"Unfair or Unconscionable": A New Approach to Time-Barred Debt Collection under the FDCPA

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Since the 1990s, the trade in second-hand debt has exploded. Debt collectors now relentlessly pursue decades-old debts, purchased for pennies on the dollar from primary creditors. To avoid the bar that statutes of limitations place on judicial enforcement of these debts, third-party debt collectors seek "acknowledgment" from unwitting consumers, which resets the limitations periods under state law. Under the Fair Debt Collection Practices Act (FDCPA), federal courts have struggled to deal with these attempts at resetting the statutes of limitations—a practice that often feels inherently unfair. So far, courts have focused on whether collection attempts have violated the FDCPA's ban on misrepresenting the legal status of a debt. But this Comment argues that courts should refocus their energies on the FDCPA's prohibition against "unfair or unconscionable" collection practices.

Under this new approach, courts are justified in classifying all attempts at collecting revivable time-barred debts as unconscionable. Not only does the extension of the FDCPA to these tactics follow from congressional intent, but it also reflects the meaning of unconscionability under contract law. When the revival of time-barred debts is viewed as a quasi-contractual interaction, it meets the definition of common law unconscionability: by violating the public policy of the FDCPA and statutes of limitations; by unfairly disadvantaging consumers due to informational asymmetry and unequal bargaining power; and by giving a windfall to debt collectors but essentially no benefit to consumers, representing a total failure of consideration. This per se ban on the collection of revivable time-barred debts will also generate greater uniformity in consumer protection law and limit the substantial discretion currently available to courts.

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INTRODUCTION

In search of an accessible epithet, newspapers across the country have christened debt that is barred by the statute of limitations "zombie debt."[1] This "funny term"[2] for time-barred debt reflects its tendency to come back to life and attack when, like the first victims in a horror movie, consumers "seal their [ ] fate" by their own heedless approaches to debt collectors.[3] Consumer protection webpages seeking to arm readers against invasion warn of debt "that rises from the grave to ingest the bank accounts of the living."[4] Stock photos of bodiless arms in B-movie makeup, poking grimly from the ground, accompany lists of methods to "[f]ight back" against an undead scourge.[5] And although burdened with bad metaphors, these articles provide useful tips to keep consumers from falling victim to debt collectors' tricks to reset statutes of limitations and revive time-barred debts.[6] Some articles even provide lists of illegal tactics that debt collectors commonly

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1 See, for example, Laura Adams, *How to Protect Yourself from 'Zombie Debt' Collectors* (US News, Oct 15, 2018), online at http://money.usnews.com/money/blogs/my-money/articles/2018-10-15/how-to-protect-yourself-from-zombie-debt-collectors (visited Jan 10, 2019) (Perma archive unavailable); Sean Pyles, *1 Wrong Move Can Bring 'Zombie' Debt Back from the Grave* (USA Today, Oct 31, 2016), archived at http://perma.cc/9RGL-PHC4; *Zombie Debt 101* (MoneyTips, Oct 18, 2018), archived at http://perma.cc/2UYJ-3FXF; Kathy Kristof, *5 States with the Most "Zombie Debt" Complaints* (CBS News, Mar 7, 2018), archived at http://perma.cc/7WFP-FVSR.

2 Adams, *How to Protect Yourself* (cited in note 1).

3 *Zombie Debt 101* (cited in note 1).

4 Id.

5 Pyles, *1 Wrong Move* (cited in note 1). See also, for example, *Zombie Debt 101* (cited in note 1); Adams, *How to Protect Yourself* (cited in note 1).

6 See Adams, *How to Protect Yourself* (cited in note 1).

deploy so that consumers can identify when a collector has crossed a line.[7] Indeed, the number of consumer protection articles on time-barred debt is exceeded only by the variety of zombie puns that editors can tolerate.

Such melodramatic descriptions are not the exclusive product of popular media. In fact, several scholarly articles unabashedly employ the same undead metaphor.[8] One article even takes this metaphor a step further by comparing the revival of time-barred debts to a metastatic cancer that only a Chapter 7 lumpectomy can effectively kill.[9] The fact that this grim wordplay, ranging from creative to cringeworthy,[10] can appeal to such a wide variety of authors and audiences signals a deeper social aversion to the debt collection practice at issue. The pervasiveness of comparisons between time-barred debt collection and undead horrors ultimately raises the question of why the practice remains such a vibrant industry,[11] free from much substantive regulation.[12] Why do consumer protection blogs continue to battle these undead debts forty years after Congress purported to eliminate "abusive, deceptive, and unfair debt collection practices" with the Fair Debt Collection Practices Act[13] (FDCPA)? Why have courts used the FDCPA as a mere linguistic tool to root out impermissible

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7 See Susannah Snider, *Know Your Rights When You're on the Phone with a Debt Collector* (US News, Mar 2, 2017), online at http://money.usnews.com/money/personal-finance/debt/articles/2017-03-02/know-your-rights-when-youre-on-the-phone-with-a-debt-collector (visited Jan 10, 2019) (Perma archive unavailable).

8 See, for example, Young Walgenkim, *Killing "Zombie Debt" through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 Loyola Consumer L Rev 65, 65 (2011); Judith Fox, *Rush to Judgment: How the Fair Debt Collection Practices Act Fails to Protect Consumers in Judicial Debt Collection*, 13 Fla St U Bus Rev 37, 42 n 28 (2014); Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 NM L Rev 327, 328–33 (2014); April Kuehnhoff and Margot Saunders, *Zombie Debt: What the CFPB Should Do about Attempts to Collect Old Debt* *2 (National Consumer Law Center, Jan 2015), archived at http://perma.cc/9SEC-JMRV.

9 See Dalie Jimenez, *Ending Perpetual Debts*, 55 Houston L Rev 609, 617–18 (2018).

10 To avoid performing a resurrection ritual of my own, I have refrained from naming this Comment and its headings per the Romero-esque conventions of previous scholars.

11 "The [debt collection] industry is expected to exceed $500 billion in collections . . . in the United States over the next ten years." Sobol, 44 NM L Rev at 336 (cited in note 8). The third-party debt-buying industry is among "the fastest-growing sectors of all financial services." 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, 265 (2011).

12 "The majority of the statutes and rules [regulating debt collection] are not designed to directly change lending practices, but, rather, are designed to force lenders to disclose the nature, extent, cost, source, and other factors regarding credit, credit-like, and credit-affecting arrangements." R. Glen Ayers Jr, *Beyond Truth-in-Lending—Federal Regulation of Debt Collection*, 16 St Mary's L J 329, 331 (1985).

13 Pub L No 90-321, 91 Stat 874 (1977), codified as amended at 15 USC § 1692.

"threats" when it actually provides a substantive framework to tackle the problem of time-barred debts at its source?

The answers to these questions are not so simple. Historically, widespread attempts to collect on time-barred debts did not arise until primary creditors first began charging off[14] old debts in bulk during the late 1980s,[15] years after the passage of the FDCPA. Unsurprisingly, Congress, while deserving praise for its bipartisan attempt to rein in abusive debt collectors, proved hopelessly reactive in passing the FDCPA.[16] By focusing mainly on remedying previous abuses by primary creditors,[17] Congress failed to predict the explosive expansion of a secondhand market for consumer debts[18] and how this market would seek to avail itself of laws in the majority of states to reset the statute of limitations.[19]

Today, an inert Congress continues to refrain from amending or expanding the reach of the FDCPA, even as time-barred debt collection poses an ever-expanding threat to consumers.[20] Meanwhile, judges continue to rely on a patchwork reading of the FDCPA's prohibition on misrepresentation, codified in 15 USC § 1692e, which has created a nonuniform field of law with plenty of loopholes for unscrupulous collectors to abuse. Yet, the FDCPA remains the most viable statutory basis for reining in the abuses associated with time-barred debt collection. This Comment posits that the best remedy to time-barred debt collection abuses lies in

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14 "Charged off" is an industry term for debt that a creditor has taken off a balance sheet because it seems unlikely to be collected. See, for example, Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection after FDCPA*, 79 S Cal L Rev 711, 725–27 (2006). See also Julia Kagan, *Charge-Off* (Investopedia, Jan 31, 2018), archived at http://perma.cc/33L7-FGLX.

15 See Goldberg, 79 S Cal L Rev at 725 (cited in note 14) (noting that, in response to economic troubles in the 1980s, the FDIC began selling the debts of failing banks and Bank of America began selling old credit card debt).

16 See id at 718 (arguing that "with [the] FDCPA, Congress created a law intended only to remedy previous abusive behavior and not to prospectively adapt to a changing industry").

17 Id.

18 See Sobol, 44 NM L Rev at 334–35 (cited in note 8) ("The [debt-buying] industry has emerged as one of 'the fastest-growing sectors of all financial services.' . . . From 1993 to 2005 the amount of purchased debt rose nearly twenty-fold, from $6 billion to over $110 billion.").

19 See note 37 and accompanying text.

20 According to the CFPB's database, complaints that collectors were seeking to recover debts that were either inflated or not owed as a percentage of overall complaints increased from approximately 30 percent in 2010 to nearly 40 percent in 2011. See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2012* *8, archived at http://perma.cc/UU7A-WLGL.

a new approach under a different statutory provision: namely, 15 USC § 1692f, the FDCPA's prohibition on "unfair or unconscionable" debt collection practices.[21]

While courts have limited the usefulness of § 1692e to time-barred debtor-litigants, they have left § 1692f largely untouched in this context. This Comment proposes that courts should classify all attempts to collect time-barred debts as "unconscionable" under § 1692f in states where resetting the statute of limitations is possible. This jurisprudential maneuver would ensure that statutes of limitations protect consumer debtors while encouraging primary creditors and downstream debt buyers to employ more honest collection practices.

To support such an approach, this Comment proceeds in three parts. Part I explains the history of time-barred debt collection, the reasons why time-barred debt collection presents unique difficulties for consumers and courts, and the background of the FDCPA. Part II takes a nuanced look at courts' current approaches to time-barred debt collection, including the two primary approaches under 15 USC § 1692e, as well as a critical summary of litigants' past attempts to challenge time-barred debt collection under 15 USC § 1692f. Finally, Part III presents a comprehensive analysis of time-barred debt collection under 15 USC § 1692f that goes beyond the unimaginative interpretations that courts have previously undertaken. By addressing the theoretical as well as the normative justifications for classifying all time-barred debt collection as an "unfair or unconscionable" practice, Part III offers a legal basis for courts to fault *any* attempt to seek repayment of these (un)dead debts.

I. THE HISTORY OF TIME-BARRED DEBT COLLECTION AND THE FDCPA

Before delving into current judicial approaches to time-barred debt collection, it is important to understand why consumers struggle with time-barred debt collection and why the FDCPA is the most protective shield against debt collector mischief. As this Part outlines, the collection of time-barred debt presents unique harms to consumers that warrant a judicial response. Furthermore, this Part demonstrates that Congress intended the FDCPA to apply to a wide variety of problematic debt collection

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21 15 USC § 1692f.

tactics, even though it did not specifically contemplate the problems of time-barred debt collection when passing the Act in 1977.

