Dirty Debts Sold Dirt Cheap

*Dalié Jiménez**

This Article uses a unique collection of contracts for the sale of consumer debts—e.g., delinquent credit card accounts—to examine the sale transaction. It finds that in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred, sometimes as far as specifically refusing to stand by "the accuracy or completeness of any information provided." The Article argues that the collection of consumer debts sold through these transactions is in violation of the Fair Debt Collection Practices Act's prohibition against using deceptive or misleading representations in connection with the collection of a debt. After considering some potential explanations for why this illegal collection has gone on for so long, the Article proposes a regulatory and a market solution to the problem.

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INTRODUCTION

When consumers fail to repay their financial obligations—credit cards, auto loans, medical bills, or even gym memberships—creditors understandably want to collect on the debts due to them. They can try to collect themselves. Or they can employ a

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third party firm to collect. But often they simply sell the debts to firms who specialize in collections. These firms, including four publically traded companies, buy these debts for pennies—or fractions of pennies—on the dollar.[1] For example, if someone owes Planet Fitness one hundred dollars in unpaid dues, Planet Fitness might sell that debt to a third party for five dollars. This third party then would seek to collect the $100 plus interest and fees from the recalcitrant fitness enthusiast, sometimes as much as a decade or more after the obligation was incurred.[2]

The low cost at which the third party can purchase the debt from Planet Fitness reflects the risk that it is taking that the account will ultimately be uncollectible.[3] Perhaps driving the purchase price down even further, as I argue in this Article, the very low price also reflects the lack of documentation and information about the debt that typically is provided with these sales. This creates a legal uncertainty to the collection.

Despite this legal uncertainty, purchasing these dirty debts dirt cheap has become a massive industry. Debt buyers purchase billions of dollars of delinquent debts annually, sometimes from originating creditors, sometimes from other debt buyers.[4] The industry has been the subject of much criticism.[5] A number of articles have

[1] While the debt purchasing market can include the purchase of non-delinquent consumer or commercial receivables, I limit my discussion in this Article to the purchase of delinquent or defaulted consumer accounts. The CFPB estimates that debt buyers and debt collectors combined totaled approximately 4,500 firms in 2007. Defining Larger Participants in Certain Consumer Financial Product and Service Markets, 77 Fed. Reg. 9592, 9599 (proposed Feb. 17, 2012) (citing U.S. CENSUS BUREAU, ECONOMIC CENSUS (2007)).

[2] 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).

[3] 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 *Sweat Box*].

[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 represented a 45.3% increase over the previous year's investment); SquareTwo Fin. Corp., Annual Report (Form 10-K) 35 (Mar. 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] *Cf., e.g.*, FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2009), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf [hereinafter REPAIRING A BROKEN SYSTEM].

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relied on the experiences of legal clinics representing consumers in these cases to find that in the majority of cases where clinics are involved, debt collectors' attorneys do not have requisite 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 or Commission) itself has acknowledged that current practices leave much to be desired, going so far as to refer 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 or Bureau) extensive powers to regulate all of the debt collection players: sellers of consumer debt—typically but not exclusively banks—debt buyers,[9] and debt collectors.[10] The CFPB is the first and only agency with authority to enact rules

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[6] See, e.g., Emanuel J. Turnbull, Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection, 38 VT. L. REV. 339 (2013); Dalié Jiménez, D. James Greiner, Lois M. Lupica & Rebecca L. Sandefur, Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach, 20 GEO. J. ON POVERTY L. & POL'Y 449 (2013); Judith Fox, Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana, 24 LOY. CONSUMER L. REV. 355 (2012) (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. MITCHELL L. REV. 1116 (2009).

[7] Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AM. BANKER, Mar. 29, 2012, *available at* 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*, AM. BANKER, Mar. 29, 2012, *available at* 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*, AM. BANKER Mar. 12, 2012, *available at* 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), *available at* 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 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] REPAIRING A BROKEN SYSTEM, *supra* note 2, at 5.

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

[10] *See generally* Dodd-Frank Wall St. Reform and Consumer Protection Act, Pub.L. No. 111–203, Title X (2010) [hereinafter DODD-FRANK]. The FDCPA generally prohibits "debt collectors" from engaging in abusive practices. 15 U.S.C. §§ 1601-1692o; 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

implementing the Fair Debt Collection Practices Act (FDCPA), the primary federal statute in this space.[11] Late last year, the Bureau published an Advanced Notice of Proposed Rulemaking seeking comments from the public on debt collection issues.[12] The Bureau also acquired supervisory powers over "large market participants" in the debt collection market[13] and it can 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.[14] The CFPB is not alone. The FTC retains its enforcement powers over the FDCPA, and has significantly increased its activities in this area in the last few years.[15]

This Article takes a critical look at the current debt purchasing business model and the information and documentation shared between credit originators and buyers of delinquent debts. Over the last year I have amassed a collection of 41—and counting—purchase and sale agreements between large banks and debt buyers.[16] These agreements are closely guarded by the industry.[17] I use these contracts—along

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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] Bureau of Consumer Financial Protection, *Debt Collection (Regulation F): Advanced Notice of Proposed Rulemaking*, 78 Fed. Reg. 67848 (proposed Nov. 12, 2013) (to be codified at 12 C.F.R.pt. 1006), *available at* http://www.regulations.gov/#!docketDetail;D=CFPB-2013-0033. Along with Patricia McCoy, I filed a comment urging the CFPB to impose greater documentation and information requirements. Patricia A. McCoy & Dalié Jiménez, Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F), Docket No. CFPB-2013-0033, Regulatory Identification Number (RIN) 3170-AA41 (Feb. 28, 2014), *available at* http://www.creditslips.org/files/jimenez-mccoy-comment-in-response-to-cfpb-anpr-on-debt-collection---final-1.pdf.

[13] 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).

[14] *See* DODD-FRANK § 10-1089, Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601-1692o, DODD-FRANK § 10-1031.

[15] DODD-FRANK § 10-1089. "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." CONSUMER FINANCIAL PROTECTION BUREAU, ANNUAL REPORT, FAIR DEBT COLLECTION PRACTICES ACT 14 (2012), *available at* http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf. *See also In Settlement with FTC, Debt Collectors Agree to Stop Deceiving Consumers and Pay Nearly $800,000*, Fed. Trade Comm'n (Mar. 23, 2013), *available at* http://www.ftc.gov/opa/2013/03/securitycredit.shtm.

[16] The contracts are all available at http://dalie.org/contracts.

[17] *See, e.g.*, Discovery Order in Gold v. Midland Credit Mgmt. Inc., et. al., 13-cv-02019-WHO (N.D. Cal. Feb. 20, 2014), *available at* http://scholar.google.com/scholar_case?case=14390888451764458862&hl=en&lr=lang_en&as_sdt=8006&as_vis=1&oi=scholaralrt (ordering defendants to produce purchase and sale agreement).

with data from the FTC and the CFPB—to examine the prototypical consumer debt sale transaction and find troubling evidence of illegality.

In Part II, I describe the landscape and mechanics of debt buying. I begin with the debt buyer business model and examine the information available to the purchasers regarding the delinquent accounts—very little. I also discuss the—in many cases—near impossibility of obtaining documentation about the accounts.[18] Finally, I discuss troubling language found in these contracts. I find that an overwhelming number of contracts purport to sell the debts "as is" and "with all faults" and oftentimes specifically disclaim any representations or warranties as to material aspects of the debts, such as the amount or interest rate.[19]

Analyzing these circumstances and contract language, in Part II, I argue that under the prevailing debt purchasing business model, some of the collection activity currently occurring violates the FDCPA. The essence of my argument is that under the circumstances I've just described a debt collector violates the FDCPA's 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 first verifying the underlying debt.[20]

In Part III, I examine potential reasons why the market has evolved this way and why it has not self-corrected. Part IV considers two potential solutions to this problem: one regulation based and one from market actors. Finally, Part V concludes with thoughts about the future of the debt collection industry.

I. LIFECYCLE OF A DEBT: A PRIMER

Creditors use a variety of strategies to recover on delinquent accounts. Internally, responsibility for the account is moved to various departments. One or more third-party entities may be hired to "work the account." Eventually, many creditors will

[18] An example clause from multiple debt purchasing agreements is instructive: "Buyer expressly acknowledges that . . . documentation may not exist with respect to the Loans purchased by Buyer." Loan Sale Agreement between FIA Card Services, N.A. and Cavalry SPV I, LLC (Oct. 29, 2008); Agreement between FIA Card Services, NA, and CACH, LLC, April 14, 2010; Agreement between FIA Card Services, NA, and CACH, LLC, Aug. 11, 2009.

[19] *Id*.

[20] In a separate working paper, I argue that where the attempt to collect is through a lawsuit, the collection attorney misleads the court and violates Rule 11 when they do verify the facts alleged in the complaints they file.

decide to assign all of their rights on an account to a debt buyer. This Part details the movement of a typical delinquent account—from delinquency until one or more purchases. I describe the "how" of a debt assignment as well as the "what"—what information or documentation regarding the debt moves with the assignment. I focus my discussion primarily on credit card debts in this article because they comprise the largest portion (by dollar amount) of consumer debt purchased by debt buyers.[21]

A. *Error-Prone Flow of Information and Documentation in the Debt Collection Ecosystem*

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 an email, letter, or a phone call from 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.[22] Information about the customer's conversations with customer representatives, disputes and complaints and the like is maintained in the bank's customer relationship management (CRM) system.[23]

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[21] While anthropological research has shown that credit predates even money itself, and that debt buying and debt trading has been around since antiquity, DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS (2012), the modern iteration of the bulk debt purchasing business model developed over thirty years ago, as a result of the savings and loans crisis. Federal Deposit Insurance Corporation, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 433, *available at* http://www.fdic.gov/bank/historical/managing/. *See also* Lee Davidson, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC BANKING REV. 17 (2005), *available at* http://www.fdic.gov/bank/analytical/banking/2005jul/article2.pdf. 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. Federal Deposit Insurance Corporation, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 433, *available at* http://www.fdic.gov/bank/historical/managing/. *See also* Lee Davidson, *Politics and Policy: The Creation of the Resolution Trust Corporation*, 17 FDIC BANKING REV. 17 (2005), *available at* http://www.fdic.gov/bank/analytical/banking/2005jul/article2.pdf. 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. *Id.* 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. FTC DEBT BUYER REPORT, *supra* note 2, at 12 (citing Robert J. Andrews, Debt Collection Agencies in the US, IBISWorld INDUS. REP. 56144, at 14 (2010)).

[22] John Tonetti, Collections Program Manager, Consumer Financial Protection Bureau, Presentation at FTC/CFPB Life of a Debt Conference: How Information Flows Throughout the Collection Process (June 6, 2013) (transcript available at http://www.ftc.gov/sites/default/files/documents/videos/life-debt-data-integrity-debt-collection-part-1/130606debtcollection1.pdf).

[23] *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*.

