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ATTORNEY LIABILITY IN LIEN ENFORCEMENT: THE UNTAPPED POTENTIAL OF THE FDCPA

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I. Introduction

Debt is an American epidemic. The total sum of consumer debt in the United States (U.S.) is approximately $11.4 trillion dollars.[3] From 1985 to 2007, an average households' debt increased from roughly 60% of post-tax annual income to more than 125%.[4] During that same period, debt-to-income ratios nearly doubled. Furthermore, roughly 35% of all adults, more than 77 million Americans, hold debt that is delinquent and in collection.[5] As a result, debt collection companies have found a viable and rapidly expanding market in debt collection.[6] Currently, the debt-collecting industry employs nearly 500,000 people (debt purchasers) in the U.S. alone.[7] In a study conducted

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[3] Bill Fay, *Americans in Debt*, DEBT.ORG (Nov. 26, 2014) (estimate of mortgage debt, auto loans, credit cards, and student debt).
[4] FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 11 (2009).
[5] CAROLINE RATCLIFFE et al., URBAN INST., DELINQUENT DEBT IN AMERICA 7 (2014).
[6] According to the FTC, between 1977 and 2007, the third-party debt collection industry increased inflation-adjusted revenue by more than six hundred percent and increased industry jobs by more than four hundred percent. FED. TRADE COMM'N, *supra* note 4, at iv.
[7] *Id.* at 10.

by the Federal Trade Commission (FTC) between 2009 and 2012, nine of the largest buyers of defaulted debt on the secondary market acquired $143 billion in defaulted loans but paid only $6.5 billion for defaulted loan's acquisition.[8] This acquisition cost is equal to only four cents per dollar of defaulted debt.[9] It is debt purchaser's goal to collect as much of the remaining debt value as possible.

A significant problem for debt purchasers is that transactions are typically completed in bulk and without a meaningful review of each acquisition, such as determining the amount of the debt, circumstances surrounding the debt, and performance—or lack thereof—by the debtor. This has resulted in a flood of complaints about debt collectors to the FTC and Consumer Finance Protection Bureau (CFPB).

According to the 2014 CFPB Annual Report, in the last five months of 2013 the CFPB received more than 30,000 individual consumer complaints relating to unsavory debt collection activity.[10] Similarly, the FTC received more consumer complaints about the debt collection industry than any other.[11] The high rate of complaints results from the debt collection companys' failure to administer policies and procedures that comply with federal law. A pattern has emerged where entrepreneurs see an opportunity to quickly turn a profit by buying debt at a low price and either collecting on the defaulted debt or selling the the right to collect for a margin. This unsavory pattern has been accompanied by an increase in collection-related litigation.

Each year more attorneys turn to either debtor or creditor rights litigation to support their practice's income. The growth of debt collection litigation exceeds growth in all other matters of litigation.[12] Unlike other areas of litigation where attorneys are shielded from outside liability,

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[8] *Id.* at ii.
[9] FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY (2013).
[10] CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2014, 11 (2014).
[11] FED. TRADE COMM'N, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 4.
[12] By way of example, more than sixty percent of small claims court cases filed in 2005 in Massachusetts were filed by debt collectors. Beath Healy, Debtors' Hell: *A Court System Compromised*, THE BOSTON GLOBE (July 31, 2006) (last visited

attorneys who collect debt themselves may also be exposed to liability as debt collectors. It matters not whether the attorney in question is pursuing collection of credit card debt or lien-based debt, such as a foreclosure.[13] Therefore, it is incredibly important to understand the law surrounding collections and collections liability. Attorneys who regularly pursue collection activities through litigation to enforce a lien or other security instrument, such as a mortgage, must take steps to protect themselves from liability under the Fair Debt Collection Practices Act (FDCPA).[14] In recent years, the increase of liability paralleled the volume of lien-based debt collection litigation, such as foreclosure actions.[15]

This article will address the intersection of the FDCPA and attorney liability in relation to lien-based collection actions. It provides a selection of concerns and best practices for practitioners on both sides of the debt collection practice.[16] Part I provides a historical background of the FDCPA. Parts II and III explain what constitutes a debt and who is considered a debt collector within the Act. Part IV addresses the one statutory defense for violating the FDCPA. Lastly, Parts V, VI and VII address three of the most commonly violated sections of the FDCPA and explain the requirements of each section, common mistakes and methods for collectors to avoid liability.

As the article will show, debt collectors often do not respect and adhere to the FDCPA. At the same time, debtors and their counsel have failed to pursue FDCPA claims at a volume sufficient to create change within the debt collection industry. Ultimately, if consumer rights attorneys realize

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Nov. 26, 2014); *see also* Ameet Sachdev, *Debt Collectors Pushing to Get Their Day in Court*, CHICAGO TRIBUNE (June 8, 2008) (explaining that debt collection actions doubled in one calendar year).

[13] *See* Piper v. Portnoff Law Assocs., 396 F.3d 227 (3d Cir. 2005).

[14] Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*

[15] *See* RATCLIFFE, *supra* note 5.