A. The Problem of Time-Barred Debt Collection

Scholars have diligently documented the harmful and pervasive impact that time-barred debt collection has on consumers at the hands of a voracious debt collection industry.[22] Since the debt-buying industry's boom in the early 1990s, third-party debt collectors have dominated the debt collection arena.[23] Primary creditors, wishing to avoid an unfamiliar debt-collecting industry and seeking to maintain good relations with their customers, have unloaded debts for pennies on the dollar to professional collections agencies.[24] Unburdened by the reputational restraints of repeat play, these collections agencies can try any trick or tactic plausibly allowed under the law.[25] One of these agencies' "insidious tactics" involves inducing consumers to revive time-barred debts—causing a legally unenforceable debt to become enforceable once more, despite the initial statute of limitations running its course.[26] Once a consumer inadvertently revives his or her debt, debt collectors can pursue a low-cost and often uncontested lawsuit to turn a profit on the underlying debt.[27] The ability of debt

[22] For example, "25 percent of all complaints received by the FTC relate to the debt-collection industry." Sobol, 44 NM L Rev at 337 (cited in note 8). Moreover, "[i]n 2013, the top complaint against debt collectors (one-third of the total received) concerned attempts to recover debts that were not owed"—which includes those debts barred by the statute of limitations. Id at 338 n 70. "Fourteen percent of Americans—nearly thirty million individuals—receive [collections] calls." Id at 334. And as to suits filed on time-barred debt, one legal services provider in New York "claims that more than half of the actions in its office were based on time-barred debt." Id at 346 n 129. Once obtained, "court judgments from collection suits can be near-permanent" and can lead to wage garnishment, frozen bank accounts, seizure of assets, reporting to credit reporting agencies, and in rare cases, arrest of the debtor. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 Harv L & Pol Rev 91, 99–100 (2017) (quotation marks omitted).

[23] "In 1996, only about a dozen debt-buying firms existed. Currently, over 500 privately owned companies, as well as at least four publicly traded companies, are debt buyers." Sobol, 44 NM L Rev at 335 (citations omitted) (cited in note 8).

[24] See id at 331.

[25] Id at 331, 360.

[26] See Goldberg, 79 S Cal L Rev at 729 (cited in note 14). Debt collectors' other deceptive strategies include: the evasion of US law by outsourcing collections to foreign countries, the use of demographics to target vulnerable consumers, and the exploitation of small-claims courts.

[27] The Federal Trade Commission has found that "90% or more of consumers sued in [debt collection] actions do not appear in court to defend." Federal Trade Commission, *The Structure and Practices of the Debt-Buying Industry* *45 (Jan 2013), archived at http://perma.cc/45NB-ZTDC.

collectors to engage in such tactics is magnified by consumers' near-universal undereducation regarding the complex laws of debt collection and statutes of limitations.[28]

An astounding lack of information on the part of debt collectors presents a pressing threshold problem. In a study by the Federal Trade Commission (FTC), the consumer's date of default—which is used to calculate the beginning of the limitations period in most cases—was actually missing from 65 percent of accounts purchased by debt collectors.[29] Likewise, consumers often lack documentary evidence of the date of default for very old debts.[30] However, consumers may not realize that debt collectors often lack this information as well; they are willing to trust that a collector would not pursue a debt unless the collector had the legal evidence to back up the debt's validity.[31] Consumer trust allows debt collectors to pursue legally dubious debts without restraint. Even when debt collectors *do* possess information on the timeliness of a debt, the narrow haven that the statute of limitations provides does little to deter collections actions.

Although the statute of limitations is an affirmative defense in most states,[32] most federal jurisdictions have held that filing suit on a time-barred debt is a per se violation of the FDCPA—either § 1692e, § 1692f, or both.[33] Given that consumer-defendants are the only party with standing to challenge time-barred suits, however, the federal per se rule provides little consolation. The vast majority of these debt collection suits result in default judgments; the few consumers who appear to defend themselves often do so pro se.[34] Without the advice of an attorney, these consumers are unlikely to know that an affirmative

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28 See Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* *26 (July 2010), archived at http://perma.cc/LL5C-GEUJ.

29 See Federal Trade Commission, *Debt-Buying Industry* at *34–35 (cited in note 27). The only information consistently included with these sold accounts is: the debtor's outstanding balance (100 percent); the debtor's name, street address, and Social Security number (98 percent); the date the debtor opened the account (97 percent); and the date the debtor made his or her last payment (90 percent). See id.

30 See Dalie Jimenez, *Dirty Debts Sold Dirt Cheap*, 52 Harv J Legis 41, 112 (2015) (arguing that it is unreasonable to expect consumers to retain documentation of account records over such long periods of time).

31 See id at 115.

32 See Federal Trade Commission, *Debt-Buying Industry* at *45 (cited in note 27).

33 See *Ramirez v Palisades Collection LLC*, 250 FRD 366, 369 (ND Ill 2008) (collecting cases).

34 See Stifler, 11 Harv L & Pol Rev at 115 (cited in note 22) (noting that "only one to ten percent of consumer defendants retain representation in debt collection cases").

statute-of-limitations defense exists or that the FDCPA may bar the suit. And like all affirmative defenses, the statute of limitations can be waived.[35] Even if the consumer later discovers that the limitations period has run, the consumer's only recourse would be to bring a new, separate suit against the debt collector to recover damages for filing the time-barred suit in violation of the FDCPA. Federal courts lack the power to overturn the original judgment, which may very likely be in excess of the maximum of $1,000 in statutory damages allowed in a successful FDCPA suit.[36]

Even more problematic than consumers' difficulty in bringing a statute-of-limitations defense is the limited reach and durability of the defense itself. In all but two states—Wisconsin and Mississippi—the statute of limitations never extinguishes a debt; it only limits the debt collector's ability to sue for repayment in a court of law.[37] Because the debt is still considered legally valid, debt collectors are permitted by state law to ask for voluntary repayment outside of a court setting.[38] Moreover, the vast majority of states allow resurrection of time-barred debts by the consumer, which may extinguish the limitations defense altogether.[39] Generally, reviving a debt requires the debtor to make some affirmative acknowledgment that she owes the debt. But some states have established a very low bar for what this acknowledgment

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[35] Id.

[36] The FDCPA only gives federal courts the power to award damages, not to provide equitable relief or overturn suits at state law. See *Weiss v Regal Collections*, 385 F3d 337, 342 (3d Cir 2004) ("[W]e hold injunctive and declaratory relief are not available to litigants acting in an individual capacity under the FDCPA."). The FDCPA also does not provide a disgorgement remedy for debts that consumers have paid solely as a result of being targeted by a prohibited debt collection practice. See *Palmer v Stassinos*, 348 F Supp 2d 1070, 1088 (ND Cal 2004). As an example of this in practice, in *McCollough v Johnson, Rodenburg & Lauinger, LLC*, 637 F3d 939 (9th Cir 2011), a debt collector filed suit on a time-barred debt with a principal balance of $3,816.80 and interest of $5,536.81. After successfully countersuing, the consumer received the maximum $1,000 damages allowed under the FDCPA. The plaintiff's much larger tort recovery ultimately came from a state law malicious prosecution claim, rather than from the FDCPA claim.

[37] See generally Thomas R. Dominczyk, *Time-Barred Debt: Is It Now Uncollectable?*, 33 Bank & Fin Serv Pol Rep 13 (2014) (explaining that, in most states, a creditor can win a judgment on a debt even after the statute of limitations has run if the debtor does not raise the statute of limitations as an affirmative defense).

[38] See, for example, *Pantoja v Portfolio Recovery Associates, LLC*, 852 F3d 679, 685 (7th Cir 2017) (noting that "[t]he creditor retains the legal right to appeal to the debtor to honor the debt out of a sense of moral obligation even if the legal obligation can no longer be enforced in court").

[39] See Stifler, 11 Harv L & Pol Rev at 103 (cited in note 22).

requires.[40] In most states, an act of *partial* payment will cause a revival of the *entire* debt's enforceability.[41] Even more dangerous is that written acknowledgment—sometimes by simply signing a form *provided by the debt collector*—revives a debt's statute of limitations in some jurisdictions.[42] Once a debt is revived, debt collectors may immediately seek judicial enforcement of the debt under state law. As the law stands, debt collectors have no affirmative duty to warn consumers that their debts could possibly revive, and consumers themselves almost universally lack an understanding of this counterintuitive area of law.[43]

In essence, acknowledgement of a stale debt constitutes an active waiver of the statute of limitations by the consumer, resetting the limitations period. Because it deprives consumers of a legal defense unknown to them, acknowledging time-barred debts can wreak substantial harm on consumers long after they have incurred them. The possibility of revival makes the problem of time-barred debt collection especially open to abuse, and thus especially deserving of remedy under the FDCPA.

B. The Contours of the FDCPA

The FDCPA targets a wide variety of abusive collections practices. It prohibits debt collectors from disclosing consumers' debt collection information to third parties[44] and harassing consumers to collect a debt,[45] and it also prohibits third parties from furnishing deceptive forms for debt collectors to use.[46] It further limits the time and place where debt collectors may contact consumers[47] and establishes a mechanism that consumers can use to request documentation to "validate" the debts they have allegedly failed

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[40] See Steve Sukert, Note, *Disclosure as a Shield against Unethical Collectors That Doesn't Weigh Down the Consumer Debtor*, 30 Georgetown J Legal Ethics 1015, 1024–25 (2017). See also Sobol, 44 NM L Rev at 349 (cited in note 8). The debt collection industry tellingly refers to the practice of inducing consumers to revive time-barred debts as "duping." See id at 349 n 155.

[41] Sukert, Note, 30 Georgetown J Legal Ethics at 1024 (cited in note 40).

[42] Id at 1025.

[43] See id at 1032. See also Consumer Financial Protection Bureau, *Outline of Proposals under Consideration and Alternatives Considered* *19 (July 28, 2016), archived at http://perma.cc/4FHF-A5JL (finding via consumer testing that "[c]oncepts related to statutes of limitations are challenging for consumers to understand, especially the fact that in some jurisdictions consumers may 'revive' a debt").

[44] 15 USC § 1692c(b).

[45] 15 USC § 1692d.

[46] 15 USC § 1692j.

[47] 15 USC § 1692c(a).

to honor.[48] For the purposes of this Comment, however, the most relevant sections of the FDCPA are § 1692e and § 1692f. The traditional home for claims against time-barred debt collection is § 1692e, which prohibits the use of "false, deceptive, or misleading representation or means in connection with the collection of any debt."[49] Conversely, § 1692f offers a much more nebulous prohibition against using "unfair or unconscionable means to collect or attempt to collect any debt."[50] Both § 1692e and § 1692f also contain a list of practices that constitute per se violations of their overarching prohibitions.[51] Neither the list in § 1692e nor the list in § 1692f explicitly mentions collection attempts on time-barred debt or other conduct that induces the revival of debts under state law.

