THE PECULIARITY OF LANGUAGE IN THE DEBT COLLECTION PROCESS: THE IMPACT OF THE FAIR DEBT COLLECTION PRACTICES ACT

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I. INTRODUCTION

When Congress enacted the Fair Debt Collection Practices Act[1] in 1977, it brought a degree of stability to the debt collection industry.[2] This legislation was long overdue, given the abuses that consumers had endured at the hands of debt collectors.[3] Consumers had to contend with

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1. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692p (2006)).

2. *See Fair Debt Collection Practices Act: Hearings on S.656, S.1130 and H.R. 5294 before the Subcomm. on Consumer Affairs of the S. Comm on Banking, Housing and Urban Affairs*, 95th Cong. 731 (1977) [hereinafter "*Hearings*"].

3. The following comment gives some idea about the need for debt collection legislation:

threatening late-night calls from debt collectors and faced the prospect of having their personal affairs disclosed to third parties.[4] It was unfortunate that some debt collectors behaved in this way, since there was evidence that most defaults arose through unforeseen circumstances and thus did not merit the abusive treatment that ensued.[5] The abuses were serious

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> The debtor who is involved in a debt collection dispute is peculiarly vulnerable to pressure, coercion and harassment. Coupled with his recognition of his inability to invoke the law in aid of any defenses he may have to the debt, the harassed debtor will easily believe that attempting to dispute the bill at best, will, be a futile act and, at worst, will probably in some mysterious way serve to compound his problems. This situation is particularly prevalent among low income consumers. For these reasons the debt collection process must be carefully regulated so as to prevent debtors from being deprived de facto of the opportunity to dispute the debt and to present whatever defenses exist to the payment.

Id. (statement of the National Consumers League). One former collection agency employee recalled some of the agency's practices:

> If a debtor asked if he would be imprisoned, the collector would reply either that he did not know or that the debtor should let his imagination run wild. It was not unusual to hear a collector inform the debtor that unless the bill was paid, they would be unable to receive medical services at any hospital, or that they had better nail their possessions to the floor before the law came and removed everything they owned.

Id. at 38 (statement of Patricia A. Miller, Beltsville, Md.).

4. Another witness at the congressional hearings stated that the conduct of collection agencies "range[d] from profanity and obscenity in phone calls to efforts to shame a consumer by contacting relatives, employers, neighbors to falsely threatening to seek harsh legal sanctions." *Id.* at 85 (statement of Robert J. Hobbs, Staff Attorney, National Consumer Law Center). The Senate Report on the Fair Debt Collection Practices Act also recapped some of the problems that led to the legislation:

> Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

S. REP. NO. 95-382, at 2 (1997), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

5. Professor Caplovitz explained the problem of consumer defaults this way:

> As my research has shown, the collection industry's image of the default debtor as a deadbeat is a grotesque caricature that has virtually nothing to do with the realities of why debtors default. . . . In the real world, the steady flow of income is by no means a sure thing. People lose their jobs or are laid off, or they become ill and are unable to work. My research has shown that sudden losses of income are by far the major reason why debtors default on their credit obligations.

Hearings, *supra* note 2, at 238 (testimony of Professor David Caplovitz, City University of New York); *see also id.* at 85 (statement of Robert J. Hobbs, Staff Attorney, National Consumer Law Center). The Senate Report captured the misconception about the beneficiaries of debt collection legislation with this language: "One of the most frequent

enough for Congress to establish a statutory framework that regulates a debt collector's conduct and grants a consumer certain rights during the collection process.[6]

The statute prohibits a debt collector from using any false, deceptive, or misleading representation in collecting a debt.[7] In addition to the general language prohibiting such conduct, the statute gives sixteen specific examples of prohibited activities.[8] The debt collector must therefore try to get its message across to the consumer without misleading or deceiving him.[9] One of the ways that a debt collector can encourage a consumer to respond to its communications is to make an offer of settlement.[10] Some consumers see this as a way out of their predicament, especially if the debt collector agrees to settle the debt at a substantial discount.[11] This arrangement can be advantageous to both

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fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.' In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay debts is miniscule." S. REP. NO. 95-382, at 3, (1977), *as reprinted in* 1977 U.S.C.C.A.N. at 1697.

6. The Senate Report put the legislation in context as follows:

> Hearings by the Consumer Affairs Subcommittee revealed that independent debt collectors are the primary source of egregious collection practices.... 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.

S. REP. NO. 95-382, at 2, (1977), *as reprinted in* 1977 U.S.C.C.A.N. at 1696. The statute captures the prohibited conduct in three sections covering harassment or abuse, false or misleading representations, and unfair practices. *See* 15 U.S.C. §§ 1692d, 1692e, 1692f (2006).

7. *See* 15 U.S.C. § 1692e (2006).

8. *See id.*

9. For example, a debt collector is forbidden from making a false representation about the character, amount, or legal status of any debt. *See* 15 U.S.C. § 1692e(5) (2006).

10. *See, e.g.*, Goswami v. Am. Collections Enter., Inc., 377 F.3d 488 (5th Cir. 2004); Soffer v. Nationwide Recovery Sys., No. 06-CV-435, 2007 U.S. Dist. LEXIS 28979 (E.D.N.Y. April 19, 2007); Gervais v. Riddle & Assocs., P.C., 479 F. Supp. 2d 270 (D. Conn. 2007); Jackson v. Midland Credit Mgmt., Inc., 445 F. Supp. 2d 1015 (E.D. Ill. 2006); Dupuy v. Weltman, Weinberg & Reis Co., 442 F. Supp. 2d 822 (N.D. Cal. 2006); Gully v. Van Ru Credit Corp., 381 F. Supp. 2d 766 (N.D. Ill. 2005).

11. Settlement offers follow certain predictable patterns, with a few variations here and there. For example, in *Jackson v. National Action Financial Services, Inc.*, the debt collector offered to settle the debt for seventy-five percent of the balance owed. 441 F. Supp. 2d 877, 883 (N.D. Ill. 2006), *aff'd sub nom.* Evory v. RJM Acquisitions Funding LLC, 505 F.3d 769 (7th Cir. 2007). Seven weeks later, the debt collector offered a settlement of fifty percent of the balance. *Id.* Some debt collectors' first settlement offer is for fifty percent of the balance due if the consumer pays within thirty days. *See Gervais*, 479 F. Supp. 2d 278; *Midland Credit Mgmt.*, 445 F. Supp. 2d 1017; *cf. Soffer*,

sides, but questions may arise about whether a collector's letter has led the consumer to believe that he would have only one chance to accept the settlement within a limited time.[12] The consumer will usually complain that the debt collector always intended to renew its settlement offer if the consumer did not accept the first offer, and therefore, that this was just another example of a false or misleading representation.[13] Sometimes a debt collector's settlement offer is ambiguous and a court has to make a distinction between a one-time offer and an offer that merely has a deadline.[14] It then becomes a question of interpretation, and courts will generally look at the nonrenewable feature of the offer before deciding whether the collector has engaged in a false or misleading representation.[15]

Debt collectors leave no stone unturned in trying to convince delinquent debtors of the urgency of their claims.[16] In this respect, they

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2007 U.S. Dist. LEXIS 28979, at *2 (offering settlement of fifty percent of balance due payable within thirty-five days); *Dupuy*, 442 F. Supp. 2d 828 (offering settlement of fifty percent of amount due payable within fifteen days).

12. *See Goswami*, 377 F.3d at 495 (holding that statement in collection letter was untrue because it made it appear that "[the creditor's] offer of a [thirty percent] discount was a one-time, take-it-or-leave it offer that would expire in thirty days"); *cf. Van Ru Credit Corp.*, 381 F. Supp. 2d at 772 (holding that collector did not make false or misleading representation when its settlement offer specified the amount it was willing to accept within a specified time period).

13. *See, e.g.*, Hernandez v. AFNI, Inc., 428 F. Supp. 2d 776, 781 (N.D. Ill. 2006) (holding that debt collector did not make false statement because collection letters did not state that entire balance would be due when settlement offer expired or that the offer was consumer's final chance to settle debt at a discount); Johnson v. AMO Recoveries, 427 F. Supp. 2d 953, 956 (N.D. Cal. 2005) (rejecting consumer's contention that collector misrepresented the time in which consumer could accept settlement offer); *cf.* Pleasant v. Risk Mgmt. Alternatives, No. 02-C-6886, 2003 WL 164227, at *1 (N.D. Ill. Jan. 23, 2003) (holding that consumer's complaint stated a claim that collection letter was false, deceptive or misleading when it offered a one-time settlement that would be null and void after a certain date).

14. *See Evory*, 505 F.3d 769; Hancock v. Receivables Mgmt. Solutions, Inc., No. C-06-1365, 2006 WL 1525723 (N.D. Cal. May 30, 2006).

15. *Compare Goswami*, 377 F.3d 488, 495 (holding that settlement offer stating that "only during the next thirty days will our client agree to settle your outstanding balance due with a 30% discount" was a false representation that the offer was a one-time offer), *with Hernandez*, 428 F. Supp. 2d at 783 (holding that settlement offer was not one-time offer because it did not state that it was consumer's final chance to settle debt at a discount).

16. *See* Brown v. Card Serv. Ctr., 464 F.3d 450, 455 (3d Cir. 2006) (holding that consumer stated claim under § 1692(e) where collection letter gave consumer five days to arrange payment or possibly face a lawsuit); Bentley v. Great Lakes Collection Bureau, Inc., 6 F.3d 60, 62 (2d Cir. 1993) (holding that collection letters were false and misleading when they notified consumer that creditor had given debt collector permission to start legal proceedings against consumer); Crossley v. Lieberman, 868 F.2d 566, 567

employ language that is sometimes ambiguous, but that is nevertheless intended to convince the consumer that it is in the consumer's best interest to make early settlement rather than to open himself to the collector's dogged pursuit.[17] The debt collector's magical language may take the form of a statement that, while literally true, does not really tell the whole story.[18] It is not unusual either for a debt collector to inform a consumer that a lawsuit is imminent, even if the collector is not in the habit of suing.[19] The objective is to make the consumer uneasy about the possibilities of litigation and to encourage the consumer to settle the debt even if he doubts its validity. But when all else fails, an attorney-collector may send out a letter that leaves his level of involvement in the collection process open to question.[20] The collection language may be just powerful enough, however, to prod the consumer into action.

(3d Cir. 1989) (finding violation where debt collector promised to sue if consumer did not make full payment in one week); Rosa v. Gaynor, 784 F. Supp. 2d 1, 4-5 (D. Conn. 1989) (granting summary judgment to consumer where collection letter created false impression that collector would file suit immediately even though he could not do so without getting permission).

17. *See Gervais*, 479 F. Supp. 2d at 278.

18. *See, e.g.*, McMillan v. Collection Prof'ls Inc., 455 F.3d 754, 762 (7th Cir. 2006) (finding that consumer stated claim under § 1692e because although statement that consumer is either honest or dishonest is literally true, the underlying implication is that consumer is dishonest in allowing check to be dishonored); Gammon v. GC Servs. Ltd. P'ship, 27 F.3d 1254, 1257 (7th Cir. 1994) (finding that collector's statement that it "provided the systems used by a major branch of the federal government and various state governments to collect delinquent taxes" may have violated § 1692e by falsely implying that the collector was affiliated with the federal government); Francis v. Snyder, 389 F. Supp. 2d 1034, 1041 (N.D. Ill. 2005) (holding that collector violated § 1692e(5) by stating that "a bad check can be considered a violation of Illinois Statutes" and by threatening to sue even though legal action could not be brought for stopping payment of a check under Illinois statute).

19. *See Brown*, 464 F.3d at 455 (holding that consumer stated a claim under § 1692e where consumer alleged that collector threatened lawsuit if consumer did not respond within five days and that collector never intended to sue); United States v. Nat'l Fin. Servs., Inc., 98 F.3d 131, 138 (4th Cir. 1996) (holding that collectors violated § 1692e(5) when they threatened to take legal action that they did not intend to take); *Bentley*, 6 F.3d at 61 (holding that letter violated § 1692e(5) when it implied that legal proceedings were imminent, when in fact they were not); Morgan v. Credit Adjustment Board, Inc., 999 F. Supp. 803, 807 (E.D. Va. 1998) (holding that debt collector's threat to take "further action" violated § 1692e(5) when collector did not intend to take any legal action).

20. *See* Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996) (holding that mass-produced letters with facsimile of lawyer's signature gave false impression that they were from the attorney); Clomon v. Jackson, 988 F.2d 1314, 1321 (2d Cir. 1993) (holding that where lawyer was not personally involved in sending out collection letters, use of his letterhead violated the FDCPA); Goins v. Brandon, 367 F. Supp. 2d 240, 245 (D. Conn. 2005) (granting summary judgment to consumer based on attorney's "complete lack of personal involvement in the decision to send a letter"); Sonmore v. CheckRite Recovery Servs.,

This Article will examine variations in language that debt collectors have used in collection letters, and the evidence will show that there is no limit to the strategies that collectors have employed.[21] Despite debt collectors' skills in drafting language that is calculated to motivate consumers into paying, courts have been generally adept at identifying when collectors have crossed the line.[22] This Article will also consider the validation section, which has garnered its own share of attention in the courts. This provision, which requires a debt collector to give certain details about the debt and to notify the consumer about the right to dispute it,[23] has led to endless confusion about the interplay between a

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187 F. Supp. 2d 1128, 1135 (D. Minn. 2001) (holding that collection letters violated statute because there was no meaningful attorney involvement); Irwin v. Mascott, 112 F. Supp. 2d 937, 950 (N.D. Cal. 2000) (finding liability where attorneys "neither conducted individual reviews of debtor files nor decided if a particular dunning letter should be sent" before signing letters); *cf.* Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360, 365 (2d Cir. 2005) (holding that defendants' clear disclaimer explaining their limited involvement in collection of consumer's debt prevented a violation of § 1692e relating to a false or misleading representation); Taylor v. Quall, 471 F. Supp. 2d 1053, 1062 (C.D. Cal. 2007) (holding that defendant had enough personal involvement in collection to avoid liability under statute).

21. *See McMillan*, 455 F.3d 754; *Goswami*, 377 F.3d 488; *Gervais*, 479 F. Supp. 2d 270; Hapin v. Arrow Fin. Servs., 428 F. Supp. 2d 1057 (N.D. Cal. 2006); *Francis*, 389 F. Supp. 2d 1034; Wan v. Commercial Recovery Sys., Inc., 369 F. Supp. 2d 1158 (N.D. Cal. 2005).

22. *See Nat'l Fin. Servs.*, 98 F.3d at 138 (holding that collector violated statute by making false threats to bring legal action); *Bentley*, 6 F.3d at 62 (holding that collector's statement that creditor had authorized all legal means necessary to collect debt suggested falsely that lawsuit was imminent); *Crossley*, 868 F.2d at 571 (holding that attorney's letter threatening to sue within a week was deceptive when consumer had thirty days to cure delinquency); Fuller v. Becker & Poliakoff, P.A., 192 F. Supp. 2d 1361, 1369 (M.D. Fla. 2002) (holding that collection letter was false and misleading when it stated that consumer would incur a "substantial amount of attorney's fees and costs," because an unsophisticated consumer would likely interpret the language to mean that he had no chance of winning any lawsuit brought by the collector); *Irwin*, 112 F. Supp. 2d at 953 (holding that collector violated § 1692e(4) by threatening certain post-judgment remedies that collector did not intend to pursue).

23. Section 1692g(a) provides as follows:

> (a) Notice of debt; contents
> 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;

debt collector's recovery efforts and a consumer's right to question the validity of the debt.[24]

Despite the absence of a writing requirement in section 1692g(a)(3), some courts have seen fit to import such a requirement in order to make that section consistent with section 1692g(a)(4).[25] But a word must also

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(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 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

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g(a) (2006).

24. *See* Camacho v. Bridgeport Fin. Inc., 430 F.3d 1078, 1082 (9th Cir. 2005) (holding that collection letter violated § 1692(a)(3) by requiring consumer to dispute the debt in writing if she did not want collector to assume that debt was valid); Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 417 (7th Cir. 2005) (finding that "the simple act of demanding payment in a collection letter during the validation period does not automatically create an unacceptable level of confusion so as to entitle the plaintiffs to summary judgment"). Shimek v. Weissman, Nowack, Curry & Wilco, P.C., 374 F.3d 1011, 1015 (11th Cir. 2004) (holding that the FDCPA does not require a debt collector to stop court clerk from filing lien after consumer requests verification of debt); Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996) (holding that the language on the front of the collection letter overshadowed and contradicted the validation notice on the back of the letter); *Gervais*, 479 F. Supp. 2d at 278 (holding that "the mere existence of a settlement offer in a validation notice is insufficient to constitute an overshadowing claim under the FDCPA as a matter of law"); *Francis*, 389 F. Supp. 2d at 1039-40 (holding collection letter violated § 1692g because it was confusing and contradictory when it stated that collector would pursue balance in full if consumer did not call on receipt of the letter, but also allowed consumer thirty days to dispute debt).

25. *Compare* Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991) (holding § 1692g(a)(3) requires consumer to dispute debt in writing), Wallace v. Capital One Bank, 168 F. Supp.2d 526, 529 (D. Md. 2001) (holding § 1692g(a)(3) requires consumer to dispute debt in writing), *and* Sturdevant v. Thomas E. Jolas, P.C., 942 F. Supp. 426, 429 (W.D. Wis. 1996) (holding Section 1692g(a)(3) requires consumer to dispute debt in writing), *with Camacho*, 430 F.3d at 1082 (holding "[t]he plain language of subsection (a)(3) indicates that disputes need not be made in writing, and the plain meaning is neither absurd in its results nor contrary to legislative intent"), Register v. Reiner, Reiner & Bendett, 488 F. Supp. 2d 143, 148 (D. Conn. 2007) (holding that collector violated § 1692g(a)(3) by requiring consumer to submit any dispute in writing), Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, 464 F. Supp. 2d 720, 724 (N.D. Ohio 2006) (holding § 1692g(a)(3) does not require consumer to dispute debt in writing), Baez v. Wagner & Hunt, P.A., 442 F. Supp. 2d 1273, 1276-77 (S.D. Fla. 2006) (holding Section 1692g(a)(3) does not require consumer to dispute debt in writing), Rosado v. Taylor, 324 F. Supp. 2d 917, 929 (N.D. Ind. 2004) (holding § 1692g(a)(3) does not require consumer to dispute debt in writing), *and* Vega v. Credit Bureau Enters., No. 02-CV-1550, 2005WL 711657, at *9-10 (E.D. N.Y. March 29, 2005) (holding that "[§ 1692(a)(3)] does not impose a

be said about the ambiguous language in the validation section that leaves the impression that a debt collector may fulfill its disclosure obligations orally in its initial communication with a consumer.[26] A careful review of section 1692g suggests that the drafters could hardly have intended to impose an obligation on the consumer to assimilate the debt collector's oral message, given the complex details of the debt and of the consumer's right to dispute the same.[27]

Finally, this Article will discuss one of the unfair practices identified in the statute, which prevents a debt collector from using any language or symbol on an envelope, other than the debt collector's address.[28] This statutory language, designed to ensure a debtor's privacy, seems unambiguous at first blush,[29] but courts nevertheless have had to go beyond the plain language of the statute to craft some benign

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requirement that a consumer dispute the validity of a debt in writing and no such requirement will be read into the subsection absent clear legislative intent").

