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Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act

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RECAPTURING THE CONGRESSIONAL INTENT BEHIND THE FAIR DEBT COLLECTION PRACTICES ACT

I. INTRODUCTION

Scenario 1: Imagine coming home after a long day of work and hearing a phone call as you walk in. The caller ID lists an unknown number or an area code you do not recognize. You pick up the phone; it is the same debt collector who has called you the last three weeks, requesting payment of medical bills you incurred last year. Later that night, you search the internet for "Debt Help" and come across an advertisement claiming that "Collection companies can't legally collect if they can't prove it." Although you know that you do in fact legally owe the debt, you cannot help but wonder whether the advertisement you read really could put an end to the stress. You know what you are doing is not right, but you are dealing with a debt collector who you've never met and who is giving you no choice; so what's the big deal?

Scenario 2: Twenty-five years ago, you were hospitalized after a bad car accident. Unfortunately, after your release, you were unable to pay for the full cost of your visit. However, the hospital was a charitable organization and agreed to forgive the remaining debt. You have since forgotten about the debt and have planned your budget accordingly. Recently, you received a letter from a debt collector demanding the remainder of the balance. The letter informs you that you have the right to contest the debt, but the letter uses extremely harsh words, threatening legal action within ten days if you do not pay. Although you consider challenging the debt, you are afraid of the threatened legal action and decide to pay. You only find out later that the debt you just paid was never legally owed.

As Americans face a recession of unknown proportions,[1] largely due to consumers' involvement with risky mortgages and high credit-card bills,[2] the

1. Pedro Nicolaci da Costa, *Recession To Be Longer than Usual: UMich*, REUTERS, Feb. 8, 2008, http://www.reuters.com/article/idUSN0826726720080208. Not only do many fear that this is the worst recession our country has faced in a quarter of a century, some predict that conditions will get worse before they get better. Maura Reynolds & Peter Nicholas, *U.S. Says Recession Is Worst in 26 Years*, L.A. TIMES, Jan. 31, 2009, at A1, *available at* http://articles.sfgate.com/2009-01-31/news/17199199_1_white-house-robert-gibbs-wall-street.

2. Reynolds & Nicholas, *supra* note 1, at A1.

risk of large numbers of consumers defaulting on loans is a very real problem.[3] Struggling for any kind of cash flow,[4] businesses are forced to seek out collection agencies, which either collect money for the business at a percentage or who buy the debt for pennies on the dollar.[5] These collectors then become the legal holder of this debt.[6] Their actions are governed by the Fair Debt Collection Practices Act (FDCPA), a consumer protection statute passed by Congress in 1978 as a means to curb abusive collection activities.[7]

As the above examples illustrate, the consumer-credit industry faces a constant struggle between keeping its creditors able to extend lines of credit while protecting consumers from abusive and harassing demands for payment. The FDCPA, devised for the purpose of striking that balance,[8] comes up short in several ways. As a result, an onslaught of litigation has ensued, pitting the unwitting consumer against the often fair and honest collector. In the end, the losers are creditors, consumers, and the taxpayers who support our courts, suffering at the expense of consumer-advocacy attorneys.

As harmful as frivolous litigation can be to the collections industry, there are those collection agencies that do break the law in their collection efforts, often targeting minorities, the elderly[9] and poor consumers.[10] While the FDCPA does provide enforcement mechanisms against these agencies, the law stops short of solving the problem. By allowing creditors to assign their delinquent accounts to collectors whom they know will likely use unethical means to collect debt, the law provides little incentive for creditors to choose collectors which practice their trade honestly. Assigning a debt to an unethical collector is a win-win situation for the creditor, as they might collect more, face no penalties and will not have their company's name associated with abhorrent collection practices.

Part I of this note analyzes how large numbers of unwary consumers and honest debt collectors attempt to tread carefully in the modern debt collection-

3. Christine Cadena, *Fair Debt Collection: Facts Often Overlooked*, ASSOCIATED CONTENT, Jan. 17, 2007, http://www.associatedcontent.com/article/118259/fair_debt_collection_facts_often_overlooked.html (further stating that the average U.S. household is $7,200 in debt).

4. HEALTHCARE FIN. MGMT. ASS'N, CHOOSING THE RIGHT DEBT BUYER 7 (2008), *available at* http://www.hfma.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2317.

5. Abigail Curtis, *For Whom the Bell Tolls; Debt Collection Business Flourishes in Recessionary Economy*, BANGOR DAILY NEWS, Dec. 20, 2008, at C1.

6. *Id.*

7. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2006); S. REP. NO. 95-382 at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1966.

8. S. REP. NO. 95-382 at 3–4.

9. *See generally* Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America's Elderly Debtors*, 16 ELDER L.J. 135 (2008).

10. *See generally* Robert B. Chapman, *"Honest and Unfortunate" or Dishonest and Greedy? Discriminating Against the Discriminated-Against in Bankruptcy*, Presentation at the Annual Meeting of the the Law and Society Association (May 27, 2004).

industry. Part II introduces the history and relevant portions of the FDCPA and Congress' original intent. Part III discusses the important role the collections industry plays in our nation's economy, particularly in maintaining a lending environment. Part IV reveals that empirical evidence suggests consumers, when given the fair opportunity, fully intend to pay debts they incur. Part V discusses the problem of consumers who, disgruntled and uncertain about what debt they actually owe, too often give in to the temptation to seek a consumer-advocacy attorney to eliminate debt they actually owe. These attorneys exploit the vagueness of the FDCPA as well as portions which have not kept current with rapidly changing communications technology. Finally, Part VI argues that, by bringing the debtor into the process more effectively and by requiring collection agencies to offer settlements, more debtors will take responsibility for their debts and be less likely to seek frivolous lawsuits. In addition, it recommends the addition of a federal cause of action against original creditors who outsource their collections to negligent contractors as a means to preemptively stop abusive collection efforts and subsequent litigation. Lastly, it makes suggestions for amendments to the FDCPA in order to eliminate some of the frequently litigated technical issues raised by consumer advocacy attorneys.

II. BACKGROUND

Advocated by consumer groups, labor unions and organizations which represent debt collectors,[11] the FDCPA was passed in 1977 as an amendment to the Consumer Credit Protection Act.[12] The legislation's stated goal was to "protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors."[13] The need for this legislation was based on a study of third-party debt collection by the Banking and Consumer Affairs Subcommittee of Congress, which examined the growing business of third-party debt collection in the United States.[14] Such debt collection, which is vital to the health of the American economy, will be discussed below.[15] Essentially, Congress became concerned with the lack of regulation concerning this growing breed of debt

11. S. REP. NO. 95-382 at 2.

12. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692o (2006)). The Consumer Credit Protection Act was the first general federal consumer protection bill passed by Congress. Although its original purpose was to protect debtors by mandating full disclosure of the terms of loans, it failed to address the debt-collection end of the process. *Consumer Credit Protection Act*, The Free Dictionary by Farlex, http://legal-dictionary.thefreedictionary.com/Consumer+Credit+Protection+Act.

13. S. REP. NO. 95-382 at 1–2.

14. *Id.* at 2.

15. *See infra* Part III.

collectors.[16] State laws were largely seen as ineffective, as they often had difficulty regulating and punishing out-of-state, third-party debt collectors.[17] Also, as many as 13 states did not have debt collection laws at all, leaving 40% of the nation's population without protection.[18] The Consumer Credit Protection Act, the Act which the FDCPA amended,[19] was seen as too weak and did not specifically address third-party debt collection.[20] Many consumer-advocacy groups reported that collectors were sometimes abusive in their collection efforts, made false threats, used inappropriate language in telephone calls, threatened violence and collected debt that was no longer legally owed.[21] In addition, debt collecting lobbies argued that unethical debt collectors retained a competitive advantage over honest ones.[22]

A. Who the Act Applies To

The FDCPA only regulates the behavior of debt collectors, which has been determined to mean all third-party debt collectors.[23] The definition of "debt collector," as stated in the statute, is "any person 1) who uses any instrumentality of interstate commerce or the mails in any business, the principal purpose of which is the collection of debts, or 2) who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[24] Original creditors are explicitly excluded from this definition, except when a creditor 1) uses a pseudonym which suggests that a third-party collector is involved in the collection process or 2) obtains the debt after default for the purpose of collection.[25] In addition, the statute only applies to debt in connection with purchases for personal, family, or household purposes; it does not cover debts incurred in one's business.[26]

16. S. REP. NO. 95-382 at 2.

17. *Id.*

18. *Id.*

19. 15 U.S.C. §§ 1601–1693r (2006); S. REP. NO. 95-382 at 1; Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2006).

20. S. REP. NO. 95-382 at 2.

21. *Id.*

22. *Id.*

23. *Id.* at 3.

24. 15 U.S.C. § 1692a(6).

25. 15 U.S.C. § 1692a(4). Whether a creditor has used a name other than its own depends on whether the name used is sufficiently identified with the name used by the creditor in conducting the underlying transaction. Randolph Bragg, *The Fair Debt Collection Practices Act 15 U.S.C. 1692 ET SEQ.*, 1591 12TH ANN. CONSUMER FIN. SERVICES LITIG. INST. 437, 455 (2007).

26. 15 U.S.C. § 1692a(5).

