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FEATURE ARTICLE

"AND THE SURVEY SAYS . . ." When Is Evidence of Actual Consumer Confusion Required to Win a Case Under Section 1692g of the Fair Debt Collection Practices Act in the Seventh Circuit?

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I. Introduction

Before 1999, the Seventh Circuit Court of Appeals consistently resolved claims that a collection letter confused consumers about their rights under section 1692g of the Fair Debt Collection Practices Act ("FDCPA" or "Act")[2] by examining the text of the letter alone. In 1999, the Seventh Circuit deviated from this trend in a series of cases beginning with *Johnson v. Revenue Mgmt. Corp.* by holding that the plaintiff could not establish that a collection letter caused confusion about the consumer's rights unless the plaintiff presented evidence showing that the letter actually confused a significant percentage of consumers.[3] After briefly introducing the reader to the FDCPA and section 1692g, this article analyzes the potential conflict between the pre-*Johnson* and *Johnson* lines of cases, proposes a means for reconciling the two lines, and discusses the future of section 1692g litigation in the Seventh Circuit in light of the potential conflict.

II. The Fair Debt Collection Practices Act and Section 1692g's Validation Requirement

In 1977, Congress passed the FDCPA as an amendment to the federal Consumer Credit Protection Act.[4] The FDCPA's purposes are to "eliminate abusive 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."[5] To accomplish these goals, the FDCPA imposes a number of restrictions on how debt collectors[6] go about trying to collect debts.[7]

In addition to restricting debt collector behavior, the Act arms consumers with certain rights. Perhaps the most important is the consumer's right under section 1692g to require the debt collector to provide proof that the debt is valid by sending the debt collector a written dispute of the debt within 30 days after receipt of the debt collector's notice of the consumer's right to do so.[8] This right, commonly known as the "validation requirement," enables consumers to stop debt collectors from continuing to hound them for invalid debts.[9] Once a consumer disputes the debt, the debt collector must refrain from making any additional attempt to collect until after it gives the consumer proof of the debt's validity.[10]

To ensure that consumers are made aware of this right, the FDCPA requires each debt collector to give the consumer a notice stating that the consumer has 30 days to dispute the validity of the debt or any part of it. The notice must be in writing and sent within 5 days after the debt collector's initial communication with the consumer.[11] Furthermore, the notice must state that if the consumer disputes the debt, the debt collector will give the consumer proof that the debt is valid.[12] By its terms, section 1692g merely requires the debt collector to give the notice and no more.[13] However, most if not all courts

hold that a debt collector does not discharge its obligation to give the notice unless it **effectively** conveys it.[14] This requirement is typically couched in the negative, *i.e.*, the debt collector must refrain from presenting the notice in a manner, or in connection with other information, that could confuse the consumer about their rights.[15] Cases involving claims that a debt collector has ineffectively conveyed the section 1692g notice basically fall into three categories. The first is where the debt collector fails to give the notice (or part of it), or inaccurately states the notice.[16] The second is where the debt collector presents the notice in a manner that makes it inconspicuous or difficult to read. An example of this type of case is where the debt collector prints the notice in small or faded type, or places the notice on the back of the collection letter with no reference to it on the front of the letter.[17]

The third, and perhaps the most often litigated, method in which debt collectors ineffectively convey the notice is by including other language with the notice or in other communications made during the 30-day validation period that apparently, if not actually, conflicts with the terms of the notice. A classic example of this type of violation is a demand that the consumer pay the debt within some time period that is shorter than the validation period itself, *e.g.*, 10 days, in conjunction telling the consumer that they have 30 days to request validation of the debt. The Seventh Circuit has held that consumers would be confused by this mixed-message:

> We think that telling a debtor he has 30 days to dispute the debt and following that with a statement that '[i]f the above does not apply' you have ten days to pay up or real trouble will start is entirely inconsistent, and a failure to comply, with the FDCPA. We think the unsophisticated consumer would be scratching his head upon receipt of such a letter. He wouldn't have a clue as to what he was sup-

> posed to do before real trouble begins. A debt validation notice, to be valid, must be effective, and it cannot be cleverly couched in such a way as to eviscerate its message. To protect the uninformed, the naive, and the trusting — the sort of people who easily fit under the umbrella of the 'unsophisticated consumer' — the notice cannot be as misleading and tricky as the one used here. . .[18]

As this passage suggests, in determining whether a communication violates section 1692g the communication must be construed through the eyes of the "unsophisticated consumer."[19] The ultimate question then in all section 1692g cases where the plaintiff claims the debt collector has included other language in its communications that apparently conflicts with the statement of the consumer's validation rights is whether the other language would "confuse" the hypothetical "unsophisticated consumer" about his or her rights.[20]

