

STATUTE OF LIMITATIONS  
and the  
TELEPHONE CONSUMER  
PROTECTION ACT

**PacWest Student Financial Services  
Conference 2016  
Olympic Valley, California**

Chad V. Echols  
Outside General Counsel  
Williams & Fudge, Inc. &  
Owner of The Echols Firm, LLC

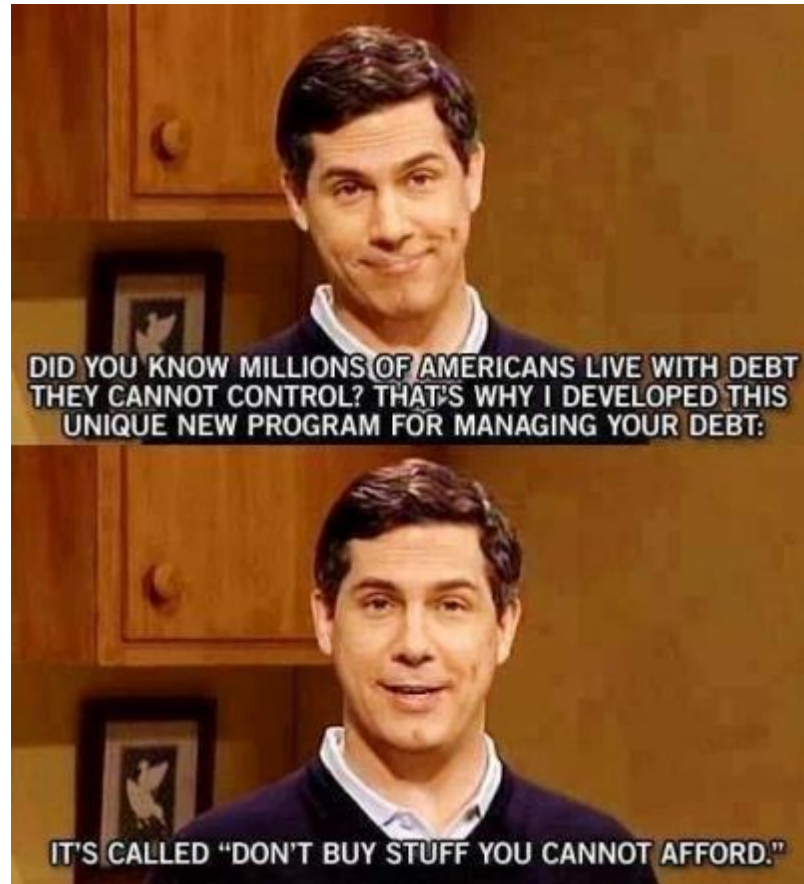
# Disclaimer

- This presentation should be construed as an overview of the issues discussed. The presentation is not legal advice to anyone attending this presentation, or reading the accompanying handout. Specific legal questions regarding these concepts and their application to any institution of higher education or other presentation participant should be directed to the institution's or other participant's legal counsel.

# Partnership

- Now more than ever, the communication between a creditor and its partnering agencies should be clear and candid. Recent positions advanced by the Consumer Financial Protection Bureau highlight this point.
- If you have information about a student that will be helpful to an agency, please identify the information at placement (i.e. bankruptcy, issues with prior agency, and/or issues with the school).

# Don't Buy Stuff You Can't Afford



**The Statute of Limitations:**  
the clock is ticking faster than you  
think!



# SOL Presentation

- The SOL portion will cover:
  - What is the statute of limitations (“SOL”);
  - What is an affirmative defense;
  - When does the SOL begin to run;
  - What does it mean to toll the SOL;
  - What does it mean to re-start the SOL;
  - How is the meaning changing in certain states;
  - How are federal regulators getting involved; and
  - What to do next?

# State Specific

- One of the difficulties with issues surrounding the statute of limitations is the result of it being a state by state issue in most cases. Therefore, many answers to potential questions would require a review of the applicable state laws, conflict of laws issues, and the case law.

