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The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos

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NOTES

The Fair Debt Collection Practices Act

THE NEED FOR REFORM IN THE AGE OF FINANCIAL CHAOS

INTRODUCTION

Congress enacted The Fair Debt Collection Practices Act (FDCPA) in 1977 to achieve the balanced goal of eliminating the most abusive practices of the debt collection industry without unduly restricting the rights of “ethical debt collectors.”¹ Unfortunately, more than three decades later, consumers are still regularly subjected to many of the same coercive debt collection tactics that Congress originally intended to eradicate. Reports compiled by regulators and major news outlets reveal that abusive debt collectors still exploit financially distressed consumers with repetitive profanity-filled telephone calls,² intentional harassment at work,³ threats of arrest,⁴ and threats of physical violence.⁵ These

¹ S. REP. NO. 95-382, at 1-3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696-98.

The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer’s legal rights, disclosing a consumer’s personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Id. Note, the FDCPA applies only to third-party debt collectors or debt buyers and does not regulate the practices of original creditors. *Id.* at 3.

² Fed. Trade Comm’n, Annual Report 2010: Fair Debt Collection Practices Act 6 (2010) [hereinafter FTC Annual Report 2010], *available at* <http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf>.

³ *Id.* at 8; see *Dateline NBC: Debt Trap; A Look Inside the Consumer Credit Debt Problem in America* (NBC television broadcast Sept. 6, 2009) [hereinafter *Dateline NBC: Debt Trap*] (interviewing Iraq War veteran Charles Houston about debt collector’s threat to report a seven-year old debt to his military supervisors) (transcript available at 2009 WLNR 17592156).

tactics are predatory and have caused some consumers to flee their homes in fear,⁶ sign over their property to debt collectors in desperation,⁷ and even commit suicide.⁸

Although anecdotal stories of egregious debt collection practices recur perpetually in the news,⁹ the current ubiquity of debt collection abuse is not merely a media-fomented perception. The annual number of FDCPA lawsuits filed by consumers increased by more than 250 percent between 2007 and 2010.¹⁰ Likewise, the Federal Trade Commission (FTC)—the regulatory agency currently tasked with administrative enforcement of the FDCPA¹¹—is fielding a growing number of complaints from consumers who allege they are victims of abusive debt collectors.¹² The financial crisis of 2008, the slow economic recovery, the lingering high unemployment rate, the high

⁴ FTC ANNUAL REPORT 2010, *supra* note 2, at 7; see *Dateline NBC: Debt Trap*, *supra* note 3 (playing phone message of debt collector asking debtor, “[d]o you want to go to the big house?”).

⁵ FTC ANNUAL REPORT 2010, *supra* note 2, at 6; see *Dateline NBC: Debt Trap*, *supra* note 3 (playing answering machine message of a debt collector asking a debtor threateningly if she had “ever been raped”).

⁶ *Dateline NBC: Debt Trap*, *supra* note 3 (interview with Texas couple who fled their home after receiving a call from a debt collector who stated that he had secured a warrant from law enforcement to forcibly enter the couple’s home).

⁷ In 2010, a Pennsylvania debt collection agency hired fake police officers to visit debtors’ houses and serve them with fake subpoenas. Martha Neil, *Debt Collector Faked Court Hearings to Trick Consumers into Paying Up, Says AG’s Suit*, A.B.A. J. (Nov. 1, 2010, 12:50 PM), http://www.abajournal.com/news/article/debt_collector_faked_court_hearings_to_trick_consumers_into_paying_up_says_. Debtors were then ordered to attend mock court proceedings held at the debt collection agency’s offices, where they were told by an employee dressed as a judge to make payments by signing over personal property or face imprisonment. *Id.*

⁸ *My9 News: Illegal Debt Collectors Push Woman to Commit Suicide* (My9 News television broadcast) (describing a suicide note left by a Tennessee woman who was humiliated by a debt collector), available at <http://anthonylemons.blogspot.com/2008/04/illegal-debt-collectors-push-woman-to.html> (video embedded in WAKE UP U.S. blog posting on Apr. 12, 2008).

⁹ Stories of debt collection abuse were commonly reported even before the Great Recession of 2008. See, e.g., William J. Holstein, *Personal Business; Consumer Tools for Holding Bill Collectors at Bay*, N.Y. TIMES (Jan. 20, 2002), <http://www.nytimes.com/2002/01/20/business/personal-business-consumer-tools-for-holding-bill-collectors-at-bay.html>; Sana Siwolop, *Spending It; Nasty Calls at 6 A.M.: Duffers Who Go Too Far*, N.Y. TIMES, July 14, 1996, <http://www.nytimes.com/1996/07/14/business/spending-it-nasty-calls-at-6-am-duffers-who-go-too-far.html?src=pm>.

¹⁰ One source reported that consumers filed 4372, 6025, 9365, and 11,395 FDCPA lawsuits, in 2007, 2008, 2009, and 2010, respectively. Jack Gordon, *The Harsh Truth: You Do Not Have to Violate FDCPA in Order to Be Sued Under It*, WEBRECON, <https://www.webrecon.com/b/homepage/> (last visited Feb. 24, 2011). Other sources have reported different totals, but still indicate a sharp increase in consumer litigation. See Darren Waggoner, *More Than 500 Lawsuits Against Agencies, Creditors*, CARDLINE, Jan. 7, 2011, available at 2011 WLNR 360699.

¹¹ See *infra* Part I.B.

¹² FTC ANNUAL REPORT 2010, *supra* note 2, at 3-4.

consumer default rate, and the increased motivation of banks and credit card companies to sell off delinquent accounts to third-party debt collectors are all interrelated factors that have fueled a growing and increasingly aggressive debt collection industry.¹³ Consequently, debt collection abuse has become an unavoidable reality for many consumers as they endeavor to navigate both short- and long-term financial setbacks in a downed economy.¹⁴

The Federal Trade Commission has taken notice.¹⁵ In recent years, the FTC commissioned multiple workshop panels of regulators, consumer rights attorneys, and debt collection industry representatives, in order to evaluate the efficacy of consumer protection in the debt collection markets.¹⁶ As a result of its findings, the FTC has recommended a number of reforms aimed at bolstering consumer protection—including legislative amendments to the FDCPA that would require debt collectors to provide consumers with more detailed disclosure of debts, and to better inform consumers of their statutory rights under the FDCPA.¹⁷ But while the FTC's careful evaluation of the debt collection industry provides a positive starting point for enhancing regulatory protection, the reforms it has proposed will not do enough to adequately remedy the statute's greatest shortcomings.

The Supreme Court's 2010 decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*¹⁸ demonstrates that FDCPA's fundamental flaw is its failure to punish debt collection abuses in proportion to the actual harm they do to consumers.¹⁹ In other words, *Jerman* illustrates that debt collectors who commit severe consumer abuses and those who commit technical violations are essentially punished equally under the FDCPA's very limited private cause of action provisions.²⁰ Consequently, consumers who are harassed,

¹³ See *infra* Part III.A.

¹⁴ See *infra* Part III.A.

¹⁵ See generally Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (2010) [hereinafter *FTC, Repairing a Broken System*]; Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change* (2009) [hereinafter *FTC, The Challenges of Change*].

¹⁶ See *FTC, REPAIRING A BROKEN SYSTEM*, *supra* note 15, at I; *FTC, THE CHALLENGES OF CHANGE*, *supra* note 15, at i.

¹⁷ *FTC, THE CHALLENGES OF CHANGE*, *supra* note 15, at 26-30.

¹⁸ 130 S. Ct. 1605 (2010).

¹⁹ See *infra* Part II.B.3.

²⁰ The FDCPA enables individuals to sue for statutory damages not to exceed a maximum of \$1000. 15 U.S.C. § 1692k(a)(2)(A) (2006). Alternatively, consumers may

deceived, and threatened by debt collectors lack the collective might needed to eliminate the offenders' profit motives through private enforcement.²¹ Moreover, because many of the FDCPA's provisions remain outdated, ambiguous, and unsettled in the courts, the statute has enabled attorneys to sue otherwise compliant debt collectors for mundane technical violations that cause consumers no actual harm.²² This regulatory inefficiency deleteriously affects both consumers and debt collectors because it conflates substantive consumer abuses with technical compliance violations, thereby diverting private enforcement efforts away from prosecuting the truly harmful consumer abuses that Congress initially sought to eliminate.

In order to reclaim the FDCPA as an effective vanguard of consumer protection, regulators must give it the power to fundamentally reshape the debt collection market by eliminating the profit motive underlying egregious debt collection abuses. It must be retooled to destroy the competitive advantage that unethical debt collectors gain through abusive tactics, while allowing ethical debt collectors to profit through compliance and capture greater market share. Accordingly, this note argues that optimal FDCPA reform must meet the balanced goal of better protecting debtors by providing tougher regulation against egregious debt collection abuses, while benefiting ethical debt collectors by clarifying existing statutory ambiguities and providing the regulatory guidance needed to lawfully integrate emerging technologies into their business models. In sum, compliance must be made easier and more profitable than abuse in order to affect positive industry-wide reform.

Part I of this note provides background information on the FDCPA, discusses its provisions, and examines its intended enforcement mechanisms. Part II examines the FDCPA's bona fide error defense and the recent Supreme Court decision of *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA* as a critical lens to identify the path to effective reform. Part III discusses the FDCPA's increasing importance as a regulatory vehicle during America's period of economic recovery. It also examines the profit motives of the debt collectors who engage in abusive practices—as well as the motives of the consumer

sue under the class action provision of the FDCPA, which allows class action plaintiffs to recover cumulative damages of up to \$500,000 or one percent of the offending debt collector's net worth, whichever amount is less. *Id.* § 1692k(a)(2)(B).

²¹ See *infra* Part II.B.3.

²² See *infra* Part IV.

attorneys who file lawsuits against them—in order to conceptualize how a revised FDCPA can more efficiently direct the market behavior of debt collectors and consumer rights attorneys towards the goal of eradicating egregious debt collection abuse. Part IV presents specific examples of how debt collectors commonly incur liability due to technicalities predicated on the outdated provisions and statutory ambiguities of the FDCPA. This section demonstrates that debt collectors' violations of the FDCPA are not always a product of unethical conduct, but rather a result of their uncertainty regarding how to correctly interpret the statute's contradictory provisions. Finally, Part V will propose specific FDCPA reforms that offer enhanced protection to consumers, punish egregious violators more extensively, and provide compliant debt collectors with a more standardized collection procedure to help immunize them to technical lawsuits. I suggest that interagency collaboration between the FTC and the newly created Consumer Financial Protection Bureau (CFPB) may provide the ideal avenue to implement evolving regulations.

I. THE FDCPA: BACKGROUND AND ENFORCEMENT

The FDCPA is at a crossroads: it can be revamped and improved as a prophylactic against consumer abuse or it can remain ineffective, to the detriment of both debt collectors and consumers alike. In order to better illuminate the path towards effective FDCPA reforms, this section provides background information on the statute and provides an overview of its relevant provisions. This section also analyzes the strengths and weaknesses of the FDCPA's current enforcement mechanisms.

A. *Creation and Relevant Provisions*

Congress enacted the FDCPA in 1977 to protect consumers from widespread abuses in the debt collection industry.²³ Specifically, Congress found that some debt collectors commonly used harassing phone calls, profanity, threats of imprisonment, and threats of violence, as well as other fraudulent, deceptive, and misleading collection practices

²³ S. REP. NO. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.A.N. 1695, 1696. Congress limited the FDCPA in scope, however, to regulate third-party debt collectors only; therefore, the statute has no regulatory effect on original holders of consumer debt. *Id.* at 3.

to prey on consumers in financial distress.²⁴ Congress also believed that enforcement efforts against abusive debt collectors would help ethical debt collectors by eliminating the abusers' unfair competitive advantage.²⁵ Accordingly, it crafted the FDCPA with the intention that it would precisely target the worst abusers for punishment, while allowing ethical debt collectors to flourish in a fair marketplace.²⁶

Substantively, the act imposes many requirements on debt collectors and it partially outlines both necessary and prohibited conduct. First, the act regulates debt collectors' communications with debtors²⁷ and with the third-party associates of debtors.²⁸ It specifically prohibits debt collectors from contacting debtors between the hours of 9:00pm and 8:00am,²⁹ and prohibits contact "at any unusual time or place . . . which should be known to be inconvenient" to the debtor.³⁰ The act also partially restricts contact at a debtor's place of employment and provides that all attempts to contact a debtor must cease once the debt collector learns the debtor is represented by an attorney.³¹ The FDCPA allows debt collectors to contact third parties, such as the family or friends of a debtor, only for the limited purpose of ascertaining the location

²⁴ *Id.* at 1.