III. The Potential Conflict Between *Johnson* and Pre-*Johnson* Cases, Its Genesis, and How to Resolve It

A. The Conflict

Before *Johnson*, the Seventh Circuit decided whether a collection letter confused the unsophisticated consumer about his or her validation rights by examining the text of the collection letter alone.[21] However, in *Johnson*, and later in *Walker v. National Recovery, Inc.*, the Seventh Circuit held that the plaintiff could not prove their section 1692g confusion claims solely from the text of the collection letter.[22] Under *Johnson* and *Walker*, plaintiffs may now have to produce evidence, in the form of a consumer survey or otherwise,[23] that the letter actually confuses unsophisticated consumers about their rights.[24]

It thus appears that *Johnson* and *Walker*'s "evidence required" rule conflicts with the Seventh Circuit's prior decisions on what is needed to show that a collection letter confuses in violation of section 1692g of the FDCPA.[25]

B. The Origin of the Conflict

To fully understand the apparent conflict between the pre-*Johnson* and *Johnson* lines of cases, it is helpful to look at the development of the "no evidence required" rule the Seventh Circuit applied in pre-*Johnson* cases. The Court laid the foundation for that rule in one of its first FDCPA decisions, *Gammon v. G.C. Services, L.P.*[26] The *Gammon* court faced the question of whether the plaintiff's allegation that the collection letter at issue was deceptive in violation of section 1692e(1) stated a claim under Federal Rule of Civil Procedure 12(b)(6).[27] The majority held that the plaintiff did state a claim based on the Court's analysis of the text of the collection letter. Judge Easterbrook wrote a concurring opinion stating that the plaintiff should have to produce evidence of deception on remand to win.[28] These two features demonstrate the Court's apparent belief (at the time) that evidence of actual consumer confusion was not needed to prove a violation of the Act because, if the Court meant to chart a course similar to *Johnson*: (1) it would have held that Gammon stated a claim under Fed.R.Civ.P. 12(b)(6) without analyzing the text of the letter;[29] and (2) Judge Easterbrook's concurrence would have been the majority opinion.

Later, the Seventh Circuit made the "no evidence required" rule explicit in *Avila v. Rubin*. The collection letter in *Avila* demanded payment within 10 days.[30] The defendants argued, based on Judge Easterbrook's concurring opinion in *Gammon*, that to win, the plaintiff had to put forth evidence that this language confused a significant percentage of consumers.[31] The Court rejected that

argument holding that the collection letters at issue could be found to violate section 1692g "without reference to evidence of actual consumer confusion."[32] In doing so, the Court characterized Judge Easterbrook's statements in *Gammon* as a "suggestion."[33] However, the Court left the door open for requiring evidence of confusion in some section 1692g cases by implying that such evidence may be required for cases that do not involve a demand for payment within a time period shorter than the validation period.[34]

Two section 1692g cases later, in *Bartlett v. Heibl* (the next section 1692g case after *Avila* was *Chauncey v. JDR Recovery Corp.*[35]), the Court seemed to close that door to some extent, if not entirely, by holding that "the issue of confusion (or, more precisely, of 'confusingness') is for the **district judge** to decide."[36] Furthermore, the Court implied that the determination of whether the letter violated section 1692g should be made by the judge after looking at the text of the letter.[37] The letter in *Bartlett* demanded payment in one week in addition to giving the 30-day validation notice.[38] The Court held, as it did in *Avila* (and *Chauncey*), that this language violated section 1692g based on an analysis of the text of the letter alone.[39]

In reaching that conclusion, the Court did not characterize the claim as one involving a "contradiction" of the validation notice as it did in *Avila* (and *Chauncey*).[40] Instead, the Court found "confusion whatever form it takes" is the touchstone for finding a violation, and that the various section 1692g claims courts had previously decided were based on a finding, explicit or implicit, that the letters at issue confused the unsophisticated consumer about their validation rights. Likewise, the Court held that cases previously decided under section 1692g fall into three categories: "actual contradiction" (express denial of part or all of the consumer's validation rights); "overshadowing" (faded print, small type, etc.); and "apparent contradiction" (demand for action during the

validation period with no explanation as to how the demand and validation language fit together).[41] The Court concluded that the type of violation at issue, as well as those at issue in *Avila*, *Chauncey* and similar cases, fell into the latter category, *i.e.*, it involved an "apparent contradiction."[42] Thus, after *Bartlett* it appeared to be the rule in the Seventh Circuit that courts could decide all cases involving an actual or "apparent contradiction" of the validation notice based on the text of the letter alone.

