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I. INTRODUCTION

Debt collectors have an unenviable task. They must zealously pursue delinquent debtors, while being careful not to let their enthusiasm lead them to excesses. In the past, collectors did not enjoy a sterling reputation.1 Some of them believed that delinquent debtors wanted to...
evade their responsibilities and that the debt collector's job was to make sure that the debtors did not succeed in doing so.\textsuperscript{2} With this mindset, some debt collectors were not inhibited in their collection efforts, and there was little state legislation in place to control them.\textsuperscript{3} The congressional hearings preceding the enactment of the Fair Debt Collection Practices Act ("FDCPA") exposed the tactics that debt collectors used to achieve their objective.\textsuperscript{4} It was not unusual for them to make telephone calls at all hours of the night, issue threats to the consumer, or divulge a consumer's confidential information to friends and neighbors, all in the quest to collect outstanding debts.\textsuperscript{5} It was
developer that unless the bill was paid, they would be unable to receive medical services at any hospital, or that they had better nail their possessions to the floor before the law came and removed everything they owned.


\textsuperscript{2} One collector reacted to the proposed federal legislation this way: We in the collection business deal with delinquent debtors not average consumers who pay their bills. I respectfully suggest the word consumer be replaced in the language of this legislation and be changed to delinquent debtor.

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

\textit{Id.} at 226, 229 (testimony of Philip Rosenthal, Virginia Collector's Association).

\textsuperscript{3} The Senate Report on the FDCPA gave a bird's-eye view of the legislation in place. It indicated: While 37 states and the District of Columbia do have laws regulating debt collectors, only a small number are comprehensive statutes which provide a civil remedy. As an example of ineffective State laws, of the 16 states which regulate by debt collection boards, 12 require by law that a majority of the board be comprised of debt collectors.


\textsuperscript{4} One witness at the congressional hearings recounted the experience of one of her clients whose husband had died recently. She reported as follows: Her husband, Sam, died recently and left her with a stack of bills and she only had her social security money to pay the bills.

After Sam's death, she got a call from a collection company. The caller told her if she didn't come up with the money for Sam's funeral, he would get a court order to dig up Sam's body and repossess the casket.

She didn't know the law. After this she needed medical treatment.

\textit{Hearings, supra} note 1, at 58–59 (statement of Karen Berger, senior attorney, Queens Legal Services Corp., New York City).

\textsuperscript{5} The Senate Report captured the highlights of the collectors' misconduct as follows: Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.
clear that Congress had to do something about these disturbing practices. In response thereto, it enacted the FDCPAA in 1977.

The FDCPA defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." One issue that has bothered courts over the years is the definition of "debt." Most courts have taken the position that a debt need not result from an extension of credit, but see the necessity of having a consensual transaction between the parties. This Article will examine the judicial approach to the term "debt." Along the same lines, this Article will examine the specific language in the definition of "debt collector" that exempts a person from coverage because the debt is obtained before it is in default. This Article will demonstrate that just be-

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8. The statute defines "debt" as follows:
   The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
   Id. § 1692a(5).


10. See Pollice, 225 F.3d 379 (Water and sewer bills were debts covered under the FDCPA, but tax bills were not.); Beggs v. Rossi, 145 F.3d 511 (2d Cir. 1998) (per curiam) (The obligation to pay personal property tax did not arise from a transaction and was not a debt.); Hawthorne v. Mac Adjustments, Inc., 140 F.3d 1367 (11th Cir. 1998) (Money owed for negligence claim did not arise from a transaction and therefore was not a debt.); Mabe v. G.C. Servs. Ltd. P'ship, 32 F.3d 86 (4th Cir. 1994) (Child support payments were not a debt.); Staub v. Harris, 626 F.2d 275 (3d Cir. 1980) (The tax was not a debt, because there was no money exchanged for goods or services).

11. The term "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity ... concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii).
cause a debt is delinquent does not mean that it is in default, although debt collectors frequently confuse the two situations.12

Finally, this Article will consider the intricacies of the validation notice and the problem that a collector faces in trying to give equal billing to its collection message, while informing the debtor about his rights to seek verification of the debt.13 One may conclude that the statute puts the debt collector in an impossible position. This is especially so in light of the judicial disagreement over the application of the bona fide error defense to mistakes of law.14

II. DEFINING "DEBT"

Congress has tried to give a clear and comprehensive definition of terms in the FDCPA. Despite those grand efforts, one cannot help noticing that the definition of "debt" has created difficulties for courts in determining whether the statute applies in certain transactions. The definition seems simple enough.15 One early case, Zimmerman v. HBO Affiliate Group,16 seemed to be on the right track when it found that there was no debt flowing from a demand for payment for television signals that were illegally obtained.17 It was clear that there was no debt, because the claim arose from a party’s tortious conduct rather than from a consensual transaction.18 The Third Circuit was not content to stop there; instead it went further to point out in dictum that a transaction must involve an offer or extension of credit.19

13. The FDCPA requires the debt collector to give certain basic information about the debt in its first communication with the consumer or within five days thereof. See 15 U.S.C. § 1692g(a) (2000). The most troublesome part of the statute relates to the collector’s obligation to inform the consumer that the consumer can dispute the debt within thirty days after he receives the collector’s letter. See id. § 1692g(a)(4). The problem is that the collector can continue to press its collection claim in the same letter, and it frequently calls on the consumer to pay the debt in less than thirty days. Allowing the collector to do this may confuse the consumer. The required validation notice has produced many a conflict. See Renick v. Dun & Bradstreet Receivable Mgmt. Servs., 290 F.3d 1055 (9th Cir. 2002); DeSantis v. Computer Credit, Inc., 269 F.3d 169 (2d Cir. 2001); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Russell v. Equifax A.R.S. 74 F.3d 30 (2d Cir. 1996).
14. The FDCPA provides: “A debt collector may not be held liable in any action . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” 15 U.S.C. § 1692k(c) (2000).
15. See id. § 1692a(5).
16. 834 F.2d 1163 (3d Cir. 1987).
17. Id. at 1168.
18. See id.
19. See id. at 1168–69.
What was the justification for this? The court was led astray by the fact that the FDCPA was part of the Consumer Credit Protection Act ("CCPA"). It seemed reasonable to the court that a transaction should be understood to have some relationship to credit in light of the FDCPA's statutory context. The court's confidence about this aspect seemed misplaced, for another statute that had nothing to do with credit also found its way into the CCPA. The Electronic Fund Transfer Act ("EFTA") was simply another of those statutes that Congress enacted as part of the CCPA, with the objective of protecting consumers across the board from abusive consumer transactions. In some cases it was credit, in others it was the collection of debts. It is understandable that the Zimmerman court may have been led astray by the CCPA's title, which, taken by itself, gives the impression that credit is an essential element of the legislation. Had the court taken a hard look at the various parts of the CCPA, it would have noticed the differences in congressional purpose behind the enactments. For example, the Truth in Lending Act ("TILA") was intended to "assure a meaningful disclosure of credit terms," while the FDCPA was geared toward eliminating "abusive debt collection practices by debt collectors." Therefore, although the CCPA's original focus may have been on credit-related transactions, that is no longer the case. Its reach is broader than that, because Congress wanted to extend protection to other transactions that were unrelated to the extension of credit, but that were nevertheless subject to abuse in the marketplace.

21. See Zimmerman, 834 F.2d at 1168-69.
23. The EFTA expresses its basic purpose as follows: "It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights." 15 U.S.C. § 1693(b) (2000)).
28. Id. § 1692(e).
29. The first three titles of the original CCPA were headed: Consumer Credit Cost Disclosure (Title I), Extortionate Credit Transactions (Title II), and Restriction on Garnishment (Title III). See Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1693r (2000)).
There was nothing that compelled the court in Zimmerman to emphasize the absence of the credit element, for it was already on solid ground in rejecting the application of the FDCPA to a tortious transaction relating to the misuse of television signals. Although the statute covers any obligation to pay money in consumer transactions, the court wanted to restrict its application to transactions involving an extension of credit. The Zimmerman court was therefore not satisfied with the plain meaning of the statute. It was left to the Seventh Circuit in Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C. to set the record straight by giving the statutory language its ordinary meaning. A consumer's obligation to pay, therefore, was not restricted to credit-related transactions. Even if it was arguable that the definition of "debt" was so unclear that the court needed some help from the FDCPA's legislative history, reference to that source only served to strengthen the court's position that Congress did not intend to restrict the statute to such transactions. While early versions of the FDCPA did contain some reference to the extension of credit, the final version lacked any such reference in the definition of "debt." The committee report revealed the statutory intent that the term "debt" should include "consumer obligations paid by check or other non-credit consumer obligations." as amended at 15 U.S.C. §§ 1693-1693r (2000), were enacted after the original Consumer Credit Protection Act was passed in 1968.

31. In Zimmerman, the court identified the kind of transaction that might produce a debt. It was a "transaction in which a consumer is offered or extended the right to acquire 'money, property, insurance, or services' which are 'primarily for household purposes' and to defer payment." 834 F.2d 1163, 1168-69 (3d Cir. 1987). One searches in vain for any statutory reference to deferral of payment in § 1692a(5).

32. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979). It has also been stated that "when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning." 2A Norman J. Singer, Statutes and Statutory Construction § 46:01 (6th ed. 2000).

33. 111 F.3d 1322 (7th Cir. 1997).

34. See id. at 1326.

35. See id.

36. The definition in H.R. 13,720 was as follows: "The term 'debt' means any obligation arising out of a transaction in which credit is offered or extended to an individual, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." H.R. REP. No. 94-1202, at 13 (1976).

37. H.R. REP. No. 95-131, at 4 (1977). The report gave as an example of a noncredit consumer obligation a "doctor, dentist or hospital bill that is originally expected to be paid in full in one payment within 30 days, and then either becomes overdue or is subsequently paid in partial payments." Id.
After *Bass*, other circuits joined the Seventh Circuit in rejecting the *Zimmerman* dictum.\textsuperscript{38} When the Third Circuit itself returned to the issue in *Pollice v. National Tax Funding, L.P.*,\textsuperscript{39} it expressed its dissatisfaction with *Zimmerman* and clarified once and for all that no extension of credit was necessary for the creation of a debt. The relevant consideration was whether there was an obligation to pay that arose from a consensual consumer transaction.\textsuperscript{40}

Although the element of credit no longer played any role in the definition of "debt," queries still remained about the kind of transaction that satisfied the definition. The *Zimmerman* court recognized the requirement of an underlying consensual exchange for the FDCPA to apply.\textsuperscript{41} The question that continued to confront the courts was whether any obligation that resulted from a consensual arrangement constituted a debt. In *Bass*, the collector tried to recover on a dishonored check.\textsuperscript{42} The debt collector did not limit its defense to the credit-related element, but argued for the exclusion of dishonored checks from the definition of "debt" on the ground that the tender of a worthless check was a criminal act.\textsuperscript{43} This seemed to be a sweeping generalization, for as the court pointed out, dishonored checks do not result only from transactions where the consumer intends to defraud the payee.\textsuperscript{44} Congress was convinced that most defaulting debtors intend to honor their obligations, and that most delinquencies flow from unforeseen and unpredictable circumstances.\textsuperscript{45} Even though some defaulting debtors do not deserve protection because of their fraudulent motives, there is no evidence that Congress intended to make the FDCPA inapplicable when debt collectors try to collect on the dishonored checks of such debtors.\textsuperscript{46} The FDCPA was intended to curb abusive collection practices, and the relevant question is whether the

\textsuperscript{39} 225 F.3d 379 (3d Cir. 2000).
\textsuperscript{40} Id. at 401–02.
\textsuperscript{41} See 834 F.2d 1163, 1168 (3d Cir. 1987).
\textsuperscript{42} 111 F.3d 1322, 1323 (7th Cir. 1997).
\textsuperscript{43} Id. at 1329.
\textsuperscript{44} Id.
\textsuperscript{45} The Senate Report on the FDCPA indicated as follows: "One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.' In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule." S. REP. No. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697.
\textsuperscript{46} The *Bass* court recognized that "[n]o section of the [FDCPA] requires an inquiry into the worthiness of the debtor, or purports to protect only 'deserving' debtors." 111 F.3d at 1330. A congressional report has previously weighed in on the issue of bad checks as follows:
consumer gave the check in payment of a consumer obligation. It is no secret that a check represents the drawer's obligation to pay for his purchases and even if the check is dishonored, that obligation still remains.47 The dishonor of the check does not affect the underlying transaction.

The defendant in Bass had hoped that the court would recognize an exception for fraud in deciding whether a dishonored check could be included in the definition of "debt."48 The court was unwilling to accept the proposition that all dishonored checks relate to fraudulent transactions, and that the exception could be sustained on that basis alone.49 Congress must have known that not all checks given in consumer transactions would be paid on presentment, but this possibility did not affect the consumer's obligation to pay money arising out of that transaction.50 This means, therefore, that the FDCPA protects an intentional defaulter, because the obligation represented by the dishonored check comes within the definition of "debt," and the statute therefore sanctions the errant collector in such cases. This aspect of the statute is not as alarming as it appears, since the statute's basic objective is to prevent abuse in the collection process, and not to control the underlying transaction between the parties.51

The definition of "debt" has come into question in other contexts. In the case of child support obligations, it is generally accepted that

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Opponents of this legislation claim that, regardless of the amount of consumer harassment or deception, there should be no legislation because the number of unpaid bills and bad checks keeps increasing. This reasoning is misleading. The issue is not one of uncollected debts, but rather whether or not consumers must lose their civil rights and be terrorized and abused by unethical debt collectors.


47. See U.C.C. § 3-310(b)(1) (2004); Harold Weisblatt, Banking Law § 121.03[1], at 121-11 (2001).

48. See 111 F.3d at 1329.

49. The court recognized that "an issuer whose intention not to pay the check arises only at some point after it is issued has still not, in most jurisdictions, committed a fraudulent or criminal act." Id.

50. Relying on the findings of the National Commission on Consumer Finance, the Senate Committee on Banking, Housing, and Urban Affairs pointed out that "the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce." S. Rep. No. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697. This suggests that there are some consumers who do not intend to repay their debt. Nevertheless, the FDCPA does not deny its protection to people in that category. After all, the thrust of the legislation is to "eliminate abusive debt collection practices." 15 U.S.C. § 1692(e) (2000).

51. The FDCPA reflects its purpose as follows: "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).
there is no "debt," because the obligor does not incur an obligation to pay in order to receive any goods or services for himself.\(^5\) It is true that the money which the child receives may be used for personal or household purposes, but the issue is whether the payor receives any "money, property, insurance, or services" primarily for such purposes.\(^5\) The function of an agreement for support is to ensure that the parent will take care of the child, and not for the parent to secure any additional benefit for himself. Therefore, there is nothing in that arrangement that satisfies the requirement that the parent must obtain something for personal or household purposes in exchange for his obligation to pay support. The focus must be on the obligor-consumer, and not on the way that the obligee uses the proceeds that flow from the support payments. The same thing may be said about an obligation to pay arising out of a divorce agreement. The promise to pay does not require any property or services from the other side that can give rise to a true consensual transaction.\(^5\)

In the case of condominium or homeowner association fees, the consumer's obligation to pay arises out of the purchase transaction.\(^5\) It does not matter that a consumer must pay his assessments even before the condominium association actually provides any goods or services.\(^5\) There is no doubt that the property which is the subject of the transaction must be for "personal, family, or household purposes."\(^5\) The assessments themselves qualify for those purposes, because they are used for the maintenance of the common areas of the

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53. A parent does not incur an obligation to support his child in order to receive consumer goods or services. Therefore, there is no "debt" under these circumstances. See 15 U.S.C. § 1692a(5) (2000); Mabe, 32 F.3d at 88. A parent does not incur the obligation because he is a consumer, and the obligation does not arise because of a "transaction." Battye, 873 F. Supp. at 105. "[H]is obligation to support his children exists simply because his children exist." Id.


[T]he dissolution of a marriage, with all of its attendant negotiations, is simply not a transaction between consumers. [T]he property settlement obligations under the terms of the divorce decree did not arise out of a consensual consumer obligation . . . and therefore does not implicate a "transaction" within the meaning of the FDCPA.

Id. at 1143.

55. See Ladick v. Van Gemert, 146 F.3d 1205 (10th Cir. 1998).

56. See Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997).

property. These assessments must be contrasted with a consumer's tax obligations, which are not considered debts under the FDCPA.

The court in Staub v. Harris recognized that taxes are "public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof, for governmental purposes, without reference to pecuniary benefits to particular individuals or property." They do not arise, therefore, from a transaction in which the governmental services are for "personal, family, or household purposes." There is no limit on the government's authority to use such taxes for broader, societal purposes such as construction, defense, court systems, and other public projects. The court in Staub could not discern the kind of pro tanto exchange between the taxing authority and the consumer that the statute contemplated. The court was looking at least for some connection between the consumer's obligation and the rendition of a service that would bring the transaction within the definition of "debt."

The court in Staub dealt with a per capita tax, but the result is not any different in the case of a property tax. In Beggs v. Rossi, a debt collector tried to collect on a personal property tax levied on the consumer's car, and the Second Circuit came to the same conclusion as the Third Circuit in Staub. The tax was not imposed on the purchase of the car, but rather on the ownership thereof, and so the court could find no transaction that would make the statute applicable.


60. 626 F.2d 275 (3d Cir. 1980).

61. Id. at 278 (BLACK'S LAW DICTIONARY 1307 (5th ed. 1979)).


63. See Staub, 626 F.2d at 278.

64. See id.

65. See id.

66. 145 F.3d 511 (2d Cir. 1998).

67. Id. at 512. The plaintiffs in Beggs tried to distinguish their case from Staub by suggesting that the property tax was a transaction-based tax like a stamp tax or tobacco tax. Id. The court pointed out, however, that the tax was levied on the ownership of the vehicle rather than on the purchase thereof. Id. The Third Circuit gave a similar explanation in Pollice v. National Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2001), when it observed that "[u]nlike a sales tax, ... which arguably arises from the sale transaction, the property taxes [in Pollice] arose not from the purchase of property but from the fact of ownership." Id. at 402. The Federal Trade Commission ("FTC") has concluded that the term "debt" does not include...
The prevailing inquiry in these cases is whether the consumer's obligation to pay arises out of a consensual transaction, and also whether the "money, property, insurance, or services which are the subject of the transaction" are primarily for personal, family, or household purposes. In the condominium assessment cases, the courts generally recognize the presence of both elements. In other contexts, sometimes one element is satisfied and the other is not. For example, in Berman v. GC Services Ltd. Partnership, the consumer argued that the unemployment insurance contributions that the debt collector tried to recover from him constituted a debt under the statute. The court agreed that the consumer's obligation to make such contributions derived from the employment of an individual, thus satisfying the requirement that the consumer must have an obligation to pay money arising out of a transaction. But the contributions did not produce any money, insurance, or services for the consumer's personal benefit. Like the taxes in Staub, the state benefits accruing from the unemployment insurance contributions were conferred on eligible residents throughout the state. There was no way of showing that the State gave the consumer anything in return other than the satisfaction of helping unemployed workers as a whole. Contributors do not stand to gain individual benefits from the insurance requirement, for the statute is intended to serve a more general purpose than the FDCPA requires. Although the consumer in Berman managed to overcome the transaction hurdle and thus was in better shape than the consumer in Staub, they both failed on the second round to show

"[u]npaid taxes." FTC Staff Commentary, 53 Fed. Reg. 50,097, 50,102 (Dec. 13, 1988). In publishing the Commentary, the FTC explained as follows:

This Commentary is the vehicle by which the staff of the Federal Trade Commission publishes its interpretations of the Fair Debt Collection Practices Act (FDCPA). It is a guideline intended to clarify the staff interpretations of the statute, but does not have the force or effect of statutory provisions. It is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public.

