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THE SEARCH FOR MORE FAIRNESS IN THE FAIR DEBT COLLECTION PRACTICES ACT

Elwin Griffith*

I. INTRODUCTION

Twenty-five years have elapsed since Congress passed the Fair Debt Collection Practices Act ("FDCPA"). In 1977, Congress introduced a framework for controlling the conduct of debt collectors, since there was ample evidence that collectors were engaging in some questionable practices. Debt collectors were often successful in their assignments because many consumers succumbed to their aggressive collection tactics rather than deal with a litany of unsettling contacts. There was little state legis-


2. A Senate Committee reported as follows:
   Hearings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source of egregious collection practices. While unscrupulous debt collectors comprise only a small segment of the industry, the suffering and anguish which they regularly inflict is substantial. 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. Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.
3. A former debt collector gave his views about industry practice:
   The debt collectors feel that their job is not to find out if the money is owed but rather to collect the money, and as long as the deadbeat approach exists in the debt collection industry, you are going to have abuses. I know that in many, many cases there are legitimate disputes and that some debts are not really owed. But a debt collector who takes time to figure out if debts are owed instead of just collecting them will soon be unemployed.
   The Debt Collection Practices Act: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Fin. and Urban Affairs, 95th Cong. 27 (1977) [hereinafter Hearings] (testimony of William R. Mann, former debt collector, Suitland, Md.).
lation in place to restrict collectors, and thus collectors had many opportunities to run rampant in the marketplace.\(^4\)

In drafting its legislation, Congress had to protect consumers from deceptive practices without unduly restricting the remedies of debt collectors.\(^5\) This was a delicate balance indeed. Even though this legislation has been in place for a long time, there is room for argument about how well it operates. Collectors would probably argue that the statute places too many restrictions on them, while consumers probably think that there are not enough.\(^6\) When all is said and done, collectors still have more than adequate means of collecting their debts. The restrictions in place relate more to the collectors’ methods of operation.\(^7\) There is much to be said for improving the statute in ways that allow consumers to have more flexibility in reacting to collectors’ demands.

This article will first discuss the validation notice that a collector must give to a consumer either in its initial communication, or within five days thereafter.\(^8\) This notice has caused problems be-

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4. A Senate Committee expressed the need for the legislation as follows: The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level.

While 37 States and the District of Columbia do have laws regulating debt collectors, only a small number are comprehensive statutes which provide a civil remedy. As an example of ineffective State laws, of the 16 states which regulate by debt collection boards, 12 require by law that a majority of the board be comprised of debt collectors.


5. The purpose of the FDCPA “is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.” Id. at 1–2.


7. See id.

8. See infra Parts II–III. The validation section provides as follows: Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

1) the amount of the debt;
2) the name of the creditor to whom the debt is owed;
3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy
cause even as collectors continue their collection efforts, they must give consumers information about their right to dispute and seek the verification of the debt within thirty days. The result is that many collectors are unable to maintain the delicate balance between demanding payment and emphasizing the consumer's right to challenge the debt. This article will suggest a solution to this dilemma that respects the rights of collectors and consumers, while allowing the validation notice to do its work.

This article will also address how the statute can clarify the collector's obligation to cease communication when the consumer so requests, and to stop collection activities when the consumer

of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

9. The Senate Committee indicated the importance of the validation provision: Another significant feature of this legislation is its provision requiring the validation of debts. After initially contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed. If the consumer disputes the validity of the debt within 30 days, the debt collector must cease collection until he sends the consumer verification.


10. A debt collector must effectively convey the notice to the consumer. See Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988). Many problems have been caused by the collector's demand for payment within less than thirty days, while giving the consumer notice of his right to dispute the debt within thirty days. See Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131 (4th Cir. 1996); Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).

11. The FDCPA currently requires a collector to cease collection activities only if the consumer disputes the debt, and then only until the collector verifies the debt or obtains a copy of a judgment. See 15 U.S.C. § 1692g(b). The Seventh Circuit explained that "[t]he debt collector is perfectly free to sue within thirty days; he just must cease his efforts at collection during the interval between being asked for verification of the debt and mailing the verification to the debtor." Bartlett, 128 F.3d at 501; see also Smith v. Computer Credit, Inc., 167 F.3d 1052, 1055 (6th Cir. 1999). The Federal Trade Commission has agreed with the courts in its Official Staff Commentary. See Federal Trade Commission Statements of General Policy or Interpretation: Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,109 (Dec. 13, 1988) [hereinafter FTC Commentary]. The FTC staff uses the Commentary to give its interpretations of the FDCPA. Id. at 50,101. However, the Commentary does not have the force of statutory provisions and does not bind the Commission or the public. Id.

12. The FDCPA sets out the collector's obligation as follows:

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—
disputes the debt, at least until the collector can verify it.\textsuperscript{3} If a collector's activities are frozen for a certain period after the initial communication, some problems would be obviated.\textsuperscript{4} It will be suggested that the collector should go further and inform the consumer of the options available to him.\textsuperscript{5}

Finally, there will be a review of the provision relating to a collector's misleading and deceptive statements.\textsuperscript{6} This review will show that many of the problems that arise in this context relate to the collector's drive to succeed with its collection efforts, while complying with the statutory requirements for the validation notice.\textsuperscript{7} The statute can remove the difficulty inherent in the collector's attempt to reconcile the two matters. Many cases show that

(1) to advise the consumer that the debt collector's further efforts are being terminated;
(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.


13. \textit{See id.} § 1692g(b) (2000).
14. There would be no conflict about whether the thirty-day statutory period is a grace period within which the collector cannot pursue the consumer or a dispute period during which the consumer can request verification of the debt. For this strategy to work, the collector would be restricted to giving the basic details about the debt with the validation notice in the initial communication, without making any demands. The collector would be spared the agony of having to draft language that motivates the consumer to pay, while at the same time conveying effectively the right to dispute the debt. \textit{See Savino v. Computer Credit, Inc.}, 164 F.3d 81 (2d Cir. 1998); \textit{Bartlett}, 128 F.3d at 497; Terran v. Kaplan, 109 F.3d 1428 (9th Cir. 1997); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991).

15. Although the FDCPA requires the debt collector to cease collection while it is verifying the debt, there is no statutory requirement for the collector to notify the consumer that such an event will occur if the consumer disputes the debt. \textit{See 15 U.S.C. § 1692g(b).} The same may be said about the collector's obligation to cease communication at the consumer's request. \textit{See id.} § 1692c(c) (2000). The consumer would be in a much stronger position if he knew that he could issue a "cease communication" directive to the collector. The collector can inform the consumer about that without much difficulty.

16. \textit{See infra} Part VI.A. The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." \textit{Id.} § 1692e (2000). The section then gives sixteen examples of conduct that is in violation thereof. \textit{See id.}

collectors fail in their mission to make the necessary reconciliation. This article suggests how this problem can be solved.

II. THE VALIDATION NOTICE

A. The Statutory Obligation

The FDCPA contains a significant provision that requires a debt collector to obtain verification of any debt that a consumer disputes in writing. It is understandable that Congress wanted

18. In Bartlett v. Heibl, the court recognized that "it is possible to devise a form of words that will inform the debtor of the risk of his being sued without detracting from the statement of his statutory rights." 128 F.3d at 501. The court provided an example of a "safe harbor" letter that would protect collectors in the Seventh Circuit. Id. at 501-02. It is significant that in that letter the court went beyond the statutory requirements by suggesting that the collector should notify the consumer that if the consumer requested proof of the debt, the collector would suspend its collection efforts until it satisfied the consumer's request. Id. at 502. So even though the "safe harbor" letter contained both the collector's demand for payment and the statutory validation notice, it also made clear that the consumer's demand for proof of the debt would put a temporary halt on the collector's activities. See id. at 501-02. The "safe harbor" letter in Bartlett reads as follows:

Dear Mr. Bartlett:

I have been retained by Micard Services to collect from you the entire balance, which as of September 25, 1995, was $1,656.90, that you owe Micard Services on your MasterCard Account . . . .

If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Micard $316 against the balance that you owe (unless you've paid it since your last statement) or call Micard . . . and work out arrangements for payment with it. If you do neither of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over.

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

The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.

Sincerely,

John A. Heibl

Id.

to create a mechanism for consumers to question the validity of a debt. But a debt collector must advise a consumer not only of the consumer's right to seek verification of the debt, but also of other matters relating to the debt. The collector must give the consumer the relevant details required by the validation section either in the initial communication or within five days thereafter.

At first blush, the congressional objective seems laudable enough: make sure that the consumer knows what the debt is about and inform him of his rights to challenge it. The consumer must make that challenge within thirty days after receipt of the debt collector’s notice. In the meantime, the collector can continue pressing the consumer for payment without affecting the validation notice that assures the consumer that he has thirty days to dispute the debt. The collector, therefore, must avoid contradicting or overshadowing the statutory rights that the consumer enjoys under the validation section. This is easier said than done, for debt collectors have had problems in crafting satis-

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20. The Senate Committee reflected its concern: “This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.” S. REP. NO. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699.

21. The collector must inform the consumer of the amount of the debt and the name of the creditor, and provide a statement that the collector will assume the debt to be valid unless the consumer disputes the debt within thirty days. See 15 U.S.C. § 1692g(a)(1)-(3).

22. See id. § 1692g(a).

23. See id. § 1692g(b).

24. There is no statutory restriction on the collector's ability to continue its collection activities. See id. § 1692g. The FTC Commentary agrees that “[a] debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dispute until he receives a notice from the consumer.” FTC Commentary, supra note 11, at 51,109; see also Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997) (holding that collection activity must stop only if the consumer disputes the debt); Sprouse v. City Credits Co., 126 F. Supp. 2d 1083, 1088 (S.D. Ohio 2000); Ditty v. CheckRite Ltd., 973 F. Supp 1320, 1329 (D. Utah 1997); FTC ANN. REP. 2001: FAIR DEBT COLLECTION PRACTICES ACT 11 (2001), available at http://www.ftc.gov/os/2001/03/fdcpaar2000.pdf (last modified March 23, 2001) [hereinafter 2001 FTC ANN. REP.].

25. The Second Circuit gave some guidance in Russell v. Equifax A.R.S. about when a collector’s notice is contradictory or overshadowing:

A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights. It is not enough for a debt collection agency simply to include the proper debt validation notice in a mailing to a consumer—Congress intended that such notice be clearly conveyed.

74 F.3d 30, 35 (2d Cir. 1996); see also Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991); Miller v. Payco-Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991); Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988).
factory collection language that does not detract from the validation message.26

B. The Problem of Contradiction

Congress thought it important for consumers to be able to dispute debts.27 A debt collector should not have any problem communicating that right to a consumer. The difficulty arises when the debt collector wants to impress the consumer with its collection language while explaining the thirty-day dispute period to the customer.28

26. Most courts view a collector's conduct through the eyes of the least sophisticated consumer to determine whether the collector has violated § 1692g. See Smith v. Computer Credit, Inc., 167 F.3d 1052, 1054 (6th Cir. 1999); Terran v. Kaplan, 109 F.3d 1428, 1431–32 (9th Cir. 1997); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 139 (4th Cir. 1996); Russell, 74 F.3d at 36. “[T]he test is how the least sophisticated consumer—one not having the astuteness of a ‘Philadelphia lawyer’ or even the sophistication of the average, everyday, common consumer—understands the notice he or she receives.” Russell, 74 F.3d at 34. It has also been said that the least sophisticated consumer standard is “lower than simply examining whether particular language would deceive or mislead a reasonable debtor.” Swanson, 869 F.2d at 1227. The Second Circuit explained the standard a little more in applying it to a violation of § 1692e: “[I]t (1) ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices, and (2) protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices.” Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993).

In Gammon v. GC Services Ltd. Partnership, 27 F.3d 1254 (7th Cir. 1994), the Seventh Circuit was uncomfortable with the least sophisticated consumer standard and opted instead for the “simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence.” Id. at 1257. The court came up with the term “unsophisticated” because the unsophisticated consumer was not on the last rung of the sophistication ladder like the least sophisticated consumer. Id. Thus under the unsophisticated consumer standard, the court could protect the consumer who is naive or uninformed, while maintaining an element of reasonableness. Id. A little later, the Seventh Circuit admitted in Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996), that “the unsophisticated consumer standard is a distinction without much of a practical difference in application.” Id. at 227.

27. A House Committee reported: “[I]n many cases people who do not even owe a debt in the first place are being harassed by debt collectors virtually without recourse.” H.R. Rep. No. 94-1202, at 5 (1976). Another report reflected the same sentiment: “This bill also protects people who do not owe money at all. In the collector’s zeal, collection efforts are often aimed at the wrong person either because of mistaken identity or mistaken facts.” H.R. Rep. No. 95-131, at 8 (1977).

28. The FDCPA does not prevent the debt collector from continuing its collection efforts during the thirty-day period granted to the consumer for disputing the debt. See supra note 24 and accompanying text. The FTC supported this interpretation in its first advisory opinion on the FDCPA in response to a request from the American Collectors Association, stating “The Commission continues to believe that the thirty-day time frame set forth in Section 809 [15 U.S.C. § 1692g] is a dispute period within which the consumer may insist that the collector verify the debt, and not a grace period within which collection
Perhaps Congress expected too much from debt collectors. A collector usually approaches its assignments with determination. This exuberance drives the collector to demand payment immediately or within a certain number of days, while simultaneously conceding the consumers's right to challenge the debt within thirty days. The statute puts the collector in this quandary by allowing the collector to continue its collection activities unless the consumer requests verification of the debt. The collector, therefore, has the unenviable task of conveying its collection message, while not contradicting or overshadowing the consumer's statutory rights.


29. At the congressional hearings on the FDCPA, one witness provided some insight into the collections industry. He testified: “The business of debt collection agencies is to make money. By being nice, you don’t get anywhere. You must be hard, harsh—not to the point of breaking the law, but you cannot be a nice guy and bring in the money.” Hearings, supra note 3, at 62 (testimony of Hugh Wilson, San Francisco, Cal.).

30. See Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998) (noting that the collector asked for immediate payment); Avila, 84 F.3d at 226 (stating that the collector demanded payment in ten days); Graziano, 950 F.2d at 109 (noting that the collector demanded payment within ten days); Swanson, 869 F.2d at 1225 (noting that the collector threatened the consumer's credit reputation if payment was not made in ten days); Rhoades v. W. Va. Credit Bureau Reporting Servs., 96 F. Supp. 2d 528, 530 (S.D. W. Va. 2000) (noting that the collector demanded immediate payment).

31. Once the consumer lodges his dispute, the collector must “cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment.” 15 U.S.C. § 1692g(b).

32. The collector may find that similar collection language brings different judicial responses. For example, in Savino, the language read: “The hospital insists on immediate payment or a valid reason for your failure to make payment.” 164 F.3d at 85 (emphasis omitted). The court found that the collector’s violation of the Act “consisted of its decision to ask for immediate payment without also explaining that its demand did not override the consumer’s rights under Section 1692g to seek validation of the debt.” Id. at 86. Nevertheless, the court in Powell v. Computer Credit, Inc., 975 F. Supp. 1034 (S.D. Ohio 1997), aff’d, 1998 U.S. App. LEXIS 26797 (6th Cir. 1998), faced the same language and reached a different conclusion. The court saw no problem of overshadowing because it treated the language as providing “two alternatives” to the consumer. Id. at 1043. The consumer could make immediate payment, but if he had a valid reason, he did not have to do so. Id. What is a collector to make of this? This is the kind of challenge that a collector faces in trying to blend the validation notice with its own collection message.
Debt collectors have used different formulations to achieve their objective. In Graziano v. Harrison, the collector threatened legal action unless the consumer paid within ten days. The Third Circuit viewed the collection language as a contradictory demand that prevented the collector from effectively communicating notice about the consumer's rights. The collector's threat of legal action may have tipped the scales in the consumer's favor, but, even in the absence of such a threat, the consumer could have been induced into overlooking the thirty-day period for disputing the debt. The conflict between the time for payment and the time for lodging a notice of dispute sows the seed of confusion in a consumer's mind. If the consumer decides to take the entire thirty-day period to think about disputing the debt, he will question whether he enjoys that luxury if the collection letter stipulates a shorter time for payment. This contradiction induces the kind of confusion that causes problems for a consumer. Even if the time for payment coincides with the time for disputing the debt, there is still room for confusion if the debt collector does not explain how the two time periods relate to each other.