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."[24] Depending on the credit card issuer, the debt may be placed with one or multiple third-party debt collection agencies during this time.[25] 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 and certain users of credit reports, such as landlords.[26]

How long the collection agency has to try to collect on an account varies widely, but can be as little as one month. If the consumer does not pay after an agency has "worked" the account, it is likely that the account will be recalled and placed with a second collection agency. Information that may have been gathered by one collection agency—such as notes describing why the consumer is not paying—is not generally transmitted to the subsequent collection agency.[27] 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.[28]

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[24] *Id*.
[25] General Accounting Office, 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., Q2 2007, at 12.
[26] "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].
[27] Tonetti, *supra* note 22.
[28] *Id.*

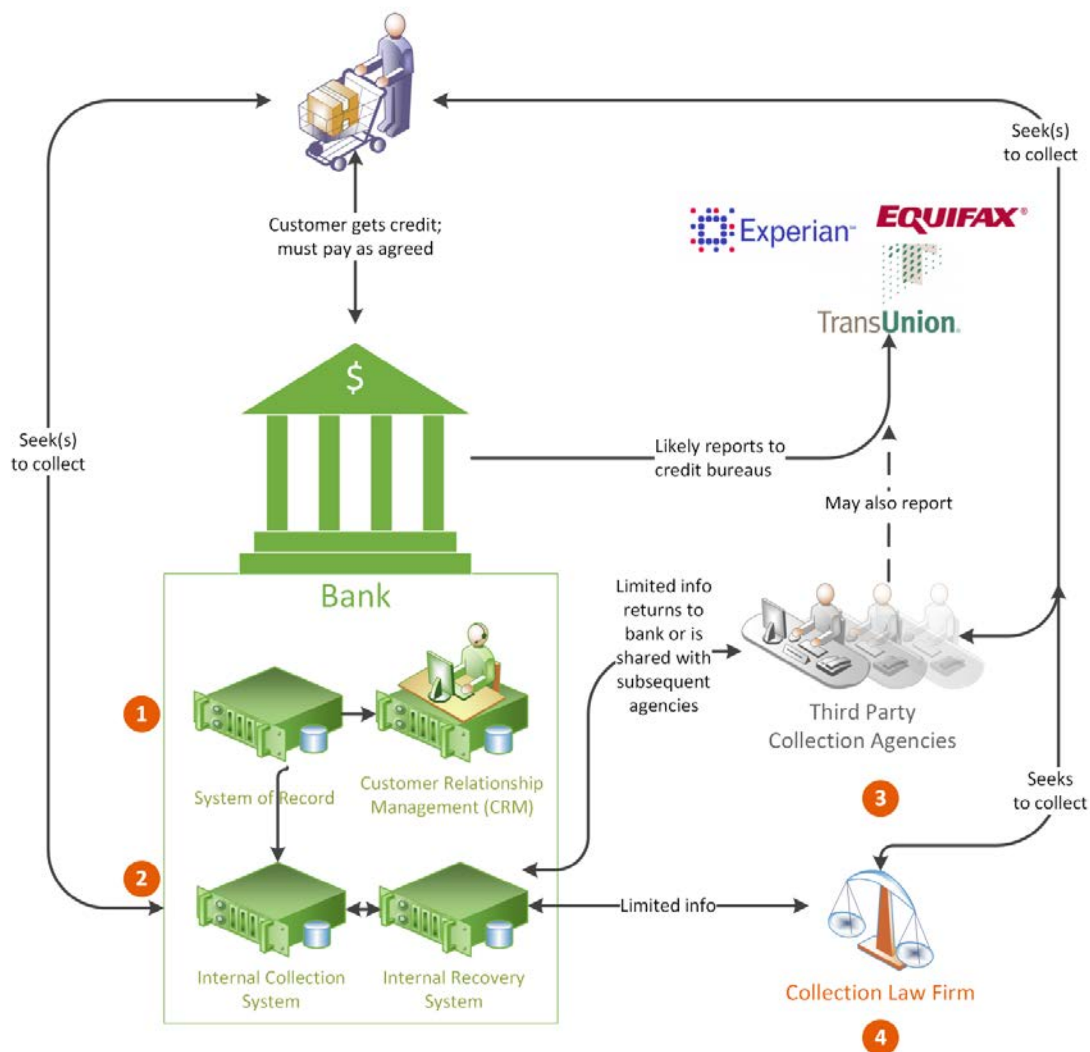
As one CFPB official notes, "the timeliness and accuracy of this information transfer can become an issue."[29]

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.

[29] *Id*.

Figure 1 – Data Flows While Debt Is Owned by Creditor[30] – 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).



If the consumer does not repay, eventually the card issuer is required by banking regulations and capital requirements to "charge-off" the account—declare it as

[30] This diagram is based on the presentation given by John Tonetti at the FTC / CFPB Life of a Debt event. *See supra* note 22. Mr. Tonetti's PowerPoint is on file with the author.

unlikely to be collected. For credit cards, the charge-off must occur within 180 days after the account is past due.[31] A charge-off has no effect on the validity or enforceability of the debt; it is simply an accounting procedure. Credit card contracts allow issuers to continue charging interest and fees post charge-off, although most banks do not do so.[32] This avoids the cost of sending periodic statements, a requirement under the Truth in Lending Act if the account continued to accrue interest or fees.[33]

At the point of charge-off, lenders move the borrowers to a recovery system.[34] "In some cases, information from the collection system is passed to the recovery system, in some cases it isn't."[35] 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."[36] 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."[37] 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."[38]

This information flow is problematic;[39] not just because the consumer will have to provide the same information more than once, but also because the consumer will be

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[31] *Uniform Retail Credit Classification and Account Management Policy*, Office of the Comptroller of the Currency (June 20, 2000), *available at* 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.
[32] *See, e.g.*, McDonald v. Asset Acceptance LLC, 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).
[33] The current regulation requiring periodic statements 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).
[34] *Id*.
[35] *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*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.

contacted repeatedly by entities she will not recognize and has no way of authenticating.

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.[40] Debt is sold by credit card issuers in pools of accounts (portfolios) that are described as having particular characteristics important for valuation—e.g., average amount outstanding, dates of last payment.[41] 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.[42] 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.[43]

Debt buyers also act as resellers of accounts to other debt buyers.[44] A debt may be sold again and again, as can be seen in Figure 2 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 could not collect.[45] 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 in Part II.B.2.

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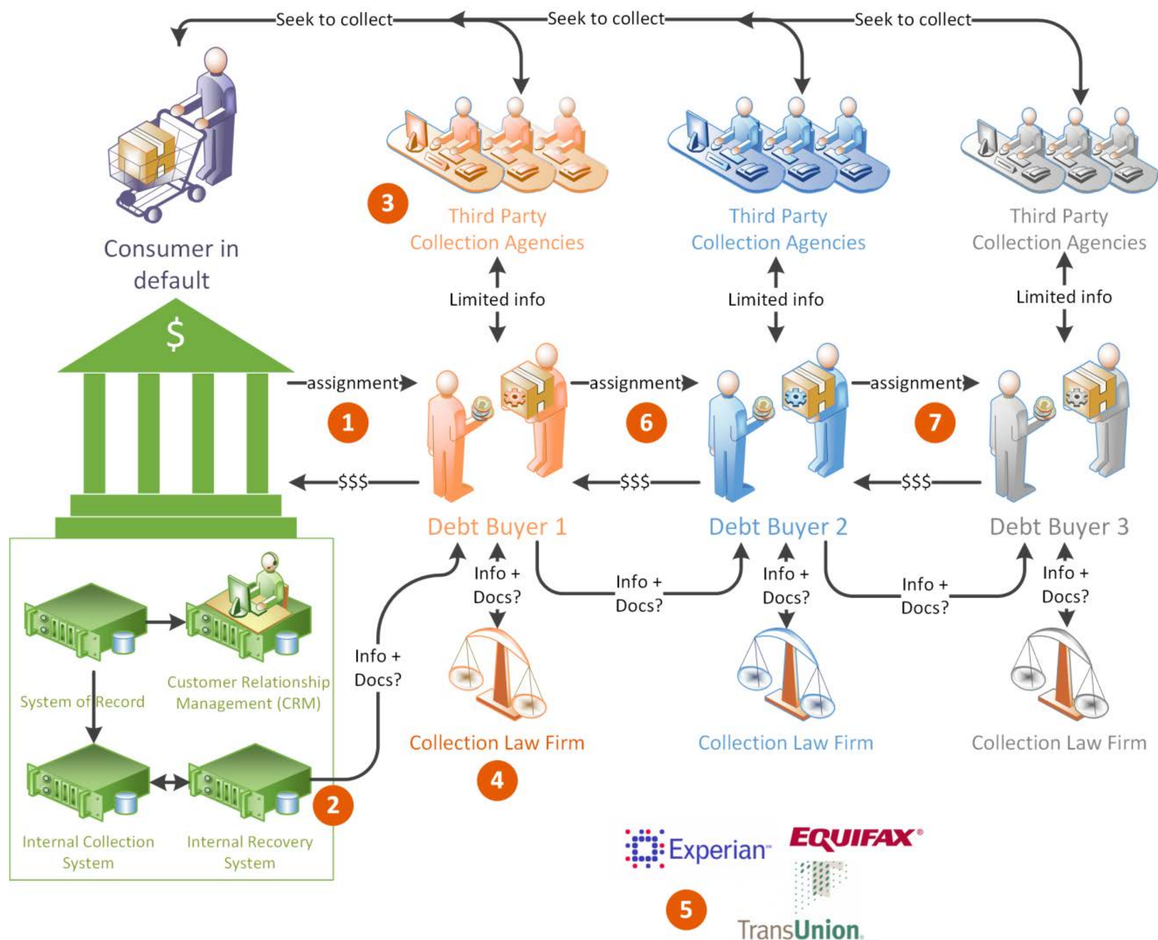
[40] *See generally* GAO DEBT COLLECTION REPORT, *supra* note 25, at 18-30.
[41] FTC DEBT BUYER REPORT, *supra* note 2, at 17-19.
[42] *Id*. at 20 ("Debt buyer industry representatives report that some large sellers (e.g., major credit card issuers) sell debts only to purchasers with well-established 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* Tonetti, *supra* note 22.
[43] Encore Capital Group Inc., Annual Report (Form 10-K) 3 (2011); FTC DEBT BUYER REPORT, *supra* note 2, 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). As the FTC explains,
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 . . . price.
FTC DEBT BUYER REPORT, *supra* note 2, at C-2 n.3.
[44] FTC Debt Buyer Report at 19-20.
[45] *Id*. at 19.

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.



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.[46] 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."[47]

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).[48] Before bidding, the debt buyer will analyze the portfolio using credit reporting information[49] and, depending on the debt buyer, may use analytical models to calculate expected recovery rates.[50]

Once they have been assigned the accounts, the first 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 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

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[46] *See McDonald*, 2013 WL 4028947.
[47] *Id*.
[48] *Id*. at 18.
[49] 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").
[50] *See, e.g.*, *Evaluate A Debt Portfolio Before You Buy Or Sell*, Experian, *available at* http://www.experian.com/consumer-information/portfolio-evaluator.html (last visited Feb. 24, 2014).

prohibited practices described therein. Throughout the article I use these terms interchangeably.[51]

B. Obtaining Information and Documentation on Debts Purchased

My primary data source for this section is a collection of 36 consumer debt sale and purchase agreements I have assembled from consumer lawyers, debt collectors, and searches of public records.[52] The contracts span over a decade: the earliest contract is from June 2002; the latest is from August 2013.[53] I have been collecting them for almost year, and despite assiduous searching, have only been able to procure 36. 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 available electronically. 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.[54]

I also compare the language in my sample to the FTC's report on the debt buying industry. In December 2009, the FTC issued orders to the nine largest debt buyers in the United States requesting a variety of information.[55] The orders "required that the recipients produce extensive data about their business practices and how they receive, acquire, and transfer information about consumer debts."[56] Ultimately, most of the information the FTC analyzed came from six of the largest debt buyers.[57] The FTC requested copies of contracts purchased from March through August 2009 and allowed respondents to produce one example of each type of contract.[58]

The debt buyers chose the roughly 350 contracts they provided; they were not a random or representative sample of the contracts the debt buyer had entered into or

[51] Notably, this Article 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.
[52] The collection of contracts can be downloaded at http://dalie.org/contracts.
[53] Blank Receivables Purchase & Sale Agreement (Aug. 22, 2013); Midfirst Bank to Calvary SPV I LLC Purchase and Sale Agreement (June 7, 2002). Not all contracts are signed, and some may not have been involved in a deal.
[54] It seems that in many circumstances, a case will be dismissed if it looks like they might have to release the contract.
[55] FTC DEBT BUYER REPORT, *supra* note 2, at 7.
[56] *Id.* at 8.
[57] 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.
[58] *Id.* at 35, C-1.

of the contracts in the industry.[59] The FTC's request was that debt buyers provide "one example of each type or variety" of contracts they entered into between July 2006 and June 2009.[60] Nonetheless, this directive 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."[61] The FTC did not release specific contracts but discussed common terms and phrases. Before the FTC study was released, only a handful of debt sale contracts had been publically released through litigation.[62]

Neither of these samples was collected randomly and so neither may be representative. Nonetheless, as I discuss further in Part IV, these contracts were selected by the industry itself and at least one bank executive opined that the study was "representative of the industry as a whole."[63] To the extent that the contracts are problematic, they represent contracts that the industry chose to release. 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 represents that the seller has legal title over the accounts being sold and assigns ownership to the debt buyer.[64] What other information or documents about the accounts the debt buyer receives varies; for the typical transaction, it does not appear to be very much. Below I describe what a debt buyer receives when she buys a pool of accounts from a creditor (or another debt buyer) and what the contracts say that she can have access to after the purchase.

1. Buyers obtain only minimal information at the time of sale

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:

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[59] *Id.* at C-1.
[60] *Id.* at Technical Appendix A-1.
[61] *Id.* at Technical Appendix C-1.
[62] Some contracts were made available as part of a news story. Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AM. BANKER, Mar. 29, 2012, *available at* http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html.
[63] 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 6, 2013), *available at* http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-2.
[64] 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* Horwitz, *supra* note 7.

