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Advantage Tenant: Fair Debt Collection Practices Act Gives Tenants Oversized Rackets in the Eviction Match

Bennett S. Silverberg

ADVANTAGE TENANT: FAIR DEBT COLLECTION PRACTICES ACT GIVES TENANTS OVERSIZED RACKETS IN THE EVICTION MATCH

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The effect of this Court's ruling is to require a sea of change in the practice as well as to open the door to a flood of federal court suits against lawyers under the [Fair Debt Collection Practices Act]. . . . [T]hese consequences will have untoward effects.[1]

INTRODUCTION

Et domus sua cuique tutissimum refugium.[2] Just as a man may be expected to protect his home from foreign invaders or burglars, any attempt to invade a man's home will meet resistance. This resistance will ensue even if the invader arrives at the doorstep with the law on his side. Even the most docile and law-abiding of tenants will respond in a negative manner when faced with an eviction notice. The eviction is not viewed from the tenant's perspective as an attempt by the landlord to recover the use of his valuable asset but as an invasion of the *tenant's castle*. Only in today's more *civilized* manner of dealing with invaders armed with the law, does the tenant view the eviction not as a war, but the beginning of a legal game.

The eviction match begins. The stakes are serious: for the tenant, the roof over his family's head; for the landlord, a vital

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[*] Brooklyn Law School Class of 2000; B.A., The Johns Hopkins University, 1997. This Note is dedicated to the memory of Noble Impulse (1991-2000).

[1] Romea v. Heiberger, 988 F. Supp. 715, 717 (S.D.N.Y. 1998).

[2] *For a man's house is his castle.* Sir Edward Coke (1644), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 208-09 (Angela Partington ed., rev. 4th ed. 1996).

source of income. The players enter the court, but the landlord starts at a disadvantage. He has been penalized for using an attorney during the eviction. In response, the court offers the tenant a larger racquet that slows down the landlord's serve on impact. The landlord suffers as the tenant unnecessarily prolongs the game that the tenant knew he would inevitably lose before the match had even begun.

This situation is the result of a series of state[3] and federal[4] cases within New York that have seriously altered the manner in which real estate litigation is practiced by attorneys throughout the nation. In the past, New York landlords were able to secure a relatively fast eviction after service of the "three day notice" on the tenant.[5] The tenant had the option either to surrender the property back to the landlord or cure the default.[6] Previously, a landlord could accept the word of a tenant a few days behind in his rent payments that he would catch up on those payments. Now, following the decision of the Second Circuit Court of Appeals in *Romea v. Heiberger*, the Fair Debt Collection Practices Act ("FDCPA")[7] gives tenants leverage over the course of the eviction when an attorney handles the eviction on behalf of a landlord. This odd result stems from the fact that attorneys are treated as debt collectors when they attempt to recover the landlord's rent.

The original purpose of the FDCPA was to protect consumers from deceptive and abusive debt collection practices.[8] To that end,

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[3] *See, e.g.*, Eina Realty v. Calixte, 679 N.Y.S.2d 796 (Civ. Ct. 1998); Dearie v. Hunter, 676 N.Y.S.2d 896 (Civ. Ct. 1998); SOHO Tribeca Space Corp. v. Mills, N.Y.L.J., May 13, 1998, at 28, col. 6 (N.Y. Civ. Ct.).

[4] *See, e.g.*, Romea v. Heiberger, 163 F.3d 111 (2d Cir. 1998); Hairston v. Whitehorn & Delman, No. 97-3015, 1998 WL 35112, at *1 (S.D.N.Y. Jan. 30, 1998).

[5] N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979 & Supp. 1999) (providing for at least three days notice to the delinquent tenant "in writing requiring . . . the payment of the rent, or the possession of the premises").

[6] *Id.*

[7] Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (codified as amended at 15 U.S.C. §§ 1692-1692o (1994 & Supp. IV 1998)).

[8] 15 U.S.C. § 1692(e) (1994). Its purpose is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively

the FDCPA provides consumers who interact with debt collectors several protections. One of these protections is the 30 day validation period.[9] During this validation period, the tenant, for whatever reason, can request that the attorney validate the amount of the debt.[10] A violation of the FDCPA can stall the entire eviction proceeding until the federal litigation over the FDCPA violation is completed. But, tenants need not have evil motives to delay their evictions, just a desire to remain in their homes.

The effects of the application of the FDCPA to delinquent rent collection nevertheless will be particularly virulent in New York City where tenants have now been given a powerful weapon against landlords in eviction proceedings.[11] The tenant's recent victory in controlling the course of the eviction process, however, may come at a high price, as landlords seek to protect their investments by raising rents and imposing harsher eviction policies in reaction to this wave of consumer protectionism.[12]

This Note focuses on the invalidation in light of *Romea* of the practice in New York under the Real Property Actions and Procedures Law ("RPAPL") of having the attorney for the landlord

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disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.*

[9] 15 U.S.C. § 1692g (1994).

[10] *Id.* §1692g(b) (providing that "if a consumer notifies the debt collector in writing within the thirty-day [validation period] . . . the debt collector shall cease collection of the debt . . . until the debt collector obtains verification of the debt . . . and a copy of such verification . . . is mailed to the consumer by the debt collector").

[11] Romea v. Heiberger, 163 F.3d 111 (2d Cir. 1998). Once under the protection of the FDCPA, the tenant enjoys the protection of the Act and the ability to stall the eviction proceedings. 15 U.S.C. § 1692 (1994). The FDCPA sets forth a debt collection procedure that must be followed or the creditor may be found liable for damages or lose the ability to collect the debt. *Id.* Of the safeguards provided to tenants the most significant are: (1) the thirty-day debt validation period; (2) a wide range of protections regarding communication about the debt with third parties; and (3) contacting the debtor when the validity of the debt is challenged. 15 U.S.C. § 1692g (1994). Any litigation outside of the summary judgment proceeding necessarily raises the cost of the eviction and may lead to unpredictable results when the underlying debt is challenged.

[12] *See infra* Part II.C, discussing the likely increase in rental costs as a result of increased consumer protection.

undertake eviction proceedings under strict statutory guidelines.[13] In *Romea*, the notice, as required by New York law,[14] when served by an attorney for the landlord, was found to be incompatible with the provisions of the FDCPA.[15] Landlords in other states that have similar summary proceedings soon may also have their evictions delayed when they have their attorney handle the eviction notice.[16] Following *Romea*, the only way a landlord can avoid

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[13] N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979 & Supp. 1999) (providing for at least three days to the delinquent tenant "in writing requiring . . . the payment of the rent, or the possession of the premises").

[14] *Id.*

[15] *Romea*, 163 F.3d at 119.

[16] The majority of all states have laws establishing summary proceedings for rent collection or eviction notice. *See, e.g.*, ALA. CODE § 35-9-6 (1991 & Supp. 1998) (allowing landlords to commence action 10 days after notice of non-payment of rent to tenant); ALASKA STAT. § 34.03.220(a)(2) (Michie 1998) (allowing 10 days notice); ARIZ. REV. STAT. ANN. § 33-361(B) (West 1990 & Supp. 1998) (allowing five days notice); ARK. CODE ANN. § 18-16-101(b) (Michie 1987 & Supp. 1999) (allowing 10 days notice); CAL. CIV. PROC. CODE § 1161(2) (West 1982 & Supp. 1999) (allowing three days notice); COLO. REV. STAT. ANN. § 13-40-104(1)(d) (West 1999) (allowing three days notice); CONN. GEN. STAT. ANN. § 47a-23(a) (West 1994 & Supp. 1999) (allowing three days notice); DEL. CODE ANN. tit. 25, § 5502(a) (1989 & Supp. 1998) (allowing five days notice); D.C. CODE ANN. § 45-1406 (1996) (allowing three days notice); FLA. STAT. ANN. § 83.56(1) (West 1987 & Supp. 1999) (allowing seven days notice); GA. CODE ANN. § 44-7-52(a) (Michie 1991 & Supp. 1999) (allowing seven days notice); HAW. REV. STAT. ANN. § 521-68(a) (Michie 1993) (allowing five days notice); IDAHO CODE § 6-303(2) (1998) (allowing three days notice); 735 ILL. COMP. STAT. ANN. 5/9-209 (West 1993) (allowing five days notice); IND. CODE ANN. § 32-7-1-5 (West 1976) (allowing 10 days notice); IOWA CODE ANN. § 562A.27(2) (West 1992 & Supp. 1999) (allowing three days notice); KAN. STAT. ANN. § 61-2304 (1994) (allowing three days notice); KY. REV. STAT. ANN. § 383.660(2) (Banks-Baldwin 1998) (allowing seven days notice); LA. CIV. CODE ANN. art. 4701 (West 1998) (allowing five days notice); ME. REV. STAT. ANN. tit. 14, § 6002(1) (West 1998) (allowing seven days notice); MD. CODE ANN., REAL PROP. § 8-401(b)(3)(i) (1996 & Supp. 1999) (allowing five days notice); MASS. GEN. LAWS. ANN. ch. 186, § 12 (West 1998) (allowing 14 days notice); MICH. COMP. LAWS ANN. § 554.134(2) (West 1989 & Supp. 1999) (allowing seven days notice); 1999 Minn. Sess. Law Serv. ch. 199, H.F. 2425, § 504B.321(1)(d) (West) (allowing 14 days notice); MISS. CODE ANN. § 89-8-13(3)(b) (1999) (allowing 14 days notice upon evidence of repeated defaults); MO. ANN. STAT. § 441.040 (West 1986 & Supp. 1999) (allowing 10

running afoul of the FDCPA, and enjoy the benefits of an expedited summary proceeding under state law, is to handle the eviction himself. This means that the landlord must deliver the three day notice and handle all aspects of the eviction up to and until the parties enter court.[17]

This Note argues that the Second Circuit Court of Appeals should not have applied the FDCPA to real estate litigation in New York State. Instead, the court should have ruled that New York's RPAPL summary non-payment proceeding is not an attempt to collect in the eyes of the FDCPA.[18] Rather than follow the Second

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days notice); MONT. CODE ANN. § 70-24-422(1)(c) (1999) (allowing three days notice); NEB. REV. STAT. ANN. § 76-1431(2) (Michie 1998) (allowing three days notice); NEV. REV. STAT. § 118A.430(1) (1997) (allowing five days notice); N.H. REV. STAT. ANN. § 540:3(II) (1997) (allowing seven days notice); N.J. STAT ANN. § 2A:18-53(c)(4) (West 1987 & Supp. 1999) (allowing three days notice); N.M. STAT. ANN. § 47-8-33(D) (Michie 1998) (allowing three days notice); N.C. GEN. STAT. § 42-3 (1976) (allowing 10 days notice); N.D. CENT. CODE § 33-06-02 (1999) (allowing three days notice); OHIO REV. CODE ANN. § 1923.04(A) (Banks-Baldwin 1998) (allowing three days notice); OKLA. STAT. ANN. tit. 41, § 131(B) (West 1999) (allowing five days notice); OR. REV. STAT. § 105.115(1)(a) (1997) (allowing 10 days notice); PA. STAT. ANN. tit. 68, § 250.501(b) (West 1994 & Supp. 1999) (allowing 10 days notice); R.I. GEN. LAWS § 34-18-35(a) (1995) (allowing five days notice); S.C. CODE ANN. § 27-40-710(B) (Law Co-op. 1991 & Supp. 1998) (allowing five days notice); S.D. CODIFIED LAWS § 21-16-1(4) (Michie 1987 & Supp. 1999) (allowing three days after termination of relationship between landlord and tenant for nonpayment); TENN. CODE ANN. § 66-28-505(a) (1993) (allowing 14 days notice); TEX. PROP. CODE ANN. § 24.005(a) (West 1984 & Supp. 1999) (allowing three days notice); UTAH CODE ANN. § 57-16-6(2)(d) (1994 & Supp. 1999) (allowing for five days notice for nonpayment of rent for mobile home); UTAH CODE ANN. § 78-36-3(1)(b)(i) (1996) (allowing for 15 days notice for nonpayment of rent for normal residence); VT. STAT. ANN. tit. 9, § 4467(a) (1998) (allowing for 14 days notice); VA. CODE ANN. § 55-248.31 (Michie 1998 & Supp. 1999) (allowing for five days notice); WASH. REV. CODE ANN. § 59.04.040 (West 1990) (allowing for 10 days notice); W. VA. CODE § 37-6-6(a) (1997 & Supp. 1999) (allowing one month notice); WIS. STAT. ANN. § 704.17(1) (West 1981 & Supp. 1998) (allowing for five days notice for year-to-year tenancies); WYO. STAT. ANN. § 1-21-1003 (Michie 1999) (allowing for three days notice).

[17] *See infra* Part II.C, discussing the procedures and pitfalls involved in having the landlord undertake the eviction process himself.

[18] An example of such an interpretation is provided in *Barstow Road Owners, Inc. v. Billing*, 687 N.Y.S.2d 845 (Nassau Dist. Ct. 1998). In this case

Circuit's reasoning in order to protect tenants in eviction proceedings, this Note suggests other means for New York State to safeguard tenant interests. Part I provides an understanding of the FDCPA and New York's summary proceeding used by landlords to regain their property under the RPAPL. Part II reviews the Second Circuit's decision in *Romea* and analyzes the case law underlying that decision, which interpreted the role of attorneys and the scope of debts covered under the FDCPA. Additionally, Part II examines the policy implications on the relationship between landlords and tenants in light of the *Romea* decision. Finally, Part III contends that New York's protections for tenants are at least equivalent to those of the FDCPA and that the FDCPA does not need to supplant New York law. This Note concludes that the Second Circuit's decision in *Romea* was unwise because it was based on flawed reasoning in prior decisions and failed to consider the effect of the ruling on landlord-tenant relations.

I. THE STATUTORY MATCH-UP

A. The FDCPA: Officiating the Relationship Between Debtor and Creditor

Congress enacted the FDCPA in response to the public outcry of consumer debtors over the abusive practices of debt collectors acting on behalf of creditors and to provide additional protections to consumers faced with inadequate state laws regulating debt

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a 10 day notice was sent to business tenants by the landlord's attorney in accordance with the lease signed between the landlord and tenant. *Id.* at 848. Additionally, the tenants were allegedly in default on paying cooperative fees. *Id.* at 853. The tenants alleged a violation of FDCPA, claiming that since the 10 day notice was an attempt to collect a debt, the FDCPA required a 30 day notice of default. *Id.* at 849. The district court ruled that the notice as required by New York's RPAPL is not an attempt to collect a debt covered by the FDCPA but merely a "jurisdictional precedent to the commencement of a summary proceeding." *Id.* at 851. The court treated the RPAPL notice like a "pleading or other court-related document" and therefore found it not to be within the coverage of the FDCPA. *Id.*

collection practices.[19] In passing the FDCPA, Congress sought to reduce the abusive practices which burdened the lives of consumers.[20] Additionally, Congress hoped the FDCPA would lead to "consistent State action to protect consumers against debt collection abuses."[21] The following examines the FDCPA, outlining the statute's requirements, repercussions of noncompliance, and the extent of the FDCPA's supremacy over state law.

1. Statutory Requirements of the FDCPA

The FDCPA provides substantive protections to consumers and sets limits on the activities of debt collectors. However, the FDCPA only applies to certain types of debt collection transactions. First, the party initiating any communication must be a debt collector.[22] The Act excludes any party who is attempting to collect debts owed to themselves[23] or parties that have a special relationship to the creditor.[24] In addition, the actual creditor will

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[19] 15 U.S.C. § 1692 (1994). The purpose of the Act has remained unchanged since its original incarnation in 1977 as an amendment to the Consumer Credit Protection Act. *Id.* Its purpose is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e).

