The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors

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I. INTRODUCTION

When Congress passed the Fair Debt Collection Practices Act1 ("FDCPA") in 1977, its objective was to protect consumers from unfair and deceptive practices in the debt collection industry without imposing unnecessary restrictions on ethical debt collectors.2 Prior to the FDCPA, the Federal Trade Commission ("FTC") protected consumers from debt collection practices which had a tendency or capacity to deceive.3 Despite such FTC enforcement, many debt collectors continued their deceptive practices and Congress thought that new laws were needed to stem the tide.4

3. See Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1172 (11th Cir. 1985). The Federal Trade Commission Act declares unlawful all "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a)(1) (1994). In dealing with the definition of "capacity to deceive," the court in Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944), observed that the law was not "made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous."' Id. at 679 (quoting Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910)).
4. The Senate Committee report indicated:
Debt collectors used many strategies to recover money for their clients. They pursued their calling with a vengeance because they believed that most debtors ignored their obligations without rhyme or reason. A common practice for debt collectors was to make late-night telephone calls or to use intimidating tactics in pursuit of their victims. They had little to worry about because there was not much state legislation to restrain them in their activities. These abuses in the debt collec-

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.


5. For example, the Senate Committee found that the use of WATS lines by collectors led to a dramatic increase in interstate collections, and that states were unable to act against unscrupulous debt collectors who harassed consumers from another state. See id. at 2-3, reprinted in 1977 U.S.C.C.A.N. at 1697.

6. One witness reacted to the proposed legislation this way:

We in the collection business deal with delinquent debtors not average consumers who pay their bills. I respectively suggest [sic] the word consumer be replaced in the language of this legislation and be changed to delinquent debtor.

... [T]he only class that will benefit from this nobly intended legislation will be the "deadbeat"—the person who refuses to pay his bills.


Professor Caplovitz had a different view of things. His research indicated as follows:

Most debtors default because of interruption in the flow of their income. Almost half of all the debtors we interviewed told us this was the reason for their default. Most of these people had either lost their job or had become ill and were unable to earn money....

The loss of income as a reason for default is not limited only to interferences with the chief wage earner's income. A number of the families we interviewed fell into economic trouble because a secondary wage earner was forced out of the labor force, and oddly enough, in some of these cases, this was the wife who had to leave the labor force because she became pregnant.

Id. at 231 (statement of David Caplovitz, Professor of Sociology, Graduate School of the City of New York).


8. The Senate Report indicated as follows:

While debt collection agencies have existed for decades, there are 13 States, with 40 million citizens, that have no debt collection laws.... Another 11 States ... with another 40 million citizens, have laws which in the committee's opinion provide little or no effective protection. Thus, 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse.
tion industry posed quite a challenge for Congress. After extensive hearings about problems experienced by consumers in the marketplace, Congress responded to the challenge by enacting the FDCPA.

The FDCPA is far-reaching. It covers persons whose principal business is the collection of debts, or who regularly collect debts owed to somebody else. The debt must arise from an obligation to pay money owing from a transaction between the consumer and the creditor, and the subject of the transaction must be primarily for personal, family, or household services. Although the FDCPA originally exempted an attorney from coverage if the attorney was collecting debts for a client, Congress repealed that exemption in 1986. Nevertheless, it remained for the Supreme Court to settle any doubts about the effect of that repeal for those who held some lingering hope that attorneys would continue to enjoy an exemption. The Court agreed that the FDCPA covered all attorneys who regularly engage in debt collection activity, even when that activity consists of litigation.

The courts have been concerned with the interpretation of other parts of the FDCPA. There is some disagreement about the meaning of “debt,” and the term has provoked some spirited discussion in the circuits. Such disagreements usually relate to the type of transaction covered by the statute.

9. The Fair Debt Collection Practices Act ("FDCPA") defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (1994).

10. The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." Id. § 1692a(5). A "creditor" is a person who extends credit or to whom a debt is owed. See id. § 1692a(4). Therefore, the definition does not include lenders only.


The statute imposes certain obligations on debt collectors. Among them is a requirement that a debt collector must inform the consumer about the consumer’s right to seek verification of the debt. If a consumer disputes the validity of the debt within thirty days after receiving details of the debt from the debt collector, the collector must stop his collection activities until he verifies the debt for the consumer. The problem is that many debt collectors seek to downplay the validation notice by using contradictory language in the collection letter, which demands payment within a very short period, although the statutory notice gives the consumer thirty days to dispute the debt. When this happens, a court has to decide whether the contradictory or overshadowing

damages arising out of an accident does not constitute a transaction and is therefore not a debt), Brown v. Budget Rent-A-Car Sys., 119 F.3d 922, 925 (11th Cir. 1997) (extension of credit is not required for the existence of a debt), Mabe v. G.C. Servs. Ltd. Partnership, 32 F.3d 86, 88 (4th Cir. 1994) (obligation to pay child support is not a debt), Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1168 (3d Cir. 1987) (claims for illegally received television signals were not a debt under FDCPA because they did not involve an extension of credit), and Battye v. Child Support Servs., Inc., 873 F. Supp. 103, 105-06 (N.D. Ill. 1994) (obligation to pay child support is not a debt).

15. Compare Zimmerman, 834 F.2d at 1168 (transactions giving rise to a debt under FDCPA involve the extension of credit to a consumer), and Staub v. Harris, 626 F.2d 275, 279 (3d Cir. 1980) (per capita tax levied by Pennsylvania taxing district was not a debt under FDCPA), with Brown, 119 F.3d at 927 (definition of debt is not restricted to credit transaction), and Bass, 111 F.3d at 1325 (same).

16. The FDCPA provides in pertinent part as follows:

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;
(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.


17. See Chauncey v. JDR Recovery Corp., 118 F.3d 516, 518 (7th Cir. 1997); Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991); Swanson v. Southern Or. Credit Serv., 869 F.2d 1222, 1225 (9th Cir. 1988).
language violates the validation provision. Courts have also had to face the challenges posed by a collector's false or misleading representations. The question that courts usually have to answer is whether the particular collection language has the capacity to deceive the consumer.

This Article discusses the latest developments in FDCPA litigation to see how the courts have dealt with the validation requirement and the definition of "debt." It also discusses the persons covered by the statute and the type of language that violates the FDCPA because of the collector's false and misleading statements. This review shows that the FDCPA has achieved a measure of success, although there is some slight disagreement between the Seventh Circuit and other courts about whether the FDCPA should be aimed at the "least sophisticated consumer" or the "unsophisticated consumer." This Article concludes with some recommendations for clarifying and improving the language of the statute, so that consumers can truly enjoy the protection that the FDCPA was intended to give.

II. DETERMINING STATUTORY COVERAGE

The purpose of the FDCPA is to eliminate abusive and unfair debt collection practices. The definition of the term "debt collector" includes a person "who regularly collects or attempts to collect, directly

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19. For the definition of "debt collector" see supra, note 9. There are several exceptions to this definition. See 15 U.S.C. § 1692a(6)(A)-(F).

20. Many courts have applied the "least sophisticated consumer" standard in determining whether a debt collector has violated the FDCPA. That objective standard seeks to protect naive consumers, while insisting on reasonableness and presuming a basic level of understanding on the part of the consumer. See Taylor v. Ferrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997); United States v. National Fin. Servs., 98 F.3d 131, 136 (4th Cir. 1996); Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993); Smith v. Transworld Sys., 953 F.2d 1025, 1028-29 (6th Cir. 1992). On the other hand, the Seventh Circuit has adopted the "unsophisticated consumer" standard that is little different, except that it is supposed to protect consumers of below-average intelligence without restricting protection to consumers who are on the last rung of the sophistication ladder. See Gammon v. GC Servs. Ltd. Partnership, 27 F.3d 1254, 1257 (7th Cir. 1994). Despite this Gammon formulation, the Seventh Circuit explained in Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996), that "Gammon does not significantly change the substance of the 'least sophisticated consumer' standard as it had been routinely applied by courts." Id. at 227 (emphasis omitted). The court concluded that the "unsophisticated consumer" standard was "a distinction without much of a practical difference in application." Id. The Seventh Circuit was looking for a "simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence." Gammon, 27 F.3d at 1257.

or indirectly, debts owed or due or asserted to be owed or due another.\textsuperscript{22} An earlier version of the statute contained an express exemption for lawyers which excluded "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client."\textsuperscript{23} Congress repealed this exemption in 1986 without substituting any other provision for the special protection of lawyers.\textsuperscript{24} It was not surprising, nevertheless, that lawyers would argue that the FDCPA did not apply to them in litigation, despite the repeal of the exemption.\textsuperscript{25}

It was left to the United States Supreme Court to settle the matter in \textit{Heintz v. Jenkins}.\textsuperscript{26} The petitioners argued in \textit{Heintz} that subjecting litigating lawyers to the FDCPA would create several anomalies not intended by Congress.\textsuperscript{27} First, a lawyer's unsuccessful lawsuit against a consumer would result in a violation of the provision that forbids a debt collector from threatening "to take action that cannot legally be taken."\textsuperscript{28} This was a surprising argument, since it was unclear how the ultimate failure of a lawsuit would necessarily relate to the legality of the lawyer's action.\textsuperscript{29} The lawsuit might be unsuccessful for any number of reasons. In any event, a lawyer's liability as debt collector could be forgiven on the basis of the bona fide error defense,\textsuperscript{30} and thus there

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\item Id. § 1692a(6).
\item Lawyers had a reason to be optimistic about being excluded from coverage under the FDCPA. The Federal Trade Commission Commentary interpreting the FDCPA excluded "[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)." Federal Trade Commission Statements of General Policy or Interpretation Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,102 (1988) [hereinafter FTC Staff Commentary]. The FTC still continues to recommend to Congress that an attorney should be exempt from the FDCPA if he pursues consumers solely through litigation. \textit{See FTC TWENTY-FIRST ANNUAL REPORT TO CONGRESS PURSUANT TO SECTION 815(a) OF THE FAIR DEBT COLLECTION PRACTICES ACT 10} (1999) [hereinafter FTC ANNUAL REPORT]. The Commentary supersedes all previous staff interpretations and is intended to clarify and codify those interpretations. \textit{See FTC Staff Commentary}, 53 Fed. Reg. at 50,101.
\item 514 U.S. 291 (1995).
\item \textit{See id. at 295.}
\item \textit{See id.} (quoting 15 U.S.C. § 1692e(5) (1994)). The FDCPA prohibits a debt collector's false or misleading representation, including "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5).
\item \textit{See Heintz}, 514 U.S. at 295-96.
\item The FDCPA provides for a bona fide error defense: "A debt collector may not be held liable in any action . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(e).
\end{enumerate}
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would be no basis for placing liability on a lawyer simply because he failed to win his lawsuit.

The second anomaly pointed out by the petitioners was that if a litigating lawyer was subject to the FDCPA, a consumer could stop a lawsuit from going forward by merely requesting the lawyer to “cease further communication.” The Court did not think it was necessary to interpret the statute in a way that affected the collector’s statutory right to let the consumer know that the collector intended to invoke a specified remedy, despite the consumer’s directive. If the collector had a statutory right to give notice of the remedy he intended to invoke, then the same right would allow him to invoke the actual remedy. Therefore, the lawyer-collector could proceed with his lawsuit. The Court’s interpretation was consistent with the statutory mandate, for the collector could take one last chance to apprise the consumer of his intentions regarding his available remedies. If he could do that, he could surely proceed directly with the remedy itself. There was no anomaly there.

The petitioners in Heintz grasped at one last straw to save the day. They looked for some hope in Representative Annunzio’s assurance that the statute covered lawyers when they were collecting debts, but not when they were performing legal tasks. Unfortunately, Representative Annunzio made his comments after the statute became law, and the Court did not give them any weight. In any event, other Representatives expressed concern during the legislative process that repeal of the exemption could interfere with a client’s right to pursue judicial reme-

31. See Heintz, 514 U.S. at 296 (quoting 15 U.S.C. § 1692c(c)).

32. See id., 514 U.S. at 296. There are three exceptions to the rule requiring the debt collector to cease communication with the consumer on the consumer’s request. See 15 U.S.C. § 1692c(c)(1)-(3). One of them allows the debt collector to tell the consumer about the remedies which the debt collector intends to invoke. See id. § 1692c(c)(2).

33. See Heintz, 514 U.S. at 296.

34. The Court put it this way: “[T]he conclusions upon the fact that it is easier to read § 1692c(o) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.” Id. at 296-97.


36. See Heintz, 514 U.S. at 298. The Court’s approach was consistent with the tenets of statutory interpretation excluding post-enactment statements as a part of legislative history. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.16, at 366 (5th ed. rev. 1992); see also Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) (“[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act’s passage.”).
dies. Nevertheless, these Representatives were unsuccessful in keeping litigation activities outside the statute.\footnote{37}

The petitioners had no better success in relying on the FTC Staff Commentary which treated an attorney’s legal activities as exempt from coverage.\footnote{38} The Court granted no deference to the Commentary because it conflicted with the statute’s plain language.\footnote{39} The Court finally concluded that the FDCPA applied to lawyers who regularly engage in debt collection activity, even when that activity includes litigation.\footnote{40}

As a general rule, creditors are not subject to the FDCPA.\footnote{41} A creditor may come within the FDCPA, however, if he uses any name other than his own which would create the false impression that a third person is collecting the debt.\footnote{42} This occurs quite frequently when a creditor uses an attorney’s letterhead to give the false impression that an attorney is the collector.\footnote{43} A creditor can mislead the consumer in other cases.

\footnote{37} Representative Hiler gave some idea of the views in the opposing camp:

Congressman Shumway also offered an amendment at the Committee mark-up of H.R. 237, which would have limited the attorney exemption. Under the Shumway amendment, attorneys-at-law generally would be subject to the FDCPA. However, an attorney-at-law who collects a debt as an attorney on behalf of a client, and who does not solicit debts for collection, would be excepted from paragraphs (1), (2), and (3) of section 804 and sections 805(b), 805(c), and 809. This amendment also was defeated by voice vote.

While I too am concerned about the protection of the consumer from abusive, unfair, and deceptive debt collection practices, I do not support placing unnecessary shackles on attorneys who collect debts as part of a legitimate law practice. I would much prefer a targeted approach that eliminates the existing abuse of the exemption without interfering with the legitimate collection practices of attorneys-at-law.


\footnote{38} The FTC Staff Commentary excluded from coverage “[a]n attorney whose practice is limited [sic] to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment).” FTC Staff Commentary, \textit{supra} note 25, at 50,102. The FTC staff publishes its interpretations of the FDCPA through the FTC Staff Commentary. The Commentary does not have the force or effect of law and is not binding on the FTC or the public. \textit{See id.} at 50,101.

\footnote{39} \textit{See Heintz,} 514 U.S. at 298. The Court could find nothing in the FDCPA or elsewhere authorizing the FTC to create this exception from the FDCPA’s coverage. \textit{See id.} The FTC Commentary is not a formal trade regulation rule or advisory opinion and is not binding on the FTC or the public. \textit{See FTC Staff Commentary, supra} note 25, at 50,101. When the language of a statute is clear and unambiguous, the courts do not look elsewhere to ascertain legislative intent. \textit{See SINGER, supra} note 36, § 46.01, at 81.

\footnote{40} \textit{See Heintz,} 514 U.S. at 299.

\footnote{41} The FDCPA excludes from the term “debt collector” any person collecting a debt which was originated by such person. \textit{See 15 U.S.C.} § 1692a(6)(F)(ii) (1994).

\footnote{42} \textit{See id.} § 1692a(6).

\footnote{43} \textit{See Taylor v. Perrin, Landry, deLaunay & Durand,} 103 F.3d 1232, 1236-37 (5th Cir. 1997); \textit{NATIONAL CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.5.5} (3d ed. 1996 & Supp. 1999).

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In *Maguire v. Citicorp Retail Services, Inc.*, Citicorp sent out a collection letter that indicated it came from Debtor Assistance, Agency Control Unit (“Debtor Assistance”). In the plaintiff’s view, the letter created the impression that a third party, Debtor Assistance, was collecting for Citicorp. The plaintiff had never received any correspondence from Debtor Assistance and she did not know that the collection letter had come from Citicorp. The court vacated the lower court’s summary judgment for Citicorp and remanded for further proceedings. The court could not find as a matter of law that a least sophisticated consumer would have realized that the letter was from Citicorp, since it was on the letterhead of Debtor Assistance.

There was a cryptic reference in the body of the letter to the “Debtor Assistance” unit of Citicorp, which offered to set up a payment schedule for the consumer. The only problem was that there was no reference to Citicorp Retail Services in any previous correspondence with the consumer. It was possible, therefore, that the consumer would not have been aware of the affiliation between Citicorp and Debtor Assistance, and could have been misled into believing that the Citicorp subsidiary was an unrelated third party.

The *Maguire* situation was a little different from *Franceschi v. Mautner-Glick Corp.*, where the consumer tried without success to hold the landlord liable as a debt collector for using the name of a third party in collecting the landlord’s debts. There was no hint of subterfuge in *Franceschi*, for the plaintiff-consumer had signed a rental agreement with the landlord’s agent which clearly indicated that the

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44. 147 F.3d 232 (2d Cir. 1998).
45. See id. at 234.
46. See id. at 236.
47. See id.
48. See id. at 237.
49. See id. at 236.
50. See id. at 234. The first page of the letter indicated that the letter came from “Debtor Assistance Agency Control Unit 245 Old Country Road Melville, N.Y.” Id. (emphasis omitted).
51. See id. at 237. The letter to the plaintiff indicated that the account would be reported to a collection agency if the consumer did not pay within thirty days. See id. at 234. The defendant argued that the consumer should have known that Debtor Assistance was not a third party since Debtor Assistance would ordinarily report the delinquency to a third party only if Debtor Assistance was the creditor. See id. at 237.
53. See id. at 251-52. The plaintiff urged that the landlord should be recognized as a debt collector because it used a name other than its own in the collection of a debt, which would indicate that a third person was collecting or attempting to collect the debt. See id. at 252; see also 15 U.S.C. § 1692a(6) (defining “debt collector”).

