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INTRODUCTION

During the past two decades, much has been written about the enforceability of pre-dispute mandatory arbitration clauses contained in most consumer agreements.[1] Suffice it to say, the strong federal presumption in favor of arbitration[2] has trumped almost every

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[1] *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?* 21 J. CORP. L. 331 (1996); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 MICH. B.J. 302 (1999); David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Arbitration Undermines "Arbitration,"* 8 NEV. L. J. 400 (2007); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Jean R. Sternlight, *Creeping Mandatory Arbitration*, 57 STAN. L. REV. 1631 (2005); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

[2] "The Federal Arbitration Act reflects an emphatic federal policy in favor of arbitral dispute resolution." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985); "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...." Moses H. Cone Memorial Hosp. v. Mercury Constr.

claim that the Federal Arbitration Act ("FAA") was not enacted to apply to consumer contracts of adhesion, is unfair to consumers, or is an ineffective method of redress. The Supreme Court recently held that the FAA preempts even state unconscionability rules that preclude arbitration provisions that prohibit collective redress or class actions.[3]

Why, then, another article rehashing the same arguments only to reach the same conclusion? Because a consumer's claim under the Fair Debt Collection Practices Act ("FDCPA")[4] is different. All of the recent Supreme Court decisions that have framed the jurisprudence upholding the validity of consumer arbitration provisions involve disputes between the parties to the arbitration agreement—the business and the consumer.[5] FDCPA claims, on the other hand, by definition involve non-parties.[6] The Act defines a debt collector as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.[7]

Corp., 460 U.S. 1, 24-25 (1983).

[3] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), *see discussion infra* Notes 82 to 92.

[4] 15 U.S.C. §§ 1692 (1977).

[5] *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) (agreement between credit card issuer and consumer); *Concepcion*, 131 S. Ct. at 1740 (agreement between cellular phone service provider and customer); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (employment contract between employer and employee); Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 581 (2008) (lease between landlord and tenant); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) (agreement between check cashing company and customer); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (agreement between finance company and customer); Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) (construction contract between contractor and owner).

[6] *See, e.g.*, Thomas v. JP Morgan Chase & Co., 2011 WL 3273477 (S.D.N.Y. July 29, 2011) (bank collecting its own debts is not a debt collector under the FDCPA).

[7] 15 U.S.C. § 1692a(6); In unusual cases, the creditor itself may fall within the scope of the Act, "the term [debt collector] includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

In other words, debt collectors under the FDCPA will almost always be a third party, removed from the consumer's agreement containing the arbitration clause.

Although the Supreme Court has recognized that the FAA sometimes authorizes non-parties to sometimes compel arbitration pursuant to an otherwise enforceable agreement,[8] claims against "debt collectors" under the FDCPA raise unique issues that should preclude the non-party debt collector from enforcing the agreement between the creditor and the consumer. There are currently more than 300,000 debt collectors,[9] collecting over $50 billion of debt[10] from approximately 30 million individuals,[11] earning more than $10 billion.[12] While many collectors fully comply with the law, the vastness of the collection industry provides ample opportunity for abuse.[13] The FDCPA is designed to deter that abuse, compensate aggrieved consumers, and provide a legal atmosphere within which ethical collectors can successfully operate. This article examines the arbitrability of FDCPA claims in light of recent Supreme Court decisions. It considers whether the FDCPA's purpose, "[t]o eliminate abusive debt collection practices by debt collectors, to insure that

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Thomas, 2011 WL 3273477 (S.D.N.Y. July 29, 2011).

[8] Arthur Anderson LLP v. Carlisle, 556 U.S. 624 (2009).

[9] Counting third-party collectors and creditors' in-house collectors together, the accounts receivable management industry employs 302,000 collectors and is expected to add 19 percent to staffing rolls between 2006 and 2018. *Collections Information,* ACA INTERNATIONAL, http://www.acainternational.org/products-collections-information-5431.aspx (last visited March 14, 2012) [hereinafter ACA INTERNATIONAL].

[10] *Id.* (Removing commission amounts from the total debt recovered leaves more than $44.6 billion in debt that agencies returned on a commission basis to creditors and the U.S. economy).

[11] FED. RESERVE BANK OF NEW YORK, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT (November 2011), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32011.pdf.

[12] In 2010, agencies recovered nearly $54.9 billion in total debt, on which they earned $10.3 billion in commissions. ACA INTERNATIONAL, *supra* note 9. Although the amount of debt being collected has risen since 2007 to over $50 billion, the recession appears to have hurt the profitability of the debt collection industry. *See* Patrick Lunsford, *The Myth of the Debt Collection Boom,* FORBES (Feb. 23, 2012), *available at* http://www.forbes.com/sites/insidearm/2012/02/23/the-myth-of-the-debt-collection-boom/.

[13] One source estimates that in 2010, there were more than 11,000 suits filed under the FDCPA. *See* Matthew R. Bremner, *The Fair Debt Collection Practices Act: The Need for reform in the Age of Financial Chaos,* 76 BROOKLYN L. REV. 1553, at n.10 (2011).

those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses,"[14] justifies a different application of existing rules, or requires an amendment to the FAA.[15]

I. ARBITRATION AND NONPARTIES

Today, nearly every written agreement[16] between a creditor and a consumer contains a mandatory pre-dispute arbitration agreement that precludes either party from going to court, requiring that disputes be settled in arbitration.[17] In arbitration, the claim will be resolved by a private "judge," who is not bound by most rules of law or evidence,[18] and with no jury or right of appeal. Consumer

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[14] 15 U.S.C. § 1692(e). *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605 (2010),

[15] It should be noted that statutory claims, generally are subject to arbitration, "unless overridden by a contrary congressional command." Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (RICO claim subject to arbitration). There does not appear to be such a "congressional command" within the FDCPA. *See also* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) (CROA claim subject to arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (ADEA claim subject to arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Clayton Act claim subject to arbitration). There does not appear to be sufficient grounds to hold that claims under the FDCPA are not subject to an otherwise enforceable arbitration clause. *See, e.g.*, Glasscock v. Cottonwood Financial, LTD., 2011 WL 4835677 (E.D. Tex. 2011) (FDCPA contains no provision barring, prohibiting, or disfavoring arbitration of claims).

[16] The Federal Arbitration Act requires that agreements to arbitration must be written. Section 2 of the Act provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1947).

[17] In all likelihood, the note, mortgage, or deed of trust between a lender and the consumer contains such an arbitration clause, as do most credit cards agreements and installment contracts.