33. 950 F.2d at 107.
34. Id. at 109.
35. Id. at 111.
36. Id. The collector in Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1225 (9th Cir. 1988) had the same problem. Its message read as follows: "IF THIS ACCOUNT IS PAID WITHIN THE NEXT 10 DAYS IT WILL NOT BE RECORDED IN OUR MASTER FILE AS AN UNPAID COLLECTION ITEM. A GOOD CREDIT RATING—IS YOUR MOST VALUABLE ASSET." Id. at 1225. The court viewed the language as an attempt to mislead the consumer into overlooking the validation notice. Id. at 1226. The form invoked a response period that was shorter than the statutory dispute period of thirty days, "promising harm to the debtor who wait[ed] beyond 10 days." Id.
37. In Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997), the Seventh Circuit explained the dilemma:
   The cases that find the statute violated generally involve neither logical inconsistencies (that is, denials of the consumer rights that the dunning letter is required to disclose) nor the kind of literal "overshadowing" involved in a fine-print, or faint-print, or confusing-typeface case. In the typical case, the letter both demands payment within thirty days and explains the consumer's right to demand verification within thirty days. These rights are not inconsistent, but by failing to explain how they fit together the letter confuses.
   Id. at 500.
38. Confusion may come in more than one form. "A contradiction is just one means of inducing confusion; 'overshadowing' is just another; and the most common is a third, the failure to explain an apparent though not actual contradiction . . . ." Bartlett, 128 F.3d at 500.
The debt collector used different language in *Wilson v. Quadrenned Corp.*, and the Third Circuit had a different reaction. Instead of demanding payment within a specific time, the debt collector advised the consumer in the first paragraph of the collection letter: “We shall afford you the opportunity to pay this bill immediately and avoid further action against you.” The court did not interpret the invitation to pay immediately as a demand for payment in less than thirty days. The court viewed the language as merely expressing the collector’s interest in receiving either the consumer’s timely payment or notice of dispute. The collection letter did not elevate one option over the other, but merely left the choice to the consumer.

The *Wilson* court did not see a demand for payment that contradicted the consumer’s right to query the debt. This was surprising because many courts have searched for language of demand or of insistence that counteracts the consumer’s statutory option. The softer language in *Wilson* still mentioned a possible sanction if the consumer did not make immediate payment. It did not explain the further action that could ensue from a failure to pay, but it was sufficient to make the consumer think that he might be not be able to wait out the thirty-day period before con-
testing the debt. The consumer could have avoided further action in Wilson by paying “immediately”\(^48\) and legal action in Graziano by paying “within ten days.”\(^49\) The consumer would likely have been confused about his rights in both cases, yet the Wilson court interpreted the language as merely giving the consumer a choice of either paying or questioning the debt.\(^50\)

In Veillard v. Mednick,\(^51\) the collection letter declared the debt to be “due immediately,”\(^52\) and the court found this language to be the same as requiring the consumer to make immediate payment.\(^53\) This was enough to create confusion in the consumer’s mind about what might happen if the consumer disputed the validity of the debt.\(^54\) There was no explicit demand for immediate payment in the collection notice, but the collector conveyed the message that the consumer’s best interests would be served by resolving the matter as soon as possible.\(^55\) The attraction in Veillard was that there was no specific number of days stipulated for payment that offered a clear contradiction of the thirty-day statu-

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48. 225 F.3d at 352.
49. 950 F.2d 107, 111 (3d Cir. 1991).
50. “225 F.3d at 360–61. It is understandable that a consumer would be able to relate more readily to the difference between a ten-day payment period and a thirty-day dispute period. The least sophisticated consumer might be persuaded that he had a deadline of ten days to act. The Wilson court read Graziano in this light. See Wilson, 225 F.3d at 356. The Wilson court must also have been impressed by the absence of a specific Graziano-type threat of immediate legal action. See id. It found comfort in Burns v. Accelerated Bureau of Collections of Virginia, Inc., 828 F. Supp. 475 (E.D. Mich. 1993), where the collector advised the consumer that it took the account for immediate collection, that time was of the essence, and that payment should be made “today.” Id. at 476. The Burns court interpreted that language as merely sending a message that the collector wanted to collect the debt in a timely manner, without creating a conflict with the thirty-day dispute period. See id. at 477. One wonders how important it was that both the collection message and the validation notice appeared on the same page without screaming headlines and an express threat.
52. Id. at 865. The collection language read: “Your best interest will be served by resolving this matter as soon as possible as our client shows this obligation to be due immediately.” Id.
53. See id. at 869. In Jenkins v. Union Corp., 999 F. Supp. 1120 (N.D. Ill. 1998), the collector asked the consumer to “immediately make payment to or arrangements with [Jerry Montell Pontiac].” Id. at 1132. In Ozkaya v. Telecheck Services, Inc., 982 F. Supp. 578 (N.D. Ill. 1997), the court found that the collection letter overshadowed the validation notice because of confusion produced by the demand to resolve the dispute “quickly.” Id. at 583–84.
54. See Veillard, 24 F. Supp. 2d at 869.
55. Id. at 865. The court saw no distinction between a collector’s demand to “make payment immediately” and the admonition that the obligation was “due immediately.” Id. at 869.
tory period for disputing the debt. Nevertheless, the overriding consideration was the confusion engendered in the consumer’s mind by the urgency of the date for payment. The debt collector’s strategy in these collection cases is to leave the impression that the consumer should pay the debt to avoid problems later. The confused consumer may relent in the face of seemingly overwhelming odds. When that happens, the debt collector has accomplished its objective.

Sometimes a debt collector will insist on immediate action by a consumer that does not equate to an outright demand for payment. In Terran v. Kaplan, the debt collector invited the consumer to call him immediately or he would recommend legal action to his client. The court saw no contradiction between the call for the consumer to communicate with the debt collector and

56. The collector urged payment “as soon as possible” because its client showed the obligation to be “due immediately.” Id. at 865. Cf. United States v. Nat’l Fin. Servs., 98 F.3d 131, 139 (4th Cir. 1996) (demanding immediate payment or payment within ten days); Russell v. Equifax A.R.S., 74 F.3d 30, 32 (2d Cir. 1996) (demanding payment in ten days); Graziano v. Harrison, 950 F.2d 107, 109 (3d Cir. 1991) (threatening action if payment not made in ten days).

57. See Veillard, 24 F. Supp. 2d at 868. The court in Bartlett v. Heibl recognized that the “unsophisticated consumer is to be protected against confusion whatever form it takes.” 128 F.3d 497, 500 (7th Cir. 1997).

58. In Savino v. Computer Credit, Inc., the collector asked for immediate payment or a valid reason for [the consumer’s] failure to make payment.” 164 F.3d 81, 84 (2d Cir. 1998). The problem here was that the collector demanded immediate payment without explaining to the consumer that its demand did not override the consumer’s validation rights under the FDCPA. Id. at 86. The court suggested some reconciliation language:

Although we have requested that you make immediate payment or provide a valid reason for nonpayment, you still have the right to make a written request, within thirty days of your receipt of this notice, for more information about the debt. Your rights are described on the reverse side of this notice.

Our demand for immediate payment does not eliminate your right to dispute this debt within thirty days of receipt of this notice. If you choose to do so, we are required by law to cease our collection efforts until we have mailed that information to you. Your rights are described on the reverse side of this notice.

Id.

The admonition to avoid later problems comes in many forms. See Swanson v. S. Or. Credit Serv., 869 F.2d 1222, 1225 (9th Cir. 1988) (noting that the collector threatened to damage consumer’s credit in ten days); DeSantis v. Roz-Ber, Inc., 51 F. Supp. 2d 244, 251 (E.D.N.Y. 1999) (noting that the collector threatened that if consumer did not pay in full or call to arrange settlement, the collector would not cooperate with consumer); Morgan v. Credit Adjustment Bd., 999 F. Supp. 803, 807 (E.D. Va. 1998) (“To stop further action, pay your account in full to this office.”).

59. 109 F.3d 1428 (9th Cir. 1997).

60. Id. at 1430.
the thirty-day validation notice. The collector had a strategy to confuse the consumer: he wanted action on his collection letter. The sanction for the consumer's failure to make contact was that the collector would encourage the creditor to sue the consumer. Surely the collector did not expect the consumer to call merely for social conversation. If the collection letter had simply invited the consumer to discuss the outstanding debt, the consumer would not have had a reasonable basis for confusion about the accompanying validation notice. Terran offered an appealing variation, since the collector did not demand payment within a specific time that conflicted with the thirty-day validation period. The collector met the challenge by staying away from a forthright demand, but the collector hoped, nevertheless, that this different formulation would leave the consumer in a quandary about the situation.

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61. *Id.* at 1434. The court explained as follows:

The request that the debtor telephone the collection agency does not contradict the admonition that the debtor has thirty days to contest the validity of the debt. This language simply encourages the debtor to communicate with the debt collection agency. It does not threaten or encourage the least sophisticated debtor to waive his statutory right to challenge the validity of the debt.

Id.

62. *Id.* at 1430. The court found it significant that the collector did not demand payment immediately. *Id.* at 1434. That would have created a conflict between such a demand and the consumer's right to challenge the debt within thirty days. *See id.* Some courts look to see whether the collector has threatened the consumer's right to dispute the validity of the debt. *See, e.g.*, United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 139 (4th Cir. 1996) (noting conflicting time periods in the demand for payment and the validation notice); Russell v. Equifax A.R.S., 74 F.3d 30, 32 (2d Cir. 1996) (noting a threat to the consumer's credit record if payment was not made within ten days). If there is no threat to the consumer's right to dispute the debt, it is easier for a court to find that no statutory violation exists. In *Smith v. Computer Credit, Inc.*, 167 F.3d 1052 (6th Cir. 1999), the collector promised to advise the consumer of its "final position regarding the status of [the] account," if the consumer did not pay before the validation period expired. *Id.* at 1053. The court saw no problem with that language because there was no threat to institute legal action and there was no reference to the consumer's credit being damaged if the consumer did not pay by a certain time. *Id.* at 1055. However, when the collector threatens the consumer with the "trouble of litigation" if the consumer does not pay "now," this kind of language dilutes the effect of the validation notice. Baker v. Citibank (South Dakota) N.A., 13 F. Supp. 2d 1037, 1042 (S.D. Cal. 1998).

63. *See 109 F.3d at 1434.*

64. A collector will rely on the difference between an "immediate telephone call" and "immediate payment." *See id.* at 1434. A telephone call may not lead to immediate payment of the debt, and, therefore, the consumer's statutory right to dispute the debt will not be compromised in any way. *See id.* Nevertheless, a collector will still be able to exercise some leverage with the mere promise of "legal action" in the absence of the consumer's response. *See id.* A collector may even suggest to the consumer that he should pay or contact
The statute challenges the debt collector to inform the consumer about the verification procedure and to fashion language that will gently remind the consumer of his obligation to pay. When the collector goes beyond the permissible limits of reconciling the demand for payment with the consumer's validation rights, he creates either an apparent or actual conflict. In Terran, the alternative to the consumer's failure to communicate with the debt collector was the debt collector's resort to legal action.

The option in Vasquez v. Gertler & Gertler, Ltd. was less ominous. The debt collector asked that the consumer show his cooperation by either sending his payment or contacting the debt collector without delay. The collector did not make any demand of the consumer that was inconsistent with the consumer's verification rights. The collector could not have been gentler in its approach—even using the word "kindly" to invite the consumer's attention and cooperation.

65. There was an example of such language in Young v. Meyer & Njus, P.A., 953 F. Supp. 238 (N.D. Ill. 1997), where the letter read: "We have been retained by RNB to commence legal action against you to collect the balance due on the accounts reference above." Id. at 240. The letter then concluded: "[R]emittance in full to us by return mail will close our file." Id. The court saw no contradiction or overshadowing because the reference to "legal action" merely explained the collector's role and the request for payment by "return mail" merely asked for payment to be sent by mail without any time period being set. Id. There was nothing offensive in the collector's communication. See id. The letter did not warn of adverse consequences if the consumer refused to pay within a period shorter than the statutory validation period of thirty days. Id.; cf. Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996); Russell, 74 F.3d at 34; Miller v. Payco-Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991).

66. As the court in Bartlett v. Heibl pointed out, the most common problem is a collector's failure to explain an apparent contradiction. See 128 F.3d 497, 500 (7th Cir. 1997). The court pointed out:

On the one hand, Heibl's letter tells the debtor that if he doesn't pay within a week he's going to be sued. On the other hand, it tells him that he can contest the debt within thirty days. This leaves up in the air what happens if he is sued on the eighth day, say, and disputes the debt on the tenth day. Id. at 501.

67. 109 F.3d at 1430.
68. 987 F. Supp. at 652.
69. Id. at 655.
70. Id. at 658.
71. Id. at 655. The collector's polite approach may have reflected a strategy to disarm
There is nothing objectionable in principle to the encouragement of dialogue between the collector and the consumer. Nevertheless, there is a fine line between dialogue and demand, and many collectors find it difficult to maintain the difference. When there is no precise period set for payment, however, it is more difficult for a consumer to prove that the collector has infringed the consumer's rights of validation. The theory is that a consumer is less likely to be confused unless there is a conflict between the applicable time periods.

C. Overshadowing Language

Collectors not only run into trouble by using contradictory language, but also by overshadowing the validation notice with their own claims. In many cases, a collector puts the validation notice on the back of its collection letter, while demanding payment from the consumer on the front of the letter in large print. Although the FDCPA does not prescribe any particular format or type size for the validation notice, courts have been adept at recognizing the collector's objective in placing the notice in a format that does not invite the consumer's attention.

the consumer, thus encouraging a false sense of security. The language was admirable: "Kindly let me have your immediate attention and cooperation by sending me your payment or contacting me without further delay." Id. The court viewed this as simply providing the consumer with an option: paying the collector or contacting the collector (neither of which imposed a time limit). Id. at 658.


74. The FTC commented on the problem in its 2001 annual report: As presently drafted, the FDCPA does not specify any standard for how the 809(a) [15 U.S.C. § 1692g(a)] notice must be presented to consumers, such as the color and size of the typeface and the location on the collection notice. Attempting to take advantage of this lack of clarity, some debt collectors print the notice in a type size considerably smaller than the other language in the dunning letter, or obscure the notice by printing it on a non-contrasting background in a non-contrasting color.

2001 FTC ANN. REP., supra note 24, at 10.

75. See Miller v. Payco-Gen. Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991) (noting that "screaming headlines, bright colors and huge lettering" overshadowed the validation notice); Swanson, 869 F.2d at 1225-26 (noting that the validation notice was overshadowed by "a bold faced, underlined message three times the size which dominate[d] the
worst mistakes that a collector can make is failing to refer on the front page to the important validation notice that appears on the back of the collection letter.\textsuperscript{76} Similarly, when the collection letter directs the consumer's attention to the reverse side of the letter with contrasting small type, the notice may elude the consumer.\textsuperscript{77} The overriding consideration in these contradiction and overshadowing cases is that the collector must convey the validation notice effectively.\textsuperscript{78} It is not sufficient for the collector to reproduce the statutory language without any thought of its impact on the consumer.\textsuperscript{79} From a collector's perspective, however, it is desirable for the consumer to overlook the validation notice. Therefore, even if there is no actual or apparent contradiction in the collection material, the collector frequently uses some diversionary tactic to steer the consumer away from his right to challenge the debt.

The collector took a novel approach in\textit{Martinez v. Law Offices of David J. Stern, P.A.}\textsuperscript{80} The collector brought suit against the consumer with a sixteen-page document that began with the summons and complaint and ended with the note and mortgage.\textsuperscript{81} The first page of the document warned the consumer that he might lose his wages, money, and property if he did not respond to the summons on time.\textsuperscript{82} The validation notice did not appear until the eighth page.\textsuperscript{83} The strategy was to emphasize the first-page threat while obscuring the notice by placing it later in the document.\textsuperscript{84} The collector must have thought itself on safe ground
because it gave the consumer thirty days to answer the summons and the same period to seek verification of the debt.\textsuperscript{85} There was no actual conflict here, but the collector faced the same hurdle that plagues collectors generally—the reconciliation challenge.\textsuperscript{86} It was not enough to include the statutory language in the collection materials.\textsuperscript{87} The collector should have conveyed its message effectively by relating its claim for payment to the consumer's validation rights.\textsuperscript{88} When the collector uses a summons as its initial communication, it can exert even greater pressure on the consumer.\textsuperscript{89} At this stage the collector has gone beyond the threat to sue.\textsuperscript{90} Once the suit begins, the consumer may feel that his only option is to respond to the complaint.\textsuperscript{91} He may be encouraged in this view because the collector does not have to give any notice that a consumer's objection will require the collector to suspend collection activities.\textsuperscript{92} If the consumer is unaware of the effect of

\textbf{WARNING FROM THE COURT\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{85}}}} on the first page of the Initial Communication would cause a least sophisticated consumer to heed the warning and choose to answer the complaint. This threatened consequence set out in bold language leads the court to the inescapable conclusion that a least sophisticated consumer would not fully understand or appreciate the FDCPA Notice.}

\textit{Id.} at 534.

