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## Manner of Debtor's Dispute Under the FDCPA is in Dispute

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# Manner of Debtor's Dispute Under the FDCPA is in Dispute

Laura Atack\*

## I. INTRODUCTION

Debt collection is a pervasive issue in the United States that cuts across race, gender, and socio-economic class.<sup>1</sup> Estimates show between thirty million<sup>2</sup> and seventy-seven million<sup>3</sup> Americans have at least one debt in collections and roughly one million debts are disputed every year.<sup>4</sup> The Federal Trade Commission (FTC) receives

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1. One study of households with moderate-income reported that “there were no significant differences in the frequency of African American and white households declaring bankruptcy, being evicted, or having property repossessed. African American households were far more likely than whites to be called by bill collectors as a result of their debt.” CATHERINE RUETSCHLIN, DÉMOS & DEDRICK ASANTE-MUHAMMAD, NAACP, THE CHALLENGE OF CREDIT CARD DEBT FOR THE AFRICAN AMERICAN MIDDLE CLASS 20 (2013), available at [http://action.naacp.org/page/-/economic%20opportunity%20documents/CreditCardDebt-Demos\\_NAACP.pdf](http://action.naacp.org/page/-/economic%20opportunity%20documents/CreditCardDebt-Demos_NAACP.pdf).

2. *Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Fin. Insts. & Consumer Prot. of the S. Comm. on Banking, Hous., & Urban Affairs*, 113th Cong. 3 (2013) (statement of Corey Stone, Assistant Dir., Consumer Financial Protection Bureau) (“By our best estimate, 30 million people have one or more debts in collection.”).

3. CAROLINE RATCLIFFE ET AL., URBAN INSTITUTE, DELINQUENT DEBT IN AMERICA 7 (2014), available at <http://www.urban.org/UploadedPDF/413191-Delinquent-Debt-in-America.pdf>. The Urban Institute collected its data from TransUnion credit reports. *Id.* at 1. “Among the estimated 220 million US adults that have a credit file, we estimate that 35 percent, or 77 million US adults, have debt in collections reported in their credit files.” *Id.* at 11 n.15. The Urban Institute has acknowledged that its figures may actually underrepresent low-income individuals, who are less likely to have a credit file. *Id.* at 1.

4. FEDERAL TRADE COMMISSION, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY iv (2013), available at <http://www.ftc.gov/reports/structure-practices-debt-buying-industry> [hereinafter FTC REPORT]. This estimate only reflects the number of debts that debt buyers, and not original creditors or other third-party collectors, seek to collect. *Id.* at 37–38. While debt buyers may be more likely to initially pursue invalid debts due to documentation issues involved in the debt-buying process, *id.* at 31, it may be assumed that at least some debts

more complaints about debt collection practices than any other industry,<sup>5</sup> and the Consumer Financial Protection Bureau (CFPB) has received more than 18,000 complaints in the past six months.<sup>6</sup> A review of the CFPB's complaint log summarizes many of the problems with debt collection and the abusive tactics of certain collectors.<sup>7</sup> But even legal debt collection tactics can have dire consequences for households and can drive households with lower incomes further into poverty.<sup>8</sup>

In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA)<sup>9</sup> to alleviate problems and abuses associated with debt collection,<sup>10</sup> including the collection of potentially invalid debts, such as those that are no longer or were never owed. Debtors and debt collectors alike have a multitude of rights protected under the statute. One significant feature for consumer protection is a debtor's right to dispute the debt.<sup>11</sup> A debtor may dispute when, for example, the debt was already paid in full, was discharged in bankruptcy, or was never owed by that debtor, whether by mistake or identity theft. A debtor's dispute triggers many additional protections, including the right to

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from original creditors are also disputed. Further, the report indicates that during its study, not all debt buyers were able to provide information on orally-disputed debts. *Id.* at 38.

5. FTC REPORT, *supra* note 4, at i.

6. *Consumer Complaint Database*, Consumer Financial Protection Bureau (CFPB), <https://data.consumerfinance.gov/dataset/Debt-collection-complaints/fphp-cr5a> (last visited May 16, 2015). The CFPB's Consumer Complaint Database reports more than 18,000 complaints about debt collection were filed between November 15, 2014 and May 15, 2015. *Id.*

7. *Id.* The complaint log shows a variety of issues with debt collection that range from clerical or procedural issues (e.g., collecting from the wrong debtor; pursuing the wrong amount; debt has already been paid or discharged in bankruptcy) to more egregious violations (e.g., no receipt of right to dispute notice; frequent or repeated calls, or calls after debtor requested communication cease; contacting debtor's employer against debtor's wishes; indicating nonpayment is a crime and threatening arrest or jail; using profane, abusive, or other obscene language). *Id.*

8. See CAROLYN CARTER & ROBERT J. HOBBS, NAT'L CONSUMER LAW CTR., NO FRESH START: HOW STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY 7 (2013), available at <http://www.dispatch.com/content/downloads/2013/10/report-no-fresh-start.pdf> (suggesting that insufficient wage and asset garnishment or levy exemptions allow debt collections to impoverish families).

9. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (1977).

10. *Id.* § 1692(a).

11. *Id.* § 1692g.

verify the debt, prevent an assumption of validity on the part of the debt collector, and potentially prevent further collection efforts.<sup>12</sup>

Knowledge of these rights is vital to protecting debtors' ability to exercise them.<sup>13</sup> Therefore, as a safeguard, § 1692g of the FDCPA requires collectors to inform debtors of their rights under the FDCPA via a written notice within five days of initial communication.<sup>14</sup> Yet the FDCPA is not entirely clear on debtors' dispute rights, specifically how a debtor must communicate her dispute to a collector: in writing or orally. Private actions for FDCPA violations have brought to light inconsistencies in the manner in which debtors are required to dispute their debts. The issue presented here involves the acceptable manner of the debtor's dispute within the creditor's initial notice, and I argue that allowing a debtor to orally dispute her debt is not just sufficient, but preferable, under the FDCPA.

Subsection (a) of § 1692g governs the debt collector's notice requirements.<sup>15</sup> Three provisions, § 1692g(a)(3)-(5), require that the

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12. § 1692g(a)(3)-(5), (b).

13. *See Consumer Information: Hearings Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Fin., and Urban Affairs*, 95th Cong. 212 (1977) (statement of Christian S. White, Assistant Dir. Spec. Stats., F.T.C.) (“[C]onsumers cannot be expected to exercise rights they are ignorant of.”).

14. § 1692g(a).

15. Section 1692g(a) reads:

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing:

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

*Id.*

collector's notice include statements informing the debtor of her right to dispute and obtain verification.<sup>16</sup> Sections 1692g(a)(4) and (5) explicitly require the debtor's dispute and request for verification to be written.<sup>17</sup> However, the plain language of the assumption-of-validity provision, § 1692g(a)(3),<sup>18</sup> which prevents the collector from assuming the debt to be valid, does not explicitly require that a debtor dispute the debt in writing.<sup>19</sup> Lawsuits against debt collectors for FDCPA violations have exposed an inconsistency in interpretations of the notice requirements under the assumption-of-validity provision.<sup>20</sup> The question remains: can the debtor trigger certain rights under the FDCPA solely by oral dispute, or must the debtor put her dispute in writing in order to avail herself of all the protections under § 1692g?

