *Ibid.* Fees may be awarded in favor of either side for papers filed in bad faith or for purposes of harassment. *Id.*, §§ 1681n(c), 1681o(b).

**[F.7] One-Satisfaction Rule:** The one-satisfaction rule is that a plaintiff is entitled to only one satisfaction for a single injury. “Courts in the Ninth Circuit have determined the ‘one satisfaction rule’ does not apply in FCRA cases.” *Cheetham v. Specialized Loan Servicing LLC*, 2021 U.S. Dist. LEXIS 99759, at \*4 (W.D. Wash. 2021). *See also Hoerchler v. Equifax Info. Servs., LLC*, 568 F. Supp. 3d 931, 937 (N.D. Ill. 2021) (*Hoerchler*) (“Case law from outside the Seventh Circuit establishes that most courts to have considered this question hold that the one-satisfaction rule, which is also referred to as an equitable offset, does not apply in FCRA cases.”); *Zook v. Equifax Info. Servs., LLC*, 2018 U.S. Dist. LEXIS 235786 (D. Or. 2018) (“As discussed above, the weight of authority holds that there is no equitable offset for causes of action under either the FCRA or FDCPA.”) (dicta). The “minority rule – represented in cases from the Northern District of Alabama – is that the one-satisfaction rule does apply to FCRA claims.” *Hoerchler*, 568 F. Supp. 3d at 937.

**[F.8] Sovereign Immunity:** The FCRA states that “person” includes a governmental entity. 15 U.S.C. § 1681a(b). In 2024, the Supreme Court decided that the FCRA validly waives the sovereign immunity of the federal government. *Kirtz*, 601 U.S. at 50. Previously, lower courts divided on whether the FCRA’s definition of “person” abrogated the sovereign immunity of governmental defendants. *Compare Daniel v. Nat’l Park Service*, 891 F.3d 762 (9th Cir. 2018) (§ 1681a(b) does not waive sovereign immunity) with *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014) (§ 1681a(b) waives sovereign immunity).

In *Kirtz*, the Supreme Court did not decide whether the FCRA validly abrogates State sovereign immunity. *Id.* at 59 n.2 (“We do not face today any question about Congress’s power under the Constitution to abrogate state sovereign immunity, only a claim against the USDA, a federal agency whose immunity Congress is free to waive as it wishes.”); *see also id.* at 60-61 (“If the FCRA is a piece of Commerce Clause legislation, the waiver of sovereign immunity effected by §§ 1681n and 1681o might be constitutionally invalid as applied against individual States.”).

### **[G] Reasonable Procedures Claim by Consumer against CRA [§ 1681e]**

A typical claim under the FCRA involves a consumer’s claim that the CRA failed to follow reasonable procedures in credit reporting on the consumer.

**[G.1] Statutory Text:** Section 1681e(a) states: “Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. . . .” 15 U.S.C. § 1681e(a). Section 1681e(b) states: “Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure [the] maximum possible accuracy of the information concerning the individual about whom the report relates.” *Id.*, § 1681e(b). As stated, the FCRA gives a private right of action to consumers for willful and negligent violations of the FCRA. *Id.*, §§ 1681n-1681o.

**[G.2] Elements of Claim:** “To prove a credit reporting agency’s (‘CRA’) noncompliance with § 1681e(b), a plaintiff must prove that: (1) inaccurate information was included in [his] credit report; (2) the inaccuracy was due to defendant’s failure to follow reasonable procedures to assure maximum possible accuracy; (3) [he] suffered injury; and (4) [his] injury was caused by the inclusion of the inaccurate entry.” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*19 (brackets and bracketed text in original; quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3rd Cir. 1996)).

In addition, under *TransUnion*, the plaintiff must also show that the FCRA violation resulted in a concrete injury sufficient to give the plaintiff standing.

“In order to make out a prima facie violation under § 1681e(b), a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information.” *Grigoryan v. Experian Info. Solution, Inc.*, 84 F. Supp. 3d 1044, 1067 (C.D. Cal. 2014). Nevertheless, “[a] credit reporting agency does not violate § 1681e(b) or [Cal. Civ. Code] § 1785.14(b) simply by reporting information that may be inaccurate.” *Id.* (emphases added; bracketed information added; quoting *Darrin v. Bank of America, N.A.*, 2014 U.S. Dist. Lexis 66461 (E.D. Cal. 2014)).

The defendant’s typical defenses may include: (a) the plaintiff’s claim is barred by the statute of limitations; (b) the disputed information was neither inaccurate nor misleading, or, in any event, was immaterial; (c) the defendant acted neither negligently nor willfully; and (d) in any event, the claimed damages and fees were not caused by the defendant’s FCRA violation and are excessive and unreasonable.

“[D]etermining whether a CRA violated § 1681e(b) is a two-step process. First, a consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information. Second, even if the report contained inaccurate information, a credit reporting agency will not be liable if it establishes that an inaccurate report was generated despite the agency’s following reasonable procedures.” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*19 (internal quotations and citations omitted).

///

///

As stated, “[i]f a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate [§ 1681e(b)] simply by reporting an item of information that turns out to be inaccurate.” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*20 (brackets in original text; internal quotations and citations omitted). *See also Grigoryan*, 84 F.Supp. 3d at 1072 (“Because a consumer reporting agency receiving a facially credible report from a source that it believes to be reputable is not liable under § 1681e(b) or [Cal. Civ. Code] § 1785.14(b) merely because the report contains inaccurate information, and because Grigoryan has failed to adduce any evidence that BOA, Sequoia, and CMI are not reputable sources[,] or that any of the alleged inaccurate reporting resulted from defendants’ failure to maintain and operate their internal database in a reasonable manner, the court grants summary judgment in defendants’ favor on Grigoryan’s § 1681e(b) and § 1785.14(b) claims.”).

### **[H] Reinvestigation Claim by Consumer against CRA [§ 1681i]**

In another typical claim, the consumer alleges that the CRA failed to investigate the consumer’s dispute of the accuracy of the credit report. This type of FCRA claim is made under 15 U.S.C. § 1681i and is called a “reinvestigation claim.” A reinvestigation claim under § 1681i is “distinct” from a reasonable procedures claim under § 1681e. *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*32 n.2.

**[H.1] Statutory Text:** Section 1681i(a)(1)(A) of the FCRA provides: “Subject to subsection (f) and except as provided in subsection (g), if the completeness or accuracy of any item of information contained in a consumer’s file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.” 15 U.S.C. § 1681i(a)(1)(A).

The CRA must promptly notify the Furnisher of the dispute. *See* 15 U.S.C. § 1681i(a)(2)(A). The CRA must provide written notice to the consumer of the results of the reinvestigation. *Id.*, § 1681i(a)(6). The CRA’s notice to the Furnisher “must include ‘all relevant information regarding the dispute that the [CRA] has received from the consumer.’” *Gorman*, 584 F.3d at 1157 (quoting § 1681i(a)(2)(A); brackets in original).

**[H.2] Elements of Claim:** “To prevail on a § 1681i(a)(1)(A) reinvestigation claims [sic], a plaintiff must show: (1) the plaintiff’s credit file contains inaccurate or incomplete information; (2) the plaintiff notified the CRA directly of the inaccurate or incomplete information; (3) the plaintiff’s dispute is not frivolous or irrelevant; (4) the CRA failed to respond to the plaintiff’s dispute; (5) the failure to reinvestigate caused the plaintiff to suffer damages; and (6) actual damages resulted to the plaintiff.” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*27; *see, e.g., Warner v. Experian Info. Sols., Inc.*, 931

F.3d 917, 921 (9th Cir. 2019) (district court correctly dismissed § 1681i claim against a CRA because the consumer did not directly notify the CRA of the consumer's dispute). Under *TransUnion*, the plaintiff must also show that the FCRA violation resulted in a concrete injury that was sufficient to give the plaintiff standing.