Id. at 50,101.


69. 146 F.3d 482 (7th Cir. 1998).

70. Id. at 486.

71. Id.

72. Id.

73. Id.

74. The court recognized that "the contributors receive only a general, public benefit similar to that associated with the payment of taxes." Id.
that the tax or the insurance contributions inured to the benefit of the taxpayer or the contributing employer.\textsuperscript{75}

Sometimes it is difficult to decipher whether the obligation to pay is too far removed from the original transaction to satisfy the definition of "debt." In \textit{Hamilton v. United Healthcare of Louisiana, Inc.},\textsuperscript{76} the consumer was covered under an insurance policy that required him to reimburse the insurer for duplicate payments received from another company for the same coverage. The court observed that the consumer's obligation to pay arose from the consumer's purchase of insurance.\textsuperscript{77} This was the transaction that produced that obligation. But was the court's observation correct?

The definition of "debt" dictates that the consumer must have an obligation to pay "arising out of" a transaction.\textsuperscript{78} When the obligation is to pay premiums for insurance coverage for personal, family, or household purposes, there is little doubt that the FDCPA covers any resulting debt.\textsuperscript{79} When the insurer asserts a subrogation claim pursuant to its policy provisions and then reminds the consumer of his obligation to reimburse the insurer, the original transaction becomes a little distant, and an observer may find it hard to make the connection between it and the consumer's obligation to pay. This was the point that bothered dissenting Judge Garza in \textit{Hamilton}.\textsuperscript{80} He was afraid that the court had gone too far with its expansive interpretation of the phrase "arising out of."\textsuperscript{81} Courts are accustomed to dealing with situ-

\textsuperscript{75} In \textit{Staub}, there was no consensual transaction and the taxes were not "primarily for personal, family, or household purposes." 626 F.2d 275, 277 (3d Cir. 1980). In \textit{Berman}, there was a consensual transaction involving the hiring of an employee, but the insurance contributions could not satisfy the "purpose" requirement. 146 F.3d at 487.

\textsuperscript{76} 310 F.3d 385 (5th Cir. 2002).

\textsuperscript{77} \textit{Id.} at 392. The defendant in \textit{Hamilton} had hoped to gain some advantage from the ruling in \textit{Hawthorne v. Mac Adjustment, Inc.}, 140 F.3d 1367 (11th Cir. 1998), when the Eleventh Circuit held that the consumer's obligation was not related to a consumer transaction, because the defendant was attempting to enforce subrogation rights arising out of an automobile accident. Unlike \textit{Hawthorne}, the obligation to pay in \textit{Hamilton} did not arise from a tortious act. The consumer in \textit{Hawthorne} found herself obligated because of her negligence; there was no element of a consumer transaction.


\textsuperscript{80} \textit{See} 310 F.3d at 394 (Garza, J., dissenting).

\textsuperscript{81} Judge Garza explained his position:

The subrogation claim asserted by United arose out of a string of events. First, there was the insurance contract between United and Hamilton. Second, there was the contract for uninsured and/or underinsured motorist coverage . . . between Hamilton and State Farm. Third, there was the accident that injured Hamilton. Fourth, there was United's payment of Hamilton's medical bills. Fifth, there was the payment by State Farm
ations where the consumer's obligation arises out of a single transac-
tion.\textsuperscript{82} This is not surprising, since it is much easier to show a
correlation between the consumer's obligation to pay money and the
central transaction between the parties.

The situation is more complicated, however, once the parties move
beyond the original arrangement. If the consumer pays for goods with
an invalid check, there is little disagreement that what a collector
tries to recover is indeed a "debt."\textsuperscript{83} The consumer's obligation to pay
for the goods is not diminished by the check's dishonor.\textsuperscript{84} A similar
relationship exists when a consumer arranges for insurance coverage
with his insurance company. In that event, the consumer's obligation
to pay his premium truly arises out of the transaction with the insurer
from which the consumer expects insurance for personal, family, or
household purposes.\textsuperscript{85} The transition from the original agreement for
coverage to the finer details of subrogation puts some tension on the
"arising out of" phrase. One argument in favor of finding that a debt
exists is that there would be no dispute if the parties did not have a
transaction involving insurance. Therefore, any problem that results
therefrom surely arises out of the transaction.\textsuperscript{86} It is not as if the dis-
pute between the parties is an isolated matter that stands on its own,
without any relationship at all to the insurance agreement. In this
sense, therefore, there is some support for giving the statutory lan-
guage an expansive reading, since the matter to be resolved is inti-
mately bound up with the insurance coverage and the consumer's
corresponding obligation to pay. The "arising out of" phraseology
gives wider scope to the statute, for then the obligation need not be

to Hamilton pursuant to the UM policy. So, although one might say that
this subrogation claim arose out of the underlying insurance agreement
between United and Hamilton, one could also say that the claim arose
out of any one of these other events.

\textit{Id.} at 394–95.

\textsuperscript{82} See \textit{Pollice v. Nat'l Tax Funding, L.P.}, 225 F.3d 379 (3d Cir. 2000) (obligation to
pay for water and sewer service); \textit{Romea v. Heberger & Assocs.}, 163 F.3d 111 (2d
Cir. 1998) (obligation for back rent); \textit{Ladick v. Van Gemert}, 146 F.3d 1205 (10th
Cir. 1998) (obligation to pay homeowner association dues); \textit{Snow v. Jesse L. Riddle,
P.C.}, 143 F.3d 1350 (10th Cir. 1998) (obligation to pay on dishonored check).

\textsuperscript{83} See \textit{Snow v. Jesse L. Riddle P.C.}, 143 F.3d 1350 (10th Cir. 1998); \textit{Duffy v. Land-
berg}, 133 F.3d 1120 (8th Cir. 1998); \textit{Charles v. Lundgren & Assocs., P.C.}, 119
F.3d 739 (9th Cir. 1997); \textit{Gradisher v. Check Enforcement Unit, Inc.}, 133 F. Supp.
2d 988 (W.D. Mich. 2001). \textit{But see} \textit{Krevsky v. Equifax Check Servs., Inc.}, 85 F.

\textsuperscript{84} See \textit{Duffy}, 133 F.3d at 1123; \textit{Charles}, 119 F.3d at 742; \textit{Bass v. Stolper, Koritzin-
sky, Brewster & Neider S.C.}, 111 F.3d 1322, 1324 (7th Cir. 1997). When an un-
certified check is taken for an obligation, the obligation is suspended until the
check is dishonored, paid or certified. If the check is dishonored, the obligee may
enforce either the instrument or the obligation. \textit{See} \textit{U.C.C. § 3-310(b)(3)} (2004).

\textsuperscript{85} See \textit{Hamilton}, 310 F.3d at 392.

\textsuperscript{86} See \textit{id.}
restricted to the initial exchange between the parties. If Congress had intended to limit the definition of "debt" to the consumer's obligation to pay the insurance premiums, it could have said simply that such an obligation referred to payment for obtaining "money, property, insurance, or services," instead of requiring the obligation to arise out of a transaction relating to such matters. There is no need to ignore the plain meaning of the statute, particularly when Congress has expressed a strong desire to regulate unfair collection practices.

III. THE MEANING OF "DEFAULT" IN THE DEFINITION OF "DEBT COLLECTOR"

After defining the term "debt collector," the FDCPA lists some activities that are excluded from the definition. Thus, a person is not a debt collector if that person's activity concerns a debt which is not in default when the person obtains it. The statute does not define the term "default," and so the courts must decide when a default occurs for purposes of categorizing someone as a debt collector.

The time of default is not merely an academic exercise. In Bailey v. Security National Servicing Corp., the debtors defaulted under their original mortgage agreement and their loan was assigned to the Department of Housing and Urban Development ("HUD"). The debtors and HUD then entered into a series of forbearance agreements for the debtors to bring their loan current. Although the original loan re-

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87. It has been said that the meaning of the words "arising out of" is understood as "originating from" or "having its origin in," "growing out of" or "flowing from." Schmidt v. Utils. Ins. Co., 182 S.W.2d 181, 184 (Mo. 1944); see also Hamilton, 310 F.3d at 391.
88. The Hamilton court said that "the plain meaning of 'arising out of' as 'stemming from' leads [the court] to conclude that the obligation to pay arose from the contract/insurance." 310 F.3d at 392.
89. The FDCPA was intended to be broadly remedial. The Senate report gave the legislative thrust: "[The] bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed." S. REP. No. 95-382, at 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1698; see also Nat'L Consumer Law Ctr., Fair Debt Collection § 3.2.1, at 62 (5th ed. 2004) [hereinafter Fair Debt Collection] (stating that language of the act is to be construed by plain meaning).
90. The FDCPA provides as follows:

The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

91. See id. § 1692a(6)(A)-(F).
92. See id. § 1692a(6)(F)(iii).
93. 154 F.3d 384 (7th Cir. 1998).
94. Id. at 386.
mained in default, the forbearance agreement superseded it for the
time being, and the loan was subsequently sold to a third party.95
When the loan servicer sent out a letter listing the next four payments
due, it cautioned the debtors that if they did not make their payments
under the forbearance agreement, the agreement would be null and
void and their note would be accelerated.96

When the debtors sued the servicer for not complying with the
FDCPA, the servicer responded that it was not subject to the statute
because it was not a debt collector.97 The court had to decide whether
the servicer was trying to collect a debt that was in default. When the
servicer obtained the debt, it was no longer in arrears, because the
forbearance agreement had temporarily replaced the original mort-
gage agreement and the debtors were not then in default in light of
the forbearance.98 The forbearance agreement was the subject of the
servicer's letter, and therefore there was no default when the servicer
acted to reassure the debtors of the new
terms.99 This was an exam-
ple, therefore, of a new agreement superseding a defaulted agreement,
thus giving a debtor another opportunity to restore his creditworthi-
ness under a new plan.100

Other cases dealing with the default issue have not ended happily
for the debt collector. In Schlosser v. Fairbanks Capital Corp.,101 the
debt collector sent the debtors a letter indicating that the debt was in
default, but failed to comply with the requirements of the FDCPA.102
As it turned out, the consumers were not in default, and Fairbanks
argued that the statute did not apply because it was not a debt
collector.103

Like the debt in Bailey, the debt in Schlosser was not actually in
default. Nevertheless, Fairbanks assumed that there was a default

95. Id at 386.
96. Id.
97. Id. at 386–87.
98. Id. at 388.
99. The court observed that "[c]ommon sense and the plain meaning of the statute
require that we distinguish between an individual who comes collecting on a de-
faulted debt and one who seeks collection on a debt owed under a brand new
payment plan, or forbearance agreement that is current." Id. at 387.
100. The servicer's letter specifically noted that the plaintiffs owed the debt under the
"forbearance agreement," not the original note, and that the servicer wanted to
work with the plaintiffs in making payment "under [that] agreement." Id. at
387.
101. 323 F.3d 534 (7th Cir. 2003).
102. The collection letter did not advise the debtors that they had a right to dispute
the debt in writing. Id. at 536.
103. Fairbanks argued that it could not be a debt collector because the loan was not
actually in default when Fairbanks obtained it. Id. Fairbanks wanted the court
to look at the real state of affairs.
and sent out its collection letter on that basis. The question was, therefore, whether Fairbanks's activities excluded Fairbanks from the "debt collector" designation because the loan was not actually in default when Fairbanks acquired it. It was all a mistake, and the statutory exclusion seemed to apply to the debt.

The court did not accept the plain meaning approach to the interpretation of the statutory language, because it would have led to an unreasonable result. Had it not looked for an alternative interpretation, it would have agreed that a debt collector could avoid any statutory obligation if it made a mistake about the status of the debt. For example, a collector would get itself in trouble for not giving a validation notice only if it was not mistaken about the debt. In order to make sense of the statute, the court focused on the collector's activity in attempting to collect the debt "asserted to be owed." The rele-

104. When Fairbanks acquired the mortgage from ContiMortgage, the mortgage records showed that it was delinquent. There was no reason for Fairbanks to think otherwise. Fairbanks identified itself to the debtors as a debt collector. See id. at 535. The collection letter started off with spectacular language: "DEMAND LETTER—YOU COULD LOSE YOUR HOME!" Id.

105. A person is not a debt collector if that person's activity "concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii) (2000).

106. Schlosser, 323 F.3d at 537–38. The courts have not been reluctant to ignore the plain meaning rule if the statutory language leads to an unreasonable result. The Supreme Court has led the way: "Where the literal reading of a statutory term would 'compel an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope." Public Citizen v. United States Dept of Justice, 491 U.S. 440, 454 (1989) (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989)). Writing for the court in Cabell v. Markham, 148 F.2d 737, 739 (1945), Judge Learned Hand explained why courts are not tied to a literal interpretation of language:

[It] is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Id. at 739.

107. The court in Schlosser identified the problem as follows:

So those like Fairbanks that obtain a mix of loans, only some of which are in default, would be subject to the FDCPA if they fail to provide the required notice of the mechanism for correcting mistakes when they attempt to collect a loan they assert is in default—but only as to those loans about which they are not mistaken.

323 F.3d at 537.

108. The relevant status is that of the "asserted debt" that the person is trying to collect. See id. at 538 (citing 15 U.S.C. § 1692a(6)(F)). It does not matter, therefore, that the debt is not actually owed. See Schroyer v. Frankel, 197 F.3d 1170, 1178 (6th Cir. 1999) (finding debt collectors liable for unfair collection practices regardless of validity of debt); McCartney v. First City Bank, 970 F.2d 45, 47–48 (5th Cir. 1992) (FDCPA action does not depend on the validity of a debt.); Baker
v. G. C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982) (finding that “debtor has standing to complain of violations of [FDCPA], regardless of whether a valid debt exists”).

109. The activity relating to a debt “asserted to be owed,” 15 U.S.C. § 1692a(6)(F), must be read together with the consumer’s “alleged obligation,” id. § 1692a(5). This language suggests that a person’s activities may fall within the statute even though the debt is not actually owed. See FAIR DEBT COLLECTION, supra note 89, § 4.3.10, at 101.

110. In that event, the person who is trying to collect cannot be regarded as a creditor, because he received an assignment of the debt for the purpose of facilitating collection. See 15 U.S.C. § 1692a(4). The debt would mean the “alleged obligation of [the] consumer,” id. § 1692a(5), which the collector has treated as being in default. See also Schlosser, 323 F.3d at 538–39 (holding a company to be a “debt collector” and not a “creditor” concerning a mortgage not actually in default when it was acquired, because the company asserted that the debt was in default from the time it was acquired).

111. The broad reach of the FDCPA can be seen in the section prohibiting harassment or abuse. The “collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” 15 U.S.C. § 1692d (2000). The language does not restrict the cause of action to the debtor and the debt may be an “alleged obligation,” rather than an actual obligation. Id. § 1692a(5). The language of the statute recognizes that a cause of action should not rest on the validity of the debt.

112. 15 U.S.C. § 1692a(6)(F)(iii) (excluding from the term “debt collector,” “any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person”).
The confusion about when a default occurs can arise in other contexts. In Alibrandi v. Financial Outsourcing Services, Inc, an automobile lessor concluded that the lessee owed a debt for excess wear and tear on the vehicle. It hired a collector to recover the debt, and the collector sent a collection letter to the lessee containing the usual FDCPA disclosures. A little later, the lessor shifted the assignment to another firm, Financial Outsourcing, and its agreement stipulated that the lessor did not consider the account to be delinquent. Financial Outsourcing was to act as a "service provider" and not as a collection agency in trying to recover the debt. When Financial Outsourcing wrote to the lessee, it assured the latter that his account was not in default, and it even referred to the debt as a "deficiency balance." There was no hint of collection language in the letter to the lessee, no threats, and no reminder of consequences to flow from the consumer's delinquency. After all, Financial Outsourcing was only "servicing" the account. Nevertheless, the consumer alleged that the so-called servicer had violated the FDCPA by not including

113. 333 F.3d 82 (2d Cir. 2003).
114. Id. at 83.
115. The agreement between First Union, the lessor, and Financial Outsourcing provided in pertinent part:

First Union National Bank does not consider these accounts delinquent. Financial [Outsourcing] shall act as a service provider and not a collection agency when handling these accounts. Financial [Outsourcing] shall not make numerous phone calls at early or late hours nor send numerous letters to such customers. All form letters must be pre-approved by First Union.

Id. at 84. The reference to "numerous phone calls," is interesting. It serves as a reminder of the need for the FDCPA. The Senate Report on the FDCPA recounted the evidence of "telephone calls at unreasonable hours." S. REP. No. 95-382, at 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

116. Alibrandi, 333 F.3d at 84.
117. Id. Financial Outsourcing did its best to bill itself as a "servicer" rather than a "collector." Id. It reassured the lessee that his account was not in default. Id.
118. The language in Financial Outsourcing's letter was too polite to fall into the collection category. Compare id. ("Your account is not in default. . . . Please remit payment using the enclosed envelope. . . . Should you have any questions, please contact our office, toll-free, . . . as our staff is prepared to assist you."), with Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 483 (4th Cir. 1991) ("YOUR SERIOUSLY PAST DUE ACCOUNT HAS BEEN GIVEN TO US FOR IMMEDIATE ACTION. YOU HAVE HAD AMPLE TIME TO PAY YOUR DEBT, BUT YOU HAVE NOT. IF THERE IS A VALID REASON, PHONE US AT [telephone number] TODAY. IF NOT, PAY US—NOW."). The bottom third of the letter was taken up almost completely by the word "NOW."). and Gradisher v. Check Enforcement Unit, Inc., 210 F. Supp. 2d 907, 916 (W.D. Mich. 2002) ("VARIOUS PENAL CODES ALLOW FOR CRIMINAL PROSECUTION when a person KNOWLINGLY writes a bad check(s). . . . We may proceed to file your check with local law enforcement.").

119. If Financial Outsourcing had been "collecting" rather than "servicing" the debt, it would have had to give the FDCPA warnings. See 15 U.S.C. § 1692g(a) (2000).
the required warnings in its letter, since the servicer, Financial Outsourcing, had obtained the debt after default.120

The Alibrandi court refused to accept the consumer's argument that a default occurred immediately after payment was due.121 Recognizing the congressional silence about the definition of "default," the court was prepared to allow the parties themselves to resolve the issue through their contractual arrangements.122 That was not the end of the matter. In the original letter to the consumer, the correspondent, North Shore, had identified itself as a debt collector, advising the consumer-lessee that "'[s]erious collection of [his] account . . . [began] with [the] letter.'"123 This seemed to be an acknowledgment that the debt was in default, and that North Shore was trying to collect it.124 The lessor's subsequent agreement with another party could not change the effect of the previous default, pursuant to which North Shore had acted.125 Financial Outsourcing's ignorance of the prior arrangement between the lessor and North Shore could not change the status of the debt when Financial Outsourcing took on the assignment.126 Unlike Schlosser, the debt here was actually in default, and it mattered not that the subsequent party had changed the focus from collection to servicing of the debt.