(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);
(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);[65]
(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).[66]

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) finance charges and fees was missing from 63% of accounts;
(3) interest rate charged on the account was missing from 70% of accounts;
(4) date of first default was missing from 65% of accounts;
(5) name of the original creditor was missing from 54% of accounts.[67]

These five largely missing pieces of information are quite important to the debt buyer's ability to legally collect for a number of reasons. The amount of principal—missing from 89% of accounts—or the total amount of finance charges and fees—missing from 63% of accounts—are important to the consumer for tax purposes. Income from a loan is not taxable because it has to be repa*id.*[68] However, if a consumer settles a non-mortgage debt and thus decreases the amount of the loan that it has to repay, the IRS requires that the consumer pay taxes on the forgiven amount.[69] The goods and services the consumer bought but did not pay for (because all or part of the debt was forgiven) are taxable income. Unless they are deductible, interest and fees added to the principal would also be taxable income.[70] However, if

[65] Some of these may be missing because a payment was never made in an account.
[66] FTC DEBT BUYER REPORT, *supra* note 2, at 34-35.
[67] *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.
[68] Martin MacMahon & Daniel L. Simmons, *A Field Guide to Cancellation of Debt Income*, 63 TAX LAWYER 415, 417 (2010).
[69] *See* U.S. v. Kirby Lumber Co., 284 U.S. 1 (1931): "Generally, a taxpayer must include income from the discharge of indebtedness … Where indebtedness is being discharged, the resulting income would equal the difference between the amount due on the obligation and the amount paid, if any, for the discharge." Martin v. Commissioner of Internal Revenue, T.C. Summ. Op. 2009-121, 2009 WL 2381577 (U.S. Tax Ct. 2009) (internal citations omitted).
[70] *See* 26 U.S.C. § 108(e)(2); MacMahon & Simmons, *supra* note 68, at 450.

the creditor or debt buyer issues a 1099-C to the consumer for an amount that lumps together principal with interest and fees, the consumer may lose out on two potential defenses that would lower her tax liability. This is because she would unable to calculate that part of the interest that may have been deductible or that part she may legitimately dispute. Under many circumstances, the consumer will not be liable for that portion of the cancelled debt that she disputed before settlement.[71] These defenses would not be available to the consumer unless the principal and interest and fees are separately broken out.[72] Creditors are in the best position to separate interest and fees and should be required to do so, and to pass that information on to anyone who subsequently owns the debt.

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.[73] 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.[74]

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.[75] In at least three states, when a debt falls out of statute, it is extinguished.[76] Outside of

[71] MacMahon & Simmons at 435-39.
[72] These defenses would be particularly important for consumers whose debts were sold under contracts that specifically disclaimed, *inter alia*, "the accuracy of … accrued interest amounts due under the loans." *See* FIA Agreements, *supra* note 18. *See also* discussion *infra* at page 7.
[73] But see below for a discussion of how infrequently additional requests for information were obtained by debt buyers.
[74] 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 *supra* note 2, at C-31 ("A few contracts prohibited debt buyers from 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.").
[75] 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. 79 (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).
[76] MISS. CODE ANN. § 15-1-3 (extinguishing all debts after statute expires), WIS. STAT. ANN. § 893.05 (mirroring the Mississippi statute), N.C.G.S. § 58-70-115(4), 155(B)(7) (2012) (prohibiting debt buyers from attempting to

those states, the statute of limitations is typically an affirmative defense.[77] However, in the consumer debt collection context, the overwhelming majority of courts have found that filing a time-barred lawsuit is a violation of the FDCPA.[78] Some have found that even threatening to file a lawsuit is a violation.[79] The FTC has taken the position that for any debts which the debt collector "knows or should know may be beyond the applicable statute of limitations," it is unfair for a collector to attempt to collect without notifying the consumer that the debt is time-barred and the debt collector has no legal remedy.[80] Given the FTC's findings, it is concerning that in 65% of accounts the debt purchaser does have the information needed to calculate the limitations clock.

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.[81] 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

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collect past the statute of limitations and requires evidence establishing the date of last payment in order to calculate the date the statute would expire).

[77] 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).

[78] A number of courts have found that filing a time-barred suit is a violation of the FDCPA. Phillips v. Asset Acceptance, LLC, 736 F.3d 1076 (7th Cir. 2013); Huertas v. Galaxy Asset Mgmt., 641 F.3d 28, 33 (3d Cir. 2011); 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); Goins v. JBC & Assoc., 352 F.Supp.2d 262 (D.Conn.2005); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767, 771 (8th Cir. 2001); Stepney v. Outsourcing Solutions, Inc., 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).

[79] *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 (finding that it is a violation of the Act to threaten to take "any action that cannot legally be taken"); *Herkert*, 655 F. Supp. 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. 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).

[80] United States v. Asset Acceptance, LLC, Case No. 8:12-cv-00182-JDW-EAJ, *Consent Decree* at 11, *available at* http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf. *See also id.* at 13 (providing specific disclosure language).

[81] FTC DEBT BUYER REPORT, *supra* note 2, at 37.

amounts of the debts are correct."[82] However, sellers 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.[83]

My sample of purchase and sale agreements is just that—the contracts themselves. As such, it is hard to know what information was sold along with the debts. There is evidence, however, that it was some of the important information described above was missing in these transactions. For example, a series of three contracts stemming from the same original sale of debts by Chase Bank state that a number of data fields will not be provided on the date of the sale and instead "will be provided when and if available."[84] These data fields included: the co-debtor's social security number, the debtor's phone number, the date of last payment, the amount of the last payment, the contract date, and the first date of delinquency.[85]

2. Account documents rarely provided at sale; hard to come by or non-existent post-sale

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 refers to the account documentation—i.e., monthly statements, contracts, the account application— as "media." This media could be transferred at the time of the sale or could be available to access post-sale. In either case, it seems that in the overwhelming majority of cases, there is no media to be found at all—whether at the sale or after.

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[82] *Id*.
[83] *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.
[84] It appears that Chase Bank sold a number of accounts (face value of at least $71,271,881) to Turtle Creek Assets, Ltd., a debt buyer from Texas, in 2009. About two months later, Turtle Creek sold some of those accounts to at least two other debt buyers. The language in all three contracts is the same and it is located at "Exhibit D: File Conversion List." *See* Purchase and Sale Agreement from Chase Bank USA NA to Turtle Creek Assets, Ltd. (May 7, 2009); Purchase and Sale Agreement from Turtle Creek Assets Ltd. to Pasadena Receivables (July 16, 2009); Purchase and Sale Agreement from Turtle Creek Assets Ltd. to Pasadena Receivables (July 29, 2009).
[85] *Id.*

In its report examining 3.9 million accounts, the FTC estimated that only 6% of accounts were sold with any kind of media at all.[86] In my sample, only three contracts—7%, all stemming from the same original creditor—included documentation at the time of sale.[87] When documentation is provided as part of the sale, it is typically in the form of account statements (in the FTC sample, 6% of accounts; in mine, 7% of contracts), "terms and conditions" documents (also 6% in the FTC sample; not present in my sample), and account applications (less than 1% of accounts in the FTC sample; not present in mine).[88]

When not transferred at the same of the sale, media is sometimes available from the original creditor. However, a number of issues severely limit its availability, 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 can be sent, and the cost to the debt buyer. Second, depending on where in the "assignment chain" a debt buyer is, the current owner of the debt may not have right to obtain media from the original creditor, as seen in Figure 3, *infra*. Finally, even if the current debt owner has the right to obtain media, it may have been destroyed or inaccessible by the time she requests it. I discuss these issues in more detail below.

Only a few contracts in my sample (7%) do not discuss media at all.[89] The rest discuss it but vary widely in whether or how much media is available, when and at

[86] "If the data from the debt buyers that submitted only samples of their portfolios are weighted by the total number of accounts purchased in this period, the estimated percentage of accounts for which any document was received at the time of purchase would decrease to 6%." FTC DEBT BUYER REPORT, *supra* note 2, at 35 n. 150. One should note however, that this sample is not likely representative. While the FTC requested information from the nine largest debt buyers at the time of the request for accounts purchased between March through August 2009, for purposes of calculating this percentage, the majority of the information (87%) came from two debt buyers. *Id*. at A-6, 35 n.149.

[87] See note 84, *supra*, describing a sale between Chase Bank to Turtle Creek Assets and two subsequent sales. The language in all three contracts is the same:

Seller shall, *to the extent such documents are reasonably available*, provide Purchaser with digitized media representing up to eighteen (18) months of account statements via our web-based platform within sixty (60) calendar days after the consummation of the transaction at no additional cost to Purchaser.

Id. (emphasis added).

[88] 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. As might be expected, whether documentation is provided depends 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." *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.

[89] Household Bank to Household Receivables Acquisition Co. II (Jul. 1, 2002); Household Receivables Acquisitions Co. II to Metris Receivables, Inc. (Dec. 1, 2005); CompuCredit International Acquisition Corp. to Partridge Funding Co. (Apr. 4, 2007).

what cost. All of the contracts that discussed media absolved the seller of liability in the event that they failed to provide it.[90] Most allowed as little as 15 and as much as 90 days to deliver the documents if found.[91]

In addition, the overwhelming majority of contracts in my sample (93%) severely limit the amount of media a buyer can obtain[92]. A number of contracts only allow buyers to request documents on between 2.5% of all accounts purchased per month and charged a fee after documents had been provided on more than 10% of the accounts.[93] The fees ranged from \$5-\$50 per document.[94]

Debt buyers purchasing from reseller buyers face an additional hurdle to obtaining account documents post-sale. 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 with the original creditor, and thus cannot require the original creditor to provide them with account documents.[95] Subsequent purchasers

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[90] *See, e.g.*, Agreement between Riverwalk Holdings LTD and Wayric Svcs. (HSBC/Orchard Bank Accounts) (Mar. 24, 2009) ("The failure of the Seller to provide an Account Document requested by Buyer will not be a breach of this Agreement."); Agreement between Chase Bank, NA and Palisades Collection, LLC at 13 (Feb. 15, 2008) ("[S]eller shall, to the extent such documents are reasonably available, provide Purchaser with copies . . . media . . . . Seller may in its sole discretion honor such request and charge Purchaser fifty dollars (\$50.00) for each document provided."); Credit Card Purchase Agreement between Platinum Capital Investments, Ltd. and (blank) at 8 (July 2012); Account Purchase Agreement between Chase Bank USA, NA and Global Acceptance Company, LP at 9 (Dec. 22, 2010). *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).

[91] *See, e.g.*, Wells Fargo Bank to Autovest, LLC (Jan. 6, 2011) (15 days); HSBC to CACH, LLC (May 18, 2011) (20 days); Citibank to Unifund CCR (Feb. 28, 2005) (60 days).

[92] *But see* Wells Fargo Bank to Autovest, LLC (Jan. 6, 2011)("[Seller] shall provide Buyer with an electronic format of imaged Receivables Documents related to no less than seventy-five percent (75%) of the Receivables accounts being purchased by Buyer hereunder within thirty (30) calendar days following the applicable Closing Date, with the remainder (but not less than eighty-five percent (85%) of available Receivable Documents) to be provided to Buyer within ninety (90) calendar days of each Closing Date.").

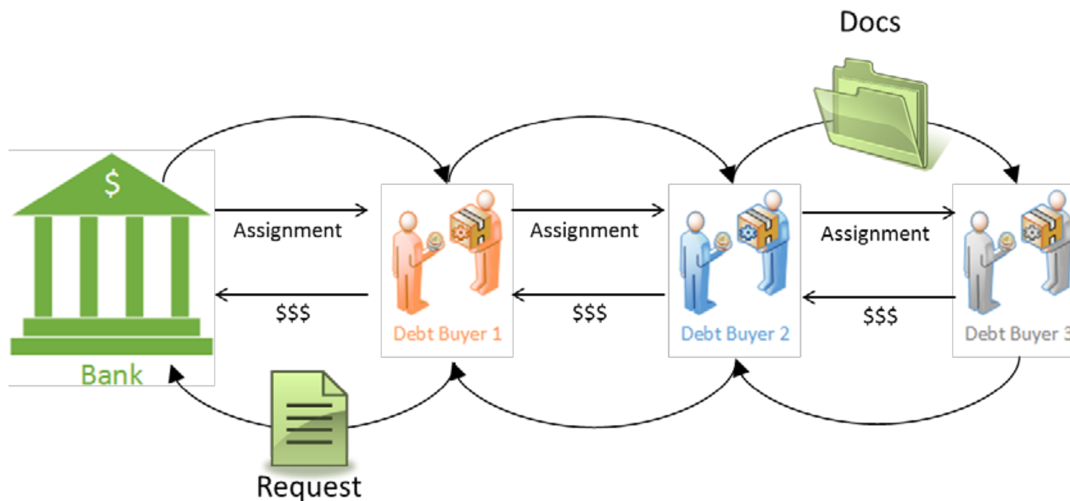
[93] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank to Palisades Collection, LLC (Feb. 15, 2008); Blank Purchase and Sale Agreement from Platinum Capital Investments (2011); Blank Purchase and Sale Agreement from Platinum Capital Investments (Jul. 1, 2012). In their review of 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. FTC DEBT BUYER REPORT, *supra* note 2, at 39.

