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NOTES

A LIE IS A LIE: THE NEED TO DEFINE SECTION 1692e OF THE FDCPA

INTRODUCTION

In recent years, complaints regarding abusive debt collection practices have spiked dramatically.¹ Even while the tools available to debt collectors have changed over the years, abusive practices remain an issue.² As a result, these unfair practices have necessitated government regulation.³ One response to the “effort to curtail deceptive, unfair, and abusive debt collection practices in the marketplace”⁴ is the Fair Debt Collection Practices Act (FDCPA or the Act).⁵ These regulations still need refinement, and a combination of disagreement among the Circuit Courts and the recent transfer of regulatory power from the Federal Trade Commission (FTC) to the Consumer Financial Protection Bureau (CFPB)⁶ have created an opportunity for effective change to the FDCPA. Specifically, Section 1692e of the FDCPA needs to be unequivocally defined in order to better protect consumer debtors.

Section 1692e governs misrepresentations made by debt collectors during the course of the debt collection process.⁷ Section I of this note will provide a brief overview of consumer credit and debt collection. Section II will explore how the recent Seventh Circuit case, *O’Rourke v. Palisades Acquisition XVI, LLC*,⁸ highlights a circuit split regarding the application of Section 1692e and why that split should be resolved broadly in favor of consumers. Section III discusses how the recent changes by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) will or should affect the interpretation of Section 1692e. Finally, Section IV suggests actions for the CFPB to take with respect to the FDCPA in order to better protect consumers from abuse while balancing the right of creditors and debt collectors to recover monies owed.

1. See CFPB, CFPB ANNUAL REPORT 2012: FAIR DEBT COLLECTION PRACTICES ACT 7 (2012) [hereinafter ANNUAL REPORT 2012].

2. See *id.* at 4.

3. See FTC, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 1 (2011) [hereinafter ANNUAL REPORT 2011].

4. *Id.*

5. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2006).

6. Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 2092–93 (2010) (codified at various subsections of 15 U.S.C. § 1692) (amending the FDCPA by transferring the power to enforce compliance with the FDCPA and prescribing rules with respect to the collection of debts from the FTC to the CFPB).

7. See 15 U.S.C. § 1692e.

8. *O’Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011).

I. CONSUMER CREDIT AND DEBT COLLECTION

A. CONSUMER CREDIT

For the purposes of this note, “consumer” will refer to the FDCPA understanding of “any natural person obligated or allegedly obligated to pay any debt.”⁹ This type of debt is best conceptualized as secured or unsecured loans in the form of personal loans, credit cards, auto loans, and mortgages.¹⁰ These debts are incurred “primarily for personal, family, or household purposes” as opposed to corporate or business debt.¹¹ In extending credit, the understanding is that a consumer will repay in a timely manner.¹² This relationship allows the average consumer to significantly increase his purchasing power, enabling him to quickly procure capital, goods, or services and gradually pay the balance over a period of time.¹³

Credit cards, a popular product today, are used for nearly every type of daily purchase¹⁴ from groceries to cars. In America they have become a common replacement for cash,¹⁵ with nearly every adult owning one or more credit card.¹⁶ Related to credit cards, credit plays a softer role in a consumer’s life, as credit history and potential income are indicators used to determine one’s “credit-worthiness.”¹⁷ Credit in turn affects an individual’s ability to invest more than his current financial resources might permit.¹⁸ Especially in modern countries, the ability to procure credit and a good credit history are as essential to business and life “as rain is to the rice field.”¹⁹

However, the flipside of credit is debt, a problem which may be aggravated by insolvency and, in unfortunate cases, could end in bankruptcy. Specific hardships exist for many consumers who are too poor or experience negative life changes and as a result cannot satisfy

9. 15 U.S.C. § 1692(a)(3).

10. See, e.g., Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 120 (2000).

11. *Consumer Laws and Regulations: Fair Debt Collection Practices Act (FDCPA)*, CONSUMERFINANCE.GOV, <http://www.consumerfinance.gov/guidance/supervision/manual/fdcpa-narrative/> (last visited Aug. 26 2012).

12. Financial illiteracy has resulted in consumers who do not fully comprehend the risks and costs of incurring debt, which may be a factor affecting timely payments back to lenders. See Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act’s “Abusive” Standard*, 14 J. CONSUMER & COM. L. 118, 120 (2011).

13. See Zywicki, *supra* note 10, at 95.

14. See *id.* at 85.

15. See *id.*

16. Richard H. Gibson, *Credit Card Dischargeability: Two Cheers for the Common Law and Some Modest Proposals for Legislative Reform*, 74 AM. BANKR. L.J. 129, 129 (2000).

17. Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 69 (1998).

18. See Margaret M. Blair, *Financial Innovation, Leverage, Bubbles and the Distribution of Income*, 30 REV. BANKING & FIN. L. 225, 306 (2010).

19. Jennifer J. Rose, *The Last Waltz, Redux*, GPSOLO, July–Aug. 2011, at 4.

outstanding debts.²⁰ As a last resort, consumers may declare bankruptcy.²¹ While this provides consumers with a fresh start, it may adversely affect one's ability to subsequently borrow, rent an apartment, buy a home, secure insurance, or even find employment.²² Although these conditions are not permanent, bankruptcy follows a consumer for 10 years,²³ which can significantly hinder any steps one may take towards reestablishing financial credibility.²⁴ Certainly, the importance of credit ratings and purchasing power in today's society underscores the need to protect consumers from unfair collection practices.

B. DEBT COLLECTION

The FDCPA governs the actions of debt collectors with the purpose of curbing abusive debt collection practices.²⁵ Under the FDCPA, the term "debt collector" refers to any person who regularly collects or attempts to collect debts owed to another or who uses a different name when collecting his own debts.²⁶ In most instances, the FDCPA tends to focus on the actions of third party debt collectors.²⁷ When consumers fail to repay their debts, not only do their credit scores suffer, but debt collectors also suffer as they must now treat those debts as a loss and "charge-off" their debt,²⁸ selling it for pennies on the dollar.²⁹ On a small scale, this may not seem significant, but when considered in the aggregate, this translates into hundreds of

20. "[T]he vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce." S. REP. NO. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697.

21. *Is Consumer Bankruptcy the Right Choice for You?*, 73 TEX. B.J. 516 (2010) [hereinafter *Consumer Bankruptcy*]; *Improving Credit*, FTC.GOV, <http://www.ftc.gov/bcp/online/edcams/gettingcredit/improvingcredit.html> (last visited Sept. 28, 2011).

22. See *Improving Credit*, supra note 21.

23. See *Consumer Bankruptcy*, supra note 21; *Improving Credit*, supra note 21 (explaining that bankruptcy remains on an individual's credit report for ten years, while outstanding debts are erased after seven years).

24. See Ronald S. Orr & James A. McDougal, *The Debtor's View of Chapter 11 in a Case Involving Real Property*, in REAL ESTATE WORKOUTS AND BANKRUPTCIES 1993, at 91, 143-50 (Practising Law Institute 1993).

25. See 15 U.S.C. § 1692(a) (2006).

26. See *id.* § 1692a(6).

27. S. REP. NO. 95-382, at 3 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1697-98. The Committee on Banking, Housing, and Urban Affairs intended for the FDCPA to apply primarily to independent debt collectors. The term "debt collector" was not meant to apply to "in house" collectors who use a creditor's true business name. Instead, it was intended to apply to all third parties who regularly collect others' debts. *Id.*

28. A "charge-off" refers to the process of an original creditor deciding that they will no longer make attempts to collect a debt. As a result, the account is "charged-off" and usually sold to a third party who specializes in debt collection in bulk for pennies on the dollar. Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 264-65, 269 (2011).