[20] *Id.* § 1692(a) (observing that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of personal privacy").

[21] *Id.* § 1692(e).

[22] *Id.* § 1692a(6) (defining "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another").

[23] *Id.* § 1692a(6)(F) (excluding "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was originated by such person").

[24] *Id.* § 1692a(6)(A)-(D). Parties who have a special relationship to the creditor include an officer or employee of the creditor collecting debts for the creditor and process servers attempting to serve legal process in connection with the legal enforcement of a debt. *Id.*

not be exempted from FDCPA coverage if the creditor "uses any name other than his own" in attempting to collect the debt since the use of a third party's name would suggest to the debtor that a party, other than the original creditor, is involved in the collection of the debt.[25] The term "debt collector" previously exempted attorneys involved in debt collection, but that exemption was removed from the Act.[26] After a great outcry from the debtor constituency over "perceived abuse" by attorneys of their exemption in their debt collection practices, attorneys lost their exemption

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[25] *Id.* § 1692a(6) (stating that "[a]ny creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts" will not receive the exclusion normally given to creditors attempting to collect their own debts).

[26] The FDCPA, as originally enacted, included attorneys in the list of parties who were not debt collectors. 15 U.S.C.A. § 1692a (6)(F), *repealed by* 100 Stat. 768 (1986). This included "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." *Id.* Although attorneys are no longer exempt from the FDCPA, the legislative history suggests that the Act retains an exemption for attorneys engaged in litigation. *See* 132 CONG. REC. H10031-02 (daily ed. Oct. 14, 1986) (statement of Rep. Annunzio) (stating that "[o]nly collection activities, not legal activities, are covered by the act . . . . The act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature."); Paulemon v. Tobin, 30 F.3d 307, 309 (2d Cir. 1994) (stating that some courts have determined, through an examination of the legislative history, that an attorney exemption still exists under the FDCPA). To suggest that the Act covered attorney litigation activities would "produce absurd outcomes." Green v. Hocking, 9 F.3d 18, 21 (6th Cir. 1993). This view was altered significantly after the Supreme Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), which apparently brought attorney litigation activities within the scope of activities covered by the FDCPA. The FDCPA now defines a debt collector as "*any person* who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6) (1994) (emphasis added).

status.[27] Attorneys, however, recently won a battle to reclaim some of their exemption status.[28]

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[27] *See generally* William Strout, Heintz v. Jenkins—*Application of the Fair Debt Collection Practices Act to Litigators: Not the Death Knoll for Attorneys, Just an Unsound Decision*, 49 CONSUMER FIN. L.Q. REP. 310, 311 (1995). While it is unlikely that attorneys will ever regain their "exemption status" through legislative action, it is still possible for the Supreme Court to reverse its earlier decision holding that litigation activities are covered under the FDCPA in light of the case law developed as a result of *Heintz*. It should be noted that enforcement of New York's Code of Professional Responsibility might yield the same results that Congress intended in both litigation and non-litigation contexts. *See generally* N.Y. CODE OF PROF. RESP., Preamble (McKinney 1998) ("CPR"). The disciplinary rules serve both as an "inspirational guide [to attorneys] and as a basis for disciplinary action when the conduct of a lawyer falls bellow the required minimum standards" of the rules. CPR, Preliminary Statement. Under the CPR, an attorney is prohibited from taking any action on behalf of a client when such action would "serve merely to harass or maliciously injure another." *Id.* at Canon 7 (stating that "[a] lawyer should represent a client zealously within the bounds of the law").

The sanctions imposed for a violation of the CPR would be "in proportion to the gravity of the offense, the turpitude involved, and the extent that the [attorney's] acts and conduct affect his professional qualifications to practice law." *Id.* Any harm the Congress intended to protect against in removing the attorney exemption, including harassment of debtors and misrepresentation, are also likely violations of the CPR. The threat of strict enforcement of the CPR, which could lead to disbarment of an attorney or other sanction, would make the application of the FDCPA to litigation activities redundant and unnecessary. Sanctions under the CPR would deter malicious actions by attorneys far more than a $1000 fine, the statutory maximum under the FDCPA. 15 U.S.C. § 1692k(2)(A) (1994). Additionally, affected debtors would not be faced with the cost of lodging FDCPA litigation against an unethical or dubious attorney. *See also Model Rules of Professional Conduct* (1995) (many states base their own rules for professional conduct on this model code, however New York has chosen not to adopt the American Bar Association's Model Rules); Mary C. Daly, *An Overview of Ethical Dilemmas*, 9 J. SUFFOLK ACAD. L. 113, 116 (1994) (giving a brief history of the CPR).

[28] Pub. L. No. 104-208, § 2305(a), 110 Stat. 3009 (1996) (codified as amended at 15 U.S.C. § 1692e(11) (1994 & Supp. IV 1998)). Under this newly amended section of the FDCPA, "formal pleadings" are exempted from some technical rules regarding initial communications from debt collectors regarding a debt. *Id.* This amendment recognizes the ambiguities of the statute raised at oral argument in *Romea* on appeal to the Second Circuit. Romea v. Heiberger, 163 F.3d 111 (2d Cir. 1998). The amendment, however, raises new questions

The FDCPA governs where the debt collector is attempting to collect a debt covered by the Act.[29] The FDCPA is only concerned with regulating consumer debts.[30] As such, the debt collector must be attempting to collect a debt from a consumer. A "consumer" is defined under the Act as "any natural person obligated or allegedly obligated to pay any debt."[31] Since a consumer must be a "natural person," the Act does not apply to debts of corporations or other non-corporeal entities. Despite this limited definition of consumer, the courts have applied the term to persons who may not necessarily be the actual debtor.[32] The Act

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since the Act does not define the meaning of "formal pleadings," 15 U.S.C. § 1692e(11), and it does not completely exempt pleadings from coverage under the Act. *Id.* In *Romea*, the landlord asserted that the statutorily required three day notice provided to the tenant in *Romea* should be considered part of the "prerequisite" pleadings required for a summary non-payment proceeding. *Romea*, 163 F.3d at 117.

[29] 15 U.S.C. § 1692a(5) (1994). The Act applies to "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." *Id.*

[30] *Id.* § 1692a(3) (defining "consumer" as "any natural person obligated or allegedly obligated to pay any debt"). Throughout the FDCPA, the statute speaks of regulating the relationship and communications between the debt collector and consumer. *See id.* §§ 1692b, 1692c. Furthermore, the congressional purpose of the FDCPA relates to issues such as personal bankruptcies and personal privacy, issues that are not related to the commercial arena. *Id.* § 1692(a). For the purposes of this Note "debtor" will be used interchangeably with "consumer."

[31] *Id.* § 1692a(3).

[32] Derek S. Burrell, *The Federal Fair Debt Collection Practices Act: An Overview Rx for Debt Collector Myopia*, 21 S. ILL. U. L.J. 1, 9 (1996). Congress' intent, according to the courts, is to protect anyone who "comes in contact with proscribed debt collection practices" of debt collectors. Flowers v. Accelerated Bureau of Collections, No. 96 Civ. 4003, 1997 WL 136313, at *7 (N.D. Ill. Mar. 19, 1997) (quoting Riveria v. MAB Collections, Inc., 682 F. Supp. 174, 175 (W.D.N.Y. 1988)). A consumer under the Act can include the relatives of deceased debtor if a letter is addressed to a deceased debtor and the person opening the letter believes the letter was addressed to him. *See* Dutton v. Wolhar, 809 F. Supp. 1130, 1136 (D. Del. 1992). Beyond confusion of identity, courts have held that any person who "stands in the shoes" of the debtor has standing to sue under the Act as a consumer. Wright v. Finance Serv. of Norwalk, 22 F.3d 647, 650 (6th Cir. 1994). A consumer, under this "Stand in the

defines a "debt" as "any obligation or alleged obligation . . . 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."[33] In determining which debts are covered under the Act, the courts have demonstrated a willingness to be flexible and have broadly construed the FDCPA's definition of a debt.[34]

While the FDCPA states what constitutes a debt within the meaning of the statute, much controversy has focused on whether an extension of credit is required.[35] To answer that question, one must look at the FDCPA's definition of a "creditor."[36] In general, the FDCPA's regulations only apply to third party debt collectors and creditors who use names other than their own to collect on the debt.[37] Therefore, creditors who collect on their own debts are not covered by the FDCPA since they would fall outside the statute's definition of "debt collector."[38] The definition of "creditor" under the statute means "any person who offers or extends credit creating a debt or to whom a debt is owed."[39] The definition of creditor is

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Shoes" doctrine, may be a person working at a corporation as the sole proprietor or administrator of a trust. Burrell, *supra* at 21.

[33] 15 U.S.C. § 1692a(5) (1994) (defining "debt").

[34] *See* Brown v. Budget Rent-A-Car Systems Inc., 119 F.3d 922 (11th Cir. 1997); Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997). Other courts disagree with this approach. *See* Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987) (requiring an extension of credit or deferral of payments to create a debt).

[35] *See Zimmerman*, 834 F.2d at 1168-69 (requiring an extension of credit or deferral of payments). *But see Bass*, 111 F.3d at 1328; *Newman*, 119 F.3d at 480; *Brown*, 119 F.3d at 925 (not requiring extension of credit or deferral of payments).

[36] 15 U.S.C. § 1692a(4) (1994).

[37] *Id.* §1692a(6) (including within the definition of "debt collector" a creditor who while in the process of collecting on its own debts, uses a name other than its own, "which would indicate that a third person is collecting or attempting to collect such debts").

[38] *Id.* (stating that "[a] debt collector is one who collects or attempts to collect debts owed or due another").

[39] *Id.* §1692a(4) (defining "creditor").

limited to the initial extender of credit or any subsequent assignors of the debt.[40] Therefore, absent the existence of a creditor who initially extended credit to the consumer there is no debt to which the FDCPA could apply.

Finally, once it is clear that a debt collector, consumer and debt are present, the FDCPA regulates the communications from the debt collector to the debtor.[41] Communications regulated by the Act include those made to third parties.[42] Furthermore, the Act prescribes when communications may not be made[43] and when further attempts to directly collect the debt from the consumer must

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[40] *Id.* The statute does not include within the meaning of creditor "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." *Id.* This exclusion clearly applies to the "to whom a debt is owed" portion of the FDCPA's definition of creditor. The "to whom a debt is owed" section of the definition does not seem to relax the offer or extension of credit requirement of the definition. It is more likely that the "to whom a debt is owed" section involves the assignment of a debt created through an offer or extension of credit to another. Hence, the statute's concern with creditors assigning their debts to debt collectors. Without this exclusion, the "debt collector" would become the person to whom the original debt is owed, and thus would no longer be considered a "debt collector" since it would be collecting its own debts, and not the debts due another. Thus, a debt collector who receives an assignment of the debt is not a creditor within the statute. The definition would not exclude any assignment of the debt to another while the account is not in default.

[41] *Id.* § 1692a(2). A "communication" under the Act "means the conveying of information regarding a debt directly or indirectly to any person through any medium." *Id.*

[42] *Id.* § 1692b. A debt collector may communicate with third parties for the purposes of locating the debtor. *Id.* In these communications, the collector may not divulge to the third party that the consumer owes a debt. *Id.* § 1692b(2). If the debt collector learns the debtor is represented by counsel, the collector may not communicate with anybody but the debtor's attorney. *Id.* § 1692b(6).

[43] *Id.* § 1692c(a). The Act prohibits communications, without prior express consent, at unusual times or places known to be inconvenient to the consumer. *Id.* § 1692c(a)(1). A debt collector may not communicate with a consumer if the collector knows the debtor is represented by counsel unless the counsel fails to respond to communications made by the debt collector. *Id.* § 1692c(a)(2). The debt collector may not communicate the nature of the debt, without the express permission of the court, to any person other than the "consumer, his attorney, a consumer reporting agency, the creditor, the attorney of the creditor, or the attorney of the debt collector." *Id.* § 1692c(b).

cease.[44] In communicating with the consumer, the debt collector may not "engage in any conduct the natural consequence of which is to harass, oppress, or abuse."[45] Additionally, the debt collector may not use any "false, deceptive, or misleading representation or means in connection with the collection of any debt."[46] The statute contains an extensive list of conduct that would violate this section of the statute.[47]

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[44] *Id.* § 1692c(c). Once the consumer informs the debt collector that he refuses to pay the debt or expresses his desire that the debt collector cease further communications with the debtor, the debt collector may not make any further communications with the debtor except under limited circumstances. *Id.* The only communications permitted are those to inform the debtor that the debt collector's efforts are being terminated, or to inform the debtor that the creditor or debt collector may invoke or intends to invoke specified remedies "ordinarily invoked by such debt collector." *Id.*

[45] *Id.* § 1692d. This conduct includes the use of "threat[s] of use of violence, . . . obscene or profane language, . . . the publication of a list of consumers who allegedly refuse to pay debts, . . . [or causing] a telephone to ring . . . repeatedly or continuously." *Id.*

[46] 15 U.S.C. § 1692e (1994 & Supp. IV 1998).

[47] *Id.* The most critical of the listed conduct violations include:

> (2) The false representation of the character, amount, or legal status of any debt.
>
> . . . .
>
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
>
> . . . .
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.
>
> (11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal

When the conduct of a debt collector does not fall neatly within the conduct listed in Section 1692(e) of the FDCPA, courts use the "least sophisticated consumer" test to determine whether the collector's conduct unfairly takes advantage of the consumer.[48] This test is an objective standard, eliminating the need for proof of actual deception by the debtor.[49] The alternative to the least sophisticated consumer test is a test based on the perceptions of a reasonable consumer, which has been rejected by most circuits in favor of the least sophisticated consumer test.[50] The least sophisticated consumer test protects the most gullible as well as the most shrewd.[51] At the same time, the test insulates debt collectors from

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pleading made in connection with a legal action.

. . . .

(15)The false representation or implication that documents are not legal process forms or do not require action by the consumer.

Id. It should be noted that any use of false, deceptive or misleading conduct by a debt collector, even if it is not among the listed conduct, is also prohibited by the Act. *See* Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993).

[48] *See Clomon,* 988 F.2d at 1318 (declaring the "least sophisticated consumer" test the most widely accepted test for determining a violation of the FDCPA). It has been adopted in nearly every circuit, including the Second Circuit. *Id. See also* Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1028 (6th Cir. 1992); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1174 (11th Cir. 1985). *But see* Blackwell v. Professional Serv. of Georgia, Inc., 526 F. Supp. 535, 538 (N.D. Ga. 1981) (applying a less restrictive "reasonable consumer" standard).

[49] ROBERT J. HOBBS, FAIR DEBT COLLECTION § 5.5.1.4, at 144 (3d ed. 1996). The "least sophisticated consumer" test is more protective than a "reasonable consumer" test since "least sophisticated" is a lower standard than "reasonable." *Id.*

[50] *See Jeter,* 760 F.2d at 1177-78 (rejecting the reasonable consumer test even though reasonable debtor would have taken debt collector's actions as empty threats).

[51] *Clomon,* 988 F.2d at 1318. In a similar area of consumer protection, in evaluating language which tends to deceive, the courts should look "not to the most sophisticated readers but rather to the least." Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961) (evaluating the standard to be used to decide issues regarding the Federal Trade Commission Act).

