

# KILLING “ZOMBIE DEBT” THROUGH CLARITY AND CONSISTENCY IN THE FAIR DEBT COLLECTION PRACTICES ACT

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## INTRODUCTION

Over the last decade, the debt collection industry has seen astronomical growth.<sup>1</sup> It has grown from relatively small operations to a multi-billion dollar industry. Such rapid growth, however, comes at a cost. The uncanny success of some debt collectors stems in part from the use of a variety of deceitful tactics in pursuit of an increasing number of consumers. One particularly deceitful ploy is to revive stale, paid-off, otherwise uncollectable debt, also known as “Zombie Debt.” In the wake of such tactics, there has been a steady growth in consumer complaints.<sup>2</sup> Here is one such story:

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<sup>1</sup> See, e.g., PORTFOLIO RECOVERY ASSOCIATES, INC., ANNUAL REPORT (FORM 10-K), at 8 (Feb. 25, 2011), available at <http://www.sec.gov/Archives/edgar/data/1185348/000095012311018695/w80903e10vk.htm> (showing one of the largest debt collection companies boasting growth in annual revenue from \$19.6 million in 2000 to \$372.7 million in 2010, a compound annual growth rate of 34 percent).

<sup>2</sup> Compare FED. TRADE COMM’N, ANNUAL REPORT: FAIR DEBT COLLECTION PRACTICES ACT 2 (2001), available at [www.ftc.gov/os/2001/03/fdcpar2000.pdf](http://www.ftc.gov/os/2001/03/fdcpar2000.pdf) (stating that nearly 14,000 consumer complaints were filed with the Federal Trade Commission (“FTC”) in 2000 in response to third-party collection attempts), with FED. TRADE COMM’N, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 5 (2011) [hereinafter 2011 FTC ANNUAL REPORT], available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf> (showing a total of 140,036 consumer complaints filed in 2010, an almost tenfold increase in complaints from 2000); see also *infra* Figure 1. The debt collection industry has also seen an increase in the civil penalties imposed against third-party collectors. See, e.g., 2011 FTC ANNUAL REPORT, *supra*, at 11 & n.30 (discussing *United States v. West Asset Mgmt., Inc.*, No. 1-11-CV-0746 (N.D. Ga. Mar. 14, 2011), where a settlement agreement of \$2.8 million was announced, the largest civil

*Debbie's Story*<sup>3</sup>

Debbie is a single mother of two with a prior history of credit difficulties. It has been over five years since she paid off the last of her delinquent credit card debts.

One day she receives a collection letter from the Law Office of Harold Simmons, claiming she owes money on an account with Evermore Funding. Debbie has never had an account with Evermore Funding. She calls Harold's number provided on his letterhead, but she only hears a pre-recorded message.

A few days later, Debbie starts getting nasty phone calls from Harold's law office. She writes a letter to Harold requesting that he verify the debt. A few days later, Harold replies, confirming the validity of the debt by the unknown Evermore Funding. The letter contains no contract, receipt, or any other document pertaining to the account. It merely states that "Evermore Funding has confirmed the validity of your debt."<sup>4</sup>

A month later, Debbie receives a complaint and summons in the mail requesting her appearance in court. Wanting to avoid stress, Debbie puts away the documents and forgets about them.<sup>5</sup> Soon, the

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penalty ever issued by the FTC, with the previous largest settlement being \$2.25 million.); *see also id.* at 12-13 ("In October 2010, the FTC reached a settlement agreement with collector Allied Interstate, Inc. ("Allied"), one of the nation's largest debt collectors...Under the settlement agreement, Allied paid a \$1.75 million civil penalty and agreed to stop collection efforts on disputed debts in the future unless and until it conducts a reasonable investigation and verifies the debt.").

<sup>3</sup> The following text contains a hypothetical story derived from real life events as described in ROBERT J. HOBBS, NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION § 1.5.4.5 (6th ed. 2008) ("NCLC [National Consumer Law Center] has heard of cases where the consumer thought they paid off the debt in response to a settlement offer from the debt buyer, only for the debt to surface months later in the hands of another debt buyer seeking payment for the old balance all over again."). All of the characters in this story are fictitious.

<sup>4</sup> *See* 15 U.S.C. § 1692g(b) (2006) (requiring a debt collector to provide verification of a debt if it is requested within 30 days of the debtor receiving a validation notice); *see also infra* Part II.a.ii-iii.

<sup>5</sup> The FTC provides several additional reasons why a debtor may not appear in court. JON LEIBOWITZ ET AL., FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 12 n.39 (2010) [hereinafter FTC ROUNDTABLE], *available at* <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> (providing the following reasons for a debtor failing to attend a court hearing: not recognizing the entity suing them, believing it's a case of mistaken identity, fear and unfamiliarity, lack of legal representation, misunderstanding the summons, housing emergencies, and

court enters a default judgment against her. She then learns her bank account and paychecks are being garnished. She loses all the money in her bank account, and her remaining paycheck is no longer sufficient to support her family.

Unbeknownst to Debbie, she is being garnished for a debt that she has already paid off – a zombie debt. The debt being claimed was for a defaulted MegaBank credit card, which she settled with another debt collector five years ago. Due to a clerical error, Debbie's paid-off account was sold to Evermore Funding. As a large-scale debt buyer, Evermore purchased the debt along with thousands of other defaulted loans on the secondary market for pennies on the dollar.<sup>6</sup>

Had Debbie been informed that MegaBank was the creditor, she would have been able to avoid garnishment by hiring an attorney or providing the debt collector with confirmation of her previous settlement.

### *Harold's Story*<sup>7</sup>

Harold Simmons is an attorney that represents national debt buyers like Evermore Funding. He receives thousands of new accounts every month from these clients. Such accounts are often defaulted debts, having been charged off by original creditors like MegaBank several years previously.<sup>8</sup> They come with very little information, frequently lacking any contracts, charge slips, or credit applications. Sometimes Harold only receives a spreadsheet with minimal information about the debtor or the debt itself.<sup>9</sup> The

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lack of transportation).

<sup>6</sup> See HOBBS, *supra* note 3, § 1.5.4.1 (citing *Scally v. Hilco Receivables, LLC*, 392 F. Supp. 2d 1036 (N.D. Ill. 2005), where a debt buyer paid ten cents on the dollar for bank credit accounts) (“In recent years hundreds of collection agencies have sprung up that purchase consumer debts, most often banks’ credit card debts which have been written off by the originator, and usually only pay pennies on the dollar for the debt while seeking to collect the full debt.”); see also ENCORE CAPITAL GROUP, INC., ANNUAL REPORT (FORM 10-K), at 1 (Feb. 14, 2011), available at <http://www.sec.gov/Archives/edgar/data/1084961/000119312511035293/d10k.htm>. (showing a debt collector reporting purchasing debts worth up to \$54.7 billion for about \$1.8 billion, a purchase approximately at three cents on the dollar).

<sup>7</sup> See HOBBS, *supra* note 3.

<sup>8</sup> See *id.* § 1.5.4.5.

<sup>9</sup> See WILLIAM E. KOVAVIC ET AL., FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 22 (2009) [hereinafter FTC WORKSHOP REPORT], available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (“An attorney who

difficulties associated with the collection of these accounts are offset by the 30 percent contingency fee Harold charges on every dollar recovered.<sup>10</sup> Such claims are often invalid.<sup>11</sup>

Harold knows that the best way to be profitable is to get as many claims to judgment as quickly and easily as possible.<sup>12</sup> The goal for Harold is to get an uncontested default judgment, which will give him the power to garnish the debtor's bank accounts and paychecks, regardless of the validity of the debt.<sup>13</sup> If the debtor does appear to contest the claim, Harold often decides to withdraw, and voluntarily dismiss the case. He figures the relatively low value of the claim would not be worth his time.<sup>14</sup>

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represents consumers in actions against debt collectors reported that debt buyers she had encountered receive only an electronic spreadsheet that contains the consumer's name, Social Security number, last known address, charge-off date, the amount owed, date and amount of last payment when they purchase account portfolios.") (internal citations omitted), *reviewed by* NATIONAL CONSUMER LAW CENTER & NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, COMMENTS TO THE FEDERAL TRADE COMMISSION REGARDING THE FAIR DEBT COLLECTION PRACTICES ACT 27-28 (June 6, 2007), *available at* <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf> (agreeing with the FTC that debt collectors should be required to possess certain basic information about debtors prior to collection attempts).