[18] *See*, Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law,* 71 FORDHAM L. REV. 761, 782-83 (2002) ("But arbitrators in most cases are not bound to follow the law, nor are their decisions appealable to a court

arbitration also generally will be more expensive than a trial in our civil courts, and the decision likely will be unpublished, secret, and not binding on any other arbitrator hearing an identical claim. Finally, the arbitration clause also probably will ban the consumer from joining or maintaining a class action.[19]

There is little question that these pre-dispute consumer arbitration agreements are binding "between the parties." There is a division, however, regarding whether the arbitration clause is binding on subsequent non-parties[20] enforcing the agreement or being sued for something that may have resulted from the agreement; in particular, debt collectors.

While the FAA requires a written provision agreeing to arbitrate, the definition of who is bound by its terms or entitled to enforce the agreement has gradually been expanding to include a wide range of non-parties. In *Arthur Anderson LLP v. Carlisle*, the United States Supreme Court considered whether those who are not parties to the written arbitration agreement are ineligible for relief pursuant to that agreement based on the doctrine of equitable estoppel.[21] The Court emphasized that Section 2 of the FAA makes

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of law for any but the most egregious of defects. Mere failure to follow the law is not such a defect. The result is that whatever the rules of law may be, arbitrators are not bound to follow them, and their handiwork is subject to only the most perfunctory of judicial oversight. Arbitrators of course may choose to follow the law - nothing requires them not to - but if they do, it's not because they have any obligation to do so, and it's not something that a litigant or her attorney can count on going in. Knowledgeable attorneys may have some sense of the approach that an arbitration panel is likely to take to a given type of case. Still, the arbitrators bring their own 'law' with them, and they take it with them when they leave."). *See also* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 720 n.82 (1999). *But see* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 Loy. L.A. L. Rev. 187, 189 (2006) (the author concludes that "the available empirical evidence to date provides at best weak support for the view that arbitration is 'lawless.'").

[19] As discussed at notes 82 to 92, the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), upholding class action waivers, will most likely have the practical effect of encouraging all creditors to include such waivers as part of their arbitration provision.

[20] As discussed in the text, the FAA requires a written agreement to arbitrate. *See* 9 U.S.C. § 2. There is no requirement, however, that the parties sign the agreement. The terms "non-parties" and "non-signatories" will both be used to indicate entities who are not parties to the agreement, with non-signatories used when the agreement is, in fact, signed by the parties.

[21] Arthur Andersen LLP v. Wayne Carlisle, et. al., 556 U.S. 624 (2009). *See generally* Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U.

written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract."[22] "That provision creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts 'to place such agreements upon the same footing as other contracts.'"[23] Relying on the Act's mandate that arbitration agreements are to be interpreted and tested pursuant to state law, the Court took what it saw as the next logical step, concluding that questions regarding who may enforce an arbitration clause should also be determined by state law:

> Because "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories,[24] waiver and estoppel," the Sixth Circuit's holding that nonparties to a contract are categorically barred from Section 3 relief was error.[25]

Thus, the Court held that when a non-party attempts to enforce an arbitration provision pursuant to Section 3 of the FAA, the decision must be based on generally applicable relevant state law,[26] including

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PA. J. BUS. L. 555 (2010).

[22] *Carlisle,* 129 S. Ct. at 1901.

[23] *Id.* (citing Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (internal quotation marks omitted)).

[24] Third party beneficiary theories will seldom be applicable in the context of a debt collector collecting a debt. To qualify as a third party beneficiary, it is necessary to show the parties intended to create a benefit for the third party. *See, e.g.,* Fox v. Nationwide Credit, Inc., 2010 WL 3420172 (N.D. Ill. Aug. 25, 2010) (In the case at bar, NCI is asserting the benefit of the arbitration agreement without showing where Plaintiff, as one of the contracting parties, intended to confer any "separate and distinct benefit" on NCI or other third-party debt collectors.)

[25] *Carlisle,* 129 S. Ct. at 1902. In a footnote, the Court also noted that federal law requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at n. 5 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).)

[26] *Carlisle* requires that the court apply "relevant state contract law" when determining whether a non-party may enforce an arbitration provision. *Carlisle,* 129 S. Ct. at 1902. Prior to *Carlisle,* most federal circuit courts faced with the question of to what extent a non-party is bound by an arbitration provision contained in a contract she is suing under had applied the federal substantive law of arbitrability to resolve the issue. *See, e.g.,* Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720 (8th Cir. 2001); Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524 (5th Cir. 2000); Int'l Paper Co. v. Schwabedissen Maschinen &

the doctrine of equitable estoppel.[27]

Today, courts routinely use "traditional principles" of state law to expand the scope of an arbitration agreement beyond the parties to the agreement. Specifically, courts find (1) agreements incorporated by reference, (2) assignments and assumption, (3) veil piercing/alter ego, (4) estoppel, and (5) agency.[28] In the case of a consumer and a debt collector, enforceability of an arbitration clause appears to depend primarily on the language of the agreement and the nature of the relationship between the debt collector and the creditor.

A. Debt Collector as Appropriate Non-party

Although courts uniformly recognize a strong federal policy favoring consumer arbitration, arbitration remains a matter of agreement.[29] In other words, there must be an enforceable agreement and it must cover the dispute at issue. "A party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit."[30] Two issues arise when applying the law to a debt collector under the FDCPA. First, does the dispute in question fall within the scope of that arbitration agreement? Second, and more importantly, is the clause enforceable by or against the debt collector, who is a non-party to the original agreement?

Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993); Hughes Masonry Co., Inc. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836 (7th Cir. 1981). *Carlisle* makes it clear that the decision to enforce an arbitration clause must be based on state law. Although this is a shift in focus, the author does not believe it will have a major substantive effect. In most cases, the federal substantive law applied in this area, is consistent with the appropriate state law. *See, e.g.*, Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 268 (5th Cir. 2004), wherein the court applied federal substantive law, but stated, "we also note there is no reason to think Mississippi law would compel a different result in this case." *See also* Kettles v. Rent-Way, Inc., 2009 WL 1406670 (W.D. Mich. May 18, 2009) (court must apply Michigan state law).

[27] *Carlisle,* 129 S. Ct. at 1904 (Souter, J., dissenting) (joined by Chief Justice Roberts and Justice Stevens dissented, stating that section 3 should *be read* as offering a stay only to signatories of an arbitration agreement).

[28] *See, e.g.*, Thomson-CSF v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) ("A non-signatory party may be bound to an arbitration agreement if so dictated by the "ordinary principles of contract and agency."") (citing McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980)).

[29] *See generally*, *supra* note 2.

[30] AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986).