"bizarre or idiosyncratic interpretations" by some consumers in reaction to otherwise ordinary debt collection attempts.[52]

Another requirement of the FDCPA is that in any written initial communication with the debtor, the debt collector must inform the debtor of the validation procedure available to debtors.[53] Unless "within thirty days after receipt of the notice, [the debtor] disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."[54] A further component of the validation procedure requires the debt collector to obtain verification of the debt and mail it to the debtor upon the debtor's request.[55] Furthermore, once the debtor disputes the debt, the debt collector must stop any attempt to collect the debt until the debt collector is able to verify the debt.[56]

Proceeding to collect a debt without following the requirements of the FDCPA could subject a debt collector to civil liability on behalf of consumers who are harmed.[57] A debt collector can avoid

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[52] *Clomon*, 988 F.2d at 1320. Collection notices are not deceptive simply because information may be conveyed in a subtle versus an explicit manner. *Id.* at 1319.

[53] 15 U.S.C. § 1692g (1994).

[54] *Id.* § 1692g(a)(3). If the initial communication did not give this notice, then within five days after the initial communication, the debt collector must send the consumer the appropriate notice. *Id.* § 1692g(a). The initial communication must also disclose the amount of the debt and the name of the creditor. *Id.* § 1692g(a)(1)-(2). If the debtor does not dispute the validity of the debt, it does not amount to an "admission of liability by the consumer." *Id.* § 1692g(c).

[55] *Id.* § 1692g(a)(4). If a judgment was issued against the debtor, a copy of the judgment would be mailed to the debtor. *Id.*

[56] *Id.* § 1692g(b).

[57] *Id.* § 1692k. Under the Act, an individual debtor is entitled to statutory damages not to exceed $1,000 and reasonable attorney fees. *Id.* § 1692k(a)(2)(A). Under the Act, a class action may also be filed with damages limited to $500,000 or one per cent of the net worth of the debt collector. *Id.* §1692k(a)(2)(B). Plaintiffs in a successful class action will also be awarded the costs of the action along with reasonable attorney fees. *Id.* §1692k(a)(3). The debtor is also entitled to compensation for any actual damages sustained as a result of violation of the Act, including mental distress and other provable injuries. *Id.* § 1692k(a)(1). Factors considered in awarding damages to the debtor include the intent, "frequency and persistence of noncompliance" by the debt collector. *Id.* §1692k(b)(1). In the event that a debtor brought the FDCPA action in "bad faith and for the purpose of harassment," the court may award the defendant-debt

liability under the Act if it can show the violation was not intentional and resulted from a bona fide error.[58] In most cases, except for the most egregious of acts by a debt collector, the court will award the debtor nominal statutory damages[59] and reasonable attorney fees.[60] Under some circumstances, this award is enough to offset the actual debt.[61] This provision gives the debtor a great deal of protection. On the other hand, it gives the tenant the ability to delay or stall collection of a legitimate debt, such as rent where the tenant recognizes that he owes the money but launches a federal FDCPA lawsuit because of a mere procedural violation in the collection procedure.

2. *Supremacy of FDCPA as Federal Law*

While federal preemption of state statutes is intended, the FDCPA does not supplant all existing state debt collection statutes.[62] To accomplish nationwide debt collection regulation,

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collector reasonable attorney fees in relation to the work expended and costs. *Id.* § 1692k(a)(3). This provision only helps the debt collector when the consumer has filed a lawsuit. *Id.* It does not compensate the debt collector for the time or expense of verifying debts which the debtor knows are valid. *Id.* It also does not compensate the creditor for the delay in receiving his money. *Id.*

[58] *Id.* § 1692k(c). Lack of intent in the debt collector's violation of the FDCPA may be a critical factor in determining the debt collector's liability for the violation. *Id.* The FDCPA states that a "debt collector may not be held liable . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* (emphasis added).

[59] *Id.* § 1692k(a)(2)(A) (setting the maximum recovery for an individual plaintiff at $1,000, but the actual amount of recovery will be determined by the list of factors set forth in FDCPA § 1692k(b)(1)).

[60] *Id.* § 1692k(a)(3) (allowing for the recovery of reasonable attorney's fees and other costs of the action).

[61] *Id.* § 1692k(a)(2)(A) (stating "in the case of any action by an individual, such [individual is entitled to] . . . damages as the court may allow, but not exceeding $1,000").

[62] HOBBS, *supra* note 49, § 6.13.1, at 274. The FDCPA purports to set federal minimum standards for debt collectors. HOBBS, *supra* note 49, § 6.13.1, at 274. For example, a state statute would not be inconsistent with the FDCPA

the FDCPA provides for the preemption of inconsistent state law.[63] A state's statute is inconsistent with the FDCPA when the latter's purposes and protections are not incorporated in the questioned state statute.[64] The use of intentionally vague terms and standards, such as "inconsistency" and providing "greater protection," gives the courts broad discretion in evaluating borderline cases.[65] In particular, these terms allow a state to create a system where multiple statutes combine and interact to give consumers overall, comparable protections and remedies to the FDCPA. For example, in New York State, the interaction of the RPAPL, the General Business Law ("GBL"),[66] Code of Professional Responsibility ("CPR")[67] for attorneys and other local legislation[68] interact in such a way as to provide consumers with

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if it provided more protection to consumers. HOBBS, *supra* note 49, § 6.13.1, at 274.

[63] *See* 15 U.S.C. § 1692n (1994). Under the terms of the statute, the FDCPA

> does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

Id.

[64] *See id.* § 1692(e). The primary purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors . . . and to *promote consistent State action* to protect consumers against debt collection abuses." *Id.* (emphasis added).

[65] *Id.* §1692n.

[66] N.Y. GEN. BUS. LAW §§ 349 to 350-f (McKinney 1988 & Supp. 1999) (offering New York State consumers protection against the "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service").

[67] N.Y. CODE OF PROF. RESP. (McKinney 1998).

[68] For example, New York City provides consumers with the additional protections of the City's Administrative Code sections that govern unfair trade practices. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §§ 20-700 to 20-706 (Lenz & Riecker 1999).

comparable protections to the FDCPA during the summary eviction process.

B. *Local Rules of the Game: New York's Landlord-Tenant Law*

In New York, the method of regaining wrongfully retained real property is governed by article 7 of the RPAPL.[69] Section 711 of the RPAPL explains that the remedy for regaining wrongfully retained property is a "summary proceeding"[70] or more specifical-

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[69] N.Y. REAL PROP. ACTS. LAW §§ 701-783 (McKinney 1979 & Supp. 1999).

[70] *Id.* § 701(1). Summary proceedings are the most popular method used by landlords where a tenant is in default. TERRI J. CLELAND, LAW DISTRESSED REAL EST. § 29.04 (1998). The use of a summary proceeding, as in *Romea*, is just one of the ways landlords may repossess their property. *Id.* Every state has a summary proceeding for the purposes of evicting a tenant. *Id.* The requirements imposed by a summary proceeding statute on the landlord-plaintiff will vary based upon the various pressures of a jurisdiction, including a heavy or light caseload and the requirements of the judges and clerks in the jurisdiction. *Id.* § 29.06. Additionally, in other jurisdictions, the landlord may be able to pursue the common law action of ejectment or the remedy of self-help. *Id.* § 29.04. Since the common law action of ejectment has been characterized as long and expensive, it is more often used, not as an alternative to, but subsequent to an attempted use of the summary proceeding, where the landlord is unable to or has failed to comply with the summary eviction statute. *Id.* § 29.05. The ejectment action requires proof as to the right of possession and an ouster by the defendant. *Id.* Ouster is defined as a "wrongful dispossession or exclusion from real property of a party who is entitled to possession" of the property in question. *Id.* *See also* Zenila Realty Corp. v. Masterandrea, 472 N.Y.S.2d 980, 982 (Civ. Ct. 1984) (describing ejectment procedure as "an expensive and dilatory proceeding which in many instances amount[s] to a denial of justice") (quoting Reich v. Cochran, 201 N.Y. 450, 453 (1911)). Self-help, a common law remedy that can be traced back to England before 1831, allowed the landlord to use any "force short of injury or death" to remove the tenant from the landlord's premises. CLELAND, *supra*, § 29.05. Recognizing the use of force can often be inappropriate in many circumstances and the courts have limited the use of the remedy to peaceful entries. CLELAND, *supra*, § 29.05. The use of the self-help method to reentry is fraught with danger where there is a dispute over right of possession, since the tenant may bring a wrongful eviction or dispossession action against the landlord. CLELAND, *supra*, § 29.05. Clearly, when practical, a landlord will pursue the easier and speedier remedy of a summary proceeding

ly, an "article 7 nonpayment summary proceeding."[71] As the name of the proceeding implies, it provides for a quick, legal resolution when the action is uncontested.[72] In contested nonpayment summary proceeding actions, the landlord must strictly adhere to the statutory framework of the RPAPL or the action will be swiftly dismissed.[73] To further speed the action along, the conditions under which continuances are granted are severely restricted and discouraged.[74] As with all court proceedings, a defense to the summary proceeding is that the court lacks jurisdiction to hear the case.

In New York, jurisdiction over the nonpayment summary proceeding is predicated upon a prior communication with the

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over any of the other common law remedies. CLELAND, *supra*, § 29.04.

[71] 2 HON. ROBERT F. DOLAN, N.Y. REAL PROPERTY PRACTICE: RASCH'S LANDLORD AND TENANT ¶ 32:1 (1998). A "nonpayment summary proceeding" is a particular kind of summary proceeding brought to recover possession of property on the grounds that the party sought to be removed is a tenant, the tenant is in possession of the property, the tenant is in default in the payment of rent pursuant to some agreement made between the parties, and a demand for the rent or repossession of the property has been made. *Id.*

[72] CLELAND, *supra* note 70, § 29.06. Uncontested actions lead to the quickest resolutions of nonpayment summary proceedings since the defendant has a short period of time before the plaintiff can request the court to enter a default judgment in his favor. CLELAND, *supra* note 70, § 29.06. Should the tenant fail to respond to the complaint within a limited period of time, the plaintiff can request the court to enter a default and subsequently an entry of default judgment in his favor. CLELAND, *supra* note 70, § 29.06.

[73] CLELAND, *supra* note 70, § 29.06. For example, if the trial date is requested before one of the defendants has answered, the trial date will be vacated. CLELAND, *supra* note 70, § 29.06.

[74] N.Y. REAL PROP. ACTS. LAW §745(1) (McKinney 1979 & Supp. 1999). In New York, an adjournment for 10 days or fewer is permitted "at the request of either party and upon proof . . . that an adjournment is necessary to enable the applicant to procure his necessary witnesses" or with the consent of all parties. *Id.* For summary proceedings conducted in New York City there are additional statutory provisions with which the parties must comply. *Id.* § 745(2). In particular, after the second adjournment by the tenant or 30 days after the first appearance by the landlord, the landlord may request the tenant to deposit with the court five days worth of rent and any additional rent as it comes due. *Id.* § 745(2)(a).

tenant.[75] The landlord must either demand the rental arrears from the tenant, or alternatively, serve a written demand that the tenant, within three days of service of the notice, either pay the rent or surrender possession of the premises.[76] The notice, provided for under section 711(2) of the RPAPL, must be "clear, unequivocal and unambiguous."[77] The purpose of the notice is to allow the

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[75] DOLAN, *supra* note 71, ¶ 32:13.

[76] N.Y. REAL PROP. ACTS. LAW §711(2) (McKinney 1979 & Supp. 1999) (stating that a special proceeding may be maintained if "[t]he tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a demand of the rent has been made, or at least three days' notice in writing requiring, in the alternative, the payment of the rent, or the possession of the premises").
The notice in *Romea*, after informing the tenant of the amounts and months past due for rent, stated:

> You are required to pay within three days from the day of service of this notice, or to give up possession of the premises to the landlord. If you fail to pay or to give up the premises, the landlord will commence summary proceedings against you to recover possession of the premises.

Respondent's Appendix at A8-1, Romea v. Heiberger, 163 F.3d 111 (2d Cir. 1998) (No. 98-7259). If the "demand of the rent" has not been made, the written notice must be served upon the tenant. N.Y. REAL PROP. ACTS. LAW § 711(2). Personal service upon the tenant is required. *Id.* § 735(1). This requirement of personal service may not be waived by the tenant through a provision of the lease or otherwise. Main Street Mall Corp. v. NR Store, Inc., 587 N.Y.S.2d 117, 119 (New Rochelle City Ct. 1992) (holding that a party may not, by agreement, vitiate the express statutory requirements of RPAPL section 735).

[77] 95 River Co. v. Burnett, 608 N.Y.S.2d 786, 787 (Civ. Ct. 1993); N.Y. REAL PROP. ACTS. LAW § 711(2) (requiring delivery of written notice without specifying the actual text beyond requiring a demand for the payment of the rent or the possession of the premises on three days notice). The necessity for the clarity of the notice is justified by the need for a tenant to make an "informed and intelligent decision." *95 River Co.*,608 N.Y.S.2d at 787. The tenant has the option to either comply with the notice or not, and therefore needs to understand the text of the message. *Id.* For example, in *95 River Co.*, the issue was over the use of the word "service" in the notice. *Id.* The notice delivered to the tenant required the tenant to pay the overdue rent "on or before the expiration of three days from the day of the service of [the] [n]otice." *Id.* Since "service" is a legal conclusion, it may be impossible for a layperson to determine when service was conducted. *Id.* Incidentally, a model notice uses the word "service" to determine the beginning of the three day period. N.Y. REAL PROP. PRACTICE FORMS

tenant to avoid forfeiture of his property interest by informing him of the "good faith" amount of rent due.[78] If the tenant chooses to pay the landlord the requested rent within the stated period of time, the default on the debt will be remedied and litigation will be avoided.[79] If the rent is not repaid, or if the leased property is not surrendered, the landlord then may commence the summary proceeding by having the petition issued and served upon the tenant.[80]

A landlord seeking the return of his premises may not forego the demand for rent and simply demand possession of the premises.[81] The written notice must give the tenant both options: either pay the rent or vacate the premises.[82] Furthermore, a tenant may

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§ 10:13 (McKinney 1986) ("you are required to pay on or before the expiration of three days from the date of service of this notice"). Another factor that must be clear and unambiguous is the sender of the notice. *See* Siegel v. Kentucky Fried Chicken of Long Island, Inc., 492 N.E.2d 390, 391 (N.Y. 1986) (holding that a three day notice signed by an attorney who the tenant has never dealt with in the past was insufficient to give the tenant notice); Anastasia Realty Co. v. Lai, 662 N.Y.S.2d 714, 715 (Civ. Ct. 1997) (declaring that it must be clear who authored the notice and that the party signing the notice is authorized by the landlord to deliver the notice).

[78] Zenila Realty Corp. v. Masterandrea, 472 N.Y.S.2d 980, 987 (Civ. Ct. 1984). The "good faith" amount of rent due included in the notice is supposed to bear "a reasonable relationship to [the amount] claimed in the subsequent lawsuit." *Id.* Prompt payment of the "good faith" amount of rent due should remedy the default and avoid the summary proceeding, provided that payment is indeed prompt. *Id.* If the payment is not prompt, or the proceeding is not brought within a short period of time after delivering the notice, then additional rent will become due and the amount stated in the notice will eventually be insufficient to cure the default. *Id.* Hence, the demand notice remains effective and accurate only for a "reasonable period of time" for both the landlord and the tenant. *Id.*

[79] *Id.*

[80] N.Y. REAL PROP. ACTS. LAW § 731(1) (McKinney 1979 & Supp. 1999) (stating the "special proceeding prescribed by [article 7 of the RPAPL] shall be commenced by petition and a notice of petition"). The actual notice of petition can only be issued by an attorney, judge or the clerk of the court. *Id.* It may not be issued by the landlord. *Id.*

[81] *See* DOLAN, *supra* note 71, ¶ 32:22.