[16] This article takes particular focus on the Third Circuit.

how prevalent FDCPA claims are and how simple they are to enforce, there is the potential for more than 77 billion dollars to be awarded to debtors.[17]

II. History and Purpose of the FDCPA

Federal consumer protection relating to the credit industry can be traced back to the 1968 Consumer Credit Protection Act, also known as the Truth in Lending Act (TILA).[18] The TILA revolutionized the relationship between debtor and creditor. It created transparency at the origination of loans by requiring disclosure of the terms and costs associated with certain consumer loans and lines of credit.[19] Over the following decade, it became clear that protecting consumers at the outset of credit origination was important, but not enough to prevent injury in post-loan closing collection activities.

Congress enacted the FDCPA in 1977 with the goal of combating the use of "abusive, deceptive, and unfair debt collection practices."[20] According to the drafters, "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[21] It is clear from the legislation that Congress sought not only to protect consumers with a national standard, but also to reward non-abusive collectors.[22] Thus, the statute protects honest debt collectors from competitive disadvantages brought on by unsavory debt collectors in the marketplace.[23]

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[17] Seventy-seven billion dollars assumes that, with seventy-seven million individual debtors having loans in default and many debtors having more than one account in delinquency, there are at least seventy-seven million claims, each of which is entitled to a $1,000 statutory fine plus court costs and counsel fees. *See* RATCLIFFE, *supra* note 5.

[18] Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, 82 Stat. 146.

[19] 15 U.S.C. §§ 1601-1667(f).

[20] *Id.*; 15 U.S.C. § 1692(a).

[21] *Id.*

[22] 15 U.S.C. § 1692(a)-(c).

[23] 15 U.S.C. § 1692(a)-(c), (e); *See* Owen v. I. C. Sys., Inc., 629 F.3d 1263 (11th Cir. 2011) (explaining that Congress identified a need to insure that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged).

As a remedial statute, the FDCPA is interpreted liberally to further the rights of the aggrieved debtor.[24] The congressional record accompanying passage of the FDCPA demonstrates that the drafters purposely used broad, general language to permit courts, "where appropriate, to proscribe other improper conduct which is not specifically addressed."[25] Generally, the FDCPA will be interpreted to favor the consumer debtor. Remedial aspects of the statute are demonstrated by imposing strict liability which does not require scienter. [26]

Congress drafted the FDCPA to provide for an award of actual damages, as well as a maximum statutory damage of $1,000 per violating debt collector.[27] To prevail on an FDCPA claim actual damages need not be established. A party merely needs to show that the creditor violated a single provision of 15 U.S.C. § 1692 *et seq*.[28] The statutory award further provides for legal fees and costs of suit.[29] By including a mandatory award of fees, Congress incentivizes attorneys to represent debtors on claims that carry a low monetary potential for statutory award. The FDCPA has been criticized for limiting damages to $1,000 per collector per action because the low ceiling can encourage collectors to make excessive violations of the FDCPA.[30] However, courts have held that where a debt collector commits a new violation of the FDCPA after resolution of a debtor's suit, a new cause of action accrues.[31]

The FDCPA is enforced two different ways. The FDCPA provides a private right of action for aggrieved consumers and a governmental enforcement provision through governmental

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[24] *See, e.g.*, Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir. 2006); Clark v. Capital Credit & Collection Servs., 460 F.3d 1162, 1176 (9th Cir. 2006); Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002); McDaniel v. South & Assocs., 325 F. Supp. 2d 1210 (D. Kan. 2004).
[25] S. REP. NO. 95-382, at 4 (1977).
[26] 15 U.S.C. § 1692 *et seq*.
[27] 15 U.S.C. § 1692(k).
[28] 15 U.S.C. § 1692 *et seq*.
[29] Lesher v. Law Offices of Mitchell N. Kay, 650 F.3d 993 (3d Cir. 2011); Savino v. Computer Credit, 164 F.3d 81 (2d Cir. 1998).
[30] *See* Barber v. Nat'l Revenue Corp., 932 F. Supp. 1153 (W.D. Wis. 1996).
[31] Goins v. JBC & Assocs., 352 F. Supp. 2d 262 (D. Conn. 2005).

agencies.[32] The primary agency with FDCPA oversight is the FTC; however, several other agencies have enforcement powers in more limited circumstances.[33] Unfortunately, the government's enforcement of the FDCPA has been unsuccessful because the number of private actions far exceeds the number of cases brought by the FTC. In fact, the FTC brought only 60 actions under the FDCPA over the course of 20 years,[34] a number that is disturbingly low considering that the FTC received more than 200,000 complaints about the debt collection industry in both 2012 and 2013.[35] These 60 actions do not even amount to one thousandth of a percentage point of all complaints received regarding the collections industry in 2012 and 2013.

These numbers demonstrate that the FDCPA is an extremely undervalued piece of legislation for debtors. One might speculate that the statute is not used with a frequency that pushes the debt collection industry to curb its unjust methods because the monetary incentive for debtors and their attorneys is too small. That said, with more and more debt collectors entering the industry annually, such companies must be prepared from day one to understand the FDCPA and develop internal procedures to ensure compliance with the Act.

