Illegality in the Sale and Collection of Consumer Debts

Dalié Jiménez[*]

Dalie.Jimenez@law.uconn.edu

** DRAFT **

Draft of December 5 2013

Introduction 2
I. Lifecycle of a debt 7
A. The flow of information and documentation in the debt collection ecosystem 7
B. Obtaining information and documentation after a debt has been sold 14
C. Contract language in the sale of consumer debts 22
1. General Quitclaim Language 25
2. Specific Quitclaim Language 26
D. Affidavits, Business Records, and Proof in Court 27
II. Are these collections illegal? 28
1. Fair Debt Collection Practices Act violations 29
a. Collecting directly from the consumer 29
b. Attorney violations of the FDCPA 33
2. Fraudulent and Negligent Misrepresentation at Tort Law 37
3. Rule 11 and Misleading the Tribunal 40
III. Factual and Theoretical Explanations 45
A. The burst of the easy credit bubble and rapid bank mergers 46
B. Market failure 49
C. Courts as debt collectors 50
IV. Addressing criticisms, or, is this really a problem anyway? 58
V. Repairing a broken system 60

---

[*] Associate Professor of Law and Jeremy Bentham Scholar, University of Connecticut School of Law. Former Policy Fellow in the founding staff of the Consumer Financial Protection Bureau, where I focused on debt collection, debt relief, and credit reporting. This paper benefited immensely from comments from participants at the 2013 Law & Society Comparative Household Debt and Insolvency workshop and at the Junior Scholars Workshop at the University of Connecticut School of Law, in particular, Dan Schwarcz and Patricia McCoy. Many thanks also to the UConn Law Faculty and attendees at the Faculty Workshop Series. Many thanks also to John Tonetti, Peter Holland, Jim Greiner, Doug Spencer, and Rafael Pardo. The views expressed herein are my own. Any mistakes are mine.

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

Electronic copy available at: http://ssrn.com/abstract=2250784

A. Industry solutions 61
B. Market solutions: Debt registry system 63
C. Regulators: Enforcement & Rulemaking 64
D. A longer term solution: a tax on distressed debt 68
VI. Conclusion 68

Introduction

Debt buyers of consumer debts have proliferated since the 1970s and have become infamous for purchasing consumer account obligations for pennies on the dollar—sometimes fractions of pennies—and then seeking to collect the full amount plus interest and fees from consumers, sometimes as much as a decade or more after the obligation was incurred.[1] The low cost reflects the risk the purchaser is taking that the account will ultimately be uncollectible.[2] There are a handful of publically traded debt buyer firms: Encore Capital, Portfolio Recovery Associates, SquareTwo Financial, and Asta Funding, and an unknown number of private ones that likely numbers in the thousands.[3] Debt buyers purchase defaulted or recently charged-off accounts from original creditors—credit card delinquencies, medical bills, auto loan deficiencies, delinquent gym memberships or magazine subscriptions, etc.—and then seek to collect on them. Debt buyers also sell some of their previously purchased debt to other debt buyers in pools of accounts. Billions of dollars of delinquent debt are purchased annually.[4]

---

[1] FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 23 (2013) [hereinafter FTC DEBT BUYER REPORT], *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf ("On average, debt buyers paid 4.0 cents for each dollar of debt."); *Id*. at T-8 (regression model includes debts between 6-15 years and 15+ years); Encore CAPITAL GROUP INC., ANNUAL REPORT (FORM 10-K) (2013) (stating that during 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with a face value of $18.5 billion, at an average cost of three cents per dollar of face value).

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

[3] These firms specialize in the purchase of delinquent consumer accounts. While the debt purchasing market can include the purchase of non-delinquent consumer or commercial receivables, I limit my discussion in this paper to the purchase of defaulted consumer accounts. The CFPB estimates that debt buyers and debt collectors combined totaled approximately 4,500 firms in 2007. Bureau of Consumer Financial Protection, *Defining Larger Participants in Certain Consumer Financial Product and Service Markets: Proposed Rule*, 77 Fed. Reg. 9592, 9599 (Feb. 17, 2012) (citing 2007 Economic Census).

[4] *See, e.g.*, Encore Capital Group Inc., Annual Report (Form 10-K) (Feb. 13, 2013) (describing that during 2012, Encore invested $562.3 million in portfolios to acquire 562 million defaulted consumer accounts with a face value of $18.5 billion, at an average cost of 3 cents per dollar of face value. This

Electronic copy available at: http://ssrn.com/abstract=2250784

The industry is not without critics. Consumer advocates have argued that the flood of litigation in small claims and district courts around the country results in overwhelming numbers of default judgments where the debt buyer plaintiff does not have to provide documentation of the underlying debt.[5] A number of law review articles have catalogued the experience of clinical programs litigating these cases and found that in the majority of cases where they get involved, debt collectors' attorneys lack documentation to prove the debt in court.[6] A plethora of newspaper articles have described stories of individuals abused by debt collectors.[7] The Federal Trade Commission (FTC) itself has acknowledged

---

represented a 45.3% increase over the previous year's investment); SquareTwo Fin. Corp., Annual Report (Form 10-K) 35 (March 1, 2013) ("From 1999, our first full year of purchasing debt, to December 31, 2012, we have invested approximately $2.2 billion in the acquisition of charged-off receivables, representing over $33.9 billion in face value of accounts. The combination of our historical and future recovery efforts is expected to result in cumulative gross cash proceeds of approximately 2.2x our invested capital. From 1999 to December 31, 2012, we have grown our business from $8.7 million to $608.0 million of annual cash proceeds on owned charged-off receivables, representing a compound annual growth rate of approximately 35%.").

[5] The Legal Aid Soc'y, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER INCOME NEW YORKERS 3 (2010), http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf; Nat'l Consumer Law Ctr., The Debt Machine: How the Collections Industry Hounds Consumers and Overwhelms Courts 11 (2010), http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf (describing a study of 365 debt collection cases brought in New York City by the 26 debt buyers who filed the greatest number of lawsuits and a 451-case sample of callers to a hotline who were sued by a creditor).

[6] *See, e.g.*, Emanuel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 Vt. L. Rev. ___ (2013); Dalié Jiménez, D. James Greiner, Lois M. Lupica, and Rebecca L. Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEORGETOWN JOURNAL ON POVERTY LAW POLICY ___ (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213000; Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2012) [hereinafter DO WE HAVE A DEBT COLLECTION CRISIS?] (describing preliminary results of a small study of debt collection cases in Indiana); Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. REV. 258 (2011) [hereinafter DEBTS, DEFAULTS, AND DETAILS]; Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259 (2011) [hereinafter THE ONE HUNDRED BILLION DOLLAR PROBLEM]; Sam Glover, *Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 Wm. Mitch. L. Rev. 1116 (2009).

[7] Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AMERICAN BANKER (March 29, 2012), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html?zkPrintable=true; Maria Aspan, *Borrower Beware: B of A Customer Repaid Her Bill Yet Faced a Collections Nightmare*, AMERICAN BANKER (March 29, 2012), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-debt-collections-delinquent-robosigning-1047991-1.html?zkPrintable=true; Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, AMERICAN BANKER (March 12, 2012), http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html; Jamie Smith Hopkins, *Md. Court Freezes 900 debt-collection lawsuits*, BALTIMORE SUN (July 20, 2011), http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720_1_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits ("Last year, [Judge] Clyburn dismissed more than 27,000 Maryland cases handled by Mann Bracken after the Rockville debt-collection law firm collapsed. In March, debt buyer Midland

that current practices leave much to be desired; it has referred to debt collection and debt buying as a "broken system."[8]

Against this backdrop, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) granted the Consumer Financial Protection Bureau (CFPB) extensive powers to regulate sellers of consumer debt (typically banks), debt buyers,[9] and debt collectors.[10] The CFPB's authority begins with regulation—Dodd Frank's passage marks the first time that an agency can enact rules implementing the Fair Debt Collection Practices Act (FDCPA), the primary federal statute in this space.[11] The CFPB also acquired supervisory powers over "larger participants" in the debt collection market,[12] and it can also enforce the FDCPA and the Consumer Financial Protection Act (CFPA) which prohibits "unfair, deceptive, or abusive acts and practices" by, *inter alia*, debt buyers and debt collectors as well as banks.[13] In addition, the FTC retains its enforcement powers over the FDCPA, and indeed has significantly stepped up its activities in this area in the last few years.[14]

Funding [a subsidiary of Encore Capital] agreed to drop just over 10,000 cases against Maryland consumers to settle a class-action lawsuit, though it admitted no wrongdoing."); Beth Healy et al., *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOS. GLOBE, July 31, 2006, at A1.

[8] Fed. Trade Comm'n, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration 5 (2009), http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf [hereinafter Repairing a Broken System].

[9] Here and throughout the piece I am referring to purchasers of delinquent consumer accounts.

[10] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Title X, Pub.L. 111–203, July 21, 2010 [hereinafter DODD-FRANK]. The FDCPA generally prohibits "debt collectors" from engaging in abusive practices. 15 U.S.C. 1692 et. seq.; 15 U.S.C. 1692a(6) ("The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."). The FDCPA does not apply to "original creditors" collecting their own debt (e.g., CapitalOne calling a consumer about her overdue credit card bill) but for purposes of the Act, debt buyers are regulated as debt collectors. *See, e.g.*, *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003) (holding that the FDCPA "treats assignees as debt collectors if the debt sought to be collected was in default when acquired by the assignee, and as creditors if it was not"). The vast majority of the debts I am concerned about here were purchased in default.

[11] DODD-FRANK § 1089.

[12] What constitutes a "larger participant" must be defined by rule, which the CFPB did in 2012 by deciding that debt buyers, collection agencies, and collection attorneys whose revenue as a result of debt collection of a consumer financial product or service exceeds $10 million in annual receipts would be covered. The Bureau estimates that this will cover 175 out of approximately 4,500 debt collection entities nationwide. Bureau of Consumer Financial Protection, *Defining Larger Participants of the Consumer Debt Collection Market: Final Rule*, 77 Fed. Reg. 65775, 65788 (Oct. 31, 2012).

[13] *See* DODD-FRANK Title X, § 1089, Fair Debt Collection Practices Act, 15 U.S.C. § 1601 et. seq., DODD-FRANK Title X, § 1031.

[14] DODD-FRANK Title X, § 1089. "In its two civil penalty cases [in 2012] . . . the FTC obtained $2.8 million and $2.5 million, respectively, the two largest civil penalty amounts the agency has ever obtained in cases alleging violations of the FDCPA." CFPB Annual Report, Fair Debt Collection

This article takes a critical look at the information and documentation exchanged between credit originators and debt buyers and the language of contracts for the sale of unsecured consumer debts (primarily credit cards) and finds troubling evidence of illegality.

In Part I, I describe the landscape and mechanics of debt buying, drawing upon newly released data on the industry from the FTC and the CFPB, as well as a collection of 28 consumer debt purchase and sale agreements I have collected, I describe the most common features found in these transactions. I first describe the debt buyer business model of acquiring delinquent accounts and seeking to collect on them. I then examine the information and documentation regarding the delinquent accounts that is available to the purchasers and discuss the (in many cases) near impossibility of obtaining that documentation.[15] Finally, I discuss the contract provisions found in consumer debt purchasing contracts. Like the FTC in their study on the industry, I find that an overwhelming number of contracts for the sale of consumer debts have one troubling feature in common: they contain "quitclaim" language; that is, language where the seller disclaims all material representations about the underlying debts sold or the information supplied about those debts, generally referring to the debts as being sold "as is" and "with all faults."[16] Some contracts contain even more specific language, disclaiming any representations made as to the "validity, enforceability, or collectability" of the debts sold as well as "the accuracy or completeness of any information provided by the seller to the buyer, including . . . current balance or accrued interest."[17]

Analyzing these circumstances and contract language against the applicable laws, in Part II, I argue that under the prevailing debt purchasing business model, some of the collection activity currently occurring violates one or more laws or rules.[18] My claim of illegality applies in very specific circumstances; circumstances which can be summed up with a story: a debt buyer purchases delinquent debts through a contract that sells those debts "as is;"

Practices Act 2012, at14, http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. *See also*, Fed. Trade Comm'n, *In Settlement with FTC, Debt Collectors Agree to Stop Deceiving Consumers and Pay Nearly $800,000* (Mar. 23, 2013), http://www.ftc.gov/opa/2013/03/securitycredit.shtm.

[15] An example clause from a debt purchasing agreement is instructive: "Buyer expressly acknowledges that...documentation may not exist with respect to the Loans purchased by Buyer." Agreement between FIA Card Services, NA, and CACH, LLC, April 14, 2010 available at https://www.documentcloud.org/documents/329733-fia-to-cach-forward-flow.html [hereinafter FIA V. CACH AGREEMENT]

[16] *Id*.

[17] FIA V. CACH AGREEMENT. It is not known how many debts have been sold subject to such language. It is also unclear whether subsequent sales of the same debt would carry similar language throughout the subsequent contracts. I am in possession of a handful of contracts with this language.

[18] For a description of the contracts the FTC studied see FTC DEBT BUYER REPORT supra n. 1, at 24-29, C-1-31.

without representations, warranties, or recourse from the seller.[19] The seller does not provide supporting documentation for the underlying accounts, and in many cases, that documentation cannot ever be obtained by the buyer. For most accounts that she's purchased, the only information the buyer has is what's contained on a spreadsheet that describes basic details about the debts and the individuals who purportedly owe them—things like the debtor's name, address, amount, date of last payment, etc. The underlying contract is never disclosed to anyone. The essence of my argument is that under those circumstances the collector violates the Fair Debt Collection Practices Act prohibition against "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt" when they seek to collect from consumers without verifying the underlying debt. Where the attempt to collect becomes a court action, I argue that the collection attorney misleads the court and violates Rule 11 when they do not do any kind of verification of the facts alleged in the complaints they file.

The practical implications of this argument may seem overwhelming, depending on what we believe to be the size of the problem. We have limited evidence on how often consumer debts are sold under the circumstances I just described. The only market-wide evidence comes from the FTC study I mentioned earlier, which examined consumer debt purchases by the nine largest debt buyers during a three year period.[20] By one calculation based on that study, debt buyers lacked documentation on up to 71% of accounts purchased.[21] If collecting on these accounts is illegal, then there is a lot of that going around. This presents a dilemma. Our economy undoubtedly relies a great deal on the ability of creditors to sell their debts to others who may be better organized to collect them.[22] A great deal of money—billions—has been exchanged for outstanding delinquent debts.

In Part III, I draw from economics, public choice, and behavioral economics literatures to examine potential reasons why the market has evolved this way and why it has not self-corrected. Part IV considers the tradeoffs of fixing these problems and addresses criticisms of my analysis.

Finally, Part V examines a number of potential solutions available at various levels. I discuss an industry-level solution that creditors could implement to increase legitimacy in the system, a newly emerging (but struggling) potential market solution in the form of a debt registry, and finally I argue that the most effective solution to this problem is in the form of

---

[19] In some cases the contracts are more specific; they disclaim the "validity, enforceability, or collectability" of the debts sold as well as "the accuracy or completeness of any information provided by the seller to the buyer, including . . . current balance or accrued interest."[19]

[20] The FTC analyzed data on more than 5,000 portfolios "containing nearly 90 million consumer accounts." FTC Debt Buyer Rpt at ii.

[21] *See* discussion below at [find part/page].

[22] [cite ACA doc, Kaulkin Ginsburg]

regulation. I thus discuss how the Consumer Financial Protection Bureau (who supervises both banks and debt buyers) can ban the practices I have described by labeling them as "unfair" under their Dodd-Frank and FDCPA authority. Part VI concludes with a look to the future.

I. Lifecycle of a debt

In this part, I detail the lifecycle of a typical consumer debt from the moment of delinquency until it is purchased by one or more debt buyers. I discuss the various ways that information about the debt may be stored through the system. I also give an overview of the debt purchasing business model and the entities involved—creditors, debt buyers, third-party collection agencies, and law firm collectors. I then describe the difficulties that debt buyers face obtaining information and documentation about the debts they have purchased.

A. The flow of information and documentation in the debt collection ecosystem

The modern iteration of the bulk debt purchasing business model developed over thirty years ago, as a result of the savings and loans crisis.[23] The Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) "became custodians of an unprecedented number of assets from failed banks and thrifts" following the crisis.[24] The FDIC established the Judgments, Deficiencies, and Charge-offs (JDC) equity partnership program in 1993 whereby select private entities were conveyed unsecured assets and proceeds were split with the RTC.[25] After the RTC assets dried up, the JDC entities found other sources of defaulted accounts from credit card companies, which were ready to sell their delinquent assets given how successful they had seen the practice would be.[26]

While debt buyers purchase all sorts of unsecured defaulted debt—auto loan deficiencies, delinquent gym memberships, and the like—credit card charge-offs represents the largest portion (by dollar amount) of consumer debt purchased by debt buyers.[27] As such, I will focus primarily on credit card debts in this section. When a credit card account goes unpaid for the first time (delinquent), the card company will typically attempt "soft" methods to attempt to collect. This generally involves a letter and/or a phone call or email from

---

[23] Anthropological research has shown that credit predates even money itself, and that debt buying and debt trading has been around since antiquity. *See* David Graeber, DEBT: THE FIRST 5,000 YEARS (2012).
[24] Federal Deposit Insurance Corporation, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE, Chapter 17: Partnership Programs, at 433, http://www.fdic.gov/bank/historical/managing/. *See also* Lee Davidson, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC Banking Review 17 (2005), http://www.fdic.gov/bank/analytical/banking/2005jul/article2.pdf.
[25] *Id*.
[26] FTC DEBT BUYER REPORT at 12 (citing Robert J. Andrews, *Debt Collection Agencies in the US*, IBISWorld Indus. Rep. 56144, at 14 (2010)).
[27] Cite to CFPB report.

internal collection staff to the consumer reminding them that their payment is late. The outreach steps up as the account goes severely delinquent (30+ days past due) and more so as it goes towards severely derogatory (90+ days past due). At this time, the bank is storing all of the information pertaining to the person's account—payments, charges, biographical information—in their system of record.[28] Information about the customer's conversations with customer representatives, disputes and complaints, etc., is maintained in the bank's customer relationship management (CRM) system.[29]

At some point after the account is severely derogatory, the bank will likely move the account information to the lender's collection system. "In most collection systems, this information flows one way. Conversations and correspondence are recorded on the collections system but very little information flows back to the system of record other than perhaps some notations that the account is being collected upon."[30] Depending on the credit card issuer, the debt may be placed with one or multiple third-party debt collection agency during this time.[31] Collection agencies work on contingency collecting debts on behalf of both creditors and debt buyers. They generally engage in the same type of collection efforts that the original creditor would have engaged in, but collect using their own name. In other words, once a consumer's debt is placed with a collection agency she will begin receiving phone calls or letters from an entity she has no prior relationship with, seeking to collect on her credit card debt. Sometimes this collection agency also reports to one or more credit reporting bureaus, which might confuse consumers.[32]

---

[28] John Tonetti, Presentation at FTC/CFPB Life of a Debt Conference (June 6, 2013), video available at http://www.ftc.gov/bcp/workshops/lifeofadebt/.

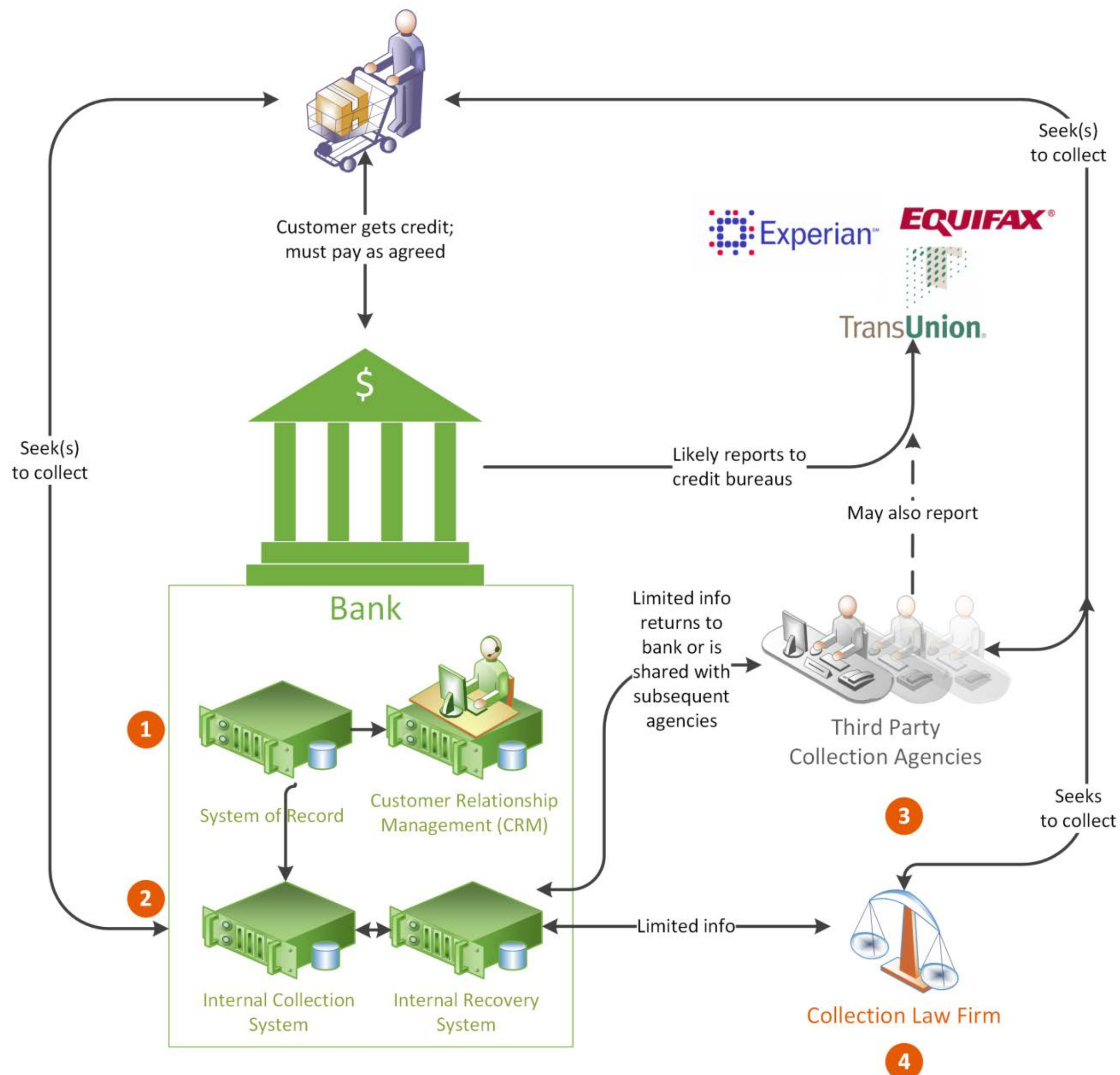
[29] *Id*. "Most often there may be some limited feed between the system of record and the CRM, but if you want the full story, you'll likely have to review the CRM." *Id*.

