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**Cover Page Footnote**

J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2013, Indiana University. The author would like to thank Professor Veryl Miles for her guidance and expertise, without which this Comment would not be possible. The author also wishes to thank his parents, Edward and Susan O'Connell, and his sister, Rachel O'Connell, for their love and support during law school. The author additionally wishes to thank Lauren Schick for her love, support, and tolerance of his hours during the research and writing process. Last, but not least, the author would like to thank the staff and editors of the *Catholic University Law Review* for the time and effort they put into this Comment, as well as every article they publish.

# CONFOUNDED COLLECTORS, CONFUSED CONSUMERS: TIME TO CLOSE THE CIRCUIT SPLIT ON WHETHER THE FAIR DEBT COLLECTION PRACTICES ACT REQUIRES A CONSUMER TO DISPUTE A DEBT IN WRITING

*Daniel O'Connell*[+]

The consumer credit industry is growing[1] and a third of adults with credit histories have debt in collections.[2] Collections can linger on credit reports for years, causing financial harm.[3] Financial stress from the recent recession has increased delinquency[4] and consumers have seen a reversion to many of the abuses the last century's consumer protection legislation was designed to end.[5]

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1. *See* DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 1:1 (2014–2015 ed. 2014). By June 2007, consumer credit outstanding in the United States exceeded $2.4 trillion and was increasing at an annual rate of six percent. *Id.* A significant proportion of this debt is credit card debt. *Id.*

2. Jeanne Sahadi, *1 in 3 U.S. Adults Have Debt "in Collections,"* CNN MONEY (July 29, 2014), http://money.cnn.com/2014/07/29/pf/debt-collections/ (according to an Urban Institute study).

3. *See* Annamaria Adriotis, *FICO Recalibrates its Credit Scores*, WALL ST. J. (Aug. 7, 2014, 7:54 PM), http://online.wsj.com/articles/fico-recalibrates-its-credit-scores-1407443549. Collections can remain on credit reports for up to seven years and can lower credit scores as much as one hundred points, saddling consumers with high interest rates or preventing them from being able to access credit. *Id.* Fair Isaac Corp.'s recent decision to exclude paid and settled collections from its credit scores should significantly ameliorate this problem for some consumers. *Id.*

4. *See* Matthew R. Bremner, Note, *The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1574–75 (2011) (noting that "lingering hallmarks of the recession" such as "high unemployment rates, low wages, and depressed property values" make consumers "more likely to default on their loan obligations") (footnotes omitted).

5. *See id.* at 1577–78 (noting that "many of the abuses about which consumers currently complain," such as harassing phone calls, "hounding debtors at their workplaces," and threats of arrest and physical violence, "are the very same abuses that the [Fair Debt Collection Practices Act] was originally enacted to eradicate").

Consumers should have a clear picture of their rights in collections, especially because erroneous collection notices have become increasingly common.[6]

The Fair Debt Collection Practices Act (FDCPA), enacted by the U.S. Congress in 1977 and codified at 15 U.S.C. §§ 1692–1692p to combat abusive collection practices,[7] acknowledges that consumers need recourse when debt collectors try to collect debts in error.[8] Section 1692g contains a mechanism for consumers to validate debts (the "validation mechanism").[9] Section 1692g(a)(3) provides that a debt collector must notify the consumer that it will assume a debt to be valid (the "1692g notice") unless the consumer challenges the debt within thirty days of receiving such notice (the "thirty-day period").[10] Section 1692g(a)(3) does not explicitly require a consumer to challenge a debt in writing[11] and a circuit split has emerged on the question of whether the section requires the challenge in writing.[12]

The Third Circuit held in *Graziano v. Harrison*[13] that § 1692g(a)(3) implies a writing requirement because such a requirement would promote statutory consistency and reduce debt collector-consumer conflict.[14] The Third Circuit recently upheld *Graziano* in *Caprio v. Healthcare Revenue Recovery Group*.[15] Conversely, in *Camacho v. Bridgeport Financial, Inc.*,[16] the Ninth Circuit held

6. Kathy M. Kristof, *When Debt Collectors Go After the Wrong Person*, L.A. TIMES (Dec. 19, 2010), http://articles.latimes.com/2010/dec/19/business/la-fi-perfin-20101219. Erroneous collection notices have become more common in recent years because "banks and credit card companies are increasingly selling debt for pennies on the dollar." *Id.*

7. *See* 15 U.S.C. § 1692(a), (e) (2012). Congress passed the FDCPA to curb "abusive, deceptive, and unfair debt collection practices" that "contribute to . . . personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.*

8. *See* Elwin Griffith, *The Role of Validation and Communication in the Debt Collection Process*, 43 CREIGHTON L. REV. 429, 433 (2010) (remarking that the FDCPA "responds to the possibility that the collector may be pursuing the wrong person or seeking to collect a debt that the consumer has already paid").

9. 15 U.S.C. § 1692g (2012).

10. *Id.* § 1692g(a)(3).

11. *Compare* § 1692g(a)(4)–(5), (b) (explicitly requiring writings), *with* § 1692g(a)(3) (providing only that unless a 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").

12. The U.S. Court of Appeals for the Third Circuit has held that there is a writing requirement. *See* Caprio v. Healthcare Revenue Recovery Grp., LLC, 709 F.3d 142, 146 (3d Cir. 2013); Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991). The Fourth, Second, and Ninth Circuits have held that there is not a writing requirement. *See* Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 491 (4th Cir. 2014); Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282, 286 (2d Cir. 2013); Camacho v. Bridgeport Fin., Inc., 430 F.3d 1078, 1081 (9th Cir. 2005), *vacated on other grounds*, 523 F.3d 973 (9th Cir. 2008).

13. 950 F.2d 107 (3d Cir. 1991).

14. *Id.* at 112.

15. *Caprio*, 709 F.3d at 146.

16. 430 F.3d 1078 (9th Cir. 2005).

that § 1692g(a)(3) permits oral disputes under a plain language reading of the FDCPA.[17] The Second Circuit in *Hooks v. Forman, Holt, Eliades & Ravin, LLC*[18] held that § 1692g(a)(3) permits oral disputes under a tiered scheme of rights.[19] Most recently, in *Clark v. Absolute Collection Service, Inc.*,[20] the Fourth Circuit held that § 1692g(a)(3) permits oral disputes on a plain language basis.[21]

This Comment examines the circuit split on whether § 1692g(a)(3) contains a writing requirement and proposes a solution to the divide. Part I examines the development of the consumer credit industry in the United States, abuses within that industry, and federal legislation to curb those abuses. Part II discusses the reasoning of the courts involved in the circuit split. Part III analyzes and weighs the reasoning of the divided circuits, finding merits to both sides of the conflict. Part IV proposes amending § 1692g(a)(3) to explicitly permit oral *and* written disputes while requiring debt collectors to include a disclaimer about the distinct effects of oral and written disputes in the 1692g notice.

## I. USURY TO UTILITY: CONSUMER CREDIT AND THE FDCPA

Credit is one of the hallmarks of a modern and prosperous society.[22] While the practice of taking on debt to finance purchases was once a burden to be avoided, debt is now a central part of the American consumer economy.[23] The popularity of buying goods and services now and paying later has its roots in the rise of discretionary income, the middle class, consumerism, and suburbanization.[24] Between the early 1950s and early 1960s, the number of Americans who maintained a favorable view of installment payments increased from fifty to sixty percent.[25] The debt collection industry grew with the use of consumer credit, with businesses assigning debts to debt collectors where they lacked the resources to pursue collections themselves.[26] Debt collections are now a large and important part of the American economy: in 2005, 6,500 collection services reclaimed $40 billion in debt for clients.[27]

17. *Id.* at 1081.

18. 717 F.3d 282 (2d Cir. 2013).

19. *Id.* at 286.

20. 741 F.3d 487 (4th Cir. 2014).

21. *Id.* at 491.

22. *See* David Caplovitz, *Consumer Credit in the Affluent Society*, *in* CONSUMER CREDIT REFORM 3, 3 (Clark C. Havighurst ed., 1970).

23. See *id.* at 3–4.

24. *Id.* at 5–6.

25. *Id.* at 4 (referencing the work of George Katona at Michigan's Survey Research Center who conducted early research on public opinion of consumer finance).