Since 1991, when the Third Circuit decided in *Graziano v. Harrison* that the assumption-of-validity provision required a debtor's dispute to be in writing,<sup>21</sup> only three other circuits have addressed this issue.<sup>22</sup> The Supreme Court has yet to weigh in and specifically declined to do so in 2010.<sup>23</sup> The trend among the district courts is to follow the Second, Fourth, and Ninth Circuits' approach, which is to allow a debtor to successfully invoke some rights under the FDCPA with an oral dispute.<sup>24</sup> In the interest of furthering the

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16. § 1629g(a)(3)-(5)

17. § 1692g(a)(4) (“[A] statement that if the consumer notifies the debt collector *in writing* . . .”) (emphasis added); § 1692g(a)(5) (“[A] statement that, upon the consumer’s *written* request . . .”) (emphasis added).

18. § 1692g(a)(3). For the purposes of this Note, I am referring to this subsection as the “assumption-of-validity provision.”

19. § 1692g(a)(3) (“[A] statement that unless the consumer . . . disputes . . .”).

20. *See, e.g.,* *Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991) (holding collector can require written dispute); *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005) (holding debtor is allowed to orally dispute); *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013) (same); *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 490 (4th Cir. 2014) (same).

21. *Graziano*, 950 F.2d at 112.

22. *See Camacho*, 430 F.3d at 1082; *Hooks*, 717 F.3d at 287; *Clark*, 741 F.3d at 486.

23. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 580 n.3 (2010) (“Because the question was not raised on appeal, the Court of Appeals did not address whether Carlisle’s inclusion of the ‘in writing’ requirement violated § 1692g. We likewise express no view . . . as that question was not presented in the petition for certiorari.”).

24. *See, e.g.,* *Busch v. Valarity, LLC*, No. 4:12–CV–2372–JAR, 2014 WL 466221, at \*4 (E.D. Mo. Feb. 5, 2014) (“Some district courts have followed the Third Circuit’s reasoning in *Graziano* . . . . The majority of district courts, however, have disagreed with *Graziano* and

FDCPA's purpose by providing protection to debtors and consistent standards among states, this is the correct trend.

Part I of this Note examines the history of the FDCPA and the cases that have given rise to the circuit split. Part II discusses the statutory interpretation devices employed by the courts creating the split and analyzes the policy considerations behind each outcome. Part III proposes that a continued shift permitting debtors to raise a dispute orally is desirable, but notes that the circuit split may remain in place until the Supreme Court weighs in or the Third Circuit departs from its reasoning in *Graziano*.<sup>25</sup> Finally, Part IV concludes, noting that this Note's proposed interpretation comports with the plain language and purposes of the FDCPA.

## II. HISTORY

### A. Fair Debt Collection Practices Act

Congress enacted the FDCPA in 1977 after finding that there were inadequate laws protecting consumers from "abusive, deceptive, and unfair debt collection practices."<sup>26</sup> The legislation had broad support from both consumer and collector associations.<sup>27</sup> The purpose of the Act was to provide consistent statutory protection for consumers from abusive practices, while still protecting debt collectors' ability to collect on behalf of their clients.<sup>28</sup> Under the law, a debtor can bring a civil action against a debt collector for violating any provision of the FDCPA<sup>29</sup> and can claim damages actually sustained from the violation, as well as additional statutory damages of up to \$1,000, attorney's fees, and court costs.<sup>30</sup>

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concluded that § 1692g(a)(3) does not impose a writing requirement on consumers." *Busch* goes on to cite seventeen district court cases from eleven different districts. *Id.*

25. 950 F.2d 107 (3d Cir. 1991).

26. 15 U.S.C. § 1692(a) (1977).

27. *See, e.g.*, 123 CONG. REC. 28, 113 (1977) (statement of Rep. Frank Annunzio) (noting "express support" of American Collectors Association and Associated Credit Bureaus, Inc. and "strong support of consumer groups, labor unions, and State and Federal law enforcement officials").

28. 15 U.S.C. § 1692(e).

29. *Id.* § 1692k.

30. § 1692k(a)

Section 1692g governs the validation of debts and requires notices from collectors advising debtors of their rights. Congress enacted this debt validation and notice section to “eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid” without “additional expense or paperwork” to the debt collector.<sup>31</sup> Section 1692g(a)(3) prevents a debt collector from assuming a debt is valid if the debtor has disputed it.<sup>32</sup> However, a debtor’s failure to dispute the debt within the thirty-day period, or at all—thereby triggering the collector’s assumption of validity—cannot operate as an admission of liability.<sup>33</sup> Therefore, absent a dispute, the assumption-of-validity provision allows the debt collector to continue its collection efforts ethically, but does not grant the ability to obtain a judgment against the debtor solely on the debtor’s initial failure to dispute.<sup>34</sup>

The plain language of §§ 1692g(a)(4)-(5) and 1692g(b) specify that the debtor’s request must be in writing to receive verification of the debt or information regarding the original creditor.<sup>35</sup> The

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31. S. REP. NO. 95-382, at 4 (1977).

32. § 1692g(a)(3).

33. § 1692g(c) (“The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.”); *see also* H.R. REP. NO. 95-131, at 6 (1977) (“The committee intends that such an assumption of validity by the debt collector shall not constitute an admission by the consumer of the validity of the debt, legally or otherwise.”). The initial versions of the provision regarding validation of debts did not include this safeguard. Legislative hearings brought this issue to light:

This section is troublesome in that it does not specify that the validation would be solely to legitimize collection efforts by the debt collector but would not constitute admission of the debt owed as a matter of law. This section should be modified to preclude collectors from using this validation process as a basis for their claim or defense in subsequent legal proceedings.

Fair Debt Collection Practices Act: Hearings on S. 656, S. 918, S. 1130, and H.R. 5294 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Fin., & Urban Affairs, 95th Cong. 250 (1977) [hereinafter May FDCPA Hearings] (statement of Lewis H. Goldfarb, F.T.C.).

34. *See* Smith v. Heckler, No. CIV.A. 04-5820, 2005 WL 894812, at \*4 (E.D. Pa. Apr. 18, 2005) (“[U]nless the debt is disputed the debt collector will proceed under the temporary fiction that the debt is correct as stated in the validation notice.”); Nelson v. Select Fin. Servs., Inc., 430 F. Supp. 2d 455, 457 (E.D. Pa. 2006) (In the assumption of validity provision, “*assumed* conveys that [the debt collector] pretends or takes for granted that [the] debt is valid for purposes of further collection efforts . . .”).