C. Reconciling the *Johnson* and Pre-*Johnson* Lines of Cases

No reconciliation of the *Johnson* and pre-*Johnson* lines of cases is possible unless one interprets *Bartlett*'s holding that "the issue of confusion is for the district judge to decide"[43] to mean something other than "confusion is to be determined based on the text of the letter alone, without the need for evidence."[44] To do this, *Bartlett*'s reference to the province of the district judge must be interpreted to mean "the fact finder in *Bartlett*" (which is plausible because that case was tried to the bench) "after considering evidence, if necessary."[45]

Combining this interpretation of *Bartlett* and the Court's characterization of the type of section 1692g claim at issue in that case (and in *Avila* and *Chauncey*, *i.e.*, an "apparent contradiction") with *Avila*'s unequivocal rejection of the need for evidence in similar circumstances, the pre-*Johnson* and *Johnson* lines of cases may be reconciled by concluding that *Johnson* and its progeny require evidence in some section 1692g cases, but not all.[46] Specifically, no evidence is required in section 1692g cases that involve an "actual contradiction" of the consumer's validation rights (as defined in *Bartlett*), or in one subset of the "apparent contradiction" type of cases, *i.e.*, those involving a demand for payment within a time period that is shorter than the validation period, as in *Avila*, *Chauncey* and *Bartlett*. Conversely, evidence may be

required in "overshadowing" cases (as defined by *Bartlett*)[47] and in another subset of the "apparent contradiction" type of cases, *i.e.*, cases like *Johnson* that arose from language that creates a false sense of "urgency" that could cause the consumer to forgo their validation rights.[48]

There is support for this proposed reconciliation in the *Johnson* line itself. Both *Johnson* and *Walker* couch their "evidence required" holdings in a way that suggests that evidence is not necessary in all section 1692g confusion cases.[49] Moreover, both cases held that evidence was needed in those cases because of the text of the **particular collection letters** at issue, implying that the Court might have reached a different result if presented with different letters.[50]

The reconciliation is also supported by the fact that the Seventh Circuit has never acknowledged that it made any departure from *Bartlett* or its predecessors. To the contrary, the Seventh Circuit relies on *Bartlett* (somewhat) to support its rationale for the *Johnson* line.[51]

But the proposed reconciliation is not fool-proof. All of the section 1692g decisions in both lines of cases involved an "apparent contradiction" section 1692g claim, and the proposed reconciliation depends on the Court recognizing that there are at least two distinct subsets of that type of claim.[52] The Seventh Circuit has indicated that it might view such a distinction as irrelevant.[53] Furthermore, one would think that after painstakingly defining the various types of section 1692g confusion claims in *Bartlett*, the Court would have made any further refinement of those categories explicit if that was what the Court intended to do. The bottom line then is that if courts that confront this issue in the future refuse to accept the division of the "apparent contradiction" category of cases proposed here (or some variation of it), then an irreconcilable conflict remains – the Seventh Circuit decided pre-*Johnson* "apparent contradiction" cases by examining the text of the letters at issue

alone, while *Johnson* and *Walker* required evidence of confusion for the same category of section 1692g claim.

IV. The Consequences for Future Section 1692g Cases in the Seventh Circuit if There Is a Conflict

A. A Conflict Does Not Invalidate Either the Pre-*Johnson* or *Johnson* Line

Seventh Circuit Rule 40(e) requires, before publication of any opinion that will "overrule a prior decision" of the Seventh Circuit or create a conflict "between or among circuits," that the panel submit the opinion to other active members of the Court for a vote on whether to hear the case *en banc*.[54] In addition to creating a potential conflict within the Seventh Circuit, *Johnson* also conflicts with other circuits:

> We note that the Seventh Circuit is the only court of appeals to have held that whether an unsophisticated consumer would be confused by allegedly contradictory or overshadowing language is a question of fact which precludes dismissal under Fed.R.Civ.P.12(b)(6) [citations omitted]. The majority of courts to have considered this question have, however, held that this determination involves a question of law.[55]

Yet *Johnson* was never circulated for potential *en banc* review under Circuit Rule 40(e).[56] The closest the Court came to doing so was to circulate the *Walker* opinion for potential *en banc* review because it raised "an issue of general importance about the proper application of Rule 12(b)(6)."[57] However, that is not the same issue as the question of whether FDCPA plaintiffs must present

evidence of confusion to win a section 1692g claim.[58]

If *Johnson* creates a conflict, that raises the question of whether the Court's failure to follow Circuit Rule 40(e) invalidates the *Johnson* line or, if not, whether the *Johnson* line overrules the pre-*Johnson* line. There are several reasons to believe a conflict does not affect the validity of either line. As for the continuing validity of the *Johnson* line, no Seventh Circuit case holds that a failure to follow Circuit Rule 40(e) renders any case invalid. Likewise, for the pre-*Johnson* line, none of the *Johnson* line of cases state that they overrule *Avila*, *Chauncey*, or *Bartlett* to any degree,[59] and the *Johnson* court's failure to follow Circuit Rule 40(e) implies that the Court did not intend for *Johnson* to do so. Support for the continuing validity of both lines lies in case law implying that when a conflict occurs within the Seventh Circuit, decisions on both sides of the conflict remain valid until a particular panel of the Court undertakes to expressly resolve the conflict.[60]

