St. John's Law Review

Volume 74
Number 2 *Volume 74, Spring 2000, Number 2*

Article 5

March 2012

The Application of the Fair Debt Collection Practices Act to Article 7 of the New York RPAPL

Joshua P. Foster

NOTE

THE APPLICATION OF THE FAIR DEBT COLLECTION PRACTICES ACT TO ARTICLE 7 OF THE NEW YORK RPAPL

JOSHUA P. FOSTER*

INTRODUCTION

The Fair Debt Collection Practices Act (FDCPA or the "Act")[1] was enacted in an attempt to curtail the abusive practices of debt collectors.[2] The Act was enacted in 1977 as a supplement to the Consumer Credit Protection Act (CCPA).[3] The FDCPA proscribes any harassment, abuse, or oppression of a debtor[4] and prohibits debt collectors from making any false representations in the collection of debts.[5] The FDCPA further requires that "a debt collector shall . . . send the [debtor] a written notice . . .

---

* J.D. Candidate, June 2000, St. John's University School of Law; B.A., The State University of New York at Stony Brook.

1 15 U.S.C. §§ 1692–1692o (1994 & Supp. IV 1999).

2 *See id.* § 1692(a) (1994) ("There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."); *see also* Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982) (stating that the purpose of the FDCPA is "to protect consumers who have been victimized by unscrupulous debt collectors"); Wiener v. Bloomfield, 901 F. Supp. 771, 774 (S.D.N.Y. 1995) (noting that the FDCPA was enacted to protect consumers from misleading statements made by some debt collectors); Graziano v. Harrison, 763 F. Supp. 1269, 1275 (D.N.J. 1991) (noting that the purpose of the FDCPA is to prevent the abuse of consumers and to enable debt collectors to efficiently collect debts through reasonable avenues), *aff'd in part, rev'd in part on other grounds*, 950 F.2d 107 (3d Cir. 1991).

3 *See* S. REP. NO. 95-382, at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. The CCPA is codified at 15 U.S.C. §§ 1601–1693 (1994 & Supp. IV 1999).

4 *See* 15 U.S.C. § 1692d (1994 & Supp. IV 1999).

5 *See id.* § 1692e. This section also disallows any type of contact or communication between a debt collector and a debtor that may be harassing or abusive. *See id.* For example, communication of the debt may not be made to third parties and the debt collector may not use an alias and may only contact the debtor during reasonable hours of the day. *See id.*

[stating] that unless the [debtor], within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the [alleged] debt will be assumed to be valid."[6] The FDCPA also regulates communications between debt collectors and debtors[7] and includes detailed notice requirements.[8]

---

[6] 15 U.S.C. § 1692g(a)–(a)(3) (1994). The FDCPA defines a "debt collector" as:

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.... [T]he term includes any creditors who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

Id. § 1692a(6); *see also* Heintz v. Jenkins, 514 U.S. 291, 294–95 (1995) (finding that the term "debt collector" includes persons who collect debts as a business and attorneys who are regularly involved in the collection of debts); Wegmans Food Mkts. v. Scrimpsher (*In re* Scrimpsher), 17 B.R. 999, 1011 (Bankr. N.D.N.Y. 1982) (requiring that the principal purpose of the business be the collection of debts); Kizer v. Finance Am. Credit Corp., 454 F. Supp. 937, 939 (N.D. Miss. 1978) (noting that an individual who collects debts owed to a third party is considered a "debt collector," while an individual who collects debts for himself, under his own name, is generally not considered a "debt collector").

[7] For example, the FDCPA prohibits debt collectors from communicating with alleged debtors concerning the collection of a debt "at any unusual time or place." 15 U.S.C. § 1692c(a)(1) (1994). The debt collector may not contact a debtor "if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication." *Id.* § 1692c(a)(3). In addition, if the debt collector knows an attorney represents the debtor, the collector may not communicate with the debtor without the attorney's consent. *See id.* § 1692c(a)(2).

[8] *See id.* § 1692g(a). This section provides in pertinent part:

> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; [and]
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector....

Id.

The New York Real Property Actions and Proceedings Law (RPAPL) only requires that a landlord give "at least three days' notice in writing" prior to commencing summary proceedings to evict a residential tenant.[9] Application of the requirements of the FDCPA to the circumstance that the RPAPL was intended to govern would produce an unjust result. A careful analysis of the legislative history of the FDCPA suggests that Congress did not intend for the FDCPA to govern the actions of an attorney acting on behalf of landlord who is attempting to evict a non-paying tenant and to collect back rent in conjunction therewith.[10]

The conflict between the FDCPA and RPAPL provisions was analyzed in *Romea v. Heiberger & Associates*.[11] In *Romea*, the plaintiff was a tenant in a Manhattan apartment building,[12] and the landlord alleged that she had failed to pay rent for four months.[13] Plaintiff was notified,[14] in accordance with the provisions of the RPAPL, that she would have to pay the back rent or vacate her apartment within three days to avoid the commencement of summary proceedings to recover possession of

---

The notice provided to the consumer must not be "false, deceptive, or misleading" as to the validity or actual plans for collection of the debt. 15 U.S.C. § 1692(e) (1994 & Supp. IV 1999). To determine whether the actual notice is in violation of the above provisions, most courts use "an objective standard, measured by how the 'least sophisticated consumer' would interpret the notice received from the debt collector." Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2d Cir. 1996) (citations omitted); *see also* Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993) (adopting the "least sophisticated consumer" standard); Smith v. Transworld Sys., Inc., 953 F.2d 1025, 1028 (6th Cir. 1992) (approving the use of the "least sophisticated consumer" test by the district courts); Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1174–75 (11th Cir. 1985) (adopting the "least sophisticated consumer" standard).

[9] N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979). The statute requires a landlord to demand either that the rent be paid or provide at least three days' notice to the tenant that the summary proceedings will be commenced if he does not either vacate the premises or become current with his rent payments. *See id.*

[10] *See* S. REP. NO. 95-382, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. A report of Senate discussions during the passage of the FDCPA cites major studies which show that the majority of people who are in default on a debt are not "deadbeats." *See id.* The studies further indicate that "the vast majority of consumers who obtain credit fully intend to *repay* their debts." *Id.* (emphasis added). This language is significant because the term "repay" connotes a previous extension of credit. Rent is not a previous extension of credit, as it is generally paid both prior to and during occupation of the property.

[11] 988 F. Supp. 712 (S.D.N.Y. 1997), *aff'd*, 163 F.3d 111 (2d Cir. 1998).

[12] *See Romea*, 988 F. Supp. at 713.

[13] *See id.*

[14] The opinion refers to the defendant's predecessor in interest as having sent the notice to the plaintiff. *See id.* It is unclear, however, whether the predecessor in interest was the landlord, a law firm, or a collection agency.

the premises and the back rent.[15] The notice was not sent directly from the landlord, but from a law firm retained by the landlord.[16] The plaintiff contended that the law firm was a "debt collector" within the meaning of the FDCPA and that the notice was a "communication" for the purpose of collecting a "debt."[17] Accordingly, the plaintiff contended that she was protected by the FDCPA.[18] The plaintiff additionally maintained that although the notification met the requirements of the RPAPL, it violated the FDCPA by "omitt[ing] notice of the required thirty day validation period."[19]

On appeal, the Second Circuit ruled that back rent in the residential landlord-tenant relationship constitutes a "debt" within the meaning of the FDCPA.[20] Likening back rent to a dishonored check and explaining that neither "derive[s] from an extension of credit but rather because the payor breached its payment obligations in the contract between the parties,"[21] the court held that because back rent is a "debt," and since the RPAPL section 711(2) notice delivered information regarding

---

[15] *See id.*

[16] *See id.* (noting that the "[d]efendant is a law firm that is said regularly to attempt to collect debts owed to this and other landlords"). The FDCPA applies to external debt collectors, such as the law firm in *Romea*, but does not apply to private debt collectors who attempt to collect their own debts. *See supra* note 6.

[17] *See Romea*, 988 F. Supp. at 713, 715.

[18] *See id.* at 713.

[19] *Id.* The court held that the defendant's argument that rent is not a "debt" within the meaning of the FDCPA could not be "squared with the language or history of the statute." *Id.* at 714.

[20] *See* Romea v. Heiberger & Assocs., 163 F.3d 111, 115 (2d Cir. 1998).