[94] *See, e.g.*, Credit Card Account Purchase Agreement between Chase Bank to Palisades Collection, LLC (Feb. 15, 2008) (\$10 per month for any requests for documents between 10-25% of accounts, \$50 per document thereafter). The FTC reported findings of \$10-15 per document. FTC DEBT BUYER REPORT, *supra* note 2, at 40.

[95] *See, e.g.*, Account Purchase Agreement between Chase Bank USA, NA and Global Acceptance Company, LP at 16 (Dec. 22, 2010) (no third party beneficiaries); Wells Fargo Blank Agreement (Jan. 6, 2010)("Nothing in this Agreement, express or implied, is intended to confer upon any person or entity other than the Parties hereto or their respective successors any rights or remedies under or by reason of this Agreement."); HSBC to Main Street Acquisition (Feb. 20, 2009) ("Nothing in this Section 20 shall be interpreted as limiting Purchaser's ability to . . . sell the Purchased Receivables, and in such case Seller shall have no obligation to such person or entity under this Agreement.").

must request that the debt buyer/reseller they purchased from go back to who they purchased from until the request reaches the original creditor.[96]

Figure 3 – How Account Information is Obtained by Subsequent Debt Buyers[97]



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 the document requester (Debt Buyer 3 in Figure 3) may have to pay a fee to the previous debt buyer (Debt Buyer 2) that is large enough to cover the costs of all previous buyers as well as the costs the original creditor requested in the contract.[98]

Many of the original creditor contracts in my sample 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."[99] I found similar language in resale contracts; that is contracts between a debt buyer acting as a reseller and another debt buyer.[100] Even more pernicious, a number of contracts

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[96] *See, e.g.*, Agreement between Chase Bank, NA and Palisades Collection, LLC at 13 (Feb. 15, 2008)("Notwithstanding the foregoing, Seller shall have no obligation to retrieve or provide any documents to any assignee of the Purchaser without Seller's prior written consent.").

[97] Figure adapted from GAO DEBT COLLECTION REPORT *supra* note 25, at 45.

[98] 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.").

[99] 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).

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

forbid the subsequent purchaser from contacting the original creditor without the reseller's express written permission,[101] and others "expressly prohibited a debt buyer from reselling any documents previously acquired from a creditor when reselling debts."[102]

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 documentation.[103] Moreover, since only buyers and sellers have a relationship, if one debt buyer in the chain goes out of business, the document request will go unfulfilled.

Another problem that arises for debt buyers seeking documentation on an account is whether the documentation is kept by the original creditor for a sufficient amount of time after the assignment. A number of the contracts in my sample contained specific time limits ranging from one to three years after which sellers will not provide documentation. 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;"

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).

[101] *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.").

[102] FTC DEBT BUYER REPORT at C-25 n.53.

[103] 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* Bureau of Consumer Protection Business Center, *In Brief: the Financial Privacy Requirements of the Gramm-Leach-Bliley Act*, http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act (July 2002).

often two to three years after the accounts were sold.[104] In a number of cases, the contracts in my sample included language making clear that it may not be possible for debt buyers to obtain account documents[105] or simply that "documentation may not exist with respect to the Loans purchased by Buyer."[106] For example, a contract in my sample noted that

> Purchaser acknowledges that many of the Charged-off Accounts do not have Account Documents available and that some Charged-off Accounts have only partial Account Documents available . . . Seller only has such Account Documents as were provided to it by the Originating Creditors and access to additional Account Documents . . . may be limited or prohibited pursuant to the terms of Seller's contracts with such parties. [107]

The FTC found the same in its report.[108] 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.[109]

Given all of these obstacles to obtaining documentation both at the time of sale and after, it is not surprising that buyers never receive documents for the vast majority of the accounts they attempt to collect on. The FTC examined almost 1.5 million accounts and 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."[110]

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[104] *E.g.* FTC DEBT BUYER REPORT at C-12-13 ("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.").
[105] "The Buyer acknowledges Seller was not the original credit grantor for the accounts, and may not have in its possession account documents that may be requested by the Buyer. Global Acceptance Credit Co. to RAB (Feb. 18, 2011); Blank Global Acceptance Credit Co. (Undated).
[106] *See* 2008, 2009, 2010 FIA Card Services, N.A. Loan Agreements, *supra* note 18.
[107] Sherman Acquisition, LLC to Gemini Capital Group, LLC (Mar. 3, 2009).
[108] *See, e.g.*, FTC DEBT BUYER REPORT at C-13 ("Seller makes no guarantees as to the availability of applications, statements, records or copies of previous payment checks on any account . . . There is no assurance that any Account Documents will be available.").
[109] ACA INT'L, THE PATH FORWARD: ACA INTERNATIONAL'S BLUEPRINT FOR MODERNIZING AMERICA'S CONSUMER DEBT COLLECTION SYSTEM 17 (April 2011), *available at* http://www.acainternational.org/files.aspx?p=/images/18898/finalblueprint-designedversion.pdf.
[110] FTC DEBT BUYER REPORT, *supra* note 2, at 40.

Note that this number includes affidavits from the creditor attesting to material aspects of the debt (<1% in the FTC sample).[111] The FTC found that the contracts they examined "routinely indicated that sellers would provide affidavits when account documents were unavailable, and indicated that those affidavits would generally attest to the existence of a consumer debt account, its chain of ownership, and the balance on those accounts in the seller's records on the date of sale."[112] The contracts in my sample are fully congruent with that statement; a number of the contracts contain blank affidavits that the buyer is supposed to fill out and send to the seller to sign, with clauses such as "Seller shall provide a notarized Affidavit of Debt (Similar to Exhibit E) in lieu of Account Documents when no Account Documents are available. Buyer shall prepare the affidavit and forward to Seller electronically for execution."[113]

Using the FTC's numbers, I estimate the maximum number of accounts for which debt buyers obtained documentation either at or post sale to be between 65-72% of the 1.5 million accounts examined by the Commission.[114]

C. *Most Contracts Disclaim All Warranties; Many Disclaim the Accuracy of Information Provided*

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

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[111] *Id.*
[112] *Id.* at C-14.
[113] *See, e.g.*, .Midfirst Bank to Calvary SPV I, LLC 5 (June 6, 2002); Citibank to Unifund CCR 8 (Feb. 28, 2005)("Buyer may, in addition to its request for Account Documents, request an Affidavit from Bank, in the form shown in Exhibit 3, *indicating the date the Account was opened, the Account number and the balance existing as of a specified date*. The Bank will provide a total number of affidavits equal to two percent (2%) of the total accounts purchased. The Buyer shall be limited to one request for affidavits per week with a maximum of 200 accounts per request.")(emphasis added); Agreement between Riverwalk Holdings LTD and Wayric Svcs. (HSBC/Orchard Bank Accounts) (Mar. 24, 2009)(same language).
[114] I calculated this by assuming that every time the FTC counted a document as being requested, it was the only type of document requested for an account. For example, if debt buyers obtained account statements and account applications for 6% of accounts each, I assumed that they never obtained both an account statement and an application for any one account. By adding all the percentages the report lists as including "Documents Obtained After Sale" (Table 13, at T-15) and rounding up, this yields a maximum 23% of accounts for which debt buyers in the study could have received documentation post-sale. The FTC also estimated that at the time of purchase, debt buyers obtained account documents for between 6-12% of all accounts. *Id.* at 35, 35 n.150. Adding up these numbers together I estimate that debt buyers received documentation either at or post sale for only 29-35% of accounts (23+6, 23+12). This yields a no documentation estimate of 65-71% of accounts. There are many assumptions behind this number, and it is by no means

debt they are suing on, that we might have a broad range of contracts to look at and compare. Nothing could be further from reality. Debt buyers fight tooth-and-nail not reveal their contracts, or heavily redact portions of those that are revealed.[115]

The language of the contracts in my sample is congruent with the FTC's observation 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."[116] I focused on specific language in the contracts in my sample and placed them in broad categories in Table 1. Except for the contracts categorized as type 1 (best, 4 contracts) and type 6 (worst, 3 contracts), I do not report the number of contracts that fall in each category. This is because I am not claiming that my sample is representative or that the exact numbers matter. My claim is merely that there are sufficient contracts with troubling language that my argument of illegality in Part II should concern us.

As shown in column 1, a few of the contracts in my sample (10%) affirmatively warrant that the information provided to the buyer is "accurate and complete in all material respects."[117] Those contracts also state that the accounts "were originated and maintained in compliance with all federal and state applicable laws" and do not include any language disclaiming warranties or representations. These contracts are the exception in my sample and in the 350 contracts the FTC studied.[118]

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[115] *See, e.g.*, HSBC to Main Street Acquisition (Feb. 20, 2009)(redacting, *inter alia*, information about the cost and availability of documents); Purchase Agreement between Wells Fargo and Purchasers Advantage (Jun. 21, 2011 (redacting, *inter alia*, the percentage of accounts that Wells Fargo was representing it could provide documentation for under the agreement); Purchase and Sale Agreement between Citibank, N.A. and CACH, LLC (Aug. 17, 2011)(two and a half pages of redactions).

[116] *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*.

[117] I categorize these as "Type 1" in Table 1, *supra*. 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). These contracts specify that the sale is made "without recourse" but do not disclaim other warranties.

[118] 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.'" FTC DEBT BUYER REPORT, *supra* note 2, at iii, 25.

Table 1 – This table categorizes the types of contracts in my sample. "Thumbs up" indicate positive unqualified representations about the debts or accounts sold. Note that the only type of contract that does not disclaim something material about the debts is in Column 1. As we move further to the right, the language in the contracts becomes increasingly problematic.

Contract type[119]	1	2	3	4	5	6
Accuracy of information						
Seller warrants that information is accurate and complete in all material respects	👍					
Warrants that information is accurate *to the best of seller's knowledge*		👎		👎		
Specifically *disclaims* representations as to accuracy or completeness of information					👎	👎
Specifically *disclaims* representations as to accuracy of interest, amounts due, or date of first delinquency			👎	👎		👎
Compliance with laws						
Seller is the original creditor and warrants that it has complied with applicable laws	👍		👍			
Debt buyer warrants that *one* owner (itself or original creditor) has complied with applicable laws (silent as to other owners, sometimes with "to the best of seller's knowledge" caveat)		👎		👎	👎	
Specifically *disclaims* compliance with laws						👎
Quitclaim language						
Accounts are sold without recourse but no waiver of warranties	👍					
Accounts are sold "as is," "with all faults," without recourse or warranties		👎	👎	👎	👎	👎

Instead, the overwhelming majority (90%) of the contracts in my sample purport to sell the debts "as is, with all faults" and with no warranties while at the same time

[119] There are exactly four Type 1 contracts in my sample and they all involve HSBC entities. Household Bank (SB), N.A. to Household Receivables Acquisition Company II (Jul. 1, 2002); Household Receivables Acquisition Company II to Metris Receivables, Inc. (Dec. 1, 2005); HSBC Card to Main Street Acquisition (Feb. 20, 2009); HSBC to CACH, LLC (May 18, 2011). Examples of Type 2 include: Platinum Capital Investments (Jul. 1, 2012). Examples of Type 3 include: Citibank to Unifund CCR (Feb. 28, 2005). Examples of Type 4 include: Midfirst Bank to Calvary SPV I, LLC (Jun. 7, 2002). Examples of Type 5 include: Wells Fargo Blank Purchase Agreement (Jan. 6, 2010). There are exactly three Type 6 contracts and all involve the FIA entity, a subsidiary of Bank of America. *See* FIA Card Services Agreements, *supra* note 18.

disclaim either explicitly or by omission some material aspect of the debts—such as the account balance or interest rate charged.

These "quitclaim contracts"[120] typically include one or more affirmative representations, such as warrantying that the "seller has good marketable title" to the accounts.[121] As shown in Table 1, most also contain a representation that *someone* has "maintained and serviced [these accounts] in compliance with all applicable state and federal consumer credit laws," in most cases the representation is either made with a "to the best of seller's knowledge" qualification or the representation is only made about one owner in the chain.[122] That is, a few of these contracts represent that the debt buyer/reseller has complied with all laws, but there is no representation that any previous buyers or the original creditor did the same. Others represent that the original creditor complied with all applicable laws but contain no representations as to what the current debt buyer/reseller did with regards to compliance.

