THE ROLE OF VALIDATION AND COMMUNICATION IN THE DEBT COLLECTION PROCESS

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I. INTRODUCTION

From time to time debt collectors have been criticized for their aggressive collection tactics. If there was any doubt, congressional hearings showed the lengths to which some collectors went to collect their debts.[1] Debt collectors took advantage of the absence of legislation to pursue debtors without much interference.[2] Some debt collectors were fond of making idle threats and harassing telephone calls to force their victims into compliance.[3] They engaged in this type of con-

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1. One witness gave an example of a collector's strategy:

> A large, interstate debt collection agency operated from across the New York border into Massachusetts. If, in the course of their collection efforts (consisting exclusively of telephone and mail contacts), Massachusetts consumers refused to answer further phone calls or mail, this agency had the practice of reporting to the local police that an emergency existed at the consumer's home and that they should investigate. Of course, police involvement was inappropriate and unwarranted in these purely civil matters. However, given the embarrassment and shame a police visit causes an unsuspecting, law-abiding citizen, many consumers paid their bills despite legitimate concerns about the amount and nature of the debt.

Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong. 605-06 (1977) [hereinafter *Hearings*] (statement of Richard A. Gross, Assistant Attorney General and Deputy Chief, Consumer Protection Division, Department of the Attorney General, Commonwealth of Massachusetts).

2. The Senate Report on the FDCPA gave some idea of the problem by making the following observation:

> The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level. While debt collection agencies have existed for decades, there are 13 states, with 40 million citizens, that have no debt collection laws . . . . Another 11 states . . . with another 40 million citizens, have laws which in the committee's opinion provide little or no effective protection. Thus, 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse.

S. REP. No. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696-97.

3. Senator Riegle set the stage for the congressional hearings with the following statement:

> I want to make emphatically clear at the outset of these hearings that I consider the overwhelming majority of debt collectors to be honest and ethical businessmen and women. All of my recent contacts with collectors have borne this out. But there is a segment of this trade – albeit a small segment – that engages in deceit, harassment, threats and misrepresentations on a regular basis. Those individuals will stop at nothing to collect money – even if it includes

duct because their success in the field depended in large measure on the amount of money they could recover for their clients.[4] The abuses became so widespread that Congress eventually intervened by passing the Fair Debt Collection Practices Act[5] ("FDCPA") in 1977.

The FDCPA has several fascinating provisions. This Article will deal first with the validation section,[6] a provision that is calculated to make consumers aware of their right to dispute their debt within thirty days after they receive a debt collector's notice. The dispute mechanism is particularly helpful to the consumer because it requires a debt collector to seek verification of the debt for the consumer's benefit once the consumer disputes the debt in writing.[7] When that happens, the collector must suspend its collection activities.[8] In the absence of the consumer's written query, the debt collector may con-

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calling a debtor's friends and neighbors to humiliate him, sending out phony legal documents, impersonating public officials and attorneys, and calling a debtor as many as 20 times in a single day.

Hearings, supra note 1, at 1 (opening statement of Sen. Riegle). One witness at the hearings reported that consumers frequently complained about debt collectors' conduct, ranging from "profanity and obscenity in phone calls to efforts to shame a consumer by contacting relatives, employers, neighbors to falsely threatening to seek harsh legal sanctions." *Id.* at 85 (statement of Robert J. Hobbs, Staff Attorney, National Consumer Law Center).

4. One authority indicates that "[t]he most common type of collection agencies engage in the full range of collection activities permitted by law and charge a contingent fee, i.e., retaining a portion of money collected, say 25 to 50%, most varying by the amount to be collected and the age of the delinquency." NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 1.5.2 (6th ed. 2008).

5. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2006)).

6. Section 1692g(a) provides as follows:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
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> 1. the amount of 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.

15 U.S.C. § 1692g(a) (2006).

7. *Id.* §1692g(a)(4).

8. *Id.* § 1692g(b). It is significant that the debt collector does not have to tell the consumer that disputing the debt will have this effect.

tinue its collection activities during the thirty-day dispute period.[9] The result is a persistent tension between the collector's demand for payment and the consumer's claim of a thirty-day respite. It is not surprising, therefore, that a debt collector must frequently confront claims that its collection language contradicts or overshadows the validation language, resulting in a dilution of the consumer's rights under § 1692g.[10] There is even more confusion when the debt collector demands payment in less than thirty days.[11] This Article will discuss the various ways in which the courts have dealt with this recurring theme of conflict between the consumer's right to dispute the debt and the debt collector's right to demand payment within the thirty-day period. Some courts look for transitional language in the collection letter that explains the relationship between the collector's demands and the consumer's right to dispute the debt.[12]

Another part of the FDCPA that has attracted judicial attention is the provision covering a debt collector's communication in connection with collection activities. The drafters tried their best to protect consumers from a debt collector's contacts at "any unusual time or place or a time known or which should be known to be inconvenient to the consumer."[13] This language does not require actual knowledge of the inconvenience, and so consumers have greater flexibility in making their case against debt collectors that continue to badger them.[14]

The statute places similar restrictions on a debt collector if the collector knows that the consumer is represented by an attorney and "has knowledge of or can readily ascertain such attorney's name and address."[15] Unlike § 1692c(a)(1), this provision requires the debt collector's actual knowledge that an attorney is representing the consumer and this Article will explore whether this difference between subsections (a)(1) and (a)(2) can be justified.

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9. *See* Jacobson v. Healthcare Fin. Servs., 516 F. 3d 85, 89 (2d Cir. 2008); Durkin v. Equifax Check Servs., Inc., 406 F. 3d 410, 416 (7th Cir. 2005); 15 U.S.C. § 1692g(b).

10. *Jacobson*, 516 F.3d at 85; Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131 (4th Cir. 1996).

11. *See generally* Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997) (indicating that demand for payment within thirty days of date of letter contradicted validation notice); Russell v. Equifax A.R.S., 74 F.3d 30, 35-36 (2d Cir. 1996) (identifying that demanding payment within ten days contradicted validation notice); Gervais v. Riddle & Assocs., P.C. 363 F. Supp. 2d 345, 351 (D. Conn. 2005) (holding that discount if consumer paid within thirty days of letter overshadowed and contradicted validation notice which gave longer period for disputing debt).

12. *Bartlett*, 128 F.3d at 501-02; Savino v. Computer Credit Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998); Meselsohn v. Lerman; 485 F. Supp. 2d 215, 220 (E.D.N.Y. 2007). *But see* McCormick v. Wells Fargo Bank, 640 F. Supp. 2d 795, 800 (S.D.W.Va. 2009).

13. 15 U.S.C. § 1692c(a)(1) (2006).

14. The relevant phrase in § 1692c(a)(1) is "known or which should be known." *Id.*

15. *Id.* § 1692c(a)(2).

With certain limited exceptions, a debt collector may not communicate with a third party in connection with the collection of any debt.[16] This restriction has caused problems for debt collectors that leave messages for consumers on recording machines.[17] Although debt collectors frequently use this device in a last ditch effort to contact a consumer, it is always a risky venture because the collector may not know who has access to the machine that bears the collection message.[18] Even if the debt collector wants to be so discreet in its communication that a third-party listener may not be aware that the recorded call is from a debt collector, there is a problem of not complying with the statutory requirement of disclosing that the communication is from a debt collector.[19] A review of the cases will show that a debt collector will invariably have difficulty justifying the use of voicemail to accomplish its mission. It runs the risk that someone other than the debtor will hear the collection message, thus resulting in the collector's violation of the provision against third-party contacts.[20]

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16. *Id.* § 1692c(b).

17. *See* Masciarelli v. Richard J. Boudreau & Assocs., 529 F. Supp. 2d 183, 185 (D. Mass. 2007) (stating that collector violated statute by leaving message on consumer's voicemail without disclosing identity); Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 669 (S.D.N.Y. 2006) (concluding that message left on consumer's recorder was a communication, even though collector did not mention anything about the debt); Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp. 2d 1104, 1112 (C.D. Cal. 2005) (stating that message left on consumer's answering machine was a communication and thus violated the statute because it did not mention that it was from debt collector).

18. It has been suggested that "[a] debt collector who leaves a message on a consumers' [sic] telephone answering device runs the risk of violating the FDCPA unless the answering device is used exclusively by the debtor or the consumer has consented directly to the debt collector to leaving messages on that answering machine." NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.5.6 (6th ed. 2008); *see also* Federal Trade Comm'n v. Check Enforcement, No. 03-2115 (JWB), 2005 WL 1677480, at *8 (D.N.J. July 18, 2005) (stating that debt collector violated statute by leaving messages on answering machines that were overheard by family members and other third parties).

19. Section 1692e(11) requires a debt collector to disclose in its initial communication that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," and in subsequent communications that "the communication is from a debt collector." 15 U.S.C. § 1692e(11) (2006). Some debt collectors try to avoid that obligation by failing to mention the debt. *See Foti,* 424 F. Supp. 2d at 643; *Hosseinzadeh,* 387 F. Supp. 2d at 1104.

20. ACA International, an association of debt collectors, tried to get the Federal Trade Commission to issue an advisory opinion relieving debt collectors from the obligation to include in any message left with a third party or an answering machine that the message is from a debt collector, as required by section 1692e(11). This would have reduced the pressure on debt collectors. Nevertheless, the Commission refused to issue an advisory opinion because the courts had already ruled that a debt collector must give the mandated section 1692e(11) warning. *See* Letter from Donald S. Clark, Secretary to the Federal Trade Commission, to Rozanne M. Andersen (July 28, 2006), *available at* http://www.ftc.gov/os/statutes/fdcpa/letters/060728staffresponsesofadvisopinion_public; *see also* FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES

Finally, this Article will discuss § 1692c(c) that allows a consumer to notify the debt collector in writing that the consumer wants the collector to stop communicating with him.[21] This is certainly a useful weapon in the consumer's arsenal, but there is room for improvement in the subsection's language. The Article will therefore conclude with some recommendations in this area that make a consumer's directive more meaningful in light of the statutory objective.[22]

II. THE CHALLENGES OF VALIDATION

A. THE TENSION BETWEEN DEMAND FOR PAYMENT AND DISPUTING THE DEBT

The FDCPA includes a provision that requires a debt collector not only to give a consumer the basic details of the debt that the collector is trying to recover, but also to advise the consumer about the consumer's rights to dispute the debt.[23] This significant feature of the legislation 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.[24] Congress therefore gave a consumer the right to dispute the debt within thirty days after the consumer receives a communication from the collector.[25] If the consumer disputes the debt in

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OF CHANGE – A WORKSHOP REPORT 47-48 (2009) *available* at http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

21. Section 1692c(c) provides as follows:

> If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except –
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> 1. to advise the consumer that the debt collector's further efforts are being terminated;
> 2. to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
> 3. where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

15 U.S.C. §1692c(c).

22. As one authority put it, "[t]his section of the Act gives the consumer the important power to decide whether to continue or to stop communicating with a collector." NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.8.2 (6th ed. 2008).

23. *See* 15 U.S.C. § 1692g(a) (2006). *See generally* Elizabeth Lea Black, Annotation, *Construction and Application of Provision of Fair Debt Collection Practices Act Relating to Validation of Debts*, 150 A.L.R. FED. 101 (2009).

24. The Senate Report on the FDCPA underscored the importance of the validation provision in this way: "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." S. REP. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

25. 15 U.S.C. § 1692g(a)(4)(2006).

writing, the debt collector must suspend its collection activities until it gives the consumer written verification of the debt.[26] If the consumer disputes the debt orally, the collector does not have any obligation to verify the debt, but the collector cannot thereafter assume that the debt is valid.[27] Although a consumer's oral dispute of the debt does not impose any obligation on the debt collector to respond to the consumer, at least it signals to the collector that there may be something wrong with its claim and that it may want to investigate the matter further.[28]

This right to dispute the debt seems straightforward enough. It may seem surprising, therefore, that it has led to so many disagreements. By itself, it allows a consumer to assert a defense against a collector's pursuit, and a consumer normally welcomes news about the right to question the validity of the debt. One must remember, however, that the purpose of a collection letter is to convince the consumer to pay the debt, and a debt collector will use all kinds of language to accomplish its objective. The result is that a debt collector will sometimes demand payment within a certain time, while simultaneously giving the consumer notice of the right to dispute the debt.[29] In some cases, the demand for payment is more pronounced and conspicuous than the validation notice, thus leading to claims that the former overshadows the latter.[30] In others, the debt collector's messages are sim-

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26. *Id.* § 1692g(b).

27. *Id.* § 1692g(a)(3).

28. Despite the omission of a writing requirement in section 1692g(a)(3), some courts have held that the section does require a consumer to dispute the debt in writing. *See* Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991); Wallace v. Capital One Bank, 168 F. Supp. 2d 888, 894-95 (D. Md. 2001); Sturdevant v. Jolas, 942 F. Supp. 426, 429 (W.D. Wis. 1996). However, the Ninth Circuit and the majority of district courts have found that section 1692g(a)(3) does not require a writing. *See* Camacho v. Bridgeport Financial, Inc., 430 F.3d 1078, 1081-82 (9th Cir. 2005); Register v. Reiner, Reiner & Bendett, PC, 488 F. Supp. 2d 143, 147 (D. Conn. 2007); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, 464 F. Supp. 2d 720 (N.D. Ohio 2006); Rosado v. Taylor, 324 F. Supp. 2d 917 (N.D. Ind. 2004); Sambor v. Omnia Credit Servs., Inc. 183 F. Supp. 2d 1234, 1240 n. 4 (D. Haw. 2002); Sanchez v. Robert E. Weiss, Inc., 173 F. Supp. 2d 1029 (N.D. Cal. 2001); Ong v. Am. Collections Enter., Inc., No. 98-CV-5117 (JG), 1999 WL 51816 (E.D.N.Y. Jan. 15 1999).