One could be sympathetic towards Financial Outsourcing in this context. The agreement with the lessor, First Union National Bank, had specifically denied that the accounts were delinquent.127 Furthermore, Financial Outsourcing was to act as a service provider and not a collection agency.128 If the accounts were not paid within 120 days, First Union was going to assign them to a collection agency for

120. Alibrandi, 333 F.3d at 84.
121. Id. at 87.
122. Id. at 87 n.5.
123. Id. at 83.
124. This letter from North Shore contained all the collection warnings required by the FDCPA. Id. Among them was the validation notice dictated by § 1692g(a).
125. On this point, the court concluded that "[t]he status of the debt would not have been alterable by the expedient of a letter agreement between First Union and Financial Outsourcing." Alibrandi, 333 F.3d at 88. In its 2001 annual report to Congress, the FTC recommended that "Congress amend [the default] exemption so that its applicability will depend upon the nature of the overall business conducted by the party to be exempted rather than the status of individual obligations when the party obtained them." FED. TRADE COMM'N, 2001 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES ACT, available at http://www.ftc.gov/os/2001/03/fdcpaar2000.htm. Had Congress adopted this recommendation, Financial Outsourcing might have had another avenue to explore.
126. North Shore had previously identified itself as a "debt-collector." Alibrandi, 333 F.3d at 83. First Union did nothing to reinstate the consumer's account, so the so-called default status did not change.
127. The contract stated: "First Union National Bank does not consider these accounts delinquent." Id. at 84.
128. Id.
resolution, thus confirming the impression that Financial Outsourcing was not to play any role in collection. Financial Outsourcing could therefore not be faulted for believing that it was merely servicing a debt that was not yet in default. Since the lessor had already made clear, through the original collector North Shore, that the debt was clearly in default, there was nothing that Financial Outsourcing could do to change the scenario.130

A person is excluded from the definition of “debt collector” if the debt is not in default when it is “obtained” by that person.131 The statutory reference to “obtained” has led some consumers to contend that the exemption applies only to debts that are transferred or assigned to a defendant, and not to those debts that are merely serviced or collected by a defendant.132 Like the term “default,” the term “obtained” is not defined in the statute. But since the term “assignment” appears elsewhere in the statute,133 there is no reason to believe that “obtained” should be read so narrowly that it becomes synonymous with “assigned.” It is reasonable, therefore, to read the term as including the right to collect a debt for the creditor.134 Although Congress did not have service companies in mind when it enacted the statute, the debts must not be in default when taken for servicing.135 As a creditor’s agent, the debt servicer has just as much incentive as the creditor to maintain a good reputation in the community. Therefore, Congress did not think it necessary to bring debt servicers within the FDCPA, since it was more concerned with responding to the need of the times to control continued abuses by debt collectors.136

129. Id.
130. Default did not occur as soon as payment became due. Id. at 87. It was First Union that started the ball rolling by hiring North Shore to begin collection, and North Shore identified itself as a debt collector. Id. at 83. There was then no turning back. Perhaps Financial Outsourcing wanted to be a true servicer, but it was dealing with a debt that the creditor had already recognized through North Shore as being in default. It was the status of the debt that mattered.
133. The word “assignment” appears in the definition of the term “creditor.” A person is not a creditor if he “receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.” 15 U.S.C. § 1692a(4).
135. The Senate Report on the FDCPA explained that the congressional committee did not intend the definition of “debt collector” to cover “mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing.” S. REP. No. 95-382, at 3–4, reprinted in 1977 U.S.C.C.A.N. 1695, 1698.
Although the FDCPA does not contain a definition of "default," another statute may provide an answer for a particular type of loan. In that event, that statute's definition controls. In *Skerry v. Massachusetts Higher Education Assistance Corp.*, the guarantor, American Student Assistance Corporation, began sending notices to the consumer after the consumer was delinquent for ninety days under his federal student loan. The debtor sued the guarantor for a violation of the FDCPA, and the guarantor defended on the basis that the loan was not in default when it sent out its letter to the debtor. This time the court did not have to wonder about the definition, for the student loan regulations recognized that no default occurred under a loan until the debt was overdue for at least 180 days. In the interim, the guarantor performed an important pre-claim role of counseling the student borrower about avoiding default, and encouraging him to resume his payments. It was evident, therefore, from the

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138. Id. at 50.
139. Id. at 49.
140. Under the Federal Family Education Loan ("FFEL") Program, a default was defined as:
   [the failure of a borrower . . . to make an installment payment when due, or to meet other terms of the promissory note . . . if the Secretary or guaranty agency finds it reasonable to conclude that the borrower . . . no longer intend[s] to honor the obligation to repay, provided that this failure persists for—
   (1) 180 days for a loan repayable in monthly installments; or
   (2) 240 days for a loan repayable in less frequent installments.
   34 C.F.R. § 682.200(b) (1998) (current version at 34 C.F.R. § 682.200(b) (2004)).
   Under the current regulations, the delinquency must continue for 270 days for a monthly installment loan, and for 330 days for a loan repayable in less frequent installments. 34 C.F.R. § 682.200(b) (2004).
141. The regulations defined preclaims assistance as follows:
   (ii) Preclaims assistance means collection assistance made available to the lender by the guaranty agency no later than the 90th day of delinquency. This assistance must include collection activities that are at least as forceful as the level of preclaims assistance performed by the guaranty agency as of October 16, 1990, and involves the initiation by the guaranty agency of at least 3 collection activities, one of which is a letter designed to encourage the borrower to begin or resume repayment. As part of their preclaims assistance, guaranty agencies must provide counseling and consumer information (in written or other format) to the borrower by the 10th working day after the agency receives the lender's request for preclaims assistance informing the borrower of all of the borrower's options to avoid default, including the availability of consolidating delinquent loans under the FFEL Program or the Federal Direct Consolidation Loan Program.
   34 C.F.R. § 682.404(a)(2)(ii) (1998). It is to be noted that the guaranty agency was to inform the borrower of options "to avoid default." Thus, even though the borrower might have been delinquent, he was not yet "in default." The current regulation continues the same theme with the term "default aversion assistance." See 34 C.F.R. § 682.404(a)(2)(ii) (2004).
regulations that there was a difference between a delinquent debt and a defaulted debt.\textsuperscript{142}

When the guarantor of a student loan steps into the picture, it is trying to rescue the student borrower before she enters default, and this accounts for the grace period following the due date of payment.\textsuperscript{143} If the FDCPA applied in this context, the guarantor would hardly be able to exert its best efforts in trying to get the student borrower back on track. In this respect, the guarantor must keep the lines of communication open in order to achieve its objective of restoring the borrower to good standing.\textsuperscript{144} If the guarantor were a collector, it would have to include a validation notice with its first communication (or at least within five days),\textsuperscript{145} and this would surely be inconsistent with the objective of assisting the borrower before she defaults. The FDCPA limits the type and frequency of contacts that a collector may make with the debtor,\textsuperscript{146} while the regulations of the Federal Family Education Loan Program ("FFELP") promote the continued interaction between the guarantor and the debtor.\textsuperscript{147} It is no surprise, therefore, that the debtor's delinquency on a student loan does not result in an immediate default.

Nevertheless, there is nothing to prevent the parties to a private loan from stipulating an earlier default in their contract. In \textit{Hartman v. Meridian Financial Services, Inc.},\textsuperscript{148} the contract provided for a default if the consumer failed to pay "on time."\textsuperscript{149} Despite this unambiguous language, the collector tried to use the \textit{Skerry} approach to avoid the strict "on time" requirement.\textsuperscript{150} The \textit{Hartman} court readily pointed out that the loan at issue did not fall under the FFELP, and that the federal regulation governing it could not affect the time of default under the timeshare loan.\textsuperscript{151} This decision underscored the

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\textsuperscript{142} The borrower's failure to pay had to continue for 180 days in the case of a loan payable in monthly installments. 34 C.F.R. § 682.200(b) (1998).
\textsuperscript{144} One court viewed the purpose of the 180-day period this way: The provision of a regulation requiring a 180-day period to pass prior to defaulting a student loan debt is a function of the consumer protection built into the FFELP. It provides time for necessary counseling and creation of alternate payment plans for the debtor, with the ultimate goal of default aversion. Skerry v. Massachusetts Higher Educ. Assistance Corp., 73 F. Supp. 2d 47, 53 (D. Mass. 1999).
\textsuperscript{145} \textit{See} 15 U.S.C. § 1692g(a) (2000).
\textsuperscript{146} \textit{See id.} § 1692c(a)–(c).
\textsuperscript{147} \textit{See} 34 C.F.R. § 682.404(a)(2)(ii) (2004) (default aversion assistance to the borrower).
\textsuperscript{148} 191 F. Supp. 2d 1031 (W.D. Wis. 2002).
\textsuperscript{149} \textit{Id.} at 1043.
\textsuperscript{150} \textit{See id.} at 1043–44.
\textsuperscript{151} \textit{Id.} at 1044.
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fact that in the absence of specific statutory or regulatory language
governing the definition of "default," a court must look to the parties'
agreement for a resolution of the problem.152

There was a variation on the theme in Kvassay v. Hasty,153 when a
defendant tried to collect the plaintiffs' alleged obligations because the
checks that the plaintiffs had issued were subsequently lost. The de-
fendants' position was that they were not debt collectors because the
debts were not in default when the defendants obtained them for col-
lection.154 This was another case where the plaintiffs confused a debt
that was in "default" with one that was "overdue" or "delinquent." Even
though the lost checks became overdue after ninety days, they
were not in default.155 Once the checks were issued, there was a sus-
pension of the underlying obligation until the check was either paid or
certified.156 Such a suspension did not result in a default.157 Therefore,
the defendant came within the exemption contained in the defini-
tion of "debt collector." This application of the exemption was
consistent with the Skerry and Hartman decisions, inasmuch as it rec-
ognized once again that a debtor's delinquency or failure to pay on
time does not necessarily constitute a default, and that one must look
to the parties' contract or applicable law to determine whether a de-
fault has in fact occurred.

IV. VALIDATING THE DEBT

A. The Problem of Competing Messages

The FDCPA provides the necessary framework for a debt collector
to inform the consumer about the details of the debt.158 At the same

152. The defendant in Hartman wanted to use the definition of default that the Skerry
court used. Hartman, 191 F. Supp. 2d at 1043. The Federal Family Education
Loan Program discussed in Skerry has its own regulations defining default, and
so it had no application to the kind of loan at issue in Hartman. See 34 C.F.R.
§ 682.200(b) (2004).


154. See id. at 1270.

155. The local statute provides that a check becomes due "90 days after its date." Kan.
check becomes stale after 90 days." Id. § 84-3-304 cmt. 1. A check that is stale is
not necessarily in default.

156. The statute provides in pertinent part: "In the case of an uncertified check, sus-
pension of the obligation continues until dishonor of the check or until it is paid
or certified." Id. § 84-3-310(b)(1).

157. Even if the checks were lost, a person seeking to enforce them could follow the
statutory procedure for enforcement as long as the person was entitled to enforce
them when he lost possession. See id. § 84-3-309. Nevertheless, this provision
for enforcing lost checks does not relate to default at all.

158. The FDCPA provides the following validation mechanism:

(a) Within five days after the initial communication with a consumer in
connection with the collection of any debt, a debt collector shall, un-
time, it requires the collector to notify the consumer about the right to dispute the validity of the debt. 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 consumers alike in dealing with the validation section raises questions about the utility of the notice in its present form.

A collector must inform the consumer that if the consumer disputes the debt in writing, the debt collector will verify the debt for the consumer. If the consumer disputes the debt, the debt collector must suspend its collection efforts until it verifies the debt. If the consumer merely disputes the debt orally, the debt collector does not have to verify the debt, but there is no assumption that the debt is valid. The difficulty with the validation section is that although a debt collector must inform the consumer of the consumer's statutory right to challenge the debt within thirty days, it may nevertheless simultaneously pursue the debtor with collection language that may

less the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

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

159. See id. § 1692g(a)(4).
160. The Senate report explained the significance of the validation provision:

Another significant feature of this legislation is its provision requiring the validation of debts. After initially contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed. If the consumer disputes the validity of the debt within 30 days, the debt collector must cease collection until he sends the consumer verification.

This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.

162. Id. § 1692g(b).
163. See id. § 1692g(a)(3).
When the consumer receives
the debt collector's assurance that he has thirty days to register any
objections to the debt collector's claim, it is natural for him to think
that he has some leeway in responding. Nevertheless, the consumer's
satisfaction with the dispute period may be short-lived when the con-
sumer reads other language in the collection letter that demands pay-
ment immediately, or at least within a certain period that falls short
of the thirty days for disputing the debt. The statute therefore cre-
ates a challenge for the collector to craft its demands in such a way
that they do not contradict or overshadow the validation notice.

From the consumer's perspective, it seems that this tension be-
tween the consumer's right to dispute the debt and the collector's right
to pursue the consumer within the same thirty-day period can be
avoided by providing a respite for the consumer from the collector's
claims. It should be enough for a debt collector to inform the con-
sumer about the elements of its claim, and then give him a chance to
react if he wants to do so. The debt collector should not be able to
use the interim period that is intended for the consumer's reflection as

164. See DeSantis v. Computer Credit, Inc., 269 F.3d 159 (2d Cir. 2001); Bartlett v.
Heibl, 128 F.3d 497 (7th Cir. 1997); Graziano v. Harrison, 950 F.2d 107 (3d Cir.
1991); Miller v. Payco–General Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991);

165. See Bartlett, 128 F.3d 497 (demand for payment within one week); Graziano,
950 F.2d 107 (threat to sue if payment not received in ten days); Rhoades v. W. Va.
mediate payment demanded); Withers v. Eveland, 988 F. Supp. 942 (E.D. Va.
1997) (demand for full payment within five days).

166. The court in Bartlett v. Heibl underscored the problem in evaluating a typical
collection letter by observing that, "[i]n the typical case, the letter both demands
payment within thirty days and explains the consumer's right to demand verifi-
cation within thirty days. These rights are not inconsistent, but by failing to ex-
plain how they fit together the letter confuses." 128 F.3d at 500.

167. The FTC views the thirty-day time frame as a dispute period in which the con-
sumer can insist on the collector's verification of the debt, rather than as a grace
period during which the collector should suspend activities. See Fed. Trade
Comm'n, 2004 FTC Ann. Rep.; Fair Debt Collection Practices Act 13 [herein-
2004fdcreport.pdf. The FTC wants Congress to add a specific provision to the
FDCPA that permits continued collection activity as long as the consumer does
not dispute the debt during that thirty-day period. See id. The FTC believes that
this clarification of the statute should include a caveat that "the collection activ-
ity should not overshadow or be inconsistent with the disclosure of the con-
sumer's right to dispute the debt . . . ." Id. It is this overshadowing and
inconsistency that has plagued courts over the years and the FTC's recommenda-
tion does not alleviate the problem.

168. The point here is that once the collector sends its initial communication with the
basic details and the validation notice, the collector should then have to wait for a
certain period of time before resuming its pursuit of the consumer. The collector
should not be able to make any demands or threats within that initial grace
period.
an opportunity to continue its badgering. It is evident that the consumer's statutory right to dispute the debt does not realize its full impact when competing with the debt collector's ability to continue pressuring the consumer. The statute presents a veiled challenge to the debt collector to compose delicate language that satisfies the statutory requirements, but also simultaneously allows the debt collector to impress the consumer with sharp demands for satisfaction of the outstanding debt.\textsuperscript{169} There is no magical formula for determining when the collector has crossed the line, but it is no secret that the debt collector always wants the consumer to pay more attention to its claim than to the validation notice.\textsuperscript{170} The debt collector will sometimes use peculiar language that brings home the message to the consumer without compromising the statutory notice.\textsuperscript{171} It is not clear why the statute should place the collector in this position, for the natural tendency is for the debt collector to state its claim with sufficient enthusiasm that the validation notice loses its appeal. There is no reason for the statute to insist on these competing interests. It seems preferable for the consumer to have a short period of time to lodge his objections, without having to worry at the same time about the debt collector's assault. It would certainly remove an incentive for the debt collector to compose language that detracts from the validation notice in another part of the collection letter.\textsuperscript{172}


\textsuperscript{170} See \textit{United States v. Nat'l Fin. Servs., Inc.}, 98 F.3d 131 (4th Cir. 1996) (The collector put large-type validation notice on back of collection letter.); \textit{Russell v. Equifax A.R.S.}, 74 F.3d 30 (2d Cir. 1996) (The validation notice on back of letter was overshadowed and contradicted by a warning that collection would be posted on the consumer's file if the debt was not paid.); \textit{Swanson v. S. Or. Credit Serv., Inc.}, 869 F.2d 1222 (9th Cir. 1988) (The collection language overshadowed the validation notice, which was placed at bottom of collection letter.).

\textsuperscript{171} In \textit{Renick v. Dun & Bradstreet Receivable Management Services}, 290 F.3d 1055, 1057 (9th Cir. 2002), the collector used language such as "send your payment today" and "prompt payment is requested" and the court found no overshadowing problem. The collection language was in the same font as the validation notice and conveyed a request rather than a demand. \textit{See id.; see also \textit{Peter v. GC Servs. L.P.}}, 310 F.3d 344, 349 (5th Cir. 2002) (no violation where collection language was "FULL COLLECTION ACTIVITY WILL CONTINUE UNTIL THIS ACCOUNT IS PAID IN FULL . . . . TO AVOID FURTHER COLLECTION ACTIVITY, YOUR STUDENT LOAN MUST BE PAID IN FULL.").

\textsuperscript{172} In \textit{DeSantis v. Computer Credit, Inc.}, the collector sent a letter that demanded that the consumer pay or otherwise give a reason for non-payment. The court found this letter confusing, because it detracted from the consumer's right to dis-
It does not take very long to recognize the challenges that a debt collector must face in getting its message across to the consumer. In Savino v. Computer Credit, Inc., the collector sought “immediate payment or a valid reason for [the consumer’s] failure to make payment.” The collector completed its collection efforts by placing the validation information on the back of the collection notice. The collector must have felt confident that it had done all it was supposed to do; yet the consumer complained about the conflict between the collector’s demands and the notice about his right to dispute the debt.

The Second Circuit emphasized that the debt collector’s call for immediate payment did not by itself violate the statute. The debt collector’s dereliction lay in refusing to reconcile the demand for payment with the consumer’s right to dispute the debt. The court believed that the debt collector could have met its statutory obligations by including in its letter transitional language that explained the relationship between these two essential features. The difficulty here is that the FDCPA sets out the specific information that the debt collector must provide to the consumer, and there is no statutory roadmap to guide the debt collector in continuing to press its collection claim. The debt collector, therefore, is free to demand payment while explain-

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173. 164 F.3d 81 (2d Cir. 1998).
174. Id. at 84.
175. Id.
176. Id.
177. Id. at 85–86.
178. Id. at 86.
179. Id.; see also Bartlett v. Heibl, 128 F.3d 497, 500–01 (7th Cir. 1997) (The collection letter was confusing, because it failed to explain how the collector’s right to demand payment and the consumer’s right to seek verification fit together.).
180. The Bartlett court set out a safe harbor letter that suggested a way to comply with the statute “without forcing the debt collector to conceal his intention of exploiting his right to resort to legal action before the thirty days are up.” 128 F.3d at 501. Even though that letter is a model of clarity, one may still quibble with the language relating to the consumer’s right to dispute the debt. The letter does notify the consumer of the right to dispute the validity of the debt or any part of it. But then it goes on to provide as follows: “If you do dispute it . . . I will . . . mail to you proof of the debt.” Id. at 502 (emphasis added). The “it” here apparently refers to the debt, but the statute requires the collector to give proof of the debt if the consumer disputes the debt, “or any portion thereof.” 15 U.S.C. § 1692g(a)(4) (2000). So, even the Seventh Circuit may have run afoul of the stat-
ing the nuts and bolts of the consumer's rights. It is conceivable that Congress may not have recognized the inevitable tension that would flow from these two competing interests. If a debt collector follows the statutory prescription, it still may find itself in deep trouble if it makes its demands without finesse.181 The debt collector has to make sure that it does not lead the consumer astray with competing collection phraseology.