29. *Id.*

millions of dollars in losses for individual creditors.³⁰ Thus, debt collection is a way for original creditors to pad their losses either through legal action or by charging-off the debt and selling it to a debt buyer who tries to collect on debts where the original creditor could not.³¹ When considered on the whole, the sum is staggering: outstanding consumer loans in 2009 totaled \$2.5 trillion.³² With so much to possibly gain, the debt purchasing industry has become a fast-growing financial service sector in recent years, which debt collectors³³ and debtors have both agreed needs regulation.³⁴

However, with 1,593,081 bankruptcy petitions filed in 2010 in the United States,³⁵ debt collectors today are left with fewer methods to recover money due to them.³⁶ Certainly a creditor that lends \$5,000 and only recovers \$1,000 cannot expect to run a profitable lending service. This is not the case for all consumer debtors, and insolvent clients are part of the risk that a creditor knowingly assumes before choosing to lend.³⁷ In some cases, a lender is aware of an individual borrower's financial constraints prior to extending credit.³⁸ Still, the importance of minimizing uncollectable debt is significant when considering how a rampant failure to collect debts may interfere with a creditor's ability to continue lending.³⁹

There are other interests at stake besides a creditor's personal financial well-being. The integral role that creditors and lenders play as financial

30. *See id.* at 269. In 2010, JPMorgan Chase charged-off 23,000 delinquent accounts valued at \$200 million. This was sold for 13 cents on the dollar, or \$26 million, accounting for \$174 million in losses due to a failure to collect debts from consumers. *Id.*

31. *See id.* at 259.

32. RICK JURGENS & ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., *THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS* 5 (2010), available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf>.

33. *See id.* at 25 (stating, as one debt buyer warned his peers in early 2008, "If we don't regulate ourselves, somebody is going to come in and regulate us for us").

34. *See* Holland, *supra* note 28, at 265; *see also* Michael Rezendes & Francie Latour, *No Mercy for Consumers, Firms' Tactics are One Mark of a System that Penalizes Those Who Owe*, BOSTON GLOBE, July 30, 2006, at A1 (discussing several instances of how debt collectors have abused the small claims state court system to satisfy judgments against unsophisticated consumer debtors).

35. *Bankruptcy Statistics*, U.S. COURTS, available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/1210_f2.pdf (last visited Aug. 26, 2012).

36. *See* ANNUAL REPORT 2011, *supra* note 3, at 1 (stating the FTC has recognized that debt collectors have a legitimate interest in collecting debts).

37. *See* Dov Solomon & Odelia Minnes, *Non-Recourse, No Down Payment and the Mortgage Meltdown: Lessons From Undercapitalization*, 16 FORDHAM J. CORP. & FIN. L. 529, 555 (2011); *First Nat. Bank of Mobile v. Roddenberry*, 701 F.2d 927, 932 (11th Cir. 1983) ("Banks are willing to risk non-payment of debts because that risk is factored into the finance charges.").

38. *Id.*

39. *See generally* David Cho, *New Crisis Threatens Healthy Banks*, WASH. POST, June 22, 2008, at A1 (noting that in light of the mortgage lending crisis, smaller banks face difficulties in continuing their lending practices and operations because debtors are having difficulties making payments).

risk-bearers⁴⁰ strengthens the case for protecting creditors' interests in receiving timely payments on debts.⁴¹ As a risk-bearer, financial lending institutions can support businesses and individuals.⁴²

One of the most recognizable types of creditors is a bank.⁴³ From the 2008 financial crisis, we learned that banks, as financial institutions and creditors, played a disproportionately large role in our modern economy.⁴⁴ The phrase "too big to fail" immortalizes this lesson.⁴⁵ While the Dodd-Frank Act seeks to end this dependency on large financial institutions,⁴⁶ an interest remains in protecting the ability to reasonably recover outstanding debt. Where banks fail to collect, third party debt collectors make a living.

A strong case may be made to protect the interests of both consumer debtors and creditors engaged in debt collection. Consumers deserve to be treated with care and respect and should not be taken advantage of through unfair debt collection practices such as harassment, embarrassment, or misrepresentation.⁴⁷ On the other hand, creditors and debt collectors also have a recognized interest in recovering monies due to them.⁴⁸ In an effort to balance these competing interests, Congress passed the FDCPA.⁴⁹ The challenge is determining how to improve the FDCPA as it is defined and interpreted, in order to provide more effective protections for consumers while still respecting the financial interests of creditors.

II. THE INCREASING PROBLEM OF MISREPRESENTATION

A. ANNUAL FDCPA COMPLAINT REPORTS

To improve the FDCPA, it is useful to consider the annual reports on the FDCPA that the FTC⁵⁰ and CFPB⁵¹ submit to Congress. These reports

40. Cf. Royce de R. Barondes et al., *Twilight in the Zone of Insolvency: Fiduciary Duty and Creditors of Troubled Companies*, 1 J. BUS. & TECH. L. 229, 238–39 (2007) (noting that some courts treat creditors as the residual risk-bearer when firms become insolvent).

41. See ANNUAL REPORT 2011, *supra* note 3, at 1.

42. See *The Credit Process: A Guide for Small Business Owners*, NEWYORKFED.ORG, <http://newyorkfed.org/education/addpub/credit.html> (last visited Sep. 16, 2012) (explaining that the New York Federal Reserve Bank provides help for individuals trying to live the "American Dream" by offering advice on how to procure financial loans for business enterprises).

43. See *NationsBank and BankAmerica Close Merger Creating Largest U.S. Bank*, PR NEWSWIRE (Sept. 30, 1998), <http://www.thefreelibrary.com/NationsBank+And+BankAmerica+Close+Merger+Creating+Largest+U.S.+Bank.-a053047354>.

44. See Jonathan R. Macey & James P. Holdcroft, Jr., *Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1376–77 (2011).

45. See Dodd-Frank Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376, 1376 (2010) (stating two purposes of the Dodd-Frank Act are to improve the financial system and put an end to institutions that are "too big to fail"); see also Macey & Holdcroft, *supra* note 44, at 1377.

46. Dodd-Frank Act, pmbl., 124 Stat. at 1376.

47. See S. REP. NO. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

48. See ANNUAL REPORT 2011, *supra* note 3, at 2.

49. See S. REP. NO. 95-382, at 1.

50. The FTC is required to annually present a report to Congress regarding its administrative functions under the FDCPA. 15 U.S.C. § 1692m(a) (2006). In 2012, this responsibility passed to

update Congress on the types of FDCPA complaints the FTC receives⁵² and on any necessary or appropriate recommendations regarding the FDCPA.⁵³ In 2011, the FTC received over 142,000 complaints, 22.3 percent of which were sent directly by consumers regarding third-party debt collectors and in-house debt collectors.⁵⁴ This number has more than doubled in a period of five years, as fewer than 70,000 complaints were filed in 2006.⁵⁵ The recent increase in reported debt collection complaints is proof enough that the FDCPA is still a necessary shield for consumers.

From 2007 to 2011, the FTC has placed FDCPA violation complaints into several corresponding categories. They include: harassment;⁵⁶ demands for illegally large payments;⁵⁷ failure to send notice;⁵⁸ threats for payment;⁵⁹ failure to identify self as a debt collector;⁶⁰ revealing alleged debt to third parties;⁶¹ placing calls to a consumer's place of employment;⁶² failure to verify disputed debts;⁶³ and ignoring "cease communication"⁶⁴ notices.⁶⁵ Each year the annual report to Congress largely lists the same complaints.⁶⁶ Interestingly, no category focuses explicitly on misrepresentations made to a consumer,⁶⁷ even though the FTC and CFPB⁶⁸ have noted the significant prevalence of debt collectors bringing collection suits based on insufficient or false information.⁶⁹ Misrepresentations cover a wide range of activities,⁷⁰ including misrepresentations made to the court in the course of litigation

the CFPB. Dodd-Frank Act § 1089, 124 Stat. at 2092 (codified at 15 U.S.C. §§ 1692k, 1692m, 1692o).

51. ANNUAL REPORT 2012, *supra* note 1.

52. *See* ANNUAL REPORT 2011, *supra* note 3, at 3.

53. 15 U.S.C. § 1692m(a).

54. *See* ANNUAL REPORT 2012, *supra* note 1, at 6.

