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The Credit Cost Reduction Act of 1997 and The Federal Fair Debt Collection Practices Act: Problems of Interpretation

By Laurie A. Lucas

I. Introduction

In 1977, Congress enacted the Fair Debt Collection Practices Act[1] ("FDCPA" or "Act") to curb "serious and widespread" abuses by debt collectors.[2] A court recently recited Congress' rationale for the Act:

> Congress explained that although unscrupulous collectors comprise only a small portion of the industry, the less ethical debt collectors threaten consumers with violence, use profane or obscene language, make telephone calls at unreasonable hours, impersonate public officials and lawyers, disclose debtors' personal affairs to employers and engage in other sorts of unscrupulous practices . . . The Act's purpose is to eliminate such practices.[3]

As the Supreme Court of the United States has recognized, the Act prohibits debt collectors "from making false or misleading representations and from engaging in [these types of] . . . abusive and unfair practices." [4]

The Act represents a great leap forward in curbing abusive debt collection tactics. Congress amended the Act twice, in 1986[5] and 1996,[6] to refine various provisions. However, this tinkering did not stem the flow of FDCPA-related litigation. Although the Supreme Court has ruled on only one case involving the FDCPA,[7] litigation concerning the Act

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continues to increase. In 1987, only fifteen federal judicial opinions even mentioned the Act. By contrast, more than 140 federal judicial opinions addressed some aspect of the Act in 1997. This alarming rise in litigation illustrates that consumers, debt collectors, litigators, and judges have experienced difficulty interpreting and applying various provisions of the Act.

Congress introduced the Credit Cost Reduction Act of 1997[8] ("CCRA") as an amendment to the FDCPA. Currently, the CCRA has been referred to the House Committee on Banking and Financial Services' subcommittee on Financial Institutions and Consumer Credit. The proposed CCRA amendment represents an attempt to resolve some of the problems in interpreting the FDCPA. Specifically, the CCRA would amend the Act for the following reasons: (1) to provide clarification of the types of litigation activities that are exempt from the Act's definition of "communication" and which would not require inclusion of the Act's various affirmative disclosures; (2) to settle the dispute over whether the validation of debt's 30-day period operates as an absolute grace period during which time all collection attempts must cease, or whether it operates merely as a dispute period during which time the consumer may dispute or request verification of the debt; (3) to require that the damage cap on liability for a class action include not only the current action but any series of class actions arising from the same violations by the same debt collector; (4) to modify and limit the award of attorney fees under the Act; and (5) to invoke Federal Rule 68 to disallow the accrual of attorney's fees after the date a settlement offer is extended and rejected if the final award is less than the offer.

This article examines the proposed amendment and analyzes its potential effect on several problems encountered in interpreting the FDCPA. First, the article analyzes how the CCRA handles the problem of collection demands which: (1) are made within the 30-day "debt validation" period; and (2) contradict debt verification disclosures. Second, the article explores the CCRA's attempt to clarify which communications involving litigation are exempt from the Act. Next, the article discusses how the CCRA would modify the Act's damage cap, and assesses the resulting impact on class action litigation. Finally, the article examines how the CCRA would revise the Act's provisions controlling attorney's fee awards.

II. Collection Activity Following Initial Notice

A. Validation of Debts — Disclosure Requirements

The FDCPA's "validation of debts" provisions require a debt collector to send a consumer a set of disclosures in the initial communication or within five days of the initial communication. These disclosures represent a frequent basis for violations simply because the FDCPA mandates specific content, but provides little meaningful guidance, as to the appropriate form the required disclosures should take. The Act only requires the following information:

> (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.[9]

Debt collectors commonly refer to these disclosures as "civil *Miranda* warnings." [10] Courts evaluate the efficacy of particular notices only after the fact and on a case-by-case basis using the "least-sophisticated consumer"[11] standard. Under this standard, a collection notice which can plausibly be read to have two or more different meanings, at least one of which is misleading, violates the Act.[12] The "least sophisticated consumer" standard focuses on whether the validation notice was overshadowed or contradicted by other language in the communication, and the standard has figured prominently in many court decisions.[13] A frequent interpretation problem crops up in litigation concerning the Act: does the Act give the consumer a 30-day "grace period" during which collection attempts must cease, or does it simply give the consumer 30 days to dispute or request verification of a debt? Debt collectors risk violating the Act when they demand or take any action within the 30-day validation period *if* the demand or action contradicts the validation notice. This interpretation implies that, within the 30-day period, debt collectors who make *any* communications demanding payment will violate the Act. The case of *Russell v. Equifax A.R.S.*[14] illustrates how one court resolved this issue.