In the vast majority of cases involving claims under the FDCPA, the arbitration agreement in question clearly covers the dispute if it arises between the parties to the contract. Most arbitration clauses contain language stating something to the effect that the clause applies to any and all claims related to, resulting from, or arising out of the agreement.[31] Thus, all disputes between the parties to the agreement (the consumer and the creditor), including statutory claims,[32] generally are covered by the arbitration agreement. The issue then is whether the arbitration clause applies to a non-party debt collector. The courts have recognized that the most direct way of resolving this question is to review the language of the arbitration provision itself.[33]

B. Language of the Agreement

As indicated above, arbitration is a matter of agreement, and the scope and applicability of the arbitration provision depends on the language of that agreement. For example, in *Sherer v. Green Tree Servicing LLC*,[34] a FDCPA claim was brought against a non-party loan servicer who moved to compel arbitration pursuant to the loan agreement. The arbitration clause at issue stated it applied to any claims arising from "the relationships which result from th[e] [a]greement."[35] The court concluded that a loan servicer is just such a "relationship," because without the Loan Agreement, there would be

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[31] For example, in the most recent consumer arbitration decision of the Supreme Court, the clause in questions read: "Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (Collectively, 'Claims'), upon the election of you or us, will be resolved by binding arbitration...." *See* Compucredit Corp. v. Greenwood, 132 S. Ct. 665, 668 (2012).

[32] Statutory claims are subject to arbitration "unless overridden by a contrary congressional command." *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (RICO claim subject to arbitration); *see also* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 667 (2012) (CROA claim subject to arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (ADEA claim subject to arbitration); and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639-40 (1985) (Clayton Act claim subject to arbitration).

[33] For example, in *In re Rubiola*, the Texas Supreme Court noted that "although "[a]rbitration agreements apply to nonsignatories only in rare circumstances[,]" the question of "[w]ho is actually bound by an arbitration agreement is [ultimately] a function of the intent of the parties, as expressed in the terms of the agreement." 334 S.W.3d 220, 224 (Tex. 2011) (citing Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 355, 358 (5th Cir. 2003)).

[34] Sherer v. Green Tree Servicing, LLC., 548 F.3d 379, 380 (5th Cir. 2008).

[35] *Id.*

no loan for Green Tree to service, and "no party argues to the contrary."[36] Therefore, the consumer expressly agreed to arbitrate with a non-signatory.[37] Similarly, a FDCPA claim against an attorney was subject to an arbitration clause between the consumer and the creditor, which stated it extended to "the benefit of any third party named as a co-defendant."[38]

On the other hand, in *Bontempo v. Wolpoff & Abramson*, the court decided the arbitration clause language did not encompass a claim against a debt collector.[39] The specific contract language required that for a claim against a debt collector to be subject to the arbitration provision, the creditor had to be joined as a co-defendant.[40] Although another provision broadly defined the scope of the agreement to arguably include the debt collector, the court held that the more specific provision that expressly included the term debt collector applied.[41]

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[36] *Id.* at 382; *see also* Hornicek v. Cardworks Servicing, LLC., No. 10-3631, 2011 WL 2623274, at *3 (E.D. Pa. June 29, 2011) (arbitration agreement expressly included any party servicing the loan).

[37] *See also* Wilson v. Cash America Int'l, Inc., No. 4:11-CV-421-A, 2012 WL 310936, at *4 (N.D. Tex. Feb 1, 2012) (arbitration agreement expressly applied to parent company, affiliates and related third parties, which included the debt collectors); Blinco v. Green Tree Servicing LLC, 400 F.3d 1308, 1312 (11th Cir. 2005) (non-signatory could compel arbitration because "[t]he scope of the [n]ote's arbitration clause is sufficiently broad to allow non-signatories to invoke the clause where, as here, they face claims derived from the [n]ote."); Hormicek v. Cardworks Servicing, LLC, No. 10–3631, 2011 WL 2623274, at *4 (E.D. Pa. June 29, 2011) ("This claim falls squarely within the terms of the arbitration provision, which states, in relevant part, that '[a]ny disputes arising from the collection of amounts you owe in connection with your [a]ccount' will be subject to arbitration"); *In re* Rubiola 334 S.W.3d 220, 224 (Tex. 2011) ("The arbitration agreement, however, expressly provides that certain non-signatories are to be parties to the agreement.").

[38] Passmore v. Discover Bank, No. 1:11–CV–01347, 2011 WL 5086431, at *6 (N.D. Ohio Oct. 26, 2011). In light of the language of the agreement in *Passmore*, the arbitration agreement most likely would not be enforceable by the third party if he was sued individually, not named as a co-defendant of the creditor. *See also* O'Fallon v. Encore Receivable Management, Inc., No. 2:11–CV–36–KS–MTP, 2011 WL 6762928, at *5 (S.D. Miss. Aug. 3, 2011) (arbitration clause applied to third parties joined as co-defendants).

[39] Bontempo v. Wolpoff & Abramson, LLP., No. 06-745, 2006 WL 3040905, at *5-8 (W.D. Pa. Oct. 24, 2008). The court also rejected claims based on agency and equitable estoppel.

[40] *Id. See also* Cohen v. Wolpoff & Ambramson, No. 08-1084 (SRC), 2008 U.S. LEXIS 77052, at *8 (D. N. J. Oct. 1, 2008); Karnett v.Wolpoff & Abramson, L.L.P., 444 F. Supp. 2d 640, 645 (E.D. Va. 2006).

[41] *Bontempo*, 2006 WL 3040905, at *5-8.

Other courts have similarly denied arbitration when the contract language that expressly defines claims subject to arbitration does not include a claim against the debt collector.[42] For example, in *Lucy v. Bay Area Credit SVC LLC,* the court denied a debt collector's motion to compel arbitration based on the language of the agreement between Lucy and AT&T.[43] The agreement stated that Lucy and AT&T agreed to arbitrate "all disputes and claims between *us*[,]" where "[r]eferences to ... 'us' include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns ... ."[44] Bay Area Credit argued that it acted as AT&T's "agent" for purposes of collection, and could invoke the arbitration agreement. AT&T, however, had previously entered into a Collection Agency Services Agreement (CSA) with Bay Area Credit that specified that the defendant was to perform as "an independent contractor and not as an agent or an employee ..."[45] Thus, the court found that the terms of the Collection Agreement precluded an agency relationship between Bay Area Credit and AT&T.[46]

C. Non-parties: Agency and Equitable Estoppel

As noted above, the Supreme Court has recognized that agency and equitable estoppel may form the basis for enforcing an arbitration agreement upon a non-party.[47] The first step in determining if a debt collector may enforce an arbitration provision is whether the collector is an "agent":

> An agent has power to make contracts which will bind his principal not only when actually authorized to do so by express words or inference of fact, but also in cases where the principal did not intend to confer such authority on the agent but, nevertheless, held out to the public or to the

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[42] *See* Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349, 1352-55 (S.D. Fla. 2011) (agreement covered agent of creditor, however, debt collector was not an agent); Fox v. Nationwide Credit, Inc., No. 06-745, 2010 WL 3420172, at *3 (N.D. Ill. Aug. 25, 2010) (agreement specified express parties to the agreement and did not include debt collector).