B. Behavior Which Constitutes Violations of the Act

Many violations under the FDCPA deal with communication from the collector to the debtor. The statute defines a "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[27] Communications to the debtor may not be false, deceptive, or misleading.[28] The standard used to determine whether a collector's methods fall within this definition is the "least sophisticated consumer" standard.[29]

In a collection agency's attempt to make initial contact with the debtor, it must disclose clearly to the debtor that the communication is for the purpose of collecting a debt, and that any information obtained will be used for that purpose.[30] This is been referred to as the "Mini Miranda" warning and will be discussed in depth later in this comment.[31]

Within five days of the initial communication to a debtor, a collector is required to provide a debtor with a "validation notice," unless it has already been included in the first communication.[32] The law requires this notice to inform the debtor of the amount of the debt, the name of the creditor to whom the debt was originally owed, and a statement saying that the consumer has 30 days from receipt of the notice to dispute any or all of the debt.[33] The dispute of any debt must be sent to the collector in writing, upon which collection efforts must cease.[34] The debt collector must then obtain verification of the debt and send it to the consumer.[35] It is still unclear what words may or may not accompany the validation notice.[36]

In its communications with a debtor, a collector may not use any "unfair or unconscionable means in order to collect a debt."[37] This prohibits the collection of any amounts that have been illegally included in the debt total, including but not limited to collection charges, interest, services charges, late

27. 15 U.S.C. § 1692a(2).

28. 15 U.S.C. § 1692e.

29. Bragg, *supra* note 25, at 457. "This standard serves the dual purpose of protecting all consumers, including the inexperienced, the untrained and credulous, from deceptive debt collection practices and protecting debt collectors against liability for bizarre idiosyncratic consumer interpretations of collection materials." Essentially, the court will judge whether the collector has acted deceptively based upon what would deceive the least-sophisticated consumer.

30. 15 U.S.C. § 1692e(11).

31. *See infra* Parts V.A–C.

32. 15 U.S.C. § 1692g(a).

33. 15 U.S.C. § 1692g(a)(1)–(5).

34. 15 U.S.C. § 1692g(b).

35. 15 U.S.C. § 1692g(b).

36. Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV 762, 784 (2005).

37. 15 U.S.C. § 1692f.

fees, or bad-check handling charges.[38] These fees may be legally added to the debt if they were provisions of the service contract signed by the debtor and do not conflict with state law.[39]

Under the FDCPA, "any conduct, the natural consequence of which is to harass, oppress, or abuse any person in connection with a debt," is subject to civil damages.[40] This conduct includes unnecessary calls to third parties, multiple calls to consumers with the purpose of harassment, and abusive tactics, specifically the use of obscene, profane, or abusive language.[41] In addition, collectors may not communicate with a consumer at any time or place which is unusual or known to be inconvenient to the consumer, and they may not communicate with a debtor at his place of employment.[42] In addition, violation of the FDCPA is a strict liability offense; a claimant need not allege that a defendant purposely or negligently attempted to harass the consumer, and need only prove one violation to trigger penalties.[43]

C. Third Parties

In the interest of protecting the consumer's privacy, a debt collector may not communicate the details of a debt to any other person but the consumer.[44] A debt collector may, however, do so to find out the location of the alleged debtor.[45] Past cases have awarded damages to consumers when a collector accidentally called the wrong number with information about a debt, left a message for a debtor and somebody else overheard and when a collector inadvertently contacted a spouse.[46] In the same interests of privacy, the FDCPA has banned the use of postcards to communicate the presence of a debt.[47]

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38. STAFF COMMENTARY ON THE FAIR DEBT COLLECTION PRACTICES ACT, FEDERAL TRADE COMMISSION, § 808(1), http://www.ftc.gov/os/statutes/fdcpa/commentary.htm#808 [hereinafter FTC STAFF COMMENTARY].

39. *Id.*

40. 15 U.S.C. § 1692d.

41. FTC STAFF COMMENTARY, *supra* note 38, § 806; 15 U.S.C. § 1692d.

42. 15 U.S.C. § 1692c(a)(1), (3). The Staff Commentary of the FTC has determined that the hours in which a collector may contact a debtor are between the hours of 8 a.m. to 9 p.m. local time. FTC STAFF COMMENTARY, *supra* note 38, §805(a).

43. *See* Clomon v. Jackson, 988 F.2d 1314, 1322 (2d Cir. 1993) (holding that although it is in the court's discretion whether or not to award damages, the FDCPA is a strict-liability statute). *See also* Tolentino v. Friedman, 46 F.3d 645, 651 (7th Cir. 1995).

44. 15 U.S.C. § 1692c(b).

45. *See* 15 U.S.C. § 1692b.

46. Federal Trade Commission v. Check Enforcement, No. Civ.A. 03-2115, 2005 WL 1677480, at *8 (D.N.J. July 18, 2005) (holding that voicemail messages overheard by family that were intended for the debtor was a violation of the debtor's privacy and thus a violation of the FDCPA).

47. 15 U.S.C. § 1692b(4).

D. Damages

A debt collector who has violated *any* provision of the FDCPA is liable for actual damages.[48] These damages can include emotional distress, loss of income for missed work and other remedies.[49] In addition to actual damages, the consumer may be awarded "such additional damages as the court may allow, not exceeding $1000."[50] The statute lays out how a court should award such damages, as it must consider the "frequency and persistence of non-compliance by the debt collector, the nature of such non-compliance, and the extent to which the non-compliance was intentional."[51] However, it remains unclear what "not exceeding "$1000" exactly means.[52] Although the Sixth and Seventh Circuits have held that statutory award damages may not be made per violation but per case brought against the collector,[53] other Circuits disagree, and Congress has not responded by codifying one of these approaches.[54]

E. Attorneys' fees

If a consumer wins his or her case on the merits, he or she is entitled to an award of costs and reasonable attorneys' fees.[55] However, if the court determines that the consumer has brought a claim in bad faith, the collector may be awarded reasonable attorneys' fees.[56]

F. Underlying Premises of the Act

While the Banking and Consumer Affairs Subcommittee concluded that there was need for substantial federal legislation to regulate third-party debt collectors, it put forth two very important premises. Firstly, although the presence of unscrupulous debt collectors was a widespread problem that affected a large segment of the population, such bad actors were the exception to the rule.[57] Instead, most debt collectors were honest business men and

48. 15 U.S.C. § 1692k(a)(1).

49. Household Credit Services v. Driscol, 989 S.W.2d 72, 90 (Tex. App. 1998).

50. 15 U.S.C. § 1692k(a)(2). FTC STAFF COMMENTARY, *supra* note 38. These additional damages are equivalent to statutory damages.

51. 15 U.S.C. § 1692k(b)(1).

52. Bragg, *supra* note 25, at 483.

53. *Id.*

54. *Id.*

55. 15 U.S.C. § 1692k(a)(3).

56. *See generally* Csugi v. Monterey Fin. Serv., Inc., No. 3:95CV2140, 2001 WL 1841444, at *1 (D. Conn. Oct. 30, 2001) *as cited in* Bragg, *supra* note 25, at 487 n.310. All attorneys' fees are calculated using the lodestar method, which multiplies the number of hours reasonably expended by a reasonable hourly rate. *See* Laurie A. Lucas & Alvin C. Harrell, *2001 Update on the Federal Fair Debt Collection Practices Act*, 56 BUS. LAW. 1231, 1244 (2001) (citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)).

57. S. REP. NO. 95-382 at 2 (1977).

women, providing an important service in several sectors of the economy for small and large businesses alike.[58] Also, the concept of the ubiquity of the "deadbeat debtor," which is described as a consumer who purchases goods on credit with no intention of ever paying for them, was relatively misguided.[59]

III. THE DEBT COLLECTION INDUSTRY

As consumer-advocacy attorneys dig their feet in, ostensibly fighting for the interests of the consumer, they are winning more and more judgments against collection agencies.[60] While complaints to the Federal Trade Commission are on the rise,[61] debt collectors, honest and dishonest alike, face an onslaught of litigation.[62] At the time the FDCPA was passed, Senators Harrison Schmitt (R-New Mexico), Jake Garn (R-Utah) and John Tower (R-Texas) expressed concern regarding the availability of these civil remedies against debt collectors.[63] Specifically, they feared that increased regulation would have a drastic effect on small businesses, which would likely have a particularly hard time assigning delinquent debt.[64] In addition, they forewarned that the availability of credit to consumers would be drastically affected, especially during times of widespread credit crises.[65] In the end, they claimed, the consumer would be the loser, bearing the cost of these civil remedies through higher interest rates and an increased cost of goods.[66]

Unfortunately, the senators' predictions, in some ways, have come to fruition. To understand the effect of these frivolous claims, one must understand how collection agencies work and how important these businesses are to the U.S. economy.

A. The Importance of the Debt Collection Industry

When a business extends a line of credit to a consumer, they do so with the belief that the consumer will pay back all payments due, including interest. As

58. *Id.*

59. *Id.* at 3.

60. *See* A.D. Sanderson, *Pretrial Litigation in Consumer Advocacy*, 79 OKLA. BAR ASS'N 579, 579 (2008), *available at* http://www.okbar.org/obj/accesstojustice/2008/030808.htm.

61. *See* Jennifer Pirone & Lee Ferran, *Beware of Dirty Debt Collection Practices: Getting the Money at All Costs Causes Some Debt Collectors to Break the Law*, ABC NEWS ONLINE (Nov. 1, 2008), http://abcnews.go.com/GMA/story?id=6159203 (further stating that consumers feel as though collection agencies treat all debtors like deadbeats, which causes collectors to use intimidation and harassment to collect debt).

