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UNFAIR PRACTICES AND PRACTICING ATTORNEYS: SHOULD THE FAIR DEBT COLLECTION PRACTICES ACT APPLY TO COMMUNICATIONS BETWEEN DEBT COLLECTORS AND DEBTORS' ATTORNEYS?

YOSEFA A. ENGLARD[†]

INTRODUCTION

Consider the following scenario: Jane Goodman purchased her dream home in 1981.¹ For nearly thirty years she made all of her mortgage payments on time. Due to the recent economic downturn, Jane found herself unable to make the last remaining payments. Instead of bringing a foreclosure action, the bank sold Jane's debt to a debt collection agency. Afraid of losing her home, Jane sought the help of an attorney, who sent a letter to the debt collection agency requesting a statement of the outstanding loan balance. The agency responded to Jane's attorney incorrectly claiming that Jane's outstanding balance was double what Jane believed she owed. Jane's attorney promptly sent a letter to the agency disputing the amount owed, but the agency did not cease its collection efforts. Both the balance misstatement and the agency's continued collection efforts violate the plain meaning of the Fair Debt Collection Practices Act (the "FDCPA" or "Act"), which regulates the conduct of debt collectors.² The question

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¹ This introductory hypothetical is loosely based on the facts of *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1141 (2012).

² See 15 U.S.C. §§ 1692–1692p (2012).

remains, however, whether the Act imposes liability for the agency's violative conduct when its actions were directed at Jane's attorney rather than Jane herself.

Certainly the issue is an important one. The debt collection industry is continuing to grow and abusive debt collection practices remain a very serious problem.³ The Federal Reserve reported that as of October 2011, consumer debt reached \$2.457 trillion, up from \$2.408 trillion in the prior year.⁴ With the rise of consumer debt and the uncertainty of the markets, reports have surfaced that "[d]ebt collectors are getting desperate and dirty."⁵ According to the Federal Trade Commission ("FTC"), the primary administrative body responsible for enforcing the Act, "[it] receives more complaints about the debt collection industry than any other specific industry."⁶ In 2010, the FTC received over 108,000 complaints, known as "FDCPA complaints," against third-party debt collectors.⁷ That number represents an overall increase from the year before and about twenty-one percent of all complaints received by the FTC in 2010.⁸ The increase in consumer debt and the abusive collection practices resulting thereof demonstrate why now, more than ever, it is imperative that debtors and their attorneys be made aware of exactly what abuses the Act does and does not protect against.

Currently, those circuits that have addressed whether certain communications directed solely at a debtor's attorney can be actionable under the FDCPA have taken three very different approaches. Under the first approach, courts reason that communications that violate the Act when directed at the debtor are *not* actionable when directed at the debtor's attorney because the Act does not provide protection to attorneys.⁹ Under the

³ See Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107, 3109–10 (2010).

⁴ FED. RESERVE, STATISTICAL RELEASE: CONSUMER CREDIT (2011), available at <http://www.federalreserve.gov/releases/g19/20111207/g19.pdf>.

⁵ Blake Ellis, *Debt Collectors Get Nasty*, CNN MONEY (July 10, 2010, 3:25 PM), http://money.cnn.com/2010/07/09/news/economy/debt_collection_harassment/index.htm.

⁶ FED. TRADE COMM'N, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 4 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf>.

⁷ *Id.* at 5.

⁸ *See id.*

⁹ *See infra* Part III.A.

second approach, communications from a debt collector to a debtor's attorney regarding the consumer debt are considered indirect communications with the debtor himself and therefore result in liability when violations of the Act occur.¹⁰ Finally, under the third approach, a debt collector's deceptive communications to an attorney may violate the Act if the representation would deceive or mislead a "competent attorney."¹¹

This Note contends that the question of whether a communication by a debt collector directed solely at a debtor's attorney is subject to the Act must be resolved consistently with the Act's underlying purposes. If Congress's purpose would be served by subjecting those communications to liability, then the conduct should be actionable. If, on the other hand, Congress's intent would not be furthered by making those communications actionable, then the Act's liability should not be imposed. Determining whether a debt collector's conduct is subject to liability depends upon the section of the Act that was violated. If, for example, a section's purpose is to protect a consumer because of his lack of commercial sophistication, treating an attorney in a similar manner as an ordinary consumer seemingly would not serve Congress's intent. Alternatively, if a section exemplifies Congress's attempt to eliminate abusive debt collection practices generally, it suggests that Congress intended to prohibit the abusive practice regardless of the receiver, and it would serve that intent to impose liability for violations directed at attorneys. Therefore, a detailed discussion of Congress's intent in enacting the Act is necessary.

This Note proceeds in three parts. Part I discusses the history of the Act and Congress's intent behind its enactment. Part I also analyzes some of the Act's provisions relating to debt collectors. Part II examines in detail the three current approaches taken by the circuit courts for determining the applicability of the Act to communications between debt collectors and debtors' attorneys. Part III argues that none of the current approaches appropriately resolves the issue. Additionally, Part III proposes a simple two-step inquiry for courts to employ when attempting to resolve whether

¹⁰ See *infra* Part III.B.

¹¹ See *infra* Part III.C.

communications toward a debtor's attorney are actionable under the Act. Part III concludes by demonstrating how this two-step inquiry properly balances Congress's intent to protect consumers without placing too heavy a burden on legitimate debt collection.

I. BACKGROUND

A. *History of the Fair Debt Collection Practices Act*

Congress's enactment of the Fair Debt Collection Practices Act came after a long history of abusive and harassing debt collection practices.¹² Consumers found themselves subject to "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."¹³ Congress found that those abusive practices "contribute[d] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."¹⁴ Prior to the enactment of the FDCPA, consumers had little legal recourse on which they could rely.¹⁵ Plaintiffs attempting to sue a debt collector under common law tort theories had difficulty winning their cases.¹⁶ And even when the consumer was victorious, the American rule, which provides that each side must pay his or her own attorney's fees, prevented the consumer from obtaining a net award.¹⁷

¹² See generally S. REP. NO. 95-382 (1977); see also William P. Hoffman, Comment, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 551-52 (2010).

¹³ S. REP. NO. 95-382, at 1696.

¹⁴ 15 U.S.C. § 1692(a) (2012).

¹⁵ Scott J. Burnham, *What Attorneys Should Know About the Fair Debt Collection Practices Act, or, the 2 Do's and 200 Don'ts of Debt Collection*, 59 MONT. L. REV. 179, 181-83 (1998) ("Common law tort claims against debt collectors have included invasion of privacy, intentional infliction of emotional distress, libel and slander, false imprisonment, malicious prosecution and abuse of process, and assault and battery.").

¹⁶ *Id.* at 181; see, e.g., *Pub. Fin. Corp. v. Davis*, 360 N.E.2d 765 (Ill. 1976). In *Davis*, the court applied the legal standard for intentional infliction of emotional distress but did not find that the debt collector's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" as the *Restatement (Second) of Torts* required. *Davis*, 360 N.E.2d at 767 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

¹⁷ Burnham, *supra* note 15, at 181.

Congress, however, did not wish for the Act to be misused by debtors in an effort to evade payment of their debts. Instead, Congress sought to strike a balance between protecting consumers from abusive debt collection practices and allowing legitimate debt collection efforts.¹⁸ While aware that the debt collection industry was a “substantial business”¹⁹ unable to afford disruption by needless legislation, Congress nonetheless concluded that “the suffering and anguish [that unscrupulous debt collectors] regularly inflict[ed] [was] substantial”²⁰ enough to warrant FDCPA legislation.

Congress focused on independent debt collection agencies, which it found were more likely to engage in abusive practices because, unlike creditors, third-party debt collectors were less concerned with their reputation among consumers.²¹ Instead, the fifty-percent commission that collection agencies generally receive provides even more of an incentive to aggressively collect the debts, using any means necessary.²² Congress highlighted that most debtors were not “deadbeats,”²³ as the debt collectors asserted, but rather individuals unable to repay their debts due to circumstances beyond their control.²⁴ Representative Frank Annunzio, Chairman of the Subcommittee on Consumer Affairs,

¹⁸ *Fair Debt Collection Practices Act: Hearing on S. 656, S. 918, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Hous. & Urban Affairs, 95th Cong. 2 (1977)* [hereinafter *Hearings*] (statement of Sen. Donald W. Riegle, Jr.) (“My goal—and I believe the goal of this subcommittee—is to report legislation which protects consumers from collection abuses and at the same time permits the honest collectors to continue to do their job effectively.”); see also Elwin Griffith, *The Challenge of Communicating with the Consumer and Validating the Debt Under the Fair Debt Collection Practices Act*, 55 U. KAN. L. REV. 61, 62 (2006).

¹⁹ S. REP. NO. 95-382, at 1696 (1977).

²⁰ *Id.*

²¹ *Id.* (“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.”).

²² *Id.*

²³ *Id.* at 1697 (“One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are ‘deadbeats.’ [sic] In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule.”).

