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# Meaningful Involvement in Collections: Should Ethics or the FDCPA Govern?

Jeffrey S. Peters\*

## I. Introduction

Under federal law, the Fair Debt Collection Practices Act (“FDCPA”) protects consumer-debtors from abusive debt collection practices.<sup>1</sup> Many FDCPA lawsuits stem from debtors’ confusion with the wording of a debt collection letter sent on law firm letterhead.<sup>2</sup> While the FDCPA makes no mention of the amount of involvement necessary for an attorney to refrain from misleading a debtor, the judicially created doctrine of “meaningful involvement”<sup>3</sup> has developed to essentially provide debtors with a cause of action against attorneys.

Nevertheless, violations of this doctrine border on violations of the American Bar Association’s (“ABA”) Model Rules of Professional Conduct (“MRPC”).<sup>4</sup> The MRPC provides the professional standards by which lawyers are to abide “for purposes of professional discipline.”<sup>5</sup> Each state, with the exception of California, has adopted ethical rules in the format of the MRPC to govern attorney conduct.<sup>6</sup> But, “[t]he Rules of Professional Conduct are [not] intended . . . to create civil liability.”<sup>7</sup>

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\* J.D. Candidate, Pace University School of Law (2014); B.S., The Pennsylvania State University (2010). I would like to thank my family and friends for their support throughout law school. I would like to give special thanks to my brother, Michael J. Peters, Esq., for sparking my interest in this topic. Lastly, I would like to thank my colleagues on PACE LAW REVIEW for their work in the editing process of this Note.

1. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (2012).

2. A debt collection letter is known as a “dunning letter.” For a discussion of case law see *infra* Part IV.

3. See *infra* Part IV.

4. MODEL RULES OF PROF’L CONDUCT (2013).

5. MODEL RULES OF PROF’L CONDUCT, Scope ¶ 14 (2013).

6. *State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A. CTR. FOR PROF’L RESP., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Aug. 30, 2014).

7. *Eddis v. Midland Funding, L.L.C.*, No. 11-3923 (JBS/AMD), 2012 WL 664812, at \*10 (D.N.J. Feb. 28, 2012) (quoting *Cohen v. Wolpoff & Abramson, L.L.P.*, No. 08-

However, in light of a New Jersey joint-committee ethics opinion (“Ethics Opinion”),<sup>8</sup> which determined that sending a debt collection letter on law firm letterhead is “the practice of law” and a violation of New Jersey’s Rules of Professional Conduct absent attorney involvement,<sup>9</sup> violations of state ethical codes are, in essence, the basis for civil liability against attorney conduct under the FDCPA. Which brings us to the question: Should ethics or the FDCPA govern “meaningful involvement” in collections? In order to explore the answer to this question, a discussion of FDCPA case law and the Ethics Opinion’s impact on attorneys is necessary because violating state ethical codes are “a matter of concern to the states”<sup>10</sup> and purportedly outside the scope of the FDCPA.<sup>11</sup>

This Note will explain and analyze the FDCPA and its case law. It will also discuss the interplay between the FDCPA case law and its ethical overtones. To understand the basis of this issue, Part II of this Note will begin by briefly developing the history and background of the FDCPA<sup>12</sup> and discuss specific sections of the law designed to protect debtors from abusive debt collection practices.<sup>13</sup> Notably, these sections relate to the prevention of improper practices for misleading debtors,<sup>14</sup> and are the focus of the lawsuits that this Note will discuss. Accordingly, Part III will briefly discuss what a dunning letter is and the similarities of the two standards of review used by the federal courts of appeals to determine whether a dunning letter is misleading.<sup>15</sup> Part IV of this Note will discuss the judicially created doctrine of “meaningful

1084 (SRC), 2008 WL 4513569, at \*8 (D.N.J. Oct. 2, 2008) (citing *Baxt v. Liloia*, 714 A.2d 271, 277 (N.J. 1998)); see also *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 123 (N.M. 1988); *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 404 (Tenn. 1991) (quoting *Terry Cove North, Inc. v. Marr & Friedlander, P.C.*, 521 So. 2d 22, 23 (Ala. 1988) (“The Code of Professional Responsibility is designed not to create a private cause of action for infractions of disciplinary rules, but to establish a remedy solely disciplinary in nature.”)).

8. Comm. on the Unauthorized Practice of Law Opinion 48; Advisory Comm. on Prof’l Ethics Opinion 725, 208 N.J. L.J. 58, 58 (2012) [hereinafter *Ethics Opinion*].

9. See Don Maurice, *NJ Ethics Opinion Deems Sending Collection Letters as the Practice of Law*, THE CONSUMER FIN. SERVICES BLOG (June 4, 2012), <http://consumerfsblog.com/2012/06/nj-ethics-opinion-deems-sending-collection-letters-as-the-practice-of-law/>.

10. *Cohen*, 2008 WL 4513569, at \*7.

11. *Id.* at 7-8 (discussing the purpose of the FDCPA).

12. See *infra* Part II.A.

13. See 15 U.S.C. §§ 1692e, 1692g (2012); see also *infra* Parts II.C.1-2.

14. §§ 1692e, 1692g.

15. See *infra* Part III.

involvement” and how the federal courts have allowed attorneys to include an appropriate disclosure of the level of involvement.<sup>16</sup> Part V of this Note will discuss the Ethics Opinion in detail and its resulting impact on disclaiming attorney involvement.<sup>17</sup> Specifically, this Note will address the direct conflict between the Ethics Opinion and federal case law, which allows attorneys to disclaim their involvement when sending an initial communication under the FDCPA.<sup>18</sup> Finally, Part VI will propose a solution to resolve the conflict between the varying case law and the ethical issues presented.<sup>19</sup>

The courts must correct the lack of uniformity in applying the FDCPA in order for consumer-debtors and debt collection attorneys to better understand how the FDCPA applies. Additionally, because the statutory language of the FDCPA does not include the words “meaningful involvement,” it is important for the federal courts to have guidance in applying this doctrine uniformly. A congressional amendment to include the words is rather unlikely, and would not solve the issue. Even if the words were added to the statutory language, this would seemingly impose ethical-like violations—a matter for the states to handle—into federal legislation. The FDCPA should not be the place for ethical issues, as each state has the power to discipline their own attorneys by enforcing violations of the unauthorized practice of law, just as New Jersey has proposed in its Ethics Opinion. Furthermore, this would eliminate the use of a disclaimer in dunning letters and increase uniformity across the country.

However, if these ethically focused “meaningful involvement” lawsuits under the FDCPA continue to go forward, the presumption in each case should be that the attorney has maintained the requisite standard of ethical behavior. This presumption should be a high one, having the plaintiff prove by clear and convincing evidence that the attorney violated ethical responsibilities, and thus violated the FDCPA. This may limit plaintiff lawsuits to those the FDCPA was implemented to protect: where law firm letterhead was lent to a debt collection agency without any attorney involvement. To begin exploring this issue, it is important to review the FDCPA.

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16. See *infra* Part IV.

17. See *infra* Part V.

18. See, e.g., *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005).

19. See *infra* Part VI.

## II. The Fair Debt Collection Practices Act

### A. History and Background

After finding that there was “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,”<sup>20</sup> Congress enacted the FDCPA in 1977<sup>21</sup> to protect debtors in the consumer-debt context.<sup>22</sup> The FDCPA protects any “communication” that a debtor receives from a debt collector.<sup>23</sup> The term “debt collector” has been construed broadly and is said to be separated into two parts<sup>24</sup>: 1) “any person who uses any instrumentality of interstate commerce or the mails in any business”<sup>25</sup> and 2) “any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”<sup>26</sup> Under the original language of the FDCPA, attorneys were exempt from the definition of a debt collector.<sup>27</sup> Not only were attorneys participating in some of the same abusive debt collection practices,<sup>28</sup> they were “boasting that they had an advantage over other debt collectors because they did not have to comply with the FDCPA.”<sup>29</sup> The provision which originally exempted

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20. 15 U.S.C. § 1692(a) (2012).

