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The Search for Meaning in the Notice Requirements of the Fair Debt Collection Practices Act: A 30 for 30 Short

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THE SEARCH FOR MEANING IN THE NOTICE REQUIREMENTS OF THE FAIR DEBT COLLECTION PRACTICES ACT: A 30 FOR 30 SHORT

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> Debt collectors generate more complaints to the FTC than any other industry. Although many debt collectors are careful to comply with consumer protection laws, others engage in illegal conduct. Some collectors harass and threaten consumers, demand larger payments than the law allows, refuse to verify disputed debts, and disclose debts to consumers' employers, co-workers, family members, and friends. Debt collection abuses cause harms that financially vulnerable consumers can ill afford. Many consumers pay collectors money they do not owe and fall deeper into debt, while others suffer invasions of their privacy, job loss, and domestic instability.[1]

I. INTRODUCTION

The first place to look for answers to what is or is not permitted when dealing with a debt collector is the Fair Debt Collection Practices Act (FDCPA or the Act). The basic provisions of the law fall into three broadly defined categories—prohibitions, required disclosures, and civil liability.[2] Prohibited conduct includes: (1) communication with the consumer at any unusual or inconvenient time or place[3] and, with a few exceptions, communications with third parties;[4] (2) "conduct the natural consequence of which is to harass, oppress, or abuse[;]"[5] (3) the use of

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[1] *Debt Collection: Federal Trade Commission Protecting America's Consumers*, FTC.GOV, http://www.ftc.gov/news-events/media-resources/consumer-finance/debt-collection (last visited Oct. 20, 2014).

[2] *See* Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012).

[3] § 1692c(a)(1).

[4] § 1692c(b).

[5] § 1692d.

"any false, deceptive, or misleading representation[;]"[6] (4) the use of unfair and unconscionable means to collect any debt;[7] and, (5) furnishing deceptive forms.[8] The prohibitions against harassment or abuse, false or misleading representations, and unfair practices are illustrated by lists of per se violations.[9] These lists are intended only as examples of prohibited conduct and are not all-inclusive.[10]

Couched in the broadest possible language, the civil liability provision of the law provides: "Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . . ."[11]

As a consequence of the phrase "any person," the civil liability provision has been construed to provide standing to enforce the provisions of the FDCPA to debtors and non-debtors, in addition to consumers.[12] However, the standing inquiry turns upon the section of the law allegedly violated.[13] For example, § 1692e states, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[14] When read in conjunction with the civil liability provision, § 1692e has been construed to mean "any aggrieved party may bring an action under § 1692e."[15]

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[6] § 1692e.

[7] § 1692f.

[8] § 1692j.

[9] §§ 1692d–1692f.

[10] *Id.* In each of these sections the Code expressly provides that: "Without limiting the general application of the foregoing, the following conduct is a violation of this section . . . ." *See also* Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993); McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 763 (7th Cir. 2006).

[11] § 1692k(a).

[12] *See* Beck v. Maximus, Inc., 457 F.3d 291, 294 (3d Cir. 2006).

[13] Barasch v. Estate Info. Servs., No. 07-CV-1963, 2009 U.S. Dist. LEXIS 79338, at *5, (E.D.N.Y. Sept. 3, 2009).

[14] § 1692e.

[15] Wright v. Fin. Serv. of Norwalk, Inc., 22 F.3d 647, 649–50 (6th Cir. 1994). For purposes of a § 1692e claim, standing has been construed to include persons who have been harmed by an improper debt collection practice, someone standing in the alleged debtor's shoes, or someone who has suffered injurious exposure to the communication. *See* Dutton v. Wolhar, 809 F. Supp. 1130, 1134 (D.Del. 1992); Sibersky v. Goldstein, 155 F. App'x 10, 11 (2d Cir. 2005); Guillory v. WFS Fin., Inc., No. C 06-06963, 2007 U.S. Dist. LEXIS 24910, at *6 (N.D. Cal. Mar. 21, 2007).

Despite the broad language of the civil liability provision, "only a consumer has standing to sue under particular sections of the FDCPA that specifically regulate communications with the consumer."[16] Section 1692g is such a provision.[17] Successful litigants who sue to enforce the FDCPA's provisions may recover actual damages, statutory damages, and attorney fees.[18]

The FDCPA applies to the collection of personal, family, or household debts only.[19] The Act's protections to consumers are contingent upon the Act's definition of the terms "communication,"[20] "consumer,"[21] "creditor,"[22] "debt,"[23] and "debt collector."[24] The FDCPA's protective power primarily emphasizes communication between a debt collector and

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[16] *Barasch*, 2009 U.S. Dist. LEXIS 79338, at *5 (citations omitted) (internal quotation marks omitted). Several sections of the FDCPA, including § 1692g, restrict the scope of the FDCPA's application by including the word "consumer" in the text. *See, e.g.*, Crafton v. Law Firm of Jonathan Levine, 957 F. Supp. 2d 992, 1001 (E.D. Wis. 2013); Tedeschi v. Kason Credit Corp., No. 3:10CV00612, 2014 U.S. Dist. LEXIS 51806, at *8 (D. Conn. Apr. 15, 2014).

[17] § 1692g(a). *See also Crafton*, 957 F. Supp. 2d at 1001.

[18] § 1692k(a)(1)–(3).

[19] § 1692a(5).

[20] "The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium." § 1692a(2).

[21] "The term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." § 1692a(3).

[22] § 1692a(4) ("The term 'creditor' means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.").

[23] § 1692a(5) ("The term 'debt' means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.").

[24] § 1692a(6) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.") The term does not include persons expressly excluded from the definition of "debt collector" in the Act. *See* § 1692a(6)(A)–(F).

consumer. Consequently, a court must determine whether a communication between a debt collector and consumer has occurred before imposing liability under the FDCPA.[25]

The FDCPA establishes certain rights for consumers whose debts are placed in the hands of professional debt collectors for collection. It is largely a strict liability statute.[26] Thus, debt collectors are liable regardless of whether the violation was knowing or intentional.[27] Because the FDCPA is a strict liability statute, proof of one violation is sufficient to support judgment in favor of the plaintiff.[28]

The FDCPA focuses on collection methods and not whether the underlying debt is valid.[29] Consequently, the plaintiff has standing to sue under the FDCPA regardless of whether a valid debt exists.[30] "A basic tenet of the [FDCPA]" is that every consumer, even one who mismanages his or her personal finances by defaulting on his or her debts, is entitled "to be treated in a reasonable and civil manner."[31] Thus, a plaintiff who

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[25] The FDCPA does not apply to creditors seeking to collect their own debts. *See* Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003); F.T.C. v. Check Investors, Inc., 502 F.3d 159, 171 (3d Cir. 2007); Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 235 (2d Cir. 1998). However, a creditor, seeking to collect its own debt, becomes subject to the Act if it uses a name other than its own which would indicate that a third party is collecting or seeking to collect such debt. *See* Bridge v. Ocwen Fed. Bank, FSB, 681 F.3d 355, 360 (6th Cir. 2012); *Maguire*, 147 F.3d at 235. "A creditor uses a name other than its own when it uses a name that implies that a third party is involved in collecting its debts, 'pretends to be someone else' or 'uses a pseudonym or alias.'" *Macguire*, 147 F.3d at 235. A creditor is not required to use its full business name or its name of incorporation when collecting its own debts. *Id.* Commonly used acronyms, the name under which it ordinarily transacts business, or any name that it has used from the inception of the credit relation are sufficient to exempt creditors from the application of the FDCPA. *Id.*

[26] *See* Reichert v. Nat'l Credit Sys., Inc., 531 F.3d 1002, 1004 (9th Cir. 2008); Owen v. I.C. Sys., Inc., 629 F.3d 1263, 1271 (11th Cir. 2011).