62. *Id.*

63. S. REP. NO. 95-382 at 9.

64. *Id.*

65. *Id.*

66. Rachel Witkowski, *SBA Loans Slammed by Credit Crunch*, JACKSONVILLE BUS. J., Jan. 21, 2009, 2009 WLNR 1169682.

soon as the consumer stops making payments, rendering the account delinquent, the business has a choice. Many large businesses have the resources to collect their bills in-house, and often find this more effective because consumers feel more obligated to pay the original creditor than third-party collectors. Small businesses, however, usually don't have the resources or manpower to collect these debts on their own.[67] At this juncture, businesses have a couple of choices. They can write off the debt entirely, deciding that their efforts to collect will not be cost effective. However, many companies choose to send these account receivables to collection agencies, whose actions are covered by the FDCPA.[68] A business may choose to either sell its debt off entirely to a debt buyer, sometimes for pennies on the dollar, or give a percentage payment to the collector.[69] This guaranteed source of income from aging and uncollectable account receivables gives creditors a fixed cash flow.[70] Additionally, some creditors feel more at ease conducting their business, knowing that if a substantial amount of debt goes unpaid, they will be able to rely on debt-buyers for quick cash.[71]

The amount of debt that is collected by third-party debt collectors is astounding. At the time of the passing of the FDCPA in 1978, $5 billion in debt was assigned for collection.[72] Since that time, the size of the industry has increased dramatically. The face value of all debt sold to debt buyers in 1993 was $1.3 billion.[73] By 1997, that number had grown to $15 billion and sales reached approximately $25 billion in 2000.[74] In 1992, there were five major debt buying companies in the United States.[75] By 1998, that number had grown to 225,[76] and by 2005 there were over 300.[77] In 2005, the 6,500 collection agencies operating in the United States, including debt buyers and percentage collectors, returned almost $40 billion back to businesses.[78]

67. Felicia A. Williams, *Small Business Uncollected Debts: How to Hire a Debt Collection Agency*, SUITE101.COM, Nov. 20, 2007, http://smallhomebusiness.suite101.com/article.cfm/small_business_uncollected_debts.

68. *See id.*

69. Christopher Palmeri, *Debt Collection Puts On a Suit*, BLOOMBERG BUSINESSWEEK, Nov. 14, 2005, http://www.businessweek.com/magazine/content/05_46/b3959128.htm (reporting that businesses can sell their debt for as low as 2 cents on the dollar and yield as much as 6 cents).

70. HEALTHCARE FIN. MGMT. ASS'N, *supra* note 4, at 7.

71. *Id.* at 8.

72. S. REP. NO. 95-382 at 2 (1977).

73. *Id.*

74. *Id.*

75. HERBERT A. ROSENTHAL, DEBT BUYERS ASS'N, COMMENTS OF THE DEBT BUYERS ASS'N (Oct. 9, 2001), http://www.ftc.gov/privacy/glbact/safeguard/dba.htm.

76. *Id.*

77. *Id.*

78. Ludwig, *supra* note 9, at 141; Robert M. Hunt, *Collecting Consumer Debts: The Challenges of Change*, BUS. REV., Second Quarter 2007, at 11, *available at*

The health care industry is heavily reliant upon collections. This industry has been hit hard by bad debt on top of already slim profit margins, sending health care providers scurrying for quick cash flow.[79] While many hospitals prefer to collect these account receivables themselves, this is becoming more complicated.[80] Many of these accounts first make their way through hospitals' in-house collection specialists, often with little success.[81] In addition, many hospitals report that they lack the resources to effectively manage the complexity and sheer number of accounts.[82] They find that selling aged receivables provides immediate cash flow, which is particularly important as economic times squeeze hospital budgets and resources.[83]

B. Exacerbation of the Problem by Recession

As America struggles through a recession, updating the FDCPA has become even more necessary in order to protect consumers, allow debt collectors to conduct their business, and keep businesses who depend on debt collectors viable. As experts predict that America's unemployment rate will climb to 9.5% by the end of 2010, its highest rate since 1983,[84] Americans will have less money to pay their debts with.[85] Thus, in times of economic struggles, the amount of bad debt companies must assign to collections increases.[86] The two leaders of this rising debt are credit card debt and medical debt.[87]

In addition, the recession has limited the number of financiers who are willing to extend lines of credit altogether. This has affected loans to small

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http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf.

79. HEALTHCARE FIN. MGMT. ASS'N, *supra* note 4, at 2. For example, the cost of a hospital stay has been outpacing inflation for years; the cost of staying in the hospital increased 13% annually from 1971–81. Judith R. Lave, *The Impact of the Medicare Prospective Payment System and Recommendations for Change*, 7 YALE J. ON REG. 499, 501 (1990).

80. HEALTHCARE FIN. MGMT. ASS'N, *supra* note 4, at 7.

81. *Id.* at 2.

82. *Id.* at 7.

83. *Id.*

84. Courtney Schlisserman, *Unemployment Benefit Rolls in U.S. Soar to Record*, BLOOMBERG NEWS, Jan. 29, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqc_bpAZTgqE.

85. Kate Murphy, *Pity the Debt Collector*, PORTFOLIO.COM, Jan. 27, 2009, http://www.portfolio.com/news-markets/top-5/2009/01/27/Trouble-for-Debt-Collectors.

86. *In Hard Times, Writing Off Bad Debt Is More than Likely*, THE SOUTHLAND TIMES, November 13, 2008, http://www.stuff.co.nz/southlandtimes/4760152a26783.html.

87. John D. Colombo, *Federal and State Tax Exemption Policy, Medical Debt and Healthcare for the Poor*, 51 ST. LOUIS U L.J. 433, 449–50 (2007); Hunt, *supra* note 78, at 7 (noting that as of 2005, 79% of debts collected by collection agencies was for credit-card loans).

business particularly, as many lenders avoid these sometimes risky investments.[88]

IV. WHEN GIVEN A FAIR OPPORTUNITY, DEBTORS WANT TO PAY DEBTS THEY LEGALLY OWE

In the world of debt collection, debate rages over who exactly is at fault for the large amount of delinquent account receivables sold by businesses every day.[89] Many in the collections industry believe that most delinquent debtors are dishonest people who attempt to evade their responsibility to pay back money that they owe.[90] The belief follows that even if they have the money to pay their debt, they would merely not pay by choice. Under this premise, debt collecting agencies often train their employees that the only way to collect debt from these "deadbeat" debtors is through the use of threats, harsh language, and mentions of impending legal action.[91] However, evidence suggests that when debt collectors engage in conduct that is abusive, it actually makes it less likely that the debtor will pay.[92] Some collection agencies, who determine that the debtor simply will never pay, make little or no attempt to contact the debtor, and instead opt for an effective yet expensive legal judgment against the debtor.[93] These judgments allow collectors to garnish the wages of debtors,[94] taking the debtor out of the process almost entirely. Other collectors use underhanded and manipulative means, such as convincing debtors that their unpaid debts can result in jail time or by asking for partial payment of the debt by check.[95] When the partial payment is sent, collection agencies can use the check's routing number to garnish bank accounts and wages of debtors without notification to the consumer.[96] Lastly, out of mistrust of the debtor,

88. Witkowski, *supra* note 66.

89. Andrew Leonard, *Dollars from Deadbeats*, SALON.COM, Sept. 10, 2007, http://www.salon.com/technology/how_the_world_works/2007/09/10/deadbeats. *See generally* Randall Kleinman, *Deadbeats: Can You Force Them to Pay?*, CBS MONEYWATCH.COM, Aug. 1998, http://findarticles.com/p/articles/mi_qa3615/is_199808/ai_n8809730; DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974) (author asserts that credit and collection industry created this image as a way to justify unconscionable means to collect debt).

90. Griffith, *supra* note 36, at 762–63.

91. *See id.* at 763.

92. Bragg, *supra* note 25, at 477.

93. Ludwig, *supra* note 9, at 141.

94. Cliff Mason, *Get Wise to Collection Agents' Dirty Tricks*, THESTREET.COM, Sept. 13, 2007, http://www.thestreet.com/story/10379280/1/get-wise-to-collection-agents-dirty-tricks.html.

95. *Id.*; *Woman Fights Back Against Bad Debt Collectors*, CBS NEWS PITTSBURGH, Jan. 22, 2009, http://kdka.com/consumer/credit.card.debt.2.915330.html [hereinafter *Woman Fights Back*].

96. *Woman Fights Back*, *supra* note 95.

collection agencies often reject a payment plan previously offered by the original creditor or will not offer settlements to the debtor.[97]

Unfortunately, Congress has recently passed legislation with this false premise in mind. Specifically, updates to bankruptcy code in 2005 were instituted largely due to hard lobbying from the consumer-credit industry, which framed the issue that *something had to be done* about the deadbeats of society who incur high credit card bills they never intend to pay.[98] This lobby insisted debtors would, instead of paying, wipe their record clean by filing for bankruptcy; as a result, it is now much more difficult to file for bankruptcy.[99]

Despite this persistent belief in the ubiquity of the "deadbeat debtor" in the collections industry, there is zero empirical evidence to support this premise.[100] In fact, at the outset of the creation of the FDCPA, Congress concluded that the vast majority of those who were in default did not incur charges without the intention of paying.[101] Congress thus believed that the passing of the FDCPA would not limit fair collection, as most debtors do strive to pay debts they legally owe when they are given the chance.[102]

Congress' finding was based on an extensive study of debtor psychology by sociologist Dr. David Caplovtiz.[103] This study examined the spending habits of several debtors from a cross-section of the community in order to determine whether the concept of the "deadbeat" was widespread or mythical.[104] After exhaustive research, Caplovitz determined that only 1.3% of Americans in debt had gotten there by making purchases they believed they would never pay for.[105] Instead, the vast majority of those in default suffered from some sort of unexpected misfortune out of their control.[106] The most common misfortunes suffered were adverse employment change, illness resulting in astronomical medical bills, or family problems.[107]

97. Pirone & Ferran, *supra* note 61.

98. Leonard, *supra* note 89 (stating that the bankruptcy reform of 2005 will result in a trend of higher debt collection numbers, as the law now makes it more difficult for consumers to eliminate their debt through declaring bankruptcy).