\textsuperscript{85} \textit{Id.} at 535.

\textsuperscript{86} "[I]f two or more messages would deliver mixed guidance to a least sophisticated consumer as to his rights under the FDCPA, reconciling language ought to be utilized to provide effective notice." \textit{Id.} at 536; \textit{see also} Bartlett v. Heibl, 128 F.3d 497, 501-02 (7th Cir. 1997).

\textsuperscript{87} Martinez, 266 B.R. at 536.

\textsuperscript{88} \textit{Id.} at 536.

\textsuperscript{89} It has been recognized that it is better to send the validation notice separately from the summons in order to avoid confusion. \textit{See} NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION \textsection 5.7.2.1.3 (4th ed. 2000 & Supp. 2001) [hereinafter NCLC]. There is no problem with this approach because the collector may give the consumer the notice either before serving the summons, or if the summons is the first communication, within five days thereafter. \textit{See} 15 U.S.C. \textsection 1692g(a) (2000). A summons can be a first communication because the FDCPA covers attorneys who regularly engage in debt collection activity, even when the activity consists of litigation. Heintz v. Jenkins, 514 U.S. 291, 299 (1995). So when such an attorney serves a summons or similar document on the consumer, that document is a communication under the FDCPA. \textit{See id.} at 298-99.

\textsuperscript{90} In Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991), the collector threatened to take legal action unless the debt was resolved. \textit{Id} at 111. In Martinez, the collector actually commenced suit. 266 B.R. at 530. It seems, therefore, that the consumer would be under greater pressure in those circumstances. \textit{See Martinez}, 266 B.R. at 534.

\textsuperscript{91} In Martinez, the defendant's counsel was at a loss to explain to the court what "the effect would have been on the time frame to file a responsive pleading to the complaint if the Debtor had requested validation of the debt pursuant to the FDCPA notice." 266 B.R. at 534. This was evidence of confusion created by the collector's initial communication. \textit{Id.}; \textit{see also} Bartlett, 128 F.3d at 501.

\textsuperscript{92} \textit{See} 15 U.S.C. \textsection 1692g(b). Subsection (a) contains the information that the collector must give to the consumer, including the consumer's right to dispute the debt, but the ob-
his disputing the debt, he may not be motivated to assert his rights, and the collector will benefit from the consumer's ignorance.

A collector has an even greater opportunity to confuse a consumer in a Martinez-type case when the validation notice is combined with the collection demand. The collector can confront the consumer with threatening language on the first page of the summons and place the validation language much later in the document, so that there is a good possibility that the consumer may never get to that material. He may be so overcome with the original shock about what can happen if he does not pay that he may not be particularly excited about the chance to dispute the debt. The validation notice is overpowered by the collector's threatening language on the summons, and the consumer has a greater chance of overlooking the information about his verification rights. Furthermore, the collector increases pressure on the consumer once it initiates its suit. The consumer may wonder about the utility of querying the debt when the documentation requires him to file a legal response to the collector's claim.

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93. It is the dire consequences suggested on the first page of the document that would move the least sophisticated consumer to heed the warning and respond to the summons and complaint. See Martinez, 266 B.R. at 534.

94. It has been said that "[t]he summons and the FDCPA validation rights notice are two wholly separate dispute resolution systems. Separate notices avoid confusing the consumer." NCLC, supra note 89, § 5.7.2.1.3. The consumer's notice of dispute should stop the collector's lawsuit, at least until the collector has provided the necessary information about the debt. See, e.g., Taylor v. Fink, No. 93-C4941, 1994 U.S. Dist. LEXIS 16821, at *11-12 (N.D. Ill. Nov. 23, 1994).

95. It all relates to a matter of confusion. In Martinez, the defendant's counsel had an answer to the court's question about what a least sophisticated consumer should have done since the collector's communication required an answer to the complaint within thirty days, but also gave the consumer thirty days to dispute the debt. See 266 B.R. at 535. The learned counsel advised the court that the consumer could both respond to the complaint and dispute the debt. Id. It was not surprising that the court viewed counsel's answer as an admission that the communication was confusing. See id. The consumer would respond to the complaint while disputing the debt only if he was uncertain about his rights. See id.; see also Bartlett, 128 F.3d at 500 ("It would be better if the courts just said that the unsophisticated consumer is to be protected against confusion whatever form its takes.").

96. If there is great pressure on the consumer when the collector merely threatens legal action, one can imagine what it is like for the consumer when he is dealing with an actual lawsuit. "[L]ogic suggests that a least sophisticated consumer would be more compelled to obey the fulfillment of a threat than the threat itself." Martinez, 266 B.R. at 534.
Overshadowing can come in different forms. The whole idea is to make a consumer uncertain about his rights. The collector achieved that result in *Greer v. Shapiro & Kreisman* when it included the usual statutory language, but also warned that "[l]egal proceedings [had] been instituted or [would] be instituted as soon as possible *notwithstanding this Notice.*" It would be natural for a consumer to wonder whether he should even bother to raise questions about the debt if the collector had already initiated, or was about to initiate, litigation. Unlike the consumer in *Wilson,* the consumer in *Greer* did not have any options because legal proceedings were in process or imminent. The collector had carefully drafted its letter so that the reference in the first paragraph to legal proceedings was calculated to catch the consumer's eye. The pressure was immediate, since the consumer wanted to do something to stop the legal proceedings.

The collector always wants the consumer to believe that there is no option other than payment. The collector can accomplish that objective by insisting that the consumer pay immediately in order to avoid trouble. The consumer must then deal with that threat. When the consumer confronts the troublesome demand first, he is usually in no condition to relate that to a subsequent validation notice. This missing link between the demand and the notice serves the collector well, for the consumer feels that the

99. *Id.* at 681.
100. *See id.* at 684.
101. In *Wilson v. Quadramed Corp.*, 225 F.3d 350 (3d Cir. 2000), the Third Circuit viewed the consumer as having two options, neither of which overshadowed the other. *Id.* at 356. The consumer could either pay the debt and avoid further action, or dispute the debt within thirty days. *See id.* There was no language encouraging the consumer to pay immediately rather than dispute the debt. *See id.*
102. See *Greer*, 152 F. Supp. 2d at 681.
103. *See id.* As the court rightly pointed out, "[t]he juxtaposition of Plaintiff's statutory rights with an indication that legal proceedings had been instituted (or will be instituted as soon as possible) would make the least sophisticated consumer uncertain as to her rights." *Id.* at 685. It was this uncertainty that motivated the court in *Bartlett v. Heibl* to provide some guidance to collectors in reconciling the consumer's validation rights with the collector's urge to continue its collection activities. *See* 128 F.3d 497, 501 (7th Cir. 1997).
demand for payment has an urgency to it that cannot be diluted by any later language.105

In Miller v. Payco-General American Credits, Inc.,106 the collector made its demand for immediate payment on the front in large white letters set off against a red background, as contrasted with the ordinary validation notice on the back.107 The collection letter also demanded immediate action from the consumer.108 That demand and the placement on the validation notice made for an offensive combination that was calculated to mislead the consumer into overlooking the notice.109

In Young v. Meyer & Njus, P.A.,110 the collection letter invited payment by return mail so that the collector could close out the file.111 The collector's demands and the validation notice appeared together on the same page and in the same typeface.112 The court found this approach acceptable because the collector's reference to legal action and payment by return mail did not leave the impression that the consumer had to pay immediately to avoid problems later on.113 Furthermore, the request for payment was not isolated in oversized capital letters that would induce the consumer to overlook the statutory validation notice.114 The collection letter passed scrutiny this time only because there were no objectionable features that distracted the consumer's attention from

106. 943 F.2d at 482.
107. Id. at 483.
108. Id.
109. See id. at 484.
111. Id. at 240.
112. See id.
113. Id. The court viewed the collection letter as merely explaining its purpose, informing the consumer of his validation rights, and giving instructions for payment. Id. This was to be distinguished from other cases like Miller and Adams v. Law Offices of Stuckert & Yates, 926 F. Supp. 521 (E.D. Pa. 1996), where the demand was for immediate payment. Miller, 943 F.2d at 484; Adams, 926 F. Supp. at 527.
114. Young, 953 F. Supp. at 240. Compare id. at 240 (using collection language and validation notice in same type size), with Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1225 (9th Cir. 1988) (using collection language in bold-faced type much larger than validation notice).
the validation notice or that concentrated on the collector's threats and demands.\textsuperscript{115}

A collector does not have to resort to large print or screaming headlines to divert the consumer's attention. It can provide an incentive in other ways for the consumer to neglect the validation notice. In \textit{Harrison v. NBD Inc.},\textsuperscript{116} the collector made a discount offer to the consumer which expired before the thirty-day validation period.\textsuperscript{117} The court did not see any overshadowing here, since the collector merely encouraged the consumer to settle the debt for a lesser amount.\textsuperscript{118} If the consumer did not accept the settlement offer, he still had thirty days to dispute the debt in the original amount, though the discount offer would have lapsed.\textsuperscript{119} The court was not bothered by the fact that the collector's offer expired before the thirty-day validation period.\textsuperscript{120} The collector's overture was not like a demand for immediate payment that, if ignored, might cause trouble for the consumer.\textsuperscript{121} There was no indication that the collector was trying to convey the impression that the consumer had to dispute the debt in less than thirty days to preserve his rights.\textsuperscript{122} Nevertheless, the effect of the collector's offer on the consumer could only be assessed in terms of the actual discount that was on the table.

\textsuperscript{115} Young, 953 F. Supp. at 240; cf. Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996) (threatening suit if payment not received within ten days); Miller, 943 F.2d at 484 (placing collection language in oversized type); Rabideau v. Mgmt. Adjustment Burea, 805 F. Supp. 1086, 1093 (W.D.N.Y. 1992) (placing validation notice on reverse side of collection letter).

\textsuperscript{116} 968 F. Supp. 837 (E.D.N.Y. 1997).

\textsuperscript{117} Id. at 848.

\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} See id. Troublesome demands may take several forms. In \textit{Beeman v. Lacy, Kateen, Ryen & Mittleman}, 892 F. Supp. 405 (N.D.N.Y. 1995), the collection letter urged: "Please immediately send your remittance . . . or communicate with us to explain your failure to do so," \textit{Id.} at 407–08. The court found that this language left the consumer with the impression that the consumers had to act immediately if they wanted to dispute the debt. \textit{Id.} at 412. Nevertheless, collection language that is calculated to encourage the consumer's payment does not by itself overshadow a validation notice. \textit{See Anthes v. Transworld Sys. Inc.}, 765 F. Supp. 162, 170 (D. Del. 1991).

\textsuperscript{122} \textit{See Harrison}, 968 F. Supp. at 848. The court explained that the expiration of the discount offer before the thirty-day validation period did not provide evidence of overshadowing. \textit{Id.} The collector can continue its collection efforts during the validation period and such efforts can include an offer to settle for a lesser amount; but the expiration of such an offer simply means that the original debt remains. \textit{Id.}
If the consumer faces a large debt, he may be persuaded to forgo his statutory rights in order to avoid a contest later. It depends on the relation of the discount to the alleged debt. It may be reasonable to treat a significant discount as an offer too good to refuse and thus, the equivalent of a demand for payment that cannot be overlooked.\footnote{123} The consumer has to weigh the available options. He can be attracted to one side or the other by the package that is being offered; however, he is usually in no position to make a true assessment of the alternatives if one feature of the transaction overshadows the others.\footnote{124} He may face the same turmoil when he encounters energetic demands for immediate payment as he does when he gets excited over a severe reduction in the debt that will clear his name. This matters little unless the collection language dilutes the message that the consumer still has his validation rights. If a court perceives a collector's language to be threatening, it is more likely to find that the language overshadows the validation notice. In \textit{Desantis v. Roz-Ber, Inc.},\footnote{125} the collector urged the consumer to “remit payment in full” or to contact the collector in order to arrange settlement.\footnote{126} The consumer was expected to comply if he wanted the collector’s “cooperation.”\footnote{127} The collection letter demanded the consumer’s immediate attention.\footnote{128} The court viewed this combination of terms as an effective way of sending an implicit threat that the collector

\footnote{123. If the collector is merely trying to settle the matter by offering a tempting discount on the original debt, this should not run afoul of the FDCPA. Under this scenario, the consumer can pay the lesser amount or dispute the debt. The difficulty arises when the collector creates doubt in the consumer’s mind about the utility of a validation notice if the consumer does not pay up immediately. \textit{See generally} United States v. Nat’l Fin. Servs., Inc., 98 F.3d 131 (4th Cir. 1996) (holding that collection letter conflicted with validation notice on deadlines and overshadowed the notice with larger typeface); Borcherding-Ditloff v. Corporate Receivables, Inc., 59 F. Supp. 2d 822 (W.D. Wis. 1999) (finding that second letter overshadowed validation notice when letter was sent only fourteen days after first letter and did not say how it affected consumer’s validation rights).}


\footnote{125. 51 F. Supp. 2d 244 (E.D.N.Y. 1999).}

\footnote{126. \textit{Id.} at 248.}

\footnote{127. \textit{Id.}}

\footnote{128. \textit{Id.}}
would not cooperate with the consumer if the latter did not pay immediately.129

Although the contested language in Desantis was above the validation notice on the same page and even in the same type size, the court was bothered by the capitalized language that introduced the collector’s demand for payment.130 It called for the consumer’s “IMMEDIATE ATTENTION.”131 The court believed this language to be unnerving to the consumer.132 Standing alone, this phrase should have caused the court some concern with respect to its overshadowing effect, but the collector took pains also to highlight the importance of the validation notice.133 Its caption received the same prominence, for the collector introduced the notice as an “IMPORTANT NOTIFICATION.”134 One wonders, therefore, whether the court paid too much attention to the collector’s device for demanding the consumer’s attention.

Although the Desantis court recognized that a threat may not be necessary for the “contested language to overshadow or contradict the validation notice,” it found the language to be threatening.135 What was the nature of that threat? The consumer had to pay or risk losing the collector’s cooperation.136 It seemed questionable whether the consumer knew what the collector was talking about.137 The court translated the consumer’s options as payment of the debt or facing the “wrath” of the collector.138 The collector’s letter demanded that the consumer either make pay-

130. 51 F. Supp. 2d at 250.
131. Id.
132. See id.
133. See id.
134. Id. at 246. The court was concerned with “the threatening nature of the contested language.” Id.
135. Id. at 250.
136. Id. The collection letter read as follows:
   You may not have intentionally neglected this obligation, but it is seriously past due and demands your IMMEDIATE ATTENTION!
   If you would like our cooperation then:
   1. Remit payment in full to this office or,
   2. Contact the undersigned in person or by telephone and arrange settlement.
Id. at 248.
137. See id.
138. Id. at 251.
ment in full or contact the collector to arrange settlement. It was this aspect of the letter that distinguished Desantis from Terran, where the collector asked the consumer to telephone its collection assistant immediately. In Desantis, the consumer’s call was supposed to arrange settlement terms. It was a channel for immediate payment. The decision about overshadowing should have rested, therefore, on the conflict between the collector’s demand for such payment and the consumer’s rights under the validation notice.

D. The Subsequent Notice

Even when a collector follows the rules in its initial validation notice, it can nevertheless cause confusion with a subsequent collection notice. The collector may dutifully advise the consumer about the thirty-day period for disputing the debt and then send another notice during that period urging the consumer to pay. That second letter may overshadow the validation notice when it warns the consumer that failure to respond to the first letter may compel the collector to seek further remedies. In such a situation, the second letter sent within the original thirty-day period may have the effect of diluting the consumer’s statutory rights so carefully delineated in the first letter and the consumer is left unsure of his options.