21. Fair Debt Collection Practices Act, Pub. L. No. 95-109, §§ 802-818, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692p).

22. 15 U.S.C. § 1692a(5) (“the subject of the transaction [is] primarily for personal, family, or household purposes”).

23. *Id.* § 1692a(2) (stating that a “communication” is “the conveying of information regarding a debt directly or indirectly to any person through any medium”).

24. See Christian Stueben, Note, *Judge or Jury? Determining Deception or Misrepresentation Under the Fair Debt Collection Practices Act*, 78 FORDHAM L. REV. 3107, 3115 & n.52 (2010) (citing § 1692(a)(6)); Scott J. Burnham, *What Attorneys Should Know About the Fair Debt Collection Practices Act, or, the 2 Do’s and the 200 Don’ts of Debt Collection*, 59 MONT. L. REV. 179, 185-86 (1998)).

25. 15 U.S.C. § 1692a(6).

26. *Id.*

27. See Eric M. Berman, *Why Changes Must be Made to the Standards of Review Used to Determine Meaningful Attorney Involvement Under the Fair Debt Collection Practices Act*, 2 DEPAUL BUS. & COM. L.J. 1, 2 (2003) (citing 15 U.S.C. § 1692a(6)(F) (1977) (excluding any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client)).

28. See H.R. REP. NO. 99-405, at 4-5 (1985), reprinted in 1986 U.S.C.C.A.N. 1752, 1754-56.

29. Burnham, *supra* note 24, at 185.

attorneys was amended in 1986.<sup>30</sup> However, one question remained: whether the 1986 amendment addressed attorneys who were regularly trying to collect debts through litigation without being in the debt collection business.<sup>31</sup> The 1995 Supreme Court decision in *Heintz v. Jenkins*,<sup>32</sup> resolved this issue when a unanimous Court held that the 1986 amendment extended to protect attorneys who “regularly” perform debt collection practices.<sup>33</sup> In light of this decision and the Seventh Circuit’s subsequent decision in *Jenkins v. Heintz*,<sup>34</sup> the issue of the ethical responsibility of an attorney in the debt collection practice remained open and leads to a discussion of the purpose of the FDCPA.

B. *The Purpose of the FDCPA*

Congress determined there are “means other than misrepresentation or other abusive debt collection practices”<sup>35</sup> available to debt collectors. Thus, the established purpose of the FDCPA is “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt practices are not competitively disadvantaged, and to promote *consistent State action* to protect consumers against debt collection abuses.”<sup>36</sup> However, the “FDCPA is not intended to enable consumers to avoid paying their legitimate debts.”<sup>37</sup> It is intended to allow debtors to repay those debts without being subject to misrepresentations, fraud, and other abusive practices by debt collectors.<sup>38</sup> Consequently, an examination of several

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30. See An Act to Amend the Fair Debt Collection Practices Act, Pub. L. No. 99-361, § 803(6), 100 Stat. 768 (1986) (codified as amended at 15 U.S.C. § 1692(a)(6) (2012)).

31. See Burnham, *supra* note 24, at 185.

32. 514 U.S. 291 (1995).

33. *Id.* at 299.

34. 124 F.3d 824, 826 (7th Cir. 1997) (holding that defendants’ attorneys were protected from liability because there was no obligation to investigate the validity of the debt prior to filing a lawsuit).

35. 15 U.S.C. § 1692(c).

36. *Id.* § 1692(e) (emphasis added).

37. Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711, 720 (2006) (citing Lynn A.S. Araki, Comment, *Rx for Abusive Debt Collection Practices: Amend the FDCPA*, 17 U. HAW. L. REV. 69, 77 (1995)).

38. See *id.* (citing David A. Schulman, *The Effectiveness of Federal Fair Debt Collection Practices Act (FDCPA)*, 2 BANK. DEV. J. 171, 172 (1985) (quoting 123 CONG. REC. 10,241 (1977) (“[E]very individual, whether or not he owes a debt, has the right to be treated in a reasonable and civil manner.”))).

statutory provisions of the FDCPA is appropriate to show how the objectives of the law are met.

### C. *Key Statutory Provisions*

#### 1. Section 1692e – False or Misleading Representations

Section 1692e of the FDCPA provides sixteen examples of conduct which are each considered a violation of the FDCPA based on false or misleading representations by debt collectors in communications with debtors.<sup>39</sup> For purposes of this Note, the two main subsections of § 1692e that will be discussed are subsection (3) and subsection (10). Section 1692e(3) prohibits “the false representation or implication that any individual is an attorney or that any communication is from an attorney.”<sup>40</sup> Section 1692e(10) prohibits “the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.”<sup>41</sup> Violations of these provisions generally occur when several interpretations of the debt collection letter sent to a debtor can be discerned, causing him or her to be misled.<sup>42</sup> Another violation of § 1692e occurs when the judicially created doctrine of “meaningful involvement” is violated.<sup>43</sup> Notably absent from § 1692e are the words “meaningful involvement.”<sup>44</sup> A more in-depth discussion of this doctrine will be featured in Part IV.<sup>45</sup>

#### 2. Section 1692g – Validation of Debts

Section 1692g provides the requirements that the initial communication, usually a debt collection letter, must contain in order to comply with the FDCPA.<sup>46</sup> Section 1692g is another frequently litigated section of the FDCPA.<sup>47</sup> Under § 1692g(a), “within five days after the

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39. 15 U.S.C. § 1692e.

40. *Id.* § 1692e(3).

41. *Id.* § 1692e(10).

42. *See* Stueben, *supra* note 24, at 3115.

43. *See infra* Part IV for case law examples of “meaningful involvement” violations.

44. 15 U.S.C. § 1692e.

45. *See infra* Part IV.

46. 15 U.S.C. § 1692g(a).

47. *See* Stueben, *supra* note 24, at 3116 & n.65 (citing Jerry D. Brown, *Painting a*

initial communication” a debtor must receive a written notice from the debt collector that contains the following:

(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.<sup>48</sup>

Section 1692g(b) includes a required moratorium on debt collection practices if the debtor disputes the debt claimed in the communication until the debt is verified.<sup>49</sup> Verification of the debt merely requires that the debtor confirm in writing that the amount demanded is what the creditor claims it is.<sup>50</sup> There is no requirement that the debtor forward copies of bills or evidence of the debt to the debt collector at that time.<sup>51</sup> Nonetheless, failure to respond to dispute the debt is not an admission by the debtor that the debt is valid.<sup>52</sup> There is clearly a nexus in the statute between § 1692e and § 1692g because of the necessity of notice demonstrated in § 1692g and the requirement that the notice cannot be

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*Mustache on the Mona Lisa—How Tinkering with the Validation Notice Will Get You Every Time*, 53 CONSUMER FIN. L.Q. REP. 42, 42 (1999) (estimating that ninety percent of all FDCPA claims come under § 1692g); see also Laurie A. Lucas & Alvin C. Harrell, 2000 Update in the Federal Fair Debt Collection Practices Act, 55 BUS. LAW. 1453, 1454 (2002) (noting that § 1692g is one of the most litigated sections of the FDCPA).

48. 15 U.S.C. § 1692g(a)(1)-(5).

49. *Id.* § 1692g(b).

50. Berman, *supra* note 27, at 23 (citing *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1998)).

51. *Id.*

52. 15 U.S.C. § 1692g(c).