99. *Id.*

100. *Id.*

101. S. REP. NO. 95-382 at 3 (1977).

102. *Id.*

103. *See generally* CAPLOVITZ, *supra* note 89.

104. *See generally id.*

105. *Id.* at 5.58.

106. *See generally id.*

107. *Id.* at 5.1, 5.62, 5.70 (finding that the most common family problem resulting in substantial debt was divorce, usually exacerbated by excessive attorneys' fees).

V. ATTORNEYS' USE OF TECHNICAL VIOLATIONS OF THE FDCPA

When the FDCPA was passed in 1978, the collections industry was small and relatively unsophisticated.[108] Although many collectors practiced their trade honestly, the industry was plagued by stories of egregious collection methods. The modes of communication available to collection agencies were limited, making compliance with the FDCPA's rules straight-forward.[109] While the intentions of the creators of the FDCPA were to protect consumers and creditors alike, several outdated and unclear provisions of the law have made collections a very tricky and complicated process.[110] These provisions have allowed consumer-advocacy attorneys the opportunity to advertise to potential clients a dangerous proposition: "It doesn't matter whether you owe the debt; it only matters if they can prove it," and, "Not only will your debt be eliminated, but if collection companies make any minor mistakes, they will end up paying you!"

Essentially, in order to have their clients' legally owed debts eliminated, consumer attorneys bring a technical violation against the collector, forcing the collector to settle.[111] They are able to do this because attorneys usually take FDCPA claims on a contingent basis,[112] as it becomes easy to convince a potential client to pay no fee upfront in exchange for potentially lucrative

108. Shera Erskine, *Please Leave a Message After the Tone: How Florida Lawyers Should Approach the "Mini-Miranda" Warning Requirement of the Fair Debt Collection Practices Act*, 32 NOVA L. REV. 245, 246 (2007) (citing Cindy D. Salvo, *Technology and the Law (Debt Collection),* N.Y.L.J., Nov. 1, 2005, at 5.

109. *Id.*

110. *Id.*

111. Many consumer-advocacy attorneys are not subtle in their strategy of suing debt collectors for technical violations. For example, attorney Stephen M. Otto's law-firm website brazenly states, "[I]f a violation of the FDCPA is proven, the debt collector is liable. . . . Debt collectors, and some courts, sometimes refer to these violations as 'technical' and dismiss them as if they are not important. I take issue with this. They are *violations*. This is *strict liability*." Amy Good-Ashman, They Aren't "Technical Violations," It's Called STRICT LIABILITY," Abusivedebtcollection.com (March 24, 2008), http://www.abusivedebtcollection.com/2008/03/24/they-aren%E2%80%99t-%E2%80%9Ctechnical-violations%E2%80%9D-it%E2%80%99s-called-strict-liability. Another example is the Law Office of Mark Anthony Silverthorn, who in his attempt to retain consumer clients, boldly proclaims, "Many violations of the FDCPA are technical in nature. Some courts have ordered debt collectors to pay consumers thousands of dollars for mere technical violations, such as the failure to include required language on a collection letter. Debt collectors often find it more cost-effective to settle these claims for a few thousand dollars, rather than go to trial and spend several times this amount in legal fees." Mark Anthony Silverthorn Law Offices, Why a Debt Collector May Have to Pay *You* Money?, http://www.collection-calls.com/help-collection-agency.html (last visited August 9, 2010).

112. Lynn A. S. Araki, Comment, *Rx for Abusive Debt Collection Practices: Amend the FDCPA*, 17 U. HAW. L. REV. 69, 105–06 (1995) (finding that contingent-basis legal fees usually include little or no money up-front in exchange for an average of 33–40% of any recovery given to the attorney).

results.[113] In addition, the plaintiff will only be required to pay the defendant's attorneys fees if the court determines the claim was brought in bad faith.[114] As a consequence, a "cottage industry" of consumer-advocacy attorneys[115] has been very successful at exploiting the ambiguities in the law in order to coerce collection agencies to drop their legitimate claims.[116] These attorneys often threaten to sue if they are not paid a quick settlement, knowing the cost of defending an FDCPA claim can easily reach $10,000 or more.[117] Moreover, if the debtor prevails, the FDCPA requires the payment of attorneys' fees.[118] One attorney in El Paso, New Mexico claims that suing for admittedly minor violations has been big business, as his average settling price is about $7,500 plus a cessation of collection efforts.[119] Essentially, for a collection agency, it is more cost effective to pay a settlement and forgive a debt than take a chance and fight a case in court, as several collectors have lost in the past due to minor violations. As a result of these ambiguities, collection agencies are forced to charge businesses more in order to offset the risk of an FDCPA lawsuit.[120] Clearly, in order for the collections industry to survive, the law must be updated in order to allow honest collectors to perform their job effectively.

A. The FDCPA Has Not Kept Current with Changing Communications Technology

Several members of commercial advocacy groups bemoan the failure of Congress to update the FDCPA to keep current with technological changes in

113. *Id.* at 106.

114. One dissenting judge in this case angrily conjectured how the settlement negotiations likely proceeded between the plaintiff suing the collector under the FDCPA. Defendant: "Even though I do not believe you will prevail, I recognize your action was filed in good faith and, therefore, even if my client prevails on your claim, he will not be entitled to attorney fees. Therefore, *in order to reduce his obligation to me* for my attorney fees, my client hereby offers you the amount he believes you will receive even if you win." Plaintiff: "Ah, but if I prove even a technical violation, I will be entitled to attorney fees. . . . I believe it is possible that I can get more by going to trial so I reject your offer." Clayton v. Bryan, 753 So.2d 632, 635–36 (Fla. Dist. Ct. App. 2000) (Harris, J., dissenting) (emphasis added). *But see* Riddle & Assoc., P.C. v. Kelly, 414 F.3d 832 (7th Cir. 2005) (sanctioning a consumer-advocacy attorney for bringing a frivolous FDCPA claim).

115. Kenneth E. Rubinstein & Alexander G. Rheaume, *Courts, Congress Send Mixed Messages to Debt Collectors*, NEW HAMPSHIRE BUS. REV., July 27, 2007, http://www.allbusiness.com/legal/banking-law-credit-regulation/5845493-1.html.

116. *Id.*

117. *Id.*

118. *Id.*

119. Araki, *supra* note 112, at 17, 28.

120. Rubinstein & Rheaume, *supra* note 115.

communications.[121] While these groups had hoped that courts would fill such gaps with case law, several court decisions have placed collection agencies in a precarious position,[122] leaving many legitimate companies wondering how to comply with federal law.[123]

This issue stems from the "Mini-Miranda"[124] which requires:

> § 807: False or Misleading Representations
>
> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> . . .
>
> (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector.[125]

It was originally believed that "initial communication" did not include any contact in which the debt collector did not speak directly to the debtor and instead merely asked the debtor to call the collector back.[126] These communications include emails, voicemails and text messages. However, in *Hosseinzadeh v. M.R.S. Association.*, the court ruled that "while [voicemail] messages may not technically mention specific information about a debt or the nature of the call, Section 1692e(11) applies to the information conveyed "directly or indirectly."[127] This, of course, includes instances in which the debt collector has left some form of message for the debtor to call him or her

121. *Id.* COMMERCIAL LAW LEAGUE OF AM., WHITE PAPER OF THE COMMERCIAL LAW LEAGUE OF AMERICA 1 (May 2007), http://www.clla.org/clla_resources/position_papers.cfm?paper=48 [hereinafter WHITE PAPER]. Posting of Connie Prater to CreditCards.com Blog, *Debt collector calling . . . and e-mailing . . . and texting?*, http://blogs.creditcards.com/2008/02/debt-collector-calling-e-mailing-texting.php (Feb. 27, 2008).

122. Rubinstein & Rheaume, *supra* note 115. Erskine, *supra* note 108, at 247.

123. Rubinstein & Rheaume, *supra* note 115.

124. Fair Debt Collection Practices Act, 15 U.S.C. § 1692e(11) (2006). WHITE PAPER, *supra* note 121, at 2.

125. 15 U.S.C. § 1692e(11). (emphasis added).

126. According to the FTC Staff Commentary on the FDCPA, "[t]he term [communication] does not include situations in which the debt collector does not convey information regarding the debt, such as: [a] request to a third party for a consumer to return a telephone call to the debt collector, if the debt collector does not refer to the debt or the caller's status as (or affiliation with) a debt collector." WHITE PAPER, *supra* note 121, at 3.

127. Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp. 2d 1104, 1115–16 (C.D. Cal. 2005); *see also* Foti v. NCO Fin. Sys., 424 F. Supp. 2d 643 (S.D.N.Y. 2006).

back.[128] Other corroborating authority has suggested that even if the information does not specifically mention the debt owed it still prompts the debtor to call back the collections agency which means the definition of an "indirect communication" has been met.[129] Thus, a Mini-Miranda warning mentioning the debt, is required when leaving a message for a debtor.