B. Demands Which Contradict the Validation Disclosures Within the 30-day Period — Russell v. Equifax A.R.S.

In *Russell*, the debt collector sent two notices to the debtor. The first notice was a two-sided letter. The front side was captioned "IMMEDIATE COLLECTION NOTICE," and closed with the warning "IT IS OUR PRACTICE TO POST UNPAID COLLECTIONS . . . TO INDIVIDUAL CREDIT RECORDS. [15] The reverse side contained the validation notice. The second notice was captioned "CONTACT THIS OFFICE AT ONCE" and closed with, "PAYMENT IN FULL WITHIN 5 DAYS IS NOW DEMANDED."[16] Given these contradictory statements and implicit threats, the court found that the 1692g notice was ineffective because the language urging immediate action contradicted and overshadowed the 30-day debt verification provisions.[17] Furthermore, the court noted that "[b]y demanding payment within five days [in the second notice], the debt collector gave the debtor only 25 days from the date of the first notice to decide whether to challenge the claim. This period of time is less than the 30 days required to be given a consumer under the Act." [18] The court's holding implies that the 30-day period is an absolute grace period for the consumer and that any notice sent after the

validation notice contradicting the 30-day period violates the Act.

C. *Proposed CCRA Amendments Addressing the 30-Day Period Issue*

Courts encountering this issue have exhibited little consistency in resolving it.[19] The CCRA amendment would address this problem by adding the following subsection to the Act's validation of debts section:

> *(d) CONTINUATION DURING PERIOD-Collection activities and communications may continue during the 30-day period described in subsection (a) unless the consumer requests the cessation of such activities.*[20]

This section would resolve the 30-day issue by allowing collection attempts to proceed during the 30-day validation period unless the consumer requests that the activities cease. The CCRA amendment does not specify whether the consumer's request must be in writing and therefore will undoubtedly invite more litigation on this point. In addition, while the CCRA amendment would resolve the dispute over the 30-day issue, it does little to address the substance of many consumers' complaints (e.g., that dunning letters and other communications usually attempt to pressure the consumer into paying the debt within the 30-day period).

The CCRA amendment, theoretically, would have relieved the debt collector in *Russell* from liability resulting from the conflicting demands about time (though not the threat to "post unpaid collections"). The CCRA amendment, however, does nothing to address the type of coercive language used in most dunning letters. Since the CCRA amendment would require nothing in regard to the appropriate form for a validation notice, but would only relieve the debt collector from liability from conflicting statements about time, abuses of this type would likely continue and would probably increase.

D. *Recommendation: Combine the CCRA Proposed Amendment With a "Clear and Conspicuous" Standard Governing the Validation Notice*

Many debt collection communications "bury" the validation notice in obscure or unreadable portions of the communication. The Federal Trade Commission ("FTC"), the regulatory agency primarily responsible for enforcing the Act,[21] has taken an active role in fighting this practice by repeatedly urging Congress to enact an appropriate standard governing the appearance of the validation notice.[22] The agency recently described how "[s]ome debt collectors print the notice . . . in a type size considerably smaller than the language in the dunning letter, or obscure the notice by printing it on a non-contrasting background in a non-contrasting color.[23] In order to eliminate this abusive tactic, the FTC advised Congress to explicitly require a "clear and conspicuous" format for the notice.[24]

If enacted, the CCRA amendment should be coupled with a provision that addresses this unfair and misleading practice. Since an overwhelming number of cases alleging violations under the Act will include a 1692g allegation, perhaps the best course would be to simply mandate a uniform "federal box"[25] for the validation of debts information in line with the "clear and conspicuous" standard. Such a

mandate would arguably do more to decrease the cost of credit than an amendment allowing debt collectors free reign to continue collecting debts during the 30-day period while providing little guidance regarding the required efficacy of the notice.