[27] *See Reichert*, 531 F.3d at 1005; *Owen*, 629 F.3d at 1270.

[28] *Macarz v. Transworld Sys. Inc.*, 26 F. Supp. 2d 368, 373 (D. Conn. 1998); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

[29] Senftle v. Landau, 390 F. Supp. 2d 463, 464, 470 (D. Md. 2005).

[30] Baker v. G. C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982).

[31] McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 762 n. 10 (7th Cir. 2006) (quoting Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1324 (7th Cir. 1997)) (internal quotation marks omitted).

"owes a legitimate debt has standing to sue [under the FDCPA] if the Act is violated by an [unscrupulous] debt collector."[32]

This Article examines 15 U.S.C. § 1692g and its requirement that debt collectors provide consumers certain specified information when attempting to collect debts.[33] Part II sets the stage for this examination by providing a general overview of the nature, character, and content of the FDCPA.[34] Thereafter, Part II(A) discusses the mandate that debt collectors provide the information specified in § 1692g.[35] It also explains the objective of § 1692g and the intent that the information serves consumers.[36] Part II(B) explores each subsection of § 1692g individually.[37] It examines decisional law explaining the manner, content, and context in which the specified information must be conveyed to consumers.[38] Part II(C) identifies the two ways the FDCPA can be violated and discusses the least sophisticated consumer legal standard involved in one of the violations.[39] This section also discusses the proof requirement under this standard.[40] Finally, this Article expressly ends where it implicitly began: consumers only have one recourse if they are to protect themselves from overzealous debt collectors—to know their rights and to demand accountability.[41]

II. ANALYSIS

A. The Information Required To Be Communicated

In addition to the prohibitions against "false, deceptive, or misleading representation[s]" and "conduct the natural consequence of which is to harass, oppress, or abuse,"[42] the Act affords consumers with specified rights to information about the alleged debt. The right to verify or validate

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[32] Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1208, 1212 (10th Cir. 2006) (quoting Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 307 (2d Cir. 2003) (internal quotation marks omitted)).

[33] *See infra* Part II.A.

[34] *See infra* Part II.A.

[35] *See infra* Part II.A.

[36] *See infra* Part II.A.

[37] *See infra* Part II.B.

[38] *See infra* Part II.B.

[39] *See infra* Part II.C.

[40] *See infra* Part II.C.

[41] *See infra* Part III.

[42] §§ 1692d–1692e (2012).

the existence of the debt is chief among these rights.[43] Not all communications from a debt collector to a consumer need to be in writing.[44] However, unless the required information is provided in the initial communication or the consumer has paid the debt, 15 U.S.C. § 1692g requires a debt collector to send a written communication informing the consumer of his or her right to dispute and obtain specific information regarding the alleged debt.[45] The debt collector typically sends this communication in the form of a collection letter.

Section 1692g "is aimed at preventing collection efforts based on mistaken information."[46] It is a strict liability provision and is violated whenever a debt collector fails to provide the required notice, regardless of whether the lack of disclosure was egregious or caused any actual harm.[47] Section 1692g restricts the scope of the FDCPA's application by including the word "consumer" in the text.[48] According to the Act:

> 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—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector

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[43] § 1692g(a).

[44] § 1692a(2).

[45] § 1692g(a).

[46] Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 537 (7th Cir. 2003).

[47] *See* Russell v. Equifax A.R.S., 74 F.3d 30, 33, 35–36 (2d Cir. 1996).

[48] *See* § 1692g. The FDCPA defines "consumer" as "any natural person obligated or allegedly obligated to pay any debt." § 1692a(3).

> 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 the 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.[49]

The initial written communication must also disclose that the "debt collector is attempting to collect a debt and that any information obtained will be used for that purpose."[50]

Congress's use of the term "shall" unambiguously manifests the mandatory nature of the provision's notice requirement, at least as the U.S. Supreme Court has established in other contexts.[51] In fact, every circuit court of appeals to address the issue of whether or not the information required by § 1692g is collectively mandatory has answered in the affirmative.[52] The information required by § 1692g is required "regardless of whether validation notice is needed or not."[53] Thus, even if the consumer already knows or has access to the information, it still must be provided in the collection letter.

The FDCPA does not assume that a consumer who receives a collection letter is aware of her rights.[54] "Instead, the Act requires the debt collector, as the party in the better position to know the law, to inform the consumer of that right."[55] The validation notice guarantees that the consumer receives the information necessary to challenge the alleged debt before making payments to the independent collection agency.[56]

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[49] § 1692g(a)(1)–(5).

[50] § 1692e(11).

[51] *See, e.g.*, United States v. Monsanto, 491 U.S. 600, 607 (1989); Pierce v. Underwood, 487 U.S. 552, 569–70 (1988).

[52] *See* Jacobson v. Healthcare Fin. Servs., Inc. 516 F.3d 85, 90 (2d Cir. 2008); Frey v. Gangwish, 970 F.2d 1516, 1518–19 (6th Cir. 1992); McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 758 (7th Cir. 2006); Riggs v. Prober & Raphael, 681 F.3d 1097, 1099–1100 (9th Cir. 2012); Ferree v. Marianos, No. 97-6061, 1997 U.S. App. LEXIS 30361, at *6 (10th Cir. Nov. 3, 1997).

[53] *Frey*, 970 F.2d at 1519.

[54] *Jacobson*, 516 F.3d at 90.

[55] *Id.*

[56] Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996).

Section 1692g only requires a debt collector to send the consumer a written notice containing the required information.[57] It does not require the debt collector to verify actual receipt of the notice by the consumer.[58] However, because the objective of § 1692g is to inform consumers of their rights,[59] merely sending the notice to any address without knowing if it is valid or if it belongs to the consumer might frustrate the purpose of the statute and result in an "abusive debt collection practice."[60]

B. Failure to Provide the Required Information

A debt collector can violate § 1692g in two ways.[61] First, failing to provide the information required by the statute constitutes a violation.[62] The second violation occurs when other language in the collection letter contradicts or overshadows the statutorily mandated language.[63]

1. Subsection (a)(1): Amount of Debt

Section 1692g(a)(1) requires that the debt collector send the amount of the debt to the consumer in a written notice, "unless [that] information is contained in the initial communication or the consumer has already paid the debt."[64] Courts have held that a notice is inadequate if it does not indicate that the amount due reflects the current balance, and interest may

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[57] *See* § 1692g(a). *See also* Bartlett v. Heibl, 128 F.3d 497, 498 (7th Cir. 1997); Mahon v. Credit Bureau of Placer Cnty., Inc., 171 F.3d 1197, 1201 (9th Cir. 1999).

