Important Dates

CFSC Spring Meeting:
April 22-24, 2010
Sheraton Denver Downtown
Denver, CO

CFSC Summer Meeting:
Aug. 6-9, 2010
The
Fairmont/InterContinental
Mark Hopkins
San Francisco, CA

CFSC Fast Facts

Number of Current Members: 1171
Number of Young Lawyer Members: 100
Number of Active Past Chairs: 7
Number of Consumer Fellows: 7
Subcommittee with the Most Members: Truth in Lending (319 Members)

Newsletter Editorial Board

Managing Editor:
Frank Springfield
Burr & Forman LLP
205/458-5187

Editors:
Lynette Hotchkiss
FTC - Division of Financial Practices
202/326-2303

Stephanie Shaw
Womble Carlyle
202/857-4509

Leadership Message

Welcome to the Consumer Financial Services Committee's new and improved newsletter. We hope that you find that the information will be helpful to you in your practice. One of the goals for our committee is to help our members stay up to date with the latest developments in our industry. Our newsletter is one of the tools to accomplish this goal. In the coming months, you can look forward to increased opportunities for learning through webinars and video seminars, which will replay the most popular CLE programs from our conferences. We are also exploring whether a Face Book, or other social networking outlet, would help us better communicate with our membership. We hope that you will be able to attend one of our upcoming meetings - Denver, April 22-24 and San Francisco, August 6-9. In addition to the great CLE and other programming, you will be able to talk with experts in our field, meet new colleagues who share your professional interests, and renew old friendships, all in two of the most beautiful cities in the world. See you there!

Terry Franzén
CFSC Committee Chair
tfranzen@franzen-salzano.com

Meeting Promos/Postcards

Thanks to everyone that attended our Winter Meeting in Park City, Utah. For those that were not able to attend, you missed a great time. While the programming was top notch as always, the high point of the meeting was the Committee Dinner (a/k/a "Don Fest") where our former fearless leader was roasted and reduced to wearing a Blue Devils hat all night. About the only thing missing from our meeting, was huge amounts of snow. However, Terry has already promised to start working on the weather for our 2012 Winter Meeting in Park City.

If you have not already signed up for our Spring Meeting in Denver, Colorado, April 21-24, 2010, it is not too late to do so. You can sign up on line by registering here. We will be staying at the Sheraton Denver Downtown Hotel and the meeting will kickoff on Wednesday, April 21, 2010 with a welcome reception at 7:00 pm. The Young (and Not-So-Young) Lawyers will be going to dinner following the reception and you can email Doug Cuthbertson (dcuthber@milesstockbridge.com) if you want to go to this dinner. The programs will start Thursday morning at 8:00 and, if you have never attended, you will want to make sure you are there at 8:00 for the introduction of all the attendees. There will be a wide array of programs ranging from "Dramatic Shifts in Consumer Financial Product Regulation" to "Trends in Default Litigation from the Creditor's Perspective." Our Committee Dinner with also be Thursday night, April 22, 2010 at the Broker Restaurant. We hope to see you in Denver.
Sub-Committee Spotlight

The **Litigation and Arbitration Subcommittee** of the ABA Business Law Section's Consumer Financial Services Committee expects 2010 to be another busy year in the realms of litigation and arbitration. The Subcommittee is planning a program for the ABA Spring Meeting in Denver tentatively titled "Emerging Exposures: Are Robocalls and Autodialers a Next Wave of Junk-Fax Type Litigation?" Invited speakers include Carolyn L. Hann of the Federal Trade Commission, William Himpler, Executive Vice President of Federal Government Affairs of the American Financial Services Association, and Jon Ledsky of Varga Berger Ledsky Hayes & Casey. This program is very timely with the increase in the use of robocalls and autodialers by collection agents or servicers of different types of consumer debt due to the struggling economy. All litigators should find this program a worthwhile event to attend.