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agent was collecting rent for the landlord.\textsuperscript{54} Therefore, the consumer could not have been under the impression that the agent was an independent debt collector.\textsuperscript{55}

An individual or an entity may be recognized as a debt collector in an indirect way. In \textit{Romine v. Diversified Collection Services, Inc.},\textsuperscript{56} Western Union used an automated voice telegram ("AVT") service to obtain consumers’ telephone numbers by eliciting responses to personal delivery telegrams.\textsuperscript{57} Western Union would then pass on the unlisted telephone numbers to creditors and collection agencies.\textsuperscript{58} When consumers called Western Union in response to Western Union’s notification, Western Union did not tell them that it was an attempt to collect a debt.\textsuperscript{59} Western Union advertised that its AVT service was "‘specially developed for the credit and collections industry.’"\textsuperscript{60} It touted its service as a revolutionary new collections device that would "‘stimulate recoveries dramatically.’"\textsuperscript{61} The dual role of the service was to obtain unlisted telephone numbers for collectors and to catalyze collection activity through Western Union telegrams.\textsuperscript{62}

Western Union defended its policy of requiring telegram addressees to release their telephone numbers by alleging that it was merely "‘confirming’" the numbers.\textsuperscript{63} The court in \textit{Romine} rejected that contention by pointing out that one could not "‘confirm’" what one did not know.\textsuperscript{64} The real reason for the so-called confirmation was to obtain unlisted numbers for debt collection agencies.\textsuperscript{65} The AVT service differed from Western Union’s standard procedure for personal telegram delivery, which required only that the recipient satisfactorily identify himself as the addressee.\textsuperscript{66} Western Union’s activities therefore went beyond a mere message delivery service. These activities were at least an indirect way of collecting debts, and Western Union took great pride in promot-

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\item[(54)] See \textit{Franceschi}, 22 F. Supp. 2d at 255.
\item[(55)] See id.
\item[(56)] 155 F.3d 1142-44 (9th Cir. 1998).
\item[(57)] See id. at 1144.
\item[(58)] See id.
\item[(59)] See id.
\item[(60)] Id. at 1147.
\item[(61)] Id.
\item[(62)] See id.
\item[(63)] See id. at 1148.
\item[(64)] See id.
\item[(65)] See id. The court acknowledged that "‘[t]he chief purpose of the alleged ‘confirmation’ process is to obtain unlisted or otherwise unavailable telephone numbers which Western Union then turns over to creditors and debt collection agencies.’” \textit{Id.}
\item[(66)] See id.
\end{enumerate}
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It acted in concert with creditors and collectors to accomplish the same objective: collection of outstanding debts. Therefore, the court reversed the district court's summary judgment in favor of Western Union and remanded the case for further proceedings.

The term "debt collector" does not include anyone who collects a debt that is not in default at the time the person obtains it. It is not always clear whether a debt is in default. In Bailey v. Security National Servicing Corp., the consumers defaulted on their mortgage, which was guaranteed by the Department of Housing and Urban Development ("HUD"). The loan was eventually assigned to HUD because of the consumers' default, and the parties then agreed on a series of payment plans, or forbearance agreements, so that the consumers could bring their loan up to date. It was understood that the forbearance agreement temporarily superseded the original defaulted loan. The defendants ended up servicing the consumers' loan and sent a letter to the consumers that not only listed the next four payments due, but also explained that the consumers' failure to comply with the terms of the forbearance agreement would result in the acceleration of all payments due under the original note. The consumers responded to the defendants' letter by filing a class action that claimed that the defendants had failed to follow the requirements of the FDCPA. The defendants claimed that they were not subject to the FDCPA because the debt was not in default when they obtained it, and therefore, they were not debt collectors.

The court in Bailey distinguished between collection on a defaulted debt and collection under a new payment plan or forbearance agreement. The defendants' letter to the consumers informed them that they

67. The court referred to an FTC staff letter dated September 17, 1996, addressed to Christopher Stanley, Esq., that described a service almost identical to Western Union's AVT service. The FTC letter concluded that the service was an indirect way of collecting debts because it alerted a letter recipient to a voice-mail left in his or her name at a certain telephone number, and it obtained the recipient's telephone number so that debt collectors could contact the recipient. See id. at 1146-47.

68. Although the FDCPA does not define "indirect collection" of debts, courts have looked to the overall statutory purpose. See Heintz v. Jenkins, 514 U.S. 291, 294-95 (1995); Scott v. Jones, 964 F.2d 314, 316 (4th Cir. 1992).


70. 154 F.3d 384 (7th Cir. 1998).

71. See id. at 386.

72. See id.

73. See id.

74. See id.

75. See id.

76. See id. at 386-87.

77. See id. at 387.
owed certain monthly payments under the forbearance agreement, not the original note, and that the defendants wanted to work with them to ensure payment under that agreement. It was clear that the defendants sought to collect the debt under the forbearance agreement, and that debt was not in default at the time the defendants obtained it. Thus, the defendants were not debt collectors under the statute.

If the court did not recognize the distinction between the original obligation and the new agreement, the implication would be that the debtors could never make a fresh start under a new plan. This would in turn result in mortgage servicers, like the defendants in Bailey, being recognized as debt collectors regardless of how long ago they assumed their role to service a debt that replaced an obligation in default.

One wonders what would have happened if the defendants had tried to collect the amounts due under the original note, rather than the new installments under the forbearance agreement. No doubt the debtors would have reminded the defendants of the new arrangement. But there was no default under that new agreement, and the consumers would have been on solid ground in adhering to its terms.

Even if the defendants in Bailey could have been classified as debt collectors, their letter to the debtors was not a communication in con-

78. See id. at 386.
79. See id. at 388.
80. See id. This was because the debt was not in default when the person obtained it. See 15 U.S.C. § 1692a(6)(F) (1994).
81. See Bailey, 154 F.3d at 388.
82. The congressional intent to exempt mortgage service companies was reflected in the Senate Committee report, that indicated the definition of "debt collector" should not cover "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." S. REP. No. 95-382, at 3-4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1698; see also Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 106 (6th Cir. 1996) ("'[a] debt collector does not include the consumer's creditors . . . or an assignee of a debt, as long as the debt was not in default at the time it was assigned.'") (omission in original); Mayer v. Bellsouth Telecommunications (In re Mayer), 199 B.R. 616, 620 (Bankr. E.D. La. 1996) (holding that defendant was not a debt collector when at the time it purchased the account it was not in default).
83. The court explained the impact of this kind of new arrangement:

The advantage of these renegotiated plans is quite clear—the creditor wins because he believes he'll be better off restructuring the loan obligation and perhaps even entering into an entirely new agreement rather than litigating or pursuing the typical remedies available to him by virtue of a default (acceleration, foreclosure, etc.). The debtor wins because in a sense his slate (and the previous default) is wiped clean under the terms of the new agreement so long as he stays current on his new obligations.

nection with the collection of a debt. The letter made no demands, but merely contained a warning that the consumers’ failure to abide by the new agreement would result in acceleration of the amount due. There was no hint in the defendants’ letter that any payment under the forbearance agreement was overdue. Thus, the communication could not be treated as related in any way to the collection of a debt.

It is to be noted that the statute does not provide any guidance about what it means to obtain a debt that is not in default. Nevertheless, there is no evidence that Congress intended to apply the exemption only to those debts assigned or transferred to the person seeking to be excluded from coverage as a debt collector. It can apply also to an agent who has the right and responsibility to collect rents for his principal.

In Franceschi v. Mautner-Glick Corp., the defendant, the landlord’s agent, was responsible for collecting rents. When the consumer defaulted, the defendant sent him a demand letter for the overdue rent. The court had to decide whether the defendant was a debt collector in light of its activities. The court took the view that the exemption in § 1692a(6)(F)(iii) should apply not only to someone who purchases a debt before default, but also to anyone who has responsibility for collecting it for his principal prior to default. The court’s exclusion of the defendant from the “debt collector” designation was consistent with the legislative intent to exclude mortgage servicers and similar organizations that service outstanding debts for others, as long as the debts are not in default when the servicing companies obtain the debts.

84. See Bailey, 154 F.3d at 387. Both § 1692e (False or misleading representations) and § 1692g (Validation of debts) cover a debt collector’s conduct “in connection with the collection of any debt.” 15 U.S.C. §§ 1692e, 1692g. The consumer had no basis for complaint if the defendant was not seeking to collect a debt. The consumer was not in default under the new agreement, and so the defendant did not have to inform the consumer that it was trying to collect a debt and that it would use any information for the purpose as required by 15 U.S.C. § 1692e(11). See Bailey, 154 F.3d at 388.

85. See Bailey, 154 F.3d at 386.

86. See id. at 387-88.

87. See id. at 389.

88. See Waddington v. Credit Acceptance Corp., 76 F.3d 103, 106 (6th Cir. 1996); Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985); Jones v. Intuition, Inc., 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998).


91. See id. at 253.

92. See id. at 252. The letter from the landlord’s management agent demanded payment of the rent but did not contain any of the language required by the FDCPA for a debt collection letter. See id.

93. See id. at 253-54.

94. See id. at 254. A congressional report indicated the scope of exempt activities:
emption of the agent in this context gave a broad definition to the term "obtain" in the section, so that it went beyond ownership or assignment of the debt. 95

III. THE KIND OF CONSUMER PROTECTED

Before Congress passed the FDCPA, the FTC had protected unsophisticated consumers from deceptive practices in the marketplace. Section Five of the FTC Act declared unlawful all "unfair or deceptive acts or practices in commerce." 96 It was recognized that the FTC Act was designed to protect the public at large, ""that vast multitude which includes the ignorant, the unthinking and the credulous." 97 When the FTC enforced its regulations against deceptive debt collection prior to the enactment of the FDCPA, it looked not to the reasonable consumer, but to a less sophisticated consumer to determine whether a collector's practice had a tendency or capacity to deceive. 98 The Second Circuit agreed, in Exposition Press, Inc. v. FTC, 99 that the FTC "should look not to the most sophisticated readers but rather to the least." 100 Subsequent cases adopted the standard enunciated in Exposition Press and applied it under the FDCPA, thus creating what is now known as the "least sophisticated consumer" standard. 101

The adoption of this standard does not mean that courts cater to every bizarre interpretation of a collection notice. Courts tend to incor-

[The committee does not intend the definition to cover the activities of trust departments, escrow companies, or other bona fide fiduciaries; the collection of debts, such as mortgages and student loans, by persons who originated such loans; mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing.


95. See FTC Staff Commentary, supra note 25, at 50,103; NATIONAL CONSUMER LAW CTR., supra note 43, § 4.3.9, at 102-03.


97. Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944) (quoting Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910)).

98. See Wilson Chem. Co., 64 F.T.C. 168, 183 (1964). The respondents used in their advertisements the words "free" and "absolutely free," but the so-called "free" article was available only if a consumer ordered certain merchandise. The respondents' advertisements were directed primarily at people of immature age. The FTC found that the advertisements had the "tendency and capacity" to mislead a substantial number of such persons. See id. at 181, 183.

99. 295 F.2d 869 (2d Cir. 1961).

100. Id. at 872.

porate the concept of reasonableness in analyzing a debt collector’s language. Therefore, there is a presumption that even a least sophisticated consumer has a basic understanding of what is going on around him and can read a collection notice with care. Nevertheless, it is generally agreed that consumers of below-average sophistication are especially susceptible to fraudulent schemes, and the FDCPA is primarily concerned with the plight of those consumers. The “least sophisticated consumer” standard therefore serves a dual function. It protects all consumers, even the naive, against deceptive collection practices, but it also protects debt collectors against bizarre or strange interpretations of collection language.

Despite the Second Circuit’s formulation of the “least sophisticated consumer” standard in Clomon v. Jackson, the Seventh Circuit modified the standard in Gammon v. GC Services Ltd. Partnership to “relieve the incongruity between what the standard would entail if read literally, and the way courts have interpreted the standard.” The Seventh Circuit was dissatisfied with the designation “least sophisticated consumer,” because such a consumer is at the bottom of the sophistication scale. He is the most unsophisticated consumer around, and the court felt that such a consumer would not be able to read a collection notice with care as anticipated in Clomon. The court opted for the term “unsophisticated consumer” as the operative standard, because it protects the consumer who is “uninformed, naive, or trusting,” while at the same time incorporating the element of reasonableness. The court believed that such a formulation avoided the consumer on the last rung

102. See Chaudhry v. Gallerizzo, 174 F.3d 394, 408 (4th Cir. 1999); National Fin. Servs., 98 F.3d at 136; Clomon, 988 F.2d at 1319.
103. See National Fin. Servs., 98 F.3d at 136; Clomon, 988 F.2d at 1319.
104. See Gammon v. GC Servs. Ltd. Partnership, 27 F.3d 1254, 1257 (7th Cir. 1994); Clomon, 988 F.2d at 1319.
105. See Maguire v. Citicorp Retail Servs., 147 F.3d 232, 236 (2d Cir. 1998); Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997); National Fin. Servs., 98 F.3d at 136; Clomon, 988 F.2d at 1319.
106. 988 F.2d 1314 (2d Cir. 1993).
107. 27 F.3d 1254 (7th Cir. 1994).
108. Id. at 1257.
109. See id. The court characterized the “least sophisticated consumer” as follows: “Literally, the least sophisticated consumer is not merely ‘below average,’ he is the very last rung on the sophistication ladder. Stated another way, he is the single most unsophisticated consumer who exists.” Id.
110. See id.
111. See id. The court believed that “[t]he reasonableness element in turn shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters.” Id.
of the sophistication ladder. Other courts seemed to achieve the same result by actually importing the concept of reasonableness into their interpretations of the "least sophisticated consumer" standard.

After Gammon, the Seventh Circuit had to explain in Avila v. Rubin that "Gammon [did] not significantly change the substance of the 'least sophisticated consumer' standard as it had been routinely applied by courts." The Avila court viewed the Gammon formulation as a less confusing way of protecting consumers of below-average sophistication. The Gammon court adopted the new terminology to reconcile the literal meaning of the "least sophisticated consumer" standard with the application of that standard. As the Avila court was careful to point out, however, "the unsophisticated consumer standard is a distinction without much of a practical difference in application."

The defendants in Avila tried to make some headway with Judge Easterbrook's concurring opinion in Gammon, which suggested that the plaintiff in Gammon should show that the collector's language had deceived a significant number of the consumers who had received the collection notice. The implication by the defendants in Gammon was that this was the only way the plaintiff could show that the collection notice would deceive an unsophisticated consumer. If the language had

112. See id. Even so, the court acknowledged that "[c]ourts which use the 'least sophisticated consumer' test . . . routinely blend in the element of reasonableness." Id. (citing Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993)). This concession seems to undercut the court's insistence on the "unsophisticated consumer" terminology.

113. In Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999), the Fourth Circuit approved the following jury instruction by the district court on the "least sophisticated consumer" standard:

   When I refer to a person unsophisticated in matters of law or finance, I am referring to a person of reasonable intelligence who has a basic understanding and has a willingness to listen to what is being said with care. I am not referring to a person who places an unrealistic or irrational interpretation upon what was said.

Id. at 408. The Chaudhry court believed that the National Financial Services court's instruction was consistent with the "least sophisticated debtor" doctrine which is geared toward naïve consumers, while "preserving a quotient of reasonableness and presuming a basic level of understanding." Id. at 409 (quoting United States v. National Financial Services, 98 F.3d 131, 136 (4th Cir. 1996)).

114. 84 F.3d 222 (7th Cir. 1996).

115. Id. at 227 (emphasis omitted).

116. See id.

117. See id. (citing Gammon v. GC Servs. Ltd. Partnership, 27 F.3d 1254, 1257 (7th Cir. 1994)).

118. Id.

119. See id. Judge Easterbrook's view was as follows: "Because we have rejected the 'least sophisticated consumer' approach, the plaintiff will have to show that a significant fraction of the letter's addressees were deceived—for if showing a handful of misled debtors were enough, we would as a practical matter be using the 'least sophisticated consumer' doctrine." Gammon, 27 F.3d at 1260 (Easterbrook, J., concurring).
misled only a handful of debtors, then the standard would be closer to the least sophisticated consumer, and the defendant in Avila wanted to make it harder for the plaintiff to prove his case. The Avila court did not accept the defendants' interpretation that Gammon had fundamentally changed the standard for evaluating FDCPA violations by introducing a heightened standard that required extrinsic evidence of large scale deception.  

If the Seventh Circuit did not intend to change the standard, one wonders why it did not leave the other standard in place, since the Avila court recognized that Gammon did not significantly affect the substance of the "least sophisticated consumer" standard as the courts had applied it. If the courts which applied that standard were accustomed to taking into account the element of reasonableness, then the application of the standard made up for any deficiency in the designation which put the consumer at the bottom of the sophistication ladder. The Seventh Circuit was aiming for the protection of the "uninformed, naive, or trusting" consumer, while also requiring an "objective element of reasonableness." But the court had already acknowledged that other courts were taking into account the same component of reasonableness. It is questionable, therefore, whether the Seventh Circuit achieved the "simpler and less confusing" formulation which it sought in adopting the "unsophisticated consumer" standard.