[30] *Id*.

[31] General Accounting Office, Report No. 09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 29 (2009) [hereinafter GAO DEBT COLLECTION REPORT]; Robert Hunt, *Collecting Consumer Debt in America*, FED. RESERVE BANK OF PHILA. BUS. REV. 12, Q2 2007.

[32] "Some consumers seemed to have difficulty in understanding the reporting of collections because items that were reported as tradelines of collection agencies did not generally identify the specific creditor or delinquent account that was involved. FTC Fifth Interim Federal Trade Commission Report to Congress Concerning the Accuracy of Information in Credit Reports (Dec. 2012) [hereinafter FTC Credit Report Accuracy].

Figure 1 – Data Flows While Debt Is Owned by Creditor[33] – At point (1) the information regarding the consumer and her account is maintained in two systems at the bank, the system of record (which contains transaction information) and the customer relationship management (CRM) system, which contains notes on the customer's interactions with customer service. As shown in (2), sometime after 30+ days of delinquency, banks will typically move the account to their internal collection system, and perhaps after further delinquency, to their internal recovery system. These may be different departments that have different strategies for "working" the account. At some point, one or more third party collection agencies may be used, as in (3). Finally, some creditors choose to sue on their own delinquent accounts and in those cases hire a collections law firm, as in (4).



How long debt is placed with a collection agency—meaning how long the collection agency has to try to collect on it—varies widely, but can be as little as one month. If the consumer does not pay after receiving phone calls or letters from one agency, it is likely that the account will be recalled and placed with a second collection agency. Information that may

[33] This diagram is based on a presentation given by John Tonetti, Collections Program Manager, Consumer Financial Protection Bureau, at the FTC / CFPB Life of a Debt event. The presentation can be watched at [link to FTC site]. The powerpoint and transcript are on file with the author.

have been gathered by the first collection agency—such as notes describing why the consumer is not paying—is not generally transmitted to the second collection agency.[34] This means that the consumer will now be contacted by a second previously unknown entity that will have no record of information the consumer gave to the first agency. It is possible that a consumer will pay the first agency and the payment will not be credited until after that agency has given back the account. This information has to be reconciled so that the lender gets paid, the right agency gets a commission, the balance is updated to reflect the payment, and the information reported to the credit reporting bureaus is updated.[35] As one CFPB official notes, "the timeliness and accuracy of this information transfer can become an issue."[36]

If the consumer does not pay, eventually the card issuer is required by banking regulations and capital requirements to charge-off the account—declare it as unlikely to be collected. For credit cards, the charge-off must occur within 180 days after the account is past due.[37] A charge-off has no effect on the validity or enforceability of the debt; it is simply an accounting procedure. Although contractually entitled to, most banks do not charge interest or fees post-charge off.[38] This makes sense from their perspective since it avoids the cost of sending periodic statements, a requirement under the Truth in Lending Act if the account continued to accrue interest or fees.[39]

At the point of charge-off, lenders move the borrowers to a recovery system.[40] "In some cases, information from the collection system is passed to the recovery system, in some

---

[34] John Tonetti, FTC/CFPB Life of a Debt, *supra* note X.

[35] *Id.*

> As these [collection] agencies may also report to the credit reporting agencies, at least theoretically the other [collection] agency ceases reporting, otherwise the same credit may be reported multiple times. But this takes discipline within collection agency, as credit reporting often may not be part of their primary business. Many lenders do not allow collection agencies to report to CRAs as long as they still own the account as they wish to control reporting of their accounts.

Id.

[36] *Id.*

[37] Office of the Comptroller of the Currency, *Uniform Retail Credit Classification and Account Management Policy*, OCC 2000-20, June 20, 2000, http://www.occ.gov/news-issuances/bulletins/2000/bulletin-2000-20.html; Federal Financing Institutions Examination Council, Uniform Retail Classification and Account Management Policy, 65 F.R. 36903, June 12, 2000.

[38] *See, e.g.*, *David-John McDonald et. al. v. Asset Acceptance*, LLC, 2:11-cv-13080, 2013 WL 4028947, Opinion and Order Granting Plaintiffs' Motion for Class Certification, Granting Plaintiffs' Motion for Summary Judgment, and Denying Defendant's Motion for Summary Judgment at *18 (E.D. Mich. S.D. Aug. 7, 2013) (describing deposition testimony from bank witnesses asserting that as a matter of business practices most banks do not charge interest or fees after charge-off).

[39] The current regulation is 12 C.F.R. §1026.5(b)(2) (2012) (Regulation Z after Dodd-Frank Act; see 26 C.F.R. §1.6050P-1) but previously this was also the case. 12 C.F.R. §226.5(b)(2) (2009) (Regulation Z as promulgated by the Federal Reserve).

[40] *Id.*

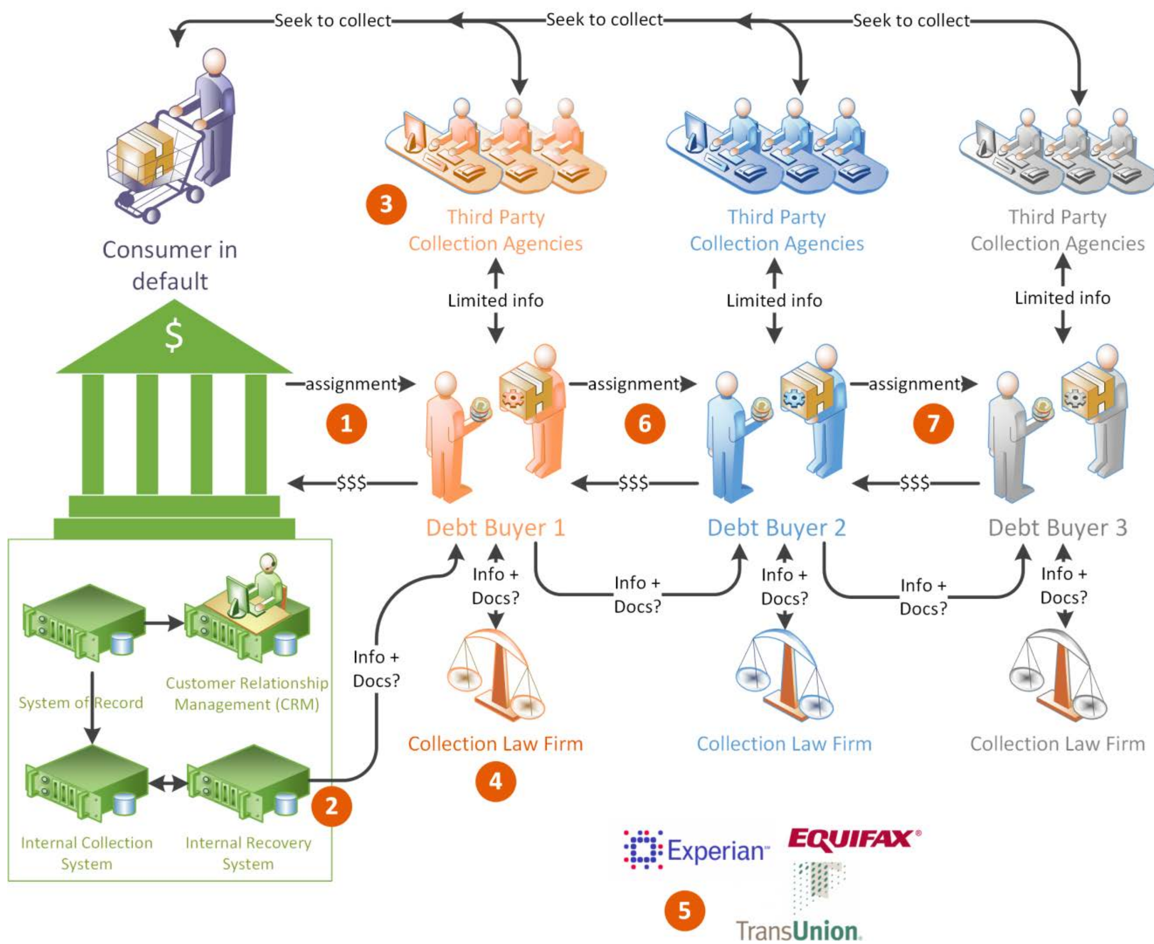
cases it isn't."[41] The collection and recovery systems are "receptacle[s] for note-taking and documenting as well as helping to manage third party vendors such as collection agencies."[42] In the majority of cases, the lender does not send all of the information they have on the account to third party vendors. "Often missing is information gathered by the lender previously, such as a history of disputes, what the lender's representative heard from the consumer, what they may have told the consumer, and similar information."[43] What is sent to third party vendors is essentially the bare minimum required to collect on the bank's behalf: "demographic and financial information so the consumer can be contacted, the balance on the account, and perhaps some information on the collection process such as a recovery score."[44] A CFPB official has noted that this information flow is problematic.[45] This is so not only because the consumer will have to repeat any relevant information they had already given to the collection agency, but also because the consumer will be contacted by various entities—the collection agencies—that they may not recognize.

It is typically soon after charge-off—although this varies a great deal by issuer—that the account will be sold either as "fresh" debt if it had never been placed with a collection agency or as primary, secondary, or tertiary debt if it has been "worked" by a collection agency before sale.[46] Debt is sold by credit card issuers in pools of accounts (portfolios) that are described as having particular characteristics important for valuation—average amount outstanding, dates of last payment, etc.[47] Most debts are sold through a bidding process, and bidders may be restricted by the seller depending on the size of the potential purchaser and their financials.[48] Credit issuers may sell a pool of accounts outright to a debt buyer, called a "spot purchase," or they may enter into "forward flow agreements" whereby they agree to send to sell a fixed amount of debt during a fixed amount of time for a specified price.[49]

---

[41] *Id*. "In some cases, the internal recovery system now becomes the system of record, in some cases the system of records remains as the original system of record." *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *See generally* GAO DEBT COLLECTION REPORT 18-30.
[47] FTC DEBT BUYER REPORT at 17-19.
[48] *Id*. at 20 ("Debt buyer industry representatives report that some large sellers (e.g., major credit card issuers) sell debts only to purchasers with well-established reputations and demonstrated financial strength. Large sellers apparently employ these selection criteria to decrease their risk of reputational harm as a result of the conduct of the debt buyers in collecting on debts as well as to decrease the sellers' credit risk."). *See also* John Tonetti, FTC/CFPB Life of a Debt, *supra* note X.
[49] Encore 10-K for fiscal year 2011 at 3; FTC DEBT BUYER REPORT *supra* note 18, at Appendix C-2. *See, e.g.,* Credit Card Account Purchase Agreement between Turtle Creek Assets, Ltd. and Pasadena Receivables, Inc., Forward Flow July 2009 through September 2009. (July 16, 2009), available at https://www.dropbox.com/sh/1kls3crton8042a/CkXElDYl2E. As the FTC explains,

Figure 2 – Data flows once debt is purchased. A debt purchase is an assignment of rights under the original contract (e.g., credit card) between the consumer and the bank. At point (1), the bank assigns the first debt buyer the right to collect on a pool of accounts, for which the debt buyer pays money. Information about the accounts, typically in the form of an Excel spreadsheet is given to the debt buyer as in (2). This diagram does not include the situation in which documentation is not sold with the debt and instead is requested later by the first or a subsequent debt buyer. See Figure 3. Sometimes documentation evidencing the contract and debt between the consumer and the bank (e.g., credit card statements, agreement) is also shared. The debt buyer will typically hire a third party debt collection agency, as in (3) to collect from the consumer. It may also seek to collect directly from the consumer (not shown). The first debt buyer (or one of its third party collectors) may report to the credit reporting agencies in (5). At some point, a collection law firm may get involved, (4), whether it is to act as a collector or to initiate a lawsuit in state court. The documentation provided to the law firm may consist of only information about the account or perhaps also documents, including affidavits from the debt buyer or original creditor. At some point, the consumer's obligation may be repackaged and sold to another debt buyer, as in (6). This may happen even after a judgment has been entered against a consumer. The same cycle will repeat again in very much the same way for any subsequent buyer.



Each party to a forward flow contract bears a risk that price changes in the "spot" market will move in an adverse manner, such that the locked-in forward flow price becomes disadvantageous relative to the prevailing spot price. When spot market prices change dramatically, relative to the forward flow price, the disadvantaged party may find it more profitable to breach the contract (and risk the payment of damages) rather than to purchase (or sell) the portfolio(s) at the previously agreed-to forward flow price.

FTC DEBT BUYER REPORT at C-2 n. 3.

Debt buyers also act as resellers of accounts to other debt buyers.[50] A debt may be sold again and again, as can be seen in Figure 1 and described further below. Debt buyers (here acting as resellers) may sell an entire portfolio they have just purchased from a creditor, repackage previously purchased portfolios, or attempt to collect on purchased debts and sell the ones that they failed to be able to collect.[51] It is important to note that subsequent debt buyers of an account have no relationship to the original creditor, a factor that will become relevant in the discussion how second or third debt buyers can seek documentation on an account.

The face value the account is sold at—the "dollar" that the "pennies" are based on—is the amount of the debt at charge-off. This is true whether the account is sold for the first time by the creditor or whether it's the fourth debt buyer who is purchasing the account. Nonetheless, most debt buyers seek to collect interest on the charged off amount.[52] When a debt buyer sells to another, the second debt buyer will "roll back" the accumulated interest and may calculate it anew. As the CFPB has noted, if the new debt buyer "calculates [interest] on a different basis, now the balance does not only [not] resemble the original charge off balance, it also doesn't resemble the balance the previous owner was attempting to collect."[53]

The debt purchasing business model is relatively simple. Debt buyers look for spot purchasing of portfolios or forward flow agreements that meet their business model criteria (some debt buyers specialize in accounts in bankruptcy, for example).[54] Before bidding, the debt buyer will analyze the portfolio using credit reporting information[55] and, depending on the debt buyer, may use analytical models to calculate expected recovery rates.[56]

Once they have been assigned the accounts, the debt buyer may further parcel out pieces of the portfolios they have acquired and place the parceled out accounts for sale with other more specialized debt buyers who may be willing to pay more for them—for example, debt buyers collecting solely in a particular state or region. For the accounts they keep, the debt buyer may use internal collectors or place them with third party collection agencies that will contact the debtors via phone or mail and try to obtain payment. The sale and

---

[50] *Id*. at 19-20.
[51] *Id*. at 19.
[52] *See* McDonald et. al. v. Asset Acceptance, LLC, *supra* n. X.
[53] *Id*.
[54] *Id*. at 18.
[55] The Fair Credit Reporting Act specifically permits pulls of credit reports for debt buyers who have not yet purchased a consumer's debt. 15 U.S.C. § 1681b(a)(1)(E) (stating that a consumer reporting agency may furnish a consumer report to someone who "intends to use the information, as a potential investor or servicer . . . in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation").
[56] *See, e.g.*, Experian, *Evaluate A Debt Portfolio Before You Buy Or Sell*, http://www.experian.com/consumer-information/portfolio-evaluator.html.

collection on an account may continue, depending on the debt buyer's business model, either until the debt is paid or the cost exceeds its expected value. Some accounts will be placed with law firm debt collectors who may first try to collect by sending letters or making phone calls, but who may eventually file a law suit. All of these collection entities—the debt buyer, its internal collection group, the third-party collector, and the law firm debt collectors—are regulated under the FDCPA as debt collectors and banned from engaging in the prohibited practices described therein. Throughout the article I use these terms interchangeably.[57]

B. Obtaining information and documentation after a debt has been sold

When purchasing a portfolio, whether it is from an original creditor or another debt buyer acting as a reseller, the debt buyer will typically receive a contract that purports to assign ownership of the accounts to the debt buyer.[58] What other information or documents—aside from the contract itself—the debt buyer receives after a sale varies; suffice it to say that for the typical transaction it does not appear to be very much. The FTC's recent report on the industry examined approximately 350 contracts that it received as part of a request for information from the nine largest debt buyers.[59] The FTC did not release specific contracts but discussed common terms and phrases and analyzed them at length in their study. Before their study was released, only a handful of debt sale contracts had been publically released through litigation. I am in possession of twenty individual contracts from various times and parties and also draw upon those contracts in the explanations in this section.[60]

The FTC examined data for over 5 million consumer credit accounts sold to nine of the largest debt buyers and found that the vast majority of accounts included the:

(1) name, street address, and social security of the debtor (found in 98% of accounts);
(2) creditor's account number (found in 100% of accounts);
(3) outstanding balance (found in 100% of accounts);

---

[57] Notably, this paper is focused on actors who fall within the ambit of the FDCPA, whether it's a debt buyer, a third-party collector, or an attorney collector.

[58] I say "purports" here because while a debt sale contract can only assign whatever rights the seller has, where that contract contains quitclaim language, the seller is not representing that they have any particular rights. Forward flow agreements may also not be true assignments in that the accounts reference a "revenue sharing plan." *See* Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AMERICAN BANKER, March 29, 2012, http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html.

[59] FTC DEBT BUYER REPORT, *supra* note 1, at Technical Appendix C-1.

[60] The contracts are available from the author. Some can also be obtained from links in an American Banker story. Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AMERICAN BANKER, March 29, 2012, http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html.

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

(4) date the debtor opened the account (found in 97% of accounts);
(5) date the debtor made his or her last payment (found in 90% of accounts);[61]
(6) date the original creditor charged-off the debt (found in 83% of accounts);
(7) amount the debtor owed at charge-off (found in 72% of accounts); and
(8) debtor's home phone number (found in 70% of accounts).[62]

The vast majority of accounts sold, however, were sold without some critical information, in particular, the

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

These five largely missing pieces of information are quite important to the debt buyer's ability to legally collect for a number of reasons. A number of jurisdictions require that before a debt buyer can collect on an account through legal means, they must separately specify the principal amount—missing from 89% of accounts—and finance charges and fees—missing from 63% of accounts.[64] It would seem that for 89% of accounts sold during the period the FTC studied, the information the debt buyer received when she purchased the accounts would be insufficient to allow her to proceed with a lawsuit in those jurisdictions. In addition, for 70% of accounts, the sale of accounts did not give the debt buyer any information about the interest rate charged on the account. Presumably, the debt buyer cannot attempt to charge any interest to the consumer until she finds out what the proper interest amount is.[65] It is not known how often debt buyers seek to collect interest on accounts they purchase, but it would be improper to do so without knowing the interest rate charged.[66]

---

[61] Some of these may be missing because a payment was never made in an account.
[62] FTC DEBT BUYER REPORT, supra n. 1, at 34-35.
[63] *Id*. at 34-37. The FTC believes that buyers will generally know the name of the original creditor because "buyers were likely to receive this information in other ways as well." *Id*. at 35.
[64] [cite]
[65] But see below for a discussion of how infrequently additional requests for information were obtained by debt buyers.
[66] Conversations with consumer lawyers, debt collectors, and my personal review of court files lead me to believe that where debt collectors charge interest, they do so at the prevailing pre-judgment interest in the state, typically compounded annually. This is puzzling because there is no credit card agreement that I have ever seen that compounds interest annually (as opposed to daily). I have also been alerted to a number of instances where debt buyers are charging interest when seeking to collect from the consumer via letter—pre-litigation—and do not seek interest when they file a lawsuit. *But see* FTC Debt Buyer Report at C-31 ("A few contracts prohibited debt buyers from

The date of first default—missing from 65% of accounts—is a critical date for purposes of calculating when the statute of limitations began to run on an account and consequently, critical to determining whether an account is out of statute.[67] In at least three states, when a debt falls out of statute, it is extinguished.[68] In the rest of the country and in most circumstances, whether a cause of action is past the statute of limitations is an affirmative defense that must be brought up by the defendant or lost.[69] However, in the consumer debt collection context, the law is different in many jurisdictions. The overwhelming majority of courts that have considered the issue have held that filing a lawsuit barred by the statute of limitations is a violation of the FDCPA.[70] Some have found that even threatening to file a lawsuit is a violation.[71] The FTC has even taken the public position that for any debts which the debt collector "knows or should know may be beyond the applicable statute of limitations," the collector must inform the debtor that the debt is time-barred and the debt

---

adding any amount to the account balances purchased from sellers, stating, simply "Purchaser agrees not to add any further interest or fees to the Account Balances.").

[67] Unless a state statute says otherwise, the statute of limitations begins to run on the date that the cause of action accrues, which is another way of saying that it starts to run when the original creditor could have first sued the consumer in a court of law. *See, e.g.*, *Citibank S.D., NA v. Sawant*, 2012 Mass. App. Div. 2012 WL 1622233 (2012); *Knighten v. Palisades Collections, LLC*, 721 F. Supp. 2d 1261, 1269 (S.D. Fla. 2010); *Dodeka, LLC v. Campos*, 377 S.W.3d 726 , 731 (Tx. 2012); *Anderson v. Neal*, 428 A.2d 1189, 1191 (Me. 1981).

[68] Wisconsin and Mississippi for all debts; North Carolina for purchased debts [cite the statutes].

[69] Day v. McDonough, 547 U.S. 198 (2006); *see also Gonzalez v. Hasty*, 651 F.3d 318 (2d Cir. 2011); *DeTata v. Rollprint Packaging Products Inc.*, 632 F.3d 962, 970 (7th Cir. 2011); *Export-Import Bank of U.S. v. Advanced Polymer Sciences, Inc.*, 604 F.3d 242, 248 (6th Cir. 2010); *Santana-Castro v. Toledo-Davila*, 579 F.3d 109 (1st Cir. 2009); *Rodriguez-Perez v. Clark*, 423 Fed. Appx. 118 (3d Cir. 2011).

[70] A number of courts have found that filing a time-barred suit is a violation of the FDCPA. *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875-76 (N.D. Ill. 2009); *Larsen v. JBC Legal Group, P.C.*, 533 F.Supp.2d 290, 302 (E.D.N.Y. 2008); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001); *Stepney v. Outsourcing Solutions, Inc.*, Case No. 97–C–5288, 1997 WL 722972, at *4 (N.D.Ill. Nov.13, 1997); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991); *Kimber v. Federal Financial Corp.*, 668 F. Supp 1480 (M.D. Ala. 1987). [is there any caselaw to the contrary?]