The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Id.

²⁵ Fair Debt Collection Practices Act § 805, 15 U.S.C. § 1692(e) (2006) ("It is the purpose of this subchapter 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.").

²⁶ *See id.* Congress believed that there were relatively few bad debt collectors who perpetrated the majority of consumer abuse; *see* S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial.").

²⁷ Fair Debt Collection Practices Act § 805, 15 U.S.C. § 1692c(a) (2006).

²⁸ *Id.* § 1692c(b).

²⁹ *Id.* § 1692c(a)(1).

³⁰ *Id.* Debt collectors are not allowed to contact debtors at their places of employment if the debt collector "knows or has reason to know that the [debtor's] employer prohibits the [debtor] from receiving such communication." *Id.* § 1692c(a)(3).

³¹ *Id.* § 1692c(a)(2)-(3).

of a debtor,³² but it clearly prohibits debt collectors from informing third parties that the debtor actually owes a debt.³³ After the debt collector initially contacts the debtor, the debtor has the power to terminate any further communications with the debt collector by informing the debt collector in writing that he or she refuses to pay the debt or no longer wishes to be contacted in connection with collection of the debt.³⁴

In addition to regulating communications with the debtor, the FDCPA broadly prohibits any conduct by a debt collector that constitutes harassment or abuse.³⁵ Debt collectors are prohibited from, among other conduct, making threats, using obscenity, repeatedly telephoning the debtor with the intent to harass, publishing the debt, or failing to state one's identity as a debt collector when communicating with the debtor.³⁶ The FDCPA also prohibits debt collectors from using specific threats, such as threatening to have the debtor arrested, threatening to reveal the debt to others, threatening to damage a debtor's reputation, and threatening the debtor with physical violence.³⁷

The FDCPA also prohibits debt collectors from making any false or misleading representations in connection with the collection of a debt.³⁸ It specifically but nonexclusively defines a misrepresentation as "[t]he false representation of (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully

³² *Id.* § 1692b. The act also provides that debt collectors seeking location information from a third-party must identify themselves by name and also indicate their employer if asked, but they must not indicate that they are seeking the information to collect a debt. *Id.*

³³ *Id.* § 1692c(b). The FDCPA makes a clear distinction between contacting a third-party to collect the location information of a debtor and contacting a third-party regarding the repayment of the underlying debt itself. Unless the debt collector is seeking location information or has express permission of the debtor, it "may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." *Id.*

³⁴ *Id.* § 1692c(c). The statute provides an exception allowing a debt collector to make further contact with the debtor to inform the debtor that further collection efforts will cease, or to inform the debtor that it intends to invoke a "specified remedy" against the debtor. *Id.*

³⁵ *Id.* § 1692d. The statute contains broad language prohibiting all conduct by debt collectors "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." *Id.*

³⁶ *Id.* § 1692d(1)-(6).

³⁷ *Id.* § 1692d(1).

³⁸ *Id.* § 1692e.

received by any debt collector for the collection of a debt.”³⁹ This provision protects debtors from debt collectors who add unlawful collection fees and interest charges onto the principal debt or who unlawfully threaten to invoke legal remedies that have expired due to the statute of limitations.⁴⁰ The FDCPA also makes it illegal for a debt collector to falsely identify himself as an official or attorney, to misrepresent the availability and nature of legal remedies the debt collector intends to take against the debtor,⁴¹ and to falsely imply that a debtor has committed a crime through virtue of non-payment.⁴² In particular, section 1692e(10) broadly prohibits, “[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.”⁴³

The FDCPA also requires debt collectors to inform debtors about certain rights that they possess under the act. Within five days of its initial contact with the debtor, the debt collector must notify the debtor of his or her right to dispute the debt.⁴⁴ The debt collector must—in a clear and understandable manner that does not understate or overshadow the debtor’s rights to dispute the debt—inform the debtor that he or she must dispute the debt within thirty days from receipt of the notice, or else the debt collector will assume it to be valid.⁴⁵ Additionally, the debt collector must advise the debtor that if he or she disputes the debt writing, then the debt collector is required to obtain and mail a verification of the debt to the debtor.⁴⁶ Accordingly, if a debtor disputes a debt in writing, the FDCPA requires that the debt collector verify it with the original creditor before proceeding with its collections efforts.⁴⁷ Debt collectors are also required to include a warning⁴⁸ in its initial contact with the debtor—regardless of whether the contact is oral or written—stating that the purpose of the contact is to

³⁹ *Id.* § 1692e(2).

⁴⁰ *Id.*; Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 749-50 (2006).

⁴¹ 15 U.S.C. § 1692e(3), (5).

⁴² *Id.* § 1692e(7).

⁴³ *Id.* § 1692e(10).

⁴⁴ *Id.* § 1692g(a).

⁴⁵ *Id.* § 1692g(a)(3).

⁴⁶ *Id.* § 1692g(a)(4).

⁴⁷ *Id.* § 1692g(b).

⁴⁸ This requirement is commonly referred to as the FDCPA’s “Mini-Miranda” warning. *Leahey v. Franklin Collection Serv., Inc.*, No. 2:09-cv-00709-AKK, 2010 WL 5279831, at *2 (N.D. Ala. Feb. 4, 2010).

collect a debt, and that any and all information gathered by the debt collector from the debtor will be used for that purpose.⁴⁹

In addition to misrepresentation, the FDCPA also targets unfair debt collection practices.⁵⁰ For example, the statute provides regulations regarding the debt collector's handling of post-dated checks and prohibits debt collectors from threatening to repossess property without proper legal standing and the actual intent to take such action against the debtor.⁵¹ The statute also prohibits creditors from using deceptive forms,⁵² such as collection letters that use the letterhead of an uninvolved debt collector to create the impression that an uninvolved third-party is aiding in collection of debt.⁵³ The aforementioned provisions of the FDCPA are not an exhaustive statement of its protections, but they are the most relevant to this note because they give rise to the most frequent violations of the statute and are in need of reform.⁵⁴

B. *Enforcement Mechanisms*

The primary enforcement mechanism of the FDCPA is shared between its private cause of action provision and the administrative enforcement powers of the FTC.⁵⁵ The FDCPA

⁴⁹ § 1692e(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.

Id.

⁵⁰ *Id.* § 1692f. "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." *Id.*

⁵¹ *Id.* § 1692f(1)-(6).

⁵² *Id.* § 1692j.

⁵³ S. REP. NO. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

⁵⁴ *See* FTC ANNUAL REPORT 2010, *supra* note 2, at 6-10.

⁵⁵ 15 U.S.C. § 1692k-l (2006); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605, 1609 (2010). Technically, seven other agencies have limited enforcement powers under the FDCPA, specific to the industries they regulate. These agencies include the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Department of Transportation, and the Department of Agriculture. 15 U.S.C. § 1692l(b) (2006). However:

Almost all of the collectors these agencies regulate are creditors collecting on their own debts, and, as such, largely fall outside the Act's coverage. If these agencies receive complaints about debt collection firms that are not under their

creates a private cause of action which enables individuals to sue for any actual damages sustained due to a debt collector's violations, and for statutory damages not to exceed a maximum of \$1000.⁵⁶ Alternatively, consumers may sue under the class action provision of the FDCPA, which allows class action plaintiffs to recover cumulative damages of up to \$500,000 or one percent of the offending debt collector's net worth, whichever amount is less.⁵⁷ Further, a successful plaintiff is entitled to costs and reasonable attorney's fees.⁵⁸ Importantly, FDCPA is a strict liability statute—a private plaintiff need not allege or prove any actual harm resulting from a debt collector's violation of the statute in order to be awarded statutory damages.⁵⁹

The FTC describes its current responsibilities as the administrative agency that oversees the FDCPA as threefold: enforcement, education, and research/policy initiatives.⁶⁰ The FTC collects and monitors consumer complaints in an attempt to identify debt collectors engaging in large-scale patterns of abuse.⁶¹ If the pattern is large enough to warrant agency action,

jurisdiction, they generally forward the complaints to the FTC or suggest that the consumer contact the FTC directly.

FTC ANNUAL REPORT 2010, *supra* note 2, at 1 n.2.

⁵⁶ 15 U.S.C. § 1692k(a)(2)(A) (2006).

⁵⁷ *Id.* § 1692k(a)(2)(B).

⁵⁸ *Id.* § 1692k(a)(3). This provision also allows the court to award the defendant reasonable attorney's fees and costs where a plaintiff brings an action in "bad faith and for the purpose of harassment." *Id.* Absent this requisite showing, however, the court may not impose attorney's fees or costs in favor of the defendant merely because the defendant prevailed on the merits of the claim. *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 705 (9th Cir. 2010) ("[I]nsulating consumers from the prospect of paying defendants' costs by requiring a finding that the action was brought in bad faith and for harassment is consistent with the stated intent of Congress.").

⁵⁹ See *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008) ("In order to prevail, it is not necessary for a plaintiff to show that she herself was confused by the communication she received; it is sufficient for a plaintiff to demonstrate that the least sophisticated consumer would be confused."); *Rosemary E. Williams, Proof Under the Fair Debt Collection Practices Act*, in 104 AM. JUR. 3D *Proof of Facts* § 66 (2008).

⁶⁰ FED. TRADE COMM'N, ANNUAL REPORT 2009: FAIR DEBT COLLECTION PRACTICES ACT 10-17 (2009) [hereinafter FTC ANNUAL REPORT 2009], available at <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf>. The FTC also retains the power to issue advisory opinions and staff commentaries, although the agency rarely makes use of these powers, having issued only four advisory opinions since the FDCPA was passed in 1977 and having issued its only formal staff commentary in 1988. *Fair Debt Collection Practices Act Links*, FTC, <http://www.ftc.gov/os/statutes/fdcpajump.shtml> (last visited Mar. 29, 2011).

⁶¹ 15 U.S.C. § 1692l(a) (2006); U.S. Gov't Accountability Office, GAO-09-748, *Fair Debt Collect Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* 14 (2009) [hereinafter GAO, *Evolving Debt Collection Marketplace*].

[The] FDCPA and the FTC Act provide [the] FTC with enforcement authority to investigate debt collection agencies it believes may be violating the law . . . [If

the FTC will typically investigate the debt collector's activities, and if violations are confirmed, it will contact the debt collector directly to negotiate a settlement.⁶² If negotiations fail to yield a settlement, the FTC can file a lawsuit in federal court directly through its own attorneys or it can request that the Department of Justice file suit on its behalf.⁶³ The FTC's power to bring civil lawsuits against debt collectors is a combined function of § 1692(l) of the FDCPA⁶⁴ and § 45 of the Federal Trade Commission Act.⁶⁵ This gives the FTC a key advantage in its litigation efforts against debt collectors because it is not subject to the same statutory damage limitations as are private plaintiffs. The FTC can seek damages in the amount of \$16,000 for each violation committed by the debt collector, and it can request injunctive relief—a remedy that can severely paralyze a debt collector's operations.⁶⁶ Consequently, the FTC can harness its leverage to settle the majority of its enforcement efforts without litigation and enjoys a high success rate against the debt collectors it targets.⁶⁷ The disadvantage is that the agency handles only a few cases each year—typically less than five—which allows many smaller abusive debt collectors to escape its enforcement efforts.⁶⁸

The FTC also lacks any rulemaking authority with respect to the FDCPA, which means it cannot promulgate binding regulations.⁶⁹ Instead, the FTC must submit an annual report to Congress to summarize its regulatory actions.⁷⁰ Consequently,

the] FTC's investigation reveals violations of either act, the agency can file suit in federal court for injunctive relief to prevent further violations and seek restitution for consumers and disgorgement of ill-gotten gains by the collector.

Id.

⁶² GAO, *Evolving Debt Collection Marketplace*, *supra* note 61, at 14; Fed. Trade Comm'n, *Re: Twenty-First Annual Report to Congress Pursuant to Section 815(a) of the Fair Debt Collection Practices Act (1999)* ("If an investigation reveals evidence of continuing FDCPA violations, staff contacts the debt collector and attempts to negotiate a settlement before recommending that the Commission issue a complaint."), *available at* <http://www.ftc.gov/os/statutes/fdcpa/senate99.shtm>.

⁶³ FTC ANNUAL REPORT 2009, *supra* note 60, at 10-11.

⁶⁴ 15 U.S.C. § 1692l(a); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1609 (2010).

⁶⁵ 15 U.S.C. 1692l(a); *Jerman*, 130 S. Ct. at 1609 (2010).

⁶⁶ 15 U.S.C. § 45(m)(1)(A), (C); 74 Fed. Reg. 857, 858 (2009) (amending 16 C.F.R. § 1.98(d) to provide for a \$16,000 civil penalty under 15 U.S.C. § 45(m)(1)(A)); *Jerman*, 130 S. Ct. at 1609.

