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Written Testimony of

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Witness Background Statement

Dalié Jiménez is a Professor of Law at the UC Irvine School of Law where she teaches courses on bankruptcy, consumer financial regulation, and contracts.

Professor Jiménez is one of three principal investigators in the Financial Distress Research Project, a large-scale, longitudinal, randomized control trial evaluating the effectiveness of legal and counseling interventions to help individuals in financial distress. The project has received generous financial support from the National Science Foundation, the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, and the Arnold Foundation, among others. Individuals enrolled in the study have all been sued in a debt collection proceeding in Connecticut small claims court.

A member of the American Bankruptcy Institute's Consumer Bankruptcy Commission, Professor Jiménez has published half a dozen articles examining debt collection, bankruptcy, and student loans.

Professor Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau working on debt collection, debt relief, credit reporting, and student loan issues. Prior to her academic career, she clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit, was a litigation associate at Ropes & Gray in Boston, and managed consumer protection issues for a Massachusetts state senator.

A *cum laude* graduate of Harvard Law School, Professor Jiménez also holds dual B.S. degrees in electrical engineering/computer science and political science from the Massachusetts Institute of Technology.

Chairwoman Waters, Ranking Member McHenry, and members of the Committee:

Thank you for the opportunity to speak to you today.

My name is Dalié Jiménez. I am a tenured professor at the University of California, Irvine School of Law, where I teach courses in bankruptcy, consumer financial protection, and contracts. The views I express here are my own, however.

I am grateful that this Committee is examining these issues. I have been studying consumer debt for over a decade and have published multiple articles examining these issues.[1] I have observed many small claims court proceedings in Maine, Connecticut, and Massachusetts, and have represented debtors in bankruptcy and small claims court.

In my limited time, I want to make three main points:

(1) The debt collection ecosystem is broken. No one player in the system has the ability to fix this because it will be disadvantageous to them individually. This is a classic collective action problem perfect for regulation. Only a regulatory solution can fix it.
(2) Current law makes it next to impossible for a collector (let alone a consumer) to know whether they are collecting a debt that is not "out of statute." As a result, zombie debts abound. Congress should enact a federal statutory period that would extinguish consumer debts once and for all.
(3) The CFPB missed a number of opportunities to protect consumers and assure the integrity of the debt collection system. Instead, the proposed rule favors debt collectors and attorneys over consumers when it comes to documentation and the collection of old debts.

I. Systemic Documentation Problems Plague the Debt Collection Ecosystem[2]

Consumer debts are created out of a contractual transaction: an unpaid credit card, car loan, or a medical bill. Consumers chose to do business with the creditor, but they cannot choose their debt collector or debt buyer, or what happens to their debt after they stop paying. Unfortunately, the debt collection ecosystem is currently broken.

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[1] I attach some of these articles as Exhibits to this testimony. Dalié Jiménez, *Dirty Debts Sold Dirt Cheap,* 52 HARVARD JOURNAL ON LEGISLATION 41 (2015), available at https://ssrn.com/abstract=2250784; Dalié Jiménez*, Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017), *available at* https://ssrn.com/abstract=3152256; Comments of 31 Consumer Law Scholars on Proposed Debt Collection Rule, CFPB-2019-0022-9568 (Sep. 19, 2019), https://www.regulations.gov/searchResults?rpp=25&po=0&s=1k3-9c98-p8hg.
[2] This section borrows from and expands upon my article *Dirty Debts Sold Dirt Cheap, supra* note 2.

A. The Problems with Debt Sales

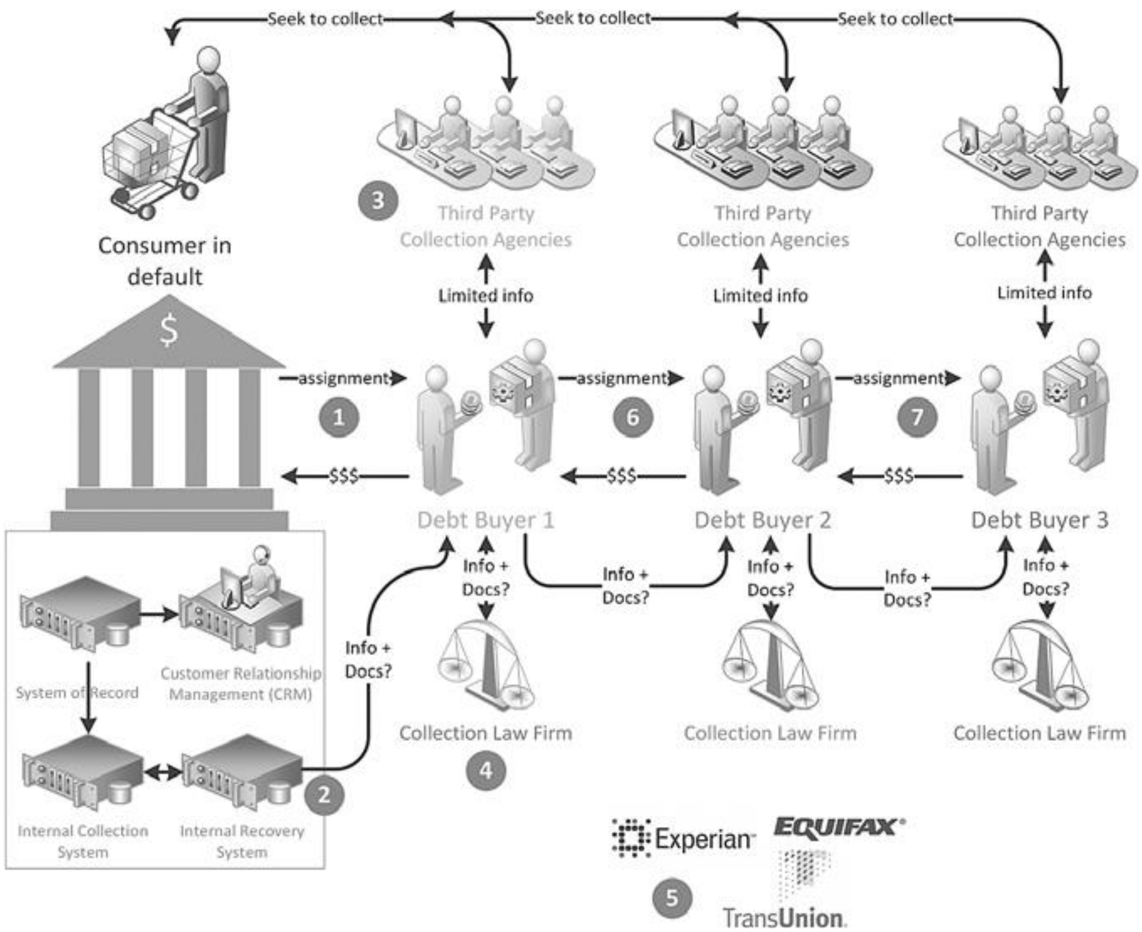
A debt sale, at its essence, is an assignment from a seller to a buyer of "any legal interest" the seller has against the account holder. Consumers have no say in whether their debt is sold, and often have no knowledge of it. Consumer debts are sold many times, sometimes more than a decade after the first default.

In the context of a sale of consumer debts, the buyer at a minimum should want the seller to promise that (1) it owns the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is providing about the debt and debtor is accurate. Separately, a rational buyer should want to obtain some documentation regarding the debt so that they can prove to the debtor and potentially to a court the amount and nature of the debt.

If the seller does not own the debts she sells, the buyer has paid money for nothing. Even if the seller owns the accounts, without accurate information about the identity of the account holders, the amount owed, and relevant dates, the buyer may have trouble collecting or may face liability under the Fair Debt Collection Practices Act ("FDCPA"). Not having documents such as account statements, contracts between the consumer and the creditor, or other documentary evidence of the debt puts the debt buyer in a difficult position: she may not be able to convince a consumer with the ability to pay that the consumer owes the debt and that the debt buyer is the right party to pay. Worse, she may not be able to sue consumers who refuse to pay, for if she sues without documentary evidence of the debt, she risks losing the suit and subjecting herself to FDCPA liability.

These issues are exacerbated by the fact that debts are often sold multiple times with the same incomplete information or lack of documentation, as shown in Figure 1 below.

Figure 1 - Data flows once a debt is purchased[3]



Unfortunately, debts are often sold without documentation and sometimes even without enough information to enable debt buyers to determine important dates such as the date that starts the statute of limitations period.[4] The largest source of consumer debt sales are financial institutions selling defaulted credit card and other financial accounts. While there are issues with information integrity throughout the life of a debt, these financial institutions are the source of documentation and information troubles for the debts they sell. The debt sale contracts sometimes allow debt buyers to request documentation from the creditor after a sale, but every contract I have seen disclaims any duty by the creditor to actually provide that documentation.

It gets worse: debts are typically sold more than once, but subsequent buyers do not have a contractual relationship with the creditor. This means that if a debt buyer wants documentation or further information on an account, they must request it from the previous debt buyer (the person who sold them the account) and on and on. If Debt

[3] Reprinted from *Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 53.
[4] FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 23 (2013) [hereinafter FTC DEBT BUYER REPORT [http://perma.cc/XSN6-XXSD]. *See also Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 76-83 (analyzing these issues).

Buyer 2 in Figure 1 goes out of business or ignores requests, Debt Buyer 3, the current owner of the debt, will be unable to obtain any documentation *even if the creditor was willing to provide it.* This means that documentation and information problems can only get *worse* as time goes on.

For decades, financial institutions have failed to provide documentation of the debts sold. Debt buyers typically receive nothing more than a few data fields with information about the debtor and the debt.

Despite widespread knowledge of these issues and even some regulatory guidance by the Office of the Comptroller of the Currency (OCC) requesting that regulated institutions do better,[5] this behavior continues.[6] In a 2016 report, the CFPB found that more than half of surveyed debt buyers "rarely" or "never" receive account documentation or billing statements.[7]

Instead of providing documentation, some financial institutions sell these debts under contracts that disclaim all warranties and representations regarding essential information, including in some cases, that they own the accounts being sold.[8] I've collected over 100 of these debt sale agreements, a typical contract clause reads:

> Bank has not and does not represent, warrant or covenant the nature, *accuracy, completeness*, enforceability or validity *of any of the Accounts and supporting documentation* provided by Bank to Buyer . . .[9]

With these contracts and what little information they receive from sellers, debt buyers call, mail, and sue consumers to collect on debts. In the overwhelming majority of cases, debt buyers win these lawsuits because the consumer defaults.[10] In most jurisdictions, all the collector had to do to win was file a lawsuit with basic allegations. Even in

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[5] BUREAU OF CONSUMER FINANCIAL PROTECTION, STUDY OF THIRD-PARTY DEBT COLLECTION OPERATIONS at 23, Table 8 (July 2016) [https://perma.cc/LC54-FJ6F].

[6] Note that even if all original creditors began to provide full documentation and information on debts, there would still be billions of dollars in outstanding consumer debts that lacked such documentation or information.

[7] Consumer Debt Sales/Risk Management Guidance, Office of the Comptroller of the Currency (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

[8] *Dirty Debts Sold Dirt Cheap, supra* note 2, at 59-60 (18% of contracts disclaimed all representations, including any representation regarding title to the accounts).

[9] (emphasis added). *Id.* at 61 (citing agreements). A more specific (and more egregious) contract used by Bank of America entities

> [S]eller has not made . . . any representations . . . as to . . . the *accuracy or completeness of any information* provided by the seller to the buyer, *including* without limitation, the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the
> Loans.

Id. at 62 (emphasis added).

[10] Consumers default for many reasons. In my experience, a combination of feeling like it is futile to contest the lawsuit, difficulties getting to court, or procedural defaults are the most likely culprit.

jurisdictions that have changed their rules to require more proof, this is often all that is provided. With judgment in hand, collectors can garnish a bank account or the consumer's wages. In some circumstances, the lawsuit starts a chain of events that may end with the consumer in jail.[11]

B. We Need a Regulatory Fix

The problems just identified will not change on their own. The market forces at play here combine to create a collective action problem that cannot be solved by even the most well-meaning market players. Regulation is needed.

Creditors who no longer wish to collect on their own defaulted debt need to find willing buyers. One might expect that debt buyers, as the bank's customers, have an incentive to demand more documentation, evidence, and positive warranties from banks. This would enhance recoveries because consumers are more likely to pay if they can trust that the person calling or writing about the debt—someone they did not initiate a relationship with—is the correct party. Enhanced evidence of the underlying debt would also enhance the debt buyer's ability to collect via the court system.

But in order for debt buyers to have the incentive to push for more documentation and warrants from sellers, these items must be needed to make debt buying profitable. Instead, the public filings of debt buyers demonstrate that no matter how broken the current system may be, it still allows them to obtain a very healthy profit. Despite all the bad press, debt buyers have been able to collect enough to accrue substantial profits from consumers directly as well as through the courts. If debt buyers can collect with the current level of information and documentation and without requiring that the creditor stand by the material aspects of the debts they are selling, they have no incentive to ask for anything more. Indeed, they have a disincentive to ask for more since this would increase the purchase price immediately with only a theoretical possibility that it would also mean increased recoveries in the future. Receiving more documentation would also mean needing to put a system in place to deal with the documents. This is costly and—so far—has been unnecessary.

Thus, any improvement in procedures a creditor undertakes will result in added costs, with little upside. This presents a collective action problem: if a creditor increases prices to cover the increase in costs, it risks losing customers. Since consumers do not choose their bank based on their collection or debt sale practices, the bank that does not implement these costly upgrades is better positioned to offer lower-priced products to consumers and poised to increase its customer base.

Without regulatory or other external pressure, individual creditors lack the incentives to "throw good money after bad" and invest in systems required to make sure that they can comfortably warrant title, legal compliance, and accuracy. An intervention is needed to spur change and solve this collective action problem. Both banks and debt buyer industry players recognize this. At a workshop held by the FTC and the CFPB in advance

[11] ACLU Report

of a debt collection rule, industry panelists repeatedly requested regulation and clarity in documentation requirements. For instance, Larry Tewell, Senior Vice President at Wells Fargo stated, "if we could have uniform national standards relative to data and media, that would go a long way toward fixing this."[12] An attorney for the collections industry echoed this sentiment "[i]f there's a mandate, a national standard, you sell an account, these are the things you will transmit. I think it helps everybody. That's a quality improvement standard and it'd be a very good thing."[13]

In response to the Bureau's notice of proposed rulemaking in 2014, both consumers and industry players identified documentation and substantiation issues as critically important to a well-functioning debt collection ecosystem.[14] JP Morgan Chase stated that the bank "would be interested in guidance from the Bureau on what information and documentation should be required to transfer with a charged-off debt when it is assigned to a collection agency or sold to a debt buyer."[15] The Bureau's own study on this issue conducted after these comments found that 36.5% of respondents "rarely" or "never" had access to an account's chain of title.[16]

C. The CFPB Rule Protects Collection Attorneys at the Expense of Consumers3

Industry comments to the CFPB rule recognized the earlier point: debt originators will not retain or pass on all the relevant information unless required to do so by federal law.[17] The Bureau's own study confirmed this to still be an issue. Unfortunately, the

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[12] Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, comments at Life of a Debt: Information Available to Debt Collectors at Time of Assignment of Sale – Panel I, at 119, Fed. Trade Comm'n & Consumer Fin. Prot. Bureau (June 6, 2013), http://www.ftc.gov/news-events/audio-video/ video/life-debt-data-integrity-debt-collection-part-2, archived at http://perma.cc/T7YK-LYUA.

[13] Life of a Debt: Data Integrity and Debt Collection – Part 3, Fed. Trade Comm'n (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-col- lection-part-3, archived at http://perma.cc/8WKF-Z6M6. At this roundtable discussion regard- ing debt collection and data integrity, Manuel Newberger, Partner, Barron & Newberger, P.C., who represents creditors and debt buyers, said, "the more information that we can have rela- tive to charge-off dates, balances, last payments . . . would be extremely relevant . . . . [T]he idea that information can be passed from agency to agency . . . that this account was disputed . . . that would be helpful." The TransUnion representative agreed: "[M]ore standardized data reporting on the front end will reduce the errors and reduce the questions consumers get. We won't be putting accounts on the wrong file or matching information correctly."

[14] Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6.

[15] J.P. Morgan Chase & Co., Response to Advance Notice of Proposed Rulemaking at 3, Debt Collection, Docket No. CFPB-2013-0033, RIN 3170-AA41 (Feb. 28, 2014), available at http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0304, archived at http:// perma.cc/3GAP-QHYZ.

[16] Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 23, Table 8 (July 2016).

[17] Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6; Commercial Law League response to question 9; Collections Marketing Center, Response to CFPB ANPR, January 13, 2014, at 2-3; *Dirty Debts Sold Dirt Cheap*, *supra* note 2, at 110 et. seq. (arguing that the "CFPB should clarify that the practice of selling debts

Bureau missed the opportunity to protect both consumers and the integrity of the debt collection system in its recent proposed rule. The proposed rules do nothing to require that original creditors maintain records or transfer them to subsequent debt buyers. More troublingly, the proposal would give debt collection attorneys a safe harbor from litigation if they "personally ... review" unspecified "information" regarding the debt.[18]

While the rules are silent on requiring that debt collectors have sufficient information and documentation before collecting, they propose giving debt collection attorneys a "safe harbor" from litigation for engaging in minimal review of whatever documentation or information there is. In my comment with 30 other consumer law professors, we explained our two major concerns with this proposal:

> First, a safe harbor provides sweeping protection for debt collectors. It would be pleaded as an affirmative defense to a consumer claim, thereby providing the collector with a complete defense to a consumer claim that a communication falsely represented the debt.
>
> Second, such a sweeping protection should contain clear and specific standards. The language of the rule is broad, potentially allowing collection attorneys to claim that superficial review of a client's claim satisfies the safe harbor requirements.
>
> Debt collection litigation is, perhaps, the setting where the disparity in power and knowledge between consumers and debt collectors is the most one-sided in favor of the collector. As little as 1-2% of consumers are represented by counsel in collection lawsuits. In many cases, consumers do not appear in the lawsuit, resulting in default judgments. In our adversarial system of justice, presided over by a "neutral" judge, collection attorneys take full advantage of this power disparity. They churn out large volumes of lawsuits, knowing that the chances of a consumer actually defending the action are slim. Even if a consumer appears, the consumer's ability to defend the action or even negotiate a favorable settlement is weak. For various reasons, including the sheer volume of collection cases, judges do not examine pleadings for sufficiency and cases rarely reach the point where a plaintiff will be required to prove its case. When consumers do have representation, they usually succeed in the lawsuit. Those of us who represent consumers in law school clinics almost always win dismissal of the collection suit, or defeat summary judgment motions. We win because debt buyers lack the evidence needed to prove their cases in court.
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> The safe harbor for meaningful attorney involvement does little to remedy the problem it attempts to address. While the defense is available to an attorney who "personally" "review[s]" pleadings (for example), there are many qualifications. The attorney must determine that the claims are supported "to the best of the

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with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception").

[18] Proposed 1006.18(g).

> attorney's knowledge, information, and belief," that claims and contentions are warranted by existing law and "factual contentions have evidentiary support." This is a broad and vague standard, easily manipulated by some attorneys. The rule imports some of the standard from Rule 11 of the Federal Rules of Civil Procedure, but the setting of debt litigation is far different from federal court. Indeed, given the contrast in representation and judicial management of cases, the settings could not be more different.
>
> Since the Bureau's draft rule does nothing to alleviate the documentation and inaccurate information problems in the debt collection ecosystem, this safe harbor is especially problematic.[19]

The comment urged the Bureau to instead use the blueprint it created for this issue in its Consent Decree with Fred J. Hannah & Associates, et al.[20] In that case, the Bureau required the lawyers in the firm to review, at minimum, certain information and documentation on a consumers' case before a lawsuit could be filed.

D. What Congress Can Do

The CFPB received over 80,000 complaints about debt collection in 2018.[21] The largest share, 40%, were complaints that the debt collectors were attempting to collect a debt that was not owed.[22] Fixing the documentation issues would go a long way towards ensuring that consumers can and sh

This Committee should report legislation that:

1. Provides that original creditors and debt buyers are all subject to the Fair Debt Collection Practices Act. **I wholly support H.R. 4403 which would clarify that debt buyers are subject to the Act, but would also go further and include original creditors.**
2. Requires creditors to only sell debts if they can stand behind them: the contracts should guarantee that the information and documentation provided to debt buyers or collectors is accurate.
3. Requires creditors to provide at least one year's worth of account documentation to debt buyers.
4. Prohibits debt collectors from contacting a consumer about a debt or initiating a lawsuit unless they have read the debt sale contract and it contains affirmative

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[19] Comments of 31 Consumer Law Scholars on Proposed Debt Collection Rule, CFPB-2019-0022-9568 (Sep. 19, 2019), https://www.regulations.gov/searchResults?rpp=25&po=0&s=1k3-9c98-p8hg.
[20] *See* Consumer Financial Protection Bureau v. Frederick J. Hannah & Associates, No. 14-02211, Stipulated Final Judgment and Order at 7-9 (D.N.D. Ga. Jan. 6, 2016), *available at* https://files.consumerfinance.gov/f/201512_cfpb_proposed-stipulated-final-judgment-and-order-hanna-frederick-j-hanna.pdf.
[21] CFPB FDCPA Annual Report 2019, https://www.consumerfinance.gov/data-research/research-reports/fair-debt-collection-practices-act-annual-report-2019/.
[22] *Id.* at 16.

representations of the information and documentation provided (as per the second point) as well as viewed account documentation provided under #3.

5. Increases the statutory damages in the FDCPA to properly deter conduct. **I wholly support H.R. 3948's proposal to index these numbers to inflation since the FDCPA was enacted**.

II. End Zombie Debt: Enact A Federal Debt Extinguishment Statute[23]

Consumers and debt collectors ought to know how long they have to try to collect on a debt, but right now that question is often impossible to answer due to conflicting legal rules. We need a federal statute of limitations for consumer debts that abolishes the debtor's personal liability on those debts and puts an end to them once and for all. **The discussion draft bill, "Strengthening Legal Protections on Debt Collections Act" is a great start, but I urge this Committee to go further.**

If a debt is not repaid in full, it will likely grow significantly over time.[24] The creditor will also be able to attempt to collect by filing a lawsuit against the consumer. Across the country, hundreds of thousands of such lawsuits are filed every year in state courts. The overwhelming majority of these suits are won by the creditor as a result of the debtor's default. Once a creditor obtains a judgment, they can pursue the debtor for 10 or 20 years in most states, sometimes longer.

The possibility (indeed likelihood) that a debts will continually resurface in an individual's life can only increase these psychic and social burdens, as over-indebted individuals are forced to remain in a debt trap potentially forever. This debt trap disincentivizes work. As the Supreme Court has noted, "[f]rom the viewpoint of the wage earner, there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either."[25] These psychic costs may be impossible to quantify, but that does not make them unimportant.

The only two (potential) solutions that consumers have are bankruptcy and statutory limitations period. Bankruptcy can be a great tool for consumers, but it is a very drastic one. We ought to encourage other solutions. However, current limitations period statutes incapable of stopping the tide of zombie debts.

A. Statutes of limitation fail to protect consumers

Statutes of limitation fail to protect consumers. First, in most states, statutes of limitations are only an affirmative defense to a civil action. Failing to raise the

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[23] This section borrows from and expands upon my article *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017), *available at* https://ssrn.com/abstract=3152256.

[24] Many contracts creating debts include provisions for adding interest and fees to a delinquent obligation. Even if there was no such provision, however, many states allow creditors to collect a statutory amount of interest.

[25] Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

defense early enough in a case typically waives it.[26] Second, not all debts have a corresponding limiting statute. Third, it is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths. Fourth, most statutes of limitations only extinguish the legal remedy, not the right to collect. Expiration of the statute does not prevent a creditor from calling or writing the debtor seeking to collect. Finally, in most states and circumstances it is very easy for a consumer to restart the statute by doing something as simple as acknowledging the debt or making a small payment.

With the exception of when Mississippi or Wisconsin law applies, every other state law allows debt collectors to continue to pursue debtors outside of the courts past the limitations period.[27] Creditors also attempt to persuade debtors to make a small payment or acknowledge the debt and thus restart the limitations period, even if that period had expired long before. This "reset" would once again allow a creditor to use the court process to collect from the debtor. This effectively extends debts forever, harming debtors.

Difficulty repaying one's debts is associated with a plethora of negative outcomes for consumers.[28] One study links an inability to make minimum payments and default to increased anxiety.[29] Multiple studies find an association between debt and depression.[30] A high debt-to-income ratio, defaulting on a mortgage, and foreclosure are also each associated with more negative health outcomes.[31] Financial stress has also been linked

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[26] The FDCPA covers some consumer debt cases; in those situations, debt collectors who file a lawsuit past the statute of limitations do so in violation of the Act. This may be little consolation for the consumer who's been sued, however. She will still need to raise the defense in the state court debt action. If she does so successfully, the lawsuit should be dismissed. If she does not raise it or does not raise it on time, the lawsuit will proceed.

[27] *See, e.g.*, Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, BANKING & FIN. SERVICES POL'Y REP., August 2014, at 13.

[28] *See, e.g.,* Eva Selenko & Bernad Batinic, *Beyond debt. A moderator analysis of the relationship between perceived financial strain and mental health*, 73 SOC. SCI. & MED. 1725, 1725 (2011) ("Heavy debt not only has economic consequences, but has also been related to severe psychological and physical distress."). However, note that it is difficult for most of these studies to perfectly tease out the causal relationship between financial distress and the negative outcome.

[29] Patricia Drentea, *Age, Debt and Anxiety*, 41 J. OF HEALTH AND SOC. BEHAV. 437 (2000).

[30] *See, e.g.,* Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. OF HEALTH ECON. 388 (2010); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status, Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197 (2005); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441 (2001).

[31] *See, e.g.,* Sarah L. Szanton et al., *Effect of Financial Strain on Mortality in Community-Dwelling Older Women*, 63 THE JOURNALS OF GERONTOLOGY SERIES B: PSYCHOLOGICAL SCIENCES AND SOC. SCI. 369 (2008); Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 SOUTHERN ECONOMIC JOURNAL 873 (2005); Patricia Drentea & Paul J Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 527 (2000); Carolyn C. Cannuscio et al., *Housing Strain, Mortgage Foreclosure and Health in a Diverse Internet Sample*, 60 NURSING OUTLOOK (2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3816996/.

to work absenteeism,[32] lower graduation rates,[33] and childhood obesity.[34] Some have gone as far as to argue "that debt may be a factor in social isolation, feelings of insecurity and shame, self-harm and suicidal ideation."[35] Research on scarcity also suggests that financial distress causes lower mental function, leading to bad decisions that in turn lead to other problems, including eviction, divorce, and a need for government benefits.[36] In these cases, individual costs can quickly become costs borne by society in the form of social benefits or health care costs.

B. The CFPB's Rule Is Wholly Inadequate

The CFPB's proposed rule would permit the collection of out of statute debt. At minimum, the CFPB should require debt collectors to ensure that the debt they are collecting is within the statutory period and prohibit the collection of out of statute debt (whether that collection is via a phone call, letter, lawsuits, or threats of a lawsuit). The collector should have a reasonable basis to believe that the debt is within the applicable statutory period before attempting to collect.

C. The Better Solution

Congress should enact a single federal collection period applicable to consumer debts.[37] To harmonize with the Fair Credit Reporting Act, this collection period should run for seven years. This proposed federal law would go further than the current concept of a statute of limitations. It should automatically extinguish not simply the legal remedy of collecting through the courts, but any right of repayment.[38] This proposal could build upon the draft bill circulated for this hearing entitled "Strengthening Legal Protections on Debt Collections Act."

Specifically, Congress should enact a federal statute that covers all consumer debts and

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[32] Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An empirically Derived Research Model*, 14 FINANCIAL COUNSELING AND PLANNING 31 (2003).

[33] Graduation rates for students from the bottom of the income distribution are reduced significantly when students owe more than $10,000 in debt. Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOCIAL FORCES 1133 (2012).

[34] Steven Garasky et al., *Family Stressors and Child Obesity*, 38 SOC. SCI. RESEARCH 755 (2009).

[35] Chris Fitch et al., *Debt and Mental Health: The Role of Psychiatrists*, 13 ADVANCES IN PSYCHIATRIC TREATMENT 194, 195 (2007).

[36] *See, e.g.,* SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013); Virginia Graves, *Does Poverty Really Impede Cognitive Function? Experimental Evidence from Tanzanian Fishers*, (2015) (unpublished Master's Thesis, University of San Francisco), http://repository.usfca.edu/thes/129/ (last visited Jul 10, 2015).

[37] The clock on this collection period should start on the moment in which the creditor could have sued in state court under the contract.

[38] As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, Miss. Code Ann. § 15-1-3, and the Wisconsin statute does not make clear that this is not the case.

(1) Extinguishes all consumer debts after seven years, with the clock beginning to run 180-days after the consumer's behavior that gave rise to the cause of action.
(2) Clarifies that any payments (or acknowledgments of the debt) made after the 180-day period would not restart the collection clock.[39]
(3) Extinguishes judgments based on consumer debts seven years after a court issues them.[40]
(4) Clarifies that when the applicable 7-year period expires, the debtor's obligation to the creditor and the creditor's right to collect cease to exist.[41] Any judgment obtained on an extinguished debt would be void and could be collaterally attacked in a different proceeding.
(5) Modifies the Consumer Financial Protection Act to clarify that attempting to collect on an extinguished debt is an unfair practice giving rise to a private right of action against the collector, with statutory financial penalty, attorney's fees, and actual costs (including disgorgement of any payments made by the consumer) obtainable from the collector. Regulators such as the Consumer Financial Protection Bureau and states' attorneys general could also enforce the statute.
(6) Clarify that the two extinguishment periods would preempt contrary state law to the extent it is less protective of consumers and that this statute could not be waived by the consumer.

A federal law is needed because a state-by-state implementation would leave in place the crushing complexity of a system in which few can be certain which statutory period applies. Even if all states adopted statutes that extinguished all rights and remedies upon the expiration of the statute of limitation, debt owners and consumers would still find it difficult to determine which statutory period applied to a particular debt.

The effect of this proposal is to give creditors a defined amount of time in which to attempt to collect from consumers. This time can be extended by obtaining a judgment on a debt; but the time to collect on that judgment would also be limited. If the creditor is not able to secure repayment during seven years, the debt will automatically discharge at the end. The aim is to encourage creditors to act diligently in attempting to secure payment.

Seven years is a reasonable amount of time; most states limit collection on contract debts to six years or less.[42] In fact, sixteen states have only "a three-year statute of

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[39] This is similar to the draft discussion bill.
[40] In other words, the initial seven-year extinguishment period can be extended if a court renders a judgment in a lawsuit filed before. The automatic discharge federal law I am proposing would not only automatically extinguish the legal remedy of collecting through the courts, but also any right of repayment.
[41] This is similar to the current statutes in Mississippi and Wisconsin, but unlike Mississippi, this proposal would not allow for a restart of the statute of limitations after it had expired under any circumstances.
[42] *See, e.g.,* Wash. Stat. §4.16.040(1) (6 years); Wisc. Stat. §893.43 (6 years); Arkansas Stat. §16-56-111 (5 years); Cal. Stat. §337 (4 years).

limitations for written contracts, oral contracts, or both."[43] While the modal number of years to collect on a judgment is longer than seven,[44] empirical evidence suggests that most judgments go unsatisfied.[45] It is likely that an empirically-derived time limit on satisfying judgments would be significantly lower than the 10 or 20 year limit that is the norm in most states.

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There are many issues this Committee is considering today that I do not have time to discuss here. I thank you for the attention you are paying to these critical problems and for the opportunity to testify today. I look forward to answering your questions.

[43] APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT'L CONSUMER L. CTR., MODEL STATUTE OF LIMITATIONS REFORM ACT, 19 (Dec. 2015), https://www.nclc.org/images/ pdf/debt_collection/statute-of-limitations-reform-act.pdf [https://perma.cc/HZ9F-KC8T]. The model statute proposed in this report recommends a private right of action for violations and prohibits extending the limitations period in certain circumstances. *Id.*

[44] Nationwide, statutes of limitation on judgments are lengthy: typically between ten and twenty years. Most states allow some form of renewal of judgments. Richard M. Hynes, *Why (consumer) bankruptcy*, 56 ALA. L. REV. 121 (2004).

[45] Richard M. Hynes, *Broke but not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1 (2008).

ARTICLE

DIRTY DEBTS SOLD DIRT CHEAP

Dalié Jiménez*

More than seventy-seven million Americans have a debt in collections. Many of these debts will be sold to debt buyers for pennies, or fractions of pennies, on the dollar. This article details the perilous path that debts travel as they move through the collection ecosystem. Using a unique dataset of eighty-four consumer debt purchase and sale agreements, it examines the manner in which debts are sold, oftentimes as simple data on a spreadsheet, devoid of any documentary evidence. It finds that in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred. Sellers also sometimes refuse to stand by "the accuracy or completeness of any information provided." After discussing potential explanations for these issues, the article suggests that lax regulation and a collective action problem prevents the market from self-correcting. It concludes by recommending that the Consumer Financial Protection Bureau declare the collection of consumer debts sold in this way as an unfair or deceptive act or practice.

I. Introduction

Imagine you get a call from a debt collector. She tells you she is calling about your $1,000 balance on a GE Capital credit card. You had no idea the company that makes your refrigerator also issued credit cards, but you are certain you never had one with it. The collector explains that she is calling regarding a GAP credit card.[1] You cannot remember the last time you stepped into a GAP store, but you vaguely recall getting a card a few years back, when you were in college. It was a long time ago, but you feel pretty certain you would have paid your bill.

You have no idea who ABC Debt Collection is, and that's where the collector tells you she is calling from. She also tells you she is collecting on

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[1] This is an entirely fictional scenario, but GAP Cards are issued by Synchrony Bank (formerly GE Capital). *See* Charmaine Ng, *It's Official: GE Capital Retail Bank Is Now Synchrony Bank*, Credit Karma (June 11, 2014), http://blog.creditkarma.com/news-trends/its-official-ge-capital-retail-bank-is-now-synchrony-bank/, *archived at* http://perma.cc/T7EW-KF6F.

behalf of XYZ Debt Buyer. This alphabet soup gives you a headache; you are certain you have had dealings with only *one* of those four companies—GAP. You want to know whether you really owe this money and who you should pay, but you worry about those scams you hear about on the news. A few days later, a letter arrives from ABC requesting payment. The letter says you can request a validation of the debt within 30 days, so you write a letter back asking for proof that this is your debt. It never comes. You still get calls and letters about this debt, but it is not ABC calling anymore. It seems like every few months the calls come from a different company altogether.

This sketch represents one of the many ways the more than 77 million Americans who have a debt in collection experience the collection system.[2] When consumers fail to repay their financial obligations—credit cards, auto loans, medical bills, or even gym memberships—creditors seek to collect on the debts. They can try to collect themselves, or they can retain a third party firm (collection agency) to collect. Often, they sell the debts to firms who specialize in collections (debt buyers). These firms, including four publically traded companies, buy these debts for pennies—or fractions of pennies—on the dollar.[3] For example, the $1,000 balance on a GAP-branded, GE Capital credit card might have been sold to XYZ Debt Buyer for $40. It is also likely that when XYZ purchased the debt, they only bought the assignment of the right to collect and a spreadsheet with some information about you and the debt. XYZ Debt Buyer is unlikely to have purchased underlying documents like account statements. XYZ Debt Buyer might have then hired ABC Debt Collection to collect the $1,000 plus interest and fees from you, sometimes as much as a decade or more after the obligation was incurred.[4] After some time, XYZ Debt Buyer may also decide to sell the debt to QRS Debt Buyer who may try to collect the debt itself or hire DEF Collection Agency. In

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[2] Caroline Ratcliffe & John Chalekian, Urban Institute, Delinquent Debt in America 7 (July 30, 2014), *available at* http://www.urban.org/UploadedPDF/413191-Delinquent-Debt-in-America.pdf, *archived at* http://perma.cc/F48P-SWMJ. This number is based on individuals who have a credit file with TransUnion. *See id.* at 8. The average debt was $5,178 and the median debt was $1,349. *Id.* at 9, 11.

[3] While the debt purchasing market can include the purchase of non-delinquent consumer or commercial receivables, the discussion in this Article is limited to the purchase of delinquent or defaulted consumer accounts. The CFPB estimates that debt buyers and debt collectors, combined, totaled approximately 4,500 firms in 2007. Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9599 (proposed Feb. 17, 2012) (citing U.S. Census Bureau, Economic Census (2007)).

[4] Fed. Trade Comm'n, The Structure and Practices of the Debt Buying Industry 23 (2013) [hereinafter FTC Debt Buyer Report], *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf, *archived at* http://perma.cc/XSN6-XXSD ("On average, debt buyers paid 4.0 cents for each dollar of debt."); *id.* at T-8 (regression model includes debts between 6-15 years and 15+ years); Encore Capital Group Inc., Annual Report (Form 10-K) 36 (Feb. 13, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1084961/000119312513055397/d443977d10k.htm, *archived at* http://perma.cc/JJ2M-QAXP (stating that in 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with face value of $18.5 billion, at average cost of 3.0 cents per dollar of face value).

some cases, the debt may be placed with a collection law firm at some point, who can collect via calls or dunning letters or file a lawsuit against you.

The low cost at which XYZ Debt Buyer purchased the debt from GE Capital reflects the risk the buyer is taking that the debt will ultimately be uncollectible.[5] The price also reflects the documentation and information (or lack thereof) about the debt that the seller provides to the buyer. Finally, the cost of the debt reflects the underlying contract language: in particular, the representations and warranties made by the seller regarding the accounts sold. The less the seller is willing to "stand by" the accounts it sells—for example, if the seller disclaims all warranties of title or accuracy of the information provided—the cheaper the debt. Debt buyers purchase billions of dollars of delinquent debts annually, sometimes from creditors, oftentimes from other debt buyers.[6] The existence of this secondary market for consumer debts lowers the overall cost of credit and, some argue, is critical to our credit economy.[7]

In recent years, however, the debt collection industry has been the subject of much criticism.[8] The Federal Trade Commission ("FTC" or "Com-

[5] Professor Mann hypothesized in 2007 that the "developing market [in the sale and purchase of consumer debt] appears to suggest that the debt is more valuable in the hands of the smaller companies that can collect more aggressively than reputable large companies." Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 391 (2007) [hereinafter *Sweat Box*].

[6] *See, e.g.*, ENCORE CAPITAL GROUP INC., ANNUAL REPORT (FORM 10-K) (Feb. 13, 2013), *supra* note 4, at 36 (describing that during 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with a face value of $18.5 billion, at an average cost of 3 cents per dollar of face value, which represented a 45.3% increase over the previous year's investment); SQUARETWO FIN. CORP., ANNUAL REPORT (FORM 10-K) 35 (Mar. 1, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1505966/000150596613000008/squaretwo-2012123110k.htm, *archived at* http://perma.cc/8JB2-TXC9 ("From 1999, our first full year of purchasing debt, to December 31, 2012, we have invested approximately $2.2 billion in the acquisition of charged-off receivables, representing over $33.9 billion in face value of accounts. The combination of our historical and future recovery efforts is expected to result in cumulative gross cash proceeds of approximately 2.2x our invested capital. From 1999 to December 31, 2012, we have grown our business from $8.7 million to $608.0 million of annual cash proceeds on owned charged-off receivables, representing a compound annual growth rate of approximately 35%.").

[7] The CFPB notes that "[c]ollection of consumer debts serves an important role in the functioning of consumer credit markets by reducing the costs that creditors incur through their lending activities. Collection efforts directly recover some amounts owed to owners of debts and may indirectly support responsible borrowing by underscoring the obligation of consumers to repay their debts and by incenting consumers to do so. The resulting reductions in creditor's losses, in turn, may allow them to provide more credit to consumers at lower prices." Debt Collection (Regulation F), 78 Fed. Reg. 67848, 67849 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006) [hereinafter CFPB ANPR] (footnotes omitted); Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 907 (1986) (arguing that "common-law debt collection fostered the development of capitalism" and "the rise of the English credit economy").

[8] *See CFPB Files Suit Against Debt Collection Lawsuit Mill*, CONSUMER FIN. PROT. BUREAU (July 14, 2014), http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/, *archived at* http://perma.cc/5EDR-NZ8E (describing CFPB lawsuit alleging that collection law firm filed lawsuits based on faulty evidence); *At FTC's Request, Court Orders Halt to Collector's Illegal Practices, Freezes Assets*, FED. TRADE COMM'N

mission"), historically the chief federal regulator of debt collectors, has referred to debt buying and debt collection as a "broken system."[9] A number of commentators have argued that attorneys suing to collect on a debt often do not have the necessary documentation to prove to the court that they own the debt or the amount owed.[10] As this article goes to press, a new mass-

(Aug. 1, 2013), http://www.ftc.gov/news-events/press-releases/2013/08/ftcs-request-court-orders-halt-debt-collectors-illegal-practices, *archived at* http://perma.cc/7AFD-DUE4 (alleging that debt collector extorted payments out of consumers by using false threats and communicating with family members, friends, and co-workers of consumers); *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt Collection Practices*, STATE OF CAL. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN. (May 9, 2013), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase, *archived at* http://perma.cc/E8B6-5WBP ("The suit alleges that Chase engaged in widespread, illegal robo-signing, among other unlawful practices, to commit debt-collection abuses against approximately 100,000 California credit card borrowers over at least a three-year period."); *Attorney General Lori Swanson Obtains Consent Judgment in "Robo-Signing" Lawsuit Against One of the Country's Largest Debt Buyers*, OFFICE OF THE MINN. ATT'Y GEN. (Dec. 12, 2012), http://www.ag.state.mn.us/Consumer/PressRelease/121212DebtBuyers.asp, *archived at* http://perma.cc/4R8N-9G5Z (describing consent order with Midland Funding meant to address issues with robo-signed affidavits); *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million For Alleged Consumer Deception*, FED. TRADE COMM'N (Jan. 30, 2012), http://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged, *archived at* http://perma.cc/7JCL-59BL (describing consent order with Asset Acceptance settling charges that the debt buyer made "misrepresentations when trying to collect old debts"); Jamie Smith Hopkins, *Md. Court Freezes 900 Debt-Collection Lawsuits*, BALTIMORE SUN (July 20, 2011), http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720_1_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits, *archived at* http://perma.cc/J4JT-SSWF ("Last year, [Judge] Clyburn dismissed more than 27,000 Maryland cases handled by Mann Bracken after the Rockville debt-collection law firm collapsed. In March, debt buyer Midland Funding [a subsidiary of Encore Capital] agreed to drop just over 10,000 cases against Maryland consumers to settle a class-action lawsuit, though it admitted no wrongdoing."); Beth Healy et al., *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOS. GLOBE, July 31, 2006, at A1, *available at* http://www.boston.com/news/specials/debt/part2_main/, *archived at* http://perma.cc/7AC3-9B9K (describing examples of individuals coming to court and finding collection attorneys unprepared); Complaint, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., No. 14-02211 (N.D. Ga. July 7, 2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_complaint_hanna.pdf, *archived at* http://perma.cc/MU7K-XAU6; Emanuel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339 (2013) [hereinafter *Account Stated Resurrected*]; Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012) (describing preliminary results of a small study of debt collection cases in Indiana) [hereinafter *Do We Have a Debt Collection Crisis?*]; Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 258 (2011) [hereinafter *Debts, Defaults, and Details*]; Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 WM. MITCHELL L. REV. 1116 (2009) [hereinafter *Flood of Debt Collection*]; *cf.* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5 (2009) [hereinafter REPAIRING A BROKEN SYSTEM], *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf, *archived at* http://perma.cc/5WG4-QLB3.

[9] REPAIRING A BROKEN SYSTEM, *supra* note 8, at 5.

[10] *See, e.g.*, Complaint, *supra* note 8, at 9; *Debts, Defaults, and Details*, *supra* note 8, at 269; *Flood of Debt Collection*, *supra* note 8, at 1118; *Account Stated Resurrected*, *supra* note 8, at 343–44; *Do We Have a Debt Collection Crisis?*, *supra* note 8, at 361. "[I]t is equally

market non-fiction book has just been released delving into the world of debt collectors.[11] The Consumer Financial Protection Bureau ("CFPB" or "Bureau"), a federal agency with freshly-minted authorities to regulate the entire debt collection ecosystem, is poised to propose debt collection rules in early 2015.[12] This article details the alarming and systemic issues that affect the information in the current debt collection and debt buying system. In doing so, it exposes the difficulties consumers face in verifying that they are paying the right amount to the right party when contacted by a collector, as well as the hurdles debt buyers face in collecting. The article ultimately argues that without regulatory intervention, these issues will continue because no one player in the debt collection ecosystem—not creditors, debt buyers, or even consumers—has the incentive to change their behavior and internalize the costs of these changes.

A debt sale, at its essence, is an assignment from a seller to a buyer of "any legal interest" the seller has against the account holder. In most commercial sales, what is conveyed is more than a quitclaim deed from the seller.[13] Many commercial contracts include warranties from the seller "be-

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clear that in the debt buyer context, 'small claims courts' have in reality become 'creditor's courts,' devoid of the hallmark characteristics of an adversary system." Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259, 272 (2011) [hereinafter *The One Hundred Billion Dollar Problem*]; *see also* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 186 (2014) [hereinafter *Junk Justice*].

[11] *See* Jake Halpern, Bad Paper: Chasing Debt from Wall Street to the Underworld (2014).

[12] The CFPB sought comments through an Advanced Notice of Proposed Rulemaking on the topic of debt collection in late 2013. The comment period closed in February 2014. *See* CFPB ANPR, *supra* note 7. Along with Patricia McCoy, the author filed a comment urging the CFPB to impose greater documentation and information requirements. Patricia A. McCoy and Dalié Jiménez, Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), Docket No. CFPB-2013-0033, Regulatory Identification Number (RIN) 3170-AA41 (Feb. 28, 2014), *available at* http://www.creditslips.org/files/jimenez-mccoy-comment-in-response-to-cfpb-anpr-on-debt-collection-final-1.pdf, *archived at* http://perma.cc/3T7J-ZDED.

[13] *See* K. A. Drechsler, *Rights or Interests Covered by Quitclaim Deed*, 162 A.L.R. 556 (1946) ("[A] quitclaim deed passes all the right, title, and interest which the grantor has at the time of making the deed and which is capable of being transferred by deed, unless a contrary intent appears, and it transfers nothing more."). Quitclaim language is frequently used in real estate transactions. *See* Black's Law Dictionary 712 (9th ed. 2009) (defining "quitclaim deed" as "[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid"); American Law Institute—American Bar Association Continuing Legal Education, *Modern Real Estate Transactions: Sample Purchase and Sale Agreement*, SU006 ALI-ABA 83, July 18–20, 2012. In real estate transactions, however, quitclaim deeds are most often used by people who know each other. *See generally* Sean Wilken & Theresa Villiers, The Law of Waiver, Variation and Estoppel (2d ed. 2002). Conveyance of property by a quitclaim deed in a real estate transaction "means that the person who signs the deed is conveying whatever interest—if any—he or she has in the property . . . . If the person doesn't own an interest in the property, the recipient gets nothing" and has no recourse against the seller. Mary Randolph, Deeds for California Real Estate 72 (8th ed. 2010).

cause they are often in the interests of both the buyer and the seller."[14] In the context of a sale of consumer debts, a rational buyer at a minimum would want the seller to warrant that (1) it has title to the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is acquiring about the debt and debtor is accurate.[15] Finally, separate from warranties, a rational buyer would want to obtain some documentation regarding the debt to show the debtor and induce payment.

If the seller does not have unencumbered title to the accounts she bought, the buyer has paid money for nothing. What's more, if the seller manages to sell the accounts but did not comply with the Fair Debt Collection Practices Act ("FDCPA") and other relevant laws, the buyer may be held liable when she attempts to collect. Moreover, without accurate information about the identity of the account holders, the amount owed, and relevant dates regarding the account, the buyer may have trouble collecting or may face FDCPA liability. Not having documents such as account statements, contracts between the consumer and the creditor, or other documentary evidence of the debt puts the debt buyer in a difficult position: she may not be able to convince a consumer with the ability to pay that the consumer owes the debt and that the debt buyer is the right party to pay. Worse, she may not be able to sue consumers who refuse to pay, for if she sues without documentary evidence of the debt, she risks losing the suit and subjecting herself to FDCPA liability. That these features are crucial to a consumer debt sale transaction is fairly sensible; this article details the surprising finding of how often sale transactions lack one or more of these.

Part II of this article describes the mechanics of debt collection and debt buying by detailing how creditors attempt to collect when accounts go delinquent. It uses a sample of eighty-four purchase and sale agreements between large banks and debt buyers, along with data from the FTC to examine the prototypical consumer debt sale transaction.[16] This is the first time such a collection has been made public and analyzed; these agreements are

[14] Kabir Masson, *Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts*, 109 Colum. L. Rev. 503, 507 (2009) (arguing that this solves "the adverse selection problem" sometimes known as "lemons problem" because "[f]or buyers, a seller warranty lends credibility to a product and reduces the risks related to a possible product defect. For sellers, a warranty can help distinguish the object of sale from others on the market that might look as good, but not function as well (so called 'lemons')").

[15] That is not to say that warranties are a master cure. As Bruce Mann has noted in the context of automobile sales, "[d]efects will exist even in vehicles sold with warranties." Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 Yale L. & Pol'y Rev. 1, 3 n.11 (1996) (describing the "lemons" problem).

[16] The contracts are all available at http://dalie.org/contracts, *archived at* http://perma.cc/6Y96-3B8N.

closely-guarded by the industry and are only made public under a court order.[17]

These contracts reveal that an alarming number of transactions lack many of the basic elements a rational debt buyer should want. Instead of warranties, most contracts contain "reliance waivers," a declaration from the buyer that it has not relied on any statements or representations the seller may have made at any point.[18] Instead of affirmative representations, the contracts specifically disclaim material aspects of the transaction and provide little to no evidence of the underlying accounts. For example, sellers (1) do not warrant that they have title to the accounts they sell, (2) disclaim that the amounts listed as owed by account holders are correct, (3) sometimes disclaim compliance with applicable laws, and (4) provide little to no documentation during a sale. Finally, in an apparent attempt to ensure that the "reliance waivers" stick, most of the contracts contain "Big Boy" clauses akin to those used in securities transactions.[19] This Part also examines the very limited information available to debt buyers regarding the delinquent accounts and discusses the (in many cases) near impossibility of obtaining documentation about the accounts after a sale.[20]

Part III catalogues the problems that arise for both debt buyers and consumers as a result of this ecosystem. It begins with the possibility that errors are introduced in the system because of the way that information about debts is transferred among multiple systems during collections. It then

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[17] *See, e.g.*, Gold v. Midland Credit Mgmt. Inc., No. 13-cv-02019-WHO, 2014 WL 767732, at *1 (N.D. Cal. Feb. 20, 2014) (ordering defendants to produce purchase and sale agreement).

[18] Masson, *supra* note 14, at 512.

[19] "Big boy letters are agreements between parties to a securities transaction where one party, typically the seller, has material, nonpublic information that it does not want to disclose, but both parties want to complete the transaction and preclude any claims based on the nondisclosure." Edwin D. Eshmoili, *Big Boy Letters: Trading on Inside Information*, 94 CORNELL L. REV. 133, 135 (2008) (footnotes omitted). The clauses here are similar to those found in securities transactions, where standard provisions include representations by the signatory that: it is financially sophisticated; it is aware that the counterparty may have material, nonpublic information that may affect the value of the traded securities; it realizes that it is not privy to any such information, if there is any; it is not relying on any of its counterparty's nondisclosures, if there are any; it is not relying on any representations not expressly set forth in the big boy letter; it is waiving all claims against its counterparty arising out of the nondisclosure; and finally, it realizes the effect of this waiver and elects to proceed with the transaction, essentially stating, "I am a big boy." *Id.*

[20] An example clause from several of the debt purchasing agreements is instructive: "Buyer expressly acknowledges that . . . documentation may not exist with respect to the Loans purchased by Buyer." Loan Sale Agreement between FIA Card Servs., N.A. and Cavalry SPV I, L.L.C. (Oct. 29, 2008), at 31, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.10.29-FIA-Card-Services-to-Cavalry-SPV-I-LLC.pdf, *archived at* http://perma.cc/6TZE-X7CN; Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Apr. 14, 2010), at 31, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.04.14-FIA-to-CACH-LLC.pdf, *archived at* http://perma.cc/993G-8EN8; Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Aug. 11, 2009), at 29, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.08.11-FIA-Card-Services-to-CACH-LLC.pdf, *archived at* http://perma.cc/GQ6U-9NVT.

details specific problems consumers and debt buyers can encounter as a result of missing information and a lack of documentation regarding the debts. Spillover effects from these problems harm consumer confidence in the banking and judicial systems.

Part IV suggests potential explanations for the puzzling manner in which these transactions are structured. Part V discusses two types of potential solutions. It begins with thoughts on the roles industry can play in self-regulation, including steps that some players have started to take in this direction. The article closes by proposing that the CFPB use its powers to regulate both creditors and debt buyers by declaring the sale and collection of consumer debts without documentation and material warranties unfair or deceptive under both the FDCPA and the Consumer Financial Protection Act ("CFPA").

II. Lifecycle of a Debt: A Primer

Creditors use a variety of approaches to recover on delinquent accounts. This Part details the movement of a typical delinquent account from delinquency until it is purchased. It describes the "how" of a debt assignment as well as the "what"—what contract language governs the assignment as well as what information or documentation regarding the debt moves with the assignment. The discussion focuses primarily on credit card debts because they comprise the largest portion (by dollar amount) of consumer debt purchased by debt buyers.[21] A great deal of the issues identified in this article involve the software and systems that store account-level information. These are critical systems, to be sure, but as the next sub-part details, they are not the same systems that house transaction-level information when an account is current. When non-performing accounts are segregated into separate sys-

[21] While anthropological research has shown that credit predates even money itself, and that debt buying and debt trading has been around since antiquity, *see* David Graeber, Debt: The First 5,000 Years 18 (2012), the modern iteration of the bulk debt purchasing business model developed over thirty years ago, as a result of the savings and loans crisis, *see* Fed. Deposit Ins. Corp., Managing the Crisis: The FDIC and RTC Experience 433 (1998) [hereinafter FDIC, Managing the Crisis]. *See generally* Lee Davison, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC Banking Rev. 17 (2005), *available at* http://www.fdic.gov/bank/analytical/banking/2005jul/article2.pdf, *archived at* http://perma.cc/N26B-KXKC. The Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) "became custodians of an unprecedented number of assets from failed banks and thrifts" following the crisis. FDIC, Managing the Crisis 433. The FDIC established the Judgments, Deficiencies, and Charge-offs (JDC) equity partnership program in 1993 whereby select private entities were conveyed unsecured assets and proceeds were split with the RTC. *Id.* After the RTC assets dried up, the JDC entities found other sources of defaulted accounts from credit card companies, which were ready to sell their delinquent assets given how successful they had seen the practice would be. FTC Debt Buyer Report, *supra* note 4, at 12 (citing Robert J. Andrews, Debt Collection Agencies in the US, IBISWorld Indus. Rep. 56144 14 (2010)).

tems, the incentives to make sure those systems perform in top shape dramatically decrease.[22]

A. Flow and Integrity of Information

When a bank-issued credit card account goes unpaid for the first time, rendering it "delinquent," the card company will typically attempt "soft" methods to attempt to collect. This generally involves an email, letter, or phone call from internal collection staff reminding the consumer that the payment is late. The outreach steps up as time passes and the account becomes severely delinquent (more than thirty days past due) and more so after ninety days past due, when it becomes categorized as severely derogatory.

Before the account is severely derogatory, the bank has been storing all of the information pertaining to the person's account—payments, charges, biographical information—in their "system of record" ("SOR").[23] An SOR "is an information storage system . . . which is the authoritative data source for a given data element or piece of information."[24] "The system of record for the banking environment states that you have your balance for your account in exactly one place."[25] Sometimes dubbed a "golden copy," the idea is that in a world in which "data is extracted, merged, massaged, replatformed, and reported many times over[,] [i]dentifying a 'system of record' establishes which source is official for each element (or chunk) of data."[26] In a banking environment, information about the customer's conversations with customer representatives, disputes and complaints, and the like

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[22] Although some have argued that even when we might think software is mission-critical, the incentives to produce quality software are lacking. James Kwak, *Software Runs the World: How Scared Should We Be That So Much of It Is So Bad?*, The Atlantic (Aug. 8, 2012), *available at* http://www.theatlantic.com/business/archive/2012/08/software-runs-the-world-how-scared-should-we-be-that-so-much-of-it-is-so-bad/260846/?single_page=true, *archived at* http://perma.cc/K6W8-DLF6 ("[A]s computer programs become more important to the financial system and hence the economy, there is insufficient incentive for trading firms to make sure their software works properly . . . . [T]he question is how much you're willing to sacrifice in the name of quality.").