**Read the Full Article...**

There is never a shortage of developments in the world of servicing, selling, and collecting debt. The **Debt Collection Practices and Bankruptcy Subcommittee** strives to keep its members current on emerging legislation and litigation trends by putting on programs that examine these issues from the consumer, collector and creditor perspective. We pride ourselves on inviting panelists from all segments of the industry, including consumer advocates, trade associations, government lawyers, in-house lawyers, and defense counsel. In the past year, we heard from Pete Barry, a well-known plaintiff's lawyer, regarding "Abusive Debt Collection Practices: Why Collectors Get Sued" and John Bedard, a prominent defense lawyer, regarding "Technology in the Collection Industry: Friend or Foe."

**Read the Full Article...**

CFSC Pro Bono/Community Service

**A Short History of Safeborrowing.com**

The Consumer Financial Services Committee’s website for consumers, Safeborrowing.com, was first published in 2001. At the request of Committee Chair Lynne Barr, committee members Jim Brown, Margie Corwin, Don Lampe, Jackie Parker, Nina Simon and Steve Zeisel put together information designed to assist consumers in making informed choices about home mortgages.

CFSC Legal Feature

**Strategic Default in Anti-Deficiency States**

Each CFSC Newsletter will include article(s) authored by the CFSC members. We are always looking for volunteers to help with articles. Therefore, please let us know if you have an article that you would like to be featured in an upcoming newsletter. This edition's features are:

- **Strategic Default in Anti-Deficiency States**
In 2004, under the leadership of Committee Chair Jeff Langer and Pro Bono Liaison John Ropiequet, committee members Nathan Bowden, Terry Franzen, David Melcer and Trish Obara expanded the existing information about home mortgage products by adding links to other websites. This was designed to give consumers additional useful information about financial services prepared by government agencies, trade associations, educational groups and others, to help the Committee achieve its goal of promoting financial literacy among consumers.

When the website was rebuilt by the Committee in 2004, there was a consensus that the Committee should provide more information to consumers than what was then provided, which was limited to information about home mortgages. The next area targeted was auto finance. As discussions continued, the perception grew that the website should also cover credit cards and student loans.

This led to a complete revision of Safeborrowing.com which was rolled out in April 2008 under the leadership of Committee Chair Don Lampe and Pro Bono Liaison John Ropiequet, who drew on the expertise of numerous committee members. With the help of Business Law Section IT staff member Frank Hillis, the home mortgage section of the website was completely rewritten, redesigned and updated by Terry Franzen, Bob Jaworski and Nina Simon. An auto finance section was prepared by Liz Huber and Scott Johnson, and Scott and Ducie Le prepared a section on credit cards. A section on student loans was assembled by Amy Bizar, Rick Hackett, Matt McIntyre, Laura Rogers, Arthur Rotatori and Steven Scott.

Today, under the leadership of Committee Chair Terry Franzen and Co-Pro Bono Liaison Scott Johnson, the website is being reviewed on regular basis to make sure that it takes into account significant legal and regulatory developments that may affect each of the four areas covered by the website. The Committee's goal is to make sure that the information provided is accurate, up-to-date and user friendly for all consumers who want to know more about financial transactions.

By: Mariana E. Gomez, American University's Washington College of Law

Mortgage lenders coping with rising foreclosure rates have a growing problem on their hands: underwater borrowers are walking away from their homes in increasing numbers. These borrowers can afford their mortgage payments but choose to "strategically default" because the amount owing on their mortgage exceeds the value of the home. As many as one in four defaults may be strategic.

"Strategic default" is fast replacing traditionally accepted mores surrounding debt and repayment. Consumer advocates are encouraging underwater borrowers to divorce themselves from their mortgages and start over.

Read the Full Article…

Is Donohue the Death Knell For Technical FDCPA Violations?
By: Tomio B. Narita, Simmonds & Narita LLP

In its recent opinion, Donohue v. Quick Collect, Inc., _F.3d _, 2010 WL 103653 (9th Cir. 2010), the Ninth Circuit joined the Seventh Circuit and the Sixth Circuit, holding that a false and misleading statement does not violate sections 1692e or 1692f of the FDCPA unless the statement is "material." See Donohue, 2010 WL 103653, *5-6. Does Donohue mark the end of the era of hyper-technical FDCPA violations? While it is probably too early for collection professionals to celebrate, the Donohue case provides strong additional support for notion that technical FDCPA violations are on their way out.