⁶⁷ *See Williams*, *supra* note 59, at § 3.

⁶⁸ FTC, *THE CHALLENGES OF CHANGE*, *supra* note 15, app.B at B-1 to B-3 (listing enforcement actions from 1977 through 2008); *see Williams*, *supra* note 59, at § 3.

⁶⁹ 15 U.S.C. § 1692l(d).

⁷⁰ *Id.* § 1692m.

like many government agencies, a portion of the FTC's resources is devoted to perpetually justifying its efforts.⁷¹ This may incentivize the FTC to focus on a few headline-grabbing enforcement efforts that will be deemed impressive in an annual congressional report, rather than cast its enforcement net widely to ensnare abuses perpetrated by smaller collectors.⁷²

Another key difference between the FTC's enforcement powers and the enforcement powers of private plaintiffs under the FDCPA is that the FTC cannot sue debt collectors for their inadvertent technical violations of the statute.⁷³ Because the FTC's ability to sue is set forth in the Federal Trade Commission Act, the agency may only sue debt collectors who engage in "unfair or deceptive" trade practices "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited . . ."⁷⁴ This requirement acts as a filter that directs the FTC's enforcement efforts towards egregious abuse.

II. *JERMAN V. CARLISLE, MCNELLIE, RINI, KRAMER & ULRICH L.P.A.*: A CRITICAL LENS FOR EFFECTIVE FDCPA REFORM

While the FDCPA provisions discussed in Part I provide some measure of protection to consumers, the private enforcement mechanism's strict liability component provides no practical differentiation between the most egregious consumer abuses and mundane technical violations that do not cause consumers any actual harm.⁷⁵ This private regulatory model is inefficient because abusive debt collectors gain a competitive advantage from their coercive tactics. To eliminate that incentive, abusive debt collectors should be exposed to more severe penalties under the FDCPA than technical violators,

⁷¹ See James Fanto, *We're All Capitalists Now: The Importance of Nature, Provision and Regulation of Investor Education*, 49 CASE W. RES. L. REV. 105, 157 (1998) (describing the SEC's investor education initiatives as an attempt to engage in the "often-used strategy of regulatory agencies justifying their existence by dramatizing an issue that demands their regulatory intervention").

⁷² *Id.*

⁷³ 15 U.S.C. § 45(m)(1)(A).

⁷⁴ *Id.*

⁷⁵ The exception is that where an egregious abuse actually causes harm to a consumer, it allows that consumer to recover in full for his or her injuries. *Id.* § 1692k(a)(1). For the technical violations, however, no harm is actually done to the consumer, so statutory damages, costs, and attorney's fees are the practical limit to damages.

who do not benefit from their inadvertent violations.⁷⁶ This section examines how the FDCPA's bona fide error defense was originally intended to distinguish between abusive debt collectors and those who sought to comply with the statute in good faith, and how in the wake of *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, this important distinction has become blurred.

A. *The FDCPA's Bona Fide Error Defense*

The FDCPA was drafted to purposefully differentiate between abusive debt collectors and debt collectors who acted in good faith to comply with the statute. Specifically, § 1692k(c) was intended to preserve this fundamental distinction by providing that if a debt collector demonstrated by a preponderance of the evidence that its violation of the FDCPA resulted "from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," it would not be held liable for its violation of the statute.⁷⁷ As the total number of new lawsuits filed by debtors under the FDCPA increased,⁷⁸ debt collectors heavily relied upon the bona fide error provision as an affirmative defense.⁷⁹ Debt collectors sought to apply this defense not only to mistakes of fact, such as misstating the amount of money owed by a debtor,⁸⁰ but also mistakes of law, such as using noncompliant language in the written communications with the debtor.⁸¹ As the "bona fide error" defense became a commonly litigated issue in FDCPA lawsuits, a split in authority among the federal circuit courts emerged as to

⁷⁶ See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605, 1633 (2010) (Kennedy, J., dissenting) ("A debt collector does not gain a competitive advantage by making good-faith legal errors any more than by making good-faith factual errors.").

⁷⁷ 15 U.S.C. § 1692k(c) (2006).

⁷⁸ See *infra* Part III.A.

⁷⁹ For some notable examples of defendants invoking the bona fide error defense, see *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1352 (11th Cir. 2009); *Ruth v. Triumph P'ships*, 577 F.3d 790, 794 (7th Cir. 2009); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 610-11 (6th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 601 (6th Cir. 2009); *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1113-14 (7th Cir. 2008); *Midland Funding L.L.C. v. Brent*, 644 F. Supp. 2d 961, 970-72 (N.D. Ohio 2009); *Drossin v. Nat'l Action Fin. Servs., Inc.*, 641 F. Supp. 2d 1314, 1316 (S.D. Fla. 2009).

⁸⁰ See, e.g., *Hartman*, 569 F.3d at 610-11.

⁸¹ See, e.g., *Ruth*, 577 F.3d at 793-95.

whether the defense applied to both errors of fact and law or whether it was limited to errors of fact.⁸²

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,⁸³ the Supreme Court held that the bona fide error defense applies to mistakes of fact only—narrowing its applicability as an affirmative defense and prompting the dissent to raise fears that the decision would spur a cottage industry of technical lawsuits at the expense of well-intentioned debt collectors (many of whom are attorneys).⁸⁴ Although *Jerman* resolved the bona fide error dispute as a matter of law, it also brought to the forefront a fundamental flaw in the FDCPA: the statute—contrary to its original balanced intentions—unnecessarily blurs the distinction between the highly abusive debt collection violations it was intended to protect against and purely technical violations that do not cause debtors any actual harm.⁸⁵ The following section will examine *Jerman* as a critical lens to identify a path towards effective reform.

B. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*

On April 17, 2006, the law firm of Carlisle, McNellie, Rini, Kramer & Ulrich LPA, served Karen L. Jerman with a summons and complaint instituting a foreclosure action for allegedly failing to pay her mortgage.⁸⁶ The law firm also served a letter titled “Notice Under the Fair Debt Collections Practices Act,” pursuant to § 1692g of the FDCPA.⁸⁷ Jerman subsequently retained an attorney to dispute the debt.⁸⁸ Her attorney contacted the debt collector by letter to inform it that the alleged debt was invalid.⁸⁹ The debt collector then contacted its client—the original creditor—and discovered that the client had made a mistake; Jerman had in fact paid her mortgage.⁹⁰ The debt collector informed Jerman’s attorney that its client

⁸² *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1114 (7th Cir. 2008); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 538 F.3d 469, 473-74 (6th Cir. 2008) (recognizing split in authority among the circuits), *vacated*, 130 S. Ct. 1605 (2010); *Johnson v. Riddle*, 305 F.3d 1107, 1121-22 (10th Cir. 2002).

⁸³ *Jerman*, 130 S. Ct. 1605 (2010).

⁸⁴ *Id.* at 1630-35 (Kennedy, J., dissenting).

⁸⁵ *Id.* at 1631-32.

⁸⁶ *Jerman*, 538 F.3d at 471.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

had made a mistake and promptly submitted a judgment entry to the court to dismiss the foreclosure complaint.⁹¹

Jerman then filed a class action lawsuit in the United States District Court for the Northern District of Ohio against the debt collector, alleging that the debt collector violated the FDCPA by using the following language in its validation notice:

I will assume all portions of this debt to be valid unless you dispute the validity of this debt or any portion thereof within thirty (30) days of the date you receive this letter. If you dispute the validity of this debt, you must notify me, in writing, within the time stated, that you dispute this debt.⁹²

Plaintiff argued that a debtor is not required to dispute a debt in writing under § 1692g(a)(3), which states simply “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.”⁹³ The plaintiff argued that the defendants’ validation notice violated the FDCPA because it created the impression that contesting the debt in writing was the only way to dispute the debt and that this was misleading because it foreclosed the possibility that she could use other forms of communication to dispute the claim.⁹⁴

The defendants filed a motion to dismiss arguing that the “in writing” language used in the validation notice was not a violation of § 1692g(a)(3).⁹⁵ The district court denied the defendants’ motion, holding that the language in the validation notice was a violation because it impermissibly overshadowed the possibility that plaintiff could invoke her rights through an alternative form of communication.⁹⁶ The debt collector, after the conclusion of discovery, filed a motion for summary judgment, arguing

(1) the foreclosure complaint was not an “initial communication,” which is necessary before debtor “validation rights can be triggered” under the FDCPA; (2) Defendants’ alleged mistake as to the

⁹¹ *Id.*

⁹² Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 464 F. Supp. 2d 720, 722 (N.D. Ohio 2006).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 721.

⁹⁶ *Id.* at 724-25.

written-dispute requirement was unintentional and resulted from a bona fide error; and (3) Defendants are absolutely immune from liability because their actions represented an “integral part of the judicial process.”⁹⁷

The district court granted the defendants’ summary judgment motion, finding that although the foreclosure notice was an initial debt collection communication that violated § 1692g(a)(3), and although the defendants were not entitled to absolute immunity as attorneys, the defendants had established their entitlement to summary judgment because they had proven that their mistake of law was a bona fide error pursuant to § 1692k(c).⁹⁸ The plaintiff subsequently appealed the district court’s decision to the Sixth Circuit Court of Appeals.⁹⁹

On appeal, the plaintiff argued that the plain language of § 1692k(c) required that a debt collector show that it maintains procedures reasonably calculated to avoid error, and that mistakes of law could not be prevented by procedures designed to avoid inadvertent factual errors.¹⁰⁰ In analyzing the plaintiff’s argument, the court looked to the case of *Johnson v. Riddle*,¹⁰¹ to find that a debt collector could establish the requisite safeguards and procedures required by the bona fide error defense by systematically staying educated and apprised of changes in FDCPA law.¹⁰² The court also agreed with the Tenth Circuit’s analysis in *Johnson*, which reasoned that the legislative history of the FDCPA indicated that its statutory language was to have a broad reach, including the statute’s affirmative defense provision.¹⁰³

Consequently, the Sixth Circuit affirmed the district court’s decision, holding that the bona fide error defense is not limited to mistakes of fact.¹⁰⁴ In June of 2009, the Supreme Court of the United States granted plaintiff’s petition for certiorari.¹⁰⁵

⁹⁷ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 538 F.3d 469, 472 (6th Cir. 2008).

⁹⁸ *Id.* at 471.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 475.

¹⁰¹ 305 F.3d 1107 (10th Cir. 2002).

¹⁰² *Jerman*, 538 F.3d at 476 (“[T]here is nothing unusual about attorney collectors maintaining procedures, such as frequent education and review of the FDCPA law, in order to avoid mistakes of law.”).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 474-77.

1. The Majority's Decision

In a majority opinion by Justice Sotomayor, citing the age old maxim that “ignorance of the law will not excuse any person, either civilly or criminally,” the Court held that the FDCPA’s bona fide error defense did not apply to mistakes of law.¹⁰⁶ The Court found that the plain language of the FDCPA did not permit debt collectors to avoid liability for their mistakes of law, and where Congress had provided an affirmative defense in other acts, it had done so more explicitly.¹⁰⁷ The Court also reasoned that since § 1692k(c) required debt collectors who invoked the bona fide error defense to demonstrate proof that they implemented “procedures reasonably adapted to avoid any such error,” the legislature did not intend for it to apply to mistakes of law.¹⁰⁸ It concluded that although a debt collector could adopt procedural methods to avoid mistakes in legal reasoning, legal reasoning was “not a mechanical or strictly linear process”; therefore, the requirement of § 1692k that the debt collector demonstrate specific procedures was meant to limit the defense to factual and clerical errors only.¹⁰⁹

To support its analysis, the Court examined the history of the FDCPA’s statutory analogue—the Truth in Lending Act (TILA).¹¹⁰ The Court found that in enacting the FDCPA in 1977, Congress copied the bona fide error provision of TILA, which the federal courts at the time had held applied only to clerical errors.¹¹¹ The Court reasoned that when Congress adopted the FDCPA it intended to give the bona fide error provision a similar

“[T]he plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors. To the contrary, § 1692k(c) refers by its terms to any ‘error’ that is ‘bona fide.’” The court next looked to legislative history, and found “no indication . . . that Congress intended this broad language to mean anything other than what it says.”

Id. (quoting *Johnson v. Riddle*, 305 F.3d 1107, 1121 n.14 (10th Cir. 2002)).

¹⁰⁵ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 129 S. Ct. 2863 (2009) (mem.).

¹⁰⁶ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605, 1611 (2010) (quoting *Barlow v. United States*, 32 U.S. 404, 411 (1833)).