Significantly, unlike the small handful of contracts in column 1 of Table 1, none of the affirmative representations made in the overwhelming majority of contracts are about 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.[123] Troublingly, the majority of these contracts go on to disclaim some specific aspect of the debts and the information or documentation provided. Stating, for example that:

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[120] Quitclaim language is frequently used in real estate transactions. *See* 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 val*id*."); 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. In real estate transactions, however, quitclaim deeds are most often used by people who know each other. SEAN WILKEN & THERESA VILLIERS, THE LAW OF WAIVER, VARIATION AND ESTOPPEL, 2nd ed. (2002). 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." MARY RANDOLPH, DEEDS FOR CALIFORNIA REAL ESTATE, 8th ed. 72 (2010).

[121] *See, e.g.*, Citibank to Unifund CCR (Feb. 20, 2009).

[122] Account Purchase Agreement between Chase Bank USA, NA and Global Acceptance Credit Company, LP (Dec. 22, 2010).

[123] 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 5 (Feb. 15, 2008).

> [The sale is made] without any representation or warranty whatsoever as to enforceability, collectibility, *accuracy or sufficiency of data* . . . made expressly . . . without warranty of any kind or character . . . . Seller specifically disclaims any warranty, guaranty or representation, oral or written, past or present, express or implied, concerning the Charged-off Accounts and the Account Documents.[124]

Or more typically,

> 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 . . . .[125]

A small number of contracts in my sample (7%) are in the other extreme of where we began. These agreements—listed in Table 1 as type 6—are far more specific about what they disclaim, going beyond denying any representations as to the "accuracy or completeness" of the information generally to name specific aspects of the debts that they cannot stand behind:

> [S]eller 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.[126]

Those same "type 6" contracts are far more egregious; including language specifically *disclaiming* any representations as to the compliance of the loans with law or regulations.[127] Curiously, they also contain language that indicates that "any information provided . . . with respect to the loans was or will be obtained from a

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[124] Sherman Acquisition, LLC to Gemini Capital Group, LLC (Mar. 3, 2009).

[125] (emphasis added). Agreement between Riverwalk Holdings LTD and Wayric Svcs. (HSBC/Orchard Bank Accounts) (Mar. 24, 2009). The rest of the agreement makes it clear that "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." *Id.* (original capitalization). Note that the FTC report also cited this language and noted 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." FTC DEBT BUYER REPORT, *supra* note 2, at C-14.

[126] *See* 2008, 2009, 2010 FIA Card Services, N.A. Loan Agreements *supra* note 18.

[127] *Id.*

variety of sources" and state that the seller "has not made or will not be obligated to make an independent investigation or verification of such information."[128] These last three contracts—all of them sales by a Bank of America subsidiary—are in their own category.

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The ninety percent of contracts in my sample with quitclaim language and disclaimers or omissions about material aspects of the debt do not give the buyer any post-purchase remedy when accounts had missing or inaccurate data."[129] This language purports to absolve the seller of liability for inaccuracies with the underlying accounts they are selling.[130] In some ways, it is not surprising to see this language in a contract; it seems perfectly natural for sellers to want to protect themselves from liability. But the context of consumer debt sales is not the same as a plain vanilla contract. As described in Part II, consumer debt collection is 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."[131]

There are 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

[128] *Id.* Those contracts also include language to the effect that "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." *Id.*
[129] *Id*.
[130] Quitclaim language is frequently used in real estate transactions. *See* 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 val*id.*"); 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. In real estate transactions, however, quitclaim deeds are most often used by people who know each other. SEAN WILKEN & THERESA VILLIERS, THE LAW OF WAIVER, VARIATION AND ESTOPPEL, 2ND ED. (2002). 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." MARY RANDOLPH, DEEDS FOR CALIFORNIA REAL ESTATE, 8th ed. 72 (2010).
[131] *Freyermuth*, 248 F.3d at 771 (ruling that a court evaluating debt collection letters must view them "through the eyes of the unsophisticated consumer"); *Larsen*, 533 F. Supp.2d at 302 (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*, 754 F. Supp. at 393 ("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*, 668 F. Supp at 1480 ("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.'").

have more to do with the lawyers who drafted the contracts.[132] In fact, this type of quitclaim language likely provides a high level of liquidity that would not be possible without it. As Professor Janger has noted, "[l]iquidity enhancement through negotiability is a key device for facilitating the trading of debt."[133] Liquidity in the market keeps the cost of credit down and ensures availability of—in particular—subprime credit. However, while it is likely true that this language may enhance liquidity, this does not mean that it is absolutely necessary. It is noteworthy that not all contracts in my sample contain this language.[134] In fact, a few included explicit affirmative representations and did not disclaim any warranties whatsoever.[135]

We may still not be too worried about this language and the explicit disclaimers of material aspects of the debts. Afterall, all of contracts in my sample and most credit issuers are banks; and there is an existing and complex regulatory scheme that might lead one to trust the information provided by banks, even if the banks themselves express a desire to escape liability for any problems. However, we do know that this regulatory scheme has failed in multiple occasions. As an example, multiple federal and state regulators have looked or are looking at JP Morgan Chase's internal collections as well as its practices selling delinquent accounts.[136] The allegations include robo-signing, bad record-keeping, and fraudulent court filings. In its own internal investigation, Chase determined that nearly one in ten of its collection

[132] *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).
[133] 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").
[134] See column 1 in Table 1.
[135] The contracts were between Household Bank (seller) to Household Receivables Acquisition Company II (buyer) and then seller to Metris Receivables (buyer).
[136] The bank settled with the Office of the Comptroller of the Currency on its investigation, but lawsuits and investigations are still pending from the Consumer Financial Protection Bureau and the Attorneys General of California, Mississippi, Hawaii, and Massachusetts. Jesse Hamilton, *JPMorgan Agrees to Repay Customers in Credit-Card Settlement*, BLOOMBERG (Sept. 19, 2013), http://www.bloomberg.com/news/2013-09-19/jpmorgan-agrees-to-repay-customers-in-occ-credit-card-settlement.html; Jessica Silver-Greenberg and Edward Wyatt, *U.S. Vows to Battle Abusive Debt Collectors*, NEW YORK TIMES (July 10, 2013), http://dealbook.nytimes.com/2013/07/10/u-s-vows-to-battle-abusive-debt-collectors/; Stephanie Levy, *California Lawsuit over Chase's Debt Collection Practices is Still On*, INSIDEARM (Jan. 8, 2014), http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/california-lawsuit-over-chases-debt-collection-practices-is-still-on/; Jonathan Stempel, *JPMorgan sued by Mississippi AG over credit card misconduct*, REUTERS (Dec. 17, 2013), http://www.reuters.com/article/2013/12/17/us-jpmorgan-lawsuit-creditcards-mississi-idUSBRE9BG1EO20131217; Andrew R. Johnson, *Massachusetts Probes J.P. Morgan's Debt-Collection Practices*, WALL ST. J. (Sept. 20, 2013), http://online.wsj.com/news/articles/SB10001424127887323808204579087643404839638.

accounts had errors such as inaccurate interest and fees.[137] "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 …"[138] In 2012, Chase stopped selling its consumer debts[139] and closed an internal unit tasked with suing consumers over credit card debts.[140]

The FTC notes in its report that this language 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."[141] One important thing to note, however, is that if no documentation is ever provided to the debt buyer—or worse yet, if the documentation does not exist—there is no way to ever know for sure the extent of any inaccuracies. In other words, if we take the FTC report estimate as an approximation—65-71% of accounts lack documentation either at or post-sale—there is no way to verify whether any of those accounts were sold with incorrect information.

There are also other reasons to be concerned. The disclaimers in these contracts may drive down the cost of credit, but at what cost to customers? The FDCPA was enacted because Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."[142] One of the explicit purposes of the statute was "to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged . . . ."[143] Liquidity is not a goal in and of itself if it comes at the cost of lawlessness. Our markets should price in the cost of our laws into the cost of credit. I argue in the next section that the market has not priced this in and that the lifecycle of a debt I have described in this

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[137] *Nearly 1 in 10 JPMorgan debt collection lawsuits had errors*, REUTERS (July 10, 2013), http://articles.chicagotribune.com/2013-07-10/business/chi-nearly-1-in-10-jpmorgan-debt-collection-lawsuits-had-errors-20130710_1_credit-card-debt-collection-jpmorgan-chase-co.
[138] Dan Fitzpatrick, J.P. Morgan Review Finds Errors in Debt-Collection Lawsuits: Errors Occurred as the Bank Sued Its Credit-Card Users, WALL ST. J. (July 9, 2013).
[139] Maria Aspan and Jeff Horwitz, *Chase Halts Card Debt Sales Ahead of Crackdown*, AMERICAN BANKER (July 1, 2013), http://www.americanbanker.com/issues/178_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html.
[140] Chris Cumming, JPM to Shutter Litigation Group for Consumer Debt Collection, American Banker (Oct. 17, 2013), http://www.americanbanker.com.ezproxy.law.uconn.edu:8080/issues/178_201/jpm-to-shutter-litigation-group-for-consumer-debt-collection-1062882-1.html.
[141] FTC DEBT BUYER REPORT, *supra* note 2, at iii.
[142] 15 U.S.C. § 1692.
[143] *Id.*

part means that under some circumstances, collections are occurring in violation of federal laws.

II. ILLEGAL COLLECTIONS

Part I described how little information and documentation debt buyers have about the debts they purchase. It also discussed how the language in some contracts disclaimed any representations or warranties by the seller with regards to many material aspects of the accounts sold—things like the amount owed and the interest charged. In this Part, I argue that this lack of information and supporting documentation means that the collection of consumer debts is in violation of the FDCPA when the collector purchases defaulted consumer accounts (1) through a contract that disclaims warranties and representations as to material aspects of the information sold, (2) receives only information about the debts in the form of a spreadsheet or similar file format, and (3) does not obtain documentation on the accounts at the time of sale.

The FDCPA defines permissible and impermissible collection practices.[144] As relevant to my 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."[145] The Act imposes strict liability measured by whether the legally fictional "least sophisticated" consumer is likely to be mislead.

Besides generally banning misleading or deceptive actions, the Act lists a number of specific instances of false, deceptive, or misleading representations, which is not exhaustive.[146] "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."[147] "[A] collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which

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[144] 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).This is not an exhaustive list. *See generally* 15 U.S.C. §§ 1601-1692o.

[145] 15 U.S.C. § 1692e ("False or misleading representations").

[146] 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.").

[147] FTC DEBT BUYER REPORT, *supra* note 2, 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).

is inaccurate."[148] In other words, "if it has the mere 'tendency or capacity to deceive' the 'least sophisticated consumer.'"[149] Liability for deceptive or misleading representations is proved through an objective test.[150] "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*]."[151]

Who is this "unsophisticated consumer" that the FDCPA protects? She "is not a dimwit, but rather uninformed, naive, and trusting."[152] While this legally fictional character lacks the "sophistication of the average, everyday, common consumer," she is "capable of making basic logical deductions and inferences."[153]

My argument rests on three premises. First, the underlying debt sale agreement contains quitclaim language and disclaims representations about material aspects of the debts. That is, the contract contains language such as "seller makes no representations as to . . . the *accuracy or completeness of any information* provided by the seller to the buyer" or it goes further to disclaim any representations about "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."[154] In other words, this is language that falls under types 3-6 in Table 1. By this language, the seller expressly disclaimed all representations as to the accuracy of information or the accuracy of the current balance or interest on the accounts. This means that all the information the buyer has about the consumer's account—e.g., how much is owed or the interest rate applicable.—is subject to these qualifications, and that the buyer has explicit reason to doubt their veracity. The second and third premise of the argument rests on the assumption that the debt buyer only received a spreadsheet with some of the information detailed in Part I.A.1 and did not obtain any documentation on an account before seeking to collect to the consumer.

[148] 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).
[149] *Kimber*, 668 F. Supp. at 1489 (citing Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985)); Hudspeth v. Capital Mgmt. Servs., L.P., 2013 U.S. Dist. 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).
[150] *See, e.g.*, Swanson v. Southern Oregon Credit Serv., Inc., 869 F.2d 1222, 1227 (9th Cir.1988); *Jeter*, 760 F.2d at 1175.
[151] *Beattie,* 754 F. Supp. at 392.
[152] *Hudspeth* , 2013 U.S. Dist. LEXIS at *11(internal citations and quotations omitted).
[153] *Id*. (internal citations and quotations omitted).
[154] *See* 2008, 2009, 2010 FIA Card Services, N.A. Loan Agreements, *supra* note 18.