[82] *See* DOLAN, *supra* note 71, ¶ 32:22. The sufficiency of the notice may be challenged if the landlord merely declares an end to the landlord-tenant

not waive his right to receive the "three day" notice.[83] When the notice is required, failure to properly deliver the notice to the tenant can be fatal to the summary proceeding.[84] Where there is any doubt as to whether the tenant received the notice, the landlord has the burden of proving that adequate notice was given to the tenant.[85] Therefore, in order for the landlord to regain possession of his property through the summary nonpayment proceeding, he must demand the rent either personally or through the written notice.

The courts have not been presented with many opportunities to test the limits of the preemption clause.[86] In New York State, the

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relationship and seeks removal of the tenant from the premises. DOLAN, *supra* note 71, ¶ 32:22. *See also*, DiBello v. Penflex, Inc., 630 N.Y.S.2d 848, 849 (Rensselaer County Ct. 1995) (holding that a landlord may not solely demand rent under RPAPL section 711(2) but must offer the tenant the alternative of surrendering the premises); McMahon v. Howe, 82 N.Y.S. 984, 985 (Saratoga County Ct. 1903) (stating a notice not offering a tenant opportunity to cure rental default and only seeks dispossession of property does not conform to the statute).

[83] *See* Alexander Muss & Sons v. Rozany, 655 N.Y.S.2d 238, 239 (Sup. Ct. 1996) (finding that any express intention of the parties to modify the requirements of the statute will not be given any effect); Pak Realty Assocs. v. RE/MAX Universal, Inc., 599 N.Y.S.2d 399, 401 (Civ. Ct. 1993) (stating that "[the parties] can not lessen a right given them by statute when it is against public policy to waive that right . . . . This Court finds that public policy requires a demand be made.").

[84] *See* Zenila Realty Corp. v. Masterandrea, 472 N.Y.S.2d 980, 984 (Civ. Ct. 1984). Since the statutory framework of the summary proceeding overrides the common law rights of tenants, strict adherence to the provision is necessary. *Id. See also* Salvatore v. Miller & Miller Consulting Actuaries, Inc., 634 N.Y.S.2d 490, 491 (App. Div. 1995) (finding failure to meet the "predicate requirements" of the summary proceeding, which requires sending the notice, a material noncompliance of the statute that requires dismissal of the proceeding).

[85] *See* DOLAN, *supra* note 71, ¶ 32:15. If service is disputed at trial, proper service must be proven by evidence at trial. DOLAN, *supra* note 71, ¶ 32:15.

[86] *See* Ziobron v. Crawford, 667 N.E.2d 202, 207 (Ind. Ct. App. 1996) (finding state law malicious prosecution claims against attorneys not preempted by the FDCPA); Codar v. Arizona, No. 94-16902, 1996 WL 471335, at *5 (9th Cir. Aug. 19, 1996) (finding an Arizona law that prohibited out-of-state debt collectors from contacting its residents preempted by the FDCPA § 1692g notice requirement); Zartman v. Shapiro, 811 P.2d 409, 413 (Colo. 1990) (holding Colorado venue provision allowing an action to be brought in any county in

question is whether consumers have adequate protection from the various statutory consumer protection laws including the RPAPL summary proceeding scheme in order to be consistent with the requirements of the FDCPA. One court has already complemented the system in stating that the "quick resolution of disputes under the RPAPL framework satisfies the essence of the FDCPA's protection of debtors."[87] Considering the RPAPL's consumer protections, there should be little need for the FDCPA to preempt the RPAPL statutory mechanism that serves a vital function for the relationship between landlords and tenants.[88]

II. *ROMEA V. HEIBERGER*[89]

In *Romea v. Heiberger*, the Second Circuit Court of Appeals held that New York's RPAPL provision, which provided for a three day notice as a condition precedent for summary nonpayment proceedings violated the FDCPA when such notice was delivered and executed by the landlord's attorney.[90] The court ruled that the FDCPA governed rent collection practices by attorneys on behalf of landlords.[91] In so ruling, the court held that rent was a debt[92] and that an attorney collecting delinquent rent payments was a debt collector.[93] The court's decision was based in large part on prior decisions that led it to believe that Congress intended the FDCPA

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violation of the FDCPA venue provision and therefore preempted).

[87] Travieso v. Gutman, Mintz, Baker & Sonnenfeldt, P.C., No. 94 Civ. 5756, 1995 WL 704778, at *4 (E.D.N.Y. Nov. 16, 1995).

[88] *But see* Hairston v. Whitehorn & Delman, No. 97 Civ. 3015, 1998 WL 35112, at *3 (S.D.N.Y. Jan. 30, 1998) (invalidating New York's RPAPL section 711(2) to the extent that notice requirement violates the least-sophisticated consumer standard and 30 day validation requirement). *See generally* Eina Realty v. Calixte, 679 N.Y.S.2d 796 (Civ. Ct. 1998) (relying on *Hairston* to make similar conclusions).

[89] 163 F.3d 111 (2d Cir. 1998), *aff'g*, 988 F. Supp. 715 (S.D.N.Y. 1998), *aff'g*, 988 F. Supp. 712 (S.D.N.Y. 1997).

[90] *Romea*, 163 F.3d at 118.

[91] *Id.*

[92] *Id.* at 116.

[93] *Id.* at 116-18.

to apply to rent collection activities conducted by attorneys.[94] These prior decisions, however, failed to fully consider the administrative commentary and legislative history of the FDCPA with regard to whether rent is a debt and whether attorneys were intended to be regulated as debt collectors under the FDCPA. Under closer examination of the legislative history, administrative agency hearings and the statute itself, the Second Circuit was incorrect in finding that the FDCPA was intended to govern rent collection practices by attorneys.

A. *The* Romea *Decision*

The facts of *Romea* provide a textbook example of a law firm following the requirements of summary nonpayment proceedings under section 711 of the RPAPL from start to finish.[95] The law firm, Heiberger & Associates, with a landlord-tenant practice in New York City, signed and sent a three day notice on behalf of the landlord to the tenant.[96] The firm did not attempt any other

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[94] *Id.* at 115 (interpreting several cases that applied the plain meaning approach to statutory interpretation in determining whether dishonored checks were debts under the FDCPA). The court compared back rent to a dishonored check and concluded that dishonored checks share the same characteristics as back rent. *Id.* The court then drew upon the holdings of these courts which determined the dishonored checks were debts under the FDCPA and concluded that back rent was a debt under the FDCPA. *Id. See also* Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350, 1353 (10th Cir. 1998); Duffy v. Landberg, 133 F.3d 1120, 1123-24 (8th Cir. 1998); Charles v. Lundren & Assocs., 119 F.3d 739 (9th Cir. 1997); Bass v. Stolper, Koritzinsky, Bewster & Neider, S.C., 111 F.3d 1322, 1326 (7th Cir. 1997).

[95] Since the Second Circuit opinion in *Romea* does not relate the facts of the case in great detail, for the purposes of this Note, many of the facts will be derived from the district court opinion.

[96] Romea v. Heiberger, 988 F. Supp. 712, 713 (S.D.N.Y. 1997). The notice read:

> PLEASE TAKE NOTICE that you are hereby required to pay to 442 3rd Ave. Realty LLC landlord of the above described premises, the sum of $2,800.00 for rent of the premises: 700.00/DEC96, 700.00/-NOV96, 700.00/OCT96, 700.00/SEP96. You are required to pay within three days of service of this notice, or to give up possession of the premises to the landlord. If you fail to pay or to give up the premises,

written or oral communications with the tenant.[97] The tenant did not surrender the premises or pay the back rent within three days after service of the notice.[98] Following the three day period, the law firm began summary proceedings against the tenant.[99] Soon thereafter, the tenant challenged the sufficiency of the RPAPL section 711 notice.[100] The housing court judge ruled that the notice served was compliant with the requirements of the RPAPL.[101]

At the district court level the issue was whether the RPAPL proceedings were inconsistent with the FDCPA. The law firm contended that the notice sent to the tenant did not need to comply with the FDCPA since they were not attempting to collect a debt.[102] Rather, they asserted, the notice was sent as a "statutory condition precedent" to beginning summary proceedings and, therefore, was not covered by the FDCPA.[103] Judge Kaplan, in denying defendant's motion to dismiss ruled upon the two critical issues determining whether notice needed to comply with FDCPA guidelines. First, the court considered the unpaid rent of the plaintiff a "debt" under the FDCPA,[104] and second, the notice sent to the plaintiff to be a "communication" to collect a debt under the FDCPA.[105] At the same time the district court declared the section 711 notice a communication covered by the Act, the court recognized a likely appeal of its decision.[106] The court stated that the decision would have a "significant effect" on the

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the landlord will commence summary proceedings against you to recover possession of the premises.

Id.

[97] Defendant's Memorandum of Law in Support of Motion to Dismiss at 4, Romea v. Heiberger, 988 F. Supp. 712 (S.D.N.Y. 1997) (No. 94-4681).

[98] *Id.*

[99] *Id.*

[100] *Id.* at 4-5.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] Romea v. Heiberger, 988 F. Supp. 712, 714 (S.D.N.Y. 1997).

[105] *Id.* at 715.

[106] *Id.* The court recognized the possibility of appeal, stating that it was "not without some discomfort that the Court reaches this conclusion." *Id.*

landlord-tenant statutory scheme designed for the "fair and efficient resolution" of disputes.[107] Furthermore, the court stated that "[t]here is nothing to indicate that [this effect] was the intent of Congress in enacting the FDCPA [which was designed] to protect debtors from fraudulent and abusive debt collection practices."[108] Nevertheless, the court felt constrained by the statutory definition of "communication" under the Act.[109]

Fulfilling the district court's prediction of an appeal, the Second Circuit Court of Appeals had the opportunity to reverse and determine that rent was not a debt under the FDCPA. Instead, the Second Circuit handed down a decision affirming the district court's holding that invalidated the RPAPL provision governing delinquent rent collection by attorneys on behalf of landlords.[110]

The first issue that the court considered was whether rent is a debt under the FDCPA.[111] For support, the defendant relied on *Zimmerman v. HBO Affiliate Group, Inc.*,[112] which held that an extension of credit is necessary for an obligation to be a debt under the FDCPA.[113] Since rent is paid in advance, the defendant argued, there was no deferral of payment or extension of credit involved in this case.[114] The court refused to follow *Zimmerman* and instead relied on the "plain language" of the FDCPA.[115] Based upon the FDCPA's definition of a debt,[116] the court

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[107] *Id.*

[108] *Romea*, 988 F.Supp. at 715.

[109] *Id.*

[110] Romea v. Heiberger, 163 F.3d 111, 119 (2d Cir. 1998).

[111] *Id.* at 114-16.

[112] 834 F.2d 1163 (3d Cir. 1987). In *Zimmerman* the court held that to be a debt under the FDCPA the debt must have been created by a transaction "in which a consumer is offered or extended the right to acquire 'money, property, insurance, or services' which are 'primarily for household purposes' and to defer payment." *Id.* at 1168-69.

[113] *Romea*, 163 F.3d at 114-15.

[114] *Id.* The landlord argued that since rent was paid in advance, the transaction between landlord and tenant involved no deferral of payment or extension of credit, and that the rent arrearage that was the subject of the notice in this case, therefore, did not involve debt collection. *Id.*

[115] *Id.* at 115.

[116] The FDCPA defines a debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money,

concluded that the FDCPA considered an obligation a debt without regard to the extension of credit or deferral of payment.[117]

Once the court decided that rent was a debt under the FDCPA, it proceeded to determine whether the RPAPL section 711 notice was a communication within the meaning of the statute.[118] The defendant argued that the section 711 notice was not a communication to collect on a debt, referring to the Federal Trade Commission ("FTC") Commentary on the FDCPA,[119] which specifically excluded notices required as a prerequisite for enforcing obligations through judicial process.[120] Instead of considering the exception carved out by the FTC Commentary, the court concluded that the notice fell squarely within the definition of a communication under the FDCPA in that it conveyed information regarding a debt.[121]

Finally, after concluding that rent was a debt and that the RPAPL notice was a communication under the FDCPA, the court determined that lawyers sending the section 711 notice under the RPAPL were collecting a debt within the meaning of the FDCPA.[122] The Romea court was bound to make this final

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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." 15 U.S.C. § 1692a(5) (1994).

[117] *Romea*, 163 F.3d at 115. The court responded to the landlords argument by stating that the landlord's argument "misconstrues the issue" by focusing on whether or not rent is an extension of credit. *Id.* The court correctly stated that "[b]ack rent by its nature is an obligation that arises from the tenant's failure to pay the amounts due under the contractual lease transaction" but went on to state that the duty to pay back rent "does not derive from an extension of credit but rather because the [tenant] breached its contract." *Id.* In so doing, the court looked at the breach by the tenant as giving rise to the obligation to pay the back rent rather than the original contractual lease between the landlord and tenant. *Id.* It is this lease transaction that should be used to determine whether back rent is within the scope of the FDCPA.

[118] *Romea*, 163 F.3d at 116-17.

[119] *See infra* notes 181-186 and accompanying text (reviewing the FTC Commentary on the FDCPA).

[120] The Second Circuit focused on this argument in its opinion although it did not acknowledge the FTC Commentary in its opinion. *Romea*, 163 F.3d at 116.

[121] *Id.*

[122] *Id.* at 116-17.

determination in light of *Heintz v. Jenkins*,[123] a Supreme Court decision, which held that all attorneys engaging in any form of debt collection were covered by the FDCPA.

B. The Case Law Underlying Romea

The *Romea* decision, finding that rent is a debt and that attorneys are to be regulated as debt collectors under the FDCPA was largely based on prior decisions that failed to fully consider the legislative history of and administrative commentary on the FDCPA. These decisions must be reconsidered in order to reach a sensible interpretation of the scope of the FDCPA.

1. Attorneys as Debt Collectors: Heintz v. Jenkins[124]

Heintz v. Jenkins, a landmark case that changed the role of attorneys involved in debt collection matters,[125] interpreted the removal of the attorney exemption from the FDCPA.[126] Although *Heintz* attempted to answer the questions vexing many litigators faced with the removal of the attorney exemption, the facts of the case do not support the broad declarations made by the Court. Thus, *Romea*, a case this Note criticizes for its reasoning, itself relied on a case based on faulty reasoning.

In *Heintz*, the defendants, an attorney and partner of the defendant law firm, filed a lawsuit on behalf of their client, Gainer Bank, to collect a debt owed by the plaintiff on her automobile

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[123] *See infra* Part III, for an in depth treatment of *Heintz v. Jenkins*, 514 U.S. 291 (1995). The *Heintz* court was faced with deciding whether attorneys were debt collectors under the FDCPA. The court in making its decision refused to consider the FTC Commentary for guidance. *Id.* at 298.

[124] 514 U.S. 291 (1995).

[125] Strout, *supra* note 27, at 310 (stating the importance of *Heintz v. Jenkins*).

[126] 15 U.S.C. 1692a(6)(F), *repealed by* 100 Stat. 768 (1986). The FDCPA, as originally drafted, excluded from the definition of debt collector "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." *Id.*

installment contract.[127] The Court did not consider whether the defendant law firm was a debt collector—it assumed this to be true.[128] After filing the complaint, Heintz sent a letter to Jenkins' lawyer to memorialize a previous telephone conversation the parties had in an attempt to "amicably resolve the matter."[129] The appellate court viewed the letter as an attempt to collect the debt.[130] The court held that since the defendant did not comply with the requirements of the FDCPA,[131] it violated the law.