The contest can be easily avoided by allowing the validation notice to enjoy the limelight during some short period, even if accompanied by an abstract statement of the debt's details.182 The debt collector seems destined to fail under the present statutory requirements,183 as it will always want to make sure that the consumer is under some pressure to act on its demands. In Savino, the debt collector communicated the urgency of the claim by insisting on "immediate payment."184 The consumer had to decipher this demand in light of the important validation notice on the back of the collection letter. A debt collector cannot be faulted for continuing its collection efforts, because the statute reins in the collector only if the consumer disputes the debt in writing.185 Even then, the collector need only halt its activities until it verifies the information about the debt.186 Although the statute imposes this obligation on the collector, the collector does not have to

181. See Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996) (collector violated statute by stating that if the consumer did not dispute the debt, he must pay in ten days or risk a lawsuit); Baker v. Citibank (S.D.) N.A., 13 F. Supp. 2d 1037, 1039 (S.D. Cal. 1998) (The collection letter violated statute by threatening "trouble of litigation" and "legal and/or attorneys fees" unless debt was paid "now.").

182. The objective is to convert the so-called dispute period (during which the collector can continue its collection efforts) into a grace period for the consumer that puts a temporary stop to such activities. Collectors would then not have to worry about a consumer's right to seek verification of the debt. Although the FTC recognizes that there is some sentiment for a grace period, it has urged Congress to clarify the statutory language by expressly permitting collectors to continue their activities during the thirty-day dispute period. See 2004 FTC ANN. REP., supra note 167, at 13.

183. The FTC has suggested that the congressional clarification of the validation provision "should include a caveat that the collection activity should not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt." Id. The courts have consistently held against overshadowing and contradiction, but the collectors still have trouble toeing the line. See DeSantis v. Computer Credit, Inc., 269 F.3d 159, 162 (2d Cir. 2001); Bartlett, 128 F.3d at 500–01; Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996); Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991).

184. 164 F.3d at 84.


186. Id. § 1692g(b). One collector got into trouble, however, by offering to settle the debt after the consumer had disputed it. The court held this offer to be an attempt to collect the debt, which thus violated the statute. Spencer v. Henderson–Webb, Inc., 81 F. Supp. 2d 582, 593 (D. Md. 1999).
tell the consumer about it.\textsuperscript{187} If it is so important for the consumer to have this validation option, it would seem to be equally important for the consumer to know what impact his exercise of the option will have on the collector's activities.\textsuperscript{188}

Although the statute does not address the importance of the clarity of the debt collector's disclosures, the courts have made no bones about insisting that other collection language must not distort or overshadow the validation notice. The debt collector's dilemma is in urging the consumer to repay the debt within a few days, while reassuring him that he still has thirty days to query the debt. In \textit{Russell v. Equifax A.R.S.},\textsuperscript{189} the debt collector used its guile to let the consumer know that she could avoid damage to her credit by paying within ten days.\textsuperscript{190} Had the debt collector not given a time limit for payment, the consumer might not have appreciated the seriousness of the situation. There was a problem, however, in reconciling the thirty-day dispute period with the ten-day window for payment.\textsuperscript{191} The courts have not been willing to overlook this difference in the windows of opportunity, because it leaves the consumer in a quandary about his choices. They have been keen to prevent collectors from including overshadowing or contradicting language in the collection letters.\textsuperscript{192}

The juxtaposition of two different time periods in the same letter, one dealing with the dispute period and the other with the collector's threat to sue, does not necessarily fit neatly within the overshadowing or contradiction scheme. It is simply that the apparent, though not actual, inconsistency leads to the consumer's confusion. In \textit{Bartlett v. Heibl},\textsuperscript{193} the debt collector gave a clear message that the consumer could contest the debt within thirty days, but in a previous paragraph of the same letter the debt collector gave the consumer one week to settle his debt or face a lawsuit.\textsuperscript{194} The Seventh Circuit viewed this juxtaposition of the two different periods as "legal gibberish" and as bad as an "outright contradiction."\textsuperscript{195} Despite this observation, the court conceded that it was nevertheless possible for a collector to con-

\begin{itemize}
\item \textsuperscript{187} See 15 U.S.C. § 1692g(b).
\item \textsuperscript{188} It is to be noted that the court's safe haven validation notice in \textit{Bartlett v. Heibl} does tell the consumer that the collector must suspend its collection efforts if the consumer requests verification of the debt. See \textit{Bartlett}, 128 F.3d at 502.
\item \textsuperscript{189} 74 F.3d 30 (2d Cir. 1996).
\item \textsuperscript{190} Id. at 32.
\item \textsuperscript{191} Id. at 34.
\item \textsuperscript{192} See Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484–85 (4th Cir. 1991); Swanson v. S. Or. Credit Service, Inc., 869 F.2d 1222, 1225 (9th Cir. 1988).
\item \textsuperscript{193} 128 F.3d 497 (7th Cir. 1997).
\item \textsuperscript{194} Id. at 501.
\item \textsuperscript{195} Id.
\end{itemize}
vey a message to the consumer about the risk of a lawsuit without
detracting from the consumer's rights.\textsuperscript{196} The court must not have
regarded this as some kind of routine accomplishment, because it then
proceeded to draft a letter that would provide a safe harbor for debt
collectors within the Seventh Circuit.\textsuperscript{197} The court's contribution
bears testimony to the fact that any debt collector faces a difficult
challenge in explaining how the two elements fit together. The plain-
tiff in \textit{Bartlett} tried to convince the court that the collector could not
threaten to bring a lawsuit within the thirty-day dispute period.\textsuperscript{198}
There was nothing to support that theory, because the statute does
not prohibit the collector from continuing its collection efforts, unless
the consumer stops the collector in its tracks with a written verifica-
tion request.\textsuperscript{199}

Even though the safe harbor letter in \textit{Bartlett} offers some comfort
to collectors in the Seventh Circuit, it still does not solve the problem
for consumers. It is, quite frankly, not the court's fault. The statute
allows the collector to throw down the gauntlet and then retreat gen-
tly with the validation language. The point is that, in a \textit{Bartlett}-type
case, the consumer does not really have thirty days to dispute the va-
idity of the debt. It is only thirty days if the collector decides that it
does not want to act between the "one week" and the "thirty days."\textsuperscript{200}
In the meantime, the consumer is not sure what to do. She is unsure
about the meaning of the time periods. The court's safe harbor letter
helps in one respect to clear the air by clarifying that the consumer
can put a temporary stop to the collector's efforts by disputing the debt
in writing.\textsuperscript{201} It is noteworthy, however, that the statute does not re-
quire a collector to tell a consumer about this suspension of activities

\begin{itemize}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{Id.} at 501–02.
\item \textsuperscript{198} See \textit{id.} at 501.
\item \textsuperscript{199} The court confirmed that "[t]he debt collector is perfectly free to sue within thirty
days." \textit{Id.} (citing 15 U.S.C. § 1692g(b) (2000)). The challenge is in devising "a
form of words that will inform the debtor of the risk of his being sued without
detracting from the statement of his statutory rights." \textit{Id.}
\item \textsuperscript{200} The courts and the FTC have consistently taken the position that the thirty-day
time frame is not a grace period during which a collector must stop its collection
activities. They view it as the time in which the consumer may dispute the debt,
but the collector is free to continue its collection efforts as long as the consumer
has not sought verification of the debt. \textit{See Smith v. Computer Credit, Inc., 167
F.3d 1052, 1055 (6th Cir. 1999); Bartlett, 128 F.3d at 501; FTC Staff Commen-
\item \textsuperscript{201} The court's model letter advised as follows:

\begin{quote}
If, however, you request proof of the debt or the name and address of the
original creditor within the thirty-day period that begins with your re-
ceipt of this letter, the law requires me to suspend my efforts (through
litigation or otherwise) to collect the debt until I mail the requested in-
formation to you.
\end{quote}

\textit{Bartlett, 128 F.3d at 502.}
during the verification process. It is the missing link that contributes to a consumer's confusion. The Bartlett court was mindful to include this bit of information to make the picture complete. If the statute continues to offer no restriction on the debt collector's language about a lawsuit, at least it should require the collector to inform the consumer about this strategy for keeping the collector at bay while the collector garners proof about the debt.

It is no secret that the threat of a lawsuit within a certain number of days when combined with the statutory notice of a thirty-day dispute period poses problems for the debt collector in terms of complying with the FDCPA. The courts are more tolerant, however, if the collector does not specify a time period for payment, even if it uses language that craves the consumer's urgent attention. Therefore, a debt collector will find judicial sympathy if it requests payment without "further delay." That kind of language would not confuse the consumer into thinking that he no longer has thirty days to lodge his objections. There is no actual or apparent contradiction here, because the debt collector still has the right to continue its collection activities, as long as it does not encroach on the consumer's statutory right to seek verification. The debt collector's language does not demand payment within a period shorter than thirty days, thus avoiding the conflict that torments courts in this context.

Allowing the debt collector to send two messages to the consumer in the same letter obviously opens the door to imaginative drafting. In Wilson v. Quadramed Corp., the collector was polite; it allowed the consumer the opportunity to pay the bill immediately and avoid further action. This time the court sided with the collector, even though the debt collector urged the consumer to act "immediately." The court was persuaded by the lack of a demand or threat by the

202. The court must have realized the significance of this information. The suspension of collection activities provides some respite for the consumer. Congress could have incorporated the language of subsection (b) as a part of the disclosure requirements of § 1692g(a), thus adding a paragraph (6) that would require the collector to provide a statement to the consumer about the collector's obligation to suspend collection activities if the consumer disputes the debt.

203. The consumer may want to know that she has the right to put a temporary stop to the collector's activities, even if she is somewhat familiar with the basis of the collector's claim. See Johnson v. Statewide Collections, Inc., 778 P.2d 93 (Wyo. 1989). In some cases the collector may choose to cease trying to collect, and thus not provide verification of the debt. See Jang v. A.M. Miller & Assocs., 122 F.3d 480 (7th Cir. 1997); Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992).

204. See Vasquez v. Gertler & Gertler, Ltd., 987 F. Supp. 652, 658 (N.D. Ill. 1997); see also Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997) (finding no violation when collection letter asks consumer to telephone collection assistant immediately).

205. 225 F.3d 350 (3d Cir. 2000).

206. Id. at 352.

207. Id.
Thus, the court saw the collection letter as a request rather than a demand for payment, and the debt collector merely gave the consumer an option of paying immediately or disputing the debt within thirty days. No doubt the delicate collection language had some impact on the court's view of things, for the court read the letter as offering a reasonable choice for the consumer to act without undue prodding by the collector.

In Savino, the debt collector had difficulty because it insisted that the consumer pay immediately or give a valid reason for not doing so. There was no transitional language linking that demand to the consumer's validation rights. On the other hand, the Wilson collector seemed interested in giving the consumer the opportunity to make his choice about paying or disputing the debt. It chose the right language to achieve its objective without sacrificing the legitimacy of the validation notice. The debt collector similarly satisfied the Fifth Circuit in Peter v. GC Services L.P. that there was no violation when the collector advised the consumer that full collection activity would continue until the account was paid in full. There was no time limit in the collector's warning, and the language about payment did not in any way detract from the consumer's right to dispute the

208. See id. at 356. There was no demand or threat like that in Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991), where the collector threatened immediate legal action if his demand for payment within ten days was not met. The Wilson court viewed the consumer as having the option of paying immediately to avoid further action or notifying the collector within thirty days that he disputed the debt. See 225 F.3d at 356.

209. The court was impressed with the fact that "the letter [did] not emphasize one option over the other." Id.

210. The courts seem to be impressed with the gentler approach. For example, the collection letter in Burns v. Accelerated Bureau of Collections of Virginia, Inc., 828 F. Supp. 475 (E.D. Mich. 1993), advised the consumer as follows: "THE ABOVE ACCOUNT HAS BEEN LISTED WITH THIS AGENCY FOR IMMEDIATE COLLECTION. TIME IS OF THE ESSENCE. THEREFORE IT IS IMPORTANT THAT PAYMENT IN FULL FOR $3547.46 BE MADE TODAY." Id. at 476. The court did not see any conflict with the validation notice, and treated the collector's language as indicating an interest in collecting the debt in a timely manner. See Burns, 828 F. Supp. at 477.


212. See id. at 86. It is this failure to explain the connection that has worried courts. See Bartlett v. Heibl, 128 F.3d 497, 500–01 (7th Cir. 1997); Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996); Miller v. Payco–General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991).

213. The collector's request for payment did not have a time limit. See Wilson, 225 F.3d at 356 (quoting Burns, 828 F. Supp. at 477). The collector studiously avoided specific limiting language by using terms such as "time is of the essence" and "today," thus convincing the court to treat the request as one for payment "in a timely fashion." Id. at 356–57.

214. 310 F.3d 344 (5th Cir. 2002).

215. Id. at 350.
It is arguable that the collector did not really demand payment, but rather confirmed that it would continue its collection activity until the consumer paid. Even so, it is noteworthy that the collector could not have continued “full collection activity” if the consumer had disputed the debt, for the collector would have had to suspend its efforts until it could provide the necessary verification. Although the statute does not require the collector to notify the consumer about this possibility, it would seem that the collector in Peter should have undertaken the responsibility to relate the activity clause to the validation notice. A consumer may have more incentive to seek information from the collector if he realizes that there will be a temporary halt in the collector’s communication when he does so.

When the debt collector does not include a time limit in its demand for payment, a court has more flexibility in determining whether the collector has violated the statute. In Kramsky v. Trans-Continental Credit & Collection Corp., the debt collector seemed almost apologetic in its letter to the consumer. The first paragraph informed the consumer that the account had been referred for collection and that the consumer should use the enclosed envelope to pay the debt in full. There was no demand for payment within a certain time, and there was no threat of consequences if the consumer did not act. The precatory language in Kramsky contrasted sharply with the language of insistence in Russell, and of immediacy in Savino. The Kramsky court could find no fault with the collection letter, which adequately

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216. Id.
217. The statute does not require the collector to notify the consumer about its obligation to suspend collection activities if the consumer questions the debt. See 15 U.S.C. § 1692g (2000). Thus, the collector in Peter was technically in compliance when he promised full collection activity until the consumer paid up. See Peter, 310 F.3d at 347. Nevertheless, there is still a sound basis for requiring the collector to disclose what will result from the consumer’s request for verification of the debt.
218. The collector obviously wanted to convince the consumer that it would not stop its collection activities until the debt was paid. See 310 F.3d at 349. The collector was not really free to do whatever it wanted if the consumer disputed the debt. See id. at 348-49; see also 15 U.S.C. § 1692g(b). This missing link between collection and a consumer’s verification request is what causes problems. It seems that the collector should have an obligation to explain the matter by providing some transitional language. See Savino v. Computer Credit, Inc., 164 F.3d 81, 85-86 (2d Cir. 1998); Bartlett v. Heibl, 128 F.3d 497, 500 (7th Cir. 1997); see also Roger S. Cox, Bankruptcy and Creditors’ Rights, 56 SMU L. Rev. 1145, 1169 n.139 (2003).
220. Id. at 909.
221. Compare Kramsky, 166 F. Supp. 2d at 909 (“we must ask that you remit the balance shown in full”), with Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996) (“PAYMENT IN FULL WITHIN 5 DAYS IS NOW DEMANDED”), and Savino, 164 F.3d at 84 (“The hospital insists on immediate payment or a valid reason for your failure to make payment.”).
informed the consumer about the debt, included the validation notice, and even advised the consumer what to do if he had insurance.222

Such language of restraint certainly has its own rewards. It can sometimes convince a debtor about the seriousness of a debt collector's position without detracting from the validation message. That is what a debt collector strives for when it communicates with a consumer about the debt. It is not unusual, however, for a consumer to be unimpressed with a collector's delicate language. Therefore, the debt collector has to toe a fine line in attracting the consumer's attention to the outstanding debt, while simultaneously driving home the consumer's right to dispute it. The present statutory framework may encourage a collector to dilute its collection language in order to avoid any conflict with the validation notice. The debt collector must face the inevitable challenge of reconciling the two positions. One may find a debt collector encouraging a consumer to "[a]ct now to satisfy [the] debt"223 without any threat of sanctions for failure to comply within a stipulated period. On reflection, it seems that this kind of language is not likely to prod the consumer into immediate action, but on the other hand, it seems to provide a safe harbor for the collector.224

There is nothing wrong in principle with this approach, because the language does not send a conflicting message that weakens the consumer's right to challenge the debt. Nevertheless, it is troubling that the statute puts pressure on a debt collector to create the right mix of language if the debt collector wants to avoid the charge of contradicting or overshadowing the validation formula.225

Even when a debt collector urges a consumer to pay "today" or to make "prompt payment," it still has to worry about its statutory responsibilities.226 The debt collector must always be concerned about

222. See 166 F. Supp. 2d at 908–09.
223. Taylor v. Cavalry Investment, LLC, 365 F.3d 572, 575 (7th Cir. 2004).
224. The Taylor court reacted favorably to the collector's language with this explanation:

"Act now to satisfy your debt" is in the nature of puffing, in the sense of rhetoric designed to create a mood rather than to convey concrete information or misinformation ("Buy Now!") "Best Deal Ever!") "We Will Not Be Undersold!") as it is perfectly obvious to even the dimmest debtor that the debt collector would very much like him to pay the amount demanded straight off, sparing the debt collector any further expense.

Id.

225. It is even more challenging for a collector to produce the right formula if any contradiction need not be threatening for a violation to occur. See Beeman v. Lacy, Katzen, Ryen & Mittleman, 892 F. Supp. 405 (N.D.N.Y. 1995).

226. Compare Renick v. Dun & Bradstreet, 290 F.3d 1055 (9th Cir. 2002) (finding that request for prompt payment was not a violation, because it was in the same font as the validation notice and did not convey a threat), with Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999) (finding that a collection letter demanding prompt payment and immediate action stated a cause of action sufficient to withstand motion to dismiss).
the consumer's propensity to act in the face of a gentle reminder about the debt. If the debt collector's language lacks the necessary punch, the consumer likely will not take it seriously, and the debt collector will find itself repeating the same message time after time without any appreciable effect on the consumer. In light of this, it may be better to give equal billing to the collector's demands and the consumer's right.227 If the debt collector merely gives a brief statement about its claim, but also gives the validation language full billing in its first communication, that will go a long way toward avoiding the potential problems caused by confusing language. With the validation notice out of the way, the collector can then devote its full energies to its recovery efforts in subsequent notices to the consumer.228

It is not easy for a debt collector to strike the proper balance between the two competing interests. A debt collector tried to press home its advantage in DeSantis v. Computer Credit, Inc.,229 by demanding payment from the consumer or a valid reason from the consumer for not paying.230 It was not surprising that the court found that the collection letter had sufficient capacity to confuse a consumer.231 The consumer might have felt compelled to give some rea-

227. The court in Johnson v. Revenue Management Corp. posed the relevant question: "Did the letter confuse its recipients—and confuse them about the statutory entitlements, not just about what words such as 'prompt' mean in the abstract. If the letter effectively advises the consumer about the statutory entitlements, then the Act has been satisfied." 169 F.3d at 1060.