<sup>10</sup> See HOBBS, *supra* note 3, § 1.5.3 ("The lawyer typically would be retained on a contingent fee basis, retaining a portion, e.g., 15-50%, of any amount collected.").

<sup>11</sup> See HOBBS, *supra* note 3, § 1.5.4.4 ("[The] NCLC has heard of all sorts of flaws in the debt buyers' claims. Some of the claims have already been paid, others were someone else's debt, and some were created by an identity thief. Others are beyond the statute of limitations, were discharged with the original credit card company years before by the consumer for fraud, nonperformance, or another problem.").

<sup>12</sup> In New York City, debt collection suits almost outnumbered all other civil and criminal suits filed in U.S. federal courts combined in 2010. HOBBS, *supra* note 3, § 1.5.4.3. One law firm consisting of 14 attorneys is reported to, on average, file nearly 80,000 lawsuits a year. Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 12, 2010, *available at* <http://www.nytimes.com/2010/07/13/business/13collection.html>.

<sup>13</sup> See HOBBS, *supra* note 3, § 1.5.4.4 ("By getting a small claims default judgment...the debt buyer no longer has to worry too much about consumer defenses that would weaken its claim if it were scrutinized and can proceed with obtaining a payment order, attachment or garnishment forcing the consumer to pay its claim whether it was valid or not.").

<sup>14</sup> One debtor defense attorney in Oregon reports that when he appears to defend the case, the debt collector often withdraws and voluntarily seeks dismissal. Telephone Interview with Bret Knewston, Attorney, Law Office of Bret Knewston (Sep. 29, 2011).

His advantage is that debtors are often people who ignore their problems. They will likely fail to show up to court, allowing him an uncontested default judgment.<sup>15</sup> In fact, Harold has discovered that contested judgments are rare when debtors are confused as to the nature of the debt being claimed; such uncertainty encourages their tendencies to do nothing.<sup>16</sup>

His hurdles are the strict requirements of the Fair Debt Collection Practices Act (“FDCPA”).<sup>17</sup> Under the FDCPA, debtors like Debbie have 30 days from the date of the validation notice to dispute the debt and seek verification.<sup>18</sup> So, although the FDCPA requires Harold to name the creditor (i.e. MegaBank) in his collection letters (or demand letters),<sup>19</sup> he formulates a tactic to confuse the debtors. He names his debt collector client, Evermore Funding, as the creditor. He also sends the debtors’ requests for verification to Evermore Funding.

Harold’s tactic works. Debbie did not recognize Harold’s debt collector client. She did not know she had previously paid off the debt. Therefore she did not dispute the debt. She requested verification, but since it never reached the original creditor (MegaBank), it was ineffective. Ultimately, Harold and Evermore obtained a judgment against Debbie and initiated garnishment of her wages and bank accounts.

Unfortunately, Debbie’s story is common in the debt collection world. Although debtors face a large variety of abuses stemming from many different misapplications of the FDCPA, one major issue stands out above others: incorrectly applying the statutory definitions of creditor and debt collector. By routinely misapplying these terms, debt collectors have created confusion among debtors, obtained erroneous rulings in the courts, and opened the door to further encroachment on the rights of debtors granted by the FDCPA.

Part I of this article looks at how the terms ‘creditor’ and ‘debt collector’ are defined in the FDCPA and interpreted by the courts, while exploring the legislative intent behind those definitions. Part II discusses how incorrectly applying the two terms effectively

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<sup>15</sup> Some debt collection experts estimate about 60 to 95 percent of debt collection lawsuits result in default judgments, with many of these experts estimating closer to 90 percent. *See, e.g.* FTC ROUNDTABLE, *supra* note 5, at 5.

<sup>16</sup> Debt collectors often seek continuances or dismissals once they discover that the debtor intends to appear in court. *See id.* at 21.

<sup>17</sup> *See* 15 U.S.C. § 1692 (2006).

<sup>18</sup> *See infra* Part II.a.ii-iii.

<sup>19</sup> *See* 15 U.S.C. § 1692g(a)(2).

robs debtors of their rights granted by the FDCPA. Part III of this article examines common arguments debt collectors raise to muddy the waters. Finally, Part IV provides recommendations to resolve the problems arising from inconsistent application of the two terms.

## I. FDCPA DEFINITIONS: CREDITOR VS. DEBT COLLECTOR

Nationwide debt collection enforcement started in 1977, when Congress enacted the FDCPA to curb a “host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.”<sup>20</sup> One of the purposes of the act was to “eliminate the recurring problem of debt collectors dunning<sup>21</sup> the wrong person or attempting to collect debts that the consumer has already paid.”<sup>22</sup> The scope of the Act was to regulate only debt collectors and not creditors because “[u]nlike creditors, who generally are restrained by the desire to protect their goodwill when collecting past-due accounts, independent [debt] collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.”<sup>23</sup>

Often the creditor who extended the credit attempts to collect the debt by hiring a debt collector. In these cases, it is simple to determine who is liable under the FDCPA because there is only one debt collector and one creditor. When the creditor, however, sells a defaulted obligation to a debt buyer (like Evermore Funding), who in turn hires others to collect the debt, the distinction between creditor and debt collector can get murky. These debt purchasers frequently attempt to escape liability under the FDCPA by falsely claiming to be creditors.

In fact, regarding any single obligation, creditors cannot be debt collectors and debt collectors cannot be creditors. The FDCPA defines the terms to be mutually exclusive.

### *a. Statutory Definition of ‘creditor’ and ‘debt collector’*

Congress sought to exclude creditors from liability under FDCPA with a bright line distinction between creditor and debt collector.<sup>24</sup> The FDCPA defines creditor as follows:

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<sup>20</sup> S. REP. NO. 95-382, at 1 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

<sup>21</sup> BLACK’S LAW DICTIONARY 577 (9th ed. 2009) (defining “dun” as a verb meaning “[t]o demand payment from (a delinquent debtor).”).

<sup>22</sup> S. REP. NO. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *See id.* at 4.

The term “creditor” means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.<sup>25</sup>

The FDCPA defines debt collector as follows:

The term “debt collector” means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . .<sup>26</sup>

*b. The Two Terms are Mutually Exclusive*

“For purposes of applying the [FDCPA] to a particular debt, these two categories—debt collectors and creditors—are mutually exclusive.”<sup>27</sup> Courts have followed this reading of the statute unanimously.<sup>28</sup> Consequently, for any given obligation a creditor cannot be a debt collector, and a debt collector cannot be a creditor under the FDCPA.<sup>29</sup>

*c. Post-Default Purchaser = Debt Collector*

Under the FDCPA, distinguishing debt collectors from creditors is readily done by determining when the entity came into possession of the obligation. Obtaining an obligation before default (i.e. as an original creditor extending credit for a consumer transaction or purchasing from an original creditor *before* default) entitles one to creditor status and exclusion from the applicability of

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<sup>25</sup> 15 U.S.C. § 1692a(4) (2006).

<sup>26</sup> *Id.* § 1692a(6).

<sup>27</sup> Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2002).

<sup>28</sup> *See id.* at 536; *see also* F.T.C. v. Check Investors, 502 F.3d 159, 173 (3d Cir. 2007), *cert. denied*, 129 S. Ct. 569 (2008) (“However, as to a specific debt, one cannot be both a creditor and a ‘debt collector’ as defined in the FDCPA, because those terms are mutually exclusive.”).