IV. THE MEANING OF "DEBT"

The FDCPA does not provide a remedy for everyone who is aggrieved by a person's attempt to collect money from him. The collector must be trying to recover a "debt." The collector must therefore be en-

120. See Avila, 84 F.3d at 226-27.
121. See id. The court recognized the Gammon court's description of the "unsophisticated consumer" as someone whose "reasonable perceptions will be used to determine if collection messages are deceptive or misleading." Id. at 227 (quoting Gammon, 27 F.3d at 1257). Judge Easterbrook was looking for the so-called "hypothetical" unsophisticated consumer in the same way that courts look for the reasonable person in tort law. See Gammon, 27 F.3d at 1259 (Easterbrook, J., concurring).
122. The court in Gammon was worried that the least sophisticated consumer "would likely not be able to read a collection notice with care (or at all)." Gammon, 27 F.3d at 1257. Nevertheless, the court acknowledged in the very next sentence that courts "routinely blend in the element of reasonableness" in applying the "least sophisticated consumer" standard. Id. (citing Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993)). This admission suggested that the court was overly sensitive about "the very last rung on the sophistication ladder." Id.
123. Gammon, 27 F.3d at 1257; see Avila, 84 F.3d at 226.
124. See Gammon, 27 F.3d at 1257 (citing Clomon, 988 F.2d at 1319).
forcing a consumer’s obligation to pay money arising out of a transaction, and the money or services which are the subject of the transaction must be for personal, family or household purposes. The statutory definition of “debt” seems simple enough, but it has provoked its fair share of litigation.

A. The Requirement of a Transaction

In one early case, Staub v. Harris, the Third Circuit had to decide whether a per capita tax levied by a state’s taxing district came within the FDCPA’s definition of “debt.” The plaintiffs recognized that they had to describe the transaction which gave rise to the consumer’s obligation. The relationship between the plaintiffs and the taxing district did not rest on a traditional commercial relationship, but the plaintiffs argued that there was a social contract between them which satisfied the transactional element.

While it was true that the government provided services to the public at large, they were not the kind of services that Congress contemplated when it enacted the FDCPA. The court pointed out that the statute limits the subject of the transaction to “personal, family, or household purposes,” and taxes are used for non-personal purposes such as “prisons, roads, defense, courts and other governmental services.” The court was on safe ground in emphasizing the personal nature of the transaction dictated by the statute, and that requirement could hardly be met when the taxes benefited the community at large, including businesses and other organizations that were not subject to the statute. Although the court did not decide whether the so-called statutory “transaction” always requires a contractual relationship be-

126. See 15 U.S.C. § 1692a(5). The FDCPA defines “debt” as “any obligation ... of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” Id.
127. 626 F.2d 275 (3d Cir. 1980).
128. See id. at 276.
129. See id. at 278.
130. See id.
131. Id. (quoting 15 U.S.C. § 1692a(5)).
132. See id. The court could find nothing in the legislative history supporting the plaintiff’s interpretation. See id. The FDCPA applies “only to debts contracted by consumers for personal, family, or household purposes.” Id. (quoting S. REP. NO. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697); see also 15 U.S.C. § 1692a(5) (defining debt).
133. See Staub, 626 F.2d at 278.
tween the parties, it required at a minimum that the "debt" must flow from the "rendition of a service or purchase of property or other item of value."

Although the Third Circuit in *Staub* avoided the question of a relationship between a transaction and a contract, the court in *Zimmerman v. HBO Affiliate Group* took the view that a "‘transaction’" was broader in scope than a contract because a transaction can include negotiations which do not lead to a contractual relationship between the parties. This view was an important consideration in *Zimmerman*, since the defendants were trying to recover payments for television signals which the plaintiffs had received illegally. It was important to know, therefore, whether a transaction could involve some elements of a tort, or whether the statute required the transaction to be consensual in nature. There was no element of consent in *Zimmerman*, for the plaintiffs never negotiated for anything.

The *Zimmerman* court was consistent with *Staub* insofar as it recognized the consensual nature of the transaction. The plaintiff in *Zimmerman* seemed disappointed because the court’s interpretation protected HBO subscribers who did not or would not pay, while denying protection under the FDCPA to other persons who might have received service without contracting for it. In the plaintiff’s view, the FDCPA seemed to protect "‘deadbeats,” and the plaintiff wanted to convince the court that Congress could not have intended to protect such debtors from collection abuses. The court was charitable enough to observe that not too many people refuse to pay their just debts, and that the vast majority of delinquencies result from unforeseen circumstances. It was significant that the plaintiff did not categorize the persons who received the television signals without contracting for them, but the tor-

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134. *Id.*
135. 834 F.2d 1163 (3d Cir. 1987).
136. See *id.* at 1168.
137. See *id.* at 1164.
138. See *id.* at 1168.
139. See *id.* at 1165-66, 1168.
140. See *id.* (emphasizing Congress' intent to protect consumers who were unable to pay for goods or services after contracting for them).
141. See *id.*
142. See *id.*
tious nature of the plaintiff's obligation could hardly be described as consensual.

While the Zimmerman court took the proper approach by excluding tortious liability from the definition of "debt," it should have stopped there. The court instead proceeded to identify the type of transaction which may produce a debt as the same type of transaction covered elsewhere in the Consumer Credit Protection Act ("CCPA"), that is, one involving credit. There was nothing in the definition of "debt" that suggested that credit was an essential element, but the court may have been led astray by the placement of a debt collection scheme within an act dealing with credit transactions. One would not have expected the court to be so easily persuaded by a title rather than by the language of the definition itself. After all, the legislative history of the FDCPA shows that the evil Congress sought to eradicate was not limited to credit transactions. Debt collectors used various strategies to recover money flowing from a consumer's obligation to pay, and such obligation usually arose from a variety of transactions, that included not only loans, but contracts for services. The objective was the same for

144. See Zimmerman, 834 F.2d at 1168.
146. The House Report indicated that the term "debt" included "consumer obligations paid by check or other non-credit consumer obligations. See H. REP. No. 95-131, at 4 (1977). An early version of the FDCPA did include a reference to credit in the definition of "debt." It defined "debt" as "any obligation arising out of a transaction in which credit is offered or extended to an individual." H.R. REP. No. 94-1202, at 7 (1976). This "credit" reference was not included in later drafts.
147. The court in Zimmerman read something into the definition of "debt" that was not there. The court's definition included a specific type of transaction, that is, one dealing with credit. In the court's words, the transaction was one in which "a consumer is offered or extended the right to acquire 'money, property, insurance, or services' which are 'primarily for household purposes' and to defer payment." Zimmerman, 834 F.2d at 1168-69. The court was hard pressed to find any support for the language relating to a deferment of payment. The other transactions covered in the CCPA did not all deal with deferment of payment. See supra note 145.
148. A congressional report indicated as follows:

With regard to section 802(e), the committee intends that the term "debt" include consumer obligations paid by check or other non-credit consumer obligations. An example of a non-credit consumer obligation is a doctor, dentist or hospital bill that is originally expected to be paid in full in one payment within 30 days, and then either becomes overdue or is subsequently paid in partial payments.

the debt collector: recover the amount owed in good time, even if it meant using questionable devices.

B. The Credit Element

Although the Zimmerman court must be applauded for distinguishing a transaction involving tort liability from one relating to a consensual arrangement, it muddied the waters by introducing the element of credit to the requirements for a transaction that gave rise to a debt. Congress was surely interested in protecting consumers from abusive collection practices, but this conduct did not occur only when collectors went after debts that resulted from credit transactions. If Congress had limited the statutory coverage to such transactions, it would have left out many consumer transactions when debt collectors were on their worst behavior.

The Zimmerman court must have been dissatisfied with the statutory text, for the FDCPA said nothing about deferring payment. In explaining the type of transaction covered by the statute, the court mentioned the consumer’s right to acquire certain items or services and “to defer payment” for them. One will look in vain for any statutory reference to the deferment of payment, and the court’s inclusion of that element must have given hope to many debt collectors who sought to avoid liability on the theory that the offensive conduct was not covered by the FDCPA.

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149. See Zimmerman, 834 F.2d at 1168.

150. There was nothing mysterious about the definition of “debt.” The court simply refused to look at the plain language of the statute. The court had to find an “obligation” to pay money, but that obligation could have arisen out of a consumer transaction not involving any granting of credit. When the language of a statute is clear and unambiguous, a court cannot add a restriction that is not there. See Singer, supra note 36, § 46.01, at 81.

151. During the hearings on the FDCPA, one witness acknowledged the persistent abuses: Mr. Chairman, in closing, let me point out that debt collection agencies, with only a few exceptions, view every debtor as a deadbeat. They are not interested in whether or not the debt is disputed or, in fact, if the debt is even owed. The debt collectors feel that their job is not to find out if the money is owed but rather to collect the money, and as long as the deadbeat approach exists in the debt collection industry, you are going to have abuses. I know that in many, many cases there are legitimate disputes and that some debts are not really owed. But a debt collector who takes time to figure out if debts are owed instead of just collecting them will soon be unemployed.


153. See Zimmerman, 834 F.2d at 1168-69.
It was not surprising, therefore, when a debt collector used the same argument in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, that an extension of credit was necessary for the FDCPA to apply. In that case, the collector tried to collect on a dishonored check which a consumer had given for certain goods. When the consumer sued the collector for violating the FDCPA, the collector tried to avoid liability by pleading the inapplicability of the statute.

The defendant-collector did not want to deal with the statutory language, but preferred to rely on legislative history to support its argument for a credit requirement. The Seventh Circuit saw no ambiguity in the statute and looked, therefore, to the statute’s plain wording to dispel any notion about a requirement for an extension of credit. The ease with which the *Bass* court handled the defendant’s reference to a credit requirement made the *Zimmerman* approach even more perplexing, because the true basis for the *Zimmerman* decision was the absence of a transaction, with no real discussion about the need for credit.

The statute covers “any obligation ... to pay money arising out of a [consumer] transaction.” Although the FDCPA does not define the term “transaction,” there is no reason why it should have a restrictive meaning in the statute. If there is no statutory definition, then a term should be given its ordinary meaning. There is no basis, therefore, for limiting the statute to credit transactions. Thus, the *Bass* court parted company with the *Zimmerman* court on that point because the latter court had neither confronted the plain statutory language, nor examined

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154. 111 F.3d 1322 (7th Cir. 1997).
155. See id. at 1324.
156. See id. at 1323.
157. See id. at 1324.
158. See id. at 1325. The court recognized the debt collector’s tactic in avoiding any analysis of the statutory text. See id. There was no textual support for the collector’s argument about a credit requirement and the court therefore saw the collector’s course of action as “understandable.” See id.
159. See id.
160. The contest was between a tortious transaction and a consensual transaction. See *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168 (3d Cir. 1987).
162. The *Bass* Court recognized that “[t]he ordinary meaning of the term ‘transaction’ is a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment.” *Bass*, 111 F.3d at 1325.
163. It has been said that “[t]he rules of statutory construction favor according statutes with their plain and obvious meaning, and therefore one must assume that the legislature knew the plain and ordinary meanings of the words it chose to include in the statute.” 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (5th ed. rev. 1992 and Supp. 1999).
the legislative history, being content to rely instead on the FDCPA's codification as a part of the CCPA.\footnote{164}

The court in \textit{Bass} did not rest there, but preferred instead to set the record straight with the available legislative history.\footnote{165} It seemed unnecessary for the court to do this, given the clear statutory definition of "debt."\footnote{166} But the court was justified in the final analysis in clarifying the matter, since the \textit{Zimmerman} court had avoided discussion about it by merely arriving at an interpretation that related to the placement of the FDCPA in an act with a credit protection title.\footnote{167}

The first point on legislative history offered by the \textit{Bass} court was the fact that early versions of the FDCPA did include a reference in the definition of "debt" to extension of credit.\footnote{168} The final version had no such language in it,\footnote{169} indicating that Congress intended to drop the credit requirement. This was no congressional oversight because the report of the committee that considered the FDCPA indicated its intent to have "the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations."\footnote{170} Second, there was also reference in the congressional hearings to the inclusion of dishonored checks as "debt,"\footnote{171} and although there was disagreement among various constituencies, Congress eventually omitted from the definition any reference to the extension of credit.\footnote{172} The legislative history does indicate that Congress was also concerned about collection abuses in credit-

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\begin{footnotes}
\footnote{164. \textit{See Bass}, 111 F.3d at 1326. The \textit{Zimmerman} court's reliance on the placement of the FDCPA in the CCPA did not impress the \textit{Bass} court. \textit{See id.} Some other subchapters of the CCPA do not deal with credit transactions at all. For example, subchapter VI covers electronic fund transfers. \textit{See 15 U.S.C. §§ 1693-1693r}.} \\
\footnote{165. \textit{See Bass}, 111 F.3d at 1326-27. The court agreed that even if the FDCPA's definition of "debt" was so unclear as to require the court to resort to extrinsic sources, those sources supported the court's view that non-credit transactions were included in the definition. \textit{See id.} at 1326-27. The court did not have to consider the legislative history to arrive at its conclusion. But courts find some comfort in referring to legislative history as an aid to statutory interpretation. It has been said that citing legislative history is like "looking over a crowd and picking out your friends." Patricia M. Wald, \textit{Some Observations on the Use of Legislative History in the 1981 Supreme Court Term}, 68 Iowa L. Rev. 195, 214 (1983) (quoting Judge Harold Leventhal). For an insight into the utility of using legislative history, see Stephen Breyer, \textit{On the Uses of Legislative History in Interpreting Statutes}, 65 S. Cal. L. Rev. 845 (1992).} \\
\footnote{166. \textit{See 15 U.S.C. § 1692a(5) (defining debt)}.} \\
\footnote{167. \textit{See supra note 164}.} \\
\footnote{168. \textit{See Bass}, 111 F.3d at 1327; H.R. Rep. No. 94-1202, at 7 (1976).} \\
\footnote{169. \textit{See Bass}, 111 F.3d at 1327; 15 U.S.C. § 1692a(5).} \\
\footnote{171. \textit{See The Debt Collection Practices Act: Hearings on H.R. 29 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Fin. and Urban Affairs, 95th Cong. 157-61 (statement of John W. Johnson, American Collectors Assoc., Inc.).}}
based transactions, but those transactions were not its only concern.\textsuperscript{173} Congress wanted to stop the abuses wherever they could be found in the debt collection process.\textsuperscript{174}

\subsection*{C. Dishonored Checks}

The troublesome aspect of the dishonored check transaction is that the FDCPA protects even those consumers who tender a check in payment of an obligation, knowing full well that the check will not be honored. A court would hardly be sympathetic to a consumer's claim of harassment when a collector presses for payment of a dishonored check. The problem in \textit{Bass} was that the collector tried to convince the court that all dishonored checks are fraudulent, and therefore not the proper subject of a transaction contemplated by the FDCPA.\textsuperscript{175} The collector ignored the fact that checks can be dishonored for good reasons, and therefore the collector swept with too broad a brush when it argued for the rejection of all dishonored checks from statutory coverage.\textsuperscript{176} Since the court did not agree with the collector on this point, it did not think it necessary to decide whether a consumer's fraudulent intent should make a difference in a decision about the applicability of the statute.\textsuperscript{177} Nevertheless, the court could not resist the temptation to express its discomfort with the creation of an exception for fraud when the FDCPA did not provide for it in the definition of "debt."\textsuperscript{178}

\begin{itemize}
\item[\textsuperscript{173}] A congressional report acknowledged the findings of the National Commission on Consumer Finance that "the vast majority of consumers who obtain credit fully intend to repay their debts." S. Rep. No. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697. But this observation was made in the context of explaining that most defaulters are not "deadbeats." \textit{See id.} There was no evidence of an intention to limit the coverage to credit-based transactions. As a matter of fact, the congressional report explained the scope of the FDCPA: the FDCPA applied only to debts "contracted" for consumer purposes and not to commercial accounts. \textit{See id.} A consumer could contract a debt in several ways, without seeking credit. Another report indicated that the term "debt" should include "consumer obligations paid by check or other non-credit consumer obligations." H.R. Rep. No. 95-131, at 4 (1977).
\item[\textsuperscript{175}] \textit{See Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1329 (7th Cir. 1997).}
\item[\textsuperscript{176}] \textit{See id.} The bank may be at fault for dishonoring a check. The consumer can hardly be blamed when that happens. Although the bank will be liable for a wrongful dishonor, the fact is that dishonor has occurred and there is no fraud on the consumer's part. \textit{See U.C.C. § 4-402 (1990).}
\item[\textsuperscript{177}] \textit{See Bass, 111 F.3d at 1329.}
\item[\textsuperscript{178}] \textit{See id.} at 1329-30. The court made the following point: "The Act's singular focus is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices." \textit{Id.} at 1330 (emphasis added).
\end{itemize}
When the point arose again in *Keele v. Wexler*, the Seventh Circuit took the opportunity to convert its discomfort into a firm holding that "there is no fraud exception to the FDCPA." The statute focuses on the conduct of debt collectors, not that of debtors, setting limits on the way debt collectors can go about their business, and protecting anyone from collection abuses, not only deserving debtors. Congress was aware that the legislation would cover those who willfully defaulted on their debts, but it wanted to deal with widespread abuses in the collection process. Congress did not want to create an exception for some debtors who might turn out to be "deadbeats." As a result, it is difficult to single out for special treatment debtors who write checks knowing that such checks will be dishonored, while at the same time giving full statutory protection to consumers who willfully default on their other obligations. There is, therefore, no basis for a fraud exception and the court in *Keele* forcefully made this point, leaving no doubt about the significance of its previous discomfort in *Bass*.