¹⁰⁷ *Id.* at 1612.

¹⁰⁸ *Id.* at 1614 (quoting 15 U.S.C. § 1692k(c) (2006)). The Court read the word “procedure” in the context of its 1976 dictionary meaning—a “series of steps followed in a regular orderly definite way.” *Id.* (citations omitted) (internal quotation marks omitted).

¹⁰⁹ *Id.* at 1614-15.

¹¹⁰ *Id.* at 1615-16.

¹¹¹ *Id.*

import as the bona fide error provision in TILA.¹¹² Additionally, although in 1980 Congress amended TILA to *expressly* exclude legal errors, the Court found that this express amendment did not imply that Congress intended to distinguish the FDCPA by failing to revise it contemporaneously with TILA.¹¹³

Finally, the Court found that the potential adverse consequences of its decision were negligible. The possibility that limiting the bona fide error defense would cause an increase in frivolous FDCPA litigation or create a conflict of interest for attorneys did not warrant a disregard for the plain textual import of the statute.¹¹⁴ The Court found that debt collectors could protect themselves from any potential legal uncertainty by requesting an advisory opinion from the FTC before taking an uncertain legal position or action, although it conceded that the administrative delay in issuing such opinions rendered the option better in theory than in practice.¹¹⁵ In addition, the Court found that debt collectors were protected from frivolous litigation because courts had discretion under the statute to award attorneys' fees and costs to defendants in cases where plaintiffs brought frivolous lawsuits, in bad faith, to chill lawful collection efforts.¹¹⁶

2. The Dissent's Opinion

In dissent, Justice Kennedy, joined by Justice Alito, emphasized the negative consequences of allowing debtors to sue for highly technical violations of the FDCPA without the requirement that the debtor actually sustain any ascertainable damages.¹¹⁷ They envisioned a "cottage industry" of attorneys generating revenue in the form of mandatory legal fees

¹¹² *Id.* at 1616.

¹¹³ *Id.* at 1617-18.

¹¹⁴ *Id.* at 1620-24.

¹¹⁵ *Id.* at 1615, 1621.

¹¹⁶ *Id.* at 1620-21.

¹¹⁷ *Id.* at 1629 (Kennedy, J., dissenting).

When the law is used to punish good-faith mistakes; when adopting reasonable safeguards is not enough to avoid liability; when the costs of discovery and litigation are used to force settlement even absent fault or injury; when class-action suits transform technical legal violations into windfalls for plaintiffs or their attorneys, the Court, by failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system.

Id.

predicated on frivolous litigation.¹¹⁸ The dissent also argued that a fundamental problem caused by technical FDCPA claims is that the very initiation of litigation is generally enough to force defendants to settle due to contrast between the relatively low statutory awards to which plaintiffs are entitled and the relatively high costs associated with defending claims to fruition.¹¹⁹ This disparity, in the dissent's opinion, created a perverse incentive for plaintiffs' attorneys to manufacture tenuous litigation against debt collectors in anticipation of settlement.¹²⁰ By limiting the bona fide error defense to questions of fact, the dissent argued that the Court would destroy one of the only protections that debt collectors—many of whom are attorneys—had to defend against these questionable claims.¹²¹

The dissent also warned that limiting the bona fide error defense would impose unrestrained technical statutory liability on debt collecting attorneys. This problem, they argued, would damage the adversarial legal system by imposing personal liability on lawyers who were representing their clients' interests in good faith, because lawyers who pursue payments for creditors are treated as third-party debt collectors under the FDCPA.¹²² Specifically, the dissent cautioned that the potential liability incurred by debt collecting attorneys would have a deleterious chilling effect on attorney client relations by creating a conflict of interest between attorneys' duty to provide zealous advocacy to their clients and the instinct of self-preservation that those attorneys might face when exposed to potential FDCPA liability.¹²³ Furthermore, the dissent noted that the FDCPA was not intended to provide debtors with highly technical legal claims against debt collectors. To the contrary, all of the provisions of the FDCPA were originally intended by Congress to sanction debt collectors' deliberate and abusive conduct without harming ethical debt collectors.¹²⁴ The dissent believed that by limiting the bona fide error defense to mistakes of fact, the statute would depart even further from its original balanced intentions.¹²⁵

¹¹⁸ *Id.* at 1631 (quoting *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1633-35.

¹²³ *Id.* at 1634.

¹²⁴ *Id.* at 1632-33.

¹²⁵ *See id.*

Likewise, the dissent also rejected the majority's contention that the bona fide error defense would allow debt collectors to escape liability by pleading ignorance of the law.¹²⁶ It found that there was no risk of debt collectors using the bona fide error defense to improperly excuse violations of the statute, because debt collectors were required to show both an unintentional error resulting in a violation of the statute and the maintenance of procedures reasonably calculated to avoid such error.¹²⁷ Accordingly, the bona fide error defense could not be utilized when debt collectors remained reprehensibly ignorant of the law, but rather, only where a particular legal issue was so unclear, ambiguous, or unsettled in the courts, that despite reasonable efforts to comply, the debt collector made an error in legal judgment.¹²⁸

3. *Jerman* as a Critical Lens for Statutory Reform

Ultimately, my purpose for examining *Jerman* is not to argue that the Court was right or wrong in its decision. Rather, *Jerman* poses important questions to those looking to reform the FDCPA. Why is the bona fide error defense so heavily relied upon by seemingly sophisticated business actors, with access to competent legal resources? Is the FDCPA sufficiently targeting the forms of abuse it was originally intended to protect against, or can it be retooled and refined to better meet its initial goals?

The majority in *Jerman* rationalized that Congress's intent for the FDCPA was to create a two-tiered enforcement system that would allow the FTC to use its heavy enforcement powers against debt collectors who knowingly violated the statute, while giving consumers comparatively much less power to sue debt collectors for both knowing and technical violations.¹²⁹ This analysis is problematic because it assumes

¹²⁶ *Id.* at 1637-38.

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *Id.* at 1612 (majority opinion). In making this argument the Court compared the language of 15 U.S.C. § 1692k(c), the bona fide error provision, to the language of 15 U.S.C. § 45(m)(1)(A), from which the FTC derives its enforcement powers. The Court found that:

Given the absence of similar language in § 1692k(c), it is a fair inference that Congress chose to permit injured consumers to recover actual damages, costs, fees, and modest statutory damages for 'intentional' conduct, including violations resulting from mistaken interpretation of the FDCPA, while reserving the more onerous penalties of the FTC Act for debt collectors whose

Congress intended that only the FTC would have the power necessary to address the debt collection industry's most egregious abuses, while consumers would be relegated to the role of makeweight technical compliance agents. Although Congress intended for the FTC to have great financial leverage over debt collectors, it also intended that consumers' private cause of action would allow them to pursue the same fundamental consumer protection goals as those which were to be pursued by the FTC.¹³⁰ It wanted consumers to act as private attorneys general in safeguarding their own rights—not for consumers to generate litigation based on cognizable technical claims that caused them no actual harm.¹³¹

Likewise, in enacting the FDCPA, Congress believed that the majority of debt collectors ran ethical operations that would not be affected by the regulations.¹³² It designed the statute to combat abuses by the most fowl-mouthed, threatening, and deceptive in the industry, who it believed caused a disproportionate amount of harm to consumers.¹³³ The problem is that the statute *has* become a two-tiered system, regardless of Congress's original intentions. The FTC can bring only a handful of enforcement actions each year, which allows many smaller debt collectors, who are sometimes the most abusive in the industry, to proceed undeterred by the FTC's enforcement efforts.¹³⁴ Comparatively, consumers are left with only minor protections against substantive abuse and those who are knowledgeable and lucky enough to secure the services of a consumer rights attorney do not have the collective enforcement power necessary to destroy the profit motives underlying the abuse. Finally, ethical debt collectors still face significant technical liability under the FDCPA, which places them categorically and unfairly in the same punitive denomination as the industry's most prolific abusers.

intentional actions also reflected 'knowledge fairly implied on the basis of objective circumstances' that the conduct was prohibited.

Id.

¹³⁰ FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 66-67.

¹³¹ *Id.*; *see also* Jacobson v. Healthcare Fin. Servs., 516 F.3d 85, 91 (2d Cir. 2008) (finding that "the FDCPA enlists the efforts of sophisticated consumers . . . as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others").

¹³² S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (stating that "unscrupulous debt collectors comprise only a small segment of the industry").

¹³³ *Id.*

¹³⁴ *See supra* Part I.B.

Now that the *Jerman* Court has held the bona fide error defense does not apply to mistakes of law, ethical debt collectors have one fewer method to combat litigation based on technical violations of the FDCPA as they are forced to navigate provisions of the statute that are vague, outdated, and unsettled in the courts. The recent uptick in privatized consumer protection lawsuits could have positive reformatory effects on the debt collection industry by providing a serious financial disincentive for debt collectors to engage in abusive practices. But *Jerman* shows us that this potential benefit can only be maximized if the statute more deliberately targets egregious abuses while allowing the most compliant debt collectors in the industry to gain market share by avoiding technical FDCPA litigation altogether.

III. DEBT COLLECTION AND DEBT COLLECTION LAWSUITS IN THE WAKE OF THE RECESSION

This section examines the short- and long-term causes of increased consumer credit default and increased debt collection efforts, and as a result, increased debt collection abuses. It shows that while the debt collection industry has undergone significant modernization and organization since the FDCPA was enacted, the most egregious patterns of abuse have persisted. This section also examines why FDCPA attorneys have no practical incentive to litigate substantive abuses over technical violations, and it posits several reasons why attorneys may actually favor litigating technical violations.

A. *Shotgun Wedding: How a Weak Economy Forces Consumers and Debt Collectors into Troubled Relationships*

To understand why now is an important moment in history to revise the FDCPA, we must briefly examine the importance of the act as a consumer protection mechanism in today's credit-driven, yet economically fragile, society. The financial crisis of 2008 sent shockwaves through world economies to an extent that had not been experienced since the Great Depression.¹³⁵ As a result, the credit market is still currently plagued by lingering

¹³⁵ Jon Hilsenrath, Serena Ng & Damian Paletta, *Worst Crisis Since 30s, with No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, <http://online.wsj.com/article/SB122169431617549947.html>.

hallmarks of the recession: high unemployment rates,¹³⁶ low wages,¹³⁷ and depressed property values.¹³⁸ Due to these economic stresses, consumers are more likely to default on their loan obligations than ever before,¹³⁹ sending their credit accounts into collection with greater frequency.¹⁴⁰

Lenders have reshaped the debt collection market as well. During the financial crisis, lenders realized that the credit extended on their balance sheets prior to the recession was overvalued; consequently, many banks took measures to reduce their outstanding liabilities.¹⁴¹ Financial institutions became increasingly willing to charge off delinquent accounts and sell debts to third-party debt collectors at a steep discount, causing debt collection efforts to increase as the market became more lucrative.¹⁴² The debt collection industry grew as a result of the increasing demand for its services, and became more aggressive as collectors found it was increasingly difficult to secure payments from consumers who were flat broke.¹⁴³

But short-term economic turmoil is not the only cause of consumer distress. There has also been a degenerative transformation in the economic health of the average American

¹³⁶ See Sewell Chan, *Before Business Leaders, Bernanke Discusses Unemployment's Toll on Americans*, N.Y. TIMES, Dec. 1, 2010, at B3, available at <http://www.nytimes.com/2010/12/01/business/economy/01fed.html>.

¹³⁷ See Michael Luo, *New Job Means Lower Wages for Many*, N.Y. TIMES (Sept. 1, 2010), at A12, available at <http://www.nytimes.com/2010/09/01/us/01jobs.html> (discussing how many workers are forced to take lower paying jobs in the recession).

¹³⁸ Global House Prices: Bottom Fishing, ECONOMIST, June 6, 2009, at 40.

¹³⁹ The default rate on consumer credit cards reached an all time high of thirteen percent in the spring of 2010. *A Special Report on Debt: The Morning After*, ECONOMIST, June 26, 2010, at 70.

¹⁴⁰ Connie Prater, *Consumer Credit Woes Mean Boom in Debt Collection*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/fair-debt-collection-5125.php> (last visited Feb. 19, 2011).

¹⁴¹ See Kathy Chu & Sandra Block, *As Lenders Clamp Down, Credit Scores Take a Hit*, USA TODAY, Sept. 23, 2009, http://www.usatoday.com/money/perfi/credit/2009-09-21-lenders-scores-credits_N.htm; see also Amy Barrett, *Snipping Credit Lines for Small Businesses*, BS. WK., May 7, 2009, http://www.businessweek.com/smallbiz/content/may2009/sb2009056_719759.htm. Interestingly, some banks became more likely to settle accounts directly with customers for less than full value upon early signs of financial distress. David Streitfeld, *Credit Bailout: Issuers Slashing Card Balances*, N.Y. TIMES, June 16, 2009, at A1.