228. The objective is to allow a consumer adequate time to digest the relevant information and give him the procedure for disputing the debt. After an appropriate grace period, the collector may resume its collection activities. The present statutory language requires a collector to cease such activities only if the consumer disputes the debt in writing. See 15 U.S.C. § 1692g(b) (2000).

229. 269 F.3d 159 (2d Cir. 2001).

230. Id. at 160.

231. Id. at 162. Although the court referred to the "unsophisticated consumer," it in fact applied the "least sophisticated consumer" standard in determining whether the consumer stated a claim upon which relief could be granted. See id. at 161. Most courts apply the "least sophisticated consumer" standard, which is a more demanding one than merely examining the effect of the validation notice on a reasonable consumer, but which still protects the debt collector from bizarre interpretations of the FDCPA. See Savino v. Computer Credit, Inc., 164 F.3d 81, 85–86 (2d Cir. 1998); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1029 (6th Cir. 1992); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988).

On the other hand, the Seventh Circuit has preferred the "unsophisticated consumer" standard. It stated its position in Gammon v. GC Services Ltd. Partnership, 27 F.3d 1254 (7th Cir. 1994), as follows: "We reiterate that an unsophisticated consumer standard protects the consumer who is uninformed, naive, or trusting, yet it admits an objective element of reasonableness. The reasonableness element in turn shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters." Id. at 1257. The court was unhappy with the "least sophisticated consumer" approach, because such a consumer is "the very last rung on the sophistication ladder" and would most likely
son for not paying, even though the statute gave him an absolute right to query the debt. The debt collector could hardly be faulted for trying to elicit a meaningful response from the consumer, but the attempt to do so left the consumer in doubt about his options. No doubt the debt collector wanted to leave the impression that the consumer needed a reason for not paying, and that the consumer had to convey that to the collector in good time. It was a device that was sure to mislead the consumer into thinking that any challenge to the debt required an explanation.

A debt collector's letter urging the consumer to call the collector or to make a partial payment will not usually cause any difficulty for the collector. Courts are sympathetic to this kind of language, because it is an inducement to pay that does not detract from the consumer's right to seek information about the debt. In this sense, it is very much like the situation where the collector merely informs the consumer about the debt, advises him of the right of validation, and then waits for a subsequent opportunity to be more aggressive about the outstanding debt. An escalation of the collector's demands usually will bring the collector closer to a conflict with the validation lan-

be unable "to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion." Id. In Peter v. GC Services L.P., 310 F.3d 344 (5th Cir. 2002), the Fifth Circuit avoided choosing either of the two standards, because "the difference between [them] is de minimis at most." Id. at 349 n.1. When the Seventh Circuit had another go at the standard in Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996), it stuck with the "unsophisticated consumer" approach, but conceded that such a standard was "a distinction without much of a practical difference in application." Id. at 227.

232. The consumer may query the debt for any number of reasons. He may not recognize the creditor's name, or he may be unsure about the amount of the debt. See Avila, 84 F.3d at 227. The collector's language in DeSantis put the consumer under pressure not dictated by the statute. The consumer did not have to give a reason for asking questions about the debt, whether such reason was valid or not. See 15 U.S.C. § 1692g(b).

233. This is just another of the problems caused by allowing the collector to include its collection language with the validation notice. The collector in DeSantis tried its best to force the consumer into some kind of response by insisting on "payment or a valid reason for ... failure to make payment." 269 F.3d at 160. If the consumer wanted to delay payment, he had to determine for himself if the reason for his doing so was valid.

234. See Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 310 (2d Cir. 2003) (finding no violation where front of letter requested consumer to call or write the collector even though validation notice was on back), cert. denied, 540 U.S. 823 (2003); Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997) (finding that request that consumer call collector immediately did not violate statute); Lerner v. Forster, 240 F. Supp. 2d 233, 240 (E.D.N.Y. 2003) (finding no violation where letter required consumer to make full payment or call collector's client to arrange partial payment); Wallace v. Capital One Bank, 168 F. Supp. 2d 524, 239 (D. Md. 2001) (finding that collector did not violate statute by inviting consumer to call if he had any questions about the debt).
guage. The collector’s invitation to call is not by itself damaging, but its combination with other collection language can cause problems.

In Rhoades v. West Virginia Credit Bureau Reporting Services, Inc.,235 the collection notice not only asked the consumer to call “to-day,” but also demanded “immediate payment” of the full amount.236 The additional language must have cast a different light on the scene, especially when the collector’s demands appeared in larger type than the validation notice.237 It was this latter element that led the court to find an overshadowing of the notice. The result may be different if the debt collector not only requests the consumer to call, but also refers the consumer to the validation notice on the back of the collection letter. This provides ample evidence that, rather than trying to overshadow the validation notice, the collector is ensuring that it attracts the consumer’s attention to the vital validation information.238

B. The Requirement of a Writing

Although the validation section is intended for the consumer’s benefit, courts disagree about whether a consumer must dispute the debt in writing if he wants to dispute it at all. This disagreement exists because § 1692g(a)(3) does not call for a writing when the consumer merely disputes the validity of the debt.239 On the other hand, if the consumer wants the collector to verify the debt, § 1692g(a)(4) requires the consumer to notify the collector in writing of the dispute.240 Furthermore, there is a similar requirement for a writing under § 1692g(a)(5) if the consumer wants to find out the name and address of the original creditor, which may be different from the current creditor.241 Some courts have imported the requirement of a writing

236. Id. at 530.
237. See id. If a collector persuades the consumer to call about the debt, the statute does not require the collector to verify the debt because any such verification request must be in writing. See 15 U.S.C. § 1692g(b). By acceding to the collector’s request, the consumer may let the thirty-day validation period expire without realizing what he has done. See Rhoades, 96 F. Supp. 2d at 532; see also Miller v. Payco–General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991).
238. See Miller, 321 F.3d at 310 (finding no violation where the collection letter repeatedly referred to the validation notice on back and advised the consumer to call only if the consumer did not wish to exercise statutory rights outlined in the validation notice); Youngblood v. GC Servs. Ltd. P’ship, 186 F. Supp. 2d 695, 699 (W.D. Tex. 2002) (motion for summary judgment denied where genuine issue of material fact existed as to whether prominent display of validation notice on the back of the letter was adequate to warn the debtor about validation rights).
239. The statute provides that the collector must give the consumer written notice containing “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.” 15 U.S.C. § 1692g(a)(3).
240. Id. § 1692g(a)(4).
241. Id. § 1692g(a)(5).
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into § 1692g(a)(3), so that it is consistent with § 1692g(a)(4) and § 1692g(a)(5). In doing so, they have not given a convincing explanation about a reason for the congressional exclusion of a “writing” requirement in § 1692g(a)(3).

In § 1692g(a)(3), a consumer can orally dispute the validity of the debt if he does not want the debt collector to assume that the debt is valid. Under § 1692g(a)(4), the consumer must notify the debt collector “in writing” that he disputes the debt if the consumer wants a verification of the debt. Why did Congress make a point of omitting the “in writing” language in § 1692g(a)(3) if it did not intend the section to have a different meaning from § 1692g(a)(4)?

In construing this section, one must look at its express language. If it is not ambiguous, it is unnecessary to resort to its legislative history, and the plain language of the statute should carry the day. If the statute’s literal application will produce a result that is clearly at odds with the drafters’ intent, then it is permissible to apply an exception to the plain language approach. There does not seem to be a place for any exception here. Congress knew full well what it was doing when it drafted § 1692g. This is not a case where the words “in writing” were omitted by mistake and the other parts of the two sections remained the same. When Congress includes certain language in one part of a section but omits it in others, the presumption is that Congress intended to make a distinction.

Although Congress omitted the words “in writing” from § 1692g(a)(3), it included them in § 1692g(a)(4) for the consumer to get verification of the debt and in § 1692g(a)(5) for the consumer to obtain the name and address of the original creditor. Furthermore, the language also appears in § 1692g(b), which requires the collector to cease collection of the debt until it obtains verification. It is hardly likely that Congress in-

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244. Id. § 1692g(a)(4).


247. See Russello v. United States, 464 U.S. 16, 23–24 (1983); United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972); 2A SINGER, supra note 32, § 46.06.

248. It is noteworthy that § 1692g(b) uses the language “notifies the debt collector in writing . . . that the debt . . . is disputed,” whereas the § 1692g(a)(3) language is “disputes the validity of the debt,” and the § 1692g(a)(5) language is “written request.” The phrases (except that in subsection (a)(3)) relate to action that the
tended that the “in writing” requirement should be implied, given the
care with which it constructed § 1692g.

If one assumes that § 1692g(a)(3) requires no writing, one must
still question why Congress intended the statute to operate in this
way. The Third Circuit in *Graziano v. Harrison*249 thought that Con-
gress could never have intended “so incoherent a system.”250 The
court was bothered by the fact that even when the consumer disputes
the debt orally, so as to call its validity into question, the debt collector
still does not have any obligation to verify the debt.251 It seemed to
question the utility of a consumer’s right to lodge an oral objection if
the consumer cannot force the collector to respond.252 If the debt col-
lector knows that the consumer disputes the debt, it may be motivated
to investigate the matter even in the absence of a writing.253 After all,
if a consumer creates some doubt about the validity of the debt, the
collector may save time and expense in not pursuing the consumer
when there is no valid claim. The theory here is that the consumer
may still use any device to let the debt collector know about his mis-
givings about the debt, and that there is no rationale for depriving
him of that right.254 This informal approach does not detract from the
formal requirements of § 1692g(a)(4), under which the collector must
verify the debt or obtain a copy of any existing judgment.255 The
§ 1692g(a)(3) approach commends itself particularly in those cases
where the consumer is unable to comply immediately with the re-
quirement of a writing, but nevertheless wants the debt collector to
know that there is something wrong with the debt collector’s claim.256
Congress must have felt that it was well worth the effort to give the
oral objectors some mechanism for querying the debt, without neces-

249. 950 F.2d 107 (3d Cir. 1991).
250. Id. at 112.
251. See id.
252. See id.
    Collections Enter., Inc.*, No. 98-CV-5117, 1999 WL 51816, at *3 (E.D.N.Y. Jan. 15,
    1999).
254. One court has recognized that § 1692g(a)(3) “provides a means for the debt collec-
    tor to receive information quickly, which may save time and expense in pursuing
    an otherwise invalid debt.” *Sanchez*, 173 F. Supp. 2d at 1034.
256. The *Sanchez* court acknowledged that “a consumer that is unable to communicate
    in writing, or simply wishes to quickly and informally clear up the matter, is
    afforded limited protection under § 1692g(a)(3).” 173 F. Supp. 2d at 1034. If the
    consumer wishes to benefit from the greater protection afforded by
    § 1692g(a)(4)-(5), then he must follow the requirement of a writing to force the
    collector to act.
sarily mandating the other statutory protections of § 1692g(a)(4). One can hardly fault Congress for this feature, since it provides an option for the consumer to draw the debt collector's attention to his concerns about the debt.

Nevertheless, despite this admirable attempt to assist the consumer, Congress may have posed a challenge to the collector to craft its message in such a way that the consumer will understand the available options. The consumer must understand that she can question the debt in more than one way, but that she must do so in writing if she wants the debt collector to verify the debt or to provide the name and address of the original creditor. Once again, the debt collector is in the position of having to stick slavishly to the statutory language if it expects to avoid problems relating to the validation notice. But even so, one wonders whether the statute is as clear as it ought to be for the collector to convey an effective message to the least sophisticated consumer. Take, for example, the case where the collector uses the following language:

Federal law gives you thirty (30) days after you receive this letter to dispute the validity of the debt or any part of it. If you don't dispute it within that period, we will assume that it is valid. If you do dispute it—by notifying us in writing to that effect—we will, as required by law, obtain and mail to you proof of the debt.

Quite frankly, by putting the phrase "by notifying us in writing to that effect" after the word "dispute," the collector creates the impres-

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257. If the consumer disputes the debt, the collector may not assume that the debt is valid. See 15 U.S.C. § 1692g(a)(3). Even if there is no statutory obligation to obtain verification of the debt when there is no written dispute, the collector will have some motivation for doing so. As a matter of principle, it will want to reassure itself sooner rather than later about the validity of the debt. See Sanchez, 173 F. Supp. 2d at 1034. There is nothing incoherent about the option that the statute provides to the consumer. The Graziano court took the view that such a choice produced an incoherence that could not be tolerated. 950 F.2d at 112; see also Wallace v. Capital One Bank, 168 F. Supp. 2d 526, 529 (D. Md. 2001).

258. The option would be meaningful in this context only if there is no written requirement in § 1692g(a)(3). It must be presumed that Congress excluded such a requirement for a specific purpose. See 2A SINGER, supra note 32, § 46:06, at 192. It is noteworthy that § 1692g(a)(3) is constructed differently from § 1692g(a)(4). In the former section, the debt is assumed to be valid unless the consumer "disputes the validity of the debt," whereas in the latter, the collector must act if the consumer notifies the collector "in writing" that the debt is disputed. Congress could have used the same phraseology in subsection (a)(3) as it did in subsection (a)(4) by requiring the consumer to notify the collector in writing that the debt is disputed if the presumption of validity was to be avoided. Congress may not have felt bound to construct the sections in a similar fashion, because it did not have the same objective in mind, that is, to insist on the written word in both sections.


260. For a discussion of the "least sophisticated consumer" standard, see supra note 231.

sion that it is explaining how the consumer may lodge his dispute. However, there is no language that explains that there is any difference in meaning between the first use of "dispute" relating to the assumption of validity of the debt, and the second use relating to the verification of the debt. 262 The debt collector in In re Risk Management Alternatives 263 must have thought that it was following the statutory mandate in phrasing its notice to the consumer. The court was not so sure, but left it to a trial to determine whether the least sophisticated consumer might believe that his challenge to the debt had to be in writing. 264

A debt collector can work similar mischief by reversing the order of § 1692g(a)(3) and § 1692g(a)(4) in its disclosure notice. 265 The statute does not require the notice to be in any particular order, but it is entirely possible that a reference to a writing that relates to verification may confuse a consumer who reads the language that follows concerning the assumption about validity of the debt. 266 There is little comfort in assuring the consumer after the fact that the words "in writing" are missing from § 1692g(a)(3). If Congress wants the consumer to know that he has a true option of making his objections known either orally or in writing under § 1692g(a)(3), then it should clarify its position by amending the statute accordingly.

C. The Reference to Documentation

Even when the debt collector includes the prescribed validation notice in its letter, its use of additional language may cause enough confusion for the consumer about his statutory rights. In Sambor v.

262. It is reasonable to read the word "dispute" in this context as meaning that a writing is required in both cases. The interposition of the punctuating dash in the reference to the "dispute" that would mandate verification seems to confirm the same meaning for the previous uses of the word "dispute" in the collector's notice.


264. In doing so, the court denied both the plaintiff's and defendant's motions for summary judgment. See id. at 503.

265. By putting the § 1692g(a)(4) statement requiring a writing first, a collector might lead a consumer into believing that the § 1692g(a)(3) statement immediately following always requires a writing.


If you dispute the validity of this debt or any portion of it, in writing to our office at the above address within thirty (30) days after receipt of this letter, we will mail verification of the debt to you. If you do not dispute the validity of this debt, or any portion of it within thirty days, we will assume it is valid.

Id. at *2-3. The court refused to grant the plaintiff's motion for summary judgment stating that "[w]hether confusion would result from this rearrangement [of the subsections] is an issue of fact properly reserved for the finder of fact at trial." Id. at *18.
Omnia Credit Services, Inc., the collector must have thought that it was being helpful by giving the consumer notice not only of his validation rights, but also of the documentation that would suffice to convince the collector of the invalidity of the debt. Had the collector limited itself to the validation notice, there would have been no problem. The insertion of the documentation requirement merely clouded the issue, because the collector left the impression that the consumer had to provide written evidence to support any dispute claim. Furthermore, the debt collector seemed to make the point that only certain documentation was suitable, thus leaving no room for unsuitable documentation. It was a misguided effort to put the consumer in a position to support his claim. The validation section actually puts the burden on the debt collector to verify the debt once the consumer disputes the debt in writing, so that the debt collector is the one who should eventually be concerned about documentation. The listing of suitable documentation in Sambor upset the validation scheme, since the statute does not even require the consumer to bother about documentation in order to dispute the debt.

While the Sambor court was on safe ground in finding that the debt collector violated § 1692g(a)(3) by including the suitable documentation language in its collection letter, its reliance on Castro v. ARS National Services, Inc. did not tell the whole story. The collector in Castro had provided the same guidance about suitable documentation to the consumer, and the court also found a violation of § 1692g(a)(3). The Castro court was concerned that the consumer might be deprived of his opportunity to dispute the debt if he could not produce suitable documentation within thirty days to support his denial of the debt collector's claim. This was all well and good. But in explaining the statutory requirements for disputing the debt, the court stated that "[t]he statute simply requires that the consumer sub-

268. See id. at 1236. The collector designated the following documentation as suitable:
   - A copy of the front and back of the processed payment
   - A final billing statement (with the original account number referenced) showing a zero balance
   - A dated letter from the original creditor advising the balance is zero
   - A letter from the original creditor or credit bureau agency stating the debt has been removed from their records
   - A letter from the original creditor stating the dispute was resolved in your favor
   - Legal document(s) providing a discharged bankruptcy

id.
269. Id. at 1240.
270. That obligation arises under § 1692g(a)(4), not § 1692g(a)(3).
272. See id. at *10-11.
273. Id.
mit a writing stating that all or a portion of a debt is disputed." \(^{274}\) This statement was all the more perplexing because the court had already noted in another part of its opinion its agreement with the conclusion in *Ong v. American Collections Enterprise, Inc.* \(^{275}\) that a consumer could orally dispute the debt if it wanted to remove the debt’s presumptive validity. \(^{276}\) The *Castro* court must have intended to make the point that if the consumer disputed the debt in writing (though not required to do so), he did not have to give supplementary documentation to bolster his objections to the debt collector’s claim. The court acknowledged that the collection letter did not require the debtor to dispute the debt in writing. \(^{277}\) The debtor could have elected to notify the collector of his position by telephone. \(^{278}\) Although the *Sambor* and *Castro* courts were clear on the point that no documentation was required for the debt to be disputed, the *Castro* court confused matters by seeming to impose a writing in § 1692g(a)(3), \(^{279}\) while at the same time conceding agreement with the *Ong* court on the proper place for an oral dispute.

Another variation on the theme occurred in *McCabe v. Crawford & Co.* \(^{280}\) The collector there tried to discharge its § 1692g(a)(4) obligation by using the following language: “In the event you contact us and dispute the charges owed, we will promptly furnish you with any and all documentation to substantiate the claim.” \(^{281}\) Although the statute requires the debt collector to notify the consumer that the consumer must dispute the debt in writing if he seeks verification of the debt, \(^{282}\) the debt collector tried to facilitate matters by not limiting the consumer to the written word. \(^{283}\) In this respect, the debt collector believed that it had honored the spirit of the statute, because it was willing to verify the debt even if the consumer did not go to the trouble of communicating in writing. \(^{284}\) The debt collector was proud of its

\(^{274}\) *Id.* at *11.