# Federal Debt

- As I am confident you are well aware, Congress has removed the statute of limitations for federal student loans.
- The Higher Education Technical Amendments of 1991 eliminated all statutes of limitations for the collection of federal loan programs. This provision specifically preempts state laws, other federal laws, and any regulations. The provisions is codified at 20 U.S.C. § 1091a.



# The Statute of Limitations

- A statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.
- See *Black's Law Dictionary* (Bryan A. Garner ed., 7<sup>th</sup> ed., West 1999).

# SOL & the FDCPA

- As you are aware, your partnering agencies are governed by the Fair Debt Collection Practices Act. One way the consumer attorneys are attacking the collection of debt is using provisions in the FDCPA to increasingly narrow the collectability of debts that are past the applicable SOL.
- The best example of this issue is the decision out of the 7<sup>th</sup> Circuit Court of Appeals called the *McMahon/Delgado* decision.
- Of note, the court followed the CFPB and FTC rather than the other two appellate courts that previously ruled on the issue.

# Breach of Contract

- There are often different statutes of limitations for different types of claims that might accrue. The statutes of limitations that we are discussing today concern claims for breach of contract. Breach of contract is the cause of action that you, as the creditor, would be bringing against a student for failing to pay their obligation.

# State Specific Statutes – The Range

- Kentucky;
  - Oral Contract – 5 years;
  - Written Contract – 15 years.
- South Carolina;
  - Oral Contract – 3 years;
  - Written Contract – 3 years.
- There is a wide variation across the country. You should, at a minimum, be aware of the statutes of limitations in the state where you are located and probably the neighboring states where many of your students will be located.

# Affirmative Defense



# Affirmative Defense

- An affirmative defense is a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's claim, even if all allegations in the complaint are true. See *Black's Law Dictionary* (Bryan A. Garner, ed., 7<sup>th</sup> ed. West 1999).
- Historically, the statute of limitations was simply an affirmative defense. If someone was sued in South Carolina 4 years after a material breach of contract, then regardless of the truth of the allegations the defendant could assert the statute of limitations as an affirmative defense and have the complaint dismissed.

When does the statute begin to run?



# When does the statute begin to run?

- As a general rule, the statute of limitations on a contract claim begins to run on the date of the breach. The date of the breach is the first day the action accrues. If students are required to pay in full by the last day of the semester, then a student that owes money at the end of the semester could be sued on the first day after the end of the semester because they are in breach of the terms of the agreement.



# Tolling the Statute of Limitations

- The tolling period varies by statute and by state, but generally this is a period of time when the running of the statute of limitations is interrupted by action or inaction of the person subject to the statute of limitation. In South Carolina for instance (3 year SOL), if the student has not paid for one year and enters active military duty for three years, then upon his/her return to South Carolina as a regular citizen, the creditor would have two more years to bring an action against the consumer.

# Partial Payments/Promises to Pay

- One issue of great importance to understand in your area is the effect of a partial payment or promise to pay. In some states a partial payment tolls the statute of limitations while in other states a partial payment re-starts the statute of limitations.
- Often a written acknowledgement signed by the party to be charged or a partial payment will serve to re-start the statute of limitations if the statute has already run. There are states where seeking the required acknowledgment can create liability if certain steps are not taken. See N.C. Gen. Stat. 75-55(1) (this applies to creditors).

# Change is coming!

- New Mexico;
- Mississippi;
- New York City;
- Wisconsin;
- Connecticut;
- West Virginia;
- Massachusetts; and
- North Carolina.

# Change is coming!

cfpb

Consumer Financial  
Protection Bureau



# The New View of the SOL

- States and federal regulators are now using the statute of limitations to make it increasingly difficult to collect older debt obligations.
- This trend is, in my opinion, being driven by the purchase and collection of older debt that is completely unrelated to higher education. Nevertheless, this niche' of the collection industry will be directly impacted. These changes will require specific action to prevent a great deal of debt from becoming virtually uncollectable.

# New Mexico

## New Mexico Settles Case Against Debt Collection Agency

Patrick Lunsford August 29, 2008 (Be the first to respond)

The New Mexico attorney general announced Thursday a settlement in a year-old lawsuit with an Illinois collection agency over the collection of out-of-statute debt.