²⁴ *Id.* The senate report pointed out that “[w]hen default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.” *Id.*

declared that “[t]he goal of [the Act] is to stop unethical debt collectors from using abusive tactics. In essence, what this means is that every individual, whether or not he owes a debt, has the right to be treated in a reasonable and civil manner.”²⁵

While the primary reason for the FDCPA’s enactment was to protect consumers from abusive practices, Congress had other concerns as well. Congress noted that debt collectors engaging in abusive practices had an unfair competitive advantage over those not willing to engage in such behavior.²⁶ Congress further found that abuses were so widespread because there was a “lack of meaningful legislation on the State level.”²⁷ Accordingly, the Act begins by declaring that 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.”²⁸

B. *Relevant Provisions of the Act*

The FDCPA regulates the conduct of debt collectors. Various sections of the Act proscribe a debt collector’s use of harassing or abusive practices,²⁹ false or misleading representations,³⁰ unfair practices,³¹ and furnishing certain deceptive forms.³² In one of the statute’s early sections and reinforced in a later section, the Act declares that once a debt collector³³ becomes aware that a debtor is being represented by an attorney with regard to the debt, “or can readily ascertain” such information, the debt

²⁵ 123 Cong. Rec. 10,241 (1977) (statement of Rep. Frank Annunzio).

²⁶ See 15 U.S.C. § 1692(e) (2012).

²⁷ S. REP. NO. 95-382, at 1696. In 1977, the time of the senate report, “nearly 40 percent of [the] population [had] no meaningful protection from debt collection abuse.” *Id.* at 1697.

²⁸ 15 U.S.C. § 1692(e).

²⁹ *Id.* § 1692d.

³⁰ *Id.* § 1692e.

³¹ *Id.* § 1692f.

³² *Id.* § 1692j.

³³ Debt collector is defined 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) (2012); see also *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230 (4th Cir. 2007).

collector may “not communicate with any person other than that attorney [regarding the debt].”³⁴ Further, communication about the debt with a third party other than the “consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector” is prohibited.³⁵

In addition to protecting a consumer against harassing or abusive practices,³⁶ a debt collector may not use “any false, deceptive, or misleading representation or means in connection with the collection of any debt.”³⁷ A non-exhaustive list provided in the Act illustrates the type of conduct that would constitute a violation, which, the Act emphasizes, does not limit the section’s general applicability.³⁸ Included in that list of violations, for example, is a debt collector’s false representation of the amount or character of any debt³⁹ or threats of legal action that cannot or is not intended to be taken.⁴⁰

The Act also imposes on debt collectors the requirement to furnish certain information upon initial communication with a debtor.⁴¹ After notifying a consumer of his outstanding debt, the debt collector must provide the consumer with written notice of the outstanding balance of the debt, the name of the creditor, that the debt will be deemed valid unless it is disputed within thirty days, and, if requested, that the debt collector will provide the consumer with the original creditor’s information if it is different from the current creditor.⁴² The Act states that

[i]f 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 shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment⁴³

³⁴ 15 U.S.C. § 1692b(6) (2012); *see also id.* § 1692c(a)(2). The Act makes an exception for an attorney who “fails to respond within a reasonable period of time” *Id.*

³⁵ *Id.* § 1692c(b).

³⁶ *See id.* § 1692d.

³⁷ *Id.* § 1692e.

³⁸ *See id.*

³⁹ *Id.* § 1692e(2)(A).

⁴⁰ *Id.* § 1692e(5).

⁴¹ *See id.* § 1692g(a).

⁴² *Id.*

⁴³ *Id.* § 1692g(b).

And, “[a] communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of [the Act].”⁴⁴

If a debt collector violates any provision of the FDCPA, the Act subjects the debt collector to civil liability.⁴⁵ The Act provides that “any debt collector who fails to comply with any provision of th[e Act] with respect to any person is liable to such person in an amount . . . [of] any actual damage sustained by such person as a result of such failure.”⁴⁶ Although the statute has been described as “strict liability” in nature,⁴⁷ it does provide an exception for those debt collectors that can show “by a preponderance of evidence” that the violation was unintentional “and resulted from a bona fide error.”⁴⁸ This bona fide error exception balances the interest of legitimate debt collectors and consumers who need protection from debt collection abuse by ensuring that the burden placed on the debt collection industry is not too heavy, punishing only those representations that are intentionally meant to take advantage of the consumer.

II. THE CIRCUIT SPLIT

Currently, there exists a tripartite circuit split among those circuits that have considered whether certain communications from a debt collector to a debtor’s attorney are actionable under the FDCPA.⁴⁹ The Ninth Circuit held that communications that violate the Act when sent by a debt collector to a debtor’s attorney, absent threats to communicate with the debtor directly,

⁴⁴ *Id.* § 1692g(d).

⁴⁵ *See id.* § 1692k(a).

⁴⁶ *Id.* § 1692k(a)(1). The Act also permits a court to impose additional damages, but not to exceed \$1,000, along with reasonable attorneys’ fees. *Id.* § 1692(a)(2)(A), (a)(3). For more on recovery under the Act, see generally Jeremy Gogel, *Remedies (and Lack Thereof) for Victims of Abusive Debt Collection Practices*, 66 J. MO. B. 330 (2010).

⁴⁷ *See, e.g.*, *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 (9th Cir. 2011) (citing *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011)).

⁴⁸ 15 U.S.C. § 1692k(c).

⁴⁹ For purposes of this discussion, this Note will presume that all communications in dispute would violate the Act had they been directed at the debtor. Thus, the central issue in the cases discussed herein was whether such violative communications were *actionable* such that they were subject to the Act’s liability, when, instead of being directed toward the debtor, they were sent to the debtor’s attorneys.

are not subject to FDCPA liability.⁵⁰ The Fourth Circuit, recently joined by the Third Circuit, has taken the opposite view, declaring that communication to a debtor's attorney qualifies as indirect communication to the debtor himself, making it unquestionably subject to the Act.⁵¹ Refusing to accept either of the existing bright-line approaches, the Seventh Circuit created a hybrid analysis. That approach recognizes that in some, but not all, circumstances, communications from a debt collector to a debtor's attorney will be actionable under the Act.⁵²

A. *Communications to a Debtor's Attorney Are Not Actionable*

1. The Ninth Circuit: *Guerrero v. RJM Acquisitions LLC*

In *Guerrero v. RJM Acquisitions LLC*,⁵³ the Ninth Circuit held that a debt collector's communication to a debtor's attorney prior to validating a disputed debt was not actionable under the Act.⁵⁴ In that case, debtor Guerrero hired an attorney after a debt collector, RJM, sent notices of his outstanding debt to each of his listed addresses.⁵⁵ Guerrero's attorney sent RJM notification that Guerrero was represented by counsel.⁵⁶ The attorney's letter also disputed the amount owed and asserted that RJM's initial letters violated the Act.⁵⁷ RJM responded to Guerrero's attorney and explained that it had acquired Guerrero's debt from Citibank.⁵⁸ Included in RJM's response was a copy of a letter from Citibank to Guerrero confirming RJM as the new owner of the debt.⁵⁹ RJM made no further attempt to

⁵⁰ See generally *Guerrero v. RJM Acquisition LLC*, 499 F.3d 926 (9th Cir. 2007).

⁵¹ See generally *Sayed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007); see also *Allen v. LaSalle Bank, N.A.*, 629 F.3d 364 (3d Cir. 2011), *cert denied*, 132 S. Ct 1141 (2012).

⁵² See generally *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007).

⁵³ 499 F.3d 926.

⁵⁴ *Id.* at 929; 15 U.S.C. § 1692g (2012).

⁵⁵ *Guerrero*, 499 F.3d at 930. The two letters were sent to the two different addresses the debtor provided the original creditor and contained identical information except that the account numbers differed by one character. *Id.* Guerrero claimed that a debtor could have been led to believe that these letters were attempts to collect two different debts. *Id.* at 934.

⁵⁶ *Id.* at 930.

⁵⁷ *Id.*

⁵⁸ *Id.* at 931.

⁵⁹ *Id.*

communicate with Guerrero or his attorney.⁶⁰ Guerrero filed a complaint in district court alleging violations of the Act.⁶¹ Specifically, Guerrero alleged that RJM's response to his attorney violated section 1692g(b) of the Act, which requires that a debt collector "cease collection of the debt" until a disputed debt has been confirmed.⁶² After extensive briefing by both sides, judgment was entered in Guerrero's favor.⁶³ The district court found that RJM violated the Act by responding to Guerrero's attorney prior to verifying the debt.⁶⁴

RJM appealed to the Ninth Circuit and urged the court to adopt the view that "communications that violate the Act when directed at a consumer do not violate the Act when directed at a consumer's legal counsel."⁶⁵ The court agreed and reversed the district court's ruling, finding that "the Act's purpose is to protect unsophisticated debtors from abusive debt collectors, and once a consumer obtains this protection by procuring legal counsel, the Act's protections become superfluous and therefore its provisions no longer apply."⁶⁶

The Ninth Circuit's bright-line approach primarily rests on the idea that "[a] consumer and his attorney are not one and the same for purposes of the Act."⁶⁷ In *Guerrero*, the court supported its holding by pointing to several different provisions in the Act

⁶⁰ *Id.* at 932.

⁶¹ *Id.* The complaint alleged violations of the Act with regard to the original letters RJM sent to Guerrero that notified him of the debt and RJM's letter responding to Guerrero's attorney. *Id.* at 933–34. For purposes of simplicity, this Note will only discuss the latter.

⁶² *Id.* at 936; 15 U.S.C. § 1692g(b) (2006).

