Creditor Certainty and Consumer Protection: Complaints as Initial Communications under the Fair Debt Collection Practices Act

Brian Koontz

Follow this and additional works at: http://scholarship.law.unc.edu/ncbi
Part of the Banking and Finance Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncbi/vol11/iss1/12
Creditor Certainty and Consumer Protection: Complaints as Initial Communications Under the Fair Debt Collection Practices Act

I. INTRODUCTION

The treatment of attorneys under the Fair Debt Collection Practices Act (FDCPA)\(^1\) has been subject to numerous changes since the Act’s inception in 1977.\(^2\) Throughout the history of the FDCPA, Congress and courts have struggled to strike a balance between (1) the extent to which attorneys must be regulated to accomplish the Act’s purposes and (2) the increased burden that heightened regulation entails for the legal profession.\(^3\) The most recent development in the context of this struggle is a provision of the Financial Services Regulatory Relief Act of 2006 (FSRRA),\(^4\) which provides that the filing of a complaint does not constitute an initial communication for purposes of the validation notices required by section 809 of the FDCPA (§ 1692g).\(^5\) Thus, collection attorneys who merely litigate collection cases are exempted from the requirements of § 1692g.\(^6\) This new amendment to the FDCPA helps alleviate a significant burden previously imposed on litigating collection attorneys under § 1692g without sacrificing consumer protection, and accordingly moves closer to striking the appropriate balance between attorney and consumer interests under the FDCPA.\(^7\)

3. See id.
5. Id. Hereinafter the validation notice requirements of section 809 of the FDCPA will be referred to by its section number as codified in the United States Code, 15 U.S.C. § 1692g.
6. See id.
Part II of this Note will discuss the purpose of the FDCPA and address the requirements that § 1692g imposes upon those falling within its purview. Part III will briefly examine the history of the FDCPA and the evolution of its applicability to attorneys. Part IV will analyze the history and purpose of the FSRRA, with particular emphasis on section 802, which exempts legal pleadings from the validation notice requirements. Part V will discuss the implications of the new legislation for attorneys with debt collection practices as well as for consumers under the FDCPA. Part VI will conclude by examining the effects of this most recent change in the context of the competing interests of consumers and attorneys under the FDCPA.

II. PURPOSE AND VALIDATION REQUIREMENTS OF THE FDCPA

In 1977, Congress passed the FDCPA to eliminate the widespread use of unfair and abusive collection practices by debt collectors. One way in which Congress sought to accomplish this goal was by requiring the debt collector to notify the consumer of his or her right to dispute the validity of the debt before further collection action ensued. By “ensur[ing] that debtors will be informed about their validation rights, and that debt collectors, knowing that they are obliged to advise debtors of these rights, will investigate claims before initiating litigation to collect debts,” Congress hoped such a requirement would prevent “unfair, harassing, and deceptive debt collection practices.”

---

8. See infra notes 13-17 and accompanying text.
9. See infra notes 18-65 and accompanying text.
10. See infra notes 66-86 and accompanying text.
11. See infra notes 87-161 and accompanying text.
12. See infra notes 162-69 and accompanying text.
13. See 15 U.S.C. § 1692(e) (1977) (amended 1986); see also Simon, supra note 2, at 392 (examining the history and purposes of the FDCPA).
14. See § 1692g.
Under § 1692g, a debt collector must send the consumer written notification containing the following five things within five days of its initial communication with the consumer regarding the debt:

(1) the amount of the debt; (2) the name of the creditor to whom it 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.16

If a debt collector fails to comply with the validation notice requirements in § 1692g, the debt collector could be liable for any actual damages sustained as a result of its failure, as well as statutory damages and the costs of the action, including attorney’s fees.17

17. § 1692k(a).
III. HISTORY OF THE FDCPA AND ITS APPLICABILITY TO ATTORNEYS

A. Original Form of the FDCPA and the Implied Litigation Exemption

In its original form, the FDCPA only applied to third-party debt collectors who were collecting consumer debts as a "principal purpose" of their business or on a "regular" basis. The original FDCPA specifically exempted from the definition of debt collector "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." This provision made the FDCPA inapplicable to attorneys, even if their practice would have otherwise fallen within the purview of the Act.

In 1986, the attorney exemption to the FDCPA was repealed in an attempt to bring attorneys within the scope of the Act and subject them to liability for violations of its provisions. Although the repeal of the attorney exemption made it clear that attorneys could now qualify as debt collectors under the FDCPA, the amended Act failed to address circumstances in which attorneys would qualify as such. This left significant room for courts to interpret the applicability of the FDCPA to attorneys.

