STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JESSICA WENSTROM and DONALD WENSTROM, husband and wife,	**Case No. CV 2001 5690**
Plaintiffs,	**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** IN PART AND DENYING IN PART AND GRANTING PLAINTIFFS' MOTION TO AMEND
vs.	
PLATINUM RECOVERY SOLUTIONS, INC., and DOES 1 through 5,	
Defendants.	

I. INTRODUCTION

This case arises out of the attempted collection of a past due promissory note. Jessica and Donald Wenstrom ("Wenstroms") borrowed approximately $2,000 from Fidelity Associates and/or AVCO Financial Services in Bozeman, Montana sometime in the mid-eighties. The Wenstroms made payments until Jessica Wenstrom contracted colon cancer. At that time, Fidelity Associates and/or AVCO Financial Services told the Wenstroms to make payments as

they were able. Accordingly, the Wenstroms did make small payments periodically on said loan, the last payment being made in March of 1995. AVCO sold the Wenstroms' debt to the Sagres Company, who in turn sold the debt to Trinity Financial in Omaha, Nebraska. On or about October 30, 2000, Trinity Financial assigned the account to defendant Platinum Recovery Solutions ("Platinum") for collection on this matter. On November 30, 2000 Platinum sent a First Notice collection letter to the Wenstroms seeking to collect $1,049.30. Ostrowski deposition Exhibits No. 2 and No. 8. On January 24, 2001, Platinum sent a settlement offer letter. Ostrowski deposition Exhibits No. 3 and No. 7. Platinum then sent a "Notice of Right to Cure Default" to Wenstroms on April 12, 2001, indicating that if the Wenstroms defaulted again that Platinum would have the right to exercise its rights under the law against them without sending another notice like the present notice. Ostrowski deposition Exhibits No. 4 and No. 8. Platinum sent a final notice letter on June 25, 2001 to the Wenstroms and stated Platinum was going to review the account and possibly turn it over to its attorney for action in Idaho. Ostrowski deposition Tr. pp. 104-105. Ostrowski deposition Exhibit No. 7. The Wenstroms filed suit on September 5, 2001, and brought several causes of action alleging (1) breaches of the covenant of good faith and fair dealing (2) intentional infliction of emotional distress (3) negligent infliction of emotional distress (4) fraud; and (5) violation of both the Idaho Collection Agency Act ("ICAA") and the federal Fair Debt Collection Practices Act ("FDCPA").

At the September 20, 2002 hearing, on Platinum's motion for summary judgment, the Court granted partial summary judgment in favor of Platinum on Wenstroms' fraud claim, the claim of breach of good faith and fair dealing, and the claim of intentional infliction of emotional distress. The Court took under advisement the Wenstroms' claims of (1) the violation of ICAA

and FDCPA §§ 1692d, e, and f (2) the claim for negligent infliction of emotional distress; and (3) the motion to amend the claim to include punitive damages.

II. PRIVATE RIGHT OF ACTION UNDER ICAA

Wenstroms' claims are based on state (Idaho Collection Agency Act) and federal (Fair Debt Collection Practices Act) law. The Wenstroms argue that Platinum's conduct creates a question of fact as to whether Platinum violated the state ICAA. Specifically, the Wenstroms claim it creates a question of fact about whether Platinum's agents dealt openly, fairly, and honestly without deception in the conduct of Platinum's business. Platinum argues that the ICAA does not create a private right of action. The Idaho Collection Agency Act requires that:

> Every permittee, foreign permittee and agent shall deal openly, fairly, and honestly without deception in the conduct of the collection agency business. When not inconsistent with the statutes of this state, the provions of the federal fair debt collection practices act, 15 U.S.C. section 1692, at sep., as amended, may be enforced by the director against agents, permittees and foreign permittees under the provisions of this chapter.

I.C. § 26-2229A(1). In the case of *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 730 P.2d 1014 (1986), the court recognized the principles set forth in the RESTATEMENT (SECOND) OF TORTS § 874A (Tort Liability for Violation of Legislative Provision) and noted:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and *needed to assure the effectiveness of the provision*, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action. *Id.* (emphasis added).