Attorney General Gary King's office said in a press release that it reached an agreement with Merchants' Credit Guide, a 110-year old accounts receivable management firm based in Chicago.

King filed suit against Merchants' in August 2007, alleging that the company had tried to collect on time-barred debt in New Mexico ("[New Mexico AG Sues Merchants Credit Guide](#)," Aug. 30, 2007). King's suit additionally stated that Merchants' was not properly licensed to collect the state when it attempted to collect some debts. Merchants' became licensed to collect in New Mexico on April 1, 2005, according to King's statement.

As part of the settlement, Merchants' has agreed to stop collecting all debt that is unenforceable due to the running of the statute of limitation



# New Mexico

- As of December 15, 2010, the New Mexico Attorney General has required debt collectors to provide certain disclosures when collecting debt in New Mexico that is past the New Mexico statute of limitations.

# New Mexico – model language

- We are required by New Mexico Attorney General Rule to notify you of the following information. This is not legal advice: This debt may be too old for you to be sued on it in court. If it is too old, you can't be required to pay it through a lawsuit. You can renew the debt and start the time for the filing of a lawsuit against you to collect the debt if you do any of the following: make any payment of the debt; sign a paper in which you give up ("waive") your right to stop the debt collector from suing you in court to collect the debt.



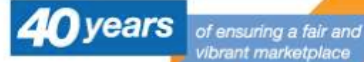
# Mississippi

- Miss. Code Ann. § 15-1-3(1):
- The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the **right as well as the remedy**. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.
- Exception for monies owed to the state of Mississippi or subdivisions thereof. See Miss. Const. Art. 4, § 104.

# New York City



# New York City



## **New York City New Debt Collection Rules**

### **Final rules released implementing changes to Local Law No. 15.**

The New York City Department of Consumer Affairs recently promulgated final rules implementing changes to the City's debt collection laws. **The rules are effective April 24, 2010.** If you are collecting debt in New York City, please read this alert carefully.

#### **Background**

In the Spring of 2009, the New York City Council passed Local Law No. 15 which significantly amended licensing and debt collection requirements for debt collectors and asset buyers operating in New York City. The Department of Consumer Affairs subsequently issued proposed rules implementing Local Law No. 15. However, these rules were not officially published in the New York City register until late March 2010.

This compliance alert provides an overview of Local Law No. 15 and summarizes the rule recently adopted by the NYC Department of Consumer Affairs.

New York City – **required disclosure** – I have placed this text in red to highlight the obvious negative effect on collections that placing the required notice in a contrasting color will have. Not to mention the increase in cost of two color letters.

**“WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT. The legal time limit (statute of limitations) for suing you to collect this debt has expired. However, if somebody sues you anyway to try and make you pay this debt, court rules REQUIRE YOU to tell the court that the statute of limitations has expired to prevent the creditor from obtaining a judgment. Even though the statute of limitations has expired, you may CHOOSE to make payments. However, BE AWARE: If you make a payment, the creditor's right to sue you to make you pay the entire debt may START AGAIN.”**

The above notice must be provided in at least 12 point type and set off in a sharply contrasting color from all other type on the permitted communication. The language must also be placed adjacent to the identifying information about the amount claimed to be due or owed on the debt.

# Wisconsin

- W.S.A. § 893.05 states:
  - When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.

# Wisconsin – FDCPA

The case of *Klewer v.  
Cavalry Investments, LLC*,  
2002 WL 2018830

The language of the statute is even more unequivocal than the FDCPA. Defendant's attempt to collect plaintiff's time-barred debt clearly constitutes an attempt to enforce a right that defendant should have known did not exist. As indicated above, plaintiff need not demonstrate that defendant's error of law was intentional. Accordingly, defendant has violated the WCA.

For all of the foregoing reasons, plaintiff's motion for summary judgment on the issue of liability under the FDCPA and the WCA is granted, and defendant's cross-motion is denied.

## **ORDER**

IT IS ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is GRANTED.