Another version of the elements appears in *Huffman v. Experian Info. Solutions*, 2021 U.S. Dist. LEXIS 78915 (N.D. Cal. 2021) (*Huffman*): "To establish a failure to properly reinvestigate under Section 1681i, Plaintiff must establish that: (1) his consumer file contained prima facie inaccurate or incomplete information; (2) he notified Experian [i.e., the CRA] of the alleged inaccuracy; (3) Experian [i.e., the CRA] failed to respond or conduct a reasonable investigation of the disputed item; and (4) Plaintiff suffered damages as a result of Defendant's conduct." *Id.* at \*18 (bracketed text added); see *White v. Experian Info. Sols., Inc.*, 2024 U.S. Dist. LEXIS 54365, at \*6 (C.D. Cal. 2024).

Typical defenses may include: (a) statute of limitations; (b) the plaintiff did not directly notify the CRA (or did not adequately notify it); (c) the disputed information was neither inaccurate nor misleading, or was immaterial; (d) the defendant acted neither negligently nor willfully; and (e) in any event, the claimed damages and fees were not caused by the defendant's FCRA violation and are unreasonable and excessive.

"The Ninth Circuit has not expressly ruled on whether a CRA's reliance on the ACDV system without more satisfies the reasonable reinvestigation." *Huffman*, 2021 U.S. Dist. LEXIS 78915, at \*20. "[C]ourts have held that the use of an ACDV does not automatically qualify as a reasonable reinvestigation in all circumstances. For example, where a CRA is affirmatively on notice that the reliability of a furnisher's information is suspect, it is unreasonable to merely rely on the ACDV process without additional investigation." *Id.* at \*20-21. "[C]ourts have found a CRA's exclusive reliance on the ACDV process sufficient to constitute a reasonable reinvestigation as a matter of law where the CRA provided the furnisher with all relevant information *and* had no reason to suspect the furnisher's reliability." *Id.*, at \*23-24 (emphasis added). In *Huffman*, the court concluded "that Experian's exclusive reliance on the ACDV process was reasonable in this case." *Id.* at \*28.

In 2016, before *Huffman*, *Avetisyan* ruled: "[¶] Although the Ninth Circuit has not expressly ruled on this issue, district courts in the Ninth Circuit have typically held that, as a matter of law, it is unreasonable for a CRA to simply verify the creditor's information through the ACDV without additional inquiry." *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*28 (citing *Grigoryan v. Experian Info. Sols., Inc.*, 84 F.Supp. 3d 1044, 1074 (C.D. Cal. 2014)).

Distinguishing *Avetisyan*, the court in *Huffman* stated: "As in *Grigoryan* and *Avetisyan*, other courts have found the CRA's exclusive reliance on the ACDV process insufficient to establish a reasonable reinvestigation in cases involving lengthy disputes, repeated notices of inaccuracies by the plaintiff, or a failure by the CRA to submit all relevant information related to the dispute to the furnisher."

///

## **[I] Fraud-Blocking Claim by Consumer against CRA [§ 1681c-2(a)]**

A typical FCRA dispute may involve a claim of identity theft.

Under § 1681c-2(a), “a consumer reporting agency shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identify theft, not later than 4 business days after the date of receipt by such agency of [:] (1) appropriate proof of the identity of the consumer; (2) a copy of an identity theft report; (3) the identification of such information by the consumer; and (4) a statement by the consumer that the information is not information relating any transaction by the consumer.” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*24 (quoting 15 U.S.C. § 1681c-2(a)).

“The FCRA defines ‘identity theft report’ to mean, ‘at a minimum,’ a report ‘that alleges identity theft . . . that is a copy of an official, valid report filed by a consumer’ with a law enforcement or other appropriate government agency, and ‘the filing of which subjects the person filing the report to criminal penalties . . . if the report is false.’” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*25-26 (quoting 15 U.S.C. § 1681a(g)(4)).

“[I]f the dispute lacks a notice of identity theft, then the reinvestigation obligations of § 1681i are triggered, and if the dispute does include a notice of identity theft, then the fraud blocking obligations of § 1681c-2(a) are triggered.” *Avetisyan*, 2016 U.S. Dist. LEXIS 188845, at \*24.

Under §§ 1681n-1681o, to prevail on a fraud-blocking claim, the plaintiff must show that the CRA acted negligently or willfully. Further, section 1681c-2(c) of the FCRA permits a CRA to decline to block reporting based on claimed identity theft when the CRA “reasonably determines” that the information was requested by the consumer in error, was requested by the consumer based on a material misrepresentation of fact by the consumer, or the consumer obtained possession of the goods, services, or money as a result of the blocked transaction. 15 U.S.C. § 1681c-2(c).

## **[J] Claim by Consumer against Furnishers [§ 1681s-2(b)]**

A typical consumer credit dispute may involve a claim against the Furnisher who furnished to the CRA allegedly inaccurate or misleading information about the consumer.

**[J.1] Statutory Text:** Section 1681s-2(b)(1) of the FCRA states: “*After* receiving notice pursuant to section 1681(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person [i.e., the Furnisher] shall – (A) conduct an investigation with respect to the disputed information; (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title; (C) report the results of the investigation to the consumer reporting agency” and take other specified actions. 15 U.S.C. 1681s-2(b)(1) (emphasis added; bracketed text added).

///

Section 1681s-2(b)(1)(E) states that a Furnisher shall, “if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified [by the Furnisher] after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the of the reinvestigation promptly – (i) modify that item of information; (ii) delete that item of information; or (iii) permanently block the reporting of that item of information.” *Id.*, § 1681s-2(b)(1)(E) (bracketed text added). In other words, “[i]f the furnisher finds that disputed information is inaccurate or incomplete, or is unable to verify the information, the furnisher must modify, delete, or permanent[ly] block the reporting of that piece of information for purposes of reporting to a CRA.” *Martinez v. Am. Express Nat’l Bank*, 2022 U.S. Dist. LEXIS 199019, at \*10-11 (C.D. Cal. 2022) (citing 15 U.S.C. § 1681s-2(b)(1)(E)).

**[J.2] Elements of Claim:** To prevail on a claim against a Furnisher under 15 U.S.C. § 1681s-2(b), the consumer-plaintiff must show: “(1) Defendant is a ‘furnisher’; (2) Plaintiff notified the CRA that Plaintiff disputed the reporting as inaccurate; (3) the CRA notified the furnisher of the alleged inaccurate information of [sic] the dispute; (4) the reporting was in fact inaccurate; and (5) Defendant failed to conduct the investigation required by § 1681s-2(b)(1).” *Miller*, 2022 U.S. Dist. LEXIS 197076, at \*19 (internal quotations and citation omitted). In addition, (6) the plaintiff must also show damages. *Miller*, at \*33 (“Damages are an element of Plaintiff’s FCRA claims here.”). Under *TransUnion*, the plaintiff must also show that the FCRA violation resulted in a concrete injury that was sufficient to give the plaintiff standing.

The Furnisher’s defenses may include: (a) the plaintiff’s claim is barred by the statute of limitations; (b) the plaintiff did not adequately notify the CRA and/or the CRA did not adequately notify the Furnisher of the dispute; (c) the disputed information was neither inaccurate nor misleading, or, in any event, was immaterial; (d) the defendant did not act either negligently or willfully; and (e) in any event, the claimed damages and fees were not caused by the Furnisher’s FCRA violation and are unreasonable and excessive. The Furnisher may also allege that the plaintiff has failed to show that the alleged FCRA violation resulted in a concrete injury that was sufficient to give the plaintiff standing.

As stated, he “duties [in § 1681s-2(b)] arise only after the furnisher receives notice of dispute from a CRA; notice of a dispute received directly from the consumer does not trigger [the] furnisher’s duties under subsection (b).” *Gorman*, 584 F.3d at 1154; *see also Lara v. Experian Info. Sols., Inc.*, 2022 U.S. Dist. LEXIS 163251, at \*10-11 (S.D. Cal. 2022) (“The duty to conduct a reasonable investigation [under § 1681s-2(b)(A)], as previously discussed, arises only after the furnisher receives from a CRA a notice of dispute.”). A claim against a Furnisher under § 1681s-2(a) (as opposed to § 1681s-2(b)) can only be pursued by federal or state officials. *Gorman*, 584 F.3d at 1162.

The Furnisher’s investigation in response to the CRA’s notice of the consumer’s dispute must be reasonable. *Gorman*, 584 F.3d at 1155-1156; *Miller*, 2022 U.S. Dist. LEXIS 197076, at \*20. “By its ordinary meaning, an ‘investigation’ requires an inquiry likely to turn up information about the underlying facts and positions of the parties, not a cursory or sloppy review of the dispute.” *Gorman*, 584 F.3d at 1155.