26. One authority identifies the problem this way: "The potential ambiguity in 15 U.S.C. § 1692g(a) depends upon whether the phrase 'following information' refers to the phrase 'a written notice,' or only to subsections (1) through (5) in 15 U.S.C. § 1692g(a), which provide the content of the notice." NAT'L CONSUMER LAW CTR., FAIR DEBT COLLECTION § 5.7.2.5 (5th ed. 2004).

27. *See id.* The Federal Trade Commission (FTC) Official Staff Commentary states that a debt collector may give the § 1692g(a) disclosure orally in the first communication, in which case no written notice is required. FTC Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988) [hereinafter *FTC Official Staff Commentary*]. The FTC staff uses the commentary to publish its interpretations of the FDCPA, but the Commentary does not have the force of law and it is not binding on the FTC or the public. *Id.* at 50, 101. The issue raised by the FTC Commentary's position on the matter is whether an oral validation notice satisfies the mandate that a debt collector must convey the notice effectively. *See* Chauncey v. JDR Recovery Corp., 118 F.3d 516, 518 (7th Cir. 1997) ("A debt validation notice, to be valid, must be effective."); Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir. 1991) (stating that debt collector must convey validation notice effectively without contradicting it); Swanson v. S. Or. Credit Serv., 869 F.2d 1222, 1225 (9th Cir. 1988) (stating that "the notice . . . must be conveyed effectively to the debtor"). It is open to question how effective an oral validation can be, given the circumstances under which a debt collector communicates with a consumer. In any event, once there is a dispute about whether the collector gave the proper notice, there is no record to assist in resolving the matter.

28. Section 1692f makes the following conduct an unfair means to collect any debt:

> Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. § 1692f(8) (2006).

29. The drafters used the word "any" in the section, making provision for only two exceptions relating to the debt collector's name and address. *Id.* One must search for the ambiguity.

exceptions.[30] It is evident that the drafters did not really mean what they said, and they should try again to get it right without deviating from the original objective of guaranteeing a consumer's privacy.

II. RECOVERING THE DEBT

A. Offers of Settlement

A debt collector will often plan different strategies to ensure success with its collection efforts. When all else fails, it is not unusual for the collector to offer settlement terms to the consumer.[31] These terms may allow the consumer to satisfy his outstanding obligation by paying a certain percentage of the debt.[32] The theory is that it is better for the collector to recover some respectable amount rather than waste its resources on a lost cause.[33] Although an offer of settlement may be attractive to a consumer, it may not induce the consumer to act unless he thinks that the offer may last only for a limited time, without any guarantee of renewal in the future.[34] It is left, therefore, to the debt

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30. *See* Strand v. Diversified Collection Serv., Inc., 380 F.3d 316, 319 (8th Cir. 2004) (holding that words "Personal & Confidential" on envelope were benign because they did not reveal the source or purpose of the letters); *Goswami*, 377 F.3d at 494 (holding that blue bar with words "Priority Letter" on envelope was benign marking that did not violate § 1692f(8)); Lindbergh v. Transworld Sys., Inc., 846 F. Supp. 175, 180 (D. Conn. 1994) (holding that symbol on envelope consisting of blue stripe and the word "TRANSMITTAL" did not violate statute because it was benign and did not relate to debt collection); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456, 1466 (C.D. Cal. 1991) (finding "Personal & Confidential" and "Forwarding and Address Correction Requested" to be benign language not prohibited by statute).

31. *See, e.g.*, *Goswami*, 377 F.3d 492; *Jackson*, 445 F. Supp. 2d 1017; *Dupuy*, 442 F. Supp. 2d 828; *Gully*, 381 F. Supp. 2d 768.

32. *See Dupuy*, 442 F. Supp. 2d at 822 (observing settlement offer of fifty percent of balance due); *Jackson.*, 441 F. Supp. 2d at 883 (noting settlement offer started out at seventy-five percent of balance due and ended up at fifty percent) *aff'd sub nom. Evory*, 505 F.3d at 769; *Hancock*, 2006 WL 1525723, at *4 (observing settlement offer of fifty percent of balance due); *Johnson*, 427 F. Supp. 2d at 954 (observing first letter offered settlement at sixty percent of balance due and sixth letter offered settlement for "reduced amount").

33. *See Gervais*, 479 F. Supp. 2d at 278.

34. *See Goswami*, 377 F.3d at 494. The debt collector used language that was intended to drive home the urgency of the offer: "Effective immediately, and only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty percent (30%) discount off your above balance owed." *Id.* at 492. The court found a violation of § 1692e(10) because the collector's statement appeared as though the offer was a "one- time, take-it-or-leave-it offer" whose purpose was to push the consumer into making "a rapid payment to take advantage of the purported limited time offer." *Id.* at 495. Since then, most courts have limited *Goswami* to situations where the collection

collector to produce language in the offer of settlement that leaves the impression that the consumer has one last clear chance to settle matters, and that this unique opportunity will not be available to him again.[35] The debt collector's objective is to make the consumer think about the consequences of refusing the collector's terms.[36] If the consumer does not settle for a lesser amount, he stands a chance of having to pay the full amount of the debt, since he has no idea whether the debt collector will make a similar offer anytime soon.[37]

The debt collector's generosity may be called into question if the debt collector formulates its offer in a way that suggests that the offer is a one-time event, but then sometime later renews its offer of settlement in order to salvage the situation.[38] At first blush, the debt collector's renewal may seem inconsistent with the one-time pledge, so much so that it leaves the debt collector open to the charge of making a false or misleading representation.[39] If the debt collector knows at the time of its

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letter indicates that the debt collector is making a one-time offer. *See, e.g., Hernandez*, 428 F. Supp. 2d at 780-81; *Johnson*, 427 F. Supp. 2d at 956.

35. In drafting its collection letter, a debt collector must be careful not to leave a false impression about the nature of the offer. *See Goswami*, 377 F.3d at 495. In *Goswami*, it was the phrase "only during the next thirty days" that caused problems for the collector, because the collector had the authority to settle the debt at any time for a thirty percent discount. *Id.* It is unusual for a debt collector to make its best offer first time around. *See Hernandez*, 428 F. Supp. at 781; *Johnson*, 427 F. Supp. 2d at 956. There is a distinction between a one-time offer of the *Goswani*-type, and an offer merely giving an expiration date without making any reference to future offers. *See Hernandez*, 428 F. Supp. at 781; *Johnson*, 427 F. Supp. 2d at 956.

36. *See Gervais*, 479 F. Supp. 2d at 278.

37. A debt collector will sow the seeds of doubt in the consumer's mind by providing for the automatic revocation of the settlement offer if the consumer does not accept it by a stated deadline. *See Hernandez*, 428 F. Supp. 2d at 777 (observing settlement offer only valid if funds received by certain date); *Johnson*, 427 F. Supp. 2d at 954 (observing settlement offer "null and void" if payment not made by certain date); *Van Ru Credit Corp.*, 381 F. Supp. 2d at 768 (providing for automatic revocation if payment not made by certain date). These settlement offers withstood attack because there was no one-time-only language of the kind encountered in *Goswami*. *See Hernandez*, 428 F. Supp. 2d at 777; *Johnson*, 427 F. Supp. 2d at 954; *Van Ru Credit Corp.*, 381 F. Supp. 2d at 768. They were simply cases where the debt collectors indicated the amount that they were willing to accept within a certain time. *Cf.* Jones v. Risk Mgmt. Alternatives, Inc., No. 02-C-9392, 2003 WL 21654365, at *4 (N.D. Ill. July 11, 2003) (granting class certification where settlement offer was a one time settlement that would be null and void if payment not made by a certain date). *Pleasant*, 2003 WL 164227, at *1 (denying motion to dismiss complaint where debt collector offered a "one time settlement" that would be null and void if payment not made by certain date).

38. *See Goswami*, 377 F.3d at 492.

39. A distinction must be made between a settlement offer that is valid only for a certain period, thus sending a message that the offer will lapse irrevocably, and a

original offer of settlement that it will make another offer sometime later if the consumer does not act on the first one, it is easier to show that the debt collector has violated the statute if he uses one-time language that tends to mislead the consumer.[40] The "one-time" feature is intended to motivate the consumer, for there is no assurance that he will have another chance to settle his outstanding debt for a reduced amount.[41] If the debt collector feigns the future unavailability of the current offer, there is every reason for the consumer to complain about being misled. If the consumer takes the offer seriously, he will want to accept it before it expires.[42] But if that acceptance ensues from the debt collector's misrepresentation about the nature of the offer, the consumer has a legitimate ground for complaining.[43]

Nowhere was that more evident than in *Goswami v. American Collections Enterprise, Inc.*, where the debt collector's letter offered a settlement that was to be valid "only during the next thirty days."[44] In fact, the debt collector had authority to offer *at any time* a discount off the balance due, and not just for the thirty-day period mentioned in the collection letter.[45] The court observed that the debt collector's statement about the thirty-day window was untrue, and that it looked as if the thirty percent discount was a one-time offer that would expire in thirty days.[46] The language raised questions about the collector's conduct.[47] It seemed that the debt collector had misled the consumer not only about its settlement authority, but also about the offer's time limit.[48] The debt

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settlement offer that merely expires on the deadline date. *Compare Goswami*, 377 F.3d at 492, *with Jackson*, 441 F. Supp. 2d at 883 *and Johnson*, 427 F. Supp. 2d at 953.

40. The literal "one-time" language does not appear very often. Some examples are *Goswami*, 377 F.3d at 492; *Pleasant*, 2003 WL 164227, at *1; *Jones*, 2003 WL 21654365, at *4.

41. *See Goswami*, 377 F.3d at 495 ("The obvious purpose of the statement was to push Goswami to make a rapid payment to take advantage of the purported limited time offer."); *cf. Johnson*, 427 F. Supp. 2d at 957 (stating that a least sophisticated consumer would understand that a mere offer does not prevent a later agreement from materializing).

42. *See, e.g., Goswami*, 377 F.3d at 495.

43. *See id.*

44. *Id.* at 492.

45. *Id.* at 495 (emphasis added).

46. *Id.*

47. *Id.*

48. The court held that the debt collector made "false or misleading statements about the settlement authority it held from [the creditor] both in the discount it was authorized to offer and the time within which Goswami was allowed to accept the offer." *Goswami*, 377 F.3d at 496.

collector was expected not to be "deceitful" in its dealings with the consumer.[49]

The Fifth Circuit in *Goswami* was convinced of the debt collector's deceit only because the debt collector had broad authority to make a settlement offer, unconstrained by time limits, but the collector nevertheless conveyed the impression that it was making only a one-time offer.[50] The difficulty in *Goswami*, such as it was, ensued from the debt collector's definitive language about the limited offer available. Had the debt collector not used the word "only" in its offer of settlement, there might not have been any grounds for an allegation of deceit.[51] But the troublesome phrase, "only during the next thirty days," appeared in the offer, leaving the impression with the consumer that he had a limited time to act within the context of a non-recurring offer of settlement.[52] If the debt collector had no authority to revive the same offer or to offer a similar one, it could hardly be said that the debt collector was involved in any deception. It was possible, indeed, for the debt collector to offer a settlement with a limited acceptance period without running the risk of being accused of deceitful conduct. That formulation does not lead a consumer to think that he will never have another chance to settle matters. It is simply an offer with a time limit, but the deadline by itself does not introduce any false information into the mix.[53]

If a settlement offer does not contain any of the *Goswami*-type language limiting its availability to a certain period only, it is harder for a consumer to prevail with his contention about a debt collector's

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49. *Id.*

50. The court observed that "[the lender] had authorized [the debt collector] to give debtors such as Goswami a 30% discount at *any time*, not just for a period of thirty days." *Id.* at 495. However, this did not affect the collector's obligation to act in a nondeceitful manner. *Id.* at 496.

51. It makes a difference where the word "only" appears. In *Goswami*, the collector reported the lender's willingness to settle "only during the next thirty days." *Id.* at 492. In other cases, the settlement offer was valid only if the collector received funds by a certain date. *See, e.g., Hernandez*, 428 F. Supp. 2d at 777.

52. *Compare Goswami*, 377 F.3d at 495 (finding the one-time language misleading), *with Hancock*, 2006 WL 1525723, at *3 (finding nothing deceptive in the debt collector's series of offers), *and Van Ru Credit Corp.*, 381 F. Supp. 2d at 772 (concluding that settlement offer that does not expressly or implicitly indicate that no other offer will be made does not violate statute even though other offers may be forthcoming).

53. In *Gully v. Arrow Fin Servs., LLC*, the collection letter stated that the creditor was willing to settle the account "at this time" at a certain discount, giving a deadline for payment. No. 04 C 6849, 2006 WL 3486815, at *1 (N.D. Ill. Dec. 1, 2006). The court found no violation, because the "at this time" phrase did not preclude future offers if the consumer did not accept the present offer. *Id.* at *4; *see also Van Ru Credit Corp.*, 381 F. Supp. 2d at 768.

misrepresentation.[54] As the Seventh Circuit observed in *Evory v. RJM Acquisitions Funding L.L.C.*, a debt collector might very well avoid conveying a false impression to a consumer by merely reminding the consumer that the debt collector might renew the offer, but that such a renewal is not assured.[55] The Seventh Circuit in *Evory* was trying to provide some safe-harbor language for debt collectors, along the same lines suggested in similar contexts.[56]

In the absence of such language, a debt collector is not liable per se for a statutory violation.[57] The Seventh Circuit prefers to inquire into a possible violation as a question of fact, thus allowing a consumer to present survey evidence that the letter would deceive a substantial number of intended consumers.[58] Otherwise, a consumer will have no chance of showing that such consumers might be deceived if the collection letter is not deceptive on its face.[59] Therefore, even when the debt collector's communication does not contain the kind of limiting language encountered in *Goswami*,[60] a consumer might still have one last shot at making his case if a court treats the deception as a question of fact. This is not to suggest that even when a court takes this route, it would never dismiss a consumer's complaint. If a consumer presents no evidence beside the collection letter and the letter is straightforward without any hint of deception, then there is nothing that would prevent a court from doing so.[61]

Sometimes the debt collector does not employ language that is as definitive as "only during the next thirty days".[62] There can be a

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54. *See, e.g.*, *Evory*, 505 F.3d at 769.

55. The *Evory* court suggested that the problem could be solved by using the language: "We are not obligated to renew this offer." *Id.* at 776. The court continued: "The word 'obligated' is strong and even the unsophisticated consumer will realize that there is a renewal possibility but that it is not assured." *Id.*

56. *See, e.g.*, Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 876 (7th Cir. 2000) (providing safe-harbor language that would protect a debt collector in disclosing the amount of the debt pursuant to 15 U.S.C. § 1692g(a)(1)); Bartlett v. Heibl, 128 F.3d 497, 501-02 (7th Cir. 1997) (providing safe-harbor language that would effectively convey a consumer's right to dispute the debt within thirty days and the debt collector's right to continue its collection efforts).

57. *See Evory*, 505 F.3d at 776.

58. *See id.* Other courts treat these matters as questions of law. *See* Wilson v. Quadramed Corp., 225 F.3d 350, 353 n.2 (3d Cir. 2000); Terran v. Kaplan, 109 F.3d 1428, 1432-33 (9th Cir. 1997).

59. *See Evory*, 505 F.3d at 776.

60. *See Goswami*, 377 F.3d at 492 (observing settlement offer was valid "only during the next thirty days").

61. *See Evory*, 505 F.3d at 776; *McMillan*, 455 F.3d at 760.

62. The decision in *Goswami* would probably have been different if the debt collector had omitted the word "only" from that troublesome phrase. The language "during the

variation on the theme that spells out an offer of settlement indicating the debt collector's willingness to accept a lesser amount "at this time."[63] The consumer in *Gully v. Arrow Financial Services, Inc., LLC* expressed dissatisfaction with this language on the ground that the debt collector knew full well that the creditor would accept a lesser amount as the debt aged and that the "at this time" representation was false.[64] The consumers must have equated this language to that of *Goswami*, but in doing so they really wanted the court to focus on the agreement between the debt collector and the creditor that allowed for more favorable forms of settlement as time progressed.[65] The consumers' discomfort lay in the collector's authority to settle later for a lower amount if the consumers did not accept the initial offer of settlement.[66] Nevertheless, the language "at this time" concentrates on what the creditor will accept there and then, and does not misrepresent the debt collector's authority in any respect.[67]

It is not language that purports to address either the past or the future, but rather that conveys the creditor's present inclination without regard to any private discussions between the collector and the creditor. It is important then to draw a distinction between not disclosing the

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next thirty days" would have been akin to a deadline that left the door open to further negotiations. *See, e.g.*, Kiliszek v. Nelson, Watson, & Assocs., LLC, No. 3:04CV2604, 2006 WL 335788, at *7 (M.D. Pa. Feb. 14, 2006) (holding that inclusion of a deadline in settlement offer did not imply a one-time only offer); *Van Ru Credit Corp.*, 381 F. Supp. 2d at 772 ("Significantly, defendant did not state that it was authorized to settle 'only' for 40 per cent until the specific dates mentioned, which would have injected an artificial sense of finality into the offer."); Sarder v. Acad. Collection Serv., Inc., No. CV02-2486, 2005 WL 615831, at *3 (E.D.N.Y. March 3, 2005) (stating that the settlement offer with a deadline indicates that there is "potential for negotiation of both the price and the date").

63. *Gully*, 2006 WL 3486815, at *4.

64. *Id.* at *1.

65. *See id.* at *4. For example, if the balance due was $1,500 or less, the collector could settle for seventy percent thereof for up to 180 days. *Id.* at *1. Thereafter, the collector could accept fifty percent of the amount due. *Id.*

66. This concern did not sway the court in the consumer's favor because there is a difference between "'not disclosing the extent of one's settlement authority and misrepresenting that authority.'" *Id.* at *2 (quoting *Van Ru Credit Corp.*, 381 F. Supp. 2d at 772). The court characterized the debt collector's sin as "one of omission, not misrepresentation." *Gully*, 2006 WL 3486815, at *4.

67. In *Gully*, it would have been different if the debt collector had said that it was authorized to settle *only* for a certain percentage until a certain deadline. 2006 WL 3486815, at *4. The debt collector creates problems for itself if it represents that it will not accept a lower settlement when it has the authority to do so. *See id.* at *1; *cf. Van Ru Credit Corp.*, 381 F. Supp. 2d at 772 (stating that debt collector has discretion to negotiate within the limits set by the creditor but cannot suggest that the settlement offer is of the one-time variety).

extent of the debt collector's authority under the collection agreement and misrepresenting that authority.[68] The focus must be on what the debt collector says in its letter and not on what it does not say. Even if the debt collector will accept a lower amount in the future, that does not make the "at this time" statement false and really does not lead to any confusion for the consumer. It would be false for the debt collector to inform the consumer that it would accept a certain percentage of the debt in settlement only during a certain period, for that would have the ring of the *Goswami* language and would reflect the objections attached to that one-time-only scenario.[69] But where the debt collector stipulates the time for acceptance, the consumer will be subject then to the normal principles that the collector is master of its offer, and that if the consumer does not act, he will pass up the chance to pay off his debt for the settled amount.[70]

A debt collector must do its best to impress the consumer about its seriousness of purpose, while at the same time not leaving a false impression about its settlement offer. This is a difficult balancing act that depends in large measure on the way the offer is phrased. If the debt collector offers a one-time settlement, it leaves the consumer with a sense of urgency and motivates the consumer to grab the only chance that he may have to rid himself of this nagging problem.[71] Nothing prevents the debt collector from setting a time limit on its offer, but language that leaves the impression that the consumer has only one last clear chance to redeem himself is misleading if the debt collector has a strategy to make new offers as others fail. For example, if the collector informs the consumer that it will not make any more offers of settlement but it then proceeds to do so on the expiration of the original offer, that will create a *Goswami*-type problem concerning the misleading nature of the statement.[72] But in many cases, a consumer tries to convince a court

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68. *See Van Ru Credit Corp.*, 381 F. Supp. 2d at 772; *Gully*, 2006 WL 3486815, at *2.