Under these circumstances, when the buyer communicates with the consumer about the debt, I argue that 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 letter, phone, or a lawsuit that the consumer owes a very precise dollar amount, made the last payment on a precise date or the like.[155] The debt buyer in this scenario purchased only *information* about the account—that is, a spreadsheet containing fields such as name, address, amount due, and date of last payment. The buyer has no documents that could give her certainty that the information on the spreadsheet is correct—e.g., account statements showing the amount owed, date of last payment, or contractual interest rate—the debt buyer proceeds to attempt to collect.[156] When the buyer seeks to collect from a consumer whose account was purchased in these circumstances without first verifying that all material information pertaining to that account is correct, they are violating violating the FDCPA and making a misleading statement.[157]

The collector makes a misleading representation to the consumer when they assert, for example, "You owe $1,500, plus 10% interest, and you have not paid since January 15, 2011." In making this statement (or similar statements including material facts regarding the debt), the debt collector is misleading the consumer because they are representing that they have full confidence in the statements they are making. Specifically, the collector cannot have full confidence in a statement that refers to an amount due when all they have to verify that amount is a spreadsheet given to them by the previous owner of the debt under a contract that disclaims all representations as to the amounts shown on that spreadsheet.

[155] "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.

[156] 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*.

[157] In a separate piece, 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 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.

Why does the collector's confidence matter? 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."[158] A potential FDCPA violation is viewed through the eyes of the least sophisticated consumer.[159] Few unsophisticated consumers would be aware that when a debt buyer purchased their specific debt they are doing so with a level of uncertainty as to the information they are buying that varies depending on the underlying contract.[160] The consumer is never told about the contract and despite some attention in the press, she cannot know what is in the contract that sold her particular debt. In attempting to collect a debt that has been sold with quitclaim language and disclaimers are to, *inter alia*, the accuracy of the accounts sold, the collector is taking advantage of "the ignorance of an unsophisticated consumer"[161] when she does not tell the consumer about the underlying uncertainty of the statements the collector makes.

It is important to remember that the FDCPA is a strict liability statute intended to be "liberally construed to protect consumers."[162] Scienter is not an element of proving an FDCPA violation.[163] Misleading or deceptive representations made as a result of carelessness or negligence are nevertheless still actionable under the FDCPA.[164]

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

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[158] Restatement (Second) of Torts § 526 (1977).
[159] *Kimber*, 668 F. Supp. at 1488.
[160] *Cf. id.* at 1488.
[161] *Kimber*, 668 F. Supp. at 1488.
[162] 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*, 6 F.3d at 63 (2d Cir. 1993); Johnson v. Riddle, 443 F.3d 723, 728 (10th Cir. 2006).
[163] 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 v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 595-596 (citing Senate Committee on Banking, Housing and Urban Affairs, Markup Session: S. 1130--Debt Collection Legislation 60 (July 26, 1977)).
[164] "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. Tex. 2009) (citing 15 U.S.C. § 1692k(c)).

and the associate information are sold to attempt to collect from the account holder.[165] 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 may purchase with warranties as to some of the information: for example, that the accounts were maintained in compliance with consumer laws,[166] 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 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, for example, 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.[167] Undoubtedly, a sale of accounts without quitclaim language, or even with affirmative representations about the debts, might nonetheless contain incorrect information. The difference is that when the sale was made with quitclaim language and specific disclaimers as to material aspects of the debts, 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. If the buyer does not obtain documentation to corroborate the information on the spreadsheet before she contacts the consumer, she knows that the statements she makes to the consumer about the debt may be incorrect and that she has no way to know this.

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[165] 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).

[166] Perhaps the compliance is only being warranted as to one previous owner and not as to the others. Perhaps also the warranty of the compliance is only "to the best of the seller's knowledge." *See* Table 1 *infra*, at p.26.

[167] 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").

All a court needs to find for an FDCPA violation is that the communications from the debt buyer to the consumer would have been misleading to the least sophisticated consumer, not whether the communication actually misled any one person. The FDCPA bans misleading statements and not just untruthful ones.[168] In this case, I argue that they would mislead most reasonable consumers and even lawyers, although it is not necessary to go this far to find FDCPA liability.

Although a strict liability statute, "there is room within the FDCPA for ethical debt collectors to make occasional unavoidable errors."[169] The primary defense available in the Act is the bona fide error defense: "[a] debt collector may not be held liable in any action brought under [the FDCPA] 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."[170] The Supreme Court has clarified that this provision "do[es] not include mistaken interpretations of the FDCPA."[171] 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.[172]

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

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[168] 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. RESTATEMENT (SECOND) OF TORTS § 526(b) (1977). 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. Whether this argument holds will depend on state law. For example, under Kentucky tort 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., 2013 WL 898152 (W.D. Ky. 2013). *See also* Weston v. Northampton Personal Care, Inc., 62 A.3d 947, 1019 (Pa. Super. 2013).

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

[170] 15 U.S.C. § 1692k(c). 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).

[171] *Jerman*, 559 U.S. at 586 (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 580.

[172] "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 582-83.

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."[173] It would be beyond the pale for a debt buyer to allege that they relied on the non-representations made by the seller. The whole point here is that the creditor is disclaiming any representations.

III. HOW DID WE GET HERE?

To the uninitiated in the business of debt buying, the business model and practices discussed above should seem troubling, if not downright illegal. In this Part, I suggest possible reasons why things have gotten to this point and explain why governmental intervention is needed. The first possible explanation is the burst of the easy credit bubble by the Great Recession and the rapid bank mergers that accelerated during this period. The second is, in a nutshell, that there has been no incentive for creditors or debt buyers to do things differently.

One plausible 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.

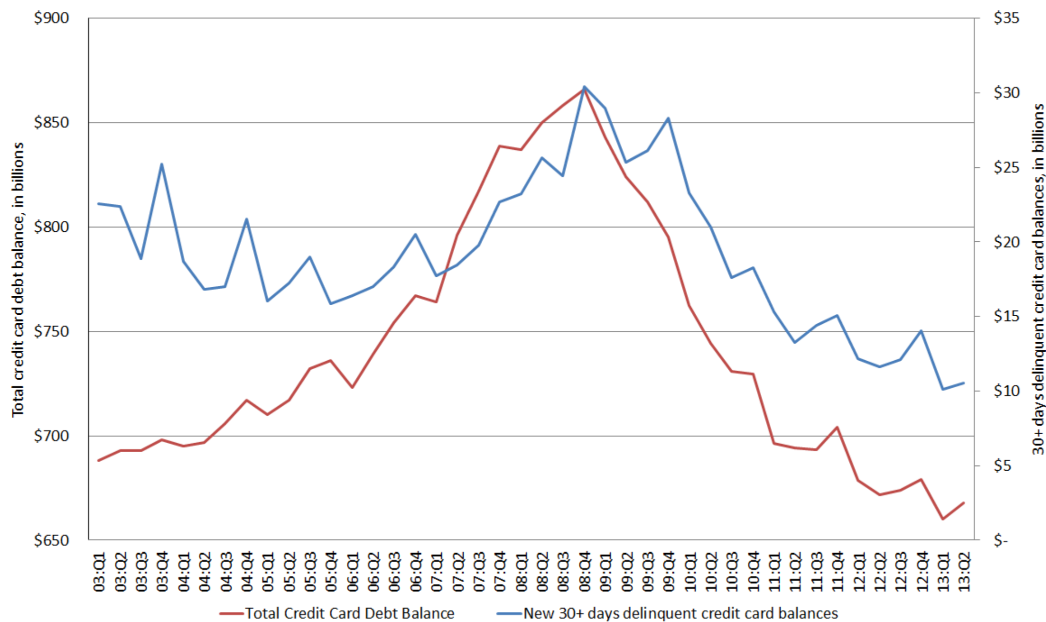
A liquidity crisis at the end of 2008 caused banks to severely curtail credit lines for their customers to limit their risk as the crisis wore on.[174] This drastic reduction in available credit severely affected customers who were current on their credit card bills as their percent utilization of credit 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

[173] McCollough, 637 F.3d at 948 (internal citations omitted).
[174] "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.

suddenly seem like a much worse credit risk to others as well.[175] 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.[176] 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.[177]

Figure 4 – Credit Card Debt Balances and Delinquencies, 2003-2013[178]



[175] 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.
[176] FICO, BOOST COLLECTIONS AND RECOVERY RESULTS WITH ANALYTICS (2010), *available at* 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), *available at* http://www.federalreservc.gov/rcleases/chargeoff/delallsa.htm.
[177] "Fresh debt" went from $0.12-$0.17 per dollar in 2007 to $0.05 to $0.07 in 2009. Kaulkin Ginsburg Report.
[178] Federal Reserve Quarterly Report on Household Debt and Credit, Aug. 2013, *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q22013.pdf.

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. A handful do not disclaim any warranties and instead contain affirmative representations that go to the specifics of the collection of individual debts. These I categorized in Table 1 as "type 1." The contracts I categorized as "type 2" do contain waivers of warranties but they also contain some (sort of) affirmative representations, such as: "*[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)" (emphasis added)."[179]

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. One hypothesis is that quitclaim language is used when the seller is not confident in the "paper" (accounts) she is selling. On this point, it is noteworthy that the four "type 1" agreements (affirmative representations, no quitclaim) in my sample span from 2002-09 but were all sales made by one bank (Household Bank merged with HSBC). Similarly the three "type 6" (worst) agreements were all sales by the same Bank of America subsidiary (FIA Card Services) between 2008-10.

[179] 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 would a seller not be confident in the accounts 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."[180] I posit that quitclaim language and disclaimers about material aspects of the accounts likely gained popularity with banks as they acquired more banks in a fairly short period of time. The agreements in my possession are not by no means representative but seem provide some possible evidence of this. The agreements in my sample range from 2002 until 2013. With few exceptions, as time passes, the agreements seem to get "worse" (move towards type 6 in Table 1). In particular, the four "worst" agreement (in terms of how many specific things they disclaim) are all post-financial crisis: from 2008-10.

In a sense, this problem is reminiscent of the back office failures that brought down a number of broker-dealers in the 1960s.[181] The 1960s was "a period of tremendous growth in the securities industry."[182] 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 serious implications not only for market efficiency but also for the financial health of firms active in the market."[183] This reminder seems to have been forgotten.

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[180] *Id.* at C-2.
[181] Securities and Exchange Commission, Study of Unsafe and Unsound Practices of Brokers and Dealers: Report and Recommendations of the Securities and Exchange Commission (Dec. 1971).
[182] Barry P. Barsach, Dir., Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, Remembering the Past: Mutual Funds and the Lessons of the Wonder Years at the ICI Securities Law Procedures Conference (Dec. 4, 1997), *available at* www.sec.gov/news/speech/speecharchive/1997/spch199.txt.
[183] Elisabeth Ledrut & Christian Upper, *The US Paper Crunch, 1967-1970*, BANK FOR INTERNATIONAL SETTLEMENTS (Sept. 1, 2008), *available at* http://www.bis.org/publ/qtrpdf/r_qt0712z.htm.

But this hypothesis is not entirely satisfying. Some of the problematic contracts in my sample date as far back as 2002. This may have been a contributing factor, but it does not satisfactorily explain the 2002 and 2005 agreements in my sample. A better explanation here is a simple market failure that has allowed creditors and debt buyers to externalize the costs of illegal collection. In a sense, these practices have continued because they have been allowed to.

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."[184] 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 very healthy profit.[185]

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[184] Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 HEALTH PSYCHOL. 132, 139 (1995).
[185] 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%.").

Given that any improvement in procedures a bank undertakes will only result in added costs that cannot be passed to the consumer (since they will not choose banks based on their collection practices) or to the debt buyers (since they have been able to 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. This "race to the bottom" is precisely what the FDCPA was enacted to avo*id.*

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."[186] 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."[187]

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.

Amidst mounting pressure from federal and state regulators, various players in the industry have realized they have an opportunity to design self-imposed obligations that might solve some of the problems described earlier and reduce regulator intermeddling. There has been movement in this direction. DBA International, the largest trade association for debt buyers, recently enacted a national "Certification

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[186] Tewell, *supra* note 63.

[187] Manuel Newburger, Partner, Barron & Newburger (represents creditors and debt buyers) at FTC/CFPB Life of a Debt Panel 2 Verifying Disputed Debts Under the FDCPA and Investigating Disputed Debts Under the FCRA (June 6, 2013), *available at* http://www.ftc.gov/news-events/audio-video/video/life-debt-data-integrity-debt-collection-part-3. "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 at *id.* 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 at *id.*

Program."[188] Starting in March 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."[189] 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.[190] 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.[191]

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. The program does not require certified debt buyers to purchase account documents when they purchase a portofolio; or to even make sure that the seller has the media available.[192]

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[188] The DBA Int'l Board adopted the program in February 2012. *DBA Debt Buyer Certification Update*, DBA INT'L (July 25, 2012), *available at* http://www.dbainternational.org/members_only/DBADebtBuyerCertificationUpdate.pdf. The first DBA member was certified under the program on May 14, 2013. *First DBA Member Completes Debt Buyer Certification Program*, DBA INT'L (May 14, 2013), *available at* http://www.dbainternational.org/memberalerts/Alert-FirstCertification_051413.pdf.