<sup>29</sup> Notwithstanding one exception: “[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.” 15 U.S.C. § 1692(6). This exception is not relevant for the purposes of this inquiry.

the FDCPA. On the other hand, obtaining an obligation after it has gone into default always confers the status of debt collector along with the burdens and obligations of the FDCPA.<sup>30</sup>

Since the FDCPA does not define when a debt is in default, courts often allow the parties to determine the date of default in the contract.<sup>31</sup> Black's Law Dictionary defines the term "default" as "the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due."<sup>32</sup> A definite way to determine whether an account was in default when it was sold is to look at the charge-off or write-off date. When a debt is charged off,<sup>33</sup> it is no longer considered an asset of value on the creditor's books, allowing the creditor to treat it as a loss to offset its taxable income.<sup>34</sup> The creditor then may continue to try to collect the debt or sell it to a debt buyer. Since the debt portfolios that debt buyers receive often include the charge-off date, the information is readily available for the

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<sup>30</sup> See, e.g., *Ruth v. Triumph P'ships*, 577 F.3d 790, 797 (7th Cir. 2009) ("[T]he party seeking to collect a debt did not originate it but instead acquired it from another party, we have held that the party's status under the FDCPA turns on whether the debt was in default at the time it was acquired."); *McKinney v. Cadleway Props.*, 548 F.3d 496, 501 (7th Cir. 2008) ("[T]he purchaser of a debt in default is a debt collector for purposes of the FDCPA even though it owns the debt and is collecting for itself."); *Schlosser*, 323 F.3d at 536 ("[T]he Act treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not."); *Check Investors*, 502 F.3d at 173 ("[O]ne attempting to collect a debt is a debt collector under the FDCPA if the debt in question was in default when acquired."); *Pollice v. Nat'l Tax Funding, LP*, 225 F.3d 379, 403-04 (3d Cir. 2000) ("[A]n assignee of an obligation is not a debt collector if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a debt collector if the obligation is already in default when it is assigned."); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("[A] debt collector does not include...an assignee of a debt, as long as the debt was not in default at the time it was assigned."); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996); *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86 (2d Cir. 2003) ("[C]lassification of debt collector depends upon the status of a debt, rather than the type of collection activities used.").

<sup>31</sup> See *Alibrandi*, 333 F.3d at 86; see also *Prince v. NCO Fin. Servs., Inc.*, 346 F. Supp. 2d 744, 747 (E.D. Pa. 2004); *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1043 (W.D. Wis. 2002).

<sup>32</sup> BLACK'S LAW DICTIONARY 480 (9th ed. 2009).

<sup>33</sup> A closed-end credit, such as car loans, must be charged off after 120 days of consecutive delinquency, and an open-end credit, such as credit cards, must be charged off after 180 days of consecutive delinquency. Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36904 (June 12, 2000).

<sup>34</sup> See HOBBS, *supra* note 3, § 1.5.12.

attorney-debt collector to determine whether the debt buyer is a 'creditor' or a 'debt collector.' Although the debt may have been in default earlier than the charge-off date (depending on the parties' contract) a debt buyer who acquired the debt after the charge-off date would undoubtedly be a debt collector, and not a creditor.

MegaBank extended the credit that created Debbie's debt and is therefore a creditor. Evermore bought the debt after Debbie supposedly defaulted, and is therefore a debt collector. Harold is also a debt collector because he is attempting to collect on defaulted debt as an agent of Evermore Funding. Nevertheless, debt collectors like Evermore frequently claim they are creditors in order to escape the applicability and consequences of the FDCPA.

## II. WHY THE CREDITOR/DEBT COLLECTOR DISTINCTION IS SO IMPORTANT

Failure to insist on a rigorous and consistent application of the definitions of creditor and debt collector can lead to many serious abuses in debt collection practice, resulting in numerous infringements upon debtors' rights. Since creditors are not liable under the FDCPA, debt collectors sometimes attempt to escape liability altogether by falsely claiming to be creditors.<sup>35</sup> More commonly, however, debt collectors use the misapplication of the terms to create confusion in the validation notice.

### *a. Debtors' Rights in the Validation Notice*

One of the primary obligations for attorney debt collectors like Harold under the FDCPA is to inform the debtors of their rights by sending a validation notice. The FDCPA requires all debt collectors to send a written notice within five days of the first contact

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<sup>35</sup> See S. REP. NO. 95-382, at 2 (1977) reprinted in 1977 U.S.C.C.A.N. 1695, 1696; see also *Russell-Allgood v. Resurgent Capital Servs., L.P.*, 515 F. Supp. 2d 1307, 1310 (N.D. Ga. June 6, 2007), vacated, (June 26, 2007). In *Russell-Allgood*, the court dismissed a claim against LVNV, an entity that purchases defaulted debts, by finding it to be a creditor. The opinion correctly referred to the FDCPA's statutory definitions of creditor and debt collector, but wrongly labeled a debt collector as a creditor. Although the Court established that LVNV purchased the debt after default, it inexplicably assumed that since LVNV owned the debt, it was a creditor. Consequently, a debt collector who purchased an obligation after default almost escaped responsibility by falsely claiming creditor status. Although the judgment in *Russell-Allgood* was eventually vacated, it serves as a reminder that such careless analysis continues to threaten the consistency of the definitions of creditor and debt collector under the FDCPA.

with a debtor.<sup>36</sup>

Since the FDCPA is a strict liability statute, the validation notice triggers strict liability duties for the debt collector.<sup>37</sup> Thus, a debt collector who fails to meet any part of the validation requirements is subject to liability even if the violation was unintentional and the consumer did not suffer any damages.<sup>38</sup> The validation notice grants five rights to the debtor under the FDCPA:

1. Right to know the amount of the debt,<sup>39</sup>
2. Right to know who the creditor is,<sup>40</sup>
3. Right to dispute the debt,<sup>41</sup>
4. Right to request verification,<sup>42</sup> and
5. Right to know who the original creditor is.<sup>43</sup>

Debt collectors erode four of these rights by falsely applying the creditor status.<sup>44</sup>

#### i. Right to Know Who the Creditor Is

Validation notices must contain “the name of the creditor *to whom the debt is owed*.”<sup>45</sup> Proper identification of the creditor (usually the bank that issued the credit card or the car loan) prevents debt collectors from “dunning the wrong person or attempting to collect debts which the consumer has already paid.”<sup>46</sup> While Debbie did not recognize the obscure debt buyer/collector that currently

<sup>36</sup> 15 U.S.C. § 1692g(a) (2006).

<sup>37</sup> *See id.* § 1692k(a); *see also* Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504, 513 (6th Cir. 2007) (“Courts have characterized the FDCPA as a strict liability statute, meaning that a consumer may recover statutory damages if the debt collector violates the FDCPA even if the consumer suffered no actual damages.”); Johnson v. Riddle, 305 F.3d 1107, 1121-22 & n.15 (10th Cir. 2002) (“Many other courts, although not squarely addressing the clerical/legal mistake issue, have stated that the FDCPA is a strict liability statute.”); Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1175 (9th Cir. 2006) [hereinafter *Clark 2*]; Randolph v. IMBS, Inc., 368 F.3d 726, 730 (7th Cir. 2004); Picht v. John R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir. 2001).

<sup>38</sup> *See Lamar*, 503 F.3d at 513.

<sup>39</sup> 15 U.S.C. § 1692g(a)(1).

<sup>40</sup> *Id.* § 1692g(a)(2).

<sup>41</sup> *Id.* § 1692g(a)(3).

<sup>42</sup> *Id.* § 1692g(a)(4).

<sup>43</sup> *Id.* § 1692g(a)(5).

<sup>44</sup> Although the right to know the amount of the debt is very important, it is not relevant to our discussion because it is not affected by incorrectly labeling a debt collector a creditor.

<sup>45</sup> *Id.* § 1692g(a)(2).

<sup>46</sup> S. REP. NO. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697.

holds her obligation, she knew her credit card came from MegaBank. Had she known the identity of the creditor, she would have known that Harold's collection attempt was for a paid-off debt, ultimately avoiding the consequence of an improper judgment and garnishment.