Whether a Furnisher’s re-investigation in response to a notice of dispute (provided by a consumer to the CRA) was reasonable depends in significant part on the allegations provided by the CRA to the Furnisher. *See Gorman*, at 1160. “An investigation is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate.” *Id.* at 1161.

“Summary judgment is generally an inappropriate way to decide the question of whether a furnisher’s investigation was reasonable because of ‘the jury’s unique competence in applying the reasonable man standard.’ *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, at \*9-10 (C.D. Cal. 2022) (quoting and paraphrasing *Gorman*, 584 F.3d at 1157).

A Furnisher is not liable for failing to report a meritless or immaterial dispute. “It is the failure to report a bona fide dispute, a dispute that could materially alter how the reported debt is understood, that gives rise to a furnisher’s liability under 15 U.S.C. § 1681s-2(b).” *Miller*, at \*30-31 (quoting *Gorman*, 584 F.3d at 1163).

### **[K] Preemption & State Law**

A consumer credit dispute under the FCRA may be accompanied by a similar claim under State law. An initial issue will be whether the FCRA preempts the claim.

“In general, the FCRA does not displace state law except when state and federal law conflict.” *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, at \*13 (C.D. Cal. 2022) (citing 15 U.S.C. § 1681t(a)). “However, the statute lists certain areas of state law it does displace including, for example, state law imposing requirements or prohibitions ‘relating to the responsibilities of persons who furnish information to consumer reporting agencies.’” *Roche*, at \*13 (quoting 15 U.S.C. § 1681t(b)(1)(F)).

“The FCRA contains two preemption provisions restricting state law claims that apply to furnishers of information.” *Dorian*, 2023 U.S. Dist. LEXIS 12915, at \*23. Those provisions are §§ 1681h(e) and 1681t(b). “The Ninth Circuit has not resolved how to interpret the interaction of these two preemption provisions of the Fair Credit Reporting Act.” *Khankin v. JLR San Jose, LLC*, 2024 U.S. Dist. LEXIS 45473, at \*8 (N.D. Cal. 2024) (*Khankin*). District courts disagree on how to reconcile the preemption provisions of §§ 1681h(e) and 1681t(b). *See id.* at \*7-13 (describing disagreement).

Section 1681(h)(e) of the FCRA provides: “Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against . . . any person who furnishes information to a consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer.” 15 U.S.C. § 1681(h)(e).

///

///

Section 1681t(a), entitled “Relation to State [L]aws,” provides: “Except as provided in subsections (b) and (c), this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.”

Section 1681t(b) provides: “No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . [¶] (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply . . . [¶] (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).” 15 U.S.C. § 1681t(b).

Section 1681t(b) saves from preemption a claim with respect to section 1785.25(a) of the California Civil Code as in effect on September 30, 1996. Section 1785.25(a) is a part of California Consumer Credit Reporting Agencies Act (“CCRAA”), Cal. Civ. Code §§ 1785.1-1785.36.

In *Khankin*, the district court ruled that § 1681t(b) preempted the plaintiffs’ state law claims against a furnisher for defamation and alleged violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. In dismissing those claims without leave to amend, the court stated: “However, this order does not prevent [p]laintiffs from directly bringing a California Civil Code § 1785.25(a) claim in any amended complaint, if [p]laintiffs can do so consistent with Federal Rules of Civil Procedure 11.” *Id.* at \*16 n.2.

Under the “majority view,” a claim against a Furnisher under the CCRAA may be preempted when the claim is based on the Furnisher’s providing inaccurate information to a CRA. See *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, at \*14 (“Courts have drawn a distinction when it comes to FCRA preemption between claims that relate to credit reporting – which are preempted – and claims that are unrelated to credit reporting – which are not.”).

In Cal. Civil Code § 1785.34(a), the CCRAA provides: “Any consumer credit reporting agency or user of information against whom an action brought pursuant to Section 1681n or 1681o of Title 15 of the United States Code is pending shall not be subject to suit for the same act or omission under Section 1785.31.” This language apparently does not preclude a plaintiff from bringing combined claims in federal court under the FCRA and the CCRAA. See, e.g., *Flannery v. Am. Express Co.*, 2024 U.S. Dist. LEXIS 16487, at \*5 (C.D. Cal. 2024); *Lopez v. Experian Info. Sols., Inc.*, 2022 U.S. Dist. LEXIS 89552, \*19-20 (N.D. Cal. 2022) (denying summary judgment on claims under FCRA and CCRAA); *Martinez v. Am. Express Nat’l Bank*, 2022 U.S. Dist. LEXIS 199019, at \*15-19 (C.D. Cal. 2022).

///

## **[V] FDCPA**

### **[A] The FDCPA**

The FDCPA, 15 U.S.C. §§ 1692-1692p, “was enacted as a broad remedial statute designed to ‘eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.’” *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1060 (9th Cir. 2011) (*Gonzales*) (quoting 15 U.S.C. § 1692(e)).

“The FDCPA comprehensively regulates the conduct of debt collectors, imposing affirmative obligations and broadly prohibiting abusive practices.” *Gonzales*, 660 F.3d at 1060-61. A debt collector who violates the FDCPA has a defense if the violation resulted from a bona fide error under 15 U.S.C. § 1692k(c).

### **[B] Jurisdiction & Standing**

The FDCPA provides: “An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.” 15 U.S.C. § 1692k(d).

Although the FDCPA does not have an amount in controversy requirement, the plaintiff must show that he or she suffered a sufficiently concrete injury to establish Article III standing. “A statutory violation of the FDCPA does not create a per se injury sufficient to create standing.” *Farmer v. Optio Sols., LLC*, 2022 U.S. Dist. LEXIS 157372, \*9 (N.D. Cal. 2022) (applying *TransUnion* to an FDCPA claim).

### **[C] Statute of Limitations**

A 1-year statute of limitations applies to FDCPA claims. Section 1692(d) of the FDCPA provides that the action must be commenced “within one year from the date on which the violation occurs.” 15 U.S.C. § 1692k(d).

Previously, the Ninth Circuit applied a discovery rule. *Lyons v. Michael & Assocs.*, 824 F.3d 1169, 1172 (9th Cir. 2016) (“Applying the discovery rule to some FDCPA claims but not others would be out of step with our general approach to the discovery rule, and would threaten to capriciously limit the broad, remedial scope of the FDCPA.”). In *Rotkiske v. Klemm*, 140 S. Ct. 355, 358 (2019), the Supreme Court “clarified that there is no ‘discovery rule’ for FDCPA claims, so ‘absent the application of an equitable doctrine, the statute of limitations in § 1692k(d) begins to run on the date on which the alleged FDCPA violation occurs, not the date on which the violation is discovered.’” *Brown v. Transworld Systems, Inc.*, 73 F.4th 1030, 1040 (9th Cir. 2023) (quoting *Rotkiske*, 140 S. Ct. at 358).

///

“[I]t is less clear which litigation acts can constitute independent FDCPA violations when the underlying FDCPA violation is a debt collection lawsuit.” *Brown*, 73 F.4th at 1041. “Put simply, to plausibly allege that a litigation act is a violation of the FDCPA, the debtor must aver sufficient facts to show that the debt collector’s act is a *new* violation of the FDCPA.” *Id.* at 1042 (emphasis in original). “In short, some litigation acts may constitute independent FDCPA violations; otherwise, debt collectors could commit unlimited FDCPA violations after commencing an improper debt collection action.” *Id.* at 1041.

### **[D] Scienter**

“The FDCPA does not *ordinarily* require proof of intentional violation [and it is] a strict liability statute.” *Gonzales*, 660 F.3d at 1061 (emphasis added). “The FDCPA is a strict liability statute that ‘makes debt collectors liable for violations that are not knowing or intentional.’” *Warner v. Midland Credit Mgmt.*, 540 F. Supp. 3d 946, 957 (C.D. Cal. 2021) (*Warner*) (quoting *Reichert v. Nat’l Credit Sys., Inc.*, 531 F.3d 1002, 1005 (9th Cir. 2008); see *Clark v. Cap. Cred & Collection Servs., Inc.*, 460 F.3d 1162, 1177 (9th Cir. 2006) (“Requiring a violation of § 1692e to be knowing or intentional needlessly renders superfluous § 1692k(c).”).