[21] *Id.* Many circuits have held that a dishonored check constitutes a "debt" within the meaning of the FDCPA. *See, e.g.*, Snow v. Jesse L. Riddle, P.C., 143 F.3d 1350, 1353 (10th Cir. 1998) (finding that a dishonored check constitutes a debt within the meaning of the FDCPA); Duffy v. Landberg, 133 F.3d 1120, 1123–24 (8th Cir. 1998) (stating that a dishonored check is a debt because it is a failure to fulfill an obligation), *cert. denied*, 525 U.S. 821 (1998); Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) (noting with approval the Seventh Circuit's holding that a dishonored check is a "debt" within the meaning of the FDCPA, and applying the rationale of that case); Bass v. Stolper, 111 F.3d 1322, 1326 (7th Cir. 1997) (concluding that the attempt to collect on a dishonored check is covered under the FDCPA); *see also* O'Connor v. Check Rite, Ltd., 973 F. Supp. 1010, 1013–14 (D. Colo. 1997) (treating a dishonored check as a debt under the FDCPA).

such debt, the notice sent by the defendant qualified as a "communication" under the FDCPA.[22]

Congress enacted the FDCPA to protect consumers from the unconscionable practices of "debt collectors" and to give consumers reasonable time to contest the validity of a "debt."[23] The FDCPA was not intended to limit the ability of landlords to remove a non-paying tenant.[24] The RPAPL, however, explicitly prescribes the means to remove a non-paying tenant from the landlord's premises.[25] The New York State legislature enacted Article 7 of the RPAPL to dissuade landlords from exercising "self-help," an often used practice resulting from the extremely time-consuming common-law action in ejectment.[26] The application of the FDCPA to landlord-tenant relationships would drastically impede the purposes of the RPAPL.[27]

This Note contends that the notification requirement of the RPAPL should not be subject to the provisions of the FDCPA, as such notification does not deliver information regarding a "debt." Part I explores the various judicial interpretations of the term "debt." Part II examines the constitutional doctrines regarding the Supremacy Clause and federal preemption of state statutes. Part III discusses discrepancies between the intended scope and purpose of the RPAPL and the FDCPA. While the FDCPA's current definition of a "debt collector" embraces attorneys, Part IV discusses the significance of the omission of attorneys from the definition of "debt collector" in earlier versions of the Act. Parts V and VI delineate New York's statutory scheme and

---

[22] *See Romea*, 163 F.3d at 116. "[T]he § 711 letter that Heiberger sent to Romea was undeniably a 'communication' as defined by the FDCPA in that it conveyed 'information regarding a debt' to another person." *Id.* (quoting 15 U.S.C. § 1692a(2) (1994)).

[23] *See supra* note 2.

[24] *See infra* Part II.

[25] *See* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 1979 & Supp. 2000); *see also* Velazquez v. Thompson, 451 F.2d 202, 204 (2d Cir. 1971) (finding that the main purpose of the legislative summary eviction proceedings is to afford a landlord an efficient, expedient, and inexpensive means to remove a non-paying tenant).

[26] *See Velazquez*, 451 F.2d at 204 (reasoning that the New York State Legislature enacted summary proceedings to avoid the delays associated with the common law action in ejectment, which prompted landlords to resort to "self-help"); *see also* Reich v. Cochran, 94 N.E. 1080, 1081 (N.Y. 1911) (noting that the purpose of New York's summary proceedings is to effectuate speedy recovery of a landlord's premises). *See generally* Tri-State Refreshments, Inc. v. Nitke, 246 N.Y.S.2d 79 (Broome County Ct. 1964) (same).

[27] *See infra* Part VI.

describe methods that must be employed to obtain an exemption from the FDCPA.

I. JUDICIAL INTERPRETATION OF "DEBT" UNDER THE FDCPA

There is a clear split in the circuits as to whether a "debt" under the FDCPA requires an extension of credit or a deferral of payment.[28] The Third Circuit, in *Zimmerman v. HBO Affiliate Group*,[29] interpreted the FDCPA as pertaining only to contracted-for services in which credit had previously been offered or extended.[30] In *Zimmerman*, the plaintiffs received a letter from a cable company accusing them of illegally receiving "Home Box Office" video programming services[31] and demanding compensation for the alleged theft.[32] The plaintiffs commenced suit alleging violations of the FDCPA and maintained that the defendant's demand for compensation was an attempt to collect a "debt" within the meaning of the Act.[33] The court rejected the plaintiff's position and held that a "debt" must involve an "offer or extension of credit to a consumer."[34] Credit generally refers to a loan of money, such as with a credit card. As such, the court found that the alleged amount owed by the plaintiffs was not a "debt" within the meaning of the FDCPA.[35]

---

[28] A majority of circuits have held that a "debt" within the meaning of the FDCPA does not require an extension of credit. *See* Romea v. Heiberger & Assocs., 988 F. Supp. 712, 714 (S.D.N.Y. 1997), *aff'd*, 163 F.3d 111 (2d Cir. 1998). This construction, however, is contrary to the use of the term "debt" throughout most of the CCPA, which was amended to include the FDCPA. Another issue that arises is whether the Electronic Fund Transfer Act pertains to "debt." *See infra* note 58.

[29] 834 F.2d 1163 (3d Cir. 1987).

[30] *See id.* at 1167–69.

[31] *See id.* at 1165. The cable company conducted an investigation to identify individuals illegally receiving its programming services. *See id.*

[32] *See id.* at 1166.

[33] *See id.* at 1167.

[34] *Id.* at 1168. The court looked to other subchapters of the CCPA and concluded that the term "debt" is consistently used to refer to a transaction "involving the offer or extension of credit to a consumer." *Id. But see* Bass v. Stolper, 111 F.3d 1322, 1325 (7th Cir. 1997) (stating that the language of the FDCPA does not require there be an "extension of credit"); Broadnax v. Greene Credit Serv., No. 95-3829, 1997 U.S. App. LEXIS 776, at *12 (6th Cir. Jan. 15, 1997) (per curiam) (concluding that a bad check constitutes a debt embraced by the FDCPA).

[35] *See Zimmerman*, 834 F.2d at 1167.

The Seventh Circuit, in *Bass v. Stolper*,[36] rejected the holding in *Zimmerman* and held that a dishonored check did constitute a "debt" and that an extension of credit is not required for a transaction to be covered by the FDCPA.[37] The court, reviewing the plain meaning of the Act, noted that there is "no language in the Act's definition of 'debt' (or any other section of the Act) that mentions, let alone requires, that the debt arise from an extension of credit."[38] In *Romea*, the Second Circuit interpreted the FDCPA in a similar manner and analogized back rent to a dishonored check.[39] The *Romea* court, however, did not address whether the FDCPA requires an extension of credit.

---

[36] 111 F.3d 1322 (7th Cir. 1997). In *Bass*, the plaintiff's joint account holder wrote a check to a supermarket that subsequently bounced. *See id.* at 1323. The defendant is the law firm employed by the supermarket to collect the funds originally due to them from the bounced check. *See id.* The firm sent a letter to the plaintiff stating that it would "hold off taking any action for 7 days if Bass . . . would make arrangements to pay." *Id.* (internal quotations omitted). The plaintiff filed suit alleging that the defendant failed to comply with the requirements of the FDCPA. *See id.* The district court found that "a dishonored check creates a 'debt' under the FDCPA." *Id.* at 1324. The Seventh Circuit upheld the district court's ruling and found that there is no requirement in the FDCPA that a "debt" flow from an extension of credit or a deferment of payment. *See id.* at 1326.

[37] *See id.* The court utilized the general rule of statutory interpretation, discussed in *Hubbard v. United States*, 514 U.S. 695, 700–01 (1995), that courts are "prohibited from reading into clear statutory language a restriction that Congress itself did not include." *Bass*, 111 F.3d at 1326. The court stated that clear statutory terms must be given their ordinary meaning and that the ordinary meaning of the term transaction has "a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment." *Id.* at 1325.

[38] *Bass*, 111 F.3d at 1325.

[39] *See* Romea v. Heiberger & Assocs., 163 F.3d 111, 115 (2d Cir. 1998). The Second Circuit reasoned that:

> [B]ack rent is much like the obligation arising out of a dishonored check where a service has been rendered or goods sold on the premise of immediate payment. The obligation to pay the bounced check, like the duty to pay back rent, does not derive from an extension of credit . . . .

Id.

Considering the plain meaning of the FDCPA, courts should find the definition of "debt" ambiguous[40] as it applies to back rent.[41] The term "debt" has generally been applied to situations where credit has been extended.[42] When back rent is at issue, however, it cannot be said that credit has been extended. When a tenant rents an apartment, no credit is extended to the tenant because continuous rent payments are to be made at the beginning of each month for the following month, per the lease agreement. Nonetheless, a question remains whether the FDCPA applies to back rent, and therefore, the statute is ambiguous.

---

[40] A rule of statutory construction is that a court should look to the legislative intent at the time of enactment. To effectuate this rule, a court should look at the plain meaning of the statute to be interpreted, foregoing a detailed analysis of the legislative history only if the meaning of the text is clear. *See* United States v. Nordic Village Inc., 503 U.S. 30, 36 (1992) (stating that "a statute must, if possible, be construed in such fashion that every word has some operative effect"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (recognizing that an examination of the plain meaning of a statute must be the starting point in the construction of a statute); *Ex parte* Collett, 337 U.S. 55, 61 (1949) (reiterating the general rule that it is inappropriate to look to the legislative history if a statute is unambiguous on its face); Market Co. v. Hoffman, 101 U.S. 112, 115–16 (1879) (stating that the cardinal rule of statutory construction is that effect be given to every word, and that every part of a statute must be construed in light of the whole); *In re* Witkowski, 16 F.3d 739, 742 (7th Cir. 1994) (stating that a court must enforce a statute according to its plain language); *see also* Solich v. George & Anna Portes Cancer Prevention Ctr., 630 N.E.2d 820, 822 (Ill. 1994) (noting that "the cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature"). The United States Supreme Court has recently indicated that a split in the circuits is evidence that a particular statutory phrase does not have a plain meaning. *See* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 355 (1999).