\(^{277}\) *Id.* at *9.

\(^{278}\) *Id.*.

\(^{279}\) The court stated, “[t]he statute simply requires that the consumer submit a writing stating that all or a portion of a debt is disputed.” *Id.* at *11.


\(^{281}\) *Id.* at 738.


\(^{283}\) The collector took the position that it was willing to verify the debt if the debtor gave only oral notification that he was disputing the debt. *McCabe*, 272 F. Supp. 2d at 742. The collector believed that by allowing the debtor the luxury of giving either oral or written notification, the collector had gone “above and beyond its duty.” *Id.*

\(^{284}\) The collector used the following language in its letter:

Unless we hear from you within thirty (30) days after the receipt of this letter disputing this claim, Federal Law provides that this debt will be assumed to be valid and owing. In the event you contact us and dis-
generosity in giving the consumer an option that § 1692g(a)(4) did not provide.

There was no way of avoiding the plain language of § 1692g(a)(4) this time around. The section required written notice, and the debt collector therefore had to notify the consumer about this. The statute does not, however, prevent the collector from providing verification of the debt if it wants to do so upon the consumer's oral request. But once the debt collector follows the statutory prescription and the consumer disputes the debt in writing, the collector must provide verification. Therefore, in McCabe, the debt collector did not effectively convey the consumer's statutory rights.

D. Disputing the Debt or Any Part Thereof

The validation section gives a consumer the right to dispute "the validity of the debt, or any portion thereof." Some debt collectors are not always careful about making it clear that a consumer can question any part of the debt. In McCabe, the debt collector gave a breakdown of the debt and advised the consumer of the right to dispute the "claim" and the "charges." The debt collector had hoped that the court would infer a correlation between the itemized parts of the debt and the consumer's right to dispute the debt. It was a chance not worth taking, since the statute makes it clear that the consumer's right to dispute extends to any part of the debt. It is not obvious why the debt collector did not want to take the statutory command at face value, but preferred instead to use language that created doubt about whether the debt collector had met the statutory objective. The debt collector obviously wanted to convey the impression that the consumer could dispute any portion of the "claim" or of the "charges." By

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285. The court pointed out that "[a]lthough a debt collector may provide verification upon oral notification, the debt collector must provide verification upon written notification." Id. at 743. The collector must therefore follow the statutory mandate if it wants to protect the consumer's right to obtain verification.

286. Id.; see also Grief v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 217 F. Supp. 2d 336, 340 (E.D.N.Y. 2002) (finding that a collector violated the statute when its letter did not inform the consumer that any notice about her disputing the debt must be in writing).

287. Both § 1692g(a)(3) and § 1692g(a)(4) indicate that a consumer has the right to dispute the debt or any portion thereof.


289. See id. at 744. The collection letter reflected the balance due as $12,266.67, comprised of physical damage of $6,347.78, loss of use at $1,680, and the collector's fee of $4,088.89. Id. at 738 n.2.

avoiding the statutory language, the debt collector faced an uphill struggle in trying to convince the court that a "claim" meant the total debt or any part thereof.

One would have thought that the debt collector in *McCabe* had learned something from the debt collector's experience in *Baker v. G. C. Services Corp.*, 291 where it studiously avoided referring to any portion of the debt. Instead, the debt collector promised verification of the debt if the consumer requested it in writing within thirty days. 292 Otherwise, the debt collector assumed the debt to be valid. 293 There was nothing in the collection language to indicate that the consumer had a right to dispute part of the debt. 294 Although the collection letters did indicate that the debt collector would provide verification on the consumer's request, they did not make it clear that the consumer had a right to dispute the entire debt, far less any portion thereof. 295 It was left to the consumer to read between the lines. Without a clear reference to any portion of the debt, a consumer would hardly know that he could challenge finance charges or interest, and thus require the collector to verify them in the same way as if the consumer was querying the entire debt. 296 The collectors in *McCabe* and *Baker* rejected the clear statutory language in favor of an alternative that did not convey the right message. The statute requires notice to the consumer that any portion of the debt may be challenged, and yet the debt collectors felt comfortable with a reference to the "claim," 297 the "charges," 298 and the "debt." 299 It was hardly surprising, therefore, that the courts held that the debt collectors had fallen short of their statutory obligation. There was no way of construing those terms to cover any portion of the debt, and, once again, the debt collectors refused to take their cue from the statutory language.

291. 677 F.2d 775 (9th Cir. 1982).
292. The collection letter contained the following statement: "Verification of this debt, a copy of judgment or the name and address of the original creditor, if different from the current creditor, will be provided if requested in writing within 30 days. Otherwise, the debt will be assumed to be valid." *Id.* at 778.
293. *Id.*
294. Strictly speaking, the FDCPA gives the consumer the right to dispute the debt, or any portion thereof. 15 U.S.C. § 1692g(a)(3)-(4). The collector's obligation to verify ensues from the consumer's disputing the debt in writing. It is not clear that the consumer has an absolute right to seek verification, absent a notice to the collector that the consumer disputes the debt. Thus, the collector in *Baker* left the consumer in the lurch, not only with respect to the right to dispute the entire debt, but also any portion thereof.
295. The collector did not mention the word "dispute" or any synonym thereof in its letter. *See Baker*, 677 F.2d at 778. The collector promised verification of the debt if the consumer requested it. *Id.*
296. *Id.*
298. *Id.*
If the debt collectors in McCabe and Baker missed the mark, the debt collector in Smith v. Transworld Systems, Inc. tried its best not to do so by at least referring to "portions" of the claim in its collection message. The debt collector advised the consumer that "[a]ll portions of [the] claim [would] be assumed valid unless disputed within thirty days." It was easier for the Smith court to find that if the assumption of validity affected all portions, then the consumer should know that he could dispute any part of the debt. The debt collector did not suffer, despite its abridgement of the statutory language, but it must have been grateful for the court's liberal interpretation. After all, "all portions" must mean the entire debt, and therefore a liberal interpretation of the debt collector's language suggested that the debt collector was not addressing the constituent elements of the debt.

E. The Amount of the Debt

A collector must inform the debtor of the amount of the debt. This requirement seems plain enough, and yet it has proved to be a challenge from time to time. In Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., the debt collector's dunning letter informed the consumer about the "unpaid principal balance," but it was careful to point out that such a figure did not include unpaid interest and other charges that would be necessary to pay the loan. The Seventh Circuit found that the debt collector had failed to comply...

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300. 953 F.2d 1025 (6th Cir. 1992).
301. Id. at 1029.
302. Id.
303. The Smith court construed the collector's language as follows:

Though Smith correctly notes that Transworld's wording does not specifically state that a portion of the debt may be contested, Transworld's letter adequately informs the reader that the debt must be disputed, if at all, within thirty days—it is implicit that the claim can be wholly, or partially, challenged.

Id.

304. The collector in Smith managed to avoid a violation, because the word "dispute" or some variation thereof appeared in its collection letter. See id. at 1029. Nevertheless, the court still had to rely on the implicitness of the collector's language that a claim could be partially challenged. See id. It is arguable that the assumption that all portions of the debt should be deemed valid unless disputed can mean that the dispute must relate to "all portions." In Baker, the collector did not mention the consumer's right to dispute the debt. 677 F.2d at 778. A similar problem occurred in Spears v. Brennan, 745 N.E.2d 862, 868 (Ind. Ct. App. 2001), with the language, "verification of the debt ... will be provided upon written request ... within 30 days[;] otherwise the debt will be assumed valid." The court concluded as a matter of law that the collector's notice did not adequately advise the consumer that he could dispute the debt.

306. 214 F.3d 872 (7th Cir. 2000).
307. Id. at 875.
with the statute, because the unpaid principal balance was not really the amount of the debt, and the statute clearly called for a disclosure of the latter.308 The debt collector should have been able to glean from the statutory language that it had to let the consumer know the amount due on the date that the debt collector sent the letter.309 Although the amount was subject to change, that possibility did not affect the debt collector's statutory obligation to state the position as of the date of its communication with the consumer.310 The statement of the exact amount due on that date gives the consumer the real picture, but it still leaves the door open for the debt collector to advise the consumer that a future adjustment may be necessary for interest and other charges when the consumer actually pays the debt.

Another debt collector ran into trouble with the language "remaining principal balance." This time the Seventh Circuit in Veach v. Sheeks311 reverted to its safe harbor language in Miller that underscored the importance of revealing a precise figure for the amount due, while leaving room for an explanation of the possibilities for change.312 The debt collector in Veach must have had a certain penchant for precision, for it included in the remaining principal balance the amount of treble damages that might be recoverable under a local statute, but that the court had not yet awarded.313 It seemed that the debt collector wanted to alert the consumer to the worst-case scenario. But the amount of the dishonored check constituting the debt in question was only $350, and the debt collector had hoped, no doubt, that by utilizing the treble damages remedy, it would have prodded the consumer into action before it was too late.314 The debt collector's statutory obligation is to inform the consumer about the amount of the debt, and not to include other items that may subse-

308. Id.
309. See id. at 875–76.
310. Just as it did in Bartlett v. Heibl, 128 F.3d 497, 501–02 (7th Cir. 1997), the Seventh Circuit came to the rescue in Miller by providing a safe harbor formula for stating the amount of the debt. It suggested the following language:

As of the date of this letter, you owe $[the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection.

Miller, 214 F.3d at 876.
311. 316 F.3d 690 (7th Cir. 2003).
312. See id. at 693 (citing Miller, 214 F.3d at 876).
313. Id. at 692.
314. The collector's notice of claim that accompanied the small claims court summons indicated an indebtedness of $1,050 as treble damages for a bad check of $350, plus attorney's fees as permitted by law. Id. at 693. The collection notice described the debt as "Remaining principal balance $1,050.00; plus reasonable attorney fees as permitted by law, and costs if allowed by the court." Id. at 692.
quently be added thereto by a court. The debt collector's letter must reflect the present state of affairs as far as the debt is concerned. In *Veach*, the consumer could not be responsible for treble damages, costs, or attorney's fees until the court had acted, and therefore the debt collector misrepresented the amount of the debt.

A debt collector may run afoul of the FDCPA not only by misstating the amount of the debt under § 1692g(a)(1), but also by attempting to recover certain costs not "expressly authorized by the agreement creating the debt or permitted by law." That was the situation in *Shula v. Lawent*. The collector had taken some liberty in sending a letter to the consumer that demanded payment of court costs. The applicable state law provided that court costs were recoverable when the debt was settled before judgment. Nevertheless, a court order imposing such costs was still necessary if the debt collector expected to recover them from the consumer. Recovery of court costs was not automatic simply because the transaction met the statutory requirements. The consumer did not yet have an obligation to pay costs, and thus there was no authority for the debt collector to include them in the debt allegedly owed by the consumer.

The debt collectors in *Person v. Stupar, Schuster & Cooper, S.C.* were in no better position when they tried to recover "the entire balance . . . plus attorney's fees." The debt collectors had the benefit of the Seventh Circuit's safe harbor letter in *Miller*, but nevertheless did not seem to rely on it for guidance. They neither specified a precise amount nor informed the consumer that the amount owed was

316. 316 F.3d at 693. The court explained, "[s]ince Veach cannot be held liable for treble damages, court costs, or attorney's fees until there has been a judgment by a court, they cannot be part of the 'remaining principal balance' of a claimed debt." *Id.*
318. 359 F.3d 489 (7th Cir. 2004). The Seventh Circuit has seen its fair share of collection strategists. In *Chuway v. National Action Financial Services, Inc.*, 362 F.3d 944, 947–48 (7th Cir. 2004), the collector stated the balance in its letter, but then advised the consumer to call for the "most current balance information." The court held that the letter did not disclose "the amount of the debt" as required, because it confused the consumer. Cf. Olson v. Risk Management Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004) (where the court interpreted the collector's disclosure of the amount of the debt as the balance and the amount "now due" as the portion that the collector would currently accept in payment.
319. *Shula*, 359 F.3d at 490.
320. *Id.* at 491 (citing 225 ILL. COMP. STAT. 425/8a-1(b) (2002)).
321. *Id.*
322. *Id.*
324. *Id.* at 959.
325. 214 F.3d 872, 876 (3d. Cir. 2000).
subject to change. A consumer could have interpreted the debt collectors' language to mean that he owed a "principal balance and an indeterminate amount of attorney fees." This language was misleading, because it detracted from the debt collectors' ability to give a true picture of the consumer's liability under the transaction. The consumer would not have known the amount due. Even if the debt collectors thought that they had made a good attempt in the first paragraph of their letter by stipulating the entire balance to be "$987.71, plus attorney's fees," they failed miserably at compliance by exhorting the consumer later in the same letter to pay $987.71 against the balance he owed. This invitation seemed confusing, for it sent a message that the identified figure might not be the true balance. The debt collectors could not have it both ways. Their attempt to mimic the safe harbor language in Bartlett was unsuccessful, since there was no way of explaining the relation of the phrase "plus attorney's fees" to the requirement of disclosing the amount due.

Confusion takes many forms. In Sonmore v. Checkrite Recovery Services, Inc., the debt collectors went out of their way to provide much information about their claim, but still left the consumer bewildered about the amount of the debt. The dishonored check in contention there was for a mere two dollars, but the collectors' letter contained two columns: one outlined the figures for a settlement offer and the other contained the figures for the consumer's liability if a judgment was entered. The amount in the judgment column was $210 more than that in the settlement offer, because it included collec-

327. Id. at 963.
328. See id.
329. The plaintiff's claim on this point was that the defendants' collection letter was deceptive and misleading. Id. at 962.
330. The challenge in Bartlett was whether the collection letter was confusing, and thus a violation of § 1692g(a). See Bartlett v. Heibl, 128 F.3d 497, 500 (7th Cir. 1997). In Person, the issue was whether the inclusion of the phrase "plus attorney's fees" was misleading or deceptive under § 1692e. See 136 F. Supp. 2d at 964.
332. The collector outlined its offer as follows:
tion costs, civil theft damages, and court costs. No one could accuse the debt collectors of not being thorough, but when all was said and done, the collectors' grand design did not give a clue about the amount of the debt. It is true that both columns in the collection letter indicated the amount of the dishonored check, but an unsophisticated consumer would not find this arrangement particularly inviting. The whole rationale for requiring a debt collector to disclose the amount of the debt is to make sure that the consumer knows where he stands, and therefore a collection letter should not leave the consumer scratching his head over the collector's claim. The consumer should know what the debt is, but this does not prevent the debt collector from making an offer of settlement once the consumer has that information. The debt collector should warn the consumer about potential liabilities in Miller fashion, but the first order of business must be the amount of the debt, which must be disclosed with precision as of a specific date. In Sonmore, the collection letter gave no explanation

<table>
<thead>
<tr>
<th>SETTLEMENT OFFER:</th>
<th>POSSIBLE LIABILITY UNDER STATE LAW IF A JUDGMENT IS ENTERED:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Check No.: 1102</td>
<td>Check Amount: $2.00</td>
</tr>
<tr>
<td>Check Date: 11-05-98</td>
<td>Cost of Collection: $30.00</td>
</tr>
<tr>
<td>Merchant: Twin City</td>
<td>Civil Penalty: $100.00</td>
</tr>
<tr>
<td>Store # 520</td>
<td>(Maximum Allowed)</td>
</tr>
<tr>
<td>Check Amount: $2.00</td>
<td>Civil Theft: $50.00</td>
</tr>
<tr>
<td>Service Charge: $20.00</td>
<td>Damages:</td>
</tr>
<tr>
<td>Civil Penalty: $100.00</td>
<td>Court Costs: $150.00</td>
</tr>
<tr>
<td></td>
<td>(filing fee and estimated service of process)</td>
</tr>
</tbody>
</table>

TOTAL SETTLEMENT OFFER: $122.00 TOTAL POSSIBLE LIABILITY: $332.00

Id. at 1131.

333. See id.

334. The Eighth Circuit applies the standard of the "unsophisticated consumer" when evaluating collection letters. See Duffy v. Landberg, 215 F.3d 871 (8th Cir. 2000). That standard protects "the uninformed or naive consumer, yet also contains an objective element of reasonableness to protect debt collectors from liability for peculiar interpretations of collections letters." Id. at 874–75. In Duffy, the violation related to § 1692e(5) and § 1692f(1). See id. at 873.

335. See Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996), where the collector notified the consumer of the right to dispute the debt, but then continued: "If the above does not apply to you, we shall expect payment or arrangement for payment within ten (10) days from the date of this letter." Id. at 225. The court observed that the unsophisticated consumer would be scratching his head when he received such a letter because "[h]e wouldn't have a clue as to what he was supposed to do before real trouble begins." Id. at 226. See also Sonmore, 187 F. Supp. 2d at 1136 (The unsophisticated consumer would be uncertain of the amount of the debt when presented with two columns of figures.).

336. In Miller, the court's safe harbor letter gave the amount due as of the date of the collection letter. Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 876 (7th Cir. 2000). In Bartlett, the safe harbor letter gave
about the service charge, and did not say whether the consumer actually owed that amount. It was left up to the consumer to unravel the mystery, an assignment that could hardly be justified under the FDCPA.

Even when a debt collector does not use two columns to make its point, it may still cause some difficulty for the consumer by using language that does not identify the amount of the debt. In *Armstrong v. Rose Law Firm, P.A.*,337 the collection letter listed the “amount referred” as $44.11, penalties of $100 and a settlement offer of $144.11.338 While the statute required the debt collector to disclose the amount of the debt, the debt collector opted for the “amount referred.”339 The collector must have viewed this phrase as synonymous with the statutory terminology, and fully expected the consumer to recognize the synonym as fulfilling the statutory demand. Although the collection letter explained that the settlement offer included the amount of the dishonored check and a service charge of $20, it did not clarify whether the consumer actually owed the latter amount or whether the debt included that service charge.340 It was left to the consumer to make the computations if she eventually understood the meaning of “amount referred.” The statute did not impose this burden on the consumer. It was up to the debt collector to clarify matters so...

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338. Id. at *8.
339. The court observed that “the unsophisticated consumer should not be required to consult a dictionary to determine that ‘amount referred’ really means the debt owed.” Id. at *11. A consumer would have had to do a little subtraction to arrive at the amount of the debt, an assignment not contemplated by the FDCPA. See id. at *10. In *Fuller v. Becker & Poliakoff, P.A.*, 192 F. Supp. 2d 1361 (M.D. Fla. 2002), the collection letter stated as follows: “For those of you have not paid since 1997 or prior, you must pay the amount of $75.00 for the last quarter of 1997, $360.00 total for the four (4) quarters of 1998, $90.00 for the first quarter of 1999, plus $50.00 for attorney fees for this collection letter . . . .” Id. at 1370. There was no indication about how much the consumer owed or how he was to determine that figure. It was not surprising, therefore, that the court found that the collector failed to comply with § 1692g(a)(1) by not stating the amount of the debt. See id. See also *Grief v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 217 F. Supp. 2d 336, 341 (E.D.N.Y. 2002) (finding that a notice stating that the consumer owed “$1,962.87 plus attorneys’ fees up to $294.43” violated § 1692g(a)(1), because the notice presented the least sophisticated consumer with “a variety of amounts of the debt, rather than simply the amount of the debt”).
340. See *Armstrong*, 2002 U.S. Dist. LEXIS 4039, at *10; see also *Sonmore*, 187 F. Supp. 2d at 1137 (A “debt collector must be explicit regarding the amount owed.”).
that the consumer would not have any doubt about the amount of the debt.