The Supreme Court confronted the issue of attorney debt litigation by relying on the plain language of the statute.[132] Recognizing that the statute expressed no exemption of any kind for lawyers, the Court concluded that there was no exemption for

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[127] Heintz v. Jenkins, No. 93 Civ. 1332, 1993 WL 284115, at *1 (N.D. Ill. July 27, 1993).

[128] For the courts deciding *Heintz*, it was not necessary to consider this issue since the appellate courts were reviewing a motion to dismiss and assumed the facts alleged as true. *See* Heintz v. Jenkins, 25 F.3d 536, 538 (7th Cir. 1994) (stating that the court was "required to accept this allegation [of being a debt collector] as true").

[129] Petitioner's Brief at 4, Heintz v. Jenkins, 514 U.S. 291 (Dec. 15, 1994) (No. 94 Civ. 367). The relevant language of the letter reads:

> [T]his is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows . . . . This matter is next up for status on July 15, 1992, and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution. If you have any questions or need additional information, please be in contact with me.

Id. at 4-5.

[130] *Heintz*, 124 F.3d 824, 833 (7th Cir. 1997). The letter was characterized by the circuit court as having "nothing lawyerly about it." *Id.* at 832. Since debt collection agencies can also send letters in an attempt to settle a lawsuit, the firm was not engaged in an activity solely within the province of lawyers. *Id.*

[131] 15 U.S.C. § 1692f(1) (1994) (prohibiting a debt collector from attempting to collect a debt not "authorized by the agreement that created the debt"); *see also id.* § 1692e(2)(A) (1994 & Supp. IV 1998) (prohibiting the false representation of the amount of any debt).

[132] Heintz v. Jenkins, 514 U.S. 291, 297 (1995).

virtually any aspect of litigation.[133] The Court refused to recognize the statements of Representative Annunzio, expressed when the attorney exemption was removed from the FDCPA.[134] The Representative had stated that the removal of the exemption was only intended to apply to law firms that acted as debt collectors outside the scope of the practice of law.[135] The Court claimed that since the comments were made after Congress voted on the amendment, they only represent the "views of one informed person on an issue" thereby restricting the resources available to the Court to make its decision.[136] This statement, however, is incorrect, since Representative Annunzio did comment on the amendment before Congress voted on the bill.[137] The Court also dismissed the FTC Commentary on the FDCPA citing the Commentary's own admission that it was not a binding document.[138] Finding that both Representative Annunzio's and the FTC's Commentary fell outside the "range of reasonable interpretations of the Act's express language," the Court held that attorneys are debt collectors under the FDCPA's plain meaning.[139]

The Supreme Court's opinion in *Heintz* in using the plain meaning, or formalist approach, to interpret the FDCPA was flawed for failing to consider the legislative history of the statute. Whereas the formalist approach is efficient in determining a statute's meaning by considering only the words of the statute, it does not allow a court to determine a statute's purpose through the review

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[133] *Id.* at 298 (finding that any litigation exemption "falls outside the range of reasonable interpretations of the Act's express language").

[134] *Id.* at 297-98.

[135] *See infra* notes 177-180 and accompanying text (discussing the scope of debt collection activities the attorney exemption was intended to impact according to Rep. Annunzio).

[136] *Heintz*, 514 U.S. at 298 (stating that "Congressman Annunzio made his statement not during the legislative process, but after the statute became law . . . [therefore] it simply represents the views of one informed person on an issue").

[137] *See* 131 CONG. REC. H10534-02 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio).

[138] *Heintz*, 514 U.S. at 298 (quoting the FTC Commentary stating that the Commentary was "not binding on the Commission or the public").

[139] *Id.*

of various extrinsic materials.[140] In following the formalist approach, the *Heintz* Court determined that Congress intended to eliminate the attorney exemption for all litigating activities involved with the collection of debt.[141] The Court summarily dismissed the defendant's recommendation that it consider extrinsic materials once it held that Congress' intent could be inferred through the language of the statute itself.[142]

In *Heintz*, the defendant contended that if the Act applied to attorney litigating activities, it would create "harmfully anomalous results that Congress simply could not have intended."[143] The Court observed that "some awkwardness is understandable" with the elimination of the attorney exemption, since after elimination of the exemption, the remainder of the statute remained untouched.[144] Nevertheless, the Court observed that the awkwardness was a by-product of the elimination of the exemption and that reading into this awkwardness to find remnants of an attorney

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[140] R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW 272, 280 (West 1984).

[141] *Heintz,* 514 U.S. at 297 (considering the plain language of the Act to evaluate the removal of the exemption).

[142] *Id.* at 298. For further discussion of case law leading up to *Heintz*, see, Strout, *supra* note 27, at 311-15. Strout highlights a split in the circuits on the issue of whether attorneys involved in litigation are debt collectors under the Act. *See* Strout, *supra* note 27, at 310.

[143] *Heintz*, 514 U.S. at 295. One anomaly identified by the Court focuses on the provisions of § 1692c of the FDCPA, which governs communications in connection with debt collection. *Id.* at 296. A strict reading of the provision would suggest that any conversations with the debtor, after the debtor indicates to the attorney to cease communicating with the debtor regarding the debt, would subject the attorney to liability. *Id.* This creates a difficulty in filing a lawsuit against a debtor who has requested no further communication from the attorney. *Id.* Another anomaly focuses on § 1692e(5), which forbids a debt collector to make any "threat to take action that cannot legally be taken." *Id.* at 295. Under this provision, any attorney who brought an action against a debtor, and lost, would be subject to liability. *Id.* Only after defending oneself through a showing by a "preponderance of the evidence that the violation was not intentional and resulted from a bona fide error" would an attorney be able to escape liability. 15 U.S.C. § 1692k(c) (1994).

[144] *Heintz*, 514 U.S. at 295.

exemption is not justified.[145] In defending its reasoning, the Court stated that other courts can plausibly imply that the Act allows for communications for purposes of informing the defendant of the intent to pursue a legal remedy.[146] However, in light of the Court's urging of a literal interpretation of the Act, there appears little reason for the Court to believe that lower courts following its example are to read the statute flexibly and imply any exemptions for attorney communications.

Courts construe the language of statutes in order to give statutes the effect that the legislature intended.[147] There are many methods courts use to interpret a given statute,[148] each with its own goals and considerations that will enter into the equation.[149] The

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[145] *Id.*

[146] *Id.* at 296 (stating that an "ordinary court-related document does, in fact, 'notify' its recipient that the creditor may 'invoke' a judicial remedy" and, therefore, comports with FDCPA § 1692c(c)).

[147] *See* United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940). There is no clear cut rule as to how the courts are supposed to complete their task, but it is clear that to take the words of the statute out of context would not contribute much to discover the purpose of the statute. *Id.* In interpreting a statute, the courts should give the statute a "sensible and practical over-all construction . . . [that is] consistent with and furthers its scheme and purpose." Phoenix Home Life Mut. Ins. Co. v. Curiale, 615 N.Y.S.2d 967, 970 (Sup. Ct. 1994).

[148] KELSO, *supra* note 140, at 272. The most often used method of interpretation is the plain meaning approach. KELSO, *supra* note 140, at 272. This method is equivalent to the formalist approach of statutory interpretation. KELSO, *supra* note 140, at 272. The other common methods are the natural law approach, the Holmesian approach, and the instrumentalist approach. KELSO, *supra* note 140, at 272. The four approaches are on a continuum, with the formalist approach on one end and the instrumentalist approach on the other. The formalist approach is the most restrictive form of interpretation. KELSO, *supra* note 140, at 272. The instrumentalist approach is the most flexible. KELSO, *supra* note 140, at 272. The courts have experimented with the four different approaches since the founding of the nation. KELSO, *supra* note 140, at 262. Formalism was typically the method of choice from 1850 to 1920. KELSO, *supra* note 140, at 262. Since 1930, courts have typically used the instrumentalist approach in interpreting statutes. KELSO, *supra* note 140, at 263.

[149] KELSO, *supra* note 140, at 262. The goal of the natural law approach is to carry out the purpose of the legislation found in the statute's text and structure. KELSO, *supra* note 140, at 262. In discerning the statute's purpose, the

different methods allow for varying degrees of the "exercise of individual judgment and perspective" by the judge.[150] However, where a statute is the focus of litigation, courts will be less "freewheeling" in their interpretation.[151]

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mischief sought to be remedied is considered. KELSO, *supra* note 140, at 262. The goal of formalism is to give statutory language its plain meaning. KELSO, *supra* note 140, at 262. This method often mandates a literal application of the statute's text. KELSO, *supra* note 140, at 262. The Holmesian seeks to determine the meaning of the statute by putting himself in the role a person involved with the creation of the statute. KELSO, *supra* note 140, at 263. He would also consider the mischief the statute intended to remedy and the legislative history of the statute. KELSO, *supra* note 140, at 263. An instrumentalist's goal in interpreting a statute is to find the legislature's intent in order to carry out its purpose. KELSO, *supra* note 140, at 263. All relevant evidence is considered to determine the intent and purpose of the legislature in passing the statute to arrive at a fair result. KELSO, *supra* note 140, at 263.

Adherents to the formalist approach consider little more than the words in the statute. KELSO, *supra* note 140, at 272. They will also consider prior judicial interpretations of the same statute. KELSO, *supra* note 140, at 273. Followers of the natural law model will consider everything the formalist will consider in addition to the title, preamble and declaration of purpose of the statute. KELSO, *supra* note 140, at 273. The Holmesian will build on what the natural law considers in addition to a vast array of legislative materials. KELSO, *supra* note 140, at 274. These materials would include any Senate and House reports, statements of the sponsor of the bill, statements of the drafter of the legislation and other non-legislative and administrative materials. KELSO, *supra* note 140, at 274. The instrumentalist considers all the materials the others will consider in addition to balancing the social polices involved. KELSO, *supra* note 140, at 274. He will try to make sense of the legislation in terms of the "developing legal and social context." KELSO, *supra* note 140, at 274.

[150] KELSO, *supra* note 140, at 262. There is always the "danger" that the court's conclusion as to legislative purpose will be influenced by the judge's own views or factors not considered by the legislative body. *American Trucking Ass'ns*, 310 U.S. at 544. This possibility, however, does not justify an "acceptance of a literal interpretation dogma" which keeps the court from reaching a correct conclusion. *Id.*

[151] KELSO, *supra* note 140, at 263. Due to the restrictive nature of the formalist approach, there is little risk that the judge's views will be substituted for those of the legislature that created the statute. KELSO, *supra* note 140 at 263. However, an appropriate determination of the legislative intent will require the judge to use his own "reference" in determining what the legislature originally meant. KELSO, *supra* note 140, at 263. Since the emphasis is on what the legislature intended at the time of the statute's adoption, the judge does not use

The "plain meaning" approach to statutory interpretation is just one of several methods available, but it is the most widely used when a statute's text is clear and interpretation will not lead to an absurd result.[152] This was the method of statutory interpretation used in *Heintz*.[153] Considering the goals and materials available for review by the formalist approach to statutory interpretation, it is the most restrictive when compared to the other methods.[154] Despite these restrictions, courts that stray from the approach do so only under limited circumstances and with "caution."[155] The Supreme Court has stated that there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."[156] Where "these words are sufficient in and of themselves to determine the purpose of the legislation" it is not necessary to look any further to determine its meaning.[157] However, when "that meaning has

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his own experience and judgment when interpreting the statute. KELSO, *supra* note 140, at 263. On the opposite end of the spectrum, instrumentalism allows the judge the greatest leeway in determining the legislature's purpose. KELSO, *supra* note 140, at 263. After reviewing all the materials, the instrumentalist judge's conclusion may be "rather distant from the statute's actual words." KELSO, *supra* note 140, at 263.

[152] *See* Schrader v. Carney, 586 N.Y.S.2d 687, 690 (App. Div. 1992) (stating that "[g]enerally, a statute is to be construed according to the ordinary meaning of its words"); Phoenix Home Life Mut. Ins. Co. v. Curiale, 615 N.Y.S.2d 967, 970 (Sup. Ct. 1994) (stating that the "intent of the legislature should be determined 'from the words and language used in the statute' . . . if the language [is] plain and clear").

[153] Heintz v. Jenkins, 514 U.S. 291, 297 (1995) (using the "plain language of the Act itself" to determine the scope of removal of the attorney exemption).

[154] *See supra* notes 148-151 and accompanying text (discussing other methods of statutory interpretation).

[155] *Schrader*, 586 N.Y.S.2d at 690 (stating that courts should use caution when they do not use the literal language of the statute as controlling the interpretation of the statute to avoid misconstruing the purpose of the statute through injection of the judges ideas).

[156] United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940).

[157] *Id. See also* Pressley v. Capital Credit & Collection Serv., 760 F.2d 922, 924 (9th Cir. 1985) (finding that legislative intent may be "ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive"); *But see* New York State Bankers Ass'n v. Albright, 343 N.E.2d 735, 738 (N.Y. 1975) (stating that "[t]he words men use are never

led to absurd or futile results . . . [the Supreme Court] has looked beyond the words to the purpose of the act."[158] Even when the "plain meaning" does not lead to an absurd result but "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the Supreme Court] has followed that purpose, rather than the literal words."[159] Therefore, even though the attorney exemption has been eliminated from the statute, interpreting the statute in a manner that included all attorney litigating activity as covered under the Act was surely contradictory to the policy goals of the FDCPA.

The FDCPA was crafted as an "extraordinarily broad statute" in an attempt to address a widespread problem of abusive debt collection practices.[160] As a result of its attempt to cover as many situations as possible, the statute was left with little "plain meaning" and an intent that was "anything but crystal clear."[161] Courts have been interpreting the poorly worded statute to cover

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absolutely certain in meaning; the limitations of finite man and the even great limitations of his language see to that . . . . [I]t is often said with more pious solemnity than accuracy, the clarity of the statute precludes inquiry into the antecedent legislative history.").

[158] *American Trucking Ass'ns*, 310 U.S. at 543.

[159] *Id.* (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)).

[160] Frey v. Gangwish, 970 F.2d 1516, 1521 (6th Cir. 1992). The *Frey* court recognized the broadness of the statute but refused to tame it in the situation facing it in dealing with the FDCPA's verification requirement for post-judgment collection attempts. *Id.* The appellee argued that no exception existed for the verification requirement to be read under sections 1692g(a) and 1692e(11) of the FDCPA for post-judgment demands of a debt. *Id.* The dissenting opinion stressed that no FDCPA purpose was served by requiring a verification notice for post-judgment collection attempts. *Id.* at 1522. Although the court agreed that such an exception would be "sensible," the court held that it was constrained to follow the statute as it was written. *Id.* at 1521. Therefore, in following the literal language of the statute, the court clearly did not follow the purpose of the statute.

