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# PROTECTING CONSUMERS FROM ZOMBIE-DEBT COLLECTORS

Neil L. Sobol\*

## ABSTRACT

The debt-collection business is booming, led by a dramatic increase in the sale and collection of defaulted debts. Annually, debt buyers purchase more than \$100 billion in debt (based on the debts' face value). In a typical debt purchase, buyers pay only a small fraction of face value; in return, they receive extremely limited and often inaccurate information. Many of the debts that buyers seek to recover are dead debts because they never existed, or are no longer enforceable by operation of law. Consumers who receive communications from debt buyers often complain about mistaken identity and identity theft, because they did not incur the alleged debts. Other debt-collection issues arise when debt buyers seek to recover debts that have previously been paid or settled, discharged in bankruptcy, or have become time-barred because the collection period under the statute of limitations has expired.

By obtaining judgments, or persuading consumers to pay a portion of these debts, acknowledge these debts, or enter into new agreements, collectors can resurrect and enforce dead or non-existent debts. The media has labeled these resurrected debts as "zombie debts."<sup>1</sup> Just as the zombies in movies come back from the dead to terrorize individuals, dead

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1. See, e.g., Liz Pulliam Weston, *'Zombie' Debt is Hard to Kill*, EDUC. CTR. 2000, [http://educationcenter2000.com/debt\\_collectors/zombie.htm](http://educationcenter2000.com/debt_collectors/zombie.htm) (last visited July 19, 2013) (originally published at MSN Money in July 2006); Madan G. Singh, *Zombie Debts, a Discussion*, EZINEARTICLES.COM (Feb. 10, 2012), <http://ezinearticles.com/?Zombie-Debts,-a-Discussion&id=6872870>. Zombie debts have also become a subject of several blog entries. See, e.g., Jonathan Ginsberg, *How Debt Buyers Turn Zombie Debt into Valid Claims*, BANKR. LAW NETWORK (Oct.18, 2011), <http://www.bankruptcylawnetwork.com/how-debt-buyers-turn-zombie-debt-into-valid-claims/>.

debts may resurface to wreak havoc on consumers. Even if a consumer successfully defeats one zombie-debt collector, the process may restart if the debt is resold.

Legal scholarship has only begun to address zombie-debt issues, and has primarily focused on litigation. However, collectors are often successful in persuading consumers to pay dead debts without filing lawsuits.

Accordingly, this Article addresses zombie-debt issues that consumers face before the onset of litigation. It identifies the failure of traditional methods to deal with this growing problem, and proposes amendments to the Fair Debt Collection Practices Act (“FDCPA”)<sup>2</sup> to establish uniform standards for the transfer of information and documentation to debt buyers and consumers. It recommends that penalties and statutes of limitation should deter debt buyers from violating the FDCPA. Finally, the article emphasizes the importance of providing assistance and education to consumers, and suggests that the recently formed Consumer Financial Protection Bureau (“CFPB”) should coordinate a holistic approach at the federal, state, and local levels to combat zombie debts.

## INTRODUCTION

*“Something coming back from the dead was almost always bad news. Movies taught me that. For every one Jesus, you get a million zombies.”*<sup>3</sup>

### A. A Horror Story

#### 1. The Opening: A Peaceful Setting

Grandparents, Harry and Helen Cooper, are enjoying dinner at their Florida home with their granddaughter when the phone rings.

#### 2. The Confrontation

**Caller:** “May I speak with Henry Cooper?”

**Harry:** “My name is Harry Cooper. I do not know Henry Cooper. You must have the wrong number.”

**Caller:** “No, our records indicate that I have the right number. I am here to offer you a one-time deal that will help clean up your credit report. You currently owe a debt of over \$3,500; how-

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2. 15 U.S.C. §§ 1692–1692p (2010).

3. DAVID WONG, JOHN DIES AT THE END 260 (2009).

ever, if you work with us we should be able to reduce the amount. Are you willing to work with us?"

**Harry:** "Why would I work with you? I do not know you, or what you are calling about. You have disturbed my dinner with my grandchild."

**Caller:** "I am sorry about the disturbance, but if you had paid this debt I would not be calling. If you work with me today, you can prevent future calls. I work for Romero Recovery Associates."

**Harry:** "Romero who? I do not recognize the name. I do not have a debt with you."

**Caller:** "Romero Recovery Associates is the current owner of a credit-card debt that you had with Guardian Trust Bank in 1995. Now let us see what we can do about resolving this matter. If you agree, to a three-month payment plan to cure this debt, I can reduce the outstanding debt by 50 percent."

**Harry:** "1995 seems like a long time ago. I am not sure that I ever had an account with Guardian, and even if I did, I am confident that I would have paid it. I always pay my debts. I just want to get back to my dinner with my wife and granddaughter. "

**Caller:** "Well, our records show that you still owe this debt. I do not want to take you away from your grandchild, but my manager says that I can only offer this deal today. Can you show me some good faith by agreeing to pay \$25, today? That will keep the settlement offer open as well as allow you time to return to your grandchild. We can then discuss this matter when you have more time."

**Harry:** "I do not recall this debt, but my granddaughter is leaving tonight and I really want to get back with her. I will pay you the \$25 to keep the deal open."

### 3. The Epilogue

In the above encounter, Harry possibly faces a zombie-debt issue. A debt that may have never existed, or that Harry had already paid, or that may be time-barred, is now enforceable because Harry agreed to pay the nominal amount of \$25.

#### *B. Confronting the Horror*

Classic horror films depict zombies as deformed flesh-eating monsters that have come back from the dead to attack the living.<sup>4</sup> Moreover,

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4. See, e.g., *NIGHT OF THE LIVING DEAD* (Image Ten, Laurel Group, Market Square Productions & Off Color Films 1968) (following the crash of a satellite, the dead come back to life as zombies seeking to eat the living); *DAWN OF THE DEAD*

they are extremely hard to kill.<sup>5</sup> While the zombies in these films are only fictional,<sup>6</sup> a non-fictional zombie now exists in debt collection that has created real fear for consumers. Like the cinematic zombie who seems to arise from the dead, zombie debt is a debt that is dead or non-existent, but has now come to life, and is wreaking havoc on consumers and their credit histories.<sup>7</sup>

The origins of zombie debt vary.<sup>8</sup> They include debts that have been previously paid or settled, debts that have been discharged in bankruptcy, debts that do not belong to the alleged debtor (due to mistaken identity or identity theft), or debts for which the statutory period for collection has expired.<sup>9</sup> Although these debts are typically considered unenforceable, aggressive collectors can resurrect “dead” debts into live or zombie debts.<sup>10</sup> Collectors can achieve this transformation when they persuade consumers to pay some amount against their debts, acknowledge the debts, or enter into new agreements.<sup>11</sup> Moreover, collectors may sue on dead debts and obtain judgments, typically by default; these judgments resurrect dead debts to enforceable debts.<sup>12</sup>

Just as in horror movies where the zombie population seems to grow at an exponential rate,<sup>13</sup> the number of individuals attacked by zombie

(Laurel Group 1978) (depicting individuals seeking refuge from flesh-eating zombies hiding in a deserted mall). For a listing of 250 zombie films, see *IheartZombies1, Zombies, Zombies, Zombies 300Films*, IMDB (Mar. 4, 2011) <http://www.imdb.com/list/q1EFAbRWd40/?start=1&view=compact&sort=listorian:asc>.

5. James, *How to Kill a Zombie: Ten Best Ways to Kill a Zombie*, YAHOO VOICES, <http://voices.yahoo.com/how-kill-zombie-ten-best-ways-kill-zombie-4740282.html> (Oct. 27, 2009) (“The undead are notoriously difficult to kill, the base reason being because they are already dead.”).

6. Although the Hollywood films are fictional, scholars have addressed the role of zombies in folklore from Haiti and Africa. See, e.g., Hans-W. Ackermann & Jeanine Gauthier, *The Ways and Nature of the Zombi*, 104 J. AM. FOLKLORE 466 (1991); Louis P. Mars, *The Story of Zombi in Haiti*, 45 MAN: A RECORD OF ANTHROPOLOGICAL SCIENCE 38 (1945).

7. Michael Forbes, *Beware the “Zombie” Debt Collectors: Consumer Rights Abuses by Purchasers of Old and Uncollected Debt*, LEXIS (Sept. 2, 2009), [http://www.lexis.com/research/retrieve?\\_m=e232029786a6e94d1fb20edbdf409879&csvc=le&cform=byCitation&fmtstr=FULL&docnum=1&\\_startdoc=1&wchp=dGLbVzV-zSkAb&\\_md5=c35195f88f03dff6e38bfce4ab55dd61](http://www.lexis.com/research/retrieve?_m=e232029786a6e94d1fb20edbdf409879&csvc=le&cform=byCitation&fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzV-zSkAb&_md5=c35195f88f03dff6e38bfce4ab55dd61).

8. Weston, *supra* note 1.

9. See *infra* Part II.

10. See *infra* Part III.A.

11. See *infra* Part III.A.1–3.

12. See *infra* Part III.A.4.

13. See, e.g., DAWN OF THE DEAD, *supra* note 4. IMDB describes the “ever-growing epidemic of zombies” in the Dawn of the Dead. *Dawn of the Dead*, IMDB, <http://www.imdb.com/title/tt0077402/> (last visited Jun. 19, 2013). Interestingly, some math

debts has also exploded in recent years due to the growth of the debt-buying industry.<sup>14</sup> Debt buyers are a relatively new but rapidly-growing “breed” of collectors who purchase debts at a fraction of their face value.<sup>15</sup> Buyers have different motivations than creditors who may seek future transactions with consumers, or collectors who operate on a commission basis.<sup>16</sup> Instead, motivated by their financial stake in the purchased debts, they have no expectation of future dealings with alleged debtors.<sup>17</sup> Thus, debt buyers tend to be more aggressive than creditors, or commission-based collectors.<sup>18</sup>

Debt buyers often purchase debts based on insufficient or inaccurate information provided by sellers.<sup>19</sup> They typically receive only summary data and little—if any—documentation on their purchased debts. Moreover, what limited information provided may be inaccurate.<sup>20</sup> Consequently, buyers often try to recover from people who are not actual debtors or from people who have already paid or settled their debts.<sup>21</sup> Additionally, buyers often direct their collection efforts at unenforceable debts, including debts discharged in bankruptcy and those for which the limitations period on any collection claim has expired.<sup>22</sup>

Although media sources and blog entries have popularized the term “zombie debt,”<sup>23</sup> legal scholarship has only begun to address the issue.<sup>24</sup>

educators use the rapid rise in the zombie population as an example of exponential growth. See, e.g., *Engaging and Motivating with Zombie Exponential Growth*, <http://orielly.weebly.com/motivating-with-zombie-exponential-growth.html> (last visited July 19, 2013).

14. See *infra* Part III.B.

15. Gary Rivlin, *America's Abusive Debt Collectors*, NEWSWEEK, Jan. 1, 2012, <http://www.newsweek.com/americas-abusive-debt-collectors-64201>; see *infra*, notes 192–96 and accompanying text.

16. See *infra* Part III.B.2.

17. *Id.*

18. *Id.*

19. See *infra* Part III.B.1.

20. *Id.*

21. *Id.*

22. *Id.*

23. See *supra* note 1 and accompanying text.

24. See Victoria J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707, 712 & n.23 (2008); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 259 (2011); Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006); Young Walgenkim, Comment, *Killing “Zombie Debt” Through Clarity And Consistency in the Fair Debt Collection Practices Act*, 24 LOY. CONSUMER L. REV. 65 (2011–12). Joshua Warren has created a blog, *Zombie Law*, dedicated to the identification of zombies in politics and the law. *About ZombieLaw*, ZOMBIELAW,

Scholarship has primarily focused on the collection of unenforceable debts through the court system.<sup>25</sup> However, abuses are not limited to litigation. Zombie-debt concerns begin with communications between consumers and collectors.<sup>26</sup> Collectors are often successful in persuading consumers to pay dead debts without filing lawsuits.

This Article focuses on attacking zombie debts at the pre-litigation stage. While efforts to combat zombie debts should be developed at all levels, battling these demons before litigation will also help reduce the incidence of subsequent problems at the litigation and post-litigation stages. This Article examines the roots and problems associated with zombie debts. Part I briefly describes the consumer-debt crisis in the

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<http://zombielaw.wordpress.com/about/> (last visited Jan. 3, 2013). He is also creating a casebook to discuss over 300 federal cases that refer to “zombies.” See *ZombieLaw THE BOOK*, ZOMBIELAW, <http://zombielaw.wordpress.com/zombielaw-the-book/> (last visited Jan. 3, 2013); Jill Schachner Chanen, *Zombies-at-Law: NY Lawyer Fascinated by the Law’s Fascination with Zombies*, A.B.A. J., Dec. 2012, available at [http://www.abajournal.com/magazine/article/zombies-at-law\\_ny\\_lawyer\\_fascinated\\_by\\_the\\_laws\\_fascination\\_with\\_zombies/](http://www.abajournal.com/magazine/article/zombies-at-law_ny_lawyer_fascinated_by_the_laws_fascination_with_zombies/).

25. See, e.g., Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2011–12) (studying forum shopping by national collection firms in Indiana); Haneman, *supra* note 24 (discussing the ethical issues involved in seeking default judgments against consumers for time-barred debts); Holland, *supra* note 24 (addressing the problems of robo-signing by debt buyers in small-claims-court actions); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257 (2011–12) (studying the role of debt buyers in collection cases in more than 500 Dallas County court cases); Connor P. Duffy, Note, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments In Consumer Debt Buyer Lawsuits in New York*, 40 FORDHAM URB. L.J. 1147 (2012–13) (addressing the problem of inappropriate default judgments obtained by debt buyers in New York); Eric Y. Wu, Note, *Vigilante Justice: Ensuring That Consumer Credit Plaintiffs Are Not Above The Law In Collins Financial Services v. Vigilante*, 60 AM. U. L. REV. 1561 (2010–11) (discussing the need for more documentation in default judgment matters). Some scholarship has addressed zombie-debt concerns at the pre-litigation level. See, e.g. Dalíé Jiménez, *Dirty Debts Sold Dirt Cheap*, (Working Paper, Mar. 4, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250784) (arguing that debt collectors who collect on purchased debts that are sold without adequate warranties, representations, or documentation may violate the FDCPA); Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under The Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 CONSUMER FIN. L. Q. REP. 372 (2010) (identifying the results of a study addressing whether consumers would pay time-barred debts if they were informed that such debts were not enforceable); Walgenkim, *supra* note 24 (suggesting that zombie-debt problems are created by debt collectors who incorrectly identify themselves as creditors under the federal Fair Debt Collection Practices Act (the “FDCPA”)).

26. See Walgenkim, *supra* note 24, at 90.

United States, and the rapid growth of the debt-buying industry. Part II discusses how consumers can assert that their disputed debts are in fact dead debts. Part III then discusses the resurrection of dead debts to zombie debts, and the impact of debt buyers on this transformation.

The Article then discusses methods to prevent the growth of zombie debts. Part IV identifies the failure of traditional federal and state efforts to prevent the proliferation of zombie-debt collection. Finally, Part V presents a general framework and specific suggestions to combat zombie debt.

## I. THE GROWTH OF THE DEBT-BUYING INDUSTRY

Over the past three decades, consumer debt has grown to staggering levels. From 1980 to 1995, consumer debt in the United States grew from approximately \$350 billion to \$1.1 trillion.<sup>27</sup> Since 1995, outstanding consumer debt has more than doubled.<sup>28</sup> From 1980 to 2011, consumer debt increased more than 60 percent faster than average income.<sup>29</sup> According to the Federal Reserve, outstanding consumer debt in the United States in 2012 was over \$2.7 trillion, reflecting an average of nearly \$8,800 for every American resident.<sup>30</sup> Actual consumer debt is higher because these figures do not include debt secured by real estate.<sup>31</sup>

The Federal Reserve further divides consumer debt into revolving and non-revolving debt. Non-revolving debt includes student and vehicle loans, and may be secured or unsecured.<sup>32</sup> Credit-card debt is the primary component of revolving debt.<sup>33</sup> Although revolving debt has dropped

27. BD. OF GOVERNORS OF THE FED. RESERVE SYS., HISTORICAL DATA FOR CONSUMER CREDIT OUTSTANDING (LEVELS), [http://www.federalreserve.gov/releases/g19/HIST/cc\\_hist\\_sa\\_levels.html](http://www.federalreserve.gov/releases/g19/HIST/cc_hist_sa_levels.html) (last updated Mar. 7, 2014).

28. Rick Jurgens & Robert J. Hobbs, *The Debt Machine, How the Collection Industry Hounds Consumers and Overwhelms Courts*, NAT'L CONSUMER LAW CTR., 5 (July 2010) [hereinafter *The Debt Machine*], available at [www.nclc.org/images/pdf/pr-reports/debt-machine.pdf](http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf).

29. *Consumer Debt Statistics*, MONEY-ZINE, <http://www.money-zine.com/Financial-Planning/Debt-Consolidation/Consumer-Debt-Statistics/> (last visited Jun. 20, 2013) (relying on data from the Federal Reserve Board).

30. *Id.*; BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER CREDIT—G.19, CURRENT RELEASE—JAN. 2014, <http://www.federalreserve.gov/releases/g19/Current/> (reflecting total outstanding consumer debt for 2012 at over \$2.9 trillion) (last updated Feb. 7, 2014).

31. *Consumer Debt Statistics*, *supra* note 29; BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 30, at n.1.

32. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 30 at n.3.

33. Glenn B. Canner & Gregory Elliehausen, *Consumer Experiences with Credit Cards*, FED. RESERVE BULLETIN, Dec. 2013, at 1, available at <http://www.feder->



from a high of \$1 trillion in 2008 to approximately \$850 billion in 2012, it accounts for about one-third of the total outstanding consumer debt.<sup>34</sup> About 75 percent of American families own at least one credit card.<sup>35</sup> The average credit-card debt per household is approximately \$7,400, with cardholders having an average of eight cards.<sup>36</sup>

Growth in the debt-collection industry has mirrored the dramatic increase in consumer debts.<sup>37</sup> Since the 1970s, jobs in the collection industry have more than quadrupled, and inflation-adjusted revenue for the industry has increased by more than six times.<sup>38</sup> It is estimated that one billion to four billion collection calls are made each year.<sup>39</sup> Fourteen percent of Americans—nearly thirty million individuals—receive these calls.<sup>40</sup>

The development of the debt-buying industry has dramatically changed the collection business.<sup>41</sup> The industry has emerged as one of “the fastest-growing sectors of all financial services.”<sup>42</sup> It includes compa-

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alreserve.gov/pubs/bulletin/2013/pdf/consumer-experiences-with-credit-cards-201312.pdf.