69. *See Midland Credit Mgmt.*, 445 F. Supp. 2d at 1020; *Kiliszek*, 2006 WL 335788, at *7; Kahen-Kashani v. Nat'l Action Fin. Servs., Inc., No. 03-CV-828A, 2004 WL 2126707, at *1 (W.D.N.Y. Sept. 21, 2004).

70. This is consistent with the concept that the offeror is the master of his offer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 29 cmt. a (1981); *see also* JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2:14 (rev. ed. 1993).

71. *See Van Ru Credit Corp.*, 381 F. Supp. 2d 766; *Jones*, 2003 WL 21654365, *1.

72. *Compare Goswami*, 377 F.3d at 492 (observing settlement available only during next thirty days), *with Hancock*, 2006 WL 1525723, at *3 (observing none of the letters gave impression that settlement offer was one-time offer that would lapse irrevocably), *and* Pescatrice v. Nat'l Action Fin. Servs., Inc., No. 05-61110-CIV, 2006 U.S. Dist. LEXIS 76807, at *21 (S.D. Fla. Oct. 12, 2006) (finding letters simply indicated terms of settlement but did not indicate whether debt collector would make other offers).

to read into the debt collector's letter, language that will support the alleged deception even though there is no hint about the offer being a one-time affair. It is not at all unusual for a debt collector to offer a settlement with a deadline for acceptance, and then in the same letter inform the consumer it could extend the deadline under certain circumstances.[73] This type of language certainly militates against the "one-time" nature of the offer, and instead holds out hope that the consumer can seek some additional time to secure a settlement to his liking, even if he fails to meet the initial deadline.

There are other examples of enticing language. In *Jackson v. Midland Credit Management, Inc.*,[74] the debt collector used these encouraging words: "You won't want to miss this settlement opportunity . . . ."[75] The debt collector offered a "positive and flexible option" to the consumers to settle their accounts by a certain date for fifty percent of the amount due and also invited the consumers to call for assistance.[76] The plaintiffs argued for summary judgment in their favor, alleging that the letters were false because of a "one-time only deal" that the debt collector was offering.[77] There was no such one-time language in the collection letter, but the consumers thought they could attract some sympathy because of the debt collector's suggestion that this was an opportunity that the consumers would not want to miss.[78] So even in the absence of the *Goswami*-type formulation, the plaintiffs concentrated on the uniqueness of the settlement offer, which gave the consumers the idea that the offer would not be repeated.[79] If the consumers did not accept the offer, they would have had to await another offer from the debt collector, or make a counteroffer themselves.[80] In the meantime, the debt would accrue more interest and the refusal of the first offer would

73. *See Pescatrice*, 2006 U.S. Dist. LEXIS 76807, *18; *Jackson*, 441 F. Supp. 2d 883; *Kahen-Kashani*, 2004 WL 2126707, *1.

74. 445 F. Supp. 2d 1015 (N.D. Ill. 2006).

75. *Id.* at 1017.

76. *Id.*

77. *Id.* at 1019.

78. *Id.*

79. There was no "one-time" language of the *Goswami* type in *Midland Credit Management*. However, the consumers tried to demonstrate through a consumer survey the false and deceptive nature of the settlement offer. *Midland Credit Mgmt.*, 445 F. Supp. 2d at 1021. Nevertheless, the court found fault with the survey because it did not explore the nature of the so-called one-time offer from the point of view of the consumers surveyed. *Id.* The survey should have asked whether the participants believed that they had an option to pay then at the amount requested, or whether they could use the fifty percent option later. *Id.* The plaintiffs could not show that this was a one-time chance to resolve the debt for fifty percent of the balance owed. *Id.*

80. *Id.*

leave the consumers open to the possibility of facing payment of fifty percent of the increased amount.[81] Even if the consumers were concerned that the collector was talking about a one-time offer, it related only to the calculation of a fifty percent figure, rather than to the consumers' chances for settling the debt for fifty percent of the balance owed.[82]

As a matter of principle, there is nothing misleading about having a deadline in the debt collector's offer of settlement. Surely the collector must be able to adopt a collection strategy that stands the best chance of success without compromising its ability to be flexible in the face of a consumer's intransigence. There is a world of difference, however, between convincing the consumer of the attractiveness of the offer and misleading the consumer that there is no opportunity for revival once the current offer expires. The challenge for a debt collector is in driving home to the consumer the bargain that is in the consumer's grasp and that may elude him in the future if he takes no action. The debt collector must convey its message without straying into this one-time only scenario that causes discomfort for a consumer who is under pressure to get rid of the debt.[83] The debt collector must resist making its offer

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81. In a sense, therefore, it was true to say that the settlement offer took a one-time approach with respect to the calculation of the fifty percent figure. *Id.* But when the balance increased because of interest or other factors, the consumer might still have had the option to resolve the debt for fifty percent of the balance owed, but the actual settlement would have changed. *See Midland Credit Mgmt.*, 445 F. Supp. 2d at 1021.

82. The settlement offer in *Midland Credit Management* was for payment of "50% off the Current Balance" within one month. *Id.* at 1017. In *Goswami*, it was for a thirty percent discount available "only during the next thirty days." *Goswami*, 377 F.3d at 492. In the absence of the one-time language in *Midland Credit Management*, the mere fact that the defendant was willing to accept less than fifty percent later did not make the fifty percent offer false or misleading. *Midland Credit Mgmt.*, 445 F. Supp. 2d at 1020. If not the defendant would have had to state its best offer in the first letter to the consumer. *Id.*

83. A debt collector's strategy is exemplified in *Johnson*, 427 F. Supp. 2d at 954, where the collector sent six letters to the consumer. The first one made an offer to accept sixty percent, with no expiration date provided. *Id.* The second letter asked the consumer to call the collector to discuss payment arrangements if the consumer could not pay in full, but it gave no specific amount or percentage for settlement. *Id.* The third letter advised the consumer that information about the delinquent account could be forwarded to a credit bureau if the consumer did not pay in full but made no mention of settlement. *Id.* The fourth letter made an offer to settle for sixty percent of the amount due if the consumer paid by a certain date. *Id.* The fifth letter offered to settle for fifty percent of the amount due, but did not give a deadline. *Id.* The sixth letter offered to settle for a "reduced amount," did not give a deadline, but did ask the consumer to call for details. *Johnson*, 427 F. Supp. 2d at 954. One must notice here that the debt collector varied the language of each letter. It started out with a settlement offer of sixty percent of the amount due, went to fifty percent, and ended up with an offer to settle for a "reduced amount." *Id.* Sometimes the offer had a deadline, other times it did not. *Id.* However,

complex, and instead concentrate on the features that will make the offer irresistible, without adding language that seems to preclude all future opportunities for settlement.

Even when the offer of settlement contains a deadline, a debt collector may indicate its flexibility by encouraging the consumer to discuss available alternatives.[84] In that event, the offer, such as it is, leaves the door wide open for other possibilities, even though the parties cannot be sure about what form they will take.[85] If the consumer does not respond to the debt collector's invitation, one cannot fault the collector for trying again, perhaps with a reduced figure as an inducement. The debt collector's invitation to the consumer to call about the account signifies at least that the collector is willing to listen, and that the figure mentioned in the collection letter may not be the final one after all.[86]

Many a consumer will complain because a debt collector sends out a second letter after giving a deadline in the first letter for the offer of settlement.[87] Nevertheless, one will have to look long and hard to infer deceit in this context if there is no misleading language about a one-time offer.[88] There would be no advantage to either side in discouraging a creditor from making an offer of settlement, and that would surely be the result if a debt collector is penalized for continuing its collection efforts with subsequent offers, any one of which might produce the desired result. A consumer would be under enormous pressure when he gets the collector's offer, since he will have no wiggle room if the first offer must be the one and only one that the collector can make.

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there was no reference in any of these letters to a one-time offer. *Id.* at 956. As a matter of fact, the first letter for a sixty percent settlement gave no deadline, but the second letter gave the consumer the option of making payment arrangements for the "outstanding balance." *Id.* The consumer would have known by then that the sixty percent option was no longer on the table. The collector confirmed this indeed with its third letter when it demanded "payment in full." *Id.* Perhaps the consumer was thinking then that if he ever got another offer of settlement, he might want to grab it.

84. *See, e.g., Midland Credit Mgmt.*, 445 F. Supp. 2d at 1021.

85. *See Kiliszek*, 2006 WL 335788, *1; *Sarder*, 2005 WL 615831, *1.

86. *See Gervais*, 479 F. Supp. 2d at 273; *Pescatrice*, 2006 U.S. Dist. LEXIS 76807, at *7; *Midland Credit Mgmt.*, 445 F. Supp. 2d at 1017; *Johnson*, 427 F. Supp. 2d at 954.

87. *See, e.g., Hernandez*, 428 F. Supp. 2d at 777.

88. *Compare Goswami*, 377 F.3d at 495 (holding that debt collector's offer to settle debt at thirty percent discount "only during the next thirty days" was false and misleading), *with Dupuy*, 442 F. Supp. 2d at 829 (holding that settlement offer with a deadline that says nothing about future offers is not misleading), *Hernandez*, 428 F. Supp. 2d at 783 (holding that settlement offer with expiration date is not false or misleading), *and Van Ru Credit Corp.*, 381 F. Supp. 2d at 773 (holding that settlement offer providing for automatic revocation if payment not received by deadline is neither false nor misleading).

B. The Message of an Attorney's Involvement

While a law firm letterhead does not by itself cause problems for a collector, it can set the stage for the consumer's fear of imminent litigation when the collector informs the consumer that it has been retained to collect the debt, and that it is contacting the consumer about an important legal matter that requires immediate payment.[89] In *Gervais v. Riddle & Associates*, the collector appreciated the value of the law firm letterhead and the importance of the vague legal references in the context of its collection letters.[90] They were all geared towards prodding the consumer into paying a debt which he might not even owe.[91]

The effect of an attorney's letter cannot be underestimated. It is particularly telling in a mass mailing, when the message can reach many people with little effort. A recipient usually cannot tell whether his case has received an individual review, although he will usually suspect that an attorney has formed an opinion about the merits of the case.[92] The challenge is to identify some meaningful attorney involvement so that one can say that the collection letter has come from an attorney in the true sense of the word. When a law firm sends out form letters produced by a computerized collection system, it is difficult to identify the meaningful attorney involvement that should be the hallmark of the process. For example, in *Clomon v. Jackson*[93] the collection letters contained the facsimile of an attorney's signature, but the attorney had not reviewed the consumer's file or the collection letter before it was sent out.[94] This certainly was sufficient to give a consumer the impression that the letters had come from an attorney, because the letters stated that the attorney had received instructions from his client to pursue the consumer, and that the attorney had scheduled the consumer's debt for "'further action as deemed appropriate.'"[95]

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89. *Gervais*, 479 F. Supp. 2d. at 276.

90. The *Gervais* court observed that the defendant's website touted the defendant's "exceptional recovery rates" and the fact that the collection letters appeared on "law firm letterhead." *Id.* The Seventh Circuit had already recognized the impact of an attorney's letter. *See Avila*, 84 F.3d at 229 (stating that an attorney is "better positioned to get the debtor's knees knocking").

91. *See Gervais*, 479 F. Supp. 2d at 276; *see also* Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 485 (4th Cir. 1991); *Masuda*, 759 F. Supp. at 1461.

92. *See* Boyd v. Wexler, 275 F.3d 642 (7th Cir 2001); *Avila*, 84 F.3d 222; *Clomon*, 988 F.2d 1314; *Sonmore*, 187 F. Supp. 2d 1128.

93. 988 F.2d 1314 (2d Cir. 1993).

94. *Id.* at 1320.

95. *Id.* at 1317.

One variation on the theme occurred in *Greco v. Trauner, Cohen & Thomas, L.L.P.*,[96] where a law firm sent out a collection letter that was not signed by any individual attorney, but the firm's printed name appeared as a signature block.[97] Nevertheless, the consumer still complained about the lack of meaningful attorney involvement in the collection process. The court distinguished *Greco* from *Clomon* because the collection letter in *Greco* contained a specific disclaimer that no attorney had yet reviewed the particular circumstances of the debtor's account.[98] Thus, the implication of meaningful involvement that ensued from the language in *Clomon* did not arise in *Greco* because the collection letter there explained the limited involvement of the attorneys at that time.[99] It was as if the law firm was heralding its representation as a collector, while at the same time emphasizing that it was not yet acting as an attorney.[100] The significance of the disclaimer was to emphasize that no lawyer had evaluated the consumer's case or made any recommendations about the creditor's claims.[101] Despite that, one cannot help but notice the contradiction between the proud assertion that the collector was "a law partnership representing financial institutions in the area of creditors rights," and the disclaimer about an attorney's review of

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96. 412 F.3d 360 (2d Cir. 2005).

97. The letter ended with the law firm's name, Trauner, Cohen & Thomas, LLP. *Id.* at 361.

98. The disclaimer read as follows: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Id.*

99. *Compare Clomon*, 988 F.2d at 1317 (finding that use of attorney's letterhead gave false impression of attorney's involvement when attorney did not review individual files), *with Greco*, 412 F.3d at 361 (indicating that no attorney had personally reviewed consumer's file).

100. The collection letter used the following introductory sentence in its first paragraph:

> The firm of Trauner, Cohen & Thomas is a law partnership representing financial institutions in the area of creditors rights. In this regard, this office represents the above named Bank of America who has placed this matter, in reference to an original account with [sic] for collection and such action as necessary to protect our client.

Greco, 412 F.3d at 361.

101. The court went to great lengths to distinguish its decisions in *Clomon*, 988 F.2d 1314, and Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003), where attorneys sent out collection letters without making any judgment about the validity of the claim and the letters contained facsimile signatures, but there was no disclaimer of the type encountered in *Greco*. *See Greco*, 412 F.3d at 364-65. The formulation in *Clomon* and *Miller* implied a certain level of attorney involvement that turned out to be misleading, but in those cases the court was willing to accept some signal from the collection letters that there was far less attorney involvement. *See Clomon*, 988 F.2d at 1321; *Miller*, 321 F.3d at 301. The contrary language militating against the implication that an attorney had adequately considered the file appeared in the *Greco* disclaimer.

the plaintiff's case.[102] The consumer must have wondered how the firm would have answered his questions about the transaction in light of the disclaimer.[103] The law firm letterhead had already done its work by making the necessary impact on the consumer. If the firm had not made any recommendations about the validity of the creditor's claims, it was not conducive to full and fair disclosure for the firm to warn the consumer about possible additional remedies. Surely that admonition could have awaited an attorney's review.

Even when an attorney tries to detach himself from responsibility for a letter's contents, he may still choose language that is open to interpretation. In *Pujol v. Universal Fidelity Corporation*,[104] the debt collector prevailed against a consumer's challenge with language that read: "I have not, nor will I, review each detail of your account status, unless you so request."[105] This disclaimer still left open the possibility that the attorney had reviewed enough of the file for him to have a meaningful involvement in the debtor's case. It was not necessary for him to review each detail for that to occur, and yet the court in *Pujol* did not believe that "the least sophisticated consumer would read [the attorney's] letter and reasonably conclude that he had reviewed some of the details in the file, but not others."[106] The attorney in *Pujol* could easily have stated that he did not review the debtor's file, but instead he left the door open for some misunderstanding about the part he played in dispatching the collection letter.[107] With this in mind, therefore, the court

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102. *See* NAT'L CONSUMER LAW CTR., *supra* note 26, § 5.5.6.3 (Supp. 2007) (indicating that "[w]hat the court failed to appreciate is that there is a contradiction between, on the one hand, the disclaimer and, on the other hand, the letterhead and the statement in the body of the letter that the sender is a law firm").

103. No attorney had personally reviewed the particular circumstances of the consumer's account and yet the collection letter invited the consumer to call if he had any questions. *See Greco*, 412 F.3d at 361.

104. No. 03-CV-5524, 2004 WL 1278163 (E.D.N.Y. June 9, 2004).

105. *Pujol*, 2004 WL 1278163, at *1.

106. *Id.* at *5. The court in *Clomon* explained the purpose of the least sophisticated consumer test as protecting "all consumers, the gullible, as well as the shrewd." *Clomon*, 988 F.2d at 1318-19 (2d Cir. 1993). This is based on "the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes." *Id.* Most courts have followed this test. *See, e.g.*, Chaudhry v. Gallerizo, 174 F.3d 389 (4th Cir. 1999); Lewis v. ACB Bus. Servs., 135 F.3d 389 (6th Cir. 1998); *Bentley*, 6 F.3d 60. The Seventh Circuit prefers the "unsophisticated consumer" test because it protects a consumer who is "uninformed, naïve, or trusting, yet it admits an objective element of reasonableness." *Gammon*, 27 F.3d at 1257. Nevertheless, this same Seventh Circuit has admitted the distinction is "without much of a practical difference in application." *Avila*, 84 F.3d at 227.

107. The court acknowledged that the letter would have been clearer if it read: "'I have not, nor will I, review *the* details of your account status.'" *Pujol*, 2004 WL 1278163, at

should not have been so hasty in granting the defendant's motion for summary judgment, for by doing so it found this to be a clear-cut case of a collector's effective disclaimer.

The *Greco* language was much stronger when it advised the consumer that "no attorney . . . [had] personally reviewed the particular circumstances of [the] account."[108] There was no hedging here about "each detail of [the] account" and the *Greco* court was no doubt making good use of the accommodation language in *Miller v. Wolpoff & Abramson, L.L.P* allowing for some disclaimer about an attorney's involvement.[109] Nevertheless, when a law firm tried to make a similar disclaimer in *Sparkman v. Zwicker & Associates, P.C.*,[110] it came up short. The firm promised to review the consumer's account if the consumer did not make arrangements for payment.[111] This suggested that the firm had not yet done a review. But that was not the end of it. The firm's letter then went on to emphasize that "[t]he review of the computerized data based upon the computerized process to determine the appropriateness of the correspondence was made by an attorney and an attorney did authorize the sending of the letter."[112] This language suggested something different: an attorney did review the consumer's account before the letter was mailed. It was, therefore, not surprising that the court found the letter deceptive as a matter of law, for a consumer could have read it as having two different meanings.[113] It was doubtful that the attorney intended to make the letter as simple as possible, and so it was hard to drum up much sympathy for the confusion and contradiction contained in his letter. The court found the disclaimer "discursive and confusing,"[114] and with good reason. But even more than that, the disclaimer contradicted other language in the letter that was intermixed with references to computerized data and a computerized process.[115]

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*5 (emphasis in original). That change from "each detail" would have clarified the ambiguity about the collector's possible review of most of the details without having seen the entire file.

108. *Greco*, 412 F.3d at 361.

109. *See* 321 F.3d 292, 300 (2d Cir. 2003) (quoting *Clomon*, 988 F.2d at 1321).

110. 374 F. Supp. 2d 293 (E.D. N.Y. 2005).

111. *Id.* at 295.

112. *Id.* at 296.