29. *See Bartlett*, 128 F.3d at 501 (7th Cir. 1997) (indicating that demand for payment in ten days despite thirty-day validation notice was confusing to unsophisticated consumer); Russell v. Equifax A.R.S., 74 F.3d 30, 34-35 (2d Cir. 1996) (stating that warning that collection would be posted on consumer's files unless debt was paid within ten days contradicted and overshadowed validation notice); *Graziano*, 950 F.2d at 111 (holding that threat to sue if consumer did not pay within ten days made validation notice ineffective and confusing); Talbott v. G.C. Servs. Ltd. P'ship, 53 F. Supp. 2d 846, 854 (W.D. Va. 1999) (holding that demand for payment in ten days overshadowed validation notice).

30. *See* Swanson v. S. Oregon Credit Serv., 869 F.2d 1222, 1226 (9th Cir. 1988) (holding that collection message overshadowed validation notice); Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991) (stating that "screaming head-

ply contradictory.[31] Sometimes the debt collector's strategy is to divert the consumer's attention from the dispute mechanism by emphasizing the demand for payment. That demand becomes even more significant when the debt collector insists on payment immediately, or at least within a period that seems to nullify the thirty days granted for disputing the debt. This collision between the debt collector's overtures demanding payment and the debt collector's statement of the consumer's right to seek verification of the debt frequently results in an ineffective message about the consumer's statutory rights.[32]

In *Miller v. Payco-General American Credits, Inc.*,[33] the debt collector demanded "immediate full payment," reminding the consumer it had his account on hand for "immediate action."[34] Lest there be any doubt about the time for payment, the debt collector emphasized in capitals across the bottom of the collection letter that it expected payment "now."[35] The debt collector drew the consumer's attention at the bottom of the first page to the validation notice on the reverse side.[36] However, the United States Court of Appeals for the Fourth Circuit

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lines, bright colors and huge lettering" in collection letter contradicted and overshadowed validation notice); Rabideau v. Management Adjustment Bureau, 805 F. Supp. 1086, 1095 (E.D.N.Y. 1992) (finding that layout of collection letter was intended to draw consumer's attention from validation notice).

31. *See* DeSantis v. Computer Credit, Inc., 269 F.3d 159, 162 (2d Cir. 2001) (stating that consumer stated an actionable claim because "[a] recipient, especially if unsophisticated, might well have understood that the collector's obligation to obtain verification would arise only if the consumer presented a valid reason for nonpayment."); *Graziano*, 950 F.2d at 111 (3d Cir. 1991) (stating that contradictory demand for payment within ten days would induce consumer to overlook his right to dispute debt within thirty days); Owens v. Hellmuth & Johnson, PLLC, 550 F. Supp. 2d 1060, 1068 (D. Minn. 2008) (holding that "demand for payment (under the threat of added penalties) within 30 days from the *date* of the letter on one hand, and the validation notice informing Plaintiffs of the right to dispute the debt within 30 days of *receipt* of the letter on the other hand – runs afoul of 15 U.S.C. § 1692g."); Russell v. Hartweg, 07-CV-311C, 2008 U.S. Dist. LEXIS 41292, at *6 (May 20, 2008 W.D.N.Y.) (finding that statute may be violated if information is conveyed in a "confusing or contradictory manner"); Francis v. Snyder, 389 F. Supp. 2d 1034, 1039 (W.D. Ill. 2005) (finding that letter warning that balance would be pursued in full if consumer did not call on receipt of letter while granting consumer thirty days to dispute the debt presented two statements that consumer could find contradictory).

32. United States v. Nat'l Fin. Servs., 98 F.3d 131, 139 (4th Cir. 1996); *Russell*, 74 F.3d at 35; *Swanson*, 869 F.2d at 1225; Morgan v. Credit Adjustment Board, 999 F. Supp. 803, 807 (E.D. Va. 1998); Riveria v. MAB Collections, Inc., 682 F. Supp. 174, 177 (W.D.N.Y. 1988).

33. 943 F.2d 482 (4th Cir. 1991).

34. Miller v. Payco-Gen. Am. Credits Inc., 943 F.2d 482, 483 (4th Cir. 1991).

35. *Miller*, 943 F.2d at 483. The debt collector conveyed the message conspicuously as follows: "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." *Id.*

36. *Id.* The notice drawing the consumer's attention to the validation notice on the reverse side of the collection letter was in the smallest type that appeared in the letter. *See id.*

questioned whether the consumer would ever venture beyond the information on the first page, which not only heralded the call for immediate payment, but also encouraged the consumer to telephone the collector with his reason for not paying.[37] The Fourth Circuit indicated its concern, therefore, not only about contradiction and overshadowing of the validation notice, but also about the possibility that the consumer's telephone response would induce the consumer to forego his statutory rights to have the debt validated.[38] An oral communication from the consumer may have given the debt collector some satisfaction, but in the final analysis its only effect would have been to destroy the debt collector's assumption about the validity of the debt, without requiring the debt collector to obtain any written verification for the consumer.[39]

The *Miller* court found that the collection letter both overshadowed and contradicted the validation notice.[40] The combination of requiring payment "immediately," "today," and "now" contrasted sharply with the thirty-day dispute period and thereby confused the consumer.[41] As the United States Court of Appeals for the Seventh

37. *Id.* at 484.

38. *Id.* The collector's obligation to seek verification of the debt arises only if the consumer disputes the debt in writing. *See* 15 U.S.C. § 1692g(a)(4). Likewise, the collector must interrupt its collection activities only if the consumer disputes the debt in writing. *Id.* at § 1692g(b). The collector's invitation to the consumer to telephone if the consumer had a valid reason for not paying only diverted the consumer's attention from the required statutory procedure for questioning the debt and seeking the needed verification.

39. *Compare* 15 U.S.C. § 1692g(a)(3) (consumer's oral dispute of the debt will remove the collector's assumption that the debt is valid), *with id.* at § 1692g(a)(4) (requiring consumer to dispute debt in writing if he wants collector to obtain verification).

40. *Miller*, 943 F.2d at 484.

41. *Id.* Most courts employ the "least sophisticated consumer" test in determining whether there has been a violation of the statute. The purpose of the test is to protect "the gullible as well as the shrewd." Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993). The standard "ensures the protection of all consumers, even the naïve, and the trusting, against deceptive collection practices, and . . . protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Clomon*, 988 F.2d at 1320; *see also* Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 592 (6th Cir. 2009); Campuzano - Burgos v. Midland Credit Management, Inc., 550 F.3d 294, 298-99 (3d Cir. 2008); Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1171 (9th Cir. 2006); Goswami v. American Collections Enterprise, Inc., 377 F.3d 488, 495 (5th Cir. 2004); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 136 (4th Cir. 1996). The Seventh Circuit adopted the "unsophisticated consumer" test in *Gammon v. GC Servs. Ltd. Partnership.* because it "protects the consumer who is uninformed, naïve, or trusting, yet it admits an objective element of reasonableness." 27 F.3d 1254, 1257 (7th Cir. 1994). The reasonableness feature protects collectors from liability for bizarre interpretations of collection letters. *Gammon,* 27 F.3d at 1257. In *Avila v. Rubin*, the same Seventh Circuit observed that there is not much "practical difference in application." Avila v. Rubin, 84 F.3d 222, 227 (7th Cir. 1996); *see also* JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 654-55 (3d ed. 2007).

Circuit pointed out in *Bartlett v. Heibl*,[42] no inconsistency exists between the debt collector's right to demand payment and the consumer's right to dispute the debt within thirty days. However, confusion ensues when a debt collector fails to explain how those rights fit together.[43] Although the FDCPA explicitly sanctions the debt collector's right to continue pursuing the consumer during the thirty-day dispute period,[44] the debt collector must still be concerned about explaining the apparent contradiction between the debt collector's and the consumer's rights.

A debt collector must always be keenly aware of the need for this explanation. It is not the mere demand for payment immediately or within the dispute period that gets a debt collector into trouble. The collector's failure to use transitional language between the demand for payment and the validation notice likely causes confusion.[45] Some courts seem more impressed with the possibility of confusion when the debt collector demands payment within a certain time period that is at odds with the thirty days that the FDCPA gives the consumer for seeking verification of the debt.[46] When the debt collector states no specific period for payment, it is likely to find the courts more sympathetic, looking for a way to avoid the strictures of cases like *Savino v. Computer Credit, Inc.*[47] and *Bartlett.*

The debt collector in *Peter v. GC Services L.P.*[48] had the good sense to omit any reference to a period for payment, but it neverthe-

42. 128 F.3d 497 (7th Cir. 1997).

43. *Id.* at 501; *see also Avila*, 84 F.3d at 226 ("A debt validation notice, to be valid, must be effective, and it cannot be cleverly couched in such a way as to eviscerate its message."); Russell v. Equifax A.R.S., 74 F. 3d 30, 35 (2d Cir. 1996) ("It is not enough for a debt collection agency simply to include the proper debt validation notice in a mailing to a consumer – Congress intended that such notice be clearly conveyed.").

44. 15 U.S.C. § 1692g(b).

45. The Seventh Circuit produced its own version of a safe-harbor letter that would protect collectors, at least in that circuit. *See Bartlett*, 128 F.3d at 501-02; *see also* Savino v. Computer Credit, Inc., 164 F. 3d 81, 86 (2d Cir. 1998) (observing that "[the debt collector] could have sought immediate payment and complied with the Act simply by inserting into the text of its letter transitional language that referred the addressee to the validation notice.") *But see* McCormick v. Wells Fargo Bank, 640 F. Supp. 2d 795, 800 (S.D.W.Va. 2009) (stating that the court did not have authority to require transitional language notifying the consumer that a collector must cease collection activities if the consumer disputes the debt).

46. *See Savino*, 164 F.3d at 86. (emphasizing that debt collector violated statute by demanding immediate payment without explaining that its demand did not override consumer's right to seek validation of the debt); *Bartlett*, 128 F.3d at 501 (deciding that collection letter that informed consumer that he would be sued if he did not pay within one week but also informed him of the thirty-day dispute period was confusing and violated FDCPA); *Swanson*, 869 F.2d at 1226 (finding that the demand for payment within ten days contradicted the consumer's right to dispute the debt within thirty days).

47. 164 F. 3d 81 (2d Cir. 1998).

48. 310 F.3d 344 (5th Cir. 2002).

less warned the consumer that it would continue its collection activity until the consumer paid his account in full.[49] The collector's language found favor with the United States Court of Appeals for the Fifth Circuit because there was nothing in the collection language that contradicted the validation notice. The collection notice did not demand payment within a concrete time period.[50] One wonders whether this was another way of demanding immediate payment if the consumer wanted the debt collector to cease its activities.[51] When a debt collector gives a specific period for payment, it is arguable that the consumer may feel less discomfort than when the collector issues a firm demand for payment that promises no letup until the consumer makes full payment. When the collector sets a period for payment, the consumer may enjoy some temporary relief knowing that there is still time to devise a strategy for dealing with the collector's demands. Under both scenarios, however, the consumer is still likely to wonder about how the debt collector's demands fit in with the validation notice. On one hand, the consumer may feel that there is a window of opportunity for a decision on the next step; on the other, the consumer may feel a need to act more urgently in order to avoid the debt collector's pursuit.

In *Wilson v. Quadramed Corp.*,[52] the debt collector was certainly more polite, because it did not really make any demands. It gave the consumer the opportunity to pay his bill immediately and avoid any further action.[53] The United States Court of Appeals for the Third Circuit viewed the collector's language as merely a general threat of some future action, as distinguished from a threat of some immediate

49. Peter v. GC Servs. L.P., 310 F.3d 344, 347 (5th Cir. 2002).

50. *Peter*, 310 F.3d at 349 ("Courts have generally found contradiction or apparent contradiction of the printed § 1692g notice where payment is demanded in a concrete period shorter than the 30-day statutory contest period").

51. The debt collector made the point as follows: "'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.'" *Id.* This sort of language gave the consumer the option of paying immediately or suffering the consequences of his delay, that is, exposing himself to further encounters with the pursuing collector. Nevertheless, language similar to that found in *Peter* has survived a challenge that it was contradictory in nature. *See* Terran v. Kaplan, 109 F. 3d 1428, 1434 (9th Cir. 1997) (deciding that request for immediate telephone call did not contradict validation notice); Vasquez v. Gertler & Gertler, Ltd., 987 F. Supp. 652, 657 (N.D. Ill. 1997) (stating that requesting payment without further delay did not demand payment within a period of less than thirty days).

52. 225 F.3d 350 (3d Cir. 2000).

53. Wilson v. Quadramed Corp., 225 F.3d 350, 352 (3d Cir. 2000). The collection letter conveyed the message: "Our client has placed your account with us for immediate collection. We shall afford you the opportunity to pay this bill immediately and avoid further action against you." *Wilson*, 225 F.3d at 352.

action for nonpayment.[54] The debt collector's failure to set a timetable for compliance detracted from the urgency of the matter, and so the Third Circuit felt comfortable in refusing to recognize any overshadowing or contradiction problem.[55] The courts are more easily persuaded that there is a violation when a debt collector employs different periods in a collection letter than when a debt collector simply promises to continue its activities until the consumer makes payment. It is easier, for example, to sow the seeds of confusion by matching a ten-day period for payment against a thirty-day period for disputing the debt, for the consumer will be wondering which time period takes priority. However, when a debt collector encourages the consumer to "[a]ct now to satisfy this debt," there should be no surprise if a court finds it to be "in the nature of puffing."[56] There is no contradiction or overshadowing here, for it is expected that the debt collector will want the consumer to satisfy the debt, the sooner the better for both parties.[57]

B. The Variations in Language

Some courts find a violation even when a debt collector has not demanded immediate payment, but has otherwise demanded the consumer's immediate attention. In *Desantis v. Roz-Ber, Inc.*[58] it was the overall tenor of the collection letter that convinced the United States District Court for the Eastern District of New York of the debt collec-

54. *Id.* at 360 n. 6. The court observed that "[w]here specific action is threatened for nonpayment, the least sophisticated debtor might feel that he has no other option but to pay, in which case such threats have been found to overshadow the validation notice and cause the debtor to overlook his statutory right to dispute the debt." *Id.*

55. *Id.* at 356. The court viewed the collection letter as giving the consumer the option of either paying the debt immediately to avoid further action or disputing the debt within thirty days, but without emphasizing one option over the other. *See id; see also Terran*, 109 F.3d at 1434 (finding that request for immediate phone call from consumer did not contradict validation notice); *McCormick*, 640 F. Supp. 2d at 800 (finding that language indicating that debt collector would not delay collection during the thirty-day dispute period did not contradict or overshadow validation notice); Vasquez, 987 F. Supp. at 657 (finding that collector's request for payment without further delay did not contradict validation notice).

