THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 74 | ISSUE 3 Spring 2022

WHY SETTLE FOR LESS? A PRAGMATIC PROPOSAL TO ADAPT ENFORCEMENT OF UDAP STATUTES TO ADDRESS DEBT BUYERS' SYSTEMIC ABUSES OF THE COURT SYSTEM

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I. INTRODUCTION

At this moment, millions of people across the United States owe money to companies they have neither heard of nor conducted business with.[1] These companies, known as "debt buyers," purchase portfolios of

* J.D., Rutgers Law School, May 2022. Professor Amy Widman's insight, passion, and guidance was vital to the development of this note. The consideration and support of the members of the *Rutgers University Law Review* was also key. Finally, I also must shoutout my family: Andrea, Jim, and Walker, whose support I rely on every day. Thank you, everyone.

1. CHRIS ALBIN-LACKEY, HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 10 (2016).

delinquent consumer debts[2] from primary creditors for a miniscule fraction of their face value.[3] These debts are usually sold "as is," so that the original creditor is insulated from liability.[4] Debt buyers then use the legal system to convert their paltry initial investment into a legally enforceable order against a consumer, which allows total recovery of the original debt, plus accrued interest.[5]

While it is possible to argue to the contrary, this Note will presume that the fundamental practice of debt buying, when performed properly, is both socially and economically desirable. This position is shared by both the Federal Trade Commission and Consumer Financial Protection Bureau.[6] But any potential socioeconomic benefit that the industry might achieve largely depends on whether the court system functions properly for the millions of Americans who find themselves cast as defendants in debt buyer collection suits each year. Unfortunately, debt buyers have little intrinsic economic motivation to play fair.[7]

Industry abuses have been well documented.[8] Suits may be brought for incorrect amounts, or served to the wrong party.[9] A debt buyer may aggressively attempt to collect on time-barred debt, or to "revive" such claims through deceptive means.[10] Insufficient service of process, or otherwise failing to properly notify defendants that a legal action is underway, is a common practice.[11] And because debt buyers often receive

2. The sources of these debts are familiar to most every American, mostly derived from medical expenses, student loans, credit cards, and mortgages. Marc C. McAllister, *Ending Litigation and Financial Windfalls on Time-Barred Debts*, 75 WASH. & LEE L. REV. 449, 452 (2018).

3. *See* ALBIN-LACKEY, *supra* note 1, at 1; Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 182 (2014) ("Banks sell this junk debt after they charge it off pursuant to Treasury Regulations, and then take the full face value of the debt as a loss for tax purposes."); *see also* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY ii (2013) ("Buyers paid an average of 4.0 cents per dollar of debt face value.").

4. Holland, *supra* note 3, at 182.

5. ALBIN-LACKEY, *supra* note 1, at 1.

6. *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION i (2010) ("[T]he debt collection system helps keep credit prices low and helps ensure that consumer credit remains widely available."); CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS REVIEW PANEL FOR DEBT COLLECTOR AND DEBT BUYER RULEMAKING 1 (2016) ("Collection of consumer debts reduces the costs that creditors incur . . . [and,] in turn, may allow creditors to extend more credit at lower prices.").

7. *See* FED. TRADE COMM'N, *supra* note 3, at 34–36, 45–46.

8. *See generally* FED. TRADE COMM'N, *supra* note 6, at ii.

9. ALBIN-LACKEY, *supra* note 1, at 28.

10. Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 329–30, 347–48 (2014); ALBIN-LACKEY, *supra* note 1, at 28.

11. ALBIN-LACKEY, *supra* note 1, at 28.

little more from creditors than a single Excel spreadsheet's worth of information, they have in the past resorted to submitting false or misleading evidence to support a debt claim, including the mass "robo-signing" of affidavits.[12]

Correcting these abuses has proven difficult. Consumer defendants rarely contest claims brought against them, resulting in widespread default judgments lacking any judicial examination of the merits.[13] Ex ante rulemaking through federal agencies is susceptible to changes in presidential disposition.[14] And the trial judges who hear these cases are rightly constrained by principles of neutrality, even if they suspect foul play.[15]

All of the above issues are addressable through targeted legislation and rulemaking, if legislatures can muster the political will to enact appropriate statutes or regulations (and provide the resources to enforce said measures).[16] But where such action is infeasible or insufficient, this Note proposes a pragmatic measure that can be undertaken under current law to incentivize the industry to self-correct abuses.

Government enforcers, including the Federal Trade Commission ("FTC"), the Consumer Financial Protection Bureau ("CFPB"), and individual state attorneys general,[17] already possess the authority to bring suit against bad actors under authority derived from "unfair or

12. "Robo-signing refers to the practice of signing affidavits and other documents 'so quickly that they could not possibly have verified the information in the document under review.'" 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, 268 (2011); *see also* Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1584 (2018); ALBIN-LACKEY, *supra* note 1, at 29.

13. *See, e.g.*, FED. TRADE COMM'N, *supra* note 6, at 7 ("[P]anelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent.").

14. *See, e.g.*, Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, WALL ST. J. (Jan. 23, 2018, 7:40 PM), https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561.

15. *See* ALBIN-LACKEY, *supra* note 1, at 61 ("Several judges told Human Rights Watch that while they are well aware of the evidentiary and other problems plaguing debt buyer lawsuits, they were uncomfortable pressing debt buyer attorneys to prove their cases when defendants did not know how [to] do it themselves. One justice . . . said he was reticent to 'invent' defenses for people who failed to bring them forward on their own.").

16. To date, twelve states have adopted procedures to aid defendants in debt claims litigation. PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 21–22 (2020).

17. Not all state consumer protection statutes cover debt buying and collection. *See, e.g.*, N.J. STAT. ANN. § 56:8-3 (West 1960) (examination limited to unlawful acts "in connection with the sale . . . of any merchandise. . . ."). However, all State Attorneys possess the ability to enforce the Dodd-Frank Act's UDAP standard. 12 U.S.C. § 5552(a)(1).

deceptive acts or practices" ("UDAP") statutes.[18] Previous cases brought in this way have typically been resolved through a consent order or other settlement.[19] The provisions of these resolutions vary substantially from agreement to agreement.[20] With some minimal retooling, future settlements reached with debt buyers could standardize and bolster forward-looking clauses to address the issue at the root of systemic abuses: an imbalanced civil court system that is failing to deliver adequate justice for everyday Americans.

Specifically, enforcers should take advantage of the injunctive power available to them to ensure that abusive practices can be better contested in court by those individuals on the receiving end of a debt buyer suit. To that end, settlements within the industry should aim to empower future consumer defendants by requiring that a supplementary notice, drafted by the enforcer and on state letterhead, be included alongside all subsequent complaints served by a given offending company. This notice should:

> a) give general context to the nature of a debt buying claim, and allow consumers to verify that the complaint is genuine;[21]

18. *See infra* Section III.B.

19. *See, e.g.*, Press Release, Fed. Trade Comm'n, Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception (Jan. 30, 2012), https://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged; Rene T. McNulty & Ballard CFS Group, *CFPB Settles with New Jersey Debt Buyer for Alleged FDCPA and CFPA Violations Based on Unlicensed Collection Activity*, CONSUMER FIN. MONITOR (Dec. 29, 2020), https://www.consumerfinancemonitor.com/2020/12/29/cfpb-settles-with-new-jersey-debt-buyer-for-alleged-fdcpa-and-cfpa-violations-based-on-unlicensed-collection-activity/; *Miller, 42 AGs Announce $6 Million Settlement with Debt Buyer*, IOWA ATT'Y GEN. (Dec. 4, 2018), https://www.iowaattorneygeneral.gov/newsroom/midland-debt-attorneys-general-settlement.