III. Exemption for Communications Involving Legal Proceedings

Under the FDCPA, another point of contention involves communications the debt collector must include in the various affirmative disclosures. Until the 1996 amendment to the FDCPA, it was unclear when, in what type, and how often the warning was required in communications with the consumer.[26] Under the Act, the FTC is required to make yearly reports and recommendations to Congress. FDCPA, § 1692l.[37] For example, it is unclear whether the Act requires debt collectors to include the *Miranda* warning in various communications with consumers. Similar confusion surrounds the extent to which attorneys must include *Miranda* warnings in formal pleadings filed to collect debts. Resolution of this issue has become crucial to attorneys in the debt collection field since filing lawsuits to collect debts is, at least theoretically, a "communication" with the consumer requiring inclusion of the *Miranda* warning in any pleadings or motions.[27]

A. **Heintz v. Jenkins** *Resolved (For a Short Time) the Circuit Court Split*

The question of whether and what type of legal activities were covered under the Act created a split in the circuit courts. The United States Supreme Court recently addressed the issue in *Heintz v. Jenkins*[28] by holding that the Act *does* apply to legal activity. In *Heintz*, the Supreme Court interpreted section 1692e(11) of the Act, which at that time stated that "the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose[,]"[29] constitutes a violation of that section. *Heintz* affirmed the circuit courts, which had held that this language applies to litigation activity as long as the other elements of the "debt collector" definition were met.[30] In reaching this conclusion, the Court rejected the holdings of other cases, which had held that a literal or technical reading of the Act to include legal activities did not comport with Congressional intent.[31] *Heintz* also rejected the FTC's position on the issue.[32] The FTC "Commentary" concluded that the Act covered attorneys engaged in debt collection activities. Arguably, *Heintz* would expand the Act's reach to attorneys who simply filed a complaint, noticed parties for a deposition, or followed federal or state procedural requirements. This momentous holding in *Heintz* set the stage for the 1996 amendment to § 1692e(11); the amendment specifically exempted the *Miranda* warning requirement from litigation activities.

B. The 1996 Amendment Overrode **Heintz**

Congress amended the FDCPA in 1996. Partially in response to the *Heintz* decision, the amended section 1692e(11) now reads as follows:

> The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with

> the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, [constitutes an FDCPA violation] except that this paragraph shall not apply to a formal pleading made in connection with a legal action.[33]

The amended section now requires full disclosure only in the *initial* (oral or written) communication, and a modified disclosure stating that the communication is from a debt collector in *subsequent* communications. Furthermore, the amendment clearly exempted "formal pleadings" from the *Miranda* requirement. The new section 1692e(11) induced a sigh of relief from attorneys involved in debt collection litigation because such attorneys who satisfy the Act's definition of "debt collector"[34] are no longer subject to liability for failure to include the *Miranda* notice in formal pleadings.

C. Interpretive Problems Remain

Even after the 1996 amendment, however, interpretive problems remained with the FDCPA, which the proposed CCRA amendment would remedy. First, the 1996 amendment exempted only the *Miranda* requirement from "formal pleadings." The Federal Rules of Civil Procedure define "pleadings" as the complaint, answer, replies to counterclaims, answers to cross-claims, third party complaints, and third party answers.[35] How the courts will interpret the words "formal pleadings" and whether they will do so uniformly remains to be seen.[36] In addition, attorneys who fall within the Act's definition of "debt collectors" must still grapple with the fact that the 1996 amendment did not address other obligations imposed by the Act. For instance, it is still unclear whether the 1996 amendment would relieve attorneys from having to include the affirmative disclosures mandated under section 1692g — the Act's validation of debts section — in formal pleadings or in any communication related to litigation activities.

D. Proposed CCRA Amendments

The proposed CCRA would amend section 1692a(2) to read as follows:

> (2) The Term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium. *Such term does not include actions taken pursuant to the Federal Rules of Civil Procedure; in the case of a proceeding in a State court, the rules of civil procedure available under the laws of such State; or a nonjudicial foreclosure.*[37]

The CCRA amendment, therefore, would clarify and expand upon the 1996 amendment's definition of the term "formal pleadings." This clarification would serve to reduce future litigation by eliminating the need to establish the meaning of the term "formal pleadings." The broader CCRA amendment also would clarify whether other affirmative obligations, in addition to the validation of debt disclosures, are exempt from the Act's definition of litigation activities. This latter clarification would prove especially helpful because the validation of debt section generates substantial numbers of FDCPA violations.