The plaintiff in Donohue asserted a highly-technical alleged violation of the FDCPA. She claimed the collector violated the Act by serving her with a state court complaint which sought the "sum of $270.99, together with interest thereon of 12% per annum...in the amount of $32.89.”

Read the Full Article…

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Litigation and Arbitration Subcommittee Update

By Craig A. Varga (Varga Berger Ledsky Hayes & Casey, Chicago, IL)
Litigation and Arbitration Subcommittee Chair

The Litigation and Arbitration Subcommittee of the ABA’s Consumer Financial Services Committee expects 2010 to be another busy year in the realms of litigation and arbitration. The Subcommittee is planning a program for the ABA Spring Meeting in Denver tentatively titled “Emerging Exposures: Are Robocalls and Autodialers A Next Wave of Junk-Fax Type Litigation?” Invited speakers include Carolyn L. Hann of the Federal Trade Commission, William Himpler, Executive Vice President of Federal Government Affairs of the American Financial Services Association, and Jon Ledsky of Varga Berger Ledsky Hayes & Casey. This program is very timely with the increase in the use of robocalls and autodialers by collection agents or servicers of different types of consumer debt due to the struggling economy. All litigators should find this program a worthwhile event to attend.

At the Consumer Financial Services Committee Winter Meeting in Park City, Utah, the Subcommittee held a program titled “The State of Consumer Credit Arbitration: Assessing Developments Regarding NAF, AAA and Proposed Federal Legislation.” The program’s panel examined the main consumer objections to arbitration, whether there is empirical evidence supporting the objections, and whether arbitration has a future in consumer financial services disputes. The inclusion of arbitration clauses in consumer financial services contracts is an industry practice that has been taking many body blows in recent months. While courts have generally found this practice acceptable and enforceable, it has been subject to successful collateral attacks ranging from an Attorney General’s enforcement action that questioned the ownership of one of the major arbitration agencies, to antitrust litigation that has resulted in large industry players abandoning the practice. The panel’s speakers included Professor Jean R. Sternlight, University of Nevada at Las Vegas Boyd School of Law & Director Saltman Center for Conflict Resolution; Professor Christopher R. Drahozal, University of Kansas School of Law; Alan S. Kaplinsky, Ballard Spahr LLP; and Mark H. Tyson, McGlinchey Stafford PLLC. The materials from this program are posted on the Consumer Financial Services Committee website for those of you who were unable to attend the Winter Meeting at http://www.abanet.org/buslaw/committees/CL230000pub/materials.shtml.

The Subcommittee will continue to provide programming throughout the year on subjects of timely interest to the members of the ABA’s Consumer Financial Services Committee. We hope to see you in Denver!
Debt Collection Practices and Bankruptcy Subcommittee Update
By Katrina Christakis and Tomio Narita

There is never a shortage of developments in the world of servicing, selling, and collecting debt. The Debt Collection Practices and Bankruptcy Subcommittee strives to keep its members current on emerging legislation and litigation trends by putting on programs that examine these issues from the consumer, collector and creditor perspective. We pride ourselves on inviting panelists from all segments of the industry, including consumer advocates, trade associations, government lawyers, in-house lawyers, and defense counsel. In the past year, we heard from Pete Barry, a well-known plaintiff’s lawyer, regarding “Abusive Debt Collection Practices: Why Collectors Get Sued” and John Bedard, a prominent defense lawyer, regarding “Technology in the Collection Industry: Friend or Foe.”