34. *Consumer Debt Statistics*, *supra* note 29; BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 30.

35. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 44 (Jan. 30, 2012), *available at* [http://files.consumerfinance.gov/f/2012/01/Congressional\\_Report\\_Jan2012.pdf](http://files.consumerfinance.gov/f/2012/01/Congressional_Report_Jan2012.pdf) [hereinafter CFPB SEMI-ANNUAL REPORT].

36. *Credit Card Debt Statistics*, MONEY-ZINE, <http://www.money-zine.com/Financial-Planning/Debt-Consolidation/Credit-Card-Debt-Statistics> (Dec. 2013) (relying on data from the Federal Reserve Board).

37. *See* Mary Spector, *Litigating Consumer Debt Collection: A Study*, 31 No. 6 BANKING & FIN. SERVS. POL’Y REPORT 1, 2 (2012); Holland, *supra* note 24, at 264.

38. *See* FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 13 (2009), *available at* <http://ftc.gov/bcp/workshops/debtcollection/dcw.pdf> [hereinafter FTC WORKSHOP].

39. Caroline E. Mayer, *As Debt Collectors Multiply, So Do Consumer Complaints*, WASH. POST, July 28, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072702473.html> (explaining that the typical collector makes over 40,000 calls per year); *see* Jurgens & Hobbs, *supra* note 28, at 5.

40. *See* Patrick Lunsford, *Americans with an Account in Third Party Collections Hits All-Time High . . . Again*, INSIDEARM.COM (May 15, 2013), <http://www.insidearm.com/daily/banks-and-credit-grantors/auto-finance-receivables/americans-with-an-account-in-third-party-collections-hits-all-time-high-again/>; CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 8 (2013), *available at* [http://files.consumerfinance.gov/f/201303\\_cfpb\\_March\\_FDCPA\\_Report1.pdf](http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf) [hereinafter CFPB 2013 ANNUAL REPORT].

41. *See* FTC WORKSHOP, *supra* note 38, at iv.

42. Holland, *supra* note 24, at 265.

nies that buy charged-off debts at deep discounts from creditors and resellers.<sup>43</sup>

The modern debt-buying industry evolved from the savings and loan crisis of the late 1980s.<sup>44</sup> Responding to the crisis, Congress created the Resolution Trust Corporation to handle the sale of the assets of insolvent institutions.<sup>45</sup> Purchasers realized that they could profit by buying and collecting on debts originally owned by these failed institutions.<sup>46</sup> They soon recognized that solvent lenders were also eager to sell off debts at deep discounts.<sup>47</sup>

In the late 1990s, the influx of institutional investors sparked growth in the debt-buying industry.<sup>48</sup> To achieve economies of scale, companies began to buy and collect on larger portfolios of bad debt. An increase in consumer spending and merchants' desire to avoid debt collection created an "astronomical growth" in the purchasing of debts.<sup>49</sup> From 1993 to 2005 the amount of purchased debt rose nearly twenty-fold, from \$6 billion to over \$110 billion.<sup>50</sup> Sales of credit-card debt accounted for about 90 percent of the purchased debt.<sup>51</sup> In 1996, only about a dozen debt-buying firms existed.<sup>52</sup> Currently, over 500 privately owned companies, as well as at least four publicly traded companies, are debt buyers.<sup>53</sup>

43. See FTC WORKSHOP, *supra* note 38, at 3–4.

44. *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT, 3 (May 2010), [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf) [hereinafter *Debt Deception*].

45. *Id.*

46. *Id.*

47. *Id.*; Goldberg, *supra* note 24, at 725 (identifying the federal government's sale of debts of distressed banks and Bank of America's sale of old credit-card debt as the "key transactions stimulat[ing] a revolution of the debt-collection industry").

48. See Haneman, *supra* note 24, at 715–16; Goldberg, *supra* note 24, at 725–26.

49. Goldberg, *supra* note 24, at 726–28. As consumers took on more debt, especially in the form of credit-card debt, creditors had more debt to sell. FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUS. 12–13 (2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> [hereinafter FTC DEBT-BUYING INDUSTRY].

50. See Jurgens & Hobbs, *supra* note 28, at 18.

51. *Debt Deception*, *supra* note 44, at 3.

52. Mayer, *supra* note 39.

53. *Id.*; *Debt Deception*, *supra* note 44, at 4; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 7 (2009), available at <http://www.gao.gov/new.items/d09748.pdf> [hereinafter GAO Report], cited in FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION at 5

The debt-collection industry also contributes to overall economic growth. In 2010, collectors recovered nearly \$55 billion in total debt.<sup>54</sup> The payroll estimates of the industry, which employs over 300,000,<sup>55</sup> is over \$10 billion, with tax revenues of nearly \$2 billion.<sup>56</sup> Forecasts suggest that job opportunities in the collection industry will grow at a rate faster than any other industry.<sup>57</sup> The industry is expected to exceed \$500 billion in collections and create more than a million jobs in the United States over the next ten years.<sup>58</sup>

Although the collection industry benefits the economy, an increase in consumer complaints has accompanied the development of the debt-buying industry. In 2011, consumers filed more than 140,000 complaints with the Federal Trade Commission (“FTC”) against third party and in-house debt collectors.<sup>59</sup> The industry is the leader in complaints received

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n.10 (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> [hereinafter FTC Broken System].

54. ERNST & YOUNG LLP, THE IMPACT OF THIRD-PARTY DEBT COLLECTION ON THE NATIONAL AND STATE ECONOMIES 2 (2012), available at <http://www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf> [hereinafter EY REPORT] (reporting on study of collection agencies commissioned by ACA International, the Association of Credit and Collection Professionals). As with other industries, the recession has reduced profits from debt collection. See Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-parties and Arbitration*, 24 LOY. CONSUMER L. REV. 586, 588 n.12 (2011–12) (citing Patrick Lunsford, *The Myth of the Debt Collection Boom*, FORBES, Feb. 23, 2012, <http://www.forbes.com/sites/insidearm/2012/02/23/the-myth-of-the-debt-collection-boom/>).

55. See Alderman, *supra* note 54, at 588 (citing *Collections Information*, ACA INT’L, <http://www.acainternational.org/products-collections-information-5431.aspx> (last visited Oct. 31, 2013)).

56. See EY REPORT, *supra* note 54, at 2–3.

57. Fox, *supra* note 25, at 358 (citing Bureau of Labor Statistics estimating growth rates for the period 2008 to 2018).

58. Martin Sher, *On the Clock*, COLLECTOR, Sept. 2010, at 9, available at <http://www.digital-collector.com/collectormagazine/201009#pg11>.

59. See CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2012 6 (2012), available at [http://files.consumerfinance.gov/f/201203\\_cfpb\\_FDCPA\\_annual\\_report.pdf](http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf) [hereinafter CFPB 2012 ANNUAL REPORT]. In 2012, direct complaints to the FTC about collectors decreased to about 125,000; however, debt collection still ranked as the top industry target for consumer complaints. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 14. Additionally, the Consumer Sentinel Network (“CSN”) reported the FTC and entities that partner with the FTC received more consumer complaints in 2012 than in 2011. *Id.* at 14 n.13 (citing FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JAN.–DEC. 2012 6, 81 (2013)), available at <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf> [hereinafter 2012 CSN REPORT]). For more information about the CSN, see *infra* notes 65–69 and accompanying text.

by the FTC and the CFPB.<sup>60</sup> Approximately 25 percent of all complaints received by the FTC relate to the debt-collection industry.<sup>61</sup> The FTC concedes that the reported numbers may underestimate the total number of complaints, as they are limited to complaints filed with the FTC.<sup>62</sup> The numbers do not include complaints made to debt collectors, the original creditor, or other agencies.<sup>63</sup> The FTC report further underestimates complaints against collectors because it does not include identity theft or “Do Not Call” Registry complaints.<sup>64</sup>

Additionally, through its Consumer Sentinel Network (“CSN”), the FTC maintains an online database of over eight million consumer complaints collected since 2008.<sup>65</sup> The database is accessible by federal, state, and local law enforcement authorities, and includes complaints received by the FTC, the CFPB, other federal agencies, state organizations, and

60. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 14. The CFPB, which was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, identifies collecting consumer complaints as one of its core functions. The CFPB began collecting credit-card consumer complaints in 2011; however, the Bureau has since expanded its scope to include mortgage complaints, bank products and services, and a variety of loans. *Learn About the Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Sept. 7, 2013); Andrew G. Berg et al., *The Consumer Financial Protection Bureau – The New Sheriff in Town*, NAT’L LAW REVIEW (July 16, 2012), <http://www.natlawreview.com/article/consumer-financial-protection-bureau-new-sheriff-town>. Similarly, the Better Business Bureau reported that the debt-collection industry ranked fifth in its 2010 list of the most complained about industries. BETTER BUS. BUREAU, *THEY DEAL IN BILLIONS 1* (2011), available at [http://stlouis.bbb.org/Storage/142/Documents/Bill%20Collector%20Study%20\(FINAL%20WITH%20CHANGES\)%2012%2027%202011.pdf](http://stlouis.bbb.org/Storage/142/Documents/Bill%20Collector%20Study%20(FINAL%20WITH%20CHANGES)%2012%2027%202011.pdf) [hereinafter *BBB STUDY*].

61. See CFPB 2013 ANNUAL REPORT, *supra* note 40, at 14.

62. *Id.* at 12. On the other hand, the FTC recognizes that not all complaints are violations of the FDCPA. *Id.* at 12–13.

63. *Id.* at 13; see Jurgens & Hobbs, *supra* note 28, at 7. In July 2011, the CFPB established a method to make the reporting of consumer complaints easier. It was initially established for credit-card complaints and has now been extended to cover consumer complaints about mortgages, bank products, student loans, and other consumer loans. CFPB 2012 ANNUAL REPORT, *supra* note 59, at 5. In June 2012, the CFPB released an overview and analysis of its program for the time period July 21, 2011 to June 1, 2012. CONSUMER FIN. PROT. BUREAU, *CONSUMER RESPONSE: A SNAPSHOT OF COMPLAINTS RECEIVED* (2012), available at [http://files.consumerfinance.gov/f/201206\\_cfpb\\_shapshot\\_complaints-received.pdf](http://files.consumerfinance.gov/f/201206_cfpb_shapshot_complaints-received.pdf). The report identifies billing disputes as the top credit-card complaint. *Id.* at 4.

64. See CFPB 2013 ANNUAL REPORT, *supra* note 40, at 14 n.12. For a discussion of identity theft issues, see *infra* notes 92–103 and accompanying text.

65. 2012 CSN REPORT, *supra* note 59, at 3. Data has been collected since 1997; however, complaints that are more than five years old are removed from the database. *Id.* at 2. The database is available at <http://www.ftc.gov/sentinel/>.

non-governmental organizations including the Council of Better Business Bureaus.<sup>66</sup> In 2012, the CSN received more than two million complaints.<sup>67</sup> The FTC divided these complaints into thirty categories.<sup>68</sup> Identity theft and debt-collection complaints ranked as the top two categories, accounting for 28 percent of all complaints received.<sup>69</sup>

A common complaint against collectors is their pursuit of debts that are not legally enforceable against consumers.<sup>70</sup> These “dead” debts are the subject the next section.

## II. DEAD DEBTS—DEFENSES FOR CONSUMERS

Just as in horror flicks in which the source of a zombie is a dead person,<sup>71</sup> the source of zombie debt is a dead debt. These unenforceable debts typically fall into one of three categories: (1) debts that never existed; (2) debts that have been satisfied by payment, settlement, or discharge in bankruptcy; and (3) time-barred debts.

### A. *Dead Debts—Debts that Never Existed*

“It’s not my account” should be a straightforward defense in a collection matter; however, some collectors continue their efforts, even after receiving evidence that they are contacting individuals who did not incur

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66. *Id.* at 2. The Council of Better Business Bureaus includes all of the North American Better Business Bureaus. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 3. Identity theft received 18 percent of the overall complaints while debt collection received 10 percent of the overall complaints. *Id.*

70. In 2013, the top complaint against debt collectors (one-third of the total received) concerned attempts to recover debts that were not owed. CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE ANNUAL REPORT 17 (2014), available at [http://www.consumerfinance.gov/f/201403\\_cfpb\\_consumer-response-annual-report-complaints.pdf](http://www.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf). Similarly, complaints that collectors were seeking to recover debts that were either inflated or not owed were the number one complaint against collectors in 2012 and the second ranked complaint against collectors in 2008–2011. See CFPB 2013 ANNUAL REPORT, *supra* note 40, at 17. The percentage of overall complaints in this category increased from approximately 30 percent in 2010 to nearly 40 percent in 2011. See CFPB 2012 ANNUAL REPORT, *supra* note 59, at 8 & app. C. Similarly, a Better Business Bureau study found that more than 50 percent of complainants claimed that collectors contacted them about debt that they did not owe. BBB STUDY, *supra* note 60, at 3.

71. See *supra* note 4.

the debts in question.<sup>72</sup> Media sources call the process of seeking to recover debts against the wrong person as “debt tagging,” because collectors will pin the debts of others on innocent consumers.<sup>73</sup> Two primary reasons for dead-debt issues are mistaken identity and identity theft, as described below.

### 1. Mistaken Identity

Unfortunately, collectors often seek recovery from the wrong people.<sup>74</sup> Despite protests from individuals that they are not the actual debtors, collectors continue to call and send demand letters.<sup>75</sup> The mistaken identity defense is an assertion that the collector is pursuing the wrong person because of some clerical error—typically in name, address, or phone number.<sup>76</sup>

For example, in *Johnson v. Bullhead Investments, LLC*,<sup>77</sup> Elaine Annette Johnson alleged that for several years Bullhead Investments, LLC, a collector for First USA Bank, pursued her for a debt that belonged to Elaine E. Johnson.<sup>78</sup> Despite her many statements to Bullhead and its counsel that the debt was not hers, that she never had an account

72. Sergei Lemberg, *Debt Collection and Mistaken Identity*, COLLECTION AGENCY MEDIA (Oct. 15, 2013), <http://collectionagencymedia.com/articles/debt-collection-and-mistaken-identity/>.

73. Elisabeth Leamy, *10 Tactics to Stop Rogue Debt Collectors in Their Tracks* ABC NEWS (Apr. 26, 2012), <http://abcnews.com/Business/10-tactics-stop-rogue-debt-collectors-tracks/story?id=16220825>; *Debt Tagging: When You Get Tagged with Someone Else's Debt*, NEWSLETTER (Identity Theft 911, Scottsdale, Ariz.), May 2010, at 1, 3.; Kathy M. Kristof, *When Debt Collectors Go After the Wrong Person*, L.A. TIMES, Dec. 19, 2010, <http://articles.latimes.com/2010/dec/19/business/la-fi-perfin-20101219>; Sonja Ryst, *'Debt Tagging' by Collection Agencies a Growing Problem*, WASH. POST, Aug. 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/06/AR2010080606237.html>.

74. Lemberg, *supra* note 72 (“It may seem like a stretch, but debt collectors routinely go after the wrong person and wreak havoc on their personal finances.”); *see, e.g.*, *Bodur v. Palisades Collection, LLC*, 829 F. Supp. 2d 246, 247–49 (S.D.N.Y. 2011).

75. *Bodur*, 829 F. Supp. 2d at 248 (alleging that even though the collector knew that Ibrahim Bodur was not the actual debtor, the collector continued to send demands for payment of debts to Ibrahim Bodur, an individual who had a different Social Security number and address than the actual debtor).

76. Leamy, *supra* note 73; Kristof, *supra* note 73.

77. *Johnson v. Bullhead Invs., LLC*, No. 1:09CV639, 2010 WL 118274 (M.D.N.C. Jan. 11, 2010) (involving a hearing before the magistrate judge on the issue of whether Johnson’s complaint alleging that Bullhead Investments, Inc. and its counsel, Brock & Scott, PLLC, violated the FDCPA should be dismissed, or alternatively that certain paragraphs of the complaint be struck). The judge denied the motion to strike and recommended that the court deny the motion to dismiss. *Id.* at \*7.

78. *Id.* at \*1.

with First USA, that she was not Elaine E. Johnson, and that she did not know Elaine E. Johnson, the collectors continued to pursue the claim.<sup>79</sup> Even after Bullhead removed her from its mailing list and had been provided proof that she had a different Social Security number, Bullhead's attorneys served her with a summons and complaint seeking recovery on the First USA debt.<sup>80</sup> Ms. Johnson then sent additional evidence to Bullhead's attorneys that she never lived in Ohio where the alleged debt arose.<sup>81</sup> Bullhead's attorneys refused to release the claim unless she proved that she was not Elaine E. Johnson by filing an affidavit that fraud had occurred.<sup>82</sup> Unaware of any fraud, she refused to file a false affidavit.<sup>83</sup> Eventually, Elaine A. Johnson hired counsel and was successful in her motion for summary judgment on the basis that she and Elaine E. Johnson were different people.<sup>84</sup>

In other cases, the FTC has filed complaints against collectors for knowingly pursuing claims against individuals who did not incur the alleged debts.<sup>85</sup> For example, in *United States v. Asset Acceptance, LLC*,<sup>86</sup> the FTC alleged that Asset Acceptance, a debt purchaser and collector, knew that the portfolio of debts it acquired from Bally Total Fitness contained unreliable data, including inaccurate or missing Social Security numbers.<sup>87</sup> Consequently, Asset Acceptance tried to collect from individuals who did not have any agreement with Bally Total Fitness.<sup>88</sup> In January 2012, Asset Acceptance agreed to pay a penalty of \$2.5 million to settle the claim.<sup>89</sup> Additionally, in July 2013, Expert Global Solutions and its subsidiaries, who represent the world's largest debt-collection opera-

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79. *Id.*

80. *Id.* at \*1–2.

81. *Id.* at \*2.

82. *Id.*

83. *Johnson*, 2010 WL 118274, at \*2.

84. *Id.*

85. Amended Complaint for Injunctive & Other Equitable Relief at 7, Fed. Trade Comm'n v. Capital Acquisitions & Mgmt. Corp., No. 04-C7781 (N.D. Ill. Apr. 11, 2005), available at <http://www.ftc.gov/os/caselist/camco/050411camcoamendedcomplaint.pdf>; Complaint for Civil Penalties, Injunctive and Other Relief at 8–10, 16–18, *United States v. Asset Acceptance, LLC*, No. 8:12-cv-00182-T-27EAJ (M.D. Fla. Jan. 30, 2012), available at <http://www.ftc.gov/os/caselist/0523133/120130assetcmpt.pdf>.