# Massachusetts

Mass.gov

State Agencies | State A-Z Topics

Skip to main content | Need help resizing text?



The Official Website of the Attorney General of Massachusetts

**Attorney General**  
**Martha Coakley**

Search... in Attorney Gener SEARCH

About the Attorney  
General's Office

News and Updates

Consumer  
Resources

Public Safety

Doing Business in  
Massachusetts

Government  
Resources

Bureaus

Home > News and Updates > Press Releases > 2012 >

MARTHA COAKLEY  
ATTORNEY GENERAL

## Media Contact

Christopher Loh  
(617) 727-2543

For Immediate release - March 01, 2012

## Updated Debt Regulations Provide Stronger Protections

### Part of AG Coakley's Effort to Modernize All Consumer Protection Act Regulations; Brings Regulations Up To Date with Evolving Technology

**BOSTON** – Revised debt collection regulations designed to provide stronger consumer protections by addressing changing technology go into effect tomorrow, Attorney General Martha Coakley announced. The regulations, which were the subject of public hearings last spring, guide the industry in its collection practices and are more consistent with existing state and federal laws.

"Given the industry's recent advances in technology, we concentrated on how we could bring our regulations up-to-date and streamline them to be consistent with other state and federal agencies," AG Coakley said. "These amendments ensure that the playing field is level for both creditors and consumers so that all parties are better protected."

# Massachusetts

(a) A creditor who makes the following disclosure shall be deemed to have complied with the requirements of this section:

WE ARE REQUIRED BY REGULATION OF THE MASSACHUSETTS ATTORNEY GENERAL TO NOTIFY YOU OF THE FOLLOWING INFORMATION. THIS INFORMATION IS NOT LEGAL ADVICE: THIS DEBT MAY BE TOO OLD FOR YOU TO BE SUED ON IT IN COURT. IF IT IS TOO OLD, YOU CANNOT BE REQUIRED TO PAY IT THROUGH A LAWSUIT. TAKE NOTE: YOU CAN RENEW THE DEBT AND THE STATUTE OF LIMITATIONS FOR THE FILING OF A LAWSUIT AGAINST YOU IF YOU DO ANY OF THE FOLLOWING: MAKE ANY PAYMENT ON THE DEBT; SIGN A PAPER IN WHICH YOU ADMIT THAT YOU OWE THE DEBT OR IN WHICH YOU MAKE A NEW PROMISE TO PAY; SIGN A PAPER IN WHICH YOU GIVE UP OR WAIVE YOUR RIGHT TO STOP THE CREDITOR FROM SUING YOU IN COURT TO COLLECT THE DEBT. WHILE THIS DEBT MAY NOT BE ENFORCEABLE THROUGH A LAWSUIT, IT MAY STILL AFFECT YOUR ABILITY TO OBTAIN CREDIT OR AFFECT YOUR CREDIT SCORE OR RATING.

(b) In the case of written communications, the disclosures required by this subsection shall be clear and conspicuous by appearing in a type which is a minimum of eight-point type and said disclosures shall be placed on the front page of the communication;

(c) In the case of oral communications, the disclosures required by this subsection shall be made immediately before or immediately after the first statement requesting payment, or, if no request for payment is made, no later than immediately after reference to the debt is first made.



# North Carolina

- N.C. Gen Stat. § 75-50:
- The following words and terms as used in this Article shall be construed as follows:
- (1) “Consumer” means any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes.
- (2) “Debt” means any obligation owed or due or alleged to be owed or due from a consumer.
- (3) “Debt collector” means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 70, Chapter 58 of the General Statutes.

# North Carolina

- N.C. Gen. Stat. § 75-55:
- No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:
  - (1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

# Federal Involvement



**For Release:** 01/30/2012

## **Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception**

### **Firm Also Will Notify Consumers with "Time-Barred" Debt That It Will Not Sue to Collect**

One of the nation's largest consumer debt buyers has agreed to pay a \$2.5 million civil penalty to settle Federal Trade Commission charges that it made a range of misrepresentations when trying to collect old debts. In addition, the company, [Asset Acceptance, LLC](#), has agreed to tell consumers whose debt may be too old to be legally enforceable that it will not sue to collect on that debt.