The FDCPA also provides for legal remedies against debt collectors who violate the Act's prohibitions. Section 1692k allows for the recovery of actual damages for violations of the FDCPA's several provisions plus the recovery of "additional damages" as a court may award.[52] Because the practices the FDCPA prohibits do not lend themselves to the evidence and calculation of "actual" damages,[53] litigants may often find the lion's share of their compensation under § 1692k's allowance for statutory damages. These statutory damages, however, remain capped at $1,000—a sum diluted by inflation, having remained the same since the act's initial passage in 1977.[54] Indeed, because of the low-compensation remedies of the FDCPA, the statute works best as a deterrent to bad debt collection practices ex ante by threatening debt collectors with litigation costs and potentially numerous but

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48 15 USC § 1692g.

49 15 USC § 1692e.

50 15 USC § 1692f.

51 See 15 USC § 1692e(1)–(16); 15 USC § 1692f(1)–(8). Examples of these per se illegal practices include: implying that an individual is an attorney when they are not, implying that failure to pay a debt will result in imprisonment, using an alias business name, and falsely representing that a collector works for a consumer reporting agency. See also note 123 and accompanying text for per se unlawful practices under § 1692f.

52 15 USC § 1692k(a).

53 See *Baker v G. C. Services Corp*, 677 F2d 775, 780 (9th Cir 1982) (observing that "[t]he only actual damages that a plaintiff would be likely to incur [from an FDCPA violation] would be for emotional distress caused by abusive debt collection practices and, unless the violations are extreme and outrageous, traditional stringent evidentiary hurdles would be difficult to overcome").

54 See 15 USC § 1692k(a).

small damages awards.[55] It does little to console the victims of debt collection abuses after the fact.

Further bolstering the FDCPA's deterrent effect are the alternatives to private enforcement embedded in its statutory scheme. Although private rights of action and class actions are two principal mechanisms of FDCPA enforcement, two federal agencies—the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB)—are endowed with regulatory powers under the statute. Section 1692*l* gives the FTC broad power to enforce a violation of the FDCPA as "an unfair or deceptive act or practice in violation of [the Federal Trade Commission Act]."[56] Additionally, the CFPB has the authority to "prescribe rules with respect to the collection of debts by debt collectors"; indeed, the CFPB's rulemaking authority extends to all agencies given incidental enforcement powers under the statute, including the FTC.[57] Concomitant with its power to issue rules, the CFPB is required under the FDCPA to report its activities to Congress.[58] There is evidence that the CFPB and FTC have taken their grant of authority seriously in the past, including with matters related to the collection of time-barred debts.[59] Indeed, some commentators have suggested that regulatory action is a promising solution to the problem of time-barred debt collection.[60] Nevertheless, given the decades that administrative agencies have had to deal with these problems and the continued scourge of

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55 Individual suits are unlikely to have a deterrent effect either, given the relative tininess of the $1,000 damages cap. Class actions are more likely to deter bad collection practices given a much higher cap on damages for the class, but at least one author thinks that the $500,000 cap for class actions is unlikely to deter the "multi-billion dollar" juggernaut that is the debt-buying industry. See Sobol, 44 NM L Rev at 367 (cited in note 8).

56 15 USC § 1692*l*(a).

57 15 USC § 1692*l*(d).

58 See 15 USC § 1692m.

59 See, for example, Jimenez, 52 Harv J Legis at 84 n 170 (cited in note 30) (providing a long list of instances from 2013 and 2014 in which the FTC sued or shut down debt collectors).

60 This solution has also been considered by the CFPB. See Consumer Financial Protection Bureau, *Proposals under Consideration* at *21 (cited in note 43). In addition to the inherent difficulties in prescribing solutions at the regulatory level—particularly the likelihood that deregulatory presidential administrations will rescind rules as soon as they come to power—there is also evidence that undermines the purported efficacy of the disclosure-based approaches to this issue taken by the FTC and CFPB. See Sukert, Note, 30 Georgetown J Legal Ethics at 1032–36 (cited in note 40). Thus, the self-reinforcing nature of a judicial solution, as proposed by this Comment, will likely prove more lasting than any action by an administrative agency.

time-barred debt collection for consumers, this Comment contends that regulatory action alone is insufficient to resolve this problem.

As one may expect, the enumerated debt collection practices that the FDCPA prohibits do not tell the whole story. The proverbial Holmesian "bad man"[61] will inevitably devise techniques to escape the reach of the law. Catchall provisions allow courts some discretion to root out bad practices that the legislature failed to predict. Although courts may not always enthusiastically accept this delegation of legislative power,[62] the FDCPA contains an apparent catchall provision in the introductory clauses of §§ 1692d, 1692e, and 1692f. In suggesting that the FDCPA embraced room for judicial interpretation, the Senate's Banking, Housing, and Urban Affairs Committee noted: "In addition to these specific prohibitions, this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."[63]

Courts have generally agreed with this statement of legislative intent in their rulings. The district court in *Tsenes v Trans-Continental Credit & Collection Corp*[64] explained that the subsections are all introduced with the phrase: "Without limiting the general application of the foregoing, the following conduct is a violation of this section."[65] Consequently, "[t]he list of [ ] violations found in the [FDCPA's] subsections are nonexhaustive" and it is thus correct to conclude that the "prefatory language [alone] provides a cause of action."[66] With this in mind, courts should not feel limited by the lists of practices the FDCPA explicitly prohibits. Rather, any assessment of unconscionability under § 1692f should originate from an examination of first principles, including judicial decisions, legislative intent, and the common law of contracts.[67]

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61 See Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457, 459 (1897). Justice Holmes's "bad man" "cares only for the material consequences which such knowledge [of the law] enables him to predict." Id. "[A] man tough enough to pay the price always has the option of noncompliance with the law's directives." Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 Fla L Rev 353, 412 (1997).

62 See notes 134–35 and accompanying text.

63 S Rep No 95-382, 95th Cong, 1st Sess 4 (1977).

64 892 F Supp 461 (EDNY 1995).

65 Id at 466.

66 Id.

67 For a discussion of what these first principles of unconscionability include, see Part III.A.

II. CURRENT APPROACH TO TIME-BARRED DEBT COLLECTION

Federal courts have not yet tackled the expansion of § 1692e jurisprudence that I urge. Nevertheless, given the pernicious effects that time-barred debt collection has on consumers,[68] it should come as no surprise that these debt collection practices have already been litigated in federal courts across the country. As a result, courts have developed various judicial approaches to time-barred debt suits under the FDCPA. The Eighth Circuit decision in *Freyermuth v Credit Bureau Services, Inc*[69] and the Seventh Circuit decision in *McMahon v LVNV Funding, LLC*[70] typify the prevailing approaches to time-barred debt collection taken by the federal courts. These decisions provide the "threat-of-litigation" test[71] and a misrepresentation standard,[72] respectively, under § 1692e. Currently, only the Eighth Circuit embraces the threat-of-litigation test developed in *Freyermuth*. The Third, Fifth, Sixth, and Seventh Circuits embrace some form of the misrepresentation standard. The remaining circuits have yet to contend with this issue. In addition to these two tests, which stand opposite one another in a circuit split based on conflicting interpretations of § 1692e,[73] some courts and commentators have advocated for mandatory disclosures and regulatory intervention to address the abuses of time-barred debt collection.[74]

This Part addresses these two approaches to time-barred debt collection in turn, presenting arguments as to their

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68 See Part I.A.

69 248 F3d 767 (8th Cir 2001).

70 744 F3d 1010 (7th Cir 2014).

71 See Part II.A.

72 See Part II.B.

73 The court in *McMahon*, the first to differ from the approach in *Freyermuth*, consciously recognized its creation of a circuit split. See *McMahon*, 744 F3d at 1020 & n 1; *Daugherty v Convergent Outsourcing, Inc*, 836 F3d 507, 513 (5th Cir 2016) ("The Seventh Circuit specifically said its 'opinion create[d] a conflict in the circuits.'"). However, at least one Court of Appeals disagrees with the proposition that *McMahon* and *Freyermuth* are in conflict. See *Buchanan v Northland Group, Inc*, 776 F3d 393, 399 (6th Cir 2015) ("Northland claims that this approach puts us at odds with two fellow circuits. No such conflict exists."). This Comment assumes, as the majority of circuits do, that the circuit split exists.

74 See, for example, Sukert, Note, 30 Georgetown J Legal Ethics at 1028–36 (cited in note 40) (advocating for the adoption of the itemized disclosures required by the CFPB's proposed Regulation F); Consent Decree, *United States v Asset Acceptance, LLC*, No 8:12-cv-182-T-27EAJ, *13 (MD Fla filed Jan 31, 2012) (mandating a disclosure that "[t]he law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it."); *Buchanan*, 776 F3d at 399 (noting that "[w]ithout disclosure, a well-meaning debtor could inadvertently dig herself into an even deeper hole").

inefficiency and failure to adequately protect consumers. After critiquing the approaches courts have taken thus far under § 1692e, this Part will examine the sparse analysis that courts have devoted to time-barred debt collection under § 1692f. As the following analysis demonstrates, the majority of courts have failed to adequately address § 1692f, specifically by latching onto a narrow reading of "unfair or unconscionable" that lacks either a statutory or common law basis. When courts give unconscionability its fair definition, the doctrine will permit 15 USC § 1692f to prohibit attempts to collect time-barred debts that are subject to revival under state law.

A. The "Threat-of-Litigation" Test under § 1692e

The first court of appeals to address time-barred debt collection under § 1692e also devised the least judicially popular approach to the issue. In *Freyermuth*, the Eighth Circuit developed a "threat-of-litigation" test that has only ever enjoyed express support by, at most, two circuits. That number has since dwindled to one following a reversal by the Third Circuit.[75] Nevertheless, the Eighth Circuit has yet to question its own precedent in *Freyermuth*, and the test developed in that case continues to face discussion, often critical, from later courts and commentators.[76] Whether rightly or wrongly decided, the case is important for establishing a baseline for future FDCPA jurisprudence on time-barred debt collection. Subsequent courts, when faced with this issue for the first time, often consider *Freyermuth* as one of only two possible paths to take. The current law accepts a dichotomous choice between *Freyermuth*'s threat-of-litigation test and *McMahon*'s misrepresentation standard.

The threat-of-litigation test introduced by *Freyermuth* only finds a violation of § 1692e when a debt collector's attempt to collect a time-barred debt contains an "express threat of litigation" against the debtor.[77] In essence, the *Freyermuth* decision takes a

[75] The Third Circuit originally appeared to agree with the *Freyermuth* holding. See *Huertas v Galaxy Asset Management*, 641 F3d 28, 33 (3d Cir 2011) (noting that a plaintiff's "FDCPA claim hinge[d] on whether [the defendant's] letter threatened litigation"). It has since reversed course and endorsed the *McMahon* misrepresentation standard. See *Tatis v Allied Interstate, LLC*, 882 F3d 422, 429 (3d Cir 2018) (agreeing with *McMahon* and its progeny that "construing the [FDCPA] to *require* a threat of legal action for any FDCPA violation interposes a mandate that is not found in its text").

[76] See, for example, *Daugherty*, 836 F3d at 513; *Tatis*, 882 F3d at 427; *Carter v First National Collection Bureau, Inc*, 135 F Supp 3d 565, 571–72 n 8 (SD Tex 2015).