Most recently, at the Winter Meeting of the Consumer Financial Services Committee, the Subcommittee hosted top representatives from the three major trade associations: Valerie Hayes (General Counsel, ACA International), Joann Needleman (NARCA Secretary and Board Member), and Barbara Sinsley (General Counsel, DBA International). In a program titled, “What’s New in DC: An Overview of the Financial Services Regulatory Environment in 2010,” they provided insight and commentary on the GAO Report concerning the collection of credit card debt, the FTC regional workshops held across the country, and the CFPA implications on the collection industry. (The materials from this program are posted on the Consumer Financial Services Committee website for those of you who were unable to attend the Winter Meeting at ____________.)

For the upcoming Spring Meeting in Denver, the Subcommittee is planning a program that addresses trends in default litigation from the creditor’s perspective, including the rise in collection counterclaims, the increase in adversary proceedings, and other bankruptcy-related claims. Invited speakers include in-house litigators from mortgage servicers, auto finance companies, and credit card issuers. The Subcommittee will continue to provide programming throughout the year on subjects of timely interest to the members of the ABA’s Consumer Financial Services Committee. If you would like to propose a topic, would like to speak, or would like to recommend a speaker, we encourage you to reach out to us.
Strategic Default in Anti-Deficiency States

By Mariana E. Gomez

Mortgage lenders coping with rising foreclosure rates have a growing problem on their hands: underwater borrowers are walking away from their homes in increasing numbers. These borrowers can afford their mortgage payments but choose to “strategically default” because the amount owing on their mortgage exceeds the value of the home. As many as one in four defaults may be strategic.

“Strategic default” is fast replacing traditionally accepted mores surrounding debt and repayment. Consumer advocates are encouraging underwater borrowers to divorce themselves from their mortgages and start over. Borrowers who walk away from their loans often blame lenders for not offering a significant reduction in the principle. But lenders may be disinclined to offer principle reductions to borrowers who refinanced purchase-money loans or took equity out of their

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1 Mariana Gomez is a third-year student at American University’s Washington College of Law and a law clerk at the Financial Services Roundtable in Washington, DC.
2 See J. Hagerty & N. Timiraos, Debtor’s Dilemma: Pay the Mortgage or Walk Away, WALL STREET JOURNAL, Dec. 17, 2009 at A22 (citing Northwestern University study estimating that 1 in 4 defaults are strategic).
5 Id.
homes to finance luxury vehicles, vacations, investment properties, weddings, and other consumer goods and services.  

Strategic defaults are a particular concern for lenders operating in states that limit lender recourse after mortgage defaults. Under the common law, a borrower is personally liable for mortgage defaults if the foreclosure sale does not satisfy the full amount of the lien encumbering the property. The common law also allows lenders to file multiple actions related to the same mortgage default; lenders can foreclose on the collateral and sue directly on the dishonored note. Defaulting homeowners in common law states faced the loss of their home and personal liability for the balance of the debt not satisfied by the foreclosure judgment. The double threat of foreclosure and a “deficiency” judgment are formidable disincentives against voluntary default.

The number of states that allowed common law foreclosures and deficiency judgments decreased after the Great Depression. States enacted a variety of “anti-deficiency” laws to mitigate the effects of strict foreclosure and personal liability. Anti-deficiency statutes take a variety of forms: they may limit the election of remedies with “one-action” and “foreclosure first”

\[See \text{ Streitfeld, With No Help in Sight More Homeowners Walk Away, supra note 3.}\]
rules\textsuperscript{7} or cap deficiency judgments based on “fair value appraisals” instead of relying on the sale proceeds to determine the value of the collateral.\textsuperscript{8} Some states go further and limit purchase-money security interest (PMSI) lenders\textsuperscript{9} and bar deficiency judgments after non-judicial foreclosures.\textsuperscript{10}

Not surprisingly, the rate of strategic defaults is higher in such states. This article explores the various options lenders can utilize to maximize recovery against borrowers who opt to “strategically default.”

\textit{Residential PMSI mortgages and deficiency laws:}

Borrowers in states with nonrecourse PMSI mortgages may be especially tempted to walk away from their homes. In contrast to states like Illinois, that explicitly allow deficiency judgments without any fair value limitation,\textsuperscript{11} strategic defaulters in


\textsuperscript{10} The following states forbid deficiency judgments after nonjudicial foreclosures: AZ, CA, CO, KY, LA, ME, MD, ME, MT, OK, PA.