20. *See, e.g.*, Consent Decree at 4–5, 16, U.S. v. Asset Acceptance, LLC, No. 8:12-cv-00182-JDW-EAJ (M.D. Fla. Jan. 31, 2012) (imposing $2.5 million civil penalty and injunctive relief for violation of FTC act and FDCPA); Assurance of Voluntary Compliance/Assurance of Discontinuance at 4, 29, *In re* Encore Cap. Grp., Inc. (Dec. 4, 2018) (imposing $6 million fine and injunctive relief targeting various deceptive practices); Stipulated Final Judgment and Order at 3, 12–13, Bureau of Consumer Fin. Prot. v. Encore Cap. Grp., Inc., No. 3:20-cv-01750-GPC-KSC (S.D. Cal. Oct. 15, 2020) (finding a violation of earlier 2015 order, obtaining $78,308 in consumer restitution, and imposing $15 million fine).

21. *See, e.g.*, *Debt Buyers*, THE OFF. OF MINN. ATT'Y GEN. KEITH ELLISON, https://www.ag.state.mn.us/consumer/publications/debtbuyers.asp (last visited May 12, 2022) (providing a clear overview of the practice of debt buying in a consumer context).

b) direct the recipient to a webpage containing the text of any earlier settlement agreements reached with the debt buyer;[22]

c) clearly state that pro se representation is a viable option to dispute the claim;[23] and

d) include directions to resources containing a collection of common defenses to such claims.[24]

The rationale for this proposal will be explored further in Part IV of this Note. Part I will examine the role of courts in the debt buying industry. Part II will provide an overview of regulatory agencies and their statutory authority under various consumer protection laws to take action against debt buyers. Part III will examine the successes and shortcomings of existing regulatory efforts and examine recent settlements reached with debt buyers. Finally, Part V will evaluate the proposal, weigh it against potential criticisms, and note possible shortcomings.

II. ECONOMIC INCENTIVES AND THE COURT SYSTEM

In 2019, outstanding consumer debt (obligations unsecured by real estate) in the United States reached a new high of nearly $4.2 trillion.[25] For the average American, that number translates into a per capita

22. Models for this type of website can be found in many contexts. Resources to maintain the webpage for a period of time might be obtained via the settlement itself. *See, e.g.*, GOOGLE PLUS PROFILE LITIG., https://www.googleplusdatalitigation.com/ (last visited May 12, 2022).

23. Contested claims are rare, but when attempted, frequently result in the debt buyer abandoning its collection efforts altogether. *See, e.g.*, Jang v. A.M. Miller & Assocs., 122 F.3d 480, 482 (7th Cir. 1997) ("[Collector] never responded to [consumer's] request for verification, but it did cease all collection activity."); *see also* STANDING COMM. ON RULES OF PRAC. & PROC., MD. CTS., NOTICE OF PROPOSED RULES CHANGES 7 (2011) ("The problem, which has been well-documented by judges, the few attorneys who represent debtors, and the Commissioner of Financial Regulation, is that the plaintiff often has insufficient reliable documentation regarding the debt or the debtor and, had the debtor challenged the action, he or she would have prevailed.").

24. Models for such resources currently exist. *See, e.g.*, April Kuehnhoff, *Stopping Debt Collection Harassment: Consumer Debt Advice from NCLC*, NAT'L CONSUMER L. CTR. (June 25, 2018), https://library.nclc.org/stopping-debt-collection-harassment-consumer-debt-advice-nclc; *Money & Debt*, ILL. LEGAL AID ONLINE, https://www.illinoislegalaid.org/legal-information/money-debt (last visited May 12, 2022).

25. *Consumer Credit – G.19*, BD. GOVERNORS FED. RSRV. SYS. (Apr. 7, 2022), https://www.federalreserve.gov/Releases/g19/current/.

consumer debt load of $12,687,[26] representing household expenses, medical expenses, student loans, auto loans, and general credit card debt.[27] From the perspective of a debt buyer, however, the widespread prevalence of financial obligations indicates something else altogether: the abundance of a commodity akin to a highly profitable, but unrefined, natural resource.[28] Unpaid debts are extremely lucrative.[29] Because creditors rarely wish to spend the resources to pursue delinquent debts, and because they may "charge-off"[30] delinquent debts for tax purposes after a given period, lenders frequently choose to sell their right to collect to debt buyers.[31] To achieve a profit, the buyer then depends on the legal system to refine these raw debts into tangible assets.[32]

Businesses in this industry must logically seek efficiencies and optimal output, just like any other. This motive is understandable, but at odds with the goals of the civil justice system, with which the debt buyer business model is inexorably entwined.[33] This tension has led to the following systemic problems.

First, and most simply, courts are not actually refineries. The traditional remedies available to a civil court, such as wage and bank garnishments, seizure of personal property, and incarceration, are legal mechanisms intended to deliver justice.[34] Debt buyers instead rely on them to produce profits.[35] If these tools are used without scrutiny, "[t]here exists a real danger that the courts will be perceived as mere

26. *2021 Consumer Debt Statistics*, LEXINGTON L. (Feb. 5, 2021), https://www.lexingtonlaw.com/blog/loans/consumer-debt-statistics-2019.html.

27. McAllister, *supra* note 2, at 452.

28. Holland, *supra* note 3, at 183 ("Lawsuits filed by junk debt buyers expose a business model that is, literally, the buying and selling of claims to be utilized in litigation for profit. . . . the primary goal of debt-buyer lawsuits is to turn unsecured debt into court judgments, fully secured and fully collectable . . . .").

29. *See, e.g.*, Encore Cap. Grp., Inc., Annual Report (Form 10-K) F-4 (Feb. 26, 2020) [hereinafter Encore Annual Report] (listing revenue from receivable portfolios as over 1.2 billion dollars).

30. Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 52 (2015) (describing charge-off procedure, which is required by banking regulations so that delinquent debts are not listed as assets on a lender's books).

31. *See* John Tonetti, Program Manager, Consumer Fin. Prot. Bureau, Presentation at FTC/CFPB Life of a Debt Roundtable: How Information Flows Throughout the Collection Process (June 6, 2013) (transcript available at https://www.ftc.gov/system/files/documents/public_events/71120/life-debt-roundtable-transcript.pdf) ("Usually [a charge-off occurs] when a portion of the balance has been unpaid for 6 months with credit cards or 4 months with other types of loans.").

32. *See* Holland, *supra* note 3, at 183.

33. *See generally* PEW CHARITABLE TRS., *supra* note 16.

34. *Id.* at 2.

35. *See* Holland, *supra* note 3, at 183.

extensions of collection agencies."[36] When debt buyers file hundreds of thousands of lawsuits across the country, taking up significant portions of individual courts' dockets, it becomes difficult (if not impossible) to apply judicial scrutiny to any individual case.[37]

Second, there is the issue of default. The adversarial process which courts use to determine the merit of a given claim is very rarely invoked in debt buyer cases.[38] Instead, debt buyer litigation overwhelmingly ends in a default judgment for the plaintiff seeking to collect, despite most defenses not being factually or procedurally complex.[39] The prevalence of default works out well for debt buyers, who may frequently lack the supporting evidence required to overcome even the most basic challenge to a given claim.[40]

Despite this, debt buyers have insisted that a default judgment should be understood as a consumer's admission that a given debt is owed.[41] While this is almost certainly true in some instances, there are a variety of factors that indicate that at least a significant fraction of cases go uncontested simply because the defendant has incomplete or misleading information.[42] Sometimes, consumer defendants are never served process.[43] Debts can be decades old, and may have traded hands on the secondary market so many times that the original creditor is

36. Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J. (Nov. 28, 2010), https://www.wsj.com/articles/SB10001424052702304510704575562212919179410 (quoting Judge Thomas Donnelly).