Even when the amount of the debt is not in contention, a debt collector may try to recover an amount not permitted by law.341 In Johnson v. Riddle,342 a collector tried to collect a statutory shoplifting fee of $250 on a dishonored check rather than a service charge of $15.343 The collector had a choice between the penalty under a shoplifting statute and the penalty under a dishonored check statute. He chose the former because it gave him a greater recovery. Nevertheless, the court held that the specific statute relating to dishonored checks trumped the shoplifting statute when the collector tried to recover a penalty for a dishonored check.344 This was not surprising, because the shoplifting statute required the debt collector to show that the consumer had not purchased goods from the seller, but had taken them from the seller's premises without permission.345 But the consumer's tendering of a check in exchange for goods was by all means a purchase within the meaning of the state statute covering shoplifting, and there was no way of avoiding the application of the statute relating to dishonored checks.346 The collector's reliance on the shoplifting statute to obtain a greater penalty therefore constituted a violation of

341. It is an unfair practice for a collector to collect any amount not "expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1) (2000).

342. 305 F.3d 1107 (10th Cir. 2002).

343. Id. at 1112.

344. Id. at 1119–20. The Johnson court gave some guidance about when an amount is "permitted by law" under § 1692f(1) by stating as follows:

We hold that an amount is "permitted by law" within the meaning of the FDCPA if state supreme court holdings establish that collection of the amount is lawful. Absent state supreme court holdings on point, we follow our familiar Erie analysis by predicting what the state supreme court would hold, or, in the appropriate case, certifying the issue to the state supreme court.

Id. at 1119. The application of this federal statute required the court to look to the meaning of "permitted by law" under state law as announced by the state's highest court. See Commission v. Estate of Bosch, 387 U.S. 457, 465 (1967). Although the Utah Supreme Court had never dealt with the applicability of the shoplifting statute to dishonored checks, it had previously held that specific statutes took precedence over general statutes, and therefore the dishonored check statute would be applicable. See Carlie v. Morgan, 922 P.2d 1, 6 (Utah 1996).

345. The Utah statute defines the "wrongful taking of merchandise" within the shoplifting statute as "the taking of merchandise that has not been purchased from a merchant's premises without the permission of the merchant or one of his employees, servants or agents." UTAH CODE ANN. § 78-11-14(5) (2002).

346. There was no doubt that the consumer had purchased the goods within the meaning of the state statute, because a purchaser includes someone who acquires goods by means of a check that is later dishonored. Id. § 70A-2-403.
the FDCPA because it was an attempt to collect an amount not permitted by law.\textsuperscript{347}

V. BONA FIDE ERROR DEFENSE

Even when a collector violates the FDCPA, it still has a last chance to avoid liability if it can show that its violation was unintentional and that it resulted from a bona fide error that occurred despite the fact that the debt collector had procedures in place to detect it.\textsuperscript{348} The Truth in Lending Act\textsuperscript{349} contains similar language, but goes further. It specifically excludes errors in legal judgment from the bona fide error defense.\textsuperscript{350} The FDCPA does not contain that exclusionary language in its bona fide error provision. It is not surprising, therefore, that the courts disagree about the application of the defense to mistakes of law.

Even before the Truth in Lending Act was amended in 1980 to emphasize that the defense could not be applied to errors of law,\textsuperscript{351} the courts had routinely taken that route by limiting it to clerical and calculation-type errors.\textsuperscript{352} The similarity of the FDCPA language made it easy for the courts to apply the same rule to the defense in the collection context.\textsuperscript{353} Debt collectors did not garner much sympathy from the early cases, because the law seemed clear, and the courts were not minded to forgive the collectors' mistakes. For example, in \textit{Baker v. G. C. Services Corp.},\textsuperscript{354} the collector failed to notify the con-

\begin{itemize}
  \item \textsuperscript{347} \textit{See Johnson, 305 F.3d at 1120; see also Irwin v. Mascott, 112 F. Supp. 2d 937, 948 (N.D. Cal. 2000) (holding that collecting a shoplifting penalty for violation of dishonored check statute violates the FDCPA); Ditty v. Checkrite, Ltd., 973 F. Supp. 1320, 1328 (D. Utah 1997) (holding that the collector violated the statute by trying to recover more than a $15 fee for dishonored checks).}
  \item \textsuperscript{348} \textit{See 15 U.S.C. § 1692k(c) (2000).}
  \item \textsuperscript{350} \textit{The bona fide error provision in the Truth in Lending Act provides that “an error of legal judgment with respect to a person’s obligations . . . is not a bona fide error.” 15 U.S.C. § 1640(c) (2000).}
  \item \textsuperscript{352} \textit{See Henning v. Daniels, 653 F.2d 104 (4th Cir. 1981); Ives v. W.T. Grant Co., 522 F.2d 749 (2d Cir. 1975); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974); Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974); Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270, 281 n.17 (S.D.N.Y. 1971); RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 12.05[2] (2000).}
  \item \textsuperscript{353} \textit{See Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d. Cir. 1989); Baker v. G. C. Servs. Corp., 677 F.2d 775, 779 (9th Cir. 1982); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 982 (N.D. Ill. 1979); FAIR DEBT COLLECTION, supra note 89, §7.5.4.}
  \item \textsuperscript{354} 677 F.2d 775 (9th Cir. 1982).}
\end{itemize}
sumer that the latter could dispute any portion of the debt.\textsuperscript{355} The debt collector, relying on its counsel, advised the consumer that it would verify the debt if requested to do so; otherwise it would assume the debt to be valid.\textsuperscript{356} The debt collector did not pay any attention to the phrase “any portion thereof,” even though the statute clearly covered it.\textsuperscript{357} This was not an isolated instance. The Eighth Circuit in Hulshizer v. Global Credit Services, Inc.\textsuperscript{358} did not forgive the debt collector’s failure to inform the consumer in the collection letter that the debt collector was trying to collect a debt.\textsuperscript{359} There was no doubt about the statutory requirements at that time. The collector had to make it clear in all communications that it was trying to collect a debt.”\textsuperscript{360} These are but two examples of the courts’ unwillingness to recognize errors of law as a bona fide defense. The courts were persuaded that they should follow the judicial trend in holding that similar language in the Truth in Lending statute did not recognize mistakes of law as a valid defense. It must be remembered that Congress had amended that statute in 1980 to make it quite clear that it did not apply to such errors.\textsuperscript{361} The Truth in Lending amendment did not have a profound effect on the FDCPA scene, because lawyers were exempt from that statute until 1986, and therefore the courts were not much concerned with mistakes of law.\textsuperscript{362} With the exemption removed, lawyers found themselves subject to liability for violations of the FDCPA, and, thus, they became more interested in the bona fide error defense. The courts then had to face the question of whether the FDCPA allows the defense, since, unlike the Truth in Lending statute, the FDCPA contains no specific language addressing the matter.

\textsuperscript{355} The collector’s notice failed to inform the consumer that he could dispute not only the entire debt, but also any portion thereof as required by § 1692g(a)(4). \textit{Id.} at 777.

\textsuperscript{356} \textit{Id.} at 776–77.

\textsuperscript{357} The court held that “[r]eliance on advice of counsel or a mistake about the law is insufficient by itself to raise the bona fide error defense.” \textit{Id.} at 779.

\textsuperscript{358} 728 F.2d 1037 (8th Cir. 1984).

\textsuperscript{359} See \textit{id.} at 1038.


When the Supreme Court decided *Heintz v. Jenkins* in 1995, it left the impression that there was no problem in applying the bona fide error defense to lawyers. The Court was then responding to the petitioners' claim that the FDCPA should not apply to litigation, because a lawyer who brought a losing claim would always be liable for bringing an action that could not legally be taken. The Court's reassurance that statutory protection was available to litigating lawyers was sure to calm the collectors' fears about the availability of the defense. But the Court may have been just trying to point out that a litigator would not be defenseless if he brought an unsuccessful suit, because the bona fide error provision would be there to protect him. The Court did not go further and specify the types of mistakes that it had in mind. After all, the Court was considering only whether the term "debt collector" applied to a lawyer who regularly litigated to collect debts. It was not concerned about whether a lawyer could assert the bona fide error defense in the case of a legal error.

It was only when the Seventh Circuit took up the consumer's claim in *Jenkins v. Heintz* that the matter of legal judgment took center stage. The consumer complained about a settlement letter from the collector that contained a claim for forced placed insurance premiums not authorized by the loan agreement. The consumer took the view that the debt collectors had used legal judgment in trying to collect these unauthorized premiums, and that they could not use the bona fide error defense against her.

The court noted that "errors in legal judgment are not an issue simply because the collectors are attorneys." It was possible, therefore, for an attorney to benefit from the bona fide error defense, even though he committed a collection error that did not involve legal judg-

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364. See id. at 295. The Sixth Circuit in *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993), made the point that if the FDCPA applied to litigating activities, a lawyer would be in trouble if he brought a losing claim against a consumer, because he would have taken an action that could not legally be taken. The Sixth Circuit's view conflicted with that of the Seventh Circuit in *Heintz* and the Supreme Court mentioned the possibility of the bona fide error defense being available to the losing lawyer in this context. See *Heintz*, 514 U.S. at 295.
365. The Court stated that it did not see how "the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'" Id. at 296.
366. The issue was "whether the term 'debt collector' in the Fair Debt Collection Practices Act ... applies to a lawyer who 'regularly,' through litigation, tries to collect consumer debts." Id. at 292.
367. 124 F.3d 824 (7th Cir. 1997).
368. Id. at 827. The consumer's contention was that the debt collectors had violated § 1692f by using "unfair or unconscionable means to collect or attempt to collect [the] debt" and § 1692e by falsely representing the character of the debt. Id.
369. See id. at 832.
370. Id.
ment. Thus, while paying lip service to the availability of the defense for legal errors, the court then acknowledged that it was not dealing in Jenkins with a legal error. The debt collectors had merely sought to recover the insurance premiums, which their bank client believed to be due. The debt collectors did not have a legal obligation to determine the validity of the bank's claim just because they were lawyers, and therefore a mistake about the claim did not make it a bona fide legal error. The debt collectors did not know that their client was buying financial risk insurance that was not authorized by the loan agreement. Therefore, they did not have to make an independent analysis of their client's claim in order to depend on the bona fide error defense. If the debt collectors were not lawyers, they would have no such obligation. It was clear to the court that a lawyer-collector should not have an obligation to look behind the creditor's claim, because to do so would make the application of the bona fide error defense depend on the collector's identity.

In Heintz, the Supreme Court did not conclude that lawyers could use the bona fide error defense for legal mistakes. It merely observed that lawyers who mistakenly brought a lawsuit were not helpless in the face of the statutory defense, but the Court did not pause long enough to explain whether it was referring to both legal and nonlegal grounds. After all, it is possible for a lawyer to litigate during the collection process on the basis of some clerical error that informs her decision to proceed. The Court had to deal with the debt collector's contention that applying the FDCPA to lawyers would make them liable anytime they brought a lawsuit against a consumer and lost. This was the debt collector's way of convincing the Court that the FDCPA should not be applied to lawyers, because otherwise lawyers would be severely handicapped in their litigation activities. The Court had to allay the collector's fears in some way, and it therefore referred to the bona fide error defense, not as a panacea for all the lawyer's mistakes, but rather as a defense in appropriate cases. The Court did not deem it necessary to go further than that. But it did make the point that bringing a losing lawsuit did not necessarily mean that the

371. See id. & n.7.
372. See id. at 832.
373. The court did not want to impose a duty on the lawyer-collector to conduct an independent investigation into the legal intricacies of the contract between the creditor and the consumer. The statute does not impose such a duty on the average collector, and thus such a requirement would create a double standard for the bona fide error defense on the basis of the collector's identity. See id. at 833–34.
374. Id. at 832.
375. See id. at 833–34.
377. See id.
378. See id.
lawyer had taken action that could not legally be taken.\textsuperscript{379} If the lawyer-collector made a mistake in compiling information, her suit would be based on inaccurate data, but there would be no basis for alleging that she did not take the action legally.

The Supreme Court's reasoning in \textit{Heintz} did not escape the Tenth Circuit's notice in \textit{Johnson v. Riddle}.\textsuperscript{380} The \textit{Johnson} court interpreted the \textit{Heintz} dictum as supporting the defense in some cases when a lawyer tries to collect an amount exceeding that owed by the debtor.\textsuperscript{381} But such an interpretation makes an assumption that the Supreme Court itself was unwilling to make. The mere fact that "a lawsuit turns out ultimately to be unsuccessful [cannot], by itself, make the bringing of it an 'action that cannot legally be taken.'"\textsuperscript{382} There was no need to assume that a lawyer would always be liable just because he lost his case. The \textit{Johnson} court concluded that the bona fide error defense should be available for mistakes of law, since a lawyer-collector can commit a legal mistake when he sues for an amount not legally owed by the consumer.\textsuperscript{383}

Ordinary debt collectors are protected when they go about their collection business relying on the information obtained from their clients.\textsuperscript{384} It is argued, therefore, that a lawyer should enjoy the same protection when she asserts a bona fide claim for a client which a court ultimately rejects.\textsuperscript{385} The basis of this argument is that the language of the FDCPA, unlike that in Truth in Lending, does not pretend to limit the defense to clerical errors. The absence of such language lends credibility to the contention that Congress did not intend to limit the defense in this way. It is noteworthy, however, that when Congress enacted the FDCPA, it included the same original Truth in Lending language that courts had consistently accepted as addressing

\textsuperscript{379} The Court was looking for something else beside the lack of success in bringing the suit. The failure to win "by itself" could not turn the action into one "that [could not] legally be taken." \textit{Id.} at 296.

\textsuperscript{380} 305 F.3d 1107 (10th Cir. 2002). On remand, the district court found that the debt collectors had established all three elements of the bona fide error defense. The error was unintentional, bona fide, and the collectors had reasonable procedures in place to avoid the error. \textit{See} \textit{Johnson}, 296 F. Supp. 2d 1283 (D. Utah 2003).

\textsuperscript{381} \textit{Heintz}, 514 U.S. at 296.

\textsuperscript{382} \textit{Heintz}, 514 U.S. at 296.

\textsuperscript{383} The \textit{Johnson} court referred to the FDCPA's legislative history to bolster its position that the defense covers any type of bona fide error. "A debt collector has no liability, however, if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations." 305 F.3d at 1123 (quoting S. REP. No. 95-382, at 5 (1977), \textit{reprinted in} 1977 U.S.C.C.A.N. 1695, 1700).

\textsuperscript{384} \textit{See} \textit{Smith v. Transworld Sys., Inc.}, 953 F.2d 1025 (6th Cir. 1992); \textit{Jenkins v. Union Corp.}, 999 F. Supp. 1120 (N.D. Ill. 1998).

only clerical errors. It is reasonable, therefore, to assume that when Congress subsequently included the same language in the FDCPA, it wanted to adopt the established judicial interpretation that courts had accepted in the Truth in Lending context. Congress created some doubt about its intent when it included in the 1980 amendments some specific language excluding mistakes of law from Truth in Lending coverage, but left intact the original FDCPA language. One interpretation of the congressional action is that Congress specifically adopted the judicial construction of the Truth in Lending statute, not that it rejected such construction for the FDCPA. Congress added the additional language to the Truth in Lending statute as part of an overall strategy to simplify the statute in 1980. It was not the only section affected by this congressional tinkering. Congress may have seen no need to make a simultaneous amendment to the FDCPA if the courts had all along been treating the two provisions the same way. The congressional failure to address the FDCPA provision has encouraged some courts to emphasize the difference in language as a basis for distinguishing the two statutes.

The legislative history of the FDCPA sheds little light on the matter. It merely mirrors the statutory language without making any distinction between legal and clerical errors. When Congress passed the Act in 1977, the Truth in Lending Act was already in force with the same language relating to errors, and Congress would have been aware then how the courts were interpreting the Truth in Lending provision. One cannot say that Congress was trying to correct judicial interpretation when it revised Truth in Lending in 1980, for the same explanatory language that it used in the amended section confirmed what the courts had been doing all along. Congress could have clarified matters by saying something about the FDCPA provision that dealt with the same bona fide error defense. It made no sweeping

387. See Reina v. United States, 364 U.S. 507, 510 (1960) (presuming that congressional adoption of the same language indicates an intent to accept judicial construction thereof).
389. See FAIR DEBT COLLECTION, supra note 89, § 7.5.4, at 331.
390. The Senate Report on the FDCPA stated as follows: “A debt collector has no liability, however, if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations.” S. REP. No. 95-382, at 5 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1700.
changes in that statute along the lines of the Truth in Lending simplification. It must have thought that the previous consistency in judicial interpretation would continue even with the Truth in Lending clarification.

It has been suggested that a collection lawyer might expose himself to liability by zealously advocating a position on behalf of his client which turns out to be wrong. If this is a concern in the FDCPA context, one wonders why there would not be the same concern for Truth in Lending. In any event, lack of success in a lawsuit does not mean that the collector took action that could not legally be taken. If a lawyer-collector takes action that is clearly in violation of the law, the courts do not see any need to be sympathetic to his cause. In Picht v. Jon R. Hawks, Ltd., the collector made a mistake in applying Minnesota’s garnishment statute, despite ample state authority limiting prejudgment garnishment to liquidated debts. The collector sought refuge in the bona fide error defense without success, for the court elected to follow Eighth Circuit precedent in restricting the defense to clerical errors. The debt collector had threatened to take action that it could not legally take. It took a chance that its collection strategy would have a direct influence on the consumer. This was not a case where the law was unclear. The collector knew full well that it could not recover any penalties that were not judicially sanctioned. It was not surprising, therefore, that the court reached the conclusion that it did.

The trend of the cases is to deny the defense for mistakes of law. The lack of sympathy for legal errors probably results from the fact

393. 236 F.3d 446 (8th Cir. 2001).
394. See id. at 451 (citing Hulshizer v. Global Credit Servs., Inc., 728 F.2d 1037, 1038 (8th Cir. 1984)).
395. The collector attempted to use the garnishment procedure before judgment was entered as required by the Minnesota statute. See Picht, 236 F.3d at 451.
396. See Janet Flaccus, Fair Debt Collection Practices Act: Lawyers and the Bona Fide Error Defense, 2001 ARK. L. NOTES 95, 99. The collector had as precedent two cases from the Minnesota Supreme Court that allowed prejudgment garnishment only when the parties are dealing with a definite contractual sum. See MacKenzie v. Belisle, 338 N.W.2d 33 (Minn. 1983); Sommers v. Thomas, 88 N.W.2d 191 (Minn. 1958). In Picht, there was no sum certain or definite, because the collector wanted to recover statutory penalties, and those were subject to the court’s discretion. See 236 F.3d at 450.
that collectors are not afraid to use aggressive tactics in the collection process. If they cross the line sometimes, they hope that the bona fide error defense will bail them out. If a debt collector makes a clerical error, the defense is readily available once the collector meets the other statutory criteria. The debt collector that is in doubt about any part of the FDCPA can always seek guidance from the Federal Trade Commission ("FTC"). In that event, the collector will be protected if a court subsequently disagrees with the FTC's position on any issue. The collector will enjoy this protection as long as it acts in good faith in conformity with the FTC's advisory opinion. This safe harbor provision is related more to questions of law, and does not detract from the bona fide error defense for clerical errors that is otherwise available under the statute.