35. § 1692g(a)(4) (notice must contain “a statement that if the consumer notifies the debt collector *in writing* . . .”) (emphasis added); § 1692g(a)(5) (notice must contain “a statement

assumption-of-validity provision, though, does not contain this explicit “in writing” requirement.<sup>36</sup>

The legislative history of the FDCPA may shed some light on the discrepancy within the plain language of § 1692g's provisions. A significant piece of legislation, the FDCPA took several years and undertook several forms before its enactment.<sup>37</sup> The provision that ultimately became § 1692g was first proposed as a disclosure provision, and also went through multiple drafts.<sup>38</sup> A section closely mirroring the final version of § 1692g—and first including the assumption-of-validity provision—did not appear until the third proposed FDCPA bill.<sup>39</sup> This bill did not pass, and three more FDCPA bills failed<sup>40</sup> before House Bill 5294 was proposed and was ultimately enacted.<sup>41</sup> Each one of these bills included the assumption-

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that, upon the consumer's *written* request . . .” (emphasis added); § 1692g(b) (“If the consumer notifies the debt collector *in writing* [of her dispute] . . . the debt collector shall cease collection . . .”) (emphasis added).

36. § 1692g(a)(3) (debt collector must send debtor notice including “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”).

37. See generally legislative history of H.R. 5294, 95th Cong. (1st Sess. 1977); Consumer Credit Protection Act Amendment, Pub. L. No. 95-109, 91 Stat. 874.

38. H.R. 10191, 94th Cong. §§ 809–10 (1st Sess. 1975); H.R. 11969, 94th Cong. § 810 (2d Sess. 1976).

39. H.R. 13720, 94th Cong. § 808 (2d Sess. 1976):

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall send the consumer a written notice containing the following information:

- (1) The amount of the debt.
- (2) The name and address of the creditor to whom the debt was originally owed and to whom the debt is currently owed.
- (3) A statement that unless the consumer, within thirty days, disputes the validity of the debt, the debt will be assumed as valid by the debt collector.
- (4) If the consumer notifies the debt collector in writing within the thirty-day period that the debt is disputed, the debt collector shall cease collection of the debt until such debt collector obtains certification of the validity of the debt from the creditor and a copy of such certification is mailed to the consumer by the debt collector. *Id.*

40. H.R. 29, 95th Cong. § 808 (1st Sess. 1977) (introduced Jan. 4, 1977); S. 656, 95th Cong. § 808 (1st Sess. 1977) (introduced Feb. 7, 1977); S. 918, 95th Cong. § 809 (1st Sess. 1977) (introduced Mar. 4, 1977).

41. H.R. 5294, 95th Cong. § 808 (1st Sess. 1977) (as introduced by House, Mar. 22, 1977).



of-validity provision, with only minor changes in language.<sup>42</sup> Not a single proposed assumption-of-validity provision contained a requirement that debtors dispute their debt in writing.<sup>43</sup> Conversely, each bill included subsections that reflected what would become §§ 1692g(a)(4)-(5) and 1692g(b), and every one of those proposed subsections did contain an in-writing requirement.<sup>44</sup>

In subcommittee hearings in March of 1977 on an earlier version of the bill, the American Collectors Association (ACA) submitted a criticism of the assumption-of-validity provision: "Present language is vague. It does not say 'how to' dispute the validity of a debt."<sup>45</sup> The ACA proposed that the provision instead include language that a debtor must "assert[] a dispute in writing to the debt collector" to prevent an assumption of validity.<sup>46</sup> Neither the House nor Senate, though, inserted the proposed in-writing requirement for the assumption-of-validity provision. During the hearings, at least one congressman expressed his belief that the FDCPA required all disputes to be in writing,<sup>47</sup> but the other statements regarding the provision fail to mention any sort of writing requirement.<sup>48</sup>

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42. H.R. 29 § 808(a)(3) ("A statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, the debt will be assumed as valid by the debt collector."); H.R. 5294 § 808(a)(3) (same, as introduced); S. 656 § 808(a)(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 as valid by the debt collector.") (added language in italics); S. 918 § 809(a)(3) (same).

43. See *supra* note 42 and accompanying text (noting language of proposed bills).

44. H.R. 29 § 808(a)(4), (b); S. 656 § 808(a)(4), (b); S. 918 § 809(a)(4), (b); H.R. 5294 § 808(a)(4), (b) (as introduced).

45. *Debt Collection Practices Act: Hearings on H.R. 29 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Fin., and Urban Affairs*, 95th Cong. 202 (1977) [hereinafter *March FDCPA Hearings*] (comments of Am. Collectors Ass'n).

46. *Id.*

47. "[The proposed Fair Debt Collection Practices Act] gives the collector the absolute right to demand a written notice from the debtor in the case of a disputed debt. And finally, the collector has the right to continue to communicate with the debtor until the debtor notifies him in writing to cease communications." *May FDCPA Hearings, supra* note 33, at 45 (statement of Rep. Chalmers P. Wylie). In the last part of this excerpted statement, Rep. Wylie was referring to a separate section of the bill, which specifically requires the debt collector to cease communications upon written refusal "to pay or even discuss an account," rather than to the debt validation section. See H.R. 5294 § 804(d) (as introduced by House, Mar. 22, 1977). Therefore, it's unclear whether his comment on the collector's "absolute right" to receive a written dispute is truly meant to apply to the entire FDCPA, or is simply in reference to the section on ceasing communications.

48. See, e.g., *March FDCPA Hearings, supra* note 45, at 141, 248-49 (comments of Am.

House Bill 5294 was introduced later that month. As the bill passed back and forth between the House and Senate, only two changes were made to the assumption-of-validity provision.<sup>49</sup> The Senate added language allowing the debtor to “dispute[] the validity of the debt, *or any portion thereof*” and changed “assumed as valid” to “assumed to be valid.”<sup>50</sup> Both changes were kept in the enacted assumption-of-validity provision, but neither clarified the ambiguity in the manner of the debtor’s dispute.<sup>51</sup> House Bill 5294 was enacted in September of 1977 and later codified as 15 U.S.C. § 1692, et seq.<sup>52</sup>

In its final version, § 1692g requires a debt collector to send written notice to the debtor, within five days of initial communication, of her right to dispute and to obtain verification of the alleged debt.<sup>53</sup> A collector may violate the FDCPA if, among other reasons, this notice to the debtor is insufficient.<sup>54</sup> Notice is interpreted by the “least-sophisticated-debtor” standard and may be found to be insufficient if it is not prominent, if the print is not large enough, or if it is contradicted or overshadowed.<sup>55</sup> Further, notice may be insufficient if it incorrectly advises the debtor how she may trigger her rights under § 1692g.<sup>56</sup>

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Collectors Ass’n), 282–84, 288–91 (statement of Joseph M. Garber, President, Credit Bureau of Cincinnati); *May FDCPA Hearings*, *supra* note 33, at 5 (statement of Sen. Jake Garn), 99–100 (statement of Kathleen O’Reilly, Exec. Dir., Consumer Fed’n of Am.), 250 (statement of Lewis H. Goldfarb, F.T.C.).