Even after the repeal of the attorney exemption, a strict reading of the statute still implied that not all activities of

18. See 15 U.S.C. § 1692a(6) (1977) (amended 1986); see also Simon, supra note 2, at 395. Courts have taken various approaches as to the amount of collection activity that is needed to subject attorneys to the Act. Some courts have focused on the percentage of legal fees that were generated from collection activities in determining whether debt collection constitutes a "principal purpose" of the attorney's business. Other courts have focused on the volume of the attorney's business generated by collection activities or the amount of time spent by the attorney on such in determining whether the activities were sufficiently "regular" to bring the attorney within the purview of the Act. Simon, supra note 2, at 395.

19. § 1692a(6)(F).

20. See Simon, supra note 2, at 407 ("In its original form, the Fair Debt Collection Practices Act specifically exempted attorneys from its requirements.").


22. See Simon, supra note 2, at 409-10.

23. Id. at 410 (noting the amended FDCPA appeared inapplicable to attorneys "performing tasks of a legal nature" but failing to define which activities fell within this category).

24. Id.
attorneys fell within the scope of the FDCPA.\textsuperscript{25} Because the provisions of the FDCPA were only applicable to those engaged in the "collection" of debts, the Federal Trade Commission (FTC)\textsuperscript{26} took the position that attorneys engaged solely in litigation activities relating to debt collection were not subject to the Act's requirements.\textsuperscript{27} In its 1988 Commentary to the FDCPA, the FTC excluded "an attorney whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)" from the definition of a debt collector, thereby rendering the FDCPA inapplicable in such a context.\textsuperscript{28} Although several courts followed the approach taken by the FTC in its nonbinding commentary, others did not.\textsuperscript{29} Thus, a split among the circuits developed as to the extent the activities of attorneys were governed by the FDCPA.\textsuperscript{30}

\textbf{B. Supreme Court's Holding in Heintz v. Jenkins}

The Supreme Court resolved the split as to the status of litigating collection attorneys under § 1692g in 1995 when it decided \textit{Heintz v. Jenkins}.\textsuperscript{31} In \textit{Heintz}, Jenkins borrowed money from a bank to buy a car and eventually defaulted on her loan.\textsuperscript{32} The bank's law firm filed suit in state court in the name of its bank client to recover the balance due from Jenkins.\textsuperscript{33} In an effort to settle the suit, one of the bank's attorneys, George Heintz, wrote a letter to Jenkins' attorney stating that she owed a balance of

\textsuperscript{25} Id.
\textsuperscript{26} Id. The FTC is the administrative agency placed in charge of enforcement of the provisions of the FDCPA. 15 U.S.C. § 16921 (2000).
\textsuperscript{27} Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed Reg. 50097 (Dec. 13, 1988) [hereinafter FTC Staff Commentary]. The FTC's rationale for its position was that attorneys engaged solely in litigation were not "collecting" debts but merely reducing debts to judgment and therefore should not be subject to the provisions of the FDCPA. \textit{Id.}
\textsuperscript{28} Id.
\textsuperscript{29} See Simon, \textit{supra} note 2, at 411-15. While the Sixth Circuit followed the implied litigation exemption advocated by the FTC, the Third, Fourth, and Seventh Circuits all rejected such an approach and made the provisions of the Act applicable to all collection attorneys even if their activities consisted solely of litigation. \textit{Id.}
\textsuperscript{30} See \textit{id.}
\textsuperscript{32} \textit{Id.} at 293.
\textsuperscript{33} \textit{Id.}
Jenkins then filed suit, alleging the bank’s attorneys had violated the FDCPA by making a false representation as to the amount of the debt and trying to collect an amount not authorized by the loan agreement. At trial, the district court dismissed Jenkins’ complaint, holding that the FDCPA did not apply to lawyers engaged in litigation. However, the Seventh Circuit Court of Appeals reversed the district court, holding that the FDCPA did apply to litigating attorneys despite contrary interpretations by the FTC and the Sixth Circuit.

In addressing the issue, the Supreme Court held the FDCPA did apply to collection attorneys solely engaged in litigation, erasing the implied exemption for litigating attorneys advocated by the FTC and the Sixth Circuit. In reaching its conclusion, the Court focused on three things: (1) an attorney who “tries to obtain payment of consumer debts through legal proceedings” is still attempting to collect consumer debts; when Congress repealed the attorney exemption in 1986, it did so “in its entirety, without creating a narrower, litigation related exemption to fill the void;” and (3) the FTC commentary suggesting an implied litigation exemption was nonbinding. After Heintz v. Jenkins, it appeared clear that the requirements of the FDCPA were applicable to all collection attorneys, regardless of whether they were “collecting” debts through litigation or otherwise.