[23] John Tonetti, Collections Program Manager, Consumer Fin. Prot. Bureau, Presentation at FTC/CFPB Life of a Debt Conference: How Information Flows Throughout the Collection Process (June 6, 2013) (transcript available at http://www.ftc.gov/sites/default/files/documents/videos/life-debt-data-integrity-debt-collection-part-1/130606debtcollection1.pdf, *archived at* http://perma.cc/52W-CSAZ).

[24] *System of Record*, Decision Support Glossary, University of Washington, http://www.washington.edu/uwit/im/ds/glossary.html (last visited Aug. 16, 2014), *archived at* http://perma.cc/4J5Y-Z44H.

[25] Bill Inmon, *The System of Record in the Global Data Warehouse*, Information Mgt. (May 1, 2003), http://www.information-management.com/issues/20030501/6645-1.html.

[26] Ronald G. Ross, *'Rules of Record'—Why 'System of Record' Isn't Enough*, 9 Bus. Rules J. 1 (2008) (internal quotation marks omitted), *available at* http://www.BRCommunity.com/a2008/b385.html, *archived at* http://perma.cc/964Y-FC6N.

is maintained in the bank's customer relationship management ("CRM") system, separate from the SOR.[27]

At some point after the account becomes severely derogatory, the bank will likely move the account information from its SOR to its collection system. Typically, the bank's SOR will not receive much information about anything that happens in the collection system.[28] Depending on the card issuer, the debt may be placed with one or more collection agencies that will work on contingency to try and recover what is owed.[29] Once a consumer's debt is placed with a collection agency, she will begin receiving phone calls or letters from an entity with which she has no prior relationship, seeking to collect on her credit card debt.[30]

If the consumer does not pay after an agency has "worked" the account, it is likely that the account will be recalled and placed with a second collection agency. Information that may have been gathered by one collection agency—such as notes describing why the consumer is not paying—is not generally transmitted to the subsequent collection agency nor is it incorporated in the bank's SOR.[31] What is sent to collection agencies is the bare minimum to enable the collector to seek payment on the bank's behalf: "demographic and financial information so the consumer can be contacted, the balance on the account, and perhaps some information on the collection process such as a recovery score."[32] Information gathered in the lender's CRM—dispute information, notes about what conversations with customer service representatives, etc.—will not be shared with the collection agency.[33] This means that the consumer will be contacted by a second previously un-

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[27] *See* Tonetti, *supra* note 23, at 34. ("Most often there may be some limited fee[d] between the system of record and the CRM, but if you want the full story, you'll likely have to review the CRM.").

[28] *See id.*

[29] Collection agencies work on contingency collecting debts on behalf of both creditors and debt buyers. They generally engage in the same type of collection efforts that the original creditor would have engaged in, but collect using their own name. *See* General Accounting Office, Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology 29 (2009) [hereinafter GAO Debt Collection Report], *available at* http://www.gao.gov/assets/300/295588.pdf, *archived at* http://perma.cc/XBN8-NQW8; Robert Hunt, *Collecting Consumer Debt in America*, Q2 2007 Fed. Reserve Bank of Philadelphia Bus. Rev. 11, 12 (2007).

[30] Sometimes this collection agency also reports to one or more credit reporting bureaus, which might confuse consumers and certain users of credit reports, such as landlords. "Some consumers seemed to have difficulty in understanding the reporting of collections because items that were reported as tradelines of collection agencies did not generally identify the specific creditor or delinquent account that was involved." Fed. Trade Comm'n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 121 (2012) [hereinafter FTC Credit Report Accuracy], *available at* http://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf, *archived at* http://perma.cc/6N78-GR5V.

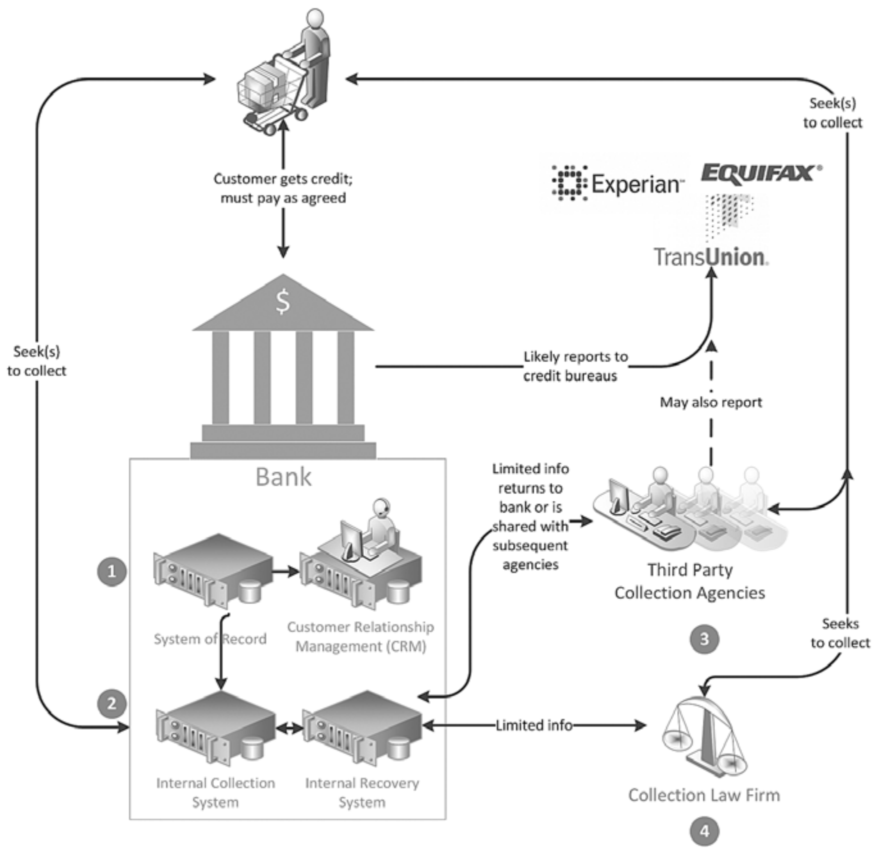
[31] *See* Tonetti, *supra* note 23, at 34–36.

[32] *Id.* at 36.

[33] *See id.*

known entity that will have no record of information the consumer gave to the first agency.

FIGURE 1: DATA FLOWS WHILE DEBT IS OWNED BY CREDITOR.[34]



At point (1) the information regarding the consumer and her account is maintained in two systems at the bank; the system of record (which contains transaction information) and the customer relationship management system, which contains notes on the customer's interactions with customer service representatives. As shown in (2), sometime after 30+ days of delinquency, banks will typically move the account to their internal collection system, and if the account continues past due for a few months, to their internal recovery system. At some point, one or more collection agencies may be used, as in

[34] This diagram is adapted from the presentation given by the CFPB's John Tonetti at the FTC/CFPB Life of a Debt event. *See* Tonetti, *supra* note 23. The diagram was designed using Microsoft Visio. Mr. Tonetti's PowerPoint is on file with the author.

(3). Finally, some creditors choose to sue on their own delinquent accounts and in those cases hire a collections law firm, as in (4).

If the consumer does not repay, eventually the card issuer is required by banking regulations to "charge-off" the account—declare it as unlikely to be collected. For credit cards, the Office of the Comptroller of the Currency ("OCC") generally requires that the charge-off occur within 180 days of the account being past due.[35] A charge-off has no effect on the validity or enforceability of the debt; it is simply an accounting procedure. Credit card contracts allow issuers to continue charging interest and fees after a charge-off, although most banks do not do so.[36] This practice avoids the cost of sending periodic statements, a requirement under the Truth in Lending Act, if the account continued to accrue interest or fees.[37]

At the point of charge-off, many lenders move the borrowers to a recovery system.[38] The recovery system does not always receive all of the information from the collection system.[39] This is the second place where information about the account may fall through the cracks: first, when the debt is placed with a collection agency and second, when it is moved to the recovery system. It is typically soon after charge-off—although this varies a great deal by issuer—that the account will be sold.[40] Debt is sold by credit card issuers in pools of accounts (portfolios) that are described as having particular characteristics important for valuation—e.g., average amount outstanding, date of last payment.[41] Most debts are sold through a bidding process, and bidders may be restricted by the seller depending on the size of the potential purchaser and its financials.[42]

Debt buyers also act as resellers of accounts to other debt buyers.[43] A debt may be sold again and again, as can be seen in Figure 2 and described

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[35] *See* OCC Bull. No. 2000-20, Policy Implementation, Uniform Retail Credit Classification and Account Management Policy, Office of the Comptroller of the Currency (2000), *available at* http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-20.html, *archived at* http://perma.cc/ZU2P-LZVR; Uniform Retail Classification and Account Management Policy, 65 Fed. Reg. 36903, 36904 (June 12, 2000).

[36] *See, e.g.*, McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 525 (E.D. Mich. 2013) (describing deposition testimony from bank witnesses asserting that as a matter of business practices most banks do not charge interest or fees after charge-off).

[37] The current regulation requiring periodic statements is 12 C.F.R. § 1026.5(b)(2) (2012).

[38] *See* Tonetti, *supra* note 23, at 35.

[39] *See id.*

[40] The information sold with the debt will generally come from the recovery system. An account may be sold as "fresh" debt if it had never been placed with a collection agency or as primary, secondary, or tertiary debt if it has been "worked" by a collection agency before sale. "Fresh" debt carries a higher price. *See generally* GAO Debt Collection Report, *supra* note 29, at 18–30.

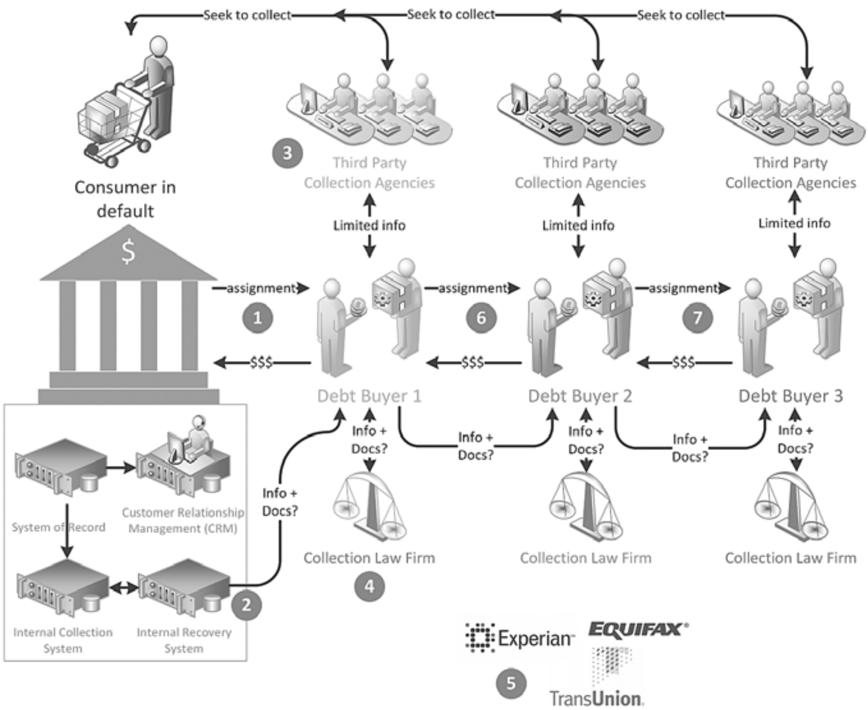
[41] FTC Debt Buyer Report, *supra* note 4, at 17–19.

[42] "Debt buyer industry representatives report that some large sellers (e.g., major credit card issuers) sell debts only to purchasers with well-established reputations and demonstrated financial strength. Large sellers apparently employ these selection criteria to decrease their risk of reputational harm as a result of the conduct of the debt buyers in collecting on debts as well as to decrease the sellers' credit risk." *Id.* at 20; *see also* Tonetti, *supra* note 23, at 34–36.

[43] *See* FTC Debt Buyer Report, *supra* note 4, at 19–20.

further below. Debt buyers (here acting as resellers) may sell an entire portfolio they have just purchased from a creditor, repackage previously purchased portfolios, or attempt to collect on purchased debts and sell the ones that they could not collect.[44] Subsequent debt buyers of an account have no relationship to the original creditor.

FIGURE 2: DATA FLOWS ONCE DEBT IS PURCHASED.[45]



A debt purchase is an assignment of rights under the original contract (e.g., credit card) between the consumer and the bank. At point (1), the bank assigns the first debt buyer the right to collect on a pool of accounts, for which the debt buyer pays money. Information about the accounts, typically in the form of an Excel spreadsheet is given to the debt buyer as in (2). This diagram does not include the situation in which documentation is not sold with the debt and instead is requested later by the first or a subsequent debt buyer. *See* Figure 3. The debt buyer will typically hire a third party debt collection agency, as in (3) to collect from the consumer. It may also seek to collect directly from the consumer (not shown). The first debt buyer (or one of its

[44] *See id.* at 19.
[45] This diagram was designed by the author. It depicts the same data flow as the one presented by Mr. Tonetti at the Life of a Debt event. *See* Tonetti, *supra* note 23.

collection agencies) may report to the credit reporting agencies in (5). At some point, a collection law firm may get involved, (4), whether it is to act as a collector or to initiate a lawsuit in state court. At some point, the consumer's obligation may be repackaged and sold to another debt buyer, as in (6). This may happen even after a judgment has been entered against a consumer. The same cycle will repeat again in very much the same way for any subsequent buyer.

Accounts are sold based on "face value," the amount of the debt due at time of charge-off, minus any payments that have been credited. After purchasing a charged-off debt, debt buyers may seek to collect interest on the charged-off amount.[46] When a debt buyer resells accounts, the second debt buyer will "roll back" the accumulated interest and may add it anew. If the debt buyers calculated the interest differently, a consumer may receive dunning letters requesting different amounts from different debt buyers about the same debt.

When purchasing consumer debts, buyers look for portfolios that meet their business model criteria (some debt buyers specialize in accounts in bankruptcy, for example).[47] Before bidding, the buyer will analyze the portfolio using credit reporting information[48] and may use analytical models to calculate expected recovery rates.[49] The first debt buyer may further parcel out pieces of the portfolios they have acquired and place the parceled-out accounts for sale with other, more specialized debt buyers who may be willing to pay more for them—for example, debt buyers who only collect in a particular state or region. It is not uncommon for subsequent debt buyers to purchase accounts originated by multiple creditors in one transaction.

For the accounts they keep, debt buyers may use their own collectors or place them with collection agencies that will contact the debtors via phone

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[46] *See* McDonald v. Asset Acceptance L.L.C., 296 F.R.D. 513, 517 (E.D. Mich. 2013). Conversations with consumer lawyers and debt collectors, as well as a review of court files, suggest that when debt collectors charge interest, they do so at the prevailing pre-judgment interest rate in the state, typically compounded annually. This is puzzling because there is no credit card agreement that compounds interest annually (as opposed to daily). In a number of instances, consumer lawyers have reported that debt buyers charged interest when seeking to collect from the consumer via letter—pre-litigation—and did not seek interest when they filed a lawsuit.

[47] FTC Debt Buyer Report, *supra* note 4, at 18.

[48] The Fair Credit Reporting Act specifically permits pulls of credit reports for debt buyers who have not yet purchased a consumer's debt. *See* Pub. L. No. 91-508 (2004); 15 U.S.C. § 1681b(a)(1)(E) (stating that a consumer reporting agency may furnish a consumer report to someone who "intends to use the information, as a potential investor or servicer . . . in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation").

[49] *See, e.g.*, *Evaluate A Debt Portfolio Before You Buy Or Sell*, Experian, http://www.experian.com/consumer-information/portfolio-evaluator.html (last visited Feb. 24, 2014), *archived at* http://perma.cc/LZJ7-WERC; Enhancing delinquent debt collection using statistical models of debt historical information and account events, U.S. Patent No. 7,191,150 B1 (filed June 30, 2000); Software solution for debt recovery, U.S. Patent No. 20,060,143,104 A1 (filed Dec. 23, 2005).

or mail and try to obtain payment.[50] Some debt buyers place accounts with law firm debt collectors who may first try to collect by sending letters or making phone calls, but who may eventually file a lawsuit. All of these collection entities—the debt buyer, its internal collection group, the collection agency, and the collection law firm—are regulated under the FDCPA as debt collectors and banned from engaging in the prohibited practices described earlier.

B. The Debt Sale Transaction: The Language of Purchase and Sale Agreements

Delinquent accounts are sold through purchase agreements that specify the relationships between the parties. Thousands of debt collection lawsuits are filed every day, most of them by debt buyers. Debt buyers carry the burden of proof in these lawsuits, so one might expect that that there would be a broad range of debt sale contracts to examine. But that has not been the case. There was very little indication of the content of these contracts until 2013, when the FTC issued a report on the debt buying industry.[51]

There are probably a few reasons for this. First, most of this litigation happens in small claims or other state courts which generally do not make their dockets available electronically. Second, no evidence of ownership is required in the vast majority of cases: between 70–90% of cases filed result in default judgments and when consumers come to court, they do so without an attorney, not knowing that they can ask for proof of ownership. Third, and anecdotally, in many circumstances debt buyers contest any motions to compel the contracts and will often dismiss a lawsuit if it looks like they may have to release the contract. Before the FTC report was released, only a handful of debt sale contracts had been publically released.[52]

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[50] The sale and collection on an account may continue, depending on the debt buyer's business model, either until the debt is paid or the cost of collection exceeds its expected value.

[51] In December 2009, the FTC issued orders to the nine largest debt buyers in the United States requesting a variety of information. *See* FTC Debt Buyer Report, *supra* note 4, at 7. The orders "required that the recipients produce extensive data about their business practices and how they receive, acquire, and transfer information about consumer debts." *Id.* at 8.

[52] Some contracts were made available as part of news stories. *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html, *archived at* http://perma.cc/U6NX-9U9X; *see also* Receivable Purchase Agreement between HSBC Card Services (III), Inc. and Main Street Acquisition Corp. (Feb. 20, 2009), at 9–10, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.02.20-HSBC-Card-to-Main-Street-Acq.pdf, *archived at* http://perma.cc/D57F-HMBC (redacting, *inter alia*, information about the cost and availability of documents); Flow Agreement for Purchase and Sale between Wells Fargo Bank, N.A. and Purchasers Advantage, L.L.C. (June 21, 2011), at 7–8, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.06.21-Wells-Fargo-to-Purchasers-Advantage-Flow-Agreement-as-is-type-language-but-limited-reps.pdf, *archived at* http://perma.cc/8JA3-B3B7 (redacting, *inter alia*, the percentage of accounts for which Wells Fargo was representing it could provide documentation under the agreement); Purchase and Sale Agreement between Citibank, N.A. and CACH, L.L.C. (Aug.

The remainder of this section adds one more data set to the discussion: it identifies the structure and terms in eighty-four consumer debt sale and purchase agreements collected over the past two years. This compilation is referred to as the "Litigation Sample," since all of the contracts were released in litigation. The following section compares the language in the Litigation Sample to that in the FTC sample. There are many similarities: most contracts disclaim all warranties and representations, many disclaim the accuracy of the information provided, and a few disclaim that the accounts comply with relevant consumer laws. In addition, most transactions do not include any documentation on the debts at the time of sale and severely limit its availability post-sale.

Before proceeding, it is helpful to compare some characteristics of the samples. In its report, the FTC obtained a collection of 350 contracts involving six large debt buyers.[53] In contrast, the Litigation Sample is comprised of contracts between seventy-eight different entities—listed in Table 3 in the Appendix—at least half of which are smaller debt buyers.[54] The FTC sample included primarily credit card portfolios (62%) but also involved a great deal of medical debts (17%).[55] The vast majority of contracts in the Litigation Sample deal with the sale of credit card debts. The time span of the samples also differs dramatically. The contracts the FTC examined were signed during a three-year period between July 2006 and June 2009. The contracts in the Litigation Sample span over a decade, from July 2001 to August 2013, as shown in Figure 3.[56] In contrast to the Litigation Sample,[57] the debt buyers themselves chose the contracts that the FTC examined.[58]

17, 2011), at 8–10, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.08.17-Citibank-to-CACH.pdf, *archived at* http://perma.cc/L5RG-Y93W (redacting two and a half pages).

[53] While the original request for information went to the nine largest debt buyers, the contracts only came from six. This was because one debt buyer exited the market in the middle of the collection period and two others specialized in the purchase of bankruptcy debt. *See* FTC Debt Buyer Report, *supra* note 4, at 8–9.

[54] The FTC noted in its report that "smaller debt buyers are a frequent source of consumer protection complaints." FTC Debt Buyer Report, *supra* note 4, at i. A list of all the entities involved in the contracts sample is at *Table 2 – Exemplar Contract Language from Litigation Sample*, and at *Table 3 – Companies Represented in Litigation Sample* in the Appendix. All contracts are available at www.dalie.org/contracts.

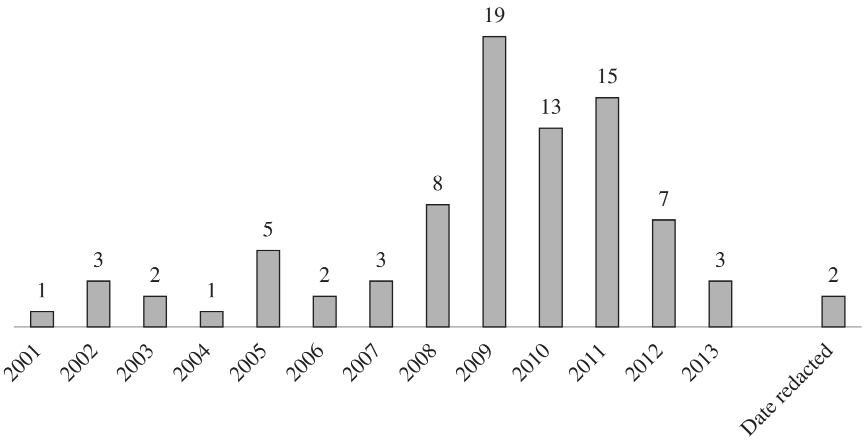
[55] *See* FTC Debt Buyer Report, *supra* note 4, at D-4.

[56] Not all contracts are signed, and some may not have been involved in a deal.

[57] *See, e.g.*, Purchase and Sale Agreement between Sagres Co. and Gemini Capital Group, L.L.C. (Apr. 9, 2009), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.04.09-Sagres-Co-to-Gemini-Capital-Group-LLC.pdf, *archived at* http://perma.cc/37CU-7PA4.

[58] The FTC's request was that debt buyers provide "one example of each type or variety" of contracts they entered into between July 2006 and June 2009. FTC Debt Buyer Report, *supra* note 4, at C-1. Nonetheless, this directive was "interpreted in a variety of ways, such that many of the sellers from whom debt buyers purchased portfolios were not represented among the contracts submitted." *Id.*

FIGURE 3: THE 84 CONTRACTS IN THE LITIGATION SAMPLE SPAN FROM 2001 TO 2013.



The final significant difference between the samples relates to the availability of contracts. The FTC quoted the language of some of the contracts in their sample, but it did not release the identities of the parties involved in the contracts. It also did not tally the number of contracts that contained particular language. The contracts in the Litigation Sample, in contrast, are publicly available, which makes it possible to analyze their terms.[59]

It is important to remember that neither sample discussed here was randomly selected; leaving uncertain the extent to which these transactions are representative.[60] Nonetheless, given how they were chosen, one might expect the FTC contracts to be favorably inclined towards the industry. The contracts in the Litigation Sample were typically released under a court order, so one might expect any bias to run in the opposite direction—that is, towards including contracts that would give rise to greater concerns. Even so, in most cases a debt buyer would have been free to dismiss a case rather than produce the contract, lessening the concern that the contracts in the Litigation Sample are particularly problematic. As discussed below, with one exception, the language in the FTC and the Litigation Sample is strikingly similar.

The evidence indicates that credit issuers typically set the terms and conditions of contracts. The contract language and formatting of documents are remarkably similar across banks and their subsidiaries, across many

[59] They are available at www.dalie.org/contracts.

[60] Nonetheless, at least one bank executive opined that the contract language the FTC study discussed "represents the industry as a whole." Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, comments at *Life of a Debt: Information Available to Debt Collectors at Time of Assignment of Sale – Panel I*, FED. TRADE COMM'N & CONSUMER FIN. PROT. BUREAU (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-2, *archived at* http://perma.cc/T7YK-LYUA.

years.[61] This is consistent with the FTC's finding that "many of the terms and conditions governing the sale of consumer debts may largely be set by credit issuers."[62]

This analysis focuses on four types of terms recurring in most contracts. TABLE 1 in the Appendix gives an exemplar of the variety of combinations of terms in the contracts in the Litigation Sample. The first term in the table, and the first term analyzed, describes the nature of the sale.

Three contracts in the Litigation Sample state that the sale is made "without recourse,"[63] meaning the seller disclaims any liability if the accounts sold do not yield any returns.[64] The rest of the contracts (81) go beyond this qualification. They disclaim not just liability in case the debtors never repay (recourse), but go on to waive any and all warranties, implied or otherwise, unless something is specifically warranted elsewhere in the agreement.[65] For example:

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[61] *Compare* Loan Sale Agreement between MBNA America Bank, N.A. and Hilco Receivables II, L.L.C. (Sept. 30, 2004), *available at* http://dalie.org/wp-content/uploads/2014/10/2004.09.30-MBNA-America-Bank-NA-to-Hilco-Receivables-II-LLC-.pdf, *archived at* http://perma.cc/W7S3-4ZUW, *with* Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (Apr. 14, 2010), *available at* http://dalie.org/wp-content/uploads/2014/10/2010.04.14-FIA-to-CACH-LLC.pdf, *archived at* http://perma.cc/G4FH-5E9F, *and* Loan Sale Agreement between FIA Card Servs., N.A. and CACH, L.L.C. (May 15, 2013), *available at* http://dalie.org/wp-content/uploads/2014/10/2013.05.15-FIA-Card-Svcs-to-CACH-LLC.pdf, *archived at* http://perma.cc/S2UA-NR4N. MBNA merged with Bank of America in 2006 and subsequently changed its name to FIA Card Servs. FIA Card Servs., N.A. 8-K (Oct. 20, 2006), *available at* https://web.archive.org/web/20070716133759/http://biz.yahoo.com/e/061020/8384408-k.html, *archived at* http://perma.cc/4QN5-3TGL. The contracts have a standard structure with sections that describe: (1) definition and terms, (2) a description of the transaction and types of accounts being sold, (3) information about the purchase price (almost always redacted in the contracts in the Litigation Sample), (4) representations and warranties of seller, (5) indemnification provisions, (6) representations and warranties of buyer, and (7) confidentiality requirements.

[62] FTC DEBT BUYER REPORT, *supra* note 4, at C-2.

[63] Second Amended and Restated Receivables Purchase Agreement between Household Bank and Household Receivables Acquisition Co. II (July 1, 2002), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/57X7-ALQC; Receivables Purchase Agreement between Household Receivables Acquisitions Co. II and Metris Receivables, Inc. (Dec. 1, 2005), at 9, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.01-Household-Receivables-Acquisition-Company-to-Metris-Receivables-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/X5ES-X2PS; Receivables Purchase Agreement between CompuCredit International Acquisition Co. and Partridge Funding Co. (Apr. 4, 2007), at 10, *available at* http://dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8CL3-3FY7.

[64] LifeWise Master Funding v. Telebank, 374 F.3d 917, 925 (10th Cir. 2004) (quoting Thomas E. Plank, *The True Sale of Loans and the Role of Recourse*, 14 GEO. MASON L. REV. 287, 289 (1991)). "The term 'no recourse' or 'without recourse' in an assignment does not, without more, evidence an intent to disclaim the implied warranty of genuineness and validity, but is meant only to make clear that the assignor does not guarantee the debtor's solvency or that the debtor will fulfill the obligation." 6 AM. JUR. 2D *Assignments* § 126 (2014).

[65] Ordinarily, a non-recourse assignment still contains implied warranties. These implied warranties include, *inter alia*, that (1) the accounts are valid and the true obligations of the consumer debtors, (2) there are no known defenses unless they are stated or known at the time

> Except as provided in this section, the charged-off accounts are being sold "as is" and "with all faults," without any representation or warranty whatsoever as to either condition, fitness for any particular purpose, merchantability or any other warranty, express or implied, and seller specifically disclaims any warranty, representation, oral or written, past or present, express or implied, concerning the charged-off accounts . . . .[66]

All eighty-one contracts with similar language did include some affirmative representations and warranties. Below, the focus is on three types of representations that go to material elements of the purchase: (1) an affirmative representation that the seller has unencumbered title to the accounts, (2) affirmative representations that the seller and anyone who owned the account previously has complied with the relevant consumer laws, and (3) affirmative representations as to the accuracy and completeness of the information the debt buyer is purchasing.

1. Title Warranties

Representations about title are material because the buyer can only buy what the seller owns. If the accounts have been sold to another buyer or they are subject to a security interest and the buyer is purchasing them "as is" and "with all faults," she may be purchasing nothing.[67] It is unclear how many contracts in the FTC sample had this language, because the FTC did not discuss this type of representation in their report.

Most sellers (82%) in the Litigation Sample affirmatively represented that they had unencumbered title to the accounts they were selling. Puzzlingly, two contracts in the sample affirmatively represented that they had title to the accounts while at the same time disclaiming any "warranties pertaining to title."[68] The remaining contracts (18%) state that they transfer "all

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of the assignment, and (3) any documents or other evidence about the accounts provided by the seller is true and correct. 6 Am. Jur. 2d *Assignments* § 125 (2014).

[66] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Midland Funding, L.L.C. (Nov. 30, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-LLC-.pdf, *archived at* http://perma.cc/LE2K-JZEF. In many contracts, the waiver of warranties is written in all capital letters so as to contrast with the rest of the document. For readability, this example is not in the original capital letters.

[67] The U.C.C. "regards 'as is' . . . and 'with all faults' as synonymous invocations signaling that the buyer takes the entire risk as to the quality of the goods." Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms*, 73 Calif. L. Rev. 261, 282 n.58 (1985) (citing U.C.C. § 2-316(3)(a) & comment 7 (1978)). These transactions are not covered by Article 2 of the U.C.C but the language is nonetheless instructive.

[68] Forward Flow Receivables Purchase Agreement between GE Capital Retail Bank, General Electric Capital Corp., GEMB Lending, Inc., Monogram Lending Servs., L.L.C., RFS Holding, L.L.C., & GEM Holding, L.C.C. and Portfolio Recovery Assocs., L.L.C. (Dec. 20, 2011), at 5, 8, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/GE-Capital-Retail-Bank-to-Portfolio-Recovery-Associates-LLC-12-20-2011.pdf, *archived at* http:/

of Seller's right, title and interest to the Loans" but make no affirmative representations as to whether the seller has any title to transfer or whether the accounts are unencumbered.[69]

2. *Compliance with Laws*

About a third of the contracts in the Litigation Sample are contracts in which a bank or other originator of accounts explicitly represents that it complied with applicable consumer laws in the creation and servicing of the accounts it is selling.[70] Another 10% are resale contracts where the debt buyer reseller represents that someone (sometimes the reseller, sometimes the original creditor) complied with applicable laws.[71] These representations are material because when the accounts are sold without recourse (as many of these are), the buyer may be liable for previous noncompliance. About another third of the contracts, include positive representations that the seller (either a debt buyer or the original creditor) complied with consumer laws but qualify the statement with a "to the best of seller's knowledge" caveat. This kind of representation "is significantly less meaningful than a representation as to the existence of a fact."[72]

Shockingly, six contracts explicitly disclaim compliance with one or more laws. A few disclaim compliance with "usury laws," but there are three contracts that disclaim "all representations, warranties, and guarantees of any type or nature, express or implied [with respect to] the *compliance of the Accounts with any state or federal rules, statutes, and regulations*."[73]

/perma.cc/B66-HQR2. It would seem that the "mystical . . . essence known as Title, which is hung over the buyer's head *or* the seller's like a halo . . . ." about which Karl Llewellyn wrote may be even more difficult to locate in this case. *See* Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. Q. Rev. 159, 165 (1938) (noting that "[h]alos are . . . indivisible[ ] [a]nd there is only one halo for buyer and seller to make out with").

[69] *See, e.g.*, Loan Sale Agreement (May 15, 2013), *supra* note 61, at 11.

[70] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Credit Co., LP (Dec. 22, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.12.22-Chase-to-Global-Acceptance-Credit-Company-Agmt-RAB-Simmens-as-is-and-reps-about-maintenance-and-service.pdf, *archived at* http://perma.cc/UB6K-2EBR. ("Each of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act."). It is important to note, however, that even when banks are selling their own accounts, a representation that the "seller" has complied with all applicable laws may not cover every entity in the chain. This is especially true if the accounts were originated by an acquired entity but may also be true if they were placed for collection with collection agencies. The language is very explicit in most of these contracts and applies only to the seller.

[71] *See, e.g.*, Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 63, at 22.

[72] Michael A. Epstein & Frank L. Politano, Drafting License Agreements § 15.04 (4th ed. Supp. 2014). *See also* Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 Colum. L. Rev. 699, 724 n.79 (1936) (citing *Wood v. Smith*, 5 M. & R. 124 (K.B. 1829), where seller sold a horse under the representation that it was "sound, to the best of my knowledge" but otherwise did not provide any warranties, and seller was held liable because he knew horse was not sound).

[73] *See, e.g.*, Purchase and Sale Agreement between Credigy Receivables, Inc. and Newport Capital Recovery Grp. II, L.L.C. (May 29, 2009), at 4, *available at* http://debtbuyeragree-

Despite this unqualified renunciation, these same contracts include language requiring the buyer to comply "with all state and federal laws, rules, statutes, and regulations applicable to debt and credit collection . . . ."[74] This is a second major difference between the Litigation Sample and the FTC's: there was no indication in the FTC's report that the contracts it examined included language disclaiming compliance with the law.

The rest of the contracts (about one-fifth) do not mention compliance one way or the other but do some times repudiate all representations that are not made expressly. In effect, they implicitly disclaim compliance with applicable laws.

3. *Accuracy and Completeness*

About a quarter of the contracts in the Litigation Sample explicitly warrant that the information the seller is providing is accurate or complete. One-fifth warrant the information was accurate "to the best of Seller's knowledge," which as described earlier, is a problematic representation.[75]

Over a third of the contracts in the Litigation Sample go further than disclaiming all warranties generally; they explicitly disclaim any representations as to the accuracy or completeness of the information provided.[76] For example, one contract states that:

ments.com/wp-content/uploads/2014/03/Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-05-29-2009.pdf, *archived at* http://perma.cc/C9JX-TRBZ (emphasis added). One of the sales was made by a receiver in a bankruptcy proceeding. *See* Purchase Agreement between Nat'l Credit Acceptance, Inc. and Sacor Fin., Inc. (Oct. 14, 2010), at 6, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/National-Credit-Acceptance-Inc-to-Sacor-Financial-Inc-10-14-2010.pdf, *archived at* http://perma.cc/5G84-BG95 (disclaiming the seller's or originator's "compliance with applicable law including, without limitation, the Fair Debt Collection Practices Act").

[74] Purchase and Sale Agreement (May 29, 2009), *supra* note 73, at 10 (specifically listing "the Consumer Credit Protection Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act and the Gramm-Leach-Bliley Act").

[75] *See* Dennis L. Greenwald, Steven A. Bank, & Carol M. Clements, Real Property Transactions (The Rutter Group California Practice Guide) Ch. 4-E (2014) (recommending that, in context of "best of knowledge" provisions, contract drafters negotiate definition of "knowledge" in each context because it "may refer to 'actual' and 'constructive' knowledge—i.e., both that which a party actually knows *and should have known* under the circumstances").

[76] A contract that both disclaimed accuracy of the information and later warranted it is not included above. *See, e.g.*, Lot Fresh Charged-Off Account Resale between Platinum Capital Invs., Ltd. and Redacted Buyer (2011), at 4, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/Template-V2-Purchase-and-Sale-Agreement-Platinum-Capital-Investments-Ltd-2011.pdf, *archived at* http://perma.cc/9UCH-GF4F ("[S]eller warrants and represents[:] . . . [t]he integrity and accuracy of the balances on the [a]ccounts supplied to [the] [b]uyer is true and accurate and has not been intentionally altered in any way [and also that] [t]his purchase is made without recourse. No representation as to the character, accuracy or sufficiency of the information furnished to [the] [b]uyer has been made by [the] [s]eller, either expressed or implied, except that [the] [s]eller warrants that the [p]ool shall not include Unqualified Accounts."). For another instance in which sophisticated parties (this time in the private equity context) wrote contracts with two important conflicting provisions see Stephen M. Davidoff, *The Failure of Private Equity*, 82 S. Cal. L. Rev. 481, 503 (2009).

> [The sale is made] without any representation or warranty whatsoever as to enforceability, collectability, *accuracy or sufficiency of data* . . . . Seller specifically disclaims any warranty, guaranty or representation, oral or written, past or present, express or implied, *concerning the Charged-off Accounts and the Account Documents*.[77]

Or more typically,

> Bank has not and does not represent, warrant or covenant the nature, *accuracy, completeness*, enforceability or validity *of any of the Accounts and supporting documentation* provided by Bank to Buyer . . .[78]

Four agreements involving Bank of America entities contain the same language specifically disclaiming the current balance on the accounts, referring to the amounts that the debt buyer will ask consumers to repay:

> [S]eller has not made . . . any representations . . . as to . . . the *accuracy or completeness of any information* provided by the seller to the buyer, *including* without limitation, the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the loans.[79]

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[77] Purchase and Sale Agreement Sherman Acquisition, L.L.C. and Gemini Capital Grp., L.L.C. (Mar. 3, 2009), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.03.03-Sherman-Acquisition-LLC-to-Gemini-Capital-Group-LLC.pdf, *archived at* http://perma.cc/YA5U-ZG2F (emphasis added); *see also* Forward Flow Receivables Purchase Agreement among Arrow Fin. Servs, L.L.C., Arrow Receivables Master Trust 2000-1 and CACH, L.L.C. (Nov. 9, 2007), at 4, *available at* http://debtbuyeragreements.com/wp-content/uploads/2014/03/Arrow-Financial-Services-LLC-to-CACH-LLC-11-09-2007.pdf, *archived at* http://perma.cc/T27X-BM5X (same language).

[78] Purchase and Sale Agreement between Riverwalk Holdings, Ltd., and Wayric Srvs. (Mar. 24, 2009), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.03.24-Riverwalk-Holdings-Ltd-to-Wayric-Services-Inc-as-is-but-affirmative-reps.pdf, *archived at* http://perma.cc/ETU6-XXPF (emphasis added); *see also* Purchase and Sale Agreement between Citibank, N.A. and Unifund CCR Partners (Feb. 28, 2005), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.02.28-Citibank-to-Unifund-CCR-some-affirmative-reps-but-FCRA-issue-without-recourse-no-warranty.pdf, *archived at* http://perma.cc/PA67-6GPJ; Account Purchase Agreement between Routhmeier Sterling Inc. and Royal Fin. Grp., L.L.C. (July 1, 2008), at § 7.8, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.07.01-Routhmeir-Sterling-Inc-to-Royal-Financial-Group-LLC.pdf, *archived at* http://perma.cc/HHD6-T5YA. Note that the FTC report also cited this language and noted that the language was found in "numerous spot sales of bank receivables; numerous spot resales of various consumer debts, including private label credit card accounts." FTC DEBT BUYER REPORT, *supra* note 4, at C-14.

[79] Loan Sale Agreement between MBNA Bank of America, N.A. and Hilco Receivables II, L.L.C. (Sept. 30, 2004), at § 9.4, *available at* http://dalie.org/wp-content/uploads/2014/10/2004.09.30-MBNA-America-Bank-NA-to-Hilco-Receivables-II-L.L.C.-.pdf, *archived at* http://perma.cc/KRF4-YXMB (emphasis added); *see also* Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at § 9.4.

This is not to claim that the ratios observed in this sample are representative of the industry as a whole; there is no way to know that. However, there is much to indicate that these contracts are not entirely aberrational. Much of the language in the Litigation Sample contracts is the same as (or very similar to) language from the FTC sample. The striking similarities among the contracts in these very different samples lend credence to the notion that these are not anomalous characteristics.

C. Information and Documentation Regarding Debts Purchased

This section discusses the information and documentation regarding the debts purchased that are available to debt buyers. The FTC's report went beyond contracts; the Commission also obtained account-level information for a multitude of deals and described it all at an aggregate level. This subpart describes the information and documentation that a debt buyer receives when she buys a pool of accounts from a creditor (or another debt buyer), as well as what documents might be available after the purchase. Because of the limitations of the Litigation Sample, this subpart relies heavily on the Commission's findings.

1. Information Obtained by Buyers at the Time of Sale

The FTC examined data for over five million consumer credit accounts and found that at the time of sale, most buyers received a data file (typically in spreadsheet form) that contained information about the accounts the buyer was purchasing. The vast majority of accounts they examined included the:

(1) name, street address, and social security of the debtor (found in 98% of accounts);
(2) creditor's account number (found in 100% of accounts);
(3) outstanding balance (found in 100% of accounts);
(4) date the debtor opened the account (found in 97% of accounts);
(5) date the debtor made his or her last payment (found in 90% of accounts);[80]
(6) date the original creditor charged-off the debt (found in 83% of accounts);
(7) amount the debtor owed at charge-off (found in 72% of accounts); and
(8) debtor's home phone number (found in 70% of accounts).[81]

Many accounts were sold without some critical information—in particular, the

[80] Some dates may be missing because a payment was never made in an account.
[81] FTC Debt Buyer Report, *supra* note 4, at 34–35.

(1) principal amount was missing (from 89% of accounts);
(2) finance charges and fees were missing (from 63% of accounts);
(3) interest rate charged on the account was missing (from 70% of accounts);
(4) date of first default was missing (from 65% of accounts); and
(5) name of the original creditor was missing (from 54% of accounts).[82]

These five commonly absent pieces of information may be important to the debt buyer's ability to legally collect, as described further in Part III.

The Litigation Sample of purchase and sale agreements is just that—the contracts themselves. As such, it is impossible to know precisely what documentation may have been provided at the time of sale.[83] There is evidence, however, that some of the same information the FTC found was missing in their contracts was also missing from the Litigation Sample transactions. For example, a series of three contracts stemming from the same original sale of debts by Chase Bank state that a number of data fields will not be provided on the date of the sale and instead "will be provided when and if available."[84] The missing data fields included: the co-debtor's social security number, the debtor's phone number, the date of last payment, the amount of the last payment, the contract date, and the first date of delinquency.[85]

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[82] *Id.* at 35. The FTC believes that buyers will generally know the name of the original creditor because "buyers were likely to receive this information in other ways as well." *Id.*

[83] Some contracts provide that within a specified period of time of the closing, available documents will be transferred to the buyer, but these contracts do not typically promise any particular set of documents. *See, e.g.*, Purchase and Sale Agreement between Juniper Bank and LHR, Inc. (Feb. 28, 2006), at § 6.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2006.02.28-Juniper-Bank-to-LHR-Inc-.pdf, *archived at* http://perma.cc/LHU3-4HBF ("Within three (3) business days from the Closing Date, Seller shall deliver to Buyer only such information specifically set forth in *Exhibit B* if available for each Account in the form and format as set forth in *Exhibit B* in the form of PGP encrypted media.").

[84] Credit Card Account Purchase Agreement between Chase Bank, USA, N.A. and Turtle Creek Assets, Ltd., by and through its general partner Forward Properties Int'l, Inc. (May 7, 2009), at 21, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/3TA-YU57. This language appears in three contracts in the Litigation Sample. From the dates and language, it appears that Chase Bank sold a number of accounts (face value of at least $71,271,881) to Turtle Creek Assets, Ltd., a debt buyer from Texas, in 2009. About two months later, Turtle Creek sold some of those accounts to at least two other debt buyers. The language in all three contracts is the same. *Id.*; Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Pasadena Receivables (July 16, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/R3SJ-XL4J; Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Matrix Acquisitions, L.L.C. (July 29, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.07.29-Turtle-Creek-Assets-Ltd-to-Matrix-Acquisitions-L.L.C..pdf, *archived at* http://perma.cc/B44M-VC4K.

[85] *See* Credit Card Account Purchase Agreement (May 7, 2009), *supra* note 84, at 21; Credit Card Account Purchase Agreement (July 16, 2009), *supra* note 84, at 20; Credit Card Account Purchase Agreement (July 29, 2009), *supra* note 84, at 20.

2. *Availability of Account Documents*

The information provided to the debt buyer detailed above is distinguished from the documentation about the account that the debt buyer acquires as part of the sale transaction. The industry refers to account documentation—i.e., monthly statements, contracts, and the account application—as "media." This media could be transferred at the time of the sale or could be available to access post-sale. In the overwhelming majority of cases, there is no media to be found at all—whether at the sale or after.

Most contracts in the Litigation Sample discuss the availability (or lack thereof) of media on the accounts sold. The language in these contracts comports with the FTC's finding that "account documents typically remained the property of the issuing creditor after the accounts were sold."[86]

When examining a subset of 3.9 million accounts, the FTC estimated that only between 6–12% of accounts were sold with any kind of media at all at the time of sale.[87] When documents were provided as part of the sale, it was typically in the form of account statements (in the FTC sample, 6% of accounts), "terms and conditions" documents (6%),[88] and account applications (less than 1%).[89] In other words, in the vast majority of cases, all the debt buyer obtained at the time of purchase was an assignment of overdue accounts, some information about the accounts (with the caveats of subpart 1 above), and nothing else.

If not transferred at the time of the sale, account documents are sometimes available from the original creditor. However, a number of issues severely limit their availability. First, the purchase and sale contracts between original creditors and debt buyers govern whether media can ever be transferred, how much of it can be sent, and the cost to the debt buyer. Second, depending on where in the "assignment chain" a debt buyer is, the current owner of the debt may not have the right to obtain media from the original creditor, as seen in Figure 4. Finally, even if the current debt owner has the

[86] FTC Debt Buyer Report, *supra* note 4, at C-9.

[87] *Id.* at 35 n.150 and accompanying text. One should note that this sample is even less likely to be representative. The FTC requested information from the then nine largest debt buyers for accounts purchased between March and August 2009. For purposes of calculating this percentage, the majority of the information (87%) came from two debt buyers. *Id.* at 35 n.149.

[88] This term refers to documents evidencing the contract terms between the issuer and account holder.

[89] FTC Debt Buyer Report, *supra* note 4, at 35. Applications may be especially difficult to obtain, as it appears that most creditors do not keep credit card applications originated electronically or via phone. As might be expected, whether documentation is provided depends on the particular portfolio of accounts sold. The FTC found that "[o]nly 13% of the portfolios contained any account documents, but overall within this set of portfolios, documents were received for 90% of the accounts." *Id.* at 35–36. At least one debt buyer admitted to the FTC that the majority of her documentation is obtained by "requesting them from the reseller after the time of purchase." *Id.* at 37 n.156.

right to obtain media, it may have been destroyed or inaccessible by the time she requests it. These issues are discussed in more detail below.

As described in Part A above, a debt buyer may choose to sell portions of its portfolio, sometimes combining portions of portfolios from different creditors. Most contracts in the Litigation Sample permitted resale, typically with the express permission of the original seller.[90] Resale contracts tended to account for the fact that the debt buyer would have to seek documents from the original creditor and include caveats to that effect, but there is similar language in contracts between original creditors and debt buyers.[91] Many contracts even forbid a subsequent purchaser from contacting the original creditor to obtain documents without the reseller's express written permission.[92]

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[90] The FTC found similarly. *See* FTC Debt Buyer Report, *supra* note 4, at C-24. A few contracts prohibited resale to specific companies, generally listed under an exhibit to the contract that was not included. *See, e.g.*, Purchase and Sale Agreement between Providian Nat'l Bank and Asset Acceptance, L.L.C. (Jan. 28, 2003), at § 5.10(b), *available at* http://dalie.org/wp-content/uploads/2014/10/2003.01.28-Providian-National-Bank-to-Asset-Acceptance-L.L.C.-.pdf, *archived at* http://perma.cc/Q2SG-3PUB; Flow Purchase and Sale Agreement between Citibank USA, Nat'l Ass'n and Sherman Originator, L.L.C. (May 24, 2005), at § 9.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.05.24-Citibank-USA-NA-to-Sherman-Originator-L.L.C.-.pdf, *archived at* http://perma.cc/S2L5-FAD6 ("Buyer shall not resell, transfer, convey or assign the ownership of any Account to Providian Financial Corporation, First Select Corporation (a Providian Financial Company) or Capital One Financial Corporation, for a period of one (l) year from the applicable Closing Date.").

[91] For example, some of the contracts between two debt buyers contain the following:

> Seller makes no guaranty that account applications, account statements, affidavits of debt, or any other documents ('Account Documents') shall be able to be provided . . . . Generally, once requested, delivery of Account Documents can take 120 days or more, if available. In many instances, the original issuer does not respond if it is unable to provide the requested Account Document. Therefore, it is Buyer's responsibility to track requests for and receipt of Account Documents. The failure of Seller to obtain in any Account Documents requested by Buyer will not be a breach of this Agreement.

Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners and CUDA & Ass'n (Apr. 18, 2008), at 5, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.04.18-Unifund-to-Cuda-Assoc-as-is-no-rep-of-compl-with-laws.pdf, *archived at* http://perma.cc/Z3UA-E63V (regarding sale of 70 accounts totaling $702,172.54 in face value of debt owed by residents in Connecticut). The last sentence in particular was also common in other contracts. *See, e.g.*, Confidential Agreement for Sale and Purchase of Receivable between Dodeka, L.L.C. and Convergence Receivables, L.L.C. (May 16, 2008), at § 5.7, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.05.16_-Dodeka-L.L.C.-to-Convergence-Receivables-L.L.C.-.pdf, *archived at* http://perma.cc/T8UQ-W3MJ ("The failure of the Sellers to provide Account Documents for any given account will not constitute a breach of this Agreement."); Credit Card Account Purchase Agreement between Platinum Capital Invs., Ltd. and Unknown (July 2012), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2012.07-Platinum-Capital-Investments-to-unknown-as-is.pdf, *archived at* http://perma.cc/X9E2-DCQ7; Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Company, LP (Dec. 22, 2010), at 9, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.02.22-Chase-Bank-USA-NA-to-Global-Acceptance-Credit-Company-LP-.pdf, *archived at* http://perma.cc/WE9S-99NB.

[92] *See, e.g.*, Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners and CUDA & Assocs. (Apr. 18, 2008), at 3, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.04.18-Unifund-to-Cuda-Assoc-as-is-no-rep-of-compl-with-laws.pdf,

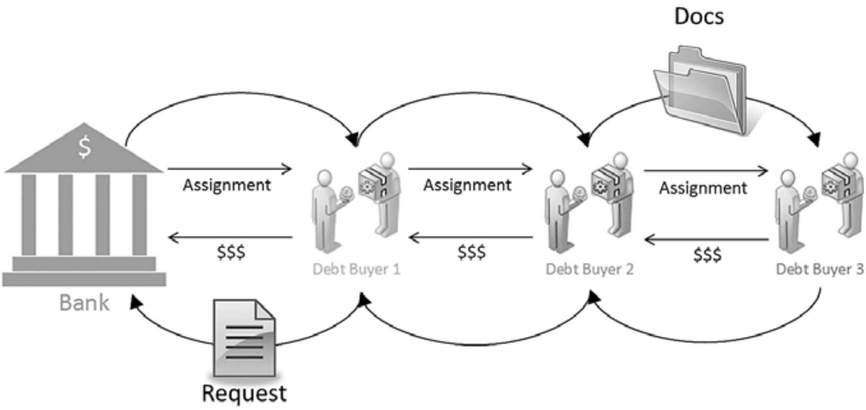
Debt buyers purchasing from reseller buyers face an additional hurdle to obtaining account documents post-sale. Figure 3 is a graphical representation of the "chain of assignment" when a debt is resold. The issue here is that subsequent purchasers have no contractual relationship with the original creditor, and thus cannot require the original creditor to provide them with account documents.[93] Subsequent purchasers must request that the debt buyer or reseller they purchased from go back to the entity from whom they purchased until the request reaches the original creditor.[94]

archived at http://perma.cc/UM8Z-Y5HM ("Under no circumstances shall Buyer be permitted to contact the originator or prior owner of any Receivable without first receiving Seller's express written consent, which consent may be withheld in its sole discretion."). Perniciously, similar to the FTC's findings, one contract "expressly prohibited a debt buyer from reselling any documents previously acquired from a creditor when reselling debts." FTC Debt Buyer Report, *supra* note 4, at C-25 n.53; Loan Sale Agreement between FIA Card Servs. and Asset Acceptance, L.L.C. (Aug. 26, 2011), at § 3.1(g)–(h), *available at* http://dalie.org/wp-content/uploads/2014/10/2011.08.26-FIA-Card-Svcs-to-Asset-Acceptance.pdf, *archived at* http://perma.cc/LUZ6-E7TA (requiring that before buyer transfers or resells an account, buyer is "required to destroy, and shall cause others under its control to destroy, all acquired account documents within its possession, custody or control . . . . [and] Buyer shall not provide . . . any account document (whether or not for monetary consideration) . . . to any subsequent purchaser or owner of the account").

[93] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, N.A. and Global Acceptance Company, LP (Dec. 22, 2010), at 16, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.02.22-Chase-Bank-USA-NA-to-Global-Acceptance-Credit-Company-LP-.pdf, *archived at* http://perma.cc/WE9S-99NB (no third-party beneficiaries); Purchase Agreement between Wells Fargo and Unknown (Jan. 6, 2010), at 28, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.01.06-Wells-Fargo-to-blank-buyer-as-is-to-best-of-seller-knowledge-disclaims-accuracy-and-completeness.pdf, *archived at* http://perma.cc/JRT2-EGHM ("Nothing in this Agreement, express or implied, is intended to confer upon any person or entity other than the Parties hereto or their respective successors any rights or remedies under or by reason of this Agreement."); Receivable Purchase Agreement between HSBC and Main Street Acquisition (Feb. 20, 2009), at 20, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.02.20-HSBC-Card-to-Main-Street-Acq.pdf, *archived at* http://perma.cc/5BXM-7PBT ("Nothing in this Section 20 shall be interpreted as limiting Purchaser's ability to . . . sell the Purchased Receivables, and in such case Seller shall have no obligation to such person or entity under this Agreement.").

[94] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank, NA and Palisades Collection, L.L.C. (Feb. 15, 2008), at 13, *available at* http://dalie.org/wp-content/uploads/2014/10/2008.02.15-Chase-to-Palisades.pdf, *archived at* http://perma.cc/6GS4-5AYM ("Notwithstanding the foregoing, Seller shall have no obligation to retrieve or provide any documents to any assignee of the Purchaser without Seller's prior written consent.").

FIGURE 4: HOW ACCOUNT DOCUMENTS ARE OBTAINED BY SUBSEQUENT DEBT BUYERS.[95]



Whether this can be done at all depends first on the agreements between the original creditor and the reseller as well as between the reseller and the subsequent purchaser. The more links in the chain that documents must cross, the higher the transaction costs.[96] The contracts in the Litigation Sample describe how in almost every case the document requester (Debt Buyer 3 in Figure 4) will have to pay a fee to the previous debt buyer (Debt Buyer 2) in order to request documents. In most of the contracts in the Litigation Sample, most reseller debt buyers charged subsequent debt buyers the same fee as the creditor charged them to obtain documents. The FTC found in their sample that "[s]ome debt resellers added fees to cover their administrative costs when passing documents up and down the ownership chain."[97]

The relay that must occur between debt buyers in the chain and the original creditor in order to obtain documents is complex. The consequence of all of this is that it will likely be extremely difficult—not to mention time-consuming and costly—for a debt buyer to obtain account documentation if they did not receive it at the time of the purchase. It will become even more difficult as the debt is sold and resold.[98] Moreover, since only buyers and

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[95] Figure adapted from GAO DEBT COLLECTION REP., *supra* note 29, at 45.

[96] *See* Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 735 n.13 (1989) ("Any contractual remedy that requires a transfer of assets from one party to another will cause the loss of value, since the transaction costs of effecting the transfer always will be positive.").

[97] FTC DEBT BUYER REPORT, *supra* note 4, at C-25 n.53.