[58] *See Mahon*, 171 F.3d at 1201. It is unsettled whether "send" implies receipt by the debtor or simply mailing by the debt collector. *Compare* Maloy v. Phillips, 64 F.3d 607, 608 (11th Cir. 1995) (the statute of limitations for an FDCPA violation begins running as of the date the collection letter is mailed), *with* Bates v. C&S Adjusters, Inc., 980 F.2d 865, 868 (2d Cir. 1992) (an FDCPA violation does not occur until the debtor's receipt of the collection notice).

[59] *See* Kim v. Gordon, No. CV 10-1086, 2011 U.S. Dist. LEXIS 85353, at * 8 (D. Or. Aug. 1, 2011); Laprade v. Abramson, No. 97-10, 1997 U.S. Dist. LEXIS 9009, at * 13 (D.D.C. June 19, 1997).

[60] Campbell v. Credit Bureau Sys., Inc., No. 08-CV-177, 2009 U.S. Dist. LEXIS 5762, at *32 (E.D. Ky. Jan. 27, 2009).

[61] *See* DeSantis v. Computer Credit, Inc., 269 F.3d 159, 161 (2d Cir. 2001); McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 758 (7th Cir. 2006).

[62] *See DeSantis*, 269 F.3d at 161; *McMillan*, 455 F.3d at 758.

[63] *See DeSantis*, F.3d at 161; *McMillan*, 455 F.3d at 758.

[64] 15 U.S.C. § 1692g(a)(1) (2012).

be added to the total.[65] "[O]ther courts have held that a [collection letter] satisfies the statute if it states the total amount of the debt (including interest and any other charges) as of the date the letter is sent."[66]

In *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*,[67] the court created a "safe harbor" formula for compliance with § 1692g(a)(1).[68] The collection letter in *Miller* said that the "'unpaid *principal* balance' of the loan was $178,844.65, but added that 'this amount does not include accrued but unpaid interest, unpaid late charges, escrow advances or other charges for preservation and protection of the lender's interest in the property, as authorized by your loan agreement.'"[69] It also provided "[t]he amount to reinstate or pay off your loan changes daily. You may call our office for complete reinstatement and payoff figures."[70] An 800 number was also provided.[71]

According to the court in *Miller*, this information did not satisfy the requirements of subsection (a)(1) because "[t]he unpaid principal balance is not the debt; it is only a part of the debt; the Act requires statement of the debt."[72] In a case where the amount due varies daily, the *Miller* court would accept this type of statement:

> As of the date of this letter, you owe $__ [the exact amount due]. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call 1–800– [phone number].[73]

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[65] Carr v. Northland Grp., No. 3:12-CV-378, 2012 U.S. Dist. LEXIS 174930, at *10 (E.D. Tenn. Dec. 11, 2012) (quoting King v. Alliance Receivables Mgmt., Inc., No. 2:12-CV-314, 2012 U.S. Dist. LEXIS 14428, at *4 (E.D. Tenn. Oct. 5, 2012) (internal quotation marks omitted)).

[66] *Id.* at 10–11.

[67] 214 F.3d 872 (7th Cir. 2000).

[68] *Id.* at 876.

[69] *Id.* at 875.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 876.

So long as the information provided in this statement is clear and accurate, the debt collector will not violate the "amount of the debt" provision.[74]

2. Subsection (a)(2): Name of the Creditor and Least Sophisticated Consumer

Pursuant to 15 U.S.C. § 1692g(a)(2), "[w]ithin five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall . . . send the consumer a written notice containing . . . (2) the name of the creditor to whom the debt is owed."[75] "Limited case law exists regarding violations of § 1692g(a)(2) for a debt collector's failure to identify the creditor's name in a communication with the consumer."[76] It has also been suggested that the language of § 1692g(a)(2) has not been strictly applied.[77] Nevertheless, the statute requires the collector to provide this information, so a plaintiff is not required to demonstrate that it is material to the communication.[78]

§ 1692g(a)(2) claims are generally analyzed from the perspective of the least sophisticated consumer.[79] Pursuant to the least sophisticated consumer standard, § 1692g(a)(2) has been violated when the least sophisticated consumer would not deduce from reading the collection letter that the name of the creditor seeking collection is the creditor to whom the debt is owed.[80]

Courts have struggled to consistently determine whether § 1692g(a)(2) has been violated in the context of home mortgage loans. For example, in *Olson v. Wilford, Geske, & Cook, P.A.*,[81] the defendant, who was a law firm, sent the plaintiffs a form collection letter that provided, in pertinent part:

> Our office has been retained by Bank of America, N.A. and The Bank of New York Mellon fka The Bank of New

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[74] *Id.*

[75] 15 U.S.C. § 1692g(a)(2) (2012).

[76] Devito v. Zucker, Goldberg & Ackerman, LLC, 908 F. Supp. 2d 564, 569 (D.N.J. 2012).

[77] *Id.*

[78] Lee v. Forster & Garbus, LLP, 926 F. Supp. 2d 482, 488 (E.D.N.Y. 2013).

[79] *See, e.g.*, *Devito*, 908 F. Supp. 2d at 568–69; Sparkman v. Zwicker & Assocs., P.C., 374 F. Supp. 2d 293, 300 (E.D.N.Y. 2005).

[80] *Sparkman*, 374 F. Supp. 2d at 300–01.

[81] No. 12-1895, 2013 U.S. Dist. LEXIS 17365 (D. Minn. Feb. 7, 2013).

> York, as Trustee, for The Benefit of the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-33CB Mortgage Pass-Through Certificate, Series 2005-33CB, which is the creditor, or the servicer for the creditor, to which your mortgage debt is owed. Your loan is in default under the terms of your mortgage dated April 28, 2005, and the creditor has referred this matter to our office to commence foreclosure proceedings . . . .[82]

The plaintiffs claimed the letter violated § 1692g(a)(2) because it did not identify the creditor as required by the section.[83] According to the plaintiffs, the letter stated that Wilford had "been retained by two different banks[,] . . . that one or both banks is the trustee [for the Certificate holder] and that one of these entities is either 'the creditor, or servicer for the creditor, to which your mortgage debt is owed.'"[84] While acknowledging that the letter was poorly drafted, the court in *Olson* found that the letter identified "both entities as 'the creditor, or the servicer for the creditor,'" and thus, "in fact contain[ed] the name of the creditor to whom the debt [was] owed."[85] Consequently, it concluded that the letter did not violate subsection (a)(2).[86]

In *Zapp v. Trott & Trott, P.C.*,[87] the court addressed the exact same issue as in *Olson* and reached a contrary decision.[88] In *Zapp*, the plaintiff received a letter from Trott & Trott that provided, in relevant part: "This office represents CitiMortgage, Inc., which is the creditor to which your mortgage debt is owed or the loan servicer for the creditor to which the mortgage debt is owed."[89]

Plaintiff alleged that the letter violated the FDCPA because it failed to identify her creditor as required by § 1692g(a)(2).[90] Defendant cited "*Olson v. Wilford, Geske & Cook* . . . for the proposition that the same language at issue here—'the creditor to which your mortgage debt is owed or the loan servicer for the creditor to which the mortgage debt is owed'—

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[82] *Id.* at *1–2.