B. The Conflict Gives Litigants a Means for Avoiding the "Evidence Required" Rule in "Apparent Contradiction" Cases

Because of the continuing validity of the "no evidence required" cases, future litigants are entitled to argue that either line of cases may be applied to determine whether a given collection letter that contains an "apparent contradiction" of the consumer's validation rights violates section 1692g of the FDCPA. Judge Eschbach's concurring opinion in *Johnson* explains why plaintiffs would want to avoid *Johnson* and its progeny, stating that to require a survey or other empirical evidence of confusion "will gut the purposes of the FDCPA" because such evidence "can be very costly," and thereby make "the cost of filing suit under the FDCPA prohibitive."[61] Defendants will no doubt find the "cost" aspect of requiring evidence of confusion just as unappealing.[62]

Since both lines of cases are valid, plaintiffs and defendants who do not like the prospect of having to incur the expense of generating a consumer survey or other empirical evidence have a good faith basis for arguing why they do not have to do so.[63] If the plaintiff's facts are similar to those at issue in *Johnson* and *Walker*, either party may argue that there is a conflict of law and, therefore, that the trial court may (because the pre-*Johnson* line is still good law), and should (for the reasons described in Judge Eschbach's concurrence in *Johnson*), follow the pre-*Johnson* line to decide whether the letter at issue violates section 1692g of the FDCPA.[64] And, if the plaintiff's facts are similar to those at issue in *Avila*, *Chauncey* and *Bartlett*, either party may argue that the proposed reconciliation compels the conclusion that no evidence is required, that there are two conflicting lines of authority and that the court should follow the pre-*Johnson* line, or both (in the alternative).

Of course, either party may appeal an adverse decision on this issue. And, when confronted with the foregoing analysis, the Seventh Circuit might clarify the *Johnson* line to exempt cases like *Avila*, *Chauncey* and *Bartlett* from its "evidence required" rule, reconsider the *Johnson* line entirely, or at least sanctify some way of harmonizing all of the Court's section 1692g decisions.

V. Conclusion

The Seventh Circuit's holding in *Johnson v. Revenue Mgmt. Corp.* that evidence may be required to prove a claim under section 1692g of the FDCPA potentially conflicts with the Court's pre-*Johnson* decisions on what is needed to show that a collection letter confuses the unsophisticated consumer. The *Johnson* and pre-*Johnson* lines of cases are reconcilable so long as courts find that evidence is not required to prove an "apparent contradiction" claim arising from a demand for payment within a

time period that is shorter than the validation period provided by section 1692g.

The Seventh Circuit should undertake to resolve this potential conflict at the first opportunity. Although the potential conflict does not affect the validity of the *Johnson* or pre-*Johnson* line of cases, it creates uncertainty for all litigants in assessing the merit of a claim or defense under section 1692g, and in assessing the costs of prosecuting and defending the case.

Endnotes

1. Michael S. Hilicki is a consumer rights and commercial litigator with the firm of Beeler, Schad & Diamond, P.C. in Chicago, Illinois. He received his J.D. with Distinction from the University of Iowa College of Law in 1994.

2. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a – 1692o (2000).

3. Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1060 (7th Cir. 1999).

4. Hawthorne v. Mac Adjustment, 140 F.3d 1367, 1370 (11th Cir. 1998).

5. Powell v. Computer Credit, Inc., 975 F.Supp. 1034, 1038 (S.D. Ohio 1997), *aff'd*, 1998 U.S. App. LEXIS 26797 (6th Cir. 1998). The findings underpinning the Act included that, "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. . . . Existing laws and procedures for redressing these injuries are inadequate to protect consumers. . . . Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts. *Id.*

6. A "debt collector" covered by the Act is not limited to "collection agencies," as that term is commonly understood. It includes "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 [and] . . . 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." 15 U.S.C. § 1692a(6). So, for example, this definition includes independent attorneys that collect debts by litigation or otherwise. *See* Heintz v. Jenkins, 514 U.S. 291, 292 (1995). There are, however, a number of exceptions to the general definition. 15 U.S.C. § 1692a(6).

7. For example, debt collectors "may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Debt collectors may not "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. And, debt collectors may not "use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692 f. Each of these provisions provides a non-exclusive list of practices that violate their terms. *See* 15 U.S.C. §§ 1692d-1692f. The Act contains other restrictions as well. *See* 15 U.S.C. §§ 1692b, 1692c, 1692i and 1692j. For a comprehensive treatment on the FDCPA, I strongly recommend ROBERT J. HOBBS, FAIR DEBT COLLECTION (4th ed. 2000).