37. *See* ALBIN-LACKEY, *supra* note 1, at 13–14.

38. Exact statistics are difficult to produce because little aggregated public information is available about this industry. In 2013, the FTC found that only 3.2 percent of defendants disputed claims made by debt buyers. FED. TRADE COMM'N, *supra* note 3, at iv; PEW CHARITABLE TRS., *supra* note 16, at 16 ("More than 80 percent of debt claims cases filed by debt buyers in Washington state's superior court from January 2012 to December 2016 resulted in default judgments in favor of the plaintiffs.").

39. PEW CHARITABLE TRS., *supra* note 16, at 2, 15–17; *see also* TEX. JUST. CT. TRAINING CTR., SELF-HELP LEGAL INFORMATION PACKET: WHEN A DEBT CLAIM CASE HAS BEEN FILED AGAINST YOU 2–3 (2022) ("Your answer doesn't have to be anything fancy. It simply needs to be in writing . . . . You can say something like 'I deny the claim and want to see proof at trial.'").

40. Tellingly, a 2011 FTC study found that debt buyers were only able to verify 51.3% of debts that consumers *did* dispute, with that percentage falling even lower to 35% if they were attempting to collect on a debt sold more than once on the secondary market. *See* FED. TRADE COMM'N, *supra* note 3, at 40–41.

41. *See* ALBIN-LACKEY, *supra* note 1, at 34 (quoting Greg Call, General Counsel of Encore Capital) ("By the time [a debt] reaches me, our consumer is part of a subset of people who've survived so far by failing to engage with the problem.").

42. *See id.* at 34–35.

43. CLAUDIA WILNER ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER INCOME NEW YORKERS 6 (2010).

unclear.[44] Many different debt buying companies might attempt to collect on a single debt in turn, as it is sold from firm to firm.[45] The defendant, not understanding that debts may be legally bought and sold, may reasonably conclude that a complaint is a scam or that they have become a victim of identity theft.[46]

This baseline tendency to produce default judgments is even more troubling because undoing an erroneous ruling can be very difficult, depending on jurisdiction.[47] Connecticut state law, for example, requires a showing that "a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment" and that the defendant was "prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."[48] Imagine that an erroneous default judgment has been filed against you, and your wages are now subject to garnishment. Forgoing shifts at work to make this showing is significantly harder and more intensive than simply being able to request that the debt buyer produce the evidence required to support a claim in the first place.

Third, this lack of participation occurs despite the tendency of debt collectors to file cases in small claims courts.[49] This type of low-cost forum was originally designed to favor pro se representation through relaxed rules of pleading and evidence.[50] Yet ironically, the very features that were intended to address "the wide disparity between the ability of the richer and poorer classes to utilize the machinery of the law," make the small claims court far more friendly to debt buyers.[51] Lower standards of

44. For an exceptional illustrative sketch of a defendant's dilemma, see Jiménez, *supra* note 30, at 41–42.

45. *Id.* at 54.

46. *See* ALBIN-LACKEY, *supra* note 1, at 34–35.

47. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 99–100 (2017) (footnote omitted) ("Default judgments can be difficult to overturn, even if improperly obtained or against the wrong person.").

48. CONN. GEN. STAT. ANN. § 52-212(a) (West 2021).

49. *See* Holland, *supra* note 12, at 183–84; RICK JURGENS & ROBERT J. HOBBS, NAT'L CONSUMER L. CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 1 (2010) ("In pursuit of judgments, creditors and collectors have swamped small claims and other state courts with a torrent of lawsuits.").

50. Barbara Yngvesson & Patricia Hennessy, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 L. & SOC'Y REV. 219, 222 (1975); *see also* PEW CHARITABLE TRS., *supra* note 16, at 15 ("[S]mall claims courts use a different procedure . . . . Written answers are optional, rules of evidence do not apply, and in many jurisdictions, the parties have no immediate right to appeal."); Holland, *supra* note 12, at 263.

51. Yngvesson & Hennessy, *supra* note 50, at 221 (quoting RICHARD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES 15 (1919)).

evidence are convenient when attempting to collect on a debt with little more than a spreadsheet listing a name, SSN, account number, and outstanding balance.[52] As it stands, small claims courts rarely provide the opportunity to discover any missing material information, which might bar recovery under normal standards of pleading.[53]

Finally, there is the plain fact that debt buyers have been known to engage in abusive practices.[54] Where the statute of limitations bars recovery of a defaulted debt, collection agents may put pressure on a consumer to "revive" the account by unwittingly making a "good faith" payment today.[55] Though debt buyers frequently lack documentation in support of a claim, the small claims forum frequently permits an affidavit to stand as proof with little or no scrutiny.[56] And even these practices assume that the defendant has actually been served in the first place, a fact of which there is no guarantee.[57] All of these practices are illegal, yet persist despite regulatory intervention because of the prevalence of default.[58] If defendants do not contest claims, there is little long-term incentive to correct these abuses.[59]

Alongside these observations, it is important to bear in mind that debt buyers have been, by almost any financial metric, enormously successful. The value of defaulted debt sold on the secondary market has risen 1500% since the 1990s.[60] Encore Capital Group, one of the nation's largest debt buyers, has estimated that a fifth of the American public owed it money at some point.[61] Larger industry players such as Encore are likely positioned to grow even larger.[62]

52. Jiménez, *supra* note 30, at 63.

53. *See id.* at 55 ("[N]o 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."); *see also* JURGENS & HOBBS, *supra* note 49, at 13.

54. *See generally* WILNER ET AL., *supra* note 43.

55. *See* Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 626 (2018).

56. *See* Holland, *supra* note 12, at 282–83.

57. WILNER ET AL., *supra* note 43, at 6.

58. *See id.* at 6, 16.

59. *See id.* at 6–7.

60. PEW CHARITABLE TRS., *supra* note 16, at 12.

61. *See* ALBIN-LACKEY, *supra* note 1, at 11. Debt buyers themselves run the gamut from large corporations to smaller "mom and pop" operations. *See* GABRIEL SCHULMAN, IBISWORLD, US INDUSTRY NAICS REPORT 56144: DEBT COLLECTION AGENCIES IN THE US 8 (Dec. 2020) (listing large debt buyers Encore Capital and PRA Group Inc. as "major players" with market share of 7.6% and 5.1%, respectively, while 80% of industry share is held by "others").

62. *See* ALBIN-LACKEY, *supra* note 1, at 10–11. Consumer debt collection lawsuits make up nearly a quarter of civil litigation filed in the American court system each year. PEW CHARITABLE TRS., *supra* note 16, at 8.

III. REGULATION AND THE DEBT BUYING INDUSTRY

Despite the persistent systemic issues described above, the debt buying industry is no stranger to regulation.[63] The FTC and the CFPB receive more consumer complaints regarding debt collection than any other issue.[64] State and federal government actors have a wide variety of statutory bases by which to police debt buyers.[65] The two most prominent authorities are explored below.

A. The Fair Debt Collection Practices Act

Instinctively, one might also assume that consumers are primarily protected from predatory debt buyers by the Fair Debt Collection Practices Act ("FDCPA"),[66] which specifically regulates the debt collection industry.[67] After all, debt buying entails an attempt to collect on debts. Several quirks of history complicate this application.[68] The FDCPA was passed in the 1970s, prior to the advent of the debt buying industry, and its drafters did not anticipate such a practice.[69]

The FDCPA was enacted to combat "the use of abusive, deceptive, and unfair debt collection practices . . . ."[70] To that end, it prohibits certain egregious violations, like calling to collect in the middle of the night, appearing at an alleged debtor's place of employment,[71] or

63. *E.g.*, Encore Annual Report, *supra* note 29, at 7–9 ("Our operations in the United States are subject to federal, state, and municipal statutes, rules, regulations, and ordinances that establish specific guidelines and procedures that debt purchasers and collectors must follow when collecting consumer accounts.").