**D. The Nature of the Transaction**

The definition of "debt" has caused problems in other contexts as well. The question that frequently arises is whether the obligation to pay the assessment of a condominium or of a homeowners' association constitutes a debt under the FDCPA. Before *Bass*, courts were misled by Zimmerman's inclusion of credit as an essential feature of any transaction covered by the FDCPA. As a result, courts excluded assessments from the definition of "debt" because homeowners usually paid their assessments before receiving any services, and thus, were not involved in any transaction requiring an extension of credit. When *Bass* clarified matters by rejecting a credit requirement, it was easier for courts to identify the transaction that gave rise to the consumer's obligation to

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179. 149 F.3d 589 (7th Cir. 1998).
180. Id. at 596.
181. See id. at 595. The court pointed out that the language of the FDCPA focuses "primarily, if not exclusively, on the conduct of debt collectors, not debtors." Id.
182. See id.
184. See Keele, 149 F.3d at 596.
The transaction was the purchase of the condominium itself, and an owner's obligation to pay the assessment flowed from that purchase.\textsuperscript{187} Without the credit element, it did not matter whether owners paid their assessments before or after receiving any services from their condominium or homeowners' association.\textsuperscript{188}

The debt collector in \textit{Newman v. Boehm, Pearlstein \& Bright, Ltd.},\textsuperscript{189} tried to raise doubts about the applicability of the FDCPA to assessments by comparing condominium assessments to the tax obligations covered in \textit{Staub}.\textsuperscript{190} The comparison failed to impress the \textit{Newman} court, for the court in \textit{Staub} did not classify the consumer's tax obligations as "debts" because such taxes were used for more general purposes of the community, rather than for personal, family, or household purposes.\textsuperscript{191} The \textit{Newman} court upheld the distinction between the two purposes, since it regarded condominium assessments as a vehicle for improving and maintaining the common areas for the benefit of each unit owner.\textsuperscript{192} In this respect, the assessments have a personal, family, or household purpose, whereas taxes serve a more general purpose through the provision of governmental services to the community at large.

The difficulty in many cases is to identify the transaction that produces the debt. In condominium cases, it is the purchase of the property.\textsuperscript{193} In dishonored check cases, it is the bargained for exchange of property or services.\textsuperscript{194} The transaction must be consensual,\textsuperscript{195} and there is usually not much difficulty in recognizing that feature in the above situations. On the other hand, a consumer may find himself subject to an obligation which is thrust upon him because of his own conduct. When that happens, the debt collector usually takes the position that the


\textsuperscript{188} See Ladick, 146 F.3d at 1206; Newman, 119 F.3d at 481.

\textsuperscript{189} The court in \textit{Newman} said that "Regardless of whether the assessment or the service comes first, the obligation to pay is derived from the purchase transaction itself." \textit{Newman}, 119 F.3d at 481; \textit{see} Ladick, 146 F.3d at 1206.

\textsuperscript{190} 119 F.3d 477 (7th Cir. 1997).

\textsuperscript{191} \textit{see} id. at 481 (citing \textit{Staub} v. Harris, 626 F.2d 275, 278 (3d Cir. 1980)).

\textsuperscript{192} \textit{See} id. (citing \textit{Staub}, 626 F.2d at 278).

\textsuperscript{193} \textit{See} id.

\textsuperscript{194} \textit{See} id.

\textsuperscript{195} \textit{See} Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350, 1353 (10th Cir. 1998); Charles v. Lundgren & Assocs. P.C., 119 F.3d 739, 742 (9th Cir. 1997); Bass v. Stolper Koritzinsky, Brewster \& Neider, S.C., 111 F.3d 1322, 1325 (7th Cir. 1997).

\textsuperscript{196} \textit{See} Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1371 (11th Cir. 1998); \textit{Bass}, 111 F.3d at 1326.
FDCPA is inapplicable to him because there is no consensual arrangement between the parties.

A good example of this is *Hawthorne v. Mac Adjustment, Inc.* In that case, a collector tried to collect from a consumer under a subrogation claim because of the consumer's negligence in an automobile accident. The court was not distracted because the statute did not define the term "transaction." It opted for the normal meaning of the term which suggested some type of "business dealing between parties." In this case, the parties did not negotiate for consumer goods or services, and therefore, there was no consensual arrangement. The consumer's obligation to pay arose out of the negligence in an accident, and not out of any transaction between the parties. Therefore, the FDCPA did not apply to this situation.

Even when there is a consensual transaction, the money, property, insurance, or services which are the subject of the transaction must be primarily for "personal, family, or household purposes." In *Berman v. GC Services Ltd. Partnership*, the obligation to pay unemployment insurance premiums met the test for a consensual transaction, but could not meet the second requirement for classification as a "debt" because the governmental services provided in exchange were not primarily for "personal, family, or household purposes." The employment arrangement between the parties was certainly the kind of consensual transaction contemplated by the statute. But the transaction did not lead to a debt under the FDCPA because, like the per capita taxes in

197. 140 F.3d 1367 (11th Cir. 1998).
198. See id. at 1369.
199. Id. at 1371. The court reacted to the absence of a definition for the word "transaction." It said: "Although the statute does not define the term 'transaction,' we do not find it ambiguous. A fundamental canon of statutory construction directs us to interpret words according to their ordinary meaning." Id.
200. Id. (citing *WEBSTER’S NEW COLLEGIATE DICTIONARY* 1230 (1979)).
202. *See Hawthorne*, 140 F.3d at 1371. The plaintiff's obligation to the defendant arose not out of a consumer transaction, but out of a tort. See id. The plaintiff could not transform into a consumer transaction the payment obligation arising out of an accident. See id; see also FTC Staff Commentary, *supra* note 25, at 50,102 (excluding tort claims from definition of "debt").
204. 146 F.3d 482 (7th Cir. 1998).
205. Id. at 486 (quoting 15 U.S.C. § 1692a(5)). The court analogized the unemployment insurance contributions to the taxes paid in *Staub*. The insurance payments are used to fund the state's payment of benefits to state residents during periods of unemployment, a more general purpose than required by the FDCPA. See id.
206. See id. at 485-86.
Staub, unemployment insurance contributions are geared towards the general purpose of paying state unemployment benefits to all qualified residents. The contributions do not primarily benefit the contributor.

The credit requirement espoused by Zimmerman provided a false sense of hope for collectors. This was clearly evident in Romea v. Heiberger & Assocs., when the debt collector argued that there was no extension of credit, and therefore no debt, in the case of rent, because tenants must usually pay their rent in advance. In the Second Circuit’s view, the issue was whether back rent was a debt, not whether all rent was an extension of credit. This was a fitting characterization, because it showed that the consumer’s obligation for back rent arose from the failure to pay the amounts due under his lease, itself a contractual transaction. In this respect, it was very much like the obligation that arises in the dishonored check cases, when the consumer breaches his payment obligations, after the other party to the arrangement provides a service or sells goods to the consumer in anticipation of immediate payment. The Romea court had Bass and its progeny as precedent on the dishonored check cases, and was able to find a similar obligation in back rent.

The collector in Romea had another point to make. It was that the tenant’s default on the lease terminated the transaction between the parties, and therefore, there could no longer be a “debt” under the statute. Fortunately, in New York, where the lease obligation in Romea arose, a tenant’s default does not automatically end a lease, so the court did not have to address the issue of a terminated transaction. Even if the

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207. See id. at 486.
208. See id. Contributing employers do not get individual benefits from the payments. They receive a general, public benefit of the type associated with the payment of taxes identified in Staub. See id.
209. 163 F.3d 111 (2d Cir. 1998).
210. See id. at 114.
211. See id. at 115.
212. See id.
213. See Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350, 1353 (10th Cir. 1998) (holding that debt is created when a person gives a dishonored check in return for goods); Duffy v. Landberg, 133 F.3d 1120, 1123-1124 (8th Cir. 1998) (stating that a dishonored check is “debt” because it is evidence of the drawer’s failure to fulfill an obligation flowing from consensual transaction for goods or services); Charles v. Lundgren & Assocs. P.C., 119 F.3d 739, 741-42 (9th Cir. 1997) (holding that a dishonored check is a debt under FDCPA).
214. See Romea, 163 F.3d at 115.
215. See id. at 115. A court must issue a warrant for the removal of a tenant and it is that act that cancels the landlord-tenant relationship. The petitioner can recover any money that was payable when he commenced the proceeding, and also the reasonable value of the use and occupation when the agreement does not make any provision for rent. See N.Y. REAL PROP. ACTS. LAW § 749(3) (McKinney 1979).
lease was deemed to end on the tenant's default, it did not remove the tenant's obligation to pay back rent. It is the obligation that continues, rather than the transaction. Although payment gives the tenant the chance to avoid eviction and thus continue the lease transaction, it also serves to satisfy an obligation arising out of the transaction itself.

V. THE VALIDATION NOTICE

A. Contradiction and Overshadowing

Congress recognized that debt collectors sometimes make mistakes in trying to collect debts. They pursue consumers who have already paid their debts, or even try to collect from the wrong people. As a result, the FDCPA contains a provision that requires a debt collector to provide the consumer certain details about the debt, including notice about the consumer's right to obtain verification of it. Debt collectors are usu-

216. See Romea, 163 F.3d at 115.
217. The court did not see why the payment of back rent had to be designated as either payment of a debt or a means to avoid termination of a lease. In the court's view, payment of back rent was both. See id. at 116.
218. See S. REP. NO. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699. The congressional report explained the purpose of the validation section: "This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." Id.
219. See 15 U.S.C. § 1692g (1994). The validation section provides as follows:
   (a) Notice of debt; contents
   Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
   (1) the amount of the debt;
   (2) the name of the creditor to whom the debt is owed;
   (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
   (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
   (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.
   (b) Disputed debts
   If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the
ally careful about giving the statutory validation notice, but occasionally their demand for payment contradicts or overshadows the notice. For example, if the collection letter demands payment in ten days while confirming that the consumer has thirty days to dispute the debt, the different time periods may be confusing to the consumer. The situation is even more perplexing if the demand for payment is made in more prominent type than the statutory validation notice. A court may find a violation because the debt collector has overshadowed the required validation notice with his prominent demand for immediate payment.

An early example of confusing language can be found in *Swanson v. Southern Oregon Credit Service.*\(^2\)\(^2\) The collection language there was printed in bold-faced type that was much larger than that of the validation notice.\(^2\)\(^2\) Although the notice informed the consumer about the thirty-day period for requesting verification of the debt, the collector's demand for payment also advised the consumer that the consumer had to pay the debt within ten days if he did not want the account to be recorded in the collector's master file as an unpaid item.\(^2\)\(^2\) The debt collector's message was a simple one: the consumer had to pay his debt within ten days if he wanted to protect his credit rating.

A collector gave a similar admonition in *Miller v. Payco-General American Credits, Inc.*\(^2\)\(^2\)\(^3\) This time the collector demanded immediate payment in full, in bold-faced type on the front of a page, while giving the required validation notice on the back.\(^2\)\(^4\) Both the *Swanson*\(^2\)\(^5\) court

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debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

*Id.*

220. 869 F.2d 1222 (9th Cir. 1988).

221.  See *id.* at 1225.

222.  See *id.*

223.  943 F.2d 482 (4th Cir. 1991).

224.  See *id.* at 483. The court provided a picture of the format:

At the very bottom of the page, in the smallest type to appear on the form (letters one-eighth of an inch high), is the statement, "NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION." The notice is printed in white against a red background. On the reverse of the document are four paragraphs printed in gray ink. The last three paragraphs contain the validation notice—that is, statements required by the Fair Debt Collection Act Practices Act (FDCPA) that inform the consumer how to obtain verification of the debt.

*Id.*
and the Miller\textsuperscript{226} court took the view that the collection notices contradicted and overshadowed the required validation notice.

The language in Graziano v. Harrison\textsuperscript{227} was more direct. The collector threatened legal action in ten days unless the consumer settled the debt.\textsuperscript{228} The problem here was that the conflicting language might have persuaded the consumer to overlook his statutory right to dispute the debt within the thirty-day period.\textsuperscript{229}

Graziano differed from Miller and Swanson in that Graziano did not pose any problem about the size or type of the validation notice. Nevertheless, the collector's demands in all three cases left the consumer uncertain as to his rights when he read such demands in conjunction with the validation notice. The collector surely had a right to pursue the consumer, but he had to find a way to express that right without diluting the consumer's right to demand verification of the debt within the thirty-day period.\textsuperscript{230} The challenge lies in reconciling the rights of the consumer with the remedies of the debt collector. This is easier said than done, for many cases have found a collector demanding payment in less than thirty days, while obscuring the consumer's statutory right to have a full thirty days to dispute the debt.\textsuperscript{231}

Not every collector's demand produces a contradiction of the consumer's validation right. In Terran v. Kaplan,\textsuperscript{232} the debt collector advised the consumer that he might find it necessary to recommend legal action to his client unless the debtor made "an immediate telephone call" to the collector's assistant.\textsuperscript{233} There was no call for immediate payment as there was in Miller, or for payment within a specific period as there was in Swanson.\textsuperscript{234} Asking the debtor to telephone the collection

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\textsuperscript{225} See Swanson, 869 F.2d at 1225-26.

\textsuperscript{226} See Miller, 943 F.2d at 484.

\textsuperscript{227} 950 F.2d 107 (3d Cir. 1991).

\textsuperscript{228} See id. at 111.

\textsuperscript{229} See id. The court observed that "[a] notice of rights, when presented in conjunction with such a contradictory demand, is not effectively communicated to the debtor." Id.; see also Terran v. Kaplan, 109 F.3d 1428, 1431 (9th Cir. 1997) (finding that an initial communication violates the FDCPA if it is likely to deceive or mislead a least sophisticated consumer).

\textsuperscript{230} If the consumer requests verification of the debt, the debt collector must suspend his collection efforts until he gives the consumer the pertinent information. See 15 U.S.C. § 1692g(b) (1994).


\textsuperscript{232} 109 F.3d 1428 (9th Cir. 1997).

\textsuperscript{233} See id. at 1430.

\textsuperscript{234} See id. at 1434.
agency did not affect the validation notice, which immediately followed the language inviting the consumer's call.\textsuperscript{235} It was the collector's way of promoting communication with the debtor, but the language did not distract the debtor from exercising his right to challenge the validity of the debt.\textsuperscript{236} The court, therefore, found no violation of the FDCPA, because the language that the collector used did not overshadow or contradict the validation notice.\textsuperscript{237}

Sometimes a collector's language seems more urgent, and therefore, it is easier to find a contravention of the statute. In \textit{Baker v. Citibank (South Dakota) N.A.},\textsuperscript{238} the debt collector urged the debtor to avoid the "'trouble of litigation'" by paying "'now.'"\textsuperscript{239} The court saw this language as a dilution of the validation notice because the collector's demand for payment had the effect of encouraging the debtor to forego her right to dispute the debt.\textsuperscript{240} It is to be noted, however, that the collector also advised the debtor to call for additional time if the debtor did not intend to pay immediately.\textsuperscript{241} It is arguable, therefore, that the debtor had the option of postponing the day of reckoning.\textsuperscript{242} It is possible that the debtor could have had an extension that matched or exceeded the statutory period for disputing the debt. One wonders whether one should

\begin{itemize}
\item \textsuperscript{235} See id.
\item \textsuperscript{236} See id.
\item \textsuperscript{237} See id. Although the consumer did not raise the point, it is open to question whether the debt collector's encouragement of the consumer's telephone call was an indirect way of avoiding the obligation to verify the debt. If the consumer disputes the debt orally, the debt collector has no statutory obligation to verify the debt. The oral dispute merely lets the debt collector know that the consumer is questioning the validity of the debt. See 15 U.S.C. § 1692g(a)(3). The notification must be in writing for the verification obligation to arise. See id. § 1692g(a)(4). The court, in \textit{Macarz v. Transworld Systems Inc.}, 26 F. Supp. 2d 368 (D. Conn. 1998), had this point in mind when it found that the debt collector's language encouraging the consumer to discuss the debt if there was a legitimate misunderstanding about it overshadowed and contradicted the validation notice. See id. at 374. The court recognized that the invitation to "'discuss'" the matter meant oral communication, and that would not require the debt collector to verify anything. See id. at 373-74.
\item \textsuperscript{238} 13 F. Supp. 2d 1037 (S.D. Cal. 1998).
\item \textsuperscript{239} See id. at 1043.
\item \textsuperscript{240} See id. at 1042.
\item \textsuperscript{241} See id. at 1041. The collection notice used this troublesome language: "'To avoid the trouble of litigation and to save legal and/or attorney's fees, PLEASE SEND THE BALANCE NOW OR CALL FOR ADDITIONAL TIME.'" Id.
\item \textsuperscript{242} The consumer in \textit{Baker} had an option. Her situation was different from that of the consumer in \textit{Russell v. Equifax A.R.S.}, 74 F.3d 30 (2d Cir. 1996), where the debt collector admonished the consumer that if the consumer did not dispute the claim and wished to pay it within ten days, it would not post the collection to the consumer's file. See id. at 34. The consumer in \textit{Russell} was locked into a payment period that conflicted with the validation period. See id. The consumer in \textit{Miller v. Payco-General American Credits, Inc.}, 943 F.2d 482 (4th Cir. 1991), was also invited to phone "'today'" or to pay "'now'" if there was no dispute. See id. at 484. The effect of that language was to encourage the consumer to forego his thirty-day statutory right to dispute the debt. See id.
\end{itemize}
place this type of language in the same category as those cases which demand payment immediately or within a certain period that conflicts with the thirty-day period of validation.  

Not all cases have been concerned with the screaming, bold-face print of the Swanson type. Some subtle contradictions have provoked similar confusion in the marketplace. In Chauncey v. JDR Recovery Corp., the collector required receipt of full payment within thirty days from the date the collection letter reached the consumer, failing which it would make a decision whether to pursue other avenues of collection. The only problem was that the debt collector also advised the debtor that the debtor had thirty days after receiving the collection notice to dispute the debt and request verification. The fine point of contradiction here was that the debtor would have had to mail his payment a few days ahead of time for the collector to receive it within thirty days, thus depriving the debtor of the full thirty-day period to lodge his request for verification. The collector may have been hoping that this fine distinction would have escaped the court’s attention, for the reference to “thirty (30) days” in the validation notice and the demand for payment would have left the impression that the debtor had the same period in which to act. The collector would therefore have seen no contradiction in the language. But the validation provision gives the consumer thirty days to dispute the debt after receipt of the collector’s notice. Therefore, the collector’s demand for payment gave the consumer a shorter

243. Compare Baker, 13 F. Supp. 2d at 1042 (demanding payment “now”), with United States v. National Fin. Servs., 98 F.3d 131, 139 (4th Cir. 1996) (conflicting time requirements in the collection notice and the validation notice violated the FDCPA), Russell, 74 F.3d at 34 (demanding payment in ten days conflicted with validation notice), and Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991) (demanding payment in ten days would induce consumer to overlook statutory right to dispute debt within thirty days).