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false or misleading in § 1692e.

### III. Dunning Letters and the Standard of Review for Violations § 1692e

#### A. *What is a Dunning Letter?*

The initial letter that a debt collector sends to a debtor is known as a dunning letter.<sup>53</sup> As stated in Part II, several of the requirements for dunning letters are found in § 1692g.<sup>54</sup> Besides satisfying the validation requirements of § 1692g, each dunning letter must include the § 1692e(11) requirement informing the debtor that, “the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.”<sup>55</sup> This requirement is known as the dunning letter’s “Miranda Warning.”<sup>56</sup> The warning is meant to inform the debtor of the context of the dunning letter and who it is from.<sup>57</sup> Along with those requirements, violations of § 1692e have been reviewed under the standards that the least sophisticated consumer or the unsophisticated consumer is not deceived by the contents of the dunning letter. Although these standards differ in name,<sup>58</sup> as discussed below, they are relatively the same.<sup>59</sup>

#### B. *The Standards of Review*

##### 1. The Least Sophisticated Consumer

Of the two standards of review for determining whether a dunning letter violates § 1692e, the “least sophisticated consumer” standard is the “most widely accepted test.”<sup>60</sup> Including the Second Circuit, the least

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53. See *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1189 n.7 (11th Cir. 2010) (“Since ‘dunning’ means ‘to make persistent demands upon [another] for payment,’ a ‘dunning letter’ may be considered as simply another name for a letter of collection.” (quoting *Dun Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/dun> (last visited Aug. 30, 2014))).

54. See *supra* Part II.C.2.

55. 15 U.S.C. § 1692e(11).

56. See Stueben, *supra* note 24, at 3116 (citing John P. Holahan, *Emerging Issues in Debt Collection Law*, 62 CONSUMER FIN. L.Q. REP. 267, 268 (2008)).

57. *Id.*

58. See *infra* Parts III.B.1-2.

59. See *infra* Part III.B.3.

60. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

sophisticated consumer also has been adopted by the Third,<sup>61</sup> Fourth,<sup>62</sup> Sixth,<sup>63</sup> Ninth,<sup>64</sup> and Eleventh<sup>65</sup> Circuits. The least sophisticated consumer standard is an objective test that “protects all consumers, the gullible as well as the shrewd.”<sup>66</sup> This standard was adopted because of “the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes.”<sup>67</sup> The court in *Clomon v. Jackson*<sup>68</sup> discussed three reasons that the least sophisticated consumer standard protects consumers.<sup>69</sup> “First, courts have held that collection notices violate the FDCPA if the notices contain language that ‘overshadows’ or ‘contradicts’ other language that informs consumers of their rights.”<sup>70</sup> Second, “courts have found collection notices misleading where they employ formats or typefaces which tend to obscure important information that appears in the notice.”<sup>71</sup> Third and finally, “courts have held that collection notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate.”<sup>72</sup> Although this standard adopts a very low burden regarding the debtor’s ability to understand a dunning letter, the “concept of reasonableness” is still preserved.<sup>73</sup> While the *Clomon* court noted that there is a variety of interpretations of the least sophisticated consumer standard,<sup>74</sup> the standard “effectively serves its dual purpose: it (1) ensures the protection of all consumers, even the naïve and the trusting, against deceptive debt collection practices, and (2) protects debt collectors against liability for bizarre or idiosyncratic interpretations of

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61. *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991).

62. *United States v. Nat’l Fin. Servs., Inc.*, 98 F.3d 131, 135-36 (4th Cir. 1996).

63. *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992).

64. *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982).

65. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174-75 (11th Cir. 1985).

66. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

67. *Id.* at 1319.

68. *Id.*

69. *Id.*

70. *Id.* (citing *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991)).

71. *Id.* (citing *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 778 (9th Cir. 1982)).

72. *Id.* (citing *Dutton v. Wolhar*, 809 F. Supp. 1130, 1141 (D. Del. 1992)).

73. *Id.* (citing *Rosa v. Gaynor*, 784 F. Supp. 1, 3 (D. Conn. 1989) (explaining that the FDCPA “reach[es] a reasonable interpretation of a [collection] notice by even the least sophisticated.”)).

74. *Id.* One example of the variety of interpretations is that, “even the ‘least sophisticated consumer’ can be presumed to possess a rudimentary amount of information about the real world and a willingness to read a collection notice with some care.” *Id.*

collection notices.”<sup>75</sup>

## 2. The Unsophisticated Consumer

The standard of review that has been adopted by the Seventh<sup>76</sup> and Eighth<sup>77</sup> Circuits for determining whether a dunning letter violates § 1692e, is the “unsophisticated consumer.”<sup>78</sup> While the court in *Gammon v. GC Services*<sup>79</sup> agreed with the analysis provided by the Second Circuit in *Clomon*<sup>80</sup> in adopting the least sophisticated consumer standard,<sup>81</sup> the *Gammon* court noted that a different standard would “relieve the incongruity between what the standard would entail if read literally, and the way courts have interpreted the standard.”<sup>82</sup> The *Gammon* court determined it was “virtually impossible to analyze a debt collection letter based on the reasonable interpretations of the least sophisticated consumer.”<sup>83</sup> Moreover, the *Gammon* court stated that, “the least sophisticated consumer is not merely ‘below average,’ he is the very last rung on the sophistication ladder.”<sup>84</sup> In continuing its dismantling of the standard, the *Gammon* court further stated that, “[e]ven assuming that he would be willing to do so, such a consumer would likely not be able to read a collection notice with care (or at all), let alone interpret it in a reasonable fashion.”<sup>85</sup> Thus, the *Gammon* court decided that the correct term was “unsophisticated” because “the hypothetical consumer . . . who is uninformed, naïve, or trusting” has an “objective element of reasonableness” to him.<sup>86</sup> This reasonableness requirement protects debt collectors from “unrealistic or peculiar interpretations of collection letters.”<sup>87</sup>

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75. *Id.* at 1319-20.

76. *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994).

77. *Duffy v. Landberg*, 215 F.3d 871, 873 (8th Cir. 2000).

78. *See Gammon*, 27 F.3d at 1257.

79. *Id.*

80. *Clomon*, 988 F.2d at 1318-20.

81. *See Gammon*, 27 F.2d at 1257.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

### 3. What is the Difference and Does it Matter?

Is there really a difference between the least sophisticated consumer and the unsophisticated consumer? In his dissenting opinion in *Gonzalez v. Kay*,<sup>88</sup> a case where the majority used the least sophisticated consumer standard to determine whether a dunning letter violated § 1692e,<sup>89</sup> Circuit Judge E. Grady Jolly noted that the term unsophisticated does not mean “illiterate or ignorant or indifferent or careless.”<sup>90</sup> Furthermore, Circuit Judge Jolly states that “a serious policy consideration is implicated here: the uniform application of a federal statute.”<sup>91</sup> In a similar case, *Leshner v. Law Offices of Mitchell N. Kay, PC*,<sup>92</sup> Circuit Judge Kent A. Jordan also dissented based on reasoning similar to Circuit Judge Jolly.<sup>93</sup> Again, as in *Gonzalez*, the majority opinion applied the least sophisticated consumer standard to a dunning letter that purportedly violated § 1692e.<sup>94</sup> In his dissent, Circuit Judge Jordan uses the least sophisticated consumer and unsophisticated consumer monikers interchangeably.<sup>95</sup> On one of his main points, Circuit Judge Jordan stated that, “[t]o say that the least sophisticated consumer would not flip the page to read the entire letter, particularly when prompted to do so by a conspicuous notice on the front of the letter” is to allow the purpose of the FDCPA to be frustrated.<sup>96</sup> Finally, in his concurrence in *Gammon*, Circuit Judge Frank H. Easterbrook, part of a court that has rejected the least sophisticated consumer standard, opined that the unsophisticated consumer is “hypothetical in the same sense as the reasonable person of tort law is hypothetical.”<sup>97</sup> However, Circuit Judge Easterbrook concluded by stating that, “what proportion is high enough, and how the extent of misunderstanding will be established, is something the district court will have to mull over,” when describing the remanded issue of how the unsophisticated consumer will have construed the dunning

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88. 577 F.3d 600, 607-12 (5th Cir. 2009) (Jolly, J., dissenting). For a further discussion of Circuit Judge Jolly’s dissent, see Part IV.B.2.