IV. *Class Action Lawsuits Under The FDCPA*

A. *The FDCPA's Damage Cap and Class Action Lawsuits* — **Mace v. Van Ru Credit Corporation**

Class action lawsuits in consumer litigation are on the rise. This increase is reflected in the FDCPA case law and has created more interpretation problems for the courts. For instance, questions have arisen about whether the FDCPA's class action damage cap implicitly requires a nationwide class action suit, as opposed to allowing a *series* of class action suits. In *Mace v. Van Ru Credit Corporation*,[38] the Seventh Circuit reviewed the lower court's denial of Rule 23(b)(3) plaintiffs' proposed class certification; the denial was based on the argument that allowing a series of class actions against the same debt collector for the same violations would negate the purpose of the cap by repeatedly exposing the same debt collector to liability in different jurisdictions. In *Mace*, Plaintiff alleged various violations under the Act based on letters that Defendant sent to her and other Wisconsin residents. Plaintiff requested class certification limited to Wisconsin.[39] The lower court reasoned that the damage cap implicitly precluded limitation of the action to one state.[40] In light of this preclusion, the court denied certification because the court calculated that a large, nationwide class would receive only a *de minimis* recovery resulting in an inferior form of adjudication if the class were certified.

On appeal, Defendant compared the Truth in Lending Act's ("TILA") damage provisions to those of the FDCPA.[41] Since the language in the TILA requires a nationwide class, Defendant argued that the FDCPA dictated the same result. The Seventh Circuit noted one critical difference between the FDCPA and the TILA damage provisions: the TILA language encompassing "any class action or series of class actions.[42] This language would require a nationwide class, but since the FDCPA does not include it, the court relied instead on the FDCPA's plain language to support its position that the FDCPA did not require a nationwide class. Given the FDCPA's lack of the "any class action or series of class actions" limitation, the court's conclusion in *Mace* is unobjectionable. However, the proposed CCRA amendment, if enacted, would dictate an entirely different result.

B. *Proposed CCRA Amendment Would Implicitly Require Nationwide Classes*

The CCRA amendment would modify section 1692k(2)(B) as follows to include the "series of class actions" language requiring a nationwide class:

> (B) In the case of a class action, *or any series of class actions arising out of the same violations by the same debt collector,* (I) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members *of such class action or series of class actions,* without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector;[43]

Whether the CCRA amendment would achieve its goal of decreasing the cost of credit

by requiring nationwide class actions under the FDCPA is far from clear. The issue clearly deserves further study. The *Mace* decision highlights some of the problems with such an amendment, including a lack of authority requiring that a class action embrace the broadest possible class, the different purposes underlying the TILA and the FDCPA, and the fact that the Federal Rules of Civil Procedure encourage specific and limited classes. More importantly, the *Mace* court argued that the possibility of a *de minimis* recovery should not automatically bar a class action since:

> [t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. *A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.*[44]

Thus, the proposed CCRA amendment represents a misguided attempt to impose a nationwide class requirement. This result would undermine Congress' purpose in enacting the FDCPA, and would contradict the Federal Rules of Civil Procedure, which encourage specific and limited classes. Accordingly, the proposed CCRA amendment probably constitutes a step in the wrong direction on the class action issue.

V. *Attorney's Fees Allowable Under The FDCPA*

The cost of litigating very small claims raises a serious problem under the FDCPA. Given the minimal amounts usually involved in consumer debts, providing incentives for attorneys to take an FDCPA case is important and represents a driving force behind the Act's allowance for statutory damages up to $1,000,[45] costs, and attorney's fees related to successful suits.[46]

A. Lee v. Gibson *Highlights the "Attorney's Fee" Problem*

A recent Sixth Circuit case, *Lee v. Thompson & Thompson,*[47] provides an example of the FDCPA's attorney's fee problem. In *Lee*, Plaintiff alleged a technical violation of the Act and sought only statutory damages. Plaintiff's attorney submitted a request for a $12,759 attorney's fee award. When the court rendered judgment for Plaintiff in the amount of $1,106.85, *including* attorney's fees, Plaintiff appealed. The court noted that Plaintiff was only "the nominal appellant, [and the attorney was] obviously the real party in interest.[48] In fact, the attorney admitted that it was the attorney's fee award that provided the motivation for the appeal.[49] The court affirmed the lower award. The *Lee* case illustrates a serious problem under the Act: that it costs a great deal to litigate what are, in some cases, very small claims. Limiting the attorney's fee award to the equivalent of statutory and actual damages, however, is not the best way to deal with this problem and arguably contradicts the purpose of the Act.