113. *See id.* at 301-02; *see also* Russell v. Equifax A.R.S., 74 F.3d 30, 35 (2d Cir. 1996) (finding that "a collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate."); Dutton v. Wolhar, 809 F. Supp. 1130, 1141 (D. Del. 1992) (stating that "[t]he least sophisticated debtor is not charged with gleaning the more subtle of . . . two interpretations").

114. *Sparkman*, 374 F. Supp. 2d at 301.

115. *See id.* at 302.

An attorney-collector may also support his collection letter with statutory references that puts the consumer on notice of the possible violation of a state statute. The phrase in contention in *Francis v. Synder*[116] read: "A bad check can be considered a violation of Illinois statutes!"[117] It was obvious that this reference to a statutory violation was intended to drive home to the consumer that a lawsuit was on the horizon, thus constituting a threat of legal action under section 1692e.[118] It was certainly not to the debt collector's advantage to clarify that the statute to which he referred related only to the case where a check was dishonored for insufficient funds.[119] So while it was literally true that a dishonored check could be a violation of an Illinois statute, the situation in *Francis* arose from the consumer's stop payment order rather than any insufficiency of funds in the consumer's account, and therefore the statute was inapplicable to the case. The debt collector's strategy to pressure the consumer into paying was unsuccessful this time because the letter contained the threat of a lawsuit that was "legally baseless."[120]

C. The Imminence Feature

While courts have tended to attach some importance to an "imminence" requirement in determining whether a collection letter contains a threat of litigation,[121] it is by no means always necessary for

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116. 389 F. Supp. 2d 1034 (N.D. Ill. 2005).

117. *Id.* at 1037.

118. The consumer's basic allegation was that the debt collector had threatened to take an action that he could not legally take, thus violating 15 U.S.C. § 1692e(5). The Illinois statute that the collector mentioned related only to dishonor of checks having nothing to do with stop payment orders given by the debtor to her bank. *See Francis*, 389 F. Supp. 2d at 1041 (quoting 810 ILL. COMP. STAT. ANN. 5/3 - 806) (West 1993)).

119. The statute provides in pertinent part that it covers:

> Any person who issues a check or other draft that is not honored upon presentment because the drawer does not have an account with the drawee, or because the drawer does not have sufficient funds in his account, or because the drawer does not have sufficient credit with the drawee . . .

810 ILL. COMP. STAT. ANN. 5/3 – 806 (West 1993).

120. *Francis*, 389 F.3d at 1041. The attorney had hoped to get as much mileage as possible out of the language, "a bad check can be considered a violation of Illinois statutes." *See id.* at 1037. When an unsophisticated consumer receives a final notice with that phrase, he will be persuaded that a lawsuit is imminent and that all hope is lost because of the alleged statutory violation. It is this indirect reference to the threat of a lawsuit that may induce the consumer to pay and thus prove to be deceptive. *See* NAT'L CONSUMER LAW CTR, *supra* note 26, § 5.5.2.8.3.

121. *See Bentley*, 6 F.3d at 62; Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 25 (2d Cir. 1989); Canlas v. Eskanos & Adler, P.C., 2005 WL 1630014, at *3 (N.D. Cal. July 6, 2005).

there to be "specific and foreboding warnings of rapidly approaching legal action."[122] A debt collector may accomplish its objective through "ambiguity and innuendo."[123] If the letter is from an attorney, it will carry more weight that legal action is at hand, particularly if it declares that the attorney has the legal right to file a lawsuit.[124] But one will get a better picture about imminent legal action by considering not only the source, but also the content of the communication. If the collection letter refers only to the possibility of legal action, it is harder to find that an action is imminent. An exasperated debt collector may choose to abandon its collection efforts by advising the consumer that the creditor may choose to pursue legal action since the consumer has failed to cooperate. Some courts view this kind of language as merely disclosing the creditor's options, and not as a threat of legal action.[125]

In the same vein, the same result should follow from a debt collector's statement that the consumer's failure to pay would leave the creditor no choice but to "consider legal action."[126] The courts look for more than the possibility of a lawsuit from the consumer's perspective; they look for some signs that such a suit is imminent or is already underway. It was another story in *United States v. National Financial Services, Inc.*[127] when a debt collector sent out form letters on an attorney's letterhead that emphasized the attorney's authority to sue and the attorney's track record of successful judgment in similar contexts.[128] The attorney's letters urged payment, failing which the attorney would be compelled "to consider" available legal remedies, not that he would

122. *Gervais*, 479 F. Supp. 2d at 275.

123. *Id.*

124. *See Nat'l Fin. Servs.*, 98 F. 3d at 133; Russey v. Rankin, 911 F. Supp. 1449, 1454 (D. N.M. 1995).

125. *See, e.g.*, Abels v. JBC Legal Group, P.C., 428 F. Supp. 2d 1023, 1029 (N.D. Cal. 2005) (holding that collection letter reminding debtor that he may be in violation of a certain statute did not constitute a threat of litigation); Madonna v. Academy Collection Serv., No. 3:95CV00875 (AVC), 1997 U.S. Dist. LEXIS 13315, at *20 (D. Conn. Aug. 12, 1997) (holding that statement that creditor may choose to pursue legal action merely informs the consumer of option available to creditor and is not false or misleading); Woolfolk v. Van Ru Credit Corp., 783 F. Supp. 724, 726-27 (D. Conn. 1990) (stating that court could not find threat of litigation where debt collector warned that legal action would be recommended and stated that collector did not believe that debtor wanted it to take further action); Riviera v. MAB Collections, Inc., 682 F. Supp. 174, 178 (W.D.N.Y. 1988) (holding that collector's statement that collector had no choice but to advise creditor that legal action may be necessary did not constitute threat to take legal action).

126. *See* Knowles v. Credit Bureau of Rochester, No. 91-CV-14S, 1992 U.S. Dist. LEXIS 8349, at *7 (W.D.N.Y. May 28, 1992).

127. 98 F.3d 131 (4th Cir. 1996).

128. *Id.* at 134.

necessarily file suit.[129] It was to the defendants' advantage to convince the court that the consideration of legal remedies was not the same as a threat to bring a suit. The debt collector left no stone unturned in trying to convince the consumers that they were up against an attorney who meant business, and that they would not be spared even if they owed only small amounts.[130] The letters made their point about an attorney who was pressing for results.[131] Surely this kind of language would impress any debtor who was wavering about his decision to pay. Lest the consumer have any doubt about the attorney's standing, the letters assured the consumer that the attorney had the authority to bring suit and that the attorney would consider legal remedies against him.[132] The defendants justified these statements as merely a recitation of the common tasks that attorneys usually performed.[133] Nevertheless, the court in *National Financial Services* would not apply a literal interpretation to the collection language, but instead viewed the letters as threatening to take legal action which the defendants did not intend to take.[134] The attorney whose letterhead was used never reviewed any of the files and knew that bringing suit would be "impracticable and burdensome."[135] So even when the letters indicated the attorney would be compelled to consider the use of the legal remedies that might be available,[136] it was a false threat because the attorney never brought any suit.[137]

A threat of litigation is particularly important in the case of a debt that is barred by the statute of limitations. If the debt collector merely tries to collect the time-barred debt without making any litigation threats,

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129. *Id.*

130. The collection letter emphasized the attorney's tenacity with the following language: "I have filed suits and obtained judgments on small balance accounts just like yours." *Id.*

131. The collection letter advised that "instructions have been given to take any action, that is legal, to enforce payment." *Id.*

132. The impressive language was capitalized to convey the following message: "PLEASE NOTE I AM THE COLLECTION ATTORNEY WHO REPRESENTS AMERICAN FAMILY PUBLISHERS. I HAVE THE AUTHORITY TO SEE THAT SUIT IS FILED AGAINST YOU IN THIS MATTER." *Nat'l Financial Servs.*, 98 F.3d at 134. The attorney did not sign the collection letters and did not review any of them that were produced by computer on his letterhead.

133. *See id.* at 137. This was not a pure academic exercise about an attorney's functions or authority. The message here was that an attorney was now on the case and that he had made a professional judgment about the debtor's file.

134. *See id.* at 138.

135. *Id.*

136. *Id.* at 134.

137. *Nat'l Financial Servs.*, 98 F.3d at 138.

it will not run afoul of the statute.[138] A collector may, therefore, feel free to remind a consumer of the possible consequences of ignoring its call for payment. It is not unusual, for example, for a collector to warn about the impact of delinquency on the consumer's credit.[139] A debt collector may even remind a consumer in its collection letter about statutory penalties that may be available against a consumer for non-payment of the debt.[140] It is not unreasonable to view this approach as a gentle reminder to the consumer about the effects of his delinquency as distinguished from a threat of litigation. Courts will look for more than an attorney's letterhead in deciding whether there is such a threat. It is perfectly in order for an attorney to say that he has been retained to collect an outstanding debt without implying that a lawsuit is imminent.[141] But when the debt collector combines the statement of representation with other language, it may find a court attributing to it an implied threat of legal action that will prove deceptive under the statute.[142]

III. THE NUANCES OF COLLECTION STRATEGY

A. Creating Ambiguity

A debt collector's strategy is to impress the consumer that the debt collector means business. Towards that end, the debt collector will frequently use language that is intended to worry the consumer, to create concern in the consumer's mind. If the consumer feels that a lawsuit is imminent, he may be motivated to satisfy the debt collector's claims in order to avoid a confrontation even if the consumer is unsure about the validity of the debt. It is the collection language that may spell trouble for the debt collector in the long run. No where was this more evident

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138. *See Gervais*, 479 F. Supp. 2d 270; *Abels*, 428 F. Supp. 2d 1023; *Goins*, 352 F. Supp. 2d 262; Freyermuth v. Credit Bureau Servs., 248 F.3d 767 (8th Cir. 2001); Wallace v. Capital One Bank, 168 F. Supp. 2d 526 (D. Md. 2001); Veillard v. Mednick, 24 F. Supp. 2d 863 (N.D. Ill. 1998).

139. In *Wade v. Regional Credit Ass'n*, 87 F.3d 1098, 1099 (9th Cir. 1996), the collection letter capitalized the warning as follows: "DO NOT DISREGARD THIS NOTICE. YOUR CREDIT MAY BE ADVERSELY AFFECTED. CONTACT US IMMEDIATELY." The court in *Wallace* was more charitable by offering to assist the debtor in rebuilding his credit, while at the same time demanding payment of the debt. *Wallace*, 168 F. Supp. 2d at 527; *see also Freyermuth*, 248 F.3d at 769 (collector advised debtor to protect his check-writing privileges by paying the outstanding debt).

140. *See Abels*, 428 F. Supp. at 1029 (finding that letter citing a civil code provision that allows for a thirty-day payment period is not the same as threatening a lawsuit).

141. *Dupuy*, 442 F. Supp. 2d at 822.

142. *See Gervais*, 479 F. Supp. 2d 270.

than in *Crossley v. Lieberman*,[143] where the debt collector demanded payment of the "full amount of the plaintiff's damages and costs."[144] This was a clever choice of words, designed to create the impression that a lawsuit had already started, and that is why there was a "plaintiff" and "damages and costs."[145] These were terms intended to produce a reaction from the consumer. But the letter did not end there. It demanded payment within one week, failing which the debt collector would be compelled to proceed against the consumer.[146] The debt collector stressed that any suit could result in a sheriff's sale of the consumer's property.[147] The only problem was that the state law required at least thirty days' notice before the debt collector could commence any legal action against the consumer.[148] Therefore, the threat of an early lawsuit if the consumer did not pay within one week was really an empty one since the debt collector as an experienced attorney knew that a premature action was not legally possible.[149] The consumer was certainly not in imminent danger of losing his home to foreclosure, but the debt collector wanted to create that impression.

The debt collector relies on the consumer's understanding that action on the debt is imminent.[150] If the consumer is not concerned that he may

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143. 868 F.2d 566 (3d Cir. 1989).

144. *Id.* at 567.

145. *See id.* This language was inaccurate since there was no lawsuit pending. The defendant's objective was to convey the impression to the consumer that litigation had commenced, thus falsely representing the status of the debt. *See id.* at 571.

146. *Id.* The one-week period ran from the date of the letter. *Id.* This meant, therefore, that the consumer had just a few days to make up her mind, allowing time for the letter to make it through the mails.

147. The collector reminded the consumer that if he did not receive payment, legal proceedings could result in a sheriff's sale of her real estate or personal property. *See Crossley*, 868 F.2d at 571.

148. *Id.* at 571 (citing 41 PA. CONS. STAT. ANN. § 403 (West 1988)).

149. As an attorney, the collector knew that he could not sue within one week as his letter threatened. Obviously then he did not intend to take the action that he threatened to take, and this was a violation of 15 U.S.C. § 1692e(5).

150. *See Brown*, 464 F.3d at 455 (holding that debtor might get impression that the litigation was imminent if he did not pay within five days as demanded); *Bentley*, 6 F.3d at 62 (finding that collection letter falsely stating collector's authority to sue implied that that a lawsuit was imminent); Dewees v. Legal Servicing, LLC, 506 F. Supp. 2d 128, 136 (E.D.N.Y. 2007) (finding that plaintiff stated cause of action because least sophisticated consumer may reasonably read statement that debt is "currently being reviewed for potential litigation" to mean that a lawsuit is imminent); Kreek v. Phycom Corp., No. 06-03887 JW, 2007 U.S. Dist. LEXIS 30652, at *10 (N.D. Cal. April 26, 2007) (finding that a less sophisticated consumer would believe that legal action was a real possibility if debtor did not call the collector); *Gervais*, 479 F. Supp. 2d at 275 (finding that attorney's collection letter requiring payment or a call from the debtor to make arrangements suggested that legal action was imminent); *Rosa*, 784 F. Supp. at 11-12 (holding that

be dealing with a matter of some urgency, he may simply take his time in reacting to the debt collector's communications. If the debt collector informs the consumer that the creditor has authorized it "to proceed with whatever legal means is necessary to enforce collection,"[151] the consumer may get the impression that he has little time to ponder his predicament because legal action is imminent. That was the collector's strategy in *Bentley v. Great Lakes Collection Bureau, Inc.*, where the debt collector feigned authority to sue the consumer by whatever legal means was necessary.[152] In fact, the creditor had not given the debt collector any such authority.[153] Furthermore, the debt collector never recommended legal proceedings unless the creditor requested the collector's input on a particular transaction, and that occurred only in about one percent of the collection accounts that the collector handled for the creditor.[154] The collector's second letter indicated that the consumer's account was then on someone's desk, ready for a decision about the steps that had to be taken to enforce collection.[155] The debt collector wanted the consumer to know that the account was now receiving someone's personal attention, when in fact there was no such "desk" designated for the consumer's account, and the references to garnishment and other legal remedies combined with the enforcement language of the second letter constituted a threat to take action that the debt collector did not intend to take.[156]

The debt collector must have been pleased about assuring the consumer that it had not taken, and was not then taking, any legal action against her.[157] But the court read that assurance as strengthening the threat of a lawsuit.[158] The collector must have expected a sympathetic

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attorney's letter indicating that he may be forced to sue would cause debtor to believe that legal action was imminent).

151. *Bentley*, 6 F.3d at 61.

152. *See id.* at 61-62.

153. *Id.* at 62.

154. *Id.*

155. *Id.* at 61.

156. The statute makes it a violation for a debt collector to threaten "to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5) (2006). The court found that the "'least sophisticated consumer' would interpret [the] language to mean that legal action was authorized, likely and imminent." *Bentley*, 6 F.3d at 62.

157. The collector's second letter advised the consumer as follows: "NO LEGAL ACTION HAS BEEN OR IS NOW BEING TAKEN AGAINST YOU." *Id.*

158. *See id.* at 63. One cannot miss the message that the debt collector was sending. It was that the debtor could enjoy a respite from the debt collector's pursuit, since no suit had yet been brought, but the collector said nothing about the future. So the threat still hung over the debtor if she did not pay or call to discuss payment arrangements.

interpretation of this language, designed to reassure the consumer that no action was underway. Nevertheless, the threat implicit in the "here and now" language of the letter said nothing of tomorrow. Not surprisingly, the court did not view this as a favorable element in this context, since the debt collector did not have the authority to bring legal proceedings and the consumer must have feared the possibilities.

Even if a debt collector is not in the habit of suing debtors, it will still want to prod a consumer into action by conveying the message that the consumer's failure to pay "could" result in a lawsuit. In *Brown v. Card Service Center*,[159] the court saved the consumer's complaint from dismissal because the collector's use of the word "could" instead of "will" in the collection letter was nevertheless deceptive.[160] A consumer might be misled into thinking that he had to act within five days in order to forestall legal action or referral to an attorney. Even though the word "could" denotes a possibility, the collector's formulation here was misleading if the collector did not usually follow the course of action suggested in the letter.[161] It is true that in *Brown* the debt collector did not say that legal action was imminent;[162] that would have sent a clear message of urgency. The debt collector's strategy was to leave an impression about possibilities without committing definitely to a lawsuit. This is why it was important for the collector to stir the consumer's

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159. *Brown*, 464 F.3d at 450.

160. The collection letter read in pertinent part: "You now have five (5) days to make arrangements for payment of this account. Failure on your part to cooperate could result in our forwarding this account to our attorney with directions to continue collection efforts." *Id.* at 451-52.

161. On this point the FTC Official Staff Commentary provides the following guidance:

> A debt collector may state that certain action is possible, if it is true that such action is legal and is frequently taken by the collector or creditor with respect to similar debts; however, if the debt collector has reason to know there are facts that make the action unlikely in the particular case, a statement that the action was possible would be misleading.

53 Fed. Reg. 50,097, 50,106 (Dec. 13, 1988). The consumer in *Brown* contended that the debt collector did not usually refer cases to an attorney, but only referred them to another collection agency if it was unsuccessful in getting payment. This was the basis for the consumer's argument that the collector never intended to file suit, thus creating a claim under § 1692e(5).

162. The Third Circuit in *Brown* observed that the district court did not see any implication that a lawsuit was imminent because the debt collector merely stated that the debtor's failure to cooperate *could* result in a lawsuit, not that it *would*. *See Brown*, 464 F. 3d at 454 (citing Brown v. Card Serv. Ctr., No. 05-CV-0498, 2005 U.S. Dist. LEXIS 12810 *1, *23 (E.D. Pa. June 27, 2005)). But the Third Circuit was more concerned with the impression that a consumer might get when he read about the possibility of litigation if he did not respond within five days. *See id.* at 455.

imagination without revealing any definite plans for litigation. It wanted the consumer to know that it could take action if the consumer did not respond, but in the debt collector's view, this was different from vowing to take action. The only problem was that the debt collector was not in the habit of referring anyone's file to an attorney, but simply referred the matter to another collection agency.[163] So what was billed as a possibility through the "could" formulation was really nothing more than an empty gesture calculated to send a deceptive signal to the consumer.

B. Misleading Impressions

A debt collector's dependence on the literal truth of a statement did not serve the collector well in *McMillan v. Collection Professionals, Inc.*[164] This time the collector relied on the language, "You are either honest or dishonest you cannot be both."[165] The consumer complained that the letter questioning her honesty was false or misleading because her check could have been dishonored for any number of reasons having nothing to do with honesty.[166] Surely the collector did not intend to congratulate the consumer on her good morals. The strategy was to focus on the check's dishonor and to raise a serious question about the consumer's role in making that happen. It was the debt collector that raised the issue of honesty, and so the reader's attention was at once focused on that aspect of the transaction.[167] This strategy is not at all unusual. Many a collector has taken a simple statement of truth and let a misleading implication flow naturally therefrom, hoping all the while that the truth of the statement will overcome all statutory objections.[168]

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163. *See id.*

164. *McMillan*, 455 F.3d at 754.