34. Id.
35. Id.
36. Id. at 294.
37. Heintz v. Jenkins, 514 U.S. 291, 294 (1995); see also Simon, supra note 2, at 410-15 (contrasting both the FTC and Sixth Circuit’s implied litigation exemption approach to the FDCPA with that taken by the Seventh Circuit).
38. Heintz, 514 U.S. at 294; see also Simon, supra note 2, at 416 (“The Supreme Court . . . held that ‘the Act does apply to lawyers engaged in litigation’ . . . activities while collecting debts.”).
40. Id. at 294-95.
41. Id. at 298.
42. Id. at 294.
C. Applicability to Validation Requirements

Although the Supreme Court made it clear in *Heintz v. Jenkins* that attorneys solely engaged in collection activity via litigation were subject to the FDCPA, it left open the precise implications of its holding with regards to various requirements of the Act. One such requirement that was largely left to the interpretation of subsequent courts was the validation notices required by § 1692g. Specifically, after *Heintz*, the question remained as to whether the service of a summons and complaint upon a consumer by an attorney constitutes an "initial communication" under the FDCPA, thus subjecting the attorney to the validation notice requirements found in § 1692g. Courts addressing this particular issue came out on both sides of the question, creating a circuit court split that would only later be resolved by the eventual passage of section 802 of the FSRRA.

The debate surrounding the status of a legal pleading as an initial communication under the FDCPA publicly manifested itself in 2001 when the United States District Court for the Middle District of Florida decided *McKnight v. Benitez*. Despite the existence of prior holdings to the contrary, the *McKnight* court held that the "the term ‘communication’ as used in the Act does not include a ‘legal action’ or pleadings or orders connected therewith.” The court noted that because the documents served upon a debtor when filing a lawsuit fall into one of the aforementioned categories, they cannot constitute an initial communication under § 1692g, and thus do not require validation

---

43. *See id.*
44. *See* Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 917 (7th Cir. 2004); Vega v. McKay, 351 F.3d 1334, 1336 (11th Cir. 2003).
45. Thomas, 392 F.3d at 917.
46. *See id.* at 920; Vega, 351 F.3d at 1337.
47. *See infra* notes 81-83 and accompanying text.
50. McKnight, 176 F. Supp. 2d at 1308.
Shortly thereafter, the United States Court of Appeals for the Eleventh Circuit adopted the approach and reasoning of the McKnight court in Vega v. McKay, establishing that the Eleventh Circuit did not recognize the service of a summons and complaint as requiring validation notices under the FDCPA.

In the year after the Eleventh Circuit's decision in Vega, the United States Court of Appeals for the Seventh Circuit reached a contrary decision in Thomas v. Law Firm of Simpson & Cybak. The court took the position that the service of a summons and complaint did constitute an "initial communication" under the FDCPA, and thus required the § 1692g validation notices. Subsequent to the Thomas decision, the overwhelming majority of courts addressing the status of a summons and complaint under the FDCPA agreed with the Seventh Circuit's rationale and holding, including the Court of Appeals for the Second Circuit. Prior to the enactment of the FSRRA, therefore, the trend among courts was to treat the service of a summons and complaint as an initial communication under § 1692g, thus requiring validation notices to be served in compliance with the provisions of that statutory section.

Before the Supreme Court's decision in Heintz v. Jenkins, the FTC's 1988 Commentary to the FDCPA excluded from the definition of "communication" any "formal legal action," including the "filing of a lawsuit or other petition/pleadings with a court;

51. Id.
52. Vega v. McKay, 351 F.3d 1334, 1337 (11th Cir. 2003).
53. Id.
54. Compare id. (concluding a complaint constitutes an initial communication for purposes of the § 1692g validation requirements), with Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914 (7th Cir. 2004) (concluding a complaint does not constitute an initial communication for purposes of the § 1692g validation requirements).
55. Thomas, 392 F.3d at 920.
57. See Goldman v. Cohen, 445 F.3d 152 (2d Cir. 2006).
58. See, e.g., Thomas, 392 F. 3d at 920.
service of a complaint or other legal papers in connection with a lawsuit, or activities directly related to such service."

After *Heintz v. Jenkins*, however, the FTC released at least two Advisory Opinions suggesting it had withdrawn from its former position in light of the Supreme Court's decision in *Heintz*. The first opinion letter, issued only two years after *Heintz*, simply stated, "[b]ecause of *Heintz v. Jenkins*, all pleadings must be considered 'communications' if they convey information regarding a debt directly or indirectly to any person through any medium." The second opinion letter, issued in 2000, more specifically addressed "communications" within the context of the validation notices requirements. The relevant portion of the letter reads:

If an attorney debt collector has had no prior communications with a consumer before serving a summons or other court document on the consumer, that document would constitute the "initial communication" with the consumer if it conveys information regarding a debt. The attorney would therefore have to include the written notice mandated by Section 809(a) (often referred to as the "validation notice") in the court document itself or send it to the consumer "within five days after the initial communication." 