\textsuperscript{11} Ill. Comp. Stat. §5/15-1508.
Arizona California, Florida,\textsuperscript{12} Montana, Nevada,\textsuperscript{13} North Carolina, and North Dakota\textsuperscript{14} may be emboldened by laws that grant PMSI mortgages on residential property non-recourse status. Oregon also restricts recourse on borrower-occupied dwellings secured with PMSI mortgages but with an important limitation: PMSI lenders can waive their lien on the collateral and sue directly on the note.\textsuperscript{15}

Other states bar personal liability on PMSI mortgages if lenders conduct nonjudicial or trustee foreclosure sales; Colorado, Louisiana, Maine, Massachusetts, Montana, Kentucky, Oklahoma, and Pennsylvania allow lenders to sue for a personal judgments after a judicial foreclosure against a residential PMSI mortgage, but not after a private sale.

In the past, laws authorizing deficiency judgments only after judicial foreclosures had the practical effect of making PMSI mortgages non-recourse because lenders often forgo deficiency judgments in favor of nonjudicial foreclosures, despite the availability of deficiency judgments after judicial

\textsuperscript{14} See supra notes 10, 15.
\textsuperscript{15} See Beckhusen v. Frank, 775 P.2d 923, 924-25 (Or. App. 1989) (allowing holder of residential trust deed to foreclose on property and waive right to deficiency or waive right to foreclose and sue directly on the note) (citing Ward v. Beem Corp., 437 P.2d 483 (Or. 1968)).
foreclosures. Lenders prefer nonjudicial foreclosures because private sales are faster, and importantly, eliminate the debtor’s statutory right to redeem the property. Eliminating the right to redeem protects the value of collateral because however unlikely it is that a debtor will exercise the right to redeem, the threat of redemption lowers the market value of the collateral.16

The increasing phenomena of strategic default may prompt lenders to rethink their foreclosure strategies. Unlike involuntary defaulters, strategic defaulters are more likely to have a reliable stream of income and own other assets. Strategic defaulters are probably more likely to purchase new property after default than an involuntary debtor. In these situations, a senior PMSI lender may weigh the hardships of judicial foreclosure with the benefits of deficiency judgment against the debtor. Where the debtor has assets subject to levy, the lender may be more inclined to pursue a course of action that permits personal liability.17

16 The threat of redemption, particularly when combined with the inability of bidders at foreclosure sales to inspect the property before auction, lowers the amount bidders will pay for foreclosed property. See Michael Shill, An Economic Analysis of Mortgagor Protection Laws, 77 Va. L. Rev. 489, 493 (April 1991) (noting chilling effect redemption right and lack of pre-auction inspection causes on bidding at foreclosure sales).
17 The role mortgage insurers do or do not play in lenders decisions to seek deficiency judgments is beyond the scope of this article. However, mortgage insurers tend to aggressively pursue deficiencies to maximize recovery and possibly to deter others from defaulting. See John Mixon, Ira Shepard, Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b), 27 Wake
If a lender obtains a personal judgment against the debtor, the judgment and lien on the debtor’s non-exempt assets survives between five and twenty years.\(^\text{18}\) During the life of the judgment creditors may levy on non-exempt property and where allowed, can garnish the debtor’s wages.

**More States are Passing PMSI Mortgage Anti-Deficiency Laws**

In response to the housing crisis and poor economic outlook, more states are enacting anti-deficiency laws to protect PMSI mortgagors. Florida will begin enforcing an anti-deficiency law that absolves borrowers of legal liability for PMSI mortgages on July 1, 2010.\(^\text{19}\) In March of 2009 Nevada enacted a law barring deficiency judgments on residential PMSI mortgages made on or after October 1, 2009.\(^\text{20}\) In 2009, Iowa passed special legislation law that forbids nonjudicial foreclosures on residential PMSI mortgages, shortens the enforceability of deficiency judgments to two years, and allows courts to invalidate junior liens if the junior lender refuses to grant a mortgage modification that reduces at least ten

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\(^\text{19}\) Deficiency judgments in Florida used to be “the rule, not the exception.” Florida H.B. No. 35 amended section 702.06(2) to prohibit deficiency judgments resulting from mortgage foreclosures on homestead property. Florida is a “homestead” state that allows unlimited exemptions for homestead properties during bankruptcy proceedings.