III. What is a Debt?

Congress broadly 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."[36] This definition has been interpreted

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32 15 U.S.C. §§ 1692(k), (l)

33 FED. TRADE COMM'N, *supra* note 4, at 5. The other agencies with enforcement powers are the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Department of Transportation, and the Department of Agriculture.

34 *Id.* at 67.

35 CONSUMER FIN. PROT. BUREAU, *supra* note 10, at 17.

36 15 U.S.C. § 1692(a)(5).

broadly to include virtually any consumer obligation to pay money, such as back rent and common utility service bills.[37] An FDCPA debt need not arise out of a transaction extending credit.[38] The lone exception appears to be fines imposed by government entities. In other words, owed taxes and fines are not consumer debts.[39]

To establish a violation of FDCPA: (1) there must be a consumer, (2) there must be a consumer debt, (2) the person or entity enforcing the lien must fall within the FDCPA's definition of a "debt collector," a person who seeks to enforce a security interest is a debt collector,[40] and (3) the debt collector must have violated one of statute's provisions.[41] Following the majority of circuits, the Third Circuit holds that a debt collection occurs whenever legal action is taken to enforce a lien.[42] This interpretation is logical because a lien is a security interest in property that helps to ensure payment of a debt or other obligation.[43] That said, a majority of jurisdictions have considered judicial foreclosure involving a lingering deficiency judgment as a debt collection.[44]

As a common rule of thumb, if a debt can be described as consumer-oriented, it will be under the purview of the FDCPA. This kind of debt includes condominium fees and student loans, but excludes child support. Debt collectors should err on the side of caution and assume any collection action is an attempt to enforce a FDCPA debt.

IV. Who is a Debt Collector, and When is an Attorney Liable Under the FDCPA?

[37] *See* Romea v. Heiberger & Assocs., 163 F.3d 111, 116 (2d Cir. 1998) (holding that back rent is a consumer debt); Piper v. Portnoff Law Assocs., 396 F.3d 227, 232-33 (3d Cir. 2005) (holding that the use of public water utility created a consumer debt obligation).
[38] Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 401 (3d Cir. 2000).
[39] *See id.*; Gulley v. Markoff & Krasny, 664 F.3d 1073, 1075 (7th Cir. 2011).
[40] 15 U.S.C. § 1692(a)(6).
[41] Peter F. Barry, Esq., Partner, Barry & Helwig, LLC, FDCPA Boot Camp (2014).
[42] Crossley v. Lieberman, 868 F.2d 566 (3d. Cir. 1989); *Piper, supra* note 13.
[43] BLACK'S LAW DICTIONARY 1006 (9th ed. 2009).
[44] *See* McDaniel v. South & Assocs., 325 F. Supp. 2d 1210, 1217 (D. Kan. 2004) (distinguishing the collection of money from a consumer and the enforcement of an interest in real property).

The FDCPA distinguishes creditors and debt collectors with regard to liability. Under the FDCPA, a creditor is an entity that either originates debt or becomes the owner of a debt before it goes into default.[45] In contrast, a debt collector is an entity that engages in the business of collecting a debt that is owed to a different entity.[46] The definition of debt collector includes third party collection agencies, collection law firms and buyers of defaulted debt.[47] The term does not, however, include a loan servicer acting on behalf of the creditor prior to the date of default on the obligation.[48] A creditor is considered a debt collector only where the creditor pursues debt collection activities under a different name, thereby suggesting to the consumer that a third party is attempting to collect the debt.[49] The FDCPA only imposes liability upon debt collectors and many entities may be debt collectors with regard to a given debt without realizing it. As such, the most essential question for a collection entity to determine is whether the entity is a debt collector with regard to each respective debt in its portfolio.

The original 1977 draft of the FDCPA contained an express exemption for lawyers. The statute stated that the term "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client."[50] The original exemption was provided "on the basis that attorneys were only incidentally involved in debt collection activities."[51] That provision was repealed by Congress in 1986.[52] The Third Circuit Court of Appeals was at the forefront of federal courts, ruling that attorneys were debt collectors after 1986 under the FDCPA. In *Crossley v. Lieberman*, the court explained that:

> Data illustrated that by 1985, more lawyers were engaged in the debt collection industry than non-attorney debt collectors. Additionally, to procure clients, many

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45 15 U.S.C. § 1692a(4).
46 15 U.S.C. § 1692a(6).
47 FED. TRADE COMM'N, *supra* note 4, at 5.
48 15 U.S.C. § 1692a(6)(F).
49 15 U.S.C. § 1692a(6).
50 Fair Debt Collection Practices Act, tit. VIII, § 803, 91 Pub. L. No. 95-109, Stat. 875 (1977).
51 H.R. REP. NO. 99-405, at 9 (1985).
52 Pub. L. 99-361, 100 Stat. 768 (1986) (*amending* 15 U.S.C. § 1692a(6)).

> attorneys were advertising their exemption from the FDCPA as an advantage to creditors. Repeal of the exemption [required] attorneys to comport with the standards of conduct that is required of lay debt collectors.[53]

Thus, the repeal fulfilled the initial congressional goal of protecting consumers and protecting honest debt collectors from unfair competition by unjust competitors.