86. *United States v. Asset Acceptance, LLC*, No. 8:12-cv-00182-T-27EAJ (M.D. Fla. Jan. 30, 2012), available at <http://www.ftc.gov/os/caselist/0523133/120130assetcmpt.pdf>.

87. *Id.* at 16.

88. *Id.* at 16–18.

89. Press Release, Fed. Trade Comm'n, Under FTC Settlement, Debt Buyer Agrees to Pay \$2.5 Million for Alleged Consumer Deception (Jan. 30, 2012), available at <http://www.ftc.gov/opa/2012/01/asset.shtm>.

tion, agreed to settle FTC claims that included allegations that collectors continued to call consumers even after consumers denied owing debts.<sup>90</sup> The settlement included a record payment of \$3.2 million by Expert Global Solutions.<sup>91</sup>

## 2. Identity Theft

In contrast to the defense of mistaken identity, identity theft involves allegations of fraud. It “occurs when a person steals another person’s name, address, [S]ocial [S]ecurity number, or other identifying information in order to commit fraud.”<sup>92</sup> In other words, consumers acknowledge debts in their name, but argue that they should not be liable for the debts because identity theft was the source of the debts.

Identity theft is a significant problem. The Identity Theft and Assumption Deterrence Act (“ITADA”)<sup>93</sup> of 1998 was the “first comprehensive effort to rewrite the federal criminal code to address the effects of identity theft on individuals.”<sup>94</sup> The ITADA directed the FTC to keep records of identity-theft complaints.<sup>95</sup> Identity-theft claims have continued to rise. In 2001, the FTC reported that consumers had filed 86,000 identity-theft complaints. In 2012, the number of complaints had increased to about 370,000,<sup>96</sup> and the FTC recognized identity theft to be the leading complaint for the thirteenth consecutive year.<sup>97</sup>

90. Press Release, Fed. Trade Comm’n, World’s Largest Debt Collection Operation Settles FTC Charges, Will Pay \$3.2 Million Penalty (July 9, 2013), available at <http://www.ftc.gov/opa/2013/07/nco.shtm>.

91. *Id.*

92. Martha A. Sabol, *The Identity Theft and Assumption Deterrence Act of 1998 Do Individual Victims Finally Get Their Day in Court?*, 11 LOY. CONSUMER L. REV. 165, 166 (1998–99). A discussion of the causes and potential solutions for identity theft is beyond the scope of this article. For more information, see Lori J. Parker, Annotation, *Legal and Procedural Issues in Prosecutions Under Federal Statutes Relating to Offense of Identity Theft*, 4 A.L.R. FED. 2D 365 (2005); Lori J. Parker, Annotation, *Validity, Construction, and Application of State Statutes Relating to Offense of Identity Theft*, 125 A.L.R. 5TH 537 (2005). Instead, this article addresses identity theft in the context of zombie debt—when a debt collector recovers on a debt that the debtor did not incur, the collector has created a zombie debt.

93. Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105–318, 112 Stat. 3007 (1998) (codified as amended at 18 U.S.C. § 1028 (2006)).

94. Erin Leigh Sylvester, *Identity Theft: Are the Elderly Targeted?*, 3 CONN. PUB. INT. L.J. 371, 376 (2004).

95. Pub. L. No. 105–318, § 5, 112 Stat. 3007, 3010 (1998); Sylvester, *supra* note 94, at 377–79.

96. See 2012 CSN REPORT, *supra* note 59, at 5, 6.

97. *Id.*; Press Release, Fed. Trade Comm’n, FTC Releases Top 10 Complaint Categories for 2012 (Feb. 26, 2013), available at [http://www.ftc.gov/opa/2013/02/sentinel\\_top.shtm](http://www.ftc.gov/opa/2013/02/sentinel_top.shtm).



More importantly, the number of victims of identity theft far exceeds the number of filed complaints. According to the Bureau of Justice's statistics for 2010, more than 8.5 million American households, roughly 7 percent of households, were victims of identity theft.<sup>98</sup> This represents an increase from the 5.5 percent of households that were victims of identity theft in 2005.<sup>99</sup> Misuse of existing credit cards has been the primary and most rapidly growing source of identity theft, increasing from 3.6 million (or about 56 percent of victimized households) in 2005, to 5.5 million (or about 64 percent of victimized households) in 2010.<sup>100</sup> The elderly are particularly vulnerable to this crime.<sup>101</sup>

Victims of identity theft not only deal with the demands from collectors who seek to recover the debts, but may also suffer emotional harm, and may spend hundreds of hours trying to repair their credit histories and reputations.<sup>102</sup> In 2010, the total economic loss of households due to identity theft exceeded \$13.2 billion.<sup>103</sup> In summary, a dead-debt defense exists when a consumer never incurred the debt and the collector pursues the debt either because of improper or fraudulent information.

### *B. Dead Debts—Debts that Have Been Satisfied*

“I no longer owe the debt” or “the debt has been taken care of” is another common defense to a debt claim. As discussed below, this defense is relevant (a) when an account has been settled or paid, or (b) when a bankruptcy proceeding has discharged the debt.

#### 1. Paid or Settled Debts

A debt is extinguished if the debtor has paid it in full or the parties have agreed to release the borrower's obligation for less than full payment. The defenses in this category include payment, release, settlement and accord, and satisfaction.<sup>104</sup> Although there may be disputes about

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98. Lynn Langton, *Identity Theft Reported by Households, 2005–2010*, U.S. DEPT OF JUSTICE, 1 (Nov. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/itrh0510.pdf>.

99. *Id.*

100. *Id.* at 2.

101. Sylvester, *supra* note 94, at 371.

102. *Id.* at 373–74; R. Bradley McMahon, Note, *After Billions Spent to Comply with HIPAA and GLBA Privacy Provisions, Why Is Identity Theft the Most Prevalent Crime in America?*, 49 VILL. L. REV. 625, 625–26 (2004).

103. Langton, *supra* note 98, at 5.

104. A thorough discussion of these defenses is beyond the scope of this article. For more information, see Vitauts M. Gulbis, Annotation, *Modern Status of Rule that Acceptance of Check Purporting To Be Final Settlement of Disputed Amount Constitutes Accord and Satisfaction*, 42 A.L.R. 4TH 12 (1985); Karen S. Harmatiuk, *Satisfaction of Debt by Payment of Less than Amount Claimed To Be Due*, 35 AM. JUR.

whether any one of these defenses applies, collectors should not be able to collect on such debts. As with the mistaken-identity and identity-theft cases, some collectors seek recovery of settled debts.<sup>105</sup> For example, in *Overcash v. United Abstract Group, Inc.*,<sup>106</sup> Chase Bank sold Larry Overcash's credit-card debt of \$1,353.15 to United Abstract, who in turn sent a letter to Overcash that the debt was paid in full.<sup>107</sup> Despite this correspondence, the debt was subsequently sold and resold.<sup>108</sup> American Credit, the ultimate purchaser of the account, sought collection from Overcash of \$41,701.58, and reported this amount to the credit bureaus.<sup>109</sup> In an action involving violations under the FDCPA, a court entered judgment against United Abstract and American Credit for \$5,155, which included attorneys' fees and statutory damages.<sup>110</sup> Similarly, in 2010 the FTC settled a dispute with Credit Bureau Collection Services, in which the FTC alleged that the company continued collection efforts against individuals who had presented evidence of payment or settlement.<sup>111</sup>

## 2. Debts Discharged in Bankruptcy

Consumers can also discharge debts by filing bankruptcy. The commencement of a bankruptcy case typically stays collection attempts of

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PROOF OF FACTS 2D 735 (1983); R.E.H., Annotation, *Trade Acceptance or Unsecured Note or Bill as Accord and Satisfaction*, 62 A.L.R. 751 (1962); G. Van Ingen, Annotation, *Payment of Undisputed Amount or Liability as Consideration for Discharge of Disputed Amount or Liability*, 112 A.L.R. 1219 (1938).

105. See Holland, *supra* note 24, at 270–71 nn.75–79 and accompanying text (describing cases where collectors have sought recovery on paid or settled debt, including a situation where a collector sued on a debt that the collector had already settled).

106. *Overcash v. United Abstract Grp., Inc.*, 549 F. Supp. 2d 193 (N.D.N.Y. 2008).

107. *Id.* at 195.

108. *Id.*

109. *Id.* The court does not explain the basis for American Credit's pursuit of a claim of over \$40,000 for a debt that was originally for less than \$1,500, but the court states that the conduct was "relatively egregious." *Id.* at 196.

110. *Id.* at 197. The judgment entered was a default judgment in which the court deemed the allegations in Overcash's complaint as true and found that United Abstract and American Credit violated the FDCPA. *Id.* at 196–97. Final damages were based on the court's assessment of damages recoverable under the FDCPA, including attorney's fees and costs. *Id.*

111. Plaintiff's Complaint for Civil Penalties, Injunctive and Other Relief at 4–5, *United States v. Credit Bureau Collection Servs.*, No.2:10-cv-169 (S.D. Ohio Feb. 24, 2010); Press Release, Fed. Trade Comm'n, Debt Collectors Will Pay More Than \$1 Million to Settle FTC Charges (Mar. 3, 2010), available at <http://www.ftc.gov/opa/2010/03/creditcollect.shtm>.

creditors and collectors.<sup>112</sup> The Bankruptcy Code describes the discharge afforded during different types of bankruptcy proceedings,<sup>113</sup> and the effect of the discharge.<sup>114</sup> Under § 524, an injunction will generally halt the collection of all debts except those specifically listed as non-dischargeable by the Bankruptcy Code or the bankruptcy judge determines to be non-dischargeable.<sup>115</sup> When granted, a discharge “operates as an injunction against the commencement of continuation of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debtor.”<sup>116</sup> Furthermore, some courts have held that the injunction applies not only to the collection of discharged debt, but also to the sale of a discharged debt.<sup>117</sup>

Despite this injunction, a market exists for debts discharged in bankruptcy, and debt purchasers do seek collection on such discharged debts.<sup>118</sup>

### C. Dead Debts—Expiration of Limitation Periods

Unlike the defenses based on an assertion that a debt never existed, or that it was satisfied, this defense recognizes the existence of the debt, but asserts that the passage of time creates a dead or non-enforceable debt. Defenses based on statutory limitation periods have existed for cen-

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112. 11 U.S.C. § 362 (2006). Of course, there are exceptions to the automatic stay, see 11 U.S.C. § 362 (2006 & Supp. 2010); however, the exceptions are beyond the scope of the issues discussed in this Article.

113. *Id.* §§ 727 (Chapter 7), 1141 (Chapter 11), 1328 (Chapter 13).

114. *Id.* § 524.

115. *Id.* A detailed discussion about the extent and impact of discharge and the dischargeability of specific debts involved in bankruptcy cases is beyond the scope of this Article. For more information, see David M. Holliday, Annotation, *Willful Violation of Discharge Injunction Provisions of Bankruptcy Code § 524(a)(2) and (3)* (11 U.S.C.A. § 524(a)(2) and (3)) 9 A.L.R. FED. 2D 431 (2006).

116. 11 U.S.C. § 524(a)(2) (2006).

117. See *Laboy v. Firstbank P.R.* (*In re Laboy*), Bankr. No. 93-00753, Adv. No. 09-00047, 2010 WL 427780, at \*6 (Bankr. D.P.R. 2010); *In re Nassoko*, 405 B.R. 515, 520-21 (Bankr. S.D.N.Y. 2009); *In re Lafferty*, 229 B.R. 707, 713-14 (Bankr. N.D. Ohio 1998). *But see* *Finnie v. First Union Nat'l Bank*, 275 B.R. 743, 746 (E.D. Va. 2002) (holding that sale did not violate discharge injunction); Guy B. Moss, *The Risks of Purchasing and Collecting Consumer Debt*, 10 AM. BANKR. INST. L. REV. 643, 663 (2002) (describing *Lafferty* as stating the minority view).

118. Adam J. Levitin, *Bankruptcy Markets: Making Sense Of Claims Trading*, 4 BROOK. J. CORP. FIN. & COM. L. 67, 81 (2009); Robert Berner & Brian Grow, *Prisoners of Debt*, BUS. WK. (Nov. 12, 2007), <http://www.businessweek.com/stories/2007-11-11/prisoners-of-debt>. Two of the top-ten debt buyers purchase only debts of consumers who have filed bankruptcy. See FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 8 n.37; FTC WORKSHOP, *supra* note 38, at 64-65.

turies.<sup>119</sup> As recognized by the Supreme Court, “they are found and approved in all systems of enlightened jurisprudence.”<sup>120</sup> They are rooted in concepts of efficiency and fairness.<sup>121</sup> They protect the interests of potential defendants, the courts, and society. Statutes of limitations encourage plaintiffs to file suits in a timely manner to ensure that evidence and witnesses are still available. They provide certainty for businesses and individuals against the indefinite threat of lawsuits.<sup>122</sup> In the consumer context, courts have specifically recognized the unfairness of filing suit after the limitations period has expired.<sup>123</sup>

Although statutes of limitation are bright-line rules barring the enforcement of old debts, collectors often pursue time-barred claims. One commentator has suggested that “time-barred debt is where the worst abuse has occurred towards the debtor.”<sup>124</sup> While Mississippi and Wisconsin statutes provide that the passage of a limitations period extinguishes both the debt and the liability,<sup>125</sup> in the majority of states, the rule is that the passage of the time extinguishes liability, but not the debt itself.<sup>126</sup> Most courts have stated that the FDCPA<sup>127</sup> does not prohibit requests for payments on time-barred debts as long as collectors do not file or threaten to file lawsuits.<sup>128</sup>

119. WILLIAM FERGUSON, *THE STATUTE OF LIMITATIONS SAVING STATUTES* 46 (1978). The characterization of a debt as unenforceable based on the passage of time does not remove the moral obligation associated with the debt. See Randy Sutton, Annotation, *Moral or Natural Obligation as Consideration for Contract*, 98 A.L.R. 5TH 353 (2002).

120. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

121. Haneman, *supra* note 24, at 710 n.16.

122. Suzette M. Malveaux, *Statute of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 75–82 (2005) (describing the policy reasons for limitation periods).

123. See, e.g., *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (recognizing that consumers are typically unaware of limitation defenses and even if consumers are aware they may refuse to raise the defense based on the time and expense necessary to appear in court).

124. Andrew Martin, *Old Debts that Won't Die*, N.Y. TIMES, July 30, 2010, <http://www.nytimes.com/2010/07/31/business/31collect.html?pagewanted=all> (quoting John Pratt, a consultant to the debt-buying industry and an author of “Debt Purchasing: An Investor’s Guide to Buying Debt” (Morris Publishing, 2005)).

125. MISS. CODE ANN. § 15-1-3 (2012); WIS. STAT. § 893.05 (1997); *Klewer v. Cavalry Invs., LLC*, No. 01-C-541-S, 2002 WL 2018830, at \*2–3 (W.D. Wis. Jan. 30, 2002).

126. Haneman, *supra* note 24, at 717–18.

127. FDCPA, 15 U.S.C. §§ 1692–1692p (2006).

128. See, e.g., *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33–34 (3d Cir. 2011); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). But see *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (holding that a threat of litigation is not

Despite prohibitions on threatening or filing lawsuits, collectors continue to threaten legal action, file lawsuits, and obtain judgments (primarily default judgments) on time-barred debts.<sup>129</sup> In the majority of states, the passage of the limitations period is an affirmative defense that the defendant must raise.<sup>130</sup> As a practical matter, alleged debtors rarely raise this defense, since most lawsuits result in default judgments.<sup>131</sup>

Unfortunately, dead debts do not always remain dead. As described below, like the re-animated zombies in the movies, collectors can resurrect dead debts to create zombie debts, creating nightmarish situations for unwitting consumers.<sup>132</sup>

### III. ZOMBIE DEBTS—RESURRECTED DEAD DEBTS

Over the last decade, the number of zombie debts has increased, and along with it the debt-buying industry has exploded.<sup>133</sup> Understanding the creation and proliferation of these resurrected debts is the first step to defeating them.

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a necessary element for a misrepresentation claim under the FDCPA and recognizing that its decision conflicts with decisions of the Third and Eighth Circuits); *Stepney v. Outsourcing Solutions, Inc.*, No. 97 C 5288, 1997 WL 722972, at \*5 (N.D. Ill. Nov. 13, 1997) (explaining petition stated a claim under FDCPA when collector knew it was collecting on a time-barred debt and letter threatened further collection action); *see also* Charles V. Gall, *Proceeding with Caution: Collecting Time-Barred Debts*, 56 CONSUMER FIN. L. Q. REP. 244, 245–47 (2002) (discussing how an implicit threat of a lawsuit may be sufficient for liability).

129. *See* FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 46. A legal provider in New York claims that more than half of the actions in its office were based on time-barred debt. *Id.* at n.192 (citing to Letter from Robert A. Martin, Assoc. Dir., DC 37 Mun. Emps. Legal Servs., to the FTC (Feb. 11, 2010) (on file with the FTC)). For scholarship discussing the problems of litigating zombie debts, *see supra* note 25. This Article focuses on pre-litigation issues.

130. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 45; Haneman, *supra* note 24, at 729–30; *see, e.g.*, Mass. R. Civ. P. 8 (establishing Massachusetts' rule limitations as an affirmative defense). Some states are now placing specific restrictions to sanction collectors who file actions with reason to know that debts are time-barred. *See* Spector, *supra* note 25, at 270–71 (citing to North Carolina law (N.C. GEN. STAT. ANN. § 58-7-115(4) (West 2011)) making it an unfair practice for a debt buyer to sue on a time-barred debt).

131. *See* FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 45. For more information about the prevalence of default judgment in collection matters, *see infra* notes 173–80 and accompanying text.

132. Forbes, *supra* note 7.

133. For a discussion of the association between the growth in the debt-buying industry and the growth in the collection of zombie debts, *see infra* Part III.B.

### A. Birth of a Zombie Debt

As illustrated by Harry's short horror story at the beginning of this article, dead debts can come back to life. Partial payments, acknowledgements, new agreements, and judgments are the primary mechanisms for resurrecting debts.