89. *Id.* at 605-07 (majority opinion).

90. *Id.* at 609 (Jolly, J., dissenting).

91. *Id.* at 611.

92. 650 F.3d 993 (3rd Cir. 2011).

93. *Id.* at 1005-07 (Jordan, J., dissenting).

94. *Id.* at 1003 (majority opinion).

95. *See id.* at 1006 (Jordan, J., dissenting).

96. *Id.* at 1006-07.

97. *Gammon v. GC Servs. Ltd. P’ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) (Easterbrook, J., concurring).

letter.<sup>98</sup>

Although these cases have fought with the concepts of the least sophisticated consumer and the unsophisticated consumer in determining violations of § 1692e, it seems to be more an issue of semantics than of an actual difference in the law.<sup>99</sup> The characteristics of both the least sophisticated consumer and the unsophisticated consumer are relatively the same. Due to the need for uniformity, the federal courts should adopt one standard that combines the concepts of both the least sophisticated consumer and the unsophisticated consumer. This will make attorneys and consumer-debtors aware of the standard that a dunning letter will be evaluated by.

#### IV. Attorney Involvement in the Debt Collection Practice

##### A. "Meaningful Involvement"

Keeping in mind the standards of review,<sup>100</sup> attorneys must be aware of whether they have misrepresented their status as an attorney in the debt collection process. This issue "has repeatedly reared its head in lawsuits."<sup>101</sup> Attorneys can participate in the debt collection process directly "by writing letters, pursuing collection, or filing suit to collect delinquent debts."<sup>102</sup> However, attorney-debt collectors cannot simply lend their letterhead to be attached to a dunning letter without taking a meaningful role, as it is a violation of § 1692e(3).<sup>103</sup> Moreover, because the debt collection process of sending dunning letters is "routinely mechanized and delegated,"<sup>104</sup> attorneys need to have some level of

98. *Id.* at 1260.

99. Notably, the United States Court of Appeals for the Fifth Circuit does not choose a standard and evaluates cases under both standards. *See McMurray v. ProCollect, Inc.*, 687 F.3d 665, 669 (5th Cir. 2012) ("We 'must evaluate any potential deception in the [dunning] letter under an unsophisticated or least sophisticated consumer standard.'" (quoting *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 495 (5th Cir. 2004))).

100. *See supra* Part III.B.1-2.

101. CCH Incorporated, *Circuit Court Ruling Could Impact Collection Letters: Is Attorney "Meaningfully Involved"?*, 25 No 4. HEALTH CARE COLLECTOR 3, 3 (2011).

102. Holahan, *supra* note 56, at 270.

103. *See Berman, supra* note 27, at 5 (citing *Boyd v. Wexler*, 275 F.3d 642, 644 (7th Cir. 2001)).

104. Andrea M. Bergia, Note, *No Shelter from the Storm: Dangers from the Fair Debt Collection Practices Act to Mortgage Industry Attorneys and a Call for Legislative Action*, 29 REV. LITIG. 391, 412 (2010).

participation in the process to comport with the requirements of the FDCPA.

What level of attorney involvement is necessary though? Are these lawsuits within the purpose of the FDCPA? Turning to the statute provides no clear answer, as it is devoid of the amount of involvement necessary.<sup>105</sup> Nonetheless, case law interpreting the FDCPA has created the doctrine of “meaningful involvement.”<sup>106</sup> This may be because “[c]ourts recognize that sometimes collection agencies make reference to an attorney in its collection demands so as to put additional pressure on debtors to pay by threatening further attorney involvement if payments is not made.”<sup>107</sup> In other words, “the price of poker has just gone up.”<sup>108</sup> One scholar suggests that “meaningful involvement” is related to the attorney-client relationship.<sup>109</sup> However, a precise definition of “meaningful involvement” has proved somewhat elusive for the courts.<sup>110</sup> Therefore, examining the case law which has created the doctrine is in order.

### 1. Beginnings of “Meaningful Involvement”

In *Clomon v. Jackson*,<sup>111</sup> the Second Circuit affirmed the judgment of the district court which had granted summary judgment for the plaintiff-debtor, Christ Clomon, in an action for damages under the FDCPA.<sup>112</sup> Clomon had allegedly owed a debt of \$9.42.<sup>113</sup> After the district court granted summary judgment for Clomon, it also granted Clomon’s motion for the maximum statutory damages of \$1,000.<sup>114</sup> Nevertheless, the district court found no actual damages,<sup>115</sup> and therefore,

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105. 15 U.S.C. § 1692e (2012).

106. See *Avila v. Rubin*, 84 F.3d 222, 228 (7th Cir. 1996); see also *Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993).

107. CCH Incorporated, *supra* note 101, at 3.

108. See Stueben, *supra* note 24, at 3121 (citing *Avila*, 84 F.3d at 229).

109. See Berman, *supra* note 27, at 4 (stating that “[i]f an attorney-client relationship exists in which the attorney is actively participating and providing services to his client, and the client benefits from the provision of such services, there is meaningful involvement.”).

110. See *id.* at 3 (noting that the challenge of whether an attorney is “meaningfully involved . . . is quite vexing in application.”).

111. 988 F.2d at 1314.

112. See *id.* at 1316.

113. *Id.*

114. *Id.* at 1317.

115. *Id.*

the facts of *Clomon* should be discussed further.

As part-time general counsel for the collection agency, a letterhead with defendant Jackson's name and position on it, as well as a copy of his signature was printed on five of the six dunning letters sent to Clomon.<sup>116</sup> However, Jackson had no "direct personal involvement" in the collection process.<sup>117</sup> Applying the least sophisticated consumer standard,<sup>118</sup> the Second Circuit held that the use of Jackson's letterhead and signature gave "the impression that the letters were communications from an attorney."<sup>119</sup> Moreover, Jackson "played virtually no day-to-day role in the debt collection process," and the dunning letters were "not 'from' Jackson in any *meaningful* sense of that word."<sup>120</sup> The *Clomon* court reasoned that:

[T]he use of an attorney's signature on a collection letter implies that the letter is "from" the attorney who signed it; it implies, in other words, that the attorney directly controlled or supervised the process through which the letter was sent. . . . [T]he use of an attorney's signature implies—at least in the absence of language to the contrary—that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent. In a mass mailing, these implications are frequently false: the attorney whose signature is used might play no role either in sending the letters or in determining who should receive them. For this reason, there will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e.<sup>121</sup>

Thus, because Jackson had no real involvement, he violated § 1692e.<sup>122</sup>

Additionally, in *Avila v. Rubin*,<sup>123</sup> the Seventh Circuit affirmed the

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116. *Id.* at 1316-17.

117. *Id.* at 1317.

118. *See supra* Part III.B.1.

119. *See Clomon*, 988 F.2d at 1320.

120. *Id.* (emphasis added).

121. *Id.* at 1321 (emphasis added).