Certain provisions of the FDCPA include an intent requirement. For example, § 1692(e)(5) prohibits “[t]he threat to take any action that cannot legally be taken or that is not *intended* to be taken.” 15 U.S.C. § 1692(e)(5) (emphasis added).

Although violations of the FDCPA ordinarily do not require proof of intent, the defendant is not liable for the violation if the defendant establishes that the violation was unintentional and resulted from a bona fide error under 15 U.S.C. § 1692k(c).

### **[E] Materiality & Least Sophisticated Debtor Test**

“A false or misleading statement is not actionable under the FDCPA unless it is material.” *Aguilar v. Mandarich Law Group, LLP*, 87 Cal. App. 5th 607, 622 (2023) (citing *Afewerki v. Anaya Law Group* (9th Cir. 2017)); *Warner*, 540 F. Supp. 3d, at 963 (citing *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010)).

“If the least sophisticated debtor would ‘likely be misled’ by a communication from a debt collector, the debt collector has violated the Act.” *Warner*, 540 F. Supp. 3d, at 960 (quoting *Guerrero v. RJM Acquisitions, LLC*, 499 F.3d 926, 934 (9th Cir. 2007)); see also *Vasquez-Looper v. Desert Valley Hosp., LLC*, 2022 U.S. Dist. LEXIS 219950, at \*6 (C.D. Cal. 2022).

The “least sophisticated debtor is reasonable and functional, but lacks experience and education regarding financial matters.” *Warner*, 540 F. Supp. 3d, at 963 (quoting *Stimpson v. Midland Credit Mgmt., Inc.*, 944 F.3d 1190, 1196 (9th Cir. 2019)).

///

“Conditional language, particularly in the absence of any language clarifying or explaining the conditions, does not insulate a debt collector from liability.” *Gonzales*, 660 F.3d 1055, 1063 (9th Cir. 2011).

### **[F] Elements of a Claim under FDCPA**

“In order for a plaintiff to recover under the FDCPA, there are three threshold requirements: (1) the plaintiff must be a ‘consumer’; (2) the defendant must be a ‘debt collector’; and (3) the defendant must have committed some act or omission in violation of the FDCPA.” *Warner*, 540 F. Supp., at 957 (quoting *Robinson v. Managed Accts. Receivables Corp.*, 654 F. Supp. 2d 1051, 1057 (C.D. Cal. 2009)); *Vasquez-Looper v. Desert Valley Hosp., LLC*, 2022 U.S. Dist. LEXIS 219950, \*5 (C.D. Cal. 2022).

Possible defenses include statute of limitations under 15 U.S.C. § 1692k(d) and the bona error defense under 15 U.S.C. § 1692k(c). The bona fide error defense is particularly significant in FDCPA disputes.

#### **[F.1] The Plaintiff is a Consumer [1st Element]**

The plaintiff must show that he or she is a “consumer” as defined in §§ 1692a(3) and 1692c(d). “Consumer” means “any natural person obligated or allegedly obligated to pay any debt.” “Debt” means a consumer debt. 15 U.S.C. § 1692a(5).

#### **[F.2] The Defendant is a Debt Collector [2nd Element]**

The plaintiff must show that the defendant is a “debt collector” within the meaning of § 1692a(6). An attorney who regularly collects consumer debts can be a debt collector. *Granlund v. Burbank Hill Cmty. Ass’n*, 2020 U.S. Dist. LEXIS 167921, at \*20 (C.D. Cal. 2020) (stating that the FDCPA also applies to “attorneys who ‘regularly’ engage in consumer-debt-collection activity, even when that activity consists of litigation.”) (quoting *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995)).

In general, a “debt collector” under the FDCPA does not include the original creditor. “An entity that collects debts on its own behalf is not a ‘debt collector’ as defined by the FDCPA and therefore is not subject to its requirements.” *Lee v. JP Morgan Chase Bank, N.A.*, 2023 U.S. Dist. LEXIS 20807, at \*4-5 (C.D. Cal. 2023).

Section 1692a(6) provides that a “debt collector” is a person who, subject to exceptions, “uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due[,] or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.” 15 U.S.C. § 1692a(6).

///

“The statute excludes from its scope ‘any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.’” *Warner*, 540 F.Supp. 3d, at 958 (quoting § 1692a(6)(F)).

### **[F.3] The Defendant Violated the FDCPA [3rd Element]**

The plaintiff must show that the defendant violated the FDCPA. It prohibits a broad variety of collection activities. “The FDCPA makes debt collectors strictly liable for misleading and unfair debt collection practices.” *Kaiser v. Cascade Capital, LLC*, 989 F.3d 1127, 1135 (9th Cir. 2021) Among the many prohibitions in the FDCPA are:

(1) the debt collector must cease communicating with the debtor under specified circumstances (15 U.S.C. § 1692c);

(2) the debt collector must refrain from harassing or abusing the consumer (15 U.S.C. § 1692d);

(3) the debt collector must refrain from making false or misleading representations to the consumer (15 U.S.C. § 1692e);

(4) the debt collector must refrain from using unfair or unconscionable means to attempt to collect the debt (15 U.S.C. § 1692f); and

(5) Within five days after the initial communication, unless provided initially, the debt collector must provide specified information about the debt and state that if the debtor disputes the debt in writing within 30 days, the debt collector will obtain verification of the debt and mail it to the consumer (15 U.S.C. § 1692g).

A claim that a debt collector violated § 1692g is sometimes called a “validation” dispute. Section 1692g imposes detailed requirements on debt collectors for responding to a validation dispute.

Section 1692g(b) provides: “If the consumer notifies the debt collector within the thirty-day period described in subsection (a) [i.e., 15 U.S.C. § 1692g(a)] that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of the judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.”

///

Section 1692g(b) further provides: “Any collection activities and communication[s] during the 30-day period [in § 1692g] may not overshadow or be inconsistent with the disclosure of the consumer’s right to dispute the debt or request the name and address of the original creditor.” 15 U.S.C. § 1692(g)(b). “A communication will . . . violate the FDCPA if it demands payment of the alleged debt within less than the thirty day statutory time frame provided for disputing the debt.” *Stevens v. Monterey Collections, LLC*, 2021 U.S. Dist. LEXIS 44985, at \*6 (C.D. Cal. 2021) (quoting *Jones v. Synergetic Commun. Inc.*, 2018 U.S. Dist. LEXIS 198087, at \*10 (S.D. Cal. 2018)).

### **[G] Bona Fide Error Defense**

“Pursuant to § 1692k(c)’s bona fide error defense, a debt collector is not liable for its violations of the FDCPA if ‘the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.’” *Clark v. Cap. Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1176-1177 (9th Cir. 2006) (quoting § 1692k(c)). “The bona fide error defense requires that the defendant ‘prove that (1) it violated the FDCPA unintentionally; (2) the violation resulted from a bona fide error; and (3) it maintained procedures reasonably adapted to avoid the violation.’” *Vasquez-Looper v. Desert Valley Hosp., LLC*, 2022 U.S. Dist. LEXIS 219950, at \*7 (C.D. Cal. 2022) (quoting *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011)).

The bona fide error defense is a “narrow exception to strict liability” under the FDCPA, and the debt collector has the burden of proof. *Vasquez-Looper*, 2022 U.S. Dist. LEXIS 219950, at \*7 (quoting *Clark*, 460 F.3d at 1177). Although “mistakes about the meaning of the FCDPA itself cannot be bona fide errors,” “mistakes about the time-barred status of a debt can be bona fide errors.” *Kaiser v. Cascade Capital, LLC*, 989 F.3d 1127, 1138, 1140 (9th Cir. 2021) (distinguishing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 605-06 (2010)).

### **[H] Nonjudicial Foreclosure**

Actions taken to facilitate a nonjudicial foreclosure, where California law does not permit a deficiency judgment against the debtor, “are not attempts to collect a ‘debt’ as that term is defined by the FDCPA.” *Gritney v. Quema*, 2023 U.S. Dist. LEXIS 48980, \*12-13 (C.D. Cal. 2023) (quoting *Vien-Phuong Thi Ho v. Recon Trust Co., NA*, 858 F.3d 568, 571-572 (9th Cir. 2017)).