B. Proposed CCRA Amendment

The CCRA amendment also would change the damages structure of the FDCPA by modifying the provisions controlling the award of attorney's fees. Currently, section 1692k(a)(3) reads as follows:

> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.[50]

The CCRA amendment would modify the section as follows:

> *(3) subject to subsection (f),[51] in the case of a successful action to enforce a liability under paragraph (1) or (2), the costs of the action, including reasonable attorney's fees, as determined by the court, in an amount not to exceed the amount awarded in such action under the applicable paragraph.[52]*

The CCRA amendment, therefore, would limit the award of attorney's fees to the equivalent of the amount of statutory and actual damages awarded. Since statutory damages are limited to $1,000 per action[53] and the amount of actual damages is likely to be small, this portion of the CCRA amendment would eviscerate the Act's provisions designed to make FDCPA actions "worth someone's labor."

The final change to the damage provisions under the CCRA amendment would be to add a new subsection (f) to section 1692k. This subsection would impose Rule 68 on the Act's provisions, and would read as follows:

> (f) RULES APPLICABLE TO ACTIONS UNDER THIS TITLE- Notwithstanding any other provision of law, in any action arising under this title, for purposes of Rule 68 of the Federal Rules of Civil Procedure, the following provisions shall apply:
>
> (1) PLAINTIFF'S ATTORNEY'S FEES - Costs shall include reasonable fees for the plaintiff's attorney.
>
> (2) DISALLOWANCE OF CERTAIN FEES ACCRUING AFTER REFUSAL OF SETTLEMENT OFFER- In accordance with Rule 68 of the Federal Rules of Civil procedure, if—
>
> (A) an offer is made by the debt collector to a consumer bringing an action (including any class action or series of class actions referred to in subsection (a)(2)(B)) under this title, and the offer is not accepted; and
>
> (B) the amount of the final judgment awarded to the consumer (or, in the case of a class action or series of class actions, the total amount awarded to all class members in such class action or series of class actions) is less than or equal to the amount of the offer referred to in subparagraph (A),
>
> [then] the consumer (or the class with regard to a class action or series of class actions) may not be awarded or otherwise recover costs for attorney's fees incurred after the date such offer is rejected.[54]

This proposal may operate to limit the number of frivolous "annoyance" suits brought by consumer debtors. However, the amendment would most likely induce debtors' attorneys into prematurely accepting "low-ball" settlement offers. Overall, the amendment does little to achieve an equal playing field between attorneys on opposing sides of the FDCPA litigation field. The CCRA's proposed amendments to section 1692k(b), discussed below, may provide a better solution.

VI. Factors Considered in Determining Liability Under the FDCPA

In determining damages awarded under the FDCPA, the Act requires judges to consider specific factors. Section 1692k(b) currently identifies the following factors: "[A]mong other relevant factors — (1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;"[55] Unfortunately, some courts have stretched the meaning of this section to *reduce* damages awarded to plaintiffs in successful FDCPA actions. The recent decision in *Vandzura v. C & S Adjusters, Inc.*[56] provides an excellent illustration of this problem.

A. Reducing Damage Awards for Actions that Include Unsuccessful Claims — **Vandzura v. C & S Adjusters, Inc.**

In *Vandzura*, the attorney's fee and cost award exceeded $18,000, while the court awarded the plaintiff only $500 in actual and statutory damages. On appeal, the court reduced this award by 45% "to account for the time spent litigating unsuccessful claims and [the] plaintiff's limited success."[57] The court reached this decision based on a strained reading of section 1692k(b)'s language. The court reasoned that this provision justified a *reduction* in the attorney's fee award when the plaintiff litigated unsuccessful FDCPA claims along with claims ultimately proving successful.[58]

B. Proposed CCRA Amendment

The CCRA amendment would modify part of section 1692k(b) by substituting a new subsection to read as follows:

> (b) Factors Considered by the Court
> In determining the amount of *any award* under subsection (a) of this section, the court shall consider, among other relevant factors
>
> *(1) In any action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the extent to which the such noncompliance was intentional, and the amount of actual damages awarded;*[59]