In Monokrousos v. Computer Credit, Inc., the collector provided the usual validation notice in its first collection letter. In

139. See id. at 248.
140. Terran v. Kaplan, 109 F.3d 1428, 1430 (9th Cir. 1997). The relevant language in Terran read as follows: “Unless an immediate telephone call is made to J SCOTT, a collection assistant of our office . . . , we may find it necessary to recommend to our client that they proceed with legal action.” Id. The court could find no way to tie the call for telephone contact to a demand for immediate payment. Id. at 1434.
141. 51 F. Supp. 2d at 248.
142. See id.
143. Perhaps the court was influenced by the collector’s threat of not giving cooperation to the consumer if the consumer failed to make contact. The question is whether a consumer would be affected by this pledge of non-cooperation. The court obviously thought so. See id. at 251. The court found the options in Desantis more onerous than those in Terran. Id.; see also NCLC, supra note 89, § 5.7.2.3 n.984.
a subsequent letter, the collector advised the consumer that if the consumer did not pay before the thirty-day period expired, the collector would inform the consumer of its final position on the account.\textsuperscript{147} What the collector gave with one hand it took away with the other. The collector obviously wanted to shake up the consumer and grew impatient despite the original promise that the consumer had thirty days to dispute the debt.\textsuperscript{148}

It is not unusual for a collector to take this approach, confident that strict adherence in the first letter to the statutory requirement of giving the proper validation notice would not be affected by a subsequent attempt to impress the consumer with the urgency of the matter. The collector attempted such a strategy in \textit{Trull v. GC Services Ltd. Partnership},\textsuperscript{149} when it sent a second letter to the consumer.\textsuperscript{150} The collector advised, even though the original thirty-day validation period had not yet expired, that it assumed that the debt was valid since the consumer had ignored the collector's first notice.\textsuperscript{151} The court held that the consumer had stated a claim because the consumer had thirty days to dispute the debt, and it was problematic for the collector to suggest a presumption of the debt's validity when the consumer still had time to lodge his objections.\textsuperscript{152}

The collector's objective in such cases is to put the consumer in a quandary about the collector's plans. If the collector uses a subsequent collection notice to make demands upon the consumer, there is a good chance that the consumer will succumb to the later communication if there is no reconciling language to explain the collector's overtures.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 234.
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{See id.} The collector sent three letters dated March 27, April 10, and April 24. The April 10 letter gave the consumer fourteen days to pay, but the validation period allowed the consumer until April 26 to do so. \textit{Id.}
\item \textsuperscript{149} 961 F. Supp. 1199 (N.D. Ill. 1997).
\item \textsuperscript{150} \textit{See id.} at 1201.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{See id.} at 1205. The collector thought that its motion to dismiss would be sustained \textit{because of the language} it used below the validation notice on the back of the collection letter: "The demands for payment in this letter do not reduce your rights to dispute this debt, or any portion thereof, and/or request verification within the thirty-day period (30) as set forth above." \textit{Id.} The court framed the issue as to whether the collector's statement about the assumption concerning the correctness of the debt overshadowed and contradicted the validation notice. \textit{Id.}
\item \textsuperscript{153} \textit{See generally} \textit{Russell v. Equifax A.R.S.}, 74 F.3d 30 (2d Cir. 1996) (providing con-
III. RESOLVING STATUTORY AMBIGUITY

A. Oral or Written Notice

A collector must use the validation provision to inform the consumer about the salient details of the transaction and the consumer's right to obtain verification of the debt. If the collector does not use the initial communication to disclose the necessary information, it must do so in writing within five days thereafter. The statute does not require the initial communication to be in writing, therefore, it is theoretically possible for a collector to fulfill the statutory obligation by including all the pertinent information in the first oral communication. It is not clear why the subsequent communication must be written if the initial one may be oral. If the ultimate objective is to ensure that the consumer has an accurate record of the information relating to the loan and also a clear understanding of his verification rights, then it is important for the collector to inform the consumer in writing. A literal reading of this language suggests that the ini-
tial contact may be oral, but that a collector must follow up in writing with the details of the debt. The collector has an advantage in using an initial oral communication to give the consumer the necessary information: there are no statutory guidelines to ensure an effective communication. Unless the collector is determined to satisfy itself that the consumer understands the details, some of the information is liable to fall between the cracks, and the consumer may be even more confused than when he has a collection letter that contains conflicting or overshadowing language. If the mission is to give the consumer a chance to avoid invalid claims, it is critical for the consumer to have a full command of the facts. The collector should not expect a consumer to recall all of the information covered in the validation notice if the collector does not convey it effectively. Furthermore, allowing oral notice creates a climate for disagreement between the collector and the consumer about the details of the notice that the collector gives in trying to fulfill the statutory requirements. There is a lurking ambiguity in the statutory language: the question is whether the "information" that the collector may include in the

ready paid.


159. See S. REP. NO. 95-382, at 4.  

160. In this connection the following observation is relevant: "[O]ral notice allows a sharp operator to excuse its failure to provide any validation notice by later falsely asserting that it had given notice orally. The result is a swearing contest with the possibility that a sharp operator may be the more skilled witness." NCLC, supra note 89, § 5.7.2.1.2; see also Laurie A. Lucas & Alvin C. Harrell, An Unholy Trilogy: Unresolved Issues Under the Federal Fair Debt Collection Practices Act, 51 BUS. LAW. 949, 953–54 (1996).  

161. If the purpose of the validation notice is to deal with mistaken claims by requiring the collector to verify the debt, oral notice does little to facilitate matters. A collector has to convey too much information to the consumer in the validation notice for oral notice to be effective. See NCLC, supra note 89, § 5.7.2.1.2.  

162. The FTC's annual report created some doubt about the accommodation of oral notice in the statutory scheme. See 2001 FTC ANN. REP., supra note 24. In discussing the standard of clarity to be applied to the validation notice, it said:

Section 809(a) of the Act [15 U.S.C. § 1692g(a) (2000)] requires debt collectors to send a written notice to each consumer within five days after the consumer is first contacted, stating that if the consumer disputes the debt in writing within thirty days after receipt of the notice, the collector will obtain and mail verification of the debt to the consumer.

Id. at 9.  

The FTC could have been more precise on the nature of the first contact. The report suggests that the first contact should not include the validation notice. See id. The congressional report was no more enlightening when it said that "[w]ithin 5 days after contacting a consumer, the debt collector must in writing notify the consumer of the amount of the debt and the name of the creditor and advise the consumer of the debt collector's duty to verify the debt if it is disputed." S. REP. NO. 95-382, at 8.
initial communication refers to “written notice” or to the details covered in subsections (1) through (5).\(^{163}\) It is arguable that the information required by § 1692g(a) is contained in those subsections only and that the manner of communicating that information is a different matter.\(^{164}\) The “information” is not the written notice, but it is safe to say that the written notice must contain the “information.”\(^{165}\) The information that the collector must convey begins with the “amount of the debt” and ends with the statement relating to the consumer’s right to know the name and address of the original creditor.\(^{166}\)

The Federal Trade Commission (“FTC”) agrees that the collector may provide oral notice of the validation rights in its first contact with the consumer.\(^{167}\) The current language is a product of several congressional amendments, none of which referred to oral notice.\(^{168}\) Nevertheless, the interpretation that supports oral notice results from the fact that a “communication” need not be written\(^{169}\) and the information that the statute requires the col-

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163. As presently drafted, the written notice must contain the relevant “information” only if the “initial communication” does not. 15 U.S.C. § 1692g(a). The section does not require the initial communication to be written. See id. That is why the ambiguity persists. See NCLC, supra note 89, § 5.7.2.1.2.

164. If the written notice must contain the statutory “information” then one would expect the initial communication to contain the same information if the collector is to be relieved of the responsibility of sending out a notice within five days of that communication. This is confirmed by the statutory language that the collector must send a written notice with the relevant information unless “the . . . information is contained in the initial communication.” 15 U.S.C. § 1692g(a).

165. The collector must send the consumer a written notice containing the items listed in subsections (1) through (5). See 15 U.S.C. § 1692g(a)(1)-(5).

166. See id.

167. See FTC Commentary, supra note 11, at 50,108. The FTC Staff uses the Commentary to publish its interpretations of the FDCPA. The Commentary is not a formal advisory opinion and therefore does not bind the Commission or the public. Id. at 50,101.

168. One early bill set the stage for the current ambiguity: “Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless such is contained in the initial communication, send the consumer a written notice containing the following information.” Fair Debt Collection Practices Act: Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking, Housing and Urban Affairs on S. 656, S. 918, S. 1130 and H.R. 5294, 95th Cong. 636 (1977).

When the FDCPA was finally passed, the word “such” was replaced by “the following information.” See NCLC, supra note 89, § 5.7.2.1.2. The question that must be answered is whether Congress intended to clarify the ambiguity posed by use of the word “such,” which could have referred either to “written notice” or “the following information.” Id.

169. See 15 U.S.C. § 1692a(2) (2000). The FDCPA gives the following definition: “The term ‘communication’ means the conveying of information regarding a debt directly or indirectly to any person through any medium.” Id.
lector to give the consumer is likewise not restricted to a written communication, unless that communication follows within five days of the initial contact. It is submitted, therefore, that the statute should be amended to require the collector to provide the information in writing in the interest of effective communication. Otherwise, a consumer is at a serious disadvantage in terms of understanding his rights concerning the collector's demands. Serious problems arise even when the collector's notice is written, especially when the collector makes no attempt to explain how its demand for payment relates to the consumer's thirty-day period for querying the debt.

Although a consumer must dispute the debt in writing if he wishes the collector to verify the debt, a mere oral notice of dispute will suffice to remove any assumption about the debt's validity. One would have hoped for some consistency on this point in the subsections, so that a consumer's oral communication would impose an obligation on a collector to come forward with details of the transaction. Nevertheless, the consumer's oral notice of dispute creates other obligations for the collector. A consumer can hold a collector liable for failure to include the consumer's side of the story when the collector feeds information about the debt to a credit reporting agency. In this sense, disputing the debt orally does serve some function in the final analysis.

170. See id. § 1692g(a) (2000).
171. If Congress was concerned about reducing a collector's expense by allowing a collector to include the validation notice in its initial communication, it could have required that the notice be included in the first written communication with the consumer. This would make it unnecessary to amend the definition of "communication." See id.
172. The verification of the debt helps the consumer to avoid invalid claims. But a consumer will have a difficult time assimilating oral notice of his validation rights because of the amount of information involved. See NCLC, supra note 89, § 5.7.2.1.2.
173. The FTC expressed its concern about the clarity of the validation notice. See 2001 FTC ANN. REP., supra note 24, at 10. However, that concern related to a written validation notice when the consumer has the material before him for review. See id. If the FTC is troubled by the different color and size of the typeface of a validation notice, it should be even more alarmed by an oral notice that a collector can manipulate to suit the degree of comprehension that he wants a consumer to attain.
176. See 15 U.S.C. § 1692g(a)(4) (requiring the consumer to dispute a claim in writing).
177. See Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998) (holding that collector's failure to communicate that a debt is disputed violates 15 U.S.C. § 1692e(8) (2000),
However, the statute does create a scenario where a collector can have notice that a consumer is contesting the debt, but the collector still does not have to verify it. Thus, a collector can continue its debt collection activities fully aware of the consumer’s position, but have no obligation to delve any further into the matter.

It was this incoherency that convinced the Third Circuit in *Graziano v. Harrison*\(^\text{178}\) that subsection (a)(3) of 15 U.S.C. § 1692g requires the consumer to lodge his notice of dispute in writing.\(^\text{179}\) In reaching that conclusion, the court ignored the plain meaning of the statute in order to bring some consistency to subsections (a)(3)–(5).\(^\text{180}\) There is something to be said for such consistency, but only congressional action can provide this remedy.\(^\text{181}\) Since Congress recognized that there would be instances when consumers would be unable to contest a debt in writing, it is strange indeed that Congress was not more flexible in allowing oral notice when a consumer seeks verification of the debt.\(^\text{182}\) It would be more important for a consumer to satisfy himself about the details of the debt if he has any doubts at all, and that right would be more meaningful if it encompassed both oral and written disputes. A consumer might have a better chance of proving his case if there is written evidence of his objections to the collector’s claim, however; that is so even with respect to subsection (a)(3) of 15 U.S.C. § 1692(g) relating to the presumption of the debt’s validity.\(^\text{183}\)

\(^{178}\) 950 F.2d 107 (3d Cir. 1991).

\(^{179}\) Id. at 112.

\(^{180}\) See id. When a statute is clear and unambiguous, the plain meaning rule prevents a court from going outside the statute to give a different interpretation. See 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46:01 (6th ed. 2000); see also Heintz v. Jenkins, 514 U.S. 291, 297 (1995) (reasoning that courts must follow FDCPA’s plain language).

\(^{181}\) There is no evidence that the difference in the subsections resulted from inadvertence. See Elwin Griffith, *The Meaning of Language and the Element of Fairness in the Fair Debt Collection Practices Act*, 27 U. TOL. L. REV. 13, 50 (1995). The oral notice of dispute carries some weight in that it disputes the validity of the debt and a collector must indicate to third parties that the debt is disputed when such parties contact the collector about the consumer. See 15 U.S.C. § 1692(e)(8); Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998).

\(^{182}\) The writing requirement appears in both subsections (a)(4) and (a)(5). See 15 U.S.C. § 1692g(a)(4)–(5) (2000).

\(^{183}\) See id. § 1692g(a)(3). There will always be a problem of proof when a consumer disputes a debt orally. But that problem does not go away in subsection (a)(3) relating to
The Graziano court should not have overlooked the plain meaning of the statute in requiring written notice of the consumer's objections. Nevertheless, there is also something to be said for a congressional review of this legislation to determine whether it is justifiable to allow oral communication in subsection (a)(3), but to insist on a writing in subsections (a)(4) and (a)(5). A consumer should be aware that a writing is more desirable from his perspective; thus, he should be motivated to create a lasting record to support his position. It may be difficult, however, for a consumer to resort to a writing. Does this mean that a consumer must therefore forgo his right to demand more details of the contested debt? If the validation section is there for the consumer's benefit, the consumer should not be denied the section's benefit merely because of the lack of a writing. This approach would be consistent with the definition of "communication." The key is for the consumer to let the collector know that he is contesting the debt.

B. Staying with the Basics

The collector must not impose any documentary requirements on the consumer with respect to the method of disputing the debt. The statute merely requires the consumer to notify the collector that the debt is in dispute, and the consumer does not have to
provide any documents in order to exercise his rights. Although the collector may be inclined to volunteer the kind of documentation that a consumer may find helpful in disputing the debt, there is a possibility that a consumer may be misled into thinking that other documents not mentioned are unsuitable for the consumer. In the same vein, a collector should not require a consumer to indicate the nature of the dispute. This exceeds the statutory requirement for disputing the debt.

As a part of the validation notice, the collector promises that at the request of the consumer it will obtain “verification of the debt or a copy of a judgment;” the difficulty arises when the collector has not obtained a judgment against the consumer but refers to “a copy of a judgment.” The collector is arguably on solid ground in using the statutory language, but there is nothing difficult about clarifying such language to make the point that the collector can only produce a copy of a judgment if the creditor has already obtained one. The present statutory language leaves the consumer wondering if there is an existing judgment. If the consumer believes that the collector has a judgment in hand, the consumer may be less enthusiastic about challenging the collector. It is possible for a consumer to discern a difference between

188. See Castro, 2000 U.S. Dist. LEXIS 2618, at *10–11. “The least sophisticated consumer confused by [a collection letter] might choose not to notify the collection agency that she disputes a debt’s validity because she cannot or will not provide ‘suitable’ documentation within 30 days.” Id. at *11.
191. See Moore v. Ingram & Assoc., Inc., 805 F. Supp. 7, 9 (D.S.C. 1992) (finding that notice about non-existent judgment is not misleading if it tracks the statutory language); Check Cent. of Or. v. Barr (In re Barr), 54 B.R. 922, 925–26 (Bankr. D. Or. 1984); FTC Commentary, supra note 11, at 50,105.
193. The Beeman court made the point:

[Where an exact quotation of the language of the statute would confuse rather than enlighten the consumer, no policy reason supports mandating exact quotation. A plain reading of the statute as well as plain logic compel the conclusion that a debt collector can not be required to disclose that it will furnish a copy of a judgment which does not exist.]
the collector's promise to obtain verification of the debt or a copy of a judgment. The statutory language suggests that the debt has already been identified, but there is no certainty about the judgment. The consumer cannot be sure about the message. He cannot necessarily quarrel with the collector if the latter follows the statutory scheme. The collector seems to have the latitude to inform the consumer that it will satisfy the consumer's curiosity in one way or another: either through verification of the debt or by providing a copy of a judgment. The fault does not therefore lie with a cautious collector that toes the statutory line. It is up to Congress to relieve collectors from the strictures of this formula. The notice to the consumer should make the point that the collector will obtain a copy of a judgment if one has been obtained against the consumer. There is no point in leaving the matter to pure conjecture.