8. Ost v. Collection Bureau, Inc., 493 F.Supp. 701, 702 (D.C.N.D. 1980). "The validation of debts provision is a significant feature of this legislation, the intent being to 'eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'" *Id.* (quoting S. REP. NO. 95-382 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1699). Other rights conferred by the FDCPA include the right to require the debt collector to stop contacting the consumer about the debt, the right to require the debt collector to apply partial payments on multiple debts to the debt or debts that the consumer directs, and, perhaps most importantly, the right to file a lawsuit in federal court to remedy any violation of the Act. 15 U.S.C. §§ 1692c, 1692h, and 1692k.

9. *Ost*, 493 F.Supp. at 702. A debt may be invalid for many reasons. The debt may be totally invalid because the consumer already paid it or never owed it, *e.g.*, it is owed by another, or was incurred through the fraudulent use of the consumer's identity. The debt may also be partially invalid because it includes interest that was never incurred, illegal charges or fees, or simply because of creditor error in communicating the amount of the debt to be collected.

10. 15 U.S.C. § 1692g(b).

11. 15 U.S.C. § 1692(g)(a).

12. 15 U.S.C. § 1692g(a)(3) and (4). The notice must also state the amount of the debt, the name of the creditor to whom the debt is owed, and that the debt collector will give the consumer the name of the original creditor, if different from the current creditor, upon the consumer's written request. 15 U.S.C. § 1692g(a)(1), (2) and (5).

13. The text of § 1692g states:

(a) Notice of debt; contents. Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;
(2) the name of the creditor to whom the debt is owed;
(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts. If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.
(c) Admission of liability. The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

14. Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996); Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2th Cir. 1996); Graziano v. Harrison, 950 F.2d 107, 111 (3th Cir. 1991); Miller v. Payco-General American Credits,

Inc., 943 F.2d 482, 484 (4th Cir. 1991); Swanson v. Southern Oregon Credit Service, Inc. 869 F.2d 1222, 1226 (9th Cir. 1988).

15. *See* cases cited *supra* note 14.

16. *See, e.g.*, Romine v. Diversified Collection Serv., Inc., 155 F.3d 1142, 1143 (9th Cir. 1998) (alleging that one of the two defendant debt collectors failed to give the notice required by § 1692g within five days of its initial communication with the consumer).

17. *See, e.g., Payco-General Am. Credits*, 943 F.2d at 483. The goal behind these tactics naturally enough is to distract the consumer from the validation language, thus avoiding the exercise of the consumer's validation rights.

18. *Avila*, 84 F.3d at 226. *See also*, Bartlett v. Heibl, 128 F.3d 497, 501 (7th Cir. 1997) (initial letter demanding payment in 7 days creates an apparent contradiction violating § 1692g as a matter of law because "[t]he net effect of the juxtaposition of the one-week and thirty-day crucial periods is to turn the required disclosure into legal gibberish.").

19. Gammon v. G.C. Serv. L.P., 27 F.3d 1254, 1257 (7th Cir. 1994). For a more in-depth description of this standard, see discussion *infra* note 25. Most other circuits apply the "least sophisticated consumer" standard. *See* Wilson v. Quadramed, 225 F.3d 350, 354 (3d Cir. 2000); Savino v. Computer Credit, Inc., 164 F.3d 81, 83 (2d Cir. 1998); United States v. National Financial Serv., Inc., 98 F.3d 131, 136 (4th Cir. 1996); Smith v. Computer Credit, Inc., 167 F.3d 1052, 1054 (6th Cir. 1999); and Terran v. Kaplan, 109 F.3d 1428, 1431-32 (9th Cir. 1997). There appears to be no practical difference between the two standards. *Avila*, 84 F.3d at 227.

20. Bartlett v. Heibl, 128 F.3d at 500.

21. *Id.* at 500-01; Chauncey v. JDR Recovery Corp., 118 F.3d 516, 519 (7th Cir. 1997); *Avila v. Rubin*, 84 F.3d at 226. ("We think the validation notice was clearly overshadowed by the language that followed on its heels."). In this quote, "overshadow" was being used in a generic sense to mean "rendered ineffective." As explained in *Bartlett*, courts have used a variety of terms, *e.g.*, "contradict," "overshadow," etc., to articulate the finding that a collection letter renders the validation notice ineffective. *Bartlett*, 128 F.3d at 500. *Bartlett* sought to eliminate these variations in terminology (at least in the Seventh Circuit) by holding that the appropriate way to

describe a letter that renders the notice ineffective is to state simply that the letter "confuses." *Id.*

22. Johnson v. Revenue Mgmt., 169 F.3d 1057, 1060 (7th Cir. 1999) ("If all the plaintiffs have to go on is the language of these letters, they must lose in the end."); *Walker*, 200 F.3d at 504. The Seventh Circuit later expanded the reach of its holdings in *Johnson* and *Walker* to claims under other provisions of the FDCPA. *See* Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1062 (7th Cir. 2000) (plaintiff cannot prove collection letter was deceptive in violation of § 1692e of the FDCPA based on the plaintiff's perceptions alone).