[41] *See* 15 U.S.C. § 1692a(5) (1994).

[42] The term "debt" should be construed in connection with the whole statute. *See Hoffman*, 101 U.S. at 115–16 (stating that every part of a statute must be construed in light of the whole). Notably, the FDCPA defines a "creditor" as "any person who *offers or extends credit* creating a *debt* or to whom a debt is owed." 15 U.S.C. § 1692a(4) (1994) (emphasis added). Moreover, the ordinary definition of the word "debt" implies that a debtor and creditor have previously entered into an agreement whereby the debtor has agreed to pay the creditor a specified sum of money. *See* BLACK'S LAW DICTIONARY 403 (6th ed. 1990) (defining "debt" as "[a] sum of money *due by certain and express agreement*") (emphasis added). The FDCPA's definition of the term "debt" follows the ordinary definition by stating that " 'debt' means any obligation . . . to pay money arising out of a transaction . . . ." 15 U.S.C. § 1692a(5). Accordingly, "debt" within the FDCPA contemplates that the creditor and debtor have previously entered into an express agreement that a sum of money is due to the creditor.

Considering the ambiguity in the language of the statute, the court in *Romea* should have examined the FDCPA's legislative history in accordance with the general rules of statutory construction.[43] The legislative purpose in enacting the FDCPA was to protect alleged debtors from the abusive practices of debt collectors.[44] The Second Circuit should have held that back rent is not a debt and, therefore, collection thereof is not covered by the FDCPA. Accordingly, back rent should not be considered a "debt" because there is no extension of credit. Therefore, the court in *Romea* should not have applied the FDCPA.

Had the *Romea* court looked into the purpose of the FDCPA, it would have found that the statute was intended to protect debtors from harassment in connection with the collection of debts. Though the RPAPL eliminates the potential harassment of a non-paying tenant by dissuading a landlord from resorting to "self help," it was primarily enacted to provide an expeditious procedure for a landlord to regain possession of his or her premises.[45] The FDCPA applies to the collection of debts, while the RPAPL is a vehicle used to dispossess a non-paying tenant. Hence, each statute was enacted for distinctively separate purposes, and therefore, the FDCPA should not be applied in the context of the landlord-tenant relationship, which is covered by the RPAPL.

II. PREEMPTION

In general, before a court may conclude that a federal statute preempts its state counterpart, the court must find that Congress clearly manifested an intent to so preempt in the

---

[43] *See* Blum v. Stenson, 465 U.S. 886, 896 (1984) ("[W]e look first to the statutory language and then to the legislative history if the statutory language is unclear."). The purpose of the FDCPA was to curb the abusive and harassing practices of debt collectors, as well as to provide guidelines for debt collectors to follow. *See* 15 U.S.C. § 1692 (1994 & Supp. IV 1999). Congress sought to prevent abusive practices including the use of "obscene or profane language, threats of violence, telephone calls at unreasonable hours," and an array of other annoying and threatening behaviors. S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1997 U.S.C.C.A.N. 1695, 1696. The RPAPL, however, applies to, and was intended to assist landlords who are seeking to evict nonpaying tenants in an expedient fashion. *See infra* notes 72–73 and accompanying text.

[44] *See supra* note 43.

[45] *See infra* notes 72-73 and accompanying text.

statute.[46] There are three circumstances in which a federal statute preempts state law.[47] Congress must explicitly define the area to be preempted, intend the entire body of existing state law to be superseded by the federal statute, or there must be a direct inconsistency between the federal statute and the state law.[48] The FDCPA, however, explicitly permits a state statutory scheme enacted for the same purpose as the FDCPA to remain in effect so long as the state law provides consumers with greater protection than the FDCPA or when the protection provided by the state law is "substantially similar" to the protection provided by the FDCPA.[49]

---

[46] *See* English v. General Elec. Co., 496 U.S. 72, 79 (1990) (reiterating the principle that Congress must clearly manifest its intent to preempt state law in an area " 'traditionally occupied by the States' ") (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[47] *See id.* at 78 (noting that "[o]ur cases have established that state law is preempted under the Supremacy Clause . . . in three circumstances"). As the *English* Court noted, preemption jurisprudence stems from the Supremacy Clause of the Constitution. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

[48] *See English*, 496 U.S. at 78–79. The Court noted that under the first circumstance "Congress can define explicitly the extent to which its enactments preempt state law." *Id.* at 78 (citing Shaw v. Delta Air Lines, 463 U.S. 85, 95–98 (1983)). The Court recognized that preemption is primarily a matter of intent and that Congress's intent is most clear when it is demonstrated by "explicit statutory language." *Id.* at 78–79. Under the second circumstance, the *English* Court found that state law is preempted by a federal statute when Congress intends to exclusively regulate the conduct covered by the state law. *See id.* at 79. This occurs when the federal statutory scheme is " 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of [the state law].' " *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Finally, under the third circumstance, the Court noted that state law is preempted when it "actually conflicts" with a federal statute. *Id.* A conflict occurs when it is impossible to comply with both the state law and the federal statute. *See id.* (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)). Conflict can also occur when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). "When a valid federal statute explicitly bars certain types of state action, there are no difficulties. But problems arise when the federal legislation does not clearly disclose its intended impact on state laws." GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 337 (13th ed. 1997).

[49] *See* 15 U.S.C. § 1692n (1994) ("For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter."). The FDCPA further provides that:

The FDCPA should not be construed to preempt section 711 of the RPAPL because this was not the congressional intent. Preemption is proper when Congress has explicitly defined the area of state law to be preempted.[50] Congress, however, did not explicitly denote its intention to completely preempt state real property law when it enacted the FDCPA, except to say that the FDCPA will preempt state law where direct inconsistencies arise.[51] Here, there are only inconsistencies if the FDCPA is deemed to pertain to the landlord-tenant context. Congress did not expressly indicate that the FDCPA applies to the landlord-tenant relationship and thereby explicitly preempt state law in this area. Federal preemption of section 711 of the RPAPL, therefore, must rest on other grounds.

Preemption is also permitted if Congress intended to supersede the entire body of state law when it enacted the federal statute.[52] Congress, however, did not intend to preempt section 711 of the RPAPL because the purpose of the FDCPA is a consumer protection law enacted to protect consumers involved in credit transactions, which do not include back rent. While some courts have found that the FDCPA covers situations regardless of whether there was an extension of credit,[53] this argument ignores the overall purpose of the CCPA.[54] The FDCPA is part of the statutory framework established by the CCPA, which has the stated purpose of assuring "a meaningful disclosure of *credit* terms so that the consumer will be able to compare more readily the various credit terms available . . . and

---

> The [Federal Trade] Commission shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

15 U.S.C. § 1692o (1994).

[50] *See supra* note 48 and accompanying text.

[51] *See* 15 U.S.C. § 1692n (1994). This section states that:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

Id.

[52] *See supra* note 48 and accompanying text.

[53] *See supra* Part I.

[54] 15 U.S.C §§ 1601–1693 (1994 & Supp. IV 1999).

to protect the consumer against inaccurate and unfair *credit billing and credit card practices*."[55]

The purpose of the CCPA is further illustrated by the regulation promulgated under the CCPA, which states that "this regulation applies to each individual or business that offers or extends credit."[56] The regulation also includes four criteria, all of which must be met for the regulation to apply: "(i) The credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly; (iii) the credit is subject to a finance charge or is payable by a written agreement in more than 4 installments; and (iv) the credit is primarily for personal, family, or household purposes."[57] If the regulation pertains to the CCPA in its entirety, the FDCPA should only apply to those transactions involving an extension of credit, even though that language was not included in the FDCPA. When Congress enacted the CCPA, it clearly intended to protect consumers from unfair credit transactions. Because the main purpose of the CCPA is to prevent unfair credit transactions, and the FDCPA falls within the CCPA, the FDCPA should be construed to pertain only in the context of consumer credit transactions.[58]

If Congress intended to preempt real property law when it amended the CCPA and enacted the FDCPA, it should have indicated that the purpose of the FDCPA included the protection of tenants. The practical effect of the FDCPA is that debt collectors are prevented from abusing consumers who purchase goods and services and owe money to a creditor as a result of

---

[55] *Id.* § 1601(a) (emphasis added).

[56] 12 C.F.R. § 226.1(c) (1999).

[57] *Id.* (footnote omitted).