122. *Id.*

123. 84 F.3d 222 (7th Cir. 1996).

judgment of the district court which had granted summary judgment for the plaintiff-debtor, Raul Avila, in a class action claiming violations, *inter alia*, of § 1692e(3).<sup>124</sup> The Avila court stated that “*Clomon* establishe[d] that an attorney sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply with the strictures of FDCPA.”<sup>125</sup> Under facts similar to *Clomon*, the Avila court, applying the unsophisticated consumer standard,<sup>126</sup> held that Rubin, the defendant-attorney, violated § 1692e(3).<sup>127</sup> The Avila court reasoned that:

A letter from an attorney implies that a real lawyer, acting like a lawyer usually acts, directly controlled or supervised the process which the letter was sent. That’s the essence of the connotation that accompanies the title of ‘attorney.’ A debt collection letter on an attorney’s letterhead conveys authority. . . . The attorney letter implies that the attorney has reached a considered, professional judgment that the debtor is delinquent and is a candidate for legal action. And the letter also implies that the attorney has some *personal involvement* in the decision to send the letter. Thus, if a debt collection (attorney or otherwise) wants to take advantage of the special connotation of the word ‘attorney’ in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor’s file. Any other result would sanction the wholesale licensing of an attorney’s name for commercial purposes, in derogation of professional standards . . . .<sup>128</sup>

Therefore, because the “true source of the ‘attorney’ letters was the

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124. *See id.* at 225.

125. *Id.* at 228.

126. *See supra* Part III.B.2.

127. *See Avila*, 84 F.3d at 229. The court also noted that Rubin merely reviewed and approved the form of dunning letters and a non-attorney “legal assistant collector” made the decision on when to send a dunning letter. *Id.* at 225.

128. *Id.* (emphasis added). The court also quoted the American Bar Association, Formal Op. 68 (1932), for the proposition that public policy requires that attorneys must, at the very least, approve correspondence purporting to come from them. *Id.*



collection agent who pressed a button on the agency's computer," Rubin violated the FDCPA.<sup>129</sup> These two cases have provided the basis for the "meaningful involvement" doctrine, but courts have not attempted to further define the doctrine other than providing examples of what is not considered "meaningful involvement."<sup>130</sup>

## 2. The Aftermath of *Clomon* and *Avila*

Following the analysis of *Clomon* and *Avila*, several courts have declined to set a minimum standard for "meaningful involvement."<sup>131</sup> This may be because "the inquiry is too fact specific" to apply a set standard for all cases.<sup>132</sup> Nevertheless, some explanation of what is sufficient to satisfy the standard would provide useful insight to determine violations of the FDCPA. Perhaps the opportunity has yet to present itself or perhaps the courts do not want to provide attorneys with a roadmap to commit fraudulent acts.

The court in *Boyd v. Wexler*<sup>133</sup> reversed summary judgment for the defendant-attorney on the grounds that the affidavit, which stated Wexler or attorneys from his firm reviewed client files before issuing a dunning letter, had serious doubt casted on it by evidence of the volume of letters sent out by his firm.<sup>134</sup> In declining to set a standard, the *Boyd* court noted that "the ultimate professional judgment concerning the existence of a valid debt is reserved to the lawyer."<sup>135</sup>

Moreover, the court in *Nielsen v. Dickerson*<sup>136</sup> determined that "in all material respects [their] case was on all fours with *Avila*."<sup>137</sup> However, the court noted some "minor" distinguishing facts between the attorney in their case and the attorneys from *Avila*, *Clomon*, and other

129. *Id.* at 230.

130. See Berman, *supra* note 27, at 8.

131. See *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 304 (2d Cir. 2003) (declining to adopt a minimum standard "to satisfy *Clomon*'s requirement of meaningful attorney involvement."); *Nielsen v. Dickerson*, 307 F.3d 623, 638 (7th Cir. 2002) (noting that the attorney's involvement "still fell markedly short of what [*Avila* and *Clomon*] require"); *Boyd v. Wexler*, 275 F.3d 642, 647 (7th Cir. 2001) (stating that the issue of "the minimum amount of lawyer review required" to satisfy *Avila* has not been resolved).

132. See Stueben, *supra* note 24, at 3122 (citing *Boyd*, 275 F.3d at 647; Berman, *supra* note 27, at 1).

133. 275 F.3d at 642.

134. See *id.* at 644-46.

135. *Id.* at 647-48; see also Stueben, *supra* note 24, at 3122.

136. 307 F.3d at 623.

137. See *id.* at 639.

cases:

[He] reviewed the master contract governing [the] accounts; he looked at the minimal information that [the collection agency] provided regarding each overdue account, and therefore knew the identities of debtors who were to receive the letters; he checked the debtor information for typographical errors and to weed out debtors who had already received a letter from him, had declared bankruptcy, or lived in a prohibited state; and he handled letters and phone calls received by his firm to the extent of categorizing them and forwarding them to [the collection agency].<sup>138</sup>

The *Nielsen* court found that these “minor” differences “amounted to no more than a ‘veneer’ of compliance with the FDCPA.”<sup>139</sup> Yet, the court failed to establish what an attorney needs to do to have “some professional involvement” to comport with § 1692e.<sup>140</sup>

Furthermore, the court in *Miller v. Wolpoff & Abramson, L.L.P.*<sup>141</sup> reversed summary judgment for the defendant law firms because the plaintiff’s discovery requests were “directly related to the ‘meaningful involvement’ claim at issue.”<sup>142</sup> The *Miller* court further reasoned that the defendant law firm “merely being told by a client that a debt is overdue” does not satisfy the requirements of *Clomon*.<sup>143</sup> Here, the court declined to set a minimum standard based on the record available because “there may be circumstances where, following discovery, it becomes clear that the attorney’s familiarity with the client’s contracts and practices would negate the need to review some if not all of the documents plaintiff seeks to require.”<sup>144</sup>

Nonetheless, the court in *Miller v. Upton, Cohen & Slamowitz*<sup>145</sup>

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138. *Id.* at 638 (internal citations omitted).

139. *Id.*

140. *Id.*

141. 321 F.3d 292 (2d Cir. 2003).

142. *See id.* at 303. The court found that the affidavits provided by attorneys for the defendants stating that they reviewed files and confirmed that there were debts outstanding were insufficient as a matter of law to detail the amount of attorney involvement and, thus, more discovery was needed. *Id.* at 299, 307.

143. *Id.* at 304 (citation omitted).

144. *Id.*

145. 687 F. Supp. 2d 86 (E.D.N.Y. 2009).

seemed to find an attorney's conduct offensive—stating that “Slamowitz’s testimony . . . lack[ed] [] credibility based on his lack of facility in answering basic questions about his practice and the Miller file, his demeanor on the witness stand, and his interest in the outcome of these proceedings.”<sup>146</sup> The court further stated that Slamowitz’s “familiarity with his own firm’s files, both paper and electronic, was woefully inadequate for a man who professed to be an experienced and able collections attorney, confident in the systems and processes in place that guided his work.”<sup>147</sup>

While most of these cases involve attorneys who did little more than review the basic information provided to them by their clients prior to printing and sending a dunning letter to the debtor, several cases suggest that the filing of a lawsuit without having evidence of a debt is not a violation of the FDCPA.<sup>148</sup>

In *Harvey v. Great Seneca Financial Corporation*,<sup>149</sup> the court concluded that “the filing of a debt collection-lawsuit without the immediate means of proving the debt” does not violate the FDCPA.<sup>150</sup> The court noted that this was not a “deceptive practice” in violation of § 1692e.<sup>151</sup> Moreover, the court in *Slanina v. United Recovery Systems, LP*,<sup>152</sup> granted a motion to dismiss, even though a collection agency sent a dunning letter to Slania demanding payment of a debt.<sup>153</sup> The court granted the motion “because there is no obligation under the FDCPA for a debt collector to verify a debt prior to collection.”<sup>154</sup> Likewise in *Derricotte v. Pressler & Pressler, LLP*,<sup>155</sup> the court found, that although the firm “appears to have acted upon the information provided by its client,” there was no violation of the FDCPA in pursuing a lawsuit without the requisite evidence of a debt.<sup>156</sup>

146. *See id.* at 99.