The proposed settlement order resolving the agency's charges also requires that when consumers dispute the accuracy of a debt, Asset Acceptance must investigate the dispute, ensuring that it has a reasonable basis for its claims the consumer owes the debt, before continuing its collection efforts. The proposed order also bars the company from placing debt on consumers' credit reports without notifying them about the negative report. The U.S. Department of Justice filed the proposed settlement order this week at the FTC's request.

"Most consumers do not know their legal rights with respect to collection of old debts past the statute of limitations," said David Vladeck, Director of the FTC's Bureau of Consumer Protection. "When a collector tells a consumer that she owes money and demands payment, it may create the misleading impression that the collector can sue the consumer in court to collect that debt. This FTC settlement signals that, even with old debt, the prohibitions against deceptive and unfair collection methods apply."

The FTC's action – alleging that Asset Acceptance violated the FTC Act, the [Fair Debt Collection Practices Act](#), and the [Fair Credit Reporting Act](#) – is part of the FTC's continuing efforts to protect consumers adversely affected by the struggling economy. The agency today also issued a new publication for consumers, "[Time-Barred Debts: Understanding Your Rights When It Comes to Old Debts](#)".

#### **E-mail this News Release**

If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

**Veá este comunicado de prensa en español.**

#### **Related Items:**

**United States of America (For the Federal Trade Commission), Plaintiff, v. Asset Acceptance, LLC, Defendant**  
(United States District Court for the Middle District of Florida)  
Case No. 8:12-cv-182-T-27EAJ  
FTC File No. 0523133

#### **For Consumers:**

- [Time-Barred Debts: Understanding Your Rights When It Comes to Old Debts](#)
- [Tick-Tock, Tick-Tock: Time-Barred Debts: What's that, and why should I care?](#)

#### **For Businesses:**

- [Watch what you're doing with time-barred debts](#)

# Connecticut & West Virginia

- These two states have similar provisions that provide two different notifications depending upon the SOL for suing the consumer and the SOL for credit reporting. The operational aspects of this requirement are very difficult.

# TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227, *et seq.*

- Telephone Consumer Protection Act of 1991;
- Think about cell phones in 1991;
- First & third party liability; and
- Significant penalties.



# TCPA

- Per violation liability;
- No class cap;
- Defense strategies:
  - Land-line;
  - Definition of dialer;
  - Legislative fix;
  - Scrubbing;
  - Etc..
- Insurance issues;
- CONSENT – your help!!
- Proposed FCC Regs



# TCPA cases can be \$\$\$

---

## **Portfolio Recovery Associates to Pay \$18 Million to Settle TCPA Class Action**

---

*Tim Bauer*    April 27, 2016    (Be the first  
to respond)

<http://www.insidearm.com/daily/debt-buying-topics/debt-buying/portfolio-recovery-associates-to-pay-18-million-to-settle-tcpa-class-action/>

# TCPA

- Both creditors (schools) and collection agencies can be liable under the TCPA. Also, per the FCC, creditors can be liable for telephone contact of their collection agencies. It is important to be aware of a creditors telephone communication practices and the actions of its agency partners as it relates to the use of dialing technology.