49. H.R. 5294, 95th Cong. § 808(a)(3) (as introduced Mar. 22, 1977) (“A statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, the debt will be assumed as valid by the debt collector.”); H.R. 5294 (as reported by House Mar. 29, 1977) (same); H.R. 5294 (as reported by Senate, Apr. 6, 1977) (same); H.R. 5294 (as reported by Comm. on Banking, Hous., & Urban Dev., Aug. 2, 1977) (“[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.”).

50. H.R. 5294 (as reported by Comm. on Banking, Hous., & Urban Dev., Aug. 2, 1977).

51. 15 U.S.C. § 1692g(a)(3) (1977).

52. H.R. 5294, 95th Cong. (1977) (introduced in the House Mar. 22, 1977 and enacted Sept. 20, 1977).

53. § 1692g(a).

54. § 1692k(a) (allowing civil liability for “any debt collector who fails to comply with any provision of this subchapter”).

55. *See, e.g.,* *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991) (“[S]tatutory notice must not only explicate a debtor’s rights; it must do so effectively.”).

56. *See* *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078 (9th Cir. 2005).

### *B. Development of the Circuit Split*

FDCPA lawsuits have inspired confusion over whether certain notices are in fact incorrectly advising debtors of their right to dispute. In several cases, debt collectors sent notices stating, in some form, that the collector would assume the debt to be valid pursuant to the assumption-of-validity provision unless the debtor disputed it in writing within thirty days.<sup>57</sup> In response, the debtors brought FDCPA actions, alleging that the collectors' notice requiring that the dispute be in writing violated § 1692g(a)(3), which does not explicitly require written disputes.<sup>58</sup>

In 1991, the Third Circuit Court of Appeals addressed whether a collector's notice requiring a written dispute to prevent an assumption of debt validity violated § 1692g(a)(3).<sup>59</sup> In that case, the defendant-collector sent the plaintiff-debtor a notice of delinquency that gave the debtor thirty days to dispute the debt in writing to avoid the assumption of validity.<sup>60</sup> The plaintiff cited three district courts in Hawaii, New York, and Oregon that had all held a debtor's dispute did not have to be made in writing.<sup>61</sup> These opinions reasoned that because certain subsections of § 1692g explicitly required the debtor's communication to be in writing, the absence of such language in the assumption-of-validity provision indicated congressional intent to allow non-written disputes.<sup>62</sup>

The Third Circuit disagreed, though, siding with the defendant's opposing interpretation: that the presence of an in-writing requirement in the other subsections of § 1692g indicates a congressional intent that subsection (a)(3) also requires written communication.<sup>63</sup> The court assessed § 1692g in its entirety and decided that the plaintiff's interpretation would lead to the following absurd result:

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57. *See, e.g., id.* at 1079; *Graziano*, 950 F.2d at 109.

58. *See, e.g., Camacho*, 430 F.3d at 1079; *Graziano*, 950 F.2d at 110; *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 283–84 (2d Cir. 2013); *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 489 (4th Cir. 2014).

59. *Graziano*, 950 F.2d 107.

60. *Id.* at 109.

61. *Id.* at 112.

62. *Id.*

63. *Id.*

[The plaintiff's] reading of the statute would . . . create a situation in which, upon the debtor's non-written dispute, the debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt or to advise the debtor of the identity of the original creditor and would be permitted to continue debt collection efforts.<sup>64</sup>

The court further noted that written disputes are preferable since they create "lasting record[s]."<sup>65</sup> This preference and interpretation of congressional intent led the Third Circuit to hold that "any dispute, to be effective, must be in writing."<sup>66</sup>

In *Camacho v. Bridgeport Financial*, the Ninth Circuit disagreed with the Third Circuit's statutory interpretation, and ultimately its outcome.<sup>67</sup> The defendant-collector appealed the district court's rejection of his motion to dismiss, arguing that the assumption-of-validity provision included an implicit in-writing requirement.<sup>68</sup> The defendant argued that this interpretation was necessary for consistency within the section itself.<sup>69</sup>

The court, however, adopted a separate interpretive approach, looking to the Supreme Court's statutory interpretation precedent

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64. *Id.* The court continued: "We see no reason to attribute to Congress an intent to create so incoherent a system." *Id.*

65. *Id.*

66. *Id.* The Third Circuit upheld this interpretation in *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142 (3d Cir. 2013). *Caprio* involved a notice that did *not* include a requirement that the debtor's dispute be written to prevent an assumption of debt validity. *Id.* at 146. The court affirmed that an oral dispute is ineffective in the Third Circuit, and found that the notice, which implied that the debtor could orally dispute, constituted an FDCPA violation. *Id.* at 151–52. The court stated:

[I]t appears more likely that the "least sophisticated debtor" would take the easier—and legally ineffective—alternative of making a toll-free telephone call to dispute the debt instead of going to the trouble of drafting then mailing a written dispute. We therefore conclude that the Collection Letter was deceptive because it can be reasonably read to have two or more different meanings, one of which is inaccurate, i.e., that Caprio could dispute the debt by making a telephone call.

*Id.* at 152 (internal quotation marks omitted).

67. 430 F.3d 1078 (9th Cir. 2005).

68. *Id.* at 1079.

69. *Id.* at 1080.

articulated in *Lamie v. United States Trustee*.<sup>70</sup> The *Lamie* Court first assessed the plain meaning of a statute, in which a subsection omitted language that was present in other, nearly parallel, subsections.<sup>71</sup> As long as the plain meaning did not produce an absurd result, the Court would not insert language, “even if it suspected that Congress inadvertently omitted such language.”<sup>72</sup> The Ninth Circuit noted that courts should presume “that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of particular language]”<sup>73</sup> and that “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”<sup>74</sup>

Applying this standard, the Ninth Circuit determined that the plain language of the assumption-of-validity provision did *not* require that the debtor dispute the debt in writing to prevent the debt collector from assuming the debt was valid.<sup>75</sup> The court reasoned that this did not produce an absurd result because, even though other subsections of § 1692g require disputes to be in writing, other subchapters of the FDCPA trigger protections through oral dispute.<sup>76</sup> In § 1692g, an oral notice of dispute merely triggers fewer protections than a written notice of dispute.<sup>77</sup> Finally, the court looked to Congress’s purpose in enacting the section—in part, to give the debtor time “to question and respond to the initial communication of a collection agency,”<sup>78</sup> and determined that these purposes were furthered in allowing a debtor to dispute either in writing or orally.<sup>79</sup>

In *Hooks v. Forman*,<sup>80</sup> the Second Circuit agreed with the Ninth Circuit, holding that a notice requiring the debtor to dispute in writing is a violation of the assumption-of-validity provision.<sup>81</sup> The plaintiff-

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70. *Id.*; 540 U.S. 526 (2004).