147. *Id.*

148. *See Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 330 (6th Cir. 2006); *Slanina v. United Recovery Sys., LP*, No. 3:11-CV-1391, 2011 WL 5008367, at \*2-3 (M.D. Pa. Oct. 20, 2011); *Derricotte v. Pressler & Pressler, LLP*, No. 10-1323, 2011 WL 2971540, at \*6 (D.N.J. July 19, 2011).

149. 453 F.3d at 324.

150. *See id.* at 330.

151. *Id.* at 331.

152. 2011 WL 5008367, at \*1.

153. *See id.*

154. *Id.* at \*2.

155. 2011 WL 2971540, at \*1.

156. *See id.* at \*6.

These cases, while not directly involving “meaningful involvement” claims, show that an attorney can pursue legal action against a debtor without having complete evidence of a debt—seemingly less involvement than issuing a dunning letter without reviewing information beyond basic pedigree information of a debtor. They do, however, pose some of the same ethical questions. Moreover, in the case of filing a lawsuit without evidence of the debt, the threat of legal action is no longer a threat, it has come to fruition. The MRPC provides that, “a lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>157</sup> If a dunning letter is sent prior to litigation, with the intent to proceed to litigation, then it should follow that Rule 1.3 would require attorneys to perform their due diligence prior to filing legal action. Thus, the issue should not even proceed under the FDCPA and should be an issue solely for attorney discipline by the states. However, another issue was added to the “meaningful involvement” doctrine and further muddled the waters when a law firm was permitted to appropriately disclose their level of involvement in collecting a debt.

B. *Disclaimer of “Meaningful Involvement”*

1. *Greco v. Trauner, Cohen & Thomas L.L.P.*<sup>158</sup>

The case of *Greco v. Trauner, Cohen & Thomas, L.L.P.* created a change in the “meaningful involvement” doctrine by allowing a disclaimer of attorney involvement to be included in a dunning letter without violating the FDCPA.<sup>159</sup> In *Greco*, plaintiff-debtor Andrew Greco received a dunning letter from the defendants Trauner, Cohen & Thomas, L.L.P on their firm letterhead.<sup>160</sup> The letter stated that the law firm represented Bank of America and also contained the § 1692g requirements.<sup>161</sup> The letter also included the following sentence: “At this time, no attorney with this firm has personally reviewed the particular circumstances of your account.”<sup>162</sup> The letter was not signed by an individual attorney, but had the law firm’s name in the signature block.<sup>163</sup>

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157. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2013).

158. 412 F.3d 360 (2d Cir. 2005).

159. *See id.* at 365.

160. *Id.* at 361.

161. *Id.*

162. *Id.*

163. *Id.* at 362.

Andrew Greco then filed a lawsuit against the law firm and the attorneys in their individual capacity claiming violations of § 1692e and § 1692g.<sup>164</sup> His suit specifically claimed that the defendants violated § 1692e(3) and § 1692e(10) by misrepresenting the amount of “attorney involvement” in the dunning letter.<sup>165</sup>

Applying the least sophisticated consumer standard,<sup>166</sup> the district court determined, as a matter of law, that there were no violations of the FDCPA because the dunning letter “was not misleading in its representation of attorney involvement.”<sup>167</sup> The district court concluded the letter “prominently stated in normal typeface that ‘[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account.’”<sup>168</sup> Moreover, it reasoned that “the least sophisticated of debtors would understand that . . . no attorney had yet recommended *filing* a lawsuit.”<sup>169</sup>

On appeal to the Second Circuit, Greco argued that by placing the dunning letter on law firm letterhead and having the law firm’s name in the signature block, a violation of § 1692e occurred.<sup>170</sup> Greco asserted that “an attorney cannot send a collection letter without being *meaningfully involved* as an attorney within the collection process.”<sup>171</sup> Greco argued that the dunning letter here was similar to those in *Clomon v. Jackson*<sup>172</sup> and *Miller v. Wolpoff & Abramson, L.L.P.*,<sup>173</sup> and therefore, the defendants violated § 1692e.<sup>174</sup>

In its analysis, the Second Circuit articulated that “Greco’s claim rests on a misunderstanding of the FDCPA’s requirements, and of [the court’s] prior explications of that statute.”<sup>175</sup> The Second Circuit further reasoned that it does not follow from the FDCPA that attorneys may participate in the process of debt collection only by providing legal services—they may provide other services so long as their status as an

164. *Id.* The court’s discussion of the § 1692g claim is not relevant to the issue of “meaningful involvement.”

165. *Id.* (emphasis added).

166. *See supra* Part III.B.1.

167. *See Greco*, 412 F.3d at 362.

168. *Id.*

169. *Id.* at 362-63 (emphasis added).

170. *Id.* at 363.

171. *Id.* (emphasis added) (internal quotation marks omitted).

172. *See* 988 F.2d 1314, 1321 (2d Cir. 1993).

173. *See* 321 F.3d 292, 301 (2d Cir. 2003).

174. *See Greco*, 412 F.3d at 364.

175. *Id.*

attorney does not mislead a debtor.<sup>176</sup> The court continued by stating that “prior precedents” allowed “*disclaimers* that should make clear even to the ‘least sophisticated consumer’ that the law firm or attorney sending the letter is not, at the time of the letter’s transmission, acting as an attorney.”<sup>177</sup> Finally, the court noted that a dunning letter on law firm letterhead represents involvement by an attorney, but it is an implied level of involvement.<sup>178</sup> Distinguishing the dunning letter in *Greco* from those in *Clomon* and *Miller*, the Second Circuit found that the disclaimer in *Greco*’s letter was “clear” and “explain[ed] the limited extent of [attorney] involvement in the collection of *Greco*’s debt.”<sup>179</sup> Thus, even the least sophisticated debtor would be able to understand that this letter intended no attorney involvement.<sup>180</sup>

## 2. Other Disclaimer Cases

Several other courts have been faced with whether a disclaimer is sufficient to comport with the FDCPA.<sup>181</sup> In *Gonzalez v. Kay*,<sup>182</sup> the Fifth Circuit, citing to *Greco*, stated that a disclaimer shows “that the lawyer is wearing a ‘debt collector’ hat and not a ‘lawyer’ hat when

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 365.

180. *Id.*

181. Compare *Leshner v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1003 (3d Cir. 2011) (rejecting a disclaimer when placed on the back), *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (same), *Robertson v. Richard J. Boudreau & Assocs., LLC*, No. C09-1681 BZ, 2009 WL 5108479, at \*2 (N.D. Cal. Dec. 18, 2009) (rejecting *Greco* as unpersuasive), and *Dunn v. Derrick E. McGavic, P.C.*, 653 F. Supp. 2d 1109, 1114 (D. Or. 2009) (finding the dunning letter more convoluted than the dunning letter in *Greco*), with *Eddis v. Midland Funding, L.L.C.*, No. 11-3923 (JBS/AMD), 2012 WL 664812, at \*6-9 (D.N.J. Feb. 28, 2012) (discussing *Greco* and *Leshner* and finding that the disclaimer on the front of the dunning letter did not violate the FDCPA), *Martsolf v. JBC Legal Group, P.C.*, No. 1:04-CV-1346, 2008 WL 275719, at \*10 (M.D. Pa. Jan. 30, 2008) (holding defendant liable because “[t]he letters do not include a disclaimer stating that no attorney has personally reviewed the debt.”), *Navarro v. Eskanos & Adler*, No. C 06-02231 WHA, 2007 WL 549904, at \*6 (N.D. Cal. Feb. 20, 2007) (denying the defendant’s summary judgment because “[t]he letter contains no disclaimer of an attorney’s involvement.”), and *Pujol v. Universal Fid. Corp.*, No. 03 CV 5524 (JG), 2004 WL 1278163, at \*5 (E.D.N.Y. June 9, 2004) (dismissing plaintiff’s case because the disclaimer, “I have not, nor will I, review each detail of your account status, unless you so request” would not make the least sophisticated consumer believe that an attorney had reviewed the file).