Nine years later, in *Heintz v. Jenkins*, the United States Supreme Court agreed with the Third Circuit, writing that "Congress intended that lawyers be subject to the Act whenever they meet the general 'debt collector' definition."[54] In that case, the Court concluded that the FDCPA applies to attorneys who "regularly engage in consumer-debt collection activity, even when that activity consists of litigation."[55] In determining whether a law firm regularly engages in debt collection activity, the Third Circuit has held that a firm consistently pursuing at least ten collection matters annually is a debt collector pursuant to 15 U.S.C. § 1692a(6).[56] This means that "debt collection services may be rendered 'regularly' even though these services may amount to a small fraction of the firm's total activity."[57]

Following *Heintz v. Jenkins*, attorneys representing clients in debt collection actions must take significant precautions to ensure that all actions taken are in compliance with the FDCPA. This becomes particularly important because often times the collection actions are being pursued under state law. There are times when state statutes relating to collection activities or litigation generally are inconsistent with the FDCPA. Attorneys must be aware that, under the Supremacy Clause of the U.S. Constitution, the FDCPA supersedes state statutes.[58]

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53 Crossley v. Lieberman, 868 F.2d 566, 569 (3d. Cir. 1989).
54 Heintz v. Jenkins, 514 U.S. 291, 295 (1995).
55 *Id.* at 299.
56 Silva v. Mid-Atlantic Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003).
57 *Id.* at 466 (quoting Schroyer v. Frankel, 197 F.3d 1170, 1174 (6th Cir. 1999)).
58 *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985); *Heintz*, 514 U.S. 291.

By way of example, New Jersey common law provides that an attorney is generally immune from liability to an adverse party arising out of litigation.[59] The classic example of common law litigation immunity occurs where an attorney files papers on behalf of his clients that contain false allegations of fact about the adversary. In this situation, where the attorney obtained the information from his client and had no reason to believe the information filed with the court to be false, the attorney is immune from claims such as defamation. The litigation privilege, however, does not apply to the FDCPA after *Heintz v. Jenkins*. As one federal court has explained, lawyers are liable under the FDCPA because, otherwise, collectors could evade the Act simply by hiring an attorney to do what the collector could not do itself.[60]

In light of the growing abundance of case law, any entity that is seeking to collect a debt should assume it is a debt collector for the purposes of the FDCPA, unless it was collecting payments on the debt before it went into default status. The industry has, in large part, divided itself into collectors and creditors as defined by the Act. This is a self-policing mechanism for collectors to avoid liability exposure.

V. There is Only One Defense Under the FDCPA, Collectors Must Plan In Advance if They Wish to Use it.

The FDCPA is a strict liability statute that imposes liability without proof of an intentional violation.[61] The United States Supreme Court has opined that a mistaken interpretation of the requirements of the FDCPA or lack of knowledge of the FDCPA altogether is not a defense to

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[59] *See* Erickson v. Marsh & McLennan Co., 117 N.J. 539 (1990); Hawkins v. Harris, 141 N.J. 207 (1995).
[60] Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987).
[61] Allen v. LaSalle Bank, 629 F.3d 364, 368 (3d Cir. 2011).

liability.[62] This interpretation follows the longstanding principle that unless a clear expression of congressional intent is provided, "ignorance of the law is no defense."[63]

Under the FDCPA, there is only one defense available to debt collectors. Commonly referred to as the "bona fide error defense," 15 U.S.C. § 1692k(c) provides the only loophole to evade liability. The defense itself is not often utilized because it requires the collector to admit having violated the FDCPA. The bona fide error defense is by no means a typical error defense and requires the creditor to demonstrate that the violation occurred despite having a system in place to prevent violations of the FDCPA. The applicable portion of the statute reads:

> (c) Intent. A debt collector may not be held liable in any action brought under this title [15 U.S.C. § 1692 et seq.] 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.[64]

It is the burden of the debt collector to establish that it has satisfied the strict requirements of 15 U.S.C. § 1692k(c). In order to prove the defense, a debt collector must establish "(1) the alleged violation was unintentional, (2) the alleged violation resulted from a bona fide error, and (3) the bona fide error occurred despite procedures designed to avoid such errors."[65] The first prong of the test is subjective and requires the fact finder to determine whether the debt collector's claim that the violation was unintentional is credible.[66] Contrast this with the second and third tests, which are objective and require a "factual inquiry into whether any precautions were actually implemented, and whether such precautions were reasonably adapted to avoid the specific error at issue."[67]

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[62] Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573 (2010). The position followed by the Supreme Court was advocated by the Federal Government as Amicus Curiae for Petitioner Jerman.

[63] United States v. Int'l Minerals & Chem. Co., 402 U.S. 558, 563 (1971); *See also* Torres v. Immigration and Naturalization Serv., 144 F.3d 472, 474 (7th Cir. 1998) ("Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the statute.")

[64] 15 U.S.C. § 1692k(c).

[65] Beck v. Maximus, Inc., 457 F.3d 291, 297-98 (3d Cir. 2006) (citing Johnson v. Riddle, 443 F.3d 723, 727-28 (10th Cir. 2006)); Kort v. Diversified Collection Servs., 394 F.3d 530, 537 (7th Cir. 2005).