Thus, based on the trend among courts as well as the position adopted by the FTC, it appeared that attorneys who merely filed collection suits on behalf of their clients would be subject to the

---

59. FTC Staff Commentary, supra note 27.
61. FTC Staff Letter 1, supra note 60.
62. See FTC Staff Letter 2, supra note 60.
63. Id.
validation requirements of § 1692g. However, the passage of section 802 of the FSRAA reversed this trend by adopting the approach advocated by the Eleventh Circuit in Vega v. McKay.

IV. FINANCIAL SERVICES REGULATORY RELIEF ACT OF 2006

At the time the Seventh Circuit decided Thomas v. Simpson & Cybak, the court noted the existence of a proposed congressional bill that could ultimately resolve the circuit court split by specifically excluding formal pleadings from the definition of "communication" for purposes of § 1692g. House Bill 3066, to which the Thomas court was referring, addressed necessary amendments to the FDCPA, including the one previously mentioned. However, the bill was referred to the House Committee on Financial Services and never resurfaced for a vote on the floor, and the Thomas court had no problem dismissing the bill's relevance for purposes of its contrary holding.

Approximately a year and a half after the introduction of House Bill 3066, a bill with a similar provision regarding the status of a legal pleading under the FDCPA was introduced in the House. House Bill 3505 entitled the "Financial Services Regulatory Relief Act of 2005" sought to "provide regulatory relief and improve productivity for insured depository institutions." While the majority of the bill focused on eliminating or amending the requirements facing the lending institutions themselves, section 902(a) of the bill provided that § 1692g was to be amended by adding a new subsection that explained, "[a] communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a)." Presumably, such an amendment

64. See supra note 56; FTC Staff Letter 1, supra note 60; FTC Staff Letter 2, supra note 60.
65. See infra notes 81-83 and accompanying text.
66. Thomas, 392 F.3d 914, 918 n.2 (7th Cir. 2004).
68. See 149 CONG. REC. H8174 (daily ed. Sept. 29, 2006).
69. Thomas, 392 F.3d at 918 n.2.
71. Id.
72. Id. H.R. 3505 § 902(a).
would accomplish the purposes of the bill by lowering compliance costs for litigating collection attorneys who were hired by financial institutions to obtain judgments against debtors who failed to meet their obligations.\textsuperscript{73} The attorneys could then pass these savings on to the depository institutions and ultimately to consumers seeking credit, thus "restor[ing] vibrancy to the national economy."\textsuperscript{74}

The House passed the Financial Services Regulatory Relief Act of 2005 on March 8, 2006,\textsuperscript{75} and sent the bill to the Senate Committee on Banking, Housing, and Urban Affairs for review.\textsuperscript{76} While the Senate Committee was reviewing the proposed legislation, a bill was introduced by Senator Mike Carpo on May 18, 2006, entitled the Financial Services Regulatory Relief Act of 2006, which was based largely upon the provisions of H.R. 3505.\textsuperscript{77} However, unlike its congressional counterpart, the Senate bill did not have a provision that exempted legal pleadings from the definition of an initial communication under § 1692g.\textsuperscript{78} The Senate approved its own version of the Financial Services Regulatory Relief Act on May 25, 2006, and sent it to the House for consideration.\textsuperscript{79}

After receiving the bill from the Senate, the House made several amendments, most notably incorporating the language of section 902(a) of its own bill into the Senate's version.\textsuperscript{80} After this amendment by the House, section 802 of the Financial Services Regulatory Relief Act of 2006 reflected the view the House advocated in its original bill, namely that a complaint does not

\textsuperscript{73} See H.R. REP. No. 109-356, pt. 1, at 45 (2005) (stating the purpose of the Financial Services Regulatory Act of 2005 was to allow banks and lending institutions to devote more resources to lending activities rather than "compliance with outdated and unneeded regulations" and thus "benefit consumers and the economy by lowering costs and improving productivity").


\textsuperscript{75} 152 CONG. REC. H738 (daily ed. Mar. 8, 2006).

\textsuperscript{76} 152 CONG. REC. S1959 (daily ed. Mar. 9, 2006).


\textsuperscript{78} S. 2856, 109th Cong. (2006).

\textsuperscript{79} See 152 CONG. REC. S5272-83 (daily ed. May 25, 2006).