[161] Bryan v. Clayton, 698 So. 2d 1236, 1237 (Fla. Dist. Ct. App. 1997). In *Bryan*, the court rejected the conclusions reached by other federal circuit courts that condominium maintenance fees were consumer debts within the definition of the statute. *Id.* at 1238. However, the court continued to reject the "extension of credit" doctrine introduced by *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987). *Id.*

many more activities than originally intended.[162] A statute that was "poorly drafted and whose true scope appears hopelessly lost in its circular definitional scheme"[163] has been producing poor decisions on some occasions.[164] Given the confusing and ambiguous nature of the FDCPA, the Court in *Heintz* should have looked beyond the mere text of the statute to the legislative history and the FTC Commentaries, to interpret its provisions.[165]

Congress eliminated the attorney exemption in response to the growing number of attorneys involved in debt collection practices in order to have these attorneys fall within the scope of the FDCPA.[166] The removal of the exemption immediately created

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[162] *Id.*

[163] *Id.*

[164] Aside from *Romea*, deciding that rent is a debt, there are several cases that have held that a consumer that tenders a check that is subsequently dishonored creates a debt. *See* Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350 (10th Cir. 1998); Duffy v. Landberg, 133 F.3d 1120 (8th Cir. 1998); Charles v. Lundren & Assocs., 119 F.3d 739 (9th Cir.); Bass v. Stolper, Koritzinsky, Bewster & Neider, 111 F.3d 1322 (7th Cir. 1997). These courts determined that the dishonored check created a debt based upon the interpretation of the meaning of "debt" under the FDCPA. Under the FDCPA, however, the meaning of "debt" is necessarily modified by the definition of "creditor" under the statute. *See* 15 U.S.C. § 1692a(4) (1994) (defining "creditor").

[165] *See* Beggs v. Rossi, 145 F.3d 511, 512 (2d Cir. 1998) (finding that, although the FTC's commentary on the FDCPA is not conclusive for the courts, it should be accorded "due weight"). The court agreed with the interpretation of the FTC, which stated that unpaid taxes are not a debt under the statute. *Id.* In order to reach this conclusion, the court found that the personal property tax incurred through ownership of a vehicle was not a "transaction" of the kind contemplated by the FDCPA. *Id. See also* Staub v. Harris, 626 F.2d 275, 279 (3d Cir. 1980) (finding that the informal opinions issued by the FTC should be given some weight by the court); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971, 976 (5th Cir. 1974) (finding that the Federal Reserve Board staff opinions on Regulation Z should be entitled great weight since they represent the opinions of those with "informed experience and judgment"); Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 747 (5th Cir. 1973) (suggesting that the Federal Reserve Board's interpretation is the "more likely" meaning of the statute).

[166] 132 CONG. REC. H10031-02 (daily ed. Oct. 14, 1986) (statement of Rep. Annunzio). Rep. Annunzio estimated that 5000 attorneys were engaged in debt collection. *Id.* At the time, the House Report estimated the number of lay debt collection firms at 4500. H.R. REP. NO. 99-405 (1985), *reprinted in* 1986

some confusion as to the scope of attorney activities the Act intended to regulate.[167] However, even after the Court in *Heintz* decided that all activities relating to debt collection are covered by the FDCPA, the scope of the FDCPA was still unclear to practitioners and courts.[168]

Despite removal of the attorney exemption from the FDCPA, courts prior to *Heintz* pointed to the Act's legislative history to suggest that the amendment to the Act was not intended to apply to all attorney debt collection activities.[169] The Supreme Court has suggested that the remarks of a sponsor of a bill that ultimately

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U.S.C.C.A.N. 1752. One plausible reason for removal of the attorney exemption was the public's perceived abuses by attorneys involved in debt collection. Strout, *supra* note 27, at 311. To support that proposition, Rep. Annunzio stated that the repeal was "intended to place attorney collectors and lay collectors on an equal footing," thereby removing any competitive advantage that attorneys enjoyed in collecting debts. 132 CONG. REC. H10031-02 (daily ed. Oct. 14, 1986) (statement of Rep. Annunzio). Law firms, not subjected to regulation under the FDCPA, were able to engage in activities that would otherwise be prohibited for debt collection companies, such as calling debtors late at night or contacting employers and neighbors regarding the debt. *Id.* These law firms occasionally employed aggressive lay debt collectors to service their customers' accounts, without the concern of running counter to the FDCPA. *Id.* However, since regulation is associated with increased costs of entry into a market (i.e., costs of compliance), an additional reason for elimination of the attorney exemption was aimed at decreasing the number of law firms directly competing with commercial debt collection agencies. *Id.*

[167] Strout, *supra* note 27, at 310. There were two sides to the argument. Strout, *supra* note 27, at 310. Consumer advocates argued that elimination of the exemption indicated that the Act "should apply to attorneys engaged in litigation-related activities." Strout, *supra* note 27, at 310. Creditor attorneys argued for a "litigation exception." Strout, *supra* note 27, at 310.

[168] Strout, *supra* note 27, at 321 (stating that the decision in *Heintz* "failed to address a number of more troubling issues regarding the proper scope of the Act as applied to litigators, such as whether a pleading is a communication under the Act and whether the Act applies to all stages of the legal process").

[169] Firemen's Ins. Co. v. Keating, 753 F. Supp. 1137, 1142 (S.D.N.Y. 1990) (stating that the purpose of the removal of the attorney exemption was not to "sweep within the scope of the term 'debt collector' those attorneys acting in the role of legal counsel while representing clients"); Heintz v. Jenkins, No. 93 Civ. 1332, 1993 WL 284115, at *3 (N.D. Ill. July 27, 1993) (referring to the comments of Rep. Annunzio); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992) (noting the FTC's policy interpretations of the FDCPA).

is enacted serves as an "authoritative guide" to the statute.[170] The amendment to the FDCPA was identical to the amendment introduced and commented upon by Representative Annunzio.[171] Representative Annunzio described the amendment as a "fairness bill" to make sure that all debt collectors "operate under the same set of rules" and to remove any competitive advantage law firms enjoyed over debt collection firms.[172] However, any competitive advantage the Representative sought to eliminate could only address non-litigation activities since traditional debt collection firms could not file a suit on behalf of their clients before or after the amendment.

Congress intended the amendment to impact the estimated 5000 attorneys involved in debt collection.[173] Representative Annunzio

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[170] North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). Representative Annunzio sponsored and drafted the amendment removing the attorney exemption and made significant remarks about the legislation on the House floor. H.R. REP. No. 99-405, at 1, *reprinted in* 1986 U.S.C.C.A.N. 1752, 1752.

[171] H.R. REP. NO. 99-405, at 2, *reprinted in* 1986 U.S.C.C.A.N. 1752, 1752. Rep. Annunzio introduced the amendment as H.R. 4617 in 1984. *Id.* He reintroduced the amendment as H.R. 237 on January 3, 1985. *Id.* The House Banking, Finance and Urban Affairs Committee reported its findings on the amendment to the House on November 26, 1985. *Id.* Rep. Annunzio made his comments on the amendment on December 2, 1985, months before Congress voted on the amendment. 131 CONG. REC. H10534-02 (daily ed. Dec. 2, 1985). The bill ultimately became law in July 9, 1986. 15 U.S.C. § 1692a (1994).

[172] 131 CONG. REC. H10534-02 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio) (stating that the amendment is a "fairness bill [to] make certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are *easy to follow* and *do not restrict the business* of ethical debt collectors") (emphasis added).

[173] *Id.* At the same time, in 1985 there were approximately 653,686 lawyers nationwide and 676,584 lawyers nationwide in 1986. American Bar Ass'n, *Total Number of Licensed Lawyers 1970 to Present* (1998) (unpublished statistics on file with the *Journal of Law and Policy*). It is not possible to determine how many of these lawyers were engaged in landlord-tenant litigation, but approximately 2413 attorneys identified themselves as landlord-tenant attorneys in 1998, in the 1998 edition of the Martindale-Hubbell Lawyer Directory. Telephone Interview with Richard Lukowski, Marketing Rep., Chaminers Business and Reprint Services (Jan. 27, 1999). This figure may not represent the total number of attorneys practicing landlord-tenant law since only 60% of the 730,000 attorneys listed in the Martindale-Hubbell Directory list a specialty. *Id.* In

stated that the amendment was necessary in reaction to the growing number of law firms engaging in debt collection practices.[174] These firms hired many non-attorneys to engage in the same activities as account representatives in traditional debt collection firms and often touted their ability to engage in activities directly forbidden by the FDCPA.[175] Therefore, in interpreting the amendment, it is reasonable to conclude that the Representative intended that these firms, which attracted so much public attention, be subject to the FDCPA in their debt collection activities or face liability. Furthermore, it is reasonable to conclude that the amendment was not directed at the hundreds of thousands of lawyers not engaged in debt collection.[176]

After the amendment's passage in Congress, Representative Annunzio addressed the confusion regarding its scope.[177] He assured the legal community that "actions which can only be taken by those possessing a license to practice law are outside the scope of the act."[178] The representative explicitly stated that the filing of the complaint is not covered by the Act since these are not debt collection activities but litigation activities.[179] Furthermore, the

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addition, not all attorneys pay to be listed in Martindale-Hubbell. *Id.*

[174] 132 CONG. REC. H10031-02 (daily ed. Oct. 14, 1986) (statement of Rep. Annunzio). Earlier, the Representative stated that "the fastest growing law firm in the country does nothing but collect debts and is totally exempt from the Act." 131 CONG. REC. H10534-02 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio). Additionally, when the exemption existed, Congress "thought that those [law firms] that did [engage in debt collection] would be operated in an ethical manner or be subject to State bar discipline." *Id.* The Representative concluded that this "has not been the case." *Id.*

[175] 131 CONG. REC. H10534-02 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio). One of the largest law firms in 1985 employed 700 lay persons along with 121 attorneys. *Id.*

[176] 132 CONG. REC. H10031-02 (daily ed. Oct. 15, 1986) (statement of Rep. Annunzio) (stating that "[o]nly collection activities, not legal activities, are covered by the act").

[177] *Id.*

[178] *Id.* (stating that "[a]ctions which can only be taken by those possessing a license to practice law are outside the scope of the act [and that] filing of a complaint is not covered by the act").

[179] *Id.* (stating that since a complaint is not covered by the Act, "there is no requirement that attorneys include the notices required [by the FDCPA] in legal

Representative made a clear distinction between debt collection activities and the practice of law by talking about debt collection and litigation as two separate and distinct activities for attorneys.[180]

The Federal Trade Commission's Commentary on the FDCPA provides additional guidance on interpreting the FDCPA and removal of the attorney exemption.[181] The Commentary defines various terms used throughout the FDCPA.[182] The definition of a "communication" under the Act excludes the filing of a formal legal action or the filing of a notice required by law as a "prerequisite to enforcing a contractual obligation between creditor and debtor."[183] In the Commentary's definition of "debt collector," the FTC associates law firms whose efforts to collect on debts

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filings").

[180] *Id.* (stating that "[t]he act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature").

[181] Statements on General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097 (1988) [hereinafter "*Staff Commentary*"]. The *Staff Commentary*, released December 13, 1988, is not binding on the FTC or the public. *Id.* at 50101. The document is an attempt to compile the informal staff letters the agency generated in response to the public's requests for the agency's interpretation of various aspects of the FDCPA. *Id.* The FTC is the governmental agency charged with enforcing the provisions of the FDCPA. 15 U.S.C. §1692l(a) (1994 & Supp. IV 1998). Since the FDCPA plays such an enforcement role, some courts find that the *Staff Commentary* carries some persuasive authority. *See* HOBBS, *supra* note 49, § 3.2.5.2, at 75. However, the *Staff Commentary* is not binding where it conflicts with an unambiguous provision of the FDCPA. *See* Heintz v. Jenkins, 514 U.S. 291, 298 (1995). Precisely what is an "unambiguous provision" of the FDCPA depends on the court's statutory interpretation of the Act. *See supra* notes 148-151 and accompanying text (discussing statutory interpretation). The *Staff Commentary* has not been updated since its original publication and therefore has not been altered to account for the Supreme Court's ruling in *Heintz v. Jenkins.*

[182] *Staff Commentary*, *supra* note 181, at 50101-02. The defined terms include: consumer; creditor; debt; and debt collector. *Id.*

[183] *Staff Commentary*, *supra* note 181, at 50101. Legal filings excluded under the Act, according to the *Staff Commentary*, include: the "filing of a lawsuit or other petition/pleadings with a court; service of a complaint or other legal papers in connection with a lawsuit; or activities directly related to such service." *Staff Commentary*, *supra* note 181, at 50101.

include activities associated with lay debt collection firms.[184] However, the FTC excludes from the definition an attorney "whose practice is limited to legal activities."[185] The Commentary refers to the use of the courts to reduce debts to judgment as a legal activity.[186] Based on the FTC Commentary, it would appear that the FTC intended to exclude attorneys who exclusively used the courts to litigate debts and to exclude those activities undertaken by attorney debt collection firms, which included the use of the courts to reduce the debts to judgments.

In accordance with the legislative history of the Act, the FDCPA should not apply to attorneys that use the courts to evict tenants who have defaulted on their rent payments when the only activities the attorney engaged in were those prescribed by the law in securing the eviction. The literal approach followed by the Court was not prudent since, by its legislative history, the extent of activities the Act intended to cover was in question. Furthermore, since the potential consequences to the legal profession were far reaching, as most litigators would be subject to the FDCPA when litigating on behalf of another, a more instrumentalist approach would have been warranted because of the flexibility and resources the Court could have considered in making its decision.[187] For example, if a complaint is the first communication between a debtor and a creditor's attorney, the pleadings are subjected to

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[184] *See Staff Commentary*, *supra* note 181, at 50102 (including law firms "whose efforts to collect consumer debts on behalf of its client regularly include activities traditionally associated with debt collection, such as sending demand letters or making collection telephone calls to the consumer"). The *Staff Commentary*, however, takes a position contrary to this Note by stating that a debt collector is also defined to include any firm that "regularly collects overdue rent on behalf of real estate owners." *Staff Commentary*, *supra* note 181, at 50102.

[185] *Staff Commentary*, *supra* note 181, at 50102 (excluding "[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)" from the Act). The *Staff Commentary* is in apparent contradiction to *Heintz v. Jenkins*, 514 U.S. 291 (1995), but the *Staff Commentary* has not been updated since its original drafting.

[186] *Staff Commentary*, *supra* note 181, at 50102.

[187] *See supra* notes 148-151 (discussing approaches to statutory interpretation).

coverage of the FDCPA. This seems wholly unnecessary given the internal regulation of court filings by the courts themselves and the rules of ethics that govern lawyers.[188] Nevertheless, as a result of the Court's decision, the lower federal and state courts have followed suit and have continued to expand the protections afforded consumers by the FDCPA. The protections of *Heintz* have been expanded to the extent that they are used to subject attorneys to the provisions of the FDCPA who litigate on behalf of landlords to recover wrongfully detained property.[189] Apparently, the courts have failed to "plausibly imply" to read the FDCPA to "authorize the actual invocation of the remedy the collector 'intends to invoke'."[190] After all, when the attorney sends the section 711 notice to the tenant, does he not intend to evict him? This Note answers the question in the affirmative.

2. *Rent as a Debt Under the FDCPA?*

After holding that attorneys seeking rent for landlords are debt collectors under *Heintz,* the Second Circuit in *Romea* then decided that rent is a debt under the FDCPA.[191] At this time, the circuit courts are split over which debts are covered by the FDCPA.[192] Specifically, the dispute is over whether the debt in question results from an extension of credit or from a deferral of payments. The Third Circuit, in deciding what obligations are covered under the FDCPA, held that in order to be considered a debt under the FDCPA, a transaction must involve the "offer or extension of credit

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[188] *See supra* note 27 (discussing New York's Code of Professional Responsibility).

[189] Romea v. Heiberger, 165 F.3d 111, 118 (2d Cir. 1998).

[190] Heintz v. Jenkins, 514 U.S. 291, 296 (1995).

[191] *Romea*, 163 F.3d at 116.