[83] *Id.* at *3–4.

[84] *Id.* at *8 (quoting Complaint at 2, *Olson*, 2013 U.S. Dist. LEXIS 17365).

[85] *Id.* at *8–9.

[86] *Id.* at *9.

[87] No. 13-12998, 2013 U.S. Dist. LEXIS 176511 (E.D. Mich. Dec. 17, 2013).

[88] *Id.* at *2, *6.

[89] *Id.* at *1 (quoting Complaint at 14, *Zapp*, 2013 U.S. Dist. LEXIS 176511).

[90] *Id.* at *2.

is not violative the FDCPA."[91] The court in *Zapp* distinguished *Olson* on the basis that "[t]he *Olson* court's interpretation—that a collection letter must simply 'contain' the name of the creditor—is contrary to the 'least sophisticated consumer' standard and to other cases requiring that the information be clearly and effectively conveyed."[92] Thus, the court concluded that plaintiff had stated a claim for a violation of § 1692g(a)(2) because the least sophisticated consumer could be confused by the manner in which the required information was provided.[93]

While the *Olson* and *Zapp* holdings seem to be in conflict, the cases can be harmonized on the basis of the underlying legal theory. The court in *Olson* viewed the underlying legal theory as the failure to provide the required information,[94] while the court in *Zapp* analyzed the case from the perspective of a failure to provide the required information in a clear and effective manner.[95] The least sophisticated consumer standard tends to be accorded significantly greater weight, due to its fact-sensitive nature.

3. Subsection (a)(3): Right to Dispute Validity of Debt

"Paragraphs 3 through 5 of section 1692g(a) contain the validation notice—the statements that inform the consumer how to obtain verification of the debt and that he has thirty days in which to do so."[96] Subsection (a)(3) requires debt collectors to inform consumers of their right to dispute the validity of the debt or any portion thereof within thirty days after receipt of the notice, not within thirty days of the date of the letter.[97] The

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[91] *Id.* at *5–6 (quoting Complaint at 14, *Zapp*, 2013 U.S. Dist. LEXIS 176511).

[92] *Id.* at *6.

[93] *Id.* at *6. The FDCPA does not apply to mortgage servicers as long as the debt was not in default at the time it was assigned. 15 U.S.C. § 1692a(6)(F)(iii) (2012). Determining which definition, "debt collector" or "mortgage servicer," applies depends on the status of the debt at the time it was acquired, which is governed by § 1692a(6)(F)(iii). *See, e.g.*, Pascal v. JP Morgan Chase Bank, N.A., 2013 U.S. Dist. Lexis 33350, at *10–12 (S.D.N.Y. Mar. 11, 2013).

[94] Olson v. Wilford, Geske, & Cook, P.A., No. 12-1895, 2013 U.S. Dist. LEXIS 17365, at *9 (D. Minn. Feb. 8, 2013).

[95] Zapp v. Trott & Trott, P.C., No. 13-12998, 2013 U.S. Dist. LEXIS 176511, at *6 (E.D. Mich. Dec. 17, 2013).

[96] Wilson v. Quadramed Corp., 225 F.3d 350, 353–54 (3d Cir. 2000).

[97] *See* § 1692g(a)(3). *See also* Edstrom v. All Servs. and Processing, No. C04-1514, 2005 U.S. Dist. LEXIS 2773, at *7 (N.D. Cal. Feb. 22, 2005); Cavallaro v. Law Office of Shapiro & Kreisman, 933 F. Supp. 1148, 1154 (E.D.N.Y. 1996).

failure to include in the notice that "any portion" of the debt, such as interest, finance charges, or penalties, can be disputed violates the FDCPA.[98] According to the plain language of the statute, the letter must also include some language that makes it clear that the "debt collector" may assume the debt valid for collection purposes.[99] A statement that imposes limitations, conditions, or requirements on the consumer's ability to exercise the right to dispute the debt or any portion thereof violates the FDCPA.[100]

Courts, however, disagree on whether the dispute referred to in subsection (a)(3) must be made in writing to the debt collector.[101] In *Graziano v. Harrison*,[102] the Court of Appeals for the Third Circuit is the first and only circuit court to deviate from the plain meaning of 15 U.S.C. § 1692g(a)(3). In *Graziano*, an attorney who operated a debt collection practice sent a notice of a delinquent debt to a debtor.[103] The notice informed the debtor that "unless he disputed the debt in writing within thirty days, the debt would be assumed valid."[104] The debtor posited that, because the statutory language of subsection (a)(3) does not require a dispute to be in writing, the attorney's letter violated § 1692g (a)(3) of the Fair Debt Collection Practices Act.[105] The attorney countered that while

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[98] *See* Baker v. G. C. Servs. Corp., 677 F.2d 775, 778 (9th Cir. 1982); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1028 (6th Cir. 1992); Lombardi v. Columbia Recovery Grp LLC, No. C12-1250, 2013 U.S. Dist. LEXIS 146375, at *7 (W.D. Wash. Oct. 9, 2013) (explaining that the statement should at a minimum refer to "portion" of the debt).

[99] *See* Fariasantos v. Rosenberg & Assocs. LLC, No. 3:13CV543, 2014 U.S. Dist. LEXIS 30898, at *23–24 (E.D. Va. Mar. 10, 2014); Iyamu v. Clarfield, Okon, Salomone & Pincus, P.L., 950 F. Supp. 2d 1271, 1274 (S.D. Fla. 2013).

[100] *See Lombardi*, 2013 U.S. Dist. LEXIS 146375, at *11.

[101] *Compare* Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991) (violation notice requirement that dispute be in writing does not violate § 1692g(a)(3)), *and* Hooks v. Forman, Holt, Eliades & Ravin, LLC., 717 F.3d 282, 287 (2d Cir. 2013) (a consumer must send the debt collector written notice of the dispute), *with* Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078, 1082 (9th Cir. 2005) (disputes are not required to be made to the debt collector in writing), *and* Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 491 (4th Cir. 2014) (validation notice's requirement that dispute be in writing violates subsection (a)(3)).

[102] 950 F.2d 107 (3d Cir. 1991).