\textsuperscript{80} See 152 CONG. REC. H7584 (daily ed. Sept. 27, 2006) (amending the Senate version by adding section 802(a) to reflect the language found in section 902(a) of the House version).
constitute an initial communication for purposes of the FDCPA validation notice requirements. 81 The House and the Senate both passed the bill in its amended form and President George W. Bush signed the bill into law on October 13, 2006. 82 The FSRRA thus ended the debate regarding the status of a complaint as an initial communication under § 1692g by adopting the approach taken by the Eleventh Circuit in Vega v. McKay. 83 This approach provides clarity and eases compliance for litigating collection attorneys under the FDCPA 84 without significantly impairing consumer protection. 85 For these reasons, the new amendment to the FDCPA moves closer to establishing the appropriate balance between consumer and attorney interests under the Act. 86

V. STRIKING AN APPROPRIATE BALANCE: IMPLICATIONS FOR ATTORNEYS AND CONSUMERS

A. Implications for Collection Attorneys

Had Congress not enacted section 802 of the FSRRA in contravention to the majority of courts and the FTC, litigating collection attorneys would have faced difficult compliance issues under § 1692g. 87 As it is, Congress’ definitive statement that a formal legal pleading does not constitute an initial communication for purposes of the FDCPA validation notice requirements greatly facilitates the practice of law for attorneys litigating collection cases. 88

81. See FSRRA § 802(a).
83. See supra notes 52-53, 81-82 and accompanying text.
84. See infra notes 96-108 and accompanying text.
85. See infra notes 128-34, 151-54 and accompanying text.
86. See Simon, supra note 2, at 394-95 (explaining consumers can adequately monitor the actions of creditors without the need for additional protection under the FDCPA); Gunnarsson, supra note 7, at 64 (discussing the burden imposed on collection attorneys under an alternative regime).
87. McKnight v. Benitez, 176 F. Supp. 2d 1301, 1306 (M.D. Fla. 2001) (stating classifying the service of a summons and complaint as an initial communication would “wreak[] havoc on the practice of law and legal actions to collect debts”).
88. See infra notes 96-108 and accompanying text.
1. Which Attorneys Will be Affected

The obvious implication of section 802 of the FSSRA is that in certain contexts, collection attorneys will not be required to provide the validation notices dictated in § 1692g. Before examining how this amendment to the FDCPA facilitates the practice of collection attorneys, it is necessary to clarify the context in which it does so.

First and foremost, Congress' pronouncement in section 802 that a complaint is not an initial communication does not affect the practices of all attorneys who may qualify as debt collectors under the FDCPA. An attorney who sends letters to a debtor in an attempt to collect an overdue payment is "communicating" with the debtor, and thus must provide the debtor with the validation notices required by § 1692g within five days of his initial letter. Therefore, if a collection attorney "communicates" with the debtor before filing a lawsuit, the FSRRA will not affect the manner in which he conducts his practice because he is already required to comply with the validation requirements of § 1692g.

However, the amendment to § 1692g will benefit those collection attorneys whose first contact with the debtor is filing a lawsuit against him or her. Despite contrary interpretations by the majority of courts and the FTC, Congress has exempted collection attorneys in this context from providing the validation notices required by § 1692g. Because such an approach helps these "litigating" collection attorneys avoid difficult compliance

---

89. See FSRRA § 802(a).
90. See id.
92. See § 1692g.
93. See Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 920 (7th Cir. 2004) (requiring an attorney debt collector whose initial communication with a debtor is the service of a summons and complaint upon him or her to also serve the section 809 validation notices).
94. See FSRRA § 802(a).
issues under the FDCPA, the § 1692g amendment greatly assists the process of reducing debts to judgments.  

2. How Attorneys Will be Affected

Had Congress explicitly or implicitly adopted the contrary interpretation advocated by the majority of courts and the FTC, it would have likely forced litigating collection attorneys to significantly alter the way they conduct their practices in order to satisfy the validation requirements. Under the FDCPA, the content of the communication containing the validation notices must not “contradict or overshadow” the Act’s notification requirements so as to make the “least sophisticated consumer uncertain as to his or her rights under the Act.” This becomes exceedingly difficult for attorneys to avoid where different time constraints exist for disputing the debt under the FDCPA and for filing an answer to the complaint under the Rules of Civil Procedure.  

Section 1692g provides the debtor with thirty days to dispute the validity of the debt. However, the Federal Rules of Civil Procedure, as well as the corresponding rules of many states, only allow a defendant twenty days to serve an answer to a complaint. When these different time constraints exist, courts have been willing to find that the rights of the debtor under the FDCPA are “overshadowed” by the procedural requirements of the summons and complaint when the validation notices are attached to such, and thus are ineffective to comply with § 1692g.  

Although differing time constraints are the most common scenario in which this concept of “contradiction or
overshadowing” occurs, the content of a complaint may still arguably “contradict or overshadow” the validation notices even if the time constraints for answering the complaint and disputing the debt are the same. In this circumstance, although there are no “contradictory” statements as to filing deadlines, a court may nevertheless find the mere fact that the validation notices were served with a lawsuit “obscures the information required by the Act,” and therefore does not provide the requisite notification to the debtor proscribed by § 1692g. Thus, even where there is no contradictory information in the document, a collection attorney who provides the validation notices with the complaint still runs a significant risk of violating the FDCPA and subjecting himself to liability under the Act.