55. *See* FTC, ANNUAL REPORT 2007: FAIR DEBT COLLECTION PRACTICES ACT 2 (2007) [hereinafter ANNUAL REPORT 2007].

56. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 8; 15 U.S.C. § 1692d (2006).

57. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 8; 15 U.S.C. §§ 1692e(2), 1692f(1).

58. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 8; 15 U.S.C. § 1692g(a).

59. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 9; 15 U.S.C. §§ 1692e(4)–(5).

60. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 9; 15 U.S.C. §§ 1692e(11), d(6).

61. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 9; 15 U.S.C. § 1692c(b).

62. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 9; 15 U.S.C. § 1692c(a)(3) (2006).

63. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 10; 15 U.S.C. § 1692g(b).

64. *See, e.g.*, ANNUAL REPORT 2012, *supra* note 1, at 10; 15 U.S.C. § 1692c(c).

65. *See* ANNUAL REPORT 2012, *supra* note 1, at 7.

66. *See id.*; ANNUAL REPORT 2011, *supra* note 3, at 6–9; FTC, ANNUAL REPORT 2010: FAIR DEBT COLLECTION PRACTICES ACT 5–10 (2010); FTC, ANNUAL REPORT 2009: FAIR DEBT COLLECTION PRACTICES ACT 6–10 (2009); FTC, ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT 5–8 (2008); ANNUAL REPORT 2007, *supra* note 55, at 2–7.

67. *See* ANNUAL REPORT 2012, *supra* note 1, at 6. There are, however, categories that focus on forms of misrepresentation such as false threats made to induce payment. *See id.* at 9.

68. *Id.* at 4.

69. Consent Decree at 4, *U.S. v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27 (M.D. Fla. Jan. 30, 2012) (detailing a debt collector's \$2.5 million settlement with the FTC for collection attempts based on improper information, illustrating an agency regulating as opposed to a consumer exercising his right to sue under the FDCPA).

70. *See* 15 U.S.C. § 1692e (2006).

through pleadings. While misstatements made out of court are covered by Section 1692e, the statute's application to misstatements and misrepresentations made in court is difficult to interpret because of disagreement between the Sixth and Seventh Circuits.

B. SECTION 1692e OF THE FDCPA GOVERNS MISREPRESENTATIONS

Section 1692e states that “[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.”⁷¹ This Section provides protections to debtors from deceptive conduct, and is especially beneficial since many debtors are not familiar with their legal rights⁷² or with the credit industry in general, and sometimes struggle with financial literacy.⁷³

This raises two questions: (1) which parties are liable under Section 1692e; and (2) at what point does a consumer have standing to sue under Section 1692e? The first issue has already been settled by the Supreme Court.⁷⁴ In *Heintz v. Jenkins*, the Supreme Court expanded the FDCPA's application from only debt collectors to include lawyers who regularly engage in debt collection.⁷⁵ The Supreme Court in *Heintz* held that the FDCPA's “definition of the term ‘debt collector’ includes a person ‘who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another.’”⁷⁶ Accordingly, lawyers who regularly try to collect consumer debts, usually on behalf of a debt collector, are also subject to the FDCPA as “debt collectors.”⁷⁷ Thus, the FDCPA and Section 1692e make both debt collectors and their attorneys potentially liable for violations.

The second issue—the scope of Section 1692e—is less clear. There is a Circuit Court split regarding the interpretation and application of Section 1692e with respect to which parties a debt collector is prohibited from making misrepresentations. The Seventh Circuit tends to interpret the misrepresentation subdivision narrowly, restricting remedies to communications directly made to the consumer and “those who stand in their shoes.”⁷⁸ However, the Sixth and Eighth Circuits follow a broader application of Section 1692e, extending it to cover misrepresentations made

71. *Id.*

72. See BUILDING THE CFPB, A PROGRESS REPORT 10 (2011) [hereinafter BUILDING THE CFPB], available at http://www.consumerfinance.gov/wp-content/uploads/2011/07/Report_BuildingTheCfpb1.pdf.

73. See Jeffrey T. Dinwoodie, *Ignorance is Not Bliss: Financial Illiteracy, the Mortgage Market Collapse, and the Global Economic Crisis*, 18 U. MIAMI BUS. L. REV. 181, 182, 184–85 (2010).

74. See *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995).

75. See *id.*

76. *Id.* at 293 (quoting 15 U.S.C. § 1692(a)(6) (2006)).

77. See *id.* (noting that even “litigating . . . seems simply one way of collecting a debt”).

78. See *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 943 (7th Cir. 2011).

to other third parties as well.⁷⁹ While there are reasons in support of both Circuits' opinions, the Sixth Circuit's position should apply instead of the Seventh Circuit's.

III. SECTION 1692e SHOULD BE READ BROADLY

A. *HARTMAN* AND *O'ROURKE*: CIRCUIT SPLIT BETWEEN THE SIXTH AND SEVENTH CIRCUITS

The Sixth Circuit in *Hartman v. Great Seneca Financial Group* and the Seventh Circuit in *O'Rourke v. Palisades Acquisition XVI, LLC* differ in their application of Section 1692e of the FDCPA. Yet, the facts in both cases are very similar. In each case, a third party debt collector sued a consumer in state court for the recovery of a purchased debt.⁸⁰ In the initial pleadings, both debt collectors attempted to mislead the court by attaching to their complaints documents that appeared to look like credit card account statements but in fact were not.⁸¹ The consumers in both cases brought claims against the debt collector for violations of Section 1692e,⁸² alleging that the debt collectors had violated the prohibition against "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt."⁸³ However, these cases differ in their outcomes.

In *Hartman*, it seems the Sixth Circuit would have allowed recovery under Section 1692e.⁸⁴ However, the issue was remanded for a determination of whether the exhibit attached to the debt collector's pleading was misleading.⁸⁵ For the *Hartman* court, there was no issue of standing, only that a suit would be successful as long as deception was in fact involved. Therefore, it would seem that, in the Sixth Circuit, statements made during litigation fall within the scope of Section 1692e.⁸⁶ The court in *Hartman* interpreted "any false representation or deceptive means to collect . . . any debt"⁸⁷ to encompass misleading acts directed at a court because

79. See *Hemmingsen v. Messerli*, 674 F.3d 814, 818 (8th Cir. 2012); *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 613 (6th Cir. 2009).

80. See *O'Rourke*, 635 F.3d at 943; *Hartman*, 569 F.3d at 609.

81. See *O'Rourke*, 635 F.3d at 939; *Hartman*, 569 F.3d at 612.

82. See *O'Rourke*, 635 F.3d at 941; *Hartman*, 569 F.3d at 610–11.

83. 15 U.S.C. § 1692e (2006); *O'Rourke*, 635 F.3d at 941; *Hartman*, 569 F.3d at 610–11.

84. *Hartman*, 569 F.3d at 613, 618.

85. *Id.* at 618. While *Hartman* does not explicitly state that Section 1692e would apply, neither the majority, concurrence, or dissent took issue with Section 1692e's applicability. Further, the concurrence in *O'Rourke* notes that *O'Rourke's* majority opinion—placing the debtor there outside of Section 1692e's scope—is directly at odds with *Hartman*. *O'Rourke*, 635 F.3d at 949 ("Restricting our understanding of the FDCPA . . . puts us at loggerheads with some of our sister circuits." (citing *Hartman*, 569 F.3d at 610, 612)).

86. *Hartman*, 569 F.3d at 616 (citing *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995)).