23. It is not enough to present evidence in the form of the plaintiff's particular impressions from reading the letter – the evidence must show that a "significant fraction of the population would be similarly misled." *Pettit*, 211 F.3d at 1060.

24. *Johnson*, 169 F.3d at 1060 ("it will be necessary to show that the additional language of the letters unacceptably increases the level of confusion"); *Walker*, 200 F.3d at 503 ("When the plaintiff decides . . . to forego factual development, then the case may come to an end by judgment on the pleadings under FED. R. CIV. P. 12(c).").

25. *Johnson*'s "evidence required" rule may also be inconsistent with the "unsophisticated consumer" standard. The standard has two aspects: (1) the letter is examined through the eyes of people of "below average sophistication or intelligence" to determine whether it is confusing but (2) this examination is tempered by "an objective element of reasonableness" to guard against "unrealistic or peculiar interpretations of collection letters." *Gammon*, 27 F.3d at 1257. Requiring evidence of actual consumer confusion is consistent with the first aspect of the test because that aspect simply establishes the subset of people whose perceptions must be used to generate the evidence.

However, it is not clear how the "reasonableness" aspect of the test is applied under the "evidence required" rule. If evidence is required to show that unsophisticated consumers are confused, and such evidence is produced, can the district court simply toss the evidence out because the court finds the result unreasonable? It is doubtful the Seventh Circuit would permit the district court to do so. *See, e.g.*, Walker v. Nat'l Recovery, Inc., 200 F.3d 500, 501 (7th Cir. 1999) ("District judges are not good proxies for the 'unsophisticated consumers' whose interests the statute protects.").

Nor can the "reasonableness" aspect of the test simply act as the reason for producing evidence in the first place (*i.e.*, the "reasonableness" of a particular interpretation of a letter turning on whether the evidence shows that interpretation to be correct). That analysis

would eliminate the "reasonableness" aspect as an analytical component of the standard – why expressly state that the plaintiff's proffered interpretation of a letter must be "reasonable" if that determination is only going made after the fact, *i.e.*, after the evidence shows it is reasonable?

Perhaps the way to reconcile the "reasonableness" aspect of the "unsophisticated consumer" standard with the "evidence required" rule is to find that it defines the **quality** of the evidence the plaintiff must produce. The Seventh Circuit has held that not just any evidence will suffice to prove that a given letter is confusing. Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1060-1062 (7th Cir. 2000) ("The self-serving opinion of the plaintiff . . . does not create a genuine issue for trial. . . . [u]nder the FDCPA, confusion is not in the eyes of the beholder."). To show that the plaintiff's interpretation of a letter is that of the "reasonable" unsophisticated consumer, the evidence must show that "a significant fraction of the population would be similarly misled"; whether it be in the form of testimony by an "expert or objective observer," a "survey," or other means. *Id.* at 1060, 1062. However, this analysis is not flawless because, in *Gammon*, the Seventh Circuit twice concluded that the plaintiff's proffered interpretation of the letter at issue was "reasonable" even though the plaintiff had not yet produced any evidence that the unsophisticated consumer would interpret the letter the same way the plaintiff advocated. *Gammon*, 27 F.3d at 1257 ("an unsophisticated consumer reasonably could interpret this statement [to mean what the plaintiff alleges]"). The "reasonableness" aspect of the test cannot define the quality of evidence needed if a court can determine that a particular interpretation is reasonable before seeing such evidence.

26. Gammon v. G.C. Services Ltd. L.P., 27 F.3d 1254, 1257 (7th Cir. 1994).

27. *Gammon*, 27 F.3d at 1257-58. Section 1692e(1) prohibits a debt collector from making "[t]he false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof." 15 U.S.C. § 1692e(1).

28. *Gammon*, 27 F.3d at 1258-59.

29. *Johnson*, 169 F.3d at 1059 ("A contention that a debt-collection notice is confusing is a recognized legal claim; no more is needed to survive a motion under Rule 12(b)(6).").

30. Avila v. Rubin, 84 F.3d 222, 227 (7th Cir. 1996).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* The *Avila* court distinguished "literally true" statements "that are potentially deceptive," *e.g.*, those in *Gammon*, with literally false statements. *Avila*, 84 F.3d at 227. The Court then went on to find that the "contradiction" between a demand for payment in 10 days and the 30 day validation period is more akin to a literally false statement – accordingly, no evidence of confusion is needed. *Id.* The *Bartlett* case recharacterized the nature of this claim. *See supra* note 21.