\(^\text{20}\) See supra note 16.
percent of the net present value owing on the junior mortgage.\textsuperscript{21} Maryland’s recent emergency legislation does not forbid deficiency judgments but creates obstacles to deficiency judgments by significantly lengthening the time it takes to conduct a nonjudicial foreclosure on residential PMSI mortgages.\textsuperscript{22}

However, borrowers should be aware that the presence of a residential PMSI deficiency law does not mean a lender can never obtain a money judgment on a residential PMSI mortgage or trust deed. Strategic defaulters relying on laws prohibiting deficiency judgments on standard PMSI-mortgages should know that both the PMSI transaction and the property securing the mortgage must meet specific criteria before an anti-deficiency law applies. For example, although the PMSI-mortgage laws are facially similar in California and Arizona, Arizona rejected California’s interpretation of the statute.

In California, PMSI protection is limited to purchaser-occupied residential dwellings for not more than four families.\textsuperscript{25} It does not apply to investment properties, vacation homes, reverse mortgages, refinancing transactions, home equity

\textsuperscript{21} Iowa Senate File 364, enacted on April 27, 2009, effective June 1, 2009. Iowa’s new mortgagor protection law passed the Senate with a 50-0 vote. The Iowa legislation will expire in 2011 unless it is renewed.
\textsuperscript{22} See 2010 Md. Senate Bill No. 276, Md. 427th (Jan. 22, 2010) (extending foreclosure proceedings from an average of fifteen days to 135 days), temporarily amending Md. Real Prop. § 1-705.1, Md. Rules of Proc. § 14-205.
\textsuperscript{25} Cal. Civ. Proc. § 580b.
withdrawals, and non-standard PMSI’s. In contrast, the PMSI-mortgage protection privileges in Arizona are broader than California law allows. For example, Arizona deems refinanced PMSI loans and loan workouts to be PMSI mortgages protected by their PMSI anti-deficiency law; Arizona also shields PMSI mortgages on investment properties from deficiency judgments.

Non-PMSI Mortgages and Deficiencies.

PMSI and non-PMSI lenders alike must contend with (1) foreclosure first laws; (2) one-action laws; and (3) bars against personal judgments after nonjudicial foreclosures. However, in most states, these laws will not apply to a non-PMSI mortgagee that is subordinate to a senior lien. A non-PMSI mortgagee with senior priority is subject to laws limiting a lender’s election of remedies, but loans that are considered “non-PMSI” (home equity loans, home improvement loans, loans to

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23 See e.g., Allstate Savings & Loan Assn. v. Murphy, 159 Cal. Rptr. 663, 664 (2d Dist. 1979) (noting section 580b did not bar deficiency judgment when loan proceeds used to construct a swimming pool); Roseleaf v. Chierighino 378 P.2d 97, 99-101 (ruling that loan paying for the balance owing on a purchase-money mortgage is not protected under 580b because it is a “standard” PMSI); Union Bank v. Wendelend, 126 Cal. Rptr. 549, 552 (App. Ct. 1976) (second loan to pay off balance of residential PMSI mortgage was not a PMSI note entitled to protection under 580b).


25 Wendelend, 126 Cal. Rptr. at 552 (one-action rule and foreclosure first rule does not apply to subordinate junior lien holders), cf. with Bank One v. Beauvais, at 814-15 (rejecting Wendelend and holding that junior lenders are subject to foreclosure first rules and one-action laws).
purchase other property, etc.) are frequently second or third in priority. For example, during the go-go credit days, a debtor with some equity in their home could usually secure a second, non-PMSI loan. The long-term of traditional purchase money mortgages (thirty years) also increases the likelihood that a non-PMSI loan secured by the borrowers home will be second to a senior PMSI mortgage.