[189] *Debt Buyer Certification Program, Appendix A: Certification Standards Manual*, DBA INT'L (Feb. 2, 2013), *available at* http://www.dbainternational.org/certification/certificationstandards.pdf.

[190] *Id.* at 6.

[191] *Id.* at 7.

[192] *DBA International Debt Buyer Certification Program, Appendix D – Audit Review Manual*, DBA INT'L (Feb. 7, 2013), *available at* http://www.dbainternational.org/certification/auditreview.pdf.

There is also evidence that creditors are being more selective in who they sell accounts to.[193] New contract language also includes resale and potentially outsourcing restrictions. None of this, however, addresses the underlying documentation problem. Why has the industry not address the documentation problems? The same failure plaguing the credit issuers applies here. Debt buyers have accrued substantial profits without this documentation. Despite all the bad press, debt buyers have been able to collect enough to turn profits from consumer directly as well as through the courts. As of 2011, debts were quite cheap, 4 cents on the dollar on average according to the FTC and in some cases "virtually zero."[194] If buyers can collect 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. This is precisely why regulation is needed.

IV. REPAIRING A BROKEN SYSTEM, REDUX

I have posited that a portion of consumer debts have been sold with disclaimers about the accuracy of the information sold and without documentation to be able to verify that accuracy. I then argued that under these circumstances, a collector violates federal law when she seeks to collect from a consumer without either verifying the debt via documentation or without telling the consumer the circumstances under which she came to own this debt. 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 may be completely unavailable.[195] An unknown number of consumers who have been collected upon until now would have FDCPA claims against debt buyers and debt collectors. I would argue that even if the number of affected consumers was small, we should still worry about this problem because it is facilitating exactly the kind of "race to the bottom" that the FDCPA was intended to stop. Of course, the larger the

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[193] Comment on CFPB-2013-0033-0001, Wolters Kluwer Financial Services , *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2013-0033-0239; Kaulkin Ginsburg, The New Norm in Debt Buying (Feb. 14, 2014), *available at* http://www.kaulkin.com/connect/2013/02/the-new-norm-in-debt-buying/.

[194] FTC DEBT BUYER REPORT *supra* note 2,at ii.

[195] *See* Part II.B, *supra*.

number of affected accounts the more concerned we might 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 "type 6" (worst) agreements in my sample 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.[196] Another way to (very roughly) estimate the magnitude of the problem would be to use the FTC study numbers. The FTC received information on over 77 million accounts sold (with a face value of almost $105 billion).[197] The Commission 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" here 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 begin with a regulatory solution which could help effectuate Ronald Mann's "distressed debt tax" to help lenders internalize the true cost of collecting (that which includes the cost of complying with the law). I then discuss potential industry-led solutions and potential market option.

A. *Rulewriting a Solution*

This section argues that regulation is a natural best-fit solution here since it has the potential to fix the collective action problem. What's more, the CFPB has the ability and authority to impose new rules in this space, rules which would go a long way towards curbing the issues I have identified.

Uniform standards benefit all entities in the market; they provide clarity that a particular action falls within the law. As described earlier, the OCC has issued a catalog of Best Practices for its regulated entities. If these are followed, many of the problems described in this article would cease to be a problem. The OCC published a

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[196] 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.
[197] FTC Debt Buyer Report, *supra* note 2, at T-2.

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."[198] Among these best practices, the OCC 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."[199] 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."[200] Unfortunately, the OCC guidelines are not mandatory and do not apply to all banks; at this point their effect is uncertain.

As an additional regulator of banks, the CFPB also has an opportunity to regulate in this arena and has indicated a desire to do so by publishing an advanced notice of proposed rulemaking.[201] 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."[202]

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).[203] Injury to the consumer is a central and determinative factor in determining unfairness in FTC case law.[204] "A 'substantial injury' typically takes the

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[198] OFFICE OF THE COMPTROLLER OF THE CURRENCY, DEBT SALES / BEST PRACTICES 3-4, *available at* http://www.americanbanker.com/pdfs/occ-debtsales-bestpractices.pdf (last visited Feb. 24, 2014). *See also* Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, AM. BANKER (July 2, 2013), *available at* http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html.
[199] OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 198, at 3.
[200] *Id.*
[201] *See* discussion *supra* note 12.
[202] Consumer Financial Protection Bureau, CFPB Bulletin 2013-07: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts 2 (July 10, 2013).
[203] *Id.* at 1; Consumer Financial Protection Bureau, CFPB Supervision and Examination Manual (Oct. 2012) at UDAAP 1 [hereinafter CFPB Manual].
[204] This is corroborated by the FTC's Policy Statement on Unfairness, which stated that "unjustified consumer injury is the primary focus of the FTC Act." FTC Policy Statement on Unfairness, Federal Trade Commission (Dec. 17, 1980), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness. According to the FTC,

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."[205] "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."[206]

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.[207] 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."[208] 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."[209]

The problems identified in this Article could be ruled by the CFPB as unfair. That is, attempting to collect on a consumer debt obtained through a quitclaim contract that disclaimed specific aspects of the debt without first obtaining documentation to verify the facts lends itself to this definition. A substantial injury occurs when consumers pay a debt they do not owe, pay a larger amount than they 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. This injury is not reasonably avoided by consumers since they are not privy to the contracts between creditors and buyers, or even know how many times their debt may have been sold, or under what terms. Sloppy recordkeeping does not benefit consumers or competition; on the contrary, this ability of collectors to do their jobs in this environment minimizes the likelihood that careful records and affirmative representations will become the norm.

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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*.

[205] CFPB Bulletin 2013-07, *supra* note 202, at 2. *See also* In the Matter of International Harvester Company*,* 104 F.T.C. 949 (1984) (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).

[206] *Id.*

[207] *Id.*

[208] CFPB MANUAL, *supra* note 203, at UDAAP 2.

[209] *Id.*

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

(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."[210]

Deceptive practices can "take the form of a representation or omission."[211] 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."[212] "Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service."[213]

As I argue in Part II, 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."[214] 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 these acts

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[210] CFPB Bulletin 2013-07, *supra* note 202, at 3.
[211] *Id.*
[212] *Id.* at 4; CFPB Manual, *supra* note 203, at UDAAP 5.
[213] CFPB Bulletin 2013-07, *supra* note 202, at 4. Perhaps counterintuitively, debt collection is a "product or service" under Dodd-Frank. DODD-FRANK § 1002(15)(A)(x) (codified at 12 U.S.C. § 5481(15)(A)(x)).
[214] CFPB Bulletin 2013-07, *supra* note 202, at 3.

as unfair or abusive practices. More specifically, for creditors subject to the CFPB's UDAAP authority: it would be a UDAAP violation to sell or attempt to collect on a consumer debt without documentary evidence regarding the amount, type of debt, date of last delinquency, and any disputes the consumer communicated to the creditor about the debt.[215] The CFPB could detail examples of the kinds of documents and information that should be kept by the creditor in order to avoid UDAAP liability.[216] It could also clarify minimal and best practice record retention policies. [217]

For debt buyers or their collectors, it would be a UDAAP to attempt to collect on a debt without (1) obtaining documentary evidence regarding the amount, type of debt, date of last delinquency, and dispute history *at the time of purchase* and (2) without obtaining specific and affirmative warrants from the seller regarding the material information and documentation provided about the debts. Concomitantly, debt owners and debt collectors would be required to verify the existence of a debt, its amount, the identity of the debtor, the limitations period status of the debt, the fact that the debt is in default, and the company's chain of title —based on the original information and underlying documentation in the company's own possession and that of the creditor—before any attempt to collect a debt. In the case of a debt sale, the contracts underlying each sale should be retained by the debt buyer and available to the consumer if she requests them. Terms that describe conditions of the receivables/accounts sold should not be redacted since they may provide a defense to the consumer. [218]

After such a rule, consumer debts could not be collected upon without this information and consumers would have a right to request it from the purported debt owners. As a practical matter, creditors and collectors could maintain all of this

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[215] 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).
[216] This could be a sort of safe harbor. As an example, the Bureau could creditors keep copies of the 12 most recent account statements showing purchases/charges and payments, if any, made by the consumer, including the date, source, and amount of the most recent payment.
[217] DBA INT'L 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.").
[218] *See, e.g.,* Wells Fargo Purchase Agreement (Jan. 6, 2010), *available at* http://dalie.org/contracts (stating that "Seller has made no representation, and now makes no representation, with respect to any of the Receivables or with respect to the completeness and accuracy of any Receivables Documents"); Jiménez, *supra* note **Error! Bookmark not defined.**.

documentary evidence themselves, or choose a third party to house it for them (as described below in the discussion on a debt registry). The responsibility would rest on creditors and debt collectors subject to the rule to ensure that this information was kept in a secure manner that minimized unauthorized access and tampering.[219] However, before *anyone* could collect on the debt, she would have to possess or have immediate access to this information (such that, for example, they can have procedures in place to verify the spreadsheet or line-item information with account statements).[220]

As Ronald Mann has pointed out, "[t]he successful credit card lender profits from the borrowers who become financially distressed."[221] In fact, in some cases lenders themselves may have driven consumers over the edge, in particular before the CARD Act.[222] Mann argues that the "standard" way 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).[223] "If the customers do not have realistic options, lenders are free to raise the interest rates and fees that they charge to those borrowers."[224] And this "rate jacking"[225] increases the risk of default by the consumer "as the cardholder is now faced with a higher interest rate and greater monthly payment demands."[226]

[219] This is especially necessary as documents are originated and kept in electronic form and there is never a hard copy "original." Private (and opaque) implementations of data compression algorithms have been found to alter numbers in a document without any way to tell that this had happened from looking at the document itself. *See* David Kriesel, Xerox Scanners and Photocopiers Randomly Alter Numbers in Scanned Documents, D. Kriesel, http://www.dkriesel.com/en/blog/2013/0802_xerox-workcentres_are_switching_written_numbers_when_scanning (last visited Feb. 28, 2014); TerraHertz, An Actual Know (and a Rack) (Dec. 1, 2013), http://everist.org/NobLog/20131122_an_actual_knob.htm#jbig2 (last visited Feb. 28, 2014).

[220] The Bureau could also require that in cases in which the creditor, debt buyer, or debt collector files a lawsuit to collect on the debt, the complaint should incorporate and attach as exhibits copies of the relevant account statements, a copy of the original debt contract and all amendments, and documentary evidence sufficient to establish the putative debt owner's chain of title and the standing of the plaintiff.

[221] *Id.* at 379.

[222] The CARD Act banned rate-jacking as described below. Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (to be codified in scattered sections of 15 U.S.C.).

[223] *Id.* at 388.

[224] *Id.*

[225] "'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." Levitin, *supra* note 174, at 339.

[226] *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.

Professor Mann's solution to this problem is a move to "allocate the losses between borrowers and lenders in a way that minimizes the net costs of financial distress."[227] 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."[228] A CFPB rule as described above could have this effect. Up until now, creditors have been able to charge debts off and obtain a small recovery from selling them. Increasing the documentation and information requirements—as well as the regulatory oversight—could have the effect of a just the kind of "distressed debt tax" that Professor Mann proposed.

B. Market Solutions

There is anecdotal evidence that large banks have "seen the writing on the wall" and begun to change their record-keeping and debt sales practices. But in addition to proactively following the OCC's Best Practices and the recommendations outlined in the previous section, banks today could take steps to increase the value of their debts as well as their collectability through the courts.

Problems arise when debts are sold multiple times and consumers are unaware of who currently owns the debt. A related problem is that Bills of Sale are not individualized at the account or debt level, they merely state that "[Seller] sold Accounts to [Buyer]" on a specified debt. This poses problems when a buyer seeks to collect through courts, but it also poses problems earlier because consumers have no way to verify that the person calling or writing is the legitimate owner of their debt. One potential "easy" solution to this would be for sellers (creditors or debt buyers) to send a "goodbye letter" to the consumer whenever their account is sold.[229]

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.[230] This letter (as well as other documentation) could "travel with the debt." Every subsequent buyer could

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[227] Mann, *Optimizing Consumer Credit Markets*, *supra* note **Error! Bookmark not defined.**, at 399.
[228] *Id.*
[229] Full credit for this idea goes to my seminar student, Samantha Koster.
[230] 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. *See, e.g.*, 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).

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 subsequent buyers at the moment of sale, this would go a long way towards ameliorating the business records problem in state court.[231] This "goodbye letter" 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.[232] The letter and copies of statements or itemization of charges could be kept by the creditor and given to the buyer at the time of purchase—evidencing a chain of title at the individual level—or could be kept by a debt registry as described later.

The industry recognizes the role notification of a sale could play in both improving collections and alleviating many of the problems described in Part I. 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."[233] However, those letters would still come on the debt buyer's letterhead and envelope.[234] One possible reason the contracts are structured this way it 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.