[43] Lucy v. Bay Area Credit SVC LLC, 792 F. Supp. 2d 320, 328 (D. Conn. 2011).

[44] *Bay Area Credit*, 792 F. Supp. 2d.at 322 (emphasis added).

[45] *Id.*

[46] *Id.* at 325. In most cases, debt collectors act as independent contractors, not agents. Note that the court also refused to enforce the agreement based on principles of estoppel.

[47] Arthur Anderson LLP v. Carlisle, 556 U.S. 1896, 1902 (2009).

> person with whom the agent dealt an appearance of authority. An agency relationship is formed when each of two parties agree that one of the parties (the agent) will act on behalf of and be subject to the control of the other party (the principal). The agency exception exists when ...the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided.[48]

In most cases, agency will not be an applicable basis for including non-party debt collectors within the scope of an arbitration clause. Creditors do not want to create an agency relationship with a debt collector. Instead, they prefer to either sell the obligation outright, or, allow the debt collector to work as an independent contractor. Equitable estoppel, on the other hand, is the most common argument used by non-parties as the basis for enforcing an arbitration provision.

For example, in *Bay Area Credit,* the court followed the Second Circuit's rules regarding estoppel:

> Bay Area Credit maintains that even if it is not AT&T's agent, it may compel arbitration against Lucy "under the common law contract principle of equitable estoppel." Under the doctrine of equitable estoppel, "a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of the relationship among the parties, the contracts they signed . . . and the issues that had arisen among them discloses that the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed."[49]

The court in *Bay Area Credit* followed what it describes as the "Second Circuit's" rules regarding estoppel. Prior to the decision in *Carlisle*, many federal courts held that the principles of equitable estoppel were a matter of federal law to be determined by the court.

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[48] Frank Z. LaForge, *Note: Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists,* 84 TEXAS L. REV. 225, 230 (2005).

[49] *Bay Area Credit*, 792 F. Supp. 2d at 325 (citing Ragone v. Atlantic Video at the Manhattan Ctr., 595 F.3d 115, 126-27 (2d Cir. 2010)).

For example, in the Fifth and Eleventh Circuits, the courts used an "intertwined claims" standard. This standard allowed a non-signatory to compel arbitration under two different scenarios:

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.[50]

Carlise, however, makes it clear that courts must look to state law to establish the doctrine of equitable estoppel. This change in focus may not have a substantive effect,[51] but should require courts to more carefully review state law doctrine rather than Circuit rules.

Although many courts use equitable estoppel to find that claims by or against a debt collector are subject to an arbitration provisions included in the original contract, some courts find the relationship between the debt collector and the creditor/consumer too tenuous to impose arbitration.

For example, in *Butto v. Collecto Inc.*,[52] plaintiffs Victoria Butto and Lakesha Houser entered into cell phone service contracts with Verizon and AT&T. Both Butto and Houser failed to pay their cell phone bills and their services were cancelled. Pursuant to standing collection agreements with the defendant Collecto, each asked Collecto to collect the overdue charges. Although Collecto had no contractual relationship with either plaintiff, it argued that both were bound to arbitrate based upon the agreements they entered into

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[50] MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (citing Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976)); *see also* Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000).

[51] *See supra* note 26.

[52] Butto v. Collecto Inc., 802 F. Supp. 2d 443, 445 (E.D.N.Y. 2011).

with Verizon and AT&T.

The court disagreed, noting, "[t]he party seeking to compel arbitration has the burden of demonstrating by a preponderance of the evidence the existence of an agreement to arbitrate."[53] In other words, Collecto had the burden of showing that it may enforce the arbitration provisions set forth in the plaintiffs' service agreements when Collecto was not a party to those contracts. The Second Circuit's recognition that a non-signatory to an arbitration agreement may be deemed a party to that arbitration agreement accordingly favored Collecto.[54] The court reviewed the methods by which a non-party may enforce an arbitration provision.[55] It identified agency and estoppel as relevant doctrines, but no others. Because it found that estoppel incorporated agency, the court considered whether Butto and Houser were estopped from denying the enforceability of the arbitration provision.

The court concluded that to establish estoppel, Collecto must satisfy a two part test: *first*, that there are "intertwined factual issues" between the claims asserted and the agreement containing the arbitration clause; and *second*, that there is "a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement."[56] As the court noted, Collecto clearly met the first test because the claims it was asserting were intertwined with the service agreements signed by Butto and Houser.[57] Under the second prong, however, the court

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[53] *Id.* at 446.

[54] *See also* Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 97 (2d Cir. 1999) ("In this circuit, we have repeatedly found that non-signatories to an arbitration agreement may nevertheless be bound according to ordinary principles of contract and agency") (citing McAllister Bros. Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980)); *see also* Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993)..

[55] An arbitration agreement may be enforceable by a non-signatory based on principles of "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354, 359 (2d Cir. 2008). *See also Smith/Enron*, 198 F.3d at 97 ("An arbitration agreement may be enforceable by a non-signatory based on principles of "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.").

[56] *Butto*, 802 F. Supp. 2d at 447.

[57] In the Court's view, the arbitration provisions in both agreements are broadly drafted, and would apply to most, if not all, legal disputes between (1) Butto and Verizon and (2) Houser and AT&T. In addition, while Collecto is not

would not enforce the arbitration provision after concluding that Verizon, AT&T, and Collecto had an insufficient relationship to support such enforcement. . Although Collecto argued that it was an agent of the service providers, the court relied on the terms of Collecto's agreement to find otherwise. The agreement stated:

> In providing any Services under this Agreement, [Collecto] is acting solely as an independent contractor and not as an agent of any other party. Persons furnished by [Collecto] shall be solely the employees or agents of [Collecto] and shall be under the sole and exclusive direction and control of [Collecto] . . . . Neither Party undertakes by this Agreement or otherwise to perform or discharge any liability or obligation of the other party, whether regulatory or contractual, or to assume any responsibility whatsoever for the conduct of the business or operations of the other Party. Nothing contained in this Agreement is intended to give rise to a partnership or joint venture between the Parties or to impose upon the Parties any of the duties or responsibilities of partners or joint venturers.

Based primarily on this agreement, the court stated, "the disavowal of both agency and control in the collection agreements nullifies Collecto's assertion that these agreements could form the basis for finding that an agency relationship existed."[58]

Other courts have also refused to allow a debt collector to impose arbitration based on a theory of equitable estopped.[59]

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mentioned in either agreement, the validity of the collection fees that Collecto attempted to levy on both plaintiffs will likely implicate those service agreements. This is particularly true with respect to the Verizon agreement, as that contract expressly mentions Verizon right to recover collection fees. Thus, the plaintiffs' claims against Collecto are almost certainly "intertwined" with the service agreements, and as such, the first prong of the two-part test is satisfied.