[98] It is also unclear whether a bank that is sharing documentation with a purchaser of its accounts violates privacy laws if the bank knows the affiliate is obtaining the information in order to forward it to a subsequent buyer. Virtually all banks' privacy policies detail that they will share information with affiliates—the purchaser—but it is not clear whether the downstream sharing could be a violation of the Graham-Leach Bliley Act. *See* BUREAU OF CONSUMER PROT. BUS. CTR., IN BRIEF: THE FINANCIAL PRIVACY REQUIREMENTS OF THE GRAMM-

sellers have a relationship, if one debt buyer in the chain goes out of business, the chain will be broken and the document request will go unfulfilled.

Over three quarters of contracts in the Litigation Sample discuss the topic of account documents.[99] The language varies widely in whether or how much account documents are available, when, and at what cost. One contract between Capital One and a commodities trading firm specifically stated that Capital One would not provide buyers with "documentation relating to any Account, including without limitation any application, agreement, [or] billing statement . . . regardless of whether such documents are in Seller's possession or could be obtained from a third party."[100] In a number of cases, the contracts included language making clear that it may not be possible for debt buyers to obtain account documents[101] or simply that "documentation may not exist with respect to the Loans purchased by Buyer."[102]

Many contracts do contemplate the possibility that account documents may be provided to the buyer after the sale. However, in these cases, most

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LEACH-BLILEY ACT (2002), *available at* http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act, *archived at* http://perma.cc/9MP4-VXWX.

[99] *But see* Second Amended and Restated Receivables Purchase Agreement between Household Bank, Nat'l Ass'n and Household Receivables Acquisition Co. II (July 1, 2002), *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/S4QE-WFUD (omitting discussion of account documents); Receivable Purchase Agreement between Household Receivables Acquisitions Co. II and Metris Receivables, Inc. (Dec. 1, 2005), *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.01-Household-Receivables-Acquisition-Company-to-Metris-Receivables-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/6F94-C3CU (same); Receivables Purchase Agreement between CompuCredit Int'l Acquisition Corp. and Partridge Funding Co. (Apr. 4, 2007), *available at* http://dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8YP9-FEGW (same).

[100] The same contract did "not represent, warrant or insure the accuracy or completeness of any information provided to Buyer or in the Sale File or any other Account Files." Account Sale Agreement between Capital One F.S.B. and Centurion Capital Corp. (Dec. 8, 2005), at §§ 4.3, 6.4, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.12.08-Capital-One-FSB-to-Centurion-Capital-Corporation-.pdf, *archived at* http://perma.cc/4EGX-9J8A.

[101] "The Buyer acknowledges Seller was not the original credit grantor for the accounts, and may not have in its possession account documents that may be requested by the Buyer." Purchase and Sale Agreement between Global Acceptance Credit Co. and RAB Performance Recoveries, L.L.C. (Feb. 18, 2011), at § 10(k), *available at* http://dalie.org/wp-content/uploads/2014/10/2011.02.18-Global-Acceptance-Credit-Company-to-RAB-Account-Purchase-Agmt-as-is-limited-representations.pdf, *archived at* http://perma.cc/Y3KF-6HNM; Template Purchase and Sale Agreement of Global Acceptance Credit Co. (undated), at § 10(m), *available at* http://dalie.org/wp-content/uploads/2014/10/Date-Unknown-Global-Acceptance-Credit-Company-Purchase-Agreement.pdf, *archived at* http://perma.cc/QTY9-539B.

[102] Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at Ex. E; Loan Sale Agreement (Aug. 11, 2009), *supra* note 20, at Ex. E; Loan Sale Agreement (Apr. 14, 2010), *supra* note 20, at Ex. E; *see also* Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at § 10(a) ("[M]any of the Charged-off Accounts do not have Account Documents available and that some Charged-off Accounts have only partial Account Documents available . . . . Seller only has such Account Documents as were provided to it by the Originating Creditors and access to additional Account Documents . . . may be limited or prohibited pursuant to the terms of Seller's contracts with such parties."); FTC DEBT BUYER REPORT, *supra* note 4, at C-13.

contracts severely limit the number of documents a buyer can obtain.[103] The terms varied widely here. A number of contracts only allowed buyers to request documents on between 2.5 to 20% of all accounts purchased per month and charged a fee after documents had been provided on more than 10% of the accounts.[104] The fees ranged from $5-$50 per document and sometimes included additional "search fees."[105] Many contracts also limited the number of documents that could be provided at any given time.[106] Most included a window during which the documents would be provided—from as few as fifteen to as many as ninety-five days to deliver the documents, if found.[107] Aside from these stipulations, most contracts contained language to the effect that "Seller shall have no obligation to retrieve or provide any

[103] *But see* Flow Purchase Agreement between Wells Fargo Bank, N.A. and Autovest, L.L.C. (Jan. 6, 2011), at § 12, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.01.06-Wells-Fargo-to-Autovest-L.L.C.-as-is-also-says-unsecured-even-tho-secured.pdf, *archived at* http://perma.cc/S365-A2N9 ("[Seller] shall provide Buyer with an electronic format of imaged Receivables Documents related to no less than seventy-five percent (75%) of the Receivables accounts being purchased by Buyer hereunder within thirty (30) calendar days following the applicable Closing Date, with the remainder (but not less than eighty-five percent (85%) of available Receivable Documents) to be provided to Buyer within ninety (90) calendar days of each Closing Date.").

[104] *See, e.g.*, Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a); Template Credit Card Account Purchase Agreement of Platinum Capital Invs., *supra* note 91, at § 6(a); Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Midland Funding, L.L.C. (Nov. 30, 2010), at § 6(a), *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-L.L.C.-.pdf, *archived at* http://perma.cc/MV7D-VVBR; Closing Statement between Platinum Capital Invs. and Redacted Buyer (2011), *supra* note 76, at § 12 (providing for documentation on up to 15% of accounts without a fee, and $10/document and $10 search fee after); Flow Agreement for Purchase and Sale between Wells Fargo, N.A. and Security Credit Servs. L.L.C. (Apr. 15, 2011), at Ex. 3, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.04.15-Wells-Fargo-Bank-NA-to-Security-Credit-Services-L.L.C..pdf, *archived at* http://perma.cc/K3KK-5PX7 (providing for 20% of documents without fee, and a $5 fee for more than 20%). In their review of debt purchasing contracts, the FTC found that the contracts generally allowed debt buyers to request between 10 to 25% of documentation in a given portfolio for free, with a time limit on the request between six months and a year. FTC Debt Buyer Report, *supra* note 4, at 39.

[105] *See, e.g.*, Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a) (providing for $10 per month for any requests for documents between 10 to 25% of accounts, $50 per document thereafter). The FTC reported findings of $10 to $15 per document. FTC Debt Buyer Report, *supra* note 4, at 40.

[106] *See, e.g.*, Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at § 10(b) ("Purchaser shall make requests for Account Documents no more than once per month.").

[107] *See, e.g.*, Flow Purchase Agreement (Jan. 6, 2011), *supra* note 103, at § 12, (15 days); Purchase Agreement among HSBC Bank Nevada, N.A. & HSBC Receivables Acquisition Corp. and CACH, L.L.C. (May 18, 2011), at § 9.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2011.05.18-HSBC-to-CACH-as-is-positive-material-representations-11-cents-on-dollar.pdf, *archived at* http://perma.cc/H6FM-3GX5 (20 days); Purchase and Sale Agreement (Feb. 28, 2005), *supra* note 78, at § 6.2 (60 days); Purchase and Sale Agreement between First Select, Inc. and Credigy Receivables, Inc. (Dec. 27, 2002), at § 5.5(a), *available at* http://dalie.org/wp-content/uploads/2014/10/2002.12.27-First-Select-Inc-to-Credigy-Receivables-Inc-.pdf, *archived at* http://perma.cc/U7BF-PEKM (95 days for information in the possession of "Original Seller;" 25 days for information in the possession of seller in this transaction). *But see* Flow Purchase and Sale Agreement (May 24, 2005), *supra* note 90, at § 6.2 (redacting the number of days).

documents to any assignee of the Purchaser without Seller's prior written consent."[108]

One problem that may arise for debt buyers seeking documentation on an account is whether the original creditor maintains the documentation for a sufficient amount of time after it sells the account. The majority of the contracts in the Litigation Sample "specified a date beyond which the credit issuer was no longer obligated to provide any account documents to the debt buyer," often two to three years after the accounts were sold.[109] After that time, the agreements contemplate that there would be no documents available.[110] Almost all of the contracts explicitly absolved the seller of liability in the event that they failed to provide documents.[111]

Given all of these obstacles to obtaining documentation both at the time of sale and after, it is not surprising that the FTC found that debt buyers in its sample never received documents for the vast majority of the accounts they purchased. The FTC examined a subset of almost 1.5 million accounts and found that post-sale "[d]ebt buyers obtained account statements . . . for 6% of accounts, account applications for 6% of accounts, and terms and conditions documents for 8% of accounts. Payment history documents and affidavits each were obtained for less than 1% of accounts, as were all other types of documents combined."[112]

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[108] Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a).

[109] *See, e.g.*, Purchase and Sale Agreement (Mar. 3, 2009), *supra* note 77, at 9 ("Seller shall use reasonable efforts to deliver documentation to Purchaser for a period of one year following the applicable Closing Date."); FTC Debt Buyer Report, *supra* note 4, at C-13 ("Nothing . . . shall create an obligation on the part of Seller to maintain any current servicing relationships or system of record . . . . Buyer understands that at any time following three years after each Closing Date Seller may cease having the ability to obtain any Account Document using commercially reasonable efforts.").

[110] "[I]t is Seller's policy not to retain all Account Documents . . . . [S]ome of the Accounts do not have an original application or a copy thereof . . . . To what extent applications are or are not available, is not known by the Seller nor represented to Buyer." Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at 6.

[111] *See, e.g.*, Purchase and Sale Agreement (Mar. 24, 2009), *supra* note 78, at § 6.3 ("The failure of the Seller to provide an Account Document requested by Buyer will not be a breach of this Agreement."); Credit Card Account Purchase Agreement (Feb. 15, 2008), *supra* note 94, at § 6(a) ("Seller shall, to the extent such documents are reasonably available, provide Purchaser with copies of . . . media . . . . Seller may in its sole discretion honor such request and charge Purchaser fifty dollars ($50.00) for each document provided."); Credit Card Account Purchase Agreement (Dec. 22, 2010), *supra* note 91, at § 6(a); Flow Agreement for Purchase and Sale (June 21, 2011), *supra* note 52, at § 6.2(b) (limiting request of documents to 100 accounts per month).

[112] FTC Debt Buyer Report, *supra* note 4, at 40. Although not typically included in the industry's definition of media, the FTC included affidavits from the creditor attesting to material aspects of the debt (<1% in the FTC sample) as "account documents." *Id.* The FTC found that the contracts they examined "routinely indicated that sellers would provide affidavits when account documents were unavailable, and indicated that those affidavits would generally attest to the existence of a consumer debt account, its chain of ownership, and the balance on those accounts in the seller's records on the date of sale." *Id.* at C-14. The contracts in the Litigation Sample are fully congruent with that statement; a number of the contracts contain blank affidavits that the buyer is supposed to fill out and send to the seller to sign. *See* Purchase and Sale Agreement (Feb. 28, 2005), *supra* note 78, at § 6.2 ("Buyer may, in addi-

The FTC study has many limitations. Nonetheless, its findings allow an estimate of the upper bound of the percentage of accounts for which debt buyers in the study ever obtained any "account documents." For argument's sake, assume that every time the FTC counted a document as "obtained" post-purchase, it was the only type of document obtained for that account. For example, if debt buyers obtained account statements and account applications for 6% of accounts each, assume that buyers never obtained both an account statement and an application for any one account. The FTC also estimated that at the time of purchase, debt buyers obtained account documents for between 6% to 12% of all accounts.[113] Further assume that a debt buyer would never request additional documents for one of those accounts. Adding these numbers together gives us an estimate of the maximum number of accounts for which debt buyers received any documentation either at the time of sale or after. This calculus reveals that the maximum number of accounts for which debt buyers obtained documentation at any time was between 29% to 35% of the accounts examined by the Commission.[114] In other words, debt buyers in the FTC study lacked documents of any kind (including affidavits) for at least 65% to 71% of the accounts they purchased.

III. Concerns with the Debt Sale Transaction

It is not surprising to see contract language that includes a waiver of warranties; it seems perfectly natural for sellers to want to protect themselves from liability.[115] In fact, this type of language likely provides a high level of liquidity that would not be possible without it. As Professor Edward Janger has noted, "[l]iquidity enhancement through negotiability is a key device for facilitating the trading of debt."[116] Liquidity in the market keeps

tion to its request for Account Documents, request an Affidavit from Bank, in the form shown in Exhibit 3, *indicating the date the Account was opened, the Account number and the balance existing as of a specified date*. The Bank will provide a total number of affidavits equal to two percent (2%) of the total accounts purchased. The Buyer shall be limited to one request for affidavits per week with a maximum of 200 accounts per request." (emphasis added)); Purchase and Sale Agreement (Mar. 24, 2009), *supra* note 78, at § 6.3 (same).

[113] FTC Debt Buyer Report, *supra* note 4, at 35 n.150.

[114] By adding all the percentages the report lists as including "Documents Obtained After Sale" and rounding up, this yields a maximum 23% of accounts for which debt buyers in the study could have received documentation post-sale. Other estimates from the Commission were that buyers obtained account documents for between 6% to 12% of accounts at the time of sale. These together yield 29% to 35%. *See id.* at T-15.

[115] The "no recourse" language is eminently reasonable. The entire purpose of these agreements is that the buyer is taking a chance on the collectability of the accounts.

[116] Edward J. Janger, *The Costs of Liquidity Enhancement: Transparency, Risk Alteration and Coordination Problems*, 4 Brook. J. Corp. Fin. & Com. L. 39, 39–40 (2009) (noting that a number of techniques have been developed, such as holder in due course, buyer in the ordinary course of business, and good faith purchaser, which "enhance the liquidity of, and hence create a market for, a particular type of asset").

the cost of credit down and ensures availability of—in particular—subprime credit.

There are plausible reasons why these contracts might waive warranties that have little to do with the confidence the seller has in the underlying information and more to do with the lawyers who drafted the contracts.[117] Perhaps such language is merely the result of prudent drafting and variations amongst creditors' attorneys. Disparities in attorney advice might also explain the range of explicit disclaimers in the contracts. The debts in most of these contracts were originated by banks. There is an existing and complex regulatory scheme that might foster trust in the information provided by banks, even if the banks themselves deny that they are trustworthy on these matters.[118] At least one judge believes that "bank records are inherently reliable 'because banks depend on keeping accurate records.'"[119] Further, as the FTC notes, language disclaiming warranties does not "necessarily mean that information inaccuracies were prevalent."[120] There is very little information about the incidence of mistakes.

By themselves, the lack of representations might seem harmless. But it is not simply the disclaimers of representations and warranties in these contracts that trigger concern. The probability of harm increases when one combines the lack of representations—and indeed the explicit disclaimers—with the structure of a consumer debt sale. Of particular concern is the way that account information typically flows through several systems of record, the fact that many debt buyers are only provided a spreadsheet with limited account information, the lack of critical documentation to verify accuracy of the information, and the uncertainty about title as accounts repackaged and sold multiple times. This Part describes issues that may arise for consumers and debt buyers as a result of the way information is transferred when a debt goes to collections. It also attempts to quantify—to the extent data is available—the potential contours of the problem.

A. *Synchronization, Systems of Record, and Accuracy*

Figure 1 describes what happens to information about an account once it becomes severely delinquent: the information the creditor has about that

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[117] *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347, 366 (1996) (suggesting that institutional norms such as lawyer-designed contract terms can themselves reflect the cognitive biases of practicing lawyers).

[118] Note that the FTC found similar language in contracts for the sale of car loans, not necessarily originated by banks, and telecom accounts. *See* FTC DEBT BUYER REPORT, *supra* note 4, at C-8.

[119] United States v. Bertoli, 854 F. Supp. 975, 1031 (D.N.J. 1994) (quoting United States v. Miller, 830 F.2d 1073, 1077 (9th Cir. 1987)), *rev'd on other grounds,* 40 F.3d 1384 (3d Cir. 1994).

[120] FTC DEBT BUYER REPORT, *supra* note 4, at iii. The FTC goes on to note, "it does raise concerns about how debt buyers handled purchased debts when such inaccuracies became apparent, and for which they had no recourse available from the seller." *Id.*

account moves from the collection system to the recovery system and eventually to collection agencies. Because there are now two systems of record (the collection agency's and the bank's), and these systems do not talk to each other in real time, it becomes difficult to ascertain which system contains the "authoritative" record regarding the amount owed and any other information gathered about the account.[121]

The CFPB has noted that "when there are two systems of record, the timeliness and financial and demographic updates is [sic] often dependent on how sophisticated the players are. The more sophisticated the lenders and agencies, the more likely these updates are timely and accurate."[122] The timing of these updates can be an issue, especially if debts are placed with a second collection agency but the first one to work the account receives a payment.[123] This requires reconciliation among all three parties so that "the lender gets paid and [Collector 2] gets paid and the information reported to the reporting agencies and the balance [Collector 2] is trying to collect is accurate."[124]

The time an account is placed with a collection agency varies, but can be as little as a month. This means that the number of SORs keeping track of a delinquent account balance grows as more collection agencies become involved. As described below, dispute information and other notes may also not be passed from collector to collector. Given the system, one CFPB official noted, "[i]t is easy to see the potential for errors and certainly the difficulty collectors, attorneys, and debt buyers can have in obtaining information and documentation to ensure that the consumer can identify the debt as being theirs."[125] These errors can be costly to collectors and debt buyers. The FDCPA makes them strictly liable for falsely representing the "character, amount, or legal status of any debt."[126]

Figure 5 highlights five categories of consumer complaints submitted to the CFPB in the one-year period beginning July 1, 2013.[127] These five cate-

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[121] *See supra* note 24 and accompanying text. *See also* Tonetti, *supra* note 23, at 37 ("[I]n most cases it is [sic] the system of record is now that of the collection agency as well as the creditor. Synchronization and updating of these two systems of record is important and may be subject to time lags.").

[122] Tonetti, *supra* note 23, at 38.

[123] *See id.* at 38–39.

[124] *Id.*

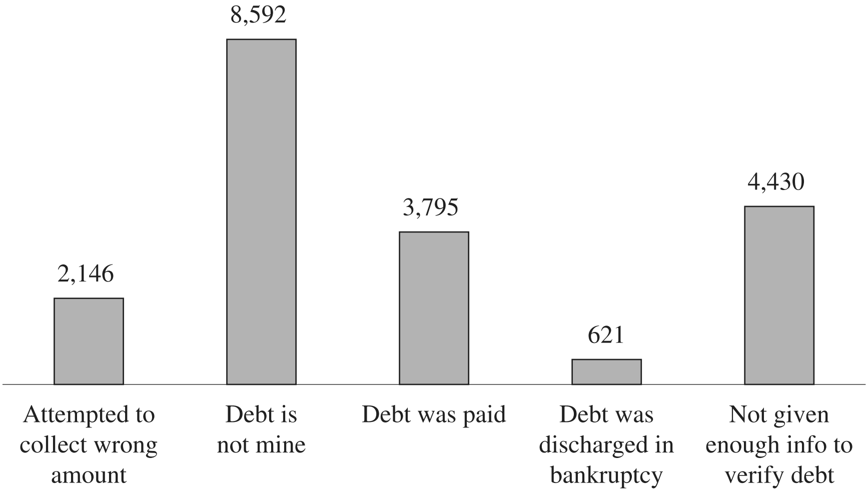
[125] *Id.* at 43.

[126] 15 U.S.C. § 1692e(2)(A) (2012).

[127] For the database of consumer complaints, see *Consumer Complaint Database*, Consumer Fin. Prot. Bureau, http://www.consumerfinance.gov/complaintdatabase/ (last visited Oct. 18, 2014), *archived at* http://perma.cc/4Z2Z-RLCF. Note that the CFPB began to officially take complaints on debt collection on July 10, 2013. Nonetheless, the Bureau did record complaints it received on the topic before then. *See* Consumer Fin. Prot. Bureau, Consumer Response: A Snapshot of Complaints Received July 21, 2011 through June 30, 2014 (2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf, *archived at* http://perma.cc/M7EX-QPJV [hereinafter CFPB Consumer Complaints].

gories relate to the quality and availability of information the collector or debt buyer has to collect from the consumer.

FIGURE 5: CONSUMER COMPLAINTS SUBMITTED TO THE CFPB.[128]



Most complaints concerned collectors' "continued attempts to collect a debt that is not owed."[129] Complaints to the CFPB are not an ideal estimate of how often these issues arise: not all consumers complain and for those who do, the CFPB does not ascertain the validity of the complaints.[130] The consumer reporting that the collector is attempting to collect the wrong amount or that the debt was paid may be mistaken, or worse.[131] Nonetheless, the number of complaints is an indicator of the potential scope of the problems identified. It is significant that these five categories made up 56% of all debt collection complaints submitted about debt collection during this time period.[132]

[128] These five categories made up 56% of all complaints submitted during the period. The source of this graph is data downloaded from the CFPB Complaint Database on August 19, 2014. *See* CFPB CONSUMER COMPLAINTS, *supra* note 127.

[129] CFPB CONSUMER COMPLAINTS, *supra* note 127, at 15.

[130] For a critique about the complaint system from the financial services industry, see *CFPB Rumors*, FIN. SERVS. ROUNDTABLE, http://fsroundtable.org/cfpbrumors/ (last visited Aug. 18, 2014) , *archived at* http://perma.cc/3G6M-FXNE .

[131] The CFPB does not "verify all the facts alleged in [consumer] complaints," but they attempt to confirm a commercial relationship between the consumer and company." *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, *supra* note 127.

[132] Other complaint categories include: "improper contact or sharing of information," issues with "communication tics," or "taking/threatening illegal action." *Id.*

B. Missing Information and Documentation

Part II.B.2 detailed a number of pieces of information that the FTC found were missing for the accounts they examined. This missing information may be material to consumers and can also hamper the ability of a debt buyer to legally collect. In particular, as explained below, a consumer (and in many cases a debt buyer) would want to know some of this information, including: the dates needed to calculate both the period during which a debt buyer may report to a credit reporting agency as well as the limitations period; information the consumer may have shared with the creditor or a collection agency; documentation of standing and changes in ownership of the account; and other documentation sufficient to prove the material elements of their claim in court.

1. Dates Needed to Calculate Limitations and Credit Reporting Periods

The FTC found that some "key dates relating to the debts" were missing from the accounts it examined, including when the original creditor charged off the debt (missing in 17% of accounts) and when the consumer went delinquent (missing in 65% of accounts).[133] These dates are significant for purposes of calculating when a debt buyer must stop reporting a debt to the credit bureaus as well as the statute of limitations period. Not having these dates exposes the debt buyer to liability under the FDCPA if she violates the Fair Credit Report Act ("FCRA") by reporting outside the correct period or if she files a lawsuit outside of the limitations period.[134]

The FCRA requires that most negative information be removed from a consumer's credit report after seven years.[135] For purposes of collection items, the seven years begins to run 180 days after the delinquency that sent the consumer to collections or that resulted in the account being charged-off.[136] Debt buyers and anyone else who furnishes information to a credit bureau must report the date of delinquency so that the credit bureau may delete the negative information from the consumer's account at the appropriate time. This can prove difficult for the debt buyer who purchased an account without information about the date of delinquency. One possibility, available only if the seller included the date of charge-off for the account, is to treat the charge-off date as if it were the date of delinquency and count 180 days from charge-off for purposes of reporting to the FCRA. This re-

[133] The FTC terms this the "date of first default." FTC Debt Buyer Report, *supra* note 4, at 35.

[134] The FCRA prohibits furnishers like debt buyers from providing "any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2 (a)(1)(A) (2012).

[135] 15 U.S.C. § 1681c(a)(4) (2012).

[136] 15 U.S.C. §§ 1681c(c)(1), (a)(4) (2012).

porting would not violate the FCRA, but it would reduce the amount of time that the debt be reported beyond what is required by the FCRA. The other alternative is not to report to the credit bureaus at all.[137]

These missing dates are also problematic for purposes of calculating the limitations. Statutes of limitation vary by state, but typically, the period to collect on a debt begins to run from the date on which the consumer breached the credit card agreement.[138] The date of breach is what the FTC calls the "date of first default," which was missing in 65% of accounts in the FTC Sample. The statute of limitations is typically an affirmative defense.[139] However, in the consumer debt collection context, the overwhelming majority of courts have found that the act of filing a time-barred lawsuit is a violation of the FDCPA, regardless of whether the consumer asserts the defense.[140] Some courts have found that even threatening to file a lawsuit is a violation.[141] Further complicating matters for collectors, the FTC has taken

[137] Recall that OCC guidelines require national banks to charge-off revolving accounts within 180 days after the account is past due. *See Uniform Retail Credit Classification and Account Management Policy*, *supra* note 35 and accompanying text. The OCC policy, however, "does not preclude an institution from adopting a more conservative internal policy," which means that the charge-off time could be shorter than 180 days. Uniform Retail Credit Classification, 65 Fed. Reg. 36903, 36905 (June 12, 2000). Because of this, a debt buyer cannot simply rely on the date of charge-off and count back 180 days to calculate the date of delinquency needed for FCRA purposes.

[138] *See, e.g.*, Citibank S.D., NA v. Sawant, 2012 Mass. App. Div. 79, at *2 (Dist. Ct. 2012); Knighten v. Palisades Collections, L.L.C., 721 F. Supp. 2d 1261, 1269 (S.D. Fla. 2010); Dodeka, L.L.C. v. Campos, 377 S.W.3d 726, 731 (Tex. App. 2012); Anderson v. Neal, 428 A.2d 1189, 1191 (Me. 1981); Kasu Corp. v. Blake, Hall & Sprague, Inc., 582 A.2d 978, 980 (Me. 1990) (noting that a contract cause of action accrues at the time of breach); Isaacson, Stolper & Co. v. Artisan's Sav. Bank, 330 A.2d 130, 132 (Del. 1974).

[139] *See* Day v. McDonough, 547 U.S. 198, 199 (2006); Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011); Rodriguez-Perez v. Clark, 423 F. App'x 118, 120 (3d Cir. 2011); DeTata v. Rollprint Packaging Products Inc., 632 F.3d 962, 970 (7th Cir. 2011); Export-Import Bank of U.S. v. Advanced Polymer Sci. Inc., 604 F.3d 242, 248 (6th Cir. 2010); Santana-Castro v. Toledo-Davila, 579 F.3d 109, 133 (1st Cir. 2009).

[140] *See, e.g.*, Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076, 1083 (7th Cir. 2013); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 33 (3d Cir. 2011); Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870, 875–76 (N.D. Ill. 2009); Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); Goins v. JBC & Assoc., 352 F. Supp. 2d 262, 266, 276 (D. Conn. 2005); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767, 771 (8th Cir. 2001); Stepney v. Outsourcing Solutions, Inc., No. 97 C 5288, 1997 WL 722972, at *4 (N.D. Ill. Nov. 13, 1997); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

[141] *See, e.g.*, *Kimber*, 668 F. Supp. at 1488 ("By threatening to sue Kimber on her alleged debt, FFC violated § 1692e(2)(A) & (10)."); *Freyermuth*, 248 F.3d at 771 (finding that it is a violation of the Act to threaten to take "any action that cannot legally be taken"); *Herkert*, 655 F. Supp. at 875–76 ("Numerous courts, both inside and outside this District, have held that filing or threatening to file suit to collect a time-barred debt violates the FDCPA."); *Larsen*, 533 F. Supp. at 302; *Beattie*, 754 F. Supp. at 393 ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."). A number of courts have declined to extend the *Kimber* reasoning to letters sent by the debt collector, although the holdings largely depend on the content of the letters. *Huertas*, 641 F.3d at 33 ("Even the least sophisticated consumer would not understand [plaintiff's] letter to explicitly or implicitly threaten litigation."); Brown v. Card Serv. Ctr., 464 F.3d

the position that for any debts which the debt collector "knows or should know may be beyond the applicable statute of limitations," it is unfair for a collector to attempt to collect without notifying the consumer that the debt is time-barred and the debt collector has no legal remedy.[142] Without this date, collectors and debt buyers risk violating the FDCPA if they collect close to or past the statute of limitations.[143] Absent this date to calculate the statute of limitations period, the debt buyer may perhaps choose to use another date that may be available for that account, perhaps by choosing the date that the creditor charged-off the account, available in 83% of accounts the FTC examined. Depending on how risk-averse the debt buyer is—the FTC's statement regarding out of statute debts is not a rule—it may have to forego some of the time it might have been able to collect on an account.

2. *Itemization of Interest and Fees*

The FTC found that most debt buyers did not obtain information regarding the amount of the debt that was made up of principal versus interest. A breakdown between the amount of principal (missing from 89% of accounts) and the total amount of finance charges and fees (missing from 63% of accounts) could help the consumer determine whether the debt is hers. It could also help consumers whose debts were sold under contracts that spe-

450, 453 (3d Cir. 2006) ("Whether a debt collector's communications threaten litigation in a manner that violates the FDCPA depends on the language of the letter, which should be analyzed from the perspective of the 'least sophisticated debtor.'"); Shorty v. Capital One Bank, 90 F. Supp. 2d 1330, 1331–33 (D.N.M. 2000) (finding that sending a debt validation notice regarding a time-barred debt, without notifying the consumer that the debt was time-barred did not violate the FDCPA).

[142] Consent Decree at 11, United States v. Asset Acceptance, L.L.C., No. 8:12-cv-00182-JDW-EAJ (M. D. Fla. Jan. 31, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2012/01/120131assetconsent.pdf, *archived at* http://perma.cc/U3S4-2XFS; *see also id.* at 13 (providing specific disclosure language). In addition, in at least three states, when a debt falls out of statute, it is extinguished. *See* Miss. Code Ann. § 15-1-3 (extinguishing all debts after statute expires); Wis. Stat. Ann. § 893.05 (mirroring the Mississippi statute); N.C.G.S. § 58-70-115(4), 155(b)(7) (prohibiting debt buyers from attempting to collect past the statute of limitations and requiring evidence establishing the date of last payment in order to calculate the date the statute would expire). In those states, any attempt to collect on a debt outside of the limitations period would likely violate the FDCPA. *See* 15 U.S.C. §§ 1692e(2)(B)(5) (prohibiting the collector from threatening "to take any action that cannot legally be taken or that is not intended to be taken") and 1692f(1) (prohibiting the collection of any amounts unless it is permitted by law); Dodeka, L.L.C. v. Cobb, No. 09 CvD 94, 2011 WL 10549927 (N.C. Dist. Mar. 8, 2011) ("[F]iling a lawsuit on a debt that is barred by the applicable statute of limitations further constitutes a misrepresentation of the legal status of such debt and violates 15 U.S.C. § 1692e and § 1692f when suit is threatened or initiated on a time-barred debt."). The "likely" caveat refers to the fact that depending on the contract there is still the question of which statute applies.

[143] How long a state allows collection on a debt depends on state statutes, on what law is applied to the issue, and on whether the plaintiff is suing on a contract theory or some other basis. Pennsylvania has the shortest limitations period at two years, 42 Pa. Cons. Stat. § 5524, but limitations periods can range from the more typical three years to fifteen years, *see, e.g.*, Ariz. Rev. Stat. Ann. § 12-543(2) (3 years); D.C. Code § 12-301(8) (3 years); W. Va. Code § 55-2-6 (10 years); Ky. Rev. Stat. Ann. § 413.090(2) (15 years); Ohio Rev. Code Ann. § 2305.06 (15 years).

cifically disclaimed, *inter alia*, "the accuracy of . . . accrued interest amounts due under the loans."[144] Given that language, a consumer would want to know what exactly was being claimed as interest in the amount allegedly due. It is almost impossible for a consumer to separate interest and fees herself on a revolving account, even if she has her entire history of account statements. Credit issuers are in the best position to separate interest and fees. Separately itemizing these would help consumers as well as debt buyers.[145]

3. *Sharing of Dispute History and Other Information*

The FTC study found that sellers did not typically include any specifics about the collection history of accounts sold, so this potentially valuable information about interactions of previous collectors with the consumer, written disputes, or attempts at verification of a debt were not forwarded to the debt buyer.[146] The majority of accounts were also sold without any information about whether the purported account holder disputed the amount, validity, or anything else about the account.[147]

The lack of dispute history information is problematic for both consumers and debt buyers. Consumers may have to provide the same information more than once and may become frustrated in explaining their situation multiple times. As the FTC noted, "[k]nowing the dispute history of debts could be very relevant to debt buyers in assessing whether consumers in fact owe the debts and whether the amounts of the debts are correct."[148]

Interactions with previous collectors would also be helpful to the debt buyer because they may contain information that can save both time and potential FDCPA liability. For example, it would be helpful for both consumers and collectors if notes indicating the consumer is represented by an attorney were passed to subsequent debt buyers or their collectors. Debt buy-

[144] *See* Loan Sale Agreement (Oct. 29, 2008), *supra* note 20, at § 9.4; Loan Sale Agreement (Apr. 14, 2010), *supra* note 20, at § 9.4; Loan Sale Agreement Aug. 11, 2009), *supra* note 20, at § 9.4.

[145] "The FTC has said that debt collectors should be required to include this information in validation notices to assist consumers in determining whether the amount owed is correct." FTC Debt Buyer Report, *supra* note 4, at 36. For an example of how this might be done, see Nat'l Consumer L. Ctr., Comments to the Bureau of Consumer Financial Protection (Feb. 28, 2014), at 63, *available at* http://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf, *archived at* http://perma.cc/6TJQ-CKHE.

[146] FTC Debt Buyer Report, *supra* note 4, at 36. The FTC believes that when selling to a subsequent debt buyer, "initial debt buyers generally do not discard any information they receive from the original creditor, but also that they typically do not supplement the information they provide to secondary debt buyers to reflect their experience in collecting on debts." *Id.* at 37 (citations omitted).

[147] Note that only four out of nine debt buyers were able to provide data on disputes. *Id.* at 37.

[148] *Id.*

ers who communicate with represented consumers after the consumer has notified a collector of the representation risk violating the FDCPA.[149]

In addition, these notes may also help ensure that the collector has made what the industry calls a "right party contact." As a debt ages, collectors turn to "skip-tracing" methods to help locate consumers who have moved or changed phone numbers.[150] Many skip-tracing methods rely on public information to associate phone numbers or other contact information with consumers. Individuals with common names or family members who have similar names may be confused for debtors and be contacted by debt collectors.[151] Once a collector finds that a skip-traced phone number or address does not belong to the person who defaulted on their account, notating that information and forwarding it to the next collector or debt buyer would help those consumers whose contact information had been wrongly associated with a debt. It would also help the next collector in ensuring she is speaking to the right party.

4. *Standing, Title, and Affidavits*

The issues around title and assignment are significant for both debt buyers and consumers. Proving ownership of a debt or standing in a lawsuit can be a challenge for debt buyers. A number of courts have found that debt buyers could not prove their standing to sue.[152] One issue is that the consumer debt transaction does not include proof of assignment at the account-level; this gets more complicated as the debt gets sold and resold. Another issue relates to the admissibility of affidavits.

Recall that during a typical debt sale, most of the time the buyer only gets some information about the debtor and the debt, as detailed in Part II.C.A. As part of the contract, the buyer and seller also sign a one-page Bill

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[149] 15 U.S.C. § 1692c(a)(2) (2012).

[150] FTC Debt Buyer Report, *supra* note 4, at 36.

[151] "In our case, a gentleman named Willie Graham, had his phone number scored as a high score letter, as a possible target. He has no connection with the three different people that the—I'll say rogue's gallery of established debt collection companies have assigned obligation for the debt. But he has received calls from, I'd say, at least half of the top ten debt buyers, all because there's an inaccurate Accurint file on him." Fed. Trade Comm., Debt Collection 2.0—Draft—Protecting Consumers as Technologies Changes [sic] 47–48 (2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-2.0-%E2%80%93-protecting-consumers-technologies-change/transcript.pdf, *archived at* http://perma.cc/R6JE-5C65.

[152] *See* MBNA Am. Bank, N.A. v. Nelson, No. 13777/06, 2007 WL 1704618, at *5 (N.Y. Civ. Ct. May 24, 2007) ("It is imperative that an assignee establish its standing before a court . . . an assignee must tender proof of assignment of a particular account . . . . Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner.") (citations omitted); In re Leverett, 378 B.R. 793, 800 (Bankr. E.D. Tex. 2007); Unifund CCR Assignee of Providian v. Ayhan, No. 36151-5-II, 2008 Wash. App. LEXIS 1922, at *21 (Ct. App. Aug. 5, 2008); Nyankojo v. North Star Capital Acquisition, 679 S.E.2d 57, 58 (Ga. Ct. App. 2009); Wirth v. Cach, L.L.C., 685 S.E.2d 433, 435 (Ga. Ct. App. 2009).

of Sale which makes recitals to the effect that: Seller, for value received and pursuant to the terms and conditions of the Purchase and Sale Agreement, hereby assigns all rights, title and interest of Seller to those receivables identified in the Sale File.[153] This one-page document is what is typically produced when proof of standing is requested. However, the Bill of Sale never references the individual account being sued on; at most, it references a spreadsheet or electronic exhibit that is almost never produced.[154]

If the plaintiff debt buyer did not purchase the account directly from the creditor, she may have to produce multiple Bills of Sale as evidence of the chain-of-title. Producing and authenticating these can present a problem. More often, what is produced instead is an affidavit from an agent of the debt buyer (or of the original creditor) stating that the consumer's account was bought from the Seller referenced in the Bill of Sale. But an affidavit is not enough in most jurisdictions, especially when it was prepared in anticipation of litigation.[155] Many state court rules of civil procedure require some evidence of the facts alleged in the affidavit be included.[156] In cases where debt buyers do not have account documents, this requirement can be difficult to meet.[157] This is perhaps one of the reasons regulators and consumer law-

[153] This phrasing is a composite of various Bills of Sale *available at* www.dalie.org/contracts, *archived at* http://perma.cc/74LP-VJHN.

[154] Some debt buyers have produced redacted printouts of spreadsheet documents: essentially one line on a sheet of paper that otherwise looks blank and spans multiple rows. *But see* Dahl v. Bain Capital Partners, L.L.C., 655 F. Supp. 2d 146, 150 (D. Mass. 2009) (finding that parties should produce Excel documents in their "native" format, that is where search and formulae capabilities are left intact). *See also* Fed.R.Civ.P. 34(b)(2)(E)(i).

[155] "[W]hen a document is created for a particular use that lies outside the business's usual operations—especially when that use involves litigation—neither of [Federal Rule 803(6)'s] justifications for admission holds . . . . [W]e adhere to the well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception." Ortega v. Cach, L.L.C., 396 S.W.3d 622, 630 (Tex. Ct. App. 2013) (quoting United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993)) (internal quotation marks omitted).

[156] *See, e.g.*, N.D. R. Civ. P. 56(e) ("If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit."); Neb. Rev. Stat. § 25-1334 ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); Me. R. Civ. P. 56(e) (same); Cach, L.L.C. v. Kulas, 21 A.3d 1015, 1019 (Me. 2011) ("To comply with Rule 56(e), however, it is not enough to merely rely on the affidavit: 'Sworn or certified copies of all papers or parts thereof referred to in an affidavit *shall be attached* thereto or served therewith.' Me. R. Civ. P. 56(e) (emphasis added)."); Arrow Financial Services, L.L.C. v. Guiliani, 32 A.3d 1055, 1058 (Me. 2011) (noting that the debt buyer did not provide (1) any evidence as proof that the original creditor owned an account in the consumer's name, such as the original contract between the original creditor and the consumer or (2) the account records and information supplied by the original creditor to the debt buyer as proof that the consumer entered into a contract for a credit card, as referenced in the affidavit).

[157] *See, e.g.*, Asset Acceptance v. Lodge, 325 S.W.3d 525, 528 (Mo. Ct. App. 2010) (reversing decision by trial court to accept testimony of debt buyer's representative to establish details of the original loan agreement because debt buyer did not originate the loan); Mfrs. & Traders Trust Co. v. Medina, No. 01C768, 2001 WL 1558278, at *1 (N.D. Ill. Dec. 5, 2001) (finding affidavits by attorneys and others lacking personal knowledge insufficient); Topps v. Unicorn Ins. Co., 648 N.E.2d 214, 217 n.1 (Ill. App. Ct. 1995) ("[U]nder the business record exception to the hearsay rule, only the business record itself is admissible into evidence rather than the testimony of the witness who makes reference to the record."); N. Ill. Gas Co. v.

yers claim that so many lawsuits are dismissed if the consumer shows up to court.[158] The lack of availability of documents is a top priority for the collections industry; so much so that the main trade associations for collection agencies listed this issue among the top four things they would like to see Congress or regulatory agencies tackle.[159] The inability to prove ownership in court has negative ramifications for consumers as well. Standing is an element of the plaintiff's *prima facie* case, but the overwhelming majority of collection cases are won by default—the consumer just never shows up.[160] In most default situations, the debt buyer will win a lawsuit without having to present documents evidencing their ownership of the debt. Even when consumers come to court, most do so without an attorney and fail to request

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Vincent DiVito Constr., 573 N.E.2d 243, 252 (Ill. App. Ct. 1991) ("The business records exception to the hearsay rule (. . .) makes it apparent that it is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.") (citations omitted); Grant v. Forgash, 1995 Ohio App. LEXIS 5900, at *13 (Ohio Ct. App. Dec. 26, 1995) ("There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records.").

[158] *See Junk Justice*, *supra* note 10, at 208 (noting that 90% of consumers don't show up to court and, of those who showed, 2% had an attorney); *Debts, Defaults, and Details*, *supra* note 10, at 296 (noting that 50% of cases were dismissed without prejudice). The Maryland Rules Committee stated in its report that the proposed rule changes (now enacted) were made because

> [p]roblems with the cases filed by [consumer debt purchasers, or CDPs] have arisen, including: failure of the CDP to be licensed, the wrong party being named as plaintiff, filing after the statute of limitations period has run, lack of personal knowledge by the affiant, lack of supporting documentation containing sufficient detail as to liability and damages, failure of the CDP to prove it owns the debt, and incorrect identification of the amount claimed.

Standing Committee on Rules of Practice and Procedure, Ct. of Appeals of Md., Notice of Proposed Rules Changes 41 (2011), *available at* http://www.courts.state.md.us/rules/reports/171stReport.pdf, *archived at* http://perma.cc/AJ77-C9MC.

[159] The availability of documents alone will not solve this problem, however. The problem stems from lack of account-level evidence of ownership. *See* ACA Int'l, The Path Forward: ACA International's Blueprint for Modernizing America's Consumer Debt Collection System 7 (2011), *available at* http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf, *archived at* http://perma.cc/N858-AS7W (stating that "collectors can have a difficult time providing documentation responsive to the consumer's dispute because creditors may not maintain the appropriate documentation to verify the debt during the collection process").

[160] *See Debts, Defaults, and Details*, *supra* note 8, at 296 (finding 68% no appearance rate, 8.68% attorney representation rate among those who showed, and 40% default rate); *Do We Have a Debt Collection Crisis?*, *supra* note 8, at 377, 381 (finding 83% no appearance rate, 73% default judgment rate, 4% attorney representation rate, and no cases resulting in trial); Consumers Union & East Bay Community Law Center, Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now 1 (2011) (describing stories of individuals who did not show up to court), *available at* http://defendyourdollars.org/pdf/Past_Due_Report_2011.pdf, *archived at* http://perma.cc/KD4K-F5NA; National Consumer Law Center, The Debt Machine: How the Collections Industry Hounds Consumers and Overwhelms Courts 4 (2010), *available at* http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf, *archived at* http://perma.cc/33BU-U4UB; New York Appleseed & Jones Day, Due Process and Consumer Debt: Eliminating Barriers to Access to Justice in Consumer Credit Cases 2 (2010), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf, *archived at* http://perma.cc/FWB7-6LY8.

proof of ownership.[161] This can also have a deleterious effect on consumers if they end up with a judgment from the wrong debt buyer.[162]

It is unclear how often this happens, but there are at least a handful of examples.[163] In one case in 2009, a court found that debt buyer Goldberg & Associates, L.L.C. entered into a contract to purchase debts from another debt buyer but never paid for them.[164] Despite that, Goldberg used the information it acquired during the transaction to collect debts that it did not own from consumers.[165] Recently, the FTC obtained a preliminary injunction against a debt broker that the FTC alleges "posted the sensitive personal information of more than 70,000 consumers online . . . in the course of trying to sell portfolios of past-due payday loan, credit card, and other purported debt."[166] The defendants had posted the debt portfolios in the form of Excel spreadsheets on a publically available website without any protection.[167] Any visitor to the website could download "consumers' bank account and credit card numbers, birth dates, contact information, employers' names, and information about debts the consumers allegedly owed."[168] Here is where the language of the debt sale agreements becomes significant: recall that 18% of the contracts in the Litigation Sample that disclaimed all warranties and representations failed to represent that the seller had title to the accounts. In a world in which it is next to impossible to verify whether a debt buyer has title to an account, a contract that disclaims title is a red flag.

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[161] The author, along with Jim Greiner and Lois Lupica, is working on a study that attempts to understand, *inter alia*, the reasons consumers default. *See* Dalié Jiménez, D. James Greiner, Lois R. Lupica, Rebecca Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY & L. POL'Y 449 (2013) (describing the study).

[162] There are many instances where the admissibility of affidavits could be successfully challenged. *See, e.g.*, Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009), *infra* note 225.

[163] *See, e.g.*, Miller v. Wolpoff & Abramson, L.L.P., No. 1:06-CV-207-TS, 2008 U.S. Dist. LEXIS 12283, at *5 (N.D. Ind. Feb. 19, 2008) (describing consumer's allegation that two debt buyers sued him on the same debt); Wood v. M & J Recovery L.L.C., No. CV 05-5564, 2007 U.S. Dist. LEXIS 24157, at *4 (E.D.N.Y. Apr. 2, 2007) (describing a dispute over who owned the fifth of a portfolio that included the debtor's account).

[164] Hudson & Keyse, L.L.C. v. Goldberg & Associates, L.L.C., No. 9:2007-81047-CIV, 2009 WL 790115, at *2 (S.D. Fla. Mar. 24, 2009) (finding that Goldberg breached the contract by not paying for the debts).

[165] *See id.* Goldberg was also sued by a third debt buyer who bought debts that Goldberg sold but to which it did not have title. American Acceptance Co. v. Goldberg, No. 2:08-CV-9 JVB, 2008 U.S. Dist. LEXIS 39418, at 1 (N.D. Ind. May 14, 2008) (alleging that Goldberg sold accounts to which it did not have title).

[166] *FTC Alleges Debt Brokers Illegally Exposed Personal Information of Tens of Thousands of Consumers on the Internet*, FED. TRADE COMM'N (Nov. 12, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/11/ftc-alleges-debt-brokers-illegally-exposed-personal-information, *archived at* http://perma.cc/7A3B-6D3H.

[167] *Id.*

[168] *Id.*

C. Uncertainty, Legitimacy, and Trust

This Part has so far described a litany of problems with the way consumer debts are sold in America. These issues are problematic for collectors and consumers alike, not just in and of themselves, but collectively. The lack of information collectors receive about alleged debtors, the lack of documents that can be used to find the consumer or prove in court how much she owes, the failure to share information with subsequent buyers or collectors, the difficulty proving to consumers and the courts who has title to an account; these are systemic problems. Together, they make collection more difficult for honest collectors and prevent consumers from being able to trust they are paying the right person the right amount. It is very likely that they also raise the cost of credit.

Consumers can find it difficult to identify the right person to pay, whether or not they have been sued. This article opened with a hypothetical setting: you receive a collection call. Many questions arise. How can you know whether XYZ Debt Buyer is really the owner of your debt, or that ABC Debt Collection, the company the collector tells you she is calling from, is an agent of XYZ? You remember having a GAP account, but how do you know this is *your* GAP account? How do you know $1,000 is the correct amount? Can you tell whether this debt is past the statute of limitations? Perhaps you have a common name and are being confused for someone else who also had a GAP card. Or maybe the woman calling you is a bogus collector, a scam-artist who has gotten a hold of you information through stolen data or other means.[169] The FTC has sued or shut down many debt collectors in the last few years; it may be difficult to know whether you can trust a disembodied voice on the phone.[170]

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[169] *See, e.g.*, Jake Halpern, *Paper Boys: Inside the Dark Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. Times (Aug. 15, 2014), http://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html, *archived at* http://perma.cc/FW3G-TMD5.

[170] The FTC has produced so many press releases on this topic in the last couple of years that a number of them have the exact same headline. *See, e.g.*, *Debt Collectors in Memphis and New York State Settle with FTC Concerning Multiple Federal Law Violations*, Fed. Trade Comm'n (Aug. 7, 2014), http://www.ftc.gov/news-events/press-releases/2014/08/debt-collectors-memphis-new-york-state-settle-ftc-concerning, *archived at* http://perma.cc/CB79-VLNC; *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts*, Fed. Trade Comm'n (July 1, 2014), http://www.ftc.gov/news-events/press-releases/2014/07/ftcs-request-court-halts-collection-allegedly-fake-payday-debts, *archived at* http://perma.cc/39Y6-3HNR; *FTC Continues Crack Down on Deceptive Debt Collection; Houston-based Defendants Agree to Stop Deceptive Fees and Practices*, Fed. Trade Comm'n (June 25, 2014), http://www.ftc.gov/news-events/press-releases/2014/06/ftc-continues-crack-down-deceptive-debt-collection-houston-based, *archived at* http://perma.cc/SZL4-E2AC; *FTC Puts Texas-based Operation Permanently Out of the Debt Collection Business After It Allegedly Used Deception, Insults, and False Threats against Consumers*, Fed. Trade Comm'n (May 19, 2014), http://www.ftc.gov/news-events/press-releases/2014/05/ftc-puts-texas-based-operation-permanently-out-debt-collection, *archived at* http://perma.cc/95CX-CU7R; *At FTC's Request, Court Halts Debt Collector's Allegedly Deceptive and Abusive Practices, Freezes Assets*, Fed. Trade Comm'n (Mar. 13, 2014), http://www.ftc.gov/news-events/press-releases/2014/03/ftcs-request-court-

In addition, the combination of the "no warranties about accuracy" and unavailability of documentation in some of these transactions poses an almost existential crisis: how is it possible to know that the amount quoted as owed is the correct amount? If the buyer never obtains documentation—worse yet, if the documentation does not exist—there is nothing with which to verify the spreadsheet information.[171] Spreadsheets are problematic for other reasons. They are easy to alter, even accidentally, as economists Carmen Reinhart and Kenneth Rogoff[172] and JP Morgan Chase found last year.[173] In James Kwak's words: "While all software breaks occasionally, Excel spreadsheets break all the time. But they don't tell you when they break: they just give you the wrong number."[174]

Without documentary evidence, all a debt buyer can do is create an affidavit that quotes the amount on the spreadsheet. If the account was sold with disclaimers of accuracy, however, the consumer (and regulators) may reasonably want verification that the amount is correct. But the debt buyer,

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halts-debt-collectors-allegedly-deceptive, *archived at* http://perma.cc/Z6PP-CY82; *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts*, Fed. Trade Comm'n (Oct. 24, 2013), http://www.ftc.gov/news-events/press-releases/2013/10/ftcs-request-court-halts-collection-allegedly-fake-payday-debts, *archived at* http://perma.cc/N5DN-JXZQ; *FTC Settlement Bans Defendants from Engaging in Debt Collection and Interest Rate Reduction Schemes*, Fed. Trade Comm'n (Sept. 10, 2013), http://www.ftc.gov/news-events/press-releases/2013/09/ftc-settlement-bans-defendants-engaging-debt-collection-and, *archived at* http://perma.cc/6YBY-GRGZ; *U.S. Defendants Who Allegedly Abetted Fake Debt Collector Calls from India Agree to Settle FTC Charges*, Fed. Trade Comm'n (Oct. 23, 2012), http://www.ftc.gov/news-events/press-releases/2012/10/us-defendants-who-allegedly-abetted-fake-debt-collector-calls, *archived at* http://perma.cc/5KMQ-X2Q5; *Court Halts Alleged Fake Debt Collector Calls from India, Grants FTC Request to Stop Defendants Who Posed as Law Enforcers*, Fed. Trade Comm'n (Apr. 11, 2012), http://www.ftc.gov/news-events/press-releases/2012/04/court-halts-alleged-fake-debt-collector-calls-india-grants-ftc, *archived at* http://perma.cc/FYD3-LK4V.

[171] At most there may be some data in the creditor's records (perhaps a copy of the spreadsheet they sent the buyer), but this is the same data that the creditor disclaimed would be correct.

[172] Reinhart and Rogoff's paper had been used by politicians and policy makers to support the austerity measures that were implemented world-wide in the wake of the Great Recession. John Cassidy, *The Reinhart and Rogoff Controversy: A Summing Up*, The New Yorker (Apr. 26, 2013), *available at* http://www.newyorker.com/news/john-cassidy/the-reinhart-and-rogoff-controversy-a-summing-up, *archived at* http://perma.cc/M464-RZ24. Attempting to replicate their work, other researchers found that the spreadsheet contained an error which led Reinhart and Rogoff to conclude that the average real GDP growth rate for certain countries was -0.1% instead of the 2.2% one finds when the error is corrected. This difference calls into question the conclusions of the earlier paper. Mike Konczal, *Researchers Finally Replicated Reinhart-Rogoff, and There Are Serious Problems*, The New Deal: The Blog of the Roosevelt Institute (Apr. 16, 2013), *available at* http://www.nextnewdeal.net/rortybomb/researchers-finally-replicated-reinhart-rogoff-and-there-are-serious-problems, *archived at* http://perma.cc/S3RN-9FBK. *See also* James Kwak, *More Bad Excel*, The Baseline Scenario (Apr. 18, 2013), *available at* http://baselinescenario.com/2013/04/18/more-bad-excel/, *archived at* http://perma.cc/9ANY-5MS6.

[173] JP Morgan Chase's investigation revealed that part of the issue with the so-called "London Whale" trades was as a result of mistakes with Excel spreadsheets. *See* James Kwak, *The Importance of Excel*, The Baseline Scenario (Feb. 9, 2013), *available at* http://baselinescenario.com/2013/02/09/the-importance-of-excel/, *archived at* http://perma.cc/K5HW-SRXW.

[174] *Id.*

without documents for the account, only has the spreadsheet she obtained at the sale to go by. This presents a problem because it is not clear how one could ever know whether the spreadsheet was changed between the time it was created and when a debt buyer wants to use it in court.[175] The consumer may have the last statement mailed to her by the creditor (the charge-off statement in the case of a credit card), which would yield an ideal comparison.[176] However, the debt buyer (and not the consumer) carries the burden of proof in these cases, and consumers in financial distress are arguably not well positioned to keep records of a debt that may be many years old. Further, as banks continue to promote paperless billing, it will become more difficult for consumers who have been charged-off to obtain their statements.[177] This all means that the correct amount owed may be unknowable. Without documentary evidence, there is uncertainty as to the amount owed—uncertainty which may not be possible to resolve if account documents no longer exist. How big of a problem is this lack of documentation? The calculations from Part II.C.2 yield a rough estimate: debt buyers never obtained documentation on 65% to 71% of the accounts examined by the FTC, whether at the time of sale or subsequently. There is reason to think that this estimate may be low. The FTC Sample only included accounts for a specific time period from the nine largest debt buyers. Further, the buyers in the study "purchased many of their debts from original creditors," so that they were closest in the chain of title to the source of documents—the original.[178] As mentioned earlier, subsequent debt buyers face additional challenges in obtaining account documentation, making it likely that the percentage of accounts for which subsequent debt buyers lack account documentation is even greater. All of this leads to the hypothesis that the 65% to 71% estimate is a lower bound for the percentage of accounts that lack documentation industry-wide, especially in the case of resales.

Because of the contractual agreements between creditors and debt buyers, the more times a debt is sold, the greater the difficulties obtaining documentation (even if it exists). Multiple sales of the same debt (purchased

[175] For an argument that evidentiary standards should require that "[w]here computer information is offered for its truth, some showing of testable reliability should be required in order to minimize the likelihood of easy admissibility of potentially undetectable, manipulated, or fabricated digital evidence," see Stephen W. Teppler, *Testable Reliability: A Modernized Approach to ESI Admissibility*, 12 Ave Maria L. Rev. 213, 256 (2014).

[176] Note that while this would help verify the correct charge-off amount, this would not resolve the issue of proving standing in court.