[66] *See Johnson*, 443 F.3d at 728-29.

[67] Rush v. Portfolio Recovery Assocs., 977 F. Supp. 2d 414, 427 (D.N.J. 2014).

There is some latitude in what will constitute an appropriate system of procedures. Courts will use a "reasonableness standard" to determine if a debt collector's policies are substantial enough to satisfy the third prong of 15 U.S.C. § 1692k.[68] Because the standard is one of reasonableness, a court may require that the debt collector provide expert testimony to establish whether a given set of procedures is reasonable by industry standards.[69]

Although debt collectors cannot evade liability based upon a mistake of law, they can obtain additional safe-harbor if the debt collector can prove that their alleged violation of the FDCPA was an "act done or omitted in good faith in conformity with any advisory opinion of the FTC."[70] It is therefore recommended that any law practice engaging in debt collection activities maintain a file of FTC opinions relating to the FDCPA and consider these opinions in establishing policies and procedures that conform to 15 U.S.C. § 1692k.

VI. Common Violation 1: Debt Collectors are Prohibited from Communicating with a Debtor that is Represented by Counsel.

There is an express prohibition under 15 U.S.C. § 1692c on communication by a debt collector with a debtor who is represented by counsel. The applicable section provides that without prior consent of the debtor provided to the collector, or the express permission of a court, the collector is prohibited from direct communication with the consumer

> [I]f the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents....[71]

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[68] *Beck*, 457 F.3d at 299; *See also* *Rush*, 977 F. Supp. 2d at 427-28; *Kort*, 394 F.3d at 539.
[69] *See* Agostino v. Quest Diagnostics, Inc., 2011 U.S. Dist. LEXIS 127904 (D.N.J. Nov. 3, 2011) (denying summary judgment on a record devoid of any specificity regarding industry standards for policies to avoid FDCPA violations).
[70] 15 U.S.C. § 1692k(e).
[71] 15 U.S.C. § 1692c(a)(2).

This provision creates significant opportunity for debt collectors to violate the FDCPA. The FDCPA broadly defines "communication," as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[72] Thus, seemingly every letter and email sent to the debtor qualifies as a communication, whether it is a monthly mortgage statement, litigation document, or collection disclosure required under state law. In other words, once it is known that a debtor is represented by counsel, nearly every conceivable correspondence related to the debt must be sent to the representing attorney instead of the debtor to avoid liability.

A distinction between 15 U.S.C. § 1692c and the majority of other FDCPA provisions is 15 U.S.C. § 1692c requires actual knowledge by the debt collector that the debtor was represented by counsel at the time the violating communication was sent.[73] Determination of actual knowledge is a question fact to be determined through discovery. A failure to plead actual knowledge will not result in a motion to dismiss.[74] The Third Circuit has minimal case law on this provision of the FDCPA; however, the neighboring Second Circuit has explored the section at length.

In determining whether actual knowledge of representation exists, there is a growing sentiment that where the creditor is aware of representation, that knowledge *can* be imputed to the collector.[75] Courts that have reached this position have followed FTC commentary on the issue.[76] The likelihood that knowledge will be imputed is significant because "to allow a creditor to hire a debt collector after receiving actual knowledge that the consumer has retained legal representation

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[72] 15 U.S.C. § 1692a.
[73] *See* Burger v. Risk Mgmt. Alternatives, Inc., 94 F. Supp. 2d 291 (N.D.N.Y. 2000); Isham v. Gurstel, Staloch & Chargo, P.A., 738 F. Supp. 2d 986 (D. Ariz. 2010).
[74] *Burger*, 94 F. Supp. 2d 291; Powers v. Prof'l Credit Servs., 107 F. Supp. 2d 166 (N.D.N.Y. 2000).
[75] *Powers*, 107 F. Supp. 2d 166; Lorenz v. GE Capital Retail Bank, 944 F. Supp. 2d 220 (E.D.N.Y. 2013); Micare v. Foster & Garbus, 132 F. Supp. 2d 77, 80 (N.D.N.Y. 2001).
[76] Fed. Trade Comm'n Statements of General Policy or Interpretation, 53 Fed. Reg. 50,097, 50,110 (Dec. 13, 1998) (stating that "the creditor's knowledge that the consumer has an attorney is not automatically imputed to the debt collector").

for that debt and then withhold knowledge of this representation from the debt collector would blatantly circumvent the intent of the FDCPA."[77]

Debt collectors should develop policies and procedures sufficient to satisfy 15 U.S.C. § 1692k(c) to prevent the imputing of knowledge from the creditor they represent. As one federal court has explained:

> [A] debt collector wishing to defeat the purposes of the act could establish a practice of not seeking out information regarding the debtor's representation by counsel. Whenever a creditor discovered that a debtor was represented by counsel, it could transfer the file to a debt collector with such a practice and allow them to contact the debtors directly without fear of liability under the FDCPA. Therefore, under those circumstances, knowledge will be imputed to the debt collector. However, where the debt collector has a procedure in place by which it asks creditors whether the debtor is represented by counsel and the creditor withholds the information, either mistakenly or intentionally, the court cannot fairly impute the creditor's knowledge to the innocent debt collector.[78]

In practice, 15 U.S.C. § 1692c(a)(2) is a powerful tool for debtors because the collection industry simply does not adhere to the FDCPA's requirements. The provision will come into effect one of two ways: Either the debtor notifies the creditor/debt collector that he or she is represented by counsel or representation becomes apparent through ongoing debt collection litigation. In the litigation context, once a complaint is filed to commence the collection litigation, and an attorney representing the debtor files an answer to the complaint, all communications directed at the debtor must go through the attorney.