87. 15 U.S.C. § 1692(e) (2006).

statements made by the attorney for a debt collector also fall within the scope of the FDCPA.⁸⁸

In contrast, the Seventh Circuit in *O'Rourke* held that the debt collector's use of a document to mislead the judge, while a "dubious method" to collect debts, did not fall within the scope of Section 1692e.⁸⁹ The Seventh Circuit decided that the scope of Section 1692e was limited to misrepresentations directly made to a consumer or someone who "stand[s] in the shoes of the consumer."⁹⁰ While there is a consensus that the FDCPA exists to protect consumers from unfair collection practices by debt collectors,⁹¹ the circuits are "at loggerheads" as to the application of Section 1692e.⁹² In order to fulfill the purpose of the FDCPA "to promote consistent State action to protect consumers against debt collection abuses," it is necessary to resolve this dispute.⁹³

B. APPELLATE COURT SUPPORT FOR A NARROW READING

A string of circuit opinions have paved the way for the Seventh Circuit's holding in *O'Rourke*. Several circuits interpret Section 1692e as applying only to the actual consumer and "those who stand in their shoes."⁹⁴ This definition includes the consumer and those who have the same authority to receive communications and to act on the consumer's behalf.⁹⁵ However, misstatements made to a judge were not discussed in this initial definition. That question was addressed in 2007 by the Eighth Circuit in *Volden v. Innovative Financial Systems, Inc.* The Eighth Circuit interpreted Section 1692e narrowly by placing a definite outer limit on the scope of Section 1692e by holding that misleading representations that were made to a third party in connection with the collection of a debt for a bounced check, did not give the debtor check-writer standing to sue under Section 1692e.⁹⁶ The next year, protection was limited to only certain cases

88. See *Heintz*, 514 U.S. at 294.

89. See *O'Rourke*, 635 F.3d at 940–41.

90. See *id.* at 944.

91. See *id.* at 941; *Hartman*, 569 F.3d at 611.

92. *O'Rourke*, 635 F.3d at 949 (Tinder, J., concurring).

93. 15 U.S.C. § 1692e (2006).

94. *O'Rourke*, 635 F.3d at 943 (majority opinion); see *Guerrero v. RJM Acquisitions, LLC*, 499 F.3d 926, 935 (9th Cir. 2007); *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 954–55 (8th Cir. 2006); *Wright v. Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 650 (6th Cir. 1994).

95. *Wright*, 22 F.3d at 650.

96. See *Volden*, 440 F.3d at 954–55. In this case, the plaintiff Volden wrote several checks that bounced. *Id.* at 949–50. Defendant IFS insured merchants against bounced checks and attempted to collect the balance for the bad checks from Volden. *Id.* Volden alleged that in the process of collection, IFS made a contractually false representation to their insurer, EFT. *Id.* at 950. After paying the balance of the bounced checks, Volden sued IFS for a violation of 15 U.S.C. § 1692e for making a misrepresentation to EFT that was "in connection with" the collection of his debt. *Id.* The Circuit Court refused to grant Volden's petition and ruled in favor of IFS, stating that for recovery, EFT had to sue IFS and that misrepresentations made to a third party are not actionable by the debtor. See *id.* at 953–55. While the court did not make this explicit, there seems to have

where misstatements were made to a consumer's attorney.⁹⁷ The Ninth Circuit applied a higher standard of review when attorneys are involved because an attorney stands a significantly lower chance of being bullied or taken advantage of as compared to his client.⁹⁸ These decisions culminated in the Seventh Circuit's decision in *O'Rourke*—false representations made to a judge in a state court are not protected under Section 1692e⁹⁹ because “[t]he statute is designed to provide information that helps consumers to choose intelligently.”¹⁰⁰

C. SUPPORT FOR A BROAD READING

1. Appellate Court Support for a Broad Reading

There have also been gradual changes throughout the circuits suggesting that a broader interpretation of Section 1692e is appropriate. The Sixth Circuit defines the term “consumer” to include “the consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator”¹⁰¹ as well as the executrix of a consumer’s estate.¹⁰² Accordingly, a violation of the FDCPA “need not offend the alleged debtor before there is a violation of the provision.”¹⁰³ In 1995, the Supreme Court

been some equitable considerations taken by the court. Volden wrote bad checks, and IFS properly tried to recover the balance for those checks but happened to make a contractual error that seemingly amounted to a legal misrepresentation. *See id.* at 949–50. There did not appear to be evidence of malice on IFS’s part. In all, Volden seems to have been motivated by less than upstanding reasons in bringing this suit against IFS. Given these considerations, the Circuit Court acted equitably; however, in doing so, the court seemingly grasped for any justification to dispute Volden’s claims. Yet, Volden’s claims have some merit. Following a plain reading of the text of Section 1692e, “[a] debt collector may not use any . . . misleading representation . . . in connection with the collection of any debt.” 15 U.S.C. § 1692e. The statute permits representations to be made to anyone. In fact, the text uses the word “any” which would suggest a broad interpretation, one that would certainly include misrepresentations made to third parties in pursuit of the collection of a debt. However, *Volden* was distinguished by *Hemmingsen*, which expanded on the *Volden* decision, stating “We are unwilling to adopt the district court’s broad ruling that false statements not made directly to a consumer debtor are never actionable under § 1692e. No other court has read the statute that narrowly.” *Hemmingsen v. Messerli*, 674 F.3d 814, 818 (8th Cir. 2012).

97. *See Guerrero*, 499 F.3d at 935. The defendant debt collector, RJM, was accused, among other things, of making a false misrepresentation to the petitioner’s attorney in connection with the collection of a debt. *Id.* at 929. The court held a letter containing a misrepresentation that is sent to the debtor’s attorney will not be treated as a misrepresentation made to the debtor himself. *Id.* at 929. Attorneys are held to a higher standard than the “least sophisticated consumer” standard for consumers. *Id.* at 929, 934–35.

98. *See id.* at 935.

99. *O’Rourke*, 635 F.3d at 943.

100. *Hahn v. Triumph P’ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009) (emphasis added).

101. 15 U.S.C. § 1692c(d) (2006).

102. *See Wright v. Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 650 (6th Cir. 1994) (finding that misleading debt collection letters sent posthumously to the debtor were actionable by the executrix of the estate of the debtor).

103. *Id.* at 649.

extended the application of the FDCPA to include attorneys who regularly represent debt collectors or who themselves regularly engage in debt collection practices.¹⁰⁴ As a result, the application of Section 1692e has also been broadened to include communications made in a court setting because “a complaint served directly on a consumer to facilitate debt-collection efforts is a communication subject” to Section 1692e.¹⁰⁵ Further, deceptive state pleadings have been argued to be covered by the FDCPA’s “rule against trickery,” which violates Section 1692e.¹⁰⁶

Additionally, the FTC has identified four major concerns that the FDCPA should address regarding debt collection litigation.¹⁰⁷ The most relevant of these is a “finding that the complaints filed in debt collection suits often do not contain sufficient information to allow consumers . . . to admit or deny the allegations.”¹⁰⁸ This suggests that the FTC intended for the FDCPA to apply to litigation as well as to communications with consumers.¹⁰⁹ Other courts have supported this finding as the application of the FDCPA to litigation conduct has been upheld in four different circuits.¹¹⁰

Following the trend to broaden the application of Section 1692e, the Sixth Circuit decided *Hartman* by creating the potential to extend its scope to in-court pleadings.¹¹¹ If the FDCPA covers attorneys who also regularly

104. See *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

105. *Donohue v. Quick Collect Inc.*, 592 F.3d 1027, 1031–32 (9th Cir. 2010).

106. See Appellant’s Reply Brief at 3, 18, *O’Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011) (No. 08 C 00430).

107. The FTC considered four policy topics: “(1) debt collection litigation and arbitration proceedings; (2) the collection of decedents’ debts; (3) the debt buying industry; and (4) technological changes.” ANNUAL REPORT 2011, *supra* note 3, at 15.

108. *Id.* at 16.

109. See FTC, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 58 (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (stating that the FTC “may take law enforcement action to address debt collection litigation activities to the extent that they violate the FDCPA”).