[77] See *Freyermuth*, 248 F3d at 771.

narrow view of § 1692e's prohibitions against the "false representation of [ ] the character, amount, or legal status of any debt"[78] and the "threat to take any action that cannot legally be taken or that is not intended to be taken."[79] The *Freyermuth* court surveyed the district court decisions that had interpreted the FDCPA with respect to time-barred debt, identifying only one court that had extended the holding in *Kimber v Federal Financial Corp*[80] to a collection letter that did not threaten litigation.[81] Moreover, the court endorsed the notion that "a statute of limitations does not eliminate the debt; it merely limits the judicial remedies available."[82] The *Freyermuth* line of decisions has cited this narrow view of the statute of limitations as evidence that an attempt to induce a "voluntary" repayment of a time-barred debt is completely lawful.[83] Only a threat to inappropriately involve the courts, the *Freyermuth* progeny has held, would rise to the level of false, deceptive, or misleading representations.

Notably, the court in *Freyermuth* performed no statutory interpretation, merely citing the text of § 1692d–f without further discussion.[84] This glossing over the statutory language in favor of deference to precedent is typical of the *Freyermuth* line of cases.[85] Their failure to critically engage the text lends credence to later courts' criticism that the FDCPA "cannot bear the reading that [*Freyermuth* and its progeny] have given it,"[86] specifically, that "construing the [FDCPA] to *require* a threat of legal action . . .

78 15 USC § 1692e(2)(A).

79 15 USC § 1692e(5).

80 668 F Supp 1480 (MD Ala 1987). *Kimber* was the first federal court decision to analyze the interplay between the FDCPA and time-barred debt collection, holding that 15 USC § 1692e is violated when a debt collector threatens to sue on a debt that it knows to be time-barred. For *Kimber*'s less rigorous analysis of 15 USC § 1692f, see note 106 and accompanying text.

81 See *Freyermuth*, 248 F3d at 771 (noting that "[o]nly one court has found a violation of the [FDCPA] in the absence of an express threat of litigation when a creditor attempts to collect on a time-barred debt"), citing *Stepney v Outsourcing Solutions, Inc*, 1997 WL 722972 (ND Ill).

82 *Freyermuth*, 248 F3d at 771.

83 See *Huertas*, 641 F3d at 32–33; *Walker v Cash Flow Consultants, Inc*, 200 FRD 613, 616 (ND Ill 2001).

84 See *Freyermuth*, 248 F3d at 771 ("Impermissible practices include harassing, oppressive or abusive conduct; false, deceptive or misleading representations; and unfair or unconscionable collection methods. 15 U.S.C.A. § 1692d–f.").

85 See, for example, *Huertas*, 641 F3d at 32–33 ("agree[ing] with the logic underlying" a long list of cases without analyzing the statutory language anew).

86 *McMahon*, 744 F3d at 1020.

interposes a mandate that is not found in its text."[87] Such a substantial lack of textual justification for the threat-of-litigation test would require significant counterbalancing policy justifications to sustain it as a valid approach.

Unfortunately for the Eighth Circuit, not only does the threat-of-litigation test lack support from sister circuits and the statutory text, but normative and public policy reasons also do not justify the rule. It is true that the test provides an undeniably bright-line rule in proposing that, "in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid."[88] Such a rule provides clearer expectations for debt collectors and arguably reduces the amount of FDCPA litigation of time-barred debt collection—especially the fact-intensive litigation required under the alternative majority approach.[89] Nevertheless, the rule falls victim to the common complaint of underinclusiveness. The threat-of-litigation test, rigidly followed, would allow a debt collector to frankly and inaccurately inform a consumer that a time-barred debt was enforceable in court as long as it did not *threaten* to act on that information.[90] This result clearly contradicts the language of § 1692e(2)(A), which bars "[t]he false representation of . . . [the] legal status of any debt."[91]

The threat-of-litigation test also ignores the broad grant of remedial authority inherent in the FDCPA by strictly declaring only a single action off-limits.[92] The court in *Freyermuth* could not perfectly predict every tactic that debt collectors would use to revive debts following the pronouncement of its test. Instead, it artificially limited courts' ability to protect consumers while placing almost no restrictions on time-barred debt collection. In fact, the court's decision arguably renders the FDCPA surplusage as to

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87 *Tatis*, 882 F3d at 429.

88 *Freyermuth*, 248 F3d at 771.

89 See *McMahon*, 744 F3d at 1019–20, citing *Evory v RJM Acquisitions Funding LLC*, 505 F3d 769, 776 (7th Cir 2007) ("Whether a dunning letter is confusing is a *question of fact*. . . . We have therefore cautioned against reliance 'on our intuitions.'") (emphasis added).

90 See *McMahon*, 744 F3d at 1021 (rejecting the rigidity of the threat-of-litigation test by noting that "[i]f a debt collector stated that it *could* sue on a timebarred debt but was promising to forbear, that statement would be a false representation about the legal status of that debt" even though "no litigation was actually threatened").

91 15 USC § 1692e(2).

92 See notes 130–31 and accompanying text for a discussion of the FDCPA's "broad remedial scope."

some time-barred debt collection. The practices that the threat-of-litigation test bars may have already been prohibited under some states' laws.[93] Moreover, the possibility of a mere $1,000 statutory claim, less litigation expenses, hardly adds protection to the least sophisticated consumer who has just revived the enforceability of a thirty-year-old debt that may greatly exceed that $1,000 cap. It strains credulity to imagine that Congress wanted to leave a debt collection practice that has such obviously harmful effects on consumers largely untouched by the FDCPA. Any benefits to the speed and cost of the court system and predictability for litigants that the threat-of-litigation test may bring are necessarily outweighed by the free rein it gives to collectors of time-barred debts.

B. The Misrepresentation Standard under § 1692e

While the Eighth and Third Circuits had more or less coalesced around the threat-of-litigation test, the Seventh Circuit took a decidedly different tack in *McMahon*. The court embraced a misrepresentation standard that faults any language that might conceivably mislead a consumer into thinking a debt is enforceable in court.[94] Noting that "efforts to collect time-barred debts *can* violate the [FDCPA],"[95] the Seventh Circuit's holding relied on two principal facts of the *McMahon* case: the lack of language in the dunning letter to the debtor indicating the "advanced age of the debt[s]," and the offer to "settle" the debts for a given price.[96] The court also approvingly cited the FTC's repudiation of the Eighth Circuit's decision in *Freyermuth* and the Third Circuit's decision in *Huertas v Galaxy Asset Management*.[97] The district courts noted, and the Seventh Circuit found persuasive, that

> the FTC has found that nondisclosure of the fact that a debt is time-barred might deceive a consumer in at least two ways: first, because most consumers do not know or understand

[93] See Consumer Financial Protection Bureau, *Proposals under Consideration* at *19 (cited in note 43) (noting that "[i]n a few states, collectors are affirmatively prohibited from bringing suit on time-barred debt under state law").

[94] *McMahon*, 744 F3d at 1020.

[95] Id (emphasis added), citing *Phillips v Asset Acceptance, LLC*, 736 F3d 1076, 1079 (7th Cir 2013).

[96] *McMahon*, 744 F3d at 1013. See also id at 1021 ("The fact that both [plaintiffs'] letters contained an offer of settlement makes things worse, not better.").

[97] 641 F3d 28 (3d Cir 2011). See also Federal Trade Commission, *The Structure and Practices of the Debt-Buying Industry* at *47 (cited in note 27).

> their legal rights with respect to the collection of time-barred debt, attempts to collect on such debt may create a misleading impression that the consumer has no defense to a lawsuit; and second, consumers often do not know that in many states the making of a partial payment on a stale debt actually revives the entire debt even if it was otherwise time-barred.[98]

The court went on to note that the FTC has recommended mandatory disclosures to remedy the problems associated with the dunning of time-barred debt.[99] While careful to caution that it is not "automatically improper for a debt collector to seek re-payment of time-barred debts" on the basis that some people consider it a "moral obligation" to pay them off fully,[100] the *McMahon* court ultimately found against the debt collector in the case. It concluded that "if the debt collector uses language in its dunning letter that would *mislead an unsophisticated consumer* into believing that the debt is legally enforceable, regardless of whether the letter actually threatens litigation (the requirement the Third and Eighth Circuits added to the mix), the collector has violated the FDCPA."[101] Although the Seventh Circuit suggested that a violation was especially likely when "a letter . . . uses the term 'settle' or 'settlement,'"[102] the court did not offer any other insight on how to determine when a collection attempt steps out of bounds without threatening litigation or offering to settle. Furthermore, the decision was not tailored to fit inside the *Freyermuth* and *Huertas* decisions; rather, the court specifically recognized that its decision created a circuit split, noting that "the statute cannot bear the reading that [the *Freyermuth* and *Huertas*] courts have given it."[103]

The benefit of the *McMahon*-style misrepresentation standard lies primarily in its flexibility. A more malleable and fact-sensitive standard than the threat-of-litigation test, the *McMahon* standard enables judges to better police the substance of debt collectors' tactics—rather than relying solely on the form of their language. By expanding the FDCPA's prohibitions to subtler, more implicit "threats" of litigation, the *McMahon* standard affords greater protection to the "least sophisticated consumer" who could

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98 *McMahon*, 744 F3d at 1015.

99 See id at 1015.

100 Id at 1020.

101 Id (emphasis added).

102 *McMahon*, 744 F3d at 1022.

103 Id at 1020.

easily succumb to threats to sue and offers to settle with similar frequency.

Just as the misrepresentation standard addresses the deficiencies of the threat-of-litigation test, however, the *McMahon* standard introduces problems of its own. The circuits that have embraced the standard have uniformly declined to establish a per se rule that offers to "settle" time-barred debts always violate the FDCPA. Instead, they have only held that such an offer "could be" deceptive or misleading.[104] Because of this limited holding, the *McMahon* misrepresentation standard remains vague in its application. The exact circumstances that might convert an offer to settle into a misrepresentation of time-barred debt are left unclear. Moreover, the circuit-level courts have not identified any similarly deceptive alternatives to the term "settle." As a result, the standard invites litigation to flesh out the outer bounds of permissible representations by debt collectors in the time-barred debt context, to determine the situations when using the word "settle" is appropriate, and to identify which alternatives to "settle" do or do not constitute misrepresentation. Furthermore, because the question whether a collection letter is misleading is a question of fact,[105] the whims of judges are likely to create divergent standards, each one distinguishable from the next on some minor factual point. The predictability and efficiency of a bright-line rule disappears with the introduction of *McMahon*'s pliable standard.

C. Previous Attempts to Litigate Time-Barred Debt Collection under § 1692f

Although the lion's share of time-barred debt collection complaints has relied on allegations under § 1692e, litigants have frequently brought these claims under § 1692f's prohibition on unfair or unconscionable collection practices. But the litigation of claims under § 1692f in this context has created an even more heterogeneous response than § 1692e litigation has.

In *Kimber*, the earliest opinion on time-barred debts and the FDCPA, the district court addressed the unconscionability of *actually* filing suits on time-barred debts, but courts have rarely tested this proposition. *Kimber* implied that if a debt collector

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[104] Id at 1022.