71. *Camacho*, 430 F.3d at 1080–81 (citing *Lamie*, 540 U.S. at 534–35).

72. *Id.* at 1081 (citing *Lamie*, 540 U.S. at 537).

73. *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

74. *Id.* (quoting *Lamie*, 540 U.S. at 534).

75. *Id.*

76. *Id.* at 1081–82. The court specifically references 15 U.S.C. §§ 1692e(8), 1692h, and 1692c(a)(1). *Id.* at 1082.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Hooks v. Forman*, Holt, Eliades & Ravin, LLC, 717 F.3d 282 (2d Cir. 2013).

81. *Id.* at 286.

debtor appealed the district court's dismissal of her complaint in which she alleged that the defendant-collector's notice violated § 1692g(a)(3) by requiring her dispute to be in writing.<sup>82</sup> The court assessed both *Graziano* and *Camacho*, and adopted the Ninth Circuit's reasoning in *Camacho*, but took the analysis a step further.<sup>83</sup>

First, the court decided that allowing an oral dispute to trigger rights and "giving effect to the difference [in statutory language] creates a sensible bifurcated scheme."<sup>84</sup> Second, the court considered the relative rights and burdens of such an interpretation. For debtors, allowing oral disputes ensures the right "could be exercised by consumer debtors who may have some difficulty with making a timely written challenge."<sup>85</sup> For debt collectors, the court indicated that allowing a debtor to orally dispute in order to prevent an assumption of validity does not place a large burden on the debt collector.<sup>86</sup> In contrast, the rights that the debtor can trigger with a written dispute under § 1692g(a)(4)-(5) and (b) impose a larger burden by placing affirmative duties on the debt collector.<sup>87</sup> The Second Circuit recognized that this more complicated scheme could minimally undermine the desire for simple debtor requirements, but that such a concern should not override the court's duty to follow the language of and congressional intent behind the statute.<sup>88</sup>

Recently, the Fourth Circuit addressed this issue as a matter of first impression in *Clark v. Absolute Collection Services, Inc.*<sup>89</sup> After summarizing the interpretations of its sister circuits, the court followed the Second and Ninth Circuits, holding that the assumption-of-validity provision allows an oral as well as written dispute.<sup>90</sup>

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82. *Id.* at 284.

83. *Id.* at 285–86.

84. *Id.* at 286.

85. *Id.*

86. *Id.*

87. *Id.* Section 1692g(4) and (5) require that the debt collector, upon receipt of a written dispute, obtain and send to the consumer verification of the debt and information about the original creditor, respectively. See 15 U.S.C. § 1692g(4)-(5) (1977). Section 1692g(b) requires that the debt collector cease collection of the debt until he obtains and provides the consumer with the verification or original creditor information. § 1692g(b).

88. *Hooks*, 717 F.3d at 286.

89. *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487 (4th Cir. 2014).

90. *Id.* at 490.

Only four circuits have addressed the manner of dispute required in the assumption-of-validity provision, and the Supreme Court has not yet had an opportunity to resolve this issue. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,<sup>91</sup> the Court noted the circuit split and acknowledged that the lower court, the District Court for the Northern District of Ohio, concluded that a notice requiring in-writing disputes violated the FDCPA.<sup>92</sup> The Court, however, declined to hear the issue because it was not properly raised on appeal.<sup>93</sup>

### III. ANALYSIS AND PROPOSAL

#### A. Statutory Interpretation of § 1692g

Courts on both sides of the circuit split use similar statutory interpretation devices to reach separate conclusions regarding the allowable method of dispute in § 1692g's assumption-of-validity provision. Paramount to statutory interpretation is a determination of legislative intent.<sup>94</sup> Supreme Court precedent emphasizes the plain language of a statute as indicative of intent, and generally abides by that language unless the result is absurd or the language is ambiguous.<sup>95</sup> A function of determining legislative intent, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."<sup>96</sup> The *Camacho* and *Graziano*

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91. 559 U.S. 573 (2010)

92. *Id.* at 579; *Jerman v. Carlisle*, 464 F. Supp. 2d 720, 725 (N.D. Ohio 2006) ("The plain meaning of the statute is clear and unambiguous; subsection (a)(3) does not impose a writing requirement on consumers.")

93. The Court declined to hear the issue in a single footnote:

Because the question was not raised on appeal, the Court of Appeals did not address whether Carlisle's inclusion of the 'in writing' requirement violated § 1692g. We likewise express no view about whether inclusion of an 'in writing' requirement in a notice to a consumer violates § 1692g, as that question was not presented in the petition for certiorari.

*Jerman*, 559 U.S. at 580 n.3 (internal citation omitted).

94. *See, e.g.*, *Takao Ozawa v. United States*, 260 U.S. 178, 194 (1922) ("It is the duty of this Court to give effect to the intent of Congress.")

95. *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks omitted)).

96. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

courts employed similar methods of statutory interpretation, but where *Camacho* found a sensible scheme,<sup>97</sup> *Graziano* found the results absurd.<sup>98</sup>

The Third Circuit in *Graziano* recognized that the assumption-of-validity provision “does not expressly require that a debtor’s dispute be in writing[,]” but nevertheless quickly concluded that interpreting the provision to allow oral disputes would create an absurd result.<sup>99</sup> The debt collector would not be required to provide verification of the debt and would not be required to cease its collection efforts, since these rights are only triggered by a written dispute.<sup>100</sup> The result would be that the receipt of an oral dispute may ruin a debt collector’s “temporary fiction that the debt is correct as stated”<sup>101</sup> and put the collector in a position in which it may legally—though perhaps not ethically—pursue the debt.<sup>102</sup> But such a result is not absurd or incoherent, and the plain language of § 1692g is not ambiguous.

The *Graziano* court did not give enough weight to the plain language of § 1692g and did not assess enough of the section’s context within the FDCPA. It argued that it looked at the structure of the debt validation section as a whole to reach its conclusion,<sup>103</sup> but the court should have gone further to determine whether allowing an oral dispute would be absurd. As the Ninth Circuit in *Camacho* points out, the *Graziano* court “failed to consider [other] FDCPA rights that are triggered by an oral dispute.”<sup>104</sup>

The *Camacho* court used a Supreme Court-sanctioned statutory interpretation method laid out in *Lamie v. United States Trustee*.<sup>105</sup> The court conducted a more thorough analysis of the plain meaning

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97. *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005).

98. *Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991).

99. *Id.*

100. 15 U.S.C. §§ 1692g(a)(4)-(5), (b) (1977).

101. *Smith v. Hecker*, No. CIV.A. 04-5820, 2005 WL 894812, at \*4 (E.D. Pa. Apr. 18, 2005).

102. *See Graziano*, 950 F.2d at 112 (“[T]he debt collector would be without any statutory ground for assuming that the debt was valid, but nevertheless would not be required to verify the debt . . . and would be permitted to continue debt collection efforts.”); *see also supra* note 34 and accompanying text.