244. 118 F.3d 516 (7th Cir. 1997).

245. See id. at 518. The pertinent language reads as follows:

Unless we receive a check or money order for the balance, in full, within thirty (30) days from receipt of this letter, a decision to pursue other avenues to collect the amount due will be made.

... If you notify this office in writing within thirty (30) days from receiving this notice that you dispute the debt or any portion of it, this office will obtain verification of the debt or obtain a copy of the judgment and mail you a copy of such judgment or verification.

Id.

246. See id.

247. See id. at 519.

248. See id. at 518.
period to act, for the collector wanted to receive its payment within thirty days.\textsuperscript{249}

Many of the cases that have dealt with the validation notice have been sympathetic to the consumer's position. The "overshadowing" usually involves the fine print or confusing type of the validation notice.\textsuperscript{250} The "contradiction" occurs in most cases when the debt collector informs the consumer about the thirty-day period for disputing and validating the debt, while still demanding payment from the consumer.\textsuperscript{251}

\textbf{B. The Seventh Circuit's Explanation}

It was left to the court in \textit{Bartlett} v. \textit{Heibl}\textsuperscript{252} to explain that there is really no logical inconsistency in the "contradiction" cases because the collection letters usually do not fail to disclose the consumer's statutory rights.\textsuperscript{253} The simultaneous demand for payment within a specified period and the explanation of the consumer's right to seek validation, though not inconsistent, cause confusion in the consumer's mind because the collector does not reveal how the two items fit together.\textsuperscript{254} The \textit{Bartlett} court, therefore, viewed the possibilities for confusion as: (1) an actual contradiction arising out of a logical inconsistency; (2) an overshadowing achieved by the placement or type of the validation notice; (3) the collector's failure to explain an "apparent though not actual contradiction," between the period for payment and the period for validation.\textsuperscript{255} It was necessary to protect the consumer from confusion in any form. The court placed the \textit{Bartlett} case within the third category because the collector informed the consumer that the consumer had to pay the debt within one week, while at the same time assuring him that he had thirty days to query the debt.\textsuperscript{256} The effect of setting out different

\textsuperscript{249}. See id. The court saw the contradiction. The consumer would have had to mail her payment a few days short of the thirty-day expiration if the collector hoped to get the payment within the thirty days. \textit{See id.}

\textsuperscript{250}. See Swanson v. Southern Or. Credit Serv., 869 F.2d 1222, 1225 (9th Cir. 1988); Rivera v. MAB Collections Inc., 682 F. Supp. 174, 177 (W.D.N.Y. 1988).


\textsuperscript{252}. 128 F.3d 497 (7th Cir. 1997).

\textsuperscript{253}. \textit{See id.} at 500.

\textsuperscript{254}. \textit{See id.}

\textsuperscript{255}. \textit{See id.} (emphasis omitted).

\textsuperscript{256}. \textit{See id.} at 500-01.
time periods was to create "legal gibberish" out of the required disclosure.\footnote{257}

The Bartlett court revealed the challenge that a debt collector faces in recovering a debt while preserving the consumer's right to question the debt's legitimacy.\footnote{258} The statute does not require the collector to abandon his pursuit of the consumer, but the collector must inform the consumer of his intention to maintain pursuit in a way that does not confuse the consumer about the right to seek validation of the debt. Even so, if the consumer seeks information about the debt, the collector must interrupt his collection efforts until he verifies the debt.\footnote{259} There is nothing troubling about allowing a collector to remind a consumer about the possibility of an imminent suit. It may indeed be advantageous to the consumer, for he can then make an intelligent decision about dealing with the collector. The collector's warning about the possibility of suit is certainly preferable to the collector's commencing suit without any warning at all.\footnote{260} One can just imagine the consumer's surprise if the collector ambushes the consumer in this way. Most collectors want to let the consumer know about the outstanding debt, while putting the consumer on notice about the statutory right to question its validity. If the debt is legitimate, both parties will be eager to come to an early settlement. But even when there is doubt, the consumer will not want to be hurried into a premature payment when the statute gives him an opportunity for reflection.

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\footnote{257. See id. at 501.}
\footnote{258. See id. The Bartlett court provided a model collection letter for the guidance of debt collectors. See id. at 501-02. Even this model letter failed to inform the consumer that disputing a portion of the debt would require the debt collector to verify the debt. Nevertheless, it simplifies the message for the consumer and puts the validation notice on the front of the letter, following the collection language. This clarifies matters for the consumer by indicating that the debt collector will suspend activities while it seeks verification. The adoption of this language by collectors would be a great advantage for consumers. While the statute requires the debt collector to suspend activities, it does not require a debt collector to give the consumer that information. See NATIONAL CONSUMER LAW CTR., supra note 43, § 5.7.2.3, at 98-99 (Supp. 1999).
\footnote{259. See 15 U.S.C. § 1692g(b) (1994).}
\footnote{260. The validation provision was intended to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. REP. No. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699. The collector's initial demand for payment starts the ball rolling without the formality introduced by a lawsuit. In Bartlett, the plaintiff's lawyer took the position that the debt collector could not allude to his right to sue the consumer within thirty days. See Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997). However, the lawyer apparently did not object to a suit being brought without warning. The court did not see how this surprise could be required by the statute. See id.}
Both the Seventh Circuit in *Bartlett* and the Second Circuit in *Savino v. Computer Credit, Inc.*\(^{261}\) have appreciated the difficulty that debt collectors face in reconciling the rights of both parties.\(^{262}\) Both courts suggested language that brought home to the consumer the collector's right to pursue collection without diluting the validation notice.\(^{263}\) The *Bartlett* model letter was more forceful in pointing out the relationship between the consumer's rights and the consumer's remedies.\(^{264}\) It stated clearly that the law did not require the collector to wait until the end of the thirty-day period before suing to collect the debt.\(^{265}\) But the *Savino* court accomplished the same objective by linking the collector's request for immediate payment with the consumer's right to demand more information about the debt and to dispute it in case of doubt.\(^{266}\)

### C. Providing Alternatives

In *Savino*, the debt collector tried to salvage its position by pointing out that it had given the consumer the chance to make immediate payment, or to give a valid reason for not doing so.\(^{267}\) The collector saw this as a reasonable alternative that was consistent with the statute.\(^{268}\) The only difficulty was that the collector's assessment of a "valid reason" might not have matched the consumer's, and the statute grants the consumer an unqualified right to dispute the debt.\(^{269}\) It is the consumer's

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\(^{261}\) 164 F.3d 81 (2d Cir. 1998).

\(^{262}\) See *Savino*, 164 F.3d 85-86; *Bartlett*, 128 F.3d at 500-01.

\(^{263}\) See *Savino*, 164 F.3d at 86; *Bartlett*, 128 F.3d at 501-02.

\(^{264}\) See *Bartlett*, 128 F.3d at 501-02.

\(^{265}\) See *Bartlett*, 128 F.3d at 502.

\(^{266}\) See *Savino*, 164 F.3d at 86. The court suggested that the debt collector could have added one of the following paragraphs to its demand letter in order to clarify matters for the consumer without undermining the consumer's right to seek validation of the debt:

> Although we have requested that you make immediate payment or provide a valid reason for nonpayment, you still have the right to make a written request, within thirty days of your receipt of this notice, for more information about the debt. Your rights are described on the reverse side of this notice.

> Our demand for immediate payment does not eliminate your right to dispute this debt within thirty days of receipt of this notice. If you choose to do so, we are required by law to cease our collection efforts until we have mailed that information to you. Your rights are described on the reverse side of this notice.

Id. at 86.

\(^{267}\) See id. at 85.

\(^{268}\) See id.

\(^{269}\) The consumer may be mistaken about the situation when he disputes the debt. But he will certainly be able to ascertain that if the debt collector assumes his statutory obligation to obtain verification.
notice of dispute that imposes the obligation on the collector to obtain verification of the debt.\textsuperscript{270} It is then that one can make a true determination about the validity of the consumer’s reason for questioning the debt. The alternative offered by the collector did not therefore remove the uncertainty about the collector’s demand. The sample paragraphs offered by the Savino court performed the essential mission of linking the collector’s call for immediate payment to the validation notice. In this respect they were very much like the model advanced by the Bartlett court.\textsuperscript{271}

This was a step in the right direction to avoid future confusion. A debt collector always has a challenge in convincing a consumer about the seriousness of his claim, while not diminishing the importance of the validation notice. The collector wants to get the consumer’s attention, but he must observe the statutory bounds by using language that does not conflict with the consumer’s rights. There are certain words that always catch a consumer’s eye.

In Walker v. National Recovery, Inc.,\textsuperscript{272} the debt collector tried to make its point by advising the consumer that the past-due account had been placed with it for “immediate collection.”\textsuperscript{273} The collector further warned that the consumer’s failure to respond might cause additional collection activity and possible legal action.\textsuperscript{274} The collector concluded its notice with a request for “payment in full.”\textsuperscript{275}

The court sided with the collector on this occasion.\textsuperscript{276} The collection letter did not demand immediate payment, but merely informed the consumer that the debt collector would assume its collection role immediately.\textsuperscript{277} The letter asked for a written response within the thirty-day validation period or payment of the debt without a time limitation.\textsuperscript{278} The debt collector did not therefore invite a response that contradicted the consumer’s rights under the statute. The court viewed the collection letter in an overall context and treated it as simply informing the consumer of the different options available.\textsuperscript{279} The letter’s second paragraph explained the consumer’s right of verification and the final paragraph

\textsuperscript{271} Compare Bartlett at 501-02, with Savino, 164 F.3d at 86.
\textsuperscript{272} 42 F. Supp. 2d 773 (N.D. Ill. 1999).
\textsuperscript{273} See id. at 775.
\textsuperscript{274} See id.
\textsuperscript{275} Id. (emphasis omitted).
\textsuperscript{276} See id. at 778.
\textsuperscript{277} See id.
\textsuperscript{278} See id. at 775.
\textsuperscript{279} See id. at 779.
recited yet another option for the consumer, payment of the debt. The collector's reference to the possibility of legal action simply underscored the consequences of the consumer's inaction.

The collector's assurance of "immediate collection" took on a different meaning in *Jenkins v. Union Corp.*, because there was additional language in the collection letter that turned the collector's overtures into a request for immediate payment. The letter referred not only to immediate collection, but also to a declaration of urgency that suggested immediate action. In addition, the letter strongly recommended that the consumer should make contact or payment. This additional language so impressed the court that the court decided that the letter created "an apparent and unexplained contradiction between its message and the thirty-day validation rights.

Neither *Walker* nor *Jenkins* demanded payment within a specific period that conflicted with the statutory period for validation. Nevertheless, the court in *Jenkins* looked for the additional language that seemed to demand hasty action by the consumer, and this made the difference between the two cases. If the *Jenkins* language was the substantive equivalent of a request for immediate payment, it is open to question whether the collector's strong recommendation of payment had any greater effect on the consumer than the combination in *Walker* of a request for payment in full and the reference to possible legal action. If the collector in *Walker* had an assignment for immediate collection, surely it did not expect payment in full too much later. It seemed unrealistic to interpret the collector's call for payment in *Walker* as a wish for

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280. See id.
281. See id.
283. See id. at 1132. The letter began with the word "URGENT." Then it informed the consumer that the debt collector had the account for "immediate collection." See id. The court viewed the "immediate collection" language as a reference to the consumer's need to pay immediately, as distinguished from mere reference to the collector's duties. See id. The confusion came when the letter strongly recommended that the consumer should contact the creditor to make payment arrangements. The court viewed this as the substantive equivalent of a request for immediate payment. See id.
284. See id.
285. See id.
286. Id.
287. See id.
288. See Walker v. National Recovery, Inc., 42 F. Supp. 2d 773, 779 (N.D. Ill. 1999). The *Jenkins* court viewed the "immediate collection" language as related to the consumer's obligation to pay immediately. See *Jenkins*, 999 F. Supp. at 1132. It is submitted that the same language in *Walker*, when tied to the possibility of legal action and the request for payment in full, would cause the consumer problems.
the consumer’s compliance sometime in the future. The Walker court must have thought that the collector had orders to start its collection activities, but that there was no pressure to complete the assignment soon. That interpretation lessened the chances of a conflict between the demand for payment and the thirty-day period for validation of the debt, but put an unrealistic gloss on the situation.289

The word “immediate” appeared in another context in Vasquez v. Gertler & Gertler, Ltd.290 This time the debt collector implored the consumer: “‘[K]indly let me have your immediate attention and cooperation by sending me your payment or contacting me without further delay.’”291 The court found no problem with this language because there was no demand for payment or any other action in less than thirty days, and there was no inkling that the consumer would suffer adverse consequences if he did not act promptly.292 In the court’s view, the collector gave the consumer an option: paying or contacting the collector.293

The language in Vasquez seemed less ominous than that in Walker and Jenkins, because it requested the consumer’s immediate attention and cooperation, and then invited the consumer to pay or contact the collector.294 The collection language left the impression that the consumer should immediately establish a dialogue with the collector with a view to settling the matter one way or the other. This overture was consistent with the consumer’s right to query the validity of the debt, or to seek verification in accordance with the statute.295

289. The court looked at the overall letter and found that it did not give the impression that it was a request for immediate payment. See Walker, 42 F. Supp. 2d at 780. One wonders why a collector would take on an assignment for immediate collection without contemplating immediate payment. The question is whether the collector is to implement his collection machinery without any expectation of immediate return.


291. Id. at 657.

292. See id.

293. See id. It is to be noted here that the collection letter did not request the consumer to telephone the collector. It asked the consumer to contact the collector. The consumer could have made that contact in many ways. Therefore, the court did not regard the letter as encouraging the consumer to dispute the debt by telephone, a procedure which would not have triggered the collector’s obligation to verify the debt. See id. at 658.

294. See id. at 655. The language was so polite that it did not seem to be from a collection letter: “Kindly let me have your immediate attention and cooperation by sending me your payment or contacting me without further delay.” Id. The letter did not demand payment immediately or within any period that conflicted with the statutory thirty-day period for validation. See id.

295. See id. at 654. The Vasquez language seemed consistent with that of the “safe harbor” language in Bartlett. See Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997). The collector even went further than the statute demanded when it advised the consumer that it would obtain a copy of a judgment “[i]f there has already been a judgment entered against you.” See Vasquez, 987 F. Supp. at 654. That promise was certainly clearer than the required statutory notice to the consumer.
The impact of the language in these cases is the thing that matters. As the Seventh Circuit clearly pointed out in Johnson v. Revenue Management Corp., it is not even necessary to have actual contradictory or overshadowing language to make a collection letter confusing. That is where the district court in Revenue Management Corp. fell down; it failed to ask the important question whether the letter was confusing because of an "apparent though not actual contradiction" between the thirty-day statutory notice and the demand for an immediate call. It is not the words themselves that dictate the result, but rather their effect on the consumer.

It is true that whether a collection letter is confusing cannot be answered merely by applying the rules of logic to its contents. In the final analysis, the consumer must be confused about his statutory rights, and not just about the meaning of words like "immediate" and "prompt" in the abstract. If the collection notice effectively conveys the consumer's statutory rights, then he has little cause for complaint.

D. The Nature of the Contradiction

Since the statute allows a collector to seek satisfaction of the debt, while at the same time notifying the debtor of the right to seek verification, some courts require a "threatening contradiction" in the collector's letter before finding a statutory violation. The encouragement for that approach came from Swanson v. Southern Oregon Credit Service, when the collection notice contained an ominous message in bold-faced type that if the debtor paid within ten days, the collector would not rec-

296. 169 F.3d 1057 (7th Cir. 1999).
297. See id. at 1060.
298. Id. (emphasis omitted).
299. See id.
301. 869 F.2d 1222 (9th Cir. 1988).
ord the account in its master file, thus protecting the debtor’s valuable credit rating. The court observed that the collection message stood in “threatening contradiction” to the validation notice, which could be found at the bottom of the notice in ordinary type.

The court in Smith v. Financial Collection Agencies seized on this “threatening contradiction” language in Swanson to support its position that there can be no violation where that type of language is missing. Although the language in Swanson was threatening in a sense, the court’s comment about the threat was not essential to its holding, since the court really wanted to ensure that the collector should convey the validation notice effectively. This meant the notice could not be overshadowed or contradicted by the collector’s demands.

In Financial Collection Agencies, the court must have been perplexed by the permissive language of the statute, which allows a collector to include both a demand for payment and a validation notice in the same communication. The court believed that since the statute made room for both, there could be no violation unless the collector went beyond the mere inclusion of such language and instead used some threat that would leave the debtor in doubt about his rights. In other words, a contradiction between the validation notice and the demand for payment had to be threatening in order to be actionable.