[105] See note 89.

filed suit on a time-barred claim, that suit would have automatically constituted an unconscionable collection practice under § 1692f.[106] Although this proposition supports the argument that time-barred debt collection in general can trip the unconscionability bar, it was drawn too narrowly to actually affect the majority of debt collection practices. Practically speaking, any time-barred debt collector that is actually deterred by the threat of liability under *Kimber* could simply seek revival of the debt first—through whatever "acknowledgment" procedures state law allows—before attempting to litigate the claim. Moreover, the implicit threat of litigation is often sufficient to induce payment. Under the current state of the law, debt collectors have ample opportunities to imply the viability of a claim without actually bringing it to court.

Though *Kimber* offers some glimmer of hope to consumer-litigants, a more troubling trend is apparent in the majority of the § 1692f cases addressing time-barred debt collection. Specifically, courts have tended to either summarily dismiss citations to § 1692f or, more troubling still, misconstrue § 1692f as particularly narrow when a claim has already failed under § 1692e.[107] Despite the general consensus that "the prefatory language [of § 1692f] provides a cause of action,"[108] the Fourth Circuit implied in *Mavilla v Absolute Collection Service, Inc*[109] that a violation of some other provision of the FDCPA is prerequisite to finding a violation of § 1692f. After ruling against a consumer appellant on the § 1692e claim, the court noted that "[a]ppellants have not presented any evidence that [appellee's] debt collection methods were illegal, and they do not argue that [appellee's] collection activities were harassing."[110] The first part of the court's statement

106 See *Kimber*, 668 F Supp at 1487 (stating that "a debt collector's filing of a lawsuit on a debt that appears to be time-barred . . . is an unfair and unconscionable means of collecting the debt").

107 This phenomenon is arguably unique to the time-barred debt collection context. For example, in the context of "unfair" and/or "deceptive" tactics, courts have made clear that § 1692f provides a cause of action independent of § 1692e. That is, "a collection practice could be unfair without necessarily being deceptive." See *Currier v First Resolution Investment Corp*, 762 F3d 529, 534 (6th Cir 2014). Thus, this Comment does not hesitate to define time-barred debt collection as unconscionable, even though it may not rise to the level of a misrepresentation. There is also little issue with classifying a practice as unconscionable even though it might similarly fail a § 1692e misrepresentation analysis because the statutory provisions are not "mutually exclusive" and "share the goal of protecting consumers from abuse by debt collectors." See *Arias v Gutman, Mintz, Baker & Sonnenfeldt LLP*, 875 F3d 128, 135–36 (2d Cir 2017).

108 *Tsenes*, 892 F Supp at 466.

109 539 Fed Appx 202 (4th Cir 2013).

110 *Mavilla*, 539 Fed Appx at 207.

begs the question: surely Congress did not pass § 1692f in order to proscribe conduct that *was already illegal*. The court's second proposition erred further by conflating § 1692f with a ban on "harassing" conduct—even though harassing conduct is expressly banned by a separate provision of the FDCPA.[111] While the *Mavilla* court's decision erred in rendering § 1692f essentially toothless, its worse fault—a fault apparent in similar decisions—is the failure to adequately discuss time-barred debt collection under § 1692f.

It is difficult to determine from a short federal court decision the exact reason *why* courts have given such little discussion to § 1692f claims in the context of time-barred debt collection. Indeed, the *Mavilla* case implies a lack of evidence offered for the claim.[112] Litigants may indeed have sunk their own § 1692f claims if they merely tacked them onto briefs without providing any justification as to why the § 1692f claim exists separate from the better-argued § 1692e claim. On the other hand, courts themselves may have reinforced the short shrift that litigants give to their § 1692f arguments. With a history of unceremoniously losing on summary judgment and appeal, plaintiffs' attorneys may have rationally decided to minimize the amount of brief space devoted to a statutory claim destined to lose. What these prior claims teach us, however, is that courts have rarely dealt with the unconscionability of time-barred debt collection critically, or have done so only in obviously inaccurate ways. The room to develop a § 1692f claim in this context remains capacious, as the following Part will demonstrate.

III. Analysis of Time-Barred Debt Collection under § 1692f

This Comment proposes a new and thus-far overlooked method for courts to tackle the problem of time-barred debt collection. Specifically, this Part presents the theoretical and normative justifications for an outright ban on attempts to collect time-barred debts as "unfair or unconscionable" under § 1692f of the FDCPA. As I explain in Part III.A below, attempts to collect time-barred debt when there is a threat of resetting the statute of

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[111] See 15 USC § 1692d.

[112] See, for example, *Mavilla*, 539 Fed Appx at 207 ("Appellants *do not specify* which prohibited activities [appellee] engaged in, but appear to contend that [appellee's] conduct generally violated the provision.") (emphasis added).

limitations theoretically fit the definition of an "unfair or unconscionable" practice as understood in three areas: (1) as previously defined by the federal courts, [113] (2) as within the intent of Congress in passing the FDCPA,[114] and (3) as defined in an analogous area of law: the common law doctrine of contractual unconscionability.[115] Part III.B explains that normatively, an outright ban on time-barred debt collection will reduce the costs and likelihood of litigation by increasing uniformity and predictability in contrast to the malleable standards used by the *McMahon*-style courts.[116] Additionally, the resolution of time-barred debts under § 1692f will allow the courts of appeals to sidestep the messy problem of overturning their respective interpretations of § 1692e to resolve the current circuit split.[117]

A. The Theoretical Justification for Barring the Collection of Time-Barred Debts under § 1692f

Unfortunately for courts and commentators, the FDCPA does not define the terms "unfair" or "unconscionable" anywhere in the statute. The best the drafters could provide is a non-exhaustive list of examples of such behavior.[118] Before asserting that time-barred debt collection falls within the purview of § 1692f, Part III.A provides some substance to the terms "unfair or unconscionable." The following sections seek to define the terms on three separate bases: (1) judicial interpretation of the FDCPA, (2) legislative intent of the FDCPA drafters, and (3) analogy to the use of "unconscionable" in the common law of contracts. After fleshing out these definitions, each section argues that the collection of time-barred debts satisfies the definition of an unconscionable act under any definition courts choose to accept.

1. Judicial definitions of "unfair or unconscionable."

The two core components of § 1692f, unfair and unconscionable, elude a concrete definition when divorced from legislative and judicial interpretation. Dictionary definitions evoke some bad act that would shock the conscience. *Black's Law Dictionary* lacks a standalone definition for "unfair," but defines "unconscionable" as "showing no regard for conscience; affronting the sense of justice,

113 See Part III.A.1.
114 See Part III.A.2.
115 See Part III.A.3.
116 See Part III.B.
117 See id.
118 See 15 USC § 1692f(1)–(8).

decency, or reasonableness."[119] *Merriam-Webster* provides that "unfair" means "marked by injustice, impartiality, or deception: unjust; not equitable in business dealings" and "unconscionable" means "shockingly unfair or unjust; excessive, unreasonable."[120] Similarly, the *Oxford English Dictionary* defines "unfair" as "not based on or behaving according to the principles of equality and justice" and "unconscionable" as "not right or reasonable."[121] These dictionary definitions—which often serve as the starting point for judicial interpretations of statutory language[122]—imply a legislative intent to prohibit acts that threaten the principles of "good conscience," "justice," "decency," "equity," or "reason." Unfortunately, these words are as nebulous and malleable as they come. Some might even argue that consumers, by refusing to pay debts and then seeking shelter in the statute of limitations, have acted as unconscionably as any debt collector seeking repayment of a legally valid debt. For this reason, it is important to turn to some examples of unconscionability offered by the FDCPA and related jurisprudence.

Along with its ban on unfair or unconscionable practices, the FDCPA includes a nonexhaustive list of prohibited acts. At first glance, it appears this list is merely a motley group of examples: the solicitation of postdated checks for the purpose of threatening criminal prosecution; depositing or threatening to deposit postdated checks prior to the date on such checks; causing charges to be made for communications by concealment of the true purpose of the communication (as in the case of collect phone calls); communicating regarding a debt via postcard; using any symbol or verbiage other than the debt collector's address when communicating regarding a debt via mail; or threatening to take a nonjudicial repossession action when such action is not permitted by

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119 *Black's Law Dictionary* 1757 (West 10th ed 2014).

120 *Unfair* (Merriam-Webster, 2019), archived at http://perma.cc/XZN7-KCEL; *Unconscionable* (Merriam-Webster, 2019), archived at http://perma.cc/A6CV-7ES8.

121 *Unfair* (Oxford English Dictionary, 2019), archived at http://perma.cc/8MRS-Z4CJ; *Unconscionable* (Oxford English Dictionary, 2019), archived at http://perma.cc/AL3U-BFUU.

122 See, for example, *Smith v United States*, 508 US 223, 228–31 (1993) (relying upon dictionary definitions of "use" to conclude that a statute prohibiting "use" of a firearm during a drug transaction covered bartering with a firearm for drugs). See also Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 Fordham L Rev 2177, 2192 (2003) ("[T]he degree of the Court's reliance on dictionaries has also increased, developing from a method of identifying possible meanings of a word into the *primary factor in determining the outcome of cases*.") (emphasis added).

law.[123] Although some of these examples reflect the outdatedness of the statutory language, they nonetheless provide a coherent theme for courts to follow in assessing unconscionability. On the one hand, the FDCPA generally condones acts that seek to induce repayment by giving benefits to the consumer (such as a promise to reduce the amount a consumer owes on a non-time-barred debt) or threats to take legally enforceable action (such as a threat to bring suit on a non-time-barred debt or report the debt to a credit reporting agency). The FDCPA even permits general persuasive tactics, such as appeals to the morality of repaying a debt. On the other hand, each of the practices § 1692f expressly prohibits tends to penalize consumers through means beyond mere persuasion. This includes causing a consumer reputational harms (in the case of overly public communication) or inducing a consumer to act against their own interests by withholding information (in the case of soliciting postdated checks or misrepresenting collect calls). It is "tricks" of this kind that the FDCPA condemns.

The practices to which courts have extended § 1692f's blanket prohibition further reflect the FDCPA's endorsement of persuasion over tricks. Practices that federal courts have held unconscionable in the debt collection context include: sending materials that mimic the appearance of credit card statements;[124] sending collections letters that shame and accuse the debtor of dishonesty;[125] filing a garnishment suit against a consumer who is current on payments;[126] and charging huge fees when consumers attempt to pay their debts.[127] Essentially, each of these practices could make repayment of a debt more likely for the collector. The practices explicitly enumerated in § 1692f could also prove very effective in inducing debt repayment. These court decisions suggest that the purpose of § 1692f is not banning practices that stray from the goal of debt collection (the repayment of debts).

[123] See 15 USC § 1692f. By analogy to the provision against threatening unlawful repossession actions, it seems rather apparent that threatening to bring a collection suit that is not permitted by law due to the statute of limitations would also qualify as unconscionable. Nevertheless, this Comment argues that *any* attempt to dun a time-barred debt, and not just a threat to file a suit on said debt, constitutes an unfair or unconscionable practice. This proposition requires justification beyond analogy to the explicitly listed practices in 15 USC § 1692f.

[124] See *Hartman v Great Seneca Financial Corp*, 569 F3d 606, 610, 614 (6th Cir 2009).

[125] See *McMillan v Collection Professionals, Inc*, 455 F3d 754, 765 (7th Cir 2006).