⁶³ *Guerrero*, 499 F.3d at 932. The district court granted in part and denied in part both parties' summary judgment motions. *Id.* Specifically, the district court concluded that RJM's letter to Guerrero's attorney "was an express 'attempt to collect a debt' following [RJM's] receipt of [Guerrero's] verification request," and therefore violated 15 U.S.C. § 1692g of the Act. *Guerrero v. RJM Acquisitions, LLC*, No. 03-00038 HG-LEK, 2004 U.S. Dist. LEXIS 15416, at *30 (D. Haw. July 9, 2004). Later, the district court adopted the magistrate's recommendation to grant Guerrero's motion for attorneys' fees. *Guerrero*, 499 F.3d at 932.

⁶⁴ *Guerrero*, 499 F.3d at 929. The district court also found that RJM violated the Act with regard to the two collection letters containing slightly different account numbers because the court determined that the least sophisticated consumer—the standard of review for FDCPA actions in the Ninth Circuit—would likely have been misled. *See id.* at 933–34.

⁶⁵ *Id.* at 929.

⁶⁶ *Id.*

⁶⁷ *Id.* at 935.

that refer both to a consumer *and* his attorney.⁶⁸ Those provisions, the court asserted, suggest that under the statute a debtor and his attorney should be treated not as one, but rather two “legally distinct entities.”⁶⁹ Additionally, the court noted that “attorney” was not included in the Act’s extensive list of individuals defined as a “consumer.”⁷⁰ The court concluded that together these provisions demonstrate that the Act applies differently to debtors and their attorneys and maintained that this reading of the statute is in line with Congress’s intent when it passed the FDCPA.⁷¹ According to the court, because attorneys are not easily susceptible to the manipulative practices of debt collectors—a concern Congress had for unsophisticated debtors when enacting the statute—it is unnecessary to extend the Act’s protections beyond those unsophisticated debtors.⁷² The court applied its reading of the statute, together with its interpretation of Congress’s intent, to hold that “a collection effort must be aimed directly to the consumer himself to be prohibited.”⁷³ The court added in dicta that any communications directed toward a debtor’s attorney would not be actionable, regardless of the provision it violated.⁷⁴

⁶⁸ *See id.* The court referred to 15 U.S.C. § 1692c(a)(2), which requires that a debt collector communicate solely with a debtor’s attorney once the debt collector is aware that one has been procured. *Id.* Later in that section, the statute proscribes communication with a third party regarding the debt except “the consumer, his attorney, a consumer reporting agency . . . the creditor, [or] the attorney of the creditor . . .” 15 U.S.C. § 1692c(b) (2012). The court also highlighted that in the statute’s long list of individuals under the defined “consumer” umbrella, “attorney” is notably absent. *Guerrero*, 499 F.3d at 935 (citing 15 U.S.C. § 1692c(d)).

⁶⁹ *Guerrero*, 499 F.3d at 935.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* (“Unsophisticated consumers are easily bullied and misled. Trained attorneys are not.”). The court did, however, distinguish between an attorney representing a debtor and a debtor who happened to be an attorney. *Id.* at 936 n.4. Nonetheless, the court did not discuss what differences, if any, it would make in the analysis if a communication was sent to a debtor who happened to also be a licensed attorney. *See id.*

⁷³ *Id.* at 936.

⁷⁴ *Id.* at 936, 939 (“[W]hen the debt collector ceases contact with the debtor, and instead communicates exclusively with an attorney hired to represent the debtor in the matter, the Act’s strictures no longer apply to those communications.”).

a. *The Dissent*

In his dissent, Judge Fletcher argued that the majority's holding would circumvent the protective purposes of the FDCPA.⁷⁵ He began by criticizing the majority's broad dicta, which stated that a violation of the Act—whenever directed toward a debtor's attorney—would never be subject to liability.⁷⁶ According to Fletcher, given the statute's structure, which first requires a debt collector to communicate solely with a debtor's attorney once one has been procured and later proscribes certain conduct, "it is impossible to conclude that all otherwise prohibited conduct is permitted merely because it is directed at a debtor's attorney."⁷⁷ Judge Fletcher added that the text of the statute, exemplified by section 1692e, which prohibits false, deceptive, or misleading representations, does not explicitly limit its application to representations made to debtors directly.⁷⁸ Rather, the section's only limitation is that the communication must be made "in connection with the collection of any debt."⁷⁹

Additionally, Judge Fletcher insisted that it would be the debtor, and not his attorney, who would suffer the consequences of the majority's holding.⁸⁰ An attorney retained by a debtor and aware of the majority's holding would be cautious, Fletcher argued, whenever a communication from a debt collector was received. The attorney would need to perform extensive verifications of all representations made by the debt collector to ensure that what was communicated was in fact the truth.⁸¹ Accordingly, the cost of the attorney's time spent on verifications, rather than on the debtor's actual needs, will ultimately be borne by the debtor.⁸² Fletcher maintained that Congress intended the FDCPA to serve as a remedial statute against debt collection abuses,⁸³ and burdening debtors with the cost of verifications

⁷⁵ *Id.* at 942 (Fletcher, J., dissenting) ("The majority's conclusion is inconsistent with the purpose of the FDCPA. More to the point, its conclusion is inconsistent with the plain statutory text.").

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 943.

⁷⁹ *Id.*; 15 U.S.C. § 1692e (2012).

⁸⁰ *Guerrero*, 499 F.3d at 945.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 942 (citing *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006)).

would frustrate that purpose.⁸⁴ He noted that the majority's reading of the statute would promote the impression that once "an attorney for the debtor enters the picture, the debt collector is free to send false, deceptive, and misleading communications to the debtor's attorney without fear of any damage judgment or award of attorney's fees."⁸⁵

Finally, Judge Fletcher criticized the majority's holding that a violation did not occur when the debt collector sent a letter to the debtor's attorney prior to verifying the disputed debt.⁸⁶ Fletcher conceded that "there may be some sense in allowing two attorneys—one representing the debt collector and the other representing the debtor—to enter into settlement negotiations while a debt is still being verified."⁸⁷ But, he added, promoting amicable settlement negotiations should not take precedence over statutory language.⁸⁸ Because, he argued, the statute requires a debt collector to cease collection efforts in that interim period, there can be no policy argument that overrules the statutory text.⁸⁹

*B. Communication to a Debtor's Attorney Is Indirect
Communication to the Debtor Himself*

The Third and Fourth Circuits adopted the opposite bright-line approach, which declares that a debt collector's communication with a debtor's attorney is indirect communication with the debtor and is therefore actionable under the Act.⁹⁰

⁸⁴ *Id.* at 945.

⁸⁵ *Id.* Judge Fletcher added that although the Act's prohibition against false, deceptive, and misleading representations should apply to communications sent by a debt collector to a debtor's attorney, a different standard of review may be appropriate. *Id.* at 946.

⁸⁶ *Id.* at 947.

⁸⁷ *Id.*

⁸⁸ *Id.* at 947–48.

⁸⁹ *Id.* at 948–49.

⁹⁰ See *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232–33 (4th Cir. 2007); *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1141 (2012).

1. The Fourth Circuit: *Sayyed v. Wolpoff & Abramson*

In *Sayyed v. Wolpoff & Abramson*,⁹¹ the defendants, Wolpoff & Abramson ("W & A"), were attorneys retained by Discover Bank to collect a debt owed by Sayyed.⁹² W & A sued Sayyed on behalf of Discover in Maryland state court.⁹³ Sayyed responded by suing W & A in federal court, alleging that W & A violated the FDCPA.⁹⁴ Sayyed specifically argued that W & A's interrogatories in the state action failed to state that they were a communication from a debt collector attempting to collect a debt,⁹⁵ that the interrogatories contained a false representation,⁹⁶ and that W & A's collection attempts were unfair or unconscionable.⁹⁷ Sayyed additionally claimed that W & A's summary judgment motion in the state action contained a misstatement as to the amount owed and a false representation as to the percent of attorneys' fees, both violations of the Act.⁹⁸ W & A responded that both the interrogatories and the summary judgment motion were served on Sayyed's attorney, not on Sayyed himself, and therefore could not have violated the Act.⁹⁹

The Fourth Circuit disagreed with W & A, holding that a debt collector's communication directed toward a debtor's attorney is not immunized from the Act's liability simply because that communication was not sent directly to the debtor.¹⁰⁰ The court first addressed W & A's claim that the Act does not apply to communications made by attorneys in the course of debt collection litigation.¹⁰¹ The court held that W & A was a "debt

⁹¹ 485 F.3d 226.

⁹² *Id.* at 228.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* (arguing that such conduct constitutes a violation of 15 U.S.C. § 1692e(11)).

⁹⁶ *Id.* (arguing that such conduct constitutes a violation of 15 U.S.C. § 1692e(10)).

⁹⁷ *Id.* at 228–29 (arguing that such conduct constitutes a violation of 15 U.S.C. § 1692f). Sayyed argued that the unfair or unconscionable collection attempts occurred when three false statements were made: "(1) that the trial date for the Maryland case was June 11, 2004; (2) that Sayyed had to state his grounds of refusal to answer the interrogatories under oath; and (3) that the state court could enter a default judgment against Sayyed if he did not mail answers to W & A within thirty days after the date of service." *Id.* at 229.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

collector” as defined by the Act¹⁰² and interpreted by the Supreme Court.¹⁰³ The court relied on *Heintz v. Jenkins*¹⁰⁴ in which the Supreme Court held that an attorney’s actions in connection with debt collection litigation were subject to the Act’s provisions.¹⁰⁵ The court also noted that after *Heintz*, Congress amended the statute to remove the requirement that a debt collector notify a recipient that a communication is made in an attempt to collect debt *only* when that communication is a “formal pleading made in connection with a legal action.”¹⁰⁶ Therefore, the court concluded, Congress’s intent was for the courts to continue to read the statute as the Supreme Court did in *Heintz*, applying the Act’s provision to communications made by attorneys in the course of litigation, except as to the limited case of a formal pleading.¹⁰⁷

The court then addressed W & A’s argument that the Act was not applicable in this case because the communication was directed toward Sayyed’s attorney, not Sayyed himself.¹⁰⁸ The court looked to the text and structure of the Act and held that “[a] communication to debtor’s counsel, regarding a debt collection lawsuit in which counsel is representing the debtor, plainly qualifies as an indirect communication to the debtor.”¹⁰⁹

¹⁰² *Id.* at 230.