Those in opposition to the enactment of section 802 of the FSRRA suggest this overshadowing problem can be cured simply by using “safe harbor” language. However, it is possible that a court will nonetheless find the standardized language confusing to the “least sophisticated consumer,” and therefore ineffective to fulfill the validation requirements of § 1692g. Further, even if this safe harbor language provides sufficient notice, “some states prohibit the inclusion of other documents with . . . [a]
complaint.” Thus, even if the complaint containing the validation notices adequately informs the debtor of his or her rights under § 1692g, a court may throw the case out because it fails to comply with its local rules. All of this serves to demonstrate that when a complaint constitutes an initial communication under § 1692g, compliance with the validation requirements is not as simple as just attaching the § 1692g notices to the body of the complaint.

Because of the significant risk associated with filing the validation notices with a complaint, the best option for collection attorneys under a regime where a complaint constitutes an initial communication would be to file the validation notices either before the complaint is filed or within five days thereafter. However, both of these options entail expensive and time-consuming modifications to the way that collection attorneys conduct their practice. In the case of waiting to provide the validation notices until after the complaint has been served, the attorney must set up a system of safeguards and checks that ensure he is providing the validation notices within the five-day time constraint. In addition, he must take the time to type up a separate document and pay to have it served upon the debtor. If the attorney opts to serve the validation notices before filing his complaint, he must necessarily delay the litigation process until the thirty-day period to dispute the debt has expired, since any request by the debtor to verify the debt requires the attorney to cease any further collection efforts, including pursuing the adjudication of a lawsuit. Further, providing this kind of advance notice to the

108. Thomas, 392 F.3d at 919.
109. See id.
110. See McKnight v. Benitez, 176 F. Supp. 2d 1301, 1306 (noting that courts have found validation notices to be ineffective both when attached to the complaint or made part of the summons).
111. See id.
112. See id.
113. Id.
114. See id.
debtor allows him to shift assets to avoid any future collection efforts by the attorney and the creditor he represents.\textsuperscript{116}

It is clear, therefore, that treating a complaint as an initial communication under § 1692g imposes a significant burden on litigating collection attorneys who are trying to comply with the validation requirement.\textsuperscript{117} By refusing to treat a complaint as an initial communication requiring validation notices, Congress has saved attorneys whose first contact with the debtor is the initiation of a lawsuit the headache of trying to figure out how to best comply with the requirements of § 1692g.\textsuperscript{118} Accordingly, section 802 of the FSRRA relieves this excess burden on these collection attorneys and makes the process of reducing overdue debts to judgments relatively straightforward and simple.\textsuperscript{119}

B. Implications for Consumers

Congress originally sought to help curb unfair and abusive debt collection practices by requiring debt collectors to serve validation notices with their initial communication or within five days thereafter.\textsuperscript{120} Such notices advise the debtor of his rights to halt any further collection activity by the debt collector until the debt collector has complied with the consumer's request to verify the debt.\textsuperscript{121} One of the main concerns for the \textit{Thomas} court was that if a complaint were not treated as an initial communication, it would create a significant loophole to the validation requirement of § 1692g that would eventually erode the requirement altogether.\textsuperscript{122} Indeed, many consumer advocate groups are completely opposed to the new amendment, citing it as a deprivation of one of the essential rights guaranteed under the FDCPA, which may result in consumers having "default judgments entered against them for debts that they do not owe."\textsuperscript{123}

\begin{flushleft}
\textsuperscript{116} See Gunnarsson, \textit{supra} note 7, at 64.
\textsuperscript{117} See id.
\textsuperscript{119} See id.
\textsuperscript{120} See supra notes 14-15 and accompanying text.
\textsuperscript{121} See 15 U.S.C § 1692g (2000).
\textsuperscript{122} Thomas v. Law Firm of Simpson & Cybak, 392 F.3d 914, 919 (7th Cir. 2004).
\textsuperscript{123} The Consumer Impact of Regulatory Relief Proposals Affecting Banks,
Because of the sufficiently narrow context in which the amendment's validation exemption applies, however, it appears that those in opposition to the new amendment are overstating its impact on consumer protection under the FDCPA.124

1. Many Consumers Will Continue to Receive Validation Notices

The scope of the amendment providing an exception to the validation notice requirements to the FDCPA is very limited.125 Therefore, although section 802 of the FSRRA will prevent debtors from receiving the § 1692g validation notices in some circumstances,126 the exception for litigating attorneys does not appear to render the validation requirement "meaningless," as its opponents would argue.127 Because the amendment only exempts formal legal pleadings from the definition of initial communication under § 1692g, whenever a consumer receives initial correspondence from the debt collector other than a complaint, he will be entitled to receive the § 1692g validation notices with such communication or within five days thereafter.128 It is therefore only in the limited circumstance in which a debt collector's first contact with the debtor is the initiation of a lawsuit where the consumer will not receive the benefit of the validation notices.129