The Financial Collection Agencies approach has not found favor in the Second Circuit. As a matter of fact, the court in Russell v. Equifax A.R.S. found it was unnecessary for the consumer to prove that the contradiction in that case was threatening, while announcing that Fi-

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302. See id. at 1225.
303. See id. at 1226.
305. See id. at 237.
306. See Swanson, 869 F.2d at 1225. The court’s view was that “the notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency.” Id. The court continued: “[T]here is little question that [the notice] is misleading in both form and content.” Id. The court was not insisting on a threat as an essential element of the misleading communication. The court in Beeman v. Lacy, Katen, Ryen & Mittelman, 892 F. Supp. 405 (N.D.N.Y. 1995) explained it best: “Although the Ninth Circuit commented that the letter it reviewed did contain a threatening contradiction this finding was not essential to its holding.” Id. at 411.
307. See Swanson, 869 F.2d at 1225.
308. See 15 U.S.C. § 1692g(a) (1994). The statute requires the debt collector to cease collection of the debt only if the consumer notifies the collector in writing that he disputes the debt or that he wants to know the name and address of the original creditor. See id. § 1692g(b).
310. 74 F.3d 30 (2d Cir. 1996).
Financial Collection Agencies was not good law in the Second Circuit.\textsuperscript{311} It was simply a question whether the overshadowing or contradictory notice made the least sophisticated consumer uncertain as to her rights.\textsuperscript{312}

Despite the Second Circuit's position in \textit{Russell}, the Sixth Circuit seemed wedded in \textit{Smith v. Computer Credit, Inc.}\textsuperscript{313} to the requirement of a "threatening contradiction."\textsuperscript{314} The collector's first letter of March 8 gave the usual validation notice.\textsuperscript{315} The second letter notified the consumer that if the debt was not paid before April 4, the collector would advise the consumer of its final position concerning the status of the account.\textsuperscript{316} The court distinguished \textit{Computer Credit} from \textit{Swanson} on the ground that the collection letter in \textit{Computer Credit} did not threaten the consumer's validation period.\textsuperscript{317} On the other hand, the court recognized the collection letter in \textit{Swanson} as containing an implicit threat that the consumer would lose his good credit rating if he did not ignore his thirty-day validation period and pay the debt immediately.\textsuperscript{318} There was a threat in \textit{Swanson}, but the question was whether it was a necessary ingredient for the confusion which the \textit{Swanson} language produced for the least sophisticated consumer.\textsuperscript{319}

If one assesses the \textit{Computer Credit} language in that light, one will see no threat of the \textit{Swanson} type, but the implicit demand for a pre-April 4 payment certainly raised a question about the priority of that date over the validation period identified in the same letter. When the court in \textit{Computer Credit} saw nothing wrong with the collection language, the court might have been looking for too much. If a debt collector's objective is to convey effectively the notice of the validation pe-

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\textsuperscript{311} See id. at 35; see also Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521, 527 n.1 (E.D. Pa. 1996) (disagreeing with \textit{Financial Collections Agencies} and stating that the heightened standard of a threatening contradiction finds no support in \textit{Graviino v. Harrison} and was rejected by \textit{Russell v. Equifax A.R.S.}).
\textsuperscript{312} See \textit{Russell}, 74 F.3d at 35. The court was interested in the question of whether "from the perspective of the least sophisticated consumer, language contained in the notice overshadowed or contradicted the mandatory validation notice." \textit{Id.}
\textsuperscript{313} 167 F.3d 1052 (6th Cir. 1999).
\textsuperscript{314} See id. at 1054, 1055.
\textsuperscript{315} See id. at 1053.
\textsuperscript{316} See id.
\textsuperscript{317} See id. at 1054.
\textsuperscript{318} See id.; see also Sixth Circuit Takes a Different View, \textsc{Consumer Credit and Truth-in-Lending Compliance Report}, April 1999, at 6 (Earl Phillips ed.).
\textsuperscript{319} See \textit{Computer Credit}, 167 F.3d at 1054; Swanson v. Southern Or. Credit Serv., 869 F.2d 1222, 1227 (9th Cir. 1988).
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period, then there is no need to require a threat before finding that a consumer is confused about his statutory rights.\textsuperscript{320}

The \textit{Computer Credit}\textsuperscript{321} court held that the debt collector's language resembled the language used by the debt collector in \textit{Terran v. Kaplan}.\textsuperscript{322} In \textit{Terran}, the collector notified the debtor that he might advise his client to pursue legal action if the debtor did not telephone the collector immediately on receipt of the collection letter.\textsuperscript{323} The \textit{Terran} court found no violation in the letter because it did "not threaten or encourage the least sophisticated debtor to waive his statutory right to challenge the validity of the debt."\textsuperscript{324}

If there is a distinction between \textit{Computer Credit} and \textit{Terran}, it is in the fact that the collector in \textit{Computer Credit} notified the debtor that unless the debtor had a valid reason for not paying, the debtor had to pay the debt.\textsuperscript{325} If the debtor did not make payment before April 4, 1996, the collector promised to advise the debtor of its final position regarding the account.\textsuperscript{326} On the other hand, in \textit{Terran} the collector invited the debtor to call, failing which the collector might recommend legal action.\textsuperscript{327}

The \textit{Terran} court recognized that the collector did not demand payment immediately, for that demand would have conflicted with the thirty-day time frame in the validation notice.\textsuperscript{328} On the other hand, in

\textsuperscript{320} The court in \textit{Russell} was closer to the mark when it stated that "[a] notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights." \textit{Russell v. Equifax A.R.S.}, 74 F.3d 30, 35 (2d Cir. 1996). In \textit{Bartlett}, the Seventh Circuit explained the evil as the collector's failure to explain the relationship between the collector's demand for payment and the consumer's right to dispute the debt within thirty days. \textit{See Bartlett v. Heibl}, 128 F.3d 497, 500 (7th Cir. 1997).

\textsuperscript{321} \textit{See Computer Credit}, 167 F.3d at 1054-55.

\textsuperscript{322} 109 F.3d 1428 (9th Cir. 1997).

\textsuperscript{323} \textit{See id.} at 1430.

\textsuperscript{324} \textit{Id.} at 1434.

\textsuperscript{325} \textit{See Computer Credit}, 167 F.3d at 1053.

\textsuperscript{326} \textit{See id}. Even without this language, the consumer might still have been confused. When the consumer received the notice, he did not know at that point of the collector's final position. The appropriate inquiry at that point would be whether the consumer was confused about the conflicting language.

\textsuperscript{327} \textit{See Terran}, 109 F.3d at 1430. Notice here that the collector did not actually commit to taking legal action against the consumer. The language was: "[W]e may find it necessary to recommend to our client that they proceed with legal action." \textit{Id}.

\textsuperscript{328} \textit{See id.} at 1434; \textit{see also} \textit{Johnson v. Revenue Management Corp.}, 169 F.3d 1057, 1059 (7th Cir. 1999) (holding that demand for immediate payment violated FDCPA by implying that the consumer does not have thirty days to ask for verification); \textit{Savino v. Computer Credit, Inc.}, 164 F.3d 81, 85 (2d Cir. 1998) (demanding immediate payment without explaining that such demand did not override consumer's validation rights constituted violation); \textit{Miller v. Payco-General Am. Credits, Inc.}, 943 F.2d 482, 484 (4th Cir. 1991) (demanding immediate payment contradicts validation notice).
The collector referred specifically to the need for pay-
ment before April 4. If there was any room for confusion, the scene-
ario in Computer Credit seemed a more likely possibility. The court thought
otherwise because the collector did not threaten to sue if the debtor did
not pay. The collector promised only to tell its final position on the
status of the account. Nevertheless, the question the court should have
asked was whether the collector’s language had produced confusion in
the consumer’s mind. What was the connection between the validation
notice involving a thirty-day period and the reference to an April 4 date
for payment? The collector must have intended to propel the consumer
into action with the language, “[i]f we are not notified that your debt has
been paid before April 4, 1996, and if this debt is not disputed.” The
“least sophisticated consumer” might have linked the payment date to
the time for disputing the debt. The evil lay, therefore, not in the collec-
tor’s asserting its final position, but rather in the confusion emanating
from the April 4 date with respect to both payment and the right to dis-
pute the debt. The court was convinced that a collector’s request for
payment could not be a demand unless accompanied by a threat. It
seemed unnecessary for the court to make a threat an essential feature of
the collector’s communication with the consumer.

It may be that a consumer will be more persuaded of the need to
act if the collector issues a threat. But the nature of the inquiry about a
consumer’s confusion ought not to rest on the presence of a threat. If the
collector refers to payment, but also to the consumer’s right to question
the collector’s right to such payment, then one must be sure that one
part of the collection letter does not lead to the consumer’s confusion
because of its apparent conflict with another provision. This really has
nothing to do with the presence or absence of a threat. If the collector

329. See Computer Credit, 167 F.3d at 1053.
330. See id. at 1055.
331. See id. at 1054.
332. The Seventh Circuit in Bartlett focused on the important element: “[T]he failure to ex-
plain an apparent though not actual contradiction.” Bartlett v. Heibl, 128 F.3d 497, 500 (7th Cir.
1997) (emphasis omitted).
333. Computer Credit, 167 F.3d at 1053.
334. The debt collector indicated that the debt must be paid, and then there was a reference in
the next line to April 4, 1996. See id. Surely the collector had an obligation to reconcile that date
with the thirty-day period for verification.
335. See id. at 1054-55.
336. The adoption of a “threatening contradiction” standard would not protect the “naive and
trusting” consumer but would undermine the “least sophisticated consumer” standard. See Beeman
Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993)).
demands payment and gives the validation notice in the same letter, he must be careful to provide some transitional language that assures the consumer that the right to verify or dispute the debt is not affected by the collector's request for payment.  

E. Some Peculiarities of Validation

The statute requires the debt collector to verify the information if the debtor disputes the debt. In Frey v. Satter, Beyer & Spires, the collector asked the debtor to indicate the nature of the dispute if the debtor disputed the claim. In rejecting the defendants' motion to dismiss, the court held that the collector had required more of the debtor than the statute dictated. There was no requirement for the debtor to disclose the nature of the dispute. The debtor only needed to dispute the debt. It seemed like a minor point for the debtor in Frey, but the court was on solid ground in rejecting the defendants' motion to dismiss the plaintiff's complaint. The debtor should not have to meet more onerous requirements than those imposed by statute. He usually has a hard enough time holding his own against the collector's strategies, and therefore, every additional imposition puts him at a disadvantage. The plain language of the statute merely requires the debtor to notify the collector that he is disputing the debt. The debtor can save the details for later, if the parties cannot agree in the first instance that there is no outstanding debt.

Another frequent inquiry is whether the debtor must dispute the debt in writing. The plain language of the statute allows the collector to assume that the debt is valid if the debtor does not question its validity.

337. See Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998) (holding that a collector can seek immediate payment and still comply with the FDCPA by using transitional language that refers consumer to validation notice); Bartlett, 128 F.3d at 501 (stating that it is possible to devise a form of words that will inform debtor about the risk of a lawsuit without detracting from statement of debtor's statutory rights); Beeman, 892 F. Supp. at 411 (noting that the debt collector can achieve clarity by using transitional phrases and then informing consumer of the procedures to be followed).

340. See id. at *1.
341. See id. at *5.
342. See id.
344. The purpose of requiring verification of the debt is to satisfy the consumer that the collector is pursuing an outstanding debt. The parties can save the details for later. The consumer may have certain defenses, but he should not have to disclose them at this early stage.
within thirty days. The statute goes on, however, to require the collector to verify the debt if the consumer notifies the collector in writing of the dispute. Some collectors have argued that Congress must have intended to require written notice anytime a debtor wants to dispute the debt, and that includes merely questioning the validity of the debt. The Third Circuit came down on the collector's side in Graziano v. Harrison. It interpreted § 1692g as requiring written notice of a dispute in all cases, since oral notice would remove any statutory basis for the collector to assume that the debt was valid, while allowing the collector to continue his collection efforts without verifying the debt. The court did not want to attribute to Congress the "intent to create so incoherent a system." The court therefore concluded that subsections (a)(3), (a)(4), and (a)(5) all required any notice of dispute to be in writing.

Since the language of the statute seems clear, collectors might naturally question the congressional purpose for allowing oral notice of dispute in one paragraph, while requiring written notice in other paragraphs of the same section. The court in Ong v. American Collections Enterprise, explained it this way:

It is not unreasonable to believe that some consumers who wish to dispute an alleged debt may lack the ability or wherewithal to do so in writing, and that Congress chose to accord these oral debt-disputers some, but not all, of the protections accorded those who dispute their debts in writing.

So, the oral notice at least lets the collector know that the debtor is questioning the debt, and therefore that there should be no presumption about its validity. Although the oral notice does not require the collector to verify the debt, the consumer's communication may nevertheless motivate the collector into further investigation about the merits of the consumer's dispute. Although the collector would have no statutory obligation to report his findings to the consumer, the collector's curios-

346. See 15 U.S.C. § 1692g(a)(3). There is no mention of a writing requirement in this subsection. See id.
347. See id. § 1692g(a)(4).
349. 950 F.2d 107 (3d Cir. 1991).
350. See id. at 112.
351. Id.
352. See id.
354. Id. at *3.
355. See id.
356. See id.
ity about the consumer’s denial of the debt may therefore produce a satisfactory result for all parties.

The consumer’s oral notice may have another effect. Once the debt collector knows that the consumer disputes the debt, he must disclose that fact to any person who legitimately seeks information about the consumer’s credit history.\(^{357}\) That statutory obligation to communicate the consumer’s position on the debt is not restricted to the consumer’s written notice of dispute. As a matter of fact, the collector who knows or should know that a consumer disputes the debt, must pass on that information to a legitimate inquirer.\(^ {355}\) Therefore, it does not matter if the collector obtains that information through the consumer. If the collector obtains notice about the dispute through third parties, he is still obligated to disclose the matter to an inquiring credit agency.\(^ {359}\)

The requirement of written notice has substantial ramifications in the collection context. Such notice forces the collector to abandon his collection activities until he verifies the debt.\(^ {360}\) Nevertheless, the consumer can still give oral notice to let the collector know his position on the collector’s claim.\(^ {361}\) Such notice may not have the same impact as if it was in writing, but then again Congress never intended that it should.\(^ {362}\) The collector may sidestep the verification requirement by simply not resuming his collection activities.\(^ {363}\) The statute does not provide a clear-cut option to the collector, for in one place the statute requires the collector to promise verification when the consumer disputes the debt, and then later on requires the collector to stop collection until he has verified the debt.\(^ {364}\) The consumer’s lot would be made easier if the statute required the collector to either verify the debt or cease all collection activities. The present language puts the collector in the

\(^{357}\) See 15 U.S.C. § 1692e(8) (1994). A debt collector has the obligation to communicate to any legitimate inquirer that the consumer is disputing the debt. See id.

\(^{358}\) See id.

\(^{359}\) This flows from the debt collector’s obligation not to communicate credit information which the collector knows, or should know, is false, and the collector’s failure to communicate that a disputed debt is disputed is a violation. See id. The “knows or should know” language does not depend upon the existence of a writing to have an impact on the debt collector. Therefore, the debt collector in *Brady v. Credit Recovery, Co.*, 160 F.3d 64 (1st Cir. 1998) was not able to get out of its § 1692e(8) obligation, despite the consumer’s failure to dispute the debt in writing. See id. at 66.

\(^{360}\) See 15 U.S.C. § 1692g(b).

\(^{361}\) See *Brady*, 160 F.3d at 66-67.

\(^{362}\) See id.

\(^{363}\) The statute merely requires the collector to “cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt.” 15 U.S.C. § 1692g(b).

\(^{364}\) Compare id. § 1692g(a)(4), with id. § 1692g(b).
position of promising to verify the debt if the consumer disputes it, thus seeming to create an obligation on the collector that really does not exist. The collector can opt out of any such promise by not pursuing the consumer. This does not prevent another collection agency from taking on the challenge of trying to collect from the consumer. If this happens a few times, the consumer may become frustrated and pay off the debt without ever obtaining verification.

The fault lies not with the collector, but rather with the statutory language which requires the collector to promise verification, while allowing him to abort the verification process by merely stopping his collection efforts. The consumer is left wondering whether someone else will challenge him later on the alleged debt.

One may make the same observation about the statutory language which requires the collector to obtain verification of the debt or a copy of a judgment. When the collector uses that language in his notice to the consumer, he may know that no judgment exists. Yet the collector has no choice because the statutory notice requires that language. Any discomfort that the collector creates for the consumer by reference to a non-existent judgment can be cured by the collector’s promise to secure a copy of a judgment, if one already exists. Such an amendment to the statute will clarify the position for the consumer and remove the collector from the uncomfortable assignment of giving a statutory notice that may not reflect the true situation.