[71] *Kimber*, 668 F. Supp at 1488 ("By threatening to sue Kimber on her alleged debt, FFC violated § 1692e(2)(A) & (10)."); *Freyermuth*, 248 F.3d at 771 (it is a violation of the Act to threaten to take "any action that cannot legally be taken"); *Herkert*, 655 F. Supp. 2d at 875-76 ("Numerous courts, both inside and outside this District, have held that filing or threatening to file suit to collect a time-barred debt violates the FDCPA."); *Larsen*, 533 F.Supp.2d at 302; *Beattie*, 754 F. Supp. at 393 ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."). A number of courts have declined to extend the *Kimber* reasoning to letters sent by the debt collector, although the holdings largely depend on the content of the letters. *Huertas v. Galaxy Asset Management*, 641 F.3d 28 (3d Cir. 2011) ("Even the least sophisticated consumer would not understand[plaintiff's] letter to explicitly or implicitly threaten litigation"); *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 453 (3d Cir. 2006) ("Whether a debt collector's communications threaten litigation in a manner that violates the FDCPA depends on the language of the letter, which should be analyzed from the perspective of the 'least sophisticated debtor'"); *Shorty v. Capital One Bank*, 90 F. Supp. 2d 1330, 1331-33 (D.N.M. 2000) (finding that sending a debt validation notice regarding a time-barred debt, without notifying the consumer that the debt was time-barred did not violate the FDCPA).

collector has no legal remedy.[72] It would seem highly problematic that in 65% of cases the debt buyer cannot calculate the limitations clock properly because she lacks the information. I argue below that this lack of knowledge is not an excuse.

In addition to these information problems, the FTC found that the majority of accounts were sold without any information about whether the purported account holder disputed the amount, validity, or anything else about the account.[73] The FTC notes that "[k]nowing the dispute history of debts could be very relevant to debt buyers in assessing whether consumers in fact owe the debts and whether the amounts of the debts are correct."[74] In the FTC sample, sellers also did not typically include any specifics about the collection history of accounts sold, so that potentially valuable information about interactions of previous collectors with the consumer, written disputes, or attempts at verification of a debt were not forwarded to the debt buyer.[75]

The information (or lack thereof) provided to the debt buyer detailed above should be distinguished from the *documentation* about the account that the debt buyer acquires upon purchasing that debt. The industry calls the documentation that could go along with an account—documents such as monthly statements, contracts, account application, etc.—"media." In the typical transaction, the debt buyer does not receive *any* media regarding the underlying accounts purchased.[76] In its report, the FTC estimated that only 6% of accounts were sold with any kind of media at all.[77] It bears repeating: a miniscule number of these accounts are sold with any documentation about the underlying obligation; the overwhelming majority are sold only with some of the *information* I detailed earlier.

When documentation is provided, it is typically in the form of account statements (in the FTC sample, 6% of accounts), "terms and conditions" documents (also 6% in the FTC

---

[72] *United States v. Asset Acceptance, LLC*, Case No. 8:12-cv-00182-JDW-EAJ, *Consent Decree* at 11, http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf. *See also id*. at 13 (providing specific disclosure language).
[73] FTC DEBT BUYER REPORT, *supra* n. 1 at 37.
[74] *Id*.
[75] *Id*. at 36. The FTC believes that when selling to a subsequent debt buyer, "initial debt buyers generally do not discard any information they receive from the original creditor, but also that they typically do not supplement the information they provide to secondary debt buyers to reflect their experience in collecting on debts." *Id*. at 37.
[76] Robert J. Hobbs & Rick Jurgens, Nat'l Consumer Law Ctr., THE DEBT MACHINE: HOW THE Collection Industry Hounds Consumers and Overwhelms the Courts (2010), *available at* http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf; Rachel Terp & Lauren Bowne, PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now (2011), http://www.defendyourdollars.org/pdf/Past_Due_Report_2011.pdf.
[77] *Id*. at 35 n. 150. It is important to note that this number only reflects the information the FTC was able to gather for this report and is not necessarily representative of the market. Specifically, the FTC requested information from the nine largest debt buyers at the time of the request for accounts purchased between March through August 2009 and for purposes of calculating this percentage, the majority of the information (87%) came from two debt buyers. *Id*. at A-6, 35 n. 149.

sample), and account applications (less than 1% of accounts in the FTC sample).[78] As might be expected, whether documentation is provided depends highly on the particular portfolio of accounts sold. The FTC found that "[o]nly 13% of the portfolios contained any account documents, but overall within this set of portfolios, documents were received for 90% of the accounts."[79]

When not transferred with the purchase, documentation may be available from the original creditor. Several issues severely limit the availability of documentation to debt buyers, and may make it impossible for a debt buyer to ever hope to obtain documentation on an account. First, the purchase and sale contracts between original creditors and debt buyers govern whether media can ever be transferred, how much of it, and the cost to the debt buyer. Second, depending on where in the "assignment chain" a debt buyer is—that is, how many other debt buyers are between them and the original creditor—the debt buyer has no right to obtain media from the entity that possesses it. Finally, original creditors are only required by federal regulations to keep account documentation for two years, and apparently some of them do discard or stop keeping track of account documentation such that the documentation may no longer exist when the debt buyer seeks to obtain it. I discuss these issues in more detail below.

Debt buyers purchasing directly from an original creditor are limited in the amount of media they may receive. In their review of debt purchasing contracts, the FTC found that the contracts generally allowed debt buyers to request between 10-25% of documentation in a given portfolio for free, with a time limit on the request between six months and a year.[80] If a buyer wants media on more accounts, they must pay a charge of $5 to $10 per document.[81] The FTC found that post-purchase, "debt buyers obtained account statements . . . for 6% of accounts, account applications for 6% of accounts, and terms and conditions documents for 8% of accounts. Payment history documents and affidavits each were obtained for less than 1% of accounts, as were all other types of documents combined."[82] At least in some contracts, debt buyers cannot request documentation on more a small percentage of accounts during any given month—2.5% of accounts in most contracts—and in either event, there was no liability if the seller failed to provide any media.[83]

---

[78] FTC Debt Buyer Report at 35-36. Applications in particular may be difficult to obtain, as it appears that most creditors do not keep credit card applications originated electronically or via phone. [cite to commentary submitted to FTC]
[79] *Id*. At least one debt buyer admitted to the FTC that the majority of the documentation they obtain by "requesting them from the reseller after the time of purchase." *Id*. at 37.
[80] *Id*. at 39.
[81] *Id*. at 40.
[82] *Id*.
[83] Agreement between Chase Bank, NA and Palisades Collection, LLC at 13 (Feb. 15, 2008); Credit Card Purchase Agreement between Platinum Capital Investments, Ltd. and (blank) at 8 (July 2012);

For debt buyers purchasing from resellers, the problem is compounded. Figure 3 is a graphical representation of the "chain of assignment" when a debt is resold. The issue here is that subsequent purchasers have no contractual relationship to the original creditor, and thus cannot require the original creditor to provide them with account documents.[84] Instead, subsequent purchasers can only go back to the debt buyer/reseller they purchased from and request that they go back to who they purchased from, etc., until the request reaches the original creditor.

Whether this can be done at all depends first on the agreements between the original creditor and the reseller as well as between the reseller and the subsequent purchaser. The cost is also likely to increase, as subsequent purchasers may have to pay a fee to the reseller that is large enough to cover their costs as well as the costs the original creditor requested in the contract.[85] Many of the original creditor contracts in my possession contain language to the effect that "[s]eller shall have no obligation to retrieve or provide any documents to any assignee of the Purchaser without Seller's prior written consent."[86] I found similar language in resale contracts; that is contracts between a debt buyer acting as a reseller and another debt buyer.[87] Even more pernicious, a number of contracts forbid the subsequent purchaser from even contacting the original creditor without the reseller's express written

---

Account Purchase Agreement between Chase Bank USA, NA and Global Acceptance Company, LP at 9 (Dec. 22, 2010), available at https://www.dropbox.com/sh/1kls3crton8042a/CkXElDYl2E. *See also* Wells Fargo Bank v. Purchasers Advantage, LLC (June 21, 2011) (limiting request of documents that can be made to pertain to 100 accounts per month), available at https://www.dropbox.com/sh/1kls3crton8042a/CkXElDYl2E.

[84] Account Purchase Agreement between Chase Bank USA, NA and Global Acceptance Company, LP at 16 (Dec. 22, 2010) (no third party beneficiaries), available at https://www.dropbox.com/sh/1kls3crton8042a/CkXElDYl2E.

[85] See FTC DEBT BUYER REPORT, at C-25 n. 53 (noting that "Some debt resellers added fees to cover their administrative costs when passing documents up and down the ownership chain.").

[86] *Agreement between Chase Bank, NA and Palisades Collection, LLC* at 13 (Feb. 15, 2008); *Credit Card Purchase Agreement between Platinum Capital Investments, Ltd. and (blank)* at 8 (July 2012) (same language); *Account Purchase Agreement between Chase Bank USA, NA and Global Acceptance Company, LP* at 9 (Dec. 22, 2010) (same language).

[87] For example, one of the contracts between two debt buyers contains the following:

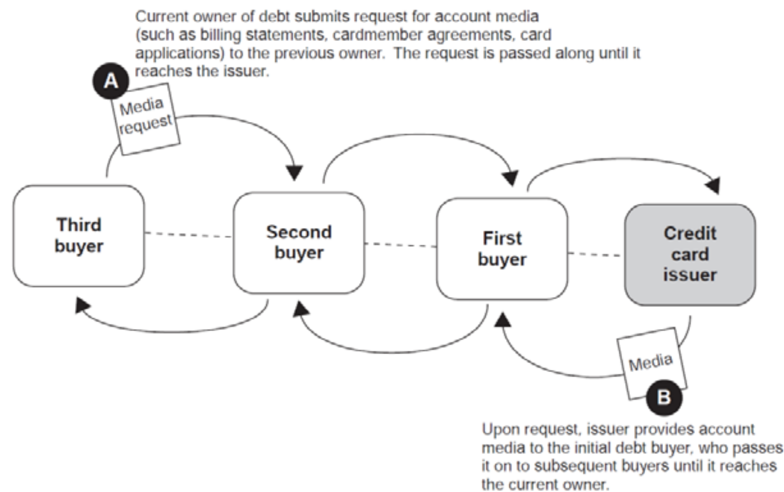
> Seller makes no guaranty that account applications, account statements, affidavits of debt, or any other documents ('Account Documents') shall be able to be provided. . . . Generally, once requested, delivery of Account Documents can take 120 days or more, if available. In many instances, the original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

Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners v. CUDA & Assoc. 5 (April 18, 2008) (regarding the sale of 70 accounts totaling $702,172.54 in face value of debt owed by residents in Connecticut).

permission,[88] and others "expressly prohibited a debt buyer from reselling any documents previously acquired from a creditor when reselling debts."[89]

The relay that must occur between debt buyers in the chain and the original creditor in order to obtain documents for some of the accounts sold is complicated to say the least. The consequence of all of this of course, is that it will likely be extremely difficult—not to mention time consuming and costly—for a debt buyer to obtain account documentation if they did not obtain it with the original contract. It will become more and more difficult as debt is sold and resold without the documentation.[90]

Figure 3 – How Account Information is Obtained by Subsequent Buyers of Debt[91]



Finally, another problem that arises for debt buyers seeking documentation on an account they were assigned is whether the documentation is kept by the original creditor for a sufficient amount of time after the assignment. A number of the agreements I have contain specific time limits ranging from one to three years after which sellers will not provide

---

[88] *See, e.g.*, *Avid Accounts Receivable Purchase Agreement between Unifund CCR Partners v. CUDA & Assoc.* at 3 (April 18, 2008) ("Under no circumstances shall Buyer be permitted to contact the originator or prior owner of any Receivable without first receiving Seller's express written consent, which consent may be withheld in its sole discretion."), available at https://www.dropbox.com/sh/1kls3crton8042a/CkXElDYl2E.
[89] FTC DEBT BUYER REPORT at C-25 n. 53.
[90] It is also unclear whether a bank sharing documentation with a purchaser of its accounts violates privacy laws where the bank knows the affiliate is obtaining the information in order to forward it to a subsequent buyer. Virtually all banks privacy policies detail that they will share information with affiliates—the purchaser—but it is not clear whether the downstream sharing could be a violation of Graham-Leach Bliley. See http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act
[91] Figure from GAO DEBT COLLECTION REPORT at 45.

documentation.[92] The FTC's analysis of the industry supports this, finding that the majority of the contracts they examined "specified a date beyond which the credit issuer was no longer obligated to provide any account documents to the debt buyer;" often two to three years after the accounts were sold.[93] The collections industry is aware of these documentation problems, so much so that one of its main trade associations has listed this issue among the top five issues they would like to see Congress or regulatory agencies tackle.[94] This is perhaps the reason why so many contracts contain language relieving the seller of an obligation to maintain documents or provide them.[95]

Using the FTC's data and making every possible assumption and all possible inferences in support of the idea that debt buyers obtained media for the accounts they purchased, the maximum percent of accounts for which any piece of information was sought was 23%.[96] To calculate this percentage, I assumed that at no time did a debt buyer request two documents for the same account.[97] Combining that percentage with the 6% of accounts that were sold along with documentation and making the same unlikely assumption, I estimate that debt buyers in the FTC study did not obtain *any form* of documentation for 71% of the accounts they acquired.[98] The FTC examined 90 million accounts in their study, but they only obtained information about whether an account had or did not have media for a small

---

[92] See, e.g., Wells Fargo Bank v. Purchasers Advantage, LLC at 8 (June 21, 2011) (1 year); Purchase Agreement between Chase Bank USA, NA and Global Acceptance Company, LP at 8 (Dec. 22, 2010) (3 years); Credit Card Purchase Agreement between Platinum Capital Investments, Ltd. and (blank) at 8 (July 2012) (3 years); Turtle Creek Assets, Ltd., by and through its general partner Forward Properties International, Inc. and Pasadena Receivables, Inc. at 8 (July 13, 2009) (three years).

[93] FTC DEBT BUYER REPORT at C-12-13 (as an example, they quote one contract as stating that "Nothing … shall create an obligation on the part of Seller to maintain any current servicing relationships or system of record … Buyer understands that at any time following three years after each Closing Date Seller may cease having the ability to obtain any Account Document using commercially reasonable efforts.").

[94] ACA Int'l, THE PATH FORWARD: ACA INTERNATIONAL'S BLUEPRINT FOR MODERNIZING AMERICA'S CONSUMER DEBT COLLECTION SYSTEM 17 (April 2011), http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf.

[95] *See, e.g.*, "Seller makes no guarantees as to the availability of applications, statements, records or copies of previous payment checks on any account." FTC Debt Buyer Report at C-13. "There is no assurance that any Account Documents will be available." *Id*.

[96] The two firms that submitted information on 85% of the accounts calculated here did not reveal their sampling methodology for choosing accounts or portfolios that they would include as being part of the sample. As the FTC notes, this "suggest[s that] the submitted information represented all of the portfolios for which any documents were obtained post-purchase." FTC DEBT BUYER REPORT, *supra* n. 1, at T-15. If so, the figures reported could be highly inflated.

[97] This is highly improbable, given the likelihood that these documents were requested for purposes of litigation and if so, more than one document would likely be requested. [cite FTC rpt footnote on this].

[98] Here I have just added 23% to 6% and assumed that debt buyers obtained documentation for all of these accounts. As stated earlier, this number is likely overinclusive.

subset of 3.9 million accounts.[99] As mentioned earlier, this subset was chosen by the debt buyers themselves.[100]

C. Contract language in the sale of consumer debts

Delinquent accounts are sold through purchase agreements; contracts specifying the relationships between the parties. Thousands of debt collection lawsuits are filed every day in state courts across the country, most of them filed by debt buyers. One might expect that since purchasers of debt have the burden of proving they own the debt they are suing on, that we might have a broad range of contracts to look at and compare. Nothing could be further from the reality. In this section, I draw from the FTC's Debt Buyer Report as well as my own collection of 28 debt purchasing contracts to describe the features of these contracts.[101]

My contracts come from public domain and were either found through news sources or consumer lawyers who were able to get them released in litigation.[102] I have been accumulating them for over past year, and despite assiduous searching, have only been able to procure 28. There are probably a few reasons for this. First, most of this litigation happens in small claims or other state courts which generally do not make their dockets easily accessible. Second, the overwhelming majority of cases end in default judgments and so no evidence of ownership is ever requested. Finally, anecdotally, debt buyers fight to prevent the release of any underlying contracts citing trade secrets.[103]

In December 2009, the FTC issued orders to the nine largest debt buyers in the United States requesting a variety of information.[104] The orders "required that the recipients produce extensive data about their business practices and how they receive, acquire, and transfer information about consumer debts."[105] Ultimately, most of the information the FTC analyzed came from six of the largest debt buyers.[106] The FTC requested copies of contracts purchased from March through August 2009 and allowed respondents to produce one example of each type of contract.[107] The debt buyers chose the contracts they provided;

---

[99] FTC DEBT BUYER REPORT, supra n. 1, at 35.
[100] *See supra* n. 96.
[101] I should note that I also have a small collection of "Bills of Sale" among creditors and debt buyers. Some of them allude to the nature of the sale as being "as is" but tend to refer to the agreement governing the transaction which I do not have.
[102] Not all contracts are signed and some may not have been involved in a deal. They are available at [put public URL here].
[103] It seems that in many circumstances a case will be dismissed if it looks like they might have to release the contract.
[104] FTC Debt Buyer Report at 7.
[105] *Id.* at 8.
[106] One debt buyer exited the market in the middle of the collection period and two others specialized in the purchase of bankruptcy debt. *Id.* at 8-9.
[107] *Id.* at 35, C-1.

they were not a random or representative sample of the contracts the debt buyer had entered into or of the contracts in the industry.[108] Nonetheless, the roughly 350 contracts that the FTC examined represent the best sample of these contracts available.

The Commission found that some of the contracts it examined "revealed that both sellers and buyers knew that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on accounts."[109] The Commission noted that "[t]here was generally no post-purchase remedy available to buyers when accounts had missing or inaccurate data."[110] "FTC study is representative of the industry as a whole."[111]

The FTC quoted examples of language disclaiming the accuracy of the underlying information on the contracts it studied. For example, "Buyer shall have no right, whatsoever, to make any claim against Seller should the actual unpaid balance of any Loan be different from the Current Balance of such Loan set forth in the Loan Schedule delivered to the Buyer in connection with the sale of such Loan."[112] Only rarely, the FTC found, did the contracts include affirmative representations, such as "SELLER represents and warrants that each Account is enforceable for its full principal balance … and is the legal, valid, and binding obligation of the maker thereof."[113] It is important to note that the FTC did not examine a representative sample of consumer debt contracts. What the FTC studied were about 350 contracts that were chosen by the debt buyers.[114]

My small and also by no means representative sample of contracts is very much in line with the FTC findings. Similar to the FTC, the overwhelming majority of the contracts I have contain at least some general quitclaim language, but not all of them do. A handful contain quitclaim language but also some affirmative representations as to material aspects—e.g., balance—of the accounts sold.[115] The oldest contract contains one of the most complete

---

[108] *Id*. at C-1.
[109] *Id*. at C-7-8. The FTC posited that "[i]n some instances, debt buyers may have been able to acquire, at a later date, particular pieces of account level data that were missing at the time of sale. In other instances, data missing from the account records at the time of sale may not have been recoverable." *Id*.
[110] *Id*.
[111] Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, FTC/CFPB Life of a Debt Panel 1: Information Available to Debt Collectors at Time of Assignment of Sale (June 2013), [link to URL when available].
[112] *Id*. at C-8-9.
[113] *Id*. at C-9.
[114] *Id*. at C-1. "Respondents were permitted to produce one example of each type or variety of responsive contract, and the submissions suggest that "type or variety" was interpreted in a variety of ways, such that many of the sellers from whom debt buyers purchased portfolios were not represented among the contracts submitted." *Id*.
[115] For example, in one contract the Seller represents and warrants that

representations, including that the account list "is accurate and complete in all material respects, and at any time the Buyer requests an Account Schedule list of Accounts and Additional Accounts, such Account Schedule will, as of its date, be accurate and complete in all material respects.[116]

Quitclaim language is frequently used in real estate transactions.[117] In real estate transactions, however, quitclaim deeds are most often used by people who know each other.[118] Conveyance of property by a quitclaim deed in a real estate transaction "means that the person who signs the deed is conveying whatever interest—if any—he or she has in the property . . . If the person doesn't own an interest in the property, the recipient gets nothing" and has no recourse against the seller.[119] Article 2 of the Uniform Commercial Code contemplates that in transactions for the sale of goods, these words mean that all implied warranties are excluded in the sale.[120] Here the quitclaim language seems to be a way to absolve the seller of liability from any inaccuracies or other problems with the underlying accounts they are selling. It is not surprising to see this language in a contract

---

> Each Account included in the Account Purchase is the legal, valid and binding obligation of the Debtor and is enforceable in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws, now or hereafter in effect, affecting the enforcement of creditors' rights in general and except as such enforceability may be limited by general principles of equity (whether considered in a suit at law or in equity).

Asset Purchase and Forward Flow Agreement Among Jefferson Capital Systems, LLC, "Seller," Midland Funding, LLC, "Buyer," and Encore Capital Group, Inc. at 13; Purchase and Sale Agreement between *Global Acceptance Credit Company, LP and RAB Performance Recoveries, LLC* (Feb. 18, 2011) ("To the best of Seller's knowledge each Account Balance being sold represents the Original Creditor's balance less any payment(s) received by the originating Creditor or subsequent owner and such Account Balance does not include post charge-off finance charges, interest, fees and the like of each Account(s)."). *See also Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Palisades Collection, LLC*, at 5 (Feb. 15, 2008); *Household Receivables Acquisition Company II and Metris Receivables* § 4.02(a)(ii) ("as of the Closing Date with respect to the Initial Accounts and as of the related Additional Cut-Off Date with respect to Additional Accounts, Schedule 1 to this Agreement, as supplemented to such date, is an accurate and complete listing in all material respects of such Accounts, and the information contained therein supplied by HRAC II with respect to the identity of such Accounts and the Receivables existing thereunder is true and correct in all material respects").

[116] Household Bank (SB), National Association and Household Receivables Acquisition Company II, Second Amended and Restated Receivables Purchase Agreement § 4.2(a)(vi) (July 1, 2002). That contract specifies that the sale is made "without recourse" but does not also disclaim other warranties.

[117] Black's Law "quitclaim deed" ("A deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid."); American Law Institute - American Bar Association Continuing Legal Education, *Modern Real Estate Transactions: Sample Purchase and Sale Agreement*, SU006 ALI-ABA 83, July 18-20, 2012.

[118] Sean Wilken, Theresa Villiers, THE LAW OF WAIVER, VARIATION AND ESTOPPEL, 2nd ed. (2002) [get pin cite].

[119] Mary Randolph, DEEDS FOR CALIFORNIA REAL ESTATE, 8th ed. 72 (2010).

[120] Uniform Commercial Code § 2-316(3)(a). Note that these contracts do not fall under the UCC.

per se; it is perfectly natural for the seller to want to protect itself from liability as it sheds these assets. But the context of consumer debt sales is not the same as a plain vanilla contract. Those sales are subject to the FDCPA, a strict liability statute—with many state analogs— interpreted from the point of view of the effect of an action on the "least sophisticated consumer," described in Part II infra.[121]

I focus my discussion below on a feature common to the majority of the agreements I have collected and the FTC examined, those containing some form of what I have called "quitclaim language," disclaimers of all warranties or representations and sales of accounts "as is." I separate these contracts into two broad types of quitclaim language—which I call specific and general.