182. 577 F.3d at 600.

sending out [a dunning] letter.”<sup>183</sup> Although the disclaimer in *Gonzalez* was exactly the same as the one in *Greco*,<sup>184</sup> the Fifth Circuit found its placement on the back of the dunning letter violated the FDCPA.<sup>185</sup> The court reasoned through a sliding-scale approach that some letters “are not deceptive based on the language and placement of the disclaimer,” some letters “violate the FDCPA as a matter of law,” and others are “[i]n the middle . . . [and] include contradictory messages.”<sup>186</sup> The court continued by determining that disclaimers are not per se unenforceable, stating that, “[t]he disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time.”<sup>187</sup> However, the dissenting judge noted that the dunning letter “conforms in every respect to the standards for legality recognized by the Second Circuit in *Greco*” and the majority “effectively creat[ed] a circuit split” by distinguishing placement of the disclaimer.<sup>188</sup> Moreover, in *Leshner v. Law Offices of Mitchell N. Kay, PC*,<sup>189</sup> the Third Circuit, dealing with the same disclaimer as in *Greco*<sup>190</sup> and almost the exact same dunning letter as in *Gonzalez*,<sup>191</sup> held that a disclaimer on the back violated the FDCPA.<sup>192</sup> The dissent by Circuit Judge Jordan in *Leshner*<sup>193</sup> agreed with the dissent by Circuit Judge Jolly in *Gonzalez*.<sup>194</sup> Circuit Judge Jordan, stated that Circuit Judge Jolly was “exactly correct” and further said, “[w]ithout legal mumbo jumbo, [the] disclaimer tells any reasonable reader, including the least sophisticated, that, ‘while this was a letter from a law firm, no attorney had specifically examined the recipient’s account information.’”<sup>195</sup> Finally, in *Eddis v. Midland Funding, L.L.C.*,<sup>196</sup> the

183. See *id.* at 604 (citing *Greco*, 412 F.3d at 361-62).

184. *Id.* at 602, 606; *Greco*, 412 F.3d at 361.

185. See *Gonzalez*, 577 F.3d at 607.

186. See *id.* at 606; see also Laurie A. Lucas & Mike Voorhees, *Fair Debt Collection Practices Act: The Regulatory Environment and Recent Appellate Cases*, 65 CONSUMER FIN. L.Q. REP. 4, 13 (2011).

187. See *Gonzalez*, 577 F.3d at 607.

188. See *id.* at 607. (Jolly, J., dissenting).

189. 650 F.3d 993 (3d Cir. 2011).

190. See *Greco v. Trauner, Cohen, & Thomas, L.L.P.*, 412 F.3d 360, 367 (2d Cir. 2005).

191. See 577 F.3d at 602 (majority opinion).

192. See *Leshner*, 650 F.3d at 1001.

193. See *id.* at 1004-07 (Jordan, J., dissenting).

194. See 577 F.3d at 607-12 (Jolly, J., dissenting).

195. See *id.* at 1006.

196. See *Eddis v. Midland Funding, L.L.C.*, No. 11-3923 (JBS/AMD), 2012 WL

District of New Jersey, comparing the same disclaimer as in *Greco*<sup>197</sup> and *Leshner*,<sup>198</sup> determined that the disclaimer did not violate the FDCPA because the content of the disclaimer was sufficient and it was in the main text of the dunning letter.<sup>199</sup>

Faced with another argument by the plaintiff, the district court in *Eddis* further rejected the notion that the New Jersey Rules of Professional Conduct provided a private cause of action and thus a violation § 1692e of the FDCPA.<sup>200</sup> The *Eddis* court noted that several other district courts had determined that “unauthorized practice of law claims are not cognizable under the FDCPA.”<sup>201</sup> Moreover, the court reasoned that the New Jersey Supreme Court had stated that there could be no independent causes of action based on a violation of the Rules of Professional Conduct.<sup>202</sup>

Allowing an attorney to waive involvement in a case to comport with the FDCPA may seem troubling to consumer-debtors. After all, an attorney, whether involved in the debt collection process or some other field, must be cognizant of their responsibilities to the legal profession as a whole. The due diligence requirements of MRPC 1.3 are only one requirement that attorneys must follow. States may provide their own interpretation of ethical rules through ethics opinions. Thus, in light of the Ethics Opinion, the disclaimer in *Greco* that was found to comport with the FDCPA in *Eddis*, was struck down.

## V. The Ethics Opinion

### A. Discussion of the Ethics Opinion

Directed by the New Jersey Supreme Court, the Committee on the Unauthorized Practice of Law (“UPLC”) and the Advisory Committee on Professional Ethics (“ACPE”), reviewed several prior ethics opinions

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664812, at \*1 (D.N.J. Feb. 28, 2012).

197. See *Greco v. Trauner, Cohen, & Thomas, L.L.P.*, 412 F.3d 360, 367 (2d Cir. 2005).

198. See 650 F.3d at 1001 (majority opinion).

199. See *Eddis*, 2012 WL 664812, at \*8-9.

200. See *id.* at \*9.

201. See *id.* (quoting *Cohen v. Wolpoff & Abramson, L.L.P.*, No. 08 1084 (SRC), 2008 WL 4513569, at \*8 (D.N.J. Oct. 2, 2008) (internal quotation marks omitted) (collecting cases)).

202. See *Eddis*, 2012 WL 664812, at \*10 (citing *Baxt v. Liloia*, 714 A.2d 271, 277 (N.J. 1998)).



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issued by their respective bodies<sup>203</sup> and reaffirmed their rulings.<sup>204</sup> The Ethics Opinion also “reaffirm[ed] that, before sending a [dunning] letter, lawyers must exercise professional judgment by independently evaluating collection demands and determining that proceedings to enforce collection are warranted.”<sup>205</sup> The New Jersey Supreme Court asked for review by the joint ethics committees after imposing discipline on an attorney for renting his name and letterhead to a collection agency.<sup>206</sup> Furthermore, the attorney exercised no judgment in collecting debts.<sup>207</sup> The collection agency engaged in the unauthorized practice of law and the attorney violated two separate New Jersey Rules of Professional Conduct.<sup>208</sup>

The Ethics Opinion further stated that an ABA ethics opinion addressed the same issue and ruled that a lawyer must have independent judgment over dunning letters.<sup>209</sup> Agreeing with the ABA opinion, the Ethics Opinion stated that, “[e]xercising independent professional judgment is a fundamental and indispensable element of the practice of law. A lawyer who fails to exercise independent professional judgment has abdicated the practice of law, has demonstrated a lack of competence, and has committed gross negligence, in violation of [NJ] RPC 1.1(a).”<sup>210</sup>

The Ethics Opinion, noting that the FDCPA and the New Jersey Rules of Professional Conduct “are distinct bodies of law,”<sup>211</sup> discussed

203. See UPLC Op. 8, 95 N.J. L.J. 105 (1972) (determining that a collection agency sending a dunning letter to a debtor threatening legal action or implying that the dunning letter was sent at the request of an attorney is the unauthorized practice of law); see also ACPE Op. 259, 96 N.J. L.J. 754 (1973) (finding a violation of ethical duties if an attorney lends their letterhead to clients to place on dunning letters); see generally ACPE Op. 506, 110 N.J. L.J. 408 (1982) (discussing the same and stating that “Opinion 259 remains the guide in this area”).