[126] See *Fox v Citicorp Credit Services, Inc*, 15 F3d 1507, 1517 (9th Cir 1994).

[127] See *Bradley v Franklin Collection Services*, 739 F3d 606, 610 (11th Cir 2014).

Rather, the purpose is to ban practices that stray from the *legislatively endorsed methods* of debt collection—positive inducements and threats of legal enforcement. The practices targeted by courts under § 1692f's catchall clause tend to stray from legislatively endorsed collection practices into the realm of tricks and gimmicks. Far from reminding consumers of the facts of their debts, these practices obfuscate and may induce consumers into committing self-destructive action.

Based upon the judicial interpretation of § 1692f's scope, unconscionability under § 1692f would likely include any attempt to collect a time-barred debt that could easily be revived under relevant state law. As long as the possibility of reviving the debt exists, the dunning of a time-barred debt will always fall outside of the debt collection tactics the FDCPA condones. With or without overt threats, time-barred debt collection can never successfully threaten a legally enforceable action before revival occurs (as no legally enforceable action exists after the statute of limitations expires). Furthermore, any "positive" inducement offered to a consumer (such as a repayment plan or reduction of the debt) would not actually amount to a net positive: a "discount" would in fact make consumers worse off by reviving the enforceability of the underlying debt. If consumers do not accept the positive inducement, they would not be obligated to repay the debt at all. Similar to the solicitation of postdated checks or the misrepresentation of collect calls, the pursuit of time-barred debts induces consumers to act against their own best interests without the benefit of information that the collectors exclusively hold. As no disclosure could adequately remedy this lack of consumer information,[128] time-barred debt collectors can never take advantage of informational asymmetries without transgressing the case law's conception of unconscionable practices.

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[128] See Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U Pa L Rev 647, 650–51 (2011) (arguing that the complexity of modern consumer transactions often means that mandated disclosure will inevitably fail to accomplish any meaningful purpose). But see Sukert, Note, 30 Georgetown J Legal Ethics at 1028 (cited in note 40) (arguing that "[t]he CFPB's proposed disclosure of a list of facts about a consumer's past debt manages to survive all of the criticisms of Ben-Shahar and Schneider," but acknowledging that "the disclosure of the rules of time-barred debt and how those apply to a given consumer would likely fall victim to Ben-Shahar and Schneider's . . . cautions").

2. The legislative meaning of "unfair or unconscionable."

In determining how far the prohibition on unfair or unconscionable practices should extend, this Comment naturally also considers how the drafters of the FDCPA expected the prohibition to operate. The legislative history suggests that Congress sought to advance a broad goal of consumer protection in passing the FDCPA. For instance, Representative Thomas B. Evans Jr noted in his remarks on the bill that "[e]very piece of legislation should have an objective or goal in mind," and the goal of the FDCPA is "to prevent the unfair and unreasonable and, in many cases, unconscionable debt collection practices that some debt collection agencies employ."[129] Representative Evans's conception of the FDCPA as a goal-oriented piece of legislation, rather than merely a sum of its constituent prohibitions, reflects an understanding of the law adopted by many federal courts. For example, the court in *Hamilton v United Healthcare of Louisiana, Inc*[130] concluded that Congress "clearly intended the FDCPA to have a broad remedial scope" given the Act's legislative history.[131] This declaration of the FDCPA's purpose and scope would go on to be cited by numerous courts thereafter.[132]

Even if courts safely conclude that the statute indeed has consumer protection as a broad policy goal, they must still consider the powers embodied in the Act's text before endowing it with powers Congress did not intend. Specifically, some courts have taken issue with the statute's supposedly "broad remedial scope."[133] While acknowledging the legislative goals of consumer protection, these courts have refused to endorse the mechanisms of § 1692f as a limitless means of implementing those goals.[134] Summarizing these contentions, the Seventh Circuit characterized the prefatory language of § 1692f as "as vague as they come,"

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[129] HR 5294, 95th Cong, 1st Sess, in 123 Cong Rec 10247 (Apr 4, 1977) (statement of Rep Evans).

[130] 310 F3d 385 (5th Cir 2002).

[131] *Hamilton*, 310 F3d at 392. See also *Johnson v Riddle*, 305 F3d 1107, 1117 (10th Cir 2002) (noting that the FDCPA should "be construed liberally in favor of the consumer").

[132] See, for example, *Serna v Law Office of Joseph Onwuteaka, PC*, 732 F3d 440, 445 (5th Cir 2013); *Carter v First National Collection Bureau, Inc*, 135 F Supp 3d 565, 569 (SD Tex 2015).

[133] *Serna*, 732 F3d at 445 (emphasis omitted); *Hamilton*, 310 F3d at 392.

[134] See, for example, *Bentrud v Bowman, Heintz, Boscia & Vician, PC*, 794 F3d 871, 875 (7th Cir 2015) (noting that § 1692f is "not an enforcement mechanism for matters governed elsewhere by state and federal law"); *Beler v Blatt, Hasenmiller, Leibsker & Moore, LCC*, 480 F3d 470, 474 (7th Cir 2007).

arguing that enforcement mechanisms should be “adopted (if at all) through the administrative process or a statutory amendment rather than judicial definition of the phrase ‘unfair and unconscionable.’”[135] This Comment agrees with the Seventh Circuit that the three-word phrase at the heart of § 1692f is “vague.” But Congress deliberately intended this vagueness to craft an adequate catchall.[136] Legislators themselves recognized their inability to predict every single abusive practice that debt collectors would invent following the passage of the FDCPA. Although members of Congress did not provide a definition of the terms in the phrase “unfair or unconscionable” anywhere in the legislative history, this comports with the expectation that courts could more effectively fill in the gaps. Whether fair or not, the FDCPA’s catchalls are intended to shift the burden of determining bad acts to the courts.[137]

Of course, this Comment’s principal argument is that the phrase “unfair or unconscionable” in § 1692f should not be construed narrowly or as some overbroad policy declaration, as some courts and commentators have argued.[138] It remains true that Congress did not provide a clear definition of the term, either in the language of the statute or in the debate over the FDCPA’s fate. While we may conclude that Congress intended “unfair or unconscionable” to have the broadest definition possible given the statute’s “broad remedial scope,” the dictionaries’ *broad* definitions remain frustratingly vague.[139] The following Section argues that Congress’s intent may be satisfied through an inquiry into another area of the law with equally broad but much more detailed definitions of unconscionability: the law of contracts.

3. The meaning of unconscionability in the law of contracts.

A longstanding canon of statutory interpretation suggests that legislatures legislate against the backdrop of the common law.[140] That is, when terms of art from the common law creep into

[135] *Beler*, 480 F3d at 474.
[136] See note 63 and accompanying text.
[137] See id.
[138] See notes 134–35 and accompanying text.
[139] See notes 119–21 and accompanying text.
[140] See *Astoria Federal Savings & Loan Association v Solimino*, 501 US 104, 108 (1991) (reiterating the presumption that “Congress is understood to legislate against a background of common-law adjudicatory principles”).

statutory law, there exists a presumption that the enacting legislature intended to adopt the common law meaning when enacting the statute.[141] The term "unfair" may be too vague to import any meaning from the common law, but the same cannot be said for the relatively obscure term "unconscionable." The doctrine of unconscionability features most prominently in the common law of contracts.[142] As this Section illustrates, there is good reason to suggest that "unconscionability" in the FDCPA embodies the meaning of the term at common law, and such an embodiment allows the FDCPA to condemn the practice of time-barred debt collection and the resurrection of consumer debts.

The Restatement (Second) of Contracts provides a generally applicable understanding of unconscionability doctrine, even though contract law varies across state jurisdictions. Starting from the broad scope of the Restatement, it is generally accepted that courts may render contracts or specific contract terms unenforceable when they are found to be "unconscionable."[143] Perhaps conscious of the fluidity of the term, the Restatement does not offer a clear-cut definition of what constitutes unconscionability. Nevertheless, the comments to § 208 do give some guidance as to when courts should find unconscionability in a contract or contract term. Comment *a* says that a determination of unconscionability is made "in light of [a contract or term's] setting, *purpose, and effect*."[144] The inclusion of effect as a determinative factor reflects the FDCPA's overall focus on the effect of debt collection practices to determine their validity.[145] At the same time, the inclusion of purpose as an equally determinative factor preserves

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[141] See *Southern Utah Wilderness Alliance v Bureau of Land Management*, 425 F3d 735, 763 (10th Cir 2005) ("When Congress legislates against a backdrop of common law, without any indication of intention to depart from or change common law rules, the statutory terms *must* be read as embodying their common law meaning.") (emphasis added), citing *Nationwide Mutual Insurance Co v Darden*, 503 US 318, 322 (1992).

[142] See Asifa Quraishi, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 UC Davis L Rev 187, 188–89 (1991) (citations omitted) (emphasis added):

> The common law concept of unconscionability first appeared in the common-law courts of equity, and their refusal to enforce oppressive and harsh bargains. As the common law developed, this goal of preventing oppressive bargains eventually appeared in section 2-302 of the Uniform Commercial Code (U.C.C.), which formalized the doctrine of unconscionability and applied it to *all contract law*.

[143] Restatement (Second) of Contracts § 208 (1981).

[144] Restatement (Second) of Contracts § 208, cmt a (1981) (emphasis added).

[145] See *Arias*, 875 F3d at 138 & n 5 (incorporating some intent analysis by holding that, while the FDCPA remains a "strict liability" statute, bad faith may convert an otherwise legal act to an "unfair or unconscionable" one).

some intent analysis "to insure [sic] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged."[146] The comments to § 208 also prescribe an analysis of "weaknesses in the contracting process," including "contractual [in]capacity [and] fraud."[147] These procedural deficiencies in the contract process occur when a "transaction involved elements of deception or compulsion, or [when] the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms."[148] Importantly for the analysis here, unconscionability doctrine also "overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy."[149] Together, these provisions comprise the doctrine of "procedural unconscionability."

Besides simply proscribing terms against public policy and terms obtained via unconscionable procedures, the Restatement provides a key piece of circumstantial evidence for courts to use in identifying substantive, rather than procedural, unconscionability: inadequacy of consideration. While cautioning that inadequacy of consideration does not alone "invalidate a bargain," Comment *c* explains that "gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable."[150] That is, when the value that one contracting party obtains greatly exceeds the value obtained by the other, courts may infer the presence of the underlying indicators of unconscionability. Examples of such indicators include procedural ills of unequal bargaining power, deception, or a lack of real alternatives. Just as judges can identify procedural inequity in the presence of "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party," a failure of consideration also acts as a heuristic in identifying substantively unconscionable contract terms.[151]

In addition to the Restatement, the Uniform Commercial Code (UCC)—a body of law with wide applicability across the states[152]—provides a supplementary understanding of common

146 *Arias*, 875 F3d at 134.