¹⁴² Prices for debt portfolios declined significantly during the financial crisis of 2008. *Ask the Experts: What's Happened to the Secondary Market for Debt Portfolios?*, INSIDEARM (July 31, 2008, 9:31 AM), <https://www.insidearm.com/daily/debt-buying-topics/debt-buying/ask-the-experts-whats-happened-to-the-secondary-market-for-debt-portfolios>; see also Prater, *supra* note 140.

¹⁴³ See *supra* notes 2-8; see also Blake Jones, *More Consumers Face Aggressive Debt Collection Tactics*, POSTSTAR (Feb. 5, 2011, 9:00 PM), http://poststar.com/news/local/article_b546dc02-3194-11e0-9637-001cc4c002e0.html.

family over the past forty years—a trend identified and characterized by Elizabeth Warren, even before the Great Recession of 2008, as the “coming collapse of the middle class.”¹⁴⁴ Consumers save less money than they did decades ago and increasingly rely upon credit to meet their basic needs.¹⁴⁵ The result is that consumer credit—even absent the recession—has slowly but surely become an integral lifeline for the average American family¹⁴⁶ in the event of sickness, unemployment, or other financial setbacks.¹⁴⁷

Consequently, these short- and long-term economic pressures have placed Americans at increased risk for credit default and loan collections. For many, this means that interaction with debt collectors—including verbal and psychological abuse—is simply becoming an unavoidable reality. And if the recent uptick in FDCPA lawsuit filings is any indication,¹⁴⁸ the FDCPA is not adequately preventing debt collection abuse at a time when the economy is driving increased debt collection activity. This trend alone warrants serious consideration for better statutory regulation and reform.

¹⁴⁴ Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Univ., Lecture at the University of California, Berkeley: The Coming Collapse of the Middle Class: Higher Risks, Lower Rewards, and a Shrinking Safety Net (Mar. 8, 2007), available at <http://grad.berkeley.edu/lectures/event.php?id=104&lecturer=102>; see generally Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Law, Economics, and Morality*, 82 WASH. U. L. Q. 1485 (2004) [hereinafter Warren, *Over-Consumption Myth*]; see also Roger L. Torkeneden, *The 80th Anniversary of the Great Crash of 1929: Law, Markets and the Role of the State: Will Devaluation of the Dollar Pull the U.S. Out of Depression Once Again?*, 15 NEXUS: CHAP. J.L. & POL'Y 67, 74-75 (2009) (discussing Professor Elizabeth Warren's analysis of the growing debt levels of American families). Elizabeth Warren is a Professor at Harvard Law School and was appointed by President Obama in September of 2010 to head the creation of the Consumer Financial Protection Bureau. See *infra* note 229 and accompanying text.

¹⁴⁵ Warren, *Over-Consumption Myth*, *supra* note 144, at 1490-1502.

¹⁴⁶ *Id.*

¹⁴⁷ This long-term macrocosmic financial crisis, according to Elizabeth Warren, has driven American households with two wage earners to use unsecured consumer credit as a means to artificially finance a basic lifestyle—adequate healthcare, higher education, and property ownership—which past generations comfortably achieved as single-earner households. See sources cited *supra* note 144.

¹⁴⁸ See sources cited *supra* note 10.

B. *Modern Debt Collection Abuses: New Dogs Learn Old Tricks*

The debt collection industry has grown significantly since FDCPA was enacted in 1977.¹⁴⁹ Along with significant growth, the industry has refined, expanded, and modernized its business methods in order to maximize efficiency and increase profits.¹⁵⁰ The debt collection industry formed association trade groups that provide a forum for debt collectors to discuss ideas, share resources, and present issues relevant to the industry.¹⁵¹ These groups also seek to integrate debt collection products into the industry that will lead to greater standardization and profitability,¹⁵² as well as promulgate ethical canons for its members that in part urge debt collectors to behave morally and to respect consumers' rights.¹⁵³

Given this continued trend towards modernization, large-scale organization, and ethical standardization, perhaps the most surprising aspect of the modern debt collection industry is that many of the abuses about which consumers currently complain are the very same abuses that the FDCPA was originally enacted to eradicate, including: harassing debtors with profanity-laced telephone calls; hounding debtors at their workplaces; threatening to have debtors arrested; and

¹⁴⁹ See FTC, *THE CHALLENGES OF CHANGE*, *supra* note 15, at iii-iv; Goldberg, *supra* note 40, at 725-34, 736-39 (discussing the growth of the debt buying industry and discussing the industry's use of outsourced collection calls and demographic profiling tools).

¹⁵⁰ See sources cited *supra* note 149 and accompanying text.

¹⁵¹ See, e.g., DBA INT'L, <http://www.dbainternational.org> (last visited Feb. 10, 2011) ("DBA International is a source of experienced, knowledgeable and ethical debt buyers and other industry participants that provides educational and networking opportunities through an annual conference.").

¹⁵² See, e.g., *DBA International Mission Statement*, DBA INT'L, http://www.dbainternational.org/what_is_dba/mission.asp (last visited Feb. 10, 2011) ("By providing products, services and education to its members, DBA International enhances the economic performance and liquidity of the international financial services industry and fosters the ability of consumers to participate in the marketplace for goods and services.").

¹⁵³ See, e.g., *DBA International Ethics Rules and Ethical Considerations for DBA Members*, DBA INT'L, http://www.dbainternational.org/what_is_dba/code_of_ethics.asp (last visited Feb. 10, 2011) [hereinafter *DBA Ethics Code*].

A Member's staff should be dignified and refrain from all illegal and morally reprehensible conduct. Because of the industry's perception to the public and the impact on the consumers it comes into contact with, even minor violations of law by a Member may tend to lessen public confidence in the profession. Obedience to law exemplifies respect for law. To Members especially, respect for the law should be more than a platitude.

Id.

threatening debtors with physical violence.¹⁵⁴ These forms of abuse are particularly egregious because they distort the power relationship between creditor and debtor—using deception to create the impression that the debt collector holds legal or moral authority over the debtor—triggering emotions of guilt, shame, fear, hopelessness, and eventually capitulation.¹⁵⁵ The resulting implication of these continued abuses is that while the debt collection industry as a whole purports to have made great strides towards creating a framework that respects consumers' rights, the temptation to engage in abusive practices remains despite the well-established prohibitions set forth by the FDCPA, and despite the industry's own efforts to disassociate itself from such practices by promulgating guidelines that label them as unethical.¹⁵⁶

So why do some debt collectors still resort to the same abusive practices that have earned the industry a sour reputation among the regulators and the general public? The answer is simple—profit. The primary goal of most serious forms of debt collection abuse is to increase the likelihood that the debtor will pay by pressuring or deceiving the debtor to redistribute his or her limited resources towards making debt payments.¹⁵⁷ Where a debtor must ration limited funds between basic needs and an array of snowballing debt maintenance obligations, the debtor should rationally meet his or her basic needs before making debt payments. Debt collectors can create the impetus needed to deceive debtors into reprioritizing their limited resources by using abuse to override their rational instincts of self-preservation.¹⁵⁸

Although the goal is the same, the tactics vary. Some debt collectors misrepresent the power they have over debtors,

¹⁵⁴ See sources cited *supra* notes 1-5 and accompanying text.

¹⁵⁵ The psychological pressure that consumers experience as a result of debt collection abuse is analogous to the pressure that others have argued causes homeowners to make payments on mortgages that are underwater. See Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 986-1006 (2010) (discussing how the government and the financial industry seek to foment a societal sense of moral obligation that homeowners should avoid foreclosure at all costs). Abusive debt collectors sometimes resort to highly elaborate means just to create this power distortion. See, e.g., *supra* note 7 and accompanying text.

¹⁵⁶ See *DBA Ethics Code*, *supra* note 153.

¹⁵⁷ See White, *supra* note 155, at 986-1006 and accompanying text; see Neil, *supra* note 7.

¹⁵⁸ See White, *supra* note 155, at 986-1006 and accompanying text; Neil, *supra* note 7.

threatening them with fictitious lawsuits or jail.¹⁵⁹ Other debt collectors harass or threaten to harass a debtor's employer to place pressure on the debtor by endangering the one financial lifeline that the debtor has left—a job.¹⁶⁰ Still, other debt collectors repetitively harass debtors on the phone to coerce payment by triggering feelings of guilt, shame, and failure in the debtor—appealing to the debtor's traditional notions of moral responsibility.¹⁶¹ At a time when most debtors are already at their lowest, these unrelenting tactics are inexcusable and predatory; however, little stands to change in a market where abuse is more profitable than compliance with the law.

C. *Any Claim Will Do: The Rise of Technical FDCPA Lawsuits*

While clearly there is a rising trend in abusive debt collection practices, not all litigated FDCPA violations cause plaintiffs actual harm.¹⁶² There are several reasons why consumer rights attorneys bring lawsuits predicated on debt collectors' technical violations of the FDCPA. First, cases that involve serious FDCPA violations are often readily identifiable to only one plaintiff at a time. In other words, substantive abuses more often need to be litigated on an individual basis whereas technical violations often present facts that are readily certifiable as a class action. For example, a mass-mailed letter that violates the FDCPA easily establishes many of the basic requirements for a class action: that "(1) the class is so numerous that the joinder of all the members is impractical; (2) there are questions of law and fact common to the class; and (3) the claims or defenses of the representative party are typical of the claims or defenses of the class."¹⁶³ This translates into greater statutory damages and higher fees for plaintiffs' attorneys than does a single-party lawsuit.¹⁶⁴

A second reason that attorneys pursue technical violations is because they know that the trajectory for the overwhelming majority of cases is settlement, regardless of whether their clients' claims would be successful if fully

¹⁵⁹ See sources cited *supra* notes 4, 7.

¹⁶⁰ See sources cited *supra* note 3.

¹⁶¹ See White, *supra* note 155, at 986-1006.

¹⁶² See *supra* Part II.B.

¹⁶³ Fed. R. Civ. P. 23(a).

¹⁶⁴ 15 U.S.C. § 1692k (2006).

litigated on the merits.¹⁶⁵ Because the maximum amount of statutory damages available to FDCPA litigants is capped at \$1000, the settlement amounts sought are small enough that debt collectors view settlement as economically advantageous—even where they may possess a meritorious defense.¹⁶⁶ The result is that lawyers can pursue technical violations knowing that the cost of defending the violation provides enough leverage for settlement—long-term litigation strategy is rarely needed.¹⁶⁷ A tenuous yet cognizable claim premised on a statutory technicality, therefore, may be worth just as much as a claim alleging far more substantive abuse.

Further, many lawyers who pursue technical violations might just be honoring their responsibility to provide their clients with zealous advocacy.¹⁶⁸ Lawyers who are retained by debtors to represent them in their dealings with debt collectors can use technical violations of the FDCPA as a sword rather than a shield, filing suit on identifiable technical deficiencies in an effort to gain leverage in the settlement of the underlying debt.¹⁶⁹ Since technical claims are permissible under the current framework of the FDCPA, a lawyer can legitimately argue that it would be unethical not to file a cognizable lawsuit on behalf of a client. While no one can fault an attorney for placing his or her client in the best possible position to obtain a favorable outcome, the FDCPA was originally intended as a means of protecting consumers against substantive abuse and was never intended as a weapon to quell the repayment pursuits of valid debt holders.¹⁷⁰

¹⁶⁵ See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605, 1628-31 (2010) (Kennedy, J., dissenting) (discussing the motivation for attorneys to file technical lawsuits in anticipation of pretrial settlement).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ MODEL RULES OF PROF'L CONDUCT: pmb1. ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.").

¹⁶⁹ See *Guerrero v. RJM Acquisitions L.L.C.*, 499 F.3d 926, 941 (9th Cir. 2007)

The Act was meant to shield debtors from abusive collection practices, but it was never intended to shift the balance of power between debtors and creditors such that a debt collector cannot work with a debtor's attorney to settle claims without exposing itself to liability out of proportion to the debt allegedly owed. Nor was it intended as a sword to be brandished by debtors who have retained counsel—the very debtors least in need of the Act's protections.

Id.