64. *See* FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK 1, 6 (2018) (ranking debt collection as #1 category of reported complaints with over 600,000 reports in 2017); Chris Johnson, *Top Five Consumer Financial Complaints Reported Across the U.S.*, CONSUMER FIN. PROT. BUREAU (July 6, 2017), https://www.consumerfinance.gov/about-us/blog/top-five-consumer-financial-complaints-reported-across-us/ (noting that debt collection accounts for 27% of all complaints submitted to the bureau).

65. Encore Annual Report, *supra* note 29, at 7.

66. 15 U.S.C. §§ 1692–1692p.

67. *Id.*

68. Debt buyers have had some success challenging whether the FDCPA applies to them at all, because they own the debts on which they seek to collect. Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1724 (2017) ("For while the creditor definition excludes persons who 'receive an assignment or transfer of a debt in default,' it does so only (and yet again) when the debt is assigned or transferred '*solely* for the purpose of facilitating collection of such debt *for another*.'"). *But see* Barbato v. Greystone Alliance, LLC, 916 F.3d 260, 268–69 (3d Cir. 2019) (holding debt buyer to be subject to act under another FDCPA prong so long as the company's "principal purpose" is debt collection).

69. *See Henson*, 137 S. Ct. at 1724 ("Congress never had the chance to consider what should be done about those in the business of purchasing defaulted debt.").

70. 15 U.S.C. § 1692.

71. *See id.* § 1692c.

engaging in physical harassment or threats in order to collect.[72] But more broadly, the act also prohibits "false, deceptive, or misleading representation[s]" made when attempting to collect.[73]

The FDCPA provides a process by which a consumer may request verification that they owe the debt in question.[74] Accompanying an initial communication with a consumer, a collector must provide a written validation notice, containing basic information about the debt, as well as informing the consumer that they may dispute the validity of the debt within thirty days, after which collection efforts will cease until the debt can be verified.[75]

Congress intended this simple self-help measure to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."[76] But despite this commendable goal, the FDCPA has proven unable to curb debt buying abuses on its own.[77] Validation notices in particular have been criticized as ineffective for various reasons.[78] Empirical data suggest that consumers may misunderstand what is meant by the term "verification" and thus forgo making the request altogether.[79] When the verification request is made, debt buyers frequently deem the account too troublesome and simply sell it to another collector, who can begin the process anew.[80]

72. *Id.* § 1692d.

73. *Id.* § 1692e.

74. *Id.* § 1692g.

75. *Id.*

76. S. REP. NO. 95-382, at 4 (1977).

77. At the time of writing, the CFPB had passed a rule requiring additional disclosures within validation notices at the outset of debt collection communications. *See* Debt Collection Practices, 85 Fed. Reg. 76734-01 (Nov. 30, 2020). The rule attempts to strengthen validation notices by providing consumers with more account-level information related to the debt, as well as a statement regarding the consumer's right to dispute the debt. *See* CONSUMER FIN. PROT. BUREAU, EXECUTIVE SUMMARY OF THE DECEMBER 2020 DEBT COLLECTION RULE 2–4 (2020).

78. *See* Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 70 SMU L. REV. 63, 113 (2017) ("The short explanation is that courts interpreting the validation provision typically examine not what actual consumers take away from it but rather what the disclosure says, and interpret it making unrealistic assumptions about consumers.").

79. Jeff Sovern et al., *Validation and Verification Vignettes: More Results from an Empirical Study of Consumer Understanding of Debt Collection Validation Notices*, 71 RUTGERS U.L. REV. 189, 195 (2018).

80. *Id.*

B. Unfair and Deceptive Acts and Practices

Because of the above shortcomings, it is fortunate that another diverse set of statutes afford every American a broad level of consumer protection. Section (a)(1) of the Federal Trade Commission Act specifically prohibits "unfair or deceptive acts or practices in or affecting commerce."[81] The Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the CFPB to take action to prevent an actor from "engaging in an unfair, deceptive, or abusive act or practice . . . in connection with any transaction with a consumer for a consumer financial product."[82] Under § 5552(a)(1) of the same act, state governments may also enforce the same standard.[83] Even without Dodd-Frank, all states also designate varying levels of consumer protection authority to an attorney general ("AG") or consumer protection agency via a similar state statute.[84]

Like most agencies, each of these regulators possesses differing rulemaking and adjudicatory abilities, yet all share an essential feature: the power to bring an enforcement action when a market actor engages in "unfair or deceptive acts or practices" ("UDAP" statutes).[85] While the traditional paradigm of consumer protection is that of "false or deceptive advertising," the FTC has made clear that it considers the concept of "unfairness" to be broader.[86] This view has generally been upheld by the Supreme Court.[87]

This broad interpretation is important because UDAP is a legislative standard as opposed to a rule, which intentionally leaves the ultimate determination of whether a practice is unfair or deceptive in the hands of a government agency.[88] The drafters of these laws "recognized the

81. 15 U.S.C. § 45.

82. 12 U.S.C. § 5531(a). Dodd-Frank also authorizes the CFPB to enforce the FDCPA. *Id.* § 1006.1.

83. *Id.* § 5552(a)(1) ("[T]he attorney general . . . of any State may bring a civil action . . . in any district court . . . to enforce provisions of this title or regulations issued under this title . . . .").

84. *See generally* NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS app. c (2018); Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37, 46 (2018). In the past, state AGs have successfully combined enforcement efforts to reach settlements across numerous jurisdictions in actions referred to as "multistates." *See generally* Stephanie Guyon, *Making the Most of Limited Resources: Multistate Enforcement Action*, ADVOCATE, Mar./Apr. 2011, at 21.

85. Cox et al., *supra* note 84, at 42.

86. *FTC Policy Statement on Unfairness*, FED. TRADE COMM'N (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

87. Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 240–41 (1972).

88. Cox et al., *supra* note 84, at 37, 43–44.

impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion."[89] Thus, the statutes allow regulation to adapt and evolve with the market.

UDAP standards are not completely uniform, but generally, a finding of "unfairness" requires the enforcer to determine that the practice "causes or is likely to cause substantial injury to consumers," that such injury "is not reasonably avoidable," and that the injury is not counterbalanced by other significant consumer benefits.[90] Similarly, a practice is "decepti[ve]" if it "is likely to mislead the consumer acting reasonably in the circumstances."[91]

UDAP has been a staple of consumer protection for decades and is generally understood to give the government "broad powers to police the marketplace."[92] The FTC, for example, evaluates whether UDAP conduct results in a consumer injury, if the practice violates public policy, and if a behavior was "immoral, unethical, oppressive, or unscrupulous."[93] Different statutes broaden scope in other ways. To guide agencies, some append various adjectives to the UDAP language, such as "unconscionable," "false," or "confusing."[94]

Applying these standards to debt buyer litigation is relatively straightforward.[95] In the context of litigation, abusive industry practices cause quantifiable financial harm to consumers. A complaint supported by a robo-signed affidavit is "deceptive" in that it leads individual consumers of credit to believe that their collections case is supported and verifiable.[96] An attempt to collect on time-barred debt might likewise be

89. *FTC Policy Statement on Unfairness*, *supra* note 86; *see also* H.R. REP. NO. 1613, at 3 (1937) ("[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.").

90. 12 U.S.C. § 5531(c)(1)(A)–(B); *see FTC Policy Statement on Unfairness*, *supra* note 86.