This means monthly loan statements demanding a reinstatement or payoff of the defaulted debt cannot be sent directly to the debtor. This also means that all notices related to the litigation must be sent directly to counsel, not the debt collector. Attorneys must be particularly careful when they interpret state statutes as requiring particular notices relating to litigation of debts to be sent directly to a *borrower*. As a general rule of federalism, where a state law is inconsistent with the

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[77] *Powers*, 107 F. Supp. 2d at 168.
[78] *Micare*, 132 F. Supp. 2d at 80.

FDCPA, the state law is deemed invalid to the extent of the inconsistency.[79] By way of example, a Massachusetts statute requiring debt collection attorneys to send a condominium owner/debtor a notice directly, was deemed invalid where the statute effectively required a violation of 15 U.S.C § 1692c(a)(2) whenever the owner/debtor was represented by counsel.[80]

In New Jersey, attorneys regularly send notices directly to debtors who are represented by counsel in the context of foreclosure debt collection actions. A common mistake is to interpret New Jersey's Fair Foreclosure Act as requiring attorneys to send notice directly to the represented debtors when they are preparing to file Applications for Final Judgment. By way of example, N.J.S.A. 2A:50-58a(1) provides that, at least 14 days prior to applying for final judgment of foreclosure, the lender must "provide the debtor with a notice" that includes information as to whom the debtor may contact to obtain an up-to-date reinstatement amount of the loan. The notice further advises that if the debtor believes he or she can reinstate the loan within 45 days, the debt collector will refrain from applying for final judgment.[81] The Fair Foreclosure Act does not specifically state that the notice must go directly to the debtor, yet attorney debt collectors often make the mistake of violating the FDCPA by directing the Fair Foreclosure Act notice directly to a debtor who is represented by counsel.

The Fair Foreclosure Act notice is almost always sent by the debt collection attorney on behalf of the lender. It is also a common practice to send the notice directly to the debtor and, in some cases, to his or her attorney as well. Every time a foreclosing attorney sends this notice or other communication relating to the collection of the debt directly to a represented debtor, it is a violation of the FDCPA, even if state practices suggest that sending the communication directly to the debtor is appropriate. In such circumstances, the attorney debt collector will not have a viable

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[79] *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); Maisonet v. N.J. Dep't of Human Servs., 140 N.J. 214, 221-22 (1995).
[80] McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1 (D. Mass. 2012).
[81] N.J.S.A. § 2A:50-58.

defense because knowledge of representation of counsel by the debtor cannot be denied where contested litigation has occurred.

Historically, debtors have not pursued the 15 U.S.C. § 1692c(a)(2) claim with regularity. That is the good news for debt collectors. To prevent liability, collectors must be aware of their exposure and move to establish procedures to (1) ensure that collectors ask the creditor and prior collectors of the debt if representation of counsel exists, and (2) follow the provisions of 15 U.S.C. § 1692c(a)(2) over state regulations when the two appear to be in conflict.

VII. Common Violation 2: Debt Collectors are Prohibited from making False or Misleading Representations.

Perhaps the broadest section of the FDCPA is 15 U.S.C. § 1692e which prohibits the use of false, deceptive, or misleading representations in connection with the collection of a debt. The provision is expansive in that it provides 16 specific categories or examples of violations but states that the list does not limit the general application of the section.[82] The implication is that additional, un-enumerated acts can be found by a court to be false, deceptive or misleading in violation of the provision.[83] The expansive approach of the section is bolstered by the language of subsection 10, which has been referred to as the "catch all" provision. Subsection 10 prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."[84]

[82] 15 U.S.C. § 1692e.
[83] Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993) (explaining that sixteen subsections of 15 U.S.C. § 1692e provide a non-exhaustive list of practices that fall within the statute's ban). Accordingly, debt collection practices may violate the Act even if not enumerated or even if the act does not fall within any of the subsections.
[84] 15 U.S.C. § 1692e(10).