¹⁰³ *See Heintz v. Jenkins*, 514 U.S. 291, 299 (1995) (holding that an attorney who regularly engages in consumer debt litigation is a debt collector for purposes of the Act).

¹⁰⁴ 514 U.S. 291.

¹⁰⁵ *Id.* at 294. The Third Circuit remanded the issue of whether the interrogatories fell under 15 U.S.C. § 1692e(11)’s definition of “formal pleading” because it had not been fully briefed by the parties. *Sayyed*, 485 F.3d at 235 n.2.

¹⁰⁶ *Sayyed*, 485 F.3d at 231; *see* 15 U.S.C. § 1692e(11) (2012).

¹⁰⁷ *Sayyed*, 485 F.3d at 231 (“Congress’ amendment of § 1692e(11) provides clear evidence that litigation activity is subject to the FDCPA, except to the limited extent that Congress exempted formal pleadings from the requirements of that particular subsection.”). The court alternatively held that common law immunities are not appropriate under the FDCPA because the Act provides a bona fide error defense, which immunizes debt collectors if, by a preponderance of the evidence, they can prove that the violation was unintentional. *Id.* at 231–32; 15 U.S.C. § 1692k(c). The court later held that this error provision may be a defense in this case, but that the district court erred in finding that it was an alternative reason for dismissing the case. *Sayyed*, 485 F.3d at 235.

¹⁰⁸ *Sayyed*, 485 F.3d at 232.

¹⁰⁹ *Id.* The court supported that assertion by drawing attention to the Supreme Court’s ruling in *Heintz*. Although the issue in *Heintz* was whether an attorney engaged in debt collection litigation constituted a “debt collector” for purposes of the Act, the Fourth Circuit emphasized that the case involved communications to a debtor’s attorney and not to the debtor herself. *See id.* at 235–36. Accordingly, the

The court found that the Act's requirement that a debt collector cease communication with the debtor once it learned that the debtor hired an attorney demonstrates the Act's applicability to communication sent to an attorney.¹¹⁰ If a debt collector's actions are regulated by the Act and the Act requires a debt collector to communicate with the debtor's attorney, the Act should, the court concluded, continue to regulate the debt collector's conduct, regardless of whether the recipient of such communication was the debtor or his attorney.¹¹¹

2. The Third Circuit: *Allen ex rel. Martin v. LaSalle Bank, N.A.*

In a similar Third Circuit case, *Allen ex rel. Martin v. LaSalle Bank, N.A.*,¹¹² the law firm of Fein, Such, Kahn & Shepard, PC ("FSKS"), was retained by LaSalle Bank to bring a foreclosure action against debtor Allen.¹¹³ Upon Allen's attorney's request, FSKS sent the attorney an itemized balance, which included processing and attorneys' fees.¹¹⁴ Allen claimed that FSKS' attempt to collect fees beyond those amounts expressed by agreement or permitted by law violated the Act.¹¹⁵ The district court noted the circuit split and ultimately adopted the Seventh Circuit's approach.¹¹⁶ Because the court concluded that a competent attorney would have recognized the overage charges immediately, the court dismissed the case.¹¹⁷

Allen appealed to the Third Circuit, which held that "[a] communication to a consumer's attorney is undoubtedly an indirect communication to the consumer."¹¹⁸ The court supported its position by focusing on the text of the statute. Like the Fourth Circuit, the Third Circuit found that "there is nothing in

court understood *Heintz* to mean that the Supreme Court impliedly held that "the FDCPA covers communications to a debtor's attorney." *Id.* at 233.

¹¹⁰ *Id.* at 233. The court added that "[a]dopting the sweeping immunities urged by [W & A] would stop the statute in its tracks." *Id.* at 236.

¹¹¹ *Id.* at 232–33.

¹¹² 629 F.3d 364 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1141 (2012).

¹¹³ *Id.* at 365.

¹¹⁴ *Id.* at 365–66.

¹¹⁵ *Id.* at 366. Section 1692f provides that the attempt to collect an amount not authorized by agreement or permitted by law is a violation of the Act. 15 U.S.C. § 1692f(1) (2012).

¹¹⁶ See *infra* Part III.C.

¹¹⁷ *Allen*, 629 F.3d at 366.

¹¹⁸ *Id.* at 368 (citing *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773 (7th Cir. 2007)).

the FDCPA that explicitly exempts communications to an attorney.”¹¹⁹ Ultimately, the court remanded the case for further proceeding to determine whether there was an agreement or state law that permitted the collection of the amounts allegedly owed in the communication sent to Allen’s attorney.¹²⁰

Essentially, both the Third and Fourth Circuits found that if communications to a debtor’s attorney are not covered by the Act, debtors will relinquish all of the Act’s protections as soon as an attorney is hired—a notion that is never explicitly stated in the statute.

C. Communication from a Debt Collector Unlikely To Mislead a Competent Attorney Is Not Actionable: The Seventh Circuit’s Approach

In *Evory v. RJM Acquisitions Funding L.L.C.*,¹²¹ Judge Posner writing for the majority, refused to adopt either bright-line approach.¹²² The Seventh Circuit held that when a debt collector’s representation “would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, [that representation] should not be actionable [under the Act].”¹²³ The court consolidated four intertwined cases to answer nine questions relating to the Fair Debt Collection Practices Act.¹²⁴ The court first addressed whether the Act’s initial notice requirements differed if a debtor obtained counsel.¹²⁵ In one of the consolidated cases, a debtor’s attorney received a letter from the debt collector that did not meet the statute’s initial communication requirements.¹²⁶ The court held that “[i]t would be passing odd if the fact that a consumer was represented excused the debt collector from having to convey to the consumer the information to which the statute entitles him.”¹²⁷ Therefore—

¹¹⁹ *Id.* The court also added that “[i]f an otherwise improper communication would escape FDCPA liability simply because that communication was directed to a consumer’s attorney, it would undermine the deterrent effect of strict liability.” *Id.*

¹²⁰ *Id.* at 369.

¹²¹ 505 F.3d 769 (7th Cir. 2007).

¹²² *Id.* at 774–75.

¹²³ *Id.* at 775.

¹²⁴ *Id.* at 771. Of those nine questions, three related to the application of the Act to debt collectors’ representations made to lawyers. *Id.* at 772. This Note will only address those questions that are relevant to the general discussion.

¹²⁵ *Id.* at 773.

¹²⁶ *Id.* at 777.

¹²⁷ *Id.* at 773.

at least with respect to notice requirements—the court determined that a debtor and his attorney are entitled to the same information.¹²⁸ Like the Fourth Circuit's approach in *Sayed*,¹²⁹ the court supported its finding by highlighting the Act's requirement that debt collectors, once given notice that the debtor obtained counsel, cease all communications with the debtor.¹³⁰

Further, the court looked to the definition of "communication" under the Act, which is defined as "the conveying of information regarding a debt *directly or indirectly* to any person through any medium."¹³¹ The court affirmed that "[t]he lawyer is both 'any person' and 'any medium' "¹³² and held that the debt collector was not discharged of its responsibilities under the Act simply because the debtor hired an attorney.¹³³

After finding that a debt collector's required disclosures under the Act did not change once an attorney was hired, the court then addressed whether other violations of the Act were also enforced as if they had been directed at the debtor.¹³⁴ With regard to the Act's prohibition against the use of false, misleading, or deceptive representations, the court held that "a representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, [would] not be actionable [under the FDCPA]."¹³⁵ In reaching its conclusion, the court expressed concerns similar to those that the Ninth Circuit addressed in *Guerrero*.¹³⁶ The court recognized that an attorney would be less susceptible to deceptive, harassing, or intimidating practices, but, unlike the Ninth Circuit, the court stated that should be "an argument not for immunizing practices forbidden by the statute . . . but rather for recognizing that the standard for

¹²⁸ *Id.* at 771.

¹²⁹ *See supra* Part III.B.

¹³⁰ *Evory*, 505 F.3d at 773; 15 U.S.C. § 1692c(a)(2) (2012).

¹³¹ *Evory*, 505 F.3d at 773 (quoting 15 U.S.C. § 1692a(2)).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* ("The next question is whether debt collectors can, without liability, threaten, make false representations to, or commit other abusive, deceptive, or unconscionable acts against a consumer's lawyer, in violation of [the Act].").

¹³⁵ *Id.* at 775.