It is hard to argue that the requirement of the Mini-Miranda warning is unfair to collectors. Without such a provision, collectors could find a loophole to avoid the disclosure requirement as well as other provisions of the FDCPA that relate only to "communications."[130]

However, the classification of a message left for the debtor as a "communication" under the FDCPA places collection agencies in an uncertain position. The FDCPA, out of concern for consumer privacy, requires collectors to refrain from communicating with third parties about a debtor's debt.[131] For example, the FDCPA has banned the use of postcards to communicate the presence of debt out of fear that a consumer's privacy will be breached.[132] While nondisclosure laws do protect consumer privacy, the law has not yet taken into account the possibility of instances where the collector does not initially speak to the debtor, but simply leaves a message. Courts have held that a Mini-Miranda warning left in a message does enough to alert third-parties about an outstanding debt to warrant civil remedies.[133] With new methods of communication, consumer-advocacy attorneys have several possibilities to make a case for a violation. If a debt collector leaves a voicemail message without a Mini-Miranda warning, they risk litigation under 15 U.S.C. §1692a(11). If the collector leaves a message that contains a Mini-Miranda warning, they risk claims of illegal disclosure if a third-party overhears the message or if the message is left on the wrong answering machine or voicemail pursuant to 15 U.S.C. §1692c.[134] Many collection agencies, out of fear of paying high civil damages, have stopped leaving messages altogether.[135]

128. *Hosseinzadeh*, 387 F. Supp. 2d at 1116.

129. *Id.* at 5–6.

130. Erskine, *supra* note 108, at 254.

131. Fair Debt Collection Practices Act , 15 U.S.C. § 1692c(b) (2006); Rubinstein & Rheaume, *supra* note 115.

132. 15 U.S.C. §1692f(7).

133. Rubinstein & Rheaume, *supra* note 115. For example, a message that sufficed to alert a third party of an outstanding debt was "Hello, this is Thomas Hunt. Please have an adult contact me regarding some rather important information. This is not a sales call, however, regulations prevent me from leaving more details. You will want to contact me at . . . as soon as possible. . . . Thank you." WHITE PAPER, *supra* note 121, at 4.

134. *See* WHITE PAPER, *supra* note 121, at 6, 12. *See supra* note 46 and accompanying text.

135. Rubinstein & Rheaume, *supra* note 115.

However, a complete cessation of leaving messages could have drastic consequences for the collections industry.[136] This will harm the collection rate of agencies, whose losses will be passed on to consumers who pay their bills on time.[137] Also, consumers could feel harassed[138] or uneasy about an unknown number that appears on their Caller ID but does not leave a message. This, logically, could lead to more consumers suing and leave collectors few options if they cannot communicate with consumers.[139] Lastly, and perhaps most importantly, this could preclude the possibility of working out a settlement,[140] because if a collector can never get in touch with a consumer, they may have to resort to obtaining a judgment in court. Several new and popular forms of media not only increase the likelihood of these types of suits, but open up the possibility of other potential violations that should be settled by Congress instead of needless litigation. In addition, by virtue of the FDCPA's status strict liability standard,[141] the debt collector runs the risk of falling into several traps without updated legislation.

B. Cellular Telephones

One risk debt collectors face is contacting debtors on cell phones. There is virtually no way of knowing whether the number provided by the debtor is a cell phone number.[142] Even if a debt collector is aware he or she is contacting a cell phone, millions of Americans have eliminated their landlines in favor of cell phones. In fact, one in four cell phone users does not have a landline at all.[143] And with the economy in recession, many predict that this growing trend will continue, as landlines are viewed by many as unnecessary expenditures.[144]

Without an update to the FDCPA, debt collectors face the possibility of fighting frivolous litigation, as the FDCPA's strict liability standard gives the honest collector little defense. Because cell phones usually accompany a

136. WHITE PAPER, *supra* note 121, at 12.

137. *Id.*

138. *Id.* at 13.

139. *Id.*

140. Rubinstein & Rheaume, *supra* note 115.

141. *See* Clark v. Capital Credit, 460 F.3d 1162, 1176 n.11 (9th Cir. 2006) ("'Congress took care to require an element of knowledge or intent in certain portions of the FDCPA where it deemed such a requirement necessary' further supports our conclusion that § 1692k(c) generally makes the FDCPA a strict liability statute."). *See also* Turner v. J.D.V.B., 330 F.3d 991, 995 (7th Cir. 2003).

142. WHITE PAPER, *supra* note 121, at 15.

143. David Ho, *Mobile Phone Is Primary Phone for Many*, THE ATLANTA JOURNAL-CONSTITUTION, Oct. 3, 2008, at 5G.

144. Daniel Gross, *Phones Without Homes: What's Really Killing the Land-line Phone Business*, NEWSWEEK, July 28, 2008, http://www.newsweek.com/id/149256; *see* Ho, *supra* note 143.

person during the day, there is a risk that a collector could inadvertently contact a consumer at an "unusual time or place"[145] or "at a place of employment."[146] In addition, the law is unclear whether a collector could face liability if he or she contacts a debtor in another time zone in which it is after 8 p.m. or before 7 a.m.[147] While these technicalities might seem trivial, they are likely sufficient for a consumer-advocacy attorney to drag an honest collector through needless litigation or extract a settlement with a substantial amount of attorneys' fees.

C Electronic Mail

Several issues concerning email confront collection agencies. Some collectors feel that communicating with debtors by email might be the best for both parties because it allows them a quick and easy way to communicate while empowering debtors with the choice of where and when to read the email or call the collector.[148] In fact, one study revealed that by a margin of four to one, debtors prefer to resolve their overdue accounts over email as opposed to answering a call from a collector.[149] The study further suggested that initial communication through email makes debtors more likely to agree to a settlement.[150]

As the law exists today, when a debtor is sent a letter via the U.S. Postal Service, it is assumed that the letter will be read only by the debtor; any third-party knowledge of the debt is not the fault of the collector.[151] However, it remains to be seen whether this same standard applies to email. What if an email is sent incorrectly, perhaps by errantly choosing "Reply to All?" In one case, a collector in England listed the names of 600 other debtors in a collections email.[152] As a spokeswoman from a consumer group said, "The

145. Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(a)(1) (2006).

146. If the debt collector knows that the debtor's employer does not allow such calls, the collector may also incur liability. *Id.* § 1692c(a)(3). Posting by Chandra to Texas Lawyer Blog, http://www.uslaw.com/library/Texas/Fair_Debt_Collection_Practices_Act_Complaints_Rise.php?item=100025 (April 1, 2008) (calls to work is the fourth-most-common complaint to the FTC regarding FDCPA violations).

147. WHITE PAPER, *supra* note 121, at 15; Prater, *supra* note 121.

148. Lisa Rogak, *Debt Collection Goes Virtual*, CREDITCARD.COM, Oct. 16, 2008, http://www.creditcards.com/credit-card-news/virtual-debt-collection-agents-1273.php.

149. *Id.* The report cited the fact that some consumers prefer the anonymity and privacy of handling collections over the Internet as opposed to over the telephone. *Id.* In addition, using email to collect a debt can be less confrontational. Using email can be a win-win situation because the debtor becomes empowered as to when and where he handles the issue, as opposed to a phone call. Prater, *supra* note 121.

150. Rogak, *supra* note 148.

151. 15 U.S.C. § 1692k(c); *see* WHITE PAPER, *supra* note 121, at 20.

152. *Bailiff Admits to Privacy Blunder*, BBC NEWS, Dec. 10, 2008, http://news.bbc.co.uk/2/hi/business/7775353.stm.

stories of careless handling of personal data are now a regular occurrence. This irresponsible disclosure of personal information is just another example.[153]

Another fear is the possibility that an employer, who possibly has the legal right to view employee's email,[154] might view a debt collection email. With many Americans mixing their work and personal email,[155] consumers might be concerned that employers could discover their outstanding debt, which could lead to possible termination or other issues at work. In addition, when a debtor receives an email, even if it is after work hours, there is always risk that the email could be received while the debtor is working late, creating a possible violation of the FDCPA by contacting the debtor during an "unusual time or place."[156]

D. SMS Text Messaging

In the last decade, Americans have grown increasingly accustomed to communicating via text message.[157] In 2003, 14 billion domestic texts were sent within the United States.[158] By the end of 2004, that number had reached 25 billion.[159] In just three years, that number has increased exponentially, as 28.8 million texts were sent in the month of June 2007 alone.[160]

With so many consumers accustomed to communicating through text messaging, collection agencies are finding text messaging to be a very

153. *Id.*

154. O'Conner v. Ortega, 480 U.S. 709 (1987) (holding warrantless searches of a government employee's desk and file cabinets is permissible under the 4th Amendment if it is reasonable in scope and if it is justified at its inception by a non-investigatory, work-related need or a reasonable suspicion of work-related misconduct). *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1335 (9th Cir. 1987) (holding that although employees have reasonable expectation of privacy in a private sector office, an employer reserves the right to search through "areas given over to his exclusive use" as long as the employee was previously notified.)

155. WHITE PAPER, *supra* note 121, at 19.

156. *See* 15 U.S.C. § 1692c(a)(1) ("[A] debt collector may not communicate with a consumer in connection with the collection of any debt . . . at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.").

157. *See* Eric J. Sinrod, *Exploding Growth in Mobile Messaging*, USATODAY.COM, Jan. 12, 2005, http://www.usatoday.com/tech/columnist/ericjsinrod/2005-01-12-sinrod_x.htm. Text messaging is a way to communicate from one mobile phone to another using Short Messaging Service (SMS). The typical text message allows 160 characters to be sent. Marguerite Reardon, *U.S. Text Usage Hits Record Despite Price Increases*, CNET NEWS, Sept. 10, 2008, http://news.cnet.com/8301-1035_3-10038634-94.html (quoting Sen. Herb Kohl).