---

124. See infra notes 128-34, 151-54 and accompanying text.
125. See supra notes 128-29 and accompanying text.
126. See supra notes 130-34 and accompanying text.
127. Thomas, 392 F.3d at 918.
129. See 15 U.S.C. § 1692g; FSRRA § 802(a).
Although the new amendment does create an exception to the validation requirement of § 1692g for litigating collection attorneys, the limited nature of the exception ensures that many consumers will continue to receive validation notices. Because many creditors outsource the collection of their overdue accounts to third-party debt collectors, the initial contact between the debt collector and the consumer in this context is not likely to be a lawsuit. Before undertaking the time and expense of initiating a lawsuit, the third-party debt collector will most likely notify the debtor of the existence of the debt, and inquire as to how he or she intends to repay it. Therefore, there will almost certainly be other communications in this context before the initiation of a lawsuit, and debtors will thus continue to be entitled to receive the § 1692g validation notice requirements.

The only situation in which a debtor will not receive the § 1692g validation notices under the new amendment is where the creditor attempts to collect his own debts rather than outsourcing this activity to a third-party debt collector. Certainly, some creditors conduct the collection of all their accounts in-house and only turn matters over to an attorney when the debt needs to be reduced to a judgment. Under the FDCPA, any contact with the consumer by the creditor himself does not constitute a

130. See id.
132. See Jim Heath, Using a Debt Collection Agency, in HOW TO COLLECT BUSINESS DEBTS (1990), available at http://www.viacorp.com/DebtBook.html#agency (Debt collectors “[w]ill usually negotiate hard with the debtor to try to get a settlement before they start legal action.”). Presumably, a creditor could simply assign the debt to an attorney who could file a lawsuit without undertaking any prior collection activity. However, not only is this not practical from the standpoint of the time and expense involved, it is also not a viable option for creditors since consumers will view such a tactic as reflective of character and practices of the creditor (as opposed to the attorney filing suit). Consumers will refuse to enter into transactions with such a creditor, and the creditor will therefore be forced to cease the operation of its business. See infra Part V.B(2).
133. See Heath, supra note 131.
“communication” for purposes of the § 1692g validation notices.\(^{137}\) When a creditor is attempting to collect his own debts, therefore, the service of a complaint by an attorney is likely to be the initial communication to the debtor for purposes of § 1692g.\(^{138}\) Because the FSRRA expressly states the service of complaint does not constitute an initial communication under § 1692g, there likely will not be an “initial communication” triggering the validation notices in this context.\(^ {139}\) Thus, only in the limited circumstance where a creditor hires a collection attorney solely for litigating a collection case against a debtor after the creditor has unsuccessfully attempted to collect the debt himself will the consumer be deprived of the § 1692g validation notices.\(^ {140}\)

2. The Free Market as a Consumer Protection

Although many consumers will continue to receive validation notices even with the new amendment to the FDCPA,\(^ {141}\) as previously discussed, some will no longer receive these notices.\(^ {142}\) However, the limited context in which consumers will not receive validation notices under the provisions of the FSRRA ensures that they will continue to enjoy sufficient protection against the unfair collection practices of debt collectors in accordance with the terms and purpose of the FDCPA.\(^ {143}\)

In contrast to the uncertainty surrounding the extent to which attorneys should fall within the purview of the FDCPA, creditors themselves have never been subject to the Act’s strictures.\(^ {144}\) In its original form, the FDCPA distinguished between creditors and third-party debt collectors, subjecting only the latter to its requirements, and this distinction has been

---

138. See Simon, supra note 2, at 395.
139. See FSRRA § 802(a).
140. See id.
141. See supra notes 128-134 and accompanying text.
142. See supra notes 135-140 and accompanying text.
144. See id. § 1692a(6)(A); Simon, supra note 2, at 394-95.
CONSUMER FOCUS

reaffirmed throughout the history of the Act. The rationale behind such a distinction lies in the accountability of creditors to those to whom they lend money. As Congress indicated by exempting creditors from the requirements of the FDCPA, consumers need no more protection from creditors seeking to collect their own accounts than that afforded by the free market system. Because consumers have a choice from which creditors they will choose to borrow, creditors are forced to avoid unfair and improper practices when attempting to collect their own debts. Unlike third-party debt collectors who generally “work on commission and have no concern for a debtor’s opinion of them,” it is extremely important for creditors to “maintain goodwill” among the consumers with whom they are dealing. “If creditors harass or otherwise use unscrupulous collection tactics, their future sales will undoubtedly suffer.” By holding creditors accountable for their collection practices in this way, the free market system ensures adequate consumer protection where collection efforts are undertaken by a creditor rather than a third party acting on the creditor’s behalf.