¹³⁶ *See supra* note 72 and accompanying text.

determining whether particular conduct violates the statute is different when the conduct is aimed at a lawyer than when it is aimed at a consumer.”¹³⁷

In holding that a different standard should be used to determine a debt collector’s liability under the Act when certain communications are directed at an attorney, the court asserted that the analysis should differ depending on the type of violation.¹³⁸ The court distinguished between false and deceptive communications.¹³⁹ When a representation by a debt collector to a debtor’s attorney is *deceptive*, as opposed to *false*, the court acknowledged that the representation may be “unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law.”¹⁴⁰ Accordingly, the court held that a factually true but nonetheless deceptive or misleading representation that would not lead a competent attorney to be misled or deceived should not be actionable under the Act.¹⁴¹ When a representation is false, on the other hand, an attorney may be just as incapable of discovering the falsity as his client.¹⁴² The court seemed to suggest that when an attorney’s commercial sophistication cannot provide adequate protection for the debtor—when, for example, he cannot discover a falsity—the Act should provide protection to the debtor where his attorney falls short. Therefore, the court illustrated that a false claim such as a “letter [that] misrepresents the unpaid balance of the consumer’s debt . . . would be actionable [under the Act] whether made to the consumer directly, or indirectly through his lawyer.”¹⁴³

¹³⁷ *Evory*, 505 F.3d at 774.

¹³⁸ *Id.* at 774–75.

¹³⁹ *Id.* at 775. Presumably, the court distinguished the terms by reasoning that deceptive representations were factually accurate but, nonetheless, presented in a way that would lead the receiver to be deceived. False representations, on the other hand, the court assumed the statement to be factually incorrect.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* (“A false claim of fact in a dunning letter may be as difficult for a lawyer to see through as a consumer.”).

¹⁴³ *Id.*

III. HOW SHOULD COURTS DETERMINE IF A VIOLATION OF THE FDCPA DIRECTED AT AN ATTORNEY IS ACTIONABLE?

Part A discusses why the three approaches taken by the circuit courts do not adequately settle the issue, addressing each approach individually. Part B proposes a solution and illustrates its effectiveness using sections of the Act.

A. *The Other Approaches Do Not Adequately Address the Issue*

1. The Ninth Circuit's Approach

The Ninth Circuit's bright-line approach, which asserts that "communications directed solely to a debtor's attorney are not actionable under the Act," is overbroad and ignores the Act's underlying purposes.¹⁴⁴ The court's ruling was partially based on the Act's multiple references to both a debtor and his attorney, which, the court concluded, indicated Congress's intention to treat the two differently.¹⁴⁵ The Ninth Circuit insisted that Congress made such a distinction because a sophisticated attorney will protect his client from abusive debt collection practices, whereas the Act will provide such protection to unrepresented debtors.¹⁴⁶ That Congress distinguished a debtor from his attorney, however, does not support the court's finding that Congress intended to shield unscrupulous debt collectors from liability simply because they communicated with the debtor's attorney and not the debtor himself.¹⁴⁷ In fact, this acknowledgment suggests quite the opposite. Congress recognized—and even accounted for—the very likely possibility that a debtor may obtain representation for his debt collection matters.¹⁴⁸ The Ninth Circuit failed to disclose how Congress's foresight that debtors would hire attorneys necessarily means that debtors' attorneys are not entitled to the Act's protections.

¹⁴⁴ *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 934 (9th Cir. 2007).

¹⁴⁵ *Id.* at 935. The court found that there appears to be a "congressional understanding that, when it comes to debt collection matters, lawyers and their debtor clients will be treated differently." *Id.* (citing *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)).

¹⁴⁶ *Id.* ("Congress did not view attorneys as susceptible to the abuses that spurred the need for the legislation to begin with, and that Congress built that differentiation into the statute itself.")

¹⁴⁷ It is a wholly unsupported assertion that Congress intended to shield a debtor from the Act's protections simply because he hired an attorney.

¹⁴⁸ See 15 U.S.C. §§ 1692b, 1692c(a)(2) (2012).

As noted by Judge Fletcher in his Ninth Circuit dissent, the structure and text of the Act do not support the majority's position.¹⁴⁹ As a textual matter, two early provisions of the multi-part statute prohibit a debt collector from communicating with any individual except the debtor's attorney with regard to the debt.¹⁵⁰ The Act subsequently sets forth actions that would constitute violations, including the use of harassment or abuse,¹⁵¹ "false, deceptive, or misleading representation,"¹⁵² "unfair or unconscionable means"¹⁵³ in connection with the collection of a debt. Therefore, Fletcher concluded, "it is impossible to conclude that all otherwise prohibited conduct is permitted merely because it is directed at a debtor's attorney."¹⁵⁴ The impossibility identified by Judge Fletcher is that if Congress meant to exclude attorneys from the Act's protection, as suggested by the Ninth Circuit majority, it would have explicitly done so. Instead, Congress *required* a debt collector to communicate with a debtor's attorney in their collection efforts and then prohibited certain types of abusive debt collection practices, never limiting those sections to apply merely to communications sent directly to debtors.¹⁵⁵

Although protecting unsophisticated consumers was arguably Congress's principal concern, there were other purposes for the Act that the Ninth Circuit ignored by adopting its approach.¹⁵⁶ Specifically, among the Act's enumerated purposes is Congress's desire to generally "eliminate abusive debt collection practices."¹⁵⁷ The Ninth Circuit's bright-line rule provides debt collectors seeking to engage in abusive behavior an opportunity to do so without fear that their conduct will be penalized. By removing communications directed at attorneys

¹⁴⁹ *Guerrero*, 499 F.3d at 942 (Fletcher, J., dissenting).

¹⁵⁰ *See supra* Part II.B; *see also* 15 U.S.C. §§ 1692b(6), 1692c(a)(2).

¹⁵¹ 15 U.S.C. § 1692d.

¹⁵² *Id.* § 1692e.

¹⁵³ *Id.* § 1692f.

¹⁵⁴ *Guerrero*, 499 F.3d at 942 (Fletcher, J., dissenting).

¹⁵⁵ Under 15 U.S.C. §§ 1692d, 1692e, 1692f, which prohibit harassment or abuse, false or misleading representations, and or unfair practices in connection with the collection of any debt, respectively, the statutory text is not limited to communications directed toward a debtor. In fact, these sections place the focus on the debt collector and begin with "a debt collector may not," never mentioning the individual receiving the representations. 15 U.S.C §§ 1692d–1692f.

¹⁵⁶ *See supra* Part II.A.

¹⁵⁷ 15 U.S.C. § 1692(e).

from the Act's coverage, there is no incentive—and perhaps even a disincentive—to engage in amicable debt collection.¹⁵⁸ If a debtor, for example, was willing and had the means to pay his outstanding debt, he would presumably do so whether the debt collector asked his attorney nicely or not. If, on the other hand, a debtor did not intend or could not afford to pay his debt, he may find a way—possibly by resorting to desperate means—to make the payment after his attorney, who is being harassed, pressured him to do so.

Another of the Act's purposes, “to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged,”¹⁵⁹ would be frustrated as well. Assuming that as a result of the Act debt collectors were engaging in a less abusive and less manipulative collection practices than before, that developed discipline would be abandoned whenever a debt collector became aware that an attorney had been hired.¹⁶⁰ If the debt collector may engage in behavior that is otherwise lawful but nonetheless harassing, a debtor's attorney may have no legal recourse except to encourage his client to repay the debt. Therefore, aside from promoting conduct that the Act specifically seeks to eliminate, those debt collectors who successfully harass attorneys to the point where the attorney is pressuring his client to repay the debt will gain an unfair competitive advantage over those debt collectors who refrain from using such tactics.¹⁶¹

The Ninth Circuit unintentionally strayed from its own reasoning when it limited its holding to debtors who hire attorneys and not to debtors who happen to be attorneys themselves. The court's entire approach is grounded in the understanding that “[u]nsophisticated consumers are easily bullied and misled” while “[t]rained attorneys are not.”¹⁶² But

¹⁵⁸ Hoffman, *supra* note 12, at 559 (“[D]ebt collecting agencies often train their employees that the only way to collect [from debtors not making payment] is through the use of threats, harsh language, and mentions of impending legal action.”). There is, however, some evidence to suggest that debtors are less likely to repay debts owed to debt collection agencies engaging in abusive behavior. *Id.*

¹⁵⁹ 15 U.S.C. § 1692(e).

¹⁶⁰ Congress's explicit acknowledgment of the potential unfair advantage that could be gained by those debt collectors engaging in abusive practices indicates that it was concerned—at least to some extent—that the unfair advantage was possible.

¹⁶¹ *But see* Hoffman, *supra* note 12, at 559.

¹⁶² Guerrero v. RJM Acquisition LLC, 499 F.3d 926, 935 (9th Cir. 2007).

the court qualified its holding to apply only to situations where an attorney is hired by a debtor and distinguished that from a case where the debtor is also an attorney.¹⁶³ In that case, the court said, “[a] debt collector is not insulated from liability under the Act merely because a debtor also happens to be an attorney.”¹⁶⁴ That qualification runs contrary to the circuit’s argument as a whole. If a “trained attorney”¹⁶⁵ possesses such sophistication so as to not need the Act’s protections, there does not seem to be a logical rationale for distinguishing between an attorney who was hired by a debt collector and an attorney who is the debtor. The majority seems to suggest either that a debtor who is also an attorney loses his sophistication merely because he is playing a dual role of debtor and attorney or that there is more to the court’s reasoning that did not appear in the opinion. This logic gap may be the court conceding that there is more to the Act than merely Congress’s desire to protect unsophisticated consumers.