165. *Id.* at 756.

166. *See id.* at 761.

167. When read literally, the collector's statement was true. The debtor was either honest or dishonest about the debt. But the literal truth may still leave a false or misleading impression on the reader. *See id.* (citing *Gammon*, 27 F.3d at 1258 (Easterbrook, J., concurring)); *Avila*, 84 F.3d at 227.

168. *See Brown*, 464 F.3d at 451-52 (concluding that it would be deceptive for collector to state that consumer's "[r]efusal to cooperate could result in a legal suit being filed" when collector had no intention of taking such action); *Fuller*, 192 F. Supp. 2d at 1369 (holding that attorney's letter violated § 1692e when it stated that consumer would incur a "substantial amount of attorney fees and costs" because consumer would probably read letter to mean that he could not prevail in a lawsuit); Schimmel v. Slaughter, 975 F. Supp. 1357, 1363 (M.D. Ga. 1997) (finding that the least sophisticated consumer would very likely interpret the language, "[a]fter judgment is obtained, garnishment can be brought to satisfy judgment," to mean that he had no chance of winning a lawsuit).

There was no question that in *McMillan* the debt collector's statement was true, but the court went beyond the literal language to examine the underlying implication that the consumer was dishonest in allowing her check to be dishonored. It found that "[b]y calling into question a debtor's honesty and good intentions simply because a check was dishonored, a collection letter may be making a statement that is false or misleading to the unsophisticated consumer."[169] The consumer survived the debt collector's motion to dismiss not only because of the general prohibition against false or misleading statements, but also because of the specific prohibition against disgracing the consumer with false representations of the consumer's misconduct.[170] The collector had hoped to avoid a violation, inasmuch as it did not accuse the consumer of a crime, but the court used the plain language approach to give the world "disgrace" its normal meaning.[171] After all, the statutory language covers "[t]he false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer."[172] Therefore, even if there is no crime, a consumer will have a basis for complaining about conduct that "shames or humiliates" him.[173] The collector provided that ground by calling the consumer's honesty into

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169. *McMillan*, 455 F. 3d at 762.

170. The statute provides that the following conduct is a violation: "The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer." 15 U.S.C. § 1692e(7) (2006).

171. The court could get no help from the FTC Official Staff Commentary because the Commentary lists only false allegations of fraud and the misrepresentation of criminal law as examples of the conduct forbidden by § 1692e(7). The Commentary does not therefore explain the other conduct that can disgrace a consumer. *See* 53 Fed. Reg. 50,097, 50,016 (Dec. 13 1988). Nevertheless, the court recognized Congress' interest in prohibiting conduct that "shames or humiliates" a debtor. *McMillan*, 455 F.3d at 763. In this way the court accommodated the collector's underlying implication that the consumer was being dishonest when she allowed her check to be dishonored. In giving the word "disgrace" its normal meaning, the court was consistent with the congressional intent to cover a debt collector's conduct that may not be criminal. *Id.* at 763. *See also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (stating that where the language of the statute is plain, "the sole function of the courts is to enforce it according to its terms") (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)); Mace v. Van Ru Credit Corp., 109 F.3d 338, 343 (7th Cir. 1997) (stating that "construing the FDCPA in accordance with its plain language may best honor its drafters' intent").

172. 15 U.S.C. § 1692e(7) (2006).

173. *McMillan*, 455 F.3d at 763. Both the allegation of a crime and the allegation of other misconduct may lead to a consumer's disgrace. It is unfortunate that the FTC Official Staff Commentary explained the statute restrictively as relating to fraud and misrepresentation of criminal law. In *McMillan*, the debt collector wanted to give the consumer a "final opportunity to prove [her] honesty and good intentions." *Id.* at 756. The implication here was that her honesty was in doubt.

question, even if only by some oblique reference to the consumer's intent in issuing the check.

Sometimes a debt collector's language seems innocent enough, but a consumer will seek a bare thread that links it to section 1692e. In some cases, a court has not been bashful in suggesting that the consumer is grasping at straws, as it were, and has rightfully rejected the consumer's invitation to find a violation where the language is merely informational and devoid of a threat. For example, in *Dunlap v. Credit Protection Association*,[174] the consumer was offended by the defendant's name, which in the consumer's view, implied that the consumer had to pay the debt in order to "'protect his credit.'"[175] The consumer alleged that the implication was false and misleading because credit reporting agencies generally do not report very small debts and the defendant itself had no intention of reporting debts in that category.[176] There was no threat in the debt collector's language and any inference about credit reporting was, "at best, very weak."[177]

This attempt to get some mileage out of this kind of language was reminiscent of the situation in *Wade v. Regional Credit Association*,[178] where the debt collector notified the consumer that failure to pay could affect the consumer's credit.[179] There was no threat to sue, for the collection letter included the usual statutory language that the collector was trying to collect a debt, and that any information it obtained would be used for that purpose.[180] If the collector had not included that information in its letter, it would have violated the statute.[181] There was nothing false or misleading in the collector's message. The consumer had a debt and the collector was trying to recover payment. There was a connection between the consumer's delinquency and his chances of obtaining future credit, and there was nothing in the statute that forbade

174. 419 F.3d 1011 (9th Cir. 2005).
175. *Id.* at 1012.
176. *Id.*
177. *Id.*
178. 87 F.3d 1098 (9th Cir. 1996).
179. The notice appeared in this form:

> WHY HAVEN'T WE HEARD FROM YOU? OUR RECORDS STILL SHOW THIS AMOUNT OWING. If not paid TODAY, it may STOP YOU FROM OBTAINING CREDIT TOMORROW. PROTECT YOUR CREDIT REPUTATION. SEND PAYMENT TODAY. . . . DO NOT DISREGARD THIS NOTICE. YOUR CREDIT MAY BE ADVERSELY AFFECTED. CONTACT US IMMEDIATELY.

Wade, 87 F.3d at 1099.
180. *Id.*
181. *See id.* at 1100 (citing 15 U.S.C. § 1692e(11) (2006)).

the collector from reminding the consumer about the consequences of his failure to pay.[182]

It is sometimes surprising that a consumer will latch on to language that on its face does not seem offensive or objectionable, even to the least sophisticated consumer. In *Turner v. Asset Acceptance, LLC*,[183] the collection letter began with the greeting: "It is our pleasure to welcome you as a new customer of ASSET ACCEPTANCE LLC."[184] The debt collector must have been pleased with its attempt to establish a connection with the consumer, but the latter would have none of it. He found the greeting misleading, because the debt collector really had no intention of welcoming anybody and in any event, she was not the collector's "customer" in any sense of the word, but rather a "debtor."[185]

The court reminded the plaintiff that friendliness was not one of the problems that Congress intended to address in passing the FDCPA.[186] It therefore found as a matter of law that there was nothing deceptive about the collector's greeting.[187] With respect to the use of the word "customer," the court saw no possibility that even the least sophisticated consumer would be misled into thinking that the debt was for something "service-related," thus causing confusion about the origin of the transaction.[188] It was unfortunate, indeed, that the consumer rested his claim of confusion on a reference to him as a customer, when the letter clarified elsewhere that the debt collector was attempting to collect a debt, and the other references also emphasized that there was a creditor

182. The consumer tried to convince the court that the debt collector had violated the FDCPA by sending its notice from California to him in Idaho, where the collector did not have a permit to operate. While acknowledging that some district courts had found a FDCPA violation when debt collectors operated without the proper state license, the Ninth Circuit concentrated on the question whether the debt collector had violated the FDCPA and on the possible violation of a state statute. *See id.*

183. 302 F. Supp. 2d 56 (E.D.N.Y. 2004).

184. *Id.* at 57.

185. *Id.* at 58.

186. *See id.*

187. *Id.*

188. *Id.* The consumer's complaint left a lot to be desired in this context. It gave the *Turner* court an opportunity to remind the parties that the least sophisticated consumer standard was intended to protect not only naïve and trusting consumers, but also "debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Turner*, 302 F. Supp. at 58 (quoting *Clomon*, 988 F.2d at 1320). The *Turner* court certainly found the consumer's observations about the word "customer" to be an example of a bizarre or idiosyncratic interpretation. *Id.* at 59. It was no wonder that the parties could find no precedent for treating the word "customer" as deceptive under the FDCPA.

and an outstanding debt that had to be satisfied.[189] This was an example of the "bizarre or idiosyncratic interpretations" which the court in *Clomon* had hoped the "least sophisticated consumer" standard would guard against,[190] but one must appreciate the temptation that the FDCPA offers when a consumer may recover statutory damages for a violation without worrying about actual harm.[191]

It is comforting, though, that the courts seem attuned to the possibility of having over-sensitive consumers enter the judicial arena to seek some personal satisfaction against a pursuing collector. In all this, the courts are always mindful that the purpose of the FDCPA is to eliminate debt collectors' abusive practices.[192] It is not to cater to the sensitivities of a disappointed debtor. If it were not so, the consumer in *Hapin v. Arrow Financial Services*[193] would certainly have prevailed with his complaint that the debt collector had made a misleading representation when it expressed its willingness to help the consumer regain his financial standing through the consumer's payment of the

189. The collection letter listed the balance due as $2729.48 and contained the usual validation notice required under § 1692g that advised the consumer about the details for disputing the debt. 302 F. Supp. 2d at 58. It concluded with a statement required under § 1692e(11) that the letter "[was] an attempt to collect a debt and [that] any information obtained [would] be used for that purpose." *Id.* at 57.

190. *See Clomon*, 988 F.2d at 1320. The Second Circuit's reference to bizarre or idiosyncratic interpretations has been discussed in other contexts. For example, § 1692g requires a debt collector to state the amount of the debt in its collection letter. In *Barnes v. Advanced Call Ctr. Techs., LLC*, the debt collector listed the past-due amount as the "Current Amount Due," and the consumer complained that the collector violated the statute by not stating the amount of the debt. The court concluded that replacing the "Current Amount Due" with "Amount of the Debt" would relieve an unsophisticated consumer from the obligation of not interpreting a collection letter in a bizarre or idiosyncratic way. 493 F.3d 838, 841 (7th Cir. 2007); *see also* Olson v. Risk Mgmt. Alternatives, Inc., 366 F.3d 509, 513 (7th Cir. 2004) (concluding that unsophisticated consumer who does not interpret a collection letter in a bizarre or idiosyncratic fashion would understand that the amount of the debt is the "'Balance'" and that the amount "'Now Due'" is the figure that the creditors would accept until the next bill is due); *cf. Brown*, 464 F.3d at 455 (finding that it would not be bizarre or idiosyncratic for the least sophisticated consumer to get the impression that a lawsuit was imminent when a collection letter gave consumer five days to pay or face referral of the account to an attorney for further collection efforts).

191. *See Turner*, 302 F. Supp. 2d at 59. The *Turner* court attributed the attorney's willingness to advance his far-fetched theory to the class action remedies and statutory damages available under the FDCPA. *See id.*; *see also* 15 U.S.C. § 1640(a)(2) (2006). This was an example of a bizarre and idiosyncratic interpretation of the collection letter.

192. *See Brown*, 464 F.3d at 453; *Greco*, 412 F.3d at 363; *Strand*, 380 F.3d at 318; Wade v. Regional Credit Ass'n, 87 F.3d 1098, 1099 (9th Cir. 1996); 15 U.S.C. § 1692(e) (2000).

193. 428 F. Supp. 2d 1057 (N.D. Cal. 2006).

debt.[194] The consumer was already aware of his poor financial condition, and it was his contention that his payment of the debt to the defendant would not have benefitted him financially because of his many other commitments.[195] There was nothing in the collection letter that promised instant restoration of the consumer's good name, but surely a reduction in his overall obligations would have ensued from his payment of this one debt.[196] This would have helped him in some small measure in trying to regain his financial standing. It was difficult to find any abusive tactics in the use of the collector's language. If anything, the language mirrored that employed in *Wade*, where the court found no violation when the debt collector warned the consumer about the adverse impact that a delinquency would have on the consumer's credit reputation.[197]

In *Hapin*, the consumer thought he had another reason to complain, because the company bragged about its pride in working with new customers, and the letter writer identified himself as an "account representative."[198] The consumer saw this as a method of concealing the true relationship between himself and the collector, that is, debtor and debt collector.[199] The consumer in *Turner* had already tried a similar strategy to no avail.[200] In both cases the collection letters contained the important statutory language indicating that the agency was trying to collect a debt, and that it would use for that purpose any information it

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194. The debt collector used the following language as part of its collection letter in trying to get the consumer's cooperation:

> Our company prides itself in working with new customers to provide solutions to help you take a step towards resolving this matter.
>
> ARROW FINANCIAL SERVICES has several programs that will help you satisfy your obligation. Please take this opportunity to help regain your financial future by contacting your account representative at our toll free number.

Id. at 1059.

195. *Id.* at 1061.

196. The court analyzed the collection letter from the perspective of the "least sophisticated consumer" without considering the particular financial circumstances of the consumer in *Hapin*. *Id.*

197. *Compare Wade*, 87 F. 3d at 1099 (collection letter suggesting that consumer pay debt in order to protect her reputation), *with Hapin*, 428 F. Supp. 2d at 1059 (collector urging consumer to make arrangements about the debt in order "to help regain [his] financial future").

198. *Hapin*, 428 F. Supp. 2d at 1059.

199. *Id.* at 1060.

200. *See Turner*, 302 F. Supp. 2d at 57 (denying relief under § 1692e where collector's letter indicated that it was the collector's pleasure to welcome the debtor as a new customer).

obtained.[201] In *Hapin*, the collector expressed its interest in giving the consumer a second chance to resolve his outstanding balance.[202] The reference to "customers" appeared in the same paragraph followed by the identification of an outstanding balance.[203] It was clear at that point that the relationship between the parties revolved around an outstanding debt, and thus the letter did not convey a misleading impression that there was anything else in play.[204]

It is unfortunate that consumers will press their luck in cases like *Wade*,[205] *Turner*,[206] and *Hapin*,[207] where the collectors tried their level best to bring some degree of compassion to the relationship between themselves and the debtors that they were pursuing. It is one thing to reject a collector's friendly approach because of the inherent adversarial interests of the parties, but it is quite another to say that the collector has misled or deceived the consumer with its diplomatic language. The consumer's clamor against a collector's amicable overtures will invariably fall flat once a collector includes the traditional language in its collection letter that it is trying to collect a debt, and then completes the picture with a validation notice that includes the word "debt" several times.[208] It is not convincing for a consumer to argue deception in this context simply because the collector wants to embrace him as a customer and then set the stage for a continuing relationship until the mission is accomplished. As a strategy, it serves the interests of both parties to encourage dialogue in anticipation of a happy solution to the debt collector's activities, and the usage of certain terms in furtherance of that

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201. The statute makes it a violation under § 1692e(11) if the debt collector fails to disclose that it is "attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11) (2006). That language appeared in both *Hapin*, 428 F. Supp. 2d at 1059 and *Turner*, 302 F. Supp. 2d at 57.

202. *Hapin*, 428 F. Supp. 2d at 1059.

203. *Id.*

204. *Id.* at 1061; *see also* Kalinina v. Midland Mgmt., Inc., 197 F. Appx. 573, 574 (9th Cir. 2006) (finding use of terms "customer and "servicer" not misleading in view of language stating that letter was from agency trying to collect debt).

205. *See Wade*, 87 F.3d at 1098 (finding that notice to debtor that her failure to pay could affect her credit did not violate § 1692e).

206. *See Turner*, 302 F. Supp. 2d at 58 (finding as matter of law that debt collector's language welcoming debtor as customer was not deceptive).

207. *See Hapin*, 428 F. Supp. 2d at 1062 (finding that debt collector's language that if the consumer paid his debts, it would help regain his financial future was not misleading or abusive).

208. The validation section mentions the word "debt" eight times in the two paragraphs dealing with the statements that the debt collector must give to the consumer concerning the right to dispute the debt. *See* 15 U.S.C. §§ 1692g(a)(3), 1692g(a)(4) (2006). So even if the consumer is a little uncomfortable with the debt collector's salutations, the validation language should leave no doubt about the collector's mission.

objective should not result in a finding that the collector has engaged in false or misleading representations.[209]

C. Getting the Consumer's Attention

Although section 1692e forbids "any false, deceptive, or misleading representation . . . in connection with the collection of any debt,"[210] sometimes a debt collector will make a false statement that does not get it into trouble because it is not the type of representation that Congress intended to address when it passed the FDCPA. In *Robbins v. Wolpoff & Abramson, L.L.P.*,[211] the debt collector made the mistake of including in its collection letter a statement that the statute required it to notify the consumer that it would cease its collection activities if the consumer disputed the debt in writing, and furthermore that the consumer's silence about the debt would not constitute an admission of liability.[212] There is nothing in the statute that requires a debt collector to inform the consumer about those events,[213] and so the debt collector was incorrect in identifying that as a requirement. Nevertheless, giving the consumer that information is not harmful or abusive in any way, but the consumer nevertheless rested his allegation of a statutory violation solely on the debt collector's misstatement.[214]

Had the debt collector made the disclosure without identifying it as a requirement, the consumer would have had nothing to complain about since the collector would simply have been reporting some statutory provisions for the consumer's benefit. After all, the collector could

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209. In *Mebane v. GC Servs. Ltd. P'ship*, the debt collector provided an opportunity for the consumer to settle her debt with the following language: "This is a great opportunity to finally take care of this long overdue account. If you wish to take advantage of this offer, contact our office or mail your remittance, in the form of a cashier's check or money order, in the amount of $225.44." 481 F. Supp. 2d 249, 250 (S.D.N.Y. 2007). The consumer complained that the collection letter was deceptive because it did not specifically mention that the collector would also accept payment by personal check, although the collector was willing to do so. *See id.* at 249-50. In holding for the debt collector, the court concluded that the collection notice would not mislead the least sophisticated consumer, since it did not state that personal checks would be unacceptable and the FDCPA did not require a debt collector to cover all acceptable methods of payment. *Id.* at 252. The court noted that the plaintiff's counsel in *Mebane* was also involved in *Turner*, 302 F. Supp. 2d 56. *Mebane*, 481 F. Supp. 2d at 252.

210. 15 U.S.C. § 1692e (2006).

211. No. 05-C-315, 2007 U.S. Dist. LEXIS 12485 (E.D. Wis. Feb. 22, 2007).

212. *See id.* at *2.

213. The statute simply requires the debt collector to cease collection until it verifies the debt and sends the consumer a copy of the verification, but the debt collector does not have to notify the consumer about this cessation. *See* 15 U.S.C. § 1692(a)(4) (2006).

214. *See Robbins*, 2007 U.S. Dist. LEXIS 12485, at *6.

hardly be chastised for educating the consumer about the realities of the statute. Where the collector went wrong, the consumer alleged, was in saying that Congress made him do it, that he had to make the disclosure when in fact there was no such requirement. The collector had made a false statement. It was now a question of determining whether Congress would have wanted to penalize a debt collector for it.

The *Robbins* court rose to the occasion, recognizing a canon of statutory construction that it should not apply the plain language of a statute when it would lead to "patently absurd consequences."[215] The debt collector had provided more useful information than the statute required, and yet the consumer wanted to hold the collector liable for stating it as a requirement. This would not have furthered the congressional objective of eliminating abusive debt collection practices, because all that the debt collector did was to make the consumer fully aware of some important statutory provisions, even if Congress itself did not have the foresight to make it a mandatory feature in the statutory scheme.[216] If a court were to hold a collector liable in these circumstances, it would send a wrong message, one that would be inconsistent with the statutory purpose of eliminating collection abuses.