103. *Graziano*, 950 F.2d at 112.

104. *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1081 (9th Cir. 2005).

105. *Id.* at 1080–81 (citing *Lamie v. United States Trustee*, 540 U.S. 526 (2004)).



of the assumption-of-validity provision and refused to insert language into the statute.<sup>106</sup> Congress explicitly included a writing requirement in three other provisions in § 1692g, but omitted it in the assumption-of-validity provision.<sup>107</sup> Given the strong interpretational preference for assuming that Congress means what it says, it was entirely appropriate for the Ninth Circuit to refuse to add an in-writing requirement to the provision, even in the event of a legislative error.<sup>108</sup> The Second Circuit's *Hooks* decision and the Fourth Circuit's *Clark* decision followed the interpretive analysis of *Camacho*, focusing on the plain language of the statute and "see[ing] no reason to ignore [the] difference in statutory language."<sup>109</sup>

The legislative history of the assumption-of-validity provision shows that Congress did, in fact, mean what it said. Despite five separate bills and in-depth hearings and reports,<sup>110</sup> Congress chose not to include an in-writing requirement in the provision. The language of what became § 1692g went through multiple revisions, and in each version, every subsection that mentioned the debtor's dispute required it to be written *except* for the assumption-of-validity provision.<sup>111</sup> While a court should not insert even inadvertently omitted language into a statute,<sup>112</sup> the omission of "in writing" was not inadvertent. In fact, Congress was made aware of the omission when the ACA argued that the language was unclear and that "in writing" should be added.<sup>113</sup> The ACA also suggested an in-writing requirement for another section while critiquing a previous related

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106. *Id.* at 1081.

107. *Id.* (comparing § 1692g(a)(4), (5), and (b) with § 1692g(a)(3)); *see also supra* notes 35–36 (relevant statutory language).

108. *Camacho*, 430 F.3d at 1081.

109. *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 285–86 (2d Cir. 2013); *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487, 490 (4th Cir. 2014) ("[Defendant] asks that we disregard the statutory text to read into it words that are not there. We decline to do so.").

110. *See generally* legislative history of 95 H.R. 5294, 95th Cong. (1st Sess. 1977); Consumer Credit Protection Act Amendment, Pub. L. No. 95–109, 91 Stat. 874.

111. *See supra* notes 39–44, 49–53 and accompanying text.

112. *Camacho*, 430 F.3d at 1081 (citing *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004)).

113. *March FDCPA Hearings*, *supra* note 45, at 202 (comments of Am. Collectors Ass'n).

House and Senate bill,<sup>114</sup> and Congress included that section's writing requirement in their later bill proposals.<sup>115</sup> While it is unclear whether the adoption of an in-writing requirement for that section was due to the ACA's suggestion, it is clear that Congress generally considered and intentionally accepted or rejected proposed revisions.<sup>116</sup>

Congress, however, did not add a writing requirement to the assumption-of-validity provision, and the ACA nonetheless supported passage of the final bill.<sup>117</sup> The congressional hearings indicate that there was little to no debate regarding the assumption-of-validity provision following the failure of either house to change the provision's language. If congressional intent is the deciding factor in interpretation, and Congress says what it means, then the provision is clear: Congress intended that a debt collector not be allowed to assume debt validity when the debtor has disputed the debt in *any* manner.

### *B. Policy Considerations*

The Second, Third, and Ninth Circuits<sup>118</sup> each cite specific policy reasons to support its conclusion that the assumption-of-validity provision should, or should not, be read to require written disputes by debtors. Each court emphasizes its own set of policy considerations.

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114. *See id.* at 194 (comments of Am. Collectors Ass'n suggesting debtor's demand that collector cease communication should be made in writing); *May FDCPA Hearings*, *supra* note 33, at 121 (comments of Am. Collectors Ass'n suggesting House bill which includes writing requirement be adopted over Senate bill that does not).

115. 95 H.R. 5294, 95th Cong. § 804(d) (1st Sess. 1977) as introduced included the "in writing" language that was excluded from H.R. 29, 95th Cong. § 804(d) (1st Sess. 1977) (introduced Jan. 4, 1977); and S. 918, 95th Cong. § 805(d) (1st Sess. 1977) (introduced Mar. 4, 1977).

116. The existence of extensive subcommittee hearings and oral and written testimony, congressional desire to gain broad support for the passage of bills, and multiple bill drafts further indicate Congress's consideration of proposed bill amendments.

117. *May FDCPA Hearings*, *supra* note 33, at 28 (letter from Am. Collectors Ass'n supporting H.R. 29); *id.* at 146 (statement of John W. Johnson, Exec. Vice Pres., Am. Collectors Ass'n, supporting H.R. 5294). While ACA desired to amend the assumption-of-validity provision the earlier bill, H.R. 29, it did not renew any contention of the provision when submitting its critiques of and testifying before Congress on H.R. 5294. *Id.* at 161; 171–72 (prepared statement of Am. Collectors Ass'n).

118. While the Fourth Circuit follows the holding and statutory interpretation of the Second and Ninth Circuits, it does not employ policy considerations to reach its decision. *Clark v. Absolute Collection Serv., Inc.*, 741 F.3d 487 (4th Cir. 2014).

But under a proper analysis, the considerations should all be read together.

The Third Circuit in *Graziano* ignored many possible policy considerations, only favoring a written dispute requirement because “a writing creates a lasting record of the fact that the debt has been disputed, and thus avoids a source of potential conflicts.”<sup>119</sup> While this argument undoubtedly supports a preference that debtors dispute in writing, it does not alone provide a convincing argument that debtors should *only* be allowed to effectively dispute in writing. In *Camacho*, the Ninth Circuit recognized the validity of *Graziano*’s preference for written disputes, but argued that the reasoning was insufficient to overcome the plain meaning analysis which points to the availability of oral disputes.<sup>120</sup> A primary purpose of § 1692g, and the FDCPA as a whole, is to prevent abuses and provide debtors an opportunity to dispute invalid or paid debts.<sup>121</sup> Giving the debtor an opportunity to respond to the collector’s notice either in writing or orally furthers these goals of debtor protection.<sup>122</sup>

The Second Circuit’s decision in *Hooks* illuminates a related policy consideration. The court analyzed the relative burdens placed on each party by allowing oral versus written disputes.<sup>123</sup> Allowing an oral dispute to prevent an assumption of validity does not place a heavy burden on the debt collector, since under the “sensible bifurcated scheme”<sup>124</sup> it creates, the collector is not required to take affirmative steps to provide the debtor with additional paperwork, nor even to cease collection altogether.<sup>125</sup>

Allowing debtors to orally dispute, triggering certain rights under the FDCPA, is an interpretation that protects debtors. Debt collection

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119. *Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991).