C. Ceasing Collection Activities

A collector must cease its collection efforts until it is able to satisfy a consumer's request for validation of the debt. It is noteworthy that a collector does not have to tell a consumer about this statutory mandate. It seems logical that the collector's obligation to cease its collection activities should be included in subsection (a)(4) dealing with verification of the debt. The collec-

892 F. Supp. at 410.

194. The problem here is that the least sophisticated consumer is supposed to understand the subtle difference between the debt and a judgment. By using the definite article in relation to "debt," the draftsmen obviously meant to refer to something already identified. The same cannot be said about a judgment. Congress may have intended to give the collector an option and may have expected the collector to do the right thing. But if the collector has not recovered any judgment, it is questionable whether a collector must "dissemble and assert a falsehood in its letter." Stojanovski, 783 F. Supp. at 324.


196. See cases cited supra note 191. But see supra notes 172–73.

197. See cases cited supra note 191. But see supra notes 172–73.

198. The statute tells the collector that the collector must provide "a statement that... the debt collector will obtain verification of the debt or a copy of a judgment against the consumer" and then mail that information to the consumer. 15 U.S.C. § 1692g(a)(4).


200. Compare id., with id. § 1692g(a).

201. The collector's obligation to cease collection activities flows from the consumer's intervention to dispute the debt. Subsection (a)(4) seems to be the logical place to cover the suspension of collection efforts because the collector would have to include the matter in the statement required by the subsection. It appears as though Congress went out of its way to isolate the collector's obligation to cease collection pending verification of the debt.
tor's statement must inform the consumer that the collector will mail a copy of the verification, but it leaves to subsection (b) the statement of the collector's duty to suspend activities until the collector has fulfilled its obligation under subsection (a)(4). It would be more useful for the consumer to know that contesting the debt will result in an immediate freeze on the collector's activities until the collector mails the relevant information to the consumer. If a consumer is aware of this interim protection, he will have more incentive to dispute the collector's claims.

Sometimes a consumer may dispute a claim even though he is already aware of the basis for it. The consumer's knowledge does not affect the collector's obligation to verify the debt; the statute does not impose any preconditions on the consumer's right to challenge the collector. Obviously, Congress wanted to establish some meaningful mechanism for ensuring that a collector would not pursue the wrong consumer or try to recover incorrect amounts. The method Congress chose would have greater impact if the collector's notice to the consumer included information concerning the collector's obligation to cease its collection efforts until it gives the consumer the relevant information about the debt. This does not give the consumer an unfair advantage over a collector. A collector may be seen to have a comparable advan-

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See id. § 1692g(b).

202. Compare id., with id. § 1692g(a)(4).

203. In Spencer v. Hendersen-Webb, Inc., 81 F. Supp. 2d 582 (D. Md. 1999), the consumer disputed the debt in writing but the collector thereafter sent a letter offering to settle the debt. Id. at 593. The court deemed this a violation of § 1692g(b) because the settlement offer constituted an attempt to collect the debt. Id. If the consumer disputes the debt, he ought to be well aware of the consequences; he need not respond to the collector until the latter has verified the debt. A collector's settlement offer may be tempting enough to lessen the consumer's resolve to join battle with the collector.

204. See id. at 583 (stating that the FDCPA does not create any exceptions for a verification sent to the consumer before the consumer disputes the debt); Johnson v. Statewide Collections, Inc., 778 F.2d 93, 100 (Wyo. 1989) (finding that the consumer's prior notice of the debt does not affect the collector's obligation to verify debt once the consumer disputes it).

205. With respect to the validation of debts, a Senate report gave some idea of the importance of a significant feature of the legislation when it disclosed the following: "This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." S. REP. NO. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699.

206. The logical question is whether Congress wanted to emphasize the collector's obligation to cease collection once the consumer disputes the debt. This runs counter to the FDCPA's underlying purpose. See 15 U.S.C. § 1692 (2000). The "cease collection" directive is such an intimate part of the validation process that one would have expected it to be part of the collector's statement to the consumer required by subsection (a)(4).
A collector can theoretically try to recover a debt and, when the consumer asks for verification, the collector can simply stop its collection efforts instead of verifying the debt, although the collector promises in its validation notice to obtain verification. The availability of this option serves as a sound rationale for including the cessation mandate with the verification language in subsection (a)(4). A consumer should be made aware of the possibilities. The verification language says that the collector will obtain verification of the debt, but omits the consequences of the collector's failure to do so. The consumer should have a complete picture about the verification process.

While the statute elicits the collector's promise to obtain verification, it allows the collector to sidestep that requirement by suspending collection activities. The collector can explain confidently that it satisfies the statute by taking that approach. If it is the collector's practice to return to the creditor all files that have attracted a verification request from the consumer, the consumer has no cause for complaint once the collector complies with the statutory mandate to choose between the two available options. This scheme is very much like the collector's promise to provide verification of the debt or a copy of a judgment. There is something to be said for requiring a collector to do what it promised.

The statute ought to be clarified to make the point that a collector should attempt to obtain verification of the debt. If the collector makes an invalid demand, then there can be no verification, and the consumer will know where he stands. A consumer should not be left in the lurch, not knowing whether another collector will pursue him later about the same matter. After all, a

207. See Jang v. A.M. Miller & Assoc., 122 F.3d 480, 484 (7th Cir. 1997); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1031-32 (6th Cir. 1992).
209. Jang, 122 F.3d at 484.
210. See id.
211. Id.
212. It is acknowledged that a collector may not always be able to obtain verification. But the query is whether the collector has an obligation to try under the circumstances. In the absence of such an obligation, a collector can very well employ a strategy that dictates the collection of unverifiable debts. If the consumer challenges the debt, the collector can merely suspend its activities without any consequences. See 15 U.S.C. §§ 1692g(a)(4), 1692g(b).
213. There is nothing in the statute that prevents a subsequent collector from picking up the challenge when a consumer requests verification from a previous collector. See id.
consumer's request for verification from one collector does not bind any other collector. The original collector's abandonment of the matter will not necessarily prevent some other collector from taking up the creditor's cause. It is preferable, therefore, for the consumer's challenge to have a definitive answer. The suspension of the collector's pursuit will not have any effect on the ultimate issue of the debt's validity. If there is no resolution on that score, the consumer's query will have no impact.

IV. A MATTER OF DEFINITION

A. The Meaning of Communication

There is another problem with the FDCPA that should concern any consumer. The definition of the term "communication" is the "conveying of information regarding a debt." The question that arises from that definition is whether a collector has to mention the debt specifically in order for its contact to be called a "communication." The FTC takes the position that specific mention of the debt is necessary, thus taking a rather narrow view of the definition. The result of that narrow construction is that a collector can leave a message for a consumer with a third party without violating the prohibition against a collector's contact with others, as long as the collector does not mention the debt. The Commentary's construction causes more problems: a collector's attempt to obtain information about a consumer's location begins with a communication (assuming, therefore, a specific reference to the debt), but yet the relevant § 1692b(2) forbids the collector's

The consumer in Jang alluded to this possibility, but the court did not see it as a problem because the collector had indeed provided verification. See 122 F.3d at 484. Nevertheless, in its concluding sentence, the court advised that "it [was] for Congress, and not the courts, to close this alleged loophole in the FDCPA." Id. See supra note 213 and accompanying text.

214. See supra note 213 and accompanying text.

215. Perhaps the statute puts the collector in an untenable position by requiring the commitment that it "will obtain verification." 15 U.S.C. § 1692g(a)(4). It may be more palatable to require a collector to seek verification. The debt may never have existed; therefore, the collector will not be able to obtain the requested verification. Nevertheless, the collector should have an answer for the consumer.

216. 15 U.S.C. § 1692a(2) (2000). The FDCPA's definition is as follows: "The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium." Id.

217. See FTC Commentary, supra note 11, at 50,101.

218. See NCLC, supra note 89, § 4.6.1.
statement that the consumer owes any debt. Such a narrow construction would also allow a collector to communicate with a third party at least once, in contravention of the underlying principle behind the FDCPA that a consumer’s troubles should not be broadcast to the world. The FDCPA gives a collector limited opportunities to ascertain the consumer’s whereabouts without delving into the consumer’s affairs. The definition of “communication” should therefore not be construed narrowly because it does violence to the FDCPA and creates intolerable inconsistencies.

A collector has the right to acquire location information about a consumer from a third party. The statute requires the collector to state that it is “confirming or collecting location information.” This use of the term “confirming” suggests that a collector is expected to have some notion of the consumer’s whereabouts when it calls the third party for help. It is difficult for a collector to confirm information that it does not have. Nevertheless, the FTC takes the position that a collector “may not call third parties under the pretense of gaining information already in his possession.” The collector may indeed have information about the consumer, but it may not be correct. The collector will not necessarily know what it has until it makes that third-party call. As a result, the collector may obtain information that alters the data in its files.

The statute may be improved by clarifying that the collector can communicate with third persons to acquire, confirm, or correct location information relating to the consumer. If the collector contacts a third party for the purpose of acquiring location information, it is incongruous for the collector to state that it is confirming information that it seeks to acquire. It is understandable that a collector will want to confirm information that may be outdated, the statutory allowance for a third party contact is rea-

219. Id.
220. See 15 U.S.C. § 1692b (2000). The reason for the collector’s contact is that the collector is trying to collect a debt. If the collector can enjoy immunity from the FDCPA’s restrictions by merely avoiding the discussion of the debt while seeking other relevant information, the statute will have failed to achieve its purpose. After all, it is the conveying of information either “directly” or “indirectly” that matters. See id. § 1692a(2).
221. See id. § 1692b.
222. Id § 1692b(1).
223. FTC Commentary, supra note 11, at 50,104.
224. See NCLC, supra note 89, § 5.3.6.
sonable in such circumstances. But the contact in such a case would not be strictly to acquire location information, because the collector already has information about the consumer that may or may not be current. The collector will be able to answer that question only after the third party has shared what he knows.

A collector may not contact a third party for location information more than once, unless the third party requests it or the collector reasonably believes that the original information is incorrect or incomplete. The natural tendency is for the collector to return to the third party if it believes that the latter subsequently obtained correct or complete information. The third party may have the correct information, but it is another question whether he may be willing to part with it. The restriction on the collector does not take this factor into account in determining whether more than one communication is justified. Unless the collector's conduct borders on harassment, the collector can justify its repeated calls on the third party because of its reasonable belief that the third party now has the relevant data. The "more than once" standard may not be sufficient to rein in a determined collector that wants to find the consumer. Perhaps the statute requires a limit on the other side. A collector cannot communicate more than once under ordinary circumstances, but the collector's zeal to obtain correct or complete information should not lead to multiple third-party contacts.

226. The problem in this context is that the Official Staff Commentary cautions a collector not to call third parties "under the pretense of gaining information already in his possession." FTC Commentary, supra note 11, at 50,104. If the collector has good reason to doubt the accuracy of the information, then the collector should be free to make the inquiry about the consumer's location.
228. The statute only requires the collector's reasonable belief that the person's earlier response was wrong and that the person now has the right information. Id. The person may have given a wrong response earlier, but had the correct information all along. The collector may want to persevere for as many times as it thinks will lead to success, short of harassment.
229. See id.
230. Congress may merely have intended the collector to have one more shot at obtaining location information once the person in possession thereof has the correct or complete story. See id.
231. The problem may be avoided by authorizing a second contact when the erroneous or incomplete information becomes correct or complete. By doing so, Congress would leave no doubt that it contemplated no more than a single contact under ordinary circumstances.
A collector who is seeking location information may identify his employer only if the third party requests him to do so.\textsuperscript{232} If the employer's name suggests that the employer is in the collection business, the employee has to confront the statutory prohibition against using any language in a communication that indicates that the employer is in such a business.\textsuperscript{233} It would seem that the employee is duty bound to identify his employer on request, and that the employee has no flexibility in giving accurate information about that even if the name readily discloses the nature of the employer's business.\textsuperscript{234}

B. Preventing Contacts with the Consumer

The statute restricts the kind of contacts that a collector can have with a consumer.\textsuperscript{235} A collector cannot communicate with a consumer at any unusual time or place, or at any time or place "known or which should be known as inconvenient to the consumer."\textsuperscript{236} This knowledge standard contains both subjective and objective components. The "should be known" aspect imposes some obligation on the collector to inquire about the consumer's individual circumstances.\textsuperscript{237} This should pose no difficulty in the ordinary case, for the creditor will usually have a complete file on the consumer that will provide relevant details about the consumer's circumstances.

The statute takes a similar approach to contacts at the consumer's place of employment.\textsuperscript{238} It prohibits a collector's communication with a consumer at the place of employment if the collector knows, or has reason to know, that the consumer's employer objects to such contact.\textsuperscript{239} The understanding is that a collector has a duty to inquire about the employer's policy in this regard, and it is no excuse for a collector to make contact when it can ascertain relevant information from the creditor, the consumer, or

\begin{footnotesize}
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  \item \textsuperscript{232} 15 U.S.C. § 1692b(1).
  \item \textsuperscript{233} See id. § 1692b(5).
  \item \textsuperscript{234} See NCLC, supra note 89, § 5.3.6.
  \item \textsuperscript{237} NCLC, supra note 89 § 5.3.2.4.
  \item \textsuperscript{238} See 15 U.S.C. § 1692c(a)(3).
  \item \textsuperscript{239} Id.
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others in a position to know the employer’s position. The nature of the employer’s business may be a sufficient indicator of the flexibility that a collector has in trying to contact the consumer. In this regard, the collector that “has reason to know” about the employer’s policy is bound not to communicate with a consumer at a time that “should be known” as inconvenient to the consumer.

A collector is also restrained from contacting a consumer who is represented by an attorney with respect to the debt in question. This statutory restriction does not impose an objective “should be known” standard like that prescribed in the subsections relating to contacts in the workplace or contacts at inconvenient times. The collector must know about the attorney’s representation. This raises a question about a collector’s duty to ask a creditor whether an attorney is involved. A collector may have reason to know, without actually knowing, about an attorney. The statutory language suggests that the collector must have actual knowledge of the attorney’s representation.

The FTC takes the position that a creditor’s knowledge will not automatically be imputed to the debt collector. The court in Mi-care v. Foster & Garbus took refuge in that language and read it as sanctioning imputation in certain circumstances. A collector may know from the credit application that the consumer holds a kind of job that cannot tolerate routine calls. This should lead the collector to further inquiry if it wants to make collection calls to that consumer. See FTC Commentary, supra note 11, at 50,104.

240. A collector may know from the credit application that the consumer holds a kind of job that cannot tolerate routine calls. This should lead the collector to further inquiry if it wants to make collection calls to that consumer. See FTC Commentary, supra note 11, at 50,104. 241. 15 U.S.C. § 1692c(a). 242. Id. § 1692c(a)(2). 243. Contact at the workplace is forbidden if the collector “knows or has reason to know” about the prohibition. Id. § 1692c(a)(3). 244. Contact is forbidden at a time or place “known or which should be known to be inconvenient.” Id. § 1692c(a)(1). 245. Id. § 1692c(a)(2); see also Burger v. Risk Mgmt. Alternatives, 94 F. Supp. 2d 291, 293 (N.D.N.Y. 2000); Herbert v. Monterey Fin. Servs., Inc., 863 F. Supp. 76, 79 (D. Conn. 1994). 246. Compare 15 U.S.C. § 1692c(a)(3) (having reason to know of employer’s prohibition), with id. § 1692c(a)(2) (knowing of attorney representation). 247. See Burger, 94 F. Supp. 2d at 293; Degonzague v. Weiss, Neuren & Neuren, 89 F. Supp. 2d 282, 284 (N.D.N.Y. 2000); Hubbard v. Nat’l Bond and Collection Assocs., Inc., 126 B.R. 422, 427 (D. Del. 1991), aff’d without opinion, 947 F.2d 935 (3d Cir. 1991); FTC Commentary, supra note 11, at 50,104. 248. See FTC Commentary, supra note 11, at 50,104. 249. 132 F. Supp. 2d 77 (N.D.N.Y. 2001). 250. Id. at 80–81. The court explained: Although the FTC Commentary states that knowledge will not “automati-
tor that establishes a practice of not inquiring about attorney representation can safely attract files from creditors without running afoul of the statutory restriction. The Micare court viewed this situation as one that required it to attribute the creditor's knowledge to the collector. The collector could be held blameless only if a creditor withheld the information about representation after the collector asked the pertinent questions in accordance with its own procedures.