1. General Quitclaim Language

In the agreements the FTC examined, "sellers generally disclaimed all representations and warranties with regard to the accuracy of the information they provided at the time of sale about individual debts—essentially selling debts, with some limited exceptions, 'as is.'"[122] The vast majority (20) of the contracts I have in my possession have similar "general" quitclaim language. For example, this language is included in multiple agreements in my possession:

> The charged-off accounts are being sold "as is" and "with all faults", without any representation or warranty whatsoever as to either condition, fitness for any particular purpose, merchantability or any other warranty, express or implied, and seller specifically disclaims any warranty, representation, oral or written, past or present, express or implied, concerning the charged-off accounts . . . .[123]

---

[121] *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (A court evaluating debt collection letters must view them "through the eyes of the unsophisticated consumer"); *Larsen v. JBC Legal Group, P.C.*, 533 F.Supp.2d 290, 302 (E.D.N.Y. 2008) (holding that the test for determining whether a collection notice violates the FDCPA is "an objective standard, measured by how the 'least sophisticated consumer' would interpret the notice received from the debt collector."); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del.1991) ("The 'least sophisticated debtor' standard is an objective standard. The question is not whether these plaintiffs were deceived or mislead [sic], but rather whether an unsophisticated consumer would have been mislead [sic]."); *Kimber v. Federal Financial Corp.*, 668 F. Supp 1480 (M.D. Ala. 1987) ("to be deceptive a representation need not be expressed and it need not be obvious to everyone; rather, as previously observed, the representation is deceptive… if it has the mere 'tendency or capacity to deceive' the 'least sophisticated consumer.'").

[122] FTC DEBT BUYER REPORT at iii, 25. The FTC opined that this fact "does not necessarily mean that information inaccuracies were prevalent, but it does raise concerns about how debt buyers handled purchased debts when such inaccuracies became apparent, and for which they had no recourse available from the seller." *Id*. at iii.

[123] *Loan Agreement between Chase Bank USA and Global Acceptance Credit Company in December 2010* (same language found in undated agreement between Chase and Midland Funding that refers to "Washington Mutual" receivables) (all of this language was capitalized in the original). There are

The agreements with this language typically include one or more representations that go to the information provided about the accounts. A typical one is be that "seller has good marketable title" to the accounts and that "[e]ach of the Charged-off Accounts has been maintained and serviced by Seller in compliance with all applicable state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Billing Act."[124] However, none of the representations refer to the account balances, interest rates, dates of last payment, or any other material information that the debt buyer would have to represent to the consumer when seeking to collect from them.[125] In addition, in the case of a debt buyer reseller, the contract sometimes includes representations that the original creditor complied with applicable laws, but does not make similar representations about compliance with the laws while the reseller owned the accounts.

2. Specific Quitclaim Language

The specific language is contained in two of the contracts in my possession as well as in an indeterminate number of the contracts the FTC examined.[126] These contracts specifically disclaim the accuracy of specific material representations being made about the accounts sold. Some examples of the language in these contracts includes sentences like "seller makes no representations as to . . . the accuracy or completeness of any information provided by the seller to the buyer, including without limitation, the accuracy of any sums shown as current balance or accrued interest amounts due under the loans [or] any other

---

some variations. For example, one contract does not contain "as is," "no representations" language, but instead states "No representation as to the character, accuracy or sufficiency of the information furnished to the Buyer has been made by the Seller, either expressly or impliedly, except that the Seller warrants that the Pool shall not include Unqualified Accounts." *Platinum Capital Investments, Ltd., Closing Statement Lot Fresh Charged-Off Account Resale*, 2011 at 3 (unqualified accounts are ones that have been classified as being in bankruptcy, where the accountholder is deceased, the account was made by fraud, or there was a prior settlement/paid/satisfied). Another states that

> Wells Fargo will sell and transfer the Accounts to Buyer without recourse, and without any express or implied representation or warranty, except as provided in this Agreement. Except as specifically set forth in this Agreement, Wells Fargo has made no other representations with respect to any of the Accounts or with respect to the completeness or accuracy of any Account Documents relating to an Account.

Wells Fargo at 6.

[124] Account Purchase Agreement dated December 22, 2010, between Chase Bank USA, NA and Global Acceptance Credit Company, LP (on file with author).

[125] There is one exception. One of the accounts in my possession includes general quitclaim language as described here but also an explicit representation that "Each Charged-off Account is enforceable for the full Unpaid Balance as reflected on Exhibit D and is the legal, valid and binding obligation of the Cardholder, enforceable in accordance with its terms and not subject to offsets or defenses. For each Charged-off Account, Seller will provide a breakdown of each component of the Unpaid Balance (principal, interest, fees, etc.)." *Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Palisades Collection, LLC*, at 5 (Feb. 15, 2008).

[126] Pincite to FTC report.

matters pertaining to the loans."[127] That same contract also states that the "Buyer agrees that Seller has not undertaken to correct any misinformation or omission of information which might be necessary to make any information disclosed to such buyer not misleading in any respect" and that "the existence of an evidence of indebtedness . . . shall not be deemed to imply that the debt evidenced thereby is enforceable."[128]

Multiple contracts examined by the FTC specifically disclaimed the enforceability or collectability—in other words, the legality—of the debts they were selling. A common disclaimer according to the FTC report was the following:

> Buyer acknowledges and agrees ... Bank has not and does not represent, warrant or covenant the nature, accuracy, completeness, enforceability or validity of any of the Accounts and supporting documentation provided by Bank to Buyer, and, subject to the terms of this Agreement, all documentation, information, analysis and/or correspondence, if any, which is or may be sold, transferred, assigned and conveyed to Buyer with respect to any and all Accounts is sold, transferred, assigned, and conveyed to Buyer on an AS IS, WHERE IS basis, WITH ALL FAULTS.[129]

(original emphasis). In addition, some of the contracts examined also stated "that the provision of account documents could not be relied upon to establish the outstanding balance of an account or that the account represented a valid and collectible debt."[130] And that "[T]he existence of Account Documents shall not be deemed to imply that the debt evidenced by the Account Documents is enforceable."[131]

The argument in sections 1 and 2 *supra* applies particularly well to contracts containing similarly explicit language. Nonetheless, in Part II I argue that the general quitclaim language described below is not materially different from the language quoted above.

D. Affidavits, Business Records, and Proof in Court

[To be written: section exploring the types of affidavits that are used in these cases and whether they satisfy evidentiary rules: best evidence, business records, non-conclusory assertions, etc. Discuss robosigning issues in this context and tie in to mortgages]

---

[127] FIA V. CACH AGREEMENT *supra* note 17. FIA Card Services was previously MBNA Bank and is now part of Bank of America. Federal Deposit Insurance Corp., *FIA Card Services, National Association*, http://www2.fdic.gov/idasp/confirmation_outside.asp?inCert1=33318.
[128] Id.
[129] FTC DEBT BUYER REPORT at C-14 (noting that this language was found in "numerous spot sales of bank receivables; numerous spot resales of various consumer debts, including private label credit card accounts").
[130] *Id*.
[131] *Id*. at C-13 (spot resale of credit card accounts).

II. Are these collections illegal?

Part I described how little information and documentation debt buyers have about the debts they purchase. The arguments I make in this section are based on the contracts described in Part I.C. They will not apply to every consumer account purchased by a debt buyer; however, if the FTC findings are any indication, they will apply to a large number of them.[132] To simplify matters, I will lay out the facts on which my argument relies.

The debt buyer in this scenario purchases a portfolio of accounts from an original creditor or reseller debt buyer. The purchase and sale agreement between the parties includes either specific or general quitclaim language. The debt buyer does not obtain media on a portion or on all of the accounts, either at the time of purchase or before commencing a lawsuit.[133] Media refers to documents from the original creditor that corroborate material facts about the debt that the debt buyer has otherwise received via a spreadsheet. At a minimum, I am referring to account statements showing the amount owed, date of last payment, and contractual interest rate if any is claimed.[134] In other words, documents that would give the debt buyer some certainty that they have the basis for making a statement such as: "You owe $1,500, plus 10% interest, and you have not paid since January 15, 2011" to the consumer. This, or a statement like this, is the representation that the debt collector will make to the consumer either via either letter, phone, or through a lawsuit.[135] In making these statements, the collector seeks to cause the consumer rely on them so that she will pay the balance owing or some portion of it.

The first argument in this section is that debt buyers violate the FDCPA when they seek to collect from a consumer whose account was purchased through an agreement that contains quitclaim language—either specific or general—without first verifying that all material information pertaining to that account is correct. I also argue that where it turns out that any of the material information communicated to the consumer was incorrect, the buyer may be liable under a fraudulent misrepresentation claim at tort law. Finally, I argue that collection attorneys also violate the FDCPA when seeking to collect from a consumer and that when an attorney brings a lawsuit on a consumer account based on a contract

---

[132] *See supra* note [] (estimating that debt buyers lacked documentation/media for 71% of the accounts that were reported to the FTC).

[133] Obtaining it after the lawsuit has been filed without having explicitly stated in the complaint that the factual contentions in the complaint "will likely have evidentiary support after a reasonable opportunity for further investigation," is not enough. *See* discussion at Part III.B.2 *infra*.

[134] These are the basic elements of the debt buyer's claim: the amount owed to the original creditor establishes the damages, the date of last payment is needed for calculation of the statute of limitations, and the interest is needed if any pre-filing interest will be sought. For a discussion of why the statute of limitations in important in this context, see Part III.B. *supra*.

[135] These are all "communications" under the FDCPA. 15 U.S.C. § 1692a(2) ("The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium.")

containing quitclaim language without communicating that fact to the court, they are misrepresenting facts to the court in violation of state and bankruptcy analogs to Fed. R. Civ. P. 11.

1. Fair Debt Collection Practices Act violations

In this section, I argue when a collector who acquired a debt through a contract with quitclaim language and who does not does not obtain any documentation regarding that debt before they attempt to collect, she makes misleading and deceptive statements under the FDCPA when she communicates with the consumer.[136] I first provide some background on the FDCPA, then explain my argument, and finally discuss potential defenses that might be raised by debt collectors.

The FDCPA defines permissible and impermissible collection practices. It prescribes how collectors may speak to debtors (cannot use or threat of force, obscene language, etc.), how they may contact them (at reasonable times by phone, no postcards), how and when they must identify themselves to debtors or third parties; how often they may contact a debtor (cannot harass), and what they may communicate to a debtor about the debt (cannot mislead, deceive, or misrepresent).[137] As relevant to this argument, the FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt."[138] The Act lists a number of specific instances of false, deceptive, or misleading representations, which is not exhaustive.[139]

a. Collecting directly from the consumer

"A practice is considered deceptive if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[140] "[A] collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate."[141] In other words, "if it has the mere 'tendency or capacity to deceive' the 'least sophisticated consumer.'"[142] Liability for

---

[136] I am assuming here that the collector does not tell the consumer that she is not truly confident that the information she is giving the consumer is correct.
[137] This is not an exhaustive list. *See generally* 15 USC § 1691 et. seq.
[138] 15 USC § 1692e ("False or misleading representations").
[139] 15 U.S.C. § 1692e(2); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62 (3d Cir. 1993) ("The sixteen subsections of section 1692e provide a nonexhaustive list of practices that fall within the statute's ban.").
[140] FTC Debt Buyer Report at 4 (quoting Federal Trade Commission Policy Statement on Deception, appended to In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 174–83 (1984)) (internal quotation marks omitted).
[141] *Russell v. Equifax A.R.S.*, 74 F.3d 30, 35 (3d Cir. 1996); *Federal Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007).
[142] *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1489 (M.D. Ala. 1987) (citing *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985); *Hudspeth v. Capital Mgmt. Servs., L.P.*, 2013 U.S. Dist.

deceptive or misleading representations is proved through an objective test.[143] "The question is not whether [a particular set of plaintiffs] were deceived or mislead [*sic*], but rather whether an unsophisticated consumer would have been mislead [*sic*]."[144] So who is this "least sophisticated consumer"? She "is not a dimwit, but rather uninformed, naive, and trusting."[145] While this legal fictional character lacks the "sophistication of the average, everyday, common consumer," she is "capable of making basic logical deductions and inferences."[146]

When a collector has obtained a particular consumer account through a contract that includes quitclaim language, the collector is making misleading representations to the consumer when they assert, in the example above, "You owe $1,500, plus 10% interest, and you have not paid since January 15, 2011." In making this statement (or similar statements about material facts regarding the debt), the debt collector is misleading the consumer because they are representing to the consumer that they have full confidence in the statements they are making.[147]

Assume that the underlying debt sale agreement contains specific quitclaim language; that is, language such as "seller makes no representations as to . . . the accuracy or completeness of any information provided by the seller to the buyer, including without limitation, the accuracy of any sums shown as current balance or accrued interest amounts due under the loans [or] any other matters pertaining to the loans."[148] By this language, the seller expressly disclaimed all representations as to the "accuracy or completeness"[149] of the information provided. This means that all the information the buyer has about the consumer's account—how much is owed, the interest rate applicable, etc.—is subject to these qualifications, and that the buyer has reason to doubt their veracity. When the buyer communicates with the consumer about the debt, they are misleadingly portraying to the consumer that the buyer is confident that the information she is providing is correct. Naturally, the buyer does not explicitly express her level of confidence in the information to the consumer, but this is what is implied when the buyer represents to the consumer via

---

LEXIS 25260 at *10 (D. Colo. Feb. 25, 2013) (collecting published cases applying the standard in the, Third, Sixth, Ninth, Seventh, and Eleventh Circuits and an unpublished case by the Tenth Circuit).

[143] *See, e.g.*, *Swanson v. Southern Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1227 (9th Cir.1988); *Jeter*, 760 F.2d at 1175.

[144] *Beattie v. D.M. Collections, Inc.*, 754 F.Supp. 383, 392 (D. Del. 1991).

[145] *Hudspeth v. Capital Mgmt. Servs., L.P.*, 2013 U.S. Dist. LEXIS 25260 at *11 (D. Colo. Feb. 25, 2013) (internal citations and quotations omitted).

[146] *Id.* (internal citations and quotations omitted).

[147] Note that the Restatement (Second) of Torts describes a fraudulent misrepresentation as when the maker "does not have the confidence in the accuracy of his representation that he states or implies" or "knows that he does not have the basis for his representation that he states or implies." § 526.

[148] FIA V. CACH AGREEMENT *supra* note 17.

[149] *Id.*

letter, phone, or a lawsuit that the consumer owes a very precise dollar amount, made the last payment on a precise date, etc.[150]

This argument gains strength when we consider the heightened standard of care collectors must operate under—the potential violation is viewed through the eyes of the least sophisticated consumer.[151] Few unsophisticated consumers would be aware that when a debt buyer purchased their debt they are doing so with a level of uncertainty as to the information they are buying that varies depending on the underlying contract.[152] Indeed, few judges are aware of this; although the industry itself should be more aware, given the reporting in the trade press.[153] Moreover, as to any particular transaction, it is actually impossible to know, unless the contract has been disclosed. In attempting to collect a debt that has been sold with the strong qualifications of quitclaim language and when not disclosing that language to the consumer, the buyer is taking advantage of "the ignorance of an unsophisticated consumer."[154]

The general quitclaim language described above does not contain an express disclaimer about individual material aspects of the accounts sold, but the previous argument still holds. When a debt buyer is sold a portfolio of accounts "with all faults, without any representation or warranty whatsoever about either condition, fitness for a particular purpose, merchantability or any other warranty," what they are purchasing is information that they are explicitly told they cannot rely on. The "particular purpose" that the information sold is to be used for is well known to the seller: the accounts and the associate information are sold to attempt to collect from the account holder.[155] When purchasing consumer credit card accounts "without representation or warranty" about their condition or ability to be collected (fitness for a particular purpose), debt buyers are purchasing at their own risk. They purchase with warranties as to some of the information: in the example above, that the accounts were maintained in compliance with consumer laws, but decidedly not others—i.e., that any of the material specific information about an account is correct. That is, the debt buyer cannot be confident that the information they need to

---

[150] "To be sure, FFC did not expressly state to Kimber that her suit was not time-barred; nor did the corporation expressly tell Kimber that she had no legal defenses to its claim. But to be deceptive a representation need not be expressed and it need not be obvious to everyone . . ." *Kimber*, 668 F. Supp. at 1489.
[151] *Kimber* 668 F. Supp. at 1488.
[152] *Cf. Kimber* at 1488.
[153] *See* discussion at Part II.C. *supra*.
[154] *Kimber* at 1488.
[155] In fact, at least one contract makes it abundantly clear. "Purchaser represents and warrants to Seller that Purchaser's primary purpose in purchasing Charged-off Accounts is to attempt legal collection of the Unpaid Balances owed on such Charged-off Accounts and is not to commence an action or proceeding against Cardholders obligated under such Charged-off Accounts." Credit Card Account Purchase Agreement between Chase Bank USA, N.A. and Palisades Collection, LLC at 5 (Feb. 15, 2008).

represent to the consumer in order to be able to collect from them—i.e., you owe me $1,500 plus 10% interest and you have not paid since January 5, 2011—is correct. And thus when they tell the consumer that they owe a particular amount at a particular interest, etc., they are making misleading statements.

This is, in a sense, an argument about increased probabilities and "certain uncertainty." The purchaser of accounts sold subject to quitclaim language knows that there is an increased probability that any given piece of information the purchaser has about those accounts will be incorrect.[156] A sale of accounts without this language—or indeed, with affirmative warranty language—might of course, still contain errors. The difference is that when the sale was made with quitclaim language, the buyer is now on notice that the chance of errors is increased, and indeed quite likely. The buyer knows that they cannot be fully confident in the information they have purchased. This "certain uncertainty" becomes more certain as time passes and the number of instances of documentation irregularities grows.

I mention above that the debt buyer, given that it signed the contract purchasing the debt, knows that they cannot be fully certain of the information they are about to relay to the consumer in a communication requesting payment. I need not have gone that far. The FDCPA is a strict liability statute intended to be "liberally construed to protect consumers."[157] Scienter is not an element of proving an FDCPA violation.[158] Misleading or deceptive representations made as a result of carelessness or negligence are nevertheless still actionable under the FDCPA.[159] All a court needs to find is that the communications from the debt buyer to the consumer would have been misleading to the least sophisticated consumer, not whether they actually misled anyone. In this case, I argue that they would mislead most reasonable consumers and even lawyers, but this is technically not necessary to find FDCPA liability.

---

[156] American Law Institute - American Bar Association Continuing Legal Education, *Limited Liability Entities 2012 Update: Auriga v. Gatz*, VCU0728 ALI-ABA 667, Jan. 27, 2012 (implying that potential buyers of a property to be sold "as is" and "with all faults" would conduct "necessary due diligence before deciding whether to bid").
[157] *Zortman v. J.C. Christensen & Associates, Inc.*, 870 F.Supp.2d 694, 702 (D. Minn. 2012). For cases holding that the FDCPA is a strict liability statute, *see, e.g.*, *Owen v. I.C. Sys.*, Inc., 629 F.3d 1263, 1271 (11th Cir. 2011), *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011) (internal citations omitted); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 63 (2d Cir. 1993); *Johnson v. Riddle*, 443 F.3d 723, 728 (10th Cir. 2006).
[158] The idea is expressed by one of the FDCPA's main sponsors, as quoted by the Supreme Court in *Jerman*: "certain things ought not to happen, period. . . . [W]hether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." *Jerman*, 130 S. Ct. at 1620 (citing Senate Committee on Banking, Housing and Urban Affairs, Markup Session: S. 1130--Debt Collection Legislation 60 (July 26, 1977)).
[159] "In lieu of a scienter requirement, the FDCPA provides a defense 'if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'" *In re Eastman*, 419 B.R. 711, 729 (W.D. Texas 2009) (citing 15 U.S.C. § 1692k(c)).

Although a strict liability statute, "there is room within the FDCPA for ethical debt collectors to make occasional unavoidable errors."[160] The primary defense available is the bona fide error defense detailed in the Act.[161] "A debt collector may not be held liable in any action brought under [it] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[162] The Supreme Court recently clarified that this provision "do[es] not include mistaken interpretations of the FDCPA."[163] In other words, a mistake of law, such as believing that there was nothing improper done under the scenario detailed above, will not exonerate a debt buyer from liability.[164] A mistake of fact, however, could excuse a violation if the debt buyer's procedures satisfy the statute. In the circumstances described above, it is not clear what 'fact' the debt buyer could allege they were mistaken about that would prevent liability. The debt buyer could not argue that they relied on the representations of the original creditor or reseller debt buyer. "[T]he bona fide error defense does not protect a debt collector whose reliance on a creditor's representation is unreasonable."[165] The whole point of this is that the creditor is not making any representations.

[discuss materiality issues]

b. Attorney violations of the FDCPA

At some point in the life-cycle of a debt, the debt buyer may decide to begin a lawsuit in order to recover from the consumer.[166] In doing so, the debt buyer would typically hire a law firm that specializes in the collection of delinquent consumer accounts.[167] As

---

[160] *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1189 (3d Cir. 2006) (internal quotations omitted).

[161] In addition, the FDCPA also does not impose liability on "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade] Commission" and, after the amendments instituted by Dodd-Frank, of the Consumer Financial Protection Bureau. 15 U.S.C. § 1692k(e). Note however that neither agency has issued an advisory opinion in the last X years. [check on the years, cite].

[162] 15 U.S.C. § 1692k(c).

[163] *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1614 (2010). Prior to *Jerman*, the courts of appeals were divided as to whether the bona fide error defense applied only to "clerical or factual errors" or whether it also encompassed "mistakes of law." *Id.* at 1610.

[164] "Our law is . . . no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law." *Id.* at 1612.

[165] *McCollough v. Johnson, Rodenburg & Lauinger*, LLC, 637 F.3d 939, 948 (9th Cir. 2011) (internal citations omitted).

[166] Jiménez et al. *supra* n. 6.