### **[I] Remedies**

**[I.1] Remedies – Damages & Fees:** The remedies authorized by the FDCPA include actual damages, statutory damages, and attorney’s fees and costs. Section 1692k(a) states: “Except as otherwise provided this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of – [¶] (1) any actual damage sustained by such person as a result of such failure; [¶] (2)(A) in the case of any action by an

individual, such additional damages as the court may allow, but not exceeding \$1,000,” plus “[¶] (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney’s fee as determined by the court.” 15 U.S.C. § 1692k(a).

**[I.2] Remedies - Business Losses:** Damages for business losses do not appear to be recoverable under the FDCPA. *See, e.g., Fischer v. Fannie Mae*, 302 F. Supp. 3d 1327, \*1332 (S.D. Fla. 2018) (“Here, Plaintiff incurred the debt in question in furtherance of his real estate investment business and not for a personal, household, or family purpose. Because the loan does not represent consumer debt under the FDCPA, Count I shall be dismissed with prejudice.”).

**[I.3] Remedies – Emotional Distress Damages:** Reasoning by analogy to the FCRA, district courts have ruled that the words “actual damages” in § 1692k(a) of the FDCPA authorize emotional distress damages. *Kaloustian v. FarMar Law Grp., PC*, 2022 U.S. Dist. LEXIS 207554, at \*20 (C.D. Cal. 2022) (citing *Riley v. Giguiere*, 631 F. Supp. 2d 1295, 1314-16 (E.D. Cal. 2009)). “Proof of physical injury is not necessary to obtain an award of emotional distress damages under the FDCPA.” *Nelson v. Equifax Info. Servs. LLC*, 522 F. Supp. 2d 1222, 1239 (C.D. Cal. 2007) (*Nelson*).

**[I.4] Remedies – Statutory Damages:** The statutory damages provision is limited to \$1,000 per lawsuit. *Nelson*, 522 F. Supp. 2d at 1238 (“The Ninth Circuit has concluded that statutory damages under the FDCPA are limited to \$1,000 per lawsuit, not \$1,000 per violation.”) (citing *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1178 (9th Cir. 2006)).

**[I.5] Remedies – No Equitable Offsets:** The “weight of authority holds that there is no equitable offset for causes of action under either the FCRA or the FDCPA.” *Zook v. Equifax Info. Servs., LLC*, 2018 U.S. Dist. LEXIS 235786, at \*8 (D. Or. 2018) (*dicta*); *Nelson*, 522 F. Supp. 2d at 1239 (“The FDCPA does not contain any provision creating an express right of contribution, indemnification, or equitable credit. Nor does Defendant present any evidence that federal common law creates such a right. Accordingly, the Court finds that no offset is warranted by virtue of Plaintiff’s settlement with Equifax.”); *see also Valle v. Westhill Exch., LLC*, 2021 U.S. Dist. LEXIS 244182, at \*7 (D. Md. 2021) (“This Court need not reach whether the one satisfaction rule can ever apply to [an] FDCPA claim because it finds that, in this factual scenario, the Plaintiff did not suffer a single, indivisible harm for which Westhill would be entitled to an offset in damages.”) (footnote omitted).

**[I.6] Remedies – Attorney’s Fees:** Under § 1692k(a), the consumer may recover his or her attorney’s fees and costs if the consumer prevails. 15 U.S.C. § 1692k(a)(3). The defendant may recover attorney’s fees and costs against the consumer if the court determines that the consumer brought the action “in bad faith and for the purposes of harassment.” *Id.*, § 1692k(a)(3).

///

## **[J] Preemption & State Law**

A consumer credit dispute under the FDCPA may be accompanied by a similar claim under State law. An initial issue will be whether the FDCPA preempts the claim.

Section 1692n of the FDCPA provides: “This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, *except* to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is *not* inconsistent with this subchapter if the protection such law affords any consumer is *greater* than the protection provided by this subchapter.” 15 U.S.C. § 1692n (emphases added).

By reason of § 1692n, the FDCPA generally does not preempt otherwise applicable State laws that are consistent with FDCPA. *Gonzales*, 660 F.3d at 1066-67.

“State laws permitting plaintiffs to recover additional statutory damages increase deterrence, thus affording greater protections to consumers and operating consistently with the FDCPA.” *Id.* at 1067. In *Gonzales*, the Ninth Circuit stated that “we presume that the FDCPA permits plaintiffs to recover additional damages under state law.” *Ibid.*

## **[VI] California’s Consumer Credit Reporting Agencies Act**

In 1975, California enacted the Consumer Credit Reporting Agencies Act (“CCRAA”), Cal. Stats. 1975, ch. 1271, pp. 3369-3377, to regulate consumer credit reporting. See *First Student Cases*, 5 Cal. 5th 1026, 1032 (2018). The CCRAA is codified at Cal. Civ. Code §§ 1785.1-1785.36.

Like the FCRA, the CCRAA requires CRAs to reinvestigate in response to consumer disputes. Section 1785.16(a) of the Civil Code provides: “If the completeness or accuracy of any item of information contained in his or her file is disputed by a consumer, and the dispute is conveyed directly to the consumer credit reporting agency by the consumer or user on behalf of the consumer, [then] the consumer credit reporting shall within a reasonable period of time and without charge reinvestigate and record the current status of the disputed information before the end of the 30-business-day period beginning on the date the agency receives notice of the dispute from the consumer or user, unless the consumer credit reporting agency has reasonable grounds to believe and determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure of the consumer to provide sufficient information, as requested by the consumer credit reporting agency, to investigate the dispute.” Cal. Civ. Code § 1785.16(a).

///

///

///

In addition, like the FCRA, the CCRAA requires CRAs to use reasonable procedures. Section 1785.14(b) of the Civil Code states: “Whenever a consumer credit reporting agency prepares a consumer credit report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates. . . .” Cal. Civ. Code § 1785.14(b).

Subject to the preemption provisions of the FCRA (discussed in the next paragraph of this outline), Cal. Civil Code § 1785.25(a) imposes duties on Furnishers. “The CCRAA differs from the FCRA in that it provides a private right of action to enforce” Cal. Civil Code § 1785.25. *Mortimer v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 51877, at \*36-37 (N.D. Cal. 2013). “To prevail on a CCRAA claim, the plaintiff must prove that (1) Defendant is a ‘person’ under the CCRAA, (2) Defendant reported information to a [credit reporting agency], (3) the information reported was inaccurate, (4) Plaintiff was harmed, and (5) Defendant knew or should have known that the information was inaccurate.” *Asad v. Experian Info. Sols., Inc.*, 2024 U.S. Dist. LEXIS 51724, at \*11-12 (C.D. Cal. 2024) (internal quotations and citation omitted).

Under the “majority view,” a consumer’s claim against Furnisher under the CCRAA may be preempted when the claim is based on the Furnisher’s providing inaccurate information to a CRA. See *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, at \*14 (“Courts have drawn a distinction when it comes to FCRA preemption between claims that relate to credit reporting – which are preempted – and claims that are unrelated to credit reporting – which are not.”); see also *Friedman v. Specialized Loan Servicing LLC*, 2024 U.S. LEXIS 111276, at \*14-15 (C.D. Cal. 2024) (“In general, the CCRAA ‘mirrors’ the FCRA, such that a CCRAA claim survives only to the extent that a FCRA claim survives.”) (internal quotations and citation omitted).

The CCRAA states that an action must be brought “within two years from the date on the plaintiff knew . . . or should have known of [] the violation of this title, but not more than seven years from the earliest date on which liability could have arisen, except where a defendant has materially and willfully misrepresented any information required under this chapter to be disclosed to a consumer . . . the action may be brought at any time within two years after the discovery by the consumer of the misrepresentation.” Cal. Civ. Code § 1785.33.