26. William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 557 (2010).

27. *Id.*

### *A. Development of Consumer Credit*

Consumers use many credit and debt instruments to finance today's purchases with promises of tomorrow's payment, including mortgages, student loans, credit cards, and car loans.[28] However, the use of consumer credit was not as widespread before the twentieth century.[29] Most Americans' lifestyles and jobs did not allow them to acquire a high standard of living, so they had little use for consumer credit.[30] However, there were certain applications of consumer credit prior to the mass market consumerism of the mid- to late–twentieth century: consumers generally bought expensive goods, such as sewing machines, on installment plans,[31] and farmers who were worried about their finances could obtain credit by trading future earnings on crops to local merchants.[32]

Consumer finance regulation, to the extent that it existed, consisted mostly of usury laws with religious origins stretching back to the middle ages that established interest rates at approximately six percent.[33] In the United States, these usury laws first appeared in the colonies,[34] and they remained dominant even until 1900.[35]

While usury laws sought to provide a measure of protection to borrowers by preventing lenders from subjecting them to excessive interest rates,[36] they could have the opposite effect by driving borrowers to illegal markets and unscrupulous lenders to obtain credit.[37] Usury laws inhibited credit access

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28. FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 1 (Nov. 2012), http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32012.pdf.

29. *See* HOMER KRIPKE, CONSUMER CREDIT: TEXT-CASES-MATERIALS 1–2 (1970). According to Kripke, "in the 19th century society . . . there was almost no personal property of enduring value. . . . [Consumer financing] was limited to a few sewing machines, pianos, and sets of books, and it was neither significant in the economy nor a significant social problem." *Id.*

30. BARBARA A. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 1 (1970) (relating that "credit could be more usefully employed in capital-producing enterprises" and that "[t]he real wages of the working man were sufficient to acquire little more than a subsistence-level standard of living").

31. Caplovitz, *supra* note 22, at 4. *See also* NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 5 (1972) (explaining how one colonial-era furniture manufacturer made almost all of its sales on credit).

32. NAT'L COMM'N ON CONSUMER FIN., *supra* note 31, at 5.

33. *See* KRIPKE, *supra* note 29, at 2 (explaining that the medieval Church believed charging interest "beyond a fair price," usually six percent, was immoral).

34. Walter D. Malcolm & John J. Curtin, Jr., *The New Federal Attack on the Loan Shark Problem*, *in* CONSUMER CREDIT REFORM 127, 130 (Clark C. Havighurst ed., 1970) (explaining that usury laws in the United States extend back to simple colonial usury statutes from around 1641).

35. *See* Paul R. Moo, *Legislative Control of Consumer Credit*, *in* CONSUMER CREDIT REFORM 18, 18–19 (Clark C. Havighurst ed., 1970).

36. *See supra* note 33 and accompanying text.

37. *See* William D. Warren, *Consumer Credit Law: Rates, Costs, and Benefits*, 27 STAN. L. REV. 951, 952–53 (1975). *See also* KRIPKE, *supra* note 29, at 2–3 (describing a transaction typical

because those with few assets seeking small amounts could not obtain credit.[38] Therefore, many borrowers turned to illegal lenders[39] utilizing exorbitant interest rates.[40] Illegal lending and borrowing practices were widespread enough that by 1900, most major American cities were home to illegal loan-makers.[41]

Debt collectors hired by creditors to pursue those falling behind on their obligations could use "virtually any tactic" during this early period, and creditors could financially ruin delinquent debtors by forcing them into bankruptcy.[42] Methods of persuasion utilized by creditors against delinquent debtors included the seizure of the debtor's property, wage garnishment, and in some cases imprisonment.[43] According to one scholar, the ease of debt recovery—and the forceful tactics implied by such ease of operation—made debt collectors "feared and hated" among their targets.[44]

In 1898, following a financial crisis in 1893, Congress passed the Bankruptcy Act to allow voluntary bankruptcy.[45] The reforms increased creditors' reliance on debt collectors as bankruptcy made it harder to reclaim minor debts.[46]

At the turn of the twentieth century, lawmakers recognized the limitations imposed by usury laws and started passing exceptions to these laws.[47] For example, some states licensed lenders to offer small, high-interest loans that would not have been previously available on the legal market.[48] In 1910, an attorney named Arthur J. Morris pioneered a financial instrument called the "Morris Plan" which allowed lenders to increase their loan yields by making loans in exchange for a consumer's monthly purchases of investment certificates to be applied to the consumer's debt.[49] In 1916, the Russell Sage Foundation

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of loansharks of the usury law era where they made $5 loans at the beginning of the week in exchange for $6 repaid at the end of the week).

38. *See* Warren, *supra* note 37.

39. *Id.* at 953. *See also* KRIPKE, *supra* note 29, at 2–3 (stating that since "the cost of handling depends on the size of the loan, and the amount involved in consumer credit is typically small" and "an important element of cost is the expense of handling the number of collections and related accounting entries," credit was not always available to ordinary wage earners). Workers seeking credit from illegal loan sharks dealt with annual interest rates as high as 1,000 percent. *Id.* at 3.

40. KRIPKE, *supra* note 29, at 3.

41. NAT'L COMM'N ON CONSUMER FIN., *supra* note 31, at 5.

42. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 714 (2006).

43. *Id.*

44. *Id.*

45. *Id.* at 715.

46. *Id.* Voluntary bankruptcy by consumers was irksome to debt collectors because consumers could "discharge all of their debts" once creditors attempted to collect on them. *Id.*

47. Warren, *supra* note 37, at 953.

48. *Id.*

49. Moo, *supra* note 35, at 19.

drafted the Universal Small Loan Act (USLA) to regulate consumer credit while preventing loansharking.[50] Many states adopted the USLA during the 1920s and 1930s, along with laws permitting loans by industrial banks under Morris Plans.[51]

The collection industry grew as consumers began to utilize credit more widely as a means of financing purchases.[52] This led companies to hire collection agents to recover debts in increasing numbers, in exchange for a return on recovered funds, where in-house collection was financially inefficient.[53] As consumers bought more goods and services on credit and experienced more delinquencies, the first professional debt collection firms began to form in earnest.[54] The potential for abuse by debt collectors became especially apparent during the Great Depression, when lenders who were "desperate" to recover debts often hired shady debt collectors.[55]

Consumer credit first became widely available after World War II,[56] and consumers commonly used credit financing by the 1960s.[57] Outstanding consumer credit increased from $21.5 billion to $137.2 billion between 1950 and 1971.[58] Yet consumer credit regulation remained a "complex tangle" of state regulations,[59] usually supplemented by statutory law and common law[60] and disparately enforced.[61] There was little federal consumer protection legislation outside of established interest rates for certain deposit accounts and regulations

50. *Id.*

51. *Id.* Commercial banks generally did not make loans until the Great Depression, when business loan sources dried up. *Id.* at 20.

52. Goldberg, *supra* note 42, at 715–16.

53. *Id.* Collecting outstanding debt was especially hard on small businesses, which often had to increase prices or conduct layoffs to make up for lost funds. *Id.* at 715.

54. *Id.* at 716.

55. *Id.* Goldberg noted that because "collectors only made money if the debt was recovered, they had an incentive to squeeze every possible dollar out of the debtor." *Id.* She also observed that "[v]icious tactics were so effective that reputable companies found it difficult to compete with 'rogue agencies.'" *Id.* at 717.

56. *See* Moo, *supra* note 35, at 21.

57. CURRAN, *supra* note 30, at 1–2.

58. NAT'L COMM'N ON CONSUMER FIN., *supra* note 31, at 5.

59. Paul A. Mondor, Comment, *Lock-in Laws: Adding More Patches to the Mortgage Lending Quilt*, 37 CATH. UNIV. L. REV. 543, 545–46 (1988). The decentralized nature of state consumer credit regulation was compounded by the fact that the regulatory "pattern var[ied] from one state to the next." *Id.* at 546.

60. Ralph J. Rohner, *Multiple Sources of Consumer Law and Enforcement (Or: "Still in Search of a Uniform Policy")*, 9 GA. ST. U. L. REV. 881, 882–83 (1992) (listing the Uniform Commercial Code and "state common law doctrines such as fraud, deceit and unconscionability" as examples of such supplementary regulation).