158. Sinrod, *supra* note 157.

159. *Id.*

160. Reardon, *supra* note 157.

effective method of informing consumers they owe money.[161] Similar to email it gives the debtor more control and ownership over the process by allowing the debtor to call the collection agent back on his or her own time.[162] One agency in Johannesburg, South Africa, reports that since it started using text messaging to communicate with debtors, its collections have improved 20% in three months.[163] Another collection agency in London claims that texting produces a higher response rate than traditional methods of contact, increasing collection rates as much as 38% in some months.[164]

Similar to email, text messaging presents legal risks similar to those posed by email communications. Because most Americans carry their cell phones with them during the day, there is a risk that a collector could technically contact a debtor while they are at work, at any time of the day. In addition, text messages occasionally deliver hours later than they are sent, creating a risk that debtors could receive collection texts out of the permissible hours under the FDCPA.[165] Lastly, because text messaging to collect debt has yet to become popular in United States, the issue of whether a Mini-Miranda warning can fit into a text lingers.

Essentially, as many other forms of communication are seen as advantageous for both the consumer and the debtor, the FDCPA must be clarified in order to make these alternative forms of communication mainstream.[166]

E. Validation Notice

Another source of litigation under the FDCPA is the requirement of a "Validation Notice." The FDCPA requires that the initial communication to a debtor must contain a notice to the consumer that he or she is allowed to dispute the listed debt.[167] If the consumer chooses to dispute the debt, he or she must do so in writing, and upon receiving such notice, the collection agent must cease collection efforts until he or she is able to verify the debt.[168] However, much litigation has followed regarding the issue of whether the language accompanying the validation notice may express urgency and

161. Louise Bolotin, *Now It's Debt Collection—by Text*, THE OBSERVER (London), June 3, 2007, at 16, *available* at http://www.guardian.co.uk/money/2007/jun/03/creditanddebt.observer cashsection.

162. Rogak, *supra* note 148.

163. Iain Scott, *SMS Messaging 'Improves Debt Collection'*, ITWEB (South Africa), July 22, 2003, http://ww2.itweb.co.za/sections/business/2003/0307221107.asp?S=Business%20Applicatio ns&A=BAP&O=FRGN.

164. *See* Bolotin, *supra* note 161, at 16.

165. Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(a)(1) (2006).

166. Prater, *supra* note 121.

167. 15 U.S.C. § 1692g(a)(4).

168. *Id.* § 1692g(b).

excitement about the time within which the debt may be paid.[169] Many courts have noted that this has confused the consumer and eliminated the purpose of the validation notice altogether.[170] A consumer who has legitimate doubts about whether he or she actually owe a listed debt might be too afraid to contest it if the same collection letter warns that if they don't pay in ten days, their credit will be adversely affected. As one scholar put it, "One can hardly quarrel with the congressional intent to make the consumer fully aware of the salient aspects of the transaction, but the agony suffered by collectors and debtors alike in dealing with the validation section raises questions about the utility of the notice in its present form."[171]

While many collection agencies use forceful and harsh language in their initial communication, believing that such language is the only way a consumer will pay, it remains to be seen whether settlement tactics, at least initially, would be a more effective way to collect debt. At least one court felt comfortable requiring that the debt collector use non-demanding or threatening language alongside its validation notice.[172] In addition, while a plainly visible and clearly worded validation notice can inform consumers that they have the right to challenge their debt, it is still questionable whether the average consumer knows what to do next. As result of this minimal requirement, much consumer ignorance still exists about how to properly contest a debt. This issue particularly plagues older consumers, who are often confused about whether the debt actually exists, to what extent they are actually indebted, and what steps the collection agency is allowed to take.[173]

VI. AMEND THE FDCPA TO FULFILL ITS CONGRESSIONAL INTENT

As stated above, when Congress passed the FDCPA, its goal was not only to end harassment by unfair debt collectors, but also to protect the collections industry from unscrupulous and harassing collectors. Even though Congress understood the importance of the collections industry to the economy in 1978, it is unlikely that it imagined how important the industry would become. While the collections industry needs a fair chance to collect legally owed debts, they continue their efforts with the assumption that the majority of debtors with excessively delinquent accounts are "deadbeats" who never intend to pay. As empirical evidence suggests, this is far from the truth: the vast majority of consumers feel a responsibility to pay debts that they legally owe,

169. *See id.* § 1692g(a).
170. *Id*. at 846.
171. *Id.* at 845.
172. *See* Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991).
173. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 736 (2006).

especially to the original creditor.[174] This well-supported theory directly negates the current consumer credit industry's strategy, which justifies unnecessarily harsh and borderline illegal tactics to collect debts with the thought that these debtors are "deadbeats" who never intend to pay.[175]

While the notion of the deadbeat debtor has largely been debunked, consumer-advocacy attorneys continue to spoil the relationship between consumers and creditors, causing consumers to give in to their worst temptations of not paying debt they know they legally owe. By filing these frivolous lawsuits against collection agencies, sometimes for statutory fees and attorneys' fees that far exceed the debt owed, collection agencies are being forced to eliminate legally owed debt entirely.[176] However, many collection agencies are not innocent, as too many agencies take advantage of those who do not have the resources to protect themselves, threatening impossible remedies such as jail time.[177]

At least one scholar has suggested that the FDCPA should be amended to eliminate the remedy of attorneys' fees for the debtor, or at least make the standard much higher.[178] However, this solution would highly discourage those who do have legitimate claims against unscrupulous debt collector. However, this could cause consumers with particularly little debt, even if not legally owed, in a position to just pay the collector as their best option. What this suggestion does not take into account is that debtors who legally owe debts genuinely want to pay the money they legally owe. However, the combination of unscrupulous debt collectors as well as greedy consumer-advocacy attorneys interferes with this process.

Based upon these premises, there are several ways to protect collection agencies from frivolous lawsuits while allowing consumers the proper causes of action they need make legitimate claims against dishonest debt collectors.

A. Validation Notice and Settlement Offer

The FDCPA should be amended to require that the first communication sent to any debtor contain no demand for immediate payment. This eliminates the possibility of litigation regarding the language accompanying the demand for payment, limiting the number of technical violations available to consumer-advocacy attorneys. It also allows consumers legitimate concerns regarding the validity of a listed debt to contest their liability without fearing that lack of immediate payment will lead to a bad credit rating or worse. This communication should merely state that a debt is owed, list the amount owed,

174. *See supra* Part IV.
175. Goldberg, *supra* note 173, at 736.
176. *See supra* Part V.
177. *See supra* Part IV.
178. Araki, *supra* note 112, at 108.

explain the procedure for contesting a debt as well as listing the original creditor.[179]

In addition, the 1-877-FTC-Help hotline number must be included in the letter, with a notice that if a debtor is confused about the debt or wants to file a complaint, he or she may call the number toll-free.[180] This will allow uneducated consumers as well as minority and elderly debtors to inquire about the process of contesting a debt.

In addition, debt collectors should be required to initially offer a reasonable settlement in an amount lower than the full amount of money owed if the debtor falls into a particular income category. While the credit industry will likely argue that a deadbeat is a deadbeat and that attempts to negotiate or settle will do nothing, empirical evidence suggests otherwise. Instead of a collector attempting to seek blood from a turnip, as studies reveal that a vast majority of delinquent debtors are in fact those who aren't able to fully pay, collectors will likely have the advantage of wasting less money on collections while getting a portion of what they are owed if they initially offer a reasonable settlement.[181] In fact, there is some evidence to suggest that if a bill is set at a level that a debtor could reasonably expect to be able to pay, debtors are more likely to pay it.[182] In addition, all prior agreements that the original creditor had, including reduced payment plans, must be honored. Giving the debtor the opportunity to be involved in the process, instead of merely being told exactly what they owe, will have the effect of making the consumer pay quicker, taking away from the traditional view of the collector as a distant, unscrupulous entity. An informed consumer who has the ability to settle with a collection agency will be less likely to resort to the dishonest methods suggested by several consumer-advocacy attorneys.

Although the collections industry might argue that a mandatory settlement offer requirement for qualified debtors would substantially hurt its profit margin, it need not look further than the Internal Revenue Service's long

179. This is the Mini-Miranda warning.

180. FED. TRADE COMM'N, DEBT COLLECTION FAQS: A GUIDE FOR CONSUMERS (Feb. 2009), http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.shtm. This hotline, set up by the Federal Trade Commission, is for debtors to file complaints or ask questions. While some may argue that this would increase litigation by informing a consumer of his or her right to take action, this author believes that the presence of this number on every validation notice would make debt collectors much more cautious and ethical in their collection efforts.

181. Murphy, *supra* note 85 (evincing the theory that, especially in economic downturn, collectors are having a particularly difficult time collecting debts because people simply do not have the money to pay, resulting in much lower profit margins for debt collectors. Some collection agencies are even losing money. As stated by one CEO of Kaulklin Ginsberg, a consulting firm for the collection industry, "[y]ou can't get blood from a stone.").