[192] On one side of the split was the Third Circuit case, *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), which required an extension or offer of credit for an obligation to be covered under the FDCPA. The other side of the split was manifested in the opinions of *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997), *Newman v. Boehm*, 119 F.3d 477 (7th Cir. 1997) and *Brown v. Budget Rent-A-Car Systems*, 119 F.3d 922 (11th Cir. 1997). These cases relied on the plain language of the FDCPA and did not require any intentional offer or extension of credit to be made.

to a consumer."[193] The Seventh and Eleventh Circuits, did not decide the issue in the same manner.[194] These courts found that an extension of credit or deferral of payments is not the deciding factor as to whether an obligation qualifies as a debt under the FDCPA. Disagreeing with the Third Circuit's perspective, the *Romea* court followed that of the Seventh and Eleventh Circuits.[195]

For purposes of landlord-tenant litigation, a debt should require a transaction in which a consumer was offered an extension of credit. If a debt is defined under the FDCPA to require an extension of credit, then it is unlikely that rent will be considered a debt since tenants are not extended credit or given the opportunity to defer their rent payments. In practice, most tenants are required to pay rent in advance of the period of their use of the premises.[196] In a typical lease, the landlord also collects a security deposit from the tenant.[197] One of the primary purposes of the security deposit is to be able to apply the deposit to the payment of any overdue rent.[198] This clearly demonstrates an intention on the part of the landlord not to extend credit to the tenant.[199] For

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[193] *Zimmerman*, 834 F.2d at 1168.

[194] *See* Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997); Newman v. Boehm, 118 F.3d 477 (7th Cir. 1997); Brown v. Budget Rent-A-Car Systems, 119 F.3d 922 (11th Cir. 1997).

[195] *Romea*, 163 F.3d at 115 (rejecting the reasoning in *Zimmerman*, 834 F.2d at 1168).

[196] Romea v. Heiberger, 988 F. Supp. 715, 716 (S.D.N.Y. 1998). For example, rent for any month is usually due on the first of the month.

[197] A typical security deposit lease clause reads as follows: "Tenant has given security to Landlord in the amount stated above." Form A-55: Apartment lease, comprehensive form, rules, guaranty, plain English format (Julius Blumberg, Inc. 1984).

[198] A typical security deposit lease clause reads as follows: "Tenant has given security to Landlord in the amount stated above. . . . If Tenant does not pay rent or added rent on time, Landlord may use the security to pay for rent and added rent then due." *Id.*

[199] It could be argued that the landlord may be making an extension of credit if the landlord does not pursue the tenant for the overdue rent and the rent due exceeds any security deposit the landlord has on hand. Otherwise, always demanding the rent from the tenant when due should indicate an intent not to extend credit.

these reasons, the Second Circuit should have found that rent is not a consumer debt under the FDCPA. As a result of its decision, landlord-tenant litigation will be burdened with the additional protections of the FDCPA.

In *Zimmerman*, the Third Circuit determined that "debts," as defined by the FDCPA, were obligations of the same type dealt with by the other chapters of Consumer Credit Protection Act ("CCPA").[200] *Zimmerman* confronted the issue whether the defendant's attempt to collect on a settlement offer to avert a lawsuit over theft of services was the type of transaction that gave rise to a debt under the FDCPA.[201] The court observed that the FDCPA was annexed to the CCPA and, therefore, found that the scope of the FDCPA should be limited to the type of transactions covered by the other sections of the CCPA.[202]

The purpose of the CCPA is to encourage "informed use of credit" by disclosing credit terms, thereby allowing the consumer to compare the costs of credit from various providers.[203] The sections of the CCPA, which touch on various credit issues, include defining finance charges,[204] determining annual percentage rates,[205] and disclosing obligations under consumer personal property leases and credit transactions.[206] Other subchapters of the CCPA demonstrate a pattern of concern by Congress in providing consumers protection in credit transactions.[207] In

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[200] Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1168 (3d Cir. 1987).

[201] *Id.* at 1167.

[202] *Id.* at 1168.

[203] Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693n (1994 & Supp. IV 1998).

[204] *Id.* § 1605(a) (defining finance charge as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit").

[205] *Id.* § 1606(a)(1)(A) (defining annual percentage rates as the "nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed").

[206] *Id.* § 1631 (listing several disclosure requirements for a creditor or lessor of equipment).

[207] *See id.* § 1671(a)(1) (finding that "extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods

Zimmerman, after considering the purpose of the FDCPA in light of the CCPA, the court held that the FDCPA was not the appropriate statute under which to seek protection from abusive practices of plaintiffs attempting to collect on tort settlements.[208] The court suggested that the plaintiff's remedy is "elsewhere than under the FDCPA."[209] Likewise, protection for tenants in landlord-tenant disputes should be found in the various state and local consumer protection statutes, rather than the FDCPA.

Unlike courts following the logic of *Zimmerman*,[210] which look to other statutes for remedies for victims of abusive collection practices, some courts suggest that the FDCPA be used to protect consumers engaged in a broad range of transactions.[211] After

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in interstate commerce"); § 1679 (finding that "certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters); § 1681 (finding that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy"); §1691 (finding it unlawful for extension of credit to be based on illegal discriminating criteria). These subchapters focus on various aspects of consumer credit and banking. The remaining banking subchapter establishes a framework for determining the rights, liabilities, and responsibilities of the parties in transactions involving the use of electronic systems to transfer funds. *See id.* §1693. None of these subchapters refer to the relationship between a landlord and tenant.

[208] Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1168 (3d Cir. 1987).

[209] *Id.* at 1169.

[210] *See, e.g.*, Coretti v. Lefkowitz, 965 F. Supp. 3, 5 (D. Conn. 1997) (agreeing with *Zimmerman's* requirement of deferral of payment where defendant attempted to collect premium cable fees from plaintiff who received cable through unauthorized means); Sarver v. Capital Recovery Assoc., 951 F. Supp. 550, 554 (E.D. Pa. 1996) (holding that a dishonored check is not a debt and that there was no agreement of deferral of payment since a check is an immediate form of payment and its dishonor does not create a debt); Adams v. Law Offices of Stucker & Yates, 926 F. Supp. 521, 526 (E.D. Pa. 1996) (finding that *Zimmerman's* definition of debt applies to an arrangement between a health-care provider and a patient since there is a deferral, rather than an immediate payment by patient).

[211] *See, e.g.*, Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1325 (7th Cir. 1997) (holding that the "absolute language" of the FDCPA

acknowledging that not all obligations are considered debts under the FDCPA,[212] these courts typically proceed to give the terms of the statute its ordinary meaning.[213] Under the plain meaning interpretation of debt, few cases escape the province of the FDCPA.

In giving the words of the Act their "ordinary meaning," the Seventh Circuit in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, concluded that an "offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA."[214] The Seventh Circuit took a fairly broad view of what was considered a debt under the FDCPA by stating "[a]s long as the transaction creates an obligation to pay, a debt is created."[215] In *Bass*, the court concluded that a dishonored check created a debt necessitating protection under the FDCPA when a plaintiff attempted to collect on the dishonored funds.[216]

The majority opinion relied on Congress' elimination of the limiting language of debt as including credit transactions.[217] This conclusion was based upon the elimination of the language from the early drafts of the legislation and congressional hearings that discussed collecting dishonored checks before the FDCPA became law.[218] The court noted that in drafting the FDCPA, early drafts

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does not allow for a limited set of obligations to which the word "debt" may apply).

[212] *Id.* at 1324.

[213] *Id.* at 1325.

[214] *Id.* at 1326.

[215] *Id.* at 1325. Another Seventh Circuit case, *Newman v. Boehm*, 118 F.3d 477 (7th Cir. 1997), was decided after and relied on *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997). The *Newman* court noted that a number of courts deciding the debt issue followed the legal reasoning promulgated in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168-69 (3d Cir. 1987). *Newman*, 119 F.3d at 480.

[216] *Bass*, 111 F.3d at 1330.

[217] *Id.* at 1327. The earlier text of the bill defined "debt" as "any obligation arising out of a transaction in which credit is offered or extended to an individual, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household services." *Id.* (quoting H.R. 13720, 94th Cong. (1976)).

[218] *Id.* The materials relied on by the court were those of the Executive Vice-President of the American Collectors Association, John W. Johnson, stating that

restricted eligible debts to "any obligation[s] arising out of a consumer transaction in which credit is offered or extended to an individual."[219] The court inferred that the deletion of the credit requirement demonstrated Congress' intention not to require an extension of credit.[220] Therefore, the attempt by the defendant to collect on the dishonored funds amounted to an attempt to collect on a debt.

The dissent in *Bass* declined to agree with the majority's interpretation of Congress' definition of debt under the FDCPA.[221] The dissent suggested that if Congress intended to include dishonored checks as debts, it would have demonstrated its intention by incorporating such a provision into the text of the statute.[222] In contrast to the majority opinion, the dissent demanded a consensual relationship between debtor and creditor before a debt was created.[223] Through a similarly broad statutory interpretation and reliance on the Seventh Circuit's decision in *Bass*, the Eleventh Circuit in *Brown*, and the Second Circuit in *Romea* took analogous positions on whether a debt requires an extension of credit.[224]

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passage of the FDCPA would make it difficult for financial institutions to collect dishonored checks. *Id.* Discussion of the issue by this private citizen is not dispositive, since this person could be mistaken as to the bill's applicability to dishonored checks.

[219] *Id.* (quoting H.R. 13720, 94th Cong. (1976)).

[220] *Id.* at 1326.

[221] *Id.* at 1331-32 (Bauer, J., dissenting) (stating that "the majority opinion gives too little weight to the reasoning of *Zimmerman v. HBO Affiliate*" and that the FDCPA does "not cover bad checks given for goods and services").

[222] *Id.* at 1331.

[223] *Id.* at 1332. The nature of a check is to pay for goods or services immediately and not to create a debtor-creditor relationship. *Id.* Implied by the nature of checks and other negotiable instruments is that when presented to the maker's financial institution, the instrument will be immediately paid. *Id.* Even when a credit card is used to make a transaction, the credit relationship is solely between the issuing bank and the credit card customer. *Id.* When a check or credit card is accepted for payment, it is merely a convenience to the customer not to require the physical transfer of legal tender at that moment and should not create any credit relationship. *Id.*

[224] Brown v. Budget Rent-a-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) (following *Bass*, the court found that unpaid administrative and other fees

The Second, Seventh and Eleventh Circuits' refusal to consider the context of the FDCPA within the CCPA was unjustified in light of the legislative history and the reasoning of *Zimmerman*. Just as these courts looked to the elimination of language from the statute to reach their decisions, they should have looked to the language of the caption of the FDCPA and the credit protection purposes of the subchapters within the CCPA. It then would have become clear that only transactions involving an extension of credit were intended by Congress to be governed by the FDCPA.

C. *The Policy Implications of* Romea v. Heiberger *on Landlord-Tenant Relations*

The Second Circuit's decision in *Romea v. Heiberger* will have significant policy implications on landlord-tenant relations in New York State. While tenants may have enjoyed a victory in terms of consumer protection as a result of *Romea*, it is likely that many landlords will continue to use attorneys for the entire eviction process and will, therefore, pass on to tenants the increased costs of rent collection under the requirements of the FDCPA. Furthermore, landlord-tenant relations will be stressed by an increased measure of concern on the part of landlords towards tenants who fail to pay their rents on time since the validation period mandated by the FDCPA drastically increases the amount of time before landlords can reclaim their property as opposed to the three day waiting period under the RPAPL.

The increased consumer protection provided by *Romea* may come at a high price as landlords seek to protect their investments by passing along the potential increased eviction costs.[225] Large

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resulting from damage to a rental truck are debts under the FDCPA).

[225] *See* Chicago Board of Realtors Inc. v. City of Chicago, 819 F.2d 732, 741 (7th Cir. 1987) (Posner, J., concurring) (reflecting on the burdens and costs to be imposed on tenants after the court's upholding of a Chicago ordinance that granted tenants more legal rights). Judge Posner also states that landlords will increase rents to offset the time value of money and less predictable cash flow. *Id.* In addition, landlords will react to the granting of greater rights to tenants by screening applicants more closely because the "cost of renting to a deadbeat will now be higher." *Id.* Furthermore, the number of available units to rent to tenants

and small landlords alike are unlikely to sit by idly and allow the costs of business to increase without reacting. When landlords are unable quickly to remove delinquent tenants from their property, they are losing potential rental income.[226] The eviction process also becomes more expensive with the increased litigation over the debt.[227] These additional costs of business will be passed on to the tenant in the form of increased rental costs.[228] Landlords of rent-control units or landlords that rent to low-income tenants will be unable to pass the costs along by raising rents. The only alternative will be to cut back on services.[229] Governmental entities that manage public housing, may need to absorb the costs, which may also lead to elimination of services.[230] Ultimately, landlords who are faced with the possibility of delinquent tenants will increase the cost of rentals for the average consumer. Society as a whole, and in particular poorer tenants, will bear the costs of the FDCPA's increased consumer protection. Furthermore, landlords may impose harsher eviction and screening policies in reaction to this wave of consumer protectionism.[231]

Romea may also encourage landlords to bypass the use of attorneys to act as their advocates. Such a result may be likely because if landlords collect their own rent, they will not be forced to comply with the burdensome restrictions of the FDCPA.[232] This means that the landlord, himself must deliver the three day notice and handle all aspects of the eviction until the parties enter

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may decrease as landlords choose to convert rental apartments to condominia and cooperatives in reaction to greater consumer protection given to tenants. *Id. See also* Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served*, 13 YALE L. & POL'Y REV. 385, 385-86 (1995) (discussing the potential negative impacts on all tenants as the result of providing advocacy to poor delinquent tenants in fighting evictions).

[226] *See* Gunn, *supra* note 225, at 385.

[227] *See* Gunn, *supra* note 225, at 385.

[228] *See* Gunn, *supra* note 225, at 386.

[229] *See* Gunn, *supra* note 225, at 386.

[230] *See* Gunn, *supra* note 225, at 386.

[231] Chicago Board of Realtors v. City of Chicago, 819 F.2d 732, 741 (7th Cir. 1987); Gunn, *supra* note 225, at 385-86.

[232] *See* 15 U.S.C. § 1692a(6) (1994) (stating that a debt collector is one who collects or attempts to collect debts owed or due another).

court. This may be manageable for the small landlord with only a few units, but nevertheless may lead to unnecessary complications and pitfalls should the landlord improperly prepare or deliver the notice or have a confrontation with the tenant.[233]

Of potential concern for landlords and landlords' attorneys alike are the claims for wrongful eviction.[234] For the landlord that ordinarily referred evictions to an attorney, the attorney will either prepare the papers and return them to the landlord for signing, or the landlord will commence the proceedings on his own. For the attorney to complete the paperwork, send it to the landlord, and subsequently, for the landlord to return the paperwork to the attorney for service, several days could pass if conventional mail is used. To do otherwise may amount to the significant expense of overnight mail or the inconvenience of personal visits to the attorney. To dispense with the careful review of paperwork may expose the landlord or tenant to potential liability.[235] If the landlord is forced to prepare his own papers, there is the risk that the notice may be inadequate or the service on the tenants may be defective. These defects will result in additional litigation, costs and delays as corrective measures are taken. The alternative is to have the attorney handle all aspects of the litigation. Typically, the most obvious way to avoid complications in the landlord-tenant arena is to keep the process simple since landlord-tenant law is not.[236] The lengthy process described above is complicated and having the landlord engage in the practice himself begs for trouble.

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[233] *See* Linda S. Votaw, *Attorney Liability for Wrongful Eviction and Related Landlord-Tenant Problems*, 2 LEGAL MALPRACTICE REP. 7, 8 (1990) (stating that educating the landlord of potential pitfalls of landlord-tenant actions should be conducted to protect the landlord from potential repercussions).