The initial change of "liability in any action" to "any award" appears to be cosmetic. Adding "the amount of actual damages awarded" to the factors would appear to allow a court to remit an excessive award to bring the award in line with the amount of damages the consumer actually suffered. The CCRA amendment would provide a more reliable vehicle for the court to use in order remit

inappropriately large attorney's fees awards. This result certainly would be more appropriate than reducing the total attorney's fees award to the sum of statutory and actual damages, as the CCRA amendment to section 1692k(a) would require, and this result would not punish the consumer for any high expectations for attorney's fees that might be harbored by his or her attorney.[60]

V. Conclusion

The Cost Credit Reduction Act of 1997 provides several answers to many of the problems of interpretation under the FDCPA. The CCRA amendment's clarification of what type of communications require inclusion of the Act's affirmative disclosures, especially those communications related to litigation activities, would help reduce the need for litigation on those issues. To have a real effect on the cost of credit (by reducing the amount of litigation), the CCRA amendment also should include some guidance, such as a "federal box" requirement in relation to the Act's validation notice as this section of the Act is a constant source of litigation.

However, not all of the CCRA amendment's modifications seem compatible with the purposes of the FDCPA. The CCRA requirement that class action lawsuits require a nationwide class deserves further study. Moreover, by severely limiting the award of attorney's fees recoverable under the Act, the CCRA arguably would eliminate an important incentive for consumers to pursue private enforcement of their FDCPA rights. Litigation in cases where the alleged violations are merely "technical" and the consumer has suffered no actual damage, however, are increasing, fueled, in part, by the Act's requirement of attorney's fees awards when the action is successful. This fact raises a serious issue for consumers and for those involved in the collection industry, especially ethical debt collectors trying to comply with this complex piece of legislation. The CCRA amendment's modification of the factors considered by courts when awarding attorneys fees is a better way to deal with the attorney's fee problem. By considering the amount of actual damages suffered, the amendment provides courts with some leeway to remit attorney's fee awards without automatically limiting those awards. Finally, the addition of a Rule 68 requirement is probably a good idea, since it would encourage settlement of FDCPA claims. The CCRA amendment would clarify much of the FDCPA, thus increasing its efficacy in protecting consumers against debt collection abuses. Overall, however, the proposed CCRA amendment would probably do more to undermine the purposes of the FDCPA than it would to effectuate those goals.

Endnotes

1. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1996) [hereinafter "FDCPA"].

2. *See* Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996).

3. *See id.*

4. Heintz v. Jenkins, 514 U.S. 291, 292 (1995).

5. *See* July 9, Act of 1986, Pub. L. No. 99-361, 100 Stat. 768 (1986).

[6] *See* Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[7] *See Heintz*, 514 U.S. at 291.

[8] Credit Cost Reduction Act of 1997, H.R. 1059, 105th Cong., 1st Sess. (1997) [hereinafter "CCRA"].

[9] 15 U.S.C.A. §§ 1692g(a)(1)-(5) (West 1995).

[10] *See* Daniel A. Edelman, *The Fair Debt Collection Practices Act Recent Developments*, 8 Loy. Consumer L. Rep. 303, 312 (1996).

[11] *See* Jeter v. Credit Bureau, Inc., 754 F.2d 907 (11th Cir. 1985).

[12] *See* Edelman, *supra* note 10 at 312 (citing Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).

[13] *See also* FDCPA § 1692g(b), which requires cessation of debt collection activities upon written request by the consumer until the debt can be verified, but does not specify whether or not collection activities must automatically cease during the 30-day period without such a request.

[14] 74 F.3d 30 (2d Cir. 1996).

[15] *Id.* at 32.

[16] *Id.* at 33.

[17] *See id.* at 35-36. The court also found the first notice which contained the validation notice to be ineffective because it was overshadowed by other language in the letter. *See id.* at 34. This finding is not relevant, though, for purposes of this discussion regarding the 30-day period.

[18] *Russell*, 74 F.3d at 36.

[19] For example, different courts reviewing basically the same form of a dunning letter may reach different results for no apparent reason. *See* Burns v. Accelerated Bureau of Collections of VA, Inc., 828 F. Supp. 475, 477 (E.D. Mich. 1993) (holding that a dunning letter which contained the appropriate § 1692g notice, in addition to a demand for payment "today," did not violate the Act because it gave no specific time limit); U.S. v. National Fin. Servs., Inc., 820 F. Supp. 228, 237 (D. Md. 1993) (holding that a dunning letter containing the required § 1692g notice in addition to the repeated use of the word "deadline" did overshadow the § 1692g notice).