### ii. Right to Dispute the Debt

Validation notices must contain "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."<sup>47</sup>

This provision gives the debtor a right to dispute the debt within 30 days of receiving the validation notice. However, when debtors do not recognize the creditor on the validation notice, they often ignore it thinking it is a scam or a mistake.<sup>48</sup> By doing nothing for 30 days, debtors waive their right to dispute the debt with the debt collector.<sup>49</sup> Debt collectors achieve this "waiver" by creating enough confusion in the debtor by obscuring the definition of creditor and "debt collector."

### iii. Right to Request Verification<sup>50</sup>

Validation notices must contain "a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will

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<sup>47</sup> 15 U.S.C. § 1692g(a)(3).

<sup>48</sup> See Interview with Greg Smith, Senior Assistant Attorney General, Or. Dep't of Justice, in Salem, Or. (Sep. 28, 2011) ("[The] Oregon Department of Justice frequently receives complaints from consumers who say they don't owe the debt because they never had a credit card with [the company named as the creditor on the validation notice]. Some even claim that these are 'scams' that are trying to get them to pay money they don't owe.").

<sup>49</sup> 15 U.S.C. § 1692g(a)(3). It should be noted that debtors may never *fully* waive their right to dispute the debt because debt collectors have a legal obligation to possess information supporting the validity of the debts they attempt to collect. See FTC WORKSHOP REPORT, *supra* note 9, at 24.

<sup>50</sup> To clarify, in the FDCPA, the term validation is used to refer to the notice informing the debtors of their rights. 15 U.S.C. § 1692g(a). Verification, on the other hand, is the process by which the debt collector must confirm that the debt is in fact collectible. *Id.* § 1692g(a)(4). Although these terms are often used interchangeably, to minimize confusion debtors should request verification of the validity of the debt.

be mailed to the consumer by the debt collector.”<sup>51</sup>

In *Clark v. Capital Credit (Clark 2)*, the Ninth Circuit explained the verification requirement by accepting the Fourth Circuit’s standard for verification as articulated in *Chaudhry v. Gallerizzo*,<sup>52</sup> where verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the *creditor* claims is owed.<sup>53</sup>

Applying the *Chaudhry* standard to the language of the FDCPA, a debt collector must at least meet the following requirements:

1. contact the *creditor*,<sup>54</sup>
2. obtain a written verification from the creditor,<sup>55</sup> and
3. mail a copy of the verification to the debtor.<sup>56</sup>

The court reasoned that “[n]o provision of the FDCPA has been found which would require a debt collector independently to investigate the merit of the debt, *except to obtain verification. . . or to*

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<sup>51</sup> *Id.* § 1692g(a)(4); *see also id.* § 1692g(b) (“If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector . . .”).

<sup>52</sup> *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1173-74 (9th Cir. 2006) [hereinafter *Clark 2*] (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir.1999), *cert. denied*, 528 U.S. 891, 120 S. Ct. 215 (1999)).

<sup>53</sup> *Id.* Even though *Chaudhry* states that “[v]erification only requires a debt collector to confirm with his client that a particular amount is actually being claimed,” the rule is consistent with the language of the FDCPA requiring verification of the debt with the creditor. *Chaudhry*, 174 F.3d at 406.

<sup>54</sup> *See Chaudhry*, 174 F.3d at 406 (“[V]erification of debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the *creditor* is claiming is owed.”) (emphasis added); *see also Clark 2*, 460 F.3d at 1173-74; *Bartlett v. Heibl*, 128 F.3d 497, 498 (7th Cir. 1997) (inserting “from the creditor” into 15 U.S.C. § 1692g(a)(4)) (“[T]he debt collector will obtain verification of the debt [from the creditor]. . .”) (brackets in original).

<sup>55</sup> 15 U.S.C. § 1692g(a)(4) (“[T]he debt collector will obtain verification of the debt or a copy of a judgment against the consumer. . . .”); *Id.* § 1692g(b) (“[T]he debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt. . .”).

<sup>56</sup> *Id.* § 1692g(a)(4) (“[A] copy of such verification or judgment will be mailed to the consumer by the debt collector”); *Id.* § 1692g(b) (“[A]nd a copy of such verification or judgment. . . is mailed to the consumer by the debt collector.”).

keep detailed files.”<sup>57</sup> The FDCPA makes a consistent bright line distinction between debt collectors and creditors. Since debt buyer clients (being debt collectors themselves) are not required to keep detailed files, they cannot adequately verify the debt.<sup>58</sup> Requesting verification from these debt buyer clients therefore would not “eliminate the problem of [a] debt collector attempting to collect a debt that has already been paid.”<sup>59</sup> Such practices are contrary to both legislative intent and the explicit requirements of the statute.

Many debt collectors wrongly verify debts with their debt buyer clients rather than with the *creditor* as required.<sup>60</sup> Since neither Evermore nor Harold are creditors, they cannot verify the debt among themselves. Verification must come from the creditor (i.e. MegaBank). If Harold had properly sought verification from the creditor (MegaBank), Debbie, Harold, and Evermore would have quickly learned the debt had been paid off. No improper judgment or garnishment would have occurred.

#### iv. Right to Know Who the Original Creditor Is

The fifth right of the validation notice allows the debtor to request within 30 days the name of the original creditor *if different from the current creditor*.<sup>61</sup> This right to request information about the original creditor only applies when the current creditor is different from the original creditor. The only time this situation arises is when the obligation is sold *before default*. If the obligation was sold *after default*, then the buyer is a debt collector. In such a case, there is only one creditor. However, debt collectors who have purchased the debt

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<sup>57</sup> Azar v. Hayter, 874 F. Supp. 1314, 1317 (N.D. Fla. 1995) (emphasis added).

<sup>58</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 43 (2009), available at <http://www.gao.gov/new.items/d09748.pdf> (“According to FTC and other stakeholders, collection agencies and debt buyers sometimes may not have adequate information about their accounts and may not always have access to documentation needed to verify the debt.”).

<sup>59</sup> S. REP. NO. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699.

<sup>60</sup> Frequently the “verification” that debtors receive only contains one paragraph showing the amount owed, the account number, and the owner of the debt. The debt collector for the above debt admits that it only checks its *own* records before sending that one paragraph verification letter.

<sup>61</sup> 15 U.S.C. 1692g(a)(5) (Validation notices must contain “a statement that, upon the consumer’s written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.”).

after default persistently attempt to label themselves as current creditors.<sup>62</sup>

*Clark v. Capital Credit & Collection Services (Clark I)* shows the error of such an approach and helps illustrate the Congressional intent behind this provision.<sup>63</sup> Plaintiff was being billed for medical treatment from a retired physician, Dr. Sullivan. Before default had occurred, Dr. Sullivan sold his business – including the accounts receivable – to Dr. Evans. After failing to collect from Clark, Dr. Evans assigned the debt to Capital Credit & Collection Services. Then, Capital Credit retained an attorney, Hasson, to collect the debt.<sup>64</sup> Hasson sent a demand letter (validation notice) to Clark naming Dr. Evans as the creditor. Clark sued Capital Credit alleging that, among other things, Hasson’s validation notice violated the FDCPA because it listed the wrong creditor. The court noted the statutory definitions of creditor and debt collector and identified Dr. Evans as the correct current creditor because she had purchased the debt *before* it was in default.<sup>65</sup> According to this reasoning, the correct labels under the FDCPA as applied to *Clark I* and our scenario are as follows:

	Original Creditor	Current Creditor	Default	Debt Collector	Debt Collector (Attorney)	Debtor
<i>Clark v. Capital Credit</i>	Dr. Sullivan	Dr. Evans			Capital Credit	Hasson
Debbie v. Harold	MegaBank	MegaBank		Evermore Funding	Harold	Debbie

<sup>62</sup> See, e.g., *Hernandez v. Affiliated Group*, No. 04CV4467, 2006 WL 83474, at \*1 (E.D. N.Y. Jan. 12, 2006). In *Hernandez*, the court, misapplying the definition of creditor, held that the debt collector did not violate the FDCPA when he named the owner of the debt (who acquired it in default) and failed to name the original creditor, who was the only entity that fit the definition of creditor. *Id.* at \*4; see also *infra* Part III.a.i. *Hernandez* has not been overturned, even though this application of the definition of “creditor” is inconsistent with the governing law in its circuit (the Second Circuit). See *Alibrandi*, 333 F.3d at 86 (“Thus, under § 1692a(6)(F)(iii), the classification of debt collector depends upon the status of a debt, rather than the type of collection activities used.”).