[177] *See, e.g.*, LaToya Irby, *Pros and Cons of Paperless Billing Statements*, AboutMoney.com, *available at* http://credit.about.com/od/creditcardbasics/qt/Pros-And-Cons-Of-Paperless-Billing-Statements.htm (last visited Nov. 15, 2014), *archived at* http://perma.cc/C2H3-D5U7 (listing as a "con" of paperless statements and noting that "you may have to go through a few extra steps (and could even have to pay a fee) to access older statements"); Hank Coleman, *Why I Hate Paperless Credit Card Statements*, AllBusiness.com, *available at* http://www.allbusiness.com/print/15445167-1-9a0bs.html (last visited Nov. 15, 2014), *archived at* http://perma.cc/VGM2-SBB9 (noting that it is easy to forget about paperless statements).

[178] FTC Debt Buyer Report, *supra* note 4, at 38.

without documentation) also increase the length of time it will take for a debt buyer to obtain that documentation, as detailed in Part II.C.2. Multiple sales also mean multiple transfers of the same account information—perhaps updated to include contact information and partial payments. These transfers introduce further complexity and increased possibility of errors.[179]

The FDCPA was enacted because Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[180] One of the stated purposes of the statute was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[181] These disclaimers (and the lack of documentation) may drive down the cost of credit in the form of increased liquidity (and cheaper costs), but they do so at a cost. Consumer confusion and mistrust in the system may ultimately reduce collections and thereby increase the cost of credit.

IV. Explaining Irrational Contracting Behavior

A. Prudent Drafting or Back-Office Failures

Before proposing solutions, it is helpful to try to think through the reasons why transactions for the sale of consumer debts might have evolved to contain the contractual features described in Part III. This subpart posits a few interconnected potential explanations.

The FTC and Litigation Samples both suggest that creditors set the majority of contract terms. To a large extent, creditors control the transaction because they create and possess the information and documentation regarding the underlying debts.[182] One potential explanation for the contract language in particular—the reliance waivers, specific disclaimers of representations, and "big boy" clauses—is that this is perhaps a few zealous attorneys wanting to minimize their client's exposure to litigation from debt buyers.

This is likely true to some extent; as others have noted, there are multiple reasons why a seller may want to include these clauses.[183] The seller may want to minimize the chance that "innocent representations made ex ante could be turned against her ex post."[184] Another possibility is that the seller

[179] In the context of financial innovation and system risk, others have noted the increased potential for costs and errors to be introduced as the ownership chain increases. Kathryn Judge, *Fragmentation Nodes*, Stanford L. Rev. 685 (quoting Henry T.C. Hu & Bernard Black, *Debt, Equity and Hybrid Decoupling: Governance and Systemic Risk Implications*, 14 Eur. Fin. Mgmt. 663, 691 (2008)).

[180] 15 U.S.C. § 1692 (2012).

[181] *Id.*

[182] *See generally supra* note 62 and accompanying text.

[183] *See* Masson, *supra* note 14, at 513.

[184] *Id.*

is concerned about a potential agency problem—being "held accountable for a misrepresentation or misinterpretation by one of her agents during the course of the negotiation."[185]

But these explanations are not satisfying in this context. The contracts in the Litigation Sample are roughly uniform; very little changes from deal to deal. They do not only include reliance waivers but also specifically include positive disclaimers—going into specifics about the things that the seller is not representing to the buyer and on which the buyer is not relying. This specificity would not seem necessary if the worry were merely about "innocent representations." The agency problem would also not seem as pronounced where the contract language remains almost the same from deal to deal. As described below, where the Litigation Sample includes multiple contracts from the same seller, oftentimes the language and formatting is exactly the same. The primary way in which the language changes is in minor individual clauses that disclaim representations as to a material aspect of the debt. For example, as between two almost identical Citibank contracts signed in 2005 with two different buyers, only one of the contracts contains additional language regarding the fact that Citibank did not provide the date of first delinquency to the buyer in that contract.[186] The contract with this additional language was signed three months before the contract that did not include it.[187]

Another hypothesis is that sellers use "waiver of warranties" clauses when they are not confident in the "paper" (accounts) they are selling. As described above in Part I, each individual bank may have one or more systems where information regarding delinquent consumers is stored—i.e., the original SOR used before delinquencies and the internal collection or recovery system used later.[188] The rapid expansion of credit combined with the equally speedy consolidation of card originators (banks and nonbanks) could have led to poor handling of data and information on accounts, especially as that data might have been stored in different custom-made systems by different banks.[189] Depending on the sophistication of the bank (and perhaps the sophistication of the bank that originated the account if that bank was pur-

[185] *Id.* at 514.

[186] *Compare* Purchase and Sale Agreement between Citibank, N.A. and Unifund CCR Partners (Feb. 28, 2005), at § 2.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.02.28-Citibank-to-Unifund-CCR-some-affirmative-reps-but-FCRA-issue-without-recourse-no-warranty.pdf, *archived at* http://perma.cc/PA67-6GPJ *with* Flow Purchase and Sale Agreement between Citibank USA, Nat'l Ass'n and Sherman Originator, L.L.C. (May 24, 2005), at § 2.1, *available at* http://dalie.org/wp-content/uploads/2014/10/2005.05.24-Citibank-USA-NA-to-Sherman-Originator-L.L.C.-.pdf, *archived at* http://perma.cc/S2L5-FAD6.

[187] *Id.*

[188] *See generally supra* note 24 and accompanying text (discussing systems of record (SOR)).

[189] For an account of how custom-made systems can limit a bank's ability to grow, see Michael Lewis, Flash Boys 135–37 (W.W. Norton & Company 2014) (describing the little documentation that developers had left for Goldman Sachs' trading systems, which were acquired from a previous firm).

chased), the different systems may or may not be able to communicate with each other. Merging these SORs successfully likely posed some challenges.[190]

There is at least one concrete example of these accuracy issues at the bank-level. Multiple federal and state regulators have looked or are looking at JP Morgan Chase's internal collections as well as its practices selling delinquent accounts. Lawsuits and investigations are pending from the CFPB and the Attorneys General of California, Mississippi, and Massachusetts.[191] The allegations include robo-signing, bad record-keeping, and fraudulent court filings. As of 2013, some believed that Chase had stopped selling consumer debts[192] and, at around the same time, the company closed an internal unit tasked with suing consumers over credit card debts.[193] In its own internal investigation, Chase determined that nearly one in ten of its collection accounts had errors.[194] "The errors ranged from inaccurate interest and fees applied by outside law firms to a 'small number of instances' in which lawsuits listed higher balances than the amounts owed by borrowers."[195] At least a few dozen cases allege that debt buyers sought to collect on debts that the

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[190] Many travelers are all-too-familiar with these problems, most recently if they traveled during the months in which United Airlines was merging with Continental, or American Airlines with US Airways.

[191] *See* Jesse Hamilton, *JPMorgan Agrees to Repay Customers in Credit-Card Settlement*, Bloomberg (Sept. 19, 2013), http://www.bloomberg.com/news/2013-09-19/jpmorgan-agrees-to-repay-customers-in-occ-credit-card-settlement.html, *archived at* http://perma.cc/8EJ4-7DT2; Jessica Silver-Greenberg & Edward Wyatt, *U.S. Vows to Battle Abusive Debt Collectors*, N. Y. Times, July 10, 2013, at B1, *available at* http://dealbook.nytimes.com/2013/07/10/u-s-vows-to-battle-abusive-debt-collectors/, *archived at* http://perma.cc/6Z2X-GUCU; Stephanie Levy, *California Lawsuit over Chase's Debt Collection Practices is Still On*, InsideARM (Jan. 8, 2014), http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/california-lawsuit-over-chases-debt-collection-practices-is-still-on/, *archived at* http://perma.cc/NW4F-QCH5 ; Jonathan Stempel, *JPMorgan sued by Mississippi AG over credit card misconduct*, Reuters (Dec. 17, 2013), http://www.reuters.com/article/2013/12/17/us-jpmorgan-lawsuit-creditcards-mississi-idUSBRE9BG1EO20131217, *archived at* http://perma.cc/TA8T-9H4J; Andrew R. Johnson, *Massachusetts Probes J.P. Morgan's Debt-Collection Practices*, Wall St. J. (Sept. 20, 2013), http://online.wsj.com/news/articles/SB100014241278873238082045790876434048396 38, *archived at* http://perma.cc/QK7S-85NU.

[192] *See* Maria Aspan & Jeff Horwitz, *Chase Halts Card Debt Sales Ahead of Crackdown*, Am. Banker (July 1, 2013), http://www.americanbanker.com/issues/178_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html, *archived at* http://perma.cc/B75C-KW38.

[193] *See* Chris Cumming, *JPM to Shutter Litigation Group for Consumer Debt Collection*, Am. Banker (Oct. 17, 2013), http://www.americanbanker.com/issues/178_201/jpm-to-shutter-litigation-group-for-consumer-debt-collection-1062882-1.html, *archived at* http://perma.cc/7AXW-RMHW.

[194] *See Nearly 1 in 10 JPMorgan debt collection lawsuits had errors*, Reuters (July 10, 2013), http://articles.chicagotribune.com/2013-07-10/business/chi-nearly-1-in-10-jpmorgan-debt-collection-lawsuits-had-errors-20130710_1_credit-card-debt-collection-jpmorgan-chase-co, *archived at* http://perma.cc/AW7L-U8X4.

[195] Dan Fitzpatrick, *J.P. Morgan Review Finds Errors in Debt-Collection Lawsuits: Errors Occurred as the Bank Sued Its Credit-Card Users*, Wall St. J. (July 9, 2013), http://online.wsj.com/articles/SB10001424127887324867904578595963522586162, *archived at* http://perma.cc/DP76-UGAY.

consumer had already paid; in some instances, the court found as much.[196] A few months later, the bank entered into a consent order with the OCC in which it "neither admit[ed] nor denie[d]" that "it filed false affidavits, filed false documents that resulted in financial errors in favor of the bank, and failed to have in place processes and systems to ensure the accuracy and integrity of accounts sold to debt buyers."[197]

Against this background, it is useful to examine the seven Chase contracts in the Litigation Sample and note the wide variety of representations. The seven contracts include one contract with an unknown (redacted) date; the rest are from 2008, 2009, and 2010. The overall language and formatting of the agreements is strikingly similar. Looking at them together, they all seem to originate from the same template. All seven use the same exact ALL-CAPS language to disclaim warranties and representations and also explicitly represent that Chase has unencumbered title to the accounts. All seven were signed by the same Chase executive.[198] But that is where the similarities end.

Five of the seven contracts (including contracts signed in 2008, 2009, and 2010) affirmatively represent that Chase complied with all applicable laws when originating or servicing the accounts. A sixth, signed in 2009, represents compliance with laws but adds a caveat that the representation is made "to the best of seller's knowledge."[199] The seventh contract, a 2009 sale of judgments Chase had obtained against delinquent customers, does not make any representations about whether Chase complied with the law.[200] The only contract from 2008 specifically warrants the accuracy of the information; one contract from 2010 warrants the accuracy "to the best of seller's books and records."[201] The remaining five contracts (from 2009, 2010, and an unknown date) do not discuss accuracy at all.

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[196] *See The One Hundred Billion Dollar Problem*, *supra* note 10, at 270 nn. 75–76, 78–79 (collecting eleven cases); Cooper Fin., L.L.C. v. Frost Nat'l Bank, No. 1:12-cv-00295-HJW, 2012 WL 5902909, at *1 (S.D. Ohio Nov. 26, 2012) (alleging that debt buyer sold accounts to another debt buyer without disclosing it did not have title to accounts, which have since been collected upon by the debt buyer without title and resold multiple times); MBNA Am. Bank, N.A. v. Nelson, No. 13777/06, 2007 WL 1704618, at *5 (N.Y. City Civ. Ct. May 24, 2007); Overcash v. United Abstract Group., Inc., 549 F. Supp. 2d 193, 196 (N.D.N.Y. 2008) (attempting to collect in excess of the balance of a previously settled debt); Miller v. Wolpoff & Abramson, L.L.P., No. 1:06-CV-207, 2008 U.S. Dist. LEXIS 12283, at *5 (N.D. Ind. Feb. 19, 2008) (recounting consumer's allegations that two debt buyers sued him on same debt); Wood v. M & J Recovery L.L.C., No. CV 05-5564, at 4 (E.D.N.Y. Apr. 2, 2007).

[197] *Junk Science*, *supra* note 10, at 185.

[198] All seven contracts were signed by Chris Schuck as President of Chase Bank.

[199] *E.g.*, Credit Card Account Purchase Agreement between Chase Bank, N.A. and Turtle Creek Assets (May 7, 2009), at 25, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.07-Chase-Bank-USA-NA-to-Turtle-Creek-Assets-Ltd-limited-as-is.pdf, *archived at* http://perma.cc/V4MH-LCZ6.

[200] *See* Judgments Purchase Agreement between Chase Bank, N.A. and Debt One L.L.C (Dec. 10, 2009), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.12.10-Chase-Bank-USA-NA-to-DebtOne-LLC-.pdf, *archived at* http://perma.cc/66Z8-H4JZ.

[201] Credit Card Account Purchase Agreement between Chase Bank, N.A. and Palisades Collection, L.L.C. (Feb. 15, 2008), at 8, *available at* http://dalie.org/wp-content/uploads/2014/

The similarity in the overall terms, structure, and "look" of the contracts all suggest that these differences in material terms (accuracy and compliance) may have had something to do with the specific portfolios being sold. The variability in contract terms used within a year also supports the theory that the contract language varied with the portfolio. In 2009, for example, Chase signed contracts that (1) affirmatively represented that the bank complied with applicable laws, (2) represented the same "to the best of seller's knowledge," and (3) did not make any affirmative representations about compliance with laws (thereby implicitly disclaiming compliance). This argument, that contract terms took into account the underlying accounts sold, is in line with the FTC's statement that in their sample "both sellers and buyers knew that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on accounts."[202]

Why might banks not be confident about the accuracy of specific portfolios? Waivers of warranties and disclaimers about material aspects of the sale may have gained popularity for two reasons: the great number of bank mergers leading to the crisis which accelerated during the Great Recession, and the large wave of charge-offs and subsequent debt sales during the recession.

Integrating information systems can be a herculean task taking many months (think of airline mergers). It is similar when large banks acquire others, except that rapid acquisitions is much more common in the banking sector. For example, between 1997 and 2007, Bank of America and its predecessor (Nations Bank) acquired or merged with seven large banks.[203] The financial crisis accelerated the already ongoing, rapid consolidation in the financial services industry. Large banks like Washington Mutual and Wachovia were bought on the cheap by even larger banks (JP Morgan Chase and Wells Fargo, respectively).[204] As these banks were acquired, all of their SORs had to be brought in alignment. Data is not available to truly discern

10/2008.02.15-Chase-to-Palisades.pdf, *archived at* http://perma.cc/8ZR3-ACH4; Chase, N.A. to Midland Funding, L.L.C. (Nov. 30, 2010), at 7, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.11.30-Chase-Bank-USA-NA-to-Midland-Funding-LLC-.pdf, *archived at* http://perma.cc/UNV6-MZTR.

[202] FTC Debt Buyer Report, *supra* note 4, at C-7-8.

[203] *See Merger History*, Bank of America, http://message.bankofamerica.com/heritage/#/merger-history/ (last visited Nov. 3, 2014), *archived at* http://perma.cc/4WSM-6SVY (noting that: in 1997 Nations Bank merged with Barnett Bank and Boatmen's Bank; in 1998 it acquired Bank of America ("BoA") and took its name; in 2004 BoA purchased Fleet Boston; in 2006 BoA purchased MBNA, making BoA the largest credit card issuer in the country; and in 2007 BoA acquired U.S. Trust and La Salle Bank Corp). BoA is represented in the litigation sample as FIA Card Servs., its credit card subsidiary.

[204] Eric Dash & Andrew Ross Sorkin, *Government Seizes WaMu and Sells Some Assets*, N.Y. Times, Sept. 26, 2008, at A1, *available at* http://www.nytimes.com/2008/09/26/business/26wamu.html?_r=0, *archived at* http://perma.cc/84G9-B4N6; *Wells Fargo Completes Wachovia Purchase*, Thomson Reuters (Jan. 1, 2009, 1:13 PM), http://uk.reuters.com/article/2009/01/01/wellsfargo-wachovia-idUKN0133136720090101, *archived at* http://perma.cc/992E-JPHV.

what happened as smaller banks with legacy systems were swallowed up by larger ones, but conversations with industry insiders suggest that getting the systems to talk to each other was not an easy task.

To add to this story, the liquidity crisis at the end of 2008 caused banks to severely curtail credit lines for their customers to limit their risk as the crisis wore on.[205] A year later, charge-offs began to skyrocket.[206] In 2007, $40 billion in credit card debt was charged-off by banks; that number had risen to $75 billion by 2009.[207] These massive charge-offs in the midst of a liquidity crisis meant that banks sought to convert their portfolio of delinquent or charged-off cards into ready cash that could be put to work quickly. Sales of consumer debt portfolios skyrocketed and prices dropped as delinquent debts flooded the market.[208]

This story is reminiscent of the back-office failures that brought down a number of broker-dealers in the 1960s.[209] The rapid growth of credit before the crisis, the large mergers before and during, and the subsequent meltdown and fast pace of new delinquencies may have overwhelmed some banks.[210] One aspect of the Litigation Sample lends some credence to this story: the "worst" agreements (those disclaiming accuracy and compliance with the FDCPA) were signed in 2009 and 2010, during the financial crisis.[211] But

[205] "The majority of credit card pricing is determined by factors unrelated to an individual borrower's risk profile and is instead based on factors such as cost of funds, cost of operations, and the aggregated risk profile of the card issuer's borrower pool." Adam J. Levitin, *Rate-Jacking: Risk-Based & Opportunistic Pricing in Credit Cards*, 2011 Utah L. Rev. 339, 343 (2011).

[206] For credit cards, charge-offs must occur within 180 days of the date of the last major delinquency. *See supra* note 35 and accompanying text.

[207] FICO, Boost Collections and Recovery Results with Analytics 1 (Feb. 2010), http://brblog.typepad.com/files/31_boost_collections_recovery_analytics_2644wp.pdf, *archived at* http://perma.cc/LC3Z-DH64.

[208] In 2008, "fresh debt" costs for some accounts dropped from "approximately 9 to 16 cents on the dollar to below 4 cents." *See Our Industry*, Sunlan Corp., http://www.sunlancorporation.com/industry-facts.php (last visited Nov. 4, 2014), *archived at* http://perma.cc/4BY3-PXXE.

[209] *See generally* U.S. Sec. & Exch. Comm'n, Study of Unsafe and Unsound Practices of Brokers and Dealers: Report and Recommendations of the Securities and Exchange Commission (1971). The 1960s was "a period of tremendous growth in the securities industry." Barry P. Barbash, Dir., Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, Remembering the Past: Mutual Funds and the Lessons of the Wonder Years at the ICI Securities Law Procedures Conference (Dec. 4, 1997), *available at* www.sec.gov/news/speech/speecharchive/1997/spch199.txt, *archived at* http://perma.cc/P2N3-9JM5.

[210] As analysts at the Bank for International Settlements have written, "the paper crunch of the 1960s serves as a reminder that weak back office procedures could have serious implications not only for market efficiency but also for the financial health of firms active in the market." Elisabeth Ledrut & Christian Upper, *The US Paper Crunch, 1967–1970*, Bank for Int'l Settlements (Sept. 1, 2008), *available at* http://www.bis.org/publ/qtrpdf/r_qt0712z.htm, *archived at* http://perma.cc/T84C-BSP3.

[211] *See, e.g.*, Purchase and Sale Agreement between Credigy Receivables, Inc. and Newport Capital Recovery Group II, L.L.C. (May 29, 2009), at § 2.1(c)–(d), *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.29-Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-.pdf, *archived at* http://perma.cc/5ZDF-DL9F. One of the sales was made by a receiver in a bankruptcy proceeding. Purchase Agreement between Nat'l Credit Acceptance, Inc. and Sacor Financial, Inc. (Oct. 14, 2010), at § 3(b), *available at* http://dalie

while the glut of charge-offs that entered the market after the crisis may have led to more errors, it doesn't explain why many pre-crisis contracts also include the "waiver of all warranties" language. Take, for example, a 2004 contract between MBNA and a debt buyer which disclaims everything not specifically represented, says nothing about title, and disclaims both "the accuracy of any sums shown as current balance or accrued interest amounts due under the loans" as well as the compliance of the loans with state or federal usury laws.[212] In 2004, MBNA was a large bank, second only to Citibank in issuances of credit cards, but it had not merged with any entities of significant size.[213]

Rapid consolidation and the search to liquidate charge-offs may have been a contributing factor, but they do not satisfactorily explain the 2002-2007 agreements in the Litigation Sample that include disclaimers of accuracy of information and title.[214] A separate explanation, perhaps complementary to the merger and charge-offs stories, is that regulatory failure allowed creditors and debt buyers to externalize the costs of illegal collection.

B. Laissez-Faire Failure

The problems with lack of documentation and warrantless contracts begin with the banks who originate the debts. Until recently, bank regulators paid little attention to the manner in which banks were selling debts.[215] This laissez-faire attitude has left the market to decide how much effort banks should take in conducting debt sales. For a variety of reasons, the way in which a bank handles collections is neither very visible to consumers nor very salient for choosing a product. Debt buyers or collectors may be able to exert pressure on banks to improve their practices (since this should increase returns), but they would have had little incentive to do so if they were still profitable without changes. The fragmentation in the collections industry makes it even less likely. Without regulatory or other external pressure, individual banks lack the incentives to "throw good money after bad" and invest in systems required to make sure that they can comfortably warrant title, legal compliance, and accuracy. In a nutshell, bank regulators' permissive attitude toward how the banks conducted these sales coupled with a lack of

.org/wp-content/uploads/2014/10/2010.10.14-National-Credit-Acceptance-Inc-to-Sacor-Financial-Inc-.pdf, *archived at* http://perma.cc/DAV7-8PRJ.

[212] Loan Sale Agreement (Sept. 30, 2004), *supra* note 61.

[213] CHARLES AUSTIN STONE & ANNE ZISSU, THE SECURITIZATION MARKETS HANDBOOK: STRUCTURES AND DYNAMICS OF MORTGAGE- AND ASSET-BACKED SECURITIES 2165 (2d ed. 2012).

[214] *See, e.g.,* Loan Sale Agreement (Sept. 30, 2004), *supra* note 61.

[215] This started to change in 2010 with the OCC's investigation into Chase. *See generally* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, AM. BANKER (Mar. 12, 2012, 9:24 PM), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html?zkPrintable=1&nopagination=1, *archived at* http://perma.cc/W46Y-TKQC.

market incentives for credit issuers to change exacerbated any issues that consolidations and charge-offs may have created.

When shopping for credit products, consumers have no incentive to care about a bank's collection practices.[216] Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people.[217] Stated differently, "[p]eople prefer to believe that their risk is below average and are reluctant to believe anything else."[218] A bank will not gain customers by touting its punctilious collection practices because consumers are not selecting their bank based on these practices. Once they are delinquent, consumers do not have a choice in who their collector is or who their debt is sold to. It is the bank that chooses what collection agencies to use and who to sell their debt to. As a result, consumers do not exert pressure to clean up questionable practices.[219] In fact, the pressure may actually go in the opposite direction: in favor of cutting costs, to the extent that the bank is competing for customers. Once the customer is delinquent, the incentives are even more perverse. The bank has little reason to throw out "good money after bad" in keeping up their collections or recovery systems; after all, the accounts in these systems belong to non-paying customers.[220]

When a bank decides to sell their debt, they enter a different market. The bank has to find willing buyers for their defaulted debts. When billions of dollars in face-value of defaulted accounts are available on the market, they have to compete with other banks for the sale of those debts. Correcting the problematic practices described previously is costly, and the market pressure in this case is relentlessly to drive costs down. Nonetheless, one might expect that debt buyers, as the bank's customers, have an incentive to de-

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[216] Bill Whitford made a similar argument in the context of first party collections in 1979. He framed it as an "imbalance of knowledge" between creditors and collectors. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 Wis. L. Rev. 1047, 1074 (1979) ("Because consumers only occasionally enter into credit contracts, and only a very few of those result in a delinquency, debtors are typically uninformed about the risks and harms associated with various types of coercive execution. Consequently, they cannot bargain knowledgeably about these matters, particularly at the time of contract formation."). *See also* CFPB ANPR, *supra* note 7, at 67849 (positing that competitive forces will not necessarily correct the collections market because consumers do not choose creditors based on collection activities).

[217] Whitford, *supra* note 216, at 1074 (noting that "consumers have a propensity to underweigh long term risks, such as the risk of delinquency, when making credit or other decisions").

[218] Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 Health Psychol. 132, 139 (1995).

[219] Consumer insurance markets have similar features in that they are "ultra-competitive with respect to price" but "remarkably noncompetitive with respect to claims handling quality." Daniel Schwarcz, *Differential Compensation and the "Race to the Bottom" in Consumer Insurance Markets*, 15 Conn. Ins. L.J. 723, 726 (2008). Both claims handling and debt sales are low incidence events that typically occur much later than the moment at which the consumer purchases insurance or obtains a credit card.

[220] As Stephen Davidoff has noted, "reputation is a 'less active influence' constraining behavior when a nefarious deed is done by many." Davidoff, *supra* note 76 (quoting The Federalist No. 15, at 72 (Alexander Hamilton)).

mand more documentation, evidence, and positive warranties from banks. This would enhance recoveries because consumers are more likely to pay if they can trust that the person calling or writing about the debt—someone they did not initiate a relationship with—is the correct party. Enhanced evidence of the underlying debt would also enhance the debt buyer's ability to collect via the court system.

But in order for debt buyers to have the incentive to push for more documentation and warrants from sellers, these items must be needed to make debt buying profitable.[221] Instead, the public filings of debt buyers demonstrate that no matter how broken the current system may be, it still allows them to obtain a very healthy profit.[222] Despite all the bad press, debt buyers have been able to collect enough to accrue substantial profits from consumers directly as well as through the courts. In 2008, debts were quite cheap: four cents on the dollar on average according to the FTC, and in some cases "virtually zero."[223] If buyers can collect with the current level of information and documentation and without requiring that the creditor stand by the material aspects of the debts they are selling, they have no incentive to ask for anything more. Indeed, they have a disincentive to ask for more since this would increase the purchase price immediately with only a theoretical possibility that it would also mean increased recoveries in the future. Receiving more documentation would also mean needing to put a system in place to deal with the documents. This is costly and—so far—unnecessary.

Thus, any improvement in procedures a bank undertakes will result in added costs to the bank, with little upside. This presents a collective action problem: if a bank increases prices to cover the increase in costs, it risks losing customers. Since consumers do not choose their bank based on their collection or debt sale practices, the bank that does not implement these costly upgrades is better positioned to offer lower-priced products to consumers and poised to increase its customer base.

But consumers are not the banks' only customers. Debt buyers are also customers, and they may also be able to absorb the increased costs. However, as discussed earlier, debt buyers and collectors who are making good returns under the current system would naturally be reluctant to accept the additional costs. In a fragmented market like this one—an estimated 4,500 firms buy and collect debts in the United States—and with insufficient regulatory oversight, there should always be debt buyers willing to buy bargain-

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[221] Or that, on the margin, the costs of documentation and warrants increase overall profits.

[222] *See, e.g.*, SquareTwo Financial, Financial Results: Year End 2011 12 (2012), *available at* http://www.squaretwofinancial.com/wp-content/uploads/2012/06/SquareTwo-Financial-Q4YE-2011-Financial-Results-Presentation.pdf, *archived at* http://perma.cc/4Y29-NWSK (reporting that "[r]eturns on 2009, 2010, and 2011 purchase years average 2.4x compared to 1.5x for purchase years 2007 and 2008, an increase of over 60%"). Public debt buyers generally are not very diversified; their entire business model usually consists of purchasing and collecting on different kinds of debts.

[223] FTC Debt Buyer Report, *supra* note 4, at ii.

priced debts.[224] This is especially true if despite the issues identified in this article sufficient consumers pay so as to make the pennies or fractions of pennies paid for the debts worth the investment.

Another potential source of market pressure, outside of regulators, are consumer lawsuits. While a few class actions have attempted to address some of these issues, it is important to note that the FDCPA's remedies are very limited.[225] The Act provides attorney's fees for prevailing plaintiffs and recovery of actual damages, but the total statutory damages for a class action are capped at "the lesser of $500,000 or 1 per centum of the net worth of the debt collector [or debt buyer]."[226] Even if this small amount could serve as a deterrent, it can only be used against debt buyers or collectors. It cannot be used to deter banks since originating creditors are not subject to the FDCPA.[227] Consumer lawyers have increased the number of individual and class actions filed under the FDCPA,[228] much to the industry's chagrin, but they are necessarily knocking on the wrong door.

An equilibrium seems to have developed around the problematic practices described in Parts II and III. Without outside pressure, any given bank has a disincentive to spend money to improve its practices. An intervention is needed to spur change and solve this collective action problem. Both the bank and debt buyer industries recognize this. At a workshop held by the FTC and the CFPB, industry panelists repeatedly requested regulation and

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[224] *See* Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.105 (2012), *infra* note 253; Joe Mont, *CFPB Considers Debt Collection Rules, Releases Complaint Data*, Compliance Week (Nov. 6, 2013), http://www.complianceweek.com/blogs/the-filing-cabinet/cfpb-considers-debt-collection-rules-releases-complaint-data#.VEDjUha9bCA, *archived at* http://perma.cc/PM3N-VGTM.

[225] *See, e.g.*, Class Action Complaint at 3-8, Vassalle v. Midland Funding L.L.C., No. 3:11-CV-00096, 2011 WL 231969 (N.D. Ohio Jan. 17, 2011) (challenging practice of "robo-signing" affidavits used in debt collection lawsuits); Midland Funding L.L.C. v. Brent, 644 F. Supp. 2d 961, 966–69 (N.D. Ohio 2009) (describing the challenged affidavit production practice). The FTC filed an amicus brief in the Midland lawsuit opposing a proposed settlement because it provided only a small payment to consumers (capped at $10), and consumers would surrender their rights under the FDCPA and state laws to challenge Midland's actions related to the company's use of affidavits in debt collection lawsuits. FTC's Brief as Amicus Curiae, Vassalle v. Midland Funding L.L.C., No: 3:11-CV-00096, at 1 (N.D. Ohio June 21, 2011), *available at* http://www.ftc.gov/os/2011/06/110621midlandfunding.pdf, *archived at* http://perma.cc/B8KF-NJRY . The court ultimately approved the settlement agreement in Midland without making changes to the agreement. Vassalle v. Midland Funding L.L.C., No: 3:11-CV-00096, 2011 WL 3557045, at *1 (N.D. Ohio Aug. 12, 2011).

[226] 15 U.S.C. § 1692k(a)(2)(B) (2012).

[227] 15 U.S.C. § 1692(a)(6)(F) (2012) ("The term 'debt collector' . . . does not include any person collecting or attempting to collect any debt . . . to the extent such activity concerns a debt which was originated by such person."). Note, however, that a handful of states have enacted state versions of the FDCPA, which include original creditors within their coverage. *See, e.g.*, Ca. Civ. Code § 1788.

[228] In 2012, consumers filed 10,320 lawsuits alleging violations of the FDCPA. This was slightly lower than the number in each of the previous three years. Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics, December 2013 & Year in Review*, Interactive Credit: The Debt collection Industry's Defense Blog (Jan. 22, 2014), http://interactivecredit.com/?p=2101, *archived at* http://perma.cc/Q22B-4U9M.

clarity in documentation requirements.[229] An attorney for the collections industry echoed this sentiment "[i]f there's a mandate, a national standard, you sell an account, these are the things you will transmit. I think it helps everybody. That's a quality improvement standard and it'd be a very good thing."[230] In recent comments to the CFPB, JP Morgan Chase stated that the bank "would be interested in guidance from the Bureau on what information and documentation should be required to transfer with a charged-off debt when it is assigned to a collection agency or sold to a debt buyer."[231]

V. Cleaning the Dirt: Towards an Improved Collection Ecosystem

This Part considers possible solutions to the problems outlined in this article. It discusses potential industry-led solutions and potential market options, before ending with a regulatory solution which could help effectuate Ronald Mann's "distressed debt tax" to help lenders internalize the true cost of collecting (that which includes the cost of complying with the law).

A. *Industry Self-Regulation*

Lacking incentives from their consumer or debt buyer customers, banks might still respond to pressure from their regulators to increase the amount and quality of information they sell. That pressure began with the passage of the 2010 Dodd-Frank Wall Street Consumer Protection Act ("Dodd-Frank") and the inception of the CFPB.[232] While still in its infancy, the CFPB made it

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[229] For instance, Larry Tewell, Senior Vice President at Wells Fargo stated, "if we could have uniform national standards relative to data and media, that would go a long way toward fixing this." Tewell, *supra* note 60, at 119.

[230] *Life of a Debt: Data Integrity and Debt Collection – Part 3*, Fed. Trade Comm'n (June 6, 2013), http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-3, *archived at* http://perma.cc/8WKF-Z6M6. At this roundtable discussion regarding debt collection and data integrity, Manuel Newberger, Partner, Barron & Newberger, P.C., who represents creditors and debt buyers, said, "the more information that we can have relative to charge-off dates, balances, last payments . . . would be extremely relevant . . . . [T]he idea that information can be passed from agency to agency . . . that this account was disputed . . . that would be helpful." The TransUnion representative agreed: "[M]ore standardized data reporting on the front end will reduce the errors and reduce the questions consumers get. We won't be putting accounts on the wrong file or matching information correctly."

[231] J.P. Morgan Chase & Co., Response to Advance Notice of Proposed Rulemaking at 3, Debt Collection, Docket No. CFPB-2013-0033, RIN 3170-AA41 (Feb. 28, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0304, *archived at* http://perma.cc/3GAP-QHYZ.

[232] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Soon after Dodd-Frank was passed, the FTC sought public comments on a proposed policy statement for how debt collectors should handle consumer debts. *FTC Proposes Policy Statement Clarifying How to Collect Decedents' Debts*, Fed. Trade Comm'n (Oct. 4, 2010), http://www.ftc.gov/news-events/press-releases/2010/10/ftc-proposes-policy-statement-clarifying-how-collect-decedents, *archived at* http://perma.cc/EV68-CKUM; Statement of the Office of the Comptroller of the Currency, Provided to the Subcomm. on Fin. Inst. and Consumer Protection, Senate Comm. on Banking, Hous. and Ur-

publically known that debt collection issues were among its top priorities. Naturally, this spurred some action on the part of industry. As this article goes to print, the Bureau is expected to propose draft debt collection rules in early 2015.[233] This section proposes that banks begin sending "goodbye packets" to their customers when they sell their debts, a simple (partial) solution that banks could implement fairly quickly. It also discusses a longer-term potential solution in the form of a debt registry.

1. Moves in the Right Direction

Amidst mounting pressure from federal and state regulators, various players in the industry have realized they have an opportunity to design self-imposed obligations that might solve some of the problems described earlier and reduce liability as well as regulator intermeddling. For instance, there is anecdotal evidence that large banks have started to change their record-keeping and debt sales practices. At the joint FTC/CFPB "Life of a Debt" event, a regulator discussed reports that banks were exerting greater control over collection agencies, sometimes allowing them to interphase with the bank's SOR. There is also evidence that creditors are being more selective with to whom they sell accounts.[234] New contract language purportedly includes resale and potentially outsourcing restrictions. These are all steps in the right direction, but as of yet, the extent of these changes is not known.

Debt buyers have also begun to move toward reform. DBA International, the largest trade association for debt buyers, recently enacted a na-

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ban Affairs: "Shining a Light on the Consumer Debt Industry," at 13 (July 17, 2013), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf, *archived at* http://perma.cc/U6BY-WLJ8; Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, AM. BANKER (July 2, 2013), *available at* http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html, *archived at* http://perma.cc/8CFD-NYCA; John L. Culhane, Jr., *No backseat for FTC in FDCPA enforcement*, CFPB MONITOR (Mar. 6, 2014), http://www.cfpbmonitor.com/2014/03/06/no-backseat-for-ftc-in-fdcpa-enforcement, *archived at* http://perma.cc/P6RY-7AG2; *Federal Trade Commission Increases Enforcement Of FDCPA*, AGRUSS LAW FIRM L.L.C. (Feb. 27, 2013), http://www.agrussconsumerlaw.com/federal-trade-commission-increases-enforcement-of-fdcpa/, *archived at* http://perma.cc/997E-AL8A.

233 Jake Halpern, *The big, debt-collection shakedown: The need to reform an industry that recovered $55.2 billion from Americans last year*, BOSTON GLOBE (Oct. 12, 2014), http://www.bostonglobe.com/magazine/2014/10/11/the-big-debt-collection-shakedown/REmoHeNzXm2d2tK7m42dzI/story.html, *archived at* http://perma.cc/H6VQ-QV27 ("Starting in 2015, the Consumer Financial Protection Bureau is expected to unveil fairly comprehensive rules governing how debt can be collected."); Debt Collection Rule, RIN 3170-AA41 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006), *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3170-AA41, *archived at* http://perma.cc/UE9M-Z466.

234 Wolters Kluwer Fin. Services, Response to Advance Notice of Proposed Rulemaking, Debt Collection, Docket No. CFPB-2013-0033-0001, RIN 3170-AA41 (Feb. 27, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0239, *archived at* http://perma.cc/GA2Q-734J; *The New Norm in Debt Buying*, KAULKIN GINSBERG (Feb. 14, 2014), http://www.kaulkin.com/connect/2013/02/the-new-norm-in-debt-buying/, *archived at* http://perma.cc/98KK-34WX.

tional "Certification Program."[235] All DBA International members will have to become certified under the program by March 2016 or lose their membership. Part of the certification requires that "on all new debt portfolios purchased after becoming certified, the Certified Debt Buyer shall require in the purchase agreement (i.e. the contract) those data elements required to sufficiently identify the consumers on the associated accounts."[236]

According to the certification requirements, this means the debt buyer must "use commercially reasonable efforts to negotiate the inclusion" of things such as name, last known address, last payment date, charge-off balance, and the current balance.[237] The certification standards do not require anything else in the language of contracts. After becoming certified, debt buyers are also required to "maintain an accurate listing for chain of title on debts purchased after certification." The standards make clear that this is not a retroactive requirement and only applies to debts purchased after certification.[238]

This is a positive move, but the program will necessarily have a limited effect. First, it does not address many of the issues discussed in Parts II and III. For example, the program does not require certified debt buyers to purchase account documents when they purchase a portfolio; or even to make sure that the seller has the media available.[239] It would be implausible to think that such a program could fix all of these problems, however, because so many of them begin with the creditor. Second, debt buyers are certainly not required to become DBA members, so the program will not reach those debt buyers who do not want to play by the rules. This may turn out to be a blessing in disguise: it could be a relatively costless way for regulators to separate those buyers who are taking active steps towards compliance and those who are not, and to spend their resources appropriately.

What these two sets of industry-led reforms have in common is that they will likely lead to a consolidation of players in the debt buying and collection agency industry. This is already happening, as increased regulatory scrutiny brings increased compliance costs and not all players can absorb them. This is not necessarily a bad thing; a smaller number of collection

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[235] The DBA Int'l Board adopted the program in February 2012. *DBA Debt Buyer Certification Update*, DBA INT'L (July 25, 2012), http://www.dbainternational.org/members_only/DBADebtBuyerCertificationUpdate.pdf, *archived at* http://perma.cc/69LU-HUA8. The first DBA member was certified under the program on May 14, 2013. *First DBA Member Completes Debt Buyer Certification Program*, DBA INT'L (May 14, 2013), http://www.dbainternational.org/memberalerts/Alert-FirstCertification_051413.pdf, *archived at* http://perma.cc/4LZQ-RV5K.

[236] DBA INT'L, DEBT BUYER CERTIFICATION PROGRAM, APPENDIX A: CERTIFICATION STANDARDS MANUAL 7 (Feb. 2, 2013), *available at* http://www.dbainternational.org/certification/certificationstandards.pdf, *archived at* http://perma.cc/82NC-WZW5.

[237] *Id.* at 6.

[238] *See id.* at 7.

[239] *See* DBA INT'L, DBA INTERNATIONAL DEBT BUYER CERTIFICATION PROGRAM, APPENDIX D – AUDIT REVIEW MANUAL 13 (Feb. 7, 2013), *available at* http://www.dbainternational.org/certification/auditreview.pdf, *archived at* http://perma.cc/XFS3-7762.

agencies and debt buyers—rather than the thousands currently in operation—would make it easier for consumers to identify a real company from a fly-by-night bogus debts operation.

The next section suggests another potential step creditors can take to improve the flow of information and trust in the collection system.

2. *Goodbye Packets*

One of the issues that arise when debts are sold multiple times is that consumers may not know or be able to determine who currently owns their debt. A related problem is that Bills of Sale are not individualized at the account or debt level, they merely state that "[Seller] sold Accounts to [Buyer]" on a specified debt. This causes problems when a buyer seeks to collect through courts, as discussed in Part III.B.4. It also means that consumers have no way to verify that the person calling or writing is the legitimate owner of their debt. One partial solution to this would be for sellers (creditors or debt buyers) to send a "goodbye packet" to the consumer whenever her account is sold.[240]

The packet should include a letter from the creditor (when the debt is first sold) summarizing what happened to the consumer's account: the creditor sold it to XZY Debt Buyer. The letter should include contact information for the debt buyer and any account or reference number needed for the debt buyer to find the consumer's account. Besides the letter, the packet should also include the charge-off statement—the last statement ever mailed from the bank to the consumer—and attach a ledger accounting of the last twelve months of purchases, payments, and interest or fee charges, or a way for the consumer to access the ledger or statements online for period of time.[241] The letter need only be one page; the charge-off statement typically is as well, since it does not include any new purchases. Depending on how long ago the consumer stopped incurring charges or making payments on the credit card, the ledger may be very brief. The entire packet could be as little as four pages, though more likely an average of five to seven.

This packet could "travel with the debt;" every seller would provide to subsequent buyers the documents sent to consumers, as well as when they were sent and to what address. Every subsequent buyer could also send a version of this letter, taking care to add whatever credits and charges were added to the account in the previous twelve months. This conceptually simple (though no doubt logistically difficult) solution would go a long way

[240] Full credit for this idea goes to Samantha Koster, while she was a student in the author's Consumer Law / Debt Collection seminar.

[241] Nothing like this is currently required by regulations. However, some current state laws and some proposed ones require evidence that the consumer used the card before a court may enter a judgment. *See, e.g.*, Debt Buying, S.B. 233, 2013-2014 Leg., 2013-2014 Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB233, *archived at* http://perma.cc/CTU6-H9PH. *See* NCLC comments to the CFPB's debt collection ANPR, *supra* note 145.

toward ameliorating the chain-of-title and standing problems in state court.[242] It would also be helpful to consumers who might wish to pay their obligations, or who wish to learn who currently owns their debt and how to get in touch with them.[243]

The industry recognizes the role notification of a sale could play in both improving collections and alleviating many of the problems described in Part III. Many of the contracts in the FTC sample required debt buyers to notify consumers that their accounts had been sold, typically within 30-60 days after the sale. However, the contracts specified that the notification would come in the form of a letter from the debt buyer, an entity the consumer does not know. Some contracts provided that at the debt buyer's request, and at a cost of $10 per individual letter, the bank would "provide a form letter on an individual basis . . . that Buyer may send to a Cardholder to confirm that the Bank sold the Cardholder's Account to Buyer."[244] However, those letters would still be sent on the debt buyer's letterhead and envelope.[245] One possible reason the contracts are structured this way is that banks have an incentive to have the buyer be the one to tell the consumer about the sale because it may reduce the bank's reputational concerns.

3. *Debt Registry*

Some of the problems described in this article might sound eerily similar to the documentation and robo-signing issues in the mortgage markets. A great deal of those problems concern the mortgage industry's registry, the Mortgage Electronic Registration System, or MERS, which came under significant attack for its actions during the foreclosure crisis.[246] By inserting

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[242] That is because each subsequent buyer would acquire a record of an individualized letter sent by the creditor to the consumer reporting that the account had been sold and would acquire it *at the moment of sale*. In states that recognize the incorporation doctrine, a debt buyer's record custodian could satisfy the business records exception to the hearsay rule. If the original debt buyer sold the account again, then the subsequent buyer would have multiple letters evincing the chain of title.

[243] Instead of a goodbye letter, however, most debt sale contracts explicitly prohibit debt buyers from providing information about the original credit issuer. FTC DEBT BUYER REPORT, *supra* note 4, at C-20. The reason for this is presumably to avoid communications with the consumer since the seller no longer owns the account, however, this policy might make it harder for consumers to figure out whether the debt buyer contacting them legitimately owns their debt. The fact that some sale contracts "expressly prohibited debt buyers from using the credit issuer's name in the subject line of notification . . . and limited usage of the seller's name to the body of such letters" further adds to the possibility of consumer confusion. *Id.*

[244] *Id.*

[245] *Id.*

[246] MERS is a computer database, established by the residential mortgage industry, which is designed to track the servicing rights on the majority of U.S. home loans. It has approximately 5,000 members—consisting of mortgage originators and secondary market participants including Fannie Mae, Freddie Mac, and Ginnie Mae—who pay MERS membership fees and fees on specific transactions in order to use the information filed with MERS. *See An Introduction to the MERS® System, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc.*, MERS®WORKS (Sept. 2014), http://www.mersinc.org/media-room/press-kit, *archived at* http://perma.cc/5PSS-Y932?type=pdf.

itself as the owner of record or owner's nominee in foreclosure actions, MERS foreclosed on homes under its own name, even though it was not entitled to any of the proceeds because it did not own the mortgage or the note.[247] Because recordation of assignments in MERS was voluntary, oftentimes consumers could not ascertain who owned their mortgages. This exposed some consumers to double foreclosure actions—and their attendant fees—because they could not determine exactly who owned their loans. In the most egregious cases, fraudsters became authorized officers of MERS and initiated foreclosure. In other cases, consumers could not find out whom to contact to settle the foreclosure case when MERS was the one that initiated the proceedings.

Given all of these issues, it may seem surprising that, for example, the CFPB recently highlighted the idea of a debt registry in its advanced notice of proposed rulemaking by asking a series of questions to the public about its potential benefits and drawbacks.[248] At least two companies have been endeavoring for a few years to interest a critical mass of creditors and debt buyers to adopt their registry solution for unsecured consumer debts.[249] Both aim to do this by serving as a "middle man registry," a way for documentation and chain of title information regarding an individual debt to live with a third party (the registry) and remain there regardless of current ownership of the debt. What would change would be the registered owner.
As one of these companies frames the issue in a whitepaper:

> Businesses and individuals would not dream of buying real property, automobiles, or anything else of value without first having its ownership status verified by a third party. If one would not buy a car or house without title confirmation, why would one spend thousands or millions buying debt without the same protection?[250]

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[247] *See* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637, 713–15 (2013); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 114–125 (2011); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1370–71 (2010). *See also* Mortg. Elec. Registration Sys., Inc. v. Chong, Order, Nos. 2:09-CV-00661-KJD-LRL, BK-S-07-16645-LBR, 2009 WL 6524286, at *2 (D. Nev. Dec. 4, 2009); Mortg. Elec. Registration Sys., Inc. v. Graham, 247 P.3d 223, 228–29 (Kan. Ct. App. 2010); In re Agard, 444 B.R. 231, 235 (Bankr. E.D.N.Y. 2011) ("This Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.").

[248] *See* CFPB ANPR, *supra* note 7, at question 12. Some of the discussion here was included in the author's joint comment letter with Patricia A. McCoy, *supra* note 12.

[249] *See Who We Are*, GlobalDebtRegistry.com, http://www.globaldebtregistry.com/who-we-are (last visited Oct. 23, 2014), *archived at* http://perma.cc/5R3K-CZ2L; *About Convoke*, ConvokeSystems.com, http://www.convokesystems.com/company (last visited Oct. 23, 2014), *archived at* http://perma.cc/NE76-UQ8Z.

[250] Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, Global Debt Registry (Jan. 5, 2011), *available at* http://ftc.gov/os/comments/debtcollecttechworkshop/00027-60064.pdf, *archived at* http://perma.cc/9YPA-7J6V.

Why indeed? While the MERS scars are still recent, there are some differences between the unsecured consumer debt context and the mortgage registry system. Unlike unsecured consumer debts, mortgages have had a registry system for hundreds of years. The county recording has been a very successful system of establishing title and recording changes in the ownership of real property. MERS was developed to supplant this already-existing registry system. Part of the reason it caused problems was because the local land records were no longer the authoritative source of title ownership. In effect, MERS added a separate SOR to the structure. In the unsecured debt context, there is nothing to supplant, and indeed, there is a need for consumers to be able to verify who owns their debts so that they may pay the right party.

This "chain of title" record-keeping and account document storage could be the most helpful features in a repository. Unless it is serving as the real-time SOR for every collector or debt owner, however, a repository would not be an appropriate place to keep the current amount owed on a debt, or the itemization between interest and fees past charge-off. This is because any information stored in the repository about the amount owed or the payments made will necessarily be out of date and in no way verifiable since they were created by a third party.

Nonetheless, a "chain of title registry" could offer advantages to both consumers and industry participants. Consumers targeted for debt collection would have a place to turn to examine the facts alleged regarding their debts.[251] If reporting to a repository were required, consumers could easily verify that the party contacting them actually owns the debt, or alternatively, that they have been called by a scammer.

To alleviate the issues around the lack of documentation, at the time that a delinquent account is entered into a repository, underlying debt contracts, the last account statement, the amount owed at charge-off, and the date of first default could be obtained from the original creditor. While only the original creditor could speak to the truth and reliability of those documents in court, outside of court, storing this documentation and information could help consumers ascertain whether the alleged principal, interest, and fees being charged were excessive and evaluate any defenses to collection. A repository could also protect against potential double recovery and fraudulent collection by helping consumers to identify the rightful owner of their debts and the debt collector or servicer who is authorized to collect on them.

To the extent that courts have held back from strictly applying evidentiary and standing rules to debt buyers out of a concern that this may increase the cost of credit, the ready availability of this information might inspire them to insist that debt holders and collectors prove a *prima facie* case before obtaining a default judgment. Although here it is important to note that a repository is not a panacea. While it can serve a very useful

[251] This positive, however, disappears if there are too many registries.

purpose in identifying the owner of the debt and the entity authorized to collect on it, data stored in a repository should be used to substantiate the amounts owed on a debt. This is because the repository is not itself the source of business records regarding the debt. The only thing an agent of a repository could testify to in court is that documents were placed with it at a particular time by a particular entity. The repository cannot speak to the validity or contents of those documents or even about how they were created. It can only speak to the integrity of those documents—that is, that they were not changed—after they were stored with the repository. An agent of a debt registry could not testify in court as to whether the amounts on account statements were correct, as they would not have personal knowledge of the creation of those amounts.[252]

Many of the advantages that a centralized repository (or a handful of repositories) could offer to consumers flow from the fact that it would be relatively easy to publicize its existence and that it could be closely supervised by the CFPB.[253] In addition, as an entity in a "business the principal purpose of which is the collection of any debts," a repository would come within the ambit of the FDCPA and be accountable to consumers who were hurt by their practices.

However, there remain unresolved issues of how a repository would fit with current law. Depending on the exact way the company operates, a centralized repository might be considered a "consumer reporting agency" under the Fair Credit Reporting Act ("FCRA").[254] This might involve some additional consumer protections such as the requirement of "maximum pos-

[252] For a discussion of hearsay issues in debt buyer cases see Holland, *supra* note 10, at 272–80.

[253] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting or debt collection. *See* Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.103 (2014); Bureau of Consumer Financial Protection Rule, 12 C.F.R. § 1090.105 (2014). They may also qualify for supervision as service providers of depository institutions. *See* 12 U.S.C. § 5515 (2012).

[254] 15 U.S.C. § 1681a(f) (2012) states that a "'consumer reporting agency' means any person who for monetary fees . . . regularly engages in whole or in part in the practice of assembling . . . consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." A "consumer report" in turn is defined in § 1681a(d)(1) as including any type of communication that bears on a consumer's credit-worthiness or credit capacity which is used or expected to be used with any of the permissible purposes of consumer reports in § 1681b(a). Under § 1681b(a), there are three ways in which a centralized repository would furnish reports that would bring it within the ambit of the FCRA. To the extent that the repository makes information available to potential collectors or debt purchasers, it would be furnishing it under § 1681b(a)(3)(E) since the repository would be sharing the information with someone who "intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation." Similarly, the repository could trigger the FCRA by furnishing the information to someone (a debt buyer or collector) who "has a legitimate business need for the information [] in connection with a business transaction that is initiated by the consumer [the original credit agreement]." 15 U.S.C. § 1681b(a)(3)(F) (2012). And finally, the repository would come under FCRA for furnishing the information "[t]o a person which [the repository] has reason to believe . . . intends to use the information in connection with a credit transaction involving the consumer on

sible accuracy,"[255] correction or deletion of disputed information,[256] and free consumer disclosures every twelve months,[257] as well as potential direct supervision by the CFPB.[258] But it would also cause additional concerns. The FCRA is ill fitted to the notion of a repository, and as currently written, it could do nothing to stop a repository from sharing this newly collected information with third parties, a development that has many potential negative consequences for consumers' privacy.

In addition, the FCRA's seven-year limit on reporting would also present a problem, as one of the most useful features of a repository would be its ability to report whether a debt has been paid or extinguished much longer than seven years since charge-off.[259] While the FCRA's provisions provide some threshold consumer safeguards, it has a mixed track record of empowering consumers to correct inaccurate credit reports. The consumer safeguards for any repository should be even stronger than those afforded by FCRA to safeguard the accuracy of and access to the information contained therein.

Given the MERS experience, there is also a real concern that agents of the repository would be called to testify in court about things of which they do not have personal knowledge—for example, the amount of the debt or the underlying terms of the agreement between the creditor and debtor. It would be crucial for the CFPB and other regulators to clarify that all a repository could verify is the assignment chain—that is, that creditor and XYZ Debt Buyer entered into an agreement that was deposited with the depository involving a particular set of consumer debts. The repository does not have personal knowledge of whether those debts are valid or correct, just that the creditor turned over documents about them to the repository for safe-keeping and that, for example, Buyer 1 sold a particular account to Buyer 2 who is now its only owner. In other words, a centralized debt repository could not satisfy (by itself) a debt owner's *prima facie* case in court.

All of this begs the question—is a repository necessary? While not strictly necessary, the idea of repositories is likely to grow in popularity in the future if regulators begin to require more from creditors, as the next subpart suggests they should. First, as to necessity: if the analysis is constrained to banks, the same beneficial functions outlined above could be accomplished if the creditor simply retained all of the information and

whom the information is to be furnished [for the] collection of an account of the consumer." 15 U.S.C. § 1681b(a)(3)(A) (2012) (emphasis added).

[255] 15 U.S.C. § 1681e(b) (2012).

[256] 15 U.S.C. § 1681i (2012).

[257] 15 U.S.C. § 1681j (2012).

[258] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting. *See* 12 C.F.R. § 1090.103. They may also qualify for supervision as service providers of depository institutions. 12 U.S.C. § 5515 (2012).

[259] *See* 15 U.S.C. § 1681c(a)(4) (2012).

documentation needed.[260] The creditor itself could keep a record of ownership, and only allow proper parties (current owners of the debt or their authorized servicers) to access this data. This starts to sound an awful lot like just placing a debt with a collection agency. If you retain liability and record-keeping, there would be little reason not to retain the upside (any eventual payment). Thus, some banks may react to stricter documentation and information rules from the CFPB by ceasing to sell debt. Nonetheless, others may find that even with the new regulatory attention, debt sales continue to make sense. Despite increased regulation, a secondary market for consumer debts will continue to exist if debt buyers are willing to purchase debts at a cost where it is better for the bank to sell rather than attempting to collect itself or placing the debt with a collection agency.[261] In these cases, a debt registry may facilitate debt sales by allowing banks to focus their due diligence and audits on the debt registry provider rather than on all subsequent debt buyers who may own the debts.[262] In other words, forcing banks to increase their diligence around charged-off accounts may in turn drive some banks to use a debt registry.[263]

C. Regulatory Action

Until recently, regulation of the entire collection ecosystem (creditors, debt buyers, collection agencies, and collection law firms) was distributed among multiple regulators who had many other priorities.[264] No single regulator had authority over both debt originators (creditors, in many cases banks) and debt collectors. The FTC gained primary enforcement power over the FDCPA in 1977, but it was (and is) prohibited from writing rules to interpret the Act, and so none have been written since.[265] The FDCPA prohibits debt collectors from, *inter alia*, using "unfair or unconscionable

[260] If we expand to non-bank delinquent debts, such as medical debts, a repository becomes a more useful concept because, among other things, it would allow consumers to check their outstanding debts with one of a handful or repositories as opposed to all potential creditors.