[20] H.R. 1059. [Throughout this article, statutory language that would be added or modified by the CCRA appears in italics.]

[21] *See* FDCPA § 1692l.

[22] *Federal Trade Commission Annual Report to Congress Pursuant to the Fair Debt Collection Practices Act* (1997), *reprinted in* 5 Consumer Cred. Guide (CCH) 62,274 at 62,280 (Mar. 17, 1997).

[23] *Id.*

[24] *See id.*

[25] Many, if not most, lenders print information containing the standard required disclosures (such as interest rate, unit price, total payments, late fee provisions, etc.) in a box at the top of the loan instrument. By placing this information at the top of the instrument, and enclosing it with a box, the lenders ensure compliance with the "clear and conspicuous" standard.

[26] The circuit courts were split on the question of whether the warning was required to appear in all communications with the debtor, or simply the initial communication. The United States Courts of Appeals for the Second, Third, Fourth, Sixth, and Seventh Circuits had held that the warning must be included in all communications with the debtor. *See* Pipiles v. Credit Bureau, 886 F.2d 22 (2d Cir. 1989); Dutton v. Wolpoff and Abramson, 5 F.3d 649 (3rd Cir. 1993); Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992), *cert. denied*, 506 U.S. 905 (1992); Frey v. Garguish, 970 F.2d 1516, 1520 (6th Cir. 1992); Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995), *cert. denied*, 515 U.S. 1160 (1995).

Conversely, the Ninth Circuit and the FTC had argued that the more reasonable interpretation would be to require the warning only in the initial communication since to do otherwise would result in harassment of the debtor, and also would impose an unnecessary burden on the ethical debt collector. *See* Pressley v.

Capital Credit & Collection Serv., Inc., 760 F.2d 922 (9th Cir. 1985). The issue of whether the warning had to be included in oral communications with the debtor also was unclear. *See, e.g.*, Austin v. Great Lakes Collection Bureau, Inc., 834 F. Supp. 557 (D. Conn. 1993) (raising the issue of applicability of § 1692e(11) notice in oral communications, but declining to rule on this issue because the court found violations under other sections of the Act sufficient to establish liability); Dutton, 5 F.3d at 656 n.7 ("Of course, we do not decide whether literal application of the phrase 'all communications' to every possible communication, including all oral communications, would be at cross-purposes with Congress's intent.").

27. In 1986, the FDCPA was amended, bringing the actions of attorneys who otherwise met the Act's definition of "debt collector" under the rubric of the Act; prior to 1986, attorneys had been specifically excluded from the Act's coverage. *See* Pub. L. No. 99-361.

28. 514 U.S. 291 (1995).

29. FDCPA § 1692e(11).

30. *See* Paulemon v. Tobin, 30 F. 3d 307 (2d Cir. 1994) (holding that a letter sent to debtor did not constitute litigation activity even if an exemption for litigation existed, and in dicta, expressing skepticism that such an exemption did exist); Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507 (9th Cir. 1994) (holding that the plain language of the Act did not support any exemption for litigious activity); Tolentino v. Friedman, 833 F. Supp. 697 (N.D. Ill. 1993), *aff'd*, 46 F.3d 645 (7th Cir. 1995) (rejecting attorney's argument that once suit is filed, actions became legal in nature and compliance under Act was not required); Scott v. Jones, 964 F.2d 314 (4th Cir. 1992) (holding that filing warrants in cases constituted debt collection); Strange v. Wexler, 796 F. Supp. 1117 (N.D. Ill. 1992) (rejecting assertion that lawsuit improperly requesting attorney's fees was a legitimate use of judicial process to collect a debt).

31. *See, e.g.*, Green v. Hocking, 792 F. Supp. 1064 (E.D. Mich. 1992), *aff'd*, 9 F.3d 18 (6th Cir. 1993) (rejecting a literal reading of § 1692a(6) definition of "debt collector" to include legal activities as contrary to Congressional intent); Firemen's Ins. Co. v. Keating, 753 F. Supp. 1137 (S.D.N.Y. 1990) (holding that an attorney pursuing legal action only was not a debt collector); National Union Fire Ins. Co. v. Hartel, 741 F. Supp. 1139 (S.D.N.Y. 1990) (finding law firm pursuing legal action only did not meet the definition of "debt collector").