[58] *Compare Butto*, 802 F. Supp. 2d at 449, *with* Morante v. Am. Gen. Fin. Ctr., 157 F.3d 1006, 1009-10 (5th Cir. 1998), where the court found an agency relationship, notwithstanding an agreement designating the collector as an independent. The court noted that an agreement describing a party as an independent agent is not conclusive; the key inquiry is the right of control the creditor exercised over the collection agency's day-to-day activities. *Id.* at 1009-10.

[59] Fox v. Nationwide Credit, Inc., 2010 WL 3420172 at *5 (N.D. Ill. Aug. 25, 2010) ("Equitable estoppel applies when the signatory 'must rely on the terms of the written agreement in asserting its claim' against a non-signatory party . . . . Here, Plaintiff's claim is not based on the terms of her cardholder contract. Plaintiff alleges only that NCI violated the FDCPA . . . ").

II. FDCPA CLAIMS SHOULD NOT BE SUBJECT TO ARBITRATION

The Supreme Court has repeatedly upheld the validity and enforceability of arbitration provisions in consumer contracts. It held that a class action is inconsistent with the FAA. It held that non-parties may enforce an arbitration agreement. However, these decisions should not be extended to claims arising under the Fair Debt Collection Practices Act ("FDCPA"). As noted above, statutory FDCPA claims arise between the consumer and a non-party debt collector. They involve policy considerations different from those that arise when determining the validity and enforceability of agreement between immediate parties or between non-parties involved in other situations. The structure of the FDCPA and the nature of litigation pursuant to the Act mitigate against extending an otherwise valid arbitration provision to a non-party debt collector.

A. The FDCPA Needs the Courts

In 1977, Congress enacted the Fair Debt Collection Practices Act.[60] The reasons for its enactment were clearly spelled out in the Congressional findings and declaration of purpose:

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
>
> (b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.
>
> (c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.
>
> (d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.
>
> (e) It is the purpose of this title to eliminate abusive

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[60] Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (1977).

> debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[61]

It is significant to note that FDCPA was not enacted to provide a national police force for the debt collection industry.[62] It did not create a substantial public enforcement mechanism through the Federal Trade Commission ("FTC"). The FDCPA is "self-enforced." Primarily through private litigation, the FDCPA promotes consistent State action. The FTC recognizes that public enforcement plays a minor role under the FDCPA. Its 2009 Report, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, stated: "The FDCPA was intended to be and should be primarily a self-enforcing statute. Thus, private action rather than government law enforcement should be the main means of promoting industry compliance with the law."[63]

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[61] 15 U.S.C. § 1692.

[62] *See* Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 FR. 9592-01 (proposed February 17, 2012) (to be codified at 12 CFR pt. 1090), *available at* http://www.consumerfinance.gov/wp-content/uploads/2012/02/20120216_cfpb_larger-participants-NPRM-as-submitted.pdf. After completion of this article, the Consumer Financial Protection Bureau announced a proposal to regulate larger debt collection firms. The Bureau has the authority under the Consumer Financial Protection Act of 2010 to supervise any "larger participant of a market for other consumer financial products or services," as defined by rule by the Bureau. The Proposed Rule would establish the initial larger participant rule for two markets: consumer debt collection and consumer reporting. The proposed threshold for the consumer debt collection market is more than $10 million in annual receipts. The Bureau estimates that this threshold would likely bring within the Bureau's scope of supervision approximately 175 entities out of approximately 4,500 firms engaged in debt collection, about 4% of the firms. Under the proposal, the Bureau will be authorized to supervise larger debt collectors by requiring the submission of reports and conducting examinations to: (1) assess compliance with Federal consumer financial law; (2) obtain information about such persons' activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to the consumer financial markets. It is difficult to say exactly what the role of the Bureau will be, but it is clear that 96% of debt collectors will not be subject to the Rule, and the FDCPA will remain the primary means of dealing with collection abuse.

[63] *See* Fed. Trade Comm'n, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT (FEB. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. The number of Commission enforcement actions is consistent with this observation. Between 1977

The "private action" referred to by the FTC is private civil litigation, resulting in public decisions that create binding precedent and consistency. Our civil justice system provides the perfect setting for the FDCPA, allowing for compensation to injured consumers as well as direction to debt collectors.[64] Judges are able protect individual consumers and provide guidance for others who might engage in similar activities.[65] A significant purpose of the Act is to eliminate abusive practices by debt collectors and "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[66]

For example, in *Bartlett v. Heibl,*[67] Judge Posner, appellate judge on the United States Court of Appeals for the Seventh Circuit, did more than simply resolve a dispute between an attorney and a consumer under the Act when he noted,

> So the judgment must be reversed. But we should not stop here. Judges too often tell defendants what the defendants cannot do without indicating what they can do, thus engendering legal uncertainty that foments further litigation.[68]

Judge Posner then proposed a "safe harbor" letter for debt collectors who want to avoid the problem faced by Heibl.[69] This is the type of private action and result expected pursuant to the

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and 2008, the FTC filed only 67 debt collection related cases. (Report Appendix B).

[64] *See generally* Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers,* 12 J. CONSUMER AND COMM. L. 151 (2009).

[65] FED. TRADE. COMM'N, STAFF COMMENTARY ON THE FAIR DEBT COLLECTION PRACTICES ACT, *available at* http://www.ftc.gov/os/statutes/fdcpa/commentary.shtm (last visited Feb. 10, 2012): The Federal Trade Commission may also interpret the FDCPA through the issuance of staff commentary. As the Commission notes, however, interpretations are a "guideline intended to clarify the staff interpretations of the statute, but does not have the force or effect of statutory provisions. It is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public." Court opinions interpreting the Act, on the other hand, do have the force of law, and are binding on all lower courts. As of July 21, 2011, only the Consumer Financial Protection Bureau ("CFPB") can issue guidelines (such as the FTC Staff Commentary) relating to the FDCPA.

[66] 15 U.S.C. § 1692(e).

[67] Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997).

[68] *Id.*

[69] *Id.*

FDCPA.[70]

The opinion in *Heibl* is a good example of how the FDCPA should work. an excellent example of what is impossible in arbitration. If the contract in *Heibl* contained an arbitration clause enforceable by the collector, the arbitrator could not accomplish what Judge Posner did. The arbitrator could only rule that the attorney had violated the FDCPA and award compensation and attorneys' fees. Arbitrators usually do not issue written opinions. When they do, the opinions are often secret. More importantly, no opinion of an arbitrator has precedential value. Unlike Judge Posner, an arbitrator could not establish a "safe-harbor." Other collectors would have no way of knowing how to avoid future liability. To the extent the FDCPA is premised on the belief that private litigation can produce consistent rules and guidance to those engaged in the business of collecting debts, widespread arbitration would frustrate Congressional intent.[71]

Court opinions are also necessary to ensure that the interpretations of the FDCPA are consistent[72] and to accommodate

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[70] Christian Stuben, *Judge of Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107 (2010) (policy considerations of FDCPA favor a consistent approach and judge made decisions).