35. Chauncey v. JDR Recovery Corp., 118 F.3d 516 (7th Cir. 1997). There, the Court applied the "no evidence required" rule without elaboration to hold that the debt collector's letter "contradicted" the validation notice because the letter demanded that the consumer pay before the end of the validation period. *Id.* at 518.

36. Bartlett v. Heibl, 128 F.3d 497, 500-501 (7th Cir. 1997) (emphasis added). The Court also stated that "the question of whether a dunning letter violates the Fair Debt Collection Practices Act does not require evidence that the recipient was confused." *Id.* at 501. But this statement is not necessarily inconsistent with the *Johnson* line. If the term "recipient" just means "the plaintiff," then the apparent conflict is reconciled by the Court's subsequent holding in *Pettit v. Retrieval Masters Creditors Bureau* that the plaintiff's particular impressions from the letter at issue are insufficient to prove confusion. Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1062 (7th Cir. 2000).

37. *Barlett*, 128 F.3d at 501.

38. *Id.* at 499.

39. *Id.* at 501 ("The cases, however, leave no room for doubt that the letter to Bartlett was confusing.").

40. For an explanation of what is meant by the term "contradiction" *see supra* note 21.

41. *Barlett*, 128 F.3d at 500. The *Bartlett* court stated: "The cases that find the statute violated generally involve neither logical inconsistencies (that is, denials of the consumer rights that the dunning letter is required to disclose) nor the kind of literal 'overshadowing'

involved in a fine-print, or faint-print or confusing-typeface case. In the typical case, the letter both demands payment within thirty days and explains the consumer's right to demand verification within thirty days. These rights are not inconsistent, but by failing to explain how they fit together the letter confuses." *Id.*

42. *Id.* at 500.

43. *Id.* at 501.

44. Id.

45. However, coupled with the statement about the irrelevance of the recipient's impressions discussed *supra* note 23, this interpretation creates what seems like too many careless word choices on Judge Posner's part, particularly coupled with his opinion in White v. Goodman, 200 F.3d 1016 (7th Cir. 2000). The *White* case involved, inter alia, a claim that a letter was deceptive in violation of § 1692e. *Id.* at 1020. ("The plaintiffs have another claim, this one under the general provisions of the Fair Debt Collection Practices Act forbidding deceptive debt collection practices."). Although *White* was argued and decided well after *Johnson*, the Court concluded that the alleged deception was "fantastic conjecture" without any discussion of the need for, or failure to produce, evidence on that question. *Id.* The Court's opinion does not even mention *Johnson. Id.*

46. At least two cases suggest that this reconciliation is tenable. Smith v. Short Term Loans, L.L.C., et al., 2001 U.S. Dist. LEXIS 1554 at *29-30 (N.D. Ill. Feb. 9, 2001) ("The defendants argue that several Seventh Circuit cases . . . [hold] that a plaintiff must present a survey or other extrinsic evidence showing confusion . . . The court, however, believes that defendants are reading too much into [those] decisions."); Nance v. Friedman, 2000 WL 1230462, *2 (N.D. Ill. Aug. 28, 2000) ("Such evidence may not be required in all FDCPA cases; in *Avila*, evidence of consumer confusion was unnecessary.").

47. The Seventh Circuit has never addressed this type of § 1692g case.

48. Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1059 (7th Cir. 1999) (demand for "prompt payment" and "[c]all our office immediately"); Walker v. National Recovery, Inc., 200 F.3d 500, 502 (7th Cir. 1999) ("Your past-due account. . . has been placed with our company for immediate collection"); Marshall-Mosby v. Corp. Receivables, Inc., 205 F.3d 323, 325 (7th Cir. 2000) ("The above account has been placed with this office for immediate collection.").

49. *Johnson*, 169 F.3d at 1060 ("To learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence."); *Walker*, 200 F.3d at 504. *See also*, Walker v. National Recovery, Inc., 42 F. Supp. 2d 773, 783 (N.D. Ill. 1999) (expressly noting *Johnson*'s holding that evidence "may" – not must – be required), *rev'd*, 200 F.3d 500 (7th Cir. 1999). In reversing, Seventh Circuit did not directly address this point.

50. *Johnson*, 169 F.3d at 1060 ("If all the plaintiffs have to go on is the language of these letters . . .") (emphasis added); *Walker*, 200 F.3d at 504 (same holding, quoting *Johnson* and further stating, "That is equally true of the letters in this case.").

51. *See, e.g., Walker*, 200 F.3d at 503 ("Whether a given message is confusing is, we held in *Gammon*, *Bartlett*, and *Johnson*, a question of fact."). However, the Court's statement is only partially correct because, although the Seventh Circuit did hold that confusion is a question of fact in *Bartlett* and *Johnson*, the *Gammon* majority opinion contains no such holding – only Judge Easterbrook's concurring opinion does. Gammon v. G.C. Serv. L.P., 27 F.3d 1254, 1259 (7th Cir. 1994) ("Like my colleagues, I think that the trier of fact must inquire whether a misleading implication arises from an objectively reasonable reading of the communication."). The basis for Judge Easterbrook's statement that his colleagues "share" his opinion is not clear.