147 Restatement (Second) of Contracts § 208, cmt a (1981).

148 Restatement (Second) of Contracts § 208, cmt d (1981).

149 Restatement (Second) of Contracts § 208, cmt a (1981).

150 Restatement (Second) of Contracts § 208, cmt c (1981).

151 Restatement (Second) of Contracts § 208, cmt d (1981).

152 See *In re Goody's Family Clothing Inc*, 401 Bankr 131, 134 (Bankr D Del 2009) (incorporating a UCC definition of "goods" into federal bankruptcy law "[g]iven the near unanimous nationwide adoption of Article 2 of the UCC").

law unconscionability. Although the UCC generally finds more currency with commercial contracts[153]—and the concept of unconscionability itself usually finds application only in the consumer context,[154]—commentary to § 2-302 of the UCC comprehensively summarizes the doctrine of unconscionability. It states: "The basic test [for unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[155] When read in conjunction with the Restatement Comments, a finding of unconscionability requires the presence of some combination of primary factors, including procedural irregularity, unequal bargaining power, deception, a lack of meaningful choice, inadequacy of consideration, or violation of public policy. No single factor is required or dispositive, although each factor appears to some degree in the time-barred debt collection context.

The revival of time-barred debts, even without the presence of threats of litigation, satisfies the composite definition of unconscionability at common law, as embodied in the Restatement and the UCC. Specifically, if a court interprets acknowledgment by a consumer as akin to a contractual agreement with the creditor, it violates the public policy of the FDCPA and statutes of limitations, unfairly disadvantages consumers due to informational asymmetries and unequal bargaining power, and represents a failure of consideration by giving a windfall to debt collectors but essentially no benefit to consumers.

As the Restatement indicates, there is substantial overlap between unconscionability and the determination that a contract or contract term violates public policy. In the time-barred debt collection context, we are concerned with the public policies that underlie the FDCPA as well as state statute of limitations laws. As the legislative history and judicial decisions suggest, Congress intended the FDCPA to promote a broad policy of consumer protection against vexatious collection tactics. Given its propensity to "wreak havoc" on overburdened consumers, the law of reviving

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153 See Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 Wash U L Q 11, 14 (1997) (noting that "the [UCC] inherits the common law's blindness to consumer concerns").

154 See *PC Com, Inc v Proteon, Inc*, 946 F Supp 1125, 1138 (SDNY 1996) (noting that "[n]umerous cases have found that 'the doctrine of unconscionability is not typically applied to commercial dealings between business entities'").

155 UCC § 2-302, cmt 1 (2002).

debts is far from a pro-consumer policy.[156] Any practice that seeks to take advantage of resetting the statute of limitations, then, is against the interests of consumers as a class. When the underlying practice takes advantage of revival without consumers' knowledge, as time-barred debt collection so often does, its contrast with the FDCPA's goal of consumer protection stands out in even starker relief.

Time-barred debt collection also contravenes the public policy behind statutes of limitations. These temporal bars to bringing suit have historically promoted the state policy of reducing the fear of litigation and ensuring that litigation is pursued at an efficient point in time. By withdrawing the legal remedies available to a potential creditor-plaintiff, the statute of limitations allows potential debtor-defendants to breathe easy after the period expires. A consumer with a time-barred debt no longer needs to look over her shoulder for the rest of her life, forever scanning the horizon for the threat of litigation.[157] The statute of limitations also compels plaintiffs to sue early, when evidence is still available to both parties.[158] The collection of time-barred debts violates the statute of limitations' public policy on both fronts. If collectors can pursue the debt indefinitely, then consumers may never stop glancing at the metaphorical rearview mirror. Moreover, unintentional revival of debts by consumers encourages litigation well after both the consumer and the parties purchasing the consumer's debt lose the supporting documentation that underlies the purchased debt.

The collection of time-barred debts implicates the unconscionability doctrine of contract law beyond merely violating public policy; it also implicates procedural unconscionability in unfairly taking advantage of the informational asymmetries and unequal bargaining power that accompany the debtor–debt collector relationship. From the start, debt collectors have more resources available to press for payment than debtors have to resist that pressure. Organizational strength is pitted against individual strength. And yet, even were we to exclude the systematic

[156] Sobol, 44 NM L Rev at 328 (cited in note 8).

[157] See *United States v Kubrick*, 444 US 111, 117 (1979) (noting that "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time").

[158] See id ("[Statutes of limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.") (citations omitted).

advantage in bargaining power that debt collectors enjoy, consumers are still disadvantaged by the debt collectors' superior information. Debt collectors almost always have suspicions (if not outright knowledge) that the debts they seek to collect are stale. And in the rare cases when debt collectors lack the information necessary to support that suspicion, that same dearth of information was factored into the lower price that the collector paid for the debt, on the assumption that it would be harder to collect.[159] On the other hand, consumers rarely have information on decades-old debts. They also importantly lack knowledge of the law of partial repayments and resetting the statute of limitations. Even when it is explained to them, the counterintuitive nature of statute of limitations law often escapes the "least sophisticated consumer's" understanding.[160] Without knowledge of how the acknowledgment of time-barred debts affects their legal rights, debtors who enter into an agreement to acknowledge (and thus revive their debts) do "not in fact assent or appear to assent to the unfair terms."[161]

And what of the unfair terms central to showing substantive unconscionability? One could argue that the informational asymmetry is immaterial as long as revival does not burden consumers with "unfair terms." Here the heuristic of grossly inadequate consideration comes into play. If the contractual interpretation of consumer debt revival is further extended, it becomes apparent that debt collectors enjoy a windfall without any reciprocal benefit to the consumer. More precisely, when a consumer revives a debt, she is taking on a liability that she did not previously bear (because her debt had become unenforceable) without gaining anything in return or placing any reciprocal liability on the debt collector. Debt collectors in turn enjoy a practically new legal right

[159] See Jimenez, 52 Harv J Legis at 43 (cited in note 30) (explaining that one of several factors affecting the price of the debt is the "information (or lack thereof) about the debt that the seller provides to the buyer").

[160] See Consumer Financial Protection Bureau, *Proposals under Consideration* at *19 (cited in note 43) ("Concepts related to statutes of limitations are challenging for consumers to understand, especially the fact that in some jurisdictions consumers may 'revive' a debt and reset the statute of limitations by making a partial payment or acknowledging the debt in writing.").

[161] Restatement (Second) of Contracts § 208, cmt d (1981).

without incurring any liability or obligation that they did not already bear.[162] Under the common law of contracts, huge disparities in consideration received by the parties strongly suggest substantive unconscionability. In this context, the gap could not be larger, as consumers receive no new consideration whatsoever.[163]

One could object to the analogy between the term "unconscionable" in federal collections law and the doctrine of unconscionability in state law as enjoying only a tenuous connection. However, the case law suggests that applying state law definitions to federal common law principles is not an unprecedented move for courts to make.[164] Superficially, the affirmative defense that unconscionability provides in contract law *does* appear unrelated to the right of action that the FDCPA provides to remedy unconscionability. Indeed, courts have consistently reiterated that § 1692f goes to the unconscionability of a collection tactic only, without reaching the enforceability of the underlying debt.[165]

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[162] See Marc C. McAllister, *Ending Litigation and Financial Windfalls on Time-Barred Debts*, 75 Wash & Lee L Rev 449, 456 (2018) (noting that time-barred debt collection "result[s] in a financial windfall to the collector, who might otherwise be prevented from collecting any portion of the debt due to the statute of limitations"). This is especially problematic considering the fact that third-party debt buyers have paid well below par value for defaulted debts. See note 20 and accompanying text. The low-price debt buyers pay for these debts *already accounted for* their time-barred nature. Resetting the statute of limitations allows these debt collectors to recoup the surplus value created by the steep reduction in prices.

[163] One could argue that the consideration that consumers receive is the clearing of their conscience, but this proposition fails to stand up to scrutiny. Consumers already had the right to clear their consciences by paying the time-barred debt before its statute of limitations was ever reset.

[164] And in fact, this move by courts comports with the history of unconscionability. The idea of unconscionability as a narrow doctrine of contractual interpretation—which Congress simply could *not* have intended to import into the FDCPA—is further repudiated by the fact that unconscionability was not always exclusive to the law of contracts. Prior to its influential appearance in the UCC (which precipitated the modern perception of unconscionability as a rarely-used, rarely-successful, "contracts-only" doctrine), courts of equity employed unconscionability "to preserve estates and family relations, protect the 'weak,' and prevent enforcement of grossly unfair or quasi-fraudulent exchanges." Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 Ala L Rev 73, 81 (2006). Indeed, Justice Harlan Fiske Stone described the "unconscientious use of legal rights" as the basis for "practically the whole content of the law of equity." *Book Reviews*, 12 Colum L Rev 757, 757 (1912). For more information on the historical role of unconscionability prior to the UCC, see Schmitz, 58 Ala L Rev at 76–90. See also *Gordon v Rosenblum*, 393 P3d 1122, 1128 (Or 2017) ("Although today the doctrine [of unconscionability] appears most often in contract law, historically the doctrine has been applied in many areas of law where courts sought to avoid what they perceived as unfair outcomes.").

[165] See *Babadjanian v Deutsche Bank National Trust Co*, 2011 WL 13214300, *11 (CD Cal), citing *Azar v Hayter*, 874 F Supp 1314, 1317 (ND Fla 1995) ("Plaintiff's FDCPA claim has nothing to do with whether the underlying debt is valid. An FDCPA claim concerns

Conversely, attempts to collect debts founded on unconscionable contracts do not automatically trip § 1692f absent some unfair collection tactic.[166] Nevertheless, the court in *Adams v Law Offices of Stuckert & Yates*[167] specifically vested § 1692f with a state-law definition of unconscionability, describing unconscionability as "patent unfairness," signaled by the "hallmark" of "abuse of [the debt collector's] superior economic position and level of sophistication."[168] A bankruptcy court, building on the *Adams* decision, faulted a tactic very similar to the revival of time-barred debts as violating § 1692f. The court noted that a debt collector, "with its numerous employees and lawyers, used its superior economic resources and knowledge of the law to induce . . . an unsophisticated consumer, to give up his legal rights by signing the Proposed Consent Judgment."[169] Thus, while no court has found the collection of time-barred debt to automatically violate § 1692f, as this Comment suggests they should, courts have already begun connecting "unconscionable" in the FDCPA to unconscionability doctrine in the common law of contracts.[170]

In addition to these judicial maneuvers, state legislatures have enacted their own consumer protection laws that mirror § 1692f's ban on unconscionable practices while simultaneously embracing the definition of unconscionability from contract law. For example, the New Mexico Unfair Practice Act[171] ("New Mexico UPA") prohibits "unconscionable trade practices," which are defined as practices in connection with the "collection of debts that

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the method of collecting the debt."). See also *Rendon v Countrywide Home Loans, Inc*, 2009 WL 3126400, *9 (ED Cal).

166 See *Babadjanian*, 2011 WL 13214300 at *12.

167 926 F Supp 521 (ED Pa 1996).

168 Id at 528, citing *Peoples Mortgage Co, Inc v Federal National Mortgage Association*, 856 F Supp 910, 927 (ED Pa 1994). Note that the district court case from which *Adams* obtains its definition of unconscionability was a diversity case interpreting the *state common law* of Pennsylvania. *Adams*'s conception of unconscionability under § 1692f has gone on to be cited approvingly by at least three other federal district courts and one federal bankruptcy court. See *Sullivan v Credit Control Servs, Inc*, 745 F Supp 2d 2, 13 (D Mass 2010); *House v Bank United*, 2002 WL 32496179, *2 (WDNY); *Williams v Javitch, Block & Rathbone, LLP*, 480 F Supp 2d 1016, 1023 (SD Ohio 2007); *In re Humes*, 496 Bankr 557, 579 (Bankr ED Ark 2013). While no circuit-level court has explicitly endorsed the *Adams* court's definition of unconscionability as rooted in state contract law, neither has any rejected it, and the Seventh Circuit is at least aware that such a judicial definition exists. See *McMillan*, 455 F3d at 765 n 15.