[58] *See* Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1168 (3d Cir. 1987) (finding that "the type of transaction which may give rise to a 'debt' as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer"). In *Bass v. Stolper*, 111 F.3d 1322 (1997), the Seventh Circuit rejected this argument and pointed to other amendments to the CCPA that are not limited to credit transactions. *See id.* at 1328. The court cited the Electronic Funds Transfer Act (EFTA), 15 U.S.C. §1693 (1994), which covers "any transfer of funds . . . which is initiated through an electronic terminal," including "automated teller machine transactions, direct deposits or withdrawals of funds." *Id.* § 1693a(6). The Seventh Circuit, however, ignored the possibility that Congress intended to expand the purpose and scope of the CCPA when it enacted the EFTA and did so through explicit statutory language. Congress did not use similar explicit statutory language when it enacted the FDCPA making the overall purpose of the CCPA more relevant when attempting to determine the true intentions of Congress.

these purchases. In contrast, the purpose and effect of the RPAPL is to provide an expedient method for landlords to regain possession of their property. Thus, it is evident that these are quite different goals governed by entirely distinct and separate areas of law.

An examination of the nature of state real property laws, including section 711 of the RPAPL, also indicates that Congress did not intend to preempt this area of law when it enacted the FDCPA. The United States Supreme Court has determined that there should be no federal preemption when the issue at hand will cause an impingement into an area that has " 'been traditionally occupied by the States,' [and] congressional intent to supersede state laws [is not] 'clear and manifest.' "[59] Moreover, the Supreme Court has refused to either presume or infer intent to invalidate state law.[60] The Court has further remarked that its "function is to determine whether, under the circumstances, . . . [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[61] When these principles are applied to the RPAPL and the FDCPA, it creates a strong argument against federal preemption.

States generally have authority over the real property within their jurisdiction,[62] and there are several arguments

---

[59] English v. General Elec. Co., 496 U.S. 72, 79 (1990) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[60] *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (concluding that "mere conflict" will not cause a federal statute to preempt state law, rather the federal interest in enacting the statute must suffer "major damage"); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978) (noting the Court's reluctance to "infer preemption"); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973) (allowing a New York statute which had an additional requirement over the federal statute to stand because the Court presumed that state regulations are legitimate; the Court noted, however, that there was no express language in the federal statute that demanded federal preemption); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1, at 319 (5th ed. 1995).

[61] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also English*, 496 U.S. at 79.

[62] It is a well-accepted notion that real property rights should generally be governed by the state law of the situs of the property, particularly when application of the state law will implement an interest of the situs state. *See* Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378–79 (1977). In *Corvallis Sand & Gravel* the Court stated that:

against the federal government's impingement upon those rights. State legislatures and courts interact with their citizens on a daily basis, and therefore, have a greater knowledge of and familiarity with their needs. This can serve as the basis for enacting laws that best address the needs of both the government and the people. In the landlord-tenant context, the New York Legislature has weighed the need to protect the non-paying tenant from premature eviction with the interests of the landlord to regain possession of his or her premises in a timely manner.[63] A state statutory scheme that regulates a purely local interest should be given deference. Notably, the landlord-tenant context is significantly different from the credit context. Rent is charged within the particular state, while credit transactions can, and often do, transcend state boundaries, thereby lending support to the federal legislation of credit transactions. The FDCPA will drastically impinge upon the states' rights to make

---

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state."

Id. at 378 (quoting Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944)); *see also* Thomson v. Kyle, 23 So. 12, 16 (Fla. 1897) (stating that "we must look to the laws of the state where [immovable property] is situated for the rules which govern its descent, alienation, and transfer, and for the construction, validity, and effect of conveyances thereof"); Denison v. Denison, 658 So. 2d 581, 582 (Fla. Dist. Ct. App. 1995) (holding that the law of the situs state will apply when a real property issue is to be determined).

The notion that the situs of the property governs which law is to be applied has substantial support. States have strong interests in governing the title, ownership, possession, use, and development of property, as well as the resolution of disputes related to the possession of the property and the enforcement of legal decisions pertaining thereto. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 19.1, at 744 (2d ed. 1992). Also, "the situs state has a clear interest in land as a source of public revenue, since real property taxation is premised on the accurate identification and description of ownership interests in land." Michael S. Finch, *Choice-of-Law and Property*, 26 STETSON L. REV. 257, 259 (1996); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971). *See generally* Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585 (1987) (positing that the law of the state should apply to real property issues when such laws will further a state interest).

[63] *See* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 1979 & Supp. 2000).

and enforce landlord-tenant laws if it supersedes the states' existing statutory scheme in landlord-tenant disputes.[64]

Congress did not even intend the area of consumer protection to be ruled "exclusively" by the federal government, as it granted the states an avenue to petition the Federal Trade Commission (FTC) for an exemption from the FDCPA.[65] The fact that the states were provided with this mechanism indicates that Congress intended to preserve state statutory schemes when they were substantially similar to that of the FDCPA. While this control is not absolute, the FTC does grant states the right to differentiate their statutes to a certain extent.[66]

Therefore, Congress has not explicitly preempted state real property law and has not demonstrated any intent to supersede the entire area of state real property law, including section 711 of the RPAPL, by enacting the FDCPA. The only remaining basis for finding federal preemption is a direct conflict between the RPAPL and the FDCPA. An examination of the provisions of

---

[64] If the FDCPA invades the states' rights to make and enforce laws governing their real property, the states' interests will be harmed because those interests vary with location. For example, a landlord of a high-rise apartment building needs to have an impersonal and expedient remedy as he or she generally does not know the tenant, but a landlord who rents only a few units will generally know the tenant and be able to work out a payment plan. While it is true the FDCPA creates a beneficial and consistent body of law covering consumer debt collection throughout the nation, the statute should be interpreted to permit location specific laws governing the landlord-tenant context. *See* S. REP. NO. 95-382, at 2–3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696–97 (calling for federal regulation of consumer debt collection). The Senate Report for the FDCPA indicated that "[t]he primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level." S. REP. NO. 95-382 at 2, 1977 U.S.C.C.A.N. at 1696. The Senate report further noted that "federal legislation is necessary, because State officials are unable to act against unscrupulous debt collectors who harass consumers from another State." S. REP. NO. 95-382 at 3, 1977 U.S.C.C.A.N. at 1697.

In counter to the concerns voiced in the Senate Report, New York has an effective remedial scheme to help and protect tenants who may be evicted, namely section 711 of the RPAPL. Furthermore, the situation at hand is one of intrastate concern. There would be no problem with out-of-state debt collectors because both the landlord and tenant are subject to the jurisdiction of New York State courts. The tenant can effectively sue the landlord in New York, even if the landlord is not present, through the use of long-arm statutes or in-rem jurisdiction, and the tenant is subject to in personam jurisdiction due to the plaintiff's residence in New York. *See* N.Y. C.P.L.R. §§ 301, 302 (McKinney 1979 & Supp. 2000).

[65] *See* 16 C.F.R. § 910.2 (1999). "Any State may apply to the Commission pursuant to the terms of this Rule for a determination that, under the laws of that State . . . [there are] requirements that are substantially similar to [the FDCPA]." *Id.*

[66] *See supra* note 49 and accompanying text.

the RPAPL and the FDCPA will demonstrate that the apparent conflict between these two statutes is insufficient to justify federal preemption because they both govern entirely different bodies of law.[67]

III. RPAPL V. FDCPA: THE RPAPL GOVERNS DISPOSSESSION PROCEEDINGS WHEREAS THE FDCPA GOVERNS DEBT COLLECTION

The apparent conflict between the three-day notice period permitted under section 711(2) of the RPAPL and the 30-day notice period required under the FDCPA is insufficient to justify federal preemption because section 711 governs dispossession proceedings[68] whereas the FDCPA governs debt collection.[69] Therefore, the FDCPA should not have been applied as it was in *Romea*, because the FDCPA was not intended to cover proceedings in which eviction is the ultimate goal. The RPAPL, however, was clearly intended to govern dispossession proceedings and was enacted to assist landlords when a tenant either refuses to pay rent or vacate the premises.[70] The RPAPL provides that a landlord must furnish a tenant with three days' notice prior to starting summary proceedings to *dispossess* for failure to pay rent.[71] The New York State Legislature intended to give a landlord, who has not been paid rent, an expedient avenue to procure the possession of his premises.[72] This is

---

[67] *See infra* Part III.

[68] *See* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 1979 & Supp. 2000).

[69] *See* 15 U.S.C. § 1692(a) (1994).