182. *See* James Unland, *Letters to the Editor: Unfair Attack on Hospitals*, CHI. SUN-TIMES, Mar. 2, 2006, at 32.

awaited Offer in Compromise Program.[183] After years of the IRS struggling to collect back taxes from delinquent debtors, including using expansive collection tactics and obtaining expensive judgments, the IRS came to the conclusion that their efforts to collect from impoverished debtors were not cost effective.[184] Instead, the IRS began the Offer in Compromise Program, which allows qualified debtors to negotiate with the Service based upon ability to pay.[185] These settlements vary from lump sum payments to installment agreements.[186] The stated goal of the program is to "achieve collection of what is potentially collectable at the earliest possible time and at the least cost to the Government.[187] However, in order to qualify for an Offer in Compromise, the delinquent debtor is required to provide documentation, requiring the debtor to become active in the process.[188]

One category of qualified debtors is "Doubt as to Collectability," which is used when the IRS doubts that the debtor can actually pay the full debt before the statute of limitations has run.[189] This category would likely be the most acceptable to the collections industry, as it appears to be the most cost effective as determined by the IRS. In order to be eligible for this exception, a debtor would have to submit documentation proving the presence of a dire financial situation. Another category is "Effective Tax Administration," which says that although the debtor might be able to pay, making him pay would be "unfair" given his financial situation.[190] This would likely place too much strain on the collections industry, and thus should not be sufficient to mandate required settlement offers.

Similar proposals requiring debt collectors to offer reasonable payment and settlements to qualified debtors have been popular in the area of medical debt. For example, one proposal in the Illinois General Assembly suggested that in order for a hospital to receive or retain tax-exempt status, they must offer reasonable payment plans for less than cost to debtors who could not afford

183. 26 U.S.C. §§ 7122–7122f.

184. INTERNAL REVENUE SERV., IRS POLICY STATEMENT P-5-100 (Dec. 14, 2009), http://www.irs.gov/businesses/small/article/0,,id=111920,00.html [hereinafter IRS POLICY STATEMENT].

185. 26 U.S.C. § 7122; Pamela Yip, *A Kinder Uncle Sam: The IRS Backs Off Harsh Measures Against Taxpayers in Hardship*, THE DALLAS MORNING NEWS, Feb. 8, 2009, at 1D (stating that in this current financial crisis, the IRS has "taken steps to give [taxpayers] a break"; in addition, if taxpayers don't qualify for the offer in compromise, the IRS now offers increased flexibility).

186. 26 U.S.C. § 7122c(1)(A)–(B).

187. IRS POLICY STATEMENT, *supra* note 184.

188. *Id.*

189. 26 C.F.R. § 301.7122-1(b)(2) (2010). IRS Tax Relief, *IRS Offer in Compromise* (2005), http://www.taxoic.com/oic.php.

190. *Id.*

pay their bills.[191] Further, the proposed law set limits on the extent to which hospitals could sell their debts after they become delinquent.[192]

B. Amend FDCPA to Take Into Account Recent Communications Technology

In order to avoid inundating our nation's court dockets with claims alleging technical violations of the FDCPA, Congress should amend the FDCPA to specifically account for changes in communications technology. The FDCPA should be amended to overrule the decision in *Hosseinzadeh* and expressly state that messages left for consumers, whether by email, text message, or voicemail, are not "communications" under the FDCPA and thus do not require a Mini-Miranda warning. In order to be excluded from this definition, the message should only indicate the name of the caller, that the call concerns an adult matter and that the debtor should contact the person leaving the message as soon as possible. This innocuous request should not be considered a communication, as it does very little to directly or indirectly communicate the presence of a debt. As the FTC Commentary states, messages left for a debtor were never intended to be considered a "communication" within the definition of the statute.[193]

If a collector leaves a message similar to the one stated above, the FDCPA should be amended to explicitly state that this message is not sufficient to raise privacy concerns contemplated by 15 U.S.C. § 1692c(b). This should apply to emails and other methods of communication as well. This bright-line rule will save collectors from a lose-lose situation by allowing collectors to reach debtors by leaving a message without risking suit for breach of privacy. Allowing collectors the opportunity to leave messages for debtors is instrumental in creating a meaningful dialogue between the two parties. This will also solve the problem regarding communicating by text-messaging, as there will no longer be the requirement of a Mini-Miranda warning in text messages because they will not be considered "communications."

Concerning the issue of a collector reaching a debtor at an inappropriate time or place due to the use of cell phone, email or text message, the FDCPA should be amended to eliminate the strict liability nature of these violations. The use of email and text messaging is evolving into an effective and preferable way to collect debt for both the consumer and the collector. Unlike the telephone, which requires the debtor to speak to the collector at the time of the call, emails and text messages allow the debtor the opportunity to the call the debtor back on his or her own time, allowing the debtor to not let collection efforts affect his or her work.[194] A strict liability standard makes these means

191. 210 ILL. COMP. STAT. ANN. 88/30(a)(2) (LexisNexis 2009).

192. *Id.* at § 88/30(b).

193. WHITE PAPER, *supra* note 121, at 3.

194. *See supra* Part V.B–D.

of communication too risky for collectors, hurting the consumer and collector alike. In addition, the rising use of cell phones at the expense of landlines also puts the collector at risk of litigation because, in many cases, this is the only way to contact the debtor at all. As these mediums provide too many opportunities for claimants to allege technical violations of the FDCPA with a strict liability standard, the Act should be amended to require a claimant who alleges that collector has contacted him or her at an inconvenient time or place or at a place of employment[195] to prove that a collector acted at least negligently.[196] Thus, if a debtor informs a collection agency that they prefer not to be called at work, would rather not be text messaged, or do not want to handle their debt over email, any subsequent actions taken by the collector using these mediums could be considered violations. These changes should do much to eliminate many of the hyper-technical violations congesting our courts, while letting truly aggrieved consumers collect damages against truly negligent collectors.

In addition, the FDCPA should give the same presumption of privacy to email that it gives to collection efforts sent by U.S. Mail. However, this creates an issue of whether an employer may be able to discriminate against or fire an employee he or she knows to have a large amount of outstanding debts. Thus, Congress should amend the Consumer Credit Protection Act[197] to account for this problem. This Act, which protects employees from being fired due to wage garnishments, should logically be extended to prevent employers from discriminating against employees who have accumulated large amounts of debt.

C. Amend the FDCPA to Hold Original Creditors Liable for Negligent Hiring

While I have laid out the reasons why Congress should amend the FDCPA to limit *frivolous* litigation, adequate safeguards are still necessary to protect consumers from unscrupulous collectors. As stated before, the FDCPA does not consider in-house debt collectors to be "debt collectors" under the meaning of the statute.[198] Congress listed several reasons for this decision, including:

195. *See* Debt Collection Practices Act, 15 U.S.C. § 1692c (2006).

196. Although the standard would be raised from strict liability to negligence, the plaintiff would not be required to prove duty, breach, causation, and damages in the normal sense of common law negligence. It would only require that the plaintiff prove that the defendant collector failed to do something which a reasonably prudent person would do under like circumstances. For example, if a collector contacted a debtor at work after the debtor requested the collector not to, this would be negligent behavior.

197. Consumer Protection Credit Act, *supra* note 12 and accompanying text.

198. *See* Kizer v. Fin. Am. Credit Corp., 454 F. Supp. 937, 939 (N.D. Miss. 1978) (holding that "it clearly appears that the 'debt collectors' covered by DCPA are those who regularly collect debts for others and not creditors of consumers . . . ." Thus, when the defendant did not attempt

> "1) one-third of the states' debt collection laws regulate creditors; (2) because debt collectors usually work on accounts that are at least six months overdue, these accounts are usually difficult to collect and are more likely to result in the use of harsh collection tactics; 3) independent debt collectors are the primary source of egregious collection practices; (4) in-house collectors generally restrain themselves from engaging in abusive debt collection practices because of their desire to protect and maintain the goodwill of their customers; (5) creditors are usually larger and more stable than third-party debt collectors; and (6) existing Federal Trade Commission remedies and enforcement are sufficient to regulate in-house collection practices."[199]

While is it safe to assume that in-house collectors are tempered in their efforts to collect debt in fear of alienating customers, the same cannot said for the next step in the collections process: assigning or selling the debt to a third-party collection agent. Assigning this debt allows the creditor the freedom to purportedly get higher returns on delinquent account receivables while turning a blind eye to dirty collection practices.[200] This allows the creditor anonymity and avoids customers' ill will. The FDCPA has made a half-hearted response to this problem by making it illegal for original creditors to use pseudonyms when attempting to collect a debt in order to give the appearance to the consumer that a third-party collector has intervened.[201]

While some leaders in the healthcare industry advise their members to perform a reasonable investigation to assure that the collectors they outsource to are ethical,[202] it remains to be seen whether this protocol is widely practiced. Additionally, it can also be argued that when creditors do assign their debts, it is not difficult to ascertain whether the collector is ethical or not.[203]

With this in mind, Congress should amend the FDCPA to create a federal cause of action allowing for direct liability against creditors who negligently

to collect debts owed to another it was held not to be a "debt collector.); Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors . . . .").

199. Araki, *supra* note 112, at 81−82.

200. One scholar suggests that by allowing a creditor to assign its debts to immune collectors, this could increase the likelihood of unethical debt collection. *See* Derek S. Burrell, *The Federal Fair Debt Collection Practices Act: An Overview RX for Debt Collection Myopia*, 21 S. ILL. U. L.J. 1 (1996).

201. Debt Collection Practices Act, 15 U.S.C. §1692a(6) (2006). *See also* Castro v. Revere Collection Agency, No. 90-5684, 1991 WL 147529, at *2 n.3−4 (E.D. Pa. July 25, 1991) (rejecting the theory that the collection agency was an agent of the original creditorbecause the pseudonym exception "strengthens the argument that creditors generally are not covered by the Act; if they were, such an exception extending liability to a narrow group of creditors would not be necessary." Thus, "the language of a federal statute need not explicitly address the concept of agency in order to displace common law agency rules.").