2. The Third and Fourth Circuits’ Approach

The Third and Fourth Circuits’ bright-line approach, which holds that a communication between a debt collector and a debtor’s attorney “plainly qualifies as an indirect communication to the debtor”¹⁶⁶ and is therefore actionable, is overbroad and captures conduct that Congress did not intend to capture. Because the Act defines communications broadly to include information sent “directly or indirectly to any person through any medium,”¹⁶⁷ that approach holds that any communication to a debtor’s attorney is by definition communication with the debtor himself.¹⁶⁸

As an initial matter, and noted by the Ninth Circuit, Congress undoubtedly intended for the Act to treat debtors and their attorneys differently.¹⁶⁹ While that does not mean that the Act *never* applies to communications sent to an attorney,¹⁷⁰ as

¹⁶³ *Id.* at 936 n.4.

¹⁶⁴ *Id.*

¹⁶⁵ The court specifically said that “[a]ttorneys possess exactly the degree of sophistication and legal wherewithal that individual debtors do not.” *Id.* at 939.

¹⁶⁶ *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007).

¹⁶⁷ 15 U.S.C. § 1692a(2) (2012).

¹⁶⁸ *Sayyed*, 485 F.3d at 232.

¹⁶⁹ *Guerrero*, 499 F.3d at 935.

¹⁷⁰ *See supra* Part IV.A.1.

discussed above, it similarly does not mean the Act *always* applies to such communications. If, for example, a debt collector sent a debtor a letter that misled the debtor by claiming that nonpayment will result in imprisonment, the debt collector would be liable under the Act. If the letter was instead sent, pursuant to statutory requirements, to the debtor's attorney, that same representation may not mislead the attorney but would, under this bright-line approach, lead to the same result.

It would seem contrary to Congress's intent to find that letter, assuming it complied with the Act in all other respects, violated the Act simply because it *could have* misled the debtor had he been the one to receive it. The statutory text, which prohibits "deceptive"¹⁷¹ and "misleading"¹⁷² representations, does not support this view. Something that deceives or misleads one individual may not produce that effect on another. Because a violation occurs when, depending on the circuit, an unsophisticated or "the least sophisticated" debtor¹⁷³ would be deceived or misled by a representation, the same standard should not be employed for representations made to sophisticated attorneys.¹⁷⁴ Concluding that a representation is subject to the Act's liability, regardless of whether it produced the effect Congress intended to protect against, ignores one of Congress's main concerns—the concern that the Act will curtail the debt collection industry.¹⁷⁵ That is because imposing liability on such actions allows for the possibility that debtors and attorneys may collaborate to take advantage of debt collectors who have technically violated the Act but have not produced the consequence that Congress sought to eliminate.¹⁷⁶

¹⁷¹ 15 U.S.C § 1692e.

¹⁷² *Id.*

¹⁷³ Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 796 n.231 (2004–2005).

¹⁷⁴ As acknowledged by the Ninth Circuit, trained attorneys are less susceptible to manipulation than ordinary consumers. See *Guerrero*, 499 F.3d at 935.

¹⁷⁵ See *supra* Part II.A. Congress intended to strike a fair balance between providing adequate protection for consumers and not handicapping the legitimate debt collection industry. See *supra* Part II.A.

¹⁷⁶ See Hoffman, *supra* note 12, at 561–62 (expressing concern for attorneys who, on a contingency fee basis, find a technical violation of the statute and threaten suit, causing debt collectors to settle).

3. The Seventh Circuit's Approach

Recognizing the limitations of both bright-line approaches, the Seventh Circuit adopted a middle ground—but that too falls short. The Seventh Circuit's approach can be broken down into three parts. First, any notice requirement under the Act “must contain the information that would be required by the Act if the notice were sent to the consumer directly.”¹⁷⁷ Second, a communication that would be considered deceptive or misleading will not be actionable if it would not deceive or mislead a competent lawyer.¹⁷⁸ Finally, a false representation will be actionable whether it was directed at the consumer or his attorney.¹⁷⁹ While this approach may lead to the right result in most cases, it is too difficult to apply.

The Seventh Circuit's approach addresses some of the problems that arise with the two bright-line approaches. This approach appropriately recognizes—as the Ninth Circuit argued—the Act's presumption that an attorney and his client are not one and the same.¹⁸⁰ This difference, however, is acknowledged by the Seventh Circuit's imposition of different standards of review—at least with regards to deceptive or misleading representations¹⁸¹—rather than foreclosing a debtor's action altogether, as the Ninth Circuit proposed.¹⁸² Additionally, this approach, unlike that of the Ninth Circuit, does not encourage abusive behavior because a debt collector's actions are still subject to liability under the Act.¹⁸³ Further, this approach does not pose a threat to the debt collection industry by imposing liability for actions that do not lead to consequences that the Act was meant to eradicate, as the Third and Fourth Circuits'

¹⁷⁷ *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773 (7th Cir. 2007).

¹⁷⁸ *Id.* at 775.

¹⁷⁹ *Id.* The court did not distinguish between a false representation of law and a false representation of fact. While the example used by the court—a misrepresentation of the outstanding balance—was a false statement of fact, the court did not seem to limit its holding. *Id.*

¹⁸⁰ *Guerrero v. RJM Acquisitions Funding LLC*, 499 F.3d 926, 935 (9th Cir. 2007) (“A consumer and his attorney are not one and the same for purposes of the Act.”).

¹⁸¹ See *supra* notes 134–43 and accompanying text.

¹⁸² See *supra* Part III.A.1.

¹⁸³ See *supra* Part IV.A.1.

approach does.¹⁸⁴ That is because under this approach, for something to qualify as misleading or deceptive, it must be deceptive or misleading to a *competent attorney*.

Although the Seventh Circuit's approach provides for a better solution than the two bright-line approaches, it does not provide an easy framework for courts to apply. In its attempt to impose a simple scheme, this approach provides courts with two different standards of review and is unclear as to when each would apply. On the one hand, when a debt collector sends a debtor's attorney a required notice or communication that contains a false representation, this approach directs the court to apply the same standard of review it would as if the communication had been sent to the debtor directly.¹⁸⁵ On the other hand, however, when a debt collector sends an attorney deceptive or misleading information, the court must determine whether that information would deceive or mislead a competent attorney. But the categorical distinction between a false, misleading, and deceptive representation is unnecessary and often very difficult to make, which may lead courts to apply the wrong standard of review. A false representation that might be obvious to a competent attorney but not to a debtor may, under this approach, result in—much like the Third and Fourth Circuits' approach—the imposition of liability where the debt collector's intended result of the falsity—namely, for the debtor to rely on the representation—never occurred.¹⁸⁶ If a competent attorney, however, could easily discover the falsity, it seems contrary to the remedial nature of the statute to impose liability.

This approach also does not account for Congress's intent underlying the sections of the Act that require a debt collector to convey certain information to a debtor. Instead of investigating *why* the Act requires certain statements and disclosures be included in communications between debt collectors and debtors, this approach incorrectly presumes that all initial communication requirements are necessary because the attorney is simply a medium through which a debt collector must go in

¹⁸⁴ See *supra* Part IV.A.2.

¹⁸⁵ It remains unclear whether a false representation about the law that an attorney would know to be false would qualify for this standard of review.

¹⁸⁶ This is assuming, of course, that the false representation was intentional. Had the false representation been unintentional, the debt collector would have an affirmative defense under 15 U.S.C. § 1692k(c) (2012).

order to contact the debtor.¹⁸⁷ Therefore, for example, if an attorney receives a notice from a debt collector that fails to include a statement disclosing that the letter is an attempt to collect a debt, as required by the Act, this approach imposes liability on the debt collector. This result is unfortunate because an attorney would presumably be aware that the reason he is receiving such communication on behalf of his client is because the debt collector is attempting to collect an outstanding debt.

B. How Should Courts Determine Whether Communications by a Debt Collector to a Debtor's Attorney Are Actionable Under the FDCPA?

This subpart offers a simple two-step analysis for courts to apply when determining whether communications from a debt collector to a debtor's attorney are actionable under the Act. When a court is faced with whether to impose the Act's liability for communication directed at an attorney, two questions must be answered: First, is the debtor's conduct of the type that Congress intended the Act to regulate? And, if so, what standard of review should the court employ for such conduct?

In order to answer the first question, the court must initially establish that a violation of the Act in fact occurred. Only after the court finds that the conduct would have resulted in liability had the representation been made directly to the debtor, does the court inquire as to whether it was the type of conduct that Congress intended to regulate. To determine if Congress intended to regulate the debt collector's conduct, the court must participate in a section-by-section analysis of all sections that the conduct would have violated had it been directed toward the debtor. If the court concludes, based on its findings, that Congress's intent would be served by imposing liability, then the Act's "strict liability"¹⁸⁸ should be imposed. If, on the other hand, the court concludes that a violation did not occur or that imposing liability for a violation that was directed at the attorney would not serve Congress's underlying intent, the statute's liability should not be imposed.

¹⁸⁷ *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 773 (7th Cir. 2007).

¹⁸⁸ 15 U.S.C. § 1692k; *see, e.g.*, *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 n.7 (3d Cir. 2011) ("The characterization of the FDCPA as a strict liability statute is generally accepted."), *cert. denied*, 132 S. Ct. 1141 (2012).