52. Alternatively, a court could hold that *Johnson* created a fourth type of § 1692g claim. But it is doubtful that that is what *Johnson* was trying to do because *Bartlett* did not create such a category in its list of the types of § 1692g cases even though there are cases involving facts similar to those at issue in *Johnson* and *Walker* that pre-date *Bartlett*. *See* Tychewicz v. Dobberstein, No. 96-C-195-S, slip. op. at 3 (W.D. Wis. Aug 28, 1996); Powell v. Computer Credit, Inc., 975 F.Supp. 1034, 1038 (S.D. Ohio 1997); Gammon v. Belzer, 1997 U.S. Dist. LEXIS 5170 at *9-10 (N.D. Ill. 1997).

53. *Walker*, 200 F.3d at 501 ("When the *Bartlett* language is not employed, however, a debt collector whose dunning letter suggests urgency must meet on the merits a contention that the letter would confuse an unsophisticated reader.").

54. 7th Cir. R. 40(e); Walker v. J.T. O'Brien, 216 F.3d 626, 634 (7th Cir. 2000) ("That is the purpose of Seventh Circuit Local Rule 40(e), under which the court does not create a new conflict without consulting all active judges.").

55. Wilson v. Quadramed, 225 F.3d 350, 353, n.2 (3d Cir. 2000). The Third Circuit overstates its case a bit because the Ninth Circuit has held that the question of whether a debt collector violated § 1692g is a question of fact. Baker v. G.C. Services Corp. 677 F.2d 775, 778 (9th Cir. 1982). A later Ninth Circuit case held that "the caselaw makes clear that the question whether language in a collection letter overshadows or contradicts the validation notice so as to confuse a least sophisticated debtor is a question of law," and proceeded to decide that question as a matter of law, without explaining how its decision squared with *Baker*. Terran v. Kaplan, 109 F.3d 1428, 1432 (9th Cir. 1997).

56. Opinions circulated for *en banc* consideration under the rule must contain a footnote showing that the rule was complied with. 7th Cir. R. 40(e). The *Johnson* opinion does not contain such a footnote.

57. *Walker*, 200 F.3d at 504. The initial *Marshall-Mosby* opinion affirmed a dismissal of a § 1692g confusion claim under FED. R. CIV. P. 12(b)(6), thus conflicting with *Johnson* and *Walker*. The panel reheard the case without further briefing and subsequently issued an opinion consistent with *Johnson* and *Walker* therefore vacating the prior one. *See* Marshall-Mosby v. Corporate Receivables, Inc., 1999 U.S. App. LEXIS 33548 (Dec. 21, 1999).

58. Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1061 (7th Cir. 1999) (Eschbach, J., concurring) ("I write separately because of two concerns I have with the conclusions of my colleagues . . ."). The first concern was the panel's construction of Fed. R. Civ. P. 12(b)(6) and the second was the panel's "emphasis on survey evidence" in FDCPA cases, indicating that these are two distinct issues. *Id.* at 1061.

59. Walker v. National Recovery, Inc., 42 F.Supp.2d 773, 783 (N.D. Ill. 1999), *rev'd*, 200 F.3d 500 (7th Cir. 1999). The reversal of *Walker* may call this reason into question somewhat, but it is equally indicative of the Seventh Circuit's intention that there should be no reversal since it remained silent on this point after considering the district court's opinion.

60. *See* United States v. Buford, 201 F.3d 937, 942 (7th Cir. 2000) ("Because this conclusion resolves a conflict among panels of this court, it was circulated to all active judges under Circuit Rule 40(e)."); United States v. Windom, 19 F.3d 1190, 1195 (7th Cir. 1994) ("Several panels of this court have pointed out the conflict between these two standards, but none have resolved it.").

61. *Johnson*, 169 F.3d at 1063 (Eschbach, J., concurring) (citations omitted).

62. This assumes that plaintiffs can find an affordable way to obtain evidence of confusion. If not, defendants will rarely, if ever, have to defend these types of cases in the future.

63. FED. R. CIV. P. 11(b)(2) prohibits one from advancing a legal argument that is not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

64. Some district courts continue to decide § 1692g cases without evidence of confusion, but do so without recognizing any conflict in Seventh Circuit authority. *See* Shepherd v. United Compucred Collections, Inc., No. 99 C 433, slip op. at 3 (N.D. Ill. Mar. 23, 2000) ("Overshadowing is a question for judges." – based on the text of the letters alone, the Court found a violation of § 1692g and entered summary judgment for plaintiff and the class.).