As with other provisions of the FDCPA, violation of 15 U.S.C. § 1692e does not require the showing of intent for a collector to be liable.[85] Nor is there a requirement that the debtor have actually been misled or deceived by the representations of the collector. Instead, the FDCPA uses "the least sophisticated consumer" standard to determine if a violation has occurred.[86] The standard is intended to provide an objective bright line test.[87] The purpose of the test is to target collector conduct, rather than to place a burden on the debtor. It is a purposefully low standard. The Third Circuit has explained the standard as follows:

> The least sophisticated debtor standard requires more than simply examining whether particular language would deceive or mislead a reasonable debtor because a communication that would not deceive or mislead a reasonable debtor might still deceive or mislead the least sophisticated debtor. This lower standard comports with a basic purpose of the FDCPA: as previously stated, to protect all consumers, the gullible as well as the shrewd, the trusting as well as the suspicious, from abusive debt collection practices. However, while the least sophisticated debtor standard protects naive consumers, it also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.[88]

Most commentary by courts discuss the low threshold of the rule. Courts may set limits to the least sophisticated standard by reviewing the communication in question with an assumption that the consumer has used "a basic level of understanding, and a willingness to read with care."[89] Courts do not engage in a battle of interpretation of a communication wherein the debtor and collector each present the court with their understanding of the proper meaning of the communication because the statute does not use a reasonableness standard.[90]

Debt collectors need to take great care in drafting written communications and in training staff who communicate orally with debtors. The FTC has warned that a representation by a debt

85 Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000); Clark v. Capital Credit & Collection Servs., 460 F.3d 1162 (9th Cir. 2006); Frye v. Bowman, 193 F. Supp. 2d 1070 (S.D. Ind. 2002).
86 Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006); Caprio v. Healthcare Revenue Recovery Grp., 709 F.3d 142 (3d Cir. 2013); Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993); Jeter v. Credit Bureau, 760 F.2d 1168 (11th Cir. 1985).
87 Lewis v. ACB Bus. Servs., 135 F.3d 389 (6th Cir. 1998).
88 *Brown*, 464 F.3d at 454 (internal quotation marks and citations omitted).
89 *Caprio*, 709 F.3d at 149.
90 *Id.* at 151.

collector that the consumer owes an amount of money will violate 15 U.S.C. § 1692e if the collector does not have documentation to substantiate the claim. This is particularly troubling for attorneys who become collectors when they pursue debt litigation on behalf of clients without necessarily receiving all proofs that substantiate the claims prior to filing the action.[91] Beyond the aforementioned, the following circumstances have been deemed to violate 15 U.S.C. § 1692:

1. A communication that can be reasonably read to have two or more differing meanings, where one is inaccurate;[92]
2. A communication from a debt collector that is signed by the "legal department" which is a "false representation or implication that an[] individual is an attorney or that [the] communication is from an attorney;"[93]
3. A communication from a debt collector offering to "settle" a debt that is no longer enforceable in court due to a lapsed statute of limitations;[94]
4. A law firm acting as a debt collector pursuing a collection action on behalf of a client and demanding attorney fees where the debtor's contract did not provide for an award of counsel fees and, therefore, the law firm is seeking funds they are not entitled to under the debt contract;[95] and
5. A threat by a debt collector that legal action would be taken if the debtor does not provide payment where the collector has no intention of pursuing legal action, regardless of the debtor's continued non-payment.[96]

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91 FED. TRADE COMM'N, *supra* note 4, at 24.
92 *Caprio*, 709 F.3d 142; Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003).
93 Rosenau v. Unifund Corp., 539 F.3d 218 (3d Cir. 2008); Lesher v. Law Offices of Mitchell N. Kay, 650 F.3d 993 (3d Cir. 2011).
94 McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480 (M.D. Ala. 1987); Goins v. JBC & Assocs., 352 F. Supp. 2d 262 (D. Conn. 2005). *But see* Shorty v. Capital One Bank, 90 F. Supp. 2d 1330 (D.N.M. 2000).
95 *See* Scioli v. Goldman & Warshaw P.C., 651 F. Supp. 2d 273 (D.N.J. 2009).
96 Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006); United States v. Nat'l Fin. Servs., 98 F.3d 131 (4th Cir. 1996); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va. 1997).

An interesting aspect of 15 U.S.C. § 1692e is that the statute can be violated without communications being sent directly to the debtor. The Third Circuit Court of Appeals has determined that communications from an attorney debt collector to counsel for the debtor can give rise to an FDCPA claim.[97] In *Allen v. LaSalle Bank*, the court wrote that, "[u]nquestionably, the scope of the FDCPA is broad. Indeed, §1692f(1) prohibits 'unfair or unconscionable means,' regardless of the person to whom the communication was directed. The FDCPA similarly defines a 'communication' expansively. A communication to a consumer attorney is undoubtedly an indirect communication to the consumer."[98] Therefore, if a debt collector complies with 15 U.S.C. § 1692c by communicating with counsel instead of the debtor, violations can still occur if communications to the debtor's attorney contain any language that is false, deceptive or otherwise violates 15 U.S.C. § 1692e.

Congress drafted 15 U.S.C. § 1692e to be extremely broad and collectors must take an abundance of caution to implement policies and procedures to prevent violations. The provisions of 15 U.S.C. § 1692e provide debtors with a substantial opportunity to obtain relief from collectors, particularly because the debtor need not actually be deceived under the least sophisticated consumer standard. For debtors and their attorneys, 15 U.S.C. § 1692e is truly the low hanging fruit of the statute. Collectors are almost always pursing collections on behalf of a different entity and, like the child's game of "telephone," the further one gets from the source, the more likely it is that the information will be inaccurate.