204. Ethics Opinion, *supra* note 8.

205. See *id.*

206. See *id.* This conduct is also not allowed by the FDCPA. See *supra* note 103 and accompanying text.

207. See Ethics Opinion, *supra* note 8.

208. See *id.* The attorney “violated [NJ] RPC 5.5(a)(2) (assisting a nonlawyer in the unauthorized practice of law) and [NJ] RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).” *Id.*

209. ABA Comm. On Ethics & Prof’l Responsibility, Informal Op. 1368 (1976) (discussing “Mass Mailing of Form Collection Letters”).

210. See Ethics Opinion, *supra* note 8, at 59 n.1 (“RPC 1.1(a) (Competence) provides that ‘[a] lawyer shall not . . . [h]andle or neglect a matter entrusted to the lawyer in such manner that the lawyer’s conduct constitutes gross negligence.’”).

211. See *id.* at 59.

several FDCPA cases which “differentiate between lawyers acting in a ‘lawyer capacity’—which would require the exercise of professional judgment and meaningful involvement in the collection matter—and lawyers not acting in a ‘lawyer capacity,’ acting as a lay debt collection.”<sup>212</sup> Moreover, the Ethics Opinion states that even if the FDCPA allows a law firm to send dunning letters in a lay capacity, the New Jersey Rules of Professional Conduct have forbidden it.<sup>213</sup> Finally, the Ethics Opinion ruled:

A lawyer *cannot disclaim* the fact that he or she is engaging in the practice of law when using law firm letterhead. A lawyer who has not reviewed the file, made appropriate inquiry, and exercised professional judgment has engaged in an incompetent and grossly negligent practice of law in violation of RPC 1.1(a). A lawyer who permits office staff, or a client, to send [dunning] letters when the lawyer has not individually reviewed the file, made appropriate inquiry, and exercised professional judgment, is assisting in unauthorized practice of law in violation of [NJ] RPC 5.5(a)(2) and engaging in deceitful conduct in violation of [NJ] RPC 8.4(c).<sup>214</sup>

B. *The Resulting Effects*

In the aftermath of the Ethics Opinion, New Jersey attorneys are no longer allowed to use the disclaimer made prevalent by the Second Circuit in *Greco*.<sup>215</sup> As one attorney has noted, it “should be seen as the equivalent of a ‘Please Kick Me’ sign placed on one’s back as it may lead to an inquiry by the Office of Attorney Ethics.”<sup>216</sup> Because the attorneys are “engaged in the practice of law,” they are not allowed to

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212. See *id.* (discussing *Lesh v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 1003 (3d Cir. 2011), *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009), *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 301 (2d Cir. 2003), and *Avila v. Rubin* 84 F.3d 222, 229 (7th Cir. 1996)).

213. See Ethics Opinion, *supra* note 8.

214. See *id.*

215. See *Maurice*, *supra* note 9 (citing *In re Goldstein*, 560 A.2d 1166, 1167 (N.J. 1989)).

216. See *id.*

use a disclaimer stating that they are not acting as an attorney.<sup>217</sup> While the Ethics Opinion noted that the FDCPA and the New Jersey Rules of Professional Conduct “are distinct bodies of law,”<sup>218</sup> it seems that this ruling effectively strengthens the “meaningful involvement” doctrine and requires more than that doctrine deems adequate. Moreover, it forbids New Jersey attorneys from a certain practice under a federal statute that attorneys in other states can use. Thus, it destroys any uniformity the federal courts have in applying federal law across the states.

## VI. The Remedy

In order to increase uniformity and resolve “effectively creat[ed] [] circuit split[s]”<sup>219</sup> in the application of the FDCPA, several remedies are available. As suggested earlier, the federal courts should adopt a consistent standard of review for violations of the FDCPA.<sup>220</sup> In doing so, attorneys and consumer-debtors will be aware of the standard that dunning letters must meet to comply with the FDCPA and it will have a uniform name, like the “the reasonable person of tort law.”<sup>221</sup>

A congressional amendment to the FDCPA to include “meaningful involvement” is both unlikely and insufficient to solve the issue. It is unlikely to provide the correct solution because the issues presented by the doctrine are properly handled by the states through attorney discipline, although the *Avila* court believed that a lack of “meaningful involvement” could result in “derogation of professional standards.”<sup>222</sup> MRPC 1.3 requires attorney to meet diligence requirements.<sup>223</sup> Also, MRPC 5.5(a) prevents lawyers from assisting others in the unauthorized practice of law.<sup>224</sup> If these rules are more strictly enforced by the states, the FDCPA can prevent the abusive debt collection practices it is meant to prevent rather than lawsuits for statutory damages only. Furthermore, once litigation ensues against a consumer-debtor, they know that an attorney is involved in the case. This is proven through case law, which

217. *See id.*

218. *See* Ethics Opinion, *supra* note 8.

219. *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (Jolly, J., dissenting).

220. *See supra* Part III.B.3.

221. *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) (Easterbrook, J., concurring).

222. *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

223. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2013).

224. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2013).

has determined attorneys who file a lawsuit without having evidence of a debt do not violate the FDCPA.<sup>225</sup>

The disclaimer of involvement that was made prevalent through *Greco*<sup>226</sup> should be struck down by the federal courts as the Ethics Opinion has provided. An attorney should not be allowed to wear multiple hats in the debt collection field because they will always have their title of attorney. This title carries with it professional responsibilities and will prevent ethical obligations from being pulled into the FDCPA.<sup>227</sup> If more states adopt an Ethics Opinion like New Jersey's, then those states would be taking a stand by regulating attorney ethics more strictly. This would also provide the opportunity for increased compliance with the FDCPA and uniformity in applying it across the states. Moreover, consumer-debtors would also be put in a better position by knowing that an attorney could not waive involvement in sending a dunning letter.

If these lawsuits continue to go forward, a rebuttable presumption should apply to the defendant-attorney. The presumption in each case should be that the attorney has maintained the requisite standard of ethical behavior if that attorney has not had any past ethical violations as a result of renting out letterhead. A standard requiring the plaintiff to prove by clear and convincing evidence that the attorney violated ethical responsibilities and failed to comply with the FDCPA in letterhead cases will diminish the use of ethical-like violations to award debtors statutory damages where no actual damages are proved. By limiting these suits to blatant violations like renting letterhead to a collection agency, the FDCPA will continue in its proper purpose.

## VII. Conclusion

Part of the FDCPA's purpose is "to promote consistent State action."<sup>228</sup> By leaving it to the states to regulate attorney discipline, the federal courts will not have to make unnecessary determinations of attorney ethical responsibilities and will be faced with FDCPA lawsuits

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225. See *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 330 (6th Cir. 2006); *Slanina v. United Recovery Sys., LP*, No. 3:11-CV-1391, 2011 WL 5008367, at \*2-3 (M.D. Pa. Oct. 20, 2011); *Derricotte v. Pressler & Pressler, LLP*, No. 10-1323, 2011 WL 2971540, at \*6 (D.N.J. July 19, 2011).

226. See *Greco v. Trauner, Cohen, & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005).

227. See *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

228. 15 U.S.C. § 1692(e) (2012).

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that truly protect consumer-debtors. Moreover, since a private cause of action cannot be brought under the MRPC, and these FDCPA violations are very similar in nature, the FDCPA should not permit them either. Doing so only creates a further divide in the uniform application of the FDCPA. Therefore, ethics should govern.