[71] For example, in a recent article, the author reviews inconsistencies in the application of the FDCPA and concludes, "Courts, attorneys, and debt collectors alike need to clearly and consistently apply the existing statutory definitions of creditor and debt collector in the FDCPA." Young Walgenkim, *Killing "Zombie Debt" Through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 LOY. CONSUMER L. REV. 65, 91 (2011). Only through litigation and judicial opinions can that consistency be achieved. Increased use of arbitration will serve to simply perpetuate the inconsistent application of the FDCPA discussed in the article, leaving debt collectors and consumers unsure of the their rights and liabilities. *See also* Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve From Abusive Foreclosure Practices*, 94 MINN. L. REV. 1269 (2010) (arguing for a consistent application of the FDCPA to claims arising out of a foreclosure); Andrea M. Bergia, *No Shelter From the Storm: Dangers from the Fair Debt Collection Practices Act to Mortgage Industry Attorneys and a Call for Legislative Action*, 29 THE REV. OF LIT. 391 (2010) (courts should be mindful of policy goals underpinning the FDCPA and avoid making attorneys who represent the mortgage industry sacrificial lambs).

[72] Excessive use of arbitration, a likely result if such clauses are enforceable and easy to draft, will have the effect of preventing the Supreme Court from resolving circuit differences. For example, in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, the Court resolved a conflict regarding whether the FDCPA's bona fide error defense applied to mistake of law. 130 S. Ct. 1605

new technologies and innovative collection practices. As with any statute, interpretation conflicts among courts can arise.[73] As debt collectors switch from letters and phone calls to email and "Tweeting," the Act must be interpreted to accommodate new and innovative methods of collection. Change can come from the cumbersome and often-contentious legislative amendment process, but it can also come from the courts.[74]

The FDCPA prohibits debt collectors from making false, deceptive, or misleading representations. Unlike common law and other consumer statutes,[75] violations of the FDCPA are actionable under a strict liability theory.[76] Statutory damages or injunctive relief may be recovered without a showing of reliance by the consumer or actual damages.[77] Thus, individual issues that often predominate

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(2010).

[73] *See* Darren W. Ford, *Secondary Liability Under the Fair Debt Collection Practices Act,* 78 U. CINN. L. REV 1079 (2010) (discussing the split of authority regarding the extent of FDCPA liability). *Compare* Schwarm v. Craighead, 552 F. Supp. 2d 1056 (E.D. Cal. 2008), *with* Kistner v. Law Offices of Michael P. Margelefsky, LLC., 518 F.3d 433 (6th Cir. 2008).

[74] Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CAL. L. REV. 1601 (2011).

[75] *See, e.g.*, Texas Deceptive Trade Practices Act, Texas Bus. & Com. Code §17.50 (a) (requiring reliance by a consumer, and authorizes additional statutory damages only if other damages are awarded).

[76] Fair Debt Collection Practices Act 15 U.S.C. § 1692k (1977). To recover damages under the FDCPA, the consumer does not have to show intentional conduct on the part of the debt collection. The degree of a defendant's culpability goes only to damages. *See id.* [Hereinafter Civil Liability]; *see, e.g.*, Allen v. LaSalle Bank, N.A., 629 F.3d 364 (3d Cir. 2011); Ellis v. Solomon & Solomon, P.C., 591 F.3d 130 (2d Cir. 2010).

[77] *See* 15 U.S.C. § 1692k. A court may award statutory damages, subject to a cap of $1,000 for individual actions, or, for class actions, "the lesser of $500,000 or 1 per centum of the net worth of the debt collector." 15 U.S.C. § 1692k(a)(2). In awarding additional damages, the court must consider "the frequency and persistence of [the debt collector's] noncompliance," "the nature of such noncompliance," and "the extent to which such noncompliance was intentional." §1692k(b). The FDCPA permits the recovery of statutory damages without a finding of any actual damages. *See, e.g.*, Gonzales v. Arrow Financial Services, LLC., 660 F.3d 1055 (9th Cir. 2011); Robey v. Shapiro, Marianos & Cejda, L.L.C., 434 F.3d 1206 (10th Cir. 2008); Miller V. Wolpoff & Abramson, L.L.P., 321 F.3d 307 (2d Cir. 2003).

As this article was being written, the Supreme Court was considering *First American Fin. Corp. v. Edwards,* which raises the issue of whether Article III §2 of the Constitution confers standing without an allegation of actual harm. Depending on the outcome in *Edwards,* the FDCPA "strict liability" provisions may not be enforceable in federal court. For a discussion of *Edwards*, *see* SCOTUS BLOG, other discussions of deception or falsity are not applicable to claims under the FDCPA. A court faced with a practice that is alleged to be false or deceptive under the FDCPA may rule based on its objective evaluation of the potential of the practice to mislead or deceive consumers generally.[78] This allows for wider, more informative rulings that further consistency and reliance by consumers and debt collectors.

The FDCPA was expressly designed for adjustments by the courts to deal with new or unforeseeable acts and practices. When it was enacted more than thirty years ago, Congress attempted to prohibit those practices it identified as wrongful. It recognized that it could not predict how the debt collection industry might change.

For example, the "False or Misleading Representations" section of the FDCPA is just one example of how the Act gives courts the necessary flexibility. This section states that a debt collector may not use any "false, deceptive, or misleading representation or means in

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http://www.scotusblog.com/case-files/cases/first-american-financial-corp-v-edwards, (last visited February 24, 2012).

[78] The standard used to evaluate the alleged false or deceptive act is not a reasonable consumer or the plaintiff. In many jurisdictions, the court employees a "least sophisticated" consumer test. *See, e.g.*, Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006) (applying least sophisticated consumer test to letter); Swanson v. S. Or. Credit Serv., Inc., 869 F.2d 1222, 1226-30 (9th Cir. 1988) (adopting the least sophisticated debtor standard in a case relating to FDCPA claims); Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433 (recognizing that the least sophisticated consumer test is an objective test); Jeter v. Credit Bureau, 760 F.2d 1168, 1175 (11th Cir. 1985) (adopting the least sophisticated consumer standard in addressing FDCPA claims). As the Second Circuit observed, "[t]he basic purpose of the least-sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that court shave traditionally applied in consumer-protection law." Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993).