56. Taylor v. Cavalry Investment, L.L.C., 365 F.3d 572, 575-76 (7th Cir. 2004). The court interpreted the collector's language as follows:

> "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.

Taylor, 365 F.3d at 575-76.

57. *Id.*; *see also* Sims. v. GC Servs. L.P., 445 F.3d 959, 965 (7th Cir. 2006) (stating that the collection agency's statement that collection activities would continue until the consumer paid the debt did not obscure the validation notice).

58. 51 F. Supp. 2d 244 (E.D.N.Y. 1999).

tor's violation. The court observed that although the existence of a threat was not necessary to find contradiction or overshadowing,[59] the debt collector in *Desantis* reached the limits by using implied threats to goad the consumer into action.[60] The collector promised that the consumer would not get the collector's cooperation if he did not pay the debt or telephone to arrange settlement.[61] The court saw in the language the possibility that a least sophisticated consumer would be pressured to respond to the debt collector if he wanted to avoid the collector's wrath.[62] The lack of the debt collector's cooperation could have caused some discomfort for the consumer, since he would hardly have known what to expect next. Furthermore, the bold greeting, "IMMEDIATE ATTENTION," moved the court to find that a consumer would be so disarmed by such a salutation and the accompanying demands, that he might never get to reading the validation notice.[63] Therefore, the sense of urgency in the message made the collection letter troubling, since the consumer might have gained the impression that he was not entitled to a thirty-day validation period.[64]

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59. Desantis v. Roz-Ber, Inc, 51 F. Supp. 2d 244, 249 (E.D.N.Y. 1999).

60. The collection letter stated in pertinent part:

> Your account has been placed in our hands by the above named client with full authority to demand payment. You may not have intentionally neglected this obligation, but it is seriously past due and demands your IMMEDIATE ATTENTION. If you would like our cooperation then:
>
> 1. Remit payment in full to this office or,
> 2. Contact the undersigned in person or by telephone and arrange settlement.

Id. at 246.

61. *Id.* at 250.

62. *Id.* at 251. It was the threatening aspect of the collection language that bothered the court even though the court acknowledged that the Second Circuit in *Russell v. Equifax*, did not require a threat to find that certain language overshadowed or contradicted the validation notice. *Id.* at 250. One wonders, though, about the importance that the *Desantis* court seemed to place on the collector's promise of cooperation if the consumer either paid in full or called the collector to arrange settlement. If the consumer paid his debt immediately, the debt collector's so-called cooperation would not be worth that much in the scheme of things since the debt collector would have received what he wanted. See *supra* note 41 for an explanation of the "least sophisticated consumer" standard.

63. *Desantis*, 51 F. Supp. 2d at 251. The court was alarmed by the phrase "IMMEDIATE ATTENTION," which highlighted the options that were available to the consumer, either of which would attract the debt collector's cooperation. The court did not explain why the collector's cooperation was a vital part of the equation.

64. It is clear that the *Desantis* court put a premium on the debt collector's cooperation. *Desantis*, 51 F. Supp. 2d at 250. This might have been important if the consumer sought favorable settlement terms from the collector. If the consumer was taken in by that prospect, one could see how he would pay little attention to the validation language that followed the collection language. This scenario was a little different from that in *Terran* where the debt collector asked the debtor to telephone a collection assistant immediately, failing which the collector would recommend that the creditor take legal action. *Terran*, 109 F.3d at 1430.

This sense of urgency also permeated the collection letter in *McNab v. Statewide Recovery Service, Inc.*,[65] where the debt collector not only demanded the consumer's immediate attention, but also "prompt remittance" to settle the outstanding account.[66] The debt collector reminded the consumer that it had the account for "immediate collection," and that the consumer's failure to respond to the collector's overtures would leave the collector no alternative but to proceed with its recovery efforts.[67] In the view of the United States District Court for the Eastern District of Louisiana, the words "immediate collection" might have persuaded the least sophisticated consumer to pay immediately rather than contest the validity of the collector's claim.[68] No explicit demand existed in *Desantis* or *McNab* for immediate payment, but in both cases the court nevertheless read the collection letter as suggesting an urgency that could not be ignored.

Not every call for the consumer's immediate attention will lead to a finding of overshadowing or contradiction. In *Foti v. NCO Financial Systems, Inc.*,[69] the debt collector left a pre-recorded message on the consumer's telephone about a personal matter that required the consumer's immediate attention.[70] The pre-recorded message came some days after the collector mailed its initial communication containing the customary validation notice, and the consumer claimed that the message overshadowed the initial validation notice.[71] In *Foti,* no implicit or explicit threat existed that approximated the urgency inherent in *Desantis.* After the debt collector invited the consumer's immediate attention, it simply urged the consumer to call back.[72] The debt collector's language did not threaten the consumer's right to dispute the debt within thirty days by demanding payment within a specific period of time.[73]

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65. No. Civ. A. 99-1571R, 2000 WL 135839 (E.D. La. Feb. 4, 2000).

66. McNab v. Statewise Recovery Serv. Inc., No. Civ. A. 99-1571R, 2000 WL 135839, at *3 (E.D. La. Feb. 4, 2000).

67. *McNab,* 2000 WL 135839 at *3.

68. *Id.* at *4. It was the combination of the assignment of the debt for "immediate collection" and the collector's call for "immediate attention" that convinced the court that the consumer could be persuaded to forego her statutory rights in favor of immediate payment. *Id.* This is why the court denied the parties' motions for summary judgment. *See also* 7 KENNETH M. LAPINE, BANKING LAW § 155.03[1] (2009).

69. 424 F. Supp. 2d 643 (S.D.N.Y. 2006).

70. Foti v. NCO Fin. Sys. Inc., 424 F. Supp. 643, 662 (S.D.N.Y. 2006).

71. *Foti,* 424 F. Supp. at 662.

72. *Id.*

73. The court emphasized the lack of urgency in the debt collector's message with the following language:

> There is no suggestion that the thirty-day validation period should be disregarded, or that immediate payment is required. Nor is there an implicit suggestion that failure to cooperate immediately could jeopardize resolution of the debt. On the contrary, the message merely asks the consumer for a return call ("please call back").

The *Foti* approach reminds us that there is nothing in the FDCPA that prevents a debt collector from pursing a consumer even after it makes its initial demand for payment, as long as it does nothing to undermine the consumer's thirty-day period for disputing the debt.[74] Therefore, the mere call for the consumer's immediate attention does no harm.[75]

If a debt collector wants to avoid problems but still send an urgent message to the consumer about the debt, it may want to ask the consumer to either pay or dispute the debt within thirty days. That language allows a debt collector to avoid a potential clash between the thirty-day period covering the validation notice and some shorter period for payment. This strategy saved the debt collector in *Jacobson v. Healthcare Financial Services*, Inc.,[76] because the collection letter gave the consumer a clear alternative of either paying or disputing the debt within thirty days to avoid further action.[77] The debt collector made its point by explaining the consumer's right to seek verification of the debt, on the same page right below the collector's statement about the debt,[78] a slightly different scenario from that in *Savino v. Computer Credit, Inc.*,[79] where the validation notice appeared on the back of the collection letter after the debt collector had already demanded immediate payment.[80] No doubt the separation of the validation notice from the collector's claim influenced the *Savino* court, because that court emphasized that the violation resulted from the collector's asserting a claim for immediate payment without explaining that such a demand did not override the consumer's right to challenge the debt.[81]

Id. at 664.

74. Congress made this clear by amending the FDCPA in 2006 to provide that a debt collector may continue its collection activities during the thirty-day dispute period as long as it does not overshadow or contradict the consumer's right to dispute the debt. *See* Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(c), 120 Stat. 1966, 2006 (codified at 15 U.S.C. § 1692g(b)).

75. *See* Peter v. GC Servs. L.P., 310 F. 3d 344, 349-50 (5th Cir. 2002) (stating that collection language requesting full payment did not violate § 1692g because it did not demand payment in a specific time that was shorter than thirty days); Spira v. Ashwood Fin., Inc., 358 F. Supp. 2d 150, 159-60 (E.D.N.Y. 2005) (staing that collection letter inviting consumer to pay in full or call at once did not violate section 1692g); Vasquez v. Gertler & Gertler Ltd., 987 F. Supp. 652, 657 (N.D. Ill. 1997) (stating that collection letter asking for the consumer's immediate attention and cooperation; and for the consumer to send payment or contact the collector without delay did not violate the statute).

76. 516 F.3d 85 (2d Cir. 2008).

77. Jacobson v. Healthcare Fin. Servs., 516 F.3d 85 (2d Cir. 2008).

78. *Jacobson*, 516 F.3d at 92.

79. 164 F.3d 81 (2d Cir. 1998).

80. Savino v. Computer Credit, Inc., 164 F.3d 81, 84 (2d Cir. 1998).

81. *Id.* at 85. The *Savino* Court was looking for some transitional language of the type first suggested by the Seventh Circuit in *Bartlett*, that would make the connection

One scenario that requires an explanation is where the debt collector sends a collection letter to a consumer with the usual validation notice and then follows up with a lawsuit before the expiration of the thirty-day validation period. While the FDCPA does not prevent a debt collector from continuing its collection activities during the validation period, those activities cannot overshadow or contradict the consumer's validation rights. Therefore, when the consumer in *Ellis v. Solomon & Solomon, P.C.*[82] complained that the debt collector had served him with a summons and complaint just fifteen days after sending him a collection letter, he was on solid ground because the collector offered no explanation about how the lawsuit affected the consumer's validation rights.[83] A least sophisticated consumer might well have thought that it was too late for him to exercise his statutory rights once he had received the summons and complaint.[84] Therefore, the collector had a duty to explain that service of the legal documents did not affect the consumer's validation rights.[85] It was only by doing so that the debt collector could avoid the overshadowing label. A debt

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between a collector's demand for payment and the consumer's right to dispute the debt. The *Savino* court gave an example of the language that the debt collector could have used in its letter to the consumer:

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

Savino, 164 F.3d at 86. The court in *McCormick v. Wells Fargo Bank*, did not see the need for any transitional language when the debt collector did not make any demand that contradicted the consumer's validation rights. After stating details about the debt, the debt collector merely advised the consumer that it would not cease its collection activities during the thirty-day dispute period. The court saw no contradiction in the collector's failure to inform the consumer that the consumer's disputing the debt would have the effect of halting the collector's activities. McCormick v. Wells Fargo Bank, 640 F. Supp. 2d 795, 801 (S.D.W.Va. 2009).

82. 599 F. Supp. 2d 298 (D. Conn. 2009), *aff'd*, 591 F.3d 130 (2d Cir. 2010).

83. Ellis v. Solomon & Solomon, P.C., 599 F. Supp. 2d 298, 304 (D. Conn. 2009), *aff'd*, 591 F.3d 130 (2d Cir. 2010). The court was concerned that there was no accompanying communication assuring the consumer she could still exercise her validation rights.

84. *Ellis*, 599 F. Supp. 2d, 304, *aff'd*, 591 F.3d 130.

85. *See* Goldman v. Cohen, 445 F.3d 152, 157 (2d Cir. 2006) (stating that a debt collector can avoid confusing a consumer by emphasizing that the advice contained in a validation notice does not affect the consumer's rights or obligations under the lawsuit); Thomas v. Law Firm of Simpson & Cybak 392 F.3d 914, 919 (7th Cir. 2004) (stating that debt collector should emphasize that there are different deadlines relating to lawsuits and those applicable under the FDCPA, and that advice contained in a validation notice does not alter the consumer's rights or obligations under the lawsuit). In *Federal Home Loan Mortgage Corp. v. Lamar*, the debt collector included the validation notice as the first item in a complaint, which explained that the consumer had twenty days to answer. The court did not see any need for reconciling language about the difference between the twenty-day period for answering the complaint and the consumer's thirty-day period for disputing the debt. The complaint said it all with clarity and precision. Federal Home Loan Mortgage Corp. v. Lamar, 503 F.3d 504, 511 (6th Cir. 2007).

collector can avoid the dilemma in an *Ellis*-type case by simply waiting for the thirty-day period to expire before beginning its lawsuit.[86] Since a lawsuit is the remedy of last resort, there is little disadvantage in making other collection efforts in the interim.

C. The Thirty-Day Dispute Period

Although the debt collector in *Jacobson v. Healthcare Financial Services, Inc.*[87] prevailed on the consumer's basic contradiction or overshadowing claim, it still found itself in difficulty with its language that the consumer's payment or notice of dispute had to be received "within [thirty] days."[88] The consumer took the view that all he had to do was send his notice to the debt collector within the thirty-day period and the FDCPA would be satisfied even if the collector received the notice after the expiration of that time.[89] While admitting that the legislative history shed no light about when a consumer's dispute takes effect under §§ 1692g(a)(3) - (4), or when the consumer's notification occurs under § 1692g(a)(4), the United States Court of Appeals for the Second Circuit nevertheless opted for the "mailbox" rule by recognizing that the consumer exercises his right to dispute the debt when he mails his notice of dispute within the thirty-day period.[90] This interpretation is consistent with the underlying statutory purpose to protect consumers in the marketplace.[91] If the validation section is intended to give a consumer the full benefit of the thirty days, the consumer should not therefore be in doubt about whether his notice of dispute will arrive at the debt collector's place of business within that magical period. If the debt collector's receipt were the controlling factor, the consumer would have to calculate how far in advance the consumer had to act in order that such notice would reach its destination in time. That approach would also mean that individual consumers would in effect have different dispute periods, depend-

86. *Goldman*, 445 F.3d at 157; Bruce N. Menkes & Anna-Katrina S. Christakis, *Federal and State Fair Debt Collection Practices Law Developments*, 62. Bus. Law. 723, 732 (2007).

87. 516 F. 3d 85 (2d Cir. 2008).