It is not unusual to find a collector asserting a bona fide error defense because it has devised its own method of compliance in the face of clear statutory direction. In *Wilkerson v. Bowman*, the collection letter indicated a balance of $3,484.02 (less applicable rebate), with attorney's fees up to $350 and twenty percent interest per annum from February 4, 2000. The only problem was that the statute required the collector to state the amount of the debt. The debt col-

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398. The statute was intended "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2000). Allowing a debt collector to use the bona fide error defense for legal mistakes might prevent consumers from coming forward with their claims. If the defense is not available, adventurous attorneys will carefully consider their clients' positions before bringing suit. See *Fair Debt Collection*, supra note 89, § 7.5.4., at 332.

399. The FTC will issue a formal advisory opinion when "[t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent" or in a case where "the subject matter . . . is of significant public interest." 16 C.F.R. § 1.1(a) (2004). A collector will have no liability for "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." 15 U.S.C. § 1692k(e) (2000). The FTC issued its first formal advisory opinion in 2000 in response to a letter from the American Collectors Association. See FTC Advisory Opinion from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Basil J. Mezines (Mar. 31, 2000) [hereinafter FTC Advisory Opinion], at http://www.ftc.gov/os/2000/04/fdcpaadvisoryopinion.htm. The FTC also issues informal staff letters for the guidance of the collection industry, but they provide no defense to collectors as the formal advisory opinions do under § 1692k(e). See *Fair Debt Collection*, supra note 89, § 3.2.5., at 65–66. A collector can also seek guidance from the FTC Staff Commentary, which was published in 1988. See FTC Staff Commentary, 53 Fed. Reg. 50,097 (Dec. 13, 1988). The Commentary does not bind the FTC, the courts, or the public and is not entitled to any deference when it conflicts with the statutory language. See *Heintz v. Jenkins*, 514 U.S. 291 (1995); FTC Staff Commentary, 53 Fed. Reg. at 50,101.

400. 200 F.R.D. 605 (N.D. Ill. 2001).

401. *Id.* at 606.

402. The written notice that a debt collector must give to the consumer must state, among other things, "the amount of the debt." 15 U.S.C. § 1692g(a)(1) (2000).
ollectors thought they could rationalize their imprecision, because they intended to collect the principal only, and the other categories mentioned in the letter did not affect the principal amount due. They could not, therefore, attribute the disqualifying disclosure to the client. The unpaid principal balance was not the debt, but really only a part thereof, and even though the amount owed would change daily, this did not prevent the collectors from disclosing the amount due as of the date of the letter.

This mistake was reminiscent of other collection mistakes that did not persuade the courts to accept the bona fide error defense. In one case, the statute required a collector to disclose in all communications that the collector was attempting to collect a debt. Nevertheless, the collector ignored the clear statutory language and left out the language in its communication with the consumer, relying instead on the informal advice of an FTC attorney. In another case, the statute required the collector to notify the consumer that the consumer could dispute the debt "or any portion thereof," and yet the collector neglected to convey that message. The collector left the consumer in doubt about the consumer's right to dispute a part of the debt. Even if the courts were sympathetic to the debt collectors in these cases, they could hardly be faulted for rejecting the mistake of law defense. The clarity of the FDCPA provision left the courts with the impression that the debt collectors wanted to use their creative talents to comply with the statute in their own inimitable way. So, the statutory directive for the collector to make a certain disclosure in all communications did not, in the collector's scheme of things, require strict adherence to the format. It makes one wonder whether most of

403. Wilkerson, 200 F.R.D. at 607.
404. Id. at 608.
405. See id. at 607; see also Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 875 (7th Cir. 2000).
408. See Hulshizer, 728 F.2d at 1038. The court made the point that the FTC staff letter was not the same as an FTC advisory opinion and therefore was not binding on the FTC. See id. The statutory language was unambiguous and the collector could not disregard it. See id.
410. The language "or any portion thereof" appears in both § 1692g(a)(3) and § 1692g(a)(4), so there could hardly be any doubt about that disclosure requirement. See 15 U.S.C. § 1692g(a)(3)-(a)(4) (2000).
these mistakes result from a debt collector's failure to understand the
intricacies of the law, or whether they simply reflect a collector's lack
of enthusiasm for literal adherence to the statutory language.

Even in those cases where a court is willing to assume that a legal
mistake can qualify as a bona fide error, it may nevertheless not grant
relief to the collector when the error plainly contravenes judicial pre-
cedent. In Nielsen v. Dickerson, the attorney-collector did not have
any meaningful involvement with the letters that went out under his
name, and the court regarded them as false and misleading. It was
not as if the collector was operating in a vacuum, for the Seventh Cir-
cuit had left no doubt in Avila v. Rubin about the role of a lawyer in
the collection process. In Nielsen, the bank selected the debtors who
would receive the attorney's letter, provided the information that the
attorney required, and handled the responses to the attorney's let-
ter. It was clear, therefore, that the debt collector used the attor-
ey's letterhead without the attorney's meaningful involvement in the
collection process. Even though the court assumed that a legal mis-
take could qualify as a bona fide error under the FDCPA, it could not
bring itself to accept the collector's excuses in this context. It was
not as if the collector was operating on a clean slate. The Seventh
Circuit had already spoken when faced with similar facts, and the col-
lector should have taken the hint and responded accordingly.

The Seventh Circuit had similarly avoided the application of the
legal error defense in Jenkins, because it believed that the collector
had not exercised legal judgment. So even when a court is willing
to recognize that the defense might be applicable, it looks for ways to
avoid applying it. On the other hand, other courts bend over back-
wards to accommodate the defense. In Frye v. Bowman, Heintz, Bos-
cia & Vician, P.C., the court was intrigued by the Ninth Circuit's
language in Baker v. G. C. Services Corp., that a mistake of law was
"insufficient by itself to raise the bona fide error defense." The
Frye court took this to mean that a debt collector could benefit from

411. 307 F.3d 623 (7th Cir. 2002).
412. 84 F.3d 222, 228–29 (7th Cir. 1996). The attorney must review the consumer's
file, decide on the propriety of sending a delinquency letter, and avoid the mass
production of the collection letter. See id.
413. 307 F.3d at 642.
414. Household Credit Services was liable as a collector because it gave the debtor the
false impression that a third party was involved in collecting the debt. Id. at 639
(citing 15 U.S.C. § 1692a(6) (2000)). Household did not succeed with its bona fide
error defense, because its actions were in "plain contravention" of the Avila deci-
sion. Nielsen, 307 F.3d at 641.
415. 124 F.3d at 832.
417. Id. at 1085 (quoting Baker v. G. C. Servs. Corp., 677 F.2d 775, 779 (9th Cir.
1982)).
the defense under certain circumstances.418 In *Frye* the collector's mistake was in using a defective summons form that was identical to that used by various court clerks within the state.419 The collector's mistaken use of that form could be traced to the debt collector's dependence on the validity of the clerks' form. The mistake was not the collector's alone, but carried the tacit approval of state officials.420 The *Frye* court was keen to treat this reliance on officialdom as the circumstances under which it could uphold the collector's bona fide error defense.421 The collector's mistake did not stand by itself, and therefore the *Baker* requirement seemed to be fulfilled. The *Frye* court was not alone in attributing some importance to the "by itself" phraseology of the *Baker* court.

The court in *Watkins v. Peterson Enterprises*422 took the same approach when the collector used unfair means to collect debts through court-ordered pay orders, instead of obtaining judgments against the garnishees. The *Watkins* court distinguished *Baker* on the ground that the collector's practices in the latter case had received no official approval.423 The *Frye* and *Watkins* courts went behind the collectors' mistakes to examine the collectors' reliance on some official practice.424 But it is questionable whether a court should assess the reliance factor without first deciding whether the statute covers a mistake of law. A court should reach the reliance element only if it is grappling with the question whether the collector had procedures in place to avoid the error in dispute.425 It is possible that some courts protect a mistake of law because the collector has relied on advice or pronouncements of others who should know the statutory requirements. When the collector in *Kort v. Diversified Collection Services, Inc.*426 relied on a form identical to one authorized by the U.S. Department of Education ("DOE") for the collection of student loans, the court was persuaded to accept the bona fide error defense, because the collector had followed the "procedures of the very administrative agency Congress empowered to implement the [FDCPA]."427 The court found it difficult to imagine how the debt collector could have more reasonably adopted a procedure to avoid legal error than the col-

418. Id. at 1085-86.
419. See id. at 1087.
420. Id.
421. See id.
422. 57 F. Supp. 2d 1102 (E.D. Wash. 1999).
423. See id. at 1107.
425. The collector must show that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error." 15 U.S.C. § 1692k(c) (2000).
427. Id. at 1026.
lector's deference to the relevant federal agency. The court did not really say why it thought that the statute should cover mistakes of law, but decided instead that the debt collector would be protected in this case, because it had satisfied the procedural requirement of having a preventive mechanism in place to avoid any violations. The court was not even sure that the DOE's language, upon which the collector relied, was a violation. Thus, there might not have been any mistake at all in the collector's use of a collection form that resembled the DOE version.

Whatever the error, the collector must still show that the violation was unintentional. It is a question of determining whether the collector will still be protected if it intended to do the act that results in the violation, even though it did not intend to commit the violation itself. In Lewis v. ACB Business Services, Inc. the Sixth Circuit made it clear that the debt collector must show only that "the violation was unintentional, not that the [act] itself was unintentional." This approach makes sense in the context of the FDCPA; otherwise the defense could hardly be available when the collector takes an action that later turns out to be wrong because of some mistake in the process.

VI. CONCLUSION

The FDCPA has been in existence since 1977. There is little doubt that it has given consumers an effective remedy for collection violations. Nevertheless, there are certain parts of the FDCPA that continue to pose problems for collectors. Among them is the requirement that a debt collector must send the consumer a written notice, within five days after it first contacts the consumer, that the collector will obtain verification of the debt if the consumer disputes the debt within thirty days. There is nothing wrong in principle with this requirement, but it leaves the collector in a quandary about this mandate. The problem is that the statute does not put any brakes on the collector's activities during the thirty-day period, unless the debtor disputes

428. See id.
429. See id.
430. The court made the point: "Further, because this court has not reached the question of whether the form letter drafted by DOE was illegal under the FDCPA, it is not clear that the 'error' here involved any mistake at all, let alone an unreasonable one." Id.
431. 135 F.3d 389 (6th Cir. 1998).
432. Id. at 402.
the debt and, therefore, the collector may continue its collection frenzy without worrying too much about the consumer's understanding of the dispute mechanism.\footnote{See id. § 1692g(b); see also Smith v. Computer Credit, Inc., 167 F.3d 1052, 1054 (6th Cir. 1999); Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997); FTC Staff Commentary, 53 Fed. Reg. 50,097, 50,109 (Dec. 13, 1988); 2004 FTC ANN. REP., supra note 167, at 13; FTC Advisory Opinion, supra note 399.} There is an inevitable conflict, therefore, between the collector's harsh collection message and the collector's conveyance of the consumer's statutory right to dispute the debt. Many collectors try their best to do the right thing, but they are careful to devise a strategy that ensures the consumer's concentration on the claim, rather than on the possibility of seeking more information about it.\footnote{See, e.g., Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003) (The front of the collection letter gave the consumer various options to check, but the validation notice was on the back.), cert. denied, 540 U.S. 823 (2003); Peter v. GC Servs. L.P., 310 F.3d 344, 347 (5th Cir. 2002) (The collection language appeared on the front of the letter, whereas the validation notice was on the back.); Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057 (7th Cir. 1999) (The collection letter requested prompt payment and asked the debtor to call the collector's office immediately.); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131 (4th Cir. 1996) (The validation notice was placed on the back of the collection letter, while the collection language was on the front of the letter in larger type.).} The collection letter becomes the communiqué in which the collector makes its point that it expects payment, while routinely letting the consumer know about the right to dispute the debt.

The FTC continues to raise concerns about the standard for clarity in the validation notice. It noted in its 2004 annual report that some collectors take advantage of the lack of any standard by obscuring the validation notice.\footnote{See 2004 FTC ANN. REP., supra note 167, at 11.} Courts have not been bashful in recognizing the contradiction and overshadowing that result from the collectors' ingenuity.\footnote{See United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131 (4th Cir. 1996); Miller v. Payco–General Am. Credits, Inc., 943 F.2d 482 (4th Cir. 1991); Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222 (9th Cir. 1989); Macarz v. Transworld Sys., Inc., 26 F. Supp. 2d 368 (D. Conn. 1998).} The FTC suggests that Congress should amend the FDCPA to require that the validation notice be clear and conspicuous.\footnote{See 2004 FTC ANN. REP., supra note 167, at 12.} It observes that the notice should be "readily noticeable, readable and comprehensible to the ordinary consumer," and be guided by various factors such as "size, shade, contrast, prominence and location."\footnote{id. The FTC's annual report cited two cases where the FTC applied the "clear and conspicuous" standard. See id. n.17 (citing Palm, Inc., No. C-4044, 2002 FTC LEXIS 17, at *11–12 (Apr. 17, 2002) (consent order); Gateway Inc., No. 992-3276, 2001 FTC LEXIS 84, at *39–40 (May 15, 2001) (consent order)); The Palm decision defined "clearly and conspicuously" in the context of an advertisement through an electronic medium, an advertisement in print, and an advertisement on a product label. With respect to the last two, the important element was that the disclosure had to be in a type size and location "sufficiently noticeable for an}
There is no quarrel with the idea of making the validation notice clear and conspicuous. However, there is no guaranty that there will be any agreement about whether the various types of collection letters will meet the suggested standard. How would a definition relating to shade and contrast of the validation notice ever alleviate the problems inherent in the current statutory formulation? The answer may be to allow the collector to give the bare essentials of the debt (lender’s name and amount of debt) in the first communication and include therewith the validation notice.\textsuperscript{441} This initial communication should not include any threats or time limits for payment, thus giving the consumer ample opportunity to concentrate on his right to seek verification if there is the slightest doubt about the collector’s claim. Once the verification period has expired (and it need not be too long), the collector can then revert to its pressure tactics, free from any potential conflict that might otherwise exist if the validation notice was competing for attention with the collection language in the same communication. The collector would not then have to worry about the size and shade of the validation notice, and courts would not have to decide whether the collector has obscured the notice by printing it on a non-contrasting background and color.\textsuperscript{442}

\textsuperscript{441} This is not to say that one should not be concerned about clarity and conspicuousness. But the initial communication should remove the temptation for the collector to give greater emphasis to its claim than to the validation notice. The mission can be accomplished by restricting the collector to the bare details of the claim in the initial communication.

\textsuperscript{442} An example of this persistent conflict can be found in \textit{Miller v. Payco-General Am. Credits, Inc.}, 943 F.2d 482 (4th Cir. 1991), where the collector went all out to make its point. The court set the stage as follows:

\begin{quote}
Across the top of the one page form is the title, “DEMAND FOR PAYMENT,” in large, red, boldface type. After the title follows information as to the creditor, the amount owed, and Payco’s address. In the middle of the page, again in large, red, boldface type, is the statement, “THIS IS A DEMAND FOR IMMEDIATE FULL PAYMENT OF YOUR DEBT.” That statement is followed by these sentences in black boldface type: YOUR SERIOUSLY PAST DUE ACCOUNT HAS BEEN GIVEN TO US FOR IMMEDIATE ACTION. YOU HAVE HAD AMPLE TIME TO PAY YOUR DEBT, BUT YOU HAVE NOT. IF THERE IS A VALID REASON, PHONE US AT [telephone number] TODAY. IF NOT, PAY US—NOW. The bottom third of the document is almost completely filled by the single word, “NOW,” in white letters nearly two inches tall against a red background.

At the very bottom of the page, in the smallest type to appear on the form (letters one-eighth of an inch high), is the statement, “NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION.” The notice is printed in white against a red background. On the reverse of the document are four paragraphs printed in gray ink. The last three paragraphs contain the validation notice—that is, statements required by the Fair Debt Collection Practices Act (FDCPA) that inform the consumer how to obtain verification of the debt.
\end{quote}
The FTC also wants Congress to clarify the law by expressly permitting a collector to continue with its collection activity during the thirty-day period for disputing the debt.443 Quite frankly, the FTC should not encourage this congressional clarification, but should strive instead for the kind of separation previously suggested between the validation notice and the collection notice. The problems that have arisen in this context deal essentially with this pressure on the collector to make its case in a serious and demanding manner, with time limits and threats thrown in for good measure.444 Somewhere else on the collection page, the collector manages to slip in the prescribed statutory language for the consumer's benefit. In many cases, the collector is not very keen about explaining how the two items fit together.445 If the consumer pays too much attention to the validation notice, she may delay the collection process and the collector will be temporarily stymied in its mission to collect the debt. The statute should aim to remove the collector's conflict and to give the consumer reasonable time to enjoy the benefit of disputing the debt if she wants to do so. If the consumer remains mute, then the collector can resume its collection efforts after expiration of the dispute period, unfettered by the statutory validation language.

It is possible for the FTC to alleviate some of the problems in this area by issuing model collection letters from time to time.446 There are model forms in Regulation Z447 and Regulation B448 that are extremely helpful to lenders in complying with those regulations. There is no reason why the FTC cannot adopt a similar device for the FDCPA. A suitable amendment to the Act would authorize the FTC to promulgate those model letters, thus providing a safe harbor to collec-

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444. See Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996) (The collection language contradicted validation notice on back of letter, because it stated that the collector would not post the collection to the consumer's file if the consumer wished to pay the claim in ten days.); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991) (A threat to sue if consumer did not pay in ten days rendered validation notice ineffective.); Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222 (9th Cir. 1988) (An implicit threat to ruin consumer's credit record within ten days contradicted consumer's validation rights.); Desantis v. Roz-Ber, Inc., 51 F. Supp. 2d 244 (E.D.N.Y. 1999) (The collector's demand for "IMMEDIATE ATTENTION" and a threat that the consumer would not receive cooperation if he did not pay in full or call to make arrangements overshadowed the consumer's right to dispute the debt.).

445. See Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Miller, 943 F.2d 482.

446. See 2004 FTC ANN. REP., supra note 167, at 15.


tors that choose to use them. The model letters should take into account the two-notice approach, with a view to removing the incentive for collectors to contradict and overshadow the validation notice.

Congress should also take immediate steps to clarify whether the bona fide error defense can be used for mistakes of law. After all, it went to the trouble of specifically excluding such mistakes in the Truth in Lending context when it amended the statute in 1980, but it left untouched the bona fide error defense language in the FDCPA. It is no wonder that some courts are confused about what Congress intended by its failure to act in the debt collection context. The Truth in Lending simplification effort followed enactment of the FDCPA in 1977, but Congress did not make any changes to the latter statute. Most courts have continued to deny mistakes of law as a defense following the Truth in Lending trend. They may feel justified in doing so because of the judicial interpretation of the pre-1980 Truth in Lending language, which did not make any specific reference to mistakes of law. The time is ripe, nevertheless, for an expression of congressional confidence in the judicial interpretation of the FDCPA provision.

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449. The FTC suggests an amendment that would add the following language at the end of § 1692(d):

"except that the Commission shall be authorized to promulgate by regulation, under Section 553 of Title 5, United States Code, model collection letters or forms for those debt collectors who choose to use them. If a debt collector adheres precisely to one of these models in creating a collection letter, the collection letter shall be deemed to be in compliance with [the FDCPA]."

2004 FTC ANN. REP., supra note 167, at 15.