61. *See id.* (noting that "[e]nforcement . . . was typically split among licensing authorities, bank supervisors, [and] state attorneys").

on national financial institutions.[62] Although the Federal Trade Commission (FTC) was able to prosecute businesses for "unfair and deceptive practices,"[63] it was forced to split its efforts between consumer protection and antitrust work and it could only pursue "enforcement actions in the public interest."[64]

Problems related to consumer credit, such as repossession, grew with the use of consumer credit.[65] Some states responded to these problems with interest rate caps.[66] In 1964, the National Conference of Commissioners on Uniform State Laws started assembling a Uniform Consumer Credit Code (UCCC)[67] repealing usury laws, interest rate caps on commercial transactions, and competitive barriers.[68] Released in 1968 and revised and reissued in 1974, the UCCC was adopted by only a few states.[69] In 1965, the American Bar Foundation launched a study of laws applicable to consumer credit.[70] The National Consumer Law Center (NCLC), part of the U.S. Office of Economic Opportunity, published a National Consumer Act (NCA) in 1970 and Model Consumer Credit Act in 1973.[71] Several states adopted parts on the NCA.[72]

With increased attention on consumer finance regulation, Congress passed a string of consumer protection laws between 1968 and 1980.[73] The Consumer Credit Protection Act (CCPA), passed in 1968, was a revolutionary piece of national legislation aimed at regulating consumer credit.[74] The original CCPA's

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62. *See id.*

63. Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. L. REV. 1147, 1164 (2010). President Richard Nixon "reorganized the FTC" to increase its effectiveness, and Congress "granted the FTC broad rulemaking authority . . . ." *Id.*

64. *Id.*

65. *See id.* at 1149–50.

66. Warren, *supra* note 37, at 955. Voters supported rate caps and legislators liked them because they gave them "enormous leverage over a giant industry." *Id.* Washington passed a twelve percent interest rate cap on retail credit in 1968 by popular referendum and California turned down by popular referendum a ballot measure that struck "the state's constitutional 10 percent interest limitation on loans of more than $100,000 made to corporations and partnerships." *Id.*

67. *Id.* at 964–65.

68. *Id.* at 965.

69. Rohner, *supra* note 60, at 883.

70. Moo, *supra* note 35, at 23.

71. Warren, *supra* note 37, at 965. Unlike the UCCC, the NCLC's legislation "takes no position on . . . usury laws, and its posture on [competitive] barriers . . . seems equivocal." *Id.* at 966. *See also* Budnitz, *supra* note 63, at 1150–51 (explaining that the Office of Economic Opportunity was created by President Lyndon B. Johnson as part of the War on Poverty).

72. Budnitz, *supra* note 63, at 1156–57.

73. Rohner, *supra* note 60, at 884–85. This trend began to slow with deregulation in the 1980s. *Id.* at 885.

74. THOMAS A. DURKIN & GREGORY ELLIEHAUSEN, TRUTH IN LENDING: THEORY, HISTORY, AND A WAY FORWARD 1–2 (2011).

most significant component was the Truth in Lending Act,[75] which required lenders to disclose credit terms and banned "extortionate credit transactions."[76] Subsequent legislation included the Fair Credit Reporting Act in 1970, the Fair Credit Billing Act and the Equal Credit Opportunity Act in 1974, and the Equal Credit Opportunity Act Amendments in 1976.[77]

### *B. The FDCPA: Passage, Main Functions, and Interpretation*

While the use of consumer credit became more mainstream, problems stemming from debt collector abuses persisted.[78] Examples of such abuses include a lender telephoning a man's relatives to inform them of his debt,[79] a loan company employee haranguing a debtor at a public bus stop about a delinquency,[80] and a lender harassing a debtor's landlady in an effort to exact payment from her tenant.[81] Federal law prohibited threatening mailings, state criminal laws barred certain harassment, and consumers could sue debt collectors for invasion of privacy and intentional infliction of emotional distress.[82] In the 1954 Texas Supreme Court case *Duty v. General Finance Co.,*[83] the plaintiffs were subjected to daily harassing telephone and mail correspondence from a collection agency.[84] The court chastised debt collectors engaged in abusive conduct, holding that a debt collector is liable to a debtor when it uses "cruel device[s]" in the course of a collection and causes the debtor "great mental anguish."[85]

Yet it was difficult to enforce state laws against out-of-state actors[86] and the CCPA did not apply to "third-party" collection agencies.[87] By 1977, abusive collection tactics gained lawmakers' attention, as debt collection had become a national industry with 5,000 collection agencies nationwide, buying $5 billion

75. *Id.* at 2.

76. *Id.* Malcolm & Curtin, *supra* note 34, at 127 (internal quotation marks omitted).

77. Rohner, *supra* note 60, at 884.

78. *See* Thomas C. Homburger, *Harassment of Borrowers by Licensed Lenders*, 1 COLUM. J.L. & SOC. PROBS. 39, 39 (1965) (explaining that "[w]hile the problem of loan sharking receives periodic publicity . . . harassment by legitimate, licensed lenders—remains less widely known").

79. *Id.* at 45.

80. *Id.*

81. *Id.*

82. *Id.* at 48–49; KRIPKE, *supra* note 29, at 322.

83. 273 S.W.2d 64 (Tex. 1954).

84. *Id.* at 65.

85. *Id.* at 66. The court also stated that "[n]o such business concerns or ethical professional men will ever be guilty of such outrageous conduct." *Id.* at 66.

86. Hoffman, *supra* note 24, at 552. *See also* John Tavormina, Comment, *The Fair Debt Collection Practices Act: The Consumer's Answer to Abusive Collection Practices*, 52 TUL. L. REV. 584, 586 (1978) (remarking that "the states' inability to control *interstate* debt collection accentuates the necessity for federal legislation").

87. *See* Hoffman, *supra* note 26, at 552.

in debt and contacting more than eight million consumers annually.[88] Positive incentives for abusive practices aggravated the situation—debt collectors could earn high commissions and did not expect future contact with their targets, and thus had little need to cultivate goodwill.[89] During FDCPA hearings, one witness recounted her employer telling her "all debtors are liars and thieves" and "the pride of a good agency collector is the effective use of scare tactics."[90] Some states had no laws on collection; others had few or ineffective laws.[91]

Telephonic technology increased the ability of debt collectors to operate across state lines.[92] Most of those individuals targeted by debt collectors were ordinary people who had fallen on hard times rather than "deadbeats."[93] Congress sought to protect consumers from unfair collection practices,[94] finding that consumers suffered from such practices,[95] and existing laws did not do enough to protect them.[96] In drafting the FDCPA, Congress had the backing of consumer advocacy groups, labor unions, and even trade associations representing debt collectors concerned that unethical debt collectors were gaining the upper hand over honest debt collectors in the marketplace.[97]

Many of the practices outlawed by the FDCPA were prohibited in some nascent form by parts of other laws, such as the FTC's power to prosecute unfair or deceptive practices, the Communications Act of 1934's ban on abusive telephone communications, and the U.S. Postal Service's power to prosecute

88. *See* S. REP. NO. 95-382, at 2 (1977).

89. *Id.* Collection agencies in 1977 usually earned fifty percent on collections, often leading them to "collect by any means." *Id.*

90. Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 762 n.1 (2005). The witness went on to testify that "[i]t was not unusual to hear a collector inform the debtor 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." *Id.* at 762–63 n.1.

91. S. REP. NO. 95-382, at 2 (1977). Approximately eighty million Americans—forty percent of the population in 1977—were left vulnerable to abuse by debt collectors because of this gap in consumer protection legislation. *Id.*

92. *Id.* at 2–3 (stating that "[t]he use of [Wide Area Telephone Service] lines by debt collectors has led to a dramatic increase in interstate collections" and "[s]tate officials are unable to act against unscrupulous debt collectors who harass consumers from another State").

93. *Id.* at 3. Just four percent of debtors in default "fit the description of 'deadbeat'" and "willful refusal to pay" was an uncommon reason for default. *Id.* Rather, "unemployment, overextension, serious illness, or marital difficulties" are often to blame. *Id.* The Senate committee noted that "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." *Id.*

94. 15 U.S.C. § 1692(e) (2012). Congress also sought to ensure fair debt collectors were not competitively disadvantaged by unfair collectors and promote "consistent State action to protect consumers" against abusive collection practices. *Id.*

95. *Id.* § 1692(a).