[103] *Id.* at 109.

[104] *Id.*

[105] *Id.* at 112.

§ 1692g(a)(3) does not contain an expressed writing requirement, subsections (a)(4) and (a)(5) of the same provision contained a requirement of writing, which demonstrates a Congressional intent that all disputes be in writing.[106] According to the attorney, Congress inadvertently omitted the requirement of a writing in subsection (a)(3).[107] After comparing the statement required by subsection (a)(3) with those required by subsections (a)(4) and (a)(5), the court in *Graziano* observed:

> Adopting Graziano's reading of the statute would thus create a situation in which, upon the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts. We see no reason to attribute to Congress an intent to create so incoherent a system.[108]

The court in *Graziano* further reasoned that a writing requirement creates a lasting record of the debt dispute, thus avoiding a source of conflict.[109]

Nearly fifteen years after *Graziano*, the Ninth Circuit, in *Camacho v. Bridgeport Fin. Inc.*,[110] addressed the issue of whether the imposition of an expressed writing requirement on a consumer's rights under subsection (a)(3) violates the FDCPA.[111] In *Camacho*, the court concluded that a consumer need not send a writing to contest the debt under § 1692g(a)(3).[112] Relying on the plain meaning of the words, the court reasoned that the contrasting writing requirements of § 1692g(a)(4) and (a)(5) manifested congressional intent not to impose a writing requirement on § 1692g(a)(3).[113] The court concluded that this interpretation was sound because the statute provides for other protections independent of subsections (a)(4) and (a)(5) in the event of an oral dispute, and those protections depend only on whether a debt was disputed, not whether there

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[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] 430 F.3d 1078 (9th Cir. 2005).
[111] *Id.* at 1079.
[112] *Id.* at 1082.
[113] *Id.* at 1081.

was a prior writing.[114] The *Camacho* court also reasoned that the legislative purpose of allowing alleged debtors to question and challenge the initial communication of a collection agency is furthered by permitting oral objections.[115] Finally, the court observed that its reading—by which some rights are triggered by an oral dispute but others require a written statement—would not mislead consumers.[116] While the Third Circuit has reaffirmed *Graziano*,[117] two other circuit courts have adopted the rationales and holding of the Ninth Circuit in *Camacho.*[118]

Camacho only held that debt collectors could not expressly require that a § 1692g(a)(3) dispute be in writing.[119] Pursuant to *Camacho*, the FDCPA allows a debtor to dispute a debt orally or in writing.[120] The court in *Camacho* did not address the issue of whether the FDCPA prohibits a debt collector from implicitly requiring that the subsection (a)(3) dispute be in writing.[121] However, this specific issue was addressed by the court in *Riggs v. Prober & Raphael.*[122] Therein, the court concluded that such an implication did not violate subsection (a)(3) because "any confusion over what a consumer *must* do in writing, versus what she *may* do in writing, stems at least in part from the FDCPA itself. It would be untenable to read the FDCPA to prohibit validation notices that simply mimic the statute's own shortcomings."[123]

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[114] *Id.* at 1081–82. Once a consumer disputes a debt orally under subsection (a)(3), the debt collector must refrain from communicating the consumer's credit information to others without disclosing the dispute. 15 U.S.C. § 1692e(8) (2012). In addition, if the consumer owes multiple debts and makes a payment the debt collector may not apply the payment to a debt that has been orally disputed. § 1692h. *See also* Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 491 (4th Cir. 2014).

[115] *Camacho*, 430 F.3d at 1082.

[116] *Id.*

[117] Caprio v. Healthcare Revenue Recovery Grp., LLC, 709 F.3d 142, 148 (3d. Cir. 2013).

[118] Hooks v. Forman, Holt, Eliades & Ravin, LLC., 717 F.3d 282, 286 (2d Cir. 2013) (validation notice's requirement that dispute be in writing violates subsection (a)(3)); Clark v. Absolute Collection Serv. Inc., 741 F.3d 487, 491 (4th Cir. 2014) (validation notice's requirement that dispute be in writing violates subsection (a)(3)).

[119] *Camacho*, 430 F.3d at 1082.

[120] *Id.* at 1081–82.

[121] Riggs v. Prober & Raphael, 681 F.3d 1097, 1102 (9th Cir. 2012).

[122] 681 F.3d at 1102.

[123] *Id.* at 1103.

4. Subsection (a)(4): Verification of Debt

Section 1692g(a)(4) requires the debt collector to include a written statement informing the consumer that if he or she informs the debt collector "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 the consumer by the debt collector."[124] Subsection (a)(4) expressly requires that the consumer be made aware that this dispute must be provided in writing.[125] The failure to include the word "writing" in the statement does not effectively convey to the consumer his rights and thus, constitutes a violation of the FDCPA.[126]

The word "dispute" is a term of art in the FDCPA.[127] Consequently, a consumer can dispute a debt for no reason at all.[128] Therefore, the debt collector need not and may not require the consumer to "support [the] written dispute with documentation or explanation."[129]

"The text of § 1692g (a)(4) leaves no room for deviation."[130] It requires the debt collector, upon receipt of a written dispute from the consumer, to "obtain verification of the debt or a copy of a judgment."[131] If the validation notice makes any lesser representation, such as "might obtain" or "will try to obtain," the letter violates § 1692g(a)(4).[132]

A validation notice that uses the verbatim language of § 1692g(a)(4) does not violate the FDCPA.[133] Likewise, a de minimis variance from the literal requirements of subsection (a)(4) does not violate the Act.[134] For

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[124] 15 U.S.C. § 1692g(a)(4) (2012).

[125] *See id.*

[126] *See, e.g.*, McCabe v. Crawford & Co., 272 F. Supp. 2d 736, 743 (N.D. Ill. 2003); Spira v. Consiglio, Parisi & Allen, No. 99-CV-870, 2001 U.S. Dist. LEXIS 24497, at *13 (E.D.N.Y Jan. 3, 2001).

[127] Gruber v. Creditors' Prot. Servs., No. 12-C-1243, 2013 U.S Dist. LEXIS 68379, at *6 (E.D. Wis. May 14, 2013).

[128] *See* DeSantis v. Computer Credit, Inc., 269 F.3d 159, 162 (2d Cir. 2001).

[129] *See, e.g.*, King v. Int'l Data Servs., No. 01-00380, 2002 U.S. Dist. LEXIS 26427, at *9, *12 (D. Haw. Aug. 5, 2002) (citing *DeSantis*, 269 F.3d at 162).

[130] Jang v. A.M. Miller & Assocs. Nos. 95 C 4919, 95 C 6665, 1996 U.S. Dist. LEXIS 10883, at *10 (N.D. Ill. July 30, 1996).

[131] 15 U.S.C. § 1692g(a)(4) (2012).

[132] *Jang*, 1996 U.S. Dist. LEXIS 10883, at *10–11.

[133] Camacho v. Bridgeport Fin. Inc., 430 F.3d. 1078, 1082 (9th Cir. 2005).