Under the terms of the new amendment, the only circumstance in which collection attorneys will no longer be required to serve the § 1692g validation notices is where their initial communication with the debtor is the service of a lawsuit. Accordingly, the validation exemption created by the new amendment is confined to situations in which the bulk of the collection activity is conducted by the creditor as opposed to a

147. See Simon, supra note 2, at 395 (noting that consumers do not need any additional protection from creditors seeking to collect their own debts because consumers can “police” creditors themselves in this context).
149. Simon, supra note 2, at 395.
150. Id.
151. See id.
third party acting on its behalf. Because the free market system effectively inhibits unfair collection practices in this context, validation notices are not necessary to ensure adequate consumer protection. Therefore, the new amendment's disposal of validation notices in this limited circumstance does not entail decreased consumer protection under the FDCPA.

Opponents of the new amendment contend it will allow litigating collection attorneys to obtain default judgments against debtors for debts they do not even owe since debtors will no longer have an opportunity to dispute the debt outside of a courtroom. However, such a conclusion neglects the incentives the free market system places on creditors to avoid this very type of behavior. As indicated previously, consumers are capable of "policing" the collection activities of creditors themselves through the mechanism of the free market. The ability of consumers to freely choose the creditor from whom they want to borrow money forces creditors to treat consumers fairly in their lending as well as collection activities if they want to stay in business. Accordingly, the abuse suggested by the amendment's opponents is curtailed by the fact that the creditor in this context has a significant interest in ensuring the validity of the debt prior to hiring an attorney to initiate a lawsuit. Thus, the incentives provided by the free market override any temptation creditors may have to take unfair advantage of consumers with the validation exception created by the new amendment.

153. See supra notes 135-140 and accompanying text.
154. See Simon, supra note 2, at 395 (noting that the application of the FDCPA is unnecessary where the creditor is attempting to collects its own debts because the free market ensures adequate consumer protection in this context).
155. See id.
156. Hearing on H.R. 3505, supra note 121.
157. See Simon, supra note 2, at 395.
158. Id.
159. See id.
160. See id. (indicating that if creditors want to stay in business they must avoid improper collection practices).
161. See id.
VI. CONCLUSION

Throughout the history of the FDCPA, Congress and courts have struggled with the Act’s applicability to attorneys.\textsuperscript{162} In less than twenty years, debt collection attorneys went from being completely exempt from the requirements of the FDCPA to being subject to each of the Act’s strictures regardless of how minimal or limited their involvement was in the debt collection process.\textsuperscript{163} This evolution imposed significant compliance burdens on collection attorneys whose sole involvement in the process was litigating the debt, especially in the context of the validation notices required by § 1692g.\textsuperscript{164}

As the latest development in the ongoing debate, section 802 of the newly enacted FSRRA marks a significant retreat from the Supreme Court’s sweeping application of the FDCPA to all attorneys in \textit{Heintz v. Jenkins}.\textsuperscript{165} By creating an exemption to the § 1692g validation requirement for litigating collection attorneys, the new amendment eliminates the unnecessary burden imposed upon collection attorneys within this context\textsuperscript{166} without significantly altering the protection afforded consumers under the FDCPA.\textsuperscript{167}

Despite the apparent utility of such an amendment in balancing the interests of attorneys and consumers under the FDCPA, it is unlikely consumer rights advocates or commercial legal organizations will allow this latest development to be the last.\textsuperscript{168} Indeed, the applicability of the FDCPA to attorneys is likely to continue to be characterized by the sort of ebb and flow that has marked the first thirty years of the Act’s existence.\textsuperscript{169}

\textbf{BRIAN KOONTZ}

\begin{footnotes}
\footnotetext[162]{See supra notes 19-25, 30-37, 45-58 and accompanying text.}
\footnotetext[163]{See supra notes 19-20, 54-58 and accompanying text.}
\footnotetext[164]{See supra notes 96-108 and accompanying text.}
\footnotetext[165]{See supra notes 37-42, 81-83 and accompanying text.}
\footnotetext[166]{See supra notes 96-108 and accompanying text.}
\footnotetext[167]{See supra notes 128-34, 151-54 and accompanying text.}
\footnotetext[168]{See, e.g., Hearing on H.R. 3505, supra note 121 (indicating the dissatisfaction of consumer groups with what they perceive to be the effects of the new amendment).}
\footnotetext[169]{See supra notes 19-25, 30-37, 45-58 and accompanying text.}
\end{footnotes}