<sup>63</sup> See generally *Clark v. Capital Credit & Collection Serv., Inc.*, No. Civ. 03-340-JE, 2004 WL 1305326 (D. Or. Jan. 23, 2004) [hereinafter *Clark I*], *rev’d on other grounds*, 460 F.3d 1162 (9th Cir. 2006).

<sup>64</sup> *Id.* at \*1.

<sup>65</sup> *Id.* at \*11.

Therefore, original creditor/current creditor status under 15 U.S.C. § 1692g(a)(5) only applies when there are multiple and sequential creditors – each of whom acquired the debt before default.

By intentionally misidentifying themselves as creditors in validation notices, debt collectors confuse debtors and burn through the 30-day window. After the 30 days have passed, debtors lose their rights to dispute the debt with the debt collector and to obtain verification.<sup>66</sup> Those rights flow directly from the right to know the identity of the creditor.

As Debbie's story illustrates, Harold's failure to identify MegaBank as the creditor results in her failing to avail herself of the protections of the FDCPA. Early and accurate verification avoids judicial inefficiencies and injustices such as judgments and garnishments on zombie debts.

*b. Current Practices – the FDCPA is Not Being Consistently Applied*

All too frequently, attorney-debt collectors like Harold routinely send demand letters (validation notices) that identify only the debt collectors – omitting any reference to the entity the debtor would recognize: the creditor. These debt collectors (defaulted debt buyers) routinely continue to falsely claim creditor status by often relying on poorly reasoned cases.

One example of such a case is *York Gee Au Chan v. North American Collectors*.<sup>67</sup> In this case, the debtor, Chan, alleged that North American Collectors violated the FDCPA by sending him a demand letter that named Citibank as the creditor.<sup>68</sup> The court denied the defendant's motion to dismiss, claiming that since Citibank had sold the debt to Unifund CCR Partners, the defendant should have named Unifund CCR as the current creditor on the account.<sup>69</sup> Although North American Collectors had actually correctly named Citibank as the creditor according to the FDCPA's definition, the court itself confused the definitions of creditor and debt collector.<sup>70</sup> The court apparently reached that decision by relying on its own understanding of the term 'creditor' instead of consulting the statute.

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<sup>66</sup> See *supra* note 49 and accompanying text.

<sup>67</sup> *York Gee Au Chan v. N. Am. Collectors, Inc.*, No. C 06-0016 JL, 2006 WL 778642 at \*1 (N.D. Cal. Mar. 24, 2006).

<sup>68</sup> *Id.* at \*1.

<sup>69</sup> *Id.* at \*3.

<sup>70</sup> *Id.*

In another case, *Hepsen v. J.C. Christensen & Associates*,<sup>71</sup> the defaulted debt buyer, LVNV Funding, LLC (“LVNV”), contracted with another debt collector, Resurgent Capital Services, Inc. (“Resurgent”), who in turn hired an attorney debt collector, J.C. Christensen & Associates.<sup>72</sup> Instead of properly identifying the bank that issued the credit card, Providian National Bank, as the creditor in the validation notice, the attorney only identified the debt collector Resurgent.<sup>73</sup> At trial, even though it was established that the obligation was in default at the time of LVNV’s purchase, the court held LVNV to be a creditor by the mere fact that it was the current owner of the debt.<sup>74</sup>

Such inconsistent and incorrect application of the definition of creditor in the context of the validation notice is a common problem in the debt collection industry.<sup>75</sup> Debt collectors frequently rely on these erroneous sources to the detriment of the debtors and sometimes of themselves.<sup>76</sup>

Proper validation notices that correctly identify the creditor fix this problem (and conform to the FDCPA) because they “guarantee that consumers . . . receive adequate notice of their legal rights.”<sup>77</sup> The purpose of this right is not to know to whom the debtor must write a check or where the payment will go, but it is to “eliminate the

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<sup>71</sup> *Hepsen v. J.C. Christensen & Assocs., Inc.*, No. 8:07-CV-1935-T-EAJ, 2009 WL 3064865 at \*1 (M.D. Fla. Sept. 22, 2009), *aff’d*, 383 F. App’x. 877 (11th Cir. 2010).

<sup>72</sup> Actually, Providian National Bank first sold the debt to OSI/Gulf State Credit, who in turn sold to LVNV. *Id.*

<sup>73</sup> *See generally id.*

<sup>74</sup> *Id.* at \*4 (“It is undisputed that Christensen identified Resurgent as the creditor in its dunning letter to Hepsen when, in fact, at the time of the October 27, 2006 letter to Hepsen, the current creditor was LVNV. This was a false representation. A creditor is ‘any person who offers or extends credit creating a debt or to whom a debt is owed,’ but such term does not include debt collectors. 15 U.S.C. § 1692a(4). By using the name of its client in the demand letter, rather than LVNV as the creditor on Hepsen’s account, Christensen violated § 1692e(10).”); *see also* Brief for Appellee at 22, *J.C. Christensen and Assoc. v. Hepsen*, No. 19-15435-A, 2010 WL 687667 (11th Cir. 2010).

<sup>75</sup> *See, e.g.*, 10 WEST’S PA. FORMS, DEBTOR-CREDITOR § 5.11 (“We are writing to notify you that we have been instructed by our client, [*Creditor*], to prepare a law suit against you.”). This form letter implies that the field “[*Creditor*]” is the same as that of an attorney’s client. The formbook does not address any modification when the client is a debt buyer and not a creditor.

<sup>76</sup> *See, e.g., Hepsen*, 383 F. App’x. 877 (addressing a case where the attorney debt collector, who was ultimately held liable for naming the wrong creditor, had his validation notice approved by the American Collection Association).

<sup>77</sup> *Miller v. Payco Gen. Am. Creditors*, 943 F.2d 482, 484 (4th Cir. 1991).

recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.”<sup>78</sup> In other words, the validation notice was intended to provide actual notice to the debtor of the nature of the debt by naming the creditor.

Usually debtors have more than one account that has gone to collections, and the debt may be several years old.<sup>79</sup> As a result, debtors may not remember the debt, especially if the validation notice names an unknown debt collector as the creditor.<sup>80</sup> Sometimes debtors assume the collection efforts are fraudulent or mere mistakes, ignoring the notices altogether, and believing that nothing will happen to them.<sup>81</sup> Such an action is reasonable given that debt collectors frequently call wrong phone numbers and send letters to incorrect addresses because they receive scant and dubious information about the debt from their debt buyer clients.<sup>82</sup>

Attorney-debt collectors count on such attitudes to get quick default judgments, knowing that by confusing debtors, they are not likely to show up to court.<sup>83</sup> Congress intended to curb such behavior and eliminate these errors by requiring validation notices that actually notify the debtor of the nature of the debt by naming the creditor. A misuse of the statutory definition of creditor and debt collector, however, denies this significant statutory right to the consumer.

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<sup>78</sup> S. REP. NO. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699.

<sup>79</sup> *See* HOBBS, *supra* note 3, §1.5.4.3 (“A major debt-buyer reports a five-year and longer time frame for collection of its purchased debts, meaning that financially distressed families will hear from them again and again for a demoralizing five or ten years, long after the jeans or toaster oven they purchased has worn out.”) (citing ASSET ACCEPTANCE CAPITAL CORP., ANNUAL REPORT (FORM 10-K) (Mar. 21, 2005) at 2, 29); *see also* Johnson v. Midland Credit Mgmt., No. 1:05 CV 1094, 2006 WL 2473004 (N.D. Ohio 2006) (debt buyer collecting on a 14 year-old and a 20 year-old account).