[167] GAO DEBT COLLECTION REPORT at 24.

mentioned earlier, law firms that regularly engage in consumer debt collection are also subject to the FDCPA, and so the analysis at Part III.B would apply to them as well.[168]

Filing collection lawsuits is a bulk business. An individual collection attorney may file thousands of lawsuits per year; roughly 23 per day if they file cases every week day during the year.[169] Courts are split on the level of involvement and judgment required of a collection attorney when she sends dunning letters to consumers. The Seventh Circuit held in *Nielsen* that an attorney violates the FDCPA's prohibition against false or misleading statements if she is not "meaningfully involved" in the case and does not make a "considered, professional judgment" before they send a dunning letter.[170] The court reasoned that "a delinquency letter from an attorney conveys authority and implies that the attorney supervised or actually controlled the procedures by which the letter had been sent."[171] The 'least sophisticated consumer' standard is what compels the requirement that an attorney be "meaningfully involved" in the sending of a letter, "to the least sophisticated consumers . . . an attorney's signature implies that an attorney directly controlled or supervised the process through which the letter was sent, and that the signing attorney has personally considered, and formed a specific opinion about, the individual debtor's case."[172] Given that the attorney in that case had not done so, his letter was effectively "not from him in any meaningful sense of the word," and thus it was a deceptive means to collect under the FDCPA.[173] Other courts have agreed.[174] The Supreme Court denied certiorari on the issue

---

[168] *Heintz v. Jenkins*, 514 U.S. 291 (1995) (holding that the FDCPA's definition of debt collector includes attorneys who regularly, through litigation, attempt to collect consumer debts).

[169] One New York law firm files roughly 80,000 lawsuits per year, roughly 5,700 cases per lawyer on staff. Andrew Martin, *Automated Debt Collection Lawsuits Engulf Courts*, THE NEW YORK TIMES (July 12, 2010), http://www.nytimes.com/2010/07/13/business/13collection.html ("The firm filed 59,708 cases in 2005, 83,665 in 2006, 87,877 in 2007 and 80,873 in 2008, records from [a] lawsuit show."). One study found that in New York City, 26 debt buyers filed 457,322 lawsuits in civil courts from January 2006 through July 2008 and were awarded $1.1 billion in judgments and settlements. Debt buyers prevailed in 9 out of 10 lawsuits, usually by obtaining default judgments. NEDAP, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOW-INCOME NEW YORKERS (May 2010), http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf) [hereinafter Debt Deception]. In 2008, Mann Bracken LLC—a now bankrupt law firm—"had an infrastructure that supported 35,000 lawsuits per month, 20,000 arbitration filings per month and $55 million in collections per month." National Consumer Law Center, THE DEBT MACHINE: HOW THE COLLECTIONS INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 11, July 2010, http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf (quoting declaration of Keith Bolt in support of Chapter 11 petition and first day motions, filed Nov. 20, 2009 in *In re Axiant, LLC*, Del. Bankr., Case no. 09-14118, p. 2.); *see also* Jamie Smith Hopkins, *Md. Court Freezes 900 debt-collection lawsuits*, THE BALTIMORE SUN, July 20, 2011, http://articles.baltimoresun.com/2011-07-20/business/bs-bz-debt-collection-suits-20110720_1_cases-against-maryland-consumers-mann-bracken-debt-collection-lawsuits ("Last year, [Judge] Clyburn dismissed more than 27,000 Maryland cases handled by Mann Bracken after the Rockville debt-collection law firm collapsed.").

[170] *Nielsen v. Dickerson*, 307 F.3d 623, 632, 635 (7th Cir. 2002).

[171] *Id.* at 631.

[172] *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 95 (E.D. N.Y. 2009) [hereinafter *Miller III*].

[173] *Id*. at 633.

of what kind of involvement is required of an attorney before sending a dunning letter earlier last year.[175]

Presumably, at least in the jurisdictions that follow *Nielsen* then, the attorney would need to be at least as meaningfully involved in the process of filing a lawsuit as they would have to be to send a dunning letter.[176] There is evidence that this is not what happens. The first piece of evidence of it is the sheer numbers: how can an individual attorney be in any way meaningfully involved in a case if they are filing 23 cases per day?[177]

One argument made by debt collectors is that they are familiar with the client, their procedures, their contracts, and the like.[178] This argument has been made before and failed.[179] To the extent that many of these cases share a nucleus of fact—for example, all credit card accounts originated by Chase and purchased by a particular debt buyer as part of a specific sale—it is perhaps plausible to believe that an attorney can familiarize herself with the common facts and send form complaints to all of the individuals who fit it. This would likely not satisfy the jurisdictions requiring meaningful involvement—they require a review of the individual's file—but it might seem less problematic.[180] Even so, it is highly unlikely that this is what is happening on the ground.[181] Decisions about whether to sue an

---

[174] *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003) [hereinafter *Miller I*]; *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993 (3d Cir. 2011), *cert denied* 132 S. Ct. 1143 (2012); *Miller III*, 687 F. Supp. 2d at 96; *Dunn v. Derrick E. McGavic, P.C.,* 653 F.Supp.2d 1109 (D. Or.2009). *But see Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009) (allowing attorneys to send dunning letters without meaningful involvement if they put a disclaimer of involvement); *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005) (same).

[175] *Lesher v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993 (3d Cir. Pa. 2011), *cert denied* 132 S. Ct. 1143 (2012).

[176] [list jurisdictions that follow and those that don't]

[177] 5,700 cases per year per lawyer per earlier footnote divided by 260 (number of weekdays in a year). *See also Miller III*, 687 F. Supp. 2d at 100 ("Cohen and Slamowitz conceded the issuance of no fewer than 211 debt-collection letters on July 18th alone, and more than 3,000 such letters in the month of July, 2000."); *Boyd v. Wexler*, 275 F.3d 642, 648 (7th Cir. 2001) (holding that the high volume of mail handled by the attorney debt collector suggested both that he might not have had time to review the file and that he might not remember it accurately).

[178] *See, e.g.*, *Miller III*; [cite others].

[179] *See Clomon*, *Miller III*, 687 F. Supp. 2d at 101-102 (holding that despite the fact that another firm had thoroughly reviewed the matter, collection "attorneys were not absolved of their professional obligations to review independently [the individual's] debt-matter"), *Nielsen* [find pin cites].

[180] *Miller I*, 321 F.3d at 304 (declining to declare a minimum standard for meaningful review, "in part because there may be circumstances where, following discovery, it becomes clear that the attorney's familiarity with the client's contracts and practices would negate the need to review some if not all of the documents plaintiff seeks to require.").

[181] *See, e.g.*, *Avila v. Rubin*, 84 F.3d 222 (7th Cir. 1996) ("Mr. Rubin reviews and approves the general form used on letters [but] does not, however, personally prepare, sign, or review any of the letters sent . . . . This is understandable, for Rubin would probably be in the hospital with a severe case of writer's cramp if he did because some 270,000 such letters go out each year. That, by the way, comes out to 1,062 per working day, 133 per working hour."). "That a law firm is merely renting its letterhead is often evinced by certain facts, including: the use of computer generated form letters; use

individual debtor have to be made at the account level, not portfolio, and they are assigned to attorneys who practice in the local jurisdiction.[182] In some ways, one might say the attorney collector is always dealing with a set of common facts when they represent a debt buyer: their client bought a delinquent consumer debt from someone. But these are far too broad strokes to fully paint the picture.[183] Their client likely purchased dozens if not thousands of portfolios from various creditors or debt buyer resellers.[184] Each of these would be governed by a separate agreement, with different terms. Each of the accounts in a portfolio purchase may also have a differing amount of documentation or information available for the attorney collector to examine.

Multiple lawsuits by attorneys general have alleged that collection attorneys handling thousands of cases per year are not meaningfully involved. The most recent of which is by the California AG, which alleges: that "[a]lthough Defendants' correspondence is signed by an attorney, no attorney has exercised any independent legal judgment in sending the correspondence, and no attorney has even reviewed the consumer's file to determine if the letter is accurate, including accuracy as to the claimed amount due."[185] It is likely that this is happening elsewhere.

The bona fide error defense discussed at II.B.1.a would potentially be available here as well, although as discussed above, it is unclear how the defense might help an attorney under these facts. The other argument that an attorney might make is that a legal pleading is not a "communication" under the FDCPA and thus not covered by the Act.[186] This is unlikely to succeed, however. At least eight circuits have considered the issue, and all but the Eleventh "have recognized the general principle that the FDCPA applies to the litigation activities of attorneys who qualify as debt collectors under the statutory definition."[187]

---

of facsimile signatures; and the high-volume of letters issued." *Miller III*, 687 F. Supp. 2d at 96 (citing *Clomon*, 988 F.2d at 1321 (holding that few, if any, cases in which mass-produced debt collection letters are used will com-ply with the FDCPA)).

[182] This is because the FDCPA requires that a debt collector file a lawsuit in the judicial district where consumer resides. 15 U.S.C. § 1692i(a)(2)(B).

[183] "[M]erely being told by a client that a debt is overdue is not enough." *Miller I*, 321 F.3d at 304.

[184] [Cite to 10ks where public companies disclose how many portfolios they've bought]

[185] Complaint, California v. JP Morgan Chase & Co., Case No. ---, at 3-4, http://oag.ca.gov/system/files/attachments/press_releases/Complaint.pdf. [Add the MN AG complaint, check for others].

[186] *See, e.g.*, *Diaz v. Portfolio Recovery Associates, LLC*, 2012 WL 1882976 (E.D.N.Y. May 24, 2012) (articulating that argument).

[187] *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007). *Compare Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003) (finding that legal pleadings were not communications but relying on subsequently superseded FTC Staff Commentary) with *Goldman v. Cohen*, 445 F.3d 152 (2d Cir.2006) (finding that an initial pleading is a communication under the FDCPA), *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004) (same);*Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432, 446 (6th Cir. 2006); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 232 (3d Cir. 2005);

2. Fraudulent and Negligent Misrepresentation at Tort Law

The same factual scenario described above may also give rise to liability at state law if the representations made by the collector turn out to be incorrect—in other words, if the collector misrepresented material information about the debt.[188] The analysis that follows is based on the Restatement (Second) of Torts; whether it is applicable in a particular state will of course depend on the specific case law in the jurisdiction.[189]

The Restatement defines a fraudulent misrepresentation as one made by someone who "does not have the confidence in the accuracy of his representation that he states or implies."[190] The comments go on to explain that a misrepresentation may be fraudulent even if it is only made "recklessly, careless of whether it is true or false."[191]

Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented.[192]

So here again we encounter a similar probabilistic argument as the one described above. The collector—here and throughout I am referring to the entity, not the individual—is aware that the information about this debt came to be his without any evidentiary basis. That is, the collector has never seen a contract or statements evidencing the debt. The collector also knows that the entity that sold it the account specifically disclaimed material facts regarding that account. When the collector attempts to collect from the consumer and represents to the consumer that she owes a specific amount, the collector knows he cannot "have the confidence in the accuracy of his representation that he states or implies" and

---

Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir.2002); *Addison v. Braud*, 105 F.3d 223, 224 n. 1 (5th Cir.1997). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 502 F. Supp. 2d 686, 692 (N.D. Ohio 2007), rev'd and remanded, 559 U.S. 573 (2010) (recognizing disagreement and agreeing with weight of authority that a pleading is a communication).

[188] In addition, the collector may also be liable under 15 U.S.C. § 1692f(1) in seeking to collect an amount not authorized by law.

[189] *See, e.g.*, Under Kentucky law,

> Fraud through misrepresentation requires proof that: (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation to be false or made it with reckless disregard for its truth or falsity; (4) the defendant intended to induce the plaintiff to act upon the misrepresentation; (5) the plaintiff reasonably relied upon the misrepresentation; and (6) the misrepresentation caused injury to the plaintiff.

Sadler v. Advanced Bionics, Inc., --- F.Supp.2d ----, 2013 WL 898152 (W.D.Ky. 2013). *See also Weston v. Northampton Personal Care, Inc.*, 62 A.3d 947, 1019 (Pa. Super. 2013) (similar).

[190] Restatement (Second) of Torts 526(b).

[191] *Id.* comment on clause (b).

[192] *Id.* comment on clause (b).

"knows that he has not the basis for his knowledge or belief professed by his assertion."[193] The representation here is the amount, interest rate, and other material information about the debt that the collector represents to the consumer. To be liable under tort law, some material information represented by the collector to the consumer must be incorrect; there would be no liability if the collector was reckless in its representations but it turned out they were correct. Liability under tort law would lie for any pecuniary loss caused to the party who justifiably relied on the representation.[194] In a debt collection scenario, a collector who recklessly misrepresented a material fact about a debt to a consumer would be liable for any amounts paid above and beyond what was truly owed.

Liability may also lie for a negligent representation. Someone "who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions" is liable for negligent misrepresentation.[195] The supplier of the information is liable for pecuniary loss to the person who justifiably relies upon it if the supplier "fails to exercise reasonable care or competence in obtaining or communicating the information."[196] The tortious representation that is made here concerns the amount, interest rate, or other material information about the debt that the collector represents to the consumer. The collector is operating in the course of their business and has a clear pecuniary interest in the transaction: if they are a debt buyer collecting in-house, any money paid by the consumer goes directly to their bottom line; if they are a third-party debt collector, they are paid a percentage of the dollar amount recovered from the consumer.

The comments to the Restatement explain that where "the matter is one that requires investigation, the supplier [of the information] must exercise reasonable care and competence to ascertain the facts on which his statement is based."[197] The argument here is that the supplier of the information (the debt buyer or collector) is on notice that the information they were given by the seller may not be correct. The seller unequivocally disclaimed any assurances that the information the collector is about to give to the consumer. In some cases—the specific quitclaim language—the disclaimer is undeniable. But even in the general quitclaim language case I refer to above, the seller is promising the buyer nothing about the accuracy of the information provided. The duty to investigate here arises both because of the uncertainty of the matter—of higher or lesser degree perhaps

---

[193] Restatement (Second) of Torts § 526.
[194] Restatement (Second) of Torts §§ 525, 531. *See also* § 532 ("One who embodies a fraudulent misrepresentation in . . . a negotiable instrument or a similar commercial document, is subject to liability for pecuniary loss caused to another who deals with him or with a third person regarding the article or document in justifiable reliance upon the truth of the representation.").
[195] Restatement (Second) of Torts § 552(1).
[196] *Id.*
[197] Restat. 2d of Torts, § 552, Comment on Subsection (1)f.

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

depending on the wording of the contract and the seller of the debt—and the enhanced duties that a collector faces when collecting a consumer debt.

Where the information provided "concerns a fact not known to the recipient, [the recipient] is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires" and "the recipient is entitled to expect that such investigations as are necessary will be carefully made and that his informant will have normal business or professional competence to form an intelligent judgment upon the data obtained."[198] There may be a factual question of whether information provided by the collector concerned facts not known to the consumer. The consumer may be charged with knowledge of the material facts regarding their debt, even if it has been years since they have received any information about the debt. This will highly depend on the material fact that turned out to be incorrect. If it is the date of last payment for example (such that the consumer has been prejudiced because they did not know they had a statute of limitations defense), there is a good argument that the consumer would not have known this information.[199] The comments go on to say that the supplier of the information "must exercise the competence reasonably expected of one in his business or professional position in drawing inferences from facts not stated in the information."[200] Is it reasonable for a collector purchasing debt from sellers who disclaim all representations to attempt to collect using that information without any underlying documentation? I argue no. The degree of reasonableness would depend on the specific language of the contract, the factual circumstances surrounding its making, and the environment in which the collector is operating. It would be relevant, for example, to know whether there had been previous reports in the press that the particular seller had trouble with its recordkeeping.[201]

There are significant difficulties in proving liability under tort law. The consumer does not typically possess the evidence to know whether any of the specific information regarding their debt is incorrect. The burden to have that information is on the collector, but if all the information it has is what it received from the seller, in a practical sense that information becomes all that is available to any of the parties. In addition, even if a misrepresentation is shown, in order to prove reckless or negligent disregard for the truth of the

---

[198] *Id*. at e.
[199] One might argue that the "least sophisticated" consumer standard should be imported here too.
[200] *Id*.
[201] *See, e.g.*, Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AMERICAN BANKER, March 29, 2012, http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html; Maria Aspan, *Borrower Beware: B of A Customer Repaid Her Bill Yet Faced a Collections Nightmare*, AMERICAN BANKER, March 29, 2012, http://www.americanbanker.com/issues/177_62/bofa-credit-cards-debt-collections-delinquent-robosigning-1047991-1.html. Bank of America owns FIA Card Services, the sellers of the contract I used as an example when describing "specific quitclaim language."

representations, the consumer would have to gain access to the purchase agreement that sold its underlying debt. That is may be possible to do during discovery, but not without difficulty.[202]

3. Rule 11 and Misleading the Tribunal

Lawsuits to collect on consumer debts are almost exclusively filed in state courts.[203] There, the attorneys filing them would be subject to state analogs to Fed. R. Civ. P. 11. Similarly, in the event the consumer initiates a bankruptcy and the debt collector files a Proof of Claim seeking a distribution from the bankruptcy estate, they will also be subject to the Bankruptcy Court's version of Rule 11.[204] I refer to these collectively as "Rule 11." The majority of those lawsuits will become default judgments, in some cases, collectible for decades.[205] In most courts, the default judgment will be obtained on the basis of the bare pleadings alleged by the plaintiff.[206] This means that no one except the attorney herself will have looked at the allegations in the complaint.

Much has been written about the ways in which collectors' use of the courts in this context is problematic.[207] My argument here is narrower: an attorney who seeks to collect on a debt sold through a contract containing quitclaim language may violate Rule 11 when they attempt to do so without (1) first obtaining documentation from the original creditor that verifies the facts alleged in the complaint, (2) disclosing in the complaint that some factual allegations need to be verified and then actually verifying them, or (3) disclosing to the tribunal that the contract that assigned the debt did so with quitclaim language.

Rule 11 states than when filing an action the attorney and their client "certifies that to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*: . . . (3) the factual contentions have evidentiary support or, *if specifically so identified*, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]"[208] (italics added). Sanctions are assessed against

---

[202] Given how few of these contracts have become available, it is fair to say that debt buyers do not like to provide them in litigation.
[203] Many of these cases are filed in small claims courts, though this varies across jurisdictions. *See* DO WE HAVE A DEBT COLLECTION CRISIS?, supra n. 5 (noting that "much of the conversation around collection activity and abuses has focused on the problems in small claims courts" but finding that "[n]ational collection firms are . . . increasingly avoiding small claims courts.")
[204] Fed. R. Bank. P. 9011.
[205] [cite to earlier fn with citations for default judgment numbers]; *Jimenez* et al., *supra* n. 6 at 15.
[206] [cite selection of court rules where that's true] [*but see* cite places like NC or DE where it isn't]
[207] *Id.* at 17-19 (detailing newspaper articles, cases, and reports).
[208] Fed. R. Civ. P. 11. For simplicity, I will describe my argument focused on the attorney filing a state court pleading, but the same could be said in federal court, bankruptcy or otherwise. The same could also likely be said about the courts' inherent authority to sanction parties and their lawyers for improper conduct. *Ingenuity 13, LLC v. John Doe*, Case No. 2:12-cv-8333-ODW(JCx), *Order Issuing Sanctions* at 3 (Dist. Ca. May 6, 2013) (quoting *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001)). *See*

the individual attorney who signs in violation of the rule, not the law firm that employs the attorney.[209] The question is not about the attorney's intent but whether the actions were reasonable under the circumstances.[210]

"Attorneys are under an affirmative duty to insure that the pleadings are reasonable in light of the facts and the law."[211] The rule is not delegable; it "does not provide a safe harbor for lawyers who rely on the representations of outside counsel."[212] A lawyer also cannot simply rely on his client; he "cannot defend himself by arguing that his client made him do so."[213] "If all the attorney has is his client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal otherwise, he has not satisfied his obligation."[214]

---

also State of Mn. v. Midland Funding, LLC, No. 05202011153034, 2011 WL 1909418 (May 19, 2011) (Minn. Dist. Ct.) (Trial Pleading) (alleging that defendant debt buyer has defrauded the courts and requesting court hold defendant in contempt for "unlawful interference" or "deceit or abuse" of the courts under a Minnesota statute).

[209] *Miller III*, 687 F. Supp. 2d at []. "As the [Supreme] Court explained, 'the purpose of Rule 11 as a whole is to bring home to the *individual signer* his *personal nondelegable* responsibility.'" *Id.* (citing *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S.Ct. 456, 460 (1989)) (emphasis added). Val-Land Farms, Inc. v. Third Nat. Bank in Knoxville, 937 F.2d 1110, 1118 (6th Cir. 1991)

[210] An inquiry into a party's conduct under Rule 11 is guided by an objective standard of reasonableness under the circumstances rather than an assessment of the party's subjective intent. *Davis v. Hudgins*, 896 F.Supp. 561 (E.D.Va. 1995) (citing *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir.1986)). "[T]he inquiry focuses on whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified." *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987).

[211] *In re Faires*, 123 B.R. 397, 404 (D. Col. Bk. Ct. 1991). This does not prevent an attorney from "advancing innovative claims and contentions" but it does require "that lawyers not commence an action until they have formed a reasonable belief, based on reasonable inquiry, that it is well grounded in fact and warranted by existing law or by a good faith argument for extension of existing law." *WSB Elec. Co., Inc. v. Rank & File Committee to Stop 2-Gate System*, 103 F.R.D. 417, 420 (D. Cal. 1984).

[212] *Val-Land Farms, Inc. v. Third Nat. Bank in Knoxville*, 937 F.2d 1110, 1118 (6th Cir. 1991); *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1280 (3d Cir. 1994) (holding that an attorney executing a legal document "must make a reasonable inquiry personally"). "The signing attorney alone is responsible for exercising professional judgment concerning the existence of a valid debt before issuing a debt collection letter. In so doing, independent judgment cannot be surrendered in mere reliance upon generalized law firm or client practices and procedures." *Miller III*, 687 F. Supp 2d at 102 (internal citation omitted). *See also In re Kunstler,* 914 F.2d 505 (4th Cir. 1990).

[213] *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 458 (7th Cir. 2005); *see also Hendrix v. Naphtal*, 971 F.2d 398, (9th Cir. 1992). *But see Kamen v. American Tel. & Tel. Co.,* 791 F.2d 1006, 1012 (2nd Cir. 1986) (finding that under the circumstances attorney's reliance on client's statements was reasonable, especially because there was a court opinion which recitation of facts bolstered the client's statements).

[214] *Coburn Optical Industries, Inc. v. Cilco*, Inc., 610 F.Supp. 656, 659 (M.Dist. N.C. 1985). *But see* Taylor v. US, 151 F.R.D. 389, 394 (D. Kan. 1993) ("In conducting his factual inquiry, [attorney] could not simply rely on [client] as his sole source of facts; he was required to investigate for corroboration. However, an attorney is to some degree dependent upon his client's good faith and forthrightness in disclosing pertinent facts. Moreover, an attorney's ability to investigate may be limited by his client's failure to keep important records and other data in an organized manner.").

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

Above, I italicized two clauses that are relevant to the typical facts in the debt collection scenario. The first italics clause indicates that the attorney must undertake an inquiry about the facts alleged in the complaint. The second indicates that if there are factual contentions that the attorney does not yet have evidentiary support for, he must specifically identify that in the pleadings. I discuss both below.