It should be noted that the "least sophisticated consumer" test is often replaced with what is viewed as a more reasonable test, the "unsophisticated consumer" test. As the court explained in *Gammon v. GC Servs. L.P.*, 27 F.3d 1254, 1257 (7th Cir. 1994),

> In maintaining the principles behind the enactment of the FDCPA, we believe a simpler and less confusing formulation of a standard designed to protect those consumers of below-average sophistication or intelligence should be adopted. Thus, we will use the term, "unsophisticated," instead of the phrase, "least sophisticated," to describe the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading.

Under either test, however, conduct may be found to violate the FDCPA without actual damages to the named plaintiff.

connection with the collection of any debt."[79] Without limiting the general application of the foregoing, the provision list 16 acts or practices that are prima facie false, misleading or deceptive.

Significantly, the list of prohibited practices is expressly made non-exclusive. This gives the courts the ability to determine whether new or innovative practices that do not fit within the list of prohibitions might still be false or misleading. This was shown in *Brown v. Card Service Center*. In *Card Service Center*,[80] the court used this general prohibition, noting, "Though we express no opinion as to whether the language of the CSC Letter constitutes a 'threat' under § 1692e(5), we believe that the facts as alleged in Brown's complaint, if proven, could render the CSC Letter a 'deceptive' or 'misleading' communication, in violation of § 1692e." The flexibility of the FDCPA allows a court deciding a case under its provisions to shape the law in a way that gives both consumers and debt collectors notice of legal and prohibited practices. Published opinions, stare decisis, and precedent ensure that the Act is applied consistently. Arbitrators may also apply the FDCPA to new or innovative acts and practices; however, they do so on an ad hoc basis. Because arbitrators' decision are secret, and there often is no written opinion, arbitrators will not know the decisions of other arbitrators and will not be bound by such a decision even if do.

B. The FDCPA Needs Class Actions

Perhaps more than other consumer statutes, claims under the FDCPA are often brought as a class action. Violations of the FDCPA are often in the form of an act or practice which can be easy to prove, and damages do not require proof of individual reliance. For example, a violation could be a letter involving numerous consumers with minor or no economic injury. The ability to recover without proof of actual deception or reliance by individual consumers[81] makes FDCPA claims more appropriate for class action certification and relief. The ability to recover attorneys' fees also provides the incentive for filing the suit. Under a recent Supreme Court decision, however, enforcing an arbitration clause between the consumer and creditor will ultimately have the effect of eliminating consumer class actions under the FDCPA.

In *AT&T Mobility v. Concepcion*,[82] the Supreme Court

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[79] 15 U.S.C. 1692e.
[80] *Brown*, 464 F.3d at 455.
[81] *See supra* note 78 and accompanying text.
[82] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

reviewed a consumer's challenge to a class action prohibition contained in an arbitration clause.[83] The District Court,[84] applying California Law, felt compelled to decide the case based on the California Supreme Court decision in *Discover Bank v. Superior Court.*[85] In *Discover Bank,* the court held that class action waivers are unconscionable and unenforceable:

> [W]hen the waiver is found in an consumer contract of adhesion in a setting in which disputes between the contacting parties predictably involve small amounts of damages, and when it is alleged that the a party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud . . . . (Civ. Code § 1668). Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[86]

Relying on this rule, the district court invalidated the provision, and ordered class-wide arbitration.[87] The Ninth Circuit affirmed,[88] and the Supreme Court granted certiorari.

In its decision, the Court began by noting that its opinion would "consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[89] Specifically, the Court

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[83] The arbitration agreement required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." That provision further stated, "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." *Id.* at 1762 n.2.

[84] Laster v. T-Mobile USA, Inc., 2008 WL 5216255 (S.D. Cal., Aug. 11, 2008).

[85] Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (2005).

[86] *Id.* at 1110.

[87] Laster, 2008 WL 5216255, at *9. The court noted, "The question presented, therefore, is whether the arbitration provision now before the Court sufficiently addresses the concerns of *Discover Bank* and provides an adequate substitute for class litigation or arbitration. For the reasons set forth below, the Court concludes it does not." *Id.*

[88] Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009).

[89] *Concepcion*, 131 S. Ct. at 1744.

examined whether California's *Discover Bank* rule could be used to invalidate a class action waiver contained in an arbitration clause. The majority recognized that the *Discover Bank* rule is a "ground[] . . . for the revocation of any contract" under California law, and appears to be within the scope of Section 2 of the FAA. But the Court refused to give validity to state contract doctrines that were inconsistent with the FAA itself. The Court stated, "Although §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[90] The Court concluded its analysis by finding that, "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA."[91]

By invalidating the application of the *Discover Bank* rule because it interferes with the fundamental attributes of arbitration, the Court authorized a business to both mandate arbitration and to preclude a consumer from bringing or joining a class action. Although the full scope and consequence of *Concepcion* currently is being debated, few dispute the fact that it will substantially reduce the ability to maintain or join a class action. As many have noted, the decision in *Concepcion* substantially decreases or effectively eliminates most consumer class actions.[92]

The prohibition of class-wide relief in debt collection cases is

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[90] *Id.* at 1746.

[91] *Id.* at 1753. "California's *Discover Bank* rule ... interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post."

[92] Although *Concepcion* may not absolutely preclude consumer class actions, it is clear that the class action device is an endangered species. *See generally*, Myriam E. Giles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. (2012, forthcoming) ("Class actions are on the ropes. Most class cases will not survive the impending tsunami of class action waivers."); Frank Blechschmidt, Comment, *All Alone in Arbitration:* AT&T Mobility v. Concepcion *and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541 (2012) (class arbitrations will decrease, but not die out completely; courts and Congress should reverse *Concepcion*); Jenna G. Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585 (2011) ("[*Concepcion*] is not the death of the class action"); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence,* 48 HOUS. L. REV. 457 (2011) ("Considered together, Stolt-Nielsen and Concepcion make clear that it will be the rare case indeed where consumers will be able to obtain class procedures if they are bound to an arbitration agreement.").

particularly onerous and will frustrate enforcement of the FDCPA. If the FDCPA is enforced through private litigation, it requires an incentive for attorneys to maintain such suits and sufficient remedies to deter wrongful conduct. One of the most efficient ways the FDCPA is utilized is through a class action. A class action can effectively and efficiently deal with a large number of small claims, and provide sufficient attorneys' fees as an incentive. Also, a class action may be beneficial to the defendant, who can achieve a single resolution of a common problem and avoid the additional time, expense, and possible inconsistencies that could result from an individual lawsuit.[93]

Claims under the FDCPA are more appropriately handled through a class action for four reasons. First, many cases involve insignificant damages. Second, the class is often easily identifiable. Third, the statutory violation is easily susceptible to proof. Finally, the strict liability nature of the Act eliminates the problem of individual issues that would preclude class certification. For example, whether a letter sent to hundreds or thousands of consumers is misleading or deceptive may be established in one action, with a statutory cap on damages. Precluding class actions through an arbitration provision could have one of two results. Adversely affected consumers may maintain individual arbitrations, which have the potential of inconsistent results, multiple statutory damages and attorneys' fees; or, individual consumers will find arbitration too time consuming and costly and will simply fail to take any action. In other words, either debt collectors may face substantial additional time, expense, and inconsistent results, or the FDCPA may go unenforced because of the inefficiencies of arbitration.