#### 1. Zombie Debts Created by Debtor's Partial Payment

Typically, the last payment made on an account serves as the starting point for running the period under the statute of limitations.<sup>134</sup> After the statutory period has run, the debt is no longer enforceable in court.<sup>135</sup> In most states, however, partial payment after the expiration of the limitations period will revive the debt and restart the clock for limitations.<sup>136</sup> As a result, a collector hoping to revive a time-barred debt may cajole a consumer into making a small payment.<sup>137</sup> Typically, the collector will not disclose that she is seeking recovery on a time-barred debt.<sup>138</sup> Resetting the limitations period may enable the collector to recover the entire amount owed as opposed to only the amount of the initial payment.<sup>139</sup>

The difficulty in determining the applicable limitation period compounds the problem for the uninformed consumer.<sup>140</sup> For example, what is the statute of limitation that applies to a Texas resident who purchases clothing at a department store in Oklahoma by signing up for the merchant's credit card that a New York bank services? Determining the appropriate limitation period for an unpaid debt often begins with a complicated choice-of-law analysis.<sup>141</sup> After determining the applicable law,

134. FTC Broken System, *supra* note 53, at 24; Emily Grace, *Out of Statute*, COLLECTOR, July 2011 at 40, available at <http://www.digital-collector.com/collectormagazine/201107#pg42>; FED. TRADE COMM'N, CONSUMER INFO., TIME-BARRED DEBTS (July 2013), available at <http://www.consumer.ftc.gov/articles/0117-time-barred-debts>.

135. See Gall, *supra* note 128, at 244; Haneman, *supra* note 24, at 717.

136. See FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 47; FTC Broken System, *supra* note 53, at 27; SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:31 (4th ed. 2008) (recognizing that "part payment of a barred debt amounts to a new promise to pay the debt . . . represents a generally accepted principle"). For collection of cases discussing the issue of how payment revives the limitation period, see H. A. Wood, Annotation, *Necessity and Sufficiency of Identification of Part Payment with the Particular Debt in Question, for Purposes of Tolling, or Removing Bar of, Statute of Limitations*, 142 A.L.R. 389 (1943).

137. Martin, *supra* note 124; FTC Broken System, *supra* note 53, at 27.

138. *Id.*

139. See Martin, *supra* note 124.

140. FTC Broken System, *supra* note 53, at 24.

141. Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1027 (1997); *Dudek v. Thomas & Thomas Attorneys & Counselors at Law*, 702 F. Supp. 2d 826, 834-35 (N.D. Ohio 2010) (discussing choice of law issues).

the next step is to identify the proper statutory period. Limitation periods vary between the states,<sup>142</sup> and even within a particular state, the characterization of the agreement between the creditor and the debtor can determine the applicable period.<sup>143</sup> For example, should the limitation period for contracts or sale of goods apply to credit-card debt?<sup>144</sup> Consumer debt typically falls within the following categories: written contract, oral contract, open account, or negotiable instrument.<sup>145</sup> Depending on the state, the limitation period for these categories may vary significantly.<sup>146</sup> Finally, even after identifying the choice of law and the applicable limitation period, the consumer has to determine when the period starts, and whether the period has tolled.<sup>147</sup> Given the complexity of determining limitation periods, it is not surprising that consumers are typically unaware of when a given debt becomes time-barred.

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Choice of law may depend on a variety of factors including the forum where the action is filed, the residence of the consumer at the time the action is filed, the residence of the consumer when the agreement was signed, and the language contained in the agreement between the consumer and the original creditor. A detailed discussion of choice of law rules for determining limitation periods is beyond the scope of this Article, for more information see Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 340-42 (2012) (discussing the different choice of law approaches for determining limitation periods). Symeonides provides a table that identifies the approaches taken by the District of Columbia and 49 of the 50 states to limitation conflicts. *Id.* at 341. Louisiana follows a hybrid approach. *Id.* at 341 n.240; *see also* Robert A. Brazener, Annotation, *Choice of Law as to Applicable Statute of Limitations in Contract Actions*, 78 A.L.R. 3D 639 (1977).

142. Clinton Rooney, *Defense of Assigned Consumer Debts*, 43 CLEARINGHOUSE REV. 542, 547 (2010) (describing that state limitation periods may range from under four years to more than ten years).

143. FTC Broken System, *supra* note 53, at 24. For a general discussion of the difficulties in determining limitation periods, *see* Richardson, *supra* note 141. As Richardson describes, “finding the applicable statute and divining the actual deadline for a claim requires a confusing multi-step analysis.” *Id.* at 1026-27.

144. *See* Gall, *supra* note 128, at 248. The determination of the applicable statute may depend on whether the merchant or a third-party provided financing. *Id.* (citing *Hamid v. Blatt*, No. 00 C 4511, 2001 WL 1035726, at \*2 (N.D. Ill. Sept. 4, 2001)).

145. *Statute of Limitations on Debts*, CREDITINFOCENTER.COM (Sept. 3, 2013), <http://www.creditinfocenter.com/rebuild/statuteLimitations.shtml#2>.

146. *See id.* (providing a chart depicting the limitation periods for each state based on the type of action); Rooney, *supra* note 142, at 547; *see, e.g., Dudek*, 702 F. Supp. 2d at 839-40 (identifying that if the debt is characterized as a debt on a written contract Ohio’s fifteen-year period applies, while if the debt is treated as a debt on an oral contract a six-year period applies).

147. *See* Brazener, *supra* note 141, at §§ 10-11; Rooney, *supra* note 142, at 547-48.

## 2. Zombie Debts Created by Mere Acknowledgement

In many states, acknowledging a debt—even without payment—can restart the limitations period.<sup>148</sup> For example, in *Ferguson v. Ingoldsby*,<sup>149</sup> the court found that, under Virginia law, a debtor’s e-mail reply to a creditor was sufficient to qualify as an acknowledgement, reviving an otherwise time-barred debt.<sup>150</sup> The creditor had e-mailed the following statement to the debtor—“[i]t is now time to take this loan seriously and make arrangements to repay us, with interest, immediately.”<sup>151</sup> The debtor responded—“[w]e cannot have a repayment plan if we do not talk. Give me a time on Tuesday and we will get a firm repayment plan in place.”<sup>152</sup> The court held that the debtor’s response acknowledged the debt and indicated a willingness to repay, thereby reviving the otherwise dead debt.<sup>153</sup> Some argue that a debtor’s moral obligation to repay justifies enforcing a debt after it has been acknowledged.<sup>154</sup>

Given the impact of the acknowledgement on a time-barred debt, a collector may attempt to get the consumer to recognize the existence of a debt without disclosing that the limitation period has run.<sup>155</sup> One such technique is to include detachable return stubs in demand letters.<sup>156</sup> The stub will offer the consumer different options for payment terms. When a consumer returns the stub even without any payment, the consumer may have acknowledged the debt, and thereby revived an otherwise dead debt.<sup>157</sup>

Although the general rule is that acknowledgements need not be in writing unless required by statute, most states have adopted provisions requiring a writing to support an acknowledgement.<sup>158</sup>

148. Goldberg, *supra* note 24, at 750; 51 AM. JUR. 2D *Limitation of Actions* § 291 (2012).

149. *Ferguson v. Ingoldsby*, No. 1:09cv739, 2009 WL 3763676 (E.D. Va. Nov. 5, 2009).

150. *Id.* at \*4.

151. *Id.* at \*3.

152. *Id.*

153. *Id.* at \*4.

154. HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 5:17 (2012).

155. Richard Rubin, *FDCPA Claims Arising Out of State Court Collection Litigation*, THE CONSUMER ADVOCATE, July-Aug.-Sept. 2008, at 19 n.22. The process of debt buyers tricking consumers into paying zombie debts is known in the industry as “duping.” *Id.*

156. *Id.*

157. *Id.*

158. See WILLISTON & LORD, *supra* note 136, at § 8:26.



### 3. Zombie Debts Created by “New” Settlement Agreements

A collector may also revive a dead debt by offering a settlement that will replace the alleged debt.<sup>159</sup> The settled amount becomes a new debt that is enforceable against the consumer, even though the underlying debt may have been unenforceable.<sup>160</sup> Collectors may use the promise of additional credit as a method of reviving dead debts. The collector will offer to roll the old debt (or some fraction of it) into a new credit-card debt. This “new” debt will now be enforceable against the consumer, even if the underlying debt was previously unenforceable.<sup>161</sup>

Similarly, consumers may agree to pay unenforceable debts in order to clean their credit reports.<sup>162</sup> Often consumers first become aware of dead debts when they try to secure financing of homes or vehicles and are typically under a time pressure to close their deals.<sup>163</sup> Attempts to get the debts quickly removed from their credit reports, however, are usually not successful. Collectors may ignore, or deny consumers’ requests to clear up their credit reports, and instead try to recover these debts.<sup>164</sup> Consequently, creditors pressure consumers to pay unenforceable debts, and consumers may end up paying for fear that they will not be able to obtain financing.<sup>165</sup>

A related issue is the re-aging of consumer debts. Under the Fair Credit Reporting Act,<sup>166</sup> collectors reporting to credit bureaus are required to provide the actual month and year when an account became delinquent.<sup>167</sup> This delinquency date determines the seven-year period during which information on a disputed debt remains on a consumer’s credit report.<sup>168</sup> Accordingly, even if limitation periods have expired, debts may remain on consumers’ credit reports for seven years and would negatively affect their ability to secure a loan or a credit line. This creates

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159. *Cf.* Weston, *supra* note 1.

160. *Cf. id.*

161. Carolyn Carter, Elizabeth Renuart, Margot Saunders & Chi Chi Wu, *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. BANKING INST. 23, 45 (2006).

162. *See, e.g.*, Berner & Grow, *supra* note 118 (describing scenarios where consumers seeking to obtain home loans agreed to pay debts that were discharged in bankruptcy but still appeared on their credit reports).

163. *See id.*

164. *Id.* (explaining some debt buyers may even change account numbers reported to credit bureaus, making it even more difficult to clean the credit report of discharged debt).

165. *Id.*; Levitin, *supra* note 118, at 81 n.65.

166. 15 U.S.C. § 1681–1681x (2006).

167. *Id.* § 1681s-2(a)(5)(A).

168. *See* Weston, *supra* note 1.

an incentive for consumers to pay debts that would otherwise be unenforceable.<sup>169</sup>

Collectors, in violation of the Fair Credit Reporting Act may re-age debts by submitting new delinquency dates that are later than the actual delinquency dates.<sup>170</sup> This allows the debt to remain on the consumer's credit report beyond the seven-year period from actual delinquency.<sup>171</sup> In 2004, NCO Financial Systems, Inc., one of the nation's largest debt-collection firms, agreed to pay \$1.5 million to settle FTC's claims that it had improperly re-aged debts.<sup>172</sup>

#### 4. Zombie Debts Created by Judgments Arising from Collection Suits

Scholarship has started to examine how collectors have improperly used the court system to convert dead debts to enforceable judgments.<sup>173</sup> Debt-collection suits represent a substantial portion of suits filed in state courts. In many courts, more than half of the civil cases filed are collection matters.<sup>174</sup> Default judgments in these cases are common, composing sixty to ninety-five percent of collection efforts.<sup>175</sup> The failure to respond

169. Rebecca Lake, *Should I Pay on a Time-Barred Debt?*, eHow.com, [http://www.ehow.com/way\\_5743982\\_should-pay-time\\_barred-debt\\_.html](http://www.ehow.com/way_5743982_should-pay-time_barred-debt_.html) (last visited July 22, 2013).

170. 15 U.S.C. § 1681s-2(a)(1) (2006); see Rex C. Anderson, *Fair Debt Collection Practices Act A Law Needing Updating?*, MICH. B.J., Sept. 2010, at 29.

171. Rex C. Anderson, *Fair Debt Collection Practices Act A Law Needing Updating?*, MICH. B.J., Sept. 2010, at 29; Donald Petersen, *Night of the Living Debt*, FDCPA.ME (Nov. 10, 2010), <http://www.fdcpa.me/night-of-the-living-debt/>; Weston, *supra* note 1.

172. Consent Decree, *United States v. NCO Grp., Inc.*, No. 04-2041 (E.D. Pa. May 13, 2004), available at <http://www.ftc.gov/os/caselist/9923012/040513ncoco9923012.pdf>. At the time, this was the largest civil penalty imposed under the Fair Credit Reporting Act. Press Release, Fed. Trade Comm'n, NCO Group to Pay Largest FCRA Civil Penalty to Date (May 13, 2004), available at <http://www.ftc.gov/news-events/press-releases/2004/05/nco-group-pay-largest-fcra-civil-penalty-date>.

173. This Article focuses on pre-litigation issues. For scholarship that has addressed methods of dealing with zombie debt that occur with the onset of litigation, see *supra* note 25 and accompanying text.

174. FTC WORKSHOP, *supra* note 38, at 55.

175. FTC Broken System, *supra* note 53, at 7; Haneman, *supra* note 24, at 717 (stating “[c]onservative estimates suggest that 70% to 90% of debt collection lawsuits brought against unrepresented defendants result in default judgments.”); FTC WORKSHOP, *supra* note 38, at 57 (stating “[p]erhaps the most significant issue related to debt collection litigation is the prevalence of default judgments”). An examination of a 365 case sample from over 450,000 lawsuits filed by 26 debt buyers in New York Civil Court from January 2006 through July 2008 found that only 10 percent of defendants filed an answer. *Debt Deception*, *supra* note 44, at 1.

may be due to a variety of factors including failing to receive the notice, failing to understand the notice, or fearing the potential time and costs involved in litigation.<sup>176</sup> Studies have shown that in many of these cases, consumers had defenses, including the dead-debt defenses described in Part II.<sup>177</sup>

Judgments “give new life” to dead debts, and allow collectors to seek collection on new obligations backed by a court order.<sup>178</sup> Judgments may be enforceable for ten years or longer.<sup>179</sup> Judgments give collectors new and more powerful methods to obtain recovery, including garnishment, judgment liens, turnover, and receivership orders.<sup>180</sup>

### *B. The Growth of Zombie Debts and the Rise in the Number of Zombie-Debt Buyers—Underlying Reasons*

Unrestricted sales of consumer debt have also contributed to the growth in zombie debts. The growth of the debt-buying industry has been

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176. *Debt Deception*, *supra* note 44, at 1; FTC Broken System, *supra* note 53, at 7. Default judgments are particularly disturbing when consumers are not provided proper notice of collection suits or default judgment hearings. *Debt Deception*, *supra* note 44, at 6. This may even be the result of an intentional failure to serve consumers. The practice where process servers file false affidavits claiming that service was made even though papers have never been served has been dubbed “sewer service.” *Id.*; FTC Broken System, *supra* note 53, at 8 n.22. See APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 10–13 (2010), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf> [hereinafter APPLESEED REPORT] (describing the sewer service problem in New York).

177. See Spector, *supra* note 25, at 272. The author refers to one study showing that in more than half the cases, consumers had good-faith defenses to collection. *Id.* A study of 365 cases filed by debt buyers in New York City found that 35 percent of the cases were clearly meritless. *Debt Deception*, *supra* note 44, at 2. Additionally, one New York legal service provider claims that at least half of the collection actions in its office were based on time-barred debts. Letter from Robert A. Martin to FTC, *supra* note 129.

178. See Haneman, *supra* note 24, at 710.

179. See, e.g., ARK. CODE ANN. § 16-56-114 (West 2005) (showing Arkansas’s ten-year period); N.Y. C.P.L.R. 211 (Consol. 2012) (showing New York’s twenty-year period). A judgment may also be revived for additional time. See, e.g., ARK. CODE ANN. § 16-65-501 (West Supp. 2011) (establishing a procedure for using *scire facias* to revive the judgment for another ten years).

180. *The Debt Collection Racket in New York*, NEW ECONOMY PROJECT, 1 (June 2013), <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf> [hereinafter *Debt Collection Racket*]; *Debt Deception*, *supra* note 44, at 1; FTC Broken System, *supra* note 53, at 6; FTC WORKSHOP, *supra* note 38, at 57 n.344. Unless the consumer can demonstrate that the judgment was improperly obtained, she may be precluded from challenging the underlying debt obtained by a default judgment. FTC WORKSHOP, *supra* note 38, at 57 n.344.

associated with an increase in the number of consumer complaints against collectors, including complaints related to the collection of zombie debts.<sup>181</sup> Although concerns related to issues raised by zombie debts existed in the 1970s,<sup>182</sup> the term “zombie debt” did not gain popular attention until after the rapid growth of the debt-buying industry.<sup>183</sup> As described below, possible reasons for the growth of zombie-debt collection accompanying the development of the debt-buying industry are insufficient and inaccurate information received by debt buyers during the sale of charged-off debts; the motivations of debt buyers; and competitive forces in the industry.

#### 1. Insufficient and Inaccurate Information Provided by Sellers to Debts Buyers—Impact on the Collection of Zombie Debts

During a debt sale, buyers often receive insufficient and inaccurate information about the debts they purchase. As a result, it is not too surprising that buyers pursue debts that may be time-barred, already paid for by debtors, discharged in bankruptcy, or misidentified.<sup>184</sup> To better explain the increase in complaints that accompanies the collection of zombie debts, the sale process is described below.

Typically, sellers will try to collect debts before charging them off and putting them up for sale. A seller will bundle these “bad” debts into large portfolios so that even though the debts sell at deep discounts, the amount it receives from the sale of a large portfolio is substantial.<sup>185</sup> Buyers may then resell charged-off debts several times.<sup>186</sup> By one estimate, as much as fifty percent of purchased credit-card debt is resold.<sup>187</sup>

181. See *Debt Collection Racket*, *supra* note 180, at 1.

182. The topic of collectors seeking recovery on debts that were not owed or were time-barred was part of the mid-1970s legislative history of the FDCPA. See *infra* notes 256–62 and accompanying text.

183. Amy Fontinelle, *Beware of Zombie Debt Collectors*, FORBES.COM (Oct. 31, 2008), [http://www.forbes.com/2008/10/31/debt-creditors-default-pf-education-in\\_af\\_1031investopedia\\_inl.html](http://www.forbes.com/2008/10/31/debt-creditors-default-pf-education-in_af_1031investopedia_inl.html).

184. *Debt Collection Racket*, *supra* note 180, at 1 (stating “[d]ebt collection abuses stem largely from structural problems related to the buying and selling of old, charged-off debts”); *Debt Deception*, *supra* note 44, at 5.

185. See, e.g., FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 8. The study examined approximately 90 million consumer accounts with a total face value of approximately \$143 billion that sold over a three-year period for about \$6.5 billion. The average face value per account was about \$1,605. *Id.* at tbl.2.

186. See Kristof, *supra* note 73. The subsequent buyer of a debt will typically pay less than the previous buyer for the same debt. *Debt Deception*, *supra* note 44, at 5.