96. *Id.* § 1692(b).

97. Hoffman, *supra* note 26, at 551–52.

debt collectors engaged in mail fraud.[98] Opponents of the FDCPA argued that Congress was intruding on state power.[99] However, because Congress had already taken over state functions with the Consumer Protection Act, the FDCPA "merely supplement[ed] previously existing legislation[,]" leaving states to "structure [their own consumer protection] laws pursuant to the guidelines of the [FDCPA]."[100]

The FDCPA draws authority from Congress's power to regulate interstate commerce.[101] It bans many abusive practices, such as threats, harassment, impersonating attorneys and government officials, misrepresenting debtors' rights, producing deceptive documents, and suing debtors outside of the place of contracting or the debtor's area of residence.[102] The law also contains a provision that allows debtors to validate debts to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts [that have] already [been] paid."[103]

The FTC administers the FDCPA in order to ensure compliance with the law and punish "unfair or deceptive act[s] or practice[s]."[104] The FDCPA has the power to subject debt collectors in violation of the law to civil liability for noncompliance.[105] In making a determination as to a debt collector's liability, courts will consider the nature, frequency, and persistence of the noncompliance, and whether the debt collector intended to violate the act.[106] In class actions, courts will also consider the debt collector's resources and the number of individuals harmed by its actions.[107]

The FDCPA is a "self-enforcing" law[108] in the sense that it allows consumers a "private right of action"[109] to sue debt collectors for up to $1,000 for a violation.[110] While the FTC can seek greater damages than private plaintiffs, and is often successful in its enforcement efforts, it brings few cases every year

98. Tavormina, *supra* note 86, at 584–85. While some would argue these federal legal protections would have eliminated the need for the FDCPA, such critics "fail[] to consider the societal benefits derived from statutorily defining the rights and obligations of the concerned parties." *Id.* at 585.

99. *Id.* at 586–87.

100. *Id.* at 587.

101. 15 U.S.C. § 1692(d) (2012).

102. *Id.* §§ 1692d, 1692e, 1692i, 1692j.

103. S. REP. NO. 95-382, at 4 (1977). "Dunning" is an archaic word for demanding payment from a delinquent debtor. BLACK'S LAW DICTIONARY 612 (10th ed. 2014).

104. 15 U.S.C. § 1692l(a) (2012).

105. *Id.* § 1692k(a).

106. *Id.* § 1692k(b)(1).

107. *Id.* § 1692k(b)(2).

108. Tavormina, *supra* note 86, at 598.

109. Rex C. Anderson, *Fair Debt Collection Practices Act: A Law Needing Updating?*, MICH. B. J. 28, 28 (2010).

110. 15 U.S.C. § 1692k(a) (2012).

under the law.[111] The FTC is statutorily required to deliver annual reports and recommendations to Congress about the FDCPA.[112] The FTC has seen a large spike in FDCPA-related complaints from consumers, witnessing a thirty-four percent increase in FDCPA complaints between 2004 and 2008.[113] Consumers have also widely utilized the law's private right of action in recent years, as the number of lawsuits filed each year under the FDCPA increased 250 percent from 2007 to 2010.[114]

Defenses available to debt collectors under the FDCPA include the debt collector's commission of an unintentional bona fide error despite "procedures reasonably adapted to avoid [the] error"[115] as well as the commission of violating acts otherwise done in good faith under the FTC's advisement.[116] However, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,[117] the U.S. Supreme Court held that the bona fide error defense does not apply to mistakes of law.[118] The dissent in *Jerman* feared this would increase FDCPA suits based on technical violations.[119] Most courts interpret the FDCPA to protect the "least sophisticated consumer,"[120] a standard which covers "even the

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111. Bremner, *supra* note 4, at 1563 (explaining that while the FTC can obtain damages of $16,000 for each person for each violation, it prosecutes just a few cases each year).

112. 15 U.S.C. § 1692m(a) (2012); Tavormina, *supra* note 86, at 599.

113. Colin Hector, Comment, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CALIF. L. REV. 1601, 1609 (2011).

114. Bremner, *supra* note 4, at 1554. According to Bremner, "[t]he financial crisis of 2008, the slow economic recovery, the lingering high unemployment rate, the high consumer default rate, and the increased motivation of banks and credit card companies to sell off delinquent accounts to third-party debt collectors" are contributing factors to this significant increase in consumer-debt collector conflict. *Id.* at 1554–55.

115. 15 U.S.C. § 1692k(c) (2012).

116. *Id.* § 1692k(e).

117. 1305 S. Ct. 1605 (2010).

118. *Id.* at 1624. The Court noted that "when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly." *Id.* at 1612.

119. *Id.* at 1631 (Kennedy, J., dissenting) (stating that "[t]oday's holding gives new impetus to [an] already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation" and punishing those who make honest compliance errors in spite of "reasonable efforts . . . to avoid mistakes").

120. Richard D. Gage, Note, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 FORDHAM L. REV. 283, 289 (2012). *See e.g.* Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir. 2006) (explaining that "[b]ecause the FDCPA is a remedial statute, we construe its language broadly, so as to effect its purpose") (internal citation omitted); Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162, 1176 (9th Cir. 2006) (quoting Sec. Pac. Nat'l Bank v. Resolution Tr. Corp., 63 F.3d 900, 904 (9th Cir. 1995)) (stating that a court "must avoid a construction which renders any language of the [FDCPA] superfluous").

naïve and the trusting."[121] The FDCPA is generally seen as a "remedial" law that ought to be interpreted "broadly" to protect consumers.[122]

It is difficult to ascertain from the FDCPA's legislative history whether Congress intended to impute a writing requirement in § 1692g(a)(3). In a Committee on Banking, Currency and Housing report analyzing the house bill published on June 1, 1976, the Committee said of the validation provision that "unless the consumer . . . disputes the validity of the debt, the debt will be assumed as valid . . . *and* . . . if the consumer notifies the debt collector in writing [collections] shall cease."[123] In contrast, there is a statement in the Congressional Record from July 1976 that makes no distinction as to a separate writing requirement: "[a]fter initial communication from the debt collector, this bill requires . . . a statement that the consumer must dispute the validity of the debt within 30 days, or the debt will be assumed valid. Where the debt is disputed, collection[s] must stop."[124]

While the June 1, 1976 report apparently distinguishes between written and unwritten disputes, evidence in the Congressional Record from July 1976 does not.[125] However, the FDCPA was amended in 1986, 1996, and 2006.[126] The 2006 amendments are of particular significance because they revised § 1692g(b) to state that debt collectors may continue collections during the thirty-day period *unless consumers lodge a written dispute*.[127] In this relatively recent amendment, Congress seems to acknowledge that there might be a distinction between a dispute made in writing and an oral dispute.[128] Additionally, the FTC encouraged Congress to amend § 1692g(a)(3) to clearly permit oral disputes in its 2005 annual report.[129]

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121. Hector, *supra* note 113, at 1607. *See also* Caprio v. Healthcare Revenue Recovery Grp., LLC, 709 F.3d 142, 149 (3d Cir. 2013) (quoting Wilson v. Quadramed Corp., 225 F.3d 350, 354 (3d Cir. 2000)) (reckoning that the "least sophisticated debtor" standard assumes that a debtor may be less than "reasonable," but more than "willfully blind or non-observant").

122. *See supra* note 120.

123. H.R. REP. NO. 94-1202, at 10 (1976) (emphasis added).

124. 122 CONG. REC. H7785–7798, 369 (1976).

125. *Compare* H.R. REP. NO. 94-1202, at 10 (1976) ("[I]f the consumer notifies the debt collector in *writing* within the 30 day period . . . the debt collector shall cease collection.") (emphasis added), *with* 122 CONG. REC. H7785–7798, 369 (1976) ("[T]he consumer must dispute the validity of the debt within 30 days . . . [w]here the debt is disputed, collection must stop.").

126. Anderson, *supra* note 109, at 28.

127. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351 § 802(c), 120 Stat. 1966, 2006–07 (2006).

128. *See id.* See *also supra* notes 125–27 and accompanying text.