Borrowers who walk away from their homes may be walking away from both first and second mortgages. A subordinate non-PMSI loan can avoid election of remedies laws and laws forbidding judgments after nonjudicial foreclosures by exercising forbearance. With the exception of Arizona, actions filed or undertaken by senior mortgagees are not attributed to junior lenders The result is the inapplicability of anti-deficiency laws to non-PMSI, subordinate lienors.

In strategic default cases, the junior position can be advantageous for a variety of reasons:

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26 See Heller v. Bloxham, 221 Cal. Rptr. 425, 427 (App. 1985) (holding Cal. Civ. Proc. § 580d does not bar purchasing junior from obtaining deficiency judgment when senior creditor elects to foreclose by nonjudicial sale, because purchasing junior did not elect private sale and it would be unfair to eliminate junior’s right to deficiency even though junior ended up with nonredeemable title); cf. with. Evans v. Cal. Trailer Ct., 33 Cal. Rptr. 2d 646 (App. 1994) (barring junior action for money judgment on junior note after junior purchased senior note and foreclosed on the senior note because juniors own actions led to foreclosure that extinguished junior’s interest in collateral), rehearing denied, review denied.

27 See supra, 27. The Beauvais court refused to allow a sold-out junior to sue for a personal judgment after the junior purchased the collateral at the senior’s sale.
Juniors are positioned to get two bites of the apple: they can purchase the collateral at the senior’s foreclosure sale (which extinguishes the right of redemption) and sue on the note for a personal judgment.

Borrowers who are planning to walk away from their homes may continue to make payments on their non-PMSI obligations even if they stopped making payments on the first mortgages. The rational is that borrowers, particularly strategic defaulters who can afford to make payments on the second mortgages, make payments on their home equity credit lines to preserve an important source of cash.

The financial resources and future income stream of strategic defaulters are probably greater than an involuntary debtor; thus the value of a money judgment may be worth more to a junior lender than a money judgment against a bankrupt debtor.

Where debtors have a degree of financial stability and the value of the collateral has decreased dramatically, a money judgment may be attractive. A money judgment avoids the practical difficulties posed by taking possession of thousands of foreclosed homes. In a depressed housing market and poor economic climate the
home may remain on the market for months before it sells. A money judgment can be promptly sold to a credit collection company.

The Long-Term Consequences of Strategic Default

Inevitably, some borrowers without second or third mortgages will avoid personal liability after they walk away from their mortgages. However, borrowers should not confuse legal liability with the debt itself. Anti-deficiency laws can extinguish the lien, but the underlying debt continues to exist. Lenders can and do pursue borrowers for “voluntary” repayment of their obligation.

A debtor’s credit report will take a heavy hit and make it more difficult for a borrower to obtain quality-credit products in the future. Defaults are reported to credit reporting agencies and may remain on the report seven years. Defaulting borrowers will also face additional hurdles the next time they apply for a mortgage; debtors must wait at least five years after a default before they can apply for a government-secured loan, and there is no guarantee that a prudent lender will extend credit to a borrower who walked away from their last mortgage.

Despite the long-term economic consequences caused by strategic default, these problems are not going away any time
soon. As long as anti-deficiency laws transform purchase-money mortgages into non-recourse debt, rational borrowers will take advantage of the laws as an easy way to shed debt. Unless anti-deficiency laws are curtailed – which is unlikely in the current political climate – or until there is a sea-change in market values, lenders can continue to expect waves of “jingle mail” to flood their offices.\textsuperscript{28}

\textsuperscript{28} Jingle mail is a short-hand term that expresses the sound envelopes make when borrowers send their lender the keys to their home because the borrower has “walked away” from the home.
In its recent opinion, *Donohue v. Quick Collect, Inc.*, _ F.3d _, 2010 WL 103653 (9th Cir. 2010), the Ninth Circuit joined the Seventh Circuit and the Sixth Circuit, holding that a false and misleading statement does not violate sections 1692e or 1692f of the FDCPA unless the statement is “material.” *See Donohue*, 2010 WL 103653, *5-6. Does Donohue mark the end of the era of hyper-technical FDCPA violations? While it is probably too early for collection professionals to celebrate, the Donohue case provides strong additional support for notion that technical FDCPA violations are on their way out.