91. FED. TRADE COMM'N, POLICY STATEMENT ON DECEPTION (1983).

92. Cox et al., *supra* note 84, at 37, 42–44.

93. Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

94. Cox et al., *supra* note 84, at 37, 44 ("[V]arious laws sometimes use related words to indicate the proscribed conduct, including acts or practices that are 'unconscionable,' 'untrue,' 'misleading,' 'fraudulent,' 'false,' [or] 'confusing[]' . . . ."). Most notably, Dodd-Frank, as well as the state legislatures of California and Maryland, have added "abusive" as a criterion. *E.g.*, 12 U.S.C. § 5531(d) (notably defining an act as abusive if a violator "takes unreasonable advantage of . . . the reasonable reliance by the consumer . . . ."); *see also* Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 133–34 (2013).

95. Little debt buyer regulation has been litigated, but settlement agreements relying on similar logic are numerous.

96. *See, e.g.*, Press Release, The Off. of Minn. Att'y Gen. Lori Swanson, Lori Swanson Charges One of Nation's Largest "Debt Buyers" with Defrauding Minnesota Courts and Citizens by Filing "Robo-Signed" Affidavits (Mar. 28, 2011),

considered "unfair" when a debt buyer is not transparent that the defendant is under no obligation to pay the debt, but may reopen themselves to liability by making even a partial payment.[97] If the nature of a collections complaint is unclear (deceptive), or service of process is insufficient (unfair), it becomes difficult for a consumer to respond reasonably.[98] This diverse background of statutory authority permits state and federal enforcers to continue to monitor the debt buying industry for abuses.

IV. ENFORCEMENT ACTIONS

Enforcement of UDAP and FDCPA standards as they pertain to the debt buying industry has most frequently resulted in the formation of settlement agreements, without issues being fully litigated before a court.[99] As a result of such agreements, the government has generally obtained types of relief that can be classified into one of three categories. Enforcers have sought restitution to compensate identified individuals who have been directly harmed by the offender.[100] Alternatively, most UDAP statutes provide for the imposition of a civil penalty, which is a fine paid to the government as a deterrent measure against future

https://web.archive.org/web/20120114140900/http://www.ag.state.mn.us/consumer/pressrelease/110328debtbuyers.asp (charging debt buyer with robo-signing practices and noting that debt buyer had spent less than $2 billion to obtain almost $55 billion).

97. *See, e.g.*, Press Release, Fed. Trade Comm'n, Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception (Jan. 30, 2012), https://www.ftc.gov/news-events/press-releases/2012/01/under-ftc-settlement-debt-buyer-agrees-pay-25-million-alleged (quoting David Vladeck, Director of FTC's Bureau of Consumer Protection) ("When a collector tells a consumer that she owes money and demands payment, it may create the misleading impression that the collector can sue the consumer in court to collect that debt. This FTC settlement signals that, even with old debt, the prohibitions against deceptive and unfair collection methods apply.").

98. *In re* Smith, 866 F.2d 576, 584–85 (3d Cir. 1989) (holding insufficient service of process as "unfair" within the meaning of UDAP statute when practice deprives defendant of an opportunity to defend in court); *see also* WILNER ET AL., *supra* note 43, at 6 (discussing the practice of "sewer service" by debt buyers).

99. In some limited respects, this tendency follows the lead of the SEC, which has been accused of "regulation by enforcement" of the insider trading laws. *See* Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259, 310–12 (2017). The power of the government to bring suits against those who violate the laws is nevertheless self-evidently important to the rule of law.

100. *E.g.*, Assurance of Voluntary Compliance/Assurance of Discontinuance, *supra* note 20, at 29 ("Midland shall internally set aside $25,000 per State to be available for restitution for Consumer redress."). *See generally* Cox et al., *supra* note 84, at 45–46.

infractions.[101] And finally, a suit can seek injunctive relief, identifying offending behavior and asking for a court order to prevent its continuance.[102]

These categories are non-exclusive, and large-scale settlements frequently include some form of all three.[103] Monetary relief is often the focus of headlines and press releases regarding public settlements and for good reason.[104] A civil penalty or restitution award provides a simple, tangible measure of an enforcement action's corrective measure.

Injunctive relief is more complicated. Such relief is punitive in nature and therefore only available through judicial order as a matter of black letter law.[105] In practice, however, state enforcers can prospectively mandate future actions of a defendant through negotiated settlements, frequently without needing to obtain a court order.[106] Using the injunctive power, a settlement may nominally prohibit the future use of unfair practices as a general matter, similar to a citation or a warning.[107] Some go further and prospectively bar the use of certain business practices altogether[108] or mandate specific disclosures to customers.[109]

101. *E.g.*, Assurance of Voluntary Compliance/Assurance of Discontinuance, *supra* note 20, at 29 ("Midland shall pay $6,000,000 to the States."). *See generally* Cox et al., *supra* note 84, at 45–47.

102. *E.g.*, Assurance of Voluntary Compliance/Assurance of Discontinuance, *supra* note 20, at 24 ("Midland shall not knowingly pursue or threaten to pursue, directly or indirectly, Collections Litigation on any Time-barred Consumer Accounts."). *See generally* Cox et al., *supra* note 84, at 45–46.

103. *See generally, e.g.*, Assurance of Discontinuance, *In re* Portfolio Recovery Assocs., LLC, No. 19-3487D (Mass. Super. Ct. Nov. 7, 2019).

104. *See, e.g.*, Press Release, Off. of Att'y Gen. Maura Healey, AG Healey Secures $4 Million from National Debt Buyer to Pay Back Consumers Harmed by Abusive Debt Collection Practices (Nov. 11, 2019), https://www.mass.gov/news/ag-healey-secures-4-million-from-national-debt-buyer-to-pay-back-consumers-harmed-by-abusive.

105. *In re* Pro-Fit Holdings Ltd., 391 B.R. 850, 864 (Bankr. C.D. Cal. 2008) (quoting 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3922 (2d ed. 1996)) ("An injunction is a court order, 'directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion.'").

106. Cox et al., *supra* note 84, at 46; *see, e.g.*, Assurance of Voluntary Compliance/Assurance of Discontinuance, *supra* note 20, at 4–38.

107. *E.g.*, Assurance of Voluntary Compliance/Assurance of Discontinuance, *supra* note 20, at 4 ("Midland shall comply with applicable provisions of the Fair Debt Collection Practices Act . . . with respect to its Collection activities.").

108. *E.g.*, Stipulated Final Judgment and Order, *supra* note 20, at 6 ("For 5 years after the Effective Date, Defendants . . . may not violate [the law] by knowingly or recklessly using a payment processor that processes Consumers' payments in another country . . . .").

109. *E.g.*, Consent Decree, *supra* note 20, at 18 ("[Defendant] shall make the following disclosure clearly and prominently on each written collection communication that is sent to a consumer for the purpose of collecting a debt . . . ."). At the apex of this authority, settlements have combined the injunctive power along with monetary penalties to regulate

There is good reason to believe that injunctive relief represents a more potent regulatory tool when thoughtfully structured.[110]

Settlements reached through the enforcement power have many upsides. Such agreements can target only those specific companies who are engaged in illegal practices, and do not directly impact entire industries writ large. Clauses can be carefully drawn on a case-specific basis in a way that broad regulation cannot and therefore should not burden those within the industry who are operating ethically. Furthermore, the reactive nature of enforcement achieves the statutory purposes of UDAP laws, allowing for regulators to evolve and adapt to newly discovered market abuses without waiting for legislative action.[111]

But downsides also exist. Settlement agreements are by nature less public than other forms of enforcement or rulemaking.[112] This leads to logistical problems. Since the overwhelming majority of debt buyer litigation takes place in state courtrooms flooded with collection cases, judges in everyday debt suits may not be aware that a settlement has been entered against a given party.[113] Even if a given judge is aware, they may not be familiar with the terms of any relevant agreement.