129. U.S. FED. TRADE COMM'N, ANNUAL REPORT 2005: FAIR DEBT COLLECTION PRACTICES ACT 12, 18–19 (2005). The FTC stated that, "[w]e believe Sections 807(8) and 809(a)(3) should be amended to expressly provide that consumers may trigger their protections by orally notifying collectors that they dispute a debt." *Id.* at 19. The FTC argued that this would "assure consistency between the [FDCPA's validation mechanism] and the standard imposed by analogous provisions of the [Fair Credit Reporting Act]." *Id.* Moreover, the FTC argued that "public policy also favors"

## II. CIRCUITS SPLIT ON A WRITING REQUIREMENT IN § 1692G(A)(3)

### *A. The Validation Mechanism*

Under the validation mechanism, the debt collector must send the consumer a written notice with certain information about the debt and the consumer's FDCPA rights (the 1692g notice) within five days of first communicating with the consumer about a collection.[130] Sections 1692g(a)(1)–(2) require that this notice provide the sum of the debt and the creditor's name.[131]

The notice must also inform the consumer that the debt "will be assumed to be valid" by the debt collector unless challenged within thirty days of receiving the 1692g notice (the thirty-day period).[132] Section 1692g(a)(4) states that the notice must inform the consumer that the debt collector will send proof of the debt or a judgment on it if the consumer challenges the debt in writing within the thirty day period.[133] Section 1692g(a)(5) states that the notice must inform the consumer that the debt collector will send the consumer the name and address of the original creditor upon written request made within the thirty day period.[134] Section 1692g(b) states that if a consumer makes a written dispute under § 1692g(a)(3) or invokes § 1692g(a)(5), the debt collector must cease collection until it can verify the debt.[135] Otherwise, collections may continue.[136] Section 1692g(a)(4)–(5) and the § 1692g(b) cease-collection provision require writings, but § 1692g(a)(3) does not explicitly require a consumer to dispute a debt in writing to avoid the debt collector's presumption of the debt's validity.[137]

### *B. Circuit Court Decisions*

The Third Circuit in *Graziano v. Harrison*[138] was the first circuit to address whether § 1692g(a)(3) permits an oral dispute to prevent a debt collector from assuming a debt's validity.[139] Harrison, an attorney with a debt collection

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allowing oral disputes. *Id.* Section 809(a)(3) of the FDCPA is codified at 15 U.S.C. § 1692g(a)(3). Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 809(a)(3), 91 Stat. 874 (1977); 15 U.S.C. § 1692g(a)(3) (2012).

130. 15 U.S.C. § 1692g(a) (2012).

131. *Id.* § 1692g(a)(1)–(2).

132. *Id.* § 1692g(a)(3).

133. *Id.* § 1692g(a)(4).

134. *Id.* § 1692g(a)(5).

135. *Id.* § 1692g(b).

136. *Id.*

137. *See supra* note 11 and accompanying text.

138. 950 F.2d 107 (3d Cir. 1991).

139. *See* Sturdevant v. Jolas, 942 F. Supp. 426, 429 (W.D. Wis. 1996) (noting that the Third Circuit had been the only federal appellate court up until that time to have ruled on whether the FDCPA requires a debtor to dispute a debt in writing).

business, sent a collection notice to Graziano.[140] The notice informed Graziano that Harrison would assume the debt was valid unless he challenged the debt in writing within thirty days.[141] Graziano sued Harrison for a number of FDCPA violations, among them that Harrison's writing requirement violated the FDCPA.[142] On cross motions for summary judgment, the district court upheld the writing requirement.[143]

On appeal, Graziano pointed out that several district courts interpreting § 1692g(a)(3) found no requirement for a written dispute,[144] while Harrison argued that the presence of explicit writing requirements in § 1692g(a)(4)–(5) evidenced a congressional intent to create a writing requirement.[145] The court held that Graziano's interpretation of § 1692g "attribute[s] to Congress an intent to create [an] incoherent . . . system" where a debt collector would have no "statutory ground" for assuming a debt's validity, yet would not need to verify the debt nor inform the consumer of the creditor's identity, and could continue to collect the debt.[146] The court also commented that requiring written disputes is preferable from a public policy and judicial efficiency standpoint because it creates a permanent documentation of a dispute that provides a bulkhead against future legal clashes.[147]

The Third Circuit encountered § 1692g(a)(3) again in 2013 in *Caprio v. Healthcare Revenue Recovery Group, LLC*.[148] Caprio filed a class action lawsuit against Healthcare Revenue Recovery Group (HRRG) alleging that HRRG violated the FDCPA with a collection letter inviting debtors to challenge

140. *Graziano*, 950 F.2d at 109.

141. *Id.*

142. *Id.* at 110.

143. *Id.* at 111.

144. *Id.* at 112. *See, e.g.* Young v. Credit Bureau of Lockport, Inc., No. CIV-86-1121E, 1989 WL 79054, at *2 (W.D.N.Y. July 17, 1989), *modified*, 729 F. Supp. 1421 (W.D.N.Y. 1989) ("It is clear from these subsections that Congress was well aware of requiring the consumer to dispute the debt . . . in writing and, as such, the omission of the 'in writing' requirement in subsection (a)(3) appears to be intentional.").

145. *Graziano*, 950 F.2d at 112.

146. *Id.* The court noted that §1692g(a)(4) requires the debtor to make a written challenge to obtain verification of the debt, § 1692g(a)(5) states that the collector must furnish the debtor with the creditor's identity upon written request, and § 1692g(b) provides that the collector must cease collection efforts upon a written dispute until he or she furnishes the debtor with proof of the debt's validity. *Id.*

147. *Id.* (noting that "a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts").

148. 709 F.3d 142, 147, 151 (3d Cir. 2013) (upholding *Graziano*'s imposition of a writing requirement).

a debt in writing *or* orally.[149] The district court granted HRRG's motion for judgment on the pleadings.[150]

On appeal, Caprio argued that HRRG's letter violated the FDCPA because the recipient, presumed to be "the least sophisticated consumer," would be under the impression that he could dispute his debt orally *or* in writing, making the letter a deceptive representation prohibited by § 1692(e)(10).[151] The Third Circuit once again held that a debtor must dispute a debt in writing for the dispute to be valid.[152] The court held that HRRG's notice was "deceptive" because "'it can be reasonably read to have two or more different meanings,'" one of which is not correct.[153] The court held that under the least sophisticated consumer standard, a debt collector does not communicate an effective notice of rights to a consumer if the notice is contradictory.[154]

In 2005, the Ninth Circuit, in *Camacho v. Bridgeport Financial, Inc.*,[155] took an approach opposite to that of the Third Circuit on the question of whether § 1692g(a)(3) implies a writing requirement, thereby creating a circuit split.[156] Camacho sued Bridgeport for FDCPA violations, including that Bridgeport allegedly misrepresented her rights under the FDCPA by requiring her to challenge her debt in writing.[157] The trial court dismissed Bridgeport's motion to dismiss, holding Camacho had a valid FDCPA claim and allowing an interlocutory appeal.[158]

On appeal, Camacho argued that Bridgeport violated the FDCPA because § 1692g(a)(3) does not include an explicit writing requirement.[159] Bridgeport, meanwhile, argued that § 1692g(a)(3) should be construed as containing a writing requirement, lest it be inconsistent with the later subsections.[160] The court held for Camacho, explaining that courts have a duty to abide by a statute's

149. *Id.* at 145–46. The letter stated that, "[i]f we can answer any questions, or if you feel you do not owe this amount, please call us toll free . . . or write us at the above address." *Id.* at 145.

150. *Id.* at 146.

151. *Id.* A "collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e (2012).

152. *Caprio*, 709 F.3d at 151.

153. *Id.* at 152 (quoting Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996)).

154. *Caprio*, 709 F.3d at 149, 151 (quoting Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991)). The court held that a letter overshadows or contradicts a validation notice if it "would make the least sophisticated consumer uncertain as to her rights," and that "'the juxtaposition of two inconsistent statements . . . render[s] the statutory notice invalid under section 1692g.'" *Caprio*, 709 F.3d at 149, 152 (quoting *Graziano*, 950 F.2d at 111 and *Russell*, 74 F.3d at 35 respectively).

