# Garnishment, the FDCPA and the Mobile Virginia Consumer

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The Fair Debt Collection and Practices Act ("FDCPA") provides that "any debt collector[1] who brings any legal action on a debt against any consumer" shall bring such action in either the judicial district where the consumer resides or in the judicial district where the consumer signed the contract.[2] When the consumer has moved to a different county after the judgment but before the garnishment, is there a problem bringing the garnishment in the court in the district where the consumer no longer resides?

A garnishment issued in the judgment debtor/consumer's former judicial district would violate the FDCPA, *if the garnishment is a legal action on a debt against the consumer*.

Nationally, some courts have held that a garnishment is obviously an action against the consumer. Such garnishment would therefore be a clear violation of the FDCPA, if the garnishment is filed in any judicial district other than where the judgment debtor now resides (or where the contract was entered into).[3]

On the other hand, other federal courts have been reluctant to override underlying state law, where the state had its own garnishment venue based on the garnishee's location.[4] Those cases say the garnishment is an action against the employer/bank/garnishee - not against the consumer.

Until 2012, judgment creditors had no clear alternative under Virginia law but to file the garnishment in the court where the judgment was entered. Perhaps in response to FDCPA challenges, a provision was added to Va. Code Ann. § 8.01-511(A)(iii) in March 2012, effective July 2012, to allow the garnishment to be filed in the city or county where the judgment debtor now resides.[5]

But, was that provision necessary? A 1978 Virginia Supreme Court case said, "In Virginia, garnishment is regarded, not as a process of execution to enforce a judgment, but as an ***independent suit by the judgment-debtor in the name of the judgment-creditor against the garnishee*** [emphasis added]."[6] That would seem to place Virginia squarely among the states where the FDCPA does not cover garnishment, because the garnishment is NOT an action against the garnishee/employer/bank - not the consumer.

It may be that the right answer is not found in the law of garnishment at all.

The Virginia Supreme Court has explained that a garnishment can only issue against property subject to a writ of fieri facias.[7] A fieri facias has its roots in the common law, but Va. Code Ann. § 8.01-474 states, "By a writ of fieri facias, the officer shall be commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is." Thus it seems the fieri facias, not the garnishment, is the legal action on a debt against the judgment debtor/consumer.

Finally, can it be argued that the fieri facias is an action against the property of the consumer, and therefore not an action *against the consumer*?

No. The Fourth Circuit clearly held in 2006 that a collector proceeding by *in rem* process is nevertheless for FDCPA purposes bringing an action on a debt against the consumer.[8]

In addition to this statutory interpretation, there's a policy reason *in Virginia law* why the judgment creditor should be required to follow the FDCPA venue provisions.

The Code of Virginia gives the judgment debtor an opportunity to exempt certain funds from garnishment. Va. Code Ann. § 34-17, familiar to consumer bankruptcy attorneys, allows judgment debtors to protect garnished funds by filing a homestead deed, pursuant to Va. Code Ann. § 34-4, after the garnish-

ment summons has been issued, up to, and until the return date of the garnishment summons. The exemption *must* be considered by the garnishing court.[9] "Thus, [ ] there is a window of opportunity 'to protect garnished wages' by 'a claim of homestead exemption.'"[10] The Code also requires that a notice of exemptions and claim for exemption form be attached to every garnishment summons.[11]

The General Assembly in Va. Code Ann. § 34-17 and Va. Code Ann. § 34-4, allows the poor debtor some small measure of protection from garnishment, by asserting a homestead exemption. Enforcing the FDCPA venue provisions on the fieri facias and garnishment furthers this debtor-friendly provision of Virginia law.

To summarize, although usually found on the same form, there is a difference between the garnishment summons and a writ of fieri facias. The garnishment summons gives the judgment creditor a means of enforcing their lien against property held by third parties, and the Virginia Supreme Court has called that an action against that third party.

The prior writ of fieri facias creates that lien on the judgment debtor's property. The fieri facias is a legal action, certainly, on a debt, certainly, and *against the consumer*. Virginia's special homestead exemption provides additional policy support for holding that the writ of fieri facias, present on the face of garnishment summons, is an action against the consumer which should be subject to the FDCPA venue provision.

Judgment creditors who proceed with a fieri facias and garnishment in the judgment court when the consumer/debtor has moved residence to a new judicial district, do so at their peril.

**(Endnotes)**

**1.** A collection attorney is a debt collector, within the meaning of the FDCPA, so actions brought by an attorney, not a pro se original creditor, are covered here.

**2.** 15 U.S.C. § 1692i(a)(2). Except, perhaps, for medical bills. Consumer debtors are most often sued where they reside, and this article focuses on actions of that type. Additionally, the FDCPA, and therefore this article, does not apply to business debts.

**3.** *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1511 (9th Cir. 1994) (construing a writ of garnishment as a legal action supports the purpose of the FDCPA as outlined by Congress); *Adkins v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 2:11-cv-00619, 2012 WL 604249 (S.D. Ohio Feb. 24, 2012) ("[a] garnishment proceeding is without a doubt a legal action.").

**4.** See *Smith v. Solomon & Solomon, P.C.* (1st Cir. 2013) (holding the Massachusetts "trustee process" is not an action against the consumer but, rather, the third-party garnishee); *Pickens v. Collection Servs. of Athens, Inc.*, 165 F. Supp. 2d 1376, 1377 (M.D. Ga. 2001), aff'd, 273 F.3d 1121 (11th Cir. 2001) (Georgia statute specifically defined a garnishment proceeding as an action between the judgment-creditor and the garnishee and required venue to be based on the garnishee's place of business).

**5.** "If the judgment debtor does not reside in the city or county where the judgment was entered, the judgment creditor may have the case filed or docketed in the court of the city or county where the judgment debtor resides and such court may issue an execution on the judgment, provided that the judgment creditor (a) files with the court an abstract of the judgment rendered, (b) pays fees to the court in accordance with § 16.1-69.48:2 or subdivision 17 of § 17.1-275, and (c) files in both courts any release or satisfaction of judgment." Va. Code Ann. § 8.01-511(A)(iii). This is narrower that the FDCPA venue provisions. Taking as an example, a consumer judgment debtor was sued in Prince William when he resided there. He now lives in Stafford. Stafford and Spotsylvania are in the same Virginia judicial district, so the FDCPA venue provision would allow a garnishment to issue from Spotsylvania. But 8.01-511 only permits judgment to be docketed for purposes of the garnishment in the city or county where the judgment debtor now resides, which would be Stafford. A Spotsylvania garnishment would violate the FDCPA as an action that cannot legally be taken.

**6.** *Lynch v. Johnson*, 84 S.E.2d 419, 421 (1954).

**7.** *Butler v. Butler*, 219 Va. 164 (1978). The authors would like to thank Darrell Drinkwater, Esq., of M. Richard Epps, PC, for bringing this case to our attention.

**8.** *Wilson v. Draper & Goldberg*, 443 F.3d 373 (2006).

**9.** Va. Code. Ann. § 34-17

**10.** *In re Banks*, 443 B.R. 708 (Bankr. W.D. Va. 2011).

**11.** Va. Code Ann. § 8.01-512.4. This is presumably why the Code requires that "service" of the garnishment be had on both the garnishee and the judgment debtor. *See* Va. Code Ann. § 8.01-511, et seq.