[70] *See* N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979). The statute provides landlords with a means to remove a non-paying tenant from his premises. *See id.* The landlord must serve the tenant with notice and then procure a court order to have the tenant removed from the apartment. *See id.*

[71] *See id.*

[72] *See* Marketplace v. Smith, 694 N.Y.S.2d 893, 896 (Monroe County J. Ct. 1999) (recognizing that the statutory scheme provided under section 711 of the RPAPL provides landlords "with a simple, expeditious and inexpensive means of regaining possession of premises"); Mitchell v. City of New York, 584 N.Y.S.2d 277, 277 (N.Y. Civ. Ct. Bronx County 1992) (noting that "the purpose of summary proceedings [under section 711 of the RPAPL] is to provide the landlord with a simple, expeditious and inexpensive means of regaining possession of his premises"); New York Univ. v. Farkas, 468 N.Y.S.2d 808 (N.Y. Civ. Ct. N.Y. County 1983) (stating that "summary proceedings [were] designed to provide the landlord with a simple, expeditious and inexpensive means of regaining possession of his premises in cases where the tenant refused upon demand to pay rent, or where he wrongfully held over without permission after expiration of the term"); Maxwell v. Simons, 353 N.Y.S.2d 589, 591 (N.Y. Civ. Ct. Kings County 1973) (same).

particularly important in the case of a landlord relying on rent payments to meet mortgage obligations and facing potential default because a non-paying tenant maintains possession for an extended period of time. Thus, the main purpose of section 711 of the RPAPL is not collection of back rent that could be considered a "debt," but rather dispossession of a delinquent tenant.[73]

In *Schwartz v. Weiss-Newell*,[74] the court correctly stated that section 711 of the RPAPL was enacted "to enforce a forfeiture of an interest in real property,"[75] which is not inconsistent with the purpose of the FDCPA. In fact, the RPAPL requires that landlords bring summary proceedings prior to, or in conjunction with, an attempt to collect back rent.[76] This signifies that the RPAPL is not intended to be an avenue for expedient collection of debts, but rather primarily an expedient remedy for evicting tenants.

The purposes behind the notice requirements under section 711(2) of the RPAPL and the FDCPA are also different. The notice requirement under section 711(2) provides a tenant in default of rent payments three days' notice before the landlord can initiate summary proceedings.[77] The notice requirement not only provides notification of a past due debt, but more importantly provides notification to the tenant that the rent must be paid or the landlord will retake possession of the

---

[73] *See* Brusco v. Braun, 645 N.E.2d 724, 726 (N.Y. 1994) (emphasizing that the state of New York sought to enact a procedure to recover the possession of property when it promulgated Article 7); Schwartz v. Weiss-Newell, 386 N.Y.S.2d 191, 193–94 (N.Y. Civ. Ct. N.Y. County 1976) (finding that the main purpose of summary proceedings is to enforce a forfeiture of the tenant's interest in real property, and not to collect the back rent owed); *see also supra* note 72. While part of the goal is to eventually assist the landlord to collect the back rent owed, this is not the primary purpose of the statute.

[74] 386 N.Y.S.2d 191 (N.Y. Civ. Ct. N.Y. County 1976).

[75] *Id.* at 193–94 (quoting Zinsser v. Herrman, 52 N.Y.S.2d 107, 109 (Sup. Ct. App. T. 1st Dep't 1898)).

[76] *See* DiBello v. Penflex, Inc., 630 N.Y.S.2d 848 (Rensselaer County Ct. 1995). Jurisdiction is found in section 711 of the RPAPL and is based upon the primary purpose of "deciding the demand for recovery of possession." *Id.* at 849. In *DiBello*, the plaintiff did not seek to dispossess the nonpaying tenant—he only sought past due rent and late charges. The court held that it lacked jurisdiction to hear the case because petitioner "did not demand recovery of possession of the property in this action," and because a summary proceeding is "governed entirely by statute." *Id.* Strict compliance therewith is necessary.

[77] *See* N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979).

premises.[78] The 30-day notice period under the FDCPA, however, applies to consumer debt collectors, not property owners attempting to dispossess tenants in default.

The United States District Court for the Northern District of Illinois followed similar reasoning in *Galuska v. Blumenthal*.[79] The district court, in disallowing the plaintiff's claim under the FDCPA, held that "an obligation to surrender adverse possession of real property to its legal owner" is not identical to an obligation to pay money.[80] The court further held that Congress, in enacting the FDCPA, did not intend for the statute to apply to actions in ejectment.[81] The *Galuska* court, quoting the United States Supreme Court's holding in *BFP v. Resolution Trust Corp.*, concluded that " 'the general welfare of society is involved

---

[78] *See id.* The statute states that summary proceedings can be maintained when:

> The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, and a demand of the rent has been made, or at least three days' notice in writing requiring, in the alternative, the payment of the rent, or the possession of the premises . . . .

Id.

[79] No. 92C 3781, 1994 WL 323121, at *5 (N.D. Ill. June 26, 1994).

[80] *Id.* at *4. In *Galuska*, however, no money was alleged to be due nor attempted to be collected. First Illinois Bank financed the defendant's home and held a warranty deed thereto, which it would only register and acquire title to if the mortgage were not paid. *See id.* at *1. Plaintiff did not pay any portion of the mortgage and eventually First Illinois filed the deed and sought immediate possession through an ejectment action against the plaintiffs. *See id.* at *2. The district court then determined that "an obligation to surrender adverse possession of real property to its legal owner" is not identical to an obligation to pay money. *See id.* at *4.

Therefore, the district court concluded that the action was not subject to the FDCPA and the thirty-day notice requirement because the bank was merely seeking possession and there was no "debt" to be collected. *See id.* at *4–5. In so concluding, the district court found that "[n]owhere in the declaration of purpose of the FDCPA, nor in the definitions of 'debt' and 'debt collection,' nor in the legislative history materials related to the statute, does Congress express any intent whatsoever to construe actions for ejectment as 'debt collection.' " *Id.* at *5 (internal citations omitted).

The *Galuska* court, however, seemed to hold as it did because there was no monetary claim, which accordingly, leaves open the question of how an Illinois court would rule if there were a combined claim for money and ejectment. The principles enunciated in *Galuska*, however, could still apply to summary proceedings under section 711 of the RPAPL because the statute was enacted primarily to "provide the landlord with a simple, expeditious and inexpensive means of *regaining possession* of his premises." Mitchell v. City of New York, 584 N.Y.S.2d 277, 277 (N.Y. Civ. Ct. Bronx County 1992) (emphasis added); *see also supra* notes 72–73 and accompanying text.

[81] *See Galuska* 1994 WL 323121, at *5.

in the security of the titles to real estate' [and] . . . [t]o displace traditional State regulation in such a manner, the federal statutory purpose must be clear and manifest."[82]

The obligation of a homeowner to pay a mortgage or face foreclosure is similar to the obligation of a tenant to pay rent or face eviction. Both situations involve the conditional use of real property; the homeowner and the tenant must pay or lose the ability to use the property. Though section 711(2) of the RPAPL does provide landlords with a mechanism to file claims for back rent, its main purpose is to restore complete property ownership rights, including the portion of those rights granted by the landlord to the tenant in the lease.[83] The divestment portion of the proceedings should not be impacted by the proscriptions of the FDCPA. A possible, albeit inefficient, remedy to the supposed conflict is to bifurcate proceedings under the RPAPL. A landlord wishing to remove a non-paying tenant could bring suit expediently under the RPAPL, while the collection of unpaid rent is simultaneously sought following the rules set forth by the FDCPA. This solution, however, would be a waste of scarce judicial time and resources and would be costly to both the tenant and the landlord. The expense associated with two separate proceedings, coupled with the time required to bring two lawsuits, would effectively prevent the landlord from ever collecting back rent.

In *Wilson Han Ass'n v. Arthur*,[84] New York's Appellate Term held that the three-day notice requirement under section 711(2) of the RPAPL was not subject to the FDCPA.[85] In *Wilson*, the plaintiff was evicted from her premises for failure to pay rent; she then brought an order to show cause claiming that the three-day notice requirement prescribed by the New York statute

---

[82] *Id.* (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994)); *see also supra* notes 62–64 (discussing the strong interest that the states have in governing real property within their jurisdiction).

[83] *See supra* notes 72–73 and accompanying text; *see also* N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979). Section 711(2) of the RPAPL allows a landlord to start dispossession proceedings and to collect back rent after the tenant has been served with three days notice in writing or a demand of rent has been made. *See id.* There is built-in statutory protection for a tenant because he or she must be given notice of the debt and an opportunity to remedy the situation prior to the commencement of proceedings. *See id.* This provides the same type of protection as the thirty-day notice period under the FDCPA. *See* 15 U.S.C. § 1692g (1994).

[84] N.Y. L.J., July 6, 1999, at 29, col. 4 (Sup. Ct. App. T. 2d Dep't).

[85] *See id.*

violated the FDCPA.[86] The Appellate Term concluded that the FDCPA has application in both federal and state courts and that Congress "spelled out the substantive rights, duties and remedies [under the FDCPA]," making recourse to Federal common law unnecessary.[87] The court then concluded that "[h]ad Congress intended to alter statutory and contractual rights concerning property rentals by transforming every . . . notice for a default in rent payment into a 30-day notice . . . such an intention should have appeared in the statutory language and the legislative history, which are silent on this point."[88]

The *Wilson* decision likely grants landlords the protection of New York's statutory scheme for dispossession, so long as the suits are brought under the RPAPL in state court. The incorrect interpretation and application of the FDCPA by the circuit courts, however, will still have an adverse effect on landlords sued in federal district courts, which are bound by the precedent set forth in *Romea*.