For purposes of this argument, I will stipulate what I believe to be the facts in the overwhelming majority of debt collection pleadings filed in state court: those pleadings do not specifically identify any factual contention which "will likely have evidentiary support after a reasonable opportunity for further investigation."[215]

The reader can probably see where the argument is headed: "an inquiry reasonable under the circumstances" in the debt purchasing context requires that the attorney read the contract that assigns the debt to his client the debt buyer.[216] And once read, the certain uncertainty created by the quitclaim language in the contract requires that the attorney either conduct a reasonable investigation or at least note that they have yet to do so in their complaint by specifying it specifically and proceeding to investigate.

I argue that relying only on the bare statements provided to the debt buyer by the seller when those statements are qualified by quitclaim language is not reasonable. It is true that courts are hesitant to find attorneys liable if their client is the best source of the information and has not kept appropriate records.[217] However, some courts have required that an attorney conduct an independent investigation.[218] "The amount of investigation required depends upon the time available to investigate and the probability that more investigation will turn up important evidence."[219] It is important to note, that course of dealing with one client who brings regular work is not sufficient to constitute reasonable reliance. In *Eastern Financing Corp. v. JSC Alchevsk Iron*, the plaintiff's attorney was sanctioned because although he looked at the contract underlying the transaction, it was written in Russian, a language he could not read, and he never got it translated.[220] The attorney pleaded that he and the client "had over the years more or less established a course of dealing with one another. It wasn't the first litigation he asked me to handle."[221] He explained that "typically we would discuss what happened. I would ask him questions that I thought were relevant. If there were documents that were available, we'd look at them. I would typically draft something

---

[215] Fed. R. Civ. P. 11.
[216]
[217] *See, e.g.*, Taylor v. US, 151 F.R.D. 389, 394 (D. Kan. 1993).
[218] *See, e.g.*, *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 751 (7th Cir. 1988); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987).
[219] *Autotech Corp. v. NSD Corp.*, 125 F.R.D. 464, 469-70 (N.D. Ill. 1989).
[220] *Eastern Financing Corp. v. JSC Alchevsk Iron*, 258 F.R.D. 76 (S.D. NY 2008)
[221] *Id*. at 86.

for him to look at, and we'd put it into final form together.''[222] The court found that this was not reasonable conduct under the circumstances.[223]

Perhaps under other circumstances, an attorney who files hundreds of cases without receiving any evidence backing up the statements made in the complaint or looking at the contract that gives her client standing is doing their duty as an officer of the court.[224] I am skeptical that this would be sufficient in any setting. Even so, in this particular context, at this moment in time, the attorney cannot simply bury her head in the sand and refuse to look at the evidence supporting her cases. Misrepresentation to the court includes "misleading statements that are knowingly made, as well as those made with reckless ignorance of the truth or falsity thereof."[225] Omissions of facts that are "highly relevant to an accurate characterization of the facts that were stated" may also be sanctionable.[226] In this case, at the very least the failure to disclose the quitclaim language in the underlying contract is problematic.

A reasonable approach for an attorney in this position might be to request documentation from their client evidencing the material facts of the claim before or soon after filing the lawsuit. In this scenario, the attorney could arguably comply with Rule 11 by specifically identifying the contentions that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[227] While this seems to satisfy the letter of the rule, under the debt collection circumstances, it does not satisfy its spirit. The problem with this approach is that in the overwhelming majority of cases, the defendant does not appear, and the plaintiff obtains a default judgment without having to present any evidence.[228] The result would ultimately be the same since a default judgment would be obtained in a manner of days or a few months after the filing of the petition. A better strategy would be to receive and review the evidence before filing suit.[229]

I fully acknowledge that Rule 11 "does not require investigation to point of absolute certainty."[230] This is not what I would have the attorney do here. If we were talking about

---

[222] *Id.*
[223] *Id.*
[224] [cite cases re minimal duty to investigate]
[225] *Nesselrotte v. Allegheny Energy, Inc.*, Not Reported in F.Supp.2d, 2009 WL 230703 (W.D. Pa. 2009) (quoting *Office of Disciplinary Counsel v. Anonymous Atty. A*, 552 Pa. 223, 714 A.2d 402, 406 (Pa. 1998)).
[226] *In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988).
[227] Fed. R. Civ. P. 11.
[228] [cite studies describing the large number of default judgments].
[229] This may not be economically feasible, an issue I discuss at Part II.C.
[230] *In re Szabo Contracting, Inc.*, 283 B.R. 242 (Bankr. N.D. Ill. 2002). "Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). *Commercial Cleaning*

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

an isolated case, the argument that a reasonable inquiry includes obtaining documentation or doing something more would be on much shakier ground.[231] However, here we are talking about a particular context, with certain background characteristics described in Part II and at the beginning of this section that are known or should be known to those whose "principal purpose . . . is the collection of any debts, or who regularly collect[] or attempt[] to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[232] Even the fact that these contracts contain quitclaim language is by now common knowledge, as it has been widely reported in the trade and popular press.[233] While most courts would not allow litigants to base all of their factual contentions in a complaint on news sources,[234] some have.[235] Allegations published in newspaper articles or made by Attorneys General in actions against debt buyers or creditors—even if they contains copies of the contracts—are not necessarily facts, however, they alert the collection attorney to potential facts that it would be reasonable to investigate before filing a lawsuit. As the comments to the federal version of Rule 11 state, "[t]he rule continues to require litigants to 'stop-and-think' before initially making legal or factual contentions."[236]

Services, L.L.C. v. Colin Service Systems, Inc., 271 F.3d 374, 386 (2nd Cir. 2001) ("[P]laintiff is not required to know at the time of pleading all facts necessary to establish the claim.").

[231] "The certification is that there is (or likely will be) 'evidentiary support' for the allegation, not that the party will prevail with respect to its contention regarding the fact." Fed. R. Civ. P. 11, Comment. The reasonableness standard is more stringent than the original "good faith" standard in previous versions of Rule 11 and "it is expected that wider range of circumstances will trigger its violation." *Marco Holding Co. v Lear Siegler, Inc.*, 606 F. Supp. 204 (N.D. Il. 1985).

[232] 15 U.S.C. § 1692a(6) (definition of debt collector).

[233] *See* discussion at Part II.C *supra*. For a complaint making a similar argument, see *Theresa Puffinberger v. Commercion, LLC*, Complaint and Demand for Jury Trial, at 7 (MD Cir. Court, March 12, 2013) ("Between 2008 and 2009, when Chase Bank, USA purportedly acquired and sold this alleged debt, news sources such as the American Banker reported serious internal problems with Chase's recordkeeping and accounting practices . . . . Because these stories have been so widely documented in major news sources, the Defendants had constructive and inquiry notice of the potential problems with this account."). *See also* FTC DEBT BUYER REPORT.

[234] *Walker v S.W.I.F.T. SCRL*, 517 F Supp 2d 801 (E.D. Va. 2007) (reliance allowed to be placed on public sources "does not extend to allow parties to fill gaps in their factual allegations by reference to unnamed or anonymous sources in newspaper article; to conclude otherwise would allow parties to circumvent Fed. R. Civ. P. 11's duty to conduct inquiry reasonable under circumstances, and would serve to reduce that duty to mere purchase of newspaper").

[235] *In re Ramada Inns Sec. Litigation*, 550 F Supp 1127 (D. Del. 1982) (disallowing Rule 11 sanctions even though attorney relied solely on information from the Wall Street Journal to support his claims); *Kamerman v. Steinberg*, 113 FRD 511 (S.D. NY 1986) ("Plaintiffs' reliance on news articles and public documents is sufficient to meet requirement of Rule 11 that plaintiffs adequately investigate basis of their claims before filing.").

[236] Fed. R. Civ. P. 11, Comments. "False pleading by creditor, even if it is product of careless mistake rather than of evil intent, cannot be tolerated, and will support award of Rule 9011 sanctions." *In re Brown*, 319 B.R. 876 (Bankr. N.D. Ill. 2005).

How often this happens is impossible to know with certainty;[237] although the FTC's findings give us some indication. As discussed above, debt buyers did not have documentation for 71% of accounts they purchased.[238] It is possible that before every lawsuit, the attorney has been given and has reviewed documentation evidencing the material facts she will allege in the complaint. This argument does not attempt to address that situation. However, conversations with consumer lawyers who defend debt buyer cases—as well as litigated cases and court opinions discussing meaningful involvement as described above—lead me to believe that these three possibilities happen rarely, if at all.

Concealing material facts "is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline."[239] Failure to read the contract and investigate the factual basis of the claim is not excused even if it turns out that the pleadings were accurate. "[A] shot in the dark is no less sanctionable because it happens to hit the mark."[240] What is perhaps more concerning to the administration of justice is if the attorney seeks to prevent the contract from being seen by the other party or the court, even if under seal or during an *in camera* examination. If that contract contains quitclaim language, this is an even larger violation.[241]

A good argument can be made that using Rule 11 to sanction attorneys is not appropriate in this case given the potential size of the problem I am describing. Court rules or even regulatory action would seem the most appropriate solutions to this problem, as it would put attorneys on clear notice of what is expected in these cases. That said, it is unlikely that regulatory or rule changes will occur before action is taken at the individual case level and consumer attorneys make these arguments.

III. Factual and Theoretical Explanations

To the uninitiated in the business of debt buying, the business model and practices discussed above should seem troubling, if not downright illegal. Part IV discusses my arguments for the illegality of these practices. In this Part, I suggest possible reasons why things have gotten to this point and explain why governmental intervention is needed.

---

[237] For an example of a case in which the attorney receives only the consumer's name, social security number, current address and telephone number, card account number, and amount of the debt, see *Miller III*, 687 F. Supp. 2d at 90.
[238] *See* Part II.B. *supra*.
[239] *Di Sabatino v. State Bar*, 606 P.2d 765, 767 (Cal. 1980) (also collecting cases).
[240] *Miller III*, 687 F. Supp. 2d at 102 (citing Garr, 22 F.3d at 1279 (quoting Vista Mfg., 131 F.R.D. at 138)).
[241] By the same token, the rule "does not require finding of bad faith;" the test is whether the attorney or party was objectively reasonable in the level of inquiry that they engaged in prior to signing the pleading. *Barth v Kaye*, 178 FRD 371 (N.D. NY 1998), aff'd 1999 US App LEXIS 22827 (2d Cir. 1999). *In re Blue Pine Group, Inc.*, 457 B.R. 64 (B.A.P. 9th Cir. 2011) (finding that there was no reasonable inquiry by attorney prior to filing paper with court into either the facts or the law is tantamount to finding of frivolousness, such as may support an award of Rule 9011 sanctions).

A. The burst of the easy credit bubble and rapid bank mergers

One hypothesis for why we are seeing so many problematic issues in servicing and in the transfer of accounts is the thought that the rapid expansion of credit combined with the just as speedy consolidation of card originators (banks and nonbanks) resulted in poor handling of data and information on accounts. Although the information would have likely been stored electronically, it is also likely that it would have been stored in a variety of custom-made systems that would not have necessarily been able to talk to each other.

A liquidity crisis at the end of 2008 caused banks to severely curtail credit lines for their customers to limit their risk as the crisis wore on.[242] This drastic reduction in available credit severely affected customers who were current on their credit card bills as their percent utilization of credit shot up when their available credit was cut by the bank without notice. A person's credit utilization ratio accounts for 30% of their FICO score, which means that a sudden spike in that ratio would not only constrain the consumer because of the reduction in available credit, but they would suddenly seem like a much worse credit risk to others as well.[243] This and the rest of the financial crisis—rising unemployment, collapse of real estate market—caused a wave of delinquencies soon thereafter. As seen in Figure 4, credit card delinquencies peaked in the fourth quarter of 2008 and rose again in 2009 before dropping to pre-2003 levels. Credit card delinquencies are currently at a historic low.

As credit card delinquencies increased, so did charge-offs. In 2007, $40 billion in credit card debt was charged-off by banks; that number had risen to $75 billion in 2009.[244] Banks sought to convert their portfolio of delinquent or charged-off cards into ready cash that could be put to work. Sales of consumer debt portfolios skyrocketed and prices dropped by more than half as delinquent debts flooded the market.[245]

---

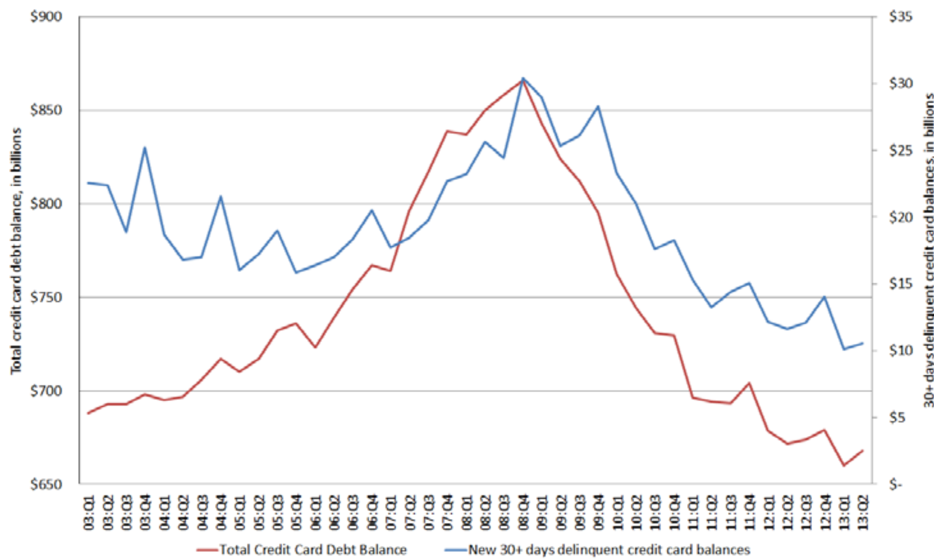
[242] "The majority of credit card pricing is determined by factors unrelated to an individual borrower's risk profile and is instead based on factors such as cost of funds, cost of operations, and the aggregated risk profile of the card issuer's borrower pool." Adam J. Levitin, *Rate-Jacking: Risk-Based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

[243] Jeremy M. Simon, *How your FICO credit score is calculated: How much you owe*, CreditCards.com, http://www.creditcards.com/credit-card-news/fico-credit-score-account-amounts-owed-1270.php

[244] FICO, *Boost Collections and Recovery Results with Analytics* (Feb. 2010), http://brblog.typepad.com/files/31_boost_collections_recovery_analytics_2644wp.pdf. By 2010 as the recovery started the number had dropped to $62 billion. U.S. Federal Reserve Board, *Statistical Release: Charge-Offs and Delinquencies on Loans and Leases at Commercial Banks* (Dec. 31, 2010), http://www.federalreservc.gov/rcleases/chargeoff/delallsa.htm.

[245] "Fresh debt" went from $0.12-$0.17 per dollar in 2007 to $0.05 to $0.07 in 2009. Cite to Kaulkin Ginsburg report on cost of debt sales.

Figure 4 – Credit Card Debt Balances and Delinquencies, 2003-2013[246]



The financial crisis came on the heels of a rapid consolidation in the financial services industry, a consolidation which the crisis itself accelerated. Large banks like Washington Mutual and Wachovia were bought on the cheap by even larger banks. Some investment banks did not fare any better—e.g., Bear Stearns and Merrill Lynch. All of these entities' systems of record had to be brought in alignment with one another. Data is not available to truly discern what happened as smaller banks with legacy systems were swallowed up by larger ones, but conversations with industry insiders suggest that getting the systems to talk to each other was not an easy task.

As mentioned earlier, not all of the contracts in my possession contain quitclaim language. Some are completely silent on the issue; a handful contain affirmative representations that go to the specifics of the collection of individual debts.

Others attempt to do something similar, although with some qualifying language: "[t]o the best of Seller's knowledge each Account Balance being sold represents the Original Creditor's balance less any payment(s) received by the originating Creditor or subsequent owner and such Account Balance does not include post charge-off finance charges, interest, fees and the like of each Account(s)."[247]

---

[246] Federal Reserve Quarterly Report on Household Debt and Credit, August 2013. [link]
[247] Purchase and Sale Agreement between Global Acceptance Credit Company, LP and RAB Performance Recoveries, LLC (Feb. 18, 2011). Note that this is an agreement among a reseller debt buyer and another debt buyer. We would have to see the underlying agreement between the original creditor and the reseller debt buyer to learn more about the weight of these representations; as stated they only extend "to the best of the [reseller's] knowledge," but the reseller does not have personal knowledge of the creditor's information.

Why do we find such a stark difference among the language in the agreements? I only have the FTC's public report and a limited number of agreements to draw from, so my thoughts here, while informed by conversations with people in the industry, are merely conjecture. My hypothesis is that quitclaim language is used when the seller is not confident in the paper she is selling. As described above in Part I and shown in Figures 1 and 2, each individual bank may have one or more systems where information regarding delinquent consumers may be stored—i.e., the original system of record used before delinquencies and internal collection or recovery systems used after. Depending on the sophistication of the bank (and perhaps the sophistication of the bank that originated the account if that bank was purchased), the different systems may or may not be able to communicate with each other.

The FTC believes that "many of the terms and conditions governing the sale of consumer debts may largely be set by credit issuers."[248] I posit that this language likely gained popularity with original creditors when they began to sell portfolios of delinquent accounts they obtained from banks they acquired. The agreements in my possession are not representative but seem provide some possible evidence of this. The agreements range from 2002 until 2012. From 2002-05, I have four agreements which either do not speak about representations one way or another or make positive representations as to the accounts sold.[249] All but one of the sixteen agreements dated from 2006 through 2012 contain some form of quitclaim language.[250]

In a sense, this problem is reminiscent of the back office failures that brought down a number of broker-dealers in the 1960s.[251] The 1960s was "a period of tremendous growth in the securities industry."[252] In this case, the rapid growth of credit before the crisis and the subsequent meltdown and fast pace of new delinquencies seems to have overwhelmed the banks. As analysts at the Bank for International Settlements have written, "the paper crunch of the 1960s serves as a reminder that weak back office procedures could have

---

[248] *Id*. at C-2.
[249] *See* Household and Household Forward Flow Agreement, July 2002 (no disclaimers); Undated Encore Forward Flow (with reference to receivables purchased in 2005, positive representations); Citibank and Unifund CCR, Feb. 28, 2005 (positive representations); Household and Metris Receivables Forward Flow Agreement, Dec. 2005 (no quitclaim language).
[250] The one with some positive representations is Jefferson Capital (seller) to Midland Funding (buyer) Receivables Previously Purchased from CompuCredit Corporation, Jan. 20, 2012.
[251] [cite to SEC report]
[252] Barry P. Barsach, Remembering the Past: Mutual Funds and the Lessons of the Wonder Years, Securities and Exchange Commission (Dec. 4, 1997), available at www.sec.gov/news/speech/speecharchive/1997/spch199.txt

serious implications not only for market efficiency but also for the financial health of firms active in the market."[253] This reminder seems to have been forgotten.

B. Market failure

Market failure may also explain why we observe the problems discussed earlier. When shopping for credit products, consumers have no incentive to care about a bank's collection practices. Optimism bias leads individual consumers to believe that they will not have to deal with a collector; default only happens to other people. Stated differently, "[p]eople prefer to believe that their risk is below average and are reluctant to believe anything else."[254] Thus a bank gains nothing by touting their punctilious collection practices, and thus has no incentive to have them. Once they are delinquent, consumers do not have a choice in who their collector is or who their debt is sold to. It is the bank who chooses what third party collection agencies to use and who to sell their debt to. As a result, bank's customers do not exert pressure to clean up questionable practices and in fact the pressure may actually go in the opposite direction (cutting costs) to the extent that the bank is competing for customers.

Once a bank decides to sell their debt, they enter a different market. The bank has to find willing buyers for their defaulted debts and when billions of dollars in face-value of defaulted accounts are available on the market, they have to compete with other banks for the sale of those debts. Correcting the problematic and possibly illegal practices described previously is costly, and the market pressure in this case is relentlessly to drive costs down, not up. One might think debt buyers have an incentive to demand more documentation, evidence, and positive warranties from banks, but this assumes that those things are needed to make collection of purchased debts profitable. Instead, we can see from the public filings of debt buyers that the current system still allows them to obtain a healthy profit.[255] In other words, there are externalities in the sale of consumer debts.

Given that any improvement in procedures a bank undertakes will only result in added costs that cannot be passed down to the consumer (since they will not choose banks based on their collection practices) or to the debt buyers (since they can make a healthy return on their investment without the additional cost), to the extent that an equilibrium has developed around a particular set of practices, without government pressure, any given bank has a disincentive to spend money to improve their practices.

---

[253] Elisabeth Ledrut and Christian Upper, The US Paper Crunch, 1967-1977, Bank for International Settlements (Sept. 1, 2008), http://www.bis.org/publ/qtrpdf/r_qt0712z.htm
[254] Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 HEALTH PSYCHOL. 132, 139 (1995).
[255] SquareTwo Investor Presentation, Financial Results: Year End 2011 at 12 (Feb. 24, 2012) (reporting that "Returns on 2009, 2010, , , and 2011 purchase years average 2.4x compared to 1.5x for purchase years 2007 and 2008, an increase of over 60%.").

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

The industry itself seems to recognize this. At a workshop held by the FTC and CFPB, panelists from the industry repeatedly requested regulation and clarity in understanding documentation requirements with statements such as "if we could have uniform national standards that would go a long way towards fixing this."[256] An attorney for the industry echoed this sentiment "[i]f there is a mandate, a national standard, if you sell an account these are the things you will transmit. I think it helps everybody, that's a quality improvement standard and it'd be a very good thing."[257]

But the debt buying industry, as the banks' customers, could also exert pressure to provide more information and documentation. This would enhance recoveries because consumers are more likely to pay if they can trust that the person calling or writing about the debt—someone they did not initiate a relationship with—is the right party. Enhanced evidence of the underlying debt would also enhance the debt buyer's ability to collect via the court system. Why hasn't this happened?[258] The same market failure that is plaguing the credit issuers applies here as well. Debt buyers have been able to accrue substantial profits without this documentation. They have done so by collecting from the consumer directly and also by using the courts to do so. Debts right now are very cheap, 4 cents on the dollar on average according to the FTC and in some cases "virtually zero."[259] If buyers are able to turn a healthy profit without documentation or without requesting that the creditor stand by the material aspects of the debts they are selling, they have no incentive to ask for anything more. Indeed, they have a disincentive since this would increase the purchase price with only a theoretical possibility that it would also mean increased recoveries.