[261] This in turn, depends on the return to capital from collection recoveries. As the economy recovers it is more likely that collectors will see increased returns.

[262] *See Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance*, Office of the Comptroller of the Currency (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html, *archived at* http://perma.cc/8EBH-WUVD [hereinafter OCC Bulletin].

[263] It may also change the *ex ante* calculus of offering accounts to certain customers, reducing the supply of credit. As discussed in Part V.B., it may also have the effect of ameliorating the "sweat box" problem Ronald Mann has identified. *See infra* note 324 and accompanying text.

[264] *See* 15 U.S.C. § 1692l (2012) (describing how the Federal Trade Commission, Federal Deposit Insurance Corporation, Federal Reserve, National Credit Union Administration, Secretary of Transportation, and the Secretary of Agriculture all share enforcement responsibility over the FDCPA). After Dodd-Frank, the CFPB was added to the list of agencies with enforcement authority over the FDCPA. *See id.* The CFPB also gained rule-writing authority. 15 U.S.C. § 1692l(d) (2012).

[265] *See* 15 U.S.C. § 1692l (2012).

means" or making "false, deceptive, or misleading representation[s]" in connection with the collection of a debt.[266] It applies to "debt collectors," which include debt buyers, collection agencies, and collection law firms, but crucially *not* creditors who collect on their own debt.[267] The FTC can also prevent unfair and deceptive practices through the FTC Act, but banks and many other types of creditors collecting on their own debt are not covered by the Act.[268]

This fragmented authority changed in 2011 with the Dodd-Frank Act, which gave the CFPB a broad mandate over all players in the debt collection ecosystem—banks and other creditors, debt buyers, debt collectors, and collection law firms.[269] The Bureau can enforce both the FDCPA as well as the Consumer Financial Protection Act ("CFPA").[270] Similar to the FDCPA, the CFPA prohibits "unfair, deceptive, or abusive acts and practices" ("UDAAPs"); it applies to all players in the debt collection ecosystem.[271]

The Bureau's authority over both of these statutes is far-reaching: it is the first and only agency with authority to enact rules implementing both statutes.[272] It can supervise creditors as well as the largest debt buyers, collection agencies, and collection law firms; and it can enforce the FDCPA against collectors and the CFPA against creditors and collectors.[273] The Bu-

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[266] 15 U.S.C. § 1692e (2012).

[267] The FDCPA generally prohibits "debt collectors" from engaging in abusive practices. *See generally* 15 U.S.C. §§ 1601–1692o (2012); 15 U.S.C. § 1692a(6) (2012) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."). The FDCPA does not apply to "original creditors" collecting their own debt—e.g., CapitalOne calling a consumer about her overdue credit card bill—but for purposes of the Act, debt buyers are regulated as debt collectors. *See*, *e.g.*, Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) (holding that the FDCPA "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not").

[268] *See* 15 U.S.C. § 45 (2012).

[269] Dodd-Frank was enacted on July 21, 2010, but the authorities granted to the CFPB did not take effect until 2011. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[270] The FTC retains its enforcement powers under the FDCPA, *see* 15 U.S.C. § 1692l(a) (2012), and has significantly increased its activities in this area in the last few years. "In its two civil penalty cases [in 2012] . . . the FTC obtained $2.8 million and $2.5 million, respectively, the two largest civil penalty amounts the agency has ever obtained in cases alleging violations of the FDCPA." CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT ANNUAL REPORT 2012, at 14 (2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf, *archived at* http://perma.cc/KX4B-GY5N. *See also In Settlement with FTC, Debt Collectors Agree to Stop Deceiving Consumers and Pay Nearly $800,000*, FED. TRADE. COMM'N (Mar. 23, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/03/settlement-ftc-debt-collectors-agree-stop-deceiving-consumers-pay, *archived at* http://perma.cc/576V-RLLV.

[271] *See* 15 U.S.C. § 1692 (2012); 12 U.S.C. § 5531 (2012).

[272] 15 U.S.C. § 1692l(a) (2012).

[273] The CFPB has authority to supervise the "larger participants" in the debt collection markets. It defined the term in a rule in 2012, deciding that debt buyers, collection agencies, and collection attorneys whose revenue as a result of debt collection of a consumer financial product or service exceeds $10 million in annual receipts would be covered. The Bureau esti-

reau is expected to publish the first set of draft rules covering the entire debt collection market in early 2015.[274] This comprehensive authority is long overdue, and as this subpart argues, the CFPB's has the authority to declare the problematic practices described earlier as unfair or deceptive and to implement new rules to ameliorate most if not all of the issues identified in this article.

As described in the previous section, the industry has taken some steps towards correcting these problems; steps spurred perhaps by the almost inevitability of regulation in this area. However, without added regulatory pressure, it is unlikely that these reforms will go far enough since the incentives to "'race to the bottom' corrupting standards for everyone else remain."[275] Regulatory pressure to improve the processes around debt sales is increasing, and it is not coming just from the usual suspects. After an investigation into the practices around debt collection and debt sales of its regulated banks, the OCC recently elevated bank debt sales to a safety and soundness issue.[276] The regulator first issued a list of "Best Practices" around debt sales, followed closely by a Bulletin.[277] The Bulletin warns banks that they "face increased operational risk when they sell debt to debt buyers."[278] In particular, the regulator is worried about "[i]nadequate systems and controls [that] can place the bank at risk for providing inaccurate information regarding the characteristics of accounts, including balances and length of time that the balance has been overdue."[279]

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mates that this will cover 175 out of approximately 4,500 debt collection entities nationwide. Bureau of Consumer Financial Protection Rule (Oct. 31, 2012), *supra* note 253. In the interest of full disclosure, the author worked on this rulemaking as a CFPB staffer.

[274] *See supra* text accompanying note 12.

[275] *See* John D. Ayer, *The Role of Finance Theory in Shaping Bankruptcy Policy*, 3 AM. BANKR. INST. L. REV. 53, 58 (1995) (attributing the term to Louis Brandeis).

[276] *See* OCC Bulletin, *supra* note 262. "Two major focuses of banking supervision and regulation are the safety and soundness of financial institutions." *Banking Supervision & Regulation*, FEDERALRESERVEEDUCATION.ORG, http://www.federalreserveeducation.org/about-the-fed/structure-and-functions/banking-supervision/ (last visited Oct. 18, 2014), *archived at* http://perma.cc/TJ3C-NU3N. "To measure the safety and soundness of a bank, an examiner performs an on-site examination review of the bank's performance based on its management and financial condition, and its compliance with regulations." *Id.*

[277] *See* OCC Bulletin, *supra* note 262; *Debt Sales/Best Practices*, OFFICE OF THE COMPTROLLER OF THE CURRENCY 3–4, *available at* http://www.americanbanker.com/pdfs/occ-debt sales-bestpractices.pdf (last visited Nov. 9, 2014), *archived at* http://perma.cc/9ZYB-3X2T [hereinafter *OCC Best Practices*]. The OCC first got involved in these issues in 2011 after a whistleblower complaint against J.P. Morgan Chase alleging that Chase "used faulty account records in suing tens of thousands of delinquent credit card borrowers for at least two years." *See* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, AM. BANKER (Mar. 12, 2012, 9:24 PM), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html, *archived at* http://perma.cc/5C28-F5LX; David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Nov. 1, 2010, at A1, *available at* http://www.nytimes.com/2010/11/01/business/01debt.html, *archived at* http://perma.cc/9YRC-RSKV.

[278] OCC Bulletin, *supra* note 262.

[279] *Id.*; *see also Shining a Light on the Consumer Debt Industry: Hearing Before the S. Subcomm. on Fin. Inst. and Consumer Prot.*, 113th Cong. 36 (2013) (statement of the Office of

Among the new supervisory expectations listed in the Bulletin is a requirement that banks provide "detailed and accurate information to debt buyers at the time of sale (to enable them to pursue collections in compliance with applicable laws and consumer protection requirements)."[280] The regulator also requires that "for each account, the bank should provide the debt buyer with copies of underlying account documents, and the related account information."[281] It then outlines eight points of specific information (and documents) that must be provided at the time of sale:

- A copy of the signed contract or other documents that provide evidence of the relevant consumer's liability for the debt in question.
- All account numbers used by the bank (and, if appropriate, its predecessors) to identify the debt at issue.
- Copies of all, or the last 12 (whichever is fewer), account statements.
- An itemized account of all amounts claimed to be owed in connection with the debt to be sold, including loan principal, interest, and all fees.
- The name of the issuing bank and, if appropriate, the store or brand name.
- The date, source, and amount of the debtor's last payment and the dates of default and amount owed.
- Information about all unresolved disputes and fraud claims made by the debtor. Information about collection efforts (both internal and [collection agency] efforts, such as by law firms) made through the date of sale.
- The debtor's name, address, and Social Security number.[282]

Complying with these and other provisions in the Bulletin should go a long way towards correcting the problems identified in this article, at least at the creditor level.[283] But it will not necessarily solve the downstream problems as debts get sold and resold. As a regulator of both banks and debt collectors, the CFPB has the opportunity to affect all players in this area.[284] The rest of this section argues that a rule requiring a minimum level of information, documentation, and contractual representations is a natural best-fit solution for these problems since it has the potential to fix the collective action problem identified earlier.

Dodd-Frank gives the CFPB the authority to prohibit covered entities from engaging in unfair, deceptive, or abusive acts or practices. It also authorizes states' Attorneys General to bring civil actions enforcing the prohibition against UDAAPs on behalf of their state "with respect to any entity

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the Comptroller of the Currency), *available at* http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf, *archived at* http://perma.cc/U6BY-WLJ8.

[280] OCC Bulletin, *supra* note 262.

[281] *Id.*

[282] *See id.*

[283] *See id.*

[284] *See supra* text accompanying note 12.

that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law."[285] The CFPB should clarify that the practice of selling debts with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception.[286]

Both the FDCPA and the CFPA prohibit unfair and deceptive practices. The FDCPA does so generally, stating that a debt collector "may not use unfair or unconscionable means to collect or attempt to collect any debt."[287] It then lists eight non-exhaustive examples of an unfair practice. The FDCPA also prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt" generally, then lists sixteen specific situations that fall within the prohibition.[288] The rest of this subpart focuses on the CFPA analysis, since it is more restrictive than the FDCPA's.[289] As a result, much of this analysis can be imported into the FDCPA, which can be used by consumers as well as Attorneys General.

1. *Unfairness*

Unfairness is defined in Dodd-Frank as an act or practice that:

(1) Causes or is likely to cause substantial injury to consumers;
(2) The injury is not reasonably avoidable by consumers; and
(3) The injury is not outweighed by countervailing benefits to consumers or to competition.[290]

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[285] 12 U.S.C. § 5552 (2012); *see also* Alan Kaplinsky, *Illinois AG Files Lawsuit Asserting Dodd-Frank UDAAP Enforcement Authority*, CFPB Monitor (Mar. 27, 2014), http://www.cfpbmonitor.com/2014/03/27/illinois-ag-files-lawsuit-asserting-dodd-frank-udaap-enforcement-authority/, *archived at* http://perma.cc/AR65-BKDT. National banks are excluded from this provision, except to the extent that the Attorney General is "enforcing a regulation prescribed by the Bureau." *See* 12 U.S.C. § 5552 (2012).

[286] In the interest of brevity, this Article focuses on unfairness and deception because these are sufficient grounds for a CFPB action and are not as controversial as the "abusive" authority held by the CFPB. *See, e.g.*, George F. Will, *Consumer Financial Protection Bureau Abusive in its Mission to Stop Abuse*, PostBulletin.com (Nov. 19, 2012, 7:03 AM), http://www.postbulletin.com/opinion/consumer-financial-protection-bureau-abusive-in-its-mission-to-stop/article_e70969a5-e43e-5ddf-a874-7229d6492616.html, *archived at* http://perma.cc/B6BA-7TW6; *House Republicans Struggle to Control CFPB*, Housing Wire (May 21, 2014, 4:20 PM), http://www.housingwire.com/articles/30081-house-republicans-struggle-to-control-cfpb, *archived at* http://perma.cc/8Q9X-P7PZ. *But see* Jean Braucher, *CFPB's Anti-Abuse Authority: A Promising Development in Substantive Consumer Protection*, Credit Slips (Nov. 21, 2012, 2:06 AM), http://www.creditslips.org/creditslips/2012/11/cfpbs-anti-abuse-authority-a-promising-development-in-substantive-consumer-protection.html, *archived at* http://perma.cc/5C2R-QE8X.

[287] 15 U.S.C. § 1692f (2012).

[288] 15 U.S.C. § 1692e (2012).

[289] For example, the definition of "deception" under the CFPA requires that the act or practice have a material effect on the consumer. This is not required by the FDCPA. *See* 15 U.S.C. § 1692e (2012).

[290] 12 U.S.C. §§ 5531, 5536 (2012); *see also* U.S. Bureau of Consumer Fin. Prot., *CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the*

To help understand what qualifies as unfair practices, the CFPB looks to the standards for the same terms under Section 5 of the Federal Trade Commission Act ("FTC Act"), the language of which is very similar.[291]

Injury to the consumer is a central and determinative factor in defining unfairness under modern FTC case law.[292] A substantial injury "typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice" but, importantly, "actual injury is not required; a significant risk of concrete harm is sufficient."[293] Courts have found that an act or practice can cause substantial injury even when only "doing a small harm to a large number of people."[294] As an example, the CFPB has found that "using inadequate compliance monitoring, service provider management, and quality assurance systems that failed to prevent, identify or correct" improper charges to a consumer was an unfair practice.[295]

The practice of selling consumer debts as described in this article poses a significant risk of concrete harm to consumers. To wit, selling debts with little information about the consumer, without documentation, and without representation as to accuracy, title, or compliance with law is troubling. This practice discourages careful and accurate recordkeeping, exposes consumers to inaccurate credit reports (which can harm them in a myriad of ways), may expose them to judgments (and post-judgment remedies) for out-of-statute debts, debts that are not theirs, and multiple lawsuits for the same debt, and may also result in the collection of inaccurate amounts or from the wrong consumer. All of these present significant risks of harm to consumers.

The second prong of the unfairness analysis focuses on whether a consumer could avoid the injury. "An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's

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Collection of Consumer Debts 2 (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf, *archived at* http://perma.cc/8JHG-JV4V.

[291] *See* 15 U.S.C. § 45(n) (2012); *CFPB Bulletin 2013-07*, *supra* note 290, at 1; Consumer Fin. Prot. Bureau, CFPB Supervision and Examination Manual, at UDAAP 1 (2012), http://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf, *archived at* http://perma.cc/K9CU-SW6H [hereinafter CFPB Manual].

[292] Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, et al., to Senator Wendell H. Ford & Senator John C. Danforth (Dec. 17, 1980), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness, *archived at* http://perma.cc/T3G6-LHKQ ("[U]njustified consumer injury is the primary focus of the FTC Act."). According to the FTC, consumer injuries can take a number of forms—monetary, health, safety, or otherwise—and are to be measured by a cost-benefit analysis of their net effects. *See id. But see* Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. Rev. 349, 354 (1988) (criticizing the FTC's definition of unfairness).

[293] *CFPB Bulletin 2013-07*, *supra* note 290, at 2; *see also* In the Matter of International Harvester Company, 104 F.T.C. 949, 1061 (1984) (requiring for a finding of unfairness that there be consumer injury that is "substantial; not outweighed by any offsetting consumer or competitive benefits that the practice produces; and not reasonably avoidable by consumers.").

[294] FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010) (citing Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 972 (D.C. Cir. 1985)).

[295] *See* J.P. Morgan Chase Bank, N.A., 2013 WL 9008326 (Sept. 19, 2013).

ability to make informed decisions or take action to avoid that injury."[296] An injury "caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable."[297] The question is "whether an act or practice hinders a consumer's decision-making. For example, not having access to important information could prevent consumers from . . . choosing those that are most desirable to them, and avoiding those that are inadequate or unsatisfactory."[298]

Consumers cannot reasonably avoid the harm caused by the manner in which their accounts are bought and sold. Consumers are not a party to the sale transaction. Consumers also do not choose their debt buyer or their debt collector. Most consumers do not request the agreements between buyers and sellers, and those that do generally have to pay attorneys to obtain them. Consumers are unlikely to realize, for example, that a debt buyer may not know the appropriate date from which to calculate the statute of limitations or the credit reporting period for their debt. They are also unlikely to know that a debt buyer who sues them in court may not have admissible documentary evidence of their debt.[299]

Reasonable consumers can be expected to retain some account documents for some period of time. However, debt collection of an unpaid account can occur practically forever: a debt is only extinguished upon payment, bankruptcy, or the expiration of the statute of limitations in only three states. To discover a discrepancy, consumers would have to keep account records for an equally long period of time.[300] Moreover, consumers who are wrongly collected upon because they have similar names or other features to account-holders cannot reasonably avoid this.

The third prong requires a cost-benefit analysis; it excludes acts or practices that are not "outweighed by its consumer or competitive benefits."[301] Lower prices or increased availability of products may be countervailing benefits.[302] Costs required to prevent the injury are also considered here.[303] These include "an assessment of the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[304]

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[296] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[297] *Id.*

[298] CFPB MANUAL, *supra* note 291, at UDAAP 2.

[299] In a separate project, the author is documenting the difficulties that consumers who are sued in court have in understanding that the debt collector may not have evidence to prove their debt. *See supra* text accompanying note 161.

[300] *See supra* note 177 and accompanying text for an argument that consumers are not well-placed to bear this burden.

[301] *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

[302] *See* CFPB MANUAL, *supra* note 291, at UDAAP 3.

[303] *See id.*

[304] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 993 (D.C. Cir. 1985) (quoting Letter from Michael Pertschuk et al., *supra* note 292) (internal quotation marks omitted).

There are many benefits of a rule requiring that debt sales include sufficient information to allow the collector to locate a consumer and follow the law in collecting, sufficient documentation to allow the collector to prove the amount of the debt in court, and warrants about title, accuracy, and compliance with the law. It would increase trust in the collection system, allowing consumers to feel more confident that they are paying the right party. It would also increase collections from the right consumer of the right amount owed. In addition, when a collector filed a lawsuit against a consumer, she would have substantiating evidence to prove in court that the consumer owed that amount. This would ensure debt buyers only obtain judgments against consumers who truly owe the debt, for the right amount.

One potential downside is an increase of the cost of credit or a reduction of its availability to certain (e.g., subprime) consumers.[305] But creditors may not need to pass on the increased costs to consumers; debt buyers are also customers here. The increased collectability of delinquent accounts that are sold with complete information and documentation would offset some of the increased costs. Debt buyers should be willing to pay more for more collectible debts, in particular because they would also come with a decreased risk of exposure to consumer lawsuits for unfair and deceptive acts and practices under the FDCPA. Sloppy recordkeeping does not benefit consumers or competition; on the contrary, it hurts the ability of collectors to do their jobs and minimizes the likelihood that careful records and affirmative representations will become the norm.

Finally, public policy considerations established by any "statute, regulation, judicial decision, or agency determination may be considered," although they are not sufficient to declare an act unfair.[306] Public policy considerations weigh heavily for this rule. The FDCPA, the federal law focused on debt collection, is "designed to protect consumers from abusive debt collection practices and to protect ethical debt collectors from competitive disadvantage."[307] As argued in Part IV.A, ethical debt buyers[308] who want to purchase debts that include sufficient information and documentation and positive warrants as to title, accuracy, and compliance with laws, are disadvantaged by a system in which that is not the rule that regulators enforce.

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[305] While economic theory may predict this, it is not always a given in practice. For example, after Congress made private student loans presumptively nondischargeable in bankruptcy, the costs of those loans increased, contrary to economic theory. Xiaoling Ang & Dalié Jiménez, *Private Student Loans and Bankruptcy: Did Students Benefit from the Increased Collectability of Student Loans?*, UpJohn Inst. Press (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332284, *archived at* http://perma.cc/D76W-TD7Y.

[306] CFPB Manual, *supra* note 291, at UDAAP 3.

[307] Quinn v. Ocwen Fed. Bank FSB, 470 F.3d 1240, 1246 (8th Cir. 2006).

[308] Recall that debt buyers are also considered debt collectors under the FDCPA. *See supra* note 267 and accompanying text.

2. *Deception*

The CFPB can also ban deceptive practices. Deception is not defined in the Dodd-Frank Act, but the CFPB has issued guidance that an act or practice is deceptive when:

(1) The act or practice misleads or is likely to mislead the consumer;
(2) The consumer's interpretation is reasonable under the circumstances; and
(3) The misleading act or practice is material.[309]

Deceptive practices can "take the form of a representation or omission."[310] In a compliance bulletin, the Bureau noted that it "also looks at implied representations, including any implications that statements about the consumer's debt can be supported."[311] "[I]f a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation."[312] In other words, the representation need not be actually false for it to be misleading. "Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service."[313]

The CFPB notes that "[e]nsuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers."[314] In the FDCPA context, there are cases establishing that it is misleading for an attorney to send a dunning letter on attorney letterhead without "having meaningfully reviewed the case."[315] Courts have permitted attorneys to send dunning letters without review if the letters include "a clear disclaimer explaining the limited extent of the law firm's involvement in the collection action."[316] In a recent case, the CFPB has found that when attorney collectors file lawsuits without meaningfully reviewing the case, they represent "directly or indirectly, expressly or by implication, that attorneys were meaningfully in-

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309 *See CFPB Bulletin 2013-07*, *supra* note 290, at 3.

310 *Id*. "A practice is considered deceptive if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." FTC Debt Buyer Report, *supra* note 4, at 4 (quoting Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce (Oct. 14, 1983), *available at* http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception, *archived at* http://perma.cc/VSH7-LWBF) (internal quotation marks omitted).

311 FDC Debt Buyer Report, *supra* note 4, at 32.

312 CFPB Manual, *supra* note 291, at UDAAP 5.

313 *CFPB Bulletin 2013-07*, *supra* note 290, at 4. Perhaps counter-intuitively, debt collection is a "product or service" under Dodd-Frank. *See* 12 U.S.C. § 5481(15)(A)(x) (2012).

314 *CFPB Bulletin 2013-07*, *supra* note 290, at 3.

315 *See* Lesher v. Law Offices of Mitchell N. Kay, P.C., 650 F.3d 993, 1001–03 (3d Cir. 2011).

316 *Id.* at 1001; Greco v. Trauner, Cohen & Thomas, L.L.P., 412 F.3d 360, 364 (2d Cir. 2005).

volved in preparing and filing the complaint."[317] This, the CFPB finds, is deceptive under the CFPA.[318]

The deceptive act takes place when a collector requests that a consumer repay a debt without disclosing that (1) the debt was purchased subject to a contract that disclaimed all warranties, including those of accuracy, title, or compliance with laws and (2) the collector could not verify the amount claimed and other material aspects of the debt with account documents. This act is misleading because the consumer will reasonably believe that the information communicated is accurate and that the debt buyer has sufficient evidence to prove it.

It is reasonable for a consumer to interpret a collector's letter or statement about the debt as a statement that the collector has reasonable confidence in the amount she is representing the consumer owes. It is also reasonable for the consumer to believe that some form of evidence backs this statement. This interpretation is reasonable under the circumstances because the consumer is not privy to the contract and is unlikely to be able to obtain it even if she asks. Without disclosure by the debt collector, the consumer cannot know that the contract language casts doubt on the certainty of the information the collector is conveying to the consumer and the collector does not have documentation to corroborate material information about the debt.

The failure to disclose the underlying contract terms and to verify the amounts claimed is material because a consumer would change her behavior if she learned of the circumstances. For example, with this information the consumer may request verification of the amount sought in the form of account documents or other proof. If the debt buyer cannot provide this proof, the consumer could refuse to pay and seek a declaratory judgment pronouncing that she does not owe the debt. She may also request that the debt buyer prove that it is the owner of the debt by documenting the chain of title and assignment for her account. Debt buyers may have difficulty doing that, as described in Part III.B.4, which may mean the consumer could obtain a declaratory judgment in her favor.

In short, the CFPB has the authority to ban unfair and deceptive acts or practices. One solution to the problems identified in this article would be to declare these acts as unfair or deceptive practices. More specifically, creditors subject to the CFPB's UDAAP authority should be prohibited from selling a consumer debt with contract language that disclaims material aspects of the debt (e.g., title, compliance, accuracy). In addition, creditors should be prohibited from selling consumer debts without providing the buyer documentary evidence regarding the amount, type of debt, and date of last delinquency. The CFPB could detail examples of the kinds of documents and

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[317] Complaint at 33, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assoc., P.C., No. 14-02211 (N.D. Ga. July 14, 2014).

[318] *See id.* at 10.

information that should be kept by the creditor in order to avoid UDAAP liability.[319] It could also clarify minimal and best practice record retention policies.[320]

For debt buyers or their collectors, it would be a UDAAP (and a violation of the FDCPA) to attempt to collect on a debt without (1) obtaining documentary evidence regarding the amount, type of debt, date of last delinquency, and dispute history *at the time of purchase*, and (2) without obtaining specific and affirmative warrants from the seller regarding the material information and documentation provided about the debts. Concomitantly, debt owners and debt collectors would be required to verify the existence of a debt, its amount, the identity of the debtor, the limitations period status of the debt, the fact that the debt is in default, and the company's chain of title—based on the original information and underlying documentation in the company's own possession and that of the creditor—before any attempt to collect a debt. In the case of a debt sale, the contracts underlying each sale should be retained by the debt buyer and available to the consumer if she requests them. Terms that describe conditions of the receivables/accounts sold should not be redacted since they may provide a defense to the consumer.[321] Finally, the CFPB could require that debt buyers maintain account level proof-of-ownership information when they purchase an account. Debt buyers can only collect upon an account that they own, and having a spreadsheet of information (or even account statements) is not proof of ownership. Chain-of-title information should be kept at the account level.

After such a rule, consumer debts could not be collected upon without this information and consumers would have a right to request it from the purported debt owners. As a practical matter, creditors and collectors could maintain all of this documentary evidence themselves, or choose a third party to house it for them (as described earlier in the discussion on a debt registry). The responsibility would rest on creditors and debt collectors subject to the rule to ensure that this information was kept in a secure manner that minimized unauthorized access and tampering.[322] However, before *any-*

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[319] This could be a sort of safe harbor. For example, the Bureau could require creditors to keep copies of the twelve most recent account statements showing purchases/charges and payments, if any, made by the consumer, including the date, source, and amount of the most recent payment.

[320] *See* DBA Int'l, The Debt Buying Industry 7 (Apr. 11, 2014), *available at* http://masonlec.org/site/rte_uploads/files/DBA%20International%20Paper%202014.pdf, *archived at* http://perma.cc/PEM6-6MXB ("The challenge, however, is that frequently this information is not available. The original creditor is not required by law to itemize a debt when it's written off. Having no obligation to do so, most creditors do not maintain these records beyond legal document retention requirements. It is a legal inconsistency that cannot be reconciled.").

[321] *See* McCoy & Jiménez, *supra* note 12, at 20; Purchase Agreement (Jan. 6, 2010), *supra* note 92, at 5 (stating that "Seller has made no representation, and now makes no representation, with respect to any of the Receivables or with respect to the completeness and accuracy of any Receivables Documents").

[322] This is especially necessary as documents are originated and kept in electronic form and there is never a hard copy "original." Private (and opaque) implementations of data compression algorithms have been found to alter numbers in a document without any way to tell

one could collect on the debt, she would have to possess or have immediate access to this information (such that, for example, the collector can have procedures in place to verify the spreadsheet information with account statements).[323]

As Ronald Mann has observed, "[t]he successful credit card lender profits from the borrowers who become financially distressed."[324] In fact, in some cases lenders themselves may have helped drive consumers over the edge, particularly before the CARD Act.[325] Mann argues that the "standard" way to increase profits after a consumer has obtained a credit card is to "focus on those customers who are unable to take their business elsewhere" (because they are having financial difficulties).[326] "If the customers do not have realistic options, lenders are free to raise the interest rates and fees that they charge to those borrowers."[327] And this "rate-jacking"[328] increases the risk of default by the consumer "as the cardholder is now faced with a higher interest rate and greater monthly payment demands."[329]

Professor Mann's solution to this problem is a move to "allocate the losses between borrowers and lenders in a way that minimizes the net costs of financial distress."[330] His suggestion is to place more risks on lenders, "so that they will have an incentive to use information technology to limit the costs of distress."[331] A CFPB rule as described above could have this effect. Up until now, creditors have been able to charge debts off and obtain additional funds from selling them. But in doing so in the ways described in this

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that this had happened from looking at the document itself. *See* David Kriesel, *Xerox Scanners and Photocopiers Randomly Alter Numbers in Scanned Documents*, D. KRIESEL, http://www.dkriesel.com/en/blog/2013/0802_xerox-workcentres_are_switching_written_numbers_when_scanning (last visited Feb. 28, 2014), *archived at* http://perma.cc/4TL6-ELZ5?type=source; TerraHertz, *An Actual Knob (and a rack)*, EVERIST.ORG (Nov. 11, 2013), http://everist.org/NobLog/20131122_an_actual_knob.htm#jbig2, *archived at* http://perma.cc/J36U-G3LF?type=source.

[323] The Bureau could also require that in cases in which the creditor, debt buyer, or debt collector files a lawsuit to collect on the debt, the complaint should incorporate and attach as exhibits copies of the relevant account statements, a copy of the original debt contract and all amendments, and documentary evidence sufficient to establish the putative debt owner's chain of title and the standing of the plaintiff.

[324] *Sweat Box*, *supra* note 5, at 379.

[325] The CARD Act banned rate-jacking as described below. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.).

[326] *Sweat Box*, *supra* note 5, at 388.

[327] *Id.*

[328] "'Rate-jacking' [is] the phenomenon of a credit card issuer suddenly raising the interest rates or fees on an account, often applying the new rate retroactively to existing balances." Levitin, *supra* note 205, at 339.

[329] *Id.* at 364. Professor Levitin argues that "rate-jacking is detrimental to consumers because it allows riskier credit card products (from a consumer perspective) to crowd out less risky credit card products, much as nontraditional mortgages that featured low initial teaser rates (and then later reset to much higher rates) started to crowd out traditional fixed rate mortgages during the housing bubble." *Id.* at 366.

[330] Ronald Mann, *Optimizing Consumer Credit Markets*, 7 THEORETICAL INQUIRIES IN L. 395, 399 (2006).

[331] *Id.*

article, creditors have been externalizing the true costs of collection. Increasing the documentation and information requirements—as well as the regulatory oversight—could have the effect of just the kind of "distressed debt tax" that Professor Mann proposed by forcing creditors and debt buyers to internalize the costs of compliance with the law.

VI. Conclusion

This article examines the life cycle of a delinquent debt as it moves through collection and is purchased by a debt buyer. It describes how little information and documentation debt buyers obtain about the debts they buy and the obstacles to obtaining more. Analyzing a rare collection of consumer debt purchase and sale agreements, it finds that many contracts disclaim warranties and representations that go to the very nature of the debts being bought and sold. Selling consumer debts through contracts that disclaim that the seller had title, that the seller and applicable servicers complied with the law, and that the account information is correct poses a variety of problems, least of which is the amount of uncertainty and lack of legitimacy it introduces into the system.

Some consumers whose debts were sold under these contracts may have had a judgment entered against them by a court of law—a judgment that in many states will follow them for decades.[332] Perhaps the amount these individuals owed was correct, perhaps the interest calculation was as well, and perhaps the statute of limitations had not yet expired. The problem is, however, that it may be impossible to know whether any of these speculations are true. The creditor's warranty disclaimers and numerous examples of malfeasance should make us question these facts, but the systemic lack of information and documentation means that in a large number of cases, more documents or information about debts sold may no longer exist. The system is broken.

After positing a few reasons that might explain the nature of these transactions (without warranties, without documents), this article ultimately concludes that it is primarily a result of a regulatory failure. It argues that the CFPB should declare the practice of selling debts with inadequate information, no documentation, and disclaiming warranties as unfair and deceptive and write new rules requiring creditors and collectors to possess minimum levels of information and documentation before they can collect in compliance with the law. Clarifying these practices as unfair or deceptive will ap-

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[332] *See, e.g.*, N.J. Rev. Stat. § 2A:14-5 (2014) (20 years); N.Y. C.P.L.R. § 211(b) (McKinney 2010) (20 years); R.I. Gen. Laws Ann. § 9-1-17 (West 2014) (20 years); Ala. Code § 6-2-30 (2014) (20 years); Ky. Rev. Stat. Ann. § 413.090 (West 2014) (15 years); Ohio Rev. Code Ann. § 2305.06 (West 2014) (15 years); 735 Ill. Comp. Stat. 5/13-206 (2014) (10 years); La. Civ. Code Ann. art. 3499 (2014) (10 years); W. Va. Code § 55-2-6 (2014) (10 years); Wyo. Stat. Ann. § 1-3-105(a)(i) (West 2014) (10 years).

ply to all players, helping to stem a collective action problem that has prevented the market from self-correcting these issues.

Changing these practices will no doubt involve costs. But those costs will be offset by the increased capability of debt buyers to collect legitimate debts and the right amounts from the right consumers. As Douglas Baird has noted, "[t]here is nothing foreordained about the extent to which creditors should be able to call upon the state to collect their debts, and the rights extended here have always been carefully limited."[333] Improving the information and documentation included in a debt sale and warrantying material aspects of the debts such as warranty and title will not only help consumers, but the market as well.

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[333] Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 942 (2006).

Appendix

Table 1: This is an exemplar of the variety of contract terms in the Litigation Sample.[334]

Contract type[335]	1	2	3	4	5	6
Disclaimers						
Accounts are sold without recourse but no waiver x of warranties	👍					
Accounts are sold "as is," "with all faults," without recourse or any warranties unless explicitly stated		👎	👎	👎	👎	👎
Ownership of Accounts						
Seller warrants it has title to the accounts	👍					
Seller states that *to the best of its knowledge* it has title to the accounts it is selling		👎	👎			
Nothing said about whether seller owns accounts				👎	👎	👎
Accuracy of Information						
Nothing said about accuracy					👎	
Seller warrants that (some or all) information is accurate and complete in all material respects	👍					
Warrants that information is accurate *to the best of seller's knowledge*			👎			
Specifically *disclaims* representations as to accuracy of interest, amounts due, or date of first delinquency				👎		

[334] A "thumbs up" indicates positive representations about the debts.

[335] There are exactly three Type 1 contracts in the Litigation Sample: Second Amended and Restated Receivables Purchase Agreement (July 1, 2002), *supra* note 63; Receivables Purchase Agreement (Dec. 1, 2005), *supra* note 63; Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 63. An example of a Type 3 contract is Lot Fresh Charged-Off Account Resale (2011), *supra* note 76. There are exactly four Type 8 contracts, and all four involve the FIA entity (previously MBNA Bank)—a subsidiary of Bank of America. *See generally supra* note 20; *but see* Loan Sale Agreement between FIA Card Servs., N.A. and Asset Acceptance, L.L.C. (Aug. 1, 2011), at §§ 4.2 & 8.3(g), *available at* http://debtbuyeragreements.com/archives/316, *archived at* http://perma.cc/T7DV-Q2C3 (agreeing to an "as is" sale, but representing that the loans were originated and serviced in compliance with all laws).

Specifically *disclaims* representations as to accuracy or completeness of *all* information		👎		👎		👎
Compliance with Laws						
Nothing is said about compliance with laws					👎	
Seller is original creditor and warrants that it has complied with applicable consumer laws	👍	👍				
Debt buyer warrants that *one* owner/servicer (itself or original creditor) has complied with applicable consumer laws (silent as to other owners)				👎		
Seller (original creditor or debt buyer) states that it has complied *to the best of seller's knowledge* with applicable consumer laws			👎			
Specifically *disclaims* compliance with one or more laws						👎

TABLE 2: EXEMPLAR CONTRACT LANGUAGE FROM LITIGATION SAMPLE

No recourse sale but does not disclaim warranties and includes affirmative representations	"As is," "No warranties" and . . . positive representations	specific disclaimers
Seller has good and marketable title [to the Receivables] free and clear of all Encumbrances[336]	Seller has good and marketable title to each Charged-off Account to be sold hereunder and each such Charged-off Account shall be transferred free and clear of any lien or encumbrance.[337]	Most contracts make *no* affirmative representations about having title, but some do: [at closing] Seller will have good and marketable title to the

[336] Receivables Purchase Agreement between CompuCredit Int'l Acquisition Corp. and Partridge Funding Corp. (Apr. 4, 2007), at 4, *available at* dalie.org/wp-content/uploads/2014/10/2007.04.04-Compucredit-to-Partridge-Forward-Flow-few-reps-no-as-is.pdf, *archived at* http://perma.cc/8HZD-CHN4.

[337] Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Matrix Acquisitions, L.L.C. (July 29, 2009), at 5, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.07.29-Turtle-Creek-Assets-Ltd-to-Matrix-Acquisitions-LLC.pdf, *archived at* http://perma.cc/LSU9-58TB.

		Accounts, free and clear of all liens, charges, encumbrances or rights of others (other than the Purchaser).
[E]ach Receivable existing as of the Cut-Off Time . . . was created in compliance in all material respects with all Requirements of Law applicable to the institution which owned such Receivable at the time of its creation and pursuant to a Credit Card Agreement which complies in all material respects with all Requirements of Law[338]	Each of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act.	Seller makes no representations as to . . .the *compliance of the Accounts with any state or federal laws, rules, statutes, and regulations* . . .[339]
The Account Schedule list of Excluded Accounts is *accurate and complete in all material respects* . . . .[340]	This sale is made only with the representations and warranties that the balances set forth in Exhibit "A" and reflected as the principal balance of the Loans purchased hereunder *represent an accurate accounting of the actual outstanding balances* as of the Cut-Off Date, and that Seller owns the Loan.[341]	Seller makes no representations as to the *accuracy of any sums shown as current balance or accrued interest* amounts due under the loans [or] any other matters pertaining to the loans . . . .[342]

338 Receivables Purchase Agreement (Apr. 4, 2007), *supra* note 336, at 4.

339 Purchase and Sale Agreement between Credigy Receivables Inc. and Newport Capital Recovery Group II, L.L.C. (May 29, 2009), at 4, *available at* http://dalie.org/wp-content/uploads/2014/10/2009.05.29-Credigy-Receivables-Inc-to-Newport-Capital-Recovery-Group-II-LLC-.pdf, *archived at* http://perma.cc/XWG2-RYLX.

340 Second Amended and Restated Receivables Purchase Agreement between Household Bank (SB), National Association and Household Receivables Acquisition Company II (July 1, 2002), at 13, *available at* http://dalie.org/wp-content/uploads/2014/10/2002.07.XX-Household-Bank-to-Household-Receivables-Acquisition-Company-Forward-Flow-Agreement.pdf, *archived at* http://perma.cc/T36W-2EBU (emphasis added).

341 Purchase and Sale Agreement between CashCall, Inc. and GCFS, Inc. (Mar. 26, 2010), at 8, *available at* http://dalie.org/wp-content/uploads/2014/10/2010.03.20-CashCall-Inc-to-GCFS-Inc-.pdf, *archived at* http://perma.cc/A8SA-MM83.

342 *See* 2008, 2009, 2010 FIA Card Servs., N.A. Loan Agreements, *supra* note 20, at § 9.4.

TABLE 3: COMPANIES REPRESENTED IN LITIGATION SAMPLE

No.	Company Name	Number of Contracts	Roles
1	Turtle Creek Assets	10	seller (9), buyer (1)
2	CACH, LLC	8	buyer
3	Chase Bank USA, N.A.	7	seller
4	HSBC Bank / Household	7	seller
5	MBNA America Bank / FIA Card Services	7	seller
6	Wells Fargo	6	seller
7	Global Acceptance Credit Company	5	seller (2), buyer (3)
8	Cash Call, Inc.	4	seller
9	Citibank, N.A.	4	seller
10	Mountain Lion Acquisitions	4	seller (1), buyer (3)
11	Unifund CCR Partners	4	seller (3) and buyer (1)
12	Credigy	3	seller (2), buyer (1)
13	Midland Funding LLC	3	buyer
14	Ozark Financial Group	3	buyer
15	Asset Acceptance	2	buyer
16	Capital One	2	seller (1), buyer (1)
17	Cavalry SVP I, LLC	2	seller (1), buyer (1)
18	Cuda & Associates	2	buyer
19	GCFS, Inc.	2	seller (1), buyer (1)
20	GE Capital Bank/ Money Bank	2	seller
21	Genesis Financial Services/ Recovery Systems	2	seller (1), buyer (1)
22	Main Street Acquisitions	2	buyer
23	Platinum Capital Investments	2	seller
24	Riverwalk Holdings	2	seller
25	Sherman Originator USA/Sherman Acquisition	2	seller (1), buyer (1)
26	US Bank	2	seller
27	Wireless Receivables Acquisition Group	2	buyer
28	Accelerated Financial Solutions	1	buyer
29	Account Resolution Finance	1	buyer
30	Amos Financial	1	buyer
31	Arrow Financial Services	1	seller
32	Autovest LLC	1	buyer
33	BH Financial Services	1	buyer
34	Capital Debt Solutions	1	seller
35	Centurion Capital Corp.	1	buyer
36	CJMA Financial Corporation	1	buyer
37	Collect America	1	seller
38	CompuCredit International	1	seller
39	Covergence Receivables	1	buyer
40	Cuzco Capital Investment	1	seller
41	Debt One LLC	1	buyer
42	Dodeka LLC	1	seller
43	First Financial Portfolio Management	1	seller
44	First Select	1	seller
45	Hilco Receivables	1	buyer
46	Hudson Keyse LLC	1	buyer
47	Jefferson Capital Systems	1	seller

48	Juniper Bank	1	seller
49	LHR, Inc.	1	buyer
50	Livingston Financial	1	buyer
51	LP Investments	1	seller
52	Metris Receivables	1	buyer
53	MRC Receivables Corp.	1	buyer
54	National Credit Acceptance	1	seller
55	National Loan Exchange	1	seller
56	Newport Capital Recovery Group	1	buyer
57	NLEX LLC	1	seller
58	Northstar Capital Acquisitions	1	seller
59	Palisades Collection	1	buyer
60	Partridge Funding Corporation	1	buyer
61	Portfolio Recovery Associates	1	buyer
62	Providian National Bank	1	seller
63	Purchasers Advantage	1	buyer
64	RAB Performance Recoveries	1	buyer
65	Retailer Credit Services	1	buyer
66	Routhmeir Sterling	1	seller
67	Royal Financial Group	1	buyer
68	Sacor Financial	1	buyer
69	Security Credit Services	1	buyer
70	Sovereign Bank	1	seller
71	Sunlan Corp.	1	buyer
72	Target National Bank	1	seller
73	TD Bank USA	1	buyer
74	The 704 Group	1	buyer
75	The Bureaus Investment Group	1	buyer
76	United Credit Recovery	1	buyer
77	US National Bank	1	buyer
78	Zenith Acquisitions	1	buyer

ARTICLE

ENDING PERPETUAL DEBTS

Dalié Jiménez*

ABSTRACT

Consumer debts in the United States can effectively live (and grow) forever: most statutes of limitations do not extinguish them; they can morph into relatives' obligations after the debtor's death; and they sometimes rise from the grave even after they have been paid. All the while, interest and fees accrue. There is one sure way to extinguish most debts, however, and that is by filing bankruptcy. This Article explores the practical, philosophical, and economic effects of the current system. It proposes a form of "automatic bankruptcy" for consumer debts: a federal discharge that, by operation of law, would extinguish debts (roughly) seven years after a default, or seven years after a judgment. The Article explores additional features of this proposal including ones designed to ensure it is self-executing, and others that mirror features of the Fair Credit Reporting Act and the discharge provisions of the Bankruptcy Code.

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I. INTRODUCTION

For human beings, death is certain; but this is not so for debts. This Article argues that law and practice conspire to create a class of virtually perpetual debts that psychologically and actually burden those individuals for much longer than economically and socially justified. It argues for an automatic form of debt discharge to occur after a period of time during which creditors have been unsuccessful in extracting payment from a debtor.

As far back as the Bronze Age, Babylonian kings periodically issued proclamations cancelling all their subjects' debts.[1] In biblical times, these "Clean Slate" proclamations were codified into law and occurred regularly.[2] This was known as the Jubilee year; an "occasion of joyful celebration," since this was a time when many peasants returned home from serving as debt peons.[3] Despite calls for a Jubilee in modern times, it remains something ancient.

Today's debts can grow and persist seemingly forever. Paying the debt in full should suffice, but sometimes even this is not

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1. DANIEL C. SNELL, A COMPANION TO THE ANCIENT NEAR EAST 206 (2006).
2. MARC VAN DE MIEROOP, KING HAMMURABI OF BABYLON: A BIOGRAPHY 12 (2005).
3. JUDY BARNES ET AL., COASTING: AN EXPANDED GUIDE TO THE NORTHERN GULF COAST 241 (4th ed. 2003).

enough. The well-documented problem of "zombie debts" stems from the larger practice of selling and reselling unsecured debts with little to no evidence of the sale record and creates a world in which individuals may be contacted about a debt many years after it is paid and required to provide evidence that they indeed paid it. The death of the debtor also fails to extinguish the debt, and it may instead turn into the obligation not just of the estate of the deceased—the legal rule—but of the survivors for failure to know about their lack of obligation under the law.

It is common to think that statutes of limitations can kill debts.[4] But this is not the case in most states. Generally, these statutes only provide a defense to a civil action.[5] If the debtor fails to raise the defense in a timely manner, the creditor may obtain a judgment against her, and enjoy another ten or twenty years in which to collect.[6] In most states outside of Mississippi and Wisconsin, creditors can continue to pursue debtors outside of the courts past the limitations period.[7] Creditors may also attempt to persuade debtors to make a small payment or acknowledge the debt and thus restart the limitations period, even if that period had expired long before. This "reset" would once again allow a creditor to use the court process to collect from the debtor.

Debtors in the United States do have one escape from immortal obligations: they can avail themselves of bankruptcy protection. A bankruptcy discharge renders the debt uncollectible

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4. LaToya Irby, *What to Know About the Statute of Limitations on Debt*, THE BALANCE (May 31, 2017), https://www.thebalance.com/statute-of-limitations-on-debt-960565 [https://perma.cc/Q3DM-9F3S]; *see also* Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under the Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 CONSUMER FIN. L.Q. REP. 372 (2010) (noting that "[m]any lawyers are surprised to learn that a creditor or debt collector is allowed to collect on a time-barred debt. After all, it may seem that this is the point of having a statute of limitations.").

5. *See* Jeanine Skowronski, *50 Things Anyone Dealing with a Debt Collector Should Know*, CREDIT.COM (Apr. 5, 2017), http://blog.credit.com/2017/04/50-things-anyone-dealing-with-a-debt-collector-should-know-168944/ [https://perma.cc/7Z7A-9YEB]. The exception to this rule only applies in two states. In Mississippi and Wisconsin, the passing of the statute of limitations period extinguishes the right as well as the remedy. MISS CODE ANN. § 15–1–29 (1976); Thomas J. Watson, *Bankruptcy Cases: Proceed with Caution*, WIS. LAW., July/Aug. 2016, at 56. In those states, once the statutory period expires, the debtor no longer owes the debt. This is essentially the proposal of this Article. Unfortunately, I have found no economic studies of the impact of these rules on the availability or cost of lending in Mississippi or Wisconsin.

6. The creditor may open itself to liability under the Fair Debt Collection Practices Act (FDCPA) in this situation, and perhaps to the state analog to the FDCPA. However, these would be separate actions that could be pursued by the debtor against the creditor. 15 U.S.C. § 1692k(a), (d) (2012).

7. *See, e.g.*, Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, BANKING & FIN. SERVS. POL'Y REP., Aug. 2014, at 13.

from the individual and protects the debtor from future attempts at collection, making it a violation of a court order to do so.[8] But not all debts are dischargeable, and the process is costly and underused. Bankruptcy can also be overkill, like amputating a limb when a more exacting surgical procedure would do.

If a debt is not repaid in full, it will likely grow significantly over time.[9] The creditor will also be able to attempt to collect by filing a lawsuit against the consumer. Across the country, hundreds of thousands of such lawsuits are filed every year in state courts.[10] The creditor, as a result of the debtor's default, wins the overwhelming majority of these suits.[11] Once a creditor obtains a judgment, they can pursue the debtor for ten or twenty years in most states, sometimes longer.[12] This means that the idea is that even if the debtor is judgment-proof at the time of the judgment, the debt owner may continue to "follow" the debtor and recover if the debtor's situation improves.[13] But how long should this be allowed? What is the cost of this system, economically and socially? Should the system change? In what way? What are the implications of such a change?

This Article explores these questions. It ultimately argues for a debt Jubilee of sorts: a statutory procedure under federal law whereby individual consumer debts are automatically and regularly extinguished and cannot be revived. Akin to an "automatic" bankruptcy discharge, this system would unequivocally "kill" unsecured consumer debts seven years and 180 days after the consumer ceased paying, or seven years after they were reduced to a valid judgment. My proposal creates a uniform federal law applicable to consumer debts owed to private,

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8. Steven H. Resnicoff, *Interactions Between Bankruptcy Law and State Law: What Illinois Judges Need to Know*, 24 LOY. U. CHI. L.J. 437, 453 (1993).

9. Many contracts creating debts include provisions for adding interest and fees to a delinquent obligation. Even if there was no such provision, many states allow creditors to collect a statutory amount of interest. Rachel Marin, *Collecting Interest on Charged Off Debts and How Debt Collectors Must Disclose the Accrual of Interest to the Debtor Collecting Interest on Charged Off Debts and How Debt Collectors Must Disclose the Accrual of Interest to the Debtor*, BUS. L. TODAY, April 2014, https://www.americanbar.org/publications/4blt/2014/04/04a_marin.html [https://perma.cc/2SD3-ESZM].

10. Richard M. Hynes, *Broke but not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1 (2008).

11. *Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor*, HUMAN RIGHTS WATCH (Jan. 20, 2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor [https://perma.cc/5AUP-PJ6Z].

12. Gerri Detweiler, *Creditor Gets a Judgment Against You—Now What?*, CREDIT.COM (Apr. 20, 2017), http://blog.credit.com/2017/04/creditor-gets-a-judgment-against-you-now-what-51696/ [https://perma.cc/QMX2-9XT3].

13. In reality, it appears that most judgments go unpaid. Hynes, *supra* note 10, at 19–20, 56–57.

nongovernmental entities.[14] This goes beyond the typical "statutes of repose" and extinguishes both the right as well as the remedy and provides the former debtor affirmative statutory rights against someone who attempts to collect an extinguished debt.

Part II gives an overview of the laws governing different types of debts—how long a creditor must use legal process to collection for various debts and in what ways can debts be extinguished. It details how and when debts can become perpetual obligations. Part III discusses the benefits, consequences, and costs of these lasting debts. Part IV proposes and explores a solution: requiring that no matter what else happens, debts be automatically discharged after a (roughly) seven-year period of nonpayment. This Part also explores the likely effects of this proposal, addresses some likely objections, and discusses theoretical justifications. Part V concludes.

II. PERPETUAL OBLIGATIONS: THE LIFE OF DEBTS

My contention that most debts are effectively perpetual rests on a combination of formal law and law-in-action. This Part describes how debts are born, grow, and how they die. It then turns to explain how debts are like a cancer—perpetually growing—often even in cases in which one might think they die, such as when they are paid in full, the debtor dies, or the statute of limitations expires. Finally, I argue that in most cases, consumer debts can only meet their "true death" through a bankruptcy discharge.

A. Birth and Development

Debts can be born in many ways. They might come about as a result of a contractual agreement a consumer failed to honor: failing to pay a credit card bill, writing a check that bounces, or failing to pay a cell phone bill. A government may impose debts for late or nonpayment of taxes, tickets, fines, or other assessments.[15] Debts may be incurred after medical treatment if the insurance company refuses to pay the whole bill. If a debt is not repaid in full, the amount due will likely increase through interest rates and

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14. I specifically carve out debts owed to individuals—such as child support and alimony—and debts owed to governmental entities (e.g., taxes, fines, etc.). These items deserve special consideration and are beyond the scope of this Article.

15. Government debts can include fines, fees, orders of restitution, taxes, and federally guaranteed student loans, among others. U. S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/W35J-AX49].

fees. This growth can be quite substantial. Whether and how much interest accrues depends on the type of debt. If the debt was created by a contract, the contract probably included a provision for interest that compounds on a daily or monthly basis until it is repaid in full. If not, many states statutes allow creditors who did not provide for interest in their contract to charge simple or sometimes compound interest on delinquent debts.[16] Similarly, fees are typically spelled out in a contractual agreement, but may be added by operation of law in the form of, for example, court costs.

When a debt is delinquent, the creditor has a few options. Calling or writing the debtor are usually at the top of the list. If these tactics fail to produce payment, the remaining options depend on the type of debt.

If attempting to collect from the consumer proves unsuccessful, a creditor may hire a third-party collection agency to attempt to collect or may choose to recoup some of the loss by selling the obligation to a debt buyer.[17] Interest can continue to accrue on the debt if allowed by law or contract. After some time, the debt owner may choose to sue the consumer in state court.[18] Winning a debt collection lawsuit allows the debt owner to essentially turn an unsecured debt into a secured one by way of a judgment.[19] Since most cases are won by default, it is often the case that the plaintiff will not need to offer any proof—that the defendant owes the debt, the amount is correct, or the plaintiff is the current owner of the debt—because the allegations in the complaint are sufficient.[20] If the debt owner wins a lawsuit, court costs and judgment interest—plus attorney's fees if permitted by the contract—will be added to the debt.[21]

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16. CONN. GEN. STAT. § 31-1 (2015), 815. ILL. COMP. STAT. 205/2 (2016), MASS. GEN. LAWS ch. 107, § 3 (2016), FLA. STAT. § 687.01 (2016), TEX. FIN. CODE § 302.002 (2016).

17. *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 42 (2015).

18. Debts owed to the government operate a little differently. While the government (state or federal) can obtain a judgment and satisfy it using the same court processes as a private creditor, in practice this is rare. The reason is that in most cases the government enjoys extraordinary powers of collection. Danielle Douglas-Gabriel, *Trump Administration Welcomes Back Student Debt Collectors Fired by Obama*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/05/03/trump-administration-welcomes-back-student-debt-collectors-fired-by-obama/?utm_term=.639cbcfe21a1.

19. Kristi Welsh, *What's the Difference Between Secured Debt and Unsecured Debt?*, CREDIT.COM (Oct. 31, 2016), http://blog.credit.com/2016/10/whats-the-difference-between-secured-debt-unsecured-debt-161871/.

20. Danning v. Lavine, 572 F.2d 1386, 1388–89 (9th Cir. 1978).

21. Margaret Reiter, *What is a Money Judgement?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-is-money-judgment.html [https://perma.cc/RTB8-K6TA] (last visited Oct. 4, 2017).

Once a judgment is entered, the plaintiff–creditor—now a "judgment creditor"—can initiate supplementary proceedings to collect on that judgment. These proceedings vary significantly state by state. In some states, a plaintiff–creditor will need to first obtain a "writ"—court order—before executing in any of the defendant–debtor's property.[22]

The defendant–debtor may or may not be given notice of this writ, or a notice to appear to supplementary proceedings where the debtor is supposed to explain whether they have any non-exempt property that could be used to satisfy the judgment. Once issued, the writ orders the sheriff or marshal to look for non-exempt property of the debtor,[23] seize it, sell it, and pay the proceeds to the judgment creditor until the judgment is fully paid.[24]

In most states, a judgment creditor can garnish the debtor.[25] A garnishment is a legal means of collecting a monetary judgment

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22. *In re* Wilson, 38 B.R. 940, 941–42 (Bankr. W.D. Ky. 1984); Asher v. United States, 570 F.2d 682, 683–84 (7th Cir. 1978).

23. Each state has exemption laws which list precisely what kind or amount of property cannot be seized by judgment creditors and the process which must be taken before doing so. A debt collector is bound by the requirements of the FDCPA for it post-judgment collection activities. *See* Richard H. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 632, 647–48 (2006) (finding that garnishments are extremely common in Virginia).