110. See Appellant’s Reply Brief, *supra* note 106, at 20; see also *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 612–13 (6th Cir. 2009) (holding there was a “genuine issue of material fact” whether a document the debt collector attached to its complaint would mislead the “least sophisticated consumer” under the FDCPA); *Sayed v. Wolpoff & Abramson*, 485 F.3d 226, 232–34 (4th Cir. 2007) (applying Congress’ and the Supreme Court’s clear intent to apply the FDCPA to litigation activities of attorneys acting as debt collectors); *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 439, 446 (6th Cir. 2006) (applying the FDCPA to a law firm’s executing and filing of misleading affidavits); *Goldman v. Cohen*, 445 F.3d 152, 155 (2d Cir. 2006) (holding that “a consumer debt collector’s initiation of a lawsuit in state court seeking recovery of unpaid consumer debts is an ‘initial communication’ within the meaning of the FDCPA”); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (applying the FDCPA to a debt collector’s claim on worthless checks that resulted in wage garnishment of the debtor); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1513 (9th Cir. 1994) (finding that an attorney who filed an application for a writ of garnishment fell within the FDCPA definition of “debt collector”).

111. See *Hartman*, 569 F.3d at 613 (noting that if there was a finding of deception, then there would be a cause of action under Section 1692e without having to reach the issue of whether to extend the scope of Section 1692e).

engage in debt collection because of their important role in the collection of a debt,¹¹² then Section 1692e should also apply when a misrepresentation is made to a party who plays a significant role in the collection of a debt. During litigation, the conversation is no longer between the debt collector and the consumer, but a third party—the judge—has also been introduced to the conversation as a finder of fact. Because both the consumer and the judge play vital roles in the resolution of a debt collection suit, a misrepresentation to either party may significantly affect the outcome of that suit. If a debt collector makes a misrepresentation to recover a debt, it should not matter whether the debtor, his attorney, or the presiding judge is deceived so long as that deception results in an improper recovery at the consumer's expense. Unfortunately, this is precisely where the Seventh Circuit drew the line in *O'Rourke*.¹¹³

2. Statutory Support for a Broad Reading

In addition to the trend among some courts to broaden the scope of Section 1692e, the plain language and purpose of the FDCPA also support this position. The FDCPA is not meant to be restricted to consumers but should apply to the “gullible as well as the shrewd.”¹¹⁴ The purpose of the FDCPA is “to eliminate abusive debt collection practices by debt collectors,”¹¹⁵ and Section 1692e accomplishes this by prohibiting debt collectors from “us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt.”¹¹⁶ Certainly, suing a debtor is one means of debt collection; indeed, the Supreme Court has observed that “litigating . . . seems simply one way of collecting a debt.”¹¹⁷ This is especially so within the court system as documents submitted to the court are also served on opposing counsel.¹¹⁸ Therefore, it is a reasonable inference that information conveyed by a debt collector to a court will also be conveyed to the defending consumer because courts are a “medium through which debt collection information is conveyed to consumers.”¹¹⁹ Assuming this, then misleading documents submitted to a court would also

112. See *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

113. See *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 943 (7th Cir. 2011).

114. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

115. 15 U.S.C. § 1692(e) (2006); *Muha v. Encore Receivable Mgmt., Inc.*, 558 F.3d 623, 627 (7th Cir. 2009) (“The purpose of the Fair Debt Collection Practice Act is to protect consumers . . .”).

116. 15 U.S.C. § 1692e.

117. *Heintz*, 514 U.S. at 297; *Donohue v. Quick Collect Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) (quoting *Heintz*, 514 U.S. at 297).

118. FED. R. CIV. P. 5(a).

119. *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 949 (7th Cir. 2011) (Tinder, J., concurring).

be conveyed to a defendant consumer and should constitute a misrepresentation to the judge and consumer.¹²⁰

With regards to the scope of protection under Section 1692e, the FDCPA is at best broad and at worst silent. However, in looking at the legislative history of the FDCPA, Congress rejected a proposal to place “litigation activities” beyond the scope of the FDCPA.¹²¹ The Supreme Court believes that, “litigation activities” refers to in-court activities by attorneys of a legal nature (e.g., submitting petitions).¹²² Section 1692e “do[es] not designate any class of persons, such as lawyers, who can be abused, misled, etc., by debt collectors with impunity.”¹²³ Thus, while the FDCPA was enacted to protect consumers,¹²⁴ it does not specify which parties the abuse of whom would constitute a harm to consumers.¹²⁵ Conversely, the language of the FDCPA does not exempt judges from Section 1692e considerations.¹²⁶

Instead, the FDCPA is steeped in broad language so as to provide consumers with the most protection reasonable.¹²⁷ The FDCPA applies to any debt collector who fails to abide by any of the FDCPA’s provisions “with respect to any person.”¹²⁸ Under the FDCPA, any violators are liable to that person.¹²⁹ Read literally, this means that any debt collector subject to the FDCPA is civilly liable to any person¹³⁰ notwithstanding the non-exhaustive enumerations in Section 1692c of the FDCPA.¹³¹ The repeated usage of the term “any” throughout the statute and its purpose of providing a wide shield for consumers suggests that it should be interpreted broadly and applied to misrepresentations made to judges.

3. Direct and Indirect Communication

Misrepresentations should be actionable under Section 1692e regardless of whether they were made through direct or indirect communications with

120. *See id.*

121. *Heintz*, 514 U.S. at 298. “[Congress] proposed alternative language designed to keep litigation activities outside the Act’s scope, but that language was not enacted.” *Id.*

122. *See id.* at 297–98.

123. *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 773 (7th Cir. 2007).

124. 15 U.S.C. § 1692(e) (2006); *Muha v. Encore Receivable Mgmt., Inc.*, 558 F.3d 623, 628 (7th Cir. 2009) (“The purpose of the Fair Debt Collection Practice Act is to protect consumers . . .”).

125. *See Evory*, 505 F.3d at 773.

126. *See O’Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 941 (7th Cir. 2011) (majority opinion) (“[Section 1692]’s language is not specifically limited to statements directed at consumers.”).

127. *E.g.*, *Wright v. Fin. Serv. of Norwalk, Inc.*, 22 F.3d 647, 649 (6th Cir. 1994) (citing *Riveria v. MAB Collections, Inc.*, 682 F.Supp. 174, 175 (W.D.N.Y. 1988)) (noting liability under the FDCPA is “couched in the broadest possible language”).

128. 15 U.S.C. § 1692k.

129. *Id.*

130. *Wright*, 22 F.3d at 649–50.

131. *See* 15 U.S.C. § 1692c(d).

the consumer. The Seventh Circuit would restrict this to direct statements.¹³² However, a debt collector may communicate with a consumer either directly or indirectly.¹³³ It is important to note that “[t]he FDCPA . . . defines a ‘communication’ expansively,”¹³⁴ and even in the Seventh Circuit, indirect communications where statements are made to a consumer’s attorney are actionable.¹³⁵ Yet, the Seventh Circuit approach to enforcement restricts itself to harms resulting from direct communications with a debt collector.¹³⁶ While both the Seventh and Sixth Circuits have agreed that the FDCPA is “designed to provide information that helps consumers to choose intelligently,”¹³⁷ the Seventh Circuit cabins Section 1692e to only those misleading statements that could influence a consumer’s decision.¹³⁸ In doing so, the Seventh Circuit in *O’Rourke* refused to extend Section 1692e to cover false representations made indirectly to a consumer by a judge in state court.¹³⁹

The Seventh Circuit in *O’Rourke* held that “[j]udges do not have a special relationship with consumers” in the same way as an executor or attorney.¹⁴⁰ This is because judges do not “stand in the consumer’s shoes.”¹⁴¹ However, such a standard is too restrictive to fulfill the FDCPA’s purpose of protecting consumers.¹⁴² *O’Rourke* fails to recognize that communications may be harmful if delivered directly or indirectly. And even if a state court pleading is not directly aimed at a consumer, it ultimately works to cause deception by the lawyer.¹⁴³ If a judge decides the outcome of a case, then deceiving the finder of fact has a very direct effect on the consumer. The court in *O’Rourke* also overlooked the fact that the debt collector submitted a misleading document while attempting to collect a debt in state court.¹⁴⁴ Therefore, the debt collector used deceptive means in an attempt to collect a debt, which patently violates Section 1692e(10)’s prohibition against “[t]he use of *any* false representation or deceptive means

132. *O’Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 943 (7th Cir. 2011).