Sometimes the literal truth of a statement will save a debt collector. In *Durkin v. Equifax Check Services, Inc.*,[217] the debt collector warned the consumer as follows: "'Should you fail to pay this dishonored check . . . steps will be taken to determine if your check will be assigned to an investigator or to a collection agency.'"[218] The consumer complained that since Equifax was itself a debt collection agency, the statement about referring the debt to a collection agency implied deceptively that the debt collector had not yet referred it to such an agency.[219] In finding

215. *Id.* at *8 (quoting United States v. Brown, 333 U.S. 18, 27 (1948)); *see also* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:7 (7th ed. 2007) (explaining the limits of literal interpretation, but also cautioning that the absurd results doctrine should be used sparingly).

216. The drafters could easily have added language to § 1692g(a)(4) that would have required the debt collector to include in its statement relevant information about the collector's obligation to cease its collection activities once the consumer lodges his dispute. That requirement would have given the consumer a complete picture of the effects of disputing the debt. The debt collector in *Robbins* tried to give the consumer as much information as possible about the parties' rights and obligations under the FDCPA, and found itself in trouble. *See Robbins*, 2007 U.S. Dist. LEXIS 12485, at *9. There was no hint here of an abusive collection practice, and after all, the main purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692e (2006).

217. 406 F.3d 410 (7th Cir. 2005).

218. *Id.* at 419.

219. *See id.*

for the debt collector, the court pointed out that the collection letter did not plainly suggest that Equifax was not a collection agency.[220] But that is the stuff that deception is made of, and it is perplexing that the court might have been more sympathetic if Equifax had made the blunt statement that it was not a collection agency. In that event, there would be no implication in play; the statement would be false in itself, thus creating a clear statutory violation. The debt collector's language sowed seeds of doubt about Equifax's status, which could have been clarified by a mere statement that steps would be taken to determine if the check would be assigned to *another* collection agency.[221] That would have left no doubt that Equifax itself was such an agency, but then that would have taken the sting out of Equifax's message that the collection process was going to begin soon. This time the debt collector escaped with a misleading implication.

A debt collector's ingenuity does not always bring success. Nevertheless, there is always the possibility that by creating some ambiguity in its language, a collector will motivate the consumer to act, even though the consumer may have some nagging doubts about the validity of the debt. A collector may impress the consumer with the possibility that it may recover a reasonable attorney's fee "to the extent permitted by applicable law."[222] This seemingly innocent phrase is actually open to two interpretations. It may leave the consumer wondering whether the debt collector is entitled to an attorney's fee at all if it prevails, or whether it is entitled to such a fee, with only the amount remaining to be determined.

It must be conceded that if the debt collector in *Gionis v. Javitch, Block & Rathbone* had suggested the possibility of an attorney's fee if permitted by law, it would have been closer to the mark.[223] But even then, there would still have been room for improvement, since the debt collector should have known whether an attorney's fee was permissible under the circumstances. The mistake that the defendant made in *Gionis*

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220. *Id.*

221. The defendant included the usual validation language in its collection letters. *See id.* at 412. It did not pretend not to be a collection agency. One wonders why it preferred to mention the possibility of referring the debt to a collection agency.

222. *See* Gionis v. Javitch, Block & Rathbone, LLP, 228 F. Appx. 24 (6th Cir. 2007).

223. In *Gionis*, the debt collector's complaint did not include a request for attorney's fees, but nevertheless an affidavit from the debt collector's agent that was attached to the complaint recited the terms of the cardholder's agreement spelling out the consumer's responsibility for attorney's fees "'to the extent permitted by applicable law.'" *Id.* at 25. The defendant saw no problem here because since Ohio law did not allow attorney's fees in this context and the defendant did not seek them, there was no harm in attaching the affidavit to the complaint. *Id.* at 30.

was in depending on the creditor's boilerplate affidavit that related to all the jurisdictions in which the creditor did business, some of which allowed for the recovery of an attorney's fee in connection with consumer debts, and some of which did not.[224] In Ohio there was no provision for the recovery of an attorney's fee, and the consumer was left confused about the language, "to the extent permitted by applicable law." It was easier for the debt collector to be precise on this occasion by deleting any reference to an attorney's fee.[225] However, the debt collector would have yielded any advantage it had in trying to convince the consumer that the door was open for the imposition of an attorney's fee, and that the consumer could avoid additional expense by settling his debt sooner rather than later.[226] A consumer should not be left wondering about the applicability of an attorney's fee when the debt collector is in the best position to set the record straight by not circulating misleading information. Surely the debt collector should be advised of the applicable law before making a reference to it.

A similar phrase, "to the extent permitted by law," has appeared elsewhere. In *McDowall v. Leschack & Grodensky*,[227] the debt collector had hoped to recover the balance due "plus interest and attorney's fees."[228] The debt collector supported its claim with a reminder to the debtor that the credit card agreement required the debtor to pay all reasonable attorney's fees "to the extent permitted by law."[229] The problem was that the debtor owed no such fees at that time, but instead of clarifying the point, the collector's letter listed the attorney's fees as part of the balance due.[230] Again this nebulous phrase left the consumer

224. The district court in *Gionis* suggested that the defendant could have used a modified version of the affidavit to avoid any reference to attorney's fees, thus avoiding confusion. *See Gionis*, 405 F. Supp. 2d 856, 867 (S.D. Ohio 2005), *aff'd*, 238 F. Appx. 24 (6th Cir. 2007).

225. *Id.* at 866.

226. The Sixth Circuit recognized the thrust of the affidavit that the collector attached to its complaint by observing that the consumer "would be confused, and reasonably might feel pressured to immediately pay the debt, even if she disputed its validity, in order to avoid the possibility of having to also pay . . . attorney fees at some later date." *Gionis*, 228 F. Appx. at 29 (quoting *Gionis*, 405 F. Supp. 2d at 867); *cf.* Barany-Snyder v. Weiner, No. 07-3244, 2008 U.S. App. LEXIS 18018, at *15 (6th Cir. Aug. 22, 2008) (finding that the consumer failed to state a claim under 15 U.S.C. § 1692e(5) and 15 U.S.C. § 1692e(10) when the defendants attached to the complaint the underlying credit agreement that stated that the attorney's fees were at the option of the creditor, but the creditor did not include such fees in the amount due).

227. 279 F. Supp. 2d 197 (S.D.N.Y. 2003).

228. *Id.* at 198.

229. *Id.*

230. *Id.*

in doubt about the actual amount due,[231] but one thing was certain, the consumer would have been concerned about these extra charges that he might have had to pay.

In these cases, the objective is to leave the consumer wondering, and to some extent, wandering about the maze that the debt collector has created for him. The debt collector will not go out of its way to clarify things, for fear of losing its advantage. After all, the debt collector wants to leave it up to the consumer to work out the various possibilities that might ensue from the interplay between the parties, but in any event, the consumer must be made aware of chances that he is taking if he does not cooperate. For example, if the debt collector threatens to collect an attorney's fee if the debtor challenges the debt,[232] the consumer may lose interest in confronting the collector. The consumer would only know that the collector would be entitled to such a fee if the consumer mounted a frivolous challenge to the debt collector's claim.[233] The consumer would therefore be at a distinct disadvantage in dealing with the collector's threat, and there would be every good reason to hold the collector liable for this deception.

Another effective device in gaining a consumer's attention is in promising to spread the word about settlement of the debt. This strategy is even more effective when the time has expired for a credit reporting agency to report the debt as unpaid.[234] In *Gonzales v. Arrow Financial Services, LLC*,[235] the debt collector promised that it would notify the various credit bureaus that the account had been settled.[236] The problem was that the creditor had already charged off the account more than seven years previously, and thus a credit reporting agency could not make any reference to it as a part of its normal reporting activities.[237] Therefore, what the collector might have characterized as a

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231. *Id.*

232. *See* Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087, 1105 (D. Or. 2000).

233. The statute provides that "[o]n a finding by the court that an action was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3) (2006). The debt collector's right to attorney's fees is therefore subject to conditions.

234. The FDCPA prevents a consumer reporting agency from making any consumer report about "[c]ivil suits, civil judgments, and records of arrest that, from the date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period." 15 U.S.C. § 1681c(a)(2) (2006).

235. 489 F. Supp. 2d 1140 (S.D. Cal. 2007).

236. *Id.* at 1143.

237. *See* 15 U.S.C. § 1681c(a)(2) (2006).

magnanimous gesture was in reality only half of the story.[238] It was possible to view the collector's language as indicating that the collector would report the matter negatively if the consumer did not pay. Therefore, it was not merely a question of sharing the good news about the consumer's payment. The defendant was forbidden from reporting any such old debts and it never had any intention of doing so.[239] But a consumer would be none the wiser, and thus the debt collector's reference would still have some effect on him. This was a tactic designed to influence the consumer into taking an action that he would not otherwise take.

If the statute forbids an agency from referring to an old debt, a debt collector should not be able to lure the consumer into a situation that promises either positive or negative reporting of the consumer's situation. In either case, the debt collector is really promising something that he cannot deliver in light of this statutory prohibition. It is not the mere message to the agency that counts, but rather the action that ensues from it. If the agency has information that it cannot share with its subscribers, it is in a sense not doing the job that it is supposed to do. Therefore, the debt collector's promise to communicate the consumer's turnaround will avail the consumer nothing, because the commercial world will not be privy to that information because of the statutory bar on reporting it.[240]

IV. THE SEARCH FOR IMPROVEMENT

A. The Consumer's Notice to Cease Communication

The statute attempts to give a consumer some relief from a debt collector's badgering by prohibiting the debt collector from communicating further with the consumer when the consumer has

238. The plaintiff in *Gonzales* alleged that the collection letters contained the following language: "'Upon receipt of the settlement amount and clearance of funds, and if we are reporting the account, the appropriate credit bureaus will be notified that this account has been settled.'" *Gonzales*, 489 F.Supp.2d at 1143. The key here is that if the debt collector was indeed reporting the account, the consumer's non-payment would surely produce a negative report. The collection letter said nothing about that, thus leading to the allegation of deception under 15 U.S.C. § 1692e(10). In any event, the defendant could not report such old debts and indeed never had any intention of doing so, thus violating 15 U.S.C. § 1692(5).

239. It is a violation of the FDCPA for a debt collector to threaten "to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692(5) (2006).

240. *See id.*

requested the debt collector to stop, except in certain circumstances.[241] Despite the requests, the statute weakens the consumer's authority in some respects by allowing the debt collector one last clear shot at the consumer.[242] The debt collector may advise the consumer that it is terminating its collection efforts, or it may notify the consumer that the debt collector or the creditor may invoke certain specified remedies that they ordinarily use, or that the debt collector or the creditor intends to use a specified remedy.[243]

At first blush, this provision seems generous to the consumer, for it allows him to stop the debt collector in its tracks and bring a hasty conclusion to continued harassment.[244] Nevertheless, it is indeed strange that the statute would allow the debt collector the opportunity to make one more contact merely to inform the consumer that it is terminating its collection activities against the consumer.[245] One can only imagine that the collector's final message will contain more than the news of termination, and the statute gives the debt collector the vehicle for pestering the consumer one last time.[246] It is no less objectionable for the debt collector to be able to advise the consumer of any legal remedies that it may invoke.[247] Surely the consumer will be fully aware of the possible consequences of his decision to issue a "cease communication" notice to the debt collector. Thus, this would allow the debt collector to make one more contact to drive this message home, which only strengthens the collector's hand in creating hysteria in a last ditch effort to impress the consumer. After all, under one scenario the debt collector need only stipulate that it *may* invoke certain remedies, leaving the consumer to wonder whether this is one of those times when the invocation will materialize.

Section 1692c(c) leaves much to be desired. The present language leaves the impression that a debt collector may communicate with the consumer at three different times after the cease communication order, if that is necessary to accommodate the three permissible purposes

241. *See* 15 U.S.C. § 1692c(c) (2006).
242. *See id.*
243. *Id.*
244. *See id.*
245. *See* 15 U.S.C. § 1692c(c)(1) (2006).
246. *Id.*
247. *See* 15 U.S.C. § 1692c(c)(2) (2006). This subsection gives the debt collector an additional weapon for exerting pressure on the consumer, even if this is the last chance for it to do so. *Id.* It is not that the debt collector will give the consumer notice of its intention to invoke specified remedies, but the collector is allowed to notify the consumer that it *may* invoke those remedies. *Id.* That possibility is certainly enough to give the debt collector enough leverage to accomplish its objective.

recognized in the statute.[248] It should be made clear that the debt collector receives only one chance to speak after the consumer himself has conveyed his last message, and the section recognizes the three topics that may be covered in the collector's last communication.[249] At least this clarification would keep to a minimum the debt collector's privilege of communication with the consumer one last time, and not leave the debt collector with the plausible argument that it may communicate even more than once with the consumer until it covers the various topics identified in section 1692c(c).

Nevertheless, a consumer's conduct may justify a debt collector's contact with the consumer despite the original directive to cease communication. In *Clark v. Capital Credit & Collection Services*,[250] the consumers did ask the debt collector and the collector's attorney not to call them anymore.[251] Despite this, one of the consumers later called the collection agency's attorney to request information about the debt.[252] The court found that this request for information constituted consent for the attorney to return the consumer's telephone call, thus resulting in a waiver of the rights granted by section 1692c(c).[253] However, this waiver related only to the attorney and not to the debt collector.[254] In this case, the consumer had studiously avoided further liaison with the debt collector because of her previous bad experiences, and the court was therefore unwilling to expand the waiver to cover any contact with the collector.[255] This limitation was justified in order to prevent one collector

248. That impression may be gleaned from the three possible actions permitted by 15 U.S.C. § 1692c(c). It is not inconsistent for the debt collector to refer to the remedies it ordinarily pursues and then later notify the consumer about a specific remedy it intends to pursue. *See* 15 U.S.C. §§ 1692c(c)(2)-(3) (2006).

249. The 2005 FTC Annual Report made the following proposal:

> We believe Section 805(c) should be amended to clarify that, after a debt collector receives a consumer's written request to cease its communications with the consumer, the consumer may contact the consumer only one more time and only for one or more of the permissible purposes. The amendment would end confusion that has led some collectors to believe that they may contact a consumer three separate times, with each contact relating to one of the permissible purposes.

2005 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES ACT 18.

250. 460 F. 3d 1162 (9th Cir. 2006).

251. *Id.* at 1167.

252. *Id.* at 1177.

253. *Id.* at 1172. The court applied the "least sophisticated consumer" test and required a knowing or intelligent waiver. *Id.* It agreed to "enforce a waiver of the cease communication directive only where the least sophisticated debtor would understand that he or she was waiving his or her rights under § 1692c(c)." *Id.* at 1171.

254. *Clark*, 460 F.3d at 1172.

255. *Id.* at 1172.

from profiting from a waiver that was intended for another collector.[256] The consumer's right to prevent further contact by a collector should not be compromised unless the consumer waives his right with respect to that collector.

A consumer's cease-and-desist letter to a debt collector will operate to ban further communications relating to any debt that the collector has tried to collect.[257] However, other debts that are assigned for collection after the original request to cease communication are not subject to the consumer's ban unless the consumer issues another directive to the debt collector covering the debts newly assigned for collection.[258] This reading is consistent with the plain language of the statute that forbids further communication with the consumer.[259] That language suggests that the debt collector has already communicated with the consumer about an existing debt, and the consumer does not want any more discussion of the matter.[260]

B. The Validation Notice

The validation provision creates a mechanism for a debt collector to inform the consumer about the amount of the debt, the identity of the creditor, and the consumer's right to dispute the debt within thirty days.[261] The problem is that the section does not prevent a debt collector from continuing its collection activities during the thirty-day period in which the consumer has the right to dispute the debt.[262] The consumer does not, therefore, have a grace period[263] and nothing prevents a debt

256. The court observed that "[t]o hold otherwise would – rather than support the remedial purpose of the FDCPA – pave the way for novel abusive practices necessitating further litigation." *Id.* at 1172 n.7.

257. Udell v. Kansas Counselors, Inc., 313 F.Supp.2d 1135, 1141-42 (D. Kan. 2004); NAT'L CONSUMER LAW CTR., *supra* note 26, § 5.3.8.2 (5th ed. 2004 & Supp. 2007).

258. *Udell*, 313 F. Supp. 2d at 1142.

259. 15 U.S.C. § 1692c(c) (2006).

260. The court concluded that the statutory prohibition against communicating with a consumer after the consumer has directed the debt collector to cease communication applies only to "currently existing debts, not future debts." *Udell*, 313 F.Supp.2d at 1142.

261. *See* 15 U.S.C. § 1692g(a) (2006).

262. *See* Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999); Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997); Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004); 15 U.S.C. § 1692g(b) (2006).

263. *See* Jacobson v. Healthcare Fin. Servs., 516 F.3d 85, 89 (2d Cir. 2008) (stating that "[t]he thirty-day window is not a 'grace period'"); *Durkin*, 406 F.3d at 416 (stating that validation period is not a grace period); *cf.* Taylor v. Heath W. Williams, LLC, 510 F. Supp. 2d 1206, 1214 (N.D. Ga. 2007) (stating that "law's intent is to provide the consumer, if she properly disputes the debt, with a 'grace period' during which time the debt collector cannot pursue the debt until he has confirmed its validity"); McDaniel v.

collector from notifying a consumer about the dispute period on one day, and then bringing suit immediately to recover the debt that the consumer has thirty days to dispute.[264] Congress has conferred the right to dispute with one hand, and then with the other has taken it away through the debt collector's discretionary activity. The consumer finds himself therefore at the mercy of the debt collector, and the debt collector tries to weather the conflict by trying to reach the right mix between compelling collection language and effective notification of the consumer's validation rights.

Even the most conscientious debt collector will find itself challenged to get its message across without contradicting or overshadowing the validation message.[265] A viable alternative to the present procedure would allow a true dispute period in which the debt collector would suspend its collection activities. It need not be as long as thirty days, but a lesser period for dispute would be a compromise that prevents a collector from pursuing the consumer in the interim. The consumer's right to dispute the debt should not be weakened by the debt collector's intervention during the dispute period. The current language perpetuates the myth that a consumer has thirty days to query the debt, when it fact that is merely a maximum period for him to act, which the debt collector can effectively repudiate by commencing litigation.[266] Even if the debt

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South & Assocs., 325 F. Supp. 2d 1210, 1218 (D. Kan. 2004) (stating that after disputing his debt, consumer was entitled to the grace period provided by the FDCPA until debt was verified).

264. *See Durkin*, 406 F.3d at 416.

265. *See* Fed. Home Loan Mortg. Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007); Sims v. GC Servs. L.P., 445 F.3d 959 (7th Cir. 2006); DeSantis v. Computer Credit, Inc., 269 F.3d 159 (2d Cir. 2001); *National Fin. Servs., Inc.*, 98 F.3d 131; Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991); Swanson v. Southern Or. Credit Servs., Inc., 869 F.2d 1222 (9th Cir. 1988); *Francis*, 389 F. Supp. 2d 1034.

266. In its 2005 annual report, the FTC recommended that Congress should clarify the law by expressly permitting a debt collector to continue its collection activity during the thirty-day dispute period as long as the consumer has not disputed the debt. 2005 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES Act 15. Congress followed that recommendation by adding the following language to subsection (b) in 2006:

> Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(c), 120 Stat. 1966, 2006 (codified at 15 U.S.C. § 1692g(b) (2006)).

collector does not want to take that step, it can still raise the consumer's discomfort with a continuous barrage that propels the faint-hearted into compliance. This is when an enterprising consumer will enter the litigation fray himself and question the contrasting messages sent by the validation notice and the collector's demands for payment.[267] The introduction of a true grace period will put a stop to this problem, without imposing any undue hardship on the collection industry.