155. 30 F.3d 1078 (9th Cir. 2005), *vacated on other grounds*, 523 F.3d 973 (9th Cir. 2008).

156. *Id.* at 1081 (repudiating *Graziano* explicitly and holding that the FDCPA's debt challenge provisions require written disputation).

157. *Id.* at 1079.

158. *Id.*

159. *Id.* at 1080.

160. *Id*.

plain meaning to the fullest extent possible.[161] The court noted that the U.S. Supreme Court has held that a statute's plain meaning is consistent with the statute if its plain meaning does "not alter the [statute's] substance or obscure its meaning."[162] The Court also held that the result of allowing oral disputes would not create an "incoherent" system, as argued by Bridgeport, because the FDCPA provides consumer rights that are "triggered by an oral dispute."[163] Finally, the Ninth Circuit held that allowing a consumer to register an oral dispute would contribute to Congress's intent by allowing a consumer to "question and respond to" a debt collector.[164]

The Second Circuit joined the Ninth in *Hooks v. Forman, Holt, Eliades & Ravin, LLC*,[165] holding that a consumer's ability to challenge a debt is among "the most fundamental" rights under the FDCPA and should therefore be available to particularly disadvantaged debtors.[166] The Second Circuit held that it is sensible in the general scheme of the FDCPA to allow debtors to dispute a debtor orally under § 1692g(a)(3) while requiring them to lodge complaints in writing under § 1692g(a)(4)–(5) and § 1692(b).[167] The court came to this conclusion because although the power to require a debt collector to halt its collection efforts under § 1692g(b) gives consumers the "ultimate power" over collection agencies, the right to have payments go toward the undisputed part of a debt under § 1692h or to have the disputed status of the debt reported when the debt collector discusses the debt with others under § 1692e(8) burdens debt collectors less than other rights.[168]

161. *Id.* at 1080–81.

162. *Id.* at 1081. The Ninth Circuit noted that in *Lamie v. United States*, the Supreme Court held that "absent sufficient indications to the contrary, [courts] should refrain from inserting language into a statute, even if . . . inadvertently omitted . . . ." *Id.* at 1081. The Ninth Circuit also referenced the Supreme Court's direction in *Russello v. United States*, which states that when Congress includes language in one part of a law but not another, there is a presumption that Congress acted with the intent to do so. *Id.* (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

163. *Camacho*, 430 F.3d at 1081–82. The court provided as examples: § 1692e(8) (preventing a collector from transmitting credit information "without including the fact that the debt is in dispute"); § 1692h (preventing a collector from applying payments for debts not in dispute to a debt in dispute); and § 1692c(a)(1) (granting relief to a consumer communicating with him at an inconvenient time or location). *Id.* at 1082.

164. *Id.* at 1082 (citing Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1226 (9th Cir. 1989)).

165. 717 F.3d 282 (9th Cir. 2013).

166. *Id.* at 286 (noting that "it was reasonable to ensure that [the right to dispute a debt] could be exercised by consumer debtors who may have some difficulty with making a timely written challenge").

167. *Id.* at 286. The court stated that this configuration makes for a "sensible bifurcated scheme." *Id.*

168. *Id.*

Most recently, the Fourth Circuit joined the side of the split allowing oral disputes in *Clark v. Absolute Collection Service, Inc.*[169] The Fourth Circuit held that there is no writing requirement in § 1692g(a)(3), asserting that "'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"[170] In addition, it would be improperly presumptive to read a writing requirement automatically into the FDCPA's validation provision for oral debt disputes, thereby reading into the law "words that are not there."[171] The Fourth Circuit rejected the debt collector's argument that excluding a writing requirement would be internally inconsistent with the FDCPA's other debt resolution provisions.[172]

### *C. Intra-Circuit Splits: District Court Decisions*

The Seventh Circuit, in *Sturdevant v. Jolas*,[173] deferred to *Graziano* in holding that a debt collector could require a consumer to challenge a debt in writing because it is necessary to look to § 1692g as a whole for the implication of a writing requirement and because of the "impracticality" of omitting a writing requirement.[174] In *Ingram v. Corporate Receivables, Inc.*,[175] a Seventh Circuit district court pointed to the fact that only the Third Circuit had ruled on the question to determine that a writing requirement should be implied to create a permanent record of a dispute and to avoid "undermin[ing]" the validation process by causing debtors to relinquish all of their other rights.[176] In *Castillo v. Carter*,[177] a Seventh Circuit district court held for the existence of a writing requirement, finding that the Third Circuit's reasoning in *Graziano* was "persuasive."[178] The court noted that while the Seventh Circuit requires district

169. 741 F.3d 487, 491 (4th Cir. 2014).

170. *Id.* at 491, 489–90 (quoting Lamie v. United States, 540 U.S. 526, 534 (2004)).

171. *Clark*, 741 F. 3d at 490.

172. *Id.* at 491. The court found that § 1692g "triggers statutory protections for consumers" not tied to later sections with writing requirements and would not "lead to [an] absurd result." *Id.*

173. 942 F. Supp. 426 (W.D. Wis. 1996).

174. *Id.* at 429. The Court found that the two cases cited by the plaintiff, *Harvey v. United Adjusters*, 509 F. Supp. 1218, 1220 (D. Or. 1980), and *Reed v. Smith*, No. 93-956-A-1, 1995 WL 907764 (M.D. La. Feb. 7, 1995), failed to "thoroughly analyze[] the inherent writing requirement of subsection (a)(3) in connection with § 1692g(a) as a whole" and failed to consider "the impracticality of their holdings." *Id.*

175. No. 02 C 6608, 2003 U.S. Dist. LEXIS 7475 (N.D. Ill. May 2, 2003).

176. *Id.* at *15–16.

177. Cause No. IP 99-1757-C H/G, 2001 U.S. Dist. LEXIS 2686 (S.D. Ind. 2001).

178. *Id.* at *12.

courts to consider the decisions of other circuits critically,[179] it should also be deferential to other circuits whenever possible.[180]

However, the Seventh Circuit district court in *Campbell v. Hall*[181] held that where a debt collection letter stated that a debtor had to dispute a debt in writing, effectuating the "plain meaning" of the law would not lead to an "absurd result[] because an oral dispute triggers multiple statutory protections" and "[a] statute need not contain parallel language in all of its subsections in order to be internally consistent."[182]

In *Diamond v. Corcoran,*[183] a Sixth Circuit district court held there was no FDCPA violation where a debt collector required a written dispute based on similar deference to *Graziano*.[184] However, another district court in the Sixth Circuit, in *Mellinger v. Midwestern Audit Service, Inc.*,[185] held that § 1692g(a)(3) does not require a writing, finding the Third Circuit's opinion in *Camacho* persuasive.[186] The Court in *Mellinger* also pointed to the First Circuit's holding, in *Brady v. Credit Recovery Co.*,[187] that § 1692e(8) does not impose a writing requirement, where § 1692e(8) "on its face does not impose a writing requirement."[188]

179. *Id.* at *9–10 (citing Citizens for a Better Env't v. Steel Co., 230 F.3d 923, 928 (7th Cir. 2000)).

180. *Castillo*, 2001 U.S. Dist. LEXIS 2686, at *9 (quoting Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987), *vacated on other grounds*, 127 F.R.D. 509 (N.D. Ill. 1989)).

181. 624 F. Supp. 2d 991 (N.D. Ind. 2009).

182. *Id.* at 994–95, 999–1000 (internal quotations omitted). The court noted that a number of Seventh Circuit district courts had not held there to be an implied writing requirement in § 1692g(a)(3). *Id.* at 1000.

183. No. 5:92-CV-36, 1992 WL 12647817 (W.D. Mich. Aug. 3, 1992).

184. *Id.* at *2. The court stated that,

> Plaintiff . . . contends that . . . the FDCPA does not require plaintiff to dispute the debt in writing. . . . The [Third] Circuit held in [*Graziano*] that § 1692g(a)(3) contemplates that any dispute, to be effective, must be in writing, and therefore the letter's requirement that disputes be in writing did not render the statutory notice invalid.

*Id.*

185. No. 11-CV-11326, 2012 WL 405008 (E.D. Mich. 2012).

186. *Id.* at *4.

187. 160 F.3d 64 (1st Cir. 1998).