It is doubtful that the FTC intended to create such confusion by using the word "automatically" in this context. If a creditor knows about the representation and fails to tell the collector about it, there is no statutory basis for asserting that the collector also knows the facts. It is one thing to hope that the creditor will convey all material information when it turns over a file to the collector. It is quite another to pin the failure to do so on the collector. The danger in imposing a greater obligation on the

\[\text{Id. at 80.}\]
\[\text{Id.}\]
\[\text{See id.}\]
\[\text{See FTC Commentary, supra note 11, at 50,104.}\]
\[\text{A creditor has a duty when turning over a file to his debt collector to convey all of the material facts regarding the claim. The law mandates that the debtor not be contacted when he has legal counsel. A creditor who has actual knowledge of such fact cannot retain a debt collector and withhold such information to contravene the FDCPA's intent.}\]

107 F. Supp. 2d 166, 169.

The court imputed the creditor's knowledge to the collector, contrary to the FDCPA's plain language requiring the collector to know about the legal representation. The collector's ability to ascertain the attorney's name and address is not relevant until the collector knows about the representation. See 15 U.S.C. § 1692c(a)(2) (2000).

256. In Degonzague, the consumer's claim was that the collector "knew or could have reasonably ascertained that [the consumer] was represented." 89 F. Supp. 2d at 283. The consumer sent notice about his attorney to the creditor, not the collector, but the creditor did not tell the collector anything about an attorney's involvement. 89 F. Supp. 2d at 284. The court held that the creditor's knowledge could not be imputed to the collector. Id. The assertion that the collector "could have reasonably ascertained" that the consumer had a
collector in this context is that it would equate a collector's actual knowledge with its reason to know. Congress recognized the distinction in § 1692c(a)(3) when it forbade communication at a consumer's place of employment if a "collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication." It is arguable indeed that a collector should have a greater responsibility to ascertain the facts relating to a consumer's legal representation. The present language does not impose that obligation and, therefore, a collector should not have to investigate the matter to avoid the imputation of knowledge from the creditor.

The court in *Powers v. Professional Credit Services* put the responsibility on the collector because the creditor had actual knowledge of the consumer's legal representation, but did not share the information with the collector. The court was concerned that "permitting creditors to engage in such a limited disclosure would utterly eviscerate the protections afforded debtors by the FDCPA." While the creditor was actually in the wrong for not disclosing the representation to the collector, the language that prohibits communication with a consumer controls the conduct of collectors and not that of creditors. Therefore, while it may be less than admirable for a creditor to withhold information from a collector, one must look somewhere other than § 1692c(a)(2) for a remedy against the creditor.

lawyer confused the requirements of §1692c(a)(2). The collector must know about the representation and must have "knowledge of," or be able to "readily ascertain" the attorney's name and address. 15 U.S.C. § 1692c(a)(2). Ascertaining the attorney's name and address follows the collector's knowledge of the representation. See id.

258. Id. § 1692c(a)(3).
259. See NCLC, supra note 89, § 5.3.3. Some courts still recognize an affirmative duty to inquire. The court in *Micare v. Foster & Garbus* believed that "imputing knowledge to the debt collector when it does not inquire whether the debtor is represented by counsel gives full meaning both to the FTC Commentary and to the protections afforded by the FDCPA." 132 F. Supp. 2d at 81.

261. Id. at 169.
262. Id.
264. The court in *Powers* reacted to the creditor's knowledge in this way: "[T]o allow a creditor to hire a debt collector after receiving actual knowledge that the consumer has retained legal representation for that debt and then withhold knowledge of this representation from the debt collector would blatantly circumvent the intent of the FDCPA." 107 F. Supp. 2d at 168. If the creditor withholds information, it is hard to see how the collector
There is also no hope for the application of constructive knowledge, as the court in *Hubbard v. National Bond & Collection Associates, Inc.* 265 was careful to point out.266 In *Hubbard*, the consumer had reason to be optimistic that the court would find the collector knowledgeable about the consumer's situation.267 After all, the consumer had filed for bankruptcy and an attorney had represented her in that proceeding.268 The consumer believed that the collector should have discussed the bankruptcy and thus ascertained the attorney's name.269 The court rejected the notion of constructive knowledge in this context, explaining that even if the collector knew about the bankruptcy, there was no way that the previous representation would have satisfied the knowledge requirement with respect to the debt in dispute.270

It is noteworthy that the statute forbids communication if the collector knows that "the consumer is represented by an attorney," but then the collector must either have "knowledge of, or [be able to] readily ascertain, such attorney’s name and address."271 This suggests, therefore, that there is a difference between knowing about a consumer's legal representation and being able to ascertain the attorney's name and address.272 It is defensible for a collector to communicate with a consumer despite its knowledge of the consumer's representation if the collector cannot readily ascertain the attorney's name and address. There may not be many situations where a collector will find it difficult to obtain further information about the attorney, but the statute recognizes the possibility.273

If a collector knows about legal representation on one debt, it does not mean that he is presumed to know about representation on other debts of the same consumer.274 The limiting language

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266. Id. at 427.
267. See id. at 424–25.
268. Id.
269. Id. at 427.
270. Id.
272. See id.
273. See id.
274. *Hubbard*, 126 B.R. at 427; see also Graziano v. Harrison, 950 F.2d 107, 113 (3d
"with respect to such debt" suggests that a consumer must prove the collector's knowledge of the debt in question and that there is no blanket application of knowledge about a consumer's debts. There is nothing to prevent a consumer from notifying a collector that a specific attorney represents him on all debts, and if the consumer does that, then the collector will know of attorney involvement.

A collector may communicate with a consumer if the consumer's attorney does not respond to the collector within a reasonable time. The interpretation of the term "reasonable time" is subject to debate, and the FDCPA does not offer a solution by using that terminology. Elsewhere in the statute Congress requires action within a certain time; therefore, it is not clear why it chose to leave this matter unsettled so that collectors and attorneys do not have firm guidance about when they must act. Thus, the statute should be amended to provide for a definite time period for an attorney to respond to a collector's communication.

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Cir. 1991); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456, 1464 (C.D. Cal. 1991); FTC Commentary, supra note 11, at 50,104.


276. See FTC Commentary, supra note 11, at 50,104.


280. An earlier bill prohibited a debt collector from communicating with a consumer "while the consumer is represented by an attorney, unless the attorney fails to respond within seven calendar days to any communication from the debt collector relating to the consumer." H.R. 11969, 94th Cong. § 804 (a)(1)(D) (1976). Obviously, Congress thought that "a reasonable period of time" was an improvement over "seven calendar days." Compare id., with 15 U.S.C. § 1692c(a)(2).
V. SEIZING THE INITIATIVE

A. Stopping Communication

Consumers have a powerful weapon to stop debt collectors from communicating with them.\textsuperscript{281} A consumer can send a written notice to the collector that he refuses to pay the debt or that he wants the collector to cease communication.\textsuperscript{282} Once that happens, the collector may no longer communicate with the consumer except in very limited circumstances.\textsuperscript{283} The collector may thereafter make contact only to notify the consumer that it is terminating its collection efforts, that it may invoke specified remedies that the collector ordinarily invokes, or that it intends to invoke a specified remedy.\textsuperscript{284}

It is unfortunate that a collector does not have to inform the consumer that the latter has the right to terminate the collector’s contact.\textsuperscript{285} A consumer who knows that he has this right is more likely to make this demand on the collector, and it would give a consumer more time to decide what course of action he wants to take in response to the collector’s notice.\textsuperscript{286} If the statute required a collector to combine the notice about the collector’s obligation to cease communication in this context with the notice of a collector’s obligation to abandon its collection efforts when the consumer disputes a debt, a consumer would be in a better position to defend himself. If a collector is going to contact a consumer about a debt, there is nothing inconsistent about requiring it to include these options in the notice, especially when the validation notice now requires a collector to inform the consumer about the right to dispute the debt.\textsuperscript{287} The “cease communication” directive does not prevent the collector from pursuing its remedies against

\textsuperscript{281} See 15 U.S.C. § 1692c(c).
\textsuperscript{282} See id.
\textsuperscript{283} See id.
\textsuperscript{284} Id.
\textsuperscript{285} A consumer needs all the help he can get in protecting himself from a relentless collector. S. REP. NO. 95-382, at 2 (1977), \textit{reprinted in} 1977 U.S.C.C.A.N. 1695, 1697. When a default occurs, it is frequently because of some unforeseen event. \textit{Id.} at 3. The consumer’s ability to stop the collector’s communication is an important weapon in the collection process.
\textsuperscript{286} Compare 15 U.S.C. § 1692g(b) (2000), with \textit{id.} § 1692c(c).
\textsuperscript{287} Id. § 1692g(a)(4).
the consumer. The consumer should be informed, however, of his right to be protected from possible harassment, especially if the consumer is convinced that the collector has no basis for its claims. Although the consumer may be willing to concede liability for part of the debt, the collector may persist with its claim for a larger amount in anticipation of the consumer’s eventual surrender. If the consumer knows that he can keep the collector at bay under these circumstances, he stands a better chance of settling the matter.

The collector’s failure to call attention to the consumer’s right to stop the collector’s communication can be especially advantageous to the collector if there is more than one debt involved. The consumer may feel the pressure under such circumstances and may rush into an irresistible bargain with the collector to make the collector go away. If the consumer asks a collector to cease communication about a certain debt, this request will not affect the collector’s conduct in relation to the consumer’s other debts. The consumer must be careful, therefore, to repeat his request if he wishes to restrict the collector’s activities on another debt. This is a reasonable interpretation because the reference in §

288. Id. § 1692c(c)(1)–(3) (2000). The collector still has the following options to communicate further with the consumer:

(1) [T]o advise the consumer that the debt collector’s further efforts are being terminated;
(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

289. An injunction or consent decree may sometimes require a collector to notify consumers of this right to stop the collector’s contacts. See NCLC, supra note 89, § 5.3.8.1 & n.215.

290. See 15 U.S.C. § 1692c(c) (stating that “[i]f a consumer notifies a debt collector in writing that the consumer refuses to pay a debt... the debt collector shall not communicate with the consumer with respect to such debt”) (emphasis added). This language suggests that the collector’s obligation to cease communication must relate to a specific debt. See id.

291. If the consumer has requested the collector to cease communication because of the consumer’s inability to pay the first debt, there is little likelihood that the consumer will make payment on a subsequent debt. Nevertheless, if there is a time lag between the two debts, it may be even more desirable for the consumer to make another request of the collector to stop communicating. A similar observation may be made when a collector knows that a consumer is represented by an attorney on one debt. The collector is not prevented from contacting the consumer about other debts until it knows that the consumer is represented on those debts. See Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991).
1692c(c) to "such debt" indicates that the statute covers the specific debts to which the consumer objects. The consumer's reaction to that debt, therefore, does not control the collector's conduct in other matters.

A consumer must not be ambiguous when he notifies the collector to cease communicating. In *Shrestha v. State Credit Adjustment Bureau, Inc.*, the consumer conveyed his wishes this way: "I would be ever grateful to you, if you please do not take any action against me. I would appreciate if you please write me with your advice or give me a call." The consumer was obviously soliciting the collector's sympathy and did not want the collector to extend its collection efforts. The consumer did not expect the collector's call to cause him more distress. He was merely looking for a way out of his predicament, but the language he used in seeking the collector's help was a far cry from that which should be contained in a "cease and desist" letter. The lesson to be learned from this is that a consumer does not have to be particularly polished in asserting his right to stop the collector's communication. He does not even have to explain his reason for exercising that right. In many cases, the consumer's attorney will take over the matter, and the consumer will not have to worry any longer about confronting the collector. But even if there is no attorney in the picture, the statute offers the consumer an opportunity to get some respite from the collector by merely notifying the collector in writing that the consumer refuses to pay or that he wants the collector to cease further communication. The consumer's willingness to exceed the simple statutory notice will sometimes cause more harm than good.

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292. See 15 U.S.C. § 1692c(c); see also NCLC, supra note 89, § 5.3.8.1.
293. See NCLC, supra note 89, § 5.3.8.1.
295. Id. at 146 (alteration in original).
296. Id. The consumer's letter invited the collector to respond to the consumer with advice. Id. This was different from asking the collector to cease communicating. See id.
297. See 15 U.S.C. § 1692c(c). The consumer may simply indicate his refusal to pay the debt or ask the collector to stop communicating. See id. However, a consumer may find it helpful to explain his individual circumstances and to document any unfair practices which the collector has utilized in trying to collect the debt.
298. See id.
B. Making One Last Contact

The purpose of § 1692c(c) is to allow a consumer to halt a collector’s contacts with the consumer; at least two of the exceptions give the collector one last chance to notify the consumer of the remedies that it ordinarily pursues, or the specific remedies that it intends to pursue.\textsuperscript{299} The collector cannot, however, use the statutory exceptions as a cover to continue its collection activities.\textsuperscript{300} This strategy would certainly dilute the effectiveness of the consumer’s demand to cease and desist. The provision seems to give a collector a last clear chance to impress the consumer with the seriousness of its collection efforts, and in that sense it may serve a salutary purpose in bringing the matter to a satisfactory conclusion.\textsuperscript{301} A consumer will certainly welcome a notice that the collector is terminating its collection efforts. The consumer will hardly experience the same elation about information relating to the collector’s remedies. Sometimes there is disagreement over whether a collector’s last contact with a consumer relates to invocation of a remedy or constitutes further communication about the debt.

The issue arose in \textit{Lewis v. ACB Business Services, Inc.}\textsuperscript{302} when a collector sent the consumer a letter after the consumer’s request that the collector cease communication.\textsuperscript{303} The question was whether the collector’s letter was a demand for payment or a notice about the collector’s remedies.\textsuperscript{304} The court viewed the letter as a settlement offer and therefore, a remedy, because it was the collector’s attempt to settle the debt with the consumer without litigation.\textsuperscript{305} The collector invited the consumer to select one of the payment options listed in the letter and make payment accordingly.\textsuperscript{306} The consumer was welcome to call the collector if he had any questions.\textsuperscript{307}

\textsuperscript{299} Id. § 1692c(c)(2)-(3).
\textsuperscript{300} See FTC Commentary, \textit{supra} note 11, at 50,105 (“A debt collector’s response to a ‘cease communication’ notice from the consumer may not include a demand for payment, but is limited to the three statutory exceptions.”).
\textsuperscript{301} See 15 U.S.C. § 1692c(c).
\textsuperscript{302} 135 F.3d 389 (6th Cir. 1998).
\textsuperscript{303} Id. at 395.
\textsuperscript{304} Id. at 398.
\textsuperscript{305} Id. at 399.
\textsuperscript{306} Id. at 396.
\textsuperscript{307} Id.
The court was persuaded that the collector's noncoercive settlement offer was consistent with the language and purpose of the FDCPA.\textsuperscript{308} It is open to question, however, whether the collector fell within the exception by its attempt to facilitate payment through the available payment plans.\textsuperscript{309}

It depends, of course, on whether the collector was dealing with a specified remedy that it normally invoked to recover its debt.\textsuperscript{310} The plain fact is that the collector offered the consumer an opportunity to pay the debt, and the collector thought that it would make it more palatable for the consumer to do so by setting out the available options.\textsuperscript{311} This was not a communication that was intended to inform the consumer about the collector's usual procedures for recovering the debt.\textsuperscript{312} It was closer to a last ditch effort to get the consumer to see things in a different perspective; if not, the collector would not have been discussing "payment arrangements" and "payment plans."\textsuperscript{313}

The court in \textit{Lewis} was impressed by the fact that the letter could not be construed as an example of collection abuse.\textsuperscript{314} But

\textsuperscript{308} \textit{Id.} at 398.

\textsuperscript{309} It is true that a collector may give the consumer notice of all the remedies that it normally pursues and the statute does not require the collector to invoke any specific remedy. \textit{See} 15 U.S.C. § 1692c(c)(2) (2000). But one may legitimately view the collector's communication as a disguised demand for payment. The collector wanted to give the consumer "an opportunity to pay [the] debt." \textit{Lewis}, 135 F.3d at 396. The payment plans offered by the collector were the mechanism for achieving that objective. \textit{See id.} The collector therefore wanted to facilitate the consumer's response to the demand for payment. \textit{See id.}

\textsuperscript{310} \textit{See} 15 U.S.C. 1692c(c).

\textsuperscript{311} \textit{Lewis}, 135 F.3d at 396. The collector may notify the consumer about the remedies it normally invokes. 15 U.S.C. § 1692c(c)(2). The collector does not depend on the consumer's cooperation for the invocation of such remedies. A payment plan can only be successful with the consumer's cooperation, and results from the collector's demand for payment. \textit{See FTC Commentary, supra} note 11, at 50,104.

\textsuperscript{312} \textit{See} 15 U.S.C. 1692c(c).