88. Jacobson v. Healthcare Fin. Servs., 516 F. 3d 85, 93 (2d Cir. 2008).

89. *Jacobson*, 516 F.3d at 93.

90. *Id.* at 94.

91. The *Jacobson* court made the following observation:

> The aim of § 1692g is to provide a period for the recipient of a collection letter to consider her options. Given these goals, we cannot adopt a construction of the Act that would not only shorten the debtor's period of reflection, but also leave that debtor uncertain as to just when – given the vagaries of the mails – she must, to be safe, send out a notice of dispute.

Id. at 95; *see also* Chauncey v. JDR Recovery Corp., 118 F.3d 516, 519 (7th Cir. 1997) (stating that debt collector must give the consumer notice that she has thirty days to mail the notice of dispute).

ing on when a particular consumer mailed the notice. Surely Congress did not intend to create this kind of differential treatment for consumers whose geographic locations dictate a longer route for a notice of dispute, thus affecting a consumer's period for disputing the debt if the consumer must always be worrying about the date of the debt collector's receipt.

When the collector in *Jacobson* linked the thirty days to the debt collector's receipt of the dispute notice, the Second Circuit had ample grounds for disapproving the collection letter. The court saw the contradiction, since the letter had also captured the statutorily required validation language that advised the consumer of his right to seek verification within thirty days after receiving the collection letter.[92]

There was a variation on the theme in *Owens v. Hellmuth & Johnson, PLLC*,[93] where the debt collector threatened legal action if the consumers did not pay within thirty days from the date of the collection letter.[94] The consumers saw this as a problem because the language conflicted with the validation notice that gave them thirty days from receipt of the letter to dispute the debt.[95] This was a case where the juxtaposition of the two competing statements would leave an unsophisticated consumer in a quandry.[96] Although the debt collector tried to soften the impact of the inconsistency by pointing out to the United States District Court for the District of Minnesota that its letter stated that "legal proceedings [might] be commenced" if the consumers did not pay, the court did not find the language any less problematic.[97] An unsophisticated consumer would still read the letter as threatening legal consequences if the consumer did not pay within thirty days of the letter's date.[98] This casual reference to

92. The collector notified the consumer that it would recommend further action against him if payment or notice of dispute was not "received within 30 days." *Jacobson*, 516 F.3d at 88. In another part of the letter, the collector properly advised the consumer that the consumer could dispute the debt "within 30 days after receiving [the] notice." *Id.* This language provided the conflict. *See also* Rivera v. Amalgamated Debt Collection Servs., Inc., 462 F. Supp. 2d 1223, 1228 (S.D. Fla. 2006) (stating that letter violated statute by stating that debtors had thirty-days from date of letter to challenge debt).

93. 550 F. Supp. 2d 1060 (D. Minn. 2008).

94. Owens v. Hellmuth & Johnson, PLLC, 550 F. Supp. 2d 1060, 1062 (D. Minn. 2008).

95. *Owens*, 550 F. Supp. 2d at 1068.

96. *Id.*; *see also Graziano*, 950 F.3d at 111 (stating that threat of immediate legal action if consumer did not pay within ten days would induce least sophisticated consumer to overlook his statutory right to dispute debt within thirty days.); Weiner v. Bloomfield, 901 F. Supp. 771 778 (S.D.N.Y. 1995) (stating that conflicting deadline for payment violated statute by overshadowing validation notice).

97. *Owens*, 550 F. Supp. 2d at 1068.

98. *Id.*; *see also* Larsen v. JBC Legal Group P.C., 533 F. Supp. 2d 290, 306 (E.D.N.Y. 2008) (identifying violation when letter stated that consumer might be sued thirty days after date of notice if consumer did not pay debt). Bishop v. Global Pay-

thirty days did not do the debt collector any good, for the collection language was apt to confuse the consumer. Given the results in other contexts, the debt collectors in both *Jacobson* and *Owens* surprisingly did not stay away from this confusing mixture of thirty-day periods, which merely had the effect of leaving the consumers uncertain about their next step.

A slight variation in the validation language can cause problems, but that does not mean that the consumer will always prevail. The debt collector won the argument in *Campbell v. Hall*[99] even though he advised the consumer that any dispute of the debt should be lodged "within [thirty] days of [the] letter."[100] This language was suspect because it did not indicate that the consumer could dispute the debt within thirty days of *receipt* of the collection letter. Nevertheless, the United States District Court for the Northern District of Indiana interpreted the language to mean that the consumers had thirty days from their receipt of the letter to dispute the debt.[101] If the omission of the language relating to the receipt of the letter did not make any difference, then one is left to wonder why the debt collector admitted the error, but then asserted that he had a good defense to it on the basis of a clerical mistake.[102] The language was not a model of clarity

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ments Check Recovery Servs., Inc., Civ No. 03-1018, 2003 WL 21497513, at *3 (D. Minn. 2003) (identifying violation when collection letter stated that consumer might be subject to penalties if debt not paid within thirty days of date of letter).

99. 624 F. Supp. 2d 991 (N.D. Ind. 2009).

100. Campbell v. Hall, 624 F. Supp. 2d 991, 995 (N.D. Ind. 2009).

101. *Campbell*, 624 F. Supp. 2d at 1010. The collection letter required the consumer to notify the collector of his dispute "within 30 days of this letter." *Id* at 995. The court found it reasonable "to assume that plaintiffs had thirty days from when they received the letters to dispute the validity of their debts." *Id.* at 1010. The court found the *Campbell* language to be different from that in *Chauncey*, where the debt collector threatened to pursue other avenues to collect the debt if the debtor did not pay "within thirty (30) days from receipt of [the] letter," but gave the consumer thirty (30) days after receiving the collection letter to dispute the debt. The *Chauncey* court saw a contradiction between the two time periods. *Chauncey*, 118 F.3d at 519.

102. *See Campbell*, 624 F. Supp. 2d at 1001. The bona fide error defense is available to a debt collector if it can show 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) (2006). Most courts limit the defense to clerical and factual errors, and do not allow it for mistakes of law. *See, e.g.*, Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451-52 (8th Cir. 2001); Smith v. Transworld Sys., Inc., 953 F. 2d 1025, 1034 (6th Cir. 1992); Pipiles v. Credit Bureau of Lockport, Inc., 886 F. 2d 22, 27 (2d Cir. 1989); Baker v. G.C. Servs. Corp., 677 F.2d 775, 779 (9th Cir. 1982). *But see* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 538 F.3d 469, 476 (6th Cir. 2008) (holding that "bona fide error defense applies to mistakes of law"), *cert. granted*, 128 S. Ct. 2863 (2009); Johnson v. Riddle, 305 F.3d 1107, 1123 (10th Cir. 2002) (same); Janet Flaccus, *Fair Debt Collection Practices Act: Lawyers and the Bona Fide Error Defense*, 2001 ARK. L. NOTES 95, 98 (2001) (submitting that the bona fide error defense is available for mistakes of law).

and it merely served as an example that left the consumer wondering about the deadline for disputing the debt.

D. The Consumer's Role Under the Validation Scheme

Despite the precision prescribed by a validation notice, a debt collector will sometimes include language in the collection letter that asks the consumer to confirm the amount of the debt or to acknowledge the amount that is due. Although the debt collector in *McKinney v. Cadleway Properties, Inc,*[103] survived the consumer's challenge to this confirmation language,[104] it is questionable whether a debt collector should be allowed to muddy the waters with language that leaves the consumer wondering whether she must fill in the blanks in order to avoid damage to her credit rating.[105] After all, a consumer has an unfettered right under the FDCPA to dispute the debt without any obligation to give further details, and from that dispute ensues the debt collector's duty to secure verification of the debt.[106] A consumer who receives this invitation to confirm the debt may be induced to say something even if the consumer admits owing only part of the debt, but is unsure of the amount.[107] A consumer may even be confused about the relationship between the validation notice and the confirmation language, resulting in a reversal of roles, since it is the debt collector that should do the confirming in response to a consumer's dispute of the debt.[108]

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103. 548 F.3d 496 (7th Cir. 2008).

104. McKinney v. Cadleway Properties Inc., 548 F.3d 496, 504 (7th Cir. 2008).

105. As Judge Rovner so clearly observed, "the letter says nothing about an *option* to confirm, and even a more sophisticated consumer would view the tone and form of the letter as a whole as *requiring* confirmation." *McKinney,* 548 F.3d at 509 (Rovner, J., concurring in part and dissenting in part) (emphasis in original). The last paragraph of the collection letter asked the consumer to confirm the balance or state the amount she believed to be correct. *Id* at 508. The form gave the options as follows: "The total amount owed as of September 24, 2004 of $ ___ is confirmed.The amount owed is incorrect. The total amount owed should be $ ___." *Id.*

106. The consumer can be concise in his dispute message and does not even have to use the word "dispute." *See* 2 Dee Pridgen & Richard M. Alderman, Consumer Credit And The Law § 12:16 (2009-10 ed.). The debt collector cannot complicate the consumer's right to dispute the debt by imposing additional obligations on the consumer. *See id.* When the debt collector suggested in *Sambor v. Omnia Credit Servs.*, 183 F. Supp. 2d 1239-40 (D. Haw. 2002) that certain documentation might be unsuitable to support the consumer's dispute, the court found a violation. *See also* Castro v. ARS Nat'l Servs., No. 99 CIV. 4596 (HB), 2000 WL 264310, at *3 (S.D.N.Y. March 8, 2000) ("Section 1692g(a)(3) does not require debtors to provide documentation of any specific or 'suitable' kind when they seek to contest the validity of a debt.").

107. Judge Rovner observed that "for the debtor who thinks she owes some amount of the debt, disputes the amount asserted by the collector, but has no basis to determine an exact correct amount, the form is nothing but confounding." *McKinney*, 548 F. 3d at 508

108. The statute requires the debt collector to obtain verification of the debt. 15 U.S.C. § 1692g(a)(4).

The debt collector introduces the competing language, and therefore it should bear the brunt of any ensuing ambiguity. In *McKinney*, the disputing language was separate from the confirmation, and while the former revealed the voluntary nature of the consumer's disputing act, it was left to the consumer to assess the nature of the confirmation. The consumer must have known that the failure to cooperate would have a negative impact on the consumer's credit report.[109] The consumer might also have wondered whether acknowledging part of the debt required the debt collector to verify that part of the debt remaining unconfirmed. It is possible that even if the consumer regards disputing and confirmation as two separate events, the consumer may nevertheless link the two events and worry about the need to dispute the debt with a specific figure if she does not agree with the debt collector's total.[110] By opening the door to such confusion, the debt collector ought to bear the consequences of a consumer's challenge under § 1692g.

It is surprising that some debt collectors go out of their way to complicate matters by ignoring the plain language of the FDCPA and crafting their own validation message to the consumer. In many cases, they pay a penalty for their innovation. In *Stark v. RJM Acquisitions LLC*,[111] the controversial language read as follows:

> Unless you dispute the validity of all or part of this debt within 30 days after receipt of this notice, we will assume the debt is valid. If you notify us in writing within the 30-day period, we will mail a copy of verification of the debt or the

109. A consumer who is in doubt about the amount owed may wonder how to deal with the confirmation statement. The question is whether a consumer should find himself in a quandary about the available options. He may know that he has an option to dispute the debt or any portion thereof, but he may not be able to answer a question concerning his confirmation option. As a general matter, a consumer should not have to deal with obligations that the statute does not demand. In *DeSantis v. Computer Credit, Inc.*, the debt collector demanded payment from the consumer, or a valid reason for the consumer's failure to pay. In finding that the consumer stated an actionable claim, the court recognized that the consumer's right to dispute the debt did not depend on whether the consumer had a valid reason for non-payment. DeSantis v. Computer Credit, Inc., 269 F. 3d 159, 162 (2d Cir. 2001); *see also* Mendez v. M.R.S. Assocs., 2005 WL 1564977, at *5 (N.D. Ill. June 27, 2005) (stating that letter created ambiguity and confusion when it asked consumer to explain the nature of his dispute, because it suggested that the consumer must have a specific reason to demand verification of the debt). In the same way, that a consumer might be misled into thinking that his right to dispute the debt was tied to the validity of his reasons for not paying, so too such a consumer might find himself confused with an inducement to confirm the debt in some fashion.

110. *McKinney*, 548 F.3d at 509.

111. No. 08-CV-2309, 2009 WL 605811 (E.D.N.Y. March 9, 2009).

> judgment to you and will provide you with the name and address of the original creditor for this debt.[112]

The consumer took the position that all he had to do to obtain verification was to request it from the debt collector, without actually saying that he disputed the debt.[113] The United States District Court for the Eastern District of New York did not accept the consumer's interpretation, preferring instead to relate the word "notify" to the consumer's right to dispute the debt.[114] Thus the court read the language as requiring the consumer to dispute the debt in writing if the consumer hoped to get verification of it, rather than interpreting it as merely requiring the consumer to request verification.[115]

The consumer gained no sympathy from the court for his position, simply because of the debt collector's reference in the first sentence to the consumer's right to dispute the debt. By the same token, one could read the notification reference in the second sentence as relevant to the consumer's desire to have the debt verified, and therefore the debt collector as promising to mail verification once the consumer notified the collector that he wanted it. The court read the word "notify" as requiring the consumer to take some action and then inform the debt collector of that action to get verification of the debt.[116] According to the court, the action contemplated was the consumer's disputing the debt. In reality, the notification and the disputing are not separate events in the statutory scheme, for the consumer disputes the debt by sending an appropriate notice to the debt collector.[117] Therefore, one

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112. Stark v. RJM Acquisitions LLC, No. 08-CV-2309, 2009 WL 605811, at *1 (E.D.N.Y. March 9, 2009).

113. *Stark,* 2009 WL 605811, at *4.

114. *Id.*

115. *Id.* The court observed that any other reading of the statute would result in the kind of bizarre or idiosyncratic interpretation that the Second Circuit was keen to avoid. *Id.* (citing Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360, 363 (2d Cir. 2005)).

116. *Stark,* 2009 WL 605811, at *4.