Enforcers have a finite number of resources to dedicate to any given case and must expend them if they wish to monitor previous agreements for compliance. And most crucially in the context of debt buying litigation, it is very likely that future defendants will be unaware of past abuses or agreements when served with a collections suit.

Conceptual problems are also apparent. If a given provision leaves some discretion to the business, it might be easily circumnavigable. Because settlements are negotiated behind closed doors, they typically lack transparency and include a statement denying fault on the part of the defendant.[114] Therefore, to be effective, injunctive relief must be thoughtful, deliberate, and adaptive to real-world conditions.

entire industries without going through legislative or rulemaking processes. *See* W. Kip Viscusi & Joni Hersch, *Tobacco Regulation Through Litigation: The Master Settlement Agreement*, U.C. BERKELEY L. & ECON. WORKSHOP 23 (2009).

110. *See generally* Turk, *supra* note 99, at 262–68 (comparing settlement agreements to notice and comment rulemaking).

111. *See, e.g.*, *FTC Policy Statement on Unfairness*, *supra* note 86 ("The Commission's ability to rely on an independent criterion of consumer injury is consistent with the intent of the statute . . . .").

112. Turk, *supra* note 99, at 315.

113. *See* Holland, *supra* note 3, at 184–85.

114. Turk, *supra* note 99, at 315.

V. A PROPOSED PRO SE REFOCUS

Between CFPB, FTC, and state AG enforcement, it is essentially inevitable that future litigation will result in the formation of additional settlement agreements with industry players as abuses come to light.[115] When such a situation arises again, the government will be faced with the challenge of structuring a deal that is acceptable to the other party yet stringent enough to avoid future abuses. Unfortunately, the history of regulation and enforcement within this industry brings to mind a game of whack-a-mole.[116] As one abuse is addressed, enforcers and regulators must turn away and expend resources to address another.[117]

Because the harms of the debt buying industry are derived primarily from the persistent prevalence of default judgments,[118] the government must do more than periodically audit the industry for bad behavior and issue fines. Debt buying businesses see such actions as part of doing business.[119] If used creatively, injunctive settlement relief, derived from UDAP authority, presents a unique and pragmatic opportunity to transcend this paradigm. Through it, enforcers already have the power to exert pressure to correct systemic problems within the industry.

Consider an "ideal" scenario—what all debt buyer collection cases should look like in a world where the parties play fair and the court system functions as intended. A debt buyer purchases the right to collect on a defaulted debt from a primary creditor. The company initiates collection proceedings. In contacting the consumer defendant, the collector serves a complaint and provides the information required for both parties to verify the claim. In the event that the consumer defendant believes the debt is in error, past the statute of limitations, or incorrectly served to the wrong party, the issues are contested on the merits before

115. *See generally* Jonathan L. Pompan & Makalia A. Griffith, *CFPB and FTC Collection Update*, VENABLE LLP INSIGHTS BLOG (Apr. 15, 2020), https://www.venable.com/insights/publications/2020/04/cfpb-and-ftc-debt-collection-update (describing recent developments in debt regulation enforcement actions).

116. *See* Peter A. Holland, *Notes from the Trenches: Current Trends in Consumer Junk Debt Buyer Litigation*, 49 MD. BAR J. 18, 26 (2016) (noting that, despite various enforcement actions, "the problem remains" if collection defendants do not mount a defense).

117. *See id.*; *see also, e.g.*, Stipulated Final Judgment and Order, *supra* note 20, at 6 (extending a 2015 settlement five years later, after debt buyer allegedly violated terms of prior agreement as well as numerous statutes).

118. *See supra* Section II.

119. *See* Encore Annual Report, *supra* note 29, at 7 (describing potential impact of Government Regulation on business model).

a neutral arbiter within a court of law.[120] Achieving this scenario, no matter how unrealistic, should be the ultimate goal of our justice system and government.

It is a long hill to climb. Certain states, such as New York, have already taken significant steps toward tackling many of the issues discussed in this Note via court rules and other administrative actions.[121] But to move towards the ideal in the most resource-effective manner possible, no available tool should be ignored.

To that end, enforcers nationwide should consider tweaking their future injunctive relief measures when reaching settlements with debt buyers to focus on providing whatever assistance they can to the future consumer defendants of collection litigation.[122] In practice, this means providing aid for consumer defendants to effectively represent themselves in court pro se,[123] as there is no constitutional right to an attorney in civil suits.[124]

120. Essentially, the ideal reflects the established concept of affording due process prior to the deprivation of property due to garnishment or other court order. *See generally* Connecticut v. Doehr, 501 U.S. 1 (1991).

121. *E.g.*, *Consumer Credit Reform Rules*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/rules/ccr/index.shtml (last visited May 12, 2022) (describing major reforms addressing default judgment applications in consumer credit cases, including additional notice requirements, additional required affidavits submitted by the primary creditors, and an affirmation of the non-expiration of the statute of limitations in order to collect). But even extensive efforts such as these can be undermined. *See* Press Release, N.Y. State Off. of Att'y Gen., Attorney General James Sues Trump Administration Over Rule That Would Allow Predatory Lenders to Target Vulnerable New Yorkers (Aug. 20, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-trump-administration-over-rule-would-allow-0 (discussing lawsuit trying to stop rule giving predatory lenders the ability to charge consumers high interest rates on loans and bypass state interest rate caps).

122. Some existing settlement agreements include clauses that trend in this direction. *See* Assurance of Voluntary Compliance/Assurance of Discontinuance, *supra* note 20, at 14–15 (proscribing additional information to be included with validation notices required to be sent under the FDCPA, 15 U.S.C. § 1692g (a)). These can be improved upon by providing clearer and more practical information to future collections defendants to cure some of the defects in validation notices generally.

123. There is widespread skepticism within the legal profession as to a pro se litigant's ability to be an effective advocate. *E.g.*, Tiffany Frigenti, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn*, 28 TOURO L. REV. 1019, 1046–49 (2012). Despite this, debt buying collection litigation lends itself well to self-defense. *See* TEX. JUST. CT. TRAINING CTR., *supra* note 39, at 3–4. Cases frequently take place in small claims court where rules are simplified. Amounts in controversy are generally low. And defenses, generally, are conceptually simple. *See supra* Section II.

124. *See* PEW CHARITABLE TRS., *supra* note 16, at 13 ("Studies from 2010 through 2019 show that the share of debt claim defendants who were served—that is, provided with official notification of the suit against them—who had an attorney ranged from 10 percent in Texas to zero in New York City."). Some states have taken steps towards establishing a

In its simplest form, this aid could take the form of requiring the inclusion of a standardized one-page letter, drafted by the enforcer, to be included whenever a debt buyer serves a consumer defendant in an upcoming collection suit.[125] Such a letter, which would conceptually expand on the validation notice requirement of the FDCPA, should be written on state letterhead and include the following elements:

A. A Plain English Explanation of Debt Buying

The drafters of the FDCPA understood that an inherent imbalance of information lies at the root of debt collections litigation.[126] Addressing basic concepts up front, such as how debt can end up in a third party's hands to begin with, could go a long way towards enabling individuals to better contextualize their situation.[127] For purposes of clarity and neutrality, it is vital that such a communication be presented not as the words of an adversarial party but as originating from some sort of authority outside of the suit.

B. Clear Instructions on How to Verify that the Debt in Question Is Genuine

While the FDCPA requires that collectors verify their debts upon consumer request, it does not specify any exact process that must be followed.[128] Collectors therefore have no motivation to provide any more than the bare minimum of information.[129] Furthermore, empirical analyses have shown that consumers may not believe "verifying" a debt

civil right to counsel. *Status Map*, NAT'L COAL. FOR CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/map (last visited May 12, 2022).