## **[VII] California’s Rosenthal Act**

In 1977, California enacted the Robbins-Rosenthal Fair Debt Collection Practices Act (aka the “Rosenthal Act,” “Rosenthal Fair Debt Collection Practices Act,” or “RFDCPA”), Cal. Stats. 1977, ch. 907, pp. 2771-2780. The Rosenthal Act is codified at Cal. Civil Code §§ 1788-1788.33 et seq. “The Rosenthal Act is intended to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts.” *Ballard v. Citadel Servicing Corp.*, 2023 U.S. Dist. LEXIS 82255, at \*9 (C.D. Cal. 2023) (internal quotations and citations omitted).

///

The remedies in the RFDCPA are “cumulative and are in addition to any other procedures, rights, or remedies under any other provision of law.” Cal. Civ. Code § 1788.32. *See, e.g., Kaloustian v. FarMar Law Grp., PC*, 2022 U.S. Dist. LEXIS 207554, at \*18-20 (C.D. Cal. 2022) (awarding statutory damages of \$1,000 under FDCPA and \$1,000 under Rosenthal Act). As stated, by reason of 15 U.S.C. § 1692n, the FDCPA generally does not preempt otherwise applicable State laws that are consistent with FDCPA. *Gonzales*, 660 F.3d at 1066-67.

“Section 1788.17 of the Rosenthal Act incorporates provisions from the FDCPA and provides that ‘every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j’ of the FDCPA.” *Warner*, 540 F.Supp. 3d at 968 (quoting Cal. Civ. Code § 1788.17).

Although the Rosenthal Act incorporates the FDCPA, the Rosenthal Act is not identical to the FDCPA. “In addition to its *other* requirements and prohibitions, the Rosenthal Act *generally* requires debt collectors to comply with the provisions of the FDCPA.” *Davidson v. Seterus, Inc.*, 21 Cal. App. 5th 283, 295 (2018) (emphases added). *See id.* at 303 (“The Rosenthal Act *does not mirror* the FDCPA, and clearly does not do so with respect to the definition of ‘debt collector.’”) (emphasis in original).

For example, the RFDCPA defines “debt collector” more broadly than the FDCPA. *See, e.g., Warner*, 540 F. Supp., at 969; *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, \*15 (C.D. Cal. 2022); *Lopez v. Experian Info. Sols., Inc.*, 2022 U.S. Dist. LEXIS 89552, at \*23 (N.D. Cal. 2022) (“The definition of ‘debt collector’ found in the state statute is broader than that contained in the FDCPA.”) (internal quotations and citation omitted). Section 1788.2 of the RFDCPA states that debt collector “means any person who, in the ordinary course of business, regularly, on behalf of that person *or* others, engages in debt collection. . . .” Cal. Civ. Code § 1788.2(c) (emphasis added).

Section 47(b) of the California Civil Code provides a privilege from liability for communications made in judicial proceedings. Federal district courts have divided on whether the litigation privilege of § 47(b) applies to Rosenthal Act claims, but “most have concluded that the privilege must yield in this context.” *Komarova v. National Credit Acceptance, Inc.*, 175 Cal. App. 4th 324, 337 (2009). In *Komarova*, the court stated: “We agree with the majority of these cases that the privilege cannot be used to shield violations of the [Rosenthal] Act.” *Id.* at 337.

### **[VIII] California’s Fair Debt Buying Practices Act**

In 2013, California enacted Cal. Civil Code § 1788.50-1788.66, Cal. Stats. ch. 64, § 1 (“CFDBPA”). It regulates the activities of debt buyers, which the statute defines as “a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes.” *Id.*, §1788.50(a)(1). The CFDBPA’s remedies include actual damages, statutory damages of \$100 to \$1,000, and attorney’s fees. *Id.*, § 1788.62.

///

## **[IX] California’s Identity Theft Act**

In 1997, California enacted Penal Code § 530.5 as part of a slate of changes to California’s CCRAA (Cal. Civil Code § 1785.2 et seq; Cal. Stats. 1997, ch. 768, § 6, p. 5205). A criminal conviction under § 530.5(a) requires proof: “(1) that the person willfully obtain[ed] personal identifying information belonging to someone else; (2) that the person use[d] that information for any unlawful purpose; and (3) that the person who use[d] the personal identifying d[id] so without the consent of the person whose personal identifying [was] being used.” *People v. Jimenez*, 9 Cal. 5th 53, 63 (2020) (internal quotations and citations omitted; brackets in original).

In 2001, California enacted Cal. Civil Code § 1798.92 et seq., Cal. Stats. 2001, ch. 354, § 21, pp. 3466-3468 (aka California’s Identity Theft Act (“CITA”)), to provide a civil remedy for victims of identity theft.

A “victim of identity theft” means “a person who had his . . . personal identifying information used without authorization by another to obtain credit, goods, services, money, or property obtained by the identity theft, *and* filed a police report in this regard.” *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, at \*15 (C.D. Cal. 2022) (quoting Civil Code § 1798.92(d)).

CITA provides that “[a] person may bring an action against a claimant to establish that the person is a victim of identity theft in connection with the claimant’s claim against that person.” Cal. Civ. Code § 1798.93(a). In addition to actual damages and fees, CITA authorizes a civil penalty of up to \$30,000. *Id.*, § 1798.93(c). See, e.g., *Roche v. SLM Corp.*, 2022 U.S. Dist. LEXIS 202927, at \*15-16 (C.D. Cal. 2022).

Whether a plaintiff is a victim of identity theft is sometimes a jury issue. *Id.* at \*16 (“A jury will have to decide who is more credible in order to determine whether Plaintiff was a victim of identity theft.”).

## **[X] California’s Unfair Competition Law**

California’s unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., provides remedies for “any unlawful, unfair or fraudulent business act or practice.” Bus. & Prof. Code § 17200. The UCL does not provide a damages remedy. The only remedies provided are restitution and injunctive relief. *Id.*, § 17203.

In November 2004, “the electorate approved Proposition 64, substantially revising the UCL’s . . . standing provisions for private individuals.” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 318 (2011) (*Kwikset*); see Bus. & Prof. Code § 17204. As amended in 2004, private standing is limited to persons who suffered injury in fact and lost money or property as a result of the unfair competition. *Kwikset*, 51 Cal. 4th at 320-321.

///

“To satisfy the narrower standing requirements imposed by Proposition 64, a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.” *Kwikset*, at 332.

“District courts are split on whether a lowered credit score *alone* is sufficient to assert UCL standing.” *Flannery v. Am. Express Co.*, 2024 U.S. Dist. LEXIS 16487, at \*8 (C.D. Cal. 2024) (emphasis added; citations omitted).

## **[XI] Bankruptcy Stay and Discharge Disputes**

The FCRA and FDCPA are not debt cancellation statutes. Consumer credit disputes under the FCRA and FDCPA are impacted when a debtor files a bankruptcy petition to obtain an automatic stay and a bankruptcy discharge.

The debtor’s filing a bankruptcy petition results in a bankruptcy estate under 11 U.S.C. § 541(a), which consists of the debtor’s non-exempt property. The petition also results in an automatic stay under 11 U.S.C. § 362(a), which generally stays creditors from further collection efforts against the debtor and the debtor’s property. If the debtor obtains a bankruptcy discharge, then it results in an injunction under 11 U.S.C. § 524(a).

The automatic stay and discharge injunction may be enforced by contempt sanctions. In addition, 11 U.S.C. § 362(k)(1) authorizes an individual debtor to recover damages and attorney’s fees against a creditor who willfully violates the automatic stay.

### **[A] The Bankruptcy Estate**

By filing a bankruptcy petition, a debtor may lose standing to pursue his or her pre-existing claims under the FCRA and FDCPA.

In general, when a debtor files a bankruptcy petition, the debtor’s pre-petition causes of action vest in the debtor’s bankruptcy estate. *See* 11 U.S.C. § 541(a) (describing property of bankruptcy estate). “When a person files for bankruptcy, that debtor’s property forms a bankruptcy estate out of which creditors may be paid. The estate includes all property interests, including claims that the debtor could have brought in a lawsuit before filing the bankruptcy petition.” *Bercy v. City of Phoenix*, 103 F.4th 591, 593 (9th Cir. 2024). “Ordinarily only the bankruptcy trustee may sue on behalf of the estate. So by filing for bankruptcy, the debtor loses standing to bring those claims.” *Ibid.*

### **[B] The Automatic Stay**

“The automatic stay is a statutory injunction that prohibits most actions to collect pre-petition debts or to execute upon property of the estate.” *Albert-Sheridan v. State Bar (In re Albert-Sheridan)*, 658 B.R. 516, 533 (BAP 9th Cir.2024) (*Albert-Sheridan*) (citing *Gruntz v. Cnty. Of L.A. (In re Gruntz)*, 202 F.3d 1074, 1081-82 (9th Cir. 2000)).