188. *Id.* at 66. The court in *Brady* also noted that "'[i]n a statutory construction case . . . when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning in all but the most extraordinary circumstance is finished.'" *Id.* (quoting Riva v. Commonwealth of Mass., 61 F.3d 1003, 1007 (1st Cir. 1995)). Moreover, the court held that where § 1692e(8) had a "much more limited effect [compared to § 1692b's cease-collection provision]" of "requir[ing] a debt collector who knows or should know that a given debt is disputed to disclose its disputed status to persons inquiring about a consumer's credit history[,]" the omission of a writing requirement "makes logical sense." *Brady*, 160 F.3d at at 67.

## III. EVALUATING THE CIRCUITS: BENEFITS AND SHORTFALLS

### *A. Oral Disputes Alone Do Not Protect Consumers*

Certainly, plain language and congressional intent are paramount considerations in statutory interpretation.[189] The Supreme Court has stated "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[190] Professor Elwin Griffith has said that, based on this strong tradition of deferring to the plain language of a statute, the inclusion of language in one part of a section in the FDCPA and its omission in another represents a "distinction" and "the plain language of the statute should carry the day" without "resort to [the statute's] legislative history."[191]

However, proponents of reading a writing requirement into the law have substantial reason to be cautious of a plain language interpretation of § 1692g(a)(3).[192] Not only does a plain language reading of § 1692g(a)(3) bring into question the usefulness of an oral dispute that does not actually require a debt collector to do anything,[193] but a debt collector who convinces a consumer to lodge an oral dispute may lead the consumer to forfeit his rights if the consumer, believing an oral dispute is sufficient to activate all his rights under the FDCPA, allows the thirty-day period to pass without also lodging a written dispute.[194]

### *B. Congress Favors Allowing Oral Disputes*

Concerns about the impact of a plain language reading of § 1692g(a)(3) notwithstanding, the Third Circuit in *Caprio* may not have paid due attention to the weight of legislative and administrative opinion with regard to the appropriateness of a writing requirement.[195] First, the U.S. Supreme Court has

189. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

190. *Id.*

191. Griffith, *supra* note 90, at 799. Griffith argues for a plain language interpretation of § 1692g(a)(3). *Id.* The U.S. Supreme Court has held that plain language should predominate where language is not ambiguous and that plain meaning "should be conclusive" except for where "the literal application [of a statute] will produce a result that is clearly at odds with the drafters['] intent." *Id. See* United States v. Ron Pair Enter., 489 U.S. 235, 242 (1989). *See also* Germain, 503 U.S. at 253–54.

192. *See infra* notes 193–94 and accompanying text.

193. Griffith, *supra* note 90, at 800. Griffith observed that the Third Circuit in *Graziano* 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." *Id.*

194. *See id.* at 798 n.237. *See also* Miller v. Payco-Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991) (noting that where a collection notice "demands 'IMMEDIATE FULL PAYMENT' and commands the consumer to 'PHONE US TODAY,'" a consumer who actually made his dispute via telephone, as apparently requested by the notice, "could lose his rights under the [FDCPA]").

195. *See infra* notes 196–99 and accompanying text.

held that courts should give deference to statutory interpretations of administrative agencies[196] and "[u]nder normal circumstances," a court should give "deference to a reasonable interpretation by the FTC if the statute [i]s ambiguous on the question" of the case.[197] Therefore, *Caprio* should have taken into consideration the FTC's unequivocal suggestion that Congress amend the FDCPA to permit oral disputes.[198] Moreover, the fact that Congress amended § 1692g(b) in 2006 to make a clear distinction between written and oral disputes rather starkly evidences the congressional intent behind the language.[199]

### *C. Consumers and Collectors Benefit from Oral Disputes and Statutory Clarity*

There are a few reasons why allowing oral disputes without obligating debt collectors to take any action might be useful to both consumers and debt collectors. First, an oral dispute puts a debt collector on notice that a debt might not be accurate and this initial dispute could spur a debt collector to look into the debt, perhaps saving time and money in the long run.[200] A provision for oral dispute provides an avenue for the consumer "to draw the debt collector's attention to his concerns."[201] This would be in line with the FDCPA's "remedial" nature and the convention of applying a broad interpretation to the FDCPA in order to protect consumers.[202]

The emergence of the circuit split on the question of whether § 1692g(a)(3) contains an implicit writing requirement has also added to the pressure on debt collection industry actors to parse the confusing provisions of the FDCPA.[203] Professors Laurie Lucas and Alvin Harrell suggest that "the circuits would be better served if Congress would clarify some of the [FDCPA's] vexing

196. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

197. Elwin Griffith, *The Meaning of Language and the Elements of Fairness in the Fair Debt Collection Practices Act*, 27 U. TOL. L. REV. 13, 21 (1995).

198. U.S. FED. TRADE COMM'N, *supra* note 129, at 12–13.

199. *See supra* note 127–28 and accompanying text.

200. *See* Elwin Griffith, *The Fair Debt Collection Practices Act — Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 46–47 (1999); Griffith, *supra* note 88, at 800.

201. Griffith, *supra* note 90, at 800–01.

202. Gage, *supra* note 120, at 287.

203. *See* Laurie A. Lucas et al., *Circuit Conflicts Create Uncertainty for Debt Collectors Under the FDCPA,* 69 BUS. LAW. 623, 623 (2014) (explaining that the circuit split is one of many that "exacerbate [disagreement] on substantive issues" and create a "need for additional guidance . . . [on] the evolving complexities of the FDCPA").

issues."[204] One commentator has suggested that ambiguities in the FDCPA have led to "regulatory inefficiency [which] deleteriously affects both consumers and debt collectors [by] conflat[ing] substantive consumer abuses with technical compliance violations."[205] It is untenable for creditors to be fully compliant with the FDCPA and creditors are exposed to legal liability because of "courts' varying and unsettled interpretations of the [FDCPA's] most ill-crafted and outdated provisions."[206]

Creditors who operate multistate businesses are the most at risk for noncompliance, whether intentional or accidental.[207] Some scholars suggest that to avoid unintentionally violating the FDCPA, businessmen operating multistate debt collection operations should simply resort to drafting two validation notices: one for the Second, Fourth, and Ninth Circuits that "avoid any suggestion that written notice of the dispute is required" and one for the Third Circuit that requires written notice.[208] Debt collectors, they suggest, should "be ready to switch notices at any time[.]"[209]

One criticism of § 1692g is that it may not always "convey an effective message to the least sophisticated consumer," especially because the law does not require the debt collector's statements in the 1692g notice to be in a specific order.[210] An unscrupulous debt collector could capitalize on this lack of ordering to confuse the consumer by referencing the necessity of a written dispute in § 1692g(a)(4) before mentioning the dispute in § 1692g(a)(3) to lead a consumer to believe that a written dispute is required.[211] This creates a conflict for debt collectors who may continue collections during the thirty-day period,

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204. Laurie A. Lucas & Alvin C. Harrell, *The Fair Debt Collection Practices Act: 2006 Review of Appellate Cases*, 61 BUS. LAW. 941, 948 (2006). Congressional action to rectify ambiguities in the FDCPA would "establish consistency *across* the circuits." *Id.* (emphasis in original).

205. Bremner, *supra* note 4, at 1556.

206. *See id.* at 1581–82. Bremner argues that "a debt collector must walk an unnecessarily fine line to avoid liability, and ultimately its guilt is less a product of its actual conduct than an arbitrary determination dependent upon the jurisdiction in which the claim is filed." *Id.* at 1583.

207. *See* John L. Culhane, Jr., *Call or Write for FDCPA Notice? Depends on the State*, LAW360 (Mar. 7, 2014, 5:00 PM), http://www.law360.com/articles/515165/call-or-write-for-fdcapa-notice-depends-on-the-state.

208. *Id.*

209. *Id.*

210. Griffith, *supra* note 90, at 801–02. Griffith notes that "by putting the phrase 'by notifying us in writing to that effect' after the word 'dispute,'" a collector may convince a consumer that only one dispute process is available under the validation mechanism. *Id.* Yet, Griffith notes, "there is no language that explains that there is [a] difference in meaning" between disputes made to avert a collector's presumption of a debt's validity and disputes made to take advantage of other rights against collectors. *Id.* at 802.