[134] *See Gruber*, 2013 U.S Dist. LEXIS 68379, at *4.

example, in the appellate case of *Gruber v. Creditors' Prot. Servs., Inc.*,[135] the collection letter, in response to the requirement of subsection (a)(4), provided: "If you notify this office within 30 days from receiving this notice, this office will obtain verification of the debt or obtain a copy of the judgment and mail you a copy of such judgment or verification."[136] This statement, according to the debtor, violated the FDCPA because it omitted the phrase "that the debt, or any portion thereof, is disputed."[137] Thus, according to the plaintiffs, the statement "direct[ed] the consumer to request verification instead of directing the consumer to dispute the debt."[138]

The court rejected this argument and concluded that "a request to verify the existence of a debt constitutes a 'dispute' under the [FDCPA]."[139] The court further opined that "unsophisticated consumers" cannot be expected to assert legal rights precisely, so if a consumer sought verification, he would be disputing the debt for all practical purposes and would be protected according to the Act.[140]

5. Subsection (a)(5): Name of Original Creditor Versus Current Creditor

Subsection (a)(5) requires that the debt collector provide a statement that, upon the consumers "written request," the debt collector will provide the contact information of the original creditor, if different from the current creditor.[141] As stated in the context of the discussion of subsection (a)(4), if the collection letter uses the verbatim language of the statute, the FDCPA has not been violated.[142] One caveat to this rule exists where other language in the collection letter contradicts the verbatim language of the statute.[143]

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[135] 742 F.3d 271 (7th Cir. 2014).

[136] *Id.* at 273.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 274.

[140] *Id.*

[141] 15 U.S.C. § 1692g(a)(5) (2012).

[142] *See supra* Part II.B.4. *See also* Camacho v. Bridgeport Fin. Inc., 430 F.3d. 1078, 1082 (9th Cir. 2005).

[143] *Compare* Ardino v. Lyons, No. 11-848, 2011 U.S. Dist. LEXIS 143586, at *20–32 (D.N.J. Dec. 14, 2011), *with* Philip v. Sardo & Batista, P.C., No. 11-4773, 2011 U.S. Dist. LEXIS 130267, at *6–9 (D.N.J Nov. 10, 2011).

Section 1692g(a)(4)–(5) expressly states a debt collector must inform the consumer that the request has to be in writing.[144] Every district court to address this issue has held that omission of the phrase "in writing" in a collection letter violates subsections (a)(4)–(5) of the FDCPA.[145] The single rationale in these cases is that oral notice of dispute of a debt has different legal consequences than written notice.[146] For example, § 1692g(b) provides that if the consumer notifies the debt collector of a dispute in writing within the thirty-day period, the debt collector must cease collection efforts until he obtains the verification or information required by § 1692g(a)(4)–(5).[147] However, "if the consumer disputes the debt orally rather than in writing, the consumer losses the protections afforded by § 1692g(b); the debt collector is under no obligation to cease all collection efforts and obtain verification of the debt."[148] Thus, debtors can trigger the rights under subsection (a)(3) by either an oral or written dispute, while debtors can trigger the rights under subsections (a)(4) and (a)(5) only through written dispute.[149]

One issue that has divided the federal district courts is whether debt collectors must comply with the literal requirements of subsection (a)(5) where the current creditor listed in the collection letter is the original creditor. For example, in the district court case of *McCabe v. Crawford & Co.*,[150] the collection letter provided, in pertinent part:

> Unless we hear from you within thirty (30) days after the receipt of this letter disputing the claim, Federal Law provides that this debt will be assumed to be valid and owing. In the event you contact us and dispute the charges owed, we will promptly furnish you with any and all documentation to substantiate the claim.[151]

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[144] §§ 1692g(a)(4)–(5).

[145] *See, e.g.*, Osborn v. EKPSZ, LLC, 821 F. Supp. 2d 859, 870 (S.D. Tex. 2011).

[146] *Id.* at 869.

[147] § 1692g(b).

[148] *Osborn*, 821 F. Supp. 2d at 869. *See also supra* note 114 for discussion of the legal consequences of disputing a debt orally.

[149] *Osborn*, 821 F. Supp. 2d at 869 (quoting Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078, 1081 (9th Cir. 2005).

[150] 210 F.R.D. 631 (N.D. Ill. 2002).

[151] *Id.* at 636.

The consumer argued that the debt collector's letter violated subsection (a)(5) because it failed to provide the name and address of the original creditor.[152] The court, however, disagreed and concluded that the FDCPA did not require such notice where the creditors remained the same.[153]

Similarly, in *Shimek v. Weissman, Nowack, Curry & Wilco, P.C.*,[154] the plaintiffs alleged a § 1692g(a)(5) violation because the defendant failed to provide the name and address of the original creditor or only provided the name but not the address.[155] The defendant argued that it did not have to include "the 1692g(a)(5) language in its debt collection letter when the current creditor [was] the original creditor."[156]

According to the court in *Shimek*, "It is undisputed that the letters indicate that the homeowners associations are both the original and current creditors, Defendant's letter does not include the Section 1692g(a)(5) language quoted above, and Defendant's letter does not provide the address of the homeowners associations."[157] Based on its interpretation of the plain statutory language and the plaintiff's failure to cite any authority to the contrary, the *Shimek* court concluded that the "[d]efendant [had] complied with the FDCPA by providing the name of the creditor to whom the debt was owed."[158] The court based its rationale on the fact that the letter sent to the debtor expressly identified the homeowners association as the original creditor, and the association was the current creditor when the defendant sent the letter.[159] This reasoning, while not novel,[160] has influenced federal district courts in numerous circuits.[161]

The extent to which the court in *Shimek* was influenced by the plaintiff's failure to cite authority to the contrary is uncertain. That said, authority to the contrary does exist. For example, in *Edstrom v. All*

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[152] *Id.* at 639.

[153] *Id.*

[154] 323 F. Supp. 2d 1344 (N.D. Ga. 2003).

[155] *Id.* at 1347–48.

[156] *Id.* at 1348.

[157] *Id.*

[158] *Id.* at 1348–49.

[159] *Id.* at 1348.

[160] *See, e.g.*, Cavallaro v. Law Office of Shapiro & Kreisman, 933 F. Supp. 1148, 1154 (E.D.N.Y. 1996).

[161] *See, e.g.*, Berndt v. Fairfield Resorts, Inc., 337 F. Supp. 2d 1120, 1132 (W.D. Wis. 2004); Forsberg v. Fidelity Nat'l Credit Servs., Ltd., No. 03CV2193, 2004 WL 3510771 (S.D. Cal. Feb. 26, 2004).