24. Writs are routinely issued and delivered to sheriffs for "execution." Once the sheriff receives a writ, he or she will go looking for the debtor's property. In practice, the lawyer for the judgment–creditor may tell the sheriff exactly where to find the property of the debtor (such as a car, a stereo, a home, etc.). In most cases, the sheriff will take physical possession of the property (termed "to levy upon the property"); take it to the courthouse; advertise it; and sell it to the highest bidder. In the case of real property, a notice of seizure and sale will be posted, or potentially a judgment lien will be entered in the property record at the registry of deeds such that the property cannot be sold without taking account of the judgment. Any proceeds obtained from the sale of the property will go to pay the judgment creditor. *Construction Law Survival Manual: Ch 17—Enforcement of Judgment*, FULLERTON & KNOWLES, http://www.fullertonlaw.com/enforcement-of-judgment#f [https://perma.cc/HC9Y-CG3G] (last visited Feb. 4, 2018). An entry is made in the judgment record noting the partial or complete satisfaction of the judgment. If the proceeds are insufficient to pay the judgment in full, the sheriff will be commanded to look for other of the debtor's property to seize and the process will start again. In many of these cases, this process will stop with the sheriff because no non-exempt property is found or known about. While the sheriff has authority to go into a person's home and seize any property that is non-exempt—e.g., jewelry, flat-screen televisions, etc.—in practice this probably rarely happens unless someone knows specifically that the debtor has high value items in his home. If the debtor owns a car outright, or has equity in it, seizure will likely occur, since many states do not exempt cars from seizure. Justin Harelik, *What Can Creditors Take in a Bankruptcy?*, BANKRATE, http://www.bankrate.com/finance/debt/what-can-creditors-take-in-a-bankruptcy.aspx [https://perma.cc/4ZQ2-DAFT] (last visited Oct. 6, 2017).

25. *See, e.g.*, FLA. STAT. § 77.01 (2016); ALA. CODE § 5-19-15 (1975); ALASKA STAT. § 09.40.010 (2015); ARIZ. REV. STAT. § 12-1598 et seq. (2007); ARK. CODE ANN. § 16-110-402 (2015); CAL. CIV. PROC. CODE § 706.050 (West 2016); COLO. REV. STAT. § 13-54-104 (2015); CONN. GEN. STAT. § 52-361a (2015); GA. CODE ANN. § 18-4-20 (2016), KY. REV. STAT. § 425.506 (2016).

against a judgment debtor by ordering a third-party—the garnishee—to pay money, otherwise owed to the defendant-debtor, directly to the judgment creditor.[26] A judgment creditor will typically seek to garnish a debtor's bank account or wages from his employer.[27]

A minority of states do not allow wage garnishment to satisfy unsecured consumer debts—but do for debts related to taxes, child support, federally-guaranteed student loans, and court-ordered fines or restitution.[28] Several other states observe maximum thresholds that are lower than the 25% maximum provided by federal law.[29] Some states prohibit garnishment altogether in certain circumstances.[30]

Once a creditor obtains a judgment, she has much longer than the original statute of limitations period to pursue the debtor: 10 or 20 years in most states, sometimes longer.[31] In New York, for example, a judgment creditor may initiate a collection proceeding up to 20 years after a judgment has been issued.[32] This means that a consumer may be obligated to pay up on a debt up to 26 years after she ceased paying.[33] During those 26 years, post-judgment interest continues to accrue.[34] In most states, post-judgment

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26. 32 CFR § 935.97 (2016).

27. *Garnishment: Forcing Debtors to Pay Involuntarily*, HIDAY & RICKE, P.A., https://www.dropbox.com/s/zrzxrzd38rd7nw3/Hiday-Ricke-Garnishment-Forcing-Debtors-to-Pay-Involuntarily.pdf?dl=1 (last visited July 26, 2015) [http://perma.cc/9FXZ-ZT8U] (noting that "garnishments can be an extremely effective recovery tool [and that] they account for a large percentage of the funds that we collect on behalf of our clientele")

28. With the exception of Pennsylvania, North Carolina, South Carolina, and Texas, all states allow some form of garnishment. to satisfy unsecured consumer debts. PA. CONS. STAT. § 8127 (2005); N.C. GEN. STAT. § 110-136 (2015); N.C. GEN. STAT. § 120-4.29 (2015); S.C. CODE ANN. § 37-5-04 (2016); TEX. CONST. ART. 16, § 28 (2017).

29. DEL. CODE ANN. tit. 10, § 4913 (2003); 735 ILL. COMP. STAT. 5/12-803 (2006).

30. The other type of garnishment, also known as attachment (or attachment of earnings), requires the garnishee to deliver all the defendant's money and/or property in the hands of the garnishee at the time of service of process to the court, to be paid over to the judgment creditor. Since this type of garnishment is not continuing in nature, but is not subject to the type of restrictions that apply to wage garnishment, it is most often used to levy bank accounts. William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 608–09 (1968).

31. *See, e.g.*, N.J. REV. STAT. § 2A:14-5 (2014) (20 years); N.Y. C.P.L.R. § 211(b) (McKinney 2010) (20 years); R.I. GEN. LAWS ANN. § 9-1-17 (West 2014) (20 years); ALA. CODE § 6-2-32 (2014) (20 years); KY. REV. STAT. ANN. § 413.090 (West 2014) (15 years); OHIO REV. CODE ANN. § 2305.06 (West 2014) (15 years); 735 ILL. COMP. STAT. 5/13-206 (2014) (10 years); LA. CIV. CODE ANN. art. 3499 (2014) (10 years); W. VA. CODE § 55-2-6 (2014) (10 years); WYO. STAT. ANN. § 1-3-105(a)(i) (West 2014) (10 years).

32. *In re* Ballenzweig's Estate, 22 N.Y.S.2d 541 (1940).

33. This assumes the consumer was sued on the debt just before the six-year statute of limitations expired. *See* N.Y. CIV. PRAC. LAWS & RULES § 201 et seq.

34. David Gray Carlson & Carlton M. Smith, *New York Tax Warrants: In the Strange World of Deemed Judgments*, 75 ALB. L. REV. 671, 692–93 (2012).

interest is set by statute or by the court with a statutory maximum. A maximum of 8–12% is not uncommon.[35]

Exacerbating the problem, some states allow post-judgment interest to compound, typically annually. As an example, in Michigan, the post-judgment interest rate for a defaulted credit card debt is 12%, compounded annually.[36] If a creditor obtained a $1,000 judgment in Michigan, she could be entitled to collect as much as $3,105.85 from the debtor through legal proceedings for up to 10 years after the judgment.[37] In contrast, the same debt in a state using simple interest would only rise to $1,900 after 10 years of remaining unpaid. After the expiration of the judgment (10 years in Michigan, longer in many other states), the creditor may still contact the debtor to obtain payment of whatever is left on the debt, although she would not have any legal means to coerce the debtor into paying.[38]

Why might a creditor wait to collect from a debtor? Sometimes it is because the debtor does not have any assets that could be seized to pay his creditors—that is, the debtor is judgment proof. The creditor might also determine that although collection costs are added to the debt, it is too costly to attempt to collect. The creditor might also hope that the debtor repays voluntarily—through phone calls or the like.

B. Cancerous Growth

Cancer cells are immortal.[39] They replicate endlessly; growing and growing perpetually.[40] My contention is that in important ways, in the United States, debts function the same way. At bottom, a debt is an obligation to pay a sum to another party. The sum itself is often changing; growing as interest accumulates,

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35. But note that the Supreme Court of Connecticut recently decided that courts do not have discretion to award post-judgment interest in a situation where the contract involved a loan and the parties agreed to a post-maturity interest rate. Sikorsky Fin. Credit Union, Inc. v. Butts, 108 A.3d 228, 233 (Conn. 2015).

36. MICH. COMP. LAWS ANN. § 600.6013 (West). This 9% compounds annually. The formula is Principal x (1 + interest rate)$^{\text{time (in years)}}$.

37. These numbers would be different if the debtor made any payments towards the debt. Michigan has a ten-year statute of limitation for collecting on a judgment. MICH. COMP. LAWS ANN. §600.5809(3) (West).

38. Depending on the interest rate, there may be incentives for a creditor to wait to get paid. AJ Walker, *Old Debt Can Take a Chunk out of Your Paycheck*, NBC CONN. (May 14, 2015, 7:12 AM), http://www.nbcconnecticut.com/troubleshooters/Old-Debt-Can-Take-a-Chunk-Out-of-Your-Paycheck-303688231.html [https://perma.cc/5T43-GV8G].

39. *Cancer Cells*, CANCER RESEARCH UK (Oct. 28, 2014), http://www.cancerresearchuk.org/about-cancer/what-is-cancer/how-cancer-starts/cancer-cells [https://perma.cc/SHY2-WLAK].

40. *Id*.

decreasing if the debtor makes a payment. In many important ways, however, consumer debts refuse to die.

Even when repaid in full, some debts may return, like zombies rising from the grave. The debtor's death does not kill her debts; they survive and may haunt the debtor's family members for months or years after.[41] At first blush, the expiration of the statute of limitations may seem to spell the end for a debt. However, in most circumstances these statutes are not meant to be debt-killers; they merely lessen the debt owner's remedies. In practice, they may have no effect unless the debtor explicitly asserts her rights. The only way to ensure a debt truly dies is through a bankruptcy discharge. Obtaining a discharge is akin to achieving permanent remission. Like with cancer, however, remission comes at a cost.

1. Full Payment. Full payment of a debt would seem like a very good way to kill it entirely. Paying it in full ostensibly extinguishes it. The debtor fulfills her obligation and the creditor is made whole. This is true for many debts, but today individuals must worry about debt zombies rising from the full payment grave to haunt the former debtor.[42]

Most unsecured consumer debts that remain unpaid are sold to debt buyers after a few months or a year of nonpayment.[43] In these situations, the buyer buys the rights that the creditor had to collect from the debtor. In many cases, that is all they buy.

As I have described elsewhere, the contracts selling these debts do not purport to sell much else—many disclaim all warranties of title or accuracy.[44] Few include any documentation about the debt.[45] All that is transferred between creditor and buyer is information about a debt (the debtor's name, address, amount of the debt, when it was incurred, etc.).[46] This is the same information that is transferred between debt buyers when the debt is sold multiple times, as often happens when it remains unpaid.

Because all that is transferred during a debt sale is information, the theft or disclosure of this information to third

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41. *In re* Marriage of D'antoni, 125 Cal. App. 3d 747, 749 (1981).

42. *See, e.g.*, Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 330 (2014).

43. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 96 (2017).

44. Jiménez, *supra* note 17, at 59.

45. Brian Burnes, *Jackson County Jury Assesses $82 Million Verdict Against Debt Collection Firm*, KAN. CITY STAR (May 15, 2015, 8:48 AM), http://www.kansascity.com/news/local/article21073359.html [https://perma.cc/M5C9-M2YP].

46. *In re* Pursley, 451 B.R. 213, 217 (Bankr. M.D. Ga. 2011).

parties means that those third parties would have the same information as the debt buyer and could pursue the debtor despite the fact that they do not own the debt.[47] Thus, payment in full may not extinguish the debt: the debtor may have paid the wrong party,[48] or the debt buyer may have sold the same debt to two different parties,[49] or sold it without disclosing that it had already been paid in full.[50] The longer a debt goes unpaid, the more times it is sold and resold, and the more likely it will turn into a zombie.

2. Death of the Obligor. Another natural way that debts should die is if the obligor dies. But this is often an imperfect death. Debts survive the death of the obligor.[51] Creditors can seek payment from the assets of the estate of the deceased.[52] In the ideal world, the estate has a trustee who liquidates assets to repay creditors and then under the supervision of a probate court, doles out any remaining assets to the estate's beneficiaries.

The reality for most Americans is much more muddled. Most individuals are insolvent—or close to it—upon their death.[53] In these situations, there is little reason for survivors to pay expensive trustee or probate fees. Instead, the survivors—typically the spouse or children—do what they can, all the while grieving for their family member.[54] Most estates have such few assets that they do not go through probate, leaving the deceased relatives to figure out what to do about the phone calls they receive from creditors about their relative's debts.[55] Survivors sometimes pay debts out of their own pocket because they do not understand the law. Eventually these debts die when the estate is administered, but before doing so, they may morph into debts of the spouse or children.[56]

47. JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD 5–7 (2015).

48. Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 270 n. 75 (2011).

49. *Id.* at 271 n.76.

50. *Id.* at 271 n.78.

51. Bill Fay, *Debt of Deceased Relatives*, DEBT.ORG, https://www.debt.org/advice/deceased-relatives/ [https://perma.cc/276R-HQW2] (last visited Oct. 10, 2017).

52. *Id.*

53. *Id.*

54. *See FTC Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts*, 76 FED. REG. 44915 (July 27, 2011).

55. *See* Concurrence of Commissioner Julie Brill, FDCPA Enforcement Policy Statement Matter No. P104806 (Jul. 20, 2011), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/statement-policy-regarding-communications-connection-collection-decedents-debts-policy-statement/110720fdcpa.pdf [https://perma.cc/A8WE-9BNN].

56. Paul Muschick, *Debt Collector Sued for Pursuing People for Relatives' Debts*, THE

3. Statutes of Limitations (SOLs). Statutes of limitations "are, and have been, considered basic in our legal system, as well as in others."[57] They have existed for almost four hundred years in Anglo-American law.[58] Sometimes called "statutes of repose," the often-repeated justification is that "they are designed to protect against stale claims after evidence has been lost, memories have faded and witnesses have disappeared."[59]

Some have argued that "the word 'repose' can be taken literally in this situation—that relief of individuals from worry over past events is a proper public purpose."[60] In their current form, however, statutes of limitations do not serve that purpose. First, in most states, statutes of limitations are only an affirmative defense to a civil action.[61] Failing to raise the defense early enough in a case typically waives it.[62] Second, not all debts have a corresponding limiting statute.[63] Third, it is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths. Fourth, most statutes of limitations only extinguish the legal remedy, not the right to collect.[64] Expiration of the statute does not prevent a creditor from calling or writing the debtor seeking to collect.[65] Finally, in most states and circumstances it is very easy

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MORNING CALL (June 10, 2015), http://www.mcall.com/news/local/watchdog/mc-hamilton-law-group-james-havassy-filial-responsibility-law-watchdog-20150610-column.html [https://perma.cc/M7X8-KS2U].

57. Charles C. Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 131 (1955).

58. "The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law." *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950).

59. Callahan, *supra* note 57, at 133. Typically, the concern is about the defendant being unable to produce old evidence, not the plaintiff. *Id.*

60. *Id.* at 136.

61. *See* Sobol, *supra* note 42, at 346.

62. *See* Dominczyk, *supra* note 7, at 13.

63. Some debts do not even enjoy the imperfect "repose" provided by a limitations period. All civil actions between private parties have a limitation period, but not all actions that could be brought by a government (state or federal) do. For example, federally-backed student loans have no statute of limitations. *See* 20 U.S.C. § 1091a(a) (2012). Also, willfully failing to file tax returns means that there is no statute of limitation on how far back the IRS or many state equivalents might reach. *See* Robert W. Wood, *Even the IRS Has Time Limits*, FORBES (Oct. 8, 2009, 12:00 PM), http://www.forbes.com/2009/10/08/IRS-tax-audits-statute-limitations-personal-finance-wood.html [https://perma.cc/XC2Y-M99Z].

64. *See* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 45 (2013), http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf [https://perma.cc/929N-EUCB].

65. *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 22–23 (2010), https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-

for a consumer to restart a statute by something as simple as making a small payment.[66]

a. Affirmative Defense Must Be Asserted or Waived. Most statutes of limitations merely provide a defense to a civil action.[67] The creditor can sue, and in most cases does not even have an obligation to plead that the lawsuit was filed within the limitations period.[68] If the debtor does not affirmatively raise the limitations defense early enough in the case, she will waive the defense and the lawsuit will continue.[69] Raising the defense shifts the burden to the plaintiff to prove they sued within the limitations period, but the consumer first has to know that this is an option. The overwhelming number of debt collection cases today are decided not on the merits but through a default judgment.[70] When consumers do appear in court to contest, they often do so without a lawyer.[71]

The Fair Debt Collection Practices Act (FDCPA or "Act") covers some consumer debt cases; in those situations, debt collectors who file a lawsuit past the statute of limitations do so in violation of the Act.[72] This may be little consolation for the consumer who's been sued, however. In the state court debt lawsuit—these are invariable in state court—she will still need to raise the affirmative defense of the statute of limitations. If she does so successfully, the lawsuit should be dismissed. If she does not raise it or does not raise it on time, the lawsuit will proceed

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collection-litigation [https://perma.cc/FK4G-8GEB].

66. *See* Sobol, *supra* note 42, at 347.

67. This is true around the world also. *See* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 4–121 (Mauro Cappelletti ed., 2014).

68. FED. R. CIV. P. 8. This was not always the case. For example, adversary possession cases in England in the 1400s and up to at least 1540 placed the burden on "the plaintiff to show that the action was started within the limitation period. . . ." Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157, 162–64 (1927).

69. "When the statute runs, a power is created in the debtor to bar any action commenced by the creditor, by pleading the statute." Albert Kocourek, *Comment on Moral Consideration and the Statute of Limitations*, 18 ILL. L. REV. 538, 540 (1923).

70. *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 208 (2014); Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 362–63 (2012); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 271–72 (2011).

71. *See* Jiménez, *supra* note 17, at 55. The creditors also often dismiss these cases because they are not prepared to proceed despite having filed the case. *See* Spector, *supra* note 70, at 295–97 (stating that in cases in which defendant debtors appeared, plaintiff creditors often opted for dismissal without prejudice).

72. Jiménez, *supra* note 17, at 77 & n.140.

and she might be found liable.[73] She will then have an independent cause of action under the FDCPA—and perhaps analogous state laws—against the debt collector.[74] There are limits, however. She will need to bring this claim within one year of the collector's lawsuit—due to the FDCPA's own statute of limitations—and her maximum recovery will be limited to $1,000 for the violation, any proved actual damages, and attorney's fees for the FDCPA case.[75] While there are generally more attorneys who take FDCPA cases than debt collection cases, the consumer who fails to raise her limitations defense still has to know that she has a possible cause of action under federal law.

b. Difficult to Ascertain. In the United States, state legislatures set most periods of limitation. These typically vary by type of action.[76] For example, actions based on written contracts tend to have limitations between 3–10 years; oral contracts between 3–6 years.[77] There is even wider variety. Besides written and oral contracts, many states have different limitations periods for implied account stated,[78] sales of goods, leases, dishonored checks, and promissory notes. It is critical for a consumer to determine which limitation period applies to the debt.[79] Figuring out which statute applies to a particular debt can sometimes be a very

73. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 495–96 (1997) ("While the sanction is certainly severe (the defense of limitation, if successful, completely bars the plaintiff's claim), there are currently so many exceptions to limitation of actions that many prospective plaintiffs will be tempted to file anyway.").

74. *See* Jiménez, *supra* note 17, at 77 & n.140; *see also* FED. TRADE COMM'N, *supra* note 65, at 6.

75. 15 U.S.C. § 1692k(a), (d) (2012).

76. *See generally 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016). Federal law sets the limitations period for debts that arise out of federal obligations—taxes for example. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 518 (1986) (stating "statute of limitations is thus a matter of federal law" when federal claims are at issue).

77. *See 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016).

78. *Id.*; Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339, 340 (2013) ("Implied account stated is a cause of action, pled when a creditor sues to recover a debt."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 282 (AM. LAW INST. 2017); 1 AM. JUR. 2D ACCOUNTS & ACCOUNTING § 26 (2017).

79. This assumes the consumer first understands that there is such a thing as the statute of limitations. In other research interviewing debt collection defendants in small claims courts in Connecticut, Maine, and Massachusetts, researchers have encountered defendants who had difficulty believing there was such a law. *See* D. James Greiner, Dalié Jiménez & Lois Lupica, *Self-Help, Reimagined,* 92 IND. L.J. 1119, 1168, 1171 & nn. 237–38 (2017).

complex undertaking and one not easily resolvable without a court's involvement.[80]

First, one needs to categorize the type of limitation that applies. Consider the purchase of a washing machine on credit in New York. Is the transaction governed by a "contract" or is it a "sale of goods?" Oral and written contracts have a six-year limitation period in New York.[81] However, the Uniform Commercial Code Article 2—applicable in New York and every other state save Louisiana—places a four-year limitations period on a collection claim where the original contract was one for the sale of goods.[82] This supersedes state laws that are specific to statutes of limitation, but it would not be something that even a savvy consumer is likely to know about. To complicate matters further for consumers, courts have held that the Uniform Commercial Code governs transactions that are not obviously sales of goods, such as a collection action on a store credit card or actions to collect delinquent utility bills for water, electricity, and gas.[83]

What about a "simple" credit card debt? Federal law requires that credit card agreements be in writing and contain certain disclosures.[84] But if the creditor cannot produce the written contract or evidence that the consumer agreed to the contract terms, she will likely sue under an "account stated" theory—if the state allows it.[85] Indeed, many debt collection lawsuits today are filed on that theory, despite most being made up of credit card debts owed originally to large national banks.

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80. Paul D. Rheingold, *Solving Statutes of Limitation Problems*, *in* 4 AM. JUR. TRIALS 441, 449–51 (1966). ("Nothing short of a treatise could cover all the problems attending the application of the statutes of limitations of the fifty states and of the federal jurisdiction, and such treatment would not be of direct interest to the practicing attorney."); Brief of ACA Int'l as Amicus Curiae in Support of Petitioner at 4, LVNV Funding, LLC v. Crawford, No. 14-858 (U.S. Feb. 19, 2015) ("Whether a debt is time-barred is not always a simple question, and sometimes requires an analysis that goes far beyond any duty that Congress has imposed on debt collectors under the Fair Debt Collection Practices Act.").

81. N.Y. C.P.L.R. § 213 (McKinney 2017).

82. U.C.C. § 2-725 (Am. Law Inst. & Unif. Law Comm'n 2014).

83. *See generally* NAT'L CONSUMER LAW CENTER, COLLECTION ACTIONS: DEFENDING CONSUMERS AND THEIR ASSETS § 3.75 (1st ed. 2008) (stating that UCC Article 2 statute of limitations applies to collection actions on store credit cards and delinquent utility bills).

84. *See* 12 C.F.R. § 226.6 (2017)*; see also Credit Card Agreement Database*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/credit-cards/agreements/ [https://perma.cc/D4XL-VUXE] (last visited Oct. 14, 2017).

85. *See* Turnbull, *supra* note 78, at 343–44, 370–71 (stating that debt buyers often plead under an account stated theory due to difficulties obtaining required documents, such as the original contract, from original creditors).

Another difficulty with limitations periods is that it not always clear which state's limitation period applies. Imagine a consumer who, while a resident of state A, obtained a credit card issued by a bank incorporated in state B. The agreement contained a choice-of-law clause selecting state C as the state whose law governs. The consumer now lives in state D and is sued there.[86] Which state's limitations period applies? Does it matter where the consumer resided when the contract was first breached? The answer depends entirely on state D's statutory and common law. It is not always possible to analyze with certainty.

Debt collectors frequently criticize the complexity of statutes of limitation,[87] and with good reason.[88]

c. Debt Remains Due and Payable Past Expiration of Statute. In most cases, statutes of limitations only extinguish the legal remedy, but they do not extinguish the "right" to collect.[89] In those circumstances, creditors can continue to dun debtors outside of court past the limitations period.[90] Creditors can also nudge a debtor to restart the limitations period by persuading her to make a small payment towards the debt, or in some states, by simply acknowledging the debt.[91] If the debtor made such a payment or

86. If the lawsuit was for a "consumer debt," the creditor or debt buyer should file suit in the jurisdiction in which the consumer lives. 15 U.S.C. § 1692i (2012). If it is a business debt, no such requirement would apply. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 719 (stating that the FDCPA specifically excluded the collection of debts from businesses and does not apply).

87. *See* NARCA, POLICY POSITIONS ADOPTED BY THE NARCA BOARD OF DIRECTORS, (June 27, 2011), http://c.ymcdn.com/sites/www.narca.org/resource/resmgr/About_NARCA/NARCAPolicyPositions.pdf [https://perma.cc/5KWZ-BXYH] ("NARCA concurs with the FTC that, ideally, statutes of limitations for consumer debt should be clear, simple and uniform."); FED. TRADE COMM'N, *supra* note 64 at 49 (noting that "[t]he debt collection industry claims it is difficult to determine whether a debt is time-barred because different statutes of limitations could apply and there could be facts that tolled or restarted the statute of limitations.").

88. *See* Ochoa & Wistrich, *supra* note 73, at 496. ("[I]t has become increasingly difficult to dispose of time-barred claims as a threshold or preliminary matter (that is, by demurrer or summary judgment) rather than at trial . . . . This difficulty also means that the legal system spends considerable time and resources in determining which claims are barred and which are not.").

89. Campbell v. Holt, 115 U.S. 620 (1885). *But see* Sprecher v. Wakeley, 11 Wis. 432, 433, 438–41 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only . . . . The statute of limitations is not only a bar to the remedy, but it takes away the legal right.").

90. *See, e.g.*, Buchanan v. Northland Grp., Inc., 776 F.3d 393, 396–97 (6th Cir. 2015) ("Under Michigan law, as under the law of most states, a debt remains a debt even after the statute of limitations has run on enforcing it in court.") (citing De Vries v. Alger, 44 N.W.2d 872, 876 (Mich. 1950)).

91. In many cases, filing this lawsuit might be a violation of the Fair Debt Collection Practices Act (FDCPA), or even state laws. However, the FDCPA and state statutes tend to

acknowledgment, courts treat it as a waiver of the previous limitations period and allow creditors to pursue the debtor as if the limitation had not run.[92] This is so even if the debtor restarted the clock unwittingly.

This is not the case in Mississippi or Wisconsin. In these two states, the expiration of the limitations period on a debt means "the right is extinguished as well as the remedy."[93] In other words, once the expiration period passes, the creditor loses all rights it had to the debt—the debtor is fully released. The Wisconsin Supreme Court explained that in their view, the expiration of the statute creates a new property right in the debtor.[94] This is precisely my proposal in this Article: a way to kill debts definitively and completely.

In Mississippi, the limitations period for written contracts is three years, among the shortest in the country.[95] In Wisconsin, it is six years, a more typical length. The Mississippi statute has been the law of the land since 1880.[96] The Wisconsin statute was

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have a one-year statute of limitations, have limited (typically $1,000) damages, and will not erase the underlying obligation. *See generally* 15 U.S.C. §§ 1692–1692p (2012); *Improving Relief from Abusive Debt Collection Practices*, 127 HARV. L. REV. 1447, 1452–54, 1460–62 (2014); Sobol, *supra* note 42, at 345, 347, 349 & n.128.

92. *See* Sobol, *supra* note 42, at 347, 349.

93. WIS. STAT. ANN. § 893.05 (West 2017); Heritage Mut. Ins. Co. v. Picha, 397 N.W.2d 156 (Wis. Ct. App. 1986) ("Wisconsin may be unique in holding that the running of a statute of limitations not only extinguishes the remedy to enforce a right but also destroys the right itself.").

94. *In re* Hoya's Will, 180 N.W. 940, 944 (Wis. 1921) (stating that Wisconsin considers "that the statute of limitations destroys the right of action itself and gives rise to a new property right in the debtor" although many states and the Supreme Court hold otherwise). *See also* Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts*, 56 CONSUMER FIN. L.Q. REP. 244, 247-48 (2002) (discussing a Wisconsin case that found a collector liable under the FDCPA and Wisconsin statutes for attempting to collect an out-of-statute debt).

95. MISS. CODE ANN. § 15-1-49 (2013); *see 50 State Statutory Survey: Civil Statutes of Limitation*, WEST (2016). Mississippi also has one of the shortest limitations periods for judgments: 7 years. *Id.*; MISS. CODE ANN. § 15-1-43, 45 (2013).

96. The current version of the statute can be found at section 15-1-3 of the Mississippi Code. This section has identical language to section 2685 in the Code of 1880. *See* MISS. CODE ANN. § 15-1-3 (2013); MISS. CODE § 2685 (1880). Interpreting the 1880 enactment, the Mississippi Supreme Court stated that the section on limitations on action "declares that 'the completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy; but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.'" Proctor v. Hart, 16 So. 595, 596 (Miss. 1895). The court went on to note that "[t]he change wrought by this new statute is radical. Not only the remedy is denied, the action barred, but the right itself is extinguished upon the completion of the period of limitation. The remedy and the right, whatever it was, are alike destroyed. There remains nothing to revive." *Id.* The Code of 1880 was a revision of the Code of 1871. It modernized the law in some ways, and although it purported to use the statutes in effect at the time as its basis, the section in question did not exist in the 1871 Code, nor was it passed as a session law in the intervening years. *See* Michael Hoffheimer et al.,

first enacted in 1979, but it codified common law that dated as far back as 1860.[97] Astonishingly, I have not been able to find any empirical or other analysis in the legal or economics literature discussing the effects of these laws.[98]

d. Easy to Restart the Limitations Period. The statute of limitations period is shockingly easy to restart. The most common way is through a partial payment of the debt.[99] This heavily incentivizes creditors to contact consumers about stale debts in order to restart the limitations period.[100] The older a debt, the cheaper it is to buy, but there are debt buyers who specialize on buying exactly this kind of debt. Although consumer protections exist in principle, in practice they are difficult to access.

Most states allow a creditor to restart the limitations period by securing a payment or a promise of payment on the debt, or sometimes by obtaining oral acknowledgment from the debtor that the debt exists.[101] The creditor can try to persuade the consumer to do any of these things any time after the expiration of the limitations period, even if many years have passed.[102] In most

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Pre-1900 Mississippi Legal Authority, 73 MISS. L.J. 195, 217 (2003); RH Thompson, Mississippi Codes: An Address (1926) (address given at the annual meeting of the Miss. Bar Association), *available at* https://library.courts.ms.gov/thompsononcodes.htm#1840 [https://perma.cc/8KJE-R4C5].

97. Sprecher v. Wakeley, 11 Wis. 432, 433, 438–41 (1860) ("It is an error to suppose that a statute of limitations affects the remedy only. . . . The statute of limitations is not only a bar to the remedy, but it takes away the legal right."); Daniel J. La Fave, *Remedying the Confusion Between Statutes of Limitations and Statutes of Repose in Wisconsin—A Conceptual Guide*, 88 MARQ. L. REV. 927, 933–34(2004).

98. The Author, a research assistant, and an extremely able librarian performed an exhaustive search of the economics, social science, interdisciplinary, and legal databases available to us as well as the Proquest dissertation database and only turned up a handful of articles that mentioned the different rules in Mississippi and Wisconsin. None analyzed them in any great detail. *See, e.g.*, Sobol, *supra* note 42, at 345; Dominczyk, *supra* note 7, at 13; Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 735 (2008).

99. "Partial payment of a debt is regarded as equivalent to an admission of the debt and, therefore, a new promise is implied from it." 31 WILLISTON ON CONTRACTS § 79:85 (4th ed. 2004). But note that "[i]f there are any words or circumstances tending to negate the implication of a new promise naturally to be drawn from a partial payment, the debt will not be revived." *Id.*; *Contra* Midland Funding LLC v. Thiel, 144 A.3d 72, 78 (N.J. Super. Ct. App. Div. 2016).

100. As noted in Part III.A, some debt buyers specialize in purchasing "out of statute" debts. *See infra* notes 156–160 and accompanying text.

101. *Developments*, *supra* note 58, at 1254 ("It has long been recognized that the expiration of the statutory period does not bar the claim if the plaintiff can prove an acknowledgment, a new promise, or part payment made by the defendant either before or after the statute has run.").

102. *See, e.g.*, Young v. Sorenson, 47 Cal. App. 3d. 911, 914 (Ct. App. 1975) ("[P]art payment of a debt or obligation is sufficient to extend the bar of the statute. The theory on

cases, the creditor does not have an obligation to notify the consumer that making a small payment or acknowledging the debt will enable the creditor to use legal means to collect, and that those means would not be available otherwise.[103]

Consumers do have some limited protections here, but like with much else regarding the statute of limitations, they have to be aware of them and assert them. The FDCPA gives the consumer the right to request that the collector cease all communications with the consumer.[104] The request must be in writing.[105] In situations where the debt is out-of-statute, if the collector does not want to run afoul of the FDPCA, this should mean that after sending a written cease-and-desist letter, the consumer will no longer hear from this collector about the debt. That said, the collector can sell the debt and the consumer will once again be dunned by a new party. She will then have to notify that party in writing that it should cease communicating with her. She will also have to understand that a debt is out-of-statute in the first instance.

More consumer protections may be forthcoming. In recent years, Maine[106] and Connecticut[107] enacted statutes that prevent the limitations period from restarting after it has expired.[108] In

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which this is based is that the payment is an acknowledgment of the existence of the indebtedness which raises an implied promise to continue the obligation and to pay the balance.") (internal citations omitted).

103. *See* Thomas R. Dominczyk, *Collecting Time-Barred Debt: Is it Worth the Risk?*, BUS. L. TODAY, Apr. 2014, at 1, 2–3 (stating that most courts treat filing lawsuits and explicitly threatening to sue as violations of the FDCPA without requiring further disclosure from debt collectors, but noting that some courts have required debt collectors to disclose that they are unable to compel payment or sue to collect the debt).

104. *See* 15 U.S.C. § 1692(c) (2012). If the consumer is being dunned by the original creditor, the law is much less clear. The CFPB has taken the position that this would be an unfair practice and that they could regulate it under their UDAAP authority. However, this authority does not provide for a right of action by consumers. *See* Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty at 6–7, *In re* Am. Express Centurion Bank, Salt Lake City, Utah, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012) (stating that dunning letters that fail to disclose the nature of time-barred debt can be regulated under the UDAAP).

105. *See* 15 U.S.C. § 1692(c) (2012).

106. *See* ME STAT. tit. 32 § 11013(8) ("Notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period.").

107. CONN. GEN. STAT. § 36a-814.

108. Massachusetts' attorney general promulgated a rule requiring collectors attempting to collect on a time-barred debt to provide a notice to consumers about their rights. 940 MASS CODE REGS. 7.07(24). Unfortunately, the safe harbor notice provided under the regulations is a 159-word all-caps block of text, a presentation which is likely to make it very difficult for self-represented individuals to understand. *See* Greiner et al., *supra* note 79, at 1135 (citing studies about the difficulty of reading all-caps sentences).

litigation, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) have taken the position that attempting to collect an out-of-statute debt without disclosing that the debt collector does not have the right to sue the consumer on that debt is a deceptive statement in violation of the FDCPA.[109] This position is not binding on the industry, although the CFPB will soon propose new debt collection rules which might include this.[110] For now, although a few courts have agreed with the consumer agencies, not all who dun consumers are subject to the FDCPA.[111] Unless and until laws or rules prohibit this behavior industry-wide, creditors will have an incentive to continue dunning consumers past the limitations period in an attempt to restart the clock.[112]

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109. *See* Brief of Amici Curiae Federal Trade Commission and Consumer Financial Protection Bureau Supporting Affirmance at 12–19, Delgado v. Capital Mgmt. Servs., LP, No. 13-2030 (7th Cir. Aug. 14, 2013); Brief of Federal Trade Commission and Consumer Financial Protection Bureau Supporting Reversal at 13–20, Buchanan v. Northland Grp., Inc., No. 13-2523 (6th Cir. Mar. 5, 2014); *Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million For Alleged Consumer Deception*, FED. TRADE COMM'N (Jan. 30, 2012), http://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged [https://perma.cc/6EH4-RRF3] (describing consent order with Asset Acceptance settling charges that the debt buyer made "misrepresentations when trying to collect old debts").

110. FED. TRADE COMM'N, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 20 (2016), http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf [https://perma.cc/G23W-64B2].

111. The CFPB also has authority to regulate many original creditors not subject to the FDCPA, namely banks. 12 U.S.C. § 5481(6), (15) (2012). Its authority in those circumstances covers what would be considered "unfair, deceptive, or abusive acts or practices" (UDAAP). 12 U.S.C. § 5531(a). The CFPB has not, however, clarified that misleading a consumer about collecting past the statute of limitations is a UDAAP. *See* Kathlyn L. Farrell, *Managing UDAAP Compliance Risks in Financial Institutions*, J. TAX'N & REG. FIN. INSTITUTIONS, Nov.–Dec. 2013, at 21, 28–30 (stating that the CFPB has the authority to regulate bank and non-banks for abusive practices, but that what constitutes an abusive practice has not yet been delineated). *But see* Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty at 6–7, *In re* Am. Express Centurion Bank, Salt Lake City, Utah, FDIC-12-315b, FDIC-12-316k, 2012-CFPB-0002 (Oct. 1, 2012), http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf [https://perma.cc/6EY6-39SY] (stating that dunning letters that fail to disclose the nature of time-barred debt can be regulated under the UDAAP).

112. *But see* FTC DEBT BUYER REPORT, *supra* note 87, at 48 n.198 (2013) (describing how New York, New Mexico, and Massachusetts have all enacted statutes or regulations that require debt collectors who attempt to collect on out of statute debts to disclose to consumers that the collector cannot initiate a legal proceeding against them).

C. True Death: Bankruptcy Discharge

Outside of Mississippi and Wisconsin, the only true death[113] for a debt is after a bankruptcy discharge.[114] This is so partly because the nature of bankruptcy as a court proceeding that catalogues and adjudicates individual debts. But a bankruptcy discharge is a superior method of killing debts for two principal reasons: (1) the bankruptcy discharge comes with a perpetual injunction against any attempt at collection of a discharge debt, and (2) the Bankruptcy Code does not permit the revival of a discharged debt outside of a bankruptcy proceeding.[115] The discharge injunction is actually a relatively new innovation: its current iteration is barely 40 years old.[116] Even so, bankruptcy also has some drawbacks: it does not discharge all debts, some consumers may be more hurt by filing bankruptcy than by abstaining, the process is costly, and it is underused.[117]

When an individual receives a bankruptcy discharge, the court issues (1) a judgment and (2) an automatic and permanent injunction declaring that the debtor no longer has any responsibility to pay for the debts included in the discharge.[118] After, creditors are barred by the injunction from pursuing the debtor for those debts.[119] Any judgments obtained in violation of

113. "'True Death' is a term that refers to the ultimate destruction of a vampire . . . ." *True Death*, TRUE BLOOD WIKI, http://trueblood.wikia.com/wiki/True_Death [https://perma.cc/4AWL-2N77] (last visited Oct. 14, 2017).

114. The current version of the bankruptcy discharge is fairly new. *See generally* Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L.J. 1–56 (1971) (discussing effects of 1970 amendments to bankruptcy code on dischargeability of debts); Doug R. Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 723–67 (1979) (noting of evolution of discharge from 1970 amendments to 1978 bankruptcy code); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047–88 (1987) (evaluating changes in the bankruptcy code through 1984 amendments); Brief of Amici Curiae Professors Ralph Brubaker et al. in Support of Appellee at 5–12, Anderson v. Credit One Bank, N.A., No. 16-2496 (S.D.N.Y. Feb. 27, 2017) Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 325–71 (1991) (detailing the evolution of discharge in the United States from prior to 1800 to 1898); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 56–113 (1990) (discussing the evolution of the malicious and willful injury exception to discharge).

115. In bankruptcy, this is called a "reaffirmation" and there are strict procedural and disclosure requirements for it to be effective. *See* 11 U.S.C. § 524(c), (d), (k) (2012).

116. *See* 11 U.S.C. § 524.

117. Joseph J. Rifkind, *Bankruptcy Law: Non-Dischargeable Debts*, 45 A.B.A. J. 685, 688 (1959).

118. 11 U.S.C. § 524.

119. This wasn't always the case. The 1976 Bankruptcy Code added the injunction. 11. U.S.C. § 32(f) (1976).

the injunction are void *ab initio.*[120] Since the proceeding is public and provides notice to creditors, it also makes it clear that an unsecured debt that was incurred prior to the bankruptcy is discharged—so long as that debt was eligible for a discharge.[121]

Bankruptcy provides a finality that nothing else can. If a consumer is contacted about a debt discharged in bankruptcy, she has the power of a federal court behind her when she tells the creditor to stop the contact. Unlike the FDCPA cease-and-desist option, the consumer does not have to do this in writing and the bankruptcy discharge injunction will work even against subsequent debt buyers.[122] Bankruptcy even supersedes state laws that say that an obligation discharged in bankruptcy can nonetheless serve as "moral consideration" for a new, enforceable obligation.[123]

However, not all debts can be discharged in bankruptcy. There are nineteen enumerated exceptions to the bankruptcy discharge.[124] Most have to do with debts owed to the federal or state governments.[125] Many others involve various types of fraud or defalcation,[126] certain kinds of injuries caused to persons or property,[127] debts that were not disclosed by the debtor[128] or were not discharged in a previous bankruptcy,[129] or debts owed to a

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120. *See generally* 11 U.S.C. § 524(a)(1) ("A discharge in a case under this title--(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . .").

121. Eligibility here will depend on a few things, such as whether the debt was listed in the bankruptcy schedules and whether it was not one of the debts barred from discharge. 11 U.S.C. § 523 (2012).

122. In most cases, it will also work even if the debtor failed to include the debt in her bankruptcy schedules. If the debtor is one of the 93% of Chapter 7 bankruptcy filers who did not have any assets to distribute to her creditors, the creditor would not have received anything under the bankruptcy anyway, so has no cause for complaint. Their debt is also discharged. *See Debt Collection*, FED. TRADE COMM'N (May 2015), https://www.consumer.ftc.gov/articles/0149-debt-collection [https://perma.cc/DK3J-XP6M]; *Can a Debt Collector Try to Collect on a Debt that was Discharged in Bankruptcy?*, CFPB, https://www.consumerfinance.gov/ask-cfpb/can-a-debt-collector-try-to-collect-on-a-debt-that-was-discharged-in-bankruptcy-en-1425/ [https://perma.cc/E9WZ-P3RC] (last updated Oct. 25, 2017).

123. Douglass G. Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36, 56, 59, 60–61 (1971).

124. *See* 11 U.S.C. § 523 (2012).

125. 11 U.S.C. §§ 523(a)(1), (a)(7), (a)(8), (a)(13), (a)(14), (a)(14A), (a)(14B), (a)(15), (a)(17).

126. *See id.* §§ 523(a)(1), (a)(4), (a)(11), (a)(12), (a)(18), (a)(19).

127. *See id.* § 523(a)(6) (willful and malicious injury to another or property of another); *see also id.* at (a)(9) (death or injury caused while under the influence).

128. *See id*. § 523(a)(3).

129. *See id*. § 523(a)(10).

spouse or child in connection with a divorce or separation agreement.[130] Finally, student loan debts are only dischargeable in bankruptcy if the debtor files a separate lawsuit within the bankruptcy case in which she is able to prove that it would be an "undue hardship" to repay her student loans.[131] A miniscule number of bankrupt individuals with student loans—by one estimate 0.1%—attempt to discharge their student loans in this fashion.[132] Although about half of them succeed, these numbers mean that student loans are practically non-dischargeable.[133]

In addition, filing bankruptcy can turn out to be a losing proposition for some consumers. In a Chapter 13 bankruptcy, the debtor makes payments for three or five years to her creditors according to a court-approved plan.[134] Nationwide, about 37% of consumers file for bankruptcy under Chapter 13; only 30% of those succeed in obtaining a discharge.[135] For the 70% who do not obtain a discharge, some successfully convert their case to a Chapter 7 bankruptcy;[136] the rest simply go back to their lives and continue to owe the debts they did not repay in full during their bankruptcy. Some of these individuals may find that filing bankruptcy but failing to obtain a discharge means that they are now responsible for debts that had previously been out-of-statute.[137] Creditors are generally allowed to file proofs of claim for out-of-statute debts.[138] Doing so does not violate the Bankruptcy Code, although upon objection by any party in interest, the claim should be disallowed.[139] Other creditors whose payout is reduced because the

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130. *See id.* §§ 523(a)(5), (a)(15).

131. *See id.* at § 523(a)(8).

132. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 495, 499, 505, 525 (2012).

133. *Id.* at 505.

134. *See* 11 U.S.C. § 1322 (2012).

135. United States Bankruptcy Courts, *Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2016* at Table F-2; Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?*, ABI J. (Dec. 20, 2013).

136. In a Chapter 7, the debtor gives up her nonexempt assets in exchange for a discharge of all debts that can be discharged. Her nonexempt assets are sold and the proceeds are distributed to creditors under a priority scheme dictated by the Bankruptcy Code. In the overwhelming majority of consumer Chapter 7 cases (93%), creditors do not receive any payment from the bankruptcy estate. Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795 (2009).

137. Deborah Swann, *Debt-Buyers Face Many Land Mines, Panelists Say*, BLOOMBERG BNA (Sept. 30, 2015), https://www.bna.com/debtbuyers-face-land-n57982059000/.

138. 11 U.S.C. Rule 3001 (2012).

139. 15 U.S.C. § 502(b)(1).

stale debt is being paid, the bankruptcy trustee,[140] and the debtor herself[141] have a theoretical incentive to investigate all proofs of claims for the possibility of stale claims.[142] But anecdotal evidence from judges and attorneys, however, indicates that very few objections are filed.[143] Last term, the Supreme Court ruled in *Midland v. Johnson* that it is not a violation of either the Bankruptcy Code or the FDCPA to file a proof of claim for a facially out-of-statute debt.[144] After this decision, a debtor who does not obtain a discharge in a Chapter 13 bankruptcy may exit bankruptcy owing not just the same debts she did before, but having restarted the limitations period and now being at risk for a lawsuit on debts that were previously legally uncollectable.[145]

Bankruptcy is also costly—so costly that it often takes consumers considerable time to get together the filing costs and attorney's fees.[146] It was previously thought that excessive, abusive, or otherwise oppressive debt collection may have triggered bankruptcy filings by consumers seeking to take advantage of the automatic stay to stop the phone calls.[147]

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140. The trustee is supposed to work for the benefit of all unsecured creditors. Bankruptcy FAQ, NAT'L ASS'N OF BANKR. TRS., http://www.nabt.com/faq.cfm [https://perma.cc/HH66-GPMB].

141. The debtor has a strong incentive to object in some cases. For example, if she has student loans they will not be discharged through the bankruptcy so any extra money that goes towards the student loans will reduce the debtor's future liability. Xiaoling Ang & Dalié Jiménez, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, in STUDENT LOANS AND THE DYNAMICS OF DEBT 175, 180 (Brad Hershbein & Kevin M. Hollenbeck, eds., Upjohn Press 2015), http://papers.ssrn.com/abstract=2332284.

142. The POCs themselves should have enough information on their face to be able to figure this out. BANKR. R. FED. PROC. 3001. As the Debt Buyer's Association points out in a brief on this issue, the statute of limitations is an affirmative defense (everywhere but within the ambit of the FDCPA) and thus it is up to a party to in interest to object to the POC. This objection must be done in writing and unless the claim is withdrawn, the court must hold a hearing on the matter. If no one objects to the claim, the debt buyer can collect a distribution from the estate, at the expense of other creditors whose claims were enforceable outside of bankruptcy.

143. Deborah Swann, *Debt-Buyers Face Many Land Mines, Panelists Say*, BLOOMBERG BNA (Sept. 30, 2015), https://www.bna.com/debtbuyers-face-land-n57982059000/.

144. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1415–16 (2017).

145. About 70% of debtors who file a Chapter 13 bankruptcy do not obtain a Chapter 13 discharge. Ed Flynn, *Chapter 13 Revisited: Can It Help Solve the Judiciary's Fiscal Problems?*, ABI J. (Dec. 20, 2013).

146. Daniel Bortz, *Are You Too Broke to Go Bankrupt?*, U.S. NEWS (July 26, 2012, 10:00 AM), https://money.usnews.com/money/personal-finance/articles/2012/07/26/are-you-too-broke-to-go-bankrupt.

147. In a nationwide sample of bankrupt debtors, more than four in five consumers had been contacted by a debt collector either at home or at work, and that the typical consumer "received an average of thirteen debt collection calls in each of the weeks just prior to their bankruptcy filing. The median respondent reported receiving six calls each

However, in a recent study from a nationwide sample, Professors Mann and Porter found that what "triggers" the actual bankruptcy filing is when a debtor has enough money to pay his lawyer and the filing fees.[148] These fees increased dramatically in 2005.[149] They conclude, "[c]reditor collection activity does not force people into an immediate bankruptcy. On the contrary, it wears them down slowly but ineluctably, like water dripping on a stone."[150]

Finally, bankruptcy is underused. Only a fraction of consumers in serious financial distress ever file for bankruptcy.[151] According to a 1998 study of a national sample of American households, bankruptcy relief would have provided an economic benefit to "15% of the sample, but only about 0.66–1% sought relief any given year."[152] There is some evidence this has not changed much.[153] Despite the vast number of individuals currently in financial distress in the United States—upwards of 77 million by one count[154]—very few choose to file bankruptcy. In 2014, less than one million bankruptcy cases were filed throughout the country: the highest one-year filing rate ever was in 2006 at just over two million bankruptcies.[155]

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week, more than one per business day." Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 306–07 (2010).

148. *Id.* at 323.

149. *Id.* at 324, n.136.

150. *Id.* at 292.

151. Amanda E. Dawsey et al., *Non-Judicial Debt Collection and the Consumer's Choice Among Repayment, Bankruptcy and Informal Bankruptcy*, 87 AM. BANKR. L.J. 1, 18–19 (2013).

152. Mann & Porter, *supra* note 147, at 290; Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206 (1998). *But see* Richard M. Hynes, *Optimal Bankruptcy in a Non-Optimal World*, 44 B.C. L. REV. 1 (2002) (arguing that "The truly destitute have little to fear from their creditors. Their poverty prevents their creditors from seizing anything of value, and the days when default meant imprisonment, enslavement, or even death have long since passed. Bankruptcy protects those with something left to lose. . . .").

153. Mann & Porter, *supra* note 147, at 290 n.3.

154. More than 77 million have at least one account reported as "in collection" on their credit report, owing an average of $5,178. Caroline Ratcliffe et al., DELINQUENT DEBT IN AMERICA 7 (2014), www.urban.org/publications/413191.html. The median debt is $1,349. *Id.* at 11 n.16.

155. The exact number of filings in 2014 was 936,795, which included cases filed by individuals, corporate entities, and even municipalities. United States Courts, *Bankruptcy Filings Drop Nearly 13 Percent in Calendar Year 2014*, U.S. COURTS (Jan. 28, 2015), http://www.uscourts.gov/news/2015/01/28/bankruptcy-filings-drop-nearly-13-percent-calendar-year-2014 [https://perma.cc/BT5S-MDRB]. It is difficult to count how many *individuals* file bankruptcy every year. The United States Courts only keeps track of bankruptcy filings, which could be made by one person or jointly between two married debtors. In addition, the numbers are broken up between "business" and "non-business" filings, which do not correspond to "corporate entities" and "individuals." Even so, one can make some crude estimates. Even assuming each case filed in 2014 included two married

Bankruptcy kills debts. But with some important caveats: not all debts are dischargeable, some consumers may end up owing more if they fail to obtain a discharge in bankruptcy, the bankruptcy process is costly and underused. More importantly, one must file for bankruptcy in order to obtain this discharge.

III. BENEFITS, COSTS, AND CONSEQUENCES OF PERPETUAL DEBTS

The previous Part made the case that debts can act like immortal obligations, surviving past payment, the debtor's death, limitations periods, and sometimes (if not discharged), bankruptcy. This Part turns to the consequences of this system. It begins by outlining the mostly economic benefits of a system in which debts may be recoverable many years after they were incurred. It then describes what I view as the heavy costs and consequences of this system to individuals and the community.

A. Benefits

The current system has potentially substantial economic benefits. Perpetual debts mean that creditors have an opportunity to wait out the debtor until her financial circumstances improve. The ability to do this means that secondary markets for debts can flourish.[156] The complexity of the system itself, not just the perpetual nature of debts, also increases the collectability of debts. This in turn may have the effect of decreasing the overall cost of credit in the economy.

Three related industries exist primarily as a result of the current effectively perpetual nature of debts: debt buyers who only buy debts that have been reduced to judgment, debt buyers who specialize in purchasing debts past the statute of limitations,[157] and analytics companies who specialize in helping debt owners "wait the debtor out."[158] Alerts are sent to creditors when it is more

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debtors, that would mean that less than 1.9 million individuals filed bankruptcy in 2014. The numbers are similar if slightly higher in previous years. *Id.*

156. *See generally* Jiménez, *supra* note 17.

157. Andrew Martin, *Old Debts Never Die; They Are Sold to Collectors*, N.Y. TIMES (Jul. 30, 2010), http://www.nytimes.com/2010/07/31/business/31collect.html?_r=0 [http://perma.cc/LW9H-EXG9] ("Such claims are routinely sold on debt collection Websites, where out-of-statute debt is for sale for a penny or less on the dollar."); *see also Portfolios*, CREDIT CARD RESELLER, LLC, http://www.creditcardreseller.com/portfolio.htm [https://perma.cc/9LHJ-EVXQ] (listing portfolios for sale whose statute of limitations began to run as far back as 2006).

158. *Locate Debtors*, EXPERIAN, http://www.experian.com/business-services/find-debtors.html [https://perma.cc/RU96-7UJ7] (last visited Jan. 16, 2017).

likely debtors can be reached for payment because, for example, they moved to a state that allows garnishment, bought a car or home, opened a new line of credit, etc. Through these companies, debt owners can passively keep track of debtors until something happens that increases the likelihood the debtor can be reached for payment: something such as moving to a state that permits garnishment, subscribing to the Wall Street Journal or New York Times, or opening a new line of credit, etc. These benefits are not insubstantial. The fact that there are businesses that specialize in older debts and that these debts continue to be traded for many years after they have remained unpaid is evidence that there are profits to be made.[159]

There is an additional benefit that results from the complexity of the current system. That is, the uncertainty for the debtor who is not likely to know about statutes of limitations or that making even a small payment past the statutory period revives the debt. For the debt owner, the ambiguity increases the likelihood that she will be able to obtain payment from the debtor or that another debt buyer will think he has the right strategy to obtain payment, and she will be able to at least resell the debt to someone else.[160]

The ability to continue to collect from debtors virtually forever may also have the benefit of lowering the cost of credit for everyone else.[161] An increased ability to collect on a debt decreases the cost of default to the creditor.[162] This may result in lower cost or more widely available credit for everyone. A number of studies have found an association between laws restricting collection remedies and "higher interest rates and increased probabilities of denials of credit."[163]

However, this is not the same as saying that less regulation necessarily equals cheaper or more available credit. In an analogous situation, one of de-regulation, Xiaoling Ang and I found the opposite effect than one might expect.[164] In 2005, Congress

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159. *See* Josh Adams, *The Role of Third-Party Debt Collection in the U.S. Economy* (ACA INT'L WHITE PAPER 2016), http://www.acainternational.org/files.aspx?p=/images/38130/aca-wp-role3rdparty.pdf [https://perma.cc/S6EG-KEPD].

160. *See* Jiménez *supra* note 17, at 42; *see also* FTC DEBT BUYER REPORT, *supra* note 87, at i.

161. Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation* 18 (2015), http://works.bepress.com/todd_zywicki/6/ [https://perma.cc/4YMD-LGJF] (last visited Oct 11, 2015) (arguing that "lenders will respond to [an] increased risk of loss by raising prices to compensate or by reducing risk exposure").

162. *See* Adams, *supra* note 159, at 4.

163. Richard M. Hynes & Eric A. Posner, *Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 185 (2002) (collecting studies).

164. Ang & Jimenez, *supra* note 141, at 175.

amended the Bankruptcy Code to, among other things, make it nearly impossible to discharge private student loans.[165] This change meant that suddenly, all outstanding and future private student loans could no longer be killed by a bankruptcy discharge—truly perpetual debts as it were. Theoretically, this change increased the expected returns of outstanding and future private student loans. In a neoclassical economics model, this kind of regime change should lead to a decrease in the cost of loans for students, assuming competition. But that did not happen. The availability of private student loans increased, to be sure, but so did the cost.[166]

It might be possible to test this proposition empirically. As previously noted, Mississippi and Wisconsin have statutes that purport to automatically extinguish debts after the statute of limitations has expired.[167] These laws date back to 1880 and 1879, respectively, making it difficult to design a study to determine the effects of the statutes.[168] Nonetheless, it is surprising that the economics and legal literature appear devoid of any discussion—theoretical or empirical—about the effects of these statutes on the cost or availability of consumer credit.[169]

There is a little we can glean from the available data, however. The Federal Reserve tracks credit card debt balance per capita and reports it by state as of the end of the year.[170] Although Mississippi had the lowest per capita outstanding credit card debt balance every year from 2003–2015, Wisconsin's credit card balances were less than a standard deviation below the national average.[171] As an example: Indiana, Iowa, and Missouri all have lower average per capita credit card balances than Wisconsin.[172] When other types of credit get lumped together, West Virginia takes the crown with the lowest level of per capita credit

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165. *Id.* at 180. Federal student loans already received that treatment from previous changes to the Code. *Id.*

166. *Id.* at 179.