112 Idaho at 101, 730 P.2d at 1021.

The question of whether the ICAA provides a private right of action and the scope of that action is a two-step process. First, the language of I.C. § 26-2229A(1) states that when not inconsistent with Idaho state statutes, the director of finance may enforce the FDCPA against

agents, permittees and foreign permittees. The language limits the scope of the director's authority to FDCPA regulations that do not contradict Idaho state statutes. Idaho Code § 26-2229A(1) does state that every permitte, foreign permittee and agent shall deal openly, fairly, and honestly without deception in the conduct of the collection agency business, but does not give the director of finance authority to enforce this language. Wenstroms cite *Wade v. Regional Credit Association*, 87 F.3d 1098 (9th Cir. 1996) to support the idea of a private right of action in Idaho under the ICAA, but *Wade* is not dispositive of the issue. In *Wade*, the Ninth Circuit Court of Appeals remanded back to the federal district judge the plaintiff's state law claims and ordered the district court to determine whether the state claims were dismissed with or without prejudice on the defendant's motion for summary judgment. The *Wade* court made no determination whether the ICAA contains a private right of action. Because it would be superfluous to recognize a private right of action under the ICAA that would provide no broader rights than those provided under the FDCPA, this Court in the present case declines to recognize a private right of action under the ICAA. Accordingly, partial summary judgment is granted in favor of Platinum against Wenstroms on their claim of a private right of action under the ICAA.

III. 15 U.S.C. § 1692d: HARASSMENT OR ABUSE

The Westroms argue that they have alleged specific facts showing that Platinum's agents engaged in harassing or abusive conduct, which creates an issue of material fact in dispute precluding the issuance of summary judgment. In particular, the Wenstroms point to behavior on the part of Platinum's employees that a reasonable juror could find constitutes conduct that harassed, oppressed or abused the Wenstrom in connection with collection of the debt. This behavior allegedly consisted of Platinum's agent responding to Mr. Westrom's statement that he

did not have enough money to pay the outstanding bill by replying that, Mr. Wenstrom apparently had enough money to afford telephone service. Defendant's Reply Brief, p. 5. Second, Mrs. Wenstrom alleges that Platinum's agent indicated to Mr. Wenstrom that he could be arrested for not paying the bill. Deposition of Jessica Wenstrom, p. 53. These statements were made in the context of an ongoing dispute about whether the Wentstroms were liable for the alleged debt. According to the Ninth Circuit's interpretation of the FDCPA the Court is to apply the "least sophisticated debtor" standard to these allegations. *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1227 (9th Cir.1988). For example, the Court shall find a violation of Section 1692d if Platinum's telephone calls are likely to harass, oppress, or abuse a hypothetical "least sophisticated debtor." *See id.* at 1225. 15 U.S.C. § 1692d states that:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
>
> (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
>
> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.
>
> (4) The advertisement for sale of any debt to coerce payment of the debt.
>
> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
>
> (6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692d. The question of whether Platinum's behavior was harassing, oppressive, or abusive raises issues of material fact in dispute. This is not the end of the analysis because Platinum argues that Mrs. Wenstrom's recollection of what her husband said is hearsay and should be disregarded as non-admissible evidence. Platinum's counsel correctly cites the rule that facts are to be liberally construed in favor of the party opposing the motion for summary judgment does not apply in determining threshold issues of admissibility of evidence offered in support of or opposition to a motion for summary judgment. *Ryan v. Beisner*, 123 Idaho 42, 844

P.2d 24 (1992). With this in mind, the Court finds that any statement made by Mr. Westrom to Mrs. Westrom after the phone conversation falls under the excited utterance exception, I.R.E. 803(2). Platinum argues that there was no indication as to the amount of time that passed between Mr. Wenstrom's phone call and what he told his wife. However, Mrs. Wenstrom testified that Mr. Wenstrom talked to her after he hung up from talking to Platinum's representative. Deposition of Jessica Wenstrom, p. 54. Platinum also argues that the Wenstroms failed to properly provide notice in the pleadings about these and other events. Paragraph VI and VII of Wenstroms' Complaint provides adequate notice that would include all of the Wenstroms' allegations. The question of whether Platinum's agents' behavior was harassing and abusive is left for the trier of fact to decide. Platinum's motion for partial summary judgment is denied as to the 15 U.S.C. § 1692d claim.