A. *Dispossession is the Equivalent of Repossession Under the FDCPA*

Another argument against federal preemption of section 711 of the RPAPL is provided by the treatment of repossession of assets under the FDCPA. An attorney acting on behalf of a landlord who is attempting to dispossess a tenant and a repossession agent who is attempting to repossess a car or some other item should be treated similarly under the federal statute. The FDCPA, however, only applies to the repossession of property in limited circumstances. The court in *Jordan v. Kent Recovery Services, Inc.*,[89] held that parties acting to repossess property are subject only to section 1692f(6) of the FDCPA,[90]

---

[86] *See id.*

[87] *Id.* (noting that "New York courts are bound by the interpretations of [] lower . . . Federal courts of a Federal statute only when it was the intent of Congress in enacting the statute that the Federal Courts share in the task of fashioning substantive rights, duties and remedies").

[88] *Id.*

[89] 731 F. Supp. 652 (D. Del. 1990).

[90] *See id.* at 660 (holding that a repossession agent is not subject to the prohibitions of the FDCPA, "except for the purposes of § 1692f(6)"); *see also* Koresko v. Chase Manhattan Fin. Servs., Inc. (*In re* Koresko), 91 B.R. 689, 694 n.2 (Bankr. E.D. Pa. 1988) (finding that repossession agencies are not subject to the FDCPA); Kohler v. Ford Motor Credit Co., 447 N.Y.S.2d 215, 217 (Sup. Ct. Albany County 1982) (deciding that a car can be repossessed without adherence to the FDCPA).

which prohibits threats of action that were either not intended to be carried out or are prohibited by law.[91] The *Jordan* court conducted a thorough examination of the statute and found that Congress intended that repossession agents be subject only to this particular section.[92]

In *Jordan*, the plaintiff purchased a used car and financed the purchase with a loan, posting the car as collateral.[93] The plaintiff did not make the required payments and the defendant hired a repossession agency to procure the vehicle.[94] After numerous attempts by an agent to repossess the car, Jordan repaid the loan and subsequently commenced suit against the defendant for alleged violations of the FDCPA.[95] The court held that the FDCPA could not apply in this situation because the agent who attempted to repossess the vehicle was not a "debt collector" within the meaning of the FDCPA.[96] Rather, since the vehicle was the collateral on the loan, the repossession agent was simply collecting the collateral.[97]

A procedure to dispossess a tenant from premises that he wrongly inhabits parallels the situation in which a repossession agent attempts to repossess a car when agreed payments are not made. Repossession of an automobile is much like the foreclosure of a mortgage; both are demands for the return of property due to the failure to make timely payments. It is irrelevant who is making the demand. Rather, the issue is that property, rather than a debt, is being recovered. Because dispossession or ejectment for failure to pay rent parallels repossession, and considering the finding in *Jordan* that repossession is not covered by the FDCPA, dispossession of a

---

[91] *See* 15 U.S.C. § 1692f(6) (1994).

[92] *See Jordan*, 731 F. Supp. at 658 (noting that "the possessor of secured property still has control of the property," which relieves the debtor of the " 'suffering and anguish' " associated with the attempts to collect debts that he does not have) (quoting Schramm v. Department of Health & Human Servs., 682 F.2d 85, 91 (3d Cir. 1982)). The court quoted the FTC's statements interpreting the Act as follows: "Because the FDCPA's definition of 'debt collection' includes parties whose principal business is enforcing security interests only for [§ 1692f(6)] purposes, such parties (if they do not otherwise fall within the definition) are subject only to this provision and not to the rest of the FDCPA." *Id.* (internal quotations and citation omitted).

[93] *See id.* at 654.

[94] *See id.*

[95] *See id.* at 655.

[96] *See id.* at 656–59.

[97] *See id.*

nonpaying tenant should likewise be free from the proscriptions of the FDCPA.

An attorney, acting under the ambit of section 711 of the RPAPL, serving notice that summary proceedings will commence against a tenant if the apartment is not vacated, acts as a repossession agent. The attorney is "an enforcer of a security interest [for a client who has a] 'present right' to a piece of secured property" and should, therefore, be exempt from the notice provisions of the FDCPA.[98] This argument is strongest when the attorney is merely attempting to dispossess the tenant, but if the attorney brings a concurrent action to collect back rent, it is more likely that he will be considered a "debt collector" and subject to the provisions of the FDCPA. The purpose of the FDCPA is not furthered by such an inefficient practice. An attorney working for a landlord-client should be permitted to give three days' notice and then commence summary proceedings against a non-paying tenant to regain possession and collect back rent, as this is the legal channel to regain possession of real property in New York. Following a decision in the landlord's favor at trial, the landlord has the right to have the tenant removed immediately, which is neither prohibited by the FDCPA nor the RPAPL.

---

[98] *Id.* at 658. In *Jordan*, the court found that an "enforcer of a security interest falls within the ambit of the FDCPA only for purposes of § 1692f(6)." *Id.* It further stated that "[s]uch a purposeful inclusion for one section of the FDCPA implies that the term 'debt collector' does not include an enforcer of a security interest for any other section of the FDCPA." *Id.* at 657. The court also found that Congress intended to prohibit repossession agencies from

> [t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
>
> (a) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (b) there is no present intention to take possession of the property; or
>
> (c) the property is exempted by law from such dispossession or disablement.

Id. at 657 (quoting 15 U.S.C. § 1692f(6)). According to the court's reasoning, if Congress wanted to subject collection agencies to the 30-day notice requirement, it would have included this provision in section 1692f(6). The court stated that "Congress apparently sought to leave unregulated those who enforce security interests when a 'present right' . . . exists." *Id.*

IV. ATTORNEYS AS "DEBT COLLECTORS"

Attorneys were originally exempted from the statutory definition of "debt collectors."[99] As a result, attorneys began abusing consumers, much like actual debt collectors, prior to the passage of the FDCPA.[100] Subsequently, Congress removed the attorney exemption from the definition of a "debt collector."[101] Now, an attorney acting as a debt collector for a client cannot hide behind the attorney exemption and abuse consumers.[102] In *Wilson Han Ass'n v. Arthur*,[103] the New York Appellate Term held "it has long been the rule [in New York] . . . that a rent demand or notice issued by an agent or attorney on behalf of a landlord is sufficient [under the RPAPL]," but should not be subject to the FDCPA.[104] While this ruling is not binding on either federal or other state courts, it shows the willingness of the New York courts to uphold New York's statutory scheme and find that the FDCPA does not apply. Regardless of jurisdiction, the provisions of the FDCPA do not govern attorneys who do not collect debts.[105] While the Act does apply to attorneys who attempt to collect debts for their clients, it does not apply to

---

[99] *See* 15 U.S.C. § 1692a(6)(F) (1982) (repealed 1986).

[100] *See* David Hilton, *As If We Had Enough to Worry About . . . Attorneys and the Federal Fair Debt Collection Practices Act: Supreme Court Rules on Former Attorney Exemption*, 18 CAMPBELL L. REV. 165, 167 (1996) (examining the original and amended versions of the FDCPA and commenting on the changes).

[101] *See* 15 U.S.C. § 1692a(6) (1994).

[102] *See* Ladick v. Van Gemert, 146 F.3d 1205, 1206–07 (10th Cir. 1998) (holding that the defendant attorney was subject to the FDCPA when he attempted to collect a past due condominium assessment); Eina Realty v. Calixte, 679 N.Y.S.2d 796, 798 (N.Y. Civ. Ct. Kings County 1998) (stating the "now well-settled [rule] that an attorney who, acting on behalf of a creditor, regularly engages in consumer debt collection activities through litigation is a 'debt collector' under the FDCPA") (citing Heintz v. Jenkins, 514 U.S. 291 (1995)); *see also* Shapiro & Meinhold v. Zartman, 823 P.2d 120, 124 (Colo. 1992) (holding that an attorney who partakes " 'directly or indirectly' . . . in debt collection activities on behalf of others" is subject to the FDCPA).

[103] N.Y. L.J., July 6, 1999, at 29, col. 4 (Sup. Ct. App. T. 2d Dep't).