Determining Congress's underlying intent for the relevant sections of the Act is not an easy task.¹⁸⁹ Courts will be required to look at what Congress's goals were for the individual sections. If a section's purpose was to eliminate abusive conduct generally, it would seem that by imposing liability on debt collectors who engage in such conduct, regardless of whether it was the debtor or his attorney on the receiving end, would serve that goal. But if a section's purpose evinces Congress's intent to provide protection to unsophisticated consumers, it would not serve that intent to impose liability where the receiver was a trained attorney rather than an unsophisticated debtor.

Once a court determines the Act applies to such communications, the court must impose a standard of review to determine whether the debt collector's conduct violates the Act. The standard of review should be whether the debt collector's communication would deceive or mislead a *competent attorney* with the *monetary resources* of an ordinary consumer. If the representation would deceive or mislead a competent attorney, the court should enforce the Act as it would if a violation directed at a debtor had occurred. If the representation would not produce such effect on a competent attorney, the court should, absent any other claim of unlawful behavior, dismiss the claim against the debt collector.

This two-step analysis is one that can be implemented by the courts with relative ease and remains committed to Congress's intent. This approach considers—as the Ninth Circuit articulated—the Act's inherent distinction between a debtor and his attorney.¹⁹⁰ In the first inquiry, courts determine whether Congress intended the violated subsection to apply to communications directed toward a debtor's attorney rather than the debtor himself, and in the second, courts will again acknowledge the distinction when implementing a heightened competent attorney standard of review. Therefore, unlike the Ninth Circuit, this approach does not automatically bar a debtor from bringing an action against the debt collector simply because he acquired representation.

¹⁸⁹ As exemplified by Part II.A, Congress had many different reasons for enacting the Act. A court would need to determine what the main purposes were for each violated section.

¹⁹⁰ *Guerrero v. RJM Acquisition LLC*, 499 F.3d 926, 935 (9th Cir. 2007).

Unlike the approach set out by the Third and Fourth Circuits, this approach does not automatically extend the Act's liability beyond Congress's intended reach. Whereas under the Third and Fourth Circuits' approach a communication that would mislead a debtor is actionable whether or not it produced that effect on his attorney, this approach provides—more closely in line with the Seventh Circuit—that a separate, heightened standard of review shall apply for communications sent to attorneys.

This approach attempts to maintain Congress's concern for those debt collectors engaging in lawful debt collection. By acknowledging that a debtor and his attorney should not be treated in the same manner under the Act, debtors and their attorneys could not use the Act to take advantage of every technical violation to impose liability,¹⁹¹ the way the Third and Fourth Circuits' approach allows. Instead, this approach attempts to consider what Congress intended when it enacted each individual provision and only applies those provisions to communications directed at debtors' attorneys where it would serve Congress's intent.

The second inquiry the court undertakes—whether a violation occurred against a competent attorney with the monetary resources of an ordinary consumer—accounts for the difference in sophistication between an attorney and his client, while providing a practical limitation on what a court can expect of an attorney who will be limited by his client's resources.¹⁹² This examination, much like the Seventh and Ninth Circuits,¹⁹³ acknowledges that Congress understood attorneys to be more than just an indirect way of communicating with the debtor. Congress recognized that an attorney with a higher level of commercial sophistication will be able to provide some protection against unscrupulous debt collectors to his client.¹⁹⁴ The second inquiry addresses the obvious shortcoming of the Seventh

¹⁹¹ See Hoffman, *supra* note 12, at 561.

¹⁹² Although it is difficult to define the monetary resources of an ordinary consumer, presumably a court would find a reasonable sum that an ordinary consumer could afford to spend on such actions and apply that figure.

¹⁹³ Guerrero, 499 F.3d at 935; see *supra* note 136 and accompanying text.

¹⁹⁴ This reasoning is exemplified in the Act itself. The Act, on more than one occasion, requires that a debt collector only contact the debtor's attorney with regard to the debt once it is made aware that one has been procured. See 15 U.S.C §§ 1692b(6), 1692c(a)(2) (2012); see also *supra* Part II.B.

Circuit's approach, which imposes liability for false representations of law or fact that were sent to an attorney but were not relied upon.

As acknowledged by the Seventh Circuit and Judge Fletcher in his Ninth Circuit dissent,¹⁹⁵ the monetary resources of a debtor are important and must be taken into account. Judge Fletcher argued that the Act's purpose of protecting consumers is circumvented if a prohibition against the use of false or misleading representations does not per se apply to a collector's communications with a debtor's attorney.¹⁹⁶ The reasoning is as follows: If attorneys are aware that a debt collector may send misleading or false representation without subjecting itself to FDCPA liability, the attorneys will be skeptical of *any* information received from debt collectors. That skepticism will result in attorneys charging their clients for the time taken to verify each representation. It is worth noting, however, that this is only true when a debtor is required to pay his attorney on an hourly basis and loses his FDCPA case.¹⁹⁷ Because the debtor would not be liable for the cost of the attorney's verification time if his action is successful, it could be argued that the debtor is not really harmed at all. But the mere possibility that a debtor will bear the cost of the additional verification time is enough to warrant section 1692e's application to such communications.

1. The Congressional Intent Analysis as Applied to Section 1692e: False and Misleading Representations

Section 1692e of the Act prohibits a debt collector's use of "false, deceptive, or misleading representation[s]."¹⁹⁸ Whether section 1692e's prohibition applies to communications sent to a debtor's attorney depends upon whether applying it to such communications would serve Congress's intent.¹⁹⁹ The text of section 1692e does not support the position that Congress meant for this section to only apply to communications sent directly to a debtor. As the Seventh Circuit argued, "[t]here is nothing in the

¹⁹⁵ *Guerrero*, 499 F.3d at 941 (Fletcher, J., dissenting); *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 775 (7th Cir. 2007).

¹⁹⁶ See *supra* notes 87–89 and accompanying text.

¹⁹⁷ Under 15 U.S.C. § 1692k, if the court finds that a debt collector violated the Act, the debt collector is responsible for reasonable attorneys' fees. 15 U.S.C. § 1692k(a)(3).

¹⁹⁸ *Id.* § 1692e.

¹⁹⁹ *Id.* See generally *Hearings*, *supra* note 18.

text of the FDCPA to indicate that attorneys representing debtors are excluded from the class of third parties to whom a debt collector may not make a false, deceptive or misleading representation.²⁰⁰ The section's only condition is that the prohibited representations must be made "in connection with the collection of any debt."²⁰¹ And, because under the statute a debt collector is barred from communicating directly with the debtor once the collector knows "or has reason to know" that counsel has been acquired, the debt collector has no choice but to direct his collection efforts towards the debtor's attorney once one has been procured.²⁰² Therefore, reading the statute as a whole, it is unlikely that Congress intended to limit the section's application to communications sent directly to debtors without unambiguously stating as much.

Section 1692e's use of the terms "deceptive" and "misleading" also support its application to communications sent to debtors' attorneys. The term "misleading" is defined by Black's Law Dictionary as "calculated to lead astray or to lead into error."²⁰³ Additionally, a "deceptive act" is one that is "likely to deceive [an individual] acting reasonably under similar circumstances."²⁰⁴ The Ninth Circuit correctly noted that "[u]nsophisticated consumers are easily bullied and misled [and] [t]rained attorneys are not."²⁰⁵ That an attorney may be less likely to be misled or deceived by representations by a debt collector does not suggest that Congress intended to insulate debt collectors from liability whenever a representation was sent to an attorney. More likely, Congress used the terms "deceptive" and "misleading" to focus on the receiver of such representations, holding more sophisticated individuals to a higher standard.²⁰⁶

A commercially savvy attorney is probably less likely to be led into error than an unsophisticated consumer. Presumably then, there will be cases where an attorney will receive a representation that he did not find misleading or deceptive but

²⁰⁰ *Guerrero*, 499 F.3d at 943 (Fletcher, J., dissenting).

²⁰¹ 15 U.S.C. § 1692e.

²⁰² *Id.* §§ 1692b(6), 1692c(a)(2).

²⁰³ BLACK'S LAW DICTIONARY 784 (9th ed. 2009).

²⁰⁴ *Id.* at 466.

²⁰⁵ *Guerrero*, 499 F.3d at 935.

²⁰⁶ As discussed in Part II, Congress intended to strike a balance between wanting to protect debtors against debt collection abuse and not wanting to harm the legitimate debt collection industry. *See supra* Part II.A.

that would have misled or deceived his client. In those situations, the Act should not impose liability. If, for example, an attorney received a letter from a debt collector that gives the appearance that it is from an attorney's office, that letter may not deceive an attorney but may have deceived his client. In that case, Congress's intent would be frustrated, and not served, by imposing liability on the debt collector. Instead, using the text of the statute, a court should conclude that a deceptive or misleading representation was not made and is therefore not deserving of punishment. Imposing liability for such representations may in fact frustrate one of Congress's main goals when enacting the statute—namely, to strike a balance between the interests of the debt collection industry and the interests of consumers with outstanding debts.²⁰⁷

Additionally, as indicated by the Seventh Circuit, it is important to distinguish between representations that are deceptive or misleading and those that are false.²⁰⁸ The Seventh Circuit held that an attorney might have as much difficulty as his client discovering a false representation and therefore should be treated the same way as a consumer under that approach.²⁰⁹ Although a court could find that Congress intended to eliminate the conveyance of false information generally, it is more likely that Congress intended to proscribe the conveyance of false representations because of the effect—specifically, the inducement of payment—those representations had on debtors. As with deceptive or misleading representations, an attorney may be in a better position than his client to discover an obvious falsity. Therefore, instead of creating a presumption that section 1692e applies to all falsities made by debt collectors, this approach allows a court to consider the type, manner, and circumstances surrounding the false representation to determine if it was of the kind that Congress meant to abolish.