<sup>80</sup> Interview with Greg Smith, Senior Assistant Attorney General, Or. Dep’t of Justice, in Salem, Or. (Sep. 28, 2011) (“Based on our investigations into debt collectors Oregon DOJ has seen a national pattern of debt buyers consistently and wrongfully identifying themselves as creditors on validation notices for defaulted consumer loans when they are, in fact, debt collectors. By wrongfully misrepresenting themselves, they confuse debtors thus making them more likely to consider validation notices as junk mail or a ‘scam’ and disregard them. This then causes the debtor to lose out on their right to timely dispute the debt or request verification of the debt. This process helps to move the debt one more step down the road to obtain default judgment.”).

<sup>81</sup> *See id.*

<sup>82</sup> *See* FTC WORKSHOP REPORT, *supra* note 9 and accompanying text.

<sup>83</sup> Hepsen v. J.C. Christensen & Assocs., Inc., No. 8:07-CV-1935-T-EAJ, 2009 WL 3064865 at \*4 (M.D. Fla. Sept. 22, 2009), *aff’d*, 383 F. App’x. 877 (11th Cir. 2010).

### III. DEBT COLLECTORS' ARGUMENTS

#### *a. The "To Whom a Debt is Owed" Red Herring Defense*

One argument that debt collectors commonly raise to support their claimed creditor status is that they have actually purchased – and are the legal owners of – the debt. In *FTC v. Check Investors*, the debt collector, Check Investors, argued that owning the obligations made it a creditor under the statute because the definition of creditor includes “to whom a debt is owed.”<sup>84</sup> This flawed argument, however, fails to account for the rest of the language in the definition, which excludes purchasers of defaulted debt from creditor status.<sup>85</sup>

The court was quite blunt in clarifying the fallacy of Check Investors’ “To Whom a Debt is Owed” red herring defense:

[Appellants] claim further that because Check Investors is owed the debt, it did not “receive[ ] an assignment or transfer” of the NSF checks “solely for the purpose of” collecting the debt for Telecheck. Thus, Appellants argue that Check Investors satisfies the statutory definition of a “creditor,” and, therefore, they are not subject to the provisions of the FDCPA. Although the argument is rather clever, it is wrong. It would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation. \* \* \* Nevertheless, pursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA.<sup>86</sup>

The court, therefore confirmed that the definition of creditor turns on whether or not the debt was purchased after default, and not on “to whom the debt is owed.”

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<sup>84</sup> *F.T.C. v. Check Investors*, 502 F.3d 159, 159 (3d Cir. 2007), *cert. denied*, 129 S. Ct. 569 (2008); *see also* 15 U.S.C. § 1692a(4).

<sup>85</sup> 15 U.S.C. § 1692a(4) (2006) (“The term creditor . . . does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.”).

<sup>86</sup> *Check Investors*, 502 F.3d at 172-73.

i. Example of Red Herring Defense #1: *Hernandez v. Affiliated Group*<sup>87</sup> – Creditor in Context of Validation Notice

Debt collectors also use the “To Whom a Debt is Owed” red herring defense to claim that the statutory definition of creditor does not apply in the context of the validation notice. Relying on the modifier, “to whom the debt is owed,” debt collectors argue that the term ‘creditor’ in the validation notice requirement is different from the statutory definition of ‘creditor.’<sup>88</sup> They therefore claim that the validation notice requirement only requires them to name the current owner of the debt, even if that owner is a debt collector.

An example of this intentional misidentification by a debt buyer, compounded by fuzzy logic and language from the Court is found in *Hernandez v. Affiliated Group*.<sup>89</sup> There, the defaulted debt buyer (Genesis Financial Solutions) hired a debt collector (Affiliated Group) to collect Hernandez’s debt.<sup>90</sup> Although the debt was sold by the creditor (Smart Energy) after default, Affiliated sent a validation notice naming only Genesis as the creditor.<sup>91</sup> The court, without consulting the statute for the definition of creditor, held that Affiliated was only “required to provide Hernandez with the name of the creditor *to whom the debt is owed*.”<sup>92</sup> The court further added that Affiliated need not name Smart Energy, the original creditor, because the identity of the original creditor is only required when the consumer requests it.<sup>93</sup>

In addition to deviating from governing law,<sup>94</sup> the court’s reasoning defies a fundamental rule of statutory construction: if a statute defines a term, that definition must be applied consistently

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<sup>87</sup> *Hernandez v. Affiliated Group, Inc.*, No. 04CV4467, 2006 WL 83474, at \*1 (E.D. N.Y. Jan. 12, 2006).

<sup>88</sup> The validation notice requirement states that a validation notice must contain “the name of the creditor *to whom the debt is owed*.” 15 U.S.C. 1692g(a)(2) (emphasis added); *see also id.* § 1692a(4) (“The term creditor means any person who offers or extends credit creating a debt or *to whom a debt is owed*. . . .”) (emphasis added).

<sup>89</sup> *Hernandez*, 2006 WL 83474, at \*1.

<sup>90</sup> *See id.*

<sup>91</sup> Actually, Smart Energy first sold the debt to Peak Financial Performers, who in turn sold the debt to Genesis Financial Solutions. *Id.*

<sup>92</sup> *Id.* at \*2 (emphasis added).

<sup>93</sup> *Id.*

<sup>94</sup> *See Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86 (2d Cir. 2003) (applying the rule that the classification of creditor depends on whether the debt was in default when obtained).

throughout the act.<sup>95</sup> Moreover, “[w]hen a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term’s ordinary meaning.”<sup>96</sup> Therefore ‘creditor,’ as defined in §1692a(4), applies uniformly throughout the statute, including the validation notice provision. Regardless of whether the current creditor is also the original creditor, the validation must name the creditor, not the debt collector.<sup>97</sup>

*ii. Example of Red Herring Defense #2: Kimber v. Federal Financial Corp.*<sup>98</sup> – Debt Collectors Collecting for Themselves

In *Kimber v. Federal Financial Corp.*, Federal Financial Corp. (“FFC”), the debt collector that purchased after default, similarly argued that the FDCPA does not apply to actual owners of the debt.<sup>99</sup>

FFC argued that when debt buyers permanently purchase debts, they do not collect debts “for another” but rather for themselves. Therefore, they claim, they do not fall in the “assignee exception”<sup>100</sup> to the definition of creditor, thus designating them as creditors. However, the court rejected FFC’s argument and held that to interpret ‘creditor’ to include holders of defaulted debt “would be to limit the [FDCPA] severely and to leave it open to easy evasion by simply adopting a different form of contract.”<sup>101</sup>

Instead, the court looked to the statutory definition of the terms ‘creditor’ and ‘debt collector’ and decided that the “assignee exception” relied on by FFC applies to “those persons who collect assigned or transferred debts that are already in default when

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<sup>95</sup> See 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:7 (7th ed. 2007) (“It is commonly understood that such definitions establish meaning where the terms appear in that same act, or in the case of general interpretative statutes, the definitions extend to as much legislation as the general act itself designates. As a rule, a definition which declares what a term means is binding upon the court.”).

<sup>96</sup> *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

<sup>97</sup> See *supra* Part II.a.iv.

<sup>98</sup> *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987).

<sup>99</sup> *Id.* at 1485.

<sup>100</sup> *Id.* The “assignee exception to creditor” refers to a portion in the FDCPA excluding assignees of debts from the definition of “creditor.”; see also 15 U.S.C. § 1692a(4) (2006) (“[S]uch term [creditor] does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.”).

<sup>101</sup> *Kimber*, 668 F. Supp. at 1485.

assigned or transferred” and not only to temporary assignees.<sup>102</sup> “Congress merely intended that the debts should have *originally* belonged to another.”<sup>103</sup> All purchasers after default fall under the assignee exception, and are thus debt collectors.