133. See *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011).

134. *Id.*

135. *Id.*; *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 773 (7th Cir. 2007).

136. *O’Rourke*, 635 F.3d at 944.

137. *Id.* at 942; *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010); see also *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 596 (6th Cir. 2009).

138. *O’Rourke*, 635 F.3d at 942; see also *Hahn v. Triumph P’Ships LLC*, 557 F.3d 755, 757–58 (7th Cir. 2009).

139. *O’Rourke*, 635 F.3d at 943–44 (finding that the Seventh Circuit draws the line for application of Section 1692e at “communications directed at consumers . . . and those who stand in their shoes”).

140. *Id.* at 944.

141. *Id.*

142. See *id.* at 943.

143. See *Richard K. Burke, Truth in Lawyering: An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1, 5 (1984).

144. See *O’Rourke*, 635 F.3d at 940–41.

to collect or attempt to collect any debt or to obtain information concerning a consumer.”¹⁴⁵

In contrast, the Sixth Circuit’s view on misrepresentations does not stop outside of the courthouse.¹⁴⁶ The Sixth Circuit in *Hartman* takes the next logical step by recognizing that a consumer’s decisions may be affected even after litigation has commenced.¹⁴⁷ A consumer is constantly evaluating what decisions to make once a debt collector begins collection attempts. Before litigation, a consumer considers whether she believes that the debt collector could prevail in a court of law,¹⁴⁸ whether threats of litigation are real,¹⁴⁹ and whether she should make the requested lump sum payment to the debt collector. After litigation commences, the consumer must then consider whether she should continue fighting the case or whether she should settle.¹⁵⁰ These later considerations are affected by the perceived strength of the debt collector’s case, and if a misleading document that resembles the consumer’s outstanding credit card statement is attached to the debt collector’s complaint, then that may indirectly cause the debt collector’s case to appear stronger than it is in actuality.¹⁵¹ This was the scenario in both *O’Rourke*¹⁵² and in *Hartman*.¹⁵³ The Sixth Circuit in *Hartman* correctly interpreted the spirit of the FDCPA and provided the consumers in that case with a potential remedy for this violation.¹⁵⁴ In keeping with the FDCPA’s purpose of protecting consumers from any misleading representations made in the course of collecting a debt,¹⁵⁵ direct and indirect communications would appear equally important.

D. CONSEQUENCES OF A NARROW INTERPRETATION

1. Contradiction of the FDCPA’s Purpose of Allowing Consumers to Act as Private Attorneys General

The FDCPA was enacted in order to allow consumers to enforce violations of the Act instead of having to rely on a government agency to intervene on the consumer’s behalf.¹⁵⁶ Government enforcement of any

145. 15 U.S.C. § 1692e(10) (2006) (emphasis added).

146. See *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616 (6th Cir. 2009).

147. See *id.*

148. See Carol L. Schlitt, *Should I Settle My Lawsuit?*, NYLAWTHOUGHTS.COM (Mar. 18, 2011), <http://nylawthoughts.com/2011/03/18/should-i-settle-my-lawsuit/>.

149. See 15 U.S.C. § 1692e(5).

150. See Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 581 (2001).

151. See *O’Rourke v. Palisades Acquisition XCI, LLC*, 635 F.3d 938, 939–41 (7th Cir. 2011); *Hartman*, 569 F.3d at 612.

152. See *O’Rourke*, 635 F.3d at 939–41.

153. See *Hartman*, 569 F.3d at 612.

154. See *id.* at 613.

155. See 15 U.S.C. § 1692e (2006).

156. See *id.* § 1692k.

statute can be a costly task, requiring enormous amounts of resources.¹⁵⁷ With this in mind, Congress decided to provide individual citizens with a private cause of action to protect their own rights against unfair debt collection practices.¹⁵⁸ By allowing consumers to act as “private attorneys general,”¹⁵⁹ the FDCPA promotes several interests. First, the FDCPA rewards citizens for educating themselves about their rights against debt collectors. Second, it forces debt collectors to exercise more caution and care when collecting debts, as they not only have to worry about the CFPB,¹⁶⁰ but also consumers bringing claims against them for FDCPA violations.¹⁶¹ Third, when citizens assert their own rights in private civil claims, it alleviates the burden on the CFPB to closely monitor minor debt collectors, allowing the CFPB to focus on large-scale FDCPA violations by bigger debt collectors.¹⁶² Last, this empowers consumers by promoting communication between debt collectors and consumers. The result should be a future where consumers are more aware of their rights and ready to bring claims to enforce those rights, and where debt collectors are incentivized to collect debts in a more equitable fashion. Providing consumers with a cause of action under Section 1692e for misrepresentations made to a court promotes these interests by enabling consumers to protect their own rights without having to depend on external remedies such as enforcement by the CFPB or court sanctions.

2. A Small Section’s Big Impact

Section 1692e is admittedly a small section when contrasted with the numerous regulations imposed by the FDCPA.¹⁶³ However, a narrow

157. Paul V. Timmins, *Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act*, Note, 84 MICH. L. REV. 1579, 1595 (1986).

158. 15 U.S.C. § 1692k.

159. *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008) (internal quotation marks omitted).

160. 15 U.S.C. § 1692l, amended by Dodd-Frank Act, Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 2092 (2010) (codified at 15 U.S.C. § 1692l).

161. 15 U.S.C. § 1692k.

162. Congress extolled the value of citizen-initiated law enforcement when enacting the Civil Rights Attorney’s Fees Awards Act of 1976:

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality.

H.R. REP. NO. 94-1558, at 1 (1976); see also Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 361 (1988).

163. See 15 U.S.C. §§ 1692–1692o.

application of this section has the potential to place substantial and widespread burdens on consumer debtors in several ways.

First, adopting the Seventh Circuit's view that Section 1692e should not apply to pleadings submitted to a state court exposes consumers to potential abuses with little hope of remedy notwithstanding the FDCPA's purpose of giving consumers a greater ability to bring actions against third party debt collectors. Congress enacted the FDCPA with the expectation that consumers, as very interested parties, would privately enforce violations of the FDCPA.¹⁶⁴ While the CFPB is permitted to take regulatory action,¹⁶⁵ the goal of passing the FDCPA was that private civil suits by consumers would make it a "primarily self-enforcing" piece of legislation.¹⁶⁶ Therefore, it is essential that consumers be permitted to enforce this right and not have to wait on a third party to champion their cause.¹⁶⁷ The alternative is a toothless regulatory act that does little to incentivize debt collectors to curb abusive debt collection practices.¹⁶⁸

Narrowly interpreting Section 1692e would cut off a consumer's remedy in cases such as *O'Rourke* where a misrepresentation has been made in court.¹⁶⁹ Instead, the consumer would be forced to depend on the court to use its discretion under Rule 11¹⁷⁰ (or the respective state's equivalent to Rule 11) to deal with any misrepresentations made by a debt collector.¹⁷¹ In cases where the court does not find a violation or chooses to not impose a sanction, a consumer would benefit from having a private cause of action under the FDCPA. A narrow interpretation of Section 1692e would take this private cause of action away from consumers, effectively

164. S. REP. NO. 95-382, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

165. 15 U.S.C. § 1692l, *amended by* Dodd-Frank Act § 1089, 124 Stat. at 2092 (codified at various subsections of 15 U.S.C. § 1692l).

166. S. REP. NO. 95-382, at 5.

167. *See* Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 1014 (1983).

168. *See* Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir. 2004).

169. *See* O'Rourke v. Palisades Acquisition XVI, LLC, 635 F.3d 938, 939 (7th Cir. 2011).

170. The usage of the word "may" in Rule 11(c) gives judges discretionary power to impose sanctions. FED. R. CIV. P. 11(c).

171. Rule 11(b) of the Federal Rules of Civil Procedure states the following:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation [and] . . . (3) the factual contentions have evidentiary support . . .