\textsuperscript{313} \textit{Lewis}, 135 F.3d at 396. The letter contained the following relevant language:

\begin{quote}
IN A PERCENTAGE OF CASES, I FIND THAT PAYMENT ARRANGEMENTS MAY NOT HAVE BEEN OFFERED BY OUR AFFILIATED OFFICE. IN ORDER TO PROVIDE YOU WITH AN OPPORTUNITY TO PAY THIS DEBT, PLEASE SELECT ONE OF THE FOLLOWING PAYMENT ARRANGEMENTS AND ENCLOSE PAYMENT, OR PROVIDE ME WITH A NUMBER WHERE I CAN CONTACT YOU TO DISCUSS TERMS.
\end{quote}

\textit{Id.} The collector therefore asked the consumer to "pay" by choosing one of the "payment" schedules, suggesting that the collector was still making a demand, even if politely. \textit{Id.}

\textsuperscript{314} \textit{Id.} at 399. One of the FDCPA's purposes is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2000). The court was justified in considering whether the collection letter was just another abusive tactic in the collector's arse-
the prohibition against further contact does not depend on the kindly nature of the communication.\textsuperscript{315} Unless the collector can bring itself within one of the statutory exceptions, it must accede to the consumer's request to stop further contact.\textsuperscript{316} The letter in question was an invitation to pay, which the consumer could easily refuse.\textsuperscript{317} A remedy originates with the collector and does not necessarily depend on the consumer's cooperation.\textsuperscript{318} Once a consumer puts a halt to a collector's efforts, the collector should not be able to seek resolution again with the consumer.\textsuperscript{319} The collector's ability to prolong the consumer's agony in this way weakens the statutory mandate.\textsuperscript{320} It is inconsistent with the nature of the right inherent in § 1692c(c).

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\textsuperscript{315} See Lewis, 135 F.3d at 398-400. However, the court was led astray by the tame language of the collection letter, finding it "less coercive and more protective of the interests of the debtor." Id. at 399. The court should have been more concerned with the consumer's right to put an end to all the collector's communication, regardless of the collector's diplomatic approach. This right is so important that the Commentary recognizes that the term "communicate" must be given its commonly accepted meaning, so that any contact with the consumer is forbidden once the consumer acts, whether or not the collector specifically mentions the debt. See FTC Commentary, supra note 11, at 50,104.

\textsuperscript{316} See 15 U.S.C. § 1692c(c) (2000). The basic issue is whether the collector is notifying the consumer about the remedies it intends to pursue. Once the consumer has asked the collector to stop contact, the collector should no longer be discussing payment options with the consumer. It is too late for that.

\textsuperscript{317} Lewis, 135 F.3d at 396. The collector could not have been any more direct: "FOR YOUR CONVENIENCE, I CAN ARRANGE FOR YOU TO PAY YOUR ACCOUNT USING VISA AND/OR MASTERCARD." Id.

\textsuperscript{318} It has been said that "[o]ur system of contract remedies is not directed at compulsion of promisors to prevent breach; it is aimed, instead, at relief to promisees to redress breach." E. Allan Farnsworth, Contracts § 12.1, at 756 (3d ed. 1999). Furthermore, one can identify "remedies" as "[t]he field of law dealing with the means of enforcing rights and redressing wrongs." Black's Law Dictionary 1296 (7th ed. 1999). When a collector reaches the point of contemplating remedies, the die has been cast and the collector should then be telling the consumer what to expect in terms of enforcement. If the collector wants to make one last attempt to recover the debt by setting out some repayment terms, it is doubtful that the collector is invoking remedies at that point. The collector is still appealing to the consumer under that scenario. The important point is that the statute does not prevent a collector from invoking legal process against an uncooperative consumer. See Heintz v. Jenkins, 514 U.S. 291, 296 (1995).

\textsuperscript{319} It is the consumer who decides whether the collector can continue its communication with the consumer. The collector may feel that it is on the brink of success, but it cannot continue its collection efforts except for the specified remedies. See 15 U.S.C. § 1692c (c)(2)-(3).

\textsuperscript{320} In one case, a collector sent at least six letters in eighteen months demanding payment from the consumer even after the consumer had notified the collector that he had paid the debt. Florence v. Nat'l Sys., No. C82-2020A, 1983 U.S. Dist. LEXIS 20344, at *7 (N.D. Ga. 1983); see also Herbert v. Monterey Fin. Servs., Inc., 863 F. Supp. 76, 79-80 (D. Conn. 1994) (noting that the collector called consumer directly four weeks after consumer's attorney advised collector that consumer did not owe the debt and therefore, refused to
Despite a consumer's pleas to the collector to cease communication, the collector may still make one last call "to advise the consumer that the debt collector's further efforts are being terminated."\(^{321}\) This is one of the exceptions to the general rule that the collector must respect the consumer's request about no further contact.\(^{322}\) One wonders about the utility of this provision. The consumer who is resisting a collector should worry about a collector's interest in giving him the good news about terminating collection. If a collector has been pursuing a consumer for several months and the consumer finally rebuffs the collector, that should end the communication.\(^{323}\) The collector is then free to seek its legal remedy, but not to harass the consumer under the guise of giving the consumer some final parting news.\(^{324}\) If there is no further contact, the consumer will realize soon enough what has happened. It takes some imagination, however, to think that the collector will restrict the call to the good news of complying with the consumer's request.\(^{325}\) One collector's promise to terminate further efforts does not prevent another collector from taking up the challenge.\(^{326}\)

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322. See id.
323. The statute allows the collector to advise the consumer that “the debt collector's further efforts are being terminated.” Id. This relates to that debt collector, but the creditor is still in control of the matter and the consumer may be lulled into a false sense of security.
324. See id. If the consumer has convinced the collector that the consumer does not owe the debt, there may be some basis for the collector's further communication to put the consumer's mind at ease. It is not unusual for consumers to be hounded for debts they do not owe. A House Committee reported:

> Consumers who are victims of computer error find it extremely difficult to obtain correction of records which have led to collection agency harassment. It is interesting to note that of the thousands of letters received by your Committee concerning debt collection problems, most of the letters were from individuals who did not owe the debt in the first place or were people who were making legitimate attempts to repay the money but the payments were not being made fast enough to suit the debt collectors.


325. The statute requires the consumer to notify the collector in writing that he does not want to hear from the collector any more. 15 U.S.C. § 1692c(c). The collector's further communication that the collector is terminating its collection efforts does not have to be in writing. See id. § 1692c(c)(1). This last opportunity for the collector to communicate may be more useful to leave the consumer in a state of confusion. The collector may be terminating its contact, but that may not necessarily be the end of the matter.

326. See id. § 1692c(c). It has been suggested that a creditor may violate a state's un-
one collector's reassurance, he cannot be sure that someone else will not take on the assignment following hard on the last conversation with the previous collector. After all is said and done, giving a collector one last clear chance to make contact with the consumer does not make life easier for the consumer. It only opens the door to further conflict about the details of the last contact between the parties.

Since mail notification from the consumer is complete when the collector receives it, a collector will be liable for making any subsequent communication with the consumer even if the collector has no actual knowledge of the consumer's request to cease communication. Although this language creates absolute liability for a collector, in Smith v. Transworld Systems, Inc., the Sixth Circuit found a way out for the collector who received a "cease communication" notice at its office in Ohio. Nevertheless, the collector's office in California sent out a collection letter to the consumer shortly thereafter. The court upheld the collector's bona fide error defense because it was convinced that the collection letter went out despite the collector's maintenance of procedures that the collector had adopted to avoid such errors. Collectors should not take much comfort from this decision, for the collector in Smith took on a difficult challenge in meeting the demands of the bona fide error defense. A collector should wait a reasonable time before following up with another demand letter. A consumer will want to use all modern commercial facili-

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fair and deceptive acts and practices statute by bringing another collector into the picture after a consumer has asked a previous collector to cease contact. NCLC, supra note 89, § 5.3.8.2 & n.230. It may also be an issue of the violation of the covenant of good faith and fair dealing. Id.


329. 953 F.2d 1025 (6th Cir. 1992).

330. Id. at 1027.

331. Id.

332. Id. at 1031. The collector can avoid liability if it can show "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," 15 U.S.C. § 1692k(c) (2000).

333. Smith, 953 F.2d at 1034 (Krupansky, J., dissenting). The collector had a computer system in place that made it impossible for the collector to comply with § 1692c(c). Id. at 1036 (Krupansky, J., dissenting). It was questionable, therefore, whether the collector had procedures in place to avoid mailing collection letters after receiving a cease and desist
ties to prove when the collector received his request. Once the consumer does that, the collector will then have the burden of exempting itself from the presumption that mail notification has occurred. This approach to the consumer's "cease communication" directive is consistent with the underlying statutory objective of controlling the possibilities of harassment, since a collector cannot feign ignorance once the consumer can show that the collector received the communication. The test is therefore not whether the collector knows about the consumer's mailing, but whether the collector received it.

VI. QUESTIONABLE COLLECTION TACTICS

A. Deception and Misleading Statements

Congress passed the FDCPA to protect consumers from abusive and deceptive collection practices. Nevertheless, collectors have not flinched from the challenge of crafting suitable language to impress consumers with the seriousness of their demands. In so doing, collectors have to worry about the possibility that their message may be construed as false and misleading. The collector wants the consumer to feel that there will be serious consequences if the consumer does not respond to the collector's demands. This is where certain "magical" words play their part. The last thing that a consumer wants to accept is a collector's invitation to the legal arena when the collector makes no bones about what the result will be. In pursuing its goal, the collector may not threaten to take action that it really does not intend to take or that it cannot legally take. As long as the consumer is under the impression that the collector means business, the collector has achieved its purpose regardless of whether it acts or not.

334. The statute recognizes that "[i]f such notice from the consumer is made by mail, notification shall be complete upon receipt." 15 U.S.C. § 1692c(c) (2000).
335. Id. § 1692(e) (2000).
336. See id. The FDCPA forbids a collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Id.
337. See id. § 1692e(5).
338. See United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 137–38 (4th Cir. 1996) (finding that the collector falsely threatened legal action); Bentley v. Great Lakes Collection Bureau, 6 F.3d 60, 62 (2d Cir. 1993) (noting that the collector referred to garnishment
An example of a collector’s suggestive language appeared in Withers v. Eveland, where the collector informed the consumer that it had been retained to institute collection proceedings against the consumer. If the consumer did not contact the collector or pay in full, the collector would pursue “all legal remedies.” What was the consumer to think about this type of collection effort? The collector used the right words to impress the consumer. The court found that it was reasonable for the consumer to interpret the letter as a threat of legal action unless the consumer paid the debt. The only problem was that the collector, who was not a lawyer, could not legally bring an action against the consumer, and the court found that the collector’s threat to do so violated the statute.

Even when a collector does not make the mistake of threatening legal action on its own, it may nevertheless run into trouble by threatening action by its attorney without further notice. If the creditor has not authorized the collector to bring suit, the collector is on shaky ground in threatening action by an attorney. The threat of immediate legal action may, nevertheless, prod the consumer into paying the debt. It is the consumer’s impression that counts. The consumer will not know if the collector has the authority to retain counsel. All that matters is the collector’s threat to take an action that he cannot legally take or that he does not intend to take.

340. Id. at 946.
341. Id.
342. Id.
344. See, e.g., Edwards v. Nat’l Bus. Factors, 897 F. Supp. 455, 457 (D. Nev. 1995) (holding that the collector’s threat that attorney would be authorized to proceed without further notice violates 15 U.S.C. § 1692e(5) since collector did not have authority to begin legal proceedings); United States v. ACB Sales & Service, Inc., 590 F. Supp. 561, 572 (D. Ariz. 1984) (finding that the statement that collector was authorized to proceed with legal action was false and therefore, collector had no intent to bring suit).
Sometimes a slight inaccuracy will come back to haunt a collector. In *Duffy v. Landberg*, the collector demanded a "$100 civil penalty" from a consumer whose check had been dishonored. The collector's demand was close to the mark, except that the state statute governing collections on a dishonored check actually provided for the recovery of "the amount of the check plus a civil penalty of up to $100 or up to 100 percent of the value of the check, whichever is greater." Even so, the consumer could avoid this civil penalty altogether if the parties settled the matter without going to court. The collector did not, therefore, tell the whole story, because it asked the consumer for the civil penalty as part of the settlement even though the state statute did not allow it at that stage.

There is surely a difference between a flat "$100 civil penalty" and a civil penalty of "up to $100." The subtle difference could not have escaped the collector's notice, but the collector must have wanted to impress the consumer with this misleading representation. The same could be said about the collector's attempt to recover legal fees, which state law prohibited because the amounts of the dishonored checks were less than $1250. When the illegal penalty and fees were added to the legal charges, the collector was sure to be in a good position to intimidate. Many consumers would succumb to this threat rather than face the prospect of fighting the collector under these circumstances.

345. 215 F.3d 871 (8th Cir. 2000).
346. Id. at 873.
347. Id. at 874 (quoting MINN. STAT. ANN. § 332.50(2)(a)(1) (West 1995)).
348. Id. (quoting MINN. STAT. ANN. § 332.50(2)(c)).
349. See id. This was a misrepresentation of Minnesota law, resulting in a violation of 15 U.S.C. § 1692e(5) (2000). Id.
350. Duffy, 215 F.3d at 874.
351. The court applied the unsophisticated consumer standard, which relates to consumers of below average sophistication without having to sink to the last rung on the sophistication ladder. See id. at 874–75; see also Gammon v. G.C. Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994). An unsophisticated consumer would have been misled into thinking that the collector could collect attorney's fees under these circumstances. Duffy, 215 F.3d, at 875. Other courts rely on the "least sophisticated standard," which "(1) ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices, and (2) protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." Clomon v. Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993); see also Bentley v. Great Lakes Collection Bureau, 6 F.3d 60 (2d Cir. 1993); Smith v. Transworld Sys., Inc., 953 F.2d 1025 (6th Cir. 1992); Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Baker v. G.C. Servs. Corp., 677 F.2d 775 (9th Cir. 1982).
Occasionally a collector will not allow the lack of a license to deter it from pursuing a consumer. The question then becomes whether the collector has threatened to take action that it cannot legally take, or even whether it has used a deceptive means to accomplish its objective. The resolution of this question depends in large measure on the interpretation of the word “threaten” in § 1692e(5). If the statute focuses on the collector's intent to recover funds for the creditor, then the threat relates to the collector's conduct that might ensue from the consumer's failure to respond to the collector's demands. The consumer will either pay or suffer the consequences. On the other hand, if the collector merely seeks to collect without describing the consequences that might flow from a consumer's failure to pay, it is not threatening any action at all because it has already made the attempt at collection.

Is it possible, however, to construe the collection attempt as the collector's threat to perform in an unlicensed capacity? The court in Sibley v. Firstcollect, Inc. certainly took this position when it decided that attempting to collect a debt without the appropriate license constituted a threat to take an action that the collector could not legally take. The court equated the attempt to collect with the threat to do the real thing, that is, to act as a debt collector. But the question remains whether the attempt was a part

354. A threat may be defined as “[a] communicated intent to inflict harm or loss on another or on another's property,” “[a]n indication of an approaching menace,” or “[a] person or thing that might well cause harm.” BLACK'S LAW DICTIONARY 1489-90 (7th ed. 1999).
355. See, e.g., United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131 (4th Cir. 1996) (holding that a threat to transfer file to an attorney constituted threat of legal action); Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087, 1102 (D. Or. 2000) (holding that a collection letter that threatened garnishment within five days violated § 1692e(5) because garnishment could not be accomplished within that period); Raimondi v. McAllister & Assocs., Inc., 50 F. Supp. 2d 825, 827 (N.D. Ill. 1999) (holding that a threat to contact consumer's employer violated § 1692e(5) in light of prohibition under § 1692c(b)).
356. See Jenkins v. Union Corp., 999 F. Supp. 1120 (N.D. Ill. 1998) (finding that a collection letter indicating that legal action was an available option did not threaten suit); Gaetano v. Payco of Wis., Inc., 774 F. Supp. 1404, 1408-09 (D. Conn. 1990) (finding that a statement that collector would use “ALL APPROVED MEANS... TO COLLECT DEBTS” did not implicitly threaten suit).
359. Sibley, 913 F. Supp. at 471. The court said as much: “[W]hen Firstcollect at-
of the collection process, and thus not a threat by itself. The collector has to keep trying until it is successful. It employs a threat only to cover the possibility that the consumer will not cooperate. If there is no threat, then one will have to find some other basis for finding the mere unlicensed attempt to collect a debt to be a violation of the FDCPA.