117. It is not unreasonable to interpret the language as indicating that the consumer wants a copy of the verification, independent of a query concerning the debt's validity. The consumer can certainly notify the collector that he wants a copy of the debt or of the judgment without saying anything else. By leaving that request open to conjecture, the debt collector subjects itself to the charge that it has not conveyed the validation information clearly and effectively. It remains unclear whether the consumer's request for verification must be tied to any dispute claim. It is the kind of uncertainty in the validation notice that convinced the court in *DeSantis* the debt collector's letter left the mistaken impression that the collector's obligation to verify the debt would arise only if the consumer gave a valid reason for nonpayment. *DeSantis,* 269 F.3d at 162. One must still query why the debt collector in *Stark* promised to provide "a copy of verification of the debt or the judgment." *Stark,* 2009 WL 605811, at *4. This is a little different from the statutory requirement that the debt collector will obtain "verification of the debt or a copy of *a* judgment." *See* 15 U.S.C. § 1692g(a)(4). Although the court did not take up the point, a reference to *the* judgment leaves a consumer with the impression that the creditor has already obtained a judgment against the consumer. The court did not take up the point, but the loose language relating to *the* judgment,

should read the language as suggesting that the debt collector will send verification to the consumer if the consumer notifies the collector that he wants it.

Having failed to convince the court on that ground, the consumer in *Stark* tried another approach, this time with success. The court read the debt collector's language as directing the consumer to give written notice that the consumer disputes the debt in order to receive verification and thus fully satisfy the statutory requirement.[118] However, the debt collector's promise to mail the verification carried with it another promise to provide the name and address of the original creditor.[119] Thus, the debt collector's statement that tied the mailing of the verification to the consumer's disputing the debt, also related the latter event to the disclosure of the creditor's name and address. The court was right to point out that the debt collector must provide the information about the creditor upon the consumer's written request, without any need for the consumer to dispute the debt.[120] The court denied summary judgment to the debt collector because a reasonable juror could find that the debt collector's validation notice did not clearly convey the information required by § 1692g(a)(5).[121] The decision to put its own linguistic stamp on the validation notice turned out to be problematic for the collector.

This inclination to experiment with the statutory language need not lead to dire consequences. The drafters set out in separate paragraphs information about how a debt collector should convey to the consumer the method for questioning the validity of the debt and the method for seeking verification from the collector. It is therefore puzzling that a debt collector would avoid the simplicity of the statutory framework and craft its own message of confusion. In *Register v. Reiner, Reiner & Bendett, PC,*[122] the debt collector advised the consumer about the right to dispute the validity of the debt. The collector then went on to say that if the consumer did so in writing within thirty days, the firm would provide written verification; otherwise, the

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when combined with the notification reference, only serves to highlight the lack of precision in the collector's communication.

118. *Stark*, 2009 WL 605811, at *4.

119. *Id.*

120. Section 1692g(a)(5) requires the debt collector to give the consumer "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." 15 U.S.C. § 1692g(a)(5). The consumer's request for information about the creditor bears no relation to the consumer's right to dispute the debt covered in subsections (a)(3) and (a)(4). The debt collector's language in *Stark* does tie the consumer's notice of dispute to the collector's promise to verify the debt and provide the name and address of the creditor. *Stark*, 2009 WL 605811, at *4.

121. *Stark*, 2009 WL 605811, at *4.

122. 488 F. Supp. 2d 143 (D. Conn. 2007).

debt would be assumed to be valid.[123] The debt collector's message was that the consumer had to dispute the debt in writing if he wanted to question its validity, and nothing in the language precluded the possibility that the debt collector would still consider the debt valid despite that written dispute. The language, "you may dispute," sends a slightly different message from that intended by the "unless" clause in § 1692g(a)(3), and the United States District Court for the District of Connecticut was mindful of the ambiguity in the collection letter about the relationship between a written dispute and the validity of the debt.[124] A problem existed because a debt collector does not really have any option about what to do if the consumer lodges a written dispute, and any confusion on that point prevents the debt collector from conveying its message effectively.

The court in *Register* found the debt collector's violation particularly objectionable because the debt collector did not take advantage of the safe-harbor language that the United States Court of Appeals for the Second Circuit had offered in *Savino v. Computer Credit, Inc.*[125] to keep debt collectors on the right track. It is questionable, though, whether the debt collector could have used the *Savino* formula to any great advantage, for in *Savino* the debt collector had apparently faithfully reproduced the validation language, but strayed by demanding immediate payment without explaining that such a demand did not override the consumer's validation rights under § 1692g.[126] In *Register*, on the other hand, the debt collector's problem lay with the valida-

123. Register v. Reiner, Reiner & Bendett, PC, 488 F. Supp. 2d 143, 146-47 (D. Conn. 2007). The relevant part of the collection letter stated as follows:

> Please be advised that you may dispute the validity of the debt or any portion thereof. If you do so in writing within thirty days of receipt of this letter, this firm will obtain and provide you with written verification thereof; otherwise, the debt will be assumed to be valid.

Id.

124. *See id.* at 147. The debt collector made a mistake in relating the assumption concerning the debt's validity to the need for a writing in disputing the debt. *Id.* at 147. It is generally agreed that section 1692(a)(3) allows a consumer to dispute the debt orally if the consumer wants to question the debt's validity. *See* Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078 (9th Cir. 2005); *Campbell*, 624 F. Supp. 2d at 1000.; *Register*,488 F. Supp. 2d at 147; *Jerman*, 464 F. Supp. 2d at 722; Baez v. Wagner & Hunt, P.A., 442 F. Supp. 2d 1273, 1276 (S.D. Fla. 2006); *Sambor*, 183 F. Supp. 2d at 1234.

125. 164 F. 3d 81 (2d Cir. 1998).

126. *Savino*, 164 F.3d at 86. The *Savino* court provided guidance about the language that the debt collector could have used to explain how its demand for payment fitted in with the consumer's statutory rights. The debt collector could have used the following explanatory paragraph:

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

Id.

tion notice itself, a problem that could have been solved by the collector's adherence to the actual language of § 1692g.[127]

III. THE COMMUNICATION PROBLEM

A. THE IMPACT OF A TELEPHONE MESSAGE

A debt collector usually looks for any opportunity to wear down a consumer in the pursuit of its claim. In that connection, the telephone is an effective weapon in the debt collector's arsenal. Quite often collection letters do not achieve their immediate objective and the debt collector will follow up with a series of telephone calls. If the consumer is not at home, it is not unusual for the debt collector to leave a message on the consumer's recording machine urging the consumer to contact a certain person for an important message.[128] The strategy for the debt collector is to create a sense of urgency in the consumer's mind, without disclosing the name of the collector or the nature of its business. By doing so, the debt collector preys on the consumer's curiosity about the call, hoping all the while for a return call that will open the door to recovery of the debt.

The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium."[129] Many debt collectors will argue that their telephone calls cannot be communications because they never mention anything about a debt when they leave their messages, but simply invite the consumer to call back about an important matter.[130] One collection message contained the language: "There has been a trial that has been sent to my office that I'm sure you are not aware of but involves you personally . . . . Failure to return my call will result in a decision mak-

127. See *supra* note 120 and accompanying text.

128. *See* Edwards v. Niagara Credit Solutions, Inc., 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga. 2008) (deciding that telephone message asking consumer to contact caller about an important matter met definition of "communication"), *aff'd on other grounds*, 584 F. 3d 1350 (11th Cir. 2009); Anchondo v. Anderson, Crenshaw & Assocs., L.L.C., 583 F. Supp. 2d 1278, 1280 (D.N.M. 2008) (denying defendant's motion to dismiss where defendant left voicemail message that consumer had an important matter with caller that needed immediate attention); Reed v. Global Acceptance Credit Co., No. C-08-01826 RMW, 2008 WL 3330165, at *7 (N.D. Cal. Aug. 12, 2008) (denying plaintiff's motion for summary judgment where defendant's message invited plaintiff to call about a very important matter that required immediate attention); *see also* John H. Bedard, Jr., *Update on FDCPA Compliance and Litigation*, 61 CONSUMER FIN. L.Q. REP. 25, 146 (2007).

129. 15 U.S.C. § 1692a(2) (2006).

130. *See* Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 654 (S.D.N.Y. 2006) (stating that message left on consumer's voicemail about a personal business matter was a communication even though it did not say anything about a debt); Hosseinzadeh v. M.R.S. Assocs., Inc., 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (stating that message left on answering machine about an important matter was a communication under the FDCPA).

ing process that you will not be a part of."[131] This was an intriguing way of putting things; the debt collector intended to craft language that would set the consumer thinking, especially when the message concluded with the admonition that the consumer's failure to return the collector's call would result in the consumer's exclusion from the decision-making process.[132]

There is ample evidence that there can be communication even if a debt collector does not mention anything about a debt in its telephone message.[133] Some courts have viewed the recorded message as conveying information about a debt indirectly, since the debt collector's objective is to persuade the consumer to return the call and discuss the debt.[134] Therefore, a debt collector cannot avoid the FDCPA simply by not mentioning the debt, because that would provide free rein for a collector's aggressive strategies once there is no mention of the transaction that brought the collector and the consumer together.

When the United States District Court for the Western District of Oklahoma took a different tack in *Biggs v. Credit Collections, Inc.*,[135] it was because the debt collector's recorded message did not contain any reference to a debt, and the court did not want to construe the language so liberally as to recognize the message in the voicemail as a communication for purposes of the statute.[136] The consumer complained about the collector's failure to provide the necessary warning

131. *Hosseinzadeh*, 387 F. Supp. 2d at 1108.

132. In *Hosseinzadeh*, the collector left six messages on the plaintiff's answering machine. Some of them warned that the consumer's failure to return the collector's call would result in the consumer's exclusion from the decision-making process, while others confirmed that regulations prevented the caller from leaving more details about the nature of the call. 387 F. Supp. 2d at 1108. The caller also assured the consumer that he had some "very important information" to discuss with the consumer. *Id.* The court noted the defendant's admission that "the calls were merely the first step in a process designed to communicate with plaintiff about her alleged debt." *Id.* at 1116.

133. *See Edwards*, 586 F. Supp. at 1350-51 (N.D. Ga. 2008); Ramirez v. Apex Financial Management, LLC, 567 F. Supp. 2d 1035, 1041-42 (N.D. Ill. 2008); Costa v. Nat'l Action Fin. Servs., 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007). *Foti*, 424 F. Supp. 2d at 657; Belin v. Litton Loan Servicing, LP, 2006 WL 1992410 1992410, at *5 (M.D. Fla. July 14, 2006); *Hosseinzadeh*, 387 F. Supp. 2d at 1116.(C.D. Cal. 2005). *But see* Biggs v. Credit Collections, Inc., No. CIV-07-0053-F, 2007 WL 4034997, at *2 (W.D. Okla. Nov. 15, 2007).

134. *See Foti*, 424 F. Supp. 2d at 656, 656 (S.D.N.Y. 2006) ("Given that the obvious purpose of the message was to provide the debtor with enough information to entice a return call, it is difficult to imagine how the voicemail message is not a communication under the FDCPA."); *Hosseinzadeh*, 387 F. Supp. at 1116. (C.D. Cal 2005) (finding it significant that the voicemail messages "were merely the first step in a process designed to communicate with plaintiff about her alleged debt.").

135. No. CIV-07-0053-F, 2007 WL 4034997 (W.D. Okla., Nov. 15, 2007).

136. Biggs v. Credit Collections, Inc.,No. CIV-07-0053-F, 2007 WL 4034997, at *4 (W.D. Okla., Nov. 15, 2007).

that the message was from a debt collector,[137] but the court was unsympathetic. It expressed its concern that "[w]ords matter—in this instance, the words of the voice mails and the words of the statutory definition of a 'communication.'"[138] It seemed, therefore, that the court was looking for a specific reference to a debt.[139]

Those voicemail messages that give the barest details in order to arouse the consumer's curiosity raise questions about the debt collector's failure to give meaningful disclosure of the caller's identity.[140] The caller's failure to disclose his identity causes the violation, and thus the caller does not have to use harassing language to get into trouble.[141] One would expect someone calling on behalf of a debt collector to disclose his name, the company's name, and the nature of the company's business.[142] A collector may be reluctant to leave too much information on the recorder, lest somebody other than the consumer hear the message.

The debt collector in *Berg. v. Merchants Ass'n Collection Division, Inc.*[143] devised a way of avoiding this conundrum by indicating in its message that if someone other than the addressee picked up the telephone, that person should disconnect the recording immediately.[144] The recording advised further that by continuing to listen to the recording the person acknowledged that he was the individual who was

137. Section 1692e(11) requires a debt collector to state in all communications after the first one that the communication is from a debt collector. 15 U.S.C. § 1692e(11)(2006)

138. *Biggs*, 2007 WL 4034997, at *4.

139. The *Biggs* court made the point that the transcript of the recorded messages contained no information about a debt. *Id.* It viewed the statutory definition as not including messages that do not convey information about the debt. *Id.* The court saw a distinction between the conveying of "information regarding a debt", 15 U.S.C. § 1692a(2) , and the conveying of "information in furtherance of any attempt to collect a debt." In the latter case, there would be a "communication" in the court's view. *See Biggs*, 2007 WL 4034997, at *4 n. 3; *see also* Bruce Menkes & Anna-Katrina S. Christakis, *Debt Collections Update: Communications and Other Issues*, 64 BUS. LAW. 665, 666 (2009).

140. Section 1692d makes it a violation for a debt collector to place telephone calls "without meaningful disclosure of the caller's identity." 15 U.S.C. § 1692d(6)(2006). *See* Leyse v. Corporate Collection Servs., Inc., 2006 WL 2708451, *4 (S.D.N.Y. Sept. 18, 2006) (stating "that there was no meaningful disclosure of caller's identity in violation of § 1692d(6) where recorded message disclosed caller as CCS and the parties had no previous dealings"); *Hosseinzadeh*, 387 F. Supp. 2d at 1112 (concluding violation of § 1692d(6) because collector's employees did not disclose collector's identity and nature of defendant's business in messages left on answering machine); Joseph v. J.J. Mac Intyre Cos., L.L.C., 238 F. Supp. 2d 1158, 1167 (N.D. Cal. 2002) (denying collector's motion for summary judgment where caller failed to disclose identify himself or employer).