187. GAO REPORT, *supra* note 53, at 29.

The sale price of a charged-off debt depends on several factors.<sup>188</sup> Generally, sale price decreases with the age of a debt and the number of times the debt has been through collection or resold.<sup>189</sup> In addition, the state where the debt is located can affect the sale price.<sup>190</sup> Debts in creditor-friendly states like Ohio, that have liberal wage garnishment rules may have higher sale prices than debts in debtor-friendly states, like Texas, that restrict wage garnishment.<sup>191</sup>

Although price points vary, debts typically sell at deep discounts.<sup>192</sup> In January 2013, the FTC released a comprehensive study of some of the nation's largest debt buyers.<sup>193</sup> As part of that study, the FTC examined 3,400 portfolios—consisting of over 75 million consumer-debt accounts—from six large debt buyers, for a three-year period beginning on July 1, 2006.<sup>194</sup> The study found that on average, debt buyers paid four cents per dollar of a debt's face value.<sup>195</sup> The average discount rate ranged from 7.9 cents per dollar for debts that were less than three years old, to 2.2 cents per dollar for debts that were between six to fifteen years old.<sup>196</sup>

Negotiation between the buyer and the seller focuses more on the sale price, and less on the information transferred from the seller during the transaction. As part of the sale, the buyer typically only receives summary data on the purchased debts. The seller often provides data on a spreadsheet or database that lists names, Social Security numbers, and the amount owed.<sup>197</sup> The FTC study found that buyers received the following information on purchased accounts:

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188. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 22–24.

189. GAO REPORT, *supra* note 53, at 28.

190. *Id.*

191. *Id.*; Fox, *supra* note 25, at 359–60. Compare OHIO REV. CODE ANN. § 2329.66(A)(13)(a)–(b) (West Supp. 2013) (exemption for wages is limited to the greater of 75% of disposable earnings or thirty-times the federal minimum wage, if paid weekly), with TEX. PROP. CODE ANN. § 42.001(b)(1) (West Supp. 2013) (current wages are entirely exempt from seizure, except for child-support payments).

192. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 22–24.

193. *Id.* The study was touted as “the first large-scale empirical assessment of the debt buying sector of the collection industry.” *Id.* at i. The study examined nine of the top buyers who purchased more than 75 percent of the debt sold in 2008. *Id.* at 8.

194. *Id.* at 22. The study primarily focused on six, rather than the original nine, debt buyers because one of the original nine stopped buying debt and did not provide data, and two other buyers specialized in purchasing bankruptcy debt. *Id.* at 8–9.

195. *Id.* at 23.

196. *Id.* at 23–24. Buyers purchased debts that were three to six years old at an average rate of 3.1 cents per dollar, while debts over fifteen years were essentially given away. *Id.*

197. *Debt Deception*, *supra* note 44, at 5; Spector, *supra* note 25, at 267; Goldberg, *supra* note 24, at 746; Holland, *supra* note 24, at 268.

(1) over 98% of debt accounts included the name, street address, and [S]ocial [S]ecurity number of the debtor; (2) 70% set forth the debtor's home telephone number, and 47% and 15% listed work and mobile telephone numbers, respectively; (3) 65% included the debtor's birth date; and (4) less than 1% revealed the debtor's credit score.<sup>198</sup>

With respect to account information, the study found that all of the accounts included the original creditor's account number and the debtor's outstanding balance.<sup>199</sup> In addition, the seller provided the following time-related information:

(1) 97% of accounts indicated the date the debtor opened the account; (2) 90% revealed the date the debtor made his or her last payment; (3) 83% stated the date the original creditor charged off the debt; and (4) 35% set forth the date of first default.<sup>200</sup>

Although buyers may receive the above information, the debts purchased are often on an "as-is and with all faults" basis, and representations regarding the enforceability of the debts, or the accuracy of the information transferred are not provided.<sup>201</sup> Sellers, who typically draft debt-purchase agreements, give buyers a limited right—if any—to return accounts due to errors or omissions in the provided information.<sup>202</sup> Additionally, sellers typically fail to provide collection history about sold debt, including disputes from the alleged debtors, and results of attempts to locate debtors.<sup>203</sup> Similarly, resellers typically fail to provide updated collection history to buyers.<sup>204</sup>

In addition, buyers do not usually receive the original loan documents, credit agreements, or even documents that reflect the assignment

198. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 34.

199. *Id.* at 34–35.

200. *Id.* at 35.

201. *Id.* at 25; *Debt Deception*, *supra* note 44, at 5; Peter A. Holland, *Defending Junk-Debt-Buyer Lawsuits*, 46 CLEARINGHOUSE REV. 12, 14 (2012) (“[A]lmost every agreement between original creditor and initial purchaser (and between the original purchaser and each subsequent assignee) is made without representations and warranties, without recourse, and often without any duty on the part of the seller to investigate the accuracy of what it is selling.”). For a detailed analysis of over forty purchase and sale agreements between debt buyers and banks see Jiménez, *supra* note 25.

202. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 25.

203. *Id.* at 36–37.

204. *Id.* at 37.

of the claims.<sup>205</sup> While some debt-purchase contracts may provide methods for obtaining documentation after the sale, they are typically limited to a narrow time window, and may require additional payment by the buyer.<sup>206</sup> With each subsequent sale, less documentation is available to the new purchaser.<sup>207</sup>

Insufficient documentation, representations, warranties, and account information for purchased debts have been associated with the increase in the collection of zombie debts.<sup>208</sup> Armed with insufficient information, debt buyers make demands on the wrong people (oftentimes individuals with similar names, addresses, or phone numbers), and for incorrect amounts.<sup>209</sup> For example, in *FTC v. Capital Acquisitions & Management Corp.*, the FTC alleged that Capital Acquisitions & Management Corp. (“CAMCO”), a purchaser of debts with little or no documentation, contacted and threatened individuals with similar names in the same geographic area.<sup>210</sup> Information provided by CAMCO’s employees and consumers confirmed CAMCO’s practice of collecting and harassing consumers merely because they had similar names or addresses as the alleged debtors. CAMCO’s employees stated that 50 percent to 80 percent of the money collected by CAMCO came from individuals who did

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205. Holland, *supra* note 24, at 268. The FTC 2013 study showed debt buyers received documentation with 12 percent of accounts purchased. When provided, documentation was limited to: account statements, terms and condition documents, and account application documents. Application documents were received in less than 1 percent of the cases, and account statements and “terms and conditions” documents were received in about 6 percent of the cases. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 35. Debt buyers typically do not receive a breakdown of principal, interest, and fees owed on purchased debts. *Id.* at 36.

206. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 39–40.

207. Fox, *supra* note 25, at 360–61.

208. ROBERT J. HOBBS & CHI CHI WU, NAT’L CONSUMER LAW CTR., MODEL FAMILY FINANCIAL PROTECTION ACT, 4–5 (2012), available at [http://www.nclc.org/images/pdf/debt\\_collection/model\\_family\\_financial\\_protection\\_act.pdf](http://www.nclc.org/images/pdf/debt_collection/model_family_financial_protection_act.pdf); *Debt Deception*, *supra* note 44, at 5; see also Holland, *supra* note 201, at 14 (explaining that insufficient information possessed by debt collectors leads to “dubious” default judgments).

209. See generally *Debt Deception*, *supra* note 44, at 5 (explaining that the information provided in the sale of debts “is insufficient to ensure that the debt buyers collect the correct amount from the correct person”).

210. Memorandum Supporting Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order, Other Equitable Relief, and Order to Show Cause Why A Preliminary Injunction Should Not Issue at 4, Fed. Trade Comm’n v. Capital Acquisitions & Mgmt. Corp., No. 04-C-7781 (N.D. Ill. Dec. 2, 2004) [hereinafter *Capital Acquisitions Ex Parte Motion*]; see Jurgens & Hobbs, *supra* note 28, at 9.

not owe the original debt.<sup>211</sup> CAMCO and its affiliated companies settled the FTC's claims by agreeing to pay a \$1 million fine.<sup>212</sup>

Similarly, in 2009 and 2010, Bank of America sold credit-card accounts to CACH LLC on an "as-is" basis, and included warnings that it might not be able to produce documentation for the accounts, that some accounts had been discharged in bankruptcy, that some account balances were approximate, and that some accounts may have been paid.<sup>213</sup> Despite these warnings, CACH LLC and its subsidiaries sought collection on these accounts and filed pleadings in courts claiming ownership and validity of the debts, but failed to acknowledge Bank of America's "as-is" warnings.<sup>214</sup> Unfortunately, most of these matters have not been addressed by the courts as collectors typically obtain default judgments.<sup>215</sup>

The process of selling and reselling of debts also hinders the consumer's ability to recognize debts that collectors seek to recover.<sup>216</sup> That is, when a consumer receives a call from a debt buyer, who may be several times removed from the original creditor, she may not remember the debt or circumstances surrounding the debt. For example, if a consumer purchases an item using a Kohl's credit card, she may not understand or be told why she is receiving calls from Capital One, who had purchased the debt from J.P. Morgan Chase, the original servicer of the account.<sup>217</sup>

211. Capital Acquisitions *Ex Parte* Motion, *supra* note 210, at 4; *see* Jurgens & Hobbs, *supra* note 28, at 9.

212. Press Release, Fed. Trade Comm'n, CAMCO To Pay \$1 Million to Settle Unfair, Deceptive Debt Collection Practices (Dec. 5, 2006), *available at* <http://www.ftc.gov/news-events/press-releases/2006/12/camco-pay-1-million-settle-unfair-deceptive-debt-collection>.

213. Jeff Horowitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AM. BANKER (Mar. 29, 2012, 6:31 AM), [http://www.americanbanker.com/issues/177\\_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html](http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html) (referring to a sales agreement stating that the bank was not making "any representations, warranties, promises, covenants, agreements, or guaranties of any kind or character whatsoever").

214. *Id.* *See also* Jeff Sovern, *American Banker Articles on Debt Collection Practices*, CONSUMER LAW & POLICY BLOG, (Apr. 3, 2012, 3:58 PM), <http://pubcit.typepad.com/clpblog/2012/04/american-banker-articles-on-debt-collection-practices.html> (explaining that the practice of knowingly collecting on such debts should be violations under the FDCPA as "false representation of the character, amount, or legal status of the debt[s]").

215. Horowitz, *supra* note 213.

216. FTC WORKSHOP, *supra* note 38, at 27–28.

217. In 2011, Capital One Financial Corp. became the issuer and servicer for new Kohl's credit cards. As part of the agreement with Kohl's, Capital One also acquired over twenty million accounts previously handled by J.P. Morgan Chase. Danielle Douglas, *Capital One Wins Deal to Back Kohl's Credit Cards*, WASH. POST, Apr. 10,



Further, seller-imposed restrictions may also preclude the buyer from revealing the name of the original creditor when initially communicating with an alleged debtor.<sup>218</sup> For example, the sale documents may prohibit the use of the creditor or seller's name in the subject line of correspondence with debtors.<sup>219</sup> Additionally, the seller's contract terms may prevent the release of contact information for the original creditor or reseller.<sup>220</sup> To further complicate matters, buyers may even change account numbers when collecting on purchased debt.<sup>221</sup>

Therefore, debt resale increases the possibility that multiple entities may improperly seek recovery on the same debt. With each sale, the subsequent purchaser receives harder-to-collect debts and more limited information.<sup>222</sup> This compounds the problem of "debt tagging," as buyers ask consumers to pay debts that they do not owe.<sup>223</sup> One commentator has compared this predicament to the "old game of telephone," because each subsequent purchaser receives less accurate and more incomplete information.<sup>224</sup> Since a subsequent purchaser does not receive the collection history that describes whether a consumer may have disputed or paid the debt, the consumer must once again begin the collection-dispute process with a new debt buyer.<sup>225</sup> Consumers face the possibility of having to relitigate collection matters that they have already won.<sup>226</sup>

Additionally, the debt buyer may not be the true owner of the debt.<sup>227</sup> For example, the seller may not have owned the purchased debt,

2011, [http://washingtonpost/business/capitalbusiness/capital-one-wins-deal-to-back-kohls-credit-cards/2011/04/07/AfdmSIFD\\_story.html](http://washingtonpost/business/capitalbusiness/capital-one-wins-deal-to-back-kohls-credit-cards/2011/04/07/AfdmSIFD_story.html).

218. See FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 26.

219. *Id.*

220. *Id.*

221. Berner & Grow, *supra* note 118.

222. HOBBS AND WU, *supra* note 208, at 4; Fox, *supra* note 25, at 360–61.

223. For a discussion of collecting on debts that do not belong to the consumer, see *supra* Part II.A.

224. Kristof, *supra* note 73; Ryst, *supra* note 73 ("The debt can change hands multiple times, or even back and forth, and each message from one owner to the next is a new opportunity for muddled information.").

225. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 36–37.

226. See Rubin, *supra* note 155, at 17 ("Occasionally, but with some consistency, debt buyers who lose a collection case will re-package the extinguished debt into one of their regular portfolios and sell it to another debt buyer for further collection."); see also David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Oct. 31, 2010, [http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=all\\_r=0](http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=all_r=0) (describing how a sale of Chase accounts included accounts where consumers had won judgments against Chase).

227. Holland, *supra* note 24, at 284.

may not have properly transferred ownership, or may have even sold the same debt to multiple entities.<sup>228</sup>

Therefore, the lack of documentation and account history creates situations where debt buyers ask consumers to pay for debts that are already resolved, or where multiple buyers seek recovery on the same debt.<sup>229</sup>

## 2. Debt Buyers' Motivations Contribute to the Collection of Zombie Debts

Prior to the growth of the debt-buying industry, creditors tended to give up on debts that they struggled to recover.<sup>230</sup> With the advent of this industry beginning in the late 1980s,<sup>231</sup> these debts are now sold to buyers who are often relentless in their pursuit of recovery.<sup>232</sup> Buyers have different motivations or perspective than the original creditors or even collectors hired by creditors.<sup>233</sup> According to the Senate Report on the FDCPA,

Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion

228. See DANIEL A. EDELMAN, COLLECTION LITIGATION ABUSE 2 (2009), available at <http://www.ftc.gov/os/comments/debtcollectroundtable1/542930-00029.pdf> (describing cases in which debt buyers have sought recovery for debts that they did not own); Edelman also quotes a trade article referring to “horror stories” [where] “[t]he same portfolio is sold to multiple buyers; the seller doesn’t actually own the portfolio put up for sale; half the accounts are out of statute; accounts are rife with erroneous information; access to documentation is limited or nonexistent.” *Id.* (quoting Corinna C. Petry, *Do Your Homework; Dangers Often Lay Hidden in Secondary Market Debt Portfolio Offerings. Here are Lessons from the Market Pros that Novices can Use to Avoid Nasty Surprises*, Collections & Credit Risk, Mar. 2007, at 24.). See also *Am. Acceptance Co., LLC v. Goldberg*, No.2:08-CV-9, 2008 U.S. Dist. WL 2074128, at \*3 (N.D. Ind. May 14, 2008) (finding that seller never owned charged-off accounts that it tried to sell).

229. See Holland, *supra* note 24, at 270–71 nn.74–79 and accompanying text. Sometimes, the same collector who settled a debt will subsequently file a lawsuit on the same debt. *Id.* at 271 n.79 and accompanying text (citing *Capital Credit & Collection Serv., Inc. v. Armani*, 206 P.3d 1114, 1116–18 (Or. Ct. App. 2009)); see also *Complaint for Damages and Incidental Relief* at 5, *MacDowell v. LHR, Inc.*, No. 9:09-CV-81330-KAM (S.D. Fla. Sept. 11, 2009) (alleging that debt buyer restarted collection efforts even after a court had determined in a prior suit that debt was not owed).

230. Allie Johnson, *Attack of the Zombie Debt*, MSN MONEY (Nov.12, 2012, 4:45 PM), <http://money.msn.com/debt-management/attack-of-the-zombie-debt?page=2>.

231. See *supra* note 44 and accompanying text.

232. Goldberg, *supra* note 24, at 727–31.

233. Rivlin, *supra* note 15.

of them. Collection agencies generally operate on a 50 percent commission, and this has too often created the incentive to collect by any means.<sup>234</sup>

In collecting their own debts, creditors may be concerned with ongoing and future dealings with debtors. Debt collectors, on the other hand, are not concerned about securing repeat business with debtors.<sup>235</sup> They have “no incentive to engender good will by treating the debtor with honesty and respect.”<sup>236</sup> Buyers who purchase accounts at cents on the dollar are even further removed from creditors (and the debtors) than collectors working for creditors.<sup>237</sup> Unlike collectors who operate on a commission basis, buyers have a personal investment, and therefore their motivation is to protect their investment and overhead.<sup>238</sup> Buyers only try to ascertain whether they can easily recover on the debts, or if the debts should be re-sold. Consequently, buyers who often possess limited and inaccurate information may be more aggressive in trying to collect than in ensuring that the purchased debts are enforceable in the first place.<sup>239</sup>

These different motivations therefore lead to an increase in the collection of zombie debts.<sup>240</sup>

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234. S. REP. NO. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 [hereinafter 1977 SENATE REPORT] (comments in the Senate Report to the FDCPA on different incentives of debt collectors).

235. *Id.*

236. *Ruth v. Triumph P'ships*, 577 F.3d. 790, 797 (7th Cir. 2009); Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at a Meeting of the National Association of Attorneys General (Feb. 26, 2013), <http://www.consumerfinance.gov/speeches/prepared-remarks-of-richard-cordray-at-a-meeting-of-the-national-association-of-attorneys-general/> (describing the “mistreatment of the consumer” when debt is given to a debt collector as creditors “may have little reason to ensure that debt collectors treat consumers fairly and appropriately or that they maintain and use accurate information”).

237. Holland, *supra* note 201, at 13 (describing junk debt-buyers as “total strangers to the consumer, and, hoping to make a killing, [who] have merely invested in a portfolio of cheap assets”).

238. Mayer, *supra* note 39 (“debt buyers who purchase paper at higher prices will have to push consumers harder and harder to get their desired return on investment”); Rivlin, *supra* note 15 (quoting Dallas attorney, Jerry Jarzombek, as stating “[t]he chances of abuse go way up when a collector has a financial stake in the outcome”).

239. *See* Holland, *supra* note 201, at 14 (purchased debts are frequently unenforceable).

240. HOBBS AND WU, *supra* note 208, at 4; *see, e.g.*, Goldsmith & Martin, *supra* note 25, at 372 (“collection efforts against . . . time-barred debts have skyrocketed since creditors discovered that they could sell debts they already have written off”); Goldberg, *supra* note 24, at 749-50 (discussing how debt buying has contributed to an increase in the collection of time-barred debts).