Although the statute requires a collector to send the consumer a written notice about the consumer’s validation rights, it says nothing about the consumer’s receipt of the notice. The consumers in Mahon v. Credit Bureau of Placer County Inc. claimed they never received any of the collection letters, but the collection agency provided ample evidence that it had mailed them. The court placed the burden on the debtors to refute the fact of mailing. The consumers argued that the court should focus on the section’s reference to “communication,” be-

365. See, e.g., Jang v. A.M. Miller & Assocs., 122 F.3d 480, 483-84 (7th Cir. 1997).
366. See 15 U.S.C. § 1692g(6)(4). The pertinent language in the statute is the collector’s promise to obtain “verification of the debt or a copy of a judgment.” Id.
368. 171 F.3d 1197 (9th Cir. 1999).
369. See id. at 1201-02.
370. See id. at 1202.
cause the term requires some kind of exchange between the collector and the debtor.\textsuperscript{371} The consumers were aware that the statute permitted the validation information to be included in the initial communication or in the written notice which the collector sent within five days thereafter.\textsuperscript{372} The court treated the word “sent” as the operative word in the statute and “communication” as simply the medium for conveying information.\textsuperscript{373}

The collector was obligated to send a written notice with the pertinent information if the collector missed the boat in the initial communication.\textsuperscript{374} It was the court’s view that the collector had complied with the FDCPA even though the consumer never received the mailing.\textsuperscript{375} One wonders, however, what would have happened if the letter did not contain the validation notice and the consumer did not receive it. It would have been in the collector’s interest to argue that no damage had been done because the consumer did not receive anything from the collector. It is arguable that the validation section is not implicated until there is a communication, and there can be no communication unless the collector conveys his message to the consumer. It seems, therefore, that a debt collector cannot violate the validation section by mailing a dunning letter that the consumer never receives, regardless of the lack of verification language.\textsuperscript{376}

In Mahon, the court presumed that the consumer had received all the collection letters.\textsuperscript{377} That being the case, it should not have grappled with the collector’s purported “sending” of a written notice containing the necessary information. The information was in the collector’s initial communication with the consumer, and the presumption of receipt by the consumer did not require consideration of the alternate method of satisfying the statutory requirements through a subsequent written notice.\textsuperscript{378} The solution to the Mahon-type problem is to ask whether the

\begin{footnotes}
\item[371] See id. at 1201. The statute defines “communication” as the “conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).
\item[372] See Mahon, 171 F.3d at 1200.
\item[373] See id. at 1201.
\item[374] See id. at 1201 & n.3 (quoting 15 U.S.C. § 1692g(a)). This makes sense because the consumer would now be aware that the collector is alleging that he owes money to somebody, and the validation notice provides the mechanism for setting out the details. If the consumer never receives any notice about anything, there is no immediate problem.
\item[375] See id. at 1202.
\item[376] If the consumer never receives the dunning letter, he has no complaint because there has been no communication. See Verification Notice Requirement, CONSUMER CREDIT AND TRUTH-IN-LENDING REPORT, May 1999, at 2 (Earl Phillips ed.).
\item[377] See Mahon, 171 F.3d at 1202 (citing the common law Mailbox Rule).
\item[378] See 15 U.S.C. § 1692g(a). The subsequent written notice is needed only if the initial
\end{footnotes}
A debt collector has communicated with the consumer. It is not consistent with the statutory objective to blame either party when no contact has been made at all.\(^9\)

The validation section offers another challenge for the collector. The collector may include in his first communication the information about validating and disputing the debt.\(^8\) There is no requirement that the communication be in writing.\(^3\) That Congress would allow a collector to convey such important information orally is puzzling. Why does an oral “initial communication” suffice, when any subsequent notice with the same information has to be written?\(^3\) One can imagine a least sophisticated consumer on the telephone absorbing all his rights about verifying and disputing the debt.\(^3\)

The answer lies in requiring such information to be in written form, so that the consumer may refer to it at his leisure and on his own time.\(^3\)

\(^{379}\) See 15 U.S.C. § 1692(e) (stating that the purpose of the FDCPA is to eliminate abusive debt collection practices).


\(^{381}\) See id.

\(^{382}\) The definition of “communication” is the conveying of information through any medium. See id. § 1692a(2). The FTC Staff Commentary surprisingly supports oral disclosure of the validation details. See FTC Staff Commentary, supra note 25, at 50,108. The congressional report about the validation of debts gave some indication of the seriousness of the matter: “Another significant feature of this legislation is its provision requiring the validation of debts. After initially contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed.” S. Rep. No. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699. Perhaps this was an indication that if the initial contact was oral, then written notice must follow with the important information, unless, of course, the initial written contact contained that information.

\(^{383}\) Even if a person is, in the words of the Seventh Circuit, merely “unsophisticated,” it would be difficult to see how that person could understand or remember the details about a debt which is communicated in this fashion. This framework would be clearly inconsistent with the “least sophisticated consumer” standard which most courts accept as the proper criterion. Compare Johnson v. Revenue Management Corp., 169 F.3d 1057, 1059 (7th Cir. 1999), Lewis v. ACB Bus. Servs., 135 F.3d 389, 400 (6th Cir. 1998), United States v. National Fin. Servs., 98 F.3d 131, 136 (4th Cir. 1996), and Gammon v. GC Servs. Ltd. Partnership, 27 F.3d 1254, 1257 (7th Cir. 1994), with Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996), and Swanson v. Southern Or. Credit Serv., 868 F.2d 1222, 1226 (9th Cir. 1989).

\(^{384}\) Even the FTC seems to take for granted that the collector’s initial communication will possibly be oral, or that, even if written, it will not contain the validation information. In its twenty-first annual report to Congress, the FTC made a recommendation for the clarity of the validation notice. It said:

Section 809(a) of the Act requires debt collectors to send a written notice to each consumer within five days after the consumer is first contacted, stating that if the consumer disputes the debt in writing within thirty days after receipt of the notice, the collector will obtain and mail verification of the debt to the consumer.

FTC ANNUAL REPORT, supra note 25, at 8.
The least sophisticated consumer will not know what the debt collector is talking about when he rattles off these items. Moreover, the consumer should be able to refer to the notice about his rights to demand certain action by the collector. If the information is not in writing, the moment of reflection is lost and the collector secures the advantage by requesting "immediate" payment. There is nothing for the consumer to contemplate, other than the collector's urgent demand.

VI. FALSE, DECEPTIVE, AND MISLEADING STATEMENTS

A. The Nature of Language

Debt collectors use their considerable talents to create effective collection letters. In doing so, however, they strive sometimes to leave their debtors in fear because of the implications of the language they use. There may be trouble for the collector when literally true statements turn out to be deceptive because the resulting implications are false or misleading. On the other hand, the statements can be false or misleading on their face. In that case, debtors have a much easier time proving a violation of the FDCPA.

In Gammon v. GC Services Ltd. Partnership, the collector was forthright when it wrote the consumer telling him that it had "provided the systems used by a major branch of the federal government and various state governments to collect delinquent taxes." It was literally true that the collector had supplied the systems, but it was not immediately apparent why the collector had to inform the consumer of that fact. The Seventh Circuit's view was that the collector wanted to leave the impression that the consumer was up against a collector which was closely involved with the tax authorities. The implication was that the consumer could expect to face the same systems in the collector's attempt to recover the debt. The court therefore held that the consumer had stated a claim upon which relief could be granted and remanded for further proceedings. This was not surprising, for the collector had

385. See Avila v. Rubin, 84 F.3d 222, 227 (7th Cir. 1996); Gammon, 27 F.3d at 1257; NATIONAL CONSUMER LAW CTR., supra note 43, § 5.5.1.3 (3d ed. 1996 & Supp. 1999).
386. See Avila, 84 F.3d at 227.
387. 27 F.3d 1254 (7th Cir. 1994).
388. Id. at 1255 (emphasis omitted).
389. See id. at 1258.
390. See id.
391. See id.
hoped to coax the consumer into paying the debt by relating the collector’s involvement with the governmental systems to an implication that the consumer had something to fear if the debt remained unpaid.

On the other hand, the collector in *Bentley v. Great Lakes Collection Bureau*[^392] sent the consumer two letters containing false statements.[^393] There was no need to search for an implication. The collector alleged that it had the legal authority to begin legal proceedings.[^394] Unfortunately, the creditor had not authorized the collector to bring suit, and therefore the collector threatened to take action that it did not really intend to take.[^395] It was the same thing with respect to the collector’s assurance that someone at a collection desk in the collector’s office was then contemplating the action that was necessary to enforce collection of the debt.[^396] The only problem was that there was no such enforcement desk in the collector’s operation, and thus the consumer’s account was not receiving the personal attention alleged in the communication.[^397]

The collector had hoped to prod the consumer into action by referring to its proposed enforcement measures, when in fact the principal had not authorized any suit on its behalf. Furthermore, the reference to the possibility of a resulting judgment would have misled the least sophisticated consumer into thinking that the collector was ready to act,[^398] and that the consumer should respond to the collector’s overtures if he wanted to avoid headaches.

The collector usually depends on the use of suggestive language to achieve its objective. In *United States v. National Financial Services*,[^399] the collector’s magical language of persuasion promised as follows: “Your account will be transferred to an attorney if it is unpaid after the deadline date!!!”[^400] The attorney followed up with a warning that he would be compelled to consider the use of available legal remedies to

[^392]: 6 F.3d 60 (2d Cir. 1993).
[^393]: See id. at 62.
[^394]: See id. at 61-62.
[^395]: See id. at 62.
[^396]: See id.
[^397]: See id. at 63. The FDCPA forbids a debt collector from using any false, deceptive, or misleading representation in connection with the collection of any debt. See 15 U.S.C. § 1692e (1994). This section lists sixteen examples of prohibited conduct. See id. § 1692e(1)-(16).
[^398]: Since this was not the Seventh Circuit, the Sixth Circuit applied the least sophisticated consumer standard. See *Bentley*, 6 F.3d at 62. The FDCPA forbids a debt collector from threatening to take “any action that cannot legally be taken or that is not intended to be taken.” 15 U.S.C. § 1692e(5).
[^399]: 98 F.3d 131 (4th Cir. 1996).
[^400]: Id. at 133 (emphasis omitted).
collect the outstanding debt. The lawyer never reviewed any of these computer-generated letters bearing his name, and had no contact with the creditor about the collection process.

What was the significance of the collector’s promise to transfer the account to an attorney? No doubt the collector hoped to convince the consumer that the consumer was in for a different experience. The consumer’s failure to pay would usher in the next phase of the collection process. An attorney can take the dispute to another level by bringing suit. The collector certainly wanted to leave the impression that a suit was inevitable. When the suit did not materialize, that simply confirmed that the attorney promised to take action that he did not intend to take. But that is the collector’s stock in trade: the ability to convince the consumer to pay a debt, although the collector has no intention to sue.

In National Financial Services, the collector even warned the consumer that the consumer would have to pay for his own attorney if there was a suit. The consumer hardly wanted to incur that cost while also having to pay the amount in contention. So the consumer might have fallen for the collector’s misstatement about the collector’s intention to sue, rather than contest the matter. This is what the collector counted on.

In Boyce v. Attorney’s Dispatch Service, the collector advised the consumer that he was “susceptible to immediate criminal prosecution” if he did not make good on his bounced check. It is to be noted that the collector did not say that the consumer “would” be prosecuted; the collector was more subtle than that by indicating that the consumer was only “susceptible” to prosecution. In the same paragraph, the collector suggested that the consumer should consult an attorney concerning his rights. What was the “least sophisticated consumer” to think?

The court believed that the consumer would construe the collector’s language as a threat of imminent prosecution in the absence of the

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401. See id. at 134.
402. See id.
403. It probably would have made no difference if the collector had suggested the mere possibility of a lawsuit rather than its inevitability. That would have been a problem too because the collector never sued to collect. It usually only sent out collection letters. See id. at 138; see also Dunning Letter to Avoid: It Threatens a Lawsuit, CONSUMER CREDIT AND TRUTH-IN-LENDING COMPLIANCE REPORT 5-6, Feb. 1997, (Earl Phillips ed.).
405. See National Fin. Servs., 98 F.3d at 136.
407. Id. at *21.
408. See id.
409. See id. at *22.
The only problem was that it was the collector's habit to refer accounts for collection without taking any steps towards prosecution. It was all a ruse to make the consumer think twice about ignoring the collector's claim.

Sometimes a collector runs into difficulty because a court takes a strict interpretation of the collector's language. In Withers v. Eveland, the collector threatened to "institute collection proceedings" and pursue "all legal remedies." It was true that the collector could not legally file suit because he was not a lawyer, but one wonders whether the least sophisticated consumer would have understood the collector to be saying that he would be representing the creditor in a legal capacity. Perhaps the court was a bit harsh in this case by interpreting the collection language in this way.

The same kind of strict construction existed in Belile v. Allied Medical Accounts Control Associated Bureaus, Inc., where the collector threatened to refer the consumer's case to its legal department. The lawyer there was not admitted to practice in the consumer's state of residence, but the court thought there was a problem because the collector's language implied that legal action was imminent. The collector could have intended to raise the stakes without necessarily aiming for a lawsuit. The legal department might have had more tools in its arsenal to forge a resolution of the problem without resorting to a court. Surely the collector could legally refer the matter to its legal department, and there was no contention that it did not intend to do so.

411. See Boyce, 1999 U.S. Dist. LEXIS 1124, at *22.
413. Id. at 944.
414. See id. at 946.
416. See id. at 661.
417. See id. at 662. The court distinguished Riveria v. MAB Collections, Inc., 682 F. Supp. 174, 178-79 (W.D.N.Y. 1988), on the ground that the collector there indicated that it had "no choice but to advise" the creditor that 'legal action may be necessary." Belile, 209 B.R. at 662 (quoting Riveria, 682 F. Supp. at 178-79). In Belile, the court identified the troublesome language as the threat to refer the case to the legal department with a recommendation to seek a judgment. See id. at 663.
418. The problem lay with the language that the collector would recommend that the legal department seek a "civil judgment." See id. at 661.
The objection was the false implication of imminent legal action, but the collector never threatened that.\textsuperscript{419} It was unfortunate, therefore, that the court went beyond the statutory language and placed the burden on the collector to explain the impact of the referral. It was surely within the collector's mandate to seek assistance in bringing the collection effort to a successful conclusion. The consumer might have responded more seriously to a lawyer's inquiry. That does not mean, however, that the referral to a lawyer constitutes the last step in the collection process, thus leading inevitably to a contest in the courtroom. A lawyer not admitted in the state of the consumer's residence could nevertheless play a pivotal role in settling the debt in question. The alleged deception in Belile was the false implication that the legal department would go to court immediately to seek recovery from the consumer.\textsuperscript{420} The least sophisticated consumer might relate a lawyer to lawsuits, but there was a serious question whether that was the only function of the collection agency's legal department.

The court in Belile was probably looking for the kind of statement made by the collector in O'Connor v. Check Rite, Ltd.,\textsuperscript{421} to coax the consumer into settlement.\textsuperscript{422} The collector in O'Connor hastened to reassure the consumer that it had made no decision yet to institute action, but warned that if it came to that, an attorney within the consumer's state would handle the matter.\textsuperscript{423} On the other hand, in Sturdevant v. Thomas E. Jolas, P.C.,\textsuperscript{424} the court obviously thought that it was unnecessary for the collector to reassure the consumer that he was admitted in the state of the consumer's residence.\textsuperscript{425} As a matter of fact, the court branded as frivolous the consumer's argument on that point.\textsuperscript{426} The court believed that the attorney-collector could have retained local counsel in Wisconsin to pursue his legal remedies against the consumer in a Wisconsin court.\textsuperscript{427} The contrasting style of the collectors in Belile and O'Connor provides a simple lesson: the collector should not leave any-

\begin{itemize}
  \item \textsuperscript{419} No one knew whether the legal department would accept the recommendation about seeking a civil judgment.
  \item \textsuperscript{420} See Belile, 209 B.R. at 662. This does not necessarily flow from the collection letter and is different from the situation in Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443, 1451-52 (D. Nev. 1994), where the collection agency engaged in unlicensed collection activities.
  \item \textsuperscript{421} 973 F. Supp. 1010 (D. Colo. 1997).
  \item \textsuperscript{422} See id. at 1013.
  \item \textsuperscript{423} See id. at 1017.
  \item \textsuperscript{424} 942 F. Supp. 426 (W.D. Wis. 1996).
  \item \textsuperscript{425} See id. at 430.
  \item \textsuperscript{426} See id.
  \item \textsuperscript{427} See id. The court held that there was no violation of the FDCPA. See id. at 431.
\end{itemize}
thing to the consumer's imagination, for courts are willing to give the consumer the benefit of the doubt by giving due weight to the least sophistication label.

The challenge for the collector is in striking a happy medium. The collector wants to strike a chord of seriousness in his demand for payment, while not leading the consumer down the path of speculation about an imminent lawsuit. The O'Connor language was right on the mark, for the consumer could not blame the collector for misleading him about future possibilities.428

The threat of an imminent lawsuit will invariably lead the consumer into a hasty response of one sort or another. The collector thrives on that prediction, and it does not usually want to clarify matters too much for the consumer. Take this language, for example: "'After judgment is obtained, garnishment can be brought to satisfy judgment.'"29 The least sophisticated consumer, looking at that language, will see a judgment as a foregone conclusion. In a case like that, there is a difference in the use of a simple word. If a collector said, for example, that garnishment was available if judgment was obtained, even the least sophisticated consumer would detect the difference.430 But that clarification would not promote the air of urgency that the collector would hope for, and therefore the consumer would not be persuaded as easily to come to terms with the collector. The consumer could easily be misled into thinking that the availability of garnishment after judgment meant that a judgment was a virtual certainty. That would be deceptive under the statute, despite the possible alternative explanation that the collector would be merely pointing out one of the courses available to it in enforcing a judgment.

The court in Schimmel v. Slaughter431 cannot be faulted for finding the "after judgment" language deceptive, for the collector's ambition was to create the impression that the consumer would eventually face a judgment, which could then lead to garnishment.432 The susceptibility of the collector's language to two different interpretations led the court to the one interpretation that might have impressed the least sophisticated

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428. The collection letter stated that no decision had been made to institute action against the consumer. See O'Connor, 973 F. Supp. at 1016.
430. The court in Dutton v. Wolhar, 809 F. Supp. 1130 (D. Del. 1992), recognized that the "use of the phrase 'once judgment is obtained' rather than some similar language such as 'if judgment is obtained,' implies that [debt collectors] would necessarily obtain judgment against the alleged debtor." Id. at 1141.
432. See id. at 1363.
consumer.433 No one can blame the court for that, since the collector
must be expected to bear the brunt of the ambiguity.

There was no surprise here, given the other possibilities. The col-
lector could have promised action once judgment was obtained. Would
this have meant as soon as or when judgment was obtained? The collec-
tor in Dutton v. Wolhar434 may have wished the consumer to think of an
inevitable circumstance, that is the securing of a judgment. There was
less likelihood of a contingency in the mind of the least sophisticated
consumer, and that is what the collector was aiming for. The consumer
would not have read “‘once’” as “‘if’” in the context of the collector’s
securing a judgment, and this was just fine with the collector, who
wanted to send a message that a judgment was inevitable.435 It was not
difficult, therefore, for both the court in Schimmel and the court in Dutt-
on to conclude that the collectors had made a false and deceptive repre-
sentation under § 1692(e).436

B. Mass Mailings

Other violations occur when collection letters are sent out under an
attorney’s name without the attorney’s review. These mass mailings can
result in a finding that the collector has made a false representation or
implication that the collection letter is from an attorney.