169 *In re Humes*, 496 Bankr at 579.

170 This is not to suggest that contract law unconscionability is the *only* way to understand § 1692f. It is merely a compelling way to do so, in light of the facts of time-barred debt revival and the past conduct of federal courts.

171 NM Stat Ann § 57-12-1 et seq.

to a person's detriment: (1) take[ ] advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) result[ ] in a gross disparity between the value received by a person and the price paid."[172] Guam has an almost identical rule,[173] Texas has a rule that prohibits practices described in item (1) of the New Mexico UPA,[174] and Wisconsin has an even broader rule, prohibiting the same conduct as the New Mexico UPA as well as seven other definitions of unconscionable acts.[175] Although these statutes, passed by wholly separate legislatures, far from conclusively establish Congress' intent behind the word "unconscionable" in § 1692f, they show that it is possible for legislatures to transplant a definition rooted in contract law to the realm of debt collection practices. Given that the revival of debts via acknowledgment resembles the creation of a bargain in many respects—including the written proof of consent and the acceptance of a new obligation by the debtor[176]—the argument that debt collection is too different from contract formation to support this Comment's analogy fails to hold much water.

B. The Normative Justification for Barring the Collection of Time-Barred Debts under § 1692f

Courts have upheld time-barred debt collection—in principle—since at least the passage of the FDCPA. Therefore, a consequentialist-minded jurist would likely seek greater justification beyond a mere definitional analysis of an admittedly vague statute before outlawing the practice. Indeed, the expansive use of § 1692f to prohibit all time-barred debt collection attempts, as outlined above, would partially contravene the underlying law of the forty-eight states that allow the revival of time-barred debts[177] and very likely burden the economically significant time-barred debt collection industry.[178] With the entire industry of time-barred debt collection at stake, it is crucial to establish the normative desirability of this Comment's proposed solution before implementing it. This Section argues that the normative benefits

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172 NM Stat Ann § 57-12-2.

173 See 5 Guam Code Ann § 32103(q).

174 See Tex Bus & Com Code Ann § 17.45(5).

175 See Wis Stat § 425.107(3).

176 See Part I.A.

177 See notes 37–38 and accompanying text.

178 See Sobol, 44 NM L Rev at 336 (cited in note 8) (noting that "[t]he 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").

of administrability, predictability, and uniformity implicated by a prohibition on time-barred debt collection will outweigh the burdens that it may impose on the debt collection industry.

This Comment's approach does not require any legislative or administrative action. Unlike the approaches that many scholars have suggested, this Comment's proposed solution to the problem of time-barred debt collection does not require a new statute, a statutory amendment, or an administrative action. The competing solution proposed by many courts and commentators—the mandatory inclusion of greater disclosures in letters that dun time-barred debts—requires additional regulation by the FTC or CFPB or piecemeal judicial fiats. Even if we were to make the very arguable assumptions that disclosures would be effective and that courts could impose disclosures independent of administrative action, we would have to trust that each circuit would craft the same or substantially similar disclosures to ensure uniformity. This hope is a bridge too far. Courts are unlikely to converge around a single scripted disclosure; the possibility that courts can agree on an interpretation that requires a mere yes or no (that is, "Is time-barred debt collection unconscionable, yes or no?") is far more likely.

Beyond the prospect of implementing this solution without legislative or administrative action, courts are particularly likely to implement this Comment's solution because it invites judge-made law into a relatively uncluttered domain. Because so few district courts and no circuit courts have *critically* evaluated the applicability of § 1692f to time-barred debt collection,[179] a new approach under that statutory provision will not require courts to overturn their own precedents. Moreover, because courts can embrace this Comment's analysis without overturning any precedent, we may expect acceptance from both the courts that use the threat-of-litigation test as well as those that use the misrepresentation standard under § 1692e. Given the Supreme Court's discretionary docket, a circuit-by-circuit approach may solve this problem sooner rather than later.[180]

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179 See Part II.C.

180 This is not to suggest that the Supreme Court would never accept the solution proposed by this Comment. In fact, two ideologically disparate judges—Justices Samuel Alito and Sonia Sotomayor—have already expressed dissatisfaction and condemnation of the time-barred debt collection industry. See Oral Argument, *Midland Funding, LLC v Johnson*, No 16-348 at *5–6, *41–42 (US argued Jan 17, 2017) (available on Westlaw at 2017 WL 169264).

Even though this approach may seem relatively simple to implement, the question remains why a judge would seek to alter the state of the law at all. The status quo of continuing to adjudicate time-barred debt collection under § 1692e would indeed be the simplest resolution of this issue. Even accepting the arguable proposition that the circuit split alone does not provide justification for a new approach, this Comment's proposal also addresses the problems presented by both current judicial approaches under § 1692e.[181] As a blanket prohibition on time-barred debt collection in those states where reviving time-barred debts is possible, classifying time-barred debts as unconscionable under § 1692f offers consumers far greater protections with a far sounder statutory basis than *Freyermuth*'s threat-of-litigation test.[182] Additionally, this blanket ban preserves the benefits of predictability and efficiency that *Freyermuth*'s test embraced. Unlike the misrepresentation standard,[183] an unconscionability approach addresses time-barred debt collection as per se forbidden, thus eliminating the need for courts to engage in messy disputes over verbiage and the impact it has on an "objective" consumer. A bright-line rule will create more predictability and reduce the costs of litigation; it will also remove the incentive that debt collectors have under the misrepresentation standard to push the boundaries of acceptable practices.

Concomitant with the benefit of keeping courts out of dictionary disputes is the uniformity that this approach will bring to federal jurisprudence. When it comes to consumer protection, uniform application of the law is desirable.[184] Uniformity also comports with the express purposes of the FDCPA "to promote *consistent* State action to protect consumers against debt collection abuses."[185] Under the competing misrepresentation standard of § 1692e, courts are not given any sample language that would per se violate the statute's ban on misrepresentation. Thus, even words like "settle" can be approved by some courts and not others. Splits can occur within the circuits themselves, not to mention among the circuits, depending on the granular facts of each case.

[181] See Parts II.A and II.B.

[182] See Part II.A.

[183] See Part II.B.

[184] See McAllister, 75 Wash & Lee L Rev at 491 (cited in note 162) (arguing that "[u]pon examining the current landscape with respect to time-barred debts, it becomes clear that greater uniformity of legal principles and judicial practices is needed to ensure that like debtors are treated alike").

[185] 15 USC § 1692(e) (emphasis added).

Discontinuity disadvantages consumers and even burdens debt collectors, who may take more or less cautious approaches in dunning letters depending on the circuit in which a consumer resides. Under the approach suggested by this Comment, the only difference across jurisdictions that will impact the validity of time-barred debt collection is whether they allow the revival of debt under state law. Because resetting the statute of limitations presents the greatest and possibly *only* easily calculable harm to consumers in the time-barred debt context, its existence as a distinguishing factor in the law makes sense.

CONCLUSION

The threat of revenant debts under state statutes of limitations undeniably causes the collection of time-barred debts, in any form, to wreak havoc on unsuspecting consumers. The current solutions to time-barred debt collection under § 1692e's prohibition on misrepresentation provide inadequate protection to consumers and mire courts in the fraught process of classifying dunning letters. Courts' current obligation to divine when an errant word in a dunning letter "goes too far" creates an environment ripe for litigation and boundary-pushing by unscrupulous debt collectors. Luckily for consumers, the FDCPA provides an escape hatch for courts who may wish to extend consumer protections further, consonant with the law's "broad remedial scope," without revising their own battle-hardened precedents. Section 1692f's ban on "unfair or unconscionable" practices provides a well-founded basis for outlawing time-barred debt collection. Theoretically, attempts to collect time-barred debts given the possibility of revival that is unknown to consumers constitutes an unconscionable practice under the precedent of federal decisions and through analogy to common law unconscionability. Normatively, a blanket ban on such a practice under § 1692f will provide much greater predictability to potential litigants, increase uniformity of decisions across the courts of appeals, and hopefully reduce the likelihood of litigating this issue.

It seems clear that a blanket prohibition will benefit consumers. The statute of limitations will serve the purpose once again of relieving consumers of the need to look over their shoulders. And we can be sure that any attempt to pay off time-barred debts truly originates from the sense of moral duty that courts so often

tout[186]—rather than from the probability nowadays that revival happens only after a consumer has been tricked into it. The biggest downside to such a comprehensive limitation on time-barred debt collection is the impact it will have on the trade of time-barred debts.[187] This is undeniable. Under this Comment's proposed solution, the time-barred debt industry will greatly suffer. The trade in debts may shrink or disappear completely when the debts' statutes of limitations have passed. But when choosing between a unified debt collection industry and a hopelessly diverse and disorganized consumer base, we should assume that the debt collectors can better bear the risk of shifting their practices to comport with the law. Indeed, a change to the FDCPA jurisprudence may even incentivize debt collectors to improve their practices, such as trading in better information.[188] But regardless of any positive changes that this Comment's approach may motivate in debt collectors, courts must remain mindful that the purpose of the FDCPA is to protect *consumers*, first and foremost. In passing the Act, Congress authorized the sacrifices of debt collectors at the altar of consumer protection. The wisdom of such a unilaterally protective law is not for courts to pass judgment on. Instead, courts should give thorough and thoughtful consideration to litigants who challenge time-barred debt collection as "unfair or unconscionable," and rule accordingly. Under this approach, the zombie debt plague may finally find a cure.

[186] See, for example, *Pantoja v Portfolio Recovery Associates, LLC*, 852 F3d 679, 685 (7th Cir 2017) ("The creditor retains the legal right to appeal to the debtor to honor the debt out of a sense of moral obligation even if the legal obligation can no longer be enforced in court."); *McMahon*, 744 F3d at 1020 ("[S]ome people might consider full debt re-payment a moral obligation, even though the legal remedy for the debt has been extinguished.").

[187] One might imagine that reducing the trade in time-barred debts could spark an unintended reduction in the credit market for less creditworthy individuals, counteracting any pro-consumer effects. While every consequence of this Comment's proposal cannot be completely divined and dismissed, I believe any potential constriction in the credit market would be negligible, as primary creditors already offload these debts at a huge loss—even with the existence of a secondhand consumer debt market—and yet continue to make credit available. Moreover, the primary credit markets operated without the benefit of a secondhand consumer debt market up until the early 1990s; the removal of only time-barred debts from that market wouldn't even return the credit markets to the pre-1990s status quo. See Sobol, 44 NM L Rev at 331 (cited in note 8).

[188] For example, if the statute of limitations preemptively bars any attempt to collect a debt, collectors may be more motivated to know the time-barred status of a debt before purchasing it. Contrast with note 29 and accompanying text.