### 3. Competitive Forces in the Debt-Buying Industry—Another Factor in the Growth of Zombie-Debt Collection

Rapid growth of, and increased competition within, the debt-buying industry has resulted in reduced profit margins and has put pressure on buyers to recover,<sup>241</sup> which in turn has led to aggressive and often abusive collection strategies.<sup>242</sup> Lauren Goldberg has identified four competition-driven “insidious tactics” practiced by debt buyers:

- (1) evading U.S. laws by outsourcing activities overseas, (2) using technology to target the most vulnerable debtors on the basis of sex, age and income by using sophisticated phone systems and software, (3) exploiting small-claims courts to obtain judgments that would not be granted in normal litigation, and (4) pursuing old debts after the statute of limitations has expired.<sup>243</sup>

In addition, competition is also a factor in increased efforts to collect on debts discharged in bankruptcy.<sup>244</sup> Some debt buyers specifically target discharged<sup>245</sup> and time-barred debts.<sup>246</sup> They do not seem to be concerned about whether their targets actually owe their debts, have debts that are time-barred, have discharged their debts, or have already been sued.<sup>247</sup> Like the exponential growth of cinematic zombies, zombie debts have exploded with the development of the debt-buying industry. As described below, reforms are necessary to halt this growing problem.

## IV. THE FAILURE OF TRADITIONAL EFFORTS TO CURB THE GROWTH OF ZOMBIE DEBTS

In July 2010, the FTC reported that the “system for resolving disputes about consumer debts is broken.”<sup>248</sup> The report identified concerns with the high incidence of default judgments, the failure of collectors to provide identifying information in lawsuits, and the collection of time-barred debts.<sup>249</sup> At a workshop in June 2013, FTC Commissioner Julie

241. Haneman, *supra* note 24, at 715–16.

242. *Id.* at 716; Goldberg, *supra* note 24, at 728.

243. Goldberg, *supra* note 24, at 729.

244. Berner & Grow, *supra* note 118.

245. *Id.*

246. Holland, *supra* note 201, at 21.

247. *Id.* at 13.

248. FTC BROKEN SYSTEM, *supra* note 53, at i.

249. *Id.* at ii–iii.

Brill recognized that despite efforts to reform debt collection, “in most respects, very little has changed.”<sup>250</sup> She added:

[D]ebt buying raises many of the same significant consumer protection concerns that we described in our 2010 report, most notably that debt buyers may have insufficient or inaccurate information when they collect on debts, which may result in collectors seeking to recover from the wrong consumer or recover the wrong amount.<sup>251</sup>

The traditional approaches rely on enforcement of federal and state law. Neither has been successful in preventing the proliferation of zombie debts.

#### *A. The Federal Approach—The FDCPA Has Failed to Keep Pace with Zombie-Debt Collectors*

Since 1977, the FDCPA<sup>252</sup> has served as the primary federal tool to fight abuses by debt collectors.<sup>253</sup> It purports to address harassment, abuse, false or misleading representations, and unfair practices by collectors.<sup>254</sup> Its focus on collectors reflects the heightened concerns that Congress had with collectors, as opposed to original creditors who might rely on future interactions with debtors.<sup>255</sup>

Although the term “zombie debts” had not yet become popular, the FDCPA’s legislative history reflects concerns about the incidence of zom-

250. Julie Brill, Comm’r, Fed. Trade Comm’n, Opening Remarks at the Life of Debt: Data Integrity in Debt Collection FTC Roundtable (Jun. 6, 2013), [http://www.ftc.gov/sites/default/files/documents/public\\_statements/life-debt-data-integrity-debt-collection/130606debtcollectionroundtable.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/life-debt-data-integrity-debt-collection/130606debtcollectionroundtable.pdf).

251. *Id.*

252. Fair Debt Collections Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. §§ 1692–1692p (2006)).

253. 15 U.S.C. § 1692e (stating that the purpose of the act was “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses”). See FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 4–5 (the FTC typically asserts that actions that violate the FDCPA also violate section 5 of the Federal Trade Commission Act (prohibiting unfair or deceptive acts or practices) and the Fair Credit Reporting Act (regulating entities that provide information to credit bureaus)).

254. See 15 U.S.C. §§ 1692d–1692f.

255. For a discussion of the legislative history recognizing the application of the FDCPA to collectors as opposed to creditors, see *supra* notes 234–35 and accompanying text.

bie debts.<sup>256</sup> For example, Congress heard testimony and received letters from consumers who alleged harassment from collectors on debts that they did not owe.<sup>257</sup> Collectors testified that they often sought recovery without knowing whether the debts were valid.<sup>258</sup> During the hearings, Congress also heard reports of collectors seeking to recover on time-barred debt.<sup>259</sup> A collector conceded that it was a common practice to request a minimal payment on a time-barred debt to restart the limitations period.<sup>260</sup> Finally, in his signing statement for the FDCPA, President Carter recognized the problem of collectors trying to recover from alleged debtors who did not owe debts.<sup>261</sup>

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256. See, e.g., 122 CONG. REC. H1193 (daily ed. Feb.19, 1976) (statement of Rep. Annunzio) (characterizing the collection of debts that are not owed as “tragic” and stating that “[a] computer error or some other mistake has supplied an agency with a name, address and amount to be collected and an unrelenting collector—working on a percentage of what he can collect—has been set on the trail of the individual who does not even owe the money”).

257. See H.R. REP. NO. 95–131, at 8 (1977), as reprinted in 1977 U.S.S.C.A.N. [hereinafter HOUSE FDCPA REPORT] (stating “of the thousands of letters received by the committee concerning debt collection problems, most . . . were from individuals who did not owe the debt in the first place or from people who were making legitimate attempts to repay the money”); *The Debt Collection Practices Act: Hearings on H.R. 11969 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking, Currency & Hous.*, 94th Cong. 63–66 (1976) [hereinafter 1976 Hearings] (consumer testifying about collector’s attempts to recover debt for a newspaper subscription that the consumer never had); *Id.* at 71 (Carolyn Fox testifying about attempts to collect the debt of Claire E. Fox from her).

258. *The Debt Collection Practices Act: Hearings on H.R. 29 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking, Fin. & Urban Affairs*, 95th Cong. 27 (1977) (stating testimony from a former debt collector: “[t]he debt collectors feel that their job is not to find out if the money is owed but rather to collect the money. . . . [A] debt collector who takes time to figure out if debts are owed instead of just collecting them will soon be unemployed.”); 1976 Hearings, *supra* note 257, at 29–30 (testimony of former debt collector acknowledging that “at least 50 percent” of the record and book account debts that he was hired to collect “were not legitimate” debts); *Id.* at 46 (describing the collector’s technique of embarrassing a consumer so he would pay even if the debt was not owed and stating that one collector had proudly posted a letter over his desk that stated, “I don’t owe this bill, but I am sending you the money just to be rid of you.”).

259. *Id.* at 30–31.

260. *Id.* (describing the practice of persuading the debtor to make a “token payment” of one dollar on a time-barred debt so that the “entire statute of limitations was revamped and we now had an additional 6 years to collect his debt”).

261. Presidential Statement on Signing the Consumer Protection Act Amendments 1977, 2 PUB. PAPERS 1628 (Sept. 20, 1977) (stating “[t]estimony . . . was given during the hearings on the bill showed that quite often innocent consumers—some of whom had been misidentified as debtors—were harassed”).

At a superficial level, it appears that the FDCPA has the capability to address zombie-debt concerns.<sup>262</sup> The FDCPA purports to punish collectors that falsely represent the “character, amount, or legal status of any debt,”<sup>263</sup> or collect amounts not “expressly authorized by the agreement creating the debt or permitted by law.”<sup>264</sup> Moreover, the FDCPA establishes verification requirements for collectors with the purpose of “eliminat[ing] the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.”<sup>265</sup> Specifically, the FDCPA requires collectors to communicate the “amount of the debt” and “the name of the creditor to whom the debt is owed” to the alleged debtor within five days of contacting her.<sup>266</sup> Within thirty days after receipt of the validation notice, the consumer can dispute the debt.<sup>267</sup> If the debtor timely disputes the debt, then the collector is required to send verification of the debt before continuing collection efforts.<sup>268</sup> Similarly, if the debtor requests the name and address of the original creditor within the thirty days after receiving the validation notice, the collector must cease collection efforts until she provides the requested information.<sup>269</sup>

Despite its good intentions, the FDCPA’s verification requirements fail to provide consumers with sufficient information to determine whether debts are dead. Although the collector must inform the consumer of the FDCPA requirements in the validation notice, consumers may not understand the notice, and, consequently, may fail to act within the short thirty-day window.<sup>270</sup> To obtain verification or information about the original creditor, the debtor’s request must be in writing.<sup>271</sup> If the alleged debtor fails to dispute the debt within the thirty-day window,

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262. HOUSE FDCPA REPORT, *supra* note 257, at 8 (“This bill also protects people who do not owe money at all. In the collector’s zeal, collection efforts are often aimed at the wrong person either because of mistaken identity or mistaken facts.”).

263. 15 U.S.C. § 1692e(2)(A) (2006).

264. 15 U.S.C. § 1692f(1).

265. 1977 SENATE REPORT, *supra* note 234, at 1699.

266. 15 U.S.C. § 1692g(a)(1)–(2) (2006).

267. 15 U.S.C. § 1692g(a)(3).

268. 15 U.S.C. § 1692g(a)(4).

269. 15 U.S.C. § 1692g(a)(5).

270. Walgenkim, *supra* note 24, at 75.

271. 15 U.S.C. § 1692g(a)(4)–(5). Currently, the courts are split whether the validation dispute under 15 U.S.C. § 1692g(a)(3) must be in writing. *Compare* Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282, 286 (2d Cir. 2013) (writing not required) *and* Camacho v. Bridgeport Fin., Inc., 430 F.3d 1078, 1082 (9th Cir. 2005) (same) *with* Graziano v. Harrison, 950 F.2d 107, 112 (3d Cir. 1991) (dispute notice must be in writing under Section 1692g(a)(3)).

the collector may assume that the debt is valid, and need not provide verification or information about the original creditor.<sup>272</sup>

Even if a consumer submits a timely request, the verification provided by the collector is often not helpful in determining whether the debt is dead debt.<sup>273</sup> The FDCPA does not define verification,<sup>274</sup> and the FTC lacked sufficient rulemaking authority to provide guidance.<sup>275</sup> Additionally, courts typically do not interpret verification to require that collectors provide consumers with original documentation or detailed statements.<sup>276</sup>

The influx of debt buyers and the growth of the debt-buying industry has further exacerbated the problems with verification. From the buyer's standpoint, although the buyer becomes the owner of the debt,<sup>277</sup> it receives limited documentation and information from the sales transac-

272. 15 U.S.C. § 1692g(a)(3)–(5) (2006).

273. Walgenkim, *supra* note 24, at 75–78.

274. FTC WORKSHOP, *supra* note 38, at 30.

275. *Id.* at 69–70; The FDCPA prohibited the FTC from issuing regulations concerning debt collection. *Id.*; 15 U.S.C. § 1692l(d). One of the advantages of the new CFPB is rulemaking authority over debt collectors. Matthew R. Bremner, Note, *The Fair Debt Collection Practice Act: The Need for Reform in the Age of Financial Chaos*, 76 BROOK. L. REV. 1553, 1593 (2010–11). For a discussion of CFPB's rulemaking authority, see *infra* notes 317–25 and accompanying text.

276. Courts are split on the exact requirements of effective verification. See Michael D. Slodov, *Documentation? I Don't Have to Show You Any Stinkin' Documentation! An Evaluation of the Verification Requirement of 15 U.S.C. § 1692g(b)*, 24 LOY. CONSUMER L. REV. 156, 160–68 (2011–12) (discussing judicial interpretations of verification). Michael Slodov has divided court rulings into three categories: the documentation view, the responsive view, and the confirmation view. *Id.* at 160–67. The “documentation view” represents the majority approach of the courts and focuses on the statement from the collector that the amount sought is what the creditor claims is due. *Id.* at 161–63 (citing *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991) and *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999)). The “responsive view” is a minority view and requires that verification only address the specific dispute alleged by the debtor. Slodov, *supra*, at 164–67 (citing *Lamb v. M & M Assocs.*, No. C-3-96-463, 1998 WL 34288694 (S.D. Ohio Sept. 1, 1998)). Finally, the “confirmation view” does not require any documentation; instead, it requires only a statement that the consumer owes the debt. Slodov, *supra*, at 167 (citing *Rudek v. Frederick J. Hanna & Assocs., P.C.*, No. 1:08-CV-288, 2009 WL 385804, at \*2 (E.D. Tenn. Feb. 17, 2009)).

277. Some debt buyers have argued that they should be treated as creditors, not subject to the FDCPA, because they own the debt; however, courts have typically found that purchasers of defaulted debts are properly treated as collectors under the FDCPA. See FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 3–4 (citing *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1486 (M.D. Ala. 1987); *McKinney v. Cadleway Props. Inc.*, 548 F.3d 496, 501 (7th Cir. 2008)); see also Walgenkim, *supra* note 24, at 89–90 (suggesting that courts should recognize that debt buyers should be treated as collectors subject to the disclosure and notice requirements of the FDCPA).



tion.<sup>278</sup> Moreover, the seller typically provides this limited information without any warranty of accuracy.<sup>279</sup> Often, the sale agreement will restrict the information that buyers can provide to debtors in their initial communications with debtors.<sup>280</sup> Additionally, buyers may change the account numbers of debts when corresponding with debtors.<sup>281</sup> Consequently, the alleged debtor may not recognize the debt or the original creditor when she receives the initial communication from a debt buyer.<sup>282</sup> Even if the debtor requests written verification of the debt in a timely manner, often the buyer will have limited access to information from the original creditor.<sup>283</sup> Typically, the debt buyer will simply confirm, without documentation, the unwarranted and potentially inaccurate information that it obtained from the seller.<sup>284</sup> As a result, the verification and validation provisions in the FDCPA have not prevented the spread of zombie debts.

Limited penalties and a short statutory limitations period also serve as obstacles to private actions under the FDCPA. The parties most vulnerable to zombie-debt collection tend to be elderly, disabled, and low-income individuals.<sup>285</sup> Given the amount of debt involved, and a fear of the expense and time involved in filing an action, these consumer groups are not likely to file claims under the FDCPA.<sup>286</sup> Moreover, a limited one-year window to file an action asserting a violation makes it unlikely that many individuals will seek timely relief.<sup>287</sup> Finally, even if a consumer successfully sues a collector, the FDCPA restricts recovery on these claims. The current penalty limitations under the FDCPA are the same as those when the FDCPA was first enacted in 1977.<sup>288</sup> The FDCPA provides that damages in individual actions are limited to the actual damages plus addi-

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278. *See supra* notes 197–207 and accompanying text.

279. *See supra* note 201 and accompanying text.

280. *See supra* notes 218–20 and accompanying text.

281. Berner & Grow, *supra* note 118.

282. *See* FTC WORKSHOP, *supra* note 38, at 27–28; *see also* Walgenkim, *supra* note 24, at 70 (alleging that “debt purchasers frequently attempt to escape liability under the FDCPA by falsely claiming to be creditors”).

283. *See supra* notes 206–207 and accompanying text.

284. FTC WORKSHOP, *supra* note 38, at 32 (“Many debt collectors have responded to verification requests by only confirming in writing for consumers that the amount demanded is what the creditor claims is owed. Collectors are conducting this minimal effort at the same time that consumers increasingly complain about efforts to collect from the wrong person or the wrong amount.”).

285. *Debt Collection Racket*, *supra* note 180, at 1.

286. *Debt Deception*, *supra* note 44, at 1.

287. 15 U.S.C. § 1692k(d) (2006).

288. *See* FTC WORKSHOP, *supra* note 38, at 66.

tional damages not exceeding \$1,000.<sup>289</sup> The \$1,000 cap is on a per lawsuit basis, rather than for each violation.<sup>290</sup> For class actions, additional damages are limited to the lesser of \$500,000 or one percent of the net worth of the collector.<sup>291</sup> Given today's multi-billion dollar debt-buying industry, these limits are not effective deterrents.

Although the FDCPA contains language that purports to deal with zombie debts, as a practical matter these provisions have not effectively addressed the growth of zombie-debt collection that has accompanied the development of the debt-buying industry.

### *B. State Approach: Lack of Uniformity Hampers Efforts to Control Zombie Debts*

Similarly, at the state level, traditional approaches have not adequately addressed zombie-debt issues. One reason for enacting the FDCPA was states' failure to address abuses in the collection process.<sup>292</sup> At the same time, however, the FDCPA recognized the importance of joint efforts with state and local authorities, by allowing state provisions to afford greater protections, and declaring that the FDCPA would not preempt state provisions unless they were inconsistent with the FDCPA.<sup>293</sup>

Following enactment of the FDCPA in 1977, most states enacted or amended their existing statutes to regulate collectors. Many of these efforts track the language used in the FDCPA.<sup>294</sup> Some have expanded coverage to include creditors as well as debt collectors.<sup>295</sup> Some impose licensing and bonds for collectors.<sup>296</sup> Others require additional disclosures

289. 15 U.S.C. § 1692k(a)(2)(A); *see* FTC WORKSHOP, *supra* note 38, at 67 (recognizing that \$1,000 in 1977 would be the equivalent of \$3,600 in 2008 dollars).

290. 15 U.S.C. § 1692k(a)(2)(A); *see* Harper v. Better Bus. Servs., Inc., 961 F.2d 1561, 1563 (11th Cir. 1992).

291. 15 U.S.C. § 1692k(a)(2)(B)); *see* FTC WORKSHOP, *supra* note 38, at 67 (recognizing that \$500,000 in 1977 would be the equivalent of \$1.8 million in 2008 dollars).

292. 1977 SENATE REPORT, *supra* note 234, at 1696–97 (“The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level.”).

293. 15 U.S.C. § 1692n.

294. BBB STUDY, *supra* note 60, at 6 (noting that “Missouri is one of only a few states without its own FDCPA”); FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 5.

295. *See, e.g.*, CAL. CIV. CODE § 1788.2 (West 2009) (collector includes “any person who, in the ordinary course of business, regularly, on behalf of himself or herself . . . engages in debt collection”); TEX. FIN. CODE ANN. § 392.001 (West 2006) (“debt collector means a person who directly or indirectly engages in debt collection”).

296. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 5; *see, e.g.*, TEX. FIN. CODE ANN. § 392.101 (West 2006) (requires bond for debt collectors); WYO. STAT. ANN. §§ 33-11-102, 33-11-108 (2013) (license and bond requirements).

for collectors. For the most part, these requirements only apply during litigation and are designed to reduce the incidence of improper default judgments;<sup>297</sup> however, some states have adopted additional pre-litigation disclosure requirements.<sup>298</sup> States may also provide consumer protection through deceptive trade acts.<sup>299</sup>

To the extent that the state statutes simply adopt the language of the FDCPA, they suffer from the same problems that handicap the practical implementation of the FDCPA. While some of the alternative state approaches more effectively address zombie debts,<sup>300</sup> the lack of uniformity in these approaches, and the enactment of these additional measures by only a few jurisdictions severely limit dealing with zombie debts on a nationwide level.<sup>301</sup> Moreover, limited state budgets also create enforcement problems at the state and local levels.<sup>302</sup>

Efforts to address the failure of the traditional methods to curb the growth of zombie debts must continue.<sup>303</sup> While focusing on the abuses associated with the high rate of default judgment, scholars, legislators,

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297. FTC DEBT-BUYING INDUSTRY, *supra* note 49, at 5–6. These requirements may be imposed by statute, regulation, or court rule. *Id.*; *see, e.g.*, N.C. GEN. STAT. ANN. §§ 58-70-150, 58-70-155 (West 2011) (establishing requirements for debt buyers filing suit and obtaining default judgment); MD. CT. R. 3-306(d) (court rules requiring additional information for judgments by affidavit in cases involving assigned consumer debt).

298. *See, e.g.*, TEX. FIN. CODE ANN. § 392.202 (West 2006) (if a consumer disputes a claim at any time, collector must respond in writing within thirty days denying or admitting the inaccuracy or stating that it did not have sufficient time to complete the investigation); 940 MASS. CODE REGS. 7.07, 7.08 (2012) (establishing notice and disclosure requirements if seeking collection on time-barred debt, and requiring documentation reflecting debtor's signature if verification requested). New York City has also issued regulations similar to the regulations implemented by Massachusetts. N.Y.C. ADMIN. CODE § 20-493.2 (2012).

299. For a state-by-state description of unfair and deceptive practices acts, *see* Carolyn L. Carter, Nat'l Consumer Law Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes (Feb. 2009), available at [http://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](http://www.nclc.org/images/pdf/udap/report_50_states.pdf).

300. *See infra* Part V.B.3 for a brief discussion of New Mexico's efforts to address abuses by collectors seeking to recover time-barred debts.

301. Some of the more promising alternatives are identified in the notes in Part V, *see infra*.

302. Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General after Dodd-Frank*, 99 IOWA L. REV. 115, 154 (2013) (identifying the limited resources of the offices of state attorneys general).

303. The FTC and National Consumer Law Center have responded by advocating changes in state and federal laws to address the problems created by the rapid growth in collection lawsuits and the debt-buying industry. *See* Jurgens & Hobbs, *supra* note 28, at 8; FTC BROKEN SYSTEM, *supra* note 53, at ii–v; Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1548 (2011).

and judges have stressed the importance of more stringent pleading and evidentiary requirements for filing lawsuits and obtaining judgments in debt-collection matters.<sup>304</sup> Although these litigation-related requirements are a significant step to curb the growth of zombie debts, we should not ignore collectors who improperly persuade consumers to pay unenforceable debts without litigation. Requirements that make it harder for debt buyers to sue consumers may increase abuses at the pre-litigation level. As described below, additional coordination between federal, state, and local authorities lead by the CFPB and underpinned by amendments to the FDCPA are required to effectively deal with zombie debts.

## V. SUGGESTIONS AND RECOMMENDATIONS FOR SLAYING ZOMBIE DEBTS

This article now provides a framework for confronting zombie-debt issues that arise before litigation, while recognizing that these efforts should be part of a comprehensive strategy for dealing with zombie debts at all stages of collection.<sup>305</sup>

### A. *A Framework for a Comprehensive Solution*

Amending the FDCPA and relying on the recently formed CFPB are the best options for attacking zombie-debt issues at the pre-litigation stage. A framework that establishes minimum uniform standards through the FDCPA, and uses the CFPB to coordinate regulation, enforcement, and education at the federal, state, and local levels will help minimize the level of zombie-debt collection.<sup>306</sup>

#### 1. Coordinate the Zombie-Debt Slayers—The CFPB and the FTC

On July 21, 2011, the CFPB began operations as the “first [federal] government agency solely dedicated to consumer financial protection.”<sup>307</sup> The CFPB can be the “catalyst” for reducing and controlling the zombie-

304. This Article focuses on pre-litigation response to zombie debts. For information about litigation responses, see *supra* note 25. For information about the high rate of default judgment in collection matters, see *supra* notes 174–75 and accompanying text.

305. A comprehensive approach is also necessary because efforts to prevent abuses at the pre-litigation stage, could cause additional abuses by collectors who file lawsuits to avoid the new pre-litigation requirements.

306. Relying on the CFPB does not preclude the use of state and local efforts. See Totten, *supra* note 302, at 128. The CFPB can work with state attorney generals to enforce consumer protection laws. *Id.* at 154–65.

307. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 2.

debt problem.<sup>308</sup> It can coordinate activities at the federal, state, and local level. Professor Dee Pridgen has categorized the creation of the CFPB as a “sea change” in consumer protection law in the United States.<sup>309</sup> The CFPB is the “new Sheriff in town [with] [r]isk assessment, risk management, complaint management and robust compliance . . . [as] top priorities.”<sup>310</sup>

Prior to the CFPB, various agencies regulated and enforced consumer financial law, often leading to forum shopping and conflicting results.<sup>311</sup> The advent of the CFPB consolidated these regulatory powers into one agency.<sup>312</sup> Additionally, CFPB’s structure and authority gives it stronger regulatory powers than the FTC’s,<sup>313</sup> including powers related to funding, governance, scope of authority, and rulemaking.<sup>314</sup> While the FTC’s funding is dependent upon congressional appropriation, the CFPB receives its funding from the Federal Reserve and certain guaranteed appropriations.<sup>315</sup> The CFPB is governed by one director, while the FTC is governed by five commissioners, with no more than three of them coming from the same party.<sup>316</sup> The CFPB’s expanded authority and rulemaking powers affords the potential for resolving zombie-debt issues.<sup>317</sup> While the FTC has the authority to review unfair and deceptive practices by non-financial institutions, the CFPB’s authority extends to all institutions and includes review of abusive as well as unfair and deceptive practices.<sup>318</sup>

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308. See Bremner, *supra* note 275, at 1588 (discussing how the CFPB can be a “catalyst” to help with changes in FDCPA); Chi Chi Wu, *Use Powers Federal Trade Commission Lacked*, N.Y. TIMES, July 21, 2013, <http://www.nytimes.com/roomfordebate/2013/07/21/consumer-finance-agencys-new-clout/use-powers-federal-trade-commission-lacked> (stating that the CFPB has the authority “to fix” the debt collection and credit reporting “industries”).

309. Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency & Stronger Laws*, 13 WYO. L. REV. 405, 405–406 (2013).

310. Berg et. al., *supra* note 60.

311. Pridgen, *supra* note 309, at 408–409.

312. *Id.* at 408–10.

313. *Id.* at 410–16.

314. *Id.* at 411–15; see Eric J. Mogilnicki & Melissa S. Malpass, *The First Year Of The Consumer Financial Protection Bureau: An Overview*, 68 BUS. LAW. 557, 557 (2013) (describing how the CFPB was given “broad authority, secure funding, and a powerful, independent director”).

315. Pridgen, *supra* note 309, at 411.

316. *Id.* at 411–12.

317. Wu, *supra* note 308 (“The C.F.P.B. has powers that the F.T.C. . . . never had—stronger tools to get inside [debt collection and credit reporting] companies, review their procedures and policies, audit their interactions with consumers, and review the accuracy of information in their files.”).

318. Jean Braucher, *Form & Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 118 (2012–13) (“Now, one agency has power to

Additionally, unlike the FTC's limited rulemaking authority, the CFPB has broad rulemaking authority under the Administrative Procedure Act,<sup>319</sup> including the ability to propose regulations through notice-and-comment rulemaking.<sup>320</sup> The CFPB also tracks and responds to consumer complaints regarding debt collection.<sup>321</sup> Consumers can submit complaints through the internet, mail, telephone, or fax.<sup>322</sup> Additionally, the CFPB database allows for online searches and downloading of data from the complaint database.<sup>323</sup> Therefore, the CFPB is equipped with the necessary tools to help tackle zombie-debt issues.

The CFPB has not been shy about using its authority and exercising its regulatory powers.<sup>324</sup> Since its creation, it has aggressively issued regulations, participated in lawsuits, collected consumer complaints, and examined financial entities.<sup>325</sup> In its 2013 annual report, the CFPB outlined its activities involving the FDCPA.<sup>326</sup> The 2013 report also describes the CFPB rules for supervising debt collectors with more than \$10 million in annual receipts from consumer-debt collection, which represents nearly two-thirds of the annual receipts from the debt-collection market, and

require disclosure under the Truth and Lending Act and to regulate unfair, deceptive, and abusive practices.”).

319. 5 U.S.C. §§ 500–596 (2006).

320. Pridgen, *supra* note 309, at 414–15.

321. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 11.

322. *Id.*

323. See *Consumer Complaint Database*, CFPB (last visited Mar. 24, 2014), <http://www.consumerfinance.gov/complaintdatabase/>.

324. The reforms that have been undertaken by CFPB are even more remarkable given the substantial political opposition it has faced in creation and daily operation. Concerns have been raised about the appointment of the director, funding, and constitutionality. A detailed discussion of the history, politics, and current activities of the CFPB is beyond the scope of this Article. For more information see Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321 (2012–13); Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25 (2012–13) Despite this opposition, the CFPB continues to press forward. One sign that the CFPB is effective is that law firms are recruiting and hiring its lawyers. Jenna Greene, *Firms Eye CFPB Lawyers*, NAT'L L.J., (June 10, 2013), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202603435755&thepage=1&slreturn=20130511135637>.

325. Berg et. al., *supra* note 60; Mogilnicki & Malpass, *supra* note 314, at 558–59 (the first-year activities of the CFPB included “thirteen final rules, a study on private student lending, a report on the three largest credit reporting agencies, countless examinations of banks . . . [as well as] a series of its own initiatives, including filing amicus briefs on issues of interest . . . and seeking consumer input through field hearings, town halls, and complaint portals on its website”).

326. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 2–3.

includes debt buyers collecting on their debts.<sup>327</sup> The report characterized the CFPB's supervision program as establishing "for the first time" the ability of a single federal agency to supervise creditors, collection firms, and debt buyers at "every stage of the lending process—from credit origination to debt collection."<sup>328</sup>

Under the provisions that created the CFPB and the 2012 memorandum of understanding between the FTC and CFPB,<sup>329</sup> the agencies have initiated a coordinated response to deal with problems in the debt-collection industry.<sup>330</sup> In recent actions, the FTC has secured multi-million dollar settlements against collectors for their alleged pursuit of zombie debt, including against those who harassed consumers after being notified that debts were not owed,<sup>331</sup> and against those who collected on time-barred debts.<sup>332</sup>

The CFPB and FTC have also coordinated their research, outreach, and educational efforts to address collection abuse.<sup>333</sup> The CFPB has actively sought input from state and local regulators, consumer groups, and the collection industry.<sup>334</sup> The CFPB and FTC have established educa-

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327. *Id.* at 22–23.

328. *Id.* at 23.

329. Memorandum of Understanding Between the Consumer Fin. Prot. Bureau and the Fed. Trade Comm'n (Jan. 23, 2012), *available at* <http://www.ftc.gov/news-events/press-releases/2012/01/federal-trade-commission-consumer-financial-protection-bureau>.

330. *Prepared Statement of the Federal Trade Commission on Shining a Light on the Consumer Debt Industry, Hearings Before the S. Subcomm. on Fin. Insts. & Consumer Prot. of S. Comm. on Banking Hous., & Urban Affairs*, 113th Cong. 14 n.32 (2013) [hereinafter *2013 Hearings*] (statement of Reilly Dolan, Acting Assoc. Dir., Div. of Fin. Practices, Fed. Trade Comm'n) *available at* [http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=d69d5a6b-aa86-4f4e-8b73-88814703f473&Witness\\_ID=44bbf66e-84e9-480d-a33f-cc6e71c841bf](http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=d69d5a6b-aa86-4f4e-8b73-88814703f473&Witness_ID=44bbf66e-84e9-480d-a33f-cc6e71c841bf) (citing Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 § 1024(c)(3) (July 21, 2010)).

331. *Id.* at 4 n.12 (citing *United States v. Expert Global Solutions, Inc.*, No. 3-13 CV 26 2611-M (N.D. Tex. July 8, 2013) in which the FTC obtained a record \$3.2 million settlement).

332. *Id.* at 5 (citing *United States v. Asset Acceptance, L.L.C.*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 31, 2012) in which the FTC obtained a \$2.5 million settlement); *see also* Federal Trade Commission, *supra* note 89.

333. *2013 Hearings*, *supra* note 330, at 14; CFPB 2013 ANNUAL REPORT, *supra* note 40, at 39–42.

334. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 35–41. In February 2013, the director of the CFPB discussed some of the collaborative efforts between the CFPB and the states. *See* Cordray, *supra* note 236.

tional programs for consumers and businesses.<sup>335</sup> In June 2013, the FTC and CFPB co-hosted a roundtable on data integrity in the debt-collection process.<sup>336</sup> The roundtable, which was free and open to the public, was streamed live to allow for widespread viewing of the proceedings.<sup>337</sup> Panelists at the roundtable included representatives from academia, the FTC, the CFPB, the debt-buying industry, state attorney general offices, and consumer associations, as well as judges and attorneys involved in collection proceedings.<sup>338</sup> They discussed in detail the debt-buying process, including concerns that the process often left collectors without adequate documentation or dispute information about debts.<sup>339</sup>

The CFPB should continue its efforts to address the issue of zombie debts. The CFPB is in the unique position of being able to regulate, enforce, and coordinate a resolution that involves efforts at federal, state, and local levels.<sup>340</sup>

## 2. Establish Uniform Standards to Attack Zombie Debts— Amending the FDCPA

Just as the CFPB can serve as the overall coordinating body to deal with zombie-debt problems, the FDCPA provides the vehicle for establishing minimum standards to combat zombie-debt issues. Uniform federal standards would benefit both consumers and collectors. Anticipating upcoming reform, collectors and debt buyers have stated that they would prefer uniform standards as opposed to piecemeal state-by-state regulations.<sup>341</sup> Similarly, for consumers who are required to navigate conflicting

335. 2013 Hearings, *supra* note 330, at 9–10; CFPB 2013 ANNUAL REPORT, *supra* note 40, at 39–41.

336. Press Release, Fed. Trade Comm'n, Federal Trade Commission, Consumer Financial Protection Bureau to Co-Host Roundtable on Data Integrity in Debt Collection (May 2, 2013), <http://www.ftc.gov/opa/2013/05/lifedebt.shtm>.

337. *Id.*

338. The biographies of the speakers and panelists are available at <http://www.ftc.gov/bcp/workshops/lifeofadebt/> (last visited July 15, 2013).

339. *Id.*; Fred Williams, *Reporter's Notebook: 'Broken' Debt Collection Process Getting a DC Makeover*, CREDITCARDS.COM (June 7, 2013), <http://blogs.creditcards.com/2013/06/broken-debt-collection-process-dc-makeover.php>.

340. For a discussion of the potential role of coordinated enforcement between the states and the CFPB, see Totten, *supra* note 302, at 154–65.

341. Representatives of the collection and debt-buying industry acknowledged at the FTC/CFPB roundtable conference in June 2013 that uniform standards should be established for information and documentation to be provided to consumers in pre-litigation collection communications. See Trevor Salter, *Lost in Translation? Ensuring Appropriate Documentation in the Pre-Litigation Debt Collection Process*, CFPB MONITOR, June 7, 2013, <http://www.cfpbmonitor.com/2013/06/07/lost-in-translation-ensuring-appropriate-documentation-in-the-pre-litigation-debt-collection-process/>;



state laws, federal provisions could establish a baseline for the information that collectors should provide to alleged debtors. States may choose to require additional information, but the hope is that federal standards would address the concerns of most states and provide uniformity.<sup>342</sup> Although the FDCPA was originally enacted in 1977 to provide a federal solution to help states combat abuses in the collection process, “[t]oday’s collection industry is markedly different from the industry contemplated when Congress enacted the FDCPA.”<sup>343</sup> As in 1977, the time is ripe for a new federal approach. This approach, as discussed below, requires amendments to the FDCPA and enforcement by the CFPB.

### *B. Proposed Methods to Slay Zombie Debts Before Litigation*

Specific amendments to the FDCPA and specific actions by the CFPB offer the greatest potential for reducing zombie debt. While some states and localities have recently begun to develop some of these methods, a comprehensive nationwide approach is necessary to combat zombie debt.<sup>344</sup> This approach should ensure that debt buyers and consumers have adequate information, documentation, and knowledge to assess whether debts are enforceable. Additionally, effective sanctions are necessary to deter violations by collectors.

#### 1. Require Debt Sellers to Transfer Information and Documentation at the Time of Sale to Allow for Identification of Zombie Debts

The FDCPA should specifically address the sale of charged-off debts, and the CFPB should establish regulations to provide guidance for such sales. The problems generated by the growth in the debt-buying industry are widespread. Safeguards and protections must ensure that *at the time of sale*, debt buyers receive accurate information about purchased debts. Buyers should receive a complete itemization of payments and charges made on purchased accounts. Similar to a chain of title in real

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Fred Williams, *supra* note 339 (stating that industry representatives understand that changes are inevitable, but hope they will be “consistent and nationwide”); Patrick Lunsford, *ARM Data Exchange Standards Focus of FTC/CFPB Collection Roundtable*, INSIDEARM.Com, (June 7, 2013) <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/arm-data-exchange-standards-focus-of-ftccfpb-collection-roundtable/> (creating standards was a theme of the roundtable).

342. See, e.g., Totten, *supra* note 302, at 128 (describing that, under the Dodd-Frank Act, “federal law is a floor, not a ceiling”).

343. CFPB 2013 ANNUAL REPORT, *supra* note 40, at 9 (recognizing that the size and scope of the debt-buying industry was not contemplated in 1977).