120. *Camacho v. Bridgeport Fin., Inc.*, 430 F.3d 1078, 1082 (9th Cir. 2005) (“While there is much to be said for the *Graziano* court’s conclusion that policy considerations weigh in favor of its interpretation . . . under *Lamie*, we can only insert language into a statute if the result of the statute’s plain meaning is absurd.”).

121. 15 U.S.C. § 1692(a); S. Rep. No. 95-382, at 4 (1977); *Camacho*, 430 F.3d at 1082 (“Congress’ intent in enacting § 1692g was to provide an alleged debtor with 30 days to question and respond to the initial communication of a collection agency.”).

122. *Camacho*, 430 F.3d at 1082.

123. *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013).

124. *Id.*

125. *Id.*

affects a large portion of the American population—some thirty million individuals as of 2013.<sup>126</sup> This number may be especially high due to the recent Great Recession.<sup>127</sup> While some instances of a bill going into collection result from bad luck and are quickly resolved, debt collection has a disparate impact on low-income Americans. Low-income individuals may be more likely to suffer greater hardships as a result of debt collection and post-judgment execution, such as wage garnishments—which can take up to 25 percent of a debtor's paycheck—and levies on vehicles and bank accounts.<sup>128</sup> Disadvantaged consumers may also be more likely to suffer abuses from debt collection.<sup>129</sup> Further, low-income individuals may be less likely to retain attorneys to assist with debts, since they cannot easily afford them<sup>130</sup> (or the size of the debt does not warrant the prospect of

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126. "At present, about 30 million Americans, nearly 10% of the population, are subject to debt collection for amounts averaging \$1,500 per person, according to the CFPB." MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., R43041, *FAIR DEBT COLLECTION PRACTICES ACT 7-5700* (2013), available at <http://www.fas.org/spp/crs/misc/R43041.pdf>. This is, however, a low estimate. Others have suggested that closer to 77 million people—approximately 35 percent of the American population—have debts in collection. RATCLIFFE ET AL., *supra* note 3, at 7.

127. See LISA STIFLER AND LESLIE PARRISH, CENTER FOR RESPONSIBLE LENDING, *DEBT COLLECTION & DEBT BUYING: THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS 2* (Apr. 2014) ("For many consumers, defaulting on a loan is inevitable when unemployment, medical emergencies, or some other financial crisis leaves them unable to cover the payments. The Great Recession only made this outcome more likely for more U.S. households."); Jessica Ratner, *Pro Bono or Problemo: Can a Moral Obligation Effectively Bridge the 'Justice Gap?'*, 18 PUB. INT. L. REP. 8, 11 (2012).

128. See John Collins Rudolf, *Pay Garnishments Rise as Debtors Fall Behind*, N.Y. TIMES (Apr. 1, 2010), <http://www.nytimes.com/2010/04/02/business/economy/02garnish.html> ("The working poor 'have difficulties maintaining payments on life's necessities with their full paycheck . . . . You lose 25 percent of it and everything folds.'" (quoting Angela Riccetti, Atlanta Legal Aid)); Paul Kiel and Chris Arnold, ProPublica, *Old Debts, Fresh Pain: Weak Laws Offer Debtors Little Protection* (Sept. 16, 2014), <http://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection> (highlighting the difficulties of one family suffering from garnishments and noting that low- to moderate-income families are subject to higher rates of garnishments); see also CARTER & HOBBS, *supra* note 8, at 7 (discussing state income and exemption laws which aim to protect low-income debtors, but which often have "enormous gaps . . . allowing creditors to push debtors and their families into financial hopelessness.").

129. See STIFLER & PARRISH, *supra* note 127, at 18 ("[C]ommunities of color, older Americans, and low- and moderate-income communities experience higher rates of debt buyer lawsuits and abuses.").

130. Ratner, *supra* note 127, at 11 ("In light of the recent recession, there has been a dramatic increase in the number of people with foreclosure, debt collection and bankruptcy cases who are unable to afford an attorney."); Peggy Maisel & Natalie Roman, *The Consumer Indebtedness Crisis: Law School Clinics As Laboratories for Generating Effective Legal*

an equally large attorney fee)<sup>131</sup> and free legal assistance agencies have limited resources to provide the level of assistance demanded.<sup>132</sup>

Even so, every year debtors dispute approximately one million debts,<sup>133</sup> and consumers file more FTC complaints about debt collection than about any other industry.<sup>134</sup> Section 1692g “provides essential safeguards that the process does not deprive debtors of a realistic opportunity to dispute the merits of any account.”<sup>135</sup>

From the standpoint of the “least-sophisticated-consumer,” an oral dispute should be permitted to prevent an assumption of validity.<sup>136</sup> Debtors may have a hard time communicating their dispute in written

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*Responses*, 18 CLINICAL L. REV. 133, 147 (2011) (“[L]ow and moderate income consumers, who may be bearing the brunt of the current crisis, are at a serious disadvantage in large part because of their inability to pay for legal representation.”).

131. Attorney’s fees can be awarded in FDCPA actions, but only if successful. 15 U.S.C. § 1692k(a)(3). The potential to claim attorney’s fees can often induce an attorney to take on such a case *pro bono*. See Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 237 (Winter 1984), available at <http://scholarship.law.duke.edu/lcp/vol47/iss1/9> (“Congress has enacted fee shifting statutes expressly to encourage public interest litigation by removing some of the economic disincentives facing public interest litigants.”). Unfortunately, debtors may be unaware that such an award is a possibility and therefore may not seek out assistance otherwise available.

132. See Ratner, *supra* note 127, at 11 (“[D]ue to cuts in federal funding for the Legal Services Corporation (LSC), LSC-funded programs eliminated 241 full-time attorney positions in 2011 and expect that similar reductions will continue to be made. These organizations anticipate that they will also need to restrict the types of cases that they accept.” (internal footnote omitted)); Dave Collins, *Lawyers Across U.S. Urged To Give Away More Free Services*, HUFFINGTON POST BUSINESS (Aug. 20, 2012, 12:20 PM), [http://www.huffingtonpost.com/2012/08/20/lawyers-crisis\\_n\\_1811805.html](http://www.huffingtonpost.com/2012/08/20/lawyers-crisis_n_1811805.html) (noting the reduction of traditional legal aid attorneys as well as cutbacks in large law firms’ *pro bono* work). The Great Recession and resultant cuts in free legal assistance has led to a drastic increase in the rates of self-representation. *Id.*

133. See Lee, *supra* note 126, at 7 (citing FTC REPORT, *supra* note 4).

134. FTC REPORT, *supra* note 4, at i.

135. *May FDCPA Hearings*, *supra* note 33, at 733–34 (statement of the Nat’l Consumers League). The National Consumers League continued:

The debt validation requirement could delay the debt collection process in those instances where debtors, in fact, notify the debt collector of the existence of a dispute . . . . [T]he objective of the entire bill . . . is to ensure debtors a realistic opportunity to dispute a debt sought to be collected from them.

*Id.* at 734.