Services and Processing,[162] the plaintiff argued that the debt collector violated subsection (a)(5) where it merely provided the name but not the address of the original creditor.[163] The defendant contended that it was not required to provide this information where the consumer already knew it.[164] According to the court,

> The letter included the name of the original creditor, the Apple Hill Association, but did not provide the Association's address or notify plaintiffs of their right to request the address. While defendant contends that plaintiff knew the Association's address because they sent a notice to the Association within the thirty-day time period, this is not relevant to my determination of whether the letter violated section 1692g.[165]

Relying on the unambiguous language of § 1692g, the court concluded that the notice "must contain the enumerated disclosures."[166] Thus, the failure of the defendant's collection letter to provide the required information violated the Act.[167]

Although inconsistent, the decisional law regarding whether a debt collector must provide the statement required by subsection (a)(5) is based on various interpretations of the literal language of § 1692g(a)(5). Courts that adhere to the view that the collector is not required to provide the statement where the current creditor and original creditor are the same construe the phrase "if different from the current creditor"[168] as a condition precedent to the statutory obligation to provide the statement in the first instance. However, this interpretation is premised on the original creditor and the current creditor being the same and the collection letter expressly stating the name of the creditor.

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[162] No. C04-1514, 2005 U.S. Dist. LEXIS 2773 (N.D. Cal. Feb. 22, 2005).

[163] *Id.* at *10–12.

[164] *Id.* at *12.

[165] *Id.* at *11–12.

[166] *Id.* at *12.

[167] *Id.* at *10–11.

[168] 15. U.S.C. § 1692g(a)(5) (2012).

C. Other Language in the Collection Letter Contradicts or Overshadows the Required Information

Courts have long interpreted § 1692g to require that the validation notice be conveyed effectively to consumers.[169] Mere inclusion of the required information does not automatically satisfy this requirement.[170] Rather, in order to be conveyed effectively, the required information must be placed in such a way as to be easily readable and must be prominent enough to be noticed by the least sophisticated consumer.[171] The information must also not be overshadowed or contradicted by other language in the initial communication.[172]

Decisional law has not specified which part of § 1692g is the source of the "overshadowing" prohibition. Some courts have analyzed the prohibition from the perspective of § 1692g(a),[173] while others refer to § 1692g generally.[174] "In 2006, Congress amended the FDCPA by . . . adding two sentences to the end of subsection (b) of § 1692g."[175] Those new sentences provide:

> Collection activities and communications that do not otherwise violate this subchapter [i.e. the FDCPA] may continue during the 30-day period referred to in subsection (a) of this section unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure

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[169] *See, e.g.*, Bartlett v. Heibl, 128 F.3d 497, 500 (7th Cir. 1997); Miller v. Payco-Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991); Swanson v. S. Oregon Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988).

[170] *See, e.g.*, *Miller*, 943 F.2d at 484; *Swanson*, 869 F.2d at 1225.

[171] *See* United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 139 (4th Cir. 1996); *Swanson*, 869 F.2d at 1225.

[172] *See Nat'l Fin. Servs., Inc.*, 98 F.3d at 139; *Miller*, 943 F.2d at 484.

[173] *See, e.g.*, *Nat'l Fin. Servs., Inc.*, 98 F.3d at 139; Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85, 90 (2d Cir. 2008).

[174] *See, e.g.*, Talbott v. GC Servs. Ltd. P'ship, 53 F. Supp. 2d 846, 852 (W.D. Va. 1999); Creighton v. Emporia Credit Serv., Inc., 981 F. Supp. 411, 415–16 (E.D. Va. 1997).

[175] Garcia-Contreras v. Brock & Scott, PLLC, 775 F. Supp. 2d 808, 813 (M.D. N.C. 2011).

> of the consumer's right to dispute the debt or request the name and address of the original creditor.[176]

Since the 2006 amendment to § 1692g(b), courts have reached differing conclusions as to whether overshadowing claims involving initial communications are governed by the new language in § 1692g(b), still implicitly governed by § 1692g(a), or both.[177]

Courts employ a least sophisticated or unsophisticated consumer standard to determine whether the statutorily required language is contradicted or overshadowed by other language in the collection letter.[178] This objective inquiry is directed toward protecting all consumers, from the gullible to the astute.[179] "The test is how the least sophisticated consumer—one not having the astuteness of a [lawyer] or even the sophistication of the average, every day, common consumer—understands the notice he or she receives."[180] The manner in which the least sophisticated consumer standard is applied in the context of an overshadowing claim is affected by the pleading, which, in turn, dictates the proof requirement. For example, if the consumer is seeking actual damages, proof that a plaintiff read the letter and was misled is required to prove that other language in the collection letter overshadowed the statutorily required information.[181] Ultimately, the evidence must demonstrate that the least sophisticated consumer would have been misled under similar circumstances. Because the FDCPA does not impose a mandatory duty on consumers to read collection letters,[182] proof that the

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[176] *Garcias-Contreras*, 775 F. Supp. 2d at 813–14 (citing 15 U.S.C. § 1692g(b) (2012)).

[177] For a detailed discussion of the legal implications of the source of an "overshadowing" claim, see *Garcia-Contreras*, 775 F. Supp. 2d 808. *See also* Osborn v. EKPSZ, LLC, 821 F. Supp. 2d 859, 868 (S.D. Tex. 2011) (citing to subsection (b) of § 1692g as the source of an "overshadowing claim").

[178] *See* Ferree v. Marianos, No. 97-6061, 1997 U.S. App. LEXIS 30361, at *7 (10th Cir. Nov. 3, 1997). "The Seventh Circuit employs an 'unsophisticated debtor' standard, which appears to differ from the majority [least sophisticated consumer] test only in semantics. *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n. 2 (9th Cir. 2011). "The 'least sophisticated debtor' or 'least sophisticated consumer' standard is employed by the majority of circuits." *Id.*

[179] Riggs v. Prober & Raphael, 681 F.3d 1097, 1102 (9th Cir. 2012); Easterling v. Collecto, Inc., 692 F.3d 229, 233 (2d Cir. 2012).

[180] *Ferree*, 1997 U.S. App. LEXIS 30361, at *5.

[181] Bartlett v. Heibl, 128 F.3d 497, 499 (7th Cir. 1997).

[182] *See id.*

letter was actually read by consumer is not necessary to allege a violation of the FDCPA when the consumer seeks statutory damages only.[183] The only requirement is proof that the statute was violated.[184] In this context, the least sophisticated consumer standard is used to discern whether a reasonable consumer would conclude, based on the language of the letter, that the statute has been violated.[185]

The "least sophisticated consumer" is a hypothetical consumer who is "presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care."[186] The relevant question is whether there is a reasonable likelihood that an unsophisticated consumer who has carefully considered the contents of the collection letter might be misled.[187] The standard assumes that the collection letter at issue was carefully read in its entirety with an elementary level of understanding.[188] It also assumes that technically false, immaterial representations are not likely to mislead the least sophisticated consumer.[189] This standard protects debt collectors from "bizarre or idiosyncratic interpretations of collection [letters] by preserving [and presuming] a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care."[190]

The least sophisticated consumer standard dictates that the consumer show more than his own confusion.[191] Instead, the consumer must show that a significant fraction of the population would have been misled by the content of the letter.[192] This requirement can be met through the use of carefully designed and conducted consumer surveys or expert testimony.[193] Ultimately, a collection letter is considered "overshadowing or

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[183] *See id.*; Schneider v. TSYS Total Debt Mgmt., No. 06-C-345, 2006 U.S. Dist. LEXIS 48177, at *8 (E.D. Wis. July 13, 2006).