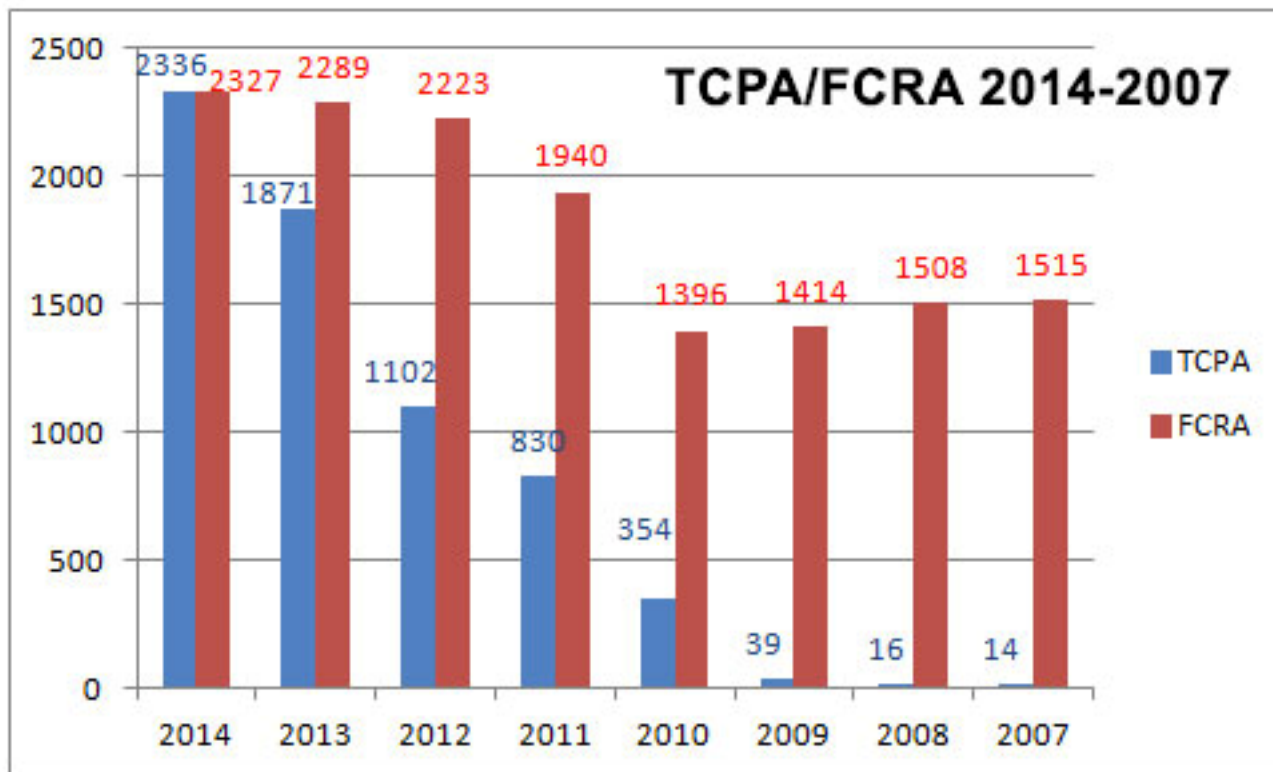




# TCPA

- **“AUTHORIZATION:** - I authorize the School, the Department, and their respective agents and contractors to contact me regarding my loan request or my loan(s), including repayment of my loan(s), at the current or any future number that I provide for my cellular phone or other wireless device using automated telephone dialing equipment or artificial or pre-recorded voice or text messages.”
- The above-stated language was taken directly from the 2012 Perkins loan master promissory note. The language is **an example** (from DOE) of language implemented because of the TCPA. The language is easily adaptable for other creditors.

# FCRA & TCPA Litigation Statistics



# FCC Rulemaking on TCPA – Released July 10, 2015

**Federal Communications Commission**

**FCC 15-72**

---

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

)  
)  
)  
)

# What do the new FCC rules mean?



# New Case Law

- While the FCC ruling from last summer was broader than creditors and collectors hoped and anticipated, courts have recently issued rulings illustrating that not every type of telephone equipment is an automatic telephone dialing system.
- The most recent Florida case involving CBE Group is an excellent example of case law that will hopefully continue trending towards the appropriate and compliant use of certain telephone systems.

What is next?



# Questions



# Thank you for attending today's presentation

- Thank you very much for your attention today. I hope a better understanding of the topics discussed will assist each institution in improving their overall approach to collections. Please feel free to contact me with any additional questions or concerns.



**Chad Echols**  
**The Echols Firm, LLC**  
**Outside General Counsel for**  
**Williams & Fudge, Inc.**  
[chad.echols@theecholsfirm.com](mailto:chad.echols@theecholsfirm.com)