FED. R. CIV. P. 11(b).

undermining the FDCPA's purpose of protecting consumers by eliminating abusive and deceptive debt collection practices.¹⁷²

Second, limiting the scope of Section 1692e will also counter the spirit of the Supreme Court's decision in *Heintz v. Jenkins* to provide further protections to consumers from debt collectors who would use their attorneys as hired guns to avoid liability under Section 1692e.¹⁷³ For years, debt collectors have side-stepped regulations imposed by the FDCPA by having their attorneys act in their stead.¹⁷⁴ In response, the Supreme Court decided to definitively extend the application of the FDCPA to include both debt collectors and attorneys representing or acting as debt collectors.¹⁷⁵ One goal in this case was to protect consumers by preventing debt collectors from abusing the attorney exception by using hired attorneys to commit FDCPA violations on the debt collector's behalf.¹⁷⁶

Third, a narrow reading of Section 1692e also permits debt collectors to abuse consumers by exploiting the misrepresentation exception,¹⁷⁷ effectively undercutting the spirit of *Heintz*.¹⁷⁸ As described in the previous hypothetical situation, a debt collector would be free to deceive his attorney in order to make a misleading representation to the court with relation to litigation to recover a debt. This type of situation is very possible given the reactions of the judges in both *Hartman* and *O'Rourke* when consumers brought civil actions against a third party debt collector for violations of Section 1692e for in-court misrepresentations. Such an abuse by a debt collector of a third party (attorney) privilege is precisely the type of misconduct that the FDCPA and Section 1692e were enacted to proscribe.¹⁷⁹ Thus, by restricting the scope of Section 1692e to the narrow definition of "communications directed at consumers" held by the Seventh Circuit,¹⁸⁰ debt collectors are still able to use some sort of deception in

172. The first section of the FDCPA states that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," and in response, the FDCPA was enacted to "eliminate abusive debt collection practices by debt collectors" because the "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. § 1692 (2006).

173. See *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

174. See Neil Simon, *The Fair Debt Collection Practices Act After Heintz v. Jenkins: A Practical Examination of the End of the Exemption*, 46 EMORY L.J. 389, 390 (1997). Congress originally passed the FDCPA with an exemption for attorneys operating as or for debt collectors. *Id.* However in 1986 Congress repealed that exemption, "theoretically bringing [attorneys] within the purview of the Act." *Id.* at 391.

175. See *Heintz*, 514 U.S. at 299.

176. See *id.* at 298.

177. See *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 943–44 (7th Cir. 2011). The Seventh Circuit "draw[s] the line at communications directed at consumers" and so excludes misrepresentations intended to mislead the judge that are submitted to a court of law from enforcement under § 1692e.

178. See *Heintz*, 514 U.S. at 294–95, 299.

179. See 15 U.S.C. §§ 1692(a),(e), 1692e (2006).

180. *O'Rourke*, 635 F.3d at 943.

relation to the collection of a debt. This is hardly the call of the FDCPA as it prohibits the use of “any false, deceptive, or misleading representation” by debt collectors.¹⁸¹

3. The Small Section’s Small Impact on Debt Collectors

It is important to note that broadly interpreting Section 1692e should not significantly disadvantage debt collectors. The FDCPA’s goal is to protect consumers while ensuring “that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.”¹⁸² Allowing a broad interpretation of Section 1692e would not remove tools available to debt collectors that they would otherwise have been permitted to use by law. Submitting misleading documents to a court was not permissible before the enactment of Section 1692e, and is still impermissible apart from Section 1692e under provisions such as Rule 11.¹⁸³ Broad coverage does not turn a permissible practice into an illegal one. A lie to the court is still a lie, even if consumers do not have standing to sue under Section 1692e for that lie. Instead, a broad scope will allow consumers to enforce their own rights where a judge and the CFPB might not. As the proposed changes to the interpretation of Section 1692e do not interfere with the legal rights of debt collectors, debt collectors will likely only suffer the disadvantage of more strictly enforced pre-existing rules of ethical conduct. By allowing consumers to regulate debt collectors, those who refrain from unfair collection practices will gain a competitive advantage over their counterparts who have carried on unchecked by the courts.

IV. DODD-FRANK AND SECTION 1692e—SUGGESTIONS FOR THE CFPB

This section focuses on the effect that the Dodd-Frank Act has and should have on the enforcement of Section 1692e. Enacted July 21, 2010, the Dodd-Frank Act transferred enforcement and regulatory powers over the FDCPA from the FTC to the CFPB.¹⁸⁴ The CFPB is charged with “regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws,”¹⁸⁵ and focuses on educating consumers and “[r]estrict[ing] unfair, deceptive, or abusive [debt

181. 15 U.S.C. § 1692e.

182. *Id.* § 1692(e).

183. FED. R. CIV. P. 11(b).

184. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 1089, 124 Stat. 1376, 2092 (2010) (codified at 12 U.S.C. §§ 1692k, 1692m, 1692o).

185. *Id.* § 1011(a), 124 Stat. at 1964 (codified at 12 U.S.C. § 5491).

collection] acts or practices.”¹⁸⁶ As such, the CFPB is charged with the responsibility of interpreting the FDCPA.¹⁸⁷

On the whole, the CFPB will have the same level of discretion and regulatory power as the FTC. However, the significance in transferring power to the CFPB is two-fold. First, the CFPB is a specialized office that represents a consolidation of consumer financial protection authorities that had been originally scattered across several federal agencies.¹⁸⁸ Second, the CFPB has rulemaking authority over federal consumer financial laws, which must be given deferential treatment by the courts.¹⁸⁹ This great deference given to rules enacted by the CFPB strategically positions it to bring considerable and effective change to consumer protection laws like the FDCPA.

In 2011, the FTC has taken “significant steps” in its regulation of abusive debt collection practices.¹⁹⁰ Additionally, the CFPB “is currently conducting nonpublic investigations of debt collection practices to determine whether they violate the FDCPA or Dodd-Frank Act.”¹⁹¹ The CFPB has filed several amicus briefs also addressing abusive debt collection practices.¹⁹² However, Section 1692e has yet to be addressed by either the FTC or CFPB. With that in mind, the following are suggested actions that the CFPB take going forward.

A. CLEARLY DEFINE THE SCOPE OF SECTION 1692e

First, the CFPB should clarify vague definitions in the FDCPA. Title X of the Dodd-Frank Act gives the CFPB deferential oversight in interpreting laws such as the FDCPA:

[T]he deference that a court affords to the [CFPB] with respect to a determination . . . regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such . . . law.¹⁹³

The CFPB is clearly the appropriate department to make such determinations, and by doing so, the CFPB would settle many disputes among the courts as to how to interpret sections of the FDCPA.

In the case of misrepresentations made by debt collectors, the scope of Section 1692e could be easily settled with an enumerated list of parties

186. *Learn About the Bureau*, CFPB, <http://www.consumerfinance.gov/the-bureau/> (last visited Aug. 28, 2012).

187. Dodd-Frank Act § 1022(b)(4)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512).

188. See BUILDING THE CFPB, *supra* note 72, at 8.

189. See Dodd-Frank Act § 1022(b)(4)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512).

190. ANNUAL REPORT 2012, *supra* note 1, at 3.

191. *Id.* at 17.

192. *Id.* at 17–19.

193. See Dodd-Frank Act § 1022(b)(4)(B), 124 Stat. at 1981 (codified at 12 U.S.C. § 5512).

subject to that subsection. This would solve any issues a court may have in interpreting what “in connection with the collection of any debt”¹⁹⁴ actually means. Additionally, clearer definitions will provide debt collectors with boundaries and consumers with a better understanding of their rights, ultimately saving both parties from unnecessary or inequitable litigation.¹⁹⁵

While there is an argument to be made that ambiguity in a legal context has a valuable deterrent effect,¹⁹⁶ Section 1692e is not one of those contexts. Ambiguity is useful when it spurs a potential violator to engage in a cost-benefit analysis that results in a choice to err on the side of caution by acting conservatively.¹⁹⁷ For example, the ambiguity of not knowing whether a police officer has set up a speed trap around the bend is effective when it causes the driver to slow down just to be safe. However, a look at cases like *O’Rourke* and *Hartman* suggest that such a deterrent effect does not exist with regard to Section 1692e violations. Deterrence would be realized if the ambiguity in application of Section 1692e led debt collectors to refrain from submitting misleading documents to state courts.