²⁰⁷ See *supra* note 18 and accompanying text.

²⁰⁸ Compare *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 775 (7th Cir. 2007) (recognizing that “[a] false claim of fact in a [communication] may be as difficult for a lawyer to see through as a consumer”), with 15 U.S.C. § 1692e(2) (2012) (stating that a false representation of “character, amount, or legal status of any debt” constitutes a violation), and 15 U.S.C. § 1692e(4) (stating that a violation occurs when a representation is made that nonpayment will lead to imprisonment, garnishment, or attachment unless such representation is true).

²⁰⁹ *Evory*, 505 F.3d at 774–75.

Legislative history supports the position that at least some communications by debt collectors should be subject to section 1692e's prohibitions. Congress, in enacting this section, specifically addressed the testimony of debt collectors using false or misleading representations in an effort to collect the debts owed.²¹⁰ Congress heard testimony of a former debt collector who stated that "[i]t was not unusual to hear a collector inform the debtor that unless the bill was paid, they would be unable to receive medical services at any hospital, or that they had better nail their possessions to the floor before the law came and removed everything they owned."²¹¹ Congress found that, although such abusive behavior was not the norm, "the havoc which they have caused in many people's lives, the amount of humiliation, [was] great indeed."²¹² Therefore, based on various deceptive tactics used by debt collectors in the past, Congress included a non-exhaustive list of such actions that would be considered violations of section 1692e.²¹³ But Congress emphasized that the general prohibition "enable[s] the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."²¹⁴ Based upon the legislative history, it would seem section 1692e has two main purposes: first, to eliminate the abusive practices that were employed by debt collectors and second, to protect individuals from such behavior. By subjecting communications by debt collectors to section 1692e, courts are not only protecting attorneys from being harassed without any legal recourse but are also sending the general message that abusive conduct will not be tolerated.

2. The Congressional Intent Analysis as Applied to Section 1692g: Validation of Debt

Section 1692g requires that a debt collector, within five days of initial communication, provide written notification to the debtor that must contain certain information specified in the

²¹⁰ See generally *Hearings*, *supra* note 18.

²¹¹ *Id.* at 38 (statement of Patricia A. Miller).

²¹² *Id.* at 1 (statement of Sen. Donald W. Riegle, Jr.).

²¹³ 15 U.S.C. § 1692e.

²¹⁴ S. REP NO. 95-382, at 1698 (1977). This section is limited, however, to representation or means only used "in connection with the collection of any debt." 15 U.S.C. § 1692e. "Debt," of course, is used as specifically defined by the Act. See *supra* Part II.B.

section.²¹⁵ For the purposes of this discussion, this part will focus on 1692g(b), which requires a debt collector to cease collection efforts once a debtor has exercised his right to dispute the debt.²¹⁶ As with section 1692e, section 1692g's applicability to communications directed at an attorney depends upon the congressional intent behind the section. As the Senate Report indicates, Congress intended to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."²¹⁷ The validation notice, Congress found, was one way of remedying that problem. Congress's concerns are not as compelling once an attorney has been hired. Presumably, an attorney would perform his due diligence and provide a recommendation to his client only once he has established that the debt is in fact his client's and that it has not already been paid.

A major criticism to this reasoning is that it assumes that an attorney would have access to the information without a validation notice. A court would need to engage in a detailed factual inquiry to determine whether such information was available to an attorney without the notice. If a court finds that a competent attorney would be unable to obtain such information without a validation notice, then the purposes behind Congress's requiring such notice are not served, and liability should be imposed for the debt collector's failure to provide the validation. But if a competent attorney could obtain the information without a validation notice, liability should not be imposed on the debt collector.

²¹⁵ 15 U.S.C. § 1692g(a).

²¹⁶ *Id.* § 1692g(b).

²¹⁷ S. REP. NO. 95-382, at 1699; *see also* Elwin Griffith, *The Fair Debt Collection Practices Act—Reconciling the Interests of Consumers and Debt Collectors*, 28 HOFSTRA L. REV. 1, 29 (1999). There was great concern for those individuals who were being targeted but never actually owed a debt. *See Hearings, supra* note 18, at 68–69 (statement of Karen Berger, Senior Attorney, Queens Legal Services Corporation). Congress heard testimony of one individual who was called by a woman purporting to be a nurse at a local hospital. *Id.* at 68. The individual was told that his eight month old child had been hit by a car. *Id.* Before hanging up, the nurse convinced him that she needed him to provide some important information. *Id.* After racing to the hospital, the individual learned that his child was safely with his wife at home and that the call was just a tactic used by a debt collector to obtain information from the individual while he was in a state of shock. *Id.* at 68–69. The most troubling part of this story? The individual did not owe the debt; the bank where the debt was outstanding provided the wrong name to the debt collection agency. *Id.* at 68.

The Ninth Circuit suggested that the policy consideration of “encourag[ing] the prompt and amicable settlement of debts”²¹⁸ may weigh in favor of not imposing liability on a debt collector who, after receiving a notice of disputed debt from the debtor, communicates with the debtor’s attorney prior to validating the debt.²¹⁹ The court noted that, while this policy does not override provisions of the Act, it is an important consideration when the statutory text is not clear.²²⁰ Where, as here, Congress’s purpose behind the section—to eliminate the problem of debtors paying debts that they do not owe—is not as significant of a concern when the representation is sent to the debtor’s attorney; promoting settlement discussions during the interim period between a debt collector’s receipt of a disputed debt and providing validation would arguably serve Congress’s overall intent to find a balance between fair debt collection and protecting consumers. Therefore, depending on the facts of the case, after determining that the information that would have been contained in the validation notice could have been collected by the attorney from other sources, a court should consider the policy of promoting settlement before imposing liability.

C. Application of the Congressional Intent Theory to the Mrs. Goodman Example from the Introduction

Assuming that Mrs. Goodman’s claims are that the debt collector falsely represented the amount of her debt and continued its collection efforts after receiving her notice that disputed the debt, her claims implicate sections 1692e and 1692g, respectively. Under the two-step inquiry, the first question a court would ask is whether this conduct is of the kind that Congress intended the Act to regulate. To answer that question, the plaintiff must establish that such actions would have violated the Act had they been directed at Mrs. Goodman herself. This is easily done. Section 1692e explicitly prohibits a debt collector from falsely representing the amount of a debt.²²¹ Similarly, section 1692g requires that a debt collector cease all collection

²¹⁸ *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 939 (9th Cir. 2007) (emphasis removed).

²¹⁹ *Id.*

²²⁰ *Id.* at 939 n.9.

²²¹ *See* 15 U.S.C. § 1692e(2).

efforts upon receiving the consumer's writing that the debt is being disputed. Both actions would be subject to the Act's liability had they been directed toward Mrs. Goodman.

Whether these two underlying sections apply to the communications directed at Mrs. Goodman's attorney requires a congressional intent analysis of each violation individually. As to the false representation of the amount of the debt, it is not clear whether Mrs. Goodman's attorney is in a better position to discover such falsity. It would serve Congress's intent to eliminate the abusive practice of sending false representations and promote fair debt collection to impose liability on this debt collector's false claim of Mrs. Goodman's outstanding debt.

Once it is confirmed that the Act applies, the court would then employ the heightened standard of review and determine whether the false statement of the amount owed would lead a competent attorney with the monetary resources of an ordinary consumer to a result. Depending on the surrounding circumstances, it is likely that a court would conclude that a competent attorney would not discover the false representation regarding Mrs. Goodman's outstanding balance. The only information available to the attorney is Mrs. Goodman's belief that the debt collector overstated the amount owed. Without statements or records, her attorney is in no better position to discover the falsity than Mrs. Goodman herself. Therefore, it is likely that a court would impose the Act's liability for the debt collector's misrepresentation.

As for the debt collector's continued collection efforts, the court would need to engage in an important factual discovery. If the collection efforts were the debt collector's attempt to engage in settlement discussions with Mrs. Goodman's attorney and the information that would have been in a validation notice was readily available, the court may choose to not impose liability.²²² If, however, the court determines that the debt collector's intent was not to settle the debt or that the information is not readily ascertainable to a competent attorney, liability would be imposed.

²²² See *supra* Part IV.B.2. There is a countervailing policy concern—namely, to promote the amicable settlement of debts—for imposing liability on a debt collector's technical violation of 15 U.S.C. § 1692g. See *supra* Part IV.B.2.

CONCLUSION

Determining whether communications between debt collectors and debtors' attorneys should be actionable under the Fair Debt Collection Practices Act is a difficult task that has led four circuits to adopt three different approaches. Those three approaches, however, do not provide an easy framework for courts to apply and do not adequately account for Congress's intent behind the Act. The two-step analysis proposed by this Note requires a court to first consider whether it would serve Congress's underlying intent to regulate a debt collector's violative conduct when it is directed toward a debtor's attorney. And, if so, whether such violation, using the standard of a competent attorney with the monetary resources of an ordinary consumer, requires the court to impose liability. By adopting the proposed two-step inquiry, courts will adequately account for Congress's purposes behind the Act, using a standard that is easy to implement.