C. Courts as debt collectors

We might think that these externalities could be resolved by, for example, class action lawsuits. Putting aside reasons why class action lawsuits may not always deter socially

---

[256] Larry Tewell, Senior Vice President, Consumer Credit Solutions Division, Wells Fargo, FTC/CFPB Life of a Debt Panel 1: Information Available to Debt Collectors at Time of Assignment of Sale.
[257] Manuel Newburger, Partner, Barron & Newburger (represents creditors and debt buyers), FTC/CFPB Life of a Debt Panel 2 Verifying Disputed Debts Under the FDCPA and Investigating Disputed Debts Under the FCRA (June 6, 2013). *See also* "The more information that we can have relative to charge-off dates, balances, last payments … would be extremely relevant. The idea that information can be passed from agency to agency that this account was disputed … that would be helpful." Chad Benson President and Chief Operating Officer CBE Group speaking on the same panel. The TransUnion representative agreed: "more standardized data reporting on the front end will reduce the errors and reduce the questions that consumers get. We won't be putting accounts on the wrong file or matching information correctly …" Denise Norgle, Vice President and Division General Counsel, TransUnion.
[258] I'd note that this attitude seems to be changing and just like some credit issuers are now selling debts with account statements and other documentation, debt buyers seem to be requesting more from them.
[259] FTC Debt Buyer report at ii.

inefficient behavior,[260] in this case the statutory scheme available to consumers is not conducive to even an attempt to correct market failures through the legal system. The FDCPA is the main tool that consumers can use to try to correct current practices and deter future bad behavior. While the statute provides attorney's fees for prevailing plaintiffs and recovery of actual damages, the total statutory damages for a class action are capped at "the lesser of $500,000 or 1 per centum of the net worth of the debt collector [or debt buyer]."[261]

Even if this small amount could serve as deterrence, it cannot be used to deter banks, since originating creditors are not subject to the FDCPA.[262] While consumer lawyers have stepped up the number of individual and class actions filed under the FDCPA,[263] they are knocking at the wrong door. In this subsection I touch briefly on possible explanations why legal process has not been able to overcome the market failure described previously. Serious allegations have been levied against the process currently used in most small claims courts across the country.[264] The large volume of suits, mail-merged complaints, and high default rates are indeed problematic. The high default rates in particular put judges in a difficult position given that our case law has not generally recognized a duty of assistance even to self-represented litigants, let alone to the litigant who does not show up.[265] To grapple with this problem particularly in the debt collection context, some courts have amended the rules governing default judgments to permit (and sometimes require) the court to look at the evidence submitted with the complaint.[266] The Maryland Rules

---

[260] [cite to latest version of Vincent Di Lorenzo, Risk-assessment by banking institutions and decisions to evade or ignore legal mandates]
[261] 15 U.S.C. § 1692k(a)(2)(B).
[262] 15 U.S.C. § 1692a(6)(F) ("The term 'debt collector' … does not include any person collecting or attempting to collect any debt … to the extent such activity concerns a debt which was originated by such person").
[263] [cite Webrecon figures]
[264] "[I]t is equally clear that in the debt buyer context, "small claims courts" have in reality become "creditor's courts," devoid of the hallmark characteristics of an adversary system." Holland at 272.
[265] The Supreme Court, in the context of a criminal case stated that "[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for as pro se defendant that would normally be attended to by trained counsel as a matter of course." (Jona Goldschmidt, *Judicial Assistance to Self Represented Parties: Lessons from the Canadian Experience*, at 3 (2006), available at http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Judicial_assistance.authcheckdam.pdf. (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183-184 (1984)). "American courts have generally taken this to mean that, if no judicial assistance is required in criminal cases, then certainly none is required in civil cases." *Id*.
[266] *See e.g.,* Fairfax County, Va. Purchased-Debt Default Judgment Checklist; North Carolina Gen. Stat. §58-70-150-(2); (3) Connecticut Superior Court - Procedures in Civil Matters, §24-24 (b)(1)(A); New York City Administrative Code, Title 20, Chapter 2, Subchapter 30 (Debt Collection Agencies) §§20-488 - 20-494.1. *But see* Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2012-2 (Aug. 22, 2012), http://courts.delaware.gov/commonpleas/docs/AD2012-2.pdf (rescinding Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2011-1 (March 16,

Committee stated in their report that the proposed rule changes (now enacted) were being made because

> [p]roblems with the cases filed by [consumer debt purchasers, or CDPs] have arisen, including: failure of the CDP to be licensed, the wrong party being named as plaintiff, filing after the statute of limitations period has run, lack of personal knowledge by the affiant, lack of supporting documentation containing sufficient detail as to liability and damages, failure of the CDP to prove it owns the debt, and incorrect identification of the amount claimed.[267]

Maryland increased the amount and kind of proof that must be submitted with a request for default judgment, which now must include, *inter alia*, written proof of the existence of the debt or account via a properly authenticated photocopy or original of either

> (A) a document signed by the defendant evidencing the account;
> (B) a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant;
> (C) or an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.[268]

While there has been a substantial movement to modify court rules (or to enact legislation requiring additional proof from debt buyers) in the last few years, it is nowhere near universal.[269] And even despite this movement, there are some who think that many rule changes have not gone far enough. For example because they do not leave room to question whether the affidavit or other documentation was prepared in anticipation of litigation.[270] Without specific rules defining what must and must not be part of the evidence submitted with a request for default judgment, most judges are likely to feel like their hands are tied.

There are three other reasons why courts—or more specifically judges—may be slow to raise alarms about the problems described in this paper or to do something to ameliorate it. One may be lack of knowledge and awareness of the extent of the problem. State court

---

2011), http://www.courts.delaware.gov/CommonPleas/docs/AD2011-1ConsumerDebt0.pdf) (2011-1 directive required a copy of the original contract and proof of assignment).
[267] Maryland Rules Committee Report at 41, http://www.courts.state.md.us/rules/reports/171stReport.pdf
[268] Maryland Court Rule 3-306(d) and Rules Committee Notes at 31-34.
[269] Cite
[270] "[W]hen a document is created for a particular use that lies outside the business's usual operations — especially when that use involves litigation — neither of [Federal Rule 803(6)'s] justifications for admission holds.... [W]e adhere to the well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception." *Ortega v. CACH, LLC*, 396 S.W.3d 622, 630 (2013) (quoting *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993))

judges may be quite familiar with problems in the foreclosure or mortgage context, but debt collection abuses have been slow to catch on. As these issues are reaching the national press on a near constant basis in the last few months, this may be changing. Consumer organizations have issued a number of reports detailing cases in which incorrect documentation or lack of documentation played a significant role.[271] Academics and clinical professors have also written extensively about this.[272] Over two years ago, it became public that the Office of the Comptroller of the Currency (OCC) was investigating JP Morgan Chase for "faulty account records" when suing "tens of thousands of delinquent credit card borrowers for at least two years."[273] The bank recently conducted its own review of 1,000 lawsuits it filed and found that 9% of the cases brought contained errors. "The errors ranged from inaccurate interest and fees applied by outside law firms to a 'small number of instances' in which lawsuits listed higher balances than the amounts owed by borrowers …"[274] Robosigned affidavits were involved in some of the cases reviewed.[275]

The parties recently entered into a consent agreement. The OCC found that Chase had

> (a) Filed or caused to be filed in courts affidavits executed by its employees or employees of third-party service providers … in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records;
>
> (b) In some instances, filed or caused to be filed in courts inaccurate sworn documents that resulted in obtaining judgments with financial errors in favor of the Bank;
>
> (c) Filed or caused to be filed in courts numerous affidavits that were not properly notarized, including those not signed or affirmed in the presence of a notary, where required[.][276]

---

[271] [cite to studies]
[272] *See, e.g.*, *id*., DEBTS, DEFAULTS, AND DETAILS, *supra* n. 6, DO WE HAVE A DEBT COLLECTION CRISIS, *supra* n. 6.
[273] Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, AMERICAN BANKER (March 12, 2010) http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html.
[274] Dan Fitzpatrick, J.P. Morgan Review Finds Errors in Debt-Collection Lawsuits: Errors Occurred as the Bank Sued Its Credit-Card Users, WALL STREET JOURNAL (July 9, 2013).
[275] *Id*.
[276] Office of the Comptroller of the Currency, AA-EC-13-76, *In the Matter of: JPMorgan Chase Bank, N.A., Columbus, Ohio, JPMorgan Bank and Trust Company, N.A., San Francisco, California, Chase Bank USA, N.A., Wilmington, Delaware*, Consent Order (Sept. 18, 2013).

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

JP Morgan Chase recently decided to close its litigation group for consumer debt collection.[277]

Chase has received a considerable amount of attention, but there is no reason to think they are alone. In a significant number of cases, courts have found that debt buyers were seeking to collect on debts that the consumer had already paid.[278] It is no longer news, in other words, that significant and large mistakes have been made by large, regulated institutions in their record-keeping.

A related reason is perhaps a trust in banks, lawyers, and the collection industry as a whole. There may have been specific instances of misconduct or irregularities like what the OCC found (although Chase did not admit wrongdoing), but this is not happening wholesale. Judges may believe that "bank records are inherently reliable because banks depend on keeping accurate records" and may thus be willing to overlook procedural or technical deficiencies in debt buyer proof.[279]

Judges may also trust the collection attorneys to "do the right thing" (or at least not the wrong one). This trust may extend to the debt buyers to the extent that they can present documents that look like statements from a credit card account, even if they are not authenticated. After all, how could this debt buyer have Chase (or other bank) statements unless they obtained them from Chase?

This particular explanation was brought home to me on a chilly day in May this year. As part of a seminar, my students and I headed to a small claims court to test a handful of self-help scripts they had developed for debt collection defendants.[280] The scripts ranged from defending a lawsuit based on a stale claim, requesting that the plaintiff prove that it is the owner of the debt and real party in interest in the lawsuit, and requesting that the plaintiff prove the amount claimed. As part of the protocol, the students asked debt collection defendants whether they would be willing to briefly discuss a form that we were developing for people in their situation in exchange for a $10 gift card.

---

[277] Chris Cumming, *JPM to Shutter Litigation Group for Consumer Debt Collection*, AMERICAN BANKER (Oct. 17, 2013), http://www.americanbanker.com/issues/178_201/jpm-to-shutter-litigation-group-for-consumer-debt-collection-1062882-1.html.
[278] ONE HUNDRED BILLION DOLLAR PROBLEM, supra n. 6, at 271-72. [put parenthetical about how many cases]
[279] *U.S. v. Bertoli*, 854 F.Supp. 975, 1031 (1994) (citing *U.S. v. Gleave*, 786 F.Supp. 258, 279 (1992)). [cite to FDIC reg saying bank records are inherently reliable]
[280] This research is part of a larger randomized control trial study studying, among other things, the effectiveness of legal representation as compared to self-help forms on the financial well-being on individuals who have been sued on a credit card debt collection case. *See* Dalié Jiménez, D. James Greiner, Rebecca L. Sandefur, and Lois R. Lupica, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEORGETOWN J. POVERTY L. & POLICY 449 (2013), available at http://ssrn.com/abstract=2213000.

One of the people who agreed to participate that morning was a young man who had his case set for trial that day, let's call him Adam. Adam was being sued on what had been his Washington Mutual credit card, later acquired by Chase.[281] Despite multiple requests from the clerk magistrate urging the parties to settle, Adam wanted a trial. The plaintiff suing him was a large debt buyer Adam had never heard of. I decided to represent Adam about 5 minutes before the trial was set to start. I asked the debt buyer's attorney to show me the evidence he was going to present. He had three documents: (1) photocopies of Chase credit card statements mailed to the defendant, (2) a one page "Bill of Sale" with 10-15 lines blacked out that stated that Chase had sold "Accounts" to the debt buyer, and (3) an affidavit from the debt buyer's employee that stated that she had personal knowledge of the plaintiff's account records and those records indicated that the defendant owed $4,500 to the plaintiff. The affidavit also said that plaintiff was the assignee of the defendant's account but did not explain how the affiant acquired that knowledge. When I pointed out to the plaintiff's attorney that this was not enough evidence to prove that his client owned this defendant's debt he said, "Yeah, that's pretty bad for the plaintiff isn't it?" I had to think for a second.

Nonetheless, we went on with the trial because the attorney had no authority to dismiss the case. During the trial, the plaintiff's attorney put Adam on the stand and asked him about the Chase statements. Adam admitted having a credit card, using it, and not paying, although he presented a credible (but unsubstantiated) defense that Chase had chosen to ignore a settlement he had made with WaMu just before Chase acquired it.[282] I made the argument to the clerk-magistrate that the plaintiff may have shown that Adam owed Chase money, but there was no evidence that Adam owed *this plaintiff* money. The clerk-magistrate seemed puzzled by my argument, after all, a few minutes earlier she had stamped over 30 default judgments for this same attorney.

The plaintiff had three arguments in rebuttal: (1) "this had never been an issue before," (2) the defendant's account number may have been one of the things on the Bill of Sale that was

---

[281] The United States Office of Thrift Supervision (OTS) seized Washington Mutual Bank from Washington Mutual, Inc. on September 25, 2008 and placed it into receivership with the Federal Deposit Insurance Corporation (FDIC). The FDIC sold the banking subsidiaries to JPMorgan Chase for $1.9 billion. Washington Mutual Inc., Int'l Business Times (last accessed Oct. 15, 2013), http://de.ibtimes.com/topics/detail/286/washington-mutual-inc/; Jim Zarroli, *Washington Mutual Collapses*, NPR All Things Considered (Sept. 26, 2008), http://www.npr.org/templates/story/story.php?storyId=95105112.

[282] Adam testified that while the card was still owned by WaMu he had entered into a settlement over the phone with WaMu and made a lump sum $6,000 payment to settle an $8,000 debt. Soon after he made that payment, he was informed that Chase had acquired WaMu. Chase disavowed the settlement. At first, Adam testified that he did not pay Chase but when he realized the toll the delinquent account was having on his credit score, he relented and made some payments. Eventually he testified that he stopped paying because he did not believe he should have to, given the earlier settlement.

blacked out, and (3) "I received these three sets of documents together, as a package." While the attorney admitted that he had no personal knowledge of how the documents were created, he reiterated that these all came were given to him paper clipped. A few weeks later we received the ruling, judgment for the plaintiff for $200 (the complaint had been for over $4,500) with $11.98 in interest and $100 in court costs.

Finally, another reason for why courts have continued to act as debt collectors might be the because of an underlying belief that defendants are guilty—that they owe the money anyway. There is an element of moral judgment in this "mental shortcut." But it is one that very much accords with the narrative that the credit card industry and many members of Congress popularized in the early 2000s in the midsts of discussion of changing the bankruptcy laws.[283] Deadbeat debtors and opportunistic bankruptcy filers was the archetype that the 2005 bankruptcy amendments were supposed to solve.[284] But the idea that most or even many of people are incurring debts without intention of paying has never been borne out in the data.[285] Instead what we have learned is that the credit card business model is most profitable when lenders "are not trying to minimize delinquencies."[286] As Ronald Mann has pointed out, "[t]he successful credit card lender profits from the borrowers who become financially distressed." [287] In fact, in some cases lenders themselves may have driven consumers over the edge, in particular before the CARD Act.[288] The "standard" say to increase profits after a consumer has obtained a credit card is to "focus on those customers who are unable to take their business elsewhere" (because they are having financial difficulties).[289] "If the customers do not have realistic options, lenders are free to raise the interest rates and fees that they charge to those borrowers."[290] And this "rate

[283] [cite newspaper articles of around this time; congressional testimony] Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. Rev. 177, 221. "[T]he legislative desire to protect the credit card's place in the American economy was one of the most important motivations for the recently adopted Bankruptcy Abuse and Consumer Protection Act of 2005." Ronald J. Mann, *Optimizing Consumer Credit Markets and Bankruptcy Policy* 7 THEORETICAL INQUIRIES L. 395, 398 (2006) [hereinafter Mann, *Optimizing Consumer Credit Markets*].
[284] [cite studies on effect of '05 law]
[285] [cite Elizabeth Warren and Consumer Bankruptcy Project studies from 99, 2003, 2007, etc]
[286] Ronald Mann, *"Sweat Box"* at 390.
[287] *Id.* at 379.
[288] The CARD Act banned rate-jacking as described below. Credit Card Accountability Responsibility and Disclosure Act of 2009 (the CARD Act), Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.).
[289] *Id.* at 388.
[290] *Id.*

jacking"[291] increases the risk of default by the consumer "as the cardholder is now faced with a higher interest rate and greater monthly payment demands."[292]

But the belief that defendants owe the debt sometimes comes from defendants themselves. Oftentimes defendants, unaware of defenses available to them, admit in court, for example that they did have an account with the original creditor. Since in the vast majority of the cases the plaintiff has only sent a lawyer to represent him, this admission is crucial to the plaintiff's case. Even if they do owe money, however, the defendant has no information about the debt buyer—or whether they have standing to bring the case. But after admitting that they are debtors, the plaintiff's burden to prove ownership of the debt seems to be overlooked in many cases.

But this issue of standing is not a simple one. Where it has been litigated, courts have found either an inability to show standing due to a lack of documentation, among other issues. For example, a court found that debt buyer Goldberg & Associates, LLC entered into a contract to purchase debts from another debt buyer but never paid for them.[293] Despite that, Goldberg used the information it acquired during the transaction to collect the debts it did not own for itself.[294] Another lawsuit is by a third debt buyer who bought debts that Goldberg sold but which it did not have title to.[295] In other documented cases, debtors have settled with one debt buyer but later learned that the debt buyer they paid did not actually own their debt.[296] A variety of courts have found that debt buyers could not prove their standing to sue in consumer collection cases.[297]

---

[291] "' Rate-jacking' the phenomenon of a credit card issuer suddenly raising the interest rates or fees on an account, often applying the new rate retroactively to existing balances." Adam J. Levitin, *Rate-Jacking: Risk-Based & Opportunistic Pricing in Credit Cards*, 2011 UTAH L. REV. 339, 339.
[292] *Id.* at 364. Professor Levitin argues that "rate-jacking is detrimental to consumers because it allows riskier credit card products (from a consumer perspective) to crowd out less risky credit card products, much as nontraditional mortgages that featured low initial teaser rates (and then later reset to much higher rates) started to crowd out traditional fixed rate mortgages during the housing bubble." *Id.* at 366.
[293] *Hudson & Keyse, LLC v. Goldberg & Associates*, LLC, No. 9:2007cv81047, Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment (March 24, 2009), http://law.justia.com/cases/federal/district-courts/florida/flsdce/9:2007cv81047/305204/63 (finding that Goldberg breached the contract by not paying for the debts).
[294] *Id.*
[295] *American Acceptance Co. v. Goldberg*, No. 2:08-CV-9 JVB, 2008 U.S.Dist. LEXIS 39418 (N.D.Ind. May 14, 2008) (alleging that Goldberg sold it accounts that it did not have title to). *See also National Bank, Old National Bank v. Goldberg & Associates*, 9:08-cv-80078-DMM (S.D.Fla., Jan. 24, 2008), *RMB Holdings, LLC v. Goldberg & Associates*, LLC, 3:07-cv-00406 (E.D.Tenn.), Dkt. # 24 (finding that "RMB began making attempts to collect the accounts it purchased from Goldberg," even though "Goldberg never delivered title or ownership of the accounts to RMB.")
[296] *Smith v. Mallick*, 514 F.3d 48 (D.C.Cir. 2008), *MBNA Am. Bank v. Nelson*, 15 Misc. 3rd 1148, 841 N.Y.S. 2d 846 (N.Y. 2007). *Wood v. M&J Recovery LLC*, CV 05-5564, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y., April 2, 2007) (dispute over who owned the 1/5th of a portfolio that included the debtor's

Finally, even when the defendant admits that they owed a debt, they do not have any way to know whether the amount sought is correct. This is an element of the plaintiff's *prima facie* case of course, but in most cases self-represented parties fail to request proof or, if proof is provided in the form of an affidavit for example, fail to challenge it. And yet there are many instances where affidavits could be successfully challenged in these cases.[298] [refer to Part I.D; have to write].

IV. Addressing criticisms, or, is this really a problem anyway?

[this section needs lots of work; comments especially welcome!]

In this Part, I address potential criticisms of my arguments.

One likely criticism of my arguments is to point out that even if no documentation is ever provided to the debt buyer and the sale contracts contain quitclaim language, this does not necessarily mean that there is a problem with the underlying information. There are other plausible reasons why these contracts may contain quitclaim language that have little to do with the confidence the seller has on the underlying information and have more to do with the lawyers who drafted the contracts.[299] To the extent that the credit issuers are banks, there is an existing and complex regulatory scheme that might lead one to trust the

---

account), *Overcash v. United Abstract Group, Inc.*, 549 F. Supp. 2d 193 (N.D.N.Y. 2008) (attempting to collect in excess of the balance of a previously settled debt).

[297] *See MBNA Am. Bank v. Nelson*, 15 Misc. 3rd 1148 (N.Y. 2007)(" It is imperative that an assignee establish its standing before a court … an assignee must tender proof of assignment of a particular account …. Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner. . . . "); *Unifund CCR Partners v. Cavender*, 14 Fla. L. Weekly Supp. 975b (Orange County, July 20, 2007);; *In re Leverett*, 378 B.R. 793, 800 (Bkrcy. E.D.Tex. 2007); *Unifund v. Ayhan*, 2008 Wash. App. LEXIS 1922 (August 5, 2008); *Nyankojo v. North Star Capital Acquisition*, 679 S.E.2d 57 (Ga. 2009); *Wirth v. Cach, LLC*, 685 S.E.2d 433 (Ga. 2009).

[298] *See, e.g.*, *Asset Acceptance v. Lodge*, 325 S.W. 3d 525 (Mo. Ct. App. E.D. Sept. 28, 2010) (MO Court of appeals reversed decision by trial court to accept testimony of debt buyer's representative to establish details of the original loan agreement because debt buyer did not originate the loan); *Manufacturers & Traders Trust Co. v. Medina*, 2001 WL 1558278 (N.D.Ill., Dec. 5, 2001) (affidavits by attorneys and others lacking personal knowledge insufficient); *Topps v. Unicorn Ins. Co.*, 271 Ill. App. 3d 111, 116, 648 N.E.2d 214 (1st Dist. 1995) ("under the business record exception to the hearsay rule, only the business record itself is admissible into evidence rather than the testimony of the witness who makes reference to the record"); *Northern Illinois Gas Co. v. Vincent DiVito Constr.*, 573 N.E.2d 243, 252 (2nd Dist. 1991) ("The business records exception to the hearsay rule (134 Ill. 2d R. 236) makes it apparent that it is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record"); *Grant v. Forgash*, 1995 Ohio App. LEXIS 5900, *13 (Ohio App. 1995) ("There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records.").

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

** DRAFT ** PLEASE DO NOT CITE WITHOUT PERMISSION **

information provided by banks, even if the banks themselves express a desire to escape liability for any problems. This argument is similar to one of the explanations I posited for the way some in the judiciary has responded to the flood of debt collection lawsuits. And yet as described earlier, there are many examples of "reputable" large banks who have been sanctioned for failing to live up to these expectations.