The automatic stay is not the same as a discharge; until the debtor obtains a discharge, a debtor’s credit reports will not report the debtor’s pre-petition debts as discharged. “The automatic stay does not render an otherwise accurate report of a delinquency inaccurate for purposes of the FCRA.” *Mortimer v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 51877, at \*25 (N.D. Cal. 2013) (*Mortimer*).

A failure to update a credit report to accurately reflect that the debtor has filed bankruptcy may violate the automatic stay under certain circumstances. *See McGarvey v. USAA Sav. Bank (In re McGarvey)*, 613 B.R. 285, 317 (E.D. Cal. 2020) (“The court shall enter a separate order granting judgment for Defendant on all claims except the one asserting that failure to update the information provided to [the] CRAs to disclose that the obligation reported is subject to a pending bankruptcy case.”) In *McGarvey*, it was alleged “that not updating the credit report [was] done as part of and has the effect of pressuring a bankruptcy debtor to pay a debt.” *Ibid*.

Conduct that could support an FDCPA claim outside the context of a bankruptcy case may not support an FDCPA claim within a bankruptcy case. For example, filing an obviously time-barred proof of claim against a debtor’s bankruptcy estate does not violate the FDCPA. *See Midland Funding, LLC v. Johnson*, 581 U.S. 224, 233 (2014) (“At the same time, we do not find in either the Fair Debt Collection Practices Act or the Bankruptcy Code good reason to believe that Congress intended an ordinary civil court applying the Act to determine these bankruptcy-related questions. The Act and the Code have different purposes and structural features. The Act seeks to help, not by closing what *Johnson* and the United States characterize as a loophole in the Bankruptcy Code, but by preventing consumer bankruptcies in the first place.”); *see also Maloy v. Phillips*, 197 B.R. 721, 723 (M.D. Ga. 1996) (automatic stay of 11 U.S.C. § 362(a)(6) prohibited debt collector from sending the validation notice required by 15 U.S.C. § 1692g).

### **[C] The Bankruptcy Discharge**

Beneath the complex provisions of the Bankruptcy Code, 11 U.S.C. § 101 et seq., “lies a simple bargain: A debtor can win a discharge of its debts if it proceeds with honesty and places virtually all its assets on the table for its creditors.” *Harrington v. Purdue Pharma L.P.*, 2024 U.S. LEXIS 2848, at \*8 (U.S., July 27, 2024).

In contrast to the automatic stay, a bankruptcy discharge relieves the debtor from personal liability for his or her debts. A discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.” 11 U.S.C. § 524(a)(2).

“Unlike violations of the automatic stay, the Bankruptcy Code does not provide a statutory remedy to debtors for a violation of the discharge injunction. But because it is an injunction, a party who violates it may be liable for contempt.” *Albert-Sheridan*, 658 B.R. 516, at 538. The FDCPA, however, is not the appropriate remedy.

For violations of the discharge injunction, the “appropriate remedy is contempt of court against the offending creditor pursuant to 11 U.S.C. § 105(a).” *Id.* at 1039; *see Taggart v. Lorenzen*, 587 U.S. 554, 556 (2019) (civil contempt remedy is available for violation of discharge injunction if the creditor had no objectively reasonable basis to conclude that the creditor’s conduct was lawful under the discharge order).

After a debt is discharged in bankruptcy, the debtor’s credit report is inaccurate and misleading if it reports that the debtor still owes the discharged debt. A discharged debtor may invoke the remedies in the FCRA when a CRA’s credit report on the debtor reports a discharged debt as delinquent.

If the consumer credit report accurately reflects the debtor’s discharge of the debt, then the credit report does not violate the FCRA if the report accurately reflects that the debt was delinquent before it was discharged. *Mortimer*, 2013 U.S. Dist. LEXIS 51877, at \*25-26 (“Several courts, including two in this district involving closely analogous factual situations, have held that [a] report, after discharge, of delinquencies in payment during the bankruptcy proceedings are not ‘incomplete or inaccurate’ information for the purpose of the FCRA.”) (internal quotations and citations omitted). *See id.* at \*29 (“However, Plaintiff does not cite any authority in which a court concluded that a creditor violated the FCRA by reporting a delinquency in the time period between the initiation of the bankruptcy and the entry of the discharge order.”).

In the Ninth Circuit, *Walls v. Wells Fargo*, 276 F.3d 502 (9th Cir. 2002), “precludes FDCPA and other claims based on violations of” the discharge injunction in 11 U.S.C. § 524(a). *Brown v. Transworld Sys., Inc.*, 73 F.4th 1030, 1035 (9th Cir. 2023); *see id.* at 1038-39 (“To the extent Brown’s FDCPA claim in Count I is based on the theory that Transworld and Patenaude improperly sought to collect debts discharged in bankruptcy, the claim falls under the second holding in *Walls*.”).

*Walls* has been criticized. *See, e.g., Cave v. Valley Collection Servs. LLC*, 2015 U.S. LEXIS 185146, at \*4 (D. Ariz. 2015) (“The limits of *Walls* have been contested, most notably by the Seventh Circuit in *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004), which held that the Bankruptcy Code does not preclude claims advanced under the FDCPA against creditors for negligent debt collection attempts during and after bankruptcy. Nevertheless, this Court is governed by *Walls*, not by *Randolph*.”).

The Ninth Circuit has limited *Walls*. It does not preclude FDCPA claims that are not based on violations of a debtor’s discharge order. *Manikian v. Peters & Freedman, L.P.*, 981 F.3d 712, 717 (9th Cir. 2020) (“And our decision in *Walls* does not bar independent theories of recovery whenever violation of the discharge also is a potentially available theory of recovery.”) *See id.*, 981 F.3d at 717 n.5 (“Because *Walls* applies only where a debtor’s FDCPA claim is premised on a violation of the discharge order, we agree with the Second, Third, and Seventh Circuits that the Bankruptcy Code did not implicitly repeal the FDCPA.”)

///

## **[D] Denial of Discharge and Exceptions to Discharge**

Under 11 U.S.C. § 727(a), an individual debtor may not be entitled to a discharge if, for example, the debtor fraudulently transferred or concealed assets. In addition, under 11 U.S.C. § 523(a), the creditor may be entitled to except its claim from discharge. For example, under 11 U.S.C. § 523(a)(2), a creditor's claim may be excepted from discharge if the creditor proves that its claim was caused by the debtor's fraud.

In general, nondischargeability disputes in bankruptcy cases involve one or more of these issues: (1) whether creditor will be able to carry its burden of proving that the individual debtor committed one or more of the acts specified in § 727(a) for denial of a discharge to the individual debtor; (2) alternatively, whether the creditor's claim against the debtor qualifies for an exception from discharge under § 523(a); and (3) in any event, whether the creditor will likely actually recover anything if the creditor incurs the time, expense, and risk of proving that the debtor should be denied a discharge or that the creditor's claim should be excepted from discharge.

In mediating a dispute involving claims by a creditor under §§ 523(a) and 727(a), the mediator should keep in mind that the creditor and debtor do not control whether the creditor's claim under § 727 can be dismissed as part of a settlement. Instead, Rule 7041 of the Federal Rules of Bankruptcy Procedure provides: "Rule 41 F.R.Civ.P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper."

## **[XII] Panel Mediation Procedures in District Court & Bankruptcy Court**

Although other panel mediators may do things differently, the author generally follows the procedures set forth below when he serves as a panel mediator in the District Court (under USDC G.O. #11-10) and the Bankruptcy Court (under USBC G.O. #95-01).

### **[1] Selection of mediator**

The parties or their counsel contact the proposed mediator and ask him (i.e., this outline's author) whether he is available to serve as a panel mediator in a case pending in the District Court or the Bankruptcy Court.

In the District Court, panel mediators may volunteer to mediate cases listed on a list periodically circulated by the District Court's ADR Program. Before doing this, the mediator should do the conflict check discussed in ¶ 2, below, or should notify the parties that a conflict check is in process.