141. *Edwards*, 586 F. Supp. at 1346.

142. *Costa*, 634 F. Supp. 2d at 1074; Knoll v. Allied Interstate, Inc., 502 F. Supp. 2d 943, 946 (D. Minn. 2007); *Hosseinzadeh*, 387 F. Supp. 2d at 1112.

143. 586 F. Supp. 2d 1336 (S.D. Fla. 2008).

144. Berg v. Merchants Ass'n Collection Div., Inc., 586 F. Supp. 2d 1336, 1339 (S.D. Fla. 2008).

supposed to get the message.[145] The only problem was that the consumer's relatives all heard the message.[146] In such a scenario one might ask whether the debt collector assumes the risk that someone besides the consumer will hear the message. Even if the caller is not aware of the consumer's surroundings, the caller should nevertheless understand that the message once left is thereafter out of the caller's control, and a warning that the listener should terminate the connection may only serve to pique that person's interest. If the consumer is in the company of others when he hears the message, a warning on the recorder about interrupting the connection if the listener is not the intended party would hardly be effective since the intended party would already be there, perhaps surrounded by curious companions who would not mind hearing the message themselves.[147]

Under ordinary circumstances, a debt collector should not communicate with a third party without the consumer's consent in connection with the collection of any debt.[148] Therefore, even if a consumer continues to listen to the recording in the presence of a third party, the debt collector cannot claim that it has secured the consumer's prior consent when there is no guarantee that the consumer will be the only one to hear the message.[149] This possibility of third-party access to the consumer's voicemail leaves the debt collector in a difficult position in terms of statutory compliance. In the ordinary course of events, the caller should disclose the caller's identity and mission,[150] but the caller must also be careful about disclosing infor-

145. *Berg*, 586 F. Supp. 2d at 1139.

146. *Id.*

147. In *Foti*, the court emphasized the inherent risk in leaving an automated message on a consumer's machine. The debt collector might violate section 1692d(6) (requiring meaningful disclosure of caller's identity) and § 1692e(11) (requiring warning "that communication is from debt collector") by not leaving enough information for the consumer, or section 1692c(b) by conveying too much information. The court in *Berg* warned that a debt collector faced similar risks in the case of voicemail messages. *Berg*, 586 F. Supp. 2d at 1343. The court felt assured that a debt collector could use other means to communicate with the debtor. *Id.* at 1344. As a result there was no violation of the First Amendment because the prohibition of the voicemail messages under the circumstances was "narrowly tailored to serve the significant governmental interest of protecting consumers' privacy." *Id.*

148. 15 U.S.C. § 1692c(b)(2006).

149. A debt collector cannot communicate with third parties "without the prior consent of the consumer given directly to the debt collector." *Id.* If the debt collector depends on a third party's action in suppressing the voicemail message, this is surely not the equivalent of the consumer's prior consent to disclosure. Any prior consent must be meaningful and given directly to the debt collector. See H.R. REP. No. 95-131, at 5 (1977) (commenting on H.R. 5294 that "[t]he committee intends that in section 804 the 'prior consent' be meaningful, i.e., that any prior consent by a consumer is to be a voluntary consent and shall be expressed by the consumer directly to the debt collector.").

150. *See* 15 U.S.C. § 1692d(6) (requesting disclosure of caller's identity); *id.* at § 1692e(11) (requiring initial disclosure of debt collector's mission and subsequently that communication is from debt collector).

mation to a third party. The debt collector is not entitled to use this particular form of communication regardless of its impact on the consumer,[151] and so where there is doubt about fulfilling the statutory requirements, a debt collector should opt for other available forms of communication that do not expose it to liability. This approach would be consistent with congressional concerns about the invasion of a consumer's privacy.[152] Congress wanted to preserve a debt collector's ability to contact a consumer, but it felt comfortable in imposing certain restrictions on debt collectors in the process.[153] For example, a debt collector cannot use a postcard to communicate with a consumer,[154] but it can surely convey the same message through a traditional letter that shields the consumer's business from the public at large. This is but one example of a statutory restriction that does no harm to the collector's case, but by the same token it sends a message that a debt collector should use another form of communication that does not embarrass the consumer. If a debt collector's use of voicemail puts the debt collector in an uncomfortable position because of the collector's statutory obligations, this discomfort becomes less important when viewed in light of the consumer's statutory right to enjoin the collector from making any calls at all.[155] Therefore, it seems a small price to pay for the debt collector to obtain the consumer's consent for

151. *See Berg*, 586 F. Supp. 2d at 1344, 1344 (observing that "[d]ebt collectors have other methods to reach debtors including postal mail, in-person contact, and speaking directly by telephone."); *Foti*, 424 F. Supp. 2d at 659 (S.D.N.Y. 2006) (suggesting that debt collectors can continue to use other collection methods, including speaking directly with the consumer or communicating by letter).

ACA International, a collection industry representative, sought an advisory opinion from the FTC in 2006 about a debt collector's obligation to reveal the employer's name in a voicemail message even if the message involves a debt, and whether the debt collector must indicate in the voicemail message that he is trying to collect a debt and that any information obtained will be used towards that end. The FTC refused to issue an advisory opinion because there was clear judicial precedent that a debt collector leaving a voicemail message must reveal the employer's name, even if the message mentions a debt and must also give the § 1692e(11) warning indicating that it is an attempt to collect a debt. *See* Letter from Donald S. Clark, Secretary to the FTC, to Rozanne M. Anderson & Andrew M. Beato, *available at* http://www.ftc.gov/os/statutes/fdcpa/letters/060728staffresponsesofadvisopinion_public.pdf. The FTC is still seeking a way out of this conundrum. *See* FEDERAL TRADE COMMISION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE - A WORKSHOP REPORT 48 (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

152. Congress found that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a).

153. *See, e.g.*, § 15 U.S.C. 1692c(b) (limiting debt collector's ability to communicate with third persons);. *id.* § 1692d(6) (except for purpose of location information, forbidding placement of telephone calls without meaningful disclosure of caller's identity); *id.* § 1692e(11) (requiring disclosure that collector is trying to collect debt and that information obtained will be used for that purpose).

154. *Id.* § 1692f(7) (2006).

155. *Id.* § 1692c(c).

voicemail messages, for the debt collector will then be able to meet its statutory obligations without wondering about the possibility of having an uninvited audience for the collection message.[156] In the absence of other arrangements, the debt collector would be well advised to call back if no one answers the telephone, and not leave any message that will come back to haunt the caller.

B. INCONVENIENT CONTACTS

A debt collector will usually try every conceivable strategy to reach the consumer in an effort to collect a debt. The FDCPA forbids any communication with the consumer "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer."[157] The statute also creates a presumption that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m. at the consumer's location.[158] This does not necessarily mean that any communication outside that time frame should be regarded as inconvenient. It would have been better for the drafters to create the presumption for an inconvenient communication, thus driving home the point that a debt collector should avoid those inconvenient hours. Nevertheless, the phrase "known or should be known" gives a clue that a debt collector should put itself in a good position by ascertaining the convenient hours for communication with the consumer and not leave it to speculation.[159] Even if the debt collector is unable to obtain this information directly from the consumer, it should use the creditor's resources to accomplish its objective.

It is noteworthy that § 1692c(a)(3) forbids a debt collector from communicating with a consumer if it "knows or has reason to know the consumer's employer prohibits the consumer from receiving such communication."[160] This language should not be viewed as the exclu-

156. ACA International, a collection industry representative, made a proposal at the 2007 public workshop convened by the Federal Trade Commission. ACA suggested that section 1692c(b) should be amended to protect debt collectors when, in leaving voicemail messages, they make unintentional disclosures to third parties. FEDERAL TRADE COMMISSION, *supra* note 151, at 48 *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. The National Association of Retail Credit Attorneys (NARCA) recommended at the same workshop that debt collectors should be allowed to leave voicemail messages that, without disclosing the caller's identity, ask the consumer to return the call. *See id.* This is the kind of call that the courts have found unappealing. *See Foti*, 434 F. Supp. 2d at 669. *Hosseinzadeh*, 387 F. Supp. 2d at 1116-17.

157. 15 U.S.C. § 1692c(a)(1) (2006).

158. *Id.* § 1692c(a)(1).

159. The statutory language "known or . . . should be known" imposes a combination of both a subjective and objective standard. *See id.* The latter standard suggests that a debt collector has a duty of reasonable inquiry to determine whether it is inconvenient to contact a consumer. NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.2.6 (6th ed. 2008)

160. 15 U.S.C. § 1692c(a)(3).

sive provision covering employment situations. It is possible indeed for a debt collector to be aware that it is not convenient for a consumer to receive calls at work, even though it does not know whether the consumer's employer forbids the practice. The inconvenience factor under § 1692c(a)(1) and the employer's prohibition under § 1692c(a)(3) are not mutually exclusive.[161] When the consumer in *Horkey v. J.V.D.B. & Associates, Inc.*[162] advised the debt collector that he could not talk with him at work, it was not clear that he was carrying out the employer's directive. The language, "I cannot talk with you at work," could have meant that the consumer had no desire to entertain the debt collector's message while otherwise engaged.[163] Such a desire would be different from saying anything about the employer's policy on the matter of extra-curricular contacts. Nevertheless, in *Horkey,* the United States Court of Appeals for the Seventh Circuit found that the consumer's statement was enough to put the debt collector on notice under § 1692c(a)(3) that the consumer was not free to speak to the collector at work.[164] The Seventh Circuit did not look for some legally precise language from the consumer to justify the application of § 1692c(a)(3). However, the Seventh Circuit did not have to rely on subsection (a)(3), which deals with an employer's prohibition of communications in connection with the collection of any debt. The debt collector knew that it was inconvenient for the consumer to receive the collector's call at work, and the judge of that inconvenience was the consumer, not the debt collector. Section 1692c(a)(1) was, therefore, relevant to this situation and it was not necessary for the consumer to show that the debt collector was aware of any employer rules concerning telephone calls.[165]

In the communication context, there is occasional confusion between § 1692c(a) and § 1692c(c). In *Wan v. Commercial Recovery Systems, Inc.*,[166] the debt collector assuaged the consumer with the

161. *See* Pittman v. J.J. Mac Intyre Co., 969 F. Supp. 609, 612 (D. Nev. 1997) (denying defendant's motion to dismiss where defendant continued to call plaintiff at her place of employment despite warning that she could not talk at work); NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.2.4 (6th ed. 2008).

162. 333 F.3d 769 (7th Cir. 2003).

163. In *Horkey*, the court conceded as much but then noted that unsophisticated consumers cannot be expected "to assert their § 1692c(a)(3) rights in legally precise phrases." Horkey v. J.V.D.B. & Associates, Inc., 333 F.3d 769, 773 (7th Cir. 2003). The court gave summary judgment to the consumer on her claim under section 1692c(a)(3). *Horkey*, 333 F.3d at 775.

164. *Horkey*, 333 F.3d at 773.

165. *See* NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.2.4, (6th ed. 2008) (suggesting that "a collector might reasonably know that a contact at the consumer's workplace is inconvenient without knowing that the consumer's employer prohibits such work contacts").

166. 369 F. Supp. 2d 1158 (N.D. Cal. 2005).

statement: "'If you notify us in writing to stop contacting you by telephone at your residence or place of employment, no further contact will be made.'"[167] The debt collector must have been proud of its magnanimous gesture in informing the consumer of its willingness to cease contact at the consumer's request. It was something of the debt collector's own doing, for the FDCPA does not require the debt collector to inform the consumer of the right to prevent further communication.[168] The United States District Court for the Northern District of California was convinced that the debt collector merely echoed the language of § 1692c(c) that provides an opportunity for a consumer to notify the debt collector in writing that the consumer wants no further contact.[169]

It is questionable, however, whether the debt collector's note in *Wan* reflected the sweeping language of § 1692(c) that forbids a debt collector's further communication with a consumer. After all, the *Wan* language refers only to telephone contacts at the consumer's residence or place of employment, and does not therefore address all contacts, wherever or however made.[170] The debt collector's invitation to the consumer to notify the collector in writing about the consumer's desire to sever telephone connections at the consumer's residence or place of employment really imposed an obligation on the consumer that the FDCPA does not support.[171] The debt collector's language related more to inconvenience for the consumer, which involved § 1692c(a)(1)[172] rather than § 1692c(c).[173] The debt collector conveyed a message that allowed the consumer to stop certain telephone contacts, but § 1692c(a)(1) does not require a writing for the consumer to accomplish that. The debt collector's generosity in conveying its will-

167. Wan v. Commercial Recovery Systems, Inc., 369 F. Supp. 2d 1158, 1160 (N.D. Cal. 2005).

168. Section 1692g(a) governs the debt collector's obligation to give notice of certain matters and to provide a statement to the consumer about the consumer's rights. Section 1692g(b) covers the collector's obligation to suspend its collection activities if the consumer disputes the debt in writing, but the collector does not have to inform him of this obligation.

169. *Wan*, 369 F. Supp. 2d at 1165.

170. The debt collector's language specifies the consumer's "residence or place of employment." *Id.*

171. The writing requirement in section 1692c(c) applies to the consumer's directive to the debt collector to cease further communication across the board. 15 U.S.C. § 1692c(c). A consumer may want to cease telephone communication at certain places without objecting to communication elsewhere. In that event, section 1692c(c) should not apply and the consumer should be free to express his preference orally.

172. Section 1692c(a)(1) forbids collection calls "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer." 15 U.S.C. § 1692c(a)(1).

173. Section 1692c(c) covers a consumer's right to stop a debt collector's further communication. 15 U.S.C. § 1692c(c).

ingness to abort its collection tactics carried with it a writing requirement that might have discouraged a consumer.[174] This is a significant imposition on the consumer because a debt collector is obligated to cease communicating with a consumer at any place which the collector knows or should know is inconvenient to the consumer.[175] Such a place may indeed include the consumer's residence or place of employment. However, information about inconvenience to the customer may come orally to the debt collector's attention, and moreover, not necessarily from the consumer himself.[176] In light of this possibility, it is difficult to reconcile the debt collector's language with § 1692c(a), which recognizes the collector's obligation not to communicate with a consumer under the circumstances covered there. The notion of a writing seems foreign to that promise, and the debt collector's promise to cease telephone contact at the consumer's residence or place of employment should not be linked to the writing requirement in § 1692c(c) dealing with the cessation of all communications.