The very existence of cases like *O’Rourke* and *Hartman* demonstrate the exact opposite—that debt collectors are attempting to take advantage of this ambiguity. Further, even if debt collectors decided to play it safe and refrain from abusing Section 1692e, the effect would be the same as the CFPB clearly defining the scope of Section 1692e. Therefore, in order to protect consumers from repeat occurrences of cases like *O’Rourke* and *Hartman*, and to provide debt collectors with unequivocal guidelines, the CFPB should clearly define Section 1692e.

B. ENACT A MORE DETAILED COMPLAINT RECORDING SYSTEM

Second, the CFPB should employ a more detailed complaint recording system. While the current categories are useful, there is no category that accounts for misrepresentations that might violate Section 1692e.¹⁹⁸ In order to better understand the issue of misrepresentations made to third parties, the CFPB should add a misrepresentation category to the types of complaints received and reported each year.¹⁹⁹ Further, the misrepresentation category should include a detailed description of the

194. 15 U.S.C. § 1692e (2006).

195. See THE PATH FORWARD: ACA INTERNATIONAL’S BLUEPRINT FOR MODERNIZING AMERICA’S CONSUMER DEBT COLLECTION SYSTEM 16 (2011) [hereinafter THE PATH FORWARD], available at <http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf>. The Association of Credit and Collection Professionals suggests to the CFPB that there should be greater clarification and direction to both debt collectors and consumers in debt collection suits. *Id.*

196. See Joan M. Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1165–66 (2003).

197. See *id.*

198. ANNUAL REPORT 2012, *supra* note 1, at 7.

199. See ANNUAL REPORT 2012, *supra* note 1, at 7–10.

types of misrepresentations that are made (e.g., statements and documents submitted to a court, to an unrelated person, to an attorney, and directly to consumers). Because it is not clear how often Section 1692e violations occur in court settings, a more detailed recording of debt collection complaints will enable the CFPB to identify the frequency of such instances. After all, the CFPB cannot address consumer debt problems without understanding the extent of those problems.²⁰⁰

C. REQUIRE TRANSFER OF PROPER DOCUMENTATION

Last, the CFPB should make debt collection suits simpler by requiring that third party debt collectors procure and maintain all documents necessary to successfully bring a debt collection suit when purchasing debt from an original creditor. Doing so would ensure that even before bringing a suit to recover a debt, debt collectors are equipped with the necessary and proper documentation to bring a suit. Having such documentation should significantly reduce the instances of document misrepresentation either to a court through pleadings or directly to a consumer.

While the Association of Credit and Collection Professionals (ACA) has suggested that the CFPB require original creditors to retain all necessary documents for a debt recovery suit,²⁰¹ it would be more effective if the CFPB mandated a transfer of all necessary documents to a third party debt collector when the debt is sold. A creditor who has sold a debt has little incentive to maintain that account's information as he has already been paid for the debt and may no longer collect on it. It is also burdensome to effectively maintain this data, as the statute of limitations to bring suit for a debt generally ranges from three to ten years.²⁰² This would require that an original creditor maintain access to individual account data potentially for an entire decade even though it has already turned over that account to a third party debt collector. On the other hand, debt collectors have a great incentive to maintain this information because their profits depend on the successful collection of purchased debt,²⁰³ either inside or outside of court. Therefore, the burden should rest on debt collectors to procure and maintain this data.

Currently, when a debt is sold, necessary and relevant consumer and account data are not always made fully available to the purchasing debt collector, leading to later debt verification problems.²⁰⁴ This is because it may be impractical and costly to transfer vast amounts of data and because

200. See Gerri Detweiler, *What the CFPB Should Do About Debt Collectors*, CREDIT.COM (July 19, 2011), <http://www.credit.com/blog/2011/07/what-the-cfpb-should-do-about-debt-collectors/2/>.

201. See THE PATH FORWARD, *supra* note 195, at 17–18.

202. See THE PATH FORWARD, *supra* note 195, at 18.

203. See Holly J. Joiner, *Private Police: Defending the Power of Professional Bail Bondsmen*, 32 IND. L. REV. 1413, 1431 (1999).

204. See THE PATH FORWARD, *supra* note 195, at 17.

there is no requirement that original creditors provide this information to purchasers.²⁰⁵ Additionally, because the CFPB is focusing on educating consumers about their debt collection rights,²⁰⁶ there may be a future increase in instances of consumers challenging debt collectors for proper verification of debts. While it may be initially burdensome for debt collectors to procure and maintain proper documentation, it will be beneficial in the future as the demand to provide accurate documentation for debt collection suits becomes more frequent.

CONCLUSION

The purpose of the FDCPA is to “eliminate abusive debt collection practices by many debt collectors” in light of “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices.”²⁰⁷ To better protect consumers, Section 1692e should be interpreted to give consumers a private cause of action against debt collectors for misstatements made in pleadings and other documents submitted to a court of law. Currently, that interpretation is unclear after *O’Rourke* and *Hartman*.²⁰⁸

The Supreme Court will have to eventually define the scope of Section 1692e. As Justice Tinker stated in his dissent in *O’Rourke*, the Seventh Circuit’s decision to exclude misrepresentations made in pleadings from the scope of Section 1692e has put the Seventh and Sixth Circuits “at loggerheads.”²⁰⁹ This difference in opinion between the Sixth and Seventh Circuits as to what constitutes a “communication” to a consumer should be settled in favor of consumers. This means a broader interpretation based on trends in circuit decisions, the purpose and wording of the FDCPA, and the potential for abuse by debt collectors under a narrow application.

While consumers should be allowed to protect their rights under Section 1692e, the CFPB also has an important role to play in protecting consumers from unscrupulous debt collection practices. By using its regulatory powers to define Section 1692e,²¹⁰ by gathering more accurate data on specific types of debt collector abuses,²¹¹ and by requiring a more stringent document transfer process when selling debt,²¹² the CFPB could

205. See THE PATH FORWARD, *supra* note 195, at 17–18.

206. See BUILDING THE CFPB, *supra* note 72, at 5–6.

207. 15 U.S.C. § 1692 (2006).

208. *O’Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 949 (7th Cir. 2011) (Tinker, J., concurring) (noting that the Sixth Circuit found a genuine issue of material fact existed regarding a “questionable statement virtually identical to the one at issue” in the Seventh Circuit case).

209. *Id.*

210. See Dodd-Frank Act, Pub. L. No. 111-203, § 1022(b)(4)(B), 124 Stat. 1376, 1981 (2010) (codified at 12 U.S.C. § 5512).

211. See Detweiler, *supra* note 200.

212. See THE PATH FORWARD, *supra* note 195, at 17–18.

also effectively address the increasing problem of deceptive debt collection practices.²¹³

A misstatement can be made inside or outside of the courtroom. In the case of third party debt collection, either type of deception has the potential to harm consumers by misleading either the consumer or the judge. However, it is not clear why the FDCPA—a body of law meant to be enforced by consumers²¹⁴—should not apply to all aspects of debt collection. Hopefully Section 1692e will be interpreted by the Supreme Court and the CFPB in a way that extends its protective scope into the courtroom.

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213. Between 2007 and 2011, there has been a steady increase in the number of complaints, related to misrepresentations by third-party debt collectors, received by the FTC that have been categorized as “[d]emanding larger payment than permitted” and “[t]hreatening dire consequences if consumer fails to pay.” See ANNUAL REPORT 2012, *supra* note 1, at 7.

214. See *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008) (stating that the FDCPA “grants a private right of action to a consumer who receives a communication that violates the Act”).

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