[104] *Id.* The court noted that previous versions of section 711 of the RPAPL allowed an agent of the landlord to serve process. The court held that the failure of the legislature to include such language in the current statute was not intended to change the rule. *See id.*

[105] *See* Hilton, *supra* note 100, at 170.

landlords who are collecting debts or in-house attorneys who collect debts on behalf of a corporation that employs them.[106]

The practical result of the inclusion of attorneys within the definition of "debt collector" is the recent trend of landlords collecting debts for themselves and serving their own tenants.[107] It has been advised that "[u]ntil the dust settles, in order to avoid the prospect of delay, dismissal or the imposition of civil penalties, attorneys may be well-advised to refrain from executing and sending rent demands to residential tenants."[108] If the FDCPA is deemed to apply to an attorney in this situation, a landlord could circumvent the statute by simply making a demand for rent without the assistance of an attorney. It is also conceivable that a landlord could ask an attorney to draft a letter to a particular tenant on plain paper, instead of the firm's letterhead, which the landlord could then sign and deliver to the tenant. Because a landlord, acting on his or her own behalf, does not qualify as a "debt collector," the FDCPA would not apply. As a result, the landlord is subject only to the three-day notice requirement under section 711(2) of the RPAPL prior to initiating summary proceedings.[109] The practical effect of this situation, however, is that a lay person, such as a landlord, will not be bound by, and may even be unaware of, the FDCPA's proscriptions, and therefore, may be more abusive than a third party debt collector or attorney when attempting to personally collect rent. Furthermore, a landlord would have to deliver the rent demand to the tenant on his or her own volition, then hire a lawyer for representation in court during the summary proceedings. This seems to defy reason because it would require a landlord-client to wait thirty days or more to have a non-paying tenant dispossessed merely because the landlord sought

---

[106] *See* 15 U.S.C. § 1692a(6) (1994). The term does not pertain to a person who is collecting a debt for himself, as evidenced by the requirement that the "debt collector" must be attempting to collect a debt "owed or due or asserted to be owed or due another." *Id.*; *see also Calixte*, 679 N.Y.S.2d at 798 (adhering to the rule that individuals acting for themselves are not subject to the FDCPA).

[107] *See Rent Demands: Recent Cases Clarify Romea's Reach*, 1 LANDLORD-TENANT PRAC. REP. 1, 8 (Issue "S" 1999).

[108] *Id.*; *see also* Robert E. Parella, *Real Property, 1997-98 Survey of New York Law*, 49 SYRACUSE L. REV. 703, 713 (1999) (stating that "[i]n order to avoid the time delay [imposed by the FDCPA], landlords will themselves have to sign the [written rent] demand").

[109] *See* N.Y. REAL PROP. ACTS. LAW § 711(2) (McKinney 1979).

legal assistance from an attorney, rather than taking matters into his or her own hands.

V. NEW YORK'S STATUTORY SCHEME

The New York State statutory scheme provides sufficient protection for tenants facing dispossession and rent demands, especially considering that the FDCPA does not apply to landlords acting on their own behalf. New York has specific remedies for a tenant who thinks that rent need not be paid because of the quality of the premises, namely a breach of the warranty of habitability,[110] or a tenant who wishes to apply the rent to bills he or she has paid for repairs to the apartment.[111] Generally, however, the tenant must pay rent for the time he or she is in possession, leaving nothing to dispute regarding a claim of unpaid rent.[112] The implied warranty of habitability present in every residential lease in New York grants the tenant the ability to sue for a rent abatement if the condition of the premises "deprive[s] the tenant of those essential functions

---

[110] *See* N.Y. REAL PROP. LAW § 235-b(1) (McKinney 1989). This section provides that:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

Id.

[111] *See id.* § 235-b (McKinney 1989 & Supp. 2000).

[112] The thirty-day notice requirement was included in the FDCPA to provide consumers an opportunity to dispute the "validity" of the alleged debt. If the consumer notifies the debt collector that he or she is disputing the validity of the entire, or even a portion of the debt, the debt collector "shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor" and sends it to the consumer. 15 U.S.C. § 1692g(b) (1994). Therefore, a tenant need only show a copy of a receipt for rent paid to the landlord or the judge to be relieved of liability and to be allowed to remain in the premises.

which a residence is expected to provide."[113] A tenant, however, is still required to pay the rent and then attempt to get an abatement.

Under current New York law, a tenant has ample protection from the abuse of landlords, as he or she cannot be removed from an apartment without the proper proceedings.[114] As such, the purpose of the FDCPA would not be furthered by its application to the landlord-tenant situation in New York. If required to wait the thirty days, New York landlords will resort to self-help in evicting tenants, which is a much more problematic and dangerous situation than allowing landlord-tenant cases to go to court with three days notice.

To force the FDCPA to apply to dispossession and the collection of debts, as opposed to the collection of debts exclusively, would infringe upon the rights of a number of other states, not just those of New York. States have adopted statutory schemes which govern the landlord-tenant relationship and have provided legal channels that allow a landlord to

---

[113] Park W. Management Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (N.Y. 1979) (stating that the implied warranty of habitability creates a minimum standard of occupancy for a dwelling to qualify as fit for safe habitation). For example, suppose a tenant has a lease on an apartment for two years on the tenth floor, and in the middle of the first year the elevator breaks and the landlord refuses to repair it. The tenant can either break the lease and move out of the apartment without liability and procure the security deposit, or seek a judicially-granted rent abatement to compensate for the loss of the elevator. In either instance, the tenant is protected from abuses by the landlord. When a tenant proves that a breach of the implied warranty of habitability occurred, he or she is entitled to a rent abatement in the amount of the "difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach." *Id.* at 1295.

[114] New York statutory law granting tenant proceedings reflects the constitutional Due Process protections given tenants under the United States and New York State Constitutions. *See* Lang v. Pataki, 674 N.Y.S.2d 903, 909 (Sup. Ct. N.Y. County 1998) (holding that leasehold interests are an aspect of real property law protected by the federal and state Due Process clauses).

dispossess a tenant in default.[115] The Second Circuit's holding in *Romea* will essentially eradicate these state statutory schemes.

VI. THE NEED FOR AN FTC EXEMPTION

New York's statutory scheme creates an equal balance between landlord interests and tenant protections. New York can and should petition the Federal Trade Commission (FTC) to rule that section 711 of the RPAPL is exempt from the FDCPA.[116] The FDCPA expressly provides in section 1692o for a means to have a particular state's laws trump the FDCPA.[117]

When a state applies for an exemption from the FDCPA pursuant to section 1692o, it must have its own laws in place to

---

[115] *See, e.g.*, ALASKA STAT. § 09.45.690 (Michie 1998) (stating that "a landlord has a right to re-enter leased premises when a tenant fails to pay rent, and may bring action to recover the possession of the premises"); FLA. STAT. ANN. § 83.56 (West 1987 & Supp. 1999) (indicating that Florida requires that the landlord give the tenant seven days to leave the premises, after which time the landlord can terminate the rental agreement if the tenant fails to comply); ME. REV. STAT. ANN. tit. 14, § 6002(1) (West Supp. 1999). Maine was granted an exemption by the FTC from the FDCPA for some of its statutes, including a provision that states that if a tenant is "7 days or more in arrears in the payment of rent," the landlord or his agent can terminate the tenancy with seven days notice. ME. REV. STAT. ANN. tit. 14, § 6002(1). This is clearly less time then that mandated by the FDCPA, yet the FTC found that Maine's statutes were in substantial compliance with the FDCPA.

[116] Maine recently sought an exemption from the FDCPA for certain types of debt collection activities including: "Collection by means of the mails and other interstate and intrastate written communications; collection by use of telephone and other electronic means of transmission; in-person collection; and repossession or other 'enforcement of security interest' activity." FTC Notice of Me. Exemption from the FDCPA, 60 Fed. Reg. 66,972, 66,973 (1995). The Federal Trade Commission attempted to determine "whether the level of protection to consumers under the Maine Act is substantially equivalent" to the FDCPA. *Id.* New York's laws are similar to both Maine's and the FDCPA, except that a shorter notice period is required under section 711(2) of the RPAPL. While this seems substantial, the particular situation necessitates a short period of notice. *See supra* notes 70–73 and accompanying text.

[117] *See* 15 U.S.C. § 1692o (1994). This section states that:

> The Commission shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

Id.

fulfill the intended purpose of the FDCPA.[118] The state's laws must be "substantially similar" to those imposed under the FDCPA[119] to ensure that consumers will not be afforded less protection under the particular state law.[120] If the FTC finds, after a thorough analysis, that under state law "a class of debt collection practices is subject to requirements substantially similar to, or that provide greater protection to consumers than, those imposed under"[121] the FDCPA and that the state has made adequate provisions for enforcement of its policies, the particular practice in that state will be exempted from the rules of the FDCPA.[122]

To prevent similar problems and to further the policies behind its real property laws, New York should petition the FTC for an exemption because New York's statutory scheme is substantially similar to the FDCPA. On December 27, 1995, Maine was granted an exemption from the FDCPA.[123] The FTC found that Maine's laws were "substantially similar" to the FDCPA, even though the FTC noted that only in some instances did Maine's laws provide greater protection for the consumer than the FDCPA.[124] Thus, the FDCPA does not require that every aspect of a state's statutory scheme provide greater protection for the consumer than the federal statute to allow exemption status.