202. *See generally* HEALTHCARE FIN. MGMT. ASS'N, *supra* note 4.

203. *See* Colo. Capital v. Owens, 227 F.R.D. 181, 189 (E.D.N.Y. 2005).

hire collection firms that are abusive and harassing to consumers. For good reason, many courts have thrown out the possibility of holding original creditors vicariously liable for the torts of their collectors largely due to the lack of an agency relationship.[204] It would be unfair to hold a creditor strictly liable for the torts of a collection agency[205] when they do not have any control over the methods the agency uses.[206] Instead, holding a creditor liable as the employer of an independent contractor and thus requiring a creditor to use due diligence in choosing collectors is a more appropriate standard.[207]

Claims for negligent hiring of collection agencies have experienced at least some success.[208] In *Colorado Capital v. Owens*,[209] the U.S. District Court of New York denied defendant Providian's motion to dismiss a claim that, as an

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204. *See id.* at 188; RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 1, 2000) ("Agency is the fiduciary relationship that arises when one person (the 'principal') manifests consent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent consents so to act.").

205. However, at least some cases have addressed the possibility of assigning liability to the creditor for the actions of its debt collectors. *E.g.,* Sonmore v. Checkrite Recovery Servs., Inc., No. 99CIV2039DDAFLN, 2000 WL 34494811 at *8 (D. Minn. Oct. 25, 2000) (holding that a creditor can be held vicariously liable for the conduct of an attorney whom it hires to collect a debt).

206. RESTATEMENT (SECOND) OF TORTS § 308 (1965) ("It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.").

207. *See Colo. Capital*, 227 F.R.D. at 189. RESTATEMENT (SECOND) OF AGENCY § 2 (1958) ("An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."). RESTATEMENT (SECOND) OF TORTS § 307 (1965) ("It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others."). RESTATEMENT (SECOND) OF TORTS § 307 cmt. b (1965) ("On the other hand, there are certain relations, of which that of master and servant is an instance, in which the actor may be required to take reasonable care to ascertain by inspection the actual character of a thing turned over to him by even a careful person or bought of a reputable manufacturer.").

208. *See* Freeman v. CAC Fin., Inc., No. 3:04 CV 981 WS, 2006 WL 925609, at *3 (S.D. Miss. Mar. 31, 2006) (holding that if the employer of an independent contractor "knows or should have known of an employee's propensity for misbehavior, then the employer may be held liable for negligent hiring." Thus, if the plaintiffs can show that the original creditor knew how the collection agent was conducting itself, there may be a finding of liability.) (citing Jones v. Toy, 476 So.2d 30, 31 (Miss. 1985)).

209. *See Colo. Capital*, 227 F.R.D. at 190; Castro v. Revere Collection Agency, No. 90-5684 1991, WL 147529, at *1 (E.D. Pa. July 25, 1991) ("The text of the [FDCPA], legislative history, and case law lead inescapably to the conclusion that, with a limited exception not present in this case, the [FDCPA] is applicable only to debt collectors, not the creditors who hire them. Because Congress has made it clear that creditors are not generally covered by the Act, common law agency principles are inapplicable and may not be applied to impose liability on a creditor.").

original creditor, it was negligent when it hired an abusive third-party collection agency.

In this case, the plaintiff was subject to unfair and abusive collection practices in his attempt to contest a debt.[210] The debt was originally owed to Providian, a bank that extends lines of credit through credit cards.[211] The plaintiff alleged common law negligence, asserting that defendant had a duty of care under New York common law to exercise care in selecting, instructing and supervising debt collection firms it hired.[212] The defendant argued that creditors do not owe a duty of care because there is no agency relationship between a creditor and a debt collector. However, the plaintiff argued in the alternative that the defendant hired the collection agency as an independent contractor and was thus subject to direct liability.[213]

On the issue of agency, the court agreed with defendant, holding that the defendant's lack of control over the debt collector eliminated the possibility of an agency relationship.[214] However, on the issue of whether the defendant and the debt collector shared a relationship of employer-independent contractor, respectively, at least for a motion to dismiss, the court agreed with the plaintiff.[215] The court stated that although pertinent state common law holds that employers cannot be held directly liable for torts associated with their independent contractor, there is an exception for the negligence of the employer in selecting, instructing, or supervising the contractor.[216] This exception is a form of direct liability because it concerns the employer's liability for its own actions or omissions rather than vicarious liability for the acts or omissions of its contractor.[217] Thus, if the plaintiff can prove the elements of negligence, he or she can succeed on this claim.[218]

210. *Colo. Capital*, 227 F.R.D. at 187.

211. *Id.* at 187–88. Providian Financial Corporation is a leading provider of credit cards to mainstream American consumers" and was recently purchased by Washington Mutual. *Providian Financial Shareholders Approve Merger with Washington Mutual*, BUS. WIRE, Aug. 31, 2005, at 1, *available at* http://findarticles.com/p/articles/mi_m0EIN/is_2005_August_31/ai_n14939765.

212. *Colo. Capital*, 227 F.R.D. at 188.

213. *Id.*

214. *But see* Household Credit Servs., Inc. v. Driscol, 989 S.W.2d 72, 86 (Tex. Ct. App. 1998) (holding that because the original creditor maintained sufficient control over the debt collector, the original creditor could be held vicariously liable for the torts of its agent. Such control included requiring the collector to activate accounts received within 48 hours, send three letters within the first 60 days, and conduct a supervisory review for delinquent accounts.).

215. *Colo. Capital*, 227 F.R.D. at 188; *see also* A.W. Howe v. Reader's Digest Ass'n, Inc, 686 F. Supp. 461, 466–67 (S.D.N.Y. 1988).

216. *Colo. Capital*, 227 F.R.D. at 188.

217. *Id.*

218. *Id.*

After confirming the presence of an employer-independent contractor relationship, the court considered whether the defendant owed a duty of care to the plaintiff and whether Providian was truly the proximate cause of the damages suffered by the plaintiff.[219] The court held that because creditors owe a duty of reasonable care to their customers,[220] the defendant did indeed owe a duty to its customers.[221] Specifically, the court felt comfortable with the notion that creditors should be able to reasonably foresee that a debt collection firm they hire could possibly resort to impermissible or objectionable conduct to collect its debt.[222] As argued in the plaintiff's memorandum to the court, a creditor like Providian has substantial experience as a consumer lender as well as employing debt collection firms to collect delinquent accounts.[223] Because Providian was likely familiar with the business models of collection agencies, it either knew or should have known that there was a substantial risk that agencies were likely to be forced by financial pressures to violate the law.[224] Essentially, given most creditors' experience and knowledge of the debt collection industry's troubled history, hiring agencies which are known to use unethical means to collect money can be seen as prima facie negligent.[225] Thus, when a debtor makes such accusations against a creditor, the court must take certain factors into account when choosing a collector. These factors include how long the creditor has been in the business of assigning debts, what the reputation of the collector is, and the business model employed by the collector.[226]

As to the issue of whether a court could reasonably hold that a creditor proximately caused the damage, the court believed that an intervening act by a third-party does not necessarily break the causal connection between a defendant's negligence and a plaintiff's injury.[227] Instead, the plaintiffs need

219. *Id.* at 189–90.

220. Dubai Islamic Bank v. Citibank, N.A., 126 F. Supp. 2d 659, 667 (S.D.N.Y. 2000).

221. *Colo. Capital*, 227 F.R.D. at 189 (finding the imposition of duty (of the collector to the debtor) as good public policy, as it is entirely reasonable to expect credit card issuers to exercise due care in the selection of debt collection firms they hire to collect their debts. "[C]redit card issuers should not be able to escape liability if they hired a debt collection firm that used . . . torturous means to collect debt from their customers. . . . Thus, the imposition of a duty of care in this context furthers the legislative and societal judgment that unfair and harmful debt collection practices in this country are unacceptable.").

222. *Id.*

223. Owens Reply Affidavit to Rule 56.1 Statement of Providian Financial Corp. at 4−5, Colo. Capital v. Owens, 227 F.R.D. 181 (E.D.N.Y. 2005).

224. *Id.* at 5–6.

225. *Id.* at 6.

226. Thus, the law should require that creditors make a reasonable investigation into a collector's history before they assign debts.

227. *Colo. Capital*, 227 F.R.D. at 189−90 (citing Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666, 670 (N.Y. 1980)).

only prove that the damages caused by the collection agency were reasonably foreseeable by the original creditor.[228]

VII. CONCLUSION

While the Fair Debt Collection Practices Act has succeeded in several ways, a closer look at the legislation suggests that several changes need to be made in order to realize the Act's congressional intent. With the United States in a recession, now more than ever Congress must amend the FDCPA to eliminate frivolous lawsuits alleging technical violations of the Act. These lawsuits make it more difficult for lenders to extend lines of credit, make the job of debt collection harder than it has to be, and cause debtors to give in to their worst temptations of not paying debts they legally owe. These lawsuits strain the relationship between the debtor and collector, making settlement of debt a near impossibility. In order to preemptively stop these problems, Congress must create a federal cause of action allowing debtors to hold creditors liable for negligently hiring abusive collection agencies. The FDCPA also must be updated to account for changes in technology and must require collectors to initially offer settlements to those debtors who are truthfully unable to pay their full debt. Only then can the true intent of Congress, to protect consumers from unfair collection practices without imposing unnecessary restrictions on ethical debt collectors,[229] be fully realized.

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228. *See id.*

229. *See supra* Part II.

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