The plaintiff in Donohue asserted a highly-technical alleged violation of the FDCPA. She claimed the collector violated the Act by serving her with a state court complaint which sought the “sum of $270.99, together with interest thereon of 12% per annum . . . in the amount of $32.89.” The collector was entitled to collect the $32.89, but that figure did not actually reflect 12% interest on the principal balance due. Rather, the $32.89 figure was comprised of $24.07 in pre-assignment finance charges (properly assessed by the original creditor) and $8.82 in post-assignment interest calculated at the 12% annual rate. Thus, the statement
in the collection complaint was technically false. *Id.* at *6.

Despite this, the Ninth Circuit ruled that the collection complaint did not violate the FDCPA. The complaint “sought recovery of sums to which Quick Collect was clearly and lawfully entitled” even though it incorrectly labeled the $32.89 amount sought as 12% interest on principal, instead of finance charges imposed by the creditor and post-assignment interest. *Id.* at *5.* Following the Seventh Circuit’s decisions in *Hahn v. Triumph Partnerships LLC*, 557 F.3d 755 (7th Cir. 2009), and *Wahl v. Midland Credit Mgmt., Inc.*, 556 F.3d 643, 646 (7th Cir. 2009), as well as the Sixth Circuit’s decision in *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009), the Ninth Circuit held that a false and misleading statement is not actionable under the FDCPA unless it is “material.” The Court stated: “We now conclude that false but non-material representations are not likely to mislead the least sophisticated consumer and therefore are not actionable under §§ 1692e or 1692f.” *See Donohue*, 2010 WL 103653, *6.*

The Ninth Circuit’s holding that only material misstatements violate the FDCPA is consistent with the remedial nature of the Act, because “inmaterial statements, by definition, do not affect a consumer’s ability to make intelligent decisions.” *Id.* The Court noted that:

In assessing FDCPA liability, we **are not concerned with mere technical falsehoods that mislead no one**, but instead with genuinely misleading statements that may frustrate a consumer’s ability to intelligently choose his or her response. **Here, the statement in the Complaint did not**
undermine Donohue’s ability to intelligently choose her action concerning her debt.

*Id.* at *7* (emphasis added). As the Ninth Circuit observed: “Even if the Complaint had separated $32.89 into interest and finance charges, we can conceive of no action Donohue could have taken that was not already available to her on the basis of the information in the Complaint—nor has Donohue articulated any different action she might have chosen.” *Id.*

Under *Donohue*, a consumer must demonstrate “materiality” by showing how an allegedly false or misleading statement could have impacted the least sophisticated debtor’s ability to make intelligent choices. Although the court stopped short of adding a “reasonable reliance” requirement, similar to common law fraud, *Donohue* does require plaintiffs to explain how the least sophisticated consumer might have changed their position as a result of the allegedly false and misleading statement. Highly-technical violations of the FDCPA will rarely qualify as “material” under *Donohue* because the language used by the collector will not “frustrate a consumer’s ability to intelligently chose a response” to the collector’s communication. *Donohue*, 2010 WL 103653, *7*.

The FDCPA was passed to prevent truly “abusive, deceptive and unfair debt collection practices” (*see* 15 U.S.C. § 1692(a)), not as method for consumers and their attorneys to seize upon meaningless misstatements contained in letters and
collection complaints. Circuit courts across the country, including the Ninth Circuit, are recognizing this by holding that technically false statements do not violate the FDCPA unless they are “material” to the collection process. Collectors facing highly-technical FDCPA claims have a powerful new ally in Donohue.