Well-reasoned opinions that track the statutory language have held similarly – that ownership of the obligation does not determine whether the owner is a creditor or a debt collector.<sup>104</sup> Rather, “the status of the debt at the time of assignment [i.e. pre vs. post default], not whether the assignee collects debt for itself or others, is the determinative factor in deciding whether the assignee is a debt collector.”<sup>105</sup>

Tellingly, courts have further ruled that, even where debt buyers do not actually collect debts themselves, but hire others to collect for them, their post-default purchase of debts is sufficient to make them debt collectors.<sup>106</sup>

The reason that the distinction of status of creditor and debt collector hinges upon the default date becomes apparent when reviewing the legislative history of the FDCPA. The aim of the FDCPA was to regulate only debt collectors, and not creditors, because “unlike creditors, ‘who generally are restrained by the desire to protect their good will when collecting past due accounts,’ independent collectors are likely to have ‘no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.’”<sup>107</sup>

“The purchaser of an already-defaulted debt – like the debt collector, and unlike the originator and servicer of a debt – has no ongoing relationship with the debtor and, therefore, no incentive to engender good will by treating the debtor with honesty and respect.”<sup>108</sup>

### *b. Affirmative Defenses*

In addition to the Red Herring defense, debt collectors also

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *See supra* Part II.

<sup>105</sup> *Centurion Capital Corp. v. Druce*, 828 N.Y.S.2d 851, 853 (N.Y. Civ. Ct. 2006).

<sup>106</sup> *See Ruth v. Triumph P’ships*, 577 F.3d 790, 796 (7th Cir. 2009).

<sup>107</sup> *F.T.C. v. Check Investors*, 502 F.3d 159, 173 (3d Cir. 2007), *cert. denied*, 129 S. Ct. 569 (2008) (quoting S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696).

<sup>108</sup> *Ruth*, 577 F.3d at 797 (internal citations omitted).

routinely rely on two affirmative defenses provided by the FDCPA: The Federal Trade Commission (“FTC”) safe harbor defense and the bona fide error defense.

i. FTC Safe Harbor Defense: Only Four Advisory Opinions

The FTC safe harbor defense of the FDCPA is as follows:

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.<sup>109</sup>

The FTC safe harbor defense only applies to reliance on official FTC advisory opinions. There have been only four advisory opinions published to date discussing the FTC safe harbor defense, and none of them addresses the issues related to identification of creditors and debt collectors.<sup>110</sup> Although some debt collectors have attempted to broaden the scope of the FTC advisory opinion defense by using FTC’s staff commentaries and informal opinion letters, courts have been reluctant to grant them relief.<sup>111</sup> The FTC itself confirmed that the commentaries are not formal trade regulations or advisory opinions of the Commission, “and thus [are] not binding on the Commission or the public.”<sup>112</sup> Therefore, the FTC safe harbor defense will not provide much help to debt collectors, such as Harold, who misidentify the creditor in the validation notice.

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<sup>109</sup> 15 U.S.C. § 1692k(e) (2006).

<sup>110</sup> See Fed. Trade Comm’n, Staff Opinion Letter, 2000 WL 34500216 (Mar. 31, 2000); see also Fed. Trade Comm’n, Staff Opinion Letter (Oct. 5, 2007), available at <http://www.ftc.gov/os/closings/staff/P064803fairdebt.pdf>; Fed. Trade Comm’n, Staff Opinion Letter (Mar. 19, 2008), available at <http://www.ftc.gov/os/2008/03/P084801fdcpa.pdf>; Fed. Trade Comm’n, Staff Opinion Letter (June 23, 2009), available at <http://www.ftc.gov/os/statutes/andersonbeatoleter.pdf>.

<sup>111</sup> See, e.g., *Fox v. Citicorp Credit Servs.*, 15 F.3d 1507, 1513 (9th Cir. 1994) (declining to adopt a position in an FTC commentary); *Hulshizer v. Global Credit Serv.*, 728 F.2d 1037, 1038 (8th Cir. 1984) (per curiam) (relying on an FTC staff letter to a debt collector was not a valid FTC safe harbor defense.).

<sup>112</sup> Federal Staff Commentary on the Fair Debt Collections Practices Act, 53 Fed. Reg. 50097, 50101 (1988).

## ii. Bona Fide Error Defense: Mistakes of Law are not Included

The bona fide error defense of the FDCPA is as follows:

A debt collector may not be held liable in any action brought under this title 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.<sup>113</sup>

Generally, the bona fide error defense covers clerical errors occurring even while proper reasonable preventative measures are in place. In *Smith v. Transworld Systems*, the court found that a clerical error, resulting in a second collection letter sent after receiving the debtor's cease and desist letter,<sup>114</sup> was covered by the bona fide error defense because the error occurred even while proper preventative measures were in place.<sup>115</sup>

By contrast, in *Reichert v. National Credit Systems*, the court held that mere reliance on the creditor who had provided accurate information in the past was not enough for a bona fide error defense because the debt collector did not show any procedures in place to prevent such errors.<sup>116</sup> *Reichert* held that even a reasonable reliance on a third party must be made "on the basis of procedures maintained to avoid mistakes" to be allowed the bona fide error defense.<sup>117</sup>

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<sup>113</sup> 15 U.S.C. § 1692k(c) (2006). Some courts have followed *Clark 2* in interpreting this provision to mean nothing more than a reasonable reliance requirement. *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1177 (9th Cir. 2006); *see, e.g., Goray v. Unifund CCR Partners, No. 06-00214 HG/LEK, 2007 WL 4260017, at \*9* (D. Haw. 2007) (finding reasonable reliance on the amount of debt provided by the creditor); *Hepsen v. Resurgent Capital Servs., Inc.*, 383 F. App'x. 877, 883 (11th Cir. 2010) (finding that the debtor unreasonably relied on the identity of the creditor, because the debt collector should have known who the creditor was from prior dealings).

<sup>114</sup> *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1031 (6th Cir. 1992). Sending a collection letter after receiving a cease and desist letter from a debtor is normally a violation of sections 1692c(c) and 1692g(b) of the FDCPA. 15 U.S.C. §§ 1692c(c), 1692g(b) (2006) (stating that, with a few limited exceptions, a debt collector may not contact a debtor who has sent a cease and desist letter to the debt collector).

<sup>115</sup> *Smith*, 953 F.2d at 1031.

<sup>116</sup> *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1006-07 (9th Cir. 2008).

<sup>117</sup> *Id.* at 1007; *see also Fox v. Citicorp Credit Serv.*, 15 F.3d 1507, 1514 (9th Cir. 1994) ("In the absence of any evidence supporting the existence of 'reasonable preventative procedures,' an essential element of the bona fide error exception,

As an affirmative defense, the burden of proof will be on Harold to show by preponderance that his error was unintentional, and could not have been prevented by reasonable preventative procedures that were already in place.<sup>118</sup> For Harold, this is a very high burden.

In *Jerman v. Carlisle*, the Supreme Court ruled that the bona fide error defense does not apply to incorrect legal interpretations.<sup>119</sup> The Court applied the reasoning from *Baker v. G.C. Services*<sup>120</sup> – that since the language of the bona fide error defense of the FDCPA is identical to that of the Truth in Lending Act (“TILA”),<sup>121</sup> it should be interpreted like TILA’s provision, to exclude legal errors.<sup>122</sup> The Court also rejected the argument in *Johnson v. Riddle* that the additional language in TILA listing the legal error exclusions gives the FDCPA’s bona fide error defense a more expansive scope.<sup>123</sup>

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Citicorp is not entitled to summary judgment on the basis of the affirmative defense.”).

<sup>118</sup> See *Turner v. JVDB & Assoc.*, 330 F.3d 991, 996-97 (7th Cir. 2003); see also *Fox*, 15 F. 3d at 1514.