¹⁷⁰ See *id.*; S. REP. NO. 95-382, at 1 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (stating that it is the FDCPA's purpose "to protect consumers from a host of

There is also an emerging sense in the debt collection industry that the predators have become the prey. Debt collectors who have faced litigation often complain that the FDCPA is a loophole for deadbeats to hinder valid collection efforts by bringing costly, frivolous litigation.¹⁷¹ In fact, to capitalize on the fear of FDCPA litigation in the debt collection industry, some companies market FDCPA tracking services that are designed to provide debt collectors with an updated list of debtors who have filed FDCPA lawsuits so that the debt collectors can clean their files in order to avoid potential litigation.¹⁷² The implication is that FDCPA plaintiffs are repeat litigants and that it is cheaper for debt collectors to avoid pursuing litigious debtors altogether rather than face the possibility of defending expensive FDCPA lawsuits in court. Consequently, consumer rights attorneys can potentially free their clients from debt collectors' efforts just by landing them on the industry's blacklist by filing an FDCPA lawsuit. This provides a strong practical incentive for both consumers and their attorneys to sue for any FDCPA violation—the egregiousness of the debt collector's offense is simply not a relevant factor.

IV. SYMPATHY FOR THE DEVIL: THE DIFFICULTY OF COMPLYING WITH THE AMBIGUOUS PROVISIONS OF THE FDCPA

Although it is highly unlikely that there will ever be a public outcry for statutory reforms that benefit debt collectors, the structure and ambiguity of the FDCPA has made it relatively easy for inventive lawyers to form highly technical, cognizable claims against debt collectors, even where their clients suffer no actual harm.¹⁷³ The result, in some cases, has been to make it impossible for creditors to achieve compliance with FDCPA, leaving them open to potential litigation based

unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors”).

¹⁷¹ See Gordon, *supra* note 10.

¹⁷² See, e.g., FDCPA CASE LISTING SERVICE LLC, <http://www.fdcpcases.org/page/page/4544578.htm> (last visited Feb. 10, 2011); *About Us*, WEBRECON, <https://www.webrecon.com/b/about> (last visited Feb. 10, 2011).

¹⁷³ See *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006), *aff'd in part, vacated in part, rev'd in part*, 516 F.3d 85 (2d Cir. 2008) (“Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the ‘widespread and serious national problem’ of abuse that the Senate observed in adopting the legislation . . .”).

upon courts' varying and unsettled interpretations of the statute's most ill-crafted and outdated provisions. This section will not provide a comprehensive analysis of all the FDCPA's compliance pitfalls—many of which have been discussed elsewhere—but it does discuss a few to help frame reform proposals that will reduce debt collectors' technical compliance problems and thereby redirect the FDCPA's focus towards combating more harmful consumer abuses.

A. *Catch-22: The FDCPA's Validation Notification Requirement*

The validation notification requirement of the FDCPA is one of its most frequently litigated provisions.¹⁷⁴ Legal commentators have noted that the ambiguities in this provision of the statute have generated litigation predicated on a number of technical compliance pitfalls involving, among other things, disputes over the size, font, location, form, and language of debt collectors' § 1692g notices.¹⁷⁵ Despite calls for reform, however, the traditional compliance problems generated by the FDCPA's validation notification provision persist. For example, in *Jerman* the district court—prior to granting defendant's summary judgment motion on the bona fide error defense—found that the defendants violated § 1692g because their validation notice limited plaintiff's rights by stating that if she wanted to dispute her debt, she was required to dispute it in writing.¹⁷⁶ Now that the Supreme Court has reversed the summary judgment ruling on appeal, the district court's original determination stands.¹⁷⁷

But the courts do not consistently apply § 1692g. For example, in *Nero v. Law Office of Sam Streeter, P.L.L.C.*, plaintiff sued a debt collector on the theory that the debt collector violated § 1692g because it “failed to inform her that

¹⁷⁴ Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 *FORDHAM L. REV.* 3107, 3116 (2010) (stating that 15 U.S.C. § 1692g is one of the most frequently litigated provisions of the FDCPA).

¹⁷⁵ See, e.g., Derek S. Burrell, *The Federal Fair Debt Collection Practices Act: An Overview Rx for Debt Collector Myopia*, 21 *S. ILL. U. L.J.* 1, 25-29 (1996); Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 *HOFSTRA L. REV.* 1, 29-51 (1999).

¹⁷⁶ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 538 F.3d 469, 471 (6th Cir. 2008).

¹⁷⁷ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605 (2010); *Jerman*, 464 F. Supp. 2d at 724-25.

she must request verification of the debt *in writing*.”¹⁷⁸ Plaintiff argued that defendant was required to advise her that she must contest the debt in writing and that debt collector had impermissibly implied that if she contested the debt orally it would trigger her statutory right to debt validation.¹⁷⁹ Accordingly, the plaintiff argued that the notice was misleading because the debt collector was under no legal obligation to honor an oral validation request.¹⁸⁰ The court agreed with the plaintiff and granted his summary judgment motion, assessing a judgment against defendant, in favor of plaintiff, for statutory damages, costs, and attorney fees.¹⁸¹ While the district courts in *Jerman* and *Nero* reached opposite conclusions regarding a debt collector’s duty under § 1692g, they both recognized that the plaintiff need not show any actual harm to prevail.¹⁸² This conflict illustrates that § 1692g of the FDCPA has become a catch-22—a debt collector must walk an unnecessarily fine line to avoid liability, and ultimately its guilt is less a product of its actual conduct than an arbitrary determination dependent upon the jurisdiction in which the claim is filed.

Yet despite the existing compliance problems, the FTC has recommended that Congress amend § 1692g to require additional disclosures.¹⁸³ While this proposal seeks the commendable goal of implementing enhanced consumer

¹⁷⁸ *Nero v. Law Office of Sam Streeter, P.L.L.C.*, 655 F. Supp. 2d 200, 204 (E.D.N.Y. 2009). In *Nero*, the debt collector gave plaintiff a notice that stated:

Unless you, the consumer, notify this office within thirty days after receipt of this notice that you dispute the validity of the debt or any portion thereof, the debt will be assumed to be valid by this office. If you, the consumer, notify us within the thirty (30) days after receipt of this notice, that the debt or any portion thereof is disputed, this office will obtain verification of the debt or a copy of a judgment against you and a copy of such verification or judgment will be mailed to you by this office. Upon your written request within thirty days after receipt of this notice this office will provide you with the name and address of the original creditor, if different from the current creditor

Id. at 203.

¹⁷⁹ *Id.* at 206.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 212.

¹⁸² See *Jerman*, 464 F. Supp. 2d at 723 (finding that the court must apply an objective standard from the perspective of the least sophisticated consumer); see *Nero*, 655 F. Supp. 2d at 205 (“In the Second Circuit, the question of whether a communication complies with the FDCPA is determined from the perspective of the least sophisticated consumer.” (citation omitted) (internal quotation marks omitted)).

¹⁸³ See FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 29-30. Specifically, it was suggested in this workshop that debtors should be notified that by invoking their right for debt verification, they effectively halt all *further* collection proceedings until verification can be made. *Id.*

protections, it would currently be irresponsible to simply append additional requirements onto the FDCPA's validation notice provision. Without regulatory clarification of § 1692g, these additional requirements are likely to lead to more technical litigation and further divert the statute from its original purpose of protecting against substantive debt collection abuses without inhibiting ethical debt collectors.¹⁸⁴ The disclosure provisions of the FDCPA do not need additional embellishments—they need total regulatory overhaul.

B. Can You Hear Me Now? Communication Is a Problem

Since the adaptation of the FDCPA in 1977, debt collectors have often employed emerging technology to assist in contacting consumers regarding their outstanding debts.¹⁸⁵ However, Congress did not anticipate society's future reliance on cell phones, e-mails, fax machines, and voice messaging machines.¹⁸⁶ Although the FTC has recognized the need to revise the FDCPA to provide regulations for debt collectors who seek to implement modern communication technology, it does not have rulemaking authority necessary to issue binding regulations; therefore, it has largely lacked the ability to issue definitive guidance.¹⁸⁷ The result has been to expose debt collectors to liability, not because they seek to willfully violate the statute to gain a competitive advantage, but because the statute's provisions are simply too outdated to address the unique problems that arise when debt collectors use modern technology.¹⁸⁸

¹⁸⁴ See *supra* Part I.A.

¹⁸⁵ FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 14-20.

¹⁸⁶ *Id.* at 47-50; GAO, EVOLVING DEBT COLLECTION MARKETPLACE, *supra* note 61, at 47-49.

¹⁸⁷ For example, the FTC's current stance on whether the FDCPA allows debt collectors to use e-mail to communicate with debtors essentially tells debt collectors that it is not illegal per se, but to use it at their own risk:

In the absence of data demonstrating that there is a higher risk of revealing to third parties that a consumer's debt is in collection, the FTC does not believe that the imposition of any special limitations on debt collectors' use of email and instant messages is now justified. Nevertheless, the Commission emphasizes that if a debt collector reveals the existence of a debt to a third party through any method, including email and instant messaging, the collector is and should be liable for violating Section 805(b) of the FDCPA.

FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 50-51. This analysis of offers little guidance to debt collectors other than to say that debt collectors using modern technologies may face liability under the FDCPA.

¹⁸⁸ See *id.* at 35-36; see also GAO, EVOLVING DEBT COLLECTION MARKETPLACE, *supra* note 61, at 49.

For example, the debt collection industry has complained to the FTC that answering machine messages pose significant problems for collectors.¹⁸⁹ Specifically, it is a violation of the FDCPA for a debt collector to call a debtor without meaningful disclosure of the debt collector's identity.¹⁹⁰ However, the FDCPA also prohibits the debt collector from disclosing debts to any unauthorized third party.¹⁹¹ In a society before answering machines and voicemail, compliance with both of these provisions may have been straightforward; however, today debt collectors must decide, without guidance from the FDCPA or the FTC, how to provide meaningful identification in its messages while avoiding the possibility that they may be overheard by a third party.¹⁹²

*Edwards v. Niagara Credit Solutions, Inc.*¹⁹³ illustrates this dilemma. In *Edwards*, the debt collector left a message on the debtor's answering machine that stated the following: "This is an important message for Edwards Brenda. [sic] Please return this message at 1-800-381-0416, between the hours of 8 a.m. and 9 p.m. eastern standard time. It is important that you reach our office."¹⁹⁴ The debt collector left a similar voice message approximately a month later.¹⁹⁵ The plaintiff sued the debt collector alleging that its prerecorded telephone messages violated the FDCPA because they failed to identify the caller as a debt collector pursuant to § 1692e(11).¹⁹⁶ In defense, the debt collector argued that it intentionally violated the identification requirement so that it would not violate § 1692c(b), which prohibits disclosure of the debt to third parties.¹⁹⁷ The debt collector also asserted the bona fide error defense—claiming that its good faith effort to comply with the statute by avoiding disclosure to third parties warranted immunity from liability.¹⁹⁸

Not surprisingly, the court was unsympathetic to the debt collector's legal conundrum. The court held that in order for the defense to apply, the debt collector had to show the

¹⁸⁹ See FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 47-49.

¹⁹⁰ 15 U.S.C. § 1692e(2) (2006).

¹⁹¹ *Id.* § 1692c(b).

¹⁹² See FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 47-50; GAO, EVOLVING DEBT COLLECTION MARKETPLACE, *supra* note 61, at 49.

¹⁹³ 584 F.3d 1350 (11th Cir. 2009).

¹⁹⁴ *Id.* at 1351.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1352.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

violation “(1) was not intentional; (2) was a bona fide error; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error.”¹⁹⁹ The court easily dismissed this defense, holding that the calls could not rightfully be claimed as unintentional bona fide errors when the debt collector admitted to intentionally violating one provision of the statute to protect against violating another.²⁰⁰

Although the court in *Edwards* scolded Niagara for intentionally violating one provision of the FDCPA in order to avoid the possibility of violating another, recent case law demonstrates that Niagara’s fears were justified. Other courts have held that where debt collectors identify themselves in answering machine messages and provide the statutorily mandated warnings, the messages nonetheless may violate the FDCPA because they may be heard by a third party.²⁰¹ The following message was designed by a debt collector to both “meaningfully disclose” the debt collector’s identity *and* avoid the possibility of revealing the debt to an unauthorized third party.²⁰²

This message is for []. If you are not [] or their spouse, please delete this message. If you are [] or their spouse, please continue to listen to this message. By continuing to listen to this message, you acknowledge that you are the right party. You should not listen to this message so that other people can hear it, as it contains personal and private information. There will be a three second pause in the message to allow you to listen to the message in private. (Pause.) My name is John Carter. I am a debt collector with FCSI. This is an attempt to collect a debt, and any information will be used for that purpose. It is important that you return my call at 1-866-550-8949.²⁰³

¹⁹⁹ *Id.* at 1352-53.

²⁰⁰ *Id.* at 1353-54.