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[231] 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 and would acquire it *at the moment of sale*. In states that recognize the incorporation doctrine, a debt buyer's record custodian could satisfy the business records exception to the hearsay rule. If the account was sold again then the subsequent buyer would have multiple letters evincing the chain of title.

[232] Instead of a goodbye letter, however, most debt sale contracts explicitly prohibit debt buyers from providing information about the original credit issuer. FTC Debt Buyer Report, supra note 2, at C-20. The reason for this is presumably to avoid communications with the consumer since the seller no longer owns the account, 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. *Id.*

[233] *Id.*

[234] *Id.*

The problems described in this Article might sound eerily similar to the documentation and robosigning issues in the mortgage markets. A great deal of those problems concern the mortgage industry's registry, the Mortgage Electronic Registration System, or MERS, which came under significant attack for its actions during the foreclosure crisis.[235] By inserting itself as the owner of record or owner's nominee in foreclosure actions, MERS foreclosed on homes under its own name, even though it was not entitled to any of the proceeds because it did not own the mortgage or the note.[236] Because recordation of assignments in MERS was voluntary, oftentimes consumers could not ascertain who owned their mortgages. This exposed some consumers to double foreclosure actions—and their attendant fees—because they could not determine exactly who owned their loans. In most egregious cases, fraudsters became authorized officers of MERS and initiated foreclosure. In other cases, consumers could not find out who to contact to settle the foreclosure case when MERS was the one that initiated the actions.

Given all of these issues, it may seem surprising that, for example, the CFPB recently highlighted the idea of a debt registry in its advanced notice of proposed rulemaking by asking a series of questions to the public about its potential benefits and drawbacks.[237] At least two companies have been attempting to fix the documentation and chain of title problems detailed here through a MERS-like registration solution for unsecured consumer debts.[238] Both aim to do this by serving

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[235] MERS is a computer database, established by the residential mortgage industry, which is designed to track the servicing rights on the majority of U.S. home loans. It has approximately 5,000 members – consisting of mortgage originators and secondary market participants including Fannie Mae, Freddie Mac, and Ginnie Mae – who pay MERS membership fees and fees on specific transactions in order to use the information filed with MERS. MERS®WORKS, Quick Facts: An Introduction to the MERS® System, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc. (Jan. 2014), *available at* http://www.mersinc.org/media-room/press-kit (last accessed Mar. 1, 2014).

[236] For an in-depth discussion, see Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 713-15 (2013); Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 WILLIAM & MARY L. REV. 111 (2011); Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. CINN. L. REV. 1359 (2010). See also Mortg. Elec. Registration Sys., Inc. v. Chong, Order, 2:09-CV-00661-KJD-LRL (Dec. 4, 2009), available at http://www.scribd.com/doc/23828361/Mortgage-Electronic-Registration-Systems-Inc-Appellant-V-Lisa-Marie-Chong-Lenard-e-Schwartzer; Mortg. Elec. Registration Sys., Inc. v. Graham, 2010 WL 1873567 at *4-*5; In re Agard, Case No. 810-77338-reg, 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.").

[237] *See* CFPB ANPR question 12, *supra* note 12. Some of the discussion here was included in my joint comment letter with Patricia A. McCoy.

[238] GLOBAL DEBT REGISTRY, DEBT VALIDATION, CHAIN OF TITLE, DEBT OWNERSHIP – HISTORY, http://www.globaldebtregistry.com/about-history (last visited Feb. 24, 2014); CONVOKE SYSTEMS, ABOUT US,

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 remain there regardless of current ownership of the debt. What would change would be the registered owner.

As one of these companies puts the issue in a whitepaper:

> 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?[239]

Why indeed? While the MERS-scars are still recent—and indeed, the injuries have not necessarily stopped—there are some differences between the unsecured consumer debt context and the mortgage registry system. Unlike unsecured consumer debts, mortgages have had a registry system for hundreds of years. The county recording has been a very successful system of establishing title and recording changes in the ownership of real property. MERS was developed to *supplant* this already-existing registry system. In the unsecured debt context, there is nothing to supplant, and indeed, there is a need for consumers to be able to verify who owns their debts so that they may pay the right party.

The theory is that this centralized repository could play the same role as the mortgage registry system for unsecured debts, and do so at a national level. It is this “chain of title” record-keeping and account document storage that could be the most helpful feature in a repository. Unless it is serving as the real-time system of record for every collector or debt owner, however, a repository would not be an appropriate place to keep the current amount owed on a debt, or the itemization between interest and fees past charge-off. This is because any information stored in the repository about the amount owed or the payments made will necessarily be out of date and in no way verifiable since they were created by a third party.

In a perfect world, this “chain of title registry” could offer advantages to both consumers and industry participants. From a consumer’s perspective, this could

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http://www.convokesystems.com/html/about_us.html (last visited Feb. 24, 2014 (referring to an “emerging Federal, state and local regulations [that] have created an industry tipping point”).

[239] Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, GLOBAL DEBT REGISTRY, *available at* http://ftc.gov/os/comments/debtcollecttechworkshop/00027-60064.pdf.

provide consumers who are targeted for debt collection with an easy-to-find place for examining the facts alleged regarding their debts. If reporting to a repository were required, consumers could easily verify that the party contacting them actually owns the debt, or alternatively, that they have been called by a scammer.

To alleviate the issues around the lack of documentation, at the time that a delinquent account is entered into a repository, underlying debt contracts, the last account statement, the amount owed at charge-off, and the date of first default from the original creditor. While only the original creditor could speak to the truth and reliability of those documents in court, outside of court, this could help consumers ascertain whether the alleged principal, interest and fees being charged were excessive and evaluate any defenses to collection. A repository could also protect against potential double recovery and fraudulent collection by enabling them to identify the rightful owner of their debts and the debt collector or servicer who is authorized to collect on them.

The ready availability of this information might encourage more courts to insist that debt holders and collectors prove a *prima facie* case before granting them default judgments to collect debts. Although here it is important to note that while the repository can serve a very useful purpose in identifying the owner of the debt and the entity authorized to collect on it, because the repository itself is not any of those entities, it cannot be used to substantiate the amounts owed on a debt. The only thing an agent of a repository could testify to in court is that documents were placed with it at a particular time by a particular entity. The repository cannot speak to the validity or contents of those documents or even about how they were created. It can only speak to the integrity of those documents—that is, that they were not changed—after they were stored with the repository.

Many of the advantages that a centralized repository (or a handful of repositories) could offer to consumers flow from the fact that it would relatively easy to publicize its existence and that it could be closely supervised by the CFPB.[240] In addition, as

[240] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for debt collection or consumer reporting. Consumer Financial Protection Bureau, *Final Rule: Defining Larger Participants of the Consumer Reporting Market*, 77 FR 42873 (July 20, 2012); Consumer Financial Protection Bureau, *Final Rule: Defining Larger Participants of the Consumer Debt Collection Market*, 77 FR 65775 (Oct. 31, 2012). They may also qualify for supervision as service providers of depository institutions. Dodd-Frank Act § 1025.

an entity in a "business the principal purpose of which is the collection of any debts," a repository would come within the ambit of the FDCPA and be accountable to consumers who were hurt by their practices.

However, there remain unresolved issues of how a repository would fit with current law. A centralized repository would seem to be a "consumer reporting agency" under the Fair Credit Reporting Act (FCRA).[241] This might bring some additional consumer protections such as the requirement of "maximum possible accuracy,"[242] correction or deletion of disputed information,[243] and free consumer disclosures every twelve months,[244] as well as potential direct supervision by the CFPB.[245] However, the FCRA would do nothing to stop a repository from sharing this newly collected information with third parties, a development that has negative consequences for consumers' privacy. In addition, the FCRA's seven year limit on reporting would also present a problem, as one of the most useful features of a repository would be its ability to report whether a debt has been paid or extinguished much longer than seven years since charge-off.[246] While the FCRA's provisions provide some threshold consumer safeguards, it has a mixed track record of empowering consumers to correct inaccurate credit reports. The consumer safeguards for any repository should be even stronger than those afforded by FCRA to safeguard the accuracy of and access to the information contained therein.

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[241] 15 U.S.C. § 1681a(f) states that a "'consumer reporting agency' means any person who for monetary fees . . . regularly engages in whole or in part in the practice of assembling … consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." A "consumer report" in turn is defined in § 1681a(d)(1) as including any type of communication that bears on a consumer's credit-worthiness or credit capacity which is used or expected to be used with any of the permissible purposes of consumer reports in § 1681b(a). Under § 1681b(a), there are three ways in which a centralized repository would furnish reports that would bring it within the ambit of the FCRA. To the extent that the repository makes available information to potential collectors or debt purchasers, it would be furnishing it under § 1681b(a)(3)(E) since the repository would be sharing the information with someone who "intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation." Similarly, the repository could trigger the FCRA by furnishing the information to someone (a debt buyer or collector) who "has a legitimate business need for the information (i) in connection with a business transaction that is initiated by the consumer" (the original credit agreement). § 1681b(a)(3)(F). And finally, the repository would come under FCRA for furnishing the information "[t]o a person which [the repository] has reason to believe…intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished (for the) collection of an account of the consumer;" (emphasis added). § 1681b(a)(3)(A).

[242] 15 U.S.C. § 1681e(b).

[243] 15 U.S.C. § 1681i.

[244] 15 U.S.C. § 1681j.

[245] Repositories would be subject to CFPB supervision if they met the Bureau's definition of a "larger participant" in the market for consumer reporting. Consumer Financial Protection Bureau, *Final Rule: Defining Larger Participants of the Consumer Reporting Market*, 77 FR 42873 (July 20, 2012). They may also qualify for supervision as service providers of depository institutions. Dodd-Frank Act § 1025.

[246] *See generally* 15 U.S.C. § 1681c(a)(4).

Furthermore, given the MERS experience, there is a real concern that agents of the repository would be called to testify in court about things that they do not have personal knowledge of—for example, the amount of the debt or the underlying terms of the agreement between the creditor and debtor. It would be crucial for the CFPB and other regulators to clarify that all a repository could verify is the assignment chain—that is, that creditor and buyer 1 entered into an agreement that was deposited with the depository involving a particular set of consumer debts. The repository does not have personal knowledge of whether those debts are valid or correct, just that the creditor turned over documents about them to the repository for safe-keeping and that, for example, buyer 1 sold a particular account to buyer 2 who is now its only owner. In other words, a centralized debt repository could not satisfy (by itself) a debt owner's *prima facie* case in court.

All of this begs the question—is a repository necessary? My answer would be that it is not necessary, but it is likely. If we constrain our analysis to banks, the same beneficial functions I've outlined above could be accomplished if the creditor simply retained all of the information and documentation needed. The creditor itself could keep a record of ownership, and only allow proper parties (current owners of the debt or their authorized servicers) to access this data. This starts to sound an awful lot like just placing a debt with a third-party collector. If you retain all liability and record-keeping, there is little reason not to retain the upside (any eventual payment). And this is why I have analyzed what a repository would look like. While some banks may react to stricter documentation and information rules by ceasing to sell debt, others may decide that debt sales still make sense and continue to do so.

V. CONCLUSION

Using a collection of consumer debt purchase and sale agreements, 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. While the precise number of consumers affected is uncertain, all indications are that hundreds of thousands, if not millions, of consumers may have paid debts to entities who did not comply with the law in collecting from them. Some of these consumers may have had a judgment entered

against them by a court of law; a judgment that in many states will follow them for decades.[247] 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. The problem is, however, that we may never know if this is true. As this Article has revealed, the systemic lack of information and documentation means that in some cases, more documents or information about debts sold may no longer exist. The system is broken.

I propose that the CFPB declare the practices described in Part I as unfair and deceptive and write new rules requiring creditors and collectors to possess minimal levels of information and documentation before they can collect in compliance with the law. New rules take time, however. In the meantime, the industry is suffering in the legal uncertainty and the public has many reasons to question the authority of the debt collector who calls them. In the shorter term, I propose that creditors can begin to send their customers "goodbye letters" if they sell an account; giving consumers an understanding of who legitimately owns their debt. Implementation of these proposals would go a long way towards stemming the problems identified in this Article.

[247] *See, e.g.*, N.J. STAT. § 2A:14-5 (20 years); N.Y. CIV. PRAC. L. & R. § 211(b) (McKinney 2010) (20 years); R.I. Gen. Laws § 9-1-17 (20 years); ALA. CODE § 6-2-30 (20 years). KY. REV. STAT. § 413.090 (15 years); OHIO REV. CODE § 2305.06 (15 years); 735 ILL. COMP. STAT. 5/13-206 (10 years); LA. CIV. CODE § 3499 (10 years); W. VA. CODE § 55-2-6 (10 years); WYO. STAT. § 1-3-105(a)(i) (10 years).