<sup>119</sup> *Jerman v. Carlisle, Mcnellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1624 (2010).

<sup>120</sup> *Baker v. G.C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982).

<sup>121</sup> 15 U.S.C. § 1692k(c) (2006).

<sup>122</sup> *Jerman*, 130 S. Ct. at 1616. Previously, courts were split on the issue of whether the bona fide error defense applies to mistakes of law. See *Johnson v. Riddle*, 305 F.3d 1107, 1121 & n.14 (10th Cir. 2002) (“Outside this circuit, federal courts have split on the issue, with a majority concluding that the defense is limited to clerical errors and cannot protect mistakes of law, but a growing minority of courts reaching the contrary conclusion”). Compare *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (holding that bona fide error defense does not apply to mistakes of law), and *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) (holding the same), and *Baker*, 677 F.2d at 779 (holding that the defense did not apply to mistakes of law because the same provision in TILA has been unanimously held not to apply to mistakes of law), with *Jenkins v. Heintz*, 124 F.3d 824, 832 & n. 7, 833 (7th Cir. 1997) (holding that a bona fide error defense *does* apply to mistakes of law), and *Johnson v. Riddle*, 305 F.3d 1107, 1122-23 (10th Cir. 2002) (holding that since TILA explicitly excludes legal errors from bona fide error defense, and the FDCPA does not mention any such exclusion, FDCPA’s bona fide error defense should cover legal errors).

<sup>123</sup> *Jerman*, 130 S. Ct. at 1617. The Court listed several reasons why the additional language in TILA does not expand the scope in FDCPA. First, the additional language in TILA may simply be an “inten[t] to codify existing judicial interpretations to remove any potential doubts.” *Id.* at 1617-18. Second, Congress enacted many other laws with similar bona fide error provisions, none of which expressly includes mistakes of law. *Id.* at 1618. Although Congress amended the FDCPA several times without expressly restricting the bona fide error defense (as done with TILA), this does not suggest that errors of law should be included. *Id.*

Rather, the Court drew from the FDCPA's language that debt collectors must "maintain procedures reasonably adopted to avoid such error" to mean that such procedures are meant to avoid clerical and factual mistakes rather than legal mistakes.<sup>124</sup> Further, the Court found that to interpret the bona fide error defense to include legal errors would be to render the FTC safe harbor defense superfluous, since legal errors are already covered by the FTC safe harbor defense.<sup>125</sup> In short, the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally" rings true for the FDCPA.<sup>126</sup>

Clearly, the debt collector who fails to properly identify the creditor on a validation notice – or verify with the creditor upon timely debtor demand – cannot escape liability under the FDCPA by claiming any bona fide error in misinterpreting the correct legal definitions.

#### IV. RECOMMENDATIONS

By intentionally misidentifying themselves as creditors in validation notices, debt collectors are ignoring the law, defying legislative intent, and violating debtors' rights. For financial gain, unscrupulous debt collectors continue to exploit the confusion they create, and therefore compete unfairly with lawful debt collectors.<sup>127</sup> Fortunately, the solution is simple. In fact, the solution is so simple that, like the forest for the trees, we often miss it. Perhaps that is why these unlawful debt collectors produce a smokescreen of misidentification and faulty reasoning. To find our way through the

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<sup>124</sup> *Id.* at 1614-15 (quoting 15 U.S.C. § 1692k(c)).

<sup>125</sup> *Id.* at 1615 ("Debt collectors would rarely need to consult the FTC if §1692k(c) were read to offer immunity for good faith reliance on advice from private counsel."); *see also supra* Part III.b.i..

<sup>126</sup> *Id.* at 1611 (quoting *Barlow v. U.S.*, 7 Pet. 404, 411, 8 L.Ed. 728 (1833)).

<sup>127</sup> The FTC attempts to correct these injustices by recommending amendments to the FDCPA. In its 2005 Annual Report, the FTC made several recommendations to amend or clarify the FDCPA. FED. TRADE COMM'N, ANNUAL REPORT 2005: FAIR DEBT COLLECTION PRACTICES ACT (2005), *available at* <http://www.ftc.gov/reports/fdcpa05/050729fdcpaprpt.pdf>. FTC renewed this recommendation for several subsequent years, but Congress has never accepted it. *See* FED. TRADE COMM'N, ANNUAL REPORT 2006: FAIR DEBT COLLECTION PRACTICES ACT 13 (2006), *available at* <http://www.ftc.gov/os/2006/04/P0648042006FDCPARReport.pdf>; FTC WORKSHOP REPORT, *supra* note 9, at 28; FED. TRADE COMM'N, ANNUAL REPORT 2010: FAIR DEBT COLLECTION PRACTICES ACT 22 (2010), *available at* <http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf>.

fog of deceit, we must be accurate and consistent in applying the statutory definitions of creditor and debt collector.

Consistency in interpreting and applying debt collection laws will benefit debtors while avoiding the significant judicial inefficiencies regarding Zombie Debt Collections. Strict adherence to clear statutory definitions of creditor and debt collector will promote clarity in communications among parties to a debt, their lawyers, and the court. Then, debtors will be able to identify the Zombie Debts and make a timely dispute. Common mistakes will be avoided. Such consistency will allow the courts and enforcement agencies to easily identify true violations, thus providing better protection not only for ethical debt collectors but also, and especially, for consumers.<sup>128</sup>

Sadly, in our current struggling economy, more people are falling into greater consumer debt.<sup>129</sup> Consequently, more of these

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<sup>128</sup> Because the definition of creditor in the FDCPA is clear on its face, proper enforcement is all that is necessary. Each consumer who receives a validation notice that fails to name the correct creditor has the right to seek damages up to \$1,000 without having to show any actual damages. 15 U.S.C. § 1692k(a)(2). The FDCPA has also provided a right to receive court costs and reasonable attorney's fees if the consumer prevails. *Id.* at 1692k(a)(3). Since the FDCPA is a strict liability statute, the faulty validation notice alone may be sufficient evidence to prevail at trial. In fact, many consumer lawyers have reported stunning results when suing debt collectors, with one lawyer in Fort Worth, Texas claiming to have lost only four cases out of 5,000 that he has brought against debt collectors. David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Oct. 31, 2010, available at <http://www.nytimes.com/2010/11/01/business/01debt.html>. These faulty validation notices may be subject to mass tort liability under class action or states' Unfair and Deceptive Practices ("UDAP") statutes. In Oregon, for example, each violation may result in a fine of \$25,000. OR. REV. STAT. § 646.642(c) (2009) ("In any suit brought under ORS 646.632 (Enjoining unlawful trade practices), if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by ORS 646.607 (Unlawful business, trade practices) or 646.608 (Additional unlawful business, trade practices), the prosecuting attorney, upon petition to the court, may recover, on behalf of the state, a civil penalty to be set by the court of not exceeding \$25,000 per violation.").

<sup>129</sup> See FTC WORKSHOP REPORT, *supra* note 9, at 11-12 ("Since the enactment of the FDCPA, consumer debt has risen dramatically. More and more Americans incur greater levels of debt, much of it attributable to mortgage debt and consumer debt. Between 1985 and 2007, outstanding household debt in the United States increased from approximately 60% of annual disposable income to more than 125%, a jump due mostly to increased mortgage debt. One workshop presenter noted that in the mid-1980s, it would have taken the average household seven months of after-tax income to pay off its household debt. As of 2007, however, an average household would have needed fifteen months of after-tax income to pay off its household debt. While household-debt-to-income ratios of consumers have nearly doubled, lower interest rates and longer repayment terms have enabled many

2011]

*Fair Debt Collection Practices Act*

91

people are coming into frequent contact with an ever-expanding group of debt collectors. These consumers are people like Debbie whose stress under such financial burdens is considerable. However, the solution is simple and readily attainable. Courts, attorneys, and debt collectors alike need to clearly and consistently apply the existing statutory definitions of creditor and debt collector in the FDCPA.

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consumers to remain current on their debts.”) (internal citations omitted).

Figure 1