32 *See* Federal Trade Commission: Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,102 (1988) ("The term [debt collector] does not include . . .[a]n attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment.)"). The FTC is the regulatory agency charged with enforcing the Act's provisions. *See* 15 U.S.C.A. §16921(a). *See also*, 132 Cong. Rec. H 10031 (Oct. 14, 1986) (statement of Rep. Annunzio) ("Only collection activities, not legal activities, are covered by the Act. . . .The act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature."). *Cf.* Staub v. Harris, 626 F.2d 275 (3d Cir. 1980) (FTC's advisory opinions not entitled to deference in FDCPA cases).

33 Pub. L. No. 104-208, 110 Stat. 3009 (1996).

34 Debt collector is defined as "[a]ny 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." FDCPA 15 U.S.C. § 1692a(6) (1997). *See also* Laurie A. Lucas & Alvin C. Harrell, *Understanding the FDCPA: A Comprehensive Analysis of Recent Case Law*, 49 CONSUMER FIN. L. Q. REP. 301, 302 n.12 (1995) (noting differing interpretations and cites cases dealing with the definition of "debt collector").

35 *See* Fed. R. Civ. P. 7(a).

36 *See, e.g.*, Cavallaro v. Law Office of Shapiro & Kreisman, 933 F. Supp. 1148, 1156-57 (E.D.N.Y. 1996) (questioning whether the section 1692e(11) warning was required in a personal notice of sale in a Article 9 foreclosure). The CCRA amendment would have resolved this issue since it specifically exempts "nonjudicial foreclosures" from the Act's requirements.

37. H.R. 1059.

[38] 109 F.3d 338 (7th Cir. 1997).

[39] This same defendant had already faced a class action lawsuit for similar violations in Connecticut. *See* Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996).

[40] The Act allows for civil liability in a class action, but limits damages to "the lessor of $500,000 or 1 per centum of the net worth of the debt collector." FDCPA §1692k(a)(B)(ii).

[41] In fact, it was noted that when enacted the "TILA" and the FDCPA's damage cap provisions were identical and neither limited class actions to a nationwide class. The "TILA" later was amended to include language which did place a such a limit under the "TILA," but not the FDCPA. *See Mace*, 109 F.3d at 342-43.

[42] Truth in Lending Act 15 U.S.C. § 1640(a)(2)(B) (1997).

[43] CCRA 1997.

[44] *Mace*, 109 F.3d at 344 (Emphasis added.)

[45] *See* FDCPA, § 1692k(2)(A).

[46] *See id.* at § 1692k(3).

[47] 109 F.3d 302 (6th Cir. 1997).

[48] *Id.* at 304.

[49] See *id.* at 305.

[50] 15 U.S.C.A. § 1692(a)(2)(A).

[51] Subsection (f) is a new subsection under § 1692k and is discussed *infra.*

[52] 15 U.S.C.A. § 1692k(a)(3).

[53] *See, e.g.*, Donahue v. NFS, Inc., 781 F. Supp. 188 (W.D.N.Y. 1991) (holding that the maximum recovery under § 1692k is $1000 per lawsuit, not $1000 per violation); Harper v. Better Business Servs., 768 F. Supp. 817 (N.D. Ga. 1991), *aff'd*, 961 F.2d 1561 (11th Cir. 1992) (holding that the statutory language supports the conclusion that the statue authorizes a maximum $1000 additional damage award per lawsuit); Beattie v. D.M. Collections, Inc., 764 F. Supp. 925 (D. Del. 1991) (holding that statutory language read together with other provisions of § 1692k supports conclusion that statute authorizes a maximum of $1000 additional damage award per lawsuit). *Cf.* Wright v. Fin. Serv., 22 F. 3d 647 (6th Cir. 1994) (holding that Act allowed the $1000 statutory damages award to be given per violation and not per lawsuit).

[54] CCRA 1997.

[55] FDCPA § 1692k(3).

[56] No. P-55, Sub. 1024, 1997 WL 56917 (E.D.Penn. Jan. 29, 1997).

[57] *Id.* at *1.

[58] Id. at *2 (citing FDCPA, § 1692k(3)).

[59] CCRA 1997.

[60] The *Vandzura* court also noted that the attorney had filed 54 cases with the court since January 1, 1993, and almost all had alleged a violation under the FDCPA. *See Vandzura*, 1997 WL 56917 at 1, n.2. Perhaps the court was intimating that this attorney might be exploiting the FDCPA attorney's fees provision by filing meritless cases.

CLR