VIII. Common Violation 3: Debt Collectors are Obligated to Make Certain Disclosures to the Debtor Within 5 days of the Debt Collector's Initial Correspondence with the Debtor.

[97] Allen v. LaSalle Bank, 629 F.3d 364 (3d Cir. 2011).
[98] *Id.* at 368.

The FDCPA requires that debt collectors comply with specific disclosure obligations, including an obligation to inform the consumer debtor whose debts they seek to collect.[99] Under 15 U.S.C. § 1692g(a), within five days after the initial communication with a consumer in connection with the collection of a debt, the debt collector is obligated to send the debtor written notice containing "the name of the creditor to whom the debt is owed."[100] The disclosure must also provide the debtor with "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."[101] This disclosure must also advise the debtor 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."[102]

While the most obvious violation of the provision is the failure to issue a 15 U.S.C. § 1692g notice, the majority of case law addresses more nuanced violations. The Third Circuit has explained that merely providing the debtor with the required statutory language does not satisfy 15 U.S.C. § 1692g unless the information is conveyed in an effective manner.[103] As with other provisions of the FDCPA, the actual notice will be reviewed under the least sophisticated debtor standard.[104] Any communication issued to satisfy 15 U.S.C. § 1692g will not comply with the FDCPA if the letter leaves any room for the least sophisticated debtor to be confused as to their rights.[105] Stated another way, if the § 1692g initial disclosure is overshadowed by, or contradicted by, other information

[99] DeSantis v. Computer Credit, Inc., 269 F.3d 159, 161 (2d Cir. 2001).
[100] 15 U.S.C. § 1692g(a).
[101] 15 U.S.C. § 1692g(a)(3).
[102] 15 U.S.C. § 1692g(a)(4).
[103] Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000).
[104] *E.g.*, *id.*; Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998); United States v. Nat'l Fin. Servs., 98 F.3d 131 (4th Cir. 1996).
[105] Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).

provided in the same communication, the communication will be issued in violation of, rather than satisfaction of, the FDCPA.[106]

Where the homeowner does not take advantage of the right to dispute a debt, 15 U.S.C. § 1692g(c) makes clear that it is not an admission of liability.[107] The Second Circuit Court of Appeals has explained that because a debtor may not know of the right to request a verification of a debt, the FDCPA requires the collector to advise the consumer of that right.[108]

Circuit courts across the country have routinely enforced the rule as drafted. A failure to issue the notice within five days following the initial communication of any debt collector to the consumer will result in a violation.[109] That said, some jurisdictions have held that the FDCPA does not require the collector to prove that the debtor actually received the 15 U.S.C. § 1692g disclosure. In those jurisdictions, the fact that it was sent by mail is sufficient to satisfy the requirement.[110]

Like the rest of the FDCPA, 15 U.S.C. § 1692g applies to all debt collectors, including attorneys. The only communication that is excluded from being an "initial communication" that triggers the disclosure requirement is a formal pleading in litigation.[111] Thus, for an attorney debt collector, it is likely that the initial communication will be triggered by other correspondence, such as discovery demands within litigation. As a rule of thumb, any debt collector should simply provide all information outlined in 15 U.S.C. § 1692g(a) within the initial communication to avoid having to struggle thereafter to satisfy the five day disclosure requirement.

IX. CONCLUSION

[106] *Nat'l Fin. Servs.*, 98 F.3d 131; Ellis v. Solomon & Solomon, P.C., 591 F.3d 130 (2d Cir. 2010).
[107] Jacobson v. Healthcare Fin. Servs., 516 F.3d 85, 89-90 (2d Cir. 2008).
[108] *Id.* at 90.
[109] *See* Douyon v. NY Med. Health Care, P.C., 894 F. Supp. 2d 245 (E.D.N.Y. 2012), *modified by* No. 10-3983, 2014 U.S. Dist. LEXIS 142671 (E.D.N.Y. Sept. 30, 2014); Riggs v. Prober & Raphael, 681 F.3d 1097, 1099 (9th Cir. 2012); *Jacobson*, 516 F.3d at 90.
[110] Mahon v. Credit Bureau, Inc., 171 F.3d 1197 (9th Cir. 1999); Antoine v. J.P. Morgan Chase Bank, 757 F. Supp. 2d 19 (D.D.C. 2010).
[111] 15 U.S.C. § 1692g(d).

The Fair Debt Collection Practices Act is an underutilized and undervalued statute. One need only refer to a national newspaper to find, on any given day, at least one article relating to unjust activity within the collections industry. With consumer debt at an all-time high and the American public still climbing out of the great recession, there are an abundance of FDCPA violations that go unenforced with each passing day. This should be a great concern to anyone engaged in the collections industry. The juxtaposition is that debtors and consumer attorneys have been missing an opportunity to pursue the rights granted by Congress under the FDCPA.

The FDCPA continues to be a self-policing statute in the civil litigation context. Federal agencies with enforcement power have made clear that they will remain on the sidelines and allow the collections industry to remain operating in the shadows of the law. The potential threat for a call to arms among debtors is very real. When it happens, the collections industry will be changed forever as the monetary incentive to pursue collections activity is greatly reduced by the threat of strict liability monetary awards, including lofty counsel fees.