167. *See supra* notes 93–95.

168. *See supra* notes 96–97.

169. *See supra* note 98.

170. *Quarterly Report on Household Debt and Credit: Q2 2010 to Date*, FEDERAL RESERVE BANK OF NEW YORK, https://www.newyorkfed.org/microeconomics/databank.html [https://perma.cc/EZW3-WTBP].

171. FEDERAL RESERVE BANK OF N.Y., CENTER FOR MICROECONOMIC DATA, STATE LEVEL HOUSEHOLD DEBT STATISTICS 2003–2015, February, 2016, https://www.newyorkfed.org/microeconomics/data.html [https://perma.cc/JL2Z-52KZ].

172. *Id.* Sadly, Mississippi has long ranked at the bottom of many lists that proxy for quality of life. *See, e.g.*, Emily Le Coz, *Kids Count Report: Miss. on Bottom of List Again*, CLARION LEDGER (Jul. 22, 2014), http://www.clarionledger.com/story/news/local/2014/07/21/kids-count-report-miss-bottom-list/12975235/ [https://perma.cc/5SUU-4YDF].

outstanding for almost all the years from 2003–2015—Mississippi comes in second.[173] Wisconsin is again below average, but above states like Texas, Nebraska, North Dakota, and Oklahoma.[174] This is not conclusive evidence of much more than more research needs to be done: there are many laws that affect the ability to collect from a defaulted obligation and outstanding credit per capita is at best a crude measure of the availability of credit.

It is plausible that the current system—by virtue of the ability of debts to remain collectible almost indefinitely—lowers the overall cost of credit or even increases access to credit. The more relevant question, however, is whether that decrease in cost or increase in access is large enough to justify the additional social costs caused by a system of perpetual debts.[175]

B. Costs

We are a nation of debtors: many of us are delinquent in our obligations and most depend on credit to absorb financial shocks. Nearly a third of Americans have at least one account reported as "in collection" on their credit report, owing an average of $5,178.[176] Almost half lack a financial cushion sufficient to survive for three months without income.[177] What are the costs of the practically perpetual nature of debts to the human beings who owe them? Or on the systems that exist to support such a regime? This Section identifies some of the psychological, regulatory, and other costs individuals and society as a whole experience as a result of the current system of nearly perpetual obligations.

It is important to separate the costs of "simple" over-indebtedness from the costs created by the almost perpetual nature of debts. Over-indebtedness undoubtedly exacts a

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173. FEDERAL RESERVE BANK OF N.Y., CENTER FOR MICROECONOMIC DATA, *supra* note 171.

174. *Id.*

175. William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1081 (1979) ("Even where regulation has impact on the profitability of collection and therefore on interest rates or credit availability, there may be circumstances in which the benefits to delinquent debtors are so great that most persons would be reasonably confident that the regulation is efficient in the wealth maximization sense and worth the liberty costs.").

176. 77 million Americans have an account in collections; the median debt is $1,349. Carolyn Ratcliffe et al., DELINQUENT DEBT IN AMERICA (2014), www.urban.org/publications/413191.html. Percent of adults calculated using 2010 Census numbers. UNITED STATES CENSUS BUREAU, STATE & COUNTY QUICK FACTS (2010), https://www.census.gov/quickfacts/fact/table/US/PST040216 [https://perma.cc/Z4GR-DHSB] (estimating that 76% of the population is 18 years or older, and that the US population in 2010 was 308,758,105).

177. PROSPERITY NOW, CFED ASSETS & OPPORTUNITY SCORECARD—LIQUID ASSET POVERTY RATE 2006–10, http://scorecard.prosperitynow.org/data-by-issue#finance/outcome/liquid-asset-poverty-rate [https://perma.cc/WLJ8-MC35] (last visited Feb. 4, 2018).

psychological and sometimes physical cost on individuals and society.[178] Difficulty repaying one's debts is associated with a plethora of negative outcomes.[179] One study links an inability to make minimum payments and default to increased anxiety.[180] Multiple studies find an association between debt and depression.[181] A high debt-to-income ratio, defaulting on a mortgage, and foreclosure are also each associated with more negative health outcomes.[182] Financial stress has also been linked to work absenteeism,[183] lower graduation rates,[184] and obesity in children[185] and adults.[186] Some have gone as far as to argue "that debt may be a factor in social isolation, feelings of insecurity and shame, self-harm and suicidal ideation."[187] Research on scarcity also suggests that financial distress causes lower mental function, leading to bad decisions that in turn lead to other problems,

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178. *See, e.g.*, Eva Selenko & Bernad Batinic, *Beyond Debt. A Moderator Analysis of the Relationship Between Perceived Financial Strain and Mental Health*, 73 SOC. SCI. & MED. 1725, 1725 (2011) ("Heavy debt not only has economic consequences, but has also been related to severe psychological and physical distress.").

179. It is difficult for most of these studies to perfectly tease out the causal relationship between financial distress and the negative outcome. *Id*. at 1731 ("[T]he causal direction from perceived financial strain to mental health . . . is uncertain").

180. Patricia Drentea, *Age, Debt, and Anxiety*, 41 J. HEALTH AND SOC. BEHAV. 437, 445 (2000).

181. *See generally* Sarah Bridges & Richard Disney, *Debt and Depression*, 29 J. HEALTH ECON. 388 (2010); Frederick J. Zimmerman & Wayne Katon, *Socioeconomic Status, Depression Disparities, and Financial Strain: What Lies Behind the Income-Depression Relationship?*, 14 HEALTH ECON. 1197 (2005); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441 (2001).

182. *See, e.g.*, Sarah L. Szanton et al., *Effect of Financial Strain on Mortality in Community-Dwelling Older Women*, 63 J. GERONTOLOGY SERIES B: PSYCHOL. SCI. & SOC. SCI. 369 (2008); Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 S. ECON. J. 873 (2005); Patricia Drentea & Paul J Lavrakas, *Over the Limit: The Association Among Health, Race and Debt*, 50 SOC. SCI. & MED. 517, 527 (2000); Carolyn C. Cannuscio et al., *Housing Strain, Mortgage Foreclosure and Health in a Diverse Internet Sample*, 60 NURSING OUTLOOK 134 (2012).

183. Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An Empirically Derived Model*, 14 FIN. COUNSELING & PLANNING 31 (2003).

184. Graduation rates for students from the bottom of the income distribution are reduced significantly when students owe more than $10,000 in debt. Rachel E. Dwyer et al., *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133 (2012).

185. Steven Garasky et al., *Family Stressors and Child Obesity*, 38 SOC. SCI. RES. 755, 757 (2009).

186. Eva Münster et al., *Over-indebtedness as a Marker of Socioeconomic Status and Its Association with Obesity: a Cross-sectional Study*, 9 BMC PUB. HEALTH (2009), https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/1471-2458-9-286 [https://perma.cc/RSA2-Y2UV] (concluding that "[o]ver-indebtedness was associated with an increased prevalence of overweight and obesity that was not explained by traditional definitions of socioeconomic status.").

187. Chris Fitch et al., *Debt and Mental Health: The Role of Psychiatrists*, 13 ADVANCES IN PSYCHIATRIC TREATMENT 194, 195 (2007).

including eviction, divorce, and a need for government benefits.[188] In these cases, individual costs can quickly become costs borne by society in the form of increased taxes or health care costs.[189]

The ability of debts to continually resurface in an individual's life can only increase these psychological and social burdens, as over-indebted individuals are forced to remain in a debt trap almost eternally. This debt trap disincentivizes work.[190] As the Supreme Court has noted, "[f]rom the viewpoint of the wage earner, there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either."[191] These psychological costs may be difficult to quantify, but that does not make them unimportant.[192]

There are other social costs. The current system with all its complexity incurs significant regulatory costs.[193] The uncertainty over which type of statute of limitation might apply to a particular debt incurs costs for debt owners, regulators, and consumers. Confusing matters further, the Fair Credit Reporting Act (FCRA) provides a different time period during which a debt can be reported to credit bureaus that is unrelated to the limitations period.[194]

Debt buyers face the risk of FDCPA liability and the attendant necessity to have systems in place to attempt to avoid it.[195] This increases legal costs, especially for anyone who operates in multiple jurisdictions. Regulators incur increased monitoring and oversight costs as a result of the complexity. Society may also

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188. *See, e.g.*, SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 13–14 (2013); Virginia Graves, *Does Poverty Really Impede Cognitive Function? Experimental Evidence from Tanzanian Fishers*, (2015) (unpublished Master's Thesis, University of San Francisco), http://repository.usfca.edu/thes/129/ [https://perma.cc/6MRF-75FH]; DAVID CAPLOVITZ, MAKING ENDS MEET: HOW FAMILIES COPE WITH INFLATION AND RECESSION 155 (1979) (finding that "[t]hose whose incomes had fallen behind rising prices were much more likely to show mental stress . . . than those whose incomes kept up with rising prices.").

189. *See* Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 1007 (2012) (positing that "[e]xcessive debt may be associated with underutilization of medical treatment[,]"" which might lead to more severe and expensive consequences).

190. *Id.* at 988.

191. Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

192. *See* Porter, *supra* note 189, at 1003–22 (proposing a framework for understanding the harms of overindebtedness and urging further empirical research).

193. *See generally* LUIGI ZINGALES, A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY (2012).

194. 15 U.S.C. § 1681c(a)(4) (2012).

195. Creditors collecting on their own debts (or debts acquired before they were delinquent) are not subject to the FDCPA. Nevertheless, they may be legitimately concerned that the CFPB will find that collecting on time-barred debt is an unfair or deceptive practice as prohibited by Dodd–Frank. 12 U.S.C. § 5531 (2010).

bear some costs in the form of increased social safety nets required to cope with consumers who get further mired in debt.[196] To be clear, the argument is not that these costs would not exist in a system where debts were automatically discharged: it is that the complexity of the current system gratuitously increases regulatory costs.

C. Consequences

A system in which debts are practically immortal creates a number of perverse incentives. One is an increase in the creditor's moral hazard at the time it grants credit when it may continue to pursue the debtor for decades after a default. Similarly, creditors have an increased incentive to try to at least delay the consumer's bankruptcy decision in order to ensure that more can be collected from them. Finally, in a system in which only bankruptcy can truly kill debts and creditors are otherwise permitted to continue dunning for many years, consumers have strong incentives to file bankruptcy. Despite this and the willingness of creditors to continue to offer credit even after bankruptcy, fewer consumers file than would economically benefit.[197] Combined, these consequences of perpetual debts disproportionally affect the most vulnerable consumers: those too poor to file bankruptcy, those who refuse to do so on ethical grounds, and those least sophisticated who reaffirm out-of-statute debts.

Imagine a world in which creditors could always be certain that they would be repaid in full. In that world, creditors would have little incentive to withhold lending from even very risky customers.[198] Collection would be risk-free, albeit not necessarily cost-free.[199] That is an extreme example, of course, but my contention is that our system of perpetual debts likewise reduces the creditor's incentive to underwrite more carefully. The ability of debt owners to "wait out" the debtor for decades increases the creditor's moral hazard as it encourages riskier lending. In 2007, Ronald Mann argued that some credit card issuers depended on what he called a "sweat box" model of credit.[200] In Mann's model,

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196. *See, e.g.*, Whitford, *supra* note 175, at 1075.

197. *See generally* Hynes, *supra* note 13; White, *supra* note 152.

198. *See* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 3 (2011) (explaining the role of financial institutions as "directing resources toward profitable investments," and the disastrous result should lenders be guaranteed recovery on even the most foolish loans).

199. *Id.* Increased costs might be tacked on to the debt itself, however, in the form of social costs as debtors lean on illegitimate modes of repayment facing such a guaranteed debt payment. *Id.*

200. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*,

"lenders are not just indifferent to default, they actually rely in part upon it to turn on the sweatbox's heat switch for their most lucrative constituency."[201] As Andrea Freeman has noted, "the ideal credit card user maintains only enough financial stability to avoid bankruptcy proceedings."[202]

In Mann's model, the breakeven period for consumers in the sweat box may be as short as two years.[203] In other words, after two years "an issuer can profit even on loans that wind up being written off entirely; every payment after that point is gravy."[204] My argument is that this gravy is enhanced by our system of perpetual debts. Not only can an issuer break even after only a few years, but after charge-off, the ability to continue to pursue the debtor for the rapidly growing debt turns that debt into an asset that can be sold to debt buyers. Until recently, that sale could be done quite straightforwardly—no underlying documentation evidencing the debt was required—and the issuer often washed its hands of any problems by disclaiming accuracy, title, and other warranties during the sale.[205] Part of the reason this system has worked is lax oversight by bank regulators; the other part is that debt buyers continued—indeed many still continue—to profit from the system by being able to pursue the debtors for many years after default and even collect default judgments in state courts.[206]

Our system of perpetual debts combined with the sweat box model may also explain the initially puzzling finding that bankrupt debtors are a highly sought-after segment for consumer credit.[207] One study found that "individuals with the lowest credit score and a lower propensity to repay as proxied by income, race[,] and education are . . . offered more credit after bankruptcy."[208] Given that bankruptcy is the only method that can truly discharge a debt, and that those who obtain a bankruptcy discharge are

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2007 U. ILL. L. REV. 375, 379 (2007).

201. John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 417 (2007).

202. Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 162 (2013).

203. Pottow, *supra* note 201, at 416.

204. *Id.*

205. Jiménez, *supra* note 17, at 61.

206. *Id.* at 95–96; *see also* Whitford, *supra* note 175, at 1064–66 (discussing the limits of debtors' leverage in debt collection).

207. Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1391–92 (2007) (finding that "just one year after bankruptcy, 96.1% of debtors were recipients of credit solicitations").

208. Ethan Cohen-Cole et al., *Forgive and Forget: Who Gets Credit After Bankruptcy and Why?* (Working Paper, July 23, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341856.

barred from obtaining another one for eight years,[209] creditors can be sure that they can keep a debtor in the sweat box for at least that period of time.

Not all individuals who have trouble repaying their debts will suffer these consequences, however. For some, the financial struggles may be temporary: a new job, completing an educational program, or a myriad of other happy circumstances could turn things around, partially or completely. Others may temporarily be better off: receiving a large tax refund, bonus at work, or a short-term increase in wages during the holiday season. This temporary improvement might be enough to pay down some debts.[210] But this may not happen to all, or even many, over-indebted individuals. For these "poor but unfortunate" debtors,[211] the U.S. legal system provides a way in which to avoid or reduce these costs: personal bankruptcy.[212]

But when debts are effectively immortal, creditors and debt owners have an incentive to attempt to delay the bankruptcy filing decision as long as possible.

In 2005, Congress amended the Bankruptcy Code.[213] The stated purpose of the amendments was to thwart what some argued was "rampant abuse" of the bankruptcy system: too many people filing strategically, despite an ability to repay.[214] Proponents of this hypothesis attributed the previous decades' increase in filings to a relaxation of bankruptcy rules and a decline in the "stigma" associated with filing bankruptcy.[215] The empirical

209. 11 U.S.C. § 727(a)(8) (2012).

210. Indeed, if the debt has been sold, the new debt owner might be eager to settle for a fraction of what is owed. Debt buyers pay less than a dime for most debts purchased. That fact may not be known to the individual, however. More perversely, individuals who are not yet on firm financial footing but could repay some debts might be concerned about getting in touch with debt collectors to offer any kind of payment. They may (reasonably) fear that exposing themselves to a garnishment or lawsuit. The uncertainty over what might happen creates additional emotional costs.

211. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U. S. 279, 286, 287 (1991)).

212. To be clear, not all can be avoided. As discussed in Part III.B, not all debts are dischargeable in bankruptcy.

213. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8 (2005).

214. *See, e.g.*, Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 193, 204 (1999).

215. *See, e.g.*, Michelle J. White, *Chapter 14 Bankruptcy Law*, 2 *in* HANDBOOK OF LAW AND ECONOMICS 1013–1072, 1068 http://www.sciencedirect.com/science/article/pii/S1574073007020142 [https://perma.cc/S3WN-969X] (last visited Aug. 21, 2015) ("The empirical work on bankruptcy suggests that the increase in the number of personal bankruptcy filings that occurred over the past 20 years could have been due to a combination of households gradually learning how favorable Chapter 7 is and bankruptcy

support for the proposition that bankruptcy filers were (or are) largely strategic players was and remains scant at best.[216] At the time, Professor Mann argued that "the important effect [of the changes would] be to slow the time of inevitable filings by the deeply distressed, allowing [credit] issuers to earn more revenues from these individuals before they file."[217] While it is impossible to know precisely why, since 2005, consumer bankruptcy filings have decreased steadily, despite the Great Recession.[218]

A system of perpetual debts also incentivizes debt owners to dun debtors excessively and inefficiently. As Professors Mann and Porter have noted, "[b]ecause each creditor has an incentive to be first in line to collect, and because the creditors can dun their debtors at little or no cost to themselves, creditors as a group engage in dunning activities that individual debtors find intolerable."[219] These dunning activities may compel some debtors to file bankruptcy, even if mostly to be rid of particularly aggressive creditors. In some cases, this may lead to bankruptcies that would not have happened but for the excessive dunning.[220]

And yet, not everyone who could benefit files bankruptcy.[221] Empirical research after The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) suggests that the amendments created both structural and procedural barriers that may prevent some worthy individuals from filing.[222] A major barrier is cost: after BAPCPA was enacted, the costs of filing

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becoming less stigmatized as filing became more common."); Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 216 (2006) (quoting a number of elected and other officials denouncing the lack of bankruptcy stigma) (quoting Federal Reserve Bank Chairman Alan Greenspan as saying: "[p]ersonal bankruptcies are soaring because Americans have lost their sense of shame"); Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365 (2006).

216. *See* Kartik Athreya, *Shame as It Ever Was: Stigma and Personal Bankruptcy*, 90 FED. RES. BANK RICHMOND ECON. Q. 1, 2 (2004); Marianne B. Culhane & Michaela M. White, *Creighton: Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999) (finding that "can pay" debtors as screened out by the 2005 "means test" constituted less than 3.6% of random sample).

217. Mann, *Sweat Box*, *supra* note 200, at 379.

218. *See, e.g.*, Robert M. Lawless, *Bankruptcy Filings Drop 10% in 2015*, CREDIT SLIPS (Jan. 7, 2016, 4:37 PM), http://www.creditslips.org/creditslips/2016/01/bankruptcy-filings-drop-10-in-2015.html [https://perma.cc/NAU2-L9R8].

219. Mann & Porter, *supra* note 147, at 292.

220. *Id.* at 330. *But see* Hynes, *supra* note 13, at 57 (finding that few judgment debtors file for bankruptcy).

221. White, *supra* note 152; Hynes, *supra* note 13.

222. LOIS R. LUPICA, THE CONSUMER BANKRUPTCY FEE STUDY: FINAL REPORT 3–4 (2011).

bankruptcy increased between 24% and 51%, depending on the type of bankruptcy.[223] Given findings that the biggest determinant of when a consumer files for bankruptcy is when they have amassed enough money to pay for the attorney and filing fee, bankruptcy is now more expensive than ever.[224] Since the Great Recession, the trend is decidedly for fewer bankruptcies: filings decreased almost 42% between 2010 and 2014 and decreases again in 2015.[225]

These consequences of a system of perpetual debts combine to hurt the most vulnerable individuals: those too poor to file bankruptcy, those who refuse to do so on ethical grounds, and those least sophisticated who reaffirm out-of-statute debts.

IV. AUTOMATIC DISCHARGE

The rest of this Article explores a proposal to ameliorate the social and economic costs of our current system of perpetual debts. My purpose is to explore the ways in which this proposal could reduce some of the regulatory and psychological costs of the current system without creating (too many) additional problems.

A. A Simplifying Proposal

I propose a form of automatic bankruptcy for individual debts: a federal law providing for the automatic discharge of consumer debts after a seven-year period.[226]

My aim is to articulate the simplest rule that would address most of the concerns from the previous pages.[227] "The simpler a

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223. Chapter 7 no asset cases, the simplest bankruptcy cases of all, increased an average of 51%. *Id.* at 6. Chapter 7 asset cases (those in which the debtor thought she would have assets to distribute to her creditors) increased 37%. *Id.* In Chapter 13, cases that completed with a discharge increased an average of 27%. *Id*. Dismissed chapter 13's—where the debtor did not obtain a discharge—increased 24%. *Id.*

224. Mann & Porter, *supra* note 147, at 292.

225. Robert M. Lawless, *Bankruptcies Down 12% in 2014, Forecast Predicts the Same Decline for 2015*, CREDIT SLIPS (Jan. 8, 2015, 3:25 PM), http://www.creditslips.org/creditslips/2015/01/bankruptcies-down-12-in-2014-forecast-predicts-the-same-for-2015.html [https://perma.cc/HY6M-D8GH].

226. For the definition of consumer debt, I borrow the one from the Fair Debt Collection Practices Act: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (2012).

227. As the National Consumer Law Center ("NCLC") has noted in their proposal to adopt a uniform statute of limitations, doing so "would promote clarity for all, avoid loopholes, and empower consumers to more easily identify and defend themselves from lawsuits that

rule is, the fewer provisions there are and the less it costs to enforce them."[228] This principle goes to both the necessity that this be a federal law and one that takes effect automatically. "The simpler [a rule] is, the easier it is for voters to understand and voice their opinions accordingly. Finally, the simpler it is, the more difficult it is for someone with vested interests to get away with distorting some obscure facet."[229]

In brief, the proposed statute would have the following five features:

(1) Owners of unsecured consumer debts would have seven years in which to collect those debts, with the clock beginning to run 180-days after the consumer's behavior that gave rise to the cause of action. Payments made during this period do not restart the collection clock.

(2) Judgments based on consumer debts would have a separate, non-renewable, seven-year clock. In other words, the initial seven-year extinguishment period can be extended if a court renders a judgment in a lawsuit filed before. The automatic discharge federal law I am proposing would not only automatically extinguish the legal remedy of collecting through the courts, but also any right of repayment.[230]

(3) When the applicable seven-year period expires, the debtor's obligation to the creditor and the creditor's concomitant right to collect cease to exist. Similar to the bankruptcy discharge, a judgment obtained on an extinguished debt is void and can be collaterally attacked in a different proceeding.

(4) Attempting to collect on an extinguished debt would be an unfair practice giving rise to a private right of action against the collector, with statutory financial penalty, attorney's fees, and actual costs (including disgorgement

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are filed after the statute of limitations has expired." My proposal differs significantly from the NCLC, who recommends a three-year period for unsecured debts not reduced to judgment and five years after a judgment. *Id.* at 6, 12–15.

228. Luigi Zingales, *Why I Was Won Over by Glass-Steagall*, FIN. TIMES (June 10, 2012) https://www.ft.com/content/cb3e52be-b08d-11e1-8b36-00144feabdc0?mhq5j=e5*; see also* ZINGALES, *supra* note 193, at 207.

229. ZINGALES, *supra* note 193.

230. As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, MISS. CODE ANN. § 15-1-3(1) (West 2013), and the Wisconsin statute does not make clear that this is not the case, WIS. STAT. ANN. § 893.05 (West 1997).

of any payments made by the consumer) obtainable from the collector. Regulators such as the Consumer Financial Protection Bureau and states' attorneys general could also enforce the statute.

(5) The two extinguishment periods would preempt contrary state law and could not be waived by the consumer.

Statutes of limitations for debts have typically been creatures of state law, and it is possible for much of this proposal to be implemented at the state level.[231] Indeed, the National Consumer Law Center has proposed a model state statute of limitations that "creates a single 3 year statute of limitations for all consumer debts being collected in the state," ensures that the enacting state's citizens would not be subject to longer statutes of limitation, extinguishes the debt upon expiration of the three years, and limits collection of judgments to five years.[232]

My proposal requires a federal law, however, because a state-by-state implementation would leave in place the crushing complexity of a system in which few can be certain which statutory period applies. Even if all states adopted statutes that extinguished all rights and remedies upon the expiration of the statute of limitation, debt owners and consumers would still find it difficult to determine which statutory period applied to a particular debt. A state-by-state enactment would retain many of the regulatory costs of the current system. That is, the costs of time spent by debt owners deciding which statute of limitation is likely to apply, time spent by courts deciding that issue, and costs of regulatory supervision over debt owners' procedures for calculating limitations periods would all remain. This means that many of the potential cost savings to creditors in Part IV.B would be non-existent.

In a state-by-state implementation, consumers would also continue to be hurt for two reasons. To the extent that a consumer

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231. The Contracts Clause does not have to be a bar to such legislation, so long as it only applies to debts that were not in default when the statute is enacted. *Developments*, *supra* note 58, at 1190 ("It has long been settled that legislatures may prospectively limit the time within which actions may be brought, and alter existing periods at will as to obligations not yet ripened into causes of action."); *see also* U.S. CONST. art. I, § 10, cl. 1 (restricting the states from coining money, but not limiting state authority to establish statutes of limitations for debts).

232. APRIL KUEHNHOFF & MARGOT SAUNDERS, NAT'L CONSUMER L. CTR., MODEL STATUTE OF LIMITATIONS REFORM ACT, 2 (Dec. 2015), https://www.nclc.org/images/pdf/debt_collection/statute-of-limitations-reform-act.pdf [https://perma.cc/HZ9F-KC8T]. The model statute also proposes a private right of action for violations and prohibits extending the limitations period in certain circumstances. *Id.*

knows what a statute of limitations is, she would likely still encounter difficulty selecting the relevant statute.[233] Second, a complex state-by-state system would continue to make it difficult for consumer advocates to communicate the concept of statutes of limitations to consumers effectively.[234] Simply put, the simplest and most efficient implementation of this proposal requires a Congressional statute.

The first substantive part of the proposal envisions a single federal collection period of seven years applicable to unsecured consumer debts, running from 180 days after a default. Seven years to collect on an unsecured debt is longer than most states' limitations periods,[235] and almost double what the NCLC has proposed.[236] Choosing this number has the advantage of simplicity.

The seven-year period purposely mirrors the Fair Credit Reporting Act's (FCRA) reporting period. The FCRA currently permits credit reporting agencies to report the existence of delinquent accounts for up to seven years from the date in which they were first sent to collections.[237] The current provision is agnostic as to whether the debt is legally collectible. A bankruptcy discharge has no effect on the reporting period; credit bureaus can continue to report discharged debts for the same FCRA-prescribed period as any other delinquent debt.[238] Because this can be confusing, credit bureaus report the debt as "included in bankruptcy" or "discharged in bankruptcy."[239] Without such a notation, third parties obtaining the consumer's credit report would assume that the debt is legally owed and the consumer has

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233. *See* Fred O. Williams, *Expiration Dates Fuzzy On Old Credit Card Debt*, CREDITCARDS.COM (Mar. 22, 2013), https://www.creditcards.com/credit-card-news/collectible-expiration-date-old-debt-statute-1282.php [https://perma.cc/RW94-P7MG].

234. *See id.*

235. Sixteen states "provide a three-year statute of limitations for written contracts, oral contracts, or both." NCLC, *supra* note 242, at 13. Many others limit collection on contractual debts to six years or less. *See, e.g.*, WASH. REV. CODE ANN. § 4.16.040(1) (West 2016) (6 years); WIS. STAT. § 893.43 (2016) (6 years); ARK. CODE ANN. § 16-56-111 (2005) (5 years); CAL. CIV. PROC. CODE § 337 (West 2006) (4 years).

236. In its model legislation, NCLC has proposed a three-year limitations period for consumer debt, and five years for judgments. *Id.*, at 2–3.

237. 15 U.S.C. § 1681c(c)(1) (2012).

238. *See* Stephanie Lane, *Can Debts Discharged in Bankruptcy Appear on My Credit Report?*, NOLO, https://www.nolo.com/legal-encyclopedia/can-debts-discharged-bankruptcy-appear-my-credit-report.html [https://perma.cc/BGM2-DWQG].

239. *See id.* This notation is not enshrined in a statute or regulation; it is the credit bureaus' interpretation of what the FCRA requires them to do to ensure "maximum possible accuracy of the information . . . ." 15 U.S.C. § 1681e(b) (2012).

failed to pay.[240] Mirroring the FCRA provision in this proposal simplifies its implementation. Assuming the underlying information is correct, if a delinquent debt is reported without a bankruptcy notation, the consumer is liable for the debt.[241]

In contrast with the first proposal, a seven-year period for judgments is significantly lower than the 10 or 20-year limit that is the norm in most states.[242] The difference here is partly balanced by the (also) significant time-difference between the proposal and current law for pre-judgment debts. Furthermore, empirical evidence suggests that most judgments go unsatisfied.[243] It is thus likely that an empirically derived time limit on satisfying judgments would be significantly lower than the current statutory period in most states. The most valuable part of a seven-year limit on collecting judgment is in its simplicity. Similar as above, a seven-year period harmonizes with the FCRA's requirement that civil judgments can only remain in a credit report for up to "seven years or until the governing statute of limitations has expired, whichever is the longer period."[244]

The third element of this proposal is critical for its function: once the applicable seven-year period expires, the debt is automatically extinguished and cannot be revived. Because the extinguishment periods cannot restart, once one knows the date of default, calculating whether a debt is still valid becomes simple arithmetic. If more than seven years (and 180 days) have passed after the default, it is as if that debt never existed. The debt owner no longer owns anything.[245] Thus, a judgment purportedly declaring that the defendant was liable for a discharged debt would be invalid and void and could be collaterally attacked in a separate proceeding.[246]

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240. *In re* Haynes v. Chase Bank USA, 2015 WL 862061, at *1 (S.D.N.Y. 2015).

241. The Consumer Financial Protection Bureau has authority to issue regulations interpreting the FCRA. Fair Credit Reporting (Regulation V) 12 C.F.R. 1022 (2011).

242. Nationwide, statutes of limitations on judgments are lengthy: typically between ten and twenty years. Richard M. Hynes, *Why (Consumer) Bankruptcy*, 56 ALA. L. REV. 121, 143 (2004). Most states allow some form of renewal of judgments. *See id.* at 142.

243. Hynes, *supra* note 13.

244. 15 U.S.C. § 1681c(a)(2) (2012). The only applicable period under my proposal would be seven years.

245. As in Wisconsin and Mississippi, the statute would create a new property right for the debtor: that be to be free from the debt. The main difference between the laws in these states and my proposal is that in Mississippi, the statute explicitly permits an extinguished obligation to serve as consideration for a new promise, MISS. CODE ANN. § 15-1-3(1) (West 2013), and the Wisconsin statute does not make clear that this is not the case, WIS. STAT. ANN. § 893.05 (West 1997).

246. *See also In re* Gurrola, 328 B.R. 158, 164 (B.A.P. 9th Cir. 2005) (explaining that in the context of the Bankruptcy Code, the term "'void' . . . unambiguously connot[es] a

Laws aimed at helping the unsophisticated (and unrepresented) consumer face a familiar stumbling block if they require that the consumer know or exercise their statutory rights in order to work. While perhaps "good on paper," such laws expose consumers to unscrupulous actors who exploit their lack of sophistication. Statutes of limitations are an apt example.[247]

The bankruptcy discharge works well because most consumers who obtain one are represented by counsel and are presumably advised on its power and reach. But it also works well because it has some "teeth" in the form of a federal injunction against collection of discharged debts (and possible money penalties). This is why we need the fourth element of my proposal: a strict liability statutory declaration that attempting to collect on an extinguished debt is an unfair practice giving rise to a private right of action against the collector.[248] The consumer would have not just the ability to collect a statutory financial penalty (similar to the FDCPA) for each attempt to collect but could also recover actual costs, including any payments made to the collector after the debt was discharged. To encourage the consumer bar to bring these cases, the consumer could also recover reasonable attorney's fees for a successful suit. Lastly, regulators such as the Consumer Financial Protection Bureau and states' attorneys general could enforce this statute. The aim here is to increase the costs to bad actors.

The final and important requirement of this proposal is to prohibit the enforcement of any waivers with regards to any of the previous provisions. Thus, similar to a bankruptcy discharge (and unlike the Wisconsin or Mississippi statutes), there could be no "revival" of the debt once the debt was automatically discharged. The previous obligation could not be reinstated even if both parties agreed and even if the debtor made a payment towards the debt.[249] A judgment issued on a debt that had been discharged would be

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judgment rendered without subject-matter jurisdiction that could be ignored as a nullity and collaterally attacked").

247. Sometimes it's not only the consumer who is exploited, but the system itself, as with the practice of using bankruptcy to collect on time-barred debts.

248. I use the word "collector" here simply to mean the entity that attempted to collect, whether that entity is the original creditor, a subsequent debt owner, or a third party hired to collect the debt.

249. The bankruptcy provision, 11 U.S.C. § 524 (2012), was intended to overturn the common law rule that a prior obligation, though discharged in bankruptcy, was enough to support consideration for a new commitment to repay. *See* RESTATEMENT (SECOND) OF CONTRACTS § 83 cmt. b (AM. LAW INST. 2017) (providing that an express promise to pay a debt could remain binding even if it was discharged during a bankruptcy proceeding). If the debtor made the payment erroneously, not knowing the law, she might even be entitled to recover that payment, depending on state law.

void and could be collaterally attacked in a separate proceeding. The most typical one would be a lawsuit under the FDCPA.

A comparison of the major differences between my proposal and the existing bankruptcy discharge might be helpful. Table 1 lays out the major features.

Table 1 - Comparing the bankruptcy discharge to the "automatic discharge" proposal

Similarities	**Differences**
Both would be federal statutes.	Debt discharge is automatic once collection period expires; debtor need not do anything.
Debts are extinguished by operation of law.	Debtor may not be aware debt has been discharged.
Debts cannot be resurrected after the discharge, even if both parties agree.[250]	No public record of which debts have been discharged.
Record-keeping of discharged debts may be available.[251]	Timing of automatic discharge could be extended if debt owner sues before debt is extinguished and obtains a judgment.
Affects most kinds of unsecured consumer debts, including those that have been reduced to judgment.	Creditor knows when the discharge will occur.[253]
Judgments involving discharged debts are void and can be collaterally attacked.	Debts are discharged individually.
	Private student loans are automatically discharged; no proof of undue hardship needed.

250. Bankruptcy has a procedure for reaffirmation of a debt but most reaffirmations must happen under the supervision of the bankruptcy judge. 11 U.S.C. § 524(a)(1)–(2), (k)(3)(J)(i)(7) (2012); Baran Bulkat, *Reaffirmation Agreements in Chapter 7 Bankruptcy*, THE BANKRUPTCY SITE, https://www.thebankruptcysite.org/resources/bankruptcy/state-bankruptcy-law/will-chapter-7-trustee-agree-my-reaffirmation-request [https://perma.cc/5XXZ-YML6].

251. In bankruptcy, the record-keeping happens when the debtor fills out her schedules listing all of her debts. These schedules become part of the public record once the bankruptcy case is filed. The analogous situation in the proposal is the debtor's credit report and its listing of outstanding debts. The analogy is not perfect. The bankruptcy filing remains a public record forever; whereas debts do not need to be listed in a credit report and will only remain there for a certain period of time. 11 U.S.C. § 521(a) (2012); MARGARET C. JASPER, HOME MORTGAGE LAW PRIMER 93 (3d ed. 2009).

253. As opposed to not knowing whether there will be a bankruptcy filing at all, let alone a discharge.

Former debtor can pursue violations through federal statutes.[252]	Private right of action against those attempting to collect, including costs, fee-shifting, and a statutory penalty.

The objective of this proposal is to give creditors a clear and defined amount of time in which to attempt to collect an unsecured debt from a consumer. This time can be extended by obtaining a judgment on a debt, but the time to collect on that judgment would also be limited and non-renewable. In effect, this proposal limits the length of an unsecured consumer obligation to 7–14 years, depending on if and when a creditor obtains a judgment. It is a clock against which the collector is racing to persuade the debtor to repay or to use legal process to force repayment. The dual goals are to encourage creditors to act diligently in attempting to secure payment and to allow debtors to easily know when they are no longer burdened by a debt.

B. *Effect on Creditors, Collectors, and the Cost of Credit*

One of the posited benefits of the current perpetual system is that the ability to continue collecting for lengthy periods from delinquent debtors may lower the overall cost of credit. It is often stated that increased regulation will tend to increase the cost of credit or decrease its availability.[254] However, as Bill Whitford and Harold Laufer found, the answer is not necessarily black or white: "regulation may sometimes induce creditors to adopt more efficient collection techniques without adversely affecting their net income."[255] Further, because creditors compete amongst each other for a small or non-existent pool of funds from the debtor, regulation may also reduce collection costs on all creditors.[256] Finally, knowing that *ex post* remedies are limited may discipline

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252. In the case of a bankruptcy discharge violation, debtors have the option to enforcing the discharge through the Bankruptcy Court (who may impose penalties for the violation of the discharge injunction) or they may sue under the FDCPA for attempting to collect a debt not legally owed. *See* Randolph v. IMBS, Inc., 368 F.3d 726, 728 (7th Cir. 2004). In the case of my automatic discharge proposal, debtors may sue under the FDCPA for the same principle.

254. *E.g.*, Zywicki, *supra* note 161.

255. Whitford, *supra* note 196, at 1077 (citing William C. Whitford & Harold Laufer, *Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607, 649 (1975) (noting that collectors had further routinized and streamlined their collection procedures following increased regulation).

256. *Id.* at 1077–78. Bankruptcy also arguably serves this function.

some creditors to make sure they are lending to those who are likely to repay.[257] Thus, it does not necessarily follow that costs would increase or availability of credit would decrease with additional regulation.[258]

On the contrary, a uniform federal law might reduce the overall cost of collection: calculating the appropriate period becomes a simple matter of addition.[259] Such a law would reduce the uncertainty caused by the current patchwork of state statutes and differing interpretations of the appropriate state law to apply. For the law-abiding debt collector, it would also reduce the probability of a FDCPA and FCRA lawsuits, a significant cost-saver.[260]

Another likely consequence of this proposal is the further consolidation of the debt collection and debt buying industry.[261] This consolidation is not new. It is currently occurring largely as a result of increased enforcement the Federal Trade Commission, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau (CFPB), and states attorneys general.[262] Looming new regulations by the CFPB, increasing numbers of FDCPA lawsuits, and intensified scrutiny in the academic and popular press are likely also to blame.

But consolidation in this space should not be feared. Commentators tend to attribute the bulk of debt collection abuses to smaller debt collectors.[263] Without regulation, there are few

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257. *See, e.g.*, Ronald J. Mann, *Optimizing Consumer Credit Markets and Bankruptcy Policy*, 7 THEORETICAL INQUIRIES L. 395, 399 (2006) (proposing rules that place more of the risk of financial distress on lenders, "so that they have an incentive to use information technology to limit the costs of distress"); Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit* at 20–21, FEDERAL RESERVE BANK OF PHILADELPHIA (June 19, 2015), https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2015/wp15-23.pdf [https://perma.cc/5A8S-ZPJH].

258. *Accord* Zywicki, *supra* note 161, at 2 ("In theory, well-designed debt collection rules can aid both borrowers and lenders by increasing access to and reducing prices for consumer credit.").

259. As one commentator has noted, "[n]o one can tell, of course, how much additional judicial effort would be required if there were no statutes of limitations; but it may well be that it would not exceed that expended in deciding legal questions engendered by the statutes themselves." *Developments*, *supra* note 58, at 135.

260. WebRecon reports that, since 2010, there have been over 10,000 FDCPA lawsuits annually with 10,402 in 2016. *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WEBRECON LLC (Jan. 24, 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/ [https://perma.cc/G5E2-YZVE].

261. *See Study: Over-Regulation of Debt Collectors by CFPB Could Harm Consumers and Credit Economy*, ACA INT'L, (Sept. 30, 2015) (quoting Zywicki, *supra* note 161).

262. Michael R. Flock, *Debt Buyers—Shrinking Opportunities Amid Regulatory Reform*, ABF J. (Sept. 2014), http://www.abfjournal.com/articles/debt-buyers-shrinking-opportunities-amid-regulatory-reform/ [https://perma.cc/SV3J-Q3G7].

263. *See* Halpern, *supra* note 47, at 158 (suggesting that small-time debt collection

barriers to entry to purchase or collect debt.[264] Smaller collection operations have fewer resources and are more likely to violate the law for lack of knowledge or ability to train their employees. They are also more likely to "work" older debt, or debt that has changed ownership multiple times, both circumstances which increase the likelihood of consumer harm. Industry consolidation should also increase efficiency of collections, and allow collectors and debt buyers to use their increased market power to create more complex and accurate analytical models of whether a debtor is likely to repay. This should in turn decrease the cost of collections, which may trickle up to a decrease in the cost of credit, all else being equal.[265]

Nevertheless, this statute would undoubtedly incur some costs. State courts dockets across the United States are already filled with debt collection lawsuits, most of which are resolved upon the debtor's default.[266] This proposal might have the effect of forcing creditors to sue more often, to obtain the additional seven-year period in which to collect. It might also increase the number of lawsuits, although whether it does would depend on whether the expected value of collecting on a judgment, conditional on winning the lawsuit, is large enough to make it worthwhile. Indeed, instead of an increase in the total number of lawsuits, we might observe a substitution effect, as some lawsuits would no longer be brought.

A potential critique of this proposal is that it will reduce the availability of credit as lenders may not be able to legally charge sufficiently high prices to compensate for the lower probability of recovery upon default. Riskier consumers will suffer disproportionately, as lenders would still be willing to offer credit to those with a low probability of default. First, to the extent that an automatic discharge would discourage lenders from granting loans to those who will be unable to repay them, this may not be a

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agencies are successful because they induce psychological anxiety in debtors).

264. *Id.*; *see* Fedaseyeu, *supra* note 259, at 20.

265. In addition, better analytics would help collectors identify those consumers who truly cannot pay (and who only own exempt assets) and should decrease the likelihood of those consumers being contacted. *See* Tom Groenfeldt, *Bank Reduces Debt Collection Costs Through Big Data Analytics*, FORBES (July 8, 2015, 7:25 AM), https://www.forbes.com/sites/tomgroenfeldt/2015/07/08/bank-reduces-debt-collection-costs-through-big-data-analytics/#20b6436379b3 [https://perma.cc/3PSM-92WE]; *Debt Management and Collection Analytics (Customer Segmentation)*, SCOREDATA, http://scoredata.com/debt-management-and-collection-analytics-customer-segmentation/ [https://perma.cc/VY4E-AWGV] (last visited Jan. 11, 2018).

266. For decades, commentators have noted that the majority of lawsuits in state court dockets involve the collection of consumer debts. *Cf.* D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 220 (1974).

great loss.[267] As Heidi Hurd has noted, "there is no virtue in allowing creditors to extend credit to those who can be reliably predicted to default on its terms."[268]

But note that independent of this proposal, the more time passes from the moment of default, the lower the probability of collecting.[269] In other words, as time passes, the recovery curve inexorably approaches zero.[270] At some point, the likelihood of recovery is so miniscule that it may be possible to set a long enough period for the automatic discharge that the diminishing returns of collection after that time would not be worthwhile. An automatic discharge rule reduces creditors' ability to collect. How *much* it reduces it, however, depends on *when* the automatic discharge happens. I have proposed setting a seven-year statutory period that could not be revived by a promise or even subsequent payments.

Another likely criticism is that an automatic discharge of debts may incentivize debtors to hide from their creditors for the statutory period in an effort to get away with not repaying their debts. While there may be some debtors who make this choice, it

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267. This may force some consumers to substitute towards other types of credit products. *See* Zywicki, *supra* note 161, at 22.

268. Heidy M. Hurd, *The Virtue of Consumer Bankruptcy* in A DEBTOR WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 234 (Ralph Brubaker, Robert M. Lawless, and Charles J. Tabb, eds., 2012). Discussing theological reasons for forgiving debts, Simon Taylor notes:

> The mutual recognition of sinfulness is significant because it implies that both debtors and creditors have a responsibility in the problems that have arisen over debt in the current context. Loans must not only be asked for, they must be granted. Responsible borrowing finds its counterpart in responsible lending. An acknowledgement of the odious nature of some debts is an essential part of this responsible lending. There is an element of risk in the creation of debt and this must be shared between creditor and borrower. It is not responsible to lend when it is clear that the debt will not be able to be repaid and that a situation of deepening indebtedness will result. Nor, however, is it responsible to simply allow debtors who have squandered their loans to be given more money to squander. The issues of moral hazard here must be addressed by any proposed debt forgiveness, but it must be addressed in both directions.

Simon J. Taylor, *Forgiving Debts: A Theological Contribution*, 41 MODERN BELIEVING 3, 11 (2000).

269. *See* Margaret Reiter, *What to Expect When Your Debt Goes to Collection*, NOLO, https://www.nolo.com/legal-encyclopedia/what-expect-when-your-debt-goes-collection.html [https://perma.cc/Y6NR-GHDR] (last visited Oct. 4, 2017). We can see this somewhat on the price of charged-off receivables, which start at cents on the dollar for "fresh" charge-offs and go to fractions of pennies for debts that are past the statute of limitations. *See* FED. TRADE COMM'N, *supra* note 64, at ii, iv–v, 23–24, 42.

270. *See, e.g.*, OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS, *Chart 7: Recovery Distributions Depending Date of Default*, *in* ACTUARIAL REPORT ON THE CANADA STUDENT LOANS PROGRAM 2011 (June 1, 2012), http://www.osfi-bsif.gc.ca/eng/oca-bac/ar-ra/cslp-pcpe/Pages/CSLP_2011.aspx#cht-7 [https://perma.cc/YY23-2MVQ].

is unlikely many would do so. First, in this age of hyper-connectivity, it is increasingly hard to hide from anyone without incurring significant costs, such as changing one's name or identity.[271] Second, this proposal does not change the current cost of defaulting. The debtor's credit report would still suffer, as would her opportunity to obtain more credit. Third, and most importantly, seven years is a *long* time. If the aim of the strategic consumer is to avoid repaying creditors, bankruptcy is a far more attractive option.[272]

In my view, this proposal is not likely to increase bankruptcy filings. In effect, debtors receive bankruptcy-like protections without having to do anything. To be sure, filing bankruptcy also means receiving the protection of the automatic stay and a court-managed process. However, in most cases, it means hiring and paying for a lawyer and paying substantial fees. More likely, enactment of this proposal would tend to decrease filing rates. In particular, debtors who would have had to save to file "no asset" Chapter 7 cases might prefer waiting out the clock, especially in jurisdictions in which wage garnishment is limited. For some creditors, a system of automatic discharge could prove to be a better deal than if the debtor filed bankruptcy.

C. Effect on Consumers

A federal statute that definitively and automatically discharges of consumer debts would go a long way towards ameliorating the social costs and negative economic consequences discussed in the previous Part. Even if restricting creditors remedies in this way does not increase "consumer welfare" in the strictly economic sense,[273] my argument is that it would be justified to fulfill objectives that go beyond wealth maximization,

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271. *See, e.g.*, Jessica Winch, '*Changing My Name Was the Only Way to Escape Debt Hell'*, TELEGRAPH (Apr. 26, 2014, 7:34 AM), http://www.telegraph.co.uk/finance/personalfinance/borrowing/10787200/Changing-my-name-was-only-way-to-escape-debt-hell.html.

272. The exception here might be with regards to private student loans, which are presumptively non-dischargeable in bankruptcy but would be automatically dischargeable under my proposal. *See* Ang & Jiménez, *supra* note 144 at 175–76, 186, 195.

273. Zywicki, *supra* note 161, at 20 (noting that "it is unclear as an *a priori* matter whether tighter restrictions on creditor collection remedies will increase consumer welfare" and cautioning against regulating without a full understanding of the costs and benefits of the potential regulation).

for example, reducing "mental anguish"[274] caused by perpetual debts.[275]

Implementation of this proposal would dramatically decrease the time during which a creditor could dun a consumer. Debt owners who continue to attempt collection from debtors after extinguishment of the debt would do so without legal basis.[276] Legally, it would be as if a debt had never existed in the first place. In the case of a debt collector, they would be violating the FDCPA's prohibition against making false or misleading representations. Specifically, the collector would be falsely representing "the character, amount, or legal status of any debt" by arguing that the consumer owed them anything.[277] An originating creditor—that is, a bank or other entity that extended credit to the consumer—is not subject to the FDCPA, but would arguably violate the CFPA prohibition against deceptive acts or practices.[278] Either party would likely violate state consumer protection statutes.

A single national law that automatically discharges debts after a unified time and which does not allow the clock to restart even when a payment is made after a default greatly reduces the power of zombie debts. Such a system greatly simplifies the message that regulators and consumer advocates would have to communicate to consumers about their rights. All they would need to explain is when to begin counting the limitations period and how long it is. The FTC may not be able to prevent scammers from calling a consumer about a debt she already repaid, but after the appropriate amount of time has passed, the consumer would be much more likely to understand that this zombie could not hurt her.[279]

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274. Whitford, *supra* note 196, at 1081 ("Even if regulation is not efficiently wealth maximizing, it might be seen as justifiable to fulfill other regulatory objectives, such as avoidance of mental anguish.").

275. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 462 (1996) (arguing that "promoting peace of mind benefits all members of society, including the innocent and the risk-averse, not just those who actually have committed a legal wrong"); Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, JURISPRUDENCE, at 6 (forthcoming 2018), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2563233 (noting that "the kind of prosperity that enables human flourishing might differ from simple maximization of gross domestic product").

276. Naturally, just like in a bankruptcy, nothing prohibits a former debtor from giving money to a former creditor, but the creditor would have no basis to seek payment. *See* Catherine E. Vance, *Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce*, 45 BUFFALO L. REV. 369, 374 (1997).

277. 15 U.S.C. 1692e(2)(A) (2012).

278. Nevertheless, a few states have enacted their own FDCPA statutes and some do cover original creditors. *See, e.g.*, CAL. CIV. CODE § 1788 et seq.

279. *See* Irby, *supra* note 6. In fact, if she can find the scammer she might even be able to hurt *him* by suing for a violation of the FDCPA. *See* Lisa Lake, *Stop a Debt Collector's*

An automatic discharge of debts would also likely reduce the emotional and social toll that perpetual debts can cause a debtor who continues receiving phone calls and letters for many years while she is unable to repay. This will also assist people who are aware that there is a debt out there that is growing interest and could resurface at an untimely moment to garnish her wages or take her assets.

This proposal does have potential downsides for consumers, however. As discussed earlier, the automatic discharge and inability to restart the clock after a default might cause a debt owner to sue a consumer she otherwise might not have. This might lead to more consumers being sued, or to a different composition of the kinds of lawsuits brought.[280] Bringing the lawsuits earlier would benefit consumers at least to the extent that they are more likely to have evidence available to defend themselves against it.[281] In addition, as Mann and Porter have noted, "losses can be minimized by a process that limits the time and expense consumed by the period of distress and returns the household to productive economic activity."[282]

V. CONCLUSION

This Article has argued that consumer debts in the United States can effectively live—and grow—forever: statutes of limitations do not extinguish them; they can morph into relatives' obligations even after the debtor's death; and sometimes rise from the grave even after they have been paid. All the while, interest and fees accrue. There is one sure way to extinguish most debts, however, and that is by filing bankruptcy. But bankruptcy is both costly and in some cases, overkill, in that it can extinguish debts that a debtor was able to and perhaps even willing to pay.

As an alternative, this Article has explored a proposal for a type of "automatic bankruptcy" of consumer debts: a debt discharge that would take effect by operation of federal law after roughly seven years from the date of default, or, in the case of a judgment, seven years after its issuance. The proposal combines features from traditional statutes of limitation (a statutory period that generally extinguishes the legal remedy) with the bankruptcy

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Empty Threats, FED. TRADE COMM'N (July 21, 2014), https://www.consumer.ftc.gov/blog/2014/07/stop-debt-collectors-empty-threats [https://perma.cc/5JY4-MAPY].

280. *See supra* note 33 and accompanying text.

281. Although it is certainly true that "for the ordinary individual, the financial and emotional burden of potential litigation cannot be underestimated." Ochoa & Wistrich, *supra* note 304, at 462.

282. Mann & Porter, *supra* note 151, at 296.

discharge (the complete extinguishment of all collection rights and remedies). The aim is to reduce the psychological and economic weight of debts that can be collected forever while limiting the potential economic downsides.

Consumer Law Scholars' Response to Proposed Rules on Debt Collection Practices (Reg F)

Docket no. CFPB-2019-0022/RIN 3170-AA41

We, the undersigned consumer law professors, write in response to the Consumer Financial Protection Bureau's ("CFPB" or "the Bureau") Notice of Proposed Rulemaking, Debt Collection Practices (Regulation F), docket 2019-022. We are all legal academics who regularly teach, research, practice, and advocate for policy reforms in the area of consumer protection and consumer debt collection. Some of us teach consumer law clinics, where we and our students have direct contact with low-income consumers, debt collectors, and debt collection law firms, often in the context of court litigation. These experiences are reflected in the comments, which include observations from collection cases in the courts of New York City, New York; South Bend, Indiana; and Dallas, Texas.

We appreciate the opportunity to submit these comments for your consideration and are at your disposal should you wish to discuss any of these comments further.

Gina M. Calabrese, Professor of Clinical Education & Associate Director, Consumer Justice for the Elderly: Litigation Clinic, St. John's University School of Law

Judith Fox, Clinical Professor and Director of the Economic Justice Clinic, Notre Dame Law School

Dalié Jiménez, Professor of Law, University of California, Irvine School of Law

Neil L. Sobol, Professor of Law, Texas A&M University School of Law

Jeff Sovern, Professor of Law, St. John's University School of Law

Mary Spector, Professor of Law and Director of the Civil/Consumer Clinic, SMU Dedman School of Law

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I. Introduction and Suggestions About the Rule's Scope

On May 7, 2019, the CFPB posted its Proposed Rules for Debt Collection Practices (Regulation F). We appreciate the substantial time and effort that has been expended in the creation of these rules. In November 2013, the Bureau submitted an Advanced Notice of Proposed Rulemaking and request for comments (docket CFPB-2013-26875). The Bureau received 399 comments at that time. Following this event, many meetings were held, research compiled, and reports written. Throughout the numerous events held by both the FTC and the CFPB, it was clear that both industry and consumer advocates wanted regulations that would clarify a statute that had not been significantly updated for more than forty years.

For more than a decade, stakeholders have recognized that developments in the collection industry along with ever-evolving technology created new questions that the FDCPA could not always resolve. While new business models (e.g., debt buying and securitization) and new modes of communication are major drivers of the need for updated legal rules, so is the growth in U.S. consumer debt. As the FTC observed in a 2009 publication, Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report, "Since the enactment of the FDCPA, consumer debt has risen dramatically."[1] The FTC also noted that the nature of consumer debt had changed, with growth in revolving credit, educational loans, and personal property, as well as mortgage loans.[2] Given the deregulation trends of the 1980s and 1990s, national banks offered more credit cards to individuals and were permitted to charge interest rates exceeding 25% in some cases (which would be usurious under some states' laws, such as New York), as well as various fees and penalties. Credit card balances quickly "snowballed" to sums consumers would never be able to pay and often, could not recognize as accurate after a long period of default.[3] By the 2000s, local courts were overwhelmed by a surge in lawsuits to collect defaulted debts, even before the recession of 2008. In New York City, for example, the number of debt collection cases filed against consumers (typically, credit card debt) climbed precipitously, peaking at over 300,000 in 2008.[4] That exceeded the number of civil lawsuits filed in every U.S. District Court that year (267,000).[5] As these numbers reflect, nowadays, "The debt collection experience is a common one—approximately one in three consumers with a credit record reported having been contacted about a debt in collection in 2014."[6] This is also reflected in the size of the debt collection industry, which "is estimated to be an $11.5 billion-dollar industry employing nearly 118,500 people across approximately 7,700

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[1] FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 11 (2009).

[2] *Id.* at 11-12.

[3] For example, one of us assisted a client whose credit card debt grew from $5,000 at the time of default to $20,000 by the time she was sued. Another client's retail card's charge-off statement showed that she had purchased $750 of goods and owed about $2000 at charge-off. This was after making at least $1400 of payments toward the account. A debt buyer ultimately sued her for over $3,000. Several years later, when she needed to replace a large household appliance that had broken down, the same store offered her a new credit card account. She declined.

[4] Shirin Dhanani, et al., Ticking *Time Bombs: Consumer Credit Default Judgments and the Role of Judges in Ensuring the Fair Administration of Justice*, N.Y. L. J. (May 23, 2019 12:15 PM), https://www.law.com/newyorklawjournal/2019/05/23/ticking-time-bombs-consumer-credit-default-judgments-and-the-role-of-judges-in-ensuring-the-fair-administration-of-justice/.