C. Contacting a Represented Consumer

Absent appropriate consent or permission, a debt collector cannot communicate in connection with the collection of any debt with a consumer who the collector knows is represented by an attorney.[177] This language does not accommodate the "should know" standard and therefore leaves open the possibility that a collector may escape liability if it does not have actual knowledge that the consumer has legal representation.[178] Once the collector knows that an attorney is in the picture, it cannot contact the consumer if it "has knowledge of or can readily ascertain, such attorney's name and address."[179] The FDCPA therefore restrains the collector who has the relevant information about the attorney's name and address, or who can secure it without too much trouble. There is something to be said, however, for imposing on the debt collector an obligation to drive home to the consumer the importance of disclosing any legal representation. As a matter of

174. *See* Brzezinski v. Vital Recovery Servs., Inc., No. 05-C-1020, 2006 WL 1982501, at *6 (E.D. Wis. July 12, 2006) (noting that by imposing a writing requirement on the consumer, the collector may have confused the consumer into thinking that the consumer could not orally prevent the collector from communicating with him at his residence or place of employment because of inconvenience to the consumer).

175. 15 U.S.C. § 1692c(a)(1)(2006).

176. *Brzezinski*, 2006 WL 1982501, at *5.

177. 15 U.S.C. § 1692c(a)(2).

178. *Compare* 15 U.S.C. § 1692c(a)(1) (forbidding communication with consumer at time or place "known or which should be known to be inconvenient to the consumer"), *with id.* § 1692c(a)(2) (forbidding communication if the collector "knows the consumer is represented by an attorney").

179. *Id.* § 1692c(a)(2).

convenience, the debt collector should have to use the validation notice required under § 1692g to advise the consumer that all contacts will be with the consumer's attorney once the debt collector gets notice of legal representation.[180] This mechanism would have the advantage not only of confirming the consumer's right to dispute the debt, but also of affording the consumer the opportunity of diverting a collector's future communications to the person who has been retained to deal with them. There is little doubt that a consumer will be anxious to give a debt collector the relevant information about the consumer's attorney, and this notification will settle most queries about the collector's knowledge concerning the identity of the consumer's lawyer.

Sometimes a creditor knows that a consumer has retained an attorney, but fails to share that information with the debt collector. If the debt collector is required to include information in the validation notice about legal representation, at least the consumer will have the opportunity to respond to the collector's reference about that possibility. Since the validation notice comes, at the latest, within five days after the debt collector's initial communication with the consumer, the consumer will have an early opportunity to disclose the information about the attorney. This early disclosure would be helpful in avoiding any problem about imputing to the debt collector the creditor's knowledge that the consumer is represented by an attorney.

There is good authority that the creditor's knowledge about legal representation should not be imputed to the debt collector.[181] As one court has pointed out, the FDCPA does not cover creditors' activities at all and there is no basis for imputing to a debt collector any infor-

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180. This requirement will certainly expand the amount of information contemplated for the consumer's consumption under section 1692g, especially when the consumer's initial communication need not be written. *See* FTC Official Staff Commentary § 809(a)-5, 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988) (indicating that if the initial communication is oral, the debt collector may make the disclosures at that time). One authority suggests that the "potential ambiguity in section 1692g(a) depends upon whether the phrase 'following information', refers to the phrase 'a written notice,' or only to subsections (1) through (5) in section 1692g(a), which provide the content of the notice." NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.7.2.5, at 288 (6th ed. 2008). The Commentary "is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public." FTC Official Staff Commentary (Introduction), 53 Fed. Reg. at 50, 101.

181. Schmitt v. FMA Alliance, 398 F.3d 995, 997 (8th Cir. 2005); Randolph v. IMBS, Inc., 368 F.3d 726, 729 (7th Cir. 2004); Burger v. Risk Mgmt. Alternatives, 94 F. Supp. 2d 291, 293 (N.D.NY. 2000); Hubbard v. Nat'l Bond & Collection Assocs.,Inc., 126 B.R. 422, 427 (D. Del. 1991), *aff'd without op.*, 947 F. 2d 935 (3d Cir. 1991); FTC Official Staff Commentary § 805(a)(3), 53 Fed. Reg. at 50,104; DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW §12:18 (2009-10 ed.). *But see* Micare v. Foster & Garbus, 132 F. Supp. 2d 77, 80 (N.D.N.Y. 2001) (stating that "imputing knowledge to the debt collector when it does not inquire whether the debtor is represented by counsel gives full meaning both to the FTC Commentary and to the protections afforded by the FDCPA").

mation that a creditor has in its files.[182] This is why a debt collector must inform a consumer of the right to seek verification of the debt. If the creditor's knowledge could be imputed to the collector, verification of the debt would be unnecessary within the context of § 1692g.

The Federal Trade Commission ("FTC") Official Staff Commentary creates some curiosity about the imputation concept by stating that a creditor's knowledge will not automatically be imputed to the debt collector.[183] This leaves the impression that there may be some situations where such imputation will occur, even though not automatically. At least one court has taken the view that the creditor's knowledge should be imputed to the debt collector when the latter does not ask the creditor whether the debtor has a lawyer.[184] The only problem with this approach is that § 1692c(a)(2) contains a "knowledge" requirement[185] rather than a "should be known" requirement like that in § 1692c(a)(1) governing contacts with the debtor at unusual or inconvenient times.[186] It seems reasonable that the "actual knowledge" standard of § 1692c(a)(2) insulates a debt collector from liability if the collector makes no genuine effort to learn the true state of affairs concerning the consumer's legal representation. However, if the drafters wanted to ensure the application of a constructive knowledge test, they would have taken the same approach in § 1692c(a)(2) that they took in § 1692c(a)(1). This strict "knowledge" approach leaves open the possibility that a debt collector will not have any incentive to learn the truth about the consumer or that a creditor will not be enthusiastic about sharing the news of an attorney's involvement.[187] Nevertheless, the fault lies with the statutory language and no amount of wishful thinking can convert the knowledge requirement of § 1692c(a)(2) into a requirement that a debt collector has an affirmative duty to dig deeper for an answer about the consumer's legal representative. Furthermore, unless a principal-agency relationship exists between a creditor and a debt collector, any imputation that normally ensues from such an arrangement is inapplicable. However, even if there is such a relationship, it is the agent's knowledge that is attributable to the principal, and therefore in the ordinary

182. *Randolph*, 368 F.3d at 729.

183. FTC Official Staff Commentary § 805(a)-3, 53 Fed. Reg. at 50,103.

184. *Micare*, 132 F. Supp. 2d at 81.

185. The debt collector may not communicate with the consumer "if the debt collector knows the consumer is represented by an attorney." 15 U.S.C. § 1692c(a)(2).

186. Section 1692c(a)(1) imposes a "known or which should be known" standard. *Id.* § 1692 c(a)(1).

187. *See* Powers v. Professional Credit Servs., Inc. 107 F. Supp. 2d 166, 168 (N.D.N.Y. 2000) (denying defendant's motion to dismiss where creditor had actual notice that plaintiff had an attorney but failed to disclose that fact to the defendant collector); NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.3, at 168 (6th ed. 2008).

course of events, a debt collector cannot be responsible for information which a creditor fails to share.[188]

Section 1692c(a)(2) forbids a debt collector from communicating with a consumer who retained an attorney in connection with the debt that the collector is trying to recover.[189] It is possible, therefore, for a debt collector to know about legal representation in connection with one debt, without knowing about the situation relating to the debt that it is pursuing.[190] Nevertheless, if a consumer notifies a debt collector that a certain attorney represents the consumer for other debts being handled by the debt collector, then the collector will be obligated to deal with that attorney only.[191] Even if a consumer makes a statement about representation in connection with a single debt, a debt collector may suspect that the first attorney continued acting for the consumer in other debt transactions. It is enough to observe, however, that the debt collector's suspicions are not enough to prevent the debt collector from communicating with the consumer because the collector must know of the attorney's role for it to be subject to any statutory restrictions.[192]

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188. *Schmitt*, 398 F. 3d at 997); *Randolph*, 368 F.3d at 729; Gorman v. Wolpoff & Abramson, LLP, 435 F. Supp. 2d 1004, 1011 (C.D. Cal. 2006).

189. A debt collector cannot communicate with a consumer about a debt if the collector knows that the consumer is represented "with respect to such debt." 15 U.S.C. § 1692c(a)(2). Thus, the representation must be for the debt the collector is then trying to recover, and not some other debt. However, if the consumer notifies the debt collector that the attorney represents him on all debts, or on other debts, then the collector must deal only with the attorney on such debts. *See* FTC Official Staff Commentary § 805(a)-3, 53 Fed. Reg. at 50,104.

190. *See* Graziano v. Harrison, 950 F. 2d 107, 113 (3d Cir. 1991) (stating that at the time debt communicated with consumer about two additional debts, collector was not informed that consumer was represented by an attorney with respect to such debts); Dragon v. I.C. Sys., Inc., 483 F. Supp. 2d 198, 204 (D. Conn. 2007) (denying consumer's motion for summary judgment where there was a dispute of material fact whether debt collector tried to collect on a second account while having actual knowledge that it represented the same debt as under consumer's first account, with respect to which collector knew that consumer was represented by counsel); Udell v. Kansas Counselors, Inc. 313 F. Supp. 2d 1135, 1145 (D. Kan. 2004) (stating that there was no evidence that consumers ever informed debt collector that they were represented with respect to new collection accounts).

191. FTC Official Staff Commentary § 805(a)-3, 53 Fed. Reg. at 50,104.

192. The FTC Commentary makes the point that "[a] debt collector who knows a consumer is represented by counsel with respect to a debt is not required to assume similar representation on other debts." FTC Official Staff Commentary § 805(a)-3, 53 Fed. Reg. at 50, 104. In *Berndt v. Fairfield Resorts, Inc.*, the consumers were represented by an attorney with respect to the cancellation of their timeshare agreement, but then a debt collector later sent them a claim for maintenance fees owed to the homeowners' association. The court found that the collector could not be expected to know that the consumers were represented by an attorney once the timeshare matter had been settled, and that therefore the collector did not violate § 1692c(a)(2) by contacting the consumer directly. Berndt v. Fairfield Resorts, Inc., 337 F. Supp. 2d 1120, 1133 (W.D. Wis. 2004).

This scenario can change only if the FDCPA imposes an obligation on the debt collector that goes beyond actual knowledge. A debt collector can use the validation notice under § 1692g to remind the consumer of the opportunity for informing the debt collector that there is an attorney in the picture. It would also be reasonable to forbid communication with the consumer if the debt collector can readily learn about that representation. It is not obvious why the drafters imposed a requirement of actual knowledge of an attorney's existence, but then loosened the standard to prevent communication if the collector has knowledge of, or can readily ascertain, the attorney's name and address.[193] The section should accommodate the "actual knowledge" requirement with respect to legal representation alongside one that approximates the ascertainment standard relating to the attorney's name and address. This new approach would leave the door open to the possibility of recognizing a debt collector's duty to inquire about an attorney's involvement, rather than allowing a debt collector to sit back and enjoy its ignorance in silence.

Noticeably, § 1692c(a)(3) prevents a debt collector from communicating with a consumer at the consumer's place of employment only if the debt collector "knows or has reason to know" that the consumer's employer objects to such communication.[194] This variation in language from that contained in § 1692c(a)(2) only serves to highlight the search for a rationale behind an actual knowledge requirement in § 1692c(a)(2). Perhaps the drafters wanted to encourage a consumer to give details of the consumer's legal representation without waiting for the news to reach the debt collector otherwise. An argument may exist for the urgency in a consumer's disclosure of an attorney's involvement, but even so it is not clear that the FDCPA should devalue the debt collector's reason to know about such an involvement.

Despite the existing statutory restraints, a debt collector may still contact the consumer if the consumer's attorney does not respond to the debt collector's communication within a reasonable time.[195] There is little to commend that general time frame. It merely leads to further speculation about the concept of reasonableness, one that might easily be avoided with the stipulation of a specific period for the attorney's response. Little justification exists for allowing a debt collector to wonder whether the so-called "reasonable" time has expired, for the collector will be anxious to get an answer to its communication.

193. The statute forbids a debt collector's communication with the consumer "if the debt collector knows the consumer is represented by attorney . . . and has knowledge of, or can readily ascertain, such attorney's name and address[.]" 15 U.S.C. § 1692c(a)(2).

194. *Id.* § 1692c(a)(3).

195. The debt collector has the leeway to contact the consumer directly if "the attorney fails to respond within a reasonable period of time . . . ." *Id.* § 1692c(a)(2).

Once the debt collector knows about the consumer's lawyer, one would expect it to terminate its overtures to the consumer. Nevertheless, in *Salsbury v. Trac A Chec, Inc.*,[196] the debt collector's employee justified her call to the consumer after finding out about the consumer's bankruptcy and subsequent legal representation, on the theory that she was "merely trying to be courteous in letting plaintiff know that [the debt collector] would not be calling again."[197] The United States District Court for the Central District of Illinois accepted this explanation on the ground that the employee did not make those telephone calls to the consumer to collect a debt.[198] If the employee was not trying to collect a debt, then the calls were simply a matter of courtesy.[199] However, the debt created the link between the collector and the consumer, and once the collector knew that the consumer's lawyer was in the picture, it should have directed its attention to the lawyer. That is the purpose of § 1692c(a)(2). The section is not intended to give the collector one last shot at the consumer after hearing about the legal representation. The drafters knew full well how to grant that one last clear chance in another context, for the FDCPA allows a debt collector to advise a consumer that it is terminating its collection efforts even after the consumer requests the collector to cease communications.[200] It is in keeping with the statutory objective to read § 1692c(a)(2) as cutting off the debt collector's access to the consumer once the collector knows the facts about the consumer's attorney.