///

///

## **[2] Conflict check and disclosures**

Next, the proposed mediator does a conflict check. After doing the conflict check, the proposed mediator discloses in an email to counsel for the parties any grounds for disqualification, including any conflicts of interest. This email also specifies whether the mediation will be a panel or private mediation. In panel mediations, the author's email states that there will not be any charge by him for any time through and including the first mediation session.

## **[3] Appointment of mediator**

The proposed mediator is officially appointed, or the matter is officially assigned to the mediator. In the District Court, the ADR Program typically assigns the matter to the mediator selected by the parties. In the Bankruptcy Court, the panel mediator is appointed when the Bankruptcy Court approves a stipulation and proposed order assigning the matter to the proposed mediator for a panel mediation.

## **[4] Request for conference call**

After receiving notice of appointment as the panel mediator, the mediator contacts all counsel and arranges a conference call to discuss scheduling the mediation session and related matters. The matters that must be discussed in the conference call are set forth in § 8.1 of USDC G.O. #11-10 and § 7.5 of USBC G.O. #95-01.

In District Court panel mediations, the mediator must have the joint conference call (or other communication) with counsel within 30 days of the "Notice of Assignment of Mediator." USDC G.O. #11-10, § 8.1. In Bankruptcy Court panel mediations, the mediator must conduct the joint conference call within 14 days of the mediator's receipt of notification of appointment. USBC G.O. #95-01, § 7.5.

## **[5] Conference call**

Within the timeframe stated in ¶ 4, above, the panel mediator has a conference call with counsel for the parties. In the call, the mediator discusses scheduling and other requirements. In addition to scheduling, subjects discussed include, but aren't limited to, the following: (a) whether any additional parties should be involved in the mediation (e.g., insurers), (b) the importance of mediation confidentiality and the need for all participants to sign and return the official form confidentiality stipulation (to be prepared by the mediator), (c) the need for counsel to consider, when applicable, Cal. Evid. Code § 1129, regarding mediation confidentiality, (d) the need for clients to calendar and attend the mediation session; and (e) the mediator's preferred format for confidential mediation statements.

///

///

In scheduling the mediation session, the mediator and the parties must comply with applicable scheduling requirements. In District Court panel mediations, the mediation session must be completed within the timeframe ordered by the judge or, if no completion date was ordered, then no later than 45 days before the date set for the final pretrial conference. USDC G.O. #11-10, § 8.2. The mediator “shall strive to schedule the mediation for the earliest possible date after the parties have had [a] reasonable time to evaluate their case, thus minimizing the expense of the litigation.” *Ibid.*

In Bankruptcy Court panel mediations, the mediation conference must begin within 30 days of the mediator’s receipt of notice of appointment, but this timeframe may be extended, although sometimes an order is required. *See* USBC G.O. #95-01, § 7.6.

During or shortly after the conference call, the mediator schedules the mediation session and sets a deadline for submitting the following items, typically to be provided via email to the mediator at least one week before the mediation session: (a) confidential mediation statements, (b) any evidentiary materials, and (c) signatures of all counsel and parties on a standard form confidentiality stipulation (which the mediator prepares and sends to counsel for their signatures and the signatures of their clients).

If the mediation session will take place via Zoom, then the mediator also requests email addresses for all clients (so that he can pre-assign them to Zoom breakout rooms).

#### **[6] Notice of date for mediation session**

In District Court panel mediations, after the mediation session is scheduled, the mediator files a notice of the mediation session date, time, and place. In Bankruptcy Court panel mediations, there is no requirement that the mediator file a notice of the scheduled mediation session date, time, and place. Instead, the mediator confirms the schedule, including the date, time, and place of the mediation session, in an email to counsel after the call described in ¶ 5, above.

#### **[7] Reminder email**

Roughly 14 days before the mediation session, the mediator typically sends an email reminding counsel of the schedule for submitting mediation statements etc. and the date for the mediation session. The email reminds counsel that their clients must attend the mediation session.

#### **[8] Preparation for the mediation session**

Ideally, but not always, counsel for the parties timely submit their confidential mediation statements etc. (and provide all required signatures on the confidentiality stipulation). After receipt of those materials, the mediator reviews them. Typically, after reviewing those materials, the mediator has pre-session telephone calls with counsel for the parties about any questions that the mediator may have, plus any suggestions counsel may have for making the mediation as successful as possible.

## [9] The mediation session

On the scheduled date, the panel mediator conducts the scheduled mediation session. As stated, counsel and their clients must attend the mediation session. *See* USDC G.O. #11-10, § 8.7; USBC G.O. #95-01, § 7.9. The author frequently does panel mediations via Zoom; in such mediations, counsel and their clients attend remotely (and everyone is spared the time and expense of travel).

During the session, if the parties settle (in whole or in part), then the mediator typically keeps the session going until everyone has signed a legally binding document. In general, oral settlement agreements made in a mediation session are unenforceable.

The settlement agreement, regardless of its abbreviated format, should: (a) contain the material terms of the resolution, (b) be signed by the parties, (c) provide that it is legally binding and enforceable, and (d) include a valid enforcement mechanism. *See* Cal. Evid. Code § 1123(b) (“A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by the provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied: . . . (b) The agreement provides that it is enforceable or binding or words to that effect.”); *Tianhai Lace Co. Ltd. v. Zoetop Bus. Co. Ltd.*, 2024 U.S. Dist. LEXIS 48286, at \*5-6 (C.D. Cal. 2024) (“In addition to the requirement of completeness, an enforceable settlement contract requires ‘the intent of the parties to bind themselves.’”) (quoting *Callie v. Near*, 829 F.2d 888, 891 (9th Cir. 1987) (*Callie*)); *Credit Bureau Collection, Inc. v. Pardini*, 580 Fed. Appx. 553, at \*553 (9th Cir. 2014) (“The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367 because the stipulated judgment expressly provided that the court retained jurisdiction over disputes relating to the enforcement or breach of the parties’ settlement agreement.”) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)). Some types of settlement are conditioned on court approval, including various types of settlement in bankruptcy cases. *See, e.g.*, Fed.R.Bankr. P. 7041 and 9019(a).

“It is well settled that a district court has the equitable power to enforce summarily an agreement to settle a case pending before it.” *Calle*, 829 F.2d at 890; *see also* Cal. Civ. Code § 664.6(a) (“If the parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.”).

If the parties don’t entirely settle during the first mediation session, then the mediator discusses whether the parties want to have a further session. If they do, then a further date is scheduled, or a timeframe is set for discussing scheduling a further session. If the parties don’t settle entirely and don’t want to mediate further, then the mediator ends the mediation. Sometimes the parties may need to seek leave from the District Court or the Bankruptcy Court to extend the deadline for completing the mediation.

///

At the end of the first mediation session, the panel mediator sends an email to counsel stating whether the mediation is concluded and confirming that there was no charge from the mediator for any services through and including the mediation session.

In panel mediations, the author does not charge the parties or their counsel for any time through and including the first mediation session. After the first session, the author may charge for his time, if everyone has agreed in writing to the proposed compensation.

Any mediator seeking compensation in connection with a District Court panel mediation must comply with USDC G.O. #11-10, § 3.8. In Bankruptcy Court panel mediations, the mediator must comply with USBC G.O. #95-01, § 9.0.

**[10] Mediator’s report to the court**

After the mediation session, the panel mediator promptly files an official form report (or official form certificate) stating whether the mediation session resulted in a settlement (but not disclosing information apart from what the official form requires). The District Court and Bankruptcy Court have different forms for this purpose.

**[11] Mediator’s report to ADR Program**

In District Court panel mediations, after the mediation session, the mediator sends a copy of the form report and the signed confidentiality stipulation to District Court’s ADR Program. In the District Court, there is a confidential online survey to be completed by the mediator.

In Bankruptcy Court panel mediations, after the mediation session, the mediator submits a copy of the signed confidentiality stipulation and a confidential form report to the Bankruptcy Court’s ADR Program.

**[12] Feedback**

After the mediation session, the parties and their counsel may provide feedback to the ADR Programs of the District Court and the Bankruptcy Court.

[\* \* \* \*]