[184] *Bartlett*, 128 F.3d at 499.

[185] *Id.* at 500.

[186] Ferree v. Marianos, No. 97-6061, 1997 U.S. App. LEXIS 30361, at *5 (10th Cir. Nov. 3, 1997).

[187] Carr v. Northland Grp., No. 3:12-CV-378, 2012 U.S. Dist. LEXIS 174930, at *7 (E.D. Tenn. Dec. 11, 2012).

[188] *See* Miller v. Javitch, Block & Rathbone, 561 F.3d 588, 592 (6th Cir. 2009).

[189] Donahue v. Quick Collect, Inc., 592 F.3d 1027, 1033 (9th Cir. 2010).

[190] Lesher v. Law Offices of Mitchell N. Kay, PC, 650 F.3d 993, 997 (3d Cir. 2011).

[191] McKinney v. Cadleway Props., Inc., 548 F.3d 496, 503 (7th Cir. 2008). *See also* Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85, 91 (2d Cir. 2008).

[192] *McKinney*, 548 F.3d at 503.

[193] *Id.*; McMillan v. Collection Prof'ls, Inc., 455 F.3d 754, 758 (7th Cir. 2006).

contradictory if it would make the least sophisticated consumer uncertain as to her rights."[194] Successful overshadowing claims typically involve collection letters, which imply that the consumer must take some action contrary to her statutory right to demand verification within the thirty-day period without explaining how that action and the right to demand verification tie together.[195]

Where a collection letter is plainly misleading, the FDCPA creates liability without extrinsic proof.[196] In other words, "if it is apparent" that the letter is confusing and plaintiff credibly testifies that he was confused, "no further evidence is necessary to create a triable issue."[197] It is only where "the letter itself does not plainly reveal that it would be confusing to a significant fraction of the population" that "the plaintiff must come forward with evidence beyond the letter and . . . his own self-serving [testimony] that the letter is confusing."[198]

III. CONCLUSION

Consumers should not be afraid or reluctant to deal with debt collectors. Rather, they should face the fact with an understanding of their rights and protections. Knowledge is power, and an informed consumer is an empowered consumer.

Section 1692g of the FDCPA affords consumers the right to: (1) verify the existence and "validity" of a debt; (2) dispute the debt "or any portion thereof"; and, (3) obtain "the name and address of the . . . creditor, if different from the [original] creditor."[199] Consumers may exercise these rights without providing any reasons or explanations to collectors.[200] If a consumer notifies a debt collector in writing within the thirty-day statutory period, the debt collector has two options.[201] It can "provide the requested

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[194] Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996).

[195] Gruber v. Creditors' Prot. Serv., Inc., 742 F.3d 271, 274–75 (7th Cir. 2014).

[196] Blarek v. Encore Receivable Mgmt., No. 06-C-0420, 2007 U.S. Dist. LEXIS 22549, at *15 (E.D. Wis. Mar. 27, 2007).

[197] *Id.* at *16 (quoting Chuway v. Nat'l Action Fin. Servs., Inc., 362 F.3d 944, 948 (7th Cir. 2004)) (internal quotation marks omitted).

[198] *Id.* (quoting Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 415 (7th Cir. 2005)) (internal quotation marks omitted).

[199] 15 U.S.C. § 1692g(a)(3)–(5) (2012).

[200] *Gruber*, 742 F.3d at 274 (quoting DeKoven v. Plaza Assocs., 599 F.3d 578, 582 (7th Cir. 2010)).

[201] *See* Jang v. A.M. Miller and Assocs., 122 F.3d 480, 483 (7th Cir. 1997); § 1692g(b).

validation[] and continue . . . collect[ion] [efforts],” or it can “cease all collection activities.”[202]

The language of § 1692g (a)(1)-(5) is plain, simple, and concise.[203] Nevertheless, some debt collectors find it difficult to comply with its straightforward mandates.[204] Consequently, § 1692g has become one of the most litigated sections of the FDCPA.[205] In response to the abundance of litigation, the Seventh Circuit in *Bartlett v. Heibl*,[206] offered the following form letter, which adheres to the requirements of the FDCPA. That letter, in pertinent part, provides:

> Federal law gives you thirty days after you receive this letter to dispute the validity of the debt or any part of it. If you don’t dispute it within that period, I’ll assume that it’s valid. If you do dispute it—by notifying me in writing to that effect—I will, as required by the law, obtain and mail to you proof of the debt. And if, within the same period, you request in writing the name and address of your original creditor, if the original creditor is different from the current creditor (Micard Service), I will furnish you with that information too.[207]

Judge Posner, writing for the court, also advised and admonished debt collectors as follows:

> We cannot require debt collectors to use “our” form. But of course if they depart from it, they do so at their risk. Debt collectors who want to avoid suits by disgruntled debtors standing on their statutory rights would be well advised to stick close to the form that we have drafted. It would be a safe haven for them, at least in the Seventh Circuit.[208]

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[202] *Jang*, 122 F.3d at 483 (citing Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1031 (6th Cir. 1992)). *See also* § 1692g(b).

[203] *See generally* Part II.B.

[204] *See supra* text accompanying note 1.

[205] *See supra* text accompanying note 1.

[206] 128 F.3d 497, 501 (7th Cir. 1997).

[207] *Id.* at 501–02.

[208] *Id.* at 502.

Despite the template offered by the court in *Bartlett*, debt collectors continue to take liberties with the validation notices of the FDCPA.[209] This raises the question: "why?" The blatantly academic answer is that the FDCPA does not require collectors to use the verbatim language or format of the statute.[210] The practical answer is that debt collection has become a lucrative business. The debt collection industry is worth an estimated 17 billion dollars.[211] The economics of the industry dictates that debt collectors must be vigilant and innovative in the methods they use to navigate and circumvent the law. The only recourse left to consumers is to know their rights and demand accountability from those members of the industry not willing to play by the rules.

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[209] *See supra* text accompanying note 1.

[210] Fariasantos v. Rosenberg & Assocs., LLC, No. 3:13CV543, 2014 U.S. Dist. LEXIS 30898 (E.D. Va. Mar. 10, 2014) (citing Vitullo v. Mancini, 684 F. Supp. 2d. 747, 756 & n. 11 (E.D. Va. 2010)).

[211] *U.S. Debt Collections Industry Worth $12.2 Billion: Plenty of Accounts, But It's Tougher To Collect, Says Marketdata*, PRWEB, http://www.prweb.com/releases/prweb9383739.htm (last visited Oct. 19, 2014).