In Clomon v. Jackson,437 the attorney approved the form of the let-
ters and the procedures for sending out the letters, but did not review
each debtor’s file and did not know the identities of the debtors.438
Therefore, although the letters had the attorney’s name and signature on
them, they were not from the attorney in any meaningful sense.439 But

433. See id. This kind of ambiguity can lead to two interpretations. The statement can be read
merely indicating one of the courses available to a collector enforcing a judgment. It can also be
interpreted as saying that a judgment against the consumer is a certainty once a suit is filed. The
court in Schimmel believed that the least sophisticated consumer would more likely interpret the
phrase “after judgment is obtained” to mean that he had no chance to win the lawsuit. See id.
434. 809 F. Supp. 1130 (D. Del. 1992). The language in Dutton that was the subject of con-
tention was “once judgment is obtained.” See id. at 1132, 1141.
435. See id. at 1141. The court did not want to saddle the least sophisticated consumer with
“gleaning the more subtle of the two interpretations.” Id.
437. 988 F.2d 1314 (2d Cir. 1993).
438. See id. at 1320.
that attorney had reviewed consumer’s file). But cf. Anthes v. Transworld Sys., 765 F. Supp. 162,
166-67 (D. Del. 1991) (finding no violation where the collection letters were mailed from attor-
ney’s office after independent review by attorney).
this is the impression that the collector wanted to give. The court saw this as a violation of § 1692e(3), because the collector gave the false impression that the communication was from an attorney who had participated in the decision to contact the consumer. The court decided that an attorney who sends out dunning letters must be directly involved in the communication. This should include a review of the debtor’s file or approval of the letters based on the recommendations of others.

The attorney in Avila v. Rubin also had very little to do with the mailing of the collection letters to various consumers. Like the attorney in Clomon, he had a close relationship with the referring collection agency, which sent out 270,000 collection letters annually. He did not review the debtor’s file and did not see particular letters before they were sent out.

The attorneys in Clomon and Avila knew full well that debtors were more likely to respond to a letter on an attorney’s letterhead. Such a letter gave the impression that the attorney had considered the debtor’s file and had reached the judgment that the debtor was a proper candidate for legal action. Although the mass mailing of collection letters is an efficient technique for reaching delinquent debtors, the FDCPA does not sanction it because it constitutes a false, deceptive, or misleading communication. The attorney cannot waive his obligation to approve the collection letters that bear his name. Otherwise, the attorney could merely sell his name to the highest bidder, so that a collector could go after the debtor without any professional involvement by the attorney. The FDCPA was designed to prevent this kind of deception.

440. See Clomon, 988 F.2d at 1320-21. The collection letters used language that suggested that the attorney had received instructions from his client to pursue the matter to the furthest extent and that the attorney had scheduled the consumer’s debt for “‘immediate review and/or further action as deemed appropriate.’” Id. at 1321.

441. See id. at 1320-21.

442. See id.; see also Bitah v. Global Collection Servs., 968 F. Supp. 618, 622 (D.N.M. 1997) (finding that attorneys are required to review debtor’s file and have some knowledge of debt before sending out a letter with their name on it); Newman v. CheckRite Cal., Inc., 912 F. Supp. 1354, 1382 (E.D. Cal. 1995) (finding that under the FDCPA, an attorney sending out a dunning letter must have reviewed the debtor’s file).

443. 84 F.3d 222 (7th Cir. 1996).

444. See id. at 225.

445. See id. at 225, 228.

446. See id. at 228-29.

447. See Avila, 84 F.3d at 229; Clomon, 988 F.2d at 1321.

448. See Avila, 84 F.3d at 229; Clomon, 988 F.2d at 1321.

C. The Character, Amount, or Legal Status of the Debt

A debt collector may not falsely represent the character, amount, or legal status of any debt. Such misrepresentations may pressure the consumer into some action that the consumer would not ordinarily take, simply to settle the matter and put it behind him. For example, if the statute of limitations has expired on the obligation, the consumer may be induced to pay the debt even though he is no longer legally responsible for it. Other scenarios are possible. The collector may inflate the amount allegedly due, thus hoping that the consumer may settle for a lesser amount. If this happens, the consumer may be misled into thinking he has obtained a real bargain. Sometimes a debt collector may try to get something extra for himself, all under a proposed settlement of sorts. The only problem is that the collector may run afoul of the FDCPA because he falsely represents the amount he can lawfully collect on the consumer’s obligation.

In *Ditty v. CheckRite, Ltd.*, the debt collector tried to collect the debt, plus a service charge and an amount listed as legal consideration for a covenant not to sue. The only problem was that the collection letters did not tell the debtors that collectors could not recover an amount greater than the debt and a $15 service charge. The court found that no reasonable juror could fail to find that the collector had misrepresented the amounts that it could collect.

The collection agency also may run into difficulty by stating the amount due in a confusing way. The agency may have thought that it

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453. See id. at 849.
455. See id.
457. See id. at 1330.
458. See id. at 1328.
460. See *National Consumer Law Ctr.*, supra note 43, § 5.5.3.2, at 74 (Supp. 1999).
was being generous in *Harrison v. NBD Inc.* when it listed the balance due on the consumer’s debt as $1979, but the consumer’s liability as $247.86. The collector’s statement was open to two interpretations, one of which had to be false. The debtor owed either one amount or the other, but not both. The least sophisticated consumer may have found himself in a quandary if he decided to reject the creditor’s offer of a discount if he paid by June 21, 1996, or if he decided to dispute the debt. He would not have known which was the controlling figure in the transaction. The collector’s letter stated twice that the consumer’s liability was $247.86; it also listed the balance due as $1979 in three separate places. It was enough for the court to deny the defendants’ motion to dismiss the plaintiff’s complaint.

A debt collector normally relies on the creditor for information about the debt. When the debt collector acts on that information, there is a question whether the collector should be protected from liability if it turns out that the consumer does not owe the amount alleged.

In *Jenkins v. Heintz*, the consumer sued the collection lawyers alleging that the lawyers knew that the insurance which the consumer’s lender obtained for the consumer’s account was not authorized by the loan. The lawyers’ defense was that they did not know the nature of the unauthorized insurance, and that they simply tried to collect from the consumer the amount the bank said was due.

The Seventh Circuit held that the defendants had no reason to question whether the claim they were pursuing was for insurance premiums not authorized by the loan contract between the consumer and the lender. The court believed that it would have had to make too many assumptions before inferring that the defendants knew about the “force placed . . . insurance.” It was a question, therefore, of allowing

462. See id. at 846.
463. See id. at 848-49.
464. See id. at 849; see also Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996) (holding that a collection notice is deceptive when it can be reasonably read to have two or more different meanings); Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993) (same).
466. See id.
467. See id.
468. See id.
469. 124 F.3d 824 (7th Cir. 1997).
470. See id. at 826.
471. See id. at 827.
472. See id. at 831.
473. Id. at 830-31.
The court’s approach prevented the consumer from imposing an obligation of independent investigation on the collector. Nevertheless, it is open to question whether the court should have imposed a knowledge requirement in an interpretation of the statute. The court sent a message that a collector must knowingly make a misrepresentation in order to violate the FDCPA. In any event, the debt collector still had to rely on the bona fide error defense to avoid liability. Its success on that score hinged on the maintenance of procedures that were calculated to avoid the error that was made about the insurance.

When the collector is a lawyer, the question always arises whether he has an obligation to evaluate the legal liability of the consumer for the debts which the lawyer is trying to collect. Under normal circumstances, a collector should not be expected to do that. But dissenting Judge Ripple had a problem in Jenkins with putting lawyers in the same group with other collectors. He did not want to restrict lawyers to the same sorts of malfeasance as other collectors. He wanted to ensure that lawyer-collectors were carrying out the duties imposed upon them as lawyers, and did not want to focus simply on the collection aspect of their enterprise. But if they were laymen seeking to do a creditable job in collecting their clients’ accounts, they would not be expected to evaluate the legal viability of those debts.

There is something to be said, therefore, for not employing a double standard for the bona fide


475. See Jenkins, 124 F.3d at 831, 835.

476. The following provision protects collectors from bona fide errors: “A debt collector may not be held liable in any action . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 U.S.C. § 1692k(c) (1994). There are other provisions where Congress clearly required intent or knowledge. See 15 U.S.C. §§ 1692b(6), 1692c(a)(1), 1692c(a)(2), 1692d(5), 1692e(8), 1692k(b)(2). Congress must have had something else in mind when it did not include such a requirement in 15 U.S.C. § 1692k(c).

477. See Jenkins, 124 F.3d at 834; Seventh Circuit Requires FDCPA Deception to be Knowing Misrepresentation in a Troubling Decision, NCLC REPORTS DEBT COLLECTION AND REPOSESSION EDITION, Sept.-Oct. 1997, at 6.

478. See Jenkins, 124 F.3d at 837 (Ripple, J., dissenting).

479. See id. This represented a basic difference between the approach of the majority and Judge Ripple. The dissenter did not feel that it was discriminating against lawyers to have them meet the duties imposed upon them as lawyers. See id.

480. See id. The majority looked for the collector’s intentional violation of the FDCPA and left it up to the consumer to bear the burden of showing the collector’s intentional collection of the illegal insurance premiums. See id. at 831.
error defense, which forgives errors by debt collectors in appropriate cases. If the lawyer-collector was expected to pursue only legally valid claims, there would hardly be any opportunity for him to use the bona fide error defense. It is questionable, therefore, whether the FDCPA should be interpreted in that way.

If a consumer disputes the debt and the debt collector seeks verification of it, the collector should be able to rely on the information provided by the creditor. If this were not so, the verification process would turn into a veritable investigation, and the collector would bear the burden of separating fact from fiction. There is nothing in the statute that demands such a performance from the debt collector.481

VII. CONCLUSION

We have now had twenty-two years experience with the FDCPA. The FTC reports that most debt collectors now conform their conduct to the standards imposed by the FDCPA.482 Perhaps this is because they now have some firm guidelines to take them through the collection process. Now that the Supreme Court has said that an attorney-collector is subject to the FDCPA,483 consumers have even greater protection under the statute. Attorneys should have no problem with this decision, since there is no justification for granting them relief from a statute which promotes fairness and frankness in the collection of debts.484

Some attorneys may have difficulty in the litigation context because they must include a validation notice in a complaint if the complaint is the initial contact with the consumer.485 That is indeed true, but the attorney has the option of providing the validation notice in his initial contact before he serves his complaint.486 He does not have to make


482. See FTC ANNUAL REPORT, supra note 25, at 2.


484. Some argued for an attorney exemption because attorney violations in the debt collection industry are rare and can be handled by local bar associations. The evidence did not bear this out. See To Amend the Fair Debt Collection Practices Act, Hearing on H.R. 237 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Fin. and Urban Affairs, 99th Cong. 2 (1985) (statement of Representative Annunzio). There was a decided thrust to exempt attorneys who were providing professional legal services for their clients. See id. at 135-36 (testimony of Leonard O. Abrams, representing the Commercial Law League of America).

485. Strictly speaking, the attorney does not have to include the validation notice in the initial communication. He can wait and do so within five days after that initial communication. See 15 U.S.C. § 1692g(6) (1994). Therefore, the FTC's observation about that point slightly overstates the case. See FTC ANNUAL REPORT, supra note 25, at 9.

486. The attorney can decide not to make the complaint the initial contact.
FD CPA:
RECONCILING CONFLICTING INTERESTS

the complaint the first contact. If the attorney makes the complaint the second point of contact, he will avoid the necessity of delaying the lawsuit once the thirty-day period for verification has passed. Although the FTC recommends that Congress should amend the statute to exempt lawyers who seek to recover debts solely through litigation,\(^{487}\) that would seem to be a step backward. Congress removed the previous exception\(^{488}\) because there was some evidence that it created loopholes for collection lawyers.\(^{489}\) It is arguable that it is unnecessary to apply the FDCPA to litigation lawyers because their primary weapon is the complaint, but one wonders whether there is a vast group of such lawyers in the marketplace which has nothing to do with the dunning letters circulating daily. The underlying policy of the FDCPA is to protect consumers from deceptive and unfair collection practices.\(^{490}\) The litigation weapon can be even more harassing than a letter or two in the normal scheme of things. It is pointless to carve out an exception that will open up a new set of problems in the marketplace. The lawyers in \textit{Heintz v. Jenkins} tried to impress the Supreme Court with anomalies that would ensue from subjecting them to the FDCPA.\(^{491}\) They failed in their efforts to resurrect an exemption that Congress had already buried, and there is no need to complicate matters at this point.

The validation notice requirement has caused problems simply because debt collectors continue to demand payment from consumers, while giving notice of the consumers’ validation rights. The debt collector must therefore be very creative in trying to make serious demands on the consumer, while not contradicting the statutory period for verification. The solution to this dilemma is for the statute to require a period of retreat during which the consumer can seek verification of the debt, and the collector must wait until the end of that period to begin his col-

\(^{487}\) See FTC \textit{ANNUAL REPORT}, \textit{supra} note 25, at 9.


\(^{489}\) See H.R. \textit{REP.} No. 99-405, at 5 (1985). A congressional report gave some idea of the abuses:

Many of the attorney debt collection firms use procedures such as precollection letters and skiptracing, and use fee structures similar to those used by lay collection firms. Similarly, the attorneys generally employ lay persons as account representatives and collectors.

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Attorney debt collectors tout the exemption from the Act in solicitations directed at creditors. Attorneys imply that they can use tactics that collection agencies are prohibited from using, and that as a result, collections by attorneys are more effective.

\textit{Id.}


This grace period will avoid the possibility of conflict between the statutory language and the collector's demands. The present language requires a collector to cease collection activities between the time of the consumer's demand for verification and the collector's production of the evidence. The collector should send out the required statutory notice together with basic details about the debt, but that notice should not be cluttered with extraordinary demands. Then after a very short period of twenty days, the collector should be able to begin his collection activity in earnest if the consumer has not questioned the validity of the debt. If the consumer acts within the twenty-day period, then the collector should not be able to resume his collection efforts until he has verified the debt. The argument in favor of a twenty-day grace period is that such a period removes the potential for conflicting and overshadowing demands in the collection letter. But the grace period will work only if the collector is allowed to provide basic information about the debt with the validation notice, and nothing more.

A consumer's oral dispute of the debt should require the debt collector to validate the debt. The present language imposes that obligation on the collector only if the consumer disputes the debt in writing. The result is that a question has arisen about one subsection of the statute which allows a consumer's oral dispute of the debt without any ensuing collector's obligation of validation, and another subsection which requires a consumer's written notice for the collector to have that obligation. The writing requirement relates only to the question of proof. If a consumer is not able to make a written query about the debt, the debt collector can stand mute without taking any action. This is not a satisfactory solution, especially when the statute already allows for oral notification in one instance and not the other.

Another clarification is necessary in this area. If the consumer asks the debt collector for verification of the debt, the debt collector can now

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492. This is the grace period approach. See FTC ANNUAL REPORT, supra note 25, at 9. On the other hand, the FTC recommends that Congress clarify the law by adding a provision that expressly permits collection activity during the thirty-day period if the collector has not received a notice from the consumer disputing the debt. See id.
494. The reduction in time to twenty days is a compromise, since the collector would no longer be able to pursue his collections during that period, as he can during the current thirty-day period allowed by statute.
495. See 15 U.S.C. § 1692g(b).
497. There may be any number of reasons why a consumer is unable to query the debt in writing.
merely cease his collection activities and simply do nothing about the consumer's request. The statute should impose an obligation on the debt collector to seek verification of the debt without simply allowing the debt collector to opt out of the process. If the collector makes no attempt at verification, the consumer may still be at the mercy of subsequent collectors who will not be foreclosed by the collection attempts of the previous debt collector. If there is a statutory obligation to respond to the consumer, the debt collector will have little incentive to pursue questionable claims, and the consumer will have the satisfaction of knowing that he can get to the bottom of the matter sooner or later.

Finally, something must be done about the clarity of the validation notice. Debt collectors have displayed considerable talent in downplaying the notice through the use of small type and non-contrasting background, while using bold-faced type to highlight the collector’s demand for payment within a specified time. It may be useful to require the validation notice to be clear and conspicuous, but then the statute would have to define those terms. That is not an impossible task, for the FTC has defined the “clear and conspicuous” standard in various contexts. It would be particularly helpful if the statute prescribed the location of the notice, so that collectors cannot place it in a position that does not invite the consumer’s attention. The consumer should not have to look for the validation notice behind the page that lists the collector’s demands for payment. The notice should be up front, so that the consumer can have a good look at his statutory rights.

498. See 15 U.S.C. § 1692g(b). The collector must cease collection until he obtains verification. See id. The present language does not address the collector’s obligation to respond to the consumer, having put the collection mechanism in motion.


500. See, e.g., Geocities, No. C-3849, 1999 FTC LEXIS 17, at *14 (Feb. 5, 1999) (defining “clear(ly) and prominent(ly)” as a “type size and location that are not obscured by any distracting elements and are sufficiently noticeable for an ordinary consumer to read and comprehend, and in a typeface that contrasts with the background against which it appears.”).

501. Many of the cases that have dealt with the validation notice problem relate to the placement of the notice. See, e.g., Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991); Swanson v. Southern Or. Credit Serv., 869 F.2d 1222, 1225 (9th Cir. 1988); Riveria v. MAB Collections, Inc., 682 F. Supp. 174, 177 (W.D.N.Y. 1988).