IV. 15 U.S.C. § 1692e(2) and 1692g: FALSE OR MISLEADING REPRESENTATIONS

The Wenstroms allege that Platinum provided false and misleading representations in its collection efforts. Platinum raises three defenses to the Wenstroms' claims: (1) the claims are barred by the statute of limitations (2) Mrs. Wenstrom's hearsay is not admissible evidence; and (3) Wenstroms misinterpret 15 U.S.C. § 1692g as it relates to Section 1692e(2). 15 U.S.C. § 1692e states:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
> (2) The false representation of--
> (A) the character, amount, or legal status of any debt; or
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
> (6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--
> (A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.
(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.
(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.
(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.
(13) The false representation or implication that documents are legal process.
(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.
(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.
(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692e. As decided in the previous section, the pleadings (¶ VI and VII of plaintiffs' "Complaint for Damages") gave notice of the potential claims, there is no statute of limitations problem. Also, the issue about Mrs. Wenstrom's testimony has been decided above.

The Court will now address the 15 U.S.C. § 1692g argument as it relates to the Section 1692e(2) charge. In essence, Platinum says that written notice of a "disputed debt" is required before a collection agency must determine the validity of a debt. 15 U.S.C. § 1692g reads:

(a) Notice of debt;
Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--
(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer's written request within the thirty- day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
(b) Disputed debts
If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section 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 a 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.
(c) Admission of liability
The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

15 U.S.C. § 1692g. The Wenstroms argue that Platinum's presumption of validity vanished once Mr. Wenstrom informed Platinum's agent that the debt was not valid under 15 U.S.C. § 1692a(3). At that point, Platinum had notice that perhaps the debt was not valid. While this may be true, the Wenstroms did not follow the requirement of 15 U.S.C. § 1692g that any dispute about the debt be sent in writing within the proscribed thirty-day period. Because of the Wenstroms' lack of compliance with 15 U.S.C. § 1692g, no claims may validly be brought under 15 U.S.C. § 1692e(2) of the FDCPA. Platinum's motion for partial summary judgment under 15 U.S.C. § 1692e(2) is granted.

V. 15 U.S.C. § 1692e(4): MISREPRESENTATION OF ARREST/IMPRISONMENT

Platinum's statement to the Wenstroms that they could be arrested clearly violates the prohibition in 15 U.S.C. § 1692e(4) against a collector from implying that a debtor might be arrested for failure to pay a debt. It should be noted that a violation of any section or subpart of the FDCPA creates a cause of action and liability. There is not a quota of sections that first must be violated before an action lies. The Wenstroms have provided a material fact in dispute about whether Platinum made false or misleading representations that prevents the grant of summary judgment on 15 U.S.C. § 1692e(4). Platinum's motion for partial summary judgment on the 15 U.S.C. § 1692e(4) claim is denied.

VI. 15 U.S.C. § 1692f: UNFAIR PRACTICES

Platinum alleges that it did not violate § 1692f's prohibition against unfair practices because the Wenstroms admitted to owing a debt and Platinum merely tried to collect on such admission. 15 U.S.C. § 1692f states:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.
> (2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.
> (3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.
> (4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.
> (5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.
> (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> (B) there is no present intention to take possession of the property; or
> (C) the property is exempt by law from such dispossession or disablement.
> (7) Communicating with a consumer regarding a debt by post card.
> (8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. § 1692f. In looking at number 1-8, it appears Platinum that it did not use unfair practices in attempting to collect on the debt. Once the Wenstroms admitted to owing a debt, Platinum had a valid legal basis to collect on the debt even though it had no copies of any original loan documents. However, in closer analysis of the wording "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt" and "without limiting the general application of the foregoing, the following conduct is a violation of this section" it appears a dispute of material fact exists. The conduct described in numbers 1-8 is not the sum of all prohibited behavior. In fact, the statute specifically states that the described conduct should not limit the "general application" of the rule. A trier of fact should decide if

Platinum's behavior includes unfair and unconscionable means to collect or attempt to collect any debt. If there is a material fact in dispute about the use of harassment and false or misleading representations, logically this same material fact in dispute could be used to question whether that same behavior is an unfair and unconscionable means to collect or attempt to collect any debt. Platinum's motion for partial summary judgment on this issue is denied.