III. CONCLUSION

For the FDCPA to remain a statute that relies upon private litigation as the primary means of enforcement and interpretation, both short term and long term solutions are needed. In the short term, courts should strictly interpret the language of agreements between consumers and businesses against enforcing arbitration with non-parties and cautiously apply estoppel.

By its very nature, equitable estoppel involves questions of

[93] The FDCPA protects the collector from excessive damages in class action by limiting recovery to "such amount as the court may allow for all other class members, without regard to a mini- mum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector." Civil Liability, 15 U.S.C.A § 1692k(a)(2)(B)(ii).

equity and fairness, often providing the court with substantial discretion. As the court noted in *Sokol Holdings, Inc. v. BMB Munai, Inc.*,[94] equitable estoppel does not mean that whenever a relationship of any kind may be found among the parties to a dispute and their dispute deals with the subject matter of an arbitration contract made by one of them, that party will be estopped from refusing to arbitrate:

> [T]here must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.[95]

Similarly, contract interpretation issues often hinge on the parties' intent and expectations. Consumers do not expect that an adhesion contract signed with a business bars them from going to court when a totally unrelated party violates our federal debt collection laws. The strong federal policy in favor of arbitration is designed to enforce the parties' agreement, not to extend that agreement beyond the intent of a reasonable person, and not in a manner that frustrates the application of the FDCPA.

The FAA recognizes that arbitration is a creature of contract, and the agreement of the parties controls most issues with respect to whether to arbitrate, the scope of the arbitration clause, and to whom it applies. As discussed above, courts look first to the language of the agreement to determine if the parties intended the arbitration provision to apply to non-parties. Looking to the language of the agreement is an appropriate approach unless the language does not express the parties' intent, or the provision is inconsistent with the legislative intent of the FAA and any other relevant statute, particularly the FDCPA.

When parties of relatively equal bargaining strength negotiate terms, the terms should be applied as agreed. However, terms in an agreement between a business, such as a bank or credit card company, and a consumer are drafted solely by the business and

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[94] Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354, 359 (2d Cir. 2008).

[95] *Id.* After carefully reviewing the facts, the court concluded that, "Given the present facts, there is no basis for finding either that Sokol consented to arbitrate with BMB, or that there would be unfairness in allowing Sokol to refuse to arbitrate with BMB on the ground that BMB was not a party to Sokol's arbitration agreement." *Id.* at 362.

presented to the consumer on a "take-it-or-leave-it" basis. This does not mean that all such clauses are unenforceable, or that the language should not be applied as part of the agreement. As the Supreme Court recognized in *Concepcion*, "the times in which consumer contracts were anything other than adhesive are long past,"[96] and no one would propose a blanket invalidity of consumer contracts of adhesion. On the other hand, contracts between a consumer and a creditor containing provisions that will control the consumer's rights vis-à-vis a non-party debt collector are different. Courts should not presume that a consumer who contracted to purchase goods or borrow money intended to waive his or her right to go to court against such parties, in the event that they violate a federal law, designed to protect the consumer against wrongful debt collection practices by a third party collector.

Both statutory interpretation and equitable estoppel, the two most common theories used to allow a non-party debt collector to impose arbitration, enable courts to consider the nature of the parties, the language of the agreement, and the objectives and goals of the statutory rights being asserted. Courts should exercise this discretion in a manner that allows the FDCPA to remain a "self-enforcing statute," resulting in consistent and fair rules.

This short-term solution, however, is at best a pyrrhic victory. Arbitration clauses are drafted by the business, presented to the consumer on a take-it-or-leave-it basis, with no meaningful negotiation. Even if courts strictly construe such clauses with a presumption of non-applicability to a non-party, each opinion provides a road-map of what was wrong with the clause and usually how it could be corrected. It is only a matter of time until courts establish exactly what boilerplate language is sufficient to make the arbitration provision enforceable against nonparties.

The only meaningful way to prevent the continued growth of arbitration and the degeneration of consumers' rights under the FDCPA is through a change in federal law – namely an amendment to the Federal Arbitration Act.[97] The simplest change is to preclude

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[96] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, at 1750 (2011).

[97] I recognize that the newly created Consumer Financial Protection Bureau has the authority to regulate pre-dispute arbitration agreements and could take action that would ban such agreement. The Dodd Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5518 (2010), provides, "The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial

pre-dispute arbitration clauses in consumer contracts from extending to non-party disputes, and permit parties to agree to arbitration only after a dispute has arisen and they have considered other alternatives. A more meaningful reform would be the Arbitration Fairness Act of 2011,[98] which would prohibit forced arbitration in all consumer contracts and make it illegal for employers to force arbitration on their employees. The Act states in relevant part:

> **SECTION 1. SHORT TITLE.**
>
> This Act may be cited as the "Arbitration Fairness Act of 2011"
>
> **SECTION 2. FINDINGS.**
>
> The Congress finds the following:
>
> (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
>
> (2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.
>
> (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.
>
> (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.
>
> (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

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products or services." While I encourage and applaud any such action, it would not eliminate the problem discussed in this article. The CFPB regulates only consumer financial products and services. *See* § 5531. Debt collectors often collect debt arising from a much wider variety of transactions.

[98] S. 987, 112th Cong. §§ 1-3, 401 (2011).

SECTION 3. ARBITRATION OF EMPLOYMENT, CONSUMER, AND CIVIL RIGHTS DISPUTES.

(a) In General- Title 9 of the United States Code is amended by adding at the end the following:

CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, AND CIVIL RIGHTS DISPUTES

Sec. 401. Definitions

In this chapter—

(1) the term "civil rights dispute" means a dispute—

(A) arising under—

(i) the Constitution of the United States or the constitution of a State; or

(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and

(B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual;

(2) the term "consumer dispute" means a dispute between an individual who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit;

(3) the term "employment dispute" means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203); and

(4) the term "predispute arbitration agreement" means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

Sec. 402. Validity and enforceability

(a) In General- Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.

(b) Applicability-

(1) IN GENERAL- An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

(2) COLLECTIVE BARGAINING AGREEMENTS- Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.