211. *Id*. *See also* Goldberg v. Winston & Morrone, P.C., 95 Civ. 9282 (LAK), 1997 U.S. Dist. LEXIS 3521, at *18 (S.D.N.Y. Mar. 26, 1997) (holding that whether the defendant's reordering of the § 1692g(a)(3) and (4) statements would "mislead the 'least sophisticated consumer'" is an issue of fact).

but who must also notify consumers of their rights.[212] Thus, the FDCPA's ambiguity harms consumers and ethical debt collectors—two groups the law was intended to benefit.[213]

## IV. CONGRESS SHOULD AMEND THE FDCPA TO EXPLICITLY PERMIT ORAL AND WRITTEN DISPUTES, WHILE REQUIRING COLLECTORS TO INCLUDE A DISCLAIMER ABOUT THE EFFECT OF BOTH METHODS OF DISPUTE

In order to resolve the circuit split on whether § 1692g(a)(3) implies a requirement that a consumer dispute a debt in writing, Congress should amend § 1692g(a)(3) to state that a debt collector must inform a consumer that he may dispute a debt in writing *or* orally, but that an oral dispute does not replace a written dispute for purposes of availing oneself of rights otherwise invoked by written disputes. Griffith has previously proposed amending the FDCPA to clearly permit oral disputes[214] and to have such a dispute compel the debt collector to verify the debt or cease collection of the debt.[215] However, the additional inclusion of a clear disclaimer requiring the debt collector to explain to the consumer the distinction between written and oral disputes in terms of the protections such disputes provide would benefit both consumers and debt collectors enormously.[216]

### *A. Strict Liability and Ambiguity Do Not Mix*

The FDCPA is a strict liability law at its core.[217] The law should be as unambiguous as possible if debt collectors can be sued for technical violations in order to avoid needlessly exposing debt collectors to liability.[218] This amendment would also put an end to the debate over whether the FDCPA

212. Griffith, *supra* note 90, at 825–26.

213. *See* Hoffman, *supra* note 26, at 551–52.

214. *See e.g.* Elwin Griffith, *The Peculiarity of Language in the Debt Collection Process: The Impact of the Fair Debt Collection Practices Act*, 54 WAYNE L. REV. 673, 732 (2008) (arguing that "there is no good reason why section 1692g(a)(3) should not be amended to clarify the point that the consumer's oral dispute of the debt is sufficient"); Elwin Griffith, *The Challenge of Communicating with the Consumer and Validating the Debt Under the Fair Debt Collection Practices Act*, 55 U. KAN. L. REV. 61, 119 (2006) (stating that "[i]f the statute allowed the consumer to dispute the debt orally [under both] (a)(3) and (a)(4), then there would be no argument about the current difference in language"); Griffith, *supra* note 90, at 802 (contending that "Congress . . . should clarify its position by amending the statute").

215. *See e.g.* Griffith, *supra* note 200, at 47 (suggesting "[t]he consumer's lot would be made easier if the statute required the collector to either verify the debt or cease all collection activities").

216. *See id.* at 47–48.

217. *See* Vartan S. Madoyan, Comment, *Attorneys Beware:* Jerman v. Carlisle *Holds You Liable for Technical Legal Errors Under the FDCPA*, 44 LOY. L.A. L. REV. 1091, 1092 (2011).

218. *See* Bremner, *supra* note 4, at 1581 (observing that "the structure and ambiguity of the FDCPA has made it relatively easy for inventive lawyers to form highly technical, cognizable claims against debt collectors, even where their clients suffer no actual harm").

encourages excessive litigation of technical violations.[219] Some scholars argue that a "cottage industry" has arisen around "exploiting the ambiguities" of the FDCPA to "coerce collection agencies" to abandon valid claims.[220] Other scholars argue that there are no technical violations under strict liability statutes, merely lapses in compliance.[221] If the former school of thought is accurate, clarifying § 1692g(a)(3) should reduce debt collectors' exposure to technical litigation.[222] If the latter school of thought is correct, the end product of the proposed amendment will be a strict liability law that is more amenable to encouraging debt collector compliance.[223]

### *B. A Disclaimer Will Solve Unique Problems of Ambiguity*

Requiring debt collectors to inform consumers that an oral dispute is not a substitute for a written dispute (for the purpose of activating rights explicitly activated via written dispute will prevent the possibility that the debt collector) will confuse the consumer by reordering the statements required by § 1692g(a)(3) and (4).[224] It will also make the consumer think twice before accidentally forfeiting his rights by believing an oral dispute is enough to stop collections and compel the debt collector to verify the debt.[225] It is a solution tailored precisely to assist the least sophisticated consumer. This amendment would also reduce the compliance burden and liability exposure of debt collectors operating multistate businesses who will otherwise have to coordinate and update their 1692g notices as courts come to different conclusions on whether consumers must dispute a debt in writing under § 1692g(a)(3).[226]

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219. *See infra* notes 220–23 and accompanying text.

220. Hoffman, *supra* note 26, at 561–62.

221. Anderson, *supra* note 109, at 28–29.

222. *See* Bremner, *supra* note 4, at 1564 (arguing that strict liability under the FDCPA is "inefficient," with "abusive debt collectors gain[ing] a competitive advantage" because there is "no practical differentiation between the most egregious consumer abuses and mundane technical violations that do not cause consumers any actual harm"). Also, attorneys are "subject to strict liability . . . for otherwise honest errors" and therefore "may strongly hesitate before advocating zealously for their [creditor] clients." Madoyan, *supra* note 217, at 1092.

223. *See* Bremner, *supra* note 4, at 1556 (arguing that "clarifying existing statutory ambiguities" would help "ethical debt collectors" by allowing them to "profit through compliance and capture greater market share").

224. *See* Griffith, *supra* note 90, at 802.

225. *Id.* at 798 n.237. *See e.g.* Rhoades v. W. Va. Credit Bureau Reporting Servs., Inc., 96 F. Supp. 2d 528, 532 (2000) (finding that statements such as "phone us today" could confuse "even a somewhat sophisticated . . . consumer").

226. Culhane, *supra* note 207.

### *C. The Amendment Gives Weight to Both Sides of the Circuit Split*

Oral disputes allow consumers to "draw the debt collector's attention to" debts[227] and would help consumers "who may have some difficulty with making a timely written challenge."[228] At the same time, a writing would avoid a "source of potential conflicts"[229] and protect consumers from forfeiting their rights.[230] Amending § 1692g(a)(3) to explicitly permit both written and oral disputes while disclaiming the hazards of relying on an oral dispute will incorporate the best ideas of both sides of the circuit split. It will allow consumers greater flexibility in disputing debt and will effectuate the recommendation of the FTC and the apparent intent of Congress in drafting and amending § 1692g while also avoiding unnecessary litigation.[231] Adding a disclaimer will remind consumers of the distinction between oral and written disputes, preventing debt collectors from confusing consumers by reordering the consumers' FDCPA rights in the 1692g notice.[232]

## V. CONCLUSION

An important consumer right under the FDCPA has become mired in a circuit split because of conflicting philosophies of statutory construction. While circuits permitting oral disputes under § 1692g(a)(3) are faithful to the FDCPA's language, history, and purpose, the Third Circuit's cautions in requiring written disputes should not go unheeded. Amending § 1692g(a)(3) to explicitly permit oral *and* written disputes while requiring debt collectors to include a disclaimer in their 1692g notices that an oral dispute does not entitle a consumer to the same rights as a written dispute will do justice to the FDCPA and the conclusions of the Ninth, Second, and Fourth Circuits while incorporating the Third Circuit's salient concerns, and closing the door on a controversy that should be resolved sooner rather than later for the benefit of consumers and debt collectors.

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227. Griffith, *supra* note 90, at 800–01.

228. Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282, 286 (2d Cir. 2013).

229. Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991).

230. *See e.g.* Griffith, *supra* note 90, at 798 n.237 (explaining that consumers could accidentally forfeit their rights by assuming an oral dispute is sufficient to avail themselves of all their § 1692g rights).

231. *See e.g.* U.S. FED. TRADE COMM'N, *supra* note 129 (proposing the amendment of § 1692g to allow oral disputes); 15 U.S.C. § 1692g(b) (2012) (distinguishing rights under written disputes from rights under oral disputes).

232. *See supra* notes 224–25.