---

[118] *See id.*; *see also* 16 C.F.R. § 901.1 (1999) ("This part establishes procedures and criteria whereby States may apply to the Federal Trade Commission for exemption of a class of debt collection practices within the applying State from the provisions of the Fair Debt Collection Practices Act . . . .").

[119] *See* 16 C.F.R. § 901.4 (1999).

[120] *See id.* (delineating the criteria which must be present before an exemption is granted).

[121] 16 C.F.R. § 901.6 (1999).

[122] *See* 16 C.F.R. § 901.6–.8 (1999). The exemption is not permanent. It can be revoked if the Commission determines that the particular state law "does not, in fact, impose requirements that are substantially similar to, or that provide greater protection to applicants" than the FDCPA. *Id.* § 901.8(a). The Second Circuit Court of Appeals implied that New York State should petition the FTC for exemption status when it stated that "New York may petition the Federal Trade Commission to promulgate regulations that exempt § 711 notices from the FDCPA." Romea v. Heiberger & Assocs., 163 F.3d 111, 118 n.11 (2d Cir. 1998). New York has not yet petitioned the FTC for such an exemption. *See id.*

[123] *See* FTC Notice of Me. Exemption from the FDCPA, 60 Fed. Reg. 66,972 (1995).

[124] *See* FTC Notice of Me. Exemption from the FDCPA, 60 Fed. Reg. at 66,972–73.

In analyzing the protections afforded the "consumer" under the FDCPA and those afforded the tenant under New York's statutory scheme, substantial similarities are revealed. A full exemption from the provisions of the FDCPA is neither warranted nor feasible; New York's landlord-tenant laws, however, should govern the landlord-tenant situations in New York. Both federal and state statutes contain a notice requirement. New York has numerous statutes that prevent landlords from arbitrarily depriving a tenant of the necessities of life, including heat, hot water, and a leak-free roof.[125] These protections serve to prevent a landlord from self-help in dispossessing a tenant. Also, New York furthers the goals of the FDCPA through its own statutory framework.[126] Therefore, a

---

[125] New York's current Multiple Dwelling Law provides such protections to inhabitants of multiple dwellings. *See* N.Y. MULT. DWELL. LAW, §§ 75–84 (McKinney 1974 & Supp. 2000). The law requires owners to maintain premises in general good repair, *see id.* at § 78(1), provide for adequate plumbing, drainage, sewage, and roofing, *see id.* at § 77, mandatory heating, *see id.* at § 79, hot water, *see id.* at § 75(3), and provide protections from dangerous lighting and ventilation, *see id.* at § 78(2); *see also* N.Y. REAL PROP. LAW § 235-b (McKinney 1989 & Supp. 2000). Generally, a party seeking to suspend rent payments must vacate the premises in order to allege a constructive eviction. *See* Barash v. Pennsylvania Terminal Real Estate Corp., 256 N.E.2d 707, 710 (N.Y. 1970). *But see* Johnson v. Cabrera, 668 N.Y.S.2d 45, 46 (N.Y. App. Div. 2d Dep't 1998) (holding that the deprivation of heat and hot water constitutes a constructive eviction, and even though the tenant is still in possession of the apartment, rent may be suspended).

[126] *See* N.Y. GEN. BUS. LAW § 601 (McKinney 1996). This statute provides in pertinent part:

> No principal creditor, as defined by this article, or his agent shall:
>
> 1. Simulate in any manner a law enforcement officer, or a representative of any governmental agency of the state of New York or any of its political subdivisions; or
>
> 2. Knowingly collect, attempt to collect, or assert a right to any collection fee, attorney's fee, court cost or expense unless such changes [sic] are justly due and legally chargeable against the debtor; or
>
> 3. Disclose or threaten to disclose information affecting the debtor's reputation for credit worthiness with knowledge or reason to know that the information is false; or
>
> 4. Communicate or threaten to communicate the nature of the consumer claim to the debtor's employer prior to obtaining a final judgment against the debtor. The provisions of this subdivision shall not prohibit a principal creditor from communicating with the debtor's employer to execute a wage assignment agreement if the debtor has consented to such an agreement; or
>
> 5. Disclose or threaten to disclose information concerning the existence of a debt known to be disputed by the debtor without disclosing that fact; or

tenant need not be afforded the thirty-day notice period within which to prepare for litigation or dispute the alleged debt when the tenant is already protected by statute for the statutorily defined justified non-payment of rent.

The protections New York law offers consumers are substantially similar to those provided by the FDCPA. The FDCPA, by regulating the time and/or place of communications as well as the persons that may be contacted, prohibits a debt collector from abusing a debtor.[127] Nor can a debt collector "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."[128] New York's statutory scheme pertaining to debt collection procedures prohibits a creditor from collecting a false debt, damaging the debtor's reputation, telling the debtor's employer of the debt, calling or communicating with the debtor at unusual hours, or threatening an unintended action.[129] New York also provides penalties for violations of the New York General Business Law sections 600-603, which are required by the FTC for it to grant an exemption.[130] Although there is no private cause of action permitted under New York's statute, the attorney general or district attorney "may bring an action in the

---

6. Communicate with the debtor or any member of his family or household with such frequency or at such unusual hours or in such a manner as can reasonably be expected to abuse or harass the debtor; or

7. Threaten any action which the principal creditor in the usual course of his business does not in fact take; or

8. Claim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist; or

9. Use a communication which simulates in any manner legal or judicial process or which gives the appearance of being authorized, issued or approved by a government, governmental agency, or attorney at law when it is not.

Id. (footnote omitted).

[127] *See* 15 U.S.C. § 1692c (1994). According to the statute "a debt collector may not communicate with a consumer in connection with the collection of any debt . . . at any unusual time or place," such as after eight o'clock p.m. and before nine o'clock a.m. *Id.* § 1692c(a)(1). The debt collector must correspond with the consumer's attorney and cannot contact the consumer at his place of employment. *See id.* § 1692c(a)(2)–(3). The debt collector cannot provide information to any third party regarding the debt, except the consumer's attorney. *See id.* § 1692c(b).

[128] *Id.* § 1692(d) (1994 & Supp. IV 1999).

[129] *See supra* note 126.

[130] *See* N.Y. GEN. BUS. LAW § 602(1) (McKinney 1996) ("Except as otherwise provided by law, any person who shall violate the terms of this article shall be guilty of a misdemeanor, and each such violation shall be deemed a separate offense.").

name of the people of the state to restrain or prevent any violation."[131] The existence of New York's scheme will provide a basis for the FTC exemption.

New York's debt collection statute and the FDCPA are virtually identical in their protections, except for the longer notice period that is required under the FDCPA. The protections afforded to consumers by the FDCPA would not be greatly diminished if New York were granted an exemption and was therefore able to apply its laws. The New York exemption need only pertain to landlord-tenant situations, where greater protections would be afforded the consumer than if only the FDCPA applied. In New York, tenants have the ability to bring suit if there is a problem with the premises. In addition, tenants are protected by section 601 of the New York General Business Law from unfair debt collection practices and are afforded notice prior to summary proceedings to evict. Applying New York's statutory scheme will better satisfy the interests of all parties involved, as landlords are provided with an expedient remedy to remove a delinquent tenant and tenants receive notice and are not subject to abuse by landlords.

CONCLUSION

The Second Circuit erred in its holding in *Romea* by following the Seventh Circuit in paralleling back rent to a dishonored check and including back rent as a "debt" within the meaning of the FDCPA. While it is true that a dishonored check is a debt, the relationship between a landlord and a tenant is different. A payee who accepts a check extends credit to the consumer in his trust that the check will be honored. When a landlord rents an apartment to a tenant, however, no credit is extended to the tenant because continuous rent payments are to be made per the contractual lease agreement. The term "debt" as used throughout the rest of the CCPA pertains to the extension of credit. As such, the Second Circuit should have found that the back rent owed by Romea was not a "debt" within the meaning of the FDCPA.

---

[131] *Id.* § 602(2); *see also* Varela v. Investors Ins. Holding Corp., 615 N.E.2d 218, 219 (N.Y. 1993) (denying a private cause of action under section 601 of New York's General Business Law). A private cause of action, however, is permitted when a person incurs actual damages caused by deceptive business practices. *See* N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988).

The FDCPA should also not be applied to the landlord-tenant area because Congress has not made its intent to preempt state law in this area sufficiently clear. The FDCPA is meant to protect against abusive debt collectors, while section 711 of the RPAPL creates an equal balance between the rights of a landlord to hire an attorney to dispossess a non-paying tenant, and the rights of the tenant to receive notice prior to the commencement of summary proceedings and be free from unsubstantiated and unlawful eviction.

While the Second Circuit stated that New York had the ability to petition the FTC for an exemption from the requirements of the FDCPA, it did not fully discuss the ramifications of such an exemption. The rights of New York citizens can best be fulfilled through an FTC granted exemption, which would allow the New York Legislature to govern its own citizens. The application of the FDCPA and the RPAPL in their respective contexts will guarantee the promotion of fair debt collection and protection from deceptive and abusive practices.