Another response to this article might be to point out that we really do not know the magnitude of this problem, and that it may in fact be a very small problem. Billions of consumer debts are charged off every year, mistakes are of course bound to happen, and we do not have any evidence of what proportion of those accounts are sold without documentation or subject to quitclaim language. And even if the majority are, we do not know the number of accounts that are collected with incorrect information. In earlier parts of this article, I tried to quantify a minimum number of consumers who might be affected by the contracts I have analyzed. I estimate using the FTC Debt Buyer Study numbers that it might be as many as 39 million accounts. This is a *very* rough calculation, and it is just an estimate of how many accounts may have been sold subject to quitclaim language; not how many accounts are being collected with incorrect information. Perhaps that number is miniscule.[300] This argument waives away the violations of law and focuses only on whether ultimately someone had paid too much. Putting aside the fact that the FDCPA bans misleading statements and not just untruthful ones, I would argue that we should be concerned about sanctioning behavior that permits collectors to play ignorant.

A practical critique might be that we should not be too concerned about these problems because the current system provides a high level of liquidity that would not be possible if the contracts did not contain quitclaim language. As Professor Janger has noted, "[l]iquidity enhancement through negotiability is a key device for facilitating the trading of debt."[301] Liquidity in the market keeps the cost of credit down and ensures availability of—in particular—subprime credit. This argument is impossible to prove or disprove, but my response would be to point out that not all contracts for the sale of consumer debts contain this language. In fact in at least one instance the same bank entered into one agreement with quitclaim language and another with positive representations.[302] In addition, it is not clear why we want to encourage subprime credit at the expense of illegality.

---

[300] In addition, it is possible that the majority of attorneys are obtaining documentation on accounts before they file a lawsuit. We do not know how often that is the case.
[301] Edward J. Janger, *The Costs of Liquidity Enhancement: Transparency, Risk Alteration and Coordination Problems*, 4 BROOK. J. CORP. FIN. & COM. L. 38, 39 (2010) (noting that a number of techniques have been developed, such as holder in due course, buyer in the ordinary course of business, good faith purchaser, which "enhance the liquidity of, and hence create a market for, a particular type of asset")
[302] *Compare* HSBC Consumer Lending to CACH, LLC (Sept. 29, 2010) (including a provision that "To the best of Seller's knowledge, Each Account is the legal, valid and binding obligation of the Borrower

V. Repairing a broken system

I have argued that a number of consumer delinquent accounts have been sold subject to some type of quitclaim language. If any of the arguments in Part II are at all convincing, determining the magnitude of this problem is quite important. An unknown number of consumer debts could be uncollectable until the debt buyer seeks more documentation from the seller. Depending on how long ago the debts were sold, that documentation could be completely unavailable.[303] An unknown number of consumers who have been collected upon until now would have FDCPA claims against debt buyers and debt collectors. The larger the number of affected accounts the more concerned we should be about the stability of the debt collection system.

The majority of the contracts I have do not disclose the number of accounts affected. However, just as an example, one of the specific quitclaim language agreements discussed in Part II was an agreement to sell credit card accounts of $60-65 million of face-value per month between April 1, 2010 and June 30, 2010. If we assume that the average credit card account was $5,000 and $60 million of face-value was sold during each of the three months of the agreement, that agreement alone could implicate 36,000 individuals.[304] Another way to estimate this would be to use the FTC study numbers. The FTC received information on 77,675,862 accounts sold (with a face value of almost $105 billion).[305] It reviewed a sample of 350 contracts—not representative, but chosen by the debt buyers themselves—and found that the "majority" contained quitclaim language. Even if "majority" means 51%, we would be talking about more than 39 million accounts.

This part considers possible solutions to the problems outlined in this article. I discuss potential industry-led solutions, promising market options, regulatory and enforcement reforms, and finally end by suggesting that Ronald Mann's proposed "distressed debt tax" would help realign lenders' incentives and cure some of the market failure discussed earlier.

---

and there are no credits or offsets that exist against such Accounts" to HSBC Card Services (III) to Main Street Acquisition Corp. ¶ 2.3 at 4 (Feb. 20, 2009) (no such provision) and HSBC to CACH, LLC (May 18, 2011) (same language). All three of these HSBC contracts were "sold and transferred without recourse as to their enforceability, collectability or documentation" and they contained some version of a warrant that the accounts were "originated and serviced in compliance with all applicable federal or state laws and regulations, including the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and the Fair Credit Billing Act." The September 29 contract added the qualifier that compliance with the laws had been "to the best of the Seller's knowledge."

[303] See Part II.B.

[304] This also assumes the agreement is not renewed, something that was contemplated in the agreement itself. If it were renewed, the amounts would of course be larger.

[305] FTC Debt Buyer Study *supra* n. X at T-2.

A. Industry solutions

One possible solution to these problems could come from the industry itself—that is from credit issuers or debt buyers. At the root of these issues are the issuers of credit since they possess the documentation and records evincing the debt. Original creditors could truly transfer their business records on accounts that they sell at the moment of sale. There is evidence that the industry is moving in this direction. A few banks have begun to sell delinquent accounts with a few months' worth of statements. This is decidedly a step in the right direction, although it is still problematic from the point of view of having admissible evidence in court. Another step would be to maintain documentation regarding an account for longer than is currently required. Debt buyers have repeatedly mentioned this as a problem, particularly with regards to state law changes that would force them to provide documentation in court that the creditor does not currently have a duty to keep.[306]

Another simple step that banks could take would be a "goodbye" letter sent to the consumer whenever their account is sold.[307] The letter could include the charge-off statement—the last statement ever mailed from the bank to the consumer—and could even attach a ledger accounting of the last year's purchases, payments, and interest or fee charges.[308] Every subsequent buyer could also send a version of this letter, and if all of the buyers kept records of the letter being sent and those records were given to the subsequent buyer at the moment of sale, this would go a long way towards ameliorating the business records problem in state court.[309] This "goodbye" would also be helpful to consumers who might wish to pay their obligations, or who wish to learn who currently owns their debt and how to get in touch with them. The letter and copies of statements or itemization of charges could be kept by a debt registry as described in Part B, *supra*, which could make it easier for both consumers and subsequent buyers.

Instead of a goodbye letter, however, most debt sale contracts explicitly prohibit debt buyers from providing information about the original credit issuer.[310] The reason for this is presumably to avoid communications with the consumer since the seller no longer owns

---

[306] DBA International White Paper at 7 ("The challenge, however, is that frequently this information is not available. The original creditor is not required by law to itemize a debt when it's written off. Having no obligation to do so, most creditors do not maintain these records beyond legal document retention requirements. It is a legal inconsistency that cannot be reconciled.").
[307] Full credit for this idea goes to my seminar student Samantha Koster.
[308] Nothing like this is currently required by regulations, however, some current state laws and some proposed ones require evidence that the consumer used the card before entering a judgment so this would be a way to satisfy that requirement. [cite to state laws and proposed laws, SC?, California SB 233 proposed, Del. Admin. Directive 2012-02 (Aug 2012), Maryland Rules 3-3-06, 308, 509 (Sept 2011), Texas Sup. Ct. Tex. Rule 508 (April 2013), Mass 940 CMR 7.08 (March 2012)]
[309] That is because each subsequent buyer would acquire a record of an individualized letter sent by the creditor to the consumer reporting that the account had been sold. If the account was sold again then the subsequent buyer would have multiple letters evincing the chain of title.
[310] FTC Debt Buying report at C-20.

the account,[311] however, this policy might make it harder for consumers to figure out whether the debt buyer contacting them legitimately owns their debt. The fact that some sale contracts "expressly prohibited debt buyers from using the credit issuer's name in the subject line of notification . . . and limited usage of the seller's name to the body of such letters" further adds to the possibility of consumer confusion.

The industry has not been blind to the role notification of a sale could play in both improving collections and alleviating many of the problems described earlier in the paper. Many of the contracts the FTC examined required debt buyers to notify consumers that their accounts had been sold, typically within 30-60 days after the sale. However, the contracts specified that the notification would come in the form of a letter from the debt buyer; an entity the consumer does not know. Some contracts provided that at the debt buyer's request, and at a cost of $10 per individual letter, the bank would "provide a form letter on an individual basis . . . that Buyer may send to a Cardholder to confirm that the Bank sold the Cardholder's Account to Buyer."[312] However, those letters would still come on the debt buyer's letter head and envelope.[313]

The goodbye letter seems like a simple enough solution, so why has the market failed to develop some version of it? One hypothesis is that banks have an incentive to have the buyer be the one to tell the consumer about the sale because if it is the bank notifying them, their (now former) customers are much more likely to call the bank and complain. This explanation is not very satisfying, however, because even if they learn it from a debt buyer, the customer may still decide to call their bank and complain.

The more satisfying explanation for why the industry has not already done this is the market failure described in Part IV.B. There is perhaps an opportunity to cure that market failure without regulation, however. Given the mounting pressure from federal and state regulators the industry has an opportunity to impose obligations on itself that would solve the problems described on Part I.

---

[311] Sample language that the FTC found in contracts it examined includes:

> Purchaser agrees not to refer any inquiries from a Debtor whose Account was purchased by Purchaser pursuant to this Agreement to Seller, but to handle any such inquiries directly with Seller. (spot resale of credit card debt, also spot sale of installment accounts for consumer goods)[; and]
> The Buyer agrees not to provide the Seller's mailing address, phone number or email address to any Obligor. (spot sale of credit card debt)

Id.

[312] *Id*.

[313] *Id*.

There has been movement in this direction. DBA International, the largest trade association for debt buyers, recently enacted a national "Certification Program."[314] Starting in March 1, 2014, all DBA International members will have to become certified under the program within two years or lose their membership. Part of the certification requires that "on all new debt portfolios purchased after becoming certified, the Certified Debt Buyer shall require in the purchase agreement (i.e. the contract) those data elements required to sufficiently identify the consumers on the associated accounts."[315] This requires the certified debt buyer to "use commercially reasonable efforts to negotiate the inclusion" of things such as name, last known address, last payment date, charge-off balance, and the current balance.[316] The certification standards do not require anything else in the language of contracts. After becoming certified, debt buyers are also required to "maintain an accurate listing for chain of title on debts purchased after certification." The standards make clear that this is not a retroactive requirement and only applies to debts purchased after certification.[317]

Debt buyers are of course not required to become DBA members, so the program will have limited effect on debt buyers who do not want to play by the rules. Nonetheless, DBA membership after certification is required for all members will separate debt buyers into those who are taking active steps towards compliance and those who are not. This information will be particularly useful for regulators. However, DBA members are not required to fulfill these requirements until after March 2014 and all the requirements are prospective. While the Certification Program is undoubtedly a step in the right direction, it does not go far enough to eliminate many of the problems described here.

B. Market solutions: Debt registry system

Some of the problems I've described in this article may sound very similar to the documentation and robosigning issues in the mortgage markets. Unlike in consumer debt context, however, the mortgages had a system of establishing title and recording changes in ownership—the county recording system. Despite that, the industry developed the Mortgage Electronic Registration System (MERS) to track nationally the changes in ownership among mortgage notes. MERS has come under a lot of attack for circumventing

---

[314] The DBA Int'l Board adopted the program in February 2012. DBA Int'l, *DBA Debt Buyer Certification Update* (July 25, 2012), http://www.dbainternational.org/members_only/DBADebtBuyerCertificationUpdate.pdf. The first DBA member was certified under the program on May 14, 2013. DBA Int'l, *First DBA Member Completes Debt Buyer Certification Program* (May 14, 2013), http://www.dbainternational.org/memberalerts/Alert-FirstCertification_051413.pdf
[315] DBA Int'l, *Debt Buyer Certification Program, Appendix A: Certification Standards Manual* (Feb. 2, 2013), http://www.dbainternational.org/certification/certificationstandards.pdf.
[316] *Id.* at 6.
[317] *Id.* at 7.

the county registration system and inserting itself as the owner of record or owner's nominee in foreclosure actions.[318]

In the context of unsecured consumer debts, the market has attempted to provide a MERS-like registration solution in the form of a debt registry system. Global Debt Registry and Convoke Systems are examples of two companies seeking to "fix" the documentation and chain of title problems in the market for consumer debt.[319] Both companies aim to do this by serving as a "middle man registry," a way for documentation and chain of title information regarding an individual debt to live with a third party (them) and stay there regardless of current ownership of the debt. What would change would be the owner of record.

[add more about the mechanics of the product and limitations]

As Global Debt Registry puts it in a whitepaper about the industry:

> Businesses and individuals would not dream of buying real property, automobiles, or anything else of value without first having its ownership status verified by a third party. If one would not buy a car or house without title confirmation, why would one spend thousands or millions buying debt without the same protection?[320]

Nonetheless, so far these market solutions have failed to gain traction. The likely reason is the market failure described in Part III.

C. Regulators: Enforcement & Rulemaking

Regulation is a natural best-fit to this problem since it fixes the collective action problem. Uniform standards benefit all entities in the market; they provide clarity that a particular action falls within the law. As described below, the OCC has issued a catalog of Best Practices for its regulated entities. If these are followed, a majority of the problems described in this article would cease to be a problem. As an additional regulator of banks, the CFPB also has an opportunity to regulate in this arena. The CFPB is administrative

---

[318] [cite more cases] *Mortgage Electronic Registration Systems, Inc. v. Lisa Marie Chong et. al.*, Order, 2:09-CV-00661-KJD-LRL (Dec. 4, 2009), http://www.scribd.com/doc/23828361/Mortgage-Electronic-Registration-Systems-Inc-Appellant-V-Lisa-Marie-Chong-Lenard-e-Schwartzer; *MERS, Inc. v. Graham*, 44 Kan. App. 2d 547, 2010 WL 1873567, at **4-**5; *In re Agard*, Case No. 810-77338-reg, Chapter 7, Memorandum of Decision (Feb. 10, 2011) ("The Court does not accept the argument that because MERS may be involved with 50% of all residential mortgages in the country, that is reason enough for this Court to turn a blind eye to the fact that this process does not comply with the law.").

[319] Global Debt Registry, http://www.globaldebtregistry.com/about-history, Convoke Systems, http://www.convokesystems.com/html/about_us.html (referring to an "emerging Federal, state and local regulations [that] have created an industry tipping point").

[320] Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, Global Debt Registry, http://ftc.gov/os/comments/debtcollecttechworkshop/00027-60064.pdf.

agency to have rule-writing authority over the Fair Debt Collection Practices Act also has an opportunity to act in this space. They have recently expressed a willingness to do so.[321]

Even before its action against JP Morgan Chase was made public, the OCC published a nonbinding list of Best Practices for debt sales, which exhorts that "[t]he bank needs to avoid the appearance of not providing the debt buyer with sufficient and appropriate information to collect debt in compliance with federal and state regulations."[322] Among these best practices, the regulator recommends that sale contract language "should confirm the accuracy of account balances, confirm marketable title that is free and clear from all liens, and confirm the completeness and accuracy of account documentation."[323] The OCC also recommends that account documentation provided to buyers "should be sufficient to allow the debt buyer to collect accounts in the normal course of business without having to request additional documentation."[324] However, the OCC guidelines are not mandatory, so it is unclear how many banks will choose to follow them, and how quickly they would be implemented.

The CFPB has so far held a number of public hearings about debt collection and a joint event with the FTC examining the "life of a debt" and the data integrity in collections.[325] They have also publically expressed a desire to turn to rulemaking under the Fair Debt Collection Practices Act in the next year. There are many possibilities for rulemaking under the Act—afterall, there have been no rules and hardly any modifications made to the Act since the 1970s. As far as the problems identified here are concerned, however, the CFPB has an opportunity to ban some of these practices by declaring them unfair or deceptive.

The Dodd-Frank Act gives the CFPB the ability to ban unfair, deceptive, or abusive acts or practices (UDAAPs). "An act or practice is unfair when:

(1) It causes or is likely to cause substantial injury to consumers;
(2) The injury is not reasonably avoidable by consumers; and
(3) The injury is not outweighed by countervailing benefits to consumers or to competition."[326]

---

[321] Cite CFPB press release talking about this.
[322] Office of the Comptroller of the Currency, Debt Sales / Best Practices 3-4, available at http://www.americanbanker.com/pdfs/occ-debtsales-bestpractices.pdf. *See also* Jeff Horwitz and Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, American Banker (July 2, 2013), http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html.
[323] *Id*. at 3.
[324] *Id*.
[325] Federal Trade Commission, Life of a Debt (June 6, 2013), http://www.ftc.gov/bcp/workshops/lifeofadebt.
[326] CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the

The principles of 'unfair' and 'deceptive' practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act).[327] Injury to the consumer is a central and determinative factor in determining unfairness in FTC case law.[328] "A 'substantial injury' typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice … [however, and importantly,] actual injury is not required; a significant risk of concrete harm is sufficient."[329] "An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury."[330] The second prong focuses on whether a consumer could avoid the injury. If avoiding the injury requires spending large amounts of money, the injury is not reasonably avoidable.[331] The question is "whether an act or practice hinders a consumer's decision-making. For example, not having access to important information could prevent consumers from . . . . choosing those that are most desirable to them, and avoiding those that are inadequate or unsatisfactory."[332] However, "an act or practice is not unfair if the injury it causes or is likely to cause is outweighed by its consumer or competitive benefits."[333]

The issue of attempting to collect on consumer debts without obtaining documentation especially in light of quitclaim language in contracts lends itself to this definition. A substantial injury occurs when consumers pay a debt they do not owe, or have a judgment entered against them for an incorrect amount. But actual injury—e.g., truly paying more than owed—is not required for a practice to be unfair. A significant risk that information debts sold with specific quitclaim language and without supporting documentation have material mistakes is sufficient.

The CFPB can also ban deceptive practices. "An act or practice is deceptive when:

Collection of Consumer Debts 2 (July 10, 2013)

[327] *Id*. at 1, CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1.

[328] This is corroborated by the "Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction," a document attached to a 1980 letter from the five FTC Commissioners to the Chair and Ranking Minority Member of the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, which stated that "unjustified consumer injury is the primary focus of the FTC Act." *Id.* at 1874. According to the FTC, consumer injuries can take a number of forms – monetary, health, safety, or otherwise – and are to be measured by a cost-benefit analysis of their net effects. *Id*. at 1875.

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

[330] *Id*.

[331] *Id*.

[332] CFPB Examination Manual v. 2 at UDAAP 2.

[333] *Id*.

(1) The act or practice misleads or is likely to mislead the consumer;
(2) The consumer's interpretation is reasonable under the circumstances; and
(3) The misleading act or practice is material."[334]

Deceptive practices can "take the form of a representation or omission."[335] In a compliance bulletin, the Bureau noted that it "also looks at implied representations, including any implications that statements about the consumer's debt can be supported." "[I]f a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation."[336] "Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service."[337]

As I have argued previously, the act of communicating with a consumer about a debt and giving that consumer the impression that the collector is more certain of the amount and other material aspects of the debt than she is able to be is misleading. The CFPB itself notes that "[e]nsuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers."[338] The material information that is omitted here is that the debt was sold with quitclaim language—language which casts doubt on the certainty of the information the collector is conveying to the consumer— and the collector does not have documentation to evince material information about the debt. It is reasonable for a consumer to interpret a collector's letter or statement about the debt as a statement that the collector has reasonable confidence in, and a statement that is backed by some form of evidence that can be proven. When this is not the case, the collector misleads the consumer by failing to disclose the precariousness of their case. This failure is material because the consumer would likely change their behavior if the collector disclosed how they obtained the debt and the contract terms that governed it.

In short, the CFPB has the authority to ban unfair and deceptive acts or practices. One solution to the problems identified in this article would be to declare as an unfair act or practice to sell consumer debt (1) without documentation about the amount, type of debt, date of last delinquency[339] or without specifically and affirmatively warranting the material information provided about the debts.

---

[334] CFPB Bulletin 2013-07 at 3.
[335] *Id*.
[336] *Id*. at 4. CFPB Examination Manual UDAAP at 5.
[337] CFPB Bulletin 2013-07 at 4. Perhaps counter intuitively, debt collection is a "product or service" under Dodd-Frank. [cite to dfn].
[338] CFPB Bulletin 2013-07 at 3.
[339] Needed to calculate the statute of limitations period as well as the allowed reporting period to credit reporting bureaus. See Fair Credit Reporting Act, 15 U.S.C. §1681c(c)(1).

[add specific suggestions about what kinds of documentation should be kept by original creditor and debt buyer]

[discuss whether rule could be done to apply prospectively—only to new debts sold—and ramifications]

D. A longer term solution: a tax on distressed debt

Ronald Mann has argued that the goal of bankruptcy policy should be redirected from "alter[ing] the incentives of borrowers to avoid financial distress and bankruptcy" (our current focus) since it is not only borrowers who determine their likelihood of falling into distress. Instead, Professor Mann suggests that we should "allocate the losses between borrowers and lenders in a way that minimizes the net costs of financial distress."[340] Mann's suggestion is to place more risks on lenders, "so that they will have an incentive to use information technology to limit the costs of distress."[341]

[discuss how an tax might force credit issuers to internalize some of the costs and prevent parts of this problem]

VI. Conclusion

Using a combination of a handful of publically available debt buyer contracts and information released by the Federal Trade Commission as part of a study of the debt buying industry, I have argued that many contracts for the sale of delinquent consumer debts contain language that makes collecting on them, without obtaining anything more than a spreadsheet with information about a debt, illegal.

After reviewing four possible solutions I conclude that the best short term solution is a regulatory ban on the practices described here by declaring them unfair or deceptive. As discussed in Part IV, the magnitude is unknown, although we have reason to believe it is significant. If this is true, one of the criticisms is the concern that regulation might have a large and potentially deleterious effect on our economy.[342] It might mean that large public companies—debt buyers as well as potentially large banks—would have to booking large losses in their balance sheets.

Moreover, making debt buyers who purchased these debts stop collecting until they verify them—something that will impossible for some of the debts—these individuals would get away with not paying back debts they incurred. At the same time, however, the repercussions to our belief in the rule of law of letting this illegality continue are also stunning. Hundreds of thousands, if not millions, of consumers may have paid debts to

---

[340] Mann, *Optimizing Consumer Credit Markets*, supra n. X at 399.
[341] *Id*.
[342] [Cite to reports discussing economic activity of debt collection and debt buying].

entities who did not comply with the law in collecting from them. A large portion of them may have a judgment entered against them by a court of law; a judgment that in many states will follow them for decades.[343] Perhaps the amount these individuals purportedly owed was correct, perhaps the interest calculation was as well, and perhaps the statute of limitations had not yet expired. Perhaps all of that was true for a large majority of these individuals. Despite this, we must remember that it was not the debtors who wrote the contracts that sold their debts or who did not retain documentation for long enough to have it available to sell.

[343] *See, e.g.*, New Jersey Stat. §2A:14-5 (20 years); N.Y. Civ. Prac. L. & R. §211(b) (20 years); Rhode Island Stat. §9-1-17 (20 years); Alabama Stat. §6-2-30 (20 years). [add cites to states with SOLs greater than 10 years]