There should be no ambiguity about the nature of that representation. In *McKeown v. Mary Jane M. Elliott P.C.*,[201] the letter from the consumer's attorney to the debt collector indicated that the attorney provided "limited representation" to individuals of limited means and that his objective was to persuade the collector to cease its collec-

196. 365 F. Supp. 2d 939 (C.D. Ill. 2005).

197. Salsbury v. Trac A Check, Inc., 365 F. Supp. 2d 939, 940 (C.D. Ill. 2005).

198. *Salsbury*, 365 F. Supp. 2d. at 941.

199. This was precisely the position taken by the debt collector. *Id.* Before the collector called the consumer, it closed the account, thus giving support to the idea that any post-closing call to the consumer was not related to any attempt to collect the debt. The caller stated in her affidavit that she did not even mention the debt. *Id.* at 940. The court found the facts in the *Salsbury* case analogous to the facts in Bailey v. Security Nat'l Serv. Corp., 154 F.3d 384 (7th Cir. 1998). However, in *Bailey* the mortgage servicer's letter to the consumer was merely trying to emphasize the importance of the existing forbearance agreement between the parties, which if not kept would lead to acceleration of the debt. *Bailey*, 154 F.3d 384, 386 (7th Cir. 1998). In *Salsbury*, the consumer had already defaulted and the debt collector had actively pursued the consumer up until the time its employee called the consumer's home. *Salsbury*, 365 F. Supp. 2d at 940.

200. 15 U.S.C. § 1692c(c)(1).

201. No. 07-12016-BC, 2007 WL 4326825 (E.D. Mich. Dec. 10, 2007).

tion activities.[202] The United States District Court for the Eastern District of Michigan observed that the attorney did not state in plain and unequivocal terms that he represented the consumers with respect to the debt in contention.[203] The phrase "limited representation" concerned the court. It left doubts in the court's mind about the nature and scope of that representation, especially when the attorney could not get an adequate response to his telephone calls.[204] Had the attorney followed his normal practice of sending a power of attorney and the client agreement to the debt collector, he might have thrown some light on the nature of the attorney-client relationship in this case. In the absence of those documents, the court was left to wonder whether the debt collector knew that the attorney truly represented the consumers with respect to such debt.

IV. NOTIFICATION TO CEASE COMMUNICATION

THE NATURE OF THE DIRECTIVE

A consumer can stop the debt collector in its tracks by requesting the collector not to contact her anymore.[205] This is a handy device for the consumer, particularly if the consumer doubts the validity of the debt or seeks relief from the collector's pursuit. Putting an end to the collector's contact does not necessarily resolve the collection matter, but it allows the consumer to marshal her forces in the interim, while the debt collector contemplates its next course of action. The impact of a cessation order can hardly be doubted, but it is not clear why a consumer's notice to the debt collector must be in writing. If the consumer gives an oral notice to the debt collector that the consumer wants no further contact and the collector obliges, then the consumer has achieved her objective. If the collector fails to comply with the oral request, the consumer still has a chance to put it in writing and nothing has been lost. But if the consumer is unable, for whatever

202. McKeown v. Mary Jane M. Elliott P.C., No. 07-12016-BC, 2007 WL 4326825, at *1 (E.D. Mich. Dec. 10, 2007).

203. *McKeown*, 2007 WL 4326825, at *6.

204. *Id.* The consumers had to demonstrate that the defendant had actual knowledge that the lawyer represented them "with respect to such debt." *Id.* The representation letters were ambiguous and did not indicate the scope of representation. *Id.* The ambiguous nature of the "limited representation" reference put the debt collector in an uncomfortable position, because the collector ran the risk of violating other statutory provisions limiting contacts to the consumer or his attorney. *See* 15 U.S.C. § 1692c(b)(2006). If the defendant was wrong about the representation, there would be liability. This points out the difference between actual knowledge and constructive knowledge.

205. Except in three limited situations, a debt collector must cease further communication if the consumer notifies the debt collector in writing that he wants the collector to stop communicating with him. 15 U.S.C. § 1692c(c)(2006).

reason, to submit a written request to the debt collector, the consumer loses the benefit of this important provision.[206]

Section 1692c(c) provides for three exceptions to the consumer's right to stop further communication from the debt collector. The first exception allows a debt collector to inform the consumer one last time that it is terminating its collection efforts.[207] This exception only serves to weaken the consumer's authority to put an end to the collector's demands, and also provides an excuse for the debt collector to take one last shot at its target. With respect to the other two exceptions relating to remedies, it is questionable whether both are needed. If the drafters thought it necessary for a debt collector to have an opportunity to inform the consumer that it may invoke certain remedies following the consumer's directive to cease communication, they should have limited the exception to the language contained in subsection (c)(3), which indicates that the debt collector intends to invoke a specified remedy.[208]

By giving a debt collector the option of disclosing to the consumer that it may invoke certain remedies which it ordinarily invokes,[209] subsection (c)(2) exposes the consumer to empty threats, a device that is calculated to create a climate of fear for the consumer. The debt collector does not have to say what it will do, but rather what it may do. Having already given the collector short shrift, the consumer now wonders about the possibilities inherent in the collector's last stand. Rather than putting an end to things, this last communication allows the collector to unsettle the consumer one more time. The section was hardly intended to do that.

V. CONCLUSION

The validation section has caused more problems than anticipated. Disagreement may exist about whether Congress made a mis-

206. The writing requirement in § 1692c(c) must be contrasted with the lack of a writing requirement in section 1692g(a)(3), which allows the consumer's oral dispute to upset the collector's assumption about the validity of the debt. More importantly, section 1692g(a) apparently allows a debt collector to give the validation notice orally in the collector's initial communication with the consumer. 15 U.S.C. § 1692g (2006). One might reach this conclusion on the basis of the definition of the term "'communication'" as "the conveying of information regarding a debt . . . through any medium." 15 U.S.C. § 1692a(2) (2006).

207. 15 U.S.C. § 1692c(c)(1).

208. *Id.* § 1692c(c)(3).

209. Under subsection (c)(2) the debt collector may notify the consumer that it *may* invoke specified remedies, whereas under subsection (c)(3) it may notify the consumer that it *intends* to invoke a specified remedy. One wonders about the need for both subsections. The use of the word "may" in subsection (c)(2) leaves the consumer in doubt about the debt collector's next move. At least subsection (c)(3) gives some notion about the debt collector's intentions.

take with the present formulation or whether debt collectors are to blame for their unwillingness to accommodate a consumer's right to dispute the debt without simultaneously employing intimidation language to obtain payment. While there is ample room for improving the tone of many collection letters, Congress must bear some blame for creating a situation in § 1692g that pits the debt collector against the consumer to see who will win the thirty-day battle.[210] The section provides the framework for an immediate call to arms, and while the dutiful collector usually advises the consumer of the thirty days to dispute the debt, it also bends over backwards to make its point that its attack will continue unabated, with success contemplated perhaps within a period that is shorter than the dispute period. As long as the present language promotes this struggle between obviously competing interests, there will always be complaints about contradiction and overshadowing because the collector will do its utmost to ensure that its demand for payment will have a greater impact on the consumer than the statutory right to dispute the debt.

A reduction in tension between the two camps might result if there was a grace period during which the debt collector could provide the validation notice in its initial communication without making any demands.[211] No opportunity would exist during such a period for the collector to convey competing messages. Even in the absence of such a grace period, debt collectors should inform consumers in the validation notice that if a consumer disputes the debt in writing, the debt

210. Disputes frequently arise over when the thirty-day dispute period begins or ends, or whether the collector's demands contradict or overshadow the consumer's right to dispute the debt. *See, e.g.*, Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85, 95 (2d Cir. 2008) (finding that collection letter created uncertainty about when thirty-day dispute period ended); Sims v. GC Servs. L.P., 445 F. 3d 959, 965 (7th Cir. 2006) (stating that validation notice was not confusing or contradictory); Savino v. Computer Credit, Inc., 164 F.3d 81, 85-86 (2d Cir. 1998) (concluding that debt collector's demand for immediate payment without explaining that demand did not override consumer's dispute rights violated § 1692g); Miller v. Payco-General American Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991) (finding that collection letter both contradicted and overshadowed validation notice).

211. The courts have agreed that the present statutory language does not provide a grace period. *See* Durkin v. Equifax Check Servs., 406 F.3d 410, 416 (7th Cir. 2005) (observing that "the debtor's right to dispute coexists with the debt collector's right to collect."); Foti v. NCO Financial Sys., Inc., 424 F. Supp. 2d 643, 660 (noting that validation period is not grace period). Nevertheless, in *Jenkins v. Union Corp.*, the debt collector was able to avoid liability when it sent a follow-up letter to the consumer that announced "IMPERATIVE – Grace period about to expire." Jenkins v. Union Corp., 999 F. Supp. 1120, 1133 (N.D. Ill. 1999). The collector was referring there to the dispute period, but the court did not find confusing the reference to a grace period. *Jenkins*, 999 F Supp. at 1133.

The FTC has given an advisory opinion that the thirty-day dispute period is not a grace period. *See* Mezines, FTC Advisory Opinion (March 31, 2000), *available at* http://www.ftc.gov/os/2000/04/fdcpaadvisoryopinion.htm).

collector will stop its collection efforts until it verifies the debt.[212] Furthermore, a debt collector should also be required to inform the consumer that the consumer can demand that the debt collector make no further contact.[213] If the debt collector's validation notice highlights these points, the consumer can avoid a scenario which allows the collector to dramatize the urgency of its demands, while allowing the consumer to reflect on the dispute mechanism that is available.

While Congress is at it, it should make a verification of the debt more meaningful by requiring the collector to conduct some reasonable investigation of the consumer's dispute. This standard would clarify that it is not enough for a collector merely to ask the creditor whether the debt is valid, and then pass on that confirmation to the consumer.[214] This new standard for verification would give true meaning to the validation language, particularly when the consumer knows that the collector must dig deeper for an answer to the consumer's query.

With respect to communication, the FDCPA contemplates that a debt collector will not overlook the consumer's right to privacy. Nevertheless, a debt collector that is unable to contact a consumer directly will inevitably leave a message on a recording machine inviting a return call. The collector's frustration obviously will lead to the use of the voicemail option, but then the debt collector will have to assume the risk that some third party will hear its message. A collector should therefore weigh the possibility of third-party accessibility, since it is not relieved of its responsibility to make the required disclo-

212. The debt collector has the obligation to suspend its collection activities once the consumer disputes the debt in writing, but the collector does not have to inform the consumer that this will happen. 15 U.S.C. § 1692g(b) (2009); NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.7.3.4, at 320 (6th ed. 2008). Nevertheless, the model letter provided by the court in *Bartlett v. Heibl*, did include language notifying the consumer of the debt collector's obligation to suspend collection activities. Bartlett v. Heibl, 128 F.3d 497, 502 (7th Cir. 1997).

213. This would be a step in the right direction because "the right is not obvious to a consumer." NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.3.8.2, at 182 (6th ed. 2008).

214. In *Chaundry v. Gallerizzo*, the court indicated that "verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed." Chaundry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999). The Ninth Circuit agreed with this approach in Clark v. Capital Credit & Collection Servs., Inc., 460 F. 3d 1162, 1173-74 (9th Cir. 2006). When Congress was considering bills preceding enactment of the FDCPA, it used the word "certification" instead of "verification." *See Hearings, supra* note 1, at 703. This suggests that Congress wanted to elevate the standard to the consumer's advantage. *See* NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.7.3.3, at 314 (6th ed. 2008). Under Regulation Z, a creditor may determine after a "reasonable investigation" that a billing error has not occurred despite the consumer's claim. 12 C.F.R. § 226.13(f)(2009). This language gives a clue that in this context, a creditor must do more than a perfunctory assessment of the consumer's claim.

sures of its identity[215] and to give the mandated warning under the statute.[216]

If an attorney represents a consumer, a debt collector is prevented from contacting the consumer only if the collector knows about the representation.[217] This language suggests that the debt collector must have actual knowledge of the situation.[218] One wonders whether any good ground exists for ignoring the context where the debt collector has reason to know the facts. That is certainly a possibility, particularly where the collector has recently dealt with the consumer on other debts. Under those circumstances, it would be reasonable for a debt collector to ask a question or two. The collector would surely save time by going directly to the attorney and the consumer would be spared the hassle of dealing with the collector's overtures.

Finally, the consumer's right to issue a cease communication order to the collector should not be diluted by allowing the collector to make one last contact with news about the remedies that the collector is contemplating or about the fact that the collector is terminating its collection efforts.[219] Even if a last contact can be tolerated, it should be limited to the collector's intention to invoke a specified remedy. This would ensure that the debt collector does not make threats that it does not intend to carry out.[220] Limiting a last contact to this event is more desirable than allowing the collector to notify the consumer under section 1692c(c)(2) that it *may* invoke specified remedies. That option leaves the consumer wondering about the possibilities, while intending to sever connection with the pursuing collector.

215. The statute makes it a violation to place telephone calls in connection with the collection of a debt without meaningful disclosure of the caller's identity. 15 U.S.C. § 1692d(6)(2006).

216. 15 U.S.C.§ 1692e(11) (2006).

217. *Id.* § 1692c(a)(2).

218. Schmitt v. FMA Alliance, 398 F.3d 995, 996 (8th Cir. 2005); Randolph v. IMBS, Inc., 368 F.3d 726, 729 (7th Cir. 2004); Graziano v. Harrison, 950 F. 2d 107, 113 (3d Cir. 1991); Offril v. J.C. Penny Co., No. C08-5050 PJH, 2009 WL 69344, at *3 (N.D. Cal. Jan. 9, 2009); *In re* Carroll, 400 B.R. 497, 502 (Bankr. N.D.W.Va. 2008); Dragon v. I.C. Sys., Inc., 483 F. Supp. 2d 198, 204 (D. Conn. 2007).

219. The statute allows a consumer to stop a collector's communications by notifying the debt collector in writing that he wants no further contact. 15 U.S.C. § 1692c(c). The question is whether any post-notification contact by the debt collector should be allowed.

220. Under section 1692c(a)(2), the debt collector has the option to notify the consumer that it *may* invoke specified remedies. 15 U.S.C. § 1692c(a)(2) (emphasis added). This leaves the door wide open for the collector to issue one more threat.