Just as it is not reasonable to destroy a village in order to save it, neither is it reasonable to violate an Act in order to comply with it. It was not reasonable for Niagara to violate § 1692e(11) of the Fair Debt Collection Practices Act with every message it left in order to avoid the possibility that some of those messages might lead to a violation of § 1692c(b).

Id.

²⁰¹ *Koby v. ARS Nat’l Servs., Inc.*, No. 09cv0780 JAH (JMA), 2010 WL 1438763, at *5 (S.D. Cal. Mar. 29, 2010) (finding that “[n]othing in the FDCPA or the Constitution entitles or guarantees a debt collector the right to leave a message on a debtor’s voice mail”); *Leahey v. Franklin Collection Serv., Inc.*, No. 2:09-cv-00709-AKK, 2010 WL 5279831, at *3 (N.D. Ala. Feb. 4, 2010) (denying defendant’s motion to dismiss where plaintiff’s friend claimed to have overheard collection message left on plaintiff’s answering machine); *Berg v. Merchants Ass’n Collection Div., Inc.*, 586 F. Supp. 2d 1336, 1345 (S.D. Fla. 2008).

²⁰² *Leahey*, 2010 WL 5279831, at *1.

²⁰³ *Id.*

The court, in *Leahey v. Franklin Collection Service, Inc.*, denied the defendant's motion to dismiss—despite its attempted statutory juggling act—because the defendant's phone message was insufficient to overcome plaintiff's cause of action alleging that defendant violated § 1962c(b).²⁰⁴ If nothing else, this message clearly demonstrates the legal contortion that some debt collectors utilize just to access modern forms of communication under the FDCPA. But *Leahey* also confirms that even where a debt collector designs voice messages that are painstakingly crafted to comply with all applicable provisions of the FDCPA, liability—or at least protracted litigation—may simply be unavoidable. Until debt collectors are provided with formal guidelines, it seems that the only way for debt collectors to maintain unassailable compliance with the FDCPA is to avoid leaving answering machine messages altogether.²⁰⁵

Likewise, the debt collection industry has complained that collectors also face similar challenges due to lack of guidance when attempting to contact debtors on their cell phones.²⁰⁶ More consumers are listing a cell phone as their primary contact number.²⁰⁷ The lack of specific cell phone regulations creates potential liability for debt collectors similar to the liability they face by leaving answering machine messages. For example, since cell phones are portable, a debtor may claim that he or she was contacted at an inconvenient place even though the debt collector would not rightfully have any knowledge of the debtor's location.²⁰⁸ A debtor might be traveling and crossing into different time zones causing the debt collector to violate the prohibition against calling between the hours of 9:00pm and 8:00am, even though the initial call may have been made under the assumption that the debtor was in his or her home time zone.²⁰⁹ If *Edwards* and *Leahey* are any indication, it is unlikely that courts would find that such messages did not violate the FDCPA just because the debtor's location was impossible to ascertain.

Debt collectors' inability to communicate may detrimentally affect consumers as well. Notably, some debt collectors have forgone all meaningful attempts to communicate with debtors and

²⁰⁴ *Id.* at *5.

²⁰⁵ See *Edwards*, 584 F.3d at 1354 (holding that the FDCPA “does not guarantee a debt collector the right to leave answering machine messages”).

²⁰⁶ GAO, EVOLVING DEBT COLLECTION MARKETPLACE, *supra* note 61, at 47-49.

²⁰⁷ FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 16.

²⁰⁸ GAO, EVOLVING DEBT COLLECTION MARKETPLACE, *supra* note 61, at 48.

²⁰⁹ FTC, THE CHALLENGES OF CHANGE, *supra* note 15, at 42.

have instead opted to file lawsuits against debtors en masse in an effort to collect enforceable default judgments.²¹⁰ While this practice is not illegal per se, it has garnered serious concern from the FTC, legal commentators, and the media.²¹¹ In cases where debt collectors are mass-producing hundreds, sometimes thousands, of lawsuits against debtors daily, there is serious doubt as to whether they are verifying claims with appropriate due diligence, or even properly serving debtors upon commencement of a legal action.²¹² Currently, the overwhelming majority of debtors do not contest debt collectors' automated enforcement actions, leading to a default judgment rate that by some estimates is as high as 95 percent.²¹³ This trend suggests that some debt collectors may view litigation as a favorable alternative to contacting consumers under the FDCPA's antiquated guidelines. Consequently, the lack of clear regulation regarding communication in the debt collection process may also hurt consumers.

V. PROPOSED FDCPA REFORMS

The FDCPA must be amended with additional protections that destroy the profit motives underlying the debt collection industry's most abusive practices. In addition, the FDCPA has to allow otherwise ethical debt collectors to flourish in the marketplace by eliminating technical compliance obstacles and enhancing their ability to profit through controlled access to existing and emerging communication technologies. This section offers some reforms in furtherance of these goals

²¹⁰ Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 717-19 (2008) (discussing how the debt-buying industry uses the legal process to enter default judgments against defendants to collect time-barred debt). Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 13, 2010, at B1, available at <http://www.nytimes.com/2010/07/13/business/13collection.html>; David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Nov. 1, 2010, at A1, available at <http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=1&r=1>.

²¹¹ See generally Haneman, *supra* note 210; Martin, *supra* note 210; Segal, *supra* note 210; FTC, REPAIRING A BROKEN SYSTEM, *supra* note 15, at 6-36.

²¹² FTC, REPAIRING A BROKEN SYSTEM, *supra* note 15, at 6-11; Segal, *supra* note 210 ("[O]ften, essential background information simply is not acquired by debt buyers . . . Without that information it is hard to imagine how any company could meet the legal standard of due diligence.")

²¹³ The FTC polled industry panelists at its recent workshop and estimated the default judgment rate against debtors to be between sixty and ninety-five percent. FTC, REPAIRING A BROKEN SYSTEM, *supra* note 15, at 7. Other estimates place the default rate at between seventy and ninety percent. Haneman, *supra* note 210, at 722.

and examines the recent creation of the Consumer Financial Protection Bureau as a timely catalyst for change.

A. *Damages*

The FTC is an effective organization, but it has limited resources and must balance its caseload with other goals. At its core, the FDCPA is a self-enforcement statute, empowering consumers to act as private attorneys general by bringing individual enforcement actions against abusive debt collectors.²¹⁴ However, the statute's monetary penalties for private parties are severely limited and, in practice, the FTC has much broader financial leverage over abusive debt collectors.²¹⁵ Accordingly, the private action damages provisions of the FDCPA should be more closely modeled after the FTC's enforcement powers rather than functioning like the "modest" powers conceptualized by the majority in *Jerman*.²¹⁶

Specifically, the statute should be modified to allow punitive damages for egregious debt collection abuses. Punitive damages are already provided for in the Fair Credit Reporting Act.²¹⁷ Punitive damages would attract more qualified attorneys to pursue the worst debt collection abuses and make lawsuits involving technical violations less attractive comparatively. Overall, a punitive damages provision would have many positive reformatory effects on the FDCPA, including: acting as a deterrent to consumer abuse; providing an incentive for talented attorneys to compete for and litigate the most egregious abuses of the FDCPA; and giving judges and juries more discretion to enforce the FDCPA by punishing the worst offenders in proportion to the egregiousness of the offense. Perhaps most importantly, increased sanctions for the most egregious violations of the FDCPA would reduce the profit motives underlying the industry's worst practices. It would also

²¹⁴ 15 U.S.C. § 1692k (2006); see *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008) (finding that "the FDCPA enlists the efforts of sophisticated consumers . . . as 'private attorneys general' to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others").

²¹⁵ See *supra* Part I.B.

²¹⁶ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605, 1612-13 (2010).

²¹⁷ Fair Credit Reporting Act § 616a(2), 15 U.S.C. § 1681n(a)(2) (2006); Jessica L. Hannah & Kevan P. McLaughlin, Comment, "On Certiorari to the Ninth Circuit Court of Appeals": The Supreme Court's Review of Ninth Circuit Cases During the October 2006 Term, 38 GOLDEN GATE U. L. REV. 409, 445 (2008).

negate the competitive advantage that some debt collector's derive from these tactics and cause them to rethink their business methods or face the possibility of being litigated out of existence.

Finally, as the FTC and others have noted, the statutory damage provision of the FDCPA has never been indexed for inflation.²¹⁸ The statutory maximum of \$1000 affords little relief to consumers compared to when the statute was first enacted. In 2009, the FDCPA's maximum statutory award of \$1000 was worth only approximately \$267 in 1977 dollars.²¹⁹ The FDCPA's damages provision must be adjusted to compensate for this inflation. By allowing inflation to steadily erode the damages provision of the FDCPA, the legislature is complicit in providing less and less protection to consumers, year after year.

B. *Integrating Technology into the Debt Collection Industry*

The numerous challenges created by existing and emerging technologies have already become readily apparent to regulators.²²⁰ Technology such as e-mail, text messaging, and social networking has the potential to fundamentally transform and to increase the efficiency of the debt collection industry.²²¹ Many debt collectors realize that the only way to reach some consumers in the future may be through modern communication technologies.²²² Balanced FDCPA reform must provide debt collectors with a way to raise profits through the ethical use of emerging technology, while nonetheless encouraging the industry to altogether abandon the psychologically coercive and deceptive tactics that have given it a bad reputation. Accordingly, regulators should be willing to facilitate the debt collection industry's access to advanced

²¹⁸ FTC, *THE CHALLENGES OF CHANGE*, *supra* note 15, at B67; Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 335 (2010).

²¹⁹ This calculation was derived using an inflation calculator, which is available at <http://www.westegg.com/inflation> (last visited on Feb. 7, 2011).

²²⁰ See generally FTC, *THE CHALLENGES OF CHANGE*, *supra* note 15.

²²¹ William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 566-68 (2010) (discussing the potential for the debt collection industry to use e-mail and text messaging to increase efficiency). These technologies are already being utilized by some debt collectors. See Alice Townsend, *Collectors Are Tracking Down Debtors Through Social Media*, TIME (Jan. 14, 2011), <http://techland.time.com/2011/01/14/collectors-are-tracking-down-debtors-through-social-media>; Lisa Rogak, *Debt Collection Goes Virtual*, CREDITCARDS.COM (Oct. 16, 2008), <http://www.creditcards.com/credit-card-news/virtual-debt-collection-agents-1273.php>. For a discussion of debt collectors in the U.K. using text messaging, see also Louise Bolotin, *Now It's Debt Collection—By Text*, THE OBSERVER, June 3, 2007, at 16, available at <http://www.guardian.co.uk/money/2007/jun/03/creditanddebt.observercashsection>.

²²² See FTC, *THE CHALLENGES OF CHANGE*, *supra* note 15, at 35.

communication technologies and make it a partner in regulation rather than an adversary.

The rapid proliferation of communication technologies is such, however, that onetime amendments or statutory reforms to the FDCPA will not be enough to ensure that it adequately regulates and guides the industry. As the debt collection industry integrates new communication technologies, it is possible, if not likely, that unethical debt collectors will simply gain additional resources to abuse consumers. Regulators must ensure that emerging technology does not give debt collectors new and innovative ways to abuse consumers, or give them the opportunity to outsource abuse to a clandestine network of foreign cyber bullies who fall beyond the jurisdiction of our courts.²²³ It is essential that this regulatory framework be dynamically crafted to deal with new forms of abuse as they emerge, rather than rely on a static system that restricts regulators to the role of observer and post-violation enforcer.²²⁴ Luckily, the newly formed Consumer Financial Protection Bureau may provide the impetus necessary to enact meaningful change.

C. *The Birth of the Consumer Financial Protection Bureau*

On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act.²²⁵ As part of this massive reform effort, Title X of the act, also known individually as the “Consumer Financial Protection Act of 2010,” created the Consumer Financial Protection Bureau (CFPB).²²⁶ The new bureau is intended to consolidate and unify the powers of various federal agencies that had been tasked with different

²²³ See Goldberg, *supra* note 40, at 732-36 (discussing the regulatory difficulties created by the outsourcing of debt collection calls).

²²⁴ 15 U.S.C. § 1692l(d) (2006). Despite this author’s reluctance to open the door for debt collectors to use new forms of communication without strict regulation, there is notably an implicit safeguard against threats and harassment. When debt collectors and consumers eventually interact online and through other emerging mediums, abuses will be far more likely to leave an incriminating digital paper trail, which will give debtors greater evidentiary ammunition of abuse and which may deter debt collectors from incurring the risk of litigation associated with harassing and threatening conduct.

²²⁵ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The stated purpose of the Act was “[to] promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices . . .” *Id.* at 1376.