The validation section requires the debt collector to give notice of "the amount of the debt."[268] Even this simple phrase has left many a debt collector in a quandary, because a debt collector will sometimes try to include references to such items as interest, expenses, and other charges that leave an impression in the consumer's mind that the figure is much larger than the consumer anticipated.[269] Sometimes the debt collector actually includes these items in one global figure as the amount due, and the consumer has no way of knowing the constituent elements of his debt.[270] It is for this reason that the debt collector should be required to itemize the amount of the debt so that the consumer can see the breakdown of the collector's claim.[271] Without any itemization, the debt

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267. The amended statute recognizes the problem of overshadowing or contradictory language. *See* 15 U.S.C. § 1692g(b) (2006). There is no lack of discussion on the point. *See, e.g.*, Olson v. Risk Mgmt. Alternatives, Inc., 366 F.3d 509 (7th Cir. 2004); Sims v. GC Servs. L.P., 445 F.3d 959 (7th Cir. 2006); *Miller*, 321 F.3d 292; Peter v. G.C. Servs. L.P., 310 F.3d 344 (5th Cir. 2002); Renick v. Dun & Bradstreet Receivable Mgmt. Servs., 290 F.3d 1055 (9th Cir. 2002). A true grace period would remove the temptation for a debt collector to use overshadowing or contradictory language that downplays the thirty-day period while highlighting the demand for payment. The statutory prohibition does not attempt to explain the kind of language that will cause trouble for a debt collector. *See* 15 U.S.C. § 1692g(b) (2006). If the debt collector must merely state its claim in its initial communication along with a statement of the consumer's right to dispute the debt within thirty days, the parties will avoid the tension that the dispute period will inevitably cause.

268. 15 U.S.C. § 1692g(a)(1) (2006).

269. *See* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000); Stanley v. Stupar, Schuster & Cooper, S.C., 136 F. Supp. 2d 957 (E.D. Wis. 2001); *McDowall*, 279 F. Supp. 2d 197; *Fuller*, 192 F. Supp. 2d 1361; Wilkerson v. Bowman, 200 F.R.D. 605 (N.D. Ill. 2001).

270. *See, e.g.*, Veach v. Sheeks, 316 F.3d 690 (7th Cir. 2003); Goins v. JBC & Assocs., P.C., 352 F. Supp. 2d 262 (D. Conn. 2005).

271. The 2005 FTC Annual Report recommended that the validation notice should be expanded "to provide that a consumer can obtain an itemization of all charges added after the current collector obtained the debt, if the consumer requests such an itemization in writing." 2005 FTC ANN. REP. : FAIR DEBT COLLECTION PRACTICES ACT 22. The itemized changes include items like interest charges, fees and expenses. *See id.* Although this recommendation is a step in the right direction, the debt collector should be obligated to give the consumer an itemization even if the consumer does not request it. That would make the validation even more effective by the collector's disclosure of the breakdown of

collector can leave the consumer guessing about the amount of the debt and intimidate him into paying charges that are not due or that may never be due.[272] The collector's disclosure should not depend on the consumer's request for more information, but should be required as a part of the initial statutory notice about the amount of the debt. An itemization would be consistent with section 1692e(2), which prohibits the debt collector from misrepresenting "the character, amount, or legal status of any debt,"[273] and with section 1692f(8), which forbids "[t]he collection of any amount...unless such amount is expressly authorized by the agreement creating the debt or permitted by law."[274] There should be no objection, in principle, to transparency in this context, for in the same way that the Truth in Lending Act promotes accurate disclosure of the cost of credit,[275] so too the FDCPA should aim for the clear and accurate disclosure of the consumer's debt. The collector's itemization would contribute towards this goal.

If the consumer disputes the debt in writing, the debt collector must suspend its collection activities until it verifies the debt.[276] However, there is nothing in the statute that requires a debt collector to notify the consumer that the consumer's dispute will produce that result.[277] Since

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the amount due. In 2006, 20.3% of FDCPA complaints were for violations relating to the character, amount or legal status of a debt. 2007 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES ACT 4. An itemization of the debt would certainly give the consumer some clue if the debt collector tries to collect some amount that the consumer does not owe.

272. The language of the collection letter in *Miller* gave a good example of the problems inherent in not properly disclosing the amount of the debt. 214 F.3d at 875. The letter disclosed the unpaid principal balance as $178,844.65, but then added the following:

> [T]his amount does not include accrued but unpaid interest, unpaid late changes, escrow advances or other charges for preservation and protection of the lender's interest in the property, as authorized by your loan agreement. The amount to reinstate or pay off your loan changes daily. You may call our office for complete reinstatement and payoff figures.

Miller, 214 F.3d at 875. If the debt collector had to itemize each charge due as of the date of the letter, the consumer would have had a better idea of the amount due, rather than of the principal balance, and the debt collector could have the flexibility to advise the consumer that the amount due on the payment date may be greater because of the intervening period. *See id.* at 876.

273. 15 U.S.C. § 1692e(2)(A) (2006).

274. 15 U.S.C. § 1692f(1) (2006). An itemization requirement would help in the FTC's enforcement of § 1692e(2)(A) and § 1692f(1). In 2006, 40.3% of the FTC complaints related to the former section and 3.4% of the complaints concerned violations of § 1692f(1). 2007 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES ACT 4-5. The number of complainants in both categories totaled 30,316. *Id.*

275. 15 U.S.C. § 1601(a) (2006).

276. 15 U.S.C. § 1692g(b) (2006).

277. *See id.*

the collector is already required to tell the consumer that disputing the debt will lead to the debt collector's obligation to seek verification thereof, it seems that it would be a welcome initiative for the debt collector to go one step further and let the consumer know that it will suspend its activities against him until it obtains such verification.[278] The statute already contains a statement about the collector's obligations;[279] an additional sentence about the effect of the consumer's dispute will not make that obligation any more burdensome. Instead, it will make the consumer more aware of the consequences of his intervention. There is no good reason to withhold this information from the consumer.[280] As a matter of fact, it would do the consumer a world of good to know that questioning the debt will give him some respite pending a resolution of his inquiry. Otherwise, it is possible that a consumer may be reluctant to ask too many questions about the debt if his curiosity encourages the debt collector to pursue him even more aggressively.

There is little doubt that the validation section is an important weapon in the consumer's arsenal. It is, therefore, remarkable that the validation section allows a debt collector to provide the critical information to the consumer in its initial communication or in a written

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278. Although the statute does not require the debt collector to notify the consumer of the obligation to suspend collection activities until the collector verifies the debt, the court in *Bartlett v. Heibl* did provide some language in its suggested letter explaining the effect of the consumer's disputing the debt. 128 F.3d 497, 501-02 (7th Cir. 1997). The safe harbor letter provided in part:

> 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.

Id. Although the letter did not clarify that the consumer had the right to dispute any part of the debt as required by § 1692g(a)(4), it nevertheless made the validation provision more understandable and drove home the point that the collector would suspend its activities until the debt collector responded to the consumer's request for verification. *See* NAT'L CONSUMER LAW CTR, *supra* note 26, § 5.7.2.7.8.4 (Supp. 2007). By including such language about suspending its activities, a debt collector puts itself in a good position to refute a consumer's claim that the collector's demand for payment overshadows the consumer's validation rights. *See* Savino v. Computer Credit, Inc., 164 F.3d 81, 86 (2d Cir. 1998); Shapiro v. Riddle & Assocs., P.C. 240 F. Supp. 2d 287, 291 (S.D.N.Y. 2003), *aff'd on other grounds*, 351 F.3d 63 (2d Cir. 2003).

279. *See* 15 U.S.C. § 1692g(b) (2006).

280. Debt collectors may not be too enthusiastic about informing consumers about the suspension of collection activities because consumers may then have an incentive to question the debt. But if the right exists, there is no need to keep notice of it under wraps. *See* NAT'L CONSUMER LAW CTR, *supra* note 26, § 5.7.2.7.8.4.8 (5th ed. 2004 & Supp. 2007).

notice to the consumer within five days thereafter.[281] The surprising element is that the debt collector's initial communication need not be in writing,[282] and so a consumer may find himself trying to assimilate information in a single oral communication from the collector. If it is important enough for the debt collector to include the details in a written notice if that notice follows the collector's initial communication, then it should be made clear that the initial communication itself should be in writing if the debt collector wants to include the notice therein. There is an apparent inconsistency between allowing an oral notice initially, and then mandating written notice within five days thereafter.[283] Perhaps the drafters ignored the definition of "communication" in this context because they intended that both the initial and the subsequent communications would be in writing for purposes of the validation section.[284] It is not altogether clear why the section would emphasize a written notice as necessary in the five-day window, but not so on the first day of the collector's communication with the consumer.[285] If a literal

281. *See* 15 U.S.C. § 1692g(a) (2006).

282. The FTC Official Staff Commentary provides that "[i]f a debt collector's first communication with the consumer is oral, he may make the disclosures orally at that time in which case he need not send a written notice." 53 Fed. Reg. 500,97, 50,108 (Dec. 13, 1988). Although the Commentary does not have the force of law, courts still look to it for guidance. In *Silbert v. Asset Resources, Inc.* No. 99-3348, 2000 U.S. Dist. LEXIS G454, at *6-7 (D. Minn. Feb. 14, 2000), the defendants argued that they had fulfilled the validation notice requirements through a telephone call. The plaintiff alleged, however, that one of the defendants hung up the telephone without giving the necessary information, and thus the court denied the defendant's motion to dismiss. *Id.* The court gave no hint that the defendants' claim of oral notice had no basis in law. *Id.*

283. One way of explaining the ambiguity is to link the phrase, "the following information," to the phrase, "written notice." If the information is the notice, then it is permissible to read the written notice as being given either in the initial communication or within five days thereafter. *See* NAT'L CONSUMER LAW CTR, *supra* note 26, § 5.7.2.5 (5th ed. 2004).

284. The statute defines the term "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2) (2006).

285. The Senate Report's summary of the validation section does not really support the theory that the drafters intended to allow a debt collector to include the validation notice in an initial oral communication. The Report summarized: "Within 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 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1702. This comment does not even take into account the debt collector's flexibility to include the validation notice in the initial communication. *See id.* The Senate Report's explanation of the legislation did no better, for it stated that "[a]fter initially contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed." S. REP. No. 95-382, at 4, (1977) *as reprinted in* 1977 U.S.C.C.A.N at 1699. This reference to written

interpretation of the statute produces an absurd result, then one should interpret the "information" reference in the validation section to include the written notice, thus giving weight to the importance of a writing.[286] If the objective is to ensure that the consumer has a clear understanding of his rights under section 1692g, then that is more likely to happen if he gets the information in writing, and that should not depend on the timing of the debt collector's notice.[287]

C. Disputing the Debt Orally

Perhaps the validation requirement in section 1692g has caused more problems than it is worth, but in the final analysis it provides an effective framework for a consumer to dispute the validity of a debt. Nevertheless, there has been some confusion over the fact that subsection (a)(4) requires a consumer to dispute the debt in writing if it wants the debt collector to seek verification of the debt from the creditor,[288] while subsection (a)(3) does not impose a writing requirement if the consumer wants to dispute the debt in order to counter the debt collector's assumption about the debt's validity.[289] Ever since the Third Circuit in *Graziano v. Harrison*[290] questioned the congressional intent of allowing oral disputes in subsection (a)(3), courts have grappled with this matter. Although the Ninth Circuit and most district courts[291] have not fallen

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notice after the initial contact must have assumed that the contact was oral, and that the debt collector needed to follow up in writing with the details of the validation notice.

286. The "unless" clause really gives a debt collector the option of including the necessary information in the initial communication in writing, or in a subsequent writing within five days. *See* 15 U.S.C. § 1692(a)(2) (2006). That still leaves open the possibility of having an initial oral communication. That interpretation would be consistent with the explanation in the Senate Report. *See* S. REP. NO. 95-382, at 4, (1977), *as reprinted in* 1977 U.S.C.C.A.N. at 1699.

287. One authority suggests that the validation section was intended to reduce the burden on debt collectors by not requiring a debt collector to send a notice if the consumer has paid off the debt and allowing a validation notice to be included in the initial written communication, thus reducing mail expense. *See* NAT'L CONSUMER LAW CTR, *supra* note 26, § 5.7.2.5.

288. A debt collector must send the consumer a written notice containing a statement that the debt collector will verify the debt "if the consumer notifies the debt collector in writing" that the debt is disputed. 15 U.S.C. § 1692g(a)(4) (2006).

289. Under subsection (a)(3) the debt collector will assume that the debt is valid "unless the consumer...disputes the validity of the debt." 15 U.S.C. § 1692(a)(3) (2006).

290. 950 F.2d 107, 112 (3d Cir. 1991).

291. *See Camacho*, 430 F.3d 1078; *Register*, 488 F. Supp. 2d 143; *Jerman*, 464 F. Supp. 2d 720; *Baez*, 442 F. Supp. 2d 1273; Turner v. Shenandoah Legal Group, P.C., No. 3:06CV045, 2006 WL 1685698 (E.D. Va. June 12, 2006); Rosado v. Taylor, 324 F. Supp. 2d 917 (N.D. Ind. 2004). *But see* Jolly v. Shapiro, 237 F. Sup. 2d 888 (N.D. Ill.

prey to the *Graziano* approach, the time has come for Congress to amend subsection (a)(3) to make it clear that a consumer's oral dispute is permissible thereunder, since the subsection merely addresses an assumption about a debt's validity and does not otherwise impose any obligation on the debt collector to respond to the consumer. Subsection (a)(4) leaves no doubt about congressional intent by using the phrase, "in writing."[292] On the other hand, subsection (a)(3) merely leaves out the phrase, leaving it then to the *Graziano*-type challenge that Congress could not have intended such dissonance.[293] The solution is to clarify that the consumer may dispute the debt orally, thus avoiding the difficulty caused by the differential treatment of the dispute mechanism in subsections (a)(3) and (a)(4).

The ambiguity about a consumer's right to dispute a debt orally also arises under section 1692e(8), which makes it a false or misleading representation for a debt collector to fail in communicating to any person that the consumer has disputed the debt.[294] Inasmuch as there is no specific writing requirement in section 1692e(8), the courts have taken the position that a consumer's oral dispute will require a debt collector to notify any consumer reporting agency that the consumer disputes the debt, even if the consumer does so orally.[295] Although the courts have taken the right approach on this question, nevertheless the judicial challenges to this provision lead to the conclusion that the time is ripe for clarifying that a collector must report the news of the consumer's dispute to the consumer reporting agency, whether that dispute is oral or written.

The consumer's right to dispute the debt orally in the context of section 1692g(a)(3) and section 1692e(8) recognizes that some consumers may be unable to dispute the debt promptly in writing.[296]

2002); Wallace v. Capital One Bank, 168 F. Supp. 2d 526 (D. Md. 2001); Sturdevant v. Jolas, P.C., 942 F. Supp. 426 (W.D. Wis. 1996).

292. 15 U.S.C. § 1692g(a)(4) (2006).

293. The *Graziano* court stated that it could see "no reason to attribute to Congress an intent to create so incoherent a system." 950 F.2d at 112. But the court missed the point that an oral dispute invites other protections under the statute. For example, the debt collector cannot report credit information about the consumer without indicating that the debt is in dispute. *See* 15 U.S.C. § 1692e(8) (2006). Furthermore, it is generally presumed that where Congress includes certain language in one part of a statute but omits it in another, it does so purposely. *See Camacho*, 430 F.3d at 1081 (quoting Russell v. United States, 464 U.S. 16, 23 (1983)).

294. 15 U.S.C. § 1692e(8) (2006).

295. *See Camacho*, 430 F.3d at 1082; Brady v. Credit Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998).

296. One court observed as follows:

> It is not unreasonable to believe that some consumers who wish to dispute an alleged debt may lack the ability or wherewithal to do so in writing, and that

Nevertheless, even if the lack of a writing does not give them all the benefits that flow from the writing requirement, at least the debt collector and the reporting agencies will be attuned to the consumer's queries and will adjust their strategies accordingly.[297] The statute does not impose any undue burden on a debt collector in this context. Surely a debt collector will prefer to know about a consumer's dispute regardless of the form it takes, so that it can fulfill its obligation to record on the consumer's credit report that the consumer disputes the debt.

D. Language on the Envelope

The FDCPA prohibits a debt collector from using unfair means to collect any debt.[298] One of the examples of such conduct is the use of "any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram."[299] The debt collector may use its business name if that name does not reveal that the collector is in the debt collection business.[300] The rejection of any language or symbol raises the question whether the drafters intended the statute to be interpreted literally.[301] Except for the business name exception, the section seems to leave no way out for accommodating other language on an envelope.[302] Nevertheless, some courts have rejected a literal interpretation and opted for one that comports with the legislative objective of preventing abuse in the debt collection industry.[303] It is submitted that a court should not

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> Congress chose to accord these oral debt-disputers some, but not all, of the protections accorded those who dispute their debts in writing.

Ong v. American Collections Enter., No. 98-CV-5117, 1999 U.S. Dist. LEXIS 409, at *8 (E.D.N.Y. Jan. 15, 1999).

297. For example, once a debt collector reports the debt to a credit reporting agency, any credit report must thereafter report the debt as disputed. So even if the consumer disputes the debt orally, notice of that dispute will have wide impact. *See* 2005 FTC ANN REP.: FAIR DEBT COLLECTION PRACTICES ACT 20.

298. 15 U.S.C. § 1692f (2006).

299. 15 U.S.C. § 1692f(8) (2006).

300. *Id.*

301. *See id.*

302. *See id.*

303. *See Strand*, 380 F.3d at 319 (holding that § 1692f(8) permitted such benign language as "Personal & Confidential" and "Immediate Reply Requested" on the envelope because those words did not indicate anything about debt collection); *Goswami*, 377 F.3d at 494 (holding that the use of the phrase "priority letter" on an envelope did not violate §1692(8)); Lindbergh v. Transworld Sys., Inc., 846 F. Supp. 175, 180 (D. Conn. 1994) (finding that symbol of blue stripe and the word "TRANSMITTAL" on an envelope did not violate § 1692f(8)); *Masuda*, 759 F. Supp. at 1466 (finding that language "PERSONAL & CONFIDENTIAL" on envelope did not violate § 1692f(8)). In

be placed in the position of ignoring unambiguous terms, unless it would lead to an absurd result.[304] While it is possible for section 16922f(8) to be take literally, it is preferable for Congress to amend the section if necessary to say what it intended, rather than leave it up to the courts to adjudicate the matter on an *ad hoc* basis.

If the section remains as is, it will be left then to the courts to continue the benign language exception that tolerates the use of any language or symbol on the envelope as long as it does not indicate the sender is trying to collect a debt.[305] In *Goswami v. American Collections Enterprise, Inc.*,[306] the Fifth Circuit worked its way out of the plain language of section 1692f(8) by finding the "priority letter" notation on an envelope permissible because it was neither threatening nor embarrassing, and because the court could find no link between the phrase and the collection of debts.[307] One wonders whether that search for a threat or a link was necessary in light of the clear language that merely forbids the use of any language or symbol. The court could not have arrived at its solution without importing an ambiguity into the existing language, one that does not arise easily given the absoluteness of the statutory prohibition.[308] This is significant because the statute allows a collector to use its business name as long as it does not indicate that it is in the debt collection business.[309] It is, therefore, perplexing that the same statute forbids the use of any language or symbol on an envelope without attempting to link it to debt collection.[310] Perhaps Congress

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summarizing the legislation, the Senate Report indicated that it was a violation for a debt collector to use "symbols on envelopes indicating that the contents pertain to debt collection." S. REP. No. 95-382, at 8 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1702.