[5] *Id.*

[6] Debt Collection Practices (Regulation F), 84 Fed. Reg. 23274, at 23277 (proposed May 21, 2019) (to be codified at 12 C.F.R. pt. 1006).

collection agencies in the United States."[7] Finally, a significant factor contributing to the growth of the debt collection industry is the emergence of debt buying businesses. The sale and re-sale of debt can result in debt collection activities lasting over a decade, beyond any statute of limitations, as the account is passed along to multiple debt buyers (sometimes referred to as "zombie debt").

Moreover, in the 40 years since the enactment of the FDCPA, consumer credit reports have been put to many new purposes beyond the original purpose of evaluating one's ability to pay a new loan. One's ability to rent an apartment, obtain and/or afford insurance, and secure employment are all impacted by one's credit report. In this context, debt collectors are able to wield considerable power over consumers, particularly those who have defaulted on debt.[8] Accuracy of debt information and prohibitions against the collection of time-barred debt (including tactics that mislead unwitting consumers to make small payments that restart the statute of limitations) are more important than ever.

Thus, significant debt burdens and debt collection now appear to be mainstream experiences for most U.S. residents. The reasons for this development are not the subject of the current Debt Collection Rule, but it seems that indebtedness is "the new normal" as Americans rely on debt to sustain a basic standard of living. Indebtedness might no longer carry the stigma it once did. Given these developments, regulations should be designed to provide strong protections to U.S. consumers from deceptive, unfair, and abusive debt collection tactics. Instead, the rules as proposed are disappointing in their lack of comprehensive coverage. When issues are addressed, the rules tip heavily in favor of the debt collection industry and not consumer protection. We address selected aspects of the Proposal below.

A. Documentation of the debt

In hearings before the CFPB, which took place in early 2014, both industry and consumer groups expressed the need for better documentation of the debt. Specifically, debt buyers complained of being unable to obtain documents from original creditors, especially as they pertained to disputes and payments. As evidenced by the comments responding to the Advanced Notice of Proposed Rulemaking, at the time of the 2014 hearings, downstream debt buyers *might* have information about the chain of title or the bill of sale (usually only by request), but not other very important information.[9] The missing information often

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[7] *Id.* at 23276.

[8] Anecdotally, at least one of us has paid a debt they did not actually owe just to resolve the matter. Others of us have encountered consumers in similar situations. Incidents like these speak volumes to the disparity of negotiating power between the typical consumer debtor and debt collectors.

[9] The Bureau's own study on this issue found that 36.5% of respondents "rarely" or "never" had access to an account's chain of title. Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 23, Table 8 (July 2016),

includes the final charge-off statement.[10] As one industry respondent noted, "at the time an account is sold, all the electronic records pertaining to that account, including images, statements and cardholder agreements, should be transferred."[11] The Bureau's own study found that, for example, less than half of respondents reported receiving account agreement documentation at the time of sale or acquisition.[12]

In August 2014, the Office of the Comptroller of the Currency ("OCC") took steps to remedy the documentation problem. It issued Bulletin 2014-37, a guidance entitled Consumer Debt Sales: Risk Management Guidance, directed to all of the entities that it regulates ("the OCC Guidance").[13] Financial institutions that are regulated by the OCC were now expected to provide accurate and complete account information at the time of a debt sale.

Overall, the OCC's concern was the risk that debt-sale arrangements posed to financial institutions. The OCC identified four categories of risk within its authority: operational risk, reputational risk, compliance risk, and strategic risk. Tellingly, and "based on its supervisory process," the OCC was concerned with the transfer of bank customer files that "lack information as basic as account numbers or customer payment histories." The OCC found that there was a direct relationship with the lack of information transferred in debt sales and inappropriate collection practices, stating:

> [B]ecause the debt buyers pursue collection without complete and accurate customer information, the debt buyers may employ inappropriate collection tactics or engage in conduct that is prohibited based on the facts of a particular case (e.g., pursue collection on a debt that was previously discharged in bankruptcy or after the applicable statute of limitations).

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https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf [hereinafter Bureau Collector Survey]

[10] Unifund, Response to Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6., February 28, 2014 at 2.; Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014, at 6.

[11] Commercial Law League of America, Response to Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking,

[12] 28 respondents reported always or often receiving documentation while 30 reported receiving it rarely or never. *See* Bureau Collector Survey, *supra* note 9, at 23. The 2016 study also states that "There is considerable variation in whether respondents receive documentation such as account agreements or billing statements" and that "More than one respondent indicated that they prefer not to obtain documentation unless and until a consumer submits an FDCPA dispute or there is another reason to review the documentation." *Id.* at 23-24. These statements are entirely contrary to the Bureau's argument for proposed 1006.26. *Id.* at 23-24.

[13] *Consumer Debt Sale: Risk Management Guidance*, Office of the Comptroller of the Currency (Aug. 4, 2014), https://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html [hereinafter *Risk Management Guidance*].

To reduce the various risks debt-sales pose to banks, the OCC Guidance included several expectations, including the expectation that at the time of a debt sale, regulated entities provide debt buyers "accurate and comprehensive information regarding each debt sold." Specifically, the OCC Guidance stated that:

> For each account, the bank should provide the debt buyer with copies of underlying account documents, and the related account information, as applicable and in compliance with record retention requirements, including the following:
>
> - A copy of the signed contract or other documents that provide evidence of the relevant consumer's liability for the debt in question.
> - Copies of all, or the last 12 (whichever is fewer), account statements.
> - All account numbers used by the bank (and, if appropriate, its predecessors) to identify the debt at issue.
> - An itemized account of all amounts claimed to be owed in connection with the debt to be sold, including loan principal, interest, and all fees.
> - The name of the issuing bank and, if appropriate, the store or brand name.
> - The date, source, and amount of the debtor's last payment and the dates of default and amount owed.
> - Information about all unresolved disputes and fraud claims made by the debtor. Information about collection efforts (both internal and third-party efforts, such as by law firms) made through the date of sale.
> - The debtor's name, address, and Social Security number

OCC-regulated banks should be complying with this guidance to meet supervisory expectations. According to the CFPB's 2017 credit card report,[14] all survey respondents that sold debt reported that they provide several key documents and account information, including an itemized account of all amounts claimed, mirroring the OCC Guidance.

The proposed rules fail to require essential documentation of the debt when both consumers and industry identified this need in their comments to the Advanced Notice of Proposed Rulemaking.[15] The rule fails to address credit originators. As several industry comments pointed out, the originators will not retain or pass on all the relevant information unless

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[14] Consumer Financial Protection Bureau, The Consumer Credit Card Market 29 (2017), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

[15] Encore Capital Group Response to Consumer Financial Protection Bureau's Advanced Notice of Proposed Rulemaking, February 28, 2014 at 6. *See also*, Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J, LEGIS. 41, 109 (2015) (arguing that "a rule requiring a minimum level of information, documentation, and contractual representations is a natural best-fit solution for these problems since it has the potential to fix the collective action problem identified earlier.").

required to do so by federal law.[16] Despite this, the rules do nothing to require that original creditors maintain records or transfer them to subsequent debt buyers.

This failure to require complete and accurate account information has already been found by another federal agency (the OCC) to lead to inappropriate debt collection practices is troublesome. Omitting such a requirement from these rules becomes more problematic when it interacts with some of the proposed rules, as described further in the discussion of 1006.30(b) in Part V.

B. Retention of Information

As one industry respondent noted, "[t]he Bureau should mandate that debt issuers maintain account records for the entire time the data evidenced by such records can be reported under the FCRA."[17] The respondent explains that original creditors, not just debt buyers, should be mandated to retain that information because banks will not do so unless required by federal regulation.[18]

C. Litigation activity

The Bureau's Proposal also fails to address the important issue of litigation activity, except in the narrow situation of limited attorney involvement addressed below. Deceptive acts during the litigation process are important, and the courts have been divided on how to address these issues. Failing to have consistent rules has led to some very unfortunate activity. Take, for example, the decision in *O'Rourke v. Palisades Acquisition*.[19] The debt collector made an account stated claim in a state court collection proceeding. As evidence, it submitted a statement, claiming that because the consumer had not objected the presumption arose that the debt was legitimate. In fact, the statement was never sent to the consumer. The *O'Rourke* court found that because this action was meant to deceive the court and not the consumer, it was not a violation of the Fair Debt Collection Practices Act.[20]

Let us set aside the fact that the pleading was sent to a consumer and could well have confused the consumer regarding the ability to defend this action. As a result of this action, debt collectors in Indiana began printing on their statements "not sent to consumer." This

[16] Commercial Law League response to question 9; Collections Marketing Center, Response to CFPB ANPR, January 13, 2014, at 2-3. Jiménez, , note 15, at 110 et. seq. (arguing that the "CFPB should clarify that the practice of selling debts with little information, no warranties, and no account documents as a violation of the prohibitions against unfairness and deception").

[17] Commercial Law League response to question 9.

[18] *Id.*

[19] O'Rourke v. Palisades Acquisition, 635 F.3d 938 (7th Cir. 2011).

[20] *Id.* at 944.

cause of action gave the entire industry a free pass to use and then file deceptive documents. The Bureau should expand the rules to prohibit this kind of activity.

II. Communication in Connection with Debt Collection

The Fair Debt Collection Practices Act was enacted in 1978, which is also the year of the first commercial cellular network. Cell phones would not become available at a reasonable cost for another twenty years. Smartphones, with their email and text messaging, followed and changed the way we communicate. Unfortunately, Congress has done nothing in the ensuing forty years to update the way the FDCPA handles communications. It is certainly true that many consumers prefer to communicate by email or text message. There are also benefits to such communications, such as the ability to read and respond on your own schedule and to maintain a complete written record of the transactions. We applaud the CFPB for addressing the serious need to update the law to more closely ally with how modern consumers and debt collectors communicate. At the same time, several portions of the proposed rules raise concerns for consumers.

A. Proposed § 1006.2 – Limited-Content Messages

The FDCPA provides a number of protections for consumers in connection with "communications." Communications are defined in FDCPA § 1692a(2) as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Proposed § 1006.2(d) provides in pertinent part that "A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector provides only a limited-content message, as defined in paragraph (j) of this section." Thus, the Proposal would enable debt collectors to leave limited-content messages without triggering the protections accorded to consumers in connection with "communications." We urge the Bureau to abandon its Proposal to enable collectors to leave limited-content messages for consumers as currently defined because the messages would invade consumer privacy, in conflict with the FDCPA.

1. The Purpose of Limited-Content Messages

Limited-content messages are intended to deal with a Catch-22 that had arisen under the FDCPA when debt collectors wished to leave messages—either on recordings or with third parties—for consumers. If a message qualifies as a communication, the collector must identify herself as a debt collector under § 1621e(11). On the other hand, under § 1692c(b), debt collectors are largely prohibited from communicating with third parties about a debt. In other words, if a collector tells a third party taking a message that she is a debt collector, she presumably violates 1692c(b), but if she doesn't and the message is a "communication," she violates § 1621e(11). A collector leaving a recorded message also runs the risk of violating one or the other provision because under the Proposal, "[d]ebt collectors cannot be certain that a voice message will be heard only by the consumer for whom it was left."[21] This problem has become known as the Foti problem after a case in which a collector was found to have violated the FDCPA when leaving the message: "Good day, we are calling from NCO Financial Systems regarding a personal business matter that requires your immediate attention. Please call back 1-866-701-1275 once again please call back, toll-free, 1-866-701-1275, this is not a solicitation."[22]

The Proposal attempts to resolve the Foti problem by creating what it labels limited-content messages,[23] and providing as noted above, that limited content messages are not communications.[24] Put another way, collectors could leave messages without violating the FDCPA as long as those messages do not stray beyond the definition of a limited-content message.

2. Limited-Content Messages Risk Invading Consumer Privacy, Contrary to the Purpose of the FDCPA

We do not object in principle to the Bureau's goal of enabling debt collectors to leave oral messages for individual consumers without violating the FDCPA. But we also agree with the statement in *Edwards v. Niagara Credit Solutions, Inc.* that the FDCPA "does not guarantee a debt collector the right to leave answering machine messages."[25] A collector may leave a message as long as the message does not conflict with the FDCPA, but we believe limited-content messages as described in the Bureau's Proposal would violate the FDCPA's key goal of preventing third parties from learning that a consumer has a debt in collection.

Congress was so concerned about this privacy invasion that it enacted numerous provisions to prevent it, in addition to § 1692c(b). Thus, Section 1692f(8) bars collectors from using language or symbols on envelopes, including the business's name if that name would indicate that the business is engaged in debt collection. Debt collectors may not communicate with consumers by post-cards;[26] of course, post-cards may be read by anyone who sees them. The theme of privacy even found its way into the congressional findings that inspired the FDCPA.[27] Accordingly, the Bureau should be especially vigilant to avoid undermining Congress's clearly-expressed goal of protecting consumers with debts in

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[21] Proposal at p. 381.

[22] Foti v. NCO Fin. Sys., Inc., 424 F. Supp. 2d 643, 655-56 (S.D.N.Y. 2006).

[23] *See* Proposed Regulation § 1006.2(j).

[24] *See* Proposed Regulation § 1006.2(d).

[25] Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350, 1354 (11th Cir. 2009)

[26] *See* § 1692f(7).

[27] *See* §1692(a) ("There is abundant evidence of the use of abusive . . . collection practices by many debt collectors. Abusive debt collection practices contribute . . . to invasions of individual privacy.").

collection from discovery by others. Unfortunately, the limited-content message vastly increases the likelihood of that occurrence.

To explain why the limited-content message would have such an effect, we turn to its definition. Under Section 1006.2(j) of the Proposal:

> [A l]imited-content message means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.
>
> (1) Required content. A limited-content message is a message for a consumer that includes all of the following: (i) The consumer's name; (ii) A request that the consumer reply to the message; (iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector; (iv) A telephone number that the consumer can use to reply to the debt collector; and (v) If applicable, the disclosure required by § 1006.6(e).
>
> (2) Optional content. In addition to the content described in paragraph (j)(1) of this section, a limited-content message may include one or more of the following: (i) A salutation; (ii) The date and time of the message; (iii) A generic statement that the message relates to an account; and (iv) Suggested dates and times for the consumer to reply to the message.

To make the definition more concrete, the Proposal helpfully supplies examples of a limited-content message.[28] Decades ago, many consumers received messages of that sort. The problem is that other forms of communication have largely supplanted such phone messages, with a few exceptions we discuss below. The Proposal attempts to address this concern when it states on page 68 that "the Bureau understands that the content required by § 1006.2(j)(1) often is included in a voicemail or other message for a person in a wide variety of non-debt collection circumstances, so a third party hearing or observing the message may not infer from its content that the consumer owes a debt."[29]

In fact, our experience with phone messages is different, and we believe that the types of messages the Bureau describes, with the exceptions discussed below, are rarely left orally today. We are not aware of any empirical evidence of how common such messages are today, and in fact, the Proposal does not cite any source, empirical or otherwise, for the

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[28] *See* Comment 2(j)-1, 2 ("This is Robin Smith calling for Sam Jones. Sam, please contact me at 1-800-555-1212." and "Hi, this message is for Sam Jones. Sam, this is Robin Smith. I'm calling to discuss an account. It is 4:15 p.m. on Wednesday, September 1. You can reach me or, Jordan Johnson, at 1-800-555-1212 today until 6:00 p.m. eastern, or weekdays from 8:00 a.m. to 6:00 p.m. eastern.").

[29] Proposal at p. 68.

proposition quoted above. At a minimum, we urge the Bureau, if it intends to move forward with this Proposal, to conduct the empirical research needed to determine if its claim is correct. To the best of our knowledge, the type of request the Bureau describes is not likely to be conveyed via a phone message. Consequently, if the Bureau adopts its Proposal, a strong possibility exists that third parties overhearing such messages will recognize that the recipient has a debt in collection, especially as limited-content messages come into broader use. That is particularly likely to be so if the collector says, as the Proposal would permit, that the message relates to an account. Messages that say that they relate to an account without identifying with whom the account is held are, we believe, exceedingly rare.

The problem would grow worse as consumers accumulated experience with limited-content messages. As the Bureau recently reported, more than one-in-four consumers has a third-party collections tradeline on their credit file.[30] Consequently, if the Bureau adopts the Proposal, we can expect many consumers to receive limited-content messages from debt collectors, and so, as time passes, to recognize them when they hear others receive them. In short, the limited-content message would soon become a badge of consumers with debts in collection.

As noted above, consumers do sometimes receive messages asking them to return phone calls. But for many consumers, these messages fall into patterns that are readily distinguishable by third parties from limited-content messages. Some messages are from businesses with whom the consumer has a relationship, but these messages usually identify the business—something the collector leaving a limited-content message is precluded from doing ("Hello, this is Star Toyota calling to confirm your service appointment"). Or they are from telemarketers, but those also do not sound like the limited-content messages ("Call now to take advantage of our low prices."). Or a friend or family member might leave a message. But in our experience, these calls too rarely resemble the limited-content message. A close friend or family member might not even identify himself, assuming that the recipient will be able to recognize his voice. Or they might give a name but not a number because, in these days of smartphones, most consumers simply click on a name in a list of contacts rather than manually dialing a number. And those regularly overhearing such messages for others will often be able to recognize the caller themselves.

In short, we believe that few consumers receive enough calls that sound like limited-content messages to provide the camouflage that such calls need so as not to convey that they are calls from debt collectors. As a test of this proposition, one of us wrote a blog post making this point and invited those who did receive phone messages resembling the limited-content message to so indicate in the comments to the post. No one did, and after a month the blog

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[30] *See* CFPB, Market Snapshot: Third-Party Debt Collections Tradeline Reporting 5 (2019).

automatically closed the post to comments.[31] Though this is hardly a scientific survey, it is nevertheless suggestive.

The Proposal states that limited-content messages can be left "orally with a third party who answers the consumer's home or mobile telephone."[32] We strongly oppose this provision because it exposes the consumer to exactly what the FDCPA was enacted to prevent. For example, what happens if the person taking the message asks with whom the consumer has the account? The collector can't answer, because that will take the message out of the limited-content message safe harbor. Most of what the collector might be tempted to say is likely to have that effect. The collector can't say, for example, that it's a "personal business matter," because that was the language used in *Foti*. The Bureau's decision not to permit the use of similar words under the safe harbor makes clear that it regards that language as out of bounds for the limited-content message (The Bureau considered, but rejected the use of "personal," "business," "confidential," "private," "important," and "time-sensitive."[33]) In fact, when consumers inevitably come to understand that debt collectors can't answer such questions but that others can, consumers can be expected to pose such questions if only to determine if the caller is a debt collector—which again will frustrate the FDCPA's purpose of protecting consumers from the embarrassment of having others know they have a debt in collection.

If the Bureau is not prepared to abandon the limited-content message, as suggested above, we urge the Bureau to prohibit debt collectors from leaving limited-content messages with third parties.[34] In the alternative, we urge the Bureau to survey consumers to ascertain how many already receive many messages resembling the limited-content message. The Bureau should not disrupt Congress's scheme to prevent disclosure that consumers have debts in collection without verifying that the assumptions accurately reflect reality. If, as we anticipate based on our experience, the numbers of such phone messages are small, we urge the Bureau to forego this aspect of the Proposal.

If, however, the Bureau ultimately adopts the limited-content message, we recommend that it preclude the use of the word "account" because the use of that word increases the likelihood that those overhearing the message will recognize that it originates with a debt

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[31] *See* Jeff Sovern, *Some big problems with the CFPB's proposal to allow debt collectors to leave limited-content messages over the phone*, Consumer Law & Policy Blog (June 7, 2019), https://pubcit.typepad.com/clpblog/2019/06/some-big-problems-with-the-cfpbs-proposal-to-allow-debt-collectors-to-leave-limited-content-messages.html .

[32] Proposal, at 62. See also Proposed Comment 2(j)–3 ("A debt collector may transmit a limited-content message to a consumer by, for example, leaving a voicemail at the consumer's telephone number, sending a text message to the consumer's mobile telephone number, or leaving a message orally with a third party who answers the consumer's home or mobile telephone.").

[33] Proposal, at 70.

[34] In our view, a conversation with a third party should be limited to asking to speak to the person (e.g., "Is Jane Smith there?") and nothing more.

collector, as reflected by common understanding of that word. Thus, the first two definitions provided by the Merriam-Webster Dictionary for "account" are: "a: a record of debit … and credit . . . entries to cover transactions involving a particular item or a particular person or concern; b: a statement of transactions during a fiscal period and the resulting balance;" the referenced definition of debit includes "a record of an indebtedness . . . ."[35] Consequently, limited-content messages are likely to convey to third-parties that the recipient is in debt.

We also believe that the alternative words the Bureau considered suffer from the same defects as the word "account" in that (1) at least over time, they will become associated with debt collectors, and (2) when the collector leaves a message with a live person, they are likely to prompt further questions. Before the Bureau permits the use of any such words, it should again conduct empirical research to determine first, whether they convey to third parties overhearing or taking down such messages that the caller is a debt collector and second, whether third parties copying down such messages would ask follow-up questions that collectors cannot answer.

Even if the Bureau finds that third parties do not understand the messages as being from debt collectors before the Proposal is adopted, that understanding may change over time as consumers with debts in collection receive them and then overhear them left for others. Accordingly, we further suggest that the Bureau monitor whether consumers become aware after the limited-content message safe harbor takes effect that such messages are being left by debt collectors, and if consumers do become so aware, that the Bureau rescind that portion of the regulation.

The Proposal as written also increases the risk that third-parties will learn of the consumer's indebtedness, in contravention of the congressional goal, in other ways. The Proposal does not block debt collectors from leaving limited-content messages with third-parties, such as neighbors, employers, friends, and family members, acts which are not only intrusive but can even be threatening.[36] If the Bureau moves forward with the limited-content message, it should limit the use of the messages to recordings left on a device owned by the debtor. While such recordings could still be overheard by third-parties, there would not be a certainty that third-parties would learn of the message, as is the case when messages are left with live persons or numbers belonging to others.

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[35] *See* Merriam-Webster, Account, https://www.merriam-webster.com/dictionary/account; Debit, https://www.merriam-webster.com/dictionary/debit#h2.

[36] *See, e.g.*, Statement of Richard Bell, Former Debt Collector, Hearings on the Fair Debt Collection Practices Act before the U.S. House Subcom. on Consumer Protection of the Com. on Banking and Housing (Sept. 10, 1992) ("A block party is where the collector contacts handfuls of neighbors close to or far away from the consumer, depending how mad the collector is. Block parties are often held for consumers who hang up on bill collectors . . . .").

B. Proposed § 1006.6(e) – Opt-Out Provision

The proposed regulation allows a consumer to opt out of email communications.[37] However, it does not specify how that opt-out option must be provided. Anyone who has ever tried to cancel an automatic subscription knows the problem this creates. The rule allows debt collectors to create impossible opt-out methods such as calling numbers that no one answers or submitting written requests to addresses that are hard to locate. At the very least, the rule should allow an opt-out option to be transmitted through the same medium as the original communication. If a consumer gets an email from a debt collector, he should be able to hit reply and opt out of further messages. The rule should set some ground rules for the opt-out beyond simply not allowing a fee (which we support).

The rule opens up numerous ways in which private information is likely to be conveyed to third parties through unwanted emails and text messages to not only the debtor but numerous others. Unlike phone numbers, many people share very similar email addresses. Many of us have experienced getting emails meant for someone else. Although the rule requires "reasonable procedures" to ensure the email address or cell phone number is correct, there is no guidance as to what constitutes a reasonable procedure. "Reasonable procedures" relating to telephone calls already result in mistaken identities all too often.

Section 1006.6(d)(3)(C) allows for communication to a telephone number or email address that was previously given to the creditor. This rule will certainly prompt creditors to include email addresses on their applications. While many people may have an email address, many do not check emails regularly in the same way that they answer the telephone or receive mail. This is especially true for the elderly and low-income families, many of whom only have internet access through their local library. Many consumers, especially elderly ones, may have a cell phone but either have no idea how to receive or send a text message or may have phones that do not allow them to access documents sent electronically. This will undoubtedly cause problems, especially if the opt-out provisions are contained in an attached document. The CFPB should mandate that all such disclosures be in the body of any message.

Another problem is the combination of the opt-out rule with email. We have experienced many instances where the debt collector contacts the wrong individual regarding a debt. There is simply no way for a debt collector to know if a consumer is "opting out" because this is not their debt or because they don't want to be contacted by email. Let us walk through a real case to illustrate the problem:

Ms. Martinez lives in Arizona and owed a debt. She had been in somewhat regular contact with the debt collector but had not paid the debt. She speaks English. Another woman with

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[37] Proposed 1006.6(e).

the identical name lives in Kansas City. She only speaks Spanish. In the real situation, the non-debtor Ms. Martinez was contacted by mail. She called in to ask what the letter was about. The debt collector refused to talk to her because she could not verify the social security number of the debtor. Instead of registering that as a denial that this was her debt, the debt collector sued her. It was a mistake that even a cursory view of the record could have prevented.

Now look at that fact scenario through the new rule. The debt collector emails the wrong Ms. Martinez. She opts out. There is no way to verify if she opted out because she is a non-debtor or because she is the debtor and does not want to use email. There is no way to know the obvious: this is a Spanish speaking only woman and not the English-speaking only debtor. If Ms. Martinez responds with an email, how do you verify that it is the debtor to whom you are communicating? The only way is to divulge sensitive, confidential information or have the debtor (or mistaken debtor in this case) do the same. It is not a workable situation. The idea of an opt-out option is well-intended, but it needs to be narrower and apply only to instances involving actual voice communications.

Even with disclosures buried in the document, consumers applying for loan are not thinking about what will happen when they default.[38] They do not plan to default.[39] Instead, they are providing information they believe has to be provided—email addresses and cell phone numbers—in order to get the credit they seek. It is not informed consent. A better rule would provide an opt-in as opposed to an opt-out option for email and text messages.

C. Privacy Concerns

Electronic communication opens consumers to a number of privacy concerns, not the least of which is a data breach. Debt collectors who send sensitive information by electronic means need to ensure that they have secure systems. Consumers should be protected against embedded cookies that either track their information or subject them to targeted ads. The Bureau should prohibit debt collectors from using such technology in their websites.

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[38] William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1074 (1979) ("Because consumers only occasionally enter into credit contracts, and only a very few of those result in a delinquency, debtors are typically uninformed about the risks and harms associated with various types of coercive execution. Consequently, they cannot bargain knowledgeably about these matters, particularly at the time of contract formation.").

[39] "Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people." Jiménez, *supra* note 15, at 94.

III. Proposed § 1006.18(g) – Meaningful Attorney Involvement

Section 1006.18(g) affords debt collection attorneys a "safe harbor" to defend against claims that a communication sent under an attorney's name is false, deceptive, or misleading if there was no "meaningful attorney involvement."[40] There are two concerns with this provision. First, a safe harbor provides sweeping protection for debt collectors. It would be pleaded as an affirmative defense to a consumer claim, thereby providing the collector with a complete defense to a consumer claim that a communication falsely represented the debt. Second, such a sweeping protection should contain clear and specific standards. The language of the rule is broad, potentially allowing collection attorneys to claim that superficial review of a client's claim satisfies the safe harbor requirements.

Debt collection litigation is, perhaps, the setting where the disparity in power and knowledge between consumers and debt collectors is the most one-sided in favor of the collector.[41] As little as 1-2% of consumers are represented by counsel in collection lawsuits.[42] In many cases, consumers do not appear in the lawsuit, resulting in default judgments.[43] In our adversarial system of justice, presided over by a "neutral" judge, collection attorneys take full advantage of this power disparity. They churn out large volumes of lawsuits, knowing that the chances of a consumer actually defending the action are slim. Even if a consumer appears, the consumer's ability to defend the action or even negotiate a favorable settlement is weak. For various reasons, including the sheer volume of collection cases, judges do not examine pleadings for sufficiency and cases rarely reach the point where a plaintiff will be required to prove its case. When consumers do have representation, they usually succeed in the lawsuit. Those of us who represent consumers in law school clinics almost always win dismissal of the collection suit, or defeat summary judgment motions. We win because debt buyers lack the evidence needed to prove their cases in court.

The safe harbor for meaningful attorney involvement does little to remedy this problem it attempts to address. While the defense is available to an attorney who "personally" "review[s]" pleadings (for example), there are many qualifications. The attorney must determine that the claims are supported "to the best of the attorney's knowledge, information, and belief," that claims and contentions are warranted by existing law and "factual contentions have evidentiary support." This is a broad and vague standard, easily manipulated by some attorneys. The rule imports some of the standard from Rule 11 of the

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[40] FDCPA 807(3).

[41] Peter A. Holland, The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases, 6 J. BUS. & TECH. L. 259, 272 (2011);

[42] Human Rights Watch, Rubber Stamp Justice (2016) at 62.

[43] Federal Trade Commission, Repairing a Broken System at 7.

Federal Rules of Civil Procedure, but the setting of debt litigation is far different from federal court. Indeed, given the contrast in representation and judicial management of cases, the settings could not be more different.

Since the Bureau's draft rule does nothing to alleviate the documentation and inaccurate information problems in the debt collection ecosystem, this safe harbor is especially problematic.

Rather than a safe harbor, the rule should instead, contain a specific prescriptive requirement of information and documents an attorney must review before filing a collection lawsuit. The Bureau has already created a good blueprint for this. In its Consent Decree with Fred J. Hannah & Associates, et al., the Bureau required "the person who will serve as the Defendants' attorney of record (including Outside Counsel) in the Collection Suit" to abide by the following markers of meaningful attorney involvement:[44]

a. Log into the Consumer's account on CLS or any other software that would create an electronic record that the attorney of record has accessed a Consumer's file;
b. Review Original Account-Level Documentation reflecting, at a minimum, the Consumer's name, the last four digits of the account number associated with the Debt at the time of Charge-off, the claimed amount, excluding any post Charge-off payments, and if Defendants are suing under a breach of contract theory, the contractual terms and conditions applicable to the Debt;'
c. Confirm, based upon methods or means proven to be historically reliable and accurate that the applicable statute of limitations has not run on the Consumer's Debt;
d. Confirm, based upon methods or means proven to be historically reliable and accurate that the Consumer's Debt was not discharged in bankruptcy or subject to a pending bankruptcy proceeding;
e. Confirm, based upon methods or means proven to be historically reliable and accurate the Consumer's correct identity and current address to determine the appropriate venue for a Collection Suit; and
f. Certify in writing or in CLS or any other software that would create an electronic record noting that the initiation of the Collection Suit complies with the terms and conditions of this Order.[45]

[44] The Consent Decree phrases these in the negative since the paragraph that precedes it talks about how the parties would be violating the Consent Decree. For ease of reading, we have translated them to the positive here.

[45] *See* Con. Fin. Prot. Bureau v. Frederick J. Hannah & Associates, No. 14-02211, Stipulated Final Judgment and Order at 7-9 (D.N.D. Ga. Jan. 6, 2016).

Note that a-f would need to be performed by the attorney on a particular case and cannot be delegated to others.

In either event, the safe harbor should make clear that, for example, the practices listed in the consent order with Pressler & Pressler, et al., would not constitute meaningful attorney involvement.[46] At the very least the safe harbor should clearly require that "[a]t the time of the signing attorney's review, the signing attorney … have access to sufficient documentation to confirm the validity of the summary data provided by the client."[47]

IV. Proposed § 1006.26 – Statute of Limitations

The proposed rules suggest that debt buyers receive enough information to determine the statute of limitations on a debt because debt buyers have the proper documentation of the debt.[48] However, the Bureau's own study and a prior FTC study belie that statement as a factual matter, and the complexity of statutes of limitations lead to the opposite conclusion as a legal matter.[49]

The draft rule characterizes the 2016 study as finding that "the majority of respondents reported always or often receiving…billing statement."[50] In fact, the opposite is true. The Bureau's own study found that the majority of respondents do not receive a billing statement. Twenty-five respondents replied that they received the billing statement always or often, while 32 responded that they received billing statements rarely or never.[51]

As a legal matter, the issue of which statute of limitations applies is often a complex calculation that requires knowing more than the dates the Bureau cites in the rule comments. The relevant date in most states is the last date in which the creditor's breach of

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[46] *In the matter of Pressler & Pressler, et.al.,* Administrative Proceeding No. 2016-CFPB-0009, Consumer Financial Protection Bureau, Consent Order (Apr. 25, 2016) ("The signing attorney generally spent less than a few minutes, sometimes less than 30 seconds, reviewing each summons and complaint before approving the filings and directing that a lawsuit be initiated").

[47] *Id.* at 7.

[48] "The information that debt buyers generally receive when bidding on and purchasing debts, and the information that other debt collectors generally receive at placement, should allow them to determine whether the applicable statute of limitations has expired." Proposal at 195.

[49] *See* Dalie Jimenez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 620-624 (2017) ("[i]t is difficult to know which statute applies to a particular situation. Oftentimes there are good legal arguments for applying statutes of different lengths")

[50] § 1006.26 Collection of Time Barred Debts, Comments to 26(b) at p..195 n.374.

[51] Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 23, Table 8 (July 2016), https://files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf.

contract cause of action arose.[52] Unfortunately, the Bureau did not survey collection firms to know how many of them receive that date from clients.[53] In an earlier study, however, the FTC found that the "date of first default was missing (from 65% of accounts)."[54]

Dates aren't the only important fact that a collector needs to calculate the limitations period. As one of us has written

> Another difficulty with limitations periods is that it not always clear which state's limitation period applies. Imagine a consumer who, while a resident of state A, obtained a credit card issued by a bank incorporated in state B. The agreement contained a choice-of-law clause selecting state C as the state whose law governs. The consumer now lives in state D and is sued there.[86] Which state's limitations period applies? Does it matter where the consumer resided when the contract was first breached? The answer depends entirely on state D's statutory and common law. It is not always possible to analyze with certainty.[55]

Another variation on identifying which state's statute of limitation to apply is the existence of "borrowing statutes," such as New York's.[56] Because breach of contract is an economic injury, the injury is deemed to have occurred in the state where the issuing creditor was located at the time the consumer defaulted. New York then applies the shorter of the "borrowed" statute of limitations or New York's own statute of limitations, which is six years. Many banks are "domiciled" in Delaware, where there is a 3-year statute of limitations for breach of contract. That is the limitations period that would apply in New York.

Less than half of respondents to the Bureau's survey reported receiving account agreement documentation or billing statements.[57] These are the most likely sources of information that might help a collector calculate the applicable statute of limitations.

We have two further concerns with the Proposal as drafted. Proposed § 1006.26(b) prohibits a debt collector from suing or threatening to sue on a debt that the debt collector "knows or should know" is time-barred. The burden of determining the limitation period should be on the debt collector so that the modifier that the collector "knows or should know" be removed. Additionally, the Proposal should forbid debt buyers from restarting of the statute

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[52] This date is also significant for purposes of reporting to credit bureaus. 15 U.S.C. § 1681c(a)(4).

[53] *Id.* The only date the Bureau reports receiving is the debtor's date of birth. *Id.*

[54] Federal Trade Commission, Collecting Consumer Debts: The Structure and Practices of the Debt Buying Industry 35 (2013) (hereinafter, the FTC Debt Buyer Report).

[55] Jiménez, *supra*note 49, at 624.

[56] N.Y. C.P.L.R §213.

[57] CFPB Collection Study, *supra* note 9, at 23, Table 8.

of limitations clock if an alleged debtor makes a payment on or acknowledges a debt for which is the limitations period has already expired.[58]

V. Section 1006.30(b) - Prohibition Against the Sale of Certain Debts

Proposed section 1006.30(b) addresses the concern that debt collectors may attempt to collect a debt that the consumer does not owe. The proposed section applies to debts that have been paid or settled, discharged in bankruptcy, or that are subject to an identity theft report. We concur with the Bureau's assessment that collection of these debts would be an unfair practice under the FDCPA and the Dodd-Frank Act since collectors would be attempting to collect debts that the consumer does not owe. But this section does not go far enough. We urge the Bureau to expand this section to protect consumers further.

In providing a justification for the rule, the Bureau cited a 2014 OCC Bulletin for supervised financial institutions.[59] In that bulletin, the OCC recommended that supervised entities ought not to sell certain debts because they "likely fail[] to meet the basic requirements to be an ongoing legal debt."[60] The subsequent list included debts that have been settled or in process of settlements, "debts incurred as a result of fraudulent activity," and "debts of borrowers that have sought or are seeking bankruptcy protection."[61] The OCC Bulletin went even further by including "accounts lacking clear evidence of ownership" and those "close to the statute of limitations,"[62] as noted earlier in this comment.

The Bureau specifically requested comments "on whether additional categories of debt, such as debt currently subject to litigation and debt lacking clear evidence of ownership, should be included in any prohibition adopted in a final rule."[63]

We strongly urge the Bureau to include both debts currently subject to litigation and debts with insufficient documentation to section 1006.30(b)(1).

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[58] Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M.L. REV, 327 (2014).

[59] Proposal, at 207 (citing Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Aug. 4, 2014), available at http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html).

[60] Bulletin No. 2014-37, Consumer Debt Sales/Risk Management Guidance, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Aug. 4, 2014), available at http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.

[61] *Id.*

[62] *Id.*

[63] Proposed Regulation § 1006.30(b)(1).

We also oppose 1006.30(b)(2)(ii), the exception that would allow a transfer of an uncollectible debt if the collector is using it as a pledge of collateral. The Bureau provides two rationales for this: (1) that it mirrors the Fair Credit Reporting Act's 615(f)(3) exceptions, and that (2) "the debt collector may be unable to exclude the debts described in proposed 1006.30(b)(1)(i) from the portfolio."[64] Neither rationale is particularly convincing. First, the FCRA's section 615(f)(3) covers only identity theft debts, whereas here the Bureau would be transplanting it to the debt collection context to include debts that are not owed by the consumer (because they've been paid or settled or have been discharged in bankruptcy). Second, as debt collectors have ample time to prepare for the adoption of a new rule, they can insist that any security agreements exclude as collateral uncollectible debts. Finally, an uncollectible debt has zero to negligible value as an asset. It follows that it should not be used as collateral to secure a loan to a debt collector; such use would appear to be misleading to the creditor.

Whether or not the Bureau keeps (b)(2)(ii), we strongly urge that a final rule explicitly require the debt collector transfer all of the information it knows about the debtor and the debt so that the previous owners also know that they cannot seek to collect on this debt.[65]

VI. Proposed § 1006.34 - Validation Notices

Section 1692g obliges debt collectors to send consumers written validation notices. Congress described this provision as a "significant feature" of the FDCPA.[66] The Bureau's Proposal includes a safe harbor model form, App. B-3, and also includes provisions governing the validation notice, chiefly § 1026.34. Some of the Bureau's Proposal regarding validation notices merits adoption, but we urge the Bureau to reconsider other aspects of its Proposal, as discussed below.

A. Model Validation Notice

We support the Bureau's Proposal to adopt a model validation form, though we think the content of that form can be improved. We endorse the decision to include in the form the statement that "If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt."[67] The Bureau is wise to permit the use of oral disputes. The decision to include a "tear-off" in the model form to make it easier for consumers to invoke their validation rights also seems like an important step forward.

[64] Proposed Regulation § 1006.30(b)(2)(iii).

[65] *See* discussion about what information is transferred in Part VI.C ("Dispute Prompts").

[66] See S. Rep. No. 95-382, at 4 (1977).

[67] *See* Bartlett v. Heibl, 128 F.3d 497 (7th Cir. 1997) (adopting similar disclosure in a safe harbor validation notice).

We applaud the Bureau for testing the efficacy of validation notices, both in qualitative and quantitative studies. We look forward to learning of the findings of the Bureau's quantitative survey. Such surveys do, however, have one big drawback. Because the respondents have not actually received the disclosures as part of a debt collection effort, it is impossible to determine from their responses how they would respond in a genuine debt collection situation. Accordingly, we urge the Bureau to monitor how consumers respond to debt collection notices when they receive them from debt collectors trying to collect an actual debt. If possible, in advance of the adoption of a rule, we recommend that the Bureau field test various versions of its validation notices by arranging with debt collectors to use them in their debt collection efforts. That should shed considerable light on the extent to which consumers take in the disclosures contained in the validation notices and actually use them.

The Bureau should amend the model validation notice in Appendix B-3 to notify consumers that failure to meet the deadline for disputing the debt does not prevent them from disputing the debt later or in court. A study of consumers who were shown a validation notice found that "more than a third of the respondents believed that if they failed to meet the thirty-day deadline, they would either have to pay a debt they did not owe or would not be able to argue in court that they didn't owe the debt."[68] Failure to include such a statement risks leaving many consumers who miss the deadline worse off than if they have not been given a validation notice, because they may mistakenly believe that they have lost the opportunity to challenge the debt if they don't act within thirty days.

B. Verification

Section 1692g(a)(4) of the FDCPA states that validation notices must include "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." Proposed § 1006.34(c)(3)(i) provides for the validation notice to include a "statement that specifies . . . that, if the consumer notifies the debt collector in writing before the end of the validation period that the debt, or any portion of the debt, is disputed, the debt collector must cease collection of the debt, or the disputed portion of the debt, until the debt collector sends the consumer either the verification of the debt or a copy of a judgment." But the model form does not refer to verification. Because the model form is a safe harbor under § 1006.34(d)(2), a collector which uses the model form need not otherwise comply with § 1006.34(c)(3)(i). We recommend that the Bureau revise its model form to refer to verification.

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[68] See Jeff Sovern & Kate Walton, Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices, 70 SMU L. REV. 63, 128 (2017) (hereinafter, Sovern & Walton).

It may be that the Bureau sees other portions of the model form as incorporating consumers' verification rights. This view is supported by the statement at page 253 of the Proposal that "While Model Form B–3 would alert consumers to an oral dispute option, the form would clarify that only a written dispute would invoke verification rights pursuant to FDCPA sections 809(a)(4) and (5)." One possibility is that the following language in the model form is intended to refer to the right to verification:

> Write to ask for the name and address of the original
>
> creditor. If you write by November 12, 2019, we will stop
>
> collection until we send you that information. You may use the
>
> form below or write to us without the form. We accept such
>
> requests electronically at www.example.com/request.
>
> * * *

But that seems intended to implement § 1692g(a)(5)'s requirement that the consumer can request the original creditor's name and address, rather than the (a)(4) verification requirement. Verification must mean more than that because otherwise, (a)(4) would have no independent meaning and so would be surplusage.

Such a limited definition of verification also seems inconsistent with what at least some courts say verification means. For example, in *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 783–86 (6th Cir. 2014) (per curiam), the court wrote that a verifying collector:

> [S]hould provide the date and nature of the transaction that led to the debt, such as a purchase on a particular date, a missed rental payment for a specific month, a fee for a particular service provided at a specified time, or a fine for a particular offense assessed on a certain date.[69]

Alternatively, it may be that the model form is intended to subsume the right to obtain verification in the following language:

> How can you dispute the debt?
>
> Call or write to us by November 12, 2019, to dispute all

[69] *See generally* Jeff Sovern, Kate Walton, & Nathan Frishberg, *Validation and Verification Vignettes: More Results from* an *Empirical Study of Consumer Understanding of Debt Collection Validation Notices*, 71 RUTGERS L. REV. (2019) (reviewing validation cases and results of consumer survey).

> or part of the debt. If you do not, we will assume that our information is correct. If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt.

But the invitation to call in that paragraph seems inconsistent with the requirement in (a)(4) that consumers are entitled to verification only when they write. While we would support a law that enabled consumers to obtain verification upon oral requests, instead of solely when they write, the Proposal does not otherwise indicate that the Bureau intended so to modify the requirement of a writing. In addition, the second sentence refers only to "information that shows you owe the debt," which would be a more modest interpretation of what consumers are entitled to than *Haddad* contemplates. While some other courts have interpreted consumers' verification rights more narrowly than *Haddad*, the Proposal does not purport to resolve that disagreement, nor is it clear that the Bureau has the authority to do so.

In short, the model form does not tell consumers that they have a right to demand verification in writing, and the Bureau should revise the form to make clear that consumers have such a right, in conformity with the FDCPA.

C. Dispute Prompts

The model validation notice includes a list of dispute prompts to help consumers identify and express disputes they might have concerning a debt. A similar type of form was created in New York State to make it easier for consumers whose bank accounts are restrained to assert their rights to have exempt funds released.[70] The final form should retain the dispute prompts. Given the unsophisticated consumer standard the rule adopts, and what is generally known about American consumers' literacy levels (including those for whom English is not their native language) it is important that consumers who have disputes are able to clearly assert them. Moreover, most U.S. consumers have become accustomed to forms with prompts, such as drop-down menus common to online consumer transactions ranging from shopping to paying parking tickets.

Consumer advocates have strongly supported the prompts, while debt collectors are concerned that the prompts will cause disputes to proliferate, increasing collection costs. To the extent that prompts facilitate valid disputes or decelerate the collection process so that a consumer can have time to investigate and assure herself that the debt or the amount is valid, the prompts are a positive development. No one—including debt collectors who

[70] N.Y. C.P.L.R. §5222-a (b)(4).

conduct business lawfully—should want a consumer to pay a sum she or he does not actually owe.

Easing the burden on consumers to file disputes is even more important given the evidence that the Bureau has collected about how debt collectors and debt buyers often *do not* share dispute information with subsequent servicers/owners.[71] In its own survey, the CFPB found that "[m]any respondents said that they do not track disputes."[72] This is not much different from the 2013 FTC Debt Buyer Report where only four out of nine debt buyers provided data on disputes to the FTC.[73] "As the FTC noted, '[k]nowing the dispute history of debts could be very relevant to debt buyers in assessing whether consumers, in fact, owe the debts and whether the amounts of the debts are correct."[74] As we suggest in Part I.A., the Bureau should require that, at minimum, collectors transfer any and all information that they have on a debt or a consumer to a subsequent collector or debt buyer.

Debt collectors—and especially debt buyers—make business decisions about the quality of debt they collect and the documentation they require of creditors. Debt that is likely to be disputed or remain unpaid is acquired for fractions of pennies on the dollar; for true third-party collectors, commissions can be negotiated accordingly if collection costs increase. If more consumers dispute debts, then perhaps fewer invalid debts will enter the collection market, which is a positive development. If it must make a choice between indirectly increasing the cost of business to debt collectors or facilitating consumers' exercise of their right to validly dispute a debt, the choice should favor consumers. The U.S. consumers' ability to assert their rights is far more valuable to individuals and our society, even if a minor increase in disputes that lack merit generates some minimal costs.

D. Statement of Rights

We agree with the Bureau's decision to create a "reference document" to assist consumers in identifying their rights,[75] but in our view, this document would be much more helpful to consumers if collectors were obliged to furnish it to them, as contemplated by the Bureau's original SBREFA Outline. Informing consumers that they may find useful information on the Bureau's web site, with a link to the generic Bureau web site rather than to pages specifically addressing debt collection,[76] will be less helpful to many consumers because

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[71] Bureau of Consumer Financial Protection, Study of Third-Party Debt Collection Operations at 30 (July 2016)

[72] *Id.*

[73] FTC Debt Buyer Report, *supra* note 54. at 37.

[74] Jiménez, *supra* note 15, at 79 (citing FTC Debt Buyer Report, *supra* note 54, at 37).

[75] Proposal, at p. 254.

[76] *See* Proposed § 1006.34(c)(3)(iv).

first, some will not visit the Bureau web site; and second, even some who do may give up before locating the particular pages that explain their rights.

E. Delivery of Validation Notice by Hyperlinks

Proposed § 1006.42(c)(2)(ii) would allow collectors to satisfy the requirement that they provide consumers with validation notices by providing hyperlinks to the notice. This provision is objectionable both because it is not consistent with the statutory text and because it reduces the likelihood that consumers will actually read the disclosure. As for the statutory text, § 1692g(a) obliges collectors to "send the consumer a written notice containing" the validation information. In *Lavallee, v. Med-1 Solutions, LLC*, --- F.3d ---, 2019 WL 3720875 (7th Cir. 2019), the court ruled that an email that included a link that ultimately led to the validation notice did not contain the validation notice. While the email, in that case, did not refer to the debt, and the Bureau's Proposal would require such a reference, the presence or absence of such a reference does not affect whether the email is a notice "containing" the validation information.

The *Lavallee* interpretation is supported by the ordinary understanding of the word "containing." For example, the Merriam-Webster Dictionary defines "containing" as "to have within: HOLD" and gives as an example "The box contains old letters."[77] An email with a hyperlink does not "have within" or "hold" the information at the hyperlink, and no one would say that an email including a hyperlink contains the information available at the hyperlink. Accordingly, as a matter of textual interpretation, the Bureau should not interpret the FDCPA to permit debt collectors to provide validation notices through hyperlinks.

The Proposal would also make it far less likely that consumers would actually see the validation notice. Some consumers might not be able to read the validation notice if they employ antivirus software or browsers that would disable such links. But even consumers who can click on the hyperlink still might not. As Professor David Vladeck, formerly the director of the Federal Trade Commission's Bureau of Consumer Protection, has noted:

> The Federal Trade Commission (FTC) has repeatedly cautioned Americans to be wary of malware and phishing expeditions. Last year, the Federal Communications Commission (FCC) alerted consumers to a new cyber threat it dubbed "smishing"—targeting consumers with deceptive text, or SMS,

[77] *See Contain,* Merriam-Webster, https://www.merriam-webster.com/dictionary/contain (emphasis in original).

> messages—and urged consumers to "never click links, reply to text messages or call numbers you don't recognize.[78]

On top of that, consumers often ignore disclosures, and the harder it is to access the disclosure, the less likely it is that consumers will actually read it. End User License Agreements (EULA), which are often accessed by clicking, provide a useful analogy. When a computer game company inserted in its EULA a term explaining that those agreeing to it would have to surrender their "immortal soul" to the company, 88% of the consumers agreed to do so. The company did offer consumers the ability to retain their souls, as well as to receive a small payment, but it required clicking on a box—which few did.[79]

Empirical research has also demonstrated that consumers rarely click on such disclosures.[80] Indeed, even consumer law professors often ignore disclosures. When one of us polled attendees at a pair of consumer law conferences "Do you read required disclosures before entering into consumer transactions?," none of the 38 respondents replied that they always read disclosures, 53% said they rarely or never read them, and only 21% said they usually read them.[81] Increasing the number of steps required to see a disclosure seems like a recipe for obscuring disclosures. It may be that consumers receiving demands to pay debts are different, but until the Bureau can verify that empirically, it should not assume that they are.

Nor is the problem of hyperlinks solved by giving consumers a right to opt out.[82] Consumers have a strong tendency to stay with the default choice, no matter what it is. For example, in one notable experiment, testers gave consumers a coffee mug and told them they could swap it for candy; 89% stayed with the default. When the experimenters gave other consumers candy and offered to trade it for the mugs, an almost identical 90% declined the offer.[83] A similar tendency to stay with the default has been observed with consumer

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[78] *See* David Vladeck, *The Consumer Bureau's Reckless Plan for Debt Collection*, WIRED (Aug. 23, 2019), https://www.wired.com/story/the-consumer-bureaus-reckless-plan-for-debt-collection/.

[79] *See* Fox News, *7,*500 *Online Shoppers Unknowingly Sold Their Souls* (Apr. 15, 2010), https://www.foxnews.com/tech/7500-online-shoppers-unknowingly-sold-their-souls.

[80] *See* Florencia Marotta-Wurgler and Daniel L. Chen. *Does Contract Disclosure Matter? [with Comment],* 168 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) / ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 94 (2012): 94-123. http://www.jstor.org/stable/41474939. (a study of clickstream data on web sites found that 0.05% of consumers read EULAs for at least one second).

[81] See Jeff Sovern, Another Survey of Consumer Law Professors Fails to Ffnd Any Who Always Reads Consumer Contracts Before Signing Them, Consumer Law & Policy Blog ((June 17, 2019), https://pubcit.typepad.com/clpblog/2019/06/another-survey-of-consumer-law-professors-fails-to-find-any-who-always-reads-consumer-contracts-befo.html (June 17, 2019).

[82] *See* Proposed § 1006.42 (d).

[83] *See* Jack Knetsch, The Endowment Effect and Evidence of Nonreversible Indifference Curves, 79 AM. ECON. REV. 1277-, 1278 (2000).

protections.[84] Existing data does not permit us to be certain that consumers will not opt out of the use of hyperlinks to provide validation notices when that is desirable, but until the Bureau conducts empirical research to verify that consumers will, in fact, opt out when appropriate, we urge the Bureau to refrain from allowing collectors to use hyperlinks to convey validation notices.

If the Bureau nevertheless moves forward with allowing the use of hyperlinked disclosures, it should require collectors to maintain records of how many consumers click on the disclosures, how long they view them for, and how many opt out. It should also require collectors to send written validation notices in another form to those who do not spend as much time on the web site displaying the validation notice as would be required to read it.

F. Overshadowing

The Bureau should limit debt collector communications to consumers during the validation period to avoid overshadowing the validation notice, except for those responding to consumer-initiated communications. Collectors, who want to be paid, have several incentives to obscure the validation notice.[85] When consumers dispute a debt, collectors must interrupt collection activities until they respond, 15 U.S.C. § 1692g(b), and if the collector reports the debt to a consumer reporting agency, the collector must also report the debt as disputed.[86] Finally, the collector would rather the consumer pay the debt than dispute it.[87] Congress recognized as much when it codified the court-created overshadowing doctrine in 15 U.S.C. § 1692g(b). And no doubt, similar thinking is behind the requirement in the Proposed Regulation limiting validation notices to the required and optional items specified in Proposed 1006.34(c), (d)(3). But the Proposed Regulation does not prevent debt collectors from communicating in other ways that might cause consumers to pay less attention to the validation notice. To be sure, collectors are still subject to the overshadowing doctrine. But courts, lacking the resources to conduct empirical research to determine what might overshadow a validation notice and what might not, have interpreted that doctrine in ways unmoored from how actual consumers behave.[88] Accordingly, the Bureau should test empirically what communications will overshadow validation notices, and then adopt rules limiting debt collectors to those that do not.

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[84] *See* Congressional Budget Office, Cost Estimate S. 2155 Economic Growth, Regulatory Relief, and Consumer Protection Act 13 (2018) (reporting that only 0.3% of Americans with credit files had used credit freeze laws to block access to their credit reports).

[85] See Sovern & Walton, supra note 67, at 70-71.

[86] *See* 15 U.S.C. § 1692e(8).

[87] *See* Elwin Griffith, *The Role of Validation and Communication in the Debt Collection Process*, 43 Creighton L. Rev. 429, 468 (2010). ("[T]he collector will do its utmost to ensure that its demand for payment will have a greater impact on the consumer than the statutory right to dispute its debt.").

[88] *See* Sovern & Walton, *supra* note 67, at 113-21.

VII. Proposed § 1006.30(d) – Venue

The Bureau requested comment on Proposed Rule § 1006.30(d) which designates the proper venue for bringing a legal action to collect a debt. Specifically, the Bureau asked if "additional clarification is needed." We believe it is. The proposed regulation mirrors the statute in defining the proper venue for a debt collection action as being the "judicial district or similar legal entity" that meets the other qualifications of the statute. There has been a significant amount of litigation trying to explain what "judicial district or similar legal entity" actually means.

As the court in *Suez v. Med-1 Solutions*, *LLC*[89] pointed out:

> Unfortunately, the key statutory term— "judicial district"—is vague. The FDCPA does not define it, and … the phrase has no general definition of meaning that can resolve this dispute. In Indiana, Illinois and most other states, state trial courts usually are organized by county for purposes of both court administration and venue. When that is so, it may seem natural to interpret the statutory terms as referring to the county in which the debtor lives or the contract giving rise to the debt was signed. But terms that seem plain and easy to apply to some situations can be ambiguous in other situations.

The court explains that, in some cases, a county-wide venue rule may actually allow a debt collector to choose the most inconvenient court for the debtor among several. As the court describes, such a rule would "undermine the venue provisions of the Fair Debt Collection Practices Act. It would amount to saying that Congress had created the provision with one hand and simultaneously nullified it with the other."[90] The court went on to suggest that the proper definition of "judicial district or similar legal entity" should be "the smallest geographic area relevant to venue in the court system in which the case is filed."[91] We encourage the Bureau to adopt this standard.

VIII. Conclusion

For the foregoing reasons, we urge the Bureau to revise its Proposed Debt Collection Regulations.

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[89] Suez v. Med-1 Solutions, LLC, 757 F.3d 636, 639 (7th Cir. 2014).

[90] *Id.* at 640.

[91] *Id.*