125. Prior agreements with debt buyers have sometimes included conceptually similar measures in the form of mandated disclosures. The difference between these measures and the following proposal is that usually these representations are to be made by the party attempting to collect, have a more limited scope, and must be included *within* the collection notice itself rather than as a separate document from an external authority. *See, e.g.*, Assurance of Discontinuance, *supra* note 103, at 12 (requiring debt buyer to include conspicuous disclosure relating to legally protected types of income).

126. S. REP. NO. 95-382, at 4 (1977) ("[The validation] provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.").

127. *See, e.g.*, Renae Merle, *Zombie Debt: How Collectors Trick Consumers into Reviving Dead Debts*, WASH. POST (Aug. 7, 2019), https://www.washingtonpost.com/business/2019/08/07/zombie-debt-how-collectors-trick-consumers-into-reviving-dead-debts/ (describing how industry uses consumer ignorance to dupe defendants into reviving debt past the statute of limitations).

128. 15 U.S.C. § 1692g(b).

129. Sovern et al., *supra* note 79, at 229 n.93 (describing debt collectors' minimal verification efforts).

is of any value, regardless of whether they believe a given debt is genuine.[130]

A notice of verification drafted by an enforcer could remedy much of this confusion by stating in clear and concise terms[131] that the debt buyer is obligated to produce proof that the debt is owed and that a customer is entitled to view the proof.[132]

Existing agreements have sometimes imposed duties on debt buyers to further verify the accuracy of a given claim before serving a demand to a consumer.[133] The conceptual difference between such measures and this proposal is simply to place the information where it will do the most good: back in the hands of the consumer. In this way, settlements are used to actualize the aspirations of the FDCPA's validation notice.

C. A Link to the Previous Settlement Agreement

Consumers deserve to be informed if they are dealing with an organization found to have engaged in abusive practices in the recent past. Large-scale settlements in other industries frequently include some sort of notification that a party's offending behavior has been addressed by an enforcer.[134] A written URL can easily connect consumers with the

130. *See id.*

131. Models for these simplified notifications exist. *See, e.g.*, Nat'l Consumer L. Ctr., Comments on Proposed Rulemaking Regarding Debt Collection (Feb. 28, 2014), https://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf.

132. *See* Sovern et al., *supra* note 79, at 220 ("[When] respondents saw the more prominent validation notice, 149 [of 182] respondents said they would write to seek verification if they received a letter saying they could do so.").

133. *E.g.*, Assurance of Discontinuance, *supra* note 103, at 6 (requiring debt buyer to include conspicuous disclosure relating to legally protected types of income) ("PRA shall not make any representation . . . that a Consumer owes a Debt to PRA . . . unless, at the time of making the representation, PRA can substantiate the representation.").

134. *See, e.g.*, Settlement Agreement at 24–27, *In re* Hyundai and Kia Engine Litig., 2021 U.S. Dist. LEXIS 109343 (C.D. Cal. June 10, 2021) (No. 8:17-cv-00838-JLS-JDE) (describing the defendants' obligations under the settlement agreement to provide notice of the settlement to various stakeholders); *see also What is a Class Action Notice?*, CLASSACTION, https://www.classaction.org/learn/class-action-notices (last visited May 12, 2022) ("Notices are typically sent after a case has settled and will provide instructions on how to claim part of the settlement.").

relevant document stored online.[135] If resources are available, agencies may also be able to combine this step with more robust resources.[136]

This step has an additional benefit of providing another level of "verification" to the process, as the existence of a settlement agreement hosted by the state would satisfy basic questions of whether or not the suit is a true "scam" or has been brought by an actual business active in the industry.

D. A Statement that Pro Se Defenses Can Be Viable, with Links to Self-Help Resources

The overall goal of the proposed enforcer's letter is to facilitate a defendant's engagement with the legal system. Because debt buyers count on obtaining default judgments, consumers stand a decent chance to prevail when they contest cases.[137]

A proposed enforcer's letter could address this by concluding with a statement encouraging the reader to respond to the complaint, if they believe that it is inaccurate or false, by submitting an answer in writing. Some more basic information should follow. As it stands, some public resources already exist for those who wish to mount a defense.[138] These resources could be tailored for each jurisdiction and included via a short URL link.

The issue is that these guides to pro se representation are kept separate from the intended audience who must wade through the internet[139] or show up to court unprepared just to gain basic information

135. *See, e.g.*, Settlement Agreement at Exhibit B, *In re* Google Plus Profile Litig., 2021 WL 242887 (N.D. Cal. Jan. 25, 2021) (No. 5:18-cv-06164-EJD) (notice of class action settlement containing a URL to the settlement website where consumers entitled to a settlement payment can access the full settlement agreement, the claim form, and other documents related to the settlement).

136. *See, e.g.*, GOOGLE PLUS PROFILE LITIG., *supra* note 22 (providing an example of a plain text summary of litigation, as well as electronic resources for filing a claim).

137. *See supra* note 23 and accompanying text; *see also* Sovern et al., *supra* note 79, at 240 n.108 ("Notre Dame Law School Clinical Professor of Law reports that after she sends a verification request to a collector, a second collector sends a letter seeking to collect for the same debt 'very often.'").

138. *E.g.*, OFF. OF THE MINN. ATT'Y. GEN., ANSWERING A LAWSUIT; *Answer Fillable Smart Form*, MINN. JUD. BRANCH, https://www.mncourts.gov/mncourtsgov/media/CourtForms/CIV302.pdf?ext=.pdf (last visited May 12, 2022) (smart .pdf file providing structure to submit a basic answer); *see also* TEX. JUST. CT. TRAINING CTR., *supra* note 39, at 2–3.

139. At the time of writing, a Google search with the query "defending myself in court" returns the following: 5 articles regarding criminal self-representation, 2 articles attempting to dissuade self-representation, 2 videos from private law firms on the subject, and 1 video from a legal aid society. *Defending Myself in Court*, GOOGLE SEARCH, https://bit.ly/2OGqBVQ (Apr. 26, 2022).

about how to mount a claim.[140] An enforcer's letter could do some basic work of linking up consumer defendants with the resources relevant to their given jurisdiction. As such, the enforcer need not be directly involved in any specific action.

VI. EVALUATION

A. Strengths

Under this proposal, consumer protection settlements become an ex-ante tool to aid those who will need it most: future consumer defendants facing debt buyers who have been shown to engage in abusive practices. Restitution cannot make these parties whole again, as their potential injury has yet to occur. Penalties and fines are blunt instruments whose impact may never be felt by the public. Other compliance and enforcement schemes cost significant resources to implement and subsequently monitor for compliance.

Enforcer letters may lack the tangible monetary benefits of alternative methods of enforcement, but they have the potential to solve a number of problems at once. The proposal is cheap and achievable, maximizing existing resources and specifically addressing the overarching issues associated with the prevalence of default in this area of the law.

Furthermore, it stands to reason that the proposed letters will have a positive impact even if they are only marginally effective. While the chances of every potential pro se defendant with a meritorious defense taking up the chance to defend themselves are essentially zero, and it is even less likely that all will prevail, each person who even attempts a defense exerts substantial economic pressure on the profitability of the current debt buyer litigation model.[141] Litigating cases costs corporate resources, especially if a significant percentage of cases proves unprofitable due to a lack of evidence, mistaken identity, or statute of limitations bar.[142] As a result of more frequently contested claims, debt buyers would be forced to confront the externalities associated with bringing cases that lack merit or evidentiary support. Ideally,

140. *See* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 46 (2002) (advocating for courts to provide basic legal information to the public to enable pro se litigants).