136. “The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law.” *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); see also *supra* note 55 and accompanying text.

format,<sup>137</sup> or may believe that an oral dispute to the collector has protected them from further collection action until the collector validates the debt. Even if a collector's notice explicitly states the debtor's dispute must be in writing, the debtor may believe that her phone call to the collection agency sufficiently puts the collector on notice of her dispute. The debtor may therefore take no further action to send in a written dispute. It may too often be the case that the collector representative with whom the debtor speaks further leads the debtor to believe that her dispute will be taken seriously. As one court has noted, "[l]aws are made to protect the trusting as well as the suspicious."<sup>138</sup> Any attempt by the debtor to orally discuss her account with the collection agency should trigger as many rights as reasonable and allowable under the FDCPA.<sup>139</sup>

For many debtors, submitting a written dispute to the collection agency can operate as an impediment. Testifying before the subcommittee considering the FDCPA, Attorney Robert J. Hobbs of the National Consumer Law Center said the following about the debt validation section:

[C]onsumers frequently do not voice their dissatisfaction with the goods and services which they purchase. This silence in the light of dissatisfaction undermines the quality of the American marketplace as manufacturers, retailers and other consumers associate the event of a purchase without complaint as customer satisfaction, generating more supply of and demand for unsatisfactory goods and services. Given this situation, the law should strenuously avoid raising new impediments to the voicing of consumer dissatisfaction.<sup>140</sup>

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137. Some debtors "may have some difficulty with making a timely written challenge" to a collector's communication. *Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 286 (2d Cir. 2013).

138. *Clomon*, 988 F.2d at 1318 (citing *F.T.C. v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937)).

139. "If . . . the debt validation requirement brought the debtor into communication with the creditor over the merits of the account, it could have a beneficial effect." *May FDCPA Hearings*, *supra* note 33, at 734 (statement of the Nat'l Consumers League, on S. 918).

140. *May FDCPA Hearings*, *supra* note 33, at 96 (statement of Robert J. Hobbs, Staff Att'y, Nat'l Consumer Law Ctr.).

Providing written notice may be especially hard for some debtors who have lower levels of education or who are low-income. Not all households have available stamps, pen, and paper—let alone a computer and printer—with which to craft a dispute letter. Further, if the debtor wished to ensure the collector's receipt of her dispute, her options include delivering it herself or sending it via certified mail, neither of which is an inexpensive or easy option.<sup>141</sup> To require debtors to voice their disputes in this manner could impede the “voicing of [their] dissatisfaction.”<sup>142</sup>

Further, there is often a vast difference in sophistication and power between debt collectors and debtors. Debt collection representatives often are not attorneys and therefore cannot give legal advice. In the instance that a debtor does come into contact with the collection attorney,<sup>143</sup> that attorney is neither obligated nor inclined to give the debtor legal advice that would undermine the collector's ability to collect on behalf of his client.

As the *Graziano* court pointed out, there are drawbacks to allowing a debtor to trigger rights under the assumption-of-validity provision via an oral dispute.<sup>144</sup> Written disputes are evidentially valuable for debtors, since a disputed debt is more likely to be resolved in litigation. Further, an interpretation that requires the dispute to be in writing makes the assumption-of-validity provision consistent with the other provisions in the validation of debt section.<sup>145</sup> This would create a more simplified scheme, which ultimately benefits debt collectors in being able to consistently follow the law, debtors in understanding which rights are triggered by their dispute, and courts in having a hard and fast rule to apply. However,

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141. Many of us may take for granted the ease of a trip across town or even to the local post office. However, consider the challenges some individuals face: taking time off work to go to the post office, finding transportation or paying for gas, deciding whether you can budget the more than \$6.00 just to send the letter certified mail with a return receipt. See USPS, *Insurance & Extra Services*, <https://www.usps.com/ship/insurance-extra-services.htm> (last visited Mar. 27, 2015) (showing certified mail cost as \$3.30; return receipt as \$2.70).

142. *May FDCPA Hearings*, *supra* note 33, at 96 (statement of Robert J. Hobbs, Staff Att'y, Nat'l Consumer Law Ctr.).

143. For example, a debtor may be likely to come into contact with the collection attorney or his representatives over the phone—possibly after she receives an initial collection notice—or in court pursuant to a summons or a subpoena to conduct a judgment-debtor examination.

144. *Graziano v. Harrison*, 950 F.2d 107, 112 (3d Cir. 1991).

145. 15 U.S.C §§ 1692g(a)(4)–(5), (b) require the dispute to be in writing.

the reality of many debtors' situations and the current trend among circuit courts may demand that oral disputes be allowed.

*C. Proposal: Availability of Oral Disputes*

Despite the drawbacks of having a more complex statutory scheme, with oral disputes and written disputes triggering different rights under the same section, oral disputes should be allowed under the assumption-of-validity provision. It may be impractical or impossible for some debtors to clearly communicate a written dispute to a debt collector.<sup>146</sup> It is in the interest of the government, courts, and society to allow debtors to communicate disputes in the easiest manner possible, furthering the FDCPA's purpose of consumer protection.

Courts should therefore continue to follow the Second, Fourth, and Ninth Circuits, and hold that it is an FDCPA violation for the debt collector's notice to require the debtor's dispute to be in writing. As more circuits adopt this interpretation, it will be easier for collectors and debtors to know their respective responsibilities and rights, which will help prevent future abuses and minimize lawsuits.

The clearest resolution of the issue—though perhaps the most difficult to achieve in today's political climate—would be for Congress to consider making legislative changes to clarify the assumption-of-validity provision. The legislative history of the provision tends to indicate that Congress did not intend to require the debtor's dispute to be in writing, but it may be time for Congress to amend the provision to explicitly state that a debtor may orally dispute, or else reassess its omission of "in writing." Until there is consistency in the courts or a legislative amendment, debt collectors may be caught in a limbo, as they risk an FDCPA violation whether they require the dispute to be in writing or not.<sup>147</sup>

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146. See *supra* notes 136–42 and accompanying text.

147. See *supra* note 66, discussing *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142, 152 (3d Cir. 2013) (finding FDCPA violation because notice encouraged "legally ineffective" oral dispute).



#### IV. CONCLUSION

The plain language and purpose of the FDCPA, as well as other policy considerations, support the allowance of an oral dispute in the assumption-of-validity provision. Despite reasons to prefer that debtors submit their debt disputes in writing, debtors should be able to trigger rights by disputing in the easiest manner they can—and for many, that is through a telephone call. The trend among the federal district courts is to side the with Second, Fourth, and Ninth Circuits, but until the Third Circuit overturns its *Graziano* decision,<sup>148</sup> the Supreme Court weighs in, or Congress amends the assumption-of-validity provision, the circuit split will remain and even seasoned debt collection attorneys may not know where their notices stand.

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148. Despite the trend of courts following the Second, Fourth, and Ninth Circuits' interpretation, the Third Circuit has seemed disinclined to overturn its *Graziano* ruling and has instead reaffirmed it. *Id.*