[234] *Id.* at 7-8 (reviewing common law wrongful eviction claims that may be filed by tenants for tortious acts of the landlord or attorney and statutory wrongful eviction claims that may be brought on broader grounds than common law wrongful eviction).

[235] *Id.* at 8.

[236] *Id.* (stating the most obvious way to prevent claims in landlord-tenant practice is "not to assume that landlord-tenant litigation is simple or uncomplicated").

It is unwise to allow one to engage in the practice without "special training" or knowledge of the "precautions" to be taken.[237]

Furthermore, for the landlord of several hundred or thousands of units, it would be impractical for the landlord to sign each individual notice prior to commencing summary judgment proceedings. In the situation where the landlord is a corporation, only those authorized to act on behalf of the corporation are allowed to sign the notice. The dubious tenant may challenge the notice if it is signed by anyone other than an officer of the corporation. Often, the corporate landlords will turn to law firms to handle their evictions from start to finish. As a result, the law firm litigating on behalf of the landlord will become subject to the FDCPA.

Should the Supreme Court consider *Romea* on appeal, the Court should determine that, since rent does not involve the extension of credit or deferral of payments, rents are not debts under the meaning of the FDCPA. In order to follow the Third Circuit decision in *Zimmerman*, and its interpretation of a debt, the Court will have to depart from the constraints of the "plain meaning" approach as followed by the circuit courts that found rent to constitute a debt.[238] If the Court is willing to consider more than the words of the statute, and follow an instrumentalist approach,[239] the Court may fully appreciate the true intent of Congress in creating the FDCPA and the policy implications on rent collection practices that the Second Circuit ignored. The district court in *Romea* expressed its concern that its ruling would "require a sea of change in the practice as well as to open the door to a flood of federal court suits against lawyers under the FDCPA."[240] If the Supreme Court heeds the recommendation of the district court, then the analysis is complete: the FDCPA would not apply once it is determined that rent is not a debt and,

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[237] *Id.* at 14.

[238] *See* Romea v. Heiberger, 163 F.3d 111 (2d Cir. 1998); Brown v. Budget Rent-A-Car Systems, Inc., 119 F.3d 922 (11th Cir. 1997); Newman v. Boehm, 119 F.3d 477 (7th Cir. 1997); Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997).

[239] *See supra* notes 148-151 (providing a definition of the instrumentalist approach to statutory interpretation).

[240] Romea v. Heiberger, 988 F. Supp. 715, 717 (S.D.N.Y. 1998).

therefore, landlord-tenant relations would necessarily be exempt from the FDCPA.

III. NEW YORK'S CONSUMER PROTECTION RULES FOR TENANTS SUPERSEDE THOSE OF THE FDCPA

Even if the FDCPA is applicable to real estate litigation in New York under the premise that rent is a debt and attorneys are debt collectors, tenants in New York benefit from superior protections under state and local laws. Since the FDCPA, by its provisions, only preempts state laws that are inconsistent with the protections afforded by the FDCPA, the *Romea* court should not have invalidated New York's rent collection and eviction proceeding laws.[241] Chapter 20 of New York State's GBL contains a "Consumer Protection from Deceptive Acts and Practices" provision that seeks to protect consumers from deceptive acts or practices.[242] This statute effectively accomplishes the same substantive goals as the FDCPA and the FDCPA's purpose to "eliminate abusive debt collection practices" in landlord-tenant cases.[243] In addition, New York City's Unfair Trade Practices Law provides roughly the same protections for City tenants.[244] Both statutes provide for an award of actual[245] and pecuniary damages.[246] Through New York's

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[241] *See* 15 U.S.C. § 1692n (1994). *See also supra* notes 62-68 (discussing the FDCPA's preemption of state laws).

[242] N.Y. GEN. BUS. LAW §§ 349 to 350-f (McKinney 1988 & Supp. 1999) (offering New York State consumers protection against the "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service").

[243] 15 U.S.C. § 1692(e) (1994) (stating that it is the FDCPA's purpose to "eliminate abusive debt collection practices by debt collectors").

[244] ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §§ 20-700 to 20-706 (Lenz & Riecker 1999) (providing protection to New York City consumers from "deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts").

[245] *See* N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988); 15 U.S.C. § 1692k(a)(1) (1994).

[246] *See* N.Y. GEN. BUS. LAW § 349(h) (giving the court the discretion to "increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars"); 15 U.S.C. § 1692k(a)(2)(A) (1994)

calculation of pecuniary damages as a multiple of actual damages, it may be easier for a plaintiff to reach the maximum allowable recovery.[247] Furthermore, both allow the successful plaintiff to recover attorney's fees.[248] The GBL has the added benefit of local enforcement by the Attorney General and the Attorney General's ability to seek injunctive relief on behalf of consumers.[249] The FDCPA relies on administration by the FTC[250] and knowledge on the part of consumers of their rights. It is far more likely that the Attorney General in New York will take notice of abusive eviction practices by attorneys within its state than the FTC. Clearly, the GBL provides consumers with at least the same amount of substantive protections as the FDCPA, although unlike the FDCPA, it does not unnecessarily spell out the particular procedural protections.

Tenants in apartments in New York State and New York City enjoy strong protections from the unfair acts of landlords through the State's GBL[251] and the City Code.[252] Both statutes protect against the deceptive practices of any business furnishing services to consumers in the State[253] and the City[254] respectively. Since

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(allowing additional damages not to exceed $1000).

[247] N.Y. GEN. BUS. LAW § 349(h).

[248] *Id.* § 349(h); 15 U.S.C. § 1692k(a)(3) (1994).

[249] N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988).

[250] 15 U.S.C. § 1692l(a) (1994 & Supp. IV 1998) (stating that "compliance with [the FDCPA] shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency"). Some enforcement powers have been delegated to other agencies where the offending party is a national bank or bank insured under the Federal Deposit Insurance Act. *Id.* § 1692l(b). The FTC, and the FTC alone, is the only federal agency with enforcement powers over the FDCPA with regard to landlord-tenant activities. *Id.* § 1692l(a).

[251] N.Y. GEN. BUS. LAW §§ 349 to 350-f (McKinney 1988 & Supp. 1999).

[252] ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §§ 20-700 to 20-706 (Lenz & Riecker 1999).

[253] N.Y. GEN. BUS. LAW § 349(a) (McKinney 1988). New York State consumer protection law protects against "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." *Id.*

[254] ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 20-700. The City's version of consumer protection law seeks to prevent any "deceptive or

tenants who lease an apartment are viewed as "consumer[s] of housing services"[255] they are entitled to the consumer protection provisions of the GBL[256] and the City Code.[257] Under the scope of the two statutes, tenants are protected during the negotiating process, tenancy, and subsequent eviction or collection attempts of landlords.[258] New York City's tenants benefit under the protection of both the GBL and the City Code. The GBL[259] and City

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unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts." *Id.*

[255] 23 Realty Assocs. v. Teigman, 624 N.Y.S.2d 155, 157 (App. Div. 1995) (finding a residential lease the functional equivalent of the "purchase of services from a landlord").

[256] N.Y. GEN. BUS. LAW § 349(a). The GBL applies to "[d]eceptive acts or practices . . . in the furnishing of any service." *Id.*

[257] ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 20-700. A consumer under the City Code is a "lessee . . . of . . . consumer goods or services." *Id.* § 20-701(d). Consumer goods under the City Code are "goods [or] services . . . primarily for personal, household or family purposes." *Id.* § 20-701(c).

[258] N.Y. GEN. BUS. LAW § 349(a). Under the City Code, "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" are prohibited. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 20-700. All business practices in connection with leasing housing to tenants (from negotiating the lease to eviction) are a part of the "furnishing" of the service to the tenant.

[259] New York State's GBL section 349(h) states:

> In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988). Additionally, under section 350-d:

> Any person, firm, corporation or association or agent or employee thereof who engages in any of the acts or practices stated in this article to be unlawful shall be liable to a civil penalty of not more than five

Code[260] provide for civil damages in the event of a statutory violation. Under the GBL, the Attorney General may seek an injunction and obtain restitution of the money obtained through the use of unlawful acts or practices.[261] For each violation, a civil penalty of five hundred dollars will be imposed in favor of the consumer.[262] Additionally, since 1980,[263] the GBL has allowed any person injured under its provisions to recover actual damages[264] or minimum statutory damages.[265] If the court finds that

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> hundred dollars for each violation, which shall accrue to the state of New York and may be recovered in a civil action brought by the attorney general. In any such action it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York.

Id.

[260] *See* ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 20-703 (Lenz & Riecker 1999) (giving a private right of action for any violation of section 20-700 of the City Code).

[261] N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988). Under the GBL, "whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation . . . has engaged in or is about to engage in any acts or practices stated to be unlawful he may bring an action . . . to enjoin such unlawful acts or practices and to obtain restitution." *Id.*

[262] N.Y. GEN. BUS. LAW § 350-d (McKinney 1988 & Supp. 1999).

[263] *See* Joseph Thomas Moldovan, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509, 509 (1982) (discussing the 1980 amendment to New York's GBL providing a private right of action as a part of the State's attempt to curb deceptive and unfair business practices).

[264] N.Y. GEN. BUS. LAW § 349(h) (stating that "any person who has been injured by reason of any violation of this section may bring an action in his own name . . . to recover his actual damages"). *See* 99 Realty Co. v. Wall Street Transcript Corp., 611 N.Y.S.2d 767, 768 (Civ. Ct. 1994) (finding a tenant entitled to the amount landlord overcharged tenant for electricity as actual damages).

[265] N.Y. GEN. BUS. LAW § 349(h) (stating that "any person who has been injured by reason of any violation [of GBL § 349] may bring an action in his own name . . . to recover . . . fifty dollars"). The plaintiff is entitled to collect the statutory minimum $50 in damages regardless of proof of actual damages. *See* Geismar v. Abraham & Strauss, 439 N.Y.S.2d 1005, 1008 (Suffolk Dist. Ct. 1981) (stating "it seems that the Legislature intended fifty dollars to be easily

a business "willfully or knowingly" violated the statute, then the injured party may collect up to three times the actual damages, with a limit imposed at a thousand dollars.[266] Clearly, under the GBL, a tenant can avoid the expense of litigating unfair practices by the landlord or landlord's attorney and still enjoy all of the benefits, including injunctive relief[267] and damages.[268] This comfort results because the Attorney general can choose to enforce the GBL independently,[269] or the costs of mounting a successful action can be shifted to the defendant.[270]

The City Code provides for a three-tier approach for recovery of damages depending on the intent of the violation.[271] For a consumer to file a cause of action under the statute, it is not necessary to prove any actual injury.[272] The statute provides for a strict liability imposition of penalties from fifty dollars to three hundred and fifty dollars for any violation.[273] Upon a landlord's knowing violation of the statute, a consumer may recover up to five hundred dollars.[274] Upon a showing of "repeated, multiple, or persistent violation[s]" of the statute, the violator may be compelled to pay into the court "all monies, property or other things, or proceeds thereof, received as a result of such violations."[275] All damages recovered are collected into one account and distributed on a pro rata share to all affected parties.[276] Although the City

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recoverable"). The private remedy provision of the GBL was enacted to encourage enforcement by individuals and deter deceptive conduct. *See 99 Realty Co.*, 611 N.Y.S.2d at 769.

[266] N.Y. GEN. BUS. LAW § 349(h).

[267] *Id.* § 349(b).

[268] N.Y. GEN. BUS. LAW § 350-d (McKinney 1988 & Supp. 1999) (providing regulations when an action is brought by the attorney general); § 349(h) (providing regulations when the action is brought by a private party).

[269] N.Y. GEN. BUS. LAW § 349(b) (McKinney 1988).

[270] *Id.* § 349(h).

[271] *See* ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 20-703(a)-(c) (Lenz & Riecker 1999) (imposing different penalties for violations of the City Code depending on the level of intent and frequency of the unfair trade practice).

[272] *Id.* § 20-703(e).

[273] *Id.* § 20-703(a).

[274] *Id.* § 20-703(b).

[275] *Id.* § 20-703(c).

[276] *Id.*

Code does not provide for injunctive relief,[277] it does allow for a reward of generous damages for both injured and uninjured parties through a type of distribution scheme.[278]

Since both the GBL and the City Code protect tenants from abusive rent collection practices as thoroughly as does the FDCPA, the decision in *Romea* to invalidate New York's rent collection proceedings should be overturned. However, even if *Romea* is not overturned, the FDCPA provides for a mechanism by which a state can petition the FTC to have certain statutes exempt from the requirements of the Act.[279] This provision may be a state's last hope of maintaining its current landlord-tenant system in light of the *Romea* decision which effectively dismantled the summary proceeding process.[280] However, in order for the FTC to grant New York the exemption for landlord-tenant practice, New York must first show that it has laws that are "substantially similar" to the FDCPA and that these laws are adequately enforced.[281]

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[277] *See Id.* § 20-703 (providing for only monetary penalties for violations of the City Code).

[278] *See generally* Van Cortlandt Park Dodge v. Commissioner of Dept. of Consumer Affairs, 577 N.Y.S.2d 274, 274-75 (App. Div. 1991) (listing penalties received on behalf of consumers for deceptive advertising by car dealership); Beth Kobliner, *Tax Giant's Loan Deals Stir Dispute*, N.Y. TIMES, Apr. 12, 1998, § 3, at 5 (explaining a settlement by H & R Block with the New York City Department of Public Affairs in the amount of $250,000 in fines and costs and a mandate to install a phone system to explain procedures to consumers).

[279] 15 U.S.C. § 1692o (1994). Section 1692o states that:

> The Commission shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

Id.

[280] Romea v. Heiberger, 163 F.3d 111 (2d Cir. 1998).

[281] *Id.*

CONCLUSION

Congress' concern for the unsavory acts of attorneys involved with debt collection may be justified. However, there are already safeguards in place in New York to protect tenants during the summary proceeding process. The nature of summary proceedings provides for an expeditious resolution of the rent collection dispute on its merits. New York State's consumer protection laws protect tenants from the deceptive acts and practices of landlords and their attorneys. The consumer protection laws allow for both private causes of action and enforcement by the Attorney General. The FTC's examination of these various rules and procedures would demonstrate that there is little need for additional protection for the tenant-debtor before or after litigation has begun. Therefore, upon review, the Commission should grant New York an exemption from the FDCPA's requirement for landlord-tenant litigation.

The recent Second Circuit decision in *Romea* disrupted the smooth functioning of New York's statutory scheme for securing evictions. A process that once was rapid will now be bogged down with cumbersome validation procedures and lawsuits against landlords' attorneys. This result demonstrates the need for reinterpretation of the statute by the Supreme Court or for a modification of the FDCPA by Congress. The *Romea* court's analysis of the FDCPA was unduly restricted by its plain meaning approach. The legislative history of the FDCPA clearly supported an alternative result that would have left New York's summary proceeding process intact. Furthermore, the *Romea* court failed to consider the true implications of its decision.

Without needed modifications, the preemption of New York's summary proceedings by the FDCPA will result in higher costs of real estate practice. The impact of increased costs also will be felt far outside the rental industry, as consumers will have less money to spend on other items or services. Additionally, the increased litigation will further burden the judicial system as tenants seek to prolong the amount of time they can remain on the landlord's premises until eviction.

There is little overall benefit in maintaining the new FDCPA-RPAPL system for either honest tenants or landlords. New York

has created a workable system for managing the large caseload of landlord-tenant disputes. It is a system that adequately protects the interests of tenants and landlords and should be left to function without the influence of the FDCPA.