344. The reforms are primarily directed at the litigation stage; however, some also confront zombie-debt issues that arise before litigation. For a discussion of some of these reforms, see *supra* notes 295–98 and accompanying text.

estate transactions, sellers should provide information about all prior owners of their debts.<sup>345</sup> Rather than simply receiving summary data in a spreadsheet, buyers should receive documentation that shows the agreement between the original creditor and the debtor, as well as documentation that shows assignment or sale to all subsequent holders of the debt. Finally, debt buyers should receive a full dispute history of each debt to ensure that consumers will not have to reassert defenses every time a debt is sold.<sup>346</sup>

While the above suggestions may appear to be a major undertaking for the debt-buying industry, the CFPB acknowledges that the request for “clear standards for data integrity and record-keeping in the debt collection market”<sup>347</sup> has now reached a “consensus across all market participants—from debt collectors, creditors, and collection attorneys, to consumer advocates, legal service providers, and state attorneys general.”<sup>348</sup> Additionally, technology now allows for warehousing of account documents and tracking information online.<sup>349</sup> For example, Convoke

345. See Daniel J. Langin, *Introducing Certainty to Debt Buying: Account Chain of Title Verification for Debt*, Jan. 5, 2011, available at <http://www.ftc.gov/os/comments/debtcollecttechworkshop/00027-60064.pdf> (advocating an account chain of title system for debt ownership using centralized recordkeeping similar to the system used for tracking real estate title).

346. Under California’s recently enacted Fair Debt Buying Practices Act, California has established some similar requirements; however, most notably, the requirements do not apply to oral communications and do not require transfer of dispute history. Fair Debt Buying Practices Act, CAL. CIV. CODE §§ 1788.50–1788.64 (West 2014). The Act, which became effective on January 1, 2014, requires that debt buyers refrain from written statements to collect debts until they have information including (1) that the debt buyer is the sole owner of the debt, (2) the charge-off balance, post-charge off interest and fees, (3) date of default or last payment, (4) identification of the charge-off creditor and associated account number, (5) identification of debtor’s name, address, and account number that the charge-off creditor had, and (6) names and addresses of all buyers of the debt. *Id.* The Act also requires that debt buyer has access to evidence of debtor’s agreement to the debt before making written demands. *Id.*

347. 2013 Hearings, *supra* note 330, at 3 (citing statement of Corey Stone, Assistant Dir. for the Office of Deposits, Cash, Collections, and Reporting Mkts., Consumer Fin. Prot. Bureau) available at <http://www.consumerfinance.gov/testimonies/corey-stone-before-the-senate-subcommittee-on-financial-institutions-and-consumer-protection/>.

348. *Id.*

349. Williams, *supra* note 339 (“Instead of passing around account records from creditors to debt buyers, [data management companies] can warehouse the records digitally in a cloud-based system, tracking the account’s ownership as it changes hands and updating it with any payments made or disputes of the debt along the way.”); Salter, *supra* note 341 (noting industry representatives acknowledged that “the necessary technology exists”); Patrick Lunsford, *New Technology to Aid Debt Purchasers*

Systems, Inc. claims that its software “solution provides credit issuers and all subsequent debt buyers or third party agencies with the ability to manage media and track chain of title, from charge-off to debt resolution.”<sup>350</sup> Warehousing allows a debt reseller to simply add any new documentation and dispute history to the file when transferring it to a new buyer.

While these suggestions do not explicitly address the problem of unwarranted data provided by sellers, by requiring actual documentation, full itemization of payments and charges, and a complete history of disputes with debtors, the debt buyer should have improved tools for evaluating whether purchased debts are dead debts.

## 2. Require Collectors to Provide Consumers with Information and Documentation

Providing debt buyers with accurate records and documentation is only a partial solution; a comprehensive framework for addressing zombie debts would also require buyers to relay this information to consumers at the time of contact. Just as courts and legislatures are beginning to address the failure of collectors to provide information about debts when they file lawsuits or seek default judgments, collectors should also be required to provide information when they attempt to collect during pre-litigation interactions with alleged debtors. Consumers could then determine whether the alleged debts are indeed debts they owe, whether they are still outstanding, and whether they are not time-barred. Accordingly, amendments to the FDCPA should require that collectors provide the following information when contacting an alleged debtor through oral or written communications:

- a. Name, address and account number of the original creditor, and, if the original creditor is servicing an account for a merchant, the name, address, and account number of the merchant.
- b. Names, addresses, and account numbers of all other owners of the debt.

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with *Media*, INSIDEARM.COM, (Feb. 4, 2008) <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/new-technology-to-aid-debt-purchasers-with-media>.

350. Press Release, Convoke Systems, *Convoke Systems, Inc. Announces First Solution for Real-time Access to Account Media and Chain of Title Tracking* (Jan. 30, 2008), [http://convokesystems.com/Convoke\\_Systems\\_Solution\\_Janauary\\_30\\_2008\\_Final.pdf](http://convokesystems.com/Convoke_Systems_Solution_Janauary_30_2008_Final.pdf). Similarly, Global Debt Registry claims on its website that “[t]he . . . purpose of the registry is to maintain and establish accurate ownership of delinquent receivable accounts which allows for delivery of requested media directly to downstream buyers in the secondary charged-off debt market.” GLOBAL DEBT REGISTRY, <http://www.dibbledot.com/gdr/index.html> (last visited on July 24, 2013).

- c. An itemization of all amounts owed.
- d. A statement of the last payment made by the debtor—including the amount and date of payment.

Additionally, consumers should have the right to view documentation that demonstrates the following:

- a. The debtor's agreement to the original debt—*e.g.*, a copy of a document that shows the debtor's signature.
- b. The assignments of debt to other owners.

Moreover, the timeline for consumers to make the request for documentation should not be limited by a thirty-day dispute window.<sup>351</sup> All collection activities should be suspended until the collector provides the requested information to the consumer. Using its rulemaking authority, the CFPB should issue regulations to force collectors to meet the requirements imposed by these amendments.<sup>352</sup>

### 3. Require Collectors to Notify Consumers about the Consequences of Paying or Acknowledging Unenforceable Debts

While providing information to consumers is important, it too, is a limited solution unless consumers are informed about the potential for zombie-debt issues, and the impact of making payment or acknowledging such debts. Support for this type of disclosure is beginning to develop in the area of time-barred debts;<sup>353</sup> however, the disclosure requirements should be explicitly extended to all forms of unenforceable debts.

In 2010, Professors Timothy Goldsmith and Nathalie Martin reported the results of an empirical study that determined the impact of providing information about time-barred debts to consumers.<sup>354</sup> The study divided consumers into two groups—A and B—that were statistically similar based on sex, age, education, income, and debt.<sup>355</sup> The participants

351. In 2012, the Attorney General in Massachusetts issued regulations requiring a creditor (defined to include a debt buyer) to provide a debtor who has disputed a debt with all documents reflecting the “signature of the debtor and which concern the debt” as well as “[a] ledger, account card, account statement copy, or similar record . . . which reflects the date and amount of payments, credit balances, and charges . . . .” 940 MASS. CODE REGS. 7.08(2) (2012). The regulations, however, require that the debtor dispute the debt in writing within thirty-days after notice of validation by the creditor.

352. Bremner, *supra* note 275, at 1593–94 (advocating that the CFPB establish standardized forms for compliance with the FDCPA's disclosure requirements).

353. *See infra* notes 361–63 and accompanying text.

354. Goldsmith & Martin, *supra* note 25, at 372.

355. *Id.* at 379.

in each group were asked how likely they would be willing to pay a debt that they had stopped making payments on more than six years ago. The study informed Group A that the debt was not enforceable in court because the enforcement period had expired. Group B did not receive this notice.<sup>356</sup> As expected, the pay-rate response by Group A was significantly lower than that of Group B.<sup>357</sup> Goldsmith and Martin concluded that given this difference, knowledge of the expiration of the limitations period is a material consideration for debtors in deciding whether to make payments.<sup>358</sup>

The New Mexico Attorney General's office used the results from this study to settle a lawsuit that alleged that a collector's failure to disclose that it was collecting time-barred debts was a deceptive trade practice.<sup>359</sup> The settlement resulted in a cash payout and an injunction that prohibited the collection of time-barred debt without disclosing that the debt would not be enforceable in a court action.<sup>360</sup> Subsequently, New Mexico issued regulations in 2010 that prohibit the collection of time-barred debts, unless the collector discloses that the debts would not be enforceable in court, and that partial payment or acknowledgement of the debt could result in restarting the limitations period.<sup>361</sup> A limited number of jurisdictions have adopted similar legislation or regulations.<sup>362</sup> Additionally, in 2012 the FTC imposed disclosure requirements as a condition of settlement with collectors who allegedly pursued time-barred debts.<sup>363</sup>

Therefore, FDCPA amendments should require collectors to provide information about unenforceable debts when they contact alleged

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356. *Id.* at 377.

357. *Id.* at 379–80.

358. *Id.* at 380.

359. *Id.*

360. Goldsmith & Martin, *supra* note 25, at 380.

361. 12.2.12 NMAC (12/10/2010).

362. *See, e.g.*, 940 MASS. CODE REGS. 7.07 (2012); N.Y.C. ADMIN CODE § 20–493.2 (2012). California's recently enacted Fair Debt Buying Practices Act requires that buyers collecting on time-barred debts disclose that they will not sue on such debts, CAL. CIV. CODE § 1788.52(d)(2)–(3) (West 2014). Similarly, effective June 6, 2014, collectors in West Virginia are also required to make this disclosure when collecting on time-barred debts. W. VA. CODE § 46A–2–128(f) (2014).

363. Consent Decree, *United States v. Asset Acceptance, LLC*, No. 8:12-cv-182-T-27EAJ (M.D. Fla. Jan. 31, 2012), available at <http://www.ftc.gov/os/caselist/0523133/120131assetconsent.pdf> (requiring disclosures if know or should know that debt is time-barred). The Seventh Circuit Court of Appeals has also recently decided that a debtor may have a misrepresentation claim under the FDCPA if a collector knowingly seeks to collect time-barred debt without disclosing that the debt is time-barred. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014).

debtors, and also inform alleged debtors about the consequences of making payment or making an acknowledgment. Moreover, such requirements should not be limited to time-barred debts; they should extend to debts that may not belong to the debtor, and to debts that may have been paid, settled, or discharged in bankruptcy.

#### 4. Educate Consumers about Zombie-Debt Issues

Sending notice to consumers is a significant step; however, if consumers do not understand the notices, these notices will not be effective. Accordingly, notices should enable consumers to comprehend the content of the notices.<sup>364</sup> Given that the elderly and low-income individuals are particularly susceptible to debt collectors,<sup>365</sup> education and assistance efforts should particularly target these groups.

To its credit, the CFPB has already begun this process. It has created action letters for consumers to send to collectors to dispute debts and obtain information.<sup>366</sup> Additional form letters could address zombie-debt issues and the FDCPA amendments proposed in this article. For example, consumers should have access to form letters that request documentation revealing a complete itemization of the amounts requested, and amounts and dates of payments received, as well as the full names and addresses of the alleged debtor, and all past and present holders of the debt.

Currently, the CFPB provides some education and outreach efforts.<sup>367</sup> The CFPB offers assistance directed to elderly consumers.<sup>368</sup> These efforts as well as information posted on the CFPB's website should specifically address zombie-debt issues and focus on those who are most

364. Excessive information provided to consumers can be overwhelming. *See* Adi Osovsky, *The Misconception of the Consumer as a Homo Economicus: A Behavioral Economic Approach to Consumer Protection in the Credit Reporting System*, 46 *SUFFOLK U. L. REV.* 881 (2013). A discussion of what constitutes effective notice is beyond the scope of this Article. For more detail, see Florencia Marotta-Wurgler, *Does Disclosure Matter?* (NYU Ctr. for Law, Econ. and Org., Working Paper No. 10-54, 2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1713860](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713860).

365. *Debt Collection Racket*, *supra* note 180, at 1.

366. *Consumer Financial Protection Bureau Puts Companies on Notice About Harmful Debt Collection Practices*, *CONSUMER FIN. PROT. BUREAU*, (July 10, 2013) [http://files.consumerfinance.gov/f/201307\\_cfpb\\_factsheet\\_debt-collection.pdf](http://files.consumerfinance.gov/f/201307_cfpb_factsheet_debt-collection.pdf) (last visited July 25, 2013).

367. CFPB Web Team, *CONSUMER FIN. PROT. BUREAU, We're 732 Days Old: Here's What We've Been Up To*, (July 22, 2013), <http://www.consumerfinance.gov/blog/hbd/>.

368. *Financial Protection for Older Americans*, *CONSUMER FIN. PROT. BUREAU*, <http://www.consumerfinance.gov/older-americans/> (last visited Aug. 5, 2013).

in need of assistance. The CFPB should coordinate education efforts at the federal, state, and local level to address zombie-debt concerns.

Given the disproportionate number of consumer cases that involve low-income individuals, the use of legal aid and law-school clinics also provide methods for helping consumers faced with demands from collectors.<sup>369</sup> Professor Peggy Maisel and Research Fellow Natalie Roman conducted an informal survey of two hundred law clinics, and detailed interviews with sixteen clinic directors and faculty members to determine what law schools were doing to help low-income consumers.<sup>370</sup> Their article highlights the variety of approaches and significant successes that clinics have had in helping low-income consumers by providing advice and representation in foreclosure, collection, and bankruptcy matters.<sup>371</sup> In addition to traditional representation in bankruptcy, litigation, and appellate matters, students in the clinics have provided consumer-education workshops, have conducted pre-litigation discussions with collectors, have mediated disputes, and have helped draft and advocate consumer legislation and regulation.<sup>372</sup> These clinics are “win-win” situations as they help consumers with their issues, as well as offer practical, real-life experiences to law students.<sup>373</sup>

Providing legal assistance to consumers in collection matters has been successful. A 2013 study found significantly lower rates of default judgment in collection cases against residents who lived in New York City compared to citizens that lived outside the city.<sup>374</sup> The study attributed the differences in part to free legal services offered by the court, local attor-

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369. Peggy Maisel & Natalie Roman, *The Consumer Indebtedness Crisis: Law School Clinics As Laboratories For Generating Effective Legal Response*, 18 CLINICAL L. REV. 133 (2011); see also APPLESEED REPORT, *supra* note 176, at 32–35 (advocating the use of legal clinics, voluntary service, and students to help consumers with debt-collection litigation).

370. Maisel & Roman, *supra* note 369, at 148–49.

371. *Id.* at 147–70.

372. *Id.*; see also Mary Spector, *From Representation To Research And Back Again: Reflections On Developing An Empirical Project*, 16 UDC/DCSL L. REV. 55 (2012) (describing the efforts of students in SMU’s civil clinic in representing consumers in collection matters and drafting rules to help consumers).

373. Maisel & Roman, *supra* note 369, at 136. Similarly, law students have also been involved in helping veterans obtain benefits. See Andrew Ostler, *Law Students Help Speed up Backlogged Veterans Benefits Claims*, JD JOURNAL (May 28, 2013), available at <http://www.jdjournal.com/2013/05/28/law-students-help-speed-up-backlogged-veterans-benefits-claims/> (describing the partnership between the Veteran’s Administration and the pro-bono clinic at William & Mary Law School to help reduce delays in the processing of veteran’s benefits).

374. *Debt Collection Racket*, *supra* note 180, at 4–12.

neys, and legal-aid groups in New York City.<sup>375</sup> Similar efforts should address consumers who receive pre-litigation communications from collectors.

##### 5. Amend the FDCPA's Penalty and Limitation Provisions

While the amendments and suggestions above are crucial to mitigate zombie-debt issues, they will not be effective unless they are enforced, and the penalty structure for non-compliance deters zombie-debt collectors. The debt-buying industry has been characterized as a “\$100 billion per year industry”;<sup>376</sup> accordingly, to help consumers combat zombie-debt collectors, the limited penalties for individual suits and class actions, as well as the one-year limitation period under the FDCPA should be amended. The penalties and the limitation periods remain unchanged since the FDCPA's enactment in 1977.<sup>377</sup> They no longer reflect the economic realities of the multi-billion dollar debt-buying industry that consists of hundreds of companies, including publicly traded companies. At the very least, Congress should index penalties to inflation<sup>378</sup> and consider awarding penalties on a per-violation basis instead of a per-lawsuit basis.<sup>379</sup> Similarly, recognizing the impact of debt buyers on the growth of zombie debts, the FDCPA should specifically state that it applies not only to collectors, but also to debt buyers.<sup>380</sup>

## CONCLUSION

While many people enjoy watching or reading about fictional zombies, zombie debts are real, and cause financial havoc for consumers. It is time to attack these real zombies. This Article has presented a general framework, and specific solutions to reduce zombie-debt collection. Additionally, recognizing that zombie-debt collectors may, like fictional zombies, be adept at finding new methods to avoid destruction, our approach must be flexible enough to respond quickly to changing industry practices and improvements in technology.

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375. *Id.* (stating that additional notice requirements adopted by the New York City Courts also helped to explain the lower rates of default judgment in the city).

376. Holland, *supra* note 24, at 259.

377. *See supra* notes 288–91 and accompanying text.

378. FTC WORKSHOP, *supra* note 38 at 66–67; Bremner, *supra* note 275, at 1589–90.

379. *See* FORBES, *supra* note 7.

380. *See* Walgenkim, *supra* note 24, at 90–91 (stating that despite the clear language of the FDCPA debt buyers have argued that they are not collectors under the FDCPA).



The FDCPA did not anticipate the growth of debt buyers in 1977. Now, we should be careful to monitor and be ready to react to factors that may increase the rate of zombie-debt collection. We must be proactive. Continued study, research, and evaluation of the approaches suggested in this article would help to track the practices of the debt-collection industry. The current efforts of the CFPB and the FTC to mitigate zombie-debt issues should be encouraged. The CFPB complaint database offers analysts the ability to assess debt-collection data.<sup>381</sup> The information included in this database should also track zombie-debt concerns, namely, time-barred debts, debts that do not belong to consumers, and debts that have been paid, settled, or discharged. We should monitor the efforts of jurisdictions such as California, Massachusetts, New Mexico, New York City, and West Virginia to address zombie debt at the pre-litigation stage. Just as citizens in horror movies need to recognize zombies and possess the proper weapons and skills to kill them, consumers in the real world must understand when debt buyers are seeking to collect zombie debts, and should possess the appropriate tools and knowledge to defeat zombie-debt collectors.

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381. See, e.g., Ian Ayres, Jeff Lingwall & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints* (Working Paper, July 17, 2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2295157](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295157) (examining the 110,000 complaints filed with the CFPB). Similarly, empirical research is necessary to further address the efficacy of legal assistance programs. For a description of a current study regarding consumer debt collection, see Daliè Jimènez, D. James Greiner, Lois R. Lupica & Rebecca L. Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449 (2013).