141. *See, e.g.*, Encore Annual Report, *supra* note 29, at 13 ("[I]ncreases in . . . court costs may increase our total cost in collecting on accounts in this channel, which may have an adverse effect on our business . . . .").

142. *See id.*

confronting the industry with costs of abusive and frivolous litigation will encourage debt buyers to engage in a higher degree of self-regulation.

The proposed letters are also practical. Enforcer resources, especially at the state level, may be very thin.[143] Drafting a single letter should be inexpensive for an agency to implement. Enforcers,[144] courts,[145] and legal aid organizations[146] are likely to have already compiled resources for consumers, which could likely be collaboratively integrated into the provided materials without much hassle. And where funds are needed, they can be negotiated for within the agreement itself through a cy pres award or other funding provision.[147]

Finally, due to the nature of settlements, the drafting process is iterative and can be improved over time. Realistically, enforcers will continue to reach these agreements as abuses are discovered within the industry. As these new agreements are entered into with offenders, enforcers can adapt and experiment with new language to determine which phrases resonate best with consumers and address new abuses as they arise.[148]

B. Weaknesses

This proposal is intended to be practical, with the understanding that it is not a panacea. It is important, therefore, to treat it as merely one of many options to regulate the industry that should be pursued alongside other forms of legislative and administrative reform.[149] Enforcement letters are primarily aimed at addressing the prevalence of default

143. *See* Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001) ("Large, wealthy, and well lawyered corporations often have far greater financial and legal personnel resources than even a large state attorney general's office.").

144. *E.g.*, *Debt Collectors*, ROB BONTA, ATT'Y GEN., STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/consumers/general/debt-collectors (last visited May 12, 2022).

145. *E.g.*, *Self-Help Resource Center*, N.J. CTS., https://www.njcourts.gov/selfhelp/index.html (last visited May 12, 2022).

146. *E.g.*, *Identity Theft Affidavit - Credit Card and Debt Buyer Cases*, ILL. LEGAL AID ONLINE, https://www.illinoislegalaid.org/legal-information/identity-theft-affidavit-credit-card-and-debt-buyer-cases (last visited May 12, 2022).

147. *See* Cox et al., *supra* note 84, at 46.

148. Enforcer letters would need to be drafted for successive settlements. Each would afford an opportunity to re-examine the effectiveness of prior drafts regarding comprehension. Such studies have been effective in other contexts. *See* KLEIMANN COMMC'N GRP., KNOW BEFORE YOU OWE: EVOLUTION OF THE INTEGRATED TILA-RESPA DISCLOSURES (Kleimann ed., 2012) (describing iterative research study for the process of drafting consumer-friendly mortgage forms).

149. *See Consumer Credit Reform Rules*, *supra* note 121.

judgments, but they cannot solve every possible avenue of abuse within the industry.

Take, for example, the problem of disputed debts which are then sold to subsequent collectors.[150] In this situation, after an initial defense is mounted, a consumer's debt is then sold to another buyer, who brings a new collection attempt.[151] It is one thing to expect a consumer to pursue self-help for a single case, but it is simply too much to expect the average person to wage a war of attrition on their own.[152] An enforcer letter notice scheme cannot address this issue directly.[153]

Similarly, enforcement letters cannot work if the defendant is never properly served to begin with. No matter what avenue is used to combat this issue, it will require greater enforcer resources. This is an area where more traditional enforcement action can compensate for the weaknesses in this proposal.[154]

Additionally, some sources report that debt buyers have been known to exploit unrepresented consumer defendants by exerting pressure once they appear in court.[155] As there is also evidence suggesting that debt buyers frequently do not contest cases when challenged[156] and that the small claims courts where debt buyer collection litigation takes place are friendly to pro se defendants, it is difficult to gauge the extent of this problem, which may or may not be widespread. It is likely that some courts will need to adopt rules to protect pro se defendants. Those rules mean very little, though, if those defendants never appear in court.

It is also possible to conceptually object to such a proposal. Scholars Carl E. Schneider and Omri Ben-Shahar highlighted the general failure of mandatory disclosures to assist the public in many consumer

150. Sovern et al., *supra* note 79, at 249 ("[A] significant number of respondents who reported that they would dispute the debt once also indicated that they would not dispute it again after the debt had been sold to a second collector.").

151. *Id.*

152. *Id.*

153. After a debt is disputed, the sale of that same debt to another debt buyer with the knowledge or expectation that the buyer will attempt to collect might violate 15 U.S.C. § 1692g(b), which prohibits collection activities until the collector obtains verification of the debt and provides that information to the consumer. Because all future debt collection litigation undertaken by a debt buyer subject to the proposed consent order would need to include the pro se letter, a buyer cannot delay the issue forever. The provision would apply to any disputed debt purchased by the debt buyer subject to the agreement.

154. *See* Clifford Jacobs, *Sewer Service: A Catalyst for Mandatory Process Server Certification in California*, SERVE NOW (Jan. 29, 2013), https://www.serve-now.com/articles/1408/sewer-service-a-catalyst-for-mandatory-process-server-certification-in-california (describing NY attorney general's 2009 campaign to vacate 101,000 court judgments obtained by debt collection firms that had used fraudulent process serving firm).

155. *See* ALBIN-LACKEY, *supra* note 1, at 53.

156. *See* Sovern et al., *supra* note 79, at 239.

protection contexts, despite their popularity with legislators and other legal professionals, resulting in widespread adoption.[157] While the idea of an enforcer letter is conceptually distinguishable from such provisions, as it originates from (and is attributable to) a non-adversarial party, the ultimate burden falls on the consumer to take action. The same overwhelming nature that critics of disclosures rightly point out will probably dissuade some consumers from mounting a pro se defense. However, Schneider and Ben-Shahar's proposals have taken common critiques into account, such as avoiding overload and accumulation, while attempting to remain precise and understandable.[158] Further work can undoubtedly be done to improve them.

VII. CONCLUSION

In the world of consumer protection, debt buyers are uniquely situated due to the fact that their business model is entirely dependent on the court system to realize a profit. It is distressing, then, that evidence suggests that a large portion of debt buyer claims may be unsupported, abusive, or misdirected. Our society relies on an adversarial system to deliver just outcomes to disputes. But it takes two for there to even be a "dispute." The prevalence of consumer default in this industry, therefore, must be addressed. Yet the economics of the situation are such that, as long as traditional civil representation rules apply, it will remain infeasible for most consumers to hire a lawyer to defend themselves in small claims courts.

But courts predate lawyers.[159] Pro se defenses, if attempted on a wider scale, would at least force debt buyers to confront a degree of the costs that are currently borne by the system. It is not at all clear that pro se defendants, should they show up, would fail to win meritorious cases.

Access to justice initiatives should absolutely be pursued to ensure that everyone gets their day in court. To correct abuses, more sweeping legislation and regulatory efforts will likely be needed. Nevertheless, these initiatives will take time, advocacy, and intelligent implementation across a number of institutions to carry out.

This Note's proposed enforcer letters can be implemented today, under existing law. They are not resource-intensive for government

157. *See* Carl E. Schneider & Omri Ben-Shahar, *The Failed Reign of Mandated Disclosure*, REGUL. REV. (June 15, 2015), https://www.theregreview.org/2015/06/15/ben-shahar-schneider-failed-disclosure/.

158. *Id.* For additional discussion of the "overload effect," see Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 687 (2011).

159. Goldschmidt, *supra* note 140, at 36.

agencies that are already overextended. Through a bare minimum of encouragement, information, and refereeing, such a letter has the potential to deliver on one of the most foundational beliefs of our justice system: that if you are wrongly charged, you may enter a court of the United States and receive justice.