VII. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

While Platinum is correct in asserting that a plaintiff seeking a claim for negligent infliction of emotion distress must prove: (1) duty (2) breach (3) causation; and (4) damages, Platinum is incorrect in asserting that there are no facts that would warrant such an outcome. *West v. Sanke*, 132 Idaho 133, 916 P.2d 228 (1988). Prior analysis has reached the conclusion that on a number of claims, there are adequate facts alleged that defeat summary judgment. Further, the Wenstroms have alleged significant physical ailments arising from Platinum's behavior that raise issues of material fact. Platinum relies on *Evans v. Twin Falls county*, 118 Idaho 210, 796 P.2d 87 (1990), for the proposition that the Wenstroms' own testimony about their physical ailments is not competent or sufficient. It is clear from *Evans* that I.R.E. 701 affords the district court discretion to determine whether a lay witness may testify as to his or her opinion regarding certain matters but testimony offered by a lay person relating to the cause of a medical condition should be disregarded. *Evans*, 118 Idaho at 219, 796 P.2d at 96. In a more recent case the Idaho Supreme Court has held that plaintiffs are competent to testify about certain physical ailments as lay opinion. *Cook v. Skyline Corporation*, 135 Idaho 26, 13 P.3d 857 (2000) (holding that physical manifestations of emotional distress which are classified as medical conditions require expert testimony, but that certain physical manifestations of distress such as lost sleep, irritability, anxiety, and being "shaky-voiced" are within the realm of lay opinion). Wenstroms' testimony about their common physical ailments such as anxiety, headaches, sleeplessness, diarrhea, and weight-loss, is certainly within the realm of lay knowledge and does not require an expert to testify. Platinum's motion for partial summary judgment on the issue of negligent infliction of emotional distress is denied.

VIII. PUNITIVE DAMAGES

Wenstroms have filed a motion to amend their complaint to include a claim for punitive damages pursuant to I.C. § 6-1604. A court shall allow the motion to amend the pleadings, "if the moving party establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." I.C. § 6-1604(2). Punitive damages are reserved for the most unusual and compelling circumstances; the reason for the disfavor with regard to awarding punitive damages is the emphasis on punishment and deterrence rather than compensation of plaintiff, which is the normal role for a civil action. *O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990). In deciding this issue, the Court was mindful of the language in the FDCPA describing why the FDCPA was implemented. The FDCPA was implemented "to eliminate abusive debt collection practices by debt collectors, to insure 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." 15 U.S.C. § 1692e. Congress passed the Act in light of the "abundant

evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." Id. § 1692a. It found that these practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." Id. Because of these compelling reasons, and the fact that punitive damages in this case are tools to shape future behavior, the Wenstroms' motion to amend to add punitive damages is granted.

IX. CONCLUSION

Platinum's Motion for Summary Judgment is **GRANTED** as to the Wenstroms' claims of common law fraud, breach of good faith and fair dealing, intentional infliction of emotional distress, claims under 15 U.S.C. § 1692e(2), 15 U.S.C. § 1692g and claims of a private right of action under the ICAA. Platinum's Motion for Summary Judgment is **DENIED** as to the Wenstroms' 15 U.S.C. § 1692d (harassment or abuse), 15 U.S.C. § 1692e(4) (misrepresentation of arrest/imprisonment), and 15 U.S.C. § 1692f (unfair practices) claims, and negligent infliction of emotional distress claim. The Westroms' Motion to Amend to include the claim of punitive damages is **GRANTED**.

ENTERED this _____11th____ day of October, 2002.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2002, a true copy of the foregoing was faxed to each of the following:

R. Bruce Owens
Susan P Weeks
Fax: 664-1684

Michael B. Hague
Fax: 664-6338

_____
Deputy Clerk