²²⁶ See *id.* at 1955. Although the agency is named the “Bureau of Consumer Financial Protection” in the Act, the agency has designated itself publicly as the “Consumer Financial Protection Bureau” (CFPB). See *Learn About the Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau> (last visited Feb. 22, 2011).

consumer protection functions.²²⁷ Part of its stated statutory objective is to “exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services . . . consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination,” and to ensure that “outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.”²²⁸ At first glance, these stated objectives align perfectly with the FDCPA’s need for reform.

The agency, however, has already suggested that its primary focus will be to regulate the lending industry by simplifying credit card and loan agreements so that consumers have the requisite knowledge required to avoid oppressive debt loads and interest rates.²²⁹ While focusing on reducing the complexity of these agreements is an important and sizeable primary task, the CFPB should not limit its role to regulating

²²⁷ See Consumer Financial Protection Act of 2010 § 1061, 12 U.S.C.A. § 5581 (West 2011). An informational video on the CFPB’s website also explains the lack of regulatory accountability is due to the fractured nature of consumer protection functions entrusted to several different agencies. See *Learn About the Bureau*, *supra* note 226.

²²⁸ 12 U.S.C.A. § 5511(b)(2)-(3) (West 2011).

²²⁹ In September 2010, President Obama appointed Professor Elizabeth Warren to head the creation of the CFPB. Kenneth R. Bazinet, *Obama Taps Elizabeth Warren to Launch Consumer Financial Protection Bureau*, N.Y. DAILY NEWS, Sept. 18, 2010, http://www.nydailynews.com/money/2010/09/18/2010-09-18_new_sheriff_on_street_obama_taps_adviser_to_crack_down_on_financial_high_jinks.html. Professor Warren was chosen for the position partially for her reputation as a fierce public advocate and her role overseeing the Troubled Asset Relief Program’s Congressional Oversight Panel. However, more importantly, she was also chosen for the position because the concept for the CFPB was an idea that grew largely out of her decades of academic work studying the causes of consumer debt and bankruptcy. It is perhaps, therefore, a reasonable expectation that the focus of the CFPB will be modeled after the regulatory framework she previously conceptualized, which focused largely on reducing complexity in the credit markets to provide consumers with clearer financial choices prior to taking out loans. See generally Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, [98-100] (2008). Indeed, early indications suggest that the agency will adapt this goal as its central principle:

The central mission of the Consumer Financial Protection Bureau (CFPB) is to make markets for consumer financial products and services work for Americans—whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products . . . Above all, this means ensuring that consumers get the information they need to make the financial decisions they believe are best for themselves and their families—that prices are clear up front, that risks are visible, and that nothing is buried in fine print. In a market that works, consumers should be able to make direct comparisons among products and no provider should be able to build, or feel pressure to build, a business model around unfair, deceptive, or abusive practices.

Learn About the Bureau, *supra* note 226.

the actions of large financial institutions at the lending stage of the debt cycle. The CFPB has much broader statutory authority to effect wide-scale changes in the consumer financial market—this includes the express authority to both regulate and enforce provisions of the FDCPA.²³⁰ One of the stated goals that Congress anticipated for the CFPB even prior to its creation was to “enforce federal laws related to consumer financial protection by establishing rules and issuing orders and guidance.”²³¹ Accordingly, when the CFPB was created it was endowed with the broad rulemaking authority necessary to implement enforceable regulations for all the consumer laws covered by its provisions, including the FDCPA.²³²

Technically then, the CFPB has the power necessary to reshape the debt collection industry by making compliance with the FDCPA easier and making substantive abuse more costly and difficult.²³³ The biggest hurdle to reform, however, might be convincing the CFPB to focus some of its resources on debt collection abuses—which occur at the end of the debt cycle—when the impetus for the agency’s creation was large-scale subprime loan origination.²³⁴ Considering that the CFPB’s primary goal is to implement reforms that combat the proliferation of complex consumer financial products—a regulatory focus that targets the beginning stages of the debt cycle rather than the end stages—and given that the CFPB is still in its infancy as an agency, it is too early to determine whether it will choose to actively regulate the debt collection industry or whether it will delegate this task primarily to the FTC and focus on its other priorities. Assuming that the CFPB does designate some of its resources and attention to the task of actively regulating the FDCPA, however, the following

²³⁰ 12 U.S.C.A. §§ 5481(12)(H), (14), 5512(a), 5564(a) (West 2011).

²³¹ S. Rep. No. 111-176, at 215 (2010).

²³² 12 U.S.C.A. §§ 5481(12)(H), (14), 5512(a), 5564(a). Rulemaking authority is also, notably, an important power that the FTC currently lacks. 15 U.S.C. § 1692(d) (2006).

²³³ There is a very narrow exception to the CFPB’s rule-making authority that exempts a small class of debt collectors from its authority, which may cause complications down the line. Specifically, 12 U.S.C.A. § 5517(a) states that the CFPB’s rule-making authority does not extend to debt collectors who collect on behalf of merchants that extend their goods or services to consumers on credit. 12 U.S.C.A. § 5517(a)(2)(A)(i)-(ii) (West 2011). The exemption is very narrow, however, and does not apply if the merchant extends credit beyond the value of the goods and services supplied, such as a store credit card, or if legal ownership of the debt is transferred to the debt collector, as is the case where the debt collector is a debt buyer. *See id.* § 5517(a)(2)(B)(i)-(ii).

²³⁴ *Creating the Consumer Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau> (last visited Feb. 6, 2011).

sections provide a few initial proposals that may help it effectuate an optimal regulatory framework.

1. Standardization

First, the CFPB should standardize statutory compliance by creating an optional set of forms that can be utilized by creditors to ensure that they fall within the more technical requirements of the FDCPA. In particular, the validation notification language should be standardized. This would alleviate some of the major inconsistencies that are occurring in different jurisdictions as Courts struggle to determine whether varying forms created by individual debt collectors comply with the provisions of the FDCPA. This would also help the CFPB achieve its goal of remediating “outdated, unnecessary, or unduly burdensome regulations,” and it would streamline the FDCPA to more precisely target substantive debt collection abuse.²³⁵ Overall, a set of standardized forms for FDCPA disclosures would alleviate ambiguity by reducing the technical compliance issues of the statute to one easily ascertainable analysis: Did the debt collector use the right form? This would not only ensure that consumers received debt notifications that are easy to understand and that comply with the FDCPA—it would also provide debt collectors with a tangible benefit in exchange for some of the additional burdens they might undertake while complying with new regulations. Finally, standardization may provide debt collectors with an increased incentive to arrange a modified payment plan directly with the consumer, and to reserve the use of legal process—a growing trend which has concerned the FTC²³⁶—as a last resort.

2. Evolving Regulation of Emerging Technologies

The bureau could also use its rulemaking authority to issue guidelines and regulations that finally address emerging forms of communication that did not exist at the time the FDCPA was initially enacted. It could provide the dynamic regulatory framework that is necessary for regulating the use of existing and emerging technologies in the debt collection industry—a change that the FTC has suggested is badly

²³⁵ 12 U.S.C.A. § 5511(b) (West 2011).

²³⁶ See *supra* Part IV.B.

needed.²³⁷ These regulations should provide guidelines for debt collectors to contact consumers on their cell phones and answering machines. Also, forward-looking regulations should be crafted address the use of technologies such as e-mail, text messaging, and online social networking.

Additionally, as other commentators have suggested, there are many unregulated technological advances already used by the debt collection industry that have the potential for abuse, such as outsourced collection calls, predictive auto dialers, and demographic profiling tools.²³⁸ Ultimately, the CFPB must promulgate regulations and guidelines that evolve with the sophistication of the entities it seeks to regulate.

3. Dual Enforcement of the FDCPA: Interagency Cooperation with the FTC

Finally, the CFPB must work in conjunction with the FTC to expand the government's collective regulation efforts. The FTC is not required to yield its enforcement authority to the CFPB under the Consumer Financial Protection Act (as many other agencies are required to do);²³⁹ instead, the act provides that the CFPB and the FTC will have concurrent enforcement jurisdiction over the FDCPA.²⁴⁰ The act also requires the two agencies to coordinate and to openly share information regarding consumer complaints.²⁴¹ While the creation of such a powerful overseeing body creates the potential for jurisdictional protectionism among agencies, more optimistically, there is the potential for regulatory synergy. The FTC has expertise regulating the FDCPA, but lacks rulemaking authority. The FTC should utilize the institutional knowledge that it has gained through years of data collection and targeted studies in order to draft proposed regulations, which could then be

²³⁷ See *supra* Part IV.B.

²³⁸ Demographic profiling tools have the ability to calculate a debtor's likelihood of repayment based on factors such as race, sex and age. See Goldberg, *supra* note 40, at 729-39; see also Linda Stern, *A New Shakedown? Debt Collectors Resort to New Tactic*, NEWSWEEK, July 21, 2008, <http://www.newsweek.com/2008/07/20/a-new-shakedown.html> (discussing use of computer algorithms and profiling systems to grade debt). For a discussion about how debt collectors target elderly debtors due to their high statistical likelihood of repayment, see Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America's Elderly Debtors*, 16 ELDER L.J. 135, 151-52 (2008).

²³⁹ 12 U.S.C.A. § 5581(b) (West 2011).

²⁴⁰ *Id.* § 5581(b)(5)(C). It is noted, however, that the FTC would be required to defer to the CFPB in some situations. *Id.* § 5515(c)(1).

²⁴¹ *Id.* §§ 5493(b)(3)(D), 5495.

reviewed and enacted by the CFPB. Since the CFPB now has the rulemaking authority necessary to promulgate binding regulations, collaboration between the FTC and the CFPB may provide the perfect marriage of institutional knowledge and administrative power necessary to improve the FDCPA.

Additionally, since both agencies have the power to bring civil actions to enforce the FDCPA, the government should utilize its additional resources to expand its enforcement efforts in the coming years.²⁴² The CFPB has even greater financial leverage over violators than does the FTC. While the FTC has the power to seek \$16,000 in fines per knowing violation of the FDCPA,²⁴³ the CFPB can seek three distinct levels of monetary damages for violations of any of the consumer protection laws within its mandate.²⁴⁴ First, the CFPB can seek \$5000 per violation of a consumer protection law, regardless of whether the offender knew of the violation.²⁴⁵ Second, the CFPB can seek \$25,000 per violation if the offender recklessly engaged in conduct that violated a consumer protection law.²⁴⁶ Finally, the CFPB has the authority to seek \$1,000,000 per violation if an offender knowingly violates a consumer protection law.²⁴⁷ Accordingly, a restructured governmental enforcement effort could more effectively target substantive debt collection abuse as follows: first, the CFPB could handle a few of the largest FDCPA enforcement actions every year, similar to the current practice of the FTC; second, the FTC could broaden its enforcement efforts to target a larger number of small, yet prolifically abusive collectors who have avoided scrutiny in the past (with exponentially more enforcement cases the FTC's increased presence would place positive pressure on the industry to self-monitor); and finally, both agencies could combine resources to better educate the consumers as to their rights under the FDCPA, which would make it more likely for abuses to be prosecuted through private consumer lawsuits. These increased efforts would collectively destroy the profit motive of debt collectors who engage in abusive practices.

²⁴² From 1997 through 2008, the FTC brought fewer than seventy enforcement actions. FTC, *THE CHALLENGES OF CHANGE*, *supra* note 15, app.B at B-1 to B-3 (listing enforcement actions from 1977 through 2008).

²⁴³ *See supra* Part I.B.

²⁴⁴ 12 U.S.C.A. § 5565(c).

²⁴⁵ *Id.* § 5565(c)(2)(A).

²⁴⁶ *Id.* § 5565(c)(2)(B).

²⁴⁷ *Id.* § 5565(c)(2)(C).

VI. CONCLUSION

We live in a credit driven society during difficult financial times. Necessarily, an inextricable financial relationship exists between consumers and debt collectors. The two sides of this relationship are in constant tension, and there must always be a fair balance between the right of debtors to remain free of harassment, misrepresentation, and unfair treatment, and the right of creditors to pursue valid debts in good faith. The Court's decision in *Jerman* clearly illustrates this tension, and regrettably, regardless of how the Court decided that case, the pendulum between creditor and consumer rights was destined to swing in one direction or another.

It need not be a zero sum game. By revising and regulating the FDCPA in a way that enhances consumer rights with modern protections, while also providing ethical debt collectors with clearer guidance to legally pursue their debts, regulators will better protect consumers, and reward creditors who act in good faith by adhering to the requirements of the statute. Finally, an improved FDCPA that provides increased financial incentives to punish substantive violators while improving, regulating, and standardizing the lines of communication between debt collectors and debtors will help contribute to a more efficient credit market and will lead to better outcomes for all parties involved.

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