304. *See* Lamie v. United States Trustee, 540 U.S. 526, 534 (2004); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 46:1, 46:7 (7th ed. 2007).

305. In *Goswami*, the court relied on the fact that the wording "priority letter" on the envelope did not relate to the collection of debts. In other words, the markings on the envelope were benign. *Goswami*, 377 F.3d at 494; *see also* FTC Official Staff Commentary, 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988).

306. *Goswami*, 377 F.3d 488.

307. *Id.* at 494.

308. The court saw two reasonable interpretations. The first possibility is that § 1692f(8) bars any language or symbol on an envelope except the names and addresses of the parties. *See Goswami*, 377 F. 3d at 493. The other possible interpretation is that § 1692f(8) prohibits only language or symbols that are unfair, such as those that indicate the writer is attempting to collect a debt, or that tend to otherwise embarrass the consumer. Id.

309. *See* 15 U.S.C. § 1692f(8) (2006).

310. It is noteworthy that in summarizing the contents of § 1692f(8), the Senate Report noted that the section prohibits debt collectors from "using symbols on envelopes

thought that it was a good idea to remove any temptation for the debt collector to prod the consumer into compliance by placing undesirable or embarrassing language on the envelope. Therefore, the absolute bar to additional symbols or language would accomplish that objective without sacrificing the debt collector's ability to communicate with the consumer.

In *Strand v. Diversified Collection Services, Inc.*,[311] the Eighth Circuit arrived at a similar solution by ignoring what it perceived to be the absurd result of a literal interpretation, since language on an envelope such as "personal and confidential" gives no indication that a debt is being collected.[312] The court depended on this concept of benign language to accommodate the use of terminology that the statute precluded on its face.[313] In effect, the court approved the use of any language on an envelope as long as there was no hint of debt collection.[314] If this is what Congress intended, then it should certainly clarify the point rather than leaving it to the courts to supply some benign language exception that does not flow naturally from the current provision.

It is noteworthy that when Congress addressed the acquisition of location information about the consumer in section 1692b, it forbade a debt collector from using any language or symbol on any envelope that indicates that the debt collector is in the debt collection business.[315] This location language left no doubt that there should be a link between the language on the envelope and debt collection for the former to be prohibited. It was not an outright ban on all such language. If Congress was concerned about maintaining confidentiality about the debt collector's communication with the consumer or some third party, its use of different formulations in section 1692b(5) and section 1692f(8) raises questions whether these two sections should be interpreted in the same

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indicating that the contents pertain to debt collection." S. REP. No. 95-382, at 8 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1702. The section itself relates the debt collection language to the collector's business name only, while leaving in place the general restriction against any other language or symbol. *See* 15 U.S.C. § 1692f(8) (2006).

311. *Strand*, 380 F.3d at 316.

312. *See id.* at 319.

313. *See id.*

314. *Id.* The court concluded that the language and symbols were benign because "they did not, individually or collectively, reveal the source or purpose of the enclosed letters." *Id.*

315. 15 U.S.C. § 1692b(5) (2006). Section 1692b(5) forbids a debt collector from using "any language or symbol on any envelope...that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt." *Id.*

way. It is reasonable to read section 1692f(8) as creating a single exception relating to the collector's business name, but then one would have to look for some rationale behind the statutory variation. The drafters could just as easily have made it clear that there would be no problem in section 1692f(8) with any language or symbol that did not refer to the collection of a debt.[316] But they did not; they left section 1692f(8) with a simple prohibition that made room only for a business name exception. It is questionable whether the embarrassment is any more severe with a reference to debt collection if a letter is addressed to the consumer rather than to a third party. There is much to be said for tying the section 1692f(8) restriction on the use of any language or symbol to evidence of debt collection, instead of having a bar that bears no relation at all to the ultimate objective of protecting the consumer's privacy.[317]

This benign language exception may still leave the door open for a debt collector's liability even if the excess language on the envelope does not relate to the debt collection or is not otherwise embarrassing to the debtor. For example, in *Voris v. Resurgent Capital Services, L.P.*,[318] the language on the envelope was "You are pre-approved* See conditions inside."[319] This language gave the impression that the envelope contained information about a credit card offer rather than debt

316. In the same way that a debt collector may use its business name if that name does not indicate that the collector is in the debt collection business, so too the drafters could have made the same allowance for the use of any language or symbol. *Compare* 15 U.S.C. § 1692b(5) (2006) (forbidding use of any language indicating that debt collector is in debt/collection business), *with* 15 U.S.C. § 1692f(8) (2006) (forbidding any language or symbol, but allowing collector's business name if it does not relate to debt collection). It is not clear why the drafters omitted the reference to debt collection when prohibiting the use of any language or symbol. Nevertheless, it is possible to reconcile the language in § 1692b(5) with the other language in the statute that prohibits unfair conduct by debt collectors. *See Goswami*, 377 F.3d at 493. The drafters did not intend merely to prohibit any language on an envelope other than a debt collector's address; they were more concerned with language that would embarrass the consumer by signaling that someone was pursuing the consumer for a debt. *See* S. Rep. No. 95-382, at 8 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1702. In that event, the literal interpretation of the prohibition should give way to Congress's objective, particularly when the avoidance of a literal interpretation would conform to the overall statutory purpose. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:7 (7th ed. 2007).

317. This is when the benign language exception comes into play. A debt collector does not violate the statute by using language on an envelope that does not give any clue about the contents of the communication. *See Strand*, 380 F.3d at 319; Voris v. Resurgent Capital Servs., L.P., 494 F. Supp. 2d 1156, 1165 (S.D. Calif. 2007); Lindbergh, v. Transworld Sys., Inc., 846 F. Supp. 175, 180 (D. Conn. 1994).

318. *Voris*, 494 F. Supp. 2d at 1156.

319. *Id.* at 1160.

collection, and the plaintiffs contended that it did not fall within the benign language exception because it induced them to treat the letter as junk mail.[320]

The defendant had argued for the court's adherence to the benign language exception which tolerates other language on an envelope as long as it does not pertain to "debt, debt collection, or otherwise does not cause embarrassment to the debtor."[321] Nevertheless, the court found that definition of the benign exception too narrow and recognized the possibility of a debt collector's liability on the basis of actual harm to the consumer.[322] The harm in this case was the consequence of the consumer's ignoring the debt collection notice because of the invitation on the envelope relating to the pre-approval for credit.[323] The language on the envelope had nothing to do with debt collection, but the court recognized, nevertheless, that the language could not be benign if it misled the consumer into thinking that the envelope's contents related only to a solicitation for credit.[324]

The *Voris* decision highlights the difference between the mere use of abstract language on an envelope that gives no clue about the collector's mission, and other language that causes harm or damage to the consumer.[325] Thus, even though the court was content to recognize the benign language exception, it was unwilling to adhere to the narrow definition of that exception which tolerates an envelope's language as long as such language does not relate to any aspect of debt collection, or

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320. *Id.* at 1161.

321. *Id.* at 1166.

322. *Id.*

323. The *Voris* court observed as follows: "The harm Plaintiffs suggest will flow from the alleged deception is the consequence of the debtor ignoring (discarding) the notice due to the content of the language. Such a violation is substantive in nature, not merely technical." *Id.*

324. *Voris*, 494 F. Supp. 2d at 1167. The court observed that "[l]anguage on an envelope that violates the letter of § 1692f(8) and, by telling only half the story, actively misleads a debtor into believing the content is merely a solicitation for credit, cannot be deemed benign." *Id.* The defendant in *Voris* had hoped to benefit from dictum in *Strand*, 380 F.3d at 319, to the effect that an envelope that looked like junk mail came within the benign exception. As the *Voris* court pointed out, however, the *Strand* court recognized the corporate logo with initials "DCS" as coming within the benign exception because they merely violated the strict letter of the law, without sending any message about the contents of the envelope. *See Strand*, 380 F.3d at 319. That is different, however, from causing affirmative harm to a debtor by using language that misleads him into thinking that he is holding in his hands a solicitation for credit. *See Voris*, 494 F. Supp. 2d at 1167.

325. *See Voris*, 494 F. Supp. 2d at 1166.

does not otherwise embarrass the consumer.[326] The *Voris* decision highlights the need for a clarification of section 1692f(8), for the importation of the exception only serves to perpetuate the problems of interpretation that have plagued this provision.

V. CONCLUSION

The FDCPA has served its purpose in establishing reasonable standards for the conduct of debt collectors in the marketplace.[327] This is not to say that it has solved all the problems that Congress found when it was considering the legislation.[328] Nevertheless, there is little doubt that consumers have enjoyed greater protections because of the statute. Although the statute prohibits debt collectors from making false or misleading representations to collect a debt,[329] some collectors still try to formulate their message in such a way that no misrepresentation is apparent on the face of it.[330] It is left then to the courts to determine whether a debt collector's message is in fact misleading. Although courts do not have an easy time deciding whether a debt collector's letter is false or misleading, at least the statute provides an effective framework for the guidance of debt collectors.[331]

Nevertheless, there are some areas which demand urgent attention. The statute gives a consumer the right to stop the debt collector from communicating further with him, but then it provides three exceptions to the section.[332] A close examination will reveal that these exceptions are

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326. *See id.* The court concluded that whether the language on the envelope violated the statute was a question of fact, and therefore denied the debt collector's motion for judgment on the pleadings. *Id.* at 1168.

327. *See* 2007 FTC ANN. REP.: FAIR DEBT COLLECTION PRACTICES ACT 1.

328. The 2007 FTC Report indicated that in 2006 there was an increase in the number of consumer complaints about third-party debt collectors. *Id.* at 2-3. There were 69,204 FDCPA complaints in 2006, as opposed to 66,672 in 2005. *Id.*

329. 15 U.S.C. § 1692e (2006).

330. *See, e.g.*, *Brown*, 464 F.3d at 450 (holding that consumer stated a claim that debt collection letter was false and misleading when it stated that consumer's failure to pay "could" result in referral to a lawyer and "could" result in a lawsuit and collector had no intention to follow through); *McMillan*, 455 F.3d at 762 (holding that consumer stated a § 1692e claim that collection letter indicating that consumer was either honest or dishonest and that he could not be both, called into question the consumer's honesty and constituted a false or misleading statement).

331. Section 1692e provides a general prohibition against false, deceptive, or misleading conduct in connection with the collection of a debt. *See* 15 U.S.C. § 1692e (2006). It then goes on to give sixteen examples of conduct that violate the statute, prominent among them being, "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5) (2006).

332. *See* 15 U.S.C. § 1692c(c) (2006).

not critical to the debt collection process and they only operate to dilute the consumer's efforts in ending the collector's barrage. This raises a question whether any purpose is served by allowing the debt collector to notify the consumer subject to the consumer's "cease communication" request that it may pursue certain "specified remedies which are ordinarily invoked by such debt collector."[333] The debt collector always has it within its power to invoke the remedies that it fancies, so it is unclear why the drafters regard it as important for the collector to let the consumer know about what it may do. Perhaps it is just one more device for letting the consumer know that his disinterest in further communication may have consequences, but there is nothing new about this. Of course, it is entirely possible that a gentle reminder of the possibilities may have an effect on the consumer even after the consumer has notified the debt collector to cease communicating with him. But the question remains whether the statute should give the debt collector the chance to rebuff the consumer's request one last time, merely to advise him of some action that it may take.[334]

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333. There is always an opportunity for a debt collector to make a last ditch effort at collecting the debt. In *Lewis v. ACB Bus. Servs., Inc.*, the consumer asked the debt collector to cease communicating with him. Soon thereafter, the collector sent the consumer a letter asking the consumer to select one of the payment options set out in the letter. 135 F.3d 389, 395-96 (6th Cir. 1998). The letter also contained the usual language indicating that it was an attempt to collect a debt. *Id.* The court held that § 1692c(c)(2) allowed a debt collector to notify the consumer that it may invoke specified remedies which the debt collector normally employs, and that the collector's letter fell within that category. *Id.* at 398. The court construed the letter as a kind of settlement offer that the debt collector normally puts to the consumer as a solution to the collection problem, and that it was consistent with the purposes of the Act to resolve the matter without litigation. *Id.* at 399. The court was not worried about the statement in the letter that the debt collector was attempting to collect a debt. *Id.* It is questionable whether the debt collector's letter can be justified on the basis of section 1692c(c)(2), since that exception merely allows a debt collector to notify the consumer about remedies that the collector may invoke. In *Lewis*, the collector was still in the collection mode and it had not yet settled on any remedies that it wanted to tell the consumer about. *Id.* at 395. This is why it was still an attempt to collect a debt.

334. Sometimes a consumer will resume contact even after he has asked the debt collector to stop contacting him. If the consumer makes subsequent contact with the collector's attorney to seek information about the debt, that contact does not authorize the collector itself to ignore the consumer's cease communication order. But the collection attorney would be justified in returning the consumer's call even though the consumer had also asked the attorney not to contact him anymore. Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162, 1172 (9th Cir. 2006); *see also* Cohen v. Beachside Two-I Homeowners' Ass'n, No. 05-706 ADM/JS, 2006 WL 1795140, at *14 (D. Minn. June 29, 2006) (holding that collector may respond to consumer's settlement offer made in same letter where consumer requested no further contact under § 1692c(c)); Johnson v. Equifax Risk Mgmt. Servs., No. 00 Civ. 7836 (HB), 2004 WL 540459, at *8 (S.D.N.Y. March 17, 2004) (holding that debt collector violated § 1692c(c) by dunning the

The validation section invites its own attention. First of all, there is no good reason why section 1692g(a)(3) should not be amended to clarify the point that the consumer's oral dispute of the debt is sufficient to question the debt's validity. The difference between section 1692f(a)(3) and section 1692g(a)(4) has been raised often enough to merit clarification.[335] But the problems do not end there. The debt collector does not have to tell the consumer that it will cease collection of the debt until it verifies the debt, even though section 1692g(a)(4) requires the collector to tell the consumer that it will verify the debt if the consumer disputes it.[336] It would have been quite easy to tie the two events together, so that the notice would cover not only the collector's pledge to clarify the debt, but also the collector's obligation to suspend its collection activities pending verification.

Although the statute allows a debt collector to continue its collection activities during the thirty-day period allowed for disputing the debt,[337] the dispute period loses much of its attractiveness when the debt collector is able to pursue its collection strategies immediately after it advises the consumer of the right to dispute the debt. This denial of a grace period only serves to promote contradiction and confusion, because the debt collector conveys its collection message in the same letter where it informs the consumer about the right to dispute the debt. Not surprisingly, this competition between the debt collector's message and the validation language produces many consumer complaints about the debt collector's objectives.[338] On the other hand, if the statute

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consumer after the consumer had merely sought verification of the debt but also had requested the debt collector to cease communication).

335. The courts continue to disagree over the interpretation of § 1692g(a)(3). *Compare Camacho*, 430 F.3d at 1082 (holding that there is no writing requirement in § 1692g(a)(3)), *Register*, 488 F. Supp. 2d at 147 (finding that Congress acted intentionally when it did not limit § 1692g(a)(3) to written notice), *Jerman*, 464 F. Supp. 2d at 725 (holding that "subsection (a)(3) does not impose a writing requirement on consumers"), *and Baez*, 442 F. Supp. 2d at 1276-77 (finding the language of the statute clear and unambiguous and the insertion of the phrase "in writing" not justified), *with Graziano*, 950 F.2d at 112 (holding that § 1692g(a)(3) contemplates that any dispute under section 1692g(a)(3) must be in writing), Jolly v. Shapiro, 237 F. Supp. 2d 888, 895 (N.D. Ill. 2002) (same), Wallace v. Capital One Bank, 168 F. Supp. 2d 526, 529 (D. Md. 2001) (same), *and* Sturdevant v. Thomas E. Jolas, P.C., 942 F. Supp. 426, 429 (W.D. Wis. 1996) (finding that requiring a debtor to dispute the validity of a det in writing does not violate § 1692g(a)(3)").

336. *Compare* 15 U.S.C. § 1692g(a)(4) (2006), *with* 15 U.S.C. § 1692g(b) (2006).

337. 15 U.S.C. § 1692g(b) (2006).

338. This tension between the debt collector's right to continue collection activities and the collector's obligation to give notice of the consumer's right to dispute the debt has produced much litigation. There is nearly always a disagreement about whether the debt collector has contradicted or overshadowed the consumer's validation rights with the

accommodated a grace period, there would be no opportunity and no incentive for the debt collector to contrast the two events. The debt collector should merely give the basic details of the debt and then the consumer should have a true grace period for reflection.[339] The present framework merely continues the disagreements between competing constituencies and leaves the consumer unsure about the real impact of the thirty-day period.

The time has come also to remove any doubt about how a debt collector may communicate the information required by section 1692g. Although the statute clearly sets out the details, it gives the debt collector the option of using either the initial communication or a written notice that follows within five days thereafter to communicate the section 1692g requirements.[340] The problem is that the initial communication does not have to be in writing, and so the statute seems to allow oral communication of the matters so carefully dictated by section 1692g.[341] If this is not what Congress had in mind, then surely it should be keen to set the record straight, leaving no doubt that it intended to give a consumer the chance to benefit from an effective notice, and not one that the debt collector conveys orally without having any real impact on the consumer.[342]

Finally, Congress should take the opportunity to reflect on the use of the phrase "any language or symbol" in section 1692f(8). In its zeal to protect a consumer's privacy, Congress may have gone overboard. It is time to save the courts from the uncomfortable assignment of having to

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demand for payment, or even whether the validation period is a grace period. *See, e.g.*, Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85 (2d Cir. 2008); *Durkin*, 406 F.3d at 410; Smith v. Computer Credit, Inc., 167 F.3d 1052 (6th Cir. 1999); Miller v. Payco-General Am. Credits, Inc., 943 F.3d 482 (4th Cir. 1991); DeSantis v. Computer Credit Inc., 269 F.3d 159 (2d Cir. 2001); Palmer v. Stassinos, 348 F. Supp. 2d 1070 (N.D. Cal. 2004); Omaraie v. Alliance Collection Agency, Inc., No. 06-C-1727, 2007 U.S. Dist. LEXIS 61617 (N.D. Ill. Aug. 21, 2007).

339. Congress amended § 1692g(b) in 2006 to make it clear that a debt collector may continue its collection activities during the thirty-day dispute period unless the consumer has disputed the debt in writing, but any communication cannot overshadow the disclosure of the consumer's right to dispute the debt. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802(c), 120 Stat. 1966, 2006 (codified at 15 U.S.C. § 1692g(b) (2006)). Quite frankly, the admonition against overshadowing or inconsistency does not offer a solution to the problem. A debt collector will still be in the position of making powerful demands on the consumer while informing him of his statutory rights. A true grace period avoids that clash of competing interests.

340. *See* 15 U.S.C. § 1692g(a) (2006).

341. The statute defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2) (2006).

342. *See* NAT'L CONSUMER LAW CTR., *supra* note 26, at § 5.7.2.4.

contrive some benign exception to accommodate the loose use of "any" in the relevant phrase. A redraft of the section will surely go a long way towards preserving the consumer's privacy, while maintaining respectability for the language.