The court in Wade v. Regional Credit Ass'n\(^{360}\) took a better approach to the problem by recognizing the collection notice as a way of reminding the consumer about the outstanding debt.\(^{361}\) There was no hint of a threat to sue or take other legal action.\(^{362}\) It was true that the notice contained the mandatory statutory language that the consumer was attempting to collect a debt and that any information obtained would be used for that purpose.\(^{363}\) But the collector had no choice but to include that language.\(^{364}\) If it had not done so, it would have opened itself up to the charge that it had made a deceptive or misleading representation in connection with the collection of the debt.\(^{365}\)

The disclosure of the collector's objective is not the equivalent of a threat. The FDCPA recognizes that a collector will want to get its money, but the statute prevents the collector from using unsavory tactics to achieve its goal.\(^{366}\) Making a request for pay-
ment is not the same thing as threatening a consumer with certain action for failing to comply. 367

There is something somewhat disconcerting about a collector’s failure to meet the relevant registration requirements. But the question is not whether the collector has satisfied the jurisdictional obligation, but whether it has threatened the consumer in a legally indefensible way, all with the intent to guarantee its success in recovering the unpaid debt. 368 It would make a difference if the collector held itself out as a licensed collection agency. 369 A consumer could then make the point that the collector was trying to mislead or deceive him, and he should have the better argument under § 1692e(10). 370

There was no pretense of that sort in Ferguson v. Credit Management Control, Inc., 371 and the court followed Wade despite the disposition of some other district courts. 372 The Ferguson court viewed the collection letter as merely providing the consumer with “information concerning the status of his debt.” 373 It was “information for the debtor’s benefit.” 374 The message in Ferguson was certainly different from that in Gaetano v. Payco of Wisconsin, Inc., 375 where the collector threatened to use “ALL APPROVED MEANS... TO COLLECT DEBTS AND THAT ANY INFORMATION... [WOULD] BE USED AS A BASIS TO ENFORCE COLLECTION OF THE DEBT.” 376 It was not surpris-

367. See Wade, 87 F.3d at 1100. As the court in Wade pointed out, “[t]he body of the [collection] notice was informational, notifying Wade that failure to pay could adversely affect her credit reputation. There was no threat to sue. The least sophisticated debtor would construe the notice as a prudential reminder, not as a threat to take action.” Id.

368. The issue is whether debt collection practices that may violate state law are per se violations of the FDCPA. See id. The court in Wade looked in vain for the collector’s threat. Id. However, the court in Sibley v. Firstcollect, Inc., 913 F. Supp. 469 (M.D. La. 1995), saw the collection letter itself as a threat by the collector to act as a collector without a license. See id. at 471.

369. See Wade, 87 F. 3d at 1100.

370. In such a case, the collector would be using a “false representation or deceptive means” as a strategy to collect, contrary to 15 U.S.C. § 1692e(10).

371. 140 F.2d 1293 (M.D. Fla. 2001).


373. 140 F. Supp. 2d at 1302.

374. Id.

375. 774 F. Supp. at 1404.

376. Id. at 1408. Although the court in Gaetno did not explain its reasoning, it may
ing that the Gaetano court saw this language as threatening an action that the collector could not legally enforce because it lacked a state license. The threat of enforcement had no legal support.

A false or misleading representation can take many forms. In Spencer v. Henderson-Webb, Inc., the collector tried to convince the consumer that it meant business by using this language: "[I]f legal action is taken, you will be responsible for attorneys fees, court costs, and pre-judgment interest, as allowed by your contract." The collector did not tie the consumer’s obligation for such items to the success of the lawsuit. The consumer was left with the impression that he would ultimately be liable for such costs and fees if the collector merely brought suit. A consumer who was confused by this message might succumb to pressure rather than await the possibility of being saddled with unpredictable expenses that would ensue from a mere filing. This was the type of leverage that the FDCPA was intended to eliminate.

There are other avenues of fear for the consumer. If a collector promises that it will investigate the consumer’s financial situation through the consumer’s employers, the consumer may be influenced by this strategy. The FDCPA says that he should not be, since it forbids a collector from communicating with a consumer’s employer under these circumstances.

have been persuaded that the collector’s intention not only to “collect” but also to “enforce” the debt put the collector in the position of threatening to take action that it could not legally take. See id. at 1414–15.

377. Id. at 1415.
378. See id.
380. Id. at 593.
381. See id. In the case of a successful action under the FDCPA, a consumer can recover the “costs of the action, together with a reasonable attorney’s fee as determined by the court.” 15 U.S.C. § 1692k(a)(3) (2000). In Spencer, the collector conveyed the impression that the consumer would be liable for costs, fees, and interest once the collector filed suit, without regard to the outcome of the action. See 81 F. Supp. 2d at 593–94.
382. Id.
383. Id. The least sophisticated consumer might be led to believe that he has no defenses to the collector’s suit. See id.
B. Imminence of a Lawsuit

Collectors frequently depend on their ability to convey the impression that a lawsuit is imminent. This possibility will normally drive a consumer into a frenzy, thus creating the right climate for the consumer to panic without really putting up a fight. Courts will look for any language that suggests that a collector threatened to take action that it did not intend to take.

In Bentley v. Great Lakes Collection Bureau, Inc., there was some ambiguity about the collector's intentions because one letter seemed to conflict with the other. The first letter informed the consumer that the collector's client had informed the collector "to proceed with whatever legal means [were] necessary to enforce collection." The second letter gave a similar message that a decision had to be made about how to enforce collection. The significant item in this second letter was the collector's declaration that the collector had not taken, and was not taking, any legal action against the consumer.

C. Sorting out the Confusion

Despite the collector's disavowal of a pending action, the court, nevertheless, read the two statements about collection as suggesting that legal action was imminent. No doubt the court interpreted the collector's language to mean that the creditor had already authorized collection and that it was only a matter of time before the collector would bring a lawsuit. The collector conveyed the impression that although it was taking no action at the moment, it was soon going to decide on the direction to be taken in enforcing collection. The court found that the creditor had retained the authority to decide on any legal action; therefore, the

385. 6 F.3d 60 (2d Cir. 1993).
386. See id. at 61–62.
387. Id. at 61.
388. Id.
389. Id. at 61–62.
390. Id. at 62.
391. Id.
392. See id. at 61–62.
The collector's posturing supported the consumer's claim that the collector did not intend to take any immediate action.\footnote{See id. at 63; see also Irwin v. Mascott, 112 F. Supp. 2d 937 (N.D. Cal. 2000); Morgan v. Credit Adjustment Bd., Inc., 999 F. Supp. 803 (E.D. Va. 1998); Edwards v. Nat'l Bus. Factors, 897 F. Supp. 455 (D. Nev. 1995).}

The collector employed a similar strategy in \textit{Morgan v. Credit Adjustment Board, Inc.},\footnote{999 F. Supp. 803 (E.D. Va. 1998).} when it urged the consumers to pay in full "[t]o stop further action."\footnote{Id. at 804.} It was clear from the record that the collector's practice was to telephone the consumer if the consumer did not respond to the collector's letter.\footnote{Id. at 807.} The court felt that the collector's threat of "future action" might mislead the consumer.\footnote{Id.} It was likely that the consumer would be confused about whether the threatened action was legal in nature, and this confusion might create a false sense of urgency in the consumer's mind.\footnote{Id.}

The problem with many collection letters is that consumers can read them as having at least two meanings, one of which is inaccurate.\footnote{The test is the capacity of the collection letter to mislead, not whether the letter actually misled the consumer. See Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 139 (4th Cir. 1996).} This is why some courts will find the collector's language deceptive. In \textit{Russell v. Equifax A.R.S.},\footnote{See Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993); Dutton v. Wolhar, 809 F. Supp. 1130, 1141 (D. Del. 1992).} the collector dutifully gave the consumer a validation notice as part of the collection package, but also advised that if the consumer paid the debt within ten days, it would not post the collection to its file.\footnote{74 F.3d 30 (2d Cir. 1996).} The consumer was in a quandary. Did she have thirty days to dispute the debt or did she have to pay within ten days to avoid credit problems later?\footnote{Id. at 32.} The court was satisfied that the demand for payment not only overshadowed and contradicted the language giving the consumer the right to dispute the debt within thirty days, but also that the notice was deceptive because it was "reasonably susceptible to an inaccurate reading."\footnote{Id. at 35.}
When the collector sent out a second notice twenty days after the first notice that demanded payment in five days, the collector aggravated the problem.\(^{404}\) The collector's action now reduced the consumer's dispute period to twenty-five days, and the consumer had to decide how to reconcile the two notices that she had received.\(^{405}\) The court viewed this second notice as deceptive because it sent a message that was "open to an inaccurate yet reasonable interpretation by the consumer."\(^{406}\)

The significant feature in cases like *Russell* is that deception is predicated on the overshadowing and contradictory nature of the collection demands in relation to the validation notice. The collector can confuse the consumer with language that suggests that the consumer does not really have thirty days to dispute the debt, and it can do this through the capacity of the statement to mislead.\(^{407}\) The collector can solve this problem by reconciling its payment demand with the consumer's rights under the validation notice.\(^{408}\) The collector runs into difficulty when it leaves the validation notice as a mere formal disclosure without making any attempt to link it to the continuing efforts to collect the debt.\(^{409}\) The consumer is left to unravel the mystery for himself; while the collector hopes, of course, that the consumer will be influenced more by the demand for payment than by the statutory provision for disputing the debt. There is something to be said for taking away the incentive for the collector to create a climate of confusion surrounding the collector's communication with the consumer. The collector should be required to provide, in its initial communication, basic information about the debt and the accompanying validation notice. There should then be a hiatus of twenty-one days before the collector can make any demands or threats.\(^{410}\) That would give the consumer an opportunity to decide on his course of action without having to interpret the conflict between the validation notice and the collector's demand for action within

\(^{404}\) *Id.* at 33.

\(^{405}\) *Id.* at 36.

\(^{406}\) *Id.*; see also United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 139 (4th Cir. 1996); Graziano v. Harrison, 950 F.2d 107, 111 (3d Cir. 1991).

\(^{407}\) *Russell*, 74 F.3d at 36; *Nat'l Fin. Servs.*, 98 F.3d at 139.

\(^{408}\) See Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); *Russell*, 74 F.3d at 34.


\(^{410}\) This proposal would require the collector to suspend its collection activities during this interim period and inform the consumer of that fact.
a certain time. The deceptive nature of the collector's language is a violation of 15 U.S.C. §§ 1692g (validation) and 1692e (misleading statements). The removal of the contradicting and overshadowing language solves the problem under both sections, while allowing the consumer to enjoy the security of being able to lodge his dispute without worrying about the collector's demands.

VII. CONCLUSION

There is little doubt that the FDCPA has offered consumers some protection from aggressive debt collectors. There is, however, room for improvement. It is obvious that some parts of the statute have turned out to be troublesome for the collections industry, and the validation notice requirements at the head of that list. While this provision has caused many headaches, it is not too late to make some adjustments for the good of consumers and collectors alike. In doing so, Congress must keep in mind the interests of the constituencies affected by the statute. Congress wanted the consumer to know that the consumer has a right to dispute the debt, but it did not necessarily want to interrupt the ongoing collection activities while the consumer is trying to decide whether to exercise his right. The collector, therefore, finds itself in a position that almost invites contradiction and overshadowing. The collector must be careful to give the consumer proper notice while pressing on with its assignment to recover the debt. The collector must always be conscious of the way in which the least sophisticated consumer is going to interpret its message. Therefore, the collector must be keen about articulating

411. The major contention about § 1692g is the conflict between the statutory thirty-day period for the consumer to dispute the debt, 15 U.S.C. § 1692g(a)(4) (2000), and the collector's demands, which suggests that the consumer may not really have thirty days to act. See, e.g., Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1059 (7th Cir. 1999) (requesting prompt payment); Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998) (demanding immediate payment); Russell, 74 F.3d at 32 (demanding payment within ten days); Talbot v. GC Servs. Ltd. P'ship, 53 F. Supp. 2d 846, 853–54 (W.D. Va. 1999) (demanding payment within ten days).


414. The ideal solution is for the collector's initial contact to be in writing. That will solve the problem inherent in the current language. The collector can include the validation language in the "initial communication," but there is no requirement for a writing if one accepts the current definition of "communication." See 15 U.S.C. §§ 1692a(2), 1692g(a) (2000).
its message without diluting the statutory notice. It is a challenge that many collectors have been unable to meet.

One way of avoiding the conflict is for the collector to simplify the details about the debt in the initial written communication that bears the validation notice. The collector should give the details of the transaction, provide the statutory notice, and then wait twenty-one days for the consumer to act. The collector will not be able to make any demands under this scenario, for the purpose of this initial communication is to apprise the consumer of the basic details and then give him time to dispute the debt within the set period. If the consumer remains silent, then the collector is free to resume its collection activities. Although the present statute gives the consumer thirty days to register his objections, it is reasonable to reduce that period to twenty-one days if the collector cannot continue its collection efforts in the interim. This approach would reflect a change from the current procedure that does allow the collector to continue its work during the thirty days that the consumer is considering the situation. This proposed scheme takes away the incentive for the collector to craft language that competes with the statutory formula for disputing the debt. The consumer gets one clear message; the collector al-

415. The objective is merely to let the consumer know about the debt and to give him enough time to decide on his next step.

416. By keeping with this formula, a collector will avoid claims that its collection language contradicts and/or overshadows the validation notice, while at the same time informing the consumer about the debt. In Bartlett v. Heibl, the court attempted to reconcile the consumer's right to dispute the debt with the collector's right to continue its collection efforts. It set forth a redacted letter that was intended to serve as a "safe harbor" for collectors, which stated:

The law does not require me to wait until the end of the thirty-day period before suing you to collect this debt. If, however, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this letter, the law requires me to suspend my efforts (through litigation or otherwise) to collect the debt until I mail the requested information to you.

Bartlett v. Heibl, 128 F.3d 497, 502 (7th Cir. 1997).

That reconciliation language goes a long way towards avoiding the problem. Nevertheless, the consumer does not really have thirty days to question the debt. He must act much faster than that if he wants to avoid the collector's contact.

417. This would provide a true thirty-day dispute period, but at least the consumer would know about the collector's allegations.

418. It is to be noted, however, that the consumer's failure to dispute the debt is not to be construed as the consumer's admission of liability. 15 U.S.C. § 1692g(c) (2000); NCLC, supra note 89, § 5.7.4.

419. See 15 U.S.C. § 1692g(b); see also supra note 8 and accompanying text.

420. There is no shortage of competing language in collection letters. See, e.g., Johnson
leges the existence of a debt, gives the details, and leaves the consumer with opportunity to say his piece. There is more than enough time for the collector to pursue the consumer if the consumer says nothing or, if he says something, after the collector verifies the debt.\footnote{421}

Another part of the puzzle relates to the ambiguity in § 1692g, which focuses on the collector's ability to provide the details of the debt in the initial communication to the consumer.\footnote{422} The difficulty here lies with the definition of "communication."\footnote{423} If the collector can orally convey information about the debt, there is a real problem with allowing a collector to convey all the information listed in § 1692g(a) in that fashion.\footnote{424} It is necessary for Congress to clarify this section so that there is no doubt what it intended here.

Even if Congress does not amend the statute to give the consumer a twenty-one day breather, a collector should have an obli-
gation to inform the consumer that any dispute of the debt will bring an immediate halt to the collector's pursuit until the collector verifies the debt.\textsuperscript{425} The current provision requires the collector to cease its collection of the debt under these circumstances, but it does not require the collector to inform the consumer of this fact.\textsuperscript{426} The more information the consumer has, the better off he is in terms of his relationship with the collector. This is an opportunity for the statute to be fairer to the consumer.

A collector should also be required to tell the consumer that if the consumer wishes the collector to cease communication, the collector will do so.\textsuperscript{427} This is not an unreasonable requirement, given the fact the statute already requires the collector to give notice of the consumer's right to dispute the debt.\textsuperscript{428} The consumer must understand, however, that a premature request to cease communication may hasten legal action that may be avoided if the parties are still in contact. Nevertheless, the consumer should know that he has the choice.

\textsuperscript{425} Compare id. § 1692g(a)(3)-(5), with id. § 1692g(b).
\textsuperscript{426} Id § 1692g(b).
\textsuperscript{427} When taken together with a revised § 1692g(b), this notice of the consumer's right to demand that the collector cease communicating would be a powerful weapon for the consumer, particularly when the consumer is convinced that the debt is not valid.
\textsuperscript{428} See 15 U.S.C. § 1692g(a)(4).